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BEYOND COMPENSATION: Proposals For Reform

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SUMMARY:

... From what we have heard from Professor Klar, this model is well represented by Canadian tort law today. ... U.S. tort law is no longer only about lawsuits on behalf of individuals; instead, we have many mass actions. ... For some accidents I would substitute a liberal model solution in place of tort law; additionally, I would alter tort law's damages rules to mimic the benefit arrangements of liberal compensation schemes. ... The failure of U.S. tort law to compensate seriously injured victims runs through other areas as well. ... In short, of 1,000 victims of negligence, 30 to 35 are compensated by tort law. ... For example, in Germany today, in the name of good social cost accounting, social security is secondary; the liberal model compensation plans and tort law are liable first and the social net is ultimately liable only where the others fail to apply. ... Recently a study team engaged by the American Law Institute undertook a comprehensive examination of U.S. tort law. ... But rather than trying to compromise within tort law, the key might just lie in taking a wider vision. ...

TEXT:

[*659]

I.

Ideology is an important part of the debate about accidents - their prevention and the compensation of their victims. In order to emphasize my point, I will describe five different models for the management of risk and its consequences, giving these models explicitly ideological labels. ¹⁴¹

The first I call the libertarian model. In this model, putting aside fraud and other intentional wrongdoing, risk and its consequences are supposed to be managed by the market and by contract.

People see what risks are presented, and they decide for themselves when to take their chances, given the benefits that flow to them from running those risks. Unless the source of a risk has promised in advance by contract to compensate victims, compensation is to be dealt with (or not) through voluntarily purchased first-party insurance. You buy disability and health insurance if you want protection. Or if you don't, you don't buy that insurance. It's your libertarian right to do so or not. What's fair is that you get what you choose in terms of both risk and compensation.

In this model, government adopts a hands-off policy toward the managing of risk. We rely

instead on the market to control conduct. For example, we assume that providers are concerned about their reputation because they will want to make future sales and that this helps assure that they won't take advantage of current customers.

This approach reflects, to a certain extent, some views Professor Epstein has put forward.¹⁴² Under his proposals, as a practical matter, **[*660]** there would probably be no third party liability in settings where parties deal with each other by contract. Doctors and product sellers could contract with patients and buyers to provide them compensation in case an accident occurs, but probably they would not; rather, the parties would probably agree that the consumer/patient would bear the loss.

This was, in important respects, the law of England in the 19th century with all of its "no duty" rules, especially with respect to product manufacturers.¹⁴³ From what Professor Matsumoto said earlier, this model may best describe the de facto law in Japan, even now, given all the barriers to bringing litigation.¹⁴⁴

My second model I call the conservative model. This model is embodied by the traditional common law tort system. From what we have heard from Professor Klar, this model is well represented by Canadian tort law today.¹⁴⁵

I call this model conservative because it reflects several appropriately conservative values, most importantly, individual rights to sue and an emphasis on fault. It focuses on deserving victims and aims to provide them with full compensation, for example, replacing all of their wage losses even if they're wealthy.

This model relies upon the decentralized system of individual lawsuits to control behavior. Unlike the libertarian model, the assumption of the conservative model is that the market and individual contracts alone will not sufficiently control wrongdoing, and that society must create enforceable rights to sue by those who are injured by another's fault.

The third model I call the liberal model. It draws on those early 20th century progressive values on which contemporary liberalism rests. Central to this model is the idea that it is primarily organizations and institutions that cause harm, and not so much people that cause harm. Hence, individual fault is de-emphasized. During the 1960s especially, liberals talked about crime in this way too. Crime was seen to be caused not so much by individuals but rather by larger, social forces. Because, in this liberal view, organizations are really responsible for accidents, then they should bear the costs. Workers' compensation clearly embodies the liberal model. **[*661]**

In the liberal model, victims are to be assured the basic needs they have as citizens. We don't try to restore the wealthy to their pre-accident financial position as in the conservative model. And we don't pay fine-tuned attention to victims' intangible losses either.

The liberal model is congruent with the Japanese compensation systems for drug accident victims and pollution victims as they have been explained here.¹⁴⁶ It also fits the Swedish medical accident scheme¹⁴⁷ and the scheme recently adopted in the United States (as elsewhere) for vaccine damaged children.¹⁴⁸ Under these plans victims are to be assured that their basic human needs are met by the large enterprise or sophisticated actors who cause the loss and regardless of fault.

The liberal model depends upon the funding mechanisms of the compensation schemes to achieve socially desirable behavioral effects. That is, the social cost accounting employed by these plans internalizes the costs of accidents so as to give organizations the financial incentive to take the socially appropriate level of precaution.

Auto no-fault schemes don't so neatly fit my liberal model because they don't concern large

institutions. Nevertheless, these plans are driven by some of the same broad ideological values - de-emphasizing personal fault, viewing accidents as things that just happen, and internalizing the costs of auto accidents to the enterprise of driving (even if it isn't an enterprise of the sophisticated, complex organizational sort).

I call my fourth model the collective or communitarian model. It rejects the idea that the causes of disability matter. Rather, people become our collective concern simply because they are disabled. In this model the disabled are to be cared for in a reasonably uniform way, and all members of society should contribute to the funding of that care.

On the compensation side, this model employs broad social insurance arrangements to deal with the needs of the disabled. Inasmuch as it doesn't cover all the disabled, New Zealand's approach of the past 20 years lies somewhere between the collective model and the liberal model. ¹⁴⁹ [*662]

The proposal by Donald Harris and his group at Oxford for a comprehensive English disability compensation scheme ¹⁵⁰ and the Woodhouse proposal for Australia ¹⁵¹ are better exemplars of the communitarian model. My comprehensive income support and health care proposal fits this model as well. ¹⁵² In the collective model, neither individual lawsuits for money damages nor targeted cost internalizing through funding mechanisms is relied upon for behavior control. Rather social channeling of conduct is pursued through regulation.

My final model I call the socialist model for which I draw on the writings of Professor Abel. ¹⁵³ The first principle here is that we currently have inequality in risk-taking which is unfair; that is, the lower classes are involuntarily and disproportionately subjected to too much risk. What we need are collective mechanisms for both redistributing risk and reducing risk. A second principle is that we have too much income inequality in society.

So, under the socialist model, we'd have more worker control over risk creation than we have today. In addition, society would provide a generous minimum income guarantee, restrictions on income inequality, and a nationalized health insurance system. No special compensation arrangements would be provided (or thought needed) for those injured in accidents.

To sum up, each model has its own mechanisms for treating people fairly in terms of paying out benefits and paying for those benefits. Each has its own approach to accident prevention.

Although each model represents a distinctive ideological position, it is not necessary to view these models as mutually exclusive. For example, a society might adopt one model for one type of accident and others for other types. To illustrate, many countries, such as Canada and the United States, have traditionally employed the liberal model for work accidents and the conservative model for most other accidents.

A society can also embrace cascading models. In Japan and Britain, for example, the treatment of worker injuries involves laying the liberal model on top of the conservative model (instead of substituting one [*663] for the other). So, too, many people favor laying the regulatory force of the collective model on top of the behavior control strategy of the conservative model. When you utilize overlapping approaches in these ways, you get an ideological mixed (although not necessarily bad) system.

Some people in the United States would find it odd that I call the tort model the conservative model because people associated with Liberalism, such as the consumer activist Ralph Nader, are big supporters of the tort system. ¹⁵⁴ The reason for this, I suggest, is that, over the past 25 years the tort system in practice in the United States has taken on a lot of the ideology of the liberal model. Indeed, this is a large part of what Professor Priest and others have been complaining about. ¹⁵⁵ U.S. tort law is no longer only about lawsuits on behalf of individuals; instead, we have many mass actions. Fault has become much de-emphasized as

courts use rhetoric endorsing the principle that organizations should pay for harms they "cause" without being too concerned about whether we can identify any wrongdoing on their part.

II.

In my own writings I have proposed interim reforms inspired by the liberal model. For some accidents I would substitute a liberal model solution in place of tort law; ¹⁵⁶ additionally, I would alter tort law's damages rules to mimic the benefit arrangements of liberal compensation schemes. ¹⁵⁷ But for the longer run, as noted above, I favor solutions that embrace the collective model.

Because Professor Klar has argued that there is no necessarily logical connection between criticisms of the tort system and proposals such as mine, ¹⁵⁸ I'd like to try to make that connection here.

I believe that the U.S. tort system fails miserably to achieve the various social objectives set forth in its defense, including the "mor [*664] alizing" function which Professor Miller has addressed. ¹⁵⁹ On the other hand, I concede that the U.S. tort system does in fact provide substantial victim compensation, albeit at an extravagant administrative cost.

So this leaves me in somewhat of a quandary. If I simply do away with U.S. personal injury law, I am left with uncompensated victims, an especially acute problem in a nation with such a porous social safety net. Therefore, I feel I must offer to replace tort with an alternative compensation scheme that will better address victim needs. By the same token, even though I conclude that U.S. tort law does not effectively achieve sufficient accident reduction, I of course find that a desirable goal, and hence my proposal contains new measures aimed in that direction too.

I admit that I am being politically expedient when I say that if we eliminate personal injury law this will free up money to be used to pay for my proposal. But, on the other hand, it hardly seems fair to make a proposal like mine without giving some attention to how it is to be financed.

I agree that the U.S. is not going to adopt my long run solution right now all in one large step. But I want to explain how we might move towards my vision of the collective model through several smaller steps.

The first strategy, I think, is to try to get the little cases out of the tort system. I mean cases where people are only temporarily unable to perform their normal activities and are not either permanently impaired or permanently disfigured in a serious way. Nor have they been intentionally or gravely wronged by the conduct of another. These little cases cost a lot of money in both awards and claims adjustment expense. They generate, at least in the United States, a lot of what I consider to be nonsense pain and suffering awards that are the result of the nuisance value of the cases; indeed, the availability of substantial pain and suffering awards promotes fraudulent claims.

Furthermore, I think that most people in these smaller injury situations would be quite satisfied if they could get their basic needs promptly and sensibly taken care of - their income needs, their medical expenses and their other costs. And I believe that through a collective approach we in the U.S. could more cheaply provide for the basic needs of a larger number of minor and modest accident victims than tort law does [*665] today. This means eliminating pain and suffering awards and largely cutting the lawyers out and then redirecting the savings (or much of it) towards compensation for out-of-pocket losses.

Here's how I think we should take care of the small injury cases. First we need a universal

health care scheme which, of course, other countries such as Canada, New Zealand and Japan already have. But with more than 30 million people currently uninsured, we don't really have a health care system in the United States.

To be sure, those 30 million plus people do get some health care. But they don't have advance arrangements for the payment of that care. Rather, they often wander into public hospitals long after they should have seen a doctor; they use emergency room service when cheaper care would be better; they tend not to seek preventive care; and sometimes they simply do without much needed medical care. So we need a better system - both for its own sake and so as to be able to say that tort law isn't really needed to provide for accident victims' medical care.

Next, we need a good system of income replacement for people with moderate injuries. I have offered two alternatives in my writings. One combines mandatory sick leave for very temporary disabilities with mandatory temporary disability insurance for disabilities lasting up to six months ¹⁶⁰ - programs that are already mandatory in many other countries. ¹⁶¹ My alternate income replacement proposal is even more ambitious. I call it Short Term Paid Leave, and it envisions a kind of forced savings scheme. ¹⁶² Under the plan for every five days you work, you would earn one day of paid leave. Whenever you don't work and you want to get paid, you draw down one of your earned days. This plan would replace paid holidays, paid vacations, sick leave, temporary disability insurance, unemployment compensation, and so on, as well as eliminating the need to resort to tort law for short term income replacement. Details are set forth in other writings of mine.

Notice that both of my proposals for short term income replacement have nothing to do with particular types of accidents. Indeed, they are not at all restricted to accidents. Rather, the first one is organized around disability generally, and my Short Term Paid Leave plan is even broader in its reach. [***666**]

Once the small cases are removed from the tort system, we would be in a far better position to think carefully about our social obligation to people who are seriously injured. These are relatively few, but, of course, the total amount of their harm is very substantial.

