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## CHILDREN'S BENEFITS IN SOCIAL SECURITY

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Almost five million children of deceased, disabled and retired workers received more than eight billion dollars in Social Security dependent child benefits in 1979.<sup>1</sup> Because they had dependent children in their care, more than one million mothers (and some fathers) received about two billion additional dollars in benefits from Social Security.<sup>2</sup> Social Security benefits for children cost roughly the same as Aid to Families with Dependent Children (AFDC), our best-known welfare program for poor children and their parents.<sup>3</sup> Children's Social Security benefits also cost more than the food stamp program.<sup>4</sup>

Although AFDC and the food stamp program have undergone intense scrutiny, criticism and increasing pressures for reform,<sup>5</sup> the child benefits portion of Social Security has gone largely unattended.<sup>6</sup> Since each of these three programs was de-

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<sup>1</sup> In December, 1978, 4,938,441 children received Social Security Benefits of more than \$700 million. In 1979, payments surely exceeded \$8 billion. See *Quarterly Statistics*, Soc. Sec. BULL., June, 1979, at 72, 80 (table Q-9).

<sup>2</sup> In December 1978, about 1,189,000 parents received Social Security benefits totaling \$160 million because they had children in their care. *Id.* at 78 (table Q-7), 79 (table Q-8), 80 (table Q-10). These recipients include widows under age 60 with children, wives of retirees with children, and wives of disabled workers with children. Some men in similar situations also now draw Social Security benefits.

<sup>3</sup> In December, 1978, AFDC provided \$891,399,000 of federal, state, and local funds to 7,211,000 children and 3,481,000 families. See *Current Operating Statistics*, Soc. Sec. BULL., June 1979, at 27, 55 (table M-32), 56 (table M-33).

<sup>4</sup> See Donnelly, *Food Stamp Costs Head for \$10 Billion Mark*, 38 CONG. Q. 191 (1980). One commentator projects, however, that the food stamp program will cost \$8.7 billion in 1980 and perhaps \$10 billion in 1981. *Id.*

<sup>5</sup> For example, the Food Stamp Act of 1977, Pub. L. No. 95-113, tit. XIII, § 1301, 91 Stat. 958 (codified at 7 U.S.C. §§ 2011-2017 (Supp. III 1979)) significantly modified the food stamp program. Moreover, in 1977 President Carter proposed replacing food stamps with cash grants as part of a comprehensive welfare reform and job guarantee program titled the Program for Better Jobs and Income. See B. FRIEDMAN & L. HAUSMAN, *WORK, WELFARE AND THE PROGRAM FOR BETTER JOBS AND INCOME, A STUDY PREPARED FOR THE USE OF THE JOINT ECONOMIC COMMITTEE*, 95th Cong., 1st Sess. (1977).

<sup>6</sup> In recent years, several books about Social Security have received widespread attention. See R. CAMPBELL, *SOCIAL SECURITY: PROMISE AND REALITY* (1977); INSTITUTE FOR CONTEMPORARY STUDIES, *THE CRISIS IN SOCIAL SECURITY: PROBLEMS AND PROSPECTS* (1977);

signed to aid households with needy dependent children, increased attention to the Social Security plan seems especially appropriate. This Article examines the history and rationale for Social Security dependents' benefits, criticizes a number of the program's internal features, and compares the favorable treatment of children who receive Social Security benefits with that of other needy children. The Article concentrates on Title II of the Social Security Act of 1935,<sup>7</sup> which provides for dependent children's benefits, and concludes with an analysis of four reform options.

## I

## THE SOCIAL SECURITY ACT OF 1935

The Social Security Act of 1935 contained four major cash benefit programs.<sup>8</sup> Title II established the Old Age Insurance Plan (OAI), which was designed to provide "earned" pensions to retired workers. Congress has frequently modified this title, which is now termed Old Age Survivors and Disability Insurance (OASDI).<sup>9</sup> Benefits provided under Title II are typically called Social Security. Title I created Old Age Assistance (OAA), a system of federal grants to the states for need-based pensions for the elderly who lacked adequate income from other sources. OAA was replaced in 1972 by Title XVI, which established a federal program of assistance to the needy aged, blind, and disabled, called Supplemental Security Income (SSI).<sup>10</sup> Titles III and IX set up a cooperative federal-state unemployment compensation scheme.<sup>11</sup> Title IV established a system of federal grants to states for Aid to Dependent Children (ADC). Since its enactment, Con-

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A. MUNNELL, *THE FUTURE OF SOCIAL SECURITY* (1977); J. PECHMAN, H. AARON & M. TAUSIG, *SOCIAL SECURITY: PERSPECTIVES FOR REFORM* (1968). None, however, adequately discussed children's benefits. Nor did the 1979 Advisory Council on Social Security consider children's benefits in its final report. See 1979 ADVISORY COUNCIL ON SOCIAL SECURITY, 96TH CONG., 1ST SESS., REPORT (Comm. Print 1979) [hereinafter cited as 1979 ADVISORY COUNCIL REPORT].

<sup>7</sup> Ch. 531, 49 Stat. 620 (current version at 42 U.S.C. §§ 301-1397f (1976)). Because Social Security dependent children's benefits are provided by Title II of the Social Security Act of 1935, ch. 531, 49 Stat. 622 (current version at 42 U.S.C. §§ 401-432 (1976)), this Article will be concerned primarily with Title II. Dependents' benefits were not included in the original 1935 Act; they were added by the 1939 Amendments (Social Security Act of 1939, ch. 666, 53 Stat. 1362).

<sup>8</sup> See E. WITTE, *THE DEVELOPMENT OF THE SOCIAL SECURITY ACT* 109-71 (1962).

<sup>9</sup> Old Age, Survivors, and Disability Amendment of 1965, Pub. L. No. 89-97, tit. III, § 300, 79 Stat. 361, 42 U.S.C. § 401 (1976).

<sup>10</sup> Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329, 42 U.S.C. § 401 (1976).

<sup>11</sup> See 42 U.S.C. §§ 501-504, 1101-1108 (1976).

gress modified this title in a variety of ways, and it is now designated Aid to Families with Dependent Children (AFDC).<sup>12</sup> Benefits under this provision are commonly referred to as "welfare."

A. *The Justification for Old Age Insurance in 1935*

When enacted in 1935, Congress intended Title II's Old Age Insurance scheme to provide lifetime pensions to elderly retired workers. These pensions were to be payable to retirees as a matter of right, regardless of individual need. Yet Congress obviously adopted the program to remedy widespread need. In 1935, the country found itself with an enormous number of needy and unemployed elderly people who had not saved enough for retirement and were out of work. These people depended on their families, private charity, or increasingly, the public dole for support.<sup>13</sup> Congress took remedial action by enacting Old Age Insurance to function as a forced savings plan. The government would collect money during a worker's productive years so that after his retirement he would receive an adequate pension. He would avoid the stigma of a means tested program, and his fellow citizens would avoid the burden of supporting him with their tax dollars. In short, Congress envisioned that Title II benefits would eventually eliminate most of the need for Title I Old Age Assistance.<sup>14</sup>

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<sup>12</sup> See *id.* at § 601.

<sup>13</sup> Private pensions established by industry were, in 1935, inadequate to the task. Fewer than 15% of industrial workers were covered, and prospects for expansion seemed slim. Moreover, long-term continuous service requirements greatly reduced the number of employees who actually collected. See COMMITTEE ON ECONOMIC SECURITY, SOCIAL SECURITY IN AMERICA, THE FACTUAL BACKGROUND OF THE SOCIAL SECURITY ACT AS SUMMARIZED FROM STAFF REPORTS TO THE COMMITTEE ON ECONOMIC SECURITY 167-78 (1937). The Committee on Economic Security was established by the Roosevelt Administration to develop the Act. See notes 46-48 and accompanying text *infra*. Today, private pensions may be replacing the need for Social Security. See P. DRUCKER, THE UNSEEN REVOLUTION: HOW PENSION FUND SOCIALISM CAME TO AMERICA (1976).

<sup>14</sup> See generally Martin, *Public Assurance of an Adequate Minimum Income in Old Age: The Erratic Partnership between Social Insurance and Public Assistance*, 64 CORNELL L. REV. 437 (1979). Title I was a grant-in-aid plan that subsidized state programs for aid to the aged. At the time, state old age assistance was itself a new approach. Before 1923, there was very little cash relief available to the elderly poor, and none through permanent state programs. Often only institutions such as the poorhouse and county farm provided assistance. Most dependent aged persons were supported by their families, primarily their adult children. Between 1923 and the end of 1934, however, 28 states adopted old age assistance plans. Yet until 1928, almost all the old age assistance recipients lived in Montana, the first state to adopt a plan, with only 884 recipients in 1928. Moreover, because of the depression, only 16 state plans were actually operating in 1933 and many had long waiting lists. At the end of 1934, there were 236,000 old age assistance recipients nationally, who received a total of \$32 million or an average of \$14.68 per month. Two-thirds resided in California, Massachusetts and New York. COMMITTEE ON ECONOMIC SECURITY, *supra* note 13, at 156-65.

Title II was designed to provide retired workers benefits that would reflect their earnings when employed. The drafters aimed for a forty- to fifty-percent wage replacement rate.<sup>15</sup> Making benefits wage related was justified on the ground that higher wage earners would be paying greater Social Security taxes. The shared employer-employee payroll taxes that Title VIII levied were viewed as "contributions" or "premiums" that funded the Title II retirement benefit program. Thus, the tax and benefit provisions combined to create a kind of personal annuity contract which would maintain "individual equity."

Congress never explained why it required higher earners to save more or "buy a larger annuity."<sup>16</sup> Its purpose may have been to protect retired workers against a dramatic decline in their standard of living. Perhaps a better justification is that the purchase of larger annuities by higher wage earners would comport with the expected behavior of fully-informed "rational" workers contracting with private insurance companies. Tradition also favored wage-related benefits because many industrial pension plans then in effect followed this pattern.<sup>17</sup>

Finally, Congress probably had a pragmatic concern: requiring all workers to defer the same amount of current income to earn the same pension might have produced either an excessive drain on the income of low earners or such a modest level of "savings" that retirement benefits for most workers would be insufficient to meet Title II's goals. Although the 1935 Act might not appear to require higher income workers to "save" much more than lower wage earners because the calculations for tax payments (and benefits) were based on only the first \$3,000 of wages each year, most workers in the 1930's earned less than that. In 1936, for example, wages averaged about \$25 per week,<sup>18</sup> or about \$1,300 annually. In any case, whatever the appropriateness of wage-related (and, in turn, contribution-related) pensions for

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In short, Title I was designed to revive, expand, and improve the floundering state old-age assistance plans. Many Congressmen considered it the most important part of the 1935 Social Security Act. See E. Witte, *supra* note 8, at 143.

<sup>15</sup> See, e.g., COMMITTEE ON ECONOMIC SECURITY, *supra* note 13, at 202, 211.

<sup>16</sup> See, e.g., *id.* at 202.

<sup>17</sup> See *id.* at 173. Further, wage-related benefits were provided by both the 1934 Railroad Retirement Act, ch. 868, 48 Stat. 1283, which was declared unconstitutional, and the 1935 Railroad Retirement Act, ch. 812, 49 Stat. 967. See COMMITTEE ON ECONOMIC SECURITY, *supra* note 13, at 173, 178. But see text accompanying note 24 *infra*. Of course, in the private sector, the plan might not be "contributory" and such benefits might be seen as a reward for past contribution to the enterprise.

<sup>18</sup> L. KAMISAR, DOWN AND OUT IN THE U.S.A. 63 (1973).

workers, the principle is firmly embedded in the American theory of Social Security.<sup>19</sup>

From the start, however, Congress contemplated two important deviations from pure individual equity. In the name of "social adequacy,"<sup>20</sup> the annuity benefits some workers were to receive exceeded what they could have purchased from private insurers had they used an amount equal to their Social Security taxes as premiums. The first deviation favored workers who would retire in the early years of the plan. They would be entitled to benefits far greater than those justified by their own plus their employer's actual "contributions." This bias was clearly necessary, however, if the plan was to have any immediate impact on the problems of the elderly poor. Without it, at least a generation would have passed before retirees had "saved" enough through Social Security to collect adequate pensions.<sup>21</sup> In addition, this deviation from individual equity was common among newly-adopted pension plans in private industry. Even today, older workers are often given, in effect, retroactive contribution accounts.<sup>22</sup>

For the Social Security fund to become ultimately self-sufficient, however, later retirees had to pay the price of favoring early retirees. Workers entering the labor force after 1949 were scheduled to receive less in Social Security benefits than they might have obtained by investing privately an amount equal to the combined employee and employer taxes.<sup>23</sup> Even for these workers, however, the projected Title II pensions exceeded what their own employee tax "contributions" could generate in the private annuity market. In short, although Social Security planners were committed to preserving individual equity with respect to the employee's tax payments, they felt that taxes paid by employers could be used for social adequacy purposes. This commitment set an important precedent, even though Social Security to date has turned out to be a better "deal" for all retirees than Congress originally anticipated.

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<sup>19</sup> This is not to say that the wage-related concept of Social Security has not been criticized. Indeed, some economists think Social Security should be entirely abolished. See M. FRIEDMAN, *CAPITALISM AND FREEDOM* (1962); W. SHORE, *SOCIAL SECURITY: THE FRAUD IN YOUR FUTURE* (1975).

<sup>20</sup> For a discussion of adequacy and equity in social insurance, see W. HABER & W. COHEN, *SOCIAL SECURITY: PROGRAMS, PROBLEMS AND POLICIES* 14-16 (1960).

<sup>21</sup> See R. MYERS, *SOCIAL SECURITY* 9 (1975).

<sup>22</sup> See E. WITTE, *supra* note 8, at 148-49, 152.

<sup>23</sup> See E. Witte, *Old-Age Security in the Social Security Act*, in *SOCIAL SECURITY PERSPECTIVES* 131-32 (Lampman ed. 1962).

Congress adopted a second deviation from the principle of individual equity. Although tax rates corresponded to wage levels up to the \$3,000 annual ceiling, benefits replaced a greater proportion of the income of lower wage earners than of higher wage earners. The purpose of this feature was, quite plainly, to keep retirees who had been low earners from having to supplement Social Security with the dole. It also reflected the terms of a number of private pension plans. Indeed, even today in some private plans, pension annuities are completely unrelated to wages and are based solely on length of employment.<sup>24</sup> The commitment to social adequacy reflected in a higher wage replacement rate for low earners has remained a central feature of OASDI.

Congress implemented its decision to favor both early retirees and low earners in the 1935 Act with a single benefit formula. The lifetime pension of a worker retiring at age sixty-five was determined by first calculating his total accumulated wages since 1937, taking into account only the first \$3,000 for any one year. Monthly benefits were 1/2% of the first \$3,000 of accumulated wages, plus 1/12% of the next \$42,000, plus 1/24% of all accumulated wages in excess of \$45,000.<sup>25</sup> Thus, for example, the first \$3,000 in wages produced a pension of \$15 a month, while the next \$3,000 added only \$2.50 more. The formula favored low earners and workers with few years of work prior to retirement, because both would have relatively less accumulated wages. The Act also imposed an \$85 per month benefit maximum, which was reached with \$129,000 in accumulated wages.<sup>26</sup> But it meant little. Even if a worker earned \$3,000 per year, he would only reach the maximum after 43 years of employment. Even if some individuals would eventually have more years of covered work, that could not begin to occur until about 1980 under the original scheme. Because retirement benefits were not payable until a worker accumulated \$2,000 in covered wages, the Act also effectively created a \$10 per month minimum pension.<sup>27</sup>

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<sup>24</sup> See generally BANKERS TRUST COMPANY OF NEW YORK, 1975 STUDY OF CORPORATE PENSION PLANS (1975); Skolnik, *Private Pension Plans, 1950—74*, SOC. SEC. BULL., June, 1976, at 11-14.

<sup>25</sup> Social Security Act of 1935, ch. 531, § 202(a), 49 Stat. 623 (current version at 42 U.S.C. § 402 (1976)).

<sup>26</sup> *Id.* § 202(b). See COMMITTEE ON ECONOMIC SECURITY, *supra* note 13, at 224.

<sup>27</sup> Social Security Act of 1935, ch. 531, § 210(c)(2), 49 Stat. 623 (current version at 42 U.S.C. § 402 (1976)).

Title II's benefit package lacked options that typically would be available in private pension plans. For example, workers could not divert funds from their lifetime annuities to acquire life insurance; nor could they elect a reduced pension in return for a continued payment of the annuity to their spouses after death.<sup>28</sup> The drafters of Title II were committed to a single benefit structure and thus had to design a uniform pension package. The Act provided that if a worker died (either before or after age sixty-five) before receiving retirement benefits equal to 3 1/2% of his covered wages accumulated since 1937, his estate would receive a lump sum equal to the difference. Although those who lived unusually long would benefit from the lifetime annuity arrangement, those who died unusually young were provided with the equivalent of a "life insurance" policy in an amount approximating the combined employer and employee "premiums."<sup>29</sup> This feature, which would yield increasing amounts of "life insurance" as a worker approached age sixty-five, is better understood as a political response to the argument that the Social Security program would forcibly take money from some who would never benefit than as a well-conceived plan for protecting the worker's survivors. At most, the lump sum payment would equal a few years' pension and it would usually be less.<sup>30</sup>

Title II of the 1935 Act is also significant because of what it omitted. The drafters gave no serious public consideration to providing additional "social adequacy" benefits directly to needy dependents.<sup>31</sup> In 1935, however, Congress still regarded social adequacy in individual terms. Thus, even though the Act provided the retired low wage earner with a pension that represented a relatively higher proportion of his past wages than his more affluent counterpart's, the worker's benefits did not take into ac-

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<sup>28</sup> By contrast, under the 1935 Railroad Retirement Act, ch. 812, § 5, 49 Stat. 967 (current version at 45 U.S.C. § 231 (1976)) a worker could elect a reduced pension in order to have his annuity paid to his spouse when he died. COMMITTEE ON ECONOMIC SECURITY, *supra* note 13, at 179.

<sup>29</sup> See COMMITTEE ON ECONOMIC SECURITY, *supra* note 13, at 212. The Title VIII tax rate was initially to be one percent of the first \$3,000 of the employer's wages. The rate was to be in effect until 1939, when it was to increase to 1 1/2%. In 1943, it was to increase to 2%, then to 2 1/2% in 1946 and 3% in 1948. *Id.* at 213.

<sup>30</sup> For example, if a worker had \$50,000 in total accumulated wages when he died, his death benefit would be \$1,750. If the same worker *retired* with \$50,000 in accumulated wages, he would receive benefits of \$625 per year. Thus, the death benefit was equivalent to less than three years of retirement benefits. See *id.* at 224.

<sup>31</sup> I have two main classes of presumptively needy dependents in mind: (a) surviving children and widows of deceased workers or deceased retirees and (b) housewives and young children of retired workers.



count the number of his dependents. Moreover, apart from the lump sum payment to his estate, once the worker died, all benefits to his household ended.<sup>32</sup>

There are a number of possible justifications for Congress' omission of dependents' benefits from the benefit structure of Title II. First, the omission greatly simplified the Act's administration. Second, the concepts of "earned" pension and individual equity were central to the plan's political sales effort; and the deviations adopted were more likely to appear work-based. Moreover, if two workers earn identical wages, the one with more dependents probably has a lower standard of living, and giving the two workers identical benefits leaves them in the same relative economic position.

Third, many viewed family size and the extra need associated with greater dependents as purely a matter of personal choice.<sup>33</sup> This attitude reflected the long-standing American practice of paying workers without adjustment for family size. This attitude was also reflected in the Workmen's Compensation Acts, enacted

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<sup>32</sup> See generally *id.* at 181-88, 459-67. By contrast, most old age insurance systems in other countries explicitly provided survivors' benefits. A report based on Social Security Act background papers suggests that Congress ducked this issue: "While a supplementary system of survivors' insurance paying regular monthly benefits to qualified dependents is socially far more desirable than [the death benefit that was included] it was not deemed advisable to recommend such a system until further investigation was possible." *Id.* at 204. Professor J. Douglas Brown, who was involved in the process, blames fear of Congressional opposition and Supreme Court hostility (as well as concerns about higher costs) for the failure of the original act to include dependents' benefits. See J. BROWN, AN AMERICAN PHILOSOPHY OF SOCIAL SECURITY 132 (1972).

<sup>33</sup> The belief that family size is a private matter and not an appropriate reason for extra transfer payments may have been partially rooted in prejudice.

European laws generally provide dependents' allowances [in unemployment compensation]. Such provision is open to the objection that it introduces the element of need with all its implications of investigation and administrative detail; it prevents relating benefits closely to contributions and favors racial or other groups with high birth rates.

