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FOR A NEGATIVE INCOME TAX

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ABSTRACT

In discussions of negative income tax plans it is generally assumed that, as in traditional welfare programs, the family, rather than the individual, is the appropriate unit for determining level of benefits. But to say that the family is the appropriate unit is at best only to describe a vague conceptual starting point. When we say that B must be included in A's unit, we are saying both that A is entitled to an allowance in respect of B and that A must include B's income in the income of A's unit. The decision on an issue of inclusion may therefore have important potential impact on family stability and harmony, on incentive to work, on geographic mobility, and on the fairness, or appearance of fairness, of the program. The variety of human relationships is so great that it is possible to array an almost endless series of problem areas.

The purpose of this paper is to describe the general problems that arise in drafting unit rules for a negative income tax, to examine the underlying rationale of the unit approach and the effects of alternative rules, and to identify as many of the significant concrete rules as possible. A brief appendix is devoted to legal problems raised by the constitutional doctrine of substantive equal protection and by the constitutional protection of personal privacy. Another appendix contains three alternative sets of family unit rules.

It is hoped that the discussion of the general and specific problems will aid the policymaker by reducing the danger of overlooking issues or of failing to appreciate fully the likely impact of a given rule.

PROBLEMS IN CHOOSING FAMILY UNIT RULES FOR A NEGATIVE INCOME TAX

INTRODUCTION

In contrast with the positive income tax in this country, the negative income tax,[1] as conceived by most people who have given serious thought to it, uses the "family" rather than the individual as the unit for determining the level of payments. But the term "family unit" reflects only a very vague, general concept--merely a theoretical starting point. In implementing a negative income tax we must ask ourselves what we mean by a "family"; we must, in other words, develop rules specifying what persons must, or may, be included in the family unit. Before discussing the specific problems that arise in this aspect of rule development for a negative income tax, it will be useful to draw attention to several background facts and concepts and then to discuss briefly the question of why it is that the family is regarded as the appropriate unit.[2]

First, it should be recognized that the notion of a "family unit" may be seen as little more than a convenient conceptual framework and a vague, somewhat metaphorical rationale for a set of rules on computation of allowances and inclusion of income. It should be recognized that the same results can be achieved using a different conceptual framework (with the individual as the relevant unit) implying a somewhat different rationale. For example, consider a family consisting

of a husband and wife and two minor children. Suppose that the rules provide that the husband is to file a claim, that he is entitled to a basic allowance of $1,200 for himself, $800 for his wife, and $600 for each of his children, and that the basic allowance is to be reduced by 50 percent of the total income of the husband, wife, and two children. These rules can be conceived of in family-unit terms--that is, in terms of the family having a claim and the husband acting as its representative in filing the appropriate forms. This view seems in turn to reflect the assumption that ordinarily the family operates voluntarily and naturally in pooling its resources and in collectively making decisions affecting the economic welfare of its members, or at least that this view of reality is closer to the truth than any other equally simplistic view would be. It is entirely possible, however, to conceptualize the same results with the individual as the relevant unit--but with that individual having certain obligations and rights. Thus, the concept could be that the husband files a claim just for himself but with his payment calculated to take account of his obligation to support his wife and children and, at the same time, to take account of his power or right to control their income.

While identical results can be arrived at under either concept, the choice of concept may in practice tend to influence decisions as to what results ought to be achieved. For example, suppose that a household consists of a woman and her two children and that the husband-father has deserted. Using the family-unit concept one might tend to conclude that the husband-father is in fact no longer a member of the family and that therefore his income can be ignored. The

questionable implicit assumption is that the income of persons who are not members of the family cannot be attributed to the family. If, on the other hand, one views the wife as the relevant unit, one might be somewhat less likely to draw the line on income inclusion at members of the household and therefore more likely to recognize that her resources may include her right to seek support from her husband. Or consider the question whether a man and woman living together, unmarried, should be treated the same as a married couple for purposes of computing allowances and aggregating income. It might be difficult for some people to conceive of the unmarrried couple as a "family unit." If aggregation of income were thought to be dependent on a finding of "family unit," then that result would be rejected by such people, without adequate examination of the considerations that point one way or the other. The point is that it may be helpful to look at concrete problems from both angles--or perhaps from neither. The results ought to turn not on general concepts but on careful appraisal of more specific factors such as the economies achieved by living together, community practice on income sharing, community ethics concerning which individuals ought to be encouraged to live together and to support one another, and so forth. In a similar vein, one should be ready to sacrifice conceptual purity by recognizing that a person might appropriately be treated as a member of a family unit for one purpose and not for another. For example, suppose that the allowance for a married couple is less than the total allowance for two single people. It is certainly conceivable that a husband and wife who are separated might be required

to file a single return with their incomes aggregated but that the total allowance should be that for two single people rather than that for a normal married couple. In other words, they might be treated as members of a unit for purposes of income aggregation but not for purposes of allowance size.

Second, there are two predominate ramifications of a decision to include an individual within the family unit, and a rule of inclusion may produce results that are favorable or unfavorable to the unit depending on the circumstances of the particular unit. The inclusion of an individual within the unit has the effect of (1) increasing the basic allowance for that unit but at the same time it has the effect of (2) including that individual's income (if any) within the income of the unit. Thus, for example, if a child with no income is included in the unit, payments to the unit will increase; but if the child has a substantial income then his inclusion within the unit may result in a decrease in the payments, so a single rule on inclusion of children may be beneficial to one family and detrimental to another. In drafting the rules, therefore, both effects must always be taken into account.

A third general observation that bears on many aspects of the family-unit rules is that income will be defined far more broadly under any reasonably conceivable negative income tax statute than it is under the present federal income tax statute.[3] Theoretically it would be possible to use the same definition of income for the negative income tax as for the positive income tax, and there are some persuasive reasons for doing so (principally to treat poor and nonpoor alike and to create

pressure for reform of the positive tax), but almost everyone who has thought seriously about negative income taxation has concluded that the possibility of doing so is not politically viable. The fact is, then, that the definition of income for purposes of negative income taxation in many ways will follow the definition of income or available resources for purposes of computing payments under traditional welfare programs. In relationship to the problem of developing family-unit rules, the most significant aspect of the rules defining income for purposes of the negative income tax is that, presumably, gifts and support payments received from persons outside the family unit will be treated as income of the unit.[4] (A deduction will be allowed to the person making such a gift or support payment.) The effect of this rule in turn may be to permit more liberal rules for the exclusion of individuals from the family unit than would otherwise be possible. For example, to accept a rule permitting a claimant to exclude children from his family unit, and thereby exclude a child's income from the income of the unit, seems easier than it would be otherwise when it is recognized that any money that a child actually gives to his family for its own use will be treated as part of the family's income. Similarly, it is easier to accept a rule allowing husband and wife to become separate units when it is recognized that any support payments from the husband to the wife will be treated as part of her income. Indeed, if there were no difficulty in measuring the amount of gifts and support payments and if they are included in income, then the aggregation of income required by the family-unit rules could be viewed simply as a device for attributing to one individual the income of another

individual that ought to be available for his or her support and for creating a strong pressure for certain individuals to seek the support to which they are entitled. For example, suppose that a husband fails to support his wife. A rule denying her the right to file for herself and ignore her husband's income will leave as her only recourse some effort to force him to support her. If he were in fact providing support at a reasonable level, the rule including such support in her income would in most cases render immaterial any decision on whether they were separate units or a single unit, as far as aggregation of income is concerned. Only if the basic allowance for a wife within a unit including her husband were lower than that for a single individual, and only therefore for the purpose of determining the total allowance for the two of them, would the family-unit rule have any substantive significance for them.

A fourth general observation is that the stringency of the rules on family unit will to some extent be a function of the difference between the allowance for the head of a unit or a single person and that for the wife in a husband-headed unit. For example, if the allowance were $1,000 per year for the husband, or for a single person, and this was same amount for the wife when husband and wife filed as a unit, the married couple might be granted considerable freedom to file as separate units (putting aside the aggregation-of-income problem, which could be dealt with in other ways). Thus, the rules could provide that a husband and wife could file as separate units whenever they were in fact living apart. But if the allowance schedule provided $1,600 for a

husband or single person and $700 for a wife living with her husband, then the same rule might be considered quite undesirable in that it might tend to encourage separation of husbands and wives.

Fifth, aggregation of income would be of little significance were it not for the fact that presumably the negative income tax and the positive income tax will be two separate systems and the rate of "taxation" for the negative income tax (that is, the rate at which payments are reduced as income rises) will be higher under the negative tax than under the positive. To illustrate, suppose that under the negative tax the basic allowance for a husband and a wife is $1,500 each,[5] and that the tax rate is 50 percent so that the breakeven level is $3,000 each, or a total of $6,000. If the husband earns $6,000 and the wife earns nothing, then if they are required to file as a unit they will breakeven; there will be no payment or tax and their total spendable resources will be $6,000. If the positive tax rate were 50 percent, then the result would be the same even if they were permitted to file separately. The wife would receive a payment of $1,500 but the husband would make a tax payment of $1,500 (50 percent of the $3,000 in excess of his own breakeven level of $3,000),[6] and again their total spendable resources would be $6,000. If, on the other hand, the positive tax rate were 20 percent (obviously a far more realistic assumption) and if separate filing were allowed, then the wife would still receive $1,500 but the husband would pay only $600 and their total spendable resources would be $6,900. Thus, under the latter, more realistic, assumption about the positive tax rate, aggregation of income is a significant issue.

Finally, by way of background discussion, we come to the question of why it is that the "family" (a term that will require definition) is regarded as the appropriate unit for determination of level of benefits. Since it will be argued ultimately that parents should be permitted, but not required, to include children in their unit, probably the most significant aspect of this general question is presented by asking why it is that husband and wife should be required to file as a unit. It will be seen later that treating husband and wife as a unit creates some very difficult problems of definition and administration. These problems could be avoided by abandoning the compulsory-unit approach. Moreover, it might be argued that there is some virtue in giving both husband and wife an independent source of support, regardless of the income of the other. The arguments in favor of unit treatment seem, however, to outweigh these considerations, particularly when it is remembered that, if we have a limited supply of funds available for a negative income tax program, then generosity toward married couples on the unit issue necessarily means less adequate benefits, or more tightness, in some other aspect of the program.

The idea that husband and wife should be required to file as a unit seems to me to be based primarily on the assumptions (1) that married couples share income and expenses and feel a strong mutual obligation of support and (2) that payments should be strictly tailored to need. Consider first the married couple living together in harmony, with no children (or at least with no children still living with them or dependent on them). Suppose that the husband earns $10,000

a year and the wife earns nothing. If the negative income tax is viewed as a substitute for traditional welfare programs--in other words, if the negative income tax is appraised in welfare terms--then obviously it makes no sense to make payments to the wife, for the simple reason that she is not in need and there are others who need the money much more than she does. Even viewing the goals of the negative income tax as being broader than mere replacement of welfare, a payment to the wife seems inappropriate. If we make payments to wives of non-poor men we will need to raise the money somewhere. To the extent that the burden falls on married men, then essentially it's just a "wash"--though there might be some degree of increase in the progressivity of the tax structure if the structure is progressive to begin with. But the burden will also fall on single people and, to that extent, single people will be sharing the burden of "supporting" married women, regardless of the income of the husbands of those women. This prospect seems inconsistent with what I assume is the still prevalent notion that the husband has the primary duty to support. The prospect of redistributing income to any family with a wife who has no income of her own seems particularly disturbing when it is recognized that many, perhaps most, married women who have little or no income, and who have husbands who are capable of supporting them, have chosen not to work precisely because they expect their husbands to support them--a decision in which, in most cases, the husband has presumably acquiesced. Payments to the wife could, of course, be

conditioned on her willingness to accept suitable employment--but to return to that vestige of traditional welfare programs would be to sacrifice one of the principal virtues of the negative income tax.

It might be thought that any potential advantage of separate treatment would be virtually eliminated by the inclusion in the wife's income of the amount of support supplied by the husband. The fact is, however, that the amount of support supplied would be extremely difficult to measure.[7] Any serious effort to make accurate determinations of the value of support on a case-by-case basis, in a huge number of cases, would undoubtedly produce an administrative nightmare. The only approach to this problem that would seem feasible would be to develop arbitrary rules. But what kind of arbitrary measure of the assumed value of support would be most reasonable? Probably the most sensible answer would be to include in the wife's income some portion of the husband's income. But that, of course, would be tantamount to treating the couple as a unit.

Another justification for treating the husband and wife as a single unit is that otherwise, in certain income ranges, the couple with two wage earners would be worse off than the couple with the same total earnings all earned by one person (assuming that the rate of taxation for the positive tax is lower than that for the negative tax). To illustrate, assume again that the basic allowance is $1,500 for the husband and $1,500 for the wife, that the tax rate under the negative income tax is 50 percent and that the tax rate under the positive tax is 20 percent. If the husband and wife each earn $3,000, then each will

be at the negative tax breakeven level and no payments will be made. They will wind up with $6,000. If, on the other hand, the husband earns $6,000 and the wife earns nothing, and assuming still that they are treated as separate units, the wife will receive $1,500, the husband will pay $600, and they will wind up with $6,900. If one accepts the idea that the system should be geared to need and if it is further assumed that generally husbands and wives do share income and expenses and feel a strong mutual obligation of support, then this kind of difference in outcome seems unjustifiable.

