

**A RECONSIDERATION OF HUSBAND'S DUTY TO SUPPORT  
AND WIFE'S DUTY TO RENDER SERVICES**

**T**HE husband's duty to support his wife (and, under later common law decisions, his children also), and the wife's duty to render services to her husband (and a less clearly defined duty to render services to her children), are two of the most ancient concepts of the common law. In very recent times, both of these have been modified in minor ways by statute, and both have been affected somewhat by common law decisions in succeeding centuries, but both have remained, as it were, fantastically unchanged, through succeeding generations when the nature of the family and the other rights and duties of husbands and wives apart from their families have very clearly changed. One often thinks of real property as the field of the law in which ancient rules do indeed continue unchanged for hundreds of years,<sup>1</sup> and, perhaps because of the reliance and need for security that people find in real property in its underlying significance for all social life, the apparent changelessness is not altogether unreasonable. But to find that basic concepts in family relations continue, although the conditions under which family life is lived so greatly change, does raise a question as to the adequacy of those concepts at the present time.

**Circumstances Under Which These Legal Duties  
Became Recognized**

The very terms of these duties seem somewhat strange and harsh to the ear. They may have some charm of apparent antiquity, but they also cause a certain disquietude from their seeming lack of adaptation to our present needs. The husband's duty to support his wife does not seem to meet the factual pattern of

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF  
CALIFORNIA

Case number: 3:09-cv-02292-VRW

PLTF                      EXHIBIT NO. PX1328

Date admitted: \_\_\_\_\_

By: \_\_\_\_\_

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#### Circumstances Under Which These Legal Duties Became Recognized

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the present day when, in so many marriages of young people, both the husband and wife work for separate and independent employers, so that there is a monetary contribution to the marriage by both husband and wife, and a mutual obligation on the part of both of them seems more accurately descriptive of what actually takes place. Thus a duty by husband and wife to contribute to the marriage in ways appropriate under the varying circumstances (for each) becomes a more accurate legal formula for the present marriage pattern, than do the common law concepts of husband's duty to support and wife's duty to render services.

The concepts of duty to support and duty to render services seem to go back very close to the Norman Conquest. Both of these duties presuppose the *Capitis Diminutio Minor* of the wife upon marriage. Marriage deprived her of her legal capacity in most matters affecting property. It was said that this legal capacity was merged in her husband, and this seems a not inaccurate description that it was she who did the merging, as it were, and the husband had his own full legal capacity and the legal control of his wife during marriage besides. It was a true merger, however, in that when the husband died, the wife again had the full legal capacity of a *feme sole* which was roughly co-extensive with those of a man.

These duties to support by the husband and to render services by the wife are more deeply feudal and more oppressive in their pre-suppositions for the wife than those that developed at a corresponding time and have since prevailed in the civil law on the continent. In a word, the law of husband and wife was peculiarly tied up with feudal obligations in which the role of the wife was very much submerged and the dominance of the husband was not only incident to his own position, but also maintained because of his role in the military and governmental scheme of the feudal pyramid.<sup>2</sup> The hard thing about it in England was that this hierarchy of feudalism in its tyranny over family relations was unrelieved in any way by a significant and mature scheme of law that was predicated upon other principles.<sup>3</sup> Not so on the continent. There the Roman Law of Justinian had at least a con-

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2. 2 POLLOCK & MANTLAND, *HISTORY OF ENGLISH LAW* (2d ed. 1899) 399-405.

3. 2 POLLOCK & MANTLAND, *op. cit. supra* note 2 at 374-377.

siderable hold at the very time that feudalism was developing and the Roman Law of Justinian (qualified by the work of glossators and the commentators) gave a very sure place to the rights of the married women making her *sui juris* during marriage in many ways. Quite naturally, we think of the law of the republic in connection with the law of the family under Roman Law in which the place of women was exceedingly subordinate, to that of the paterfamilias. But the law of Justinian was qualified largely by the law of the later empire when divorce was free, the *potestas in manu* was substantially abolished, and the right to own and dispose of her own property, though a married woman, was generally established.<sup>4</sup> But the Roman Law did not prevail in England and this background of women's rights was not there to temper, or at least in some minor way alleviate, the severity of the feudal notions under which the rights of married women were substantially abolished through the device of merging them in her husband.