*Id.* at 119. The anti-black, anti-Catholic overtones of this quote should not be overemphasized, however. For example, on the Advisory Council on Economic Security, which expressed its views on the proposed economic security package to the Committee on Economic Security, there were no Catholics among the 20 original members. Professor Witte believes this was simply a gaffe. When it appeared that there were no Catholics on the Committee, the Administration quickly added two. E. WITTE, *supra* note 8, at 52-53. The Social Security Act developers seemed naive about racial issues. When Congress debated the OAA proposal, Southern political leaders successfully fought to reduce federal supervisory powers over state programs to be sure that the government would not "deny aid to any state because it discriminated against Negroes in the administration of old age assistance." *Id.* at 144. Professor Witte states that "it had never occurred to any person connected with the Committee on Economic Security that the Negro question would come up in this connection." *Id.*

in the early 1900's, which typically did not provide extra sums for dependents of injured workers.<sup>34</sup> The state unemployment compensation acts, adopted in response to Titles III and IX of the 1935 Act, also generally paid wage-related benefits that were unrelated to family size.<sup>35</sup>

Fourth, Congress surely realized that workers with families could voluntarily buy adequate life insurance to protect their survivors. Otherwise, given the "no option" benefit structure of Title II, providing adequate survivor benefits would probably compel single persons—and perhaps those with working spouses—to buy something they did not want.

Finally, Congress did not completely ignore a worker's survivors. Elderly widows could claim old age grants under Title I.<sup>36</sup> Moreover, although not considered as an alternative to the expansion of Title II, Congress intended Title IV's Aid to Dependent Children plan to benefit young "orphans" and their mothers.

### B. Children's Benefits

Long before 1935, it was widely agreed that children were entitled to the basic necessities of life—food, shelter, and education. Apart from education, the primary obligation to provide and pay for these necessities traditionally rested with the family. Indeed, until very recently, the legal obligation lay squarely on the father,<sup>37</sup> and the traditional assumption has been that if the man of the house is working, the basic needs of his children will be met. Thus, in the 1930's, the plight of impoverished children was thought to be due mainly to their father's unemployment. The Roosevelt Administration attacked that problem in a variety of ways: through action designed to revive the economy generally, with public employment programs, and by adopting an unemployment compensation scheme that would replace a portion of a worker's wages during periods of temporary involuntary un-

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<sup>34</sup> See generally 2 A. LARSON, WORKMEN'S COMPENSATION LAW § 62 (1976).

<sup>35</sup> In 1936, for example, only the unemployment compensation law of the District of Columbia provided dependents' allowances. States typically replaced 50% of an unemployed worker's wages but the District provided 40% of wages to a single worker, 50% of wages for a worker with a dependent spouse, and an additional 5% of wages for each child, up to a maximum of 65% of wages. COMMITTEE ON ECONOMIC SECURITY, *supra* note 13, at 440, app. V.

<sup>36</sup> Widows under age sixty-five and, in some states, under age seventy were ineligible unless they had a minor child in their care. See 42 U.S.C. § 402(e) (1976); Committee on Economic Security, *supra* note 13, at 161, table 36.

<sup>37</sup> H. CLARK, LAW OF DOMESTIC RELATIONS § 6.2, at 187-89 (1968).

employment. In 1938, the administration sponsored minimum wage laws to attack the problem posed by those who were employed but inadequately paid.<sup>38</sup>

Although the needs of most children could apparently be met by providing work or unemployment benefits for their fathers, not all children had fathers to whom they could turn. In the early history of our nation, society employed a variety of methods to deal with such children. Many were placed in institutions. Others were indentured to work at very early ages, placed in foster homes, or supported by private charity.<sup>39</sup> Many such "poor relief" mechanisms are still with us. After the first White House Conference on Children in 1909, however, a distinctive strategy known as Mothers' Pensions emerged.<sup>40</sup> It evolved into the current AFDC Program.

The Mothers' Pension movement sought to relieve poor mothers with dependent children and no husbands to support them from primitive "poor relief" schemes. Mothers received cash that enabled them to raise their children at home. This was known as "outdoor" relief, in contrast to "indoor" (or institutional) relief. But not all husbandless mothers were to be eligible for Mothers' Pensions. The guiding theme of the movement was that outdoor relief was appropriate *only* if the mothers met certain standards of parenting. Social workers and other child welfare professionals felt that this new type of aid should be made available only to women who were professionally certified. Because its recipients were the "deserving" poor, Mothers' Pensions were supposed to be received with pride.

Illinois enacted the first program in 1911. By 1934, forty-five states had followed suit.<sup>41</sup> Yet in the early 1930's, many plans were in desperate financial straits and unable to fulfill the needs of long waiting lists of qualified applicants. Moreover, in most states the Mothers' Pension plans did not compel the cooperation of local authorities; more than half the states made no financial contribution.<sup>42</sup>

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<sup>38</sup> See Fair Labor Standards Act of 1938, ch. 672, § 6, 52 Stat. 1062 (current version at 29 U.S.C. § 206 (1976)).

<sup>39</sup> See generally J. BROWN, PUBLIC RELIEF 1929-1939, 1-38 (1940).

<sup>40</sup> See generally W. BELL, AID TO DEPENDENT CHILDREN 3-19 (1965); COMMITTEE ON ECONOMIC SECURITY, *supra* note 13, at 233-50; J. HANDLER, REFORMING THE POOR 11-16 (1972); R. LUBOVE, THE STRUGGLE FOR SOCIAL SECURITY 1900-1935, 92-112 (1968). See also Leff, *Consensus for Reform: The Mothers'-Pension Movement in the Progressive Era*, 47 SOC. SERVICE REV. 397 (1973).

<sup>41</sup> COMMITTEE ON ECONOMIC SECURITY, *supra* note 13, at 233-37.

<sup>42</sup> J. BROWN, *supra* note 39, at 27-28.

The promoters of Mothers' Pensions designed the program primarily to benefit widows. In many states, to the extent that a Mothers' Pension program operated at all, it was almost exclusively limited to them. Mothers who did not receive benefits from Mothers' Pensions continued to rely on whatever general relief plan was available in their localities.<sup>43</sup> Many women whose husbands had deserted them, who were divorced, or who had illegitimate children—as well as "uncertified" widows—found themselves relegated to a less deserving category of the poor.<sup>44</sup>

Congress intended Title IV of the 1935 Act, Aid to Dependent Children (ADC), to serve the Mothers' Pensions population. A grant-in-aid plan with few federal requirements,<sup>45</sup> ADC began as a federal bailout of the state Mothers' Pensions programs. Congress did not view Title IV as a high priority item, and did not coordinate it with Title II.

The development of the Social Security Act of 1935 formally began on June 29, 1934, when President Roosevelt appointed a Committee on Economic Security.<sup>46</sup> Because responsibility for the problems of old age security and the security of children was divided among the Committee's staff, the proposals for Old Age Insurance and Old Age Assistance arose out of work separate from that which led to Title IV.<sup>47</sup> Attention was divided still

<sup>43</sup> See generally W. BELL, *supra* note 40, at 9-13.

<sup>44</sup> See J. HANDLER, *supra* note 40, at 12.

<sup>45</sup> See Social Security Act of 1935, ch. 531, §§ 401-06, 49 Stat. 627 (current version at 42 U.S.C. §§ 601-610 (1976)).

<sup>46</sup> Frances Perkins, Secretary of Labor, chaired the Committee. See generally G. MARTIN, MADAM SECRETARY, FRANCES PERKINS (1976). Other members included the Secretary of the Treasury, the Attorney General, the Secretary of Agriculture, and the Federal Emergency Relief (FERA) Administrator, Harry Hopkins. Perkins, Hopkins and Dr. Arthur Altmeyer, Second Assistant Secretary of Labor, were the Committee's most active members. E. WITTE, *supra* note 8, at 7-9. Hopkins had headed President Roosevelt's temporary emergency administration when Roosevelt was governor of New York. Altmeyer later became the long-time chairman of the Social Security Board, which ran the Social Security program.

FERA, Roosevelt's first stop-gap federal welfare plan, was adopted by Congress in early 1933. Hopkins designed and ran FERA, which from the start emphasized public employment as well as cash grants. See A. SCHLESINGER, THE COMING OF THE NEW DEAL 263-81 (1959). Although the Administration had always intended to phase out FERA, the Social Security Act was meant to be permanent and to take over part of FERA's functions. FERA was dissolved at the end of 1935. For Hopkins' version of federal relief efforts, see H. HOPKINS, SPENDING TO SAVE (1936). Perkins, the first woman cabinet member, also came to Washington from New York, where she had been Roosevelt's Industrial Commissioner. See A. SCHLESINGER, *supra*, at 299. See generally, G. MARTIN, *supra*, at 341-56. Professor Edwin E. Witte served as the Committee's director and supervised its staff studies. Various advisory bodies provided ideas, reactions, and audiences for the Committee. See generally, E. WITTE, *supra* note 8, at 22-63.

<sup>47</sup> The proposals were also developed separately from Title V programs—child welfare services, maternal and child health services, and crippled children's services. University of California law professor Barbara Armstrong headed up the studies for the old age pro-

further because the different titles had their own natural constituents. Indeed, for a time it looked as if Congress would enact only Title I, and perhaps the unemployment compensation program. Professor Witte argues that had the President not insisted that Congress act on the entire package, it probably would have provided no federal support of Mothers' Pensions at all.<sup>48</sup> As it was, the federal support recommended by the Committee for ADC—one-third of state costs—was less than the support proposed for OAA—one-half. Congress not only adopted this lesser amount, but further limited federal aid to a maximum of \$6 per month (1/3 of \$18) for the first child and \$4 per month (1/3 of \$12) for additional children.<sup>49</sup> By contrast, Congress provided up to \$15 per month (1/2 of \$30) to support OAA grants to elderly persons.<sup>50</sup>

Nevertheless, ADC did provide benefits for the dependents of some workers, and Title II did not. Title IV's first appropriation was more than \$24 million,<sup>51</sup> and in 1936, ADC paid recipients a total of about \$50 million in benefits from federal, state and local sources.<sup>52</sup> Meanwhile, the Social Security Board was still collecting taxes and paying virtually nothing. No retirement payments were scheduled under Title II until January 1, 1942.

## II

### SOCIAL SECURITY DEPENDENTS' BENEFITS: THE 1939 AMENDMENTS

The most far-reaching of Congress' 1939 amendments to the major Social Security Act programs were those to Title II.<sup>53</sup> A basic change was the creation in Title II of benefits for depen-

grams; Katherine Lenrost and Dr. Martha Elliott of the Children's Bureau (until then largely a children's research and advocacy group in the Department of Labor) headed the staff work that led to the recommendations for grants-in-aid to states for aid to dependent children. See COMMITTEE ON ECONOMIC SECURITY, *supra* note 13, at 135, 227; E. WITTE, *supra* note 8, at 30.

<sup>48</sup> See *id.* at 164.

<sup>49</sup> Social Security Act of 1935, ch. 531, § 403(n), 49 Stat. 628 (current version at 42 U.S.C. § 603 (1976)). Witte provides a fascinating account of how the ADC amounts were determined. See E. WITTE, *supra* note 8, at 163.

<sup>50</sup> Social Security Act of 1935, ch. 531, § 3(a), 49 Stat. 621 (current version at 42 U.S.C. § 303 (1976)).

<sup>51</sup> COMMITTEE ON ECONOMIC SECURITY, *supra* note 13, at 292.

<sup>52</sup> SOC. SEC. BULL.—ANNUAL STATISTICAL SUPPLEMENT, 1974, Table 153, at 173.

<sup>53</sup> For example, these amendments also increased the federal share of state ADC costs from one-third to one-half. Social Security Amendments of 1939, ch. 666, tit. IV, § 402(a), 53 Stat. 1362 (amending 42 U.S.C. § 403(a) (1935)).

dents and the virtual ending of the existing death benefits.<sup>54</sup> This change represented a theoretical shift from the individual equity underpinnings of the 1935 Act towards a social adequacy theory.<sup>55</sup> Part II of this Article examines (1) the problems dependents' benefits were intended to remedy and (2) the legislative history of the basic dependents' benefits provisions.

#### A. *The Need for Dependents' Benefits*

Proponents of Social Security realized that the 1935 Act would provide lower retirement benefits to an individual retiree and his wife than were being paid by many state OAA plans.<sup>56</sup> The proponents of Social Security originally conceded that Title II's modest benefit levels would have to be tolerated in the early years of the program and that some families would have to claim under both programs. Tolerance of widespread dependence on OAA was, however, short-lived. To help overcome that dependence, the 1939 Amendments provided Title II dependents' benefits to both wives over age sixty-five and children under age eighteen of insured retirees. Each dependent was to receive a benefit equal to 50% of the retiree's benefit, or the "primary insurance benefit."

Similarly, the lump sum death benefit payable to deceased workers' estates was usually inadequate to support the worker's surviving family. As a result, many children and their mothers turned to ADC and many elderly widows resorted to OAA. Although Mothers' Pensions were originally conceived as a program for the "deserving" poor, the drafters of the 1939 Amendments concluded that Title II survivor benefits were preferable. The Amendments granted Title II survivor benefits to elderly widows of workers, to minor children of deceased workers, and to their mothers while the children were young. Widows' and mothers' benefits constituted 75% of workers' primary insurance benefit,

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<sup>54</sup> The amendments also changed the method of calculating a worker's individual monthly retirement benefits by abandoning the accumulated wages concept in favor of an average monthly wages formula. Social Security Act Amendments of 1939, ch. 666, tit. II, §§ 202(a), 209(e), 53 Stat. 1362 (amending 42 U.S.C. §§ 402, 409 (1935)). Yet the new formula maintained the basic principles of the 1935 Act. Individual equity generally determined an individual worker's benefits, with special consideration given to early retirees and low wage earners. Indeed, Congress intended the shift to average monthly wages to preserve the favored positions of long-time low earners and early retirees, while denying such status to retirees with only a few high wage years of coverage. See Soc. Sec. BULL., Dec. 1939, at 6.

<sup>55</sup> J. BROWN, *supra* note 32, at 135-36.

<sup>56</sup> E. WITTE, *supra* note 23, at 138.

calculated by reference to wages earned until his death. Children's benefits were 50% of the workers' primary insurance benefit.<sup>57</sup> Thus, the 1939 Amendments provided workers—at no extra cost—with earnings-related life insurance policies and retirement bonuses that increased with the number of their dependents.

Congress' solution to the alleged deficiencies of the 1935 Act raises several important questions. First, why was it undesirable for dependents to resort to ADC and OAA? If those programs were flawed, why were they not amended? If their difficulties were insoluble, why were not all their beneficiaries transferred into Title II? For example, why were only some dependent children entitled to Social Security? In addition, once Social Security benefits were extended to certain dependents, what criteria guided the choice of factors that determined who received benefits? Most important, why were dependents' benefits calculated as a *percentage* of worker primary insurance amounts instead of a flat grant for dependents, or a Title II family minimum based on family size? A careful look at the steps leading to the 1939 Amendments will help answer these questions.

## B. *The Administration's Initiative*

### 1. *The Advisory Council*

In early 1937, the Senate Finance Committee and the Social Security Board agreed to create an Advisory Council on Social Security to study possible amendments to Title II.<sup>58</sup> The most important questions to be considered were: (1) whether the system should start paying out retirement benefits sooner than January 1, 1942; (2) whether the benefits to *retirees* in the earlier years should be made even larger than contemplated; and (3) whether to alter the policy of accumulating reserves for future Social Security payments and holding them in government securities.<sup>59</sup> Also included among the subjects for study was the "advisability of ex-

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<sup>57</sup> If neither a widow nor minor children survived a deceased worker, his dependent parents received benefits equal to 50% of his primary insurance benefits. Social Security Act Amendments of 1939, ch. 666, tit. II, § 202(f)(1), 53 Stat. 1362 (amending 42 U.S.C. § 402 (1935)).

<sup>58</sup> This Advisory Council on Social Security was the first of many. 42 U.S.C. § 907(a) (1976) requires the establishment of an advisory council every four years to consider major policy changes in the Social Security program.

<sup>59</sup> A. ALTMAYER, *THE FORMATIVE YEARS OF SOCIAL SECURITY* 88-89 (1966).

tending the benefits . . . to survivors of individuals entitled to such benefits."<sup>60</sup>

Appointed in May 1937, the Council did not meet until November<sup>61</sup> because of hostilities expressed by Democrats on the House Ways and Means Committee who felt that they—and not the Council—should initiate proposals for Social Security reform.<sup>62</sup> On September 11, 1937, Social Security Board Chairman Altmeyer sent a memorandum to President Roosevelt proposing specific positions for the Administration to adopt on reform issues. This memorandum became the focal point of the Advisory Council's deliberations.<sup>63</sup> Altmeyer proposed that the reform measures provide benefits for wives of retired Social Security beneficiaries and for surviving widows and children of deceased workers.<sup>64</sup>

On April 28, 1938, the President, at Altmeyer's urging, requested the Social Security Board to consider "providing benefits for aged wives and widows, and providing benefits for young children of insured persons dying before reaching retirement age."<sup>65</sup>

On December 10, 1938, the Advisory council issued its report, which clearly reflected the influence of Altmeyer and his staff:

I. The average old-age benefits payable in the early years under Title II should be increased.

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III. The enhancement of the early old-age benefits under the system should be partly attained by the method of paying in the case of a married annuitant a supplementary allowance on behalf of an aged wife equivalent to fifty per cent of the husband's own benefit; *provided*, that should a wife after attaining age 65 be otherwise eligible to a benefit in her own right which is larger in amount than the wife's allowance payable to her husband on her behalf, the benefit payable to her in her own right will be substituted for the wife's allowance.

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<sup>60</sup> 1938 ADVISORY COUNCIL ON SOCIAL SECURITY, 75TH CONG., 2ND SESS., REPORT 3 (Comm. Print 1938) [hereinafter cited as 1938 ADVISORY COUNCIL REPORT].

<sup>61</sup> *Id.* at 3, 6.

<sup>62</sup> See A. ALTMAYER, *supra* note 59, at 90.

<sup>63</sup> *Id.* at 91. In the memorandum, Altmeyer reveals conclusions about appropriate changes that he had already made after discussions with Labor Secretary Perkins, and Roosevelt advisor Hopkins, who continued to play key roles in the evolution of the Social Security program.

<sup>64</sup> *Id.* at 296-97.

<sup>65</sup> *Id.* at 91.



V. The widow of an insured worker, following her attainment of age 65, should receive an annuity bearing a reasonable relationship to the worker's annuity. . . .

VI. A dependent child of a currently insured individual upon the latter's death prior to age 65 should receive an orphan's benefit, and a widow of a currently insured individual, provided she has in her care one or more dependent children of the deceased husband, should receive a widow's benefit. . . .

.....  
VIII. In order to compensate in part for the additional cost of the additional benefits herein recommended, the benefits payable to individuals as single annuitants after the plan has been in operation a number of years should be reduced below those now incorporated in Title II. . . .

.....  
IX. The death benefit payable on account of coverage under the system should be strictly limited in amount and payable on the death of any eligible individual.<sup>66</sup>

To fully understand children's benefits, the proposed treatment of elderly wives requires attention first.

a. *Wives' Benefits*. The council reemphasized the theme of the 1935 Act: a preference for the elderly to retire with what was perceived to be an earned Social Security pension rather than the more "charitable" Old Age Assistance benefits. Old age income protection as a matter of right should be based upon "past participation in the productive processes of the country," the Council argued, because this policy is more "in harmony with individual incentive within a democratic society" than is dependency relief.<sup>67</sup> It was clear to the Council that when Social Security benefits started flowing, many retirees would find them wholly inadequate and would be forced to apply for public assistance as well.<sup>68</sup> In short, even with the benefit bias in favor of early retirees and low wage earners, Social Security benefits, under the 1935 benefit structure, could not satisfy the basic needs of many recipients.<sup>69</sup> The Council might have easily avoided this con-

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<sup>66</sup> 1938 ADVISORY COUNCIL REPORT, *supra* note 60, at 9-10.

<sup>67</sup> *Id.* at 17.

<sup>68</sup> For example, it was estimated that by 1945, the average monthly Social Security benefit would be \$19.00. *Id.* at 13. The average individual Old Age Assistance grant in 1938 was already \$19.21 per month, and substantially larger in the case of an aged couple. *Id.* at 16. Average individual Old Age Assistance grants varied from \$6.37 per month in Mississippi to \$32.39 per month in California. Half the grants ranged from \$15 to \$30. *Id.*

<sup>69</sup> For a contemporaneous discussion of proposals to remedy this problem, see P. DOUGLAS, SOCIAL SECURITY IN THE UNITED STATES 393-98 (2d ed. 1939).

tinued dependency on "welfare" programs by simply increasing early Social Security pensions. Social adequacy was already an accepted part of the Old Age Insurance scheme; why did the Council not simply accord it increased weight?<sup>70</sup>

The Advisory Council did not, however, propose simple extensions of existing "social adequacy" features, such as increasing the monthly minimum pension from \$10 to \$25, or increasing the benefit formula from 1/2% monthly of the first \$3,000 in accumulated wages to 1%. By 1938, the Council's appreciation of the "need" for higher benefits was too sophisticated to permit such a simple solution. Not all workers would need more. The Council argued that the need for larger pensions depended upon a variety of factors—for example, whether the worker was single or married, and if married, whether the spouse also had an earned Social Security pension.

