

# The New Property After 25 Years

By CHARLES A. REICH\*

**T**WENTY-FIVE YEARS AGO, two great crises emerged: the crisis of the environment and the crisis of the individual. The environmental crisis was a visible one. I could see it with my own eyes, and verify its existence from my own direct experience. The crisis of the individual was invisible; there was no way to prove its existence. There was always the possibility that it was no more than my own subjective feeling. And yet I was convinced that the individual was threatened by organized society, that my grandfather's generation possessed an independence that was fast disappearing, that my own generation was being asked to give up too much individuality for the sake of a job or a career.

The crisis of the individual is a product of the same modern organized social system that has provided many benefits. If the crisis becomes sufficiently severe, however, it can undermine all of those benefits, and there are signs that this is now happening. When the crisis of the natural environment becomes life-threatening, we pay attention. The crisis of the individual may be more life-threatening than we yet realize; the evidence of individual decay is all around us.

In the case of the environment, a response has evolved that utilizes science, raising public awareness, and a concerted effort to provide legal protection for environmental values. The response to the crisis of the individual can be expected to follow the same outline. There must be an empirical recognition of severe damage to the individual. Our national illness of dependency and addiction might be studied from this point of view. Then there must be a national awareness that the individual is in danger. This started to happen in the sixties, but the first wave of awareness receded. As for the legal approach, a foundation was laid by the Warren Court and by many lawyers and law professors who fought for individual rights.

But the struggle to save the individual has hardly begun. It is far behind the struggle to save the natural environment, which itself is only beginning.

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Should we therefore despair, as William Kunstler appears to?<sup>1</sup> He is right that so far the American people have not awakened to the threats to either the environment or the individual. But this passive condition is itself a symptom of the decline and endangerment of the individual, and I fully expect people to see the danger sooner or later. Mr. Kunstler is wrong to say that I have given up on the greening of America. On the contrary, I hold fast to that vision, and I am confident that the greening of America lies ahead. But it will take a lot of work, much by lawyers who try to build protections for the individual into the legal system (a project to which Mr. Kunstler has long contributed great energy).

*The New Property*<sup>2</sup> was written twenty-five years ago as a suggestion for the legal effort to build a system of protection for the individual. I am glad to see this job being carried forward by the contributors to this issue of the University of San Francisco Law Review. I have never insisted that "the new property" as an idea is the best possible approach to protecting the individual — it has advantages and disadvantages, as the contributors point out. What matters most is that there be a continuing discussion and effort to build a workable system of protection for individual values in an organized society.

In the twenty-five years since I wrote *The New Property* there have been many important developments in this area. These developments have underscored the importance of new property to the safeguarding of individual freedom, and the degree to which new property power, without safeguards, is capable of abuse. First, new property has grown immensely in importance as a form of wealth. This has resulted from the vast growth of government and large corporations as sources of wealth. Second, new property has been used more and more openly as a way for one group to enrich itself at the expense of others. The HUD scandal, the Savings and Loan disaster, the relative decline of labor, and the impoverishment of public services all demonstrate that new property is a powerful way to redistribute wealth, often upward. The power of the television networks in American life rests on their ability to hold onto FCC licenses—a form of new property. Third, the drug war has caused government to resort more and more to the attempted use of new property to control individual behavior, a most ominous development. What this means is that we have no principle that forbids organized society from making use of our dependency to achieve goals of social control.

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1. See Kunstler, *A "Real World" Perspective on The New Property*, 24 U.S.F. L. REV. 291 (1990).

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

We need and must develop a principle to define what is illegitimate use of the power vested in the organized sector by virtue of dependency.

This is the perspective from which I view discussion of new property issues today. Now I would like to offer some comments, clarifications, and further thoughts on what I wrote twenty-five years ago.

The "new property" refers to both an economic phenomenon and to a suggested legal treatment of this phenomenon. These two subjects are separable; there is no debating the growing importance of new property as a phenomenon, but there is much room for debate as to the appropriate legal treatment. At the same time, there can be no dispute that some form of legal approach is necessary. Indeed, new property is rapidly becoming an area of law that will occupy its own place in the curriculum of law schools and its own subject heading in the Index to Legal Periodicals. Already there is a large body of legal scholarship and enough court decisions to fill an excellent casebook.<sup>3</sup> And however diverse the subject matter of new property, there are emerging principles that apply to all the different forms.

As a phenomenon, "the new property" refers to the development of economically valuable interests that are of vital importance to the holders of those interests, but that do not come within the traditional definition of "property." These interests are an outgrowth of an economic system based upon large organizations, including both government and private corporations. New property represents a relationship between an organization and the holder, the organization being "the source" of the interest, the holder being the beneficial owner. This uneasy relationship is the origin of most of the legal disputes concerning new property. The organization seeks to place conditions on the new property, and through these conditions organizations can exercise controls over the holder that would not otherwise be possible. The holder tries to resist these controls.

