

CHOICE OF LAW, MAINTENANCE AND INCOME: IMPUTATION, OPTIMIZATION AND IMPACT—WHOSE VISION, WHOSE REALITY?

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I. INTRODUCTION

America has struggled through over a half a century of frustration trying to create a viable framework for the establishment, modification, and enforcement of child support obligations. Even then, it took the proverbial eight hundred pound gorilla in the form of Congress threatening to deny the states access to federal funds to get states to sign on to the current scheme.¹ Given the relative homogeneity of America, how much more challenging is it to devise a scheme that might be more or less acceptable to a diverse global community where the essence of the scheme impacts “the family”—the construct that lies at the heart of a community’s social, cultural, religious and sometimes even political diversity?²

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1. See 42 U.S.C. §§ 651–669a (1935). See, e.g., 42 U.S.C. § 667 (1935) and related regulation 45 C.F.R. §302.56 (2006) (requiring states to establish mandatory guidelines for child support); 42 U.S.C. § 666(f) (1935) (requiring all states to adopt the Uniform Interstate Family Support Act).

2. As has been pointed out in the context of another international convention on support, the choice of law rule may regulate both the identities of any claimants and defendants, as well as the amount

The international community also has fifty years of experience in the same arena.³ In 1999, dissatisfaction with aspects of the various conventions in force led a Special Commission operating under the aegis of the Hague Conference to propose the development of a comprehensive new approach to be embodied in a Convention on the International Recovery of Child Support and other Forms of Family Maintenance.⁴ This process is well under way.⁵

One of the problem areas in the development of any such scheme is the issue of the law applicable to the maintenance obligation. The difficulties in this area led the Special Commission in 2003 to establish the Working Group on the Law Applicable to Maintenance Obligations.⁶ The contentious nature of this project has led to a general strategy that envisages that a choice of law regime would be included in an optional instrument.⁷

At the operational level any scheme could be premised on the application of foreign law or be restricted to domestic law, or involve some structured combination of these. The operational regime in America generally gives the law of the issuing state the right to govern the nature, extent, amount and duration of current payments and other obligations of support, and the payment of arrearages under the order.⁸ Because of constitutional due process requirements, the issuing state must be a state that has personal jurisdiction over the potential obligor, and this means that this individual either would have consented to the jurisdiction of the court or, for a variety of different possible reasons, will have some other significant connections to the state.⁹

The Hague Working Group is proposing what it describes as a “cascade” of potential choice of law rules.¹⁰ Under this arrangement, preference would

of support. See Carol S. Bruch, *The 1989 Inter-American Convention on Support Obligations*, 40 AM. J. COMP. L. 817, 821–25 (1992). These themes are not trivial when the potential classes of defendants include stepparents, sperm and egg donors, birth mothers, “intended” parents, same sex partners who may or may not be parties to a civil union, or a similar relationship that under a given state’s law may recognize them as parent even as other states decline to do so. In the American context, this list opens up the awkward possibility of a federally acceptable convention exposing a potential obligor to liability under a jurisdictional premise which grants authority to a foreign jurisdiction to generate that liability with respect to that obligor even when any relationship to the child is not only not recognized by federal law, but even may be offensive to federal law.

3. See William Duncan, *The Development of the New Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, 38 FAM. L. Q. 663–66 (2004).

4. *Id.* at 665.

5. *Id.* at 663.

6. *Id.* at 683.

7. *Id.*

8. See John J. Sampson, *Uniform Interstate Family Support Act (1996) Statutory Text, Prefatory Note and Commissioners’ Comments*, 32 FAM L. Q. 385, 490–92 (1998) (discussing § 604 of the Act).

9. Uniform Interstate Family Support Act § 201 (1996).

10. *Report of the Working Group on Applicable Law*, at Art. C, para. 10, HAGUE CONFERENCE ON

be given to the country of the maintenance creditor's habitual residence, and in the event that the "creditor" is unable to obtain maintenance under this regime, the law of the forum or, if this fails to permit recovery, the law of the parties' common nationality.¹¹ The avowed purpose behind this arrangement is to reinforce an approach in the draft convention designed "to favour the maintenance creditor in international situations."¹² This point marks an interesting and challenging logical elision on the part of the Working Group. It is one thing to have a convention, targeted to ensuring that *established* rights are vindicated, structured to favor the rights holder. It is quite another to use a presumption of entitlement of a claimant to establish the jurisdictional premise which will determine whether there is an entitlement in the first place. Indeed, even if some such an entitlement exists, it is not necessarily obvious that we should be looking to a "preferred" jurisdiction of the creditor to determine the extent of the entitlement.¹³ While the idea of using the law of the forum drew resistance on the basis that it invited forum shopping,¹⁴ quite appropriately the Working Group points out that using the law of the claimant's habitual residence "allows a determination of the existence and amount of the maintenance obligation having regard to the legal and factual circumstances of the social environment in the country where the creditor lives and engages in most of his or her activities."¹⁵ The difficulty is that correspondingly there is a potential debtor operating in a different country and a different social milieu. In the absence of justification primarily grounded on tackling the Gordian knot, why the latter's reference framework should be discounted is not clear. Indeed, even if the "creditor's" law is preferred it is not clear that this will automatically "favor" the creditor.¹⁶

PRIVATE INTERNATIONAL LAW, Preliminary Document No 22, (June 2006) (reporting for the Attention of the Special Commission of June 2006 on the International Recovery of Child Support and Other Forms of Family Maintenance) [hereinafter Doc. 22].

11. *Id.* at Art. C, para. 13, Alternate proposals would allow the law of the forum to be invoked immediately if the "debtor" has his habitual residence there, or if the proceedings are instituted in such a forum, or in a third variation, if it is the debtor's habitual residence and the creditor requests that law be applied.

12. *Id.* at para. 11.

13. In general, it is possible that one jurisdiction might be preferred for the purpose of identifying an appropriate claimant or obligor and another jurisdiction used to determine the amount claimable.

14. Doc. 22, *supra* note 10, at para. 23.

15. *Id.* at para. 13.