It is important to appreciate here that many people who are clearly victims of tortious conduct by others go uncompensated or are vastly under-compensated through U.S. tort law today because their injurer is uninsured or underinsured. In California, for example, in perhaps two-thirds of automobile accident cases there's no possibility of obtaining more than \$ 50,000 from the other driver. This is because we have 20 to 25 percent uninsured motorists, and of those who are insured, half or more carry \$ 50,000 or less in coverage. ¹⁶³

There is more than a little irony here. In the U.S., where tort law is relatively pro-plaintiff and promises Rolls Royce level damages for those who are successful in the system, the cost of auto insurance is relatively high. Hence many don't purchase it, or else buy too little of it. In Canada and Japan and in Europe generally, where tort law is formally less generous, auto liability insurance is more affordable, coverage limits are typically much higher or unlimited and more people buy it. Indeed, other countries are politically more able to insist upon insurance as a condition of car ownership than are we in the U.S. Furthermore, we let people who do insure get away with intolerably low limits of liability. But, of course, a seriously injured person would rarely be fully compensated with \$ 50,000 or less.

The failure of U.S. tort law to compensate seriously injured victims runs through other areas as well. Consider medical malpractice. A recent Harvard study and Professor Paul Weiler's book *Medical Malpractice on Trial* tell us that of 100,000 hospital admissions, there are 4,000 medical accidents, which is four percent. One thousand of those accidents are caused by negligence. ¹⁶⁴ So upon entering a U.S. hospital you run a one percent chance of a medical malpractice injury.

Out of those 100,000 hospital admissions about 125 tort claims are filed, and about 60 people actually get money. Of those, 25 to 30 are undeserving, in the sense that they really weren't the victims of malpractice. In fact, they may not have even been injured, but they recover at least something by way of settlement. The other 30 to 35 who recover really were the victims of malpractice. In short, of 1,000 victims of negligence, 30 to 35 are compensated by tort law. [*667]

To be sure, many of those who don't recover have relatively small injuries. But, still, there are many patients in that 1,000 who suffer serious injuries (including a large number who die from malpractice) who are not compensated by tort law.

In the face of these numbers, one strategy is to shift the treatment of serious medical injuries away from the conservative/tort model and over to the liberal/no-fault model. Indeed, that is exactly what Professor Weiler proposes. Moreover, he argues that by redirecting the money now put into the medical malpractice system, we could provide sensible compensation to all seriously injured victims of medical accidents, not just seriously injured victims of medical malpractice. Under such a plan, he argues, not only would those seriously injured by accident be better off, but, as a class, medical malpractice victims too would be better off, even though, of course, many of those 30 in 100,000 who recover huge pain and suffering awards in tort today would come away with far smaller recoveries.

I have proposed a somewhat similar approach to serious auto accidents. In homage to New Zealand, I call for the creation of an Auto Accident Compensation Corporation (AACC).¹⁶⁵

In the tradition of the liberal model, the AACC would collect revenue from three sources: (1) gasoline taxes; (2) drivers, based upon their driving record and driver experience so that young people and other novices would be charged more; and (3) vehicle safety, determined by an index measuring the safety of the car. These funding sources are designed to target costs in ways that promote both behavior control and a sense of fairness as to who should pay.

With these revenues, the AACC would pay no-fault benefits at a very generous level: Income replacement of 80 or 85 percent up to twice the average weekly wage, that's up to at least \$ 50,000 a year; medical expenses of up to at least \$ 500,000; plus other kinds of first party benefits such as for replacing home services. In addition, if this were socially desired, the plan could afford to pay modest lump sums of the New Zealand sort for pain and suffering, impairments and disfigurements.¹⁶⁶ [*668]

When I say the plan could afford those benefits, I mean that the AACC would have enough money to cover them even by setting contribution levels such that most drivers would pay into the AACC substantially less than they now pay for auto insurance that would no longer be needed. Obviously the AACC would provide many auto victims with much better compensation than does the current U.S. system, including many people who are victims of the fault of others. Combined with one of my proposals for handling smaller injuries, the AACC could sensibly concentrate on seriously injured victims of auto accidents.

Other liberal model schemes like this are also clearly possible. For example, we could adopt a no-fault air crash compensation plan. I've discussed this elsewhere.¹⁶⁷ Drug accident compensation plans, vaccine damage compensation plans, and so forth could add to the list.

Imagine now that the U.S. has adopted liberal model plans of this sort covering many types of accidents. At this point people would have to start asking themselves: why treat these classes of the disabled better than the disabled generally? And I think such distinctions would be difficult to maintain.

Once that conclusion were drawn, the logical policy response in the U.S., I believe, would be to improve the benefits paid by our Social Security disability system, a scheme aimed at the disabled in general. ¹⁶⁸ In this way, the compensatory role for the specialized schemes would be reduced. This assumes, of course, that eligible claimants were required to seek social security first and the liberal model compensation plans paid only where social security coverage was lacking. That is, I am assuming that social security would be "primary" and the focussed no-fault plans "secondary."

I admit that not everyone would prefer social security to be primary even in a nation with a generous social net. For example, in Germany today, in the name of good social cost accounting, social security is secondary; the liberal model compensation plans and tort law are liable first and the social net is ultimately liable only where the others fail to apply. The upshot is that much accident litigation there essentially involves one insurance pool suing another. I am highly skeptical about whether any important gains in terms of fairness or behavior channeling [*669] are achieved by this, and I would want to save the administrative costs involved (although I admit that others see this differently).

I would be even more comfortable with the collective approach if other mechanisms were put in place to harness the talents of those who now try to police corporate wrong-doing through the personal injury system. Hence I favor arrangements that give ordinary citizens and their representatives better leverage to prod the regulatory process to act and that reward citizen efforts to uncover negligence by enterprises.

I am happy to see the personal injury lawyer well-rewarded for coming forward and identifying corporate wrongdoing. Certainly there are some areas where personal injury lawyers seem to have exposed dangers before others have done so, and we wouldn't want to lose that source of socially desirable disclosure. But the work of most plaintiffs' lawyers has nothing to do with uncovering secret wrongdoing; and even where products are newly shown to be harmful, the current system most rewards those lawyers who bring a series of cases concerned with the same basic problem, rather than moving on to new problems.

I admit that my proposals for more citizen involvement in the regulatory process may turn out to be naive and might not function as I hope. Nonetheless, this is the direction I think we should be heading. In short, we should combine a more populist approach to regulation with a community responsibility approach to compensation; or, as I have said in my writings, the idea is to de-couple the compensation of victims from the behavior control and fair punishment of wrongdoers.

This, of course, is a radically different approach from one which would try to improve tort law so as to have it better serve multiple goals simultaneously. Recently a study team engaged by the American Law Institute undertook a comprehensive examination of U.S. tort law. ¹⁶⁹ This study at least collected data on the libertarian, liberal and communitarian alternatives to the conservative/tort approach. But when it came to making recommendations, the team largely proposed a modest tinkering with tort. ¹⁷⁰ So far as the communitarian model is concerned, the ALI team begged off on grounds of (a) political implausibility and (b) lack of expertise. I find the latter reason so modest as to be disingenuous. The former reason might be right, but it is a little sad to have scholars shy away on those grounds, especially when [*670] so much of what the study team did propose (much of it very clever) is now being ignored by the U.S. political process.

The authors of the study appear to have tried to generate support for their recommendations by portraying them as a compromise between the selfish interests of the plaintiff and defendant sides. But the report seems not to have been received in that way. Many advocates on both sides believe (or fear) that the report's recommendations would, on balance, be harmful to them. ¹⁷¹

Perhaps the hostility of the defense side to the report is explained by the fact that in the wider U.S. political arena the defense interests have been trying to use their muscle to push back tort law in a one-sided way, that is, without giving up something in return. Some advocates want to push it back to the very modest role it played in the 1950s. ¹⁷²

Yet these defense-side efforts have not been all that successful. Business, physicians, and municipal governments have won some rollbacks here and there, but the changes have been uneven from state to state and not enormously great anywhere. This suggests to me that there may be room for some sort of compromise after all.

But rather than trying to compromise within tort law, the key might just lie in taking a wider vision. For example, business could say: "We'll agree to provide better compensation benefits for our workers and our customers through other mechanisms if we can be relieved from some of the burden tort law." And through this sort of deal, steps could be taken in the direction of the collective solutions that I favor. ¹⁷³ Whether this will really happen, of course, only time will tell.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law > Excise Taxes > Fuels (IRC secs. 4041-4042, 4081-4084, 4091-4093, 4121) > General Overview
Torts > Procedure > Conflicts of Laws > General Overview
Torts > Transportation Torts > General Overview

FOOTNOTES:

¹⁷¹ Stephen D. Sugarman, A Restatement of Torts, 44 Stan. L. Rev. 1163 (1992).

¹⁷² See, e.g., Richard A. Epstein, Medical Malpractice: The Case for Contract, 1976 Am. B. Found. Res.J. 87.

¹⁷³ Robert A. Rabin, The Historical Development of the Fault Principle: A Reinterpretation, 15 Ga. L. Rev. 925 (1981).

¹⁷⁴ See Tsuneo Matsumoto, *supra* beginning at p. 577.

¹⁷⁵ See Lewis N. Klar, *supra* beginning at p. 583.

¹⁷⁶ See, e.g., *infra* at p. 717.

¹⁷⁷ See Jan Hellner, Compensation for Personal Injury: The Swedish Alternative, 34 Am. J. Comp. L. 613 (1986) and Carl Oldertz, Security Insurance, Patient Insurance, and Pharmaceutical Insurance in Sweden, 34 Am. J. Comp. L. 635 (1986).

¹⁷⁸ See Sugarman, *supra* note 24, at 106-110.


¹⁷⁹ Geoffrey Palmer, Compensation for Incapacity, *supra* note 78.

¹⁸⁰ Donald Harris, et al., Compensation and Support for Illness and Injury (1984).

¹⁸¹ See Compensation for Incapacity, *supra* note 78.

¹⁸² Sugarman, *supra* note 24, at 127-152.

- ¶n153 See, e.g., Richard L. Abel, *A Critique of Torts*, 37 UCLA L. Rev. 785 (1990).
- ¶n154 See, e.g., Ralph Nader, *The Assault on Injured Victims' Rights*, 64 Denv. U. L. Rev. 625 (1988).
- ¶n155 See, e.g., George L. Priest, *supra* at p. 544, and Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* (1988).
- ¶n156 See, e.g., Stephen D. Sugarman, *Choosing Among Systems of Auto Insurance for Personal Injury*, 26 San Diego L. Rev. 977 (1989).
- ¶n157 Stephen D. Sugarman, *Serious Tort Law Reform*, 24 San Diego L. Rev. 795 (1987).
- ¶n158 See Lewis N. Klar, *supra* beginning at p. 583.
- ¶n159 See Richard S. Miller, *supra* beginning at p. 626.
- ¶n160 Sugarman, *Serious Tort Law Reform*, *supra* note 157.
- ¶n161 Stephen D. Sugarman, *Personal Injury Law Reform: A Proposed First Step*, 16 Indus. L.J. 30 (1987).
- ¶n162 Stephen D. Sugarman, *Short Term Paid Leave*, 75 Cal. L. Rev. 465 (1987).
- ¶n163 Stephen D. Sugarman, *Nader's Failures?*, 80 Cal. L. Rev. 289 (1992).
- ¶n164 Stephen D. Sugarman, *Doctor No*, 58 U. Chi. L. Rev. 1499 (1991).
- ¶n165 Stephen D. Sugarman, *California's Insurance Regulation Revolution: The First Two Years of Proposition 103*, 27 San Diego L. Rev. 711-714 (1990) and Sugarman, *Nader's Failures?*, *supra* note 163 at 299-305.
- ¶n166 Palmer, *Compensation for Incapacity*, *supra* note 78. For recent New Zealand developments, see Richard S. Miller (forthcoming).
- ¶n167 Stephen D. Sugarman, *Right and Wrong Ways of Doing Away with Commercial Air Crash Litigation*, 52 J. Air L. & Com. 681 (1987).
- ¶n168 Sugarman, *supra* note 24, at 127-152.
- ¶n169 ALI Reporters' Study, *supra* note 2.
- ¶n170 Sugarman, *A Restatement of Torts*, *supra* note 141.
- ¶n171 For a good example from the plaintiffs' side, see Jerry J. Phillips, *Comments on The American Law Institute Study of Enterprise Liability for Personal Injury* (Apr. 1991 processed).
- ¶n172 Stephen D. Sugarman, *Taking Advantage of the Torts Crisis*, 48 Ohio St. L.J. 329 (1987).
- ¶n173 For a proposal to achieve a similar solution via contract, see Robert Cooter & Stephen D. Sugarman, *A Regulated Market in Unmatured Tort Claims: Tort Reform by Contract*, in *New Directions in Liability Law* (Walter Olson ed. 1988) at 174.

