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Legislation: The Maryland Equal Rights Amendment: Eight Years of Application

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LEGISLATION

THE MARYLAND EQUAL RIGHTS AMENDMENT: EIGHT YEARS OF APPLICATION

"As the species homo sapiens *slowly evolved from the baser life forms, both a congregating into a family group and a division of labor therein became saliently characteristic. Man was the hunter and the warrior; Woman, the keeper of the hearth and rocker of the cradle. Even latter-day refinements were little more than variations upon this primordial theme. An increasingly organized society fashioned customs and then conventions and then laws to enforce the obligations implicit in this division. In the post-World War II enlightenment, however, such notions appear as remote as the Pleistocene. Organized society may still make distinctions based upon physical prowess, intellectual endowment, earning capacity, etc., but it may no longer arbitrarily assign roles and obligations automatically upon the basis of gender.*

"This enlightenment found expression in our own sovereignty on November 7, 1972, with the ratification of Article 46 of the Maryland Declaration of Rights: 'Equality of rights under the law shall not be abridged or denied because of sex.'"[1]

I. INTRODUCTION

Judge Charles E. Moylan's characterization above of the social history leading to the ratification of the Maryland equal rights amendment[2] provides a backdrop for viewing the subsequent social development of sexual equality, but it is not an entirely accurate assessment of the role played by the Maryland ERA since its ratification. Rather than the natural extension of a developing policy of equal rights for women, the ratification of an equal rights amendment in Maryland represents a radical departure from prior laws concerning women. None of the change that Judge Moylan attributes to the post-war period took full effect in any jurisdiction until that change was mandated by constitutional provision.

This article undertakes a general review of equal rights for women from three perspectives. First, a legal history of women's

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1. Coleman v. State, 37 Md. App. 322, 323, 377 A.2d 553, 554 (1977).
2. MD. CONST., DECL. OF RIGHTS art. 46. This provision will be referred to as the Maryland equal rights amendment or "ERA." Although not all state constitutional guarantees of equal rights for women are constitutional amendments, for the sake of convenience they will be designated as "equal rights amendment" or "ERA."

rights in this country indicating why individual states mandated equal rights in their own state constitutions.[3] Second, an examination of the interpretation of equal rights amendments by the courts in other states providing a comparative look at the Maryland ERA in application.[4] Finally, a consideration of the Maryland courts' interpretation of the ERA, and the General Assembly's reaction to that interpretation, suggesting answers to questions as yet unsolved that will demonstrate the effect of the ERA in Maryland.[5]

II. WOMEN'S RIGHTS — AN HISTORICAL PERSPECTIVE

A. *A 450-year Tradition*

During America's colonial period, both men and women were participants in an agricultural economy, and both were equals. Nonetheless, married women possessed neither political power nor legal identity.[6] Then, in 1776, Thomas Jefferson authored the Declaration of Independence proclaiming that all *men* are created equal. Despite the sweeping eloquence of that idea, women gained no rights under Jefferson's scheme. Jefferson wrote that women had to be excluded from politics "to prevent depravation of morals and ambiguities of issues."[7]

American women generally accepted their lack of legal standing with resigned frustration until, on July 19, 1848, a group of women became angry enough to call for a women's rights convention at Seneca Falls, New York. That first women's rights convention, led by Elizabeth Cady Stanton,[8] composed a Declaration of Rights expressing the participants' frustration with the roles into which American women were then forced. The women's Declaration, paralleling the language of Jefferson's Declaration of Independence, declared the signers' strong belief that both men *and women* were created equal and demanded that law and social policy reflect that view.[9] Little change in either law or social policy, however, resulted from the Seneca Falls convention.

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3. See text accompanying notes 6–33 *infra*.
4. See text accompanying notes 34–58a *infra*.
5. See text accompanying notes 59–158 *infra*.
6. See 1 W. BLACKSTONE, COMMENTARIES *442, which reads, in part: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage . . . ."
   During the colonial period, single women had some political rights. The right to vote was based on ownership of property, and unmarried women were allowed to hold legal title to property. DePauw, *Women and the Law: The Colonial Period*, 6 HUMAN RIGHTS 107, 111 (1977).
7. Thomas Jefferson, *quoted in* Ginsburg, *Sex Equality and the Constitution*, 52 TULANE L. REV. 451 (1978).
8. *See generally* L. BANNER, ELIZABETH CADY STANTON (1979).
9. *See* Kerber, *From the Declaration of Independence to the Declaration of Sentiments: The Legal Status of Women in the Early Republic 1776-1848*, 6 HUMAN RIGHTS 115, 118–21 (1977).

Following the Civil War, the fourteenth amendment[10] was proposed and ratified as an express guarantee of equal rights for the newly emancipated slaves, but many mid-nineteenth century feminists viewed the new amendment as an opportunity to improve the status of women. The first signal of what women could expect from Supreme Court interpretation of the fourteenth amendment came in the *Slaughter-House Cases of 1873*.[11] The Court, discussing the equal protection clause of the fourteenth amendment, expressed the opinion that it was doubtful "whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever come within the purview of this provision."[12]

In the *Slaughter-House Cases,* the Supreme Court also ruled that the privileges and immunities clause of the fourteenth amendment was merely a confirmation of the existing law and that no new rights were extended by its ratification. The Court subsequently relied on this interpretation in *Bradwell v. Illinois,*[13] the first case directly testing the application of the fourteenth amendment to women generally. Myra Bradwell had been denied admission to the Illinois bar solely because she was a woman. Bradwell, claiming that admission to the practice of law was a privilege of citizenship guaranteed by the fourteenth amendment, sued for admission. Relying on the recent *Slaughter-House Cases* ruling, the *Bradwell* Court approved the Illinois statutory scheme prohibiting the admission of women to the bar and held that the practice of law was not a "privilege" of citizenship.[14]

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10. U.S. CONST. amend. XIV.
11. Butchers' Benevolent Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 83 U.S. (16 Wall.) 36 (1873).
12. *Id.* at 81.
13. 83 U.S. (16 Wall.) 130 (1873).
14. Perhaps the most disappointing aspect of *Bradwell* for feminists of the time was the language of Justice Bradley in his concurring opinion:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . .
>
> . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

83 U.S. (16 Wall.) at 141. *See* Hochfelder, *Equal Rights — Where Are We Now?*, 64 ILL. B.J. 558, 559 (1976).

In Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874), Virginia Minor, pinning her hopes on the privileges and immunities clause, pressed a claim that she was entitled to the right to vote. In an opinion equating women with children for the purpose of determining legal rights, the Supreme Court rejected any chance of granting women the right to vote. 88 U.S. (21 Wall.) at 174.

Thus, the case for equal rights for women had failed under both the equal protection and the privileges and immunities clauses of the fourteenth amendment. Not until 1908 did the Supreme Court address whether the due process clause allowed discrimination based upon sex.[15] In *Muller v. Oregon,*[16] the defendant laundry owner was convicted of violating an Oregon statute limiting the number of working hours for women employees. Muller, relying on a 1905 Supreme Court decision invalidating on fourteenth amendment due process grounds a New York statute limiting working hours for *male* bakers,[17] asserted that the same rule forbidding discrimination against male bakers applied to regulations governing working hours for women. The Supreme Court, manifesting a paternalistic need to protect women from themselves, ruled that the Oregon statute was valid under the due process clause.[18]

In the 1961 case of *Hoyt v. Florida,*[19] the Supreme Court reiterated its unwillingness to recognize equal rights of women under the fourteenth amendment. Hoyt was convicted by an all male jury of killing her husband. She argued on appeal that the absence of women from the jury substantially diluted any chance of prevailing on the defense that her actions were justified by her husband's abuse. In an unanimous opinion, the Court ruled that the Florida statute limiting jury service to those women who volunteered violated neither the equal protection clause nor the due process clause.[20] Thus, the Court seemed firmly entrenched in its position that the fourteenth amendment did not afford significant rights to women.

B. The Modern-day Ebb and Flow

Despite the Supreme Court's apparent reluctance to utilize the fourteenth amendment as a framework for women's rights, in 1971 the Court's resolve to deny women any protection under that

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15. Muller v. Oregon, 208 U.S. 412 (1908).
16. *Id.*
17. Lochner v. New York, 198 U.S. 45 (1905).
18. In speaking of women, the *Muller* Court said:
    > It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection . . . .

    208 U.S. at 422. Forty years later, the Supreme Court upheld a Michigan statute which purported to protect women by prohibiting them from tending bar unless their husbands or fathers owned the business. Goesaert v. Cleary, 335 U.S. 464 (1948).
19. 368 U.S. 57 (1961).
20. The *Hoyt* Court harkened back to its decision in Strauder v. West Virginia, 100 U.S. 303 (1879), and justified its decision to allow the exclusion of women from jury duty by reasserting that women were "still regarded as the center of home and family life." 368 U.S. at 61–62.

amendment ended. In *Reed v. Reed,*[21] an Idaho statute granting males priority in the administration of decedent's estates was struck down as unconstitutional by an unanimous Court. The *Reed* decision marked a recognition by the Court of a revived feminist movement and an awareness that women were entitled to additional rights.[22] The Court left unclear, however, the standard of protection that would apply to future sex discrimination cases.

