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THE OBLIGATIONS OF HIGH-INCOME PARENTS

Margaret Ryznar*

I. INTRODUCTION

At least half of all children will be eligible for child support at a certain point in their childhoods.¹ It is a truism that noncustodial parents must, and should, support these children. Despite agreement that parents must financially support their minor children, however, there is little agreement on the proper amount of that support in certain cases.² The Child Support Guidelines (“Guidelines”), incentivized by federal law, have filled the void and provide rebuttable guidance in most states.³ However, not only do the Guidelines differ by state, but also by income level.⁴ Specifically, each state has different Guidelines that may consider

* Associate Professor of Law, Indiana University Robert H. McKinney School of Law. Many thanks to the members of the University of Chicago Law School, especially Lisa Bernstein; members of the Indiana University Robert H. McKinney School of Law, especially Nicholas Georgakopoulos and George Wright; and the participants of Prawfsfest for their comments on this Article during its presentation, including Dan Markel, Jack Chin, Robin Effron, David Han, Michael Helfand, Eric Miller, Garrick Pursley, and Victoria Schwartz. For invaluable research assistance, thanks to Bryan Stoffel, Reham Hewedak, and Susan DeMaine. Thanks also to the editors of the *Hofstra Law Review* for excellent editorial assistance. This Article is dedicated to the memory of Dan Markel, whose generosity to colleagues knew no bounds.

1. Marsha Garrison, *The Goals and Limits of Child Support Policy*, in *CHILD SUPPORT: THE NEXT FRONTIER* 16, 16 (J. Thomas Oldham & Marygold S. Melli eds., 2000).

2. June Carbone, *Child Support Comes of Age: An Introduction to the Law of Child Support*, in *CHILD SUPPORT: THE NEXT FRONTIER*, *supra* note 1, at 9-10. June Carbone raises the important questions implicated by any discussion of child support: How does the child support obligation translate into dollars? Is it independent of the relationship between the parents or of the circumstances of the child’s birth? What do equality and fairness between the parents require? *Id.* at 3.

3. The Child Support Enforcement Amendments of 1984 required states to establish numerical formulas to help judges set child support awards. Pub. L. No. 98-378, 98 Stat. 1305 (1984) (codified as amended in scattered sections of 42 U.S.C.). If the states did not have the Guidelines by 1987, they would lose a percentage of federal welfare funds. ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 195 (6th ed. 2009). The Family Support Act of 1988 required states to use the Guidelines as a rebuttable presumption for child support awards. 42 U.S.C. § 667(b)(2) (2012).

4. Stacy Brustin, *Child Support: Shifting the Financial Burden in Low-Income Families*, 20

the child's needs and parents' income.⁵ Notably, exceptions are made for judicial discretion at both the high-income and low-income level, where disagreement about the proper amount of support is heightened.⁶

At the low-income level, the Guidelines make low-income adjustments.⁷ Noncustodial parents who earn below a certain amount in relation to the federal poverty guideline are to provide the most minimal amount of child support—often fifty dollars per month or less.⁸ Given the increasingly penal nature of the child support system, it may seem harsh to hold low-income parents responsible for unrealistic child support payment amounts.⁹

At the high-income level, on the other hand, the issues are largely different. For example, child support enforcement is easier to collect in many respects.¹⁰ While high-income parents have the financial resources

GEO. J. ON POVERTY L. & POL'Y 1, 6-7 (2012).

5. See *id.* at 11-12, 26-32.

6. In terms of the reasonable needs of a child, Laura W. Morgan notes that:

[W]hen states first enacted their guidelines, the child support charts were finite and did not consider the case of the high-income families earning over \$120,000 per year. As a result, judges determined child support at their discretion, not based on the guidelines. As a result, a body of case law developed called "excess" child support; that is, child support that was in excess of the child's "reasonable needs." Support that was in excess of the child's reasonable needs, the courts held, were in reality (1) distribution of the obligor's estate, not support; (2) an inappropriate "windfall" to the child; (3) an abridgement of the parent's right to direct the lifestyle of his/her child.

LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION & APPLICATION § 8.07[E] (2d ed. 2013) [hereinafter MORGAN, CHILD SUPPORT GUIDELINES]. For criticism of the Guidelines in high-income cases, see generally Nancy D. Polikoff, *Looking for the Policy Choices Within an Economic Methodology: A Critique of the Income Shares Model*, in ESSENTIALS OF CHILD SUPPORT GUIDELINES DEVELOPMENT: ECONOMIC ISSUES AND POLICY CONSIDERATIONS (1987); Laura W. Morgan, *Child Support Guidelines and the High-Income Parent: The Use of the "Good Fortune Trust,"* 9 DIVORCE LITIG. 92 (1997) [hereinafter Morgan, *High-Income Parent*].

7. Brustin, *supra* note 4, at 11. There has been much literature in the area of low-income child support cases. See generally Brustin, *supra* note 4 (discussing the effect of low-income adjustments); Daniel L. Hatcher, *Don't Forget Dad: Addressing Women's Poverty by Rethinking Forced and Outdated Child Support Policies*, 20 AM. U. J. GENDER SOC. POL'Y & L. 775 (2012) (discussing the feminization of poverty, the essentialist response, and the impact on child support policies); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991 (2006) (discussing the fact that child support laws do not consider poor, nonresident fathers' informal, nonfinancial contributions).

8. Brustin, *supra* note 4, at 11-12.

9. See, e.g., *Turner v. Rogers*, 131 S. Ct. 2507, 2512, 2515-16 (2011) (considering the constitutionality of South Carolina's child support enforcement practices, which included prosecuting indigent parents for failing to fulfill their support obligations and declining to provide them with counsel).

10. Various states define "high income" differently. For context, based on data from the American Community Survey ("ACS") regarding income received from January 2006 to November 2011, the top five percent of households earned at least \$191,469 per year. Charles Adam Bee, *The Geographic Concentration of High-Income Households: 2007-2011*, U.S. CENSUS BUREAU 1 (Feb. 2013), <http://www.census.gov/prod/2013pubs/acsbr11-23.pdf>; see LINDA LEVINE,

to litigate,¹¹ there are only so many issues to litigate once paternity is established. Furthermore, the most common ways to collect child support—such as automatic withholding from paychecks¹² and suspension of professional licenses, as in the license to practice law—inc incentivize high-income parents to cooperate. Finally, increasing collection in high-income cases is easier given that these parents have the financial resources to pay.¹³ All of these factors combine to facilitate child support collection in high-income cases.

While enforcement issues are, therefore, less prevalent at the high-income level, the issue of the proper amount of child support becomes grayer.¹⁴ Specifically, should the child receive a proportion of the noncustodial parent's income regardless of its amount, or should there be another limit?¹⁵ States continue to grapple with this question and the attendant issue of how much child support to award the children of high-income parents.¹⁶ States have adopted different approaches:

CONG. RESEARCH SERV., RS20811, THE DISTRIBUTION OF HOUSEHOLD INCOME AND THE MIDDLE CLASS 2 (2012), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1980&context=key_workplace ("In 2011, 1.9% of households (2,297,000 out of 121,084,000) had incomes between \$200,000 and \$249,999, for example. Another 2.3% of households (2,808,000 out of 121,084,000) had incomes of \$250,000 or more. (The Census Bureau does not disaggregate income within the group of households with incomes of \$250,000 or more.)"). According to the 2012 ACS, median household income in the United States was \$51,371. Amanda Noss, *Household Income: 2012*, U.S. CENSUS BUREAU 1 (Sept. 2013), <http://www.census.gov/prod/2013pubs/acsbr12-02.pdf> ("State estimates from the 2012 ACS ranged from \$71,122 in Maryland to \$37,095 in Mississippi."). State median household income was lower than the national median in twenty-seven states and higher in twenty states and the District of Columbia. *Id.* For examples of high-income cases, see *Finley v. Scott*, 707 So. 2d 1112, 1117 (Fla. 1998) (father-payor was professional athlete whom the trial court ordered to pay temporary support of \$5000 per month from his gross monthly income of \$266,926); *White v. Marciano*, 235 Cal. Rptr. 779, 781 (Ct. App. 1987) (the father-payor earned \$1 million and paid \$1500 per month in child support).

11. David F. Cavers, *International Enforcement of Family Support*, 81 COLUM. L. REV. 994, 994 (1981) ("Breaking through jurisdictional barriers is not easy when claimants have economic resources enabling them to carry the burden of litigation.").

12. One of the most successful child support enforcement tools is the income withholding order, which is statutorily permitted by each state's law and allows the automatic deduction of the child support from the noncustodial parent's wages. *Quick Facts: Child Support Enforcement*, NAT'L CHILD SUPPORT ENFORCEMENT ASS'N, <http://www.ncsea.org/wp-content/uploads/2011/12/Enforcement-of-Child-Support-Orders-Quick-Facts.pdf> (last visited Feb. 15, 2015).

13. On the other hand, "millions of low-wage earning parents are unable to support themselves, let alone their children, with their limited income." Brustin, *supra* note 4, at 1.

14. This is an issue in high-income divorces and property division, as well. See Margaret Ryznar, *All's Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases*, 86 N.D. L. REV. 115, 119-27 (2010).

15. While it may be fair to order noncustodial parents to pay a percentage of their income in child support, increasing the percentage in high-income cases is not necessarily required by fairness.

16. MORGAN, CHILD SUPPORT GUIDELINES, *supra* note 6, § 807[E]–[G]. Different states and different courts will have varying judgments about the appropriate amount of child support; high child support costs can well exceed \$1000 per week. For example, one Alabama appellate court in 1993 found that \$72,000 per year of child support is too high, particularly on top of expensive life

some employ a formulaic approach, while others defer to judicial judgment.¹⁷ While the amount of child support in average cases is resolved by each state's Guidelines, the controversy often continues in high-income cases.¹⁸

This Article traces the narrative on child support obligations in high-income cases by considering the development of the economic aspect to the parent-child relationship, as well as the purpose and nature of the child support system.¹⁹ Accordingly, Part II considers the function of the child support system and examines the parent-child relationship.²⁰ Part III considers the demographic changes that may impact the child support system generally, and offers the arguments relied upon by the states that have recently moved to limit child support in high-income cases, which suggest that reasonable limits on child support in such cases are consistent with the child support system currently established.²¹

II. THE CHILD SUPPORT SYSTEM

In examining the child support obligations of high-income parents, it is important to first consider the nature and purpose of the child support system. It is also useful to consider the nature of the parent-child relationship. Accordingly, this Part considers each in turn.²²

A. *The Child Support Legal Framework*

Child support exists to provide children financial support from both parents.²³ Parents may choose to supplement the child support order with

and disability insurance policies and the child's reasonable medical, dental, health, and educational needs, including private school tuition and room and board costs. *Anonymous v. Anonymous*, 617 So. 2d 694, 697 (Ala. Civ. App. 1993). In high-income cases, given the discretion of the courts, the facts of the case will be important. *See In re Marriage of Scafuri*, 561 N.E.2d 402, 407 (Ill. App. Ct. 1990) (awarding \$6000 per month for three children in light of their needs and the lifestyle they were accustomed to).

