

# SSI Treatment of In-Kind Income-the One-Third Reduction Rule

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## NOTES

### SSI TREATMENT OF IN-KIND INCOME— THE ONE-THIRD REDUCTION RULE

The Federal Supplemental Security Income (SSI) program provides financial assistance to the elderly, the blind, and the permanently and totally disabled. Effective January 1, 1974, this program, administered by the Social Security Administration (SSA), replaced a system of state-administered assistance programs that were partially funded by federal grants.<sup>1</sup> Congress designed the new program to ensure a minimum income for beneficiaries.<sup>2</sup> The SSI statute defines income comprehensively<sup>3</sup> to

<sup>1</sup> Social Security Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1329, 1465 (codified at 42 U.S.C. §§ 1381-1385 (1976 & Supp. II 1978)), as amended by Social Security Act Amendments of 1977, Pub. L. No. 95-171, § 6, 91 Stat. 1353, 1355 (1977). Kennedy, Thomas & Schmulowitz, *Conversions to Supplemental Security Income From State Assistance: A Program Records Study*, SOC. SEC. BULL., JUNE 1975, at 17. See A. ABRAHAM & D. KOPELMAN, FEDERAL SOCIAL SECURITY 182-83 (1979).

<sup>2</sup> See *Cardinale v. Mathews*, 399 F. Supp. 1163, 1164 (D.D.C. 1975) (dicta); S. REP. NO. 1230, 92d Cong., 2d Sess. 383-84 (1972); SOCIAL SECURITY ADMINISTRATION, DEP'T OF HEALTH, EDUCATION AND WELFARE, SOCIAL SECURITY HANDBOOK 352-53 (1978) [hereinafter cited as HANDBOOK].

<sup>3</sup> 42 U.S.C. § 1382a (1976) provides:

(a) For purposes of this subchapter, income means both earned income and unearned income; and—

(1) earned income means only—

(A) wages . . .

(B) net earnings from self-employment . . . and

(2) unearned income means all other income, including—

(A) support and maintenance furnished in cash or kind; except that (i) in the case of any individual (and his eligible spouse, if any) living in another person's household and receiving support and maintenance in kind from such person, the dollar amounts otherwise applicable to such individual (and spouse) as specified in subsections (a) and (b) of section 1382 of this title shall be reduced by 33 1/3 percent in lieu of including such support and maintenance in the unearned income of such individual (and spouse) as otherwise required by this subparagraph, (ii) in the case of any individual or his eligible spouse who resides in a nonprofit retirement home or similar nonprofit institution, support and maintenance shall not be included to the extent that it is furnished to such individual or such spouse without such institution receiving payment therefor (unless such institution has expressly undertaken an obligation to furnish full support and maintenance to such individual or spouse without any current or future payment therefor) or payment therefor is made by another nonprofit organization, and (iii) support and maintenance shall not be included and the provisions of clause (i) shall not be applicable in the case of any individual (and his eligible spouse, if any) [who was living in another's household before a national disaster caused his relocation]. . . .

(B) any payments received as an annuity, pension, retirement, or disability benefit, including veterans' compensation and pensions, workmen's compensa-

include support and maintenance furnished in cash or in kind.<sup>4</sup> This Note examines the difficulties with statutory provisions and implementing regulations governing in-kind support and maintenance, and evaluates criticisms of the program and proposals for improvement.

### A. Statutory Provisions

The SSA reduces an individual's benefit by the amount of his outside income<sup>5</sup>—including the actual value of all support and

tion payments, old-age, survivors, and disability insurance benefits, railroad retirement, annuities and pensions, and unemployment insurance benefits;

(C) prizes and awards;

(D) the proceeds of any life insurance policy to the extent that they exceed the amount expended by the beneficiary for purposes of the insured individual's last illness and burial or \$1,500, whichever is less;

(E) gifts (cash or otherwise), support and alimony payments, and inheritances; and

(F) rents, dividends, interest, and royalties.

See STAFF OF SENATE COMM. ON FINANCE, 95th CONG., 1st SESS. REPORT ON THE SUPPLEMENTAL SECURITY INCOME PROGRAM 72 (Comm. Print 1977) [hereinafter cited as STAFF REPORT].

<sup>4</sup> 42 U.S.C. § 1382a(a)(2)(A) (1976). In-kind support and maintenance income occurs frequently and is difficult to measure. In 1975, HEW estimated that the special provisions on support and maintenance in kind affected 400,000 individuals. *Supplemental Security Income Program: Hearings Before Subcomm. on Public Assistance of the House Comm. on Ways and Means*, 94th Cong., 1st Sess. 239 (1975) [hereinafter cited as 1975 Hearings] (statement of Rep. Richard H. Fulton). The American Association of Retired Persons and the National Retired Teachers Association estimated that these provisions affect 20% of old-age recipients. *Id.* at 265 (statement of John B. Martin). Measuring in-kind income presents practical problems of valuation. 1975 Hearings, *supra* at 10 (statement of James B. Cardwell, Commissioner, Social Security Administration); S. REP. NO. 1230, 92d Cong., 2d Sess. 388 (1972); H. R. REP. NO. 231, 92d Cong., 1st Sess. 152 (1971), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4989, 5138.

<sup>5</sup> 42 U.S.C. § 1382 (b) (1976) provides:

(1) The benefit under this subchapter for an individual who does not have an eligible spouse shall be payable at the rate of \$1,752 . . . reduced by the amount of income, not excluded pursuant to [42 U.S.C. § 1382a(b) (1976)], of such individual.

(2) The benefit under this subchapter for an individual who has an eligible spouse shall be payable at the rate of \$2,628 . . . reduced by the amount of income, not excluded pursuant to [42 U.S.C. § 1382a(b)], of such individual and spouse.

Under 42 U.S.C. § 1382f (1976), the benefit levels are adjusted periodically to reflect cost-of-living increases. As of July 1979, benefits were \$2,498.40 for a single individual and \$3,747.60 for an individual with an eligible spouse. SOCIAL SECURITY ADMINISTRATION, DEP'T OF HEALTH, EDUCATION AND WELFARE, CLAIMS MANUAL § 13128 (1979).

The term "benefit level" refers to the annual rate of payment specified in the statute for a single recipient or a recipient with an eligible spouse. The term "income level" refers to the amount of the individual's income recognized under the statute and subtracted from his benefit level. 42 U.S.C. § 1382a (b) (1976 & Supp. II 1978). Benefits are computed by subtracting an individual's income level from his benefit level. For example, as of July

maintenance furnished in kind—unless the individual falls within one of three exceptions.<sup>6</sup> An important exception applies to an individual who lives in another's household and receives in-kind support and maintenance from that person.<sup>7</sup> For a qualifying beneficiary, the statute reduces the applicable benefit level "by 33 1/3 percent in lieu of including such support and maintenance in the unearned income of such individual (and spouse)."<sup>8</sup> This provision is known as the one-third reduction rule.

Congress designed the one-third reduction rule to simplify program administration<sup>9</sup> by eliminating the practical problems of determining the actual value of in-kind support and maintenance provided to SSI applicants living in the household of a friend or relative.<sup>10</sup> The rule provides an irrebuttable presumption that if an individual receives any such in-kind income, it is worth one-third of the applicable benefit level.<sup>11</sup> Because actual value of this income is irrelevant, cash payments by the SSI recipient to the person with whom he lives do not reduce the presumed value of the support and maintenance he receives.<sup>12</sup>

1979, the benefit level for an individual without a spouse was \$208.20 per month. If he had an income level of \$108 per month, his SSI benefits would be \$100.20 per month (\$208.20 - 108.00). See HANDBOOK, *supra* note 2, at 355.

<sup>6</sup> See 42 U.S.C. § 1382a(a)(2) (1976).

<sup>7</sup> 42 U.S.C. § 1382a (a)(2)(A)(i) (1976). See note 3 *supra*. The two other major exceptions are: (1) in-kind income in the form of support and maintenance provided by certain nonprofit retirement homes under certain conditions, *id.* § 1382a (a)(2)(A)(ii), and (2) government emergency housing in national disaster areas, *id.* § 1382a(a)(2)(A)(iii). In addition, \$240 of unearned income per year (\$20 per month) is excluded. *Id.* § 1382a (b)(2)(A).