Furthermore, none of the definitional and administrative problems of unit treatment can be avoided if it is agreed that people with similar needs should receive similar allowances, that a married couple achieves significant economies, and that, therefore, the allowance for the wife should be lower than that for the husband or for a single adult.[8] Assume, for example, that it is decided that the basic allowance should be $1,500 for a single person and $2,500 for a married couple, in order for all individuals to achieve the same standard of living. Once that decision is made, the problems to be discussed below cannot be avoided, and one of the principal arguments for separate treatment evaporates. It must be remembered that, if it is granted that an economy is achieved by living together in marriage, then unless there is a lower total allowance for husband and wife than for two single adults, money will be paid to married couples that is presumably more needed by single persons.

On balance then it seems that unit treatment of married couples is appropriate. As for children, it is obvious that someone else will

be required to file claims and income reports for them and receive the allowance to which they are entitled (that is, control the funds allotted to them). Thus, it will be convenient in most cases to include children in a unit containing an adult. It is not so obvious, however, that parents (or other adults caring for children) should be required to include in their unit all children living with them, where it would be disadvantageous to do so because of relatively high earnings of the child. This problem will be discussed later, along with other issues, such as which adults should be permitted to claim which children.

THE CONCEPT OF "MARRIAGE" FOR PURPOSES OF NEGATIVE INCOME TAXATION

The simple case of a man and woman who are legally married[9] and living together is of course the prototype for a rule based on the notion of an economic unit. As has been indicated, the effect of such a rule is (1) to aggregate income, presumably on the theory that the income of each is in fact available for the support of the other (or, to put it in slightly different terms, that income is pooled) and possibly (depending on decisions on allowance schedules) (2) to produce a lower total allowance than would be made to two single individuals, presumably on the theory that savings in living costs can be achieved by living together.[10] Problems of definition or line drawing arise, however, by virtue of the fact that the mere existence of a legal marriage cannot by itself be made determinative of whether an economic unit exists without doing violence to the justification for

unit treatment. There are some situations in which a man and woman who are married to one another but not living together should not be treated as a unit and some situations in which it might be argued that a man and woman who are not married but are living together should be treated as if they were married.

A. The Separated Couple

1. Problems of allowance size. In examining the problems raised by the separated couple, it will be useful to consider separately the problem of allowance size and the problem of aggregation of income, even though it may be concluded (as seems likely) that a single rule should be used to determine both issues. I begin with the problem of allowance size.

The difficulties in dealing with the allowance-size problem can be suggested by considering an extreme, quite unrealistic possibility. Suppose that for some reason an allowance schedule were adopted under which the maximum payment to a single individual were $2,000 while the maximum payment to a married couple (no children) were $2,500.[11] The question would arise, what about a couple that splits up and gets divorced? There are, of course, compelling reasons for treating both the man and the woman as separate units, each entitled to a payment of $2,000. Each of them presumably needs that much to live on and it would simply seem unfair to treat either of them worse than other single people. The trouble is that a rule that would provide such an increase in total payments to them as separate units might be thought to create an incentive to divorce--surely an effect that ought to be avoided.[12]

It may be argued, of course, that the problem just raised is a function solely of the allowance schedule and not of the family-unit rules. If the allowance schedule were thought to be geared accurately to individual needs, then any cause for concern would largely disappear; there would be no net advantage to living apart because the cost of doing so would fully offset the added payments. This argues for extreme caution against setting a wife's allowance too far below that of a single person; if anything, error in favor of the married couple should be preferred.[13] But as long as the total allowance of a married couple is less than that for two single adults, it will be necessary to be careful in defining "married couple." The preceding discussion suggests that the greater the gap between the allowance for two single people and the allowance for a married couple, the more critical this problem of definition becomes.

The definitional problems arise by virtue of the fact that many family breakups fall short of leading to divorce or other legal separation. As a practical matter, some of these nonformalized breakups may lead to the same economic circumstances as occur with divorce and may therefore equally be thought to justify acceptance of the reality of separate economic units. At the same time, there may be situations in which some sort of physical separation has occured but in which no significant economic change from married status has taken place. Thus, the question arises, what kinds of breakups or separations should be treated as justifying treatment of the husband and wife as separate units for the purpose of allotting to each a single person's allowance, and how is the existence of such a breakup or separation to be determined.

The most sensible kind of rule for husband-wife unit might be one that required unit treatment of any legally married couple unless the husband and wife had separate domiciles (so that for each of them the cost of living would be comparable to that of a single person) and the separation appeared likely to be permanent or at least of reasonably lengthy duration (so that the administrative burden of adjusting to the change in circumstances would not be incurred in cases in which the difference in benefits would not be significant enough to justify that burden). In addition, the rule would have to be one that could reasonably be administered--without great cost to the government or psychic burden on the claimants.

The problem can best be seen from the standpoint of the wife whose husband has left and who wants to claim an allowance as a single person. Her claim to separate-unit status could be made dependent on her establishing either that (1) she had instituted an action for divorce or legal separation, or had sought a support order,[14] or that (2) her husband has established a separate domicile, or that (3) her husband had in fact been absent. The first possibility has the advantage of objectivity, and therefore is appealing for administrative reasons. It also minimizes the chance of unwarranted benefits. At the same time, however, it would be very harsh in some cases--for example, where the wife is hoping for her husband to return to her and is unwilling to risk worsening the breach by instituting legal action against him, but still needs a full single person's allowance in order to survive (particularly if she wants to stay in the house or apartment that

once had been suitable for two people). The second possibility again seeks to insure against unwarranted benefits but at the same time provides adequate benefits, geared to need, and thus, as suggested above, might seem ideal. It suffers the obvious shortcoming, however, that in many circumstances the wife simply will have no way of knowing of her husband's circumstances. In addition, if the husband is in fact absent and the wife continues to maintain their previously common domicile it is not the wife but the husband who creates the problem and the rules should therefore be lenient towards her. It may be true that some husbands will avoid the expense of maintaining a separate residence by living with friends or relatives or in other ways, but perhaps this is not a matter for serious concern in any event because, presumably, there will be no rule denying benefits to single people who achieve similar economies. Thus, the third standard seems the most appropriate for the purpose of determining allowance level. (For purposes of aggregation of income a different standard might seem more appropriate.) Presumably after the husband has left his wife he will continue to file as the head of a unit (consisting of himself alone) and will be denied the right to claim his wife as a member of his unit once she has become entitled to treat herself as a separate unit.

Assuming that the husband's mere absence (without divorce or legal separation) is to be determinative of the wife's right to file and to be paid as the head of a separate unit, some very difficult problems of definition and enforcement arise. These problems stem from the question of what degree of absence is sufficient and how it is to be

proved. In other words, there will be problems of ambiguity and of fraud. The same kinds of problems have proved to be a source of friction and of potential or actual oppression (to say the least) in traditional welfare programs,[15] and it is disconcerting to find that they do not disappear under a negative income tax approach to relief of poverty.

As for ambiguity, if the husband leaves and is never seen again the answer is easy. The same is true if he returns once or twice a week merely to see his children. But what if on those occasions he stays and sleeps with his wife? What if he stays more frequently and perhaps performs other husband-like acts such as bringing in groceries, letting his wife or children use his car, and so forth?[16] Hopefully the pressure for the kind of interpretation and enforcement that leads to serious friction or oppression will be considerably lower under a negative income tax than under traditional welfare, because a lesser difference in payments will be at issue and because a federally administered program will be less susceptible to the excesses, often seemingly punitive, of local officials responding to the paranoid delusions of ill-informed but aroused constituencies. To insure that the amounts at issue will not be large at any one point of dispute it might be helpfull to have a rule to the effect that the operating agency, when challenging a woman's assertion that her husband has been absent, must prove its case for each month in issue, with no presumption that proof of his presence in one month establishes or even tends to establish his presence in any other month (with the possibility of a criminal prosecution for fraud being relied upon to prevent serious abuse). An even greater protection of the wife's right to payment and of her

privacy might be achieved by the adoption of a rule to the effect that any inquiry into the husband's presence or absence would be ended by proof by the wife that he in fact maintained a separate domicile somewhere. In other words, she would not be required to prove that he had a separate domicile, but, if a question were raised as to his absence, she would win if she could show a separate domicile; if he had the separate domicile she would be relieved of any cause for concern about how often he spent the night with her. Alternatively, it might be provided that, whenever the operating agency challenged the wife's claim that her husband had left her, it would be required to prove that he did not have a separate domicile or to prove that he spent more than half of his nights with her, or both. These kinds of rules will not, of course, eliminate all friction and oppression, but might reduce it to tolerable levels. After all, some people have been highly incensed by individual enforcement activities of the Internal Revenue Service. I assume that the same is true of the Social Security Administration, the Veterans Administration, and other agencies. Yet it is my impression that in general the level of resentment is low enough to be tolerable (though undoubtedly other factors are involved as well).

As for fraud, it must be presumed, I think, that there will be some effort to prevent outright, deliberate cheating. There will be a criminal division of the agency administering the negative income tax (though it might be helpful to integrate this division with the division of, say, the Internal Revenue Service or the Social Security Administration, so that the poor would be exposed to the same procedures and personnel as

the nonpoor). The question is, how can excesses be prevented or at least minimized? This question is beyond the scope of the present paper. As has been suggested, however, if it is true, as I suspect it is, that the Internal Revenue Service, the Social Security Administration, and the Veterans Administration have deservedly better reputations for their enforcement activities than do many welfare agencies, then we ought to try to figure out why and make sure that we follow the better model.

As for the permanency of the separation, one possibility would be to require a "waiting period"--that is, require that the husband be gone for, say, at least sixty days. This kind of rule might be a bit harsh[17] but has some obvious administrative advantage. Alternatively, or additionally, the wife could be required to establish that she did not expect her husband to return--which raises the issue of what kind of expectation should be required. There are "trial" separations that turn out to be permanent and "permanent" separations that turn out to be short-lived, plus endless variations. Should it be enough that the wife is uncertain whether her husband will return or should she be required to establish (somehow) that she cannot reasonably expect him to return? Perhaps it would be true that any distinction of this sort would in practice be without significance, but the issue is at least worth some consideration, and, at the drafting stage, must be resolved one way or another.

Assuming that a decision is made that some level of expectation of permanence of the separation must be established, the next question that arises is how the fact is to be established. It would be possible to

use the approach of traditional welfare and require some sort of immediate verification (at least by personal interview) by an employee of the agency administering the program. It seems more consistent with the philosophy and objectives of a negative income tax, however, simply to rely on the wife's signature on a form declaring the necessary facts. Then the only question is the extent of audit of this kind of declaration. If auditing became rigorous and thorough enough it could, of course, become tantamount to the caseworkers' policing that is regarded as one of the unfortunate aspects of traditional welfare programs. On the other hand, there must be some limited effort at verification--at least of the formal records in a sample of cases. This is a matter that apparently must be left largely to administrative discretion, with appropriate response to actual experience.

2. Problems of income aggregation. While it may be concluded that, for the purpose of allowance size, fairly lenient rules permitting the establishment of separate units for husband and wife are not a cause for serious concern, the same conclusion may be more difficult to accept when the focus is on aggregation of income. For the latter purpose significant concern may arise from what may be referred to as the "nest egg" problem. To illustrate, suppose that the rule is that a husband's mere absence for thirty days is sufficient to permit his wife to establish herself as the head of a separate unit (including their children living with her). Suppose that the basic allowance is $1,200 for the head of the unit, $800 for the spouse, and $600 for each child, and that the tax rate is 50 percent so that the breakeven point is $6,400.

Now consider a family of four with no income at all which receives a benefit of $3,200 and assume that the husband is offered a job paying $6,400. If he takes the job, payments to the family will end. This is just another way of saying that he is confronted with a tax rate of 50 percent. But now suppose that the negative and positive tax systems are not coordinated and that the rates under the positive tax remain the same as they are now. If the husband moves out and his wife establishes herself as a separate unit, then the unit consisting of herself and the two children can receive an allowance of $2,400. This amount would be reduced by 50 percent of any support that the husband provided, so that no serious problem of "abuse" arises unless the husband decides (presumably, in most cases, with the acquiescence of his wife) that he will allow his family to exist on the negative income tax allowance while he saves and establishes a "nest egg" that will be available upon his ultimate return.[18] The husband's net after a positive tax of about $1,000 will be $5,400. Thus, total resources available to the family will be $7,800 instead of the $6,400 that would have been available if the husband had remained a member of the family unit. Suppose that the husband is able to live on $1,200 and therefore to save $4,200. Of this amount, $1,400 may be said to be derived from "beating the system" and the remaining $2,800 from the family's own thriftiness.

