Family Solidarity Versus Social Solidarity in the United States

Sanford N Katz, Boston College Law School
One of the major issues in the United States and one that was recently played out in the discussions about health care reform was the issue of the extent to which individuals in families should be responsible for each other and the extent to which government should assume that responsibility. In other words, what are the boundaries of the responsibilities of individual family members to each other and that of the responsibility of the state to the individual? What legal obligations does the state delegate to individuals in the family and what obligations does the state maintain its obligation to individuals? We must keep in mind that in the United States, the family is not recognized as a legal unit in the sense that it has any legal status, like say a corporation, a partnership or a trade union. In the United States, a family consists of a bundle of relationships: husband and wife, parent and child, sibling and sibling, with the husband and wife relationship being the foundation of the family. In the 1888 United States Supreme Court case of Maynard v. Hill, Mr. Justice Field wrote:

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties
may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for dissolution.¹

Justice Field was referring to civil marriage and his statement made in 1888 is basically true today with the exception that courts may review legislation to assure that it conforms to constitutional mandates.

My presentation today will concentrate on economic obligations of family members to each other and the state to its citizens.

Let me begin by stating that the United States does not have the kinds of economic safety nets that are available in other industrial western countries. Primarily, our safety net is Social Security, a modest government run pension program. Most working Americans, unless specifically exempted, contribute a percentage of their salary to Social Security by the employer’s withholding the contribution. The federal Congress instituted Social Security in the 1930s after the Great Depression. It was part of President Roosevelt’s “New Deal.” One qualifies to be paid from the fund if one has worked 40 quarters during a person’s life. Payments may begin at age 62 for women and 65 for men, although those ages may be changing because of our aging population and the number of people who work until 70 and above. There is no means test. In the United States, a millionaire who has contributed to Social Security receives his monthly check just as the sales clerk. Medicare, a government program, was developed in the 1960s, and is our healthcare program for all Americans over 65. There is no means test for Medicare, which for many older Americans is their exclusive medical care coverage. To other Americans, Medicare provides their basic coverage, but a private insurance plans picks up where Medicare either does not cover the medical problem or only covers

¹ 125 U.S. 190 (1888).
a certain percentage of it. Medicaid is a healthcare program for adults who are indigent and in need of healthcare. Those adults would consist of people living below the poverty level. We do not have a universal health care program, except for Medicare, and millions of Americans, under the age of 62, are uninsured. This will change under the recently enacted health reform legislation, which will mandate health insurance for those who do not have such coverage and will provide a government subsidy for those who can not afford health insurance. For the most part, most Americans who are employed full-time acquire their healthcare insurance through their employers. This is called an employer-sponsored system. Whether the employer contributes to the healthcare program or the employee pays for it partially or completely, depends on the individual employer.

Attaching healthcare to employment is a great problem in the United States. Many people work for that benefit. The reason for my going into detail about healthcare in the United States is to illustrate the existence of an anti-government involvement in healthcare except for the elderly. Most, if not all, western industrial countries make healthcare available to all of their citizens as an entitlement. We in the United States have not. We have other federal welfare programs that are relevant to my presentation and I shall mention them later.

One can approach this topic by looking at the impact of the welfare state on individuals or one can take a different approach, namely examining how the law, through judicial decisions and statutes, seeks to assign individual responsibility as a preference to state responsibility. Except in very limited cases, it would be difficult to draw very clear lines of distinction by stating that in certain situations family members are responsible for each other and in others it is the state’s responsibility.
The limited cases to which I refer would be support obligations adult children have to parents, support obligations parents have to children and support obligations a husband has to his wife during marriage and at divorce. An adult child’s obligation to support his indigent parents, which can be traced back to English law which Blackstone ascribed to the reciprocal responsibility, namely since parents supported their children, adult children should support their needy parents, can be found in thirty American states, twenty-two of them providing a civil remedy. Seventeen of them condition the child’s financial responsibility on his financial ability to pay. There seems to be no uniformity among the states as to who can bring the action, whether it is the parent herself, a district attorney, or the court itself. Some states allow the adult child to defend the action against him by arguing that that he was not supported by his parent. With the availability of Social Security, the pressure on adult children to support their indigent parents has been lessened. It should be said, however, that adult children who do support their parents with more than 50% of the parent’s income can take a deduction for that support on the adult-child’s income tax return. Thus, the adult-child does acquire some financial benefit for supporting his indigent parent.\(^2\)

Child support has historically been the responsibility of the parent, the father in cases of legitimate children, and the mother in cases of illegitimate children.\(^3\) The support obligation a parent and now both parents have to support their children from birth to the age of majority, now 18, is based on the common law, codified in many states either through support laws or through child neglect laws. Whatever the source, the

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\(^3\) Laura Morgan discusses both the historical basis for this statement and its contemporary application. She cites Sir William Blackstone’s Commentaries as the source of the statement, based on natural law. See Laura W. Morgan, *Child Support Fifty Years Later*, 42 Fam. L. Q. 365 (2008)
obligation exists and would be difficult to contract the obligation away. In cases of divorce, the obligation may exist beyond the age of majority in cases of a child’s education. Some states, like Massachusetts, have specific statutes that mandate post majority child support for college expenses. The obligation has been attacked by resistant fathers who claim that the age of majority should terminate their support obligation because the same obligation would not exist in an intact family.

