Louisiana Law Review

Volume 73 | Number 1
Coastal Land Loss in the Gulf Coast and Beyond: A Symposium
Fall 2012

All in the Family: Examining Louisiana's Faulty Birth Order-Based Discrimination

Taylor Gay

All in the Family: Examining Louisiana's Faulty Birth Order-Based Discrimination

INTRODUCTION

Parents should not have favorite children.[1] However, the Louisiana Legislature forces parents to play favorites when a parent owes child support to multiple families.[2] In multiple family situations, the obligor[3] owes one child support order to the "first family" and another child support order to the "second family," and, if applicable, to other subsequent families.[4] Regrettably, Louisiana has chosen the worst available method to calculate child support for multiple families.

Although every child is entitled to support from his or her parents,[5] children from prior families receive more financial support than do children from subsequent families under Louisiana's current system for calculating child support.[6] This

---

1. *See* Joshua D. Foster & Ilan Shrira, *When Parents Play Favorites: Preferring One Child over Another*, PSYCHOLOGY TODAY (Jan. 10, 2009), *available at* http://www.psychologytoday.com/blog/the-narcissus-in-all-us/200901/when-parents-play-favorites ("Disfavored children experience worse outcomes across the board: more depression, greater aggressiveness, lower self-esteem, and poorer academic performance . . . And it's not all rosy for the favored children either—their siblings often come to resent them, poisoning those relationships.").

2. The term *multiple family* describes cases in which an obligor has children from different partners who have existing child support orders and none of those dependents live in the obligor's household. *See* LA. REV. STAT. ANN. § 9:315.1(C)(3) (Supp. 2012). Generally, the meaning of *multiple family* is different from the meaning of *second family*. *See id.* § 9:315(C)(2). Second family situations typically involve "the legal obligation of a party to support dependents who are not the subject of the action before the court and who are in the party's household." *Id.* For purposes of this Comment, however, the term *second family* refers to the second family to which an obligor owes child support.

3. For purposes of this Comment, the parent who has a court order requiring him or her to pay child support is deemed the *obligor* or *non-domiciliary* parent, while the other parent, who does not have a court order requiring him or her to pay child support, is deemed the *domiciliary* parent.

4. This Comment refers to the obligor's first and preceding families as the *prior family* and the obligor's second and sequential families as the *subsequent family*.

5. *See* LA. REV. STAT. ANN. § 9:315.1(A) (Supp. 2012) ("The premise of these guidelines as well as the provisions of the Civil Code is that child support is a continuous obligation of both parents, children are entitled to share in the current income of both parents, and children should not be the economic victims of divorce or out-of-wedlock birth.").

6. *See* discussion *infra* Part I.B.

statutory preference is known as a "first-family-first" policy.[7] The Louisiana Legislature's intent behind using this policy to calculate multiple family support orders is to deter divorce and ensure that the first family receives the amount of support it would have received if the family were still together.[8] Yet, despite these goals, Louisiana's child support guidelines[9] unconstitutionally discriminate[10] against subsequently born children.[11] Additionally, child support awards rendered under the guidelines create feelings of inferiority in subsequent children[12] and do not serve the best interest of all the obligor's children.[13]

The goal of this Comment is to highlight the major problems with the first-family-first policy[14] and to identify potential alternatives that would better calculate support in multiple family

---

7. *See* LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 3.04[b] (Supp. 2004).

8. *See* Katherine Shaw Spaht, *The Two "ICS" of the 2001 Louisiana Child Support Guidelines: Economics and Politics*, 62 LA. L. REV. 709, 732–33 (2002) (The statutory rhetoric that is now incorporated into the guidelines is "that [1] a child should not be the victim of divorce and [2] the obligor [cannot] 'shed' or, at a minimum, reduce his responsibility to his first family by incurring additional obligations to a second family.").

9. The current Louisiana child support guidelines, which implement the first-family-first policy, are hereinafter referred to as the "guidelines." *See* LA. REV. STAT. ANN. § 9:315–:315.47 (2008 & Supp. 2012).

10. The guidelines classify the obligor's children based on the family to which they were born and discriminate against children born in the obligor's second family. The determining factor for which family is awarded more child support money is based on who establishes the child support order first. This has been described as a "race to the court house." REVIEW OF LOUISIANA'S CHILD SUPPORT GUIDELINES: 2000 FINDINGS AND RECOMMENDATIONS OF THE CHILD SUPPORT GUIDELINES REVIEW PURSUANT TO LSA RS 9:315.12 31 (2000) [hereinafter 2000 FINDINGS AND RECOMMENDATIONS]. Children from the first family, however, have a significant leg-up in this race because they have more time to obtain the child support order than those children from subsequent families. The guidelines necessarily give a preference to children from the first family, and for purposes of this Comment, the determining factor for which family is awarded more support is based on each child's birth order—i.e., based on which family the child was born into.

11. *See* discussion *infra* Part II.

12. *See* discussion *infra* Part III.C.3.

13. *See* discussion *infra* Part III.C.1.

14. For an explanation of first family first's constitutional problems, see discussion *infra* Part II. For an explanation of first family first's policy problems (which include: the unconstitutionality of first family first, the fact that child support awards rendered under the guidelines are not in the best interest of all the obligor's children, and the fact that child support awards rendered under the guidelines provoke feelings of inferiority among subsequent children), see discussion *infra* Part III.

cases.[15] Part I of this Comment describes how the current guidelines are applied to multiple family cases and illustrates the discriminatory treatment of subsequent children resulting from the first-family-first policy. Next, Part II examines the unconstitutionality[16] of this discriminatory policy[17] through the lens of illegitimacy-based classifications.[18] These classifications are extremely similar and should thus be subject to the same level of judicial scrutiny.[19] Finally, Part III describes the inequities resulting from the first-family-first policy and discusses alternative policies that could be implemented to calculate support for multiple families more fairly.[20] Unless and until the guidelines are amended, Louisiana will continue to violate the Constitution and deprive subsequent children of the support that they deserve.

I. LOUISIANA'S DISCRIMINATORY METHOD FOR CALCULATING MULTIPLE FAMILY SUPPORT ORDERS

Ever since the Digest of 1808, Louisiana parents have been obligated to support their children.[21] Although this obligation is

15. *See* discussion *infra* Part III.

16. Specifically, the guidelines violate the equal protection clauses found in the Fourteenth Amendment of the United States Constitution ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.) and article I, section 3 of the Louisiana Constitution of 1974 ("No person shall be denied the equal protection of the laws. . . . No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth . . . ." LA. CONST. art. I, § 3.).

17. *See supra* note 10.

18. The phrase "illegitimacy-based classifications" refers to past laws that invidiously discriminated against children based on their parents not being married at the time of their birth. *See* BLACK'S LAW DICTIONARY 815 (9th ed. 2009) (An illegitimate child is a child born out of lawful wedlock.). The term *illegitimate* is no longer an appropriate word for referring to children born out of wedlock, but this Comment will use the word *illegitimate* for simplicity's sake—as both the jurisprudence evaluated in this Comment and the Louisiana Civil Code use the term *illegitimate* to describe children born out of wedlock. *See* LA. CIV. CODE arts. 238–245 (2011); discussion *infra* Part II.

19. Illegitimacy-based classifications are subject to intermediate scrutiny. Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146, 1150 (1987).

20. This Comment argues that an equalization policy is the best way to calculate support for multiple families. *See* discussion *infra* Part III.C.5.

21. "Fathers and mothers, by the very act of marrying, contract together the obligation of nourishing, maintaining and educating their children." DIGEST OF 1808 ONLINE, bk. 1, tit. 7, art. 46 (1808), http://www.law.lsu.edu/index.cfm?geaux=digestof1808.home&v=en&t=012&u=018#018. This obligation traces back further to the Code Napoléon of 1804. "Spouses contract together, by the

derived from French law,[22] Louisiana's current child support guidelines have largely been shaped by federal legislation.[23] In 1988, Congress passed the Family Support Act,[24] which compelled every state to implement child support guidelines and to choose one of three child support calculation models.[25] In response to the Act, Louisiana enacted presumptively correct[26] child support guidelines and adopted the "income shares" calculation model.[27]

A. Income Shares Model

The fundamental principle behind the income shares model is that a parent's child support obligation is equal to the portion of income that parent spent to support the children when the family was living together.[28] The first step in calculating a child support award under the income shares model is to add the monthly income of both parents together.[29] Then, using the parents' combined monthly incomes, the judge refers to a table in the guidelines to determine the basic amount of support owed to the

---

very act of marrying, the obligation of supporting, maintaining, and educating their children." CODE CIVIL DES FRANÇAIS, bk. 1, tit. 10, art. 203 (1804).

