Payments to Not Parent? Noncustodial Parents as the Recipients of Child Support

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INTRODUCTION

Like many marriages, Jon and Sarah Cryer's ended in divorce. Jon and Sarah are both actors, but their careers are remarkably divergent. Jon, a star of the sitcom *Two and a Half Men*, makes hundreds of thousands of dollars a month; Sarah has not worked since 2005. For the first five years after their divorce in 2004, Jon and Sarah's family arrangement was rather traditional—the higher-income, noncustodial parent paid monthly support to the lower-income, custodial parent. Sarah had custody of their son approximately 65 percent of the time, and Jon had custody the remainder. Jon paid $10,000 each month in child support. After a 2009 dependency action brought by the Los Angeles County Department of Children and Family Services,[1] Jon was awarded nearly complete custody—approximately 96 percent of the time with their son. Jon then sought to reduce his monthly child-support obligation to zero.[2]

Mara Rubin and Anthony Della Salla were never married, but, over the course of their nine-year relationship, they had one son. After separating, they jointly provided for their son's custody and support informally. Eventually, however, they sought and received a judicial determination of their son's custody and support. Anthony was awarded primary physical custody, receiving 56 percent of the overnights, and the two parents were awarded parallel legal custody. Mara, unemployed, petitioned the court for an order requiring Anthony, a millionaire, to pay her child support pursuant to the substantial amount of parenting

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1 The dependency action was brought after another of Sarah's sons was injured at her home. Prior to that, Jon had sought full custody, alleging that Sarah "improperly cared for . . . and left unattended" their son; while his request was denied, Sarah was warned not to leave either of her children unattended in the future. *In re Marriage of Cryer*, 131 Cal Rptr 3d 424, 428 (Cal App 2011).

2 Id at 428–30.

time that she had accrued, arguing that any other result would be unjust.[3]

The results in these cases might seem surprising. Even after Sarah Cryer's custody of her son was reduced to 4 percent, she continued to receive child support to almost the same extent: $8,000 each month.[4] The court determined that payment from Jon to Sarah of only the statutorily mandated $1,141 per month would be "unjust and inappropriate."[5] Mara Rubin was less fortunate. In addressing her petition, the New York Appellate Division confirmed that despite substantial parenting time, legal custody, and a vast income disparity, a custodial[6] parent could never be ordered to pay child support to a noncustodial parent.[7]

These particular results represent extremes. More jurisdictions would allow Mara to recover than Sarah. Even that fact, however, pushes against the intuition that child support should be an obligation of a parent who does not spend time (and thus money) raising his or her children.[8] And indeed, in every state, a noncustodial Anthony Della Salla or Jon Cryer could be ordered to pay child support.

This Comment considers three related issues: whether a custodial parent can be ordered to pay child support, when such an arrangement might make sense, and how a legal rule should be crafted to produce a result that allows for noncustodial parents to receive child support. Despite a contrary popular understanding, state courts have allowed for this arrangement for decades,[9] yet scholarship has assumed that the noncustodial parent always pays support.[10] The issue whether noncustodial parents can receive child-support payments is not particularly

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3 *Rubin v Della Salla*, 107 AD3d 60, 63–64 (NY App 2013).

4 Throughout this Comment, all child-support amounts mentioned are paid on a monthly basis.

5 *Cryer*, 131 Cal Rptr 3d at 429.

6 For the purposes of this Comment, the custodial parent is the parent with whom the child spends the majority of his or her time. While different states use different labels, this colloquial understanding is preferable for simplicity.

7 *Rubin*, 107 AD3d at 67.

8 See J. Thomas Oldham, *The Appropriate Child Support Award when the Noncustodial Parent Earns Less than the Custodial Parent*, 31 Houston L Rev 585, 596–97 (1994) (discussing the problem of lower-income, noncustodial parents without acknowledging that they might be allowed to receive child support).

9 See Part II.B.

10 See, for example, Oldham, 31 Houston L Rev at 587 (cited in note 8) ("These child support calculation techniques apparently reflect an assumption that noncustodial parents should contribute to the support of their child as long as the noncustodial parent has some income.").

aberrational—three state appellate courts considered this issue in 2013.[11] This Comment argues that the prevailing understanding—that there are circumstances that warrant this arrangement—is correct, but states must be careful to avoid creating rules that strengthen the incentives for parents to engage in strategic bargaining that can result in net transfers of wealth away from the child.

The following parts examine the relationship between child support and physical custody throughout the United States. Part I examines the background, theory, and aims of child support in the United States. Part II examines how support is determined, both in typical cases—those in which a custodial parent seeks support from a noncustodial parent—and in cases in which noncustodial parents seek support. It then considers the informal bargaining that parents normally use to set child support in practice. Part III evaluates the possible rules in terms of how each advances or subverts the aims of child support in general and how each affects the bargaining incentives and strategies of parents seeking to reach agreements on support. Part III then proposes that courts adopt a rule that both advances the equitable aims that would be served by allowing payment of child support by the custodial parent in limited cases, while frustrating the ease with which a subset of parents might exploit legal rules to extract payments through strategic bargaining. This proposed rule institutes a cost-incurring standard that the noncustodial parent must satisfy in order to be awarded child support as an alternative to current methods such as judicial discretion, weighting a specific number of overnights, or requiring substantially equal parenting time.

I. THE PURPOSES OF CHILD SUPPORT AND ITS RELATIONSHIP TO CUSTODY

This Part examines child-support law in the United States. Section A covers the modern development of child support, namely the mandating of formal, presumptive child-support guidelines by the federal government in the 1970s and 1980s. Section B then examines the theoretical underpinnings of child-support law, which help explain the manner in which child-support guidelines are written, and what factors lead courts to depart from those guidelines. This Part highlights the connection

[11] See text accompanying notes 95–96.

that custody has had, and still has, with the purposes of child support.

A. The History of Child Support in the United States

Child support historically has been defined in one of two ways. Some states and commentators have defined it as "the entire payment obligation of the noncustodial parent . . . includ[ing] current support payments, health care coverage, child care contribution and periodic payments on arrearages."[12] Broader definitions include "money legally owed by one parent to the other for the expenses incurred for children of the marriage" or "[a] parent's legal obligation to contribute to the economic maintenance and education of a child until the age of majority."[13] These definitions are not mutually exclusive, and they focus on two distinct attributes of child support. First, it is a transfer from one parent to another or from both parents to some third party. Second, the support obligation is for the benefit of the child, not the other parent or the third party.

Modern child-support law reflects two central concerns. First, states have moved to formalize and regularize child-support awards, replacing discretionary regimes.[14] Second, the law has sought to ensure that parents financially support their children in the first instance.[15] To these ends, the federal government

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[12] Conn Child Support Guidelines § 46b-215a-1(6). See also Robert Scott Merlin, *Recent Development: The New Line 11 Visitation Credit: The Non-custodial Parent Wins while the Child Loses*, 55 Wash U J Urban & Contemp L 317, 320 (1999) (defining "child support" as "court mandated, periodic transfers of money from a non-custodial parent to a custodial parent for the benefit of a minor child from a dissolved marriage").

[13] *Black's Law Dictionary* 274 (West 9th ed 2009). See also Idaho Code § 32-1602(4) (defining "child support" as "the obligation, pursuant to a support order, to provide for the needs of a child, including food, clothing, shelter, education, day care and health care").

[14] See Sylvia Law, *Families and Federalism*, 4 Wash U J L & Pol 174, 187–90 (2000). This has partly been the product of congressional efforts. See Family Support Act of 1988 (FSA), Pub L No 100-485, 102 Stat 2343, codified in various sections of Title 42.

[15] In the nineteenth century, states split over whether parents could be obligated to provide support or whether public support should be the default rule. Compare *Van Valkinburgh v Watson*, 13 Johns 480, 480 (NY 1816) ("[I]f the parent neglect[s] that duty [to support his child], any other person who supplies such necessaries . . . conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay."), with *Angel v McLellan*, 16 Mass 28, 31 (1819) (expressing the belief that a person who supports a child outside the care of the child's father has no right to be indemnified by the father). The legal duty theory prevailed. See Donna Schuele, *Origins and Development of the Law of Parental Child Support*, 27 J Fam L 807, 815 (1989) ("[T]he judicial trend throughout the nineteenth century moved towards declaring that the duty of a parent to support his children was legally enforceable.").

began mandating the use of regularized child-support guidelines during the 1970s and 1980s. First, the Social Services Amendments of 1974[16] (SSA) provide that states must issue child-support plans that require the establishment of paternity for any child for whom payment was made under 42 USC § 602, while states must secure support from the parent.[17] Second, the Child Support Enforcement Amendments of 1984[18] (CSEA) require states to create guidelines available to judges in all cases, though it notes that these need not be binding.[19] Finally, § 103 of the Family Support Act of 1988[20] (FSA) requires that states ensure that their guidelines are presumptive and that there must be a "finding on the record that the application of the guidelines would be unjust or inappropriate" to justify a deviation.[21] The FSA further requires that states review their guidelines every four years.[22] All fifty states and the District of Columbia now have presumptive child-support guidelines applicable to every child-support order.[23]

It is important to understand the social and legal context that existed when child support was being formalized through the guidelines. As one court has noted, when the guidelines were written it was presumed in almost all cases that the noncustodial parent would have more income than the custodial parent.[24] Two social factors contributed to this background presumption, but both have become less powerful over time. First, even as the maternal preference formally fell away in the 1970s, evidence from the 1980s and early 1990s shows that judges still exhibited a preference, conscious or not, for mothers when custody was contested.[25] While the mother remains vastly more likely to be

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16 Pub L No 93-647, 88 Stat 2337, codified in various sections of Title 42.

17 SSA § 454, 88 Stat at 2354, codified at 42 USC § 654.

18 Pub L No 98-378, 98 Stat 1305, codified in various sections of Title 42.

19 CSEA § 467(a)–(b), 98 Stat at 1321–22, codified as amended at 42 USC § 667.

20 Pub L No 100-485, 102 Stat 2343, codified in various sections of Title 42.

21 FSA § 103, 102 Stat at 2346, codified at 42 USC § 667(b)(2).

22 FSA § 103, 102 Stat at 2346, codified at 42 USC § 667(a).

23 For various states' child-support guidelines, see *Child Support Guideline Models by State* (National Conference of State Legislatures Apr 2013), online at http://www.ncsl.org/research/human-services/guideline-models-by-state.aspx (visited Nov 3, 2014).

24 See *Dudgeon v Dudgeon*, 318 SW3d 106, 111 (Ky App 2010).

25 See Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U Pa L Rev 921, 967–69 & nn 226–28 (2005) (citing studies from Massachusetts and Georgia that showed a maternal preference among judges even after formal abolition, a New York judge who referred to fathers seeking postdivorce involvement as

the sole custodial parent today, it has become more prevalent for the father to be the sole custodian,[26] and when fathers contest custody in court, they frequently succeed in obtaining some residential rights.[27] Additionally, the law has moved toward a preference for joint custody as the legal norm.[28]

The second factor that has weakened this presumption relates to the economic situation of women. First, while it remains persistent, the pay gap between men and women has abated over time. In 1975, just after the first federal child-support mandate was passed, women made about sixty cents on the dollar compared to men.[29] Today, women on average make eighty-four cents on the dollar compared to men, and the gap is even smaller for younger women.[30] Further, mothers have increasingly remained in the workforce over the last forty years.[31] With women, including mothers, working in greater numbers and making more money, it is less presumptively certain that they will be the lower-income parent, even when they are the custodial parent.

A final potential wrinkle derives from the changing nature of American families. For example, gay and lesbian parents are likely to have different economic baselines than heterosexual parents.[32] Additionally, more children are born out of wedlock today than in the 1980s, and more children have stepparents

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"pathological," and a Vermont case in which an unemployed mother who had committed child abuse was granted custody because the father was unemployed).

[26] See Oldham, 31 Houston L Rev at 597–98 (cited in note 8) (noting that the fraction of one-parent households led by a father rose from 10 percent to 14 percent between 1980 and 1990, and, among divorced households, they rose from 11 percent to 18 percent).

[27] See Maldonado, 153 U Pa L Rev at 973–74 (cited in note 25) (noting that, in cases in which courts issue a decision on the custodial arrangement, fathers are awarded either sole or shared custodial rights in somewhere between "fifty to sixty-five percent of cases," including those in which "the mother was the child's primary caretaker").

