

PARTNERSHIP MARRIAGE: THE SOLUTION TO AN INEFFECTIVE AND INEQUITABLE LAW OF SUPPORT

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Introduction

The great awakening to individual rights sparked by the civil rights movement of the fifties and sixties is permeating all the cracks and corners of law. The call for equality of individual rights and obligations and the demand for recognition of the dignity and worth of each person's contributions to society have reached family law. In particular, the increased consciousness of sex discrimination in the law is forcing a new look at how family law treats individuals.

The belief that the family is essential to the continuation of society and government has long been unquestioned.¹ Obligations and rights arising from the family relationship have been imposed by government because they are deemed necessary for the continuation of the family unit and of civilized society itself.² However, courts have refused to recognize that family obligations and family rights different from those they impose might serve society as well or better. Few courts have dared to state that the rights and obligations with which the common law courts clothed husband and wife may not be the best means of furthering the interests of the family group.

Today, for the first time, large numbers of persons are aware of what only a few have long known: that the principles developed to protect marriage and family as an institution are the most sex discriminatory in all of law. When legal rights and duties are dependent upon the sex of an individual without regard to the relevance of sex to the object of those rights and duties, sex discrimination is being used unjustly as a legal tool. This is exactly what the common law has done with regard to support obligations between husband and wife.

This article will first examine the modern law of spousal support and point out both the law's ineffectiveness in protecting the family unit and the extent to which sex discrimination is used in the process. Second, the article will propose a family partnership model as an alternative base for determining support rights and duties between spouses. The essential

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¹ *Maynard v. Hill*, 125 U.S. 190 (1888); *Reynolds v. United States*, 98 U.S. 145 (1878).

² *Garlock v. Garlock*, 279 N.Y. 337, 18 N.E.2d 521 (1939).

purpose of the proposal is to give to the law of interspousal support a means of strengthening the family unit while simultaneously according equality of rights to both spouses.

I. THE LAW OF SUPPORT: SPOUSES LIVING TOGETHER

A. *The Context of Support Obligations*

Two concepts, Christian and feudal in origin, are basic to the development of the law of support obligations in Anglo-American legal culture. The first of these, "husband as head of the household," developed from Jesus' "and they twain shall be one flesh," through the declarations of St. Paul that the wife is subject to the husband,³ to Blackstone's statement that by marriage, "the husband and wife are one person in law, that is, the very being or legal existence of the women is suspended during the marriage, or at least is incorporated and consolidated into that of the husband under whose wing, protection, and care, she performs everything."⁴ The secular American courts soon recognized that marriage ". . . is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."⁵ To preserve the marriage institution they applied the church-developed law of marriage as set out by Blackstone whose *Commentaries* was probably the most widely available law book in the country. An excellent general outline of the dimensions of the legally imposed rights and obligations of husband and wife was given by the Ohio supreme court in 1870:

Whatever may be the reason of the law, the rule is maintained, "that the legal existence of the wife is merged in that of the husband, so that, in law, the husband and wife are one person."

The husband's dominion over the person and property of the wife is fully recognized. She is utterly incompetent to contract in her own name. He is entitled to her society and her service; to her obedience and her property. All her personal chattels are absolutely his, and her choses in action when reduced to his possession, and the right to so reduce them is at his will and pleasure. He has an unqualified right to the use of her realty during coverture, and an estate for life, in the event of her death, if she bear him a child born alive, etc.

³ See, e.g., *Virginia Ry. & Power Co. v. Gorsuch*, 120 Va. 655, 661-662, 91 S.E. 632, 634 (1917).

⁴ W. BLACKSTONE, *COMMENTARIES* 445 (1813). Since numerous other Christian countries apply community property concepts of equality in marriage, researchers attribute acceptance of these particular concepts to the economic system in feudalism. See W. DEFUNIAK, & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* (2d ed. 1971); Sayre, *A Reconsideration of Husband's Duty to Support and Wife's Duty to Render Services*, 29 VA. L. REV. 857 (1943).

⁵ *Maynard v. Hill*, 125 U.S. 190, 211.

In consideration of his marital rights the husband is bound to furnish the wife a home and suitable support. He owes her protection, and is liable for her debts contracted before marriage.⁶

The Married Women's Property Acts passed in all states during the 19th Century gave the married woman control over her own earnings and property at law, but it did not affect any of the other rights and duties flowing from the concept of merger which the law had imposed upon the parties in marriage.⁷ In particular, the husband remained the essence of the household.⁸ This concept of husband as head of the household remains intact in most states;⁹ it is solidified in some by statutes which state that "The husband is the head of the family."¹⁰ The husband has power and responsibility to determine the standard of living of the family, where they shall live, how the household shall be managed and how the children shall be raised.¹¹ Only through divorce or separation is an indirect limit placed on the husband's arbitrary power to govern the household as he sees fit. The law gives the husband "almost unbounded

⁶ *Phillips v. Graves*, 20 Ohio St. 371, 380 (1870).

⁷ *Texas & Pac. Ry. Co. v. Humble*, 181 U.S. 57, 63 (1901); *Smith v. Nicholas Bldg. Co.*, 93 Ohio St. 101, 112 N.E. 204 (1915); *State v. Phillips*, 85 Ohio St. 317, 97 N.E. 976 (1912); *Pummer v. Trost*, 81 Mo. 425 (1884); *Johnston, Jr., Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U.L. REV. 1033 (1972); *Younger, Community Property, Women and the Law School Curriculum*, 48 N.Y.U.L. REV. 211 (1973); *Warren, Husband's Right to Wife's Services*, 38 HARV. L. REV. 421 and 622 (1925).

⁸ There is a general consensus of opinion that the family existed before the state, and that autocratic family government was the first of all forms of government. It seems to have been regarded as an axiom by publicists for centuries that the family was the basis of the state, and that destruction of the family would be the destruction of the state. To insure the unity and preservation of the family, there seemed to be thought necessary a complete identity of interests, and a single head with control and power. The husband was made that head, and given the power, and in return was made responsible for the maintenance and conduct of the wife.

Haggett v. Hurley, 40 A. 561, 563 (Sup. Jud. Ct. Me. 1898).

⁹ *Fallon v. Fallon*, 111 N.J. Eq. 512, 162 A. 406 (1932). In *Howell v. Ohio Casualty Insurance Co.*, 124 N.J. Super. 414, 307 A.2d 142 (1973), a New Jersey court criticized the doctrine of merger but did not attempt to abrogate or declare it invalid. See discussion in W. PROSSER, *THE LAW OF TORTS* 859 (4th ed. 1971) describing the struggle to recognize that merger no longer bars interspousal tort actions.

¹⁰ OHIO REV. CODE § 3103.02 (Page 1972); CAL. CIV. CODE § 5101 (West 1970).

¹¹ See, *Fallon v. Fallon*, *supra*, n. 9; *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953); *Sprinkle v. Ponder*, 233 N.C. 312, 64 S.E.2d 171 (1951); *Perry v. Perry*, 93 Cal. App. 2d 720, 209 P.2d 847 (1949); *Commonwealth v. George*, 358 Pa. 118, 56 A.2d 228 (1948); *Town of Milton v. Bruse*, 111 Vt. 82, 10 A.2d 203 (1940); *Eddleman v. Eddleman*, 183 Ga. 766, 189 S.E. 833 (1937); *Neville v. Neville*, 220 Ala. 57, 124 So. 107 (1929); *Cassidy v. Constantine*, 269 Mass. 56, 168 N.E. 169 (1929); *Garboctowski v. State*, 32 Del. 386, 123 A. 395 (1923); *Spafford v. Spafford*, 199 Ala. 300, 74 S. 354 (1917); *Brewer v. Brewer*, 79 Neb. 726, 113 N.W. 161 (1907); *Richardson v. Stuesser*, 125 Wis. 66, 103 N.W. 261 (1905); *Baker v. Carter*, 83 Me. 132, 21 A. 811 (1890). For a general discussion see L. KANOWITZ, *WOMEN AND THE LAW* 46-52 (1960).

discretion as to expenditures and style of living"¹² and establishes the first parameter of any right to support that either spouse may have from the other.

The second legally imposed consequence of marriage is that the husband is entitled to the wife's services in the home and that she is obligated to give those services without compensation.¹³ These services include both the duty to render manual labor in the home as well as the duty to cohabit and provide sexual services.¹⁴ The English ecclesiastical courts provided a remedy to enforce the husband's right to services in the form of an order to perform conjugal obligations or be excommunicated.¹⁵ Today legal consequences of this obligation are more indirect. The question most often arises in claims by the husband for loss of consortium when a tortfeasor has injured the wife. Again and again courts recognize that the cause of action is in the husband for loss of household services by the wife and hold that the legislation giving married women control of their earnings did not abrogate this right.¹⁶

These services of the wife in the household in the discharge of her domestic duties, in the care of the home and in the education and rearing of the children, belonged to the husband. . . . This right has not been abridged or affected by the legislation which has abrogated the common law disabilities of the wife. . . . The services for which the wife may now recover compensation in her own name . . . are services other than those rendered in the discharge of her household and domestic duties. . . .¹⁷

Only a few years ago the Ohio supreme court explained this ancient concept by stating that under the common law a wife was not a person legally but "at most a superior servant to her husband. . . ." She was ". . .

¹² Crozier, *Marital Support*, 15 BOSTON U. L. REV. 28, 33-34 (1935).

¹³ Fallon v. Fallon, *supra* n. 9; Commonwealth v. George, *supra* n. 11.

¹⁴ See, H. PILPEL AND T. ZAVIN, YOUR MARRIAGE AND THE LAW 64 (1964); Bishop, *Divorce and the Bedroom*, 8 J. FAM. L. 361 (1968); cases collected in Annot., 88 A.L.R. 2d 553 (1963).

¹⁵ When that failed to render one Sarah Holmes properly submissive, the authorities in 1778 requested the temporal courts to "take and imprison the Body of Sarah Holmes that they whom the Fear of God will not reclaim for evil ways your Majesty's Animadversion may force and compell. . . ." G.I.O. DUNCAN, THE HIGH COURT OF DELEGATES 284 (1971).

¹⁶ Texas & Pac. Ry. Co. v. Humble, *supra* n. 7; Tryon v. Casey, 416 S.W.2d 252 (Mo. Ct. App. 1967); Warren, *Husband's Right to Wife's Services*, *supra* n. 7.

¹⁷ Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 103-104, 112 N.E. 204, 205 (1915). In recent years numerous courts have recognized that a wife also has an action for loss of the husband's companionship due to injury. The court in Clouston v. Remlinger, 22 Ohio St. 2d 55, 258 N.E.2d 230 (1970), cites many cases in overruling the law which denied this cause of action in *Smith v. Nicholas Bldg. Co.* Although the Ohio court recognized the outdated nature of the concepts that the wife owed services to the husband, but was not harmed by injury to him, it stated no dicta indicating that the wife could claim for loss of her own services in the household.

only a chattel with no personality, no property, and no legally recognized feelings or rights."¹⁸

Since services in the home are presumptively owed to the husband, the woman who does earn money by tasks such as sewing for a fee or taking in boarders in her home may find that the income is her husband's, subject to execution by the husband's creditors or collectible only by the husband or his estate.¹⁹ Even when the wife performs services in her husband's business, there is some question as to whether she can recover compensation. A typical decision held that a wife working in her husband's business would be an employee for purposes of workmen's compensation only if her labor was not of a nature generally required by the marriage relationship.²⁰ For an employment relationship to exist, the husband and wife must not only have power to contract with one another but the services rendered must be ones not already required as marital duties of the wife.

In applying to legal controversies the concept that a wife's services were owed to the husband by virtue of entering the marriage, the courts were reflecting a cultural truism. The culturally defined role of wife was to contribute to the marital unit by performance of household services.²¹ That role was once of great value to the family and to society.

For centuries, in Judeo-Christian society, "woman's work" was the entire preparation of food, the production of household utensils, garments, and necessities (soap, medicines, candles, etc.), the care of farm animals, and to a large extent, work in the fields (agriculture). These and a host of other roles (together with mothering a vast brood of children) were "woman's work." . . . Woman was the first *industrialist*.²²

In terms of child bearing, production of commodities, production of clothing and food, and management of the home, the wife was directly contributing to the maintenance of the family. However, neither law nor economics recognized the value of that contribution in traditional monetary terms. The most that was acknowledged was a reciprocal duty upon the husband to support the wife. The duties, though, were reciprocal, not equal. Crozier analyzed the situation in biting terms:

¹⁸ Clouston v. Remlinger, 22 Ohio St. 2d 65, 72-74, 258 N.E.2d 230, 234-235 (1970).

¹⁹ See, Plummer v. Trost, 81 Mo. 425 (1884); cases discussed in Warren, *Husband's Right to Services*, *supra* n. 7.

²⁰ Reid v. Reid, 216 Iowa 882, 249 N.W. 387 (1933).

