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# Maryland's Equal Rights Amendment Challenges the Common Law Action of Criminal Conversation: Kline v. Ansell

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# Maryland's Equal Rights Amendment Challenges the Common Law Action of Criminal Conversation: *Kline v. Ansell*

At common law the cause of action for criminal conversation[1] was maintainable solely by the husband.[2] The basis of the action was adultery,[3] and a plaintiff-husband could recover upon proving that a valid marriage existed and that his wife and the defendant-interloper engaged in sexual intercourse.[4] Although the right to maintain a criminal conversation action belonged exclusively to the husband at common law,[5] virtually all American jurisdictions recognizing the action[6] now permit the wife to

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1. " 'Criminal' because it was an ecclesiastical crime; 'conversation' in the sense of intercourse." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 875 n.75 (4th ed. 1971). For a more detailed history of criminal conversation, see Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 654-60 (1930).

2. 2 W. BLACKSTONE, COMMENTARIES *532. Blackstone states:

> *Adultery*, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary.

*Id. See also* 2 T. COOLEY, LAW OF TORTS § 167 (4th ed. 1932).

3. W. PROSSER, *supra* note 1, at 875.

"In its general and comprehensive sense, the term criminal conversation is synonymous with adultery; but in its more limited and technical signification, in which it is here to be considered, it may be defined as adultery in the aspect of a tort." Turner v. Heavrin, 182 Ky. 65, 67, 206 S.W. 23, 23 (1918).

4. Sebastian v. Kluttz, 6 N.C. App. 201, 209, 170 S.E.2d 104, 109 (1969); Trainor v. Deters, 22 Ohio App. 2d 135, 136, 259 N.E.2d 131, 133 (1969); Schneider v. Mistele, 39 Wis. 2d 137, 141, 158 N.W.2d 383, 384 (1968). *See* Note, *Piracy on the Matrimonial Seas—The Law and the Marital Interloper*, 25 SW. L.J. 594, 598 (1971).

5. The primary reason that only the husband could bring a criminal conversation action is that the husband was considered to have a property right in the body of his wife. Since the wife was regarded as a chattel, a trespass action would lie against an interloper who had, in essence, used another's property. Lippman, *supra* note 1, at 655-56. The obstacles to a wife's recovery for her husband's adultery were first procedural because at common law she generally could not sue without joining her husband. Furthermore, whatever she might recover would become his property. *See* Bennett v. Bennett, 116 N.Y. 584, 593, 23 N.E. 17, 19-20 (1889).

6. Although most states still recognize the cause of action for criminal conversation, currently sixteen states and the District of Columbia have legislatively abolished it. *See* ALA. CODE § 6-5-331 (1975); CAL. CIV. CODE § 43.5 (West 1954); COLO. REV. STAT. § 13-20-202 (1973); CONN. GEN. STAT. ANN. § 52-572f (West Supp. 1980); DEL. CODE ANN. tit. 10, § 3924 (1974); D.C. CODE ENCYCL. § 16-923 (West Supp. 1978); FLA. STAT. ANN. § 771.01 (West 1964); GA. CODE ANN. § 105-1203 (Supp. 1980); IND. CODE ANN. § 34-4-4-1

maintain it, either by statute or by reason of a liberal interpretation of the married women's property acts.[7] The Maryland Court of Appeals, however, took a different approach in *Kline v. Ansell.*[8] Rather than expanding the cause of action for criminal conversation to allow the wife to maintain it against her husband's paramour, the court held the action unconstitutional as being violative of the state equal rights amendment and abolished it in its entirety.[9]

On August 17, 1962, Mr. Donald S. Ansell married Vivian Jean Klapperd in Biloxi, Mississippi.[10] The Ansell's marriage was marred by frequent arguments, financial difficulties, physical violence, and Mr. Ansell's alcohol problem.[11] On November 10, 1977, Mrs. Ansell and their three children left the marital residence at the suggestion of her husband.[12] In early 1978, Floyd R. Kline began having sexual relations with Mrs. Ansell even though she was still lawfully married to Mr. Ansell.[13] Mr. Ansell filed a complaint against Mr. Kline in Maryland's Washington County Circuit Court on September 1, 1978, seeking

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(Burns Supp. 1980); MICH. COMP. LAWS ANN. § 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. § 30.850 (1979); VA. CODE § 8.01-220 (1950); WIS. STAT. ANN. § 768.01 (West Supp. 1980); WYO. STAT. § 1-23-101 (1977). Prior to the Maryland Court of Appeals' decision in Kline v. Ansell, 414 A.2d 929 (Md. 1980), there were only two states that had judicially abolished criminal conversation. Bearbower v. Merry, 266 N.W.2d 128 (Iowa 1978); Fadgen v. Lenkner, 469 Pa. 272, 365 A.2d 147 (1976).