These attacks, often based on the argument of a denial of equal protection under the federal constitution, have not been adopted by courts. Sometimes college children sue their parents for post majority child support either under the statute or under the doctrine of necessities. They have been successful. Courts have decided that children of divorce differ from children in intact families in that children of divorce are part of a vulnerable population, need protection and that the statutory mandate furthers a legitimate governmental objective. In the 1999 Michigan case of *Kohring v. Snodgrass*, the Supreme Court of Michigan was convinced by the mother’s assertion that the state had “a legitimate interest in securing higher education opportunities for children from

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4 The Massachusetts Statute, M.G.L. 208 § 28 reads in pertinent part as follows:
“The court may make appropriate orders of maintenance, support and education of any child who has attained age eighteen but who has not attained age twenty-one and who is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance. The court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three, if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance due to the enrollment of such child in an educational program, excluding educational costs beyond an undergraduate degree.”


5 Kohring v. Snodgrass, 999 SW 2d 228 (Mo. 1999).
broken homes.” Quoting a previous holding in a 1993 Missouri case of *Leahy v. Leahy*,\(^6\), the court went on to say that children of an existing marriage derive many benefits that children of a dissolved marriage are deprived of sharing and therefore the state has a legitimate interest in protecting children of a marriage that is dissolved. Then the court went on to say that parents who are financially capable of supporting their children in higher education should be required to do so. And, the highest court in Missouri held that the Missouri state provision that required a parent to support a child in a university did not violate the father’s constitutional rights of equal protection of the law.\(^7\)

For a long period of time, child support laws were not vigorously enforced either by courts or by the non-supporting parent. There were a variety of reasons, one of which was that once a father moved out of the state, it was difficult and costly to sue him in his new state. That problem was potentially and theoretically cured in 1950 with the promulgation of the Uniform Reciprocal Enforcement of Support Act (URESA)\(^8\). That Act allowed the mother to file a complaint in her state that could be heard, processed and collected in the husband’s new state. A second reason for the non-enforcement of support orders was that there was a safety net, namely federal and state welfare programs, like Aid to Dependent Children, referred to as AFDC. Abandoned mothers, believing that pursuing private claims against the father of their children was hopeless because of their not knowing the whereabouts of the father, sought financial aid through AFDC, which resulted in officials searching for the delinquent fathers and once found seeking reimbursement from him. During the 1970s, there was a concerted effort to decrease the

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\(^6\) 858 S.W.2d 221 (Mo. 1993).
\(^7\) *See also* In re Marriage of Grittman, 730 NW 2d 209 (Iowa Ct App. 2008); In re Crocker, 22 P3rd 759 (Ore. 2001).
\(^8\) 9B ULA 273 (2001).
welfare rolls and the federal government took leadership to provide incentives to states, which reduced the number of families dependent on welfare. New techniques were devised to locate delinquent fathers through their social security numbers, obtain liens on their salaries if they were working and intercept tax refunds if they qualified for such refunds. States established special departments for child support. This was accomplished under the federal Child Support Enforcement Act of 1974,\textsuperscript{9} which among other things, established a federal Office for Child Support. Since then, the federal Congress has enacted further legislation dealing with child support awards and mechanisms for enforcement. These acts included: The Child Support Recovery Act of 1992, the Full Faith and Credit for Child Support Orders Act in 1994 and the Deadbeat Parents Punishment Act of 1998. Incidentally, the Federal Child Support Recovery Act provides for criminal prosecution of an obligor parent who knows of his legal duty to pay support and then voluntarily and intentionally violates that duty. My purpose for describing these congressional acts is two-fold: one to illustrate the extent to which the federal Congress is serious about individual parents taking financial responsibility for supporting their children and secondly that the federal Congress has shown an interest in financially protecting children.

Child support has traditionally been a highly contentious matter in divorce cases, and remains such today, perhaps providing more acrimony between the parents than alimony, and many times is played out in a custodial battle. The reason has to do with the fact that in the past the amount of child support was discretionary and judges made decisions on a case by case basis without uniform guidelines and without a record. This changed dramatically in 1984 when the federal Congress passed legislation mandating

\textsuperscript{9} 42 USC §§ 651-669 (2000 & Supp. 2005),
that the individual states establish definitive numerical formulas to assist courts in establishing child support obligations if states wanted to receive federal funds in their child welfare programs. Experience has demonstrated that guidelines can work and can provide uniformity among courts in individual states. They also are extremely helpful to lawyers in preparing their cases and educating their clients in what to expect in so far as a support order is concerned.