16. For example, one of the traditional problems experienced under the current American regime is that an obligor is ordered to pay pursuant to child support guidelines existing in an American state. Such guidelines base the award, at least in part, on the obligor's American income. This opens the door to the argument that this income, and hence the award, has purchasing power in the obligee's country that far exceeds the child's needs. *See, e.g.,* Nischal v. Nischal, 879 A.2d 813 (Pa. Super. 2005) (comparing Washington D.C. and India); Gladis v. Gladisova, 856 A.2d 703, 708 (Md. 2003) (comparing Maryland and

The reason why we should experience some disquiet with a blanket approach aimed at reinforcing the claimant's position is that any choice of law rule will be the premise that in one fell swoop may capture the subtleties of any conflicting international philosophies, and in the process annihilate a significant

Slovakia: the lower cost of living in the child's locality not a proper basis for deviating from the guidelines). In *Gladis* the court took the position that the child's needs were a function of the parent's economic position, and seemed to suggest that the obligor's economic strength should be transferred to the child in the nation of less wealth. *Id.* at 712, 714. Such an analysis conflates the theme of needs, cost of living and standard of living—themes to be returned to below. *Gladis*, 856 A.2d at 719 (Raker J. dissenting). In the domestic context, the Supreme Court of Ohio has accepted that it might be unreasonable for a court to ignore the economic realities of a cost of living differential between obligor and obligee's states. *Booth v. Booth*, 541 N.E.2d 1028, 1029 (Ohio 1989) (comparing the cost of living in New York and Ohio). Under the proposed Hague regime this problem might or might not arise depending on whether the country of the creditor's "habitual residence" premises the award on the creditor's needs in that jurisdiction or on the debtor's resources. The rationale for the convention's proposed choice of law rule suggests it should be the former, but there is no reason why the claimant's country might not use the obligor's resources as the basis for the claim—adopting the *Gladis* perspective. Doc. 22, *supra* note 10, at para. 13. To make matter's more complicated, if the basis chosen for the award is one that seeks to ensure that the child enjoys a "standard of living" that at least equals that of the obligor, there are at least fourteen countries in the world where it appears to be more expensive than it would be to maintain the same lifestyle in New York City. THE ECONOMIST, POCKET WORLD IN FIGURES 88 (2006). Here, indeed, the proposed choice of law regime would "favour" the creditor. Then again, there are at least four or five countries in the world where statistically speaking it is possible to enjoy a higher "quality of life" for less money than that "life" would cost in New York. *Id.* Indeed, as was pointed out in *Gladis*, in such a scenario the increased purchasing power of U.S. dollars in the Slovak Republic would mean that while the U. S. obligor generating those dollars was enjoying a "modest and comfortable life," the child was being placed in the position where she would have the ability "to live a life of luxury". *Gladis*, 856 A.2d at 718–19 (Raker J. dissenting). As an additional complication, the operative jurisdiction may premise the award on the "cost of living" in the claimant's country rather than on what it takes to maintain a specific "standard of living"—conceptually different benchmarks. See *Nischal*, 879 A.2d at 815. In one case, a Colorado appellate court held that the guidelines could be deviated from if to apply them would be "inequitable, unjust, or inappropriate" but that the burden would be on the contestant to establish that deviation was both reasonable and necessary. In the *Interest of A. K.*, 72 P.3d 402, 404–05 (Colo. Ct. App. 2003). The appellate court accepted the trial court's determination that what would be considered "a normal lifestyle" would be significantly more expensive in Russia than in Colorado, and that this determination reflected a focus on the child's needs rather than the father's income—though ultimately the trial court's order was reversed in part due to a failure to fully consider the details of the relevant "living expenses." See *id.* at 405. To add insult to injury, a potential obligor may argue that a guideline based award is inequitable to him because there is a different "standard of living" between his jurisdiction and that of the claimant. See *Edwards v. Dominick*, 815 So. 2d 236, 239 (La. Ct. App. 2002) (purporting the difference in standard of living between Louisiana and South Africa). The converse set of arguments also is recognized. Here the obligor suggests that the burden ordinarily imposed by the guidelines should be reduced because of the obligor's relatively high cost of living. See *In re Marriage of Dortch*, 801 P.2d 279, 283 (Wash. Ct. App. 1990) (describing the high cost of living in Alaska.); *In re the Marriage of Welch*, 905 P.2d at 132, 136–37 (Mont. 1995) (describing the higher cost of living in Washington D.C. would be an acceptable reason for deviating from the guidelines if the cost of living is established by proper evidence); *In re Marriage of Beecher*, 582 N.W.2d 510, 514 (Iowa 1998) (obligor's higher cost of living in California not a basis for departure from the guidelines).

number of them. And these subtleties, as we shall see at some length with respect to America, can be very subtle indeed. Moreover, to offset the intuitive appeal of an asserted claim for child support, it is worth remembering that a foreign support order imposed on “unsuitable” criteria can expose an American obligor to what at best may be a debt that cannot be satisfied or eliminated and at worst to the prospect of incarceration.

The rest of the article, through a discussion of some aspects of the child support obligation in the context of the American experience, aims to reveal some of the sorts of concerns and nuances that are at stake as competing jurisdictional perspectives come into play.

II. CHILD SUPPORT: WHOSE OX IS BEING GORED?

As a basic proposition, if the only interest involved in a child support award is what benefits the child, the governing legal regime in most instances should be one that produces the highest possible award because, when it comes to child support, virtually without exception, money matters.¹⁷

In reality, the policy considerations impacting child support, and parenthetical questions related to our later discussion of whether to demand income optimization, reflect the concerns of four constituencies, namely, the parent caring for the child (the residential parent), the non-residential parent,

17. See, e.g., Martin Dooley & Jennifer Stewart, *Family Income and Child Outcomes in Canada*, 37 CAN. J. ECON. 898 (2004) (positive relationship between income and child outcomes); Joe Blanden & Paul Gregg, *Family Income and Educational Attainment: A Review of Approaches and Evidence for Britain*, 20 OXFORD REV. ECON. POL'Y 245 (2004) (family income has a causal relationship with educational attainment); Louise Séquin, et al., *Understanding the Dimensions of Socioeconomic Status that Influence Toddlers' Health: Unique Impact of Lack of Money for Basic Needs in Quebec's Birth Cohort*, 59 J. OF EPIDEMIOLOGY AND COMM. HEALTH 42 (2005) (lack of money for basic needs has a significant impact on toddlers' health); Don Kerr & Roderic Beaujot, *Family Relations, Low Income, and Child Outcomes: A Comparison of Canadian Children in Intact, Step-, and Lone-Parent Families*, 43 INT'L J. COMP. SOC. 134 (2002) (low income has significant impact on childhood difficulties in lone-parent and step-families); E. Jane Costello, et al., *Relationships Between Poverty and Psychopathology, A Natural Experiment*, 290 J. AM. MED. ASS'N 2023 (2003) (poverty has major effect on children's conduct and oppositional defiant disorders); Pamela A. Morris & Lisa A. Gennetian, *Identifying the Effects of Income on Children's Development Using Experimental Data*, 65 J. OF MARRIAGE AND THE FAM. 716 (2003) (some suggestion increased income improves development of low-income children with regard to school attachment and positive social behavior); Lawrence M. Berger, *Income, Family Structure, and Child Maltreatment Risk*, 26 CHILD. & YOUTH SERVICES REV. 725 (2004) (suggests income and family structure affects family's overall risk of child maltreatment); Jay Bainbridge, et al., *Who Gets an Early Education? Family Income and the Enrollment of Three- to five-year-olds from 1968 to 2000*, 86 SOC. SCI. Q. 724 (2005) (strong link between family income and early education enrollment); Erik Plug & Wim Vijverberg, *Does Family Income Matter for Schooling Outcomes? Using Adoptees as a Natural Experiment*, 115 ECON. J. 879 (2005) (family income has a significant effect on school attainment); Jake M. Najman, et al., *The Generational Transmission of Socioeconomic Inequalities in Child Cognitive Development and Emotional Health*, 58 SOC. SCI. & MED. 1147 (2004) (family income related to child cognitive development and emotional health).