This reasoning should have led the Council to advocate a higher minimum Title II benefit for married pensioners or a uniform allowance for wives of retired workers. It did not. Rather, the Council proposed that a wife's benefit amount to 50% of the worker's benefit. This proposal is at odds with the Council's rationale, because it would mean that funds would be paid to couples for whom the primary insurance benefit was adequate. Moreover, the proposal treated wives of higher income workers more favorably than wives of lower income workers.

The Council furnished scant justification for this anomalous result. It might have argued that those with higher wages had "earned" greater benefits for their wives by paying larger "contributions". But the Council did not assert this. It viewed the benefits justified by a worker's share of the Social Security taxes as his only "entitlement." For example, the council argued that single annuitants "should receive in all cases insurance protection at least equal in value to their individual direct contributions invested at interest"<sup>71</sup>—more than they could obtain from private insurance schemes. Wives' benefits would come out of the *employer's* share, which the Council thought could fairly be used for social adequacy purposes. This view was necessary to support its recommendations, which called for reducing the benefits that some single retirees could have expected under the 1935 formula.<sup>72</sup> The pro-

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<sup>70</sup> Of course, the larger benefits would in fact be no more individually "earned" than public assistance.

<sup>71</sup> See 1938 ADVISORY COUNCIL REPORT, *supra* note 60, at 26.

<sup>72</sup> *Id.* at 10.

posals covering wives were supposed to meet social needs.<sup>73</sup> Yet the Council provided no satisfactory theoretical justification for basing a wife's benefits on her husband's earnings. The Council stated that it "believe[d] that an additional 50 per cent of the basic annuity would constitute a reasonable provision for the support of the annuitant's wife."<sup>74</sup> This is hardly a justification. Indeed, in 1971 Professor J. Douglas Brown, chairman of the 1937-38 Advisory Council, observed:

The question might be asked: Why did the Advisory Council hit upon 50 percent as the wife's allowance? In the recollection of the chairman of the Council, no other percentage was discussed. It was a common-sense judgment and not the result of elaborate studies. "Fifty percent" possessed a quality which might be termed "aesthetic logic" in that it looked right. Any other percentage would have seemed awkward and have encouraged debate. The fact that the 50 percent figure has never been challenged and has remained unchanged for thirty years appears to support the judgment of the Council in reflecting the consensus of the American people.<sup>75</sup>

The Council was apparently seeking a mechanism that formally would be a permanent feature of the plan but in practice would operate to increase benefits primarily in the program's early years. The Council anticipated that its wives' benefit proposal would achieve this objective since it would only be available when the wife had an insufficient benefit account of her own, and many women would soon be building up their own benefits.<sup>76</sup> But this objective alone fails to justify the choice of an allowance related to the husband's wage. The same assumption about women in the work force would make a minimum family benefit and a uniform pension for workers' wives self-liquidating.

The flavor of the Council's further explanations of its proposal can be sensed from its statement: "... the payment of higher benefits to persons retiring in the earlier years of the system ... should not be at the expense of reasonable differentials in benefit payments as related to taxable wages earned."<sup>77</sup> Thus, it appears that the Advisory Council was eager to preserve the principle that

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<sup>73</sup> Cf. *id.* at 24 (allowances to annuitants with elderly wives designed to "meet the greatest social need with the minimum increase in cost"); *id.* at 21 (purpose of Social Security to prevent dependency and to provide a minimum subsistence income).

<sup>74</sup> *Id.* at 24-25.

<sup>75</sup> J. BROWN, *supra* note 32, at 139.

<sup>76</sup> In 1978, however, more than 2 million elderly wives were still receiving dependents' benefits under OASDHI. See SOC. SEC. BULL., June 1979, at 78.

<sup>77</sup> 1938 ADVISORY COUNCIL REPORT, *supra* note 60, at 22.

couples that had earned more should receive more benefits along the entire length of the benefit schedule. Therefore, it would be unwilling to adopt a solution that relied upon a socially adequate family minimum if a substantial portion of the distribution schedule would be flat—that is, if over a fairly large income range, extra past wages would not result in a higher family pension. This would have been the likely result of a family minimum provision, especially in the early years. Thus, to protect Social Security from appearing to the public as purely a public relief program, the Council, perhaps wisely, concluded that the plan's relief aspects must not undermine its overall wage-related character.<sup>78</sup> Nevertheless, the wage related nature of total husband and wife benefits might have been preserved by phasing out the wife's allowance while increasing the husband's earned benefit at a lower rate. If that would have proved too complicated, surely uniform grants to wives would have preserved the wage-relatedness of the family's total benefit. Either approach would have been more "progressive" than the one proposed.

Yet, these alternative solutions raise some difficulties that perhaps the Council wished to avoid. For example, under a family minimum plan, determining the minimum would be a difficult decision. The Council was aware that the cost of living and customary cash wages varied significantly across the nation.<sup>79</sup> The wide range of OAA average payments partly reflected this variation. It would probably be politically unacceptable for the federal government to pay different Title II benefits from state to state. Yet a uniform family minimum might have appeared either excessive in Mississippi or inadequate in California. By relying on the husband's wage history as the basis for the wife's benefits, the Council may have crudely approximated the interstate cost of living variations with an apparently uniform rule. Of course, this approach is hardly adequate for low earners in high cost states.

The alternatives to the Council's proposal probably would have created still a different problem. Under either a family minimum or a uniform wives' allowance, perhaps a great proportion of the elderly couples eligible for Title II benefits would *still* have had to apply for OAA. The 50% benefit proposal, therefore,

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<sup>78</sup> See generally, H. & A. Somers, *Recent Developments and Emerging Concepts*, in W. HABER & W. COHEN, *supra* note 20, at 54-56 (trend away from individual wage loss compensation towards family benefit).

<sup>79</sup> See 1938 ADVISORY COUNCIL REPORT, *supra* note 60, at 21 (differences in OAA and Social Security benefits must be examined according to national wage levels and living costs).

may have wisely concentrated Social Security payments on those with the best chance of surviving on "earned" pensions alone. Although inconsistent with the principle of serving the greatest need, the Council nonetheless implied such a justification: "[w]hile, in some cases, it will be necessary to supplement insurance benefits by assistance grants despite any reasonable enhancement of early benefit payments, it is sound public policy to reduce this overlap considerably."<sup>80</sup>

Of course, it is unclear whether these difficulties affected the Council's ultimate solution. Perhaps it could not untrack its collective mind from the notion that benefits received should be based upon contributions. Or maybe the Council simply saw the political handwriting on the wall. Other explanations may emerge from an examination of the other Council proposals for dependents' benefits.

b. *Survivors' Benefits.* The Council's wives' benefit proposal set a pattern for the others: The Council grafted social adequacy factors on to the Social Security individual equity approach by keying dependents' benefits to the wage history of the breadwinner.

Social Security death benefits were initially intended solely to reflect a measure of individual equity when persons died before they had recouped benefits roughly equal to their own—and their employers'—contributions.<sup>81</sup> Although one can quarrel with the sensibility of this particular form of "life insurance," it nevertheless saved workers without dependents the expense of paying "premiums" for those with dependents. Moreover, the latter could always voluntarily provide additional protection for their survivors. If not originally so, it soon became obvious that many workers did not provide adequately for their survivors through life insurance or other arrangements.

Although survivors were, of course, eligible for other forms of "welfare,"<sup>82</sup> the Council now considered these inadequate. Mothers' pensions, which had by then become ADC benefits, might have been less demeaning than general relief, but were still considered relief. As with wives' benefits, the Council concluded

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<sup>80</sup> *Id.*

<sup>81</sup> See text accompanying note 29 *supra*.

<sup>82</sup> Poor surviving young children and their mothers were eligible for Title IV benefits, and in 1937-38, 43% of the ADC caseload constituted families in which the father was dead. 1938 ADVISORY COUNCIL REPORT, *supra* note 60, at 30. Presumably, in most cases the father had been a worker at the time of his death (or prior to retirement if death occurred thereafter). In September 1938, the average ADC payment was about \$32 per month. *Id.* Similarly, surviving poor widows were eligible for state Old Age Assistance programs once they reached age sixty-five.

that it was socially preferable to pay for need through social insurance rather than through public assistance.<sup>83</sup>

One solution would have been to allow a worker to elect either his anticipated personal annuity or lower individual benefits with actuarially equivalent survivor benefits added. The survivor benefits alternative might even have been imposed on family heads. Alternatively, the existing death benefit could have been substantially increased and made payable in a lump sum or as an annuity, depending upon whether the worker had dependents. All of these proposals would have maintained horizontal equity among single workers, those who would have left dependent widows of varying ages, and those who would have left dependent children.

The Council instead proposed that workers with dependent survivors receive more than those without because their families needed it more.<sup>84</sup> Payment of uniform minimum amounts for each dependent survivor would have been a logical extension of this theory. Such a scheme would have amounted to payment, through the Social Security system, of a nationalized ADC benefit schedule for deceased worker families with young children, and a nationalized OAA benefit schedule for elderly widows of workers. But as in the case of wives' benefits, the Council rejected this approach in favor of payments "related to the normal income of the deceased wage earner."<sup>85</sup>

This proposal is easily understood as it related to aged widows. The Council could not urge a 50% benefit for aged wives and then call for a shift to a flat sum per month when they become widows. Indeed, the proposed elderly widows' benefit of 75% of the husband's benefit plainly was designed to leave the widow with half of the couple's combined amount when he was alive.<sup>86</sup> I will not quarrel with the Council's attempt to maintain aged widows' standards of living.

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<sup>83</sup> "Above all, the relief method is not the most desirable way of meeting childhood dependency. Social insurance offers an improved method of dealing with the problem." *Id.*

<sup>84</sup> In effect, this proposal imposed a 100% estate tax on the value of survivor benefits on workers without dependents. No estate tax was imposed on the value of benefits when dependent survivors claimed them. However, the 100% rate and the unavailability of either earlier spending, gift-giving or charitable contribution alternatives weakens this analogy to the estate tax.

<sup>85</sup> *Id.* at 31.

<sup>86</sup> The Council also proposed that widows under age sixty-five at the time of their husbands' death receive wage-related pensions once they reached age sixty-five. This did not follow obviously from the wives' benefit rule. One reason for the minimum age requirement for widow's benefits may have been Congress' expectation that widows would live with their married children. See J. BROWN, *supra* note 32, at 142.

When it considered benefits for dependent children, however, the Council should have considered whether all surviving children deserve similar benefits or public transfers designed to keep them in the same relative economic position. But the Council never recognized the issue, and its unexplained proposal that survivor's benefits correspond to the deceased's wages is difficult to justify. One could argue that such benefits approximate what the survivors would have received if each deceased father had made an informed decision to buy insurance. Those with higher wages would probably have bought more coverage. But they would have had to pay more for it. The Council candidly admitted, however, that the employer's share would largely finance dependents' benefits at the expense of a reduction in retirement and death benefits for single workers.<sup>87</sup> Thus, the proposed addition of wage-related survivors' benefits amounted to a horizontal income transfer by increasing benefits for all workers with families at the expense of all workers without families.<sup>88</sup> If the Council thought it necessary to decrease pension and death benefits for single persons to promote social adequacy, however, why did it not concentrate on those who needed it most—especially since the Council also envisioned funding some portion of the dependents' benefits with general tax revenues?<sup>89</sup>

Plainly, the Council thought its position favored families—particularly families with children. But its proposal did not uniformly reflect this position, because it favored some survivor children over other survivor children. In addition, although its proposal brought many dependent survivor children onto the Social Security rolls it also left many other children on the ADC rolls. Most of these “stranded” children had fathers living outside the household who refused or were unable to support their children. The Council did not reveal whether it paid any attention to this class of children. Certainly it did not explain why its proposal treated children with fathers that failed to pay child support less favorably than children with deceased fathers who had failed to

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<sup>87</sup> See 1938 ADVISORY COUNCIL REPORT, *supra* note 60, at 29.

<sup>88</sup> See *id.* at 44. The Council itself stated that “Survivors’ protection in the event of the early death of a wage earner with young children is the counterpart of the protection of the wage earner and his aged wife or widow should he live to retirement after his children are grown.” *Id.* at 30.

<sup>89</sup> *Id.* The Council had models for its proposed benefit structure. For example, in 1925 Paul Douglas proposed a social welfare system to assure that a workingman's family would not live in poverty; his allowance scheme would not only have provided uniform amounts per child of low income earners, but also have phased out the benefit for those receiving high wages. See P. DOUGLAS, WAGES AND THE FAMILY 211-12, 220-23 (2d ed. 1927).

obtain adequate life insurance.<sup>90</sup> Moreover, even if the Advisory Council regarded children with deceased fathers more deserving, it apparently did not consider the stigma that might attach to the children left on ADC after others had been "elevated" to Social Security.<sup>91</sup>

There is, of course, a straightforward explanation for the omission of children with able-bodied but nonsupporting fathers. The advisors favored dependents of deceased, elderly and disabled workers because of the breadwinner's *inability* to work.<sup>92</sup> Able-bodied men who did not pay child support for other reasons represented a different problem to the Council. Yet, to the dependent child, the effects were the same.<sup>93</sup>

## 2. *Action on the Advisory Council Recommendations: Endorsement by the Administration*

On December 30, 1938, less than three weeks after the Advisory Council issued its report, Chairman Altmeyer sent the President and Congress a report from the Social Security Board proposing changes in the Social Security Act.<sup>94</sup> Although this report contained recommendations for many programs covered by the 1935 Act, its old age insurance proposals were patterned on the Advisory Council's report.<sup>95</sup>

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<sup>90</sup> The Council did propose Title II protection for another class of ADC beneficiaries—children and families with disabled workers. Records in 1938 indicated that 25% of ADC families had incapacitated breadwinners. SOC. SEC. BULL., Jan. 1939, at 7. Although the Council agreed that disabled workers and their families should receive Title II benefits, many of its members were so concerned about costs and administration that no proposal emerged. See 1938 ADVISORY COUNCIL REPORT, *supra* note 60, at 32-35.

<sup>91</sup> Similarly, the Council seemingly ignored the possibility that additional stigma could fall on recipients of Old Age Assistance when those who would otherwise have received both Social Security and Old Age Assistance survived on Social Security alone.

<sup>92</sup> See Cohen, *Twenty-Five Years of Progress in Social Security*, in W. HABER & W. COHEN, *supra* note 20, at 87-88.

<sup>93</sup> Other aspects of the Council's proposals are noteworthy. It proposed that mothers who stayed at home and cared for children who were entitled to dependents' benefits should receive additional benefits of their own. 1938 ADVISORY COUNCIL REPORT, *supra* note 60, at 31. These widows with young children were not seen as deserving in their own right; rather, their entitlements flowed from their children. See *id.* (payments to widow to cease upon last child attaining age limit for eligibility). It is also noteworthy that the Council did not propose any specific wage-related formula for surviving children and their mothers, even though it did urge specific percentages for elderly wives and widows. Nor did it discuss whether a maximum should be imposed on family benefits.

<sup>94</sup> See SOCIAL SECURITY BOARD, A REPORT OF THE SOCIAL SECURITY BOARD TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES (1938), *reprinted in* SOC. SEC. BULL., Jan. 1939, at 4 [hereinafter cited as BOARD REPORT].

<sup>95</sup> A. ALTMAYER, *supra* note 59, at 96.



Like the Council, the Board justified the wife's benefit as an attempt to deal with the presumptively greater need of retirees with elderly wives.<sup>96</sup> It offered no explanation for why payments were tied to the husband's benefit rather than providing either a minimum family guarantee or a uniform sum to wives. The Board merely emphasized the importance of distinguishing wage-related pensions provided by Title II from individual need-based pensions provided by Title I.<sup>97</sup>

The Board also rested its recommendation for survivor benefits to elderly widows, younger mothers, and children on presumptive need. It emphasized the importance of paying annuities to dependents instead of a lump sum to the estates of workers with or without dependents.<sup>98</sup> The Board did not propose a specific formula for determining survivors' benefits. Moreover, its report did not clearly favor wage-related survivors' benefits.<sup>99</sup>

Unlike the Advisory Council, the Social Security Board examined more than Social Security questions. It called for increased federal aid to state ADC programs.<sup>100</sup> Here, the Board did not find ADC stigmatizing. Rather, it argued that not enough states had adopted ADC programs and that many were inadequately financed.<sup>101</sup> It proposed legislation to strengthen ADC rather than abolish the need for it. In its discussion of Title IV changes, the Board made no reference to the expected impact of its proposals for Title II.<sup>102</sup> President Roosevelt, in his January 16, 1939 message to Congress endorsing the Board's report, did however, point to the "two-fold" approach to the needs of dependent children— Social Security survivor benefits for deceased workers as well as increased federal aid to state ADC programs.<sup>103</sup> Neither the President nor the Board seemed to find anything odd about this division in the treatment of needy children.

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<sup>96</sup> The Board was enthusiastic about future employment for wives. See BOARD REPORT, *supra* note 94, at 6. Since wives' benefit rights based on earnings would eventually increase, the cost of providing a supplement for dependent wives could decrease. *Id.*

<sup>97</sup> *Id.* at 5.

<sup>98</sup> *Id.* at 7.

<sup>99</sup> See *id.*

<sup>100</sup> *Id.* at 16.

<sup>101</sup> See *id.* By the end of 1938, only 42 states had approved ADC programs. See *Statistics for the United States for December, 1938*, SOC. SEC. BULL., Feb. 1939, at 64.

<sup>102</sup> See *Proposed Changes in the Social Security Act*, SOC. SEC. BULL., Jan. 1939, at 16.

<sup>103</sup> See PRESIDENT'S MESSAGE TO CONGRESS TRANSMITTING A REPORT OF THE SOCIAL SECURITY BOARD RECOMMENDING CHANGES IN THE SOCIAL SECURITY ACT, H.R. DOC. NO. 110, 76th Cong., 1st Sess. 2 (1939).

### C. *The Congressional Process*

#### 1. *The House*

The House Ways and Means Committee began hearings on the 1939 Amendments on February 1, 1939.<sup>104</sup> Although public hearings continued for many weeks with dozens of witnesses, and produced more than 2,000 pages of testimony and papers, very little attention was actually given to the questions under consideration here.

Judged by sheer volume of testimony, the most controversial matter before the committee was its reconsideration of the "Townsend Plan," which Congress rejected in 1935.<sup>105</sup> The Townsend proposal called for universal pensions—demogrants for the elderly retired to be paid regardless of prior earnings or current needs. This plan was an alternative to the combination of Old Age assistance and Old Age Insurance. The original Townsend Plan contemplated pensions of \$200 per month. By 1938 most, but not all, of its advocates were willing to support pensions of only about \$60 per month. This scheme, however, would have provided greater benefits to the elderly than any other proposal under consideration, and the elderly supported it enthusiastically.<sup>106</sup> Nevertheless, the Townsend Plan was defeated again. In fact, the wage-related nature of the dependents' benefits proposal may have been prompted by a desire to maintain great distance between the worker-earned orientation of Old Age Insurance and the uniform grant characteristics of the Townsend proposal. If couples were guaranteed an "adequate" minimum Old Age Insurance amount, this minimum might apply—at least in the earlier years—to so many beneficiaries that OAI might begin to look like a scaled-down version of the Townsend Plan.

Still, the Committee was offered other solutions to the Advisory Council dependents' benefits proposals. These alternatives came from across the political spectrum. For example, Dr. J. Frederic Dewhurst, an economist, submitted a booklet prepared by the Committee on Old Age Security of the Twentieth Century Fund, entitled, "A Program for Action." It recommended that wives' without Social Security accounts of their own receive ben-

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<sup>104</sup> A. ALTMAYER, *supra* note 59, at 99.

<sup>105</sup> For a discussion of the Townsend Plan and the Lundeen Bill for Unemployment Insurance, another proposal from the "left" that also failed in 1935, see P. DOUGLAS, *supra* note 69, at 69-83.

