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FOUNDATIONS OF LEGAL ATTITUDES TOWARD WELFARE RECIPIENTS' RIGHTS AND PRIVILEGES: A SURVEY.

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Beginning with the Elizabethan Poor Laws of the Sixteenth century, cultural predispositions and ingrained attitudes concerning welfare have been reified to form the basis of our existing social and legal attitudes on this topic. This heritage is reflected in a chain of ideologies transmitted through our elected representatives and translated into existing welfare laws.

Increasing automation in 20th Century America has made the recipient of public welfare a cog in the wheels of administrative procedure. Rights and privileges are defined morally according to community values. Laws conditioning the receipt of welfare are predicated on these values. The courts, with their high costs and time delays have remained one of the few avenues of redress, but are a vehicle little understood, feared and ill-afforded by those subject to the whim of the administrative and moral interpretation.

This study concerns the origins and evolution of public attitudes about rights and privileges accorded recipients of public welfare as reflected in welfare laws in the United States.

English Heritage

The English poor-law system originated with the Poor Law Act of 1598 which was passed by the Ninth Parliament of Elizabeth I of England. The poor laws, directly and indirectly, may be credited with laying the foundations or precedents for laws and attitudes that exist today. In the original poor laws and related legislation we find the "means test,"[1] re-

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[1] The "means test" required parents or children of poor persons to contribute to their support when they had sufficient means. This obligation was extended to grandparents in 1601 and reinforced as late as the Poor Law Act of 1930. Familial responsibilities have also been upheld in the U.S. See, for example;

(1) Snell v. Wyman, 393 U.S. 323 (1969).

Where welfare departments may confiscate tort recoveries and inheritances from A.F.D.C. (aid to families with dependent children) recipients;

(2) Woods v. Miller, 70-780 (W.D. PA., 1970).

(3) Carleson v. Superior Court, 100 Cal. Rptr. 635 (Calif. Ct. app. 1972).

strictions on indigent travel, the idea of local responsibility for the poor, forced labor or make work projects, governmental wage subsidies, public attitudes toward the poor as a class of persons deemed to be shiftless, lazy and genetically inferior, and class distinctions made by society in questions of restitutionary rights versus privileges.

The poor laws were brought about by an admixture of compassion for the needy and a fear of disturbance. They were based upon a minimum of social amelioration and maximum deterrence.

Sixteenth century England was changing from a basically feudal farming society to an industrial one. The maintenance of peace was a continuous problem when the English Lords erected enclosures and turned arable land into pastures in order to pursue the much more profitable industry of wool growing. As the farm land disappeared, thousands of peasants were displaced. These displaced peasants roamed the land resorting to begging, thievery, or whatever menial work that could be found. However, the right of mobility was restricted to the parish by the 1662 Act of Settlement and Removal. The parish became a "country" to which the indigent was bound by birth. Further, roving indigents could be forceably brought back to their native parishes which were legally obligated to provide relief.

In the parish, unpaid overseers of the poor, under the direction of Justices of the Peace, were appointed to provide for the poor and to tax the parishioners in each jurisdiction. The duties of the overseer included supervising the able-bodied poor on jobs intended to return some money to the system. The result of these efforts was often forced labor or make-work tasks, not too dissimilar to many work schemes for indigents today.[2] Unfortunately, the overseers were often corrupt or incompetent and the work system failed to solve the problem of swelling welfare rolls.

The system failed completely with the passage of the Speenhamland law in 1795. The Speenhamland Law provided a governmental subsidy when wages fell below an established scale. Employers naturally paid below scale.[3] Further stigma was attached to the receipt of this form of subsistence allowance as a charity.

In the cities, the general public ignorance of conditions of the working classes and their residence areas, which later became known as slums and

[2] C. F. Ramas v. County of Madera, 484 P.2d 93 (Calif. Sup. Ct. 1971).

[3] Speenhamland Law was repealed in 1834. The failure of subsidized employment with a goal toward creating a minimum income policy creates a precedent of doubt in President Nixon's welfare reform proposals (HR. 1, 1969).

today ghettos, strengthened the conception that the poor were merely shiftless. The physical degradation induced by these conditions stamped the slum dwellers as a race apart. The slum dwellers, in turn, discouraged with their lot in life and unable to improve their condition, turned to drink. The immorality engendered by the overcrowded conditions and the desperate hopelessness compounded by dirt, disease and misery made most people caught in these circumstances apathetic, and indifferent to their surroundings.