17. *See infra* Part II.A.

18. *See infra* Part II.A.

19. *See infra* Part II.

20. *See infra* Part II.

21. *See infra* Part III.

22. *See infra* Part II.A–B.

23. *See* Laura W. Morgan, *Child Support and the Anomalous Cases of the High-Income and Low-Income Parent: The Need to Reconsider What Constitutes "Support" in the American and Canadian Child Support Guideline Models*, 13 CANADIAN J. FAM. L. 161, 167-68 (1996); *see also infra* Part II.B.

additional payments, but the child support system provides a minimum level of support.²⁴

In the United States, child support enforcement “[has] progressed from private, to state, then to federal remedies.”²⁵ Much of the reason for this progression is the increasing numbers of children reliant on child support, as well as the fact that taxpayers must financially provide for the child of the father who will not or cannot.²⁶

Before federal law imposed the Guidelines, the amount of child support in a particular case was determined by judges, who had significant discretion in calculating child support.²⁷ Therefore, although it is difficult to generalize the amounts of the child support awards under the scheme of judicial discretion,²⁸ they conformed to the child’s best interests—the governing standard when it comes to judicial matters on children.²⁹

The states moved from judicial discretion to the Guidelines in the late twentieth century, largely as a result of federal legislation.³⁰

24. See 42 U.S.C. § 651 (2012) (“For the purpose of enforcing the support obligations owed by noncustodial parents to their children . . . there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of [the Child Support Enforcement Act].”). Many parents choose to spend more than legally mandated on their children, both during the children’s minority and majority. See *infra* Part III.A.3.

25. WALTER WADLINGTON & RAYMOND C. O’BRIEN, *FAMILY LAW IN PERSPECTIVE* 129 (3d ed. 2012).

26. See Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 620 (2012) (“[T]he governmental interest in welfare cost recoupment has influenced public policy and law surrounding child support enforcement . . .”).

27. Ira Mark Ellman & Tara O’Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107, 110-12 (2008) (“At one time, child support orders were determined case by case. Trial judges exercised discretion under statutes that left them largely free to set awards at the dollar amounts they thought appropriate.”); Daniel L. Hatcher, *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 BROOK. L. REV. 1333, 1373 (2009) (“Courts initially possessed wide discretion in setting child support amounts by simply considering children’s needs and their parents’ financial circumstances.”).

28. Ellman & Ellman, *supra* note 27, at 111; Hatcher, *supra* note 27, at 1373.

29. Lori W. Nelson, *High-Income Child Support*, 45 FAM. L.Q. 191, 191 (2011) (noting that child support cases were previously driven by the “best interest of the child” standard). For a useful background on the American best interests standard, see John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J.L. REFORM 57, 64 n.23 (2006). The child’s best interests continue to play a significant role in modern day child support orders. See, e.g., *Strahan v. Strahan*, 953 A.2d 1219, 1223-24 (N.J. Super. Ct. App. Div. 2008) (“[T]he needs of a child in such circumstances also calls to the fore the best interests of a child.”).

30. Ellman & Ellman, *supra* note 27, at 112; Hatcher, *supra* note 27, at 1373. Justice Scalia has expressed concern about the increasing federalization of family law:

I think it obvious . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will

Specifically, the Child Support Enforcement Amendments of 1984³¹ required states to establish numerical formulas to help judges set child support awards.³² If the states did not have the Guidelines instated by 1987, they would lose a percentage of federal welfare funds.³³ Congress pushed the issue even further with the Family Support Act of 1988,³⁴ which required states to use the Guidelines as a rebuttable presumption for child support awards.³⁵ In other words, an amount under the Guidelines is presumptively correct.

In many states, judges may deviate from the Guidelines only upon issuing written findings.³⁶ While judges may retain some discretion, the Guidelines provide concrete limits on that discretion in the average case.³⁷ There are both advantages and disadvantages to determining child support awards under the Guidelines instead of by judicial discretion.³⁸ The benefits of the Guidelines include more

be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.

Troxel v. Granville, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting). *But see* Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 202-04, 206-07, 231, 241, 254-55 (1999) (arguing that there is no foundation for the view that family law belongs in the state domain). As an example, before the Guidelines, courts in Kentucky considered the reasonable needs of the child and the ability of the parent to pay. *Stewart v. Madera*, 744 S.W.2d 437, 439 (Ky. Ct. App. 1988); *see also* Judge Gregory M. Bartlett, *Setting Child Support for the Low Income and High Income Families in Kentucky*, 25 N. KY. L. REV. 281, 303 (1998).

31. Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended in scattered sections of 42 U.S.C.).

32. 42 U.S.C. § 667(a) (2012). The requirement was amended in 1988, and currently states: Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts.

Id.

33. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 467(a)-(b), 98 Stat. 1305, 1321-22 (1984) (codified as amended in scattered sections of 42 U.S.C.); *see also* MNOOKIN & WEISBERG, *supra* note 3, at 195.

34. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988).

35. § 667(b)(2); *see, e.g.*, N.D. ADMIN. CODE § 75-02-04.1-09 (2011); *see also* MNOOKIN & WEISBERG, *supra* note 3, at 195.

36. *See, e.g.*, *In re Admin. Order No. 10*: Ark. Child Support Guidelines, 347 Ark. 1064, 1066 (2002) (per curiam) (requiring the courts in Arkansas to make express findings of fact justifying deviation from the Guidelines); Brian Meadors, *The Not-So-Standard Visitation Order and a Proposal for Reform*, 64 ARK. L. REV. 703, 704 (2011) (noting that the courts in Arkansas must make express findings of fact justifying deviation from the Guidelines).

37. *See, e.g.*, *Wasson v. Wasson*, 965 N.E.2d 882, 888 (Mass. App. Ct. 2012) (finding that a lower court judge abused her discretion by deviating from the Guidelines in excluding capital gains income generated by the father's sale of investments, without specific findings of fact to support the deviation).

38. PAULA M. CAREY ET AL., REPORT OF THE CHILD SUPPORT GUIDELINES TASK FORCE 29

predictability and consistency.³⁹ For these reasons, many judges had called for the Guidelines.⁴⁰ Perhaps a less expected effect of the Guidelines was the increase of child support awards following the implementation of the Guidelines.⁴¹ However, there are also disadvantages to the Guidelines, including less ability for judges to make case-by-case awards, the possibility for increased litigiousness, and potential issues with the substance of the Guidelines themselves.⁴²

There are several models for how child support is apportioned through the Guidelines.⁴³ Most states use the income shares model, which has several unique features.⁴⁴ First, the model shares the cost of raising a child between two parents by considering the income of each parent.⁴⁵ Second, the income shares model attempts to recreate the financial situation of an intact household.⁴⁶ Accordingly, the approach determines the proportion of the parents' combined income spent on the children in an intact household, and then prorates that amount between the two parents based on their relative incomes.⁴⁷

(2008) (noting that when it came to the Massachusetts Child Support Guidelines, "[c]omments were made that Child Support Guidelines should allow for more judicial discretion. Other comments said that there should be more uniformity, therefore less discretion").

39. *But see* Nelson, *supra* note 29, at 191, 194-96 ("A continuing difficulty exists, however, not just because the various states have created their own methods, but also the method within any particular state may not be set forth with sufficient clarity to provide consistent results.").

40. *See, e.g.,* INDIANA CHILD SUPPORT RULES & GUIDELINES NO. 1 (2010), available at http://www.in.gov/judiciary/rules/child_support/child_support.pdf.

41. William S. Comanor, *Child Support Payments: A Review of Current Policies*, in THE LAW AND ECONOMICS OF CHILD SUPPORT PAYMENTS 1, 4 (William S. Comanor ed., 2004). According to one estimate, the implementation of the Guidelines more than doubled obligations, increasing them from \$10 billion to \$27 billion in 1979. *Id.*

42. Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 340-47; Ellman & Ellman, *supra* note 27, at 110-14; Arlene Browand Huber, *Children at Risk in the Politics of Child Custody Suits: Acknowledging Their Needs for Nurture*, 32 U. LOUISVILLE J. FAM. L. 33, 48 (1993). Katherine K. Baker describes the Guidelines as formulas that calculate obligation:

By unpacking the formulas, one sees that family law has turned to algorithms not because reformers have come to agreement about the origins and scope of family law obligation, but because they have not. The formulas are riddled with arbitrary and contested conclusions about who should be obligated and for how much. But once those conclusions have been incorporated into a formula, they help create their own sense of fairness: at least formulas render predictable results.

Baker, *supra*, at 321.

43. Pamela Foohey, *Child Support and (In)ability to Pay: The Case for the Cost Shares Model*, 13 U.C. DAVIS JUV. L. & POL'Y 35, 43 (2009). Two recommended Guidelines that provide useful guidance, but have not been enacted in the states, are the American Law Institute's Child Support Principles and the cost shares model. *Id.*

44. *Id.* at 43, 49.

45. *Id.* at 49.

