The Treatment of Mandatory Tax Withholdings in Calculating AFDC Benefits: Fairness as a Relevant Inference in Ascertaining Congressional Intent

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Aid to Families with Dependent Children (AFDC) is a federal-state public assistance program originally enacted by Congress as a part of the Social Security Act of 1935.1 Participating states2 provide assistance to certain needy families,3 and the federal government reimburses the state for a certain percentage of the funds thus expended.4 In order to receive federal reimbursement, the states are required to administer their programs pursuant to a state plan in accordance with federal statutory provisions and U.S. Department of Health and Human Services (HHS) regulations governing AFDC.5

The AFDC program is intended to provide assistance only to families that are "needy" and only in the amount that is needed.6 The amount of an AFDC family's monthly grant is determined by comparing the "income"7 of the AFDC family, less certain deductions referred to as "disregards,"8 with the particular state's "standard of need" for a hypothetical family of that size.9

In the Omnibus Budget Reconciliation Act of 1981 (OBRA),10


2. States may choose not to participate in the AFDC program. Once a state elects to participate, however, it must adhere to the relevant federal statutes and regulations. McCooq v. Hegstrom, 528 F. Supp. 575, 578 (D. Or. 1981), affd, 690 F.2d 1280 (9th Cir. 1982).

3. To be eligible for assistance, needy families must include a dependent child, as defined in 42 U.S.C. §§ 606(a), 607(a) (1982), and establish need by meeting certain income tests, the guidelines for which are stated in 42 U.S.C. § 602. Approximately 11.1 million individuals received AFDC assistance during 1981. Duvall, Goudreau & Marsh, Aid to Families with Dependent Children: Characteristics of Recipients in 1979, SOC. SECURITY BULL., Apr. 1982, at 3.


9. Each state has discretion to set its own "standard of need" for AFDC. The "standard of need" is the state's view of the amount of money needed to provide for the essential needs of a hypothetical family. See 42 U.S.C. § 602(a)(17) (1982); 45 C.F.R. § 233.20(a)(2) (1983).

Congress altered the formula for calculating AFDC benefits by changing the so-called "disregards." Prior to OBRA, states were required to disregard all work-related expenses before determining an applicant's need. OBRA replaced this open-ended, individually calculated disregard with a flat $75 figure for work expenses. In implementing this change, HHS issued instructions to the states that the standard $75 disregard is to be deducted from "gross income," calculated to include taxes withheld from a recipient's earnings, and that such withholdings are to be regarded as work expenses covered by the standard disregard. Recipients have challenged this interpretation, claiming that mandatory payroll deductions for taxes have never been considered either "income" or "work expenses" and that Congress did not intend to change this long-standing policy when it passed OBRA. The courts are divided regarding which interpretation is in accord with Congressional intent.


12. OBRA made changes in disregards for work expenses, the cost of care for a child or incapacitated adult, and work incentives. This Note is directly concerned with the change involving work expense disregards.

13. Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 106(b), 76 Stat. 172, 188 (amended 1981). Prior to OBRA, 42 U.S.C. § 602(a)(7) provided "that the state agency shall, in determining need, take into consideration any other income and resources . . . as well as any expenses reasonably attributable to the earning of any such income."


16. See cases cited at note 17 infra. The exclusion of mandatory tax withholdings from "income" can make a significant difference in the amount of a working recipient's grant. See notes 141-43 infra and accompanying text.


As this Note was going to press, Congress passed legislation amending 42 U.S.C. § 602(a)(8) with the intention of clarifying the status of mandatory tax withholdings. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1135 (1984); H.R. CONF. REP. No. 98-861, 98th Cong., 2d Sess. 1394-95 (1984). The amendment to § 602(a)(8) provides that in implementing § 602(a)(8) "the term 'earned income' shall mean gross earned income, prior to any deductions for taxes or for any other purposes." 98 Stat. 494, 1135 (1984). This added language does not clearly resolve the issue framed by the courts in Turner and Ram and discussed in this Note, i.e. whether mandatory withholding taxes are considered "work expenses" under § 602(a)(8) or whether they are considered nonincome under 42 U.S.C. § 602(a)(7).
This Note contends that the more appropriate construction of the statute is to view mandatory tax withholdings as nonincome and nonwork expense items. Part I traces the pre-OBRA legislative and administrative history and examines the judicial interpretations of 42 U.S.C. section 602(a)(7) “income” and section 602(a)(8) “earned income.” It concludes that under the “availability” principle, tax withholdings have always been regarded as nonincome items distinct from work expenses. It contends that, notwithstanding contradictory language in the regulations implementing section 602(a)(8), the status of tax withholdings as nonincome items under section 602(a)(7) is controlling. Part II considers the legislative history and purposes of OBRA. It argues that the legislative intent is consistent with the exclusion of mandatory withholding taxes from the income considered in determining need. Finally, Part III demonstrates that inclusion of mandatory withholdings in the flat work expense disregard would result in unfair and unequal treatment of working recipients relative to nonworking recipients. It asserts that, absent a clear indication to the contrary, courts should presume that legislatures intend to treat similarly situated individuals equally in passing legislation.

I. PRE-OBRA TREATMENT OF MANDATORY TAX WITHHOLDINGS

The pertinent language in section 602(a)(7) regarding the consideration of a recipient’s “income” in determining need has remained relatively unchanged since it was enacted in 1939. By leaving the language unchanged, the OBRA Congress must be presumed to have adopted the interpretation given that language by previous Congresses, courts, and administrative agencies. Thus, in order to determine the intended meaning of “income” in section 602(a)(7), it is necessary to trace the legislative, judicial, and administrative history of the language from its inception in 1939 to the passage of OBRA in 1981.
When Congress initially enacted the AFDC program in 1935, it neglected to provide that income already available to the household should be taken into consideration in determining need for grants. In 1939, Congress solved this problem by adding 42 U.S.C. section 602(a)(7), which required that states consider "any other income and resources" of a claimant in determining need. In 1962, section 602(a)(7) was amended to create a work expense allowance by adding the requirement that "expenses reasonably attributable to the earning of any such income" also be considered in determining need. In 1968, Congress revised 42 U.S.C. section 602(a)(8), creating the so-called "work incentive disregard." This disregard consisted of the first $30 plus one-third of a recipient's monthly "earned income." It was instituted to encourage work by allowing recipi-
ents to retain some of their earnings without a reduction in benefits. In 1981, OBRA amended both sections by removing the provision for consideration of work expenses from section 602(a)(7) and adding the flat $75 work expense disregard (and other provisions) to section 602(a)(8). The courts that have ruled for HHS have held that Congress intended section 602(a)(8) to control the need calculation and that tax withholdings are included in both “income” and “earned income” and are covered by the flat $75 work expense disregard. Courts ruling for the recipients have held that section 602(a)(7) controls the need calculation, that mandatory tax withholdings have never been considered either part of “income” or a “work expense,” and that the OBRA Congress did not intend to change this long-standing treatment of mandatory tax withholdings as nonincome items.

A. THE AVAILABILITY PRINCIPLE

Mandatory payroll deductions for federal and state income taxes did not exist in 1939, so there is nothing in the legislative history of the 1939 amendments addressing the question of whether such withholdings should be treated as “income.” In the hearings and floor debate that accompanied the addition of section 602(a)(7), however, concern was expressed that the needy not be penalized through the inclusion in their income of sums not actually available to them.


28. The statute as amended currently reads in pertinent part as follows:

A State plan for aid and services to needy families with children must . . .

(7) except as may be otherwise provided in paragraph (8) . . . provide that the state agency

(A) shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . .

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

. . . .

(ii) shall disregard from the earned income of any child or relative applying for or receiving aid to families with dependent children . . . the first $75 of the total of such earned income for such month (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month) . . .