<sup>8</sup> *Id.* § 1382a(a)(2)(A)(i). In the example in note 5 *supra*, the one-third reduction rule would reduce the individual's benefit level from \$208.20 to \$138.80 per month. When the SSA subtracted his income level of \$108 from this reduced benefit level, the individual would receive an SSI payment of \$30.80 per month instead of \$138.80 per month.

<sup>9</sup> STAFF REPORT, *supra* note 3, at 73.

<sup>10</sup> See note 4 *supra* and text accompanying note 67 *infra*.

<sup>11</sup> STAFF REPORT, *supra* note 3, at 73.

<sup>12</sup> The SSA recognizes a payment by the individual toward his support and maintenance only to determine whether the one-third reduction rule applies. See text accompanying notes 14-15 and 20-22 *infra*. If the value of the support and maintenance exceeds the payment, the individual receives in-kind income in excess of his payment and the one-third reduction rule applies. The SSA, however, does not reduce the amount of the one-third reduction by the amount of the individual's payment.

Congress intended the one-third reduction rule to apply whether or not recipients make any payment toward their support and maintenance. The House and the Senate Reports state: "Under the bill, the value of room and board, regardless of whether any payment was made for room and board, would be assumed to be equal to one-third of the applicable benefit standard." S. REP. NO. 1230, 92d Cong., 2d Sess. 388 (1972); H.R. REP. NO. 231, 92d Cong., 1st Sess. 152 (1971). The Social Security regulations implement this congressional intent. See 20 C.F.R. § 416.1125(B)(1) (1979).

## B. *The Regulations*

The one-third reduction rule applies when four conditions are satisfied: (1) the SSI applicant receives in-kind income, (2) in the form of support and maintenance, (3) provided in another person's household, (4) by that person.<sup>13</sup>

### 1. *In-Kind Income*

The one-third reduction rule applies only if the individual receives in-kind support and maintenance income. This requirement poses substantial administrative difficulties when the individual makes payments toward his support and maintenance. If an individual asserts that his payment equals the full value of support and maintenance received, the SSA must determine the value, the very determination that the one-third reduction rule was designed to eliminate.<sup>14</sup> If he pays less than the value of his support and maintenance, he receives net in-kind support and maintenance, and the rule applies.<sup>15</sup> Until 1978, the regulations did not prescribe a method for valuing support and maintenance to determine net income.<sup>16</sup> The SSA's operating policy, however, valued such support and maintenance by the "community rate" approach.<sup>17</sup> Under this approach, if an individual paid an amount equal to the costs of living in his community's commercial facilities, the SSA assumed he was paying full value for his support and maintenance and did not apply the one-third reduction rule.<sup>18</sup> The community rate approach proved inflexible and inequitable. The SSA later conceded that "[t]he community rate concept . . . bore no necessary relationship to the current market value of the support and maintenance an individual actually received. Moreover, this concept was open to varied interpretations and thus . . . it could not be applied with any consistency on a national basis."<sup>19</sup>

In an attempt to resolve these problems, the SSA issued regulations in 1978 that replaced the community rate approach with a valuation based on the individual's pro rata share of household

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<sup>13</sup> 42 U.S.C. § 1382a(a)(2)(A)(i) (1976).

<sup>14</sup> See notes 9-10 and accompanying text *supra*.

<sup>15</sup> 42 U.S.C. § 1382a(a)(2)(A)(i) (1976). See notes 20-22 *infra*.

<sup>16</sup> See 40 Fed. Reg. 48,937, 48,938-39 (1975); 38 Fed. Reg. 27,406, 27,407-08 (1973).

<sup>17</sup> 43 Fed. Reg. 29,281, 29,283 (1978).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

expenses.<sup>20</sup> Under the new scheme, the SSA first divides the total household expenses by the number of persons in the household, regardless of their age or actual consumption.<sup>21</sup> If the individual pays his pro rata share within five dollars, the one-third reduction rule does not apply.<sup>22</sup> Because the pro rata share is based on the actual costs of running the household, the share is usually equal to or below the fair market value of the in-kind support and maintenance. The new regulations thus avoid the necessity of determining actual market value, while assuring that the individual subject to the one-third reduction rule receives net in-kind income.<sup>23</sup>

## 2. *In the Form of Support and Maintenance*

Although the statute does not define the term "support and maintenance,"<sup>24</sup> the pre-1978 regulations defined the term as

<sup>20</sup> *Id.* at 29,284 (codified at 20 C.F.R. § 416.1125(b)(3)(iv) (1979)). "An individual is not considered to be living in another person's household when . . . [t]he eligible individual is paying at least a pro rata share of the average monthly total household operating expenses as described in paragraph (b)(5) of this section." *Id.*

<sup>21</sup> 20 C.F.R. § 416.1125(b) 5.

Total household operating expenses means the average of total monthly expenditures for food, rent or mortgage payments, real property taxes, heating fuel, gas, electricity, water, sewer services and garbage collection services. The term refers only to amounts actually expended by the household for the purposes specified in this paragraph . . . ; it does not include the value of any in-kind support and maintenance provided by a source external to the household. A pro rata share of total household operating expenses is determined by dividing the monthly average of these expenses by the number of persons in the household regardless of age or individual consumption of any of the items. Payment of an amount which is within \$5 of the monthly pro rata share is considered to meet the pro rata requirement. A pro rata is generally determined by averaging the specified household expenses for the 12-month period prior to determination.

*Id.* The specified items are "the only household expenses to be considered" in determining the pro rata share. SOCIAL SECURITY ADMINISTRATION, DEP'T OF HEALTH, EDUCATION AND WELFARE, CLAIMS MANUAL § 12236.3B1 (1978).

<sup>22</sup> 20 C.F.R. § 416.1125(b)(5) (1979). If an individual pays for in-kind support and maintenance by providing services, the pro rata share approach does not, of course, apply since this would be earned income. *See id.* § 404.419(c).

<sup>23</sup> Some commentators have criticized the pro rata share approach because the recipient bears the burden of rebutting the presumption that he receives in-kind income. *See, e.g., 1975 Hearings, supra* note 4, at 92 (statement of Wilbur Schmidt, Chairman, National Council of State Public Welfare Administrators); *id.* at 276 (statement of Philip Mastin, member, Michigan Legislature, for National Conference of State Legislatures). The individual may be unable to rebut the presumption. He must show that he currently pays his pro rata share, but in some cases he can pay nothing until he receives SSI funds. *Id.* at 276. Despite these inequities, the use of this rebuttable presumption may withstand judicial review. *See* note 85 *infra*. These inequities could be resolved through appropriate statutory modifications. *See* notes 80-83 & 88-94 and accompanying text *infra*.

<sup>24</sup> *See* 42 U.S.C. § 1382a(a)(2)(A)(i) (1976).

“room and board and . . . other incidentals, such as clothing, necessary to an individual’s normal sustenance.”<sup>25</sup> The present regulations, however, expressly include only “food, clothing, and shelter, or any portion of any or all of such items.”<sup>26</sup> This definition is inadequate in several respects. It fails to specify *how much* food, clothing, and shelter an individual must receive to qualify as a recipient of support and maintenance. Although provision of a single meal clearly does not constitute support and maintenance, the imprecision of this definition invites uncertainty. Moreover, the new definition omits items traditionally considered to fall within the term. For example, the current regulation appears to exclude medical supplies—a substantial expense for many aged, blind or disabled individuals—from “support and maintenance.”<sup>27</sup> However, neither the regulation nor the SSA’s discussion of the regulation indicate that the agency considered the 1978 change significant, so this omission may have been unintentional.

Under a literal reading of this new definition, if an individual receives food, shelter and medical supplies from the person with whom he lives, only the food and shelter would qualify for the one-third reduction. Because medical supplies would fall outside the definition of support and maintenance, they would constitute additional unearned income that would further reduce the individual’s benefit level.<sup>28</sup>

Another interpretational problem arises when an individual’s payment toward his support and maintenance covers the value of food but not shelter, or vice versa. Because this individual receives in-kind income in the form of free shelter, the one-third reduction rule would seem to apply. The SSA, however, requires that the individual receive both food *and* shelter to trigger the rule’s

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<sup>25</sup> 40 Fed. Reg. 48,937, 48,938 (1975). The SSA issued regulations in 1973, 1975, and 1978. The 1973 and 1975 regulations defined support and maintenance similarly. See 38 Fed. Reg. 27,406, 27,407 (1973) (“Support and maintenance may generally be defined as room and board, and would also include other incidentals necessary to an individual’s normal sustenance.”).

