Cleveland State Law Review

Volume 30 | Issue 2 Note

1981

Alienation of Affection and Defamation: Similar Interests - Dissimilar Treatment

Richard G. Zeiger

ALIENATION OF AFFECTION AND DEFAMATION: SIMILAR INTERESTS—DISSIMILAR TREATMENT

I. INTRODUCTION

AN INDIVIDUAL'S RIGHT TO NONINTERFERENCE in personal matters and the preservation of the rights of society as a whole have been, and are, concepts of primary importance in the development of any legal system. When determining which direction to take on specific legal questions these two interests may conflict and must be carefully considered by the decision-maker. When individual rights and the rights of society conflict, the decision-maker has three choices. He may uphold the rights and interests of society to the detriment of individual interests. Conversely, he may choose to protect the rights of the individual over those of society. More often than not he will choose to find a middle ground at which the rights of the individual and the interests of society are both served.

The latter is clearly the better choice, yet it presents the greatest difficulty. Determining how much of one interest must be deferred to the interest of the other often demands the wisdom of Solomon. Further complicating the process is the consideration that very often the line between individual rights and the best interest of society is served by maintaining individual rights. Thus, when a decision must be made as to what the law should be, balancing the two interests is a difficult and precarious challenge which few would willingly accept.

Regrettably, this challenge has not been accepted in considering the action for alienation of affection. After having made significant progress in its development, the action has met with considerable resistance by those advocating its total abolition. In the past half-century, "anti-heartbalm" commentary, advocating such a fate, has demonstrated its influence on a majority of state legislatures. These legislatures have, in turn, either quickly done away with the action or have slowly chipped away at its existence.

The action for defamation of character has also recently passed through a period of resistance. After having first placed severe limitations on this action,[1] however, the United States Supreme Court has moved away from an extreme view of limitation and toward a more balanced approach to individual and societal interests.[2] The result has been to better serve the interests of the society, *i.e.*, providing for the free exchange of ideas, and thereby maintaining a measure of societal stability.

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[1] *See* Elder, *The Supreme Court and Defamation: A Relaxation of Constitutional Restraints*, 44 KY. BENCH & B. 38 (1980) [hereinafter cited as Elder].

[2] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

The recent legal decision-making process of the Supreme Court in the area of defamation raises the issue of why a balanced approach has not been similarly applied to actions for alienation of affection. The revelance of this issue is even more striking when we consider that, in effect, these two actions serve to protect similar interests. Actions for defamation are concerned with preserving the reputation of the individual in the eyes of society. Interference with the individual's relationship with third persons is the underlying injury. Actions for alienation of affection are concerned with preserving the reputation of the individual in the eyes of his or her spouse. As in the action for defamation, interference with the individual's relationship with a third person is also the underlying injury in alienation of affection cases.

This Note will discuss the historical development of these two actions in an effort to determine why they have been accorded dissimilar treatment, and whether such treatment is justified. Consideration will be given to the individual and societal interests which each action serves. The effect of changing social policies on these actions throughout history will be examined. Finally, suggestions will be made concerning the future treatment of the alienation of affection action.

II. ALIENATION OF AFFECTION—THE HISTORICAL PERSPECTIVE

A. *Origins and Development in England*

Interference with marital rights has long been actionable in English law. What has today developed into the action for alienation of affection had its early origin in actions for abduction or enticement of one's wife, for which a remedy was available by writs of ravishment or trespass before the local lord.[3]

By the thirteenth century an action at common law was available.[4] Statutes expressly permitting an action for the abduction of a man's wife appeared during the reigns of Edward I and Richard II.[5] By the fourteenth century actions based on the statutes of Westminster were highly evident.[6]

An action was also available to the agrieved husband against one who

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[3] III W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (9th ed. 1783); H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 262 (1968); R. H. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND 109 (1974).

[4] *See* Milsom, *Tresspass From Henry III to Edward III*, 74 L.Q. REV. 195, 211 (1958) [hereinafter cited as Milsom]. Prior to recognition of the "abduction" injury, one who physically interfered with or "assaulted" a man's wife had to forfeit his wergeled to his lord, but no remedy was statutorily available to the husband. *Id.*

[5] 3 Edw. I, c. 13; 13 Edw. I, c. 36; 6 Rich. II, st. I, c. 6.

[6] *See* Milsom, *supra* note 4. The specific writ employed was *de uxore abducta cum bonis viri. Id.*

took part in the "diversion" of his wife.[7] This action was maintained under canon law. However, the remedy available in common law courts minimized the use of the ecclesiastical action.[8]

The actual injury for which the husband brought suit was the loss of "consortium." Consortium had been considered to consist of the total services of the wife,[9] and the husband's interest in his wife's services permitted an action for damages. This action, *per quod consortium amisit*, would be instituted when another individual physically removed or hurt the wife.[10]

To be actionable the taking had to have been by persuasion, violence or fraud.[11] This was deemed to be an assault on the husband and not the wife.[12] The action brought for this assault was distinct from another action whereby the husband could join the wife against the offender for the actual physical assault on the wife. In the latter action, suit was brought for the *wife's* injury as opposed to the injury to the husband.[13]

In *Guy v. Livesey*,[14] it was alleged that "the plaintiff's wife went with the defendant and lived with him in a suspicious manner."[15] The action brought by the plaintiff was for the trespass of assault and battery, in that the defendant "did assault, beat, and wound *the plaintiff*."[16] Because the defendant had also physically beaten the plaintiff's wife, the defendant argued that the plaintiff should have had only one action, that of the assault of the wife.[17] The defendant argued that allowing the

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[7] *See* R. H. HELMHOLZ, *supra* note 3.

[8] While the ecclesiastical courts offered return of the abducted spouse and imposed penance on the offenders, money damages were not available. However, money damages were available to the husband in common law courts. The offenders would also be imprisoned and fined at the King's pleasure. It should be noted that recovery of the abducted spouse was not an element of the common law remedy. *See* III W. BLACKSTONE, *supra* note 3; R. H. HELMHOLZ, *supra* note 3.

[9] The consortium right of the husband developed from the master's property right in his servants. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124 (4th ed. 1971) [hereinafter cited as W. PROSSER]; H. CLARK, *supra* note 3, at 263. *See also* Guy v. Livesey, Cro. Jac. 502, 79 Eng. Rep. 428 (1619); Note, *The Suit of Alienation of Affections: Can its Existence be Justified Today?*, 56 N.D. L. REV. 239, 242 (1980) [hereinafter cited as *Existence Justified?*].

[10] A TREATISE OF FEME COVERTS: OR, THE LADY'S LAW 85 (1732).

[11] W. BLACKSTONE, *supra* note 3. The law presumed force and constraint, as a woman could not give her consent to leaving her husband.

[12] This "assault on the husband" approach to the injury may have developed from the time of William the Conqueror. *See* note 4 *supra*.

[13] VIII W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 630 (1952).

[14] Cro. Jac. 502, 79 Eng. Rep. 428 (1619).

[15] *Id.*

[16] *Id.* (emphasis added).

[17] A woman in medieval England could not bring an action for trespass in her own name. Such an action had to be brought by the woman's husband or father.

plaintiff to recover for injury to him would not bar a second action by the wife,[18] and thus defendant would be punished twice for the same assault.

The court, in holding plaintiff's action to be properly brought, stated:

> The action is not brought in respect of the harm done to the wife, but is brought for the particular loss of the husband, for that he lost the company of his wife, which is only a damage and loss to himself, for which he shall have this action . . . .[19]

In emphasizing the injury to the husband for the wrongful acts perpetrated on the person of the wife, and by permitting the action to be brought only by the husband, the courts underscored the broad social policy equating a wife's consortium to a property right vested solely in the husband.[20] Viewing a wife as "property" was a well established social principle of early English law[21] and in effect, if not in fact, the action for *per quod consortium amisit* was brought for injury to the husband's property. This "damaged goods" view of the action prevailed in the courts until the eighteenth century.[22] At that time the injury was extended to cover the loss of the intangibles of marriage, love and affection.[23]

The specific allegation of alienation of affection was first made in *Winsmore v. Greenback*.[24] In *Winsmore*, the plaintiff's wife had left the plaintiff and taken up residence with the defendant. When the wife desired to reconcile with the plaintiff she was prevented from leaving by the defendant. The plaintiff alleged that the defendant maliciously persuaded, procured and enticed the wife into staying, and caused her to alienate her affections from the plaintiff. The defendant objected to the lack of precedent for an alienation of affection action.[25]

Lord Chief Justice Willes stated that while an action brought for alleged alienation of affection had no precedent, the complaint was

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The woman, however, would be joined in the action. *See* note 11 *supra* and accompanying text.

[18] *See* note 17 *supra*.

[19] Cro. Jac. 502, 79 Eng. Rep. 428 (1619).

[20] *See* Brown, *The Action for Alienation of Affection*, 82 U. PA. L. REV. 472 (1934) [hereinafter cited as Brown]; *See generally* Warren v. Warren, 89 Mich. 123, 50 N.W. 842 (1891); Crane v. Ketcham, 83 N.J.L. 327, 84 Atl. 1052 (1912).

[21] *See generally* notes 2, 6-7 *supra* and accompanying text.

[22] Unfortunately, this view continued to prevail in the minds of ordinary citizens and the legislatures of many states.

[23] *See Existence Justified?*, *supra* note 9. The original "property" view was probably based on the duties the wife performed around the house, much like a servant. *Id.* The change in attitude towards women has been gradual, reflecting the slow change in the definition of consortium from property rights to intangible marriage rights.

[24] Willes 577, 125 Eng. Rep. 1330 (1745).

[25] *Id.* at 1331.

merely the allegation of a new fact[26] in the recognized action for *per quod consortium amisit.*[27] As such, the allegation was permitted to stand and the action for "alienation of affections" was recognized.[28]

Thus, in England, an early action for interference with marital rights represented the right of the individual to maintain and protect his personal property. This individual interest was in accord with the interests of a landed society. Property was the basic source of wealth in medieval society[29] and, as such, protection of personal property was of utmost importance to the maintenance of a stable society. This interest, coupled with the societal interest of maintaining the King's peace and the Church's interest in perserving the marital institution, carried over into the eighteenth century and eventually found its way to America.