Perhaps the problem is not really worth worrying about. As has been indicated, it is a function of the factor of a significantly lower tax rate under the positive income tax than under the negative income tax--a factor that probably should be eliminated under any ultimate,

ideal negative income tax plan. But that is a factor that in reality is likely to be present at least in the short run (and certainly in any experimental program). It may also be argued that allowing, or even encouraging, a family to establish a nest egg is a good thing. But certainly it would not be argued that a couple should be encouraged to separate in order to augment the nest egg. And it does seem somewhat unfair that the wife and children in this kind of situation should be supported by negative income tax allowances when true need in reality does not exist. Finally, it may be argued that there are not likely to be many cases in which the kind of finagling described in the example is likely to occur; not many men would leave their homes and deprive their families of better support for the sake of a rather modest opportunity to save. But that observation merely raises the question of whether the abuses can be eliminated when they do arise, no matter how rarely, without sacrificing other goals.

Assuming that we do want to foreclose the kind of "nest egg" possibility that the example illustrates, the question becomes, what kind of rule can and should be adopted? In approaching this problem it must be remembered that we want to avoid depriving a female-headed family of support when that support is really needed and that, as far as possible, we should avoid adopting rules that cannot be effectively implemented without an intolerable level of personalized inquiry or "snooping."

The problem could, of course, be virtually eliminated by treating the husband and wife as a unit in the absence of a divorce or legal separation, but, as suggested in connection with the discussion of problems of allowance size, that just seems too harsh. The rule

favored in the earlier discussion--requiring the wife's declaration that the husband's absence was expected to be permanent or at least indefinite--would eliminate the problem for all honest claimants, but, at the same time, would leave a significant opportunity to cheat, since the critical fact would be the wife's perception, and it would be virtually impossible for an administering agency to challenge her assertions about that perception without becoming somewhat oppressive in its interrogations or investigations (which I assume we are not prepared to allow it to do).

Another possible solution is a rule to the effect that if the husband did in fact return within, say, twelve months, then benefits would be recomputed retroactively as if he had never left. Such a rule would be subject to manipulation, of course--the husband could wait for twelve months and a day. Moreover, it would tend to create financial disincentives to reconciliation in cases of true (that is, emotionally rather than financially motivated) separations. And, to the extent that the problem of manipulation were eliminated, the financial disincentive to reconciliation would be increased. Thus, on balance, a rule permitting a wife to establish herself as a separate unit on a mere declaration of her husband's absence and her understanding that he had, to her knowledge, no definite intention to return, seems most acceptable, at least until experience proves the need for a tougher rule. The problem of the rigorousness of efforts to verify the declarations has been discussed in the preceding section.

3. Obligations of support. One final problem of the separated couple seems to deserve separate consideration, if only because it seems to be the source of so much administrative difficulty and personal grief in traditional welfare programs.[19] The problem is what to do about the absent father's obligation to support his wife and children. The absent father is exemplary of a wider class of persons who are legally obligated to support relatives--for example, the successful adult who is legally obligated to support destitute parents--but neglect by a man of his legally prescribed duty to support his wife and children seems to evoke the most serious public concern. To take the clearest case, suppose that there has been a divorce and that pursuant to the divorce the husband has been ordered to make payments to support his ex-wife and children; suppose further that the man is financially capable of making the payments but fails to do so, and that the woman makes no effort to enforce the support order, despite the fact that the man could easily be found. In this kind of case it might be argued that the woman has turned her back on income and that her payments should be no higher than they would be if she had received the support from her ex-husband to which she and the children were entitled; in other words, it might be argued that the amount that the man is obligated to pay should be treated as if it had in fact been paid. After all, it may be asked, why should the government assume the full burden of support in these circumstances? At the very least it may be thought that the woman should, as a condition for receiving full payments, be required to make some sort of reasonable effort to

enforce her own and her children's right to support. On the other hand, even in the kind of case hypothesized it may be that the best policy is to rely simply on the woman's financial incentive to seek added income (which under the negative income tax is subject to a tax rate of less than 100 percent) in order to avoid the possibility of inflicting psychic wounds on her and administrative burdens on the system. Her position arguably is no different than that of a man who is capable of working harder and earning more but fails to do so. Under a negative income tax system we ask not what the man could earn but rather what he did earn, despite the fact that in some instances it will be clear that more could have been earned, and despite the fact that his failure to earn more will mean greater burdens or reduced benefits for others. (Similarly, under existing systems of positive income taxation, we look not to what a man could have earned but rather to what he did in fact earn, despite the fact that a man who chooses to be lazy or to pursue a low-paying profession will pay less in taxes than he would otherwise pay.) The case for ignoring the potential income from enforcement of an obligation of support becomes much stronger, of course, when we recognize that, as a practical matter, it is probably impossible to identify those situations in which the effort to enforce a support obligation is worthwhile--that is, to identify those situations in which it is really true that the woman could have gotten a significant amount of money if she had tried, and to determine how much she could have gotten or to find out whether she had made a sufficient effort in light of the

possibility of getting money and in light of other factors that might be thought to properly affect her willingness to pursue her ex-husband.

It may be worth noting that the problem of obligation of support is, again, a function of the lower rate of positive tax than of negative tax. If support payments and alimony are included in the wife's income then presumably they must be deductible by the husband. If the rate of taxation of the husband is at least as high as that of the wife, then the government loses nothing by virtue of his failure to pay; payments to her are higher, but taxes on him are equally higher than they would be if he did pay. Looking at this thought somewhat differently, in traditional welfare programs the entire amount of any support payment received by the wife is "profit" to the government, since the wife is taxed at 100 percent and the husband gets no deduction. It is not surprising, then, that coping with the problem of obligation of support has proved to be one of the most serious problems of welfare administration.

SINGLE ADULTS

Accepting the general notion that the family is the appropriate unit for determining the level of benefits under a negative income tax, one of the most troublesome problems is that of the unmarried man and woman who are living together (in a nonplatonic relationship). This problem can best be examined in the context of the broader problem of allowance level and aggregation of income for unmarried

adults sharing accommodations in various ways. Obviously there is virtually an infinite number of possible sharing arrangements, but a few prototypical cases should serve to illustrate most of the basic issues.

Let us assume that a single adult living alone would be entitled to file for himself and to receive the maximum individual allowance, but that, if he (or she) were married, the filing unit would be the couple, with aggregation of income and with a lower allowance for the spouse than for the filer (head of household). As indicated earlier, the assumptions underlying this approach are that a married couple pools income and shares expenses and that economies in living are achieved by virtue of the fact that they live together. Now consider the case of two unrelated women living together. Assume to start that, while they do allocate expenses (e.g., each pays half of the rent and half of the normal grocery bills), they do not in general pool their separate incomes. Should each be treated as if she were single and living alone or should they be treated the same as a married couple, or is there an appropriate middle ground? It does seem reasonably clear that aggregation of income would be undesirable, and that they should therefore file separately. To make one person's entitlement to welfare benefit dependent on the income of another person who has no obligation to support him seems exceedingly unfair--so unfair, indeed, that it may well be unconstitutional.[20] Wholly apart from the question of fairness, which would seem to militate strongly against aggregation, it could be predicted that, if one of them had income above

the breakeven level and the other did not, aggregation would strongly tend to induce them to live apart and there is no good reason for creating such an inducement. In other words, it would be unwise to say in effect to a single adult with an income below the breakeven level that his or her allowance will be reduced if he or she moves in with another single adult with an income above the breakeven level; to do so not only might seem unfair and unrealistic in light of common income-sharing arrangements but also would, for no good reason, tend to prevent movement into such joint living arrangements.

The question of allowance size, however, is not so easily disposed of. If the amount of reduction of allowance for a second unrelated adult in any dwelling truly reflected savings in cost of living, there would be no financial disincentive to sharing of dwellings. But that observation certainly does not settle the matter. Consider the question in these terms: Would it make sense to have a rule to the effect that, for purposes of allowance size, only one person in any dwelling unit can receive the maximum (head of household) allowance and that any other person must receive a lower allowance? To be more concrete, if the allowance for a husband were $1,500 and for his wife $1,000, would it make sense, for example, to provide that any adult could file separately and need report only his or her own income but that, in any dwelling unit, only the owner or lessee would be entitled to an allowance of $1,500 and all other adults would be entitled to allowances of $1,200? Such a rule could be defended, if at all, only on the assumption that by living with another adult one generally achieves a measurable reduction in the cost of living. But is this

a valid assumption, and even if it is, should the assumed circumstance affect allowance size?

First, the validity of the assumption is at best questionable. To be sure, situations can be imagined in which economy is achieved--but often only at some sacrifice. If two women, each of whom had been living in a one-room apartment, decide to share an identical one-room apartment at the same rental, then each of them saves half of the rent previously paid. But if, as seems more likely, they decide to live together in a two-room apartment, then the saving may be minimal. And even if they do decide to share a one-room apartment, can it not be said that each has simply decided to achieve an economy by sacrificing something (in this case, privacy, convenience, and space)? Surely the income maintenance system should not penalize the person who achieves an economy in this way, any more than it should penalize the person who economizes on clothes, food, or any other item--not only because to do so would be to intrude too much into the individual's freedom to allocate his income among various items of consumption but also because it is, as a practical matter, impossible to measure and account for indirect benefits (ranging from economic to psychic benefits) of this sort. It must be remembered, after all, that one of the objectives of negative income taxation presumably is to allow to the individual maximum freedom to make decisions on consumption patterns, to avoid telling people how to spend their money.

There is an additional objection to the idea of providing for a reduced allowance in cases where a dwelling is shared--namely, that

any rule designed to effectuate the idea would have to be either highly arbitrary or would have to vest in administrative officials a degree of discretion that should be avoided whenever possible. After all, what is a separate dwelling unit and what is sharing? What about the woman who is a "boarder"--that is, who lives with a family and has a room of her own but must pass through the family premises in order to get to it? Should it matter that she has to share a bathroom? What if there is a private entrance to her room? How can she be distinguished from a woman who has a room in a hotel, with a wash bowl and running water? Would the rule be that, in order to be a head of a household, one must have a room with minimum prescribed square footage, cooking facilities (would a hot plate do?), a shower or bath, and a toilet? The point is, of course, that it is virtually impossible to imagine any rule that would be reasonably objective and at the same time would not produce a significant number of very incongruous results. One might have a vague, abstract concept of a mere boarder on the one hand and roommates on the other hand. But how in heaven's name could the line be drawn in practice? And, in any event, why should it be? One can imagine, in wild speculation, a system in which payments were geared very precisely to the peculiar needs and circumstances of each individual. Many of the features of traditional welfare programs are designed to achieve this kind of result. But it is difficult to imagine that the benefits of such a system would outweigh the costs of administration and the inevitable loss of individual freedom from governmental intrusion into personal privacy and from dependency on the essentially uncontrollable decisions of

government officials. It is for all these reasons that the positive tax system wisely ignores most personal bargains, economies, and psychic benefits.

When we turn from roommates and boarders to adults living with friends, superficially the argument for a reduced allowance may seem stronger. For example, consider the man who has been married but leaves home and "sponges off" friends, living a month here, two months there, and so forth. One might feel inclined to reduce or even eliminate benefits for such a person, but again it is difficult to imagine how this kind of "bad" case could be identified and, even if it could, there remains the question of whether the kind of economy that the man has achieved ought to affect his benefit level even if that economy could be identified and measured, when we know that many other economies and indirect benefits will be ignored.

Proceeding along the spectrum, we can next consider an adult living with his parents. Is this case any different from that of an adult living as a boarder with an unrelated family or sharing an apartment with other adults (who may, after all, be good friends--like family--or virtual strangers)? The difference, if any, would no doubt lie in assumptions about the value of what the individual will derive from the arrangement <u>in most cases</u>. That is, we may consider it reasonable to assume that, in most cases, he will be getting, at reduced cost, housing and food comparable in value (for the average person) to that purchased by adults living alone. However, it must be noted that the rules on definition of income will probably include in income

the value of support--e.g., free rent or food--received in kind, so the adult living with well-off parents who help to support him will receive reduced payments by virtue of that rule. We should probably, then, be thinking in terms of the adult living with parents (or other relatives) who are themselves poor or who are not inclined to provide any financial support.[21] And, when one thinks in those terms, this kind of case begins to look much more like that of a person who is a boarder or who simply shares a dwelling with roommates. Any savings in the basic costs of living for a poor adult living with his or her parents may well be minimal and the value of indirect benefits (such as easy access to the kitchen or the TV set) can be ignored because they would be impossible to measure, because it is difficult to distinguish them from other kinds of benefits, economies, and bargains that no one would seriously try to account for, and because they may in no sense reduce the basic costs of living.

