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Welfare Law-1972 Social Security Act Amendments-Supplemental Security Income for the Aged Blind and Disabled

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Welfare Law—1972 Social Security Act Amendments—Supplemental Security Income for the Aged, Blind, and Disabled

Act of October 30, 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1465

Although the Ninety-Second Congress dealt a fatal blow to President Nixon's much heralded Family Assistance Plan,[1] it did produce some meaningful welfare reform.[2] Present state-administered programs of aid to the aged, blind, and disabled will be replaced by a single, wholly federal welfare program which will become effective January

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1 Pub. L. No. 92-603, 86 Stat. 1329 (1972) [hereinafter cited as "1972 Act" or "the Act"]. The Act, as signed by the President, contained no reform with respect to the Aid to Families with Dependent Children (AFDC) program. All that remained was a savings provision regarding expenditures for social services. *Id.* § 403, 86 Stat. 1487.

The administration's original bill, the proposed Family Assistance Act of 1970 (H.R. 16311, 91st Cong., 2d Sess. (1970)), would have made far-reaching changes in the existing welfare structure. It provided for direct federal payments to all needy families with children, including the working poor and families with unemployed fathers. *Id.* § 101. *See generally* American Enterprise Institute for Public Policy Research, The Bill to Revamp the Welfare System (1970). As Senate Finance Committee Chairman Long explained, the reforms were killed by the conference committee. 118 Cong. Rec. S 18,488 (daily ed. Oct. 17, 1972). In effect, the House would not agree to the Senate provisions, nor would the Senate agree to the House proposals. "[I]t was agreed that the Honse will send to the Senate next year [1973] some kind of a bill relating to social security and public welfare . . . to offer the Senate the opportunity to propose the sort of things . . . that the Senate thought were vital but which the House felt needed more time for their consideration." *Id.*

In comparison, aid to the aged, blind, and disabled is politically popular because, for the most part, the recipients are safely unemployable. *See* note 94 and accompanying text *infra*. Furthermore, these programs are characterized by smaller numbers of people, smaller budgets, and more nearly static beneficiary roles, and are thus more susceptible to rapid and efficient reform than the family programs. H.R. Rep. No. 231, 92d Cong., 1st Sess. 146 (1971) [hereinafter cited as House Report].

2 Although President Nixon was disappointed in the failure of Congress to agree upon any reform in the family area, he felt that the 1972 Act embodied many of his recommendations to improve programs for the aged, blind, and disabled. CCH Pov. L. Reports, No. 14, at 1 (Nov. 14, 1972). Similarly, Senator Long felt that the Act accomplished real reform. In response to Senator Ribicoff's suggestion that the failure of Congress to agree on any reform in the family area set the entire welfare mess back to 1969, Senator Long replied: "[W]e have done much in this bill. We have done for the aged, blind, and disabled categories, I believe, most of what the Senate wanted to do and I think almost all of what the House wanted to do." 118 Cong. Rec. S 18,488 (daily ed. Oct. 17, 1972). The editors of the New York Times disagreed:

> Welfare reform is dead. The reform of any program for the betterment of the human condition is now in danger of falling victim to the reactionary paranoia that sees all the poor as chiselers or criminals. Waste is to be tolerated only in defense contracts and to bail out mismanaged corporations. But fear of waste is enough to veto essential measures for the care of children, the elderly or the poor.

N.Y. Times, Jan. 15, 1973, at 28, col. 1.

1, 1974.[3] This program will have the obvious advantage of uniformity insofar as it establishes basic minimum criteria which will be in effect nationwide.[4] The states, with certain restrictions, will have the option of supplementing federal payments.[5]

The overall effectiveness of this reform should be evaluated in light of the existing schemes for Old Age Assistance (OAA).[6] Three vital aspects of welfare administration—the federal-state relationship, the determination of eligibility, and the determination of benefit levels—merit analysis.

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OLD AGE ASSISTANCE—PRESENT AND FUTURE

A. *The Federal-State Relationship*

The current OAA program is a patchwork of state programs sewn

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[3] 1972 Act § 301, 86 Stat. 1465. A preliminary description of the program was provided by the House Ways and Means Committee:

> Under the new Federal program, uniform eligibility requirements and uniform benefit payments would replace the multiplicity of requirements and benefit payments under the existing State-operated programs. The new program has been designed with a view toward providing:
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> 1. An income source for the aged, blind, and disabled whose income and resources are below a specified level;
> 2. Incentives and opportunities for those able to work or to be rehabilitated that will enable them to escape from their dependent situations; and
> 3. An efficient and economical method of providing this assistance.

HOUSE REPORT 147.

[4] With regard to the need for this type of reform, the House Committee reported:

> The welfare system in the United States has been moving toward a state of crisis and chaos—to change its direction will be difficult. The purpose of this bill is to effect that change. Your committee's bill will establish a new welfare system, based on a sympathetic understanding of the needs of the helpless, and the conviction that all those who are capable of participating in the economy of this country should have the opportunity and the responsibility of doing so. It is a system designed to be fair and rational, the kind of system which recipients deserve and taxpayers can respect.

Id. at 3.

One drawback to the implementation of uniform benefits, however, is that the cost of living varies from one region to another. This concern prompted Alaska's Senator Gravel to urge that a study be made to determine the feasibility of factoring cost of living variants into the benefit formula. 118 CONG. REC. S 16,948 (daily ed. Oct. 5, 1972). His amendment died in committee.

[5] 1972 Act § 301, 86 Stat. 1474; *see* notes 19-23 and accompanying text *infra*.

[6] The concentration on OAA is not meant to slight the importance of other programs, but they are essentially parallel to OAA. The one important area in which they differ is in the determination of eligibility, which is necessarily far more complex under such programs as Aid to the Blind (AB) and Aid to the Permanently and Totally Disabled (APTD).

Further, the OAA program involves more people. In 1968 there were 0.1 million recipients under the AB program, 0.9 million under the APTD program. OAA reached 2.3 million in 1968. PRESIDENT'S COMM'N ON INCOME MAINTENANCE PROGRAMS, POVERTY AMID PLENTY: THE AMERICAN PARADOX 115 (1969).

together by certain basic federal requirements. The scheme is financed through a system of cost sharing, with the federal government bearing most of the financial burden of states' programs.[7] Although state governments are required to participate in the financing of state programs,[8] much of the states' share is borne by local governments.[9] Although there are no federal restrictions on the states' freedom to determine benefit levels, and the states retain primary responsibility for the day-to-day operation of the program,[10] the federal government has not given the states free rein in the administration of state programs. Indeed, "much of the Congressional attention paid to OAA when the Social Security Act was originally considered in 1935 was devoted to the federal standards it incorporated and to the methods chosen by the draftsmen for enforcing them."[11]

Federal supervision is accomplished primarily through the requirement that the states submit, and the Secretary of Health, Education, and Welfare approve, a "state plan."[12] This plan must provide for

7 The federal government pays two-thirds of the costs in 22 states and 60% in most of the others. Burke, *The Need for Welfare Reform*, 2 FAMILY L.Q. 353, 357 (1968). Despite the amount of federal financial participation, state and local governments retain overall control. *Id.* An additional drawback to the present cost sharing program is the difficulty involved in determining exactly how much money the state is entitled to receive. As Professor Burke points out:

> A national welfare system would also eliminate the grant-in-aid system which is probably the most confusing and complex ever developed. To give one example: the Federal Government grants to the state, for an old-age recipient, 31/37th of approximately half of the grant, and then pays anywhere from fifty to sixty percent of the remaining half the grant . . . .

Id. at 359.

8 42 U.S.C. § 302(a)(2) (1970).

9 In New York, for example, local governments account for 29.1% of the welfare budget. NATIONAL STUDY SERVICE, STATE VERSUS LOCAL ADMINISTRATION OF PUBLIC WELFARE: A MOUNTING ISSUE 6 (1968). Local government financial participation has advantages and disadvantages. Limited fiscal ability and the variation in willingness to support public welfare among local units of government may have a depressive effect on state programs. *Id.* at 8. Argnably, however, local funds in the program may generate local interest. *Id.* at 10.

10 This freedom has led to the wide disparity of beuefit levels throughout the country. Although some fiexibility might be warranted by virtue of the cost of living variations (*see* note 4 *supra*), the variance from state to state is seen as one of the major ills of the present system. *See* Musgrave, Heller & Peterson, *Cost Effectiveness of Alternative Income Maintenance Schemes*, 23 NAT'L TAX J. 140 (1970).