In this way then, however liberal the western world may think itself to be, and may indeed be with respect to the general social position of women, it remains true that there is more straight feudalism in the law of husband and wife in modern American Law, through the common law, than perhaps in any non-common law country. To put it bluntly, we are backward in this matter, and a reconsideration of our technique seems reasonable.<sup>5</sup>

We are backward on other scores in this same field. The notion of community property is not Roman in its source, but German.<sup>6</sup> It has many Roman connotations, however, from the simple fact that it is adopted generally in civil law countries all over the world, the same countries that take their general pattern from the Roman law. The notion of community property has many elements of equality for husband and wife and other factors that give dignity and separate protection to the wife far beyond the legal notions of dower and right to support that the common law conceded to married women. Although community property is not Roman, its source is what we generally call customary law,

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4. CORBETT, *THE ROMAN LAW OF MARRIAGE* (1930) 122-146.

5. I HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* (1904) 3-32; Sayre, *Husband and Wife as Statutory Heirs* (1929) 42 *HARV. L. REV.* 330.

6. MCKAY, *COMMUNITY PROPERTY* (2d ed. 1925) 23-62.

growing up in the particular localities of certain invading tribes from the plains of Russia that later over-ran most of western Europe. But these property notions were not brought by the Angles and Saxons or the Danes in their invasions of England, in the sense that they took hold at all in the new ground and became a part of English customary law. It does not appear that even the germs of community property were introduced into England in the sense that they have survived directly or indirectly. Whether we look at the vast scheme of community property, or the still more vast scheme of Roman law of the family, we find that the English common law of husband and wife is untouched by either and its bleak feudalism is unchanged or unqualified by any other legal system.

True the law of husband and wife has been greatly qualified in this country in the last hundred years by legislation. But this legislation has been piecemeal in character. Its basic presupposition has been one of changing particular concepts or abolishing particular doctrines in the common-law system. It has not attempted to qualify or even to question the basic approaches and presuppositions of the common-law, which, in this field, are so strikingly feudal. Husband's duty to support and wife's duty to render services are basic principles and sources of legal rules and concepts and doctrines. Their implications continue to govern the law even though particular rules or concepts are changed or qualified by legislation. The plain fact is that they have much of the actual original tang of the feudal way of life, and we are continuing to use them (subject to patchwork changes through legislation) although the general pattern of our present family life has perhaps gone further from feudalism than in any other modern country.

#### **Husband's Duty to Support**

If we called this not "husband's duty to support", but "husband's duty to contribute to the family", could we not in all fairness subsume under this everything that the law now, through the modern cases requires under the "husband's duty to support", but also at the same time create a judicial new start for the interpretation of this common-law duty under modern conditions?

Perhaps at the outset, complete candor requires me to say that

I want to get rid of the miserable common-law phrase on aesthetic and moral grounds as well as legal ones. "Husband's duty to support" is an offensive phrase. It is humiliating to the wife in most cases and to the husband too, if he has any real sense for the proprieties in these matters. No wife worthy of the name wants to be supported by anybody, and no husband can talk about how he supports his wife without wearing a silly grin or changing the subject as quickly as possible. As a mere matter of words to convey meaning and to describe an important part of life, the whole phrase is an abomination. In the name of good manners and common decency, it is high time that not only the legal profession but the whole human race got rid of the thing once and for all.

Under the present law, the husband's duty to support is not enforced directly, and for that matter, there is no legal way for a wife to get currency out of her husband even indirectly, although in civilized life under modern conditions for a wife to have to ask for five cents for car fare would surely be ridiculous.<sup>7</sup> There is not a plain definition of what reasonable support by the husband is in relation to his income or to any other circumstances. The wife may have an action leading to separate maintenance or divorce for non-support or she may have a basis of recovery for actual necessities in the sense that if a third person is willing to rely on his action against the husband for the goods he gives her, then she can get the goods. But even this is on the barter basis as it were and gives her no part of her husband's income in money form. Furthermore, merchants quite reasonably do not want to enter a family quarrel and rely on their right of a lawsuit against the husband for goods they give the wife.<sup>8</sup> True, she also has a right of so-called implied agency to pledge her husband's credit directly, but this also is an indirect and unwieldy method which

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7. With almost no exceptions, all rights and duties within the family are enforced indirectly rather than directly. This too was much better adapted to feudal conditions than to those of the present time where the wife does have separate property and rights to sue in tort and contract, so that a direct protection of her rights and her husband's rights is more in keeping with our actual pattern of living. Pound, *Individual Interests Involved in the Domestic Relation* (1916) 14 *MICH. L. REV.* 177.