7. W. PROSSER, *supra* note 1, at 881-82.

8. 414 A.2d 929 (Md. 1980). Maryland's Married Women's Act provides in pertinent part as follows: "Married women shall have power to . . . sue . . . for torts committed against them, as fully as if they were unmarried." MD. ANN. CODE art. 45, § 5 (Supp. 1979). The *Kline* court explained that Maryland's Married Women's Act was not intended to create rights for married women in addition to those enjoyed by single women at common law. Since single women obviously could not maintain a criminal conversation action at common law, the Married Women's Act did not extend that right to married women. 414 A.2d at 933 n.4.

9. 414 A.2d at 933.

10. Brief for Appellant at 2. Although the couple was married in Mississippi, they resided in New Jersey where three children were born to them. In 1971 they moved to Hagerstown, Maryland. *Id.*

11. *Id.* at 3. After moving his family to Hagerstown, Mr. Ansell returned to New Jersey where he began serving an 18 month prison sentence for an earlier criminal conviction. During Mr. Ansell's absence, Mrs. Ansell was forced to rely primarily on public assistance for financial support. *Id.* at 2.

12. *Id.* at 3.

13. *Id.* Mr. Kline first met Mrs. Ansell in 1976. Later, after she had left her husband, Mr. Kline helped Mrs. Ansell purchase a residence for her and her three children. At the time of the appeal Mr. Kline lived with Mrs. Ansell. *Id.*

damages for criminal conversation and assault.[14]

The jury found in favor of Mr. Ansell on the criminal conversation count and the court awarded $40,000 compensatory damages and $4,250 punitive damages.[15] Maryland's court of final jurisdiction, the Court of Appeals, reversed.[16]

The court, in a unanimous opinion, began with an extensive history of the action for criminal conversation.[17] Although the court set forth most of the rationales that have been relied upon by courts and legislatures to justify abolishing criminal conversation, it chose not to rest its decision on any of them.[18] Instead the court reasoned that because the action for criminal conversation in its common law form provided different benefits for and imposed different burdens upon men vis-a-vis women, it could not be reconciled with the Maryland equal rights amendment.[19] The court relied heavily on *Rand v. Rand*,[20] one of its own decisions dealing with the impact of Maryland's equal rights amendment on the father's common law obligation to support his minor children. The *Rand* court held that the equal rights amendment mandated that the common law obligation of child support be shared equally by both parents.[21] The *Kline* court determined that applying the *Rand* rationale produced a clear result: the elimination of the criminal conversation cause of action in Maryland.[22]

The rationale that state equal rights provisions mandate the abolition of criminal conversation is unsound in terms of legal analysis. The *Kline* decision represents a dangerous and unprecedented application of a state equal rights amendment in the area of family law. Rather than abolishing criminal conversation altogether, the court should have modified the rules governing

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14. 414 A.2d at 929-30.

15. Brief for Appellant at 1.

16. 414 Ad at 933. Following the trial court's directed verdict against Mr. Kline, he filed an appeal in the Court of Special Appeals of Maryland as well as a petition for a writ of certiorari in the Court of Appeals of Maryland. The writ of certiorari was granted by the highest court before consideration by the Court of Special Appeals. *Id.* at 930.

17. *Id.* at 930-31.

18. *Id.* at 932. In response to these rationales, the court stated: "Were 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." *Id.*

19. *Id.* at 933.

20. 280 Md. 508, 374 A.2d 900 (1977).

21. *Id.* at 516, 374 A.2d at 905.

22. 414 A.2d at 933.

the action to ensure its just operation.

