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Daniel Katkin
University at Buffalo

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BOOK REVIEW

CASES AND MATERIALS ON SOCIAL WELFARE AND THE INDIVIDUAL.

By Robert J. Levy, Thomas P. Lewis, and Peter W. Martin.
Mineola, New York: The Foundation Press, Inc. 1971. xxi
+ 1,594 pages. \$20.50.

DANIEL KATKIN*

There is an anomalous quality about this book. Virtually every page documents the bankruptcy of the War on Poverty; yet the simple fact that the book exists is evidence that the War has not been altogether unsuccessful. Reading *Social Welfare and the Individual*, one gets the unhappy feeling that the lot of the poor has changed very little. However, the very fact that there is a demand for books such as this,¹ and that there is ample source material from which to derive their contents, suggests that the legal profession is changing. And it may well be that such a change in the attitudes and values of the legal profession is an essential precondition to significantly changing the lot of the poor.

The evidence clearly suggests that the domestic "War" waged by the Johnson administration has fared no better than the foreign one. The dream that the Economic Opportunity Act of 1964² might become the cornerstone of a successful effort to eradicate poverty clearly seems to have perished. Experts discussing various aspects of the War on Poverty seem to agree unanimously "that federally financed . . . programs have so far not resulted in any observable changes in the predicament of the poor."³ In fact, in 1969 the Committee on Labor and Public Welfare of the Senate, while recommending the extension of the Office of Economic Opportunity (OEO) for two years, virtually declared that the dream had perished by commenting casually

* Assistant Professor of Social Welfare, State University of New York at Buffalo. B.A., City College of New York, 1965; J.D., Columbia University, 1968; Dip. in Criminology, (Cantab.), 1969.

1. See also P. DODYK, *CASES AND MATERIALS ON LAW AND POVERTY* (1969).

2. Pub. L. No. 88-452, 78 Stat. 508 (1964), as amended, 42 U.S.C. § 2701-2994d (1970).

3. K. CLARK & J. HOPKINS, *A RELEVANT WAR AGAINST POVERTY* 249 (1968); See also D. MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING* 130 (1969).

that the program "offers no direct, immediate prospect of turning widespread poverty into universal prosperity."⁴

Yet it is not fair to say that there is nothing new under the sun. The values and attitudes of substantial numbers of Americans seem to have changed. There is a new political consciousness,⁵ particularly visible among the young and members of minority groups, and there even seems to have been a significant change within segments of the legal profession.⁶ Indeed a whole new concern with the legal problems of the poor seems to have developed. A note in the *Harvard Law Review* observed that:

With startling suddenness the legal profession has recently come to realize that a society can guarantee equal justice only by providing all citizens with effective access to the institutions by which justice is obtained [T]he New Wave in legal services is a recognition that the overriding interest of the poor is the elimination of poverty, an interest which lawyers for the poor must represent as advocates.⁷

The literature of the profession has seen a proliferation of articles dealing not only with the form and functions which legal services should take,⁸ but also with commentaries on the substantive issues with which poverty lawyers must deal.⁹

That lawyers have undertaken new types of cases, and begun to respond to the problems of the poor is most easily seen by observing the fact that "judicial attention to welfare programs has increased exponentially in the last few years (a trend which shows no sign of slacking)."¹⁰ Indeed, that trend is so extreme that the authors of this book complain of the difficulty in keeping the material current. So much business is being transacted so quickly by the courts, that galley proofs of such a book as this are likely to be obsolete by the time they return from the printer.¹¹

4. S. REP. No. 91-453, 91st Cong., 1st Sess. 5-6 (1969).

5. See generally C. REICH, *THE GREENING OF AMERICA* (1971).

6. See generally pp. 1423-1519.

7. Note, *Neighborhood Legal Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805 (1967).

8. See especially Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964).

9. See, e.g., J. TENBROEK, *THE LAW OF THE POOR* (1966); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

10. P. xi.

11. It should be noted that fully 70% of the cases included in the book were decided after 1964; and fully half have been decided more recently than the end of 1967. The authors have done a magnificent job of keeping current with their fast-changing subject matter.

While the law schools may not always have been in the forefront of these new developments in the profession, they certainly have not remained untouched. Many schools have developed law reform units and special service and training projects which touch upon problems of the poor.¹² At least three schools have begun joint programs leading to degrees both in law and social work.¹³ Everywhere, courses related to poverty and income maintenance are being developed and implemented. This is a development of considerable importance, and it is in the light of this development that *Social Welfare and the Individual* emerges as an important book.