²¹ See, Paulsen, *Support Rights and Duties Between Husband and Wife*, 9 VAND. L. REV. 709 (1956); Younger, *Community Property, Women and the Law School Curriculum*, 48 N.Y.U.L. REV. 211 (1973).

²² Luce, *Woman: A Technological Castaway*, 1973 BRITANNICA BOOK OF THE YEAR 24, 27 (emphasis in original).

Such a situation can be explained on the theory that one of the parties has an original right to the other's labor without having to pay for it; although in no other department of life has anyone had such an ownership of the time and labor of another person since the abolition of slavery. Clearly, however, that economic relationship between A and B whereby A has an original ownership of B's labor, with the consequent necessity of providing B's maintenance, is the economic relationship between an owner and his property rather than that between two free persons. It was the economic relationship between master and slave, and it is the economic relationship between a person and his domesticated animal. In the English common law the wife was, in economic relationship to the husband, his property.²³

Today one occasionally finds a court indicating that such doctrines are archaic and ancient concepts, and stating that the wife's legal personality is no longer merged in that of her husband,²⁴ but one does not find any change in the basic requirement arising from the marital relation that the wife's total services in the home belong to the husband without compensation.

3. *The Support Obligation*

The husband has the sole responsibility to support his wife. The common law placed this duty on the husband because he owned and controlled all her property, all her earnings and her services. When the Married Women's Property Acts permitted a wife the control of her separate property, they did not relieve the husband of his duty to support her.²⁵ At that time few women owned property or earned an income outside the home, and the services performed in the home continued to belong to the husband. The basic cultural bargain continued: husband's support in return for wife's services.²⁶

²³ Crozier, *Marital Support*, 15 BOSTON U. L. REV. 28 (1935).

²⁴ *Clouston v. Remlinger*, *supra* n. 17; *Howell v. Ohio Casualty Insurance Co.*, 124 N.J. Super. 414, 307 A.2d 142 (1973). The *Howell* opinion severely criticized the unity concept, but rather than declaring it invalid, it allowed the wife to recover on an insurance policy in spite of a defense against the husband by holding that the contract rights were property held separately.

²⁵ Although there are no cases allowing an order for support while the parties lived together, there are innumerable decisions involving actions for necessities or criminal non-support enunciating the continuing duty to support. When the parties are separated, direct orders for support, for reimbursement, and for payment to third parties who supplied necessities are commonly made. See, for necessities: *Geo. H. Humphrey & Son v. Huff*, 3 Ohio App. 111 (1914); *Abraham Lincoln Memorial Hospital Corp. v. Gordon*, 111 Ill. App. 2d 179, 249 N.E.2d 311 (1969); *Kerner v. Eastern Dispensary and Casualty Hospital*, 210 Md. 375, 123 A.2d 333 (1956); cases collected in Annot., 60 A.L.R.2d 7 (1958); for reimbursement: *Spalding v. Spalding*, 361 Ill. 387, 198 N.E. 136 (1935); for direct action: *Smith v. Smith*, 86 Ohio App. 479, 92 N.E.2d 418 (1949); *Brewer v. Brewer*, 259 Ala. 149, 66 So.2d 150 (1953); *Genazzi v. Genazzi*, 343 S.W.2d 686 (Mo. Ct. App. 1961); *Etheridge v. Webb*, 210 Miss. 729, 50 So.2d 603 (1951); cases collected in Annot., 10 A.L.R.2d 466 (1950).

²⁶ Although some courts may consider the amount of money the wife earns or the amount

A possible reevaluation of this concept was reflected in statutes such as that enacted in California and copied in Ohio which stated: "Husband and wife contract towards each other obligations of mutual respect, fidelity, and support."²⁷ The wife's support obligation under these statutes was so new that lawyers claimed the meaning of such a strange statute was beyond the comprehension of lawyers dead or living.²⁸ But the statute was held to be declaratory of the common law obligation of the husband to support his wife.²⁹ The courts applied it a significant number of times, but recognized that the wife's obligation was distinctly secondary and dependent upon the husband's inability to support himself and upon her already owning property or earning income which enabled her to help the husband in his need.³⁰ The cases granting relief either involved third parties who supplied necessities or husbands and wives who were separated.³¹ These interpretations indicate a purpose to protect the public purse from needy husbands with wives who have assets. The courts did not reevaluate the basic concepts concerning support of spouses. Subsequent decisions have reaffirmed that the husband alone has a duty to support the family, so long as he is able, from property or earnings. The wife is neither obligated to contribute financially if she is able nor is she given the recognition that her household services are, in fact, a form of support of the family.

The predominant feature of the husband's duty to support the family is that it is an obligation defined and controlled solely by him and is not enforceable by the wife. As the head of the household, he sets the standard of living for the family and is only obligated to support the wife at that level.³² The classic illustration of the inability of the wife to in-

of her assets in determining the amount the husband should pay, there is consensus that the husband's duty of support is not relieved by her wealth. See, *Churchward v. Churchward*, 132 Conn. 72, 42 A.2d 659 (1945); *Ewell v. State*, 207 Md. 288, 114 A.2d 66 (1955); *Ott v. Hentall*, 70 N.H. 231, 47 A. 80 (1900); *Grishaver v. Grishaver*, 225 N.Y.S. 2d 924 (Sup. Ct. 1961); *Coleman v. Coleman*, 37 Ohio App. 474, 175 N.E. 38 (1930); *Heflin v. Heflin*, 177 Va. 385, 14 S.E.2d 317 (1941); *Waldrop v. Waldrop*, 222 Ala. 625, 134 So. 1 (1931). Cases collected in Annot., 10 A.L.R. 2d 466 at 529 (1950) and Annot., 1 A.L.R. 3rd 208 (1965).

²⁷ CAL. CIV. CODE §§ 155, 176, 243 (West 1954); OHIO REV. CODE § 3103.01 (Page 1972); IDAHO CODE §§ 32-901, 32-915 (1963); MONT. REV. CODES ANN. §§ 36-101, 36-122 (1961); N.D. CENT. CODE § 14-07-01 (1971).

²⁸ *Hickle v. Hickle*, 6 Ohio C.C.R. 490 (1892).

²⁹ *Humphrey & Sons v. Huff*, 3 Ohio App. 111 (1914).

³⁰ *Hagert v. Hagert*, 22 N.D. 290, 133 N.W. 1035 (1911); *Labadie v. Henry*, 132 Okla. 252, 270 P. 57 (1928); *Klump v. Klump*, 96 Ohio App. 93, 121 N.E.2d 273 (1954).

³¹ See, *Hausser v. Ebinger*, 161 Ohio St. 192, 118 N.E.2d 522 (1954); *Smith v. Snapp*, 16 Ohio Op. 2d 304, 175 N.E.2d 333 (1961); *In re Milholland*, 30 Ohio N.P. (n.s.) 563 (1933); *Livingston v. Super. Ct. of Los Angeles County*, 117 Cal. 633, 49 P. 836 (1897).

³² *Coe v. Coe*, 313 Mass. 232, 46 N.E.2d 1017 (1943); *Pattberg v. Pattberg*, 94 N.J. Eq. 715, 120 A. 790 (1923); See, *Gimbel Bros., Inc. v. Pinto*, 188 Pa. Super 73, 145 A.2d

fluence the level of support given her is *McGuire v. McGuire*³³ in which the husband owned assets worth more than \$100,000 but forced the family to live in a home without bathroom, kitchen sink or adequate furnace and would not give the wife money for church or charities. The court would not, however, make an order to assure the wife a better level of support. In *Commonwealth v. George*,³⁴ the wife sought an order for a definite amount of money because she wished control over some of the finances and because she did not wish to "have to ask for fifty cents." She was not successful. So long as the law gives the total dominance of the household to the husband, courts' pronouncements of a right to support in the wife are trappings without substance.³⁵

Not only does the husband set the level of his obligation, but if he ceases to perform it, there is generally no enforcement mechanism given to the wife.³⁶ No direct action is permitted by the wife to enforce her "right to support" if she remains living with the husband.³⁷ The Supreme Court of South Carolina in a recent suit involving separated spouses recognized that removing a remedy for enforcement of support would relieve the husband of the obligation to support.³⁸ As a practical matter, that is exactly the situation of the wife who is living with her husband. So long as she is denied any direct action against the husband, her right to support is meaningless. She has no right to an allowance, no right to any fixed amount of money under her personal control, no right to a claim against the husband's earnings or his property.

865 (1959), where the husband had stated, "To be successful, you have to look successful" and was held liable for a mink coat!

³³ 157 Neb. 226, 59 N.W.2d 336 (1953).

³⁴ 358 Pa. 118, 56 A.2d 228 (1948).

³⁵ The best she might be able to achieve is a divorce for his cruelty in refusing to allow them to live reasonably in view of the amount of income he has. See, *Miller v. Miller*, 320 Mich. 43, 30 N.W.2d. 509 (1948); *Jordan Marsh Co. v. Cohen*, 242 Mass. 245, 136 N.E. 350 (1922); *DeBrauwere v. DeBrauwere*, 203 N.Y. 460, 96 N.E. 722 (1911); *Grishaver v. Grishaver*, 225 N.Y.S.2d 924 (Sup. Ct. 1961).

³⁶ One wonders why so little recognition of this fact has been accorded in legal literature. A contributing factor is that like the tricky weavers of the Emperor's new clothes there were those who mislead us. The great Roscoe Pound stated that the wife had a direct action to enforce her right to support, but the cases he cited were ones involving *separated* husbands and wives. Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 195 n. 83 (1916). A second article gave the same misleading impression some years later. Brown, *The Duty of the Husband to Support the Wife*, 18 VA. L. REV. 823, 846 (1932).

³⁷ *Smith v. Smith*, 86 Ohio App. 479, 92 N.E.2d 418 (1949); *Chittenden v. Chittenden*, 22 Ohio C.C.R. 498 (1901); *Etheridge v. Webb*, 210 Miss. 729, 50 So. 2d 603 (1951); *Elsley v. Elsley*, 297 S.W. 978 (Mo. App. 1927); cases collected in Annot., 6 A.L.R. 65 (1920) and Annot., 10 A.L.R. 2d 466 (1950); *Paulsen, Support Rights and Duties Between Husband and Wife*, 9 VAND. L. REV. 709 (1956).

³⁸ *Towles v. Towles*, 256 S.C. 307, 182 S.W.2d 53 (1971).

It seems clear that the continuance of the wife's privilege of living with the husband . . . is the substance of what is called her right of support. . . .

So long as the spouses are living together, the wife's right of support is not a right to any definite thing or to any definite amount even in proportion to the husband's means. . . . To be sure, it is said that he should support her in accordance with his means, but that is no more than an ideal, with which he may or may not comply.³⁰

There are a number of explanations for the courts' refusal to recognize a remedy for the wife's right to support while the parties live together. A very technical explanation at common law was that the wife had no legal existence. If she could not sue others in her name she likewise could not sue her husband.⁴⁰ A more likely explanation was the judicial reflection that the husband's authority in the home was not to be questioned and the belief that if the wife could live with him surely she could influence him to provide adequately for her. An acknowledged purpose was that of keeping the parties together. As late as 1962 a New York court justified its refusal to grant a support order to a wife who was still living with her husband, saying, "The court should not encourage a separation by granting temporary support in which event the wife would move from the marital residence, if otherwise she might not."⁴¹ The thought was that by ordering money paid to her, the court would render the wife capable of leaving the husband. This is a clear recognition of the old notion that keeping the wife barefoot will indeed keep her in the home. At a time when women could not obtain employment or when they had minor children to care for, this was surely an effective method of forcing the wife to continue to live in the household with the husband. In the New York case, the wife who had been beaten by the husband but who was without friends or relatives or a job to provide economic aid was probably compelled to remain with him. Forcing the wife to endure mistreatment at the hands of the husband until destitution became a more attractive alternative for her did keep families together—for a while. Whether it has that effect today is doubtful, and whether it is the best alternative for the good of society may also be questioned. But the courts apparently assume its effect and will not be responsible for enabling a woman to leave her husband.

A second acknowledged aim of the courts in refusing to order support payments while the parties live together is their reluctance to become

³⁰ Cozier, *Marital Support*, 15 BOSTON U.L. REV. 28, 33 (1935). See also, *Commonwealth v. George*, 358 Pa. 118, 56 A.2d 228 (1948); *McGuire v. McGuire*, 157 Neb. 226, 59 NW 2d 336 (1953).

⁴⁰ *Sodowsky v. Sodowsky*, 51 Okla. 689, 152 P. 390 (1915).