the child, and society at large.¹⁸ Those considerations relevant to us were articulated by the American Law Institute (ALI), after almost a decade of analysis, as follows:

- 1) That parents share income with a child in order that the child enjoy
 - a) A minimum decent standard of living when the combined income of the parents is sufficient to achieve such result without impoverishing either parent; and
 - b) A standard of living not grossly inferior to that of either parent;
- 2) That a child not suffer loss of important life opportunities that the parents are able to provide without undue hardship to themselves or their other dependents;
- 3) That residential parents be treated fairly;
- 4) That non-residential parents be treated fairly;
- 5) That child-support rules not discourage the labor-force participation or vocational training of either parent;
- 6) That child-support rules take into account a child's need for care;
- 7) That child-support rules be readily comprehensible, and administrable, and reflect popular understanding of the duties and obligations of parents to a child and to each other.¹⁹

III. CHILD SUPPORT: GROUNDING THE CALCULATION

When it comes to determining the amount of child support due, there are four stock approaches that appear on the American radar screen.

The first requires the non-residential parent to contribute child support to a level that equalizes the standard of living of the residential and non-residential households.²⁰ Although widely advocated in feminist literature, no American jurisdiction formally implements it.²¹

The second, the Percentage of Obligor Income model, establishes the award solely on the basis of a certain percentage of the obligor's income.²² The amount awarded is simply a function of the demands placed on the resources

18. See generally PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Am. Law. Inst. 2002) [hereinafter PRINCIPLES].

19. *Id.* § 3.04

20. *Id.* at 574.

21. *Id.*

22. See *id.* at 572.

of the obligor.²³ The obligee parent's "performance" only impacts the aggregate resources available to the household.

The third is the Income Sharing model. The award is a percentage of the parents' combined incomes, the percentage being determined by what an economic analysis suggests would have been assigned to support a child were that combined income to be found in an intact household.²⁴ The obligation is to pay, pro rata, the same percentage of each parent's income after the family breakdown.²⁵ Here, the residential parent's performance directly impacts the amount available to that parent and the child and also affects the burden on the obligor, but only to the extent that the percentage of the combined income attributable to child support varies with the aggregate amount of the parents' incomes.²⁶ Each parent's contribution to child support varies in proportion to that parent's income. Because the relationship between income and obligation is not linear, as the combined income goes up, the burden for each parent relative to his or her own income declines, and in this model it declines an equivalent proportion for each parent. Accordingly, in percentage terms, the cost/benefit consequences of "performance" by a parent are equal. This proposition is only true in absolute terms if the incomes and standards of living of the households are equivalent—which ordinarily they won't be—so, again, "under performance" by one parent may result in both the child and the residential parent being under-supported, and in fairness terms the allocation of the relative burdens in absolute terms may be unfair. However, on the plus side, this model permits avoiding a work disincentive for the residential parent.²⁷

A drawback of the Income Sharing model is that it does not lend itself to producing an equivalent standard of living in each household. As a result, the model may impose relative and absolute economic suffering on the child. This possibility supplied the ALI with a justification for casting aside concerns about creating a work disincentive.²⁸

23. PRINCIPLES, *supra* note 18.

24. *Id.* at 572.

25. *Id.* In an international context, one of the criticisms of the application of a state law derived guideline developed on an Income Shares model is that the economics of the model will be based on United States' data indicating what parents in an intact household spend on their children, and that it is unrealistic to apply these data to the entire world in an attempt to equalize standards of living. *Gladis*, 856 A.2d at 717 (Raker J. dissenting).

26. *Id.*

27. PRINCIPLES, *supra* note 18, § 3.05A, at cmt. i. One argument is that, in time, such a disincentive is a disservice to the residential parent because when the child grows up the child support ends. *Id.*

28. *See id.*

The ALI child support model starts with an Income Sharing analysis but it then adds a supplemental payment from the obligor.²⁹ This supplemental payment declines as the income of the residential household increases. Thus, in this model, economic under-performance by the residential parent increases the burden on the obligor, while any adverse effect on the residential household's resources arising from the division of the notional joint household economy is dampened by the supplement from the obligor. Accordingly, the model, in inter-parent fairness terms, is sensitive to under-performance by the residential parent, although vis-a-vis the child the impact of under-performance is nullified—at least if the non-residential parent has the resources to pay the supplement.

IV. CONSTITUENCY INTERESTS AND IMPUTATION AND OPTIMIZATION

As we saw, the ALI Principles identified four constituencies with a vested interest in a child support award—the residential parent, the non-residential parent, the child and society at large. The Principles accept that the constituencies' values and interests may be competing so that it is difficult to fully implement any one of them.³⁰

The underlying spectrum of policy considerations and the various approaches (suggested and used) to calculate child support open the door to our next level of inquiry. The establishment of a child support award inevitably requires the legal regime to determine the resources out of which that award may be made. Typically, the question we have to answer is what is each parent's "income?" For this purpose, and for the purpose of our present discussion, should we allow, or require, the relevant legal regime to impute income to a parent? And, as yet another layer in the analysis, even if imputation is permitted in principle, are there limits on the extent to which this should occur? By way of an example, can the regime require that an individual qualified as a neuro-surgeon work as such, or just work as a general surgeon, or work as a general practitioner, or just work? What if the parent in question is the residential parent and wishes to remain at home to care for the child?

