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William D. Herlong

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Are Mandatory Income Tax Withholding Work Expenses or Are They Not “Income” in AFDC: An Analysis of the Statute and Its History

I. INTRODUCTION

Aid to Families with Dependent Children (AFDC)¹ is a federal-state² public assistance program authorized by title IV of the Social Security Act of 1935.³ States that participate in AFDC provide assistance to “needy”⁴ families that have at least one child, an adult relative living in the same home with the child, and at least one parent who cannot sup-

1. The AFDC program was originally known as “Aid to Dependent Children.” Social Security Act of 1935, ch. 531, § 401, 49 Stat. 620, 627. In 1962, the name of the program was changed to “Aid and Services to Needy Families with Children” and the name of the assistance provided was changed to “Aid to Families with Dependent Children.” Pub. L. No. 87-543, § 104(a)(1)-(2), 76 Stat. 172, 185 (1962).

2. It is “cooperative federalism” whereby funds are provided on a matching basis by the federal government but the program is administered by the states. D. BAUM, *THE WELFARE FAMILY AND MASS ADMINISTRATIVE JUSTICE* 11 (1974).

3. Social Security Act of 1935, ch. 531, § 401, 49 Stat. 620, 627 (codified as amended at 42 U.S.C. § 601 (1982), and also amended by Deficit Reduction Act of 1984, Pub. L. No. 98-369, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1135).

This single piece of legislation replaced a tradition in the United States of individual states administering their own relief programs. M.D. COFER, *ADMINISTERING PUBLIC ASSISTANCE* 11 (1982). The Act encompassed several different programs. First, it provided social insurance in the form of federal old-age insurance and federal unemployment compensation financed by contributions of the beneficiary and his employer. Second, the Act established the public categorical assistance programs of Old Age Assistance, Aid to the Needy Blind, and Aid to Dependent Children (now AFDC). These programs were financed by general taxation. Third, the Act created health and welfare services of Maternal and Child Health Services, Services for Crippled Children, Child Welfare Services, Vocational Rehabilitation, and Public Health Services. *Id.*

The Social Security Act has undergone several major transformations since its inception in 1935. In 1950, Aid to Permanently and Totally Disabled became part of the public categorical assistance programs. In 1965, Old-Age, Survivors, and Disability Insurance as well as Public Assistance and Maternal Health and Child Welfare services were expanded. Medicare and Medicaid also were added. *Id.* In 1972, Assistance to the Needy Aged, Blind, and Disabled came under the auspices of the Social Security Administration in terms of total funding and implementation in the form of Supplemental Security Income (SSI). 42 U.S.C. §§ 1381-83(c) (1982). The 1972 amendment, however, left the administration of AFDC in the hands of the states. M.D. COFER, *supra* note 3, at 11.

4. 42 U.S.C. §§ 606, 607 (1982). There is no national standard of need and the definition of “needy” is left entirely to each state. A national standard of need was not developed because Congress felt that the heterogeneity of the country made a single standard unrealistic and potentially disruptive to the economic and social structure of the country. W. BELL, *AID TO DEPENDENT CHILDREN* 21 (1965). States were not even obliged to provide assistance sufficient to meet minimum standards of health and decency. The level of public support was, and remains, entirely within the discretion of each state. *Id.*; see also 45 C.F.R. § 233.20(a)(2)(i) (1983); *Dandridge v. Williams*, 397 U.S. 471, 478 (1970); *King v. Smith*, 392 U.S. 309, 318 n.14 (1968); *CENTER ON SOCIAL WELFARE POLICY AND LAW, MATERIALS ON WELFARE LAW* III-3, VI-4, 306 (1972) [hereinafter cited as *MATERIALS ON WELFARE LAW*]. States must not lower their existing standard of need without justification, such as a decrease in the cost of living. *Rosado v. Wyman*, 397 U.S. 397 (1970). To circumvent that limitation, however, a state could simply maintain its standards of need but decrease

port the child.⁵ A percentage of the funds expended by each state is reimbursed by the federal government.⁶ In return for federal funds, the states must administer their programs in accordance with the statute and the regulations of the administering federal agency.⁷

The statute gives three purposes for AFDC: to provide adequate income for needy families with dependent children, to keep such families together, and to encourage adult members of such families to "attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection."⁸ Because of this wide scope, AFDC has become the most

the amount or percentage of that standard that it would pay. *Jefferson v. Hackney*, 406 U.S. 535 (1972).

For a recent article describing how states arrive at their standards of need, see Chief, *Need Determination in AFDC*, 42 Soc. SEC. BULL., Sept. 1979, at 11.

5. 42 U.S.C. §§ 602(a), 606(a) (1982). See D. BAUM, *supra* note 2, at 11; S. LAW, *THE RIGHTS OF THE POOR* 21-22 (1973). Law also discussed such important issues as "who is a child?", "who is an adult relative of a needy child?", and "when is a child deprived of support of one parent?" *Id.* at 21-30.

For more detailed discussion of these issues, see MATERIALS ON WELFARE LAW, *supra* note 4, chapter III; Lander, *AFDC Eligibility under the Social Security Act: Reaping the Harvest of King v. Smith*, 4 CLEARINGHOUSE REV. 180 (1970); Comment, *AFDC Eligibility Requirements Unrelated to Need: The Impact of King v. Smith*, 118 U. PA. L. REV. 1219 (1970).

A second program, Aid to Families with Dependent Children and an Unemployed Parent (AFDC-UP), began in 1961 to give aid to families where both parents were in the home but one was unemployed. 42 U.S.C. § 607 (1982). See S. LAW, *supra*, at 31-33; MATERIALS ON WELFARE LAW, *supra* note 4, at II-37.

6. 42 U.S.C. § 603 (1982). Originally, the federal government paid one-third of the states' costs up to a total of \$18 per child. The 1939 amendments increased the percentage to one-half. By 1948, it was two-thirds of the first \$12 per child and one-half of the balance. Act of June 14, 1948, ch. 468, § 3(b), 62 Stat. 438, 439.

Today, the formula for payment of the federal share to states has two parts. First, the federal government pays five-sixths of the first \$18 of the average payment per recipient. Second, the federal government pays a specified "federal percentage" (50 to 65%) of the next \$14 of the average payment. 42 U.S.C. § 603 (1982). The second step, in effect, limits the amount of state expenditures that will be federally funded. See Platky, *Aid to Families with Dependent Children: An Overview, October 1977*, 40 Soc. SEC. BULL., Oct. 1977, at 17, 19 (table listing the "federal percentage" funded to each state through September 1979).

7. 42 U.S.C. § 602 (1982). See Platky, *supra* note 6, at 17 (enumerating the requirements for a state plan as of October 1977); see also 45 C.F.R. § 223.20(a) (1983). The secretary of the administering federal agency, now the Department of Health and Human Services (HHS), can stop payments to a state program that deviates from these guidelines. 42 U.S.C. § 604 (1982).

The Social Security Board administered the AFDC program until 1946. The task then fell to the Federal Security Agency. See Reorg. Plan No. 2 of 1946, 3 C.F.R. 192 (1946), reprinted in 5 U.S.C.A. app. at 176 (West 1967), and in 59 Stat. 613 (1946). The newly created Department of Health, Education, and Welfare (HEW) took over in 1953. See Reorg. Plan No. 1 of 1953, 3 C.F.R. 131 (1953), reprinted in 5 U.S.C.A. app. at 286 (West 1967), and in 67 Stat. 631 (1953). In 1979, the Department of Health, Education, and Welfare (HEW) was redesignated as the Department of Health and Human Services (HHS). See Department of Education Organization Act, Pub. L. No. 96-88, § 509, 93 Stat. 668, 695 (1979).

8. 42 U.S.C. § 601 (1982).

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives, by enabling each State to furnish financial assistance . . . to needy dependent children and the parents or relatives with whom they are living, to help maintain and strengthen family life, and to help such parents or relatives to attain or retain capability for the

conspicuous of all the public assistance programs of the 1935 Act.⁹ The costs to the federal and state governments have grown very rapidly.¹⁰ To control growing costs, the statute was amended in 1981 by the Omnibus Budget Reconciliation Act (OBRA).¹¹ OBRA, however, did not explicitly change the stated purposes of AFDC.

Since 1939 the amount of an AFDC assistance grant has been a function of the "need" of an AFDC family.¹² Prior to OBRA, the statute required a four-step procedure to determine if an applicant was "needy" and, if so, what the applicant's assistance benefits would be. (1) The state first determined the applicant's "earned income" which has now been defined as gross earned income.¹³ (2) The state then subtracted from the

maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized . . . a sum
Id.; see also *Shea v. Vialpando*, 416 U.S. 251, 253-54 (1974).

The 1946 HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION mentions two purposes of AFDC: "(1) to make it possible for the child to remain in or return to the custody and care of his parents or relatives who have a natural bond of affection and concern for his well-being; and (2) to enable the child's unmet need to be supplied." HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION § 3401 (1946), reprinted in MATERIALS ON WELFARE LAW, *supra* note 4, at V-177. The HANDBOOK also says that the economic support should be enough to enable the parent to care for the child without having to take a job to supplement the grant. *Id.*

9. Comment, *The 1981 AFDC Amendments: Rhetoric and Reality*, 8 U. DAYTON L. REV. 81, 84 n.7 (1982). The program is what the public most often associates with the derogatory term "welfare." M.D. COFER, *supra* note 3, at 7-8. To the public, AFDC benefits connote the desire of able-bodied individuals to shirk responsibility and employment. *Id.* The myths about AFDC recipients have in some cases been so pervasive and disturbing to the administering federal agency that it distributed literature to educate the public. See HEW, SOCIAL AND REHABILITATION SERVICE, MYTHS V. FACTS, Pub. No. SRS 71-127 (1971).

10. From 1935 to 1950, total AFDC expenditures did not exceed \$500 million. "The total doubled between 1950 and 1960. From 1960 to 1967, another one billion in expenditures was added." *Hearings on Social Security and Welfare Proposals Before the House Comm. on Ways and Means*, 91st Cong., 1st Sess. 120 (1969). In 1975, total outlays were \$7.9 billion. HEW, Soc. Sec. Admin., *Current Operating Statistics*, 38 SOC. SEC. BULL., Dec. 1975, at 51 (Table M-32). By 1980, federal outlays alone were \$7.3 billion. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1982, at 264 (1982). The 1984 Federal Budget estimated federal AFDC outlays to decline to \$7.5 billion from \$8.2 billion in 1983. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1984, at 5-125 (1984).

11. Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, § 2301, 95 Stat. 357, 843 (1981) (codified at 42 U.S.C. § 602(a)(8)(A)(ii) (1982)).

12. Before 1939, a family could conceivably have received more than it "needed" because the statute did not require that the assistance grant be reduced by the family's other income and resources. Social Security Act of 1935, ch. 531, § 402, 49 Stat. 627. The 1939 amendment required that states, in determining eligibility and benefits, consider "other income and resources." Social Security Amendments Act of 1939, ch. 666, § 402(a)(7), 53 Stat. 1360, 1379. The grant then could not be more than the family "needed" though it certainly could be less. See authorities cited, *supra* note 4.

13. 42 U.S.C. § 602(a)(8)(C) (1982).

In addition to the recent congressional definition of the term, regulation 45 C.F.R. § 233.20(a)(6)(iv) (1969) defined earned income as total "earned income" without reduction for such expenses as tax withholdings, transportation costs, lunches, uniform costs, etc. For text of this regulation, see *infra* note 124 and accompanying text. No one questioned the propriety of this regulation when it was promulgated.

applicant's "earned income" any applicable "disregards,"¹⁴ such as the work incentive disregard,¹⁵ to determine the applicant's non-exempt¹⁶ "earned income." (3) Next, the state determined the applicant's "income and resources."¹⁷ (4) After that, the state was to disregard, i.e., subtract, from the "income and resources" any work related expenses. The state then offset whatever "income and resources" remained against the state "standard of need"¹⁸ for a family of the same composition as the applicant's to determine if the applicant was "needy," and if so, how much assistance the applicant would receive.¹⁹

OBRA slightly but significantly altered the above procedure. (1) The state still first determines the applicant's "earned income,"²⁰ which is simply his gross earned income. (2) The state then determines the applicant's non-exempt "earned income" by subtracting from his gross earned income any disregards which apply. Because of OBRA, this step now includes the subtraction of \$75 to cover work expenses.²¹ (3) The state

14. "Disregard" is a term used to mean "particular categories of monies which are excluded from consideration as income for purposes of AFDC in determination of (1) eligibility for grants based on the amount of income attributable to an AFDC beneficiary; and (2) the amount of such grants which a beneficiary may receive." *James v. O'Bannon*, 715 F.2d 794, 795 n.1 (3d Cir. 1983).

15. The work incentive disregard allowed certain portions of an applicant's earned income to be ignored in the calculation of the applicant's benefits. *See infra* note 112 and accompanying text. It did not, however, operate in the determination of eligibility. Thus, the procedure had to be done twice: once to determine eligibility, and a second time to determine what amount of earned income would be used to reduce the assistance grant the applicant would receive.

There were, of course, other disregards too, such as a disregard for the earned income of a child who was a full-time student. *See* 42 U.S.C. § 602(a)(8) (1982).

16. "Non-exempt" "earned income" means that part of "earned income" used to reduce an applicant's benefit grant or make him ineligible.

17. "Income and resources" was defined as an amount that, after all disregards had been applied, was actually available to the recipient. 45 C.F.R. § 233.20(a)(3)(ii)(D) (1982). *See infra* note 127 for text of this regulation.

The actual wording of the statute is "other income and resources." *See infra* notes 65, 92, 113 & 150. The "other" means income other than that from the AFDC program. It does not mean income other than earned income. This is clear because the term "earned income" did not appear in the statute until 1967, twenty-nine years after "other income" was included in the statute.

18. The "standard of need" is "the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level." *Shea v. Vialpando*, 416 U.S. 251, 253 (1974).

19. A state did not have to pay 100% of the applicant family's budget deficit. It could establish a statewide "level of benefits" less than 100% and only pay that amount. *Rosada v. Wyman*, 397 U.S. 397 (1970). For a discussion of the varying methods of grant computations see MATERIALS ON WELFARE LAW, *supra* note 4, at VI-303 to -305.

20. This characterization of how the statute now works is significantly different from that by the court in *Turner v. Prod*, 707 F.2d 1109 (9th Cir., 1983), *rev'd sub nom. Heckler v. Turner*, 53 U.S.L.W. 4211 (U.S. Feb. 27, 1985) (No. 83-1097). *See infra* note 145. As will be demonstrated later, the characterization by the court in *Turner* unduly slants the issue. Furthermore, the court's characterization does not realistically consider how the statute operated *before* OBRA. *See infra* notes 142-44.

21. OBRA also changed the work incentive disregard significantly. The work incentive disregard still operates on "earned income" and only to determine benefits, not eligibility. It now operates, however, on the "earned income" left *after* the work expense disregard and any other disregards have been applied. 42 U.S.C. § 602(a)(8)(A)(iv) (1982). Furthermore, it only operates

then, as before OBRA, determines the applicant's "income and resources."²² What remains is used to determine eligibility and, if eligible, the amount of assistance benefits.