The present system is a grant-in-aid program. *See* note 7 *supra*. The federal government merely gives states money with which to administer their programs within the broad parameters of the Social Security Act. Congress has provided some guidelines, however. *See* notes 12-18 and accompanying text *infra*.

11 R. LEVY, T. LEWIS & P. MARTIN, CASES AND MATERIALS ON SOCIAL WELFARE AND THE INDIVIDUAL 76 (1971) [hereinafter cited as SOCIAL WELFARE AND THE INDIVIDUAL]. The authors observe that "Congressional respect for State prerogatives fluctuates cyclically as a function of a host of political and ecouomic variables." *Id.* at 77.

12 *See* 42 U.S.C. § 301 (1970).

statewide coverage, state financial participation, and administration of the program by a single state agency.[13] A plan cannot be approved unless it complies with the requirements of the Social Security Act.[14] If a state plan does not comply, the Secretary may attempt to negotiate compliance.[15] If negotiation fails, the Secretary may initiate a conformity hearing.[16] Upon a finding of nonconformity, federal grants-in-aid for the program in question must be discontinued "until the Secretary is satisfied that such prohibited [state] requirement is no longer so imposed, and that there is no longer any such failure to comply."[17]

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13 *Id.* §§ 302(a)(1)-(3). These standards were apparently designed to avoid the "poor law" attitudes of local government officials and to improve administration. SOCIAL WELFARE AND THE INDIVIDUAL 84. In 1935, the President's Committee on Economic Security reported:

> The administrative provisions in many of the laws are . . . defective . . . . Many laws place the entire cost of pensions on the local governments, and about one-third of these acts are optional in the sense that counties may or may not operate under the pension system as they see fit.
>
> Many of these old-age-pension laws are entirely nonfunctioning; many pension authorities because of financial pressure have cut benefits below a proper minimum, and there are long waiting lists of needy persons.

PRESIDENT'S COMM. ON ECON. SECURITY, REPORT 26-27 (1935).

The administration of state and local cost sharing can be as complex as the administration of federal and state cost sharing. For example, in Town of Vanden Broeck v. Reitz, 53 Wis. 2d 87, 191 N.W.2d 913 (1971), the court was faced with a typical problem in local welfare administration. Mr. Reitz was receiving general assistance from the Town of Vanden Broeck but he was living elsewhere. The court upheld the town's position that if Reitz was to continue on the rolls he must return to Vanden Broeck. Despite the court's assertions (*see id.* at 93-95, 97-99, 191 N.W.2d at 916-19), this result may be inconsistent with Shapiro v. Thompson, 394 U.S. 618 (1969). *See* notes 23, 27 & 86 and accompanying text *infra*. *See generally* NATIONAL STUDY SERVICE, *supra* note 9.

14 42 U.S.C. § 302 (1970).

15 HEW regulations emphasize the importance of negotiation:

> Hearings with respect to [conformity] matters . . . are generally not called, however, until after reasonable effort has been made by the [Social and Rehabilitation] Service to resolve the questions involved by conference and discussion with State officials. Formal notification of the date and place of hearing does not foreclose further negotiations with State officials.

45 C.F.R. § 201.6(c) (1972).

16 The procedures for conformity hearings are set forth in *id.* §§ 213.11-.29 (1972). The hearing is a quasi-judicial proceeding held to determine whether or not the state is in compliance with the federal standards. Parties may appeal an adverse ruling to the Court of Appeals. *Id.* § 201.7. Individual recipients, as well as welfare rights groups, are permitted to intervene in these hearings. *See* Arizona State Dep't of Pub. Welfare v. HEW, 449 F.2d 456 (9th Cir. 1971), *cert. denied*, 405 U.S. 919 (1972).

17 42 U.S.C. § 304 (1970). Prior to termination, the Secretary must accord reasonable notice and opportunity to be heard and find

> (1) that the [state] plan has been so changed as to impose any age, residence, or citizenship requirement prohibited by section 302(b) of this title, or that in the administration of the plan any such prohibited requirement is imposed, with the knowledge of such State agency, in a substantial number of cases; or
>
> (2) that in the administration of the plan there is a failure to comply substantially

Despite these federal conformity requirements, however, the states retain a great deal of fiexibility in determining need and benefit levels.[18]

The new federal program is to be administered in accordance with uniform rules and regulations; however, a state may enter into an agreement with HEW whereby HEW will administer a state-financed supplementary program to augment federal benefits.[19] This supple-

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with any provision required by section 302(a) of this title to be included in the plan . . . .

Id.

Until 1968, the Secretary was required to discontinue federal funding for all categorical aid programs upon a finding of nonconformity. At this time, however, the Secretary in his discretion may withhold payments within the offending parts of the program. *See* 45 C.F.R. § 201.6(e) (1972).

Recipients' suits, either singly or in a class action, are another important method of enforcing the federal standard against nonconforming states. For an individual, the conformity hearing is not a very desirable approach since it affords no individual relief and has little precedential value. Consequently, recipients frequently seek relief in the courts. If the plaintiff opts for federal court, he will be faced with a significant jurisdictional problem. If he has a colorable constitutional argnment, he can get into federal court on the basis of 28 U.S.C. § 1343(3) (1970). An attendant statutory claim could then be decided by pendant jurisdiction. *See* King v. Smith, 392 U.S. 309 (1968). Both the statutory and constitutional claims must be derived from a common nucleus of law and fact as required by United Mineworkers v. Gibbs, 383 U.S. 715 (1966). In attempting to establish jurisdiction under § 1343(3), however, the constitutional argument cannot be frivolous. *See* Russo v. Kirby, 453 F.2d 548 (2d Cir. 1971).

An argument can be made that a federal court should grant jurisdiction under § 1343(4) solely on the basis of a statutory claim. The theory is that § 1343(4) provides for jurisdiction in the district court of any Act of Congress providing for the protection of civil rights. 42 U.S.C. § 1983 (1970) provides that anyone who is deprived of a right or privilege secured him by the constitution and federal laws has a cause of action. Authority is split on the legitimacy of this argument. *Compare* McCall v. Shapiro, 416 F.2d 246 (2d Cir. 1969), *with* Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969), and Hall v. Garson, 430 F.2d 430 (5th Cir. 1970).

18 The determination of need, that is, who does or does not have sufficient income, is very difficult. The usual starting point for that determination is the Social Security Administration's "poverty line," but that is not a very realistic figure. *See* notes 75 & 76 *infra.* To compound the problem, most states are unable to meet even this figure. ADVISORY COUNCIL ON PUBLIC ASSISTANCE, REPORT, S. DOC. No. 93, 86th Cong., 2d Sess. 18 (1960). Consequently, benefit levels—what the applicant will actually receive—are far from adequate.

19 1972 Act § 301, 86 Stat. 1474. A state entering such an agreement will benefit from the Act's "hold harmless" clause which provides:

> The amount payable to the Secretary by a State for any fiscal year pursuant to its agreement or agreements under section 1616 of the Social Security Act shall not exceed the non-Federal share of expenditures as aid or assistance for quarters in the calendar year 1972 . . . .

Id. § 401(a)(1), 86 Stat. 1485. As former HEW Secretary Richardson explained in a statement before the Senate Finance Committee, the hold harmless clause protects the states from increased financial burden due to the application of more liberal eligibility requirements under the new federal standards. If the states choose to raise their benefit levels,

mentary program must include those individuals eligible under the federal scheme,[20] but, if it so chooses, a state may employ a higher income/resource disregard[21] in its supplementary program, thereby bringing more applicants within its program than would the federal plan.[22] In order to discourage "benefit shopping," the Act allows the states which adopt supplemental benefit plans to impose a durational residency requirement.[23]

The establishment of a national system is without question the most significant aspect of the program. OAA is presently administered under fifty-four different programs with varying need and income formulations.[24] By providing for guaranteed minimum benefits, admin-

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however, they would have to shoulder that burden themselves. *Hearings on the Social Security Amendments of 1971 Before the Senate Comm. on Finance*, 92d Cong., 1st Sess. 117 (1971) (testimony of E. Richardson, Secretary, HEW).

