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CONSTITUTIONAL IMPLICATIONS OF PARENTAL SUPPORT LAWS

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This article addresses the constitutionality of those statutes known as "parental support laws" or "relative support statutes" in light of the equal protection clause of the fourteenth amendment to the United States Constitution.[1] These statutes impose upon a person the duty to support an indigent parent or other impoverished relatives. This article focuses only on the statutory duty of children—under threat of punishment—to support indigent parents.[2] In order to pass Constitutional muster under the requirements of the equal protection clause, there must be established at least a rational relationship between the class designated by the statute and the objective of the statute; that is, there must be a nexus between the burdened class and the objectives of the statute which singles out that class from society. We have assumed that fundamental rights requiring strict scrutiny for equal protection analysis are not involved in evaluating these statutes, and that only a rational basis is required to support the statutes.[3]

In establishing whether or not a rational relationship exists between children of the indigent and the goal of making that class responsible for the support of less fortunate parents, it is necessary to determine whether the logic requiring a parent to support his child works equally effectively in reverse. In other words, if a parent has a duty to support his offspring, does the state thereby have the right to require a child to support a parent in need? Further, it is necessary to examine whether the parent-child relationship itself supports the constitutional premise.

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1. U. S. CONST. amend. XIV, § 1. In Virginia, the relevant statute is at VA. CODE ANN. § 20-88 (Repl. Vol. 1975).

2. Lopes, *Filial Support and Family Solidarity*, 6 PAC. L. J. 508 (1975) [hereinafter cited as Lopes].

3. P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 558 (1975).

There are three theories that proponents of the statute implicitly rely on: 1) the analogy to parent-child support statutes; 2) the novel theory of relational interests; and, 3) the contract theory that because a parent supports a child, the child should support a parent. That is, in receiving aid, a rational basis is established for thereafter providing it. In the authors' opinion none of these views provides a rational basis for imposing a duty of parental support on children, and so, these statutes are unconstitutional. This article will further show that the sociological and economic effects of those statutes have been unsatisfactory in actual practice and also that the statutes have been applied haphazardly.

I. Historical Background

The "responsible relative" statutes date from the Elizabethan Poor Law of 1601, which was a successful attempt by the state to rid itself of the burden of supporting indigents by designating relatives to bear the duty of support. Indeed, the Elizabethan statutes did not merely limit the duty to direct offspring of indigents, but also broadened the family sphere to encompass such relationships as husband-wife, grandparents-grandchildren, and siblings.[4]

The ostensible purpose behind these statutes was to provide for the poor, but the real thrust of the law was to shift the burden of welfare measures from the state to a relative of the poor person. While such a person might not really be "capable" of supporting his indigent relative, the punitive threat of fine or imprisonment was impetus to do so. This "real purpose" of relieving the drain on the common trough under the more lofty guise of filial duty was also the basis of similar American laws.[5]

It should be noted that no such duty of a child to support his parent existed at common law.[6] The statutes in many states are justified by the theory that the state would force more fortunate relatives to assume their moral duty of support for their less fortunate relatives. In this view the support has as its primary purpose the instance of the indigent party rather than relieving the burden on the state. A Kentucky case, holding for contribution from more than

4. The full history of these cases is set forth in Lopes, *supra* note 2, at 508-19.

5. *Id.* at 511.

6. 32 Chi.- Kent L. Rev. 334, 335 (1954).

one relative, supports this view.[7] However, a West Virginia court held that no contribution should be demanded of others once one sibling has been required to support indigent parents.[8] The theory relied upon is that once the state has been relieved of its duty to support, it has no real interest in how the indigent party is to be maintained.

Thus, the objective of supporting the indigent parent has neither a consistent basis nor application. In some states, it is a moral imperative; in other states, a sincere concern for the plight of the poor; and yet in others, a frank desire to wash state hands publicly and find a class anywhere, anyhow, to assume an unwieldy and unwanted burden.

