

2005

Retrospective on Justice and the Poor in the United States in the Twentieth Century

Henry Rose

Loyola University Chicago, School of Law, hrose@luc.edu

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>

 Part of the [Law Commons](#)

Recommended Citation

Henry Rose, *Retrospective on Justice and the Poor in the United States in the Twentieth Century*, 36 Loy. U. Chi. L. J. 591 (2005).

Available at: <http://lawcommons.luc.edu/lucj/vol36/iss2/18>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

Retrospective on Justice and the Poor in the United States in the Twentieth Century

*Henry Rose**

The purpose of this essay is to review the history of legal developments in the twentieth century that affected America's poor. The twentieth century was a period of both positive developments and unfulfilled promise in the legal rights of the poor. Although progress had been made, at the end of the century there remained obstacles to fulfilling America's commitment to equal justice under law. Section I details the important social programs enacted by Congress in the last century, and comments on their varying degrees of success. Section II delineates some of the important jurisprudential developments affecting the poor in the same period. Section III notes the increasing disparity between the rich and the poor in this country, highlighting the need for increased scrutiny on the programs and law detailed in the first two sections.

I. NECESSITIES OF LIFE—SOCIAL PROGRAMS

Unlike the constitutions of some European countries,¹ the United States Constitution does not guarantee any economic rights (i.e., rights to employment, medical care, nutrition, or shelter). As a result, the American government is not legally obligated to provide the basic necessities of life to its indigent citizens.

As the twentieth century began, poor Americans could seek employment or volunteer assistance to meet their basic needs but the government took little responsibility for their problems. If Americans lacked the economic resources to provide for themselves, they generally turned to families, neighborhood groups or religious organizations for assistance. Such measures, however, were far from adequate and destitution was common. With the onset of the Depression in the late 1920s and early 1930s, the federal government faced the question of

* Associate Professor of Law, Loyola University of Chicago School of Law.

1. For example, the German Constitution of 1919 states that the government must provide for the basic needs of citizens who are not working. CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS* 64 (2004).

whether it should provide economic assistance to indigent Americans, not as a matter of constitutional obligation, but as wise social policy. Franklin Roosevelt was elected President in 1932 promising aggressive federal action to revive the national economy and meet basic human needs. At President Roosevelt's initiation, Congress passed the first major national social program in American history: the 1935 Social Security Act.² This Act created three new social programs: Social Security, Aid to Dependent Children and Unemployment Insurance.³

What follows is a brief description of the three social programs that were created in the 1935 Social Security Act and five other major social programs that were created by the American government in the twentieth century. Some of the prominent public issues in the development of these programs will also be highlighted.

A. Social Security

Social Security was initially conceived as a retirement program for American workers who retire at the age of sixty-five.⁴ Eligible retired workers receive a monthly check from the government based on their contributions to the Social Security system as workers. Social Security benefits were later expanded in 1939 to provide survivor's benefits to the spouses and children of workers who die before retirement age and again in 1956 to provide disability benefits for workers who become medically unable to work before they reach retirement age.

Social Security has been a successful program in two important respects. First, it has been a reliable source of income for tens of millions of needy Americans who had a limited ability to support themselves through employment. Second, income via Social Security retirement checks has raised the large majority of elderly Americans out of poverty. In 2003, 9.8% of America's elderly were poor compared to 17.7% of children and 12.7% of the general population.⁵

Social Security now faces a long-term financial crisis. Currently, a large proportion of contributions from the more than 150 million American workers who pay into the Social Security system are immediately paid out to nearly fifty million beneficiaries of Social

2. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.).

3. *Id.*

4. *Id.*; see also U.S. SOCIAL SECURITY ADMINISTRATION, SOCIAL SECURITY ONLINE, HISTORY, at <http://www.ssa.gov/history/age65.html> (last visited Feb. 2, 2005) (explaining the history behind the origin of the age of 65 as an appropriate retirement age).

5. U.S. CENSUS BUREAU, 2003 AMERICAN COMMUNITY SURVEY: RANKING TABLES, at <http://www.census.gov/acs/www> (last revised Aug. 20, 2004).