The Ways and Means Committee noted:

> [T]here may be a continuing need for State supplementation of the new Federal assistance programs. . . . [I]t would appear generally desirable that such supplementation be provided through the same agencies which would be established to operate the federal programs. This would avoid unnecessary duplication of administrative costs, would permit the States to take advantage of the improved methods and procedures which the bill would require, and would tend to foster national uniformity in the operation of assistance programs.

HOUSE REPORT 199.

20 *See* 1972 Act § 301, 86 Stat. 1474.

21 In determining need, a state may wish to exclude certain income and resources. This is primarily used as a work incentive. *See* notes 91-94 and accompanying text *infra*. Obviously, the application of a higher exclusion will have the effect of bringing more people within the program since applicants with correspondingly higher incomes become eligible.

22 The Act provides:

> Any State (or political subdivision), in determining the eligibility of any individual for supplementary payments described in subsection (a), may disregard amounts of earned and unearned income in addition to other amounts which it is required or permitted to disregard under this section iu determining such eligibility, and shall include a provision specifying the amount of any such income that will be disregarded, if any.

1972 Act § 301, 86 Stat. 1475.

States are further encouraged to furnish services to help recipients attain or retain capability for self-support or self-care. This program is a grant-in-aid program similar to the existing OAA scheme. *See id.* § 302, 86 Stat. 1478-84.

23 Any State (or political subdivision) making supplementary payments described in subsection (a) may at its option impose as a condition of eligibility for such payments, and include in the State's agreement with the Secretary under such subsection, a residence requirement which excludes individuals who have resided in the State (or political subdivision) for less than a minimum period prior to application for such payments.

Id. § 301, 86 Stat. 1474. A state which chose to use such a requirement, however, might find itself open to attack on the basis of Shapiro v. Thompson, 394 U.S. 618 (1968). *See* note 13 *supra* and notes 27 & 86 and accompanying text *infra*.

24 *See* HOUSE REPORT 150. Naturally, a wide disparity in benefits results from this multiplicity of programs. For example, in April 1968, OAA payments ranged from $50 in

istered uniformly, while permitting the states the freedom to supplement federal benefits, the new plan represents a significant improvement.[25]

B. *Determination of Eligibility*

In the context of the present OAA system, the principal eligibility requirements are age[26] and maximum income standards. States participating in the OAA program must provide benefits to applicants who are otherwise eligible, that is, those who can meet the state's need definition, and who are over sixty-five. A state may, if it chooses, provide benefits to younger applicants, but if it does so, it cannot expect federal aid for those individuals.[27] The states are able to

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Mississippi to $182 in Nebraska. AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, *supra* note 1, at 46.

25 In addition to the obvious advantage of uniformity, the quality of administration may improve since the new program will be administered by the Social Security Administration. HOUSE REPORT 157. This should obviate the highly variable quality of state administration, even though many of the same employees will be involved. *See Hearings*, *supra* note 19, at 120-21 (testimony of E. Richardson, Secretary, HEW).

26 42 U.S.C. § 306(a) (1970):

> For the purposes of this subchapter, the term "old-age assistance" means money payments to, or . . . medical care in behalf of or any type of remedial care recognized under State law in behalf of, needy individuals who are 65 years of age or older . . . .

27 This is consistent with the policy that the federal definitions describe the minimum OAA population. A state may not deny aid to those within this population. A state may take it upon itself to expand this population, but currently,

> only Colorado makes noncontributory pensions available to needy persons at an earlier age; a Coloradan may obtain (wholly state financed) benefits at 60 if he has been a resident of the state for 35 years immediately preceding his application for aid.

SOCIAL WELFARE AND THE INDIVIDUAL 88. California has taken a middle road, providing for benefits at 65, but stating that if the federal government should "make available to this state grants-in-aid to persons who have attained the age of 60 years" then it would also drop the age requirement to 60. CAL. WELF. & INST'NS CODE § 12050 (West 1972).

The Act also contains an institutional inmate exclusion, which states that "the term 'old age assistance' . . . does not include any such payments to or care in behalf of any individual who is an inmate of a public institution (except as a patient in a medical institution)." 42 U.S.C. § 306(a) (1970). The justification for this exclusion is clear:

> [S]ince public institution inmates are cared for at public expense, they have no need for an additional (at least federally financed) stipend; the categorical assistance programs were designed to promote "outdoor assistance," not to encourage state and local governments to expand their institutional populations.

SOCIAL WELFARE AND THE INDIVIDUAL 1335. Although inmates of public institutions may fall within this rationale, a question arises concerning applicants who are residents of private institutions. Presumably the state could not exclude such individuals from its OAA population if maximum weight were accorded to the "all eligible individuals" rationale. *See* notes 29-32 and accompanying text *infra*. *See also* note 88 and accompanying text *infra* (discussing viability of argument that institutional inmates were non-needy).

Other standards originally included in the Act have become obsolete through the

determine the need level for OAA applicants and may exclude any applicant whose income and resources exceed this level.[28]

The extent to which states may develop other eligibility criteria is somewhat unclear. The Social Security Act presently requires that aid be furnished to "all eligible individuals."[29] In the AFDC context, this phrase has recently been construed to mean that the state must furnish aid to all persons who are not specifically excluded by the statute.[30] In the OAA section of the Act, however, this phrase is followed by qualifying language which may give the state flexibility.[31] If such qualifying language is not so construed, states must be bound by the strictures of the Act.[32]

In addition to the age criterion of sixty-five,[33] the new plan contains a uniform "needs test," which requires applicants to have,

judicial process. A citizenship standard was struck down in Graham v. Richardson, 403 U.S. 365 (1971), where the Court held that a state cannot condition welfare benefits upon the applicant's possession of American citizenship. In Shapiro v. Thompson, 394 U.S. 618 (1969), the Supreme Court approached the problem of a congressionally authorized residence standard, and held that the imposition of a one-year waiting period violated the equal protection clause of the fourteenth amendment.

28 *See* notes 40-42 and accompanying text *infra.*

29 42 U.S.C. § 302(a)(8) (1970).

30 In Townsend v. Swank, 404 U.S. 282 (1971), the Court was faced with a challenge to a provision in the Illinois AFDC program which terminated benefits to college students but not to those in trade schools. The Court found this provision to be inconsistent with the "all eligible individuals" clause. This interpretation of the statute greatly limits the states' discretion to determine eligibility for AFDC, for it in effect says that everyone is eligible who is not excluded by the federal definitions.

31 Section 302(a)(10)(B) provides that a state may "include reasonable standards, consistent with the objectives of this subchapter, for determining eligibility for and the extent of such assistance." 42 U.S.C. § 302(a)(10)(B) (1970). In light of the principle embodied in *Townsend,* however, this section might be interpreted to mean that the state may expand upon the basic federal definitions of eligibility, but that it may not cut into the federally protected OAA population. *See* note 27 *supra.* By 1974, however, this question will become academic, since uniform eligibility criteria will be in effect. *See* note 3 and accompanying text *supra.*

32 The Act excludes very few needy applicants. It contains an age requirement of 65 years (42 U.S.C. § 302(b)(1) (1970)) and an institutional inmate exclusion. *Id.* § 306(a). Thus, anyone over 65 who is not subject to the institutional inmate exception must be eligible if the *Townsend* rationale applies. This is not to say that the applicant will receive any benefits, however, since the state remains free to establish need and benefit levels. It does mean that the application must be considered, processed, and run through the need/benefit formula. *See* notes 40-42 and accompanying text *infra.*

33 Although 65 is the usual retirement age, it is not necessarily the most appropriate eligibility threshold. For example, the Social Security Act now provides that individuals may opt into the Old-Age, Survivors and Disability Insurance program [social security] at age 62, as long as all other eligibility criteria are fulfilled. 42 U.S.C. § 402(a)(2) (1970). The establishment of an age standard is primarily a sociological problem, not a legal one, and is beyond the scope of this Note.

subject to certain exclusions,[34] personal incomes of less than $1,560 per year and resources of less than $1,500 in order to qualify.[35] In addition, there are special limits on gross income from a trade or business[36] and a limitation on the eligibility of certain individuals—specifically, those who are outside of the United States[37] and those who, throughout any month, have been in a "hospital, extended care facility, nursing home, or intermediate care facility."[38] Alcoholics and addicts are covered by the Act, but only if they are undergoing "treatment that may be appropriate for [their] condition . . . at an institution or facility approved . . . by the Secretary" and can demonstrate that they are "complying with the terms, conditions, and requirements of such treatment."[39]

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34 *See* note 67 *infra.*

35 1972 Act § 301, 86 Stat. 1466. *See* notes 65 & 66 and accompanying text *infra.*

36 The Secretary may prescribe the circumstances under which, consistently with the purposes of this title, the gross income from a trade or business (including farming) will be considered sufficiently large to make an individual ineligible for benefits under this title. For purposes of this subsection, the term "gross income" has the same meaning as when used in chapter 1 of the Internal Revenue Code of 1954.