22. *See id.* Louisiana Civil Code article 141 establishes parents' duty to support their children. *See* LA. CIV. CODE art. 141 (2011); *see also id.* art. 227 (mothers and fathers have obligations to support, to maintain, and to educate their children); *id.* art. 240 (parents have a duty to support their children born out of wedlock).

23. *See* MORGAN *supra* note 7, at § 1.02.

24. Pub. L. No. 100-485, 102 Stat. 2343 (1988).

25. MORGAN, *supra* note 7, at § 1.03 (The Family Support Act did not prescribe that states choose a specific model for calculating support; instead, the Act required only that states adopt some model for calculating support.). More than thirty states implemented the income shares model. *See Chapter Nine: Establishment of Child Support Obligations*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (1999) [hereinafter *Chapter Nine*], http://www.acf.hhs.gov/sites/default/files/css/essentials_for_attorneys_ch09.pdf. Other states implemented the "Percentage of Income" model or the "Melson Formula" model. *Id.*

26. The guidelines create a presumption that the amount resulting from their application is correct and in the best interest of the child. MORGAN, *supra* note 7, at § 1.02. *See also* LA. REV. STAT. ANN. § 9:315.1(A) (Supp. 2012); Christopher L. Blakesley, *Louisiana Family Law*, 52 LA. L. REV. 607, 610 (1992).

27. Sue Nations, *Louisiana's Child Support Guidelines: A Preliminary Analysis*, 50 LA. L. REV. 1057, 1061 (1990). *See also* LA. CIV. CODE art. 141 cmt. d (2011); LA. REV. STAT. ANN. §§ 9:315.2(D), 9:315.3–:315.8(A) (2008 & Supp. 2012).

28. MORGAN, *supra* note 7, at § 1.03.

29. *Id.*

children.[30] Next, in order to determine the presumptively correct amount of support owed,[31] the judge adds the child's daycare costs, health insurance premium costs, extraordinary medical expenses, and other extraordinary expenses to the child support obligation.[32] The amount of child support owed by each parent is then allocated based on his or her portion of the combined monthly income.[33] The non-domiciliary parent is required to pay the calculated amount; whereas, the domiciliary[34] parent is merely expected to spend the calculated amount on the child.[35] The income shares model is a seemingly straightforward way to calculate child support, but this calculation is more complex when the obligor owes child support to multiple families.[36]

B. Multiple Families and the First-Family-First Policy

The child support guidelines were developed to apply to situations in which an obligor had only one family to support.[37] However, obligors frequently have multiple families to support,[38] and the method used in Louisiana for determining child support for subsequent families is almost identical to that used for determining child support for first families.[39] The only difference between the

---

30. *Id.* (The amount in the table or grid derives from economic data on a child's household expenditures.). *See also* LA. REV. STAT. ANN. § 9:315.19 (Supp. 2012).

31. MORGAN, *supra* note 7, at § 1.03.

32. *See* LA. REV. STAT. ANN. § 9:315.20, Worksheets A & B (2008). Judges also have the option to subtract for the child's income.

33. MORGAN, *supra* note 7, at § 1.03.

34. *See supra* note 3.

35. MORGAN, *supra* note 7, at § 1.03. For example, if a couple had a combined income of $2,000, each partner contributed 50% to this income, and no additional expenses needed to be added or subtracted, then, according to the table in the guidelines, their one child would be awarded $378 per month. The non-domiciliary parent would pay $189, while the domiciliary parent would be expected to spend $189 on the child. *See also* LA. REV. STAT. ANN. §§ 9:315.8(C)–(D), :315.19–:315.20 (2008 & Supp. 2012).

36. *See* discussion *infra* Part I.B.

37. Marygold S. Melli, *Guideline Review: The Search for an Equitable Child Support Formula*, *in* CHILD SUPPORT: THE NEXT FRONTIER 113, 120 (J. Thomas Oldham & Marygold S. Melli eds., 2000).

38. In 2004, 52.2% of previously divorced men age 25 and older were married for a second time, and 43.5% of previously divorced women age 25 and older were married for a second time. TASHA R. HOWE, MARRIAGES & FAMILIES IN THE 21ST CENTURY: A BIOECOLOGICAL APPROACH 428 (2011). About 50% of marriages end in divorce. *Id.* at 407. These statistics indicate that many parents marry, have children, divorce, then subsequently remarry, have more children, divorce again and, thus, owe child support to multiple families.

39. *See* discussion *supra* Part I.A.

two calculations is that when determining the amount of child support owed to a subsequent family, the obligor's preexisting child support orders are subtracted from the obligor's monthly gross income.[40] Because the amount of child support awarded is a function of the obligor's monthly gross income, the amount of money awarded to children from subsequent families is necessarily less than the amount awarded to prior families.[41] For example, if a couple has two children, and the non-domiciliary parent makes $2,200 per month while the domiciliary parent makes $0 per month, the non-domiciliary parent would owe the family a child support award of $601 per month.[42] If the non-domiciliary parent later has two additional children with a person who makes $0 per month, the non-domiciliary parent would owe the second family a child support award of $435 per month.[43] Therefore, the obligor's first family will automatically receive 24% more money than the obligor's second family.[44] It is also worthwhile to note that this disparity in child support awards disproportionally impacts the second families of less affluent obligors.[45]

As evidenced by the foregoing example, Louisiana's child support guidelines favor the obligor's prior family over his or her subsequent family or families. This first-family-first policy[46] is

40. *See* LA. REV. STAT. ANN. § 9:315.20 (2008).
41. *See* LA. REV. STAT. ANN. § 9:315.8 (2008).
42. LA. REV. STAT. ANN. § 9:315.19 (Supp. 2012).
43. *Id.*
44. The calculation can become truly complex when the obligor has more than two families. For example, if a non-domiciliary parent makes $2,200 per month and his or her first partner makes $0 per month, their three children would receive $709 a month. *Id.* If the non-domiciliary parent later has three more children with a second partner who also makes $0, those children would receive $506. *Id.* If the non-domiciliary parent then has three more children with a third partner who also makes $0 per month, he or she would owe the third family $310 per month. *Id.* If the non-domiciliary parent then has three more children with a fourth partner who makes $0 per month, the non-domiciliary parent would owe the fourth family $104 per month. *Id.* In sum, the obligor's first family would receive $709, but his fourth family would receive only $104, an 85% disparity in child support awards based on the children's birth order. This example assumes that there were no additional expenses that needed to be subtracted from the gross income.
45. For example, the second family of a middle-class obligor making $6,000 per month, with two children in both families, will receive 13% less child support than the obligor's first family. *See* LA. REV. STAT. ANN. § 9:315.19 (Supp. 2012). The second family of a poor obligor, making $1,300 per month with two children in both families, will receive 27% less child support than the obligor's first family. *See id.*
46. *See* D.A. Rollie Thompson, *The Second Family Conundrum in Child Support*, 18 CAN. J. FAM. L. 227, 250 (2001) (highlighting that child support guidelines preferring prior children to subsequent children employ the first-

based on a "religious and moral hostility to divorce"[47] and the idea that parents should not be able to relieve themselves of their financial responsibilities to children of their previous marriages by voluntarily incurring additional financial obligations to a subsequent family.[48] The policy is meant to deter divorce and to prevent the first family from being "forced onto the welfare rolls, while [the obligor] goes about creating a second family."[49] Regardless of these arguably positive intentions, many Louisianans are dissatisfied with how the policy calculates support for multiple families.[50]

C. Attempts to Remove the First-Family-First Policy from Louisiana's Guidelines

Because the guidelines are intended to apply to single family situations, multiple family cases are a challenging area of guideline development.[51] Louisiana family law practitioners, parents, and lawmakers have repeatedly acknowledged issues with the adequacy and fairness of the guidelines.[52] Of those Louisianans

---

family-first policy). "'First family first' predominates in the United States, both in the strong legislative preference for 'prior' children and the limited deviation permitted for 'subsequent' children." *Id.* at 265. *See also* HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 20 (1981). Although it is not explicitly stated that Louisiana implements the first-family-first policy, the guidelines condone the first-family-first policy. *See* 2000 FINDINGS AND RECOMMENDATIONS, *supra* note 10, at 25 (describing how Louisiana uses a form of the first-family-first policy to calculate multiple family support).

47. *See* Thompson, *supra* note 46, at 255–56 (Moreover, the first-family-first policy conveys that "[a] lower standard of living for the second family is the proper result, because of the primacy of birth order and the need for a deterrent and sanction to payors."); Spaht, *supra* note 8, at 736 (Louisiana advocates of the policy argue that giving all of the obligor's children the same amount of support, regardless of whether they were born to the first or second family, would significantly damage the security of the marriage promise.).