29. *Id.* § 3.05A, at cmt b. The formula envisages a base amount, which is the percentage of the obligor's income that if paid would ensure all parties the same standard of living, if the parents had equal incomes. The supplement is an additional amount aimed at ensuring that the child enjoys a minimum decent standard of living, if the combined incomes of the parents are capable of achieving that result without impoverishing either parent, as well as ensuring that the child has a standard of living not grossly inferior to that of either parent. As the residential parent's income increases the supplement decreases. When the parents' incomes become equal, the supplement disappears. *Id.*

30. *Id.* § 3.04, cmt. a.

A. *The Public Purse and Other Society Interests*

There is another dimension to this problem that is particularly relevant in the international context. Single-parent family poverty is a universal phenomenon across all developed economies regardless of individual cultural or social characteristics. That is, it is the economics as such that is flawed in a way that can only be remedied by public fund transfers.³¹ In such a situation, the essential balance that needs to be struck is one between the public purse and family needs, not between the non-residential parent and the family. Transported to the international arena, the choice of law rule ultimately has the power to answer the question of whether a particular country's public funds will be burdened?³² Not totally surprisingly in this regard, as far as the Hague drafting process is concerned, one choice of law rule seems to have made its way directly into the tentative draft of the convention itself without too much fuss. It provides that "[t]he right of a public body to seek reimbursement of a benefit provided to the creditor in place of maintenance shall be governed by the law to which the body is subject."³³ It should be noted, however, that even where the transfer of public funds is required, the legal regime's stand on imputation and optimization may dictate the magnitude of that transfer and the extent of any demand for reimbursement. The fact that any paying "public body" is likely to be one in the "creditor's" country of habitual residence suggests that there should be no inconsistencies on the issue of imputation and optimization as between the creditor's basic claim and the public body's demand for reimbursement. But this need not necessarily be the case. If, for example, the public body's initial contribution is capped, its regulatory regime should not be in a position to demand optimization or even imputation beyond the extent of the public contribution. In such a context, should the "creditor"

31. See *id.* § 3.04, at cmt. h.

32. Ordinarily, this is likely to be a one-dimensional problem involving a decision as to whether the authorities of the court's own jurisdiction should support the child. In the international scene, and certainly with respect to American states, one is not likely to see a system receptive to the idea that the public authority in an American state, at the behest of a court in a foreign country, could be obligated to support a non-resident child in that other country. Of course, it is conceivable that an obligor, having paid child support, is left so impoverished that he or she comes to depend on public resources in one form or another. Ordinarily this should not happen because support guidelines are supposed to have an adequate self-support reserve built into them. The realities may be otherwise.

33. *Tentative Draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance*, at Art. 32(2), Hague Conference on Private International Law, Preliminary Document no.16 (Oct. 2005) [hereinafter Doc. 16]. Interestingly, this structure allows the conceptual framework in which the public body operates to determine the legitimacy of the obligee's claim. In the international context, for example, this would allow entities in countries with broad social support infrastructures to establish a legitimate claim against an American obligor in a context where an American public entity may not have provided support to the obligee.

be entitled to demand more of a potential obligor, or should the public body's limit define the magnitude of a "deserving" claim, at least where imputation or optimization is involved?³⁴

Beyond the above concerns, the starting point is that society ought not to be required to support a child whose parents have adequate resources to do so.³⁵ Over and above that, society is concerned to see that sufficient support is provided for the care, nutrition, education and well-being of children as the next generation.³⁶ In this context, the ALI sees economic inadequacy of a parent as, not only injurious to the child, but also as an unwise under-investment in an important social resource.³⁷

From the American perspective, America rejects, as a social ethic, a public role of primary guarantor of a child's economic well-being.³⁸ At best, the public purse's function is subsidiary. Accordingly, to the extent that the child's needs place a demand on that purse, the obligor is unlikely to be allowed to avoid necessary optimization. But, in turn, the most the state can demand is performance to a level that removes the burden from the public purse. Ideally, the level of state support would be one which advances the totality of the state's interests, such as those related to health and education, never mind the child's ideal interests. But, this is not likely to be the case. At best, state interest justified optimization demands are likely to be limited to those necessary to plug an obvious hole—referenced to some poverty standard—in a still leaky dike.

B. The Child's Interests and Parental Autonomy

Ideally, a child should be left unharmed financially by family dissolution. However, ordinarily, two households cannot live as cheaply as one. As the child and the residential parent share a common household, usually it is not possible to hold the child harmless economically and not do the same for the residential parent. The effect, in concept, is to impose the economic costs of the dissolution entirely on the non-residential parent.³⁹ Recognizing this fact, the ALI adopts two reference standards. First, the child should enjoy a minimum decent standard of living—assuming the possibility of the parents

34. From an American perspective such a "limit" might be seen as particularly problematic in instances where the foreign country's level of public support exceeds what is considered "acceptable" in America.

35. See, e.g., *Kramer v. Kramer*, No. FA-91 0321225-S, Slip. Op. at *19 (Conn. Super. Ct. Apr. 19, 1992).

36. PRINCIPLES, *supra* note 18, § 3.04 cmt. b.

37. *Id.*

38. See *id.* § 3.04 at cmt. h.

39. *Id.* § 3.04 at cmt. c.

mustering sufficient resources to do that.⁴⁰ Second, the child should not suffer disproportionately compared to other family members.⁴¹

Sometimes, it may be possible to decouple the child's economic interests from those of the residential household. The most notable example of this is with respect to "life opportunities," especially those relating to education. The concern is that parents under-invest in a child who is not in a common household.⁴² Thus, we can adopt a position that a child should be left unharmed if the parents can "afford" to provide a given opportunity.⁴³ Since the basis of this "entitlement" is "affordability," not willingness, this conceptualization lays the source of any resource generation demand notionally at the door of society, but actually in the hands of the demanding (usually residential) parent. The effect is that one parent loses economic autonomy to the other. The extent of that loss is regulated by an external determination of what a parent is capable of doing to "afford" the entitlement. In this process we need to determine whether "affordability" should be determined on the basis of imputed income.⁴⁴ There is a further limiting condition. Since the benchmark is a potential loss by the child, the objective should not demand performance beyond that which would have been expected if the family had remained intact. Accordingly, production at the level that was achieved in the marriage will suffice, unless enhanced performance reasonably could have been anticipated in an intact family to meet the demands of future "opportunities." Nevertheless, the open-ended question of what are legitimate "opportunities" potentially exposes the obligor to significant pressure towards optimization.