8. *Zent v. Sullivan*, 47 Wash. 315, 91 Pac. 1088 (1907).

in theory turns upon the actual existence of a need for these articles under the particular circumstances.<sup>9</sup>

Isn't it fair to say that the wife does not want to be supported by anyone as a matter of personal duty or condescension? She has entered into a very important association called marriage and, we assume for the moment, that she intends to pledge her best efforts and perhaps risk her life itself in order that it may succeed. Any support for her individually is beside the point. We may reasonably assume that she can support herself quite well if she didn't undertake this marriage venture. What she is concerned about is her husband's share of this undertaking and her share of it, in which they both serve the marriage itself with equal dignity though with very different functions. It is good sense and strictly in keeping with the facts to talk about husband and wife contributing to the family, that is, their joint venture in marriage whether or not it may include children. In most cases under the modern pattern, the husband will earn most if not all of the money, while the wife spends at least a great deal of her time incident to the children. That is what they both want and reasonably expect.

Viewed sociologically therefore, it is a question of what the law should call a fair contribution of each party to that joint venture (marriage). This fits the modern pattern and is flexible for the inevitable variations in this pattern that the future may bring. This pattern in turn is fairly represented by our concept of the duty of both husband and wife to contribute to the family. The present common law concepts of a husband's duty to support and the wife's duty to render services do not come within gunshot of describing the results that the courts themselves now reach through the use of these feudal phrases.

#### **Wife's Duty to Render Services**

The common-law duty of the wife to render services could also be fully represented through the actual cases under a similar designation of the wife's "duty to contribute to the family." And we may say at the outset that not only does this give a judicial new-start for interpreting the modern pattern sociologically with

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9. *De Brauwere v. De Brauwere*, 203 N. Y. 460, 96 N. E. 722 (1911).

full application of the actual decisions, but it is high time that we got some presuppositions that did put teeth into the notion that women should do something in marriage. Although the phrase itself is exceedingly unpleasant and humiliating, the truth is that both in social custom and in judicial interpretation the wife's duty to render services is little better than an innocuous phrase. Indeed it does positive harm, not from its offensive wording, but from the implied sneer it casts on any duty whatever from the fact that the actual pattern of marriage is so far from the theoretical obligations.

In the old days (for better or for worse) the wife's duty to render services was a very real thing. For one thing, there were no other gainful occupations, except in the field of unskilled labor, and there was no competition between work in the home and outside it as there is now. Furthermore, rendering services in the home so far as the actual experience of most women, rich and poor, was concerned, amounted to about as full and exhausting a career as any human being would want to undertake. Generally it meant a large number of children. Furthermore, there were not the labor saving devices then that there are now. And in addition to all this, the wife was expected to be a very hard working person in carrying out her husband's social obligations. It was not a matter of taking your casual acquaintances out to dinner occasionally. It was a question of several guests almost every day in a big house and a number of visitors for several weeks at a time throughout the whole year. When these rules grew up about the wife's rendering services, it was no contemptuous phrase. It roughly described a very difficult and exhausting career for rich and poor.

But the phrase has no honest meaning under the modern pattern. The offensive name should be dropped and some new legal concept employed into which an honest and reasonable duty can be read. Refusal to bear children is not grounds for divorce now or for legal separation.<sup>10</sup> In any event, large families are exceedingly rare at present. Furthermore, there are kindergartens for the children and all sorts of gadgets for the domestic establishment so that the twenty-four hour a day job that the wife held

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10. *Reynolds v. Reynolds*, 65 W. Va. 15, 69 S. E. 381 (1912).

in feudal times practically does not occur now in a comparable sense.