Early in the development of new property, the major focus was on interests deriving from government. But today the private sector is an equally important source. This immediately complicates the legal picture. Government operates under one set of constraints, while the private sector is subject to different rules. For example, government employees enjoy constitutional protections not applicable to the private sector. On the other hand, limitations on the rights of government employees, such as denial of the right to strike, are often justified by claims of public necessity that do not apply to private business. One of the most important issues concerning new property is whether the public-private

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3. See Appendix attached hereto.

distinction is still valid, or whether the similarities between the two forms of new property now require similar legal treatment.

New property raises equally momentous substantive and procedural issues. Substance and procedure can never be entirely separated, since under accepted due process reasoning, the nature of the interest determines the process that is "due." Nevertheless, it is helpful to remember that we are dealing with both substance and procedure and that sometimes one, and sometimes the other, will be the focus of dispute.

What kinds of interests are included within the concept of new property? This question is open-ended. New kinds of non-traditional interests are constantly being created, and older forms take on new meaning and new functions. This is an area of the law where defining the subject matter itself will always be part of any debate. For example, we must confront the question of whether a job, public or private, merits some kind of protection. With respect to discrimination based upon race or gender, a job already enjoys substantial "new property" protection. With regard to tenure, a public job often carries protection whereas a job in the private sector usually does not. Another challenging question is whether environmental rights deserve "new property" status. Is there a right to clean air or pure water? Is there a right to use of the national parks and forests? In a dynamic society, there will never be an end to the new interests that claim protection.

Is the use of the term "property" helpful or appropriate in discussing this great variety of non-traditional interests? Certainly the term is tendentious and argumentative. Many of the claims for protection of non-traditional interests could be advanced on other grounds. For example, revocation of a professional license for political activities can be analyzed as a civil liberties issue without introducing the idea of "property." On the other hand, there are strong reasons for calling at least some non-traditional interests "new property." Consider an action for divorce where, as is increasingly common today, the husband and wife possess virtually no property in the traditional sense. They own no house, no land, no significant personal property except for appliances, television, and a stereo. But suppose there is one major asset: the husband has a professional license—perhaps he is a physician. And suppose that the wife worked for years to put the husband through medical school, sacrificing her own interests and acquiring no property of her own. Suppose that the income-producing value of the medical degree and license can be calculated by experts. And suppose that the applicable statute commands the court to make an equitable division of all "marital property" between husband and wife. In this case, unless the medical license is

accorded the status of property, a substantial injustice to the wife may result. The term "property" is essential because the medical license is actually a substitute for property in its traditional form.

But there is a more basic reason for the idea of "new property." The idea of private property, of individual ownership, is basic to our Constitution, to our economy, to democratic society itself. Take away private property, and we would have a form of collectivism, whether of the right or of the left, in which the American ideal of the sovereign individual would be crushed by organized power. It is quite true that many Americans were without property when the Constitution was adopted. But they had the hope and the means to acquire property through their own labor, and, on the frontier, land for homesteads was available to the enterprising.

In today's society, we face the very real possibility that, for most people, property will disappear as a fundamental assumption of American life. The successful professional or corporate employee will count as her assets a job, benefits deriving from the job, other benefits deriving from government, and her credentials—education, occupational licenses, experience, and reputation. Medical insurance, pensions, and other intangible assets complete the picture. Even if they own a house or other traditional property, studies have shown that most middle class people will lose these if they lose their job and cannot find other employment, or if they are unable to practice their profession. Inflation will wipe out savings if there is no additional income. Traditional property will thus be limited to corporations and the very rich. Can America survive as a society without the institution of private property? If not, then there is good reason to be creative about the idea of property, and to apply this idea to those interests, however non-traditional, on which most people today depend for their security and independence.

Society must protect the fruits of people's labor, the investments people make through their life activities. Education, particularly higher education, represents years of labor and a major financial investment. Failure to protect such investments by some form of due process would defeat people's settled expectations and undermine the stability of any society. This is an area where an innovative legal approach is needed to advance a fundamentally conservative idea.

If new property means protecting the investments of the middle class, it has an equally important meaning for those who cannot work—children, the aged, the seriously disabled, and the growing numbers of the dispossessed—those who cannot find employment, the poor, the hungry and the homeless. Here we confront the basic question of commu-

nity. Is America a community to which all belong? Or is membership restricted to the more fortunate? Is there a right to basic subsistence—food, shelter, care—the minimum essentials of survival? Does the idea of new property help at all in resolving these questions?