Id., 86 Stat. 1466-67.

37 Notwithstanding any other provision of this title, no individual shall be considered an eligible individual for purposes of this title for any month during all of which such individual is outside the United States . . . . [A]fter an individual has been outside the United States for any period of 30 consecutive days, he shall be treated as remaining outside the United States until he has been in the United States for a period of 30 consecutive days.

Id., 86 Stat. 1468.

38 *Id.*, 86 Stat. 1467. Those individuals are eligible for a maximum benefit of $25 per month. *See id.* The apparent rationale for this provision is that "[f]or [those] people most subsistance needs are met by the institution and full benefits are not needed. Some payment to [those] people, though, would be needed to enable them to purchase small comfort items not supplied by the institution." HOUSE REPORT 150; *see* notes 87-88 and accompanying text *infra.*

39 1972 Act § 301, 86 Stat. 1467. The statute is not clear as to whether aged individuals are included in this provision. It provides that "no person who is an aged, blind, or disabled individual solely by reason of disability" caused by alcoholism or addiction may be eligible unless he submits to treatment. *Id.* Arguably this requirement should be read to cover those who are obtaining benefits solely on the basis of disability caused by alcoholism or addiction. The aged and the blind should be entitled to benefits by virtue of the fact that they are aged or blind. Apparently the Ways and Means Committee was of this opinion since they reported

> that those who are *disabled,* in whole or in part, as a result of the use of drugs or alcohol should not be entitled to benefits under this program unless they undergo appropriate, available treatment in an approved facility, and the bill so provides. Your committee, while recognizing that the use of drugs or alcohol may indeed cause disabling conditions, believes that when the condition is susceptible to treatment, appropriate treatment at Government expense is an essential part of the rehabilitation process of people so disabled.

HOUSE REPORT 149 (emphasis added). Insofar as it applies to the disabled, this requirement

C. *Determination of Benefit Levels*

States currently have almost complete freedom in establishing need and benefit levels.[40] Ordinarily, the state establishes what it believes to be an adequate need standard in an effort to define its needy population. In determining benefit levels, any existing income is subtracted from this figure to yield a "net need."[41] If, after this computation the applicant remains "needy," the benefit is computed. Theoretically, the benefit should equal the net need; however, since most states have inadequate resources, the benefit level is usually far below this figure.[42]

Crucial to the determination of benefit levels is the precise meaning of "income." The Social Security Act requires that a state must "take into consideration any other income and resource" of an OAA applicant.[43] This requirement has led to some unexpected results. For example, an increase in benefits in one program must be considered as "income" with respect to the recipient's eligibility for another. Consequently, an increase in social security benefits, for example, would lower an OAA recipient's benefits and possibly destroy

seems eminently reasonable in light of the current levels of drug addiction and alcoholism throughout the country.

40 The present Act does contain a provision with respect to AFDC which requires a cost of living adjustment of the need figure. 42 U.S.C. § 602(a)(23) (1970). This was recently construed to require the states to re-evaluate the component factors that comprise their need equation. *See* Rosado v. Wyman, 397 U.S. 397 (1970). Furthermore, under *Rosado*, a state may no longer create a maximum limit on family benefits; states which have a maximum must adjust it to comport with cost of living increases. *Id. See generally* Rabin, *Implementation of the Cost-of-Living Adjustment for AFDC Recipients: A Case Study in Welfare Administration*, 118 U. PA. L. REV. 1143 (1970). There is no parallel requirement with respect to OAA.

41 *See* Cox v. State Social Welfare Bd., 193 Cal. App. 2d 708, 713, 14 Cal. Rptr. 776, 779 (1961).

42 Less than half the states fully meet need by their own standards. ADVISORY COUNCIL ON PUBLIC ASSISTANCE, *supra* note 18, at 18. A state may impose maximums on the amount any individual or family may receive. *Id.* Another approach is to pay a percentage of the need figure. *Id.* The constitutionality of a Maryland regulation which establishes a maximum grant per family was recently upheld by the Supreme Court in Dandridge v. Williams, 397 U.S. 471 (1970). Although the Maryland statute had the effect of discriminating against large families, the maximum was held to be defensible as long as every eligible individual received some benefit. The Court reasoned:

> Given Maryland's finite resources, its choice is either to support some families adequately and others less adequately, or not to give sufficient support to any family. We see nothing in the federal statute that forbids a State to balance the stresses that uniform insufficiency of payments would impose on all families against the greater ability of large families—because of the inherent economies of scale—to accommodate their needs to diminished per capita payments.

Id. at 479-80.

43 42 U.S.C. § 302(a)(10) (1970).

his eligibility for collateral programs such as public housing or food stamps.[44] Unfortunately, the new plan provides only a twenty dollar per month disregard as protection from this illogical result.[45]

One of the most difficult problems states presently encounter is in valuing the applicant's home as a resource. Consequently, there is a wide variance from state to state in the treatment of a home.[46] In some states, for example, an applicant may be declared ineligible if he owns a home worth more than a specified maximum.[47] In other states the applicant's home will be considered as one factor in determining his need.[48] A third group of states simply ignores the value of the home.[49]

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44 The problem is not merely a theoretical one. Some 187,000 elderly recipients suffered an overall reduction in benefits when a recent 20% increase in social security payments went into effect. *See* Shipler, *Social Security Rise Becomes a Nightmare for Many Elderly*, N.Y. Times, Oct. 3, 1972, at 1, col. 7. This article was one of several used by Senator Mondale to support his "pass-through" amendment which was designed to avoid this result. *See* 118 CONG. REC. S 16,929-36 (daily ed. Oct. 5, 1972).

45 *See* note 67 *infra*. Eligibility for Medicaid was preserved (*see* 1972 Act § 249E, 86 Stat. 1429), but the Mondale amendment, although passed by the Senate, was deleted by the conference committee. Senator Mondale voted for the 1972 Act, but not without protest:

> I cannot believe that any of my colleagues really intended when they voted for the 20-percent increase to reduce the benefits available to old people, who have already suffered inordinately from the inflation which has gripped our Nation for several years now.
>
> . . . .
>
> . . . I only hope that the Congress will turn its energies as quickly as possible to rectifying the injustice it has done.

118 CONG. REC. S 18,499 (daily ed. Oct. 17, 1972).

46 All states have established exclusions of one sort or another for ownership of homes or realty by applicants and recipients. About half the states place a maximum value on homestead ownership, ranging from $2500 to $12,000. Other states exclude homesteads completely and establish varying dollar maxima for real estate of other kinds.

SOCIAL WELFARE AND THE INDIVIDUAL 108.

47 *See* 1 CCH POV. L. REP. ¶¶ 1300.60-.76 (1972).

48 *Id.*

49 SOCIAL WELFARE AND THE INDIVIDUAL 108. This diversity in treatment is due in part to the federal government's failure to define "resource" with the same precision as "income." Furthermore, the federal regulations say almost nothing about need determination.

The federal regulations are also silent on the question of whether in considering the value of an applicant's home the state should consider the market or equity value. For example, a question arises as to what value should be attributed to an applicant's resource determination when he owns a $40,000 home but has a mortgage of $30,000 outstanding. The Arizona Attorney General held that the term "fair market value" of an applicant's property as used in various Arizona welfare eligibility provisions means the equity value, or the value of the owner's interest in the property after deducting the amount of the outstanding unpaid mortgage, lien, encumbrance, or security interest. ARIZ. ATT'Y GEN. OP. No. 69-25, at R-98 (1969).