⁴¹ 16 App. Div. 2d 409, 411, 228 N.Y.S. 2d 470, 472 (Sup. Ct. 1962).

involved in handling relatively minor intra-familial grievances. The courts do not see themselves as budget makers for family units. Holding that a criminal statute under which the court could order payments applied only when the parties were separated, the court said:

The statute was never intended to constitute a court a sounding board for domestic financial disagreements, nor a board of arbitration to determine the extent to which a husband is required to recognize the budget suggested by the wife or her demands for control over the purse strings.⁴²

One suspects that the courts fear a burdensome caseload, or perhaps a type of caseload which judges are not well equipped to handle. The courts seem to be reasoning that they will have to draw the line somewhere as to what grievances they will hear, and they are drawing the line at the family level.⁴³ This reasoning is unsound in light of the courts' insistence that marriage and the family are the foundation of society and civilization. How ironic it is that the courts' refusal to entertain these requests indirectly encourages a separation of the parties and a complete breakdown of the family unit. Only in separation does the right to support find legal substance. Until then the right to support is no more than the wife's right to live with the husband and render to him sufficient household and sexual services to obtain her support.

Attempts to achieve enforceable rights by private agreements have been unsuccessful. Husbands and wives, aware of the failure of the law to accord the wife specific or enforceable rights to support, have sought to do so by private agreement. They have been unsuccessful in these attempts. The common law duty of support is imposed by operation of law as an incident of the marital relationship, rather than as a legal obligation sounding in contract. The courts uniformly adopt the view that the legally imposed incidents of marriage cannot be modified. As the court in *Maynard v. Hill* held:

The consent of the parties is of course essential to its existence, but when the contract to marry is executed by marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and hold the parties to various obligations and liabilities.

⁴² Commonwealth v. George, 358 Pa. 118, 121, 56 A.2d 228, 231 (1948).

⁴³ There is also an element of wishful thinking in some opinions. Viewing the marriage relation as unitary was more important than allowing reimbursement to a wife who may have intended to "loan" her husband money during the marriage in *Rey v. Rey*, 279 So. 2d 360 (Fla. Ct. App. 1973). The court said it was degrading to the institution of marriage to see dissolution degenerate into a battle between accountants and that allowing a judgment for the money would be "totally incompatible to the unity concept of marriage."

It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and society, without which there would be neither civilization nor progress.⁴⁴

A few states, such as Ohio, freeze this judicially announced concept in statutes: "Husband and wife cannot, by any contract with each other, alter their legal relations, except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation."⁴⁵

Consequently, a private contract between the parties to alter the husband's support obligation is invalid, on the theory that the duty of support is so important to the preservation and stability of the marital relationship that variation is against public policy and therefore void.⁴⁶ A fortiori, a wife's promise to provide support for the family is unenforceable,⁴⁷ as is her promise to make periodic payments to her husband.⁴⁸ Since nothing in the law now obligates a wage earning or propertied wife to contribute to the support of the family, it is impossible for spouses who desire an enforceable support obligation in the wife as well as the husband to achieve it.

The obligations are unalterable not merely as a matter of public policy. Courts have held that the husband's promise of support even at a fixed level is not adequate consideration for a contract with his wife, as he is promising no more than he is already obligated by law to do.⁴⁹ The same reasoning has been used to discount the wife's promise to render services in the home in return for a fixed compensation or amount of support.⁵⁰

The inability of husband and wife to alter their relationships by contract renders it impossible for a wife to have a legal guarantee of a fixed

⁴⁴ *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

⁴⁵ OHIO REV. CODE § 3103.06 (Page 1972).

⁴⁶ *Towles v. Towles*, 256 S.C. 307, 182 S.E.2d 53 (1971); *Garlock v. Garlock*, 279 N.Y. 337, 18 N.E.2d 521 (1939); *Williams v. Williams*, 29 Ariz. 538, 243 P. 402 (1926); *VanKoten v. VanKoten*, 323 Ill. 323, 154 N.E. 146 (1925); *French v. McAnarney*, 290 Mass. 544, 195 N.E. 714 (1935); *In re Simonson*, 165 Wis. 590, 160 N.W. 1040 (1917).

⁴⁷ *Corcoran v. Corcoran*, 119 Ind. 138, 21 N.E. 469 (1889).

⁴⁸ *Brewer v. Brewer*, 79 Neb. 726, 113 N.W. 161 (1907); *Poor v. Poor*, 8 N.H. 307 (1836).

⁴⁹ *See, In re Ryan's Estate*, 134 Wis. 431, 114 N.W. 820 (1908); *Garlock v. Garlock*, 279 N.Y. 337, 18 N.E.2d 251 (1939).

⁵⁰ Attempts to relinquish the husband's right to the wife's services so that she could then contract with him for them have generally been doomed to failure. The reasoning is that even though the Married Women's Property Acts enabled the wife to contract freely with her husband, they did not emancipate her from the duty of rendering services to him without compensation; thus her promise to perform them could not constitute consideration. *Ritchie v. White*, 225 N.C. 450, 35 S.E.2d 414 (1945); Warren, *Husband's Right to Services*, *supra* n. 7; *But see, O'Day v. Meadows*, 194 Mo. 588, 92 S.W. 637 (1906).

level of support within the ongoing marriage. The *Garlock* decision, which held invalid a contract between unseparated spouses for a fixed level of support, mentioned that such an agreement would interfere with a desired flexibility in family economic affairs.⁵¹ Since a wife has no remedy available to enforce support payments, "desired flexibility" means that it is desirable that the husband have the arbitrary power to decide how he will support the family.

In only one area will courts uphold a contract between parties living together which provides for a fixed level of support: that is in the case of a "reunion" agreement. In *Adams v. Adams*,⁵² the parties were having marital problems. The wife agreed to take the husband back if he would make a weekly cash payment. The court enforced the contract which required a \$100 weekly payment to the wife as a reunion agreement.⁵³ Considering the lack of remedies for enforcement of support obligations in an ongoing marriage, it appears that the only way a married woman can insure adequate support and compensation for her services in the home is by separating from her husband and insisting on a contract guaranteeing a fixed level of support as a prerequisite to resumption of cohabitation. This solution is tragic. Courts refuse to enforce support obligations when the parties are living together because of a fear of breaking up the matrimonial home. By this refusal, purportedly based on strengthening the family unit, courts indirectly create reasons for terminating the marriage.

C. Rights of Others Relating to Spouses' Support Obligations

There are currently four legal avenues through which third parties or the state may seek enforcement of support obligations. These include (1) an action for necessities, (2) family expense statutes, (3) poor laws, and (4) criminal non-support laws. The first of these, an action for necessities, is a right of action belonging to a creditor to whom the wife has pledged her husband's credit. The wife living with her husband is empowered by the common law to pledge his credit for the purchase of necessities for herself and the family. This has been described as the remedy afforded to her if the husband fails in his obligation of support.⁵⁴

⁵¹ *Garlock v. Garlock*, 279 N.Y. 337, 18 N.E. 2d 251 (1939).

⁵² 17 N.J. Misc. 234, 8 A.2d 214 (1939).

⁵³ But even in reunion contracts great care must be exercised to make them valid. In *Towles v. Towles*, 256 S.C. 307, 182 S.E.2d 53 (1971), the court held such an agreement invalid because the wife promised not to bring any action against the husband for support. The court held that without a remedy there was no right to support and, therefore, the contract was void as removing the husband's obligation to support. See also, *Terkelsen v. Peterson*, 216 Mass. 531, 104 N.E. 351 (1914).

⁵⁴ *Ewell v. State*, 207 Md. 288, 14 A.2d 66 (1955).

The right is actually not the right of the wife, but a right of action belonging to the supplier which he may assert against the husband. Nothing in the wife's "right to support" places any obligation on a supplier to provide necessaries for her. Only if the wife can persuade the merchant to sell to her on the husband's credit can she benefit. Court decisions reveal that even in the days of the friendly corner grocer a wife found it difficult to obtain her needs through this device. The Iowa supreme court pointed out:

The wife may find it difficult, if not impossible, to obtain a continuous support in this way, since such dealers and professional men would be unwilling to supply their articles or services if thus compelled to resort to litigation in order to secure their pay. Here then is a plain legal duty of the husband for the violation of which no adequate remedy . . . can be had. . . .⁵⁵

In addition to a merchant's general reluctance to pursue an unconsenting debtor, the burden of proving his cause of action is so onerous that it will discourage him from supplying the wife with her needs unless the husband has actually agreed to pay.⁵⁶ First, he must prove that the items supplied were indeed necessaries: items needed and appropriate to the standard of living which the husband had established for the family.⁵⁷ Second, the merchant must establish that the husband was not already supplying the needs of the wife.⁵⁸ A merchant will be hard-pressed to determine whether a specific item is "necessary" since the definition of that term varies with the family situation. In *Bloomington Bros. Inc. v. Benjamin*,⁵⁹ the court held that whale meat and caviar were "necessaries" because, "in the gilded world wherein the Benjamins moved, whale meat and caviar may very well have been regarded as plain but honorable." At its best the action for necessaries might benefit the Mrs. Benjamins of the world. A merchant would take the risk of collecting from the wealthy man, but there is no incentive for him to supply the middle or low economic classes in this fashion.

The merchant also runs a risk that the wife has wrongfully left the husband, for only wives who are living with their husbands or who have separated with good cause have the power to pledge their husband's

⁵⁵ *Graves v. Graves*, 36 Iowa 310, 14 Am. Rep. 525 (1873) quoted in *Avery v. Avery*, 17 N.W.2d 820, 821 (Iowa 1945).

⁵⁶ See cases collected in Annot., 60 A.L.R. 207 (1958).

⁵⁷ *Ewell v. State*, 207 Md. 288, 114 A.2d 66 (1955); *Labadie v. Henry*, 132 Okla. 252, 270 P. 57 (1928); *Hinton Dept. Co. v. Lilly*, 105 W. Va. 126, 141 S.E. 629 (1928); *Woodward & Perkins v. Bonner*, 43 Vt. 330 (1870).

⁵⁸ *Saks & Co. v. Bennett*, 12 N.J. Super. 316, 79 A.2d 479 (1951); *James McCreery & Co. v. Martin*, 84 N.J. L. 626, 87 A. 433 (1913); *Keller v. Phillips*, 39 N.Y. 353 (1868).

⁵⁹ 200 Misc. 1108, 1110, 112 N.Y.S.2d 33, 35 (N.Y. City Ct. 1955).

credit.⁶⁰ Overall it is obvious that pledging the husband's credit for necessities is a less than satisfactory means of enforcing a supposed right to be supported.

The second method of enforcing support obligations by third party action is through Family Expense Statutes which were passed in many jurisdictions in conjunction with the Married Women's Property Acts.⁶¹ Their purpose may have been to soothe creditors who feared loss of the wife's property as an asset for payment of family debts when the husband no longer had control of her property. For the first time the wife's property under these statutes is directly subject to the obligation for family support.

The Missouri statute states that annual products of the wife's separate real estate "may be attached or levied upon for any debt or liability of her husband, created for necessities for the wife and family. . . ."⁶² A similar statute subjects the wife's personal property to such execution.⁶³ This has been held to be a legislative continuation of the common law liability of the wife's property for the husband's debts.⁶⁴ Although Missouri courts hold that no direct personal obligation for support of the family is created against the wife,⁶⁵ the statute clearly continues the common law practice of allowing creditors to take the wife's property prior to or in lieu of the husband's to satisfy debts for necessities.⁶⁶

In states such as Iowa and Illinois the family expense statute is worded more broadly:

The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefore, and in relation thereto they may be sued jointly or separately.⁶⁷

Both of these states' courts have held that the statute creates not only a

⁶⁰ *Abraham Lincoln Memorial Hosp. Corp. v. Gordon*, 111 Ill. App. 2d 179, 249 N.E.2d 311 (1969); *Kerner v. Eastern Dispens. & Casualty Hosp.*, 210 Md. 375, 123 A.2d 333 (1956); *Cowell v. Phillips*, 17 R.I. 188, 20 A. 933 (1890).

⁶¹ III VERNIER, *AMERICAN FAMILY LAWS* § 160 (1935).

⁶² REV. STAT. MO. § 451.260 (1952); *See also Megraw v. Woods*, 93 Mo. App. 647, 67 S.W. 709 (1902); *Ault v. Eller*, 38 Mo. App. 598 (1890).

⁶³ REV. STAT. MO. § 451.250, (1952); *Dougherty v. McClelland*, 192 Mo. App. 498, 182 S.W. 766, (1916); *Harned v. Shores*, 75 Mo. App. 500 (1898).

⁶⁴ *D. M. Osborne & Co. v. Graham*, 46 Mo. App. 28 (1891); *Gabriel v. Mullen*, 111 Mo. 119, 19 S.W. 1099 (1892).

⁶⁵ *Towles v. Owsley*, 44 Mo. App. 436 (1891); *Harned v. Shores*, 75 Mo. App. 500 (1898).

⁶⁶ A due process challenge to this statute was ineffective in *Gabriel v. Mullen*, 111 Mo. 119, 19 S.W. 1099 (1892). *Quaere*: what decision today?