This is not to say the child support guidelines have not been criticized. Fathers groups have been highly critical claiming that they are government imposed without regard to input from them. Further criticisms center around the fact that they are based on a mathematical formula instead of consideration of the individual circumstance of the father, for example in the situation where the father has remarried and has a new family. But the case by case approach is precisely why the guidelines were developed in the first place – to provide uniformity and to limit the individual judicial approach. Often overlooked by the critics is the fact that a judge can deviate from the guidelines so long as the judge justifies the departure in writing.

Child support illustrates the clearest expression of a government’s concern in mandating that it is the parent’s responsibility to support their children. It is only in cases of the parent’s failure for whatever reasons that the state steps in to provide assistance, with the hope that eventually the government will be reimbursed.

It is interesting to see that there are other instances in which courts manifest their preference for family responsibility over state responsibility. That is in the treatment of step-parents. With more and more divorces, the second family has become common place. Is a step-parent financially responsible for his step child while the two are living
together or when the step-father divorces the child’s mother? There is no uniformity on this. If there is no legislative basis for the financial responsibility a judge might deny responsibility. Others, however, might use equitable principles and adopt the American Law Institute’s phrase of “equitable parent” or another concept, “de facto parent,” to impose financial responsibility.\(^\text{10}\) The point would be that if a father acted as if he were the child’s natural parent by assuming the role of the parent and providing support, even though it was voluntary, he can not later deny the responsibility, especially where the child has relied on the relationship.

In these cases, one must think of the alternative, namely if a private person, the father, does not support the child, who will? The fact situation is often found to be that the natural father had abandoned the child and the child’s mother, so that he would not be a source of financial responsibility. The alternative would be the state through a welfare program, like AFDC. However, these programs are very limited in terms of duration and often require the mother to seek employment. Beyond that would be a homeless shelter.

Let me move on to adult relationships and the question of the extent to which adult members of a family are responsible for each other. I have already stated that with regard to children, the parent has the responsibility to support his child. Now it is the joint responsibility of mother and father.

Under the common law, a husband had the responsibility to support his wife and that obligation continued even after divorce. Marriage was designed to be a social and legal institution that was based on mutual dependency and mutual obligations. Although in the United States there has never been a means test or a state inquiry into the relative

\(^\text{10}\) These terms are defined in PRINCIPLES OF THE LAW OF FAMILY DISSOLUTIONS: ANALYSIS AND RECOMMENDATIONS § 2.03, 107-110 (Amer. Law Inst. 2002).
financial worth of individuals seeking to marry, nonetheless the presumption is that the married couple will be financially independent. I should also add that in decedent’s estates, husbands could not disinherit their wives. Intestacy laws are state laws and differ from state to state, but as a general rule, wives are given priority in her husband’s estate, if he dies intestate, by either acquiring the entire estate if there are no children, or either one-third or one-half if there are children.\textsuperscript{11} To me intestacy laws reflect society’s basic values, which in the United States means a preference for marriage over non-marriage and family over strangers or friends. No matter how close or distant the family relationship, it is preferred over a companion or the state.

American marriage and divorce laws illustrate the relationship between family solidarity and social solidarity. Marriage in American law is the preferred status as compared with either being single or living in a formal or informal cohabitation arrangement. As I said earlier, the United States Supreme Court referred to marriage as “the most important relation in life.” The economic benefits of marriage clearly illustrate that point as does the fact that there is an interdependency that may be present in cohabitation arrangements, but are recognized only if designated in a cohabitation contract.

Illustrative of that point are cases which declare that unless specified, an individual who lives in a cohabitation arrangement without a contract can not expect to be awarded maintenance upon the termination of the cohabitation. To do so, courts have said, would amount to a court creating a marriage where one was not anticipated or even desired. Justice Greany of the Supreme Judicial Court of Massachusetts, for example, in

Wilcox v. Trautz \textsuperscript{12} was unwilling to provide equitable remedies to an individual in a cohabitating arrangement because, in the language of the court, “it would have the effect of dividing property between unmarried parties.”

Some might consider it unfair not to hold a cohabitating couple who lived together for a substantial amount of time mutually financially responsible. That would result in essentially throwing the vulnerable person to the wolves, or making him or her public charge, imposing the financial responsibility on the public taxpayer. Such is the position of the American Law Institute.\textsuperscript{13}

During most of the last century, it used to be said that marriage was “one” and that “one” was the husband. That meant that in terms of property interests, the husband was paramount. If title to real property was in the husband’s name, for example, the property was his. If a wife stayed home and took care of the house and the children and did not work outside of the home, her contribution to the marital enterprise was considered zero. Upon divorce, such a wife might leave a marriage with very little assets, save perhaps alimony, and be dependent on the state for any additional financial assistance if she fit within certain categories for aid. In other words, it was possible in years gone by that a husband could leave a marriage with hundreds of thousands of dollars in assets and his divorced wife could be a public charge.

