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## **Lay Intuitions About Child Support and Marital Status**

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### **ABSTRACT**

Given the fact that the child and custodial parent generally share a living standard, there is some tension between the traditional rule excluding marital status altogether as a consideration in setting child support levels, and the traditional American rule making marriage an absolute requirement in claims by one spouse against the other for support (traditionally, ‘alimony’) for herself. How should that tension be resolved? This paper is part of a larger project investigating how ordinary citizens resolve such policy problems, by asking them to decide a series of cases that systematically vary critical facts so as to reveal the underlying principles animating their views. This study extends the authors’ prior child support studies by a) expanding the range of paternal incomes presented to respondents, and b) examining the effect of the parents’ marital status and relational duration. We replicate our prior findings on the impact of parental incomes, and the disparity between them, across the expanded income range, and the finding that overall, citizens favor higher support amounts than the law provides when custodial parent income is low, but lower support amounts when the custodial parent income is higher. We also now find that our respondents would increase support awards for low income mothers (over current levels) by larger amounts when parents had married, than when they had cohabited, and would give the lowest awards to mothers who had had no relationship at all with the father, beyond the single sexual act leading to the child’s conception. We explain why the pattern of their support awards suggests that in setting child support levels they give more weight than current American law to the children’s interests.

## Introduction

The formal law of the United States and many other English-speaking countries today makes the marital status of parents irrelevant in determining the amount of child support one parent may be ordered to pay the other. Equally irrelevant is the duration of their relationship. American child support guidelines make no distinction among cases in which the parental separation comes after 20 years of marriage or a month of cohabitation, or in which the parents couldn't separate because they had never lived together in the first place. At the same time, current American law makes a sharp distinction between married and unmarried partners with respect to alimony claims,<sup>1</sup> and often gives important weight in alimony adjudications to relational duration: Alimony is possible when spouses divorce, and is more likely after a long marriage, but it is never allowed at the separation of unmarried cohabitants, no matter how long their relationship.

At a formal doctrinal level these very different rules can be explained and perhaps also defended. There is widespread agreement today that it is wrong for the law to disadvantage children because their parents had not married. And while the sentiment is not as universal, many assume that most Americans believe that those who have formally married should have greater legal obligations to one another than those who have not (unless perhaps the unmarried partners have made an equivalently formal expression of mutual commitment through a device such as contract). So one may argue that both rules find support in widely-endorsed societal norms.

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1. We favour the traditional term 'alimony' because it is one word rather than several. Some American states still employ it, although most now use other terms, such as 'spousal support' or 'maintenance'.

Yet as plausible as each rule may seem when considered alone, they are unavoidably incoherent when considered together. The reason is straightforward: the law may distinguish transfers of income between households by their label—alimony or child support—but the reality of household economics makes those labels largely meaningless. Households have joint consumption items, such as the bulk of housing and utility expenditures, which comprise a large portion of the total household expenditures. Parents and the children living with them inevitably share a common living standard. The cost of providing comfortable middle class housing for the child necessarily includes the cost of providing it for the custodial parent. And the custodial parent who uses alimony income for personal expenses, such as clothing or food, necessarily has more funds then left from other sources with which to buy clothes or food for the child.

So the reality is that child support payments will necessarily benefit the custodial parent, and alimony payments will necessarily benefit the children living with that parent. Child support payments made to the mother of a child born from a fleeting or casual relationship help that mother, despite any legal rule making her ineligible for alimony, while the rule denying her alimony disadvantages her child, even though the law otherwise insists that children should not suffer from their mother's marital status at their birth. While American law does not fully acknowledge this tension between the alimony and child support rules, one can see its impact on the legal rules for both. The support amounts provided in most state child support guidelines are low,<sup>2</sup> but proposals for higher amounts are often met with objections that increases would only

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2. We know from our own prior work that citizens asked to make judgments about the appropriate amount of child support will choose higher support amounts than most income shares guidelines for the cases in which CP income is low and NCP is not. Ellman, Braver, and MacCoun, 'Intuitive Lawmaking: The Example of Child Support' (2009) 6 *Journal of Empirical Legal Studies* 69. Much academic commentary agrees. See, e.g., Ellman and Ellman, 'The Theory of Child Support' (2008) 45 *Harvard Journal on Legislation* 107 and the articles cited therein.

provide mothers with ‘hidden alimony’. So the size of support awards may be suppressed by this concern to avoid an unjustified windfall for the mother, a concern that implicitly recognizes that mother and child share a financial fate – and thus, that ‘hidden alimony’ is unavoidable at any support level. On the other hand, most American child support guidelines take account of the alimony payments the mother receives, by adding them to her income (and subtracting them from the income of the child support obligor, if he is also the alimony obligor) before calculating the amount of child support. This reduces the child support payment to mothers who also collect alimony, in apparent recognition of the fact that the alimony she collects will be available, in part, to help the child. Turning the usual father’s group objection on its head, one can thus describe alimony awards as containing ‘hidden child support.’

Quite obviously, neither the effort to resist ‘hidden alimony’ in child support, or the implicit recognition of ‘hidden child support’ in alimony, resolves the tension between the economic realities of household finances and the legal fiction that alimony and child support dollars affect only the obligor’s former spouse or the obligor’s child, respectively, but never both. One of us has previously argued that this economic reality needs to be confronted when one constructs rules (guidelines) that set support amounts across parental income levels.<sup>3</sup> One must recognize that such guidelines necessarily choose the proper tradeoff, for each case to which they apply, between the obligor’s valid interest in not supporting the custodial parent under the rubric of child support, and the custodial parent’s and child’s valid interest in a child support award that is sufficient to provide the child with a living standard not grossly

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3. Ellman and Ellman, ‘The Theory of Child Support’, (2008) 45 *Harvard Journal on Legislation* 107.

disproportionate to the obligor's. A question that arises, however, is whether the obligor's interest is unvarying across support cases, or whether it is instead weaker when the facts of the case could justify an alimony award, than in cases in which they could not. If the obligor's interest does vary this way across cases, then perhaps the amount of child support should be determined by rules which take such alimony-relevant facts into account for child support as well. Opposition to higher child support amounts that is grounded in the belief they would provide the custodial parent an unwarranted windfall might lessen, if the higher amounts applied only when there were facts, such as a long marriage, giving the custodial parent a plausible claim for alimony.

This could mean that higher child support amounts would be allowed when the parents were married, or had more than a short-term relationship. The obvious objection is that such a proposal improperly disadvantages nonmarital children. Those who believe support amounts should be higher in *all* cases may object that half a loaf is not better than none if its price is conceding that it is appropriate to provide less support to nonmarital children or the children of short marriages. So reasonable people may surely reject any such legal reform. On the other hand, the current law was largely formed at time when the social reality to which it applied was very different than it is today.<sup>4</sup> We know from our own prior studies, described below, that

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4. For a recent and helpful review of many of these changes, see A Cherlin, 'Demographic Trends in the United States: A Review of Research in the 2000s' (2010) 72 *Journal of Marriage and the Family* 403. As he reports, in 1950 only 4% of all children were born outside of marriage; by 2007 it was 39.7%. While the lifetime probability that a marriage will end in divorce has declined since divorce rates peaked in 1979-1980, the decline seems largely concentrated among the better educated, and the overall probability of that a recent marriage will end in divorce probably still exceeds 40%. The proportion of men and women who would cohabit outside marriage grew enormously, and now exceeds 50% even for the college educated. Not that long ago, unmarried cohabitation was a crime in many if not most states. See RA Posner and KB Silbaugh, *A Guide to America's Sex Laws*, (University of Chicago Press, 1996). Federal requirements that states make serious efforts to collect child support, including the adoption of guidelines and the use of mandatory wage assignment, did not come into place until the 1980's; before

Americans do not necessarily favour the total exclusion of alimony for unmarried cohabitants. So it may be that the sharp distinction in alimony law between the married and the unmarried requires revisiting, and that a child support law that considered reformed alimony-relevant factors might not disadvantage the nonmarital child very much.

This paper is part of a larger project that tries to shed light on such questions by gaining a greater understanding of the intuitions of ordinary citizens as to what the law should require. We do that by asking a random sample of Arizona residents how they believe a court should decide each of a series of cases the facts of which are systematically varied so as to reveal the underlying principles the respondents employ in resolving them. We have elsewhere reported data on citizen beliefs with respect to both child support amounts and alimony awards,<sup>5</sup> and described the relationship between those results and child support theory.<sup>6</sup> In this paper we

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that time very little child support was collected even if it was ordered, and often it was not even ordered. Effective programs to collect support from men who were not married to the mother only began in the last decade. See P Legler, 'The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act' (1996) 30 *Family Law Quarterly* 519.

5. We have previously reported on child support in two articles, Ellman, Braver, and MacCoun, 'Intuitive Lawmaking: The Example of Child Support' (2009) 6 *Journal of Empirical Legal Studies* 69, available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1297588](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1297588)>, and Ellman, Braver, and MacCoun, 'Abstract Principles and Concrete Cases in Intuitive Lawmaking', forthcoming in (2011) *Law and Human Behavior*, (<http://www.springerlink.com/content/6725852nh7841778/>),. Our report on alimony is Ellman and Braver, 'Lay Intuitions About Family Obligations: The Case of Alimony', forthcoming in (2012) 13 *Theoretical Inquiries in Law*. We have also reported on respondent beliefs regarding the allocation of custodial time in Braver, Ellman, Votruba, and Fabricius, 'Lay Judgments About Child Custody After Divorce' (2011) 17 *Psychology, Public Policy, and Law* 212.

