"Welfare Law"—the focus of the following series of student Notes and the predecessor Welfare Law Survey in Cornell Law Review Volume 59—does not appear as species, genus, family, order, class, or phylum in the West Publishing Company's Key Number System. Moreover, if one were to take the American Association of Law Schools' Directory of Law Teachers and the Index to Legal Periodicals literally, one would have to conclude that it is neither a subject which law teachers teach nor one about which scholarly articles are written. Having convinced successive editors of this Review that the field merits annual coverage, I felt compelled, when asked, to provide a few words of introduction to this year's welfare project.

It is regrettable, but symptomatic, that we have no term of widespread acceptance denoting either the full arsenal of government programs that each year distribute benefits worth more than $100 billion to individuals and families, or "the law" that controls this distribution. The programs, of course, all have names: Aid to Families with Dependent Children (AFDC), Supplemental Security Income (SSI), Old Age, Survivors, and Disability Insurance (OASDI), Food Stamps, Medicaid, Medicare, Veterans' Pensions and Compensation, Unemployment Insurance, Workmen's Compensation, Public Housing and so forth. But a word or phrase generally understood as describing them collectively is lacking. "Welfare," used here for that purpose, has for many a much narrower connotation. Its use, however, is justified because all other alternatives are at least equally flawed.


1 The nearest equivalent in the West taxonomy is "Social Security and Public Welfare."


3 The figure for fiscal year 1972 was, by one reckoning, $102.5 billion. See STAFF OF SUBCOMM. ON FISCAL POLICY OF THE JOINT ECONOMIC COMM., 92D CONG., 2D SESS., HANDBOOK OF PUBLIC INCOME TRANSFER PROGRAMS 8 (Comm. Print 1972). Comparable figures for fiscal years 1973 and 1974 would be in excess of $115 and $132 billion. See Skolnik & Dales, SOCIAL WELFARE EXPENDITURES, FISCAL YEAR 1974, 38 SOC. SEC. BULL., January 1975, at 3, 6 (the sums of their totals for social insurance and public aid).
THE PROBLEM OF TERMINOLOGY

The problem is not one of concept or definition. Many have had reasonable success at identifying features that distinguish welfare programs from a commercial code, tariff, or scheme regulating interstate air travel. Eveline Burns, for example, writing in 1956, characterized the former as "measures . . . [in which] the object of public action is to provide alternative income to persons whose normal private incomes have temporarily or permanently disappeared or to remove from individuals and families the burden of some very generally experienced charges on income." A recent congressional study refers to "public programs which have as their aim the maintenance or supplementation of current personal living standards through assistance in cash or in goods and services such as food, health care, and housing." The issue is simply what to call such laws. Dr. Burns was defining, she said, those programs which "now commonly [go] by the name of social security." But they do not go by that name today, nor did they in 1956, at least in this country. During the last thirty years, "Social Security" has become synonymous with a single federal program: Old Age, Survivors and Disability Insurance (OASDI).

Those who selected the title of the Social Security Act of 1935 had greater aspirations for the phrase. It was chosen over its major rival, "economic security," as the appropriate umbrella for a number of programs quite disparate in structure and focus: (1) federal grants-in-aid for three categories of state-administered public assistance—Old Age Assistance, Aid to the Blind, and Aid to Dependent Children; (2) a complicated tax-incentive scheme encouraging state-financed unemployment compensation programs combined with grants-in-aid for their administration; and (3) the totally federal Old Age Insurance Program. Although these pro-

