

A CASE STUDY IN FAILED LAW REFORM: ARIZONA'S CHILD SUPPORT GUIDELINES

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The story I tell here is not mine. It is rather the story of the extraordinarily talented and dedicated group of volunteers with whom I was so lucky to work: the members of the 2008 Guidelines Review Committee appointed by the Chief Justice of the Arizona Supreme Court. They all deserve recognition they were never given for the unprecedented effort they put into improving the lives of the children and the parents caught up in the child support system. I must make special note, however, of some particularly special people. Nothing ever seemed too difficult for the court specialist assigned to staff the Committee, Kathy Sekardi. She too was effectively a volunteer because the time and talents she gave this Committee without complaint far exceeded what anyone could reasonably expect. The members of the "spreadsheet subcommittee" with whom I served (Rebecca Albrecht, Kim Gillespie, and David Horowitz) sacrificed countless evenings and weekend mornings, and meals away from family, poring over the numbers produced by the *Childshare* program described here. I do not think any of us realized at the outset just how much work it would be to find numbers reasonably consistent with *all* the criteria of fairness we believed the statute required us to consider. I will always treasure the opportunity our joint effort gave me to know these wonderful people. Nothing the Committee did would have been possible without the leadership provided by its chair, the Honorable Bruce Cohen. He showed everyone with whom he dealt a model of intelligence, patience, empathy, and judgment that few could emulate but all admired. Finally, I must acknowledge the Committee's "volunteer consultant," Tara Ellman, who worked hundreds of hours over many months creating, revising, and reinventing the *Childshare* program on which all the Committee's work relied—and that was only a portion of her contribution. There is no doubt that bringing her into this project was my most important contribution to the Committee's effort.

I am also pleased to be part of this issue honoring Barbara Atwood. Her important contributions include her admirable work as a law reformer, and as a member of several American Bar Association committees and committees appointed by the Arizona Supreme Court. She is one of Arizona's commissioners in the National Conference of Commissioners on Uniform State Laws, and she was the reporter for one of the uniform acts adopted by the Conference. She is currently chair of the drafting committee for a new uniform act that will replace the often-criticized Uniform Premarital Agreements Act. Her effectiveness is

It is hardly news to observe that a proposed legal reform is not adopted even though nearly all experts believe it would effectively advance the law's widely supported policy goals. But if this phenomenon is commonplace, that is all the more reason for trying to understand why it happens. The recent effort to reform Arizona's child support guidelines provides a particularly compelling case study of such a failed law reform effort, for several reasons. First, child support has generally not been politically contentious: Both Democrats and Republicans have for several decades combined to support changes in child support law intended to ensure that non-custodial parents contribute to the support of their children. Second, this is not merely a case of legislative inaction. In Arizona, as in many states, the state supreme court is the body assigned the task of writing the rules that establish how much child support a non-custodial parent must pay. The proposed reform would have become law had the legislature not affirmatively acted to overrule the recommendations of a series of committees the court had appointed to study the issue. Finally, all available information suggests that the proposed reforms were more consistent with the views of the Arizona electorate than the existing provisions they would have replaced. In sum, the legislature acted to prevent adoption of child support reforms proposed by the public bodies entrusted with deciding them even though the reforms were consistent with the views of the public and supported by nearly all the experts asked to study them. This Article attempts to understand why this happened. Among other things, it concludes that the reform suffered from an asymmetry in citizens' motivation to engage the political process: those who stand to gain from a reform may not work as hard for its adoption as those who stand to lose from it will work for its defeat.

evidenced by the simple fact that the National Conference appointed her to chair this committee even though she was herself one of the best-known critics of its current Act. As a participant in this drafting committee's deliberations, I have been fortunate to have the chance to watch Barbara lead a group of strong-minded people with diverse views toward a consensus in support of much-needed reforms.

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INTRODUCTION

This Article tells the story of a failed effort to reform Arizona’s child support guidelines. Federal law requires every state to have rules that specify the precise dollar amount of the child support award that must be granted in any case.¹ A judge can “deviate” from these formulaic “guidelines” only if the judge justifies the deviation in a written opinion.² States can in principle be penalized by reduced

1. Family Support Act of 1988, 42 U.S.C. § 667(a), (b)(2) (2006).

2. *Id.* § 667(b)(2); Arizona Supreme Court, Administrative Order 2010-116, Adoption of Revisions to the Arizona Child Support Guidelines §§ 3, 20 (2010) [hereinafter 2011 Child Support Guidelines] (adopting revised Arizona Child Support Guidelines, effective June 1, 2011), *available at* <http://www.azcourts.gov/Portals/22/admorder/Orders10/2010-116.pdf>. A subsequent order made technical changes to the new guidelines. See Arizona Supreme Court, Administrative Order 2011-46, Adoption of Technical Revisions to the Arizona Child Support Guidelines (2011).

federal contributions to their welfare programs if deviations are too common.³ The vast majority of child support orders thus specify the guideline amount. In Arizona, as in about half the states, the state supreme court is responsible for creating the guidelines.⁴ Federal law requires that they be reviewed quadrennially,⁵ and the chief justice appoints a Guidelines Review Committee (“GRC”) to conduct the review and recommend any changes. As explained below, concern over the method by which the guidelines were constructed led Arizona’s 2004 GRC to suggest consideration of an alternative. Between then and 2010, both a special Economic Study Workgroup, appointed by the staff of the legislative Child Support Committee, and the 2008 GRC, developed and recommended a new method for constructing support guidelines. They believed the new method produced guidelines that were fairer as well as more faithful to the governing Arizona statute.⁶ The new method was called Child-Outcome Based Support

3. Reducing welfare expenditures by more effective collection of child support obligations was an important reason for the federal action and explains the connection to the federal government’s contributions to a state’s welfare budget. The welfare program in question was initially Aid to Families with Dependent Children which was, after the Clinton-era welfare reforms of the 1990s, replaced by Temporary Assistance to Needy Families. For fuller descriptions of how and why the federal government became involved in requiring child support guidelines, and the impact of the Clinton welfare reforms, see LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.01 (1996); Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 521–27 (1996). For a discussion of the success of some of these reforms in increasing child support collections, see PAUL LEGLER, POLICY STUDIES INC., LOW-INCOME FATHERS AND CHILD SUPPORT: STARTING OFF ON THE RIGHT TRACK 6 (2003), available at <http://www.aecf.org/upload/publicationfiles/starting%20off.pdf> (finding that child support collections increased from \$8 billion in 1992 to \$18 billion in 2000).

4. An Arizona statute assigns this task to the court. ARIZ. REV. STAT. ANN. § 25-320(D) (2011). The National Conference of State Legislatures (“NCSL”) conducted a survey of how each state establishes child support guidelines and compiled a list over-viewing each state. The compilation shows that support guidelines are adopted by legislative action in 25 states, by judicial action in 18 states, and by specially created agencies or commissions in the remainder. See *Archive: Which Branch of Government Establishes Each State’s Child Support Guidelines*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/?tabid=17623> (last visited Feb. 1, 2012). Such tabulations necessarily oversimplify. For example, for this purpose California is counted among the 25 states that adopt their guidelines legislatively, but the legislation is based upon recommendations of a committee appointed by the California Judicial Council. *Id.* An examination of the NCSL compilation shows that reliance on such specially appointed committees is common, even when the ultimate adopting authority is the legislature or the state’s highest court. *Id.* Consultants typically work with these committees rather than with the ultimate adopting authority.

5. The quadrennial review requirement exists to ensure that “application [of the guidelines] results in the determination of appropriate child support award amounts.” Family Support Act of 1988, 42 U.S.C. § 667(a) (2006); see also 45 C.F.R. § 302.56(e) (2008).

6. BRUCE R. COHEN ET AL., GUIDELINES REVIEW COMM., FINAL REPORT AND RECOMMENDATIONS OF THE CHILD SUPPORT GUIDELINES REVIEW COMMITTEE 51–64 (2010) [hereinafter GRC FINAL REPORT], available at http://www.azcourts.gov/Portals/84/MeetingMaterials/2010/pdfs/TAB6_FinalAJCBinder.pdf.

(“COBS”), and the new guidelines developed through this method were called the COBS guidelines. The COBS guidelines were reviewed and endorsed by the Committee on Superior Court (consisting of superior court judges), and by the Arizona Judicial Council (“AJC”), a public body charged with advising the court on its administrative duties, chaired by the Chief Justice, and consisting of judges from around the state, other public officials, and public members.⁷

Over the five years during which the process took place, there were many public hearings on the COBS guidelines. The effort seemed to culminate in success in March 2010 when the AJC voted to recommend the court’s adoption of COBS. Yet that adoption never took place. A late-mounted campaign by opponents enlisted the support of key members of the state legislature, which ultimately resulted in the AJC withdrawing its recommendation, and the legislature later enacting a statute that effectively barred the court from ever adopting the COBS guidelines.⁸

This Article examines why this reform effort collapsed at the 11th hour. The story is necessarily told from the perspective of the Author, who was intimately involved in the Committee’s work.⁹ But an accurate understanding of what happened, and why it happened, is just as important to those who worked for the reform, as for those who opposed it.

I present this story in four parts. Part I discusses why constructing child support guidelines is difficult, applying more general observations I made years ago¹⁰ about the difficulties inherent in making family law rules. Part II tells the reform story—both the process (how the committees conducted their business) and

7. A more complete description of the AJC, its membership, and its functions is available on its website. *Arizona Judicial Council*, ARIZ. JUDICIAL BRANCH, <http://www.azcourts.gov/ajc/Home.aspx> (last visited Feb. 1, 2012).

8. In 2011, the Arizona Legislature passed a bill providing that [t]he supreme court shall not adopt the child outcome based support model for child support unless the supreme court selects a nationally recognized independent research organization to review and assess the methodology used in creating the child outcome based support model for child support and the effect that model would have on the courts and on child support for families in this state if that model were adopted.

An Act Providing for a Review by the Supreme Court of the Child Outcome Based Support Model for Child Support, 2011 Ariz. Sess. Laws 1st Reg. Sess. ch. 228, § 1. The legislature provided no funds to the court to conduct any such review, nor is it clear what the legislature meant by a “nationally recognized independent research organization.” At one point during the spring of 2010, the court did seek an outside review of COBS but was unable to find anyone with the adequate skills and knowledge to conduct such a review.

9. The Author was a member of the 2004 GRC, the Economic Study Workgroup, the 2008 GRC, and the spreadsheet subcommittee of that GRC whose efforts are described below. The descriptions provided here of the Committee’s deliberations and reports are sometimes documented in public records available online and referenced in the notes; in other cases the descriptions are based on the Author’s recollections, buttressed by the Author’s personal notes and the confirming recollections of other participants in the process.

10. See Ira Ellman, *Why Making Family Law Is Hard*, 35 ARIZ. ST. L.J. 699 (2003).

the substance (what they proposed, and how the proposal would have changed the status quo). Part III compares the support amounts that would be required under the COBS guidelines to the amounts required under the current Arizona guidelines they would have replaced, and to the amounts favored by Arizona citizens (as shown by recently published data that was not fully available to the Committee at the time of its deliberations). Part IV asks why the reform failed. The Conclusion muses as to whether a different approach to reform might work in the future.

I. WHY MAKING CHILD SUPPORT GUIDELINES IS HARD

One important function of law is to change the consequences of some act to make them more fair. But legal rules frequently limit the universe of facts considered relevant to such fairness judgments. Contract rules are a familiar example. It seems fair to require people who break their promise to pay for the costs others incur because of their breach. But the law's understanding of "fairness" in that context is quite focused on the terms of the particular contract in question. The law is not usually concerned with the parties' relationship more generally. Nor, except perhaps in very extreme cases, is it concerned with whether the bargain it is now asked to enforce was fair in the first place, or whether the breach was intentional, negligent, or just the result of bad luck. But family disputes invite a more global evaluation. We know that spouses think of their marital relationship as a whole, and not as a series of discrete and unrelated transactions.¹¹ They respond to particular incidents within their relational context, not in isolation. Yet outsiders will rarely know enough about someone else's marriage to understand that larger context, which also means they are unlikely to know enough about it to know what is fair.

So the challenge in devising fair family law rules lies in the difficult choice between a broad rule that invites unrealistically deep scrutiny of an entire relationship, or a narrow rule that makes decisions turn on a smaller set of facts that are accessible but incomplete. Lawmakers who intuitively appreciate the shortcomings of the narrow focus have historically favored general language that invites courts to make global evaluations. So statutes tell courts to divide marital or community property "equitably," to award maintenance to the spouse who "needs" it, and to allocate custodial time in the way that is "best."¹² The contrast with most other fields of law is apparent. We do not tell courts to allocate the assets of a dissolving business partnership "equitably," leaving each judge to decide which facts should matter, and how much.¹³

The rules governing child support were once no different from these other family law rules—quite similar, in fact, to the largely discretionary rules that still

11. That is why, for example, most wives who perform a disproportionate share of domestic tasks report they believe the allocation is "fair"—they see that allocation as just one aspect of the give-and-take in a larger relationship that they believe is fair overall. Steven L. Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971, 1977, 1981–84 (2000). One might guess that a survey asking *divorced* women whether the task allocation in their now-dissolved marriage was fair would yield a different result.

12. See, e.g., ARIZ. REV. STAT. ANN. §§ 25-318, -319, -403, -408 (2011).

13. See, e.g., *id.* § 29-1077 (providing clear guidelines for how partnership assets and liabilities are distributed among partners at the end of the partnership).

govern maintenance (alimony) claims.¹⁴ The shift occurred in the 1980s when federal law made states replace individualized child support judgments with formulaic guidelines.¹⁵ Although concern over unexplained award variability and inadequate awards helped motivate the federal requirement, a key federal goal was reducing welfare outlays to single mothers by improved enforcement of the father's support obligations.¹⁶ Guidelines were one strategy for collecting more child support because they would make it easier and cheaper to establish the support obligation in the first place. The word "guidelines" may be misleading if it connotes no more than suggestions for a judge to consider. To the contrary, the federal rule not only requires guidelines that identify the exact dollar amount of the support order that should be entered in any case, but also mandates a state law requiring judges to order that amount, unless they write an opinion explaining why special facts justify deviating from it.¹⁷ It was no easier for states to devise such mechanical rules for child support than for alimony, and to this day few have for alimony. But for child support they had no choice.

Child support guidelines narrow the fairness inquiry relevant to setting support amounts. The older child support rules invited disputes over each child's "needs" because different parents can have different values about what a child "needs"—about what should be done for their children. None of this matters under the guidelines, which base support amounts primarily on parental incomes and the number of children.¹⁸ The guidelines' early opponents objected to this narrowing of the relevant facts¹⁹ but few worry about that today. Judges and family law practitioners are now accustomed to support guidelines and few favor returning to the old discretionary system.

But even agreement on limiting the relevant facts to parental incomes and the number of children does not make guidelines easy to write. It is instructive to remember that we do not attempt to establish a dollar support requirement for children who live with both their parents. Parents in intact families are of course also legally obliged to support their children, but the measure of *their* legal obligation is exceedingly modest because it is addressed under the law of abuse

14. See IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 419–22 (5th ed. 2010) (alimony); *id.* at 518–20 (child support).

15. See *supra* notes 2–3 and accompanying text.

16. Family Support Act of 1988, Pub. L. No. 100-485, §§ 121–29, 102 Stat. 2343, 2351–55 (providing improved procedures for child support enforcement).

17. 42 U.S.C. § 667(b)(2) (2006).

18. See, e.g., 2011 Child Support Guidelines, *supra* note 2, at 6–7.

19. For example, Chief Justice Nix of Pennsylvania voiced this concern in dissent:

It is essential to our system of justice that such determinations be made on an individualized basis, according proper weight to all relevant factors and recognizing the unique characteristics of each family situation. The uniform guidelines imposed upon the process relieve the court of its responsibility to balance the equities in each case, allowing the court to hide behind a mathematical formula and detracting from actual consideration of the parties' situation.

Melzer v. Witsberger, 480 A.2d 991, 1000 (Pa. 1984) (Nix, C.J., dissenting).

and neglect.²⁰ The obligation is met if the child is provided with “the necessities of life.”²¹ Even very wealthy parents have no *legal* obligation to do more, although nearly all will. But how much more is up to them—the law defers to their choice so long as it exceeds this minimal threshold.

The law must apply a different rule, however, when parents live apart and disagree about the child’s support. The legal rule cannot defer to the parents’ judgment when there are two different judgments. It must instead resolve their dispute. There is no reason or basis for giving either parent the sole legal authority to decide the proper level of support. And both parents have a self-interest at stake along with their interest in their child. The obligor’s self-interest in paying less is obvious. The custodial parent’s self-interest in receiving more is nearly as obvious, because children do not live alone, and members of a household normally share a living standard. So support payments justified by the child’s needs cannot help but benefit the custodial parent as well. Both parents may combine confidence in their view about the proper support level needed to protect the child’s welfare, with skepticism of the other parent’s motives. Such is the nature of some divorce disputes.

Support guidelines resolve such disputes, and every state’s guidelines increase the support amount with obligor income, to a point well beyond what is required to provide basic subsistence and avoid a finding of neglect. There is thus wide agreement that the neglect standard does not apply. The harder question is how far beyond that standard the guidelines should go. Different states give different answers. Any answer necessarily strikes a balance between the financial claims of the child and the support obligor’s claim to decide how to spend his money. Choosing the right balance is unavoidably a matter of policy, not arithmetic. The chosen policy is reflected in the guideline table or formula.²² In many states, including Arizona, a table sets forth a basic support obligation, by parental income and number of children.²³ The complete guidelines then explain how to complete the calculation, beginning with the “basic support amount” taken from the table. These additional calculations take account of items “outside” the table, such as the allocation of parenting time between the parents,²⁴ and the cost

20. A child support order requires the parent to make payments to the person who has custody of the child—usually, though not necessarily, the other parent. Such an order has no meaning if the parents are living together with the child in a single household. The state can, of course, intervene to protect a child in an intact family from neglect. To come within the jurisdiction of the juvenile court, so that it may intervene in the intact family, the child must be adjudicated “dependent,” and so the question is when parental support becomes inadequate enough to justify such a dependency finding. Along with the bases one might expect, such as physical abuse, Arizona law defines a child as dependent if the child is “[d]estitute or . . . is not provided with the necessities of life, including adequate food, clothing, shelter or medical care.” ARIZ. REV. STAT. ANN. § 8-201(13)(a)(ii) (2011).

