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California previously held that section 834a applies only to *arrest* situations.[35] If the court's reasoning on "duty" can be slightly extended,[36] a justified detention and examination would seem to fall within the definition of "in the performance of his duty" for a peace officer. If so, section 834a is unnecessary since resistance in such circumstances would fall directly within the felony battery portion of section 243 (assuming that the result of the resistance is a battery). Another situation unresolved by *Curtis* is that in which resistance to a lesser restraint, such as detention and examination, could give rise to a more serious offense than resistance to an *unlawful* arrest.

A very troublesome problem is recognized by the *Curtis* Court but left unanswered. The rationale of section 834a as applied to unlawful arrest is tenable only if the victim has an adequate remedy at law. As the court admits, there is a remedy, but in reality it is often more illusory than real.[37] In an era when individual rights are receiving special attention, the improbability of pursuing this remedy to judgment is unfortunate. The *Curtis* decision would appear to compensate to a limited extent for the discrepancy between the existence of a remedy on one hand and small chance of recovery on the other.

LOUIS N. SAUNDERS, JR.

FAMILY LAW—CHILD SUPPORT—MOTHER MUST GIVE SUPPORT PAYMENTS TO FATHER WHO IS IN CUSTODY OF CHILDREN WHEN NOT DOING SO WOULD RESULT IN AN INEQUITABLE SITUATION. *Moore v. Moore* (Cal. App. 1969).

Jack Moore originally brought suit for divorce against his wife, Helen. Following a cross-complaint by Helen, the parties entered into a property settlement agreement. It was then stipulated that the complaint, the answer to the complaint, and the answer to the cross-complaint be withdrawn and default by Jack Moore be entered. This agreement was approved by the court in an interlocutory decree (July 23, 1962) and set forth in the judgment. Custody of the children (two girls and one boy) was

35. People v. Coffey, 67 Cal. 2d 204, 221, 430 P.2d 15, 26, 60 Cal. Rptr. 457, 468 (1967).
36. This may be contrary to the court's warning, *supra*.
37. 70 Adv. Cal. at 366, 450 P.2d at 37, 74 Cal. Rptr. at 717.

awarded to Helen, and Jack was ordered to pay $175 monthly for support and maintenance of the children (August 15, 1963). Both parties later remarried, and on November 21, 1967, a stipulation was entered into by Jack and Helen in which it was agreed that custody of the children be awarded to Jack and that he be relieved of paying support for the children to Helen.

On February 16, 1968, Jack filed a declaration and requested the mother be ordered to pay partial support and maintenance.[1] The trial court found that the father's expenses for the two children (the oldest child being married) residing with him were in excess of $250 per month, and that his expenses for a new residence for himself and the children would be $225 per month. The court also found that the mother earned $380 per month take-home pay and had the ability to contribute $80 per month toward support of the children.[2] The trial court then ordered the stipulation of November 21 to be modified in that the mother should pay to the father $40 per month, per child, commencing April 1, 1968.[3] On appeal to the Appellate Court (Second District), *held*, affirmed: the trial court did not abuse its discretion in ordering mother to contribute to partial support and maintenance of the two children. *Moore v. Moore*, 274 Adv. Cal. App. 760, 79 Cal. Rptr. 293 (1969).

At early common law, the duty to support one's children was considered merely a moral duty and not sufficient to bind the father.[4] However, this was considered repugnant to the sense of justice and the great majority of American jurisdictions today

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1. Jack claimed the following: 1) Their son was in Douglas, Wyoming, where he was sent by Helen without Jack's consent. The son wanted to come home. This meant added living quarters and expense. 2) A paper products company of the father had gone out of business, thereby cutting off expected income. 3) The youngest daughter was about to graduate from high school and desired to go to college. Moore v. Moore, 274 Adv. Cal. App. 760, 762, 79 Cal. Rptr. 293, 294 (1969).

2. Helen's earnings were found to fall under Civil Code section 171c and were therefore available for her separate obligations. 274 Adv. Cal. App. at 763, 79 Cal. Rptr. at 294-95.

3. "A child support order can be modified where the parties have stipulated as to the amounts of such support or when the decree is silent as to the amount of support." 274 Adv. Cal. App. at 765, 79 Cal. Rptr. at 396. Here, the stipulation was silent with reference to the support of the children. *Id.* at 761, 765, 79 Cal. Rptr. at 293, 296.