The traditional view of social welfare deemed aid to the unfortunate to be a form of charity or hand-out. The recipient had no more rights than the street person who begs for spare change from a passersby. By contrast, the more that we advance toward the idea that welfare benefits are property, the more we recognize that every individual life has dignity. Property, the idea that something belongs to a person as of right, is a critical element of dignity, at least in our society. It preserves and nurtures our separate identity. In an interdependent economy such as ours, where the fate of individuals so often depends upon forces and decisions beyond their control, the ideal of new property affirms the value of each person as a part of the human community.

New property is an example of the problem that arises when the law is confronted by fundamental social change. All law—common law, statutory law, and Constitutional law—rests on certain assumptions concerning social reality. These assumptions may not be articulated; indeed, they may even be unconscious. Or they may hold a prominent place in statements concerning the law. In any event, changes in the structure of society or in the social landscape are capable of altering these assumptions and over time existing assumptions may become wholly invalid. But the law may fail to notice these changes. There is no automatic process whereby such changes are recorded by society. Denial of change is a powerful factor in all societies, and denial often prevails over the reality of change.

When the assumptions upon which the law is based are overturned, but the changes are denied or ignored, the result is that the law may cease protecting the interests it was designed to protect. It may wholly lose its original purposes, and by inaction the law may even come to function in a way that undermines and wars against the very values it was meant to affirm. Leaving the law alone is not necessarily the conservative thing to do in a dynamic society. Inaction only appears to be conservative. In fact, inaction may be very radical in its effects, upsetting the existing order, allowing the destruction of traditional values.

These principles are strikingly illustrated in the history of property. Two hundred years ago, the institution of private property was the foundation of individual independence, co-equal with liberty in the Constitutional scheme. During this period, the power of organized society, public and private, was small in comparison to the unorganized or individual

sector. All of the essentials of life could be found outside of the organized sector. Farming and other occupations were individual or family activities; food, shelter, and security could be obtained by individual effort. Not everyone had property, but those who did could thumb their noses at the organized sector.

Two hundred years later, most individuals are dependent on organized society for their needs. Traditional property has become largely collective and corporate, rather than individual. Most land, including farm land and residential land, and most other forms of property are held either by corporations or by government. As a consequence, organized society now has the power to exclude individuals from gainful employment, to deprive individuals of their homes, to undermine the security of individual savings. From the greatest defender, property has become the greatest enemy of the independence of individuals.

Wherever she turns, the individual finds that her liberty is threatened by property in the control of organized society. Organizations control access to health care from birth to death, they control access to education and knowledge, they control water and food, travel, clothing, light and heat. And the noose is tightened still further by pervasive regulation of many of the basic human activities and occupations. Occupations from nursing to child care, from milking cows to driving a taxi are regulated.

The practical effect of this transformation has been to make our interests in the system vital while our interests outside the system lose the power to sustain us. Freedom to travel becomes dependent upon having a drivers license, or upon compliance with the requirements of air transportation, or upon obtaining a passport if one wishes to travel abroad. Even for the most successful individuals, certainly for the entire middle class, dependency rules our lives. We are often told that the welfare state has made the poor and the unfortunate into a dependent class. In fact, we are all a dependent class today.

Let us now consider what happens if, while all of these changes are taking place in social reality, we leave the law of property unchanged. The most "conservative" choice produces the most radical consequence, with the individual unprotected against organized power. On the other hand, if the law is changed to modify the power of collective property—by antitrust, labor law, rent control and the other familiar elements of liberal reform—the result is a greater degree of stability. Some of the traditional values associated with the independent individual are retained, although in modified form. For example, the traditional value of family home ownership would be devastated by legal inaction. By a

combination of housing subsidies, farm subsidies, public housing, multiple dwelling regulations and so forth, a degree of family control over the home has been preserved by legal innovations.

The appropriate governing principle is this: Whatever increases dependency, or allows dependency to increase, harms traditional values in the property area; whatever enhances independence, or prevents the growth of dependency, preserves the values that property was intended to protect. There is, of course, still room for dispute about what laws actually increase or decrease dependency. What about food stamps? Arguments are made that food stamps encourage dependency by accustoming people to live on the dole; contrary arguments are made that in an age when so many people's economic fate is beyond their own control, minimum subsistence is an essential underpinning of independence. But if the existence of food stamps is an accepted fact, then there should be no dispute that laws which offer protection to recipients from arbitrary denial are more favorable to independence than laws which allow food stamps to remain a government hand-out subject to unlimited discretion.<sup>4</sup> Retention of the old treatment of government benefits as a charity conferring no rights is more radically destructive of traditional values than a new view of government benefits as protected entitlements.

This paradox—that the law must change in order to keep things the same—lies at the heart of the new property concept. Unless the law acts creatively, unless new property rights are actively created, the old property's functions will disappear. New property is an effort to preserve traditional values, a truly conservative idea. New property is designed to safeguard the individual as old property was expected to do.