<sup>26</sup> 20 C.F.R. § 416.1125(a) (1979).

<sup>27</sup> Since neither the regulation nor the SSA’s discussion of the regulation indicate that the agency considered the 1978 change significant, this omission may have been unintentional. See 43 Fed. Reg. 29,281, 29,282-83 (1978). In actual practice, medical supplies are included in the term support and maintenance.

<sup>28</sup> The statute requires all unearned income to be included in the computation of the individual’s benefit level unless the income falls within one of three exceptions. See 42 U.S.C. § 1382a(2) (1976) and notes 6-8 and accompanying text *supra*.

application.<sup>29</sup> This interpretation appears to conflict with the regulation providing that the "one-third reduction . . . applies regardless of any payment the individual . . . may make toward the support and maintenance."<sup>30</sup> To determine whether an individual receives both food and shelter and is thus subject to the one-third reduction, the SSA must recognize any payment he makes toward his support.<sup>31</sup> Moreover, the SSA is forced to value the in-kind food or shelter.

The SSA avoided this conflict by creating a rebuttable presumption that an individual living in another person's household receives both support and maintenance.<sup>32</sup> If the individual proves that he pays for food or receives food from someone other than the person with whom he lives, he can escape the statutory one-third reduction rule.<sup>33</sup> The regulations nevertheless treat his

<sup>29</sup> The one-third reduction rule does not apply when an individual receives "in-kind support and maintenance from [the person with whom he lives] in the form of *food only* or *shelter only*, but not both." 20 C.F.R. § 416.1125(c)(1) (1979) (emphasis added). See *Califano v. Heinol*, 576 F.2d 112 (7th Cir. 1978); 43 Fed. Reg. 29,281, 29,282 (1978).

<sup>30</sup> 20 C.F.R. § 416.1125(b)(1) (1979).

<sup>31</sup> The SSA could avoid this apparent inconsistency by interpreting the regulation requiring disregard of payments to apply only when those payments are less than the value of either food or shelter. If the payment exceeded the value of either food or shelter, the individual would not receive both support *and* maintenance and the one-third reduction rule would not apply. This approach, however, would force the SSA to determine the value of the food and shelter for every SSI applicant—the very process the one-third reduction was designed to avoid. See notes 9-10 and accompanying text *supra*. See also SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY RULINGS ON FEDERAL OLD-AGE, SURVIVORS, DISABILITY, HEALTH INSURANCE, SUPPLEMENTAL SECURITY INCOME, AND BLACK LUNG BENEFITS 137 (1977) (Ruling No. 77-30) (recipient held to receive both support and maintenance and thus fall within scope of one-third reduction rule although he bought own clothes and paid \$25 per month toward room and board).

<sup>32</sup> When an eligible individual . . . lives in another person's household . . . he or she will be presumed to be receiving in-kind support and maintenance in the form of both food and shelter from the person in whose household he or she lives, and the one-third reduction will apply unless the presumption is rebutted. . . .

20 C.F.R. § 416.1125(b)(4) (1979).

<sup>33</sup> Applicability of the one-third reduction may be rebutted by showing that an eligible individual . . . [d]oes not receive both food and shelter from the person in whose household he or she lives. An individual who purchases (i.e., pays for) his own food, or who receives food from someone other than the household is not receiving in-kind support and maintenance [as required by the presumption of 20 C.F.R. § 416.1125(b)(4)].

*Id.* § 416.1125(b)(6)(iii). The individual must establish that his contribution "is specifically for food or shelter as opposed to an unrestricted contribution to the pooled income of the household." SOCIAL SECURITY ADMINISTRATION, DEP'T OF HEALTH, EDUCATION & WELFARE, CLAIMS MANUAL § 12236.4B (1978).

The rebuttal regulation promotes administrative simplicity because the individual—not the SSA—bears the burden of establishing the value of the food or shelter for which

net in-kind income as unearned income, valued at one-third of his SSI benefit, unless the individual can prove that its actual value is less than the presumed one-third valuation.<sup>34</sup> If the actual value of his net in-kind support or maintenance exceeds one-third of his benefit level, the SSA ignores such excess in computing his benefits. This result violates the statutory requirement that all unearned income be included in computing an individual's benefit,<sup>35</sup> because the SSA computes the one-third valuation by using benefit levels far below current living costs.<sup>36</sup>

### 3. *Provided in Another Person's Household*

The statutory requirement that in-kind income be provided "in another person's household" to trigger the one-third reduction

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he pays. Thus, the SSA need review only cases in which recipients challenge the presumption.

<sup>34</sup> 20 C.F.R. § 416.1125(c)(1), (d) (1979).

In *Kimmes v. Califano*, 472 F. Supp. 474 (D. Colo. 1979), *appeal docketed*, No. 79-1961 (10th Cir. Aug. 31, 1979), a district court implicitly rejected the regulations' market value approach. The case involved a woman who lived alone in a mobile home owned by her daughter. Although the woman paid all expenses associated with the trailer, the SSA determined that she received in-kind income measured by the difference between her rental costs and the trailer's market rental value. The SSA's approach accorded with its current and prior regulations, both of which state that "[u]nless otherwise specified . . . , the value of in-kind support and maintenance refers to its current market value." 20 C.F.R. 416.1125(a) (1979); 40 Fed. Reg. 48,937, 48,938 (1975).

While recognizing that the "Social Security Administration's regulations are valid and generally consistent with the Social Security Act," 472 F. Supp. at 475, the court ignored those regulations by rejecting the market value approach. 472 F. Supp. at 476. The court noted, "[T]he central issue here is not whether in-kind income is countable or whether it should be valued in one way or another, but whether plaintiff in fact received in-kind income at all." *Id.* Although one cannot determine whether the woman received in-kind income unless one first determines how in-kind income is measured, the court concluded: "The law is clear that income, in-kind or otherwise, must be 'actually available' to the welfare recipient in order for it to be counted against his or her eligibility or level of benefits." *Id.* To support this proposition, the court cited two cases, *Von Lare v. Hurley*, 421 U.S. 338 (1975), and *Shea v. Vialpando*, 416 U.S. 251 (1975), that used a federal supremacy rationale to invalidate state welfare regulations that conflicted with federal statutes and regulations on Aid to Families with Dependent Children (AFDC). Because both SSI and AFDC are federal programs, the supremacy rationale does not apply in *Kimmes*. The court also cited *Green v. Barnes*, 485 F.2d 242 (10th Cir. 1973), and *Wilczynski v. Harder*, 323 F. Supp. 509 (D. Conn. 1971), which held that welfare agencies could consider only actually available resources in determining eligibility. The SSI program, however, would not count as income the types of resources involved in these cases.

<sup>35</sup> See 42 U.S.C. §§ 1382 (b), 1382a (1976). The statute defines unearned income as "all other income, including . . . support and maintenance furnished in cash or in kind." *Id.* § 1382a(a)(2)(A) (emphasis added). If the SSA were to assign less than full value to in-kind support and maintenance, some income would be excluded in violation of the statute.

<sup>36</sup> For example, as of July 1979, the benefit level for an eligible unmarried individual was \$208.20 per month. Application of the one-third rule would reduce his maximum SSI benefit by \$69.40, an amount clearly less than the actual value of food or shelter received.

rule<sup>37</sup> also raises challenging problems. The pre-1978 regulations provided no guidance for determining whether an individual was living in the household of another.<sup>38</sup> As an operating policy, the SSA concluded that an individual lived in another's household unless the individual contributed to household expenses *and* participated in household decisions.<sup>39</sup> This policy unfairly applied the one-third reduction rule to aged and mentally retarded SSI beneficiaries who paid their pro-rata share of household expenses but did not participate in household decisions.<sup>40</sup>

In 1978, the Social Security Administration replaced this operating policy with comprehensive regulations.<sup>41</sup> The regulations presume that an adult individual lives in another person's household when someone other than the individual's spouse, minor child, or "essential person" lives in the house.<sup>42</sup> To rebut this presumption, the individual must show (1) that he or his spouse "has an ownership or life estate interest in the home,"<sup>43</sup> or (2) that he or his spouse "is liable to the landlord for payment of any portion of the rental charges,"<sup>44</sup> or (3) that he is living in an exempt noninstitutional substitute home care situation,<sup>45</sup> or (4) that he "is paying at least a pro rata share of the average monthly total household operating expenses."<sup>46</sup>

<sup>37</sup> 42 U.S.C. § 1382a(a)(A)(i) (1976).