6. The first author's analysis of child support theory, including discussions of earlier work by others, is set out in Ellman and Ellman, 'The Theory of Child Support', (2008) 45 *Harvard Journal on Legislation* 107. The relationship between our data and both the theory and the actual content of most child support guidelines is explored in Ellman, Braver, and MacCoun, 'Intuitive Lawmaking: The Example of Child Support', (2009) 6 *Journal of Empirical Legal Studies* 69 and Ellman, Braver, and MacCoun, 'Abstract Principles and Concrete Cases in Intuitive Lawmaking', forthcoming (2011) *Law and Human Behavior*. Briefly, our work establishes that our respondents believe that support amounts should be higher than the amounts called for by most state guidelines, when the obligor's income is higher than the custodial parent's, but lower when the custodial parent's income is higher than the support obligor's. The pattern of our respondents' support amounts are more consistent with the theoretical analysis offered in *Ellman and Ellman*, above, than are current guidelines, as are our respondents' views about possible child support principles.

report new data on our respondent's resolution of child support claims across a series of cases that vary the marital status and relational duration of the parents—factors that are usually thought relevant to alimony awards but not child support awards.<sup>7</sup> (Our earlier papers also reviewed earlier empirical studies of attitudes about child support.<sup>8</sup>)

To set the stage for understanding this data, the next two sections briefly review the recent history of the rule requiring no distinction in the child support award allowed for marital and nonmarital children, as well as the data on the beliefs of Americans about the import of marital status and relational duration in the setting of alimony awards.

## I. The traditional law on the relevance of marriage and relational duration on child support.

Child support awards in the United States are set in judicial orders. At one time judges

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7. A companion research project, funded by the Nuffield Foundation, is now planned in Britain. Using methods adapted from the American project, it will explore the views of the British public regarding the appropriate design for a child support schedule, and the extent to which the schedule should reflect certain family circumstances in addition to the parents' incomes. The plan is to field the questions on the British Social Attitudes (BSA) 2012 survey."

8. In brief, two earlier studies asked respondents to state the amount of support they would require, Schaeffer, 'Principles of Justice in Judgments about Child Support' (1990) 69 *Social Forces* 157, and Bergmann and Wechtler, 'Child Support Awards: State Guidelines vs. Public Opinion', (1995) 29 *Family Law Quarterly* 483. As explained more fully in the Methods section of this article, our access to the Pima County jury pool not only allowed us to achieve very high response rates from an excellent sample; it also permitted us to ask each respondent many more questions than is possible in the brief telephone interviews employed in these prior studies. As explained more fully in Ellman, Braver, and MacCoun, 'Intuitive Lawmaking: The Example of Child Support', (2009) 6 *Journal of Empirical Legal Studies* 69, Schaeffer dealt with the limitations of her telephone sample by using the Factorial Survey approach, in which respondents were asked 3 scenarios randomly chosen from a factorial set with a total of 600 possibilities. But the analytic method she used required the assumption, almost certainly incorrect, that each respondent's scenario judgments were independent of one another. By asking the entire factorial of each subject we are able to use analytic methods that compare the pattern of judgments exhibited by respondents across scenarios to the patterns in the judgments of other respondents. The within-subjects design also resulted in comparatively small, and accurate, standard errors. A third earlier study, (Coleman et al, 'Child Support Obligations: Attitudes and Rationale', (1999) 20 *Journal of Family Issues* 46), used a mailed survey to ask about support amounts in a scenario in which the obligor's gross income was twice the custodial parent's. It employed a format for respondent answers that effectively anchored responses at the guideline amount or below. See Braver, MacCoun, and Ellman, 'Converting Sentiments to Dollars: Scaling and Incommensurability Problems in the Evaluation of Child Support Payments', paper presented at the 2009 *Conference on Empirical Legal Studies*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1121240](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121240).

considered support claims case by case, weighing the parties' conflicting claims as to the child's needs and each parent's resources. Since the early 1980's, however, federal law has not only required states to promulgate formulaic guidelines that set support amounts, but also to bind state judges to order the guideline amount in every case, unless they write an opinion explaining why that amount is inapt in the particular case before them. Each state is free to design its own guideline formula, but must have a guideline that will produce a specific dollar support amount in every case. All state guidelines start with a basic calculation that establishes a support amount on the basis of the parental incomes and the number of children. The guideline then typically sets out further rules that adjust that basic amount to reflect estimates of job-related child care costs, medical expenses, and sometimes other factors such as the allocation of custodial time between the parents. State guidelines vary both in how they calculate the basic amount, and in how they make adjustments to it. But every state has guidelines, and in the great majority of cases in every state, judges follow their state guideline in making their child support orders.<sup>9</sup>

Can an American state calculate the amount of support owed by a noncustodial parent who was never married to the custodial parent by rules that are different than the rules it applies to divorced parents? The answer is not entirely clear. In *Gomez v. Perez*,<sup>10</sup> the Supreme Court held that Texas violated the Equal Protection Clause by denying nonmarital children any claim for paternal support, given that it recognized such claims on behalf of marital children. It would be a further step to conclude, however, that no distinction may be drawn in the *amount* of support for each. Nonetheless, the Court's evident concern about discriminatory treatment in the

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9. These American rules are explained in Chapter Five of IM Ellman, PM Kurtz, L Weithorn, B Bix, M Eichner and K Czapanskiy, *Family Law: Cases, Text, Problems* (Lexis, 5<sup>th</sup> ed, 2010).

10. 409 U.S. 535 (1973).

support law governing nonmarital children, not only in *Gomez* but also in other cases concerning statutes of limitation for paternity claims,<sup>11</sup> has generally led state courts to resist any distinctions in child support law between marital and nonmarital children. For example, the Supreme Court of Connecticut recently held that a statute giving nonmarital children the right to support until they had completed the twelfth grade or reached the age of nineteen should be applied retroactively to support orders issued before its effective date. Because that same extended support rule was applied retroactively to children of divorced parents, the Connecticut court believed it would violate the Equal Protection Clause to construe the statute as having only prospective effect for nonmarital children.<sup>12</sup>

A contrary authority arose in New York. In *Kathy G.J. v. Arnold D.*,<sup>13</sup> the court considered a support claim against a ‘world-famous entertainer’ who had fathered a non-marital child with a woman on welfare.<sup>14</sup> New York (like many states) at that time had separate statutes governing child support for marital and nonmarital children, but the only ‘potentially significant

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11. *Mills v. Habluetzel*, 456 U.S. 91 (1982), and *Pickett v. Brown*, 462 U.S. 1 (1983), held respectively that both one- and four-year limitation periods were too short to meet the state's constitutional obligation to allow ‘a reasonable opportunity’ for a claim to be brought on the child's behalf. Later Justice O'Connor, writing for a unanimous Court, found unconstitutional a Pennsylvania rule barring most suits to establish the paternity of a nonmarital child brought more than six years after the child's birth. The Court relied on Equal Protection grounds, as the state allowed later actions on behalf of the children in certain situations, and allowed fathers to bring suits to establish their paternity without any statute of limitation. *Clark v. Jeter*, 486 U.S. 456 (1988). Taken together, these opinions suggest that the Constitution requires allowing a paternity action to be brought at any time during child's minority. The constitutional question seems unlikely to present itself again, however, because after *Pickett*, Congress enacted the Child Support Enforcement Amendments of 1984, which effectively eliminate all statutes of limitation in paternity actions by requiring every state ‘to have procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday.’ 42 U.S.C.A. § 666(a)(5).

12. *Walsh v. Jodoin*, 925 A.2d 1086 (Conn. 2007); see also *Doe v. Roe*, 504 N.E.2d 659 (Mass. App. 1987) (nonmarital child between 18 and 21 years of age was entitled to support while living at home and dependent upon a parent, because a marital child would be entitled to such support under state law).

13. 501 N.Y.S.2d 58 (App. Div. 1986).

14. *Id.* at 65.

difference' between them was the former's reference to the 'marital standard of living' as a relevant factor in fixing the support level. The court found this difference valid.<sup>15</sup>

The reason for this distinction is an important, valid and constitutional one. Using the marital standard of living as a guidepost in determining a marital child's support decreases the possibility that such a child will have to face the additional trauma of adjusting to a new standard of living, while adjusting to all of the other changes engendered by the breakup of a marriage.<sup>16</sup>

The court agreed that if a nonmarital child had lived with his parents and established a 'nonmarital family,' their standard of living would be relevant in setting support. This court thus found that a constitutionally permissible line could be drawn between children in either marital or 'nonmarital' families on one side, and nonmarital children who had never lived with both parents in a family setting, on the other. In focusing on the *de facto* reality as well as the formal family status, the court took an approach quite similar to that which the Supreme Court later took in determining when a nonmarital father's relationship to their children is protected by the Constitution: the relationship is protected if his paternity has a social reality as well as a biological one.<sup>17</sup>

One cannot tell whether the court in *Kathy G.J.* was also concerned that a generous child support award would unavoidably confer windfall benefits on a nonmarital mother who had no claims for support in her own right. But that concern comes through more clearly in a similar

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15. Id. at 63.

16. Id.

17. Most particularly, *Quilloin v. Walcott*, 434 U.S. 246 (1978), in which the Court explained its conclusion that the Equal Protection Clause did not require the state to treat Mr. Quilloin's paternal claims equivalently to those of a married father on the ground that Mr. Quilloin had not in fact acted like a father. It thus drew the constitutional line on the basis of the reality of the parental relationship rather than the formality that the parents had married. It later protected the paternal claims of a nonmarital father whose paternity was social as well as biological, *Caban v. Mohamed*, 441 U.S. 380 (1978).

Arizona case. In *Edgar v. Johnson*<sup>18</sup> the Arizona court held that once the nonmarital father conceded his income was sufficient to provide for the child's needs, its precise amount was irrelevant because a larger support award could not be justified no matter how great his additional income. The court made clear its concern was with the unjustified benefits this nonmarital mother might reap from a higher support award, observing explicitly that she, unlike a married mother, had no claim for support in her own right.<sup>19</sup>

*Edgar* and *Kathy G.J.* were both decided before the state's adoption of child support guidelines. After support guidelines were later put in place, later decisions in both states rejected these cases, on the ground that their respective child support guidelines made no distinction between married parents and unmarried parents (including those who have never lived together).<sup>20</sup> Left unresolved is whether the support guidelines *could* make such distinctions, or whether such a guideline rule would violate a Constitutional principle. It does appear, however, that New York may continue to follow *Kathy G.J.* in cases that deal with issues not governed by its guidelines.<sup>21</sup> And there is at least a plausible constitutional argument that the *Kathy G.J.* distinction is permissible. That would mean a state guideline could set lower support amounts for nonmarital children who had never lived with their parents in an intact family, on the ground that

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18. 731 P.2d 131 (Ariz. App. 1986).