⁶⁷ ILL. REV. STAT. ch. 68, 15 (Smith Hurd 1959).

charge against the wife's property but also personal liability.⁶⁸ The Illinois courts have also held that "family expenses" are not so broad as those for necessities. Family expenses must be items which benefit or mutually affect the members of the family generally, whereas necessities may be personal and individual items.⁶⁹ This type of family expense statute does nothing to create direct personal rights for support in either spouse, but it represents a weak move toward equality of responsibility for family support at least on the part of spouses who have property.⁷⁰

Another type of statute, also inaugurated at the time of the Married Women's Property Acts, retains the concept that the husband's property and labor are primarily responsible for support, but obligates the wife to provide support when the husband is unable to do so.⁷¹ These statutes create a direct support obligation upon the wife for which she is not entitled to obtain reimbursement from the husband.⁷² But this obligation is secondary in the sense that it does not exist until the husband is disabled. However, like the common law right of support no direct action is created by these statutes for parties living together. The right is merely that of creditors.

Poor laws or family responsibility statutes are a third means of enforcing support and are presently in force in thirty-three states. These laws impose an obligation upon certain persons to support relatives.⁷³ In the tradition of the Elizabethan poor laws, these laws function as welfare or private assistance measures and serve to shift financial burdens which would otherwise threaten or tap the public purse. Consequently, such remedies as are provided are designed to secure minimum support

⁶⁸ *Frost v. Parker*, 65 Iowa 178, 21 N.W. 507 (1884); *Hayden v. Rogers*, 22 Ill. App. 557 (1887); *Carson Pirie Scott & Co. v. Hyde*, 39 Ill.2d 433, 235 N.E.2d 643 (1968). See cases collected in Annot., 15 A.L.R. 781 (1921) for other states and other variations in interpretation.

⁶⁹ *Hyman v. Harding*, 162 Ill. 357, 44 N.E. 754 (1896).

⁷⁰ It has been stated that the husband's primary obligation of support continues so that the wife may obtain reimbursement from him for her money or property involuntarily expended for support, H. CLARK, *LAW OF DOMESTIC RELATIONS*, 187, (1968), but this does not seem to be true when the parties remain living together. See *Spalding v. Spalding*, 361 Ill. 387, 198 N.E. 136 (1935); *Courtright v. Courtright*, 53 Iowa 57, 4 N.W. 824 (1880); 41 AM. JUR. 2d *Husband & Wife* § 335 (1968).

⁷¹ OHIO REV. CODE § 3103.03 (Page 1972); CAL. CIV. CODE § 5132 (West 1970).

⁷² *Hausser v. Ebinger*, 16 Ohio St. 2d 192, 118 N.E. 2d 522 (1954). But see *Sodowsky v. Sodowsky*, 51 Okla. 689, 152 P. 390 (1915), where the court stated a wife who was not being supported could extend credit to the husband and collect from him just as a third party could under the portion of the statute authorizing actions by those who supply necessities.

⁷³ Analyses of these laws can be found in Mandelker, *Family Responsibility Under the American Poor Laws*, 54 MICH. L. REV. 497, 607 (1956) [hereinafter cited as Mandelker] and in Tully, *Family Responsibility Laws: An Unwise and Unconstitutional Imposition*, 5 FAM. LAW Q. 32 (1971).

necessary for sustenance and health.⁷⁴ Even though the statute may state that one spouse is obligated to support the other, these statutes are not employed to enforce the common law duty of support.⁷⁵ Because the poor laws serve only a welfare purpose, Mandelker suggested that those entitled to common law support, wives and children, should be removed from the poor laws. If necessary, he suggested a direct action by children against their parents for suitable support should be created.⁷⁶ He did not suggest creating a direct action between spouses. This is probably because he mistakenly believed that it already existed.⁷⁷

The poor laws are not a method of enforcing the common law duty of support. Even though public officials or even one spouse might obtain money from the other under the family responsibility statutes, it would be a minimal amount. The statutes serve the very poor; they are not a codification or additional remedy available for enforcement of the wife's common law right of support.

Another statutory attempt to enforce support is found in the criminal non-support laws; nearly all states make it a criminal offense for a husband to fail to support his wife.⁷⁸ Two substantive limitations on this criminal offense in most jurisdictions demonstrate that these statutes do not give a remedy for enforcing the common law duty of support. First, most statutes require both desertion or abandonment and non-support so that by their terms they are not applicable to the woman still living with her husband.⁷⁹ The husband may not desert his wife and starve her, but he may stay at home and starve her. This reflects the traditional hesitancy to accord legal sanctions for matters within the ongoing family. Second, in most states the statutes provide that the wife must be "necessitous" or destitute, in the sense of not being supplied with the bare essentials of life by anyone, in order to sustain conviction.⁸⁰ The Missouri courts' attitude was extreme. In *State v. Ball* the court said: "In order for

⁷⁴ Mandelker found that 2/3 of the statutes create a remedy only in a public official, but that many courts have also permitted the needy individual to obtain an order for payment. Mandelker at 608.

⁷⁵ Mandelker at 503.

⁷⁶ Mandelker at 508.

⁷⁷ He cited Brown's misleading article, *supra* note 36, in stating, "Most courts now allow the wife to sue the husband directly for support," Mandelker at 498-99 n. 2.

⁷⁸ Ohio was a rarity with no crime unless the wife was pregnant, OHIO REV. CODE §§ 3113.01, 3113.99 (Page 1972), until January 1, 1974, when H.B. 511 became effective. In modernizing the entire criminal code it brought into being OHIO REV. CODE § 2919.21 which makes it a misdemeanor for any person having a duty of support to fail to provide adequate support.

⁷⁹ See discussions and cases cited in H. CLARK, LAW OF DOMESTIC RELATIONS 202 (1968) and Jones, *The Problem of Family Support: Criminal Sanctions for the Enforcement of Support*, 38 N.C.L. Rev. 1 (1959).

⁸⁰ See cases collected in Annot., 36 A.L.R. 866 (1925).

the state to make a case . . . [in prosecution for wife and child abandonment] it must appear that the wife or the child or children are actually in need of necessary food, clothing, and lodging."⁸¹ A husband was not guilty when the wife had necessary food, clothing, and lodging through her own efforts,⁸² or through generosity of relatives.⁸³ In jurisdictions where these interpretations persist, the purpose of the criminal law is obviously to protect the public from support of deserted wives and nothing more.

Recent experience in Missouri reflects what is currently the more common practice: to use criminal penalties without requiring that the wife and children be on welfare or actually destitute. The Missouri law was amended in 1947 to omit the requirement of abandonment of wife and to change the requirement of destitution to "neglect" or refusal "to provide adequate support."⁸⁴ However, the statutory changes have not been the equivalent of enforcing the common law duty of support. The analogous situation in *State v. Davis*⁸⁵ is illustrative. An order for child support had been given in connection with granting a divorce. When a criminal prosecution for non-support was brought, it was argued that the defendant-father would be guilty only if he had the capacity to pay the amount ordered in the civil action. The Missouri supreme court held that the criminal action did not serve as enforcement of amounts ordered for child support in a divorce action. It defined "adequate support" as that "reasonably suitable to the condition in life and commensurate with the defendant's ability,"⁸⁶ but held that the State did not have to prove that defendant had the capacity to provide as much as the support called for by the divorce decree. The aim of the statute seems to be to provide criminal penalties to assure somewhat better support of dependents but not to function as a state controlled remedy for the level of support that the marital relation requires. The possibility of greater obligations arising from the marriage contract remains.

In a few states the criminal statutes require neither desertion or necessitous circumstances. Connecticut's criminal non-support statute states:

⁸¹ *State v. Ball*, 157 S.W.2d 262 (Mo. Ct. App. 1942).

⁸² *State v. Higbee*, 110 S.W.2d 789 (Mo. Ct. App. 1937).

⁸³ *State v. Thornton*, 233 Mo. 298, 134 S.W. 519, 32 L.R.A. (n.s.) 841 (1911).

⁸⁴ Mo. Laws 1947, vol. 1, p. 259. This amendment's specification in regard to support of children that it was immaterial whether or not they suffered actual want or destitution was applied to wife support in *State v. Roseberry*, 283 S.W.2d 652 (Mo. Ct. App. 1955) citing Laws 1953, p. 424. However, the section was broken into two sections by Laws 1965, p. 669, and that reference to wife was dropped, apparently inadvertently. The pertinent law is now REV. STAT. MO. § 559.353 (Supp. 1974).

⁸⁵ *State v. Davis*, 469 S.W.2d 1 (Mo. 1971).

⁸⁶ *Id.* at 4.

(a) [a]ny person who neglects or refuses to furnish reasonably necessary support to his wife, child under the age of eighteen or parent under the age of sixty-five shall be deemed guilty of non-support and shall be imprisoned not more than one year Such court may suspend the execution of any jail sentence imposed, upon any terms or conditions that it deems just [a]nd . . . may order that the person convicted shall pay through the family relations division of the circuit court, such support, in such amount as the court may find commensurate with the necessities of the case and the ability of such person, for such period as the court shall determine.⁸⁷

Here a remedy seems to be available for enforcement of the husband's common law duty of support, but a closer look, through the perspective of case law interpretation, shows that the non-support statute provides such a remedy in only limited situations. The statute goes on to provide that "A written agreement to support . . . made with the family relations division of the circuit court by the liable relative and filed with said court, shall have the same force and effect as an order of support by the circuit court"⁸⁸ The apparent purpose of the procedure is to achieve an out-of-court agreement with the man under which he will make payments to the family relations division to be handed over to his family or to reimburse the welfare department.⁸⁹ A Connecticut decision is sometimes cited as authority for the proposition that the order of support will be arrived at just as in a civil non-support suit.⁹⁰ The language of *State v. Moran* sounds promising:

To support a wife, in the commonly accepted meaning of the phrase, means more [sic] to supply her with barely enough to keep her from being a pauper or an object of charity, or from being in danger of falling into that condition. To support a wife is to furnish her with such necessities as the law deems essential to her health and comfort, including suitable clothing, lodgings, food, and medical attendance. What they are in kind and amount is to be determined in each case by the means, ability, social position, and circumstances both of the particular husband and of his wife.⁹¹

However, there are no facts outlined in the case report to indicate that claim for support above the subsistence level was being sought. In fact, the question before the court was whether or not the trial court erred in overruling a demurrer by the defendant on the grounds that the infor-

⁸⁷ CONN. GEN. STAT. REV. § 53-304(a) (1974-1975 Supp.).

⁸⁸ *Id.*

⁸⁹ Satlow, *The Poor Have Children* 20-24 (unpublished senior studies paper from Yale Law School) (1966).

⁹⁰ H. CLARK, *LAW OF DOMESTIC RELATIONS* 202 (1968). See also Annot., 36 A.L.R. 2d 56 (1925).

⁹¹ 99 Conn. 115, 120, 121 A. 277, 279 (1923).

mation did not state facts sufficient to show that the accused had violated a statute of the state, in that the information did not allege that "either his wife or his child is or may become a public charge by reason of his neglect or refusal to support them."⁹² The court's language is understandable in light of the defendant's contention. The court would not want to require a showing such as that required in Missouri that a man's wife or child was actually destitute as a prerequisite to invoking the statute. The court would want to extend the remedy to wives and mothers who were not likely to become a public charge because of outside support from relatives, but who were receiving no support from their husbands.

A later pertinent case is *State v. Boyd*,⁹³ quoting *State v. Moran* as precedent for its determination that the purpose of Connecticut's criminal non-support statute is not only to protect the public purse, but also to provide directly for unsupported wives and children. But again the facts of the case do not call for arriving at the amount as in a civil action. The suit was brought at the instance of the state welfare department which was providing support for the defendant's minor son through its aid-to-dependent-children program. The court held that being on welfare is not a precondition for invoking the remedy and that the purpose of the statute was to "provide directly" for wives and children. This allows a wife or child who is not being provided for to seek the assistance of the family relations department as a "collection agency" without having to go through the humiliation of applying for welfare as a condition precedent to invoking a criminal action for support. The uncertain effect of these two decisions coupled with the actual practice in Connecticut of utilizing the criminal action only on behalf of persons who have been deserted and who have little or no financial help⁹⁴ suggests that even there the common law duty of support is not enforced by the state.

The Maryland decision in *Ewell v. State*⁹⁵ quoted the *Moran* case and

⁹² *Id.* at 116, 121 A. at 278.

⁹³ *State v. Boyd*, 4 Conn. Cir. 544, 236 A.2d 476 (1967).

⁹⁴ Satlow, *supra* note 89 at 20-25, described the following situation: In over half the cases brought to court, the family is on welfare. In these cases the criminal non-support proceeding functions as a means for reimbursing the public purse. The majority of the remaining cases are initiated by wives who complain of lack of support. And the rest of the cases, a very small proportion, are born out of situations where a couple comes to the family relations department for counselling or is referred to the department by the circuit court after being arrested for breach of the peace. It is this small margin of cases that are likely to involve married couples living together. But the family relations division's normal procedure is to threaten arrest for non-support if the husband refuses to sign a support agreement worked out by the division. However, if the man is living with his wife, the threat of arrest is usually not invoked. A female member of the family relations division gave this justification for the administrative practice, "I don't know why a man should have terms that he has to pay in here if they're living together."

