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# Casenotes: Torts — Family Law — Criminal Conversation — Judicial Abrogation of the Civil Action for Adultery. *Kline v. Ansell*, 287 Md. 585, 414 A.2d 929 (1980)

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TORTS — FAMILY LAW — CRIMINAL CONVERSATION — JUDICIAL ABROGATION OF THE CIVIL ACTION FOR ADULTERY. *KLINE v. ANSELL*, 287 Md. 585, 414 A.2d 929 (1980).

I. INTRODUCTION

In *Kline v. Ansell*,<sup>1</sup> the Court of Appeals of Maryland abolished the common law cause of action for criminal conversation. Prior to the *Kline* decision, a husband was afforded a remedy against his wife's paramour for being the partner in her adulterous acts.<sup>2</sup> The court has now reversed its position due to the anachronistic policy underlying this tort,<sup>3</sup> its incompatibility with today's sense of personal and sexual freedom of women,<sup>4</sup> and its inherent violation of Maryland's Equal Rights Amendment.<sup>5</sup>

This casenote explains the development of criminal conversation as a cause of action and analyzes Maryland's position in relation to the modern trend toward abrogation of this tort. In addition, the underlying policy reasons that mandated this change in the court's position as well as the *Kline* court's misplaced reliance on the Equal Rights Amendment are discussed.

II. THE FACTS

Donald and Vivian Ansell were married in 1962 and resided together until 1971, when Mr. Ansell was incarcerated.<sup>6</sup> After serving an eighteen-month sentence, he returned to his wife and remained with her until November of 1977, when their stormy marriage ended in separation.<sup>7</sup> In January or February of 1978, Mrs. Ansell began having sexual relations with Floyd Kline.<sup>8</sup> When Mr. Ansell learned of his wife's affair, he began threatening and harassing Mr. Kline. A confrontation between the two ensued, during which Mr. Kline threatened Mr. Ansell with a shotgun.<sup>9</sup>

In September of 1978, Donald Ansell filed suit against Floyd Kline alleging criminal conversation and assault.<sup>10</sup> The Circuit Court for Washington County directed a verdict for the plaintiff Ansell on

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1. 287 Md. 585, 414 A.2d 929 (1980).

2. See *Geelhoed v. Jensen*, 277 Md. 220, 352 A.2d 818 (1976).

3. *Kline v. Ansell*, 287 Md. 585, 588-89, 414 A.2d 929, 931 (1980).

4. *Id.* at 589, 414 A.2d at 931.

5. *Id.* at 591-92, 414 A.2d at 932-33. See text accompanying notes 75-79 *infra*.

6. Brief for Appellant at 2, *Kline v. Ansell*, 287 Md. 585, 414 A.2d 929 (1980).

7. *Id.* at 2-3.

8. *Id.* at 3. Mr. Kline and Mrs. Ansell currently reside together as husband and wife. *Id.* at 2-3.

9. *Id.* at 3.

10. *Kline v. Ansell*, 287 Md. 585, 586, 414 A.2d 929, 929-30 (1980).

the criminal conversation charge. The assault charge, however, went to the jury, and the defendant Kline was found liable for assault. Damages were awarded in the amount of \$40,000 compensatory and \$4,250 punitive for the criminal conversation and \$6,000 compensatory and \$4,000 punitive for the assault.<sup>11</sup> Mr. Kline's appeal reached the court of appeals on a writ of certiorari prior to consideration by the court of special appeals.<sup>12</sup>

### III. HISTORICAL BACKGROUND

#### A. General Development of the Tort of Criminal Conversation

At common law, a claim of criminal conversation<sup>13</sup> could be raised by a husband in an action in trespass *vi et armis*<sup>14</sup> against his wife's paramour for interference with the husband's right to his wife's services.<sup>15</sup> Although the cause of action was regarded as an intentional tort, the elements were only a valid marriage and an act of sexual intercourse between the defendant and the plaintiff's wife;<sup>16</sup> proof of malice was unnecessary.<sup>17</sup>

The only recognized defense to criminal conversation was the husband's consent,<sup>18</sup> whether express or apparent.<sup>19</sup> The defendant's lack of intent or ignorance of the wife's marital status was not a legally permissible defense,<sup>20</sup> nor was a subsequent divorce<sup>21</sup> or legal separation.<sup>22</sup> Even adulterous acts by a husband could not counteract the criminal conversation of his wife and a third party, although evidence of this nature was admissible to mitigate damages.<sup>23</sup>

11. *Id.* at 586, 414 A.2d at 930.