<sup>106</sup> See generally A. HOLTZMAN, *THE TOWNSEND MOVEMENT: A POLITICAL STUDY* (1963).

efits of \$15 per month beginning at age sixty. Widows would get the amounts that their retired spouses received before death.<sup>107</sup> Jacob Baker, President of the United Federal Workers, speaking on behalf of the Congress of Industrial Organizations, called for increasing minimum Old Age Insurance payments to the aged by \$20 per month for single individuals, and \$30 per month for couples, with unspecified extra benefits for additional dependents.<sup>108</sup> Dr. Abraham Epstein, Executive Secretary of the American Association for Social Security and a leading writer in the field of economic security, also urged that dependents' benefits go to those with the greatest need. Complaining that too many Old Age Insurance benefits would go to those not in need,<sup>109</sup> he proposed limiting the program entirely to those earning less than \$3,000 (or perhaps \$5,000) per year.<sup>110</sup> For them, Epstein would have provided elderly wives' and widows' benefits.<sup>111</sup> He proposed, however, that surviving children receive benefits from a strengthened Aid to Dependent Children program.<sup>112</sup> Merryle S. Rukeyser, on behalf of the Social Security Commission, established by the Hearst newspapers, recommended that an employee be allowed to elect a reduced annuity for himself supplemented by an annuity payable to his spouse.<sup>113</sup>

The Committee appeared to give little consideration to these proposals. Nearly all witnesses who addressed the issue favored the principle of adding dependents' benefits to Title II.<sup>114</sup> Indeed, what Congressman would oppose old ladies, widows and orphans? The only serious debate over the wives' and survivors' benefits came during the testimony of Dr. Altmeyer. The Com-

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<sup>107</sup> See *Hearings Relative to the Social Security Act Amendments of 1939 Before the House Comm. on Ways and Means*, 76th Cong., 1st Sess. 810 (1939) [hereinafter cited as *Ways and Means Committee Hearings*].

<sup>108</sup> *Id.* at 1477 (statement of Jacob Baker).

<sup>109</sup> *Id.* at 1015-16 (statement of Abraham Epstein).

<sup>110</sup> *Id.* In 1935, the Committee on Economic Security also recommended exempting nonmanual workers earning more than \$250 per month from Title II. See COMMITTEE ON ECONOMIC SECURITY, *supra* note 13, at 211. This proposal was rejected.

<sup>111</sup> *Ways and Means Committee Hearings, supra* note 107, at 1058.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1858 (statement of Merryle Rukeyser). The testimony of professional social welfare representatives is also revealing. They talked exclusively of improving the ADC program through increased federal funding, and ignored the proposed shift of many ADC beneficiaries to the Social Security program. See, e.g., *id.* at 1316 (testimony of Paul T. Beisser, President of the Child Welfare League of America); *id.* at 1319 (testimony of William Hodson, New York City Commissioner of Welfare, on behalf of the American Association of Social Workers); *id.* at 1327 (testimony of D. S. Howard, researcher for the Russell Sage Foundation, also on behalf of the American Association of Social Workers).

<sup>114</sup> See, e.g., *id.* at 1773 (statement of Edwin Witte).

mittee cross-examined Altmeyer at some length about the fairness of favoring workers with families over those without. The proposal to replace the lump sum death benefit provisions of the 1935 Act with survivors' benefits seemed to bother Congressman McCormack: "In other words, John Jones, who has been in the system and who has \$500 to his credit when he dies, who is single and has no widow, nobody eligible—that then goes into the fund?"<sup>115</sup> When Altmeyer said that it would, the Congressman replied, "In other words it is a form of tontine fund?" "Well, it isn't that," Altmeyer protested, "It is getting away from the savings principle and to the insurance principle." This response made little sense. Although the 1935 provisions had been billed as a savings plan, the lifetime annuity feature already made Title II primarily an insurance scheme. A tontine is also an insurance plan, although perhaps Altmeyer thought the word pejorative. He would not, however, acknowledge that a single person might prefer a larger individual annuity to *any* kind of survivors' insurance. Instead, he asserted that the Title II proposals gave all workers "more by way of overall protection."<sup>116</sup>

Congressman Cooper observed that enactment of the proposals would mean that "Congress, through the exercise of its discretion, has decided that this other group [survivors] that did not pay the benefits are more entitled to be taken care of than the estates of these people [those without dependents] who paid in the taxes."<sup>117</sup> Dr. Altmeyer again objected, arguing that it was inaccurate to say that "widows and orphans do not pay for those benefits," and second, that it did not create an "inequity to the single person because . . . [the] schedule of benefits for the single person . . . is equal to or in excess of the protection he could purchase from a private insurance company."<sup>118</sup> These statements are inconsistent: If the wage earner's own benefits at least equal what he is entitled to in return for his taxes, how can he or his dependents *also* pay for the additional benefits his survivors receive? Perhaps sensing this contradiction Altmeyer returned to the insurance package theme: "I don't think you can really think in terms of single men and married men . . . because the single man does not know whether he is going to be single all his life, when he starts out . . . . So it is a family concept. You just cannot think of these people as individuals. You have to think of them in

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<sup>115</sup> *Id.* at 2179.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 2197.

<sup>118</sup> *Id.* at 2197-98.

family relationships.”<sup>119</sup> Later, Congressman McCormack chimed in: “[with] private insurance I have the option of taking out any kind of insurance I want to. Under this [Title II proposals] I have no option.”<sup>120</sup> Altmeyer simply responded that the Title II “policy” provisions ought to provide compulsory survivors’ benefits because that would best serve most of the 130,000,000 potential beneficiaries.<sup>121</sup>

Although the Social Security Board and the Advisory Council based their proposals on a social adequacy rationale, Altmeyer did not argue that the program further abandon the principle of individual equity. Rather, he emphasized the concept of a single comprehensive insurance policy. Perhaps as a result of this line of argument, the Congressmen did not question whether the proposals treated the dependents of low wage earners less fairly than those of high wage earners. At no point during Altmeyer’s testimony did the Committee discuss the appropriateness of providing dependents’ with benefits equal to a percentage of the wage earner’s primary benefit amount. Congressman Reed, however, submitted two particularly revealing written questions to Dr. Altmeyer. Question: “Why should payments to widows and orphans not be limited to needy cases?” Answer:

The whole object of Title II . . . has been to provide protection upon a basis of right and to eliminate the necessity of applying the means test to each recipient. However, since benefits payable to low-wage earners are larger in relation to the wage loss, presumptive or probable need is taken into consideration.<sup>122</sup>

The latter statement, although true, was disingenuous. Although dependents of a low wage earner would receive a greater percentage of his wages, they would receive less money than would dependents of a higher wage earner. Thus, Altmeyer continued to imply that widows and orphans of higher wage earners needed greater benefits than did those of lower wage earners. The word “need,” however, ordinarily refers to some uniform minimum. Perhaps Altmeyer assumed that because poor people were accustomed to little, those with higher incomes would sustain greater psychological injury if they had to survive on the minimum.

Congressman Reed also asked, “[c]ould there be a limitation of the payment of widows’ pensions and orphans’ pensions to per-

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<sup>119</sup> *Id.* at 2199.

<sup>120</sup> *Id.* at 2208.

<sup>121</sup> *Id.* at 2209.

<sup>122</sup> *Id.* at 2299.

sons in low-income groups?"<sup>123</sup> Altmeyer answered that "[t]his limitation could not be made without destroying the contributory principle or denying benefits to the higher-income groups who had already made contributions to the system."<sup>124</sup> But if payments are made for social adequacy reasons based on presumptive need, as Altmeyer had stated earlier,<sup>125</sup> the contributory principle had already been compromised. Moreover, if single workers received benefits equal to what they could have obtained through private insurance, as Altmeyer also argued, it is hard to understand how higher income employees have contributed to dependents' benefits.

In sum, Dr. Altmeyer successfully defended the package of Title II proposals with a variety of conflicting rationales. No one in the public sessions took up the issues raised by Congressman Reed, and the only significant change produced by the Committee's questioning was the addition of surviving dependent parents' benefits. Congressman McCormack had argued that at least some consideration should be given to the single worker supporting his parents,<sup>126</sup> and he prevailed.

Three final points about the proposals Dr. Altmeyer defended should be noted. First, when he testified, the Administration had already decided that benefit amounts for surviving children and their mothers would be 50% and 75%, respectively, of the worker's primary benefit amount. But it offered no explanation for these figures. Second, wage-related benefits for young children of retired workers had been added to the package—also without explanation. Perhaps early in the process no one considered the possibility that even sixty-five year-old men may need financial help to care for minor children. Third, and most important, the Administration's plan now included a family maximum.<sup>127</sup>

At the close of public testimony, the Ways and Means Committee met for six weeks in executive session and eventually reported out a bill, H.R. 6635,<sup>128</sup> which adopted the recommendations of the Administration on wives', widows', and children's Title II benefits.

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> See text accompanying note 122 *supra*.

<sup>126</sup> *Ways and Means Committee Hearings, supra* note 107, at 2209-10.

<sup>127</sup> See notes 144-49 and accompanying text *infra*.

<sup>128</sup> 76th Cong., 1st Sess. (1939).

In its report, the Ways and Means Committee did not further explain its reasons for adopting the dependents' benefits provisions.<sup>129</sup> It did reveal that it had rejected the Advisory Council's proposal to commit general revenues for the payment of benefits, and that it was content to let the Title II "trust fund" grow at a more modest rate than a private insurer's. This break from the original commitment to a fully-funded plan made today's Title II intergenerational transfer system inevitable.<sup>130</sup> The Republican minority of the Ways and Means Committee did not criticize H.R. 6635 too harshly,<sup>131</sup> although it did "question the fairness of providing . . . increased benefits at the expense of single persons and married men whose wives are under 65."<sup>132</sup> On June 10, 1939, after a spirited and lengthy floor debate in which nothing of additional importance was said about the Title II amendments, the House passed the bill by a vote of 364-2.<sup>133</sup>

## 2. The Senate

The Senate Finance Committee hearings on H.R. 6635 resembled those of the Ways and Means Committee. Abraham Epstein again testified against the Administration's Title II Plan, warning "you will be throwing out millions of dollars on people who are not social problems."<sup>134</sup> But his plea fell on deaf ears; the Senate Committee endorsed all the important aspects of H.R. 6635 that dealt with Title II benefits.<sup>135</sup>

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<sup>129</sup> See H.R. REP. NO. 728, 76th Cong., 1st Sess. (1939). The Committee added a few provisions—dependent parent's benefits and benefits for children of retirees—not recommended by the Advisory Council or the Social Security Board in their reports to the President.

<sup>130</sup> 84 CONG. REC. 6715-16 (1939).

<sup>131</sup> See *id.* at 6697 (supplemental statement of Republican Minority).

<sup>132</sup> *Id.* at 6699-7000.

<sup>133</sup> See *id.* at 6951-71; A. ALTMAYER, *supra* note 59, at 106.

<sup>134</sup> *Social Security Act Amendments of 1939: Hearings on H.R. 6635 Before the Senate Comm. on Finance*, 76th Cong., 1st Sess. 190-91 (1939).

<sup>135</sup> The Committee did take issue with the House bill by proposing that the \$10 per month individual minimum OAI benefit for a retired worker be retained. Thus, with a wife's benefit, the couple would be assured of \$15 per month. This was adopted in the Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 203(a), 53 Stat. 1367 (amending 42 U.S.C. § 403 (1935)). The House bill changed the 1935 Act's \$10 per month minimum to a family minimum, which entitled retired husbands and their wives to only \$10 per month if the husband's monthly benefit was \$6.67. Although the Finance Committee's change was a trivial one that would help few people, it shows that the Committee recognized that social adequacy could be improved by altering the minimum. Apparently, however, it did not consider the possibility of entirely substituting an "adequate" family minimum for wage-related dependents' benefits.

On the floor of the Senate, the Townsend plan was once more the center of the debate. This time its proponents had further diluted the plan to provide for only a \$40 per month pension to every person over age sixty who was not working, regardless of the person's other income or wealth. This benefit level was, however, substantially greater than what most OAI retiree households (especially those without working wives) could expect for some time. Nevertheless, the proposed pension was not small enough that rather than being dismissed as utopian, it could have triggered discussion of an important policy issue: should all the retired elderly be paid uniform pensions, or should some receive aid from a means-tested program while others receive wage-related amounts from a social insurance plan? If the Senate had considered this issue, it might also have faced a parallel question: whether dependent children should receive a Townsend-like demogrant rather than Title II benefits in some situations and Title IV benefits in others? But the Senate did not deal with these questions. Most Senators were apparently satisfied that the Townsend proposal was too costly, that the proposed financing for it—a national value added tax—was absurd, and that most established economists opposed it.

On July 12, 1939, the Senate passed H.R. 6635 by a vote of 57-8, without important alterations of the House's changes in Title II. The Conference Committee soon worked out the differences between the two bills, and on August 10, 1939, President Roosevelt signed the approved bill.<sup>136</sup>

### III

#### DEPENDENT CHILDREN'S BENEFITS IN 1939: HOW MUCH?

Part II focused on the strategic policy decisions that shaped the 1939 amendments to Title II, but it did not discuss the particular factors that determined the amount of the children's benefit.

##### *A. Calculation of the Principal Insurance Benefit*

Although the 1939 Amendments substituted an average monthly wage concept for the accumulated wages principle embodied in the 1935 law, the new formula continued to favor early

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<sup>136</sup> A. ALTMAYER, *supra* note 59, at 111-13.



retirees and low wage earners. A retiree's average monthly wages were calculated starting with wages earned in 1937 or at age twenty-two, whichever came later, and continuing until age sixty-five.<sup>137</sup> The formula only included the first \$3,000 in annual wages (a maximum of \$250 per month). Monthly benefits equalled the sum of (1) 40% of the average monthly wage, up to \$50, plus 10% of the average monthly wage in excess of \$50; and (2) 1% of the amount computed in the first part of the calculation multiplied by the number of years in which the worker earned \$200 or more.<sup>138</sup>

This formula's bias towards low wage earners is apparent. A worker retiring in 1947 at age sixty-five with ten years of covered wages averaging \$100 per month would receive a pension of \$27.50 per month,<sup>139</sup> while another worker with \$200 per month in average wages would receive \$38.50 per month. Thus, twice the average wage increased the pension by only 40%.<sup>140</sup>

The bias of the 1939 formula toward early retirees is also apparent. If a \$100 per month worker retired in 1957, with twenty, instead of ten, years of covered wages, his pension would be \$30 per month—only \$2.50 per month, or about 9%, more for ten additional years of employment. The 1939 changes even helped early retirees without dependents; the amended formula was more favorable to single workers who retired after ten years

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<sup>137</sup> See Social Security Act Amendments of 1939, ch. 666, tit. II, § 209(f), 53 Stat. 1362. Wages in quarters prior to 22 would count if the worker earned more than \$50 in such quarter. *Id.*

<sup>138</sup> See *id.* § 209(e), 53 Stat. at 1375-76. The 1939 Amendments, like the 1935 law, required a certain minimum wage history before a worker could draw any retirement benefits. The worker had to be "fully insured." To attain this status he had to have at least one quarter of coverage for every two that elapsed, starting in 1937 or after he reached the age of 21, and a minimum total of six quarters of coverage. The worker would remain "fully insured" after he had 40 quarters of coverage. *Id.* § 209(g), 53 Stat. at 1376-77. The worker was credited with a quarter of coverage for any quarter during which he earned \$50 of wages. The worker also had to be either fully insured or "currently" insured before his family could receive any survivor benefits. To be "currently" insured a worker had to have earned at least \$50 in wages for at least six quarters out of the last twelve quarters prior to the quarter in which he died. *Id.* § 209(h), 53 Stat. at 1377. The less stringent test for currently insured status was especially helpful to the family of a younger deceased worker who had had a substantial unemployment history but who had nonetheless been working regularly for at least a year and a half prior to his death. On the other hand, the rule with respect to survivors' benefits was not as generous as it could have been. For example, the dependent survivors of workers killed in the course of employment are typically entitled to Workmen's Compensation benefits even if the employee had worked only one day.

<sup>139</sup> The calculation is:  $(40\% \times \$50) + (10\% \times \$50) + (1\% \times 10 \times \$25) = \$27.50$ .

<sup>140</sup> The lower wage earner would have 27.5% of his wages replaced, in contrast to only 19.25% for the higher wage earner.

or less of coverage than the 1935 formula. In accord with the Advisory Council proposal, however, the new formula reduced benefits for individual workers with longer years of service, especially if they also had higher earnings. For example, a worker with \$250 per month of covered wages and forty-three years of wage credits received \$85 per month—the maximum—under the original enactment. Under the 1939 formula he became eligible for only \$57.20 per month. On the other hand, if he had a sixty-five year-old wife, the retired couple would be entitled to \$85 per month—still the maximum under the new rules.<sup>141</sup>

Under the 1939 Amendments, survivor benefits were determined simply by applying the retiree benefit formula that existed when the worker died. A concept like the average monthly wage was needed to achieve wage-related survivor benefits that were sensibly related to need. Social policy makes it desirable not to base the amount of a worker's life insurance (dependent annuities) mainly on his number of years in the work force. As a result, the family of a deceased worker would receive greater benefits under the 1939 Amendments than it would have received under the old accumulated wages rule.<sup>142</sup>

### B. *The Child's Benefit Amount and Family Maxima*

The 1939 Amendments provided a young child of a deceased or retired worker a benefit equal to 50% of his father's primary insurance benefit. Elderly wives also received 50% of the primary insurance benefit, while elderly widows and widowed mothers caring for young children received 75%. Although Congress did not explain why it chose these particular percentages, some justifications may be inferred.

Providing husband and wife with 150% of the benefits paid to single beneficiaries instead of 200% probably reflects an assumption about economies of scale—that two together can live more cheaply than two alone. This rationale may also explain the difference between the 75% benefit for widows and the 50% ben-

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<sup>141</sup> See H.R. REP. NO. 728, 76th Cong., 1st Sess., reprinted in 84 CONG. REC. 6711, 6714 (1939). The staff proposals to the Committee on Economic Security in 1934 envisioned an OAI program that would eventually replace an average of 40% or 50% of the earnings of retired workers up to the maximum. See COMMITTEE ON ECONOMIC SECURITY, *supra* note 13, at 202-03. Although the new formula clearly abandoned this goal for individual earners, it did promise a retiree with 40 years of service \$100 per month or less in average wages, and an elderly non-working wife slightly more than 50% of his covered earnings.

<sup>142</sup> Under the 1939 formula, survivor benefits would still increase as the worker's length of service increased.

efit for wives. We can extend this principle to children's benefits. If a widowed mother needs a 75% benefit, her child needs less than that if they live together. But the 1939 Amendments contain an anomaly: children's benefits remain at 50% regardless of family size instead of declining to reflect greater economies of scale as the size of the household increases. This issue must be evaluated in light of the family maxima.

Under the 1939 formula, the maximum monthly pension an individual worker with forty-three years of employment could earn was \$57.20.<sup>143</sup> The \$85 per month maximum established in 1935 was preserved, but it applied to the entire family—not to the individual.<sup>144</sup> If this were the only limit on family benefits, it probably would have applied to only a few families, and primarily to families with relatively high incomes. For example, this maximum would only limit benefits for the family of a worker who died with ten years of covered earnings of \$100 per month if he was survived by a wife and five or more children. By contrast, if a worker with \$250 per month in covered wages died after ten years of employment, his family's benefits would reach the maximum if he was survived by a wife and three or more children.<sup>145</sup>

The 1939 changes also imposed two other family maxima, with the proviso that the lowest of the three would govern: the family benefits could not exceed either 200% of the worker's primary benefit amount or 80% of his average monthly wages.<sup>146</sup> These additional limits affected the families of low wage-earners more than they did the families of high wage-earners. The 80% limit reduced the family maximum for a worker with \$100 per month in average wages from \$85 to \$80, and the 200% limit reduced his family maximum even further—to \$70 per month if he had forty years to average, and to only \$55 per month if he had worked only ten years. On the other hand, the 80% rule did not even affect the worker with maximum coverage (\$250 per month in wages) because of the \$85 limit. The 200% limit would restrict him after he had seven years of coverage, when the \$85 provision would apply.

The public record reveals no discussions, debates, or explanations of the various family maxima. The family maximum ex-

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<sup>143</sup> See text accompanying notes 139-41 *supra*.

<sup>144</sup> Social Security Act Amendments of 1939, ch. 666, tit. II, § 203(a), 53 Stat. 1367.

<sup>145</sup> Without the family maximum, they would receive \$99 per month.

<sup>146</sup> Social Security Act Amendments of 1939, ch. 666, tit. II, § 203(a), 53 Stat. 1367. In no event, however, would the maximum be less than \$20 per month.

pressed in terms of 80% of average wages is, however, understandable. By assuring that retirees and their families suffered some income loss upon retirement, this scheme placed a high value on current work. It also reflected the fact that Social Security is not subject to income tax and that after retirement the family would probably save work-related expenses. The 80% limit is also sensible when applied to families of deceased workers. A family's cost of living probably decreases when the wage-earner dies because there is one less individual to support. Limiting the family's benefits to 200% of the worker's benefit amount is, however, harder to justify. The 200% maximum accounts for economies of scale only up to a certain family size. For example, a family comprised of a widow and one child would receive a 125% benefit, while a widow and three children would receive 200% by virtue of the maximum. But the economy-of-scale justification dissolves when one compares the benefit percentages to survivor families of various sizes under the 1939 Amendments with a plan without such a maximum.