A relevant value that may be more uniquely American is one which posits that when it comes to dealing with a higher income parent, that parent should be allowed to benefit disproportionately from the fruits of his or her own labors relative to other family members.⁴⁵ This value enjoys substantial, but not unanimous, support in America and is implicit in the formulation of all current American child support rules.⁴⁶ While the comments to the ALI Principles suggest that the value generally is not subject to compromise in an interest

40. *Id.*

41. PRINCIPLES, *supra* note 18, § 3.04 at cmt. c.

42. *Id.* at cmt. j.

43. *See id.*

44. Courts have pointed out that any guideline based structure is premised on "affordability" rather than the child's actual needs. *See Nischal*, 879 A.2d at 816 (quoting *Mascaro v. Mascaro*, 803 A.2d 1186 (Pa. 2002)).

45. PRINCIPLES, *supra* note 18, § 3.04 at cmt. d.

46. *Id.* Arguably a similar tenet can be found in the Scandinavian countries to the extent that they consider that maintenance should only be granted to a divorced spouse in exceptional circumstances. Doc. 22, *supra* note 10, at para. 36.

balancing process, in reality the extent to which the higher income parent is left with a higher standard of living is a result of the impact of the other competing interests.⁴⁷ Thus, parental autonomy reflected in a decision to attempt to optimize income in the parent's own interests may be undercut by competing demands. Here we face an interesting boundary problem. Even if competing demands cannot compel a parent to optimize income, can these interests assert a priority claim when and if the income is optimized? Should the answer be specific to the situation and simply reflect a balance between the "utility" of the claim and the burden of the resource generator's self-imposed optimization efforts?

C. *The Residential Parent's Interests*

The residential parent is concerned to not carry a disproportionate share of the out-of-pocket costs attributable to raising the child. In addition, this parent should not suffer a disadvantage through opportunity cost losses associated with child rearing. We could tackle this latter issue by valuing the child services rendered, or we could do this by acknowledging the extent to which the child rearing function limits the residential parent's market earnings.⁴⁸ Both of these premises lay a foundation for a claim against the other parent's reserve capacity to enhance his or her income. Unfortunately, both premises open the door to opportunism on the part of the residential parent. The residential parent's interests have to be balanced against the non-residential parents' interests and in "appropriate" cases yield to them.⁴⁹

The Principles tread carefully when it comes to the residential parent's employment. They argue that it is important that child support rules not "discourage," as distinct from encourage, the residential parent's labor force participation.⁵⁰ During the child's minority, the gainful employment of the residential parent "to the extent consistent with the needs of the child"⁵¹ serves everyone's interests. After that minority, it is in the interests of the residential parent to have maximized the quality and quantity of past labor force participation.⁵² Two aspects of this justify comment. First, the residential parent's "obligation" is not couched in imperative terms. While the benefits of market participation are recognized, optimization is not demanded. Moreover, these benefits can be offset by the needs of the child, the arbiter of which the

47. PRINCIPLES, *supra* note 18, § 3.04 at cmt. d.

48. *Id.* at cmt. e.

49. *Id.*

50. *Id.* at cmt. l.

51. *Id.* at cmt. e.

52. PRINCIPLES, *supra* note 18, § 3.04 at cmt. e.

Principles fail to identify. Structurally, the burden seems to be placed at the door of the obligor to demonstrate that the residential parent's non-market-related contributions to the child's needs are unwarranted.

The Principles do provide some glosses. If there is no child under the age of six in the residential household income should be imputed.⁵³ That is, a move in the direction of optimization should be demanded, to a level that the residential parent could reasonably earn "considering the parent's residential responsibility for the children of the parties"⁵⁴ The Principles start with a premise that they are not willing "to second guess the hard choices facing parents with residential responsibility for preschool children."⁵⁵ This is partly because of the difficulty of securing adequate day care and meeting employer expectations while serving as a residential parent.⁵⁶ Accordingly, with a child below six, the safe harbor is absolute and the residential parent does not even have to try to be fair to the obligor, and indeed is given this permission without any examination of whether the choice made by the residential parent actually is reasonable with regard to the interests of the child. It simply is assumed that it is.

The ALI suggests that receipt of child support by a residential parent does not seem to discourage labor market participation.⁵⁷ Various reasons have been advanced to explain this phenomenon. First, child support payments are uncertain and market participation is a means of hedging this risk. Additionally, this participation may reflect cooperation in the form of burden-sharing by the residential parent to encourage continued support flow. This may explain why there is an enormous return per dollar in the child's educational outcomes—the residential parent seeks to please the obligor through the child's performance, complimented by enhanced participation by the payor in the child's life to monitor the payor's investment.⁵⁸ But there is the possibility that this result is just a function of the dollars rather than behavioral responses to the dollars. After all, we know that generally outcomes are more favorable the higher the household income. Even accepting the Principles analysis, if its chain of causation is correct, it suggests that there might be a justification for moving from a neutral position of not discouraging market participation to one of affirmatively encouraging it.

53. *Id.* at § 3.14 at cmt. e.

54. *Id.* § 3.15(1)(a).

55. *Id.* § 3.15 at cmt. b.

56. *Id.*

57. PRINCIPLES, *supra* note 18, § 3.04 at cmt. l.

58. *Id.* (citing ANDREA H. BELLER & JOHN W. GRAHAM, SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT 225 (1993); Jonathan R. Veum, *Interrelation of Child Support, Visitation, and Hours of Work*, 115(6) MONTHLY LABOR REVIEW 40–47 (June 1992)).

The choices involved in work-derived income optimization are seen as different for residential and non-residential parents. For the latter, the choice is between work and leisure. With the former, it is a choice between exchanging market labor for child-rearing. Given the dual identities of the residential parent, especially one who in the intact family was the primary parent, the Principles suggest that residential parents are more sensitive to work disincentives than non-residential parents, even where the residential parent has a long history of attachment to the labor market.⁵⁹ In the ALI view, the interests of children and residential parents almost inevitably will produce work disincentives, but that rules should seek to restrict such situations to the unavoidable minimum.⁶⁰

That said, the Principles require that child support rules take account of the child's need for care.⁶¹ The ALI position is that the interests of children and society are not always served by the residential parent's gainful employment and that, from the child's perspective, the residential parent's personal provision of needed care, particularly in the early years, may be a legitimate trade-off against market employment—although, as the child ages, the balance of preference should shift in favor of market participation.⁶² Given the inability of child support statutes to be particularly nuanced, it seems legitimate to ask whether it is appropriate to premise the entire support structure on a presumptive entitlement to not participate in the market, especially given the acknowledged pressure that the residential parent's dual identity creates in favor of non-participation. Of course it may not be economically rational to participate in the market, as where the transaction costs exceed the returns. Even here, there may be reasons to justify apparent economic irrationality, such as where a short term loss while in education will generate increased earning capacity to the advantage of the residential parent, the child and the non-residential parent. Generalized, this proposition highlights the fact that optimization is both a concept and a process, so that it may become difficult to evaluate competing demands for optimization occurring in different contexts. Thus, asking for restructuring of an investment portfolio to achieve higher yields cannot necessarily be judged in the same way as would an assertion that housing costs should be reduced to enhance liquidity.⁶³ In such an environment, consistency in relative burden imposition becomes difficult.