12. *Id.*

13. Dean Prosser explained that it was "'criminal' because it was an ecclesiastical crime; 'conversation' in the sense of intercourse." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124, at 875 n.75 (4th ed. 1971).

14. 3 W. BLACKSTONE, COMMENTARIES \*139. The action was brought in trespass because the wife was considered her husband's chattel. Comment, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 656-57 (1930) [hereinafter cited as *Consortium*].

15. 3 W. BLACKSTONE, COMMENTARIES \*139-40.

16. *Fennell v. Littlejohn*, 240 S.C. 189, 125 S.E.2d 408 (1962).

17. *Tinker v. Colwell*, 193 U.S. 473, 485 (1904). Because malice need not be shown, some courts have considered criminal conversation a strict liability tort. *E.g.*, *Fadgen v. Lenkner*, 469 Pa. 272, 365 A.2d 147 (1976).

18. *Kohlhoss v. Mobley*, 102 Md. 199, 206, 62 A. 236, 236-37 (1905). See RESTATEMENT (SECOND) OF TORTS § 687 (1977).

19. RESTATEMENT (SECOND) OF TORTS § 687, Comment b (1977).

20. Comment, *Piracy on the Matrimonial Seas — The Law and the Marital Interloper*, 25 SW. L.J. 594, 598 (1971). Moreover, the Restatement suggests that even misrepresentation by the spouse of his or her marital status is not a defense. RESTATEMENT (SECOND) OF TORTS § 685, Comment f (1977). See also *Antonelli v. Xenakis*, 363 Pa. 375, 69 A.2d 102 (1949).

21. *Vogel v. Sylvester*, 148 Conn. 666, 174 A.2d 122 (1961); RESTATEMENT (SECOND) OF TORTS § 689(2) (1977).

22. *Sebastian v. Kluttz*, 6 N.C. App. 201, 170 S.E.2d 104 (1969); RESTATEMENT (SECOND) OF TORTS § 689(2) (1977).

23. *Breiner v. Olson*, 195 Neb. 120, 130, 237 N.W.2d 118, 126 (1975).

For several centuries only a husband could sue for criminal conversation. A wife's inability to sue her husband's paramour resulted from the underlying basis of the cause of action for criminal conversation. At common law, a husband was regarded as having a proprietary right in his wife.<sup>24</sup> "The wife was considered the husband's servant, and anyone who interfered with the right of a master to the services of his servant was liable to him in damages."<sup>25</sup> An action for criminal conversation therefore evolved as a remedy for the invasion of a husband's property rights. In 1904, however, the Supreme Court recognized, in *Tinker v. Colwell*,<sup>26</sup> that criminal conversation also constituted an interference with the husband's personal rights, such as his marital right to exclusive intercourse with his wife.<sup>27</sup> As a result of the recognition that an action for criminal conversation involved a direct interference with the marital relationship and the widespread acceptance of married women's property acts,<sup>28</sup> most states adopted the view that a wife could sue her husband's paramour.<sup>29</sup> Today, a vast majority of the states, either by specific statute<sup>30</sup> or by a liberal interpretation of the married women's act,<sup>31</sup> have granted a wife the same rights and remedies that her husband has historically enjoyed.

It is unclear whether damages awarded in a criminal conversation suit were to be considered punitive or compensatory.<sup>32</sup> A New York court has suggested that the better-reasoned view categorizes such damages as punitive, based on the theory that courts, in awarding large damages for the incidental effects of the defilement of the

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24. *Consortium*, *supra* note 14, at 659.

25. *Id.* at 655—56. See 3 W. BLACKSTONE, COMMENTARIES \*143. One reason why the wife did not have a similar cause of action was that she was considered inferior and "the inferior hath no kind of property in the company, care, or assistance of the superior as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury." *Id.* See generally 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 429—30 (2d ed. 1937).