Two years later, the Supreme Court decided *Frontiero v. Richardson,*[23] the landmark case in women's rights under the United States Constitution. Frontiero, a married woman serving in the United States Air Force, was denied dependent benefits for her husband because she could not demonstrate that he was actually dependent upon her for more than half of his support. Married male Air Force servicemen were not required to make a similar showing in order to receive dependent benefits. In a plurality opinion, the Court ruled that the Air Force requirement was a violation of due process guaranteed under the fifth amendment.[24] Justice Brennan, speaking for himself and three other Justices,[25] wrote in the opinion of the *Frontiero* Court that "sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny."[26] These four Justices represented a reversal of the judicial philosophy from the decision twelve years earlier in *Hoyt* denying women protection under the fourteenth amendment. Thus, after *Frontiero,* women seemed on the brink of achieving constitutional protection ensuring equality of rights.

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21. 404 U.S. 71 (1971).
22. *See* Ginsburg, *From No Rights, To Half Rights, To Confusing Rights,* 7 HUMAN RIGHTS 13 (1978).
23. 411 U.S. 677 (1973).
24. *Id.* at 91.
25. Justices Douglas, White and Marshall concurred with Justice Brennan. Justice Stewart concurred in the judgment. Justices Powell, Burger and Blackmun filed a separate concurring opinion. Justice Rehnquist dissented.

    In B. WOODWARD & S. ARMSTRONG, THE BRETHREN (1979), the authors assert that Justice Stewart came very close to joining Justice Brennan's opinion and declaring sex-based classifications suspect:

    > Stewart indicated that he favored striking individual laws as they came up and, perhaps after a number of years, doing what Brennan proposed. It would be better for the dynamics of the law — a slow evolution and then a clearly logical ultimate step. Besides, Stewart was *certain* the Equal Rights Amendment would be ratified. That would relieve the Court of the burden. The responsibility really should be assumed by legislatures.

    Id. at 255 (emphasis in original). Justice Brennan refused to compromise.
26. 411 U.S. at 682 (footnote omitted). In his concurring opinion, Justice Powell maintained that it was not necessary to declare that sex based classifications were suspect to decide *Frontiero.* In fact, Justice Powell said, it was probably ill-advised for the Court to do so in light of the pending ratification of the federal ERA. *Id.* at 691–92.

The plurality opinion in *Frontiero,* however, represented the apex of women's rights in the Supreme Court. In *Kahn v. Shevin,*[27] the Court withdrew the prospect that sex would be held to be a suspect classification protected by the requirement of strict scrutiny.[28] Justice Douglas, writing for the majority of the Court, held that a Florida statute granting to widows tax incentives which were not available to widowers did not violate the requirements of due process because the statute rested "upon some ground of difference having a fair and substantial relation to the object of the legislation."[29] This language indicated that the proper standard of judicial review in gender-based classification cases was something less than the strict scrutiny requirement that the classification be justified by a compelling governmental interest. Thus, although the *Kahn* decision appeared to benefit individual women, it was actually a significant retreat from recognition of equal rights for all women.

With the plurality opinion in *Frontiero* pointing the way toward sex as a suspect classification, and the majority opinion in *Kahn* indicating that a less rigid standard than strict scrutiny should be applied, the Court heard the case of *Craig v. Boren,*[30] hoping to resolve the ambiguity. In *Craig,* the Supreme Court considered the constitutionality of an Oklahoma statute that allowed women to drink alcohol at age eighteen, but required that men be twenty-one years old before they could drink. Rather than adopting the rationale of either *Frontiero* or *Kahn,* the *Craig* Court decided that gender-based classifications could not be accommodated within the framework of the traditional two-tier analysis and placed such classifications into a so-called middle-tier.[31] The Court indicated that in order to "withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[32] The new middle-tier approach was a more fluid analysis that did not hold the Court to any established standard for judicial review.

Under the *Craig* middle-tier standard of constitutional protection, women are in a hybrid position — they may be discriminated

27. 416 U.S. 351 (1974).
28. The source of the two-tier analysis approach was a footnote in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
29. 416 U.S. at 355 (citations omitted). Justices Brennan and White filed dissents reaffirming their commitment to equal rights for women in line with the plurality opinion in *Frontiero.*

    Justice Douglas justified the apparent contradiction between his stands in *Frontiero* and *Kahn* by saying that there was a distinction between the two because the statute in *Kahn* was not designed purely for administrative convenience as was the one in *Frontiero. Id.*
30. 429 U.S. 190 (1976).
31. *See* Note, *Equal Protection and the "Middle-Tier": The Impact on Women and Illegitimates,* 54 NOTRE DAME LAW. 303, 316–17 (1978).
32. 429 U.S. at 197.

against in the absence of a compelling governmental interest, but something more than a rational basis is required to justify the constitutionality of that discrimination. The middle-tier test remains the currently applicable standard under the fourteenth amendment for review of gender-based classifications.[33]

The view that society will no longer tolerate sex discrimination in any form is not borne out by recent Supreme Court decisions. At least at the national level, social evolution has not reached the point of prohibiting under all circumstances discrimination based upon gender.

III. STATE EQUAL RIGHTS AMENDMENTS — GENERAL OVERVIEW

As a supplement to the limited protection afforded women under the fourteenth amendment, seventeen states have guaranteed equal rights for women in their constitutions.[34] The effectiveness of these state equal rights amendments has been varied. With the court of each state free to set its own standard for fulfilling the purpose of its ERA, many interpretations have been proposed with varying effects upon equality of rights for women. State court interpretations of equal rights amendments may, however, be categorized roughly into three groups.[35] A consideration of those groups individually clarifies the status of equal rights law at the state level.

A. The Rational Basis Group

The easiest approach for state courts considering cases requiring interpretation of an ERA is to adopt a form of the traditional two-tier equal protection analysis. Three state courts interpreting state equal rights amendments have applied the rational basis tier of the equal protection test and require a mere showing that sex-based discrimi-

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33. *See, e.g.*, Wengler v. Druggists Mut. Ins. Co., 100 S. Ct. 1540 (1980); Orr v. Orr, 440 U.S. 268 (1979).

34. ALASKA CONST. art. 1, § 3; COLO. CONST. art. 2, § 29; CONN. CONST. art. 1, § 20, *as amended by* art. 5; HAWAII CONST. art. 1, § 21; ILL. CONST. art. 1, § 18; LA. CONST. art. 1, § 3; MD. CONST., DECL. OF RIGHTS art. 46; MASS. CONST. pt. 1, art. 1; MONT. CONST. art. 2, § 4; N.H. CONST. pt. 1, art. 2; N.M. CONST. art. 2, § 18; PA. CONST. art. 1, § 28; TEX. CONST. art. 1, § 3a; UTAH CONST. art. 4, § 1; VA. CONST. art. 1, § 11; WASH. CONST. art. 31, § 1; WYO. CONST. art. 1, § 3.

A collection of the text of individual state equal rights amendments is contained in the appendix to Driscoll & Rouse, *Through a Glass Darkly: A Look at State Equal Rights Amendments*, 12 SUFFOLK U.L. REV. 1282, 1309 (1978).

35. The three groups are: (1) states that have adopted a rational basis standard of analysis; (2) states that apply a strict scrutiny test; and (3) states that absolutely prohibit discrimination on account of sex.

nation is not arbitrary or capricious in order to allow the discrimination to stand.[36]

Under the equal rights amendments of the three states in this group, Louisiana, Utah, and Virginia, women are afforded no practical protection when they encounter sex discrimination, as most of those states which have no formal ERA require at least the same rational basis to uphold sex-based discrimination.[37] The constitutional protection of the women's rights in Louisiana, Utah, and Virginia would not be affected, therefore, if there were no state constitutional guarantees of equal rights for women. Significantly, these three states are among the fifteen that have failed to ratify the federal ERA.[38]

Also, in light of the Supreme Court holding in *Craig* granting middle-tier protection in cases of sex discrimination,[39] there is no reason for one who encounters discrimination on account of sex in these three states to rely upon the state ERA. The superior protection under the federal constitution has rendered the Louisiana, Utah, and Virginia equal rights amendments ineffective.

B. The Strict Scrutiny Group

Courts in several states have used equal rights amendments to grant women more constitutionally guaranteed rights than are available under the fourteenth amendment. Although the United States Supreme Court refused to grant "gender" suspect classification status along with the accompanying right to strict scrutiny

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36. Broussard v. Broussard, 320 So. 2d 236 (La. App. 1975); Cox v. Cox, 532 P.2d 994 (Utah 1975); Archer v. Mayes, 213 Va. 633, 194 S.E.2d 707 (1973).