29. See cases ruling for HHS cited at note 17 supra.

30. See cases ruling for recipients cited at note 17 supra.


The Social Security Board reported and elaborated on the "availability" principle in a policy statement issued soon after the enactment of the 1939 amendments. The income should "actually exist" and "be available to the applicant. To be regarded as available, an income or resource must be actually on hand or ready for use when it is needed." This policy was subsequently incorporated in the Board's Guide to Public Assistance Administration, and has continued to exist in some form in administrative regulations for the AFDC program ever since.

Tax withholdings have never been considered available income under section 602(a)(7) in evaluating need. In 1961, an HEW report stated: "[T]he term 'gross income,' as used by States . . . refers to

33. See RAM v. Blum, 564 F. Supp. 634, 639 n.11 (S.D.N.Y. 1983) ("The Social Security Board was the federal agency charged with administering the AFDC program until 1946. At that time the task was taken over by the Federal Security Agency, which administered the program from 1946 until 1953 . . . . The newly created Department of Health, Education and Welfare became the administering agency in 1953 . . . . [I]n 1979, [HEW] was redesignated the Department of Health and Human Services.").


37. See RAM v. Blum, 564 F. Supp. 634, 640 n.16 (S.D.N.Y. 1983). The 1967 version of the availability regulation was quoted by one court as follows: "[O]nly income and resources that are, in fact, available to an applicant or recipient for current use on a regular basis will be taken into consideration in determining need and the amount of payment." Lewis v. Martin, 397 U.S. 552, 555 (1970) (citing HEW Handbook of Public Assistance Administration, pt. IV, § 3131.7). The 1969 version read: "[O]nly such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered." 45 C.F.R. § 233.20(a)(3)(ii)(C) (1969). The Supreme Court has noted that the availability principle as embodied in these regulations clearly comports with § 602(a)(7) of the statute. Lewis v. Martin, 397 U.S. 552, 553 (1970); King v. Smith, 392 U.S. 309, 319 n.16 (1968).

The post-OBRA version of this regulation reads: "Net income . . . and resources are considered available . . . when actually available . . . for support and maintenance." 45 C.F.R. § 233.20(a)(3)(ii)(D) (1983). In its response to comments regarding the OBRA interim regulations, HHS indicated that they did not alter the "currently available" standard:

Comment: One of the comments asked for a definition of "currently available" when applied to evaluating resources.

Response: The existing regulation at § 233.20(a)(3)(ii)(D) gives a clear statement of what "currently available" means, and is unchanged by OBRA.

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'take-home pay' after payroll deductions ... have been made. 'Net income' refers to amounts available after other employment costs have been recognized.\textsuperscript{38} No federal court has applied the availability principle specifically to tax withholdings.\textsuperscript{39} However, this simply may have been unnecessary because states were uniformly excluding such withholdings from income.\textsuperscript{40} Moreover, there is an element of conceptual incongruity in the notion of mandatory withholdings be-

\textsuperscript{38} G. WHITE, STATE METHODS FOR DETERMINING NEED IN THE AID TO DEPENDENT CHILDREN PROGRAM 25 (Public Assistance Report No. 43, 1961). The court in granting defendant's motion for summary judgment in \textit{Dickenson v. Petit}, 569 F. Supp. 636, 643 (D. Me. 1983), \textit{affid.}, 728 F.2d 23 (1st Cir. 1984), responded to this report by reasoning that it "does not support plaintiffs' argument that the prevailing state practice was \textit{required} by federal law," 569 F. Supp. at 643 (emphasis in original), and concluded that after the introduction of the work expense disregard in 1962, "there was no longer a need for the states artificially to categorize withholdings and other expenses as unavailable income." 569 F. Supp. at 644. The court then offers no explanation, however, for why mandatory withholdings, a major item, were mentioned neither by speakers urging the passage of the work expense disregard in 1962, see notes 43-44 infra and accompanying text, nor in the section of \textit{DEPARTMENT OF HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION} (1962 ed.) that defines work expenses under this disregard. See 569 F. Supp. at 644 & n.6; note 45 infra and accompanying text.


The \textit{Dickenson} court, in denying a preliminary injunction to the plaintiff, contended that the "availability principle" is literally inapplicable to tax withholdings, interpreting it not as limiting the definition of "income," but rather as "circumscrib[ing] the income sources to be considered." \textit{Dickenson v. Petit}, 536 F. Supp. 1100, 1116 n.13 (D. Me.), \textit{affid. on other grounds}, 692 F.2d 177 (1st Cir. 1982). However, this argument is not supported by the cases cited in \textit{Dickenson}, which were concerned not only with \textit{sources}, but also with \textit{amounts} of income. \textit{Cf. RAM v. Blum}, 564 F. Supp. 634, 641 n.17 (S.D.N.Y. 1983) (\textit{Shea v. Vialpando} does not mean that withheld taxes cannot be considered "unavailable."). The cases at issue or dealing with the same concerns are \textit{Van Lare v. Hurley}, 421 U.S. 338, 346 (1975) (amount of contribution by lodger rather than existence of lodger is only justification for reducing AFDC grant); \textit{National Welfare Rights Org. v. Mathews}, 533 F.2d 637, 647 (D.C. Cir. 1976) (failure to consider encumbrances on property in determining its value to applicant was inconsistent with the availability requirement); \textit{Barron v. Bellairs}, 496 F.2d 1187, 1188 (5th Cir. 1974) (per curiam) (may not compute grants based on average monthly income of child support where family received support only sporadically); \textit{Jamroz v. Blum}, 509 F. Supp. 953, 960-61 (N.D.N.Y. 1981) (financial aid for school, when given under conditions that preclude its use for current living conditions, cannot be considered available to meet current need); \textit{Brown v. Bates}, 363 F. Supp. 897, 901 (N.D. Ohio 1973) (money given for educational purposes under Work Study Program cannot be considered "actually available for current use"); \textit{Garcia v. Swoap}, 63 Cal. App. 3d 903, 911-13, 134 Cal. Rptr. 137, 143-44 (1976) (may not base AFDC grants on income received in a previous month), \textit{cert. denied}, 436 U.S. 930 (1978). Nor is the \textit{Dickenson} argument consistent with the thrust of the original regulations setting forth the availability principle. The Social Security Board's \textit{GUIDE TO PUBLIC ASSISTANCE ADMINISTRATION} in 1942 stated: "[I]income should not be attributed to sources and kinds of property that produce no income or that are not meeting a requirement of the applicant. \textit{Neither should income be attributed in excess of the income actually produced or in excess of the benefit derived.}" \textit{RAM v. Blum}, 564 F. Supp. at 640 n.15 (emphasis added) (quoting \textit{SOCIAL SECURITY BOARD, GUIDE TO PUBLIC ASSISTANCE ADMINISTRATION} § 202 at 2 (May 22, 1942)).

\textsuperscript{39} See \textit{James v. O'Bannon}, 715 F.2d 794, 805 (3d Cir. 1983).

\textsuperscript{40} This is implied by G. WHITE, \textit{supra} note 38, at 25.
ing immediately available. There are a number of state cases holding that such amounts are neither "actually" nor "currently" available to a household to meet its needs and are therefore not "income." 41

B. WORK EXPENSES

In amending section 602(a)(7) to provide that states consider not only the income and resources of recipients in determining need but also "any expenses reasonably attributable to the earning of any such income," 42 neither Congress nor HEW regarded mandatory tax withholdings as a work expense. Before these amendments, federal agencies encouraged but did not require states to allow credit for work-related expenses so as not to discourage recipients from working. The agency focus, however, was on out-of-pocket employment-related expenses; mandatory tax withholdings were not mentioned. 43 Nor were they mentioned in either the legislative history of the 1962 amendments 44 or the definitions of work expenses articulated by

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

44. In the hearings and floor debate prior to passage of the 1962 work expense disregard, many examples of work expenses were given, but mandatory tax withholdings were never mentioned. See, e.g., Public Assistance Act of 1962: Hearings on H.R. 10606 Before the Senate Comm. on Finance, 87th Cong., 2d Sess. 152 (1962) (colloquy between HEW Secretary Ribicoff and Senator Curtis):

Senator CURTIS. . . .