[28] See Mary Ann Mason, *The Roller Coaster of Child Custody Law over the Last Half Century*, 24 J Am Acad Matrim L 451, 453 (2012) (noting that almost half of jurisdictions currently have a formal rule favoring joint custody). Whether the movement toward joint custody is a positive change remains a hotly debated topic. See id at 456–58.

[29] See Francine D. Blau and Lawrence M. Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can?*, 21 Acad Mgmt Persp 7, 8 (Feb 2007).

[30] See Pew Research, *On Pay Gap, Millennial Women Near Parity—For Now* (Dec 11, 2013), online at http://www.pewsocialtrends.com/2013/12/11/on-pay-gap-millennial-women-near-parity-for-now (visited Nov 3, 2014) (finding that, on average, women aged twenty-five to thirty-four earn ninety-three cents on the dollar compared to men).

[31] See Mason, 24 J Am Acad Matrim L at 455 (cited in note 28).

[32] See Dan A. Black, Seth G. Sanders, and Lowell J. Taylor, *The Economics of Lesbian and Gay Families*, 21 J Econ Persp 53, 61–67 (2007).

who are heavily involved in their lives.[33] These types of families are not best served by legal institutions that are designed around the notion that divorce will normally feature a lower-income mother and a higher-income father. The sum of these changing factors is that a lower-income, noncustodial parent with significant residential responsibilities is much more likely to exist today than when the guidelines were written.

B. The Theory and Purposes of Child Support

Beyond considerations of parental obligation and the regularization of awards, child-support laws are crafted with several additional principles in mind.[34] States and commentators have proposed various limiting rationales and purposes, which can be generally grouped into three categories. First, child-support awards should advance the principle of minimal disruption to the lifestyle that the child had before support was necessary, and these awards should advance the child's well-being.[35] Second, awards should protect both parents from being treated unfairly.[36] Third, child-support awards should reinforce certain aims embraced by public policy.[37]

Many states explicitly note that child-support awards should be made with some regard for the particular circumstances and well-being of the child.[38] While divorce tends to harm children, this harm can be mitigated through financial

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33 See Mason, 24 J Am Acad Matrim L at 459–60 (cited in note 28).

34 This Section considers principles derived from statutes and descriptive scholarship while avoiding a discussion of hypothetical normative theories of child support. For an example of a normative account of child support, see generally Adrienne Jennings Lockie, *Multiple Families, Multiple Goals, Multiple Failures: The Need for "Limited Equalization" as a Theory of Child Support*, 32 Harv J L & Gender 109 (2009) (critiquing child-support laws for failing to recognize demographic realities, and proposing a new theory that favors existing families).

35 See Ind Code § 31-16-6-1(a)(2) (requiring the court to consider "the standard of living the child would have enjoyed if: (A) the marriage had not been dissolved; (B) the separation had not been ordered; or (C) in the case of a paternity action, the parents had been married and remained married to each other" when setting child-support awards).

36 See Del Fam Ct RCP 52(c) (instructing courts to consider several support variables, including net income and the number of dependents, in order to ensure a "uniform, equitable approach").

37 See Ira Mark Ellman and Tara O'Toole Ellman, *The Theory of Child Support*, 45 Harv J Legis 107, 137 (2008) (discussing the "societal consensus that both parents have a moral obligation to support their children, even if the child lives primarily with one parent").

38 See, for example, Ariz Rev Stat Ann § 25-320(1)(A) (noting that one purpose of the guidelines is "[t]o establish a standard of support for children consistent with the reasonable needs of children and the ability of parents to pay").

stability, positive relationships with both parents, and minimal parental conflict—child-support rules consider how to effectuate those positive influences.[39] One formulation, for example, is that child support should protect, "to the extent practicable, [ ] the standard of living that children would enjoy if they were living in a household with both parents present."[40] This rationale is straightforward if one parent retains sole physical custody—the other parent must pay the amount of money necessary for the first parent to maintain a household comparable to what existed before separation.[41] This conception breaks down, however, when each parent has substantial custodial time. Must both parents provide a comparable home? This is more expensive than providing one home and is infeasible for many separated parents.[42]

In examining this child-well-being standard, Professor Ira Mark Ellman and Tara Ellman reviewed a number of studies on the effects of financial stability on the welfare of children.[43] They found substantial evidence that increased household income leads to improved socioeconomic outcomes for children.[44] The American Law Institute (ALI) similarly suggested protecting "a minimum decent standard of living"—provided that neither parent becomes impoverished—that is "not grossly inferior to that of either parent."[45] The ALI further proposed that the child should "not suffer loss of important life opportunities that the parents are able to provide without undue hardship."[46] In providing an undue hardship exception, the ALI reasoned that the adoption of a total-harm-prevention standard with regard to

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39 See Christy M. Buchanan and Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 Wake Forest L Rev 419, 423–32 (2008).

40 W Va Code § 48-13-102. Not all states present such strong formulations. California, for example, provides merely that child support should be set "in the manner suitable to the child's circumstances." Cal Fam Code § 3900. Delaware requires that each child's basic needs are taken care of before the parents retain income beyond that level and entitles the child to a share of income beyond basic needs. Del Fam Ct RCP 52(c).

41 See Ellman and Ellman, 45 Harv J Legis at 113–14 (cited in note 37) (noting that the two-parent-household standard is both omnipresent and unrealistic).

42 Some states attempt to address this problem by raising *each* parent's presumptive obligation to the child in cases of shared custody, but these adjustments cannot change the amount of money that the parents actually have. See, for example, Md Fam Code Ann § 12-204(f), (m).

43 See Ellman and Ellman, 45 Harv J Legis at 131–37 (cited in note 37).

44 See id at 132.

45 American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 3.04(1) at 477–78 (2002).

46 Id at § 3.04(2) at 478.

the child "would also hold the residential parent harmless" because such an approach would require the child, and thus the custodial parent, to retain the exact same lifestyle that the child had before the divorce, placing "all the economic costs of family dissolution on the nonresidential parent."[47]

As the last point shows, the protection of the child is not absolute; most states also suggest that parents should be afforded some protections in the law of child support.[48] Delaware, for example, maintains that each parent is entitled to retain at least "[t]he absolute minimum amount of income each support obligor must retain to function at maximum productivity."[49] Similarly, Arizona requires that "the court [ ] perform a Self Support Reserve Test to verify that the noncustodial parent is financially able both to pay the child-support order and to maintain at least a minimum standard of living."[50] Some states also have a number of provisions that implicitly recognize that child support should not impose undue hardship on the parents.[51]

The protection of parents finds support in commentary as well. In addition to endorsing the principle that parents should not be "impoverish[ed]" due to child support,[52] the ALI states that both parents should "be treated fairly."[53] In explaining this fairness inquiry, the ALI notes the interest of custodial parents in sharing out-of-pocket costs and not being "disadvantaged, as compared to the child's other parent, by the financial opportunity costs of residential responsibility."[54] Additionally, the noncustodial parent has an interest in both not paying spousal support

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47 Id at § 3.04, comment c at 479.

48 Functionally, these protections will generally be focused on the obligor parent. The obligee parent receives similar protection by the presumption that he or she spends any support directly on the child. See *Macy v Macy*, 714 P2d 774, 777 (Wyo 1986) ("Child support is for the benefit of the children. . . . A support payment is the children's money administered in trust . . . for their benefit."); SD Cod Laws § 25-7-6.2 ("The share of the custodial parent is presumed to be spent directly for the benefit of the child.").

49 Del Fam Ct RCP 52(c).

50 Ariz Rev Stat Ann § 25-320(15). Arizona's guidelines make clear that custodial parents can also pay child support. See Ariz Rev Stat Ann § 25-320(2)(E). But the language does not seem to require that the self-support-reserve test be applied to custodial parents. Presumably, a court would apply the self-support-reserve test to the custodial parent, but the issue does not appear to have been litigated.

51 See, for example, Cal Fam Code Ann § 4055(b)(7) (providing a rebuttable presumption in favor of a low-income adjustment when the obligor's monthly disposable income is less than $1,500).

52 ALI, *Law of Family Dissolution* § 3.04(1)(a) at 477 (cited in note 45).

53 Id at § 3.04(3)–(4) at 478.

54 Id at § 3.04, comment e at 480.

under the guise of child support and not being forced to pay to the extent that it causes him or her "disproportionate suffering."[55] As Ellman and Ellman have noted, certain principles, such as the parents' rights to "keep what they have earned" and to avoid being "[i]mpoverished," explain why some states depart from proportional allocation of the support burden based on spousal income.[56]

Finally, four social mores also appear to factor into child-support guidelines. First, child-support guidelines should be designed to reduce litigation between parents over support, as evidenced by state laws promoting the use of settlements.[57] Additionally, empirical evidence shows that the children of divorced parents fare better when their parents have amicable relationships.[58] Second, both parents should formally contribute to the support of their children.[59] This is seen most clearly in states that calculate an amount of child support that each parent is theoretically responsible for, even though payments will generally move in only one direction.[60] Third, child support should be acquired from parents before turning to the state for support. This aim derives from the nineteenth-century debate over whether child support is a moral or legal obligation[61] as well as from the federal mandates that require states to look to parents before welfare as a source of child support.[62] Fourth, child support should not function in a way that encourages parents to either refuse to work in order to avoid child-support payments or to use child support in lieu of income. This aim is effectuated through rules that impute income for the purpose of calculating child support to parents who choose not to work, thus decreasing

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55 Id at § 3.04, comment f at 481–83.

56 Ellman and Ellman, 45 Harv J Legis at 145 (cited in note 37).

57 Many states have written their guidelines so as to encourage settlement. See, for example, Ariz Child Support Guidelines § 20(B). The ALI also endorses this approach by suggesting that guidelines "foster cooperation and minimize conflict between a child's parents." ALI, *Law of Family Dissolution* § 3.04(9) at 478 (cited in note 45).

58 See Buchanan and Jahromi, 43 Wake Forest L Rev at 419 & n 3 (cited in note 39).

59 See Ellman and Ellman, 45 Harv J Legis at 137–38 (cited in note 37).

60 The majority of states use an approach that calculates a presumptive obligation for each parent but will have only the parent who owes more actually pay child support. See text accompanying notes 64–68.

61 See note 15.

62 See 42 USC § 654 (requiring establishment of paternity and enforcement of child-support obligations as a condition of state child-support plans); 42 USC § 608(a)(2) (providing that the state must deduct welfare assistance when an individual refuses to cooperate with the establishment of paternity or enforcement of child support).

the financial incentives to choose unemployment, which child support might otherwise provide.[63]

These general—and occasionally conflicting—aims of child support leave considerable room for states to create different legal rules for child support. The choices that states make determine when child support is paid, how much child support is paid, and what relationship exists between custody and child support, as both a matter of law and an initial framework for parental bargaining. Ultimately, the manner in which states draft and implement their child-support laws determines whether a noncustodial parent might be able to receive child support.

II. THE CUSTODIAL PARENT WHO PAYS: STATE RULES AND BARGAINING REALITIES

This Part examines how child support is awarded in the United States. First, it briefly discusses the baseline rules for setting child support. It then analyzes the five primary legal regimes that exist for determining whether a noncustodial parent may receive child support. Finally, it examines private bargaining, the method that is used in practice to determine most child-support awards.

A. Calculating Child Support and Deviating for Substantial Custody

Generally speaking, there are only a handful of formulas for establishing child support. Most states use the income-shares method, which generates a presumptive obligation for both parents based on the ratio of their incomes.[64] Some states use the percentage-income method, which assigns only the obligated parent the responsibility to pay a set percentage of his or her

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[63] See, for example, Admin Rules Mont § 37.62.106 (deeming it appropriate to "impute income" to parents who are, for instance, "unemployed" or "underemployed," based on the presumption "that all parents are capable of working at least 40 hours per week at minimum wage, absent evidence to the contrary").