Furthermore, the wife has separate property now and can work outside the home as she likes and can keep all her wages and contribute nothing to her home, while the husband continues under his common-law duty to maintain the home and support the wife anyway. The married women's separate property acts and the wife's right to her own labor and her own wages are good and sensible things.<sup>11</sup> But these changes have been piecemeal and without regard to a parallel change in the rights and duties of others that should in fairness have occurred at the same time.

Finally the whole question of the wife's inability to recover from her husband according to his agreement to pay because of her duty to render services, throws the thing out of balance again on the other side.<sup>12</sup> In a word, if this feudal notion of rendering services were interpreted now under the modern pattern of a duty to contribute to the family, then we could use all the authorities, but with some regard to the facts, and re-interpret some reasonable duties for the wife that would correspond with those of the husband, with equal dignity for both.

It would seem that both duties should remain absolute, and not one dependent on the other, but there should be honest content in the duties in each case. Thus, incident to all the indirect remedies of the wife, in enforcing which she must allege that she has been a good and faithful wife performing her obligations, it would not be possible to bar her right of recovery unless under the circumstances she made a reasonable showing of her part of contributing to the family under her particular circumstances. For instance, she could still work outside the home, but if she contributed in no way to the maintenance of the home itself, this would not be considered a fair discharge of her duty any more than it would be a discharge of her husband's duty if he took his whole income for himself as if he were unmarried. True, the courts somewhat reflect this situation now, but they do it without any dependable technique for their own results.<sup>13</sup> They do

11. 3 VERNIER, *AMERICAN FAMILY LAWS* (1935) 102-112, 192-196.

12. Warren, *Husband's Right to Wife's Services* (1925) 38 *HARV. L. REV.* 421 et seq.

13. While the marriage continues, there seems to be no way, direct or indi-

it as a patchwork of special cases or special interpretations, with no honest basic principles for evaluating all of them.

### Alimony

It is here perhaps that a new approach to the rights and duties of husband and wife is most needed. Alimony as we have it today was unknown to the common law, though we seem to treat the earlier cases at common law as if they were the direct ancestors of what our courts of equity now are doing and what our legislatures have enacted.<sup>14</sup> Divorce itself was unknown to common law, except for an occasional freak case of divorce by Parliament, which was so rare that it need hardly be mentioned even as an exception. Divorce at common law was a thing for the wealthy, and it was confined to judicial separation which did not terminate the marriage itself at all. And from the factual point of view, the whole approach was very different from anything we have now.

Since it involved the wealthy, and since the system of marriage settlements was affected, even if the court did decree alimony for the wife, it usually meant that the husband was merely paying the income to his wife in some small degree from the property he had already received from her or her family at the time of their marriage.<sup>15</sup> Furthermore, allowance for the children, which with us often is the sole payment that the husband makes, was of much smaller scope then and applied almost exclusively to little children for a short time only. The father had sole custody of the children at common law, and the social views that prevailed when these rules were growing up made it usual for the courts to consider that a father and his children were still a unit with the custody of the children almost exclusively in him even though he lived

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rect, to compel a wife to contribute to the marriage either by domestic work or by a share of her earnings outside the home. The duties of support by the husband and rendering services by the wife are absolute duties, not dependent upon performance by the other spouse. The wife may indirectly compel support through pledging the husband's credit for necessities, but the husband has no method to compel a corresponding contribution by the wife. It is recognized only upon divorce, where the courts will consider the wife's ability to earn her own living in estimating the amount of her alimony. *Arado v. Arado*, 281 Ill. 123, 117 N. E. 816 (1918).

14. Sayre, *Divorce by Judicial Decision* (1933) 18 IOWA L. REV. 493, 494-502.

15. Sayre, *supra* note 14 at 494-497.

separately from his wife. Under our practice, we think of a family breaking up, as it were, in two parts, though in truth usually the children go substantially with their mother, and after divorce the father is more likely to be the outcast, and the family group to continue in some measure through the mother and the children who remain with her.<sup>16</sup>

The theory of alimony which we persist in to this day is that the wife wants to live with her husband and work hard as before, but that his conduct makes it so far unsafe for her to do so that her life would be in danger. Since divorce was for the wealthy, and since the rules arose when women had no opportunity for earning a living as a rule except in purely menial tasks, the courts took the view that the wife was excused from rendering services since it was unsafe for her to do so however much she might want to continue to work for her husband, while his misconduct did not excuse him from continuing his duties to support his helpless wife.