In *Broussard* and *Cox*, the doctrine of maternal preference in child custody cases was under attack. The Louisiana court in *Broussard* ruled that the maternal preference doctrine was proper because it was "not unreasonable, capricious or arbitrary." 320 So. 2d at 238. The court in *Cox* also upheld the doctrine, saying that Utah's ERA "does not mean that the law must pretend to be unaware of and blindly ignore obvious and essential biological differences." 532 P.2d at 996.

The Virginia court was required to decide in *Archer* whether a statute that allowed a woman to be excused from jury duty to fulfill her role as a mother was constitutional under the state ERA. The Supreme Court of Virginia upheld the statute because "there [was a] reasonable basis for the classification." 213 Va. at 637, 194 S.E.2d at 710. The *Archer* court relied heavily upon prior Supreme Court decisions construing the fourteenth amendment and would probably apply the *Craig* middle-tier standard in interpreting the Virginia ERA today.

The equal rights amendments of Montana, New Hampshire, New Mexico, and Wyoming have not been sufficiently litigated to determine the applicable standard in those states. *See* Comment, *Equal Rights Provisions: The Experience Under State Constitutions*, 65 CALIF. L. REV. 1086, 1090 (1977).

37. *See, e.g.*, Wark v. State, 266 A.2d 62 (Me. 1970); Warshafsky v. Journal Co., 63 Wis. 2d 130, 216 N.W.2d 197 (1974).
38. U.S.C.A. CONST. amend. XXVII (proposed) (1974 & Supp. 1980) (annotation).
39. See text accompanying notes 30–32 *supra*.

protection,[40] the states in this group require a compelling governmental interest to justify sex-based discrimination.[41]

The strict scrutiny approach is the most widely accepted test among states with equal rights amendments. States that apply this standard carry equal rights for women a step beyond the middle level protection of *Craig*.[42] The Supreme Court has applied this same high level of protection in cases considering discrimination based upon race, alienage, and national origin, and the Court could be expected to apply the strict scrutiny standard to sex-based discrimination if the federal ERA is ultimately ratified.

C. *The Absolute Standard Group*

A progressive minority of states have not followed the general trend of adopting some form of the traditional equal protection analysis. In 1971, four distinguished constitutional scholars collaborated on a law review article outlining how and why an absolute standard of review should be adopted if the proposed federal ERA is ratified.[43] Largely as a result of that article, courts in Pennsylvania[44]

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40. See text accompanying notes 28–33 *supra*.
41. *E.g.*, Schreiner v. Fruit, 519 P.2d 462 (Alaska 1974); People v. Salinas, 551 P.2d 703 (Colo. 1976); Page v. Welfare Comm'r, 170 Conn. 258, 365 A.2d 1118 (1976); Holdman v. Olin, 59 Hawaii 346, 581 P.2d 1164 (1978); People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974); Commonwealth v. King, ___ Mass. ___, 372 N.E.2d 196 (1977); Mercer v. Board of Trustees, 538 S.W.2d 201 (Tex. Civ. App. 1976).

    In *Page*, while the Supreme Court of Connecticut did not use the ERA to decide the case, it observed that if it had been called upon to determine what the proper standard would have been, it would have ruled that "the strict scrutiny standard [was] mandated by the equal rights amendment." 170 Conn. at 267, 365 A.2d at 1124.

    The court in *Ellis* found that under the ERA "a classification based on sex is a 'suspect classification' which, to be held valid, must withstand 'strict judicial scrutiny.'" 57 Ill. 2d at 132–33, 311 N.E.2d at 101. Similarly, in *Mercer* it was held that under the Texas ERA, "[a]ny classification based upon sex is a suspect classification." 538 S.W.2d at 206.

    In *King*, the court ruled that a statute which only allowed women to be charged with the crime of prostitution violated the ERA. The applicable standard, the court said, "must be at least as strict as the scrutiny required by the Fourteenth Amendment for racial classifications." ___ Mass. at ___, 372 N.E.2d at 206.

    In *Holdman*, the Supreme Court of Hawaii ruled that requiring women to wear a brassiere before allowing them to enter a state prison did not violate the ERA. "We have concluded that the treatment of which appellant complains withstands the test of strict scrutiny by reason of a compelling State interest." 59 Hawaii at 354, 581 P.2d at 1169.
42. See text accompanying notes 30–32 *supra*.
43. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).
44. Commonwealth v. Butler, 458 Pa. 289, 328 A.2d 851 (1974). In striking down differential sentencing of men and women, the Pennsylvania court ruled that under the ERA "sex may no longer be accepted as an exclusive classifying tool." *Id.* at 296, 328 A.2d at 855.

and Washington[45] have interpreted their states' equal rights amendments to prohibit any sex-based discrimination.[46]

States that have applied the absolute standard of review to their equal rights amendments have indicated their commitment to a clear break with sex stereotypes of the past. A major philosophical problem facing the "absolute standard" states is the uncertainty as to what degree, if any, social standards and essential physiological and biological differences may be considered in reviewing gender-based discrimination. The absolute standard of review permits no balancing whatever and is the strongest possible statement of a clear intention to make equal rights for women a reality.

D. Maryland

Once the ERA became a part of the Maryland Declaration of Rights, the Court of Appeals of Maryland faced the problem of establishing the standard of review for sex discrimination cases. *Maryland State Board of Barber Examiners v. Kuhn*[47] gave the court an immediate opportunity to indicate its view of the impact of the new amendment. Although the court decided *Kuhn* without reference to the newly ratified ERA, it nonetheless expressed an opinion as to the proper standard of review were the ERA to have been applied to the case. The court of appeals indicated that, had it been called upon to apply the ERA, it would have adopted the strict scrutiny standard of review.[48] This standard prevailed in Maryland for a period of four years.[49] The court's 1977 decision in *Rand v. Rand*,[50] however, a case actually requiring application of the amendment, adopted an unexpected approach.[51]

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45. Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975). The Washington court did away with a rule which prohibited high school girls from competing on boys' teams, stating that the ERA was "intended to do more than repeat what was already contained in the otherwise governing constitutional provisions . . . by which discrimination based on sex was permissible under the rational relationship and strict scrutiny tests." *Id.* at 871, 540 P.2d at 889.
46. *See* Kurtz, *The State Equal Rights Amendments and Their Impact on Domestic Relations Law*, 11 FAMILY L.Q. 101, 109 (1977); Comment, *Equal Rights Provisions: The Experience Under State Constitutions*, 65 CALIF. L. REV. 1086, 1108 (1977).

    Some commentators believe that the Colorado ERA has been interpreted to require an absolute standard of review in People v. Salinas, 551 P.2d 703 (Colo. 1976). *E.g.*, Annot., 90 A.L.R.3d 158, 173 (1979). In *Salinas*, the Colorado court held a rape statute valid under the ERA even though it discriminated against men because the discrimination was "reasonably and genuinely based on physical characteristics unique to just one sex." 551 P.2d at 706. This language indicates that the Colorado standard is more closely related to the strict scrutiny test.
47. 270 Md. 496, 312 A.2d 216 (1973).
48. *Id.* at 506–07, 312 A.2d at 222.
49. *See, e.g.*, Cooke v. Cooke, 21 Md. App. 376, 319 A.2d 841 (1974).
50. 280 Md. 508, 374 A.2d 900 (1977).
51. *Id.*

Florence and Robert Rand were divorced in 1971, and Robert was ordered to pay child support of $250 each month for the support of their minor daughter, Virginia. In 1975, Virginia was to begin college, and Florence filed suit seeking increased support from Robert to meet anticipated college expenses. Robert Rand's income was $27,000 per year, and Florence Rand's income was $16,000 per year. The Circuit Court for Montgomery County ruled that Virginia would require $520 monthly while she was in college and that Robert would have to pay $480 monthly. The court of special appeals readjusted Robert's payments to reflect the proportion of his income to Florence's (63% or $325 monthly).[52] The Court of Appeals of Maryland granted certiorari to consider whether the court of special appeals' ruling was proper under the ERA.