[64] See Tim Grave, Comment, *Child Support Guidelines Encourage Forum Shopping*, 37 Duquesne L Rev 287, 303 (1999). For example, in Maryland, if the parents have a combined income of $11,200 per month and one child, the total support obligation is $1,450 per month. If the noncustodial parent makes 75 percent of the combined income ($8,400), he or she will owe 75 percent of the combined support obligation ($1,087.50) to the custodial parent each month. See Md Fam Code Ann § 12-204.

income.[65] Three states use the Melson formula, the most complicated method.[66] It first attempts to protect the subsistence needs of each parent and the child, and it then grants the child a right to a share in any additional income.[67] In all three of these methods, the obligor parent is ordered to pay support to the other parent, but the obligee parent is presumed to spend his or her support directly on the child.[68] Lastly, a minority regime exists in California. The California formula creates a strict relationship between parenting time and money, such that a parent is awarded child support when he or she cares for the child for a greater percentage of days than his or her percentage of the combined parental income.[69]

Most states allow for the obligor parent to receive a credit for significant amounts of parenting time.[70] These credits fall generally into one of two categories. First, some states provide a

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[65] See, for example, 750 ILCS § 5/505(a)(1). In Illinois, an obligated parent turns over a variable percentage based on the number of children. If the obligor has one child and makes $8,400 a month, he or she will owe $1,680.

[66] See 13 Del Code Ann § 514; Hawaii Child Support Guidelines § II.A (2010), online at http://www.courts.state.hi.us/docs/form/maui/2CE248.pdf (visited Nov 3, 2014); Admin Rules Mont § 37-62-1.

[67] For a description of the Melson formula, see *Dalton v Clanton*, 559 A2d 1197, 1212–16 (Del 1989). For example, assuming a noncustodial parent with no visitation who makes $8,400 each month after taxes and deductions; a custodial parent who makes $2,800; and no primary expenditures for child care necessary for work, health care, or private education, the noncustodial parent would have $7,280 available for child support after deducting Delaware's current self-support reserve of $1,120. The custodial parent would have $1,680. If the parents have one child, Delaware assigns a primary support obligation of $510, for which the noncustodial parent would be responsible for 82 percent, or $418. This would leave the noncustodial parent with $6,862 available from which to deduct a standard of living adjustment, which is set at 17 percent for one child, or $1,167. The primary support obligation and the standard of living adjustment are totaled, and the noncustodial parent would owe the custodial parent $1,586. See Family Court of the State of Delaware, *Form 509: Child Support Calculation* (May 3, 2011), online at http://flc.delaware.gov/information/MelsonFormula/ChildSupportCalculation.doc (visited Nov 3, 2014).

[68] See note 48. See also Ohio Rev Code § 3119.07(A) ("[A] parent's child support obligation for a child for whom the parent is the residential parent and legal custodian shall be presumed to be spent on that child.").

[69] See Cal Fam Code Ann § 4055. California's formula compares the percentage of income for the higher-earning parent to the percentage of the time that he or she has the child. When this percentage of income is higher than the percentage of time, the higher-income parent pays; when it is lower, the lower-income parent pays. If the two percentages are equal, neither parent pays.

[70] California's basic formula always awards a time credit. Other states' guidelines have separate provisions that allow an obligor some relief. For a theoretical examination of the issue of time credits, see Marygold S. Melli and Patricia R. Brown, *The Economics of Shared Custody: Developing an Equitable Formula for Dual Residence*, 31 Houston L Rev 543, 560–71 (1994).

credit if the obligor parent reaches a certain threshold of parenting time in the form of a flat reduction in child support.[71] In these states, once the obligor's baseline of support is calculated, that baseline amount will be reduced if he or she reaches a certain number of custodial days. In other states, when both parents meet a certain threshold of days, the parents' presumptive obligations will be multiplied by the time that each parent has with the child, and whichever parent has a greater result will pay the difference.[72] This second type of threshold offset is the plurality method by which a noncustodial parent may be awarded support.[73]

B. State Rules for Awarding Child Support to Noncustodial Parents

Almost all state guidelines are based on a presumption that the noncustodial parent will pay the custodial parent child support.[74] This creates predictability—absent settlement or unusual facts, the court orders the noncustodial parent to pay the custodial parent according to the guidelines. Yet this approach was developed at a time when both custody and the relative income of the parents were also predictable ex ante—"one parent (usually the mother) was the primary custodial parent and earned substantially less income than the noncustodial parent (usually the father)."[75] Modern family dissolution is not as predictable. Today, both parents are likely to have physical custody for a substantial amount of time, and the primary custodial parent sometimes has a higher income.[76] Rigidly applying a guideline formula when a noncustodial parent has both a lower income and a substantial amount of parenting time can lead to unjust

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71 See, for example, Minn Stat Ann § 518A.36(2).

72 For an examination of how this rule selects which parent will pay and how much that parent will pay, see Part II.B.1.

73 This is so at least to the extent that a threshold state does not have some alternative rule for when a custodial parent may be ordered to pay child support.

74 See, for example, Ga Code Ann § 19-6-15(b)(7) ("Determine the presumptive amount of child support for the custodial parent and the noncustodial parent resulting in a sum certain single payment due to the custodial parent."). Despite this language, noncustodial parents can be the recipients of child support in Georgia. See *Williamson v Williamson*, 748 SE2d 679, 681 (Ga 2013) ("[T]he trial court retains some discretion to determine that the statutory objective . . . may be best served by requiring the custodial parent to pay child support to the noncustodial parent.").

75 *Dudgeon v Dudgeon*, 318 SW3d 106, 111 (Ky App 2010).

76 See Part I.A.

results.[77] Jurisdictions are split, however, on whether the support obligation can be reversed such that the noncustodial parent is in fact paid. Five approaches have been offered.

1. The threshold approach.

Of states that have a clearly identified solution, the plurality approach relies on child-support guidelines that specify a certain level of actual physical custody of the child. If that threshold is reached, then the courts will determine which parent is the obligor on an equitable basis instead of applying the normal formula.[78] Under this approach, if both parents are expected to have a certain amount of actual parenting time—generally measured in number of overnights[79]—the courts calculate what each parent's obligation to the other would be if each were to pay child support.[80] This figure is then multiplied by the percentage of time that the *other parent* has the child.[81] Whoever has the higher result pays the difference between the two amounts.[82] This approach does not rely on legal custody or on particular labels for arrangements such as joint custody.[83] Rather, it focuses on the actual amount of time that each parent is responsible for the child.[84]

Consider Maryland, which has a threshold of 35 percent of overnights, for a hypothetical application of this method.[85] If the combined income of the two parents is $6,200 per month, their combined support obligation for one child is $1,501 each month.[86] If the mother makes $4,200 each month, her share of that obligation is $1,017, and the father's share is $483. If the

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77 See *Colonna v Colonna*, 855 A2d 648, 651 (Pa 2004) ("Colonna II") (expressing concern about following state child-support guidelines when there is a significant income disparity).

78 See, for example, Md Fam Code Ann §§ 12-201(m), 12-204(m); Admin Rules Mont § 37-62-134(2)(b); Alaska RCP 90.3(b), (f).

79 See, for example, Md Fam Code Ann § 12-201(m)(1).

80 See, for example, Md Fam Code Ann § 12-204(m)(1)–(2).

81 See, for example, Md Fam Code Ann § 12-204(m)(2).

82 See, for example, Md Fam Code Ann § 12-204(m)(2)–(3).

83 See, for example, Md Fam Code Ann § 12-201(m).

84 Of course, child support is enforceable entirely and severally from visitation, so that the expected parenting time need not track actual parenting time. See notes 135–36 and accompanying text.

85 Md Fam Code Ann § 12-201(m)(1).

86 When one parent fails to meet the threshold level, the basic, rather than adjusted, child-support obligation is used. The adjusted child-support obligation is one-and-a-half times the basic one, to account for the increased costs when the child has two homes. See Md Fam Code Ann § 12-204(f).

mother has custody for 65 percent of the overnights, she owes the father $1,017 × 0.35, or $355.95. The father owes the mother $483 × 0.65, or $313.95. Since the primary custodial parent (the mother) owes more, she pays the difference between the two amounts, or $42.[87]

The upshot of this approach is predictability: both the parties and the courts know under what circumstances the primary custodial parent would be ordered to pay. It also protects custodial parents from receiving reduced or reversed child-support awards when the noncustodial parent's share of the parenting time is higher than his or her share of the costs of childrearing due to baseline costs of childrearing that are not distributed proportionally.[88] The threshold ensures that a primary custodial parent is ordered to pay only if each parent maintains a regular household for the child, incurring the associated costs in the form of more room, furniture, toys, and clothes. On the other hand, this approach creates a cliff effect, making the marginal value of the 128th overnight immense.[89] In the example above, the father would owe $323 if he had 127 overnights. With 128 overnights, he instead receives $42, a net gain of $365 each month. In *Payne v Payne*,[90] a Maryland appellate court signaled that the 128-day limit was absolute.[91]

This powerful cliff effect is not generated because the noncustodial parent receives a credit for the actual time with the child. The credit itself is relatively small because the parents' presumed obligation first increases by 150 percent when the threshold is triggered.[92] If the noncustodial parent just meets the threshold at 35 percent of the overnights, his or her presumed obligation ends up being 97.5 percent of what the nonthreshold obligation would have been.[93] In the example above, that would amount to $315—a rather trivial reduction of $8 per month. Even if the noncustodial parent has 50 percent of the overnights, because of an increase in presumptive support, this

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87 See Md Fam Code Ann § 12-204(m)(3).

88 See Melli and Brown, 31 Houston L Rev at 568 (cited in note 70) (noting that, in the limited context of offsets, it is thresholds rather than reversals that account for the fact that the custodial parent's costs do not decrease when there is limited time sharing).

89 365 × 0.35 = 127.75.

90 752 A2d 1209 (Md App 2000).

91 Id at 1216. This suggests that the threshold approach may be somewhat underinclusive in the event that both parents do incur the base costs of providing a home but one of them does not meet the threshold.

92 See, for example, Md Fam Code Ann § 12-204(f).

93 1.5 × 0.65 = 0.975.

works out to 75 percent of the nonthreshold level.[94] Rather, the cliff effect is a product of the ability to offset the presumptive support of the custodial parent, which, unlike a time credit, can serve to shift the support burden from the noncustodial parent to the custodial parent, as in the example calculation.

2. The California approach.

California addresses the inquiry in a unique manner. Rather than use a threshold approach, the California formula always accounts for the time that each parent has with the child and each parent's relative income.[95] The effect of this approach is that the guideline formula returns a result of no support if each parent's share of expected parenting time matches his or her percentage of income; if it does not, the parent whose income proportion is greater than his or her parenting-time proportion owes the support obligation.[96]

This approach avoids the cliff effect. As parenting time increases, the support obligation changes linearly—there is never a point at which the marginal value of additional time is exceptional.[97] On the other hand, as seen in *In re Marriage of Cryer*,[98] this approach allows a parent who has near-complete custody to pay child support.[99] Indeed, the *Cryer* court refused to order the support to be reduced to the guideline amount in part because the mother would be in danger of losing her home, which would weaken the possibility of reunification with her child.[100]

3. The discretionary approach.

Some state guidelines lack formulas that specify when a custodial parent might be ordered to pay child support. These states split over whether their statutes allow for the custodial parent to pay support on a discretionary basis.[101] The courts that

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94 $1.5 \times 0.5 = 0.75$.

95 See notes 69–70 and accompanying text.

96 See notes 69–70 and accompanying text.

97 See notes 69–70 and accompanying text.

98 131 Cal Rptr 3d 424 (Cal App 2011).

99 See id at 428–29 (referencing an application of the formula that returned an award of $1,141 to a noncustodial mother who had 4 percent of the parenting time).

100 See id. Part of what drove the California court's decision was that Jon Cryer was asking for a modification of the preexisting support order. The court was reluctant to order a significant change in the event that custody were to change again. See id.

