

## The Long-Arm's Inappropriate Embrace

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## ARTICLES

### THE LONG-ARM'S INAPPROPRIATE EMBRACE

LYNDA WRAY BLACK<sup>†</sup>

*"I've got the drinkers and the smokers and the eaters on my side."<sup>1</sup>*

#### INTRODUCTION

Forty miles south of downtown Memphis lies the gambling town of Tunica, Mississippi. Not dissimilar from other gambling venues, visitors pack the poker tables and fill the concert halls. Alcohol and money flow freely. Smoke wafts and permeates the senses. Liaisons consummate. Addictions are indulged. But underneath the frivolity in Tunica's gambling halls lurks an antiquated morality tort that might have a visitor to Tunica losing more than a poker hand.

#### I. THE PLAYERS: GOLFER AND GIRLFRIEND

##### A. *Meet John Daly*

Professional athletes live their successes and failures in an increasingly public arena.<sup>2</sup> The championship victories as well as

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<sup>1</sup> *John Daly Quotes*, AZQUOTES, [www.azquotes.com/quote/555390](http://www.azquotes.com/quote/555390) (last visited June 25, 2017).

the personal tragedies are front page news.<sup>3</sup> The achievements and struggles of American professional golfer John Daly are no exception.<sup>4</sup> Arguably, the achievements make him a legend, and the struggles make him real.<sup>5</sup> Daly was raised in Arkansas, taught himself to play golf using golf balls he recovered from a pond,<sup>6</sup> joined the PGA TOUR in 1991 and that same year was named PGA TOUR Rookie of the Year.<sup>7</sup> By the age of thirty, Daly had achieved two major championship titles,<sup>8</sup> he boasts a total of five career PGA TOUR victories.<sup>9</sup> Despite all of his talent, Daly remains the only eligible two-time major winner never to be chosen to play in the prestigious Ryder Cup.<sup>10</sup> Perhaps his antics on and off the greens are to blame.<sup>11</sup> In his personal life, Daly has been married and divorced four times and has fathered three children, one each with wives two, three and four.<sup>12</sup> Daly is on the verge of marriage number five. He and his

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<sup>2</sup> See, e.g., Jimmy Sanderson, *Professional Athletes' Shrinking Privacy Boundaries: Fans, Information and Communication Technologies, and Athlete Monitoring*, 2 INT'L J. SPORT COMM. 240, 241 (2009).

<sup>3</sup> See, e.g., George Diaz, *Privacy Is a Game Pro Athletes Have Lost*, ORLANDO SENTINEL, (Nov. 17, 1996), [http://articles.orlandosentinel.com/1996-11-17/news/9611160878\\_1\\_blotter-nick-anderson-athletes](http://articles.orlandosentinel.com/1996-11-17/news/9611160878_1_blotter-nick-anderson-athletes) ("Their lives are full of confusing contradictions, reflecting society's curious demands.").

<sup>4</sup> See Doug Ferguson, *John Daly Suspended for 6 Months by PGA Tour*, GOLF, <http://www.golf.com/ap-news/john-daly-suspended-6-months-pga-tour> (last visited June 25, 2017).

<sup>5</sup> See *John Daly*, JOCKBIO.COM: MY SAY, [http://www.jockbio.com/Bios/Daly/Daly\\_mysay.html](http://www.jockbio.com/Bios/Daly/Daly_mysay.html) (last visited June 25, 2017) ("Everybody goes through divorces. There's millions of people that have drinking problems. There's people that their weight goes up and down, just like mine. It's just life. And I think people relate to that. I really do.").

<sup>6</sup> See Kelly Phillips Erb, *John Daly Relied on Tax Records to Figure \$90 Million Gambling Losses*, FORBES (June 2, 2014, 2:45 PM), <http://www.forbes.com/sites/kellyphillips/2014/06/02/john-daly-relied-on-tax-records-to-figure-90-million-gambling-losses/#5947951e49bc>.

<sup>7</sup> See *Bio*, JOHNDALY.COM, <http://johndaly.com/bio/> (last visited June 25, 2017).

<sup>8</sup> See *id.*

<sup>9</sup> John Daly won the 2004 Buick Invitational, the 1995 Open Championship, the 1994 BellSouth Classic, the 1992 B.C. Open, and the 1991 PGA Championship. *John Daly Player Profile*, PGA TOUR, <http://www.pgatour.com/players/player.01249.johndaly.html/profile> (last visited June 25, 2017).

<sup>10</sup> See *supra* note 7.

<sup>11</sup> See generally JOHN DALY WITH GLEN WAGGONER, *MY LIFE IN AND OUT OF THE ROUGH: THE TRUTH BEHIND ALL THAT BULL\*\*\*\* YOU THINK YOU KNOW ABOUT ME* (2007).

<sup>12</sup> See Christina Patracuolla, *Anna Cladakis, John Daly's Fiancée: 5 Fast Facts You Need to Know*, HEAVY (July 17, 2015, 2:12 PM), <http://heavy.com/sports/2015/07/anna-cladakis-john-dalys-fiancee-ex-wife-divorce-suing-affair-married-girlfriend> (last updated July 8, 2016).

girlfriend, Anna Cladakis, became engaged in December 2014.<sup>13</sup> Daly, now with Cladakis by his side as caddie and fashion double,<sup>14</sup> continues to live large.<sup>15</sup> As the hallmarks of Tunica, Mississippi—eating, drinking, smoking and gambling—are also self-proclaimed hallmarks of Daly.<sup>16</sup> One would not be surprised to learn that he has, on occasion, visited Tunica, Mississippi for recreation. The casual intersection of John Daly, his girlfriend and Tunica provides a litigious lens through which the exercise of long-arm jurisdiction by one state over residents of another state must be examined.<sup>17</sup>

### B. *Romance on the Road*

Despite an estimated \$90 million in gambling losses between 1991 and 2007,<sup>18</sup> John Daly owns an impressive tour bus.<sup>19</sup> Daly considers his Prevost RV to be his “home away from home.”<sup>20</sup> These days one might find him in Augusta, Georgia, not on the golf course as in his glory days, but rather, hawking his merchandise from his tour bus parked in front of the Augusta Hooters.<sup>21</sup> Allegedly, such a tour bus provided the situs in 2007

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<sup>13</sup> See Micah Peters, *John Daly Got Engaged to His Girlfriend of Seven Years*, USA TODAY: FTW GOLF (Dec. 5, 2014, 5:14 PM), <http://ftw.usatoday.com/2014/12/john-daly-engaged-girlfriend-seven-years>.

<sup>14</sup> Daly has an endorsement contract with Loudmouth Golf whose bold and garish clothing line has “proven to be a perfect fit for John Daly—and girlfriend Anna Cladakis.” *“Bad Golf Style” Lives with Loudmouth, Daly*, PGA TOUR: FASHION INSIDER (Oct. 27, 2010), [www.pgatour.com/news/2010/10/27/fashion-insider.html](http://www.pgatour.com/news/2010/10/27/fashion-insider.html).

<sup>15</sup> Luke Kerr-Dineen, *Breaking: John Daly Is on Snapchat* (Mar. 23, 2016, 11:12 AM), <http://ftw.usatoday.com/2016/03/john-daly-is-on-snapchat-brace-yours-elves-people> (“John Daly announced that he is . . . letting us take a glimpse of his crazy-pants wearing, chain-smoking, Hooters food-eating, diet coke-drinking, club-throwing, Donald Trump-supporting, ‘wild thing’ lifestyle.”).

<sup>16</sup> *John Daly*, *supra* note 5 (“Everyone has addictions and my problem is that I have 5,000 of them. If it’s not drinking, it’s gambling; if it’s not gambling, it’s eating anything from burgers, doughnuts to M&Ms. The only addiction I don’t suffer from is chasing women.”).

<sup>17</sup> Long-arm jurisdiction is achieved through a state’s long-arm statute which is defined by Black’s Law Dictionary to be “[a] statute providing for jurisdiction over a nonresident defendant who has had contacts with the territory where the statute is in effect. Most state long-arm statutes extend this jurisdiction to its constitutional limits.” *Long-Arm Statute*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>18</sup> Phillips Erb, *supra* note 6.

<sup>19</sup> See *Take a Look Inside John Daly's RV Parked in Front of the Augusta Hooters*, GOLF, <http://www.golf.com/video/tour-john-dalys-rv-parked-outside-augusta-hooters> (last visited June 25, 2017).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

and 2008 for Daly and girlfriend Anna Cladakis to engage in the type of behavior in which professional athletes and the beautiful women surrounding them often engage.<sup>22</sup>

Imagine a 39-year-old Cladakis employed as a promotional director for Hooters meeting John Daly through his endorsement contract with Hooters.<sup>23</sup> Imagine further that in 2007 Cladakis travels from her home state of Florida to Memphis, Tennessee for a social visit with Daly.<sup>24</sup> While in Memphis, the separated but still legally married Daly and Cladakis hop onto Daly's tour bus for a short drive.<sup>25</sup>

Memphis is situated in the southwest corner of Tennessee.<sup>26</sup> Daly could have driven the tour bus 30 minutes east or north and remained within the state of Tennessee. Alternatively, Daly could have driven 30 minutes west of Memphis to the state of Arkansas. Within either Tennessee or Arkansas, Cladakis's alleged tour bus tryst with a married man would not have given rise to a cause of action in tort.<sup>27</sup> However, Daly drove 30 minutes south to the gambling and entertainment town of Tunica, Mississippi. Travel in this direction—and only in this direction—opened the door to a lawsuit by Daly's then wife against Daly's companion on the tour bus.<sup>28</sup> Notwithstanding the

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<sup>22</sup> *Miller v. Provident Adver. & Mktg., Inc.*, 155 So. 3d 181, 188 n.4 (Miss. Ct. App. 2014), *cert denied*, 135 S. Ct. 2862 (2015). Ironically, Daly's tour bus is not the first RV to feature prominently in heart balm litigation. In 1997, Suzanne Barkes sued her former fiancé Dr. Alvin D. Gilbert for breach of promise to marry after his former lover showed up at the motor home in which Barkes and Gilbert were vacationing. *Gilbert v. Barkes*, 987 S.W.2d 772 (Ky. 1999); *see also* Jane Van Ryan, *Hazen v. Scharringhaus and Barkes v. Gilbert*, MABRY-HAZEN HOUSE (Jan. 4, 2016), <http://www.mabryhazen.com/news/2016/1/4/hazen-v-scharringhaus-and-barkes-v-gilbert>.

<sup>23</sup> Peters, *supra* note 13.

<sup>24</sup> *Miller*, 155 So. 3d at 185.

<sup>25</sup> THE ASSOCIATED PRESS, *John Daly Love Triangle May Be Headed to Supreme Court*, N.Y. POST (May 12, 2015, 11:03 AM), <http://nypost.com/2015/05/12/john-daly-love-triangle-may-be-headed-to-supreme-court/>.

<sup>26</sup> *Where Is Memphis, Tennessee?*, WORLDATLAS, <http://www.worldatlas.com/na/us/tn/where-is-memphis.html> (last visited June 25, 2017).

<sup>27</sup> As of 2007, neither Tennessee nor Arkansas recognized the torts of alienation of affections or criminal conversation, Tennessee having abolished them in 1989 and 1991, respectively, and Arkansas having abolished them in 1989. *See infra* note 35. *See also infra* Part III for a discussion of these torts.