Thus, the Sixteenth century provided the underpinnings of belief that the poor possessed certain inherent characteristics which society could not change, but might regulate. Social responsibility became synonymous with gratuity, amelioration with compulsory forced work schemes, and poorhouses and poverty with genetic predisposition.[4]

American Heritage

The Eighteenth and Nineteenth century New England colonies strongly identified with the economic and religious doctrines of the Puritans of England. The immigrants to America followed their English counterparts in derogating economic assistance to the poor. Practically, peddlers or vagrants were threats to the tenuous thread of self-sufficiency in the colonies and little could be spared for nonproductive members. Moreover, the early colonists could not tolerate deviations from the social and religious norms of community life. The Puritan ethic viewed poverty or wealth as a demonstration of God's grace. Riches were proof of goodness and favor while insufficiency and poverty were evidence of evil and rejection.[5] Charity was regarded as a family responsibility.

The administration of poor relief followed the English pattern. In

[4] Excellent background material on the economic status of England during this period may be found in Karl Polanyi, *The Great Transformation* (New York: Holt, Rinehart and Co., 1957). See also, D. L. Hobman, *The Welfare State* (London: John Murray, Ltd., 1953); Maurice Bruce, *The Coming of the Welfare State* (New York: Schocken Books, Inc., 1966); for a discussion of conditions within the workhouses see James Farndale, ed., *Trends in Social Welfare* (London: Pergamon Press, Ltd., 1965); on the Speenhamland Law see Samuel Mencher, *Poor Law to Poverty Program* (Pittsburgh Press, 1967).

[5] The Reverend Thomas Hooker rejected the idea that the poor should be aided or supported by the community: "neither rule nor reason leads us or allows us to relieve the poor by all our good things." Quoted from Mencher, *id.*, p. 43. This, of course, excluded the church which was then and is now supported by the public and aided by governmental tax relief. See also, R. H. Tawney, *Religion and the Rise of Capitalism* (London: John Murray, 1926), and Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans, by Talcott Parsons (New York: Charles E. Scribner, 1958).

New England, the town was the principle unit of aid. In the southern colonies, the parish was the central agent, but was held responsible to the county court. In New York, the church assumed responsibility for charity. However, all colonies sought to avoid governmental relief systems. Some colonies adopted the practice of restricting entry and deporting undesirables.[6] Only the Dutch settlers organized work-relief programs for the poor. However, the New England towns did provide a reduction of taxes, and food and clothing at reduced prices for the needy. Generally, the few demands made by the poor were met by negative spirit and action.

American Ethics

Early American social norms reflected the commercial ideals of the Protestant ethic, the notion of social contract as interpreted by Locke, and the ideology of the "natural" equality of man. Also, many theorists have espoused the proposition that the Federalist position reflected at the "Grand Convention" of 1787 could be summarized as an association solely for the protection of life and property. The theories of social contract, equality and protection of property may be extended to a system of welfare laws formulated by the "haves" as a form of protection against the "have nots." Since this was an underlying purpose in the Elizabethan poor laws, it is not too remote to infer this same motivation in the development of our own welfare legal system. However, while maintaining the same legal attitudes about the nature of poverty, early American state and county welfare systems gave way to more localized control while the English turned increasingly to centralized governmental direction which has culminated in an almost completely socialized welfare system. Even at this early date reform liberals in England and the United States espoused education as a means of preparing the lower classes to improve their social position, and saving to learn the habit of thrift. Numerous temperance societies were formed to combat the immorality associated with poverty.

In accordance with our religious mores, charitable organizations emphasized the importance of the contribution of the individual. They felt that individual initiative rather than the force of society should be the stimulus for change. Opportunity could always be found along the expanding frontiers. The offspring of this philosophy was the paternalistic benevolence of the wealthy industrialists and businessmen of the period.

[6] Indigents have traditionally been unwelcome arrivals in the U.S. in spite of the greeting noted on the Statue of Liberty. An Act Concerning Passengers in Vessels Coming to the Port of New York sought to regulate such arrivals under the state's police powers as late as 1824. See: N. Y. v. Miln, 11 Peters 102 (1837).