Now, on page 14 the bill before us requires that a State agency in determining need must take into account any expenses that may be reasonably attributable to the earning of income.

The requirement is new; it is not? [sic] Secretary RIBICOFF. That is correct.

Senator CURTIS. Explain how that would work?

Secretary RIBICOFF. Well, basically, let us say that for a woman or a man to get a job he would have to take a train or a bus, and the transportation expenses might be $1 a day.

He would have to be given a credit for $1 a day or, let us say, he had a job where he had to get special goggles or special safety shoes, items of clothing or let's say he had a job
HEW in implementing the 1962 amendments. The logical inference to be drawn is that tax withholdings were not mentioned because states were already required to disregard them as nonincome items under the availability principle.

From 1962 to 1974, many states included mandatory tax withholdings in their lists of work expenses, but this inclusion may be viewed as a matter of administrative convenience rather than substantive significance. Because both mandatory tax withholdings and work expenses generally were being disregarded in full, there was no reason to distinguish between them. However, most states that had

where he was required to buy uniforms. He might have a job in a gas station or a hotel, where the uniforms had to be bought.

Senator CURTIS. A State can take those things into account now?

Secretary RIBICOFF. They can. But not all of them do. What we are trying to do, Senator Curtis, is do everything we can to encourage people to get a job and work and we feel it is important to encourage the States. By having this provision, the State will take into account these expenses so people will get jobs. I believe that the State should give them an allowance for those items that are necessary for them to get the job.

Senator Kern, a leading proponent of the bill in floor debate, described the amendment as requiring states to take into account expenses incurred by AFDC recipients in the earning of income and gave as examples "bus fare, . . . clothing, and similar items." 108 Cong. Rec. 12,663 (1962).

45. In 1963 and 1964, after enactment of the work expense disregard, HEW explained the deduction of work expenses in § 3140 of the HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION in much the same way as it had prior to the 1962 amendments. The agency also provided an extensive list of items that states might consider as employment expenses, including uniforms, transportation, employee benefits, tools, licenses, union or other dues, education, publications, child care and protective clothing. No mention was made of mandatory tax withholdings. See RAM v. Blum, 564 F. Supp. 634, 643 (S.D.N.Y. 1983). In light of the fact that such withholdings probably entail more money than any item on the list and may even approach their combined total, the omission is a "glaring" one. "It is unimaginable that so significant an item would have been left out of section 3140 if, as defendants contend, mandatory payroll deductions were being treated as 'employment expenses.'" RAM v. Blum, 564 F. Supp. 634, 643 & nn.23-25 (S.D.N.Y. 1983); see also Dickinson v. Petit, 569 F. Supp. 636, 645 (D. Me. 1983) ("Nor do [plaintiffs] suggest how regulations as detailed as those dealing with AFDC need calculations could reasonably be thought to have overlooked any mention of payroll withholdings."). affd, 728 F.2d 23 (1st Cir. 1984).

46. See notes 38-41 supra and accompanying text.

The district court in James v. O'Bannon thought work expenses, particularly payroll deductions for items like union dues, indistinguishable from tax withholdings, calling such a distinction one "whose economic real world significance is very hard to appreciate." 557 F. Supp. 631, 641 (E.D. Pa. 1982), affd, 715 F.2d 794 (3d Cir. 1983); see also Dickinson v. Petit, 569 F. Supp. 636, 645 (D. Me. 1983), affd., 728 F.2d 23 (1st Cir. 1984). The arguments in note 45 supra contain two refutations to this reasoning. First, the "economic significance" of the distinction is all too real to recipients when the amounts are compared. See also note 142 infra. Second, the DEPARTMENT OF HEW, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION (1962 ed.) list specifically included union dues, yet omitted taxes.

47. See James v. O'Bannon, 715 F.2d 794, 804 (3d Cir. 1983) (quoting SOCIAL SECURITY ADMINISTRATION, U.S. DEPT. OF HEW, SUMMARY OF STATE AGENCY POLICY ON EXPENSES REASONABLY ATTRIBUTABLE TO THE EARNING OF INCOME 122a-35a app. (1972) (42 states recognized one or more mandatory tax withholdings as expenses reasonably attributable to the earning of income). The 22 states recognized one or more mandatory tax withholdings as expenses reasonably attributable to the earning of income. But see note 80 infra and accompanying text.

the standard deductions for work expenses in 1972 required that mandatory tax withholdings be itemized and disregarded separately. Since these were the only states that had any reason to differentiate between mandatory tax withholdings and work expenses, the fact that most of them did so distinguish supports the view that the two items were regarded as being conceptually different.

In *Shea v. Vialpando*, the Supreme Court faced the question of whether a state could limit all disregarded employment expenses, excluding child care, to a flat amount per month. The Court held that under pre-OBRA section 602(a)(7) employment expenses had to be deducted in full. States could still use a standard disregard for such expenses, but only if provision was made to accommodate those whose expenses exceeded the flat amount.

Some courts have cited language in *Shea* to support the proposition that prior to OBRA mandatory tax withholdings were considered "work expenses" to be deducted from "gross" income. While some of the *Shea* language may be so interpreted, contrary interpretations favoring a view of mandatory tax withholdings as separate from work expenses are equally plausible. More importantly, the

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49. According to RAM v. Blum, 564 F. Supp. 634, 644 (S.D.N.Y. 1983) (citing HEW Internal Memorandum (Feb. 1, 1972)), in 1972 fifteen states used a flat deduction for work expenses other than child care and twelve of these required that mandatory tax withholdings be itemized separately and in addition to the set amount. See also Turner v. Woods, 559 F. Supp. 603, 612 (N.D. Cal. 1982), affd. sub nom. Turner v. Prod, 707 F.2d 1109 (9th Cir. 1983), cert. granted sub nom. Heckler v. Turner, 104 S. Ct. 1412 (1984) (also citing HEW Internal Memorandum (Feb. 1, 1972)).

50. See note 49 supra and accompanying text. But see James v. O'Bannon, 715 F.2d 794, 806-07 (3d Cir. 1983). The *James* court rejected this argument on the basis that "in January of 1972 at least five states . . . did not regard themselves as bound to disregard all mandatory tax withholdings under the 'availability principle.'" The court is wrong regarding at least one of the states it cites: Colorado. See *Shea v. Vialpando*, 416 U.S. 251, 255 & n.3 (1974) (discussing Colorado's standard work-expense allowance); note 52 infra; see also note 60 infra and accompanying text.


52. 416 U.S. at 252-53. At issue was the Colorado state plan, which limited work expenses to a flat $30 per month disregard but allowed for individualized treatment of mandatory payroll deductions and child care expenses. 416 U.S. at 255 (discussing 4 COLORADO DIVISION OF PUBLIC WELFARE STAFF MANUAL § 4313.13 (effective March 1970)).

53. 416 U.S. at 258, 262, 265.

54. 416 U.S. at 265 (citations omitted).


56. The court in *Bell v. Hettleman* relied on the *Shea* Court's implicit approval of HEW regulation 45 C.F.R. § 233.20(a)(6) (1983) (see note 64 infra), in which "earned income" was defined as total income tax deductions. 558 F. Supp. 386, 392 (D. Md.), affd. sub nom. Bell v. Massinga, 721 F.2d 131 (4th Cir. 1983). This reasoning is dubious. First, neither the regulation cited nor § 602(a)(8) of the statute that it implemented was at issue in *Shea*. The case involved the interpretation of the work expense allowance in § 602(a)(7), not the work incentive disregard to which § 602(a)(8) was relevant. See notes 85-99 infra and accompanying text. Second,
value of Shea as authority in this instance is questionable. The question of whether mandatory tax withholdings were "income" to be disregarded or simply not "income" at all was not before the Court nor was it germane to the analysis of the case.57

Following Shea, most states included mandatory tax withholdings on the list of work expenses used to compute expenses,58 but some continued to itemize them separately.59 Even though the for-

in the quoted passages the Shea Court views this regulation as indicative of Congress' awareness of the availability principle. The Shea court did not suggest that the regulation in any way altered the treatment of tax withholdings as nonincome.