<sup>38</sup> See 40 Fed. Reg. 38,938 (1975) (proposed 20 C.F.R. § 416.1135(b)(3)) and 38 Fed. Reg. 27,408 (1973) (proposed 20 C.F.R. § 416.1125(a)) ("Another person's household refers to the household of a private individual."). See also 43 Fed. Reg. 29,281 (1978) (discussion of prior operating policy for determining "another's household").

<sup>39</sup> See 43 Fed. Reg. 29,281, 29,282-83 (1978).

<sup>40</sup> *Id.* at 29,282.

<sup>41</sup> *Id.*

<sup>42</sup> 20 C.F.R. §§ 416.1125(b)(2), 416.1190 (1979). If the eligible individual is a minor living only with his parents, he does not live in "another's household." *Id.* §§ 416.1125(b)(2)(iii), 416.1185(b).

<sup>43</sup> *Id.* § 416.1125(b)(3)(i).

<sup>44</sup> *Id.* § 416.1125(b)(3)(ii).

<sup>45</sup> *Id.* § 416.1125(b)(3)(iii).

<sup>46</sup> *Id.* § 416.1125(b)(3)(iv), (b)(5). The House Ways and Means Committee supported the pro rata share approach:

Testimony from representatives of the Administration indicated that their present policy is not to apply the "one-third reduction" when an individual pays his full pro rata share of the household's expenses. The Committee wishes to reemphasize its approval of this policy by stating its intention that any SSI recipient living in the household of another who contributes his pro rata share toward household expenses should not be subject to the one-third reduction by reason of his living arrangements.

H.R. REP. NO. 1201, 94th Cong., 2d Sess. 11 (1976).

The most dramatic change in the regulations is the extension of the one-third reduction rule to individuals receiving support and maintenance in their own households. Under the current regulations, the SSA presumes that the value of in-kind support and maintenance provided in one's own household equals one-third of one's applicable benefit level.<sup>47</sup> The individual can rebut this presumption by showing that the current market value of such support and maintenance, less any payment he makes, is less than the presumed value.<sup>48</sup>

By eliminating the practical significance of the distinction between living in one's own household and living in another's household, the regulations promote administrative simplicity. The extension of the one-third valuation, however, lacks statutory basis. The SSA acknowledged that this regulation "relates to situations in which an individual living in a household receives support or maintenance, or both support and maintenance, *but the statutory requirements for a one-third reduction in the payment standard for living in the household of another does not apply.*"<sup>49</sup> The statute, however, clearly requires that in-kind income be assessed at full value if the statutory requirements for one-third reduction are not met.<sup>50</sup> By restricting the value of in-kind support and maintenance provided to an individual in his own home to one-third of his benefit level, the SSA prevents reduction of his benefit by all unearned income worth more than the presumed one-third value.

#### 4. *By That Person*

The one-third reduction rule applies only when the person in whose household the SSI recipient lives provides in-kind income in the form of support and maintenance.<sup>51</sup> Until 1978, this requirement often caused inequities. If an individual received support and maintenance from a person in the household and also from someone outside the household, the statute required the SSA to apply the one-third reduction rule *and* deduct the value of the in-kind income received from the outsider.<sup>52</sup> Yet if the indi-

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<sup>47</sup> 20 C.F.R. § 416.1125(c)(4), (d)(2) (1979).

<sup>48</sup> *Id.* § 416.1125(d) (1979).

<sup>49</sup> 40 Fed. Reg. 48,937, 48,938 (1975) (discussion of proposed 1975 regulations) (emphasis added).

<sup>50</sup> See note 35 and accompanying text *supra*.

<sup>51</sup> 42 U.S.C. § 1382a(a)(2)(A)(i) (1976).

<sup>52</sup> See *id.* at § 1382a(a)(2)(A), 1382(b) (1976).

vidual received the same amount of in-kind benefits solely from the person in whose household he lived, SSA would apply only the one-third reduction rule. The identity of the person providing the support and maintenance thus significantly affected the amount of SSI benefits that an individual received.

To remedy this inequity, the SSA adopted regulations providing that when the one-third reduction rule applies, "any additional in-kind support and maintenance an eligible individual (or couple) receives is not counted as income regardless of the source."<sup>53</sup> This regulation exceeds statutory authority by permitting the SSA to disregard this unearned income when computing an individual's benefit.

### C. Criticisms of the One-Third Reduction Rule

Although the SSA has attempted to resolve the major problems of administering the one-third reduction rule, the rule itself remains subject to criticism.

#### 1. Constitutional Problems

The one-third reduction rule may not withstand constitutional attack. In *Vlandis v. Kline*,<sup>54</sup> the Supreme Court observed that "[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process [Clause] of the Fifth [Amendment]."<sup>55</sup> The Court in *Vlandis* held that an irrebuttable presumption is unconstitutional "when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination."<sup>56</sup> The irrebuttable presumption underlying the

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<sup>53</sup> 20 C.F.R. § 416.1125(b)(1) (1979).

<sup>54</sup> 412 U.S. 441 (1973).

<sup>55</sup> *Id.* at 446 (1973). The Court affirmed a lower court order enjoining the University of Connecticut from enforcing a state statute's irrebuttable presumption of continuing nonresidency for students who were residents of other states when they applied for admission. The Court held that the presumption violated the due process clause of the fourteenth amendment. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 643 (1974) (irrebuttable presumption that women four or five months pregnant are incapacitated from teaching held unconstitutional); *United States Dep't of Agric. v. Murry*, 413 U.S. 508, 514 (1973) (irrebuttable presumption of lack of need based on dependency status for federal income tax purposes held unconstitutional); *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (irrebuttable presumption that unwed fathers are unfit parents invalidated).

<sup>56</sup> 412 U.S. at 452. The Court applies a rational basis test when evaluating irrebuttable presumptions in social welfare programs. Otherwise, the doctrine disfavoring irrebuttable presumptions could become "a virtual engine of destruction for countless legislative judgments." *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975). In *Weinberger*, the Court upheld the

one-third reduction rule is clearly not "necessarily or universally true in fact" since the actual value of the in-kind income will equal its presumed value merely by coincidence. Moreover, complex regulations used to determine whether the irrebuttable presumption applies undercut the practical justification for the irrebuttable presumption.<sup>57</sup> The irrebuttable presumption is not crucial to

Social Security provisions that denied benefits to all widows and children whose relationship to the deceased existed for less than nine months before he died. Quoting *Flemming v. Nestor*, 363 U.S. 603, 611 (1960), the Court said:

[W]hen we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

422 U.S. at 768. The *Weinberger* Court concluded:

There is thus no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce.

*Id.* at 785. In a more recent decision, the Supreme Court found a rational basis on which to uphold an SSI provision that terminated benefits for any month that the recipient spent outside the United States. *Califano v. Aznavorian*, 439 U.S. 170, 174 (1978). The Court noted that "[s]ocial welfare legislation, by its very nature, involves drawing lines among categories of people, lines that necessarily are sometimes arbitrary. This Court has consistently upheld the constitutionality of such classifications in federal welfare legislation where a rational basis existed for Congress's choice." *Id.* See also *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

The prevalence of the rational basis standard of review, which usually guarantees survival of governmental classifications, fails to quiet doubts about the constitutionality of the one-third rule's irrebuttable presumption. Some courts have used the rational basis test to defeat SSI classifications. See, e.g., *Termini v. Califano*, 464 F. Supp. 797, 801-02 (S.D.N.Y. 1979) (New York State SSI supplementation program's definition of "living with others," which embraced SSI recipients living with their minor children, held "patently irrational" and unconstitutional). In addition, one court used a higher standard of review to invalidate, on equal protection grounds, statutory provisions denying SSI to persons in public mental hospitals. The court found that mentally disabled SSI recipients possessed some indicia of a suspect class and thus qualified for the intermediate standard of review. *Sterling v. Harris*, 478 F. Supp. 1046, 1050-53 (N.D. Del. 1979). An equal protection challenge, which attacks the classification created by the irrebuttable presumption, implicates a higher standard of review than a due process challenge.