Equal rights provisions do not mandate the elimination of the cause of action for criminal conversation. The wording of Maryland's equal rights amendment is clear and unambiguous: "Equality of rights under the law shall not be abridged or denied because of sex."[23] The thrust of the state equal rights provision "is to insure equality of rights under the law and to eliminate sex as a basis for distinction."[24] The elimination of sex discrimination does not require the elimination of rights for both men and women. The more logical consequence of state equal rights amendments and state constitutions containing equal rights provisions is to extend to women those rights that were previously enjoyed only by men.

The *Kline* court is the first court to rely on an equal rights amendment to abolish the criminal conversation cause of action.[25] Surprisingly, neither the appellee's nor the appellant's brief even mentioned Maryland's equal rights amendment.[26] Furthermore, the facts of the case do not readily present an equal rights issue because a woman was not seeking to bring the action. Since no precedent existed, and since neither brief discussed Maryland's equal rights amendment, it is clear that the court generated its own equal rights argument.

In search of some supporting authority for its decision, the court turned to its own analysis in *Rand v. Rand*.[27] The *Rand* decision, however, does not support the *Kline* court's abolition of the criminal conversation cause of action. In *Rand* the court extended to women the father's common law obligation to sup-

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23. MD. CONST. Declaration of Rights art. 46.

24. Kline v. Ansell, 414 A.2d at 932 (quoting Henderson v. Henderson, 458 Pa. 97, 101, 327 A.2d 60, 62 (1974)). *See also* Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977); Eckstein v. Eckstein, 38 Md. App. 506, 379 A.2d 757 (1978); Bell v. Bell, 38 Md. App. 10, 379 A.2d 419 (1977); Coleman v. State, 37 Md. App. 322, 377 A.2d 553 (1977).

25. Only Pennsylvania and Iowa had judicially abolished criminal conversation prior to *Kline*. The Supreme Court of Pennsylvania justified abolishing criminal conversation on the ground that it "impose[s] upon a defendant such harsh results without affording any real opportunity to interject logically valid defenses . . . such as the role of the plaintiff's spouse in the adulterous relationship or the quality of the plaintiff's marriage . . . ." Fadgen v. Lenkner, 469 Pa. 272, 281, 365 A.2d 147, 151 (1976). The Supreme Court of Iowa relied upon essentially the same rationale to abolish criminial conversation in Bearbower v. Merry, 266 N.W.2d 128, 135 (Iowa 1978). Although neither court relied on an equal rights provision to abolish criminal conversation, Pennsylvania could have because it has an equal rights amendment.

26. *See* Brief for Appellant and Brief for Appellee, Kline v. Ansell, 414 A.2d 929 (Md. 1980).

27. 280 Md. 508, 374 A.2d 900 (1977).

port his minor children, holding that "the parental obligation for child support . . . is one shared by both parents."[28] The equal rights amendment in that instance expanded, not contracted, the common-law child support obligation. A correct application of *Rand* to the instant case merely would have extended to women the right to maintain a criminal conversation action, not eliminated that right for both men and women. This misapplication of both the Maryland equal rights amendment and the *Rand* rationale to the criminal conversation cause of action is a major flaw in the court's analysis.

Numerous other examples exist where courts have applied state equal rights amendments[29] to laws governing family matters.[30] In such situations the courts have extended to men and women those family rights previously denied them, rather than eliminated essential rights to which they were entitled. An examination of the impact that state equal rights provisions have had on child custody, child support, and consortium rights will demonstrate the anomaly the *Kline* decision represents.

*Rand* is not the only case in which a court has extended to women the common law obligation of child support under the authority of a state equal rights amendment. Other courts also have held that child support should be shared equally by both parents.[31] This is not to say that both parents must give equal contributions, rather each parent has an equal obligation to provide child support in accordance with his or her ability.[32] No case authority exists for the situation where an equal rights amendment or an equivalent constitutional provision has eliminated the parental obligation of child support.

Equal rights legislation has initiated a similar expansion of traditional family law rights in the child custody area. The pre-

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28. *Id.* at 516, 374 A.2d at 905.

29. Presently sixteen states have equal rights amendments or equal rights provisions in their constitutions. *See* ALASKA CONST. art. 1, § 3; COLO. CONST. art. 2, § 29; CONN. CONST. art. 1, § 20; HAWAII CONST. art. 1, § 4; ILL. CONST. art. 1, § 18; MD. CONST. Declaration of Rights art. 46; MASS. CONST. pt. I, art. 1; MONT. CONST. art. 2, § 4; N.H. CONST. pt. I, 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.