Security. However, demographic trends in America are such that the ratio of workers to beneficiaries will decline, especially when the post World War II “baby boomers” begin to retire after 2010. It is projected that the Social Security system will be insolvent in 2052.⁶

A variety of proposals to reform Social Security have been made. For example, President George W. Bush has proposed to partially privatize the system by allowing workers to place a portion of their retirement contributions into private investment funds. To date, no political consensus has developed concerning reforming Social Security to avert the long-term insolvency threat. Suffice it to state that unless the system is reformed, the intergenerational compact between workers and retirees that Social Security represents will be ruptured and elderly Americans will face a much less economically secure future.

B. Aid to Dependent Children

Aid to Dependent Children (“ADC”)—commonly called “welfare”—was conceived as a program for poor children who were not living with one of their parents due to abandonment, death or divorce. Under this program, federal and state governments jointly provided the households of these impoverished children with a monthly check to meet their basic needs. However, like Social Security, ADC has not been without its problems. Because individual states determined the amounts of monthly ADC benefits, these benefits have historically been meager and widely disparate among the states. Initially, adults who lived in ADC households were not required to work and critics of the program argued that this created dependency on government. As illegitimacy rates in America began to grow (among all income groups) in the 1960s, ADC became associated in the public’s mind with this trend and political opposition to the program grew. Efforts to reform ADC culminated in 1996 legislation that set time limits on the receipt of benefits and required adults in recipient households to actively seek employment.⁷

In the last decade, the number of persons receiving welfare benefits has declined by more than half.⁸ Of the families who have left welfare,

6. CONGRESSIONAL BUDGET OFFICE, *THE OUTLOOK FOR SOCIAL SECURITY*, at <http://www.cbo.gov/SocialSecurity.cfm#p12> (June 2004).

7. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. The program was also renamed Temporary Assistance to Needy Families (TANF).

8. HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, *TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) PERCENT OF TOTAL U.S. POPULATION, 1960–1999*, at <http://www.acf.dhhs.gov/news/stats/6097rf.htm> (last updated Dec. 15, 2000) (stating that in 1993, out of the United States’ population of 258,137,000, 14,142,710 people received welfare benefits, or 5.5% of the population while by June 2000, only 2.1% of the

most now include an adult who is working full-time. However, most of these families remain poor with inadequate income from employment to provide for their basic needs. Tax subsidies through the federal Earned Income Tax Credit provide additional support for these families but it is not enough for most of them to escape poverty.

Despite these changes to the welfare system, America retains the highest child poverty rate (17.7%) among the nineteen wealthiest countries in the world.⁹ Many continue to argue that the changes in the welfare system enacted in the 1990s were designed more to punish socially unpopular behavior among adults than to assist needy children, undermining the original purpose of the program.

C. Unemployment Insurance

Unemployment Insurance ("UI") was conceived as temporary assistance for workers who are between jobs. The unemployed worker is entitled to a maximum twenty-six weeks of monetary UI benefits from the state if he or she is actively looking for work. States raise funds for UI by levying a tax on employers.

After World War II, most unemployed adult Americans received UI benefits; since then, there has been a steady decline in the percentage of the unemployed who receive UI benefits.¹⁰ The structure of the UI system needs to be revised to account for dramatic changes in the workforce since its creation in 1935 (e.g., fewer manufacturing jobs, more independent contractors and part-time workers, more two-adult working families). However, proposals to reform UI have little political support because they are perceived to necessitate tax increases on employers while reducing incentives for the unemployed to work.

D. General Assistance

A program closely related to UI is General Assistance ("GA"). GA was created by most states during the Depression to provide assistance to persons who experienced long spells of unemployment but were not eligible for UI. Over time, GA became a program of last resort for poor persons who were not eligible for benefits under any federal program. Unfortunately, many states (including Illinois) phased out GA in the 1990s because of state budget problems. This phase out of GA was a

population received benefits).

9. Jeff Madrick, *Economic Scene*, N.Y. TIMES, June 13, 2002, at C2.

10. GENERAL ACCOUNTING OFFICE, UNEMPLOYMENT INSURANCE: ROLE AS SAFETY NET FOR LOW-WAGE WORKERS IS LIMITED 10 (Dec. 2000), available at <http://www.gao.gov/new.items/d01181.pdf>.

horrendous development in the law for the poor, effectively terminating basic government income assistance to large numbers of poor Americans who were not eligible for any federal income assistance.