B. *Further Development—America*

Specific allegations of alienation of affection, first recognized in England during the eighteenth century, took almost a century longer to be transmitted to, and recognized as, an independent cause of action in the United States. Prior to 1866, an action on the case, much like that of the English common law, for "enticing away and harboring" a man's wife was available to American husbands whose wives had been physically removed from them.[30] The necessary elements of this action were that the defendant, acting from improper motives, induced or persuaded the plaintiff's wife to physically depart from the plaintiff, thus depriving him of her consortium: Consortium was defined as assistance and society.[31]

In 1866 the New York court in *Heermance v. James*[32] was faced with a previously unconsidered fact that would ordinarily, under the established action on the case for enticing away and harboring, prohibit an

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[26] The action was brought on the case for enticing away and detaining the plaintiff's wife. Among the facts, or counts, which the plaintiff plead were that the defendant: 1) intended to injure the plaintiff's wife; 2) desired to deprive him of her aid, assistance and comfort; 3) intended to promulgate argument and discord between them; 4) sought to deprive the plaintiff of his wife's estate; and 5) desired to alienate the affections of the plaintiff's wife to him. *Id.*

[27] *See* Duffies v. Duffies, 76 Wis. 374, 45 N.W. 522 (1890). The tort of alienation of affection is still not recognized, in its own right, in England. *See* Gottlieb v. Gleiser, 1 Q.B. 267 [1958]; *Existence Justified?*, *supra* note 9, at 241.

[28] Of course, nothing truly *new* was recognized in *Winsmore* except the terminology "alienation of affection." The action was still *per quod consortium amisit.*

[29] *See generally* H. PIRENNE, MEDIEVAL CITIES: THEIR ORIGINS AND THE REVIVAL OF TRADE 42-43, 222 (1952).

[30] Turner v. Estes, 3 Mass. Rep. 317 (1807); Schuneman v. Palmer, 4 Barb. 225 (N.Y. 1848).

[31] *Id.*

[32] 47 Barb. 120 (N.Y. 1866).

aggrieved husband from bringing an action. The plaintiff alleged that the defendant had intentionally alienated the affections of the plaintiff's wife via persuasion, and the plaintiff had thereby lost the comfort, society, aid, assistance and conjugal affection of marriage. The plaintiff's wife had *not* been physically removed from the marital home, but was, in fact, still living there. Therefore, the defendant argued, there was no interference with the marital relationship for which the plaintiff could have a cause of action.[33]

The court, in allowing the action to be maintained and sustaining the lower court's judgment for the plaintiff-husband, recognized that the injury for which the action had been brought was precisely the same as if the parties had been physically separated.[34] Noting that there had been a "poisoning" of the wife's *opinion* of her husband, the court stated that a remedy for this wrong should be available to the husband.[35]

Recognition by the court in *Heermance v. James* of the loss of an intangible of marriage, such as affection and favorable opinion of one's spouse toward the other, without the traditionally required physical loss, suggests a strong departure from the social policy which considered wives to be their husband's chattel. The action was no longer one for the loss of an individual's interest in personal property, but for the loss of the affection and esteem of his spouse. "Consortium" had apparently attained a new meaning.[36]

It is from this point in time that alienation of affection as a mere allegation of fact became an action in its own right.[37] The elements of the new action became established as: 1) the wrongful conduct of the defendant with the plaintiff's wife;[38] 2) the loss of affection and consortium;[39] and 3) a causal connection between the acts of the defendant and

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[33] *Id.*

[34] The court observed that the continuing physical presence of the wife, who constantly rejected her husband, was in all probability of greater injury to the husband than if the wife had been enticed away. *Id.* at 126.

[35] *See* 47 Barb. at 125-26.

[36] A necessary element of the husband-wife relationship must be some degree of esteem between the parties. This esteem, or high regard, is lost when affection is alienated. *See generally* W. PROSSER, *supra* note 9, at 876.

[37] Not all courts were as quick to adopt the new action as was the New York court. The Massachusetts court specifically refused to permit the action. *See* Tasker v. Stanley, 153 Mass. 148, 26 N.E. 417 (1891). *See also* Crane v. Ketcham, 83 N.J.L. 327, 84 Atl. 1052 (1912).

[38] The action could, at this time, still only be brought by a husband for the alienation of his wife's affection. *See* Duffies v. Duffies, 76 Wis. 374, 45 N.W. 522 (1890).

[39] Because of the unequal development in and treatment by the various state courts, "consortium" eventually came to include affection, society, companionship, services, assistance, opinion, exclusive sexual relations and any other kind of relations that normally arise between husband and wife in the traditional sense of the marriage relationship. Each state would choose from among these

the loss of consortium.[40] The primary purpose of the action was to inhibit interference with familial relations and preserve the stability of the home.[41]

Only one vestige of medieval social policy remained to be expunged from the action for it to conform to modern social thinking. The action could still only be brought by a husband for loss of his wife's consortium.[42] Actions brought by a wife for the loss of her husband's consortium were denied for various reasons, including the historical considerations of the wife as her husband's property and the human nature of all males and females.[43] A woman was considered to be "purer and better by nature than her husband"[44] and, because of this, it was understood that a wife assumed the risks of an unfaithful husband. In *Duffies v. Duffies*[45] the court expounded upon this proposition by stating that a husband is often

> exposed to the temptations, enticements and allurements of the world, which easily withdraw him from her society or cause him to desert or abandon her .... The wife had reason to expect all these things when she entered the marriage relation, and her right to his society has all these conditions, and is not the same in "degree and value" as his right to hers.[46]

Once again some courts began to recognize the inequity and lack of sound reasoning behind such a policy.[47] As women's legal rights expanded into other "male" areas of law from which they had once been precluded,[48] many state courts deemed it time to correct the feudal fiction that baron and feme were one individual.[49] Increasing numbers of

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and other terms in defining consortium. Thus, the alienation of affection action came to mean slightly different things in different jurisdictions. *See* Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923). *See also* H. CLARK, *supra* note 3. *Accord*, Brown, *supra* note 20.

[40] *See* Bearbower v. Merry, 266 N.W.2d 128, 129 (Iowa 1978). On occasion, a forth element has been added: the existence of the marriage at the time of alienation. *See Existence Justified?*, *supra* note 9, at 243.

[41] *See* Brown, *supra* note 20. *See also* Feisinger, *Legislative Attack on Heart-Balm*, 33 MICH. L. REV. 979, 992 (1935) [hereinafter cited at Feisinger].

[42] *See* notes 17, 38 *supra*.

[43] *See* Duffies v. Duffies, 76 Wis. 374, 45 N.W. 522 (1890).

[44] *Id.* at 375, 45 N.W. at 525.

[45] *Id.* at 374, 45 N.W. at 522.

[46] *Id.* at 375, 45 N.W. at 525.

[47] *See* Haynes v. Nowlin, 129 Ind. 581, 29 N.E. 389 (1891).

[48] *See generally Existence Justified?*, *supra* note 9, at 242-43.

[49] *See* Haynes v. Nowlin, 129 Ind. 581, 29 N.E. 389 (1891); Bennett v. Bennett, 116 N.Y. 584, 23 N.E. 17 (1889). For an excellent account of the various treatments accorded to the action by the states just after the turn of the century, see King v. Hanson, 13 N.D. 85, 99 N.W. 1085 (1904).

states followed this lead until virtually every state permitted the wife to bring her own action for alienation of affection.[50]

As a result, the action's focus was shifted from the feudal property interest of the individual to the individual's right to noninterference in his or her marital relationship. This in turn had the beneficial effect on society of protecting these relationships from outside interference. A certain amount of stability reminiscent of the English interest in keeping the King's peace was maintained.

C. *Decline of the Cause of Action*

During the 1930's, actions for alienation of affection and criminal conversation[51] came under strong attack. Objections were based on several grounds, among which were: 1) unfounded actions and coercive settlements; 2) increased blackmail and extortion activity; and 3) excessive damages.[52]

Despite the advancements made in the action by extending it to women and recognizing that "consortium" consisted of marriage intangibles, advocates of abolishing the action revived the "property" stigma of feudal law to proclaim a fourth objection. Their argument was that because the action had its original basis in property law, it had been made obsolete by women's emancipation statutes and could not exist in modern times.[53]

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[50] *See* Comment, *"Anti-Heart Balm" Legislation Revisited*, 56 NW. U.L. REV. 538, 539 (1961) [hereinafter cited as *Anti-Heart Balm*].

[51] Criminal conversation is the common law civil action for adultery. Some commentators have stated that the two actions are alike in scope of injury and function. *See* Feisinger, *supra* note 41. While such a claim may be true in certain circumstances, the scope of injury in the alienation of affection action would appear to be much broader than in criminal conversation. The scope of injury in criminal conversation is loss of exclusive sexual relations only. *See id. See also* note 40 *supra* and accompanying text.

Adultery may be alleged in alienation of affection actions but is not required to show injury to the plaintiff. Such a showing would only affect the amount of damages awarded. *See* Bearbower v. Merry, 266 N.W.2d 128 (Iowa 1978); W. PROSSER, *supra* note 9, at 876-77.

[52] The action was recognized by some courts as being convenient to those who would either not bring an action against a person of high social standing in return for some compensation, or would bring such an action in the hopes of deceiving a judge or jury and recovering money damages. At the very least an unscrupulous plaintiff could hope to embarrass the innocent defendant so as to gain an out of court settlement. These schemes were highlighted by a willing press. *See* Miller v. Levine, 130 Me. 153, 154 Atl. 179 (1931); McCollister v. McCollister, 126 Me. 318, 138 Atl. 472 (1927).

Damages awarded for the alienation of affection action were often considered to be excessive and were often judicially reduced. *Anti-Heart Balm*, *supra* note 50, at 540 n.16.

[53] It is ironic that those who advocated a progressive cause such as women's

The public was informed of these injustices by a highly receptive and sensationalistic press. Newspaper accounts of alienation of affection cases were often exaggerated. Many included elements of love, passion, sex, scandal and excessive damages awarded by highly sympathetic and outraged juries.[54] Actions brought which were of significant value and protected legitimate interests were ignored.[55] The press' purpose could only have been to increase its number of readers.[56]

Due to highly visible and publicized "abuses" of these actions, which became known at "heart-balm" actions, state legislatures began to enact "anti-heart-balm" legislation. This legislation abolished the actions for alienation of affection and criminal conversation. Indiana was the first state to pass such a measure, with New York following the same year.[57] Twenty-three states have, to date, joined with Indiana and New York in abolishing the action.[58] Five others have modified the action by making

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rights would fail to realize the progress made in eliminating the feudal property bias of the alienation of affection action. Just when the action had been equalized between the sexes and a nonproperty injury had been recognized, these "progressives" deemed the action outdated. This would indicate the confusion which existed at the time among these individuals, as to whether the action was a tort to the person or one to property. *See* Comment, *Legislative Abolition of Certain Actions Designed to Protect the Family Relation*, 30 ILL. L. REV. 764, 771-72 (1936) [hereinafter cited as *Abolition Legislation*].

[54] *Id.* at 772 n.57. The jury reaction in these cases may indicate the strong interest of the general population in redressing the wrongs committed in actions for alienation of affection.

[55] *Id.* at 772.

[56] *See generally Anti-Heart Balm*, *supra* note 50, at 538-40.