<sup>28</sup> Mississippi is one of only a handful of states which provides legal recourse to a brokenhearted plaintiff whose spouse's affections have been alienated by the wrongful acts of another. *See* Sheri Stritof, *Alienation of Affection State Laws*, ABOUT: MARRIAGE (Dec. 25, 2015), <http://marriage.about.com/od/legalities/a/alienation.htm>.

insignificant amount of time and money Cladakis spent in the state of Mississippi, her lack of assets, and business interests in the state,<sup>29</sup> her crossing across the state line into the jurisdictional reach of Mississippi's long-arm statute set the stage for Part II: Mississippi Provides a Remedy.<sup>30</sup>

## II. MISSISSIPPI PROVIDES A REMEDY

On February 19, 2010, the almost nine-year marriage of Sherrie Miller and John Daly ended with a Tennessee divorce.<sup>31</sup> Consistent with Tennessee law, the divorce court presumably<sup>32</sup> distributed marital property equitably,<sup>33</sup> made provisions for the child of the marriage,<sup>34</sup> and severed the parties' legal status as husband and wife. The Tennessee court was, however, impotent to offer additional financial salve for Sherrie Miller's wounded heart, as the public policy of Tennessee no longer embraced the amatory torts<sup>35</sup> of alienation of affections<sup>36</sup> and criminal

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<sup>29</sup> The amount of time and money spent within a state, as well as property owned or business ventures conducted within a state, are factors supporting whether an individual has purposefully established minimum contacts with a state necessary for the state to exercise personal jurisdiction over the individual without offending "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316–17 (1945).

<sup>30</sup> See *infra* note 42.

<sup>31</sup> This was Daly's fourth divorce. See Patracuolla, *supra* note 12.

<sup>32</sup> Terms of the divorce are not publicly available as the case is under seal.

<sup>33</sup> Tennessee is an equitable division state. Fault is not a factor in the equitable division of property. See TENN. CODE ANN. § 36-4-121 (West, Westlaw through 2017 1st Reg. Sess.). Some practitioners, however, contend that marital fault such as adultery may indirectly affect the judge's discretion to award more property to the innocent spouse. See *Grounds for Divorce in Tennessee FAQ's*, MILES MASON LAW FIRM, <http://memphisdivorce.com/grounds-for-divorce-in-tennessee-faq/> (last visited June 25, 2017).

<sup>34</sup> The Tennessee Child Support Guidelines are found at TENN. CODE ANN. § 36-5-101. Miller and Daly have one son together. Patracuolla, *supra* note 12.

<sup>35</sup> See TENN. CODE ANN. § 36-3-701 (West, Westlaw through 2017 1st Reg. Sess.) (legislatively abolishing alienation of affections in Tennessee); TENN. CODE ANN. § 39-13-508 (West, Westlaw through 2017 1st Reg. Sess.) (legislatively abolishing criminal conversation).

<sup>36</sup> David M. Cotter, *The Well-Deserved Erosion of the Tort of Alienation of Affections and the Potential Liability of Nonresident Defendants*, 15 No. 12 DIVORCE LITIG. 204 (2003) ("The essential elements of alienation of affections are as follows: (1) The existence of a valid marriage at the time the alienation occurred; (2) Wrongful conduct on the part of the defendant; (3) An injury to the innocent spouse demonstrated by the loss of affection or consortium; and (4) A causal connection between the defendant's conduct and the innocent spouse's loss.").

conversation.<sup>37</sup> In 1991, the Tennessee Supreme Court declared that such amatory torts “ha[d] no place in contemporary society, because the social harm [caused] far outweighs any justification for [their] existence . . . .”<sup>38</sup> Dissatisfied with the public policy of her home state, Miller filed a complaint for alienation of affection and intentional infliction of emotional distress against Anna Cladakis in the DeSoto County Mississippi Circuit Court.<sup>39</sup> Miller filed her complaint on February 25, 2011, a full year after Miller’s divorce from Daly, alleging that Cladakis’s wrongful and inappropriate contact with Daly caused the breakdown of Miller’s marriage to Daly which, in turn, caused Miller to suffer loss of society, companionship with Daly, and loss of sexual relations.<sup>40</sup> The enumerated acts of Cladakis’s wrongful conduct comprise cell phone calls and text messages to Daly and two dates on which Cladakis and Daly allegedly engaged in sexual conduct while on Daly’s tour bus parked in Mississippi.<sup>41</sup> The hook on which Miller relied to establish a claim of alienation of affections under Mississippi law was the reach of the Mississippi long-arm statute, which provides as follows:

*Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction*

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<sup>37</sup> Shauna M. Deans, Comment: *The Forgotten Side of the Battlefield in America’s War on Infidelity: A Call for the Revamping, Reviving, and Reworking of Criminal Conversation and Alienation of Affections*, 53 HOW. L.J. 377, 393 (2010) (“The elements of criminal conversation, despite slight variance among different jurisdictions and time periods, generally included: (1) proof of a valid marriage; (2) a third party’s adulterous intercourse with the plaintiff’s spouse; and (3) damages.”).

<sup>38</sup> *Hanover v. Ruch*, 809 S.W.2d 893, 894 (Tenn. 1991).

<sup>39</sup> *Miller v. Provident Advert. & Mktg. Inc.*, 155 So. 3d 181, 185 (Miss Ct. App. 2014).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 188 n.4; *see also id.* at 186–87 (noting that “[o]n February 27, 2012, Miller moved to file a second amended complaint, which would have given two specific dates [of January 1, 2007, and April 13, 2008] of the alleged sexual and/or improper conduct . . . .”).

*of the courts of this state.* Service of summons and process upon the defendant shall be had or made as is provided by the Mississippi Rules of Civil Procedure.<sup>42</sup>

Though the trial court of Mississippi dismissed Miller's claim for lack of personal jurisdiction over nonresident Cladakis,<sup>43</sup> the Mississippi Court of Appeals reversed, holding that Miller had established a prima facie case for personal jurisdiction pursuant to the Mississippi long-arm statute<sup>44</sup> by alleging that Cladakis had committed a tort "in whole or in part in [Mississippi] . . . against a . . . nonresident of this state . . . [which] subjected [Cladakis] to the jurisdiction of the courts of this state."<sup>45</sup> Having established personal jurisdiction in a state recognizing as tortious the alienation by another of one's spouse's affections,<sup>46</sup> Miller was situated to proceed to trial seeking money damages against Cladakis under Mississippi law.<sup>47</sup> Through application of the tort prong of the Mississippi long-arm statute,<sup>48</sup> "a Tennessee resident *took advantage* of Mississippi's long-arm statute to sue a Florida resident for alienation of affection—a cause of action not recognized in Tennessee."<sup>49</sup> It is interesting to note that both alienation of affections and criminal conversation were recognized in Mississippi until 1992<sup>50</sup> at which time criminal conversation—which allowed a plaintiff to recover in tort against a third party for adultery with plaintiff's spouse—was jettisoned by

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<sup>42</sup> MISS. CODE ANN. § 13-3-57 (West, Westlaw through 2017 Reg. Sess.) (emphasis added).

<sup>43</sup> *Miller*, 155 So. 3d at 187.

<sup>44</sup> *Id.* at 191.

<sup>45</sup> See MISS. CODE ANN. § 13-3-57 (West, Westlaw through 2017 Reg. Sess.).

<sup>46</sup> Alienation of affections is recognized in Mississippi as a valid cause of action against a paramour to remedy intentional conduct that causes a spouse to suffer loss and injury to her marital relationship. *Fitch v. Valentine*, 959 So. 2d 1012, 1020 (Miss. 2007), *reh'g denied*, July 26, 2007.

<sup>47</sup> In an action for alienation of affections, jury awards of punitive and actual damages may be substantial. See, e.g., *id.* at 1030 (upholding a punitive damages award for \$112,500 and actual damages award of \$642,000).

<sup>48</sup> See MISS. CODE ANN. § 13-3-57 (West, Westlaw through 2017 Reg. Sess.).

<sup>49</sup> The terminology employed by Judge Maxwell in *Waldrup v. Eads*, 180 So. 3d 820, 829 (Miss. Ct. App. 2015) (emphasis added), is both noteworthy and accurate. Barred from suing in Tennessee, Miller opportunistically filed suit in Mississippi just prior to the running of the three statute of limitations imposed by MISS. CODE ANN. § 15-1-49 (West, Westlaw through 2017 Reg. Sess.).

<sup>50</sup> David Neil McCarty, *Love in Vain: The Social Value of Mississippi's Alienation of Affection in Protecting Marriage*, 31 MISS. C. L. REV. 107, 111 (2012).

Mississippi<sup>51</sup> consistent with the national trend of states' disfavoring the heart balm torts.<sup>52</sup> Once criminal conversation was abolished, Mississippi was "left with one arrow in its quiver to protect marriage: alienation of affection."<sup>53</sup> Mississippi continues to vehemently adhere to this morality tort as necessary protection of the values which underscore marriage.<sup>54</sup> Even as other states reject the antiquated and ineffective "arrows" of the amatory torts, Mississippi is sharpening its arrow, and providing a shooting range for brokenhearted residents and nonresidents alike.<sup>55</sup>

### III. HISTORY OF HEART BALM

In order to understand Mississippi's judicial devotion to—and interstate peddling of—the tort of alienation of affections, one must examine the ebb and flow of the popularity of the heart balm<sup>56</sup> torts and their perceived necessity<sup>57</sup>—or utter worthlessness<sup>58</sup>—for vindicating a broken heart.<sup>59</sup> At common law, a man's legal remedies were embodied in two distinct torts: alienation of affections and criminal conversation, both offering redress against the third-party male interloper on the marriage

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<sup>51</sup> *Saunders v. Alford*, 607 So. 2d 1214, 1214 (Miss. 1992) (holding that the tort of criminal conversation was no longer a viable tort in Mississippi).

<sup>52</sup> See *infra* Section III.B.

<sup>53</sup> *McCarty*, *supra* note 50, at 111.

<sup>54</sup> Jamie Heard, Comment, *The National Trend of Abolishing Actions for the Alienation of a Spouse's Affection and Mississippi's Refusal to Follow Suit*, 28 MISS. C. L. REV. 313, 331 (2009) ("Refusing to abolish the tort, the court stated that it 'believe[s] that the marital relationship is an important element in the foundation of out [sic] society [and t]o abolish the tort of alienation of affection would, in essence, send the message that [the court is] devaluing the marriage relationship.'" (citing *Bland v. Hill*, 735 So. 2d 414, 418 (Miss. 1999))).

<sup>55</sup> The Mississippi Court of Appeals noted that Miller "lack[ed] a viable alternative forum to adjudicate [her] claim, since both Tennessee and Florida have abolished alienation-of-affection as a cause of action. This fact increases Mississippi's interest in adjudicating this claim." *Miller*, 155 So. 3d at 194.

<sup>56</sup> Heart balm is a euphemistic label conveying, perhaps derisively, that the money judgment award in tort will serve as salve for the broken hearted plaintiff.

<sup>57</sup> F. HARPER & F. JAMES, *THE LAW OF TORTS* 629 (1st ed. 1956) ("Particularly in alienation, grievous wrongs are suffered and some of life's most important interests ruthlessly invaded. To abolish all remedy in such cases is certainly subject to serious questions.").

<sup>58</sup> Deana Pollard Sacks, *Intentional Sex Torts*, 77 *FORDHAM L. REV.* 1051, 1055 (2008) (claiming that "contemporary jurisprudence reflects the view that a broken heart is not actionable . . .").

<sup>59</sup> See BEVERLY, MELDRUM & BLACK, *TENNESSEE DOMESTIC RELATIONS LAW* (forthcoming 2017), for a discussion of the history of heart balm torts.

relationship.<sup>60</sup> Historically, these morality torts were not available to wives as men and women were not equal players under the law,<sup>61</sup> and within domestic relations law, the pattern was clear: Women were legally dependent appendages to their legally dominant male, whether father or husband.<sup>62</sup> Consistent with the notion that women were appendages to their legally dominant male, the common law provided two remedies to the man, either the father or the spouse, whose woman, either wife or daughter, was compromised by the intentional, wrongful affections of a third party.<sup>63</sup>

The specific elements establishing an action for alienation of affections may vary; however, in general, the plaintiff must show the existence of a marriage with love and affection between the plaintiff and his spouse, wrongful actions by another directed to the plaintiff's spouse, and a causal link between those wrongful actions and a breakdown in the marriage.<sup>64</sup> Alienation of affections has also carried the descriptive moniker "enticement"<sup>65</sup> and seeks to redress the various losses—financial and intimate—suffered by a husband whose wife is enticed away from him by the wrongful (and often sexual) advances of another.<sup>66</sup>

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<sup>60</sup> The heart balm torts of alienation of affections and criminal conversation evolved from the English common law actions for enticement and seduction, respectively. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 124 (5th ed. 1984).