48. *See* Spaht, *supra* note 8, at 736.

49. *See* Thompson, *supra* note 46, at 256; *see also* Spaht, *supra* note 8, at 736 (discussing Louisiana's goals behind the first-family-first policy).

50. *See infra* note 54.

51. Marianne Takas, *Improving Child Support Guidelines: Can Simple Formulas Address Complex Families?*, 26 FAM. L.Q. 171, 179 (1992).

52. *See* Spaht, *supra* note 8, at 735 ("The issue of how to treat additional dependents was a 'major issue for a substantial portion of guidelines users in Louisiana.'"); REVIEW OF LOUISIANA'S CHILD SUPPORT GUIDELINES: 2004 FINDINGS AND RECOMMENDATIONS OF THE CHILD SUPPORT GUIDELINES REVIEW PURSUANT TO LSA RS 9:315.16 25 (2004) [hereinafter 2004 FINDINGS AND RECOMMENDATIONS] ("The phenomenon of second and subsequent families is an ever-increasing problem in the family law arena."); *infra* note 54.

polled in a 2004 study, 55.3% found the guidelines applying to multiple families to be "Inadequate to Very Inadequate."[53] In the 2008 Regular Legislative Session, by recommendation of the Louisiana State Law Institute, one Louisiana senator proposed that the guidelines be amended to remove the first-family-first policy.[54] The fundamental objective of this proposal was to treat multiple families equally.[55] The bill failed,[56] but this proposal indicates that some Louisianans believe that equal protection of the obligor's

53. 2004 FINDINGS AND RECOMMENDATIONS, *supra* note 52, at 24. In compliance with federal regulations, state legislatures must review their child support guidelines, with the consultation of the child support review committee, every four years in order to ensure the continued effectiveness of guidelines. 42 U.S.C. § 667(a) (2011); 45 C.F.R. § 302.56 (2012); LA. REV. STAT. ANN. § 9:315.16 (Supp. 2012). If the guideline review indicates the need for change, the legislature is to amend the guidelines accordingly. LA. REV. STAT. ANN. § 9:315.16 (Supp. 2012). In Louisiana, the last quadrennial review occurred in 2008. CHILD SUPPORT GUIDELINES REVIEW: 2008 QUADRENNIAL REPORT 3–4 (2008) [hereinafter 2008 QUADRENNIAL REPORT]. The Louisiana Legislature gave the responsibility of reviewing Louisiana's child support guidelines to the Office of Family Support, Support Enforcement Services of the Department of Social Services and the Louisiana District Attorneys' Association in consultation with the Child Support Review Committee. *Id.* The Child Support Review Committee identified issues for review by reaching out to the public. *Id.* The Committee surveyed judges, hearing officers presiding over matters involving child support, members of the Family Law Section of the Louisiana State Bar Association, and approximately 300 domiciliary and non-domiciliary parents receiving services within the child support agency, as well as those domiciliary and non-domiciliary parents not receiving services. *Id.* One issue identified for review was the application of the current child support guidelines to cases involving multiple families. *Id.* at 13. This issue was also raised in the 2000 and 2004 reports. *See* 2000 FINDINGS AND RECOMMENDATIONS, *supra* note 10, at 24–31 (in which the issue of what to do with additional dependents was debated); 2004 FINDINGS AND RECOMMENDATIONS, *supra* note 52, at 24 (in which the Child Support Review Committee acknowledged that "the phenomenon of second and subsequent families is an ever-increasing problem in the family law arena" and that 55.3% of respondents to the Louisiana Child Support Guidelines User Survey of 2003 found the guidelines applying to multiple families to be "Inadequate to Very Inadequate.").

54. *See* S. 605, 2008 Leg., Reg. Sess. (La. 2008), *available at* http://www.legis.state.la.us/billdata/streamdocument.asp?did=473066 (The proposal would reenact Louisiana Revised Statutes section 9:315.14 as Louisiana Revised Statutes section 315.8.1.).

55. *Id.* ("The fundamental policy objective in multiple support cases is to treat children of separate households with a common parent equally in the establishment of a base child support obligation.").

56. *See Instrument Information: SB605—2008 Reg. Sess.,* http://www.legis.state.la.us/billdata/History.asp?sessionid=08RS&billid=SB605 (last visited Oct. 8, 2012) (The bill was referred to the committee on Judiciary A but never went any further.).

children would be the best option for multiple family cases.[57] This belief is well-founded because the current guidelines create a discriminatory classification that violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[58]

II. ASSESSING THE CONSTITUTIONALITY OF LOUISIANA'S BIRTH ORDER-BASED DISCRIMINATION THROUGH THE LENS OF ILLEGITIMACY-BASED DISCRIMINATION

By classifying an obligor's children based on birth order,[59] the Louisiana child support guidelines deny subsequently born children equal protection under the law and are therefore unconstitutional.[60]

Illegitimate children are children born to unmarried parents.[61] Historically, the government has discriminated against illegitimate children by denying them equal protection under the law.[62]

---

57. *See supra* note 54.

58. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Also, the first-family-first policy violates the Louisiana Constitution of 1974 which states that "No person shall be denied the equal protection of the laws. . . . No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth . . . ." LA. CONST. art. I, § 3. *See also* discussion *infra* Part II. To the author's knowledge, neither the Louisiana Child Support Review Committee nor any Louisiana congressperson has requested that the guidelines be amended because they are unconstitutional. Moreover, the constitutionality of the first-family-first policy has not received much scholarly attention in Louisiana or in other states. *But see* Blakesley, *supra* note 26, at 608 ("Where a paying parent has undertaken additional obligations, including marrying again and fathering other children, he will not be excused from his primary obligation to support his non-custodial child. This, of course, gives a privileged position to the children of the first marriage, raising the question of whether this preference for one's first family is constitutional?"). *See generally* Rebecca Burton Garland, *Second Children Second Best? Equal Protection for Successive Families Under State Child Support Guidelines*, 18 HASTINGS CONST. L.Q. 881 (1991) (for a broad discussion regarding the constitutionality of first family first).

59. *See supra* note 10.

60. *See supra* note 58.

61. *See supra* note 18 and accompanying text (see specifically, LA. CIV. CODE art. 238 (2011)).

62. Mathews v. Lucas, 427 U.S. 495, 505–06 (1976) ("[T]he law has long placed the illegitimate child in an inferior position relative to the legitimate in certain circumstances, particularly in regard to obligations of support or other aspects of family law."). For examples of these discriminatory classifications, see Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (in which the state disfavored illegitimate children over legitimate children with regards to parental death benefits); N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (in which the state disfavored illegitimate children over legitimate children with

Illegitimacy-based discrimination persisted until 1968, when the U.S. Supreme Court held that denying children rights based on their legitimacy is unconstitutional.[63] However, despite the extreme similarities between illegitimacy-based classifications and birth order-based classifications,[64] Louisiana courts have yet to hold the child support guidelines unconstitutional.[65]

A. Similarities Between Birth Order-Based Classifications and Illegitimacy-Based Classifications

Similar to illegitimacy-based classifications, birth order-based classifications stem from immutable characteristics,[66] punish children based on the relationship or marital status of their parents,[67] and impact a child's ability to receive essential financial benefits.[68] Such similarities are important to recognize because these characteristics have led courts to declare illegitimacy-based classifications unconstitutional.[69]

---

regards to welfare benefits); Jimenez v. Weinberger, 417 U.S. 628 (1974) (in which the state disfavored illegitimate children over legitimate children with regards to Social Security disability benefits); *Matthews*, 427 U.S. 495 (in which the state disfavored illegitimate children over legitimate children with regards to survivor's benefits under the Social Security Act).

63. Levy v. Louisiana, 391 U.S. 68, 71–72 (1968) (A state cannot deny children the right to recover based on their illegitimacy. Illegitimate children are subject to all of the responsibilities owed by American citizens and thus cannot be "denied correlative rights which other citizens enjoy."). Since *Levy*, illegitimacy-based classifications have largely disappeared in the legal landscape. *See generally Mathews*, 427 U.S. at 505–506; Trimble v. Gordon, 430 U.S. 762 (1977); *Jimenez*, 417 U.S. 628; Gomez v. Perez, 409 U.S. 535 (1973); *Weber*, 406 U.S. 164; Labine v. Vincent, 401 U.S. 532 (1971); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

64. *See* discussion *infra* Part II.A.

65. *See supra* note 10.

66. This Comment argues that, like illegitimacy, a person's birth order is an immutable characteristic because it is determined solely by the "accident of birth." Frontiero v. Richardson, 411 U.S. 677, 686 (1973). *See* discussion *infra* Part II.A.1.

67. While illegitimacy-based classifications punish children based on their parents not being married at the time of their children's birth, Louisiana's birth order-based classifications punish children because their parent has procreated with multiple partners.