Continued use of the irrebuttable presumption in the one-third reduction rule may be unwise. As one state legislator has observed:

The single instance in which SSI attempts to adjust its grant to the needs of the individual, the one-third reduction of benefits for those classified as living in the household of another, is not based on a realistic distinction and seems to result in truly capricious reduction in the SSI grants of some individuals. . . . [T]he flat one-third reduction seems arbitrary at best.

1975 *Hearings*, *supra* note 4, at 276 (comments of Philip Mastin, member, Michigan Legislature, for National Conference of State Legislatures).

<sup>57</sup> The regulations' complexity stems from the difficulty of determining when the one-third reduction rule applies. One state legislator commented, "As an exercise in futility, I encourage you to read the regulations that are supposed to tell you who gets the reduced

the smooth operation of the SSI program; a rebuttable presumption could serve the same function.<sup>58</sup>

## 2. *Disincentive to Outside Sources of Assistance*

The one-third reduction rule discourages families and friends from both aiding a blind, disabled, or aged SSI recipient or taking him into their home.<sup>59</sup> If the family's in-kind assistance triggers the rule, that family may actually reduce the recipient's standard of living unless the value of the contribution exceeds one-third of the recipient's benefits.<sup>60</sup> Many families of SSI recipients cannot afford such a commitment.

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1/3 and who doesn't." 1975 Hearings, *supra* note 4, at 674 (statement of California State Senator George R. Moscone). The regulations have since been amended and are now more complex. Compare 40 Fed. Reg. 48,938-39 (1975) with 20 C.F.R. § 416.1125 (1979). See also notes 28-34 & 37-48 and accompanying text *supra*.

<sup>58</sup> A rebuttable presumption adopted for administrative convenience would satisfy the rational basis test. See, e.g., Weinberger v. Salfi, 422 U.S. 749, 767-68 (1975). The Supreme Court recently affirmed the strong presumption of constitutionality given to social welfare legislation. See Califano v. Aznavorian, 439 U.S. 170, 174-75, 178 (1978). The Court has upheld the constitutionality of a given welfare provision "[s]o long as its judgments are rational, and not invidious." Jefferson v. Hackney, 406 U.S. 535, 546 (1972).

The SSA currently employs a rebuttable presumption for regulations on in-kind support and maintenance that fall outside the terms of the one-third reduction rule. See notes 34-35 and 46-48 and accompanying text *supra*.

<sup>59</sup> Carroll Kowal, Chairperson of the Housing Committee of the New York Chapter of the National Association of Social Workers testified: "The system of penalizing families who are trying to take care of their disabled members or their elderly members of the family is very unfortunate, and unfair." 1975 Hearings, *supra* note 4, at 323. Congresswoman Bella S. Abzug stated: "By allowing less than the full one-third reduction in some cases as this [proposed bill] does, we might encourage certain kinds of companioned living arrangements." *Id.* at 463.

<sup>60</sup> When the family's in-kind contribution triggers the irrebuttable presumption that the contribution's value equals one-third of the benefit level, the support must equal the amount of the reduction to maintain the SSI recipient's standard of living. See 42 U.S.C. § 1382a(a)(2)(A)(i) (1976). If the donated support is worth less than the reduction, the recipient's standard of living will decline. If, however, the recipient lives in his own household or receives only food or shelter, he may use a rebuttable presumption to prove that the in-kind support and maintenance received is worth less than one-third of his benefit level. See notes 32-35 & 47-48 *supra*. In such a case, the SSA will reduce his benefit by the market value of the contribution. See 20 C.F.R. § 416.1125(d) (1979) and text accompanying note 34 *supra*. But if his family attempts to cover this reduction with additional in-kind support, the SSA will further reduce his benefit, dollar-for-dollar, until the family in-kind contribution totals one-third of his benefit level. *Id.* The SSA then disregards additional family contributions. *Id.* at § 416.1125(h)(1). Thus, families' efforts to improve SSI recipients' standards of living are "fruitless . . . unless the contributors alone [can] support them at a much higher level than SSI benefits" by giving in-kind support and maintenance worth more than the one-third reduction. 1975 Hearings, *supra* note 4, at 728 (statement of Sen. Robert Taft, Jr.).

The Supplemental Security Income program, which was intended to assist the elderly, the disabled, and the blind, prohibits additional assistance from outside sources by deducting such income from the SSI recipient's potential benefits.

The rule may also encourage the institutionalization of recipients who require costly equipment or drugs. Application of the one-third reduction rule to such a recipient may reduce his total available income from SSI and outside sources below the amount needed to sustain him at home, thus forcing him to enter an institution where government pays all his costs.<sup>61</sup> Besides frustrating families and friends and increasing government's costs,<sup>62</sup> institutionalization upsets the individual by removing him from familiar surroundings and companions.

### 3. *Penalty to Recipient*

The one-third reduction rule penalizes an SSI beneficiary who receives in-kind support and maintenance income that is worth less than its presumed value. Such an individual receives lower net benefits than does a person receiving in-kind income of comparable value who falls outside the rule's scope, because the latter's benefit shrinks only by the actual value of his in-kind income.<sup>63</sup> This inequitable treatment can occur in a variety of circumstances. The individual's support and maintenance may depend on his contributing partial payment when he resides with friends or relatives who cannot or will not pay the full cost of support and maintenance. Often an individual needs the companionship or general assistance available in a household but wishes to avoid institutionalization.<sup>64</sup> Out of personal pride the indi-

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This is particularly cruel when an elderly, disabled, or blind person's own immediate family wishes to assist the SSI recipient to rise over a bare subsistence standard of living.

*Id.* at 451 (statement of Rep. Edward I. Koch).

<sup>61</sup> Carroll Kowal, Chairperson of the Housing Committee of the New York Chapter of the National Association of Social Workers stated: "[The one-third reduction rule] serves as an incentive for families to institutionalize, rather than keep at home, SSI recipients." *Id.* at 328. Jack Gruenenfelder, Chairman of the Governmental Affairs Committee of the National Association for Retarded Citizens, stated: "[The rule] has acted as a disincentive to families to keep their retarded family member at home." *Id.* at 353.

<sup>62</sup> Irving Engelman, Staff Member of the American Public Welfare Association, testified: "[The one-third reduction rule] obviously tends to impair the degree to which aged persons are acceptable in their own homes and tends to force them into these infinitely more expensive institutional surroundings." *Id.* at 139.

<sup>63</sup> An individual who lives "in another person's household," rather than in his own household, is, subject to the one-third reduction rule. 42 U.S.C. § 1382a(a)(2)(A) (1976), 20 C.F.R. § 416.1125(b)(3), (c)(4) (1979).

<sup>64</sup> Because SSI beneficiaries must be either aged, blind, or disabled, they often reside in others' households where care and companionship are available; although they may receive only minimal support and maintenance, they are subject to the full one-third reduction. This result is ironic because Congress aimed the SSI program specifically at poor

vidual may desire to contribute toward his own support. Regardless of any offsetting payment by the individual, the value of the in-kind support and maintenance may fall below its presumed value because of poor quality. The present SSI program fails to recognize these discrepancies in value, and, as a result, penalizes these SSI recipients. Further, because the SSA disregards all partial payments made by recipients covered by the one-third rule, an individual who makes a significant partial payment receives the same reduction as an individual who makes no payment whatsoever. An individual who pays more than one-third of his applicable benefit level toward his support and maintenance will be subject to the one-third reduction rule unless he can prove that he is paying his pro-rata share of expenses.<sup>65</sup>

#### 4. *Potential Abuse of SSI Program*

If the one-third reduction rule applies, the SSA disregards any in-kind income worth more than one-third the benefit level. Consequently, the SSA treats an individual who receives expensive in-kind support exactly the same as an individual who struggles to survive on SSI benefits and minimal in-kind support. An individual receiving abundant in-kind support from wealthy and generous friends and relatives may qualify for SSI benefits even though the program was designed to meet basic subsistence expenses.<sup>66</sup>

#### D. *Proposals To Improve SSI Treatment Of In-Kind Income*

Legislators have advanced numerous proposals to improve SSI treatment of in-kind income. Solutions range from full valua-

people, who are unlikely to have wealthy families capable of providing substantial support. See note 83 and accompanying text *supra*.