[57] 1935 IND. ACTS. c. 208; 1935 N.Y. LAWS c. 263. As indicative of the strength with which the statutes passed, the Indiana Act passed the House by a vote of 87 to 7, and in the State Senate, 31 to 15. The New York Assembly vote was 146 to 6 and the Senate vote was 36 to 9.

In signing the New York law, then Governor Lehman stated:

> The public is well acquainted with the many abuses that have arisen in the prosecution or threats of prosecution of this type of action. For years these actions have been used to extract large sums of money without proper justification. They have been a fruitful source of coercion, extortion and blackmail.

Abolition Legislation, *supra* note 53, at 773 n.59.

[58] ALA. CODE § 6-5-331 (1975); ARIZ. REV. STAT. ANN. § 25-341 (Supp. 1979); CAL. CIV. CODE § 43.5 (West 1954); COLO. REV. STAT. § 13-20-202 (1973); CONN. GEN STAT. ANN. § 52-572b (West Supp. 1979); DEL. CODE ANN. tit. 10, § 3924 (1974); FLA. STAT. ANN. § 771.01 (West 1964); GA. CODE ANN. § 30-109.1 (Cum. Supp. 1979); IND. CODE ANN. § 34-4-4-1 (Burns Supp. 1973); ME. REV. STAT. ANN. tit. 19, § 167 (Supp. 1979); MD. CTS. & JUD. PROC. CODE ANN. § 5-301 (1974); MICH. COMP. LAWS ANN. § 600.2901 (1968); MINN. STAT. ANN. § 553.01 (West 1980); MONT. REV. CODES ANN. § 17-1201 (1974); NEV. REV. STAT. § 41.380 (1973); N.J. STAT. ANN. § 2A:23-1 (West 1952); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 1976); OHIO REV. CODE ANN. § 2305.29 (Page Supp. 1979); OKLA. STAT. ANN. tit. 76, § 8.1 (West Supp. 1979); OR. REV. STAT. § 30.840 (1977); VT. STAT. ANN. tit. 15, § 1001

it more difficult to maintain or by limiting recoverable damages.[59] Louisiana has judicially refused to recognize the action.[60]

Today's opponents of the action cite the same arguments proposed almost a half century ago. Warnings of possible abuse of the action by spiteful spouses are voiced.[61] Similarly, adverse publicity, reminiscent of blackmail and coercion claims, is also cited.[62] Perhaps the only new argument presented is that the action fails to be of any benefit in a society where free love and individual privacy are of utmost importance.[63]

The current legislative attitude toward alienation of affection reflects the presence of thinking influenced by the ideas of the 1930's. Present attitudes are best summed up by the preamble to the Florida alienation statute. After recalling the effects of the "grave abuses" attributed to the action and the "unscrupulous persons" who have used the action to their own gain, the legislature stated that it is in the best interest of the people to completely abolish the action.[64]

Whether the abolition of the action best serves the interest of society must be considered in light of legislative misunderstandings of the action and its manipulation for political purposes. If society has been best served, legislative choice of abolishing the action (clearly an extreme in the legal decision-making process) surely is not in the best interest of

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(Supp. 1979); VA. CODE § 8.01-220 (1977); W. VA. CODE § 56-3-2A (Supp. 1979); WIS. STAT. ANN. § 248.01 (West Supp. 1979); WYO. STAT. § 1-23-101 (1977).

[59] ARK. STAT. ANN. § 37-201 (Supp. 1979) (one year statute of limitations); ILL. ANN. STAT. ch. 48, § 170 (Smith-Hurd 1959) (only recovery of actual damages permitted); PA. STAT. ANN. tit. 48, § 170 (Purdon 1965) (no action against strangers); R.I. GEN. LAWS § 9-1-14 (Supp. 1978) (one year statute of limitations); TENN. CODE ANN. § 28-305 (1956) (three year statute of limitations).

[60] Moulin v. Monteleone, 165 La. 169, 115 So. 447 (1927). The court stated that marriage is a civil contract, and that no action is recognized in the Louisiana Civil Code for damages against a third party who induces a party to the civil contract to break that contract. *Id.*

[61] *See Existence Justified?*, *supra* note 9, at 250-52.

[62] *Id.* at 253-54.

[63] *Id.* at 254-55.

[64] The preamble states:

> Whereas, the remedies provided for by law for the enforcement of action based upon alleged alienation of affections have been subjected to grave abuses, causing extreme annoyance, embarassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing who are merely the victim [sic] 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 have resulted in the perpetration of frauds, exploitment and blackmail, it is hereby declared as the public policy of the State of Florida that the best interest of the people and of the state will be served by the abolition of such remedies.

FLA. STAT. ANN. § 771.01 (West 1964).

promoting an individual's right of noninterference with his marital relations. If both of these interests are to be served, a middle ground must be struck, as evidenced by the development of the law of defamation.

III. DEFAMATION—THE HISTORICAL PERSPECTIVE

A. *Origins and Development in England*

The action for defamation of character developed early on in the common law of England and evolved under changing social policy. The interests it has protected have been shaped by the needs of societal time periods and thereby have also been open to periodic criticism and abuse.[65]

The origin of the action has been traced to Germanic influences on early English common law.[66] The physical act of revenge for wrongs gradually gave way to the payment of the *wer* as compensation for an injury.[67] Other forms of punishment were decreed in the event that the offender could not meet this monetary obligation.[68]

Prior to the development of the King's common law courts, three courts held jursidiction over defamation cases. Like the early actions for abduction or enticement, almost every defamation action brought prior to the thirteenth century was instituted in seignorial courts. The plaintiff claimed compensation for actual damage and also for the shame done to him.[69] Actions brought in the seignorial courts apparently served to satisfy the claims of the ordinary masses.[70]

At the same time the ecclesiastical court also claimed jurisdiction over defamation. Defamatory falsehoods were considered to be a sin. The Church's jurisdiction extended over sexual morality, usury, perjury

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[65] *See* Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903) [hereinafter cited as Veeder].

[66] *Id.* at 548. Early libel law has been considered to have been based on Roman law. *Id.* at 547.

[67] *Id.* at 548. The amount of damages and form of payment were often dictated by the degree of the insult. *Id.* at 548 n.3. Under the *Lex Salica*, if one called a man a "wolf" or "hare" the fine was three shillings. On the other hand, falsely calling a woman a "harlot" could cost the slanderer forty-five shillings. II F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 537 (1895).

[68] King Alfred decreed that should a slanderer be unable to pay damages, he would have his tongue cut out. Under the Norman Customal, one who falsely calls another a "thief" or "manslayer" must pay damages and, holding his nose, publicly confess to be a liar. *See* Veeder, *supra* note 65, at 548-49.

[69] F. POLLOCK & F. MAITLAND, *supra* note 67. *See* II SELECT PLEAS IN MANORIAL COURTS (Seldon Soc.) at 13, 56. The damage to reputation was even evident in an action for the failure to repay a debt. *See* THE COURT BARON (Seldon Soc.) at 47.

[70] *See* II SELECT PLEAS IN MANORIAL COURTS (Seldon Soc.) at 19, 36, 82, 95, 109, 116, 143, 170; THE COURT BARON (Seldon Soc.) at 48, 57, 61, 125, 133, 136. Nobles could still resort to the duel. *See* Veeder, *supra* note 65, at 549.

and defamation.[71] The basis of its jurisdiction, as with interference with marital rights, was the *injuria*.[72] Punishment for defamation in the ecclesiastical courts usually consisted of mere acknowledgment of the falsity of the statement and an apology to the person defamed.[73]

While early English statutory law provided specifically that actions for defamation should be the sole province of the Church and that money and damages could not be awarded,[74] eventually money damages and the seignorial courts were made available to the action. The Church's control over the action was substantially weakened over time until it was finally eliminated.[75]

A third jurisdiction available only to defamed individuals of the nobility was administered by the King's Council. The offense of *De Scandalis Magnatum*, enacted by statute in 1275, provided for imprisonment of anyone found to be slandering the King or the upper class.[76] Punishment was later made determinable by the Council[77] which sat in what was to become known as the "Star Chamber."[78]

De scandalis magnatum survived for more than 600 years.[79] The social purpose of the action was essentially to do away with dueling in order to preserve the king's peace. Like the action for alienation of affection, actions for defamation of character were statutorily enforceable in order to avoid physical revenge. This, in effect, served to stabilize society. In carrying out this purpose, however, the Star Chamber eventually ex-

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[71] Veeder, *supra* note 65, at 550.

[72] *Id.*

[73] A similar punishment for the action of "diversion" of one's wife was available in these courts. The inability to procure money damages eventually led both actions to be brought primarily in secular courts. *See* notes 7-8 *supra* and accompanying text. *See also* Veeder, *supra* note 65, at 551-52.

[74] *See* 13 Edw. I, c. I.

[75] *See* Veeder, *supra* note 65, at 552. Ecclesiastic jurisdiction was finally abolished during the reign of Queen Victoria. 18 & 19 Vic. c. 41.

[76] The statute provided:

> Whereas much as there have been aforetimes found in the courts devisers of tales . . . whereby discord hath arisen between the King and his people or great men of this realm . . . it is commanded that none be so hardy as to tell or publish any false news or tales whereby discord or occasion of discord or slander may grow between the King and his people or the great men of the realm; he that doth so shall be taken and kept in prison until he hath brought him into the court which was first author of the tale.

3 Edw. I, c. 34. "Great men of the realm" was defined as "Prelates, Dukes, Earls, Barons, . . . Chancellor, Treasurer, Clerk of the Privy Seal, Steward of the King's House, Justices . . . and other great officers of this realm." 2 Rich. II, c. 5.

[77] *See* 12 Rich. II, c. 11.

[78] *See* Veeder, *supra* note 65, at 554.

[79] The action was finally abolished in 1887. Statute Law Revision Act, 1887, 50 & 51 Vic., c. 59.

tended its criminal jurisdiction to nonpolitical defamation.[80] Thus, general defamation of a member of the nobility was susceptible to a criminal trial before the Star Chamber, and as a result, the Star Chamber developed an infamous reputation of infringing upon individual rights of free speech.[81]

Beginning with the reign of Elizabeth I, the common law courts began to extend their jurisdiction over the law of defamation. This was partially due to the slow demise of a landed society and the emergence of a merchant class. Seignorial courts had also gradually declined. In addition, the reformation had so altered the social and political makeup of English society that the Crown, in order to usurp the control of the Church, had to absorb those areas of the law which had formerly been the province of the ecclesiastical courts.[82] Actions for defamation[83] became so numerous that the common law courts quickly found methods with which to dismiss the actions.[84]

Written defamation took still another path before hooking up with its oral relative. With the development of the printing press in 1476, the potential for a socio-cultural, and possibly political, revolution presented itself. With this the Church began to realize the enormous threat to its position should there be a free and unfettered press. Thus the Church imposed controls.[85]

Serious treatment of political and nonpolitical defamation occurred when the legal power of the Church passed to the Crown. Censorship was continued and strengthened.[86] Eventually the jurisdiction for written defamation passed to the Star Chamber which decided that harsh Roman criminal law, rather than canon law, should be adopted as the basis for implementing punishment for the violation of the Crown's censorship laws.[87] The interests of society and the individual's interests in reputation were given extreme preference over the individual right of free speech.