The court in Dickenson v. Petit cites from Shea, 416 U.S. at 254, in support of the proposition that "§ 602(a)(7) income" means "gross income" including mandatory tax withholdings: "In determining net income [as in 45 C.F.R. § 233.20(a)(3)(ii)(D) (1983), see note 37 supra], any expenses reasonably attributable to the earning of income are deducted from gross income." 536 F. Supp. 1100, 1110 (D. Me.) (emphasis added) (citation omitted), affd. on other grounds, 692 F.2d 177 (1st Cir. 1982). Justice Powell, however, may be viewed as addressing the importance of the availability principle in this and other passages, using the phrases "gross or total income" as opposed to "net income" as a means of distinguishing income before and after work expenses have been disregarded. See RAM v. Blum, 564 F. Supp. 634, 641 n.17 (1983). For example, Powell also observes that "expenses attributable to the earning of income . . . reduce the level of actually available income, and if not deducted from gross income will not produce a corresponding increase in AFDC assistance." 416 U.S. at 264 (emphasis added). This language suggests that Justice Powell equated "gross income" for the purposes of 602(a)(7) with "available income." See also note 84 infra and accompanying text (arguing for a broad reading of income as used in § 602(a)(8)).

In arguing that "the Supreme Court . . . implicitly recognized mandatory payroll deductions . . . as work-related expenses under pre-OBRA law," 536 F. Supp. at 1114, the Dickenson court relied heavily on Powell's statements that "while Colorado continued to allow individualized treatment of mandatory payroll deductions and child care costs, all other work-related expenses were subjected to a uniform allowance of $30 . . . " and that "[a]ccording to HEW, 20 states, including Colorado, presently employ a standard work-expense allowance in combination with actual child care expenses, and in some cases mandatory payroll deductions . . . ." 536 F. Supp. at 1112 & n.9 (quoting Shea, 416 U.S. at 255 & n.3). However, this reliance is incorrect. First, the footnote quoted from Shea, 416 U.S. at 255 n.3, and related statements are merely descriptive of state plans; they are in no sense a prescriptive statement of the Court concerning the treatment of mandatory tax withholdings. Moreover, of these states the overwhelming majority treated mandatory tax withholdings as separate from work expenses. See notes 49-50 supra and accompanying text. Second, Justice Powell's description of the Colorado plan in which the phrase "all other work-related expenses" follows the reference to mandatory payroll deductions and child-care costs, is grammatically ambiguous since the word "other" may be read to refer solely to child-care costs. See Turner v. Woods, 559 F. Supp. 603, 612 n.6 (N.D. Cal. 1982), affd. sub nom. Turner v. Prod, 707 F.2d 1109, 1118 n.10 (9th Cir. 1983), cert. granted sub nom. Heckler v. Turner, 104 S. Ct. 1412 (1984).


mer practice was prevalent, a change in the way a federal statute is administered on the state level can hardly be said to change the intent with which it was enacted. More importantly, since every state now was required to disregard both work expenses and tax withholdings in full, there was no need to distinguish between the two. Finally, it is not clear that Congress was cognizant of any change in practice inconsistent with the long standing interpretation of section 602(a)(7) "income" when it enacted OBRA.

C. RELATIONSHIP OF SECTION 602(A)(7) AND 602(A)(8)

When Congress created the "work incentive disregard" by revis-

60. See RAM v. Blum, 564 F. Supp. 634, 644 (S.D.N.Y. 1983) ("Even if some number of administering state agencies had misconstrued the terms of the statute, in a manner which had no effect on the amount of benefits paid, their erroneous practice would be scant basis for concluding that the meaning of statutory terms should be read in a new light."). Moreover, the RAM court suggests that various HEW memoranda issued during the 1970's attest to the fact that the agency's own construction of the terms "income" and "work expenses" remained relatively unchanged through 1981. 564 F. Supp. at 643 n.25.


In James v. O'Bannon, 715 F.2d 794, 805-06 (3d Cir. 1983), the court rejects this argument. First, it contends that tax withholdings prior to OBRA were only deducted from gross earnings after 1969 because they were deemed to be work expenses under 45 C.F.R. § 233.20(a)(6)(iv) (1969), implementing regulation to § 602(a)(8). See note 64 infra. Without finally deciding the question of whether prior to 1969 the availability principle applied to tax withholdings, see 715 F.2d at 803, 807, the court then suggests that beginning in 1969 they were so deducted because under 45 C.F.R. § 233.20(a)(3)(ii)(D) all disregards were controlled by § 602(a)(8) of the statute. However, the language quoted by the court for the 1969 regulation and the reference to Dickenson, 536 F. Supp. at 1111 n.8, cited at 715 F.2d at 806, are from the 1981 OBRA amendments, see note 37 supra, not the 1969 regulation, which reads: "All income and resources, after policies governing the allowable reserve, disregard or setting aside of income and resources have been applied, will be considered in relation to the State's standard of assistance. . . ." 45 C.F.R. § 233.20(a)(3)(ii)(a) (1969). Thus, the regulation in 1969 refers not to all disregards, as implied by the James court, but only "disregar[ds] . . . of income," that is, the work incentive disregard. See generally notes 85-98 infra and accompanying text. Finally, the court concludes with the argument that if tax withholdings were not work expenses they should not be disregarded at all (although conceptually nonincome would not have to be disregarded) because under the availability principle their loss would be more than offset by the gain represented by the work incentive disregard. The court understandably makes no effort to justify its odd perception of this disregard.

62. As the Ninth Circuit in Turner noted:

The defendants appear to argue here that the agency practice became so notorious between 1972 and 1981, and the documents presented Congress in 1981 were so clear in their references to such taxes as work-related expenses, that the 97th Congress intentionally chose to repeal sub silentio the "income available" standard of the 76th Congress. The change in agency practice seems established. Whether Congress had adequate notice of the change is unclear. What is clear is that Congress had no notice of the fact that the change would create a conflict with long standing and familiar interpretations of § 602(a)(7). We therefore refuse to hold that Congress has repealed a forty-year-old policy by implication.

ing section 602(a)(8) in 1968, the HEW implementing regulation, (a)(6)(iv), defined “earned income” as “total” income, “irrespective of personal expenses, such as income tax deductions . . . .”6

A companion regulation, (a)(7)(i), indicated that all “personal and non-personal” work expenses were to be deducted from the “gross amount of ‘earned income’ ” after the work incentive disregard had been deducted.65 These regulations remain relatively unchanged under OBRA.66

The regulations implementing section 602(a)(8) seem to contradict the 602(a)(7) regulations. Under 602(a)(7), tax withholdings were not considered work expenses, because they were treated as nonincome items under the (a)(3)(ii)(D) availability regulations long before the work expense allowance and its (a)(3)(iv) regulation were added.67 Under the 602(a)(8) regulations, tax withholdings were considered “personal” work expenses, which were disregarded from “earned income.”68

These contradictions raise two distinct issues. The first is definitional: whether the definition of “earned income” in (a)(6)(iv) controls the meaning of “income” in (a)(3)(ii)(D). The second is operational: whether the 602(a)(8) regulations control the 602(a)(7) calculations. In addressing these issues, it should be kept in mind that prior to OBRA these contradictions were of purely theoretical significance, since under either set of regulations tax withholdings were not considered income in determining need.69

63. See notes 25-27 supra and accompanying text.

64. 45 C.F.R. § 233.20(a)(6)(iv) (1970) provided:

(6) Disregard of earned income; definition. Provide that for purposes of disregarding earned income the agency policies will include: (i) A definition of "earned income" in accordance with the provisions of subdivisions (iii) through (viii) of this subparagraph; and

(ii) . . . . [The term “earned income” means the total amount, irrespective of personal expenses, such as income-tax deductions, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers. (emphasis added).

