Louisiana Law Review

Volume 17 | Number 4
June 1957

THE RIGHT TO LIFE, by A. Delafield Smith. University of North Carolina Press, Chapel Hill, 1955. Pp. ix, 204. $3.50.

Daniel R. Mandelker

is what Volume 3 amounts to. Many others will wish that they could buy Volume 2 alone. But such is life, and such are the ways of bookmakers. If I had to decide whether to part with my $60.00 or to do without Harper and James' treatment of accident liability, I am sure that I would pass my money over to the publishers.

*Wex S. Malone**

THE RIGHT TO LIFE, by A. Delafield Smith. University of North Carolina Press, Chapel Hill, 1955. Pp. ix, 204. $3.50.

Some sixty years ago a leading American sociologist could justly remark that "In each commonwealth the fabric of the public charitable institutions rests upon the quicksands of the poor law, which few study and probably none understands."[1] Today, while the fabric of American welfare programs is infinitely more complex, the legal framework for these programs is still too little studied and too little understood. This book, subtitled "A Legal Approach to Society's Responsibility to the Individual," is therefore especially welcome.[2] Written by an Assistant Attorney General in the Federal Department of Health, Education and Welfare, it seeks to establish a proper philosophical perspective for man's undertakings to relieve the dependency needs of his fellow man.

While the book purports to be an analysis of the "Right to Life," this reviewer experienced some difficulty in determining just what is to be included within this term. At one point, Smith characterizes it as comprehending public protection against the adverse effects of wage loss, together with public provision of a full opportunity for personal fulfillment and development.[3] However, and although a few chapters are also devoted to the legal problems of guardianships, the book seems concerned primarily with the legal and philosophical basis of the American social security programs.

Both the substantive and administrative aspects of social

*Professor of Law, Louisiana State University.

1. WARNER, AMERICAN CHARITIES: A STUDY IN PHILANTHROPY AND ECONOMICS 311 (1894), quoted in BRECKENRIDGE, PUBLIC WELFARE ADMINISTRATION IN THE UNITED STATES 13 (1927).

2. The attention the book has received in the law journals is also welcome. See, *e.g.*, Manning, Book Review, 66 YALE L.J. 315 (1956). There have been at least two book reviews in social welfare journals. Virtue, *Book Review*, 38 SOCIAL CASEWORK 36 (1957); Wright, *Book Review*, 30 SOCIAL SERV. REV. 373 (1956).

3. Pp. 98, 99.

security are considered. With respect to substantive goals, the author favors the underwriting of minimum economic need on a universal basis, but does not relate this goal specifically to the structure of existing programs.[4] His criticism of present administrative procedures in social security programs is that applicants have not been able to use the processes of law to compel compliance with the statutory provisions under which they claim entitlement.[5]

As can be seen, Smith has painted on a broad canvas, and this complicates the task of a reviewer. He has, however, dealt with issues that have been particularly troublesome to the legal scholar, and that currently attract a considerable amount of public attention. They relate to the underlying meaning of and basis for public social security. This book attacks the problem from two directions. In dealing with the substantive aspects of social security, it attempts to spell out an underlying philosophical argument by which the aims of these programs can be justified. In dealing with the administrative aspects of social security, it attempts to spell out a comprehensive constitutional framework within which the applicant can find protection. This reviewer wants to express complete agreement with the general direction of this thesis. But he also wishes to express dissent from the specific analysis of public social security which this book undertakes.

The discussion to follow will center on the still surviving public program of local poor relief, with which the opening quotation deals. In this area the problems the book raises have been least satisfactorily resolved. Besides, concentration on a specific context should give more meaning to the book's rather general treatment.[6]

Smith bases his philosophy of social security on a pre-political theory of natural rights and natural law. He notes that man was once able to satisfy his wants entirely from his natural environment.[7] Man is no longer able to do so because of the social interdependences created by the industrial revolution. As a con-

4. See Chapter 4, especially p. 58.
5. See Chapter 8.
6. The reader will note that I have substantially limited the scope of Mr. Smith's treatise. However, I submit that it is eminently fair to him to do so, inasmuch as he deals specifically with poor relief by way of illustration.
7. See, especially, Chapter 2.

sequence, he reasons, society must substitute for the right to depend on nature the right to depend on one's fellow man.[8]

To this reviewer, the difficulty with this approach is the difficulty inherent in any theories which attempt to predicate social decisions on so-called natural principles. Smith seems to identify the rule of nature with the rule of law.[9] In so doing, he neglects the element of choice which resides in any judgment of public policy. Professor Patterson's point, that Pound's theory of social interests is a better explanation for modern programs of social welfare,[10] is more attractive. After all, society could choose just as easily to let men fall victim to whatever risks the industrial revolution and concomitant social forces might create.

Actually, the author recognizes elsewhere that society must ultimately make the decision with respect to how it is to meet human needs.[11] This is implicit in his explanation that the Elizabethan Poor Law was motivated by a negative desire on society's part to prevent strife.[12] Actually, the historical evidence is not nearly this conclusive.[13] Regardless of the origins of poor relief, however, the point is that the twentieth century is perfectly entitled to make its own evaluation unhampered both by historic precedent, and by whatever is thought to be implicit in the origins of political society.