Obviously, a book is important not merely because there is a need for it, but also because it adequately fills that need. The judgment that a book is important subsumes the judgment that it is also good. On balance, *Social Welfare and the Individual* is definitely a good book. But that judgment is certainly a matter of balancing.

Conceptually the book may be divided into three parts:¹⁴ The prologue, five chapters which relate to income maintenance programs and social welfare legislation (of which two are very good), and five chapters which relate to problems peculiar to the poor, but not related to income maintenance (of which two are very good). The limitations of this reviewer's expertise are of such a nature that this review will focus on the prologue and the almost 750 pages of the book which relate to income maintenance.

The Prologue

The first forty pages, while interesting, are disappointing. They are designed to give the reader a sense of the magnitude of the problem of poverty in our society. Interspersed with policy analyses and statistics are occasional descriptions of the plight of the poor. Thus, the reader learns not only that of the 25 million Americans whose annual incomes fall below the poverty line (\$3,500 for a family of four), 70% live in families with incomes at least \$500 below the poverty level, and 50% live in families with

12. Columbia Law School and New York University Law School, for example.

13. University of California at Berkeley, Washington University of St. Louis, and State University of New York at Buffalo.

14. Levy, Lewis and Martin suggest this division themselves in the preface at xii.

incomes at least \$1,000 below the poverty standard,¹⁵ but also what it means to individuals to live on such limited incomes.¹⁶

What is missing from the prologue is a discussion of the vital social and philosophical issues which are involved in the administration of social welfare programs. On the right, the argument has been made that social welfare programs give government too much control over the lives of individuals, and thus undermine the individualism and self-reliance which are necessary in a free society.¹⁷ On the left, the argument has been made that extension of the rule of law¹⁸ and traditional notions of property rights¹⁹ into this area of law will guarantee the integrity of individuals, while permitting the elimination of human misery.

A society in which a substantial number of people are dependent for their livelihoods upon the largess of government is a society in which civil liberties are in danger. Whether there are existing legal theories adequate to abate the danger is not only a vitally important issue, but also an issue which has received considerable attention in professional literature. The absence from the prologue of any materials relating to this great controversy is very conspicuous.

Income Maintenance

Each of the four major chapters in this section of the book focuses on the problems of a particular group of people (the aged, dependent children, the disabled, and the unemployed). On first blush such an approach to the complexities of social welfare legislation seems desirable indeed. The problems of each group promise to be unique, and dealing with each group *ad seriatum* seems quite rational. There is, however, a difficulty which stems from the fact that America's social response to the problems of poverty and economic dislocation is considerably less than rational. Each group of economically troubled people may be eligible for assistance from three or four different programs, and each program

15. Thus, it would be necessary to distribute 11 billion dollars among these 25 million people merely to bring each up to the poverty line.

16. A model budget on page 20 indicates that a family of four living on \$3,500 a year has \$122 per month for food, \$91 for housing, \$57 for clothing and personal care, \$6 for transportation, nothing for medical care, life insurance or gifts, and only \$9 for all other expenses (such as recreation, education, tobacco).

17. F. HAYEK, *THE ROAD TO SERFDOM* (1944).

18. Jones, *The Rule of Law in The Welfare State*, 58 COLUM. L. REV. 143 (1958).

19. See Reich, *The New Property*, 73 YALE L.J. 733 (1964).

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may be addressed to the members of as many as three or four of the groups. Consider the following chart.

TYPE OF PROGRAM	TYPE OF GROUP			
	<i>Aging</i>	<i>Children</i>	<i>Disabled</i>	<i>Unemployed</i>
General Assistance	x	x	x	x
Categorical Assistance	x	x	x	
Social Security	x	x	x	
Workmen's Compensation			x	
Unemployment Insurance				x

A serious consequence of the decision to divide the content of this part of the book into chapters about groups is that the authors have made it very difficult for the reader to develop a comprehensive understanding of some of the programs.