21. *Id.*

22. *See, e.g.*, 2011 Child Support Guidelines, *supra* note 2, at 23 (providing a table of “basic support obligations”).

23. *Id.*

24. *Id.* at 10–13.

of health insurance or of child care required for a parent to earn income.²⁵ But the basic support obligation found in the table is the heart of the guideline.

In choosing the policy implemented by the numbers in this table, one might guess that the benefit conferred on children by each additional dollar of household income will usually decline as household income increases. So additional support dollars are more important to children when the custodial-parent income is low, but become less important as custodial-parent income increases. The dollars necessary to bring children to some minimally acceptable living standard are more important, for example, than the additional dollars needed to raise a child from the middle class to the upper-middle class. On the other hand, the same principle would suggest that the burden of paying any given amount of child support declines as the obligor's income increases. Yet there 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*. Deviations from the guideline amount are in principle available for the special cases, even though the law discourages their frequent use.²⁶

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. Fathers' groups complain of "hidden alimony" to capture their objection to the windfall benefit they thus see conferred on the custodial parent.²⁷ But "hidden alimony" is unavoidably part of all child support payments: The custodial parent will necessarily benefit along with the child from small as well as large support payments. For the same reason, every dollar an obligor pays in child support affects not only him but also others in *his* household. So while the law recognizes no obligation of those living with the support obligor to help support his child living elsewhere, it will in fact make them pay. It has no other choice.²⁸

25. *Id.* at 14.

26. *See, e.g., id.* at 16–17.

27. *See, e.g.,* Marsha Garrison, *Child Support Policy: Guidelines and Goals*, 33 FAM. L.Q. 157, 179 n.91 (1999).

28. One can observe that the same logic also tells us that there is "hidden child support" in alimony payments made to former spouses with children. Even if the alimony recipient uses the entire payment to buy her food and her clothing, she then has more left from her other resources to spend on joint consumption items that also benefit the child, such as rent, utilities, or a new refrigerator.

The Arizona statutes suggest the legislature understood that constructing child support guidelines requires balancing these competing claims. Section 25-320(D) of the Arizona Family Code assigns the guideline-writing task to the Arizona Supreme Court, but directs the court to create guidelines that balance a host of factors, including the financial needs and resources of the child and the two parents, and to consider the marital living standard as a benchmark to employ in striking that balance.²⁹ Arizona's quadrennial reviews³⁰ are conducted by the ad hoc GRC appointed each time by the Chief Justice. The GRC recommendations are vetted through presentations to a number of bodies prior to coming before the court itself, which eventually adopts revised guidelines in an administrative order. The court has historically adopted the GRC's recommendations. While state procedures vary, Arizona's is not unusual. Whatever the procedure, the review body's key decision is its choice of numbers to put in the guideline table.

States usually seek the help of an economic consultant to update their guidelines. One might expect consultants to apply some standard formula that adjusts the current guideline numbers to reflect changes in the value of the dollar. In Arizona, however, as in many other states, the consultant instead reconstructs the table from scratch, using more recent economic data. A single consultant (and his successor in interest) has performed this task for many states, Arizona among them.³¹ The GRC appointed by the court has normally accepted the consultant's revised table with little review, focusing its efforts instead on supplementary issues contained in the guidelines, such as the rules that determine the income attributed to each parent, and calculations of matters dealt with outside the table. In effect, the consultant prepares the main body of the guidelines while the GRC focuses on the footnotes. One reason committees have been content with this practice is the belief that preparing the guideline tables is a technical task, not policymaking one, perhaps because the consultant's table merely implements policy choices previously made.

Can we identify such a prior policy choice that the consultant might be implementing? There are different "models" for support guidelines, one of which, called "income shares," has been adopted by most states, including Arizona.³² The defining feature of an income shares guideline is that the support amount cannot be calculated without knowing the incomes of both parents. By contrast, the system used by a smaller group of states, known by the acronym "POOI," which stands for Percentage of Obligor Income, calculates the support amount as a percentage

29. ARIZ. REV. STAT. ANN. § 25-320(D) (2011).

30. Federal law requires states to review their guidelines at least once every four years. 42 U.S.C. § 667(a) (2006).

31. See Ira Mark Ellman, *Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines*, 2004 U. CHI. LEGAL F. 167, 172 n.9. Policy Studies Inc. ("PSI"), the company described in this Article, has since left the guideline construction business, but the same person identified there now provides the same consulting services through a different company, the Center for Policy Research ("CPR"), which prepared the updating report for the 2008 Arizona guideline review.

32. See *Guideline Models by State*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/guideline-models-by-state.aspx> (last visited Feb. 2, 2012).

of the obligor's income alone, without regard to the income of the custodial parent. It is natural to think that in choosing "income shares" Arizona has made its policy choice—it has chosen guidelines that base support amounts on both parents' incomes rather than only the obligor's. But while important, that choice is just the first step. The critical next step is choosing the method for determining the basic support amounts specified in the table. The consultants who prepare these tables necessarily have *some* method for coming up with the numbers, and their method necessarily implements *some* policy. One cannot understand what that policy is without understanding their method. Over the years there have probably been few members of the GRC that had such an understanding. For lay people, or attorneys and judges whose expertise lies elsewhere, mastering the methodology would be hard work indeed, and there was little to motivate such effort. The GRC was never asked to think about the method the consultant used to construct the support table, much less the policy behind that method.

It is also easy for those who work in the area to mistakenly think that they understand the traditional method for writing income shares guidelines. Some believe the guidelines are based on estimates of the "cost" of a child, even though it does not take much reflection to see there must be more to it than that. What children "cost" obviously depends on what you buy for them. A lot more is bought for some children than for others. One could pick some single living standard and calculate the cost of providing that, and then set the support level accordingly. That system would aim to provide the same standard of living to every child. It is clear that no state follows this rule, because they all have guidelines that increase support amounts systematically with obligor income (other things held equal), and thus provide a higher living standard to children with wealthier parents.

One might expect the support guidelines themselves to contain a statement explaining where its numbers came from, and Arizona's guidelines do. But that statement may also mislead. It is contained in the guidelines' first paragraph, headed "Background," and explains that under the income shares model "[t]he total child support amount approximates the amount that would have been spent on the children if the parents and children were living together. Each parent contributes his/her proportionate share of the total child support amount."³³ One can read this sentence to suggest that children will enjoy the same living standard they would have enjoyed if the family were intact, because about the same amount will be "spent on" them. Some states with incomes shares guidelines explicitly adopt this suggestion. A Maryland appellate court, for example, explained that the "conceptual underpinning" of the income shares model (which Maryland also follows) "is that a child should receive the same proportion of parental income, and thereby enjoy the standard of living, he or she would have experienced had the child's parents remained together."³⁴

Could it really be that Maryland's guidelines, or Arizona's, ensure all children the funds needed to keep them at the marital living standard after their parents separate? Of course not. It does not require an economist to know that more money is needed to maintain all family members at *any* given living standard

33. 2011 Child Support Guidelines, *supra* note 2, at 1.

34. *Voishan v. Palma*, 609 A.2d 319, 322 (Md. 1992).

if they are spread across two households than if they all live together. So the parents' separation necessarily means a living standard shortfall as compared to their joint living standard if they were together. Support guidelines cannot avoid that shortfall. All they can do is allocate it. To allocate *none* of the shortfall to the child—to keep the child at the marital living standard—would require burdening the support obligor with *all* of it. A high-income obligor might then be required to make support payments so high that all the members of the custodial household would live much better than he would despite his higher income. The idea that Arizona's (or any other state's) incomes shares guidelines are intended to produce that result is simply silly. They are not, nor should they be.

So how do we explain official statements that say that income shares guidelines like Arizona's provide support for children in "the amount that would have been spent on the children if the parents and children were living together?"³⁵ The explanation is that the statement is true, in a sense—just not in the sense some readers (like the Maryland court) misunderstand it to mean. The confusion arises from the definition of "the amount that would have been spent on the children." A natural reading of that phrase—perhaps the most natural reading—understands "expenditures on children" to include all expenditures that benefit children. A guideline that ensured no change in child expenditures, *so defined*, would indeed protect children from any decline from the living standard they would enjoy if their family all lived together. But the calculations that underlie the standard method for constructing income shares guidelines assume a very different definition of child expenditures. Therein lies the confusion.

A full explanation of these calculations would require a lengthy detour into technical material tangential to the purpose of this Article. I have fully explained and documented the method's calculations elsewhere.³⁶ I therefore only summarize it here.

The definition of child expenditures the consultants employ focuses on expenditures that benefit the child *exclusively* ("marginal expenditures," in economic jargon).³⁷ Expenditures the intact family would have made anyway, because they benefit other household members as well as the child ("joint expenditures") are excluded from the tally.³⁸ Amounts a childless couple would

35. 2011 Child Support Guidelines, *supra* note 2, at 1.

36. For the most complete description of the standard method used to construct income shares guidelines, and the technical difficulties with the method, see Ellman, *supra* note 31. In addition to the conceptual issues with that standard method, very briefly capsuled in this Article, *Fudging Failure* also explains why the Bureau of Labor Statistics data, on which that standard method necessarily relies, introduce other important distortions in the expenditure estimates that are the basis of the guideline numbers. For further discussion of the methodological difficulties, and their policy implications, see Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107 (2008). The report issued by Arizona's 2008 Guidelines Review Committee also reviews many of these problems in explaining why it recommends adoption of the COBS alternative. GRC FINAL REPORT, *supra* note 6.

37. Ellman, *supra* note 31, at 183–85.

38. *Id.* at 185. It is of course likely a family would upgrade some items when a child is added to their household. Perhaps they spend a bit more to have a safer car. That

also have spent on the family car, on heat or electricity, on the cost of having a home with a kitchen, a bathroom, and a location in a nice neighborhood, do not count because they also buy benefits for other members of the child's household.³⁹ Because children also benefit from these joint expenditures, which make life better for *all* household members, the marginal expenditure definition used by the consultants will always yield amounts that fall short of the expenditures needed to provide the child the living standard enjoyed by the intact family.⁴⁰

Although filling a guideline table with estimates of the marginal child expenditures made by the average family reflects *some* balance among the competing interests of the child and the two parents, it does not do so overtly. Indeed, this method for constructing guidelines does not even acknowledge that such balancing is part of the process. That may be precisely why it appeals to lawmakers. It frees them from making difficult balancing judgments. Marginal child expenditures by parents in *intact* families is simply assumed to be the correct measure of what parents in *separated* families should be required to spend. And determining what parents in intact families spend on their children sounds like a technical problem that can be left to a consultant to solve. In that case, no one need make the hard balancing choice. It has been avoided as if by magic. But like most magic tricks, the illusion is produced by misdirecting the observer's attention. The hard choice is not avoided. It is made by the consultant. Before you count expenditures on children you must define the expenditures you will count, and the choice of definition is not a technical decision but a matter of child support policy that effectively implements a particular balancing choice.⁴¹ I will later say more about what that choice is.

Because traditional income shares guidelines are based on estimates of marginal expenditures on children, I follow the lead of the Committee's report and refer to them as Marginal Expenditures Guidelines ("MEG"). One can of course devise guidelines that take account of the incomes of both parents but are not based on marginal expenditure estimates. Indeed, that is just what was recommended by the Committee whose story is told in this Article.

What then is the policy consequence of basing support guidelines on estimates of marginal expenditures on children? Do child support guidelines constructed this way produce support amounts that in fact balance the competing interests in a way that is both fair and consistent with the commands of Arizona's governing statute? Would a different method produce results that were fairer and more faithful to the statutory directions? No one really knew because no one had

added expenditure is included in the consultant's tally even though the parents may also benefit, but *only* that bit more—by itself, not enough to buy any car at all.

39. *Id.* Another way to understand this point: Child expenditures, so defined, are really the amount of money the intact family would save if the child were removed from the household.

40. *Id.*

41. Once you have defined child expenditures, identifying and obtaining the proper data to measure it is indeed a technical task, and a daunting one. I have elsewhere documented serious flaws in the data available to the consultants, and measurement techniques available to them, that cast serious doubt on their expenditure estimates even if one agreed with their definition of child expenditures. *See id.* at 199–213.

ever asked these questions. The rest of this Article tells the story of the first GRC in Arizona that did.

II. THE 2008 GUIDELINE REVIEW

A. *Why There Was a Broader Inquiry in This Guideline Review than in Earlier Years*

The story begins with the GRC appointed in 2003. This Committee began its work just as the earlier GRCs had, by focusing on the guideline text. But its attention was drawn to the consultant's methodology by the pattern of changes the consultant made to the support table. The changes raised child support amounts for cases in which total parental income was low, but lowered support amounts for cases in which total parental income was higher.⁴² That meant, for example, that a custodial mother earning \$1,000 monthly would be owed more child support than before if the father earned \$6,000 a month or less, but less child support than before if the father earned \$6,500 a month or more.⁴³

These recommended changes conflicted with the intuitions of many Committee members, who were not satisfied by the consultant's effort to explain or justify them. But the GRC did not have the time, skills, or resources needed to propose an alternative table. It compromised its concerns by accepting the consultant's table while also recommending establishment of a workgroup to review the consultant's methods and recommend any changes in time to implement for the next guideline review in 2008. Other relevant bodies also supported establishing such an interim workgroup.⁴⁴ Although Arizona statutes allocate the task of creating child support guidelines to the Arizona Supreme Court, general issues of child support policy are addressed by the Child Support Committee, a body with both legislative and non-legislative members that is

42. This result is shown by the 2003 consultant's report that compared the basic child support amounts called for under the proposed guideline revisions and the unrevised guidelines then in force. JANE C. VENOHR & TRACY E. GRIFFITH, POLICY STUDIES INC., ECONOMIC BASIS FOR UPDATED CHILD SUPPORT SCHEDULE: STATE OF ARIZONA 43-45 (2003), available at <http://azcourts.gov/Portals/31/Child%20Support/psi1.pdf>.

43. *Id.* This pattern is also noted in a report by staff members of the Arizona Supreme Court and Attorney General's Office:

The new Schedule results in increases to the [lower] tier of the Schedule and decreases to the middle and upper tiers. Variations in the Schedule are attributed to . . . [l]ow-income households...spending more of their net income and high-income households...spending less of their net income on "household consumption." This results in higher child support amounts for families at low income levels and lower amounts for higher income[] families.

E-mail from Marianne Alcorn, Reference Librarian, Ariz. State Univ. Sandra Day O'Connor Coll. of Law, to author (Jan. 11, 2005) (on file with author) (quoting language from the report summarizing revisions issued by Megan Hunter of the Arizona Supreme Court staff, and Janet Sell of the Arizona Attorney General's Office).

44. It was supported by the Committee on Superior Court, a committee of superior court judges, and the Child Support Committee appointed by the legislature.

appointed by the legislature and staffed by the court.⁴⁵ Committee staff established this Economic Study Workgroup, as it was called, and the Workgroup held its first meetings on February 10–11, 2005.

The Workgroup was co-chaired by the chief of the child support section of the Attorney General's Office and the presiding judge of the superior court in rural Greenlee County. Other members included the presiding judge of the family court in Maricopa County, several highly respected family law attorneys who had served on many prior Guidelines Review Committees, and the present Author, an academic whose nationally known research had in recent years focused on the construction of child support guidelines. Also appointed to the Workgroup was Professor Burt Barnow, an economist then at Johns Hopkins University.⁴⁶ Barnow had been the principal investigator for an exhaustive 1990 report, congressionally mandated and commissioned by the Department of Health and Human Services, on the use of estimates of child expenditures to prepare child support guidelines.⁴⁷ He was an ideal choice because he was one of the few economists familiar with the details of guideline construction, and while he had some prior experience consulting with states on support guidelines, he had no consulting business that depended on states using any particular model for support guidelines.

The Workgroup's final report was presented to the Child Support Committee, then co-chaired by Representative Peter Hershberger and Senator Ron Gould, on August 11, 2006.⁴⁸ The report observed that the current guidelines based support amounts on estimates of marginal expenditures on children in intact families, and that this definition led to guidelines with three problematic features. First, they specify payment amounts that have very little effect on the child's living standard. If the custodial parent is poor, the custodial household remains poor after receiving the child support payment, even when the support obligor's income is high. Second, children whose parents have the same combined income can find themselves in dramatically different financial circumstances after divorce, if one lives primarily with the higher-earning parent and the other with the lower-earning parent. Third, low-income obligors are expected to pay unreasonably high support amounts to high-income custodial parents, given that in these cases the child

45. The Child Support Committee is created by statute. ARIZ. REV. STAT. ANN. § 25-323.01 (2011). Its functions and purposes are described on the Arizona Supreme Court's website. *Child Support Committee*, ARIZ. JUDICIAL BRANCH, <http://www.azcourts.gov/cscommittees/ChildSupportCommittee.aspx> (last visited Feb. 1, 2012).

46. Barnow is currently the Amsterdam Professor of Public Policy at George Washington University.

47. LAURIE BASSI ET AL., LEWIN/ICF, ESTIMATES OF EXPENDITURES ON CHILDREN AND CHILD SUPPORT GUIDELINES (1990), *available at* <http://www.alacourt.gov/pdfppt/lewin.pdf>.

48. The Child Support Committee minutes memorializing the presentation of this report are available on the Arizona Supreme Court's website. Meeting Minutes of the Child Support Comm. (Aug. 11, 2006), *available at* <http://www.azcourts.gov/LinkClick.aspx?fileticket=UQbCvU2h1os%3d&tabid=3999>. The report itself was provided to the Child Support Committee via e-mail by Arizona Supreme Court staff about two weeks before the meeting. E-mail from Megan Hunter, Staff Member, Ariz. Supreme Court, to author (July 28, 2006) (on file with author).

enjoys a much higher living standard than the obligor even before any support is paid.