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4 E. BURNS, SOCIAL SECURITY AND PUBLIC POLICY 4 (1956).
5 STAFF OF SUBCOMM. ON FISCAL POLICY OF THE JOINT ECONOMIC COMM., 92d CONG., 2D SESS., HANDBOOK OF PUBLIC INCOME TRANSFER PROGRAMS 1 n.1 (Comm. Print 1972). See also id. at 8.
6 E. BURNS, supra note 4, at 4.
7 A. ALTMeyer, THE FORMATIVE YEARS OF SOCIAL SECURITY 5 (1966). In other parts of the world, "social security" reportedly is still used in the larger sense. It appears in the 1942 Declaration of the United Nations and in the constitutions of a number of countries which attained independence during the past three decades. Id. In the United States, one can find a few holdouts. See, e.g., HEW, SOCIAL SECURITY PROGRAMS IN THE UNITED STATES iii (1966).
grams or their successors remain clustered in title 42 of the United States Code under the heading "Social Security Act," and have been joined there by such important additions as Medicare and Medicaid, the phrase "Social Security" is almost never used to refer to the full collection. On those few occasions when it is, it remains too narrow a term, for it fails to include income security programs that have ended up in other parts of the United States Code (Food Stamps, Public Housing, and Veterans' Pensions) or programs that have remained state or local efforts (General Assistance and Workmen's Compensation).

More expansive, but equally unsatisfactory, is "social welfare legislation." In a thoughtful piece appearing several years ago in the Stanford Law Review, Lawrence Friedman explores the difficulties of defining that phrase along with two others he treats as synonyms—"social legislation" and "welfare legislation." Quite rightly, Friedman notes that it is neither the degree of the legislators' altruism nor legislative purpose which sets "social welfare legislation" apart. His ultimate working definition comes quite close to the Burns definition of social security. Indeed, he trims it down a bit:

We will use the term "social welfare legislation" to describe the enactments that, either as a whole or in some part, contain provisions that have the following three features: First, the statute defines or implies a minimum standard of living. Second, it asserts or implies that there is a group that falls below the minimum; it may tell how the group is to be identified. Third, it sets up or implies some program to help all or part of that group to reach or approach the minimum standard.

But unfortunately usage of the phrase "social welfare" is not so disciplined. In its annual computation of social welfare expendi-

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9 Some, but by no means all, of the programs established by the Social Security Act are run by the Social Security Administration. However, its Social Security Bulletin furnishes statistics on all of them plus a number of other "public income-maintenance programs." See, e.g., Current Operating Statistics, 37 Soc. Sec. Bull., March 1974, at 46.


12 Id. at 218-19.

13 Id. at 220. Friedman distinguishes his definition from Burns's definition, noting that hers is potentially so broad as to include "higher education and a wide range of government services, including fire, police, and garbage collection." Id. at 218.
tures, for example, the *Social Security Bulletin* includes not only programs for income maintenance "through social insurance programs and public assistance" but also public expenditures for health and education. A recently published law casebook entitled *Social Legislation* devotes over one-third of its pages to public regulation of labor standards—wages, hours, and working conditions.

"Welfare," which Friedman suggests as a synonym for "social welfare," seems today a less amorphous term. Its problem is that it may have shrunk too small. In January 1973, just after the enactment of a dramatically new welfare program for the elderly, blind, and disabled (SSI), the *New York Times* bemoaned the death of "welfare reform." It was referring, of course, to the Congress's failure to replace the program of Aid to Families with Dependent Children (AFDC) with something better. For the *Times* and most of its readers, AFDC has become "welfare." But even for many more careful in their use of the word, "welfare" has come to serve the purpose which "public assistance" once did—a designation for all cash programs (or, perhaps, even all programs) with a need test: AFDC, SSI, and General Assistance. Its broader meaning, encompassing the "social insurance" programs, is still recognized by some, but that usage is distinctly less common now than it was in the late sixties when the Friedman piece was written.

In a number of recent government studies, and in social science literature generally, all these troublesome terms have been supplanted by several new ones which seem to offer greater precision—at least in part because they are without confusing, popular connotations. A series of studies prepared for the Sub-

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"Welfare" is a word of many meanings, even as applied to governmental programs. Probably the most restricted use of the term and the one adopted in this Chapter [a chapter entitled "The Welfare System"] is to denote governmental cash transfer programs designed exclusively to support the poor.