46. *Id.*

47. *Id.* Pamela Foohey gives the following example of the income shares model:

The second most employed model is the percentage of income standard, which calculates child support obligations “by applying a set percentage to the income of the obligor parent.”⁴⁸ There are some variations in the application of this model. First, certain states use the parent’s gross income for the calculation, while others use net income.⁴⁹ Second, certain states use a “flat percentage model” that relies on a fixed percentage across all levels of income of the obligor parent.⁵⁰ Other states, meanwhile, use a “varying percentage model” that “applies different percentages to different levels of income.”⁵¹ Finally, the percentage may vary “based on the number of children supported, and . . . on the children’s ages.”⁵² The percentage of income standard model applies only to the noncustodial parent because it assumes that the custodial parent pays her share by virtue of living with and caring for the child.⁵³

Finally, a few states use the Melson Formula, which requires three steps to calculate the amount of child support owed.⁵⁴ First, each parent’s net income must be calculated and “a self-support reserve is subtracted.”⁵⁵ Second, “each parent’s remaining income is applied to a pre-determined primary support need for the . . . children” derived from economic data.⁵⁶ Finally, an “additional percentage of the remaining income” may be added to the child support obligation.⁵⁷

Despite the rigidity of the child support system under the Guidelines, high-income cases are not governed by the Guidelines in certain states; these households provide a notable opportunity to depart

[A]ssume that the custodial parent’s yearly income is \$50,000, the non-custodial parent’s yearly income is \$70,000, 25 percent of the parents combined income was spent on their two children in an intact household, and there are no extraordinary expenses. The \$30,000 “basic child support obligation” would be apportioned \$12,500 to the custodial parent and \$17,500 to the non-custodial parent. Accordingly, the non-custodial parent would owe the custodial parent \$17,500 per year in child support for their two children.

Id. at 49-50.

48. *Id.* at 44.

49. *Id.*

50. *Id.* at 45.

51. *Id.*

52. *Id.*

53. *Id.* at 44. In some states, the time spent with a child can reduce child support owed pursuant to this logic. In other states, “child support orders tend to be high under some state child support formulas (because the father gets no credit for visitation) and they still have no enforceable custody rights.” Kirk C. Stange, *Educating Military Servicemember Clients on Family Law Issues and Concerns*, in STRATEGIES FOR MILITARY FAMILY LAW: LEADING LAWYERS ON NAVIGATING FAMILY LAW IN THE ARMED FORCES 7, 21 (2012).

54. Foohey, *supra* note 43, at 52.

55. *Id.*

56. *Id.* at 52-53.

57. *Id.* at 53.

from the Guidelines.⁵⁸ For example, the Alaska Guidelines do not apply in cases where the noncustodial parent earns over \$120,000.⁵⁹ In these cases, “the court may make an additional award only if it is just and proper, taking into account the needs of the children, the [children’s] standard of living[,] . . . and the extent to which that standard should reflect the supporting parent’s ability to pay.”⁶⁰ Meanwhile, the Massachusetts Guidelines do not apply when the parent has over \$250,000 of available income, at which point the award of support at the \$250,000 level is the minimum presumptive order, with additional support at the court’s discretion.⁶¹ In the Arizona Guidelines, the top income is \$20,000 per month, which determines the presumptive amount for higher incomes.⁶² In Arizona, it is possible to receive more than the presumptive amount if the noncustodial parent can prove that it is in the best interests of the children, in light of factors such as the standard of living of the children, if the family were intact, and the needs of the children.⁶³ Many other states take similar approaches.⁶⁴

In other states, the courts—as opposed to the legislatures—refuse to apply the state’s Guidelines to high-income cases. For example, in Connecticut, a court found that applying the Guidelines to incomes that exceeded \$750 per week was inequitable because the statistical basis for the Guidelines became invalid as the parent’s income increased.⁶⁵

58. The other significant area of child support left to the discretion of judges is post-majority child support. For a general framework regarding post-majority child support, see generally Anna Stepień-Sporek & Margaret Ryznar, *Child Support for Adult Children*, 30 QUINNIPIAC L. REV. 359 (2012).

59. ALASKA R. CIV. P. § 90.3(c)(2).

60. *Id.*

61. MASS. CHILD SUPPORT GUIDELINES § II.C (2013), available at <http://www.mass.gov/courts/docs/child-support/2013-child-support-guidelines.pdf>. For a description of Massachusetts cases dealing with high-income parents, see generally Robert J. Rivers Jr., *Child Support Orders in High Income Cases—Searching for Guidelines*, MASS. LAW. J., Mar. 2011, at 17, available at http://www.massbar.org/media/969024/mljmach2011_web.pdf.

62. ARIZ. CHILD SUPPORT GUIDELINES § 8 (2011), available at <http://www.azcourts.gov/Portals/31/GuideSched10072011.pdf>.

63. *Id.*

64. See, e.g., *Nuveen v. Nuveen*, 825 N.W.2d 863, 866 (N.D. 2012) (affirming an upwards deviation in child support under North Dakota’s Guidelines, which allow the court to consider the needs of the child when the monthly net income exceeds \$12,500); see also Laura W. Morgan, *Child Support in High Income Cases: A State-by-State Survey*, SUPPORTGUIDELINES.COM, <http://www.supportguidelines.com/articles/art200302.html> (last modified Mar. 19, 2003) (giving a brief overview of the high-income Guidelines in each state).

65. *Battersby v. Battersby*, 590 A.2d 427, 431 (Conn. 1991). For additional examples of cases in which the courts grapple with determining child support awards when there are high-income parents, see Marygold S. Melli, *The United States: Continuing Concern with the Economic Consequences of Divorce*, 31 U. LOUISVILLE J. FAM. L. 491, 495-97 (1993).

In certain states, therefore, judges have discretion to set the award amounts in high-income cases.⁶⁶ In other words, they are not bound by the Guidelines in high-income cases.⁶⁷ The problems resulting from this judicial discretion parallel those that existed for all cases before the Guidelines, which included unpredictability, inconsistency, and arbitrariness.⁶⁸ Adding to the inconsistency is the fact that the judicial discretion is triggered at different income ranges depending on the state, as each state defines “high income” differently and by a different dollar amount.⁶⁹

In sum, determining child support awards used to be in the discretion of the judge, but is now governed by Guidelines pursuant to federal legislation.⁷⁰ However, the high income of a parent triggers judicial discretion once again in many states, when the Guidelines end at a particular parental income level.⁷¹ This has often left courts without guidance about what to do in high-income cases, and raises important questions of fairness in child support.

B. The Nature of the Parent-Child Relationship

The child support framework attempts to reflect public policy on child support, which is rooted in ensuring that parents financially support their children’s upbringing.⁷² However, a significant factor

66. See Morgan, *supra* note 64 (briefly describing the discretion available in high-income cases under each state’s Guidelines); see also Nelson, *supra* note 29, at 192 (“Several other states also have a pure discretionary scheme [at high-income levels]”). It has been noted that:

[O]nce a judge deviates from the guidelines, states have a large range of methods by which the support amount can be calculated. Currently, three states have no statutory provision regarding high-income child support, eleven states employ their own special calculation, and the rest generally leave the decision to the discretion of the court to varying degrees.

Laura Raatjes, Note, *High-Income Child Support Guidelines: Harmonizing the Need for Limits with the Best Interests of the Child*, 86 CHI.-KENT L. REV. 317, 318 (2011); see also LA. REV. STAT. ANN. § 315.13 (2008) (providing for court discretion in high-income cases); MD. CODE ANN., FAM. LAW § 12-204(d) (West 2006) (same).

67. See *supra* notes 30-37 and accompanying text.

68. Strahan v. Strahan, 953 A.2d 1219, 1225 (N.J. Super. Ct. App. Div. 2008) (noting that the lower court’s \$200,000 addition to an annual child support award was arbitrary); Raatjes, *supra* note 66, at 329-30; see *supra* notes 38-42 and accompanying text.

69. As Laura Raatjes explains:

[S]tates have widely varying thresholds for determining whether a parent is a high-income earner. Some states permit courts to deviate from statutory guidelines for high-income parents who earn as little as \$50,000 per year, while others do not permit courts to deviate for high-income purposes until the parent earns \$240,000 per year.

Raatjes, *supra* note 66, at 318.

70. See *supra* notes 27-35 and accompanying text.

71. See *supra* notes 58-67 and accompanying text.

72. See Ellman & Ellman, *supra* note 27, at 129.

driving the public policy on child support depends on the nature of the parent-child relationship.⁷³

The model of the parent-child relationship as economic has always existed, although there has been a role reversal in recent decades.⁷⁴ Historically, children have been able, and even expected, to contribute to their parents' household in the United States.⁷⁵ Before an outright ban on child labor, Congress attempted to simply penalize employers using child labor with a ten percent tax.⁷⁶ The U.S. Supreme Court invalidated this tax, holding it to be an invalid exercise of the taxing power, which the Court suspected to be a penalty.⁷⁷

The economic support role transitioned from the child to the parent in the twentieth century, facilitated by child labor laws.⁷⁸ By 1944, the Court's sensitivity to child labor trumped religious freedom. Specifically, in *Prince v. Massachusetts*,⁷⁹ the Court affirmed an aunt's violation of child labor laws by allowing her nine-year-old niece to distribute religious literature on a Brockton, Massachusetts street.⁸⁰ The dissent expressed concern about "whether a state, under the guise of enforcing its child labor laws, can lawfully prohibit girls under the age of eighteen and boys under the age of twelve from practicing their religious faith insofar as it involves the distribution or sale of religious tracts on the public streets."⁸¹

73. See *infra* text accompanying notes 74-116.

74. See, e.g., HUGH D. HINDMAN, *CHILD LABOR: AN AMERICAN HISTORY* 8 (2002) (discussing child labor and the role of children as financial contributors).

75. *Id.* In some countries, child labor is still used. See, e.g., Sophia Eckert, *The Business Transparency on Trafficking and Slavery Act: Fighting Forced Labor in Complex Global Supply Chains*, 12 J. INT'L BUS. & L. 383, 402 (2013) (noting news coverage that there was child labor at Foxconn, a foreign supplier to American corporation Apple); David Millon, *Human Rights and Delaware Corporate Law*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 173, 186 (2012) (describing the scandal following the news that Nike relied on child labor to manufacture many of its products). See generally Liana M. Nobile, *The Kids Are Not Alright: An Open Call for Reforming the Protections Afforded to Reality Television's Child Participants*, 17 U.C. DAVIS J. JUV. L. & POL'Y 41 (2013) (discussing child labor laws in the context of child reality stars). For a legal analysis of child labor, see generally Hillary V. Kistenbroker, Note, *Implementing Article 32 of the Convention on the Rights of the Child as a Domestic Statute: Protecting Children from Abusive Labor Practices*, 44 CASE W. RES. J. INT'L L. 921 (2012).

76. Child Labor Tax Case, 259 U.S. 20, 34-35 (1922).

77. *Id.* at 36-38.