The Workgroup's report noted that these anomalous results "cannot be eliminated entirely because support guidelines are necessarily based upon principles that are sometimes in tension with one another."⁴⁹ It recommended, however, that

[t]o minimize these anomalies . . . in the future Arizona rely on a method for generating child support guidelines that focuses on the relative economic well-being of the two parental households as they exist at the time of the support order, in contrast to the current method that focuses on the expenditures on children in intact two-parent families that no longer exist and may never have existed.⁵⁰

It also noted that the guidelines are in the end "necessarily based on policy preferences as well as data, given that it is not possible for anyone to provide data that will give single numbers as the only possible answer to the questions."⁵¹

The legislative Child Support Committee approved the recommendation to hire a consultant to provide the next GRC the data on the relative economic well-being of the two parental households at the time of the support order, in addition to updated tables for the traditional income shares approach. The next GRC could then compare the guidelines recommendations generated by the two methods. The Arizona Supreme Court followed this recommendation. It appointed a 2008 Guidelines Review Committee chaired by a family court judge who had been one of the experienced family law attorneys serving on both the Workgroup and the 2004 GRC (as well as most prior GRCs). The court contracted with two consultants to assist the GRC: The Center for Policy Research would do the traditional MEG updating,⁵² while Professor Barnow would assist the Committee in preparing the alternative guidelines through the process recommended by the Workgroup.⁵³ In addition, the Committee relied extensively on the work of a third consultant, Tara Ellman,⁵⁴ whose valuable volunteer efforts were ultimately recognized by the Arizona Supreme Court as well as the Committee.

B. The Work of the 2008 GRC: Process

The GRC appointed in March 2008 held its first meeting on April 25, 2008.⁵⁵ A public website⁵⁶ gave notice of all meetings, contained the minutes of

49. E-mail from Megan Hunter, *supra* note 48.

50. *Id.*

51. *Id.*

52. GRC FINAL REPORT, *supra* note 6, at 39. The person who had been in charge of preparing Arizona's 2005 MEG tables for PSI, the consultant Arizona had then hired, performed this task for CPR.

53. *Id.* at 35.

54. *Id.* at 1.

55. Meeting Minutes of the Ariz. Child Support Guidelines Review Comm. (Apr. 25, 2008), *available at* <http://www.azcourts.gov/Portals/74/CSGRC/Minutes/CSGRC42508FinalMinutes.pdf>. All Committee documents, as well as minutes of all its

meetings already held (as well as all documents considered by the Committee in its meetings), and allowed any member of the public to comment on the Committee's working draft and its deliberations. An extensive outreach program included presentations on the Committee's work at seminars for attorneys and judicial officers. Presentations were made periodically to two oversight bodies, the Committee on Superior Court and the Arizona Judicial Council. Statewide meetings were also held with clerks of the court, representatives of the Attorney General's Office, members of the Bar, and judicial officers.⁵⁷

The GRC established a subcommittee, informally called the "spreadsheet committee," to develop guidelines by the alternative method recommended by the Workgroup.⁵⁸ This subcommittee worked closely with Professor Barnow and Tara Ellman, and made regular presentations to the full GRC to seek feedback.⁵⁹ On March 27, 2009, the full GRC voted to recommend adoption of the new COBS

meetings, are posted on the Committee's website. *Child Support Guidelines Review Committee*, ARIZ. JUDICIAL BRANCH, <http://www.azcourts.gov/cscommittees/ChildSupportGuidelinesReviewCommittee.aspx> (last visited Feb. 1, 2012).

56. *Child Support Guidelines Review Committee*, *supra* note 55.

57. Kathy Sekardi, the court policy analyst who worked with the 2008 GRC, reports that her records indicate the following meetings held for this purpose at the outset of the Committee's work:

- (1) Stakeholder meetings held at Maricopa County Regional Courthouses for court administrators, conference officers, attorney case managers, commissioners, and judges
- (2) Arizona Association of Superior Court Clerks
- (3) The legislative Child Support Committee (September 2008)
- (4) Committee on Superior Court (May 2008 and September 2009)
- (5) Attorney General's Office - Pinal County (Hon. Sally Simmons and Hon. Bruce R. Cohen - June 2008)
- (6) Presentation and Q&A session at the State Bar Convention - (Hon. Bruce R. Cohen - June 2008)
- (7) Memo sent to Family Law Presiding Judges statewide requesting comments and feedback (July 2008)
- (8) State Bar Executive Council of the Family Law Section - Casa Grande (November 2009).
- (9) Arizona Judicial Council - (Updated the AJC in June, October, and December 2009 meetings).

E-mail from Kathy Sekardi, Policy Analyst, Ariz. Supreme Court, to author (Oct. 4, 2011) (on file with author).

58. The GRC also established another subcommittee to work on several other goals for improving the guideline text and instructions. The Committee ultimately made many valuable clarifying and rationalizing revisions to the guidelines—all of which were also lost when COBS was rejected. The new guidelines eventually adopted simply repeated the text of the old ones verbatim, along with the new tables prepared by CPR. (Some technical changes made later, in Administrative Order 2011-46, resulted in some slight changes in wording. *See supra* note 2.).

59. The four spreadsheet committee members were a highly regarded retired judge, who had served on prior guideline committees; the head of the child support enforcement division of the Attorney General's Office, who had chaired the Economic Study Workgroup; a family law attorney who had a background in economics; and the Author of this Article.

guidelines the subcommittee had generated.⁶⁰ It presented this recommendation at the June 17, 2009 meeting of the Arizona Judicial Council.⁶¹

The GRC sought more time, however, to gather feedback from stakeholders around the state to help improve the COBS draft, then still in preliminary form. The AJC was receptive to both the new guidelines and to the GRC's request for time to seek this feedback. The GRC reported back to the AJC in October 2009,⁶² while continuing to meet with interested parties through to the following spring.⁶³ This prolonged feedback period produced important changes to the original COBS draft, including a new provision, applicable to cases in which the new guidelines would substantially increase support amounts, that allowed such increases to be phased in gradually over years. At its March 25, 2010 meeting, the AJC unanimously approved the COBS guidelines.⁶⁴ It was also agreed, however, that the GRC would return to the AJC in June 2010 if it decided

60. Meeting Minutes of the Ariz. Child Support Guidelines Review Comm. 2-3 (Mar. 27, 2009), *available at* <http://www.azcourts.gov/Portals/74/CSGRC/Minutes/CSGRC032709%20Final%20Minutes.pdf>.

61. Meeting Agenda of the Ariz. Judicial Council (June 17, 2009), *available at* <http://www.azcourts.gov/portals/84/MeetingMaterials/2009/09June/PDFS/AJCCSGCoverSheet.pdf>.

62. Meeting Agenda of the Ariz. Judicial Council (Oct. 21, 2009), *available at* <http://www.azcourts.gov/portals/84/MeetingMaterials/2009/09October/09pdfs/OCTOBERAgenda2009AJCAGENDAII.pdf>.

63. The records of court staff reflect the following meetings:

- (1) The legislative Child Support Committee (October 2009)
- (2) Committee on Superior Court (February 2010)
- (3) Family law practitioners - Prescott (November 2009)
- (4) Yavapai County Bar Association (November 2009)
- (5) Family law practitioners - Tucson (December 2009)
- (6) State Bar Family Law Institute and Academy of Matrimonial Lawyers (January 2010)
- (7) Family law practitioners and judges - Prescott (January 2010)
- (8) Arizona Judicial Council (Updated the AJC in March and June 2010, with the final vote in October 2010)
- (9) Superior Court Administrator's meeting (March 2010)
- (10) Updates to Family Law Seminar (April 2010)
- (11) Arizona Supreme Court Justices' Retreat (May 2010)
- (12) GRC held two public hearings (June 4, 2010 and September 10, 2010)
- (13) Conciliation Court Roundtable (Fall 2010)
- (14) Report to the Senate Committee on Public Safety and Human Services and the House Committee on Health and Human Services (November 9, 2010)
- (15) Special Interest Group Meetings (five or six meetings of about three hours each held with a fathers' rights group)
- (16) Legislator meeting - meeting with legislators to educate them about the COBS model and answer concerns that were brought to their attention by the special interest group.

E-mail from Kathy Sekardi, *supra* note 57.

64. Meeting Minutes of the Ariz. Judicial Council 9 (Mar. 25, 2010), *available at* <http://www.azcourts.gov/LinkClick.aspx?fileticket=f4hZ7QwiZHg%3d&tabid=2652>.

to adopt any further refining language, as the chair informed the AJC it was continuing to hold discussions with some stakeholders.⁶⁵

Between the March and June meetings the chair of the GRC held six lengthy meetings with a group of fathers' rights activists who objected to COBS. On June 4, the Committee held a further public hearing to hear comments from this group and other members of the public. Following that public hearing the GRC adopted six further amendments to the COBS guidelines designed to respond to concerns the fathers' rights group had raised. The AJC approved these six amendments at its June 24, 2010 meeting,⁶⁶ but the amendments did not reduce the opposition of the fathers' rights activists. The AJC asked the GRC to hold one more round of public hearings on their objections, and also agreed to make a final decision on the COBS guidelines at its October 2010 meeting.

Between June and October of 2010, the opponents of COBS took their objections to members of the legislature. By the time of the October 2010 AJC meeting, legislative leadership had communicated opposition to COBS to the court. In October the AJC voted to postpone adoption of COBS for another year, to give the legislature time to act on the matter.⁶⁷ The motion put the updated version of the MEG guideline in place in the "interim." This action effectively killed COBS because the body proposing it, the 2008 GRC, expired at the end of 2010. The final blow came in April 2011, when the Governor signed Senate Bill 1192, which effectively barred the court from adopting COBS.⁶⁸

Why did COBS come to such an ignominious end? The first step in exploring that question is learning more about the substance of the Committee's work: why it concluded the MEG guideline should be replaced, and how it constructed the COBS guideline to replace it.

C. The Work of the 2008 GRC: Substance

I. Evaluating the MEG Guideline

Section 25-320(D) identifies four key factors to guide the court's construction of support guidelines: the economic needs and resources of the child, the mother, and the father, at the time of the support order, and the living standard the child would enjoy if the family were intact.⁶⁹ The GRC sought a numerical

65. The meeting minutes show the precise language of the motion that was passed: "to approve the guidelines and the COB model as presented, including the addenda passed out today, and authorize the Committee to continue to make clarifying language, discuss clarifying changes, adjust the guidelines as necessary, and bring back for review at the June meeting." *Id.*

66. The approval of the amendments is shown in the meeting minutes. Meeting Minutes of the Ariz. Judicial Council 6 (June 24, 2010), available at <http://www.azcourts.gov/LinkClick.aspx?fileticket=tulA9rKtlqw%3D&tabid=2652>.

67. Meeting Minutes of the Ariz. Judicial Council 14-15 (Oct. 21, 2010), available at <http://www.azcourts.gov/LinkClick.aspx?fileticket=56RjmZckShM%3d&tabid=2652>.

68. See *supra* note 8.

69. ARIZ. REV. STAT. ANN. § 25-320(D) (2011). As the Committee's report to the AJC explained, the section directs the court to consider four additional factors as well. *Id.*

translation of these standards through measures of the relative living standards of the two parental households at the time of the support order, and of the single household that would exist if the family were intact. These outcome measures would allow the GRC to gauge whether the current MEG guideline struck a fair balance among the competing considerations the statute required the court to take into account. If it did, the Committee would recommend retaining MEG. If it did not, the Committee would use the same outcome measures to create new guidelines that did. Just such an examination of the MEG support amounts was urged years ago by the very economist whose estimates of marginal child expenditures have always provided the basis for the MEG support tables developed by Arizona's consultant.⁷⁰ Because an examination of outcomes was the hallmark of this new method, the Committee named it Child Outcome-Based Support, or COBS.

Household living standard depends on household size as well as income. A common way to make living standard comparisons is to use a benchmark, such as the income a household of a given size needs to avoid poverty. One can then describe a given household income as a percentage of the income that household requires to achieve the benchmark level. For example, we might describe a household's income as 75%, or 150%, of the income that household needs to meet the poverty threshold. Anyone constructing child support guidelines should want to know whether either parent's household is above or below some minimal living standard level, so a measure of this kind is helpful. Poverty measures, however, are poor vehicles for comparing families with middle-class incomes or higher. The Committee therefore asked the consultant to provide two benchmarks: the income required to avoid a true hardship—a “minimally adequate” income—and also the income required to enjoy the living standard of a middle-class Arizona family.⁷¹

As a benchmark for a middle-class living standard, the consultant recommended the median income for an Arizona family of four. This was \$69,210 in 2007, the latest year for which data was then available.⁷² As the Committee's report explained, the consultant then derived the equivalent income benchmarks

One of the four additional statutory factors, the allocation of parenting time, is dealt with formulaically in both the existing guideline and in the COBS guideline, but in a separate calculation. A second additional factor is the medical plan for the child, which both COBS and the existing guideline deal with as a separate post-calculation “add-on” determined on a case-by-case basis. The final two statutory factors recognized two special circumstances: cases in which a parent has engaged in financial wrongdoing, or in which the child has special needs. Both possibilities are necessarily dealt with as a permissible basis for deviations from the guideline amount that would otherwise apply, in COBS as well as in all MEG guidelines.

70. David Betson et al., *Trade-Offs Implicit in Child Support Guidelines*, 11 J. POL'Y ANALYSIS & MGMT. 1, 2–5 (1992). Both CPR, for the 2008 revision, and its predecessor PSI (for earlier guidelines) relied on Betson's estimates of marginal parental expenditures in creating the table of basic support obligations for Arizona (and for other states for which they perform this service).

71. GRC FINAL REPORT, *supra* note 6, at 16.

72. This estimate was based on the American Community Survey, administered by the Census Bureau, which had a margin of error of \$2,614 at a 90% confidence interval. *See id.* at 16 n.11.

for households of other compositions (such as a single person, or a single mother and two children) by employing the equivalence formula recommended by the National Academy of Sciences.⁷³ The second benchmark, a minimally adequate income, was defined as the income needed to purchase basic necessities (a nutritionally adequate diet, a safe place to live, a way to get to school or work, and clothing to wear there) without anything left for ordinary amenities such as having a friend over for a meal or attending a movie.⁷⁴ It set that benchmark at 170% of the federal poverty threshold, which is low enough to qualify for many means-tested public benefit programs.⁷⁵ At the time the Committee set this benchmark, the poverty threshold for a single person was \$903 a month,⁷⁶ so that the minimally adequate monthly income for a single person was \$903 x 1.70, or \$1,535. This choice was informed in part by the results of a scientific survey of citizens living in Pima County (Tucson).⁷⁷

Using these benchmarks, the Committee could then calculate how each parental household would come out after the child support payment set by any particular child support guideline. A computer program devised by volunteer consultant Tara Ellman, named *Childshare*, automated these calculations for up to six maternal and six paternal incomes (and thus 36 income combinations) simultaneously.⁷⁸ Table 1 provides an example of the *Childshare* output for two income combinations. The parents' total gross income is the same in both cases, \$8,000 a month, but in one case the Custodial Parent ("CP") earns \$2,000 and the Non-Custodial Parent ("NCP") earns \$6,000, while in the other their incomes are reversed. Three inputs are required to perform such calculations: the number of children, the child support system being used, and the number of parenting days per year allocated to the NCP. (The number of parenting days affects both the child support amount and the benchmark incomes, as explained below.) In both

73. *Id.* at 16. "The NAS formula assumes that there are economies of scale when an additional person (adult or child) is added to any household, and that the marginal cost of a child is .7 of the cost of an adult." *Id.* at 16 n.12.

74. *Id.* at 16.

75. *Id.* at 16–17. For example, a household is eligible for WIC (the Special Supplemental Nutrition Program for Women, Infants, and Children) if its income does not exceed 185% of the poverty threshold. *Id.* at 17 n.14.

76. *Id.* at 16 n.13. The poverty threshold is regarded as outdated by the government agencies responsible for it, which is why many means-tested public benefit programs serve people with incomes above the poverty threshold. For a basic understanding of the poverty threshold, prepared by the Census Bureau, see *Poverty Data – Poverty Thresholds*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/poverty/data/threshld> (last updated Feb. 10, 2012). A broad overview of the history and issues with the poverty threshold is available from the Department of Health and Human Services website. *Further Resources on Poverty Measurement, Poverty Lines, and Their History*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://aspe.hhs.gov/poverty/contacts.shtml> (last updated Feb. 3, 2012). A description of efforts to update the measure, undertaken by a panel of the National Academy of Sciences at the direction of the Census Bureau, is also available online. Kathryn Porter, *Proposed Changes in the Official Measure of Poverty*, CTR. ON BUDGET & POLICY PRIORITIES (Nov. 15, 1999), <http://www.cbpp.org/cms/index.cfm?fa=view&id=1385>.

77. See GRC FINAL REPORT, *supra* note 6, at 17 n.15.

78. *Id.* at 17.

examples provided in Table 1, there is one child, the NCP has been allocated 100 days of parenting time annually, and the child support amount was calculated using Arizona's traditional MEG guideline, as updated for the 2008 Committee by CPR.⁷⁹ *Childshare* could perform the same calculations for the guidelines of several other states in addition to Arizona, as well as for any customized set of child support amounts entered by the user. This last feature was relied on extensively by the GRC in designing what became known as the COBS guideline, as explained further below. Appendix B contains a more complete explanation of the *Childshare* calculations.

The two families in Table 1 have the same total income (Line 1), and therefore the same living standard when they were together (Line 5(a)). They were more affluent than most Arizona families at 154% of the Arizona median. Separation, however, takes a serious toll on the lower-income custodial parent, whose household (before receipt of the child support payment) falls to 66% of the median living standard (Line 5(b)), while the non-custodial parent improves to 191%. The child support payment of \$601 reduces this gap, but it remains large: The custodial household is still below the Arizona median at 87%, whereas the non-custodial household, at 165% (Line 5(c)), is still *better* off than before the separation. Most people would probably agree that the higher earner should enjoy a higher living standard than the lower earner. The question is how big the gap should be when the child lives with the lower earner most of the time. One might believe the gap in this case is too large: Even after this child support payment, the child's living standard falls precipitously from well above the median Arizona family when the family was together (154%) to less than the median after the separation (87%). And the obligor could make a larger support payment and still be better off than before the parents separated. As it turns out, a scientific examination of the views of Arizona citizens asked to set support amounts intuitively, without the benefit of economic measures such as these, found that they would require a larger support payment than the MEG guideline in a case like this.⁸⁰ The Committee, with the benefit of this data, ultimately agreed.

79. This is in fact the guideline in use at the time of this Article's publication.

80. Ira Mark Ellman, Sanford Braver & Robert J. MacCoun, *Intuitive Lawmaking: The Example of Child Support*, 6 J. EMPIRICAL LEGAL STUD. 69, 100–01 (2009) [hereinafter Ellman et al., *Intuitive Lawmaking*]. This study considered only three incomes for each parent; a later study, not available until after the Committee completed its work, expanded that income range. This later study confirmed the same phenomenon across the wider income range. Ira Mark Ellman & Sanford Braver, *Lay Intuitions About Child Support and Marital Status*, 23 CHILD & FAM. L.Q. 465 (2011) [hereinafter Ellman & Braver, *Lay Intuitions About Child Support and Marital Status*].