26. 193 U.S. 473 (1904).

27. *Id.* at 485.

28. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124, at 881—82 (4th ed. 1971).

29. THE RESTATEMENT (SECOND) OF TORTS § 683, Comment d (1977), states: "[A]n action for criminal conversation . . . involves a direct interference with the marital relationship, and since the married women's acts these causes of action have consistently been made as available to the wife as to the husband." See also *Oppenheim v. Kridel*, 236 N.Y. 156, 161, 140 N.E. 227, 229, *rehearing denied*, 236 N.Y. 643, 142 N.E. 317 (1923).

30. RESTATEMENT (SECOND) OF TORTS § 683, Comment d (1977). See *Markson v. Shelton*, 124 F. Supp. 206 (D. Kan. 1954) (construing a 1905 Wisconsin statutory amendment which provided that a wife could bring an action for alienation of affections).

31. See, e.g., *Sims v. Sims*, 79 N.J.L. 577, 76 A. 1063 (1910); *Knighten v. McClain*, 227 N.C. 682, 44 S.E.2d 79 (1947); *Karchner v. Mumie*, 398 Pa. 13, 156 A.2d 537 (1959); *Scates v. Nailling*, 196 Tenn. 508, 268 S.W.2d 561 (1954); *Newsom v. Fleming*, 165 Va. 89, 181 S.E. 393 (1935); *Woodman v. Goodrich*, 234 Wis. 565, 291 N.W. 768 (1940).

32. See *Consortium*, *supra* note 14, at 656—57.

marriage bed,<sup>33</sup> attempt to punish the defendant in order to deter a recurrence of his behavior.<sup>34</sup> Moreover, the excessive damage awards likely reflect the judges' or juries' sympathy or moral indignation and not the damage suffered.<sup>35</sup> In addition to being very large and exemplary, damages for criminal conversation usually are founded upon inexact computations.<sup>36</sup> Some states have legislatively remedied these problems by limiting recovery to actual damages only, specifically excluding punitive, exemplary, and aggravated damages.<sup>37</sup> In the majority of states, however, courts acknowledge the tenuous relationship between the amount of injury suffered and the damages awarded yet continue to award excessive damages.<sup>38</sup>

During the 1930's, legislative receptivity to the abolition of the tort of criminal conversation surfaced due to the inappropriate application of a damage remedy to injured feelings and the prevalence of the husband's blackmail of the paramour.<sup>39</sup> Many objections arose because the existence of this cause of action "afforded a fertile field for blackmail and extortion by means of manufactured suits in which the threat of publicity [was] used to force a settlement."<sup>40</sup> Based upon such considerations, Indiana became the

33. See *Tinker v. Colwell*, 193 U.S. 473 (1904). Such "incidental effects" include wounded pride and affection, suspicion cast on the legitimacy of offspring, and loss of consortium. *Id.* at 484. See, e.g., *Bigaouette v. Paulet*, 134 Mass. 123 (1883); *Oppenheim v. Kridel*, 236 N.Y. 156, 140 N.E. 227, *rehearing denied*, 236 N.Y. 643, 142 N.E. 317 (1923).

34. *Consortium*, *supra* note 14, at 657 (citing *Goldman v. Cohen*, 30 Misc. 336, 63 N.Y.S. 459 (1900)).

35. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979, 979 (1935) [hereinafter cited as Feinsinger].

36. 3 W. BLACKSTONE, COMMENTARIES \*139-40.

37. See, e.g., ILL. ANN. STAT. ch. 68, §§ 42-44 (Smith-Hurd 1959). Although the Illinois statute does not define what constitutes actual damages in an action for criminal conversation, it does identify elements not to be considered in determining damages:

In determining the damages to be allowed in any action for criminal conversation, none of the following elements shall be considered: the wealth or position of defendant or the defendant's prospects of wealth or position; mental anguish suffered by plaintiff; any injury to plaintiff's feelings; shame, humiliation, sorrow or mortification suffered by plaintiff; defamation or injury to the good name or character of plaintiff or his or her spouse resulting from the criminal conversation complained of; or dishonor to plaintiff's family resulting from the criminal conversation.