<sup>61</sup> Sacks, *supra* note 58, at 1056 (noting that the heart balm torts "were dismantled to a large degree in recognition of their propensity to perpetrate antifeminist sexual stereotypes, which may cause social harm per se.").

<sup>62</sup> See *Women and the Law*, HARVARD BUSINESS SCHOOL: WOMEN, ENTERPRISE & SOCIETY, [http://www.library.hbs.edu/hc/wes/collections/women\\_law](http://www.library.hbs.edu/hc/wes/collections/women_law) (last visited June 25, 2017), (explaining that historic "marriage and property laws, or 'coverture,' stipulated that a married woman did not have a separate legal existence from her husband. A married woman . . . was a dependent, like an underage child or a slave, and could not own property in her own name or control her own earnings, except under very specific circumstances. When a husband died, his wife could not be the guardian to their under-age children."); see also Sacks, *supra* note 58, at 1058 (noting that seduction, the precursor to criminal conversation, remedied the economic harm to a woman's father's property interest in her and that enticement, the precursor to alienation of affections, redressed the economic harm of a husband).

<sup>63</sup> *Donnell v. Donnell*, 415 S.W.2d 127, 132 (Tenn. 1967).

<sup>64</sup> See Cotter, *supra* note 36.

<sup>65</sup> See KEETON ET AL., *supra* note 60, § 124.

<sup>66</sup> Proof of sexual contact between the defendant and the plaintiff's wife is not required to establish the tort of alienation of affections. KEETON ET AL., *supra* note 60, § 124 ("[I]t is not necessary to show adultery or that the plaintiff spouse has been deprived of any household services or has suffered any pecuniary loss.").

Criminal conversation is similar to the tort of alienation of affections; however, it requires proof of actual adulterous contact between the suitor and the plaintiff's spouse.<sup>67</sup> Historically, criminal conversation compensates the plaintiff for the resulting devaluing of his wife at the hands or perhaps by the hands of the defendant.<sup>68</sup> The moniker "criminal conversation" is reminiscent of chapter four of Genesis in which Adam "knew" Eve and she conceived a child.<sup>69</sup> Both linguistic usages disguise the act: "sex plain and simple."<sup>70</sup>

The final heart balm tort, breach of promise to marry, began as "a popular means of soothing the sufferings of rejected love."<sup>71</sup> The common law offered this remedy to the woman whose suitor breached the pillars of social propriety by failing to commit to her, resulting in the nonoccurrence of her desired marriage. A woman's economic opportunity cost of engagement or marriage to one man was the foreclosure of attaining wife status with any other. Consequently, where the promise to marry was not fulfilled, the common law provided a paternalistic economic redress for the dashed hopes, tarnished reputation and decreased future economic prospects of the rejected woman. The redress was in the nature of a breach of contract action against the fiancé. While the breach of promise to marry cause of action remains in many states,<sup>72</sup> the modern embodiments of this cause of action require an actual contract to marry either evidenced by a written promise or proven by the testimony of two disinterested witnesses,<sup>73</sup> and may limit damages to actual damages proven.<sup>74</sup>

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<sup>67</sup> See Deans, *supra* note 37, at 393.

<sup>68</sup> The euphemistically named tort was formerly known as seduction. See KEETON ET AL., *supra* note 60, § 124.

<sup>69</sup> Genesis 4:1 (King James).

<sup>70</sup> Joanna L. Grossman & Lawrence M. Friedman, *The Legal Price of Adultery Goes Down: North Carolina and West Virginia Abandon Heartbalm Actions*, VERDICT: LEGAL ANALYSIS & COMMENT. FROM JUSTIA (June 24, 2014), <https://verdict.justia.com/2014/06/24/legal-price-adultery-goes/>.

<sup>71</sup> See, e.g., Rivkin v. Postal, No. M1999-01947-COA-R3-CV, 2001 WL 1077952, at \*3 (Tenn. Ct. App. Sept. 14, 2001) (quoting Homer H. Clark Jr., *The Law of Domestic Relations in the United States* § 1.1 (2d ed. 1987)).

<sup>72</sup> About half of the states recognize a limited right of action under the theory of breach of promise to marry. See Neil G. Williams, *What To Do When There's No "I Do": A Model for Awarding Damages Under Promissory Estoppel*, 70 WASH. L. REV. 1019, 1020–21 (1995).

<sup>73</sup> See, e.g., TENN. CODE ANN. § 36-3-401 (West, Westlaw through 2017 1st Reg. Sess.).

<sup>74</sup> See, e.g., *id.* § 36-3-404 (Westlaw).

With time, the heart balm torts were modernized to provide a gender-neutral remedy to either a man or a woman whose promised marriage was not solemnized or whose solemnized marriage was sacrificed to the affections of another. As the heart balm torts comprise three distinct causes of action, a state may embrace them all, reject them all or find one or two to be consistent with the state's public policy while rejecting the other(s).<sup>75</sup> Tennessee still recognizes the tort of breach of promise to marry;<sup>76</sup> the other amatory torts, however, have been scrutinized, criticized and abolished by the courts and lawmakers in Tennessee.<sup>77</sup> While the salacious fact patterns underlying the amatory torts may present sympathetic would-be plaintiffs,<sup>78</sup> the public policy repudiating recovery in tort for alienation of affections and criminal conversation is absent any ambiguity for Tennesseans and their marriages, as the following cases demonstrate.<sup>79</sup>

#### A. *Two Tennessee Tortfeasors*

Loyalty is expected from one's spouse and one's business partner; Walter A. Dupuis was betrayed by both. In 1986 Mr. Dupuis filed an action for alienation of affections against his close friend and business partner Charles Hand for engaging in a three-year affair with Mr. Dupuis' wife,<sup>80</sup> which affair resulted in both the demise of Mr. Dupuis' marriage and his business

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<sup>75</sup> Significantly more than the other amatory torts, the tort of breach of promise to marry has survived scrutiny and remained a cause of action in roughly half of the states as of 1995. *See Williams, supra* note 72, at 1020–21.

<sup>76</sup> TENN. CODE ANN. § 36-3-401 (West, Westlaw through 2017 1st Reg. Sess.).

<sup>77</sup> *See id.* § 36-3-701; *id.* § 39-13-508 (West, Westlaw through 2017 1st Reg. Sess.).

<sup>78</sup> *See, e.g.,* Heck v. Schupp, 68 N.E.2d 464, 465 (Ill. 1946) (compensating a husband whose wife participated in an illicit affair while her husband was hospitalized); Scharringhaus v. Hazen, 107 S.W.2d 329, 330 (Ky. 1937) (compensating a jilted socialite \$80,000 for her fiancé's failure to marry her after a 15-year engagement); Archer v. Archer, 219 S.W.2d 919, 921 (Tenn. Ct. App. 1947) (finding for the plaintiff, as defendant "did by feminine wiles and guile incite and welcome the attentions of [plaintiff's] husband"); *see also* Murphy v. Colson, 999 N.E.2d 372, 374 (Ill. App. Ct. 2013) (redressing a father of six whose wife ran off with her cross fit trainer); *Miss Hazen's Courtship in Court*, LAWSON MCGHEE LIBRARY (Jan. 27, 2010), <https://www.knoxlib.org/about/news-and-publications/podcasts/historic-knoxville-news-podcast/miss-hazens-courtship-court>.

<sup>79</sup> *See* Hanover v. Ruch, 809 S.W.2d 893, 893 (Tenn. 1991); *see also infra* notes 90–91.

<sup>80</sup> Dupuis v. Hand, 814 S.W.2d 340, 341 (Tenn. 1991).

ventures.<sup>81</sup> Following a convoluted procedural history through the Court of Appeals, in 1991 the Supreme Court of Tennessee affirmed the trial court's grant of summary judgment in favor of the defendant, Mr. Hand, and judicially abolished the common law action for alienation of affections in Tennessee.<sup>82</sup> The common law tort of alienation of affections had been abolished by the General Assembly of Tennessee as of July 1, 1989.<sup>83</sup> However, the court found that the Tennessee General Assembly lacked the authority to enact a law which retroactively changed Mr. Dupuis' vested common law right in his previously filed alienation of affections case.<sup>84</sup>

A second case decided by the Tennessee Supreme Court in 1991 addressed alienation of affections, criminal conversation and medical malpractice when a prominent gynecologist in Memphis was sued by the husband of a patient.<sup>85</sup> In 1983, Dr. Robert M. Ruch and his patient Sandra Hanover began a two year affair notwithstanding Mrs. Hanover's then twenty-nine-year marriage to Jerome Hanover.<sup>86</sup> At trial, the jury found that Dr. Ruch had committed the tort of criminal conversation and awarded compensatory and punitive damages to Mr. Hanover in the amount of \$125,000.<sup>87</sup> On Dr. Ruch's appeal, the Tennessee Court of Appeals recommended the abolishment of criminal conversation, but noted its lack of authority to do so.<sup>88</sup> The Tennessee Supreme Court, however, relying on precedent establishing retroactive application of judicial changes to the common law, declared the tort of criminal conversation to be obsolete and abolished it under Tennessee law.<sup>89</sup>

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<sup>81</sup> Dupuis v. Dupuis, 1988 WL 74620, at \*1-2 (Tenn. Ct. App. July 20, 1988).

<sup>82</sup> *Hand*, 814 S.W.2d at 341.

<sup>83</sup> 1989 Tenn. Pub. Acts 517.

<sup>84</sup> *Hand*, 814 S.W.2d at 343.

<sup>85</sup> Hanover v. Ruch, 809 S.W.2d 893, 893 (Tenn. 1991) ("The defendant, Robert M. Ruch, M.D., is a gynecologist. The plaintiff is Jerome Hanover, whose wife, Sandra Hanover, was Dr. Ruch's patient."). The affair between the doctor and Mrs. Hanover lasted for two years, at which point Mr. Hanover sued his wife for a divorce and filed a "civil complaint against Dr. Ruch, alleging three causes of action: criminal conversation, alienation of affections, and medical malpractice." *Id.*

<sup>86</sup> *Id.* at 893.

<sup>87</sup> *Id.* The tort of alienation of affections had just been retroactively abolished in *Hand*, 814 S.W.2d at 341.

<sup>88</sup> *Hanover*, 809 S.W.2d at 893.

<sup>89</sup> *Id.* at 898.

The holdings in *Dupuis* and *Hanover* contain diatribes against the evils underscoring and the harms promulgated by the heart balm torts of alienation of affections and criminal conversation.<sup>90</sup> Having abolished the torts both legislatively and judicially, the lawmakers and judges of Tennessee have clearly articulated the public policy of Tennessee against these antiquated amatory remedies.<sup>91</sup>

*B. The Nearly Universal Demise of Morality Torts: Antiquated Paradigms and Outdated Actions*<sup>92</sup>

Tennessee was neither the first nor the most recent jurisdiction to recant on the desirability of the heart balm torts.<sup>93</sup> In fact, the amatory torts have “come and gone in most jurisdictions.”<sup>94</sup> Beginning in the mid-1930s the legislatures of several states including Alabama,<sup>95</sup> California,<sup>96</sup> Colorado,<sup>97</sup> Illinois,<sup>98</sup> Indiana,<sup>99</sup> New Jersey,<sup>100</sup> and New York<sup>101</sup> targeted the common law torts of alienation of affections, criminal conversation, and breach of promise to marry.<sup>102</sup> The sudden enactment by these various state legislatures of Heart Balm

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<sup>90</sup> Alienation of affections “diminishes human dignity, demeans the participants, inflicts pain upon the innocent, and does not prevent human misconduct.” *Id.* (quoting *Lentz v. Baker*, 792 S.W.2d 71, 76 (Tenn. Ct. App. 1989)).