19. *Id.* at 132

20. *Ortiz v. Rappeport*, 820 P.2d 313, 314 (Ariz. App. 1991) ('The [child support] guidelines apply to all children whether they are born in or out of wedlock [and] . . . supersede any statements made in *Edgar*'); *Jones v. Reese*, 642 N.Y.S.2d 378 (App. Div. 1996) (rejecting *Kathy G.J.* on the basis that the child support guidelines are equally applicable to children born out of wedlock). See also *Shuba v. Reese*, 564 A.2d 1084 (Del. 1989) (rejecting nonmarital father's claim that Melson Formula's Standard of Living Adjustment should not be applied because parents had never cohabited).

21. See, e.g., *Merithew v. Tuper*, 601 N.Y.S.2d 671 (Fam. Ct. 1993) (relying on *Kathy G.J.* in rejecting argument that nonmarital child cannot be denied an order directing father to name child as life insurance beneficiary, where such an order might be issued for marital child); *Orna S. v. Leonard G.*, 599 N.Y.S.2d 285 (App. Div.1993) (similar).

the ‘marital living standard’ was not, for them, one of the relevant benchmark factors to be taken into account in setting the guideline amounts.<sup>22</sup>

## II. The impact of marriage and relational duration on alimony.

### A. Current law

While child support amounts are today governed by presumptive guidelines that make the factors that determine awards transparent, and the amount of awards very predictable, the law of alimony is largely the opposite. The typical statute lists factors for a court to consider in deciding whether to allow an award, and in what amount, but leaves unspecified the relative weight the court should give the specified factors. The traditional statute makes the claimant’s ‘need’ an essential requirement of any alimony claim, but in this context the meaning of ‘need’ is highly variable. The result is that the decision of whether to award alimony, and in what amount, is largely a matter of trial court discretion in the broadest sense, with appellate review playing a limited role.

All these features of the traditional alimony law have been reviewed and criticized in detail in the legal literature. Much of the critical literature seeks reforms meant to make the law more certain by imposing clearer standards, often by way of adopting alimony guidelines that would play a role similar to that which child support guidelines have played in changing child support law from the similar state it was in during the pre-guideline era.<sup>23</sup> While alimony

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22. One might object that the same principle would have to apply to marital children so that, e.g., where married parents separated before the child’s birth the same lower guideline amounts would apply. However, the Supreme Court had no difficulty in *Quilloin* with a rule that protected marital fathers who had never lived with their child but not nonmarital fathers in otherwise identical circumstances.

23. For an overview and survey of American alimony law and the criticisms of it, see IM Ellman, PM

guidelines have been adopted by courts or bar associations in local jurisdictions, they are not normally as comprehensive as child support guidelines, and they usually are advisory, unlike statewide child support guidelines which set out a specific dollar amount of child support which the court is bound to order unless it writes an opinion explaining why a ‘deviation’ from the guideline amount is appropriate in that particular case. The result is that the traditional criticisms of alimony law remain largely apt despite several decades of reform efforts.

Empirical studies generally fail to find any consistent principles of decision that explain the alimony awards actually allowed in judicial orders. Part of the difficulty is that the financial arrangements set out in these orders are overwhelmingly the product of a negotiated agreement rather than of a judge’s decision after a hearing, and the parties’ agreement about alimony is just one part of a larger financial package that also includes property allocation and perhaps child support. Looking at alimony terms in isolation may thus provide a distorted view because it does not take into account the tradeoffs among the various components of the financial package that may have formed the basis of the parties’ agreement. Nonetheless, it seems clear, whether from agreement or judicial preference, that alimony awards are not the norm among all divorce cases. A Maryland study found that alimony was sought in 17.4% of divorce petitions filed statewide in 1999, and was granted to nearly half the wives who requested it.<sup>24</sup> The study found only three facts to be independent predictors of an alimony award: marital duration (but only when greater

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Kurtz, L Weithorn, B Bix, M Eichner and K Czapanskiy, *Family Law: Cases, Text, Problems* (Lexis., 5<sup>th</sup> ed, 2010) at p 419. For an early critique of the highly discretionary and unpredictable nature of the law, see Ellman, ‘The Theory of Alimony’, (1989) 77 *California Law Review* 1. The American Law Institute has offered a comprehensive proposal to replace the traditional law with a more coherent and consistent set of rules in Chapter 5 of *Principles of the Law of Family Dissolution: Analysis and Recommendations* (LexisNexis, 2002).

24. THE WOMEN’S LAW CENTER OF MARYLAND, INC., CUSTODY AND FINANCIAL DISTRIBUTION IN MARYLAND 17 (2004), at <<http://www.wlcmd.org/pdf/publications/CustodyFinancialDistributionInMD.pdf>>. Alimony was allowed in two of the 42 cases in which it was requested by the husband, and in 125 of the 252 cases in which it was requested by the wife. *Id.* at 18.

than twenty years); husband's income (but only when greater than \$80,000 annually), and disparity of income between the spouses (but only when greater than 100%).<sup>25</sup> A survey of Ohio judges found little consistency among them.<sup>26</sup> The American Law Institute, seeking to introduce more predictability and consistency in the provision of financial awards between divorcing spouses, recommended guidelines based on relational duration and income disparity to determine both whether an award would be allowed, and in what amount.<sup>27</sup>

A separate question is whether alimony awards should be allowed at the dissolution of nonmarital cohabiting relationships. On this question American law is clearer: a nonmarital relationship cannot itself give rise to a claim for alimony. In principle contract claims between separating cohabitants are allowed in most states, but of course only if there is a contract. Express contracts are not common and implied contract claims are barred in some states and rarely if ever successful in the remainder.<sup>28</sup> There are a limited number of decisions recognizing equitable claims between separating cohabitants in the absence of a recognized contract, but even these few cases allow only claims to share in the property accumulated during the relationship, and not alimony-like claims to share in a former nonmarital partner's post-separation income. Cases in which an alimony-like claim is actually allowed, whether on implied contract or equitable grounds, are essentially nonexistent.<sup>29</sup> This American rule contrasts with the law in a

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25. *Id.* at 27. Marital duration was more than ten years in about half the cases in the study's sample. *Id.* at 16.

26. L H Spillane, 'Spousal Support: The Other Ohio Lottery', (1998) 24 *Ohio N.U. Law Review* 281

27. *American Law Institute, Principles of the Law of Family Dissolution* (LexisNexis 2002) Chapter 4 (Ellman, Chief Reporter for the Principles, had primary responsibility for Chapter 4).

28. See A Estin, 'Unmarried Partners and the Legacy of *Marvin v. Marvin*: Ordinary Cohabitation', (2001), 76 *Notre Dame Law Review* 1381; I Ellman, 'Contract Thinking' Was *Marvin*'s Fatal Flaw', (2001) 76 *Notre Dame Law Review* 1365; and M Garrison, 'Social Revolution and Legal Regulation', (2008) 42 *Family Law Quarterly* 309.

29. For a review of the case law and the legal literature, see IM Ellman, PM Kurtz, L Weithorn, B Bix, M

number of other common law countries, including Canada, that make no distinction for this purpose between married couples and cohabitants who pass a threshold test that usually consists of either a minimum relationship duration or the couple's parentage of children.<sup>30</sup> The American Law Institute recommends such a rule but its recommendation has not been adopted. Even jurisdictions that allow alimony claims at the dissolution of a nonmarital cohabiting relationship do not award alimony where the couple had never cohabited, even if they had engaged in sexual relations. The award, in other words, arises from a relationship, rather than from physical intimacy alone, even if physical intimacy is one feature a relationship must ordinarily have to qualify the claimant for the award.

#### B. The Views of Lay Respondents

While American law excludes nonmarital cohabitants from alimony claims, our lay respondents could have a different view. To understand the significance of the results we report in this paper, which examines how the alimony-relevant considerations of marital status and relationship duration affect their judgment as to the amount of child support to award, we need to know whether our lay respondents believe marital status and relationship duration are proper considerations in awarding alimony. We investigated that question in another study, the results of which we summarize here.<sup>31</sup>

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Eichner and K Czapanskiy, *Family Law: Cases, Text, Problems* (Michie Co., 5<sup>th</sup> ed., 2010).

30. For a review of the Canadian law, see N Semple, 'In Sickness and in Health? Spousal Support and Unmarried Cohabitants', (2008) 24 *Canadian Journal of Family Law* 317.

31. Ellman and Braver, 'Lay Intuitions About Family Obligations: The Case of Alimony', available in an earlier form at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1737146](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737146)>, and forthcoming in (2012) *Theoretical Inquiries in Law*.

The earlier study, like the current one, asked a random sample of the Tucson, Arizona population to decide each of a series of cases (vignettes) presented to them. The method employed was largely the same as the method employed in this study, which is described in more detail below, although of course the survey instruments used in the prior study asked respondents whether they would award alimony, and in what amount, rather than child support. The series of vignettes in the alimony study systematically varied relationship duration, partner incomes, the presence of children (young or grown) and marital status. For vignettes in which the separating partners were described as the parents of minor children, the facts not only stated that the alimony claimant was entitled to child support, but also provided the amount of the support award. (That amount was taken from either the then-current Arizona child support guideline, or the higher award amount that we had found was favoured by our respondents in an earlier study of child support.) As in this study, respondents were asked what they believe the law should require in each of the cases—should alimony be awarded, and if so, in what amount. Respondents were told explicitly that judges themselves disagreed as to the appropriate resolution of these cases, and that their job was not to guess what the law would provide but to tell us how they thought the court *should* decide the cases put to them.

We found that our respondents believed alimony should be allowed when there is a significant disparity in income between separating partners, even where the alimony claimant has sufficient income on her own to maintain a middle class living standard. Most favoured alimony awards in at least some cases involving partners who had not married, although marriage led them to favour an award more often. They were particularly likely to make little distinction between married and unmarried couples, in their treatment of alimony claims, when the couple

had children who were still young at the time of separation. They were more inclined to allow an alimony award when the relationship is longer, although a six year relationship is long enough for most respondents to allow an award in at least some cases, especially if the couple has young children.