*Id.* § 44.

38. See, e.g., *Kremer v. Black*, 201 Neb. 467, 471-72, 268 N.W.2d 582, 584 (1978). In *Breiner v. Olson*, 195 Neb. 120, 237 N.W.2d 118 (1975), the court recognized that "it is the general rule that in an action for criminal conversation damages are incapable of precise measurement and there is no fixed rule for determining the amount thereof." *Id.* at 130, 237 N.W.2d at 125.

39. Feinsinger, *supra* note 35, at 979. See also *Kane, Heart Balm and Public Policy*, 5 FORDHAM L. REV. 63 (1936).

40. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124, at 887 (4th ed. 1971). Similarly, one commentator has noted that "the threat of notoriety incident to such a suit offers a convenient medium for extortion of large sums from innocent defendants." Feinsinger, *supra* note 35, at 992.

first state to statutorily abolish criminal conversation in 1935;<sup>41</sup> New York took similar legislative action shortly thereafter.<sup>42</sup>

A growing minority of states have abolished the tort of criminal conversation. To date, sixteen states and the District of Columbia have statutorily abrogated this tort,<sup>43</sup> while two jurisdictions have judicially abolished the cause of action.<sup>44</sup> In 1976, the Supreme Court of Pennsylvania in *Fadgen v. Lenkner*<sup>45</sup> asserted that "the cause of action itself is an anachronism and that in today's society it is unreasonable to impose upon a defendant such harsh results without affording any real opportunity to interject logically valid defenses on the merits . . . ."<sup>46</sup> More recently, the Supreme Court of Iowa judicially abolished criminal conversation, employing a similar rationale for its action.<sup>47</sup> A majority of states, however, still recognize the cause of action for criminal conversation, citing protection of the sanctity of the marital relationship and similar policy reasons as justification for allowing such suits.<sup>48</sup> In most of these jurisdictions, the definition of criminal conversation has been expanded to allow a wife to bring suit against her husband's paramour.<sup>49</sup>

41. Law of March 11, 1935, ch. 208, § 1, 1935 Ind. Acts 1009 (codified at IND. CODE § 34-4-1 (1976)).

42. Law of March 29, 1935, ch. 263, §§ 61a-61i, 1935 N.Y. Laws 732 (codified at N.Y. CIV. RIGHTS LAW § 80-a (McKinney 1976)). Section 61a, entitled "Declaration of Public Policy of the State," provided in pertinent part:

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

Kane, *Heart Balm and Public Policy*, 5 FORDHAM L. REV. 63, 63 (1936).

43. See ALA. CODE § 6-5-331 (1977); CAL. CIV. CODE § 43.5 (West 1954); COLO. REV. STAT. § 13-20-202 (1973); CONN. GEN. STAT. ANN. § 52-572f (West Supp. 1979); DEL. CODE ANN. tit. 10, § 3924 (1974); D.C. CODE ENCYCL. § 16-923 (West Supp. 1978); FLA. STAT. §§ 771.01-.08 (1964); IND. CODE ANN. § 34-4-4-1 (Burns Supp. 1979); MICH. COMP. LAWS § 600.2901 (1968); MINN. STAT. ANN. § 553.02 (West Supp. 1979); N.J. STAT. ANN. § 2A:23-1 (West 1952); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 1976); OR. REV. STAT. §§ 30.840, 30.850 (1977); TEX. FAM. CODE ANN. tit. 1, § 4.05 (Vernon Supp. 1980); VA. CODE § 8.01-220 (1977); WIS. STAT. ANN. § 768.01 (West 1980); WYO. STAT. § 1-23-101 (1977).

44. See *Bearbower v. Merry*, 266 N.W.2d 128 (Iowa 1978); *Fadgen v. Lenkner*, 469 Pa. 272, 365 A.2d 147 (1976).

45. 469 Pa. 272, 365 A.2d 147 (1976).

46. *Id.* at 280-81, 365 A.2d at 151 (footnote omitted).