Table 1

Example of *Childshare* output for two cases in which child support (“CS”) is calculated under the traditional Arizona MEG guideline now in force, when there is one child, 100 days of parenting time for the NCP, and \$8,000 in total monthly parental income.

Income and Living Standard Measures	TWO CASES OF PARENTS EARNING \$8,000			
	Custodial Parent (“CP”) Has Lower Income		Non-Custodial Parent (“NCP”) Has Lower Income	
	CP	NCP	CP	NCP
1. Gross Monthly Income	\$2,000	\$6,000	\$6,000	\$2,000
2. Net (After-Tax) Monthly Income	\$1,895	\$4,494	\$4,777	\$1,667
3. Support Payment (added or subtracted)	+\$601	-\$601	+\$91	-\$91
4. Net Income After Payment	\$2,496	\$3,893	\$4,868	\$1,576
5. Net Income as % of Middle-Class Standard				
(a) As Intact Family	154%	154%	154%	154%
(b) Each household, before CS payment	66%	191%	166%	71%
(c) Each household, after CS payment	87%	165%	169%	67%
6. Net Income as % of Minimally Adequate Standard, after Child Support payment	129%	233%	252%	94%
7. CS Payment as % of NCP’s Net Income		13%		5%

In the second case in Table 1, the custodial household has the higher income, and even *before* receipt of any child support payment it enjoys a better living standard (166% of the Arizona median, Line 5(b)), than the intact family had (154%, Line 5(a)). The non-custodial household, on the other hand, falls far below the middle-class benchmark (71%, Line 5(b)) before paying support. The seemingly modest payment of \$91 a month required by the MEG guideline is thus a real burden on this NCP. Indeed, it pushes him *below* a minimally adequate income (Line 6). Why do we require this low-income NCP to pay anything at all to this high-income custodial household? The payment is not needed to preserve the child’s living standard, which *improves* by virtue of the parents’ separation (because the NCP cost the intact family more than he earned). Our reasons may be primarily symbolic—to make clear to everyone, but especially to both parents and their child, that the NCP *is* a parent with both parental obligations and parental rights. A lower support amount might serve that symbolic purpose just as well, however. It might even be better for the child, who will live with this low-income

NCP 100 days a year. Indeed, the child's interest might suggest the CP make payments *to* the NCP to ensure the NCP can adequately provide for the child during those 100 days.

Table 1 also illustrates another important point made by the original Workgroup: The children in these two cases, who had the same living standard when their families were intact, live very differently from one another after they separate, because their living standard is determined primarily by the income of the custodial parent. That is, *child support payments under MEG have very little impact on the living standard of either child.*

It is important to keep in mind that Table 1 presents cases in which the parental incomes are quite disparate. The GRC's examination of the full range of cases confirmed (as the Workgroup had also said) that the results become less problematic as parental incomes become less disparate, and seemed entirely appropriate for cases in which the two parents earned about the same incomes.

The GRC agreed with the Workgroup that this pattern results from the MEG method's counting only the *marginal* expenditures on children—such as the *extra* cost of an additional bedroom—triggered by the child's addition to the family. MEG effectively assumes each parent can afford the living room, bathroom, and kitchen on his or her own. That assumption works when the parents have equal incomes because they are equally able to provide those base expenditures to which the marginal costs of the child are added. But when parental incomes are highly disparate, most and sometimes all the base expenditures for the intact family were provided by the high-income parent. A low-income parent unable to contribute much to them during the marriage still cannot after they divorce. So the child support payment based on *marginal expenditures* does not do much for the living standard of the child in the low-income custodial home: Receiving the high-income NCP's share of what an extra bedroom costs does not help the low-income CP pay for the kitchen or living room. And in the reverse case, the low-income NCP, barely able to afford bedroom for himself, cannot contribute much to the additional cost the high-income parent incurs for a larger house with another bedroom. The GRC thus concluded that Arizona's guidelines would be both more consistent with the governing statute, and more fair, if support amounts were determined using the COBS method. But just how does that method work?

2. *The COBS Guideline*

Using the outcome measure provided by *Childshare*, the Committee generated new guidelines. Appendix A provides a detailed account of the process the Committee used, and Appendix B provides a more detailed explanation of the basis of the *Childshare* calculations. Briefly, however, the spreadsheet committee used *Childshare* to identify support amounts that yielded outcomes consistent with principles that were based on the interests that section 25-320(D) requires the guidelines to consider. Among them were these considerations:

- (a) Parents who earn about the same incomes as one another ("equal earners") should enjoy approximately equal economic outcomes. Equal earners would have the same living standard as one another if

they were childless, and the child support amount should be set so that the allocation of custodial time between them does not alter this parity.

- (b) When one parent earns more than the other parent, that higher-earning parent should continue to enjoy a higher living standard after the child support payment is made.
- (c) The child support payment should always be high enough to ensure that the child's living standard in the custodial household does not fall below the "minimally adequate" benchmark, unless meeting that goal would require the obligor to make a payment that would bring his living standard below the minimally adequate benchmark, or below the living standard of the other parental household.
- (d) A low-income obligor should still contribute to the support of his or her children, but this contribution may take the form of providing for the children when they are in his or her custody. A non-custodial parent whose income is below the minimally adequate benchmark level should not be required to make support payments to a custodial parent whose income is comfortably above that level (keeping in mind that the living standard of each household is measured so as to take account of the allocation of custodial time).
- (e) No parent should be required to pay more than half of his or her net income in child support, even when the support is for multiple children.
- (f) Within the limitations imposed by the first five principles, the child support payment (when the parents are not equal earners) should be set as to reduce, but not eliminate, the anomaly that the Economic Study Workgroup found under the MEG guidelines: that children whose parents have the same combined income enjoy very different living standards after the parents separate, depending on whether they live primarily with the higher- or lower-earning parent.

As the Child Support Committee's Economic Workgroup had observed, the applicable principles can be in tension with one another, requiring the guideline writer to fashion a compromise between their demands. There were other complications as well. First, outcome measures cannot be calculated without making some assumption about the size of the household whose outcome is being measured. The basic COBS support table was constructed on the assumption that neither parent had remarried⁸¹ and neither had additional children in their household beyond the children whose support was at issue.⁸² Both these assumptions will obviously be incorrect in many cases. The solution was to provide for adjustments to the support amount that would otherwise apply under the COBS table, to take account of such family reconfigurations. Because the same basic problem is also faced under the existing MEG guideline, that guideline

81. GRC FINAL REPORT, *supra* note 6, at 18 n.16.

82. *Id.* app. E at 1.

already included a method for adjusting support amounts to take account of other children to whom either parent owed a legal duty of support. The Committee was able to adapt this MEG adjustment for the COBS guideline. The MEG guideline contained no method, however, for adjusting the support amount to take account of either parent's remarriage. The Committee fashioned a discretionary adjustment that the COBS guideline encouraged the court to employ in appropriate cases, based upon principles found in Arizona appellate cases.⁸³

Second, Arizona support guidelines had for some time provided for adjusting the support amount to reflect the allocation of custodial time between the parents.⁸⁴ The Committee believed the COBS guideline should continue that practice.⁸⁵ The MEG adjustment formula could not be adapted for use in the COBS guideline, however.⁸⁶ In any event, the Committee found important flaws in the MEG adjustment formula.⁸⁷ A new formula was therefore developed to adjust the amounts in the COBS support table to reflect the parenting time allocation in each case.⁸⁸ Appendix A provides further details on the COBS adjustment formula, and its differences from the parenting adjustment used in the MEG guideline.

Finally, a third constraint on the Committee arose from the need to provide a complete table of support amounts that covered a wide income range and different numbers of children. The Committee obviously could not examine every possible combination of parental incomes and family size. Instead, the Committee set support amounts for a much smaller set of cases that could provide anchor points that the consultant, Professor Barnow, could use to construct the complete table. One value in this exercise was that construction of the full table required a step back from the focus on particular cases, to a vantage point that revealed overall patterns in the support amounts in the full table. One could then see when revisions of the anchor points was required in order to ensure that the support amounts changed in sensible and consistent ways across the full range of parental incomes, family sizes, and visitation arrangements.

83. The general Arizona rule is that the income of a parent's new spouse is not considered in the child support calculation. 2011 Child Support Guidelines, *supra* note 2, at 5. However, appellate cases have allowed the court to count in a parent's income the cash value of regularly recurring contributions a third party makes to the parent's living expenses. *See, e.g., Cummings v. Cummings*, 897 P.2d 685, 689 (Ariz. Ct. App. 1994). The new provision, contained in Section II(B)(2) of the COBS guidelines, relied on this authority. *See* Public Hearing and Meeting Minutes of the Ariz. Child Support Guidelines Review Comm. 12 (June 4, 2010), available at <http://www.azcourts.gov/Portals/74/CSGRC/GRCMIN6410%20-%20Final%20revised%20by%20all.pdf> (“[W]hile the court may not consider the income of a new spouse, . . . if the court finds that regular or substantial contributions from a new spouse, or others, reduce living expenses, the court may determine the value of the reduced expenses and add that amount to the income of that party.”).

84. GRC FINAL REPORT, *supra* note 6, at 5–6.

85. *Id.* at 32–35.

86. *Id.* at 32.

87. *Id.*

88. *Id.* at 32–35.

Figure 1A offers the first of three overviews of the changes COBS would have wrought, using as an example a case in which there is one child, a CP who earns \$2,000 monthly, and an NCP who had the child 105 days per year. The figure shows the outcomes, as a percentage of the middle-class benchmark, for both custodial and non-custodial households under both COBS and MEG, for the full range of NCP incomes. It also provides the intact family living standard benchmark for comparison. As indicated by the brackets on the right, the highest and lowest lines show the outcomes for both parents under MEG, while the two interior lines show the outcomes for the same family if COBS applied. Within each pair, the dashed line shows the outcome for the non-custodial parent and the solid line shows the outcome for the custodial parent. You can see that for all cases in which the NCP's income is more than the CP's (\$2,000 in this case), the NCP has the higher living standard *after* the child support payment is taken into account. What the figure also shows, however, is that the two lines are closer together—the living standards are less disparate—under COBS than under MEG.

As one should expect, the four lines converge at about the equal income point—where the NCP, as well as the CP, earns \$2,000 a month in gross income. Because difficulties with the MEG guideline arise primarily as parental incomes diverge, the support payments in equal-earner cases are not very different under the COBS guideline than under MEG, and under both guidelines the two parental households come out with approximately equal living standards. Of course, under both COBS and MEG, the two families' living standard, after the separation, is below that of the intact family. The intact family living standard is shown in Figure 1A, 1B, and 1C by the shaded portion of the graph, and one can see that at the point where parental incomes are equal and the four lines converge, they all fall within the shading, rather than above it.

One can also see how the outcomes for the two parental households diverge as NCP income rises above the CP's: The higher-income NCP then has a living standard advantage that grows with his income, and is quite large on the right side of the graph where the parental incomes are most disparate. We have already observed that this outcome gap between parental households is wider under MEG than under COBS, but one can see that it also increases more rapidly, with NCP income, under MEG than under COBS. Indeed, under MEG, the living standard of the CP household barely changes with rising NCP income, which is why the CP line is nearly horizontal. The NCP does not share very much of his rising living standard with the custodial household. COBS corrects this pattern, but only modestly. The COBS CP line has a small upward slope as NCP income rises, but COBS still leaves a substantial outcome gap at higher NCP incomes. So even under COBS, higher-income NCPs continue to enjoy a living standard that is higher than the intact family enjoyed, an outcome the custodial household certainly never realizes. Essentially the same pattern is evident in Figure 1B, which presents an otherwise identical case in which the CP income is \$4,000 rather than \$2,000. Note that in Figure 1B the four lines converge at the NCP income of \$4,000, the equal-earner case for this CP income.

Figure 1C examines the case of the high-income CP—a CP earning \$10,000 monthly. Once again all four lines converge at the equal-earner point. For NCP incomes below this point, the CP comes out slightly less well under COBS

because it sets support payments lower than does MEG, for this lower-income NCP. But the difference is small in the living standard terms charted here because the lower-income NCP's support payments, under COBS or MEG, are just not large enough to have much impact on the high-income CP's living standard. And the living standard difference between COBS and MEG becomes almost invisible for the lowest-income NCPs. At higher NCP incomes the CP does a bit better under COBS but again the difference is small. Overall, when the custodial household has a high income, its living standard is not much affected by the CS payments under COBS or MEG.

Figure 1

Household living standard, on vertical axis, measured as a percentage of the Arizona middle-class benchmark, for cases with one child in which non-custodial parent gross income (before paying child support) varies from \$1,000 to \$20,000, the non-custodial parent has the child for 105 days per year, and the custodial parent gross monthly income (before receiving child support) is either \$2,000, \$4,000, or \$10,000. The height of the shaded area shows the living standard of the intact family at any NCP income. The lines show the living standard of both post-separation households, after payment of child support, under the MEG and COBS support schedule.

Figure 1A: Custodial Parent Income Is \$2,000 Monthly

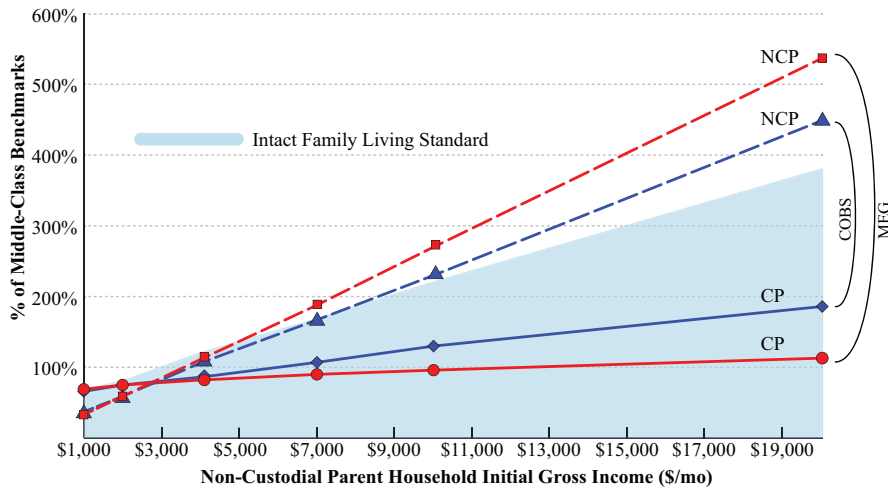


Figure 1B: Custodial Parent Income Is \$4,000 Monthly

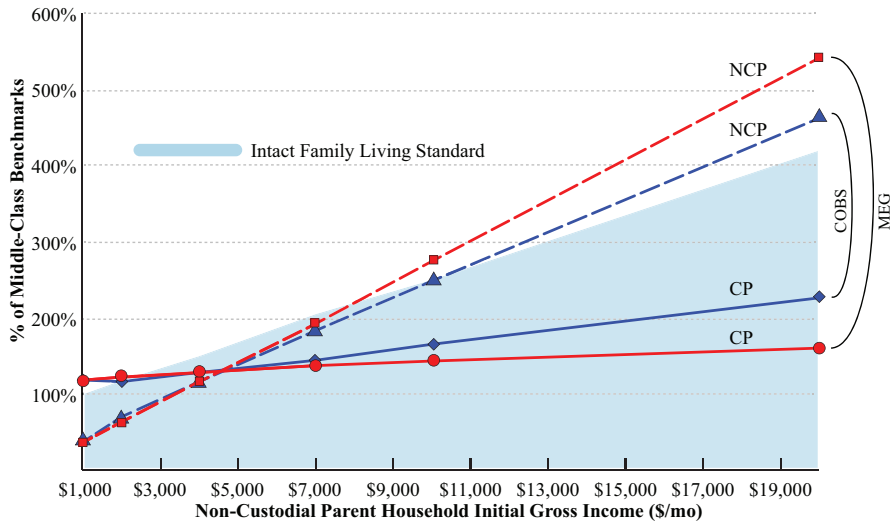
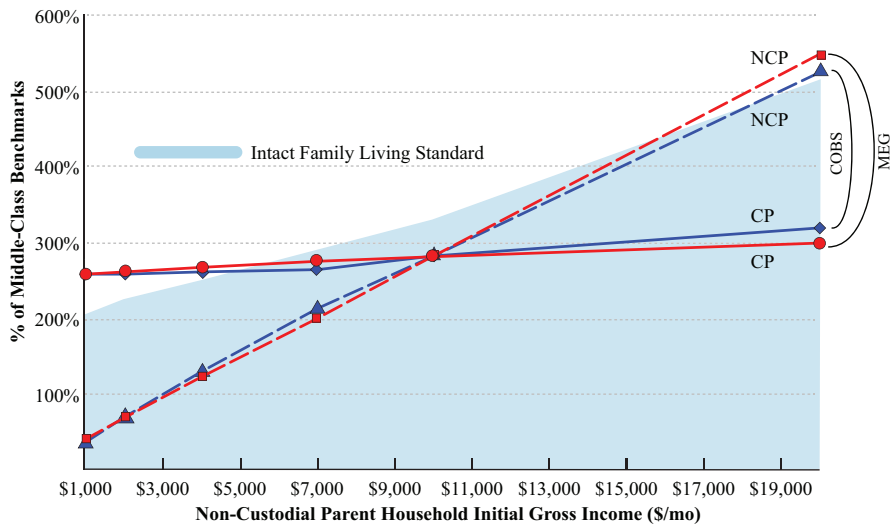


Figure 1C: Custodial Parent Income Is \$10,000 Monthly



Figures 1A, 1B, and 1C all compare *living standard* outcomes under the two systems. But what about dollar changes in the actual support orders? Table 2 and Figure 2 present this kind of information. As part of its contract with Arizona, the consultant that performed the updating of the MEG guideline (CPR) also reviewed a representative sample of child support cases decided in the prior year (2007).⁸⁹ Table 2 and Figure 2 compare the actual orders in 416 MEG guideline

89. See *id.* app. D.

cases in this sample, to the amounts that would have been ordered in these same cases if the proposed COBS guideline had applied.⁹⁰ For both COBS and MEG, the order amount includes certain costs that can or must be added to the basic support order: medical expenses, including health insurance, educational expenses, and child care.⁹¹ Table 2 shows that most existing support orders would have been *reduced* under COBS. In contrast, the updated MEG guidelines that were eventually adopted (instead of COBS) *increased* support amounts in nearly all cases, as compared to the prior MEG guidelines they replaced.