4. Mortimore v. Wright, 6 M. & W. 482, 487 (Ex. 1840); Kelley v. Davis, 49 N.H. 187 (1870); Gordon v. Potter, 17 Vt. 348 (1845). H. CLARK, DOMESTIC RELATIONS § 15.1 at 488 (1968), suggested a conflict in the early American cases.

hold the duty to be legal.[5] Two basic theories are used to rationalize this duty.[6] First, it is correlative to and dependent upon the parent's right to custody of the child; second, it springs from the fact of parentage in that by bringing the child into the world, parents have brought it upon themselves to support it.

Civil Code section 196 is California's version of the duty to support minor chldren.[7] Section 139 governs its application since section 139 gives the trial court the power to make suitable allowances for the support of the minor children.[8] The new Family Law Act that will be effective January 1, 1970, in the State of California, has not changed these sections.[9] Therefore, the case law should virtually remain unchanged.

Under Civil Code section 196, the former rule was that the parent was relieved of liability when "not in custody," absent a court order.[10] Prior to 1923, penal sanctions were equated with civil liability. Therefore, the rule was that a court order obligating the parent "not in custody" (usually the father) was needed for criminal liability.[11] However, the Penal Code was amended in 1923 to hold the father criminally liable for the non-support of his minor child regardless of who had custody of the child.[12] This resulted in the expansion of civil liability, which now corresponds

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5. *See* J. SCHOULER, DOMESTIC RELATIONS § 781 (6th ed. 1921), saying that this is usually made so by statute; *see also* H. CLARK, DOMESTIC RELATIONS § 15.1 at 488 (1968).

6. Few courts say what is definitely the basis, but this seems to be the underlying reasoning. *Extent of Parent's Duty to Support,* SELECTED ESSAYS ON FAMILY LAW 1072 (1950).

7. CAL. CIVIL CODE § 196 (West 1954) provides:

> The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability.

8. CAL. CIVIL CODE § 139 (West 1969) provides:

> In any interlocutory or final decree of divorce or in any final judgement or decree in an action for separate maintenance, the court may compel the party against whom the decree or judgment is granted . . . to make suitable allowance for support, maintenance and education of the children of said marriage during their minority . . . .

9. No. 252, [1969] Cal. Senate Bill, Title 5, § 4700 (a) provides: "In any proceeding where there is at issue the support of a minor child, the court may order either or both parents to pay any amount necessary for the support, maintenance, and education of the child."

10. *In re* Perry, 37 Cal. App. 189, 174 P. 105 (1918).

11. B. ARMSTRONG, CALIFORNIA FAMILY LAW 1098 (1953).

12. CAL. PENAL CODE § 270 (West 1955).

with the amended penal sanctions.[13] Therefore, it is no longer necessary that the father be in custody or subject to a court order before he is liable for support of his children.[14]

Civil Code section 196 also provides that the mother must assist the father in the support of their children if the father is unable to do so. This part of section 196 was interpreted in *Fox v. Industrial Accident Commission*,[15] where the court suggested that the primary obligation is on the father.[16] This was further defined in *Stargell v. Stargell*,[17] where the court stated:

> [A]lthough the trial court has the power to require either the father or mother or both to assist in the support of a legitimate minor child, the civil liability for the supoort of a legitimate child is imposed primarily on the father and only secondarily on the mother.[18]

This has been the traditional interpretation of section 196, and also the general view in the United States.[19]

The *Moore* court determined that no precedent exists which specifically defines "when the father is or is not able to give adequate support."[20] This introduced a new concept in the interpretation of Civil Code section 196. The court then focused upon the exact requirements to determine whether a father could or could not fulfill his duty. The following test was given by the court:

> [I]t . . . is not an absolute test dependent upon whether the husband has any resources at all to furnish adequate support for his child, but a *relative test* in which the *legitimate needs* of the child must be whittled down or expanded in accordance with resources available from his parents. Their *relative*

13. 37 CAL. JUR. 2d, *Parent and Child* § 21 (1957).
14. Dixon v. Dixon, 216 Cal. 440, 14 P.2d 497 (1932).
15. 194 Cal. 173, 228 P. 38 (1924).
16. *Id.* at 179, 228 P. at 40. The court stated:

> [T]he code sections quoted establish the proposition that, while the father is expected primarily to support the minor children, the mother is not exempted from this obligation. Where a father cannot fulfill the duty, the mother must . . . . The existence of a legal duty resting upon the father does not free the mother from her legal obligation; it is only performance of the duty by him that excuses her . . . .