<sup>91</sup> *Id.* (“[T]he public policy of the state, as expressed by the Legislature, is offended by criminal conversation actions . . .”).

<sup>92</sup> “When the reason for a rule of law disappears, so to [sic] should the rule.” *Helsel v. Noellsch*, 107 S.W.3d 231, 233 (Mo. 2003) (first citing *Thomas v. Siddiqui*, 869 S.W.2d 740, 741 (Mo. 1994) (en banc); and then citing *State ex inf. Norman v. Ellis*, 28 S.W.2d 363, 368 (Mo. 1930)).

<sup>93</sup> In 2009, the Virgin Islands Supreme Court disavowed the tort of alienation of affections. *Matthew v. Herman*, S. Ct. Civ. No. 2009-0074, 2012 WL 1965891, at \*5 (V.I. May 15, 2012).

<sup>94</sup> Marshall Davidson, Comment, *Stealing Love in Tennessee: The Thief Goes Free*, 56 TENN. L. REV. 629, 629 (1989).

<sup>95</sup> ALA. CODE § 6-5-331 (West, Westlaw through 2017 Reg. Sess.).

<sup>96</sup> CAL. CIV. CODE § 43.5 (West, Westlaw through Ch. 9 of 2017 Reg. Sess.).

<sup>97</sup> COLO. REV. STAT. § 13-20-202 (West, Westlaw through 1st Reg. Sess. of the 71st Gen. Assemb.).

<sup>98</sup> See ch. 38 ILL. COMP. STAT. §§ 246.1, 246.2 (West 1943). The Illinois Heart Balm Act was found to be unconstitutional by the Supreme Court of Illinois in *Heck v. Schupp*, 68 N.E.2d 464, 465–66 (Ill. 1946).

<sup>99</sup> IND. CODE ANN. § 34-12-2-1 (West, Westlaw through 1st Reg. Sess. of the 120th Gen. Assemb.).

<sup>100</sup> N.J. STAT. ANN. § 2A:23-1 (LEXIS through 217th 2d Annual Sess.).

<sup>101</sup> N.Y. CIV. RIGHTS LAW § 80-a (McKinney 2016).

<sup>102</sup> N. P. Feinsinger, *Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections, and Related Actions*, 10 WIS. L. REV. 417, 417 (1935).

Acts—perhaps better named *Anti-Heart Balm Acts* as they abolished the common law heart balm torts—evidenced “the wave of agitation” with the common law torts.<sup>103</sup> The verbose verbiage<sup>104</sup> of New York’s noteworthy legislation is illuminating:

“The remedies heretofore provided by law for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry, having been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetuation of frauds, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of such remedies.”<sup>105</sup>

While courts throughout the United States had until then almost uniformly embraced the desirability of the common law torts,<sup>106</sup> the sweep of Heart Balm Acts through the state legislatures reflected a legislative perspective that “the courts were suffering from precedent paralysis, and were not awake to social realities.”<sup>107</sup> The gradual acceptance of gender equality and sexual freedom fostered a gradual rejection of possessory descriptions of the relationship between lovers; consequently, the heart balm torts were seen by most states as the very antithesis of the modern public policy underlying the state’s domestic relations laws.<sup>108</sup> The repudiation of the common law remedies represented a relaxing of the social rigidity of the concept and

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<sup>103</sup> Frederick L. Kane, *Heart Balm and Public Policy*, 5 FORDHAM L. REV. 63, 63 (1936).

<sup>104</sup> The redundancy in the phrase “verbose verbiage” is intentional as the author contends that neither verbosity nor verbiage standing alone is sufficient to capture New York State’s legislative pronouncement of the public policy of the state in N.Y. CIV. PRAC. ACT § 61(a) (McKinney 2016).

<sup>105</sup> *Id.*

<sup>106</sup> Alaska never embraced the heart balm torts. *Harris v. Dragseth*, No. S-5502, 1994 WL 16459435, at \*3 (Alaska Oct. 5, 1994).

<sup>107</sup> Kane, *supra* note 103, at 70.

<sup>108</sup> Sacks, *supra* note 58, at 1060–61 (noting that the heart balm remedies were “antithetical to gender equality and women’s self-determination”).

function of the family as well as an embracing of “increased freedom of association between each spouse and the outside world.”<sup>109</sup>

A second wave of legislative attack on the heart balm torts accompanied the rapid social change of the 1960's.<sup>110</sup> During the 1980's and 1990's, disdain for the heart balm torts moved from the legislative assemblies to the courthouses.<sup>111</sup> When the Supreme Court of Missouri abolished alienation of affections as recently as 2003, the court acknowledged the changed social parameters, paradigms and expectations within intimate relationships noting that such changes require modification to antiquated rules of law.<sup>112</sup>

Whether the abuses of the heart balm torts were ubiquitous or merely the result of a few isolated but well publicized cases of infidelity is largely irrelevant.<sup>113</sup> The fact remains that “the amatory torts [fell] victim to the legal equivalent of a ‘perfect storm.’”<sup>114</sup> Widespread disapproval of the torts was penned by legislative bodies<sup>115</sup> and judicial clerks alike,<sup>116</sup> noting that modern public policy is offended by the tort of alienation of

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<sup>109</sup> Kane, *supra* note 103, at 71–72 (citing Nathan P. Feinsinger, *Legislative Attack on “Heart Balm,”* 33 MICH. L. REV. 979, 1009 (1935)).

<sup>110</sup> The following states legislatively abolished the tort of alienation of affections during the 1960's: Connecticut by CONN. GEN. STAT. ANN. § 52-572b (LEXIS through Pub. Acts 1–7 of the 2017 Reg. Sess.); Delaware, rejected in tort by DEL. CODE ANN. tit. 10, § 3924 (West, Westlaw through 81 Laws 2017, chs. 1–20); Michigan by MICH. COMP. LAWS ANN. § 600.2901 (West, Westlaw through 2017 Reg. Sess. of the 99th Leg.); Montana by MONT. CODE ANN. § 27-1-601 (LEXIS through 2017 Reg. Sess. of the 65th Leg.); West Virginia by W.VA. CODE § 56-3-2a (West, Westlaw through 2017 Reg. Sess.).

<sup>111</sup> The following states abolished alienation of affections by judicial proclamation: Idaho by O'Neil v. Schuckardt, 733 P.2d 693, 698 (Idaho 1986); Iowa by Fundermann v. Mickelson, 304 N.W.2d 790, 794 (Iowa 1981); Kentucky by Hoyer v. Hoyer, 824 S.W.2d 422, 423 (Ky. 1992); South Dakota by Hunt v. Hunt, 309 N.W.2d 818, 819 (S.D. 1981); Washington by Wyman v. Wallace, 615 P.2d 452, 455 (Wash. 1980).

<sup>112</sup> Helsel v. Noellsch, 107 S.W.3d 231, 232 (Mo. 2003) (citing Thomas v. Siddiqui, 869 S.W.2d 740, 741 (Mo. 1994)).

<sup>113</sup> See Harold V. Dixon, *Penal Provisions of the New “Heart Balm” Legislation*, 10 ST. JOHN'S L. REV. 236, 239 (1936) (noting that local media coverage of the Heart Balm Acts in the mid 1930's focused on misuse of the morality torts).

<sup>114</sup> Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 362–63 (2008).

<sup>115</sup> See, e.g., MINN. STAT. ANN. § 553.01 (West, Westlaw through 2017 Reg. Sess. and 1st Spec. Sess.).

<sup>116</sup> See, e.g., Wyman v. Wallace, 549 P.2d 71, 74 (Wash. Ct. App. 1976), *aff'd* 615 P.2d 452 (1980) (stating that an action for alienation of affections “diminishes human dignity”).

affections.<sup>117</sup> Most legislative repudiations of the heart balm torts were accompanied by vitriolic proclamations of that state's public policy.<sup>118</sup> The death of the heart balm torts in some states, by contrast, came quietly, as the state had made little or no use of the common law causes of action.<sup>119</sup>

By 2000, all but seven states had repudiated the legal and social foundations underpinning the tort of alienation of affections.<sup>120</sup> Even within those seven states, the decline of the heart balm torts can be seen in the paucity of cases,<sup>121</sup> the lukewarm<sup>122</sup> or even negative dicta of state courts,<sup>123</sup> and state

<sup>117</sup> See, e.g., *Young v. Young*, 184 So. 187, 190 (Ala. 1938); *Rotwein v. Gersten*, 36 So.2d 419, 420 (Fla. 1948); *Quinn v. Walsh*, 732 N.E.2d 330, 336 (Mass. App. Ct. 2000); *Kozlowski v. Kozlowski*, 395 A.2d 913, 918 (N.J. Super. Ct. Ch. Div. 1978).

<sup>118</sup> See, e.g., 740 ILL. COMP. STAT. ANN. 5/1 (West, Westlaw through 2017 Reg. Sess.) (abolishing the tort of alienation of affection) (“[T]he enforcement of the action for alienation of affections has been subjected to grave abuses and has been used as an instrument for blackmail by unscrupulous persons for their unjust enrichment, due to the indefiniteness of the damages recoverable in such actions . . . . It is also hereby declared that the award of monetary damages in such actions is ineffective as a recompense for genuine mental or emotional distress.”); MINN. STAT. ANN. § 553.01 (West, Westlaw through 2017 Reg. Sess. and 1st Spec. Sess.) (“[A]ctions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry, have been subject to grave abuses, have caused intimidation and harassment, to innocent persons and have resulted in the perpetration of frauds. It is declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of these causes of action.”).

<sup>119</sup> There are only two reported cases of alienation of affections in New Hampshire, one in 1970 in which a husband sued his wife's lover whose name, ironically, was Romeo. See *Dube v. Rochette*, 262 A.2d 288, 289 (N.H. 1970); see also *Duval v. Wiggin*, 474 A.2d 1002, 1005 (N.H. 1984). Alienation of affections was abolished by the New Hampshire legislature in 1981. N.H. REV. STAT. ANN. § 460:2 (West, Westlaw through 2017 Reg. Sess.).

<sup>120</sup> In 2016, alienation of affections is a recognized tort in only six states: Hawaii, Mississippi, New Mexico, North Carolina, South Dakota and Utah. Having legislatively repealed alienation of affections in 1935 with passage of the Heart Balm Act, the Supreme Court of Illinois reinstated the tort in 1946 in *Heck v. Schupp*, 68 N.E.2d 464 (Ill. 1946), but the legislature later repealed it again on January 1, 2016. 740 ILL. COMP. STAT. ANN. 50/7.1 (West, Westlaw through 2017 Reg. Sess.). In that case, Mr. Heck claimed that before he joined the army, he and his wife, Henrietta, enjoyed a happy, loving marriage. *Heck*, 68 N.E.2d at 465. Mr. Heck sued Henrietta's lover, Mr. Schupp, for the tort of alienation of affections after Mr. Schupp “wantonly and maliciously destroyed and alienated . . . the affection of the said Henrietta” while Mr. Heck was deployed. *Id.*

<sup>121</sup> The only reported case of alienation of affections in Hawaii is *Waki v. Yamada*, 26 Haw. 52, 53 (Haw. 1921) in which the Supreme Court of Hawaii upheld the dismissal of an action for enticement, the legal precursor to alienation of affections. See *Hunt v. Chang*, 594 P.2d 118, 123 (Haw. 1979).