47. *Bearbower v. Merry*, 266 N.W.2d 128, 135 (Iowa 1978).

48. See, e.g., *Kremer v. Black*, 201 Neb. 467, 268 N.W.2d 582 (1978). See 25 BAYLOR L. REV. 495 (1973), which states that "[t]he primary rationale for establishing and maintaining the cause of action of criminal conversation has been that it supposedly protects the sanctity of the marriage by acting as a deterrent to third persons to prevent interference in family relations." *Id.* at 498.

49. See text accompanying notes 28-31 *supra*.

### B. *The Tort of Criminal Conversation in Maryland*

The development of Maryland law surrounding the tort of criminal conversation has deviated from the path followed by the majority of states. Criminal conversation was first recognized in 1828 in *Fornshill v. Murray*,<sup>50</sup> which stated in dictum that an actual marriage must be proved in order to sustain this cause of action.<sup>51</sup>

As early as 1905, the Court of Appeals of Maryland held in *Kohlhoss v. Mobley*<sup>52</sup> that active or passive consent by a husband to his wife's adultery barred an action for criminal conversation. In that case, the husband was found to have granted passive consent by not protesting to plans between his wife and her paramour.<sup>53</sup> The court reasoned that the husband had "afford[ed] to their incipient amour full opportunity to develop and mature into her complete dishonor."<sup>54</sup>

Although Maryland adopted the Married Women's Property Act in 1898,<sup>55</sup> only recently has a wife been granted the right to sue for criminal conversation.<sup>56</sup> Shortly after the passage of the Act, the court of appeals, in *Wolf v. Frank*,<sup>57</sup> allowed a woman to bring a tort action against her husband's paramour for alienation of affections,<sup>58</sup> a right not afforded a wife at common law, thereby granting a wife rights equal to those of her husband.<sup>59</sup> The court of appeals subse-

50. 35 Md. 452 (1828).

51. *Id.* at 455.

52. 102 Md. 199, 62 A. 236 (1905).

53. *Id.* at 206, 62 A. at 236. The court relied upon the general rule that:

If . . . the conduct of the husband as established by undisputed evidence or admitted in his own testimony is such that a rational mind could draw no other conclusion therefrom than that he had consented actively or passively to the conduct on the part of his wife and the defendant of which he complains, the question would become one of law . . . .

*Id.*

54. *Id.* at 211, 62 A. at 238.

55. Law of April 9, 1898, ch. 457, § 5, 1898 Md. Laws 1082 (current version at MD. ANN. CODE art. 45, § 5 (Supp. 1980)). The Act currently states in pertinent part: "Married women shall have power . . . to sue . . . for torts committed against them, as fully as if they were unmarried . . . ." *Id.*

56. *Kromm v. Kromm*, 31 Md. App. 635, 358 A.2d 247, *cert. denied*, 278 Md. 726 (1976).

57. 92 Md. 138, 48 A. 132 (1900).

58. *Id.* at 143, 48 A. at 134. Alienation of affections is closely related to criminal conversation in that it is also directed at protecting a spouse against intentional interference with the marriage relationship. See *Brown, The Action for Alienation of Affections*, 82 U. PA. L. REV. 472, 473-74 (1934). This action is distinguishable from criminal conversation, however, because proof of the defendant's intent to interfere with the marital relationship must be shown, whereas such intent is presumed in the case of criminal conversation. Furthermore, alienation of affections results in the deprivation of the wronged spouse's right to the aid, comfort, assistance, and society of the other spouse in the family relationship; criminal conversation injures the husband's right to exclusive sexual intercourse with his wife. Finally, proof of adultery, which is enough to sustain a cause of action for criminal conversation, is insufficient for alienation of affections. *Id.* at 473.