Obviously, since OBRA, work expenses may not be fully disregarded. Because work expenses in excess of \$75 a month are no longer disregarded, the question of what is a work expense becomes very important. On the one hand, if "earned income" and "income and resources" are defined narrowly, items which might otherwise be thought of as work expenses, i.e., mandatory tax withholdings,²³ might be excluded from "earned income" and "income" before the statutorily prescribed procedure even begins. In that case, the exclusion of those items would not be affected by the OBRA limitations on the disregarding of work expenses. On the other hand, if "income" and "earned income" are defined broadly to include amounts mandatorily withheld from wages, mandatory withholdings would be subject to the flat \$75 work expense disregard. As a result, such expenses would only be disregarded to the extent that they, plus all other work expenses, do not exceed \$75.

The federal agency administering AFDC in 1940 defined "income and resources" as income and resources that were "available for current use."²⁴ That definition stands today in a slightly altered form.²⁵ Under this regulation, tax withholdings seemingly are not "income"—they may or may not be "earned income."

When the term "earned income" was incorporated in the AFDC statute in 1967,²⁶ the administering federal agency, the Department of Health, Education, and Welfare (HEW), defined it to be total earned income without reduction for such expenses as tax withholdings, lunches, transportation costs, uniform costs, etc.²⁷ Indeed, in 1984, Congress defined the term "earned income" in the statute itself to include mandatory income tax withholdings. Thus, the meaning of that term is not in question. The 1984 Congress did not, however, define "income," and it is

during the first four months of a family's eligibility under AFDC. *Id.* § 602(a)(8)(B)(ii)(II). For the text of the statute, see *infra* note 150.

22. The administrative regulations still define "income and resources" to be the income that is available after all disregards have applied. 45 C.F.R. § 233.20(a)(3)(ii)(D) (1983). For the text of this regulation, see *infra* note 127.

23. For purposes of this comment, all references to "tax withholdings" are intended to mean "mandatory tax withholdings."

24. See *infra* note 74.

25. 45 C.F.R. § 233.20(a)(3)(ii)(D) (1969). For the text of the current regulation, see *infra* note 127. Today, the regulation expressly states that "income" is to be computed after all policies with respect to disregards have been uniformly applied. 45 C.F.R. § 233.20(a)(3)(ii)(D) (1983). Only then is it subject to the "availability" rule.

26. Act of January 2, 1968, Pub. L. No. 90-248, § 202(b), 81 Stat. 821, 881-82 (codified as amended at 42 U.S.C. § 602(a)(8) (1982)).

27. 45 C.F.R. § 233.20(a)(7)(i) (1969). For the text of this regulation, see *infra* note 124. This regulation did not describe how income and resources other than "earned income" was to be treated.

conceivable that somehow "income" might not include tax withholdings even though "earned income" does. In such a case, perhaps tax withholdings would have to be disregarded over and above the flat \$75 work expense disregard of OBRA.

In 1967, however, in addition to defining "earned income" to be gross earned income, HEW promulgated another regulation which provided that non-exempt "earned income" was to be determined by finding total "earned income" and disregarding from that amount the work incentive and work expense disregards.²⁸ What remained was applied against the standard of need to reduce the applicant's assistance grant. This implies that "earned income" is but a subset of "income." Of course, if "earned income" is merely a subset of "income," Congress, by defining "earned income" to include tax withholdings, indicated that tax withholdings were also part of "income." In that case, there is no doubt that tax withholdings must be disregarded as work expenses in the flat \$75 work expense disregard if they are disregarded at all.

The apparent inconsistency between the first regulation and the second two was not challenged before OBRA.²⁹ But since OBRA instigated the flat \$75 disregard for all work expenses, it has become very important to determine whether tax withholdings are work expenses or are simply not AFDC "income." The regulations of the Department of Health and Human Services (HHS), now the administering federal agency, make plain that the agency considers tax withholdings, along with expenses such as uniform costs, subject to the new flat \$75 work expense disregard limit.³⁰ As a result, the benefits of many working recipients of AFDC have been reduced sharply.³¹ In *Turner v. Prod.*,³² working AFDC recipi-

28. 45 C.F.R. § 233.20(a)(7)(i) (1983). For the text of this regulation, see *infra* note 126. This regulation has remained unchanged since its promulgation in 1969.

29. In *Turner v. Prod.*, 707 F.2d 1109 (9th Cir. 1983), *rev'd sub nom.* Heckler v. Turner, 53 U.S.L.W. 4211 (U.S. Feb. 27, 1985) (No. 83-1097), the court of appeals commented that the second two regulations had not been challenged because, prior to OBRA, regardless of which regulation was followed, the outcome was the same since all work expenses were fully disregarded.

The court's assertion is open to question. It is possible that had the availability regulation, 45 C.F.R. § 233.20(a)(3)(ii)(D), controlled and had tax withholdings not been considered work expenses, applicants would have gotten no disregard at all for their tax withholdings. This is because so much "earned income" would be disregarded within the work incentive disregard that all remaining income would be "available." As a result, there would be no need to disregard tax withholdings. See *infra* text accompanying notes 142 & 143.

The probable explanation for why the inconsistency was not challenged is that applicants were better off under the regulations which included tax withholdings in AFDC "income." These were the same regulations that the plaintiffs in *Turner* challenged.

30. See 45 C.F.R. § 223.20(a)(7), (a)(6)(iv), (a)(11) (1983).

31. As an illustration, the court of appeals in *Turner* considered the case of a California mother with three children who earned \$3.35 per hour for 40 hours a week for 4.3 weeks a month. The sum withheld each month for state and federal income taxes, social security taxes, and state disability insurance amounted to \$59.62.

If the calculations for the benefit grant are done as the plaintiffs asserted they must be, "income" of step (1) is actually \$516.68, or \$3.35 times 40 times 4.3 minus \$59.62. That is, tax withholdings

ents filed a class action suit challenging the second two regulations as being inconsistent with the older "availability" regulation and inconsistent with the original purposes of the AFDC statute.

The plaintiffs in *Turner* claimed that "income" in AFDC does not include tax withholdings because tax withholdings are not "available." They maintained that tax withholdings are to be excluded from AFDC "income" over and above the \$75 that is disregarded for work expenses.³³ If the second two regulations govern the computations, the plaintiffs urged, then only \$75 would be disregarded for work expenses, such as uniform costs, and for tax withholdings. Thus, unless tax withholdings, plus all other expenses, are less than \$75, some or all of tax withholdings would not be disregarded.³⁴ If the any tax withholdings are not disregarded from "income," the resulting "income" that is used to offset the standard of need is not, according to the plaintiffs, available.³⁵

are not AFDC "income" at all. The second step reduces the \$516.68 by \$75 for the work expenses of a full-time employee. The mother then has \$442 and, with the state standard of need being \$601 for her family, would receive a grant of \$159, or \$601 less \$442.

If the calculation is done as the state of California and HHS maintained, the mother's AFDC "income" is \$3.35 times 40 times 4.3, or \$576. That is, her "income" is her "gross income." Then \$75 is deducted for her work expenses. The remaining \$501 is offset against the \$601 to give a benefit grant of \$100. *Turner*, 707 F.2d at 1112.

The court in *Turner* noted that in California the practical effect of the government regulations was to reduce AFDC aid benefits to approximately 45,000 AFDC families by the amounts of their respective mandatory payroll deductions. *Id.* This is because the \$75 would be entirely "used up" by the regular work expenses leaving none to cover tax deductions:

regular work expenses = \$75)
)
 taxes withheld = \$25)
)
 the \$75 deducted for the work expense disregard fully covers the regular work expenses.
 No deduction is now available for tax withholdings.

If, however, the regular work expenses were less than \$75, then some of the tax withholdings would be covered by the \$75 disregard:

regular work expenses = \$50)
)
 taxes withheld = \$25)
)
 the \$75 work expense disregard is deducted for work expenses. But there are only \$50 of traditional work expenses, so \$25 is left over. So no taxes are without a disregard.

If the regular work expenses and tax withholdings were less than \$75, the applicant would actually be better off after OBRA than before, since \$75 is disregarded anyway:

regular work expenses = \$25)
)
 taxes withheld = \$25)
)
 \$75 is disregarded for work expenses but regular work expenses and taxes equal only \$50. The applicant is \$25 ahead. Before OBRA, only \$50 would have been disregarded in this situation.

32. 707 F.2d 1109 (9th Cir. 1983), *rev'd sub nom.* Heckler v. Turner, 53 U.S.L.W. 4211 (U.S. Feb. 27, 1985) (No. 83-1097).

33. See *supra* note 31.

34. *Id.*

35. *But cf.* the definition of "availability" given by the court in *Randall v. Goldwork*, 495 F.2d

This result, the plaintiffs claimed, creates a disincentive to employment in direct contravention of the express purpose of AFDC. The Ninth Circuit Court of Appeals³⁶ agreed with the plaintiffs and affirmed the district court's³⁷ holding that AFDC "income" does not include tax withholdings because tax withholdings are not available.³⁸

The Supreme Court granted certiorari to hear the *Turner* case.³⁹ In August, 1984, however, Justice Rehnquist, acting as a circuit justice, stayed the Ninth Circuit's opinion because Congress had amended the statute to explicitly define "earned income" to include tax withholdings.⁴⁰ The 1984 amendment relied on by Justice Rehnquist is quite powerful evidence that Congress intended tax withholdings to be included in the flat \$75 work expense disregard created by OBRA. Yet, because Congress chose not to define "income" and not to indicate specifically that tax withholdings are work expenses, the plaintiffs in *Turner* may still argue that tax withholdings must be disregarded over and above the \$75 work expense disregard. The conference report for the 1984 amendment referred to the fact that the issue of whether tax withholdings were work expenses to be subsumed within the flat \$75 work expense disregard was going to the Supreme Court. The report did not indicate how the Court should resolve the issue.⁴¹

To answer the question of whether tax withholdings are work expenses subject to the flat \$75 work expense disregard or whether tax withholdings are simply not AFDC "income" and thus not covered by the \$75 work expense disregard, one must consider the history of the AFDC statute and program. There are several main issues to resolve in this analysis of the history: (1) whether Congress, when it added the term "income"

356 (1st Cir.), *cert. denied*, 419 U.S. 879 (1974) (money that is not "in hand" can be "available" if it is used to pay obligations which the recipient would otherwise incur).

36. *Turner*, 707 F.2d at 1112-13.

37. *Turner v. Woods*, 559 F. Supp. 603 (N.D. Cal. 1982), *aff'd sub nom. Turner v. Prod.*, 707 F.2d 1109 (9th Cir. 1983), *rev's sub nom. Heckler v. Turner*, 53 U.S.L.W. 4211 (U.S. Feb. 27, 1985) (No. 83-1097).

38. Several other courts have reached the same conclusion as the court of appeals in *Turner*: *RAM v. Blum*, 564 F. Supp. 634 (S.D.N.Y. 1983) (summary judgment and permanent injunction for the plaintiffs); *Williamson v. Gibbs*, 562 F. Supp. 687 (W.D. Wash. 1983) (preliminary injunction in favor of the plaintiffs), *appeal docketed*, No. 83-3725 (9th Cir. April. 7, 1983); *Nishimoto v. Sunn*, 561 F. Supp. 692 (D. Hawaii 1983) (summary judgment for the plaintiffs), *rev'd mem.*, 734 F.2d 21 (9th Cir. 1984); *RAM v. Blum*, 533 F. Supp. 933 (S.D.N.Y. 1982) (preliminary injunction for plaintiffs); *see also Clark v. Helms*, 576 F. Supp. 1095 (D.N.H. 1983); *Kelly v. Perales*, 566 F. Supp. 785 (S.D.N.Y. 1983).

However, numerous courts have reached the opposite conclusion: *Dickenson v. Petit*, 728 F.2d 23 (1st Cir. 1984), *aff'g*, 536 F. Supp. 1100 (D. Me. 1983); *Bell v. Massinga*, 721 F.2d 131 (4th Cir.), *aff'g, sub. nom. Bell v. Hettleman*, 558 F. Supp. 386 (D. Md. 1983); *James v. O'Bannon*, 715 F.2d 794 (3d Cir. 1983); *aff'g*, 557 F. Supp. 631 (E.D. Pa. 1982).

39. 104 S. Ct. 1412 (1984).

40. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2625, 98 Stat. 494, 1135.

41. H. CONF. REP. No. 861, 98th Cong., 2d Sess. 1395, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 1389.

to the statute in 1939, intended that tax withholdings be excluded from the term by definition, and, if not, whether the definition of "income" later came to exclude tax withholdings;⁴² (2) whether, when the 1962 Congress made the work expense disregard mandatory for all states, it intended that tax withholdings be disregarded as work expenses, or whether such practice was administratively adopted contrary to congressional intent;⁴³ (3) whether Congress, when it incorporated the term "earned income" into the statute with the 1967 amendmemnt, considered that term merely a subset of the term "income";⁴⁴ (4) whether the 1981 Congress was aware of and adopted a prior administrative interpretation which classified tax withholdings as work expenses⁴⁵ and whether classifying mandatory tax withholdings as work expenses is consistent with the 1981 Congress' goals for the OBRA amendments to AFDC;⁴⁶ and (5) whether the 1984 Congress, when it amended the statute to define "earned income" to include tax withholdings, intended that "income" also include tax withholdings.⁴⁷

After a brief overview of the evolution of the pertinent parts of the AFDC statute,⁴⁸ this comment analyzes the relevant legislative, administrative, and judicial history of AFDC from 1935 to 1984.⁴⁹ By analyzing the historical development of this issue, the comment aspires to create the proper basis for the interpretation of the 1981 and 1984 amendments.

The comment concludes that the history of AFDC does not show that tax withholdings were not ever AFDC "income." Moreover, the history unequivocally does show that tax withholdings have been considered AFDC "income" at least since 1969. The comment further concludes that even if the 1962 Congress did not intend for the work expense disregard to cover tax withholdings, the 1981 Congress believed that under the prior law, tax withholdings were AFDC "income" and were classified as work expenses. The 1981 Congress intended that tax withholdings be included in AFDC "income" and be subsumed within the new flat \$75 work expense disregard. And finally, the comment concludes that the 1984 Congress, by defining "earned income" to include tax withholdings and by describing the prior law in such a way as to suggest that "earned income" is just a subset of "income," meant for tax withholdings to be included in AFDC "income" (as well as in "earned income") and

42. See *infra* notes 79-91 and accompanying text.

43. See *infra* notes 100-10 and accompanying text.

44. See *infra* notes 140-48 and accompanying text.

45. See *infra* notes 160-67 and accompanying text.

46. See *infra* notes 169-73 and accompanying text.

47. See *infra* notes 177-81 and accompanying text.

48. See *infra* notes 50-55 and accompanying text.

49. See *infra* notes 61-181 and accompanying text.

disregarded only to the extent that they, plus all other work expenses, do not exceed \$75.