<sup>122</sup> While alienation of affections remains a common law cause of action in New Mexico, the Court of Appeals has expressed its disfavor of the tort in *Padwa v.*

statutes limiting alienation of affections to a mere shadow of its former common law embodiment.<sup>124</sup> In some states alienation of affection has survived direct appeals to abolish the tort by a minority of the state's Supreme Court judges.<sup>125</sup>

The rejection of the heart balm tort of alienation of affections by the vast majority of states represents a paradigm shift in family law. Only two states, Mississippi<sup>126</sup> and North Carolina,<sup>127</sup> have refused to “[t]hrow out these claims into the ashbin of history” and instead continue to enthusiastically entertain modern actions for the wounded of heart.<sup>128</sup> Recent judicial opinions from each of Mississippi<sup>129</sup> and North Carolina,<sup>130</sup> however, might foreshadow a reeling in of the availability of alienation of affections as a tort remedy against nonresident defendants.

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*Hadley*, 981 P.2d 1234, 1240 (N.M. Ct. App. 1999). Noting that the Supreme Court of South Dakota was not a “legislative overlord,” that court deferred to the state’s statutorily based tort of alienation of affections in affirming a \$265,000 jury award to a husband whose wife had engaged in sexual relations with her supervisor. *See Veeder v. Kennedy*, 589 N.W.2d 610, 616 (S.D. 1999).

<sup>123</sup> *See Coulter v. Renshaw*, 418 N.E.2d 489, 490 (Ill. App. Ct. 1981) (“Not only have alienation of affection actions been limited sharply by statute in Illinois, they also have been subject to close and strict judicial scrutiny within very narrow limits both in pleading and proof.”); *see also Feldman v. Feldman*, 480 A.2d 34, 34 (N.H. 1984).

<sup>124</sup> N.H. REV. STAT. ANN. § 460:2 provides, “No damages shall be allowed to either spouse in any action based on alienation of the affections of the other spouse.” This statute effectively abolished alienation of affections in New Hampshire. Damages for alienation of affections actions in Illinois are statutorily limited to actual damages per ILL. REV. STAT. ch. 40, § 1901–07 (repealed 2016). Causes of action brought before the repeal may still stand as valid. *See* 740 ILL. COMP. STAT. 5/7.1 (West, Westlaw through 2017 Reg. Sess.).

<sup>125</sup> *See, e.g., Veeder*, 589 N.W.2d at 616 (S.D. 1999) (holding that public policy does not require the abolition of the statutorily-derived tort of alienation of affections); *see also* Michele Crissman, Note, *Alienation of Affections: An Ancient Tort—But Still Alive in South Dakota*, 48 S.D. L. REV. 518, 537–38 (2003).

<sup>126</sup> *Miller v. Provident Advert. and Mktg.*, 155 So. 3d 181, 185 (Miss. Ct. App. 2014).

<sup>127</sup> *See generally*, Jean M. Cary & Sharon Scudder, *Breaking Up is Hard To Do: North Carolina Refuses to End its Relationship with Heart Balm Torts*, 4 ELON L. REV. 1, 2 (2012).

<sup>128</sup> Grossman & Friedman, *supra* note 70.

<sup>129</sup> *Nordness v. Faucheux*, 170 So. 3d 454, 456 (Miss. 2015).

<sup>130</sup> *Rothrock v. Cooke*, No. 14CVS870, 2014 WL 2973066, at \*6 (N.C. Super. Ct. June 11, 2014). (holding North Carolina’s action for alienation of affections to be unconstitutional as it “explicitly seeks to punish the expression of friendliness, affection or intimacy by consenting parties . . .”).

## IV. HEART BALM'S THREAT TO STATE SOVEREIGNTY

Residents of one state often interact with residents of sister states or with the sister state itself. If, however, an individual is to become a defendant in a sister state, that state must establish personal jurisdiction over the individual. A state's exercise of jurisdiction over an out-of-state tortfeasor requires conduct by the defendant which links the defendant to that state. In a torts action these links, called minimum contacts, focus upon the relationship between the defendant, the state and the elements of the underlying tort.<sup>131</sup>

The forum state's hook by which it pulls nonresidents into the embrace of its laws is the forum state's long-arm statute. An expansive long-arm statute might provide that the commission of all or part of a tort within the state is a sufficient link to the state to require a nonresident tortfeasor to defend a lawsuit within that state.<sup>132</sup>

The commission of wrongful acts which alienate a married individual from his spouse fails to be a tort in most states.<sup>133</sup> However, if the wrongful acts occur within one of the few states still upholding the tort of alienation of affections,<sup>134</sup> these tortious contacts within the state trigger the state's jurisdiction over a nonresident tortfeasor.<sup>135</sup> Undoubtedly, in self-preservation of its own public policy and protection against the infringement upon its residents' rights, each state will seek to extend its long-arm jurisdiction over nonresident defendants in tort actions brought by state residents. However, in tort actions brought by a nonresident against another nonresident, the dual rationales of public policy preservation and vindication of residents' rights are missing, making the broad exercise of long-arm jurisdiction

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<sup>131</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945).

<sup>132</sup> *See, e.g.*, MISS. CODE ANN. § 13-3-57 (West, Westlaw through 2017 Reg. Sess.) (emphasis added).

<sup>133</sup> *See* 740 ILL. COMP. STAT. ANN. 50/7.1 (West, Westlaw through 2017 Reg. Sess.).

<sup>134</sup> *See supra*, note 120.

<sup>135</sup> David Neil McCarty, a Mississippi lawyer, foresaw this very problem: "*Knight* is a resounding statement of support for the tort of alienation of affection. Not only will the tort survive in Mississippi under this reasoning, but persons from other states and countries would be well-advised to use caution because the state has a unique interest in protecting the relationships of its citizens."

McCarty, *supra* note 50, at 117; *see also Knight v. Woodfield*, 50 So. 3d 995, 997 (Miss. 2011).

constitutionally tenuous. Importantly, due process demands that even when minimum contacts exist, a state's exercise of personal jurisdiction over a nonresident defendant must not violate the traditional notions of fair play and substantial justice.<sup>136</sup>

A. *Mississippi's Very Long-Arm and the Dilution of Minimum Contacts*

A basic tenet of state sovereignty demands that one state's recognition of a legal remedy and its provision of a forum to its residents to pursue such remedy is not dependent upon the inclination of sister states to do likewise.<sup>137</sup> There is no mandatory uniformity from state to state within family law.<sup>138</sup> While there may have been substantial commonality of legal principles among the states under early family law jurisprudence,<sup>139</sup> the evolution of legal norms has progressed at different rates from state to state.<sup>140</sup> Meanwhile, some states

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<sup>136</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

<sup>137</sup> *Sovereignty*, THE LEGAL DICTIONARY, <http://legal-dictionary.thefreedictionary.com/sovereignty> (last visited June 25, 2017) ("Sovereignty is the power of a state to do everything necessary to govern itself, such as making, executing and applying laws . . .").

<sup>138</sup> See *infra* Section V.B. (discussing Uniform Laws).

<sup>139</sup> For example, early divorces in the United States required a showing of fault. The earliest record of divorces in the United States come from the Colony of Massachusetts Bay, where a special tribunal was formed in 1629 to hear divorce matters. The grounds for divorce were fault-based: adultery, bigamy, desertion, and impotence. *The History of Divorce Law in the USA*, HISTORY COOPERATIVE: A SHORT HISTORY OF NEARLY EVERYTHING, <http://historycooperative.org/the-history-of-divorce-law-in-the-usa/> (last visited June 25, 2017). The first divorce in the United States was granted in Massachusetts Bay in 1639 to Mrs. James Luxford on the grounds of bigamy. 1 CULTURAL SOCIOLOGY OF DIVORCE: AN ENCYCLOPEDIA 684 (Robert E. Emery ed., 2013).

<sup>140</sup> California was the first state to introduce no fault divorce. On January 1, 1970, California's Family Law Act became effective. The Act listed two grounds for divorce: "[i]rreconcilable differences, which have caused the irremediable breakdown of the marriage" and incurable insanity. CAL. CIVIL CODE § 4506 (West, Westlaw through Ch. 9 of 2017 Reg. Sess.); see also CAL. FAM. CODE § 2310 (West, Westlaw through Ch. 9 of 2017 Reg. Sess.) (providing California's modern rule for no fault divorce). "The basic . . . change [made by the Act was the] elimination of fault or guilt as grounds for granting or denying divorce . . ." *Cary v. Cary*, 109 Cal. Rptr. 862, 865 (Cal. Ct. App. 1973). The California legislature did away with the requirement of a showing of fault for a few reasons: it caused the parties to dig up old wounds that they otherwise may have forgiven or forgotten; the evidence of blame only served to show that the marital differences were insoluble; and it only exacerbated the negative effect divorce had on the parties' children. See *Assemb. Daily Journal*, Cal. Legislature, 1969 Regular Sess. 8058 (Jan. 6, 1969). California courts recognized that the idea of no fault divorce was relatively unpopular "because

may cling to an archaic legal norm, refusing to adapt public policy even in the face of changing norms across the country.<sup>141</sup> Family law is a reflection of shared values within a particular jurisdiction. Close scrutiny must be given to any state law that provides a forum to nonresidents to circumvent the law of their home state.<sup>142</sup> Such state laws flirt with the due process rights of the nonresident defendant and disrespect the sovereignty and public policy of the defendant's home state. The Court of Appeals in Mississippi does precisely that by affirming the state's personal jurisdiction over Floridian Anna Cladakis and by providing both a forum and a cause of action for Miller's claim of damages for her broken Tennessee marriage to Daly.<sup>143</sup>

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it permits a spouse guilty of morally reprehensible conduct to take advantage of that conduct in terminating marriage against the wishes of an entirely unoffending spouse." *Walton v. Walton*, 104 Cal. Rptr. 472, 481 (Cal. Ct. App. 1972). However, the court maintained that

"[w]hile this may be true and while such a result may be offensive to those steeped in the tradition of personal responsibility based upon fault, this contention presents no issue cognizable in the courts . . . It is not the province of the courts to inquire into the wisdom of legislative enactments."

*Id.*

<sup>141</sup> Only three states still require a showing of fault for a unilateral divorce: South Dakota, Mississippi, and Tennessee. The South Dakota legislature recently rejected House Bill 1221, which would have created unilateral no fault divorce in the state; South Dakota still requires a showing of fault to grant unilateral divorces. *See* S.D. CODIFIED LAWS § 25-4-2 (West, Westlaw through 2017 Reg. Sess. and Spec. Sess.); *SD House Votes Down Unilateral No-Fault Divorce Proposal*, KDLT NEWS (Feb. 26, 2015), <http://www.kdlt.com/2015/02/26/sd-house-votes-down-unilateral-no-fault-divorce-proposal>. Mississippi also requires a showing of fault for unilateral divorces: "Divorce from the bonds of matrimony may be granted on the ground of irreconcilable differences, but only upon the joint complaint of the husband and wife," or where the defendant has been given notice. MISS. CODE ANN. § 93-5-2 (West, Westlaw through 2017 Reg. Sess.). Finally, Tennessee also requires a showing of fault for unilateral divorce, unless both parties agree to all terms. *See* TENN. CODE ANN. § 36-4-101 (West, Westlaw through 2017 1st Reg. Sess.) (providing the grounds for divorce); *id.* § 36-4-103(e) (Westlaw) (providing that a divorce may not be granted on the grounds of irreconcilable differences unless both parties agree).

<sup>142</sup> Ironically, the legislators of Mississippi are adamant that Mississippi's public policy regarding degrees of consanguinity in lawful marriage (the marrying of one's first cousin, for example) not be circumvented by the public policy of other states. *See* MISS. CODE ANN. § 93-1-3 (West), Westlaw through 2017 Reg. Sess.) ("Any attempt to evade Section 93-1-1 by marrying out of this state and returning to it shall be within the prohibitions of said section.").

<sup>143</sup> *Miller v. Provident Advert. and Mktg., Inc.*, 155 So. 3d 181, 191 (Miss. Ct. App. 2014).