Our respondents did not seem especially concerned about compensating the partner who was the primary caretaker of the couple's now-grown children for the earning capacity loss she may have thereby incurred, as the difference in award frequency between childless cases, and those with grown children, was small. But they are very concerned about ensuring an adequate income to the partner who remains the primary caretaker of the couple's young children at the time of separation, as award frequency was much higher when the alimony claimant was the primary custodian of minor children, even though respondents were told of the child support award. Neither the frequency nor size of the alimony award was affected by whether the child support award in the vignette was set at the guideline amount or the higher amount favoured by prior respondents.

While marital status, the presence of young children, and relationship duration all affected the proportion of cases in which our respondents allowed an alimony award, they had little effect on the *amount* of the award once one is allowed. Award amounts were instead determined almost entirely by the partners' incomes, with higher awards being allowed when the claimant's income is lower and the disparity between partner incomes is higher.

Demographic information provided by our respondents revealed no important differences among them with respect to these patterns, which were equally true of men and women, higher and lower income individuals, conservative and liberals, Democrats and Republicans, those

divorced and those not. While women, and older respondents, were somewhat more inclined than others to award alimony overall, the impact of the varying vignette factual patterns on their responses was not different than for other respondents.

### III. The Current Empirical Study

#### A. Method

##### *1. Respondent pool.*

The respondent pool and survey distribution closely resembled that of our earlier studies.<sup>32</sup> The respondents were citizens called to serve on the Pima County (Tucson) Arizona jury panel. The jury commissioner uses a computer program that randomly selects individuals from a comprehensive list of local residents, with the goal of obtaining a representative cross-section of the adult citizens in the county. Of those who are summoned by the county jury commissioner, over 90% eventually appear (Ellman, Braver & MacCoun, 2009). Because exemptions from jury service are only rarely granted and because of stringent enforcement and penalties, Pima County jury pools show less self-selection and bias than jury pools in some other jurisdictions.

Jury panel members' participation in the survey was of course voluntary. The N of those completing all the child support questions was 356. The participation rate (the number completing the survey divided by the number to whom it was offered, excluding those prevented

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32. Ellman, Braver, and MacCoun, 'Abstract Principles and Concrete Cases in Intuitive Lawmaking', forthcoming in (2011) *Law and Human Behavior*, (<http://www.springerlink.com/content/6725852nh7841778/>), and Braver, Ellman, Votruba, and Fabricius, 'Lay Judgments About Child Custody After Divorce', (2011) 17 *Psychology, Public Policy and Law* 212.

from completing by being called to jury or lunch) was 53%, a bit less than the rate found by Ellman, Braver & MacCoun (2009). Past studies using this identical method and jury pool and obtaining approximately this response rate have found that the ultimate sample responding to the survey resembled the national population in age distribution, level of education achieved, and household income.

## 2. *Survey design.*

This study used a mixed within-subjects and a between-subjects design.<sup>33</sup> The incomes of the parents varied within subjects: every respondent was asked to name the child support amount he or she judged appropriate in each of the same 15 cases that varied in the parental incomes but were otherwise identical. These basic 15 questions answered by every respondent took this format:

**Mom's** monthly take-home pay is **\$5,000 a month**, and **Dad's** is **\$6,000**.  
How much should Dad be required to pay Mom every month for child support, all things considered? \$\_\_\_\_\_ per month?

The father's (obligor's) take-home pay was 2, 4, 6, 9, or 12 thousand dollars per month; the mother's (obligee's) take-home pay was 1, 3, or 5 thousand per month. There were thus 5 x 3, or 15, possible income combinations.

Each survey form posing these fifteen questions began with 'stage setting' instructions that identified the family configuration the respondent was instructed to assume for all the fifteen

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33. In a within-subjects design, also called repeated measure, the independent variable (in this case, the parental incomes) is varied in repeated trials with the same subject. In a between-subjects design, each subject experiences only one value of the independent variable, but different subjects experience different values. This study used a mixed design because each subject was asked about only one family configuration, but about a full set of parental incomes. The dependent variable was, of course, always the amount of child support the subject would order as the judge in the case.

questions that followed. The five different family configurations varied between subjects, as each subject answered fifteen questions for just one of the five configurations. The first two configurations were a married couple who were divorcing after having been together for either 4 years or 15 years, while the second two were the equivalent unmarried couples, who had lived together for either 4 or 15 years and were now separating. These 4 configurations may thus be described as a 2 X 2 factorial. The fifth family configuration was a couple that was not really a couple at all: their child was conceived from their only act of intercourse, which took place the night they met: this couple never lived together nor subsequently continued their relationship.<sup>34</sup>

To control for possible order effects<sup>35</sup> arising from the sequence in which the fifteen income combinations were presented, there were four different versions of the survey form for each of the five family configurations. These four versions of each form differed only in the sequence of the vignettes. In this way parental incomes were counterbalanced in 4 different orders. There were thus 20 distinct versions of the survey form altogether. The stage setting instructions with which each survey began read as follows:

When a couple who have had one or more children do not live together, the children will usually end up living more of the time with one parent than the other. In this situation, courts routinely order that child support be paid to the parent with whom the children live most of the time, *by* the other parent.

In *all* of the following stories, you should assume

- there is one child, a 3 year-old boy
- this child now lives mostly with Mom, but Dad sees him often,

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34. This fifth case might be considered a ‘trailer control’ design. See S Himmelfarb, ‘What Do You Do When the Control Group Doesn’t Fit into the Factorial Design?’, (1975). 82 *Psychological Bulletin* 363

35. In any repeated measure design, subject responses may be affected by the sequence in which the conditions are presented. Our own methodological studies found that effect here: the amount of child support our respondents preferred at any given value of parental income was affected by sequence in which the incomes were presented. One controls for such order effects by administering several “counterbalancing” orders, then averaging results obtained across the different orders, as we do here.

- the child frequently stays with Dad overnight.

We want to know the *amount* of child support, if any, that you think Dad should be required to pay Mom every month all things considered,. What will change from story to story is how much Mom earns, and how much Dad earns. There is no right or wrong answer; just tell us what *you* think is right.

Try to imagine yourself as the judge in each of the following cases. Picture yourself sitting on the judge's bench in a courtroom needing to decide about what should be done about ordering child support in the case and trying to decide wisely.

Each survey form also included a fourth bullet point (inserted among the three set out above) that stated the family configuration--and thus varied among five versions: 'the couple was married for 4 [15] years, but now is getting a divorce'; 'the couple was never legally married, but lived together for 4 [15] years, and is now separating'; or 'the woman got pregnant by the man on the night they met, but they have never lived together, nor been in a relationship since'. Thus, the five between-subject conditions were defined by which of these five family configuration statements appeared on the survey form each respondent completed.

## B. Results

Table 1 shows the mean child support awards arrayed by the within-subject factors (income of the two parents) averaged over the four family configurations in the 2x2 factorial (excluding the fifth 'one night' relationship). The statistical analysis confirmed that the child support amounts increase regularly and very significantly both as the father's income increases and the mother's declines.<sup>36</sup> That is, the mean support amount averaged across maternal incomes

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36. The responses were analyzed by a mixed analysis of variance. The ANOVA (Analysis of Variance)

increases regularly as paternal incomes increase (see the marginal means 370, 711, 1105, 1674, and 2367, in the last row of Table 1), while the mean support amounts averaged across paternal incomes decreases regularly as maternal incomes increased (see the marginal means 1537, 1217 and 982, in the last column of Table 1).

**Table One: Mean Child Support Awards by Parental Income**

Mother's Monthly Take Home Pay	Father's Monthly Take Home Pay					Average
	2,000	4,000	6,000	9,000	12,000	
<b>1,000</b>	467	939	1428	2043	2807	<b>1537</b>
<b>3,000</b>	347	643	1086	1643	2367	<b>1217</b>
<b>5,000</b>	296	550	800	1337	1928	<b>982</b>
<b>Average</b>	<b>370</b>	<b>711</b>	<b>1105</b>	<b>1674</b>	<b>2367</b>	<b>1245</b>

Each parental income thus had a highly significant 'main effect'.<sup>37</sup> Their linear X linear interaction was also highly significant.<sup>38</sup> That is, not only did each parental income alone have a significant impact on the respondent's judgment as to the appropriate support amount (the two 'main effects'), but there was also a highly significant separate and independent effect arising from the relationship between the two parental incomes (the 'interaction'). These three effects can be appreciated most easily by examining the lines displayed in Figure 1, a graph of the data

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showed that the NCPIncome main effect (tested as a linear trend) was extremely significant,  $F(1,355) = 583.78$ ,  $p < .01$ , as was the CPIIncome main effect, (also tested as a linear trend,  $F(1,355) = 300.17$ ,  $p < .01$ . ( $F$ 's need be in the range of only about 4 to obtain significance). While a few of the 20 higher trend orders significance tests (i.e., those gauging any curvature of the trend lines) obtained statistical significance, this was due to the very high statistical power of the within-subject design. These significant  $F$ 's were much smaller (generally less than 6) and visually, the lines appear essentially straight.

37. An independent variable has a significant 'main effect' when its impact on the dependent variable is discernable when averaging over the other independent variables. Independent variables may also 'interact', which means that their impact differs depending on the level of the other independent variables with which they interact. An independent variable can have both a main effect and also a significant interaction with one or more other independent variables.

38.  $F(1,355) = 130.12$ ,  $p < .01$ .

in Table 1. The main effect of paternal income is seen by the upward slope of all three lines, demonstrating that the support amount increases with paternal income. The main effect of maternal income is seen by the fact that there are three distinct lines, one for each of the three maternal incomes about which our respondents were asked. If maternal income had no

**INSERT FIGURE ONE ABOUT HERE**

significant main effect, the three lines would largely overlap on top of one another, and would not be arrayed in an orderly sequence from highest maternal income (the bottom line) to the lowest (the top line). The interaction between the two incomes can be seen by the fact that the three lines ‘fan apart’ as one moves rightward—they are not parallel. That is, the greater the paternal income, the larger is the impact of maternal income. The ANOVA<sup>39</sup> tells us that all three of these visually apparent effects are indeed extremely significant—very unlikely to be the product of chance. These results replicate the authors’ previous findings as to the impact of the parental incomes on child support amounts.