In Charleston v. Wohlgemuth, 332 F. Supp. 1175 (E.D. Pa. 1971), *aff'd*, 405 U.S. 970

Under the new program, the applicant's home (including the land that appertains thereto) is excluded from the benefit calculation—at least to the extent that its value does not exceed such amount as the Secretary deems reasonable.[50] Although this uniform approach may ease some administrative burdens, a more equitable system would not automatically deny eligibility to an applicant owning a home valued above a set amount, but would consider the home as a resource and factor its value through the needs formula.[51]

The state might, under the existing OAA program, provide for the recoupment of welfare grants through the implementation of a relatives' responsibility statute.[52] This could have the effect of forcing an applicant to live in the home of a relative who is in a position to provide assistance.[53] When the applicant is actually living with

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(1972), the federal district court held that a Pennsylvania regulation which provided that certain welfare recipients would have to repay assistance and execute a lien on their real property to the state to secure the repayment obligation violated neither the Constitution nor the Social Security Act. Snell v. Wyman, 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd mem.*, 393 U.S. 323 (1969), held constitutional three types of repayment obligations: liens on interests in real property; liens upon actual and potential recoveries for personal injuries; assignments of the interests of an insured recipient in life insurance policies.

50 1972 Act § 301, 86 Stat. 1470.

51 A denial of eligibility is a harsh policy since the potential applicant does not have any opportunity to establish need. Allowing the homeowner to apply for benefits despite the value of his house would avoid the problem of setting an arbitrary limit. The need equation should filter out those whose equity value is so great as to render the applicant non-needy. *See* note 89 and accompanying text *infra*.

52 [These] statutes . . . originated in the Elizabethan Poor Law of 1601. The poor law was not just a law about the poor but a law of the poor. It was an accumulation of the legal provisions which monitored and guided all facets of the lives of that particular class of people. The provisions were special and are distinguishable from the common law under which all others in England lived. They were designed not to solve the causes and problems of destitution but to minimize the cost to the public of maintaining the destitute. The blood relationship was one of the means used to find resources, other than public, for the support of the poor.

4 ST. MARY'S L.J. 240, 242 (1972) (footnotes omitted). Prior to 1601 there was no common law duty to support indigent parents. Tully, *Family Responsibility Laws: An Unwise and Unconstitutional Imposition*, 5 FAMILY L.Q. 32, 38 (1971).

There are 33 states with relatives' responsibility statutes. *Id.* at 32 n.2. The various statutes differ greatly with respect to which relative may be liable, the circumstances under which the relative is liable, and the scope of the relative's liability. SOCIAL WELFARE AND THE INDIVIDUAL 125. In some states, for example, the statutes impose a support obligation on siblings and grandchildren as well as the spouse and children. *Compare* ILL. REV. STAT. ch. 23 § 3-1.2 (Smith Hurd 1967) *with* IOWA STAT. ANN. § 249.6 (1969). *See generally* Mandelker, *Family Responsibility Under the American Poor Laws*, 54 MICH. L. REV. 497 (1956).

Relatives' responsibility statutes are not viewed favorably by the federal authorities who have urged that the states eliminate such liability. Furthermore, these statutes may be unconstitutional. *See* Neiman, *Legal Problems of the Aged Poor*, 26 LEGAL AID BRIEFCASE 13, 15 (1967). *But see* 4 ST. MARY'S L.J. 240 (1972).

53 Relatives' responsibility statutes are defended on two grounds. First, they supposedly

another person, states presumably must attempt to ascertain the fair value of that accommodation.[54] The new program provides that when the applicant is living with another person, regardless of the type of accommodations, his benefits must be reduced by one-third.[55] This provision avoids the practical difficulties encountered in determining the value of room and board but has the disadvantage of accompanying rigidity.[56]

Another problem in the existing scheme which is considered by the new plan is the treatment of the spouse's income and resources. The complexity of the present scheme is illustrated in *Cox v. State Social Welfare Board*,[57] in which the court had to determine whether or not the Board was required to consider the applicant's wife's eligibility for social security as a resource. The court held that federal regulations required that the wife's income be considered if she were an "essential person,"[58] although it noted that the state could apply its own definition of "essential person"—at least until a federal definition was formulated.[59] The new plan, on the other hand, provides that "income

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serve to protect the state treasury. Second, they are designed to strengthen the family unit. Tully, *supra* note 52, at 39-44. However, they may well lead to serious psychological problems for both the applicant and the responsible relative. *Id.* at 39-43. Furthermore, they tend to perpetuate poverty by thrusting a support obligation upon those just emerging from poverty themselves. *Id.* at 42-43.

54 It is not clear whether the states have to consider the receipt of food and shelter as "income and resources." Certainly, the state has the power to take this into account in determining income and resources without running afoul of the Social Security Act. Contributions from relatives must be considered as income, however. 45 C.F.R. § 233.20(a)(4) (1972). Although there are no cases in point, it certainly seems logical to require the states to consider the actual receipt of such benefits in determining benefit levels.

55 1972 Act § 301, 86 Stat. 1468-69.

56 An interesting problem is presented when the applicant voluntarily becomes impoverished. In Bertch v. Social Welfare Dep't, 45 Cal. 2d 524, 289 P.2d 485, (1955), for example, the applicants transferred all of their worldly possessions to a religious society from which they received food and shelter. The applicants stipulated that they would turn over any OAA benefits received to the society. The court held that the finding that the applicants' need was based upon voluntary acceptance of a lower standard of living was immaterial to the need determination. Presumably, however, benefits could be reduced by the value of the benefits actually received from the society.

Under the new Act, the benefits received by the plaintiffs in *Bertch* would be automatically reduced by one-third. *See* note 55 and accompanying text *supra*.

57 193 Cal. App. 2d 708, 14 Cal. Rptr. 776 (1961).

58 *Id.* at 716, 14 Cal. Rptr. at 780-81.

59 The court said: "[S]o long as [the applicant] obtains increased benefits as a result of his obligations toward his wife she must realistically be an 'essential person' within the meaning of the federal regulation." *Id.* at 715, 14 Cal. Rptr. at 780. Should a subsequent federal definition of "essential person" be promulgated which conflicts with the California rule, the federal definition would prevail under conformity and supremacy principles. A state which continued to utilize its own, more restrictive definition of "essential person"

and resources shall be deemed to include any income and resource of [a] spouse, whether or not available to [the applicant]."[60] This presumption applies not only to a legal spouse under state law but also to individuals who "are found to be holding themselves out to the community in which they reside as husband and wife."[61] The breadth of this provision may be subject to constitutional attack.[62]

Under the present OAA system, in addition to items which must be counted as "income and resources," certain other items may be disregarded in determining net need. The states may disregard up to $7.50 of any income and $20 of earned income per month.[63] Earned income between $20 and $80 would reduce benefits at the rate of fifty cents for every dollar earned.[64] Any unearned income over $7.50 and any earned income over $80 will reduce benefits dollar for dollar.

The new plan establishes an income limitation of $1,560 per year[65] and a resource ceiling of $1,500.[66] In determining these figures, however, the Act provides for a significant income and resource disregard,[67] although it maintains the distinctions between earned income

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would be liable under the "all eligible individuals" clause. *See* Townsend v. Swank, 404 U.S. 282 (1971).

60 1972 Act § 301, 86 Stat. 1473.

61 *Id.* This requirement is important since it precludes a couple from terminating their formal marital relationship solely to obtain the increased benefits which would accrue to them as individuals.

62 *See* note 90 and accompanying text *infra.*

63 42 U.S.C. §§ 302(a)(10)(A)(i), (ii) (1970).

64 *Id.* § 302(a)(10)(A)(ii). The section provides that "of the first $80 per month of additional income which is earned the State agency may disregard not more than the first $20 thereof plus one half of the remainder." *Id.*

65 1972 Act § 301, 86 Stat. 1466. For couples this figure becomes $2,340. *Id.*

66 *Id.* For couples this figure becomes $2,250. *Id.*

67 The income disregard is $20 a month for social security or other income and an additional disregard of $65 of earned income plus one-half of any earnings above $65. *Id.*, 86 Stat. 1469-70. This is essentially a work incentive program. *See* notes 91-94 and accompanying text *infra.* State payments under an optional state plan are also excluded. 1972 Act § 301, 86 Stat. 1470. This is consistent with the desire to encourage states to supplement the federal program.