90. These cases were decided under the 2005 MEG guidelines that COBS would have replaced. There were 568 cases in the entire sample, but cases in which the court order deviated from the guidelines were not included in this analysis because its purpose was to compare outcomes under the two sets of guidelines. *Id.* app. D at 2. Of the 423 non-deviating cases, 7 were also excluded because they involved split custody, in which each parent is the primary custodian of one or more siblings.

91. *See id.* at 16. This analysis generally assumed that the COBS order would specify the same amount for these add-on costs as did the actual MEG order, because the rules applicable to these add-on costs were the same under COBS and MEG.

The exception was child-care costs. *Id.* The MEG guidelines allow but do not require the court to order either parent to contribute to employment-related child-care expenses incurred by the other parent. They were in fact ordered in 35% of the cases in the sample. *Id.* One could not tell whether the remaining 65% had no order for child-care costs because the court rejected a claim for them, or because no such claim was made. COBS also left an award of child-care costs to the court's discretion, but included new guideline language intended to discourage such awards when the basic child support award provided the CP with sufficient funds to pay them. Because one cannot know whether courts would in fact make fewer or smaller child-care awards under COBS, this comparison required care. The Committee performed two alternative calculations. In the first, it assumed that the cost of child care would, under COBS, be included in every case in which it was included in the 2007 order in the database, and in the same amount. In the second, it assumed that under COBS the court would never include child-care costs in its order. As the Committee explained when it presented this analysis to the AJC, one may regard this pair of results as two "bookend" figures portraying what will happen under either of two extreme assumptions, neither of which is likely. The more likely outcome would lie somewhere between these bookend figures, and the data summary presented in Table 2 assumes the midpoint between them. It turned out, however, that even if one assumed that a child-care award was made under COBS in every case in which it was made under MEG, and for the same amount, COBS would still have lowered support amounts more often than it would have raised them.

Table 2

The impact of moving to COBS on support orders in 416 cases sampled from non-deviating orders made in 2007 in several Arizona counties, urban and rural, under the MEG guidelines then in effect.

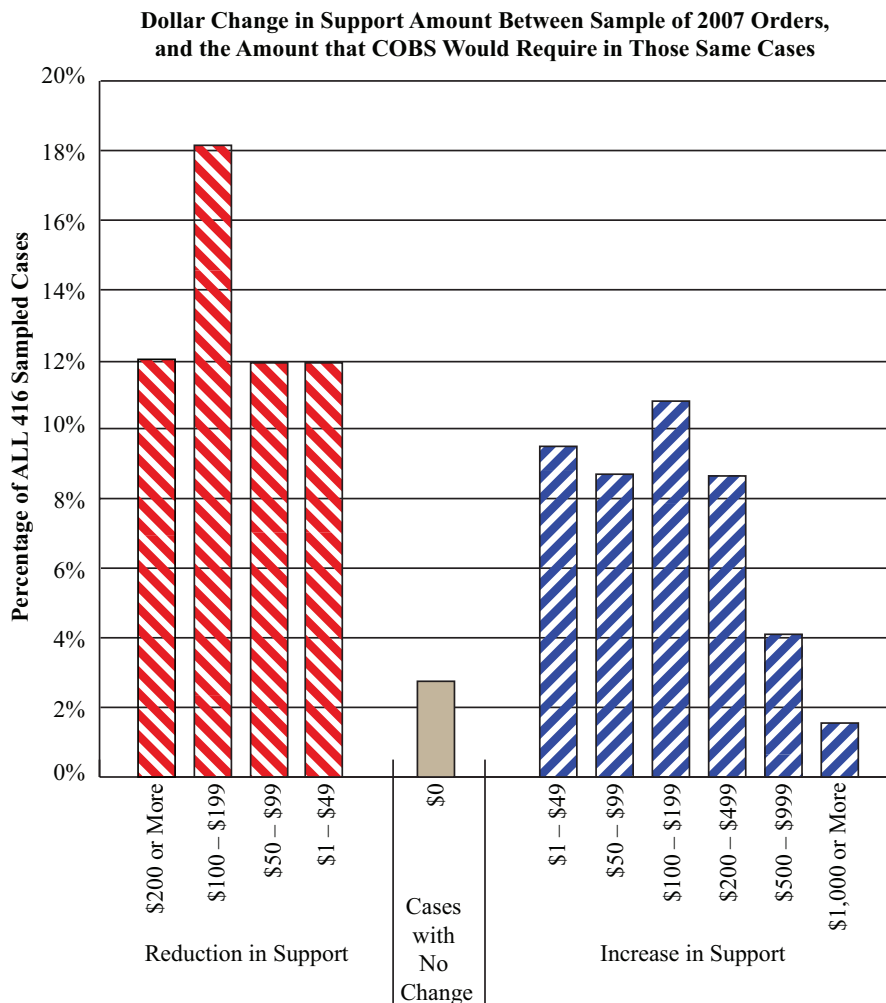
Percentage of Cases in Which COBS:	
<i>Lowers Support Order</i>	52.5
<i>Makes No Change</i>	3.9
<i>Increases Support Order</i>	43.5

These overall results are broken down in Figure 2 by the dollar amounts of the increase or decrease in support. The bars on the left side of the figure represent cases in which the COBS order would be less than the MEG order; bars on the right side represent cases in which the COBS order would be higher. This breakdown is revealing. In one sense, the patterns seem the same as in Table 2: a fairly symmetrical distribution between increases and reductions, but skewed a bit toward the reduction side. There are reductions exceeding \$100 in 30% of the cases (summing the two categories at the left, 18% and 12%), and increases exceeding \$100 in about 24% (summing the four categories furthest to the right). Note, however, the small number of cases with very large increases in absolute dollar terms: more than \$500 in a bit less than 6% of the cases, with more than \$1,000 in less than 2% of the cases. There are no cases with correspondingly large reductions in support amounts. This is not surprising. COBS reduced support amounts primarily in cases in which the obligor had a lower income, which means the support amounts could not be too high in the first place. One cannot reduce a support obligation of \$100 by \$500.⁹² By contrast, the largest increases in support awards occur when the support obligor has a very high income and the custodial parent a very low one. Especially given the pattern of the existing MEG awards in such cases, there was substantial room for increases in these cases.

92. Actually, one can, in a sense: One could replace an order requiring the NCP to pay the CP \$100 with an order requiring the CP to pay the NCP \$400. As explained elsewhere, however, such “negative” support amounts were not common, and ones that provided for such large amounts were quite rare. *See infra* note 133.

Figure 2

Comparison of child support orders actually issued in a sample of 416 Arizona cases decided in 2007 with the order that would have been issued in that same case had the COBS guidelines applied.



The foregoing analysis reveals two things. First, the COBS guidelines did indeed implement the important reform goals identified by the Economic Study Workgroup, as well as the principles that the GRC itself had identified as consistent with the governing statute. Changes in support amounts were made primarily in cases of disparate incomes, for which the living standard of children in the custody of the lower-earning parent was improved. Higher-earning parents nonetheless retained a living standard advantage. And low-income NCP’s were shielded from having to make burdensome support payments to custodial households that already enjoyed a much higher living standard than they did.

Second, however, the analysis also reveals that in a small group of cases, the COBS guideline would raise the required support payment by a large amount. From the Committee's perspective, these increases merely reflected its correction of the same defect that earlier committees had identified with MEG guidelines; their failure to deal appropriate with cases in which the parents had highly disparate incomes. But was the committee's view shared by Arizona citizens?

III. DID THE PUBLIC PREFER COBS OR MEG?

One would certainly expect objections to COBS from those who would pay more. The question, however, was whether those with less self-interest in the matter would consider the new amounts fair. Of course, the Committee was itself one source for such an "objective" judgment, and perhaps a particularly good one since the judgment was reached over many hours of deliberation and discussion and was informed by good outcome data. Certainly, the Committee did not fail to notice the extent of these changes. It gave them considerable attention. Nonetheless, there is no reason to assume that a Committee comprised of different people might not have made different judgments. Research shows some systematic differences in the child support judgments made by men as compared to women.⁹³ There is also considerable fluctuation across individuals that, while not tied to any demographic characteristic, does mean that one randomly chosen group of four people might reach very different judgments than another.⁹⁴ In one sense, filling in the numbers in a child support guideline table is like completing a criminal sentencing guideline. Nearly everyone might agree that a burglar should receive a longer sentence than a shoplifter but a shorter sentence than a kidnapper, but it is another matter to get agreement on precisely how long the burglar's sentence should be. The answer will vary with whom one asks.

While that might make it difficult to know whether the Committee's judgments were "right," one can ask whether the Committee's judgments differed very much from the average judgment that would be made by a good cross-section of Arizona citizens. But a scientifically valid assessment of what people in fact believe about child support payments requires more than the typical survey that asks a few general questions. One must instead command people's attention long enough to present them with a series of cases in which they tell the researcher the child support amount they believe the law should require—as if the respondent was on the Guideline Committee for a day. Careful attention must also be given to how the questions in such a study are phrased, because the framing of the questions affects the answers. The present Author has been part of an interdisciplinary research team that includes social psychologists, and which has for some years been conducting just such a project. It has been examining citizen views on a wide range of family law issues, and its work has drawn international attention. But Arizona citizens have been the primary respondents, and child support has been a particular focus of the project. Because the team conducting these studies included the present Author, partial results were available to the Committee at the time of its deliberations, and helped guide them. More complete

93. Ellman et al., *Intuitive Lawmaking*, *supra* note 80, at 90. The spreadsheet subcommittee was evenly divided between men and women.

94. *Id.*

results (published in leading peer-reviewed journals) are now available, however, and give us a better basis than the Committee had for testing both the COBS and the MEG guidelines against the views of Arizona citizens.⁹⁵

All the studies used the jury pool in Pima County, Arizona. I summarize the study's methods here, but they are more fully described in the published papers presenting their findings.⁹⁶ Briefly, citizens waiting in the jury assembly room to learn if they will serve on a jury are asked to complete a survey form in which they are presented with a series of child support cases. They are told to imagine themselves as the judge in the case, charged with making the child support order they believe fair, all things considered. The respondents indicate their judgment by writing the dollar amount of the child support order they would make. Each respondent renders such judgments in a series of cases, in which the facts are systematically varied to allow the researchers to measure the impact of factual changes on the respondents' judgment. State law penalizing citizens who do not respond to a jury summons, combined with the efforts of the Jury Commissioner to summon a representative sample of citizens and to enforce these summons, yield an excellent survey sample. The researchers have obtained response rates from this sample that have always exceeded 50%, and were often much higher.⁹⁷

Respondents in these surveys provide demographic information, and prior studies in this series found that most demographic indicators, including income, political party preference, and self-reported political ideology on a scale from very liberal to very conservative, have no effect on respondent answers. We thus have no reason to believe we would have obtained systematically different results from surveys of the jury pool in other Arizona counties.⁹⁸

95. The first publication from this project was Ellman et al., *Intuitive Lawmaking*, *supra* note 80. A companion piece to that essay is Ira Mark Ellman, Sanford Braver & Robert J. MacCoun, *Abstract Principles and Concrete Cases in Intuitive Lawmaking*, 36 LAW & HUM. BEHAV. (forthcoming 2012) [hereinafter *Abstract Principles and Concrete Cases*]. Some of the methodological studies the authors conducted, to determine how to phrase the questions, are reported in Sanford Braver, Robert J. MacCoun & Ira Ellman, *Converting Sentiments to Dollars: Scaling and Incommensurability Problems in the Evaluation of Child Support Payments* (Apr. 15, 2008) (unpublished manuscript) [hereinafter *Converting Sentiments to Dollars*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121240 (presented to the Third Annual Conference on Empirical Legal Studies). Leading peer-reviewed journals in England and Israel have now published reports of this work. See Ellman & Braver, *Lay Intuitions About Child Support and Marital Status*, *supra* note 80; Ira Ellman & Sanford Braver, *Lay Intuitions About Family Obligations: The Case of Alimony*, 13 THEORETICAL INQUIRIES L. 209 (2012). The Nuffield Foundation in London has funded a research team including the Author and several British scholars to replicate this work in the United Kingdom. See *Ellman Is Co-Recipient of Nuffield Foundation Grant*, ARIZ. STATE UNIV. SANDRA DAY O'CONNOR COLL. OF LAW (Aug. 9, 2011), <http://www.law.asu.edu/News/CollegeofLawNews.aspx?NewsId=3267>.

96. See *supra* note 95 and accompanying text.

97. The actual response rates obtained are reported in each of the published studies referenced *supra* note 95.

98. See Ellman & Braver, *Lay Intuitions About Child Support and Marital Status*, *supra* note 80, at 479. That report of the study did not provide a detailed demographic breakdown of the respondents, but I can report more details here. Women

A recently reported study in this series examined the impact of parents' marital status, and the duration of their relationship, on the respondents' child support judgments.⁹⁹ Judgments were obtained from four groups of respondents. One group was told the parents had been married 4 years before separating, while a second group was told the marriage had lasted 15 years. The third and fourth groups were told the parents had never married, but had lived together for either 4 or 15 years. Individuals in each group were given 15 cases. In all the cases the parents had one child, a three-year-old boy, who lived primarily with the mother although the father "sees him often." What differed among the 15 cases given to each respondent was the incomes of the parents. The mother's income was either \$1,000, \$3,000, or \$5,000 a month in "take-home pay," while the father's was either \$2,000, \$4,000, \$6,000, \$9,000, or \$12,000 in "take-home pay." There were thus 15 possible income combinations: three maternal incomes multiplied by five paternal incomes. Because all the respondents rendered a child support judgment for all 15 cases, they all produced their own "mini-guideline." Because other studies from the same project had shown that the order in which the incomes were presented affected the respondents' answers, four different sequences were employed. The reported results were the average across all four.

Survey respondents given cases in which the parents had married favored higher support awards than those given cases in which they had not. A significant proportion of Arizona child support cases involve unmarried parents,¹⁰⁰ but of course Arizona law, like the law of other states, does not consider marital status or relationship duration in the calculation of a child support award. We can therefore

were 58.3% of our respondents, and 24% of them reported having received child support. Twenty-one percent of the men in the survey reported having been ordered to pay child support. (There were virtually no men in the sample who had received child support, and no women who had paid it.) The sample thus has a higher proportion of women than the population as a whole, which may have made the mean support award a bit higher than if the sample were precisely half women. On the other hand, about half our respondents were asked about cases involving unmarried parents, and their mean support order was lower than the mean support order of the other half (which was asked about married parents). So the overall mean is lower than it would have been if our respondents were given a higher proportion of cases with married parents. The proportion of actual cases that come before Arizona courts in which the parents are married is probably greater than 50%, although the courts do not collect this data because Arizona law makes no distinction in support amounts between marital and non-marital children. In 2008 approximately 45% of all Arizona births were to unmarried women. *Births to Unmarried Women (Percent) – 2008*, KIDS COUNT DATA CTR., <http://datacenter.kidscount.org/data/acrossstates/Rankings.aspx?ind=7> (last visited Feb. 1, 2012). We do not know, however, the proportion of such births in which a formal support award is ultimately made, as compared to the proportion of marital births that eventually lead to a support award.

99. Ellman & Braver, *Lay Intuitions About Child Support and Marital Status*, *supra* note 80.

100. Because the proportion of unmarried parents among all Arizona child support cases is probably less than half, unmarried parents were a bit over-represented among the cases we gave our respondents, as compared to their proportion of the case load presented to Arizona courts. The mean support awards given by our respondents would thus have been slightly higher if the proportion of unmarried parents was aligned more closely with their proportion in actual cases.

average the mean child support amounts favored by the respondents in this study across the four respondent groups (two with married parents, together for 4 or 15 years, and two with unmarried parents together for 4 or 15 years). There were 356 respondents in the 4 groups, a large sample size for this kind of work. Moreover, the support awards reported in this study replicated the findings of an earlier study in the project that had 262 respondents, providing further reason for confidence in the stability of these findings.¹⁰¹

One wants to compare the mean support amounts these Arizona citizens favored to the support amounts called for in the same cases under both the MEG and the COBS guidelines. Recall that our respondents were told that the child lived primarily with mom but that dad sees him “often.” To calculate the corresponding support amounts under either the MEG or COBS guideline, one must assume an equivalent parenting time allocation. The traditional Arizona MEG guideline adjusts for parenting time by grouping custodial arrangements, and the middle and most commonly used group are cases in which the support obligor has the child between 88 and 115 days annually. We treated the survey cases as falling within this range. The COBS guideline does not group cases; the calculation requires inputting a particular number of parenting days. We chose 100 days of parenting time, an approximate midpoint in the MEG range we employed. Because both the COBS and MEG guidelines base support amounts on the parents’ gross incomes, we also needed to transform the “take-home” pay specified in the cases given to our respondents to equivalent gross incomes. To do this we used the *Childshare* program to find the gross income that would yield an after-tax net income equal to the “take-home” pay specified in each of the cases.¹⁰²

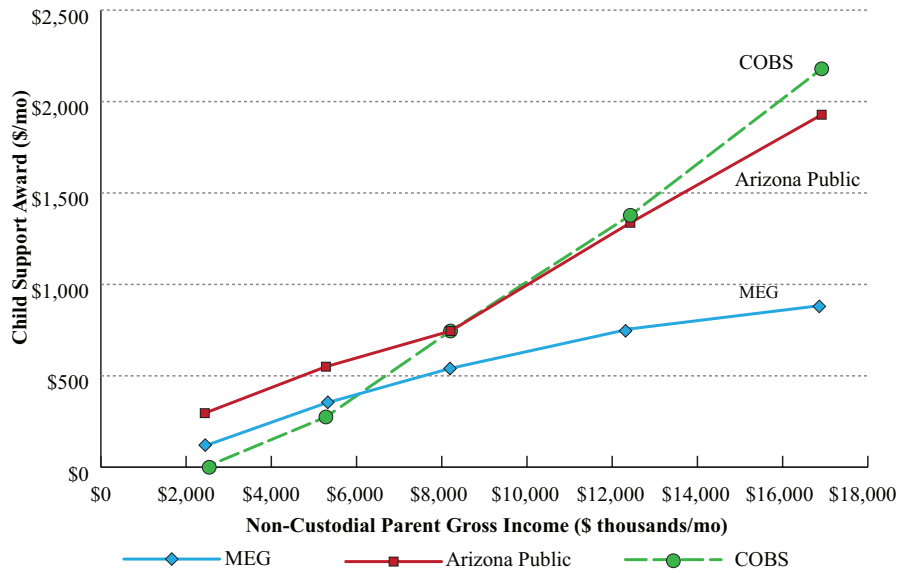
Figure 3 compares the public’s favored support amounts, for cases in which the mother’s take home pay was \$3,000, to the support amounts called for in the same cases, under both the MEG and COBS guideline. Although I do not reproduce the figures here, the basic pattern was the same for the other two maternal incomes presented to our respondents: \$1,000 and \$5,000 in take-home pay. Neither COBS nor MEG reproduce the mean views of Arizona citizens precisely, but COBS is *much* closer to citizen views than is MEG. The mean support amount favored by these Arizona respondents is higher than the support amount specified by the MEG guideline for all but the lowest-income obligors. Moreover, the gap between the public’s preferred amount, and the current MEG guideline amount, grows larger as obligor income goes up, becoming very large indeed when obligor gross incomes exceed \$7,000 a month. In short, the average Arizona citizen believes high-income obligors should pay much more child support than the MEG guidelines call for.