It is particularly clear here that these quaint phrases, "duty to support", "duty to render services", fit the factual pattern of the times very well when the rules grew up and are a reasonable basis for the rules themselves. But we have continued the rules with a stubborn or blind persistence, when the facts out of which they grew are no longer even similar to the ones that now generally obtain.<sup>17</sup>

First, in most states, divorce for cruelty or desertion or other conventional reasons does not mean usually that either husband or wife is under serious danger of physical injury if the marriage continues. Thus, to say that the wife *ipso facto* is absolved from any duties to do anything on her side, although the husband continues to be under a duty to support his wife (in many cases even where the divorce is for the wife's own fault and the decree is awarded to the husband) is to lose all touch with reality and fairness. It is not a question of whether the wife gets too much money under the circumstances of divorce. It goes much deeper than this. It is a moral question of honest living and the basic

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16. Sayre, *Awarding Custody of Children* (1942) 9 U. OF CHI. L. REV. 672, 674-676.

17. *State ex rel. Hagert v. Templeton*, 18 N. D. 525, 123 N. W. 283 (1909). See also 2 VERNIER, *op. cit. supra* note 11 at 303-308.

dignity and honor of both husband and wife. Under the conditions of modern divorce, for a wife to get substantial support for the rest of her life while she lives in idleness, is fundamentally injurious to her and out of keeping with her own dignity. Of course, the courts in fact may reduce the alimony in such cases, and some judges will rise in righteous indignation to refuse alimony entirely. But these again are patchwork and fragmentary alleviations of a basic wrong.<sup>18</sup> In every analytical sense, the law still is that the wife is still entitled to alimony, figured on a basis of her husband's income, even though she does not render services. On the contrary, by getting the divorce for trivial reasons, she may have greatly embarrassed her husband in his business locally or in his professional work of trust, so that it is increasingly difficult for him to earn a living with which to pay her alimony.

Perhaps it is in connection with alimony that the whole law directly or indirectly protruding from the duty to support and duty to render services is most artificial and in most need of change. The old analogies and the old rules in awarding alimony no longer fit the modern pattern. The result is that the law of alimony is almost without concepts or techniques that can be discussed professionally; in a word, we are almost reduced to layman's law administered by equity judges but without recognized rules or standards or methods or techniques which can be discussed at all as bases for awarding alimony in a single litigation; or as guides by which lawyers can predict what the judges will do in future cases.<sup>19</sup> Surely there is no field of the rules of damages

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18. This patchwork characteristic is perhaps most strikingly illustrated by the doctrine in many states that a husband must continue to pay his former wife alimony (providing the decree did not expressly terminate the alimony on remarriage) even though the wife remarries. This seems to be directly contrary to the common law duty of the husband to support his wife, even apart from the very strange policy and bad taste of having one man support the wife of another man. *Galusha v. Galusha*, 116 N. Y. 635, 22 N. E. 1114 (1889).

19. *Pinion v. Pinion*, 92 Utah 255, 67 Pac. (2d) 265 (1937). This case gives as good discussion of the things to be considered in determining the amount of alimony as any case. It is amazing at times to see how the courts award alimony without pointing out the bases for their award at all. See Sayre, *supra* note 14, at 495-497.

at law or of other particular relief granted in a court of equity that is comparably vague and nebulous.

If, however, we adopt the concept of the duty of both husband and wife to contribute to the family we have not only a judicial new start in general, but a very definite basis for the amount of alimony which shall be awarded, when without some new approach we have practically none at all.