59. *Wolf v. Frank*, 92 Md. 138, 143, 48 A. 132, 134 (1900).

quently limited the effect of the Act, however, by holding that the purpose of the Act "was not to enable [a wife] to maintain suits that she could not have maintained before its passage but only to bring in her own name those which before she must have brought in her husband's name either alone or as party plaintiff with her."<sup>60</sup> Despite this limitation of the Act, in the 1976 case of *Kromm v. Kromm*,<sup>61</sup> the court of special appeals concluded that, because of the decision in *Wolf*,<sup>62</sup> it was compelled to hold that an action for criminal conversation may be maintained by a wife.<sup>63</sup>

Although the Maryland General Assembly abolished the closely-related tort of alienation of affections in 1945,<sup>64</sup> this legislative action was thereafter held not to affect the common law action for criminal conversation.<sup>65</sup> As recently as 1976, the Court of Appeals of Maryland in *Geelhoed v. Jensen*<sup>66</sup> recognized that criminal conversation was still a viable cause of action in this state.<sup>67</sup> Moreover, the 1977 General Assembly rejected a bill proposing the abolition of the tort of criminal conversation in Maryland.<sup>68</sup>

#### IV. HOLDING AND ANALYSIS OF *KLINE*

Despite the General Assembly's refusal to abrogate criminal conversation, the court of appeals in *Kline v. Ansell*<sup>69</sup> judicially abrogated the common law cause of action for criminal conversation in

60. *Fernandez v. Fernandez*, 214 Md. 519, 522, 135 A.2d 886, 887 (1957). *See also* *Hudson v. Hudson*, 226 Md. 521, 174 A.2d 339 (1961) (Married Women's Property Act did not give a wife the right to sue her husband for a tort committed against her); *Furstenburg v. Furstenburg*, 152 Md. 247, 136 A. 543 (1927) (Act did not give wife the right to sue her husband or his employer for tort committed against her). *But see* *Lusby v. Lusby*, 283 Md. 334, 390 A.2d 77 (1978) (court of appeals permitted exception to interspousal tort immunity if tort committed is outrageous in nature, but did not base its holding on the Married Women's Property Act).

61. 31 Md. App. 635, 358 A.2d 247, *cert. denied*, 278 Md. 726 (1976).

62. 92 Md. 138, 48 A. 132 (1900).

63. 31 Md. App. 635, 637, 358 A.2d 247, 249, *cert. denied*, 278 Md. 726 (1976).

64. Law of May 4, 1945, ch. 1010, § 1, 1945 Md. Laws 1760 (current version at MD. CTS. & JUD. PROC. CODE ANN. § 5-301(a) (1980)). Section 5-301(a) states in pertinent part: "A cause of action for alienation of affections is prohibited whether it arose in the State or elsewhere." *Id.*

65. *DiBlasio v. Kolodner*, 233 Md. 512, 197 A.2d 245 (1964). *See* 24 MD. L. REV. 358 (1964).

66. 277 Md. 220, 352 A.2d 818 (1976). Although this case deals primarily with a jurisdictional question, the suit involved was for criminal conversation.

67. The court of appeals cited the definition of criminal conversation as stated in the RESTATEMENT OF TORTS § 685 (1938): "One who, without the husband's consent, has sexual intercourse with a married woman is liable to the husband for the harm thereby caused to any of his legally protected marital interests." 277 Md. 220, 224, 352 A.2d 818, 821 (1976).

68. *See* MD. S.J. 3034, 3514 (1977); MD. H.J. 162, 2397, 2904 (1977). The bill received a favorable committee report and was unanimously passed by the House. The Senate, however, gave it an unfavorable report.

69. 287 Md. 585, 414 A.2d 929 (1980).

Maryland. In reviewing the background of this tort, the *Kline* court considered its historical basis and its current treatment in the United States as well as the development of relevant case and statutory law in Maryland.<sup>70</sup> Judge Davidson, writing for a unanimous court, cited with favor a variety of policy reasons in support of her conclusion that criminal conversation was an unreasonable and anachronistic cause of action.<sup>71</sup> After reviewing Maryland precedent, however, she noted that "[w]ere the interrelated judicial and legislative history of this action in Maryland the only factor to be considered, we would deem it inappropriate to predicate its demise on the ground that it is unreasonable and anachronistic."<sup>72</sup>