30. *See* Annot., 90 A.L.R.3d 158, 178-203 (1979).

31. *See* Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974); Lyle v. Lyle, 248 Pa. Super. Ct. 458, 375 A.2d 187 (1977); Friedman v. Friedman, 521 S.W.2d 111 (Tex. Civ. App. 1975); Cooper v. Cooper, 513 S.W.2d 229 (Tex. Civ. App. 1974).

32. *See* Friedman v. Friedman, 521 S.W.2d 111 (Tex. Civ. App. 1975); Cooper v. Cooper, 513 S.W.2d 229 (Tex. Civ. App. 1974).

sumption that the mother is a more suitable custodian of the children than the father, and therefore should be given custody of the children on divorce, has been held to violate state equal rights provisions.[33] The wife's right to custody of the children was not eliminated, but the husband was placed on equal status with her.

The right to sue for loss of consortium represents another area of family law where state equal rights legislation has had an impact. In *Hopkins v. Blanco*,[34] the Pennsylvania Supreme Court held that under the state's equal rights amendment, the wife possesses the same right that the husband does to sue for loss of consortium. Other courts have reached similar results.[35] In the consortium context as in others, the application of equal rights legislation enabled women to bring an action that they previously could not maintain.

The very application of equal rights provisions to criminal conversation is somewhat superficial in that married women in virtually all jurisdictions recognizing the action are now able to maintain it.[36] American courts had already extended women the right to bring a criminal conversation action long before states began enacting equal rights legislation. The New York Court of Appeals' decision in *Oppenheim v. Kridel*[37] recognized over fifty years ago that there was no valid reason why women should be denied the right to bring a criminal conversation action:

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33. *See, e.g.*, Marcus v. Marcus, 24 Ill. App. 3d 401, 320 N.E.2d 581 (1974); Anagnostopoulos v. Anagnostopoulos, 22 Ill. App. 3d 479, 317 N.E.2d 681 (1974); Spriggs v. Carson, 470 Pa. 290, 368 A.2d 635 (1977); McGowan v. McGowan, 248 Pa. Super. Ct. 41, 374 A.2d 1306 (1977). *See also* Strand v. Strand, 41 Ill. App. 3d 651, 355 N.E.2d 47 (1976); Davis v. Davis, 41 Ill. App. 3d 942, 354 N.E.2d 657 (1976); Christensen v. Christensen, 31 Ill. App. 3d 1041, 335 N.E.2d 581 (1975); Pratt v. Pratt, 30 Ill. App. 3d 214, 330 N.E.2d 244 (1975); Kauffman v. Kauffman, 30 Ill. App. 3d 159, 333 N.E.2d 695 (1975).

34. 457 Pa. 90, 320 A.2d 139 (1974).

35. *See* Schreiner v. Fruit, 519 P.2d 462 (Alaska 1974); Miller v. Whittlesey, 562 S.W.2d 904 (Tex. Civ. App. 1978).

36. W. PROSSER, *supra* note 1, at 881-82. *See, e.g.*, Turner v. Heavrin, 182 Ky. 65, 206 S.W. 23 (1918); Nolin v. Pearson, 191 Mass. 283, 77 N.E. 890 (1906); White v. Longo, 190 Neb. 703, 212 N.W.2d 84 (1973); Seaver v. Adams, 66 N.H. 142, 19 A. 776 (1890); Knighton v. McClain, 227 N.C. 682, 44 S.E.2d 79 (1947); Scates v. Nailling, 196 Tenn. 508, 268 S.W.2d 561 (1954); Cahoon v. Pelton, 9 Utah 2d 224, 342 P.2d 94 (1959); Frederick v. Morse, 88 Vt. 126, 92 A. 16 (1914). Also, many of the jurisdictions that have abolished the criminal conversation cause of action had previously permitted women to maintain it. *See, e.g.*, Parker v. Newman, 200 Ala. 103, 75 So. 479 (1917); Foot v. Card, 58 Conn. 1, 18 A. 1027 (1889); Krom v. Krom, 31 Md. App. 635, 358 A.2d 247 (1976); Oppenheim v. Kridel, 236 N.Y. 156, 140 N.E. 227 (1923); Karchner v. Mumie, 398 Pa. 13, 156 A.2d 537 (1959).