II. OVERVIEW OF THE EVOLUTION OF AFDC

The Aid to Families with Dependent Children (AFDC) program was set up as a part of the Social Security Act of 1935.⁵⁰ In 1939, the statute was amended to add section 402(a)(7) which requires that states, in determining eligibility and benefits of applicants, reference the grant against any "other income or resources" of the recipient's family.⁵¹ In 1962, section 402(a)(7) was amended to require that states disregard, in determining eligibility and benefits, any expenses applicants had in earning "other income."⁵²

In 1967, Congress added the work incentive disregard to section 402(a)(8).⁵³ Under the work incentive disregard, a state, in determining benefits, disregarded the first \$30 from "earned income" and disregarded one-third of the remainder of the "earned income." In the Omnibus Budget Reconciliation Act of 1981 (OBRA), Congress changed the work expense disregard of section 402(a)(7) so that a standardized disregard of \$75 in section 402(a)(8) now takes the place of disregards for all "reasonable" work expenses.⁵⁴ The work incentive disregard was also altered significantly. And in the Deficit Reduction Act of 1984, Congress amended section 402(a)(8) to define "earned income" to include tax withholdings.⁵⁵

III. STATUTORY INTERPRETATION OF SECTIONS 402(a)(7) AND 402(a)(8)

The interpretation of a statute necessarily begins with the words of the statute itself.⁵⁶ Section 402(a)(7) states that after the disregards of section 402(a)(8) have been applied, the state must consider "any other income and resources."⁵⁷ Thus, before consideration of section 402(a)(7),

50. Social Security Act of 1935, ch. 531, § 401, 49 Stat. 620, 627 (codified as amended at 42 U.S.C. § 601 (1982)).

51. Social Security Amendments Act of 1939, ch. 666, § 401, 53 Stat. 1360, 1379 (codified as amended at 42 U.S.C. § 602(a)(7) (1982)). See *infra* note 65 for text.

52. Act of July 25, 1962, Pub. L. No. 87-543, § 106(b), 76 Stat. 185, 188 (codified as amended at 42 U.S.C. § 602(a)(7) (1982)). See *infra* note 93 for text.

53. Act of January 2, 1968, Pub. L. No. 90-248, § 202(b), 81 Stat. 821, 881-82 (codified as amended at 42 U.S.C. § 602(a)(8) (1982)). See *infra* note 113 for text.

54. Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, § 2301, 95 Stat. 357, 843 (1981) (codified at 42 U.S.C. § 602(a)(8)(A)(ii) (1982)). See *infra* note 150 for text.

55. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2625, 98 Stat. 494, 1135.

56. Consumer Product Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108 (1980).

57. 42 U.S.C. § 602(a)(7) (1982). The "other" here does not mean other than earned income. It means other than the income received from the government in the AFDC program. See *supra* note 17.

section 402(a)(8) must be considered.

Section 402(a)(8) sets out the disregards to be applied to "earned income," which is gross earned income. Disregard number (a)(ii) requires states to disregard \$75 from "earned income."⁵⁸ If no other disregards apply, non-exempt "earned income" is then simply gross earned income less \$75. Once non-exempt "earned income" is determined, focus returns to section 402(a)(7) for a determination of "income."⁵⁹

The plain reading of the statute would have "income" include all income left after an applicant's gross earned income is reduced by the disregards of section 402(a)(8). Thus, if none of the disregards applied, "income" would be gross earned income plus unearned income. It would then include tax withholdings since "earned income" includes tax withholdings. However, Regulation 45 C.F.R. section 233.20(a)(3)(ii)(D) defines "income" as available income.⁶⁰ Since tax withholdings are arguably not available, this regulation suggests that "income" does not include all non-exempt "earned income." Under this argument, "income" includes only what it is defined to include. The definition need not be consistent with that of "earned income," and therefore, while "earned income" includes tax withholdings, "income" need not.

To determine whether the definitions of the two terms are consistent and therefore whether "income" includes tax withholdings, the history of the statute must be examined. The first question to consider in this examination is whether the 1939 Congress, when it introduced the term "income" to the statute, intended the term to include tax withholdings or, because tax withholdings are "unavailable," to exclude tax withholdings.

A. *The 1939 Amendment—The Requirement That the Assistant Grant be Referenced to "Other Income and Resources"*

Originally, the AFDC statute did not require the states to reduce the assistance grants paid to needy families that had other income or resources.⁶¹ As a result, recipients could receive grants which, when added to whatever income and resources they already had, would give them more income than the state standard of need.⁶² In 1939, Congress acted

58. 42 U.S.C. § 602(a)(8)(A)(ii) (1982).

59. *Id.* § 602(a)(7).

60. Regulation 45 C.F.R. § 233.20(a)(3)(ii)(D) (1983) defines "income" as "net income," but this appears to conflict with regulation 45 C.F.R. § 233.20(a)(6)(iv) (1983) which defines "earned income" as gross earned income.

61. See *Hearings Relative to the Social Security Amendments Act of 1939, Before the House Comm. on Ways and Means, 76th Cong., 1st Sess. 2254 (1939)* (colloquy between Chairman Alt-meyer and Congressman Duncan).

62. The old structure created a tremendous incentive for a recipient to work as long as he did not exceed the standard of need. But the recipient's earnings did not reduce the amount that the government had to pay him. The work incentive disregard instituted in 1968, see *infra* notes 111-19

on a proposal of the Social Security Board⁶³ to correct this situation. Congress added section 402(a)(7) to the AFDC statute.⁶⁴ This section requires states, in determining eligibility and assistance benefits, to "take into consideration any other income and resources" of the applicant family.⁶⁵ As a result, a recipient family no longer could receive a grant larger than that needed to bring the family's income up to the state standard of need.

1. Legislative History

The vast majority of the discussion on the 1939 amendments centered on the taxing of income for Social Security (FICA) and on increasing the federal share in the public assistance programs.⁶⁶ One of the few Congressmen to question the income referencing requirement was Congressman Poage. Representative Poage, discussing the impact of the income referencing requirement in the Old-Age Assistance part of the Social Security Act, expressed fear that the words "and resources" would be used to deny aid to destitute elderly people who had children without regard to whether those children actually provided assistance to their parents.⁶⁷ He prepared an amendment to strike the "and resources" language because he thought that "unless these words [were] deleted, they [would] at some future time be interpreted as including more than the personal income and property of the applicant himself."⁶⁸ He rescinded the proffered amendment on assurances that it was unnecessary.⁶⁹

The House Report on the introduction of the income-referencing requirement into the public assistance statutes stated that "regardless of its nature or source, any income or resources will have to be considered."⁷⁰

and accompanying text, acted in accordance with the original act, except that not all of the recipient's earnings were ignored in figuring benefits. Thus, the government's payment to the recipient was less than if the recipient did not work at all.

63. H.R. Doc. No. 110, 76th Cong., 1st Sess. (1939), reprinted in *Hearings Relative to the Social Security Act Amendments of 1939, Before the House Comm. on Ways and Means, 76th Cong., 1st Sess.* 3 (1939).

64. Social Security Amendments Act of 1939, ch. 666, § 401, 53 Stat. 1360, 1379 (codified as amended at 42 U.S.C. §§ 602(a)(7)-(a)(8) (1982)).

65. "402(a) A State plan for aid to dependent children must . . . (7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child claiming aid to dependent children;" *Id.*

66. *See supra* note 6.

67. 84 CONG. REC. 6851 (1939) (statement of Rep. Poage).

68. *Id.*

69. *Id.* at 6851-52. Representative Dirksen offered a similar amendment and was later convinced that it was unnecessary. *Id.* at 6921-22.

70. *Id.* at 6721. Professor Sands states that with regard to statutes passed without change from the version the committee recommends, the legislature can be taken to have adopted the intent and understanding of the committee. 2A C.D. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 48.06 (4th ed. 1973). Such intent is highly persuasive as to the proper construction of the statute. *United States v. Five Gambling Devices*, 346 U.S. 441 (1953).

At one point Representative Duncan, a sponsor of the bill, said that "income and resources" would not require the consideration of all "resources." He stressed, however, that all "income" would have to be taken into account.⁷¹ No one objected to his statement with respect to "income," but Representative Brewster said that his statement as to "resources" was contrary to the language of the Act.⁷²

2. Administration from 1939 to 1962

Soon after the passage of the 1939 amendment, the Social Security Board, then the administering federal agency, released a policy statement interpreting the phrase "income and resources."⁷³ The Board said that, in order to be included in AFDC calculations, the "income and resources" had to actually exist, be available to the applicant to meet current needs, and have appreciable significance in meeting the applicant's needs.⁷⁴ The statement did not refer to mandatorily withheld taxes.

Soon the Board realized that the 1939 amendment created a disincentive to employment because recipients with earnings were not allowed to disregard the expenses attributable to achieving such earnings. In 1942, the Board began to encourage states to give working applicants credit for work expenses.⁷⁵ The Board, however, did not clearly define work ex-

71. 84 CONG. REC. 6704-05 (1939) (statement of Rep. Duncan). The relevance of Representative Duncan's remark is not clear because he was not referring to the earned income of the recipient himself. In his example, he mentioned only an elderly man who received \$50 a month from his son.

72. *Id.* at 6705.

73. SOCIAL SECURITY BOARD, GUIDE TO PUBLIC ASSISTANCE ADMINISTRATION § 202 (1940) (interpretation of 1939 amendments to Social Security Act in relation to the consideration of income and resources to determine need).

74. *Id.* The statement read:

[t]he policies and procedures adopted by the State agency shall be consistent with the following criteria for the consideration of income and resources in the determination of need: (a) The income or resource shall actually exist. Attributing a definite amount of income to sources or to kinds of property that produce either no income or less than the amount attributed to them is fictitious and such an imputed amount cannot properly be considered as an actual resource. (b) The income or resources shall be available to the applicant. To be regarded as available, an income or resource must be actually on hand or ready for use when it is needed. Consideration does not mean attributing a resource to sources from which income, contributions, maintenance, or support are not in fact available and forthcoming . . . (c) The income or resource shall have some appreciable significance in meeting the requirements of the applicant. (d) The income or resource shall be considered from the standpoint of its conservation and its maximum utilization in the interest of the welfare of the applicant.

75. State Letter No. 4 from the Social Security Board, Bureau of Public Assistance to State Agencies Administering Approved Public Assistance Plans (April 30, 1942):

The Board has always recommended that a determination with reference to the existence of need and the amount of assistance be based on the actual circumstances of the individual recipient. Under such a policy, persons who work but do not earn enough to support themselves may still be found in need of assistance. Also it should be recognized that when a person is working there may be additional needs which must be met such as additional clothing, transportation, food and the like. This would merely be applying good practice to these special situations.

[I]f people are encouraged to seek employment and assured that changes in needs resulting from the fact of employment will be recognized . . . , the objective in view can be obtained

penses,⁷⁶ and even as of 1957, the *Handbook of Public Assistance Administration*⁷⁷ defined work expenses simply as "food, clothing, . . . personal incidentals . . . and other items of work expense."⁷⁸

3. Discussion and Analysis

The preliminary question in resolving whether tax withholdings are AFDC "income" is whether the 1939 Congress, when added the term "income" to the AFDC statute, intended the term to include mandatory income tax withholdings. This question cannot conclusively be answered. As noted above, the statements of Representative Poage and Senator Duncan indicate that only the income of the applicant himself was to be counted.⁷⁹ Income from other sources was only to be counted if available to the applicant.⁸⁰ No one ever mentioned mandatorily with-

without violating any provision of [the Social Security Act] or any principle of good public assistance administration.

See also State Letter No. 291 from the Social Security Board, Bureau of Public Assistance to State Agencies Administering Approved Public Assistance Plans (Mar. 11, 1957) (further indicating approval of such deductions).

76. A 1943 regional field letter suggested that work expenses included increased costs to a mother for taking a job. The letter mentioned "clothes, lunches, transportation costs, [day care,] and other necessary expenses involved in the mother's absenting herself from home." Regional Field Letter No. 411 from Social Security Board § 223 (February 27, 1943), reprinted in MATERIALS ON WELFARE LAW, *supra* note 4, at V-179a, -179b, paraphrased in HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION § 3401.1 (1946), reprinted in MATERIALS ON WELFARE LAW, *supra* note 4, at V-178, -179.

77. The HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION contained the official administrative guidelines for the AFDC program from the early 1940's until the issuance of the *Code of Federal Regulations* in 1968. See MATERIALS ON WELFARE LAW, *supra* note 4, at intro-5; see also Bennett, *The Role of the Courts in Developing Welfare Law*, 1970 DUKE L.J. 1 (former deputy general counsel of HEW explaining the process behind the development of the welfare regulations).

The HANDBOOK has frequently been relied on by courts as the primary source of official administrative interpretation of the Social Security Act. See, e.g., *Shea v. Vialpando*, 416 U.S. 251, 259 n.8 (1974); *King v. Smith*, 392 U.S. 309, 316-33 (1968).

78. HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION § 3140.1 (1957):

A State public assistance agency may establish a reasonable minimum money amount to represent the combined additional cost of three items—food, clothing, and personal incidentals—for all employed persons. The State plan may provide that other items of work expense will be allowed when there is a determination that such expenses do, in fact, exist in the individual case.

Id.

Section 3140.2 added that, in arriving at the net income of each AFDC family member, adequate provision may be made for all expenses entailed in producing that income. For working children [and other members] such provision might include costs of additional food, clothing and personal upkeep, and other items such as transportation, purchase or repair of a bicycle (for use by a child delivering newspapers, etc.), participating in the "snack break," contributing to collections for employee benefits, etc., as are found to be necessary in connection with holding the job. Cost of such items should be consistent with reasonable and realistic employment expenses.

Id. § 3140.2. The 1962 HANDBOOK, released before the amendments of 1962, had nearly identical sections 3140.1 and 3140.2. The only difference was that the 1962 HANDBOOK explicitly stated that section 3140.2 applied to all family members that worked. HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION §§ 3140.1-.2 (1962).

79. See *supra* notes 67, 68 & 71 and accompanying text.

80. See *Hearings Relative to the Social Security Act Amendments of 1939*, 76th Cong., 1st Sess.

held income taxes. That is hardly surprising, however, because income taxes were not withheld from wages until 1943.⁸¹ Yet, withholding for social security taxes existed as of 1937 and was extensively discussed in the debates over the 1939 amendments to the Social Security Act. No one implied that such withholdings were not "income" for the public assistance programs such as AFDC. Thus, while the scattered references in the legislative history indicate that Congress was concerned that unavailable income not be counted against an applicant, the references do not indicate that Congress considered amounts mandatorily withheld from an applicant's wages not to be available.