In its analysis, the *Kline* court summarily considered the general policy of judicial restraint which mandates that the common law be abrogated by legislative action.<sup>73</sup> The court also cited the relatively recent, albeit generally accepted, doctrine that the common law may be changed by judicial decision if it has become "unsound in the circumstances of modern life."<sup>74</sup> Judge Davidson then looked to Maryland's Equal Rights Amendment (ERA),<sup>75</sup> a unique basis for the abolition of the action for criminal conversation. Article 46 of the Maryland Declaration of Rights provides: "Equality of rights under the law shall not be abridged or denied because of sex."<sup>76</sup> Noting its earlier decision in *Rand v. Rand*,<sup>77</sup> the court of appeals reiterated its commitment to the ERA:

[W]e 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 E.R.A. in this state was

70. *Id.* at 587-90, 414 A.2d at 930-32.

71. *Id.* at 589, 414 A.2d at 931. See text accompanying notes 39-40 *supra*.

72. 287 Md. 585, 591, 414 A.2d 929, 932 (1980).

73. *Id.* at 590, 414 A.2d at 931. See MD. CONST., DECL. OF RIGHTS art. 5 (common law is subject to revision, amendment, or repeal by the legislature).

74. 287 Md. 585, 590, 414 A.2d 929, 931 (1980). In Maryland, common law generally has been changed by judicial decision when the legislature has failed to take action. See *McGarvey v. McGarvey*, 286 Md. 19, 27, 405 A.2d 250, 254 (1979); *Lewis v. State*, 285 Md. 705, 715, 404 A.2d 1073, 1078-79 (1979); *Pope v. State*, 284 Md. 309, 341-42, 396 A.2d 1054, 1072-73 (1979); *White v. King*, 244 Md. 348, 354, 223 A.2d 763, 767 (1966). But see *Austin v. Mayor of Baltimore*, 286 Md. 51, 56-57, 405 A.2d 255, 258 (1979).

Two appellate courts in other jurisdictions recently had the opportunity to abolish the action for criminal conversation, but deferred to the legislature to perform this function. See *Kremer v. Black*, 201 Neb. 467, 286 N.W.2d 582 (1978); *Felsenthal v. McMillan*, 493 S.W.2d 729 (Tex. 1973).

75. MD. CONST., DECL. OF RIGHTS art. 46. For an overview of the ERA's impact on the treatment of the tort of criminal conversation in Maryland, see Legislation, *The Maryland Equal Rights Amendment: Eight Years of Application*, 9 U. BALT. L. REV. 342, 361-63 (1980).

76. MD. CONST., DECL. OF RIGHTS art. 46.

77. 280 Md. 508, 374 A.2d 900 (1977).

intended to, and did, drastically alter traditional views of the validity of sex-based classifications.<sup>78</sup>

Based upon the dictates of the ERA, the *Kline* court held that the common law cause of action for criminal conversation is unconstitutional.<sup>79</sup> The language of the ERA was applied to the common law's disparate treatment of men and women. The court reasoned that Maryland's law provided different benefits for its citizens based solely upon their sex by allowing a man, but not a woman, a cause of action for criminal conversation. Similarly, a man who performed adulterous acts with another man's wife was civilly liable for damages, but a woman who engaged in such activity with another woman's husband was not. The common law therefore also imposed different burdens upon Maryland's citizens.

In basing the abrogation of the tort of criminal conversation on the ERA, the court of appeals failed to recognize that, at the time of its decision, the law in Maryland complied with the ERA's mandate of sexual equality. The 1976 court of special appeals' decision in *Kromm v. Kromm*,<sup>80</sup> by which Maryland joined the majority view, placed a wife on equal footing with her husband by allowing her to maintain an action for criminal conversation based on a broad interpretation of the Married Women's Property Act.<sup>81</sup> Without citing *Kromm*, the *Kline* court implicitly overruled that decision by interpreting the Act as granting a woman rights equal to those of an unmarried woman rather than equal to those of her husband.<sup>82</sup> The court's commitment to equalizing treatment of the sexes<sup>83</sup> could have been achieved by reliance on a more analytically defensible ground merely by affirming the *Kromm* decision.