Next, let us move to the case of the man and woman living together, with no children. They could, of course, be mere roommates--a particularly likely possibility if they were both elderly. Or the woman could be a housekeeper (that is, one who kept house for, rather than with, the man). But at least in the case of younger people it is more likely that they would be lovers--that is, that they would have some degree of mutual fidelity and sexual and emotional intimacy. At the same time, there would also on the whole probably be, to some varying and undefinable degree, a lesser sense of mutual obligation to share income and to stay together than would be true of husband

and wife. One thing seems clear--that no rule could be devised that could distinguish between those unmarried couples that are like husband and wife and those that are merely "shacking up" (like very friendly roommates with convenient access to sexual gratification)--or at least no rule that could be applied without flagrant disregard for commonly shared notions of the proper limits on the powers and activities of government employees.[22] Which way should we go--all men and women living together treated as husband and wife (with possible exceptions for related persons and for cases of great age disparity)? Or none? Neither result is wholly satisfactory. On the one hand, a rule that provided that a man and woman living together (without children) would never be treated as husband and wife unless they were married would produce seemingly anomolous results in comparing the married couple with the closely knit unmarried couple and might properly be criticized for producing a financial inducement to avoid marriage. On the other hand, it is difficult to imagine any rule to the contrary that would not produce at least equally disturbing results. Suppose, for example, that whenever any unrelated man and woman, both less than 60-years-old, had the same residence they would be treated as husband and wife. Such a rule would cover a man and woman who were just good friends and decided to live together, as roommates, just as a matter of convenience. However objectionable the result in such a case might be, it could perhaps be dismissed as too rare to worry about. The rule would also cover cases in which the man was truly just a boarder--unless the rule were fashioned

so that compulsory unit treatment turned on a case-by-case determination of whether the man and woman engaged (how often?) in sexual intercourse. The more likely, and still somewhat disturbing, kind of case would be that of a man and woman who were lovers but who had not reached the degree of closeness and mutual dependence in which they felt obliged to share their incomes. Suppose that the woman has no income and that the man has a good job, and that he starts living with her. If he has enough money so that he can keep some sort of residence elsewhere then, assuming that he contributes nothing to her support, she would continue to receive a full adult allowance. As soon as he gives up his other residence, then, assuming that his income is above the breakeven level for a husband-wife unit, she would receive nothing. Such a rule might create a market for phony residences--that is, places where a man would have a bed that he called his own, where he might keep some clothes, and where he could receive his mail--for all of which he would presumably pay a modest fee ("rent"). And, even if the truly phony residence could be ignored, the kind of rule suggested would tend to induce the man to engage in the wasteful conduct of maintaining an idle room or apartment. Of course a husband-wife status could be made to turn on the amount of time the man spent at the woman's place. But in these kinds of cases do we really want to induce the man to go home every night at midnight or to avoid eating supper or breakfast too often at the woman's residence or to limit the number of personal effects he keeps at her place or avoid seeming too friendly towards her in front of the neighbors or to avoid any other such conduct that

might be made determinative of the issue of whether he was in fact "living with" her?[23] The answer must, I think, be "no"--not only because the negative income tax system should not be used to alter patterns of conduct of the poor when the nonpoor are free from similar pressures, but also because enforcement of such rules would necessitate the most odious kind of government snooping and neighborhood back-biting. Any such rule would, for example, almost inevitably invite reliance on such infamous enforcement techniques as the so-called "midnight raid."[24]

There is one other factor that must be kept clearly in mind in thinking about the treatment of the unmarried couple--namely, that the rules on definition will presumably treat as income not only support received in cash or in kind but also gifts. Thus, where a man pays more than his share of the rent or food costs or buys clothes and other things for the woman, then she will have income and her payments will be reduced accordingly. These rules will tend to eliminate the disparity in treatment between the married couple and the unmarried couple in those cases in which the latter are like a married couple in that they begin, in effect, to pool income. It is true that these rules will create serious problems of definition and administration--but ones that involve the estimation of amounts instead of all-or-nothing determinations, and that are therefore likely to be more malleable than the definitional and administrative problems that would be involved in treating some unmarried couples as if they were married. The rules on income from support and gifts, by reducing the possible financial advantage of being unmarried, certainly make more palatable a rule

that leaves the unmarried couple in the same status as roommates. On balance that result seems clearly to be preferred.[25]

The immediately preceding discussion has focused on unmarried couples with no children. Assume that we decide that the unmarried couple with no children should not be required to file as a unit. Now let us turn to situations in which a man and woman living together have no children of their own but one of them (usually the woman) does have children who are the offspring of previous relationships and who live with her. The question that we are here concerned with is whether this change in circumstances--that is, the presence of children other than common children--justifies a change in outcome. Basically the same arguments pro and con, the same issues and problems, are presented regardless whether there are children. There is still a wide variety of possible relationships, ranging from the fleeting encounter to the permanent liaison, with or without pooling of income. A flat rule turning on a legally recognized marital relationship is bound to produce unsatisfactory outcomes but it is virtually impossible to imagine any other criterion or set of criteria that would satisfy one's sense of fairness or equity and at the same time be susceptible of administration without undue arbitrariness or odious investigative practices. Of course the problem is simplified if one takes the position that, where there are children present, no man other than the husband should be present (except, of course, at "normal" visiting hours), that it is appropriate for an income maintenance program to effectuate this policy, and that therefore a woman who cannot find

a man who is willing to support her and her children must choose between having a live-in male companion and feeding her children. One obvious objection to any rule that might be designed to enforce such an approach is that it would still leave serious definitional problems, such as how much time can a man spend at the woman's place and what other conduct can he engage in before he stops being a mere "date" or "boyfriend" and becomes a putative spouse, and enforcement problems, such as who determines the relevant facts, on the basis of what kinds of leads or suspicions, and how? [26] But perhaps an even more serious objection is that the effect of such a rule would, in some cases, be to deprive a person of a kind of relationship that may be common and accepted among the poor and, among the nonpoor, not subject, as a practical matter, to any formal sanctions. And perhaps the most significant objection is that the effect of a compulsory unit rule in many cases would be to deprive children of support in order to punish the conduct of their mother.[27] These objections may suggest that the rule on compulsory units should be the same regardless of the presence of children and that the rule should be that, while income would include support and gifts, a man and woman could always file as separate units unless they were married.

It may be, however, that the presence of children is relevant as an indicator of certain other pertinent facts and therefore as a predictor of the likely aggregate effects of a rule in which results turn on that factor. Suppose, for example, that we had reason to believe that not more than 10 percent of unmarried couples without

children had a feeling of mutual obligation to support one another but that among unmarried couples with children in the household 90 percent did have that sense of mutual obligation. If the rule treated as husband and wife (that is, produced a lower allowance level than for unmarried adults and required aggregation of income) all couples living together without children, it might reasonably be predicted that, for this class of people, the most significant consequence in terms of numbers of people affected would be to induce alterations of conduct to avoid the adverse effects of the rule. For example, assuming that the man had no intention of supporting the woman, or at least that he would go pretty far to avoid doing so, and that the woman had no prospect of becoming self-supporting, then presumably the man would keep a separate room, limit the time he spent with the woman, get out of her place very early every morning, or do whatever he would have to do to avoid having her treated as his wife. This kind of effect could only be approved by those who placed a high premium on maintaining among the poor a certain level of <u>appearance</u> of adherence to conventional morality. Even for those couples that did have a strong sense of mutual obligation to share income, avoidance might still be possible. Thus, the number of cases in which the rule actually did produce a family unit and thereby reduce payments would be relatively small. In other words, there would be relatively few cases in which it could be claimed that the rule produced the presumably desirable effect of treating the close-knit unmarried couple like its married counterpart, while there would be a

relatively large number of cases in which the principal effect would be simply to alter pre-existing patterns of behavior. The opposite might be true, however, for the class of married couples with children in the household--depending, of course, on assumptions as to the typical patterns of behavior and attitude among that class of people. In other words, a fact that is relatively easily determined (that is, the presence of children) might be regarded as a reliable indicator of another fact, not easily determined (namely, the degree of mutual commitment or obligation), and the existence of the inferred fact might be relevant to a prediction of the effect of a rule. It is well beyond the scope of the present paper to inquire into the true state of facts among either group (or among any others of the many categories that might be established), but it does seem worthwhile to point out that many proposals and discussions do, I think, often implicitly make the kinds of assumptions that I have offered hypothetically; explicit recognition of such assumptions would at the very least tend to reduce misunderstanding and might also lead to rules better adapted to uncertainty about the validity of the assumptions.

The strongest argument for treating an unmarried couple living together as husband and wife is that in which they have a common child living with them. The arguments pro and con on the question of unit treatment in such cases are easily derived from the preceding discussion, and need not be reviewed, but the balance is far more heavily weighted in favor of treatment as a unit.[28] In these

kinds of situations the number of cases of close comparability to married status is likely to be large in relation to the total, while, correlatively, the number of cases likely to present administrative difficulty, or in which a rule requiring unit treatment might seem unfair, is likely to be relatively small. Or at least that seems to me to be a reasonable supposition, pending development of evidence to the contrary. It should be recognized, however, that unit treatment will present some problems of determining issues such as whether a man is living with a woman. But the same issue arises, as we have seen, with a legally married couple, with or without children.

Before leaving the problem of marriage and similar arrangements one final suggestion is in order. Any couple, regardless whether married, ought to be permitted to file as a husband-wife unit. Usually it will be disadvantageous to do so, but some couples might want to do so anyway. In some instances it might be advantageous to file as a unit--for example, where one had an income just at the breakeven point for a single person and the other had large medical deductions and no income--but presumably such cases would be rare and the possible abuse does not seem very disturbing. However, in order to prevent a trafficking in unused deductions, one might want to have a rule requiring that the couple be either married or living together, or some other kind of protective rule.

CHILDREN

The proper treatment of children turns out to be a surprisingly complex problem because of the great variety in their circumstances, particularly as they go through the transition from childhood to adulthood. The young child living with his natural parents presents no problem. There ought to be an allowance for him, payable to one of the parents, and payments should be based on need as measured by the parents' unit's income. Problems begin to arise as the child becomes older and more independent. The indicia of independence are many and independence is a relative matter. Moreover, the child's "independence" is relevant to several issues: whether some adult should be permitted to claim him as a dependent for purposes of determining the allowance level of the adult's unit; whether an adult should be required to include him in the adult's unit for purposes of determining the unit's total income; and whether the child should be permitted to file a claim for himself and, if so, whether his allowance level should be that of a child living with his parents or of an adult, or something in between. Consequently, there is an endless variety of reasonable sets of rules relating to children and, for present purposes, a rather discursive examination of issues and relevant factors seems most appropriate.

One of the most significant problems can best be posed by asking whether a parent should always be permitted to exclude a child from the parents' unit in order to exclude the child's earnings from the

income of the unit; and, if so, how often should the parent be permitted to alter his decision on the matter. For the sake of posing this issue most sharply, we must think in terms of a child whose connection with the family has not in any observable way become significantly attenuated. A typical "patently connected" child might, for example, be an unmarried 16-year-old girl living with her natural parents and two younger children, and regularly attending high school. What about her earnings from an after-school job? If she actually gives her earnings to her parents then there is no problem--the money would be treated as part of the parents' unit's income even if the daughter is not included in the unit.[29] If the earnings are below the breakeven level for the daughter's allowance level, her parents achieve no advantage by excluding her (and her income) from the unit, since they could do so only by sacrificing the additional allowance for her.[30] The question boils down, then, to whether or not the operating assumption should be that a child will and should share his "extra" earnings with his family--that is, whether or not those earnings ought to be regarded as being available to the rest of the family.[31] If the answer is negative, then the rules should provide the parent with the option to exclude the child and the question then arises, how long should the parent be bound by a decision to include or exclude? This last question involves primarily accounting issues, however, and cannot appropriately be pursued in this paper.

Another important issue is, who should claim children who are not living with their natural parents? One alternative is to allow a child to be claimed only by a person who provides more than half

the child's support--following the approach of positive tax law.[32] This alternative has obvious appeal on grounds of equity and need but creates some serious problems of administration and proof. Another alternative is to permit the child to be claimed by the head of the unit with whom the child is in fact living.[33] This kind of rule could still require, in some instances, a potentially difficult factual determination--but presumably such cases would be relatively rare.[34] The simple residency test seems to produce fair results even if the person claiming the child (e.g., the mother) receives substantial support payments from someone not a member of the unit (e.g., an absent father)--once it is recalled that support payments will be treated as income by the unit receiving them and will be deductible by the unit from which they come. It might be suggested that a simple residency test could lead to horrors such as a group of 15-year-old runaways moving into a communal "pad" with some 21-year-old hippie serving as head of the unit. But if that is an evil surely we can rely on enforcement of state and local law to prevent it. And if no laws are violated (e.g., if the children are old enough to leave home legally), then why worry about this sort of Pied Piper phenomenon?

Obviously, there are other variables that could be taken into account in determining who should be permitted to claim a child, such as the relationship of the child to the person claiming him, the length of time in which the child has lived with such person, the relative ages of the claimant and the child, approval of the living arrangement by a competent official, and so forth. But it is my feeling that elaboration of the provisions on this issue is not likely to do more good than harm

and that, therefore, a simple residency test should at least be given a chance, with the thought that, if there are unfortunate consequences, changes can be made that can be tailored to actual problems, rather than to imaginary ones.

On the question of what factors should be determinative of whether a person should be treated as an adult, it is difficult to discuss any one factor in isolation. For example, age is certainly an important factor, but a person who is 17-years-old might properly be treated as a child if he is living with his parents and going to high school but might be treated as an adult if he is working, married, and living apart from his parents. The possible combinations of relevant factors are virtually endless. Consequently I will simply list the factors that seem most relevant and comment briefly on some of them. Appendix B contains two different sets of rules[35] that illustrate how these factors might be taken into account in combination with one another. By examining those rules, the reader will be able to appreciate the wide variety of alternatives that are open. Appendix C contains another set of rules drafted by a group of students at Yale Law School and further demonstrates the possibilities for differences in approach that are significant and quite reasonable.