The court of appeals considered each of the three possible approaches for setting a standard of review under the ERA. The court first examined and specifically rejected the view that any sex-based classification that is reasonably related to a legitimate state interest may stand under the Maryland ERA.[53] The court also unexpectedly rejected the view that the ERA permits sex-based classifications which arise from a compelling governmental interest,[54] the standard the court had suggested in *Kuhn*. Instead, the Court of Appeals of Maryland specifically adopted the position of those state courts holding that equal rights amendments prohibit *all classifications* based on sex.[55] Drawing upon opinions rendered in Washington[56] and Pennsylvania[57] for guidance, the *Rand* court said,

> We believe that the broad, sweeping, mandatory language of the amendment is cogent evidence that the people of Maryland are fully committed to equal rights for men and women. The adoption of the ERA in this state was intended to, and did, drastically alter traditional views of the validity of sex-based classifications.[58]

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52. Rand v. Rand, 33 Md. App. 527, 365 A.2d 586 (1976).
53. 280 Md. at 515, 374 A.2d at 904–05. See notes 36–39 and accompanying text *supra*.
54. 280 Md. at 514–15, 374 A.2d at 904–05. See notes 40–42 and accompanying text *supra*.
55. 280 Md. at 515–16, 374 A.2d at 904–05. See notes 43–46 and accompanying text *supra*.
56. Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975). See note 47 *supra*.
57. Commonwealth v. Butler, 458 Pa. 289, 328 A.2d 851 (1974). See note 46 *supra*.
58. 280 Md. at 515–16, 374 A.2d at 904–05. The court also said, "The words of the E.R.A. are clear and unambiguous; they say without equivocation that 'Equality of rights under the law shall not be abridged or denied because of sex.' This language mandating equality of rights can only mean that sex is not a factor." *Id.* at 511–12, 374 A.2d at 902–03.

    At least one commentator has misinterpreted *Rand*, noting the case but concluding that the court announced no clear standard for reviewing cases under the ERA. Driscoll & Rouse, *Through a Glass Darkly: A Look at State Equal Rights Amendments*, 12 SUFFOLK U.L. REV. 1282, 1304 (1978).

With the decision in *Rand,* Maryland joined the small number of progressive states that consider absolute prohibition of sex based discrimination a workable standard of review for a state ERA. This new standard of protection was a radical break from the law in Maryland prior to the ERA.[58a]

IV. THE ERA IN MARYLAND

The Maryland Equal Rights Amendment has had far-reaching effects on the law of Maryland. The major impact of the ERA has been in two areas, domestic relations law and criminal law. In the discussion that follows, the changes brought about by the ERA in those areas, as well as an analysis of whether the protections of the Maryland ERA extend beyond state action, will be considered.

A. Domestic Relations Law

In response to a number of social and legal changes, including the adoption of the Maryland ERA, the courts and legislature in Maryland have made major revisions in the Maryland law of domestic relations. Of these changes in family law, the impact of the ERA has been the most significant with respect to alimony, child support, child custody, the presumption of a husband's dominance over his wife, and criminal conversation.

1. Alimony

Immediately following the adoption of the ERA in Maryland, divorced men attacked the statutory provision for alimony, asserting that it had become unconstitutional sex based discrimination. The pertinent sections of the Maryland Code then in effect provided that "[i]n cases where a divorce is decreed, alimony may be awarded,"[59] and that "[i]n all cases where alimony . . . [is] claimed, the court shall not award such alimony . . . unless it shall appear from the evidence that the *wife's* income is insufficient to care for her needs."[60]

The first case challenging the constitutionality of the Maryland alimony statute on the basis of the newly ratified ERA was *Minner v.*

58a. The Court of Appeals of Maryland recently reaffirmed its commitment to the absolute standard of review in Kline v. Ansell, No. 96, Sept. Term 1979 (Md., filed May 26, 1980).

59. MD. ANN. CODE art. 16, § 3 (1973) (current version at MD. ANN. CODE art. 16, § 3 (Supp. 1979)).

60. MD. ANN. CODE art. 16, § 5(a) (1973) (current version at MD. ANN. CODE art. 16, § 5(a) (Supp. 1979)) (emphasis supplied).

Minner.[61] Mrs. Minner had been awarded alimony and attorney's fees after being granted a divorce *a mensa et thoro*. Mr. Minner's only argument on appeal was that Maryland alimony law violated the ERA because a husband could not receive alimony under the statute.[62]

The court of special appeals averted the inevitable collision between the ERA and Maryland's pre-ERA alimony policy by ruling that Mr. Minner had no standing to challenge the alimony statute under the ERA. At the divorce hearing in *Minner*, the chancellor had said:

> [W]e are not going to throw out the baby with the bath water and throw out the right of a wife to obtain alimony merely because the legislature has not given equal right to the husband. I am not called upon in this case to decide whether the husband in this State has a right to alimony . . . .[63]

The court of special appeals agreed that *Minner* was not the proper case to consider the alimony issue. Even if husbands were entitled to collect alimony, Mr. Minner could not have qualified, and the court preferred to wait for a more suitable case.[64]

Maryland's alimony statute, however, did not escape *Minner* unscathed. There were indications from the court of special appeals that the alimony law, as it stood, would have a troublesome future. In its opinion, the court quoted favorably from the chancellor's oral opinion:

> You question whether it is invidious discrimination because there is no concomitant right of the husband to ask for alimony from the wife if the facts in a particular case justified it.
>
> My answer to that . . . is simply that you may have a point . . . .[65]

Meanwhile, an alimony provision similar to that in effect in Maryland had been struck down on the basis of the Pennsylvania

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61. 19 Md. App. 154, 310 A.2d 208 (1973).
62. Mr. Minner's attorney was unusually careful to preserve the trial record for an appeal based upon the ERA. It appears from the transcript of proceedings that Mr. Minner was anxious that his case test the effect of the ERA on Maryland's alimony statute. 19 Md. App. at 157, 310 A.2d at 210.
63. 19 Md. App. at 157–58, 310 A.2d at 210.
64. The issue of whether Maryland's alimony law was constitutional under the ERA was also considered in Colburn v. Colburn, 20 Md. App. 346, 316 A.2d 283 (1974). The court of special appeals again ruled that the appellant lacked standing to bring the suit. *Id.* at 353–54, 316 A.2d at 287.
65. 19 Md. App. at 157, 310 A.2d at 210.

ERA.[66] Prior to any court action, however, the 1975 Maryland General Assembly reacted by changing the Maryland alimony statute to provide, "In cases where a divorce is decreed, alimony may be awarded to *either spouse*."[67] Then in 1976, the legislature finished its alterations by amending another part of the alimony statute to provide, "In all cases where alimony . . . and counsel fees are claimed, the court may not award alimony . . . or counsel fees unless it appears from the evidence that the *spouse's* income is insufficient to care for *his or her* needs."[68] The 1976 change was clearly a reaction to the changing climate surrounding the ERA and was enacted "[f]or the purpose of extending the provisions for alimony . . . to both sexes; and generally clarifying the language of those provisions."[69]

The hint from the court of special appeals had not been lost on the legislators. With the ratification of the ERA, dramatic changes in the area of alimony became necessary, and the legislature acted to eliminate sex as a factor to be considered in awarding alimony in Maryland. In 1979, the Supreme Court ruled that an alimony statute which would not allow men to collect alimony violated fourteenth amendment equal protection under the *Craig* middle-tier standard.[70] By amending the alimony statute, the Maryland General Assembly both anticipated and avoided state and federal constitutional problems.

2. Child Support

At common law, the primary responsibility for the support of minor children in Maryland was upon the father.[71] Then, in 1929, the Maryland legislature enacted a statute that provided, "The father and mother are the joint natural guardians of their minor child and are equally charged with its care, nurture, welfare and education. They shall have equal powers and duties, and neither parent has any right superior to the right of the other . . . ."[72] But, courts in Maryland continued to apply the law on child support as they had

66. Henderson v. Henderson, 458 Pa. 97, 327 A.2d 60 (1974).
67. Law of April 22, 1975, ch. 332, 1975 Md. Laws 2119 (codified at MD. ANN. CODE art. 16, § 3 (Supp. 1979)) (emphasis added).
68. Law of May 4, 1976, ch. 440, 1976 Md. Laws 1161 (codified at MD. ANN. CODE art. 16, § 5(a) (Supp. 1979)) (emphasis added).
69. *Id.*
70. Orr v. Orr, 440 U.S. 268 (1979).
71. *E.g.*, Alvey v. Hartwig, 106 Md. 254, 67 A. 132 (1907). The court ruled that it was "the duty of the father to provide reasonably for the maintenance of his minor children." *Id.* at 261, 67 A. at 136.
72. Law of April 11, 1929, ch. 561, 1929 Md. Laws 1362 (codified as amended at MD. ANN. CODE art. 72A, § 1 (1978)). See McKay v. Paulson, 211 Md. 90, 126 A.2d 296 (1956), for a history of this section.

before the statute was passed.[73] Largely ignoring the language in the 1929 statute requiring that both parents be equally responsible for the support of their minor children, the Court of Appeals of Maryland perpetuated the old rule that the father bore "a continuing common law obligation to support his children."[74]

The common law rule as to child support remained in effect until the 1977 court of appeals decision in *Rand v. Rand*.[75] In that case, the Rands had been divorced in 1971 and the husband had been ordered to pay child support for their minor daughter. Subsequently, the wife petitioned for an increase in the child support payments, but the court of special appeals, while agreeing that an increase was in order, ruled that each parent was responsible for a proportion of the support equal to his or her ability to pay.[76]