68. A state cannot deny a child support because the child is illegitimate. Gomez v. Perez, 409 U.S. 535, 538 (1973). Likewise, Louisiana should not diminish a child's support simply because he or she was born later. *See* discussion *infra* Part II.A.3.

69. *See* discussion *infra* Part II.A.1–3.

1. Immutable Characteristics

The Court uses a heightened form of scrutiny[70] when the characteristic defining the class is an immutable one, that is, one outside of the person's control.[71] Illegitimacy is an immutable characteristic[72] "because children born out-of-wedlock cannot control the status of their birth and cannot force their parents to legitimate them through subsequent marriage."[73] Immutable characteristics are "determined solely by the accident of birth."[74] A person has no control over whether his or her parents were married at the time of his or her birth, and illegitimacy "bears no relation to the individual's ability to participate in and contribute to society."[75]

These considerations apply equally to birth order classifications. A person likewise has no control over his or her birth order and cannot control whether his or her parents choose to

---

70. The Supreme Court applies one of three levels of scrutiny depending on the type of class. Note, *supra* note 19, at 1147–50. The first, and toughest, level is strict scrutiny. Strict scrutiny applies to suspect classifications. *Id.* at 1148. For a court to apply strict scrutiny, the legislature must have either significantly abridged a fundamental right or passed a law that involves a suspect classification. *Id.* A suspect class is one that has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). Suspect classifications include race, national origin, and religion. Laws discriminating against these classes must be "narrowly tailored" to further a "compelling governmental interest." Note, *supra* note 19, at 1149. The second, and less strict, level is heightened–intermediate scrutiny. Intermediate scrutiny applies to classifications based on sex, alienage, illegitimacy, and mental retardation. *See id.* These classifications must be "substantially related" to an "important" governmental interest. *Id.* at 1152. The third, and weakest, level is rational basis scrutiny. Rational basis scrutiny applies to classifications based on different reasons than those described above. *Id.* at 1148. These classifications must be "reasonably related" to a "legitimate" governmental interest in order to be constitutional. *Id.*

71. *See Frontiero*, 411 U.S. at 686.

72. The Supreme Court considers illegitimacy, sex, race, and national origin immutable characteristics. *See id.*; Mathews v. Lucas, 427 U.S. 495, 505 (1976) ("[T]he legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual.").

73. Julie E. Goodwin, *Not All Children Are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L.J. 234, 245 n.76 (2005). *See also Mathews*, 427 U.S. 495.

74. *Frontiero*, 411 U.S. at 686.

75. *Id.*

have additional children with other partners. Birth order is determined solely by the accident of birth, and the order of an individual's birth is not related to his or her ability to participate in and contribute to society.[76] Since birth order is immutable, birth order-based classifications should be analyzed under heightened scrutiny.[77]

2. Both Types of Classification Unjustly Punish Children Based on Their Parents' Relationship or Marital Status

Illegitimacy-based classifications punish children based on their parents' not being married at the time of their birth. These classifications intend to discourage parents from having children out-of-wedlock.[78] But, financially disadvantaging a child in order to express society's disapproval of the parent's liaisons "is illogical and unjust."[79] As the Supreme Court of the United States has noted:

> [I]mposing disabilities on illegitimate children is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.[80]

---

76. *Id.* at 686–87 (Gender-based classifications are subject to intermediate scrutiny because:

> what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. (citations omitted)).

Likewise, a person's birth order should not relegate him or her to an inferior legal status when birth order bears no relation to the ability to perform or contribute to society.

77. *See supra* note 72 and accompanying text.

78. Levy v. Louisiana, 391 U.S. 68, 70 (1968).

79. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972). In *Weber*, the U.S. Supreme Court struck down a Louisiana workman's compensation law that allowed illegitimate children to recover for their parent's death only if the parent's legitimate children had not already exhausted the benefits. The Supreme Court held that this classification violated the Equal Protection Clause because the classification was not related to the State's interest in promoting legitimate family relationships. Although equal allocation of the benefits between the legitimate and illegitimate children takes money away from the legitimate children, the Court's opinion indicates that this reallocation is sometimes necessary in order to comply with the Constitution.

80. *Id.*

Thus, a state may not "attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships."[81]

This "illogical and unjust" financial disadvantage was a justification for striking down illegitimacy-based classifications.[82] Likewise, it should justify striking down birth order classifications that similarly punish children based on their parents' conduct. These classifications penalize subsequently born children because their parents have procreated with multiple partners. However, no child however, is responsible for the liaisons of his or her parents. Therefore, penalizing subsequently born children based on their parents' conduct is an ineffectual and unjust method for deterring parents.[83]

3. Child's Right to Receive Financial Benefits

Illegitimacy-based and birth order-based classifications are also analogous because both classifications involve a child's right to receive financial benefits.[84] The Supreme Court in *Gomez v. Perez* held that "once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother."[85] Louisiana gives all children a judicially enforceable right to support[86] but denies a subsequently born child

81. Trimble v. Gordon, 430 U.S. 762, 769 (1977). *Trimble* was distinguished by *Lalli v. Lalli*, 439 U.S. 259 (1978). In *Lalli*, the Court upheld a law requiring that illegitimate children be acknowledged by their fathers in order to inherit from them. Also, in *Mathews v. Lucas*, the Court distinguished *Trimble* by upholding a law that forced illegitimate children to prove their dependence upon a deceased parent in order to inherit from that parent. 427 U.S. 495 (1976). These distinctions, however, bear no relation to Louisiana's child support guidelines because the children obtaining support have previously been declared dependents of the obligor. Thus, there is no question of whether the child is truly entitled to support from the father.

82. *Weber*, 406 U.S. at 175.

83. *See id.*

84. *See supra* note 68.

85. Gomez v. Perez, 409 U.S. 535, 538 (1973). *See also* Clark v. Jeter, 486 U.S. 456, 461 (1988) (citing *Gomez*, 409 U.S. at 538) (This assertion was distinguished by the Court in *Clark v. Jeter*, where the Court acknowledged that in some cases it may be appropriate to treat illegitimate children differently in the support context because of "lurking problems with respect to proof of paternity." However, in Louisiana, proving paternity is not a problem when the issue of child support is involved because a father's paternity is inherent in his owing a child support obligation.); *supra* note 80.

86. LA. CIV. CODE art. 141 (2011).

the right to receive as much support as a prior born child. Since no constitutionally sufficient justification exists for denying a child support simply because the child is illegitimate,[87] there cannot be a constitutionally sufficient justification for diminishing a child's right to support simply because he or she was born later.

Due to the profound similarities between birth order-based classifications and illegitimacy-based classifications, it stands to reason that judges should assess the constitutionality of Louisiana's child support guidelines using the same level of judicial scrutiny.

B. Intermediate Scrutiny Analysis

Courts review illegitimacy-based classifications under the intermediate scrutiny standard.[88] In order to survive intermediate scrutiny, a classification must be "substantially related"[89] to an "important"[90] governmental interest.[91]

---

87. *Gomez*, 409 U.S. at 538.

88. Mathews v. Lucas, 427 U.S. 495, 504 (1976) (Illegitimate children are a quasi-suspect class, and classifications based on illegitimacy are subject to intermediate scrutiny.). *See also* Trimble v. Gordon, 430 U.S. 762, 767 (1976). Throughout the Supreme Court's review of illegitimacy-based classifications, the Court has used several standards of review before settling on the intermediate scrutiny standard. *See* Kathleen M. Overcash, *Constitutional Law—Equal Protection—State's Denial of Right to Inherit Intestate Succession Based on Illegitimate Status Invalidated*, 52 TUL. L. REV. 406 (1978) (providing examples of the various standards).

89. There is no precise way to determine whether the classification is substantially related to a governmental interest. In *Levy v. Louisiana*, the State's classification was not substantially related because the illegitimate children had nothing to do with the harm inflicted on their mother. 391 U.S. 68, 72 (1968). In *Trimble v. Gordon*, the classification was not substantially related because, "parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status." 430 U.S. at 770. In *Weber v. Aetna Casualty & Surety Company*, the Court held that the classification was not substantially related because condemning a child for his or her parents' irresponsible liaisons beyond the bonds of marriage is "illogical and unjust" and "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." 406 U.S. 164, 175 (1972). In *Labine v. Vincent*, however, the State's interest in establishing a method of proper distribution for a decedent's property was important enough to justify discrimination. 401 U.S. 532 (1971). The classification was substantially related to the State's interest because of the difficulties involved with proving paternity and the related danger of spurious claims. *Id.* at 552–58. Nevertheless, the *Labine* case is not applicable to Louisiana's guidelines; proving paternity is irrelevant in establishing or modifying child support for multiple families because the obligor's paternity is inherent in his owing the obligation. *See id.*; *supra* note 85; *infra* note 90.