II. Application of Parental Support Statutes

These statutes have been applied haphazardly. For example, in *Duffy v. Yordy*[9] an aged mother being cared for by one child sued another child for contribution to her maintenance under a statute imposing that duty on "children." It was held that such an action for contribution could not be maintained once she was actually being cared for since the vital factor in civil liability is the condition of actual want.[10] Hence, there is an apparant denial of equal protection to a paying child where the same statute makes one child amenable to suit and not another. The state admitted in *Duffy* that once its duty of support has been shifted, and the want of the needy party has been satisfied by *someone*, the state no longer cares how the law shall apply to that someone. The party affected thus becomes, in effect, an arbitrary choice and a victim of fate.

In *Reed v. Reed*,[11] the Supreme Court spoke to the very type of arbitrary application of a statute that occurred in *Duffy*. That case held that the rational basis requirement of equal protection requires minimally that the classification be based upon "some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated

7. Wood v. Wheat, 226 Ky. 762, 11 S.W.2d 916 (1928).
8. Connell v. Connell, 131 W.Va. 209, 46 S.E.2d 724 (1948).
9. Duffy v. Yordy, 140 Cal. 140, 84 P. 838 (1906).
10. *Id.*
11. 404 U.S. 71 (1971).

alike."[12] Two siblings, both able to support an indigent parent, are certainly "similarly circumstanced," but in *Duffy*, they are not "treated alike." In the same vein, another definition of the minimum standard for the rational basis requirement of equal protection states that "[a] reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law."[13] Under *Duffy*, the two parties similarly situated are not included in the same class as to the duty imposed. Indeed, it is the thesis of this article that children generally are not a class different from the world at large with regard to support of indigent parents.

Another question is whether illegitimate children are liable for support of indigent parents under these statutes. In *Lee v. Smith*,[14] the New York court interpreted "child" in their statute to include illegitimate children vis-a-vis the duty to support an indigent parent. The court cited the increasing rights and protections of illegitimates as a sufficient logical basis for implying a greater obligation and duty on their part. In commenting on this case, one author said:

> The court's construction of the statute as including illegitimate children appears consistent both with the purpose of the legislature to shift the burden of supporting indigent adults from the taxpayers to financially capable blood relatives of the poor, and with the tendency to give bastards the legal status of legitimates—a tendency which, if not carried out to impose duties as well as rights, would favor bastards over legitimate children.[15]

However, in *Castellani v. Castellani*,[16] a decision totally inconsistent with *Lee v. Smith*, the New York court emphasized the "scanty" nature of the rights accorded to illegitimate children as being a basis too insufficient for creating the same support duty as legitimate children.[17] Once again, members of a class similarly situated are

12. *Id.* at 76. *See also* Levy & Duncan, *The Impact of Roe v. Wade on Paternal Support Statutes: A Constitutional Analysis*, 10 FAM. L. Q. 179, 183 (1976) [hereinafter cited as Levy].

13. Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949).

14. Lee v. Smith, 161 Misc. 43, 291 N.Y. Supp. 47 (1936).

15. Note, *Duty of an Illegitimate Child to Support Its Destitute Mother*, 46 YALE L. J. 875, 878 (1937).

16. Castellani v. Castellani, 176 Misc. 763, 28 N.Y. Supp. 2d 879 (1941).

17. Note, *Duty of Illegitimate Child to Support His Parent*, 36 ILL. L. REV. 686, 688 (1942).

treated differently by the same law. It is not clear whether in present society these cases would be decided consistently, but this haphazard application provides further reason to examine the basis of the laws in detail.

III. THE CALIFORNIA CASES

Some of the more recent challenges to the constitutionality of the "responsible relative" statutes involve a series of five California cases from 1958 to 1973.