*Id.* at 252. For an example of the view that the in-kind programs (food, housing, and medical care) are part of "the welfare system," see M. Barth, G. Carcagno & J. Palmer, *Toward an Effective Income Support System: Problems, Prospects, and Choices* 15 (1974).

committee on Fiscal Policy of the Joint Economic Committee of Congress speak of "public income transfer programs." Another recent report concerns itself with the "income support system."19 "Income maintenance" is a third phrase with fairly wide currency. What allows these terms to offer greater precision is also the source of their weakness: they have, as yet, failed to gain significant acceptance in the popular or legal vocabulary.20 For the moment, they remain "technical" terms, useful among experts but not widely understood.

It is a truism that for those able to piece together the tale, words can tell a great deal about the individuals and institutions that have given them shape. The absence of a word for a particular concept probably tells even more. So it is hardly by chance that our popular and professional vocabulary has no firmly established term for our national system of "income support." The truth is that neither the public nor Congress nor the legal profession has viewed these programs as a whole. The principal elements of the Social Security Act of 1935 had such different political dynamics that they shortly developed independent direction. Although initially in the hands of a single Social Security Board, Unemployment Insurance, OASDI, and AFDC each found its way to a different home in the federal bureaucracy. Different agencies, and different congressional committees, were given jurisdiction over such new programs as housing subsidies, Legal Services, and Food Stamps. Workmen's Compensation and General Assistance have continued to be the responsibility of state and local governments. In short, during the lifetime of these programs, there has been no institutional expression of "system" comprehensive enough to invite Congress or members of the public to think of the component programs as part of a whole.

Nor has the legal profession been prepared by training or practice to provide that perspective. Segments of the bar furnishing service for a fee, often a contingent one, have over the years handled a reasonable volume of OASDI and Workmen's Compensation claims. A few union-sponsored legal service programs have also covered Workmen's Compensation and sometimes Unemployment Insurance as well. But until the federally funded

20 There does exist an "income maintenance" casebook, but except for introductory material, it is inexcusably limited to AFDC. G. COOPER & P. DODYK, INCOME MAINTENANCE (2d ed. 1973).
Legal Service Program was launched, there was negligible professional representation of those sufficiently impoverished to be claimants of need-tested benefits. Since 1965 that program has involved a portion of the bar in "welfare claims," but the emphasis has tended to be heavily upon the need-tested programs. The "fee generating" programs have remained primarily the province of the private bar.21

The way law schools have packaged their curriculum has had little effect on this problem of perspective. There are numerous law schools in which there is no course which even hints at the full range of government income support programs. Several combine AFDC with selected problems in domestic relations, consumer protection, housing, and other odds and ends as a course in Law and Poverty. That leaves Workmen's Compensation to Torts, perhaps; Unemployment Insurance to Labor Law, perhaps; and OASDI, Medicaid, and Medicare without coverage. Other schools treat the cash benefit, need-tested programs as sufficiently important to warrant a full course. If published teaching materials are any guide, such a course is likely to be devoted predominantly to AFDC law. In any event, such an offering still leaves the social insurance and in-kind programs looking for a home. Finally, among schools that offer a course attempting some overview there is no consensus in terminology. Catalog listings include: Government Benefit Programs (N.Y.U.); Social Legislation (Ohio State, Oregon, Texas, University of Washington); Modern Social Legislation (Illinois); Law and Social Welfare (U.C.L.A.); Social Welfare Legislation (Chicago, Minnesota); Welfare Law (Cornell); Income Maintenance (Yale, Stanford); and Legal Control of Economic Insecurity (Pennsylvania).