The second question of overriding importance is whether "income" was administratively construed to exclude mandatory income tax withholdings. It is quite easy to say that the administering federal agency defined "income" to exclude amounts that were not available to the applicant. The statement released by the Social Security Board in 1940 and incorporated into the *Guide to Public Assistance Administration* conclusively proves that.⁸² Moreover, the Social Security Board's interpretation of the term "income" is entitled to substantial deference.⁸³ Even the courts have judged "income" under an availability standard.⁸⁴ Yet no evidence exists which indicates that from 1939 to 1962 tax withholdings were considered unavailable to an applicant and therefore not "income."⁸⁵ No court ever ordered the administering state agency to exclude mandatorily withheld taxes or any other mandatorily withheld sum

2254 (1939) (testimony of Chairman Altemeyer that if the income and resources are indeed available to an elderly recipient of Old Age Assistance from the child, the assistance grant is reduced).

81. Mandatory income tax withholding did not begin until 1943. As of 1937, however, small amounts were withheld from wages for social security taxes. *Turner v. Prod*, 707 F.2d 1109, 1114-15 (9th Cir. 1983), *rev'd sub nom. Heckler v. Turner*, 53 U.S.L.W. 4211 (U.S. Feb. 27, 1985) (No. 83-1097); *Bell v. Hettleman*, 558 F. Supp. 386, 391 n.7 (D. Md.), *aff'd sub nom. Bell v. Massinga*, 721 F.2d 131 (9th Cir. 1983).

82. *See supra* note 74.

83. [A]dministrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. . . . The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.

Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933) (Cardozo, J.). *See also* K. DAVIS, *ADMINISTRATIVE LAW* § 7:14 (2d ed. 1979).

84. *See, e.g., Van Lare v. Hurley*, 421 U.S. 338, 346 (1974) (a state regulation which created a presumption that a nonpaying lodger in an AFDC recipient's home contributed to the support of the household); *Lewis v. Martin*, 397 U.S. 552, 555-56 (1970) (a state regulation requiring state AFDC officials to consider the income of a nonadoptive stepfather—one assuming the role of a spouse—regardless of whether such income was available for the child's needs); *King v. Smith*, 392 U.S. 309, 311 (1968) (a state regulation denying benefits to the dependent children of a mother who cohabited with an able-bodied man, regardless of whether the latter was either obliged to contribute support or, in fact, did contribute support); *see also Dickenson v. Petit*, 536 F. Supp. 1100, 1115 n.13 (D. Me. 1983) (collecting cases but noting that none of the AFDC cases involved tax deductions), *aff'd*, 728 F.2d 23 (1st Cir. 1984).

85. *See infra* note 148.

from AFDC "income" because the sum was unavailable.⁸⁶ No agency letter described how gross income was reduced by mandatory payroll withholdings to determine AFDC "income." If tax withholdings were considered unavailable and therefore not to be AFDC "income," it was not mentioned. For instance, a 1953 article in the *Social Security Bulletin* described how "income" was determined but made no mention of any mandatorily withheld sum being subtracted out before calculations began.⁸⁷ One of the few times that tax withholdings were mentioned was in a 1961 study by HEW. In that study, mandatory tax withholdings were termed "employment expenses."⁸⁸ Thus while the "availability" concept

86. Some state courts, in considering state non-AFDC welfare plans, have held that with regard to those plans, tax withholdings were not "income" because such amounts were unavailable. Therefore, the courts determined that tax withholdings were not work expenses. See, e.g., *Watson v. Connecticut Dep't of Pub. Welfare*, 42 Pa. Commw. 181, 400 A.2d 669, 670 (1979). The Pennsylvania statute expressly required that income be available for current use. Income was not as broadly defined in Pennsylvania as under the AFDC statute, and the legislative history did not indicate that calculations were to begin with gross income. See also *Harbolic v. Berger*, 43 N.Y.2d 102, 371 N.E.2d 499, 400 N.Y.S.2d 780 (1977) (the legislative history "strongly suggest[ed]" that the work expense deduction was not intended to include tax withholdings and the New York statute expressly required that the grant amount be determined by consideration of available resources); *Dumbleton v. Reed*, 40 N.Y.2d 586, 357 N.E.2d 363, 388 N.Y.S.2d 893 (1976). The *Dumbleton* court held that in a determination of Medicaid eligibility, social security taxes deducted from wages were not included as income. The New York statute required consideration only of available income and resources, and the decision was limited to social security withholdings. The *Dumbleton* court noted that a special exemption was necessary to exclude from consideration income tax withholdings because "amounts paid for income taxes can and do come into the possession of a wage-earner so . . . these funds are not strictly unavailable to him . . ." *Dumbleton*, 40 N.Y.2d at 588, 357 N.E.2d at 365, 388 N.Y.S.2d at 895.

87. The article said that "[t]he financial resources of a family, such as earned income, old-age and survivors insurance benefits, and contributions from relatives, are deducted from the standard budget requirements of the family. The resulting deficit determines the assistance payments to the family, . . ." *Future Citizens All: A Report on Aid to Dependent Children*, 16 Soc. SEC. BULL., Jan. 1953, at 9, 11.

The significance of the above language is clearer when one realizes that though the term "earned income" did not enter the AFDC statute until 1968, it had been defined by 1950 for another part of the Social Security Act to be gross earned income, see *infra* notes 111 & 125. Since the article did not say "available earned income," it must have intended gross earned income. While the article is not a definitive statement of the administering federal agency's view on tax deductions and the definition of "income," the article does suggest that the "availability" requirement was not applied to "earned income."

88. HEW BUREAU OF PUBLIC ASSISTANCE, REPORT NO. 43, STATE METHODS FOR DETERMINING NEED 25 (1961). The study stated, "[t]he term 'gross income,' as used by the States in these policies, refers to 'take-home pay' after payroll deductions for union dues, income taxes, retirement, and other such items have been made. 'Net income' refers to amounts available after *other employment costs* have been recognized." *Id.* (emphasis added). The study stated that "gross income" was defined by states to mean take-home earned income—what is commonly referred to as net income, not as gross income. See BLACK'S LAW DICTIONARY 687 (5th ed. 1979). In this comment, "gross" is given its common meaning—total income before any deductions for any expenses. Note that tax withholdings and union dues were treated identically by the states. According to the study, both were regarded as employment expenses.

The HEW study was not definitive and has been read to reach the opposite conclusion; that is, the tax withholdings were not AFDC "income." *Turner v. Prod*, 707 F.2d 1109, 1118 (9th Cir. 1983), *rev'd sub nom.* *Heckler v. Turner*, 53 U.S.L.W. 4211 (U.S. Feb. 27, 1985) (No. 83-1097); *Bell v.*

has long controlled the definition of "income," it cannot be proven to have ever mandated that tax withholdings be excluded from AFDC "income."

It is far more likely that tax withholdings were considered AFDC "income" and were disregarded from "income" as work expenses by those states which, at the urging of the Social Security Board, allowed the disregard of work expenses.⁸⁹ Indeed, that is how they were described in the 1961 HEW study.⁹⁰ It simply cannot be determined from the surviving evidence either that the 1939 Congress intended that AFDC "income" not include mandatorily withheld tax withholdings or that the administrative interpretation of "income" excluded from it mandatorily withheld taxes.⁹¹

The next question for analysis is whether the 1962 Congress when it mandated that all states disregard work expenses, intended then that "income" include tax withholdings and that tax withholdings be disregarded from "income" as a work expense.

B. *The 1962 Amendment—The Mandatory Work Expense Disregard*

In 1962, Congress mandated that all states adopt the Social Security Board's policy of recognizing and disregarding work expenses.⁹² Section 402(a)(7) was changed so that states, when considering "income and resources," also had to consider "any expenses reasonably attributable to the earning of any such income."⁹³ The report of the Senate Finance Committee stated that if "work expenses are not considered in determining need, they have the effect of reducing the amount available for food,

Hettleman, 558 F. Supp. 386, 391-92 (D. Md.), *aff'd sub nom.* Bell v. Massinga, 721 F.2d 131 (4th Cir. 1983).

89. See *supra* note 75 and accompanying text.

90. See *supra* note 88.

91. One court has argued that the statement of the Social Security Board in 1940 was meant to exclude from an applicant's "income" any income derived from unavailable "sources," as opposed to unavailable income per se. Dickenson v. Petit, 536 F. Supp. 1100, 1115-16 n.13 (D. Me. 1982), *aff'd*, 728 F.2d 23 (1st Cir. 1984). Under this reading, income to persons other than the applicant would not be available unless that source of income, presumably a wage earner, was legally obligated to provide income to the applicant or did in fact provide income to the applicant. This distinction is very clever and finds some support in the Board's statement. See *supra* note 74. However, the statement also indicates that "income" must be "on hand," which supports an argument that tax withholdings could not have been AFDC "income."

92. Act of July 25, 1962, Pub. L. No. 87-543, § 106(b), 76 Stat. 185, 188 (codified as amended at 42 U.S.C. § 602(a)(7) (1982)).

93. *Id.* Section 402(a)(7) of the Act then read:

A State plan for aid and services to needy families with children must . . . provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, as well as any expenses reasonably attributable to the earning of any such income;

Id.

clothing, and shelter”⁹⁴ The statute did not, however, indicate whether tax withholdings were to be considered “expenses reasonably attributable to the earning of any such income.”⁹⁵

1. Administrative Treatment

Before 1962, the *Handbook of Public Assistance Administration* defined “expenses attributable to the earning of income” in a very general way.⁹⁶ After the 1962 amendment, HEW revised section 3140 of the *Handbook* to list specific examples of work expenses.⁹⁷ The *Handbook* did not list tax withholdings but did say that “dues to unions, business organizations, employee clubs, or similar assessments”⁹⁸ were work expenses. Then in 1966, the Children’s Bureau of HEW, in discussing the impact of “work-related expenses” on the situation of an AFDC family, listed eight items to be considered in estimating a mother’s work expenses.⁹⁹ The list paralleled the list in the 1964 *Handbook* except that taxes were explicitly denoted.

2. Discussion and Analysis

The apparent reading of the 1962 statute is that tax withholdings are “expenses reasonably attributable to the earning of . . . income.” But if tax withholdings were excluded from “income” before 1972 by the administering state and federal agencies because such withholdings were unavailable, Congress could have adopted that interpretation in the 1962

94. S. REP. NO. 1589, 87th Cong., 2d Sess. 17-18 (1962). The House Report is almost identical. See H.R. REP. NO. 1414, 87th Cong., 2d Sess. 23 (1962).

95. See *supra* note 92.

96. See *supra* note 78.

97. HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION § 3140.1 (1964).

In addition to the increased cost of food, and additional amounts for clothing, care of clothing and personal incidentals, other expenses reasonably attributable to earning income might include: Special safety or protective clothing items or uniforms and the cost of cleaning . . . of these special items. Participation in the “snack break” where it is the custom for that employment. Transportation to and from work and transportation on the job if not reimbursed by the employer. Contributions to collections for employee benefits, etc., as are found to be necessary in connection with holding the job. Tools and licenses required for the job. Dues to unions, business organizations, employee clubs, or similar assessments. Educational expenses related to employment, including necessary publications. Care of child(ren) at home or in day-care facilities, cost of more expensive ready prepared foods for the family when the housewife works. Special safety devices needed by handicapped people not furnished by employer.

Id.

98. *Id.*

99. HEW, CHILDREN’S BUREAU, CRITERIA FOR ASSESSING FEASIBILITY OF MOTHER’S EMPLOYMENT AND ADEQUACY OF CHILD-CARE PLANS 1, 7-8 (1966), reprinted in MATERIALS ON WELFARE LAW, *supra* note 4, at V-180, -187 to -188. The Bureau noted that such expenses could consume one-third to one-half of the mother’s earnings and that, therefore, the state must consider not only the family’s total income but its net income.

amendments.¹⁰⁰ Under this reading, Congress, because it gave no indication that tax withholdings should become "income" in 1962 to be thenceforth disregarded from "income" as a work expense, presumably intended that tax withholdings continue to be excluded from AFDC "income" because of unavailability.¹⁰¹ This reading, however, requires tax withholdings to have been disregarded before 1962 by state and federal agencies, not as work expenses, but as "unavailable."¹⁰² As indicated above, that cannot be shown to have been the case.¹⁰³ This reading also requires Congress to have been aware of a prior administrative practice of excluding tax withholdings from AFDC "income" because of unavailability.¹⁰⁴ Yet, no evidence suggests that Congress was aware of any such practice. The difficulty of proving the existence of any such practice makes it unlikely that Congress could have been aware of it even if it had existed. Indeed, if Congress was aware of anything of this nature, it was more likely aware of the 1961 study by HEW which termed tax withholdings "employment expenses."¹⁰⁵

Since nothing in the legislative history indicates that Congress intended to adopt an administrative practice of excluding tax withholdings from AFDC "income," and since the legislative history itself is barren of any evidence which proves that tax withholdings were or were not to be covered by the then newly created work expense disregard, the interpretation given the work expense disregard by the administering federal agency, HEW, must be carefully considered. And thus the fact that HEW, when it revised the *Handbook of Public Assistance Administration* in 1963 to accommodate the 1962 changes, did not list tax withholdings as a work expense¹⁰⁶ suggests that tax withholdings were not work expenses. Tax withholdings conceivably, however, could have fallen under the rubric of "union dues . . . or other similar assessments."¹⁰⁷ Tax withholdings might not initially appear to be a "similar assessment" but they are an assessment. Furthermore, as the 1961 HEW study indicates,

100.

A Court may accord great weight to the administrative interpretations placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.

NLRB v. Bell Aerospace Co., 416 U.S. 267, 274 (1974).

101. Professor Davis finds this doctrine of reenactment to be "obviously unsound because the committees or subcommittees of Congress may or may not know outstanding interpretations when they are considering reenactment; they do not in fact approve what they know nothing about." K. DAVIS, *ADMINISTRATIVE LAW* § 7:14 at 67 (2d ed. 1979).

102. *Id.*

103. *See supra* notes 82-91 and accompanying text.

104. *See supra* note 101.

105. *See supra* note 88.

106. *See supra* note 97.

107. *Id.*

before 1961, tax withholdings and union dues had been treated identically and had both been considered "employment expenses."¹⁰⁸ Assuming that tax withholdings and union dues were not AFDC "income" before 1962 and thus were not employment expenses, the 1962 Congress did not indicate that union dues should suddenly become AFDC "income" but that tax withholdings should remain non-"income" for AFDC. If assessments for union dues were not work expenses before 1962 but became so after 1962, logically, tax withholdings should have been transformed as well. The truth is probably that both union dues and tax withholdings were regarded as AFDC "income" before 1962, and thus the agency did not, without reason, distinguish one from the other after 1962 but simply failed to list tax withholdings.¹⁰⁹ The idea that tax withholdings were work expenses in the view of HEW just as were union dues is supported by the fact that the Children's Bureau of HEW in 1966 did explicitly list tax withholdings as a work expense.¹¹⁰

The next question for examination is whether Congress, when it introduced the term "earned income" into the statute in 1967, considered "earned income" to be a part of "income" so that whatever was "earned income" was also "income"; or whether congress considered "earned income" and "income" to be distinct and inconsistent concepts.