In determining the value of an applicant's resources, the applicant's home, household goods, personal effects, and automobile are not considered if they are within reasonable limits as determined by the Secretary. *Id.* Also excluded are:

> (3) other property which, as determined in accordance with and subject to limitations prescribed by the Secretary, is so essential to the means of self-support of such individual (and such spouse) as to warrant its exclusion;
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> (4) such resources of an individual who is blind or disabled and who has a plan for achieving self-support approved by the Secretary, as may be necessary for the fulfillment of such plan; and
>
> (5) in the case of Natives of Alaska, shares of stock held in a Regional or a Village Corporation, during the period of twenty years in which such stock is inalienable . . . .

and other income.[68] These new income and resource standards are expansive and should bring more recipients into the OAA population.[69] To protect the current eligibility of recipients in states which have more liberal income and resources limits than the Act prescribes, the new plan provides that they shall automatically be deemed to meet the resource test.[70] However, the Senate rejected an amendment which would have required the states to "supplement the new Federal minimum assistance levels to bring them back up to the present levels."[71]

II

Is This Reform?

In attempting to analyze the effectiveness of the reforms embodied in the new scheme, it is helpful to factor the program through a set of criteria for comparison with existing OAA programs.[72]

In determining the resources of an individual (or eligible spouse) an insurance policy shall be taken into account only to the extent of its cash surrender value; except that if the total face value of all life insurance policies on any person is $1,500.00 or less, no part of the value of any such policy shall be taken into account.

Id., 86 Stat. 1470-71.

68 *See* notes 91-94 and accompanying text *infra.*

69 *See* note 73 and accompanying text *infra.*

70 1972 Act § 301, 86 Stat. 1468. This section was added pursuant to an amendment offered by Senator Cranston. In presenting the amendment, the Senator stated:

[T]his amendment is of a basically noncontroversial nature, and would simply "grandfather" in present eligibility and resources of those receiving aid to the aged, blind, and disabled. This encompasses approximately 1,500 individuals whose resources are presently within the allowable resources in their respective States, but who would be over the maximum resource "disregard" in [the new Act].

118 Cong. Rec. S 17,029 (daily ed. Oct. 5, 1972).

71 *See* 118 Cong. Rec. S 17,037 (daily ed. Oct. 5, 1972). As Senator Tunney urged, this amendment would guarantee that the "aged, blind, and disabled public assistance recipients in States such as California will not be worse off after the enactment of [the Act] than they are presently." *Id.* In marshalling the opposing forces, Senator Long responded:

[A]s it would stand without the Tunney amendment, if States wanted to take some of the money they are spending on welfare payments and spend it on social services instead of for these purposes, should they be permitted to do so?

Should they be permitted to reduce their welfare payment levels in order to spend more on education, for example? Without the Tunney amendment, the State would be entrusted with that decision. With the Tunney amendment, it could not make the decision.

Id. at S 17,038.

72 Several authorities have formulated criteria which are helpful in evaluating welfare programs. *Compare* Marmor, *On Comparing Income Maintenance Alternatives*, 65 Am. Pol. Sci. Rev. 83 (1971) (adequacy, stigma, equitable efficiency, incentive effects (work and family), program costs, and political support), *with* Lampman, *Expanding the American System of Transfers To Do More for the Poor*, 1969 Wis. L. Rev. 541 (preserving incentives to seek pre-allowance income, maintaining vertical and horizontal equity, paying out

A. *Adequacy*

One of the most striking aspects of the new program is that the number of eligible individuals in the aged, blind, and disabled categories will almost double.[73] This is not to say that benefit levels will necessarily increase, however.[74] The new benefit level of $130 a month ($195 per couple),[75] although an improvement in most states, is still woefully inadequate. A popular standard for defining the poor is the "poverty line." Its popularity seems to be based more on convenience than rational analysis, however, since it too is inadequate.[76] The pov-

money only or primarily to poor, avoiding incentives to family disintegration, and integrating plan with existing tax and transfer system) *and* Musgrave, Heller & Peterson, *supra* note 10 (adequacy, uniformity, work incentives, incentive to break up families, and lack of privacy).

73 The projected number of recipients under current law for fiscal year 1973 is 3.4 million. HOUSE REPORT 227. Under the new plan that figure would jump to 6.2 million. *Id.* This will be a welcome step since poverty is more prevalent among the aged than among any other age group. In 1968, 25% of all aged persons were poor. *See* COMM. FOR ECON. DEVELOPMENT, IMPROVING THE PUBLIC WELFARE SYSTEM 26 (1970). This rather grim statistic improved to 22% in 1971. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CHARACTERISTICS OF THE LOW INCOME POPULATION: 1971, at 4 (1972).

More applicants will be covered under the Act than even the most liberal states reach now. HOUSE REPORT 227-28. California will experience the least increase, going from 599,700 eligibles under current law to 608,700 under the new Act. *Id.* at 228.

74 *See* note 71 and accompanying text *supra*.

75 *See* 1972 Act § 301, 86 Stat. 1466.

76 Until 1969, the poverty index, developed by the Social Security Administration, was based upon the Department of Agriculture's measure of the cost of a temporary, low-budget, nutritious diet for households of various sizes. The poverty index is derived simply by multiplying this food budget by three to reflect the fact that food typically represents one-third of the expenses of a low-income family. PRESIDENT'S COMM'N ON INCOME MAINTENANCE PROGRAMS, *supra* note 6, at 14.

As a result of the deliberations of a federal inter-agency committee, two important changes were instituted in 1969:

> (1) that the [Social Security Administration] thresholds for nonfarm families be retained for the base year 1963, but that annual adjustments in the levels be based on changes in the Consumer Price Index (CPI) rather than on changes in the cost of food included in the economy food plan; and
>
> (2) that the farm thresholds be raised from 70 to 85 percent of the corresponding nonfarm levels.

BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *supra* note 73, at 17.

Writers have occasionally urged that the poverty line is too generous. *See, e.g.*, R. FRIEDMAN, POVERTY: DEFINITION AND PERSPECTIVE 43-45 (1965). The majority, however, support the view that the line is totally inadequate. *See generally* S. Jacobsen, A Proposal for an Alternative Poverty Line, June 8, 1970 (unpublished thesis in Mann Library, Cornell University). Jacobsen suggests that a more reasonable standard is the Bureau of Labor Statistics' lower standard budget of $5,915 for an urban family of four. *Id.* at 62-95. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 3 STANDARDS OF LIVING FOR AN URBAN FAMILY OF FOUR PERSONS, Bull. No. 1570-5, at 6 (1967). In urging the application of this standard, Jacobsen asserts that it is less arbitrary than the present line because of the "utilization of scientific data for several components and the concept of income elasticity

erty line for a single male over sixty-five is $1,931 in annual income.[77] The new program—which is some $40 per month more generous than that proposed by the President[78]—fails even to reach this paltry figure.[79] Aged couples fare no better; their federally guaranteed $2,340 is some $84 per year below the poverty line.[80] Although some of the states will supplement the federal program,[81] the inescapable fact remains that federally guaranteed benefit levels are inadequate.

B. *Efficiency*

To be truly efficient, a distributive program must make benefits available to the entire target population and no one else.[82] The new plan contains eligibility criteria which are sufficiently stringent to

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for the remainder of the budget provides an objective method of derivation." Jacobsen, *supra*, at 92. However, the BLS budgets are not designed to identify the cut-off point which separates families with enough from those with insufficient income. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *supra*, at vii.

Another possible standard is offered by Victor R. Fuchs—that any family with an income less than one-half the median family income should be classified as poor. *See* Fuchs, *Comment*, in SIX PAPERS ON THE SIZE DISTRIBUTION OF WEALTH AND INCOME 198 (L. Soltow ed. 1969). *See generally* Rein, *Problems in the Definition and Measurement of Poverty*, in POVERTY IN AMERICA (L. Ferman ed. 1968).

77 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *supra* note 73, at 18.

78 The original plan proposed by the President called for monthly benefits of $90. *See Hearings on the Family Assistance Act of 1970 Before the Senate Comm. on Finance*, 91st Cong., 2d Sess., pt. 1, at 199 (1970) (testimony of R. Finch, Secretary, HEW). The monthly level of benefits provided for in the 1972 Act is $130. *See* 1972 Act § 301, 86 Stat. 1466.

79 This inadequacy is in direct contravention of the recommendatiou of the President's Task Force on the Aging, which urged that all elderly citizens should be brought up to the poverty line. PRESIDENT'S TASK FORCE ON THE AGING, TOWARD A BRIGHTER FUTURE FOR THE ELDERLY 24 (1970). In support of this recommendation, the Task Force asserted:

> In spite of the present welfare and Social Security systems, 4.6 million older individuals had money incomes below the "poverty line" in 1968. Over two million elderly Americans who are eligible for Old Age Assistance are at present not receiving it, and even for those who do receive it, in many States the standards for such assistance payments are grossly inadequate.