101 Three states have considered whether their guidelines allow child support to be awarded to the noncustodial parent, with mixed results. Compare *In re Marriage of*

allow custodial parents to pay tend to defend their decisions first on statutory grounds, particularly by pointing to talismanic language found in the guidelines along the lines of "the court may, in its discretion, order *either or both* parents owing a duty of support to a child of the marriage to pay."[102] These courts also justify their interpretation on policy grounds—that is, the inequity of asking a lower-income parent to pay child support to a higher-income parent.[103]

The language stating that "the court may order either or both parents owing a duty of support to a child to pay an amount reasonable or necessary for his support" derives from § 309 of the Uniform Marriage and Divorce Act of 1973[104] (UMDA). In the comment for § 309, the drafters of the UMDA specifically noted that this language "permits the court to order the custodial parent to contribute to the child's support as well."[105] While this language could be read to suggest that courts can order only custodial parents to spend a certain amount of money on the child, courts in jurisdictions that have adopted the language tend to read it to permit payments from the custodial parent to the noncustodial parent.[106] In total, twenty-three states have child-support statutes that use the "either or both" language.[107]

Even if a state's statute does allow the court to order the custodial parent to pay child support, the court must determine when to do so. In *Colonna v Colonna*,[108] the Pennsylvania Supreme Court addressed this issue. The case involved a custodial

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Turk, 12 NE3d 40, 45 (Ill 2014) (determining that noncustodial parents could receive child support on a discretionary basis), *Williamson*, 748 SE2d at 682 (same), with *Rubin v Della Salla*, 107 AD3d 60, 67 (NY App 2013) (holding that the court had no power to award child support to noncustodial parents).

102 See, for example, *Turk*, 12 NE3d at 45, citing 750 ILCS § 5/505(a).

103 See, for example, *Colonna II*, 855 A2d at 651.

104 UMDA § 309 (National Conference of Commissioners on Uniform State Law 1974).

105 UMDA § 309, comment.

106 See, for example, *In re Marriage of Antuna*, 8 P3d 589, 597 (Colo App 2000); *In re Marriage of Fest*, 742 P2d 962, 962 (Colo App 1987). Colorado is a threshold state per its child-support statute, though the *Antuna* and *Fest* courts did not comment on this. See Colo Rev Stat Ann § 14-10-115(3)(h), (8)(b).

107 Of the twenty-three states, only New York and Ohio appear to nonetheless ban noncustodial child support. See *Rubin*, 107 AD3d at 67; Ohio Rev Code Ann § 3119.07(A). A handful of other states with "either or both" language are states that apply a substantially equal custody standard but will not award support to a noncustodial parent who does not meet that threshold. See, for example, Minn Stat Ann § 518A.36.

108 855 A2d 648 (Pa 2004).

father with 73 percent of the parenting time and a monthly income of $16,130 who had been ordered to pay support to a noncustodial mother with 27 percent of the parenting time and a monthly income of $4,607.[109] The initial award was reversed on appeal by the Pennsylvania Superior Court because "[w]here primary physical custody is changed from one parent to the other parent, no valid justification remains for requiring the new custodial parent to continue payments that are intended to be purely for the support, benefit, and best interest of the children."[110] The Pennsylvania Supreme Court rejected this analysis, noting that it was "troubled by the [income] disparity."[111] The state supreme court stated that, since the mother had "a less significant income than the custodial [father], it [was] likely that . . . she [would] not be able to provide an environment that resembles the one in which the children are accustomed to living with the custodial [father]."[112] The court further noted that an expectation that this would not "negatively impact[ ]" the relationship between the noncustodial parent and the child was "not realistic."[113] The court concluded that it was "an abuse of discretion" to not consider awarding the noncustodial parent child support whenever "the incomes of the parents differ significantly."[114]

Some courts have also awarded child support to noncustodial parents under special circumstances. In *Dring v Dring*,[115] a Hawaii appellate court affirmed an order requiring a custodial mother to pay child support to a noncustodial father for the limited purpose of interstate travel necessary for visitation.[116] The *Dring* court rejected arguments that the order was either an abuse of discretion per se or an abuse of discretion when the noncustodial parent "ha[d] significantly greater resources."[117] Rather, the *Dring* court announced a three-part test that can be satisfied "if the order reasonably can be complied with without decreasing the funds reasonably necessary to support the children

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109 Id at 650.

110 *Colonna v Colonna*, 788 A2d 430, 442 (Pa Super 2001), revd 855 A2d 648 (Pa 2004).

111 *Colonna II*, 855 A2d at 651.

112 Id.

113 Id.

114 Id at 652.

115 956 P2d 1301 (Hawaii App 1998).

116 Id at 1309.

117 Id at 1308–09 (quotation marks omitted).

and the custodial parent at the relevant standard of living and the order is not otherwise an abuse of discretion."[118]

4. The "substantially equal" approach.

Some states allow either parent to pay child support when the amount of physical custody is mathematically unequal, provided that both parents contribute "presumed equal"[119] parenting time or both parents provide a "primary residence."[120] The parenting time need not be precisely equal, but merely something close to equal. Some of these states are more akin to threshold states, specifying a number of overnights that creates presumptive equality;[121] other states use a looser standard to determine whether both households are primary.[122] The determination of which parent pays child support is set by requiring the parent with a greater support obligation to pay the difference to the parent with the lesser support obligation.[123] While the substantially equal regime uses thresholds, its requirement of near equality means that it does not allow for the sort of balancing utilized in the traditional threshold approach. Rather than crediting parents for the time that the child spends with the other parent, support is always paid by the parent with higher income. Further, under this rule, the parents are treated as if they have truly equal residential responsibilities, meaning that neither parent would be the noncustodial parent for the purpose of this analysis.

5. The absolute bar.

Finally, a number of states erect an absolute bar against the payment of support by a custodial parent.[124] The rationale for

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118 Id at 1309. Such an order would be within the trial court's discretion, even if the order would not meet the standard, if "it ha[d] no reasonable alternative" provided that "the order must impact the custodial parent and the noncustodial parent in reasonable proportion to their abilities to pay." Id.

119 Minn Stat Ann § 518A.36(2), (3).

120 *Wallbeoff v Wallbeoff*, 2009 WL 4282286, *3 (Conn Super).

121 In Minnesota, for example, parenting time is presumptively equal if each parent has at least 45.1 percent of the parenting time. Minn Stat Ann § 518A.36(2).

122 In an unpublished opinion, a Connecticut Superior Court determined that "primary residence" does not necessarily mean a residence where a child spends the majority of the time, and that both parents could simultaneously provide a primary residence. *Wallbeoff*, 2009 WL 4282286 at *3.

123 See, for example, Minn Stat Ann § 518A.36(3).

124 See, for example, *Rubin v Della Salla*, 107 AD3d 60, 62 (NY App 2013); *Motley v Motley*, 69 S3d 210, 218 (Ala App 2011); La Rev Stat Ann § 9:315.8.

this approach was explained in *Rubin v Della Salla*.[125] In *Rubin*, the New York Appellate Division held that, even in cases of shared custody, a trial court has no discretion to depart from the rule that child support cannot be paid by the custodial parent. The court noted that the Child Support Standards Act[126] uses mandatory language that "undeniably shows that the legislature intended for the noncustodial parent to be the payer of child support and the custodial parent to be the recipient."[127] The *Rubin* court emphasized that the financial circumstances of the mother did not create the need for a remedy, even if "the child [ ] would live 'in or near poverty' during the time he spends with his mother."[128] The court also argued that allowing an "unfair result" to reverse child-support awards would mark an undesirable return to "nonpredictability and nonuniformity."[129]

C. Bargaining Realities and the Relationship between Support and Custody

These five legal rules represent the various formal legal analyses for when a noncustodial parent may be awarded child support, but they tell only part of the story. The reality is that child support is usually determined through private bargaining.[130] Indeed, this bargaining is expected and even occasionally endorsed by state law.[131] Even when this is not the case, there is substantial evidence that judges are reluctant to upset a negotiated agreement between the parents.[132] Because bargaining is

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125 107 AD3d 60 (NY App 2013).

126 NY Domestic Relations Law § 240.

127 *Rubin*, 107 AD3d at 67. The *Rubin* court rejected the mother's attempt to import a threshold methodology from other states without explicit statutory approval. Id at 66–67.

128 Id at 72.

129 Id at 73.

130 See Eleanor E. Maccoby and Ronald H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* 159 (Harvard 1992) (finding that only 1.5 percent of divorce cases are adjudicated).

131 See, for example, Ariz Child Support Guidelines § 1(C) (emphasizing that the statute was intended to "promote settlements"). But see *In re Marriage of Goodarzirad*, 185 Cal App 3d 1020, 1027 (1986), quoting *Anderson v Anderson*, 56 Cal App 87, 89 (1922) ("Where the welfare of children is involved as it is in divorce cases, parents cannot by contract so bind themselves as to foreclose the court from an inquiry as to what that welfare requires.").

132 See Nancy Thoennes, Patricia Tjaden, and Jessica Pearson, *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 25 Fam L Q 325, 345 (1991) (finding that guidelines were ineffective, in part, because judges were unwilling to disturb settlements).

the way that child support is often set, it is important to understand how bargaining for child support works.

1. Bargaining support for custody.

No state's law provides that child support and custody (or visitation) are determined and allotted by the same procedure, largely for two reasons. First, custody determinations, unlike child-support determinations, focus almost exclusively on the best interests of the child, not on the interests of the parents.[133] Second, support cannot be awarded until the courts have settled the custody and visitation plans, as these elements will determine who pays support and how much support is paid.[134] In other words, there is a formal dissociation of proceedings for child support from those for child custody. The formal dissociation is made clearer by the fact that each obligation is enforced severally—an obligor parent may not refuse to pay child support because the obligee has interfered with his or her visitation time,[135] nor can an obligee parent prevent visitation because the obligor has refused to pay.[136]

Despite the official separation of custody and child support, in practice parents bargain custodial rights for support obligations.[137] Such bargaining takes many forms. For example, a noncustodial parent might offer to pay more child support for the right to see his or her child more often. Alternatively, a parent might agree not to contest custody at all and take less visitation in exchange for being required to pay less child support. Still another possibility is that a parent might agree to an equal or near-equal living arrangement and a splitting of expenses in exchange for de minimis child support.

Even if the guidelines produce legal certainty as to the determination of support and even if parents could accurately predict ex ante how a court would resolve custody, the expense of litigation often provides a sufficient incentive for a party to accept

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[133] See, for example, Cal Fam Code Ann §§ 3011, 3040.

[134] See Part II.A. See also *Turinsky v Long*, 910 P2d 590, 595 (Alaska 1996) ("Child support awards should be based on a custody and visitation order.").

[135] See *In re Marriage of Dooley*, 569 P2d 627, 628 (Or App 1977). However, in some cases, an obligee may lose his or her right to child support retroactively if he or she entirely cedes de facto custody to the obligor. See, for example, *Bennett v Bennett*, 6 P3d 724, 728 (Alaska 2000).

[136] See *Johnson v Johnson*, 368 NE2d 1273, 1274 (Ohio App 1977).

[137] See Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L J 950, 964–65 (1979).

less support.[138] Further, despite the command of the FSA that guideline awards should be "presumpt[ive]" and that courts should deviate from them only with specific findings,[139] some states treat the fact of an agreement contrary to the guidelines as a sufficient reason to deviate. In Arizona, for example, parents are encouraged to settle, and the courts are mandated to approve settlements if both parents show that they are aware of what support would have been awarded.[140] In California, on the other hand, courts have made it clear that they retain the ability to disrupt parental settlements when they run contrary to the best interests of the child.[141]

Until now, the focus has been on the formalistic presumption in favor of the guidelines. However, despite this strong presumption, legal scholarship has consistently shown that, in practice, courts do not disturb settlements on custody and support. Professors Eleanor Maccoby and Robert Mnookin found that only 1.5 percent of divorce proceedings reach final adjudication.[142] A study of the effect of the presumptive guidelines on child-support awards showed limited effect and noted that judges are reluctant to disturb private agreements.[143] The ability of parents to bargain is strengthened by lax evidentiary standards: parents are rarely required to prove their incomes to the same degree that they would outside of a family court.[144] Further, not all child-support cases reach courts—parties may address their support arrangements privately.[145] In other words, the ability of judges to follow the guidelines accurately are frustrated both by their own distaste for disrupting settlements and by functional difficulties, such as poor discovery standards and private settlements.

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138 See id at 975–76.

139 FSA § 103, codified at 42 USC § 667.

140 See Ariz Child Support Guidelines § 1(C).

141 See, for example, *Marriage of Goodarzirad*, 185 Cal App 3d at 1027.

142 Maccoby and Mnookin, *Dividing the Child* at 159 (cited in note 130).

143 See Thoennes, Tjaden, and Pearson, 25 Fam L Q at 345 (cited in note 132).

144 See Victoria Vazquez, Note, *Evaluation of the New York Child Support Standards Act: Have the Guidelines Really Made a Difference?*, 4 J L & Pol 279, 297, 307–09 (1995) (finding that courts in New York rarely collect proof of income and frequently deviate from the guidelines). See also *Olson v Olson*, 574 P2d 1004, 1008 (Mont 1978) (noting that the initial award was problematic in part because the district court had "no evidence" of the father's income or expenses, nor of the children's financial needs).