1. Mississippi's Application of its Long-Arm Statute is Facially Unreasonable and Violative of State Sovereignty and Public Policy

The Supreme Court requires that jurisdiction must be reasonable to avoid offending "traditional notions of fair play and substantial justice."<sup>144</sup> In determining whether the exercise of jurisdiction is reasonable, a court is to look at a multitude of factors, including: the forum State's interest in adjudicating the dispute, the burden on the defendant, the availability of an alternative forum, and the shared interests of the several States in furthering fundamental substantive social policies.<sup>145</sup> An analysis of these factors necessarily and unequivocally leads to the conclusion that Mississippi's assertion of jurisdiction is patently unreasonable; it violates not only the Due Process Rights of the parties, but also the Fourteenth-Amendment-ensured sovereignty of Tennessee.

First, Mississippi lacks any real interest in adjudicating this dispute, apart from forcing its domestic relations law on the rest of the states. This case involves a Tennessee marriage, a Tennessee divorce, and a couple domiciled in Tennessee. The plaintiff is not a resident of Mississippi. States have a "manifest interest in providing effective means of redress for [their] residents,"<sup>146</sup> but this "legitimate interest[s] [is] considerably diminished" when the parties are not residents of the forum state.<sup>147</sup>

Next, Mississippi argues that the burden on Cladakis of hearing the case in Mississippi is low: "Cladakis availed herself of the 'privilege of conducting activities' with Daly in the state of Mississippi, we do not find it improper to bring her back into Mississippi to defend the alienation-of-affection case that arose out of those alleged activities."<sup>148</sup> This again misinterprets the alienation of affection claim. The breakdown of the Dalys' marriage did not occur in Mississippi, but rather Tennessee. Ms. Cladakis is a Florida resident. The burden on Cladakis to travel to Mississippi to defend this suit is high.

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<sup>144</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>145</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

<sup>146</sup> *McGee v. Int'l Life Ins.*, 355 U.S. 220, 223 (1957).

<sup>147</sup> *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 114 (1987).

<sup>148</sup> *Miller*, 155 So. 3d at 194.

Third, Mississippi argues that it has a strong interest in adjudicating the dispute because it offers the only forum for Miller to obtain a remedy: “Miller lacks a viable alternative to adjudicate [the alienation of affection claim], since both Tennessee and Florida have abolished alienation-of-affection as a cause of action. This fact increases Mississippi’s interest in adjudicating this claim.”<sup>149</sup> This is a gross misapplication of the law. There are two appropriate, alternative forums: Tennessee and Florida. Tennessee has an interest in the Dalys’ marriage, divorce, and the remedies arising from their relationship. Florida has personal jurisdiction over Cladakis, as she is a resident of that state. These interests are infinitely stronger than Mississippi’s. Moreover, even though both states have abolished alienation of affection rules, Tennessee and Florida have choice-of-law rules. If they felt that Mississippi’s interests were so critical, they could simply choose to apply the law of Mississippi. Thus, Mississippi is not the only forum for this case. Mississippi’s actions further undercut the sovereignty of Tennessee and Florida vis-à-vis their residents.

Fourth, Tennessee and Mississippi do not “share[] interest[s] . . . in furthering fundamental substantive social policies.”<sup>150</sup> Tennessee and Florida have expressly rejected the alienation of affection tort on public policy grounds, so there is absolutely no shared interest in furthering the application of the statute.<sup>151</sup> The statutory codes of Tennessee and Florida have removed from the courts of Tennessee and Florida, respectively, the power to compensate Miller for her broken heart.<sup>152</sup> Furthermore, states that have abolished alienation of affections are loathe to backdoor a heart balm claim through another cause

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<sup>149</sup> *Id.*

<sup>150</sup> *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

<sup>151</sup> See FLA. STAT. ANN. § 771.01 (West, Westlaw through 2017 1st Reg. Sess. of the 25th Leg.) (“The rights of action heretofore existing to recover sums of money as damage for the alienation of affections . . . [is] hereby abolished.”); TENN. CODE ANN. § 36-3-701 (West, Westlaw through 2017 1st Reg. Sess.) (“The common law tort action of alienation of affection is hereby abolished”).

<sup>152</sup> See *Rothrock v. Cooke*, No. 14CVS870, 2014 WL 2973066 at \*1 (N.C. Super. Ct. June 11, 2014) (Judge J. O. Craig III sidestepped the public policy arguments for abolishing alienation of affection and criminal conversation in North Carolina by noting that the “North Carolina Supreme Court . . . has unequivocally held that changes in the law based on public policy rest solely within the prerogatives of the legislative branch of government, not the judicial.”).

of action.<sup>153</sup> If the courts of Tennessee are without power to vitiate the clearly articulated public policy of the anti-heart balm legislation in Tennessee, how much more impotent ought the courts of other jurisdictions be to veto Tennessee law as it applies to Tennessee marriages.

The jurisdictional question can be succinctly formulated as follows: When the Mississippi public policy directly conflicts with the Tennessee public policy, which state's public policy should be—and should be reasonably expected by the parties to be—applicable to a Tennessee plaintiff aggrieved with a Florida defendant over the breakdown of a Tennessee marriage? Though the Mississippi judges might fancy themselves as necessary outliers in the protection against the interference with marriage, the dictates of state sovereignty and due process block Mississippi's crusade at the Tennessee state line.

In sum, Mississippi's exercise of personal jurisdiction over the parties is facially unreasonable and violates U.S. Supreme Court precedent. By asserting personal jurisdiction and entertaining this out-of-state dispute, Mississippi imposes the tort of alienation of affection upon Tennessee and Florida, which long ago expressly rejected the tort.<sup>154</sup> Should Mississippi be permitted to police the region and impose its public policy on other states, the doctrine of state sovereignty will be corrupted. Mississippi's actions offend the courts and state legislatures of Tennessee and Florida, and invite similar wrongs against other states in future cases.

## 2. Mississippi Lacks Jurisdiction to Hear Miller's Case

Mississippi's claim of jurisdiction over Anna Cladakis is a violation of the Due Process Clause of the Fourteenth Amendment, as the parties have no meaningful connection to or contacts with Mississippi.

*Burger King v. Rudzewicz* requires that the defendant have minimum contacts with the forum in order for the state to assert personal jurisdiction.<sup>155</sup> "Minimum contacts" may arise from the defendant purposefully availing herself to the forum state<sup>156</sup> or

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<sup>153</sup> See *Bailey v. Faulkner*, 940 So. 2d 247, 250, 253 (Ala. 2006).

<sup>154</sup> See *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

<sup>155</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

<sup>156</sup> *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

from foreseeability of the lawsuit.<sup>157</sup> Even if minimum contacts exist, the assertion of personal jurisdiction may not be so unreasonable or unfair as to violate Due Process.<sup>158</sup> Here, the Dalys lack any meaningful connection with Mississippi. Cladakis did not purposely avail herself to the jurisdiction of Mississippi,<sup>159</sup> nor, presumably, did she believe a lawsuit in Mississippi was foreseeable. Even if Cladakis did have minimum contacts with Mississippi, it would be grossly unreasonable and unfair for Mississippi to assert personal jurisdiction over her.

The tort of alienation of affection requires proof that a previously solid marriage broke down to the point where it was terminated due to the acts of another.<sup>160</sup> The real focus of this tort is on the breakdown of the marriage, not on the commission of the sexual acts which contributed to the breakdown of the marriage.<sup>161</sup> At the time of Daly's and Cladakis' alleged venture into Tunica, the Dalys were already separated;<sup>162</sup> they did not have a solid marriage. The actual "harm" was the termination of the marriage, which occurred in Tennessee.<sup>163</sup> Only a tiny portion of the acts which could sustain the tort of alienation of affections occurred in Mississippi; no cause of action arose there. The dissolution of Miller's marriage to Daly occurred entirely

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<sup>157</sup> *World-Wide Volkswagen Corp.*, 444 U.S. at 292.

<sup>158</sup> *See Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113–14 (1987).

<sup>159</sup> The Mississippi Court of Appeals held that Cladakis did, in fact, avail herself to the jurisdiction of Mississippi by engaging in sexual activity in that state. *Miller v. Provident Advert. & Mktg., Inc.*, 155 So. 3d 181, 193 (Miss. Ct. App. 2014). For mere public policy reasons, this is a far-reaching conclusion. Mississippi cannot possibly argue that every individual who has had sex in that state has availed themselves to the laws of Mississippi.

<sup>160</sup> *See Cotter, supra* note 36.

<sup>161</sup> The heart balm action of criminal conversation, on the other hand, arises from extramarital sexual acts. It does not require showing of a breakdown in the marriage. However, Mississippi abolished this tort. *Saunders v. Alford*, 607 So. 2d 1214, 1219 (Miss. 1992) (In abolishing the tort of criminal conversation, the court held, "[f]or the several reasons enumerated above we conclude that the tort of criminal conversation has outlived its usefulness.").

<sup>162</sup> Steve DelVecchio, *John Daly's Ex-Wife Suing His Fiancee For Home-Wrecking*, LARRY BROWN SPORTS (Feb. 11, 2015), <http://larrybrownsports.com/golf/john-dalys-ex-wife-suing-his-fiancee-for-home-wrecking/254909>.

<sup>163</sup> Cladakis could also argue that Florida has a better case for exercising jurisdiction over the case because she is a resident of that state; however, Florida abolished the tort of alienation of affection in 1945. FLA. STAT. ANN. § 771.01 (West, Westlaw through 2017 1st Reg. Sess. of the 25th Leg.). This fact makes Mississippi's exercise of jurisdiction all the more unreasonable.

within the state of Tennessee—the only state with authority to dissolve that union. Arguably, Miller’s allegations of adultery, if proven, between Daly and Cladakis while parked within the state of Mississippi would support a claim for damages under the tort of criminal conversation were it not for the fact that the Mississippi Supreme Court had previously repudiated that tort.<sup>164</sup> Asserting jurisdiction in this case circumvents Supreme Court precedent and violates Cladakis’ and Daly’s due process rights.

### 3. Mississippi’s Assertion of Jurisdiction Creates Inconsistencies Within Tennessee

In *Windsor*, the Supreme Court explained that “[m]arriage laws may vary from State to State, but they are consistent within each State.”<sup>165</sup> Mississippi is creating inconsistencies in Tennessee marriages, despite the fact that Tennessee has expressly stated its public policy regarding alienation of affection and other heart balm actions.<sup>166</sup> In doing so, Mississippi has “diminish[ed] the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect.”<sup>167</sup> For example, had Mr. Daly and Ms. Cladakis stopped at a rest stop on the Tennessee side of the Tennessee-Mississippi border rather than continuing on to Tunica, there would have been no cause of action. Mississippi’s actions thus have created an “unequal . . . subset of [Tennessee] sanctioned marriages.”<sup>168</sup>

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<sup>164</sup> *Saunders*, 607 So. 2d at 1219.

<sup>165</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2681 (2013). In *Windsor*, a surviving spouse of a same-sex, married couple was denied federal tax benefits available to heterosexual, married couples. *Id.* at 2683. The Supreme Court found the federal statute unconstitutional on the basis that this same-sex married couple was treated differently than other married couples, in violation of the Equal Protection Clause. *Id.* at 2695. Even though *Windsor* deals with a federal statute, much of the Court’s analysis is applicable to the case at hand. The Court reiterated the fact that domestic relations are historically within the province of state law. It also noted that federal law may supersede state law when that law is violative of the Constitution. *Id.* at 2695–96; *see also* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

<sup>166</sup> *See* TENN. CODE ANN. § 36-3-701 (West, Westlaw through 2017 1st Reg. Sess.).

<sup>167</sup> *Windsor*, 133 S. Ct. at 2694.

<sup>168</sup> *Id.* at 2681.