⁹⁵ *Ewell v. State*, 207 Md. 288, 114 A.2d 66 (1955).

described the criminal law as enforcing the husband's civil duty of support. However, the issue in *Ewell* was simply whether there could be criminal responsibility for total failure to support if the wife had independent funds. The court did not decide on the level of the support required by the common law as contrasted with that under the criminal law, but it held that the criminal law was the same as the civil in regard to the immateriality of the wife's assets.

On balance, criminal non-support laws, like the family responsibility statutes, serve primarily a public welfare value. Neither in the wording of the statutes nor in the case law or day-to-day practice of prosecuting attorneys is there any indication that these laws serve to give substance to the common law duty of support arising from the marriage contract.

II. THE LAW OF SUPPORT: CONCLUSIONS

The first conclusion to be drawn from this study of the law of spousal support is that the law is ineffective. While husband and wife live together, the husband's common law duty of support does not guarantee the full-time housewife or the family any economic security. A married woman does not have equal rights to the family income despite the fact that she may devote seventy or more hours a week to performance of household services necessary or conducive to the family welfare. In fact, she has no enforceable right to any money, compensation, or allowance. Her "right to support" is not the right to be maintained at a level commensurate with either her efforts or the amount of the husband's earnings or assets. She is not legally entitled to any remuneration for her household services and consequently, she is given no legally enforceable claim on the husband's earnings or on the property he amasses.

At first glance, one does not appreciate the full import of this lack of remedy. A closer look shows that while a woman chooses to live with her husband she has no control over her own ability to remain in the home. If she desires to continue living with the man who gambles or drinks up most of his paycheck on Friday night, she must be content with what he decides to give her, because she can do nothing to compel more adequate support from him. If she requires more funds to live adequately, she must get a job or leave her husband. Whether she gets much or little is for the husband to decide. Having no enforceable right of support, a married woman has no way to build a nest egg for retirement, and no social security or retirement system to provide for her old age except through the husband's efforts.

The courts' failure to face the emptiness of this right to support not only has prevented us from considering whether a better system could be

adopted, but has done serious harm. The Citizen's Advisory Council on the Status of Women reports that

The prevalence of mistaken ideas about a husband's responsibility for support of wife and children, which have been reinforced by opponents of the equal rights amendment, are [sic] a great disservice to the nation, particularly to its women and young girls. Many young women, relying on the belief that marriage means financial security, do not prepare themselves vocationally. Parents and counselors act on this false assumption in advising girls about their future.⁹⁶

The common law concepts of support are also ineffective in requiring from the wife any financial contribution to the family. Forty-five percent of wives, living with their husbands, earn wages outside the home. But the only obligation to contribute to the family which the law places upon them, even in theory, is the duty to render household services. Neither the husband nor the family, has any right to a share of the wife's outside earnings or to a financial contribution from the nearly one-half of the wives who work outside the home. Furthermore, the law today forbids married couples from contracting with each other to create equal rights and duties of support between themselves. Thus, the effectiveness of the common law duty of support fails on all counts: it provides no real *protection* to a family with a full-time homemaker and it requires no monetary *contribution* to the family from a wage earning wife.

In addition to being ineffective, support laws are inequitable. In view of the rapidly changing role of women in the family and society, the fact that support rights and obligations between husband and wife have remained unchanged for over 200 years is shocking. Many current writers have expressed surprise at the tenacity of the legal doctrine of support. Homer Clark, in his text *The Law of Domestic Relations* stated, "It is somewhat surprising that the principles have not been affected by the Married Women's Property Acts and the changed economic position of women."⁹⁷ Leo Kanowitz in *Women and the Law* restated the point saying, "In the light of fundamental changes in the husband-wife relationship worked by the Married Women's Acts and other emancipatory legislation, the legal rules about support often appear to have been left behind by social developments."⁹⁸

For many women the most significant inequity of these common law concepts preserving the traditional roles of husband and wife is that they

⁹⁶ U. S. DEP'T OF LABOR, CITIZENS ADVISORY COUNCIL ON THE STATUS OF WOMEN, THE EQUAL RIGHTS AMENDMENT AND ALIMONY AND CHILD SUPPORT LAWS 7 (1972). For an example of reinforcement of these mistaken ideas, see *The Right to be A Woman*, 6 *The Phyllis Schlafly Report* 4 (November 1972).

⁹⁷ H. CLARK, LAWS OF DOMESTIC RELATIONS, 182 (1968).

⁹⁸ L. KANOWITZ, WOMEN AND THE LAW 70 (1969).

perpetuate an inequality of legal status that is inappropriate for our society. The first dimension of that inequality is that the law continues to treat the husband as head of the household with full authority to direct the family's affairs. It does so on the strength of an unfounded belief that unity and preservation of the family require a single head with power and control. These outmoded legal attitudes have been criticized by the American Home Economics Association because they penalize both men and women and fail to foster homes and families in which all members can function as effective individuals.⁹⁹ The law does not accurately reflect what is occurring within successful marriages at the present time. The few empirical studies that have been done indicate that most successful marriages are partnerships with the husbands and wives sharing equally in decision making, rather than an autocracy with husband ruling as head.¹⁰⁰ The family is a social unit that requires joint effort and decision-making of two persons devoted to its maintenance. The law should not foster and perpetuate values contrary to that purpose. It is particularly inappropriate when those values continue a subservient status for one of the marital partners. The refusal to give the wife a legal vote in that joint venture brands her as unequal and second class in the venture.

The second inequity in legal status arises from the fact that on marriage a woman loses the right to her own labors in the home.¹⁰¹ The economic relationship of husband and wife, in which the husband has original ownership of the wife's labors with the reciprocal duty of providing support, has been described as "the relationship between owner and property."¹⁰² That the law should regard one human being as the chattel of another runs counter to the most fundamental values of freedom cherished in our country.

A third inequity is the failure of the law to recognize that the wife's prodigious contributions to the household are valuable to society. The refusal to value these services in economic terms treats her as a socially

⁹⁹ Statement by Dr. Marjorie East, President, American Home Economics Association, March 19, 1974.

¹⁰⁰ JACOBS & ANGELL, A RESEARCH IN FAMILY LAW 469 (1930). Max Rheinstein points out that it

is the essence of a good marriage that crises arise and that they are overcome through the common effort of both parties to understand, to be patient, to endure, to stick together, and thus to grow to ever fuller understanding, to become one not only in flesh but in mind and spirit.

M. RHEINSTEIN, MARRIAGE STABILITY, DIVORCE AND THE LAW 427-443 (1972).

¹⁰¹ John Stuart Mill declared, "Marriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house." J. S. Mill, *The Subjection of Women*, in *ON LIBERTY AND OTHER ESSAYS* 195 (E. Neff ed. 1926). This work is quoted extensively in Johnston, Jr., *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U.L. REV. 1035 (1972).

¹⁰² Crozier, *Marital Support*, 15 BOSTON U. L. REV. 28, 34 (1935).

non-productive person. The supposed "right" to be supported by the husband without regard to the quality or quantity of her contribution to the family categorizes her as a parasite. At a time when society is particularly attuned to the dignity and worth of each individual, it is unjust for the law to ignore the valuable contribution that a wife or homemaker renders to the family.

A fourth inequity is the needless limitation upon the freedom of husband and wife which results from the common law prohibition against their defining by contract the legal incidents of the marriage relationship. The invalidity of contracts between husband and wife relating to their duties of support and performance of household services forces them into a status with legal connotations that are not necessary or conducive to the stability of the family. Those connotations are so demeaning to some young people that they prefer to live together without entering the legal status of marriage. Others simply wish to delineate for themselves the parameters of their marital relationship. A study center at Case Western Reserve University is now collecting examples of privately drawn marriage contracts.¹⁰³ Although some of these agreements may be so far afield from society's fundamental concepts of marriage that they should not be given legal validity, one cannot justify invalidating all contractual bases for the duties of financial support and performance of household services. This is especially true when contract is the only means by which either party could obtain enforceable rights. To limit an individual's capacity to order his private affairs by contract in the absence of demonstrated social advantage seems inherently unjust.

A fifth inequity arising from the application of common law concepts to the marriage relationship is the failure of the law to place any obligation upon the wife who earns money to contribute financially to the family. To require only the husband to make monetary contributions when both partners are earning wages is unrealistic. This traditional approach ignores the changing societal role that has been forced upon women by the technological revolution. In a revealing article entitled "Woman: A Technological Castaway," Clare Booth Luce explains that the tasks once performed in the home by women are no longer done there. Woman's traditional housewife and child-rearing roles are in a state of occupational decline:

Today all the weaving, almost all the preparation and production of food, and the manufacture of all household equipment and utensils are "man's work." Man is now the weaver, baker, butcher, candlestick maker, pot-and-pan manufacturer of society. There is almost no produc-

¹⁰³ HARPERS, May, 1974 at 102.

tive domestic task, once traditional and "natural" to woman, that man has not taken over.¹⁰⁴

As a result, women have been moving into the employment force in order to make the same economic contributions to their families that they once made through household production and household services. Nearly forty percent of the workforce in the United States is female.¹⁰⁵ Forty-one percent of the married women living with their husbands were employed in 1970,¹⁰⁶ up from only sixteen percent in 1940.¹⁰⁷ In Missouri over fifty percent of the mothers of school age children have outside employment and thirty-four percent of mothers with preschool age children also work.¹⁰⁸ "Since the period immediately preceding World War II, the number of women workers has more than doubled, but the number of working mothers has increased eightfold."¹⁰⁹ It is simply not efficient for a household which needs an economic addition to the husband's earnings to obtain it through the wife's services in making soap and medicines. The technological revolution has forced both parents into the marketplace.

As long ago as 1943 Sayre recognized that when both parties were earning money and performing services in the home a more realistic reflection of family life would be a legal requirement that each contribute according to his or her individual ability to the marriage venture rather than a rigid requirement of services from the wife and support from the husband.¹¹⁰ The statistics tell us emphatically that wives in large numbers are expending a great deal of time which was once devoted to household services to the earning of wages. There seems no justification for allowing one member of an institution so important to our society as

¹⁰⁴ 1973 BRITANNICA BOOK OF THE YEAR 24, 27 (1973).

¹⁰⁵ WOMEN'S BUREAU, U.S. DEP'T. OF LABOR, *WOMEN WORKERS TODAY* 1 (1970).

¹⁰⁶ U.S. DEP'T. OF COMMERCE, *STATISTICAL ABSTRACTS OF THE UNITED STATES* 213 (1971).

¹⁰⁷ J. KREPS, *Sex in the Marketplace: American Women at Work*, 18 *JOHNS HOPKINS POLICY STUDIES IN EMPLOYMENT & WELFARE* No. 11 (1971).

¹⁰⁸ REPORT OF THE MISSOURI COMMISSION ON THE STATUS OF WOMEN (Dec. 1973).

¹⁰⁹ WOMEN'S BUREAU, U. S. DEPT. OF LABOR, *Who are the Working Mothers?* (1972).

¹¹⁰ Sayre, *A Reconsideration of Husband's Duty to Support and Wife's Duty to Render Services*, 29 *VA. L. REV.* 857, 864 (1943).

No wife worthy of the name wants to be supported by anybody . . . 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? . . . 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 . . . Viewed sociologically therefore, it is a question of what the law should call a fair contribution of each party to that joint venture.

marriage to retain all wealth or earnings for her own ends. A just law would impose an obligation upon both spouses to share the profits of their labor with the family unit.

These antiquated but persistent concepts of wife as non-productive property, fulfilling only the role of wife and mother in the home, do more than perpetuate unjust legal relationships. The final inequity is that they affect and help mold the self-image and self-concept that women and men have of themselves in society. Paulsen suggested that these legal concepts gave a reality to a cherished myth. He described our cherished ideal thus: "In the best of worlds Alice does not leave after breakfast for a job which may bring more money into the household than her husband's earnings. It is best if she is the protected homemaker and he the protecting provider."¹¹¹ Cherished values from an earlier day when enshrined in the law remain to influence attitudes out of keeping with the realities of modern life. The legal incidents of marriage giving women a supposed right of support in exchange for domestic and sexual services in the home, define woman's "true" role only as that of mother and housekeeper, so that any work outside the home is seen as secondary to woman's "real" function. As a consequence, women tend to define their roles as home-related and do not aspire to outside employment except where their earnings are necessary to the maintenance of home and children. When women do seek outside employment they receive less pay and are refused job accessibility because they are not by legal definition the breadwinners in the family. This is true even though thousands of women are the heads of their households and thousands more earn because the family needs their help.

It is well known that the women's liberation movement has castigated the continuance of the "wife and mother" image to the exclusion of all other self-concepts.¹¹² Rather than branding these statements as extremist polemics, one must consider the facts. It is evident that concepts solely of wife and mother are unrealistic today for the American woman. First, the average woman today has a life expectancy of about seventy-five years. She looks forward to more years of life than her counterpart a century ago. Second, the average young woman of today

¹¹¹ Paulsen, *Support Rights and Duties Between Husband and Wife*, 9 VAND. L. REV. 709 (1956).