59. See PRINCIPLES, *supra* note 18 § 3.04 at cmt. 1.

60. See *id.*

61. See generally PRINCIPLES.

62. *Id.* § 3.04 at cmt. n.

63. *Id.* § 3.14(3)–(5). Other troublesome scenarios include voluntary unemployment or under-employment and the appearance of a new spouse or partner for the residential parent. *Id.*

D. *The Role of Fairness*

“Fairness” requires that the residential parent not carry, disproportionately, the costs of child rearing.⁶⁴ In turn, the non-residential parent’s interests are recognized by giving respect, but not a controlling deference, to the idea that a parent need not contribute more than would have been done in an intact household; by not requiring this parent to share earnings to the point of equalizing household income; and by this parent not being required to suffer “pointlessly” by virtue of the support obligation.⁶⁵ Apart from the fact that international support disputes involve countries with differing costs of living, which intrinsically may enhance the risks of an “excessive” demand, the above concerns raise numerous optimization related issues.

To start with, economic under-performance by the residential parent can make that parent’s share of the costs disproportionate, especially regarding fixed child related costs. On the other side of the coin, as the approach relative to the non-residential parent is less concerned with what is proportionately reasonable, and focuses more on what is necessary for the child, and since the residential parent controls the household budget, that parent, through under performance, is in a position to increase the pressure on the non-residential parent to optimize income—even if the latter ends up disproportionately burdened.

Beyond these considerations, in the domain of “fairness,” even when the household no longer contains a child under six, the Principles lean in favor of the residential parent. The ALI sees the concept of imputing income to the residential parent, that is invoking a process that moves in the direction of optimization, as inherently problematic because it reflects a legal judgment about how the residential parent should allocate time between gainful employment and child rearing—“a matter normally left to the decision making of parents.”⁶⁶ The linguistic ambiguity in the use of “parents” in this context exposes an interesting hiatus in principle. No doubt a joint decision by parents in an intact household as to market participation is appropriately theirs—at least short of neglect. It is less clear that the underlying premise continues to be viable in a post-dissolution universe when the consequence is an obligation imposed on the obligor, backed, at worst, by the sanction of incarceration and which at best generates a debt that cannot be shed. To permit this situation seems to attribute such an absolute significance to the child care function that a case by case analysis would seem to be a better approach. While the ALI calls for such an analysis with children beyond the age of five, even here any

64. PRINCIPLES, *supra* note 18, § 3.04 at cmt. k.

65. *Id.*

66. PRINCIPLES, *supra* note 18, § 3.15 at cmt. b.

pressure to work is mitigated by the residential parent's responsibilities for the parties' children.⁶⁷ Indeed, the ALI notes that to the extent that income is imputed to the residential parent, it penalizes the child economically for the parent's decision to give the child more, rather than less, direct parental care.⁶⁸ Apparently overlooked is the fact that it is the residential parent's decision which leads to this result. Implicit therefore in this structure is an acceptance of the fact that the residential parent's choice inherently is legitimate—consequently, the Principles accept that the imputation of income to the residential parent should be undertaken with even greater caution than is accorded imputation of income to the non-residential obligor.⁶⁹

Under the ALI scheme, imputing income to the residential parent has the effect of reducing the obligor's financial burden and, in the event of non-production by the residential parent, also reduces the resources available to the child.⁷⁰ The process, however, does not expose the residential parent to legal sanctions. The ALI's position is that there is less incentive to shirk on the part of the residential parent because that parent shares any resources earned with the child.⁷¹ What the Principles do not acknowledge fully is that this moderating influence is offset where the obligee sees a possibility of "under performance" being compensated for by increased demands on the non-residential obligor. What the Principles draw attention to is that the residential parent may see a trade-off between caring for the child and employment.⁷² The difficulty with reinforcing the legitimacy of any such analysis is that it relies initially on the residential parent's subjective perception (and perhaps ultimately a court's perception) of that parent's "worth" to the child.⁷³ This arrangement, in turn, can be countered or reinforced by the burdens, or lack thereof, imposed on the obligor.

Overriding the residential parent's prioritization of commitments becomes even harder if personalized care by a parent is perceived as socially normative behavior,⁷⁴ that is, if, in principle, any market driven substitution for those

67. *Id.* § 3.15(1)(a).

68. *Id.* § 3.15 at cmt. b.

69. *Id.*

70. *See id.* § 3.14 at cmt. e.

71. PRINCIPLES, *supra* note 18, § 3.14 at cmt. e.

72. *Id.*

73. Even if a child care program is subsidized, values and beliefs about parenting may obstruct take up of this benefit. *See* Edward D. Lowe & Thomas S. Weisner, *You have to Push It—Who's Gonna raise your Kids?: Situating Child Care and Child Care Subsidy Use in the Daily Routines of Lower Income Families*, 26 CHILD. & YOUTH SERVICES REV. 143 (2004).

74. *See* Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 72 (1989) (assuming the parental responsibility is a "traditional ideal").

residential services has no intrinsic legitimacy. The above analysis results in the treatment of a residential parent being reviewed exclusively in the realm of fairness between the adults without an examination of whether any failure to generate resources works to the advantage of the child. Accordingly, any lack of optimization may produce operational unfairness—a fact that the Principles do not seem willing to acknowledge.⁷⁵ The absence of a recognized market based exchange value for the services rendered by the residential parent, except to the extent that the parent acknowledges such an exchange, means that we have no reference standard for “fairness.” And that is just as between the adults. As indicated above, this basic posture forecloses the possibility of the evaluation of the residential parent’s earnings-related conduct with reference to the child’s interests, not just in terms of services rendered to the child by the residential parent, but also with respect to additional marginal benefits to the child in terms of the possibility that more revenue could purchase services that the residential parent cannot provide in the immediate term, as well as in regard to that parent’s opportunity costs in the form of lost savings or underdeveloped human capital that might endure to the child’s benefit in the future. That said, the literature indicates that not all forms of work benefit the children of all parents. The consequences for a child of employment of a hard-to-place worker parent in a low prestige job are not necessarily positive.⁷⁶