145 This initially happened in *Rubin*. See *Rubin*, 107 A3d at 63. See also Herbert Jacob, *The Elusive Shadow of the Law*, 26 Law & Society Rev 565, 584–85 (1992) (concluding from empirical research that "bargaining over children and support payments occurs with little awareness or concern about law" and "agreements are often worked out in private with very little apparent law talk").

Therefore, bargaining is both possible and likely in the context of child support for three reasons. First, child-support awards are based on two variables—custodial time and parental income—which create a model that parents can use to bargain. Second, parties have incentives to bargain custodial time and status for financial support or relief because bargaining reduces litigation costs and allows them to tailor support and custody to their own preferences.[146] Third, despite legal rules that appear to discourage support that deviates from the guidelines, the realities of judicial practice make it easy for the parents to deviate once an agreement is reached. Judges prefer not to upset parental agreements even when they deviate from the guidelines, and courts rarely require actual evidence of the variables, such as parental income, that would determine a support award.[147]

2. Bargaining concerns in the child-support context.

Parties bargain for divorce settlements, including over custodial rights and child-support awards. This reality is not particularly troubling. The system of civil litigation in the United States is friendly to settlement, and there is no categorical reason to differentiate divorce. On the other hand, child-support awards are not actually obligations that one parent owes the other; they are obligations that both parents owe the child.[148] In this sense, a significant problem arises when parents engage in strategic bargaining, in which parents bargain with each other through bluffs and threats.[149] In the context of child support, the most significant concern is that a parent will threaten to contest custody—even though he or she has no interest in residential responsibilities—in order to convince the other parent to concede on the financial terms of child support.[150] Such strategic bargaining raises issues not because of the harm to the parents,

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146 See Mnookin and Kornhauser, 88 Yale L J at 973–74 (cited in note 137).

147 See Thoennes, Tjaden, and Pearson, 25 Fam L Q at 345 (cited in note 132).

148 See *Black's Law Dictionary* at 274 (cited in note 13) ("The right to child support is the child's right.").

149 See Mnookin and Kornhauser, 88 Yale L J at 972–73 (cited in note 137). One study showed that when measured in both dollars and percentage of income, child-support recipients faired significantly worse in settlement than in adjudication, though attorneys' fees were higher. See Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 NC L Rev 401, 431–36 (1996).

150 Other forms of strategic bargaining for child support could include a parent who, confident of receiving custodial status, attempts to extract extra child-support payments in exchange for concessions on visiting time.

but because it results in a diminished pool of money available to the child.[151] Strategic bargaining over custody to extract favorable support settlements is made more attractive to the strategic parent by the embrace of the "friendly-parent" rule, which disfavors parents who object to joint custody arrangements.[152] In other words, a nonstrategic parent who is forced by a strategic parent to litigate custody not only has to expend litigation costs but also is in a weaker position in court for opposing the strategic parent's custodial demands.

These considerations do not matter unless strategic bargaining actually happens. While Mnookin and his various coauthors have argued that strategic bargaining for child support is rare,[153] the majority of scholarship has disagreed.[154] There is some evidence that the adoption of presumptive guidelines increased strategic bargaining.[155] Further, strategic bargaining may be more likely to occur in precisely the situation that leads to noncustodial parents being awarded support—when there is significant income disparity between the parties. Research has suggested that, when there is a wealth disparity between the parents, the higher-income parent occasionally uses the "starv[e] her out" strategy, in which the higher-income parent relies on the inability of the lower-income parent to afford legal fees in order to force a concession.[156] Additionally, the specter of strategic bargaining when a noncustodial parent may be awarded child support raises a more substantive concern than the mere

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151 See note 166 and accompanying text.

152 See Jana B. Singer and William L. Reynolds, *A Dissent on Joint Custody*, 47 Md L Rev 497, 517 (1988).

153 See, for example, Maccoby and Mnookin, *Dividing the Child* at 102 (cited in note 130) (finding that only 10 percent of men and 7 percent of women strategically bargained in divorce proceedings).

154 See, for example, Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* 310 (Free Press 1985) (finding that one in three women reported that their husband had threatened to contest custody as a ploy); Jessica Pearson and Nancy Thoennes, *Custody after Divorce: Demographic and Attitudinal Patterns*, 60 Am J Orthopsychiatry 233, 240 (1990) (finding that one in five individuals in divorce proceedings felt pressured to make financial concessions for custody terms).

155 See Scott Altman, *Lurking in the Shadow*, 68 S Cal L Rev 493, 499 (1995) (contending that, while only 13 percent of lawyers reported receiving threats to contest custody, that practice was rising).

156 Penelope Eileen Bryan, *The Coercion of Women in Divorce Settlement Negotiations*, 74 Denver U L Rev 931, 931 (1997). While "starv[e] her out" is not the only avenue in which strategic bargaining might be problematic, it is a particularly concerning one. Because litigation is expensive even when both parents can afford it, however, the opportunity for strategic bargaining is always present.

trading of time for custody: a soon-to-be-custodial parent might simply buy custodial rights from a parent who wants money but not custody. This concern is significant because it removes from the child both financial stability and an ongoing relationship with a parent, both of which are associated with the long-term success of the child.[157]

III. PAYING THE NONCUSTODIAL PARENT

Thus far, this Comment has analyzed the legal regimes currently in place for determining whether a noncustodial parent can receive child support. This Part moves away from the preceding descriptive analysis and toward an evaluation of these regimes against the policy goals embraced in child-support legislation. Section A examines how potential legal rules advance both the legal and policy aims of child support per se, as well as how legal rules provide a framework for private bargaining that does the same. Focusing primarily on the threshold approach, the California approach, and the absolute bar,[158] this Section shows that each of the regimes in place is less than ideal. Section B then discusses how to create a rule that would both protect the ability of a noncustodial parent to receive support and advance the aims of child support better than the current legal regimes. Section C presents the rule as a model statute and analyzes the likelihood of its adoption by various jurisdictions.

A. Advancing the Purposes of Child Support

This Section evaluates the existing models of noncustodial child support against the three broad statutory aims of child support—the well-being of the child, the fair treatment of parents, and the enforcement of certain public policy aims—and against the bargaining concerns identified in Part II.C. Each rule has clear advantages. The threshold approach and the

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[157] See Buchanan and Jahromi, 43 Wake Forest L Rev at 419 (cited in note 39) ("[C]hildren are more likely to thrive psychologically following divorce when they experience a family context characterized by: (a) low or contained and well-handled conflict between parents; (b) ongoing positive relationships with and effective parenting of at least one, preferably both, parents; and (c) economic stability.").

[158] The discretionary regime is, by its nature, more difficult to analyze in this light because it is dependent on judges believing that, on a particular set of facts, noncustodial child support makes sense. In addition, it is inconsistent with the federally mandated public policy embodied in the FSA, which dictates that child support be both uniform and predictable. The substantially equal rule, despite its nuances, can largely be treated as similar to the threshold approach for these purposes.

substantially equal approach provide protection for most noncustodial parents who provide a home, the absolute bar protects custodial parents from strategic bargaining, and the discretionary regime allows for tailoring. However, each rule has significant disadvantages as well. The threshold approach and the substantially equal approach increase the ability to bargain strategically, the absolute bar frustrates an economically viable relationship with the lower-income parent, and the discretionary regime sidesteps the federal mandates to move toward regularity. By identifying the strengths and weaknesses of the various approaches, this Section provides groundwork for proposing a rule that better advances the aims of child support.

In particular, this Section reveals that the absolute bar does not work well because it provides insufficient protection for noncustodial parents.[159] Instead, there needs to be some opportunity for noncustodial parents to receive child support in order to correctly calibrate a child-support regime. Particularly, a noncustodial parent should receive child support when he or she has both lower income than the custodial parent and a substantial amount of residential responsibilities. Accordingly, even an award of no support would determine that the noncustodial parent and the child were harmed, while leaving the custodial parent unharmed. However, the existing regimes that allow for noncustodial child support appear to frustrate other aims of child support in unacceptable ways, particularly by creating too great an opportunity for bad actor, noncustodial parents to be rewarded, either through strategic bargaining or through overcompensation.

1. The well-being of the child.

Family dissolution tends to lead to negative outcomes for children, though this can be mitigated by minimal parental conflict, positive relationships with at least one and preferably both parents, and a stable financial situation.[160] When examining actual or theoretical rules for awarding child support to noncustodial parents, it is imperative that these three mitigating factors be kept in mind to ensure that the rule serves the statutory aim of protecting the child's well-being.[161]

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[159] See notes 176–77 and accompanying text.

[160] See Buchanan and Jahromi, 43 Wake Forest L Rev at 419 (cited in note 39).

[161] Child-support guidelines tend to be crafted with the child's well-being in mind. See, for example, 15 Vt Stat Ann § 650:

Each of the nondiscretionary regimes provides different costs and benefits in light of these factors. The threshold rule, the absolute bar, and the substantially equal rule all recognize—by preventing parents who do not provide a regular home from receiving support—that it is more expensive to provide a regular home for a child than to simply care for him or her occasionally.[162] On the other hand, the California approach, as *Cryer* illustrates, protects the ability of the child to have a financially viable relationship with the noncustodial parent.[163] In other words, these rules have unique advantages and disadvantages. The first group is calibrated to protect the child's financial stability when residing with the custodial parent, at the cost of being underprotective of the child's financial stability when residing with the noncustodial parent. The California regime works in the opposite direction.

Additionally, the threshold approach can frustrate *either* parent's ability to provide a home that is substantially equivalent to a two-parent home because of the increased cost of the second home.[164] While this concern occurs whenever there is shared custody after a divorce, the threshold rule and the substantially equal rule tend to minimize child-support awards because these rules both subtract one parent's obligation from the other's.[165] This prevents either parent from being able to draw on an amount similar to the pooled resources,[166] which decreases the likelihood of either being able to maintain a predissolution lifestyle for the child. On the other hand, though the amount of child support paid tends to decrease as the amount of parenting increases, parents are more likely to pay *some* child support

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> The legislature finds . . . it is in the best interests of [the parents'] minor child to have the opportunity for maximum continuing physical and emotional contact with both parents . . . . [It] further finds and declares as public policy that . . . support orders should reflect the true costs of raising children and approximate insofar as possible the standard of living the child would have enjoyed had the family remained intact.

162 See note 88 and accompanying text.

163 See *Cryer*, 131 Cal Rptr 3d at 429.

164 See Gary L. Crippen and Sheila M. Stuhlman, *Minnesota's Alternatives to Primary Caretaker Placements: Too Much of a Good Thing?*, 28 Wm Mitchell L Rev 677, 690 (2001) (noting that joint-physical-custody awards may be counterproductive if the parents cannot afford to provide two homes). While joint custody presents a different scenario than a noncustodial parent being paid child support on account of his or her substantial parenting time, the same concern should be present.

165 See notes 78–84 and accompanying text.

166 Unless, of course, the resources are pooled in one parent to begin with due to vast income or wealth disparity.

when they have regular parenting time than when they have none at all.[167] While some of the loss in support payments is offset by the increased in-kind and direct payments made by the noncustodial parent, this does not completely account for the loss of the wealth transfer to the custodial parent.[168] The California approach raises similar concerns, but because a noncustodial parent with even de minimis time is entitled to reductions in obligations and the possibility of receiving support, again, as in *Cryer*, the concern is even more pronounced.[169]

In sum, all three rule-like regimes protect the child's interests in different ways. Assuming that the parents actually direct their support obligations toward the child, it is not clear that these differences actually affect the child's well-being in a measurable way. Each rule protects the child in different and countervailing ways. However, each rule also lacks flexibility and creates an opportunity to harm the child.

2. Fair treatment of the parents.

Child-support laws seek to protect both parents.[170] Custodial parents are best protected by a rule that prevents them from ever paying child support, even if a court reduces the noncustodial parent's obligation to zero.[171] Noncustodial parents are best protected by the California rule,[172] which has become somewhat notorious for being protective of noncustodial parents at the expense of their children.[173]

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167 See Buchanan and Jahromi, 43 Wake Forest L Rev at 429–30 (cited in note 39).