When the *Rand* case reached the court of appeals, the issue was whether the court of special appeals had acted properly in reinterpreting Maryland's child support statute[77] in light of the ERA.[78] In deciding that the court of special appeals had acted properly, the court of appeals said:

> Applying the mandate of the E.R.A. to the case before us, we hold that the parental obligation for child support is not primarily an obligation of the father but is one shared by both parents. The clear import of the language of Art. 72A, § 1, standing alone, seemingly compels that result. Any doubt remaining from the past failure of the courts to so interpret that statutory provision is removed by the gloss impressed upon it by the E.R.A. The common law rule is a vestige of the past; it cannot be reconciled with our commitment to equality of the sexes. Sex of the parent in matters of child support cannot be a factor in allocating this responsibility. Child support awards must be made on a sexless basis.[79]

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73. *E.g.*, Seltzer v. Seltzer, 251 Md. 44, 246 A.2d 264 (1968).
74. *Id.* at 45, 246 A.2d at 265. *See* Wagshal v. Wagshal, 249 Md. 143, 238 A.2d 903 (1968); Woodall v. Woodall, 16 Md. App. 17, 293 A.2d 839 (1972).
75. 280 Md. 508, 374 A.2d 900 (1977).
76. A discussion of *Rand* and the role it played in setting the standard of review for cases involving sex based discrimination under the Maryland ERA is contained in the text accompanying notes 47–58a *supra*.
77. The support statute in effect in Maryland when *Rand* was decided was essentially the same as the 1929 statute.
78. 280 Md. at 509, 374 A.2d at 901.
79. *Id.* at 516, 374 A.2d at 905. The court also noted that Pennsylvania and Washington, both states which use an absolute standard of review, have reached the same result. *Id.* at 516, 374 A.2d at 905. *See* Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974); Smith v. Smith, 13 Wash. App. 381, 534 P.2d 1033 (1975).

The court of appeals remanded *Rand* for a determination by the chancellor of how much each party should pay. The court specifically refused to choose an

Thus, the interpretation of Maryland's child support statute was altered dramatically by the ERA. The rule of the common law had survived attempts by the legislature to change it, and the father remained responsible for the support of his children until the ERA took effect in Maryland. Rather than merely codifying the changing social status of women,[80] the ERA caused a radical break with prior child support law. The amendment effectively accomplished what the legislature had been unable to do by statute and placed women in the position of sharing responsibility for the support of their children.

3. Child Custody

Early common law presumed the father to know what was in the best interest of his minor child, and he invariably retained custody of the child upon dissolution of the marriage.[81] Within the last 100 years, however, this traditional approach changed; courts awarded traditional custody to the mother unless she was proven unfit.[82] This latter rule was the law on child custody in Maryland when the ERA became a part of the Maryland Declaration of Rights in 1972.[83]

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exact formula, preferring that the chancellor make his determination in light of the totality of the circumstances of the parties. The court of special appeals had ruled that each spouse should pay a proportion of the child support equal to the proportion his salary bore to the salary of the other spouse. Under that test, Robert was liable for 5/8 of $520, or $325. *Id.* at 510, 374 A.2d at 905. The chancellor adopted that same test on remand and reached the same result. His actions were approved in a subsequent appeal. Rand v. Rand, 40 Md. App. 550, 392 A.2d 1149 (1978).

In German v. German, 37 Md. App. 120, 376 A.2d 115 (1977), a trial court had ruled that because a wife has an equal obligation to support her child under eighteen years of age, she must pay ½ of the $500 child support. The court of special appeals said that *Rand* and the ERA require equality *under the circumstances*. Since the wife had a net income after expenses of $633 compared to the husband's $885, exactly ½ was probably not equality under the circumstances. *Id.* at 122–23, 376 A.2d at 117.

80. See text accompanying note 1 *supra*.

81. *See* 1 W. BLACKSTONE, COMMENTARIES *453, which reads, in part: "The legal power of a father, — for a mother, as such is entitled to no power, but only to reverence and respect; . . . ceases at the age of twenty-one."

82. Francke, *The Children of Divorce*, NEWSWEEK, February 11, 1980, at 59. *See, e.g.*, Hild v. Hild, 221 Md. 349, 157 A.2d 442 (1960). "Since the mother is the natural custodian of the young and immature, custody is ordinarily awarded to her . . . ." 221 Md. at 357, 157 A.2d at 446.

83. *See, e.g.*, Kirstukas v. Kirstukas, 14 Md. App. 190, 286 A.2d 535 (1972).

Immediately following the ratification of the ERA in Maryland, one commentator predicted that under the ERA the presumption that an adulterous mother was an unfit guardian for her child would be held unconstitutional. 2 U. BALT. L. REV. 355 (1973). In fact, when the presumption was finally declared invalid in Davis v. Davis, 280 Md. 119, 372 A.2d 231 (1977), the ERA was not even mentioned. In ruling the adulterous mother presumption void, the court cited "rapid social and moral changes in our society" as a prime factor in its decision. *Id.* at 127, 372 A.2d at 235.

For an article on child custody in Maryland, see Comment, *Best Interests of the Child: Maryland Child Custody Disputes*, 37 MD. L. REV. 641 (1978).

The child custody statute then in effect provided that each parent "shall have equal powers and duties, and neither parent has any right superior to the right of the other concerning the child's custody."[84] Maryland courts ignored the plain meaning of the statute, however, and continued to prefer the mother in deciding custody cases.[85] The courts used the maternal preference doctrine to grant the mother greater custody rights than the father when the child was of tender years.[86]

The first post-ERA case to consider whether the maternal preference doctrine would survive the ratification of the ERA came in 1974. In *Cooke v. Cooke,*[87] the trial court awarded the mother custody of a minor child relying, in part, upon Maryland's well-established maternal preference doctrine. The Court of Special Appeals of Maryland ruled that the evidence produced at trial was sufficient to support the decision to grant the mother custody independent of the maternal preference doctrine, but it raised sua sponte the issue of how the ERA affected the doctrine.[88] The court concluded that the ERA severely curtailed the use of the maternal preference doctrine — the doctrine could be used as a tie-breaker in custody cases when all other factors were equal, but *only* as a tie-breaker.[89]

Shortly after *Cooke,* the Maryland child custody statute was amended to provide that "in any custody proceeding, neither parent shall be given preference solely because of his or her sex."[90] The effect of this amendment was tested in *McAndrew v. McAndrew.*[91] In *McAndrew,* the chancellor, who found that the mother and father would be equally fit guardians of their minor child, used the maternal preference doctrine as a tie-breaker in awarding custody to the mother. The court of special appeals avoided using the ERA to dispose of the maternal preference doctrine. Instead, the court cited the amendment to the statute as the determining factor in ruling that the maternal preference doctrine was no longer a valid

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84. MD. ANN. CODE art. 72A, § 1 (1973) (codified as amended at MD. ANN. CODE art. 72A, § 1 (1978)).
85. *See, e.g.,* Oberlander v. Oberlander, 256 Md. 672, 261 A.2d 727 (1970).
86. *See, e.g.,* Neuwiller v. Neuwiller, 257 Md. 285, 262 A.2d 736 (1970).
87. 21 Md. App. 376, 319 A.2d 841 (1974).
88. *Id.* at 379–80, 319 A.2d at 843.
89. *Id.*
90. Law of April 9, 1974, ch. 181, 1974 Md. Laws 806 (codified at MD. ANN. CODE art. 72A, § 1 (1978)).
Cooke was decided on May 24, 1974, while the amendment, which was enacted for "the purpose of providing that neither spouse . . . be given preference because of sex in a court custody proceeding," took effect on July 1, 1974. *Id.*
91. 39 Md. App. 1, 382 A.2d 1081 (1978).

consideration in granting child custody. Because the maternal preference doctrine was the only sex based classification under the child custody law, the court reasoned that the statute was meant to, and did, put the maternal preference doctrine to rest.[92]

Some commentators have concluded that because the *McAndrew* opinion did not rely upon the ERA in doing away with the maternal preference doctrine,[93] it was not actually an ERA case.[94] There were indications in *McAndrew,* however, that the court of special appeals had changed its position since the decision in *Cooke* and would have been willing to declare the maternal preference doctrine constitutionally lacking under the ERA. The court said, "To the extent that we postulated in *Cooke* that a preference of any type could be a tie-breaker, we disaffirm that theory. Our choice of that term in retrospect, like *the use of the term maternal preference, was ill advised.*"[95] Courts in Illinois and Pennsylvania had struck down maternal preference doctrines under their equal rights amendments between the time of the *Cooke* and *McAndrew* decisions.[96] Also, during that same period, the court of appeals had indicated its intention to require an absolute standard of review in Maryland under the ERA.[97] Despite the court's statement in *McAndrew* that it did not have to reach the issue of how the ERA affected the maternal preference doctrine, in fact, the ERA caused the demise of the doctrine so frequently applied before 1972.