Thus if the couple have been married only a short time, there are no children, and the wife is practically as able to earn a living after the divorce as before, the duty to contribute to the family by both husband and wife might well be interpreted as very small; and little if any alimony is given to the wife, where she no longer contributes to the family at all. But if the couple has been married for some twenty years or more and have several children, and the wife has greatly aided in building up the husband's financial position, and he maneuvers a divorce almost solely that he may marry a much younger and (in his opinion) much more beautiful wife, the duties of both husband and wife might involve a very considerable alimony for the wife who is now well-advanced in years and whose services to the family in the past have precluded her from current efficiency in earning a living in present day competition. In a word, this approach would enable the courts to work out a regular scale to fit the needs in type alimony situations. It would still be a court of equity that would individualize each case and would use its discretion within this general pattern. But there would be a pattern, there would be recognized standards that would be applicable to the claims of both parties as in the law of damages at the present time. Roughly, the underlying factors incident to alimony are as well known in many cases as the underlying factors incident to the law of damages in particular tort or contract problems. Yet we have a fairly well-developed technique for fixing damages in these cases which can be discussed in court and made to fit the needs of particular cases as one would expect in a mature system of law. We have nothing similar in the law of alimony.<sup>20</sup> Once more, it is sub-

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<sup>20</sup> The law of damages in actions of law which deal with pain and suffering involve surely as difficult and nebulous a problem as the bases for alimony in divorce cases. Yet even here the law courts have a developed technique. *Lane v. Southern Ry. Co.*, 192 N. C. 287, 134 S. E. 855 (1926).

stantially layman's law, unpredictable and indeed arbitrary action by the particular judge, not because he wants it so, but because there simply is no developed technique to use in giving his judgment. Duty to contribute to the family by both parties is at least a basic presupposition for developing more detailed rules in the allocation of alimony. It is as definite and as adaptable and flexible for the development of subsidiary rules, as most of our basic rules in the law of damages now or in the law of equitable relief generally.<sup>21</sup>

And in connection with all this, it works so much better for the proper dignity and self-respect of those who honorably seek the law of divorce to meet their needs. Because so many selfish lazy women secure alimony unjustly and as a kind of "racket", many fine women whose whole lives have been lives of honorable and unselfish service may feel uncomfortable in asking alimony at all. Whatever one may think of divorce, as long as we do have divorce on the statute books and do provide for alimony, it does seem that as gentlemen as well as lawyers, we are under a duty to provide alimony which honorable people can take with self-respect. It is suggested that if this proposal about duty to support the family were generally used, there could be a well-worked out technique for awarding alimony that would in every practical sense correspond to merit and to need under the circumstances, which would curb the racketeer and protect the honorable litigant and remove some of the more serious abuses from the whole law of divorce. By doing all these things it would in turn protect the family itself.

#### Interests of Husband and Wife in the Labors and Consortium of the Other

Under the common law, the husband had a right to secure damages for the personal injury to his wife if these injuries interfered with the services which she was under a duty to render.<sup>22</sup> And by statute generally the wife may sue for loss of her expect-

21. So far as techniques go, the same may be said in such a difficult field on the equity side in the case of equitable relief against torts. Pound, *Equitable Relief against Defamation and Injuries to Personality* (1916) 29 HARV. L. REV. 640; Chafee, *Progress of the Law—Extension of Equitable Jurisdiction Beyond the Protection of Property Rights* (1921) 39 HARV. L. REV. 388.

22. *Hey v. Prime*, 197 Mass. 474, 84 N. E. 141 (1907).

ancy from the labor of the husband under his duty to support her in case of his injury.<sup>23</sup> On the property side the interests of husband and wife were well fixed in precise rules by the common law, but these in turn have been very generally superseded now by express statutory provisions. Finally, the consortium, or all those intangible elements incident to the companionship of husband and wife, may involve the legally defined interests of both husband and wife if this right of consortium is injured by third persons.<sup>24</sup> Thus the husband at common law could sue for alienation of affections if a third person interfered with this consortium, although he could not show that it involved an impairment of her services. And if this alienation of affections involved adultery (which was a crime) the husband could sue under civil liability for damages in an action for criminal conversation.<sup>25</sup> Later with the aid of statutes in many cases, the wife also had an action for alienation of affections but generally not for criminal conversation.<sup>26</sup>

Furthermore, the married women's separate property acts have very greatly affected for practical purposes, most of the other relations between husband and wife. Generally speaking, although married women may by statute hold property as if they were unmarried, these sweeping statutes do not permit suits in either tort or contract within the family.<sup>27</sup> Furthermore, although by statute husband and wife may contract with each other, this does not permit the wife to collect for services rendered within the home (even though this is construed to be the whole farm) since the wife is under a common law duty to render services within the home and there would be no consideration for the latter contract to do the same thing.<sup>28</sup> Substantially, however, wives are able to collect their wages from their husbands under modern

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23. For a history of the basis of this legislation, see 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923) 37. *Kansas Pac. Ry. Co. v. Cutter*, 19 Kans. 83 (1877). This case contains the famous discussion by Judge Brewer on the necessarily vague character of all damages in wrongful death cases.