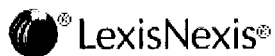
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ARTICLE: REFORMING WELFARE THROUGH SOCIAL SECURITY

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SUMMARY:

... In the early years of the program, however, there were relatively few such absent-parent cases. ... Under either method, the child support obligation ultimately imposed upon the absent parent will be identical. ... These proposals suggest that states should look primarily to the absent parent's earnings to determine the child support obligation. ... What should happen if the caretaker parent earns wages above approximately \$ 600 a month, thereby causing a reduction in the Social Security caretaker's benefit at the rate of one dollar per two dollars in wages earned? This loss should not increase the child support obligation of the absent parent. ... In other words, depending upon which method is adopted, states should either reduce or treat as discharged the absent parent's child support obligation by the full amount of Social Security benefits to which the child and the caretaker parent would be entitled if the caretaker parent was not employed. ... At the same time, the fact that the custodial parent earns wages should not reduce the absent parent's child support obligation, at least not until the caretaker parent has earned wages sufficient to exhaust her own right to Social Security caretaker's benefits. ...

TEXT:

[*817]

It is unfortunate that discussions of welfare reform almost never mention Social Security. Although Social Security contributes to the welfare problem, it also may be used as part of the solution. When Americans talk about welfare, they usually envision poor single mothers who receive cash aid from the program widely known as Aid to Families with Dependent Children (AFDC). Social Security generally is not mentioned because most people are unaware of the large cash assistance program that Social Security provides for other dependent children and their caretakers. Additionally, most people who are aware of the role played by Social Security do not imagine that it is connected to the welfare problem.

In this Article, I first want to illustrate the connection between Social Security and AFDC - to explain the Social Security program and to demonstrate how it contributes to the welfare problem. More importantly, I then want to offer a reform proposal that builds on Social Security as a way to begin to eliminate AFDC and the current welfare problem. Simply put, I propose that Social Security should provide benefits to children with absent parents on the same basic terms on which it now provides benefits to children with deceased, disabled, or

retired parents.

I. Comparing Social Security and Welfare

Consider two hypothetical scenarios, the first of which explains how Social Security's existing benefits for children and their caretaker parents work. Suppose Jane and Bob are married and have a two-year-old child, Rachel. Bob, who **[*818]** works full time, dies suddenly. ¹ Although few people seem to realize it, regardless of whether Bob and Jane had purchased sufficient private life insurance to replace Bob's lost earnings, Social Security provides Bob's survivors with a life insurance annuity benefit, assuming that he was insured for Social Security purposes at the time of his death. ²

This public life insurance benefit is divided into two parts. First, Social Security would pay a monthly cash benefit to Jane for Rachel's support, referred to as the child's benefit. ³ The benefit amount would be based on Bob's previous wages ⁴ and generally would continue until Rachel reaches age eighteen. ⁵

Second, Social Security would make the following benefit offers to Jane, referred to as the caretaker parent's benefit: If you previously were not in the paid labor force, you may continue to stay at home and care for Rachel and Social Security will provide you with a monthly cash benefit in addition to Rachel's. ⁶ If you previously worked full time in the paid labor force, you have the option to quit your job and stay home to care for Rachel, in which case Social Security will provide you with the same caretaker parent's benefit available under the first offer. ⁷ If you decide to continue working, or to enter into the paid labor force, Social Security will provide you **[*819]** with the full caretaker parent's benefit as long as you do not earn more than approximately \$ 600 a month. If you exceed that amount, Social Security will reduce your benefit by one dollar a month for every two dollars you earn, until the benefit disappears entirely. ⁸ Regardless of how much you earn, however, the child's benefit to Rachel will continue unabated.

Social Security would provide the same child's benefit to Rachel ⁹ and would provide Jane with similar options as the caretaker parent ¹⁰ if Bob became totally disabled or was at least sixty-two years old and retired. ¹¹ Moreover, these benefits would be paid regardless of whether Bob and Jane had purchased disability insurance to cover the risk of Bob's disability or had saved funds for the support of the family in anticipation of Bob's retirement, for example, through a pension plan.

Having illustrated how Social Security's dependent child program works at the individual family level, it is now appropriate to provide some recent national data on the program's operation. As of April 1992, Social Security was paying benefits to more than 1.8 million children of deceased workers ¹² and to nearly 300,000 of those children's widowed mothers. ¹³ Social Security also was paying benefits to almost 1.1 million children of disabled workers ¹⁴ and to approximately 200,000 spouses who care for those beneficiary children. ¹⁵ Finally, the program was paying benefits to more than 430,000 children of retired workers ¹⁶ and to approximately 100,000 spouses who care for the beneficiary children of those workers. ¹⁷ In sum, nearly four million children and caretaker parents currently are beneficiaries of the Social Security **[*820]** program. ¹⁸ In dollar terms, as of April 1992, monthly child benefit awards amounted to more than one billion dollars. ¹⁹ About three-quarters of that sum was paid to children of deceased workers. ²⁰ Benefits to caretaker parents total an additional two billion dollars annually. ²¹ Hence, the combined annual cost of Social Security payments to children and their caretakers is approximately fourteen billion dollars.

Now consider an alternative scenario which contrasts the fate of children who lose financial support through the absence of a parent, for example, through divorce. Suppose that Bob

and Jane divorce or separate and that Jane obtains custody of Rachel. Presently, no Social Security benefit would be available for Rachel and Jane. Bob likely would be ordered to pay child support to Jane for Rachel's benefit. He also might be ordered to pay spousal support to Jane. The two payments together might suffice to support Jane and Rachel adequately, even if Jane stays at home and cares for Rachel; although typically the amount of the payments would require Jane and Rachel to accept a sharply reduced standard of living. Moreover, even if the amount of the award is sufficient, there is a considerable possibility that Bob will not pay the full amount ordered, or even a part of it.²² He may disappear from Jane's and Rachel's lives, stop working, pay initially but then stop paying, or start a new family to which he will devote his time and money.

In the event that Jane does not obtain sufficient support from Bob, she probably will have to continue working or enter into the paid labor force, even if she does not believe that such action is in Rachel's best interests. Because Social Security will not provide any benefits, Jane will not have the options that she would have had if Bob had died.²³ If Jane does work, her earnings might well be the household's primary means of [*821] support. If Jane cannot find employment, or if she decides to stay at home and care for Rachel, then her only other option may be to apply for welfare benefits under AFDC.

In order to qualify for AFDC, Jane first will be required to deplete any liquid assets remaining after her divorce or separation from Bob.²⁴ Such an "assets" test is not imposed as a requirement to obtain Social Security benefits. Assuming that Jane and Rachel qualify for AFDC, the benefits they receive will vary from state to state, but certainly will be less than the official poverty level for a single mother with one child.²⁵ By contrast, if Bob had died, their Social Security benefits would be a nationally uniform amount related to Bob's past earnings,²⁶ and might well be above the poverty level. For example, the average individual benefit paid by Social Security to children of deceased workers was more than \$ 400 a month in 1991 and 1992²⁷ - the equivalent of the average monthly payment to an entire AFDC family.²⁸ To illustrate the contrast differently, rather than receiving an average of about \$ 400 a month from AFDC, the family benefit for widowed caretakers and children receiving survivor benefits under Social Security averaged more than \$ 1100 a month at the end of 1990.²⁹ The family benefit for children who alone receive survivor benefits averaged more than \$ 570 a month at the end of 1990.³⁰

The relative generosity of the Social Security programs may be viewed from yet another perspective. Whereas Social Security is now paying about fourteen billion dollars annually to almost four million dependent children and their caretaker parents,³¹ AFDC paid out nearly twenty-one billion dollars to more than twelve million recipients in 1991, including about [*822] eight million children.³² In other words, AFDC's budget was only fifty percent greater, even though its caseload was three times larger.

Additionally, if Jane receives AFDC benefits, the prospect of combining public benefits and wages from work is much less attractive than if Bob had died and she was receiving Social Security benefits. Instead of being able to earn about \$ 600 a month before Social Security benefits are reduced, Jane and Rachel would begin to lose their AFDC benefits almost from the outset.³³ AFDC benefits are reduced during the first four months of employment while under the program at a rate of two dollars for every three dollars earned and not otherwise disregarded,³⁴ and thereafter at a rate of one dollar for every dollar earned and not otherwise disregarded.³⁵ Recall that this is in contrast to the Social Security program, which reduces benefits by one dollar for every two dollars earned.³⁶ Put differently, Social Security presents wage-earning recipients like Jane with what is commonly called an implicit marginal tax rate of fifty percent; that is, the recipient loses fifty cents in benefits for each dollar earned. AFDC's implicit marginal tax rate begins at sixty-seven percent and increases to one hundred percent after four months of employment; that is, the recipient loses a dollar in benefits for each dollar earned.

Another way that Jane might improve her household's standard of living is through remarriage. Indeed, many divorced and widowed mothers do remarry.³⁷ If Jane is divorced and receives AFDC benefits, the price of remarriage is that she and Rachel would no longer receive benefits under the program.³⁸ By contrast, although Jane would lose any [*823] benefits she was receiving as a caretaker parent if she remarries while covered by Social Security,³⁹ Rachel would continue to receive her Social Security child's benefit. Therefore, other things being equal, marrying a divorced Jane imposes a considerably larger financial obligation for the new husband than does marrying a widowed Jane, even though in most states a new husband does not have any formal legal obligation to support Rachel unless he adopts her.⁴⁰

In sum, if a child does not obtain sufficient financial support from his absent father and the child and his mother are poor enough, they can qualify for AFDC. They will be forced, however, to live on an income below the poverty level. In contrast, if a child's working father dies, becomes disabled, or retires, the child and his mother can qualify for Social Security benefits and probably will live above the poverty level either from Social Security alone or by combining Social Security benefits with the mother's earnings, private insurance, or savings.

A. Historical Background

America has not always treated children with absent fathers so differently from those with deceased, disabled, or retired fathers. Neither Social Security nor AFDC existed before 1935, although there were state-level precursors to AFDC, typically called "mothers' pensions" programs.⁴¹ During the Depression, many of these mothers' pensions programs had long waiting lists, were depleted of funds, or functioned in only a portion of a state.⁴² Title IV of the Social Security Act of [*824] 1935⁴³ created the AFDC program,⁴⁴ which was essentially a partial financial bail-out of state mothers' pensions programs by the federal government. In effect, if a state enacted a program of aid for poor children that met certain minimum requirements, the federal government would pay a portion of the cost of the program through a matching grant. All of the states found this arrangement sufficiently attractive and enacted qualifying AFDC programs soon after the adoption of the Social Security Act.⁴⁵

Title II of the Act established the program that we now commonly refer to as Social Security.⁴⁶ Originally, Social Security existed as a program for retirees and their estates called Federal Old-Age Benefits,⁴⁷ commonly referred to as old-age insurance (OAI). OAI did not provide benefits for the dependents of covered workers.⁴⁸ Thus, if the first scenario involving Bob, Jane, and Rachel had occurred shortly after 1935, no Social Security survivor benefits would have been paid to Bob's family upon his death.⁴⁹ However, if Jane was poor enough, she could have qualified for AFDC and obtained an amount determined by her state of residence. At AFDC's inception, it was anticipated that the program mainly would support poor widows and their children and, in fact, it initially functioned in that way.⁵⁰

Under the federal program rules, AFDC also would help to support children whose parents were divorced, separated, or never married, or whose fathers were incapacitated.⁵¹ In the early years of the program, however, there were relatively few [*825] such absent-parent cases.⁵² One explanation is that divorce, separation, and childbirth outside of marriage were far less common than they are today. A second reason is that states initially were permitted to impose moral requirements in determining who was eligible for AFDC. Many states adopted the same practices and requirements utilized under the mothers' pensions programs, which largely restricted benefits to "gilt edged widows" - those behaving in a morally upright manner that suited their assigned social worker.⁵³ As a result, if the second scenario involving Bob, Jane, and Rachel had occurred shortly after 1935, it is far from certain that Jane and Rachel would have been deemed eligible to receive AFDC benefits

after the divorce, regardless of their financial need. As a last resort, Jane and Rachel might have been able to obtain some cash aid from their state's or county's residual general relief programs, sometimes referred to as "general assistance."