In time the Star Chamber lost its power and some balance was struck between the conflicting interests. The division between written and

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[80] *See* Veeder, *supra* note 65, at 555. *See generally* SELECT CASES IN THE STAR CHAMBER (Seldon Soc.) at 20, 38, 39-41, 101, 104, 109, 163, 166, 182, 244, 245, 261.

[81] *See generally* Veeder, *supra* note 65.

[82] *Id.* at 555-58.

[83] Defamation, at this point in time, consisted only of oral defamation. *Id.*

[84] *See* Veeder, *supra* note 65, at 558-60.

[85] *Id.* at 558-62.

[86] Under Elizabeth I, penalties for failing to comply with the censorship provisions could have resulted in mutilation and death. *Id.* at 562.

[87] *Id.* at 562-69. Roman law distinguished defamatory falsehoods on the basis of their form. Specific provisions for *libellos famosis* were available for the use, and abuse, of the Star Chamber.

spoken defamation, libel and slander respectively, had become clearly defined.[88] Thus a defamatory falsehood, when spoken, could very well have caused little or no repercussion because of a common law ancestry,[89] thereby realizing some degree of free speech. But the same remark, when written, evidenced greater malice. Such a remark, when written, evidenced greater extent of publication, thereby causing even greater harm to the defamed individual.[90] Written defamation continued to be closely monitored.

The purpose of the Crown in prosecuting defamatory remarks and preserving reputations appears to have been two-fold. First, the Crown desired stability in the realm. By permitting an action to be maintained for defamation of the Crown, the Crown intended to secure its authority. Second, the individual rights to noninterference between the relationship of the defamed individual and the rest of society was preserved. This right of action had also been available to commoners. As in the action for alienation of affections, balancing the interests of society and the individual was of utmost importance to the stability of society.

B. *America—Prior to 1964*

The importance of protecting one's reputation has been well recognized in American courts,[91] and the common law action for defamation was essentially preserved in America prior to 1964. Publication of falsehoods which could cause "public hatred, shame, obloquy . . . contempt, ridicule, aversion, ostracism, degradation or disgrace" were actionable.[92] The three distinguishing characteristics of defamation were still strict liability, presumption of damages and the limited availability

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[88] *See Developments in the Law—Defamation*, 69 HARV. L. REV. 875 (1956) [hereinafter cited as *Developments—Defamation*].

[89] Penalties for common law oral defamation were, by comparison to the criminal penalties of the Star Chamber, relatively mild. *See generally* note 67 *supra* and accompanying text.

[90] *See* King v. Lake, Hardres 470 (1670). *See also* Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785, 797 (1979) [hereinafter cited as Ingber].

Lord Mansfield recognized the injustice of different standards for slander and libel, but followed the historical treatment as handed down. *See* Thorley v. Lord Kerry, 4 Taunton 355 (1812).

The basis for distinguishing the two forms of defamation has long been debated, and will not be examined here. For a brief commentary on this subject, see Veeder, *supra* note 65, at 571-73.

[91] *See* Ingber, *supra* note 90, at 796; *Developments—Defamation*, *supra* note 88.

[92] Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933). The Restatement of Torts defines a defamatory statement merely as one that "intends so to harm the reputation of another as to lower him in the

of defenses.[93] To bring an action the plaintiff had only to place the statement in evidence and prove that the defendant was responsible for uttering or publishing the statement to others.[94]

The strict liability aspect was indicative of a continued recognition by the courts that innocent defamation could cause as much harm as intentional defamation.[95] The presumption of damages was founded on the premise that the plaintiff might not be able to prove actual damage due to the illusive nature of reputation.[96] General damages were available to the plaintiff.[97] Upon a showing of malice, punitive damages were also allowed.[98]

Due to the intangible nature of the injury, *i.e.*, damage to esteem, damages awards made by juries were highly speculative.[99] Emotionally charged juries resulted in a large range of possible awards. Verdicts ranged from a few cents to several thousand dollars.[100]

Under the common law a defendant had two major defenses: truth and privilege. Originally under the common law, "truth" meant literal truth. However, the harshness of this definition lead American courts and some legislatures to require only substantial truth.[101] The second major defense, "privilege," was easily susceptible to abuse. Absolute privilege was limited to governmental acts, the purpose being to permit officials the freedom to exercise their duties without fear of possible

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estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT OF TORTS § 559 (1938).

[93] *See* Ingber, *supra* note 90, at 797.

[94] *See* Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc., *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, at 1353 (1975) [hereinafter cited as Eaton]; Ingber, *supra* note 90, at 797-98.

[95] *See* Eaton, *supra* note 94.

[96] *See* Ingber, *supra* note 90, at 799.

[97] *Id.* Intangible damage consisted of the damage to reputation that is the lowering of one's esteem in the eyes of others. *Id. See also* D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES § 7.2, at 513-54 (1973).

[98] *See* Ingber, *supra* note 90, at 799. Prior to 1825, malice, in the sense of ill will or spite, was an essential element of the action. In Bromage v. Prosser, 107 Eng. Rep. 1051 [K. B. 1825], the court stated that malice would be implied from the utterance of the defamatory statement unless it was prima facie excusable. Thereafter "malice" became a mere formality and was no longer an essential element of a plaintiff's case. However, it may have been essential when attempting to overcome one of the various exceptions raised as a defense to strict liability. *See* Eaton, *supra* note 94, at 1353.

[99] *See* Ingber, *supra* note 90, at 799. Ingber comments that the amount of damages that a plaintiff might recover in a libel suit was more speculative than in any other field of law. *Id.*

[100] *See* W. PROSSER, *supra* note 9, at 761; Ingber, *supra* note 90, at 799.

[101] Ingber, *supra* note 90, at 800.

lawsuits.[102] However, absolute privilege prohibited actions against officials despite the fact that the defendant's only purpose was to injure the plaintiff.[103]

This privilege was also available for defamatory falsehoods made in connection with official proceedings.[104] It was assumed that judicial sanctions for contempt and perjury would be sufficient to penalize those who made such remarks.[105] This privilege was also extended to administrative proceedings and legislative hearings.[106]

Qualified privileges existed for defendants who made publication in order to fulfill a public or private duty to speak.[107] The duty to speak had to have been based on legal or moral grounds.[108] Generally, the speaker could not communicate to a larger audience than was necessary to serve his social purpose. He must also have had reasonable grounds of belief in the truth of what he had said. Finally, he must not have been acting out of improper motives.[109] A plaintiff could overcome a defendant's qualified privilege by a showing of malice.[110]

The interest being protected by the common law action was the individual's right to determine his relationship with society. Interference with that relationship, by diminishing the individual's esteem, was actionable to order to protect this individual right.

This right was often protected, however, at the expense of the free exchange of ideas. As noted, strict liability for defamation, absent a privilege, placed severe limitations on free speech.[111] In effect, the balance between the individual and societal interest in protecting individual relationships with third persons and the interest in preserving free speech had been tipped heavily in favor of the former interest. With this imbalance in mind, the Supreme Court proceeded to tip the

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[102] *See* Ingber, *supra* note 90, at 800; *Developments—Defamation*, *supra* note 88, at 918.

[103] *Developments—Defamation*, *supra* note 88, at 917-20.

[104] *Id.* at 920.

[105] *Id.* at 921-22. However, it would appear that these sanctions were often not utilized. Consider Ginsburg v. Black, 192 F.2d 823 (7th Cir. 1951), where the defamatory remarks were made within objections to plaintiff's petition for appointment as *amicus curiae* in a previous action. The court considered the remark absolutely privileged. *Id.*

A court would often consider the remark in relation to the proceeding to determine if it was privileged. *See* Kinter v. Kinter, 84 Ohio App. 399, 87 N.E.2d 379 (9th Dist. 1949).

[106] *See Developments—Defamation*, *supra* note 88, at 921-22.

[107] *See* Ingber, *supra* note 90, at 801.

[108] *Id.*

[109] *See Developments—Defamation*, *supra* note 88, at 929.

[110] *Id.* at 930. For an in-depth discussion of common law privileges and defenses to defamation actions, see *id.* at 917-33; Eaton, *supra* note 94, at 1360-63.

[111] *See* notes 93-110 *supra* and accompanying text.

scale in the opposite direction by severely limiting the action, only later to balance the conflicting interests involved.

C. *Constitutional Restraints (1964-74)*

From 1964 to 1974, the United States Supreme Court entered into the development of the law of defamation by considering the effects of the first amendment upon that law.[112] Prior to 1964, the Court firmly rejected suggestions that the Constitution required the common law action be modified or abridged. Such a suggestion prompted Mr. Justice Frankfurter to state that "nowhere was there [in the first decades after adoption of the Constitution] any suggestion that the crime of libel be abolished."[113] In 1964, however, the Court decided to reconsider its position on defamation in light of some of the action's more potentially abusive elements.[114] In *New York Times Co. v. Sullivan*,[115] the Court found that the "fair comment rule," employed by a majority of states, violated first amendment guarantees.[116]

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[112] Prior to 1964, infusion of the first amendment into the law of defamation by the Supreme Court was extremely limited. In 1925 the Court first suggested that the first amendment applied to the states through the fourteenth amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925). A definite holding to that effect did not occur until 1931. *See* Stromberg v. California, 283 U.S. 359, 368 (1931). Defamatory statements still were not considered protected by the first amendment. *See* Near v. Minnesota, 283 U.S. 697 (1931). The Court, in 1942, stated:

> [T]here are certain well-defined and narrowly limited classes of speech, the prevention of which have never been thought to raise any constitutional problem. These include the lewd, the obscene, the profane, the libelous, and the insulting, or "fighting" words . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth, that any benefit that may be derived from then is clearly out-weighed by the social interest in order and morality.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

[113] Beauharnais v. Illinois, 343 U.S. 250, 254-55 (1951). For the proposition that punishment for libel does not violate the first amendment, see Washington Post Co. v. Chaloner, 250 U.S. 290 (1919); Dorr v. United States, 195 U.S. 138 (1904); Pollard v. Lyon, 91 U.S. 225 (1876). *See also* Roth v. United States, 354 U.S. 476, 482-83 (1957); Schnectady Union Publishing Co. v. Sweeney, 316 U.S. 642 (1942). *But see* Roth v. United States, 354 U.S. 476, 484 (1957); Stromberg v. California, 283 U.S. 359, 369 (1931); Whitney v. California, 274 U.S. 357, 375-76 (1927).

[114] *See generally* notes 93-110 *supra* and accompanying text.