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92. *Id.* at 8, 382 A.2d at 1085.
93. The court noted that the "[a]ppellant, below and on appeal, raised the issue of the effect of the Maryland Equal Rights Amendment on the maternal preference principle in custody cases. We do not reach the issue here . . . ." 39 Md. App. at 8 n.9, 382 A.2d at 1086 n.9.
94. Comment, *Best Interests of the Child: Maryland Child Custody Disputes,* 37 MD. L. REV. 641, 653–54 (1978); Annot., 90 A.L.R.3d 158, 189–90 (1979).
95. 39 Md. App. at 9, 382 A.2d at 1086 (emphasis added).
96. Lane v. Lane, 40 Ill. App. 3d 229, 352 N.E.2d 19 (1976); Commonwealth *ex rel.* Spriggs v. Carson, 470 Pa. 290, 368 A.2d 635 (1977).

    Also between the decisions in *Cooke* and *McAndrew,* two federal courts passed up the opportunity to consider the validity of the maternal preference doctrine under Maryland's ERA. In Hinish v. Maryland, 393 F. Supp. 53 (D. Md. 1975), *aff'd,* 558 F.2d 1029 (4th Cir. 1977), the plaintiff alleged that the state trial court was wrong in awarding custody to the mother because she was a "more fit custodian for a child of tender years." *Id.* at 54. The United States District Court for the District of Maryland ruled that Hinish must exhaust his state remedies under the ERA before his case could be reviewed by a federal court.

    In Delavigne v. Delavigne, 530 F.2d 598, 600 (4th Cir. 1976), the father wanted to have his child custody suit heard in a federal court because, he alleged, the judges in Montgomery County were prejudiced against men. The United States Court of Appeals for the Fourth Circuit ruled that federal courts had no jurisdiction over the matter. Significantly, the district court had cited MD. ANN. CODE art. 72A, § 1, the Maryland ERA, and *Cooke* as evidence that the Maryland judicial system was not prejudiced against men. 402 F. Supp. 363, 367–68 (D. Md. 1975).
97. See text accompanying notes 47–58a *supra.*

4. Husband's Dominance

In Maryland, a presumption developed at common law that the husband was the dominant figure in a marriage. In *Manos v. Papachrist*,[98] the court of appeals indicated that the presumption arose because "of the natural dominance of the husband over the wife, and the confidence and trust usually incident to their marriage."[99] The first post-ERA case to consider the rule of the husband's dominance was *Trupp v. Wolff*.[100]

Trupp involved the multiple issues arising from the testamentary disposition of a large number of shares of stock. One evidentiary issue concerned who bore the burden of showing whether there was a confidential relationship between a husband and wife. Wolff argued that the husband's dominance presumption raised an inference of a confidential relationship. Although the court found on other grounds that there was a confidential relationship, it went on to note, "the shaky foundation upon which the presumption rests in light of the Equal Rights Amendment."[101]

The court of special appeals once again had an opportunity to consider how the ERA affected the husband's dominance presumption in *Liberty Mutual Insurance Co. v. Craddock*.[102] In order to recover under Maryland's Unsatisfied Claim and Judgment Fund law, a claimant is required to show that he is domiciled in Maryland. The domicile of a young married couple was at issue in *Craddock*. The court concerned itself only with the husband's domicile, saying that "[a]s the legal domicile of a wife is that of her husband, the question is where was [the husband] domiciled on the date of the accident."[103] The court also was careful to note, however, "We do not reach the effect on this common law rule of the passage of the Equal Rights Amendment . . . ."[104]

Finally, in *Bell v. Bell*,[105] the court of special appeals ruled that the husband's dominance presumption had not survived the ratification of the ERA in Maryland. In *Bell*, the wife's attorney prepared a separation agreement which she forwarded to her husband for his signature. The husband made substantive changes and called the wife to his office to sign the agreement. Although he did not verbally threaten his wife, the husband showed her cards which intimated that he knew she was having an affair (presumably using cards because he was taping the conversation). A tape of the conversation

98. 199 Md. 257, 86 A.2d 474 (1952).
99. *Id.* at 262, 86 A.2d at 476.
100. 24 Md. App. 588, 335 A.2d 171 (1975).
101. *Id.* at 616 n.15, 335 A.2d at 188 n.15.
102. 26 Md. App. 296, 338 A.2d 363 (1975).
103. *Id.* at 302, 338 A.2d at 367 (citation and footnote omitted).
104. *Id.* at 302 n.2, 338 A.2d at 367 n.2.
105. 38 Md. App. 10, 379 A.2d 419 (1977).

allowed into evidence revealed that the wife had asked to leave or consult an attorney, but the husband threatened to sue for divorce on the ground of adultery if she did so. The wife signed the agreement, but subsequently sued to have the settlement set aside. Relying upon the presumption of a husband's dominance, she alleged that her husband had violated a confidential relationship.

In striking down the presumption, the *Bell* court said, "We noted the questionable foundation upon which this presumption rests in light of . . . the Equal Rights Amendment in *Trupp v. Wolff*. Since that decision, the Court of Appeals has held that sex classifications are no longer permissible under the amendment. Consequently, the presumption of dominance cannot stand."[106] Thus, the ERA eliminated any possibility that either partner in a marriage could be considered dominant as a matter of law.

5. Criminal Conversation

The early English common law regarded the action of a man to entice another's wife into adultery as a significant civil wrong.[107] Thus, the cause of action for criminal conversation developed to provide compensation to the injured husband. Only men, however, could sue in tort for criminal conversation — an injured wife had no remedy in tort for her husband's adultery.[108]

Although Maryland courts followed the common law approach at the time that the Maryland ERA was ratified,[109] the trend current in 1972 was toward granting a wife the right to sue for criminal conversation.[110] In 1976, the Court of Special Appeals of Maryland adopted this view in *Kromm v. Kromm*, holding that Maryland law had progressed to the point that "the tort of criminal conversation may be maintained by the wife of the marriage."[111] The *Kromm* court decided that under the Maryland Married Women's Property Act[112] a wife had personal rights equal to those of her husband, including the right to sue for criminal conversation.[113] Although the *Kromm*

106. *Id.* at 13–14, 379 A.2d at 421 (citations omitted). *See* Eckstein v. Eckstein, 38 Md. App. 506, 379 A.2d 757 (1978).

In *Eckstein*, the court of special appeals reaffirmed its conclusion in *Bell*, but went even further and stated that the husband's dominance presumption was dead long before the decision in *Rand*. "Since the adoption of . . . the Equal Rights Amendment, we have abandoned the previous presumption that the husband was the dominant figure in a marriage." 38 Md. App. at 511, 379 A.2d at 761.

107. 3 W, BLACKSTONE, COMMENTARIES *139–40.

108. *Id.*; *see* PROSSER, THE LAW OF TORTS, § 124 (4th ed. 1971).

109. *See, e.g.*, DiBlasio v. Kolodner, 233 Md. 512, 197 A.2d 245 (1964).

110. *See, e.g.*, Vaughn v. Blackburn, 431 S.W.2d 887 (Ky. 1968).

111. 31 Md. App. 635, 637, 358 A.2d 247, 249 (1976).

112. MD. ANN. CODE art. 45, § 5 (1971).

For an extensive discussion of the Married Woman's Property Act, see 8 U. BALT. L. REV. 584, 587 (1979).

113. 31 Md. App. at 637, 358 A.2d at 249.

decision was consistent with the ERA mandate that sex should no longer be a factor in determining rights and liabilities, the court did not mention the ERA.

Beginning around 1975, a new trend toward abrogating the common law tort of criminal conversation emerged from the courts and legislatures in many jurisdictions.[114] Despite this trend, in 1976 the Court of Appeals of Maryland ruled in *Geelhoed v. Jensen* that the cause of action for criminal conversation remained available in Maryland,[115] and in 1977 the Maryland General Assembly rejected the opportunity to abolish the tort by statute.[116]

Finally in 1980 the court of appeals reversed *Geelhoed*, declaring that the tort of criminal conversation no longer exists in Maryland. Judge Rita Davidson, writing for an unanimous court in *Kline v. Ansell*,[117] held that recovery for criminal conversation was barred by the Maryland ERA because only an injured husband could bring the cause of action. Without citing *Kromm*, the court effectively overruled the reasoning of the court of special appeals that the Married Women's Property Act extended recovery for criminal conversation to women. Rather than giving married women rights equal to those of their husbands, the court reasoned, the Act granted rights equal to those of unmarried women.[118] "Thus, because at common law a woman did not have the right to maintain an action for criminal conversation, the married women's act did not extend that right to her."[119] Nonetheless, the court believed that *the Maryland ERA* granted married women rights equal to those of their husbands. The *Kline* court cited the Maryland ERA as "a factor of sufficient significance to persuade [the court] that the action for criminal conversation is no longer viable."[120]

In *Kline*, the court of appeals used the ERA to bring Maryland into line with the current trend toward abrogating the tort of criminal conversation. The court provided no explanation why extending a wife the right to sue for criminal conversation would not equally have satisfied the constitutional requirements of the ERA.