168 See id at 431–32. See also Singer and Reynolds, 47 Md L Rev at 513 (cited in note 152) (noting that, "for the vast majority of families[,] doing [joint custody] right is expensive, perhaps prohibitively so").

169 See *Cryer*, 131 Cal Rptr 3d at 429.

170 See, for example, Ariz Child Support Guidelines § 15; Cal Fam Code Ann § 4055(b)(7); Del Fam Ct RCP 52(c).

171 Consider the following scenario: Two parents make a combined $6,000 each month and are calculated to have a $1,500 child-support obligation. The custodial mother makes $4,000, so her share of the obligation is $1,000; the noncustodial father makes $2,000, so his share is $500. The child spends 60 percent of the time with the mother and 40 percent of the time with the father. In a state that bars the custodial mother from paying child support, she has $4,000 to account for her monthly expenses, including the time that she has the child. If she lived in a threshold state, she would owe $100 ($1,000 × 0.4 – $500 × 0.6) each month to the noncustodial father while still running the same fixed costs. If her money is marginally valuable, she is left worse off.

172 The California rule creates a strict association between parenting time and money without any form of thresholds. See text accompanying notes 95–100.

173 See, for example, Maccoby and Mnookin, *Dividing the Child* at 257 (cited in note 130); Jay Chiu, Note, *Is California's Uniform Child Support Guideline Formula* Really *More Bizarre than Alice in Wonderland? Yes!*, 31 W St U L Rev 311, 322–23 (2004) (observing that

Custodial parents can be harmed in the California system because it does not properly account for the special costs associated with providing a regular residence for a child.[174] To be fair, in some cases this will be a low burden on the custodial parent. The *Cryer* case is an example of this. The *guidelines* suggested an award of $1,141 per month to be paid by Jon, or roughly 1/3 of 1 percent of his claimed net monthly disposable income. For custodial parents less wealthy than Jon Cryer with less dramatic custodial divides, the effect could be more substantial, though California does allow for deviations when the parents have extremely low incomes.[175]

While the absolute-bar rule always protects the custodial parent, it does not necessarily protect a noncustodial parent who has substantial parenting time.[176] When a noncustodial parent has substantial parenting time, such that he or she provides a second home but is unable to receive support awards, he or she is in effect paying for a greater share of the support than his or her income would entail.[177]

The threshold approach provides similar protections for custodial parents, but it too can be underprotective of noncustodial parents. Threshold rules can arbitrarily exclude parents who incur the special costs associated with providing a full-time home for the child. For example, imagine a situation in which the noncustodial parent has full residential rights for the ten weeks of the year that the child is on summer vacation, while the custodial parent has full residential rights for the rest of the year.[178] The noncustodial parent is likely to be investing in the sort of permanent costs in housing, furniture, and clothes that are necessary

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noncustodial parents in California pay less support than noncustodial parents with comparable incomes in Nevada). To be fair to California, this problem is widespread. See Marsha Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 Cal L Rev 41, 67 (1998) (noting that "awards under the guidelines reviewed caused children's living standards to decline by 26% while noncustodial parents' *improved* by 34%").

174 See Melli and Brown, 31 Houston L Rev at 568 (cited in note 70).

175 See Cal Fam Code Ann § 4055.

176 Protecting the noncustodial parent is a standard aim of child support. See, for example, Del Fam Ct RCP 52(c) (providing that a parent is entitled to account for his or her own needs).

177 For example, consider a hypothetical parent who has 44 percent of the nights but only 20 percent of the total parental income (a less extreme version of *Rubin*). If this parent is barred from receiving support as a noncustodial parent, he or she would in effect be responsible for 44 percent of the actual obligation, more than what his or her share would be in an income-shares state. See note 42 and accompanying text.

178 This example is derived from the proposed settlement in *Payne v Payne*, 752 A2d 1209, 1210 (Md App 2000).

to have residential responsibilities for ten weeks at a time, but the noncustodial parent will fall well short of the threshold set in states like Maryland.[179] If the noncustodial parent additionally has a substantially lower income, then he or she is not only unable to receive child support but is also unable to receive any form of deduction for the time that he or she provides a home.

In terms of protecting parents, the absence of some sort of dividing line for when parenting time should lead to deviations is untenable: it fails to acknowledge that occasional, short-term parenting time is simply not the equivalent of providing a full-time residential home. Yet this is the approach that California takes, which results in a situation that is overprotective of noncustodial parents. On the other hand, both the absolute-bar approach and the threshold approach appear underprotective of certain noncustodial parents who incur the costs of providing the equivalent of a full-time home.

3. Achieving public policy aims.

State law contemplates four primary public policy aims.[180] First, parents, rather than the state, should pay for their children.[181] Second, both parents should contribute to the expense of raising a child.[182] Third, child-support awards should not disincentivize parents from working.[183] Finally, child-support awards should not encourage parents to litigate.[184] This Section shows that none of the current regimes will work to promote all these aims, and in some cases the regimes will actively frustrate them.

When the noncustodial parent is barred from receiving child support, there is a chance that the child will spend a significant amount of time with a parent who cannot afford to support the child above poverty levels. This may be problematic under the

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[179] Ten weeks of the year amounts to seventy days, or roughly 19 percent of the year. This would be lower than Florida's threshold of 20 percent, which is the lowest threshold in any threshold state. See Fla Stat Ann § 61.30(11)(b).

[180] See Part I.B.

[181] See notes 61–62 and accompanying text. See also 15 Vt Stat Ann § 650 ("The legislature [ ] finds and declares as public policy that parents have the responsibility to provide child support.").

[182] The income-shares model is perhaps the best reification of this aim, because it calculates a specific amount of money that the obligee parent is responsible to the child for.

[183] See, for example, Admin Rules Mont § 37.62.106 (allowing courts to impute income to a parent who is unemployed, is underemployed, fails to provide sufficient proof of income, has unknown employment, or is a student).

[184] See, for example, Ariz Child Support Guidelines § 20(B).

general social policy that parents, if possible, should provide for their children, rather than the state. This is the situation that occurred in *Rubin*, in which the child was expected to spend 44 percent of his nights with a parent who could not receive child support and had no income.[185] Even though the parents as a unit in that case were perfectly able to support the child, the wealth was distributed in such a way that the child was regularly living with a mother who could not afford to support him.[186] If the mother had been allowed to receive child support, this problem would have been avoided. This is categorically different from the danger that exists when the combined wealth of the parents is insufficient to support the child after divorce, because in the former case the parents can afford to support the child. The *Rubin* scenario looks especially problematic when evaluated against the federal mandate enacted in the SSA that parents provide support for the child before the state does so. By legally barring Mara Rubin from seeking support from the custodial parent who could feasibly provide it, the absolute bar increases the chance that state support will be necessary. The threshold approach and the California approach provide some safeguards against this scenario. While Mara Rubin may not have been able to fully afford to support her son for the 160 days a year that she had residential responsibilities, child support would have provided some relief from placing this burden on the state.

Whether a rule advances or frustrates the aim of ensuring that both parents share in the financial costs of raising a child depends in large part on whether the situation is viewed externally or internally. External to the arrangement, a noncustodial parent who does not pay child support and indeed receives child support appears not to contribute to the financial expenses of raising a child. Internal to the arrangement, however, the opposite situation arises. Consider a hypothetical state with an income-shares model for assigning child support and an absolute bar against the custodial parent paying support. If a custodial parent is responsible for 60 percent of the child-support obligation and has the child for 54 percent of the overnights, he or she will be underpaying his or her share of the support obligation while the noncustodial parent will be overpaying his or her share. On the other hand, under the threshold rule or the California rule, he or she will end up paying a sum to the noncustodial parent that

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[185] *Rubin*, 107 AD3d at 71–72.

[186] Id at 65–66.

better represents the share of the parenting obligation suggested by the proportion of their incomes. It is important to note, however, that in certain extreme cases allowed by the California rule in particular, such as in *Cryer*, a noncustodial parent will be able to entirely avoid any share in the cost of raising the child. Child-support law appears to consider the external appearance of providing a home to generally be sufficient; it does not require, for example, a child-support-receiving parent to actually account for how the support is spent.

All else equal, any rule that allows the noncustodial parent to receive child support could encourage the noncustodial parent to not work. This was an explicit concern for the *Rubin* court, which noted that Mara Rubin had an advanced degree yet was not participating in the labor force.[187] Additionally, in *Cryer*, a noncustodial parent who did not work was able to receive an award worth $92,000 annually.[188] This concern is particularly strong when the noncustodial parent has the opportunity to recover support without incurring significant childrearing costs, such as in *Cryer*, in which a noncustodial parent received what was almost a six-figure annual payment for what amounted to one or two days of actual parenting time. Indeed, under the California rule, a parent who does not work and has his or her child only one day per month is guaranteed under the formula to receive some form of child support so long as the other parent has some income. In this sense, the California rule is undesirable because it allows noncustodial parents to substitute child support for income. While other rules may alter the work incentive to a degree, they do not provide the same opportunity to receive child support while triggering minimal costs.

By creating a clear association between time and money, the threshold approach and the California approach lead to increased litigation that frustrates the aim of minimized conflict.[189] As identified earlier, the threshold approach creates a significant cliff effect at the threshold-triggering day.[190] In 2002, the Maine legislature retreated from the threshold approach

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[187] Id at 63.

[188] See *Cryer*, 131 Cal Rptr 3d at 429.

[189] See, for example, Ariz Child Support Guidelines § 20(B) (exemplifying the aim of minimized conflict by permitting courts to deviate from the guidelines when the parties have reached an otherwise-legitimate agreement on support).

[190] See notes 88–94 and accompanying text.

specifically because of the cliff effect,[191] which creates a situation in which a marginal overnight is worth an incredible amount of money and thus increases the incentive to litigate.[192] A similar issue can be seen in the Maryland case *Payne*. In that case, the custodial mother had offered to settle a dispute over whether custody should be changed by offering the noncustodial father six additional weeks.[193] The father responded by advising the court of the offer and claiming that he would accept it in exchange for relief from paying child support for those six weeks and receipt of support from the mother instead.[194] The plan was not accepted and negotiations broke down because the mother refused to engage in any child-support negotiations while the husband remained below the threshold.[195] Without the threshold, the litigated issue would not have existed—the parents would have had an increased incentive to settle on a reasonable reduction for the six-week shift.

In sum, each of the rules looks particularly problematic when measured against the public policy aims that underlie child support. The absolute bar leads to situations in which state welfare will be used for child support before the parents' resources. The California rule creates powerful incentives for noncustodial parents to reduce their income. The threshold approach leads to increased litigation. Finally, both the California approach and the absolute bar can enable parents to avoid their reasonable contributions to the child and to give the appearance that they are not participating in the parenting of their child.

4. Strategic concerns.

Strategic bargaining is a typical feature of child-support negotiations. Studies estimate that bargaining occurs anywhere

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191 See generally LD 234 Bill Summary, Maine Legislature, 121st Reg Sess, 2003, online at http://www.maine.gov/legis/opla/JUD03.pdf (visited Nov 3, 2014). Rhode Island expresses similar contempt for the use of thresholds in its child-support guidelines, declaring, "No deduction from a basic child support obligation should be allowed . . . predicated on cumulative . . . visitation. . . . If allowed, this procedure would engender costly and time-consuming litigation." Rhode Island Family Court, *Administrative Order 2007-03* *4 (Sept 14, 2007), online at http://www.mtlhlaw.com/Page-9.pdf (visited Nov 3, 2014).

192 The effect is so large because, regardless of which parent pays, he or she gets to deduct the other parent's obligation from his or her own. See note 86 and accompanying text.

193 *Payne*, 752 A2d at 435.

194 Id.

195 Id.

from 7 percent of the time[196] to as frequently as 33 percent of the time.[197] There is evidence that the introduction of child-support guidelines, particularly the state-specific regimes that created a clear connection between time and money, led to an increase in the frequency of strategic bargaining in divorce.[198] Because bargaining itself is not problematic but strategic bargaining is often harmful to the child, it is important that regimes for awarding child support to the noncustodial parent do not increase the incentive to bargain strategically. However, the current rules increase the incentive to bargain strategically, either by lowering the cost of strategic bargaining or by creating a more powerful financial incentive to bargain strategically.