78. See, e.g., The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2012) (regulating child labor with wage, hour, and safety requirements for children under the age of eighteen and requiring fourteen as the minimum age for nonagricultural, nonhazardous employment); 29 C.F.R. § 570.2 (2013) (establishing minimum ages of employment for agricultural work, except in a family farm context); 29 C.F.R. § 570.33 (2013) (listing occupations deemed "oppressive child labor" under the Fair Labor Standards Act).

79. 321 U.S. 158 (1944).

80. *Id.* at 161-62, 170-71.

81. *Id.* at 172 (Murphy, J., dissenting).

Nonetheless, it was never expected that children should be able to support themselves, and, therefore, a system of child support was put into place from an early time in history. Before the rise of both divorce and nonmarital births that have come to dominate the late twentieth and early twenty-first centuries,⁸² parents served as the main financial support for their minor children,⁸³ although friends and extended family might have provided financial support to parents who needed it.⁸⁴ Poor laws, similar to the Elizabethan Poor Law in England, were also enacted in most American states.⁸⁵ Nonetheless, the fundamental family law principle was that courts did not become involved in the matters of an intact family—unless the parents’ treatment of their children rose to the level of neglect or abuse—and traditionally, most children were raised in intact families.⁸⁶

By the twentieth century, almost all states had enacted civil statutes requiring parents to support their children.⁸⁷ The courts also adopted the “doctrine of necessities,” which stemmed from the English common law duty of a husband to provide for the necessary expenses of his wife and child.⁸⁸ Under this doctrine, the seller of goods to one spouse can charge the other spouse if the goods are necessary for the beneficiary.⁸⁹

82. Approximately thirty-four percent of births in the United States in 2002 were nonmarital, many the result of cohabitation. Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 314 (2008). This is comparatively much higher than the 3.8% of nonmarital births in the United States in 1940. *Id.* For further discussion of the demographics of families, see *infra* Part III.A.4.

83. Donna Schuele, *Origins and Development of the Law of Parental Child Support*, 27 J. FAM. L. 807, 809 (1988-89).

84. *Id.* at 809-10.

85. *Id.* at 809.

86. See *Kilgrow v. Kilgrow*, 107 So. 2d 885, 888-89 (Ala. 1958). One married couple could not agree on the education of the child and brought the case to court, but the Alabama Supreme Court held that it had no jurisdiction in “the settlement of a difference of opinion between parents as to what is best for their minor child when the parents and child are all living together as a family group.” *Id.*

87. Schuele, *supra* note 83, at 825.

88. Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1767, 1767 (1984).

89. Susan Kalinka, *Taxation of Community Income: It Is Time for Congress to Override Poe v. Seaborn*, 58 LA. L. REV. 73, 94-95 (1997) (“Under the doctrine of necessities, the earning spouse is responsible for payment of expenses incurred by the nonearning spouse for those things that are necessary for the family.”). In order to determine what is “necessary,” courts must “examin[e] factors such as the [spouses’] means, social position, and circumstances . . .” *Id.* There is also, in family law, a duty to support one’s spouse—this is one of most notable differences between marriage and cohabitation. See, e.g., *Family Law: Spousal Support and Other Marital Rights*, OHIO LEGAL SERVICES, http://www.ohiolegalservices.org/public/legal_problem/family-law/spousal-support-and-other-marital-rights/qandact_view (last visited Feb. 15, 2015). In marriage, the courts may require one spouse to pay a fair and reasonable sum for the other spouse’s support, having due regard to the circumstances of the respective parties. See *id.*

It is clear that the economic contributor role has now shifted significantly from the child to the parent. The cost of raising a child to the age of eighteen has been estimated to be \$221,190 in recent years.⁹⁰ This does not include college costs, which may total tens of thousands additional dollars.⁹¹ The cost of a college education has increased each year, outpacing inflation.⁹² During the 1980s and early 1990s, college tuition increased by double-digit percentages, and annually by 4 or 5% by the late 1990s.⁹³ While many students take out major loans to achieve their educational goals,⁹⁴ parents contribute, on average, one third of college costs.⁹⁵

In certain states, parents may even be required to contribute to college costs if they are divorced or unmarried. This obligation arises in states that have enacted post-majority support statutes that require divorced or non-marital parents to pay for their children's college

90. MARK LINO & ANDREA CARLSON, U.S. DEP'T OF AGRIC., MISCELLANEOUS PUB. NO. 1528-2008, EXPENDITURE ON CHILDREN BY FAMILIES, 2008, at 23 (2009), available at http://www.cnpp.usda.gov/sites/default/files/expenditures_on_children_by_families/crc2008.pdf. In 1960, the cost of raising a child was \$183,509 (in 2008 dollars). *Id.* In comparison, the cost of upbringing per child in Poland is 190,000 PLN (about \$65,000), according to experts from the Adam Smith Center. Stępień-Sporek & Ryznar, *supra* note 58, at 361 n.10.

91. LINO & CARLSON, *supra* note 90, at 22.

92. See Ben Wildavsky, *Is That the Real Price?*, U.S. NEWS & WORLD REP., Sept. 6, 1999, at 64, 64 ("Since 1980, the average tuition at four-year institutions has more than doubled after adjusting for inflation, while the median family income for the parents of college-age children has increased just 12 percent.").

93. Judith G. McMullen, *Father (or Mother) Knows Best: An Argument Against Including Post-Majority Educational Expenses in Court-Ordered Child Support*, 34 IND. L. REV. 343, 346 (2001).

94. William S. Howard, *The Student Loan Crisis and the Race to Princeton Law School*, 7 J.L. ECON. & POL'Y 485, 504 (2011); Michael C. Macchiarola & Arun Abraham, *Options for Student Borrowers: A Derivatives-Based Proposal to Protect Students and Control Debt-Fueled Inflation in the Higher Education Market*, 20 CORNELL J.L. & PUB. POL'Y 67, 78 (2010); see also Kimberly M. Gartner & Elizabeth R. Schiltz, *What's Your Score? Educating College Students About Credit Card Debt*, 24 ST. LOUIS U. PUB. L. REV. 401, 401 (2005) ("Observers have expressed concern about burgeoning credit card debt loads which, when combined with already-high student loan burdens, can force students into quitting college, declaring bankruptcy, and even, in a few tragic cases, suicide.").

95. Doug Lederman, *How Americans Pay for College*, INSIDE HIGHER EDUC. (Aug. 20, 2008 4:00 AM), <http://www.insidehighered.com/news/2008/08/20/pay>. According to a report based on a national annual survey of undergraduate students and their parents:

On average, the money to pay for the typical student's college costs came from the following sources: parents' income and savings (32 percent), student borrowing (23 percent), parent borrowing (16 percent), grants and scholarships (15 percent)[,] student income and savings (10 percent), and support from friends and relatives (3 percent).

Id.; see also SALLIE MAE, IPSOS PUB. AFFAIRS, *HOW AMERICA PAYS FOR COLLEGE* 2012, at 10 (2012), available at <https://www.salliemae.com/assets/Core/how-America-pays/HowAmericaPays2012.pdf>; Tasnim Shamma, *Families Make Big Changes to Pay for College*, NPR (Aug. 2, 2012, 1:43 AM), <http://www.npr.org/2012/08/02/157657475/families-make-big-changes-to-pay-for-college>.

education.⁹⁶ Missouri legislation, for example, permits a special type of child support potentially owed to college students until the child reaches the age of twenty-one or finishes the program, whichever occurs first.⁹⁷ To receive the support, the child must continue to attend and progress toward completion of a secondary school program of instruction.⁹⁸ There are strict requirements for the child in these circumstances, including that the child must enroll in college in the fall following high school, take at least twelve credit hours per semester, and show each semester's transcript to the parents.⁹⁹ State supreme courts in Arkansas, North Dakota, and Alabama have also permitted divorce courts to impose awards of post-majority support, including college expenses.¹⁰⁰ The Washington Supreme Court, permitting post-majority child support, underscored that children of divorced parents face more economic disadvantages than children from intact homes.¹⁰¹

Even without college expenses, many children cost their parents well into adulthood. The economic recession that began in 2007 exasperated the situation, increasing the number of adult children economically dependent on their parents.¹⁰² While the unemployment rate for the general American population hovered at approximately 9% after the economic crisis began in 2007,¹⁰³ unemployment among young people and college students surged to almost 20% in 2010.¹⁰⁴ In July

96. See, e.g., COLO. REV. STAT. ANN. § 14-10-115(15) (West Supp. 2013); IOWA CODE ANN. § 598.21(f) (West 2001); MO. ANN. STAT. § 452.340(5) (2003). For an analysis of parental support of children's college costs in the states of Alabama, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Mississippi, Missouri, Montana, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, and Washington, see Madeline Marzano-Lesnevich & Scott Adam Laterra, *Child Support and College: What Is the Correct Result?*, 22 J. AM. ACAD. MATRIMONIAL LAW. 335, 339-72 (2009).

97. MO. ANN. STAT. § 452.340(5).

98. *Id.*

99. *Id.*

100. Carol R. Goforth, *The Case for Expanding Child Support Obligations to Cover Post-Secondary Educational Expenses*, 56 ARK. L. REV. 93, 97-103 (2003); see also Donarski v. Donarski, 581 N.W.2d 130, 136-37 (N.D. 1998) (permitting college support based on the general discretionary power of the court). *But see Ex parte Christopher*, 145 So. 3d 60, 68 (Ala. 2013) (reversing precedent which gave courts discretion to award post-minority support for college education because it was not authorized by the legislature).

101. Childers v. Childers, 575 P.2d 201, 207-09 (Wash. 1978).

102. See Richard Fry, *A Rising Share of Young Adults Live in Their Parents' Home: A Record 21.6 Million in 2012*, PEW RES. CENTER (Aug. 1, 2013), <http://www.pewsocialtrends.org/files/2013/07/SDT-millennials-living-with-parents-07-2013.pdf>.

103. News Release, Bureau of Labor Statistics & U.S. Dep't of Labor, *The Employment Situation—July 2010*, at 1 (Aug. 6, 2010), available at http://www.bls.gov/news.release/archives/empsit_08062010.pdf.

104. News Release, Bureau of Labor Statistics & U.S. Dep't of Labor, *Employment and Unemployment Among Youth—Summer 2010*, at 2 (Aug. 27, 2010), available at http://www.bls.gov/news.release/archives/youth_08272010.pdf.

