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Joanna L. Grossman

*Maurice A. Deane School of Law at Hofstra University*

Lawrence M. Friedman

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# Verdict

June 24, 2014

Joanna L. Grossman and Lawrence M. Friedman

## The Legal Price of Adultery Goes Down: North Carolina and West Virginia Abandon Heartbalm Actions



Angela Rothrock was an angry woman. On February 12, 2014, she filed a lawsuit in Forsyth County, North Carolina, against Sherry Cooke of Winston-Salem; she claimed that Cooke had had an “adulterous affair” with Angela’s husband, Timothy Gray Rothrock.

Historically, there were two causes of action that might allow a man to sue his wife’s lover, or a woman to sue her husband’s mistress: criminal “conversation” and alienation of affection (collectively known, along with some others, as “heartbalm” actions). Most states have long since thrown these claims into the ashbin of history, but North Carolina, along with only a small number of other states, has up to now stubbornly preserved them. In a recent ruling, *Rothrock v. Cooke*, a lower court judge in North Carolina has decided that enough is enough. He ruled that these causes of action were no longer valid in North Carolina, although for somewhat strange reasons. Just days later, the Supreme Court of Appeals of West Virginia reached a similar conclusion, eliminating the tort of criminal conversation, but for more sensible reasons.

### An Affair to Remember

Angela and Timothy had been married for 27 years; but now, following Timothy’s affair with Sherry, the marriage was a broken vessel, and husband and wife were separated. Angela demanded damages in the amount of \$100,000, and punitive damages on top of that. Her claims were based on the two hoary causes of action we mentioned above: criminal conversation and alienation of affection.

A plaintiff has a case for alienation of affections if he or she can show a happy marriage (a marriage of “genuine love and affection”) which the wicked defendant had “alienated and destroyed,” through “wrongful and malicious acts.” To win a case of “criminal conversation,” a married plaintiff has to show that the defendant, during the marriage, had sexual intercourse with the plaintiff’s spouse. “Criminal conversation” is a rather odd label for this kind of lawsuit: first of all, it is not a criminal case; and secondly, the gist of it is hardly “conversation;” it is sex plain and simple. There are no defenses based on motive or consequence. The adultery is the wrong that merits a remedy.

### Heartbalm in North Carolina

Angela no doubt thought she had a good case. North Carolina has always allowed this pair of claims. And with a certain gusto. In 2004, a wrestling coach sued a man who killed his marriage by having sex with the coach's wife in a motel. A jury awarded the coach the huge sum of \$900,000 in actual damages, plus another half million in punitive damages; an appellate court upheld this decision. About two hundred suits for alienation of affections are filed each year in North Carolina. Some sort of climax was reached in 2010: Cynthia Shackelford got an award of \$9 million against Anne Lundquist, the woman who broke up Cynthia's long-term marriage (thirty-three years).

North Carolina, however, has been, as we said, something of an outlier. Almost all the other states have already said goodbye and good riddance to these lawsuits, either by judicial rulings eliminating the causes of action or legislative actions abolishing them. And the few other survivors—Hawaii, New Mexico, Utah, and South Dakota—seem to make little or no use of these lawsuits. Only in North Carolina did they flourish.

Until now. Judge John Craig III, presiding in the Superior Court of Forsyth County, dismissed Angela Rockroth's claim. "Crim con" and alienation of affections, in his view, were obsolete relics of a bygone day. Moreover, in his opinion, these types of lawsuit violated rights guaranteed by the United States and North Carolina constitutions.

### **The History of Heartbalm**

In the high and palmy days of Victorian sensibilities, these two causes of action had been very much alive. They were part of a cluster of rules and institutions that aimed to build a kind of legal wall enclosing and protecting traditional marriage. The most important of these were rules about adultery and fornication; and rules that made divorce hard to get (in theory), and available only to the truly innocent (also in theory). There were other subsidiary rules: under an Illinois law of 1899, for example, "seduction" of a woman "of previous chaste character" was actually a crime. But the law specifically offered the seducer a kind of get out of jail free card: marry the woman you seduced, and the State would forget about prosecution.

A jilted woman had another rather powerful weapon: she could sue for breach of promise of marriage. An engagement was treated as a kind of contract; jilting breached the contract, and therefore laid the jilter open to a suit for damages. A woman's case was strong if the bouncer had "ruined" her, that is, taken her virginity. And it was strongest of all if she became pregnant with his child. In theory, breach of promise was a unisex action; but in fact, only women ever filed suit.

"Crim con" and alienation of affections fit neatly into this cluster of legal devices. They were, to be sure, bit players in the drama, but they were not completely unimportant. Unlike breach of promise, these were open to men whose wives had cheated on them. Going to court, after all, was more civilized than taking out a gun and drilling holes in the wife's lover, although that also happened from time to time. (In those cases, by virtue of the so-called "unwritten law," juries rarely if ever convicted the outraged husband.) "Crim con" was fairly specific: the defendant had to have had sex with the fallen spouse. Alienation of affections had broader possibilities. It could be brought against anybody who poisoned the relationship between husband and wife—an evil mother-in-law, for example.

But even as early as the 19<sup>th</sup> century, these various causes of action were not universally applauded. There was a constant drumbeat of criticism. In theory, these were claims brought by the pure against the impure, but a strong odor of blackmail and extortion hung over them. In 1890, Jacob Vanderbilt, a member of one of America's super-rich families, married a woman named Violet Ward, who was not from the "social circles in which the Vanderbilts moved." Vanderbilt's father made a huge fuss, and the marriage did go sour. Violet sued for alienation of affections. No doubt many people thought she was nothing but a gold-digger. In 1921, one Edward McFarlin sued Senator Ralph Cameron, of Arizona, for alienation of affection; Cameron, according to the plaintiff, had committed acts of "misconduct" with Marjorie McFarlin on a New Haven railroad train. McFarlin wanted \$100,000. The Senator denied the charges and accused the McFarlins of blackmail.