37. 236 N.Y. 156, 140 N.E. 227 (1923).

> [T]here is no sound and legitimate reason for denying a cause of action for criminal conversation to the wife while giving it to the husband. Surely she is as much interested as the husband in maintaining the home and wholesome, clean, and affectionate relatonships. Her feelings must be as sensitive as his toward the intruder, and it would be mere willful blindness on the part of the courts to ignore these facts. Both the courts of this state and the statutes have recognized this change in the status, rights, and privileges of a married woman.[38]

For many years most courts have allowed women to bring a criminal conversation action by simply expanding the common-law rule. Therefore, there is no compelling reason to apply equal rights legislation to the cause of action for criminal conversation.

The *Kline* court's inconsistency in application of Maryland's equal rights amendment to criminal conversation is further demonstrated by *Geelhoed v. Jensen,*[39] one of its own decisions that had earlier recognized by way of dictum a married woman's right to maintain a criminal conversation action. After referring to the husband's right to bring a criminal conversation action, the *Geelhoed* court cited Restatement of Torts § 690 (1938), which allows a wife to bring a criminal conversation action.[40] The *Kline* court distinguished the *Geelhoed* decision by contending that "[i]n *Geelhoed*, . . . we did not consider the impact of the ERA."[41] In addition to summarily distinguishing *Geelhoed,* the *Kline* court failed to mention *Krom v. Krom,*[42] a Maryland lower court decision holding that "the tort of criminal conversation may be maintained by the wife of a marriage. Such, plainly, is the weight of authority."[43] The *Kline* court, however, refused to follow "the weight of authority"[44] and effectively overruled *Krom* and the *Geelhoed* dicta.

The application of Maryland's equal rights amendment to criminal conversation was also unwarranted in light of Maryland's legislative action regarding the tort. As recently as 1977,

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38. *Id.* at 162, 140 N.E. at 229.

39. 277 Md. 220, 352 A.2d 818 (1976).

40. *Id.* at 225, 352 A.2d at 821.

41. 414 A.2d at 932.

42. 31 Md. App. 635, 358 A.2d 247 (1976).

43. *Id.* at 637, 358 A.2d at 249. The *Krom* court justified its holding by relying on *Wolf v. Frank,* 92 Md. 138, 48 A.2d 132 (1900), a Maryland Court of Appeals' decision that recognized a wife's right to maintain an action for alienation of affections.

44. Krom v. Krom, 31 Md. App. at 637, 358 A.2d at 249. *See generally* 41 AM. JUR. 2d *Husband and Wife* § 476 (1958); 42 C.J.S. *Husband and Wife* § 698 (1972).

both houses of Maryland's legislature rejected House Bill 170, which would have abolished criminal conversation.[45] Contrary to this clear signal from the legislature that the cause of action be retained, the *Kline* court used the equal rights rationale to abolish criminal conversation.

It is apparent, therefore, that the court's reliance on the equal rights amendment as a justification for abolishing criminal conversation is misplaced. A proper application of the Maryland equal rights amendment to criminal conversation would have extended to women the right to maintain the action. The *Kline* court's use of the equal rights amendment to eliminate a family law right is a clear break from other case authority where equal rights provisions have been applied to family law. Also, the very application of Maryland's equal rights amendment to criminal conversation was unnecessary because married women already enjoyed the right to maintain the action in Maryland by reason of *Krom* and the *Geelhoed* dicta. Furthermore, Maryland's legislature clearly indicated its public policy choice to retain an action for criminal conversation. Thus, the *Kline* court's use of the Maryland equal rights amendment to abolish criminal conversation suggests that an equal rights provision can be used by the courts as a sword to eliminate essential family law rights.

Desite the unusual and questionable approach taken by the Maryland Court of Appeals in abolishing criminal conversation, the cause of action itself has nevertheless been in disrepute for over half a century. At common law a plaintiff needed to prove only two facts to recover: (1) a valid marriage existed with his or her spouse, and (2) an act of sexual intercourse occurred between his or her spouse and the defendant. This "strict liability" tort first came under attack in the United States with the Anti-Heart Balm legislation of the 1930s.[46] Many rationales have been offered to justify its demise:

> The action for criminal conversation is notorious for affording a fertile field for blackmail and extortion because it involves an accusation of sexual misbehavior. Criminal conversation actions may frequently be brought, not for the purpose of preserving the marital relationship, but rather for purely merce-

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45. Kline v. Ansell, 414 A.2d at 932.