All of this would be reasonably clear were it not for a second paradox — that those who call themselves “conservatives” today, “conservatives” in the courts and political “conservatives”, oppose new property concepts. This paradox is the result of the confusion of labels in contemporary American public life. The label “conservative” has been adopted by those who are pro-corporate, pro-authority, pro-strong executive power, pro-institution. Chief Justice Rehnquist precisely fits this profile. Those who take the side of organized society have assumed the conservative label, while advocates of new property are left without a label, but with a principled cause. The fundamental issue is the survival of the individual in the age of organization. There is no paradox that such survival requires active legal intervention today, whereas formerly such intervention was unnecessary. Exactly the same situation exists today with

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4. *See, e.g., Lyng v. United Automobile Workers*, 485 U.S. 360 (1988).

respect to nature. Once nature seemed omnipotent; today nature is endangered. The individual is an endangered species.

Given this perspective, it is not surprising that new property issues are involved with the most vital controversies and movements in the law today. Consider the feminist view of law. The key word used by some of the leading feminist legal scholars is "domination." From their point of view, "domination" means male domination. But male domination, as these scholars see it, is exercised through the structures of organized society. Who are the victims of domination? Women, even those who are part of the power structure; poor women, children, care-providers who perform roles traditionally assigned to women; and traditional and non-traditional families. Thus, the concern of feminists is clearly with the preservation of individual values and the individual sector.

New property theory offers feminists a structure for preserving and protecting feminist values when threatened by organized society. For example, a prime concern of feminists is to enable women to have both a working career and a private career as a mother. If the needs of corporate employers are placed ahead of child-raising, a damaging conflict is inevitable. But new property concepts can help to resolve the conflict, as Mary Ann Glendon points out in *The New Family and the New Property*.<sup>5</sup> For example, Professor Glendon mentions two types of proposals for supporting the child-raising function. One would directly credit the work of a parent in child care. The second would provide some kind of income maintenance for all families with children.<sup>6</sup> Both of these are "new property"-type proposals. Both would provide legal support for the individual sector against domination by the organized sector. The pattern of male domination that feminists correctly see is actually part of a larger pattern of domination in which all individuals are subjugated—both female and male, a pattern which new property theory struggles to combat.

My first encounter with new property issues occurred in 1951, when I was a student at the Yale Law School and Editor-in-Chief of the Yale Law Journal. One of my classmates who was also a journal editor, Warren H. Saltzman, wrote a comment on the subject of passports.<sup>7</sup> At that time, the issuance and retention of a passport was considered a "privilege," not a right, and passports were denied or revoked in a high-handed and astonishingly arbitrary manner at the personal whim of the Chief of

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5. M.A. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1981)

6. *Id.* at 135.

7. Comment, *Passport Refusal for Political Reasons: Constitutional Issues and Judicial Review*, 61 *YALE L.J.* 171 (1952).

the State Department's Passport Bureau. Since the Chief was opposed to political nonconformity, and this was the period of extreme anticommunism and loyalty investigations, passport denial became a weapon in the anti-communist crusade.

Warren Saltzman's first draft soon became the most interesting subject being worked on at the Law Journal, and several other editors, including myself, became heavily involved in thinking the problem through. There was little law to guide us. Passports had always been a discretionary governmental function and neither the Constitution nor any statute had ever been applied to limit that discretion. Yet it was perfectly apparent that passport denials were frequently based on free speech and otherwise protected political association.<sup>8</sup> What the State Department was saying came down to this: you are free to exercise your constitutional rights, but we can deny you a passport for doing so; the Constitution only protects you against criminal punishment, not other kinds of sanctions and deprivations. An ugly joke was being played on the dissenter.

The joke was on the political nonconformist in many other ways during the McCarthy period. It was common for individuals to lose their jobs, or be blacklisted from an entire industry, or suffer public obloquy and hatred for their opinions and associations. Justice Holmes' statement that a man may have the right to talk politics, but he has no right to be a policeman, became a refrain: a person may be a political nonconformist, but she has no right to be a teacher, to be a government employee, to be a subway conductor, to live in public housing. Even drivers licenses were not immune; "subversive driving" was added to the ways of attacking dissenters. The joke on those who claimed constitutional protection was that there are a hundred other forms of reprisal, reprisals in the economic realm and reprisals in the personal realm. See how little good it does you to hide behind the Bill of Rights, the inquisitors were saying—we'll get you where it hurts.