2010, the share of young people employed hit the lowest July rate since records began in 1948.¹⁰⁵ In 2009, almost 50% of college-educated youth were either unemployed or working in a job that did not require a college degree, with a median annual salary of \$27,000.¹⁰⁶

There are also the significant costs created by parents who move from the labor markets to the homemaker sphere upon having children. Many women take part-time and flexible jobs more frequently than men, mostly to accommodate their children.¹⁰⁷ Other women decide to remain at home after the birth of their children,¹⁰⁸ which results in a significant loss of human capital.¹⁰⁹

All of these costs do not include pre-pregnancy fees many parents incur to conceive. With ten percent of the American population affected by infertility, entire industries have developed around fertility treatments, surrogacy, and adoption.¹¹⁰ Many of the alternative ways to create families, besides adoption, have come about only in the last fifty

105. *Id.* at 1.

106. *NYT: Nearly 50% of 2009 College Graduates Are Either Jobless, or Working in Jobs that Don't Require a College Degree*, INT'L BUS. TIMES (May 20, 2011, 1:57 PM), <http://www.ibtimes.com/nyt-nearly-50-2009-college-graduates-are-either-jobless-or-working-jobs-dont-require-college-degree>.

107. *See, e.g.*, N.Y.C. BAR ASS'N, LAW FIRM DIVERSITY BENCHMARKING REPORT: 2006 REPORT TO SIGNATORIES OF THE STATEMENT OF DIVERSITY PRINCIPLES 17 (2006), available at <http://www.nycbar.org/images/stories/pdfs/firmbenchmarking06.pdf> (determining that nine percent of New York City women attorneys work flexibly compared to about one percent of men); Marin Clarkberg & Phyllis Moen, *Understanding the Time Squeeze: Married Couples' Preferred and Actual Work-Hour Strategies*, 44 AM. BEHAV. SCIENTIST 1115, 1121 (2001) (noting that women, not men, typically prefer part-time work); Marianne Bertrand et al., *Dynamics of the Gender Gap for Young Professionals in the Corporate and Financial Sectors* 18-22 (Nat'l Bureau of Econ. Research, Working Paper No. 14681, 2009).

108. *See, e.g.*, Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKLEY J. EMP. & LAB. L. 1, 3, 7 (2007) ("This catchphrase [the 'opt-out revolution'] is used to describe highly educated professional women who have chosen to leave their jobs to care for their children or to arrange reduced work hours to have more time at home."); *see also* Joyce P. Jacobsen & Laurence M. Levin, *Effects of Intermittent Labor Force Attachment on Women's Earnings*, MONTHLY LAB. REV., Sept. 1995, at 14, 16 ("Women who leave the work force are more likely to be married and to have children than are their counterparts who remain in the work force.").

109. For a summary of the labor market challenges mothers face, including lower wages, *see generally* Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359 (2008). On the other hand, abstaining from paid work often diminishes human capital:

First, women who leave the labor force and later re-enter do not build up seniority, which, by itself, often leads to higher wages. Second, women who return to the labor force are less likely to receive on-the-job training to increase their productivity and thereby raise their pay. Third, when women are not in the work force, their job skills may depreciate. Finally, employers may view gaps in work history as a signal that women who leave may do so again.

Jacobsen & Levin, *supra* note 108, at 14.

110. Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43 J. MARSHALL L. REV. 1009, 1024, 1026-27, 1035-36 (2010).

years¹¹¹ and remain expensive.¹¹² These additional expenses have become common in modern families,¹¹³ yet people eager to grow their families continue to pay these costs for the experience of parenthood.

In sum, for much of human history, children have contributed economically to the household.¹¹⁴ The rise of child labor laws in the twentieth century contributed to the end of this economic role for children.¹¹⁵ Over the following decades, the trend reversed and, currently, parents fully support their children in terms of finances, resulting in unprecedented cost.¹¹⁶ The child support system reflects this evolving role of parents as economic providers.

III. THE CHILD SUPPORT OBLIGATIONS OF HIGH-INCOME PARENTS

In light of this economic parent-child relationship, state jurisdictions have taken various approaches to child support obligations of high-income parents.¹¹⁷ Some states allow increased obligations due

111. See Andrea B. Carroll, *Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy*, 88 IND. L.J. 1187, 1193-94 (2013) (noting that the first successful in vitro fertilization ("IVF") procedure in the United States occurred in 1981).

112. Jim Hawkins, *Selling ART: An Empirical Assessment of Advertising on Fertility Clinics' Websites*, 88 IND. L.J. 1147, 1161, 1163 (2013) (noting that many people pay for assisted reproductive technologies out of pocket, which is expensive; for example, IVF costs approximately \$12,317 on average). The typical surrogacy fee in India, a frequent fertility tourism destination, has been around \$25,000 to \$30,000, which is approximately a third of that in developed countries such as the United States. LAW COMM'N OF INDIA, REPORT NO. 228, NEED FOR LEGISLATION TO REGULATE ASSISTED REPRODUCTIVE TECHNOLOGY CLINICS AS WELL AS RIGHTS AND OBLIGATIONS OF PARTIES TO A SURROGACY § 1.7 (2009), available at <http://lawcommissionofindia.nic.in/reports/report228.pdf>.

113. Infertility affects approximately ten percent of the American population. Kevin Yamamoto & Shelby A.D. Moore, *A Trust Analysis of a Gestational Carrier's Right to Abortion*, 70 FORDHAM L. REV. 93, 100 (2001). This rate of infertility is expected to dramatically increase over the next twenty-five years. *Id.* Infertility may be caused by the delay of pregnancy or sexually transmitted diseases. See, e.g., JANICE G. RAYMOND, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM* 7 (1993); Michele Goodwin, *Assisted Reproductive Technology and the Double Bind: The Illusory Choice of Motherhood*, 9 J. GENDER RACE & JUST. 1, 20, 53 (2005).

114. Jill Duerr Berrick, *From Mother's Duty to Personal Responsibility: The Evolution of AFDC*, 7 HASTINGS WOMEN'S L.J. 257, 268 (1996).

115. *Id.*

116. See Judith G. McMullen, *The Professional Athlete: Issues in Child Support*, 12 MARQ. SPORTS L. REV. 411, 412-13 (2001).

117. Bartlett, *supra* note 30, at 300 & nn. 148-50, 301 & nn. 151-53 (citing cases supporting the author's characterization that in high-income cases, depending on the state, courts may: (1) use a statutory formula; (2) presume that the child support amount indicated for the highest income in the tables is correct; or (3) disregard the Guidelines and engage in a common law analysis of the child's needs and the parents' ability to pay). However, as Morgan states:

Regardless of which approach is used, there is nearly uniform agreement that it is error to determine child support by mechanical upward extrapolation from the income and support amounts listed in the guidelines. . . . Courts have identified two major reasons

in such cases, while others limit, or even reduce, support owed as the parents' income rises.¹¹⁸ Recently, a few states have moved toward the latter approach, buttressed by several public policy arguments.¹¹⁹ The result often depends on what type of model of child support a state uses.¹²⁰ Often, judicial discretion is involved if the noncustodial parent's income is not within the income scale of the Guidelines.¹²¹

A. Public Policy in High-Income Cases

While some courts take the view that fairness requires not capping child support in high-income cases, and instead requires sharing a parent's wealth with the child, other courts have ruled against unlimited child support awards.¹²² The first set of arguments against unlimited child support deals with the child,¹²³ the second with the recipient parent,¹²⁴ and the third with the obligor parent.¹²⁵

It must be noted at the outset, however, that most of these arguments are applicable only to high-income parents and are irrelevant to the average child support case, which is more focused on meeting the child's financial needs than on redistributing a parent's wealth. No doubt, in the average child support case, the child's needs must remain the central focus, whereas this becomes only one factor in cases where money is abundant.

why straight-line extrapolation constitutes error. First, the child support guidelines do not authorize extrapolation. Second, the Income Shares Model and the Melson Formula Model presume that the percentage of income that parents spend on child care decreases as income increases. Therefore, straight-line extrapolation will yield an amount of child support that is in excess of the child's actual reasonable needs.

Morgan, *supra* note 23, at 189; *see also* MORGAN, CHILD SUPPORT GUIDELINES, *supra* note 6, § 8.07[A]–[D]. *But see* Lanham v. Mierzwiak, 967 N.E.2d 1256, 1258 (Ohio Ct. App. 2011) (finding that the trial court acted within its discretion in utilizing the extrapolation method to calculate child support).

118. MORGAN, CHILD SUPPORT GUIDELINES, *supra* note 6, § 8.07[A]–[B].

119. Bartlett, *supra* note 30, at 303-04.

120. *See supra* Part II.A; *see also* Douglas W. Allen & Margaret F. Brinig, *Child Support Guidelines: The Good, the Bad, and the Ugly*, 45 FAM. L.Q. 135, 149-50 (2011) (citing ANDREA H. BELLER & JOHN W. GRAHAM, SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT 200 (1993)). *See generally* Nelson, *supra* note 29.

121. *See supra* note 6 and accompanying text.

122. *See, e.g.,* Anonymous v. Anonymous, 617 So. 2d 694, 696 (Ala. Civ. App. 1993); Maturo v. Maturo, 995 A.2d 1, 9-10 (Conn. 2010).

123. *See infra* Part III.A.1.

124. *See infra* Part III.A.2.

125. *See infra* Part III.A.3.

1. The Child's Best Interests

No doubt, every child has an interest in being financially supported by each parent. If the parent cannot or will not pay, the state will often substitute for the absent parent if the custodial parent cannot earn sufficient money for the household.¹²⁶

To help ensure that children receive support, child support enforcement has become aggressive.¹²⁷ Enforcement techniques range from penalties, such as the suspension of recreational licenses, to criminal prosecution and incarceration.¹²⁸ The federal government has also become involved in child support enforcement, including enacting legislation requiring states to have the Guidelines.¹²⁹ The federal government has also enacted legislation to increase child support enforcement, providing states with the funds to do so.¹³⁰

To oversee this complicated federal-state enterprise—and to manage the federal government's role as creditor¹³¹—Congress created the Administration for Children and Families, Office of Child Support Enforcement (“OCSE”) within the Department of Health and Human Services.¹³² The OCSE oversees federal programs that “promote[] the economic and social well-being of families, children, individuals and communities.”¹³³ Specifically, the OCSE enforces child support

126. Monica Hof Wallace, *Child Support Savings Accounts: An Innovative Approach to Child Support Enforcement*, 85 N.C. L. REV. 1155, 1158-59 (2007).