E. The Non-Residential Parent’s Interests

As to the non-residential parent, America has rejected the notion that child support is a voluntary contribution.⁷⁷ Rather, it is a legal duty. Nevertheless, an element of voluntariness remains where the non-residential parent does not have to contribute more to the support of the child than notionally would have been contributed if the child was living in an intact household.⁷⁸ Conceptually, this is the basis of one of the standard models of child support. Intrinsically, this approach does not hold the child harmless, nor prevent unequal suffering,

75. See PRINCIPLES, *supra* note 18, § 3.14 at cmt. e.

76. Thus, even with positive psychological benefits for the residential parent, there may be adverse impacts on her parenting style if the work is low prestige. See generally C. Cybele Raver, *Does Work Pay Psychologically as well as Economically? The Role of Employment in Predicting Depressive Symptoms and Parenting Among Low-income Families*, 74 CHILD DEVELOPMENT 1720 (2003). Also, if the parent can be classified as “very-hardest-to-employ,” following that parent’s employment, a child’s school engagement may decrease and aggressive behavior increase, even with substantial increases in parents’ employment and income. See Hirokazwe Yoshikawa et al., *Effects of Earnings-supplement Policies on Adult Economic and Middle-childhood Outcomes Differ for the ‘Hardest to Employ’*, 74 CHILD DEVELOPMENT 1500 (2003). This result is contrary to that encountered where the parent is just “moderately hard to employ.” See *id.* at 1518.

77. PRINCIPLES, *supra* note 18, § 3.04 at cmt. f.

78. *Id.*

nor guarantee a decent standard of living. Accordingly, in part, the approach may reflect the non-residential parent's interests.⁷⁹ The approach also legitimates the idea that any duty only extends to supporting the child rather than benefiting the residential parent—although factually “spillover” is almost inevitable.⁸⁰ However, this approach does not determine how much income ought to be generated. It only defines how income that is generated should be distributed. Thus, it just supplies the foundation on which optimization issues play out.

The ALI proposes a support formula based on the marginal difference in spending by parents with notionally equal incomes, compared to what a childless couple would spend on themselves.⁸¹ This approach seeks to strike a balance between the non-residential parent's interests, the child's interests in not suffering, and the residential parent's interests in not contributing disproportionately to support.⁸² This conceptualization does not inform any optimization analysis. Nevertheless, the underlying interests do. Thus, parents can be expected to perform to a level that obviates the child's suffering. This does not tell us the extent to which each can be expected to perform relative to the other, but if we accept the legitimacy of a non-residential parent's interest in only sharing income with the child and not with the residential parent, this does suggest a boundary marker against which optimization demands may be measured.

Some questions almost have a metaphysical character—and the ALI analysis has few answers. Should a non-residential parent's optimization burden be reduced because of fewer opportunities to enjoy a relationship with the child? Should such a claim be offset by the residential parent's increased responsibility and additional child-care duties?⁸³ Also, the ALI rejects factoring in remarriage.⁸⁴ The ALI's perspective is that child support and child-care obligations are a form of negative dower for both parents and thus don't justify a relative adjustment.⁸⁵ Apparently, conceptually, this negative dower would not support a demand for optimization. Moreover, where an obligor “acquires” subsequent children to support, in the ALI view they should be treated like any existing child, except, arguably, to the extent that the additional mouth pushes one or other household into a zone of absolute financial hardship (based on

79. *Id.* But to the extent that the obligation emerges from guidelines that require a payment that exceeds the child's reasonable needs, these interests are discounted. *See Nischal*, 879 A.2d at 815.

80. *See generally* PRINCIPLES, *supra* note 18, § 3.04.

81. *Id.* at 570.

82. *Id.* § 3.04 at cmt. f.

83. *See id.* § 3.04 at cmt. g.

84. *Id.* § 2.15.

85. *See generally Id.*

some percentage of the poverty level).⁸⁶ Such a scenario would seem to support a demand for income optimization by the person who “generated” the marginal burden in order to abate this situation as far as possible.

Custody awards generally result in the child being placed with the parent who historically performed that role. Frequently, that parent’s market value will have suffered by virtue of that role. This negative handicapping may be compounded by a post-divorce supervisory function. The combination of these child-derived penalties may adversely impact the child’s economic well-being. To what extent can we make demands on the income performance of the non-residential parent to offset this? The Principles, at least as far as child support is concerned, limit the demands to such performance as avoids a gross-disparity between the economic circumstances of the child and those of a higher-income non-residential parent.⁸⁷ The goal is not to equalize household incomes, but to strike a balance between ensuring that the child not suffer disproportionately, and capping the non-residential parent’s outlay at a level hypothetically found in an intact family.⁸⁸ This might dictate enhanced performance, but not necessarily optimization. And there might be further limits. Thus, a critical goal of the ALI child support framework is that it not discourage labor force participation by either parent.⁸⁹ As to the non-residential parent, this produces an analysis suggesting that any disincentive flowing from the obligor retaining less of his earnings is offset by an encouragement to work harder to reach a desired level of income. However, this analysis holds up only as long as the obligation is set a level where there is a marginal return for the obligor on the additional effort.⁹⁰ Additionally, the analysis relies on an assumption that the physical or psychological effort involved in producing income at the margin remains the same. If this is not true, additional labor force participation may be rejected—that is, even if additional income is possible, there is no necessary linear relationship between the economic incentives to optimize income and the psychological/physical resources to do so. This is somewhat analogous to the residential parent’s dual identity dilemma—discussed above—which resolves itself into a tension between what the actor can do and what the actor wants to do.

The Principles suggest that support determinations be calculated to enhance vocational training, even at the expense of short-term income optimization, especially for a residential parent who already may be under-invested in human capital and who, through child care and earning

86. See PRINCIPLES, *supra* note 18, § 3.16 at cmt. c.

87. *Id.* § 3.04 at cmt. i.

88. *Id.*

89. See *id.* § 3.04 at cmt. l.

90. *Id.*

responsibilities, may be hampered in efforts to acquire additional training.⁹¹ The system should encourage investment in such training in a way that makes worthwhile gains for both the residential household and the non-residential parent.⁹² This suggests, at least vis-à-vis the non-residential parent, that the system should be less encouraging of vocational training at his relative expense unless the effect, in due course, is to reduce his burden, or unless we can justify his contribution to the training through the ultimate marginal benefit to the child in the form of enhanced residential household resources. Also, the Principles only encourage vocational training, not education for its aesthetic value or the cultural enrichment of the residential household.⁹³ Followed to its logical conclusion, child care provided by the residential parent for the parent's psychic benefit and at the expense of income generation, should not be encouraged. And, we should take a hard look at any justification by the residential parent for non-optimization, where that justification is based on that parent's determination of the child's "needs" especially where those "needs" do not demonstrably demand economic under-performance.