4. Mississippi's Actions Will Inflict Financial Harm on Tennessee

The Supreme Court held in *Windsor* that the federal Defense of Marriage Act was inappropriate as it would levy financial harm against families.<sup>169</sup> It is even more inappropriate for another state—Mississippi—to levy financial harm against residents of Tennessee and Florida. Cladakis' defense of Miller's alienation of affections law suit generated substantial legal fees. The trial court had awarded Cladakis \$78,307.22 in legal fees finding that Miller's lawsuit was groundless;<sup>170</sup> however, this award was reversed by the Court of Appeals.<sup>171</sup> In addition, the court took judicial notice of the "not great" distance between Mississippi and Florida, thereby minimizing the cost to Cladakis to defend a lawsuit in Mississippi.<sup>172</sup> Neither travel costs nor attorneys' fees, however, are the true cost of this alienation of affections lawsuit. Nor are the compensatory and exorbitant punitive damages awarded to the successful plaintiff.<sup>173</sup> The true cost emerges as "[a]dversarial pressures and competitive economic impulses inevitably work to impair significantly, if not frustrate completely, the attainment of postdivorce harmony."<sup>174</sup>

5. Most Shockingly, Mississippi's Law Creates a National Law of Domestic Relations, in Direct Violation of Supreme Court Precedent

"[T]here is no federal law of domestic relations."<sup>175</sup> If there is no federal law of domestic relations, there should be no Mississippi law of domestic relations that extends beyond its borders. Mississippi is attempting to make itself national law for alienation of affection claims.<sup>176</sup> This paternalistic approach violates state sovereignty.

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<sup>169</sup> *Id.* at 2695.

<sup>170</sup> *Miller v. Provident Adver. & Mktg., Inc.*, 155 So. 3d 181, 187 (Miss. Ct. App. 2014), *cert denied*, 135 S. Ct. 2862 (2015).

<sup>171</sup> *Id.* at 197.

<sup>172</sup> *Id.* at 194.

<sup>173</sup> Alice Gomstyn & Lee Ferran, *Wife's \$9M Message to Mistresses: 'Lay Off,'* ABC NEWS (Mar. 23, 2010), <http://abcnews.go.com/GMA/Business/wife-wins-million-husbands-alleged-mistress-story?id=10177637>.

<sup>174</sup> Davidson, *supra* note 94, at 660.

<sup>175</sup> *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).

<sup>176</sup> *See Miller*, 155 So. 3d at 194 ("The Legislature, in modifying our state's long-arm statute in 1980, expressed the public policy of the state to provide a forum for

Mississippi asserts that because Tennessee has explicitly repealed alienation of affection claims, it has a duty to offer this tort action to all who seek it.<sup>177</sup> Obligations in marriage are not universal; states define marriage obligations for themselves. The federal government has refused to redefine the marriage relationships that states have created.<sup>178</sup> Tennessee defined and created the relationship between the Dalys. Mississippi, then, is wrong to insert itself into the Dalys' marriage. Mississippi may not redefine the Dalys' obligations—whether they be moral, financial, or legal—with respect to the relationship that Tennessee created. Allowing Mississippi to create a national law for alienation of affection will only serve to further water down state sovereignty in the realm of domestic relations and tort law.

*B. North Carolina's Long-Arm Just Got Shorter*

Alienation of affections has enjoyed a prominent and lucrative run in North Carolina, prominent in the frequency of cases filed<sup>179</sup> and lucrative for the plaintiffs as million dollar verdicts are not uncommon.<sup>180</sup> As in Mississippi, the North Carolina long-arm statute authorizes personal jurisdiction over a nonresident defendant whose actions constitute minimum contacts with the state.<sup>181</sup> Whether those contacts comprise phone calls,<sup>182</sup> emails,<sup>183</sup> or sexual encounters,<sup>184</sup> the Supreme

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nonresidents to pursue compensation for torts committed in whole or in part in this state.”).

<sup>177</sup> *Id.*

<sup>178</sup> *See infra* Part V.A.

<sup>179</sup> *Rothrock v. Cooke*, No. 14CVS870, 2014 WL 2973066, at \*2 (N.C. Super. Ct. June 11, 2014) (noting that North Carolina courts routinely hear cases pertaining to alienation of affections). It is estimated that over 200 alienation of affections cases are filed in North Carolina each year. *Infidelity & Alienation of Affection*, ROSEN L. FIRM, [www.rosen.com/divorce/divorcearticles/alienation-of-affection-and-criminal-conversation](http://www.rosen.com/divorce/divorcearticles/alienation-of-affection-and-criminal-conversation) (last visited June 25, 2017).

<sup>180</sup> *See Gomstyn & Ferran, supra* note 173.

<sup>181</sup> *Cooper v. Shealy*, 537 S.E.2d 854, 857 (N.C. Ct. App. 2000) (“[T]he North Carolina long-arm statute authorizes personal jurisdiction since the plaintiff’s injury allegedly occurred within North Carolina and was allegedly caused by the defendant’s solicitation of plaintiff’s husband’s love and affection by telephoning plaintiff’s home in North Carolina.”).

<sup>182</sup> *Id.*

<sup>183</sup> *Crockett v. Prantner*, No. COA11-1565, 2012 WL 4076463, at \*7 (N.C. Ct. App. 2012).

<sup>184</sup> *Jones v. Skelley*, 673 S.E.2d 385, 393 (N.C. Ct. App. 2009).

Court of North Carolina has consistently recognized that “North Carolina has a strong interest in protecting its citizens from local injury caused by the tortious conduct of [nonresidents].”<sup>185</sup>

Within North Carolina, alienation of affections is not without limitations. In 2003, the Court of Appeals held that contacts by a nonresident defendant with North Carolina were insufficient to establish personal jurisdiction.<sup>186</sup> That court noted that the Tennessee plaintiff’s decision to sue the California defendant for alienation of affections in North Carolina “smacks of forum-shopping.”<sup>187</sup> However, the tort remains despite attempts to abolish this common law cause of action whether stemming from the North Carolina Court of Appeals<sup>188</sup> or the General Assembly.<sup>189</sup>

Completely sidestepping the myriad of public policy arguments that have underscored the near universal demise of the heart balm torts, a lower court judge in North Carolina recently penned a novel attack on the validity of alienation of affections. In *Rothrock v. Cooke*,<sup>190</sup> Superior Court Judge John O. Craig III held that both alienation of affections and criminal conversation are unconstitutional both facially and as applied to the facts as due process violations of the liberty and privacy interests guaranteed by the Fourteenth Amendment. This attack by a North Carolina lower court may not ultimately announce the death of alienation of affections in North Carolina. But for now, Mississippi stands alone in its unjustifiable love affair with alienation of affections.

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<sup>185</sup> *Cooper*, 537 S.E.2d at 858.

<sup>186</sup> *Eluhu v. Rosenhaus*, 583 S.E.2d 707, 712 (N.C. Ct. App. 2003).

<sup>187</sup> *Id.* at 711.

<sup>188</sup> *See Cannon v. Miller*, 322 S.E.2d 780, 784 (N.C. Ct. App. 1984), *vacated*, 327 S.E.2d 888 (N.C. 1985) (The Court of Appeals’ concluded that there was no “legal or logical basis” for alienations of affections was overturned by the Supreme Court of North Carolina).

<sup>189</sup> *See Sherry Honeycutt Everett, The Law of Alienation of Affections After McCutchen v. McCutchen: In North Carolina, Breaking Up Just Got Harder To Do*, 85 N.C. L. REV. 1761, 1767–68 (2007).

<sup>190</sup> *Rothrock v. Cooke*, No. 14CVS870, 2014 WL 2973066, at \*1 (N.C. Super. Ct. June 11, 2014).

## V. FAMILY LAW POLICY IS—AND SHOULD BE—THE CREATION OF STATE LAW

States have the exclusive right and power to regulate domestic relations. “By history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States.”<sup>191</sup> This is for good reason—states have a fundamental interest in regulating family law due to its importance to society. Marriage has traditionally been the basis of the family unit where “we inculcate and pass down many of our most cherished values, moral and cultural.”<sup>192</sup> Marriage thus has been understood not merely as being “a routine classification for purposes of certain statutory benefits,”<sup>193</sup> but rather an intrinsic human right that is “older than the Bill of Rights.”<sup>194</sup> The power to regulate marriage rests with the state such that federal courts—absent a showing of diversity or federal question jurisdiction—lack authority to try family law cases.<sup>195</sup> An action by an ex-spouse seeking damages against the person she holds responsible for the breakdown of her marriage goes to the very heart of a state’s public policy regarding the regulation of marriage and should be decided by state courts.<sup>196</sup>

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<sup>191</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2680 (2013); *see also* *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (noting that the power to regulate domestic relations has “long been regarded as a virtually exclusive province of the States”).

<sup>192</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 503–04 (1977) (“[T]he institution of the family is deeply rooted in this Nation’s history and tradition.”).

<sup>193</sup> *Windsor*, 133 S. Ct. at 2693.

<sup>194</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

<sup>195</sup> This is known as the “domestic relations exception.” Although federal courts are not prohibited from hearing cases “involving the issuance of a divorce, alimony, or child custody decree,” there is a presumption against them doing so. *Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992). *See* *Barber v. Barber*, 62 U.S. 582 (1858) for an overview of the domestic relations exception. There, a federal court was asked to hear a tort case involving ex-spouses. *Id.* at 584. The non-moving party attempted to invoke the domestic relations exception, which they argued prohibited the federal court from hearing a family law case. *Id.* at 588. The *Barber* court disagreed, reasoning that federal diversity jurisdiction gave the court authority to hear the case. *Id.* at 592. There may be some erosion occurring with respect to the adherence to the domestic relations exception to the jurisdiction of federal courts in post-divorce tort actions. *See, e.g., Jones v. Swanson*, 341 F.3d 723 (8th Cir. 2003).

<sup>196</sup> *Cotter*, *supra* note 36 (citing *Andrews v. Patterson*, 585 F. Supp. 553 (M.D.N.C. 1984)).

Tennessee's domestic relations statute is contained in Chapter 36 of the Tennessee Code Annotated. Tennessee regulates who may marry, the process of applying for a marriage license, who may officiate the wedding, the obligations arising from marriage, as well as the divorce process.<sup>197</sup> Remedies within marriage are another subset of categories that states may define. Conversely, the United States Code deals with marriage and divorce for survivorship, tax, and insurance purposes.<sup>198</sup> Of course, there is no federal process for marriage or divorce, because "there is no federal law of domestic relations."<sup>199</sup>

#### A. *The Constitutional Exception*

A state's interest in the institution of marriage, while fundamental,<sup>200</sup> is not final.<sup>201</sup> Rights or remedies attendant to marriage within one state may be extended to residents of another state whose laws circumscribe marriage rights and remedies broadly. In fact, the legal quest for the recognition of more permissive marriage laws co-opted from another may result in a constitutional challenge to the more narrowly framed rights and remedies of the sister state. The right to marry is protected by the Fourteenth Amendment;<sup>202</sup> so federal law may supersede state law when it violates the Constitution.<sup>203</sup> Such has been the recent history of state laws restricting marriage<sup>204</sup> and adoption to heterosexual couples.<sup>205</sup>

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<sup>197</sup> See, e.g., TENN. CODE ANN. § 36-3-101 (West, Westlaw through 2017 1st Reg. Sess.) (providing an overview of who may marry in Tennessee); *id.* § 36-3-301 (Westlaw) (prescribing who may officiate a wedding); and *id.* § 36-4-101 (Westlaw) (outlining Tennessee's divorce procedures).

<sup>198</sup> See, e.g., 5 U.S.C. § 8345 (2012) (prescribing the payment of benefits to federal employees and their spouses); 42 U.S.C. § 416 (2012) (defining "marriage," "divorce," "wife," and "husband" for social welfare purposes).

<sup>199</sup> *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).

<sup>200</sup> *Zablocki v. Redhail*, 434 U.S. 374, 381 (1978).