Nonconformists were charged with "hiding" behind the Constitution; this is the period when "Fifth Amendment Communist" became a common epithet. In justification for the many new ways of restricting constitutional rights, it was constantly reiterated that those who do not like our system should not be permitted to use the Constitution to undermine America. The Bill of Rights is for the loyal, not the disloyal. It is worth recalling that advocates of racial equality and civil rights were often among the targets of the witch-hunters. Loyalty investigators often

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8. *Id.*

asked whether a suspect advocated the equality of the races; this was considered strong evidence of subversive tendencies.

Nearly forty years have passed, but the ugly joke about getting people where it hurts is still heard. The war against drugs has given the joke new life; take away their drivers licenses, take away their benefits, take away their jobs. A West Virginia statute recently passed revokes the drivers licenses of those who drop out of high school, even for such reasons as getting married and supporting one's family.<sup>9</sup> We cannot prevent you from dropping out of school, but we'll get you where it hurts a teenager most—by denying driving "privileges." And there is a similar joke on gays: they have no right to employment in the Armed Forces or other "sensitive" branches of government service.<sup>10</sup> Now there is also a joke on strikers: they have a right to strike, but food stamps for their families may be taken away because they are striking.<sup>11</sup>

All of these threats to the integrity of individuals were visible in 1951 as we labored at the Yale Law Journal to answer the argument that a passport is a privilege, not a right. Our argument was based upon the theory of law and social change. Warren Saltzman's research showed that during most of American history, a passport had not been essential to leave this country or to travel abroad. A passport was originally a mere courtesy — a request by the U.S. Secretary of State, addressed to foreign countries, asking them to treat the traveler as an American citizen and allow her to "pass freely" in other lands.<sup>12</sup> Thus, the denial of a passport did not necessarily mean denial of the right to travel. If there was a constitutional right involved, it was the right to travel, not the right to a passport.

But by 1951 the original situation had changed. It was no longer lawful to leave this country without a passport, and it was no longer possible to travel in foreign countries without a passport. Therefore, we argued, the right to a passport had far more importance in 1951 than in earlier periods of history. We argued that what may once have been a mere privilege had become a right because it was the equivalent of the right to travel itself. And, to finish the argument, the Due Process clause should be held applicable to actions of the passport office.<sup>13</sup> When the

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9. W. VA. CODE § 18-8-11 (1989).

10. See e.g., *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, No. 89-876 (February 26, 1990).

11. *Lyng v. United Automobile Workers*, 485 U.S. 360 (1988).

12. Comment, *supra* note 7, at 171-72.

13. *Id.* at 171.

Supreme Court finally held, in *Kent v. Dulles*,<sup>14</sup> that passports were entitled at least to procedural protection, the Saltzman comment was cited.

In the years after I graduated from law school, I learned that the passport issue was but one of many similar uses of “privileges” to extend governmental power. My next encounter was with the denial or revocation of professional licenses for exercising political rights. In 1953, while I was serving as law clerk to Justice Hugo L. Black, the Supreme Court was asked to consider whether a physician’s license to practice medicine could be suspended by the State of New York because the physician was found in contempt of the House Committee on Un-American Activities.<sup>15</sup> A majority of the Court upheld the suspension, despite the fact that the physician’s “crime” had absolutely nothing to do with his ability to practice medicine. (Just as a West Virginia boy’s dropping out of high school to get married has nothing whatever to do with his ability to drive an automobile).

In Justice Black’s office, we spent many hours and days discussing and debating the Barsky case (the other law clerk was David J. Vann, later a reform Mayor of Birmingham, Alabama). I was very keen about this issue, having spent months on the passport comment just two years earlier. And in the meantime, I had come to see the issue in very personal terms. Just a year earlier, I had been admitted to the bar in New York. Candidates were subject to review by the Committee on Character and Fitness, and there were many rumors that the Committee would reject anyone thought to harbor left-wing tendencies. In my college days I had supported Henry Wallace’s third party candidacy in the 1948 presidential election. Running on the same ticket, for Governor of Connecticut, was Professor Thomas I. Emerson of Yale Law School, who was both a friend and mentor during my law school years. Professor Emerson’s activities earned him the name “Tommy the Commie.” Would my suspicious associations lead to trouble with the Committee on Character and Fitness? Fortunately for me, I was never questioned. The reason: I was an associate at the firm of Cravath, Swaine & Moore at the time of my admission to the bar, and the Committee never questioned a candidate who had the backing of the prestigious and ultra-respectable Cravath firm. But years later, when George Anastaplo was actually denied admission to the bar for declaring his adherence to the revolutionary principles in the Declaration of Independence, and a California applicant named Konigsberg was denied admission for “subversive associations,”

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14. 357 U.S. 116 (1958).

15. *Barsky v. Board of Regents*, 347 U.S. 442 (1953).

and both denials were upheld by the U.S. Supreme Court,<sup>16</sup> I realized my fears were indeed justified.