Id.

80 The poverty line for couples is $2,424. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *supra* note 73, at 18. For a family of four, the poverty line has risen from a base fignre of $3,128 in 1963 to $4,137 in 1971. *Id.* at 17. As inflation continues to push the consumer price index upward, the benefits provided by the new Act will become more and more inadequate.

81 *See* notes 19-23 and accompanying text *supra*. Estimates now available indicate that 30 states and the District of Columbia would maintain a supplemental program. The remaining states, Guam, Puerto Rico, and the Virgin Islands would not. *See* HOUSE REPORT 212-13 (Table 4).

82 For example, the present welfare program is inefficient because it fails to reach certain needy people—single individuals, married couples without children, and the working poor. On the other hand, social security is an inefficient program because it distributes benefits to some who are non-needy.

guard against payment to the non-needy, but this represents no change from existing OAA programs. The new program, however, represents an improvement insofar as it brings more of the target population into the program. But it is still far from adequate unless the artificial poverty line is accepted as realistic.[83]

C. *Potential for Litigation*

A program which spawns litigation cannot be considered efficient. Much of the litigation under the present system has involved the interrelationship of the states and the federal government.[84] The nationalization of the new scheme remedies this problem, although weaknesses in the statute continue to invite litigation. In part, this is unavoidable. A statute would be unwieldy if it attempted to deal with every conceivable source of income or type of resource. However, some specific provisions seem unnecessarily contentious. Foremost is the provision allowing the states to impose a durational residence requirement.[85] Although states clearly should be allowed to limit their payments to bona fide residents, any durational requirement is probably unconstitutional.[86] The institutional inmate exception[87] might also generate

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83 *See* note 76 and accompanying text *supra.*

84 This litigation is usually based upon a conflict between the state plan and the Social Security Act. In that sense the litigation usually, but not always, arises from the conformity hearing. *See generally* 1 CCH Pov. L. Rep. ¶ 1850, at 1860 (1972).

85 1972 Act § 301, 86 Stat. 1474; *see* note 23 *supra.*

86 *See* Shapiro v. Thompson, 394 U.S. 618 (1969); note 23 *supra.* The exact boundaries of *Shapiro* are not clear, but it has been relied upon to strike down a presumption that an applicant who was not a resident for more than one year had moved into the state for the purpose of obtaining benefits and was therefore ineligible. *See* Gaddis v. Wyman, 304 F. Supp. 717 (S.D.N.Y. 1969). In Pease v. Hansen, 404 U.S. 70 (1971), the Supreme Court held, per curiam, that whether a welfare program is or is not federally funded is irrelevant to the constitutional principles enunciated in *Shapiro.* Thus, a state may not rely upon the argument that since a program is state-funded the state may impose whatever criteria it desires. Former HEW Secretary Richardson took the view that state durational residency requirements are unconstitutional:

> We think that the Supreme Court decision on this point makes unconstitutional the provision of H.R. 1 which seeks to permit States to apply residency requirements with respect to eligibility for the State supplement.

Hearings, supra note 19, at 112.

Conceivably, a subdivision of a state might try to impose a residency requirement for applicants for a supplementary program. This might be constitutionally defensible on the basis that *Shapiro* spoke only to the right of interstate travel. However, it would seem that the right to travel interstate could include the right to travel intrastate. Thus, any proposed durational residence requirement, insofar as it served as a prerequisite to eligibility for county general assistance benefits, could impede the right to travel intrastate. *See* Colo. Att'y Gen. Op. No. 70-4521 (1970). *But see* Town of Vanden Broeck v. Reitz, 53 Wis. 2d 87, 191 N.W.2d 913 (1971).

87 *See* note 38 *supra.*

equal protection attacks.[88] The provision that the Secretary may establish a maximum value for an applicant's house is also arbitrary and susceptible to attack. Regardless of what figure the Secretary chooses, there may be needy applicants excluded by his classification.[89] Finally, the presumption that a spouse's income will be imputed to the applicant could be subject to challenge, particularly since the provision applies to those who do not have a support obligation under state law.[90]

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88 This eligibility exclusion will certainly ease administrative burdens, but its supporting rationale is appropriate only with respect to those recipients who are not expected to leave such an institution. The rationale that the institution fulfills the applicant's every need ignores the fact that the recipient might well have outside expenses, such as rent or taxes, which are continuing obligations. Furthermore, if the recipient has an eligible spouse, the spouse—at least until the recipient has been institutionalized for more than six months—will only be entitled to one-half of the reduced couples benefit of $195. As an eligible individual, the spouse would be entitled to $130. *See* 1972 Act § 301, 86 Stat. 1473.

89 For example, suppose that the Secretary establishes a maximum value of $15,000. Applicant A has a house assessed at $14,500. He is therefore "eligible" and has the opportunity to have his application factored through the needs formula. Furthermore, the value of his house will be disregarded under the resource disregard. *Id.*, 86 Stat. 1470. Applicant B has a house assessed at $15,500. He would not be entitled to the resource disregard since he is over the limit established by the Secretary. Furthermore, he is excluded from even applying because of the $1,500 resource limitation. *Id.*, 86 Stat. 1466. This would be the result even if B had no income or other resource and A were earning $3,000 per year. *See* notes 91-92 and accompanying text *infra*. This inequity could be avoided if the Secretary were to establish an exorbitant limit—say $100,000. A more sensible system would be to factor each applicant through the needs formula.

90 The presence of a support obligation has been deemed crucial by the Supreme Court in the AFDC area. In King v. Smith, 392 U.S. 309 (1968), the Court invalidated Alabama's so-called "substitute father" regulation, which denied AFDC payments to a mother who cohabited with any single or married able-bodied man. The Court held that when Congress specified "parent," it meant one who had a duty of support. Subsequently, the Court had to determine the validity of a California regulation which presumed the needs of the family to be reduced by virtue of a man's presence in the home. *See* Lewis v. Martin, 397 U.S. 552 (1970), *rev'g* Lewis v. Stark, 312 F. Supp. 197 (N.D. Cal. 1968). In striking down the regulation, the Court relied on an HEW regulation which provided, in part, that "only income and resources that are, in fact, available to an applicant or recipient for current use on a regular basis will be taken into consideration in determining need and the amount of payment." 397 U.S. at 555. The current regulations provide: "[O]nly such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered." 45 C.F.R. § 233.20(a)(3)(ii)(c) (1972). *See also* Solman v. Shapiro, 300 F. Supp. 409 (D. Conn.), *aff'd per curiam*, 396 U.S. 5 (1969).

These cases were decided upon statutory grounds, however. Consequently, if one wanted to attack the presumption created by the new law, he would have to formulate a constitutional argument. In the *Lewis* case, the plaintiff alleged violation of both the due process and equal protection guarantees. 312 F. Supp. at 199. The lower court dismissed these arguments, and the propriety of that disposition was not resolved on appeal since the constitutional issue was not reached. Thus, a constitutional argument does not appear to be foreclosed.

D. *Work Incentives*

The new Act's provisions with respect to income exclusions have a built-in work incentive. In determining the applicant's income, the administrative agency must disregard $20 of social security or other income plus $65 of earned income per month. One-half of any earned income in excess of $65 will also be disregarded.[91] Applying this formula, a recipient could earn up to a total of $3,900 and receive up to $240 in social security payments before dropping out of the program. Unearned income is not entitled to this disregard. Consequently, families with the same incomes could receive different benefits on the basis of the source of their income. This differential is justified on the ground that it enhances the work incentive by giving earned income a preferred status.[92] The purpose of this kind of incentive is to enable "those aged, blind, and disabled individuals who are able to do some work to do so and in the process give them a higher income in addition to supplemental security income."[93] However, since the overwhelming majority of the recipients in this category are unemployable,[94] the work incentive serves a limited purpose.

E. *Personal Costs*

In evaluating the overall desirability of a given welfare program, it is important to examine the extent to which the program requires

91 1972 Act § 301, 86 Stat. 1469-70; *see* note 67 and accompanying text *supra*. Originally, this provision did not apply to the aged. The difference was justified on the grounds that the blind and the disabled needed added encouragement to enter rehabilitative programs or to accept employment. Fortunately, Congress realized that many aged desire to keep working and that denial of the income disregard would be unfair to them. *See* AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, *supra* note 1, at 46.