101. The earlier study asked respondents about only 9 parental income combinations, rather than 15 income combinations considered in the study summarized here. But the fitted support amounts for those nine cases were very close to the support amounts for those same nine cases reported here. Ellman et al., *Intuitive Lawmaking*, *supra* note 80, at 86 n.18.

102. For further details on how *Childshare* calculates net and gross income equivalents, see *infra* Appendix B.

Figure 3

A comparison of the child support amount specified in the 2008 revised MEG guideline and the amounts specified under the proposed COBS guideline, with the mean support amount that would be awarded in the same case in a survey of Arizona citizens. Custodial parent has a gross income of \$3,562, non-custodial parent gross income is one of five values indicated on the X axis, and the child is with the non-custodial parent 100 days per year.



The COBS guideline, by contrast, calls for about the same support amount, at an obligor income of \$7,000, as the public favors. As obligor gross income rises above \$7,000, COBS requires support payments that eventually inch up a bit higher than the amounts the public favors. But the two lines that show the public’s views and the COBS amounts are still close—far closer than either is to the MEG line. As gross obligor income falls below \$7,000, COBS again diverges from our mean respondent’s preference, but in the opposite direction: COBS calls for *lower* support amounts than those favored by our mean respondent. Moreover, the gap between the COBS amounts, and the public’s preferred amounts, is greater at low-obligor incomes than at high-obligor incomes. There is some irony in this result. In all the public hearings on COBS, it was *never* criticized for setting support amounts that are too low for low-obligor incomes. The critics focused their fire on the cases involving higher-income obligors, in which COBS reflected the public’s views very closely, while ignoring the cases of low-income obligors, in which COBS diverged.

None of this demonstrates, of course, that the higher support amounts COBS required of high-income obligors were, in any objective sense, “correct.” It does demonstrate, however, that they were well within the mainstream view

among Arizona citizens. Indeed, they were far more closely aligned with mainstream citizen views than are the MEG guidelines the legislature required the court to adopt instead. Why then did the COBS guidelines fail?

IV. WHY DID THE REFORM FAIL?

Many different things could have contributed to COBS' defeat. One possibility is substance: Perhaps COBS was just a bad idea, and lost because people figured that out. A second possibility is a flaw in the process: Did COBS lose because the efforts to involve relevant parties in its development were inadequate? Finally, one must consider whether the problem was not COBS but inadequacies in the political process. Perhaps state government, or at least this state government, cannot cope rationally with this kind of lawmaking problem. We now consider all these possibilities.

A. Substance

Were the numbers in the COBS guidelines "right"? For any particular case, there is necessarily a range of possible support amounts within which any one choice can be defended as well as any other. So for any given case, some reasonable people would balance the claims of the child and the two parents differently than did the reasonable people who crafted the proposed COBS guideline. But of course neither the court nor the legislators were going to revisit the particular dollar amounts that the COBS guideline called for in each case. Their choice was instead a choice between two guideline systems, COBS and MEG, and the full set of support amounts called for in one system versus the other. And there is a good substantive basis for making this choice between two systems. It is based on answers to questions like these: Which method for constructing guidelines asks the right questions? Which method produces guidelines more consistent with established state policy? Which method yields guidelines more consistent with the values of Arizona citizens? We have already considered each of the questions, but reflect a bit more on them all here.

1. Which Method Asks the Right Questions?

MEG guidelines are based on answers to one question: What was (or would have been) the NCP's dollar contribution to the marginal expenditures on children made by these parents when (or if) the family was intact? The answer of course varies with the parents' combined income and the number of their children. The COBS guideline is based on answers to a different set of questions: How do the living standards of the two parental households, after payment of a proposed child support amount, compare to one another, and also to the living standard of the intact household, the median Arizona family, and a family living at a minimally adequate level? The COBS support table reflects the Committee's judgment as to payment that yields the fairest balance among the outcomes of the two households, so measured. Neither COBS nor MEG ever considers the question central to the other method. That is, a MEG guideline is prepared without ever asking about its impact on the custodial and non-custodial households to which it will apply, while a COBS guideline is prepared without ever asking for the dollar

amount of the marginal expenditures made on children in intact families of the same size and income as the parents to whom it will apply.

The questions asked by the COBS method make sense if our policy goal is to make sure that the child's living standard is reasonable in light of the parents' ability to provide for the child, and also that both parents contribute to the child's support in an amount that has a reasonable relationship to their relative financial capacity. That is because the COBS method asks questions that allow the guideline writer to measure these criteria.

The policy purpose that would explain the question asked by the MEG method is to ensure that the obligor's financial burden is exactly what it would have been if the family were intact. That is, when parents live together we assume they jointly incur the additional (marginal) expenses resulting from their having a child, and the MEG guideline simply requires the NCP to continue to contribute his share of those same marginal expenditures when the parents separate—no more and no less. This purpose may seem sensible if the issue is viewed exclusively from the obligor's perspective. The problem, however, is that the cost of maintaining the family goes up when it occupies two households rather than one. Limiting the obligor's payment to his share of the marginal costs of a child in an *intact* family means he pays nothing toward the additional expenditures that arise from the fact that it is not intact.

A MEG guideline is thus devised with a single-minded focus on ensuring that the obligor's support burden is unaffected by the separation. It implicitly assumes that if the NCP pays the CP his share of the pre-separation support burden, then the CP will only need to add her share of the pre-separation support burden to provide adequately for the child. The assumption is flawed because the total support burden necessarily rises when parents separate. Because the MEG guideline does not allocate that extra burden it is largely all left on the custodial parent. By focusing exclusively on intact family marginal expenditures, the MEG method fails to ask questions it should ask. The COBS focus on outcomes is better because it asks about the outcomes for *all* the parties, at the time of their separation.

Of course, the questions one should ask ultimately depend on the policy one means to implement. Arizona *could* have a policy of placing all the costs arising from family dissolution on the custodial household. Does it? This brings us to the next issue.

2. *Which Method Is More Consistent with Announced State Policies?*

The legislature's delegation of the guideline-writing task to the Arizona Supreme Court could be a delegation of the policymaking function. Or, the legislature could instead set the policy in broad language that the court is then left to implement through the guidelines. The latter appears to be the situation in Arizona. Section 25-320(A) offers a broad statement of the child support law: The courts may order a parent "to pay an amount reasonable and necessary for support of the child."¹⁰³ Section 25-320(D) then not only delegates to the court the task of

103. ARIZ. REV. STAT. ANN. § 25-320(A) (2011).

promulgating support guidelines implementing this broad statement, it also states considerations on which the guidelines should be based.¹⁰⁴ That list of considerations amplifies the language of section 25-320(A) in suggesting state policy, but is also quite general. Within the boundaries set by this language, the court must fill the gaps.

The key features of section 25-320 were described earlier.¹⁰⁵ It clearly says the guidelines should be based on multiple considerations: the economic needs and resources of the child and each parent at the time of the support order, taking account of the living standard the child would enjoy if the family were intact.¹⁰⁶ The COBS method is consistent with this statutory formulation because it is based on measures that allow the guideline writer to gauge the financial impact of a child support order on both parental households, and thereby determine whether it strikes a reasonable and fair balance among the competing considerations the statute required be taken into account.¹⁰⁷ The COBS guidelines are more consistent with the policy guidance the statute gives the court than are the MEG guidelines based upon just one criterion: ensuring the obligor's support burden is unaffected by the separation.

3. *Which Method Sets Support Amounts That Are More Consistent with Citizen Views of What Is Fair?*

There is no doubt that COBS opponents thought the guidelines unfair, and they were effective in making their opposition known during the final stages of the process. Within a judicial process, the substance of arguments is more important than the number or volume of those making them, but the opposite is sometimes true in the political process. So shifting the decisionmaking arena from the Arizona Supreme Court to the legislature probably changed what mattered to the decision. Nonetheless the court was not deciding an individual case, but was instead functioning as an administrative rulemaking agency. Thus, it could reasonably believe that important weight be given to public opinion as well as to its own judgment of the matter's merits. Creating child support guidelines requires value judgments. One might wish to avoid value choices very different than those the average citizen would make. The survey data presented above establishes that as to the issue which drew *all* the public opposition—the increases in support amounts for higher-income obligors—the COBS guidelines were far closer to the public's values than were the MEG guidelines they would have replaced. But that data was not available to the court or the legislature at the times they were asked to make a

104. *Id.* § 25-320(D).

105. *See supra* text accompanying note 69.

106. Four other factors mentioned in the statute are necessarily dealt with outside the basic support table. *See supra* note 41 and accompanying text.

107. COBS did adopt a more sophisticated approach than MEG to calculating the parenting time adjustment—an approach that distinguished between the variable costs that shift between the parents in proportion to the time allocation, and duplicated costs incurred by the non-custodial parent in increasing amounts as the time allocation heads toward equal custody, but which do not represent cost savings to the other parent. This refinement was lost when COBS was abandoned but it was not a particular focus of the COBS debate.

decision on COBS. All they did know was that nearly all those who came to public hearings on COBS opposed it.

Even at the time the decision was made, however, there was good reason to believe the Committee's views were likely to be closer to those of the average citizen than were the views of the COBS opponents. We know that citizens' attitudes about the principles that should determine the amount of child support are affected by their experiences in the child support system.¹⁰⁸ We also know that gender affects their judgments, on average. Men believe child support amounts should be lower and women believe amounts should be higher.¹⁰⁹ Few if any Committee members had any personal stake in the issue, and the Committee was almost evenly divided between men and women.¹¹⁰ The COBS opponents, on the other hand, were almost all male child support obligors. Self-selected advocates for a subgroup whose views are unrepresentative will not tell one much about what average citizens believe. An organization of advocates for mothers receiving child support would be no better, had one appeared at the hearings.¹¹¹ But none did. There were very few voices speaking for low-income CPs at the hearings, and they were hardly heard over the much greater volume of fathers' rights advocates.

Perhaps this discrepancy in numbers led some in the legislature or the AJC to think the COBS guidelines indeed diverged from mainline public opinion. Just as likely, however, the legislature was influenced by the political reality that those who care enough to organize and express their views on an issue are also more likely than those who remain silent to take the legislator's actions into account on election day. The majority of citizens who have no personal stake in a matter are included in any good random sample of public opinion, but they rarely present themselves to legislative committees. So the real puzzle may be why, among those who did have a personal stake, obligors who objected to paying higher amounts were more motivated, more informed, or more able to voice their views, than custodial parents who believed they received too little. One can only speculate about any particular case, but the phenomenon of "loss aversion," now well demonstrated in many experiments, tells us that people are in general more motivated to avoid losing what they have, than to take advantage of opportunities to have more.¹¹² Perhaps that is one reason why more people are motivated to work

108. Those who have received support favor principles more generous to the custodial parent than those who have paid it. See *Abstract Principles and Concrete Cases*, *supra* note 95, tbl.3.

109. Ellman et al., *Intuitive Lawmaking*, *supra* note 80, at 90.

110. It had seven women and five men, and the chair was a man.

111. A handful of mothers dependent on child support did appear before the Committee and the AJC, and their views were very different than those of the fathers. But there were not many of them, and they had no affiliation with any group organized around issues important to single mothers.

112. The literature on loss aversion, also known as the endowment effect, is now immense. Two classic articles are Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990) and Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039 (1991). Kahneman has revisited this and other aspects of his Nobel Prize-winning work in his recent book, DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011). Perhaps the best-known effort to apply behavioral

against a proposed law that will take something from them, than are motivated to work for a law that would give something to them. It may also matter that the high-income obligors who would have lost the most under COBS probably have a greater capacity to participate in the political process, than do low-income single parents who would have gained the most.

4. *Conclusion*

It is difficult to make out a case that the COBS proposal was wrong in substance. Yet it is not surprising that some of those charged with accepting or rejecting the GRC's recommendations had doubts. Well-organized opponents ultimately dominated all public discussion of COBS and focused attention on the size of the increases it would make in support amounts for the small group of cases with high NCP incomes and low CP incomes. They created the impression that a large segment of the public was strongly opposed, and that the COBS amounts were extreme. Both impressions were wrong, but the GRC did not have the tools to persuade people of that.

B. Process

Self-interested advocates certainly play an important role in any democratic process. They are motivated to present arguments, provide information, and may bring important issues to the attention of lawmakers. The fathers' rights advocates were tireless in this role. In its busy final year, the work of the citizen volunteers on the Committee was devoted almost exclusively to consideration of their concerns. Yet their opposition was not diffused by their involvement in and impact on the process.

Guidelines review committees sometimes include as members a non-custodial parent paying child support and a custodial parent collecting child support; this Committee had neither. But throughout the process Committee members held meetings around the state with lawyers, judges, and the like who worked with support guidelines. All the Committee's deliberations were of course in meetings open to the public, and the minutes of all its meetings were posted on a public website. So the Committee's work was entirely transparent even though it did not seek out client groups—custodial and non-custodial parents. The Committee assumed that given the publicity it arranged for its activities, interested parties who wished to be involved would have ample opportunity to come forward. And that assumption eventually proved correct for the fathers' rights group. Would their earlier involvement have mattered to the outcome, either by leading the Committee to make different recommendations, or by softening their later opposition?

It is obviously impossible now to do more than speculate, but one can make some relevant factual observations about the process as it actually played out. The simple fact that the opposition never softened, despite the many hours of attention the opponents' concerns received, suggests that their additional

economics findings, including loss aversion, to policy questions is set out in RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2009).

involvement would not have had much impact. The large dollar gap in awards between MEG and COBS, in some of the cases involving higher NCP incomes, meant that even substantial reductions in the COBS support amounts would leave large increases in place for those cases. The fathers' rights group formed a community united by the goal of defeating COBS, and their group bond may have made defections unlikely even by members who eventually learned that their own support obligations would not increase by much. Group members were also skeptical of any analysis of COBS' impact that the GRC provided. One can imagine that if one of the less-affected men had been involved in the Committee's deliberations from the outset, and had supported the Committee's recommendations, the united opposition of the entire group would have been less likely. That does not mean, however, that the wealthiest COBS opponents would not have remained opposed, and would not have been effective in their efforts to persuade legislative leaders to intervene.

In principle one might also imagine the Committee being aided by having a member who was a motivated and effective advocate for low-income custodial parents. If she then supported COBS (despite reductions in the support obligation of low-income obligors), perhaps she would have organized grassroots support for it. The public hearings might not have been as dominated by COBS opponents, and the legislature might have heard a more balanced message. There are reasons to think this scenario unlikely, however. Committee members never found any organization of custodial mothers, equivalent to the fathers' rights group, and there may be none that such an advocate could call upon. And this fact may reflect difficulties in organizing custodial parents that would also defeat any organizing effort by this hypothetical Committee member.

On balance, it seems that although a different process might have helped, it is just as likely it would not have. But adding two "guideline consumers" to the GRC, one each sharing the obligor and custodial parent perspectives, has little downside, at least if one chooses persons who are capable and flexible as well as representative of a perspective.

1. Political Difficulties in Dealing with Complex Issues

The GRC's commitment to COBS was born of hundreds of hours of effort, over many years, devoted to both understanding the reasons why the current method for writing guidelines produced results that were a problem, and devising a new method to replace it. The effort gave Committee members some mastery of the technical aspects of guideline construction, which were only summarized in the first part of this Article. This deeper understanding of how support guidelines are constructed was important in giving the Committee the confidence to propose abandoning an approach to guideline construction that Arizona and many other states had followed for years. Once educated, the GRC put considerable effort into educating the various bodies whose support it needed. It made multiple presentations to the AJC, rather than the single presentation typical in prior years. Inevitably, however, the further in the process people were from those who actually did the work, the shallower was their understanding. The body that ultimately made the final decision on the COBS proposal, the legislature, had the shallowest understanding of all. For the legislature the policy questions put by the

choice between COBS and MEG had to be based instead on whose description of the issue they chose to believe.

This is hardly an unusual position for legislators to be in. To the contrary it is common because legislatures must often make decisions about complicated matters in short periods of time. They employ several strategies to cope with this problem. In part they depend on staff who have the expertise and the time to master a matter and advise them. In part they depend on one another, as different legislators become known among their colleagues for their expertise in particular subjects. And in part they delegate matters to other bodies they trust who develop and apply the required expertise. Delegation was precisely the approach the Arizona Legislature had long ago devised for the construction of child support guidelines. They delegated the matter to the Arizona Supreme Court, which in turn both appointed a Committee of people with experience and expertise in the subject, and hired expert consultants to advise them. That method had always worked in the past, but on this occasion legislative leaders communicated their disapproval of COBS after it had received its initial positive recommendation from the AJC, and eventually enacted legislation effectively barring the court from adopting it.¹¹³ The question was why.