¹¹² L. BALLARD, *The Slave Women of America, The Revolution in THE WOMEN'S MOVEMENT* (1969); E. BLAIR, *Discouraged Feminists*, in KRADITOR, *UP FROM THE PEDESTAL* (1970); S. CRONAN, *MARRIAGE* (1970); R. GALIEN, *WIVES' LEGAL RIGHTS* (1967); K. HORNEY, *FEMINE PSYCHOLOGY* (1967); H. LANGHORST, *MOTHERHOOD AND THE SUBORDINATION OF FEMALES AND CHILDREN*; E. REED, *PROBLEMS OF WOMEN'S LIBERATION* (1971); K. STAMPP, *THE PECULIAR INSTITUTION* (1956); M. TAX, *WOMAN AND HER MIND: THE STORY OF DAILY LIFE* (1970).

expresses a desire to have only two children. Decreased infant mortality, the fears of population explosion, the lack of familial advantage from many children that existed in a frontier and agrarian society, and the relative effectiveness of birth control all combine to convert that desire to fact. Having two rather than eight or ten children frees many years of formerly full-time mothering and homemaking for other activities which may be desired. Rather than most women expecting to devote most of their lives to the child-rearing role, they find that that role now consumes only a fraction of their total adult life span. Even if mothers remain fulltime in the home until both children reach eighteen years, this is only twenty years out of an expected fifty-seven years of adulthood, leaving thirty-seven years without the responsibility of children. In addition to the technological revolution creating incentives for women to develop careers outside the home, the prospect of thirty or forty years of adult life free from the demanding motherhood role opens new vistas for women. *For the first time in history all women in this country can see themselves in a role other than that of full-time mother and homemaker.*

It is time for the law to recognize that women do and will increasingly play other roles in society.¹¹³ The recognition that it is proper and valuable to society for a woman to perform a role other than full-time homemaker may contribute to the resolution of the modern woman's identity crises.¹¹⁴ The time has come to acknowledge that the "cherished myths" of a woman's role exclusively as homemaker are so out of step with reality that the law must cease fostering them. In the absence of evidence that it is necessary for a furtherance of marital stability to continue the common law myth its divergence from reality is unjustified. We must accord realistic legal recognition not only to the equal role that a woman plays in the family in terms of childbearing and homemaking, but also to the fact that she has other societal roles.

However, the failure to accord the wife and mother protection for the support she needs during the stage of her life while contributing to

¹¹³ We are currently witnessing a phenomenal increase in the numbers of mature women returning to college and to the work force. See U.S. Dept. of Labor Women's Bureau, *Continuing Education Programs and Services for Women* 1-8 (1971).

¹¹⁴ Clare Booth Luce maintains that women are having "identity crises all over the lot" because "[M]an is leaving woman emotionally, physically, and economically underemployed." She says women "don't know who they are or what they are. *They don't know what they are good for anymore. They don't know where they are really needed, or what society expects of them now.* . . . The awareness, conscious or unconscious, of women today that their traditionally full-time roles of wife and mother are in a state of decline, and that no other roles are open to them that promise them the same gratifications, is at the root of most of the restlessness, discontent, and psychological hang-ups they are experiencing." Luce, *Woman: A Technological Castaway*, 1973 BRITANNICA BOOK OF THE YEAR 24 at 28-29 (emphasis in original).

the family through vital child rearing and homemaking services or while incapable of supporting herself due to the years devoted to those services should not be ignored simply because in another stage of life the wife may, indeed, be earning money. Neither should the ability to contribute in the form of money be ignored because she produces none during other stages of life. The current family law ineffectively and inequitably focuses exclusively on what has become a part-time role of most modern women. Legal recognition is needed for both the marriage partnership and the changing roles that both husband and wife can perform in that partnership. Women will never be accorded equality of opportunity and equality of rights in society if law denies them that equality in the most fundamental unit of society, the family.

III. EFFECT OF THE EQUAL RIGHTS AMENDMENT

Family law remains one of the greatest strongholds of sex based generalizations and resultant sex discrimination. It seems strange therefore that in this area adoption of the Equal Rights Amendment (ERA) would have only mild impact. Ratification of the ERA would invalidate a state right or obligation imposed solely on the basis of sex.¹¹⁵ In the family law area the ERA would require every state to recognize equal management rights and family obligations in both husband and wife. The common law concept of the husband-family, with the husband as head of the household and the wife obligated to render household services would be invalidated. The symbolic duty of support imposed by the common law on the husband in favor of the wife would have to be modified under the ERA so as to equalize family obligations. The Senate Judiciary Committee's final report on the Equal Rights Amendment considered this modification and defined support in functional terms which included non-monetary contributions to the family. The report stated: "when one spouse is the primary wage earner and the other runs the home, the wage earner would have a duty to support the spouse who stays home in compensation for the performance of her or his duties."¹¹⁶

Persons opposing the ERA suggest that ratification of the amendment will destroy the role of housewife and mother and will compel a woman in the home to obtain an outside job.¹¹⁷ They predict that married women will no longer have the right to remain in the home.¹¹⁸ Their fears

¹¹⁵ For a thorough discussion of the effects of the Equal Rights Amendment see Brown, Falk, and Freidman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L. J. 871 (1971).

¹¹⁶ S. REP. No. 92-687, 92nd Cong., 2d Sess. (1972).

¹¹⁷ See, e.g., *Phyllis Schlafly Newsletter*, Vol. 2 at 1 (August 1973).

¹¹⁸ This claim is based exclusively on a projected analysis by Professor Paul Freund, *The*

are unjustified. In fact, a married woman living with her husband has no such right now, unless her husband chooses to support her in that role. If he does not, the only support which the courts might force him to pay is support at a subsistence or welfare level under criminal support statutes. And even this, the wife alone cannot compel.

Criminal non-support statutes which impose a criminal sanction only on men who do not provide support would be invalid under the ERA.¹¹⁹ A state legislature could enact a substitute non-support statute which makes no distinction on the basis of sex, reworded in terms of failure of a "person" who has a duty of support to perform that duty, rather than using the word "man" or "husband." This form has been suggested by the Committee to Draft a Modern Criminal Code for Missouri¹²⁰ and appears in the first general criminal non-support statute in the State of Ohio, effective January 1, 1974.¹²¹ In Pennsylvania a similar criminal statute has been upheld under the state equal rights amendment.¹²² The decision in the Pennsylvania case is especially important in that the court recognized that a criminal statute in sex-neutral terms was permissible even though it would probably be applied more frequently against men than against women, due to the fact that men more often are wage earners while women provide their contribution to the family by working in the home. This suggests that criminal prosecutions for nonsupport would not change in effect under the ERA. Thus neither in the civil nor the criminal law would the Amendment take from the full-time housewife any legal right which she now has.

Unless modified, statutes allowing a creditor to recover from a husband for "necessaries" or making the wife liable for her husband's

Equal Rights Amendment Is Not the Way, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 234 (1971). Freund was writing about the ERA during the 91st Congress; he criticized the fact that no definitive analysis of its effect on various types of state laws had been made and that there was no legislative history on its effect. Freund confirmed in a telephone conversation (Feb. 8, 1973) that he was only projecting possibilities and did not believe that the ERA would necessarily require the result which the opponents claimed he stated.

Professor Thomas Emerson's article at 80 Yale L. J. 871 (1971) supplied the missing analysis and was heavily relied upon during the debates in the 92nd Congress by both proponents and opponents. Brown, *supra* note 115. That Congress is the one which passed the ERA and its legislative history leaves no doubt that it was the intent of the Congress that the wage earner should financially support the homemaker in compensation for homemaking services.

¹¹⁹ Such statutes would likely be struck down by the courts rather than extended to impose a similar sanction on women, because of their penal nature. Criminal or penal laws are strictly construed and courts will generally not extend the application of a penal statute to a new class of persons not covered in the legislation. See Brown, *supra* note 115 at 913 and 915.

¹²⁰ *Proposed Criminal Code for the State of Missouri* § 13.040 (1973). See also MODEL PENAL CODE § 230.5 (Prop. Off. Draft 1962).

¹²¹ See discussion at note 78 *supra*.

¹²² Lukens v. Lukens, 224 Pa. Super. 227, 303 A.2d 522 (1973).

debts¹²³ and poor laws which place differing rights and duties of support on husband and wife would be invalid under the ERA.¹²⁴ These statutes, as we have seen, provide little protection for the woman living with her husband, and function to protect the coffers of creditors and state welfare departments. The purposes of such statutes could be achieved on a sex-neutral basis by enactment of broadened family expense statutes making husband and wife jointly liable to the extent of their earnings and assets to merchants for "necessaries" provided to members of the family unit.¹²⁵

The fact that the ERA will have little impact on the legal rights and obligations of the full-time housewife will provide reassurance to critics of the amendment who fear it would undermine traditional family roles. However, this same fact should be of concern to proponents of the ERA who hope that the amendment may do more than give to women a symbolic equality in the home.

In truth, the ERA will not increase the enforceable rights of a married woman living with her husband. For the woman working in the home the ERA will require legal concepts that function much like the traditional right of support, giving her a "right" of equality which in fact, gives her no right to anything tangible or material. The ERA will not overcome the reluctance of courts to become involved in the financial affairs of a family. Therefore, a married person living with his or her spouse will still be unable to enforce the right to support to which that person is legally entitled. In other words, a woman working in the home, married to a man employed outside the home, will still be able to obtain only that level of support which he decides to give her. The income remains *his*, in fact if not in law, and *hers* is to plead for her fair and rightful share. Equality is a hollow word with no means of enforcement.

IV. A PROPOSAL: THE PARTNERSHIP FAMILY MODEL

Affirmative legislation is needed to assure equality of rights to both husband and wife living together in the home. Two philosophical approaches to such legislation are available.¹²⁶ The first approach would require that husband and wife be treated as individuals, as they are under the law today, but that married women would be entitled to fair compensation for their household services. This is generally the result which would follow under the ERA in that a woman's services in the home would entitle her to support from her husband. Further, the ERA would

¹²³ See text at note 55 *supra*.

¹²⁴ See text at note 73 *supra*.

¹²⁵ See discussion in text and notes at notes 69 and 70 *supra*.

¹²⁶ See Johnston, *Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality*, *supra* note 7 at 1071.

require that a married woman have the same property right as her husband to manage and control her earnings. Such equal treatment, however, does not necessarily result in equality in fact. As one writer has pointed out:

However, if she spends her married life performing domestic services for her family, she will have no earnings during that period nor the prospect of making any when the marriage ends. The law's treatment of her, although equal to that accorded her husband, does not put her on a par with him—he, in fact, earns. Because she does not, the law should give her something to compensate for this disparity—a share of his earnings during marriage and a pension when it ends.¹²⁷

The second alternative is to treat husband and wife, not as individuals, but as a marital unit with each sharing equally in the burdens and rewards of the joint venture, including the net income generated by the services of either member of the unit. This alternative is the concept of the partnership form of marriage and is the best design for achieving true equality of husband and wife.

What follows is a structural proposal of legal concepts to form the basis of specific state legislation embodying the partnership family model. The proposal is not intended as model legislation, since the precise legislative format needs to be tailored for the enacting state. Instead the proposal is a basic structure of legal ideas to establish equality in the family.

1. Husband and wife owe to the family created by their marriage equal obligations of service.
2. Husband and wife are entitled to share equally in the management and assets of the family created by their marriage.
3. All property acquired by either the husband or wife during the marriage, except that which is the separate property of either, shall be deemed the family property of the husband and wife and shall be subject to their joint ownership, management, and control.
4. Separate property includes:
 - (a) That property of either spouse which he or she owned before the marriage;
 - (b) That property received individually by either spouse during the course of the marriage by way of gift, inheritance or devise;
 - (c) That property which is the portion of the family's periodic income set apart to each spouse as her or his separate property by agreement of the spouses or, in the event the spouses fail to agree, by court order upon a finding that individual ownership of such por-

¹²⁷ Younger, *Community Property, Women and the Law School Curriculum*, 48 N.Y.U.L. Rev. 211, 213 (1973).

tion of the family income is fair and equitable under all the circumstances.

5. The expenses of the family shall be chargeable by creditors upon the property of the family and upon the separate property of both husband and wife, or either of them.

6. The legal rights and obligations of husband and wife in the management and property of the family are subject to alteration by contract. When parties to a marriage recognized by the laws of this state enter into a marriage contract, they may define their rights and obligations in the family and in relation to the family property as they see fit, subject only to the rights of creditors and the obligation of each parent to serve the best interests of his children.

7. The rights and obligations of husbands and wives as they relate to the control and ownership of family property are fully enforceable in a court of law. No court shall refuse to enforce any of the property rights created by law or any property rights arising out of a marriage contract solely because husband and wife are cohabiting at the time suit is brought.