Age is clearly a relevant factor. Even if, for example, a child continues to live with his parents for his entire life, there may be some point at which he should be entitled to the sense of independence that might be achieved by having a right to his own benefit claim. It is difficult, however, to think about age without thinking simultaneously

about whether or not the child is living with his parents. A child living alone--on his own, so to speak--is patently more like an independent adult than a child of the same age living with his parents. To take account of where a child lives, however, is to create some serious problems of incentive for unnatural split-ups ("unnatural split-ups being those in which a child who would normally continue to live with his parents is induced by the negative income tax system to move out). These problems are exacerbated if the parent in all circumstances is required to include a child in his unit--in other words, if he is denied the option to exclude. For example, consider the case of a 17-year-old boy who has dropped out of school. If he has no income and if his right to a benefit check of his own is made dependent on whether or not he is living with his parents, then the system creates an incentive for him to move out; the incentive may be enough to induce him to move even though he would have preferred to continue to live with his parents, for reasons either of economy or of affection. If the boy does get a job, and if his income is high enough, then, unless the parent is <u>permitted</u> to exclude him even if he lives at home there is again a financial incentive for him to move out (unless, of course, the parent were required to include him even if he in fact moved out--a possibility that is too draconian from the parent's viewpoint). These considerations suggest that it may be very risky to make a person's status as a claimant turn on whether he lives with his parents (or some other adult).

Another possible criterion of independence is whether or not a person is in school. Here again there is a danger of creating undesirable incentives. On the one hand, being in school suggests dependence. On the other hand, to allow a person to become an independent claimant if he is not in school, but not if he is, may be to create too significant an incentive to quit school. It might seem anomolous to treat an 18-year-old high school senior as an independent claimant, but it might seem equally anomolous to refuse to treat as independent an 18-year-old who has left school and is trying seriously to support himself. But it may be necessary to accept the latter anomoly because it is impossible to distinguish between those 18-year-olds who have left school in order to qualify as independent claimants and those who would have left anyhow. A youngster's status could also be made to turn on whether or not he has graduated from high school. For example, the rules could provide that a person is to be treated as an independent claimant if he is either over, say, 18 years or a high school graduate. The theory would be that a person ought to be encouraged to stay in school at least until his 19th birthday. The problem with this approach is that it seems unfair when applied to those persons who may have left school for good reason--for example, because they simply cannot get anything more worthwhile out of it, or because they are married.

The student-nonstudent dichotomy has been thought by some to be particularly significant where the school in issue is not high school but college. Thus, it has been proposed that a person 19- or 20-years-

old be treated as independent claimants if and only if they are not college students.[36] The theory behind this proposal is not entirely clear to me, but my guess is that the proposal is an outgrowth of the assumption that college students come from middle-class families and have no need for negative income tax support because they ought instead to be supported by their families. It would seem peculiar to turn the negative income tax into a device for supporting the children of the wealthy while they are in college. But, as applied to the class of people consisting of the children of the poor, the proposal seems downright pernicious to the extent that it exaggerates financial difficulties that those children are faced with if they want to go to college. In other words, the proposal tends to create a financial incentive to avoid going to college. The problem is how to avoid this kind of effect without creating an unintended subsidy for children of the nonpoor. One solution might be to impute to any person under 21, if he is in college, some percentage of the income of his parents (though this might create constitutional problems[37]). If this solution seems too harsh, because some well-to-do parents actually do refuse to support their children's college educations, and because ad hoc inquiries into parents' willingness to support might be impractical and unfair, then perhaps we should be prepared to allow the negative income tax to become a device for subsidizing higher education.

Another factor that might be held relevant to a determination of entitlement to independent status of people in the in-between

years (16 to 21) is marital status. The thought would be simply that, once a person is married, he occupies a different place in society than another person similar in age and other characteristics. Again, there may be some fear of encouraging early marriages. The thought of, say, a 16-year-old boy marrying a 15-year-old girl in reliance on the prospect of living on a negative income tax allowance is somewhat disturbing though probably fanciful. As with the Pied Piper phenomenon mentioned above, perhaps we should refrain from implicit condemnation through a welfare program of a practice that has not been prohibited in any other way. The youthful marriage does suggest another problem of more general concern--namely, whether young people, even though fully independent, can be expected to live on less money than older people. This possibility raises a factual question on which I offer no opinion; it seems sufficient to point out that this problem is best attacked by adjusting allowance levels, not by treating people as dependents.

The foregoing factors seem the most significant ones. Others might include whether the person is a boy or a girl, whether the person's parents are living, whether the person has children, and how long the child has been living apart from his family. It is no more possible in the area of family units than it is in most other areas to draft simple rules to cope with complex problems. But, at the same time, there is some point at which one must accept the fact that no set of rules will be perfectly adapted to all conceivable circumstances and that, particularly in the early stages of rule-development, when there is little experience to guide us, we must therefore be content with fairly gross distinctions.

FOOTNOTES

[1]It is assumed that the reader is generally familiar with the concepts underlying the negative income tax. Descriptions may be found in William A. Klein, "Some Basic Problems of Negative Income Taxation," *Wisconsin Law Review* (Summer 1966), p. 776; Tobin, Pechman, and Mieszkowski, "Is a Negative Income Tax Practical?" *Yale Law Journal* vol. 77, no. 1 (1967); Comment, "A Model Negative Income Tax Statute," *Yale Law Journal* vol. 78, no. 2 (Dec. 1968), p. 269.

[2]For general discussions of the desirability of using the family as the unit for positive tax purposes, see Groves, *Federal Tax Treatment of the Family* (1963); Report of the [Canadian] Royal Commission on Taxation, Vol. 3, Ch. 10 (1966); Bittker, "Tax Reform in Canada," in the Report of the Royal Commission on Taxation, *University of Chicago Law Review* vol. 35, no. 4, (Summer 1968), pp. 645-50.

For descriptions of tax systems that do use the family unit concept see Harvard Law School, *World Tax Series, France*, Sec. 5/1.2, 12/1.4 (1966) and *United Kingdom*, Sec. 5/1.3 (1957).

While in our own federal income tax the individual has always been treated as the proper unit, traces of family unit theory may be thought to underlie our provision allowing income-splitting by husbands and wives: Internal Revenue Code of 1954, Sec. 2. Even more direct incorporation of family-unit thinking can be found in that part of the averaging provisions that assigns base period income to parties to a divorce: Internal Revenue Code, Sec. 1304(c); see Ferguson and Hood, "Income Averaging," *Tax Law Review*, vol. 24 (1968), pp. 79-84. Section 214 of the Code contains some very interesting, if not to say curious, rules under which the deductibility of child care expenses is made to turn on the taxpayer's marital status and upon the physical condition, as well as the income, of his spouse.

The state of Wisconsin at one time had an income tax law requiring husband and wife to aggregate their income on a single return. The Wisconsin law was held unconstitutional in Hoeper v. Wisconsin, 284 U.S. 206 (1931). While the Hoeper case has never been expressly overruled, it is extremely doubtful that the court today would hesitate to overrule it or somehow cast it into oblivion. See Ballester v. Court of Tax Appeals, 61 Puerto Rico Reports 460 (1943), *aff'd*, 142 F. 2d 11 (1st Cir.), *cert. denied* 323 U.S. 723 (1944); Ray, "Proposed Changes in Federal Taxation of Community Property: Income Tax, *California Law Review* vol. 30, no. 4 (May 1942), pp. 425-32.

[3]See authorities cited *supra*, n.1.

[4]See e.g., Comment, *supra*, n.1., *Yale Law Journal*, vol. 78, p.311.

[5]It is more reasonable to assume, of course, that the allowance for the wife will be lower than that for a head of household (husband or other adult), but at this point my discussion is concerned with aggregation of income and the assumption of identical allowance prevents needless confusion.

[6]It is assumed that, if the negative and positive tax systems are not otherwise properly meshed, any positive tax paid on earnings below the negative tax breakeven level will be reimbursed as part of the negative tax system, so that the rate of tax will not exceed the desired rate (in the example used, 50 percent).

[7]At least in the long run we must assume that the wife will have managed to begin receiving negative tax payments before the issue of support arises, so she will be able to show a source of self-support. Then the question would be, for example, how much of the value of the apartment that she shares with her husband, or of the television set, is "hers"; whether to treat as a "gift" the value of a meal eaten at a restaurant; and so forth.

[8]It is true, of course, that there will be some frivolous marriages and some marriages of convenience in which these characteristics will be missing and in which the husband and wife are more like roommates or casual lovers. But presumably these will be exceptions, and it is impossible to imagine how they could be identified for purposes of special treatment.

[9]The determination of the existence of a legally cognizable "marriage" is not in all instances a task without difficulty, since common law and putative marriage are possible and depend on complex facts and law. See, e.g., Weyrauch, "Informal Marriage and Common Law Marriage," in Slovenko (e.d.), *Sexual Behavior and the Law*, at 297-340 (1965).

[10]Conceivably marriage could increase the total allowance if, for example, the wife were too young to qualify for a single-adult allowance.

[11]Actually this relative difference in allowances is not much greater than that found in the poverty index used by the Social Security Administration. See, e.g., Mollie Orshansky, "The Shape of Poverty in 1966," *Social Security Bulletion* Vol. 31 (Mar. 1968), p. 3; Orshansky, "Counting the Poor: Another Look at the Poverty Profile," *Social Security Bulletin* Vol. 28 (Jan. 1965), pp. 3, 5-11. The SSA index covers families with children and elderly couples, for whom certain costs, particularly housing, may not vary much with the presence or absence of one parent. For young couples without children, in contrast, there may be very little saving achieved by living together--for example, if poor single people tend to live in rooming houses but poor couples need an apartment with greater privacy.

[12]The most extreme form of incentive to separate is found in the AFDC rule now in effect in most states, under which the mere presence of a husband in the household results in a total denial of benefits which the family would otherwise receive. See King v. Smith, 392 U.S. 309, n. 13, (1968).

[13]See Comment, *supra* n.1, *Yale Law Journal* vol. 78, p. 280.

[14]Compare Internal Revenue Code of 1954, Sec. 214(d)(5), which for purposes of the child-care deduction provides:

> (5) Determination of Status.--A woman shall not be considered as married if--
>
> (A) she is legally separated from her spouse under a decree of divorce or of separate maintenance at the close of the taxable year, or
>
> (B) she has been deserted by her spouse, does not know his whereabouts (and has not known his whereabouts at any time during the taxable year), and has applied to a court of competent jurisdiction for appropriate process to compel him to pay support or otherwise to comply with the law or a judicial order, as determined under regulations prescribed by the Secretary or his delegate.

[15]See, e.g., Joel Handler and Margaret Rosenheim, "Privacy in Welfare: Public Assistance and Juvenile Justice, *Law and Contemporary Problems* vol. 31 (Spring 1966), pp. 382-83. Parrish v. Civil Service Commission, 66 Cal. 2d 260, 425 P. 2d 223 (1967).

[16]See Western Center for Law and Poverty, Welfare Files for Ester J. Penniless (1969), mimeo. (a hypothetical welfare file); Commerce Clearing House, Poverty Law Reporter, Par. 1320 (digesting materials on substitute father and man-in-the-house rules). Compare California regulations setting forth facts to be taken into account in determining whether a man has assumed a role of spouse, quoted *infra*, n. 23.

[17]Indeed, conceivably it could be deemed so harsh as to result in an unconstitutional denial of substantive due process; *c.f.* Shapiro v. Thompson, 89 Sup. Ct. 1322 (1969), discussed in Appendix A.

[18]I am not concerned here with the problem of the husband who decides that he will go off and "live it up"--spending his whole salary while his family lives at a subsistence level on negative income tax payments. I would view that as a true separation, raising only the problem of a husband's legal obligation of support, which problem is discussed below.

[19]See Note, "Maintaining Welfare Families' Income in Kentucky: A Study in the Relationship Between AFDC Grants and Support Payments from Absent Parents," *Kentucky Law Journal* vol. 57 no. 2 (1968-1969), p. 228.

[20]See discussion in Appendix A of Smith v. King, 277 F. Supp. 31 (D. Ala. 1967) (3 judge court) (alternative holding) *aff'd* on other grounds, 392 U.S. 309 (1968).

[21]But see the discussion, *supra* p.11, of the difficulty of measuring the value of such support.

[22]It is argued in Appendix A, on the basis of Griswold v. Connecticut, 381 U.S. 479 (1965), that any imaginable rule might be unconstitutional because its administration would necessarily require unconscionable investigatory practices. In addition there is the potential Smith v. King constitutional barrier (see *supra* n.12).

[23]Compare California's regulations defining a "man assuming the role of spouse" for purposes of AFDC (State of Calif., Dept. of Social Welfare, Manual of Policies and Procedures, Public Social Service, Rule 42-515.4, 3-1-69):

Man Assuming the Role of Spouse

.41 Definition

A man will be considered to be assuming the role of spouse if it has been found that he is not married to the mother and not the father of any of her children, but that:

.411 He is in or around the home and is maintaining an intimate relationship with the mother; and

.412 Either he has assumed substantial financial responsibility for the ongoing expenses of the AFDC family; or

.413 He has represented himself to the community in such a way as to appear in the relationship of husband or father, or both.