One problem was that the complexity of the rationale for COBS did not have a symmetrical impact. Some of the opponents' attacks on COBS were in fact attacks on all child support guidelines, even though cast as if the objectionable feature was unique to COBS. But for people who do not understand how all child support guidelines work, the attack could be effective. A common refrain, for example, was that the COBS guideline sets amounts that have

nothing at all to do with the actual cost of the child; that is not even considered. All that is considered is the income of dad, the income

113. See *supra* note 8. As this Article was in preparation, the legislature was also considering S.B. 1246, which would amend A.R.S. 25-320(D)(3), the clause that currently includes the standard of living the child would have enjoyed, had the marriage not been dissolved, as one of several criteria the court is directed to base the guidelines on. S.B. 1246, 50th Leg., 2d Reg. Sess. (Ariz. 2012). The change would make clear that this criterion should be considered in the context of (a) what is economically feasible given the parents' resources, and (b) the fact that each parent needs to be able to provide for the child when the child is with that parent. *Id.* The first point is certainly correct, and was of course well appreciated by the GRC that proposed COBS. The second point was emphasized by the bill's sponsor, Senator Gray, in her comments at the hearing on the bill in the Senate Public Safety and Human Services Committee, which she chairs. She noted that otherwise support amounts might be so high that a low-income obligor would be unable to provide adequately for the child when the child was with that obligor. This was, of course, one of the two primary problems with the MEG guidelines that COBS sought to correct, and the reason why COBS reduced support amounts for so many low-income obligors. Senator Gray apparently did not know that the MEG guidelines that were adopted because of COBS's defeat required higher support amounts than COBS for these low-income obligors, and thus contributes to precisely the problem that concerns her. The hearing on this bill is available online. *Child Support; Supreme Court; Factors: Hearing on S.B. 1246 Before S. Comm. on Pub. Safety & Human Servs.*, 50th Leg., 2d Reg. Sess. (Ariz. 2012), available at http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=10124.

of mom, and the disparity between the two. If [dad] makes more, he is obligated to give a higher amount to mom¹¹⁴

These statements are of course an accurate description of *all* child support guidelines, including the MEG guideline that COBS would have replaced. The power of the criticism relies on the common misunderstanding that current support guidelines are based on estimates of the cost of children.

COBS opponents could also generate effective sound bites by focusing attention on the small group of cases with large increases in support. The explanation for these increases could not be captured in an equivalent sound bite. A constant complaint of COBS opponents was that its purpose was to equalize the living standards of the two parental households.¹¹⁵ Of course, the Committee had explicitly rejected that purpose and had systematically set support amounts inconsistent with it. Yet the opponents' claim was repeated uncritically, not only by the media,¹¹⁶ but even by lawyers.¹¹⁷ Other, more fundamental, errors also appeared on opponents' websites.¹¹⁸ But most importantly, such statements were

114. Robert Franklin, *Arizona Poised to Radically Increase Child Support Payments*, FATHERS & FAMILIES (July 8, 2010), <http://www.fathersandfamilies.org/?p=8427>. This quotation is from a posting on the website of a national organization, Fathers and Families, that some Arizona opponents sought to use to help generate opposition to COBS. The same post offers another common attack, that the guidelines were somehow prepared "in secret" and that there had been only one public hearing—all demonstrably false claims. *Id.* This same group also made repeated personal attacks on the Committee chair and on the Author of this Article, based on "facts" they made up. For example, this same post site accuses the Author of "personally benefitting" from COBS by "having been the keynote speaker for the Divorce Lawyers of America conference in May of 2010." *Id.* There is no such organization, nor does the writer explain how the author could have "benefitted" from speaking at the meeting, had there been such a meeting. A fuller exposure of the nature of the opponents' comments is available on the archives of postings on either of two local Arizona sites. See *COBS Adverse Outcomes*, ARIZONANS FOR SENSIBLE POLICY, <http://aspfl.wordpress.com/category/policy-concerns/cobs-adverse-outcomes/> (last visited Feb. 2, 2012); *Father's Forum*, ARIZ. FATHER'S RIGHTS, <http://www2.arizonafathersrights.com/default.asp> (last visited Feb. 2, 2012).

115. Franklin, *supra* note 114.

116. Laura Fishman, *Child Outcome Based Support Proposed in Arizona*, PHX. FAM. L. NEWS BLOG (Sept. 23, 2010, 6:31 PM), <http://phoenixfamilylawnews.com/2010/09/child-outcome-based-support-proposed-in-arizona.html> (reporting on a story carried on radio station KPHO). The blog post contains quotations from COBS opponents; they apparently never sought any clarification from the Child Support Committee.

117. Doug Daly of the Daly Law Firm wrote: "COBS . . . would supposedly create the same standard of living in both households . . ." Doug Daly, *Child Outcome Based Support Model: An Unfair Solution to Child Support Disparity in Arizona?*, PRWEB (Jan. 19, 2011), <http://www.prweb.com/releases/2011/ArizonaChildSupport/prweb4978254.htm>. The Baker Law Firm has a post on its website with similar language: "[T]he Child Outcome Based Support (COBS) . . . roughly equaliz[es] the incomes of both households." *Arizona's Proposed Child Outcome Based Support Guidelines*, BAKER LAW FIRM, <http://www.bakerlaw-az.com/Articles/Arizona-s-Proposed-Child-Outcome-Based-Support-Guidelines.shtml> (last visited Feb. 2, 2012).

118. Statements on some attorney websites are disturbing because they indicate misunderstandings about the most basic aspects of child support guidelines. For example, the statement from Doug Daly of the Daly Law Firm, *see* Daly, *supra* note 117, suggests

apparently treated as authoritative by some legislators, some of whom even referenced them on their own websites.¹¹⁹ Ultimately, the sponsor of Senate Bill 1192, the bill that effectively killed COBS, said that COBS' purpose was to give the child of divorced parents the same living standard that the child had when the family was intact. She quite correctly derided this goal as unrealistic, in apparent ignorance of the fact that her view was shared by the GRC and was a basic principle underlying the design of the COBS guideline.¹²⁰

The asymmetrical impact of complexity thus helped COBS opponents to enlist legislative support. The committee chair who sponsored the legislation killing COBS made clear she had made no attempt herself to understand it.¹²¹ Because the legislators were unequipped to evaluate the matter for themselves, all that mattered was who they chose to believe: the COBS opponents, or the Committee the Arizona Supreme Court had appointed to do the work. The answer was the opponents.

that one problem with COBS is that it deprives the judge of discretion in setting support amounts, in apparent ignorance of the fact that Arizona and all other states have for decades complied with federal law requiring severe limitations on judicial discretion—limitations that COBS could not and did not change in any way. Or see the website of attorney Wendy Raquel Hernandez, which states that COBS was adopted by the legislature, and was awaiting action by the supreme court, and erroneously states that the COBS guideline changes the law because it looked only at parental incomes and not at “mitigating factors like the remarriage of either parent, the addition of children to either parent’s family or spousal maintenance/child support payments going to a third party.” Wendy Raquel Hernandez, *Child Outcome-Based Support: Arizona’s New Standard?*, HERNANDEZ FIRM, <http://www.hernandezfirm.com/Articles/Child-Outcome-Based-Support-Arizona-s-New-Standard.shtml> (last visited Feb. 2, 2011).

119. For example, State Senator Nancy Barto’s website provides the reader a link to the statement quoted from Franklin, *supra* note 114, on the Fathers and Families website. Nancy Barto, *Child Support Guideline Hearing*, NANCY BARTO FOR STATE SENATE (Nov. 8, 2010), <http://nancybarto.com/wordpress/?p=665>.

120. The sponsor of the bill was Senator Linda Gray. She made these comments in her March 24, 2011 testimony, as the bill’s sponsor, before the House Judiciary Committee. *Child Support Model; Review; Report: Hearing on S.B. 1192 Before the H. Comm. on the Judiciary*, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (statement of Sen. Linda Gray, Chair, S. Comm. on Pub. Safety & Human Servs.), available at http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=8962 (click the “SB 1192” link on left panel). Senator Gray was chair of the Senate Committee on Public Safety and Human Services. At that Committee’s February 9, 2011 hearing on the bill, she explained that her concern about COBS was based in important part on the fact that it provided for alimony as well as child support. *Child Support Model; Review; Report: Hearing on S.B. 1192 Before S. Comm. on Pub. Safety & Human Servs.*, 50th Leg., 1st Reg. Sess. (Ariz. 2011) [hereinafter *Hearing Before S. Comm.*] (statement of Sen. Linda Gray, Chair, S. Comm. on Pub. Safety & Human Servs.), available at http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=8281 (click the “SB 1192” link on left panel). Of course, it did not.

121. Senator Gray commented on the effort that would be required to understand the issue, at the hearing she chaired on the legislation that killed COBS, by suggesting in obvious jest that a Committee colleague might try, in his spare time, to work through the supporting documentation the court had provided. *See Hearing Before S. Comm.*, *supra* note 120.

The reasons for this credibility gap are necessarily much broader than this particular dispute. There is certainly a recent history of tension between the court system and the legislature. To a certain degree this is common nationwide. If it is worse in Arizona than in some places, one can only speculate as to why. The Arizona Supreme Court is not known for issuing controversial, high-profile decisions. Most of its decisions are unanimous even though it has judges appointed by governors from both parties.¹²² One divide is that while the legislature is partisan, like the legislature in most states, most Arizona judges are selected in a “merit system” that removes the legislature from involvement in judicial appointments. They are appointed by the governor from a list of nominees put forth by a nonpartisan nominating commission, and in recent years this has been a constant source of conflict between the courts and the legislature.¹²³

One way legislators can justify their campaign for more control over judges is the claim that judges must be kept from overstepping their proper role, described as applying “the law” rather than making policy. That refrain may seem particularly inapt in this case, because the only reason that the court is constructing support guidelines is that the legislature told it to. The existing MEG guidelines were in place only because earlier committees appointed by the court recommended them and the court adopted them. The decades over which they were in force nonetheless conferred on them a stature that allowed COBS critics to argue that adopting this large change would constitute “making policy,” without their having to explain why continuing the MEG guideline was not also a policy choice.

The overall result was that on this complex issue, the legislature ultimately deferred to a group of self-interested advocates rather than to the expert bodies to which it had delegated the issue. Whether that illustrates a general problem with legislatures, or a special problem with *this* legislature, is beyond this Author’s competence to know.

2. *The Power of the Entrenched Status Quo*

All human decisionmaking reflects a bias in favor of the status quo.¹²⁴ That bias may be stronger among politicians, at least as to rules that allocate resources among people. Politicians know that people are more likely to notice and react to the government’s removing a benefit they now have, than to the government’s failure to provide a benefit they never had. The push for change came from the GRC, a Committee of professionals who studied, worked with, and

122. See Gary Grado, *Arizona’s High Court Rulings Rarely Break on Partisan Lines*, ARIZ. CAPITOL TIMES, July 15, 2011.

123. For a description of the most recent conflicts between the legislature and the courts over the merit system, see Gary Grado, *Arizona’s Merit Selection of Judges Facing Possible Revamp*, ARIZ. CAPITOL TIMES, Apr. 15, 2011, and Gary Grado, *Early Attacks on Arizona’s Judicial Merit Selection Dwindle to a Few*, ARIZ. CAPITOL TIMES, Feb. 27, 2011. The merit system applies only to Maricopa and Pima Counties; trial judges in the rural counties are not chosen under the merit system.

124. William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 7–11 (1988) (coining the term “status quo bias” and discussing the roots of the bias).

applied the support guidelines, not from the citizen consumers of the guidelines. It is hard to persuade lawmakers to make a large policy change under that circumstance. While one message of Figure 3 is that citizen views are much closer to the COBS guideline than to the MEG guideline, another message is that a change from MEG to COBS is a very big change indeed. Its magnitude is important because MEG was not merely a possible alternative to COBS, but was the status quo, entrenched for decades.

MEG's position as the status quo had another effect as well. It was entrenched in the minds of everyone who dealt with support guidelines in Arizona, and necessarily provided an anchor point for any discussion of the *appropriate* child support amount. The impact of such anchor points on human judgments is well established. The data presented in Figure 3 is from respondents given *no* anchor point. Because we did not want to push their views in any particular direction, we did *not* tell them the support amount that Arizona law provided, and we did *not* suggest any other reference point for them to work from. We just asked them to tell us the child support amount they believed was fair in each case, all things considered. In a companion methodological study,¹²⁵ however, we did provide our respondents with a soft anchor. For each case, respondents were told: "In this situation, some courts would order \$XXX per month as child support, but other courts would order a different amount." The dollar figure they were told "some courts would order" varied among respondent groups. One was given the support amount that was at the 33rd percentile of respondents in an earlier survey without any anchor, and a second was given the amount at the 66th percentile. The other two groups were given a midpoint measure from that same earlier survey, either the mean or the median support amount. Even these soft anchors—"other courts would order a different amount"—had a statistically significant effect on subject responses. Subjects given the 66th percentile as anchor gave the largest child support value, those given the 33rd percentile as anchor gave the smallest child support value, and those given the mean or median gave child support values that were intermediate and similar.

We have no doubt that the judgments of those who reviewed and considered the COBS proposal were similarly affected by anchor points, but for them the anchor was the support amount set by MEG. Indeed, the Committee routinely provided comparisons between the support amounts yielded by the COBS recommendations and the amounts specified by the MEG guideline, because that information was desired by those to whom it was presented. In cases of significant income disparity involving high-earning obligors, the comparison showed large gaps between MEG and COBS. While the Committee viewed these gaps as a measure of the problem with MEG guidelines, others may have seen them as a measure of the Committee's audacity in proposing such large changes from the status quo. Audacious proposals require especially persuasive justification. Given the complexity of the actual explanation, the Committee may not have been able to meet this burden of persuasion with many of the people it had to convince.

125. For an early version of this work, see *Converting Sentiments to Dollars*, *supra* note 95. A fuller version is currently in preparation.

CONCLUSION

The problems with the MEG guideline are real, and COBS' political failure does not change the need to address them, even if the solution is different than COBS. It is therefore important to understand why COBS failed. It would be wrong to identify one cause. A myriad of factors combined to produce its political failure.

One must first consider how the current support guidelines came about. The federal mandate included no corresponding federal funding for guideline development. Each state was on its own. They welcomed the help of consultants, and one particular consultant promoting one particular method quickly dominated that market. Its success occurred despite flaws that concerned scholars, in the data on which it relied, as well as in its basic conception. One reason for its success was that states were offered no competing solution to the problem federal law required them to solve.¹²⁶ Once guidelines were thus developed, focus shifted to their benefits in general, rather than on the validity of this particular implementation of them. Before support guidelines, support amounts were just one of several critical issues negotiated between parties, and it was not uncommon for them to make tradeoffs between the child support amount and other aspects of the divorce settlement, including custody arrangements. The implementation of uniform guidelines that established the support amount in every case helped eliminate that dynamic and removed one potential complication in reaching a judgment on all divorce issues. Advocates and decision-makers appreciated the predictability of the existing child support system (which routinely gave rise to stipulated settlements) as well as a core value of consistent application to all litigants. Over time, the guidelines gained institutional acceptance, overshadowing any concern that anyone might have with the particular model.

The existing model thus had the seal of approval from Arizona as well as the historical credibility conferred by two decades of use. The absence of any objection to it in the decades following its implementation testified to its acceptance. Even those initially surprised or concerned by the numbers in the MEG table will rarely have the time for close analysis and evaluation of how they were chosen. Moreover, the fact that the guideline always produces an exact support amount, down to the penny, gives an impression of scientific certainty. Users see this precise number, not all the questionable assumptions that go into producing it. Repeated reliance on the numbers produced by the existing guidelines creates a powerful anchor effect in the minds of users, who come to assume they are the correct answer, or at least something quite close to it. This anchor effect is not limited to lay users, but applies as well to judicial officers and attorneys. It means that the larger any proposed revision, the more skepticism it will encounter.

126. The POOI system, adopted by a handful of states, was in principle an alternative. The problem, however, was that a system that took no account at all of the custodial parent's income conflicts with most people's intuitions of a fair way to proceed. See Ellman et al., *Intuitive Lawmaking*, *supra* note 80. This flaw in a POOI system was easy for lawmakers to see, in contrast to the serious but relatively inaccessible flaws in the MEG system.

The anchoring effect of an entrenched status quo also makes objections to the existing system less likely, even by those now paying too much or receiving too little. That also helps explain why the public does not voice disapproval of the guidelines despite the fact that, as we know from scientific studies, they would design them quite differently. But even if the public's silence is not misunderstood as approval, it is still silence, and lawmakers may be disinclined to stir up a battle where none is present. It may be a losing battle because those who stand to lose from any change are more likely to voice their objections, than are those who stand to gain from change to voice their support.

The Committee charged with revising the support guidelines devoted many hundreds of hours to mastering the problem and devising a solution; legislators would have very little time to understand what they did. The complexity of the policy question proved particularly problematic in the political climate that prevailed at the time. The anti-tax Tea Party movement, perhaps now in retreat,¹²⁷ was at its strength during the time COBS was debated, and has many sympathizers among the Republican legislators who commanded a lopsided legislative majority. There may be a connection in the minds of some between higher taxes and higher child support schedules, especially if low-income citizens are their common beneficiary. A highly partisan environment also encourages suspicion of any proposal that does not come from one's political allies. In this climate, a proposal whose virtues require study to understand will be particularly vulnerable to sound-bite attacks by its opponents. Opponents attacked COBS with phrases like "income redistribution," "equalization of income," and "hidden alimony." Legislators may have felt they knew the COBS proposal came from people who were not their political allies, while its opponents were. In this climate, that alone may have been sufficient to defeat it.

The GRC's membership may have contributed to this political problem because it did not include interest groups aligned with the legislative majority. The apparent criteria for appointment were expertise and knowledge. One reason these criteria made particular sense for *this* GRC was the unusual task it was assigned: to examine how new guidelines might address previously identified shortcomings in the existing support model. If the Committee was going to have the capacity to make its own judgments on these matters, rather than merely accept a new consultant's recommendations in a process like that which produced MEG, then it needed members who possessed the relevant skills and knowledge. But once the Committee developed its proposal, the absence of interest group representatives provided a basis for some to oppose it. The opponents' frequent claim that the Committee had operated in secrecy was completely false, but still provided them with an organizational rallying cry and a way to both divert attention from the merits and legitimize their opposition.

These observations do not necessarily mean it would have been better if the GRC had included representatives of competing interest groups. There is the risk that those chosen to represent a particular view will focus on advocating that view rather than on finding solutions to identified problems. A committee with

127. Kate Zernike, *Support for Tea Party Falls in Strongholds, Polls Show*, N.Y. TIMES, Nov. 30, 2011, at A24.

several such people may become dysfunctional. That experience is not unknown to those who have served on committees asked to work on other issues in family law. A committee composed of knowledgeable people who do not see themselves as representatives of some view point can still benefit from communications with those who are. It is obviously important that any committee be exposed to a diversity of views and take them into account. But that does not mean that every such view must have an advocate on the committee.