<sup>65</sup> See notes 20-22 and accompanying text *supra*.

[S]ome State administrators did not believe and do not now believe that the phrase "and receiving support and maintenance in-kind" would be interpreted in such a way that it would result in a one-third reduction even for the individual who is making a contribution, to the household in which he lives, of at least as much as one-third of the benefit amount.

1975 *Hearings*, *supra* note 4, at 138 (statement of Wilbur J. Schmidt, chairman, National Council of State Public Welfare Administrators (American Public Welfare Association)).

<sup>66</sup> The low SSI benefits available, however, limit the rewards of such abuse. As of July 1976, the maximum benefit for an individual subject to the one-third reduction rule was \$138.80 per month. See note 9 and accompanying text *supra*.

Any *cash* income, earned or unearned, that the well-supported SSI beneficiary receives will also be deducted from his SSI benefits. See 42 U.S.C. §§ 1382a(1), 1382(b) (1976). Cf. 42 U.S.C. § 1382a(b) (1976 & Supp. II 1978) (excluding certain amounts from income).

tion of in-kind income to complete exemption of such income in computing benefits.

### 1. *Full Valuation*

One possible solution to the problems of the one-third reduction rule is to eliminate any special treatment of in-kind income and, instead, reduce benefits by the actual value of the support and maintenance received. In theory, this proposal provides the most equitable approach. By accounting for disparities in the value of support and maintenance and in any offsetting payments, it would eliminate penalties under the present system. In practice, however, significant inequities would persist. In 1975, James Cardwell, commissioner of the SSA, argued that "determinations of in kind income are especially difficult and prove troublesome for both the administrators and beneficiaries, and inevitably result in inequities in spite of complicated attempts to establish a value for such income."<sup>67</sup> Under the current system, inequities arise from a refusal to determine the value of in-kind income in certain situations. Under a full valuation approach, they would arise from the SSA's inability to determine value accurately and consistently throughout the system.

Even if the SSA were able to value in-kind income, this proposal would create major administrative problems. It would require dramatic increases in SSA staff and support facilities to determine the value of support and maintenance in individual cases. Despite this expansion, the inherent difficulty of making such determinations would delay SSI application processing. Additional appeals would result, further straining the appeal process.<sup>68</sup>

Finally, the full valuation method would increase the present disincentives to family assistance for SSI recipients. Because the SSA would deduct the full value of the in-kind assistance from the recipient's SSI benefits, private contributors could not increase the

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<sup>67</sup> 1975 *Hearings*, *supra* note 4, at 10 (statement of James Cardwell, Commissioner, Social Security Administration).

<sup>68</sup> See SUBCOMM. ON SOCIAL SECURITY OF HOUSE COMM. ON WAYS AND MEANS, 96TH CONG., 1ST SESS., SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES: SURVEY AND ISSUE PAPER 21 (Comm. Print 1979); SUBCOMM. ON SOCIAL SECURITY OF HOUSE COMM. ON WAYS AND MEANS, 95TH CONG., 2D SESS., DISABILITY ADJUDICATION STRUCTURE 24-27 (Table I) (Comm. Print 1978); BUREAU OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION, BHA FACT SHEET FOR FISCAL YEAR 1977, BHA Pub. No. 039 (1978).

standard of living of an SSI beneficiary unless they first paid the total amount of SSI benefits received by the individual.

## 2. *Partial Exemption*

Some legislators have suggested that the SSA should exclude donated cash or in-kind support and maintenance worth less than a specified dollar amount when computing the recipient's income level.<sup>69</sup>

This bill would encourage members of the immediate family to supplement the frugal SSI benefit, thus enabling the beneficiary to rise above a less than bare minimum subsistence level. [A] \$200 a month limitation [on the amount disregarded] . . . provides enough flexibility to make a meaningful contribution to all individuals without permitting excesses. Most contributions will be considerably less. The legislation will also eliminate the need for subterfuges to disguise cash contributions as inkind payments, thus enhancing respect for law and the dignity of all involved.<sup>70</sup>

Because an individual receiving up to \$200 in cash or in-kind donations would receive the same SSI benefit as a more needy individual receiving no donations, this approach would produce serious inequities. Moreover, such a dollar limit would significantly increase the SSI program cost. In addition to the expanded SSA staff and resources required in each case to ensure that the in-kind income is worth less than \$200, the total amount of SSI payments would increase because many SSI beneficiaries would no longer be subject to any benefit reduction.<sup>71</sup> If Congress expanded the exclusion to cover the first \$250 of donated income,

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<sup>69</sup> See, e.g., H.R. 7033, 94th Cong., 1st Sess., 125 CONG. REC. 14512 (1975) ("A bill . . . to provide that support and maintenance (in cash or kind) furnished to an eligible individual by members of his or her immediately [sic] family shall be disregarded (and shall not serve to reduce his or her supplemental security income benefits) to the extent that it does not exceed \$200 a month."). This bill covers only support and maintenance provided by an individual's immediate family; a more equitable approach would disregard the source of the assistance. See also H.R. 8375, 94th Cong., 1st Sess., 121 CONG. REC. 21685 (1975) (proposing exclusion of up to \$250).

<sup>70</sup> 1975 *Hearings*, *supra* note 4, at 452 (statement of Rep. Edward I. Koch).

<sup>71</sup> Individuals whose SSI benefit levels are currently subject to the one-third reduction because they receive support and maintenance worth less than the specified dollar amount would receive no support and maintenance if the first \$200 were excluded. Thus they would no longer be subject to the one-third reduction.

available resources would, in effect, double for some recipients.<sup>72</sup> Aware of these problems, Congress has refused to adopt proposals excluding initial amounts of donated income.

### 3. *Reductions in Presumed Value*

Proposals to reduce the presumed value of in-kind support and maintenance from the current one-third to one-fifth of the applicable benefit level are variations of the current scheme. As with the one-third rule, all in-kind income worth more than the presumed value would not count in computing SSI benefits. Unlike the partial exemption proposals based on a dollar amount, a reduction in the presumed valuation would present the same disincentives to outside sources of assistance that exist under the current scheme.<sup>73</sup> A family's contribution would improve the recipient's standard of living only if the contribution exceeded the fractional reduction.<sup>74</sup> This approach also ignores the problems caused by wide variations in the value of donated support and maintenance. The SSI program would remain open to abuse by recipients whose wealthy contributors can satisfy their every material need. Like the partial exemption proposals, reduction in the presumed value would increase program costs. This proposal would increase SSI benefits for all those now subject to the one-third reduction rule and would extend SSI payments to individuals who are currently ineligible because their total income—including the presumed value of in-kind income—exceeds the applicable benefit level.<sup>75</sup> The House Ways and Means Commit-

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<sup>72</sup> The maximum current SSI benefit for an eligible single individual is \$208.10 per month. Under a \$250 exclusion, if an individual received full SSI benefits plus in-kind support with an actual value of \$250, his available resources would be more than doubled.

<sup>73</sup> Any donation of in-kind support and maintenance to the SSI recipient would trigger the fractional reduction in benefits, even if the contribution's actual value was less than the amount of reduction. Where the recipient successfully rebutted this presumed valuation, donated contributions would reduce his SSI benefit, dollar-for-dollar, until increasing donations equalled the fractional amount. See note 60 and accompanying text *supra*.

<sup>74</sup> A family unable to contribute more than \$69.40 (one-third the current benefit level for a single individual) to an SSI recipient might be able to afford more than \$41.64 (one-fifth the benefit level). For such families, reduction in the fractional valuation would remove the disincentive to aid an SSI recipient.