17. 263 Cal. App. 2d 504, 69 Cal. Rptr. 715 (1968).
18. *Id.* at 510, 69 Cal. Rptr. at 718.
19. H. CLARK, DOMESTIC RELATIONS § 15.1 at 488 (1968).
20. 274 Adv. Cal. App. at 764, 79 Cal. Rptr. at 295.

> *contributions* in turn must *depend on the urgency of the needs of the child* and the *relative hardship to each parent* in contributing to such needs.[21]

The weighing of these variables is at the discretion of the trial court and should not be upset unless there is an abuse of that discretion.[22] According to the trial court findings,[23] if Jack was to use all his assets to support the children, he would have to sacrifice possible future income which he could later apply to his and the children's needs. It would also be necessary for the father to sacrifice his own needs and pleasures to fulfill the expenses of support and maintenance. On the other hand, since the mother was remarried and employed, she had fewer financial problems. She had income of $380 per month (take-home) and was well able to contribute to the support of the children. Can it be said the court erred in its decision? Clark has suggested; "If the wife is able to contribute to the child's support and thereby enhance his welfare, there is no reason why she should not be required to."[24]

To summarize, section 196 is the California rule on the duty to support minor children[25] and section 139 gives the trial court the power to require the father or mother or both to assist in the support of the minor children.[26] Thus, the trial court may use its discretion in application of section 196.[27] The *Moore* test definitely limits this power. The trial court now has certain guidelines to follow in exercising their discretion.[28] In trying to determine why the court created these guidelines, a glimpse into past decisions is helpful. It seems that the decisions at the trial court level were far from uniform.[29] The lack of precise guidelines

21. *Id.* at 764, 79 Cal. Rptr. at 296 (emphasis added).

22. *Id.* at 764-65, 79 Cal. Rptr. at 296.

23. *Id.* at 765, 79 Cal. Rptr. at 296.

24. H. CLARK, DOMESTIC RELATIONS § 15.1 at 496 (1968).

25. *See* note 8 *supra*.

26. *See* note 7 *supra*; Davis v. Davis, 68 Cal. 2d 290, 437 P.2d 502, 66 Cal. Rptr. 14 (1968); Brockmiller v. Brockmiller, 57 Cal. App. 2d 623, 625, 135 P.2d 184, 186 (1942).

27. 57 Cal. App. 2d at 625, 135 P.2d at 186.

28. 274 Adv. Cal. App. 764, 79 Cal. Rptr. 296.

29. The following cases exemplify the varying decisions: Hale v. Hale, 55 Cal. App. 2d 879, 132 P.2d 67 (1942). This was a very unusual situation where the mother and the father both had abundant means. Custody being with the mother, the father was paying $125 per month child support which the mother requested to be raised to $168 (since the son was entering college). The court held it was not an abuse of discretion to refuse the modification.

Brockmiller v. Brockmiller, 57 Cal. App. 2d 623, 135 P.2d 184 (1943). The father

could have been a major factor in these inconsistencies. The prior cases did not expressly say what factors the trial court was to consider, but merely implied that the circumstances of each case were adequate.[30] Reversal as a matter of law was difficult on appeal since the only grounds for such was an "abuse of discretion" by the trial court.[31] This being true, the decisions even when seemingly inequitable remained untouched.[32] A re-evaluation of the facts by the appellate courts may have been an answer to the need for greater consistency; however, this is not the law and probably never will be since this would overburden the higher courts with an influx of litigation. Therefore, the *Moore* court's guidelines are a possible answer to this dilemma.

The implications of the *Moore* decision can be seen in light of the trend towards equalization of the rights of parents.[33] Prior to 1923, there was a possibility that a father could not be held liable for the support of his minor child.[34] Since women at that time lacked the rights and protection that they have today,[35] there was a fear of such an inequitable result becoming a reality.[36] Therefore, sanctions were imposed to hold the father liable under

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had earnings of $130 per month of which $30 had to be paid for a lease. The mother, who had custody of the child, had earnings in excess of $1400 a year. Cost to maintain the child was $60 per month. The court, in holding that an award of $60 per month was not an abuse of discretion, said: "We may not say as a matter of law that the trial court, in placing the whole burden of supporting the children upon the husband, abused its discretion merely because the wife is in receipt of a larger income than the husband." *Id.* at 625, 135 P.2d at 186.