Legislation based on this structure would introduce new elements into the law of most states. Items similar to one and two are needed to remove from the law vestiges of the common law concepts of merger, husband as head of household, and wife's duty to render services to the husband. They create a mutual obligation of service to the marital unit, the family, whether it includes children or not. The term "service" is broad enough to include financial and non-monetary contributions to the family, so that a wage earning wife would have a duty to contribute to the family financially whereas the wife in the home could satisfy her obligation by her services in the home. These items also recognize the equality of husband and wife in the management of the marital unit and in sharing the rewards of the family.

Items three and four when read with the enforcement section, item seven, are the heart of a new concept of enforcing tangible contributions both to the marital unit and to each individual in the unit while the husband and wife continue to live together. Item three states a principle well known in community property states, but the enforcement section creates a right to court enforcement during the marriage which now seldom exists. It encompasses the situation of the wage earning husband who gambles most of his paycheck away before he gets home on Friday night, or of the working wife who might secrete her wages in a private savings account. Court orders to bring the earnings into joint family management and to expend them for family purposes could be enforced

by wage assignments or punishment by contempt. No longer would Mrs. McGuire have to suffer without a kitchen sink while her miserly husband kept over \$100,000 in bank accounts and bonds. This power would give a non-wage earning homemaker, for the first time, an actual right to support.

Item four defines two categories of property as separate property as they are defined in community property law, but it then creates a new category. One objection to using community property law exclusively is that if enforcement is permitted during the marriage, there is no recognition that each of the members of this marital unit are, indeed, individuals who ought to have some independent financial means if there are otherwise adequate assets for family needs. In a business partnership, the partnership agreement provides for the percentage of profits or amount of income each partner is to have as his individual share, and if disagreement arises the partnership is dissolved. In most marriages, especially under a legal system that encourages private agreement, the spouses, either formally or informally, would make a somewhat similar arrangement. For those few families in which one partner has no incentive to agree to an individual share for the other or in which the partners cannot agree on an equitable amount but desire to salvage the marriage, the law should provide incentive for private agreement and should provide a resolution in lieu of contract. Courts should welcome the opportunity, when a family member seeks court resolution, to help a family remain together rather than to order its dissolution. In contrast to the business partnership, the courts have long stated that the state has an interest in preserving marriage. Consequently, legislation should provide a means for preventing marriage dissolution in those occasional situations in which one spouse is merely seeking a portion of the family income to have at his or her individual disposal. Mrs. George should not be encouraged to have her husband prosecuted criminally because she resents having to "ask for fifty cents." She should have an enforceable right to obtain an equitable amount of the family income to dispose of as she pleases.

Item five is essential to insure that the concept of family property does not unfairly limit the rights of creditors.

A provision similar to item six is required to create a new right to define by marriage contract the rights and obligations between husband and wife both in regard to the sharing and control of the assets of the marriage and, also, in regard to the responsibilities and roles they should each assume in managing and enjoying the family life. However, the enforcement section, item seven, provides for enforcement only of those

contract provisions and those laws which deal with property matters. The criminal law could continue to punish failures to serve the family including failure to support or care properly for children, but the civil law should not become involved in attempts to force particular behavior within the marital unit.

This proposed structure requires careful modification to fit the needs of particular states, but it is presented here as a starting point for evaluation of possible solutions to the twin problems of enforcing adequate family support from its wage earners and according equality in legal status to men and women in their marriage.

The partnership model with some modifications is the best design for achieving equality in fact. This model makes the maintenance and preservation of the family unit the central theme for legal regulation of the husband-wife relationship. The family idea which the law has held sacred is the idea of the husband-family, where man has not only the dominant role, but the only active role. The family partnership model which is being advocated in this proposal, is that of a democratic family-unit with husband and wife having equal roles.

The partnership model as a basis for family legislation would not assign particular roles to husband and wife. For a workable and lasting relationship, these decisions as to family roles should be made by the parties to the marriage based on their individual skills and competence. Law should not encourage a married woman to assume a traditional role in the home, nor should it discourage her from being a full-time housewife and mother. It is the right of both women and men to choose their roles in life that constitutes the essence of freedom and liberation.¹²⁸ Law should not force husband or wife into a particular role, nor assign him or her an unequal position once a particular role is assumed.

Robert Sedley expressed the point well:

Liberation means freedom. For a woman in American society today this means that she will no longer by virtue of her sex be placed in a societally subordinate role, that she will have her choice of life role, that she will no longer be channeled into a societally perceived role of "wife and mother." While many women will choose the "wife and mother" role, those women who do not must have the same opportunity to maximize their life chances as do men. By the same token, a woman who does choose the "wife and mother" role must not for that reason, be disadvantaged or made subordinate to her husband.¹²⁹

In contrast to its laissez-faire approach to familial role-definition, the

¹²⁸ Sedler, *The Legal Dimensions of Women's Liberation: An Overview*, 47 *IND. L. J.* 419 (1972).

¹²⁹ *Id.* at 419.

partnership model would define the property rights of husband and wife. In 1963, the Committee on Civil and Political Rights of the President's Commission on the Status of Women expressed approval of the partnership model for the marriage relationship. The Committee concluded that during marriage each spouse should have a legally defined right in the earnings of the other spouse and in the property acquired by such earnings. Further, this policy should be implemented by appropriate legislation.¹³⁰

4. *Criticism of the Partnership Family Model*

Although the partnership family model has much support and seems to be a logical and workable structure for the legal and social relationship of husband and wife, it has received criticism from both sides of the political spectrum. Even today, when equality seems to be the watchword of American democracy, there is a reluctance to allow equality in the home and family. Some of the arguments for male dominance in the home and family take the following forms.

First it has been contended that marriage is a sacrament and that laws which would equalize the position of the parties to the marriage within the ongoing family, substitute a business relationship for a sacred relation between husband and wife.¹³¹ Ideally perhaps law should have no effect on the marriage relationship, which many see as a holy bond. However, marriage laws which assign equal roles to husband and wife seem more in line with the Christian ethic than the male dominated family structure supported by existing family laws.

Others contend that male dominance in the home and in society is part of the natural order of things. The claim is that the woman-wife is naturally dependent on her husband because of her child-bearing function, i.e. female dependency is a phenomenon of biological differences. A recent study indicates that biological factors do have the potential for determining how dominant or submissive an individual, male or female, will be.¹³² But the study revealed that the effect of this biological potential could only be detected in males. This implies that a woman's socialization process, so completely ignores her individual attributes that her unique biological potential is not apparent. In other words, women are stereotyped by their upbringing in a submissive role, so that the bio-

¹³⁰ REPORT OF COMMITTEE ON CIVIL AND POLITICAL RIGHTS OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN (1963).

¹³¹ W. DEFUNIAK, PRINCIPLES OF COMMUNITY PROPERTY § 3 at 7 (2nd ed. 1971); see *Rey v. Rey*, 279 So.2d 360 (Fla. 1973), and discussion *supra* note 43.

¹³² I. I. Gottman, *Heritability of Personality: A Demonstration*, in J. GARDNER, PROSPECT WOMEN'S ROLE IN CONTEMPORARY SOCIETY 109 (1970).

logical differences which might create a dominant or submissive posture are not reflected. Women are submissive, not because of biology, but because of socialization. Women are not naturally dependent, but are taught to be dependent by their fathers and their husbands.

A third argument for male supremacy in the home takes a more practical approach, somewhat reminiscent of the administrative convenience arguments used to justify many types of discrimination.¹⁸³ The argument goes something like this: In the day-to-day affairs of married life differences of opinion arise. It will be much easier to settle these differences if every disagreement doesn't involve a power struggle as well as resolution of the problem at hand. One party must win and one must relent. The role of the law is to say which party has the upper hand. The law assigns this position to the man because he is stronger and has more experience in decision-making.¹⁸⁴

Even apart from the assertion that man is the stronger and more experienced partner to the marriage, the argument outlined above rests on a fallacious assumption—that there must be one dominant figure in the marriage, one eternal head of the household. The natural arrangement is a division of powers in the marriage with each partner being absolute in the "executive branch of his own department." As Mill pointed out, it is not necessarily practical and certainly not essential that all marital decisions be made by any one person, and that that person always be the husband.¹⁸⁵ The division of power in the home should not and can not be established by law since it depends on the special capabilities of the partners to the marriage.

A final rationale for preservation of the male dominated family model is the spousal-protection theory: the argument that existing family and support laws are necessary to "protect" women.¹⁸⁶ A closer look shows that the real purpose of existing family laws is not to protect women, but to keep them "in their place"; to preserve and reinforce the traditional male-dominated family model in which the husband earns and controls all the income and the wife remains in the home with no right to

¹⁸³ *But see* Reed v. Reed, 404 U.S. 71 (1971).

¹⁸⁴ J. BENTHAM, *Principles of the Civil Code*, 1 WORKS 355-56 (1838). *See generally* Johnston, Jr., *Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U.L. Rev. 1031, 1046-52 (1972).

¹⁸⁵ J. S. MILL, *The Subjection of Women*, in ON LIBERTY AND OTHER ESSAYS 195 (H. Neff ed. 1926).

¹⁸⁶ "I vote against measures like the E.R.A. because I believe that a mother is more important to most families than a father, and that women deserve the generally preferred status which they now enjoy under the law of this state," Letter from Senator Paul L. Bradshaw (Missouri Legislature) to the authors, April 16, 1973.

compensation.¹³⁷ Both the common law and community property systems, under the guise of spousal-protection, encourage the woman to assume her traditional role in the home by promising her a right of support. Outside employment is discouraged in more subtle ways, including failure of the law to recognize a woman's ability to contribute to the family maintenance and discriminatory tax treatment for working wives.

A criticism of the partnership model contrasting sharply with those just discussed, is that a marital partnership imposes too many limits on individual rights and freedoms.¹³⁸ The theory is that ideally persons should be treated as individuals, and that marriage should be a personal, not an economic relationship, between two persons.

This ideal was propounded almost forty years ago, by Professor R. B. Powell:

Shall we adopt the rather characteristic tendency of our country and of our time, to think dominantly in terms of money, of wealth, of things, and embody the modern view of the equality of man and woman in a pronouncement that justice as between husband and wife consists in the having of equal shares in all the "things" acquired during the marriage through the efforts of either or both? Or shall we accept an approach simultaneously less mercenary and more individualistic, and regard marriage as a sharing of experiences, not primarily concerned with wealth, by two coordinate persons each of whom should be accorded by law the power to acquire, to control and to dispose of such wealth as his separate abilities may enable him to secure?¹³⁹

Simone de Beauvoir put it another way:

¹³⁷ See generally Kulzer, *Property and the Family: Spousal Protection*, 4 RUTGERS-CAMDEN L.J. 195, 214-17 (1973).

In a memorandum sent to "all persons interested in Missouri's ratification of the Equal Rights Amendment" by Senator Richard M. Webster (Missouri Legislature), Spring 1974, the Senator states,

My essential objection is that the ERA must be applied absolutely. It dictates that society may not choose whether or not to grant any privilege or to treat differently, husband or wife, or mother or father, no matter how justified the reason or compelling the interest. Society does have a compelling interest in the protection and stability of the family, and this fundamental interest justifies obligating husbands and fathers to support their families and permits draft exemptions to mothers of dependent children while fathers are drafted.

This memorandum concludes with the statement that allowing each individual "an equal right to determine, live, and support his life within equitable laws as he sees fit" is, "a beautiful concept which is absolutely necessary in every human relationship—except the family. In my own view the demands for the stability of the family require that individual self fulfillment be reasonably subjected to needs of the family."

The Senator assumes that equality of opportunity and equal obligations means irresponsibility to the family. That is not true.

¹³⁸ See generally Kulzer, *Id.* at 222-28.

¹³⁹ Powell, *Community Property—A Critique of its Regulations of Intra-family Relations*, 11 WASH. L. REV. 12, 15-16 (1936).

The couple should not be regarded as a unit, a closed cell; rather each individual should be integrated as such in society at large, where each (whether male or female) could flourish without aid; then attachments could be formed in pure generosity with another individual equally adapted to the group, attachments would be founded upon the acknowledgment that both are free.¹⁴⁰

The ideal advanced by Powell and de Beauvoir would have the marital relationship make no impact on property rights of husband and wife. There would be no need for marital property laws, because the property rights of the parties to the marriage relationship would remain unchanged by that relationship. All forms of spousal protection would be removed, leaving the law of property neutral on the point.

The ideal is workable only when both husband and wife may acquire property independently. As has been illustrated by experience in common law property states where each spouse has a right to manage his or her separate earnings, equality under the law is of little value when the ability to acquire earnings is not equal.¹⁴¹ Even when equal opportunities for employment and earnings are available to women, many married couples may decide that one spouse should work in the home. In addition, pregnancy and post-natal childcare may make it necessary for some women to spend periods of time unemployed and in the home. The law should provide equality in fact and should protect equally the spouse performing family obligations in the home.