Another element of American tradition that is worthy of note was the attitude toward foreigners and their customs. During the colonial period, immigrants were viewed as intruders for economic and religious reasons. Many settlers from Southern and Eastern Europe, and notably Ireland following the potato famine, arrived in America destitute. During the Nineteenth century, they became the consistent scapegoats for all the problems of the ricocheting economy; as the Negro of today is blamed for the problems of the cities. Foreigners were held responsible for the crowded cities, low wages, and periodic depressions. They were blamed for *their* poverty, *their* slums, and crime. The Social Darwinists viewed foreigners as an unfit and inferior species. The only solution provided by the welfare agencies appearing in the cities was to gather poor slum children together and send them to farms in the country where they were frequently exploited. At the end of this era, a gradual shift occurred from the idea of individual to social causation as the determinate of poverty, although the fear of the consequences of public relief remained tenaciously welded to the belief in the defective character of the recipients. The one bright star on the horizon was the increased use of scientific social research techniques, which attempted to view poverty objectively rather than subjectively and moralistically. Facts and figures began to offset myths.

An Increased Role for Government

In the late 1800's and early 1900's, the growing complexity of social and economic life resulted in increasing social intervention by government. The haphazard public relief system suffered most during the frequent depressions that followed the Civil War. Great numbers of unemployed crowded the cities and demanded special governmental action. However, the greatest welfare burden was borne by private philanthropic organizations. The primary distinction between the private and governmental approach to welfare assistance was that in the first case stress was placed on the social and economic conditions affecting the general well-being of the recipient while the latter adhered to a preoccupation with the unique individual characteristics which led to failure.

Governmental interest in public welfare turned briefly to private insurance schemes and the illusion that welfare administration might develop as a private instead of public administrative burden. However, the means for a more direct role for government arose with the passage of the Sixteenth Amendment to the Constitution in 1913.[7] This amendment has

[7] Nowhere in the Constitution is a responsibility for welfare mentioned, except

provided not only a large and secure resource, but was related to the ability of the taxpayer to pay.

The shambles of the Hoover administration gave way to the Great Depression of the Thirties and a growing recognition that the economic system was not an end in itself, but a means to man's welfare. In a 1934 message to Congress, President Franklin D. Roosevelt stated the objectives in a modern state's responsibility to its citizens:

> Among our objectives I place the security of the men, women and children of the nation first .This security for the individual and for the family concerns itself primarily with three factors. People want decent houses to live in; they want to locate them where they can engage in productive work; and they want some safeguard against misfortunes which cannot be wholly eliminated in this manmade world of ours.

The means of attaining these objectives have yet to be translated into laws.

Social Security

America began with the myth of an "endless frontier" for expansion and unhampered opportunities for every man to earn a living free of the social encumbrances that hampered England and Europe—every able-bodied man could find a job if he really wanted to work. Also, there was a firm belief that any responsible industrious and thrifty man could set aside enough money during his productive years to provide for temporary bad times as well as sickness and old age. Despite evidence to the contrary, the false image of each man's productivity extending to 75 years of age which had applied to life on the farm, was extended to city workers in an age of industrialization. By 1929, reality proved that employment for those over 40 was almost non-existent. Benefits available for the average worker included limited workman's compensation, private life insurance, and little else. Also, the employment situation in 1929 differed from earlier eras. The vast frontiers of expansion had largely closed and the United States had become a nation of employers and employees, rather than farmers. Of the 49 million gainful workers in the 1930 census, only 4 million were listed as farm laborers.

The long term collapse of the economy in the period 1930-1936 brought a realization that an industrial society required a carefully planned system of meeting the needs of millions who could be deprived of employment

in Art. I. Section 8, Cl. 1, where the powers to collect taxes and "provide for the common defense and general welfare of the United States," are linked.

through no fault of their own.[8] The indictment that the unemployed were intrinsically lazy, intellectually inferior and improvident could not logically be extended to cover one-third of the work force. With the fact of 15 million persons unemployed in 1934, the situation demanded unprecedented action by government. Accordingly, President Roosevelt announced his desire for a broad social insurance program to protect individuals from the major economic hazards of the fluctuating economy. Roosevelt's Committee on Economic Security submitted a report to Congress in early 1935 which, with minor modifications, was passed by the House and Senate and signed into law by August 14, 1935.[9]

The Act was not viewed favorably by all. Governor Landon, the Republican candidate for the Presidency in 1936, characterized the Act as "unjust, unworkable, stupidly drafted, and wastefully financed."[10] Many workers opposed the jobless compensation scheme which permitted others to obtain money for not working. Fear was expressed that large corporations would throw men out of jobs in order to avoid payroll taxes. Others viewed the Act as the first step leading to the collapse of the political and economic structure, the usurpation of sovereign state's rights and an impingement on individual liberties.[11]