Smith's attempt to achieve a rationalization of the basis for social security in terms of natural law is also belied by his recognition that public assistance has been justified by police power concepts.[14] But he is hostile to this solution, and prefers to rely on the taxing power instead.[15] This results from a misconception

8. Pp. 97, 98.

9. Pp. 29-32. As I understand him, the author reasons that reliance on nature does not destroy man's independence because nature is consistent and unvarying. There is no discretion in its judgment. Given a certain set of factors, the outcome can be depended on. He seems to attribute the same characteristics to law. Witness his foredoomed call for "objectivity" in social welfare laws. Pp. 59, 114, 117.

10. PATTERSON, A PRAGMATIST LOOKS AT NATURAL LAW AND NATURAL RIGHTS IN NATURAL LAW AND NATURAL RIGHTS 48, 62-64 (Harding ed. 1955). Indeed, Locke's conception of natural rights which are necessarily reserved against the state is a negative concept which ill fits the positive framework of modern welfare legislation.

11. See p. 40: "You can convert an ethical principle into law on almost any terms you please. . . ."

12. P. 44.

13. Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CALIF. L. REV. 175, 178-180 (1955).

14. P. 42.

15. *E.g.*, pp. 171, 181. The tax power is always involved in public assistance to the extent that appropriations must be made and defended on public purpose principles. See Moses v. Olson, 193 Minn. 173, 255 N.W. 617 (1934).

of the function of the police power, which misconception stands in the way of a more adequate explanation of social welfare theory. To Smith, the police power performs only a negative and restrictive function in society. It is a policing power. He overlooks entirely its positive function for social betterment, as reflected in the United States Supreme Court's decision in *Berman v. Parker*,[16] upholding the District of Columbia urban redevelopment law on broad principles of social well-being.

Turning next to the question of procedure, the author postulates that the recognition of a legal right to public assistance lies in an application of the equal protection of the laws. But he states that public assistance has not been put to this test, and puts the blame on the tradition of private philanthropy and the indifference of the police power to personal rights.[17] On all counts, Smith seems somewhat wide of the mark.

To begin with, what he says is not true of all the contemporary programs of social security. In the so-called insurance programs statutory procedures have been provided through which the applicant can secure even judicial review of a denial of his claim. While categorical assistance — Old Age Assistance, Aid to Dependent Children, and the related programs — does not go this far, the federal statute requires at least state administrative review of a decision adverse to a claimant if he wishes it. Really, then, it is only in local poor relief, or general assistance, that the problem is acute.

Smith's claim[18] that the "supporting statutes" have not been challenged under the equal protection clause is just not true, at least as to poor relief. The challenge has been made, but on substantive grounds, and has been rejected. Equal protection requires only a reasonable classification among the objects of regulation, and this has not been hard to find.[19] But a constitutional requirement of this type does not test the basic concepts of a public assistance law. To do this, an attack under more basic constitutional provisions, such as the due process clause, is required. But these challenges have often been turned back on grounds of

16. 348 U.S. 26 (1954).
17. Pp. 104-108.
18. P. 106.
19. See the cases sustaining family responsibility legislation. Atkins v. Curtis, 259 Ala. 311, 66 So.2d 455 (1953); Wood v. Wheat, 226 Ky. 762, 11 S.W.2d 216 (1928). Nor has this provision been successfully urged against the validity of removal legislation. See *In re* Chirillo, 283 N.Y. 417, 422, 28 N.E.2d 895, 898 (1940) (dissenting opinion).

historicity. Since, for example, a work relief requirement has deep historic roots antedating the Constitution, it is held immune from attack under any constitutional provision.[20]

Decisions like this may point to the conclusion that the application of constitutional command to the substantive provisions of public assistance legislation requires express affirmation. *Edwards v. California*,[21] which invalidated a California exclusion statute that was part of the local poor law, might mark a new direction inasmuch as the decision represents a tacit if not explicit repudiation of the antiquity rule. But the narrow grounds for this decision may tend to limit its impact to the immediate context of restrictions on freedom of movement.

Inadequate procedures in poor relief would seem to flow less from any deficiency in the substantive implications of equal protection than from the difficulty Anglo-American jurisprudence has had and is still having in deciding whether and to what extent the sovereign is subject to the rule of law. This is evidenced as much in the current discussion of governmental immunity from tort and the application of constitutional guarantees to the federal security program as it is in poor relief and public assistance. With respect to public programs of private grant, however, the courts have held that the legislature need not create a cause of action against itself to provide for the enforcement of benefits which it confers.[22] Still, this has not prevented the courts from construing the applicable statutes to provide some limited measure of relief to applicants seeking review.[23]

Again, contrary to what Smith implies, there is every indication that the equal protection clause, while it has been ineffective as a constitutional limitation on the substantive provisions of relief legislation, might well provide the avenue for a form of judicial review of administrative action in assistance cases.[24]

20. Commonwealth v. Pouliout, 292 Mass. 229, 198 N.E. 256 (1935) (rejecting claim that work relief law violated Thirteenth Amendment). In People v. Hill, 163 Ill. 186, 46 N.E. 796 (1896), the family responsibility law was sustained against constitutional objection in large part through reliance on the antiquity of such provisions.