65. 45 C.F.R. § 233.20(a)(7)(i) (1970) provided:

(7) Disregard of earned income; method. (i) Provide that the following method will be used for disregarding earned income: The applicable amounts of earned income to be disregarded will be deducted from the gross amount of “earned income,“ and all work expenses, personal and non-personal, will then be deducted. Only the net amount remaining will be applied in determining need and the amount of the assistance payment.


67. 45 C.F.R. § 233.20(a)(3)(ii)(D) (1983), with origins dating back to 1940, defines “income” as “net income available" and may be construed as not including tax withholdings. See note 38 supra and accompanying text. It continues to exist virtually unchanged after OBRA. See note 37 supra.

68. See notes 63-65 supra and accompanying text.

69. See notes 47-50 & 61 supra and accompanying text.
1. DEFINING "INCOME" AND "EARNED INCOME"

In *Dickenson v. Petit*, the court reasoned that "income" in section 602(a)(7) must include tax withholdings because "in common parlance," "earned income" would logically be defined as a "subset" of income. The court reasoned thus: since "earned income" includes tax withholdings and "income" includes "earned income" (and unearned income), "income" must also include tax withholdings. While different kinds of income, including both earned and unearned, may be considered in making the need determination under 602(a)(7), there are persuasive reasons why 602(a)(7) "income" should not be defined to include all that the (a)(6)(iv) regulation defines as "earned income."

First, because the two statutory provisions were enacted at different times and with different purposes, it is not necessary that the definitions of "income" and "earned income" be entirely consistent.

The reenactment of § 602(a)(7) "income" provision was originally enacted in 1939. See note 23 supra. It was again reenacted with minor revisions in 1968 when § 602(a)(8) was amended to add the "earned income" provision. See note 25 supra. The meaning of "income" in § 602(a)(7) as originally enacted in 1939 and reenacted in 1962 and 1968 should not be affected by the addition of "earned income" in § 602(a)(8) in 1968. See 1A SUTHERLAND, supra note 19, at § 22.33:

The provisions of the original act or section reenacted by the amendment are held to have been the law since they were first enacted, and the provisions introduced by the amendment are considered to have been enacted at the time the amendment took effect. Thus, rights and liabilities accrued under the provisions of the original act which are reenacted are not affected by the amendment.
revised in 1968.\textsuperscript{77} 602(a)(7) was controlling the determination of need and had been doing so for twenty-nine years.\textsuperscript{78} The sole purpose of section 602(a)(8) was creation of the work incentive disregard.\textsuperscript{79} The only textual effect that it had on section 602(a)(7) was the addition at the beginning of that section of this language: “except as may otherwise be provided in clause (8) . . . .”\textsuperscript{80} It did not refer to “work expenses,” nor did it purport to detract from “making the determination [of need] under clause (7).”\textsuperscript{81}

The rationale behind the broad regulatory definition of 602(a)(8) “earned income” did not similarly apply to section 602(a)(7) “income.” In calculating the work incentive disregard, “earned income” was defined as broadly as possible to enhance the employment incentive by maximizing the amount of earned income that the AFDC recipient was allowed to retain.\textsuperscript{82} The need for an expansive definition of income is unique to section 602(a)(8) and the work incentive disregard; it is inconsistent with the availability concept of “income” under section 602(a)(7).\textsuperscript{83}

Second, the \textit{Dickenson} argument in effect substitutes \textit{gross} income for the term “income.” While semantically it may seem reasonable to do so, in fact, as used in section 602(a)(7), the term

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\textsuperscript{77} See note 25 \textit{supra} and accompanying text.

\textsuperscript{78} See notes 22-23 \textit{supra} and accompanying text.

\textsuperscript{79} See note 27 \textit{supra} and accompanying text.

\textsuperscript{80} The relevant text of the 1962 and 1968 versions of the statute appears at notes 24 & 25 \textit{supra}.


\textsuperscript{82} Because the work incentive disregard was calculated as a percentage of “earned income,” the broader the definition of that term, the larger the amount from which the disregard would be calculated. This rationale for the expansive definition of “earned income” was confirmed in Arizona Dept. of Pub. Welfare v. Department of HEW, 449 F.2d 456, 469-71 (9th Cir. 1971), \textit{cert. denied}, 405 U.S. 919 (1972), and Connecticut Dept. of Pub. Welfare v. Department of HEW, 448 F.2d 209, 214-15 (2d Cir. 1971); \textit{see also} Turner v. Prod, 707 F.2d 1109, 1117 n.10 (9th Cir. 1983), \textit{cert. granted sub nom.} Heckler v. Turner, 104 S. Ct. 1412 (1984).

The Senate Report discussing the proposed work incentive disregard (at a point when the amount under consideration was the first $50 plus one-half of remaining earnings) indicates that Congress intended that the calculation be based on gross earnings rather than “available” income:

As an example of how these provisions would work, consider a family consisting of a mother and three children who have a grant of $200 a month. If the mother goes to work and earns $120 in a month, her family will get the $120 of earnings plus $165 of grant (one-half of the earnings above $50 would have been deducted) for a total of $285.


\textsuperscript{83} See notes 31-38 \textit{supra} and accompanying text for a discussion of the availability concept of “income.”
“income” is properly read as available income. A broader term — “earned income” — was introduced in section 602(a)(8) and defined in (a)(6)(iv) as representing the largest possible amount — greater than available income — from which to calculate the work incentive disregard.\(^{84}\)

2. **Statutory Control of the Calculation of Income**

The court in *Bell v. Hettleman*,\(^{85}\) interprets the language in section 602(a)(7), “except as may otherwise be provided in clause (8),”\(^{86}\) as directing that section 602(a)(8) has controlled all calculations involving “earned income,” including the deduction of tax withholdings and work expenses, since 1968.\(^{87}\) Such a reading has little to recommend it. It is hard to comprehend how 602(a)(8) could be said to control the deduction of work expenses when its sole purpose was calculation of the work incentive disregard, and it literally contained no reference to work expenses.\(^{88}\) The *Bell* court ignores the 602(a)(8) language specifying that it applies “in making the determination under paragraph (7).”\(^{89}\) The “except as otherwise provided in paragraph (8)” language at the beginning of 602(a)(7) is best explained as a device to maximize the benefit of the work incentive disregard to the recipient by providing that it be calculated first.\(^{90}\)

In *James v. O’Bannon*,\(^{91}\) the court contends that the (a)(6)(iv) regulation deemed . . . [tax withholdings] . . . to be a work-related expense\(^{92}\) and should be accorded deference because its promulgation

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\(^{84}\) For the reasons underlying a broader definition of “earned income,” see note 82 *supra*. The *Dickenson* court argued that it could “find no statutory language or legislative history which would indicate that the term ‘earned income,’ as used in subsection 402(a)(8), was intended by Congress to be read more broadly than the more general term ‘income’ used in subsection 402(a)(7).” 569 F. Supp. at 640. However, there is no direct evidence that Congress intended that the term be read more narrowly either. In fact, virtually every passage cited by the court in support of its argument contrasts earned income with income qualified by some other modifier — “income from any source,” “all income regardless of source,” “total income,” “gross income,” etc. 569 F. Supp. at 640-41; note 56 *supra* (quoting 536 F. Supp. at 1110). If “income” clearly is broader than “earned income” in any more than a semantic sense, there would seem to be little need for these clarifying phrases.


\(^{86}\) This language remains substantially the same in the statute after OBRA. The relevant text of the statute as amended in 1968 and 1981 appears at notes 25 & 28 *supra*.

\(^{87}\) 558 F. Supp. at 393 & n.10; cf. *James v. O’Bannon*, 715 F.2d 794, 805-06 (3d Cir. 1983) (§ 602(a)(8) controls all disregards based on language in 45 C.F.R. § 233.20(a)(3)(ii)(D) (1969) which indicates that available income is to be determined after policies regarding disregards have been applied). But see note 61 *supra*.

\(^{88}\) See notes 79-81 *supra* and accompanying text.

\(^{89}\) This language remains in the statute after OBRA. The relevant text of the statute as amended in 1968 and 1981 appears, respectively, at notes 25 & 28 *supra*.


\(^{91}\) 715 F.2d 794 (3d Cir. 1983).