Bargaining is explicitly endorsed by a number of state laws.[199] It allows parents to reach agreements that deviate from the guidelines and account for their unique circumstances and preferences[200] while avoiding litigation.[201] Strategic bargaining is an outgrowth of allowing parties to bargain. It arises because parties are unable to know, perfectly, each other's idiosyncratic values, each other's levels of risk aversion, and the certainty of the outcome at court, in addition to the advantages that strategic behavior can provide to the strategic bargainer.[202] The only way to totally eliminate strategic bargaining is to eliminate the ability of parents to bargain at all, which is an undesirable option given the legislative preference for settlement. Additionally, strategic bargaining can occasionally be beneficial to the child. For example, if a custodial parent can extract additional support in exchange for increased visitation with the noncustodial parent who can afford it, the child receives both increased financial stability and increased contact with each parent.[203] Yet post-divorce poverty is a real and serious concern that can be exacerbated by strategic bargaining when the custodial parent trades less support for more time.[204]

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196 Maccoby and Mnookin, *Dividing the Child* at 102 (cited in note 130).

197 Weitzman, *The Divorce Revolution* at 310 (cited in note 154).

198 See Altman, 68 S Cal L Rev at 507–08 (cited in note 155).

199 See, for example, Ariz Child Support Guidelines § 20(B); Ind Child Support Rules and Guidelines 1(3); Nev Rev Stat § 125B.080(2).

200 See Mnookin and Kornhauser, 88 Yale L J at 957–58 (cited in note 137).

201 See Saul Levmore, *Joint Custody and Strategic Behavior*, 73 Ind L J 429, 433 (1998) (acknowledging that a mandatory-joint-custody rule would deter both strategic behavior and positive bargaining by nonstrategic parents).

202 See Mnookin and Kornhauser, 88 Yale L J at 972–73 (cited in note 137).

203 See Altman, 68 S Cal L Rev at 512 (cited in note 155).

204 See id at 513.

The California rule, which has created a specific dollar value attached to any amount of visitation in all cases, has led to an increase in the incidence of strategic bargaining.[205] This result is somewhat counterintuitive given the reduced marginal value of additional custodial time and the alternative option of reducing support payments by earnestly asking for more custodial time. Professor Scott Altman has proposed theories to explain the increase in threats, including increased incentives for custodial parents to make threats and the refusal of noncustodial parents to reduce visitation without compensation.[206]

The absolute bar and the substantially equal rules lower the costs of strategic threats while escalating the penalties for not responding to such threats. Currently, rules creating preferences for joint custody—and the associated friendly-parent rule, which favors the parent who does not object—are the norm in determining custody.[207] This allows a strategic parent to make a powerful threat. Imagine that there is a parent who does not want custody at all but would like to avoid paying child support, or would even like to receive child support. That parent can behave strategically and threaten to go to court and ask for joint custody unless the other parent agrees to settle on favorable financial terms. If the parent who actually wants custody refuses to settle and goes to court, he or she might lose custody due to the friendly-parent rule.[208] Further, even if the court awards significant visitation to the noncustodial parent, the absolute bar prevents him or her from receiving support for that time. Thus, he or she risks being left in the situation of Mara Rubin if the strategic threat is allowed to play out—receiving parenting time that he or she cannot afford—and even that is in the best-case scenario.[209] On the other hand, the risks for the strategic parent are mitigated. At worst he or she gains custody rights

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[205] See id at 507–09.

[206] See id.

[207] See Margaret K. Dore, *The "Friendly Parent" Concept: A Flawed Factor for Child Custody*, 6 Loyola J Pub Interest L 41, 53 (2004).

[208] See id (noting that the friendly-parent rule "creates an opportunity to compel financial concessions from the economically disadvantaged parent, typically the mother").

[209] See *Rubin*, 107 AD3d at 73–74 (Acosta dissenting) (noting that the refusal to award child support to a low-income noncustodial parent "sacrifices the child's well-being at the altar of an arithmetic formula" and "forces the child to bear the economic burden of his parents' decisions, even where . . . the child . . . is in danger of living in poverty, solely to preserve uniformity and predictability").

that need not be exercised;[210] at best he or she receives protection from paying child support or even the chance to receive child support. While this threat can still play out under the California approach or the threshold approach, its effect is somewhat mitigated by the fact that significant visitation rights receive financial protection.

The threshold approach implicates some of the concerns of both the California approach and the absolute bar when it comes to strategic bargaining. As under the California approach, parents have increased incentives to act strategically over the specific number of days that they have since each day has some value. Additionally, the presence of the cliff effect creates an incentive for parents to bargain strategically away from the cliff. However, the threshold might provide some guards against strategic bargaining as well. Consider *Payne* as recounted above.[211] While the court in *Payne* did not consider this possibility, the father's actions could be read as strategic if his aim was simply to reduce his child-support payments. In this view, a strategic father determines that he does not want to pay as much child support, so he sues for custody. Upon extracting a settlement offer, he immediately seeks to turn this into a financial advantage. The threshold approach stops this in its tracks by preventing child support from being changed unless the threshold is reached.[212]

B. A New Approach

The previous Section showed that the current regimes for establishing the noncustodial parent as the recipient of child support are flawed; they fail to advance the general aims of child support. The threshold rule, which is likely better than the others, protects the interests of the child and custodial parent, but at the cost of increasing litigation and underprotecting those noncustodial parents who actually incur the costs of providing a full-time home. The absolute bar protects the interests of the custodial parent and reduces legal uncertainty but does a poor job protecting the interests of the noncustodial parent and the

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[210] See Dore, 6 Loyola J Pub Interest L at 54 (cited in note 207) ("For the noncaretaker parent using custody as a bargaining tool, there is little downside risk. If the strategy fails, he will likely be able to change his mind as the other parent will likely want to care for the child.").

[211] See text accompanying notes 193–96.

[212] See *Payne*, 752 A2d at 445.

child's ability to foster a relationship with the noncustodial parent. The substantially equal rule functions similarly to the absolute bar, but with the disadvantage of the threshold formula's cliff effect. Discretionary regimes are difficult to categorize ex ante with regard to their ability to protect the parents and child, but they increase transaction costs and create legal uncertainty, which is inconsistent with the public policy that the FSA mandates. Finally, the California approach appears to fail the most dramatically. It frustrates the interests of the child and custodial parent alike by underestimating the fixed costs of maintaining a regular home, it appears to increase the incidence of strategic bargaining, and the protection that it provides for noncustodial parents is overcompensatory.

States should instead follow Maine and abandon the use of thresholds. Thresholds are practical in theory but create significant dangers by raising the incidence of strategic bargaining and increasing the chance of litigation. Under the 2002 amendments to the state's child-support law, Maine eliminated its threshold and the related formula but left open the possibility that noncustodial parents could receive support when it would be unjust, inequitable, or not in the child's best interests to rigidly apply the presumption in favor of the custodial parent, thus implying that noncustodial child support could be awarded by judicial discretion.[213] This model successfully eliminates the cliff effect, but at the cost of creating legal uncertainty as to whether and how much a noncustodial parent could be paid.

To improve on Maine's approach, states should retain the time-income offsets when a court establishes that both parents provide a regular residence for the child. A regular residence should be understood such that each parent provides the rough equivalent of the pre-separation home in terms of space, furniture, and goods, or the rough equivalent of each other's homes, and that the child spends extended time at each home on a sustained or predictable basis. This accounts for the fixed cost of providing the equivalent of the full-time house, generally considered necessary when a child spends more than the occasional weekend.[214] As many commentators have noted, the fixed cost of

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[213] See LD 234 Bill Summary at *3–4 (cited in note 191).

[214] See Melli and Brown, 31 Houston L Rev at 554 (cited in note 70) (explaining that "shared custody is more expensive than sole custody" primarily because of the "additional expense" associated with "duplicate housing and related costs").

providing a home is the justification for the threshold rule in the first place.[215]

The goal of the regular-residence standard is to capture the benefits that thresholds are intended to capture—namely, protecting custodial parents from shifting costs toward noncustodial parents who do not incur the same baseline costs, while avoiding the pitfalls that thresholds lead to. These pitfalls include an increase in litigation and the exclusion of certain noncustodial parents who incur those costs.[216] Rather than turning on whether each parent reaches a certain number of days, the regular-residence standard would be met when both parents provide the equivalent of a full-time home that the child actually uses on regular and substantial intervals. To approve a payment of child support to a noncustodial parent, the court would evaluate qualitatively, rather than quantitatively, the home that the parent provides. The noncustodial parent would have to show an investment in tangible goods—such as space, furniture, and clothing—comparable to what a similarly situated custodial parent would spend.

The benefit of using the regular-residence standard is threefold. First, it defeats the ability of parents to place ex ante valuation on a particular number of days, avoiding the problems of a cliff effect, which weakens the ability of the parents to bargain strategically. Second, the standard is verifiable ex post since it involves the existence of an actual home. The home requires a sustained, significant investment on the part of the noncustodial parent, and the noncustodial parent cannot meet the cost-shifting trigger without actually providing the home, thereby avoiding the problem of parents asking for custodial rights that they do not, for financial purposes, plan to exercise.[217] Third, the standard protects noncustodial parents whose visitation arrangements mirror those of providing a full-time home without meeting a set number of days, such as in *Payne*, which concerned an arrangement in which one parent had the children for the school year and the other for the summer.[218] While such an arrangement is not quantitatively different from every other weekend plus two weeks' vacation, it is qualitatively different in that it features two parents who provide a regular home and accrue the

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[215] See, for example, id at 563.

[216] See text accompanying notes 178–79.

[217] See note 150 and accompanying text.

[218] *Payne*, 752 A2d at 1210.

associated costs. Additionally, such a standard mitigates the dangers of a strict association between time and money, such as that which exists under the California rule, by making the trigger for such a connection the exception rather than the norm. The "shadow" in which the parties bargain would be primarily one in which time and money are not strictly associated and one in which positive bargaining—such as when a higher-income, noncustodial parent pays more in order to see his or her child more often—can still occur.

The most significant concern with this standard is that it retains an association between time and money that may be dangerous.[219] However, some such relationship is likely necessary in order to create the predictable, reliable child-support awards that modern law favors.[220] Further, it is important to remember that the law of child support has multiple aims and purposes that occasionally push against one another. While an association of time and money might lead to negative strategic bargaining and increased litigation, it also helps ensure that the child and both of the parents are protected in proportion to their costs, and it provides an avenue for parents to reach nonstrategic agreements and reduce litigation. The goal of a child-support regime should be to balance the parties' interests, and a regular-residence standard provides a sufficient barrier to strategic bargaining.

Another significant concern is that the ambiguity that a standard creates might lead to an increase in litigation.[221] However, this concern overestimates how much the law is driving the decision to settle or litigate in the divorce context.[222] Parties in divorce negotiations are not particularly driven by the operation

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[219] Other scholarship has suggested that strategic bargaining should be attacked through a ban on settlements that address both custody and child support. See Altman, 68 S Cal L Rev at 527–28 (cited in note 155). However, such an approach is problematic because it takes away the only bargaining chip that parents have in negotiations, and it provides an incentive for parents to lie to each other in custody negotiations regarding support terms.

[220] See text accompanying notes 14–22.

[221] See Mnookin and Kornhauser, 88 Yale L J at 979 (cited in note 137) (arguing that uncertainty causes parties to overestimate their likelihood of success and thus increases the cost of settlement). Professors Robert Mnookin and Lewis Kornhauser also believe that introducing uncertainty into the law categorically disfavors risk-averse parents, which is "peculiarly ironic and tragic" because those parents are presumably better, and uncertainty forces them to accept less in order to avoid the risk inherent in adjudication. Id.

[222] See Jacob, 26 L & Soc Rev at 584 (cited in note 145) (noting that divorcing parties tend not to think of their bargaining in legalistic terms).

of the law.[223] Rather, the concern is that the law should not provide rules that allow sophisticated parties to frustrate settlement. Returning to *Payne*, note that negotiations broke down and litigation commenced because one of the parties was aware that the legal rule prevented cost shifting for support below the statutory threshold.[224] The use of the standard would prevent this strategy because the question would have focused on what the father was providing rather than on whether he reached a certain number of days.