127. See *supra* notes 7-13 and accompanying text.

128. Maldonado, *supra* note 7, at 1000; see also Margaret Campbell Haynes & Peter S. Feliceangeli, *Child Support in the Year 2000*, 3 DEL. L. REV. 65, 89 (2000) (explaining Delaware's ability to suspend recreation, driving, and professional licenses); Elizabeth Warren, *The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401, 410 & n.27 (2004) (noting that parents behind on child support payments may lose their driver's licenses or work permits). For an in-depth treatment of license revocation for child support enforcement purposes, see generally Mark R. Fondacaro & Dennis P. Stolle, *Revoking Motor Vehicle and Professional Licenses for Purposes of Child Support Enforcement: Constitutional Challenges and Policy Implications*, 5 CORNELL J.L. & PUB. POL'Y 355 (1996); Mai M. Petersen, *Enforcing Child Support by Revoking Licenses: How Constitutional Is It?*, 11 J. CONTEMP. LEGAL ISSUES 441 (2000). But see *Zablocki v. Redhail*, 434 U.S. 374, 389-91 (1978) (striking down a Wisconsin law that denied a marriage license to parents with an unpaid child support obligation).

129. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984) (codified as amended in scattered sections of 42 U.S.C.); see *supra* notes 30-35 and accompanying text.

130. See Margaret Ryznar, *Two Direct Rights of Action in Child Support Enforcement*, 62 CATH. U. L. REV. 1007, 1015-20 (2013).

131. See *id.* at 1019 & n.94 (explaining that custodial mothers must “assign their support enforcement rights to the state in exchange for welfare benefits”).

132. See *id.* (citing Fondacaro & Stolle, *supra* note 128, at 360 n.19).

133. See *id.* (citing *About the Office of Child Support Enforcement (OCSE)*, ADMIN. CHILD. & FAMS., <http://www.acf.hhs.gov/programs/css/about> (last visited Feb. 15, 2015) [hereinafter *About OCSE*]) (internal quotation marks omitted).

payments and audits states' compliance with their federally approved child support enforcement plans.¹³⁴

The OCSE is not a federal agency working in isolation.¹³⁵ In fact, "the OCSE collaborates with various federal and local agencies to ensure the success and efficiency of child support collection."¹³⁶ The OCSE works together with these agencies to locate parents, establish paternity, and enforce child support orders."¹³⁷

The enforcement of child support obligations is essential for the child's best interests, and there is a minimum amount of child support that every child needs. However, the Three Pony Rule has evolved in some of the case law as a limit: "[N]o child, no matter how wealthy the parents, needs to be provided more than three ponies."¹³⁸ In other words, children do not need a significant portion of their wealthy parent's income.¹³⁹ This idea of *reasonable needs*, therefore, may serve as a type of limit on many child support awards when the parent's high income allows the judge to exercise discretion in setting the award.¹⁴⁰

Of course, it may be difficult to determine the amount of a child's reasonable needs in high-income households. If the child's standard of living prior to the parents' divorce is a factor in determining reasonable needs, then children from high-income families will have higher

134. See *id.* at 1019 (citing *About OCSE*, *supra* note 133 (noting that the OCSE works with state enforcement agencies to help them administer their programs effectively)).

135. See *id.*

136. See *id.* (citing *About OCSE*, *supra* note 133 (explaining that "OCSE collaborates with federal, state, tribal, and local governments")).

137. See *id.* at 1020 (citing *About OCSE*, *supra* note 133).

138. *In re Marriage of Patterson*, 920 P.2d 450, 455 (Kan. Ct. App. 1996).

139. See Baker, *supra* note 42, at 331 n.90 ("[C]ourts sometimes stray from the guidelines on the theory that no child needs twenty percent of a very, very wealthy parent's annual income . . .").

140. For example, an Illinois court had held a lower court judge's award pursuant to the Guidelines in a high-income case was an abuse of discretion because the evidence showed that the children's needs and lifestyle could be maintained on an award of \$6000 per month. *In re Marriage of Scafuri*, 561 N.E.2d 402, 406-07 (Ill. App. Ct. 1990); see also *Maturo v. Maturo*, 995 A.2d 1, 9 (Conn. 2010) ("Children's economic needs do not increase automatically . . . with an increase in household income."); *Anonymous v. Anonymous*, 617 So. 2d 694, 696 (Ala. Civ. App. 1993) (noting that the court's discretion "is not unbridled. It must relate to the reasonable and necessary needs of the child"); Kathleen A. Hogan, *Child Support in High Income Cases*, 17 J. AM. ACAD. MATRIM. LAW. 349, 355 (2001) ("The process of establishing an appropriate child support level based upon the 'reasonable needs' of the child may begin with proof of such things as food, clothing and educational expenses. Elements such as private school tuition, private lessons, and cultural, social and/or recreational activities are also subject to documentation."). Hogan points out that support for luxury items, such as luxury cars and vacations, may, therefore, be more problematic. Hogan, *supra*, at 355. But see *In re Marriage of Scafuri*, 561 N.E.2d at 406 (noting that "a child support award is not limited to the 'shown needs' of the children" and that "[a] court may award support in excess of the needs of the children"). The concept of reasonable needs may be further limited by the ability of the parent to pay. See, e.g., *Dyas v. Dyas*, 683 So. 2d 971, 973-74 (Ala. Civ. App. 1995); *Voishan v. Palma*, 609 A.2d 319, 324-25 (Md. 1992).

reasonable needs, potentially including many luxury items, such as expensive schools, camps, and vacations.¹⁴¹ This approach leaves a significant role for judicial discretion.

2. The Obligee Parent (Recipient)

Some commentators have observed that child support, in fact, financially supports the custodial parent in addition to the child.¹⁴² This phenomenon has been termed “hidden alimony” and has prompted state legislatures to be cautious in how they formulate Guidelines.¹⁴³

The concern is that the line between alimony—also known as “maintenance” in some states—and child support will be blurred by custodial parents who seek high child support to maintain the entire household at a high level.¹⁴⁴ This is particularly true in jurisdictions that do not recognize long-term alimony or alimony at all, as well as in the cases wherein the parents were never married, and therefore, the custodial parent does not qualify for alimony.¹⁴⁵

More jurisdictions have made the transition to phase out alimony in recent years, instead relying on property distribution between the

141. MORGAN, CHILD SUPPORT GUIDELINES, *supra* note 6, § 8.07[F] & n.130 (citing a wave of cases holding that high-income father-payors should provide their children with the advantages of their wealth in the form of a high standard of living).

142. T.L.H. v. R.A.R., 977 So. 2d 482, 489-90 (Ala. Civ. App. 2007); *Maturo*, 995 A.2d at 15; *In re Marriage of Scafuri*, 561 N.E.2d at 406-07. In *Maturo*, the court recognized that:

The effect of unrestrained child support awards in high income cases is a potential windfall that transfers wealth from one spouse to another or from one spouse to the children under the guise of child support. In the present case, the award of 20 percent of the defendant's indeterminate annual bonus without any justification relating to the characteristics or needs of the children closely resembles the ‘disguise[d] alimony’ this court disapproved of in *Brown v. Brown*, 190 Conn. 345, 349, 460 A.2d 1287 (1983).

Maturo, 995 A.2d at 15; *see also* Marsha Garrison, *Child Support Policy: Guidelines and Goals*, 33 FAM. L.Q. 157, 179 & n.91 (1999) (noting that the possibility of such “hidden alimony” results in less generous child support amounts); Hogan, *supra* note 140, at 355-56 (noting that a large home, transportation in a late model car, live concerts, plays or sporting events, foreign travel or luxury vacations, and country club memberships benefit the custodial parent in addition to the child, prompting protests from child support payors).

143. Garrison, *supra* note 142, at 179 & n.91. One court even suggested that the husband was intended to be punished by a high child support order for his misconduct during the marriage. *Anonymous*, 617 So. 2d at 697.

144. *In re Marriage of Scafuri*, 561 N.E.2d at 406-07. One method of combatting this is the good fortune trust, which contains child support funds in excess of day-to-day support, to be used by the child after reaching the age of majority. *See* Boyt v. Romanow, 664 So. 2d 995, 996-99 (Fla. Dist. Ct. App. 1995); Nash v. Mülle, 846 S.W.2d 803, 806-08 (Tenn. 1993); Carlton D. Stansbury, *Deviating from Child Support Guidelines in High-Income Cases*, in 1997 WILEY FAMILY LAW UPDATE § 1.11 (discussing generally, the use of trusts).

145. Although “palimony” is an alternative to alimony in certain states, it is not easily awarded, and an agreement between two people may have to be proven before it is awarded. *See, e.g.,* Marvin v. Marvin, 557 P.2d 106, 116 (Cal. 1976). *But see* Hewitt v. Hewitt, 394 N.E.2d 1204, 1207-08 (Ill. 1979).

spouses to achieve a clean start for the former couple.¹⁴⁶ For example, Massachusetts recently enacted a significant alimony reform bill that limits the duration of many alimony awards and terminates alimony in certain cases.¹⁴⁷ Similarly, Indiana limits alimony to rehabilitative alimony not to exceed three years,¹⁴⁸ and cases wherein one of the spouses is incapacitated or is caring for an incapacitated child.¹⁴⁹

Even in jurisdictions permitting alimony, the child support order may benefit the custodial parent when the formula for child support does not take into account the obligee's income.¹⁵⁰ In other words, the recipient parent's income does not influence the child custody award, even when it is substantial. This is the case in the percentage of income model used in many states, which considers the noncustodial parent's income to the exclusion of the custodial parent's income.¹⁵¹ Therefore, the custodial parent may receive a windfall in lieu of alimony in such cases, which would be based on financial need in many states.

In any case, the existence of a child support system, completely separate and apart from alimony and property division, suggests that the state legislatures intended them to be separate. The blurriness between child support and alimony is a problem under the federal tax code as well, under which alimony and child support are treated differently.¹⁵² These are just a few of the reasons why child support obligations in high-income cases should not blur this line between support for the custodial parent and support of the child.¹⁵³

146. Carbone, *supra* note 2, at 7 (noting that divorce settlements in the modern era aim to terminate any continuing relationship between the spouses, thereby increasing the use of property division instead of alimony to distribute divorcing spouses' assets).

147. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2011-2012: "DOMA" Challenges Hit Federal Courts and Abduction Cases Increase*, 46 FAM. L.Q. 471, 485 (2013).