Yet another problem is that some of the most important constitutional cases of the past decade have been either omitted from the book altogether or presented in such a way as obfuscates their real importance. *Sherbert v. Verner*²⁰ involved a Seventh-Day Adventist who refused to accept employment that would have required work on the Sabbath. She had been found ineligible for unemployment insurance on the ground that she had refused without good cause to accept suitable employment when offered. The Supreme Court reversed on the ground that governmental units may not use the denial of a benefit as a tool with which to coerce individuals not to exercise their constitutional rights. The Court rejected the argument that because the state did not have to give the benefit at all, it was free to give it with any conditions it chose. *Sherbert* was a constitutional development of considerable importance, and its implications for the administration of all types of social welfare programs are clear. Yet the organization of the book is such that the implications of this case are understated so that it appears limited to the narrower issue of whether the first amendment protects religious freedom as "good cause" for maintaining that work is not suitable within the meaning of an unemployment insurance statute.

20. 374 U.S. 398 (1963).

*Shapiro v. Thompson*²¹ and *Levy v. Louisiana*²² are landmark cases in the development of the "new" equal protection doctrine. Yet neither case receives more than fleeting comment (not even about the constitutional issues in the case of *Shapiro*) in a note.

Traditionally the equal protection clause has been held to prohibit only those classifications made by a state which are not rationally related to some *legitimate* state interest.²³ The new equal protection doctrine holds that a state classification which tends to inhibit the exercise of some fundamental freedom is constitutionally permissible only if it is necessary to achieve some *compelling* state interest.²⁴

Thus, in *Shapiro* the Supreme Court struck down residence requirements because they tended to inhibit the exercise of the fundamental freedom to travel interstate without promoting a compelling state interest. The note in this casebook which discusses this case is concerned only with residence requirements; the constitutional *ratio decidendi* receives no attention at all.

In *Levy* the Court held that a statute which limited the right to bring wrongful death suits to legitimate children worked a deprivation of equal protection to illegitimates. Under traditional equal protection standards both a legitimate purpose (discouraging illegitimacy) and a rational relationship between the statute and that purpose might well have been found. *Levy* employed the new equal protection standard, and found no compelling interest to be served by the Louisiana statute. Its importance as an equal protection case is considerable. Yet, even though the rights of illegitimates are discussed at some length in the chapter on children, *Levy* receives no more than a single sentence in a note.

It is difficult to understand the authors' lack of concern for constitutional issues. It is as if they have conscientiously omitted cases which deal with "vague" concepts (such as equal protection and due process) in order to make more room for the types of cases which will develop technical expertise.

21. 394 U.S. 618 (1969).

22. 391 U.S. 68 (1968).

23. See Katkin, *Residence Requirements: The Unresolved Issues*, 36 ALBANY L. REV. 35, 46-48 (1971).

24. *Id.* at 48-54.

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Technical precision is indeed the great strength of this book. Statutes and administrative regulations are examined in great detail. Issues related to such things as eligibility, intergovernmental functioning, the definition of statutory terms, and the realities of economic constraints are explicated at great length. *Social Welfare and the Individual* is a virtual gold mine of information. One cannot escape the feeling that the authors of this book know everything there is to know about social welfare programs.

But the great strength is the other side of the book's substantial weakness. The authors have sacrificed discussion of constitutional and social philosophical issues almost as if that were necessary to achieve technical precision.

Two weaknesses in the book have so far been identified: a failure of organization which makes it difficult for the reader to develop a comprehensive understanding of the individual programs which constitute the nation's response to the problems of poverty and economic dislocation, and a failure to adequately address constitutional and philosophical issues. These weaknesses are comparatively inconspicuous in the chapters on disability and unemployment, which are, accordingly, the best parts of the book.

At the beginning of the chapter on disability, the authors comment that the lack of program integration in this area requires that each program be examined independently. The chapter is broken into two parts, one on social security benefits for the disabled and one on workmen's compensation. The programmatic approach (for which the authors seem to be apologetic) facilitates comprehension. In addition, the philosophical and constitutional issues simply do not have the same pressing quality in this area; consequently their absence is not so important. Furthermore, in addition to the technical precision which characterizes the entire book, there are particularly good discussions of policy issues in this chapter.

In the materials on workmen's compensation these discussions involve such issues as: what element of a disability is compensated for—is it merely the loss of earnings, or can pain and suffering be factors; to what extent can the negligence of the injured be offered as a defense by the insurer; what if an employee was injured in a fight which, though it took place at work, did not

involve work related matters; what if the injured party provoked the fight; what if a disability occurs at work but while the injured was not performing a work related function (such as an outdoor employee who is injured during working hours while trying to save a drowning man); is the insurer totally liable if a preexisting disability is made total by a work related accident; and to what extent can workmen's compensation laws be utilized to encourage the employment of disabled persons.