The court's decision, nonetheless, is one in which the ends justify the means. Judge Davidson's brief discussion of the policy reasons underlying the need for abrogation of this tort in modern times is similar to rationales used in other jurisdictions to justify abolishing the cause of action for criminal conversation.<sup>84</sup> The fre-

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78. 287 Md. 585, 591, 414 A.2d 929, 932 (1980) (quoting *Rand v. Rand*, 280 Md. 508, 515-16, 374 A.2d 900, 904-05 (1977)).

79. 287 Md. 585, 593, 414 A.2d 929, 933 (1980).

80. 31 Md. App. 635, 358 A.2d 247, *cert. denied*, 278 Md. 726 (1976).

81. See text accompanying notes 55-63 *supra*. Judge Davidson acknowledged that other jurisdictions have interpreted the married women's acts as allowing a woman to sue for criminal conversation. 287 Md. 585, 593 n.4, 414 A.2d 929, 933 n.4 (1980).

82. 287 Md. 585, 593 n.4, 414 A.2d 929, 933 n.4 (1980). *Kromm* relied on the broad interpretation of the Married Women's Property Act given in *Wolf v. Frank*, 92 Md. 138, 143, 48 A. 132, 134 (1900), which involved a cause of action for alienation of affections by a spouse against a third party. See text accompanying notes 61-63 *supra*. The *Kline* court, however, relied on the narrow interpretation of the Act found in interspousal tort immunity cases. 287 Md. at 593 n.4, 414 A.2d at 933 n.4. See cases cited note 60 *supra*.

83. 287 Md. 585, 593, 414 A.2d 929, 933 (1980).

84. See, e.g., *Bearbower v. Merry*, 266 N.W. 2d 128 (Iowa 1978); *Fadgen v. Lenkner*, 469 Pa. 272, 365 A.2d 147 (1976).

quently cited problems of blackmail,<sup>85</sup> collusion,<sup>86</sup> and excessive damage awards<sup>87</sup> as well as the recognition of the husband's consent as the only valid defense,<sup>88</sup> compel the demise of this action. Moreover, any motive to preserve the marital relationship is thwarted when a spouse is afforded a legal battleground for his vengeance or mercenary enrichment.<sup>89</sup>

## V. CONCLUSION

With the court of appeals' decision in *Kline v. Ansell*, Maryland joined the modern trend to abrogate the common law cause of action for criminal conversation. A paramour in Maryland, therefore, will no longer be subject to the threat of suit by a cuckolded husband. Redress for adultery finds an appropriate place, instead, in a divorce action, a criminal charge, or a combination of these remedies.<sup>90</sup>

In most of those jurisdictions that continue to permit an action for criminal conversation, the right of the wife to sue her husband's paramour for criminal conversation has been recognized. Future abrogation, therefore, will be predicated upon the inherent problems of blackmail, inaccurate and excessive damage awards, inadequacy of defenses available to the paramour, and general incompatibility with the circumstances of modern life, rather than upon a commitment to comply with the mandate of the ERA.

*Sherry Hamburg Flax*

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85. See text accompanying notes 39—40 *supra*.

86. See 12 CREIGHTON L. REV. 1369, 1388—89 (1979); 48 NOTRE DAME LAW. 426, 430 (1972).

87. *E.g.*, Fadgen v. Lenkner, 469 Pa. 272, 279, 365 A.2d 147, 151 (1976).

88. *E.g.*, Bearbower v. Merry, 266 N.W.2d 128, 130 (Iowa 1978).

89. In Bearbower v. Merry, 266 N.W.2d 128 (Iowa 1978), Justice McCormick, dissenting in part, stated:

Any third person who kicks at the cornerstone of a shaky marriage will not bring it down without active support from one or both of the parties. It is simplistic and unrealistic to suppose the edifice will be held together either so long as or because spouses have the right to obtain vengeance in the form of damage suits against the third person. Although a recovery of damages will punish the third person and sooth [*sic*] the ego while enriching the purse of the plaintiff, it is hardly calculated to be a constructive influence in maintaining or restoring a mature and stable marriage . . . .

*Id.* at 138 (McCormick, J., dissenting in part).

90. Shaw v. Glickman, 45 Md. App. 718, 727, 415 A.2d 625, 631 (1980).