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### Dependency in the Welfare State: Beyond the Due Process Vision

Richard O. Lempert

*University of Michigan Law School, rlempert@umich.edu*

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**Social Control, Deviance, and  
the Law**

**Dependency in the Welfare State: Beyond  
the Due Process Vision**

*Law and the Search for Community*, by JOEL HANDLER. Philadelphia: University of Pennsylvania Press, 1990. 176 pp. \$25.95 cloth. ISBN: 0-8122-8201-9.

RICHARD LEMPert  
*University of Michigan*

The due process revolution has failed. Never mind that this verdict is an oversimplified exaggeration. It is closer to the truth than its opposite. Giving powerless, dependent, poor people property interests in their welfare benefits and the right to call those who exercise discretion over them legally into account does not magically cure the poverty, powerlessness, or dependency that motivated the extension of rights in the first instance. The optimistic view of legality that motivated much of the social activism of the late sixties and early seventies inevitably gives way before the reality of being poor.

No one in the legal academy perceived the limitations of the legal rights approach earlier than Joel Handler, nor has anyone articulated this position more clearly or, for that matter, more frequently over the years. Now in his latest book, *Law and the Search for Commu-*

nity, Handler, after restating his thesis of the failure of rights, asks "What's next?" and comes up with the optimistic answer that it is at least possible to construct dialogic communities which may empower poor people in a way that legal rights did not and which can raise the poor, in the limited sphere of their dependency, to a status of moral equality with their official beneficiaries—welfare workers, medical personnel, and the like. Moreover, Handler argues, the creation of such communities will be advantageous for both the dependent poor and the people and agencies on which they depend. In constructing his argument Handler draws on legal and sociological research, the sociology of organizations, jurisprudence, with special attention to critical legal, feminist, and modern continental theorists, and philosophic challenges to liberalism. The result is a book that may be read profitably by anyone interested in the situation of dependent populations in the modern welfare state.

Handler's argument rests on two well-supported premises. The first, to which I have alluded, is that, at least when measured by the claims made for it, the due process revolution has failed dependent poor people. The second is that the Weberian ideal of rationality has similarly failed as an explanation of legal and organizational behavior. The two failures are not unconnected, for the first is an almost necessary result of the second. If legal rights are not necessarily enforced and if official organizational commitments may be transformed as they are implemented, top-down extensions of rights and privileges carry no necessary entitlements for those on the bottom.

Handler both documents these propositions and explores the possibilities that exist once Weberian rationality is discarded as a master organizing principle of social life. He proceeds to do this by looking at the work of selected contemporary authors who have written on the legal rights of dependent people, regulation and organization, jurisprudence, and modern and postmodern communitarian ethics. The bulk of the book—about two-thirds of its length—is devoted to this enterprise. In his exploration of these themes Handler's voice is submerged, for he advances his arguments by summarizing the ideas of others. These summaries are not only clear and concise, but they also are so nicely

joined that the composite avoids pastiche and conveys the sense of a coherent, guiding intelligence.

The first two chapters following the introduction emphasize the collapse of the liberal legal vision and the need for those who wish to understand the situation of poor people before the law to grasp the reality of power—a reality that includes not only the ability to dominate in situations of conflict but also the ability to prevent grievances from ever finding a forum that will allow them to mature into legal conflicts and the still greater power of preventing the perception of harm in the first instance.

The second two core chapters explore ways that people, especially poor, dependent people, may relate to each other, to organizations, and to law once the path of liberalism has been discarded. Handler argues for a communitarian relationship based on dialogue—that is, mutually respectful conversation—which has as its goal the empowerment of poor people and their equal interaction with authority. He believes such relationships must be based on what, following Baier (1986), he calls "morally decent trust," meaning trust that is "expressible" in that the relationship can survive the knowledge of why the parties are remaining in it. While he recognizes the optimism that underlies the goals he posits, Handler sees these goals as realizable rather than utopian. The key to their realization lies in the establishment of "reciprocal concrete incentives."

Chapter 6 give three examples of what relationships of morally decent trust built on such incentives can look like and one example of a cooperative relationship that fails on the trust dimension. As an example of a successful relationship, Handler cites the case of renal patients who must undergo regular dialysis. These patients are given a wealth of information by their doctors and are empowered to participate in their treatment on a more or less equal basis—certainly on a basis of mutual dependency and respect—with their physicians. The key to this relationship is that the structurally more powerful actor, the doctor, cannot successfully and cheaply treat a chronic renal patient without that patient's cooperation and participation in the treatment. Thus to succeed by their own terms—that is, to successfully treat the disease—doctors must depend on patients. The trust in this

relation is expressible because doctors can reveal their motivating goal—the well-being of the patient—without alienating the patient.

The regulation of water pollution is an example of a relationship that is not expressible. Parties cooperate, but not because the stronger willingly empowers the weaker (sometimes it is hard to know which is which) or because there is a shared sense that the two are working for a common good. Rather, both the regulated and regulator are motivated, and perceive the other to be motivated, by self-interest that for the moment makes behavior in concert in their mutual best interest. Absent the threats each party can bring to bear on the other, the constellation of interests would change and with it the parties' behavior.

Ultimately the question with which one leaves Handler's book is whether his preferred communitarian mode of empowering poor people is more likely to succeed than the liberal rights model. True, Handler can point to instances of its successful instantiation, but adherents of the legal rights model can point to instances where extending rights did empower poor people and made important differences. The same combination of popular prejudice, underfunding, staggering case-loads, and street-level discretion that has subverted the legal rights approach is in my view likely to do in the alternative approach implicit in Handler's vision, and Handler acknowledges this possibility. But even the skeptic must admit that Handler's alternative vision rests on a far more sophisticated view of power and organizational dynamics than proponents of the liberal legal rights view ever advanced. This is in itself reason for those interested in law in the welfare state to welcome Handler's latest contribution to the sociolegal and welfare organization literatures.

### Other Literature Cited

- Baier, Annette. 1986. "Trust and Antitrust." *Ethics* 96:231-60.