The bad publicity kept coming. After all, the newspapers tended to report the lurid, the sensational, the unusual; and these were often distinctly fishy—stories that played into the idea that these causes of action were open

invitations to abuse, that they led to false claims, extortion, blackmail, and the like. State after state felt the heat and got rid of all of these actions: breach of promise, criminal conversation, alienation of affections. In Indiana, for example, these were all swept away in 1935, as part of “An Act to Promote Public Morals.” California followed suit in 1939. In some states, the courts stepped in—in Idaho, for example, where the court simply held that the state would no longer recognize these as valid causes of action. The Mississippi Supreme Court abolished criminal conversation in 1992 but curiously enough reserved judgment on alienation of affections. In any event, by 2014, as we said, only a few of these dinosaurs survived, and apparently they were thriving only in North Carolina.

The bad publicity and the scandals were certainly a major reason why courts and legislatures moved to get rid of crim con and alienation of affections. Basically, these causes of action were supposed to protect the purity of women and uphold the sanctity of traditional marriage. But powerful, elite men came to see crim con and alienation of affections (along with breach of promise) as weapons that designing women could use to attack them and extort money. Their influence probably doomed these causes of action. Claims of blackmail and extortion were behind a number of the legislative moves to abolish these causes of action. But there was surely an even deeper reason for the decline and fall of these doctrines. Victorian sensibilities themselves gradually entered a stage of decline and fall. In this era of permissive sex, this age of anything goes, this period of x-rated shows and gay marriage and no-fault divorce, crim con and alienation of affections seemed as out of place as a woolly mammoth in the jungle.

### ***Rothrock v. Cooke and Golden v. Kaufman***

Judge Craig’s opinion in the *Rothrock* case more or less makes this point, although hidden behind a dense thicket of legal verbiage. His central argument, which seems a bit far-fetched, is that these causes of action are offenses against freedom of speech, freedom of expression, and the right of privacy. Alienation of affections, he says, “explicitly seeks to punish the expression of friendliness, affection or intimacy by consenting partners and effectively restrains those consenting parties from engaging in free expression.” Criminal conversation too “punishes all expression of affection or intimacy in the form of consensual sexual conduct between individuals”—as if “crim con” really were about conversation, a nice, warm, cozy chat, which just happens to pave the way to adulterous sex.

The two causes of action “chill” the right to express oneself, he says—as if the issue were soap-box oratory. The founding fathers would be amazed at the idea that freedom of speech provides a shield of protection for seduction, or that sex outside of marriage comes under the sheltering wings of the concept of freedom of expression. How expressive is conduct that by design occurs in secret? But at the end of his opinion, Judge Craig makes what is probably his strongest point: all but six states had already done away with criminal conversation and alienation of affections; this is powerful evidence that these were “antiquated” doctrines, no longer “useful means of protecting marriage;” and that it was high time for them to go.

As if to underscore Judge Craig’s point, the Supreme Court of Appeals of West Virginia chimed in, on June 16, 2014, with a decision in the case of ***Golden v. Kaufman*** (<http://law.justia.com/cases/west-virginia/supreme-court/2014/14-0280.html>). Golden, the original defendant, challenged a decision of Kaufman (a lower court judge). The facts were these: Mark and Maria Miller were married in 1994 (they have a 15-year-old son). Golden, an employee of New York Life, helped Maria Miller with her 401(k) retirement account; and did so good a job, and so winningly, that they apparently found each other sexually irresistible. (How often do affairs start during retirement planning?) Maria then divorced her husband, Mark. Mark Miller, enraged, and suffering (he claimed) from a constant fear of contracting a “loathsome disease” (herpes), brought a lawsuit against Golden for criminal conversation (among other things), and claimed a raft of damages, including over half a million in costs for refinancing his house and giving up some interests in jointly-owned property. For good measure, he also sued New York Life for failing to supervise a randy employee adequately.

West Virginia had long since abolished alienation of affections but apparently had not bothered to do the same for criminal conversation. In *Golden*, the state’s highest court filled in the gap. The court saw little reason to distinguish between the two causes of action; they were basically twins. A cause of action for criminal conversation, said the court, is, “in its essence, a claim for alienation of affections.” And, like almost all the other

courts that considered the question, West Virginia's Supreme Court felt crim con was archaic, unnecessary, and subject to abuse. In the court's view, the trial court should have summarily tossed out Miller's lawsuit; and told him, in essence, to get on with his life.

## Conclusion

This is one more indication of the way the legal current is running. Of course, West Virginia decisions are not binding in North Carolina, which can continue to go its own way. We cannot, then, be sure that the North Carolina decision will stick. The *Rothrock* case can be appealed to the North Carolina Court of Appeals; and beyond that, perhaps, to the North Carolina Supreme Court. That court would have the last word on the subject; and it has so far given no sign that it wants to get rid of these causes of action, and never mind what happens elsewhere in the country. But sooner or later the end will surely come. The *Rothrock* case indicates, if nothing else, that some judges in North Carolina feel the time for abolition is now. The mills of change grind slowly in North Carolina, but in the end they will no doubt grind exceedingly small.



Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of [Inside the Castle: Law and the Family in 20th Century America](#) (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of [Gender Equality: Dimensions of Women's Equal Citizenship](#) (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.

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Lawrence M. Friedman is the Marion Rice Kirkwood Professor of Law at Stanford University and an internationally renowned legal historian. Professors Grossman and Friedman are co-authors of [Inside the Castle: Law and the Family in Twentieth Century America](#) (Princeton University Press 2011) and working together on a social history of privacy law.

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