A legitimate question in the face of this failure of terminology is whether there really is something here which deserves recognition as a distinct field of law. I am strongly persuaded that there is. Let me briefly marshal the arguments. First, there is a high degree of similarity in the legal issues generated by programs superficially

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21 The research tools of the practicing bar clearly reveal this split. The Legal Services or Legal Aid lawyer will turn to the CCH Poverty Law Reporter which contains a "Welfare" section devoted to the need-tested cash programs. It is a child of the OEO, Legal Services era. For the private bar, CCH offers an Unemployment Insurance Reporter which inexplicably covers Social Security (OASDI) as a subtopic. It is nearly 40 years old. CCH also publishes the Workmen's Compensation Law Reports.

Another tool of the Legal Services lawyer suggests that over time OASDI, Unemployment Insurance, and Workmen's Compensation have claimed more of that program's attention. Compare the Case Development headings in volumes 1-3 of the Clearinghouse Review with those in volume 8.
as diverse as AFDC, OASDI, and Food Stamps. All three must define eligibility and benefit levels. All three are dependent on income, or certain types of income, which in turn requires rules for the definition and measurement of income over time. All three must accommodate themselves to the living arrangements and the family ties of beneficiaries, and thus they must include some reference to status under state domestic relations law. The procedural apparatus for adjudicating individual benefit claims and the role of judicial review is an obvious point of comparison. Finally, the programs may be usefully analyzed in terms of the intergovernmental relations they involve. There are two points to make regarding these similarities. First, there is substantial pedagogical economy in considering such programs together. The detail of the Food Stamps program, OASDI, or Medicare is far less imposing after one has mastered the structure of some other "welfare" program. Second, a comparative look at treatment of particular issues across several programs provides an invaluable perspective for critical judgments about them.

Another argument for the existence of a distinct field of law, whether it be termed income maintenance, social welfare, or welfare law, is that, despite the aimlessness of its development, it constitutes a system. Certain programs react very directly to changes in other programs. The development of a new need-tested program for the adult categories (SSI) has serious implications for OASDI, Food Stamps, and Medicaid. One of the points on which the ill-fated Family Assistance Plan ran aground was the irrationality of its interaction with the housing programs and Medicaid. Sensibly or not, the current quilt of programs drapes itself across our national population with large areas of overlap. It is not unusual for a single family to be involved with two, three, or even five of these programs. Until those who deal with the individual programs, including lawyers, develop a habit of thinking about the

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22 See, e.g., CENTER ON SOCIAL WELFARE POLICY AND LAW, 1 MATERIALS ON WELFARE LAW 1-2 (1972). The introductory comment argues that "six interrelated issues underlie virtually all income maintenance programs. . . . Analyze a particular . . . program in terms of these issues, and you understand that program." Id.


24 An estimated 66% of AFDC families also receive benefits from three other public income transfer programs; 10% from four others; 1% from five others. STAFF OF SUBCOMM. ON FISCAL POLICY OF THE JOINT ECONOMIC COMM., 92D CONG., 2D SESS., PUBLIC INCOME TRANSFER PROGRAMS: THE INCIDENCE OF MULTIPLE BENEFITS AND THE ISSUES RAISED BY THEIR RECEIPT 28 (Comm. Print 1972).
entire system, their efforts will be seriously limited and occasionally counterproductive.\textsuperscript{25}

Having argued for recognition of a field so large, one must confess that it is so vast that no single book, course, or law review issue could cover it comprehensively. That is hardly a damning concession, however, for the same is true of most worthy and useful categories of law. The following Notes do not pretend to be comprehensive. They are devoted to developments during 1974 in certain portions of the welfare law field (broadly defined). They include two Notes on litigation, which cut across program lines, two Notes which are sequels to last year's survey of developments in SSI and AFDC, and a review of the developing case law under the little-noticed Emergency Assistance for Needy Families with Children program. Individually they should prove useful to practicing lawyers in the welfare field. Collectively they affirm the view that this is a huge area of great importance deserving far more attention in legal literature than it receives.

\textsuperscript{25} \textit{See generally Staff of Subcomm on Fiscal Policy of the Joint Economic Comm., 93d Cong., 1st Sess., Issues in the Coordination of Public Welfare Programs (Comm. Print 1973).}