<sup>75</sup> As the presumed value of the in-kind income shrinks, the amount of income attributed to the individual also decreases. Individuals with in-kind support and maintenance valued at one-third the applicable benefit level may be ineligible for SSI because their income level slightly exceeds the current applicable benefit level. Such individuals may become eligible if the reduction in the presumed value of their in-kind income pulls their income level below the benefit level. Because their entitlements would not exceed the reduction in presumed value of in-kind support and maintenance, their actual benefits may be comparatively low.

tee rejected a proposal to reduce the presumed value of in-kind support and maintenance because "it would not completely solve the problems which arise, and entailed considerable cost."<sup>76</sup>

Another proposed modification would reimburse recipients for all partial payments they make towards in-kind support and maintenance, up to the amount of the one-third reduction.<sup>77</sup> Although this proposal would eliminate inequities arising from the current disregard of partial payments, the reimbursement would subsidize outside sources of assistance. If the SSA reimbursed recipients dollar-for-dollar for all partial payments up to the one-third reduction amount, they would have no incentive to hold such payments below that amount. Consequently, the federal government could end up paying full SSI benefits to a recipient who in turn might pass one-third of each payment to his source of support. Because these proposals would dramatically increase costs without substantially benefiting recipients, they do not merit serious legislative consideration.

#### 4. Complete Exemption

A bill currently before Congress would exempt all in-kind support and maintenance from SSI benefit calculations.<sup>78</sup> This approach could be easily administered and would eliminate disincentives to outside sources of assistance. The proposal, however, would allow wide disparities in the value of the in-kind income, yet would not affect the amount of SSI benefits and would not prevent abuse of the SSI program. Moreover, the proposal might encourage recipients to disguise cash payments as in-kind income

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<sup>76</sup> HOUSE COMM. ON WAYS AND MEANS, SUPPLEMENTAL SECURITY INCOME AMENDMENTS OF 1976, H.R. REP. NO. 1201, 94th Cong., 2d Sess. 11.

<sup>77</sup> See, e.g., H.R. 165, 94th Cong., 1st Sess., 121 CONG. REC. 188 (1975). The National Retired Teachers Association and the American Association of Retired Persons endorsed this approach. Speaking on behalf of these organizations, John B. Martin, former United States Commissioner on Aging, stated: "Arbitrary rules to avoid the complexity of individualized determination fail to provide the human compassion and understanding which is necessary to maximize the choice of living arrangements available to SSI recipients." 1975 Hearings, *supra* note 4, at 265.

<sup>78</sup> H.R. 1727, 96th Cong., 1st Sess., 125 CONG. REC. H 403 (daily ed. Jan. 31, 1979) ("A bill to amend . . . the Social Security Act to provide that support and maintenance furnished in kind shall not be counted as income in determining the eligibility of any individual for supplemental security income benefits or the amount of such benefits, whether such individual is living in another person's household or otherwise . . ."). Several bills to exempt all in-kind support and maintenance provided to mentally retarded individuals living in another person's household have been introduced. See, e.g., H.R. 588, 96th Cong., 1st Sess., 125 CONG. REC. H.172 (daily ed. Jan. 18, 1979); H.R. 3937, 95th Cong., 1st Sess., 123 CONG. REC. H.1,394 (daily ed. Feb. 23, 1977).

in order to take advantage of the full in-kind exemption. The proposal would cost more than the current program, since SSI benefits would increase by the amount of the one-third reduction. In addition, benefits would be extended to recipients who are now ineligible because their income, including the value of in-kind support and maintenance, exceeds the applicable benefit level. SSI benefits would also increase for those who are able to successfully disguise cash payments as in-kind income.

### E. *Recommendations*

Most of the problems with the current treatment of in-kind income can be solved without radically restructuring the SSI program. Congress should (1) replace the one-third reduction rule's irrebuttable presumption with a rebuttable presumption, (2) provide a statutory basis for the current regulations that extend the one-third reduction rule, (3) adopt a reduction scheme requiring fractional valuation for all in-kind support and maintenance, and (4) narrow the definition of "support and maintenance."

#### 1. *Replace the Irrebuttable Presumption With a Rebuttable Presumption*

The statute's one-third reduction rule contains an irrebuttable presumption that the value of the in-kind support and maintenance income provided to the SSI recipient living in another person's household is worth one-third of the recipient's applicable benefit level.<sup>79</sup> Congress could improve the SSI program in three respects by making this presumption rebuttable. First, this modification would remove any doubts about the statute's constitutionality.<sup>80</sup> Second, a rebuttable presumption could simplify the regulations, which now draw complex distinctions between situations in which the presumed value is rebuttable and those in which the presumed value is irrebuttable.<sup>81</sup> Removing the irrebuttable presumption would foster consistent and coherent regulations. Such a modification would alleviate some of the inherent inequities of the statute because recipients who receive in-kind income worth less than the presumed value would be able to rebut the presumed valuation. Moreover, a rebuttable presump-

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<sup>79</sup> See note 11 and accompanying text *supra*.

<sup>80</sup> See notes 55-57 and accompanying text *supra*.

<sup>81</sup> See 20 C.F.R. § 416.1125 (1979) and notes 57-58, 47-48 & 32-35 *supra*.

tion would reduce the disparate treatment between persons covered by the statutory one-third reduction rule and those covered by the rebuttable one-third reduction.<sup>82</sup>

Although a rebuttable presumption would increase program and administrative costs, the additional expense would be minimal. Since the one-third reduction is based on SSI's low benefits, the value of in-kind support and maintenance will usually exceed the one-third reduction.<sup>83</sup> Consequently, few recipients would challenge the reduction by seeking actual valuation of their support and maintenance. Moreover, a challenging recipient would bear the burden of proving the actual value of his support and maintenance, thus minimizing additional administrative responsibility.

## 2. *Provide Statutory Support for Current Regulations*

Although designed to facilitate administration of the one-third reduction rule, the current regulations exceed their statutory authority. They extend the one-third rule to situations not covered by the statute and prevent unearned in-kind support and maintenance income worth more than the presumed value from reducing the recipient's benefit.<sup>84</sup> These regulations would not

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<sup>82</sup> In addition to differences in the amount of benefit reduction, a further inequity occurs when the SSA uses a rebuttable presumption to value support and maintenance received by persons exempt from the statutory one-third reduction rule because they are living in their own households or are receiving only food or shelter. Such individuals have a choice. If the actual value of their in-kind income exceeds the presumed one-third, they can choose to do nothing and benefit from income not counted against their benefit level. But if the actual value of the in-kind income is less than the presumed value, they can rebut the presumption. If they succeed, their SSI benefits will increase. Because of current regulations, the statutory irrebuttable presumption thus engenders inequities within the SSI program. See notes 32-36 & 47-48 *supra*.

<sup>83</sup> The minimum income level guaranteed to an eligible single SSI applicant was "approximately 73% of the poverty line [income] for a one-person family." The income level assured an eligible couple was "approximately 83% of the poverty threshold for a two-person family." CONGRESSIONAL BUDGET OFFICE, WELFARE REFORM: ISSUES, OBJECTIVES AND APPROACHES 11 (1977). Even after inclusion of state supplements, the income levels often remain below the Bureau of Labor Statistics' estimated poverty levels. See 1975 Hearings, *supra* note 4, at 641 (statement of Janet Bruin, Community Organization Director, Philadelphia Corp. on Aging). In many cases, the benefit levels even before application of the one-third reduction do not cover the cost of basic necessities. See *id.* at 153-54 (statement of Rep. Elizabeth Holtzman); *id.* at 167 (report of the SSI Monitoring Subcomm., Citizens' Committee of Aging); *id.* at 228-29 (statement of William R. Hutton, executive director, National Council of Senior Citizens); *id.* at 301 (statement of Joseph A. D'Elia, commissioner, Nassau County Dep't of Social Services).

<sup>84</sup> See notes 33-35 and 47-50 and accompanying text *supra*. The Senate Finance Committee's staff report on the SSI program noted that the SSA reacted to problems caused by the one-third reduction rule

withstand judicial review.<sup>85</sup> Although a court challenge is unlikely because the regulations benefit most affected SSI recipients,<sup>86</sup> Congress should provide statutory support for the regulations. Such approval would not change the operation of the SSI program.