TABLE 1: SURVIVOR BENEFIT PERCENTAGES

|           | 1939 Amendments |       | Plan with No Maximum |       |
|-----------|-----------------|-------|----------------------|-------|
|           | %               | Cum % | %                    | Cum % |
| Widow     | 75              | 75    | 75                   | 75    |
| 1st Child | 50              | 125   | 40                   | 115   |
| 2nd Child | 50              | 175   | 35                   | 150   |
| 3rd Child | 25              | 200*  | 30                   | 180   |
| 4th Child | 0               | 200*  | 25                   | 205   |
| 5th Child | 0               | 200*  | 20                   | 225   |
| 6th Child | 0               | 200*  | 15                   | 240   |
| 7th Child | 0               | 200*  | 10                   | 250   |
| 8th Child | 0               | 200*  | 5                    | 255   |

\*Maximum

The latter plan illustrates that the 1939 rules only crudely reflect economies of scale. In short, the 200% limit rule seems calculated to cut off funds to large families, especially large low-income families. It also precludes payment of full benefits to families composed of a widow and three or more children, or a retiree, an elderly wife and two or more children.<sup>147</sup> This is difficult to jus-

<sup>147</sup> Dependents, but not workers, had their benefits reduced proportionately when the family maximum was reached. *Id.* Dr. Altmeyer explained to the Ways and Means Commit-

tify. Did Congress fear that providing higher benefits to larger families would stimulate large families? It seems implausible that a few extra benefit dollars per month for those extra children would influence a couple's decision to procreate—particularly when the benefits would be paid only if the children were still minors when the father died or reached age sixty-five. Perhaps the drafters just gave up on large families, leaving them to turn to ADC to make up Social Security's shortfall, while hoping that smaller families could survive on the Title II benefits. They may have considered government funding so limited that paying for more children in larger families would result in inadequate benefits for others.<sup>148</sup> On the other hand, if Congress regarded ADC as demeaning for the deserving families of deceased workers, why would it single out large families for continued stigma? Could it be that a government dominated by white Protestants arrived at this result because of its perceptions of Catholics and blacks?<sup>149</sup>

Perhaps there is a less sinister explanation. Dr. Altmeyer emphasized that the proposal resembled a uniform "typical" insurance policy and argued, in effect, that since most men marry, most would want survivor benefits. Perhaps the drafters felt that only families with two or three children were "typical," and that it was unfair to ask all workers to insure themselves for the needs of more than three children. Nonetheless, this argument ignores the concepts of social adequacy and presumptive need. Indeed, if any dependent children could be presumed needy at the death or retirement of their father, children with many siblings could. Thus, the 200% family maximum compounded the unfairness that had been created by the initial decision to make child benefits wage-related.

### C. *The Retirement Test*

In 1935, Title II was called Old Age Insurance. But old age alone did not entitle a worker to the pension. He had to be retired as well. The Committee on Economic Security had assumed

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tee the operation of the family maximum, but he never put forward a general justification for having a maximum. Nor did he defend the particular solution proposed. *House Ways and Means Committee Hearings, supra* note 107, at 2168.

<sup>148</sup> Under the alternate plan in Table 1, for example, families with one, two and three children fare worse than under the straight 50% rule with the 200% maximum. These two plans might well have similar total costs.

<sup>149</sup> Professor Brown views the 200% rule as the liberal one; but this is hard to understand in light of the examples given above. See J. BROWN, *supra* note 32, at 145-46.

from the outset that the purpose of the law was to provide security for the old person when he no longer was a wage-earner. All actuarial calculations had been made on that assumption.<sup>150</sup> Oddly, however, the House bill contained no such requirement.<sup>151</sup> The Senate Finance Committee added the requirement that the claimant not be engaged in his customary employment during any month in which he received benefits. The House conferees accepted this readily and it became part of the law.<sup>152</sup>

The 1939 Amendments somewhat modified the retirement requirement by allowing a retired worker to earn up to \$15 per month in wages without losing his full Title II pension.<sup>153</sup> The 1939 Amendments also dealt with two similar issues concerning dependents' benefits. First, what should happen to the benefits of a retiree's dependents if the retiree works? Second, what should happen to the dependents' benefits if *they* work? The bill answered the first question by providing that the wife and children of a retiree would receive no benefits for any month in which the retiree earned sufficient wages to lose his own benefits.<sup>154</sup> Apparently, Congress reasoned that there is no presumptive need to justify payments to an employed worker or his family. As a practical matter, this feature gave an elderly worker with dependents more incentive to stop working than his single counterpart because the "tax" on his wages in the form of lost benefits was higher.

The bill provided that a *dependent* who earned more than \$15 in a month lost his benefits for that month. But it penalized nobody else;<sup>155</sup> other dependents and the retired worker still received their benefits. This rule was sensible when applied to elderly wives. Most would not work anyway. Those who did work would probably earn only enough for their own maintenance. Giving such a wife a dependent's benefit would not contribute to the social adequacy goal that such payments were designed to promote.<sup>156</sup>

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<sup>150</sup> E. WITTE, *supra* note 8, at 159.

<sup>151</sup> Professor Witte explains that Congressman Beaman objected to all proposed definitions of "retired from active employment," and a Subcommittee of the Ways and Means Committee finally agreed to strike the requirement altogether. *Id.*

<sup>152</sup> *Id.* at 160.

<sup>153</sup> Social Security Act Amendments of 1939, ch. 666, tit. II, § 203(d), 53 Stat. 1367.

<sup>154</sup> *Id.* § 203(e), 53 Stat. at 1367.

<sup>155</sup> *Id.* § 203(d), 53 Stat. at 1367.

<sup>156</sup> A companion rule reduced elderly wives' and widows' dependent benefits by an amount equal to any earned benefit of their own. *Id.* §§ 202(b)(2), 202(d)(2), 53 Stat. at 1367. This reflects the social adequacy rationale of the Advisory Council's recommenda-

The wisdom of applying the "retirement" test<sup>157</sup> to young widows and children is less clear. Probably the drafters did not devote much consideration to the problem of working children. But many teenagers worked regularly, and some who attended school undoubtedly had jobs that paid \$15 per month, at least in the summer.<sup>158</sup> The soundness of denying children benefits because of their own earned income is debatable. On one hand, the working child contributes to the family income and helps pay for his needs, thus reducing the family's need for benefits. The rule might also be seen as a way of encouraging self-enforcement of child labor laws. On the other hand, the child may be working to finance his education, or to otherwise prepare for his future, and it is not at all clear that such an investment should be hampered. Moreover, because working children would tend to come from poor families, the benefit reduction scheme affected families regressively.<sup>159</sup> Nevertheless, the 1939 Amendments subjected children to the \$15 per month rule.<sup>160</sup>

The most curious aspect of the retirement test is the way it treated the earnings of widowed mothers.<sup>161</sup> Because Congress provided benefits to a young widow to assure the family sufficient income to allow her to stay at home and care for her children, Congress understandably would take away her benefits when she

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tions. Elderly couples were presumed to be less needy to the extent that the woman had built up an account of her own. Of course, it also had the practical effect of giving many couples no pension bonus for the woman's work. See *House Ways and Means Committee Hearings, supra* note 107, at 2170 (statement of A. Altmeyer).

<sup>157</sup> The statutory language does not refer to retirement. See Social Security Act Amendments of 1939, ch. 666, tit. II, § 203(d), 53 Stat. 1367. In common usage, the provision for reducing benefits based on employment means just that. It is, of course, awkward to speak of a "retirement" test when referring to young mothers, and in fact, it is an earned income test.

<sup>158</sup> Under the 1939 Amendments, children's benefits for 16 and 17 year olds were restricted to those who regularly attended school. See *id.* § 203(d)(2), 53 Stat. at 1367.

<sup>159</sup> Whether reductions for children's wages were enforced is not entirely clear. Section 203(g) imposed a duty on the recipient to report circumstances that would result in a benefit reduction. A knowing failure to report triggered a 100% penalty. *Id.* § 203(g), 53 Stat. at 1367.

<sup>160</sup> *Id.* § 203(d), 53 Stat. at 1367.

<sup>161</sup> It appears from reading Section 202(e) of the Act that the mother would not be entitled to Widow's Current Insurance Benefits when she and the child were living apart from the father when he died, because it provided that she had to be living with the worker at the time of his death. However, Section 209(n) of the Act deemed a woman to be living with her husband not only if they shared the same household but also if she was either receiving support contributions from him or he had been ordered by a court to contribute to her support. This did, however, seem to exclude the woman who had just separated from her husband and who had not arranged for support from him, or a court order for such support, before he died.

went to work. But under the 1939 Amendments, no matter how much she earned, her children continued to be fully entitled to their benefits.<sup>162</sup> This clearly was not the rule in ADC. Indeed, Congress emphasized in 1939 that the states must take the income of the mother into account in making ADC awards.<sup>163</sup> The drafters did not want Title II to incorporate a demeaning means test. But Congress could have adopted a rule of thumb no more offensive than the \$15 per month rule—such as whether the mother had full-time employment or whether she earned \$100 per month. Perhaps Congress simply assumed that few mothers who went to work could earn enough to support their children as well as themselves. In 1939, this may have been true.<sup>164</sup> Probably, however, Congress never seriously considered the issue.

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<sup>162</sup> Under the 1939 rules, if the family received the maximum, the mother's employment would not result in greater benefits for her children. The reduction for the maximum was applied before the retirement test reduction. *Id.* § 203(a), 53 Stat. at 1367.

<sup>163</sup> *See id.* § 401(b), 53 Stat. at 1379-80.

<sup>164</sup> During the Senate debate, Senator Downey of California, a Townsend supporter, attacked the wives' benefit provision because it required the wife to be too old—age sixty-five—to claim it. Downey was concerned that because many men were married to younger women, their wives would be unfairly excluded from the program. The Advisory Council recognized that retirees with non-working wives younger than they could be as needy as retirees with wives age sixty-five and older. Nonetheless, it proposed restricting the wives' benefit to women age sixty-five and older, because without such a restriction, an unfair inequality among women would be created; many wives would draw benefits at an earlier age than women with their own retirement accounts—who could not begin to receive benefits until they reached age sixty-five. This "inequality" argument is not so obviously compelling. The wife's benefit provided money to relieve presumptive need. If the wives' benefit had no age requirement, a retired man with a younger wife who stayed at home would receive her 50% benefit. Since his earnings would have presumably been their only income, they would need 150% of his benefit to support them both. Senator Downey observed that if the wife worked, she would presumably not need the extra benefit and the bill would disqualify her from the wives' benefit for each month in which she earned \$15 or more. If she had worked in the past, but was not working when he retired, she would receive the wife's benefit until she reached age sixty-five. *See* 84 CONG. REC. 9010-23 (1939). At that time she would begin to receive her own benefit and perhaps some of her wife's benefit. *See* note 156 *supra*. All of these results seem harmonious with the purposes of the 1939 Amendments. But the wife would be able to stop working and draw benefits before age sixty-five and the working single woman could not.

The Advisory Council may have been concerned about providing money for social adequacy reasons that would entice women to drop out of the labor force. Applying a test of "able-bodiedness" to decide whether younger women needed the 50% aid would defeat the Council's purpose of avoiding a demeaning needs-based test. To avoid this problem, the bill, in effect, presumed that wives could and would work between their husband's retirement and their 65th birthday. This is ironic, because wives' benefits were grounded on the assumption that few women were working and building retirement accounts of their own. Widow's benefits were distributed according to the same theory: they could claim if they were age sixty-five or cared for a dependent child. But a childless widow received no benefits between her husband's death and her own sixty-fifth birthday. Again, this struc-



## IV

## DEPENDENT CHILDREN'S BENEFITS 1940-1980

Between 1940 and 1980, Congress has amended Title II numerous times. The changes in the Social Security program reflect some important policy shifts, and have added much complexity. Nonetheless, the basic principles of Social Security have not changed since 1939.

A. *Covered Children*

One major change in Social Security since 1939 has been the increased scope of its coverage. Originally, OAI covered only employees in private industry.<sup>165</sup> Since 1939, Congress has extended the Act's coverage on a compulsory or voluntary basis to self-employed persons (including professionals), most farm and domestic workers, many government employees, employees of non-profit and religious organizations,<sup>166</sup> and others. As a result, Title II also covers more children. Beginning in 1958, the Act provided benefits to children and other dependents of eligible disabled workers, according them the same general status as children of retired workers.<sup>167</sup> After 1958, many families that had previously relied on ADC when the father became incapacitated could instead claim under Title II. Providing benefits for dependents of disabled recipients immediately qualified about 180,000 persons for Social Security.<sup>168</sup> Today, children of disabled bene-

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ture effectively presumes that she will work during those years, and would be enticed away from work if a benefit were available. Indeed, the Advisory Council asserted that most younger widows without dependent children "re-enter employment." Congress failed to consider whether widows of this "in between" age could find employment. The Board had recommended that widows in this category be given temporary aid to help them recover from their husbands' death and to find work. *See Ways and Means Committee Hearings, supra* note 107, at 2170. *See also* Soc. SEC. BULL., Jan. 1939, at 7. This lesser concern for women who did not have children in their care and who were not yet age sixty-five reflected the OAA and ADC pattern then in effect. It is still reflected in the AFDC and SSI picture today.

<sup>165</sup> *See* A. MUNNELL, *supra* note 6, at 158-59.

<sup>166</sup> *Id.*

<sup>167</sup> Between 1956 and 1960, one long-term objective of the 1938 Advisory Council was realized: benefits were finally extended to totally and permanently disabled workers. *Id.* at 158-160, 164-65.

<sup>168</sup> Schottland, *Social Security Amendments of 1958: A Summary and Legislative History*, Soc. SEC. BULL., Oct. 1958, at 7.

ficiaries constitute a significant portion of Title II's child beneficiary population.<sup>169</sup>

When Congress amended Title II, allowing children of the disabled to "escape" Title IV, it gave no special consideration to those who remained.<sup>170</sup> After the adoption of Social Security disability benefits, most Title IV recipients were: (1) children who were not supported by their father, because he had divorced or deserted the children's mother, or (2) children whose fathers had died or become disabled without having compiled adequate earnings records.<sup>171</sup> In short, Congress continued to subject the children in the most difficult family situations and who were most likely to be needy to a program that the public increasingly viewed as demeaning.

Before 1960, many of these children fared even worse. State or county officials often denied a child aid because they disapproved of some characteristic of his mother's, such as her dating behavior or race.<sup>172</sup> The "good mother" requirements of the Mothers' Pension era were not yet extinguished; the federal government did not yet require states to give alternate aid to children who lost ADC because of a perceived flaw in their mother's character.<sup>173</sup> Congress finally changed this in 1960.<sup>174</sup>

## B. Child Benefits

### 1. Changes in Calculating the Principal Insurance Amount

Under Social Security, a worker's principal insurance benefit—now called the Principal Insurance Amount (PIA)—remains wage-related. The calculation of the retirement pension has changed repeatedly, however, and the current rules differ markedly from those enacted in 1939. Inflation and rising real wages have required continual adjustment in the PIA formula.

<sup>169</sup> Of about five million recipients of children's benefits at the end of 1978, about a million and a half were children of the disabled. *Quarterly Statistics, Soc. Sec. BULL.*, June, 1979, at 86 (table Q-9).

<sup>170</sup> See Schottland, *supra* note 168, at 3.

<sup>171</sup> For example, by 1969 just over 70% of AFDC cases involved fathers absent because of marital break-up or because they never married the child's mother. See U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, FINDINGS OF THE AFDC 1971 STUDY (Pub. No. (SRS) 72-03756, 1972). By 1977, such families comprised 84.7% of the AFDC caseload. See note 227 *infra*.

<sup>172</sup> See generally W. BELL, *supra* note 40, ch. VI; Note, *Welfare's "Condition X,"* 76 *YALE L.J.* 1222, 1230-31 (1967).

<sup>173</sup> W. BELL, *supra* note 40, at 73-74; Note, *supra* note 172, at 1223-24.

<sup>174</sup> Act of May 8, 1961, Pub. L. No. 87-31 § 4(b), 75 Stat. 75 (codified at 42 U.S.C. § 604(b) (1976)). See generally *King v. Smith*, 392 U.S. 309 (1968).

Since 1950, Social Security planners have had to cope with two related problems: (1) providing those already retired on Social Security with sufficient income to avoid the dole, and (2) assuring that current workers accumulate enough wage credits to avoid that same plight in the future. These problems have been particularly acute since the mid-1960's.

Congress has taken three steps in an attempt to solve these problems. First, it increased the tax rate to generate more revenue for the system.<sup>175</sup> The rate climb has been relentless, reaching 4.95% in 1977.<sup>176</sup> Fearing Social Security bankruptcy at the end of 1977, Congress voted to implement a further rate hike in 1978, even though earlier legislation contemplated no increase in the total OASDI rate until 2011. Both employers and employees are now scheduled to pay a tax of 6.2% by 1990<sup>177</sup>—about 25% more than previously planned. These increases were defended as necessary to keep the Title II program afloat. As early as 1978, however, Congress considered reducing some of the 1977 tax increases.<sup>178</sup>

Second, Congress increased the annual maximum amount of covered earnings. As workers have earned more, more annual wages have been both subject to the payroll tax and counted toward retirement credits. Various amendments increased the maximum amount of annual covered wages from \$3,000 to \$3,600 in 1950, and then to \$4,800 in 1965. Increases since then have been more dramatic. The 1972 amendments boosted the maximum amount of covered earnings to \$10,800,<sup>179</sup> and, by 1977, to \$16,500.<sup>180</sup> The 1972 changes instituted automatic future increases in maximum wages that were tied to general wage increases.<sup>181</sup> The House Ways and Means Committee estimated

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<sup>175</sup> In the 1940s, the planned growth in the Social Security tax rate, which had been scheduled to jump from 1% to 2% in 1943, to 2 1/2% in 1946 and to 3% in 1949 and thereafter, was actually retarded. The rate began its climb in 1950 and reached 3% in 1960, including a .25% amount to finance the recently-added disability benefits. See A. MUNNELL, *supra* note 6, at 181.

<sup>176</sup> This figure includes two components: 4.375% for OASI and .575% for DI, which maintain separate funds. Congress also added a tax to fund the Medicare program that it had adopted in 1965. In 1977, this tax was .9% for both employers and employees, so that the total 1977 rate for each was 5.85%. See *id.* at 182.

<sup>177</sup> See *Summary of the Conference Agreements on H.R. 9346, The Social Security Amendment of 1977*, [1977] UNEMPL. INS. REP. (CCH) ¶ 15,395 [hereinafter cited as *Conference Agreement*].

<sup>178</sup> See, e.g., *Tackling Social Security: Is 1980 the Year of Decision?*, CONG. Q., Jan. 12, 1980. Congress earmarked all of the tax rate increase through 1980 for the disabled and their dependents. *Conference Agreement, supra* note 177, at 2499-547.

<sup>179</sup> See A. MUNNELL, *supra* note 6, at 183.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

that these automatic increases would double the \$16,500 maximum by 1987.<sup>182</sup> In 1977, however, Congress deemed even this rate of increase insufficient, and scheduled the maximum to double by 1982 and to reach \$42,600 by 1987.<sup>183</sup> This steady climb will increase both revenues and benefit entitlements.

Finally, Congress improved the PIA calculation itself. In 1950, Congress recognized that higher post-war wages and prices had made prior earnings credits inadequate, and passed an amendment designed to give workers a "new start." Beginning in 1952, the worker could calculate his PIA with respect to average monthly wages earned after 1950 only if it increased his benefits. Further, the Amendments increased the PIA formula. The 1950 formula promised 50% of the first \$100 plus 15% of the next \$200, rather than 40% of the first \$50 and 10% of the next \$200 as provided by the 1939 rules.<sup>184</sup> Finally, the 1950 changes "gratuitously" awarded benefit increases to those already retired and to those who would retire with pre-1950 wage records.<sup>185</sup> This change had a dramatic impact. The *average* pension paid in 1950 under the 1939 law was \$26 per month; the 1950 changes boosted that average approximately 75% to \$45 per month.<sup>186</sup>

During the next 15 years, Congress increased the PIA formula modestly. In 1965, as a result of changes made in 1952, 1954 and 1958, the schedule called for benefits equal to 58.85% of the first \$110 plus 21.40% of the next \$290 in average monthly wages.<sup>187</sup> Starting in 1965, however, the benefit schedule skyrocketed. Following the 1972 Amendments, the PIA formula paid more than 100% of the first \$110 in average monthly wages; moreover, an automatic cost of living adjustment was added.<sup>188</sup> As the formula became more generous, it became more complex.<sup>189</sup>

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<sup>182</sup> See *Conference Agreement*, *supra* note 177, at 2499-548.

<sup>183</sup> *Id.*

<sup>184</sup> See A. MUNNELL, *supra* note 6, at 170.

<sup>185</sup> *Id.* This set the pattern for the future: Congress would revise the PIA formula to benefit both the currently retired and the retirees of the future.

<sup>186</sup> See Cohen & Meyers, *Social Security Amendments of 1950: A Summary and Legislative History*, Soc. SEC. BULL., Oct. 1950, at 3. The 1950 changes eliminated the 1% increase in pension amounts for additional years of service that the 1939 law had included. *Id.*

<sup>187</sup> See A. MUNNELL, *supra* note 6, at 170.