As discussed in our earlier work, these three effects provide three important insights into our respondents’ intuitions about how child support amounts should be set. First, the linear trend main effect of paternal income means that our respondents reject the view that support amounts should be based on an estimate of the cost of providing the child some basic or minimum living standard. Support amounts grounded on such an estimate of basic costs would not rise linearly with rising NCP income through to \$12,000 a month in net (take home) pay. Our respondents

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<sup>39</sup> ANOVA is the standard abbreviation for Analysis of Variance, the normal statistical technique used in this situation.

thus seem instead to favour the principle implicit in most child support guidelines, that children should share, at least to some extent, in the living standard enjoyed by the higher-income obligor, even if that brings them above what they need to meet basic costs.

Second, the main effect of maternal income, illustrated by the fact that three different lines are required for the three different CP incomes, mean that our respondents reject ‘POOI’ guidelines,<sup>40</sup> adopted in about ten American states and more recently in Britain, which set support amounts as a percentage of obligor income without regard to the income of the custodial parent. To the contrary, our respondents believe that, for any given level of NCP income, the amount of child support should decline as CP’s income increases. Third, the significant interaction between the two parents’ incomes reveals that our respondents believe that support amounts should increase more rapidly with NCP income when CP income is lower. This result suggests that our respondents care about the parents’ *relative* incomes—in other words, about their income disparity—and not only about the absolute level of each parent’s income. The greater the disparity, the larger the award they favour. This is a principle that American support guidelines do not follow as consistently as do our respondents.

The present study not only replicates these earlier findings, (with nearly identical dollar values for the support amounts for each income combination)<sup>41</sup> but also extends them in two ways. First, our prior studies did not include vignettes with NCP incomes above \$6,000 in take-home pay (THP); the results here thus show that the previously identified patterns persist through

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40. This acronym stands for Percentage Of Obligor Income.

41. The support amounts reported here are the overall means across all respondents for all four family configurations in the 2x2 factorial, whereas the support amounts reported in the earlier study are taken from the regression lines that best fit the data. When an analogous regression line approach is taken on the current data, the support amounts for each income combination come even closer, generally within \$30, to the amounts reported in the earlier study.

NCP incomes of \$12,000 a month THP. Second, the questions put in previously reported studies did not vary the parents' marital status nor state the duration of their relationship; this study shows that the prior studies' basic findings are unaffected if respondents are told the parents are married or cohabiting, or had been together for 15 years or 4 years.

It is also important to understand that, as in our prior studies, the two main effects and their interaction are pervasive across our respondents. That is, while there is considerable dispersion around the mean support amount for any given set of parental incomes, there is very little dispersion in the *adjustment* our respondents make in their preferred support amount to changes in either parent's income. One can visualize this result by imagining a version of Figure One that did not present the *mean* child support amounts for each maternal income, across all respondents, but rather the 356 individual regression lines best describing each individual respondent's support amounts for each maternal income. We would see that the height of these individual lines—their Y-intercepts—varied considerably, but that their slopes (and thus the coefficients for each income term) vary much less.<sup>42</sup> In sum, the three basic patterns we have replicated and extended here are highly robust: arising across an expanded income range, across different family compositions, and across respondent characteristics.

Of equal interest, however, are the additional effects of the family configurations on support amounts, which prior studies did not examine. Relationship duration (4 years versus 15

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42. However, we did previously find that the slope was indeed steeper for women than for men, and for those with more education—meaning that the amount of support increased significantly more rapidly with NCP income for women and for the more educated—even though the variance in slope across all respondents was considerably smaller than the variance in Y-Intercept. See Ellman, Braver, and MacCoun, 2009, *supra* n. 4. A subsequent study also found that differences among respondents in both slope and Y-intercept could be predicted from their Likert ratings of statements setting out abstract principles by which child support amounts should be determined. Ellman, Braver, and MacCoun, 'Abstract Principles and Concrete Cases in Intuitive Lawmaking', forthcoming in (2011) *Law and Human Behavior*, (<http://www.springerlink.com/content/6725852nh7841778/>).

years) had no significant effect on the child support amounts favoured by our respondents, either alone or in combination with other factors such as marital status or parental incomes. The parents' marital status, however, had *both* a significant main effect, *and* a significant interaction with the obligor's income.<sup>43</sup>

The main effect of marriage means that the mean support award for all cases in which the parents were married was significantly higher than the mean award for all cases in which the parents had cohabited. Recall that Table 1 disclosed that the overall mean support amount, averaged over all 15 income combinations for all four family configurations in the 2x2 factorial, was \$1,245. But the mean support amount for the cases in which the couples were married was \$121 more, \$1,366, while the mean for cohabiting couples was \$121 less, at \$1,124. This “marriage premium”— the \$242 difference between the marital and cohabiting means — is statistically significant (that is, almost surely real, rather than the result of chance fluctuation).

In addition, the significant interaction between marital status and paternal incomes reveals that the marriage premium results primarily from cases in which the paternal income was higher. That pattern is revealed by Figures 2a, 2b, and 2c. The lines for married and cohabiting partners converge at the left end of Figures 2, when paternal income is lowest, but increasingly diverge as paternal income increases, a visual representation of the fact that the marriage premium increases with paternal income.

**INSERT FIGURES 2a, 2b, and 2c ABOUT HERE.**

**Please place them on one page, with 2a on top and 2c on the bottom, if at all possible.**

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43. For the main effect of Marital status,  $F(1,355) = 8.38, p < .01$ ; for the interaction of Marital Status and NCP's Income,  $F(1,355) = 7.14, p < .01$ .

This pattern must be understood in light of the general finding that our respondents (without regard to demographic characteristics or political affiliation) regularly increase support amounts as paternal income increases, across the full range of paternal incomes we have presented to them (up to \$12,000 monthly THP). We earlier observed that this finding demonstrates widespread rejection of any principle that would limit child support to the amounts needed to keep the child from falling below some minimally adequate living standard. To the contrary, there is a broad consensus that child support should be set a levels that allow the child with a higher-earning parent to share, at least to some extent, in the enhanced living standard that parent enjoys. The interaction found here between paternal income and marital status means, however, that they favor a larger reduction in the living standard gap between the child and the high-income noncustodial parent when the parents were married, than when they were cohabiting. But when there is no living standard gap at issue—when the obligor’s limited resources mean that the most one can expect from him is some help to ensure the child minimal adequacy—the marriage premium disappears. *Something* is still required of every obligor—perhaps enough to ensure the child a minimally adequate living standard, if the obligor can do at least that--but not more than that even if the parents had married.

Finally, Figure 3 displays the mean support amounts by parental incomes for the case in which there was no parental relationship at all, but only the single evening of sexual relations leading to the child’s conception. One can see that the lines in this figure are not quite as straight

as the lines for the other family configurations. Nonetheless, the basic pattern is the same: a main effect for each parental income<sup>44</sup> and a significant interaction between the parental incomes resulting in the fanning out of the lines<sup>45</sup>.

**INSERT FIGURE 3 ABOUT HERE**

Overall, however, the mean support amount (across all income combinations) for the ‘one night’ relationship, \$989, was significantly lower than the overall mean of \$1242 across all cases in the 2x2 factorial.<sup>46</sup> Table 2, showing the overall means for married couples, cohabiting couples, and the one-night relationship, makes the pattern clear. If there is a marriage premium

**Table 2: Mean Child Support Amount Across All Income Combinations, For Each of 3 Family Configurations**

<b>One-Night Relationship</b>	<b>Cohabiting Parents</b>	<b>Married Parents</b>
\$989	\$1124	\$1366

of \$242, then there is also a “relationship premium” of \$135—the difference between the mean amount for the cohabiting parents and for parents with no relationship, but only a single incident of sexual relations.

Because of the interaction of the two parental incomes in all analyses, however, that difference across family configurations is greater at higher NCP incomes, and at lower CP incomes. The point is illustrated by comparing that difference in the two bookend cases: the combination of the highest maternal THP (\$5,000) with the lowest paternal THP (\$2,000), and the combination of the lowest maternal THP (\$1,000) with the highest paternal THP (\$12,000).

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44. For NCP’s Income,  $F(1,100)=127.46, p<.01$ ; for CP’s Income,  $F(1,100)=63.01, p<.01$

45.  $F(1,100)=27.71, p<.01$

46.  $F(1, 455) = 8.99, p<.01$

Table 3 presents the mean support amount for those two cases for the one night relationship, cohabiting couples, and married couples.

**Table 3: Mean Child Support Amount for 2 ‘Bookend’ Cases Across Family Configurations**

Father’s THP/ Mother’s THP	Family Configuration		
	One Night Relationship	Cohabiting	Married
\$2,000/\$5,000	\$277	\$278	\$314
\$12,000/\$1,000	\$2131	\$2533	\$3080

One can see that in the first case (the upper row), involving a low-income father and a higher income mother, our respondents’ mean child support amount hardly varies at all across these three family configurations. In contrast, in the case of the high income father and the low-income mother (the lower row), the mean support amount jumps over \$400 when the couple has lived together, as compared to the one-night relationship, and then an additional \$500 if they are married. In short, family configuration hardly matters at all in the first case, but matters quite a bit for cases involving wealthy fathers and poor mothers.

All the results reported here—a main effect for marriage, and interaction of marriage with paternal income, a lower mean support amount for the one night relationship; a main effect for each parental income and an interaction of parental incomes—are not only true for our respondents as a whole, but also for every demographic subgroup. That is, these patterns are also present in respondent subgroups sorted by gender, education, income, age, current marital status, political party affiliation, or self-reported political philosophy on a scale from very conservative to very liberal. Nor was there any difference in these effects between respondents who had been

divorced and those who had not, or between those ordered to pay child support, or were the beneficiaries of a support order, and those who reported neither experience.