148. IND. CODE ANN. § 31-15-7-2(3) (2008).

149. § 31-15-7-2(1)-(2). In Indiana, alimony is called "maintenance." *Id.*

150. This was the case in the old New Hampshire Guidelines. Christine Gordon, *Child Support Paid by High-Income Earners Is Recalculated*, N.H. BUS. REV. (Sept. 6, 2013), <http://www.nhbr.com/September-6-2013/Child-support-paid-by-high-income-earners-is-recalculated>.

151. See *supra* notes 48-53 and accompanying text.

152. J. MARTIN BURKE & MICHAEL K. FRIEL, TAXATION OF INDIVIDUAL INCOME 871 (10th ed. 2012). Specifically, alimony is deductible by the payor and includable in income by the recipient, while child support is neutral in terms of tax implications. *Id.*

153. As one commentator observed: "The prominence of child support is a critical element in a larger shift from the husband-wife relationship to parent-child ties as the defining element of family obligation." Carbone, *supra* note 2, at 3.

3. The Obligor Parent (Payor)

There are several public policy reasons put forth for capping child support at the high-income level when it comes to the obligor parent.¹⁵⁴ Most notably, there is a general principle that a person who earns her money should spend it as she desires.¹⁵⁵ While this is inarguably limited by a responsibility to one's minor children, when that responsibility is met, there is an argument for letting a parent decide how much discretionary income to spend on her children.¹⁵⁶ Some parents may choose to spend little discretionary income on their children, while others do not need a court order to lavish their children with significant gifts.¹⁵⁷

This principle permeates the field of trusts and estates law, where the intention of the testator is paramount.¹⁵⁸ Some testators prefer to control how much property their children inherit, so as not to ruin their

154. Hogan, *supra* note 140, at 352-53.

155. *Id.* at 353-54.

156. There are many cases of wealthy parents who choose not to spend money on their children for fear of spoiling them, or other reasons. *See, e.g.*, Strahan v. Strahan, 953 A.2d 1219, 1223-24 (N.J. Sup. Ct. App. Div. 2008); Brind'Amour v. Brind'Amour, 674 S.E.2d 448, 450 (N.C. Ct. App. 2009). In *Brind'Amour*, the court found that:

An amount in excess of the amount awarded as child support, below, would essentially result in Plaintiff providing support to Defendant and/or result in Plaintiff subsidizing Defendant's choices regarding the children's standard of living—choices that Plaintiff has historically not supported and are inconsistent with his own lifestyle and the choices he has made for the minor children.

Brind'Amour, 674 S.E.2d at 450. Similarly, in *Strahan*, the court described the "unique problem" of determining children's needs in high-income cases:

First, a balance must be struck between reasonable needs, which reflect lifestyle opportunities, while at the same time precluding an inappropriate windfall to the child or even in some cases infringing on the legitimate right of either parent to determine the appropriate lifestyle of a child. This latter consideration involves a careful balancing of interests reflecting that a child's entitlement to share in a parent's good fortune does not deprive either parent of the right to participate in the development of an appropriate value system for a child. This is a critical tension that may develop between competing parents. Ultimately, the needs of a child in such circumstances also calls to the fore the best interests of a child.

Strahan, 953 A.2d at 1223-24; *see also* Lee Anne Fennell, *Death, Taxes, and Cognition*, 81 N.C. L. REV. 567, 580 (2003) (noting that donors do not want to spoil children or grandchildren through their wealth transfers).

157. For example, one father established a trust for his child's benefit and the benefit of the wife's child by a prior husband. *Anonymous v. Anonymous*, 617 So. 2d 694, 696-97 (Ala. Civ. App. 1993). The father also gave each child an almost-quarter interest in a profitable optical business. *Id.*

158. Margaret Ryznar & Angelique Devaux, *Au Revoir, Will Contests: Comparative Lessons for Preventing Will Contests*, 15 NEV. L.J. 1, 6-7 (2013).

child's work ethic, among other reasons.¹⁵⁹ In fact, in every state except Louisiana, the law allows parents to completely disinherit their children, but not their spouses.¹⁶⁰ Disinheritance of children is a foreign concept in many civil law jurisdictions, where it is almost impossible to disinherit one's own children.¹⁶¹ However, in common law jurisdictions, property rights are privileged.¹⁶²

The analogy to parents' estates has been made by a few courts hesitant to award uncapped child support, albeit in a different way.¹⁶³ Specifically, some courts have underscored that because a child's needs are finite, excess child support awards are in fact redistributing the parent's estate from parent to child.¹⁶⁴

Finally, depending on the amount, the child support obligation may increase or decrease the financial consequence for having children.¹⁶⁵ This is especially true given that men are liable for child support even after having been deceived into conception or having been subject to

159. Ellen Evans Whiting, *Controlling Behavior by Controlling the Inheritance: Considerations in Drafting Incentive Provisions*, PROB. & PROP., Sept./Oct. 2001, at 6, 9-10. For example, the author notes that:

Most notable among the list of high profile clients who have emphasized the desire to control their children's inheritances is Warren Buffet. He is famously quoted as saying "[t]he perfect inheritance is enough money so that they feel they can do anything, but not so much that they could do nothing." This concern is hardly new.

Id. at 6.

160. See generally JESSE DUKEMINIER, WILLS, TRUSTS, & ESTATES (2013).

161. See, e.g., Ryznar & Devaux, *supra* note 158, at 19 (noting that children in France are statutorily entitled to a portion of their parents' estates).

162. See *Sawada v. Endo*, 581 P.2d 1291, 1295 (Haw. 1977).

163. See, e.g., *Anonymous v. Anonymous*, 617 So. 2d 694, 697 (Ala. Civ. App. 1993); *Ford v. Ford*, 600 A.2d 25, 30 (Del. 1991).

164. See MORGAN, CHILD SUPPORT GUIDELINES, *supra* note 6, § 807[E]. Morgan notes that *Ford* exemplifies this concept:

When the income of an individual is substantial, he or she will use a smaller percentage of that income to maintain a certain standard of living as compared to an individual with less income. This is because, outside the unusually extravagant lifestyles, only a limited sum can be spent on a standard of living. At some point income is directed less and less toward "needs" and more and more towards savings or investments and thus becomes part of an individual's estate. The Delaware Child Support Statute certainly contemplates that children share in their parents' standard of living, even a somewhat luxurious standard of living. . . . But it does not direct or authorize the Family Court to distribute a parent's estate. The Family Court has no duty or authority to order payments which go beyond the demands of reasonable and generous support, meaning, in this context, enough to share in the respective lifestyles of the parents.

Id. (quoting *Ford*, 600 A.2d at 30). Morgan continues to explain that "[t]hus, the court [in *Ford*] reasoned, support that goes beyond the reasonable needs of a child is no longer 'support,' but is a distribution of the obligor parent's estate." *Id.*

165. See *supra* Part III.A.2.

another type of fraud.¹⁶⁶ In pro-family jurisdictions, as many are,¹⁶⁷ government may want to encourage family growth by controlling child support obligations.¹⁶⁸ On the other hand, if a parent is not intending to provide the child with resources and support, the child support system should not facilitate that parent's ability to have many children without the attendant responsibilities.¹⁶⁹ This is especially true in light of recent demographic changes, considered next.¹⁷⁰

4. Demographic Changes

Several major demographic shifts have occurred in the recent decade and since the introduction of the child support system. Specifically, the number of non-marital births is approaching the number of marital births.¹⁷¹ Furthermore, the number of divorces is now impacting a huge proportion of children. Specifically, 40.8% of children are born to unmarried parents,¹⁷² and the divorce rate is nearly 50%.¹⁷³

166. Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J.L. & PUB. POL'Y 29, 52-61 (2003) (describing several "purloined sperm" cases in which men were ordered to pay support for children conceived without their knowledge or consent); Judith G. McMullen, *supra* note 116, at 413-16 (noting that "[h]owever unscrupulous or irresponsible the behavior of the young mother, athletes must be advised that this does not relieve them of their legal support obligations").

167. Many jurisdictions seek higher fertility rates. For example, in Japan, the local government has even turned to matchmaking. David McNeill & Chie Matsumoto, *Fertility Crisis in Japan: Let the State Find You a Mate*, INDEPENDENT (Nov. 10, 2009), <http://www.independent.co.uk/news/world/asia/fertility-crisis-in-japan-let-the-state-find-you-a-mate-1817736.html>. One notable exception is China, which has implemented a one-child-per-family policy. Robert S. Gordon, Comment, *The New Chinese Export: Orphaned Children—An Overview of Adopting Children from China*, 10 TRANSNAT'L LAW. 121, 131 (1997).

168. Stepień-Sporek & Ryznar, *supra* note 58, at 383.

169. Carbone, *supra* note 2, at 9 ("Numerous studies documented the declining well-being of American children and attributed a substantial part of the result to the growing numbers of single-parent families and their straitened economic circumstances."); *see also* Garrison, *supra* note 1, at 23.

170. *See infra* Part III.A.4.

171. GRETCHEN LIVINGSTON & D'VERA COHN, PEW RESEARCH CTR., *THE NEW DEMOGRAPHY OF AMERICAN MOTHERHOOD* 1, 13 (2010), available at <http://pewsocialtrends.org/files/2010/10/754-new-demography-of-motherhood.pdf> ("A record four-in-ten births (41%) were to unmarried women in 2008, including most births to women in their early 20s.").

172. JOYCE A. MARTIN ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., *BIRTHS: FINAL DATA FOR 2010*, at 8 (2012), available at http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01.pdf. This figure marked a decrease in children born out of wedlock for the second consecutive year; the number of births to unmarried parents peaked at 1,726,566 in 2008. *Id.*

173. MARTHA L. MUNSON & PAUL D. SUTTON, U.S. DEP'T OF HEALTH & HUMAN SERVS., *BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2003*, at 1 (2004), available at http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_22.pdf (reporting that there were 3.8 divorces per every 7.5 marriages in 2003); Rebecca Love Kourlis et al., *IAALS' Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising from Separation or Divorce*, 51 FAM. CT. REV. 351, 356 (2013) ("Overall, this means that one million children live with parents who are in the midst of a divorce each year."); Margaret Berger Strickland, Comment,

Although unmarried couples with children comprised 6.6% of households in 2010 (constituting approximately 7,744,711 households overall), these couples had a 90% chance of separating if they were not married within five years.¹⁷⁴ This contributes to the fact that most single parents in the United States are women over the age of twenty.¹⁷⁵ As a result, children of both divorced parents and never-married parents will need to rely on child support.¹⁷⁶ In fact, well over half of the children born in the next generation will be born to unmarried or eventually-divorced couples.¹⁷⁷

The significant and increasing number of nonmarital children prompts the question of whether modern demographics challenge the American child support system, which was originally conceived of as a way to economically recreate the nuclear unit after divorce at a time when non-marital births were significantly less common.¹⁷⁸ If the parents never lived together before the birth of a child, the relevance of the parents' lifestyle in determining the reasonable needs of the

What's Mine Is Mine: Reserving the Fruits of Separate Property Without Notice to the Unsuspecting Spouse, 51 LOY. L. REV. 989, 990 (2005) ("[I]n 2003, for every two marriages, there was a divorce.").