E. Federal Housing Assistance

The Depression also led the federal government to create another program to benefit the poor: the public housing program. Under this program, the federal government distributed funds to local public housing authorities to build apartment buildings with rental units for poor households.

Designed to provide much-needed housing to low-income families and to stimulate the housing industry, the public housing program has proved to be socially disastrous. In many urban areas, public housing buildings were poorly managed and housed high concentrations of the poor that led to unlivable conditions and high crime rates. Some of the buildings were deemed irreparable and have been physically demolished by government fiat.

In the last 30 years the federal government has de-emphasized the public housing program, instead turning its focus towards developing programs to encourage private developers and landlords to provide low cost housing to the poor. Also, the federal government's goal now is to disperse low-income housing throughout society rather than to concentrate the poor geographically. However, funding for federal low income housing programs remains inadequate and only about one quarter of eligible households now receive federal assistance to defray the cost of their housing.

F. Medical Assistance Programs

America is the only major industrialized country in the world that does not guarantee health insurance to its citizens. As a result, nearly forty-five million Americans, or approximately sixteen percent of the country's population, are uninsured.¹¹

In the 1960s, in an effort to reduce the number of uninsured, the federal government created two major health insurance programs targeted at different populations: Medicare (elderly and disabled) and

11. See generally CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2003 (Aug. 2004), available at <http://www.census.gov/prod/2004pubs/p60-226.pdf> (compiling data from information collected in the 2004 Annual Social and Economic Supplement to the Current Population and indicating that even though the number of Americans with insurance coverage rose from 1.0 million, in 2002, to 243.3 million, in 2003, the number without coverage rose by 1.4 million for a total of 45 million uninsured Americans in 2003).

Medicaid (the poor). Both programs have grown substantially and together cover approximately a third of the American population.¹²

Like health insurance expenditures generally, the costs of Medicaid and Medicare are expanding rapidly. Medicare, in particular, faces insolvency in 2019 as the post World War II “baby boom” generation reaches eligibility age after 2010.¹³ The urgent insolvency problem facing Medicare has been complicated by the addition of prescription drug benefits for Medicare recipients beginning in 2006, necessitating increased revenue to support the Medicare program.

Access to health care continued to be a problem for many Americans at the end of the twentieth century. This problem cries out for a comprehensive solution that will guarantee all Americans access to affordable and high quality health care.

G. Nutrition Programs

In the mid-1960s, Congress created several programs designed to provide nutritious food to needy populations: Food Stamps (poor households); Meals-on-Wheels (disabled and elderly); School Lunch (poor grade school and high school students); and Women, Infants and Children (poor mothers who are pregnant or who have young children). These programs significantly reduced the incidence of hunger and malnutrition in America. However, at the end of the twentieth century, free food distribution programs run by private charitable organizations were serving growing numbers of recipients.

The Food Stamp program is designed to serve all low income Americans. However, one puzzling aspect of the program is that although it serves approximately twenty-five million Americans, this constitutes only sixty percent of the eligible population.¹⁴ This shortfall in participation is generally attributable to the bureaucratic red tape associated with the program and the perceived stigma of participation in a social program for the poor that many eligible households would rather avoid.

12. See CENTERS FOR MEDICARE & MEDICAID SERVICES, 2003 DATA COMPENDIUM, at <http://www.cms.hhs.gov/researchers/pubs/datacompendium/2003/03pg12.pdf> (Nov. 2003) (In 2001, 17% of Americans received Medicare benefits while 15.7% received Medicaid benefits).

13. BOARD OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE AND FEDERAL SUPPLEMENTARY MEDICAL INSURANCE TRUST FUNDS, 2004 ANNUAL REPORT 12, at <http://www.cms.hhs.gov/publications/trusteesreport/2004/tr.pdf> (2004).

14. See Robert Pear, *Electronic Cards Replace Coupons for Food Stamps*, N. Y. TIMES, June 23, 2004, at A1 (reporting that “[m]ore than 23 million people receive food stamp benefits each month, but nationwide only three of five eligible people are participating”).