.42 Criteria

The determination of whether the man has assumed financial obligations or has represented himself as spouselike shall include but shall not be limited to consideration of the following factors. The existence of a single factor may not be conclusive proof that the criteria are met. A man may take the children on outings, provide gifts or even discipline them. This fact alone would not be proof of a spouselike relationship.

.421 Man has Assumed Financial Obligations

a. Man has paid family bills, opened charge accounts jointly or in his name for use of the family, or similarly obtained credit for the benefit of the family.

b. The man has paid medical or other bills incurred by the family.

c. Man has claimed mother and children as dependents in filing income tax.

.422 Man Represents Self as Spouselike

a. Representation to others, such as landlords, friends, community, as husband and wife.

b. Use of man's name by children for various purposes, including school records.
c. Man's attendance as parent at children's school function.
d. Man is attentive to children (other than casually) and provides recreation, gifts, etc., or admittedly disciplines children.
e. Children refer to man as father.
f. Substantial use of man's automobile by AFDC family or registration in man's and mother's names.
g. Use of AFDC family's address by man for mail, employment records, hospitalization, arrests, etc.
h. No demonstrable or confirmable alternative living arrangement other than with the AFDC family.

[24]To be sure, if such a rule were plainly reasonable and necessary then we should be willing to accept the burden of difficult enforcement. For example, espionage and drug "pushing" are difficult crimes to detect and prevent and often evoke objectionable police techniques, but we do not conclude that the conduct should therefore be authorized. But the interest in treating the unmarried couple as a unit is not of the same order as that in preventing espionage or drug trade.

[25]And possibly constitutionally required. See text at n.20, *supra*, and Appendix A.

[26]See California "MARS" rule, quoted in *supra* n. 23.

[27]It would, of course, be possible to take a middle ground by continuing to make the children's allowance independent of the income of their mother's male friend while at the same time treating the man and the woman as a unit for the purpose of determining her allowance. Such treatment might be the very least that is required to protect the children's constitutional rights. (See Smith v. King, *supra* n.12 and discussed in Appendix hereto.) But the fact is that, if the woman is not being supported by the man and she accepts responsibility for the care of her children, the effect of cutting off the allowance for her will undoubtedly be adverse to the welfare of the children.

It is worth noting that, in the case of married couples, the draftsman of negative income tax rules is in effect forced to ignore the possibility that one member of the unit (usually the father) might not in fact make his income available to the others. Family unit rules make no sense unless sharing is assumed. Actions under state law must be relied upon as the ultimate tool for enforcing the obligation of support. See Comment, *Yale Law Journal Supra*, n. 1, 78, p. 280. However, one possible device for reducing the danger of refusals to support is to issue checks jointly to husbands and wives. *Id.*, p. 306.

[28]It would probably be wise, however, and possibly necessary because of constitutional constraints (see discussion of Smith v. King in Appendix A) to make payments for any stepchildren whom the man is not legally obligated to support, if he chooses not to support them. See Comment, *Yale Law Journal* vol. 78, *supra* n.1, p. 279, 309.

[29]Except, presumably, to the extent used to cover the daughter's expenses if she is not treated as a member of the unit.

[30]Suppose that the basic allowance for the family is $50 a month greater with the daughter than without her, and that the tax rate is 50 percent. The breakeven level for her is $100 per month. As long as she earns less than $100 per month, the payments to the unit will be greater if she is included than if she is not.

[31]It may be that in the aggregate the earnings of children are so insignificant that they ought to be ignored in all cases for the sake of administrative convenience.

[32]See Internal Revenue Code of 1954, Sec. 152. See also Comment, *supra* n.1, *Yale Law Journal* vol. 78, p. 308.

[33]If two or more units share a dwelling, the child could be deemed to live with the unit with whom he has the closest blood relationship or with the one whose head either was the owner or the lessee of the dwelling.

[34]One problem that would not be rare would be the proper treatment of students who go away to college (assuming they are to be treated as children rather than as independent adult units). Normally they should, I suppose, be treated as members of the unit with which they lived before going away to school and with which, usually, they will spend their vacations. However, it may be that the children of the poor may tend, more than the children of the middle class, to assume financial independence upon leaving high school and that therefore no rule requiring that they be treated as dependent members of any unit can work fairly.

[35]Appendix A and B are modified versions of rules that I drafted for use in connection with work on the Institute's negative income tax experiments. The final version of the rules used in those experiments contain many provisions that are relevant and meaningful only in the experimental context and that would therefore not be useful for the purposes of this paper.

[36]Tobin, Pechman, and Mieszkowski, *supra,* n. 1, p. 10.

[37]See Appendix A. Perhaps the child could be required, at least, to include an amount that a father might legally be compelled to pay if the parents were divorced, though such a figure might be impossible to determine.

APPENDIX A*

*See *supra*, n. 35.

RECENT CONSTITUTIONAL DEVELOPMENTS OF RELEVANCE TO NEGATIVE INCOME TAX RULES

Negative income tax rules--particularly the family unit rules--cannot be drafted properly without some sensitivity to the constitutional constraints imposed by the developing constitutional doctrine of "substantive equal protection."[1] The gist of this doctrine seems to be that a rule that affects a vital interest may be constitutionally impermissible even though it serves some reasonable legislative policy if it produces results that seriously offend a very vaguely defined sense of fundamental fairness.[2] The purpose of what follows is to put some meat on the bones of this generality by discussing some of the recent decisions that support it. I have neither the inclination nor the capability, however, of offering an intensive or sophisticated, much less a definitive, analysis of these decisions; the reader's freedom to speculate on their meaning or implications will, or should be, little impaired by any gloss that I may place on them.[3]

In order to best understand the significance of some of the cases to be discussed, it is useful to summarize the opposing doctrinal positions by quoting from the majority and dissenting opinions in a recent lower court case, Snell v. Wyman.[4] The court in that case rejected a constitutional challenge to parts of the New York Social Services Law that provided that the state could recover welfare benefits by attaching real property, personal injury recoveries, and insurance proceeds

of the recipients of the benefits. The Supreme Court affirmed without an opinion.[5] The outcome of the case does not seem to be of great significance, since the plaintiffs could easily have lost even on a statement of the law most generous to them. Of greater interest for my purposes is a statement in the majority opinion that expresses a philosophy of judicial restraint in overturning legislative enactments on constitutional grounds:[6]

> It is appropriate from time to time to appreciate the full measure and continued vitality of what Mr. Justice Holmes meant when he said: "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." Lochner v. State of New York, 198 U.S. 45, 75, 25 S.Ct. 539, 546, 49 L.Ed. 937 (1905) (dissenting). Now that his dissenting thought has won the day, we ought not to trivialize the achievement by viewing it only as the interment of Spencer's social doctrines. The principle applies to the social philosophers that most of us, including judges, find more persuasive than Spencer. If we were free to enforce what we may modestly deem our more enlightened view, we might seriously consider the changes plaintiffs propose. But we have no such power, and it is better in the end for everyone that this is so.

That statement is certainly an accurate reflection of the present attitude of the Court toward legislation in the realm of economic regulation. The dissenting judge, however, seems more accurately to have captured the spirit of the Court in recent years in cases involving racial discrimination, criminal procedure, voting, and rights of the poor--that is, in cases involving "vital interests"--when he stated:[7]

> Where the state regulates or interferes with fundamental aspects of freedom, "precision of regulation must be the touchstone." Griswold v. State of Connecticut, 381 U.S. 479, 498, 85 S.Ct. 1678, 1689,

> 14 L.Ed.2d 510 (1965), quoting NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). If a statue or regulation impinges on critical personal interests, we are required to subject it to closer scrutiny, and to search with care for adequate justification. We must ascertain, therefore, whether the restriction is reasonably related to the public interest the legislature sought to secure, and if it could have been as effectively secured with less abrasive impact on the personal right involved. Because I believe the scheme designed by New York does not withstand the requisite inquiry, I disagree with my brothers. I hasten to add that I do not dissent because I believe that it is beyond the power of the state to devise a rational recovery provision. Instead, I am of the view that by reason of the seriousness of the personal interest involved, the inelegance of the scheme designed, the ease of correcting it by more discriminating methods, and the insubstantiality of the interest served, the State of New York has not acted with adequate precision. Where substantial challenge is made to state regulations impinging upon increasingly important yet largely overlooked aspects of personal liberty, I believe the federal courts are obligated to do more than dismiss the complaint with facile reference to judicial attitudes toward state attempts to regulate business interests in order to foster personal dignity.

A number of recent Supreme Court decisions can be cited in support of the dissenter's quoted statement from Snell v. Wyman. One of the most far-reaching of these[8]--so far-reaching, indeed, that Justice Harlan, dissenting, characterizes it as a "constitutional curiosit[y]"[9]--is Levy v. Louisiana, in which the majority ruled that it was constitutionally impermissible for Louisiana to provide by statute that an illegitimate child did not have the same right as a legitimate child to recover for the wrongful death of a parent. In order to understand the significance of this decision, one must understand the rather peculiar nature of the right to recover for the wrongful death of another.

At common law a person could recover damages for the injuries wrongfully inflicted upon him by another if he survived the injury, but if he died his right to recover died with him. Louisiana acted to alter this rule by statute, but in doing so it was confronted with the question of what persons should be permitted to recover. It could, of course, have made recovery turn on proof of a claimant's financial or emotional dependence on the decedent, but that course, though appealing, would have created difficult problems of proof, particularly if more than one person were in a position to claim such dependence. Instead, Louisiana, following a "traditional pattern," allowed recovery by certain classes of persons defined by "arbitrary lines based on family relationships, excluding issues concerning the actual effect of the death on the plaintiff.[10] The right of recovery was given first to the surviving spouse; if none, then to the surviving children; if none, then to the surviving parents if none, then to brothers and sisters; and if none, then the action expired. An illegitimate child had no rights. The effect on illegitimate children is harsh and perhaps even punitive. The rule may be exceedingly unwise. But, as the dissent points out, it is by no means wholly irrational:[11]

> If it be conceded, as I assume it is, that the State has power to provide that people who choose to live together should go through the formalities of marriage and, in default, that people who bear children should acknowledge them, it is logical to enforce these requirements by declaring that the general class of rights that are dependent upon family relationships shall be accorded only when the formalities as well as the biology of those relationships are

> present. Moreover, and for many of the same reasons why a State is empowered to require formalities in the first place, a State may choose to simplify a particular proceeding by reliance on formal papers rather than a contest of proof. That suits for wrongful death, actions to determine the heirs of intestates, and the like, must as a constitutional matter deal with every claim of biological paternity or maternity on its merits is an exceedingly odd proposition.

The majority opinion relies on statements designed to evoke sympathy for the position of the illegitimate child and upon the assertion that a state "may not draw a line which constitutes an invidious discrimination against a particular class."[12] Not much of a guideline! The message seems to be little more than this: "Legislatures beware. We are watching you. And if what you do seems sufficiently offensive to us we will strike it down and make you do it over again." If this is a proper statement of the meaning of Levy, then the dissenter in Snell stated the scope of the Equal Protection clause too narrowly.

The Levy case may stand alone and may, in the long run, simply be ignored--at least if its implications are as broad as I have suggested. But there are other cases that do form a coherent, consistent line in support of the more conservative doctrine enunciated in the excerpt from the Snell dissent quoted above. Among these is a series of cases involving the rights of indigent criminal defendants to a transcript of the trial record and to counsel for purposes of appeal.[13] The results in these cases might well have been justified on grounds of criminal due process, but the court made quite clear that it was at least as much concerned with equal treatment of rich and poor. Thus, in Douglas v. California[14] the court held that it was constitutionally

impermissible for the state to deny the request of an indigent convicted of a felony to appoint a lawyer to appeal his conviction. The California court, acting in accordance with its established procedures, had denied the request after reviewing the trial record and concluding that there was no meritorious argument for reversal. The U.S. Supreme Court nonetheless found an invidious discrimination in the fact that "the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot."[15] The dissenters argued that a State does not discriminate when it merely fails to redress an imbalance in economic resources for which it was not directly responsible. Putting aside this debate over the distinction between a sin of commission and a sin of omission and its relevance to constitutional law, what remains in defense of the California procedure is the argument that the State should not have to expend its resources on an appeal that in its view "would have been utter extravagance and a waste of the State's funds."[16] What is significant for present purposes is that this argument failed to sway the majority. The mere fact that the rule in issue served a reasonable and legitimate policy of the State was not considered by the majority an adequate basis for permitting differential access to what they obviously regarded as a vital or fundamental interest--the interest in equal access to representation by counsel in a criminal appeal.