In short, none of these demographic characteristics predicted our respondents' treatment of differences in marital status, relationship duration, or parental income. But this similarity among respondents in how or whether they adjusted support amounts in response to variations in vignette facts does not mean their support awards did not differ. They did, because in two cases their similar adjustments were made to differing baseline amounts: Women, and those with more education, generally favoured somewhat higher support amounts than did men, and those with less education.<sup>47</sup> (There were no other notable demographic effects.<sup>48</sup>) So while, for example, there was no difference between men and women in the amount of the marriage premium, that premium was, in effect, added to a baseline amount that was higher for women than for men. These findings are consistent with our two earlier child support studies, which also found no differences among demographic subgroups with respect to the basic pattern of their answers—how their support amounts changed in response to changing facts.

#### IV. Discussion

We began by asking whether facts that are relevant in deciding on alimony claims might be taken into account in fixing child support amounts as well. We wondered in particular whether

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47. The gender difference between men and women in the mean dollar amount of child support awards across all family configurations and incomes was \$169. There was also a significant linear positive relationship overall between education and child support amount,  $F(1,395)=4.59$ ,  $p<.05$ .

48. An exception is that those who had paid child support favoured significantly lower support amounts than did those who had not. However, this effect was confounded with gender, since child support obligors were overwhelmingly male, while those who had received child support were overwhelmingly female. In an attempt to unconfound, we discovered that the mean support award given by men who had paid child support was more than \$300 lower than the mean for men who hadn't, but this difference just missed being significant.

our lay respondents would adjust support amounts in response to the parents' marital status, the duration of their relationship, or whether they had a relationship at all. We find they take account of marital status, and of the presence or absence of a relationship, but they do not distinguish between relationship durations of 4 years and 15 years. We suggest these results may reflect both our respondents' intuitive understanding that child support payments will necessarily benefit the custodial mother as well as the child, and their willingness to accept a larger collateral benefit to custodial mother who had had a relationship with the father, and especially if she had been married to him. Distinguishing between the two approaches to setting support amounts that was alluded to above provides conceptual benchmarks that further inform this understanding of their response pattern

One approach, which we can call the basic-cost principle, would limit the legal support obligation to the amounts needed to ensure the child some minimally adequate living standard. A caring obligor may wish to provide more, but in this view any additional amounts should be voluntary rather than legally compelled, perhaps arrived at through parental discussions. Low support amounts grounded on a basic-cost principle will still confer some collateral benefit on the custodial parent,<sup>49</sup> but the basic-cost principle minimizes the benefit to her just as it minimizes the benefit to the child. One might regard the basic-cost amount as a floor below which support amounts cannot fall without endangering the child's minimum interest—to avoid

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49. Joint consumption hardly disappears in low income households. Because 'basic necessities' unavoidably include the cost of important joint consumption items such as housing, there is no objectively correct measure of the *child's* share of those necessities. Therefore, even a child support system based on the principle that the obligor pay only the amount needed to provide the child with necessities will necessarily require that the obligor sometimes subsidises the custodial parent as well, unless one is prepared to see the child as well as the parent fall below the basic necessity level. For a more complete discussion of these issues, see Ellman and Ellman, 'The Theory of Child Support' (2008) 45 *Harvard Journal on Legislation* 107.

poverty. We would then expect nearly everyone to agree the father should be required to pay at least this basic-cost amount in every case, unless he is himself impoverished. The question becomes whether fathers should be required to pay more when they have the financial ability to do so. A principle that requires higher-income fathers to pay more requires some benchmark beyond the cost of a minimally adequate living standard, as a reference point against which to set their obligation.

One conventional benchmark often found in child support statutes is the pre-separation living standard of the intact household in which both parents once lived with the child.<sup>50</sup> The more the intact family's living standard relied on the support obligor's income (because it was higher than the custodial parent's), the further below the benchmark the custodial household will fall after separation—except to the extent the difference is reduced by child support payments. (Where the parents had never lived together, one could substitute as the benchmark the mythical intact family living standard they would have enjoyed if they had.) We can say that child support amounts based on this benchmark employ a “shared living standard” principle rather than a basic cost principle. A shared living standard principle will not ensure the child suffers no living standard loss at all from the parental separation, nor does it require the two post-separation parental households to have equal living standards, because there are considerations in addition to the child's claims that weigh against either result.<sup>51</sup> But it does set the marital living standard

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50. See, for example, the list of factors that the Arizona statute specifies should be considered in constructing guidelines: among them is “the standard of living the child would have enjoyed had the marriage not been dissolved”. Ariz.Rev.Statutes. § 25-320(D).

51. For example, to protect the child from any loss in living standard would require a support payment that placed the entire cost of the separation on the noncustodial parent, whose living standard would then fall below the custodial household's even though the noncustodial parent earned more. Other applicable principles counsel against this result. For a fuller account of these competing considerations, see Ellman and Ellman, ‘The Theory of Child

as an aspiration, even though other considerations usually make it impossible or unwise to realize fully. One of those other considerations is the obligor's interest in not providing the custodial parent the benefit of an enhanced living standard under the child support rubric—his claim, in other words, to avoid paying too much “hidden alimony”. A child support system based on a shared living standard principle must then set support amounts that reflect some compromise or tradeoff between the child's claim to minimize the loss in living standard that arises from the parents' separation, and the obligor's claim against requiring him to provide the custodial parent with a living standard windfall.<sup>52</sup>

Because child support guidelines in every American state increase support amounts with increasing obligor income, it would seem that they necessarily follow some version of the shared living standard principle. The considerable variation among state guidelines can then be seen as variation in how they make the necessary tradeoff between the competing claims of the child and the obligor. One of us has concluded that although the dominant American child support system is called ‘income shares’, the methodology most states employ to generate the guideline amounts leads to results much more favorable to the high-income obligor, when the parent's incomes are disparate, than to the children he is required to help support.<sup>53</sup> Our current work suggests that our respondents agree that current American guidelines are flawed in this regard.

Our earlier studies showed our respondents favor statements that express a shared-living-standard principle over those that express a basic cost principle, and are faithful to this

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Support’ (2008) 45 *Harvard Journal on Legislation* 107

52. This account of the tradeoffs required in setting child support amounts is a very simplified version of the far more complete discussion found in Ellman and Ellman, *id.*

53. I. Ellman, ‘Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines’, (2004), 2004 *University of Chicago Legal Forum* 162.

preference in deciding on the child support amount to award in concrete cases.<sup>54</sup> We can better understand the policy implications of our new results on family configuration by recalling how our respondents' support awards differs from the pattern found in most American support guidelines, as we documented in our earlier work<sup>55</sup>. This study reinforces that earlier comparison because the dollar amounts of our respondents' mean support awards are so close to those we found in that earlier work. And as we shall see, the way in which our respondents adjust their support award in response to changing family configurations sheds further light on the values they apply in setting support amounts.

Our earlier work compared our respondents' support amounts to those found in Iowa's guidelines, because other studies had found that Iowa's support amounts were at about the median among American states. What we found before and reaffirmed here is that our respondents' mean support amounts are nearly identical to the amounts specified in Iowa's guidelines for the cases in which the mother's THP was \$3,000--the middle value of the three maternal incomes we asked about.<sup>56</sup> On the other hand, our respondents' mean support amounts are consistently different from the Iowa amounts when maternal income was above or below

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54. As to their preference with respect to the abstract principles, and its relationship to the way they decide cases, see Ellman, Braver, and MacCoun, 'Abstract Principles and Concrete Cases in Intuitive Lawmaking', forthcoming in (2011) *Law and Human Behavior*, (<http://www.springerlink.com/content/6725852nh7841778/>), reporting on a study in which we asked our respondents to rate competing support principles on a scale of 1 to 7. We report there that the mean rating our respondents give principles that limit the father's responsibility falls on the 'disagree' side of that scale, while their mean rating of principles that favour ensuring the child a living standard not disproportionate to the support obligor's are well to the 'agree' side. This same article also shows that the support amounts individual respondents favour in the cases are logically related to their preferences with respect to these principles.

55. Ellman, Braver, and MacCoun, 'Intuitive Lawmaking: The Example of Child Support' (2009) 6 *Journal of Empirical Legal Studies* 69.

56. Of course, we are replicating this result only for the nine income combinations we asked about in both studies; there is no earlier measure for the six additional income combinations we asked about, for the first time, in the current study.

\$3,000 in monthly take-home pay. Our respondents specify *higher* support awards than do most state guidelines when the mother's THP is lower than \$3,000 a month, but they favour *lower* support awards when the mother's THP is higher.

This pattern suggests that in compromising competing interests, our respondents focus more than do current support guidelines on the interests of children. They require higher payments than current law when children's interests depend on them (because custodial parent income is low) but lower payments when children's interests do not depend on them (because custodial parent income is higher). Why do they require any payment at all when children's interests do not depend on them? Our earlier work suggests it is because of their belief in a second principle they also endorsed,<sup>57</sup> which we called "dual obligation": that both parents should always contribute *something* to the child's support, without regard to whether the contribution of both is essential to the child's financial well-being. But vindication of the 'dual-obligation' principle does not require support amounts of any particular magnitude, and it can thus be satisfied with lower amounts.

In sum, our respondents make the necessary tradeoff between the father's interest and the child's more favorably (than current law) to the child, when the child most needs it, but more favorably (than current law) to the father, when the child least needs it. Our respondents' focus on children's interests is also evident from the companion study we conducted (described briefly above) on alimony, which found them more likely to award alimony to a former partner who has current primary custody of the couple's minor children, even though that parent is already

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57. Ellman, Braver, and MacCoun, 'Intuitive Lawmaking: The Example of Child Support' (2009) 6 *Journal of Empirical Legal Studies* 69.

collecting child support.