During the discussions with Justice Black and David Vann over the Barsky case, I suggested the idea of new property. I argued that a doctor's license or a lawyer's license were so valuable that they ought to be considered as property. And as property, they were deserving of constitutional protection. When Justice Black's dissent in the Barsky case was finally completed, it contained these sentences:

I have no doubt that New York has broad power to regulate the practice of medicine. But the right to practice is, as Mr. Justice Douglas shows, a very precious part of the liberty of an individual physician or surgeon. It may mean more than any property.<sup>17</sup>

In his dissent, Justice Douglas said that:

If . . . New York had attempted to put Dr. Barsky to death or to put him in jail or to take his property, there would be a flagrant violation of due process. I do not understand the reasoning which holds that the State may not do these things, but may nevertheless suspend Dr. Barsky's power to practice his profession. I repeat, it does a man little good to stay alive and free and propertied, if he cannot work.<sup>18</sup>

It was nearly ten years after *Barsky* that I encountered another side of the new property puzzle. While I was working on the article that eventually was published as *The New Property*, I discovered that welfare recipients were subjected to the same type of arbitrary official action as passport applicants, physicians, and candidates for admission to the bar. Under the Aid to Dependent Children Program, a single parent household headed by a mother was eligible for assistance, but not if the family received additional support from a man.<sup>19</sup> In order to enforce this restriction, the welfare authorities wanted to know if the mother secretly had a man in her life. Not only did this policy discourage marriage, and even encourage husbands to leave the home in order to permit the family to receive assistance, it also forced mothers to deny that they were even seeing a man. Hoping to catch the mother in a lie, the welfare authorities instituted a policy of "midnight searches." Arriving without warning in the middle of the night, authorities would demand the right to enter and search the premises to see if there was a "man in the house" as evidenced by a man's clothing in the closet, a man's shaving kit in the bathroom, or perhaps even a man sharing the mother's bed. Discovery of a "man in

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16. *In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).

17. *Barsky*, 347 U.S. at 459 (Black, J., dissenting).

18. *Id.* at 473 (Douglas, J., dissenting).

19. *See, e.g., Wyman v. James*, 400 U.S. 309 (1971).

the house" led to revocation of assistance. And if the mother refused to admit the authorities to her apartment, her refusal led to revocation of assistance.<sup>20</sup>

Quite obviously these searches were a violation of the mother's fourth amendment rights. But if she claimed her Constitutional rights, she lost her welfare assistance. Welfare was a "privilege, not a right." The joke was on her and her unfortunate children. It was the same ugly joke played on political dissidents who claimed their rights but lost their jobs, passports or professional licenses. It was the same joke played on the high school dropout who lost his drivers license. The mother might try to hide behind the Constitution, but the authorities still were able to "get her where it hurts." Played on helpless children, the "joke" became even nastier.

At the time I was making these discoveries about welfare, I was teaching the basic course in property law. One of the most interesting questions that came up at the beginning of the course was, where does property come from? The cases that answer this question include many law school classics. There are the fox hunters who pursue their quarry only to have a "saucy intruder" carry off the prize. There are the finders cases where lost valuables are claimed by the discoverer. There are meteorites that fall from heaven onto somebody's farm. What all of these cases teach is that ultimately property comes into existence by sanction of the state, and individuals qualify for ownership by meeting whatever criteria the state sets up. Likewise, ownership of land is ultimately traced back to a grant from the sovereign. In England, much land in private hands can be traced back to grants from the king. In the United States, some land goes back to royal grants. Acts of Congress provided the basis for many other land grants, and the ultimate source of property in land will always be the sovereign. Property other than land is acquired in accordance with the laws of the sovereign.

If *all* property comes from the state, why should some grants be considered sacred rights, while others, such as welfare, are considered mere privileges? I began to think that the mere fact that welfare benefits come from the state cannot justify the denial of rights in the recipients. Property has always been created by the state in order to serve some socially desired goal. In Medieval times, property was created to reward military service to the lord. The United States created vast grants of property to encourage the building of transcontinental railroads. We

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20. See Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

used grants of property to aid individual ownership of farms under the Homestead Act. Today we are certainly free to treat welfare or other benefits as property if that status will serve the needs of this society and its people.

Welfare and licenses both present the issue of whether new property can be used by government to enhance its power and undermine or “buy up” constitutional rights. But welfare opens up a larger question: whether the needy in our society are entitled to some form of social support, some share in the wealth of society by right. Do the homeless have the right to a home? Do the hungry have the right to food? Does the Constitution grant such rights today even if they were not discussed by the Framers two hundred years ago?