The Social Security Act may have justified Landon's criticism of the measure as a cruel hoax on the American people. It rendered assistance to the jobless, but did not eliminate the major causes of insecurity.[12] There was no protection offered against illness, the premature death of the head of household, or against industrial accidents, something the states had continuously refused to act upon. Instead, it provided tragically inadequate protection for a minority of the population.[13]

[8] In the campaign of 1932, FDR had pledged federal government assistance and acknowledged a national responsibility for financial assistance relief. See Herbert L. Marx, Jr., ed., *The Welfare State* (New York: the H. W. Wilson Co., 1950).

[9] Excellent details on the passage of the Act are contained in Birchard E. Wyatt and William H. Wandel, *the Social Security Act in Operation* (Washington, D.C.: Graphic Arts Press, Inc., 1937).

[10] Maxwell S. Stewart, *Social Security* (New York: W. W. Norton and Co., Inc., 1937), p. 142.

[11] Also the free movement of labor would be impaired and the capitalist system destroyed. The idea that business was entitled to large profits because of the risks involved was defended over the rights of workers. "As long as it was the welfare of the propertied classes that was being advanced the work stood as Holy Writ. But the horrors of the 'welfare state' were shouted from the roof-tops when the Federal Government began to spend money to aid the great groups in our society that had little or no property,"—from "Are We Headed Toward Collectivism?" by Senators Harry F. Byrd and Paul H. Douglas in Marx, *op. cit.*, p. 83.

[12] No payments were made under the insurance schedule until 1942 in order for the reserve to develop.

[13] Farm workers, share-croppers, domestic servants and women—essentially

Provisions of the Act

The framers of the Social Security Act envisioned the act as a final and lasting contribution by the federal government to public assistance. The public assistance provisions were not originally designed to create benefits for the unemployed, but rather were intended to encourage the states to adopt systems of jobless compensation of their own.[14]

A joint responsibility for the protection of certain classes was acknowledged between federal, state and local agencies.[15] Grants to the states would be made once the states had submitted public-assistance plans to the federal government for approval. Among the standards applicable for approval of state plans, inherited predispositions of our English heritage were reflected in the following:

1) A state plan must apply to all of its political subdivisions and be mandatory to them.

2) The state must provide a portion of the cost of financing the program.

3) The state must provide the opportunity for a fair hearing to any person whose claim for assistance is denied.[16]

4) Assistance payments must be made in cash, and not in groceries or services.

5) Half of any money collected from the estates of recipients of old-age assistance must be paid to the federal treasury.

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those, with low incomes, particularly Negroes and excluded workers in exempt groups were provided grossly inadequate benefits, if any, because of the annuity scheme. The system, of course has been greatly expanded since 1935. See James Tobin and W. Allen Wallis, *Welfare Programs: An Economic Appraisal* (Washington, D.C.: American Enterprise Institute, 1968).

[14] Taxes were employed to strengthen the Act (26 U.S.C. Supp. v. Sect. 1400). The tax provisions were upheld in Helvering v. Davis, 301 U.S. 10; 81 L.Ed. 1307 (1937). Alabama's (state) unemployment compensation tax (law) was upheld in Carmichael v. Southern Coal and Coke Co., 301 U.S. 495, 81 L.Ed. 1245 (1936).

[15] Under the grant-in-aid system that was employed, the government was not responsible for administering public assistance, which included the classes of needy aged (Title I), dependent children (Title IV), and the needy blind (Title X). This responsibility was delegated to the states. Most states gave the task of administration to the counties, which have accepted the responsibility grudgingly. See, for example, Raymond A. Shapek, "The Cost of Welfare: Who Pays," *Conference Board Record* (May, 1972).

[16] The fair hearing requirement has proved an administrative nightmare for supervising agencies but has generally worked. H.E.W. is currently under pressure from a number of states, especially New York, New Jersey, and California, to weaken many of the important features of the fair hearing regulation (45 C.F.R. Sect. 205.10). Their opposition is to the requirement that in cases of suspension, reduction or termination of eligibility, full payment must be continued pending a state hearing decision. These states wish to return to the previously applied local fair hearing date as a payment termination point.