<sup>201</sup> See generally *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013); *Loving v. Virginia*, 388 U.S. 1, 7, 11–12 (1967).

<sup>202</sup> *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The absence of dispute reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978))).

<sup>203</sup> See *Windsor*, 133 S. Ct. at 2695–96; see also *Obergefell*, 135 S. Ct. at 2604–05 ("[T]he right to marry is a fundamental right in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry.");

However, federal law does not provide answers to conflicts between states over rights and remedies which lack Constitutional significance. If the Constitution itself contains no basis for denying Tennessee the authority to repudiate the tort of alienation of affections, how can the Courts of Mississippi wield such power over Tennessee? Left unchecked, the public policy of Mississippi through its long-arm statute's inappropriate embrace of nonresidents could be imposed on residents of all fifty states.

*B. Uniform Laws: The Exception Proves the Rule*

In rare cases, the individual sovereignty of states in matters of family law gives way to an overarching need for uniformity among the states. Some aspects of family law require uniformity across states because there is a need for consistency among the states in order to make rulings or jurisdictional decisions feasible. The Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") was drafted in 1997 and has since been adopted in 49 of the 50 states. Massachusetts is the only state that has not adopted the Act.<sup>206</sup> The stated purposes of the Act was to revise the child custody jurisdictional laws, in light of federal enactments and years of inconsistent rulings, to clarify jurisdictional questions, and to provide a uniform procedure of interstate custody enforcement.<sup>207</sup>

Similarly, the Uniform Parentage Act is federal legislation that helps establish guidelines for states in establishing paternity of children born to unmarried parents.<sup>208</sup> This Act was

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*Loving*, 388 U.S. at 7, 12 (striking down Virginia's ban on interracial marriage because the ban violated the couple's Due Process rights).

<sup>204</sup> *Obergefell*, 135 S. Ct. at 2604–05.

<sup>205</sup> See *V.L. v. E.L.*, 136 S. Ct. 1017, 1019 (2016). In that case, the Alabama Supreme Court refused to recognize a Georgia adoption and subsequent divorce decree, where the parents were a homosexual couple. *Id.* The U.S. Supreme Court reversed Alabama's ruling, holding that Georgia had subject matter jurisdiction to issue the divorce decree and parenting plan. *Id.* at 1022. Alabama had to abide by its full faith and credit obligation. *Id.*

<sup>206</sup> See *Legislative Fact Sheet - Child Custody Jurisdiction and Enforcement Act*, UNIF. LAW COMM'N (1997) <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act>.

<sup>207</sup> *Prefatory Note: Univ. Child Custody Jurisdiction and Enforcement Act*, NAT'L CONF. OF COMM'RS ON UNIF. STATE LAW (1997), [http://www.uniformlaws.org/shared/docs/child\\_custody\\_jurisdiction/uccjea\\_final\\_97.pdf](http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccjea_final_97.pdf).

<sup>208</sup> *Prefatory Note: Uniform Parentage Act*, NAT'L CONF. OF COMM'RS ON UNIF. STATE LAW (2002), [http://www.uniformlaws.org/shared/docs/parentage/upa\\_final\\_2002.pdf](http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf).

originally drafted in 1973, modernized in 2000, and then amended in 2002.<sup>209</sup> So far it has only been enacted in 11 states,<sup>210</sup> but has been endorsed by numerous ABA Sections.<sup>211</sup> This is another example of an area of family law that is better served by uniformity, because paternity issues could be ongoing and could be greatly affected by people moving across state lines. Both the UCCJEA and the Uniform Parentage Act are Acts put forth by the federal government to regulate family law, but the federal government has still left implementation to the states, thus reinforcing state autonomy.

While Federal IV-D Regulations require a uniform application of child support guidelines throughout any given state, the states are still free to determine their own provisions of the guidelines on how to calculate support.<sup>212</sup> This is just another example of the federal government leaving most regulation of families to the states, so that the states can further their individual public policies and not the public policies of the federal government.

To contrast, the Uniform Commercial Code regulates business transactions because many business transactions take place across numerous state lines and, therefore, uniformity is essential.<sup>213</sup> Businesses must have standardized rules, so that they are better able to determine how to interact with each other to make sales and contracts across the nation. But families are not usually stretched across state borders in this manner, nor are they dealing with one another at an arm's length, and therefore, state regulation is generally preferable.

The need for uniformity in heart balm torts, like most family law actions, has not risen to the level of these other unique Acts. Heart balm torts relate to an incident frozen in time, and are never going to be an ongoing action, unlike the actions under the jurisdiction of the UCCJEA and the Uniform Parentage Act. So far, these torts have been left to the states, and many states have deemed it necessary to abolish or at least minimize these actions.

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<sup>209</sup> *Id.*

<sup>210</sup> Alabama, Delaware, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, Wyoming have enacted the Uniform Parentage Act.

<sup>211</sup> *Legislative Fact Sheet - Parentage Act*, UNIF. LAW COMM'N (2002), <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act>.

<sup>212</sup> 42 U.S.C. § 602(a)(2) (2012) (amended 1997).

<sup>213</sup> U.C.C. § 1-103(a) (AM. LAW. INST. & NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 2016).

If state legislatures and state courts decide that their state no longer needs these actions or they do not wish to expand the torts, this is rightfully within their power. The states know what works for them and what policies they wish to cultivate.

C. *The Unnecessary Call for the Abolishment of Heart Balm Actions*

As a resident of Tennessee, a state whose well-considered public policy against alienation of affections is legally sound, the author could join the prolific scholarship calling for the uniform abolition of heart balm laws.<sup>214</sup> Yet this article stops short of that battle cry, considering it to be an unnecessary infringement upon the sovereignty of states. Nor does it join the pro-marriage activists or the feminist scholars who, for very different policy reasons find favor with the amatory torts.<sup>215</sup> States are not obligated to legislate equally, but rather are free to legislate uniquely. If the policy makers in the state of Mississippi choose to cling to the classic paradigms expressed by Prosser, namely that alienation of affections statutes “give increased protection to family interests and the sanctity of the home,” so be it.<sup>216</sup> But no long-arm statute should ever be long enough to force Mississippi’s public policy upon the nonresidents of Mississippi, whose home states have jettisoned alienation of affections as a harmful cause of action which instead “diminish[es] human dignity, demeans the participants, inflicts pain upon the innocent and does not prevent human misconduct.”<sup>217</sup>

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<sup>214</sup> See Crissman, *supra* note 125, at 518 (arguing that South Dakota should abolish alienation of affections); see also Kay Kavanagh, Note, *Alienation of Affections and Criminal Conversation: Unholy Marriage in Need of Annulment*, 23 ARIZ. L. REV. 323, 340 (1981); Cary & Scudder, *supra* note 127, at 26 (“North Carolina should take the next step in its journey by abolishing criminal conversation and alienation of affection because they are antiquated, do not protect marriage or deter adultery, and in fact defeat forgiveness, thereby prolonging the healing process after infidelity.”); Heard, *supra* note 54, at 313 (“Mississippi should join the majority of states in the nation that have already legislatively or judicially abolished the action”); Christopher Joseph Whitesell, *Loss of Consortium and Intentional Infliction of Emotional Distress: Alternative Theories to Alienation of Affections*, 67 IOWA L. REV. 859, 860 (1982).

<sup>215</sup> Nehal A. Patel, Note, *The State’s Perpetual Protection of Adultery*, 2003 WIS. L. REV. 1013, 1037–38; see also McCarty, *supra* note 50 at 119–20.

<sup>216</sup> KEETON ET. AL., *supra* note 60, § 124.

<sup>217</sup> Dupuis v. Hand, 814 S.W.2d 340, 346 (Tenn. 1991).

The author's primary critique of Mississippi's alienation of affections statute stems from the Mississippi court's inappropriate extension of its domestic relations policy outside of the state of Mississippi such that Mississippi effectively vetoes the public policy of sister states. Secondly, the author criticizes the sloppy application of the tort of alienation of affections to the Daly facts. While the alleged facts in Daly, if proven, might sustain an action for criminal conversation, such facts fail to establish alienation of affections. Therefore, it is impermissible for the courts of Mississippi, having abolished criminal conversation, to nevertheless allow an action to proceed by squeezing it into the remaining tort of alienation of affections.<sup>218</sup> Mississippi is not its neighbor's keeper, with respect to morality torts or otherwise. If the legislators of Mississippi, elected by the people of Mississippi, wish to provide redress to the residents of Mississippi for a morality tort, Mississippi should be applauded.<sup>219</sup> But the tort required to fit the Daly facts would resemble criminal conversation, not the alienation of affections statute as currently enacted in Mississippi.

One commentator has suggested an interesting corollary between the rise of no fault divorce and the rise of domestic tort actions, namely, that "no fault divorce has deprived some spouses of the opportunity to give the judge evidence of the other spouse's marital sins."<sup>220</sup> The anger and frustration that once were channeled into the fault aspects of a divorce action may now lead to an independent lawsuit by one spouse against the other or, in the case of heart balm torts, by one spouse against the alienator. If Mississippi wishes to cultivate post-divorce anger and

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<sup>218</sup> *Bailey v. Faulkner*, an Alabama case, stands for the proposition that in states that have barred alienation of affection, a party cannot backdoor a claim via a different cause of action. 940 So. 2d 247, 253 (Ala. 2006). It follows, then, that if courts in *Tennessee* lack the power to offer alienation of affection as a cause of action to Tennessee residents, Mississippi should likewise lack that power. Further, Mississippi has barred the tort of criminal conversation, but is essentially allowing Sherrie Miller to allege it through the tort of alienation of affection.

<sup>219</sup> See William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 98 (2001); cf. Heard, *supra* note 54, at 334 ("[l]ike other supporters of abolition, [Mississippi Supreme Court] Justice Dickinson found the current rationale underlying the tort to be a legal fiction – stating several times that the tort does not, in fact, preserve or stabilize a marital union. . . . [Instead], alienation actions have 'outlived any relevance or usefulness they may have once possessed . . . .'").

<sup>220</sup> See Robert G. Spector, *All in the Family—Tort Litigation Comes of Age*, 28 FAM. L. Q. 393 (1994).

frustration by providing a tort and a forum for its residents, no other state has reason to object. However, Mississippi's self-perceived role as the haven for the wounded hearts of nonresidents violates due process.

### CONCLUSION

Arguably, the heart balm torts have outlived their relevance in a society where marriage is no longer a necessary imprimatur for intimate relations,<sup>221</sup> and where broken hearts and failed marriages are the statistical norm.<sup>222</sup> A state's resolute rejection of the heart balm torts in principle as well as applied to modern domestic relations mores need be checked neither by Constitutional protections of marriage nor by the need for uniformity among sister states. Therefore, one state need not and must not transport its domestic relations public policy across state lines. Mississippi's expansive jurisdictional embrace of nonresidents, John Daly and Anna Cladakis, based upon their alleged temporary embrace of each other, violates Anna Cladakis' due process rights while providing a forum for Daly's opportunistic ex-wife to pursue publicity and monetary damages by vitiating the clear public policy of her home state of Tennessee.

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<sup>221</sup> One author has proposed a modification of the amatory torts noting that "America is ready for a tort that protects against outside interference with all intimate adult relationships." See Deans, *supra* note 37, at 383.

<sup>222</sup> "Of college-educated people who married in the early 2000s, only about 11 percent divorced by their seventh anniversary, the last year for which data is available. Among people without college degrees, 17 percent were divorced . . . Overall, the marriage trends resemble those in many other areas of American life. For people on the wealthier side of the class divide, life is better than it used to be in many ways. For people on the other side, the situation is much more complicated." Claire Cain Miller, *The Divorce Surge is Over, but the Myth Lives on*, N.Y. TIMES (Dec. 2, 2014), <http://www.nytimes.com/2014/12/02/upshot/the-divorce-surge-is-over-but-the-myth-lives-on.html>.