The Douglas case may be more directly pertinent to problems of income definition than to problems of family-unit definition. In the rural experiment, payments may be reduced by virtue of a rule that

treats as income one-tenth of certain capital assets. Can it be argued that this rule is unconstitutional because it treats poor people more harshly than the nonpoor are treated under the positive income tax? It may be said in response to that question that the negative income tax and the positive tax are not comparable--the former is basically a welfare program and the latter is a revenue-raising device. Moreover, it might be suggested that the assets test does not really discriminate against the poor but rather defines as nonpoor those persons who have capital assets. But are those responses dispositive? After all, the distinction between benefits bestowed and burdens imposed by government is essentially without substance. The dollar saved by the positive taxpayer by virtue of the rules of positive income taxation is worth just as much to him and costs others just as much in terms of additional burden as the dollar paid to a welfare recipient under a similar rule under the negative income tax. The problem might be seen more clearly by considering this possibility: Suppose that we were to say that the burden of raising revenue should be borne equally by all members of society to the extent possible; that is, that the burden ideally should be distributed on a per capita basis. There are obvious objections on humanitarian grounds and on grounds of economic incentive to pushing this theory to its extreme, but we could proceed in the direction that it indicates by providing that all persons whose taxable income is low enough that their tax payment falls below a specified amount (determined with reference to the average per capita burden of operating the government) would be required to

make up all or part of the deficit by paying an amount equal to, say, ten percent of the value of their assets. The theory would be that, in supporting the government, high-income people should not have to subsidize low-income people who have assets such as to make the subsidy unnecessary. Would such a rule, plainly applying a different, more onerous standard to low-income people than to high-income people, be immune from constitutional attack? And in what way is the use of an assets test for purposes of the negative income tax any different--except that it seems worse because it treats the very poor differently from the moderately poor (who presumably receive governmental benefits, albeit indirect, worth far more than what they pay)?

At the risk of overkill, one more case seems to deserve mention before proceeding to cases involving the interests of welfare recipients. In Harper v. Virginia Board of Elections[17] the Court held constitutionally invalid the Virginia poll tax, concluding that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.[18] Again the significance of the decision can best be appreciated by considering the arguments against it. Justice Black in his dissent[19] argued that "under a proper interpretation of the Equal Protection Clause States are to have the broadest kind of leeway in areas where they have a general constitutional competence to act" and that "State poll tax legislation can 'reasonably,' 'rationally' and without an 'invidious' or evil purpose to injure anyone be found to rest on a number of state policies including

(1) the state's desire to collect revenue, and (2) its belief that voters who pay a poll tax will be interested in furthering the state's welfare when they vote."[20] But again, as in Levy and Douglas, the majority was not swayed.

The only recent supreme court decision involving welfare rules is Shapiro v. Thompson,[21] and in that case the court did not rely on the unadorned substantive equal protection concept that has developed in the decisions discussed thus far. In Shapiro, the plaintiffs successfully challenged the constitutionality of state and District of Columbia statutes making a person ineligible for certain welfare benefits until the person had been a resident of the state (or the District) for at least one year. The majority opinion relies heavily on the proposition that the inequality of treatment of persons who had, and persons who had not, been residents for a year interfered with the constitutionally protected freedom to move from state to state; that such interference would be permissable only if the rule served some compelling public interest, and that no such interest could in fact be found. There was no data to support the proposition that the rules in issue, in fact, had any significant deterrent effect on travel. Certainly the plaintiffs in the cases before the court had not been deterred. However, the reason and justification given for the rules was precisely that they would deter movement. Without that justification, the unequal treatment of the plaintiffs could not be defended because that treatment served no other substantial, legitimate purpose. And the deterrence justification was worse than nothing

because it constituted a conscious affront to the constitutionally protected freedom to travel, and this effect might well have required a finding of unconstitutionality even if the classification had served some legitimate and substantial state interest.

The Shapiro decision may have more significance for the federal government's role in supporting national programs than it does for the states. If it is thought that high benefits lure the poor to a state, then low benefits presumably will be thought to have the opposite effect. If low benefits deter the poor from moving into a state, then we must begin to consider whether that effect raises constitutional problems about the rules setting that level of benefits. It seems absurd to push this thought to the point of suggesting that the Supreme Court would require a low-benefit state like Mississippi to make at least some reasonable effort to match the welfare benefit level (and the quality of school programs and other public services) of a high-benefit state like California, so that Californians would not be deterred from moving to Mississippi. Obviously at some point the Constitution's concern for freedom of travel is overshadowed by its commitment to federalism. But federal government programs cannot be viewed in the same perspective. At present, federal payments per recipient are lower in some states than in others because those payments are a function of state benefit levels. The consequence is that the federal program affirmatively promotes a system that--at least arguably--has the effect of impeding travel into low-benefit states. After Shapiro can such a program continue? In other words,

doesn't Shapiro suggest that federal welfare benefits must be uniform from state to state? The question may seem startling to those who have, over so many years, become accustomed to the present system. And the answer to it may turn out to be "no." But it cannot be said that the question is a frivolous one.

Two recent lower court decisions illustrate the implications for negative income tax rules of the substantive equal protection decisions discussed thus far. In Williams v. Dandridge,[22] a three-judge federal district court in Maryland held unconstitutional the Maryland "maximum grant" regulation, which set a monthly limit of $250 a month on welfare grants regardless of the size or need of the family. The practical effect of the regulation, of course, was that individuals in large families were treated worse than those in smaller ones. This, said the court, violated the requirements not only of the Social Security Act but also of the Fourteenth Amendment. The basis for the court's constitutional conclusion, and the implications of its decisions for a negative income tax, may best be seen in the following language from its opinion:[23]

> That under these rules the maximum grant regulations is offensive is easily demonstrable. AFDC is a program to provide support for dependent children. By the standards of need set by Maryland, a dependent child is in as great need and as deserving of aid, whether he be the fourth or the eighth child of a family unit, although if the latter, the amount of his need may not be quite as great as that of the former, because it is cheaper to provide clothing, food and shelter for the eighth child than for the fourth. Yet the maximum grant regulation, in accomplishing its purpose of conservation of inadequate funds, assumes that a child, because he is the eighth

> (or any other number where to grant him benefits would bring the aggregate benefits to the family unit over the maximum grant) is either not in need or that his need must go unsatisfied. Reason and logic will not support such a result. The fact that such a child, if moved to the home of an eligible relative, may receive such benefits lends additional support to this conclusion. In effect, Maryland impermissibly conditions his eligibility for benefits upon the relinquishment of the parent-child relationship. * * * The result we reach is fully in accord with that of other courts which have considered the same or similar questions. * * * We hold, therefore, that the maximum grant regulation transgresses the equal protection clause.

Finally, we come to Smith v. King,[24] in which the "substantive equal protection" doctrine was brought to bear on a problem of direct relevance to the family-unit rules. In that case, a three-judge federal district court held unconstitutional[25] an Alabama rule that cut off AFDC benefits to the plaintiff, Mrs. Smith, on the basis of a finding that she had had sexual relations with a man who was not her husband. The bare facts of the case reveal a welfare policy that makes many aspects of the Elizabethan poor laws seem downright enlightened and benevolent by comparison. It appeared that the man with whom Mrs. Smith was accused of having sexual relations was married and was living not with Mrs. Smith but with his wife and eight of his nine children; that he was totally incapable of providing any support to Mrs. Smith; and that, since he was not the parent of any of Mrs. Smith's children, he was not legally obligated (even if he had been financially able) to provide a penny of support to her or them. While the rule denying benefits to Mrs. Smith and her children in

these circumstances may seem draconian, it does not appear quite so arbitrary and irrational when seen in light of one of the features of AFDC that has been central to that program since its inception. AFDC was designed primarily to respond to the plight of children who had been deprived of support by virtue of the death or absence of their father. Aid was denied if the father was living with the family, regardless whether he was willing or able to provide support. Thus, it was not unreasonable for Alabama (and other states) to adopt a rule to the effect that, where a man assumed the role of spouse, aid should be denied so that the unmarried couple would not be better off than the married couple. Of course it is true that the natural father has a legal duty to support his family, while the man assuming the role of spouse does not, but that distinction seems of little significance since the legal duty to provide support is worth nothing to children whose natural father, living at home, is in fact unable to support them.

The court in Smith, in arriving at its conclusion that the Alabama rule was unconstitutional, focused on the position of the Smith children and said that, in a program whose purpose and function is to meet the needs of children, the state could not, without violating the requirements of the Equal Protection Clause, deny benefits to some needy children, while granting them to others, on the basis of considerations that had nothing to do with the needs of the children. If this is a proper statement of the rationale, then it would seem that the decision has very broad implications. For one thing, it casts very serious doubt

on the constitutionality of a rule denying benefits to children merely because their father is living with them, if he has no income. If the rule in the Smith case may be said impermissibly to punish the children for their mother's immorality, then the death-or-desertion requirement seems equally impermissible to punish them for their father's inability or unwillingness to work. Thus, in effect, under Smith the Constitution may require nationwide adoption of AFDC-UP and it may be constitutionally impermissible to deny benefits to a man's family because of his refusal to accept work. In relation to the family-unit rules, Smith suggests that, while there is no objection to including in a woman's income any amount of support that she receives from a man living with her, it cannot be provided, through treating them as a unit, that her benefits (and benefits for her children even more so) will be reduced by virtue of income of his that he does not make available to her and is under no obligation to make available to her. It is not perfectly clear, of course, that the Supreme Court would go this far, but the Supreme Court decisions discussed in this memorandum do seem to support the decision of the lower court in Smith, and the inferences I have drawn from Smith seem to me almost inescapable.

By way of postscript, another area of constitutional doctrine seems to deserve brief mention. In Griswold v. Connecticut,[26] the Supreme Court overturned a criminal conviction for violation of the state's statute prohibiting the giving of advice on methods of birth control. The theory of the court was that there is a constitutionally protected right of privacy; that a married couple's sexual

activities are entitled to the protection afforded by that right; and that the statute in issue unduly intruded upon that protection. It is possible, of course, to read the decision narrowly, because the court stressed the peculiarly sacrosanct status of privacy in the marital context and because the statute represented an effort to control or prevent activity. But the court suggested a much broader notion in the following language:[27]

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

This statement might well be extrapolated to protect single people as well as married couples. It seems to me entirely reasonable to argue that any imaginable process of investigating a single person's sexual activity would necessarily be repulsive--even if private, consensual sexual activity could be labeled criminal in the absence of the problems of protection of privacy that the enforcement of such a law inevitably creates. If that is so, then any rule that is unenforceable without such a process of investigation will be constitutionally suspect. The fact is, however, that any family-unit rule that treats as husband and wife a man and woman who are not in fact married will likely require inquiries into whether or not they fornicate with one another. Suppose, for example, that we know that a man and woman are living in the same apartment or house. What can we infer from that fact standing alone? The man could be a boarder or the woman could be a housekeeper. Or they could be mere roommates.

In what circumstances, then, will we treat them as husband and wife? We could borrow the standard of common-law marriage and make the outcome turn on whether they hold themselves out as husband and wife. But that seems to be an insufficiently encompassing test, and perhaps one that rewards secrecy (or discretion) too highly. It would be possible to make the outcome turn on whether the man supported the woman, but that might be too difficult to administer and again might be thought of as a too narrowly cast net. The temptation, then, will be to make the outcome turn on the presence or absence of continued intimacy, manifested primarily in fornication. But under the Griswold language quoted above, it may be that the presence or absence of that kind of relationship cannot be made the pivotal issue because any process of inquiry into whether it exists would necessarily be repulsive. We can only speculate on whether the Supreme Court would expand Griswold to that point. Very likely it would not. But the possibility that it would does seem to exist.

FOOTNOTES TO APPENDIX A

[1]Professors Tussman and tenBroek have been credited with originating, or at least nurturing to viability, the phrase "substantive equal protection" in their article, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, at 361-65 (1949). See Karst and Horowitz, Reitman v. Mulkey: A Telophase of Substantive Equal Protection, in Kurland (ed.), The Supreme Court Review, 1967, at p. 39.

[2]See Karst and Horowitz, *supra*, n. 1, at 57-58. For a less abbreviated and therefore more accurate statement see the quote, in the next paragraph, from the dissenting opinion in the Snell case.

[3]For further elaboration see Karst and Horowitz, *supra*, n. 1; Note, Developments in the Law of Equal Protection, 82 Harv. L. Rev. 1065 (1969). The doctrine has developed in decisions interpreting the Equal Protection Clause of the 14th Amendment, which controls the conduct of the states. However, the Due Process clause of the 5th Amendment makes the same doctrine applicable to the federal government. See Shapiro v. Thompson, 394 U.S. 618, 89 Sup. Ct. 1322 (1969).

[4]281 F. Supp. 853 (S.D. N.Y. 1968) (three-judge court); *aff'd per curiam*, 89 Sup. Ct. 553 (1969).

[5]89 Sup. Ct. 553 (1969) *per curiam.*

[6]281 F. Supp. at 863 (1968).

[7]281 F. Supp. at 869-70 (1968).

[8]Levy v. Louisiana, 391 U.S. 68 (1968).

[9]*Id.*, p. 76.

[10]*Id.*, p. 77 (dissenting opinion).

[11]*Id.*, p. 80-81 (footnote omitted).

[12]*Id.*, p. 71.

[13]Anders v. California, 386 U.S. 738 (1968); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[14]372 U.S. 353 (1963).

[15]*Id.*, p. 357.

[16]*Id.*, p. 359 (dissenting opinion).

[17]383 U.S. 663 (1966).

[18]*Id.*, p. 666.

[19]*Id.*, p. 670.

[20]*Id.*, p. 674.

[21]89 Sup. Ct. 1322 (1969).