One might expect that respondents so focused on children would not reduce child support when the parents had not married or had had no relationship at all. It seems doubtful that respondents with a consistent focus on children's interests would give them lesser weight in those cases. We therefore suggest a different explanation for the marriage and relationship premium: that family configuration affected the weight our respondents gave to the *father's* interest against which the child's claims must be balanced—his interest in not providing windfall benefits to the mother. The father's claim to avoid the windfall of 'hidden alimony' is weaker when mother is more deserving of alimony: when the parents had married or at least lived together for some time. The hidden alimony objection to child support is thus stronger when the parents had not married, and stronger yet when they had no relationship. We therefore suggest that our respondents intuitively adjust the tradeoff they make between the child's and the father's interests to reflect the shifting strength of the *father's* claim, not the *child's*, and do so in ways that are consistent, systematic, and principled.

The fact that the weight our respondents give marriage increases with paternal income reinforces this interpretation. At the lowest paternal income there is essentially no difference in mean support amounts between the married and the cohabiting, and relatively little between the cohabiting and parents who had no relationship. Yet substantial marriage and relationship premiums develop as the father's income increases. A basic cost calculation of child support does not rise with paternal income, of course, but a shared living standard calculation does, and it rises more rapidly at lower maternal incomes. Thus, the pattern one would expect to have in a child support system based on a shared living standard principle is precisely the pattern shown in

our overall results (presented in Figure 1): higher support at lower maternal income and higher paternal income, and a more rapid increases in support (as paternal income goes up) when maternal income is lower. We found that this general pattern within each family configuration as well as in the overall results, which means the marriage and relationship premium also increases in size as paternal income goes up and maternal income goes down. That is precisely the pattern it should be if our respondents' commitment to a shared living standard measure of child support increases with an increased belief that the parents' relationship with one another may be sufficient to justify an alimony obligation and thus reduce any concern that an enhanced support amount may give the mother a windfall benefit..

We also expected relational duration to matter to our respondents, because we had found in another study that it mattered to their decision on whether to allow alimony. But it did not, and one must ask why. Perhaps it matters that duration is a continuous variable while both marriage, and presence or absence of any relationship at all, are binary classifications. It may be that four years is long enough for our respondents to conclude the partners may have some obligations to one another, and an extension to 15 years just doesn't add that much more to the obligation. The duration effect we found in our alimony study came from a comparison of 6 years and 22 years, a gap that is about one-third greater—and even then, the difference was less than it was for marriage.

We also wonder whether the difference in the importance of duration in the two studies is actually a further reflection of the fact that our respondents care more about children than they do about former spouses. Although we believe our respondents intuitively understand that both alimony and child support help both the parent and the child in the household that receives it,

questions framed in terms of alimony may focus our respondents' attention on the claims of the former spouse, while questions framed in terms of child support may focus their attention on the interests on the child. Such a framing effect would likely matter if our respondents believe, as we assume they do, that shorter durations compromise a former spouse's claim but not a child's claim. If marriage matters to our respondents more than duration, it might survive a framing effect while duration does not.

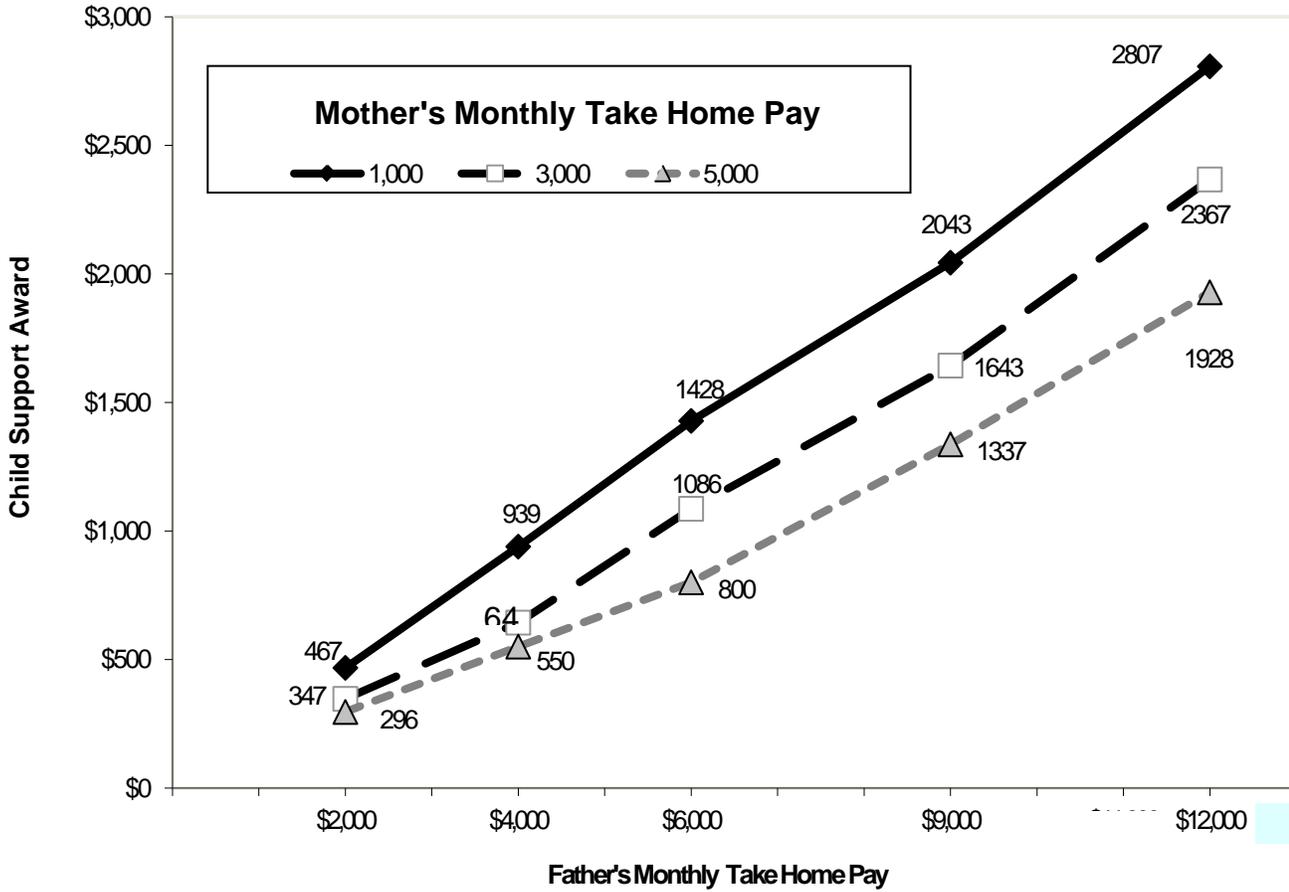
While we thus conclude that our respondents are inclined to give the father's competing claims more weight, in setting child support amounts, when the parents were married or had a relationship, we also conclude that throughout all their decisions they give the child's interests more weight than it is given in current law. It seems important that our respondents were unwilling to shift to a basic cost principle for *any* family configuration, including even the one night relationship. For the lowest custodial parent income, our respondents favour child support amounts in the one-night relationship case that are about the same as the Iowa guidelines require in *all* cases.<sup>58</sup> The one-night relationship support amounts do fall below this Iowa benchmark when the mother's THP is \$3,000 a month or more.

That is, it is not that our respondents would reduce current support amounts when the parents were unmarried, but that the size of the *increase* in support amounts they favour (at low maternal incomes) is greater when the parents had been married. We thus conclude that our respondents support for a child support system that considers family configuration arises from the fact that they would give *more* weight (than the typical American guideline) to protecting the

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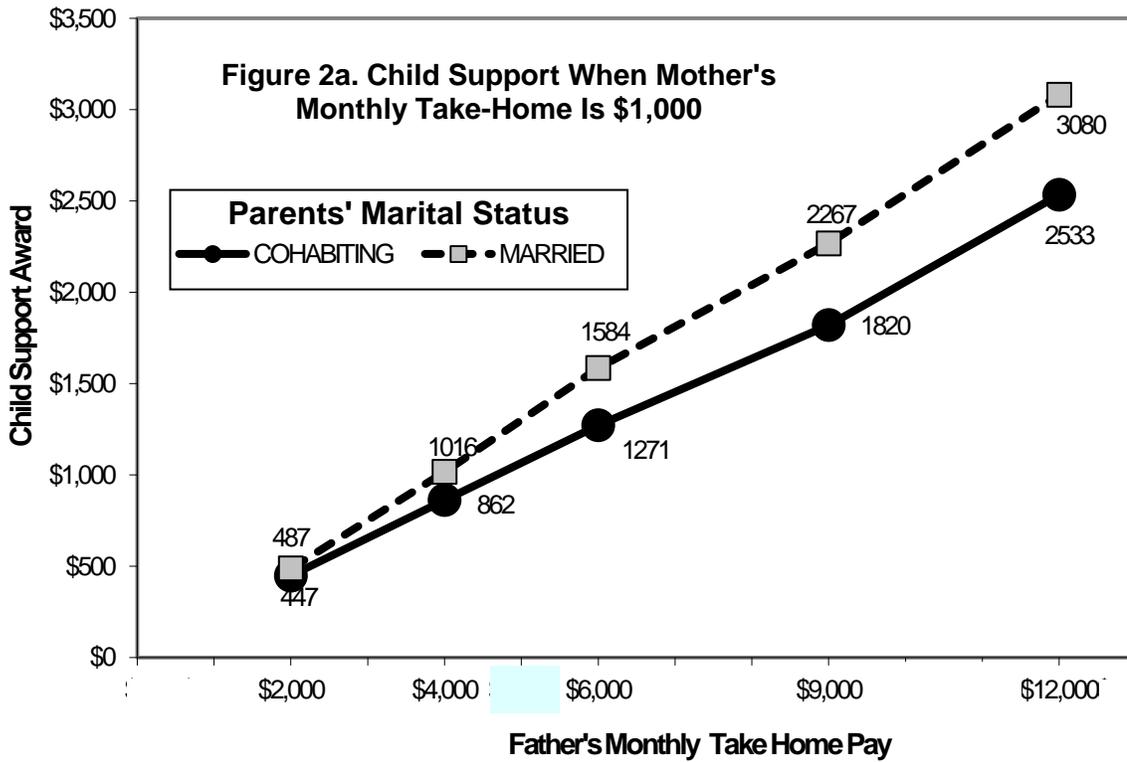
58. For example, Figure 3 shows that where the mother earned \$1000 and the father \$6000, the mean support award allowed by our respondents for the one-night relationship was \$1147. The Iowa guideline amount for that income combination, applicable to all cases, is \$1122 (Ellman, Braver, and MacCoun, 'Intuitive Lawmaking: The Example of Child Support', (2009) 6 *Journal of Empirical Legal Studies* 69, at p 93.)