In any event, the Social Security Act Amendments of 1939⁵⁴ changed the picture dramatically. OAI was modified to emphasize "social adequacy" as much as "individual equity."⁵⁵ Dependents' benefits were added for the spouses and children of retirees⁵⁶ and for the widows, widowers, and children of deceased workers.⁵⁷ The program appropriately was retitled Federal Old-Age and Survivors Insurance Benefits,⁵⁸ commonly referred to as old-age and survivors insurance (OASI). Through further amendments beginning in the 1950s, the plan ultimately was expanded to provide benefits to totally disabled workers⁵⁹ and their dependents⁶⁰ and was renamed, yet again, as Federal Old-Age, Survivors, and Disability Insurance Benefits,⁶¹ more widely known as old-age, survivors, and disability insurance (OASDI). **[*826]**

An obvious objective of the 1939 amendments was to elevate widowed mothers and their children from AFDC to Social Security - a goal that largely has been achieved. As discussed previously,⁶² about 2.1 million children and their caretakers received Social Security survivor benefits in 1992. Formally, these caretakers and their children still may be eligible for AFDC if they do not qualify for Social Security.⁶³ Despite this potential eligibility, however, cases involving widows and their children comprised less than two percent of the AFDC caseload during 1989,⁶⁴ which in absolute numbers - approximately 200,000 mothers and children - is far fewer than the approximately 2.1 million widowed mothers and children now receiving OASDI benefits.

After the 1939 reforms, there was reason to hope that AFDC largely would wither away as a result of moving widows and their children onto Social Security. This, of course, has not happened. Cases involving incapacitated fathers represented a significant percentage of the AFDC caseload until the late 1950s,⁶⁵ when totally disabled workers, their children, and their spouses first qualified for Social Security.⁶⁶ As a result of these amendments, the AFDC caseload involving incapacitated parents is currently small, comprising only three percent of the total, or approximately 300,000 caretakers and children,⁶⁷ compared with the 1.3 million caretakers and children who receive OASDI benefits through a disabled worker.⁶⁸

AFDC's continuation is instead largely attributable to the caseload explosion involving recipients who are divorced or separated, or who have never been married. Presently, about eighty-five percent of AFDC cases are comprised of women and their children who fit within this category,⁶⁹ usually referred to as "absent father" cases. During the 1940s and 1950s, cultural patterns and state policies limited the number of absent father cases. Since the 1960s, however, enormous **[*827]** changes have occurred. First, the divorce rate has increased dramatically from thirty years ago. Second, the out-of-wedlock birthrate is significantly higher. Third, the poor generally seem much more willing and able to ask for and obtain AFDC benefits than they were in the past, mainly the result of several important developments of the 1960s: the ideology of the War on Poverty, the civil rights movement, the welfare rights movement, and the introduction of federally funded legal services for the poor. Finally, changes in state laws have increased greatly the number of "absent father" claimants.⁷⁰

B. Expanding Social Security's "Social Adequacy" Function

The Social Security Act has created two classes of presumptively needy children - those with deceased, disabled, or retired fathers who no longer must look to means-tested AFDC benefits for support, and those with absent fathers who remain dependent upon welfare. In comparing these two classes, it must be emphasized that in all instances in which a child faces the risk of poverty, both the private economy and the private law may make it unnecessary for the child and her mother to seek any public income transfers. The deceased

father may have had adequate life insurance; the disabled father may have adequate disability insurance; the retired father may have adequate savings or an adequate pension; and the absent father may have adequate earnings and may pay adequate child support.

The "social adequacy" provisions of Social Security are founded on the social reality that many fathers simply do not have adequate life insurance, disability insurance, savings, or pensions. Although it is true that the shortfall in each of these [*828] respects is less today than it was in 1935, the shortfall remains substantial and almost surely would continue if Social Security dependents' benefits were eliminated. Recognizing this clear social need, Congress provided for a social insurance benefit through Social Security by establishing a reasonable floor of support for the children and spouses of deceased, disabled, and retired workers. The benefit amount is progressive in the sense that it replaces a larger proportion of a low-wage earner's salary than of a person whose earnings are comparatively higher.⁷¹ At the same time, because payments are related to a worker's past wages, the benefit helps to maintain consistency in a child's relative standard of living after the event that triggers a loss in earnings.

In other words, although the Social Security child's benefit is not tailored individually to an absolute need for subsistence income, the benefit plainly does serve the need for substitute income when a child can no longer depend upon his father's earnings. Fathers, of course, can arrange privately for life insurance, disability insurance, savings, and pensions, but these serve to benefit their children beyond the base that Social Security provides. Obviously, some men provide less private support because they are aware of the role that Social Security plays. As previously indicated,⁷² however, the nature of American lifestyles suggests that many fathers would not provide for their children even if Social Security did not exist.

When a child is deprived of financial support due to her father's absence and failure to pay child support, the governmental arrangements are altogether different.⁷³ From the child's perspective, however, the risks and subsequent needs are similar. Just as men often die without sufficient insurance, men also father children only to later divorce or leave the children's mothers without paying the child support required of them. Some men may not pay because they become financially unable to do so or were unable to pay an adequate sum in the first place. Some men may not pay simply because they prefer instead to spend the money on themselves, a new partner, or perhaps new children. Some men may not pay because of anger and hostility toward the custodial parent. Still others may not pay because they are never identified as [*829] the fathers of the needy children, or even if they are so identified, have never had a support order entered against them and do not pay voluntarily.⁷⁴

Since 1974, the federal government has expanded its efforts to require states to adopt and operate more effective child support enforcement programs.⁷⁵ These enforcement programs have enlisted the support of local law enforcement officers, have sought to create higher and more standardized support awards, and have attempted to implement a wide variety of child support withholding mechanisms, for example, through withholding from wages and income tax refunds. The child support shortfall remains extremely large, however.⁷⁶

The consequences for children with absent fathers are troubling. Although other similarly needy children are rescued by the largely invisible Social Security program, support through AFDC and absent fathers may be wholly inadequate. Moreover, the fact that AFDC no longer serves children of deceased and disabled fathers surely has contributed to the stigmatization and political weakness of those who must continue to depend on AFDC for support. That is to say, if widows and incapacitated wage earners constituted a larger portion of the AFDC caseload relative to absent parent cases, opponents of AFDC would be less effective in characterizing it as a plan for irresponsible women who bear illegitimate children or who cannot keep their marriages together.⁷⁷ In this way, Social Security has contributed to the welfare problem.

II. The Proposed Plan

The description in Part I of the basic structure of Social Security benefits for children and their caretakers demonstrates [*830] how the system might be made available to a large number of those children currently on AFDC. By amending Social Security, a meaningful reformation of welfare can be achieved. The goal is to continue the trend established by the Social Security amendments in the 1930s and 1950s - moving even more needy children and their mothers from AFDC to Social Security.

Suppose that a child deprived of the regular presence of a parent in the home qualified for Social Security benefits determined in the same manner as if the absent parent had died. Suppose further that the child's caretaker parent also qualified for Social Security benefits determined in the same manner as if the absent parent had died.⁷⁸ This Part initially will focus on how such a benefit program would function and explain the financial and psychological advantages it would provide for its beneficiaries. This Part then will consider whether the new benefit can be understood coherently as an appropriate object of Social Security and how the new benefit would be financed. Finally, attention will be given to the welfare problem that would remain after the adoption of the proposal and to the plan's political prospects.

A. Financial Advantages for AFDC Claimants

In order to qualify for the new Social Security benefit, the program generally would require that the absent parent, typically the father, have sufficient recent attachment to the work force to be insured for Social Security purposes at the time of the divorce or separation, or the child's birth if the parents are not married or living together at that time. I will assume that the insured status needed to qualify a child for absent parent benefits would require the same past labor force attachment of the wage earner that is required for the current child's benefit.⁷⁹

Although it is difficult to determine the proportion of AFDC recipients who would be eligible for Social Security benefits [*831] under this proposal, the share is likely to be large. For two primary reasons, however, the proportion probably would be lower than the proportion of widowed mothers otherwise eligible for AFDC benefits who currently are receiving Social Security benefits instead. First, there almost certainly is a higher proportion of absent fathers than deceased fathers who are not insured for Social Security purposes. Included in this category are teenage fathers who have never worked and young fathers who have not yet established a sufficient earnings record to qualify as insured. Second, the identification rate of fathers of children born outside of marriage almost certainly is lower than that of fathers who have died.⁸⁰

As with current Social Security benefits, the child and the caretaker parent would be eligible for benefits based upon the absent parent's past wages. From data already presented concerning Social Security survivor benefits,⁸¹ it seems fair to conclude that in a large number of cases, the new Social Security benefit would be greater than what the mother and child currently receive under AFDC, thereby improving their financial status. For now, I will assume that in cases where the new Social Security benefit is less than the current AFDC benefit, the mother and child would be eligible to apply for AFDC benefits to "top up" the benefits to their previous level. The caretaker parent thus could stay at home with her child or enter into or remain in the paid labor force at her option, facing the same Social Security benefit loss rules that apply in survivor benefit cases. Perhaps most importantly, the child's benefit would not be reduced regardless of the mother's earnings,⁸² which contrasts sharply with AFDC benefits.⁸³ Similarly, the caretaker's benefit would be reduced using the current Social Security rate of one dollar for every two dollars earned after approximately the first \$ 600 in monthly earnings.⁸⁴ As a result, women currently receiving AFDC benefits [*832]

would find it far more financially attractive to combine Social Security benefits and wages than to combine AFDC benefits and wages.

The irony presented by the current welfare situation merits discussion. Many people seem to want AFDC mothers to work, while they appear less willing to pressure Social Security mothers to do the same. Because of its higher implicit marginal tax rate,⁸⁵ however, the AFDC program discourages voluntary work much more than does the Social Security program. The proposed plan would end this perverse work incentive pattern, thereby providing a reasonable basis to believe that many women now solely dependent upon AFDC would choose a combination of Social Security benefits and paid work. It also is worth noting that AFDC recipients who currently earn modest wages and illegally fail to report their earnings to the AFDC program could combine the new Social Security benefit with their current earnings and cease to be lawbreakers.⁸⁶

For many women now receiving AFDC benefits, transferring to Social Security would provide the opportunity to combine the new benefit with supplemental private support from the child's absent parent. As a condition of eligibility, AFDC recipients currently are required, when necessary, to cooperate in establishing the paternity of a child and in obtaining an order of child support against that child's father, and to assign that support award to the state.⁸⁷ The state ordinarily collects the child support payment and remits only fifty dollars a month to the mother, keeping the remainder, in effect, to pay for the AFDC benefit the mother is receiving.⁸⁸ Hence, a child receiving AFDC benefits is helped very little if the father actually pays support. In contrast, just as children and their caretakers can supplement Social Security survivor benefits with private life insurance or estate assets left by the deceased parent, they could supplement Social Security absent parent benefits with private child support payments. This would give [*833] mothers a greater incentive than they currently have under AFDC to ensure that absent fathers pay the required support. Because caretaker parents would have various opportunities to supplement their household's Social Security benefits, there would be less need for AFDC to "top up" Social Security in cases where the Social Security benefit is less than the AFDC benefit.