[22]297 F. Supp. 450 (D. Md. 1968); probable jurisdiction noted by Supreme Court, 10-13-69. For other current litigation on this issue, see Commerce Clearing House, Poverty Law Reporter, Par. 1410.

[23]297 F. Supp., p. 458-59.

[24]277 F. Supp. 31 (M.D. Ala., 1967) (three-judge court), *aff'd* 292 U.S. 309 (1968). See also Solman v. Shapiro, 300 F. Supp. 409 (D. Conn. 1968), *aff'd per curiam*, 90 Sup. Ct. 25 (1969).

[25]The Constitution was one of two alternative bases for the court's decision. The other was the Social Security Act. The Supreme Court's affirmance was solely on the basis of the Act; it refused to reach the constitutional issue.

[26]381 U.S. 479 (1965).

[27]*Id.*, p. 485-86. See also, People v. Belous, 71 Advance California Report 996, 80 Cal. Rptr. 354, 458 P.2d 194 (1969), in which the California Supreme Court held that a criminal statute prohibiting giving advice about abortion was unconstitutional because it was too vague and then went on to say that, even if the statute had not been too vague, it would have been unconstitutional, citing Griswold, because it interfered with the female advice-seeker's right of privacy in deciding whether or not to have children.

APPENDIX B

Draft of 10-3-67 (modified)

Family Unit Rules--Version 1.

I. Claimants

A claimant is permitted to file a claim on behalf of himself and his dependents (if any) and is entitled to the maximum allowance.

A claimant is defined as any person who is a resident of the United States, except:

A. An unmarried person less than 21 years of age, unless such person is at least 18 years of age, has no parent living, and provides more than half his own support.

B. A person who is claimed as a dependent of any other person for purposes either of determining payments under this program or tax liability under the existing Federal income tax; or

C. A husband or wife who has deserted (as defined in IV, below); or

D. A husband who is legally separated from his wife and is not entitled to claim as dependents more than half of their children.

E. A wife whose husband has not deserted or been legally separated.

II. Claimant - dependents

A claimant-dependent is permitted to file a claim on behalf of himself and his dependents (if any), but his allowance is limited to that of the first child in a family.

A claimant-dependent is defined as:

A. A husband who has legally separated from his wife; or

B. A person who is at least 18 years of age but less than 21 years of age, and who is living apart from his parents, and who provides more than half of his own support. A person who is a student will be deemed to be living with his parents unless he lived apart from them and received no support in any form from them for a period of at least 6 months during which he was not a student.

III. Dependents

Dependents are persons whom a claimant or a claimant-dependent may list as the basis for an allowance. The income of all claimed dependents is included in the claimant's or claiment-dependent's income. A wife who has not deserted or been legally separated must be claimed, but no other dependent must be claimed.

A. A dependent is defined as a person who:

1. Does not fall into any of the following categories:

(a) A claimant or claimant-dependent; or

(b) A person who has been claimed as a dependent by any other claimant or by any taxpayer; or

(c) A spouse who has deserted.

2. And, does fall into one of the following categories:

(a) A spouse, a child or a stepchild, or a descendant of any child or stepchild, if such person is either living with the claimant or derives more than half his support from the claimant; or

(b) Any person who is living with and derives more than half his support from the claimant.

B. Special rules

1. A person who is confined to an institution may be claimed as a dependent, if otherwise eligible, but such person shall be presumed to have an income in kind equal to the allowance that can be claimed for him or her, less the amount paid by the claimant in support of such person.

2. If, under the rules set forth in A, above, a person is eligible to be claimed as the dependent of more than one claimant, or claimant-dependent, or if a child is eligible to be claimed as a dependent by a claimant or claimants and/or by a claimant-dependent or claimant-dependents and by a taxpayer or taxpayers, then such person can be claimed as a dependent only by the person who supplies more than half his support.

IV. Desertion

Where one spouse has deserted and the remaining spouse files a claim, he or she must include in his or her income all payments (in cash or in kind) received from the deserting spouse. Where husband and wife are living apart, it will be conclusively presumed, in the absence of a state-court determination to the contrary, that the one with whom more than half the children are living has been deserted; and, if half the children are with the husband and half with the wife, or if there are no children, it will be conclusively presumed, in the absence of a state-court determination to the contrary, that the husband has deserted.

Notes to Version 1.

1. Where a parent has no income and a minor child has a fairly substantial income, the parent will simply elect not to claim the child as a dependent, thereby excluding the child's income.

2. Rule II B is a compromise designed to provide for the young person whose parents simply will not help him or her in any way, while at the same time not providing too much incentive to leave home or to avoid going to school. The remaining incentive to leave home or to avoid school may still seem serious to some, and this prospect might unreasonably endanger the entire program. From the standpoint of foreclosing attacks, the best alternative would be to eliminate II B. To lower the age in I A would be to expose the program to attack as a subsidy of the wealthy (but query whether this is bad, since negative income taxation is not supposed to be a "pure" welfare program).

3. The definition of dependent does not need to include parents, siblings, nieces and nephews, etc., since all of these can be claimed by some other person or can file on their own. There is no generally applicable support test for the persons in III A 2 (a), because the inclusion of their income in the claimant's income makes a support test unnecessary.

4. Members of religious orders and prisoners should be dealt with as a problem of income in kind. I suggest a rule creating a rebuttable presumption that income in kind in such cases is equal to the allowance amount.

5. The rules may be too tough on deserters; they are not granted any allowance. This could encourage them to take steps to legalize and therefore possibly make permanent, a "trial" separation.

6. My treatment of desertion does leave open the possibility that we will be encouraging friendly desertions, for example, where the husband goes off to a temporary job. If this is a serious problem, the definition of desertion can be tightened, but at least for present purposes I think we should assume the problem is not significant.

Family Unit Rules--Version 2

I. Filers and members of units

A family unit may consist of one or more individuals. The person who is responsible for filing the claim for a family unit, and to whom payment under this program will be made, is called a "filer." The following rules establish which individuals may be filers, which individuals must be included in the filer's family unit, and which individuals may be included in the filer's family unit. A filer will become entitled to additional payments for each additional member of his family unit but will be required to include in the income of the family unit the income of all members of the unit.

A. Male filers

1. A man is a filer if he is:

   (a) At least 18 years old; or

   (b) married; or

   (c) a high school graduate.

2. A male filer must include his wife in his family unit unless they are legally separated or informally separated (as defined in Section C). A male filer must also include in his family unit any woman who is living with him and is the mother of one or more of his children living with him.

3. A male filer may include in the family unit any person who is under 18 years old and who lives with him provided, however, that no person under 18 years old who is not a child of the filer or a woman who must be included in his unit until such person has lived with him for 90 consecutive days. (But see Section E 2.)

B. Female filers

1. A woman is a filer if she is:

   (a) At least 18 years old and either unmarried, divorced, legally separated, or informally separated (as defined in Section C);

(b) a high school graduate and either unmarried, divorced, legally separated, or informally separated (as defined in Section C);

(c) married and has received a consent from her husband as described in Section E 1.

2. A female filer must include in her family unit any man who is living with her and who is the father of one or more of her children living with her.

3. A female filer who is eligible to be a filer by virtue of Section E 1 must include her husband in her family unit.

4. A female filer may include in the family unit any person who is under 18 years old and who lives with her provided, however, that no person under 18 years old who is not a child of the filer or a man who must be included in her unit until such person has lived with her for 90 consecutive days. (But see Section E 2.)

C. Informal separation defined

A man and woman will be deemed to be informally separated if

1. (a) they have not lived in the same dwelling unit for 30 consecutive days, and

(b) they do not maintain a common residence, and

(c) one of them files an affidavit with the Secretary, swearing or affirming these facts on information or belief and further stating a belief that the separation will continue indefinitely; or

2. if either of them is confined to a penal institution for a period of time not certain to expire within 120 days.

D. Special rules for incompetents, stepchildren, children confined to public institutions, etc.

1. If a person is otherwise eligible to be a filer, but is physically or mentally incapable of filing reports, then reports may be filed and payments received in his or her behalf by the person who is responsible for his or her care.

2. If a person under 18 years old is living in a State-approved foster home or a State-operated institution (other than a

penal or correctional institution) and if the State has adopted a plan approved by the Secretary for seeking to enforce the legal obligation of any other person to support such person, then the State shall be entitled to receive in respect of, and for the benefit of, such person an amount equal to the allowance prescribed for such person, reduced by the full amount of any support payment received by the State.

3. A person who is eligible to be a filer may, regardless of his income, file a claim for a unit consisting of any persons under 18 years old and living with him, for whom he certifies that he has no legal obligation of support under the law of the State in which he resides, and whom he refuses to support, except that he must include in such unit's income not only the income of such person or persons under 18 years old but also the income of any other persons living with him who does have a legal obligation to support such persons under 18 years old and except that this provision shall not apply to persons under 18 years old for whom payments are or could be made under Section D 2.

E. Miscellaneous provisions

1. A husband may file a written consent to allow his wife to be the filer for their family unit, in which case payments will be made to her.

2. No person may be a member of more than one unit. If a person who is under 18 years old lives with more than one filer then he can be claimed only by the filer who supplies the greatest amount of support.

3. Each time a monthly report of income is made, the filer may make a new choice as to whether to include any person (other than his spouse) in the family unit.

APPENDIX C*

*The following rules are taken from Comment, "A Model Negative Income Tax Statute," *Yale Law Journal*, vol. 78, No. 2 (Dec. 1968) pp. 307-309.

Section 9. Family Unit Defined

(a) *General Rule.*--A family unit shall consist of at least one claimant, and not more than two claimants, and any dependents which the claimant or claimants, individually or jointly, are entitled to claim and which all the claimants in a family unit choose to claim, except that any person 16 years old or older who is claimed as a dependent must agree in writing to be claimed as a dependent.

(b) *Claimants.*--Any person who--

(1) is 21 years of age or older, or

(2) is 19 or 20 years of age and maintains a domicile separate from his parents or guardian, does not receive more than half his support from his parents or guardian, and is not a student within the meaning of section 151(e)(4) of the Internal Revenue Code of 1954, or

(3) is under 21 years of age and is married, provided that he and his spouse maintain a common domicile, are not legally separated under a decree of divorce or of separate maintenance, or informally separated, as defined by subsection(e),

may declare himself a claimant under this provision of this Act for so long as he resides in the United States or its territories.

(c) *Dependent.*--A claimant or claimants in a family unit may declare as a dependent under the provisions of this Act any person who--

(1) is a son or daughter of the claimant, or is any person for whom the claimant is legal guardian, provided that such person, son, or daughter receives a significant portion of his support from the family unit of the claimant, or is a student within the meaning of section 151(e)(4) of the Internal Revenue Code of 1954, or

(2) is any other person who receives over half of his support from the family unit of the claimant and who resides in the same dwelling unit as the claimant,

provided that such person has not rightfully declared himself a claimant under subsection (b), or has not been rightfully declared as a dependent under this subsection by a claimant in another unit which in fact provided the larger share of the declared dependent's support during the preceding twelve months. The Secretary or his delegate may require any claimant who declares a person as a dependent under subsection (c)(2) to substantiate the amount of support provided the dependent and the residence of the dependent.

(d) *Required Family Units.*--

(1) A husband and wife, who have not been informally separated, legally separated or divorced, must file as members of the same family unit.

(2) A man and a woman, domiciled together and the common parents of at least one child, must file as members of the same family unit.

(e) *Informal Separation Defined.*--A husband and wife shall be considered informally separated for the purposes of this Act if--

(1) they have not lived in the same dwelling unit for 30 consecutive days, and

(2) they do not maintain a common residence, and

(3) one of the spouses files an affadavit with the Secretary, swearing or affirming these facts on information or belief and further stating a belief that the separation will continue indefinitely.

(f) *Special Rule for Required Family Units.*--

(1) Notwithstanding the provisions of subsection (a), a claimant in a family unit required to file together under subsection (d) shall be entitled to receive, in respect to any dependent of such claimant--

(A) who is owed no duty of support by the other claimant in the family unit, and

(B) whom such other claimant refuses to support,--
an income supplement as provided by section 5 of this Act, not reduced in amount by reason of the special tax imposed by section 7 of this Act on income attributable solely to such other claimant; *provided*, that the family unit shall receive no other income supplements in respect to such dependent. Any income supplement paid to both claimants jointly shall be determined by treating the family exclusive of such dependent as a separate family unit for the purposes of sections 5 and 7 of this Act.

(2) The supplements provided under this subsection for the benefit of dependents specified in paragraph (1) shall be reduced by 50 percent of (i) any support actually provided by the refusing claimant and (ii) any income earned by the non-refusing claimant and such dependent; *provided*, that the family unit including such dependent shall not receive benefits less than it would be entitled to if this subsection did not apply.

(3) The Secretary or his delegate, before making any payments under this subsection, may require from the claimant refusing support an affidavit attesting that (i) he is under no legal obligation to support such dependent and (ii) he will not adequately support such dependent during the supplement period involved. The law of the state in which the family unit resides shall determine to which dependents the refusing claimant owes an obligation of support.

(g) *Limitations on Family Units*.--No person shall be declared as a claimant or dependent of more than one family unit during the same period of time.