Sawyer v. Sawyer, 57 Cal. App. 2d 582, 134 P.2d 868 (1943). The mother, who was in custody of the two children, earned $120 per month and her husband earned $160 per month. The father of the children earned $237 per month. The court held that a $10 per month child support decree was not an abuse of discretion. (This case shows an opposite twist.)

30. Cases cited note 29 *supra*.

31. Brockmiller v. Brockmiller, 57 Cal. App. 2d 623, 625, 135 P.2d 184, 186 (1943).

32. *Id.*

33. 1 U.C.L.A. L. REV. 110, 112 (1953); *see also* note 9 *supra*.

34. The former rule was that the parent not in custody was not liable for the support of the child absent a court order. *In re* Perry, 37 Cal. App. 189, 174 P. 105 (1918). Also, it was at the trial court's discretion whether the father or mother or both would be required to pay support for their minor child. Brockmiller v. Brockmiller, 57 Cal. App. 2d 623, 135 P.2d 184 (1943).

35. For a comprehensive development of women's rights, *see*: D. SMITH, JUSTICE IS A WOMAN (1966); M. TURNER, WOMEN AND WORK (1969).

36. The *Moore* case puts the shoe on the other foot. Now the courts are concerned about the father who may be put into an inequitable situation when he has custody of the child.

any and all circumstances.[37] As women's rights have increased, the need for their protective blanket has diminished.[38] However, there still remains a tendency to give greater benefits to the mother in alimony and child support decrees. It appears that the *Moore* court devised its guidelines to help combat the possible inequitable decisions that may have resulted. This may not be the panacea; however, this result is a step toward uniformity of decisions and is in line with the trend toward equilization of the rights of men and women.

ROBERT Y. NAGATA

PAROLE—EXCLUSIONARY RULES—DETRIMENTAL EFFECT ON THE REHABILITATION OF PAROLEES NOT CONSIDERED IN HOLDING THAT EXCLUSIONARY RULES HAVE NO APPLICATION TO PAROLE REVOCATION PROCEEDINGS. *In re Martinez* (Cal. App. 1969).

While released on parole, Martinez was arrested, charged with and found guilty of possession of heroin.[1] The Court of Appeal, Second District, subsequently reversed the conviction[2] on the grounds that the search involved was illegal and the statements used against him were obtained without constitutional warning. The petitioner's parole had previously been revoked,[3] after a hearing at which he was present, on the following grounds: (1) The conviction (which was subsequently reversed); (2) driving a motor vehicle without consent of his parole agent; and (3) using alcoholic liquors to excess. Martinez's applications for parole were annually heard and denied; the Adult Authority[4] took cognizance of the

37. 37 CAL. JUR. 2d, *Parent and Child* § 21 (1957); B. ARMSTRONG, CALIFORNIA FAMILY LAW at 1098.

38. Women today have the ability to provide for themselves, thereby lessening the need for the husband's support. *See*, M. TURNER, WOMEN AND WORK (1964).

1. The record discloses that petitioner is now confined in Folsom State Prison. On May 12, 1955, petitioner was convicted in the Los Angeles Superior Court of violation of section 11500 of the Health and Safety Code (sale of narcotics—heroin), sentenced and committed to state prison. He had admitted a prior narcotics conviction. He was released on parole on June 14, 1962. In February, 1963, he was arrested and charged with possession of heroin. In October he was found guilty, sentenced to state prison and committed to the California Department of Corrections, in whose custody he has remained. *In re* Martinez, 275 Adv. Cal. App. 55, 57, 79 Cal. Rptr. 686, 687 (1969).

2. People v. Martinez, 232 Cal. App. 2d 796, 43 Cal. Rptr. 197 (1965).

3. Petitioner's parole on the 1955 conviction was canceled November 15, 1963, and formally revoked February 13, 1964. See note 1 *supra*.

4. Reference to the "Adult Authority" throughout this note refers specifically to California's parole board.