90. There is no precise way to determine whether a government's interest is "important," but the U.S. Supreme Court has deemed certain interests as not

1. The State's Interest Is Not Important Enough to Discriminate Against Subsequent Children

Louisiana uses a first-family-first policy in order to deter divorce and to ensure that the obligor does not relieve himself of the financial responsibility that he owes to his first family.[92] Yet, neither of these interests is important enough to withstand intermediate scrutiny.

Despite the fact that divorce may have negative effects on children,[93] the State's interest in deterring divorce does not justify the discriminatory classification of subsequently born children. In *Trimble v. Gordon*, the Supreme Court of the United States declared unconstitutional a Louisiana law that prohibited illegitimate children from inheriting through their fathers.[94] The Court decided that Louisiana's interest in promoting legitimate family relationships,[95] i.e., encouraging parents to marry before having children, was not important enough for the illegitimacy-based classification to withstand judicial scrutiny because children cannot do anything to promote their legitimacy.[96]

The unconstitutional law in *Trimble* is similar to Louisiana's child support guidelines because both punish children for their parents' conduct even though children cannot control this conduct.[97] Since the Supreme Court determined that promoting

---

important enough to justify an illegitimacy-based classification. In *Trimble v. Gordon*, the State's interest in encouraging legitimate (i.e., marriage-based) family relationships was not important enough to discriminate against illegitimate children. 430 U.S. at 770. In *Weber v. Aetna Casualty & Surety Co.*, the State's interests in promoting legitimate family relationships and minimizing problems of proof were not important enough to discriminate against illegitimate children. 406 U.S. 164, 175 (1972). In *Levy v. Louisiana*, discouraging illegitimate births was not important enough to discriminate against illegitimate children. 391 U.S. 68, 72 (1968).

91. Craig v. Boren, 429 U.S. 190, 197 (1976).

92. *See* Spaht, *supra* note 8, at 736.

93. *See generally* BRIDGET MAHER, DETERRING DIVORCE 7–9 (2004), *available at* http://downloads.frc.org/EF/EF04E17.pdf (In some cases, divorce may result in emotional and behavioral problems, less education, illegal drug use, out-of-wedlock childbearing, depression and suicide, less economic achievement, higher risk of divorce, and weak family relationships.).

94. *Trimble*, 430 U.S. 762.

95. "The Louisiana categories are consistent with a theory of social opprobrium regarding the parents' relationships and with a measured, if misguided, attempt to deter illegitimate relationships." *Id.* at 768 n.13.

96. *Id.* at 770.

97. Subsequently born children cannot do anything to prevent one of their parents from divorcing a former spouse.

legitimate family relationships is not important enough to allow discrimination against illegitimate children,[98] Louisiana's interest in deterring divorce cannot be important enough to allow discrimination against the obligor's subsequent children.

Furthermore, the State's interest in ensuring that the obligor does not relieve himself of his financial responsibilities to his first family is not important enough to survive intermediate scrutiny. The logic from *Trimble* also applies to this interest because the State punishes subsequently born children even though they cannot do anything to ensure that their parents continue to pay child support to their first families.[99] Further, even though protecting an obligor's first family is important, the protection of his second family is equally important. Parents have an obligation to support *all* of their children;[100] however, the first-family-first policy subordinates the second family's needs to the needs of the first family.[101] Because the obligor has an equal duty to support all of his children,[102] the State should be interested in protecting the financial needs of all the obligor's children. Hence, the financial needs of prior families should not trump the financial needs of subsequent families, and neither of the State's interests is important enough to justify Louisiana's birth order-based classification.

2. The First-Family-First Policy is not Substantially Related to the State's Interest

In addition to requiring that the governmental interests be important, the intermediate scrutiny analysis requires that the

98. *See Trimble*, 430 U.S. 762.

99. A child cannot control whether a parent pays his obligation to another family—i.e., whether the parent chooses to relieve himself of his financial responsibilities to his first family.

100. Laiche v. Laiche, 111 So. 2d 120, 122 (La. 1959). *See also* LA. CIV. CODE art. 227 (2011) (parents have a duty to support children of marriage); *id.* art. 240 (parents have a duty to support children not of marriage).

101. *See* discussion *supra* Part I.B; *see also* Martinez v. Martinez, 660 A.2d 13, 17 (N.J. Super. Ct. Ch. Div. 1995). The New Jersey Superior Court described problems with first family first, as follows:

> Family one sees such applications as an unfair erosion of their standard of living directly caused by the obligor's unwillingness to recognize that if he cannot support the children of the first relationship, he should have refrained from having more; and family two, primarily the new spouse or paramour, perceives such strident opposition as nothing more than a 'cake for you, crumbs for me' response, a contest fought for her and for her child's survival. Ofttimes, as here, there are enough grains of truth to fill many a sack.

Id.

102. *See supra* note 99.

classification be substantially related to those interests.[103] The first-family-first policy fails to meet the substantial relationship requirement for two major reasons. First, the policy is ineffective at deterring divorce because couples considering divorce are not likely to contemplate the first-family-first policy beforehand.[104] In *Weber*, the Court held that people will not "shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation."[105] In the same vein, parents are unlikely to shun divorce simply because their subsequent children may not receive as much child support as their prior children.[106] This notion is supported by statistics conveying the frequency of divorce.[107]

Second, the first-family-first policy is not substantially related to the State's interest in deterring divorce because, in many cases the parents from the first family were never married.[108] Despite the State's goal in deterring divorce, the child support guidelines are blind to whether the obligor was married or not.[109] In cases where the parents were not married, the State's goal in deterring divorce is impossible to achieve. Moreover, in cases where the obligor's first marriage occurred within the *second* family, the guidelines contradict the State's interest. Louisiana's birth order-based classification often does nothing to deter marriage and sometimes violates the State's goal. The classification, therefore, is not substantially related to the State's interest.

The discriminatory classification of subsequent children in the Louisiana child support guidelines is unconstitutional because the classification fails to survive intermediate scrutiny. Because Louisiana must comply with the Constitution,[110] its legislature

---

103. Craig v. Boren, 429 U.S. 190, 197 (1976).

104. Notwithstanding the *Trimble* decision, in the author's opinion, it seems preposterous for the State to assume that a parent contemplating divorce will consider the first-family-first policy or be persuaded by the fact that his or her future children may someday receive less child support money than his or her current children.

105. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972).

106. *See supra* note 103.

107. *See supra* note 38.

108. "About 53 percent of first births that occurred between 1990 and 1994 to women 15 to 29 years old were either born out of wedlock or conceived before the women's first marriage." Amara Bachu, *Trends in Martial Status of U.S. Women at First Birth: 1930 to 1994*, U.S. CENSUS BUREAU (March 1998), http://www.census.gov/population/www/documentation/twps0020/twps0020.html.

109. *See* LA. REV. STAT. ANN. §§ 9:315–:315.47 (2008 & Supp. 2012).

110. "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

needs to find a constitutional policy for calculating multiple family support orders. Fortunately, there are alternative, constitutional policies that address the policy problems inherent in first family first.[111]

III. LOUISIANA IGNORES BETTER POLICY ALTERNATIVES FOR CALCULATING MULTIPLE FAMILY SUPPORT ORDERS

Notwithstanding serious constitutional concerns,[112] the guidelines also present various social policy issues. This Part conducts a policy analysis to explain alternatives to first family first,[113] to describe what criteria the Legislature should evaluate when searching for a new policy,[114] and to apply those criteria to the alternatives in order to determine the best choice for Louisiana.[115] The preferred alternative is an equalization policy that is constitutional, results in awards that are in the best interest of all the obligor's children, and is perceived as fair by the obligor's children.[116]

A. Available Alternatives

In its effort to better calculate support for multiple families, the Louisiana Legislature needs to analyze alternative policies.[117] Such alternatives to first family first may include: using a second-family-first policy,[118] treating subsequent children as a defense against an upward modification,[119] treating subsequent children as

111. *See* discussion *infra* Part III.C.
112. *See* discussion *supra* Part II.
113. *See* discussion *infra* Part III.A. This section briefly explains policy alternatives.
114. *See* discussion *infra* Part III.B.
115. *See* discussion *infra* Part III.C.
116. *See* discussion *infra* Part III.C.5.
117. "Very broadly three approaches can be found in U.S. guidelines: (i) ignore prior or subsequent children; (ii) allow a 'deduction' from income for a prior or subsequent child; or (iii) make the prior or subsequent child a ground for downward 'deviation.'" Thompson, *supra* note 46, at 250.
118. States that use second family first include: Colorado, Iowa, Missouri, North Carolina, and Vermont. Morgan, *supra* note 7, at § 3.04[b].
119. States that use this policy include: Colorado, Connecticut, Delaware, Florida, Iowa, Kansas, Massachusetts, Missouri, New Mexico, North Carolina, Oklahoma, South Carolina, Utah, Vermont, and West Virginia. Morgan, *supra* note 7, at § 3.04[b] n.136; Thompson, *supra* note 46, at 250.

a cause for downward modification,[120] and equalizing all of the obligor's children.[121]

1. Second Family First

When searching for a new policy, the Legislature may evaluate the second-family-first policy employed by some states.[122] This policy, however, is merely the opposite of first family first and is no better at calculating multiple family support.[123] Second family first suggests that the second family's needs trump the first family's needs.[124] Thus, when considering the amount of support owed to the first family, the court will consider the needs of the obligor's second family and deduct the amount needed to support the second family from the income used to determine the first family's award.[125] Accordingly, the second family will receive more support than the first family, so, like first family first, this policy is also unconstitutional.