[115] 376 U.S. 254 (1964). Dean Prosser considered this case to be "the greatest victory won by defendants in the modern history of the law of torts." W. PROSSER, *supra* note 9, at 819.

[116] The "fair comment rule" was privilege applied to matters of public interest. The majority of states extended the privilege to "fair" expression of opinion and not to misstatements of fact. The theory behind the rule was that misstatements of fact were more damaging to reputations of public persons than were expressions of opinion. It was also believed that fair opinion served a useful public pur-

In the *New York Times* case, the Court was faced with inaccurate facts published by the New York Times in a paid advertisement supplied by a group of civil rights advocates.[117] The plaintiff, a Montgomery, Alabama city commissioner, had not been named or referred to in the advertisement, but claimed to have been defamed in his capacity as supervisor of the police department by two of the factual errors which concerned police activity.[118] The primary issue at trial was the truth of the advertisement's allegations, as Alabama's fair comment rule provided protection for opinions based on the truth of the facts underlying the statements made.[119] Alabama law did not privilege good faith misstatements of fact in discussion of public issues.[120] The jury found for the plaintiff and awarded damages of $500,000, which the Alabama Supreme Court affirmed.[121]

The United States Supreme Court reversed, finding that the defense of truth, by itself, was inadequate to protect the first amendment right of freedom of expression. Mr. Justice Brennan, writing for the Court, stated that in order for a public official to bring a defamation action he must prove that the defamatory statement was made with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not."[122]

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pose in the dissemination of ideas, while defamatory misstatements of fact impaired the public's ability to obtain accurate information. *See* Gutman, *The Attempt to Develop an Appropriate Standard of Liability for the Defamation of Public and Private People: The Supreme Court and the Federalization of Libel Law*, 10 N.C. CEN. L.J. 201, 204-05 (1979); Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875 (1949); Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413 (1910); Note, *Fair Comment*, 62 HARV. L. REV. 1207 (1949). *See also* Eaton, *supra* note 94, at 1362-63.

[117] The group called themselves the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." 376 U.S. 254, 257. The inaccuracies contained within the advertisement were relatively minor. The advertisement stated that: 1) Negro students demonstrating outside the Alabama State Capital sang "My Country, 'Tis of Thee," but the demonstrators actually sang the National Anthem; 2) nine students were expelled by the State Board of Education for leading the demonstration, whereas they had been expelled for demanding lunch service at the county courthouse; 3) the entire student body had protested, where only most of the students had; 4) the dining hall had been locked, when it had not; 5) police were deployed "ringing" the campus, when they had only been deployed near the campus; and 6) Dr. King had been arrested seven times and assaulted by police, where he had only been arrested four times and the issue of assault was disputed. *Id.* at 258-59.

[118] Specifically, the plaintiff objected to the misstatements concerning deployment of the police in response to demonstrations and the number of arrests of Dr. King and the alleged assaults on his person. *Id.* at 258.

[119] *Id.* at 267.

[120] *See* Eaton, *supra* note 94, at 1365.

[121] 376 U.S. at 256.

[122] *Id.* at 279-80. This "new" standard for defamatory falsehoods directed

The Court's purpose in modifying the common law action was to reduce interference with the free communication of ideas and opinions concerning government and public officials. The Court recognized a "national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[123] Social interest in the free communication of ideas and opinions on issues concerning public officials was now to take precedent over the rights of a defamed public official.[124]

Shortly thereafter the Court extended the actual malice requirement to cover "public figures," thereby placing a further limitation on the common law action. In *Curtis Publishing Co. v. Butts*[125] (and its companion case, *Associated Press v. Walker*), five members of the Court agreed that the actual malice limitations should cover all public persons, consisting of public officials and public figures.[126] It was reasoned that all public persons had sufficient access to means with which to rebut defamatory falsehoods, and that by voluntarily thrusting themselves into public life, these persons had assumed the risk of being defamed.[127]

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against "public officials" was adapted by the Court from Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908). In that case the plaintiff, the Attorney General of Kansas and a candidate for re-election, brought an action against a newspaper publisher for alleged defamatory statements made concerning the plaintiff's official conduct. The trial judge instructed the jury that the plaintiff had to show actual malice; otherwise, the publication was privileged. The jury found that the plaintiff had failed to carry this burden.

On appeal the Kansas Supreme Court affirmed, noting the social importance of being able to freely discuss candidates for office. The court extended the privilege to "a great variety of subjects. . . . [which] includes matters of public concern, public men, and candidates for office." 78 Kan. 711, 723, 98 P. 281, 285 (1908).

[123] 376 U.S. at 270. In their concurring opinions, Justices Black, Douglas and Goldberg advocated absolute immunity in these actions. *Id.* at 293-305.

[124] *See* Ingber, *supra* note 90, at 803.

[125] 388 U.S. 130 (1967).

[126] Mr. Justice Harlan was joined by Justices Clark, Stewart and Fortas. Chief Justice Warren (concurring in result only), joined by Justices Brennan and White (concurring in *Walker*, dissenting in *Butts*), concurred in the extension to public figures, but would have adhered to the *New York Times* standard. 388 U.S. at 162-170. Specifically, objection was made to Justice Harlan's evidentiary requirement of a "showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155, 163.

Justices Black and Douglas repeated their position in *New York Times* that the media was absolutely immune from defamation liability under the first amendment. *Id.* at 170-72.

[127] *Id.* at 154-55, 162. The plaintiff in Butts, the athletic director at the University of Georgia, had been accused in the Saturday Evening Post of conspiring to fix a football game between Georgia and the University of Alabama by giv-

In so reasoning the Court noted that freedom of speech went beyond political and governmental issues and "embraced all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[128] Thus, the logical extension of the limitation placed on common law defamation in *Rosenbloom v. Metromedia, Inc.*[129] should have come as no surprise.

The Court in *Rosenbloom* chose to focus on the nature of the subject matter which the alleged defamatory statements discussed rather than the status of the plaintiff or his degree of access to the media.[130] Here, the *New York Times* malice test was extended to cover any statement relevant to an issue of public interest[131] and, in effect, this approach precluded almost any defamation action from being brought against the press.[132] A private individual, involuntarily linked to matters of general interest, had no legal recourse against a defamatory falsehood unless he could satisfy the *New York Times* test.[133]

The limitations imposed upon actions for defamation by the infusion of first amendment rights, and the interpretation of those rights by the Supreme Court beginning in *New York Times* and ending with *Rosenbloom*, severely altered the action of defamation as it was known

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ing away Georgia's plays and formations to the Alabama coach. *Id.* at 136. In *Walker*, the plaintiff was a retired army general who had commanded federal troops during a school desegregation confrontation in 1957. In private life he had been actively engaged in politics and had actively opposed federal intervention in school desegregation. An Associated Press dispatch had stated that Walker had taken command of a violent crowd and had personally led a charge against federal marshals who had been sent out to enforce court ordered desegregation. *Id.* at 140-42.

Both Butts and Walker had originally been awarded tremendous damages. Butts received $460,000 including punitive damages, and Walker had received $500,000 in compensatory damages. *Id.* at 138, 141-42.

[128] 388 U.S. at 147, *citing* Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

[129] 403 U.S. 29 (1971).

[130] *See* Elder, *supra* note 1; Ingber, *supra* note 90, at 807. In *Rosenbloom*, the plaintiff was arrested on criminal obscenity charges for distributing "nudist magazines." The trial judge found, as a matter of law, that his material was obscene. The defendant radio station had reported that upon plaintiff's arrest the police had confiscated 3,000 obscene books. Later the station described the plaintiff as a "girlie-book-peddler" who was engaged in "the smut literature racket." The district court held that the *New York Times* test was not applicable; the jury awarded the plaintiff $25,000 in general damages and $725,000 in punitive damages. The punitive award was reduced by the court to $250,000. On appeal, the court of appeals reversed the decision. *Id.* at 32-35.

[131] *See* Ingber, *supra* note 90, at 807.

[132] The opinion by Justice Brennan was joined by the Chief Justice and Justice Blackmun only. However, the position of Justices Black and Douglas in *New York Times* and *Butts* would appear to support the holding. *See* Elder, *supra* note 1, at 38.

[133] *See* Justice Powell's comments on *Rosenbloom* in Gertz v. Robert Welch, Inc., 418 U.S. 325, 333 (1974).

in the common law. The injury to a defamed individual was still recognized. The effect of a defamatory falsehood would still disgrace and lower an individual's esteem in the eyes of third persons. But free expression was now considered to be of much greater importance than the injury to the individual. The Supreme Court's trend since 1964 had so altered the common law action that the potential to virtually eradicate the action existed.[134] However, perhaps in recognizing such potential and due to the fact that severe limitations placed on the action could allow one individual to freely injure another, the Court sensed that it had gone too far.[135]

D. *Relaxing Constitutional Restraints*— Gertz v. Robert Welch, Inc.

In *Gertz v. Robert Welch, Inc.*,[136] the petitioner, an attorney, had been retained by the family of a young boy who had been shot and killed by a Chicago policeman named Nuccio, to represent the family in civil proceedings against Nuccio.[137] In this capacity, the plaintiff attended the coroner's inquest into the boy's death and brought an action for civil damages.

The respondent published *American Opinion*, the monthly publication and voice of the John Birch Society. As part of a continuing effort to inform the public of a "nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a communist dictatorship,"[138] an article was commissioned on Nuccio's murder trial. In March of 1969, the respondent published an article entitled, "Frame-Up: Richard Nuccio and the War on Police."[139]

The article attempted to show that false testimony against Nuccio was given at his trial and that his prosecution was part of a Communist plan. The article portrayed the petitioner as one of the masterminds behind this plot. It stated that the petitioner: 1) had a lengthy police record; 2) had been an official of a Communist organization which advocated the violent overthrow of the United States government; 3) was a Communist; and 4) was a member of the National Lawyers Guild, described as the organization which masterminded the Chicago riots at the 1968 Democratic National Convention.[140]

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[134] *Id.* at 341-46.

[135] *Id.*

[136] 418 U.S. 323 (1974).

[137] The state had prosecuted Nuccio for homicide and eventually obtained a conviction for second degree murder. *Id.* at 325.

[138] *Id.*

[139] *Id.* at 325-26.