Finally, one must also consider whether COBS over-reached. The principal concern COBS addressed was MEG's treatment of cases with a great disparity in the parents' incomes. COBS solved this problem. Yet it did so through a new and very different method, and it revised guideline numbers throughout the full range of cases. The global nature of the changes not only made opposition more likely, but also made it more effective. Opponents could stoke fears that the GRC was seeking to launch the state on a worrisome experiment, a path where no one had ventured before. A plan that focused exclusively on the particularly problematic cases might have had more success. Such an approach is in fact available: the child support model recommended by the American Law Institute.¹²⁸ It takes the traditional MEG guideline as its starting point, but then adds a "supplement" to the MEG amount for cases in which parental income disparity exceeds a threshold. One can of course adjust the amount of the supplement, and the range of cases to which it would apply. Had the GRC proposed such a system, the resulting discussion might have focused on those details in the supplement design, rather than on the larger issues raised by COBS opponents. Even the opponents would have been forced to confront the problem created by the income-disparity cases. A debate over alternative solutions to the problem of disparate-income cases would almost surely have led to a better result than did the COBS debate on whether there should be any reform at all.

In retrospect, the Committee might have done better to have taken such an approach. Whether that approach could be offered now is a different question. Those who led the COBS reform effort have been tainted as well as exhausted. Having spent hundreds of hours working hard on a road to nowhere, they will be reluctant to try again, and in any event are unlikely to be asked. The court may also be reluctant to reenter this fray any time soon. Yet, there is no doubt that the COBS guideline would have fixed a problem that is still there, and the arguments for reform remain compelling. Especially if there is a change in the local political climate, a new set of reformers might succeed with such a retooled approach. But perhaps the most troubling consequence of the COBS experience is that it may make it impossible to find any reformers willing to try.

128. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 2 (2002).

**APPENDIX A:
FURTHER DETAILS ON HOW THE COMMITTEE
CONSTRUCTED THE COBS GUIDELINE**

To establish support amounts, the Committee initially considered a series of *Childshare* matrices. Figure A-1 reproduces one such matrix, showing the *Childshare* analysis using child support amounts taken from the 2008 MEG guideline, for a case of one child and 100 parenting days for the NCP. It provides, in a compact form, the same outcome measures for 36 cases that Table 1 provided for two cases. These are the 36 cases that arise from the 36 possible combinations of gross incomes of \$1,000, \$2,000, \$4,000, \$8,000, \$12,000, or \$20,000 a month for each parent. Note the cases in which the parents have the same incomes are arrayed in an “equal-earner” diagonal from Cell 1 in the upper left corner to Cell 36 in the lower right. Figure A-2 is the equivalent matrix for the COBS schedule ultimately recommended by the Committee. One can thus compare how the outcomes, as well as the support amounts, were changed by COBS.

Of course, when the Committee began its work, there was no COBS schedule to analyze. But the Committee could use *Childshare* to examine outcomes under the guidelines of several other states as well as the Arizona MEG,¹²⁹ which gave the Committee additional context for setting amounts under COBS. The Committee could examine the impact of support amounts it considered by entering them manually in *Childshare*, which would display the outcomes. Different support schedules could thus be compared, and these comparisons eventually formed the basis of the COBS guideline. At nearly every meeting of the GRC, the spreadsheet committee reported its ongoing efforts. Its reports often included *Childshare* matrices that showed the outcomes, for a given set of cases, under both the MEG guideline and the amounts being considered for the alternative COBS guideline.

129. Most importantly, *Childshare* could compute support amounts and outcomes for two states that do not use a MEG income shares guideline: Wisconsin and Massachusetts. Wisconsin is a POOI state which calculates support amounts as a percentage of the obligor’s income alone, and Massachusetts is an income shares state with support amounts that are considerably more generous to the custodial parent than is the typical MEG guideline. See GRC FINAL REPORT, *supra* note 6, at 36–37.

Figure A-1

Example of Childshare output analyzing outcomes under the Arizona MEG guidelines updated in 2008, for cases of 100 parenting days and parental gross incomes of \$1,000, \$2,000, \$4,000, \$8,000, \$12,000, and \$20,000.

Table with columns for Gross Income (\$1,000 to \$20,000) and rows for various financial metrics (NCP Gross, After Tax, SOL percentages, Support Payment, etc.). Includes sub-headers for Custodial Household Income and After Tax*.

The spreadsheet committee did its initial work over nearly 20 meetings of 4 to 6 hours each between during 2008 and 2009.¹³⁰ Part way through this process the Committee concluded that the COBS guideline would also have to include its own “parenting time adjustment”—an adjustment in the support amount to reflect the allocation of parenting time between the parents. A parenting time adjustment embedded in the existing MEG guideline could not be easily ported to COBS, and in any event there was dissatisfaction with it. The MEG parenting time adjustment does not distinguish between “variable costs” and “duplicated costs.” When the NCP pays for variable costs, such as meals, the CP realizes a corresponding reduction in expenses. By contrast, duplicated costs are items, such as the expense of maintaining an extra bedroom in one’s house, which duplicate an expense incurred by the CP. While the NCP has a real expense, there is no corresponding reduction in the CP’s expenses. The problem with the MEG guideline is that it reduces the support payment dollar for dollar for duplicated costs as well as variable costs, even though the CP realizes no financial benefit from the *duplicated* costs incurred by the NCP.¹³¹

The Committee believed that a parenting time adjustment should distinguish duplicated and viable costs, and it devised a new parenting adjustment formula that followed this principle.¹³² Under the COBS parenting time adjustment, the NCP’s variable costs reduced his support payment dollar for dollar, but his duplicated costs were treated as an additional expense of the parents’ separation that they should share in proportion to their incomes. The outcome measures were themselves also revised so that the *Childshare*’s outcome outputs adjusted automatically to reflect the parenting time allocation. For example, an NCP who has the child one-third of the time requires a larger income to realize the median Arizona living standard than does a childless single person,

130. The Author’s diary through March 1, 2009 shows spreadsheet committee meetings on September 6, September 22, October 4, October 23, November 17, December 1, and December 12, 2008, and January 8, January 14, January 28, and February 9, 2009. Records after that indicate six additional meetings by the spring of 2009.

131. Variable costs are incurred at any level of parenting time, and each parent’s share is proportional to the parenting time allocation. Duplicated costs are more likely to be incurred when the NCP has a significant share of the parenting time. The MEG guideline increases the parenting time adjustment disproportionately as the NCP’s share of parenting time increases beyond 129 days a year, apparently to reflect the additional duplicated costs. See 2011 Child Support Guidelines, *supra* note 2, at 12 tbl.A (providing the proportion of the basic child support amount by which the support payment is reduced). That proportion jumps to .253 at 130 days, as compared, for example, to .161 for the most common allocation of between 88 and 115 days. *Id.* This table is carried over unchanged from the 2005 guidelines.

132. A detailed explanation of how the new parenting adjustment worked is provided in the Committee’s report. GRC FINAL REPORT, *supra* note 6, at 32–35. In sum, the Committee assumed the NCP incurred no duplicated costs when he had the child less than 20% of the time, and the full set of duplicated costs once he had the child 40% of the time, with the percentage increasing linearly as the NCP went from 20% to 40% time. Relying on published studies and the guidelines of some other states, the Committee also concluded that the estimates of total costs were equally divided between variable and duplicated. Cost estimates themselves increased with parental income.

and the CP requires less income than does a single parent who has the child full-time.

Several principles further bounded the Committee's choice of support amounts. First, the Committee was reluctant to take very much money from an obligor whose income was already below a minimally adequate level. Arizona's MEG guideline, like the guidelines of many other states, had long included a "self-support reserve" provision protecting obligors from orders requiring payments that would bring them below the federal poverty threshold. COBS continued the zero-payment policy for obligors below the federal poverty threshold, but also made more modest demands than MEG on obligors above that threshold but below a minimally adequate income.¹³³

For *equal* earners, other than the poorest parents exemplified here in Cell 1, the Committee sought to equalize outcomes. Childless equal earners living separately and alone would have equal living standards. The Committee believed

133. The application of that principle can be seen by examining the top row of Figure A-2, which shows the support payments for the lowest-income obligor (\$1,000 gross income monthly) across six different custodial household incomes. COBS requires no payment at all from this low-income NCP, except for the Cell 1 case in which the custodial household has the same low income. The Earned Income Tax Credit ("EITC") gives the lowest-income custodial parents net incomes higher than their gross, making them better off than the low-income NCPs who are not eligible for the credit. That might lead one to question whether the low-income NCP should be required to make any payment here as well. The Committee decided that the support schedule should not be used to undercut the federal policy that underlies the EITC. The corresponding MEG amounts, in the top row of Figure A-1, are higher than COBS in Cells 1, 2, and 3. Once the custodial household income reaches \$8,000, in Cell 4, the MEG payment becomes negative: The CP earning \$8,000 monthly pays support to the NCP earning \$1,000. A negative payment can arise when the parenting time credit—the amount by which the NCP's payment is reduced to reflect his share of the parenting time—is larger than his support obligation. While the MEG guidelines produce such negative amounts in some cases, the Committee's collective experience was that Arizona courts almost never required the CP to make payments to the NCP, but routinely treated negative support amounts as zero payments. The child support calculator for the 2005 guidelines, provided to the public on the Arizona Supreme Court's website, changed all negative support amounts to zero even though the guidelines did not themselves provide for this result. That calculator is available online. *2005 Child Support Calculator*, ARIZ. JUDICIAL BRANCH, <http://www.azcourts.gov/familylaw/2005ChildSupportCalculator.aspx> (last visited Feb. 2, 2012). The widely used child support calculator designed by Judge Norman Davis, who is now Presiding Judge of the Maricopa County Superior Court, accurately reported negative support amounts. In that case the COBS guideline for Cells 4, 5, and 6 was consistent with the existing practice even though not with the written guideline. The final COBS guideline did in fact require payments from a high-income CP to a low-income NCP, but only when the NCP had the child for at least 121 days a year—about one-third of the time. The Committee believed the child's interest required such assistance to the low-income household in which the child lived so much of the time. Where the child lived with the NCP for less than one-third of the time, as in the 100-parenting-day cases considered in these figures, the COBS guideline officially transformed negative amounts into a zero award. For the final version of the COBS guideline, see ARIZONA CHILD SUPPORT GUIDELINES: CHILD OUTCOME BASED SUPPORT MODEL (2011), available at <http://www.azcourts.gov/Portals/74/CSGRC/FinalguidelinesforAJC102110.pdf>.

that the allocation of custodial time between equal earners with children should not give either a financial advantage over the other. *Childshare* gave the user a simple measure of the households' relative living standards: the ratio of the middle-income living standard in the custodial household to the living standard in the non-custodial household. One can see that the MEG guidelines produced ratios of about 1.25 for the two lowest equal-earner incomes in Figure A-1 (Cells 1 and 8). In general, the Committee tried to keep this ratio between .9 and 1.1 for cases along the equal-earner diagonal, although the final COBS guideline did not quite achieve this result. Of course, most parents are *not* equal earners. While the equal earners were an easy place to start, the guidelines' treatment of parents who are not equal earners is therefore critical.

One approach the Committee employed to set amounts for parents who were not equal earners was to examine "cell pairs"—pairs of cases, like the pair presented in Table 1, that share the same total parental income but differ in each parent's contribution to that total. Every cell in Figures A-1 and A-2 that is not on the equal-earner diagonal is a member of such a pair. In these cases, the Committee's operating assumption was that the household of the higher-earning parent should emerge from the separation with a better living standard than the household of the lower-earning parent. That also meant, of course, that the child who lived with the higher earner would enjoy a higher living standard than the child who lived with the lower earner. The question was how much higher.

Several principles guided the Committee's deliberations in these cases. First, there was broad agreement on the Committee that the highest priority was to ensure that the living standard of the custodial household was at or above the minimally adequate benchmark, so long as one could do so and still leave the higher-earning parent with a living standard advantage. In some cases this principle required substantially larger support payments than under MEG. Cell 13 is an example. On the other side, there was broad agreement that in no case should the support amount exceed 50% of the obligor's net income. This was a more important constraint than might at first seem because the guidelines went to four (or more) children. The 50% rate was applied to some cases of four children. A rational overall pattern required a lower effective rate cap for cases with fewer children. That is one reason why the highest support rate for any case in Figure A-2, which treats cases with one child, is .29, in Cell 19.

While all Committee members shared the principles just described, they differed on other matters, such as the weight given to reducing the extent of the child's fall from the intact family living standard. Support amounts in the initial rounds thus often required compromise among the Committee members. Yet the requirement that the guidelines change systematically and sensibly with changes in incomes and family size required many revisions from the Committee's initial figures in any event. Such coherence in the overall COBS schedule was achieved only with considerable back and forth between the Committee and Professor Barnow, as the report of the Economic Study Workgroup had anticipated. The Committee would produce support amounts for 36 income combinations, and a particular number of children, as illustrated in Figure A-2. Professor Barnow would use these as anchor points from which to interpolate the full set of numbers in a complete support table. That process would reveal anomalies and

inconsistencies in the anchor points, which the Committee then revised. The final tables were produced only after many such iterations.

The 36 specific examples in Figures A-1 and A-2 provide a detailed but narrow window into both the Committee's ultimate product, and the way it compares to the MEG alternative. Most noticeable are the very large increases in support amounts for the cases with the highest-income obligors and the lowest-income CPs. While the dollar changes in the support amounts are very large, the outcome measures also demonstrate that the high-income obligor retains a considerable living standard advantage after these large payments. For example, Cell 31 of Figure A-2 shows that under COBS the obligor earning \$20,000 a month would pay \$3,645 to the CP earning \$1,000, an enormous increase from the \$1,385 required under MEG (see Figure 1). Yet even after this large COBS payment, the NCP's income puts him at 447% of the Arizona median living standard, while the custodial household is at 165%—a large drop in living standard for the child from the intact family level of 369%. At the same time, one can also see that through much of the equal-earner diagonal, and for all the cases to the right of it, COBS yields lower support amounts than called for under MEG.

**APPENDIX B:
FURTHER DETAILS ON *CHILDSHARE* CALCULATION**

As previously noted, the income required to live at either benchmark living standard, middle class or minimally adequate, varies with household size. *Childshare* therefore adjusts the income required to achieve a benchmark living standard to reflect the parenting allocation. In the Table 1 examples, the required income reflects the fact that the NCP has one child living with him for 100 days a year, and the CP has one child for 265 days.¹³⁴ *Childshare* must also take account of the fact that Arizona's guidelines have always based support amounts on gross rather than net income, a feature retained in COBS. It was the Committee's belief, however, that in evaluating or setting support amounts, one would make more accurate comparisons between household living standards if the comparisons were based on net incomes, so *Childshare* converts gross to net incomes for this purpose.¹³⁵

134. That adjustment is made by first identifying the marginal cost of the children's presence in the household by subtracting the benchmark figure for a single person from the figure for the same benchmark for a household with the custodial parent's composition. One-half of this dollar marginal cost figure is assumed to be variable costs that rise and fall proportionately with the children's presence in the household, and the benchmark figure for the custodial parent is therefore reduced by the proportion of these variable costs equal to the proportion of parenting days that the children are with the non-custodial parent. The other half of these marginal costs are assumed to be duplicated costs—expenses that the non-custodial parent incurs by virtue of the children's visitation, but which do not reduce the expenses of the custodial household. Duplicated costs as well as variable costs are therefore added to the benchmark figure for the non-custodial parent, again in proportion to parenting days.

135. To calculate the equivalent after-tax income for any given gross income, *Childshare* assumes that the non-custodial parent is taxed as a single person and the custodial parent is taxed as head of household with exemptions equal to the parent plus the number of children. The average federal income tax actually paid by single persons and by heads of households across a set of gross incomes was obtained from the IRS. To this federal tax liability, an additional 20% was added, as an estimate of the state income tax for any particular income. (For the purpose of this calculation, it was assumed that anyone who receives an EITC payment from the federal government has a zero state income tax liability.) Finally, an estimate of FICA and Medicare tax paid was added by applying the applicable rates to the income, assuming that all the income was earned income that is subject to these levies.

Because the traditional MEG guideline is based on estimates of marginal child expenditures in intact families of any given *net* income, the consultant constructing a gross income guideline like Arizona's must also do a conversion, to associate the estimated marginal child expenditure with the appropriate *gross* income. CTR. POL'Y RESEARCH, BASIS OF AN UPDATED CHILD SUPPORT SCHEDULE FOR ARIZONA 40–41 (2009), *available at* <http://www.supreme.state.az.us/csgrc/Documents/2009-Basis.pdf>. The method CPR uses assumes that all parental income is earned income, and that both parents are taxed at the withholding table rate applicable to a single person. *Id.* at 40. This set of assumptions yields higher tax rates and lower support amounts than the plausible alternative assumptions that might have been used (e.g., that the custodial parent is taxed at the head of household rate, that one of the parents at least has remarried, or that some of the income is taxed at the most

Childshare assumes neither parent's household includes anyone other than the children who are the subject of the child support order in question. Should one adjust a support amount based on this assumption for cases in which it is not correct? The answer depends on whether one believes the resources contributed or consumed by the additional people *should* be taken into account—a matter of child support policy. For example, the traditional MEG guidelines *did* adjust support orders to take account of children who lived with either parent who were *not* the children who were the subject of the support order, but only if the parent had a legal duty of support for these additional children also.¹³⁶ So, for example, a support order for children of one's second unsuccessful marriage is adjusted to reflect the cost of supporting children of the first one, but no adjustment would be made to reflect that same parent's contribution to the support of the children of his second spouse—stepchildren—who lived with him.¹³⁷ COBS retained both these rules. It also *added* an adjustment that took account of contributions to household expenses made by the custodial parent's new spouse.¹³⁸ In these two ways support amounts based on the assumption that there are no additional people are adjusted to reflect the cases in which there are. Both the MEG and COBS guidelines also take account of spousal maintenance paid or received.¹³⁹

favorable rates that apply to capital gain income). By relying on average taxes actually paid, *Childshare* avoids the need to make any such assumptions.

136. See 2011 Child Support Guidelines, *supra* note 2, ¶ 6.

137. These adjustments are made by reducing the income of either parent, when calculating the support amount, by an amount determined by a formula provided in the guidelines that estimates the additional expenditures a parent makes on account of the children living with him.

138. See *supra* note 83.

139. The MEG rule, retained by COBS, adds spousal support received to the recipient's income, and subtracts it from the obligor's income, for the purpose of the support calculation.