6) Old-age assistance and aid to the blind plans may not impose residency requirements to exclude applicants who have resided in the state for five of the preceding nine years preceding application and one continuous year immediately prior to application. Nor may the plans impose citizenship requirements.[17]

7) The purpose of the programs is to provide assistance to "needy" individuals. The exact definition of need was left to each state.[18]

Within these basic provisions lie the summation of our heritage concerning the rights of indigents as interpreted by society.[19] To this point, we find a bias against the indigent and a generalized feeling of responsibility by government for the plight of the poor, but reluctance, especially on the part of local government to assume this burden. Perhaps as part of our unique materialism and individualism groups emerged dependent on (while society condoned) a system of government payments or subsidies. Welfare grants became identified (and scorned) as gratuities while other grants became recipient rights.

Rights and Privileges of Indigents

Welfare has traditionally been considered a gratuity to be granted or withheld at the discretion of the legislature.[20] The laws concerning welfare

[17] See Shapiro v. Thompson, 39 U.S. 168 (1969), for an affirmation of the indigents right to travel. The denial of public assistance on the grounds of nonresidency was ruled a denial of due process; see also Smith v. Reynolds, 277 F. Supp. 65 (E.D. Penn. 1967; however, residency requirements have been upheld in county welfare programs (General assistance) where no federal funds are involved; Peace v. Hansen, 483 P.2d 720 (Mont. Sup. Ct. 1971).

[18] In establishing the criteria for eligibility, Title IV defines needy child as "a dependent child . . . who has been deprived of parental support or care by reason of death, continual absence from home, or physical or mental incapacity of the parent." Since a determination of "need" is required as a condition of eligibility, state plans must employ some form of "means" test. All but item 3 are expressions of enforced local responsibility. Item 3 is a manifestation of the increased role of the national government in the protection of individual rights against impingement by the states which appears to have reached its apogee in the U. S. Supreme Court decisions of the Warren era. State plans may sometimes be held invalid; see Conn. St. Dept. of Public Welfare v. Department H.E.W., 448 F.2d 209 (1971).

[19] Basic rights defined by the U.S. Supreme Court include the right of liberty equality, property and contract, the right to live, marry and rear children and to maintain a home; see Mayers v. Nebraska, 262 U.S. 390 (1923). Other scholars go further and include welfare as a right to demand from government the economic necessities of life; see, James P. Cooney and H. David Prior, "Social Welfare Searches and the Social Security Act." *Yale Law Journal, 72* (June, 1963), 610. A legal "right is derived from membership in a group which is entitled to aid under a statute."

[20] Frisbie v. U.S., 157 U.S. 160 (1895). This judicial doctrine was not abandoned until 1963. See, Sherbert v. Verner, 374 U.S. 398; See also, James P. Conney and H. David Prior, "Social Welfare—An Emerging Doctrine of Statutory Entitlement," 44 *Notre Dame Lawyer,* 603 (1969).

developed on the gratuity theory and, the receipt of public welfare could be made subject to whatever conditions the state chooses to impose.[21] Welfare payments have characteristically been treated as privileges. Social welfare legislation has also incorporated its own unique characteristics. It has been defined as legislation that, among other things, sets up some minimum standard against which need of a particular group is measured.[22]

In practice welfare legislation has drawn a distinction between programs designed to assist the "middle-class" as a due, and charity programs in aid to indigents. In "middle-class" programs benefits are considered a right since eligibility has been earned and benefits are restitutionary: in this instance a "means" test is avoided. The characteristics of "charity" legislation are completely the reverse.[23] The rationale of rights based on some contribution, versus privileges has been the continued justification for the Social Security Act and subsequent increases in payments. For example, in 1949, the "Report of the Advisory Council to the Senate Committee on Finance" noted:

> Differential benefits . . . based on a work record are a reward for productive effort and are consistent with general economic incentives, while the knowledge that benefits will be paid . . . irrespective of whether the individual is in need . . . supports and stimulates his drive to add his personal savings to the basic security he has acquired through the insurance system. Under such a social insurance system, the individual *earns a right* to a benefit that is related to his contribution to production. This *earned right* is his best *guarantee* that he will receive the benefits promised, and that they *will not be conditional* on his accepting either scrutiny of his personal affairs on restrictions from which others are free.[24]

Following our cultural heritage, the legislative system has thus maintained a differentiation between privileges that are rights for those who contribute, and privileges granted, withheld, or made conditional for noncontributors. However, there is no direct correlation between the value of

[21] Charles A. Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues," 74 *Yale Law Review*, 1245 (1965).