[140] *Id.* at 326. Specifically, the article stated that the petitioner's police file was

All of the accusations in the article were false,[141] and the managing editor of *American Opinion* made no effort to verify or substantiate the allegations. In fact, under a photograph of the petitioner he wrote the caption, "Elmer Gertz of Red Guild harasses Nuccio."[142] The magazine was placed on sale across the county and reprints of the article were handed out on the streets of Chicago.[143]

Petitioner filed a diversity suit for libel in federal district court. The respondent filed a motion for summary judgment claiming a constitutional privilege against defamation liability. Respondent relied on *New York Times*, *Butts*, and *Rosenbloom*, stating that the petitioner was either a public official or public figure and that the article concerned an issue of public interest.[144]

The district court denied the respondent's motion, believing that at trial the petitioner could factually show "actual malice."[145] After admission of all the evidence, but before submitting the case to the jury, the court ruled that the petitioner was not a public figure or public official.[146] The jury returned with a verdict for the petitioner awarding him $50,000.[147]

Subsequently, the district court reconsidered its earlier position and, deciding that this was an issue of public concern, stated that the petitioner had failed to show "actual malice," which was necessary to overcome an application of *Rosenbloom*.[148] The court entered a judgment for the respondent notwithstanding the verdict.[149]

The court of appeals affirmed the decision, noting that the article con-

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so large that it took "a big, Irish cop to lift," the petitioner had been an official of the "Marxist League for Industrial Democracy," originally known as the Intercollegiate Socialist Society, which has advocated "violent seizure of our government," the petitioner was a "Leninist" and a "Communist-fronter," and the petitioner was a member of the National Lawyers Guild described as a Communist organization that "probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention." *Id.*

[141] The petitioner had been a member and officer of the National Lawyers Guild fifteen years earlier. *Id.*

[142] *Id.* at 327.

[143] *Id.*

[144] *Id.*

[145] *Id.* The District Court evidently rejected the *Rosenbloom* argument that a privilege existed by way of a public issue. *Id.*

[146] *Id.*

[147] *Id.* at 329.

[148] 322 F. Supp. 997 (1970). The District Court had anticipated the Supreme Court's holding in *Rosenbloom*. 418 U.S. at 323-24.

[149] "Having already concluded that there was not sufficient evidence presented at trial to support a finding of actual malice or reckless disregard for the truth, judgment notwithstanding the verdict should be entered for the defendant." 322 F. Supp. at 1000.

cerned issues of public interest.[150] The court relied on the intervening decision of the Supreme Court in *Rosenbloom* to require that the *New York Times* test be applied to any publication of an issue of public interest without regard to the status of the person defamed.[151] Because the petitioner had failed to meet the *New York Times* requirement of showing "actual malice," the respondent was privileged in his remarks.[152]

On review of its self-imposed constitutional restraints on defamation, the Supreme Court recognized two important points. First, in an effort to alleviate the inequities of the common law, it had placed limitations on the action which permitted defamatory acts to go unchecked.[153] Second, the Court specifically recognized that the common law action for defamation of a private individual was of substantial importance.[154]

Speaking through Mr. Justice Powell, the Court noted that "there is no constitutional value in false statement of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open debate on public issues.' "[155] Further, the Court stated that "[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose . . . ."[156]

The Court also noted that a second societal value was at stake.[157] According to the Court, erroneous statement of fact is inevitable in a free

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[150] 471 F.2d 801, 805 (7th Cir. 1972).

[151] 418 U.S. at 330-31. This is substantially the result of *Rosenbloom*. *See* note 123 *supra* and accompanying text. Judge John Paul Stevens stated that:

> [W]e may also assume that the article's basic thesis is false. Nevertheless, under the reasoning of New York Times Co. v. Sullivan, even a false statement of fact made in support of a false thesis is protected unless made with knowledge of its falsity or with reckless disregard of its truth or falsity.

471 F.2d at 806.

[152] 471 F.2d at 806-07.

[153] *See* note 110 *supra* and accompanying text.

[154] *See* 418 U.S. at 340-42, 344-48.

[155] *Id.* at 340. *See* note 123 *supra* and accompanying text.

[156] *See* 418 U.S. 340, at 341. Justice Powell recalled Mr. Justice Stewart's admonition in Rosenblatt v. Baer, that an individual's right to protect his reputation

> reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality . . . is left primarily to the individual states . . . . But this does not mean that the right is entitled to any less recognition by this Court as a basis of our constitutional system.

Id. at 341 (Stewart, J., concurring).

[157] Both defamation actions and first amendment protections were implicitly recognized as being of value to society. *Id.*

society and punishing all errors could have a restrictive effect on constitutionally guaranteed free speech and press;[158] however, to allow unconditional immunity from defamation liability[159] "requires a total sacrifice of the competing value served by the law of defamation."[160]

Clearly a balance between the two competing values had to be struck.[161] The Court first considered Mr. Justice Harlan's formulation in *Rosenbloom* that these values be balanced on a case-by-case basis.[162] This was rejected as being unpredictible, uncertain, and a burden on the Court.[163]

The Court then considered and accepted a compromise position somewhere between *New York Times*, *Butts* and *Rosenbloom*. The Court first recognized that the first defense of a defamed individual was that of "self-help," that is, using every means at his disposal to rebut the false statement and minimize the impact on his or her reputation. While public officials and public figures had significant access to those channels of communication which could effectively permit them to accomplish this defense, ordinary individuals did not. Further, the media was entitled to assume that public figures and officials had voluntarily accepted the risk of being defamed by entering into the public eye.[164] The private individuals had not thrust their good names into the public eye, and therefore they "are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."[165]

The Court therefore struck down the *Rosenbloom* limitation and substantially retained the *New York Times* standard. But in placing defamation back in the hands of the states, the Court could not permit the common law inequity of strict liability to be resumed. Noting that such a doctrine runs counter to the *New York Times* test, and that it

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[158] *Id.* at 340-41.

[159] This was advocated by Justices Black and Douglas. *See* note 126 *supra* and accompanying text.

[160] 418 U.S. at 341.

[161] *Id.* at 343.

[162] Once the evident need to balance the values underlying each is perceived, it might be seen purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular plaintiff who prevailed.

403 U.S. at 63 (Harlan, J., dissenting) (footnote omitted).

[163] 418 U.S. at 343.

[164] *Id.* at 344-45. The public's eye extends to all aspects of a public figure or official's life, including personal activities. *Id. See* note 127 *supra* and accompanying text.

[165] 418 U.S. at 345.

would be highly unreasonable to one who takes all possible precautions but still commits the error, the Court held that the states could not impose strict liability.[166] In its place, the Court stated that the states had free latitude with which to define for themselves the appropriate standard of liability in the case of defamation statements injuring private individuals.[167]

Another inequity of the common law, singled out by the Court, was the amount of damages recoverable by a defamed individual. The doctrine of presumed damages[168] and punitive damages appeared to the Court to be amenable to potential abuse and become a further hindrance to first amendment principles.[169] Therefore, the Court held that plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth, under *New York Times*, would be limited to compensation for actual injury.[170] While the Court had modified the common law, the action retained a substantial amount of its original characteristics. Yet the Court had highlighted and diminished the more grave problems of the common law action while leaving the rest intact.[171]

In the time since *Gertz*, the Supreme Court has had several opportunities to elucidate its position. In each instance the result has been to further define the flexibility of the states in delineating the boundaries of the action, and to emphasize protection of an individual's reputation.[172] Society's interest in eliminating the interference of one in-

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[166] *Id.* at 346-47.

[167] The Court found this to be an equitable balance between the two conflicting concerns: the state's legitimate interest in protecting private individuals, and protecting the media from strict liability. *Id.* at 347-48. *See* Elder, *supra* note 1, at 38.

[168] Under the common law, the plaintiff was presumed to have been injured solely by the publication of the defamatory falsehood. This was most likely based on a broader presumption that publication would have a detrimental effect on the plaintiff's reputation under every circumstance.

[169] 418 U.S. at 349-50. The Court feared the subduing effect the threat of strict liability would have on the free exchange of opinion, the possible use of this measure to punish unpopular opinions and the unpredictability of a jury in awarding punitive damages. *See* note 168 *supra* and accompanying text.

[170] 418 U.S. at 349-50. But the Court loosely defined actual injury to include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350. While all awards require the support of competent evidence, no evidence which assigns an actual dollar amount to the injury need be submitted. *Id.*

This may have actually returned the common law strict liability to the action. *See* Ingber, *supra* note 90, at 810.

[171] Ingber, *supra* note 90, at 811-58. Most states have adopted some form of negligence test. *See* Collins and Drushal, *The Reaction of the State Courts to* Gertz v. Robert Welch, Inc., 28 CASE W. RES. L. REV. 306 (1978).

[172] *See* Elder, *supra* note 1; Gutman, *supra* note 116, at 218-22. In Time, Inc. v. Firestone, 424 U.S. 448 (1976), the Court considered the plaintiff to be a private

dividual in the relations of another with his peers would appear to have the support of the Supreme Court as well as the common law. At the same time the Court has retained protections for society's interest in a free press and free speech by eliminating the strict liability standard and placing a greater burden of proof on the plaintiff who desires more than compensatory damages.[173]

IV. ALIENATION OF AFFECTION AND DEFAMATION— PROTECTING THE SAME INTERESTS

The historical and developmental similarities of the action for alienation of affection and defamation of character are substantial. This is important when considering the present status of each. While differences between the actions exist, it is questionable whether these differences are so great as to justify according different treatment to each cause of action.

Historically, both actions have served the same societal purposes and have essentially protected the same individual rights. Each action developed, in the common law, as a hedge against violating the stability of society. Both actions represented the occurrence of a tort which would produce high emotions and which ran the risks of personal vengeance. In order to avoid acts of physical violence, these incidents became actionable in the courts. This development demonstrated a very real societal belief that protecting the individual's marital and social rights served the best interests of society. The common and canon law, both reflecting society's interests, recognized that substantial wrongs were committed under both sets of circumstances and that the wronged individual in each should have the opportunity to remedy these wrongs.

As each action developed, each was modified to reflect the special in-

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person. Mrs. Firestone was married to an heir of the Firestone fortune and had been involved in a lengthy and complicated divorce. She had held numerous press conferences concerning her pending divorce and the Florida Supreme Court had deemed the divorce a "cause celebre." Yet the Court stated that she had not assumed "any role of special prominence in the affairs of society, other than perhaps Palm Beach society," and had not "thrust herself to the forefront of any particular public controversy." *Id.* at 453.

The Court also refused to equate "public controversy" with "all controversies of interest to the public." *Id.* at 454. In so doing the Court placed a qualitative limitation on the types of activities in which a public figure would participate. *See* Elder, *supra* note 1, at 39.

In Herbert v. Lando, 441 U.S. 153 (1979), the Court held that an admitted public figure could invade the editorial process and inquire into the state of mind of the defendant in order to prove "actual malice." *See also* Wolston v. Readers Digest Association, Inc., 443 U.S. 157 (1979) (individual convicted of contempt in grand jury investigation concerning espionage activity in the United States not a public figure); Hutchinson v. Proximire, 443 U.S. 111 (1979) (recipient of federal grant with media access not a public figure).