2. Subsequent Children as a Defense Against Upward Modification[126]

Some states permit the obligor to assert that he or she is supporting subsequent children as a defense in cases where the domiciliary parent files suit to increase a preexisting child support order.[127] In its 2008 review of the child support guidelines,

120. States using this policy include: Alaska, California, and Idaho. Morgan, *supra* note 7, at § 3.04[b] n.137.

121. States that use the equalization policy include New Jersey. *See* N.J. CT. R. 5:1–:8 app. IX; *see also* N.J. CT. R. 5:6A ("The guidelines set forth in Appendix IX of these Rules shall be applied when an application to establish or modify child support is considered by the court.").

122. *See supra* note 117 and accompanying text.

123. *See* discussion *infra* Part III.C.2.

124. *See* discussion *infra* Part III.C.2.

125. *Id.*; MARIANNE TAKAS, THE TREATMENT OF MULTIPLE FAMILY CASES UNDER STATE CHILD SUPPORT GUIDELINES 2, 23–24 (1991).

126. *See Chapter Nine, supra* note 25 ("Courts often treat subsequently born children differently, depending on whether the obligor is raising the issue 'offensively' or 'defensively.' In other words, courts are reluctant to allow an obligor to modify an order based on the need to support subsequently born children. They are more receptive to recognizing subsequent children as a defense to an obligee's motion to increase support.").

127. *See* Thompson, *supra* note 46, at 250. A parent's attempt to either increase or decrease a preexisting child support order is known as a modification proceeding. *See* LA. CIV. CODE art. 142 (2011) ("An award of child support may be modified if the circumstances of the child or of either parent materially change and shall be terminated upon proof that it has become unnecessary."). In

Louisiana's Child Support Review Committee recommended that Louisiana Revised Statutes section 9:315.12 be amended to implement such a policy.[128] Nevertheless, the Legislature did not adopt the Committee's suggestion.[129]

3. Subsequent Children as Cause for Downward Modification

A policy that allows subsequent children to be considered a cause for downward modification allows obligors to reduce preexisting child support orders when the obligor is supporting children from subsequent families.[130] Currently in Louisiana, an obligor cannot assert that he is supporting additional children as grounds for reducing a prior child support obligation.[131]

Louisiana, the only way an obligor can use his second family as a defense against upward modification is by proving that he or she has taken a second job or is working overtime to provide for the second family. LA. REV. STAT. ANN. § 9:315.12 (2008).

128. *See* 2008 QUADRENNIAL REPORT, *supra* note 53, at 13. The proposed modification to Louisiana Revised Statutes section 9:315.12 included:

> ~~Second~~ Multiple families; second jobs and overtime; additional dependents
>
> A. The court may consider the interests of a subsequent family as a defense in an action to modify an existing child support order when the obligor has taken a second job or works overtime to provide for a subsequent family. However, the obligor bears the burden of proof in establishing that the additional income is used to provide for the subsequent family.
>
> (1) The court may consider the expenses of the obligor for the support of children from a subsequent family as a defense in a proceeding to modify an existing child support order. The obligor has the burden of proving by documentary evidence both the parent-child relationship and the amount of support being provided to additional dependents.
>
> (Words which are ~~struck through~~ were proposed deletions from the existing statute, while words underscored were proposed additions).

129. *See* LA. REV. STAT. ANN. § 9:315.12 (2008).

130. *Id.*

131. *See* LA. CIV. CODE art. 142 cmt. b (2011). An obligor can reduce a preexisting child support order only when his circumstances have materially changed. LA. CIV. CODE art. 142 (2011). Subsequent children, however, are not considered a material change because the State does not want prior children to suffer financially due to the voluntary acts of their parents. Laiche v. Laiche, 111 So. 2d 120, 122 (La. 1959) ("[I]t would be contrary to the letter and spirit of the law to conclude that one required to pay alimony should be relieved therefrom, either wholly or partially, when he has brought about his own unstable financial condition by voluntarily incurring subsequent obligations, secondary to the alimony obligation, which render him unable to meet that obligation."). Nevertheless, why should the court's logic in *Laiche* not equally apply to subsequently born children? Why should subsequently born children

4. Equalization of Obligor's Children

Equalization is the "equal treatment" of all the obligor's children and is premised on the idea that "had the parents stayed together and produced additional children, there would have been adjustments and a likely reduction in the resources available for the first child."[132] The equalization policy is exemplified by New Jersey's child support guidelines.[133] Similar to Louisiana, New Jersey judges subtract preexisting child support orders from the obligor's income when calculating child support for the obligor's subsequent family.[134] However, New Jersey's guidelines differ from Louisiana's guidelines because, after using the formula to determine the subsequent family's child support order, New Jersey judges have the option to "either average the obligor's orders or fashion some other equitable resolution in order to treat all supported children fairly under the guidelines."[135]

Equalization and the other mentioned policies may be better at calculating support for multiple families than first family first. Accordingly, the Louisiana Legislature should evaluate the advantages and disadvantages of each policy.

B. Criteria that Must Be Evaluated in Order to Make the Best Policy Choice

The Legislature must be mindful of certain criteria when evaluating these alternatives to first family first. The evaluation criteria must include whether the policy: (1) is constitutionally sound, (2) results in awards that are in the best interest of *all* the obligor's children, and (3) results in awards that are perceived as fair by the obligor's children.[136]

---

suffer due to the voluntary obligations that their parents incurred before their birth?

132. Martha Minow, *How Should We Think About Child Support Obligations?*, *in* FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT 315 (Irwin Garfinkel et al. eds., 1998).

133. N.J. CT. R. 5:1–:8 app. IX.

134. *Id.* at app. IX-B. *See also* discussion *supra* Part II.B.

135. N.J. CT. R. 5:1–:8 app. IX-A. *See also* discussion *supra* Part II.C (In Louisiana, an equalization policy was recommended to the legislature in 2008, but the bill died in committee.).

136. These criteria need not be the Legislature's only considerations when searching for a new policy. However, these three criteria are necessary to the Legislature's evaluation because Louisiana must comply with the U.S. Constitution. *See* U.S. CONST. art. VI, cl. 2.

1. Constitutionality

An evaluation of whether an alternative policy violates the Equal Protection Clause is fundamental in determining whether the alternative should be implemented because Louisiana law must comply with the Constitution of the United States.[137] The constitutional evaluation of the alternatives to first family first will examine whether the policy creates a birth order-based classification and, if so, whether that classification is substantially related to an important governmental interest.[138] If the policy does not create a discriminatory classification, then no further constitutional evaluation is necessary.

2. Best Interest of All the Obligor's Children

A thorough analysis of the alternative policies must consider whether the amount of support calculated through application of the policy would be in the best interest of all the obligor's children.[139] This is an important factor in the Legislature's evaluation because every state's child support guidelines presume that the amount of support awarded via the guidelines is in the best interest of the child.[140] Therefore, in order for this presumption to be accurate for all the obligor's children, the chosen policy should

---

137. *See* U.S. CONST. art. VI, cl. 2.

138. Such birth order-based classifications will be subject to intermediate scrutiny. *See* discussion *supra* Part III.B.

139. Sarah McGinnis, *You Are Not the Father: How State Paternity Laws Protect (and Fail to Protect) the Best Interests of Children*, 16 AM. U. J. GENDER SOC. POL'Y & L. 311, 313 (The best interest of the children is important because "[f]amily law cases involving children operate under a single guiding principle: children's well-being is the paramount concern in any judge's decision." (citation omitted)). The best interest of the child standard is used by courts to determine what arrangements would be to a child's greatest benefit. *See* BLACK'S LAW DICTIONARY 181 (9th ed. 2009). The best interest of the child standard is "extremely vague." Blakesley, *supra* note 26, at 638.