C. The 1967 Amendment—The Work Incentive Disregard

By 1967, Congress took a step beyond the mere avoidance of financial disincentives to employment and created the work incentive disregard. The 1967 amendment required the states to disregard more than one-third of an applicant family's "earned income"¹¹¹ in calculating that family's assistance grant.¹¹² Section 402(a)(7), which said that states had to consider "other income and resources" and "expenses reasonably attributable to the earning of such other income," was made to operate after

108. See *supra* note 88.

109. But cf. *RAM v. Blum*, 564 F. Supp. 634, 643 (S.D.N.Y. 1983) ("[i]t is unimaginable that so significant an item would have been left out of section 3140 if, as defendants contend, mandatory payroll deductions were being treated as employment expenses"). The court concluded that tax deductions simply were not "income" under section 402(a)(7) before OBRA. *Id.*

The court in *RAM* awarded tremendous deference to the failure of the HANDBOOK to list tax deductions and thus considered the HANDBOOK a definitive source of agency interpretation. The court, however, did not explain why, if tax deductions were simply not AFDC "income," this definitive source did not mention that fact.

110. See *supra* note 99.

111. "Earned income" had first entered the lexicon of the Social Security Act in 1950 when Congress used it in section 1002(a)(5) to create a similar sort of work incentive disregard in the Aid to the Needy Blind public assistance program. The administrative definition that followed defined "earned income" as total earned income including tax deductions. Internal Memorandum of HEW, Social and Rehabilitation Service (Feb. 1, 1972). See *infra* note 125 for the 1952 definition.

112. Act of January 2, 1968, Pub. L. No. 90-248, § 202(b), 81 Stat. 821, 881-82 (codified as amended at 42 U.S.C. § 602(a)(8) (1982)).

As early as 1956, Senator Douglas of Illinois had tried to have some sort of incentive to employ-

the newly created work incentive disregard section 402(a)(8).¹¹³ Section 402(a)(8)¹¹⁴ was changed to require that states, in determining benefits, disregard *from*¹¹⁵ the applicant's "earned income," the first \$30 plus one-third of the remaining "earned income."¹¹⁶ Thus, "income" in section 402(a)(7) would not include whatever was disregarded in section 402(a)(8). The result was that the average AFDC family with earned income no longer was "taxed" 100% on its earnings¹¹⁷ but retained about 50% of its "earned income."¹¹⁸ The term "earned income" was not defined within the statute until the 1984 amendments.¹¹⁹

ment passed. His first effort, a \$50 disregard from earned income, died in conference. 104 CONG. REC. 18009 (1958) (statement of Sen. Douglas).

The Senator's second effort in 1958 called for \$20 of earned income to be disregarded. He attacked the extant system arguing that "[o]ne cannot imagine a better system for discouraging effort and encouraging idleness than the grants which are now provided." *Id.*

In 1962 Representative Steed tried to amend the Old-Age Assistance part of the Act to follow \$50 of earned income be disregarded. 108 CONG. REC. 14233 (1962).

Indeed, in 1950 the Aid to the Needy Blind sections of the Act had been amended to require the disregard of \$50 of earned income. See MATERIALS ON WELFARE LAW, *supra* note 4, at A-41 to -42.

113. As amended in 1968, the pertinent parts of section 402(a)(7) read as follows:

A State plan for aid and services to needy families with children must . . . *except as may be otherwise provided in clause (8)*, provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses attributable to the earning of any such income; . . .

Act of January 2, 1968, Pub. L. No. 90-248, § 202(b), 81 Stat. 821, 881 (codified as amended at 42 U.S.C. § 602(a)(7) (1982)) (emphasis added).

114. 42 U.S.C. § 602(a)(8) (1982).

115. It is important that the statute directed the state to disregard \$30 plus one-third *from* earned income and not to disregard \$30 plus one-third *of* earned income. Only if the statute had said "of" could "earned income" be defined as gross earned income and not conflict with "income" defined as available (meaning "in hand") income. Such a reading of the statute would allow the work incentive disregard to be calculated on gross earned income but, conceivably, subtracted from another sum, "income," which could be defined to exclude tax deductions. See *infra* note 143 and text accompanying notes 177-81.

116. As amended in 1968 the pertinent parts of section 402(a)(8) read as follows:

A State plan for aid and services to needy families with children must . . . provide that, in making the determination under clause (7), the State agency—

(A) shall with respect to any month disregard—

(ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first \$30 of the total of such earned income for such month plus one-third of the remainder of such income for such month . . .

Act of January 2, 1968, Pub. L. No. 90-248, § 202(b), 81 Stat. 821, 881-82 (codified as amended at 42 U.S.C. § 602(a)(8) (1982)).

117. For a discussion of the effective 100% tax on earnings see Comment, *supra* note 9, at 87.

118. S. REP. NO. 139, 97th Cong., 1st Sess. 552 (1981) *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 819.

119. See *supra* note 40.

1. Legislative History

The congressional debates on the 1967 amendments do not settle the meaning of the term "income." In those debates, the Representatives and Senators repeatedly referred to the work incentive disregard as operating on "earnings"¹²⁰ or on "income earned by AFDC recipients."¹²¹ These references, although not particularly good evidence, suggest that the Congressmen saw "income" as including all "earned income."¹²²

2. Administrative and Judicial Interpretation

HEW modified its regulations after the 1967 amendments to accommodate the work incentive disregard.¹²³ Regulation 233.20(a)(6)(iv) defined "earned income" to be *total earned income*, including tax withholdings.¹²⁴ This definition of the term "earned income" is virtually identical to the one that the administering federal agency had promulgated soon after the term first appeared in another section of the Social Security Act in 1950.¹²⁵ The earlier definition too had explicitly included tax withholdings within "earned income."

Regulation 233.20(a)(7)(i) stated that, to determine the assistance payment, the work incentive disregard was deducted from "earned income," and work expenses were deducted from the remaining "earned income." The "earned income" left was used to reduce the amount of the assistance

120. 113 CONG. REC. 23054, 23102, 23062, 23071, 23076 (1967) (statements of Representatives Mills, Fieghan, Byrnes, Ullman, and Broyhill, respectively).

121. *Id.* at 23107 (statement of Sen. Rhodes).

122. The Senate Finance Committee Report gives some evidence that "earnings" meant gross earnings. S. REP. NO. 744, 90th Cong., 1st Sess. 1, 162 (1967) reprinted at 1967 U.S. CODE CONG. & AD. NEWS 2834, 2996. The report gave an example of how the provisions of the Senate version of the House bill (H.R. 12080) would work. In the example, the family received \$200 each month in AFDC benefits. The mother then found a job and earned \$120 a month. According to the Senate Report, the family would then receive \$165 in assistance each month. The Senate version of H.R. 12080 had a \$50 plus one-half work incentive disregard which meant that non-exempt earned income was $\$120 - \$50 - (\$120 - \$50)/2$ or \$35. The income of the mother, the \$120, was probably gross earned income since the report did not state otherwise. This is, however, weak evidence at best.

123. Notice on Final Policies and Regulations, 34 Fed. Reg. 1394 (1969).

124. 45 C.F.R. § 233.20(a)(6)(iv) (1983). "Earned income" is "total earned income, irrespective of personal expenses such as tax deductions, lunches and transportation to and from work, and irrespective of expenses of employment which are not personal such as the costs of tools, materials, special uniforms, or transportation to call on customers." This regulation has remained unchanged since its promulgation in 1969.

125. The 1952 definition of "earned income" in the HANDBOOK OF PUBLIC ASSISTANCE was identical to the 1968 definition, *see supra* note 124, except that non-personal employment expenses were not part of the "earned income":

With reference to commissions, wages, or salary, the term "earned income" means the total amount, irrespective of personal expenses, such as income tax deductions, lunches, and transportation to and from work. However, expenses of employment which are not personal, such as cost of tools, materials, special uniforms, or transportation to call on customers, are to be deducted from the gross remuneration, if furnished by the employee.

Internal Memorandum, *supra* note 111, at 2.

payment.¹²⁶ This of course indicated that tax withholdings had to be work expenses if they were to be disregarded at all since no other provisions for reducing income was given. Furthermore, because the regulation used the term "earned income" instead of "income" and because it had "earned income," as reduced by the disregards, being applied against the standard of need as though the statute said that "income" as reduced by the disregards was to be applied against the standard of need, the agency must have considered "income" and "earned income" essentially identical. Since "earned income" included tax withholdings, "income" must have too.

HEW did not, however, significantly change regulation 233.20(a)(3)(ii)(D) which said that "income" was to be determined after all disregards had applied and had to be available.¹²⁷ This regulation was the descendant of the original Social Security Board policy statement which mandated that "income and resources" be available for current

126. 45 C.F.R. § 233.20(a)(7)(i) (1983).

The applicable amounts of earned income to be disregarded will be deducted from the gross amount of "earned income" and work expenses, personal and non-personal, will then be deducted. Only the net amount remaining will be applied in determining need and the amount of the assistance payment.

The regulation has remained unchanged since its promulgation in 1969.

127. *Id.* § 233.20(a)(3)(ii)(D) (1983). This regulation states that:

A State plan for . . . AFDC . . . must . . . provide that, in determining need and the amount of the assistance payment, after all policies governing the reserves and allowances and disregards or setting aside income and resources referred to in this section have been uniformly applied: net income . . . and resources available for current use shall be considered; income and resources are considered available both when actually available and when the applicant has the legal ability to make such sum available for support and maintenance.

Id. Note that HHS considers this definition of income unchanged by OBRA. Internal Memorandum, HHS, Office of Family Assistance 5 (Sept. 11, 1981) ("[F]or purposes of rulemaking, the income definitions not specifically addressed by the Reconciliation Act remain unchanged.")

The regulation does say that "income and resources" available for current use are to be considered only "after all policies governing . . . disregards have been uniformly applied." The court of appeals in *James v. O'Bannon*, 715 F.2d 794 (3d Cir. 1983), found that because "income" did not have to be determined until after all disregards had applied, the "income" found would indeed be available. This is because one applicable disregard would be the work incentive disregard, which would exceed tax withholdings. After it had operated to reduce "earned income," all the "earned income" remaining would be available. This analysis strongly supports the practice prior to OBRA, but overlooks the fact that after OBRA the work incentive disregard only applies for four months.

The court's argument, nonetheless, when considered from the pre-OBRA perspective, shows that, the availability regulation was not needed to exclude tax withholdings from "income" and that, in fact, if the availability regulation had been followed for "earned income," and if tax withholdings had not been excluded as work expenses, tax withholdings would not have been excluded at all. This is because before income was tested for availability, it was reduced by the work incentive disregard. What income remained would all be available even though tax withholdings had not been subtracted from it. See *infra* text accompanying notes 142 & 143. Since OBRA did not change this sequence, the fact that the work incentive disregard no longer applies beyond the first four months should not change the classification of tax withholdings.

The district court in *Dickenson v. Petit*, 536 F. Supp. 1100, 1115-16 n.13 (D. Me. 1983), *aff'd*, 728 F.2d 23 (1st Cir. 1984), held that this regulation was not directed at the "availability" issue of mandatory tax withholdings, rather the regulation referred only to availability of "sources" of income. See *supra* note 91 for discussion.

needs.¹²⁸ Thus, on the one hand HEW said that tax withholdings were personal expenses of employment which were part of earned income and thus were work expenses.¹²⁹ On the other hand, the agency said that "income," as determined after all disregards had applied, had to be available.

Regulations 233.20(a)(6)(iv) and (a)(7)(i) indicate that HEW by 1968, if not before, considered tax withholdings to be AFDC "income" (not just "earned income") which would be disregarded as a work expense.¹³⁰ A 1972 study by HEW indicates that by then, HEW was even approving state plans which provided for flat, non-itemized work expense disregards and which covered tax withholdings as well as all other work expenses.¹³¹ This practice continued until 1974 when the Supreme Court, in *Shea v. Vialpando*,¹³² held that a flat work expense disregard was not proper because the statute required that all work expenses be disregarded.

On the state level, the same 1972 study by HEW shows that forty-two states considered tax withholdings "income" to be disregarded as work expenses.¹³³ Another four also considered them "income" but had flat

128. See *supra* note 74.

129. Tax withholdings were also enumerated as work expenses in the guidelines promulgated by HEW for the Work Incentive Demonstration (WIN) programs which also were authorized by the 1967 amendments. WIN Guidelines, section 34, July 1969, reprinted in MATERIALS ON WELFARE LAW, *supra* note 4, at VI-188 to -189. The WINs were to create incentives for AFDC recipients to gain employment in the regular economy, to train recipients to work in the regular economy, and to get recipients to participate in special work projects. S. REP. NO. 744, 90th Cong., 1st Sess. 1,149 (1968), reprinted in 1967 U.S. CODE CONG. & AD. NEWS 2834, 2983. In two of the three types of WIN programs, recipients received "true wages" from regular employers which were fully subject to all taxes. *Id.* at 152, reprinted in U.S. CODE CONG. & AD. NEWS at 2986. Regarding those programs, HEW stated that the work expenses to be disregarded when determining if a participant needed a supplementary grant included transportation costs, lunches, additional clothes, and mandatory payroll deductions such as income taxes, FICA taxes, union dues, etc. WIN Guidelines, section 34, July 1969, reprinted in MATERIALS ON WELFARE LAW, *supra* note 4, at VI-188 to -189.

The structure of the work expense disregard under the WIN program shows that tax withholdings are AFDC "income"; if they were not AFDC "income," they would be disregarded twice. Income earned under a WIN is still considered under section 402(a)(7) of the Act to see if the recipient is in need of a supplementary grant. If section 402(a)(7) "income" is net of tax withholdings then no reason exists to further disregard tax withholdings as work expenses; however, as mentioned above, HEW mandated that tax withholdings be disregarded as work expenses for WIN programs. *Id.*

130. The brief of HEW in *Adams v. Parham*, unreported order, Civ. A. No. 16041 (N.D. Ga. April 14, 1972), reprinted in MATERIALS ON WELFARE LAW, *supra* note 4, at VI-218 to -223, also indicates that HEW viewed tax withholdings as simply another example of work expenses. HEW Brief, reprinted in MATERIALS ON WELFARE LAW, *supra* note 4, at VI-202 to -211. In *Adams*, HEW argued that a flat work expense disregard was reasonable under the statute. The agency argued that the validation of all work expenses was an overwhelming administrative burden. As an example, the agency discussed how tax withholdings vary according to many factors. *Id.* at VI-205.

131. International Memorandum of HEW, Social and Rehabilitation Service, para. 4 (April 13, 1972); see also Internal Memorandum, *infra* note 133, parts (b) & (c).

132. *Shea v. Vialpando*, 416 U.S. 251 (1974).

133. Internal Memorandum Of HEW, Social and Rehabilitation Service, parts (b) & (c) (Feb. 1, 1972). A number of states had flat work expense disregards for many types of expenses but allowed the itemization of tax withholdings and child care costs over and above the flat amount. *Id.* The

disregards for work expenses and considered those amounts to cover tax withholdings. In fact, more states allowed the disregard of tax withholdings as work expenses than allowed the disregard as work expenses of either child care costs or transportation costs.¹³⁴ And no one doubted that income spent on child care or on transportation was AFDC "income."