[22] Lawrence N. Friedman, "Social Welfare Legislation: An Introduction," 21 *Stanford Law Review*, 221 (1969).

[23] For example, the recipients of farm subsidies, veterans pensions, educational benefits or even work-study programs hardly view themselves as on the government dole, much less as welfare recipients.

[24] Jacobus Tenbroek and Richard B. Wilson, "Public Assistance and Social Insurance—A Normative Evaluation," 1 U.C.L.A. L. Rev. 237. Note the reflections of the Puritan ethic?

the contribution made and the actuarial value of the benefits to which these contributions entitle a person . . . in social insurance or subsidy, entitlement is earned regardless of the amount of prior contribution.

Legislative Prerogative: The Majority Will

Rights and privileges in welfare legislation reflect the will of the people.[25] In spite of the inequities in legislative apportionment of welfare funds, the federal courts have avoided intrusion into the realm of legislative prerogative.[26] There is also no constitutional limitation or standard by which to defend the types of benefits that may be made available and the manner by which such benefits may be regulated.[27] The welfare recipient is left to the mercy of the legislature which may ignore whatever standards or conditions of eligibility for benefits it may choose, with at times, little regard for the rights of the individual.[28]

Welfare implies dependence and dependence means that people may more easily be induced to part with rights they would ordinarily defend. Some officials feel that opening one's home to unannounced inspection is a reasonable condition to the receipt of public funds. The poor may be asked to observe standards of morality not imposed on more affluent members of the community and be forced to endure officially condoned condescension, derogation and prying into even the most personal aspects of their lives.[29]

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[25] Legislative roll-call analysis of the 83rd-88th Congress (1953-64) revealed that voting on economic policy is more subject to constituency constraints. AAge Clausen and Richard B. Cheney, "A Comparative Analysis of Senate-House Voting on Economic and Welfare Policy: 1953-1964," *American Political Science Review*, LXIV (March, 1970).

[26] The Legislature's function, is to formulate policy and establish legal structures to deal with the problems: the legal system's function is to determine whether the legislature has overstepped its legal power. "The wisdom of a particular provision or the policy judgment it represents are not legal issues and should be addressed to the legislature and not the courts," see Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).

[27] Snell v. Wyman, *supra.*

[28] Cooney and Prior found only three categorical legal restraints on legislatively imposed eligibility requirements in the area of public assistance: (1) The unconstitutional conditions test . . . unconstitutional conditions may not legally be attached to the receipt of benefits in such a way that the recipient of the benefit is forced to choose between the benefit and the relinquishment of a constitutional right—see Speiser v. Randall, 357 U.S. 513 (1958). (2) The responsible relationship test . . . The conditions placed on a determination of assistance eligibility must be reasonably related to the purpose of the statute under which the assistance is made available. (3) The statutory construction test—state welfare statutes must be consistent with the purpose of the controlling federal staute. *Op. cit.*, 629.

[29] Charles A. Reich, "Midnight Welfare Searches and the Social Security Act," 72 Yale L.J. 1359 (1963).

Administrative and Legislative Coercion

In some states, mothers of illegitimate children are dissuaded from applying for assistance by threats of neglect proceedings which will lead to the loss of custody of the child or children. While receiving assistance, if the mother gives birth to an illegitimate child, she is subject to the charge that the latest pregnancy constitutes "neglect" of the previous children. In Los Angeles, the welfare department recently terminated aid to needy children in all such cases, thus purging the rolls of some 23,000 children because of actions by the mother.[30] Reich delineated seven major areas in which conditions are usually attached to determining eligibility of recipients or continued receipt of benefits: 1) Privacy—midnight raids and other intrusions in the house are justified on moral grounds; 2) Responsibility—states seek to impose duties of financial responsibility on relatives of indigents beyond that which is required by general law; 3) Residence—laws are designed to hinder migration and travel by indigents and establish elaborate residency requirements; 4) Employment—able-bodied personnel must work to be eligible for assistance; 5) Housing—public housing authorities are given the power to select and oust tenants at will, and often employ month-to-month leases (which promote insecurity); 6) Loyalty Oaths—written and verbal oaths are required as a condition of receipt of benefits; and last, 7) Criteria of Eligibility—eligibility is determined on a selective basis with a great deal of discretion being given to the individual case worker.[31]