21. 314 U.S. 160 (1941). For a discussion of the impact of this case on poor relief legislation see Mandelker, *Exclusion and Removal Legislation*, 1956 WIS. L. REV. 57.

22. Dismuke v. United States, 297 U.S. 167 (1936) (dictum, government employee's pension); Calderon v. Tobin, 187 F.2d 514 (D.C. Cir.), cert. denied, 341 U.S. 935 (1951) (Federal Employees' Compensation Act).

23. See State v. Weir, 106 Mont. 526, 79 P.2d 305 (1938).

24. For a case affording such review in an analogous context see Glicker v. Michigan Liquor Control Comm., 160 F.2d 96 (6th Cir. 1947). See also Note, 29 IND. L.J. 189 (1953).

But the type of review that would be provided by this method does not support the statement that "The conception of a legal right and the idea of equality in legal treatment are complementary ideas."[25] Review based on the principle of equal protection is only peripheral review to insure that the administrator has not based his decision on a standard that violates the constitutional concept of equality. It does not imply that, beyond this, the applicant has a claim which is judicially enforceable to the extent that review can be had of the administrator's decision on the facts and on the law. But it is this full measure of judicial review which is required if the applicant is to be allowed to secure enforcement of his claim.[26]

Smith is absolutely right in equating an adequate social philosophy of public assistance with adequate procedures for the enforcement of claims on the welfare system. What would have been appreciated is a full and forthright attempt to spell out the reasons for public acceptance of the concept of right in terms of the necessary social decisions that have to be made. The book contains the germs of such an inquiry,[27] but the reader's expectations in this regard are left unfulfilled. That this is a difficult task is conceded, and the reviewer is well aware that his own efforts in this direction are also exploratory.

But it is submitted that this is the fundamental task for perceptive inquiry in the field of social welfare. The role of government has changed drastically in the past twenty years, and is forcing the reexamination of basic concepts with regard to the obligations and duties of government within the legal framework. What is needed is an all-embracing revision of historic notions of public privilege and public gratuity. It might well begin with the frank recognition that society has now concluded that the adverse effects of economic dependency warrant social

25. P. 104.

26. Smith's call for restricting social welfare agencies to their professional as distinguished from their authorative function misses this point. He laments the fact that agencies must carry out "police power responsibilities." Pp. 185, 186. But the agency which passes on an assistance claim is carrying out a decision-making function within the structure of assistance legislation which seems well-nigh inescapable. If he means that this function must be eliminated he is calling for the impossible. The problem lies in the ex parte agency determination so common to poor relief, and in the measures necessary to bring it under the control of judicial review.

27. Thus, Smith postulates that the right to life must be achieved to "restore the basic confidence of the individual" and to give him "mental and emotional security." P. 61. Again, the author points out that in the absence of a "statutory right" the applicant finds himself subject to a discretion he cannot control. P. 175. But he does not fully develop these observations.

protection against the consequences of wage loss. That Mr. Smith has started us in the right direction there can be no doubt.

*Daniel R. Mandelker**

THE CODE AND THE COMMON-LAW WORLD, edited by Bernard Schwartz. New York University Press. New York, 1956. Pp. x, 438. $12.25.

Here are reproduced eighteen lectures delivered in December, 1954, on the occasion of the sesquicentennial celebration of the Code Napoleon organized and sponsored by the New York University Institute of Comparative Law. The subjects of the lectures were chosen with the hope their development would increase the common-law world's understanding of the French experience under the Code and clarify the lessons which English-speaking countries might learn from it. With few exceptions the contributions provide a wealth of background and observations which are bound to interest both the students of the substance of the private law and those concerned with the techniques of its elaboration and interpretation.

The lectures may be placed under four general classifications. Five of the first six are concerned with the Code Napoleon's spirit, purpose, and position among the formal sources of law, and the reasons for its ready imitation in other countries: the Code's philosophical background (E. J. Friedrich), its grand outlines (André Tunc), its relation to national unity, both as manifestation and as effective agent (René Cossin), the relative importance of the Code and the case law on the same subject matter (Angelo P. Sereni), and the reasons for the acceptance or imitation of the French Code in other countries (Jean Limpens). The seventh through tenth deal with the original concepts and subsequent transformations of the four fundamental institutions of the Code: contract (Arthur Von Mehren), the family (Max Rheinstein), property (Claude Léwy), and torts, here discussed in terms of the development of the law of unfair competition, a subject without separate identity when the Code was written (Walter J. Derenberg). The eleventh through fifteenth treat of the suitability of codification for various kinds of legal systems or subject matters: the codifica-

*Associate Professor of Law, Indiana University.