B. Psychological Advantages

Those mothers who transfer from AFDC to Social Security should, in general, gain a great deal in self-respect. First, there would be an end to AFDC's intrusiveness in the form of school and work requirements, routine social worker supervision, to the extent that this still exists under AFDC, and inquiry into assets, none of which occur under the Social Security program. Public agencies still could offer social, vocational, and educational services to these mothers, but the programs would have to be of a high quality in order to attract the voluntary participation of caretaker parents. Obviously, coercive intrusion would be appropriate in cases of child abuse or neglect, but under the proposed plan, single mothers would no longer be presumed incompetent or unfit in the way that AFDC now essentially presumes.⁸⁹

At the same time, because caretaker parents would not have to face coercive AFDC requirements, they would no longer suffer one of the main consequences of such requirements - restricted access to benefits. Rather than helping recipients finish school or enter into the paid labor force, as the AFDC requirements purportedly intend, these rules often serve simply as insurmountable hurdles, which purge from the AFDC caseload, or otherwise penalize, needy children and their mothers.⁹⁰

Additionally, beneficiaries of the proposed plan may come to see themselves as recipients of an earned benefit rather than a "hand out," as AFDC often is viewed, despite its formal status [*834] as a legal entitlement. This stronger sense of rightful entitlement holds some promise of securing better treatment by, and generating greater self-confidence in dealing with, the administering bureaucracy. At the same time, public criticism of these caretakers

may be reduced sharply because rather than claiming from a program with a bad reputation, they would obtain benefits through the Social Security program, which currently does not receive significant public opposition.

The psychologically appealing quality of Social Security, as compared with AFDC, would be important to another group as well. Some women who have not applied for AFDC benefits because of the attached stigma presumably would apply for the new Social Security benefit. At a minimum, these women and their children could improve their financial position because of the addition of the child's benefit. Further, some of these women who currently work in the paid labor force rather than receive AFDC might reduce their employment or quit altogether when the new Social Security benefit becomes available. In this respect, they are simply being provided with the same options now offered under Social Security to caretaker mothers whose husbands have died.

Finally, because Social Security would provide an opportunity to combine benefits with wages or private child support, fewer women who are now receiving AFDC benefits would feel the need to remarry simply to improve their financial positions. Again, this would place these women on par with widowed mothers now covered under Social Security.

C. Financial Advantages for Non-AFDC Claimants

Thus far, the focus of the proposal has been on transferring recipients from AFDC to Social Security. Another large group of children also would be affected, however. The new Social Security benefit would not be limited to AFDC-eligible children and their caretakers, just as Social Security survivor benefits for children and their caretaker parents are not restricted to AFDC-eligible claimants. All children in single-parent homes, along with their caretaker parents, potentially would be eligible. Indeed, most working, middle-, and upper-class couples who divorce or separate could be affected.

Of course, many women apply for AFDC benefits following divorce, separation, or childbirth outside of marriage, even [*835] though they previously did not consider themselves poor. Many other single mothers do not apply for AFDC, however. Through a combination of their earnings, the child and spousal support they receive, and other resources, these mothers may find it unnecessary to turn to AFDC for assistance. This does not mean, however, that single mothers as a class are financially well off. To the contrary, the studies of the economic consequences of divorce vividly demonstrate that a substantial proportion of women and their children suffer financially.⁹¹ Therefore, in addition to its promise to solve much of the welfare problem, the proposed plan also may protect nonimpoverished women and their children from the sharp declines in living standards that they face at the time of divorce or separation, especially in cases where the divorced or separated fathers fail to pay child support.

It is worth noting that the structure of the proposed Social Security child's benefit would correspond to the existing moral and legal norms governing the financial relationships between children and their absent parents. The new benefit would reflect the absent parent's past income, just as child support is calculated to reflect the absent parent's ability to pay based on his past earnings. In other words, Social Security's commitment to wage replacement dovetails with the belief that child support should maintain the child's past living standard to some degree.

D. The Impact of the New Social Security

Benefit on Support Obligations

A critical issue raised by this proposal concerns the interaction of the new Social Security benefit with the child support obligation of the absent parent. To remain generally consistent with current Social Security practice, the absent parent benefit would not be reduced when child support is received. Instead, such support payments would supplement the benefit in the same way that life insurance now supplements Social Security survivor benefits. Simply because child support payments would supplement the new Social Security benefit does not mean, however, that states would continue to maintain their **[*836]** private child support obligations at current levels. To the contrary, if states believe that the support levels currently imposed are appropriate, it is likely that they would reduce the initial support obligation by an amount equivalent to the new benefits received. Alternatively, states may elect to credit the new Social Security benefit toward the satisfaction of the support obligation. Under either method, the child support obligation ultimately imposed upon the absent parent will be identical.

Regardless of the method selected, both the child's and the caretaker's benefits under Social Security should be accounted for when calculating the absent parent's child support obligation, because these benefits together would be provided for the purpose of supporting the child. In some households, this will mean that the absent parent's child support obligation is covered fully by the Social Security payments; that is, depending upon the method adopted by the state, either the initial support obligation would be reduced to zero or the support obligation would be discharged fully by crediting the Social Security benefits toward the support obligation.⁹² These proposals suggest that states should look primarily to the absent parent's earnings to determine the child support obligation. Although some states currently do so, most have adopted formulae that focus on the earnings of both parents.⁹³ Hence, the adoption of the new Social Security benefit may cause many states to rethink their basic calculations of child support awards.

States should not reduce a spousal support award by the amount of Social Security benefits in excess of the absent **[*837]** parent's child support obligation, nor should states, under the alternative method, treat the excess Social Security benefit as discharging a spousal support obligation by an equal amount. Unlike Social Security caretaker's benefits, spousal support should not be awarded for the support of children, nor should its amount depend upon the presence of children. Rather, spousal support awards should be based upon claims that are independent of current parenting status, even though it may be theorized that the underlying justification for spousal support rests upon a woman's traditional role in caring for children, or upon the specific spouse's prior parenting activities that might have ceased by the time of the divorce or separation. The topic of spousal support, the underlying basis of which is currently the subject of much controversy, is beyond the scope of this Article.

What should happen if the caretaker parent earns wages above approximately \$ 600 a month, thereby causing a reduction in the Social Security caretaker's benefit at the rate of one dollar per two dollars in wages earned? This loss should not increase the child support obligation of the absent parent. After all, the child is already better off because the caretaker parent's extra earnings will increase the household's financial position, despite a partially offsetting loss in Social Security benefits. In other words, depending upon which method is adopted, states should either reduce or treat as discharged the absent parent's child support obligation by the full amount of Social Security benefits to which the child and the caretaker parent would be entitled if the caretaker parent was not employed.

At the same time, the fact that the custodial parent earns wages should not reduce the absent parent's child support obligation, at least not until the caretaker parent has earned wages sufficient to exhaust her own right to Social Security caretaker's benefits. Otherwise, the implicit marginal tax on the caretaker parent's earnings would be sufficiently large - a fifty percent loss of the Social Security benefit, positive income and Social Security tax

obligations, and the loss of child support - to make it financially pointless for the caretaker parent to earn moderate wages above \$ 600 a month.

Relatively minor technical questions could arise in cases where the divorced couple is awarded joint physical custody of their child and where the higher-wage earner is awarded primary custody and child support normally would not be [*838] imposed on the noncustodial parent. Although these matters require additional analysis, it seems sufficient to assume that where custody is shared equally, the couple could choose the earnings on which the benefit is to be based, and that the plan would generate benefits from one parent's absence regardless of the couple's relative earnings. ⁹⁴

E. Is the Proposed Social Security Benefit

Coherent Social Insurance?

The argument for a new Social Security benefit has rested from the beginning on the equal treatment of claims made on behalf of children of absent parents - children whose innocence and potential need is the same as that faced by children of deceased, disabled, and retired parents. In other words, from the child's perspective, there is a need for financial support when a parent has left the household, whether because of death, divorce, or separation. Nevertheless, thinking about this new benefit as insurance reveals at least three potentially significant differences between the risk guarded against by the proposed benefit and the risks that Social Security currently insures against: the fact that the absent parent is still working, the possible "moral hazard" that the proposal creates, and the arguably different desires of wage earners who pay Social Security "premiums."

First, whereas deceased, disabled, and retired workers are not expected and usually are not able to continue to earn wages, this generally is not true of working parents who are absent from the household. In other words, in instances of divorce or separation, there is no risk of earnings loss against which insurance generally is necessary. Some may believe that this difference alone is fatal to the entire notion of having Social Security cover the financial risk of absent parents. There remains, however, the risk of income loss for the household now comprised of the child and the caretaker parent. The policy question is whether Social Security's social adequacy objective should include dealing with such a risk. [*839]

It may be argued that there is no real need for earnings replacement when earnings are not interrupted, which ordinarily is the case in absent parent situations. From the child's perspective, however, there is indeed a risk of interruption. It is hardly determinative that the absent parent might provide support privately. After all, each of the risks presently covered by Social Security could, in principle, be covered privately. We know as a society, however, that many workers simply will not buy sufficient life or disability insurance and will not save enough to support themselves and their families in their retirement. Social Security insurance thus responds not so much to market failure as to human failure. The justification for the new Social Security benefit similarly rests upon the social awareness of another human failure - that many absent fathers simply do not pay any or enough child support.

Consider, under the existing regime, the situation in which parents separate or divorce, the absent father pays no child support, and then later he dies. At the time of his death, his child becomes entitled to a Social Security child's benefit. There is a certain irony in this situation; only now that the absent father has died does the child begin to receive the support that he should have received all along. Under the proposed regime, both types of ordinary parental obligations to the child - support when the father is living and life insurance at the father's death - will be satisfied partially through Social Security.

A second potential difference between the existing Social Security benefits for children and the proposed benefit concerns what usually is termed "moral hazard;" that is, the tendency

of insurance availability to lead to a behavioral change that causes the loss. Although it is possible that some people cause their own deaths or disabilities⁹⁵ because they know that Social Security benefits will be available as a consequence, it is unlikely that this happens very often. Most people want to live, and to do so without a disability. It is highly unlikely that the prospect of receiving Social Security benefits is sufficiently enticing to overcome their preferences for life and health.⁹⁶

There may be a greater concern, however, that people will be encouraged to separate because of the existence of Social [*840] Security insurance covering absent parents. There are two ways to analyze this possibility. First, consider the situation from the father's viewpoint. If today he is somewhat discouraged from leaving his wife and child because of the child support obligation that he would have to pay, then a reduction in his support obligation, other things being equal, will increase the likelihood of his departure. In short, the existence of the insurance may change his behavior in a way which increases the likelihood that the insurance will be used - a moral hazard.

If this behavioral response by fathers is considered socially undesirable, it may be possible to counteract the behavior through the method by which the new Social Security benefit is funded, for example, by allocating the cost of claimed benefits to the absent fathers. On the other hand, it is not entirely clear whether a man who wishes to terminate his marriage, and who would do so but for the financial burden that leaving will impose upon him, ought to be encouraged to remain married. This quite different perspective has, in turn, different implications for the funding of the new Social Security benefit.

Second, consider the situation from the mother's viewpoint. If mothers currently remain in marriages because of the fear that child support, even if ordered, will not be paid, then the new Social Security benefit may encourage more mothers to end their marriages. Once again, the existence of the insurance may increase the occurrence of the triggering event. As with fathers, however, it is not clear that this is socially undesirable. How healthy is it for a woman to be tied to a marriage because of the fear of poverty? Thus, what some may term a moral hazard risk can be redefined. From the mother's viewpoint at least, the new benefit can be seen as providing some insurance against the financial risk that, upon separation, the father of her child will not pay sufficient child support.

A quite different concern is that couples who otherwise would prefer to stay together will be enticed to separate because of the financial attractiveness of the new Social Security benefit. Although this result may be socially undesirable, such behavior is unlikely to occur frequently because of the emotional and financial benefits couples generally gain by living together. Additionally, because financial incentives already exist under the AFDC regime for couples to separate,⁹⁷ it is unlikely that [*841] large behavioral changes would occur with the introduction of the proposed absent parent benefit.