46. Feinsinger, *Legislative Attack on "Heart Balm"*, 33 MICH. L. REV. 979 (1935); Kane, *Heart Balm and Public Policy* 5 FORDHAM L. REV. 63 (1936); Kingsley, *The "Anti-Heart Balm" Statute, The Work of the 1939 California Legislature*, 13 So. CAL. L. REV. 37 (1939).

> nary or vindictive motives. An award of damages does not constitute an effective deterrent to the act of adultery, and it does not effectively help to preserve or restore a marital relationship in which adultery has already occurred. Indeed, a contested trial may destroy a chance to restore a meaningful relationship. In addition, this action, which eliminates all defenses except the husband's consent and which imposes liability without any regard to the quality of the marital relationship, is incompatible with today's sense of fairness. Most important, today's sense of the increasing personal and sexual freedom of women is incompatible with the rationale underlying this action.[47]

Although some of the attacks that have been made against the tort of criminal conversation are valid, many of them are unpersuasive. The argument that criminal conversation is not an effective deterrent to the act of adultery confuses tort law with criminal law. An underlying rationale of all tort liability "is the concern with compensation for harm done."[48] If a harm has occurred to a recognized interest, in this case the interest in one's marriage, then tort law should apply to compensate for the harm suffered. Possible deterrence is only secondary. Although tort law may deter wrongful conduct, the main responsibility for deterring wrongful conduct rests in the body of criminal law.[49]

Since the primary function of tort law is to compensate for harm suffered, the inability of the defendant to assert as a defense the fact that the plaintiff's spouse consented to the adulterous relation is also justified. Mrs. Ansell's consent to sexual relations with Mr. Kline does not alleviate the harm possibly suffered by Mr. Ansell, nor should it negate the compensation to which Mr. Ansell may be entitled.[50]

The argument that today's increasing personal and sexual freedom justifies abolishing criminal conversation is also unpersuasive. Tort liability is imposed upon a person who has harmed another by engaging in "conduct which is socially unreasonable."[51] Most married people still consider it socially unreasonable for a third person to have sexual relations with his or her

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47. Kline v. Ansell, 414 A.2d at 931.

48. P. KEETON & R. KEETON, CASES AND MATERIALS ON TORTS 2 (2d ed. 1977).

49. *Id.* at 1-2.

50. *See generally* Tinker v. Colwell, 193 U.S. 473 (1904).

51. W. PROSSER, *supra* note 1, at 6. *See* Fadgen v. Lenkner, 469 Pa. 272, 285, 365 A.2d 147, 154 (1976) (Roberts, J., dissenting).

spouse.[52]

However, not all of the arguments favoring the abolition of criminal conversation are unpersuasive. Some valid criticisms of common-law criminal conversation actions are that the defendant is not permitted to assert logically valid defenses[53] and that the action may be brought for purely mercenary or vindictive motives. Of these criticisms, the classical attack on criminal conversation is its susceptibility to abuse. It is widely recognized that a criminal conversation action may be brought for purely mercenary or vindictive motives. Many actions are susceptible to abuse, yet that does not necessarily justify abolishing them.[54] One helpful modification that might alleviate abuse of the action would be to permit the factfinder to consider whether the action is a sham and, in such instances, to reduce damages accordingly. If the case were being tried to a jury, the court could instruct the jury that the plaintiff's motive in bringing the cause of action is a factor to consider in determining the damages award. This would discourage opportunists from bringing criminal conversation actions and thereby would lessen the potential for abuse. Had the jury in the *Kline* case been able to consider Mr. Ansell's motive in bringing the cause of action, it is questionable whether $40,000 in compensatory damages would have been awarded.

Another persuasive attack on criminal conversation is that the only defense available to the defendant is the plaintiff's consent. The inability of the defendant to assert logically valid de-

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52. Fadgen v. Lenkner, 469 Pa. at 285, 365 A.2d at 154.