First, in *Department of Mental Hygiene v. Hawley*,[18] the court dealt with a criminal proceeding in which a man murdered his wife and was subsequently confined in a state mental institution. Under the California support statute,[19] the state forced a son to pay for his father's confinement. The son successfully challenged the statute on the grounds that a public interest was involved in confining and reclaiming an individual via the criminal law proceeding of the state and that the cost of such a public interest should not be chargeable to a private individual. The court held that the logical nexus between the social objective and the private class sought to be charged could not be justified as a rational basis for singling out that class. So, a violation of equal protection was found and the child was not liable for support.[20]

In *Department of Mental Hygiene v. Kirchner*,[21] a situation basically similar to *Hawley* existed in a civil context. Here the court found that the sequestration of mentally defective persons in state institutions was primarily a state function, the cost of which must be borne by the state. Any attempt to shift such a public cost onto a private class of individuals would be arbitrary and, therefore, violative of the equal protection clause.[22]

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18. Department of Mental Hygiene v. Hawley, 59 Cal. 2d 247, 28 Cal. Rptr. 718, 379 P.2d 22 (1963).

19. CAL. CIV. CODE § 206 (West 1954).

20. *See generally* Note, *Relatives' Support Liability: Two Years After Kirchner*, 18 HASTINGS L. J. 720 (1967) [hereinafter cited as Relatives].

21. Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 36 Cal. Rptr. 488, 388 P.2d 720 (1964).

22. One commentator finds no rational basis for naming private individuals as being obligated to shoulder the duty to support an indigent relative. He states:

> Modern judicial analysis of an equal protection question first defines the purpose of

The California Supreme Court in *Kirchner* implied that as far as the mentally incapacitated are concerned, there is a pre-existing legal duty incumbent upon the state rather than a private individual. A relative cannot be properly charged with the cost of mental confinement by the state of one of his family members unless he bears a pre-existing legal duty. Why find a pre-existing legal duty on children who have their own responsibilities and concerns? Must they not support their own children? Why not place the burden on the society as a whole which has benefited from the indigent elderly individual's labors during his or her working lifetime?

Responding to the California Supreme Court's decisions of *Hawley* and *Kirchner*, in the *County of Alameda v. Espinosa*,[23] a court of appeals attempted to define the public versus the private interest in terms of duty to assume the cost of support. This case held that where the primary purpose of the confinement was public, the state could impose no demand for reimbursement upon a private relative. If, however, the purpose of the confinement involved the objective of individual rehabilitation as strongly as that of public protection, then an individual relative could be forced to reimburse the state—if he had a statutory duty to support.[24] The court here seemed to assume the constitutionality of support laws that would impose a legal duty to support relatives who are mental patients.

Regarding another problem, the California Supreme Court, in *County of San Mateo v. Boss*,[25] found no duty for a relative to reimburse the state for benefits conferred upon a needy recipient. *Boss* emphasized the need for a statutory legal duty and stated further that there is no common law duty for children to support "needy" parents. The court also considered "in need" to be different from "poor" as set forth in the statute and thereby sidestepped a constitutional confrontation by semantics. So, recovery by the

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the statute under attack, then defines the classification established by the statute, and finally attempts to determine whether there is a reasonable relation between the purpose and the classification.

He suggests, essentially, that support of the elderly indigent is a proper function and duty of the state which cannot be imposed upon individuals without resulting in a violation of equal protection. Lopes, *supra* note 2, at 529-31.

23. 243 Cal. App.2d 534, 52 Cal. Rptr. 480 (1966).

24. *See generally* Relatives, *supra* note 20, at 723-24.

25. County of San Mateo v. Boss, 3 Cal. 3d 962, 92 Cal. Rptr. 294, 479 P.2d 654 (1971).

county was denied and the right of the plaintiff not to pay support was upheld. Subsequently the California Legislature changed the wording of the support law from "poor" to "in need" which effectively foreclosed any further attempt by a court to examine the financial condition of the alleged recipient.[26]

The most recent California case in which support statutes were treated is *Swoap v. Superior Court*.[27] In this class action by both parents and children, a restraining order was issued to the California Department of Social Welfare enjoining enforcement of filial support laws. This order was overturned on appeal, in which the constitutionality of the laws was upheld on the basis of equal protection. The court found the classification of children as having the burden of support of parents to be a rational one "since these children received special benefits from the class of 'parents in need,' it is entirely rational that the children bear a special burden with respect to that class."[28]