\(^{92}\) 715 F.2d at 805.
was an exercise of the agency's generally "broad rule-making power". 93 In making this assertion, the *James* court presumes a connection between this regulation and the work expense allowance added to 602(a)(7) in 1962. 94 It seems much more likely, however, that the significance of the (a)(6)(iv) and the (a)(7)(i) regulations was limited to implementation of the 1968 amendments to 602(a)(8). First, the regulations were promulgated in 1969, seven years after the enactment of the work expense allowance in 602(a)(7). 95 Second, the regulations refer only to "earned income," a statutory term appearing only in 602(a)(8). 96 Third, another regulation, (a)(3)(iv), already provided for the deduction of work expenses and was more consistent with the statutory treatment of the work expense allowance. 97 With this (a)(3)(iv) regulation in place, the only purpose served by including withheld taxes as part of "earned income" in (a)(6)(iv) was to ensure a broad interpretation of "earned income" so as to maximize the work incentive disregard. For these reasons, any deference accorded to the (a)(6)(iv) regulation should be limited to its interpretation of 602(a)(8) "earned income" for purposes of calculating the work incentive disregard. 98

The (a)(7)(i) regulation providing for the deduction of work expenses (including taxes) from "earned income" after the work incentive disregard has been deducted may be viewed as no more than a practical clarification. A new term — "earned income" — had been introduced to implement a new step in the need calculation process — the work incentive disregard. It was defined broadly to include items disregarded in the ultimate need determination under

93. 715 F.2d at 806 (quoting Thorpe v. Housing Auth., 393 U.S. 268, 277 n.28 (1969)). In this passage, the *James* court refers to regulation (a)(3)(iv). This reference, however, appears to be a misprint. The court most likely intended the reference to be to (a)(6)(iv) since the passage occurs in the midst of a discussion directed solely at (a)(6)(iv) and the (a)(3)(iv) regulation is not mentioned in any other place in the opinion.

94. *But see* RAM v. Blum, 564 F. Supp. 634, 648 n.32 (S.D.N.Y. 1983): Furthermore, even if the Court were of the view that § 233.20(a)(6)(iv) conflicts with the long-standing availability principle of § 233.20(a)(3)(ii)(D), it would rely on the latter subsection. It is that regulation that construes the statutory section at issue in this proceeding. Contradictory regulations interpreting other statutory sections would hardly present a basis, as agency interpretations, for deference by this Court.

95. *See note 24 supra* and accompanying text.

96. *See Williamson v. Gibbs, 562 F. Supp. 687, 689 (W.D. Wash. 1983) ("[T]he former . . . provision interpreting 'earned income' does not call for a modification of the longstanding interpretation of 'income' contained in 45 C.F.R. § 233.20(a)(3)(ii)(D), particularly since the two phrases are different and serve different purposes within the statutory and regulatory framework of the AFDC program."). The relevant texts of the 1968 statute and implementing regulations appear at notes 25 & 64-65 *supra*.

97. 45 C.F.R. § 233.20(a)(3)(iv) (1970). See note 24 *supra* for the relevant portion of the regulation. This regulation is consistent with the statutory treatment of the work expense allowance, because in keeping with the availability principle underlying § 602(a)(7) it classified work expenses as unavailable income.

98. *See note 82 supra* and accompanying text.
602(a)(7). This regulation may be viewed as a way of ensuring that these "non-income" items included in the definition of "earned income" would not be carried over into 602(a)(7) "income" in the ultimate calculation of need.99

II. OBRA

Thus far this Note has contended that, at the time that OBRA was enacted, tax withholdings were considered neither "income" nor "work expenses" in making the need calculation under section 602(a)(7). With this pre-OBRA background in mind, the ultimate question to be resolved is whether Congress in enacting OBRA intended that tax withholdings be included within the flat work expense disregard.100 The OBRA amendments to AFDC were designed to cut the program's cost.101 Purportedly, the amendments were to accomplish this purpose by reducing fraud and administrative inefficiency and encouraging work,102 rather than simply by reducing benefits.103 Courts ruling for HHS have focused on the cost-saving purpose of OBRA as evidence that mandatory withholdings were meant to be included in the flat work expense disregard.104

99. Between the 1968 amendment and the passage of OBRA, the disregard of work expenses continued to be addressed by § 602(a)(7) and its (a)(3)(iv) implementing regulation. See notes 24 & 97 supra. The question is whether mandatory tax withholdings similarly continued as nonincome items under the § 602(a)(7) definition of available income, or after 1968 were deducted only because they were classified as an item to be disregarded under the § 602(a)(8) regulations. Cf. text at note 61 supra (explaining that it is not necessary for states to distinguish between work expenses and tax withholdings after Shea). There would be no need for the (a)(3)(iv) regulation if the deduction of work expenses was controlled by (a)(7)(i). The fact that the disregard of work expenses continued to be addressed by § 602(a)(7) despite their inclusion in the (a)(7)(i) regulation to § 602(a)(8) suggests that it is perfectly reasonable that mandatory tax withholdings also continued to be controlled by § 602(a)(7).

100. A conclusion that mandatory tax withholdings were treated as work expenses prior to OBRA would not literally exclude the possibility that Congress may not have intended that they be included in the flat $75 disregard. However, this is the same weak position that the Note contends has been taken by the Secretary — that Congress altered by implication in OBRA longstanding administrative practice under AFDC. See Turner v. Prod, 707 F.2d 1109 (9th Cir. 1983), cert. granted sub nom. Heckler v. Turner, 104 S. Ct. 1412 (1984):

In our view, if mandatory payroll deductions enter into income at all, they must be treated as work-related expenses subject to the $75 ceiling enacted by OBRA, because no separate disregard for payroll withholdings exists. It is this argument which the Dickinson, O'Bannon, and Bell courts found persuasive . . . . We, however, reject the original premise that such withholding enters into income. 707 F.2d at 1120 (citations omitted) (emphasis in original).


102. See notes 121-33 infra and accompanying text.

103. Nowhere in the statute or legislative history is there any mention whatsoever of a reduction in the base level of benefits established by the states' standards of need. Cf. Miliken Orders Cut in Welfare, Detroit News, May 15, 1981, at B1, col. 1 (five percent across-the-board cut in welfare benefits ordered.)

104. See James v. O'Bannon, 715 F.2d 794, 808-10 (3d Cir. 1983); Bell v. Hettleman, 558 F. Supp. 386, 394 (D. Md.), aff'd sub nom. Bell v. Massinga, 721 F.2d 131 (4th Cir. 1983); Dicken-
Courts ruling for the recipients have reasoned that individual treatment of such payroll deductions is unrelated to fraud and inefficiency in the program, and that to include tax withholdings in the flat work expense disregard would be inconsistent with the objective of encouraging work.

A. SPECIFIC REFERENCES IN THE LEGISLATIVE HISTORY

The language of the OBRA amendments is inconclusive in determining congressional intent in this instance. There is no reference in the statute to tax withholdings, nor is there a definition of “income,” “earned income,” or “work expenses.” The OBRA Congress did not alter the language in section 602 (a)(7) regarding the consideration of a recipient’s income in determining need, nor did it give any indication that it intended a new meaning for that language. It would seem that Congress intended that the ultimate determination of need would continue to be made under 602(a)(7), since it retained the language at the beginning of section 602(a)(8) that refers to “making the determination under paragraph (7).”

Nor are the terms “income,” “earned income” or “work expenses” clarified in either the Senate or House Conference Committee reports regarding OBRA. The Senate report speaks of “total income” in describing prior law, “income” in describing what remains after disregards and what is used to determine assistance, “earned income” with respect to OBRA disregards, and “gross income” in connection with a new OBRA eligibility provision not rele-


106. See notes 132-36 infra and accompanying text.


108. See notes 25 & 28 supra and accompanying text.


vant to the tax withholdings issue. In describing the pre-OBRA work expense allowance, the Senate report gives examples of work expenses, but it does not include mandatory tax withholdings among these.