174. Garrison, *supra* note 82, at 322 (noting that, after five years, only ten percent of unmarried, cohabiting couples remain together); Margaret Ryznar, *Two Direct Rights of Action in Child Support Enforcement*, 62 CATH. U. L. REV. 1007, 1026 (2013); *see also* Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403, 409 (2004) (explaining that cohabiting couples report feeling less committed to their relationships and, further, that cohabitation before marriage reduces the couple's chances of future marital success); William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001, 1005-12 (2003) (arguing that cohabiting partners are less faithful to each other, less happy, less wealthy, and less stable than married couples).

175. MARTIN ET AL., *supra* note 172, at 8. Most unmarried mothers have reached adulthood; in 2010, only twenty percent of non-marital births were to teenagers, compared to twenty-eight percent in 2000. *Id.*

176. The U.S. Supreme Court has held that "once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." *Gomez v. Perez*, 409 U.S. 535, 538 (1973); *see White v. Marciano*, 235 Cal. Rptr. 779, 782 (Ct. App. 1987) ("The father and mother of a child have an equal responsibility to support and educate their child. Illegitimate and legitimate children are to be treated alike." (citation omitted)).

177. Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1490 (2013) ("[M]any of the legal distinctions between marital and nonmarital children have been eliminated.").

178. *See supra* Part II.A. *But see* McMullen, *supra* note 116, at 412-13 (quoting *Gomez*, 409 U.S. at 538 ("Neither the existence of a support obligation nor the amount of support due is related to whether the child's parents have ever married each other.")).

child may be decreased.¹⁷⁹ Thus, modern demographics raise important questions for child support law.

B. States Moving to Limit Child Support in High-Income Cases

There is no doubt that the adoption of an approach to child support determination is fraught with difficult public policy choices.¹⁸⁰ Ultimately, whether and how state legislators choose to cap child support in high-income cases depends on their view of fairness, as well as on their view of the nature and obligations of the parent-child relationship. The public policy choices include how to award child support in high-income cases, and what income qualifies as sufficiently

179. Kathleen A. Hogan notes that:

The popular press is replete with stories of musicians, actors, entertainers, or professional athletes who have fathered children out of wedlock often after only a brief acquaintance with the child's mother. Many wealthy individuals outside the public eye also find themselves in similar circumstances. In such cases there will be no prior joint lifestyle for the court to examine in determining the lifestyle that might reasonably have been expected for the child. Similarly, there will generally be no basis for any claim that the father has any ongoing duty to support the mother or subsidize her lifestyle. Presumably in such cases the standard for establishing support will primarily rest upon the reasonable needs of the child.

Hogan, *supra* note 140, at 357. Hogan further concedes that:

[P]roving the reasonable support needs of a dependent child of a wealthy parent can become more problematic where the circumstances offer no family history established during an intact marriage. Such a situation may arise where the obligor parent's wealth is newly acquired after a dissolution such as the case with lottery winners or other windfall recipients. There is a similar lack of "family history" from which to discern the child's expected lifestyle when the parents were never married to one another, particularly if the child is the result of a one night stand or a very short term relationship.

Id. at 356.

180. Ira Mark Ellman writes that:

[T]here is no tool by which to compare the benefit that an additional dollar will provide the child against the burden that paying it will impose on the obligor. That is one reason why the policy choice is difficult. The fact that the accuracy of these generalizations may vary among cases (some children and some obligors have special needs that make additional dollars more important to them) adds further complication. The guideline table must reflect one's choice of the best way to balance these competing interests *on average*. . . . The policy choice is further complicated by the fact that minor children do not live alone, and that members of their household necessarily share a living standard. So the cost of providing the child a safe place to live in a neighborhood with good schools necessarily includes the cost of providing that home to the custodial parent, and perhaps to others in the child's household as well. Yet the obligor may have no duty to provide anything to *anyone* in the child's household apart from the child.

Ira Mark Ellman, *A Case Study in Failed Law Reform: Arizona's Child Support Guidelines*, 54 ARIZ. L. REV. 137, 145 (2012).

high to trigger a limit.¹⁸¹ Some states have been actively considering their positions on these choices.¹⁸²

For example, Wisconsin instated high-income payer Guidelines that apply when the paying parent's income for child support is more than \$84,000 annually.¹⁸³ This is an example of a state's answer to the unique challenges posed by high-income cases.¹⁸⁴ The percentage of child support due under the Wisconsin Guidelines, in fact, decrease as income increases: for one child, 17% of the first \$7000 of monthly income is applied to the child support obligation, but only 14% of monthly income between \$7000 and \$12,500, and 10% of monthly income above \$12,500 is applied to the child support obligation.¹⁸⁵

On July 1, 2013, New Hampshire also implemented new Guidelines, under which the percentage of income owed in child support likewise decreases with the payor parent's income.¹⁸⁶ These New Hampshire Guidelines evolved from supporting research.¹⁸⁷

Support for this trend is found not only in the Three Pony Rule, the reasonable needs standard, and other public policy arguments,¹⁸⁸ but also in empirical data on family expenditures that shows a negative relationship exists between family income and the fraction of income that is spent on children.¹⁸⁹ Furthermore, the income share model may

181. For a discussion of the definition of "high income," see *supra* note 10.

182. Ellman, *supra* note 180, at 144.

183. *Child Support Guidelines for High-Income Payers*, WIS. DEP'T CHILD. & FAMS., http://dcf.wisconsin.gov/bcs/order/guidelines_high_income.htm (last updated June 20, 2012) [hereinafter *Wis. Child Support Guidelines*].

184. Implementing separate Guidelines for high-income parents may be wise given the criticisms that general Guidelines incur when applied to high-income cases. See generally Polikoff, *supra* note 6 (critiquing the economic calculations in the income shares model). Morgan notes that:

[E]conomic research . . . suggests the child support guidelines themselves are flawed in setting support for the high-income parent. One study has suggested that the underlying economic data failed to reflect true child-related expenditures in upper income families, including such nonconsumer expenditures as principal on the home, savings, and trusts for the benefit of children. Thus, the Income Shares Model, predicated on the premise that as income increases the percentage of income dedicated to child support decreases, does not accomplish the goal of ensuring that parents, after they break up, continue to spend on their children the same percentage of income that they would have spent if they were together.

Morgan, *High-Income Parent*, *supra* note 6, at 92 (citing Polikoff, *supra* note 6, at 32).

185. *Wis. Child Support Guidelines*, *supra* note 183.

186. Gordon, *supra* note 150.

187. See generally MALCOLM L. SMITH ET AL., UNIV. OF N.H. COOP. EXTENSION, 2009 NEW HAMPSHIRE CHILD SUPPORT GUIDELINES REVIEW AND RECOMMENDATIONS (2009), available at <http://www.unh.edu/campusjournal/2013/09/unh-analysis-leads-change-how-child-support-calculated-nh>.

188. See *supra* Part III.A.1.

189. SMITH ET AL., *supra* note 187, at 5; see also *Maturo v. Maturo*, 995 A.2d 1, 9 (Conn. 2010) ("The preamble [to Connecticut's Child Support and Arrearage Guidelines] specifically notes

require a limit on one parent's contribution.¹⁹⁰ On the other hand, some commentators and courts have insisted that children should share in their parents' good fortune, and that limiting child support in high-income cases is not appropriate.¹⁹¹ Ultimately, it will depend on each state jurisdiction to determine its course in high-income child support cases.

IV. CONCLUSION

Child support, as currently conceived, is primarily concerned with the economics of raising a child, and any amount of attention to the economic situation of the child confirms that every child needs and deserves financial support from noncustodial parents. While meeting this need is consistent with the goals of the child support system in place in the United States, more states have recently decided that additional financial support in high-income cases does not necessarily improve that consistency.¹⁹²

Indeed, there have been many public policy arguments made in support of these states' decision against unlimited child support awards.¹⁹³ These arguments carefully consider the roles of the child, obligee, and obligor.¹⁹⁴ No doubt, the question of child support in high-income cases requires difficult public policy decisions centering on the

that 'economic studies have found that spending on children declines as a proportion of family income as that income increases, and a diminishing portion of family income is spent on each additional child.'"); *Gentile v. Carneiro*, 946 A.2d 871, 885 (Conn. App. Ct. 2008) ("The guidelines are based on the premise that a parent with a high net income pays a lower percentage of his income for child support as compared to an obligor with a lower net income.").

190. See *supra* notes 43-47 and accompanying text. The *Maturo* court held that:

The preamble further explains that the guidelines are based on the income shares model, which considers the income of both parents and "presumes that the child should receive the same proportion of parental income as he or she would have received if the parents lived together." Children's economic needs do not increase automatically, however, with an increase in household income.

Maturo, 995 A.2d at 9 (citation omitted).

191. See, e.g., McMullen, *supra* note 116, at 421. Judith G. McMullen notes that:

[T]he statistically short career span of a professional athlete may motivate a court to order higher child support payments than might be ordered for a parent with a similar income in a more long-lived career. Concerns about the athletes' earning potential after the end of their professional careers are well-founded

Id.; see *Morgan*, *supra* note 23, at 202 ("Children should not be deprived of funds that they otherwise would have received had the marriage remained intact merely because these funds do not pay for everyday living expenses, but fund such items as trusts, savings, and education.").

192. See *supra* Part III.B.

193. See *supra* Part III.B.

194. See *supra* Part III.A.1-3.

very meaning of fairness, but they must be undertaken if the same consistency is desired in high-income cases as in all other child support cases.