C. Adopting a Model Rule

This Section presents a model noncustodial-child-support statute that better promotes the aims of child support. It then examines how the proposed rule would handle some of the difficult noncustodial-support cases identified earlier and acknowledges issues in noncustodial child support that it does not purport to resolve. Finally, it considers which states would be in the best position to adopt the model rule.

A guideline seeking to implement this approach would be modeled as follows:

> Section 1. *Definitions*.
> (a) *Regular Home*. A regular home means a home in which the child or children spend a consistent, predictable, and extended amount of time. It does not include homes in which the child spends only weekends and holidays, but it does include homes in which the child spends an entire month[225] during the summer with one parent, even if this is less cumulative time than a holidays-and-weekends arrangement would be.
> (b) *Actual Costs*. Actual costs are those that a parent is, or will soon, incur, such as increased costs in housing size and furniture, rather than temporary costs that are incurred only when the child is in the parent's custody, such as increased costs in electricity.

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[223] See id at 586.

[224] See *Payne*, 752 A2d at 435.

[225] This serves as an example of a situation that would qualify, not a minimum or necessary amount of time. The purpose here is to turn the analysis away from a time-triggered framework and toward an analysis that focuses on the cost of the home that each parent provides.

> Section 2. *Shared Parenting Time*. When each parent (a) provides a regular home for the children or provides the sole home for at least one child, and (b) incurs the actual costs associated with providing a permanent home for the children, the parents shall be deemed to be engaged in shared parenting time.
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> Section 3.[226] *Calculation of Child Support during Shared Parenting Time*. In cases of shared parenting time, the basic child-support obligation will be adjusted upward by one-and-one-half times.[227] This adjusted child-support obligation will be apportioned to each parent on the basis of his or her respective income. Each parent's share of the adjusted child-support obligation shall then be multiplied by the percentage of time that the child or children spend with the other parent to determine the theoretical, basic child-support obligation owed to the other parent.[228] The parent owing the greater amount shall owe the difference between the two amounts as child support.
>
> Section 4. *Absence of Shared Parenting Time*. Absent a finding of shared parenting time, a parent who does not have physical custody over the child or children for at least 50 percent of the overnights shall not receive any child-support award, and no agreement of any kind purporting to provide such child support shall be judicially approved or enforceable.

Notably, both *Cryer* and *Rubin* would have come out differently under the proposed rule. In *Cryer*, Sarah would have failed to meet the standard that triggers time-income balancing.[229] In

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[226] Section 3 is a slightly modified version of Md Fam Code Ann § 12-204(m)(1)–(3).

[227] This sort of upward adjustment is how states attempt to account for the extra expense of providing two homes. See note 86 and accompanying text.

[228] This supposes an income-shares system, but the text could be adapted for a percentage-income or Melson formula as well. A percentage-income version would read:

> Section 3. *Calculation of Child Support during Shared Parenting Time*. In cases of shared parenting time, the presumptive support obligation for each parent will be calculated as if that parent were the obligor. These presumptive obligations shall then be multiplied against the percentage of time that the child or children spend with the other parent. The parent owing the greater amount shall owe the difference between the two amounts as child support.

See notes 64–69 and accompanying text.

[229] The court could still, as it did, have reversed this determination and awarded Sarah support in the interest of justice, of course. See *Cryer*, 131 Cal Rptr 3d at 433–44.

Rubin, Mara would have met the new standard, triggering that balancing, and while she would have had income imputed to her for the purpose of calculating support, she still would have been allowed to recover.

This solution provides a more equitable result in situations in which the child spends the school year with the custodial parent and summer vacation with the noncustodial parent, as in the proposed plan in *Payne*, in which the noncustodial parent provided a full-time home for a below-threshold fraction of the year. Providing a home for two months during the summer would qualify as a regular home, and if the home was larger because of the extended time that the child was there, the increased costs would qualify as actual costs under § 2. Thus, the noncustodial parent would be allowed to trigger cost shifting under § 3. On the other hand, a parent who has the child every weekend would be unlikely to trigger cost shifting, even if they had the child for more cumulative time.

This solution does not solve every problem that is created by raising a child in two households. It retains a dangerous association between time and money, though this danger is mitigated by the fact that the regime operates on a nondefault basis. This solution does not address that raising children postdivorce is substantially more expensive than raising children in a unified household, nor does it adequately deal with legitimate concerns regarding the financial feasibility of joint or shared custody for low-income families. Those problems, however, exist apart from whether noncustodial parents—with substantial parenting time, accruing the costs of providing a home, and with lower incomes than the custodial parents—are allowed to receive child support.

Federal mandates ensure that child-support guidelines are reviewed every four years.[230] While a drastic change is thus theoretically possible, it is less likely to happen due to varying political pressures.[231] It seems more likely that states that would need only to tweak their child-support guidelines would adopt such a change. In the threshold states, such as Maryland, the states need merely to change their triggering event from a certain number of days to the proposed standard. The "either-or-both"

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[230] FSA § 103, 102 Stat at 2346, codified at 42 USC § 667; 42 USC § 667.

[231] As part of periodic review, an attempt to overhaul the guidelines in Arizona in order to impose higher support obligations of higher-income obligors failed in 2011. For the story of this failure, see generally Ira Mark Ellman, *A Case Study in Failed Law Reform: Arizona's Child Support Guidelines*, 54 Ariz L Rev 137 (2012).

states could adopt this standard without legislative intervention through judicial determination of "in the interest of justice." On the other hand, California and the substantially equal states would need a more extensive overhaul of their systems, including potentially dropping their current formulas entirely. Finally, states that expressly bar noncustodial parents from receiving support are the least likely to adopt the proposed standard and could not do so through judicial intervention.

TABLE 1. LIKELIHOOD OF ADOPTING A NONTHRESHOLD TIME-INCOME BALANCING APPROACH

High	States that currently use a threshold approach: Alaska, Colorado, District of Columbia, Florida, Idaho, Maryland, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Vermont, West Virginia, Wisconsin, Wyoming.[232]
Medium	States that currently use a discretionary approach with "either or both" language: Connecticut,[233] Illinois, Kansas, Kentucky, Maine, Missouri, New Hampshire, Pennsylvania.[234]
Low	States that allow noncustodial child support but have a formula that is inconsistent with this proposal: Arizona, California, Delaware, Iowa, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Tennessee, Utah, Virginia.[235]

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[232] See Alaska RCP 90.3(b), (f); Colo Rev Stat Ann § 14-10-115(3)(h), (8)(b); DC Code § 16-916.01(q)(1); Fla Stat Ann § 61.30(11)(b); Idaho RCP 10(e); Md Fam Code Ann § 12-201(m); Admin Rules Mont § 37-62-134(2)(b); Neb S Ct Rule 4-212; NJ Rules of Ct 5:6A, Appx IX A(13); NM Stat § 40-4-11.1(d)(3), (f)(2); North Carolina Administrative Office of the Courts, *North Carolina Child Support Guidelines* *5–6 (2011), online at http://www.nccourts.org/forms/documents/1226.pdf (visited Nov 3, 2014); 43 Ok Stat Ann § 118E; *SC Child Support Guidelines* § 4.1, online at http://www.state.sc.us/dss/csed/forms/2006guidelines.pdf (visited Nov 3, 2014); 15 Vt Stat Ann § 657(a); W Va Code § 48-13-501(1); *Wis Dept of Children and Fam Code* § 150.04(2), online at https://docs.legis.wisconsin.gov/code/admin_code/dcf/101_153/150.pdf (visited Nov 3, 2014); Wyo Stat § 20-2-304(c).

[233] In an unpublished opinion, a Connecticut appellate court announced that a child can have "two primary residences" to get around statutory language that appears to bar a noncustodial parent from receiving support. *Wallbeoff v Wallbeoff*, 2009 WL 4282286, *3 (Conn Super).

[234] See *In re Marriage of Turk*, 12 NE3d 40, 45 (Ill 2014); Kan Stat Ann § 23-2215; Ky Rev Stat Ann § 403.212 (not providing for any form of cost shifting, but not barring it either); LD 234 Bill Summary at *3–4 (cited in note 191) (stating Maine's approach); Mo RCP Form 14; NH Rev Stat Ann § 43-458-C:5(h) (noting that even approximately equal parenting time is not itself grounds for a child-support adjustment, but not prohibiting such an adjustment or reversal); *Colonna II*, 855 A2d at 651 (deciding Pennsylvania's approach).

[235] See Ariz Child Support Guidelines § 15; Cal Fam Code Ann § 4055; *Dalton v Clanton*, 559 A2d 1197, 1212–16 (Del 1989); Iowa Ct Rules 9.9 (entitling a parent with less-than-equal custody to at most a 25 percent reduction in support obligation); Massachusetts Office of the Chief Justice, *Massachusetts Child Support Guidelines* *7 (2013),

Very Low States that expressly bar noncustodial child support: Alabama, Arkansas, Louisiana, Mississippi, Nevada, New York, Ohio, South Dakota, Washington.[236]

CONCLUSION

Over the past thirty years, the American approach to child support has changed dramatically. Federal mandates accelerated the adoption of mandatory child-support guidelines, thus reducing the role of judicial discretion in setting child support and creating increased room for a strict time-money relationship. Further, as the realities of the modern American family have changed, traditional presumptions about custodial status and income have become less powerful.

In the past year, litigation in three states has addressed whether a noncustodial parent could be paid child support. As it turns out, such an arrangement is not unheard of under the state guidelines and, indeed, it appears to occur with some regularity. This result may appear odd in that it seems like a parent is being paid for not parenting, but more frequently it arises out

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online at http://www.mass.gov/dor/docs/cse/guidelines/2013-child-support-guidelines.pdf (visited Nov 3, 2014) (entitling a noncustodial parent with between 33 percent and 50 percent of the parenting time to pay the average of what he or she would pay under the base calculation if he or she had equal custody); Michigan State Court Administrative Office, *Michigan Child Support Formula Manual* § 3 (2013), online at http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Manuals/focb/2013MCSF.pdf (visited Nov 3, 2014); Minn Stat Ann § 518.36(2); ND Admin Code § 75-02-04.1-08.2 (establishing North Dakota as a substantial-equality state); Rhode Island Family Court, *Administrative Order 2007-03* *4 (Sept 14, 2007), online at http://www.mtlhlaw.com/Page-9.pdf (visited Nov 3, 2014); Rules of the Tennessee Department of Human Services Child Support Services Division Chapter 1240-2-4-.04(7)(h): Child Support Guidelines (providing a complicated formula for determining reductions for noncustodial parents with more than ninety-two days of physical custody, but without allowing for shifting); Utah Code Ann § 78B-12-207; Va Code § 20-108.2(G)(3).

[236] See *Motley v Motley*, 69 S3d 210, 218 (Ala App 2011); 9 Ark Code Ann § 9-14-105(b); La Rev Stat Ann § 9:315.8; Miss Code § 43-19-101 (establishing child-support calculations based on the "absent" parent); Nev Rev Stat Ann §§ 125B.030, 125B.080(4) (putting the duty of support on the parent without physical custody and setting the absolute minimum support amount at $100 per month, unless the obligor cannot pay); *Rubin*, 107 AD3d at 67 (deciding New York's approach); Ohio Rev Code Ann § 3119.07(A); SD Cod Laws § 25-7-6.2 (setting a technical threshold of 180 days—which on all but the most formalist account is the same as not having a threshold—and stating that "[t]he noncustodial parent's proportionate share establishes the amount of the child support order"); Wash Rev Code § 26.18.020 (defining the obligee of a child-support order as "the custodian of a dependent child").

of an attempt by the courts to ensure some semblance of economic balance when a lower-income, noncustodial parent provides a home for a substantial amount of time.

Unfortunately, the majority solution for dealing with the problem of noncustodial child support—creating a direct association between time and money—exacerbates the problem of strategic bargaining between parents, thereby diverting resources away from the child. This Comment's solution reduces the bargaining incentive by proposing a costly standard that each parent must meet to trigger cost shifting. Instead of having a right merely to a set number of overnights that they need not exercise, each parent must actually incur the costs of providing a home. This approach should reduce the incentive to bargain strategically for decreased support payments, while still protecting the ability of a lower-income, noncustodial parent to provide a sufficient home for his or her child.