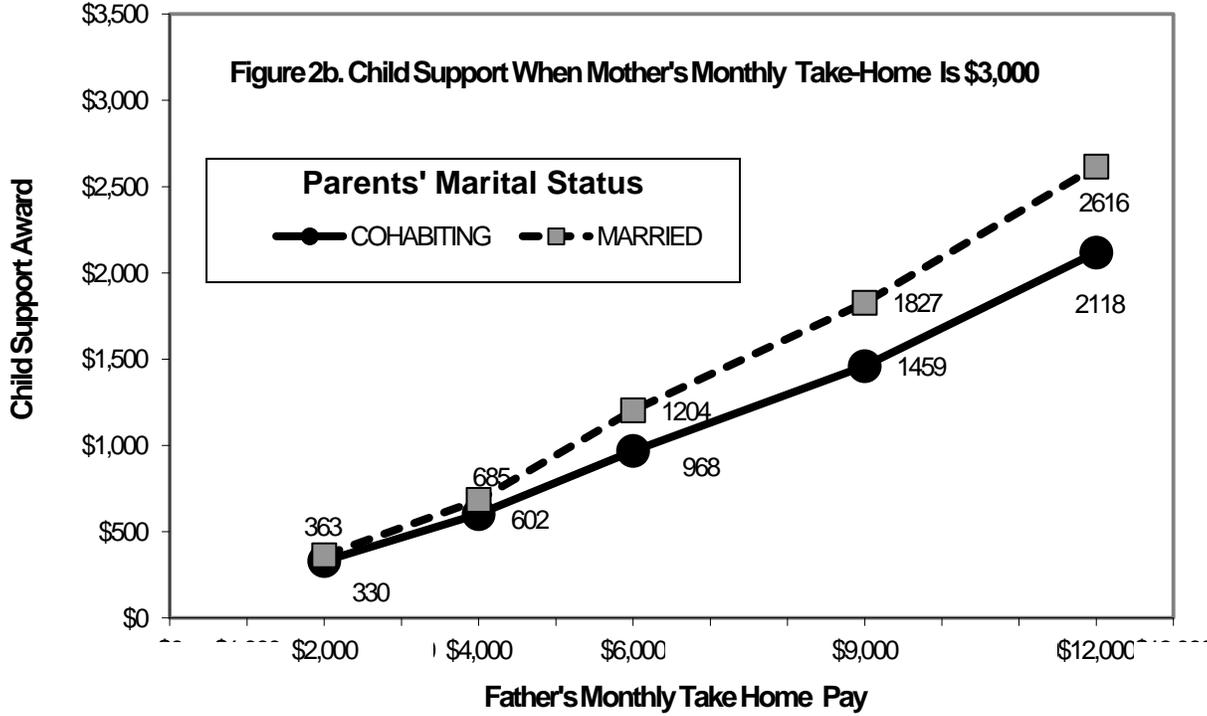
child's living standard, not less, although they also look more favorably than current law on the obligor's objections to "hidden alimony" when the child's interest in not falling too far below the marital living standard are not endangered.

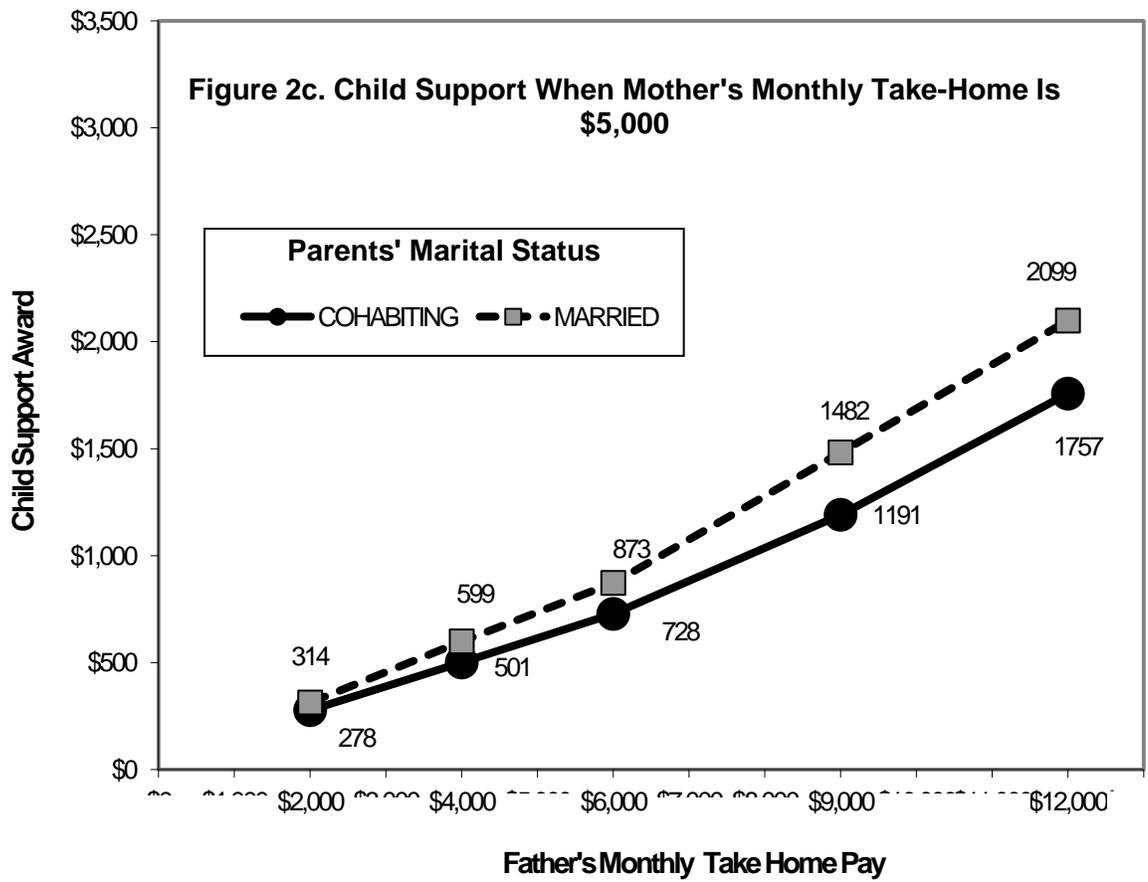


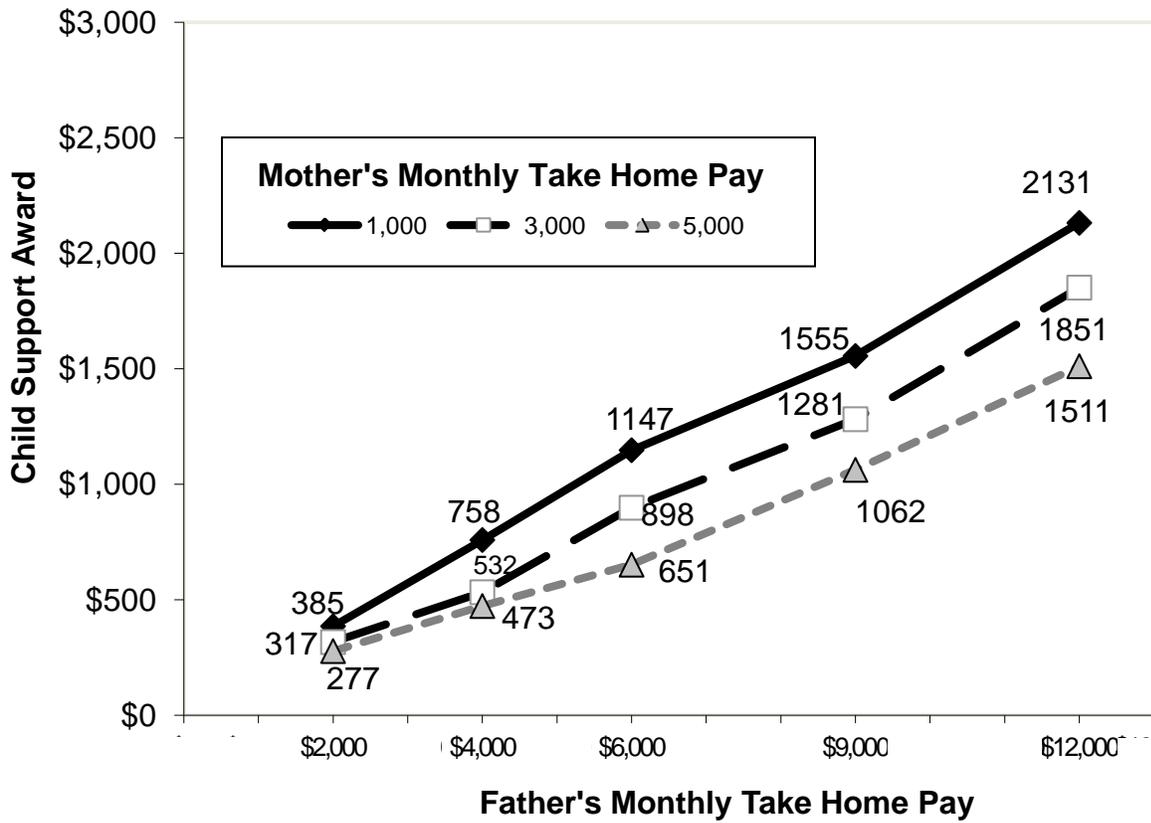
**Figure 1. Mean Child Support Amounts by Income, Averaged Over the Four Family Configurations in the 2x2 Factorial**

**Figures 2a, 2b, and 2c: Mean Child Support Amounts by Income For Married and Cohabiting Relationships (4 and 16 Year Durations Combined)**









**Figure 3. Mean Child Support Amounts by Income for One-Night Relationship**