140. MORGAN, *supra* note 7, at § 1.02. Notably, the author suggests the following:

> There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

Id. See also LA. REV. STAT. ANN. §§ 9:315.1(A), 9:315.1(B)(1), 9:315.1 cmt. a (2008 & Supp. 2012). The guidelines create a presumption that the amount resulting from their application is correct and in the best interest of the child.

calculate *all* child support orders in proportion to the obligor's total income.[141] By ensuring that both prior and subsequent families receive child support awards that are proportionate to the obligor's total income, the guidelines will render child support awards that are in the best interest of *all* families.

3. Perceived Fairness by the Obligor's Children

Evaluating whether the obligor's children would perceive the amount of support calculated by application of the policy as fair is the final component of this analysis because "unequal child support awards between prior and subsequent children could create feelings of inferiority in the subsequent children."[142] When the law favors one family,[143] the subsequent, non-favored family may feel that the law deems it less important than the prior, favored family.[144] Moreover, studies suggest that children equate fairness with exact equality, regardless of the purpose of the parent's

141. For purposes of this Comment, *total income* refers to situations where the court does not subtract preexisting child support orders from the obligor's income when calculating support for the subsequent family. For a policy to render awards that are in the best interest of *all* the obligor's children, the policy should calculate each family's child support order without subtracting preexisting child support orders. Obviously it would be in the best interest of a family, either prior or subsequent, to be the only family entitled to a support award that is proportionate to the obligor's total income because that family would get more money than the obligor's other family. However, the presumption that the amount awarded by application of the guidelines is in the best interest of the child applies to both children from prior and subsequent families. Thus, in order for this presumption to be true, the chosen policy should award support in proportion to the obligor's total income for all families.

142. Misti N. Nelc, *Inequitable Distribution: The Effect of Minnesota's Child Support Guidelines on Prior and Subsequent Children*, 17 LAW & INEQ. 97, 114 (1999).

143. I.e., when the law allows one family to receive more money than the other family.

144. Also, the nonfavored children may feel that the obligor loves them less. *See* Nelc, *supra* note 142, at 114 ("One policy issue that should be taken into consideration is that unequal child support awards between prior children and subsequent children could create feelings of inferiority in the subsequent children. Since they are less favored by the law, they may feel less favored and less loved by the obligor."). *See generally* WILLIAM R. BEER, STRANGERS IN THE HOUSE: THE WORLD OF STEPSIBLINGS AND HALF-SIBLINGS (1989) (describing the relationship between siblings who share only one parent); Susan M. McHale & Terese M. Pawletko, *Differential Treatment of Siblings in Two Family Contexts*, 63 CHILD DEV. 68, 68 (1992) ("[C]hildren who perceive their own treatment as less favorable [than their siblings] may experience a host of negative affective reactions that may be manifested in adjustment difficulties or in problematic sibling relationships.").

behavior.[145] Thus, an alternative's perceived fairness will be determined by whether the policy favors one set of children over the other and whether the policy's application results in unequal child support awards that would likely engender feelings of inferiority among the obligor's children.[146] By evaluating whether the proposed alternatives are perceived to be fair by the obligor's children, in addition to evaluating whether the policy is constitutional and in the best interest of all children, Louisiana can find a better policy for calculating support in multiple family cases.

C. Criteria Applied to the First-Family-First Policy and the Policy Alternatives

When deciding whether to keep the first-family-first policy or adopt a new policy, the Louisiana Legislature needs to determine whether the policy meets the aforementioned criteria.[147]

1. First Family First

The first-family-first policy is not the best choice for Louisiana because it fails to satisfy any of the criteria. In addition, this policy is unconstitutional because it creates a discriminatory classification that is not substantially related to an important government interest.[148]

First family first does not result in awards that are in the best interest of all the obligor's children. The first family receives an award that is proportionate to the obligor's total income, while the second family receives an award that is proportionate to the obligor's income minus the preexisting child support order.[149] Thus, the guidelines only result in an award that is in the best interest of the first family.

---

145. *See* Amanda Kowal & Laurie Kramer, *Children's Understanding of Parental Differential Treatment*, 68 CHILD DEV. 113, 117 (1997) (Studies suggest that children equate fairness with exact equality regardless of the purpose of the parent's behavior. So, even though the law forces the parent to pay less money to the subsequent family, the reason why the inequity occurs is irrelevant to the child. He or she only recognizes that it is unequal treatment.).

146. Because children equate fairness with exact equality, a policy that renders equal awards for both families will be the best at meeting this criterion. *Id.*

147. *See* discussion *supra* Part III.B.

148. *See* discussion *supra* Part II.B (arguing that Legislature should not consider keeping the first-family-first policy because it is fundamentally flawed in that it violates the Equal Protection Clause).

149. *See* discussion *supra* Part I.B.

Finally, the obligor's subsequent children could perceive the award resulting from application of the first-family-first policy as unfair because the prior children would receive more financial support.[150] Because the first-family-first policy meets none of the three criteria, it is not the best policy for Louisiana.

2. Second Family First

The second-family-first policy is likewise not the best choice for Louisiana because it also fails to meet any of the three criteria. Though the calculation method used in second family first is the opposite of the calculation used in first family first,[151] the problems with the two policies are identical. Like the first-family-first policy, the second-family-first policy is unconstitutional because it creates a birth order-based classification that is not substantially related to an important government interest.[152] Attempting to prevent an obligor's second family from financial turmoil may be an important state interest;[153] however, an obligor's duty to support his first family is equally important.[154] Thus, classifying children based on their birth order is not important enough to justify the discriminatory classification. And even assuming that the governmental interest is important, the classification is not substantially related to that interest because previously born children cannot do anything to ensure that their parent pays his or her obligations to the second family.[155]

The second-family-first policy also fails to meet the best interest of all the obligor's children. The policy results in an award that is in the best interest of the obligor's subsequent family only because the second family's child support is awarded in proportion to the obligor's total income; whereas, the first family's child support award is not.[156] Since the policy, as applied, does not result in an amount that is consistent with the best interest of all the

150. *See* discussion *supra* Part I.B.
151. *See* discussion *supra* Part I.B.
152. The second-family-first policy creates a birth order-based classification because child support is awarded based on whether the child comes from the subsequent family or the prior family. *See* MORGAN, *supra* note 7, at § 3.04[b].
153. The State's interest would be the financial success of the second family. *See* Thompson, *supra* note 46, at 250. This interest, however, is not substantial enough to create a discriminatory classification because children cannot control whether their parents pay child support. *See* discussion *supra* Part II.B.2.
154. *See* discussion *supra* Part II.B.1.
155. Trimble v. Gordon, 430 U.S. 762, 769 (1977). *See also* discussion *supra* Part III.B.2.
156. *See* Nelc, *supra* note 142.

obligor's children, the second-family-first policy fails to meet this criterion.

Finally, the obligor's prior children would not perceive the amount awarded via the second-family-first policy as fair. Children equate fairness with equality; however, the second family first policy results in awards that are unequal and would likely provoke feelings of inferiority and jealousy among the obligor's prior-born children.[157] Therefore, Louisiana should not adopt the second-family-first policy.

3. Subsequent Children as Defense to Upward Modification

A policy that treats subsequent children as a defense to upward modification meets the criteria slightly better than first family first and second family first. But it, too, is not the best choice for Louisiana. In cases where the domiciliary parent from the obligor's prior relationship files suit to modify a preexisting child support order and the non-domiciliary parent defends himself or herself from this modification attempt by asserting that he or she supports children from a subsequent family, this policy does not create a discriminatory classification. Thus, in modification cases, the subsequent-children-as-a-defense-to-upward-modification policy is constitutional.[158]

On the other hand, in non-modification proceedings, the policy is identical to first family first and is therefore unconstitutional. Moreover, the support obtained by use of this policy is not in the best interest of all the obligor's children in non-modification proceedings because the second family does not receive child support awards that are proportionate to the obligor's total income.[159] Finally, subsequent children would not perceive the amount awarded under this policy as fair because the first family inherently receives more child support.[160] Such an inequality would likely provoke feelings of inferiority amongst the obligor's subsequent family.[161]

---

157. *See* Kowal & Kramer, *supra* note 145.

158. A *modification proceeding* refers to one parent's attempt either to decrease or increase a preexisting child support order. *See* LA. CIV. CODE art. 142 (2011). Only the prior family involved in the modification proceeding can have its support altered. The subsequent family must file a separate modification proceeding to have its support raised. *See* LA. CIV. CODE art. 141 cmt. c (2011).

159. *See* discussion *supra* Part III.C.1.