53. The only valid defense to criminal conversation was the husband's consent to the adulterous relation. *See, e.g.*, Kohlhoss v. Mobley, 102 Md. 199, 62 A. 236 (1905). The *Kline* court stated:

> The fact that the wife consented, that she was the aggressor, that she represented herself as single, that she was mistreated or neglected by her husband, that she and her husband were separated through no fault of her own, or that her husband was impotent, were not valid defenses.

414 A.2d at 930. *See generally* 1 F. HARPER & F. JAMES, THE LAW OF TORTS 612-14 (1956); W. PROSSER, *supra* note 1, at 875; RESTATEMENT (SECOND) OF TORTS § 687 (1977).

54. *See* Wilder v. Reno, 43 F. Supp. 727 (M.D. Pa. 1942).

> First, the very purpose of courts is to separate the just from the unjust causes; secondly, if the courts are to be closed against actions for . . . alienation of affections on the ground that some suits may be brought in bad faith, the same reason would close the door against litigants in all kinds of suits, for in every kind of litigation some suits are brought in bad faith; the very purpose of courts is to defeat unjust prosecutions and to secure the rights of parties in just prosecutions.

*Id.* at 729.

fenses may produce harsh results. This rule could be modified so that the defendant would not be liable unless he knew or should have known that his paramour was married. Such a modification would permit the defendant to assert his ignorance of any marital relationship as a defense. Since the basis of criminal conversation is intermeddling with the marital relationship, a person should not be liable for the harm he causes unless he knows or by reasonable inquiry should have known that he is interfering with a marriage.[55]

Another prudent modification would be to permit the factfinder to consider the quality of the marital relationship in determining the amount of recoverable damages.[56] The key criterion in such a determination should be whether the husband and wife are still living together in a marital relationship. The facts in the *Kline* case illustrate the need for this change. Since Mr. Ansell suggested that Mrs. Ansell leave the marital residence,[57] and since the Ansells were separated when Mrs. Ansell began having intercourse with Mr. Kline,[58] it is highly questionable whether Mr. Ansell suffered any compensable harm. The trial court's $44,250 award probably would have been substantially less if the quality of the marital relationship had been considered as a factor in determining the actual harm suffered by Mr. Ansell.

The primary interest the tort of criminal conversation seeks to protect is a highly valued interest in most marriages: the exclusive right to have sexual intercourse with one's spouse.[59] The cause of action for criminal conversation seeks to preserve one of the most delicate human relationships—that of husband and

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55. Note, *The Tort of Criminal Conversation in Nebraska, 58* NEB. L. REV. 595, 607-08 (1979).

56. Arguably, the mere occurrence of infidelity in a marriage indicates deterioration in the quality of that marital relationship. There are, however, instances where the interloper intrudes into a normally secure marriage by way of seduction and thereby destroys a quality marital relationship. In any event, allowing the quality of the marriage to be a factor would just allow the jury to make a case-by-case judgment of what harm, if any, has been done.

57. Brief for Appellant at 3.

58. *Id.*

59. *See, e.g.*, Oliver v. Oliver, 159 Neb. 218, 66 N.W.2d 420 (1954); Hargraves v. Ballou, 47 R.I. 186, 131 A. 643 (1926); McMillian v. Felsenthal, 482 S.W.2d 9 (Tex. 1972). Although the interest sought to be protected is quite narrow, the real basis of recovery is "the defilement of the marriage bed, the blow to the family honor, and the suspicion cast upon the legitimacy of the offspring." W. PROSSER, *supra* note 1, at 875.

wife.[60] Although the Ansell marriage had deteriorated to the point that perhaps no relationship remained, many other viable marital relationships exist that deserve protection. Rather than abolishing the cause of action for criminal conversation by using a questionable equal rights amendment rationale, the Maryland Court of Appeals should have considered the modifications of criminal conversation presented here. By retaining the action for criminal conversation in a modified form, a civil remedy would still be available to those who actually had been harmed by an unwarranted interference with their marriage while avoiding many of the injustices the action may produce.[61]

*McKay Marsden*

60. *See* 1 F. HARPER & F. JAMES, *supra* note 53 at 606.

61. Kremer v. Black, 201 Neb. 467, 479, 268 N.W.2d 582, 588 (1978) (McCown, J., dissenting).