V. THE SYSTEM EFFICIENCY PRINCIPLE—ANOTHER EIGHT HUNDRED POUND GORILLA ELIMINATES THE CAMEL'S NOSE

Despite all the subtlety extracted above, the choice of law rule may dictate the application of an approach that would suggest the above analysis is pointless.

The Principles noted the need for the system to be administrable and understandable. This, in turn, readily elides into a premise that sees an overarching goal as being achieving efficiency within the child support system. This would demand that, wherever possible, individualized determinations be minimized.⁹⁴ In the American context, this emerges as an argument that the opportunity to argue for deviations from established child support guidelines should be limited.⁹⁵ Thus, in the few reported cases where the arguments have

91. PRINCIPLES, *supra* note 18, § 3.04 at cmt. m.

92. *Id.*

93. *See id.*

94. Thus, in *In re the Marriage of Andersen*, 895 P.2d 1161, 1164–65 (Colo. Ct. App. 1995), the court pointed out that a finding that one parent has a higher cost of living will not ordinarily justify deviation from the guidelines and that the guideline commission had considered a specific provision to permit a deviation from the guidelines in such a circumstance but had concluded that ordinarily implementing such complex criteria "would only serve to make support awards less uniform and predictable and more subject to individual whim and manipulation. *Id.* at 1164. That said, the court acknowledged that the failure to expressly include a higher cost of living as a reason for deviation from the guidelines did not preclude doing so where "the difference in cost of living alone would render application of the guidelines inequitable, unjust, or inappropriate." *Id.* at 1165.

95. *See, e.g., Ball v. Minnick*, 648 A.2d 1192, 1197 (Pa. 1992) (stating that "[t]he clear intent of

been raised that the guidelines should not be used because they produce an “excessive” award relative to what the circumstances in the foreign country would demand, an efficiency principle has been used to block further analysis—why let the “nose” of detailed analysis intrude?⁹⁶

True, when it comes to *interstate* arguments along the same line in America, there seems to be more willingness to entertain an argument for deviation based on “cost of living” differential considerations and the like.⁹⁷ While the reason for the distinction between the national and international approaches is not clearly articulated, one cannot help guessing that what is “foreign” is almost inevitably deemed to be more of a problem.⁹⁸ This posture very easily slides over into one which will be readily embraced by American legal institutions, namely, that any mechanism should be simple and involve an efficient use of judicial and administrative resources. Nothing gets closer to achieving this goal than the rote implementation of established child support guidelines even if these tend to produce inappropriate or even absurd results.⁹⁹ It is difficult to imagine an American jurisdiction willingly departing from its domestic standards towards imputation and optimization (or lack thereof) in the face of countervailing pressures from overseas on criteria that would in any event have to be independently established—at least unless the domestic regime absolutely insists that such a departure be undertaken. If this hypothesis is correct, the argument of efficient use of judicial resources will swallow all the other nuanced analyses, except to the extent that they are already embedded in existing guidelines. What plays in Peoria will always be right for Peoria.

The fact that the courts even now seem inclined to follow the path of least resistance when it comes to support determinations with an international component would be yet another argument for caution in selecting the choice of law rule. In the international sphere the right rule would seem to be one that entertains subtleties.

the guidelines . . . was to do away with individual case-by-case determinations of just what constitutes the *reasonable needs and expenses* of the particular parties involved and thus to limit the trial court’s discretion.”).

96. “One of the primary purposes of the Guidelines ‘was to limit the role of trial courts in deciding the specific amount of child support to be awarded in different cases, by limiting the necessity for factual findings that had been required under pre-guidelines case law.’” *Gladis*, 856 A.2d at 712 (citing *Petrini v. Petrini*, 648 A.2d 1016, 1019 (1994)). “Allowing a deviation from the Guidelines based on the standards of living in different localities would encourage trial courts to examine those circumstances on a case-by-case basis and, no doubt, depart from the guidelines more frequently.” *Gladis*, 856 A.2d at 712.

97. *Id.* at 711–12.

98. “How, for instance, could fact finders consistently determine the precise differences in standards of living in two different countries, given that the value of currency changes constantly and that middle-class living conditions in Maryland may be considered poverty or extravagance elsewhere?” *Id.* at 712–13.

99. Thus in *Gladis* the guidelines required the obligor to pay \$497 per month, while at most the actual expenses of the child appeared to be no more than \$280 per month. *Id.* at 717 (Raker J. dissenting).

VI. CONCLUSION

Absurd results may arise if we impose blanket obligations to optimize or impute income. Thus, an American income generator may be asked to produce "too much," and conversely imposing an optimization burden on an individual where wages are very low may be fair as a matter of abstract principle but ridiculous in absolute terms as far as the relative burden on the parents is concerned.

Ideally, any choice of law rule would identify a legal regime, which under the circumstances, enabled the interests of the relevant constituencies to be addressed with subtlety. However, a variable choice of law rule involving a case by case analysis of available regimes would be highly inefficient. Instead, the key would seem to be to adopt a choice of law rule but include a number of limited defenses, or conditional rule changes, built into the choice of law protocol and embodying as much refinement as is deemed desirable. For example, we could select a legal regime based on the claimant's habitual residence, but subject to a limiting condition to the extent that any burden imposed on an obligor could not demand performance beyond current activities unless the claimant could establish that performance at some other level was a matter of compelling necessity. Even such a structure may be too detailed. Perhaps in the interests of gaining acceptability and minimizing the need to impute income, the choice of law rule should simply be subject to a blanket limitation that no more may be sought than the claimant's actual reasonable costs to maintain the obligor's standard of living, if the cost of living is less than that in the country of the obligor's habitual residence. And where the claimant's cost of living is greater than that of the obligor, the primary responsibility to meet those marginal excess costs (if necessary including the possibility of imputing income and demanding optimum performance) would be placed at the door of the person whose move produced the cost of living differential.

Finally, in the American context with its established guideline structure, recognition of the diverse pressures outlined above in the international context may be difficult unless the deviation criteria permitted by the guidelines are sufficiently flexible to accommodate multi-country related problems. Additionally, and in particular, American courts must be sensitized to the need to be more receptive to arguments for deviation where foreign countries are involved, and in the process to resist the appeal of arguments of judicial efficiency and simplicity that follow from rote application of the guidelines themselves.