[173] *See* notes 166-70 *supra* and accompanying text.

terests of society and the individual at that particular point in history. This is evidenced by the changes in the alienation of affection action in redefining "consortium" to reflect intangible interests rather than physical property rights, and in recognizing the right of women to bring the action. In the law of defamation this process is demonstrated by the development of libel, for personal and political purposes, in response to the development of the printed word.

Both actions continued their common law development until they were abrogated in the twentieth century. The suit for alienation of affection has been legislatively eliminated or altered in a majority of states.[174] The defamation action had been judicially restricted to the point of near ineffectiveness by the Supreme Court in the ten years prior to 1974.[175]

While many historical developments are similar, the primary similarities between these two actions are their elements and, more specifically, the injury in each which is imposed upon the plaintiff. In a true case of defamation, the defendant has published a defamatory remark about the plaintiff. The publication has influenced a third person's thought process and has injured the plaintiff by the loss of esteem or reputation in which he is held by that third person. In the alienation of affection action, the defendant has committed some act which has influenced a third person who happens to be the plaintiff's spouse. This influential act, whether verbal or physical, has injured the plaintiff in that he or she is no longer held in as high regard by the spouse than he or she had been prior to the defendant's act.

Of course it may be said that a spouse, so influenced by the defendant, can still maintain the same degree of respect and esteem for the plaintiff as before the act. This is, however, inconsistent with the facts of most alienation of affection situations. It can not realistically be said that when such an act takes place, absolutely nothing has been changed in the spouse's attitude towards the plaintiff and the marriage; some change in the spouse's opinion must occur.

Further, the injury to the plaintiff may extend to society in general. The effect of losing one's spouse under alienation of affection circumstances could also affect the opinions other individuals have with regard to the plaintiff. Thus when a "good" marriage is destroyed by the acts of outside individuals, the inability to preserve the marital relationship may reflect unfavorably on the plaintiff in the eyes of other individuals.

The same may be said of the circumstances surrounding the defamation action. There must be some effect on the person to whom a defamatory falsehood is published. Even if such a false remark is

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[174] *See* note 58 *supra* and accompanying text.

[175] *See* note 134 *supra* and accompanying text.

dismissed for what it is, the remark has been heard, or seen and processed in the mind of some third person. Although the degree of harm may be slight, it will nevertheless be present.

Both actions are alike in that they are relational torts.[176] This species of tort recognizes the injury done to one individual's relationship with another,[177] and the "gist" of the harm is the interference with the personal relationship of the plaintiff with a third person. Alienation of affection and defamation share this common harm because, in both situations, the defendant has interfered with the plaintiff's relationship with a third person by causing some loss of an intangible part of an interpersonal relationship.[178]

The difference between the two actions consists of the kind of relation interfered with. The defamatory falsehood interferes with nonfamilial relationships, while alienation of affection actions deal solely with the relationship between spouses.[179] A second difference between the actions is that one developed out of property law, while the other was strictly a personal tort. As has been noted, the alienation of affection action grew out of the husband's feudal property right in his spouse.[180] Defamation, on the other hand, was always more akin to a personal injury action.[181] These differences, however slight, were to greatly affect the futures of these two actions and may explain their differing positions today. However, the question of whether these differences should have had such effect remains to be answered.

V. SUPERFICIAL ARGUMENTS AND UNDERLYING REASONS FOR DECLINE OF ALIENATION ACTIONS

The present rationale behind abrogation of the action for alienation of affection is basically the same as that stated during the initial movement towards abolishment of the action during the 1930's.[182] The three primary arguments consist of abuse of the action, the unstable marriage and excessive damages.

In response to those fearing abuse of the action leading to increased incidents of extortion and blackmail, it can only be said that there is no

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[176] A relational tort is one which deals with an injury to a relational interest, that is, relations between one individual and another. *See* Green, *Relational Interests*, 31 ILL. L. REV. 35 (1936).

[177] *Id.*

[178] In defamation cases, this consists of esteem and reputation. In alienation of affection the loss consists of esteem, love, affection, etc. *Id.*

[179] *See generally* Kane v. Quigley, 1 Ohio St. 2d 1, 203 N.E.2d 338 (1964); Duffies v. Duffies, 76 Wis. 374, 45 N.W. 522 (1890).

[180] *See* note 20 *supra* and accompanying text.

[181] *See generally* notes 65-90 *supra* and accompanying text.

[182] *See* note 52 *supra* and accompanying text.

real evidence of such abuse commonly occurring.[183] Further, procedural and judicial discretion would appear to be sufficient safeguards against such abuse. "Fear of abuse" could be argued when considering legal treatment of any action. The purpose of the judicial system is to ferret out those actions which are abusive and brought in bad faith, in order to protect the rights of those who, in good faith, have been injured.[184]

The second argument often made is that if the marriage is so easily shaken it is because it is shaky to begin with.[185] This argument fails to take into account the existence of a "good" marriage which may still be susceptible to the bad influences of third parties.[186] Such an argument would appear to exemplify a lack of clear understanding of the possible application of the action. Not every alienation of affection involves one spouse's participation in sexual relations with a defendant. In fact, a majority of cases involve one spouse's immediate family member interfering with and harrasing the spouse's marriage.[187] For example, of the forty-one alienation of affection actions reaching the Supreme Court of Iowa prior to May 1978, more than half involved immediate family members of a spouse without any allegation of extramarital sexual activity.[188]

The final argument made against maintaining or reinstating the action is that the action has a tendency to inflame the passions of jurors, leading to excessive damages.[189] However, the same general problem has

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[183] *See* Feisinger, *supra* note 41, at 1008-09.

[184] *See* Wilder v. Reno, 43 F. Supp. 727 (M.D. Pa. 1942), where the court stated that if alienation of affection actions were to be denied for the possibility of the action being brought in bad faith, every action would be precluded, "for in every kind of litigation some suits are brought in bad faith; the very purpose of courts is to defeat unjust prosecutions and to secure the rights of parties in just prosecutions . . . ." *Id.* at 729. *See also* W. PROSSER, *supra* note 9, at 887-88.

[185] *See* Note, *The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship*, 48 NOTRE DAME LAW. 426, 431 (1972) [hereinafter cited as *Intentional Interference*].

[186] *Id. Contra*, H. CLARK, *supra* note 3, who states that "a marriage is not broken up by outsiders it if is solidly based on the affections of the parties." *Id.* at 266.

[187] *See* Glatstein v. Grund, 243 Iowa 541, 51 N.W.2d 162 (1952); Brown v. Brown, 338 Mich. 492, 61 N.W.2d 656 (1953), *cert. denied*, 348 U.S. 816 (1954); Wallace v. Wallace, 83 Mont. 492, 279 P. 374 (1929); Achione v. Achione, 376 Pa. 36, 101 A.2d 642 (1954); Woodhouse v. Woodhouse, 99 Vt. 91, 130 A. 758 (1925); Carrieri v. Bush, 69 Wash. 2d 536, 419 P.2d 132 (1966); W. PROSSER, *supra* note 9, at 876; Brown, *supra* note 20, at 482.

[188] Bearbower v. Merry, 216 N.W.2d 128, 132-33 (Iowa 1978). The Court stated that of the forty-one actions brought before them, twenty-two involved members of a spouse's immediate family, and seventeen of these were brought by the wife against one or both of her in-laws. *Id.* "Mother-in-law" cases are common in the annals of alienation of affection actions. *See* cases cited in note 187 *supra*.

[189] *E.g.*, Cleavenger v. Castle, 255 Mich. 66, 237 N.W. 542 (1931) ($450,000); Woodhouse v. Woodhouse, 99 Vt. 91, 130 A. 758 (1925) ($465,000).

been met in the defamation action.[190] Judicial discretion has, again, been an effective tool to combat this problem when necessary.[191]

The very basis of this argument is also questionable. The notion that jurors' passions become inflamed in these instances is apparently based on the same misconceptions about the action which developed from the sensational newspaper stories of the 1930's.[192] Even if these reports were accurate, it is doubtful that such a claim could legitimately be made today. Today's juror is more sophisticated than the juror of fifty years ago. He has been exposed, primarily through electronic media, to a variety of alienation of affection circumstances. By being exposed to more of these situations, today's juror is more accustomed to seeing these circumstances in daily life. It is less likely that his or her "passions" will become inflamed when presented with an alienation of affection action.

As has been demonstrated, none of these superficial arguments withstand rational thought. If the action is considered clearly and in the proper perspective, without the influence of the nonlegal community, it is apparent that the action represents a genuine interest in protecting the individual from interference in an interpersonal relationship. What then are the underlying causes of the action's decline?

A. *Misunderstanding the Action*

The action itself has been misinterpreted in two ways which have led to its decline. When abolishment of the action was called for during the 1930's, one of the major concerns voiced was that the action was based on a property right.[193] As such, it was argued that any action which treated newly emancipated women as chattel could not exist in modern society.[194]

While it is true that the action originally was based on the premise that the wife was the husband's chattel,[195] by the 1930's this had clearly been changed.[196] With the recognition that damage was caused by the loss of marriage intangibles,[197] and that a wife had an interest in her hus-

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[190] *E.g.*, Gertz v. Robert Welch, Inc., 403 U.S. 29 (1971) ($750,000); Curtis Publishing Co. v. Butts *and* Associated Press v. Walker, 388 U.S. 130 (1967) ($460,000 and $500,000 respectively); New York Times v. Sullivan, 329 U.S. 254 (1964) ($500,000).

[191] Cleavenger v. Castle, 255 Mich. 66, 237 N.W. 542 (1931) (jury verdict of $450,000 reduced to $150,000).

[192] *See* note 52 *supra* and accompanying text.

[193] *See* note 53 *supra* and accompanying text.

[194] *Id.*

[195] *See* notes 20-28 *supra* and accompanying text.

[196] *See generally* notes 22-23 *supra* and accompanying text.

[197] *See* note 35 *supra* and accompanying text.

band's consortium,[198] the action no longer was one for (or based on) property rights. The action had become a personal injury tort, much like defamation.[199]

Secondly, only a small minority of the alienation of affection actions involved extramarital sexual escapades,[200] abuse of the action,[201] or excessive damages.[202] There are indications that a majority of cases involved a spouse's immediate family members interfering with the marriage.[203] Abuse of the action and potential excessive damages have been judicially controlled.[204]

Thus, misunderstanding the basic nature of the action and its historical development would appear to be the true reason for abrogation of the action.[205] Legislators, desiring to woo the voting public, had chosen to rely on the misrepresentation of sensational journalism rather than on the true legal nature of the action.[206] Because of this, state after state has acted, with a snowballing effect, to do away with the action based on the uninformed sensational representations of the 1930's.[207]

B. *Misunderstanding "Consortium"*

Another underlying reason for the abrogation of the action was, and is, the misunderstanding of the term "consortium." As noted, consortium was originally a property right vested in the husband. Since the case of *Heermance v. James*,[208] however, the property aspects of "consortium" have been done away with.[209]

Twentieth century social policy should recognize that the consortium of present day marriage and family relations consists of more than the physical presence of a servant or chattel. Consortium consists of intangibles such as love, affection and esteem. Such intangibles make a successful marriage relationship possible.[210]

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[198] *See* notes 42-50 *supra* and accompanying text.