92 Another justification might be that by reducing payments to those with unearned income, more money becomes available to those in greater need. *See* ASS'N OF THE BAR OF THE CITY OF NEW YORK, JOINT SUBCOMM. ON WELFARE PROPOSALS, REPORT ON WELFARE PROPOSALS 14-15 (1970) (urging abolition of distinction on basis that it was inconsistent with program's basic purposes). Furthermore, this distinction discourages relatives and friends from making gifts to recipients.

93 118 CONG. REC. S 18,486 (daily ed. Oct. 17, 1972) (summary of conference action on the Act). It is interesting that the Act contains a work incentive for the elderly, particularly since the Social Security program contains a retirement test designed to discourage the elderly from working. *See* 42 U.S.C. § 411 (1970). The 1972 Act liberalized that test by increasing the earnings limitation from $1,680 to $2,100. For earnings in excess of that amount, $1 in social security benefits will be withheld for each $4 of earnings. 1972 Act § 105(a), 86 Stat. 1341. An amendment was added to H.R. 1 which would have required the Secretary of HEW to conduct a study to determine the feasibility of eliminating or extensively revising the earnings test. This amendment was stricken by the conference committee. *See* CONF. REP. NO. 92-1605, 92d Cong., 2d Sess. 8 (1972).

94 In 1964, only 28% of men aged 65 and over were in the labor force. Neiman, *supra* note 52, at 13. Forty percent of the aged are physically unable to carry on their major activity. *Id.*

the sacrifice of certain personal rights.[95] Personal cost is made up of at least three elements: stigma, loss of privacy, and incentive for family disintegration.

1. *Stigma*

Many critics of the current welfare system claim that "the means test degrades and humiliates recipients and that administrative practices perpetuate feelings of shame."[96] The problem may also be viewed in terms of alienation and loss of self-respect.[97] If the needs test is retained, some stigma could be avoided by using the applicant-declaration method of eligibility determination rather than the caseworker-investigation method.[98] Since the new Act retains the needs test and makes no provision for more equitable administration, it represents no improvement in this area.

2. *Loss of Privacy*

The needs test is also onerous because it involves governmental intrusion into the applicant's family and personal affairs. Many commentators feel that extensive inquiries, insofar as they are conducted to root out "chiselers," are unnecessary.[99] Although some recent decisions

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95 In the present system these personal costs are occasionally so high that many eligibles reject assistance. *See* Tobin, Pechman & Mieszkowski, *Is a Negative Income Tax Practical?*, 77 YALE L.J. I, I (1967).

96 Handler & Hollingsworth, *Stigma, Privacy, and Other Attitudes of Welfare Recipients*, 22 STAN. L. REV. 1, 1 (1969). The authors report the findings of a survey taken in an attempt to ascertain recipients' attitudes. According to indicators of embarrassment and community hostility, more than one-half of the recipients surveyed had at least some feelings of stigma. *Id.* at 5. The authors make the perceptive point that those who feel stigmatized are usually the activists who are "more likely to join welfare rights organizations or to seek out lawyers or other people with access to power, such as community organizers, when they have complaints against welfare." *Id.* at 18. Those who felt no stigma seemed to be passive and accepting. *Id.* at 19.

97 In some countries the poor have been able to maintain their self-respect, but in America, "[v]ery many of the poor, for their own part, view the rest of us with resentment or themselves with contempt." A. SCHORR, EXPLORATIONS IN SOCIAL POLICY 264 (1968).

98 As of July 1, 1971, the states were required to implement a simplified method for determining eligibility for OAA. 45 C.F.R. § 205.20(a)(2)(ii) (1972). This simplified method adopts the applicant-declaration principle, subject to further investigation when the applicant's statement is incomplete, unclear, or inconsistent. *Id.* § 205.20(a)(3). *See* REPORT ON WELFARE PROPOSALS, *supra* note 92, at 24-25. *See also* COMM. FOR ECON. DEVELOPMENT, *supra* note 73, at 21:

> Present methods of certification and payment are particularly onerous, needless, and wasteful where the aged, blind, and disabled are concerned. We recommend that the administration of the assistance programs for the aged, blind, and disabled be handled within the Department of Health, Education, and Welfare by federal payments in a manner similar to that used for Social Security payments.

99 The long-established eligibility determination process is increasingly recog-

have limited the scope and manner of the administrative inquiry,[100] questionable techniques[101] remain in operation, and the new Act does not preclude them.

3. *Incentive for Family Disintegration*

Although this aspect of personal costs is usually discussed in conjunction with the AFDC program, it is applicable to the OAA program as well. The new Act provides for a lower total benefit to a couple than to two individuals. However, the apparent incentive for divorce, or perhaps even for common law marriage, is offset by two factors. First, the Act provides that as long as a couple remain living together they will be considered a couple.[102] Second, the lower benefit level for couples is a deliberate attempt to factor economies of scale

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nized as an anachronism. It is unduly time-consuming and administratively costly to the agency, as well as being frustrating and humiliating to the applicant. There is no evidence that persons dependent on public support are any less honest than other citizens. Complicated fraud investigations reveal no more, if as many, efforts at deception than are found in income tax returns or in the fraudulent practices such as shoplifting as experienced by the business world.

NATIONAL STUDY SERVICE, *supra* note 9, at 3.

100 For example, in Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488 (1970), the district court held that Connecticut could not terminate a mother's AFDC payments for refusal to identify the father of her child. The relevant section in the federal statute requires that a state must provide

> for the development and implementation of a program under which the State agency will undertake . . . in the case of a child born out of wedlock who is receiving aid . . . . to establish the paternity of such child and secure support for him.

42 U.S.C. § 602(a)(17) (1970). Through tortured statutory analysis, the court was able to side-step § 602(a)(17) and to base its decision on the statute without reaching the constitutional issues involved. A more reasonable approach would have been to rest the decision on constitutional grounds. There are three potential arguments raised by the case: the fifth amendment's protection against self-incrimination, equal protection, and invasion of privacy rights protected under Griswold v. Connecticut, 381 U.S. 479 (1965).

101 One of the most odious techniques used is the home visit. In Wyman v. James, 400 U.S. 309 (1971), the Court upheld the home visit procedure, saying that the home visit was not a search and that even if it were it would not be unreasonable. *Wyman* should not be construed as a license to permit all types of home visits, however. In *Wyman* the visit was prearranged and there was some pretext of counseling. A surprise visit designed to catch and punish the unwary recipient should mandate a different result.

Another administrative technique which tends to erode the applicant's self-respect is the use of collateral contacts and neighborhood investigations to verify eligibility. Indiscriminate use of collateral contacts has three major disadvantages: the information received is not always reliable, a "climate of suspicion" is created in the neighborhood, and the procedure perpetuates the "badging of the poor." *See* Comment, *Eligibility Determinations in Public Assistance: Selected Problems and Proposals for Reform in Pennsylvania*, 115 U. PA. L. REV. 1307, 1328-33 (1967).

102 *See* note 61 and accompanying text *supra*.

into the Act. Thus, two singles are no better off than a couple with a lower total would be.[103]

F. *Financial Costs*

The estimated total to be spent on various existing OAA, AB, and APTD programs in fiscal year 1973 is $3,614.2 million.[104] Under the new program this would increase to $5,656.2 million.[105] The most significant change, however, would be in the relationship between state and federal spending. Under the existing program, federal expenditures would amount to $2,177.6 million; state expenditures would total $1,436.6 million. Under the new plan, the federal payments would almost double—to $4,137.3 million—although the anticipated state participation would rise only slightly—to $1,518.9 million.[106] Thus, the expected change in estimated federal and nonfederal costs for fiscal year 1973 would amount to an increase in federal spending of $1,959.8 million, and an increase in state expenditures of $82.3 million.[107]

CONCLUSION

The new federal program for income supplementation of the elderly, blind, and disabled marks a significant welfare reform in this country. The most significant improvement is that there will be a single national welfare program with federally guaranteed minimum standards and benefits. The primary limitation is that the guarantees offered by the program are inadequate. With state supplementation, however, realistic benefit levels may be reached in some states.

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103 HOUSE REPORT 150. However, two individuals of the same sex sharing an apartment would be eligible for the full benefit.

104 *Id.* at 210-11 (Table 3).

105 *Id.* at 212-13 (Table 4).

106 *Id.*

107 *See id.* at 214-15 (Table 5).