H. Legal Services Corporation

In 1974, the Congress created the Legal Services Corporation (LSC) to provide funding for the provision of legal services to the poor in civil cases.¹⁵ From its inception, LSC was controversial because some argued that the lawyers whose services were funded under the program were more interested in reforming the law than providing the poor with representation for their individual legal problems, like divorces or evictions. President Ronald Reagan sought to de-fund LSC in the early 1980's for this reason. However, after strong lobbying by the American Bar Association and others, LSC survived these efforts to eliminate it.

Today, LSC-funded lawyers are saddled with federal restrictions on their legal representation not faced by lawyers in the private sector. For example, LSC-funded lawyers cannot lobby on behalf of their clients or pursue class action litigation. In addition to these onerous restrictions, funding for LSC has declined significantly in real dollars over the last 20 years. As a result, LSC-funded lawyers can only provide legal representation to the poor in less than twenty percent of the legal problems they face.¹⁶ As a result, many poor persons go without legal representation for their civil legal problems.

II. DECISIONS OF THE UNITED STATES SUPREME COURT WITH SPECIAL RELEVANCE FOR THE POOR

The United States Supreme Court made several decisions in the twentieth century of special importance to the poor. The first of these cases was *Helvering v. Davis*,¹⁷ which upheld the constitutionality of the Social Security system under the "general welfare" clause of the federal Constitution.¹⁸ *Helvering* was significant because, prior to 1937, the Supreme Court consistently found social welfare legislation unconstitutional in violation of reasonableness standards embodied by principles of substantive due process. However, the Supreme Court reversed course in *Helvering* and several other cases to effectively hold that it would no longer "second guess" the reasonableness of most social welfare legislation.¹⁹ This reversal meant that most of the New

15. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified at 42 U.S.C. 2996 (2000)). For more information on the Legal Services Corporation, visit their web site at http://www.lsc.gov/welcome/wel_who.htm (last visited Jan. 6, 2005).

16. Margaret Graham Tebo, *Lag in Legal Services*, A.B.A. J., July 2002, at 67.

17. *Helvering v. Davis*, 301 U.S. 619 (1937).

18. *Id.* at 640, 644-45.

19. *Id.* at 622-23.

Deal legislation designed to combat the social ills caused by the Depression withstood constitutional challenge. After *Helvering*, substantive due process no longer was effectively used to challenge the constitutionality of social welfare legislation.

In *Gideon v. Wainwright*, the Supreme Court held that criminal defendants facing imprisonment who could not afford to hire a defense attorney were entitled to an appointed attorney at state expense pursuant to the 6th and 14th Amendments of the United States Constitution.²⁰ However, *Gideon's* holding does not extend to civil cases, for which the Supreme Court has never recognized the right to counsel in any broad context.²¹ Thus, unlike many European countries where the right to counsel in civil cases is guaranteed, poor litigants in America must often proceed without counsel in civil litigation and, as a result, their legal rights may not be vindicated in the courts.

The Supreme Court decided in *Harper v. Virginia Board of Elections*, that states cannot charge poor persons fees to exercise their federal constitutional right to vote.²² In *Harper*, a poll tax levied by the State of Virginia as a condition of voting in state elections was found to violate the Equal Protection Clause of the 14th Amendment.²³ However, the Supreme Court later decided in *Harris v. McRae* that if a person's poverty prevented her from exercising a federal constitutional right, the federal government had no obligation to subsidize the exercise of that right.²⁴ In *Harris*, the Supreme Court held that the federal government need not fund abortions for poor women who could not afford to pay for them, even though they have a constitutional right to choose an abortion.²⁵ Thus, the government cannot place financial obstacles in the way of the exercise of constitutional rights by poor persons, but if lack of income prevents them from exercising their constitutional rights, the government need not come to their aid.

The Due Process Clauses of the 5th and 14th Amendments took on new meaning in *Goldberg v. Kelly*, when the Supreme Court held that the receipt of welfare benefits constitutes a property interest that cannot be diminished by the state without affording procedural due process to

20. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

21. *Lassiter v. Durham County*, 452 U.S. 18 (1981) (holding that appointment of counsel for indigent litigants who face civil parental termination is not required by Due Process).

22. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

23. *Id.* ("We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.").