Remedies

Many disputes over state regulations affecting welfare recipients could be settled by the Secretary of H.E.W., who has the power under the Social Security Act to issue regulations governing federally supported state programs or to disapprove programs that, in his judgment, do not conform to federal standards. He may exercise this power, or the ultimate, but not feasible, sanction of withholding federal funds from the offending state. Administrative action by H.E.W. in these instances would save untold costs and hardship on those least able to contest unfair state practices

[30] The L.A. action was later ruled invalid by H.E.W. Also in California, a woman using any portion of a grant to support a man "assuming the role of spouse" may be charged with the crime of misusing the funds. People v. Shirley, 360 P.2d 33, 55 Cal. App. 2d 521 (1961). In Washington, D.C., the courts were faced with the question of whether a mother of nine should be denied funds because her husband visited her too frequently. Simmons v. Simmons, Civil No. D 2545-61, D.C. Ct. of Gen. Sess. Domestic Relations Branch (1964).

[31] *Ibid.*, pp. 1247ff.

through the long process of litigation.[32] Where negotiation between the state welfare agency or the state and H.E.W. has failed, the matter must be decided by the courts.

In some cases, H.E.W. may challenge the offending state statute rather than impose the ultimate sanction of termination of relief. For example, in *Brodie v. Wyman*,[33] H.E.W. filed an *amicus curiae* brief challenging the validity of payments-of-benefits differentials between welfare recipients in New York City and other parts of the state.[34] In other cases, it is the burden of the recipient himself to bring his complaint to the courts. His particular problem may not lend itself to class action support. Many such cases involve seemingly minor issues, such as the right of welfare recipients to receive rent security deposits,[35] for necessary repairs to one's home,[36] and for the reissuance of lost food stamps before the original ones were recovered.[37] Some issues are raised that involve greater numbers of persons, more substantive rights, or more complicated questions. Violation of the "equal protection" clause was recently the issue for class action suits when twelve Indian counties refused to participate in the food stamp program;[38] the "duplicate assistance" policy of the Illinois Department of Public Aid which authorized deductions from assistance checks for previous emergency disbursements;[39] and citizens of Colorado who had received old age pensions and medical benefits under federal and state welfare programs but lost when the 15 percent increase in Social Security benefits in 1970[40] became effective.

These, of course, are examples of a few actions brought by individuals affected by state interpretations of legislative enactments. Federal law, however, provides an alternate means of challenging alleged unfairness.

[32] The late Justice Black has indicated that there is considerable judicial preemption of H.E.W.'s rightful responsibility and countless law suits involving welfare recipients that could be avoided if H.E.W. took the initiative in reviewing state statutes for conformity. See Black's dissents in Rosado v. Wyman, 397 U.S. 397 (1970), Lewis v. Martin, 397 U.S. 552 (1970).

[33] Civ. No. 70-C-2000 (N.D.N.Y., 1970).

[34] H.E.W. contended that the state must provide for equitable treatment of individuals assisted under the state plan. Determination of need and the amount of assistance given to all recipients must be made on an equitable and objective basis.

[35] Figures v. Swank, No. 53864 (Ill. Sup. Ct., 1970).

[36] Palmer v. State of Washington, No. 714187 (Washington Super. Ct., 1970).

[37] Williams v. Martin, No. 402556 (Calif. Super. Ct. 1970).

[38] Miller v. Martin, No. 402556 (Calif. Super. Ct., 1970).

[39] Acosta v. Swank, No. 69 C 2502 (N.D. Ill., 1969). The Illinois statute was upheld, but plaintiffs filed for reconsideration in view of H.E.W. regulation 45 C.F.R. Sect. 233.20 (a) (3) (11) (c). The regulation stipulates that only *currently* available resources should be considered in determining assistance payments.

[40] Fullington v. Shea, No. C-2469 (D.C. Colo., Aug., 1970). Savings provisions were incorporated in the 1972 Social Security payment increase legislation.