<sup>188</sup> See *id.* at 169-70.

<sup>189</sup> As a result, effective June 1976, the PIA formula provided that benefits would be 137.77% of the first \$110 in average monthly wages, plus 50.11% of the next \$290, plus 46.83% of the next \$150, plus 55.04% of the next \$100, plus 30.61% of the next \$100, plus 25.51% of the next \$250, plus 22.98% of the next \$175, plus 21.28% of the next \$100. *Id.* Because no worker who was retired at the start of 1976 could have more than \$613 in average monthly earnings, only the first four steps of the formula applied at that time.

Congress provided that these formula changes were to operate retrospectively. With each change, retirees have had their PIAs recalculated on the new formula and have immediately received larger checks. Similarly, workers retiring after each change have had the new formula applied to "covered" wages earned prior to the formula change.

a. *The "Decoupling" Problem.* These changes produced some interesting results. Congress intended each change in the benefit formula to provide retired people with cost of living increases. The original promise of Title II, even after the 1939 changes, was that a retired worker would receive more than if he had invested his Social Security taxes in private annuities. Many people, however, understood that promise to assume a non-inflationary world. From this perspective, it seemed only fair that as the purchasing power of the dollar declined Title II benefits would increase. Upward adjustments in the PIA formula have done this. Workers who retired years ago now receive pensions far larger than the highest wages they ever earned. These cost-of-living increases demonstrate what a good "deal" Social Security has been. The owners of private fixed dollar annuities, by contrast, have no such increases. Variable annuities or mutual funds do not have fixed returns, but they subject investors to the volatile securities markets.<sup>190</sup>

Congress passed cost-of-living increases, in part, to allow as many retirees as possible to support themselves with Title II grants instead of "welfare." But the increase in the PIA formula for future retirees, combined with increasing wages and the increase in the maximum for covered wages, produced unintended results. Over the years, Congress increased covered wages not only to collect more taxes but also to make a worker's lifetime average monthly wage rise with both real wages and inflation. In 1974, however, critics began to suggest that wages that were increased to account for rising prices were multiplied by a benefit formula that had also been increased to account for the same increase in prices.<sup>191</sup> This phenomenon became known as "double

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<sup>190</sup> Moreover, most private pension plans have little or no post-retirement cost of living increases. See Skolnick, *supra* note 24, at 13-14. For discussions of Social Security as a good investment see R. MYERS, *supra* note 21, at 208-17; Ozawa, *Income Redistribution and Social Security*, 50 SOC. SERVICE REV. 209 (1976); Ozawa, *Individual Equity versus Social Adequacy in Federal Old-Age Insurance*, 48 SOC. SERVICE REV. 24 (1974).

<sup>191</sup> SENATE COMM. ON FINANCE, SOCIAL SECURITY AMENDMENTS OF 1977, S. REP. NO. 95-572, 95th Cong., 1st Sess. 18 (1977) [hereinafter cited as SENATE FINANCE REPORT].

indexing." For a while, keying increases in final wage replacement percentages to rising wages could be justified as promoting the intent of Title II's framers to improve wage replacement rates over time. By the mid-1970's, however, many regarded this policy as too expensive and generous.<sup>192</sup>

In 1977, Congress "decoupled" the system by separating cost-of-living adjustments to a worker's benefits from the PIA calculation made at the time benefits are first determined.<sup>193</sup> Under the old plan, a worker's actual wages since 1950 were averaged, leaving out his five lowest earning years. The resulting average monthly wage (AMW) was plugged into the ever-increasing PIA formula. Under the new law, a worker's wage record is first "updated" or indexed to reflect general increases in average wages since his wages were earned. For example, if the average worker's wages today are \$12,000 and average wages in 1957 were \$4,000, indexing would triple any worker's covered wages for 1957. Once all past years have been indexed, the worst five years are discarded and average indexed monthly earnings (AIME) are determined. This amount is then applied to a new PIA formula.<sup>194</sup>

The new PIA formula, like the old one, is weighted in favor of low wage-earners. But the numbers are quite different. Under the new formula, PIA equals 90% of the first \$180 of AIME plus 32% of the next \$905 of AIME plus 15% of the remainder.<sup>195</sup> Moreover, Congress intended these percentages, unlike the old ones, to remain fixed. On the other hand, the "bend points" will automatically increase to keep pace with wages. For example, the 90% step will eventually apply to more than the first \$180 in AIME.<sup>196</sup> This system maintains a progressive benefit structure

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In such a program wages of \$100 would produce a benefit of \$50. If wages and prices both rise by 10 percent, the individual who is on the benefit rolls will have his benefit increased to \$55 and the person who is still working will have his \$100 wage increased to \$110. If the benefit formula is left unchanged, both individuals would qualify for a \$55 benefit. But under present procedures the benefit formula is also increased to 55 percent and the person who will retire in the future with wages increased from \$100 to \$110 will get a benefit of \$60.50.

*Id.*

<sup>192</sup> By the year 2000, a retiring worker with average earnings would have a 52% wage replacement rate as a percentage of final wages, and a lower earner would have a 75% rate. The projections were for a 65% rate for the average earner and 106% rate for the low earner by the 2040. *Id.* at 20.

<sup>193</sup> See Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1527 (amending 42 U.S.C. § 402 (1976)); *Conference Agreement, supra* note 177, at 2499-548.

<sup>194</sup> See SENATE FINANCE COMMITTEE REPORT, *supra* note 191, at 17-25.

<sup>195</sup> See 1979 ADVISORY COUNCIL REPORT, *supra* note 6, at 57.

<sup>196</sup> *Id.*

and tries to fix the wage replacement rate prospectively at approximately 43% of final wages for those with average covered wages, at 55% for those with low earnings and at 30% for those with high earnings.<sup>197</sup>

In sum, the 1977 Amendments changed the Social Security benefit calculation in two ways: (1) by applying cost-of-living adjustments to retirees only and (2) by adopting the new benefit formula. The savings to the Social Security fund from these two changes are considerable.<sup>198</sup>

b. *Dependents in a Decoupled World.* For dependents of retired and other disabled or deceased workers, the consequences of these changes are essentially the same as they are for retirees themselves. Although Congress repealed the double indexing provisions of the old law that it considered excessively generous in determining initial benefits, dependents continue to receive increases as the cost of living increases.

For dependents of workers who die or are disabled at a *young* age, however, the 1977 law made a dramatic change. The old formula averaged actual wages. As wages and the maximum in covered wages increased, the system increasingly favored young workers and their families. A fifty year-old worker or his dependents might have to average in many years of relatively low earnings from the 1950s, while survivors of a younger worker or a younger disabled worker and his dependents had only more recent, higher wage-years included in the average. Thus, the AMW of the latter group was greater and they received a higher PIA and higher dependent's benefits. The 1977 Amendments cured this "injustice" by adopting the indexed wage plan.<sup>199</sup>

<sup>197</sup> HOUSE COMM. ON WAYS AND MEANS, SOCIAL SECURITY FINANCING AMENDMENTS OF 1977, H. REP. NO. 95-702, 95th Cong., 1st Sess. 12 (1977) [hereinafter cited as WAYS & MEANS COMMITTEE REPORT]. In 1982, the replacement rates are scheduled to be 25% for the maximum earner, 44% for the average earner, and 57% for the minimum wage earner. See 1979 ADVISORY COUNCIL REPORT, *supra* note 6, at 59.

<sup>198</sup> WAYS & MEANS COMMITTEE REPORT, *supra* note 197, at 57.

<sup>199</sup> This decision was deliberate. "Indexing the worker's wages . . . would virtually eliminate the unintended and growing advantage that young disabled workers and their families and the survivors of deceased [young] workers have over retired workers under the present law." *Id.* at 25. See also SENATE FINANCE COMMITTEE REPORT, *supra* note 191, at 22. A simple example illustrates this shift. Suppose a father and son worked on the same assembly line, earning approximately the same wage. If both were killed in an auto accident, the son's family would, under the old law, almost surely get higher benefits, even though the father may have been covered by Social Security for 20 more years. Under the new rule, however, in survivor and disability cases, past wages are updated through indexing. If both father and son earned average annual wages throughout their careers, on their deaths they both will have an average wage AIME and hence average PIA's. Thus, although the father's family would not get more than his son's, it would not get less—assuming the same

2. *Changes in the Children's Benefit Amount, the Family Maximum and the Earned Income Test*

Children's benefits continue to be based on the worker's benefit amount. For children of retired workers, the rate has stayed at 50%, and it now applies to children of the disabled. The 1960 Amendments, however, raised the benefits for surviving children of deceased workers to 75% of the worker's PIA.<sup>200</sup> In any individual family, however, the benefits are still subject to the family maximum, which has also been modified.

a. *Missed Opportunities in Child Benefit Reforms.* Congress, in granting increased benefits to surviving children, did not consider either putting the child's benefit formula on different terms or distributing the new benefits differently. For example, rather than increasing the benefits paid all children to 75% of the worker's PIA, the new money might have created a substantial minimum child's benefit.<sup>201</sup> Congress could also have added a flat dollar amount to the previous 50% rate. Both of these proposals would have aided children of low wage-earners more than the plan Congress adopted. Alternatively, the new money could have been used to increase the family maximum, a move that would also have focused aid on larger and probably needier families. Instead, because the boost was tied to the worker's PIA, children in smaller families whose fathers or mothers had earned the most received the largest increase. This result hardly promotes the goal of social adequacy.

b. *Family Maxima Confusion.* Although various amendments since 1939 have increased the family maximum, these changes have done little except keep the family maximum in line with the ever-improving PIA formula. For example, the 1950 test elimi-

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family composition. The other result is that, starting in 1979, beneficiaries tied to accounts of younger workers—many of whom are children—get substantially less than they would have received under the old law. The result of the old rule may have been intended. It is at least arguable that the son, already making nearly his father's wage, could have looked forward to even higher income had he lived. The higher benefits his dependents received under the old rule were designed to compensate his family for that expectation. Congress apparently found this argument unpersuasive. See WAYS & MEANS COMMITTEE REPORT, *supra* note 197, at 29.

<sup>200</sup> Social Security Amendments of 1960, Pub. L. No. 86-778, § 301, 74 Stat. 959 (amending 42 U.S.C. § 402 (1952)). As an intermediate step, Congress in 1950 provided a single extra child's benefit amount of 25% of the worker's benefit amount, regardless of the number of children in his family. See generally A. MUNNELL, *supra* note 6, at 176-77.

<sup>201</sup> Congress has, however, indirectly increased the minimum dependent benefits by increasing the minimum PIA. See SOC. SEC. BULL.—ANNUAL STATISTICAL SUPPLEMENT, 1975, at 23.



nated the old 200% of PIA ceiling that affected lower earners most, and established dollar ceilings.<sup>202</sup> The 1958 changes made the family maximum the lesser of \$254 a month or 80% of AMW, but not less than 150% of PIA (or PIA plus \$20).<sup>203</sup> Because \$254 was then double the maximum possible PIA, the result of this complex formula was that the family maximum varied oddly in relation to the worker's PIA. Depending on the amount of the worker's average monthly wages, the maximum rose from 150% of his PIA to over 200% of his PIA, and then fell back to 200%.

The 1977 Amendments preserved this pattern, setting the family maximum at 150% of the first \$230 of PIA, increasing it to 188% of PIA for PIAs up to \$332 and then reducing it to 175% of PIA for PIAs of \$433 and more.<sup>204</sup> Although this complex formula appears somewhat illogical, it does insure that anyone with an AIME of up to \$300 will have a family maximum in excess of his AIME. This is an understandable reflection of the needs of very low income families; it also indicates that Title II benefits are no longer restricted to less than the worker's earnings. However, there seems to be no particular rationale for providing an accelerated family maximum for workers with AIMEs between \$393 and \$712—the range that generates PIAs of from \$230 to \$332 a month.

The 1977 reformers apparently did not want to deal with the issue. Instead, they kept in place the relationships that had already developed.<sup>205</sup> Assuming it is desirable to impose a family maximum, simplicity alone would suggest a rule that adopted a uniform proportion of the PIA. A 175% of PIA rule would probably cost no more than the current rule.<sup>206</sup> On the other hand, a different arrangement could further favor low wage-earners with more dependents. For example, a family maximum of 200% of PIA for PIA amounts up to a given level and then phasing down to 100% of PIA for amounts above that level would favor those families most in need. Rather than liberalizing this amount, how-

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<sup>202</sup> See SOC. SEC. BULL., Oct. 1950, at 10.

<sup>203</sup> See A. MUNNELL, *supra* note 6, at 172.

<sup>204</sup> WAYS & MEANS COMMITTEE REPORT, *supra* note 197, at 28. The bend points in the family maximum formula are to be raised as the PIA bend points are changed over time.

<sup>205</sup> *Id.* at 28.

<sup>206</sup> In 1972, Professor Brown proposed that the family maximum be set at 200% of PIA, suggesting then that this would not add greatly to the program's cost. J. BROWN, *supra* note 32, at 148. Other things being equal, under the current formula, unlike the 1939 formula, low wage-earners seem better off with a family maximum expressed as a proportion of PIA rather than AIME.

ever, Congress in 1980 cut back on the family maximum in disability cases. The cutback will harm most larger families with relatively low wage records.<sup>207</sup>

c. *Inattention in the Earnings Test Reform.* Amendments since 1939 have increased the income a recipient can earn without reducing or terminating his Title II benefits. In 1950, Congress raised this amount to \$50 per month from \$14.99.<sup>208</sup> Moreover, starting in 1950, the earnings of a recipient over age seventy-five had no effect on his benefits. In 1954, Congress amended this provision to apply at age seventy-two.<sup>209</sup> By 1972 those under age seventy-two could earn \$175 per month without losing any benefits, and those who earned more lost one dollar of benefits for every two dollars earned.<sup>210</sup> In short, the system effectively imposed a 50% tax on earned income above a \$2,100 annual exemption. As with other provisions in the 1972 law, Congress created an automatic upward adjustment in the exempt amount.

Recently, the concept of benefit reduction for earned income has come under increasing attack. The most outspoken advocates of change seek to make the scheme an old age plan, not simply a retirement scheme. They argue that *all* elderly people—working or not—should receive benefits at age sixty-five, because they have duly contributed, and are old enough to receive benefits.<sup>211</sup> In addition, representatives of the poor allege that the earnings test forces some would-be retirees to continue working at a full-time job because many workers' benefit levels provide inadequate support and part-time work quickly eats up benefits, leaving the worker impoverished. Moreover, they point out that easing the retirement test will allow some recipients who now combine Social Security and SSI to instead combine Social Security and work. Finally, critics charge that by making earnings the only form of income that diminishes Title II benefits, the test unfairly discriminated against the working class. A poverty-diminishing reform does not, however, require a complete end to the earnings test. Rather, the earnings test could be phased in with higher PIA levels, thus eliminating the test for those it burdens most.<sup>212</sup>

In the face of these considerable pressures, Congress in 1977

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<sup>207</sup> Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 101, 94 Stat. 441 (to be codified at 42 U.S.C. §§ 403, 415, 423, 424a).

<sup>208</sup> See A. MUNNELL, *supra* note 6, at 179.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> See 1979 ADVISORY COUNCIL REPORT, *supra* note 6, at 180-85.

<sup>212</sup> See, e.g., H. R. 3385, 95th Cong., 1st Sess. (1977) (introduced by Congressman Vanik).

increased the annual exemption from \$3,000 to \$4,000 starting in 1978, and, incrementally, to \$6,000 in 1982.<sup>213</sup> Moreover, it reduced the age after which all earnings are exempt from seventy-two to seventy, effective in 1982.<sup>214</sup>

d. *Dependents and the Earnings Test.* Until 1977, Congress made any change in the earnings test apply to all beneficiaries. For example, in 1977 a child beneficiary, or one who received his mother's benefits, could earn \$250 a month without losing any portion of his grant.<sup>215</sup> The 1977 Amendments broke from this pattern. The relaxation of the earnings test described above only applies to persons age sixty-five and over. Younger beneficiaries, and children and their younger mothers, for example, are left with the old, lower rate.<sup>216</sup> Political reality probably best explains this disparity: the elderly, not widows and children, lobbied for the change.

Some policies, however, justify the less favorable treatment of mothers and children. Congress originally provided benefits for a wife or widow with dependent children to allow her to stay home and care for her family. Giving her benefits while she engages in substantial employment would not further that goal, and would create an unjustified distinction between her and a young, childless widow, who has always been ineligible for payments, on the ground that she could and should work. On the other hand, if Congress wished to encourage widows with children to work rather than to rely entirely on benefits, but was not willing to take all their benefits away, a reasonably liberal earnings test might have been wiser. Thus, a middle ground between the 1939 \$15 per month rule and the current rule for the elderly might have been appropriate; hence, the current law may indeed be quite fair.

On the other hand, some young mother recipients undoubtedly face the same problems as some of the elderly: their family's benefits are so low that they must work to support their family. Yet the strict earnings test may put them in a bind: for the children's sake, they may feel they can only work part-time, yet they

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<sup>213</sup> *Conference Agreement, supra* note 177, at 2499-549.

<sup>214</sup> *Id.*

<sup>215</sup> *See A. MUNNELL, supra* note 6, at 179.

<sup>216</sup> *See* Social Security Amendments of 1977, Pub. L. No. 95-216, § 203, 91 Stat. 1527 (amending 42 U.S.C. § 402 (1976)). The Senate version would have applied the liberalized test to all beneficiaries, but the House version, which was ultimately adopted, limited it to those over age sixty-five. *See* WAYS & MEANS COMMITTEE REPORT, *supra* note 197, at 14; SENATE FINANCE COMMITTEE REPORT, *supra* note 191, at 26; *Conference Agreement, supra* note 177, at 2499-549.

cannot afford to start losing their benefits if their incomes exceed \$250 per month. Thus, phasing in the earnings test at higher PIA levels might be a sensible solution to the dilemmas of both these mothers and the elderly.<sup>217</sup> This does not, however, seem urgent; \$400 a month in earnings only reduced their benefits by \$75 a month in 1977.

Children who work full-time may be independent and not in need of benefits. Here too, a very generous earnings test may miss the point of the program. Allowing some part-time work by child beneficiaries without benefit loss is probably desirable, and policing any rule that forbade such work would be difficult to enforce. The \$250 monthly amount allowed in 1977 seems to accommodate both of these considerations.

On balance, the failure to extend the liberalized earnings test to those younger than age sixty-five does not seem particularly unfair.<sup>218</sup> Indeed, the most anomalous aspect of the earnings test remains: although a widowed mother earning \$25,000 a year will lose her own benefits, her income does not at all affect the payments to her children. Congress could easily provide that once a mother earns more than what the Bureau of Labor Statistics considers necessary for a moderate standard of living, her children's benefits will also cease. This would better implement Congress' intent to provide benefits only to assure recipients an adequate standard of living. Without such a rule, the different treatment of these children and AFDC children who lose benefits when their mothers work seems especially inequitable.<sup>219</sup>

### C. "Welfare" Changes

As Title II evolved, so did Title I. For example, starting in 1974, Title XVI's Supplementary Security Income plan (SSI) replaced the grant-in-aid OAA program of Title I. SSI now provides federally funded means-tested aid to elderly, disabled, and blind poor people. Many SSI recipients also receive Social Security and SSI serves to "top up" otherwise inadequate Title II benefits.<sup>220</sup>

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<sup>217</sup> See note 212 and accompanying text *supra*.

<sup>218</sup> In 1979, the Council nonetheless recommended making the more generous retirement test applicable to those under age sixty-five. See 1979 ADVISORY COUNCIL REPORT, *supra* note 6, at 184.

<sup>219</sup> AFDC reduces a family's benefits by \$2 for every \$3 earned after a monthly deduction of \$30, plus certain work-related expenses. See 42 U.S.C. § 602(a)(7)-(8) (1976 & Supp. III 1979).

<sup>220</sup> A high proportion of SSI recipients also receive some OASDI benefits. Plainly, the decision to create a national means-tested program for the elderly poor raises questions

In contrast, the AFDC program has remained almost static. The basic terms of Title IV have changed remarkably little since 1935. Congress has imposed new conditions on the states in return for continued federal aid, but the program remains a grant-in-aid plan under which states are firmly in control of the amount of benefits that claimants receive.

Despite Congressional inactivity in the area, after 1960 two factors improved the AFDC program for poor children. First, the number of AFDC claimants has increased dramatically. Heightened awareness of eligibility, demographic changes, the civil rights movement, urban riots and the war on poverty contributed to the increase. A very high proportion of households eligible for AFDC for any significant length of time receive benefits.<sup>221</sup> Second, the federal judiciary began to alter state AFDC programs. Starting in 1968, the Supreme Court has used both the constitution and Title IV to make AFDC available to many children who were previously denied benefits.<sup>222</sup> The Court's decisions may also have lent a new legitimacy to AFDC benefits and recipients.<sup>223</sup>

Nevertheless, many policy analysts, welfare rights advocates, and beneficiaries still disapprove of AFDC. Millions of children continue to depend upon AFDC, whereas millions of others depend instead on Social Security. It is time to consider eliminating this disparate treatment by structuring a comprehensive benefit program for children.