24. *Harris v. McRae*, 448 U.S. 297, 316 (1980)

25. *Id.*

the recipient.²⁶ Although it did not create new substantive legal rights, *Goldberg* provided poor persons with procedural fairness when their government benefits are threatened by state action. The enforcement of procedural due process rights, however, was dealt a blow by the Supreme Court in *Schweiker v. Chilicky*.²⁷ In *Schweiker*, a class of Social Security disability recipients sued the federal government for damages when the Social Security Administration unconstitutionally terminated their benefits in the early 1980s.²⁸ Although the Supreme Court conceded in *Schweiker* that the terminations violated procedural due process standards and many of the plaintiffs had suffered serious financial losses as a result, the Court found that no damage remedy existed because Congress had not authorized one.²⁹ The effect of the *Schweiker* decision was to diminish the value of constitutional protections that promise procedural fairness under the Due Process Clauses of the 5th and 14th Amendments.

In *San Antonio Independent School District v. Rodriguez*³⁰ the Supreme Court addressed the important issue of whether the poor are a suspect class under the Equal Protection Clause and therefore are entitled to strict review of legislation that disadvantages them. *Rodriguez* involved a challenge to the Texas system for funding public elementary and secondary schools, which resulted in the lowest state financial contributions going to the poorest school districts.³¹ The Supreme Court rejected the argument that the poor, like racial minorities, are a suspect class entitled to special constitutional protection and the Texas funding scheme survived minimal equal protection scrutiny.³² Many state supreme courts, including in Texas, later decided that grossly inequitable funding of public education violated various provisions of their state constitutions.³³

III. WEALTH DISTRIBUTION

One area in which the poor suffered at the end of the twentieth century was in distribution of total wealth. The last quarter of the

26. *Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970).

27. *Schweiker v. Chilicky*, 487 U.S. 412 (1988).

28. *Id.* at 417-18.

29. *Id.* at 429.

30. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

31. *Id.* at 6-17.

32. *Id.* at 28.

33. *E.g.*, *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). The Texas Supreme Court found that Texas's scheme for funding public elementary and secondary schools violates the Texas Constitution. *Id.* at 393.

twentieth century saw unprecedented concentration of wealth among the most affluent members of American society: the top one percent of richest households owned less than twenty percent of all wealth in 1976; twenty-five years later their share of total wealth nearly doubled to thirty-eight percent of all wealth.³⁴ At the same time, the wealth owned by the bottom forty percent of American households declined.³⁵

One particularly egregious effect of the wealth disparity in America involves the funding of public elementary and secondary schools. Since most of these schools are funded primarily by property taxes, the school districts in wealthier communities generally spend more per pupil than is spent in poorer communities.³⁶ These disparities among rich and poor communities can be in multiples as high as nearly four-to-one.³⁷

The key to providing improved economic opportunity for poor children is to guarantee them a high quality education. Yet, America's method for funding public education virtually guarantees poor students an inferior education relative to more affluent students. If we are serious about providing equal educational opportunity to poor children, we must start by providing equalized funding for their education.

IV. CONCLUSION

During the Twentieth Century, the federal government developed a patchwork of social programs designed to meet the needs of the poor to income, medical care, nutrition and shelter. These programs, although often inadequately funded and poorly coordinated, represented a national commitment to provide the basic necessities of life to those who cannot afford them. By the end of the twentieth century, American public support for these programs waned as funding for many of them declined in real terms and others faced future financial uncertainty.

Under the United States Constitution, the poor are entitled to no special protection. Many of the legal rights that the poor do share with all Americans are frequently not enforced because they cannot afford to pay for the legal services needed to vindicate them.

America's commitment to equal justice under law remains an

34. WILLIAM H. GATES & CHUCK COLLINS, *WEALTH AND OUR COMMONWEALTH: WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES* 15 (2002).

35. *Id.* at 16.

36. JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 208 (1991).

37. For example, in Illinois in 2002, Rondout High School in Lake County expended \$18,225 per pupil while Summit Hill High School in Will County spent \$4,816 per pupil. Stephanie Banchemo & Darnell Little, *Scores Reveal Surprise Gap: Minority Failures Could Bode Badly For Even Top Schools*, CHI. TRIB., Nov. 13, 2002, at A1.

important national ideal. Much progress was made in the twentieth century to move closer to achieving it. Nevertheless, the ideal is not yet a reality and the work of lawyers and the public in the twenty-first century must be to move closer to its attainment.