A parallel analysis can be made with respect to the decision to bear children. For example, a pregnant woman living alone may have a greater incentive, other things being equal, to bear an additional child if the new Social Security benefit were available. Yet this possibility also currently exists under the AFDC program, a charge frequently levelled against the program by its critics.⁹⁸ The empirical evidence suggests, however, that AFDC does not have any significant impact on the birthrate.⁹⁹ Thus, it is unlikely that the new Social Security benefit, although larger, would have a substantial behavioral effect either.

A third difference between the existing Social Security child's benefit and the proposed absent parent benefit concerns the desires of workers. As workers become disabled or approach death, they typically regret not having bought private insurance for their children and, therefore, are grateful for having been required to arrange for such insurance through Social Security. For parents who live apart from their children, the picture is more complicated. Some, of course, will be happy to have Social Security insurance to assure that

their children's financial needs are met. Others presumably would just as soon forget about their children's financial well-being; and hence, we might conclude initially that such parents would not want the new benefit. Yet, once the absent parents' legal obligations to those children and the increasingly effective child support enforcement mechanisms are considered, even uncaring absent parents may be pleased to be part of a system that at least helps to discharge their financial responsibilities.

The stronger objection to this form of insurance seemingly would come from those who do not anticipate becoming divorced or separated while their children are minors. Those workers might object to the idea of having to insure against a risk that they are not concerned about, especially when they have to pay the same "premium rates" as others. Such an objection would be especially strong from those who have not fathered any children and who do not intend to become fathers. Nonetheless, [*842] it is essential to understand that this type of objection has carried no weight with respect to the existing Social Security child's benefit. Regardless of whether a worker has children or, if so, wants to insure them against the risk of his death, disability, or retirement, the worker is required to carry such protection as part of his Social Security package. Workers in low-risk jobs and with few children pay the same amount, on the same terms, as those who engage in extremely dangerous activities and have many children. Hence, that a worker is unlikely to have a personal need for the insurance would seem to be an insufficient objection to the idea of divorce or separation insurance provided through Social Security.

Some people may find it personally offensive to have Social Security provide financial protection against the risk of divorce and parenthood outside of marriage based upon moral objections to such lifestyles. They may not want to be part of a system which to them symbolizes society's acceptance or endorsement of divorce and single parenthood. Although this outlook cannot be rejected as illegitimate, the same objection could be made to the AFDC program. Perhaps the reply from these objectors would be that at least under AFDC, we stigmatize claimants who behave in these socially "undesirable" ways. Of course, one goal of the new program is to end that stigmatization. This debate represents a clash of values which can hardly be expected to lead to consensus, and signals at least one source of likely opposition to absent parent benefits through Social Security.

A less passionate objection to the proposed benefit is that insurance should not be available for risks that people voluntarily cause to occur. Such an objection is not based simply on moral hazard concerns, but more broadly on concerns that the program will no longer function like insurance. Divorce and separation, in this analysis, simply seem too willful relative to disability and death. Indeed, whereas life and disability insurance are available in the private market, divorce insurance is not. It must be emphasized once again, however, that from the viewpoint of the child, having an absent parent is rarely voluntary, and hence is something that children, if they had the financial resources and could decide rationally, well might wish to insure against. Therefore, this objection reflects a belief that the absent parent benefit would operate not as insurance, but rather as a transfer payment, and one that other workers should not be required to help finance, at [*843] least when absent parents can bear the financial burden. Dealing with this concern requires an analysis of the method by which the new Social Security benefit would be funded.

F. Financing the New Absent Parent Benefit

If Social Security is to provide both child's and caretaker's benefits in absent parent cases, difficult choices will have to be made about the funding of those benefits. There are three basic alternatives. First, the benefit could be funded in the same manner as existing Social

Security benefits - through a uniform payroll tax imposed on employees and employers. This approach would make the benefit most like insurance. At the time of need, the absent parent would be asked to pay no more than any other working person.

A second, contrasting approach would be to separate the funding of the new benefit from the existing OASDI scheme and to require individual absent fathers to reimburse Social Security for the benefits paid to their children. The justification for this approach is that although social insurance may be necessary from the child's viewpoint, it is not equitable to socialize the cost of the insurance when the triggering event is under the absent parent's control and is unrelated to a loss of earnings. Under this approach, the benefit would function more like AFDC. In effect, society would agree to advance the amount necessary for the new Social Security benefit, but then would seek reimbursement from the absent parent, dollar for dollar, to the extent feasible.

A third approach would fall somewhere in between these two extremes. Absent parents whose children obtain Social Security benefits would pay more, either individually or as a group, into the Social Security system than would the ordinary contributor, but not to the full extent of the benefits paid to recipients. For example, all absent parents whose earnings records were the bases of benefit payments could be subject to an additional percentage of tax on their earnings. Alternatively, individual absent parents could be required to reimburse Social Security for a percentage of the benefits that were paid out based upon their earnings. Similar intermediary funding arrangements also could be imagined. [*844]

The choice among funding alternatives may be influenced particularly by projected behavioral responses.¹⁰⁰ For example, allocating the cost of claimed benefits primarily to individual absent parents would counter the fear that the new benefit would stimulate couples to end their marriages, either through genuine breakups or separations feigned for the purpose of obtaining benefits.

An alternative way to examine the funding issue is from a gender-based perspective, although on balance, the solution from this viewpoint seems indeterminate. In one sense, it may seem fair that women workers, as part of the collective workforce, contribute through regular payroll tax contributions to the funding of the new absent parent benefit because, in practice, women will be the primary recipients of the new caretaker's benefit. In another sense, however, it may seem unfair to require women to contribute to the funding of a benefit that rarely will replace their wages, but instead will serve primarily to satisfy what is now understood to be fathers' obligations. The same objection could be made, however, to the existing Social Security survivor benefits, which replace the earnings of a higher proportion of men than women.

In the end, faced with the wide variety of considerations raised by the funding issue, it may be preferable to await reaction to the proposal in general before making a choice among funding alternatives. Until a decision is made on the proposal in general, it is not clear that states can decide sensibly whether to increase the support obligations they impose on absent parents. Specifically, although it may be assumed that the states consider current support levels to be appropriate, if the new Social Security benefit were not funded primarily by payments from individual absent parents, the states well might conclude that higher support levels are desirable. Nonetheless, these are issues which may be left open for further debate.

A broader question regarding funding is the likely cost of the proposal. Before the plan becomes a serious political possibility, its cost would have to be examined in detail. Several preliminary points can be made, however. First, although OASDI costs would increase, AFDC costs would [*845] decrease. Admittedly, there almost surely would be a significant net increase, absent unexpectedly substantial earning behavior by single parent caretakers. A large increase in public spending, however, does not necessarily imply either an increase in the federal deficit or a danger to the financial solvency of Social Security. To begin with, a

reduction in AFDC costs would have a positive impact on federal and state budget deficits. Further, although the OASDI fund currently is running an enormous surplus of tens of billions of dollars a year, ¹⁰¹ this surplus should not be viewed as an available source of funding for the new benefit. Rather, this surplus will be needed in the future to pay retirement benefits to the baby-boomer generation and should be left to accumulate. ¹⁰²

Nevertheless, a variety of income sources could be tapped to provide funding for the new benefit. If dollar-for-dollar payments were required from absent parents, there would not be a significant net financial difference from the current system, at least for many families not currently on AFDC. For those families, Social Security would function essentially as a collection and disbursement agency. For AFDC families and families in which absent parents currently are not paying what they owe, a primary concern is whether Social Security would be more effective than existing state agencies at collecting child support payments. In any event, there are sure to be financial shortfalls which would have to be funded by a general Social Security tax, unless complete general revenue financing is adopted for this part of the plan, presumably on the ground of savings in AFDC costs. If the new benefit is to be funded entirely by a general Social Security tax, the primary issue is how large that new tax would be. Although a definite figure cannot be provided at this stage, it is important to emphasize that the amount may well be within what most workers would favor paying in light of the benefit protection that they would obtain. [***846**]

G. Which Children?

To whom should this new benefit be made available? More specifically, the ability of stepchildren, adopted children, and children born outside of marriage to qualify for the new benefit must be addressed. Under the Social Security rules applicable to children of deceased, retired, and disabled workers, a child whose biological parents are divorced or separated would qualify without a further showing of actual dependency upon the absent parent at the time of the divorce or separation. ¹⁰³ A child born outside of marriage presently qualifies for Social Security benefits based upon a biological parent's insured status if one of the following tests is met: the child is able to inherit from the insured parent under state law; ¹⁰⁴ the parents have gone through an invalid marriage ceremony; ¹⁰⁵ the insured parent has acknowledged the child in writing; ¹⁰⁶ or a paternity or maternity determination or child support order has been entered against the insured parent. ¹⁰⁷ If none of these tests are met, the child may still claim benefits if she can present sufficient evidence of parenthood and actual dependency through support from, or by living with, the insured parent. ¹⁰⁸ The same general requirements presumably would apply to the new absent parent benefit.

Are there respects in which these rules might seem unfair? There are two rather different situations to consider in cases where a child's parents never married. In the first situation, consider the father who has lived with his child for some time and then has ended the relationship with the child's mother. In that event, claims for the new benefit would be analogous to those made in Social Security disability or death cases where the father had acknowledged paternity in writing or had a paternity or support obligation entered against him during the time he had lived with the child.

In the second situation, consider the father who has never lived with his child. In this situation, an absent parent benefit could be sought from the time of birth. This, of course, rarely [***847**] occurs in death cases, and typically does not occur in retirement and disability cases, although "afterborns" are entitled to benefits. The existing Social Security principles would permit the child born outside of marriage to qualify for the new absent parent benefit if she can inherit under state law, there was a ceremonial marriage, or the father was supporting the child at the time of the birth. This seemingly is an appropriate outcome. What if none of these elements are met, but instead, a support order is entered or

a written acknowledgement of paternity is signed at some point after the child's birth? Although exact parallels cannot be drawn to other Social Security benefits available to children, I believe that the child should be entitled to absent parent benefits at that time and should not suffer unduly from a delayed legal identification of his father.

In cases where the parents never married, the focus thus far has been on the child's benefit. Certainly, as a policy matter, when the child qualifies for benefits, the caretaker parent should as well. Yet this would be a departure from current Social Security practice, which provides caretaker benefits to legal spouses only.¹⁰⁹ This discriminatory treatment of unmarried mothers was attacked unsuccessfully in *Califano v. Boles*.¹¹⁰ If the adoption of the new absent parent benefit provides an occasion for overturning the rule upheld in the *Boles* case, a decided social gain, in my judgment, will have occurred.

Under the current regime, an adopted child who is claiming benefits based upon the adopting parent's earnings is treated as a biological child.¹¹¹ Additionally, a stepchild of the mother's new husband is entitled to claim based upon her biological father's account.¹¹² This also would apply to the new benefit; after all, such an approach is central to the proposal. The current regime provides that if a child is adopted by her stepfather before the child's biological father dies, retires, or becomes disabled, the child's future entitlement to Social Security benefits based upon the biological father's earnings [*848] is terminated. On the other hand, once the child starts drawing benefits based upon her biological father's earnings, a subsequent adoption by her stepfather would not terminate those benefits.¹¹³ Whether a stepparent adoption should terminate the proposed absent parent benefit is a difficult question. Under the current rules, because the father necessarily will be absent and the child likely will be drawing benefits before the stepparent adopts, that adoption would not terminate the Social Security benefits.¹¹⁴ This result is intended so as not to discourage such adoptions. On the other hand, because state law traditionally curtails the biological father's support obligation at the time of adoption by the stepparent,¹¹⁵ a policy favoring parallel treatment to that practice would call for terminating the absent parent benefit.