The single most interesting issue raised by the materials on disability insurance through the social security system involves the concept of psychiatric disability. The social security statute requires that injuries be medically provable.²⁵ The fact that differences in opinion among psychiatrists are often very pronounced, and the extent to which psychiatrists are dependent on the subjective reporting of symptoms rather than on objective and observable characteristics of disorders combine to make it very difficult to satisfy the statutory requirement. Indeed, there is even case law which stands for the proposition that chronic alcoholism (a diagnosis on which psychiatrists are comparatively likely to be able to agree and which has comparatively objective symptoms) is not necessarily disabling within the meaning of the statute.²⁶ *Marion v. Gardner*²⁷ is a particularly interesting case which held that a committed sexual psychopath is disabled within the meaning of the statute and is thus eligible to collect social security benefits during the period of his confinement.²⁸

The only shortcoming in the discussion of psychiatric disability is the failure to include some psychiatric literature. An excerpt from the works of Thomas Szasz, a University of Syracuse Professor of Psychiatry, who maintains that psychiatry is a pseudoscience comparable to alchemy and astrology²⁹ would be both illuminating and provocative in this context.

The chapter on unemployment is also characterized by interesting material related to issues of social policy. Unemployment compensation insurance (the only program discussed in

25. 42 U.S.C. § 223(d)(3) (1970).

26. *Osborne v. Cohen*, 409 F.2d 37 (6th Cir. 1969), reprinted at 631.

27. 359 F.2d 175 (8th Cir. 1966).

28. Let those who consider this just another example of "coddling," such as is no longer likely to be found acceptable by the Supreme Court, note that the decision was written by then Circuit Judge Blackmun.

29. T. SZASZ, *THE MYTH OF MENTAL ILLNESS* (1961).

this chapter) is not designed so much to alleviate the suffering of the poor as to keep middle-class people from slipping into poverty. It is designed to give temporary assistance to members of the labor force who are available for suitable employment, but who are unable to find it. Many important issues arise from the concept of availability and the corollary notion that the unemployment be involuntary: Is unemployment involuntary if it arises from misconduct by the employee; what constitutes misconduct; can an employee who moves to a section of the country where he is unlikely to be able to find suitable work maintain that he is available within the meaning of the statute; may a union member refuse to accept nonunion work and still be considered available; if a union strike at one plant causes another to close, are members of that union who work at the second plant involuntarily unemployed despite the fact that their problems stem from the voluntary actions of the organization that represents them in labor-management negotiations.

A particularly interesting issue arises from the fact that unemployment compensation is an insurance program—that is, in what manner are premiums to be assessed? There is considerable controversy over experience ratings which would relate premiums to the rate of employee turnover at a plant. An employer who provides stable ongoing employment opportunities would be rewarded by having lower premiums assessed. Such a scheme might well provide incentives to employers to regularize their labor pool and cut down on turnover. The possibility that social legislation can be used not only as a remedy but as a positive tool of social policy designed to prevent social problems is exciting.

The last chapter in this section of the book, which deals with income maintenance alternatives (primarily the negative income tax) is disappointing. In the chapters on unemployment and disability the reader expects (and wants) a considerable amount of technical material. In this chapter, as in the chapters which discuss the welfare system, the absence of theoretical and philosophical considerations is particularly conspicuous. Once again the reader gets the feeling that the authors perceive contract law, accounting and economics as somehow more legitimate than jurisprudence.

Often the technical material reprinted is excellent. This is

particularly true of the material on economics excerpted from the testimony of Professor Milton Friedman before the House Ways and Means Committee.³⁰ But policy decisions about income maintenance alternatives cannot be made aside from considerations of ethics and social philosophy. The way in which a people choose to deal with poverty is a reflection of their values and attitudes. Yet values and attitudes receive very little attention in this chapter.

This reviewer's judgment is that *Social Welfare and the Individual* is indeed a good book. In places its organization provides difficulties for the reader; but they are not insurmountable. In places the absence of "philosophical" considerations is very unfortunate; but that can be overcome by assigning a few essays or law review articles which will provide enough background information so that students can find the philosophical issues on their own. At places the remarkable extensiveness of the information and ideas contained in the book is nothing less than impressive; and that alone justifies the use of this book.

30. *Hearings on H.R. 16311 Before the House Comm. on Ways and Means*, 91st Cong., 2d Sess. 1945-48 & 1957 (1970), reprinted at 754-57.