IV. THEORIES TO SUPPORT A RATIONAL BASIS

A. *Analogy to Parent-Child Support Statutes*

The above quote in *Swoap* is the only language of the California Supreme Court addressing the rationale behind the underlying issue of parental support laws, and thus needs to be re-examined. *Swoap* assumed that the duty of a child to support his parent is a mirror-image of the parents' responsibility to support a child. The proposition is offered by the court as a simple truism inherently logical and too apparent to demand analysis. However, breaking that down into fundamentals, the language requires children to support parents on an implied contract (which will be dealt with later) or based on the same theory that requires parents to support children.

But, the logic of parent-child support does not bear out a duty of child-parent support in view of responsibility stemming from volitional acts. The parent bears a duty to support the child since there is "a rational relationship of nexus between the father's act of intercourse and the birth of the child."[29] In other words, the volitional

26. *See* CAL. CIV. CODE § 206 (West Cum. Supp. 1979).
27. Swoap v. Superior Court, 10 Cal. 3d 490, 111 Cal. Rptr. 136, 516 P.2d 840 (1973).
28. 516 P.2d at 851. *See* Lopes, *supra* note 2, at 532-33.
29. Levy, *supra* note 12, at 179.

act directly responsible for the birth of the child serves as a rational basis for assigning responsibility and a legal duty of support for the result of that act.

This duty of parent-child support has been analyzed in a law review article written in light of the United States Supreme Court holding in *Roe v. Wade*.[30] The article determined that even though the mother would, in effect, have sole responsibility for the decision to bear or not to bear a child, the nexus between the father's act of intercourse was not sufficiently broken to alleviate him of the burden of responsibility for the birth of the child. This article concluded in part: "The mother's decision to bear does not interrupt the natural sequence of events but rather allows the natural sequence of events to take place. Thus, the mother's decision to bear is not a sufficient intervening cause to shift the burden of support from the father to the mother."[31]

Thus, the real justification for parental duty to support a child becomes a matter of proximate cause. By the voluntary act of procreation, a parent sets in motion an unbroken sequence of biological development culminating in birth, and responsibility for support is assigned accordingly. Where the burden of support depends upon responsibility and all who are responsible bear the burden, the rational basis requirement of equal protection is satisfied.

In the converse situation of the duty of a child to support a parent, there is no proximate cause, no volitional act, and no rational basis for the demand for support. The child has not acted to bring about the life of the parent. Thus, taking his property to support a relative for whose existence he bears no personal responsibility is arbitrary. While a father assumes the voluntary status of fatherhood, the child assumes no duty by having been born. His birth is the result of the act of the father and mother and such a result cannot logically or physically be turned into proximate cause.

Since there was no volitional act or control by the child, there can be no responsibility based on this act. Creating a class of children bearing the duty to support parents based on this theory is thus arbitrary. Since the class has no rational connection with the duty

30. *Id.*
31. *Id.* at 195.

imposed upon it, there is a denial of equal protection. Thus, this theory underlying the *Swoap* decision cannot stand.

Moral duty and gratitude, or lofty ideals, cannot be used as a justification for the taking of property. It has been urged that the duty to suppport indigent parents is a moral imperative originally imposed by nature which should be reinforced by statute.[32] However, the law should not act in lieu of conscience or in forcing an action in the public tribunal that should properly remain a matter in the private domain of individual morality. The "notion of a duty" purposed by nature here has no biological foundation. The duty dictated by natural law, which should be assumed by all who bear it, is really love and affection. This is considered in the next section.

B. *The Relational Interests of Family Status*

Is there a duty arising from the very fact of relational status? In his inquiry into Roscoe Pound's exposition concerning the competing and interacting interests inherent in domestic relations,[33] Henry H. Foster examined the notion of how areas of the law have evolved into a champion of family status. There is special emphasis on the fact that there are "four types of family relationships secured at least in some measure by law—those of *parents, children, husbands,* and *wives*—and that each type of claim might be asserted *against the world* or *against the other party* to the relation.[34]

Along with products liability and medical malpractice, family law ranks in the vanguard of those areas most in ferment in the law. The family is no longer a private domain, and its concerns and problems have been pushed into the public arena of open scrutiny. As early as 1916, Pound had already noted "trends in the law and foresaw an increasing public concern with the internal affairs of the family."[35] This has materialized in a public preoccupation with regard to traditionally private matters such as discipline of juveniles, abortion, and medical care for the aged.