In congressional hearings regarding the proposed OBRA legislation, the statements of some witnesses who testified against the proposed flat work expense disregard indicated that these individuals thought that mandatory tax withholdings were included in the disregard. Such testimony, however, generally constitutes only weak evidence of legislative intent. In particular, these statements were from opponents of the OBRA legislation, and should be discounted because of the likelihood that witnesses will exaggerate the negative points of legislation that they oppose.

Relevant testimony from proponents of the flat work expense disregard includes that of then Secretary of HHS, Richard Schweiker. The Secretary, describing the changes proposed by OBRA, stated that the $30 and one-third disregard would be deducted from “net income.” This description suggests that tax withholdings would be deducted prior to and separate from work expenses.


114. 2A SUTHERLAND, supra note 19, at § 48.10; see also Kelly ex. rel. Lofstock v. Perales, 566 F. Supp. 785, 790 n.8 (S.D.N.Y. 1983) (One cannot determine “whether Congress enacted the legislation despite such comments, or whether the comments were considered an inaccurate description of the effect of the legislation, or indeed to what extent they were noted at all.”).

115. Cf. NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 66 (1964) (statements of legislators opposing bill are suspect evidence of legislative intent).

116. See Administration's Proposed Savings, supra note 113, at 6-7 (statement of Richard S. Schweiker, former Secretary of HHS).


118. The term “net income” in the Secretary's statement is ambiguous. It is fairly clear that by “gross income” he meant “earned income,” defined in 45 C.F.R. § 233.20(a)(6)(iv) (1983) as including tax withholdings. “Net income” could refer to “gross income” less the
B. Interpretation Consistent with Legislative Objectives

As the preceding discussion illustrates, the explicit language of the OBRA legislation and its legislative history shed meager light on congressional intent regarding the treatment of mandatory tax withholdings. The legislative purposes of OBRA, however, as expressed in its legislative history, do provide at least some insight into the treatment that Congress may have intended to be accorded mandatory tax withholdings under the current statutory scheme.\textsuperscript{119} The analysis below demonstrates that inclusion of such taxes as income in determining need does not promote any of the avowed purposes of the OBRA amendments.

The general aim of OBRA was to reduce federal spending.\textsuperscript{120} The changes in the AFDC program were to forward this objective through prevention of fraud and abuse and promotion of administrative efficiency, confinement of assistance to the "truly needy," and encouragement of AFDC recipients to work.

According to the committee reports, the work expense disregard was standardized primarily to prevent abuse of the disregard and to reduce administrative complexity and error.\textsuperscript{121} The lack of a clear

\textsuperscript{119} The purposes of OBRA must also be considered in light of the overall purposes of the AFDC program. These purposes include providing adequate income for needy families with dependent children, keeping such families together, and encouraging adult members of such families to get and keep jobs. \textit{See} 42 U.S.C § 601 (1982). The provision embodying the overall purposes of AFDC was left intact by OBRA. \textit{See} Pub. L. No. 97-35, 95 Stat. 357 (1981).

\textsuperscript{120} \textit{See} generally hearings cited at note 113 supra; note 101 supra and accompanying text.

\textsuperscript{121} The Senate committee report expressed these goals very clearly: The committee believes that the current earned income disregard provisions have resulted in serious problems. Because Federal law neither defines nor limits what may be considered a work-related expense, there is now great variation among the States and many instances of abuse. In addition, the requirement for itemization of individual work expenses has resulted in administrative complexity and error. It is the committee's belief that the change in the law with respect to work expenses would have the effect of limiting abuse of the work expense disregard and also result in simpler and more accurate determination of benefits.
definition as to what constituted a work-related expense, the open-ended nature of the disregard, and difficulties in documenting expenses, encouraged fraud and abuse. These problems and the requirement that work expenses be itemized separately and reimbursed in full, resulted in an administrative burden and increased the likelihood of error. While the establishment of a flat work expense disregard advances the purposes of discouraging abuse and promoting administrative ease and accuracy, these goals may be achieved without the inclusion of mandatory tax withholdings. Such withholdings are prime examples of amounts that are clearly defined, not subject to falsification, and not difficult to document or calculate. Thus, separate itemization of tax withholdings is unrelated to the problems that the flat work expense disregard was intended to remedy.

The goal of confining AFDC to the "truly needy" achieved primarily by changing the formulae for determining eligibility and need for assistance. These changes resulted in a loss of eligibility or reduction in benefits for those whom Congress considered less needy than others. This goal, however, is not explicitly associated with the establishment of the flat work expense disre-
One might argue that by preventing recipient abuse of an open-ended work expense allowance the flat disregard, reduces the benefits of less needy or deserving recipients or at least prompts recipients with extravagant work expenses to attempt to economize. Nevertheless, even if a "serving only the truly needy" purpose is thereby ascribed to the disregard, that purpose is not advanced by inclusion of mandatory tax withholdings. Not only are tax withholdings easily verifiable and therefore not subject to abuse, they also are not subject to economizing. They are mandatory expenses over which the applicant has no control, and because they are never available for the recipient to use, they can hardly be said to relate to "true need."

The Senate OBRA report reaffirms the overall AFDC policy objective of encouraging independence from welfare through employment. The committee notes that the $30 and one-third work incentive disregard has been abused and has failed to encourage employment, and suggests that these occurrences underlie the cutting back on this method of promoting employment. However, while OBRA clearly demonstrates a change in congressional emphasis

129. The Senate report confirms that the flat work expense disregard was not perceived as a means of limiting assistance to the truly needy. After discussing how the proposed flat work expense disregard would deal with the problems of abuse and administrative complexity inherent in the pre-OBRA open-ended disregard, the report continues:

The committee recognizes, however, that these changes in the work expense and child care expense disregards do not address another serious problem with the disregard provisions — the fact that . . . families may remain on welfare even after they are working full time at wages well above the State welfare standard. For this reason, the committee would limit the application of the work incentive disregard to the first four consecutive months . . . . S. REP. No. 139 at 502, reprinted in 1981 U.S. CODE CONG. & AD. NEWS at 768, supra note 101.

130. In hearings on the OBRA changes, Secretary Schweiker mentioned the latter possibility in his description of the standard work and child care disregards. He noted that "[t]hese changes should simplify administration, reduce error, and provide [sic] incentive for AFDC recipients to find the most economical ways to meet their work expenses." Administration's Proposed Savings, supra note 113, at 11 (statement of Richard S. Schweiker, Secretary of HHS).


133. S. REP. No. 139 at 502, reprinted in 1981 U.S. CODE CONG. & AD. NEWS at 768, supra note 101. The Senate report also notes:

The $30 and one-third disregard was added to the law in 1967 because it was believed that it would operate as an incentive for mothers to move into employment and to become self-sufficient. . . . [T]his has not been the case. . . .

. . . .

The committee believes that the $30 and one-third disregard of earnings should be applied to the initial months in which a welfare recipient is employed. . . . Applied in this way, the committee believes that the provision would provide a useful buffer to those trying to readjust to employment, but without resulting in keeping families on welfare for an unlimited period. Combined with the other provisions . . . aimed at providing em-
from that of the 1962 and 1967 amendments, "apparently . . . aban-
don[ing] the policy of attempting to encourage self-sufficiency by
creation of financial incentives," there is no indication in the
amended statute or the legislative history that Congress intended to
create a disincentive to work. Counting tax withholdings as in-
come and including them in the flat work expense disregard creates
just such a disincentive.

III. FAIRNESS AS A RELEVANT INFERENCE — A PROCESS VIEW

A conclusion that the OBRA Congress intended that tax with-
holdings continue to be treated as nonincome distinct from work ex-
penses is not inconsistent with either the expressed legislative
purposes of the AFDC amendments or the provisions themselves on
their face. Therefore, it can be argued that this interpretation should
be adopted on the authority of the established principle that, when
reasonable, provisions of the Social Security Act should be construed
in favor of those seeking benefits. It is clear, however, that OBRA
itself was primarily a revenue measure. It may be true that inter-
preting "work expenses" to include mandatory tax withholdings
would achieve greater cost savings than continuing to classify them

employment for AFDC recipients, these changes are expected to decrease welfare depend-
dency . . . .