In 42 U.S.C. sect. 1983,[41] the deprivation of rights, privileges or immunities may provide an avenue for litigation. A similar remedy exists in 28 U.S.C. 1343 which permits cases to go beyond the state courts directly to the district courts and provides damages or other equitable relief.[42]

Administrative Reform

By mid-1971 over 13.6 million persons received grants equaling $5 billion under the five categorical public welfare programs.[43] These programs were designed at least minimally, to meet the needs of recipient groups, which are comprised 55.8 percent of children, 16.7 percent mothers, 14.9 percent aged, and 11.7 percent blind and disabled. Contrary to popular beliefs, less than one percent of the recipient group included able-bodied fathers.[44] The cost of these programs rises at an alarming rate each year not only with increases in welfare rolls, but also to match the rise in economic inflation.[45] The administrative system itself has become so complex

[41] Every person who, under color of any statute, ordinance, regulation custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in the action at law, suit or equity, or other proper proceeding for redress. Relief under 42 U.S.C. 1983 cannot be denied welfare claimants on the ground that they had not first sought relief under state laws providing administrative remedies. Damico v. Calif., 88 S.Ct. 526, 389 U.S. 416, 19 L.Ed. 2d 647 (1967). The problem with this statute as with the question of rights and privileges in general is, of course, that the persons affected are not always aware of the remedies available and have insufficient resources to contest arbitrary decisions by welfare officials.

[42] "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42; (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent; (3) To redress the deprivation, under color of any State Law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

[43] Category Titles include assistance for the aged (OAA), blind (AB), permanently and totally disabled (APTD), and children (AFDC). A fifth category, general assistance (GA) receives no federal funds and is completely state and locally administered.

[44] Myths concerning welfare are still so strongly attached to our belief system that in 1971 H.E.W. published a booklet entitled *Welfare Myths v. Facts* to offset public criticism of welfare programs.

[45] In January, 1973, a person was considered eligible for federal poverty programs if his net income (in a non-farm area) was less than $2,100 per year and

that only the most patient of scholars have ventured to penetrate its staggering intricacies. The cries for Congressional reform in this area are tempered by those who seek to facilitate the delivery of cash and services to the recipient groups, and those who wish to close the loopholes making the administrative burden that much more costly and difficult.

President Nixon's welfare reform proposal was introduced in 1969 and has been debated and amended in great detail, but still has failed in passage. However, in October, 1972, a Conference Committee version of H.R.1 was signed into law.[46] Significantly, the bill authorized a 1974 federalization of the categorical programs relating to the needy aged, blind, and disabled, with a national system of uniform benefits to these groups. These groups have traditionally not been included in the same classification of indigence, with the affiliated predispositions, as A.F.D.C. recipients, presumably because they also largely fall under the heading of previous contributors. Significantly also was passage in this bill of expanded benefits for Social Security and Medicare recipients, which are also largely "contributing" groups.

No compromise was reached with regard to the most controversial aspects of the proposals, those which were related to Title IV, or A.F.D.C. The Senate version of H.A.I had included provisions that would have reversed almost every major court decision in this area in the past five years. These included: 90 day durational residency requirements, restrictions on present confidentiality protections and fair hearing requirements, and prohibitions against use of the declaration system, aid to unborn children, and to non-citizens or aliens not admitted for permanent residence, and the granting of aid to alcoholics and drug addicts. In an inability to compromise, supporters and foes successfully deleted Title IV from the final bill.[47]

The successes and failures of this measure leave us with the yet unanswered question of what is a right which is owed by society to the recipient, and what is a privilege, to be granted, withheld or made subject to

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$4,200 for a family of four. The expansion rate which has proved especially irksome to legislators and constituents alike has been in the A.F.D.C. program, at 15 percent per annum. This may be one additional reason for the large number of cases reaching the courts concerning infringement of rights of A.F.D.C. recipients.

[46] PL 92-60341 U.S.L.W. 107 (U.S., Nov. 24, 1972).

[47] Pressure was exerted by the National Welfare Rights Organizations, Coalition for Adequate Welfare Reform Now, the AFL-CIO, the U.A.W., the League of Women Voters, Common Cause, the American Civil Liberties Union, and many others. For a discussion of the various proposals and Congressional action see the *Welfare Law News* (New York: Center for Social Welfare Policy and Law, Nov., 1972).

legislatively imposed conditions. In spite of considerable effort by welfare rights groups to merge the two concepts in the past,[48] and continued actions through the courts, there remains a *legislatively imposed* distinction which is based on cultural and moralistic precedent.

[48] An excellent discussion of this topic is contained in James P. Cooney and H. David Prior, "Social Welfare—An Emerging Doctrine of Statutory Entitlement," 44 *Notre Dame Lawyer*, 603 (1969).