32. Note, *Parent and Child: Responsibility of Adult Child for the Support of Needy Parents*, 33 NOTRE DAME LAW. 108, 109 (1957).

33. Foster, *Relational Interests of the Family*, 1962 ILL. L. F. 493 (1962).

34. *Id.* at 493.

35. *Id.*

In the law itself this ferment has manifested itself in many areas. Now a parent may recover in many states for the loss of affection and companionship of a minor child in a wrongful death action where formerly he was limited to recovery of mere pecuniary loss. Many states have abolished interspousal and intra-familial tort immunities, concepts once revered as sacred cows whose desecration would bode ill for harmonious hearths. Changing mores, pressing needs, and rising expectations as to notions of individual equality have all contributed to the public incursion into this settled, intimate circle of relationships.

> In 20th century America, status and its incidents have undergone substantial modification as to both husband and wife and parent and child, including their rights and duties *inter se* and their relationships to outsiders and society. No longer is the family a semi-autonomous government, for both custom and law have moved to abandon the concept of paterfamilias . . . . Moreover, the principle of equality has won out over the principle of subordination in most areas of family law so that the claims of the wife or child may prevail over those of husband or father . . . . In short, . . . legal doctrines which once governed family relations have been expressly or impliedly modified or repudiated as the family has emerged as a different institution, as social values have changed, and as the social interest in the individual has given rise to welfare legislation.[36]

The theme underlying many of these changes has been a greater regard for individuals as persons and the emotional realities of relationships rather than individuals viewed solely in the context of the family relationship.

Relational interests might be used by some to buttress parental support statutes on the theory that these relationships involve love and affection between parent and child which gives a rational basis for these statutes. But, in view of the emotional realities of the individuals involved, the relational interest can be viewed as being both too broad and too narrow to serve as a criterion for determining the duty to support indigent relatives. It is too broad in consideration of the fact that not all children love and revere their parents. The status of a child confers no special emotional tie in and of itself.

36. *Id.* at 496.

In order to justify the parental support laws under this theory, it is necessary to presume that loving concern and gratitude flow naturally from the child-parent relationship, making support of parents incumbent upon any child who is not so "unnatural" as to suppress these emotions. However, the status of a child can be merely an adventitious occurrence rather than the sacred bond conferred providently and deliberately by devoted parents. Thus, the presumption of "natural bond" fails by logical overbreadth. What about victims of child abuse? What about the myriad of factors that would tend to paint an ugly face over the idyllic parent-child relationship if they were known or acknowledged?

In addition to being overly broad, the relational interest as a basis for these laws can also be found inadequate as being too narrow in scope. Assuming that loving concern and gratitude should naturally flow from the parent-child relationship and that thereby a duty to support is created, it would then seem to follow that the child should become liable to support all those for whom he feels the same emotional commitment—not necessarily parents. Using this rationale, the logic of relational status would fail to encompass many other possible candidates for support—a dear, indigent neighbor, mentor, or relative too distant to be statutorily included within the ambit of the support statutes. Thus, basing a duty upon the relationship alone fails as being both overinclusive and underinclusive and patently restrictive.

C. *Contract Analogy*

A last argument in favor of the relative support laws is that there exists some sort of relation of the child to the parent by virtue of having been supported with the idea being that the recipient of support has a continuing nexus to the giver. This immediately calls to mind a contract analogy. Should there actually be a basis for such support in a theory of contract, the state would then have its rational basis for designating children as a class responsible for supporting indigent parents. This theory also may underlie *Swoap*.