The partnership model provides a workable resolution of the problems presented, in that it puts a minimum of restrictions on individual freedom and does not influence or encourage the assumption of particular roles by husband and wife. On the other hand, the partnership model provides protection to the spouse working in the home and for spousal child-rearing. Thus a partnership model is the one structure which gives a married woman freedom to have a career and establish an active role in life outside the home, while giving adequate protection to the woman who chooses to assume a traditional in-home role or to the woman who is required to spend some part of her life in the home in child-rearing.

B. Community Property Theory—A Legal Basis for Property Rights in the Partnership Family Model

The preceding proposal for the partnership family model adopts the original philosophical concepts of the community property system as its basis and attempts to build from that foundation of familiar legal con-

¹⁴⁰ S. DE BEAUVOIR, *THE SECOND SEX* 479 (1953).

¹⁴¹ See *supra* note 127.

cepts to create a new marital property system. Although the community property system as it exists in the United States today, warped by decades of judicial interpretation, will not achieve the results sought by this proposal, the basic tenets of the system provide a structure of existing legal concepts from which workable laws for regulation of the property rights of partners to the marriage can be developed. Therefore, only the fundamental tenets of the community property system are adopted, and case law construction and interpretation of these principles is generally rejected.

The main tenet of the community property system is equality. The historical development of this equality concept was explained by DeFuniak, tracing the development of the system back to the Visigothic tribes:

In adopting the concept of a community of goods, the law was realistic. It had regard for the industry and common labor of each spouse and the burdens of the conjugal partnership and community of interest. With the feeling in mind that during marriage the time and attention of husband and wife should be directed toward furthering the goals—economic, moral, social—of the marriage, the community was instituted as the most suitable vehicle for accomplishing these goals.

Thus the policy of community property was to establish equality between husband and wife in the area of property rights in marital property acquisitions, in recognition of and to give effect to the fundamental equality between the spouses based on the separate identity of each spouse and the actual contribution that each made to the success of the marriage. Note the striking difference between this and the common law doctrine of the merger of the identity of the wife into that of the husband.¹⁴²

Historically, community property considered woman as an individual and marriage a partnership in which both parties had obligations and duties. Husband and wife, the partners to the marriage, were given the right to share equally in the gains and acquisitions of the partnership during its existence.

Although the underlying tenets of the community property system are good, the system has not provided equality between husband and wife in practice. Today the community property system may discriminate against women more harshly than the common law system. For example, under community property laws now in force in six of eight community property states, a married woman's individual income becomes community property subject to the sole management and control of her husband, so that she loses any right to share in the disposition of funds

¹⁴² DeFuniak, *Principles of Community Property*, *supra* note 131 at § 11.1.

acquired by her individual efforts.¹⁴³ Thus, adoption of the existing community property system would not result in actual equality between husband and wife.¹⁴⁴

The advantages of community property concepts have been recognized by many legal writers. Professor Robert Sedler made these comments:

Under a community property system, each partner contributes his or her efforts within the home or outside, or by a combination of both, to the well-being of the marital enterprise. Each partner thereupon has the right to share equally in the wealth acquired by the joint efforts. . . .

Under a true system of community property, in which the management would be entrusted to the partners jointly, many of the dependency problems which accompany the present legal structure of marriage could be eliminated. The contribution of the woman, if she chooses to stay at home and take care of the children, would legally be considered the equivalent of the man's. Secondly, the community property system would be more conducive to an arrangement by which both partners would share the household and child care responsibilities equally or by which the wife would be the sole "breadwinner." It would enable the parties to make their own arrangements concerning the contribution of each to the marital enterprise, would equalize those contributions and would eliminate any notion of "head of the household."¹⁴⁵

Harriet Daggett pointed out another advantage of the economic partnership approach of the community property system:

Thoughtful students of modern marriage have expressed the view that the wife in the home should feel that her efforts are materially rewarded. The sense of satisfaction derived from the fact of remuneration would prevent, in cases where it is not necessary or desirable, the seeking of outside employment in industrial areas and elsewhere with the consequent dissatisfaction and disintegration of the family as a unit. Furthermore, the wife who is unable to earn money outside of her home would not have the feeling, despite her drudgery, of being a liability rather than an asset. The husband and children are more apt to put a higher estimate upon the efforts of the woman of the household if her job is evaluated in terms of dollars and cents. She, in turn, has a greater interest in conserving and augmenting the family finances and takes greater responsibility in these matters.¹⁴⁶

¹⁴³ See Younger, *supra* note 127 at 232.

¹⁴⁴ For a general discussion of the limits of the community property system in practice see Younger, *supra* note 127 at 212 and Kulzer *supra* note 137.

¹⁴⁵ Sedler, *supra* note 127 at 431-32.

¹⁴⁶ Daggett, *Division of Property Upon Dissolution of Marriage*, in *SELECTED ESSAYS ON FAMILY LAW* 1053, 1059 (1950).

C. *Role of Family Laws in Implementing the Partnership Family Model*

The proposal, having considered the soundness of the marital partnership theory, defines the role of family laws as affecting only the property rights of husband and wife and not their familial roles or relationships. This partnership family model would establish the family enterprise as the point of primary concern, and should state the essential obligation of husband and wife to serve the family. Paul Sayre made this point in 1943:

If . . . 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 . . . [impair] 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.¹⁴⁷

Although law provides a model for the family structure and should establish a basic relationship of equality and mutual service between husband and wife, law should not attempt to dictate further the personal social relationship of husband and wife. Family laws should not tell husband and wife what roles each should perform in the family, or for that matter, in the outside world. Such decisions should be made by the parties to the marriage based on their particular interests and abilities.

In addition, family laws are not effective to compel the assumption of the role of homemaker by the wife or breadwinner by the husband, but merely make life more difficult for the woman or man who assumes a non-conforming role.¹⁴⁸ Law is not a workable tool and has been unsuccessful in regulating social behavior, particularly in a relationship as fundamental and personal as marriage. Therefore, this proposal places on husband and wife mutual obligations of service to the family, but does not attempt the futile task of compelling the assumption of particular roles to perform those obligations.

¹⁴⁷ Sayre, *supra* note 110 at 875.

¹⁴⁸ An empirical study conducted by Professors Jacobs and Angell in 1928 makes this point. Over 1000 families in various parts of New York were studied. The study determined that in almost half of the families where the husband was the sole wage earner, the wife had some say in the administration of the husband's earnings, and in a higher number of the families the spouses acted jointly in determining important family expenditures. This was true, even though under the law of New York the wife had no legal right in her husband's earnings, apart from her right of support. In addition, in the majority of the cases where the wife was a wage earner, she retained control of her own earnings and often a part of her husband's as well. Jacobs and Angell, *supra* note 100 as cited in FOOT, LEVY & SAUNDERS, CASES AND MATERIALS ON FAMILY LAW 318 (1966).

This study illustrates that existing family laws do not reflect the way that most families actually function today and points out that law has very little impact on this day to day function.

Family law should not interfere with the social structure of the family but should be restricted in its application to the area in which it is most effective, regulation of the property rights of husband and wife. Laws for assuring the right of both individuals to accumulate property either jointly or separately should be in existence. Indeed, laws which establish equitable marital property rights have been recognized as encouraging marriage stability.¹⁴⁰

D. *Particular Duties and Rights Subject to Modification*

Under the traditional view the legal incidents of marriage arise automatically by operation of law upon entering the marital status and therefore cannot be altered by the parties to that relationship. Clearly some rights and duties of husband and wife should be fixed absolutely by law, as for example, the duty of parents to care and provide for their children.¹⁵⁰ The proposed legislation would achieve this by establishing a narrow foundation of permanent legal obligations, designed primarily to protect creditors and children, which would be beyond the control of the parties.

However, in the absence of demonstrated justification for regulation, certain other husband-wife relations should be determined by contract, not by operation of law. The manner in which husband and wife perform their obligations to serve the family should be within their control. For too long, the state has taken a paternal attitude in justifying the state's invasion into the personal and private relationship of husband and wife on a public policy theory. The theory is that the state has a valid interest in marriage stability, and allowing the parties to the marriage to decide and determine the legal incidents of their relationship will undermine that stability.¹⁵¹ This reasoning is fallacious for it is doubtful that the state can show that marriage agreements jeopardize any valid interest of the state. Indeed, marriage agreements may well increase the stability of marriage and the family. Marriage, at least in theory, is a lifelong relationship. Husbands and wives who do seek to determine the legal incidents of this relationship by contract will necessarily have to consider carefully the legal as well as the social and moral obligations they owe one another, and this in turn, should encourage marital stability.

In any event, it is unreasonable to force upon husband and wife a set of legal obligations which may be inappropriate for their relationship,

¹⁴⁰ Daggett, *supra* note 146 at 1065.

¹⁵⁰ See text at note 103 *supra*. See also, Comment, *Marital Contracts Which May be Put Asunder*, 13 J. FAM. LAW 23 (1973). For a discussion of the availability of antenuptial and postnuptial contracts in community property states, see Younger, *supra* note 127 at 247-51.

¹⁵¹ Comment, *Marital Contracts Which May be Put Asunder*, *supra* note 150 at 36-39.

particularly when those obligations support no valid state interest. Therefore, the proposed legislation affirmatively establishes the right of the parties to delineate and modify their rights.

Once property rights and duties have been established, either by law or contract, courts must provide enforcement. Traditionally, courts in both common law and community property states have refused to step into the ongoing marriage relationship to enforce the rights and obligations arising out of that relationship. Courts have been reluctant to make orders they cannot enforce, and seem particularly hesitant to tell a husband how he must spend *his* earnings when he has not "neglected" or "deserted" his wife. Thus, the courts make support orders only when they can no longer avoid the problem: when the marriage relationship has broken down or when the state's coffers are being threatened because a wife or child is not being provided with the bare necessities.

These justifications for the court's refusal to enforce support obligations owed to the wife do not stand up under close scrutiny. It is interesting to note that the courts are not so reluctant to interfere with the ongoing family relationship to enforce marital property rights of the husband. In *Wilcox v. Wilcox*¹⁵² a wife secreted \$30,000 in community property funds and refused to return them to her husband, testing her ownership interest against her husband's statutory right to manage the funds. The husband sued to recover the funds and the appellate court upheld his claim saying:

The right of the husband thus conferred to manage, control and dispose of community personal property is invaded by his wife when she deprives him thereof by taking, secreting and exercising exclusive control over community funds. A husband has a cause of action against his wife for such an invasion and violation of his right in the premises with attendant appropriate remedies.¹⁵³

Once the law has intervened in the private area of the marriage relationship to establish property rights and obligations, the law cannot consistently refuse to enforce the duties thus established on a theory that law has no place in determining the day to day workings of the home. Generally, married couples do not call on the courts to work out their problems unless their private, extra-legal procedures break down. If the courts are truly interested in marital stability and harmony, they should intervene and assist husband and wife in solving their difficulties. This approach is being taken by some states which have established family courts to assist married couples in this way.¹⁵⁴

¹⁵² *Wilcox v. Wilcox*, 21 Cal. App.3d 457, 98 Cal. Rptr. 319 (1971).

¹⁵³ *Id.* at 459, 98 Cal. Rptr. at 320. See Younger, *supra* note 127 at 235.

¹⁵⁴ See, e.g., N.Y. Family Ct. Act § 812 (McKinney 1963). See generally Dyson &

In addition, a court's reluctance to intervene in the ongoing family relationship to enforce the support rights thus established may be eased by some aspects of this proposal. First, because the legal incidents of marriage are based on a contract theory, rather than arising from the marriage relationship, it is justifiable to assume that husband and wife have consented to the terms of the marriage contract, a contract which they have written themselves, or have accepted without modification as provided by statute. Second, the enforceable duties and obligations of marriage relate only to the property rights of husband and wife and not to their social relationship. Therefore, the courts will not find themselves in the position of having to enforce contractual obligations relating to matters such as intimate sexual behavior or household duties.

Conclusion

This survey compels the conclusion that the law of husband and wife concerning management of the household and duties to render services and support is ineffective to further family stability. The resultant inequality of legal status between husband and wife, is, therefore, a needlessly unjust and harmful condition. That inequality serves no purpose other than to foster a model of family life unnecessary and largely outmoded for our times. For a model that may increase family loyalty, family cooperation, and family stability, we urge acceptance in the law of every state of the partnership model for marriage and family. The proposed legislation will (1) establish equality of obligation to serve the family; (2) permit contractual modification of the husband-wife relationship; and (3) provide for actual enforcement of the support rights of husbands and wives while they live together. In this fashion we can strengthen the family unit, accord equality to both spouses, and remove the last great legal barrier to justice for women.

Dyson, *Family Courts in the United States*, 8 J. FAM. L. 505 (1968), 9 J. FAM. L. 1 (1969); Cole, *Family Courts—Their Nature and Function*, 4 MAN. L. J. 317 (1971); Paulsen, *The New York Family Court Act*, 12 BUFF. L. REV. 420 (1963); 39 FORD. L. R. 530 (1971).