In the courts, the idea that tax withholdings were AFDC "income" was never questioned. In *Shea v. Vialpando*,¹³⁵ the Supreme Court invalidated the Colorado regulation which allowed only a flat amount to be disregarded for work expenses. Even though the Colorado regulation allowed tax withholdings to be itemized over and above the flat amount, the Court did not question Colorado's classification of tax withholdings as "income" and as work expenses. Indeed, Justice Powell's opinion twice specifically referred to tax withholdings as work expenses and "income."¹³⁶ In numerous lower court cases, such regulations similarly were not questioned.¹³⁷

Congress itself was not unexposed to the fact that HEW and the states

court in *Turner* thought that this practice indicated that tax withholdings were "conceptually different" from work expenses. *Turner v. Prod*, 707 F.2d 1109, 1121 (9th Cir. 1983), *rev'd sub nom. Heckler v. Turner*, 53 U.S.L.W. 4211 (U.S. Feb. 27, 1985) (No. 83-1097). HEW, however, only required that states allow the separate itemization of child care costs. See Internal Memorandum (April 13, 1972) *supra* note 131. Perhaps these states allowed tax withholdings to be itemized simply because tax withholdings were not as difficult to verify as other expenses. See, e.g., NEW YORK STATE DEP'T OF SOC. SERV., CHARACTERISTICS OF HOME RELIEF FAMILIES IN NEW YORK CITY - AUGUST 1971 - PROGRAM ANALYSIS REPORTS No. 47, 2 (1972), reprinted in MATERIALS ON WELFARE LAW, *supra* note 4, at V-30 to -31.

134. Internal Memorandum, *infra* note 133, part (c).

135. *Shea v. Vialpando*, 416 U.S. 251 (1974).

136. At one point, Justice Powell wrote for the Court, "expenses attributable to the earning of income . . . reduce the level of actually available income, and if not deducted from gross income will not produce a corresponding increase in AFDC assistance." *Shea*, 416 U.S. at 264. He continued, "while Colorado continued to allow individualized treatment of mandatory payroll deductions and child care costs, all other work related expenses were subjected to a uniform allowance of \$30." *Id.* at 264.

The court of appeals in *James v. O'Bannon*, 715 F.2d 794 (3d Cir. 1983), considered *Shea* pertinent to its decision. But the court in *Turner* discounted it because the court thought the apparent classification of tax withholdings as work expenses was "grammatically ambiguous." *Turner*, 707 F.2d at 1118 n.10.

137. In *County of Alameda v. Carlson*, 5 Cal. 3d 730, 97 Cal. Rptr. 385, 488 P.2d 953 (1971), the plaintiff counties maintained that a disregard need not be given for tax withholdings since California then had no recoupment policy for income tax refunds. The California Supreme Court, however, held that tax withholdings must be disregarded as work expenses since "income" of AFDC had to be available. The court thus neatly combined the availability requirement with the requirement that work expenses be disregarded. "Availability" was measured only after, not before, work expenses were disregarded and was applied to the income remaining after all the work expenses had been disregarded.

See also *Vialpando v. Shea*, 475 F.2d 731 (10th Cir. 1973) (flat disregard for work expenses was not proper; court did not question the classification of tax withholdings as work expenses), *aff'd*, 416 U.S. 251 (1974); *Connecticut State Dep't of Pub. Welfare v. HEW Social and Rehabilitation Service*, 448 F.2d 209 (2d Cir. 1971); *Amos v. Engleman*, 333 F. Supp. 1109 (D.N.J. 1970) (flat disregard for work expenses was held proper; the court did not question the inclusion of tax withholdings among

considered tax withholdings to be AFDC "income" to be disregarded as work expenses. In hearings on a proposed flat work expense disregard in 1976, the witnesses and exhibits repeatedly and explicitly referred to tax withholdings as work expenses.¹³⁸ No testimony suggested that tax withholdings were not AFDC "income." The availability concept, however, was discussed. One witness pointed out that if Congress chose to adopt a flat disregard to cover all work expenses, it would be abandoning the basic tenet of the Social Security Act that, to be counted against a recipient, income must be available.¹³⁹ The witness, of course, was adumbrating what actually occurred in 1981 with OBRA.

3. Discussion and Analysis

The most important question raised by the 1967 amendments, for the purposes of this comment, is what Congress meant by "earned income" and whether "earned income" was meant to be a part of "income." The 1984 amendments to the statute define "earned income" to include tax withholdings.¹⁴⁰ The 1984 amendment, however, does not specifically

work expenses); *Adams v. Parham*, unreported Order, Civ. A. No. 16041 (N.D. Ga. 1972), reprinted in *MATERIALS ON WELFARE LAW*, *supra* note 4, at VI-218 to -223.

In *Compagnolo v. Harder*, 319 F. Supp. 414 (D. Conn. 1972), the court held that all responsible work expenses must be excluded and defined work expenses to include tax withholdings. See also *Anderson v. Graham*, 492 F.2d 986 (8th Cir. 1973) (court invalidated a flat work expense disregard but concurred with the trial court that a flat disregard is proper for expenses other than "tax deductions, Social Security tax withholdings, and child care costs" as long as the state allows a greater disregard in individual cases); *Conover v. Hall*, 11 Cal. 3d 842, 114 Cal. Rptr. 642, 523 P.2d 682 (1974) (court invalidated a flat \$50 disregard for work expenses but did not question the inclusion of tax withholdings among work expenses); *Blackner v. Commonwealth of Pa. Dep't of Pub. Welfare*, 379 Pa. Commw. 532, 379 A.2d 1359 (1977) (court denied the plaintiff a special allowance for extra work expenses but did not question the state regulation classifying tax withholdings as work expenses).

138. *Hearings Before the Subcomm. on Public Assistance of the House Comm. on Ways and Means*, 94th Cong., 2d Sess. 9, 11, 14-24, 28, 29, 31, 33 (1976) (statements of Sylvia A. Havelin, Assistance Supervisor, Income Maintenance Division, Monroe County Department of Social Service, Rochester, New York; Keith Comrie, Acting Director, Department of Public Social Security Service, County of Los Angeles, California; and Marvin Rachlin).

The subcommittee was entertaining a discussion on the use of a flat work expense disregard of the type later adopted in OBRA. The budget worksheets provided by Ms. Havelin prominently listed tax withholdings under "personal work expenses." *Id.* at 14-24.

139. *Id.* at 58 (statement of Catherine Day Jermany, Chairwoman, National Welfare Rights Organization Legal Committee, and Henry A. Freedman, Center on Social Welfare Policy and Law on behalf of the National Welfare Rights Organization).

140. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2625, 98 Stat. 494, 1135.

The definition of "earned income" even without this amendment is quite clear from the legislative history, despite conclusions to the contrary by the court in *Turner*. The term, when it was incorporated into the AFDC sections of the Social Security Act in 1967, already had a longstanding meaning under the Social Security Act. Since 1954, "earned income" had been defined to be gross earned income. See *supra* note 125. Since the previous definition included tax withholdings and since the 1967 Congress did not indicate that such inclusion was improper for AFDC, the 1967 Congress can be presumed to have adopted the prior meaning of the term for AFDC.

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change, see *Albemarle Paper*

indicate whether that term is a subset of "income." It leaves open, at least in theory, the issue of whether "income," in addition to "earned income," includes tax withholdings and whether therefore tax withholdings are to be subsumed within the flat \$75 work expenses disregard of OBRA.

The regulations promulgated by HEW in 1968 and used to determine an applicant's assistance grant define "earned income" as including tax withholdings. But, more importantly now that the statute itself does that, the regulations indicate that HEW viewed tax withholdings as "income," not just "earned income." This is clearly shown by a comparison of how the statute would have operated if the availability regulation had controlled with how the statute did operate under the regulations promulgated in 1968.

Under regulations 233.20(a)(6)(iv) and (a)(7)(i) which treat tax withholdings as work expenses, and after *Shea* had held that work expenses must be fully disregarded, tax withholdings were fully disregarded. Consider a family with \$500 of gross earned income per month, \$100 of tax withholdings, \$100 of regular work expenses, and no other kinds of income or resources. (1) First, "earned income" would have been \$500. (2) Then the work incentive disregard would have reduced "earned income" to \$313.¹⁴¹ (3) Next, work expenses would have been disregarded. Since work expenses included tax withholdings, they totalled \$200 and reduced "earned income" to \$113. The \$113 would have been used to reduce the family's assistance grant.

Under regulation 233.20(a)(3)(ii)(D), however, tax withholdings probably would not have been disregarded at all. (1) First, "earned income" was \$500 again because it was defined as gross earned income by regulation 233.20(a)(6)(iv) and now by section 402(a)(8)(c).¹⁴² (2) Then the

Co. v. Moody, 422 U.S. 405, 414 n.8 (1975); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951); *National Lead Co. v. United States*, 252 U.S. 140, 147 (1920); 2A C. Sands, Sutherland on Statutory Construction § 49.09 and cases cited (4th ed. 1973). So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 n.66 (1982) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)).

The conclusion that "earned income" was meant to include tax withholdings is buttressed by the fact that soon after the 1968 amendment, HEW issued a new definition of "earned income," very similar to the old, that included tax withholdings. See *supra* note 83.

141. $\$500 - \$30 - (\$500 - \$30)/3 = \$313$. See *supra* note 116 for the text of the statute.

142. An interpretation which would result in "earned income" being defined as available "earned income" is inconsistent with the statute and the availability regulation. Such an interpretation would also conflict with how an assistance grant was, in fact, determined before 1981. In the assistance grant calculation, the work incentive disregard was itself calculated from "earned income" defined as "gross earned income," instead of net earned income, so that it would be as large as possible. If "earned income" had been "available earned income" or "net earned income," the work incentive disregard would have been smaller. As a result, more of the applicant's own income would have been counted against him and his grant would have been reduced. The applicant would have

“earned income” would have been reduced by the work incentive disregard to \$313. (3) Next, the remaining “earned income” would have been reduced by work expenses. Since work expenses did not include tax withholdings, work expenses totalled only \$100. This left \$213 of “earned income.” (4) Lastly, “income” would have been found; it would have included all available, non-exempt income of any sort. “Income” then would have been \$213 since all of the \$213 was available to the applicant. Thus, \$213, not \$113, would have been used to reduce the applicant’s benefit grant.¹⁴³ Tax withholdings would have been subsumed within the large work incentive disregard. This would have reduced the impact of the work incentive disregard.¹⁴⁴ The 1967 Congress quite clearly, however, constructed the work incentive disregard so that an applicant would get to keep the maximum amount of his earned in-

had, consequently, a lesser incentive to work. See *infra* note 143 and accompanying text for a numerical discussion of these calculations.

143. Another interpretation of the statute which also followed the availability regulation, failed to reach a result where only \$113 of “earned income” would be counted against the applicant. Under this interpretation “earned income” meant available “earned income.”

Using the same figures as in the text, this interpretation works as follows: (1) Available earned income is \$500 less mandatory tax withholdings or \$400. (2) The work incentive disregard reduces earned income to \$247, or $\$400 - \$30 - (\$400 - \$30)/3$. (3) The work expenses of \$100 are disregarded from earned income leaving only \$147. Thus the applicant’s benefit grant is reduced by \$147 instead of \$113. The district court, in *James v. O’Bannon*, 557 F. Supp. 631, 641 (E.D. Pa.), *aff’d*, 715 F.2d 794 (3d Cir. 1983), pointed out that, if the plaintiffs were correct in alleging that the definition of earned income as gross earned income was incorrect and that the proper definition of earned income should have been available earned income, then AFDC recipients with earned income had received greater benefits in past years than were warranted. Today, with “earned income” defined in the statute to be gross earned income, there is no question that such interpretation is incorrect.

Another reading of the statute under the availability regulation produces the same \$113 as did the other regulations. Under this alternative reading, the work incentive disregard amount is determined from gross earned income but is used to reduce not “earned income” but “income.” This reading works as follows: (1) Earned income is \$500. (2) The work incentive disregard amount is \$187, or $\$30 + (\$500 - \$30)/3$. (3) “Income,” which includes all available income, is gross earned income less unavailable earned income or \$500 less \$100 for the tax withholdings—\$400. (4) The \$187 work incentive disregard then is subtracted from \$400 to leave \$213 of “income.” (5) “Income” is then further reduced by the work expenses of \$100 to leave only \$113 of “income.”

This calculation, however, does not comport with either the statute or with the availability regulation. The statute clearly indicates that the work incentive disregard is determined *from* and disregarded *from* “earned income.” The “earned income” left is further reduced by the work expenses. What remains is used to reduce the applicant’s assistance grant. See *supra* note 116 & *infra* note 150 for the texts of the 1967 and 1981 statutes. The availability regulation mandates that “income” is to be determined only after “all policies on disregards have been uniformly carried out.” 45 C.F.R. § 233.20(a)(3)(ii)(D) (1983).

144. The court of appeals in *Turner* apparently did not work through the various interpretations of the statute as it asserted that, before OBRA and after *Shea*, tax withholdings were fully disregarded under either set of regulations. *Turner v. Prod*, 707 F.2d 1109, 1118 (9th Cir. 1983), *rev’d sub nom.* *Heckler v. Turner*, 53 U.S.L.W. 4211 (U.S. Feb. 27, 1985) (No. 83-1097). The court made the statement to explain why no one had challenged the 1968 regulations as being inconsistent with the availability regulation until after OBRA. A better explanation, as the text shows, is that the procedure set out in the 1968 regulations was to the benefit of aid recipients who naturally would not challenge them.

come. Following the availability regulation, which the plaintiffs in *Turner* argued was to their advantage, would have been greatly to the disadvantage of aid recipients and contrary to the intent of the 1967 Congress.¹⁴⁵

Since it was not unimportant which set of regulations was employed to determine benefits, the fact that the set which was used unequivocally mandated that tax withholdings were "income" to be disregarded as a work expense is very important. The use of this set of regulations indicates that tax withholdings were viewed by AFDC administrators as AFDC "income."¹⁴⁶ The Supreme Court even understood tax withholdings to be AFDC "income" to be disregarded as a work expense.¹⁴⁷ Thus, the availability regulation simply did not apply to tax withholdings. It probably did not apply to any part of a person's own wages.¹⁴⁸

145. The assertion of the court in *Turner*, that the result under either set of regulations would be the same, was simply incorrect. See *supra* note 144 and accompanying text.

Perhaps the most disingenuous assertion of the court in *Turner*, however, was its analysis as to how the statute operated. The court stated that the first sum determined in computing AFDC benefits was "income." *Turner*, 707 F.2d at 1112. But later the court indicated that the first sum determined was "earned income." *Id.* at 1117. After calculating "earned income," the court subtracted the work incentive disregard; only then was "income" found. But work expenses were disregarded from "income," not "earned income."