160. *See* discussion *supra* Part III.C.1.

161. Children equate fairness with equality. *See* Kowal & Kramer, *supra* note 145. Although the needs of subsequent children may be considered in a modification proceeding, the subsequent children's award will not be modified

The only benefit of the subsequent-children-as-a-defense-to-upward-modification policy over the first-family-first policy is that the former is constitutional in modification proceedings. In non-modification proceedings, however, this policy is identical to first family first, and, consequently, it is not the best policy for Louisiana.[162]

4. Subsequent Children as Cause for Downward Modification

An analysis of a policy considering subsequent children a cause for downward modification is essentially identical to the above analysis of a policy considering subsequent children as a defense to an upward modification.[163] Both policies are only constitutional in modification proceedings. Neither renders awards that are in the best interest of all the obligor's children, nor do they not render awards that are perceived as fair by the obligor's children.[164] Despite these similarities, the subsequent-children-as-a-cause-for-downward-modification policy is better than the subsequent-children-as-a-defense-to-upward-modification policy because the former can be used in both types of modification proceedings. Thus, the subsequent-children-as-a-cause-for downward-modification policy better facilitates constitutionality since it can be used more often in modification proceedings. Nonetheless, Louisiana should choose a policy that meets all of the criteria in establishment and modification proceedings. Downward modification, therefore, is not the best policy for Louisiana.

5. Equalization of Obligor's Children

Equalization is the best policy for Louisiana because it is constitutionally sound, it renders awards that are in the best interest of all the obligor's children, and it would be perceived as fair by the obligor's children. Unlike the first-family-first policy or the aforementioned alternatives, the equalization policy does not create a discriminatory classification because all of the obligor's children

---

unless their parent files a modification action. LA. CIV. CODE art 142 cmt. c (2011). Thus, children will not perceive the amount awarded as fair unless their parent also files a modification proceeding.

162. *See* discussion *supra* Part III.C.1.

163. *See* discussion *supra* Part III.C.3.

164. *See id.* In proceedings to establish support, the policy is unconstitutional because it creates a class that is not substantially related to any important government interest. *See* discussion *supra* Part III.B.

are treated equitably.[165] Accordingly, the policy does not violate the Equal Protection Clause and is therefore constitutional.[166]

Furthermore, application of the equalization policy results in child support awards that are in the best interest of all the obligor's children. A policy in the best interest of all children should establish each family's child support award in proportion to the obligor's total income, and an equalization policy satisfies this requirement. New Jersey is one state that uses an equalization policy when calculating child support awards for multiple families.[167] New Jersey's policy provides an excellent framework for a potential Louisiana equalization policy; however, the Louisiana Legislature should make certain adjustments when adopting an equalization policy. Even though the equalization policy used in New Jersey subtracts preexisting child support orders from the obligor's income,[168] child support is awarded in the best interest of the obligor's children because the court "may either average the orders or fashion some other equitable resolution to treat all supported children fairly under the guidelines."[169]

Finally, equalization would best meet the perceived fairness criterion. This is because children equate fairness with exact equality, and the equalization policy comes the closest to rendering equal awards.[170] In sum, because the equalization policy meets the three criteria, it presents the best choice for calculating child support awards for multiple families in Louisiana.

---

165. *See* N.J. CT. R. 5:1–:8 app. IX-A. The rules indicate the following:

> When the court adjudicates a case involving an obligor with multiple family obligations, it may be necessary to review all past orders for that individual. If the court has jurisdiction over all matters, it may either average the orders or fashion some other equitable resolution to treat all supported children fairly under the guidelines. If multiple orders reduce the obligor's income to an amount below the self-support reserve, the orders should be adjusted to distribute the obligor's available income equitably among all children while taking into consideration both the obligee's share of the child support obligation and obligor's self-support reserve.

Id.

166. *See* discussion *supra* III.B.1. As the policy does not create a discriminatory classification, no equal protection analysis is necessary.

167. *See* N.J. CT. R. 5:1–:8 app. IX.

168. *See id.*

169. *Id. See also* 2004 FINDINGS AND RECOMMENDATIONS, *supra* note 52, at 29 ("[T]he best interests of all children are better served when special consideration is taken to ensure fair distribution of limited resources.").

170. *See* Kowal & Kramer, *supra* note 145.

New Jersey's equalization policy gives judges discretion when calculating child support awards for multiple families.[171] This discretion, however, may prove problematic because, historically, "leaving the determination of child support to the complete discretion of judges . . . led to inconsistent orders."[172] A problem with New Jersey's policy, therefore, is that judges may have *too much* discretion in setting child support.[173] Accordingly, in the implementation of an equalization policy, the Louisiana Legislature should limit judicial discretion by restricting the situations in which judges may fashion equitable solutions in certain situations, such as when one family has special needs that warrant more support.[174] The Louisiana Legislature should either

171. *See* N.J. CT. R. 5:1–:8 app. IX-A (demonstrating how New Jersey uses an equalization policy that equitably divides the obligor's resources); Martinez v. Martinez, 660 A.2d 13, 19–21 (N.J. Super. Ct. Ch. Div. 1995). The *Martinez* case provides an example of such equitable distribution of support. Because the child from the first family was healthy, while the child from the second family was an infant with medical difficulties, the judge in *Martinez* granted the second family more money than the first family. The judge looked into the costs associated with the infant's illness. With these considerations in mind, the judge found that justice required a reduction in the first family's child support award: "I recognize that any dollars taken from the first family children may pinch to some degree. But I also find that unlike their half-brother, they do not have the crisis of health, shelter and survival unknowingly faced by an infant now living in a family on the economic brink." *Id.* at 20.

172. MORGAN, *supra* note 7, at § 1.02 ("[T]wo noncustodial parents with the same number of children, the same income, and the same circumstances, might very well obtain vastly different support orders."). Before the Family Support Act of 1988, child support awards were inconsistent and inadequate. This prompted the U.S. Congress to limit a state judge's discretion in order for child support awards to be more consistent.

173. If the Louisiana Legislature chooses to implement the equalization policy, it will also face the issue of whether all existing child support orders for multiple families should be reopened and equalized. In order to avoid onerous administrative burdens, the Legislature should not force courts to retroactively equalize child support orders for multiple families. Instead, the equalization policy should be used in all proceedings to establish or modify support filed on or after the day that the Legislature implements the equalization policy. *See* LA. REV. STAT. ANN. § 9:315.1(A) (Supp. 2012). Louisiana Revised Statutes section 9:315.1(A) indicates that "[t]he guidelines set forth in this Part are to be used in any proceeding to establish or modify child support filed on or after October 1, 1989." *Id.* The Legislature could write something similar as a preface to the equalization statute.

174. Currently, a child's daycare costs, health insurance premium costs, extraordinary medical expenses, and other extraordinary expenses are subtracted from the child support obligation. These costs could also be used as mechanisms to gauge whether the needs of one child are more compelling than another. Only in those cases where one family's needs are more compelling could the court fashion an equitable solution. *See* LA. REV. STAT. ANN. § 9:315.19, Worksheets

give judges the ability to average the obligor's child support orders like New Jersey or structure the guidelines such that an obligor's child support orders are automatically averaged.[175] In addition to averaging support orders, Louisiana judges should have the option to fashion an equitable solution when one family absolutely needs more financial support.[176]

Based on this analysis of available alternatives, an equalization policy that averages support orders and considers the unique needs of one family only when necessary is the optimal solution for Louisiana's multiple family quandaries. Because Louisiana is required to abide by the federal Constitution,[177] the Legislature must purge the unconstitutional first-family-first policy from the guidelines and should exchange it with an equalization policy. Not only would such a policy be constitutional, but the policy's application would also render awards that are in the best interest of all the obligor's children and perceived as fair by all the obligor's children.

CONCLUSION

Although a plethora of alternative policies better protect all children who receive child support,[178] the Louisiana Legislature has done nothing to eliminate first family first and thereby end the discriminatory treatment of subsequent children. If the guidelines are not changed, children from subsequent families will continue to face discrimination for no important reason. Moreover, child support awards will not be awarded in the best interest of an obligor's subsequent children, and subsequent children will continue feeling inferior to their previously born siblings.[179] The State can no longer force parents to play favorites, and the Legislature must immediately amend its unconstitutional child support guidelines.

Taylor Gay[*]

A & B (2008). Judges also have the option to subtract for the child's income if applicable. *Id.*

175. *See* N.J. CT. R. 5:1–:8 app. IX-A.

176. *See id.*

177. U.S. CONST. art. VI, cl. 2.

178. *See* discussion *supra* Part III.C.

179. *See* discussion *supra* Part III.C.1.

* J.D./D.C.L., 2013, Paul M. Hebert Law Center, Louisiana State University.