There can be no assertion that a direct contract negotiated between two consenting parties has been brought into being between parent and child. So, any consideration of a contract theory in this context must revolve around an analogy to implied or quasi-contract.

An *implied contract* arises by means of "[a] promise that is implied in fact is merely a tacit promise, one that is inferred in whole or in part from expressions other than words on the part of a promisor. It is a question of fact whether or not in a particular case a promise should be so inferred."[37] Thus, an implied contract presupposes the concurrent existence of the parties engaged in some sort of mutual activity from which the law can draw inferences as to their assent to specific conditions. The opportunity for two parties to communicate as to a common area of interest must exist or there would be nothing upon which to base an inference: "Contractual duty is imposed by reason of a *promissory expression* . . . . The language used to express assent, whether of words or of other signs and symbols, may be one invented by the parties themselves for their own private communications . . . ."[38]

Because the two parties necessary to the contract do not exist simultaneously at the moment of "making" the duty of support, which is conception, implied contract is an inappropriate theory in the parent-child relation. There is a lapse of nine months from conception until one party even exists, and then that party is incapable of contracting at all until reaching the age of majority.

The concept of a promise *implied in law* is more appropriate. Thus:

> When a promise is said to be 'implied in law,' it is meant that neither the words nor the other conduct of the party involved are promissory in form or justify any inference of a promise. The term is used to indicate that the party in question is under a legally enforceable duty, just as he would have been if he had in fact made a promise.[39]

The duty of a parent to support a child is one imposed by law arising from the very status of parenthood. He or she need not assent by words or acts in order to assume the obligation. Once the status of parenthood is attained, the law automatically creates the obligation.[40] The issue then becomes whether, by analogy, a reciprocal obligation is created in the party for whose benefit the duty was

37. CORBIN, CONTRACTS § 17, at 24 (1952) [hereinafter cited as CORBIN].
38. *Id.* § 18 at 25 (emphasis added).
39. *Id.* § 17 at 24.
40. *Id.* § 19 at 27.

originally imposed. That is, does the pre-existing duty of a parent to support a child imply a subsequent duty for the child to support the parent?

As a matter of contract law, the performance of a *pre-existing* duty is *insufficient* to serve as consideration for implying a promise in another party. As Corbin states: "The very frequently stated rule is that neither the performance of duty nor the promise to render a performance already required by duty is a sufficient consideration for a return promise."[41] "Legal duty" is a pre-existing duty and is defined along lines that accord perfectly with the states' requirement of parental support for a child:

> One is under a legal duty when some performance is required of him and some form of societal compulsion is applicable against him. Compulsion does not necessarily mean the application of force to his person . . . it also includes any other form of societal sanction or penalty that is made applicable for the purpose of inducing performance.[42]

Therefore, the action of the state in imposing a duty upon parents to support children, and then inferring from that duty by analogy that children should support their parents, is lacking in any foundation in contract. Performance of a pre-existing duty by a parent cannot serve as "valuable consideration" creating a nexus to provide a rational basis for the obligation of a child to support his parent.[43]

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41. *Id.* § 171 at 245.

42. *Id.* § 171 at 246-7.

43. Cases involving pre-existing duties hold that it cannot serve as consideration for a return promise or even for a reward. For example, it is contrary to the pre-existing duty rule for a public official or a law enforcement officer to accept a reward for rendering services in his official capacity. Where a police officer obtained special information concerning a diamond theft, he was held ineligible to receive the reward promised since his official duty required that he assist the public in precisely the kind of matter involved. "The services he rendered in this instance must be presumed to have been rendered in pursuance of that public duty, and for its performance he was not entitled to receive a special quid pro quo." Gray v. Martino, 91 N.J.L. 402, 103 A. 24 (1918).