It was necessary that the court maintain "earned income" to be the first sum determined in order for it to argue that work expenses were disregarded not by section 402(a)(8) from "earned income" but by section 402(a)(7) from "income." The court asserted this in response to the argument, advanced by the district court in *Bell v. Hettleman*, 558 F. Supp. 386, 393 (D. Md.), *aff'd sub nom. Bell v. Massinga*, 721 F.2d 131 (4th Cir. 1983), that, because section 402(a)(7) was expressly operative after section 402(a)(8), whenever an applicant had earned income, all calculations would be done in section 402(a)(8). In short, the *Turner* court rejected the argument of the court in *Bell* because, according to the statute, the work expense disregard was in section 402(a)(7) and operated on "income," not on "earned income."

On the other hand, the *Turner* court, in its overall characterization of the statute, was forced to assert that the first sum determined was "income" so that the court could read the statute as allowing the work incentive disregard to be *calculated* from gross earned income and then *subtracted*, not from "earned income," but from "income." The court could then claim that "income" was only available income and thus excluded tax withholdings. As a result, the gross income of the applicant would be reduced by the work incentive disregard (as calculated from the gross earned income) and by the mandatory income tax withholdings. Only by such a reading could the court reach the same result as the reading suggested by HEW. See *supra* note 143. However, the court's reading blatantly conflicted with the statute which required the work incentive disregard to be *determined from* and *subtracted from* "earned income." The reading also conflicted with the availability regulation the court held sacrosanct. See *supra* note 143 and accompanying text. That regulation had, since 1969, said "income" was only determined after all disregards had operated; it did not say that "income" was determined before any disregards had operated and later reduced by any disregards applicable.

146. Some states did not, under their own welfare programs, view tax withholdings as "income." See *supra* note 86.

147. *Shea v. Vialpando*, 416 U.S. 251 (1974). See *supra* note 136 accompanying text.

148. One circuit court in 1974 stated that "available" did not mean "in hand." *Randall v. Goldwork*, 495 F.2d 356 (1st Cir. 1974). The court stated in dicta that regular payments by third parties which directly benefit AFDC recipients and are actually used to defray expenses that the recipients would otherwise incur can be considered available to the recipients. Thus, a resource is available, the court said, when the sum actually reduces expenses for which an aid recipient would otherwise be liable. *Id.* at 361.

But, if we assume, as the court of appeals did in *Turner*, that no Congress had intended that tax withholding be included in AFDC "income," the actual issue then becomes whether the 1981 Congress intended to change that result by adopting the widespread practice of including tax withholdings within AFDC "income" to be disregarded as work expenses. For this we must look to the 1981 OBRA amendment.

D. *The 1981 Amendment—The Flat Work Expense Disregard*

In 1981, as part of the Omnibus Budget Reconciliation Act (OBRA),¹⁴⁹ Congress amended the AFDC statute to require states to disregard a flat \$75 to cover work expenses regardless of actual expenses.¹⁵⁰ Thus, the statute no longer requires the states, in determining eligibility and need, to take into consideration "any expenses reasonably attributable to earning income." Moreover, section 402(a)(7) no longer contains the work expense disregard. Section 402(a)(7) now merely requires that, after application of the disregards of section 402(a)(8), the states, in determining eligibility and need, shall consider "other income and resources."¹⁵¹ Section 402(a)(8) still contains the work incentive disregard, but that disregard is now limited to the first four months of assistance and operates after all other disregards.¹⁵² Furthermore, section 402(a)(8) now requires that, in making the determination under section 402(a)(7), states shall disregard from the "earned income" of each wage earner in the applicant family the first \$75 of "earned income."¹⁵³

149. Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, § 2301, 95 Stat. 357, 843 (1981) (codified at 42 U.S.C. § 602(a)(8)(A)(ii) (1982)).

150. The pertinent parts of sections 402(a)(7) and (a)(8) then read:

A State plan for aid and services to needy families with children must . . . ;
except as may be otherwise provided in paragraphs (8) or (31) and section 615 of this title,
provide that the State agency—

shall, in determining need, take into consideration other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid;
. . . .

provide that, with respect to any month, in making the determination under paragraph (7),
the State agency—

. . . .
shall disregard from the earned income of any child or relative applying for or receiving aid to families with dependent children, or of any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first \$75 of the total of such earned income for such month (or such lesser amount as the Secretary may prescribe in the case of any individual not engaged in full-time employment or not employed throughout the month)

Id. § 2301, 95 Stat. at 843 (codified at 42 U.S.C. § 602(a)(7), (a)(8) (1982)).

151. *Id.*

152. *Id.*

153. *Id.*

1. Legislative History

The congressional debates on OBRA do not show whether Congress intended the flat \$75 work expense disregard to cover tax withholdings. The report of the Senate Finance Committee is more helpful.¹⁵⁴ It lists four reasons for the 1981 changes in AFDC: to ameliorate administrative problems, to decrease variations among the states as to what are considered work expenses, to discourage welfare dependency, and to limit instances of abuse.¹⁵⁵ The report further shows that Congress largely abandoned financial incentives as a means of encouraging employment among AFDC recipients¹⁵⁶ and instead authorized other, more direct means of achieving that goal, such as mandatory work programs.¹⁵⁷ The report indicates that Congress was aware of the financial disincentives to employment that its changes would create.¹⁵⁸ Most interestingly, however, is the characterization of prior law given in the report. According to the report, states "in determining AFDC benefits, [had to] . . . disregard from the recipient's total income: (1) the first \$30 earned monthly, plus one-third of additional earnings; and (2) any expenses (including child care) reasonably attributable to the earning of such income." After these deductions, whatever income remained. . . . , the

154. S. REP. NO. 139, 97th Cong., 1st Sess. 501 (1981), *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 768.

155. *Id.* at 501-02, 1981 U.S. CODE CONG. & AD. NEWS at 768.

156. *Id.* at 501, 1981 U.S. CODE CONG. & AD. NEWS at 768-69. Statistics cited by the report showed the percentage of AFDC mothers employed had not significantly changed with either the formal introduction of the work expense disregard in 1962 or the introduction of the work incentive disregard in 1968. In 1961, 14.1% of AFDC mothers worked full or part time. In 1967, that figure rose to 14.9%, but returned to 14.1% again in 1979. The statistics further showed that AFDC mothers were not achieving the goal of self-sufficiency. Only 8% of case closings were due to earnings of the mother. In California the number was 2% and in New York it was only 3%. *Id.*

For a critical analysis on Congress' use of these statistics see Comment, *supra* note 9, at 87 n.34.

157. See, e.g., 42 U.S.C. § 609 (1982) (to "improve employability of participants through actual work experience"); *id.* § 614 (1982) ("to make jobs available as an alternative to aid otherwise provided under the State plan"); *id.* § 645 (1982) (to establish "work incentive demonstration program[s]").

The court in *RAM v. Blum*, 533 F. Supp. 933 (S.D.N.Y. 1982), commented that the mandatory work programs showed that the goal of reducing welfare dependency by encouraging employment was still very much a part of AFDC. Therefore, the court reasoned, tax withholdings cannot be "income" under AFDC because such a characterization would undermine that goal.

While these work programs demonstrate that the goal of participant independence still exists, they also indicate a change in the methods used to achieve the goal. See *James v. O'Bannon*, 715 F.2d 794, 809 (3d Cir. 1983).

158. S. REP. NO. 139, *supra* note 154, at 552, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS at 819.

These proposals [standardized work expense disregard, four month limit to \$30 plus one-third, and others] would, however, increase the work disincentives found in the current AFDC program. Currently, AFDC families, on average, are able to retain about 50 percent of their earned income. Under the proposed changes, AFDC families would be able to retain only about 20 percent of their earned income.

Id.

report said was, used to reduce the amount of the AFDC grant.”¹⁵⁹

2. Discussion and Analysis

There are two major issues to consider in analyzing the legislative history of OBRA. The first, of course, is what did Congress intend to accomplish with OBRA. The second is what was Congress' understanding of the law prior to OBRA. Congress' understanding need not be correct with respect to the intent of the prior Congress which passed the law. But, if Congress' understanding indicates that it was aware of how the prior law actually worked in practice, then this practice is incorporated into the law at the time of amendment, unless Congress otherwise indicates the practice is improper.¹⁶⁰ Congress thus adopts the administrative or judicial interpretation of the law. Assuming that the 1939, 1962, and 1967 Congresses did not intend for "income" to include tax withholdings or for tax withholdings to be disregarded as work expenses, incorporation of that practical understanding into the law is precisely what happened here.

The language of the Senate Report which describes the prior law tracks regulation 233.20(a)(7)(i) so closely that the committee must have had the regulation in mind when it wrote the report.¹⁶¹ The language of the report shows that Congress considered any item disregarded from "total income," other than the work incentive disregard, to be a work expense. This shows that Congress was aware of the prior administrative interpretation of section 402(a)(7) "income" as including the total earned income of the individual.¹⁶² Congress can be presumed then to have adopted that administrative interpretation because it did not indicate that such interpretation was improper.¹⁶³ As a result, the regulation¹⁶⁴ requiring "income" to be available, either must have never meant that

159. *Id.* at 501, reprinted in 1981 U.S. CODE CONG. & AD. NEWS at 767; see H.R. REP. NO. 208, 97th Cong., 1st Sess. 979, reprinted in 1981 U.S. CODE CONG. & AD. NEWS 1341.

160. This administrative law doctrine of reenactment is widely accepted, see *supra* notes 100 & 140, but is not without its critics. See *supra* note 101.

161. See *supra* text accompanying note 159 for the Senate Report's description of the prior law. See *supra* note 126 for regulation 45 C.F.R. § 233.20(a)(7)(i) (1983).

162. See *supra* note 138 & 139 and accompanying text regarding 1976 Committee Hearings on proposals for flat work expense disregards.

163. See *supra* notes 100 & 140. The court of appeals in *Turner* did not find the Senate Report helpful. Basically, the court found a historical presumption that tax withholdings were not work expenses, nor section 402(a)(7) "income" at all, and refused to accept a non-explicit change in that presumption. *Turner v. Prod*, 707 F.2d 1109, 1120-21 (9th Cir. 1983), *rev'd sub nom.* *Heckler v. Turner*, 53 U.S.L.W. 4211 (U.S. Feb. 27, 1985) (No. 83-1097).

Other courts, have established the opposite presumption: "Congress in enacting OBRA . . . in no way indicated . . . that mandatory tax withholdings should be excluded from earned income or calculated as augmentation to the \$75 disregard." *Bell v. Hettleman*, 558 F. Supp. 386, 396 (D. Md.), *aff'd sub nom.* *Bell v. Massinga*, 721 F.2d 131 (4th Cir. 1983). See also *James v. O'Bannon*, 715 F.2d 794, 807 (3d Cir. 1983).

164. 45 C.F.R. § 233.20(a)(3)(ii)(D) (1983).

tax withholdings were not "income," or must now not mean that.¹⁶⁵

Two other minor factors outside of the report also suggest that Congress probably viewed tax withholdings as work expenses and therefore AFDC "income" when it passed OBRA. First, two witnesses at two committee hearings explicitly described tax withholdings as work expenses.¹⁶⁶ And second, the committee report on a later bill to reinstate the full work incentive disregard to AFDC explicitly referred to tax withholdings as work expenses.¹⁶⁷

Aside from what Congress thought the prior law was, consideration of three of the four objectives of OBRA¹⁶⁸ also suggests that tax withhold-

165. After the 1962 amendments, the availability concept merely meant income left over after work expenses had been disregarded, and that such income was, by definition, available. This is the construction that several courts used, *see supra* notes 137 & 148; such a construction comports with the availability regulation which expressly states that availability is only determined after all disregards have operated. 45 C.F.R. § 233.20(a)(3)(ii)(D) (1983). This conception of availability, as the amount left after the work expenses are disregarded, emerged in the 1976 Hearings on proposals for flat work expense disregards. *See supra* notes 138 & 139 and accompanying text. The fact that HHS does not consider OBRA to have affected the meaning of "income" or the availability requirement, *see* 47 Fed. Reg. 5648, 5657 (1982), strongly suggests that available "income" only means the income left after the disregards have applied or that availability has never been applied to exclude tax withholdings from "income."

166. *Hearings Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means, 97th Cong., 1st Sess. 88-89 (1981)* (testimony of Christine Pratt-Marston for the National Anti-Hunger Coalition, Administration's Proposed Savings in Unemployment Compensation, Public Assistance, and Social Services Programs); *Hearings Before the Senate Comm. on Finance, 97th Cong., 1st Sess. 277 (1981)* (testimony of Marian Wright Edelman, President, Children's Defense Fund, Spending Reduction Proposals). Testimony of witnesses before committees, however, is only "weak evidence" of legislative intent. 2A C.D. SANDS, *supra* note 70, at § 48.10. As the court commented in *Kelly v. Perales*, 566 F. Supp. 785, 790 n.8 (S.D.N.Y. 1983), there is no way to determine whether Congress enacted this legislation despite the testimony, whether the testimony was considered inaccurate, or indeed even if the testimony was noticed at all. *Id.*

167. H.R. REP. NO. 587, 97th Cong., 2d Sess. 12 (1982). The report also indicated that recipients were ineligible under prior law when their "countable income" (gross income minus any disregards) equalled the state standard of need. *Id.* at 6. This report, of course, is not part of the legislative history of OBRA but, nevertheless, "is entitled to some consideration as a secondarily authoritative expression of expert opinion." 2A C.D. SANDS, *supra* note 70, § 48.06 (footnote omitted); *see also* *Bell v. Hettleman*, 558 F. Supp. 386, 393-94 n.12 (D. Md.), *aff'd sub nom.* *Bell v. Massinga*, 721 F.2d 131 (4th Cir. 1983).

OBRA legislatively repudiated *Shea v. Vialpando*, in which the Supreme Court explicitly described tax withholdings as AFDC "income" and as work expenses. After the passage of OBRA, numerous bills were proposed to settle the issue discussed in this comment. Most would have reduced the flat amount disregarded in section 402(a)(8)(B) from \$75 to \$50 and add another disregard that is a percentage of the applicant's salary or wages. *See* H.R. 4327, 98th Cong., 1st Sess. (1983); H.R. 2354, 98th Cong., 1st Sess. (1983); S. 2823, 97th Cong., 2d Sess. (1982); S. 1124, 98th Cong., 1st Sess. (1983). Essentially, the only difference between the different House bills was that the first declared that tax refunds were not AFDC "income," while the second declared that tax refunds were AFDC "income." Both Senate bills declared that tax refunds are AFDC "income."

Another bill, H.R. 3512, 98th Cong., 1st Sess. (1983), simply declared that "earned income" in section 402(a)(8)(A)(ii) was gross earned income but that tax credits or advances were not AFDC "income." This is the approach Congress eventually took in the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2625, 98 Stat. 494, 1135 (1984).