[199] *See* notes 180-81 *supra* and accompanying text.

[200] *See* notes 187-88 *supra* and accompanying text.

[201] *See* note 183 *supra* and accompanying text.

[202] *See* note 189 *supra* and accompanying text.

[203] *See* notes 187-88 *supra* and accompanying text.

[204] *See* notes 184, 190-91 *supra* and accompanying text.

[205] Dean Prosser also lumps together the action for alienation of affection and criminal conversation. *See* W. PROSSER, *supra* note 9, at 876.

[206] *See* notes 54-55 *supra* and accompanying text.

[207] *See* notes 57-58 *supra* and accompanying text.

[208] 47 Barb. 120 (N.Y. 1866). For a discussion of the case and its application to the consortium definition, see notes 32-36 *supra* and accompanying text.

[209] One possible explanation for the nonrealization of the change in the consortium character may be that because each state had its own definition of consortium, the *Heermance* definition was not acted on by other jurisdictions.

[210] *See* notes 35-39 *supra* and accompanying text. Recently, the term "consor-

These consortium rights are not the same property rights of medieval times. They are intangible rights which should be freely available to both parties in a marriage. The diminution of any of these intangibles should be by choice of the spouse rather than the choice of some third party.

C. *Decline of the Family*

A possible third reason for the decline of the alienation of affection action is the changing social view of the family relationship. The rationale for this is that the values which today's society places on the marriage institution are not the same as those of earlier times.[211] It could be argued that today's morals permit extramarital sexual activity and that, therefore, the action is outdated. This view would appear to run contrary to an increasing divorce rate. If society permits extramarital sexual relations, why would anyone get divorced for adultery?

The "permissible extramarital affair" argument would appear to be a logical argument for the abolition of criminal conversation, but not for the abolition of alienation of affection. Criminal conversation deals solely with the exclusive right of one spouse to sexual relations with the other spouse.[212] This action has been noted to be flawed for the very reason presented above. Evidently the argument has been directed towards the wrong action.[213]

The alienation of affection action does not require a showing of adultery in order to be maintained. The interests involved in the alienation of affection action and the criminal conversation action are different. The former involves the intangible injury to love and affection, while the latter involves injury for loss of exclusive sexual rights. The latter involves a loss of a more tangible nature akin to the early property right for which medieval actions for marital interference were maintained.

Further, the defendant in the alienation of affection action has a number of defenses available to him, including connivance, ignorance of marriage and privilege.[214] These defenses take into account the actions

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tium" has been defined as company, cooperation, affection and aid, in addition to conjugal fellowship. *See* Bearbower v. Merry, 266 N.W.2d 128, 133 (Iowa 1978). *See also* Kane v. Quigley, 1 Ohio St. 2d 1, 203 N.E.2d 338 (1964) (dissenting opinion).

[211] Consider the descriptions of various modern relationships contained in Flaherty, *Property Rights on Termination of Alternative Life Styles: Cohabitation*, 10 CAP. U.L. REV. 1 (1980) [hereinafter cited as Flaherty].

[212] Bearbower v. Merry, 266 N.W.2d 128, at 134 (Iowa 1978).

[213] *See* note 205 *supra*.

[214] *Intentional Interference*, *supra* note 185, at 429. In Fuller v. Robinson, 130 S.W.343 (Mo. 1910), the trial court gave the following instruction to the jury:

> Yet, if you shall further believe from the evidence that plaintiff permitted or connived at, or consented to or encouraged such attentions and

of those who compromise an unsuspecting potential defendant. For example, a stranger who was tricked into an alienation action, or a family member interfering in good faith, would both have valid defenses. Further, the action requires *purposeful* interference with the marriage; if the defendant lacks personal knowledge that the marriage exists, he or she cannot be held liable.[215]

The traditions of marriage and the family institution are still of great importance in today's society. While there may be a variety of cohabitation plans which are employed as a substitute for traditional marriage,[216] traditional marriages continue to exist. When one interferes with a traditional marriage, with the intent to disrupt that relationship, a basic civil right is being attacked. The right to maintain the family and to self-determination as to the future of the marital relationship are rights which married individuals reserve to themselves. The Supreme Court of the United States has said that marriage is a basic civil right and "fun-

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> conduct from the defendant to his wife or from his wife to the defendant, then your verdict must be for the defendant, notwithstanding you may believe from the evidence that such attentions and conduct finally resulted in alienating the affections of the plaintiff's wife from him and in her separation from him. Fifth. That if she had any affection for plaintiff and the same was alienated by the conduct and actions of plaintiff himself towards her, or by his neglect of her, or from any cause whatever, other than the attentions, conduct, or influence of defendant, with the wrongful and willfull purpose and intent of alienating her affections from her husband, or inducing her to separate or remain away from him, then your verdict will be for the defendant.

Id. at 353. In Madison v. Neuburger, 130 Misc. 650, 224 N.Y.S. 461 (1927), it was noted that "in an action for alienation of affections, plaintiff has the burden of proving scienter on the part of the defendant as to the relationship she was breaking up." 130 Misc. at 654, 224 N.Y.S. at 463. Finally, in Carrieri v. Bush, 69 Wash.2d 536, 419 P.2d 132 (1966), the court explained the defense of privilege as follows:

> It is within the context of the defense of jurisdiction and excuse that a parent, near relative or one standing in a professional or semiprofessional relationship to a marital partner may be clothed with a qualified privilege to reasonably and in good faith intervene in the domestic affairs of a married couple. This privilege, however, where it appears, may be overcome by evidence that the interference in the marital affairs was prompted by malice or ill will; accompanied by falsehoods; implemented by threats; utilized recklessly; or motivated by an unlawful, immoral or improper purpose.

419 P.2d at 136-37 (citations omitted). But the court also gave the following warning: "An intermeddling stranger, on the other hand, can claim no privilege to invade the domestic circle. He intervenes at his peril, and bears the burden of otherwise justifying or excusing his action." *Id.* at 137.

[215] *See* W. PROSSER, *supra* note 9, at 877-78; *Intentional Interference*, *supra* note 185. Even mere negligence which results in alienation of affection is not actionable: The defendant's act must be for the purpose of alienating affections. *See* W. PROSSER, *supra* note 9, at 877-78.

[216] *See* Flaherty, *supra* note 211.

damental to our very existence and survival."[217] The marriage relationship is of such importance that it has been stated to be one that is protected under the penumbra of the Bill of Rights.[218] The right to privacy in the marriage relationship should not be interfered with, and the opportunity to redress such interference should not be abridged.

VI. SUGGESTIONS

The arguments presented in favor of abolishing the action for alienation of affection and the underlying cause for this trend do not appear to be sufficiently justified in light of careful analysis. It is clear that in this area, just as in defamation law, there is a real injury for which an action should lie.[219] Inequities may exist in the action. These should not, however, be cause to "throw out the baby with the bath water."[220]

Just as the United States Supreme Court has struck a balance between the conflicting social and individual interests of protecting interpersonal relations harmed by defamatory statements and maintaining the free exchange of ideas, a balance should be struck in the law of alienation of affection. Social and individual interests are represented by prohibiting interference with the marital relationship. At the same time this interest must be balanced with the consideration that an individual in a marital relationship has the freedom to choose to voluntarily alienate his or her own affections, thereby imputing no guilt to a third person. This balance would more accurately reflect the needs of society in protecting these interests.

Legislative action on this matter has been unacceptable. Reliance on misinformation and misunderstanding of the nature of the action and the interests it protects has led a majority of legislatures to choose the easy way out of the legal decision-making process.[221] Political considerations, having played a part in these decisions, suggest that perhaps the process should be turned over to the judiciary. Judicial activity in the similar relational tort action of defamation would indicate that the judiciary is better qualified to apply this process.

Some uniformity in the application of the law and the definition of consortium is needed. Lack of uniformity among the states in applying this law was one element which led to the initial failure of the action fifty years ago.[222] Uniformity, however, may be impossible to achieve in the

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[217] Loving v. Virginia, 388 U.S. 1, 12 (1966); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). *See also* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

[218] *See* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

[219] *See* W. PROSSER, *supra* note 9, at 887-88.

[220] *See Intentional Interference*, *supra* note 185, at 430.

[221] *See* notes 51-60 *supra* and accompanying text.

[222] *See* notes 37, 209 *supra* and accompanying text.

near future if the need is left for a slow and heavily-burdened judicial system.

Recognizing that it may be some time before this area of the law could reach the United States Supreme Court for definitive guidelines,[223] it is suggested that the action be initially turned over to a committee of practitioners and scholars to develop and present a set of uniform guidelines in this matter to the various states for adoption. Such guidelines should include, for example, a definition of consortium as consisting of intangibles (love and affection), and uniform jury instructions as to the necessity of proving actual intent to disrupt the marriage. The guidelines also could require involuntary participation of the alienated spouse, prior to any recovery.[224]

A balancing effect, rather than following one extreme or the other, would be attained. This would protect the rights of all individuals involved in this action which, in turn, would serve the best interests of society and the judicial decision-making process. Questions which should then arise at trial include who initiated the disruptive act and, if initiated by the third person, whether he was initially aware of the marriage. Such questions of fact are to be answered by the judicial process.

VII. CONCLUSION

Total abolition of the action for alienation of affection has clearly been the easy way out of a legal dilemma. This way has been chosen by a number of legislatures based on misrepresentation of the action in newspaper accounts as well as their own misconceptions of the very nature of the action. The interests which the action serves are those of the individual, the marriage and society as a whole. Total abolition would only remove the protections afforded to those interests by the action.

The better route is to modify the action by balancing the interests involved. In this manner, protections are left intact for married individuals and new protections are created for the potential defendant. The approach employed by the United States Supreme Court in the area of defamation, also a relational tort, demonstrates the effectiveness of the balancing of these interests when making new law. Because of the

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[223] Consider the length of time the action of defamation took to reach the Supreme Court in order to establish uniform guidelines. *See* notes 91-114 *supra* and accompanying text.

[224] A degree of negligence was recognized at common law as being a bar to bringing the action. *See* note 215 *supra* and accompanying text. However, this degree did not extend to the defendant who was approached by a spouse whose affections had been voluntarily alienated prior to making the approach. The defendant may not have been the cause of the alienation but still would have been held liable.

need for reexamination of the action, the need for balancing the interests involved and uniformity among the laws of the states is essential to the existence of the action, it is urged that such steps be immediately taken by those actually involved in this area of the law. Such treatment of the law of alienation of affection would better serve both society and the individuals who are legitimately injured in alienation cases.

RICHARD G. ZEIGER