## V

### THE FUTURE OF CHILDREN'S SOCIAL SECURITY BENEFITS

Concern for fairness—both among children within the OASDI program and between those in and those outside the program—must inform the future policies with respect to OASDI. Structuring a fair OASDI program turns largely on personal values.

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about the continuing appropriateness of the "social adequacy" biases in Social Security benefits for workers; but that is not our purpose here. See Martin, *supra* note 14, at 507-19.

<sup>221</sup> See M. Bendick, Jr., Why Do Persons Eligible for Public Assistance Fail to Enroll? (August 1979) (unpublished working paper no. 0819-02 of The Urban Institute).

<sup>222</sup> See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969); King v. Smith, 392 U.S. 309 (1968).

<sup>223</sup> See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970). But see Wyman v. James, 400 U.S. 309 (1971).

Nonetheless, an analysis of issues of fairness is useful. First, the manner in which a program actually functions may reveal an inconsistency between the program's operation and the social values it is intended to promote. Second, examining arguments about fairness may help both adversary groups and policy analysts decide whether these issues ought to be given high priority. Finally, some of these issues do turn on facts rather than values and are more vulnerable to logical criticism. Examination of various policy options designed to eliminate OASDI's inequities puts the issue of fairness into sharp focus.

#### A. *Option I—Internal OASDI Reform*

Suppose that (1) children's OASDI benefits were no longer paid on a wage replacement basis; (2) the OASDI family maximum were eliminated; and (3) the earnings test were to apply differently to children's benefits. Children's benefits might either be paid as a flat monthly sum per child; alternatively, they might equal the difference between the family's other OASDI benefits and a minimum family benefit level. Suppose that monthly flat grants were \$150 per child; or alternatively that the family minimum for a widow with two children would equal \$500 per month, for a disabled worker with a spouse and two children, \$600 per month, and so on. Under either scheme, the family maximum would be repealed. Finally the earnings test would change: sufficient earnings by either parent would reduce OASDI child benefits on the same terms (one dollar lost for each two dollars earned) that now govern OASDI generally.

##### 1. *OASDI Children Categorized*

Of the five categories of OASDI child recipients, two—children under 18 whose fathers (or in some cases mothers) are either deceased or disabled—deserve special attention. At the end of 1978, approximately two million children with deceased fathers and 1.3 million children with disabled fathers received OASDI funds.<sup>224</sup> A third and smaller group consists of children under 18 of retired OASDI beneficiaries—approximately 400,000 at the end of 1979.<sup>225</sup> Groups four and five include children over 18 with deceased, retired or disabled parents. These children qualify for OASDI benefits either because they are in college and under

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<sup>224</sup> *Quarterly Statistics, Soc. Sec. BULL.*, Sept. 1979, at 86.

<sup>225</sup> *Id.*

the disqualifying age, or are themselves disabled, thus qualifying for benefits of their own. In March 1979, about 800,000 recipients were in the former group, and approximately 400,000 in the latter.<sup>226</sup>

## 2. *Who Would be Affected by the Proposed Reform?*

Assume that the aggregate amount of OASDI children's benefits is held constant. If so, then the "winners" and "losers" under the proposed reform are easily identifiable. Higher benefits would go to families with "breadwinners" who had earned relatively low wages prior to death or disability. Higher benefits would also go to relatively larger families—especially families with disabled workers (that currently reach the family maximum more quickly, because the disabled worker is an additional adult beneficiary). Lower benefits would go to families whose former breadwinners had earned relatively high wages prior to death or disability. Benefits would also be reduced for OASDI families in which the non-deceased or disabled parent was working and earning substantial income.

This proposal would not significantly alter the number of children in OASDI. Nor is it likely to change dramatically the size of the AFDC program. Even though better basic OASDI benefits would eliminate the need for *some* dual OASDI-AFDC families to receive AFDC benefits, because this category is relatively small, the impact of the proposal would not be great.<sup>227</sup> A far more important issue is whether an altered OASDI benefit structure would mean that large numbers of OASDI families would have to rely on AFDC as well. Historically, this may have been an important reason for wage-related OASDI benefits. But this is currently not a serious concern, because the proposed OASDI benefits will surely exceed AFDC benefits in most states.<sup>228</sup>

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<sup>226</sup> *Id.*

<sup>227</sup> In March 1977, for example, absent father cases alone accounted for 84.7% of the AFDC load—a rise of over 7% since May, 1969. HOUSE COMM. ON WAYS AND MEANS, REPORT ON THE SOCIAL WELFARE REFORM AMENDMENTS OF 1979, H.R. REP. NO. 96-451, 96th Cong., 1st Sess. 94 (1979) [hereinafter cited as 1979 HOUSE REPORT].

<sup>228</sup> \$500 a month for a widow with two children—the OASDI benefit level I have assumed here—is well above the sum provided by AFDC to such households in most states. In early 1980, for example, California paid a maximum of \$410 per month to such family benefit units. See *Garcia v. Woods*, 103 Cal. App. 3d 702, 710 n.15, 163 Cal. Rptr. 272, 280 n.15 (Ct. App. 1980). If a widow with three children were to receive \$600 from OASDI in

### 3. *The Case for Reform on Social Adequacy Grounds*

The argument for this package of reforms rests first on the idea that individual equity does not demand wage-based children's benefits; and second, that the goal of social adequacy would be better served by the proposed scheme.

Initially, benefits for children were to be funded by reducing benefits for single workers. This deviation from individual equity was justified by concern for social adequacy. Over time, OASDI funding arrangements and the benefit structure have evolved so that current earners pay taxes that are almost immediately paid out to current beneficiaries—a further support for the social adequacy underpinnings for payments to dependent children.<sup>229</sup> Even if children's benefits are considered paid pursuant to a uniform "insurance policy" obtained by all workers, no individual equity argument supports adopting the current terms of that "policy." Instead, why are not workers with large families insured against becoming disabled or dying on the same terms as those with small ones? Why are not all workers insured so that their disability or death yields their families a minimum income or a fixed sum per child rather than a wage-related amount? On the other hand, why should children receive any public "insurance" when one parent dies or is disabled but the other is a substantial wage-earner? Because individual payroll taxes cannot provide contractual-based answers, other principles must govern. What are the true implications of social adequacy as the governing principle? Under Option I, child benefits would be paid, to the extent feasible, in accordance with real needs by providing families with a decent income. The present OASDI system, however, fails to guarantee adequate income to some qualifying families, while to others it provides children's benefits even after a decent minimum has been assured. It is this anomaly that Option I would alter—without the need for additional funding.<sup>230</sup>

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addition to state payments, they would be slightly above the 1979 poverty level of \$7,160 for a family of four. In 1979, except for Hawaii, no state's AFDC plan—even after adding the value of food stamps received—paid more than poverty-level income to a family of four. HOUSE REPORT, *supra* note 227, at 92.

<sup>229</sup> See generally Ozawa, *Individual Equity versus Social Adequacy in Federal Old-Age Insurance*, *supra* note 190, at 24.

<sup>230</sup> The average monthly benefit paid to OASDI child beneficiaries in 1979 was about \$160. In July, 1979, OASDI benefits averaged \$116 to 675,000 children of the retired, \$203 to 2,800,000 children of the deceased, and \$93 to 1,500,000 children of the disabled. *Current Operating Statistics*, SOC. SEC. BULL., Nov. 1979, at 42; *Quarterly Statistics*, SOC. SEC. BULL., Sept. 1979, at 86 (numbers of recipients based on March 1979 figures). This is somewhat above the \$150 per child benefit figure assumed in one version of Option I earlier.



Although both the uniform child benefit and the family minimum approach (alternatively proposed by Option 1) better serve the goal of providing recipients with adequate income than does the current wage-based approach, one might question whether such a goal is the proper aim of Social Security. Might social adequacy mean the maintenance of a family's past standard of living? I think not. Distributive justice does not demand that children be supported by society at a level commensurate with their prior standard of living. Social adequacy is not served if OASDI funds are used to maintain income differences that would have continued had the breadwinners not died or become disabled. That advantage is one that the child ought to obtain only from his deceased or disabled parent's private insurance or savings.

Of course, a sharp drop in a child's standard of living would add to the trauma caused by the death or disability of a parent. But to respond to that concern with higher OASDI payments fails to recognize the ongoing harm to a child whose family has always been worse off; it implies the unacceptable view that the maintenance of class status is justified because the poor have grown accustomed to their poverty.

The discussion has assumed that children are a separate economic unit receiving their OASDI benefits in isolation. This obviously is not the case. One or both of their parents will typically be receiving OASDI as well. This factor requires further attention; indeed, the two main categories of child beneficiaries—dependents of deceased wage-earners and dependents of disabled wage-earners—should, for this purpose, be considered separately.

Minor surviving children typically qualify for benefits along with their surviving parent (usually the mother), and that surviving parent qualifies solely because she has children in her care. Under these circumstances I think Social Security still owes the surviving family a decent income. The caretaker parent has no

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In July 1979, the average OASDI payment to a disabled worker was \$320.65; a disabled worker's spouse received \$95.77, and a child of a disabled worker \$93.26. *Current Operating Statistics*, Soc. SEC. BULL., Nov. 1979, at 42. Aggregating the total benefits for a worker with a spouse and two children, the family would receive \$602.94—slightly more than the \$600 monthly guarantee for such a family assumed at the beginning of this discussion. Of course, not all the sums could be used toward paying the family minimum. Some high earners with no dependents would claim more than their average share. OASDI disability benefits for workers becoming disabled in 1978 ranged from \$122 to about \$730 per month. SENATE COMM. ON FINANCE, REPORT ON THE SOCIAL SECURITY AMENDMENTS OF 1979, S. REP. No. 96-408, 96th Cong., 1st Sess. 35 (1979). The average family payment for disabled workers with dependents in June 1979 was \$639. *Id.*

more of an OASDI claim to a wage-replacement benefit than does a child. Neither individual equity nor social adequacy grounds support such a result. Thus, a change in the formulation of the child's benefit may well imply a change in the surviving parent's benefit. This is more clearly the case if the child's benefit is cast as a uniform amount. Otherwise, retaining the wage-related mother's benefit would mean that OASDI would provide a higher standard of living to some families who are not needy. On the other hand, if the child's benefit is cast in a family minimum form, the formulation of the mother's benefit may well be irrelevant since a larger amount is offset by a smaller child's portion. Still, surviving wives of the highest wage-earners might wind up under today's wage-related formula with mother's benefits that by themselves exceed the amount the family minimum would guarantee to a surviving mother and child. To avoid that result, social adequacy for children calls for a new mother's benefit as well. Indeed, there is no real need for a separate mother's benefit at all; the family OASDI benefit could instead be defined as a package, starting with \$350-\$400 per month for a widowed mother and one child.

Children of disabled parents present a more difficult case because the breadwinner also receives benefits that concededly will remain wage-related. What then should be the role of additional OASDI benefits for children and the disabled person's spouse? My view is that the concept of social adequacy should once more justify providing a decent income. Thus, when the disabled worker has children and a spouse, OASDI should supplement his benefit to the extent necessary to assure the family a decent income. In this setting, the family minimum formulation for child's benefits is clearly preferable to the uniform amount per child formulation alternatively proposed by Option I, since in some cases the worker's benefit alone would equal or exceed the family minimum.

After focusing on the family's income as the object of child benefits for the two main categories of recipients, the need for a changed earnings test, as proposed in Option I, becomes apparent. If the caretaker parent earns a substantial income, the social adequacy argument for paying additional benefits to both that parent and the children is undercut because the family is no longer needy. Hence, unlike the current practice, Option I would require the caretaker's earnings to reduce the child's benefits as well.

Similarly, the decent family income goal is served by removing the existing OASDI family maximum for both disabled work-

ers and survivor families. It currently affects only children's benefits, and thus stands in the way of assuring large families an adequate income.

But is a decent family income to be the only goal of OASDI children's benefits? Is social adequacy the only relevant principle?

#### 4. *Other Principles*

Why do most think that families ought not find themselves wealthier after the death or disability of a breadwinner? Disabled workers, after all, may incur extra living costs (notwithstanding some savings from work expenses). Similarly, single parent families often incur special expenses and must go without substantial non-cash benefits that a two parent family enjoys. In short, in some ways a family's needs increase after the death or disability of a breadwinner.

Nor do I think financial gain from the death or disability of a breadwinner will create work disincentives. The narrowly-drawn definition of disability, together with the required rehabilitation programs and work-trial incentives contained in the Social Security Act, prevent relatively high benefits from significantly affecting the behavior of disabled beneficiaries—notwithstanding some economic theory to the contrary.<sup>231</sup> OASDI benefits that are higher than past family income might well influence whether the surviving or nondisabled spouse works. But deterring this behavior is not a goal of the program; after all, the primary justification for paying benefits to the caretaker parent is to enable the parent to care for the child at home without working.

The sentiment against providing OASDI family benefits in excess of the family's past income probably stems simply from a sense that it is improper. For some, this may be simply a revulsion over people profiting from the death or disability of a family member. I do not share this feeling. A more satisfactory reason is that the concept of work should be rewarded; that is, justice requires that a family earn more if a member is working.

This too, is a controversial value. Some find it rather unfair to suggest that A deserves more than B because A is working when B is unable to work. As important as this debate is, it most concerns the proportion of wages that are replaced by OASDI when a worker is disabled or retires—a subject beyond the scope of this Article. Still, given the wage replacement rates in OASDI today, the issue does become relevant when children are involved.

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<sup>231</sup> See generally *id.* at 35-40.

Notwithstanding the family maximum, some OASDI families, especially those headed by disabled workers who were low-wage earners, have been receiving more in benefits than the worker ever earned in wages.<sup>232</sup> And my proposal in Option I to guarantee a decent family minimum and eliminate the family maximum could increase this number significantly.

If prior to death or disability, the worker made even less than what OASDI would declare as a decent income for his family, and if the family's previous income was not supplemented in some other way, then we ought to be very concerned about their well-being even before the breadwinner dies or becomes disabled. Nonetheless, this creates a dilemma. If a worker is unable to earn enough to support his family through full-time work, should not government funds first assist him while he is employed? Alas, our society may be unwilling to recognize the inability of the labor market to provide decent incomes—a problem that might be highlighted if OASDI payments to families often exceed the past earnings of deceased or disabled workers.

In any event, my proposal would not be destroyed if OASDI family benefits did not exceed the worker's past wage. A condition could be attached that family benefits would be subject to a maximum of the greater of 100% of the deceased or disabled breadwinner's AIME or his full-time earnings from a minimum-wage job. For example, a full time worker earning the minimum wage (currently just above \$3 per hour) should make somewhat more than \$6,000 per year, or \$500 monthly. Thus, if this restriction were in effect today, family benefits might be restricted, where applicable, to the greater of the worker's AIME or \$500. In the spring of 1980, Congress responded to this concern in what I consider a less desirable way by making the family maximum in disability cases 85% of the worker's AIME.<sup>233</sup>

Option I reform might be questioned because of its potential to stimulate large families. I find this quite unconvincing, for families of both deceased and disabled workers. A more tenable objection is that people should not have large families if they are unable to provide adequately for them and that it is not right to reward large families through the OASDI scheme. Again, this is a

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<sup>232</sup> In 1979-80, perhaps 6% of disabled workers receive *individual* OASDI benefits in excess of their AIME. *Id.* at 37. Plainly more OASDI *families* have gained financially from the disability of a breadwinner.

<sup>233</sup> Technically, the new limit is the lesser of (a) 85% of the worker's AIME (or 100% of his PIA if larger) or (b) 150% of his PIA. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 101, 94 Stat. 441 (to be codified at 42 U.S.C. §§ 403, 415, 423, & 424(a)).

question of values; in my view it is not proper to penalize children merely because they happen to have many siblings.

On the other hand, because economies of scale generally flow from living in larger groups, I would expect that a reformed OASDI child benefit scheme would contain some rough adjustments designed to account for this. Hence, in the assured family minimum version, while benefits would increase with family size, there would be a decreasing incremental increase per child. Similarly, the preliminary assumption in the alternative version, that OASDI child benefits might equal \$150 per month per child, is too crude.

How is the scheme to account for cost of living variations across the country? How can Congress set a uniform national family minimum that will not be too low in some places and too high in others? First, uniform family minimums are set for a variety of purposes already—including the Bureau of Labor Statistics family budgets, SSI, the level at which the earned income tax credit begins to phase out, eligibility for federal Title XX social services, and eligibility for free and reduced cost school lunches. Second, while OASDI payments themselves vary across the country, average payment differences from state to state are less than many may think. For example, in 1978 survivor children received approximately \$190 per month in California, and \$150 per month in Mississippi.<sup>234</sup> Of course, within each state and from family to family there are substantial variations which, of course, Option I intends to change.

A different reservation about using OASDI children's benefits to assure a decent family income is that its emphasis on the goal of social adequacy will make social security look too much like welfare. But to whom and of what consequence? The ordinary person, surely, has little idea that OASDI even serves a large role in providing aid to children; most people, I believe, think Social Security is a retirement scheme. Even experts often ignore the children's benefit provisions of OASDI. Thus, Social Security's popular image and political acceptability would be unaffected by the adoption of Option I.

More important, therefore, is the political feasibility of Option I. The opinions of the chairmen of the Senate Finance and House Ways and Means Committees, key presidential advisors, policy people in the Social Security Administration, and spokes-

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<sup>234</sup> *Quarterly Statistics, Soc. Sec. Bull.*, Sept. 1979, at 90-91.

people for important labor, business, and perhaps child welfare and poverty groups are most likely to be crucial. Are there factors that might make some of these important actors reluctant to support Option I?

Because social adequacy features of Social Security have traditionally been thought to come from the employer's share of the payroll tax, employers' views may be considered particularly relevant. Would not the self-interested view of employers be, "if you must tax us, please let it be to benefit people who really need it?" Yet this assumes the tradeoff is between helping the needy and reducing taxes. The employers' response might be different if instead they were told they would be taxed so much in any event. Then employers might wish to favor employees with higher incomes for the same reason that many use private pension plans to supplement the incomes of their higher earners. But it is, naturally, more complicated than this. First, many private pension plans today are "integrated" with social security so that adjustments in OASDI might directly affect employers' obligations to pension trusts.<sup>235</sup> And although the impact of Option I may be hard to predict, uncertainty alone would militate against change. Second, some employers—especially in certain unionized industries—contribute to pension plans in a decidedly more egalitarian manner by computing pension benefits solely on the employee's length of service.<sup>236</sup> Perhaps this reflects a different view of how OASDI child benefit funds should be allocated, or perhaps it merely reflects union strength.

What, then, might unions and employees think about Option I? This becomes more important in view of the common economic assumption that the employer's share of the payroll tax really falls on the employee.<sup>237</sup> But it is difficult to say how workers perceive their collective self-interest. In this "real world" look at the program, one might ask how either current workers generally or workers with few or no dependents would want their taxes to further social adequacy objectives. One piece of evidence that favors the family minimum solution is that employees and their representatives commonly obtain employer-paid medical insurance plans that cover their families. On the other hand, when it comes to income benefits in survivor and disability cases, even union-

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<sup>235</sup> See generally BANKERS TRUST COMPANY, 1975 STUDY OF CORPORATE PENSION PLANS 25-33 (1975).

<sup>236</sup> *Id.*

<sup>237</sup> See generally J. BRITAIN, THE PAYROLL TAX FOR SOCIAL SECURITY 21-59 (1972).

controlled private benefit plans probably do not reflect the principles of Option I more than the current OASDI principles. A focus on the practices of specific unions might, in any case, prove misleading because some surely represent workers whose wages are typically higher and more uniform than in other unions. Moreover, while organized labor might count for more politically, it hardly represents employees generally—especially low-earning non-professional workers.

Child welfare advocates too often focus on the social service needs of certain children rather than the cash needs of children from low-income families. But if they did examine Option I, they might fear that my criticisms of OASDI's current terms would not lead to Option I, but rather to budget cutbacks. Their concern would be that low-earner OASDI families and large OASDI families would not attract the savings from cut-backs of higher wage-earners and families with working caretaker spouses. Rather, taxes would be cut.

Children's advocates may reason that although *some* children are unfairly favored under the current program, an alternative scenario in which *no* children are advantaged would be less desirable. More generally, perhaps the current terms reflect all the redistribution of income that Social Security can carry. This judgment, along with a desire not to appear to be against children's benefits, may also explain why both the Administration and the Social Security Administration have avoided the child benefit issue.