24. *Marri v. Stamford St. Ry. Co.*, 84 Conn. 9, 78 Atl. 582 (1911).

25. *Tinker v. Colwell*, 193 U. S. 473 (1903).

26. *Oppenheim v. Kridel*, 236 N. Y. 156, 140 N. E. 227 (1923).

27. *Peters v. Peters*, 42 Iowa 182 (1875); *Drake v. Drake*, 145 Minn. 388, 177 N. W. 624 (1920); Note (1920) 4 MINN. L. REV. 538.

28. See Warren, *supra* note 12, at 427-438.

statutes if these labors are performed in the routine course of commercial or other similar activities outside the home.

In all these instances, the indirect presupposition behind both the common law rule and the modern statute is the husband's duty to support and the wife's duty to render services incident to the marriage relation. But in modern times, the scope of work within the home is very much reduced, if, as at present, we construe this duty to mean rendering services within the home. Furthermore, the loss of the wife's services to the husband, if predicated in all fairness on her services within the home, may be a very different or at least a very artificial thing compared with what it was once, when the wife's services within the home were indeed very considerable for rich and poor and under all manner of circumstances. In view of the changed circumstances it would seem that the suggested test of each contributing to the family is not only more flexible but more nearly corresponds to the actual pattern of modern life.

For instance, take the more elusive and difficult of them first and consider consortium. In a literal sense it does seem arbitrary to think of consortium in the case of married persons in the larger income brackets as literally the same thing now as it was two hundred years ago when the wife's activities were much more circumscribed within the home. But it would be a shocking thing to say that because women have greater freedom or greater scope of activity, that thereby necessarily the significance of their marriage must be less and that the intimacy with their husbands must be impaired. If you take such a view, you soon reach the postulate that the greater freedom there is the less union there is. This surely is offensive and contrary to our general presuppositions, however accurately it may seem to describe certain marriage failures. What we need is a definition of the duties of husband and wife that is at least adaptable to modern circumstances in which the women are much less in the home than formerly.

For instance, in the case of most young couples now (if we include the case of the farmers when the wives certainly join in the work on the farm) both the man and the woman work from the beginning of their marriage and usually continue so for a considerable period. Thus in fact the woman does contribute very

greatly by her earnings to the marriage and often she heroically continues to work not for any selfish or vain interests of her own, but that they may secure enough money so that she can have children and bring them up with the reasonable advantages that she feels in duty bound to give them. In a word, the whole course of her effort is unselfish from beginning to end. It involves great industry and energy on her part and it is devoted in every way to her own self-sacrifice for her husband and children and the bearing of those children themselves. This is a marriage pattern of modern times showing great devotion to the family and a great sense of unity in spite of forces that might be said to tear it apart. It is not dealt with in terms of wife's services meaning work within the home, and it does not represent the husband's alleged duty to support since in fact he is not supporting the family in full. Inevitably this elusive and most important element of consortium is not literally the same thing as it was under the former pattern. But, if such a thing is possible, it is even more precious now to both husband and wife than before, and its content splendidly developed for many people to meet the new situation in which women work outside the home. Therefore consortium should continue to be recognized as a most important interest for the law to protect, though it should not be protected under an artificial and tortuous interpretation of the old duty to support and duty to render services. It should be interpreted in terms of a dignified and realistic duty of modern life under which both husband and wife contribute to the family.

In this connection, let us make this element clear with reference to all the legal interests we have discussed. While the modern pattern may generally be one of equality in the duties to the family and its members, the common-law pattern involved separate obligations which did not carry the equal duties in a general sense. It would be unfair as well as degrading to interpret equality as identity. Of course the contributions of husband and wife are not identical, from the fact that husband and wife themselves are different. But the dignity and justice of equality does not carry with it the limiting and stultifying requirement of identity. From the very fact that our test is the duty of husband and wife to contribute to the marriage, these contributions are

expected to be different, although there is a general and dignified obligation to contribute equally though not identically.