168. *See supra* note 155 and accompanying text.

ings should be AFDC "income" to be disregarded within the flat \$75 work expense disregard if disregarded at all. First, while it is perhaps not a great administrative burden to verify the existence of tax withholdings, it is administratively easier not to consider tax withholdings at all and simply disregard \$75. Second and similarly, if all administrators have to do to take care of work expenses is disregard \$75, the creation of bogus work expenses will be impossible. As a result, fraud will decrease. And third, subsuming tax withholdings within the \$75 work expense disregard will decrease variations among the states as to what is considered a work expense.¹⁶⁹ This is because if states have discretion to disregard parts of an applicant's earned income because those parts are not available to him, the problem of variations among the states as to what are considered work expenses will arise again. For instance, if tax withholdings are not "income" because they are not available for current use, monies that are mandatorily withheld for a retirement fund might also not be "income" as they are equally unavailable for current use. Courts could easily and logically enlarge this exception to the flat work expense disregard even further; then uniformity in what are considered work expenses will be hopeless.

It is more difficult to see how Congress' fourth objective for OBRA, the promotion of independence from public aid, will be furthered by including tax withholdings within AFDC "income" and the flat work expense disregard. The goal will be undermined whenever an applicant's work expenses are greater than \$75. In those cases there will actually be a disincentive to employment because the recipient, assuming four months have passed and the work incentive disregard no longer applies, will have more to spend if he does not work.¹⁷⁰ The Senate Report, however, shows that Congress decided that the methods of avoiding financial disincentives to employment and of creating financial incentives to employment were not significantly reducing welfare dependency.¹⁷¹ Fur-

169. The court in *RAM v. Blum*, 546 F. Supp. 634, 646 (S.D.N.Y. 1983), misread Congress' goal of uniformity to mean that Congress wanted to reduce variations in benefits for applicants. The court reasoned that because state and local taxes vary between states and communities, if such tax withholdings are not fully disregarded uniformity will be lost.

Undeniably, the court was correct about uniformity of benefits, but uniformity was not the purpose of the OBRA amendments, see *supra* note 155 and accompanying text. Indeed, states have broad discretion in AFDC to set their own standards of need and levels of benefits. See *supra* note 4. See also *Shea v. Vialpando*, 416 U.S. 251, 253 (1974); *Jefferson v. Hackney*, 406 U.S. 535, 541 (1972); *Rosado v. Wyman*, 397 U.S. 397, 408-09 (1970); *Dandridge v. Williams*, 397 U.S. 471, 478 (1970); *King v. Smith*, 392 U.S. 309, 318-19 (1968).

170. It is interesting to note that employment was not a goal of the original Act but that self-sufficiency was. AFDC was, in fact, initially to provide enough aid for mothers that they would not have to leave their children to work. See *supra* note 8 and accompanying text.

171. See *supra* note 156 and accompanying text. The court of appeals in *Turner* refused to recognize Congress' changed purpose in OBRA. *Turner v. Prod*, 707 F.2d 1109, 1121 (9th Cir. 1983), *rev'd sub nom.* *Heckler v. Turner*, 53 U.S.L.W. 4211 (U.S. Feb. 27, 1985) (No. 83-1097); *James v. O'Bannon*, 715 F.2d 794, 810 (3d Cir. 1983). The *Turner* court stated that because OBRA

thermore, the report shows that Congress had in mind new methods to achieve the goal of welfare independence.¹⁷² Thus, because the idea of avoiding financial disincentives to employment is gone, it is reasonable to conclude that Congress meant to include tax withholdings within the \$75 work expense disregard even though that would be a financial disincentive to employment. Furthermore, Congress expected the limitation of the work incentive disregard to the first four months of eligibility to accomplish the goal of reducing welfare dependency.¹⁷³ It can be argued that the limitation of the work incentive disregard was unwise and will not accomplish this goal, but there is no doubt that Congress did limit the work incentive disregard in order to discourage welfare dependency. Perhaps the limitation of the work expense disregard was not seen as contributing to this objective but rather only seen as contributing to the other three.

Even if one assumes that tax withholdings were not AFDC "income" to be disregarded as work expenses before 1981, it is apparent that the 1981 Congress intended for them to be so classified. Thus, it intended that tax withholdings be disregarded from an applicant's income only to the extent that the withholdings, along with other work expenses, do not exceed \$75.

The final question to be analyzed is essentially moot as the 1981 amendment and the prior history of the statute show that tax withhold-

had not amended the original goal of AFDC to discourage welfare dependency, tax withholdings could not be included in "income" and be subject therefore only to the flat \$75 work expense disregard. The court limited the lower court holding to the extent that only mandatorily withheld income and social security taxes would not be AFDC "income." *Turner*, 707 F.2d at 1124. It recognized that amounts withheld for retirement funds, union dues, etc. were "income" and were work expenses subject to the \$75 disregard. *Id.* But the court failed to explain if and how these items were different with regard to the recipient of the sums. Similarly, the court did not explain why Congress' acceptance of the flat work expense disregard, with its obvious effect of deterring employment for those applicants with work expenses greater than \$75, did not indicate that the AFDC statute no longer prevented disincentives to employment. See *James*, 715 F.2d at 809-10 ("it is no longer possible to argue that interpretations of AFDC that create disincentives to employment must, because they have such an effect, be regarded as inconsistent with the purposes of the program"). See *supra* note 158.

172. See *supra* note 157 and accompanying text.

173. S. REP. NO. 139, *supra* note 154, at 501-03, reprinted in 1981 U.S. CODE CONG. & AD. NEWS at 768-69. The Committee recognized that the changes in the work expense disregard did not address another serious problem with the provisions—

the fact that, because of the permanent application of the \$30 and one-third provision, families may remain on welfare even after they are working full-time at wages well above the state welfare standard.

Id. at 502, 1981 U.S. CODE CONG. & AD. NEWS at 768. The Committee thus recommended changing the work incentive disregard to run only for the first four months of eligibility:

[T]he provision would provide a useful buffer to those trying to readjust to employment, but without resulting in keeping families on welfare for an unlimited period [T]he changes are expected to decrease welfare dependency, and emphasize the principle that AFDC should not be regarded as a permanent income guarantee.

Id. at 502, 1981 U.S. CODE CONG. & AD. NEWS at 769.

ings are "income" and must be disregarded in the \$75 work expense disregard, if at all. Nevertheless, assuming the history and the 1981 amendment were less clear the final question to consider is whether the 1984 Congress, when it defined "earned income" to include tax withholdings, intended that AFDC "income" also include tax withholdings.

E. *The 1984 Amendment—Congressional Definition of "Earned Income"*

In the Deficit Reduction Act of 1984, Congress amended section 402(a)(8) to define "earned income" to be "gross earned income, prior to any deductions for taxes or for any other purpose."¹⁷⁴

1. Legislative History

In its comment on this provision the Conference Report specifically referred to the controversy in the courts over the treatment of tax withholdings.¹⁷⁵ The report, however, did not state that Congress was acting to settle the matter. It merely stated that the Supreme Court had agreed to consider the issue.¹⁷⁶ The failure of the report to state that the 1984 amendment was intended to settle the question of whether tax withholdings are "income" and, in fact, the failure of Congress to simply define "income" to include tax withholdings may indicate either that Congress did not think its amendment should settle the issue, or that tax withholdings were "income." On the other hand, however, it is more likely that Congress simply failed to realize that it was not resolving the controversy. While Congress did not settle the issue or indicate an intent to settle the issue, from the definition of "earned income," the inescapable conclusion is that tax withholdings are "income" to be disregarded as a work expense if disregarded at all.

2. Discussion and Analysis

The plaintiffs in *Turner* may still argue that tax withholdings should be disregarded over and above the flat \$75 work expense disregard. This argument would have the statute work as follows.

Assume gross wages of an AFDC recipient are \$500, tax withholdings are \$100, and unearned income is zero. (1) "Earned income" is \$500. (2) The work incentive disregard amount is \$187.¹⁷⁷ (3) The work expense disregard is \$75. Thus the disregards total \$262. (4) "Income,"

174. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2625, 98 Stat. 494, 1135 (1984) (to be codified at 42 U.S.C. § 602(a)(8)(C) (1982)).

175. H. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1395, reprinted in 1984 U.S. CODE CONG. & AD. NEWS at 1389.

176. *Id.*

177. \$30 plus $(\$500 - \$30)/3$.

which includes all "available" income, is gross earned income less un-available earned income, or \$500 less \$100 for tax withholdings—\$400. (5) "Income is then reduced by the work incentive and work expense disregard amount of \$262 to leave \$138. This \$138 would be applied against the standard of need to determine the applicant's assistance grant."¹⁷⁸

This reading of the statute satisfies the requirement that "earned income" be gross earned income and "income" be "available" income. It fails, however, to follow the statute in one important regard. Section 402(a)(8) of the statute states that the disregards to "earned income" are to be *determined from and subtracted from* "earned income," not determined from "earned income" and subtracted from "income." Furthermore, the availability regulation itself indicates that this reading of the statute is incorrect. According to that regulation, "income" is to be determined only after all policies on disregards have been uniformly carried out. The regulation does not say that "income" is determined before all disregards have operated and later reduced by the disregards found.

Another problem with the reading of the statute in the paragraph above is that it vastly differs from how the statute operated and how Congress understood the statute to operate before the 1981 amendment. After *Shea v. Vialpando* and before the 1981 amendments, HEW and the states clearly considered tax withholdings to be work expenses and AFDC "income."¹⁷⁹ Some evidence shows that as early as 1968, HEW viewed tax withholdings as "income" to be disregarded as a work expense.¹⁸⁰ Congress was aware of these interpretations in 1981 but did not indicate that they were incorrect.¹⁸¹ It can be presumed to have adopted those interpretations of the statute even if, in effect, they were contrary to how Congress originally meant the statute to operate.

Thus, the 1984 amendment defining "earned income" to include tax withholdings implicitly also defines "income" to include tax withholdings. This means that tax withholdings are not to be disregarded over and above the flat \$75 work expense disregard.

VI. CONCLUSION

The 1984 amendment defining "earned income" to include tax withholdings virtually resolves the issue of whether tax withholdings are to be subsumed within the flat \$75 work expense disregard. Unless "income" and "earned income" are defined inconsistently, "income" must be viewed as also including tax withholdings and therefore tax withholdings

178. See *supra* note 143 for how this interpretation would have worked before OBRA.

179. See *supra* notes 130-34 and accompanying text.

180. See *supra* notes 91 & 130 and accompanying text.

181. See *supra* notes 138-39 and accompanying text; see also text accompanying note 162.

could only be disregarded as work expenses. For "income" and "earned income" to be defined inconsistently, that is for "earned income" to include tax withholdings but "income" not to, the statute would have to operate in a very odd way. This operation would be contrary to the language of the statute, the regulation which defines "income" as "available" income and the history of how the statute has operated. However, because the 1984 amendment did not specify that "income" included all "earned income," it is possible to argue still that tax withholdings must be separately disregarded over and above the \$75 work expense disregard because they are "unavailable."¹⁸² According to this argument "income" and "earned income" need not be consistently defined; that is, "earned income" can include tax withholdings while "income" does not include them.

An analysis of the statute's history shows that the 1984 amendment was not necessary for the statute to mean that tax withholdings are to be disregarded within the flat \$75 work expenses disregard, if disregarded at all. The history shows, in short, that tax withholdings were AFDC "income" and disregarded as work expenses long before either the 1984 or the 1981 amendments and that Congress either intended this originally or later acquiesced and adopted the practice. There are several factors contributing to this conclusion.

First, no evidence shows that the 1939 Congress intended that AFDC "income" not include mandatory payroll tax withholdings. Nor does any evidence show that the federal agencies which construed the meaning of "income" after 1939 considered it to not include mandatory payroll tax withholdings. The availability concept simply cannot be demonstrated to have ever applied to tax withholdings. Indeed, if tax withholdings were disregarded before 1962, it was probably because states viewed them as work expenses and therefore permitted their disregard.

Second, no evidence suggests that the 1962 Congress, when it made the disregard of work expenses mandatory for all states, did not see tax withholdings as "income" to be disregarded through the work expense disregard. HEW's failure, however, to include tax withholdings on a representative list of work expenses promulgated soon after the 1962 amendments suggests that perhaps tax withholdings were not work expenses and thus were not "income." The persuasiveness of that interpretation is undermined considerably by the fact that HEW did not list

182. Note, *The Treatment of Mandatory Tax Withholdings in Calculating AFDC Benefits: Fairness as a Relevant Inference in Ascertaining Congressional Intent*, 82 MICH. L. REV. 1739 (1984). This note concludes that "under the 'availability' principle, tax withholdings have always been regarded as non-income items distinct from work expenses," and that "inclusion of mandatory withholdings in the flat work expense disregard would result in unfair and unequal treatment of working recipients relative to nonworking recipients." *Id.* at 1741.

union dues, an items which it had previously viewed as being of the same nature as tax withholdings, when there was no reason for HEW to begin distinguishing between union dues and tax withholdings. Furthermore, by 1966, the Children's Bureau of HEW did explicitly list tax withholdings as work expenses.

Third, when the Congress incorporated the term "earned income" into the statute in 1968, it did not indicate that the term was to be defined inconsistently with "income." The term "earned income" had already been administratively defined in the Social Security Act to include tax withholdings, and Congress did not indicate that such a meaning was incorrect for the term in the AFDC statute or incompatible with the meaning of "income" in AFDC. After the 1968 amendment, HEW promulgated regulations which defined "earned income" as gross earned income and which showed that HEW viewed tax withholdings as work expenses and "earned income" as a part of "income."

Fourth, when Congress passed OBRA in 1981 and created the flat \$75 work expense disregard, it was aware of the prior administrative practice of including tax withholdings in "income" and of disregarding them as work expenses. Congress, while explicitly limiting the disregard for work expenses, did not indicate that the administrative practice and construction was wrong. It did not say that tax withholdings were to be disregarded not because they were work expenses but because they were unavailable. Congress adopted the administrative practice, if indeed that practice was contrary to how Congress had earlier intended the statute to operate.

Thus, when Congress amended the statute in 1984 to say that tax withholdings were part of "earned income," it did not change the statute at all. It merely clarified the statute in response to confusion in some courts. The amendment, as this comment has show, was unnecessary except as a way to quickly end the confusion. In any event, however, the 1984 amendment underscores an inescapable fact: however counterproductive and unwise it may be, tax withholdings, because they are "income" to be disregarded as a work expense if disregarded at all, are subject to the flat \$75 work expense disregard.

EPILOGUE

As this comment went to press, the United States Supreme Court, in *Heckler v. Turner*,¹⁸³ unanimously reversed the Ninth Circuit and held that mandatory tax withholdings were AFDC "income" to be disregarded as a work expense within the flat \$75 work expense disregard.

183. 53 U.S.L.W. 4211 (U.S. Feb. 27, 1985) (No. 83-1097).

The Court's decision is in accord with the analysis and conclusions set forth in this comment.

WILLIAM D. HERLONG*

* Northwestern University School of Law, Class of 1985; Articles Editor, Northwestern University Law Review.