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114. *See, e.g.*, CONN. GEN. STAT. § 52-572f (West Supp. 1979); MINN. STAT. ANN. § 553.02 (West Supp. 1979); N.Y. CIV. RIGHTS LAW § 80-A (McKinney 1976); Bearbower v. Merry, 266 N.W.2d 128 (Iowa 1978); Fadgen v. Lenkner, 469 Pa. 272, 365 A.2d 147 (1976).
115. 277 Md. 220, 233, 352 A.2d 818, 826 (1976).
116. *See* Kline v. Ansell, No. 96, Sept. Term 1979, slip op. at 7 (Md., May 26, 1980). In 1964, the Court of Appeals of Maryland ruled that the cause of action for criminal conversation had survived the 1945 statutory abrogation of the tort of alienation of affection. DiBlasio v. Kolodner, 233 Md. 512, 197 A.2d 245 (1964).
117. No. 96, Sept. Term 1979 (Md., filed May 26, 1980).
118. *Id.* slip op. at 9 n.4.
119. *Id.*
120. *Id.* slip op. at 7.

Such an extension of the right to sue would have met the mandate of the ERA without clashing with the 1977 decision by the Maryland General Assembly not to abrogate statutorily the tort of criminal conversation. Instead, the court of appeals used the ERA as a means to avoid the doctrine of judicial restraint which would have required the court not to act where the legislature had refrained from acting.[121]

It is clear after *Kline* that the Court of Appeals of Maryland views the ERA as an effective tool for bringing about social change that the court feels is important. The commitment to an absolute standard of review in Maryland remains strong following *Rand* and *Kline* and will likely continue to cause dramatic change in the area of domestic law.

B. Criminal Law

The far-reaching application of the ERA in the area of domestic relations demonstrates the commitment of judges and legislators in Maryland to reject antiquated laws which designate different social roles for the members of each sex. Likewise, changes in the area of criminal law reflect this commitment.

1. Rape

The Maryland rape statute in effect when the ERA was ratified provided merely that penetration without emission was evidence of rape, and that the penalty for rape was imprisonment for eighteen months to life.[122] Courts had to rely upon the common law definition of rape as "a *man* having unlawful carnal knowledge of a female . . . by force without consent and against the will of the victim."[123] Because women were physically unable to meet this act requirement, they could never be perpetrators of the crime.[124]

In 1975, a convicted rapist brought an appeal challenging the constitutionality of the rape law under the Maryland ERA. In *Brooks v. State,*[125] the defendant savagely raped a woman, brutally sodomized her, beat her into unconsciousness, and then carved an *X* on her forehead. After being convicted by a jury, Brooks was sentenced to eighty years imprisonment. He raised a variety of claims on appeal. One of the issues Brooks argued was that Maryland's rape law, by definition applicable only to men, was unconstitutional.

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121. *See* Austin v. City of Baltimore, 286 Md. 51, 55, 405 A.2d 255, 256–57 (1979).
122. MD. ANN. CODE art. 27, § 461 (1957).
123. Hazel v. State, 221 Md. 464, 468, 157 A.2d 922, 924 (1960).
124. Mumford v. State, 19 Md. App. 640, 313 A.2d 563 (1974).
125. 24 Md. App. 334, 330 A.2d 670 (1975).

The court of special appeals upheld Brooks' conviction against the ERA challenge, observing that the proposition that "only females may be raped is nothing short of a physiological reality."[126] In so deciding, however, the *Brooks* court employed the rational basis test[127] that had already been rejected by the court of appeals in favor of a standard at least equal to the strict scrutiny test.[128] In its eagerness to consider the ERA in conjunction with the equal protection clause of the fourteenth amendment, the court of special appeals used the standard applicable to the fourteenth amendment to review the conviction under both constitutional provisions.

The misapplication of the proper standard of review required by the ERA was noticed by the Maryland General Assembly. During the legislative session immediately following *Brooks,* the General Assembly repealed all sex-related criminal statutes in effect in Maryland and established a comprehensive sexual offense statutory scheme with new definitions and penalties.[129] The new law was sexually neutral — it contained no sex-based definitions or classifications.

Even if the court had applied the proper strict scrutiny standard in *Brooks,* the rape statute in effect in 1975 may have been constitutional, though it applied only to men. In Illinois and Texas, states which have adopted the strict scrutiny test for ERA review, courts have upheld rape laws that were by definition applicable only to men.[130] In each case, however, the court used a test similar to the rational basis test. Whether such a statute could withstand review more stringent than the rational basis test is unclear. Under the *Rand* "absolute" standard, however, Maryland's rape law in effect in 1975 probably would have been held unconstitutional. Once again the Maryland legislature acted to avoid the inevitable collision between an existing statute and the ERA.

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126. *Id.* at 338, 330 A.2d at 673.
127. *Id.* at 338–39, 330 A.2d at 673. The court said that "the limitation of culpability [for rape] to males constitutes a rational classification directly related to the objective of the criminal penalty. . . . Surely, the state of facts in a rape situation, most sordidly demonstrated by the case at bar, rationally justify the sex classification at issue." *Id.*
128. *See* Maryland State Bd. of Barber Examiners v. Kuhn, 270 Md. 496, 312 A.2d 216 (1973). See also text accompanying notes 47–49 *supra.*
129. Law of May 17, 1976, ch. 573, 1976 Md. Laws 1528; Law of May 17, 1976, ch. 574, 1976 Md. Laws 1541. The legislature completed the alterations during the next legislative session. *See* Law of May 17, 1977, ch. 290, 1977 Md. Laws 1976; Law of May 17, 1977, ch. 292, 1977 Md. Laws 1985; Law of May 17, 1977, ch. 293, 1977 Md. Laws 1988; Law of May 17, 1977, ch. 294, 1977 Md. Laws 1990; Law of May 17, 1977, ch. 336, 1977 Md. Laws 2076 (all now codified at MD. ANN. CODE art. 27, §§ 461–464E (Supp. 1979)). *See also* Note, *Rape and Other Sexual Offense Law Reform in Maryland 1976-1977,* 7 U. BALT. L. REV. 151 (1977).
130. People v. Medrano, 24 Ill. App. 3d 429, 321 N.E.2d 97 (1974); Finley v. State, 527 S.W.2d 553 (Tex. Crim. App. 1975).

2. Criminal Non-Support

At common law in Maryland, a husband owed a legal duty to his wife to provide for her support[131] and to furnish her with necessaries.[132] At the time of the ratification of the Maryland ERA, it was a criminal offense for a *man* to "willfully neglect to provide for the support and maintenance of his wife."[133] The constitutionality of this statute under the ERA was at issue in *Coleman v. State.*[134]

In *Coleman,* the appellant was convicted of both desertion and non-support of his wife under Maryland's criminal non-support statute and was sentenced to three years probation. On appeal, Coleman argued that Maryland's criminal non-support law was unconstitutional under the ERA because the statute contained no reciprocal requirement that a wife provide for the support of her husband.[135] The court of special appeals reversed Coleman's conviction and ruled that, although the criminal non-support statute accurately reflected social temperament at the time it was enacted in 1896, the law was an anachronism in 1977.[136] Drawing upon the decision of the court of appeals in *Rand,* which had been handed down earlier that year, the court of special appeals said:

> Measured against the clear command of the Equal Rights Amendment, there is no question that [the criminal non-support statute] cannot pass muster. To establish that it is a crime for a husband to desert his wife but no crime for a wife to desert her husband and to establish that it is a crime for a husband to fail to support his wife but no crime for a wife to fail to support her husband is to establish a distinction solely upon the basis of sex.[137]

Some commentators viewed the *Coleman* decision as the demise of non-support as a crime in Maryland.[138] Shortly after *Coleman,* one student commentator pointed out that *Coleman* provided the Mary-

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131. Roberts v. Roberts, 160 Md. 513, 154 A. 95 (1931).
132. Ewell v. State, 207 Md. 288, 114 A.2d 66 (1955).
133. MD. ANN. CODE art. 27, § 88(a) (1971) (current version at MD. ANN. CODE art. 27, § 88(a) (Supp. 1979)).
134. 37 Md. App. 322, 377 A.2d 553 (1977).
135. *Id.* at 324, 377 A.2d at 554.
136. The court said that "the purpose that once animated § 88(a) is no longer the public policy of this state." 37 Md. App. at 328, 377 A.2d at 556.
137. 37 Md. App. at 327, 377 A.2d at 556. *Coleman* was the first major case to apply the strict prohibition standard of *Rand,* and Judge Moylan drew heavily upon the language in the *Rand* opinion in writing the opinion of the court in *Coleman.*
138. Sykes, *Of Men and Laws: Murphy, Cornford, Arnold, Potter, Parkinson, Peter, Maccoby, and Gall,* 38 MD. L. REV. 37, 55 (1978); Comment, *Decriminalization of Non-support in Maryland — A Re-examination of a Uniform Act Whose Time Has Arrived,* 7 U. BALT. L. REV. 97 (1977).