Nonetheless, if advocates in the poverty movement were to support an OASDI reform of the sort here discussed, perhaps some change could be achieved. Maybe a compromise could be reached in which uniform rather than wage-related child benefits are paid, and where the family maximum, although not abolished, is made more progressive. It might, for example, start at 200% of PIA and phase down to 100% of PIA as the worker's PIA increases. However, Congress' 1980 modification of the family maximum in disability cases is not too encouraging.<sup>238</sup>

One explanation for this cutback is that low-earner OASDI families have not been the focus of the anti-poverty movement, which has aimed at families *not* served by OASDI. Thus, its goal has been the reform of other programs—primarily AFDC. Let us then leave Option I for now and consider other futures for OASDI children's benefits that would also affect needy children

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<sup>238</sup> See UNEMPL. INS. REP. (CCH), May 1980, No. 979.

not an OASDI. Social adequacy involves more than just OASDI eligible children.

## B. Programs for Non-OASDI Beneficiaries

### 1. Other Programs Aiding Minor Children

It is important to understand how other existing programs respond to the actual or presumed needs of children in the first three OASDI categories described above. Children with one deceased or disabled parent can, in all states, qualify for AFDC—provided the family is poor enough. Although most of these children depend upon AFDC instead of OASDI, for others, AFDC serves to supplement otherwise inadequate OASDI benefits. However, because most AFDC families are characterized by an absent, rather than a deceased or disabled parent, they do not qualify for OASDI. Moreover, unlike OASDI, under AFDC the single parent's earnings reduce both the parent's benefit and the child's benefit. On the other hand, like OASDI, some states impose a family maximum on AFDC payments that reduces per capita payments to larger families.<sup>239</sup>

Needy, or presumptively needy, children whose unemployed breadwinner parent is able-bodied are in a different situation. They must turn first to their state's unemployment compensation program, which typically replaces 50% of the unemployed person's wages up to the state average weekly wage.<sup>240</sup> States typically pay unemployment compensation for only 6 to 9 months, depending upon the unemployment rate. Most states pay no additional benefits if the wage earner has dependents, and in those few that do the amounts are usually trivial.<sup>241</sup> Reinforcing unemployment compensation's individual wage-replacement features, these programs ignore the earned income of other family members, the family's wealth, and its unearned income. Thus, apart from part-time earnings, which reduce the grant, unemployment compensation programs do not contain an earnings test similar to AFDC or OASDI. In sum, the presence of a child in the home yields quite different social insurance consequences if

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<sup>239</sup> See generally Chief, *Need Determination in AFDC Program*, SOC. SEC. BULL., Sept. 1979, at 19.

<sup>240</sup> See generally NATIONAL COMMISSION ON UNEMPLOYMENT COMPENSATION, FIRST INTERIM REPORT 32, 44-46 (1978).

<sup>241</sup> See HOUSE WAYS AND MEANS COMM., SUBCOMM. ON UNEMPLOYMENT COMPENSATION, 94TH CONG., 1ST SESS., INFORMATION ON UNEMPLOYMENT AND UNEMPLOYMENT COMPENSATION PROGRAMS 46-50 (Comm. Print 1975).



the breadwinner dies or becomes disabled on the one hand, or is unemployed on the other.

A second program for unemployed breadwinners is available in just over half the states. AFDC (here called AFDC-U) is also available to the family whose former earner is unemployed but whose unemployment compensation is either inadequate or no longer available.<sup>242</sup> As with AFDC generally, benefits are paid on the basis of actual need, with additions for children (sometimes subject to a family maximum). States without AFDC-U sometimes provide, through residual general assistance programs, cash assistance to families headed by able-bodied unemployed persons. These programs vary considerably.

Finally, consider the situation of children of the working poor. State and federal minimum wage laws and legislation facilitating collective bargaining have helped insure that the earnings of full-time workers will be adequate to place their families above the poverty level. This does not necessarily guarantee, however, that one full-time minimum wage job necessarily pays "adequately"—especially for families with three or more children. Thus, some families can fare worse on one minimum wage job than on AFDC-U.<sup>243</sup>

It is noteworthy, then, that the federal government recently has adopted two significant programs aimed primarily at the working poor. The earned income tax credit ("EITC")<sup>244</sup> is payable to earners with families.<sup>245</sup> A grant equal to 10% of earnings is paid on annual income up to \$5,000; benefits then phase out as income increases. Although paid through the income tax system, EITC is suitably described as a grant, because the credit is "refundable"—payable in cash if the benefit exceeds taxes otherwise due. At present, of course, even the maximum benefit is modest. And although only available to families, no additional credits are provided for children. But the scheme has great potential for growth.

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<sup>242</sup> See generally HOUSE REPORT, *supra* note 227, at 86-89, 118-21.

<sup>243</sup> See, e.g., *Macias v. Finch*, 324 F. Supp. 1252, 1253 n.1 (N.D. Cal.), *aff'd*, 400 U.S. 913 (1970) (upholding validity of federal regulation defining those who work fewer than 30 hours weekly as "unemployed" and thus entitled to AFDC, and allowing inclusion of those who work more than 30 but less than 35 hours weekly within definition).

<sup>244</sup> I.R.C. § 43.

<sup>245</sup> For a description of the EITC and proposed amendments, see HOUSE REPORT, *supra* note 227, at 95, 145-48.

The other significant plan is the food stamp program,<sup>246</sup> available to nearly all of the poor. Although AFDC recipients constitute the bulk of the program's beneficiaries, intact working poor families are eligible too—provided their income is low enough. Like AFDC benefits, the food stamp benefit increases with family size.

## 2. *Other Programs Aiding Adult Child Beneficiaries*

Other programs serve the "adult" categories of OASDI child beneficiaries—college students and persons disabled at birth or in childhood. College students have an elaborate system of federal and state grants and loans available to help finance their educations—whether or not they have a deceased, disabled, or retired parent.<sup>247</sup> Since 1974, cash support for adults who were disabled while young has been available from the need-based Federal Supplemental Security Income program.<sup>248</sup> This program is, in effect, the AFDC counterpart for adult poor who are aged or disabled. Many states supplement the basic federal amount.

This discussion of existing public income transfer programs and their effect on different categories of children provides a backdrop against which the next OASDI options can be considered.

## C. *Option II—Blanketing In*

One way to achieve fairer treatment of children in and out of OASDI might be called "blanketing in." This approach broadens the risks covered by (and perhaps the persons covered by) the OASDI program. New groups of presumptively needy children would be added to the categories of children now eligible for dependent's benefits, on the same terms as other eligible children. These terms may be the existing terms or terms adopted pursuant to Option I.

Among those that might be added to the current list are children with an absent parent. Just as children with deceased and disabled parents have been moved from AFDC to OASDI over the years, most children on today's AFDC rolls—those with absent fathers—would also be "elevated." Such a change might also be

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<sup>246</sup> 7 U.S.C.A. §§ 2011-27 (1980).

<sup>247</sup> See generally *Federal Aid to Postsecondary Students*, 18 J. FAM. L. 147 (1979).

<sup>248</sup> 42 U.S.C. §§ 1381-85 (Supp. 1 1977). See generally HOUSE REPORT, *supra* note 227, at 96-104.

appropriate for other categories of beneficiaries such as children of the unemployed and children of the working poor. Although OASDI coverage for children with absent fathers has been proposed from time to time,<sup>249</sup> and providing OASDI for these other classes of children has not, this is surely not determinative. What are the justifications for broader coverage and how would inclusion of these various groups promote those justifications?

The main advantages to beneficiaries derived from OASDI coverage presumably are the potential for greater benefits and reduced social stigma. On the surface, both seem to support transfer from AFDC. Yet however stigmatizing in the past, AFDC is probably considerably less so today. After all, because welfare is seen more as a right, there is perhaps relatively little loss of self-esteem in claiming welfare today. The availability of OASDI instead of AFDC will probably not greatly increase self-esteem. Stigma caused by demeaning AFDC administration also seems minimal today, because most states have abandoned individualized grants in favor of uniform awards based on simple demographic characteristics, and have reduced the use of and intrusiveness of welfare workers. Finally, as to the stigma arising from public scorn of those who apply for welfare, it is likely that those who denigrate single parents for their dependence on the state are likely to continue to do so whether Congress "elevates" them to OASDI or not. Indeed, recipients might be scorned even more for receiving benefits from a program for which they have not traditionally qualified.

Whether recipients' benefits improve depends, of course, on the specific terms of OASDI. If Option I were enacted, OASDI would certainly provide former AFDC families with a decent minimum income. But because of the national variations in aid, OASDI might not provide a financial gain to beneficiaries in all states—including some with large AFDC populations. Thus, some might fare worse if AFDC were abolished. On the other hand, if AFDC were retained, for many the result would be dual-entitlement, and virtually no change financially.

The situation of children of the unemployed and of the working poor is vastly different. Although the programs geared to help these families may be better regarded than AFDC, they do not account for the presence of children in the family; both un-

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<sup>249</sup> See, e.g., U.S. PRESIDENT'S COMMISSION ON INCOME MAINTENANCE PROGRAMS, BACKGROUND PAPERS 442-45 (1970) [hereinafter cited as BACKGROUND PAPERS]; A. SCHORR, POOR KIDS (1966).

employment compensation programs and the minimum wage largely ignore the existence of children. And although AFDC-U and the earned income tax credit are family-sensitive, they are very modest programs today. Hence, making these categories of children eligible for OASDI promises to make many substantially better off.

Moreover, in general terms, it is readily understandable how OASDI family benefits might be determined for both unemployed and working poor families. As for the former, following Option I, OASDI benefits could supplement unemployment compensation to the extent necessary to reach the OASDI family minimum. Earnings, if any, of a spouse not receiving unemployment compensation would affect benefits pursuant to the OASDI earnings test—as in Option I. The same principles would apply if working poor families were put on OASDI as well.

Is there a policy concern about the risks of unemployment, low wages—indeed, even of having an absent breadwinner—that renders these families inappropriate recipients of OASDI? These risks are certainly as important to a family's financial security as the risks of the death, disability or retirement of a breadwinner. It must be understood, however, that to expand OASDI in this way would make the program such a dominant component of our nation's income protection mechanism that it would jeopardize all other separate unemployment compensation and earned income tax credit programs. In other words, if the program were to expand to this degree, payments to *breadwinners* as well as their dependents would also seem sensibly integrated into OASDI.

The logic of broad "blanketing in" leads to OASDI insuring individual wage-related income security *and* minimum family income protection against all major risks, thus becoming a comprehensive system of social insurance. Put differently, benefits to children soon become the tail that wags the dog. The expansion of OASDI would dramatically restructure our public income transfer schemes, with one result being that nearly all children would be assured that their family has a decent income.

This restructuring, however, raises many hard questions. How would unemployment insurance, with its tradition of weekly compensation, mesh with OASDI's tradition of monthly or annual accounting? What would happen to the merit rating tradition for the financing of unemployment insurance? How would the commitment to a family minimum in OASDI square with unemployment insurance's traditional willingness to disqualify entirely claimants who voluntarily quit their jobs or refused suitable work?

All of this suggests that if the needs of children of the unemployed are a pressing concern and ought to be accorded the same dignity as the needs of children of deceased or disabled parents, then perhaps this problem should be remedied, not by merging unemployment insurance into OASDI, but by federal legislation reforming unemployment insurance itself.

Similar questions arise with respect to the EITC as well. The income tax laws that govern dependents and the EITC's own terms can be readily manipulated to give children of the working poor financial security similar to that which OASDI would provide for its child beneficiaries. This retreat from OASDI as the foundation for a comprehensive family financial support policy brings us back to AFDC. Are its recipients specially appropriate for transfer to OASDI, or is it necessary only to reform AFDC?

Providing children with absent parent OASDI protection creates some serious difficulties. In the existing categories, it is the parent's absence from the work force that is the triggering event; OASDI replaces income that he previously provided. But for many AFDC families, the situation is different. On the one hand, the absent parent may well be working, but providing inadequate child support. On the other hand, in many cases neither the child nor the mother had ever depended on the father. For example, illegitimate children whose mothers never lived with their fathers and children of non-working teenage fathers make up a significant portion of the AFDC rolls. Of course, it matters little to the child whether he is poor because a parent failed to provide life insurance in the survivor cases, or child support here. Similarly, from the child's view, the sufficiency of the absent parent's prior or continuing earnings matters little. Still, to provide OASDI protection in all absent father cases would require a recharacterization of the OASDI concept. For example, the elimination of the prior labor force attachment requirement would, of course, affect retired, disabled and survivor cases as well.

Apart from general problems of implementation, a child's need created by inadequate child support deserves special consideration. First, expanding OASDI might encourage non-payment of child support. That is, because the absent parent is alive and able-bodied, the availability of OASDI may give the absent parent an excuse to abandon support or desert his child. But a preoccupation with the "moral hazard" element would undercut AFDC as well, unless the point is that through AFDC society deliberately stigmatizes the child to encourage the absent parent to pay. A genuine and related problem, however, is the impact of child

support payments if children of absent parents received OASDI. The existing OASDI terms would ignore this unearned income—just as they ignore life insurance and savings in survivor cases and disability income payments in disabled parent cases. AFDC, of course, takes the opposite approach, paying parent benefits only to the extent that child support is insufficient. Although many absent fathers default on child support payments, a great many do not. In short, in many cases the child is not needy; moving absent father cases to OASDI will mean moving over far more than AFDC families.

The second and more general objection to moving absent parent cases to OASDI is that too much money would go to those who have no social adequacy claim to it. Such children include not only those who receive adequate support from an absent parent but also children whose custodial parent remarries and are well provided for by the step-parent. That this anomaly exists in the current OASDI program suggests, of course, that equal treatment of needy children will not be served by moving any more children on to OASDI, but can be achieved by terminating OASDI children's benefits and replacing them with a program better tailored for the job.<sup>250</sup> This brings us to Options III and IV.

#### D. *Option III—A Special Child's Benefit*

One solution to the twin concerns so far addressed—OASDI's favored treatment of children of higher earners and the unfair exclusion of other children from OASDI—is the creation of a new single benefit that would serve the needs of all children. Under such a plan, all children would be entitled to a grant based on age alone, regardless of whether they had a parent who was deceased, disabled, absent, unemployed, or merely a low-wage earner. A version of such a scheme, typically termed the children's allowance or child benefit,<sup>251</sup> exists in many countries and enjoyed some popularity as a serious reform proposal in this country during the 1960s. But it made little headway with Congress, for good reasons.

If the child benefit alone is to adequately assure each child a decent minimum income, its benefits must be far larger than in countries that have adopted the program. Such a well-funded

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<sup>250</sup> See Ozawa, *Income Redistribution and Social Security*, *supra* note 190, at 220.

<sup>251</sup> See generally BACKGROUND PAPERS, *supra* note 249, at 412-17.

program would be very expensive. Because an adequate income for the child requires an adequate income for his parent as well, this becomes, in effect, a family allowance for all American families. To be sure, higher taxes might be imposed to finance this program (including the taxation of the family allowance itself); but unless the tax reduces the benefit to a mirage, such a plan will necessarily transfer funds to families with children from those without—whether or not the recipient family is needy. As a result, the family allowance will not answer the criticism that OASDI helps those who are not needy and that making an absent parent an OASDI-covered risk would do the same. Indeed, the family allowance would exacerbate the problem by extending the overpayment to families with decent earned incomes.

Not only is this plan conceptually flawed, but its costs will probably lead to the enactment of an inadequate partial child benefit. Of course, combined with other income, even a modest child benefit can help many children escape poverty. In this respect, a modest child benefit can be particularly effective for children of the working poor and the unemployed. But this scaled-down child benefit alone will not suffice to meet the income needs of the survivor, disabled parent and absent parent families. Their needs would require either a new OASDI dependent family benefit program and the continuation of AFDC benefits, or the creation of some new form of aid. Although the family allowance itself could be awarded in different amounts depending upon the family's financial situation, this individualized scheme would destroy the central notion underlying the proposal—a uniform award to all children. Differentiation (except on the basis of the number of children in the family) transforms the proposal into a different program.

#### E. *Option IV—A National Guaranteed Annual Income*

Suppose broad family adequacy objectives were pursued neither through an expanded and reformed OASDI, as suggested by the combination of Options I and II, nor through the universal family allowance techniques of Option III, but instead by adopting a generous and non-stigmatizing national guaranteed annual income scheme. This has been the main focus of the anti-poverty movement.

The innumerable variations of such proposals tend to obscure their substantial similarities. Each would establish a certain income to be provided to a family, individual or household. Each plan then would reduce benefits as the family increases its

income (typically this "tax" on benefits is greater on unearned income than on earned income). Finally, each plan has a "break-even" point at which a family's income is sufficient to cause termination of benefits. Plainly both the zero income benefit (the "base") and the implicit tax on benefits affect the break-even point. To control program costs, a choice must be made between (a) a higher base, a higher tax rate and a lower break-even point; and (b) a lower base, a lower tax rate and a higher break-even point.

Variations of this plan provide different answers to a number of questions, including what the claiming units are, what counts as income, the accounting period over which the claimant's need is to be assessed, how to account for assets, how individualized need is to be determined, and so on. Clearly, OASDI has answers to all of these issues as well.

Some plans are designed to incrementally broaden and nationalize the existing AFDC (and sometimes SSI) plan,<sup>252</sup> some are structured as tax credits (often called the negative income tax)<sup>253</sup> and some create a new guaranteed annual income program within the SSA.<sup>254</sup> Despite these differences, which are by no means unimportant, all the proposals share the features described above. Moreover, most of these proposals include some provisions regarding work—requiring the able-bodied to look for work, mandatory work training, or the actual promise of a suitable job (with financial penalties for the failure to accept). What are the implications of such a scheme for OASDI children's benefits?

If OASDI remains the same, except that Social Security children's benefits reduce a recipient's national income maintenance payment dollar for dollar (as with AFDC today), the financial result would be that the only people to whom OASDI children's benefits will matter are those who are not considered needy by the national income maintenance program. And if that new program turns out to be non-stigmatizing, there would surely be some pressure to end the payment of OASDI to children whose income needs were already being met. In short, OASDI children's benefits might simply be phased out, leaving the new plan to fulfill *all* families' needs for a decent income—not just those with deceased, retired and disabled parents. In this way, the concerns

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<sup>252</sup> See HOUSE REPORT, *supra* note 227, at 14-21.

<sup>253</sup> Milton Friedman popularized this label in CAPITALISM AND FREEDOM (1962).

<sup>254</sup> President Carter's Better Jobs and Income plan advocated this approach. See H.R. 9030, 95th Cong., 1st Sess. (1977).



about favoring some OASDI children and excluding others from OASDI altogether would be simultaneously addressed. At least the needs of all minor children could be readily handled through the new program.

Adult recipients of OASDI child benefits could be served in other ways. College student beneficiaries could be helped through existing college aid programs or new, expanded programs. Adults disabled since childhood could be treated the same as other disabled persons with inadequate OASDI benefits of their own, through SSI or the new national income maintenance scheme. In sum, if our nation could enact a satisfactory needs-tested program, perhaps it could better achieve the social adequacy goals now served by OASDI.

Some critics contend that any needs-tested program is undesirable because it tends to create divisiveness and stigmatizes recipients.<sup>255</sup> They would prefer a system of universal grants such as the "social dividend" or the "demogrant." Indeed, the family allowance described in Option III is a demogrant restricted to families. I have already expressed my doubts about that proposal.<sup>256</sup> But there may be a better solution that would incorporate the social dividend concept into OASDI itself. Suppose all Americans received a minimum Social Security payment, with family payments adjusted to assure a family minimum. Under the OASDI earnings test, earnings would cause a reduction in benefits. Although the consequences for most children would be similar in fact to those of Option II, this approach to Option IV starts with quite a different assumption. Children and their families would not be put onto OASDI because of certain triggering events that signify need. Rather, everyone would be on OASDI. This plan would, of course, have to be integrated with unemployment compensation and other schemes, and the treatment of certain items of unearned income received by OASDI recipients would have to be resolved. The final result could be that America would replace its current bewildering array of public income transfer programs with one comprehensive scheme—Social Security. In short, one central program would simultaneously serve both the social adequacy and wage-replacement objectives for all classes of persons. It is vision that some would like to pursue over the long run by organizing income maintenance reform not around a new welfare scheme or a special family allow-

<sup>255</sup> See, e.g., Schorr, *Welfare Reform and Social Insurance*, CHALLENGE, Nov. 1977, at 14.

<sup>256</sup> See text accompanying note 251 *supra*.

ance, but rather around a comprehensive Social Security program. The possibility of such a gradual reshaping of our total benefit structure has special implications for short run OASDI child benefit reform. Is Social Security still to serve a social adequacy function or not?

In sum, even if one has a clear idea of the meaning of social adequacy, without a consensus about the long run roles of today's various federal benefit programs, it is difficult to determine what OASDI child benefit reform measures should be pursued now. Should the reforms suggested in Option I be adopted, with the idea that OASDI will ultimately be our comprehensive national income scheme? Or should OASDI children's benefits be phased out in favor of some sort of new national income maintenance scheme described by Option IV? This depends on what consensus develops. For now, Social Security child benefit reformers are left with a difficult choice, and, as I have emphasized, one that is largely a matter of personal values.