That approach has changed and for the past three decades at least, the whole concept of marriage has been defined as an economic partnership in which the individuals in a marriage pool their resources.\textsuperscript{14} Although not specifically mentioned as the reason for the approach, certainly one reason is to underscore the economic

\textsuperscript{12} 693 N.E. 2d 141, 145 (Mass. 1998).
\textsuperscript{13} See \textit{PRINCIPLES OF THE LAW OF FAMILY DISSOLUTIONS,} supra note 10 at § 6.06
interdependency rather than dependency on the state. In addition, by describing marriage as an economic partnership, one is basically defining the institution in gender neutral terms.

In 1981, Professor Mary Ann Glendon wrote about the new marriage and the new property in which she described the changes from a title theory of marital property to an equitable distribution theory. What she meant was that although not necessarily articulated, married couples contribute to the marriage in various ways. The husband may contribute his salary to the marital enterprise; the wife may contribute her time and effort in working in the home, maintaining that home and raising children. Both contributions have value and both should be considered valuable.

Professor Glendon also noted that the accumulation of wealth and the maintenance of wealth have also changed. For the first half of the twentieth century and before, one’s status was determined by family identification. Wealth was acquired and maintained through family inheritance and family management. According to Professor Glendon, today status and wealth accumulation are determined by one’s job. This puts a great emphasis on employment.

By expanding the definition of marital property, as has taken place, there is more interdependency and less dependency on the state. Divorce does not necessarily mean the absolute financial disaster to the spouse who has not been working in the marketplace. Today, most divorcing couples enter into a contract regarding the economic consequences of divorce. These contracts, called property settlements, must be approved by a judge. Where there has been no private property settlement, a judge decides how the marital assets will be distributed. Spouses are protected from financial disaster under the

theory of equitable distribution of marital assets. Under equitable distribution, the first question is what the marital assets are. The second question is to what extent has each spouse contributed to the acquisition of those assets, and the third question is how should the assets be distributed or assigned? Through the expanding definition of marital property, such assets as pensions, savings accounts, checking accounts, one’s career, one’s license to practice a profession or one’s professional graduate degree, one’s potential for advancement in one’s career, are all included one way or another in the marital estate. The longer one is married, the more likely it is that one spouse will have a substantial financial interest in the other spouse’s assets, broadly defined. The goal, it seems to me, is to provide a married couple during marriage and upon divorce, the ability to be economically independent of the state.

A further idea in divorce that has become more pronounced is that divorce should really terminate the marital relationship in terms of financial dependency. This is put in practice by limiting alimony. For example, in short-term marriages, say five years, alimony is very limited. It is only in long term marriages, say fifteen years and longer, that alimony could be life-time support for the dependent spouse. What is seen more and more is the application of rehabilitative alimony. That form of alimony means that the dependent spouse is awarded enough finances in order for her to rehabilitate herself so that she can become economically independent of her husband as well as being independent of state responsibility. Rehabilitative alimony can take the form of retraining, developing a career by enrolling in further education, and so on.

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16 The whole matter of property distribution in an equitable distribution jurisdiction is discussed in Katz, FAMILY LAW IN AMERICA, supra note 4 at 87-94.
In preparing my presentation for this conference, I was forced to rethink the issue of the relationship between family solidarity and social solidarity in a new way. As I read the trends in Family Law cases and Family Law statutes, I believe that in the United States there appears to be more of an emphasis on family members assuming financial obligations for each other rather than having the state assume that burden. The exception is in Social Security and Medicare, two federal programs that provide senior citizens the opportunity to be financially independent of their family members. During the economic crisis that we in the United States are experiencing, these two programs are the lifeline for the elderly population. For divorcing couples, equitable distribution provides a fair and just approach to the assignment of property, and fairness and justice are, after all, a goal of the law.

What is also clear is that civil marriage is the center piece for family solidarity. So much of American law is premised on that fundamental belief. American Family Law is also built on that concept as seen in so many substantive and procedural laws, like common law marriage, marriage by presumption, de facto marriage and putative marriage. The idea is that marriage in American law is valued, is presumed to be beneficial in countless ways not only to the couple but to the state.  

17 Professor Marsha Garrison contrasts marriage with non-marital cohabitation and illustrates the benefits of the latter in Marsha Garrison, Nonmarital Cohabitation: Social Revolution and Legal Regulation, 42 FAM. L. Q. 309 (2008).