A child also currently may claim Social Security benefits based upon her stepfather's account, provided that she is living with or supported by her stepfather at the time of his death, disability, or retirement.¹¹⁶ Should the child likewise be allowed to claim benefits based upon her stepfather's account when he divorces or separates from her mother? On the one hand, although empirical studies show that residential stepfathers generally support their stepchildren,¹¹⁷ neither law nor custom supports the notion that they must provide support following the breakup of their marriage with the stepchild's mother.¹¹⁸ From this perspective, stepchildren probably should not be allowed to claim absent parent benefits based upon their absent stepfathers' earnings. Yet, there is a growing belief among commentators that stepfathers, at least those who have taken on a strong parenting role, should have support duties and perhaps even visitation or custodial rights with respect to their stepchildren after the end of their marriages to the children's mothers.¹¹⁹ Consistent with this outlook, perhaps absent parent benefits ought to be allowed in the event of the separation or divorce of a child's mother from his stepfather.¹²⁰ [*849]

H. The Remaining Welfare Problem

Of course, there will be some children with absent parents who will not be served adequately by the proposal advanced here. As indicated earlier, some single parents will not qualify for the new Social Security benefit because of insured status problems or because of an inability to link the child to a specific earner. Others will qualify for only a very low benefit. What might be done about them? One solution is simply to leave them wholly or partially dependent upon a more residual AFDC program. Although this solution may be the easiest and most straightforward, it may not be the most desirable. Those families remaining on

AFDC may be stigmatized even more severely because of an expansion of the earlier pattern of moving "more deserving" single mothers and their children from AFDC to Social Security. In any event, there currently is widespread dissatisfaction with long-term dependence upon AFDC. ¹²¹

Perhaps these families could qualify for some new program, such as transitional aid intended to promote greater long-term independence through the provision of financial, vocational, and educational benefits for a limited period of time. President Clinton has advocated a similar proposal. ¹²²

An alternative approach would be to provide these families with a uniform minimum Social Security benefit based on family size rather than on the past earnings of an absent parent. This strategy is sometimes referred to "blanketing in," ¹²³ and its aim would be to reduce stigmatization by having all absent parent claimants deal with the same bureaucracy. Under this approach, Social Security essentially would provide a guaranteed level of child support for all children with an **[*850]** absent parent. ¹²⁴ If this alternative proved successful, it also might be utilized to provide Social Security benefits to all children of disabled or deceased parents, thereby blanketing in most of the relatively small number of AFDC cases where the wage earner is dead or incapacitated and the household either does not qualify for Social Security disability or survivor benefits or qualifies for such a small benefit that AFDC support is also needed.

These reforms admittedly would not eliminate the problem of child poverty. Some children, for example, would continue to suffer because of the unemployment or low earnings of the able-bodied parents with whom they live. Although in principle unemployment insurance, minimum wage laws, and the earned income tax credit are intended to deal with these needs, they often fall short in practice. It may be possible to deal with the needs of these children through Social Security, thereby making the child's benefit more like a universal children's allowance of the sort provided in most industrialized nations, but not in the United States. ¹²⁵ Such an analysis is beyond the scope of this Article.

Conclusion<ENDCENTER>

Three final issues must be considered. First, adding the proposed benefit to the Social Security system potentially risks stigmatizing all Social Security benefits available to children, or indeed all of Social Security. Moreover, that risk probably is increased as the Social Security Administration becomes more involved in what is, in effect, child support enforcement. This ultimately may become a question of how much social adequacy freight the OASDI train can carry. Although OASDI ought in principle to be able to carry the added burden of the absent parent benefit, whether it can in reality remains to be seen.

This brings to the fore a second issue - the politics of the proposal. On the one hand, poor single mothers generally are thought to be politically weak. Yet, in view of recent reforms **[*851]** in child support and its enforcement, divorced women with children, either on their own or with and through their advocates, appear to be an increasingly effective lobbying group. Further, despite recent federal changes in the AFDC program, many believe that the welfare problem is far from being solved. ¹²⁶ Add to this the desirability of removing AFDC costs from state and federal budgets and there is a potentially powerful political alliance in favor of the proposed plan.

Because an increase in the Social Security tax rate would be unpopular with business, some methods for funding the new benefit would generate more opposition than others. Perhaps, unlike past practice, any addition to the Social Security payroll tax could be imposed solely upon employees - a solution that perhaps makes further sense if differential obligations are established for absent parents. Additionally, advocates of the elderly, who are most concerned about the financial stability and integrity of Social Security's obligations to

retirees, might be concerned about adding any new Social Security benefits. On the other hand, child welfare groups which have long pushed for a broader "children's allowance" might well embrace the plan. What is needed is public discussion and further policy evaluation of the general idea of the proposal.

The third and final point is that the formula for calculating the new absent parent benefit need not be identical to that used for calculating existing Social Security benefits. Perhaps upon closer examination, the current formula will be considered too generous or too modest. To endorse the proposal in general certainly does not require a commitment to all of the details. ¹²⁷

What is important now is to determine whether the arguments presented here convince thoughtful people that the core idea is both attractive and imaginable - that Social Security reform may hold the key to welfare reform.

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law > Delinquency & Dependency > General Overview

Family Law > Marital Termination & Spousal Support > General Overview

Public Health & Welfare Law > Social Security > Assistance to Families > Temporary

Assistance to Needy Families > Eligibility

FOOTNOTES:

¹n1. In these scenarios and in the discussion generally, it will be assumed that the child has lost the support of her father and now depends upon her mother. Although this certainly is not the universal pattern, it is the overwhelmingly common one.

²n2. This requires that Bob was either "fully" or "currently" insured. 42 U.S.C. 414 (1988). In order to attain either status, Bob must have a certain number of "quarters of coverage" in covered employment. *Id.* 413. Although it was not true in the early years of Social Security, today nearly all employment is covered, including self-employment. *Id.* 410, 411.

³n3. *Id.* 402(d).

⁴n4. Bob's average indexed monthly earnings (AIME) would be calculated and then would be put into a formula to determine his primary insurance amount (PIA). *Id.* 415(a), (b). As the child of a deceased worker, Rachel's benefit would be 75% of Bob's PIA, *id.* 402(d)(2), subject to a family maximum. *Id.* 403(a).

⁵n5. *Id.* 402(d)(1)(E). The benefits are terminated earlier if Rachel marries before reaching age 18, and may be continued beyond age 18 under certain special circumstances, for example, if Rachel is disabled. *Id.* 402(d)(1).

⁶n6. *Id.* 402(g)(1). This benefit, like Rachel's, would be based on Bob's previous earnings. The widowed caretaker parent's benefit is 75% of the wage earner's PIA, *id.* 402(g)(2), subject to a family maximum, *id.* 403(a), and will continue until Rachel is 16 years old. *Id.* 402(s)(1). Note that between the ages of 16 and 18, ordinarily only Rachel would receive benefits. Jane's benefit would terminate earlier if she remarries before Rachel reaches age 16. *Id.* 402(g)(1).

⁷n7. *Id.* 402(g)(1).

¶n8. Id. 403(b).

¶n9. Id. 402(d)(1).

¶n10. Id. 402(b)(1)(B).

¶n11. The benefit amounts paid to Jane and Rachel would, in each case, be 50% of Bob's PIA. Id. 402(b)(2), (d)(2). Note that this percentage is less than if Bob had died. See supra note 4.

¶n12. Current Operating Statistics, Soc. Security Bull., Summer 1992, at 91, Table 1.B4.

¶n13. Id. at 92, Table 1.B5.

¶n14. Id. at 91, Table 1.B4.

¶n15. Social Sec. Admin., U.S. Dep't of Health & Human Servs., Social Security Bulletin - Annual Statistical Supplement 204, Table 5.H2 (1991) [hereinafter Annual Statistical Supplement].

¶n16. Current Operating Statistics, supra note 12, at 91, Table 1.B4.

¶n17. Annual Statistical Supplement, supra note 15, at 204, Table 5.H2.

¶n18. Of the 3.3 million beneficiary "children" as of April 1992, more than 620,000 were disabled and over the age of 18. Current Operating Statistics, supra note 12, at 91, Table 1.B4.

¶n19. Id.

¶n20. Id.

¶n21. Social Security does not report clearly the amount paid to caretaker parents of beneficiary children, yet estimates can be derived from the Annual Statistical Supplement, supra note 15, at 190, Table 5.F1 and 198, Table 5.F12.

¶n22. Recent estimates suggest that only about one half of the children with support orders receive the amounts that have been awarded, and about one quarter receive partial payments. See Gordon H. Lester, U.S. Dep't of Commerce, Child Support and Alimony: 1987, at 4 (1990).

¶n23. See supra notes 6-8 and accompanying text.

¶n24. States may not permit a family receiving AFDC benefits to have assets of more than \$ 1000, apart from a home, a modest automobile, burial plots and funeral arrangements, and real property of which the family is attempting in good faith to dispose. 42 U.S.C. 602(a)(7)(B) (1988).

¶n25. See Staff of House Comm. on Ways & Means, 102d Cong., 1st. Sess., Overview of Entitlement Programs - 1991 Green Book 597-600, Tables 7, 8 (Comm. Print 1991) [hereinafter 1991 Green Book].

¶n26. See supra note 4 and accompanying text.

¶n27. Current Operating Statistics, supra note 12, at 89, Table 1.B2.

¶n28. 1991 Green Book, *supra* note 25, at 606, Table 11.

¶n29. Annual Statistical Supplement, *supra* note 15, at 204, Table 5.H2.

¶n30. *Id.* The average family benefit varies substantially depending upon the number of children in the family. For example, the combined benefits for two children averaged \$ 899 a month at the end of 1990. *Id.*

¶n31. See *supra* notes 12-21 and accompanying text.

¶n32. 1991 Green Book, *supra* note 25, at 614, Table 17 and 620, Table 21.

¶n33. Under current law, the state will disregard \$ 90 of income per month as deemed "work expenses," up to \$ 175 of income per month to cover child care expenses (\$ 200 in the case of a child under age two), and an additional \$ 30 of income per month for the first year of employment while under the program. 42 U.S.C. 602 (a)(8)(A) (1988 & Supp. IV 1992).

¶n34. *Id.* 602(a)(8)(B)(ii)(I)(a).

¶n35. *Id.* 602(a)(8)(B)(ii)(I)(b).

¶n36. See *supra* note 8 and accompanying text.

¶n37. Studies have found that more than one third of divorced women remarry within three years after divorce, and 70% of women with children in their custody remarry within six years after divorce. See David L. Chambers, *Stepparents, Biologic Parents, and the Law's Perceptions of "Family" After Divorce*, in *Divorce Reform at the Crossroads* 102 nn.1 & 2 (Stephen D. Sugarman & Herma H. Kay eds., 1990).

¶n38. Depending upon her new husband's circumstances, the couple may, in rare cases, qualify for AFDC benefits under the provisions governing children deprived of the support of an incapacitated or unemployed (AFDC-U) parent. See 42 U.S.C. 607 (1988). Because of the various restrictions imposed under those provisions, only 7.6% of AFDC families were in the AFDC-U category between October 1988 and September 1989. 1991 Green Book, *supra* note 25, at 639, Table 31.

¶n39. See 42 U.S.C. 402(g)(1) (1988).

¶n40. See Chambers, *supra* note 37, at 108.

¶n41. See Winifred Bell, *Aid to Dependent Children 3-19* (1965); Joel F. Handler, *Reforming the Poor: Welfare Policy, Federalism, and Morality* 11-16 (1972); Roy Lubove, *The Struggle for Social Security 1900-1935*, at 92-112 (1968).

¶n42. See Committee on Economic Sec., Social Sec. Bd., *Social Security in America* 233-49 (1937).

¶n43. Ch. 531, 49 Stat. 620 (current version at 42 U.S.C. 301-1397f (1988 & Supp. IV 1992)).

¶n44. Social Security Act of 1935, ch. 531, tit. IV, 401, 49 Stat. 620, 627 (current version at 42 U.S.C. 601-687 (1988 & Supp. IV 1992)).

¶n45. 1938 Advisory Council on Social Sec., 75th Cong., 2d Sess., Report 3 (Comm. Print 1938).

¶n46. Social Security Act of 1935, ch. 531, tit. II, 201, 49 Stat. 620, 622 (current version at 42 U.S.C. 401-433 (1988)).

¶n47. See *id.*; Stephen D. Sugarman, Children's Benefits in Social Security, 65 Cornell L. Rev. 836, 837-44 (1980).

¶n48. See Sugarman, *supra* note 47, at 847.