135. See notes 144-47 infra and accompanying text.
136. The disincentive results because while work expenses may roughly approximate $75
per month, combined with tax withholdings the total will invariably exceed that amount, thus
leaving the working recipient with less disposable monthly income than the nonworking recipi-
ent. See generally notes 141-43 infra and accompanying text.
137. In Damon v. Secretary of HEW, 557 F.2d 31 (2d Cir. 1977), the court emphasized:
This court has repeatedly held that "the Social Security Act is a remedial statute, to be
broadly construed and liberally applied" . . . "in consonance with its . . . humanitarian
aims" . . . These general principles of liberal construction plainly apply to the child's
benefit provisions here under consideration . . . . In practical terms the principles mean
that, when a Social Security Act provision can reasonably be construed in favor of the one
seeking benefits, it should be so construed.

557 F.2d at 33 (citations omitted). These principles apply to the AFDC program as part of the
Smith and its progeny have erected a fundamental principle of AFDC jurisprudence: that the
Social Security Act will not countenance depriving needy children of benefits because of fac-
tors beyond their control, and unrelated to their need.") See generally 2A SUTHERLAND, supra
note 19, at § 58.04 (nature of interests and kinds of persons affected should be considered in
interpreting legislation); 3 SUTHERLAND, supra note 19, at § 71.08 (statutes enacted to provide
relief to the poor should be liberally construed).

138. See note 120 supra and accompanying text; cf. Penner, How Fair is Welfare?, N.Y.
Times, Mar. 29, 1981, § III, at 2, col. 3 ("Policy makers constantly must make trade-offs be-
tween minimal living standards for the poorest of the poor, work disincentives, and costs. This
Administration has chosen to increase work disincentives slightly in order to reduce costs.").
as nonincome. Nevertheless, just because Congress intended to cut costs through OBRA does not mean that any interpretation of OBRA that maximizes cost savings is presumptively consistent with congressional intent.

Although $75 is a conservative figure, it at least can be regarded as a reasonable legislative approximation of a working recipient’s monthly job-related expenses. But it can only be so regarded if mandatory tax withholdings are excluded from the items covered by the disregard. If these amounts are computed as work expenses, then a disproportionate reduction in benefits is imposed on working relative to nonworking recipients by the OBRA amendments.

The *James* court dismissed the fact that inclusion of tax withholdings in the $75 work expense disregard penalized working recipients by concluding that the legislative history of OBRA “reflects Congress’ determination to effect a substantial departure from Congress’ original policy of avoiding financial disincentives to employment.” It based its conclusion, however, on the rationale stated for eliminating the work incentive disregard. Congress did not depart from its policy of offsetting work disincentives — it retained the

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143. The reduction in benefits results because any amount that is a cost of earning income and is not offset will be treated as income in calculating need in relation to the base standard set by each state.


work expense and child care disregards designed to equalize the benefits of working and nonworking recipients. The distinction is fundamental. Elimination of the $30 and one-third disregard simply equalizes the benefits of working and nonworking recipients. It constitutes recapture of a financial incentive granted to employed recipients earning more than the minimum standard of need, which Congress determined was not accomplishing its intended objective of encouraging employment. Inclusion of tax withholdings in the $75 work incentive disregard, however, leaves working recipients with less disposable income than the minimum standard.

Courts ought to infer that legislatures intend to be fair. Accordingly, when Congress intends that particular subjects of legislation be treated unfairly, the courts should require an explicit expression of that intention, to ensure both that the legislative process be transparent and that the opportunity for the interests of those affected be fully perceived and represented. Congress can satisfy this requirement either by explicit language in the statute or by clear statements of intent in the supporting materials. If Congress's objectives constitute a "hidden agenda," evident neither from


147. See note 133 supra and accompanying text.

148. Cf. 2 H. Hart & A. Sachs, The Legal Process 1410-11 (1958) (unpublished manuscript) ("In trying to discharge the function of statutory interpretation the court should: 5. Be mindful of the nature of law and of the fact that every statute is a part of the law and partakes of the qualities of law, and particularly of the quality of striving for even-handed justice."); 2 Hart & Sachs, supra note 148, at 1413 (One "policy of clear statement [that] call[s] for particular mention . . . forbids a court to understand a legislature as directing a departure from a generally prevailing principle or policy of law unless it does so clearly.").

149. See Hart & Sachs, supra note 148, at 1413 (One "policy of clear statement [that] call[s] for particular mention . . . forbids a court to understand a legislature as directing a departure from a generally prevailing principle or policy of law unless it does so clearly.").


152. But cf. Note, supra note 148, at 899 ("equation of literalism with legislative intent" does not resolve problems of interpretation stemming from situations unforeseen by Congress or from the limitations of language). The situation being suggested here, however, is a deliberate obfuscation of intent.
the face of the statute nor from statements of purpose, the courts should not give effect to that agenda. Congress is free, within the limits of the Constitution, to pass any legislation it chooses. But when it places the courts in the position of adopting "hard" legislation by inferring, on scant evidence, an intention to be inequitable, the institutional legitimacy of both the legislature and the judiciary is undermined.

CONCLUSION

Prior to 1968, two facts are noteworthy with respect to mandatory tax withholdings and the calculation of need under the AFDC program — the consistent adherence to the availability principle in counting a recipient's income, and the conspicuous omission of tax withholdings from the list of items that the work expense disregard was intended to cover. Courts holding that tax withholdings are included within the flat $75 work expense disregard introduced by OBRA have relied largely upon the regulations implementing the work incentive disregard adopted in 1968 and out-of-context inferences from Justice Powell's language in Shea v. Vialpando in concluding that, whatever the status of such withholdings prior to 1968, after that time they were regarded as work expenses. There is, however, no direct evidence whatsoever that the administering agency intended that the regulations designed to implement the work incentive disregard would override the preexisting statute and regulations controlling the work expense disregard and overall calculation of need, nor that Congress intended or apprehended any change in the


Just why is it that in many cases legislators appear willing, with hardly any thought, to accept an expensive tax incentive program when they would just as quickly reject a similar direct expenditure program, even a much smaller one? . . . Is it that the legislators know full well what is involved, despite the complexity of tax bills, but believe the public will not perceive what is being done because of the complexity of tax bills and because tax expenditures do not show up in the budget?

154. But cf. Note, supra note 148, at 906-07 (concerned with the undermining of legitimacy that occurs when strict adherence to the literal language of a statute as an expression of legislative intent produces an unjust or incongruous result). This Note argues that similar problems of legitimacy arise if courts interpret statutes to produce inequitable results on the basis of unspoken intent.

155. Cf. 2 Hart & Sachs, supra note 148, at 1410 ("In trying to discharge th[e] function [of statutory interpretation] the court should: 1. Respect the position of the legislature as the chief policy-determining agency of the society, subject only to the limitations of the constitution under which it exercises its powers . . . .").

156. Cf. Note, supra note 148, at 903-04 ("The legitimacy of [legislative] commands or processes depends in turn on the role the Court plays in shaping the meaning of statutes; that is, the legitimacy of statutory commands cannot be supported solely by appeal to the authority and competence of Congress.") & 912 ("The Court's failure to exercise critical capacity by equitably interpreting statutes only fulfills its prophecy that regulatory law is pervasive, inexplicable, and uncertain.").
status of tax withholdings and the availability principle prior to OBRA.

Similarly, there is virtually no direct evidence in either the statute or legislative history of OBRA that tax withholdings were intended to be included within the $75 work expense disregard. Nor would such an inclusion advance any of the stated goals of the various AFDC amendments. Inclusion of tax withholdings in the $75 allowance for work expenses results in working AFDC recipients being left with less disposable income than the state's minimum standard of need and places them in a worse position than nonworking recipients. Absent a clear statement to the contrary, Congress should be presumed not to have intended to achieve such a palpably unfair result.