Where a reward is offered, acceptance by performance is void where that performance is done by a public official within the scope of duty. "Performance of the terms of the offer constitute sufficient consideration, but performance by one otherwise bound to do so does not operate as a sufficient consideration." Comment, *Effect of Public Policy Upon Reward Offers*, 20 WASH. & LEE L. REV. 395, 396 (1963). Whereas a public officer might accept a reward if

V. Sociological and Economic Side Effects of the Statutes

The statutes in question have proven most unsatisfactory in actual application. Indigent parents have been loath to claim state support for fear that the state would seek reimbursement from their children. Many have preferred to suffer in silence rather than be the cause of pressure on young, struggling families. The phobia of the elderly of becoming a burden and their concomitant desire for independence are plagued by the pride-inhibiting effect of the laws.[44]

Economic ramifications of the statutes have been equally disastrous. The program perpetuates poverty by keeping a child from properly providing for his own family or for his own retirement. Frequently, the "able" child is just barely capable of assuming such

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some part of the service he rendered were performed beyond the scope of his duty or on his free time, Corbin, *supra* note 37, § 180, at 261, other cases apply the common law principle very strictly and refuse to allow policemen working on their own free time to collect rewards—at least within the confines of their own jurisdiction. *In re* Russell, 51 Conn. 577 (1884).

Another situation in which discharge of a pre-existing duty fails to provide consideration for a subsequent promise is in the area of creditor-debtor relations. A debtor cannot promise to pay his debt to a creditor and by that promise of a payment already owed extract a further obligation or favor from his creditor. "A promise by a debtor or other obligor to perform his already existing legal duty is binding without any new consideration whatever; and the fact that the creditor gives some inoperative consideration is immaterial." Corbin, *supra* note 37, § 191, at 274.

A third area where pre-existing duty cannot serve as consideration is in the context of domestic relations. Where a wife sued a husband for default on a promise to pay her $100 per annum for performance of her domestic duties, the court held that such services were obligatory and correlative to the marital status. The court found a *nudum pactum*, a voluntary agreement wholly unsupported by consideration. Lee v. Savannah Guano Co., 99 Ga. Rep. 572, 27 S.E. 159 (1896). In a similar case, where a widow sought to recover from her deceased husband's estate for services and care she had agreed to render to him in exchange for payment, the court held that she was not entitled to recover the special value of such services on a theory of quasi-contract or implied assumpsit. Again, the rationale was that the pre-existing duty of a husband to support a wife could not be made the basis of an enforceable agreement. Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945).

In contrast, one case allowed a wife to collect on a promise by her husband to pay her for services within the marital context. This situation involved a couple that had become estranged and had lived apart. In order to induce his wife to take him back into her home and to nurse and care for him, the husband promised to convey to her property worth $6,000. After his death, she sued successfully with the court finding adequate consideration. Since the marital duty had been ruptured, ending the husband's right to services, the wife's agreement to render such services was a new agreement going beyond and separate from the original contract. In this new contract, furnishing marital services was no longer imposed by duty; thus, consideration could be found. Young v. Cockman, 182 Md. 246, 34 A.2d 428 (1943).

44. Lopes, *supra* note 2, at 523.

support, with the resulting shift of "economic desolation from one generation to the next."[45] Rather than burden their children or compromise their own pride, many indigent parents refuse to apply for public aid at all. Thus, they recieve nothing from their children or the state.[46]

VI. CONCLUSION

The "parental support" statutes have been examined and found to have no rational basis biologically, through a love relationship, or by contractual analogy to the parents' duty to support their children. Having no rational basis, they are in direct violation of the equal protection clause of the United States Constitution. One court has found that these laws violate state constitutional provisions on equal protection grounds.[47] However, that court, while referring to the California cases cited above, provided no analysis of the statutes to support their conclusions.

The sociological impact of the parental support or filial support laws is negative. Moral questions involved should remain a private matter among family members. Thus viewed, the real duty to support the indigent elderly is a proper function of the state. An elderly person has spent his or her lifetime contributing to society by his or her labor, and it is society at large that has the duty to support the indigent elderly in return.

These "parental support" statutes should, therefore, be declared unconstitutional and state legislatures should repeal such laws where they are on the books.

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45. *Id.* at 526.
46. *Id.* at 527.
47. Hospital Services' Inc., v. Brooks, 229 N.W.2d 69 (N.D. 1975).