### 3. *Require Fractional Valuation of Contributions*

The most serious defect of the one-third reduction rule is that it discourages contributions from an SSI recipient's family and friends. Under the current scheme, such contributions may reduce a recipient's benefits, and occasionally, reduce his net income.<sup>87</sup> Congress should eliminate this disincentive by requiring the SSA to value all in-kind donations at a specified fraction of

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not by seeking legislative change, but through administrative action contrary to the law. . . . [T]he Social Security Administration has transformed the one-third reduction rule from an alternative to be used in certain specified cases meeting statutory criteria to a maximum limit on the value of in-kind contributions. The statute says all income is to be considered except where an individual is living in someone else's household and receiving income in kind from him; the Social Security Administration's policy says instead that regardless of whether an individual is living in someone else's household, income in the form of support and maintenance in kind shall *never* be considered to be worth more than one-third of the basic payment level. . . . While this rule may be of some help, administratively, there is no statutory basis for it.

STAFF REPORT, *supra* note 3, at 73 (emphasis added).

<sup>85</sup> The Supreme Court enunciated the appropriate standard of review of regulations in *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356 (1973):

Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of the enabling legislation."

*Id.* at 369 (citing *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 280-81 (1969) (footnotes omitted)). The relevant provision of the SSI statute provides: "The Secretary may make such administrative and other arrangements . . . as may be necessary or appropriate to carry out his function under this subchapter." 42 U.S.C. § 1383b (1976). The regulations fail to meet the *Mourning* test. By exempting all in-kind income worth more than the presumed value, the regulations contravene the statute's purpose of providing a uniform governmental minimum income. They also directly conflict with the statute's explicit requirement of including *all* unearned income not falling within a statutory exception.

<sup>86</sup> In the few cases in which the actual value of in-kind income is less than the amount of the one-third reduction, the regulations allow the SSI recipient to prove the lower value and obtain an adjustment in his benefit level. 20 C.F.R. §§ 416.1125(c), (d) (1979). Such claimants have little incentive to attack the regulations. They would have to present the same evidence as they would if they were rebutting the presumption of value, and, if successful, they would risk the consequences of removal of the one-third rule's ceiling. Although the individual's in-kind income may now be less than the one-third reduction, because of inflation its value may rise above that level in the future.

<sup>87</sup> See notes 59-60 and accompanying text *supra*.

their actual value and deduct this amount from the recipient's benefit level.<sup>88</sup> If a contribution of support and maintenance activated the one-third reduction rule, the SSI recipient could rebut the rule's presumption of value by showing that the fractional value of the contribution less any payment made toward it was less than its presumed value.<sup>89</sup> If he succeeded, the SSA would deduct a fraction of its net value from his benefit level. In other situations where the actual value of donated support and maintenance is subtracted dollar-for-dollar from a recipient's benefit level,<sup>90</sup> Congress should require the SSA to deduct a fraction of the value instead. If such donations increased, the SSA would further reduce the individual's benefit level until the fractional value exceeded the presumed value under the one-third reduction rule. The SSA would then disregard further contributions.<sup>91</sup>

This fractional valuation approach would encourage contributions from families and friends. A contribution to an SSI beneficiary would immediately increase his standard of living, because the SSA would reduce his benefits by only a fraction of the contribution. This approach would also recognize the recipient's partial payments toward his support and maintenance. The SSA would subtract the payment from the actual value of the support and maintenance and then compute the fractional value of the remainder. To the extent that such payments reduced the fractional value below the presumed value and the recipient chose to rebut the presumption, his SSI benefits would increase. The SSA would, in effect, reimburse him for a fraction of that payment. Successful implementation would reduce inequities of the current approach and provide meaningful assistance to individuals making partial payments.

This approach, like others discussed above, would significantly increase program costs. Although the SSA now assesses the actual value of in-kind support and maintenance in certain cases, the administrative burden would increase if more beneficiaries could rebut the presumption of value.<sup>92</sup> Benefit costs would also

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<sup>88</sup> This approach is similar to the SSI program's work incentive provision, which disregards the first \$20 of earned or unearned income each month. 42 U.S.C. § 1382a(b)(2)(A) (1976).

<sup>89</sup> See 20 C.F.R. § 416.1125(d) (1979).

<sup>90</sup> See *id.* § 416.1125(d) (presumption rebutted upon showing market value of contribution) and note 34 and accompanying text *supra*.

<sup>91</sup> See 20 C.F.R. § 416.1125(b)(1) (1979).

<sup>92</sup> The magnitude of this increased burden is difficult to predict. Because of extremely low benefit levels, many SSI beneficiaries could not rebut the presumed one-third valuation

increase, but additional outside contributions encouraged by the fractional valuation approach would partially offset such costs.<sup>93</sup> Without empirical study, however, the overall cost increase is unpredictable.<sup>94</sup>

#### 4. *Narrow the Definition of "Support and Maintenance"*

The SSA should restore its pre-1978 definition of support and maintenance as "room and board and . . . other incidentals, such as clothing, necessary to an individual's sustenance."<sup>95</sup> Under this definition, an SSI beneficiary's receipt of medical supplies from the person with whom he lives would not reduce his benefit beyond the one-third reduction.<sup>96</sup> The phrase "necessary to an individual's sustenance" should provide some limit on the quantity of food or clothing that constitutes support and maintenance;<sup>97</sup> by narrowly interpreting "necessary," the SSA could prevent individuals who receive extensive support and maintenance from abusing the one-third reduction rule. This approach would require careful implementation to minimize intrusive inquiries about the nature of donations to the SSI recipient. Its potential for eliminating non-needy recipients from the SSI rolls, however, makes it one of the most cost-effective measures available.

### CONCLUSION

After six years of operating the SSI program, the SSA has attempted to solve the major administrative problems presented

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even when using fractional valuation of the actual in-kind income. The magnitude of these effects also depends on the fraction chosen; more beneficiaries would be able to rebut the presumed one-third value if the in-kind contributions were valued at 50% of actual value than if they were valued at 75% of actual value. A sliding fractional rate, similar to a progressive income tax rate, may be desirable. Small contributions could be valued at a lower fraction than larger contributions. This approach would encourage a greater number of small contributions without increasing the total cost of the program as much as would a uniform low rate for all contributions.

<sup>93</sup> If Congress adopted a 50% fractional valuation scheme, a \$50 contribution to an individual who currently receives no support and maintenance would produce a \$25 net increase in his standard of living and a corresponding \$25 decrease in federal expenditures. If such a scheme encourages additional contributions to individuals not otherwise subject to the one-third reduction rule, federal expenditures might decrease.

<sup>94</sup> No empirical data exists to indicate the number of individuals whom this proposal would affect because many such persons are now subject to the one-third reduction rule or receive no SSI benefits at all. In either case, since the actual value of total support and maintenance received is unascertainable, accurate assessment of the probable effects of fractional valuation is impossible.

<sup>95</sup> 40 Fed. Reg. 48,937, 48,938 (1975).

<sup>96</sup> See note 28 and accompanying text *supra*.

<sup>97</sup> See note 26 and accompanying text *supra*.

by the one-third reduction rule. The rule itself, however, is flawed. The rule discourages outsiders from aiding SSI recipients, penalizes some recipients for their living arrangements, and allows individuals whose benefactors provide them with high standards of living to misuse the SSI program. In addition, the irrebuttable presumption employed by the rule may not pass constitutional muster. Although legislators have proposed major changes to correct these problems, radical restructuring of the program is unnecessary.

By replacing the rule's irrebuttable presumption with a rebuttable presumption, Congress can remove any constitutional defects and provide the program with needed flexibility. Such a modification would eliminate the penalty to recipients whose actual in-kind income is less than the one-third reduction. Congress should also provide statutory support for the present regulations' extension of the one-third reduction to remove any doubt concerning the legality of the SSA's eligibility determinations. To encourage contributions from families and friends, Congress should require fractional valuation of donated support and maintenance. This approach would require the SSA to recognize the value of a recipient's partial payments toward his support and maintenance. Finally, the SSA should tighten the definition of support and maintenance to minimize abuse of the SSI program. Although these modifications would increase the administration costs of the SSI program, they would significantly improve the operation of the one-third reduction rule.

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