Homelessness and other forms of need present a fundamental challenge to our thinking. Instinctively, we feel that it is wrong, a violation of justice and human rights, that one portion of the American population should be dispossessed, like refugees in their own country. Although they are less visible, we know that there are many dispossessed other than the homeless, including children, the aged, the mentally ill. What we lack is a conceptual framework to see their situation as a violation of America’s promises.

I would start from an environmental perspective on human society. Every human being, like every other form of life, requires a supportive environment in order to survive. In this era of endangered plant and animal species, we are familiar with the idea that it takes a certain territory to support a pair of owls, and it takes a certain combination of elements to support a redwood tree. No individual life form can exist without its habitat. Human beings cannot exist on the concrete pavement of American cities.

For almost all of human history, a supporting environment has been available to those willing and able to work — whether that work was hunting and fishing, agriculture, or the services people render in an industrial society. This was true when this nation was founded. Land for homes and farming was available, and so was work in the towns and cities. Two great changes have taken place. First, the sources from which people can supply their needs have been monopolized. Such necessities as food and shelter are controlled by large organizations, available only to those who can pay the prices demanded by the monopolists. Second, the supply of work has been monopolized, subject to ever tighter control by fewer and fewer organized employers. Today willingness to work is no guarantee that a person will be able to find work. Willingness to expend effort to supply one’s own needs is no guarantee that this goal

is possible. Corn cannot be grown on the sidewalk, nor can homes be built without materials and land. Moreover, industrialism has so damaged the traditional family and community that these social structures often no longer offer support for those, like children and the aged, who once depended upon them.

The monopolization of the sources from which human needs can be supplied is a development that has taken place with the assistance of the state. The corporation itself is a creature of the state and could not exist but for the state's aid and protection. Every step of the way from the self sufficiency of two hundred years ago to the dependency of today has been taken with the active help of the law. By the ordinary meaning of language, is it not fair to say that the state has "deprived" the dispossessed population of life, liberty and property?

We need to question our assumptions concerning the base, or starting point, for a member of this society. Could the Framers have imagined that individuals would start naked, with absolutely nothing and no means to obtain it? Or was the starting point family, community, land, and available work? The assumption that every American begins life without the means to survival might seem absurd if we had become accustomed to it by incremental stages. If 1789 had been succeeded by 1990 instead of 1790, might not people have rebelled against the seizure of land and work by government-sponsored monopolies?

Another great change since the nation was founded is the fact that the economic fate of individuals today is greatly affected by remote governmental decisions over which the individual has no control. If the Federal Reserve Bank raises interest rates, this can cause layoffs and plant closings that throw individuals out of work through no fault of their own. A rise in interest rates can constrict the housing market so that many people cannot find a house. A change in government contract policy can impoverish an entire region. If the government ceases to support the defense industry, many individuals will become homeless and destitute in direct consequence. Should it not be said that such governmental actions "deprive" people of life, liberty and property?

We might also view the dispossessed and the destitute of our society as people who have been forced to bear the costs of improvements from which the rest of society benefits. Every labor-saving advance in technology or organization throws people out of work, often permanently. The profits of corporations are maximized when they "cut labor costs" — i.e., put people out of work. In this very real sense, the homeless contribute to profits. Prosperity for one segment of society has been maximized by preventing another segment from sharing in that prosperity. The health

of one sector is built on the sickness of another sector. The interdependence of every aspect of our economy today demands a holistic view that everyone's fate is connected.

I see the homeless and destitute people in America today as resembling the trees that are dying from acid rain. These trees are dying because of chemicals produced by companies in the process of making a profit for themselves. Steps to curb pollution would save the trees but reduce the profits. The trees' death ought to be counted as a cost of the manufacturing process that produces the profits. Only a perversion of economic thinking allows us to deny this fact so that we fail to include the death of trees on the cost side of the manufacturing company's balance sheet. Such euphemisms as "social costs" or "externalities" merely mean "costs that the company is allowed to impose on others." Trees that are dying of acid rain and homeless people struggling to survive on our streets can be saved only by a long-overdue change in our thinking.

The new property raises many other legal issues besides the ones I have mentioned. Indeed, new property issues arise in so many different areas of law that it is very difficult to maintain a comprehensive view of the problems. Labor and employment law, domestic relations, environmental law, government contracts and subsidies, executive compensation, the entire field of welfare, health law and children's law together do not exhaust the subject. This should indicate the pervasive influence of the new forms of wealth that have come to occupy such a dominant position in our society. It seems to me that treating new property as a field of law in its own right would assist in the ordering of this dynamic field.<sup>21</sup>

In some way or other, law schools should make the *individual* an important focus of the curriculum. The perspective should include both constitutional rights and the ordinary struggles of the individual to deal with a legalistic society. Too many lawyers serve the interests of organized society; too few help the individual to cope. Yet in areas like employment, there is a rising need for protection of individual interests. "The Individual vs. Organized Authority" should be required in every law school.