#### Interests of the Family as an Entity

Under this heading I mean to consider some of the newer doctrines in the field of legal liability which have been predicated upon the family as a unity or as a going concern, or as an entity (according to the varied language of the courts). rather than merely a relationship that characterized in some minor way the particular persons who made up the family. In other words, until very recently we have talked mainly of family relations or domestic relations. That is, we are still talking about the individual rights of the members of the family, but we are discussing a particular group of rules which apply to those several persons with respect to their family relations as against other relations. Apparently the automobile has changed that way of thinking, and we really owe to the advent of personal injury claims due to automobiles, our developed thinking in considering the family as a unity (somewhat like a partnership or a business trust or a corporation) as against the separate members who make it up individually.

From the mere point of view of a wise allocation of loss, we had to do something about the case where papa owned an automobile that Willie ran and proceeded to injure third persons through his negligence. Under the common-law, of course, the third person had an action against Willie. But in most circumstances the car belonged to papa and Willie had no property from which a judgment against him for negligence could be satisfied. The courts might have used this to show that the automobile was a dangerous instrumentality, but they perhaps wisely were unwilling to go so far.<sup>29</sup> Instead they have generally worked out the "family automobile doctrine," fixing liability in the head of the family for injuries committed by dependent members when this head permits the automobile to be used by members of the family for family purposes.

Following this big change, there is now at least a good deal of

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<sup>29</sup> Norton v. Hall, 149 Ark. 428, 232 S. W. 934 (1921); Pratt v. Cloutier, 119 Me. 203, 110 Atl. 353 (1920).

theoretical argument in favor of making the assets of the family somewhat generally subject to judgments against any members of the family when the conduct was fairly incident to family power and family advantage. Certainly the notion of family responsibility as a unity has been very greatly strengthened in recent years. Without asserting that the family is an entity in the strict corporate sense or even in the sense of the uniform partnership act, the law shows tendencies to recognize the family at least as a flexible and varying unit for many purposes, where formerly the law saw the individual members only, and regarded the family relation as merely a particular aspect or qualification of the individual. This is a considerable development in the law, and has already had far reaching effects in the whole field of legal liability and social consequences. In this new and somewhat undefined field also, it is submitted that the test of mutual duty to contribute to the family will be much more helpful in fixing the rights and duties of the family as a unit, than the primitive notion of a separate duty in the husband to support and a separate duty in the wife to render services.

#### Conclusion

From the point of view of analysis perhaps a final word may be said. Under the common-law, the family was conceived of in these terms. Husband and wife were one. That one meant the husband legally speaking, because the wife's legal personality was merged in his during coverture. As for the children, they had individual liability, but their right to sue and be sued and all elements of control were substantially under the father until they came of age or were free from his authority. By one technique or another, therefore, the father very generally represented the whole family. In keeping with this, his duties were phrased in terms of duties to support both wife and children, and both wife and children were under a duty to render services to him. But this patriarchal system simply does not fit either the practice or the statute law of the present day. Except for this general doctrine of the common-law, of duty to support and duty to render services, together with similar general principles that flow from it (like the husband's right to sue for loss of the wife's

services) it may be said that the present practice and present statutory law is almost the direct contradiction of the patriarchal pattern of the common-law from which these relics of the past originally proceeded.

Husband and wife and children have separate rights and duties now, involving freedom of action which they formerly did not have. If we try to assert the unifying principles of the patriarchal family, we run counter to modern practice and to the whole scope of modern statute law in both property and personal relations. If, on the other hand, we do nothing to assert a duty to each other in the case of husband and wife and a duty in both of them to the family as a unity, we make the law aid the destruction of the family and the impairment of the most valuable elements of unity within the family for all cultural life. The unit is now the family and duties of husband and wife should be interpreted in terms of service to the family and thereby of course, service to each other. The common-law presupposition not of the family but of the husband, and the existence of the family expressed in law through service of the wife and children to the husband—that pattern, or presupposition or postulate is now contrary to both law and fact.

*Paul Sayre.*

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