land General Assembly with a perfect opportunity to decriminalize non-support entirely in Maryland[139] and enact the Uniform Liability for Support Act.[140] Instead, the legislature acted to patch up the ailing criminal non-support statute by changing all sex-based references to sexually neutral terms.[141] The avowed purpose of the amendment was to extend "the criminal prohibition against willful nonsupport to all spouses."[142] Thus, decriminalization of non-support was not dictated by the Maryland ERA.[143]

C. *State Action*

In 1978, a member of the Maryland House of Delegates asked the Maryland Attorney General whether, in his opinion, a private, non-profit, civic or charitable organization could discriminate on the basis of sex in Maryland.[144] In response, the Attorney General first noted that all federal prohibitions against sex-based discrimination do not apply to private discrimination because they require state action furthering the discrimination. Similarly, Maryland's due process provisions[145] have been held to contain a state action requirement.

The Maryland Attorney General went on to state that "the activities of private organizations not affected with State action do not appear to be within the ambit of [the ERA]."[146] That assessment, however, is not as clear as the Attorney General believed it to be. There are several aspects of the Attorney General's conclusion that warrant critical examination.

1. The Express Language

The thirteenth amendment to the United States Constitution[147] was ratified in 1865 to abolish slavery forever in this country. Unlike

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139. Comment, *Decriminalization of Non-support in Maryland — A Re-examination of a Uniform Act Whose Time Has Arrived*, 7 U. BALT. L. REV. 97 (1977).
140. 9 UNIFORM LAWS ANN. 135 (1973).
141. Law of May 29, 1978, ch. 921, 1978 Md. Laws 2703 (codified at MD. ANN. CODE art. 27, § 88(a) (Supp. 1979)).
142. *Id.*
143. In Berry v. State, 41 Md. App. 563, 398 A.2d 59 (1979), one of the issues raised on appeal was whether the criminal provision for non-support of a minor child was unconstitutional under the ERA. In *Coleman*, the court of special appeals noted that although the criminal non-support statute was invalid as it applied to a husband who failed to support his wife, its decision "in no way affects the constitutionality of art. 27, § 88(b), which imposes criminal sanctions upon 'any parent' who deserts or willfully neglects to provide for the support of his or her minor child." 37 Md. App. at 323 n.1, 377 A.2d at 554 n.1. In *Berry*, the court did not decide the ERA issue because it had not been raised below.
144. 63 Op. Md. Att'y Gen. 246 (1978).
145. Maryland's due process provisions are found scattered throughout the Maryland Declaration of Rights. MD. CONST., DECL. OF RIGHTS arts. 19, 23, 24, 32.
146. 63 Op. Md. Att'y Gen. 246, 250 (1978).
147. U.S. CONST. amend. XIII.

the fourteenth amendment, the prohibition against slavery contained no express language making it applicable solely against the states. On its face, the thirteenth amendment applied against everyone within the jurisdiction of the United States.

In the *Civil Rights Cases of 1883*,[148] the Supreme Court ruled that the thirteenth amendment prohibition against subjecting another person to slavery or involuntary servitude was directed at individual citizens as well as to the states.[149] The absence of any language in the thirteenth amendment requiring state action to prove a violation made it clear that Congress had not intended to require state action.

The Maryland ERA provides, "Equality of rights under the law shall not be abridged or denied because of sex."[150] The Maryland General Assembly did not include any language that might limit the application of the Maryland ERA to cases involving state action. The same rules that governed the Supreme Court in interpreting the thirteenth amendment should apply equally to the Maryland ERA. When the language of a statute is clear and unambiguous, words that would make that statute express another meaning may not be inferred.[151] There is no need to look elsewhere to determine the intent of the legislature.

The language of the Maryland ERA is clear and unambiguous; it mandates no state action. Following the example set by the Supreme Court in interpreting the thirteenth amendment and applying basic rules of statutory construction, the Maryland ERA seems clearly to require no state action. In Maryland, the ERA should apply to all persons, public and private.

2. Other Equal Rights Amendments

The proposed federal ERA provides, "Equality of rights under the law shall not be denied or abridged by the United States or *by any State* on account of sex."[152] During and prior to 1972, ten states adopted some form of constitutional equal protection for women. Four of those ten state equal rights amendments included some state action requirement within the language of the provision,[153] while the other six omitted any mention of state action.[154]

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148. 109 U.S. 3 (1883).
149. *Id.* at 20. *See generally* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
150. MD. CONST., DECL. OF RIGHTS art. 46.
151. *See, e.g.*, Police Comm'r of Balt. City v. Dowling, 281 Md. 412, 379 A.2d 1007 (1977); Slate v. Zitomer, 275 Md. 534, 341 A.2d 789 (1975).
152. H.J. Res. 208, 92d Congress, 2d Sess. (1972) (emphasis added). For some inexplicable reason, the Maryland ERA contains the words 'denied' and 'abridged' in reverse order of the proposed federal ERA.
153. COLO. CONST. art. 2, § 29; ILL. CONST. art. 1, § 18; VA. CONST. art. 1, § 11; WYO. CONST. art. 1, § 3.
154. ALASKA CONST. art. 1, § 3; HAWAII CONST. art. 1, § 21; PA. CONST. art. 1, § 28; TEX. CONST. art. 1, § 3a; UTAH CONST. art. 4, § 1; WASH. CONST. art. 31, § 1.

The Maryland General Assembly could have followed the lead of the United States Congress and those four state legislatures which had included express state action language. Instead, the Maryland legislature elected to exclude any state action language. Presumably, the members of the Maryland General Assembly were aware of the choices available and made a knowing decision to omit state action language.

The effect of excluding state action language from state equal rights amendments has not yet been fully developed. Although some commentators have assumed that the enforcement of all state equal rights amendments requires state action,[155] the better reasoned view is that no state action is required when none is mentioned.

In *Ebitz v. Pioneer National Bank*,[156] the Supreme Judicial Court of Massachusetts considered the validity of a private trust that limited the beneficiaries of a scholarship fund to "young men." The court ruled that the testator's general testamentary scheme indicated a desire to include women as beneficiaries of the trust fund. The court said in dicta, however, that if it had not so ruled, "the declared policy of the Commonwealth [under the ERA] regarding equal treatment of the sexes"[157] would have led the court to require that women be included for aid through the scholarship fund.

Future decisions regarding private discrimination under state equal rights amendments that contain no state action language will probably be in line with the dicta in *Ebitz*. The opinion of the Maryland Attorney General that the Maryland ERA requires state action is not altogether persuasive. The Court of Appeals of Maryland has indicated that it is not bound by an opinion of the Attorney General and will not use an opinion that the court believes is not logically sound.[158] Thus, Maryland attorneys should beware of the Maryland Attorney General's opinion as to the state action requirement under the Maryland ERA.

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155. *E.g.*, Comment, *An Overview of the Equal Rights Amendment in Texas*, 11 HOUS. L. REV. 136 (1973).

156. 372 Mass. 207, 361 N.E.2d 225 (1977).

157. *Id.* at 211, 361 N.E.2d at 227.

158. Schmidt v. Beneficial Fin. Co., 285 Md. 148, 158, 400 A.2d 1124, 1129 (1979).

> Beneficial argues that the Attorney General's opinion is a contemporaneous construction of the [law] which should not be disregarded except on the most imperative ground. The imperative ground here is that we do not agree with the conclusion reached by the Attorney General. We are not bound by an opinion of the Attorney General, and we do not find his opinion here to be persuasive.

Id.

V. CONCLUSION

Instead of a gradual progression toward equality of the sexes, the Maryland ERA caused a sharp break with earlier unsuccessful efforts to end sex discrimination. With the failure of the drive to ratify the federal ERA, the state ERA stands as the most comprehensive protection from sex discrimination in Maryland. The Court of Appeals of Maryland interpretation of the state ERA as an absolute bar to gender-based discrimination affords ultimate protection from discrimination. Rather than serving as an enforcement of rights already essentially guaranteed under the state constitution, the Maryland ERA has become a prime mover in the area of equal rights.

The scope of the Maryland ERA is virtually unlimited. It affords protection from sex-based discrimination not available through the federal constitution, and unequaled in all but three states. Further, it appears that the Maryland ERA is not bound by a requirement of state action in assuring equal rights in Maryland. The Maryland ERA does indeed assure that "[e]quality of rights under the law shall not be abridged or denied because of sex."

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