¶n49. A lump sum might have been payable to Bob's estate, regardless of whether Bob was married or had any children. See *id.* at 842.

¶n50. In the earliest years, more than half of the cases involved deceased father claims. Stephen D. Sugarman, *Roe v. Norton: Coerced Maternal Cooperation*, in *In the Interest of Children* 365, 371 (Robert H. Mnookin ed., 1985).

¶n51. The basic statute defines a dependent child as one who "has been deprived of parental support or care by reason of the death, continued absence from the home ... or physical or mental incapacity of a parent" 42 U.S.C. 606(a) (1988).

¶n52. Cases involving deceased fathers and incapacitated fathers together amounted to more than three quarters of all early cases. Sugarman, *supra* note 50, at 371.

¶n53. See Bell, *supra* note 41, at 3-19.

¶n54. Ch. 666, 53 Stat. 1360.

¶n55. See Alicia Munnell, *The Future of Social Security* 5-8 (1977).

¶n56. Social Security Act Amendments of 1939, ch. 666, tit. II, 202, 53 Stat. 1360, 1364-65 (codified as amended at 42 U.S.C. 402(b)-(d) (1988)).

¶n57. *Id.* (codified as amended at 42 U.S.C. 402(d)-(f) (1988)).

¶n58. 201, 53 Stat. at 1362.

¶n59. Social Security Amendments of 1956, ch. 836, tit. I, 103(a), 70 Stat. 807, 815 (codified as amended at 42 U.S.C. 423(a) (1988)).

¶n60. Social Security Amendments of 1958, Pub. L. No. 85-840, tit. II, 205, 72 Stat. 1013, 1021-23 (codified as amended at 42 U.S.C. 402(b)-(d) (1988)).

¶n61. Social Security Amendments of 1956, ch. 836, tit. I, 103(i), 70 Stat. 807, 824 (codified as amended at 42 U.S.C. 401 (1988)).

¶n62. See *supra* text accompanying notes 12-13.

¶n63. For example, Social Security benefits may not be available if the husband did not work in covered employment, or had insufficient quarters of covered wages at the time of his death.

¶n64. 1991 Green Book, *supra* note 25, at 638-39, Table 31.

¶n65. See *supra* notes 50, 52.

¶n66. See *supra* notes 59, 60 and accompanying text.

¶n67. 1991 Green Book, *supra* note 25, at 638-39, Table 31.

¶n68. See *supra* text accompanying notes 14-15. These statistics cover the period from October 1988 to September 1989. See sources cited *supra* notes 14-15.

¶n69. 1991 Green Book, *supra* note 25, at 638-39, Table 31.

¶n70. For example, during the 1960s, many states had rules that denied a woman and her children AFDC benefits if their home was "unsuitable." Often, a home was deemed unsuitable simply because the state disapproved of the mother's sexual behavior. See *King v. Smith*, 392 U.S. 309, 320 (1968); *Sugarman*, *supra* note 50, at 374-76. A similar requirement often denied AFDC benefits to a child whose mother lived with a "man assuming the role of spouse." See *Lewis v. Martin*, 397 U.S. 552, 553-54 (1970). Some states simply sought to deny benefits to women who had "illegitimate" children while on welfare, on the ground that this proved the unsuitability of the home. See *King v. Smith*, 392 U.S. at 322. States no longer may deny assistance to dependent children "on the basis of their mothers' alleged immorality or to discourage illegitimate births." *Id.* at 324.

¶n71. For a discussion of the changes in the Social Security benefit formula over time, see *Sugarman*, *supra* note 47, at 866-68, 876-81.

¶n72. See *supra* note 22 and accompanying text.

¶n73. See *supra* text accompanying notes 23-30.

¶n74. *Sugarman*, *supra* note 50, at 372-73, 429-33. It is estimated that about two in five children with absent fathers were not awarded child support in 1978, 1983, 1985, and 1987. 1991 Green Book, *supra* note 25, at 667, Table 3.

¶n75. See Harry D. Krause, *Child Support Reassessed*, in *Divorce Reform at the Crossroads*, *supra* note 37, at 169-74. See generally 1991 Green Book, *supra* note 25, at 658-729 (discussing the federally enacted Child Support Enforcement Program).

¶n76. Approximately one third of awarded support is not paid, amounting to approximately five billion dollars a year. 1991 Green Book, *supra* note 25, at 699. Moreover, this does not account for the 40% of children who were not awarded support. See *supra* note 74.

¶n77. More than 50% of the total national caseload of AFDC families falls within the "not married" category. See 1991 Green Book, *supra* note 25, at 638-39, Table 31.

¶n78. For earlier proposals in a somewhat similar vein, see *President's Commission on Income Maintenance Programs*, *Background Papers* 442-45 (1970); *Alvin Schorr, Poor Kids* (1966). For my earlier, less enthusiastic views, see *Sugarman*, *supra* note 47, at 900-04.

¶n79. See *supra* note 2.

¶n80. Of course, as is the case under the AFDC program, some unmarried mothers will choose not to name the fathers of their children, even if known. Consequently, those children will not qualify for the new Social Security benefit. For a general discussion of the problem of identifying absent fathers, see *Sugarman*, *supra* note 50, at 372-74.

¶n81. See *supra* notes 26-32 and accompanying text.

¶n82. Perhaps this should be reconsidered in cases where the mother earns substantial income and the social adequacy basis for paying the child's benefit is no longer served. Cf. *Sugarman*, *supra* note 47, at 888 (discussing reform alternatives, including a change in the

earnings test that would reduce the child's benefit when either parent earns sufficient income).

¶n83. See supra notes 33-35 and accompanying text.

¶n84. See supra note 8 and accompanying text.

¶n85. See supra text following note 36.

¶n86. See generally John A. Gardiner & Theodore R. Lyman, *The Fraud Control Game* 123-37 (1984) (discussing the limited effectiveness, high cost, and moral ambivalence of traditional "fraud control" programs that require extensive verification procedures and impose criminal penalties).

¶n87. 42 U.S.C. 602(a)(26)(A), (B) (1988).

¶n88. See 1991 Green Book, supra note 25, at 689-90. The first \$ 50 of monthly child support received by a household is not regarded as income and therefore does not cause a reduction in benefits. See 42 U.S.C. 602(8)(A)(vi) (1988).

¶n89. I have long wondered whether mandatory visits by social workers to all recipients would be tolerated on the ground that such visits are not "searches," even though compelled visits to AFDC recipients have been approved on this ground. See *Wyman v. James*, 400 U.S. 309, 326 (1971).

¶n90. See Sugarman, supra note 50, at 403.

¶n91. See Marsha Garrison, *The Economics of Divorce*, in *Divorce Reform at the Crossroads*, supra note 37, at 75.

¶n92. Indeed, some households will receive more from Social Security than from child support. In that event, although the absent parent would not pay any child support directly, the child and the caretaker parent would still fare better. Such households are most likely to be those in which the absent parent has low earnings, where Social Security would replace those earnings at a higher rate than they traditionally would be tapped for child support.

In some situations of course, the new Social Security benefit would not fully cover the child support obligation, and the absent parent would be obligated to make up the difference. That shortfall likely would be especially large in cases involving wage earners whose earnings are well beyond the maximum covered by Social Security. The maximum creditable amount in 1993 is \$ 57,600. 1 Unempl. Ins. Rep. (CCH) <psign>12,001, at 1017 (Oct. 29, 1993).

¶n93. See Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. Rev. 209, 229 (1991). See generally Janice T. Munsterman, *National Ctr. for State Courts, Child Support Guidelines: A Compendium* (1990) (compiling state child support guidelines).

¶n94. In fact, joint physical custody is rare, as is primary custody by fathers. See Robert H. Mnookin et al., *Private Ordering Revisited*, in *Divorce Reform at the Crossroads*, supra note 37, at 37, 52-55.

¶n95. This could occur through either deliberate action or other intentional risk-taking behavior that leads to death or disability.

¶n96. Social Security retirement benefits are, of course, another matter. For retirees, Social Security operates more like forced savings than insurance.

¶n97. AFDC usually requires an absent parent. See supra note 38 and accompanying text.

¶n98. See, e.g., Charles Murray, *Losing Ground: American Social Policy, 1950-1980*, at 17-19 (1984).

¶n99. See David T. Ellwood & Mary J. Bane, *The Impact of AFDC on Family Structure and Living Arrangements* 4 (1984); see also David T. Ellwood & Lawrence H. Summers, *Is Welfare Really the Problem?*, *Pub. Interest*, Spring 1986, at 57, 67-73.

¶n100. See supra text accompanying notes 95-99.

¶n101. The fund is projected to be able to pay benefits for approximately 50 more years. See *Actuarial Status of the Social Security and Medicare Programs*, *Soc. Security Bull.*, supra note 12, at 36.

¶n102. Whether it is a good idea to accumulate this fund, and whether the fund is in any sense meaningfully being accumulated when Social Security "invests" the fund in the national debt by acquiring governmental securities are complex issues which will not be explored here.

¶n103. See 42 U.S.C. 402(d)(3), 416(e)(1) (1988).

¶n104. See *id.* 416(h)(2)(A).

¶n105. *Id.* 416(h)(2)(B).

¶n106. *Id.* 416(h)(3).

¶n107. *Id.*

¶n108. *Id.*

¶n109. See 42 U.S.C. 416(h)(1) (1988). Spouses, widows, and widowers are defined as those who: are recognized as such under state law, can inherit under state law, or went through a ceremonial marriage in good faith even though the marriage later is deemed invalid. *Id.* A cohabitant does not meet any of these tests.

¶n110. 443 U.S. 282 (1979).

¶n111. See 42 U.S.C. 402(d), 416(e) (1988).

¶n112. See *id.*

¶n113. See *id.* 402(d)(3).

¶n114. See *id.*

¶n115. See Ira Ellman et al., *Family Law: Cases, Text, Problems* 361 (2d ed. 1991).

¶n116. See 42 U.S.C. 402(d)(4) (1988).

¶n117. See Chambers, supra note 37, at 105-06.

¶n118. See Sarah H. Ramsey & Judith M. Masson, *Stepparent Support of Stepchildren: A Comparative Analysis of Policies and Problems in the American and English Experience*, 36

Syracuse L. Rev. 659, 671-72 (1985).

¶n119. See Ramsey & Masson, *supra* note 118, at 709-11.

¶n120. To be consistent with the usual rules governing other Social Security benefits in these situations, a child entitled to benefits on more than one individual's earnings record (the absent biological father's and the absent stepfather's) ordinarily would receive payment based upon the earnings record which yields the largest benefit. See 1 Unempl. Ins. Rep. (CCH) <psign>12,331, at 1095-3 (Oct. 28, 1986); *id.* <psign>12,367, at 1157-5 (Jan. 6, 1992). In any case, if benefits were based upon a stepparent's earnings, I assume that the current regime's durational marriage requirements would apply. For these requirements, see 42 U.S.C. 416(e), (k) (1988).

¶n121. See Joel Handler & Yeheskel Hasenfeld, *The Moral Construction of Poverty: Welfare Reform in America* 201-21 (1991).

¶n122. See Jason DeParle, *Idea of Curbing Welfare Gets a Tour and an Earful*, N.Y. Times, Nov. 17, 1993, at A24.


¶n123. See Joseph A. Pechman et al., *Social Security: Perspectives for Reform* 104-09 (1968).

¶n124. For a related proposal for publicly guaranteed child support, see Irwin Garfinkel & Marygold S. Melli, *Maintenance through the Tax System: The Proposed Wisconsin Child Support Assurance Program*, 1 Australian J. Fam. L. 152 (1987).

¶n125. See Sugarman, *supra* note 47, at 904-05.

¶n126. See Handler & Hasenfeld, *supra* note 121, at 230-41.

¶n127. For example, perhaps the Social Security child's benefit should not be based upon the earnings of the parent, but should instead be uniform in amount. Alternatively, perhaps it would be desirable to reduce the amount of the benefit paid when there are one or two children, but in return increase the amount paid by raising the family maximum when there are more children. For discussions of these issues, see Sugarman, *supra* note 47, at 868-71, 888-98.

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