But what is more important than curriculum or casebooks is the need to develop a philosophy that will preserve liberty and independence, as well as justice, in what has become a collective society. Each instance of the abuse of new property power points toward a larger truth: the modern state contains too much unchecked power over individuals, and too few safeguards have been designed to cope with the inevitable misuse

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21. See Appendix attached hereto.

of this power. The fact that the most powerless people in our society are the most common victims makes the task of revising safeguards urgent. But ultimately every individual, rich as well as poor, needs protection from organized power.

Advocacy of new property rights does not carry with it any approval of the bureaucratic, hierarchical, "public interest state" or corporate state that has come to dominate America. My own position on this form of social structure should be clear from *The Greening of America*: I find the corporate state to be at war with all of the most cherished human values, and I would eagerly welcome the replacement of the corporate state by some form of New Community which could nurture those values. I welcome the vision of those scholars, including members of the Critical Legal Studies movement, the Feminists, the Liberationists, all of whom seek a change of consciousness that would end existing domination and make a New Community possible.

The case for new property theory rests on the fact that the bureaucratic state *is* our present reality, and under our present reality many people are *now* deprived of rights, and every day that passes is a day of deprivation for them — and for all. It makes no sense to me to stop fighting for rights today because of the promise of a distant Utopia. I am aware of the C.L.S. criticism of so-called liberal rights—that they tend to affirm the existing system and to lull people into an acceptance of the status quo, thus subduing revolutionary fervor. I am also aware of the criticism that liberal rights are often illusory promises. All of these C.L.S. criticisms have a degree of validity which I acknowledge.

I also accept the ideas of civic republicanism with its concepts of public virtue and dialogue, and its rejection of the atomistic and self-centered individual. But I deny that new property rights would bring about the further isolation of the individual. Quite the contrary.

In the late sixties and early seventies I had the opportunity of getting to know many college students who were influenced by the search for new consciousness that characterized this period. Recently, after a long interval, I became curious about today's undergraduates, who have so often been portrayed in the media as selfish and materialistic. To satisfy this curiosity, I taught for four quarters at the University of California, Santa Barbara, and found that the undergraduates were indeed different.

On the surface they did seem to be different in the way the media have described. But underlying the excessive concern with career, grades, and material possessions was something the media have never mentioned—a pervasive anxiety about the power of the vast and imper-

sonal University of California bureaucracy and its ability to crush any individual student who does not submit to the hierarchy. Students seem painfully aware that so many people have arbitrary power over their lives — the power of grades, recommendations, admission to desirable classes. There are so many authorities to propitiate, so many lines to stand in, so many requirements to observe — humbly.

It is not pleasant to see so many healthy and strong young people continually assume attitudes of submission and subservience dictated by anxiety and fear. The lesson they seem to have learned all too well is that bureaucracy has so much power over one's future that it is useless to try to be an individual, destructive to fight the system. Take away this pervasive domination, and in private moments the students seem to have the same ideals as the students of an earlier generation—indeed, they seem to have gone beyond.

My remedy for the present condition of student subservience would be more student rights. University degrees and credentials are a prime example of new property, with all of its power over people's lives and futures. I deplore the system that turns teachers into tyrants. My larger point is that new property rights are needed to give individuals enough freedom to realize the ideals of civic virtue, public dialogue and the New Community. Bureaucratic structures create an oppressive social environment in which isolation and selfishness are promoted because they seem necessary to survival. New property rights would enhance, not diminish, the potential for civic virtue.

In the twenty-five years since *The New Property* was published, I believe that the position of the individual in our society has become ever more endangered, and the abuses of power by organized authority have so far stifled hopes of a more humane community. Alienation and domination are greater than ever today. As for social justice, the homeless in our streets and parks tell us that the more powerful the centralized bureaucratic state becomes, the more power will be used by a ruling elite to enrich and enhance themselves at the expense of the powerless. And so I renew my call for empowerment through economic rights. Law cannot create better people or a better community. But it can give us the breathing space in which to pursue those high ideals.

## APPENDIX

[*Editors' note: This appendix was compiled by the staff of the University of San Francisco Law Review. It is a list of articles and cases that cite The New Property. It is intended to demonstrate the impact of the New Property upon legal scholarship, and support Charles Reich's call for the teaching of the New Property as its own legal discipline. It is not our intent, however, to imply that the following cases and articles is an exhaustive list of citings of The New Property; it is merely exemplary.*]

## CASES

1. *Thorpe v. Housing Auth.*, 386 U.S. 670 (1967)

Petitioner was evicted from a federal housing project after being elected to a tenant's organization. The Supreme Court of North Carolina affirmed the eviction. The United States Supreme Court granted certiorari, but vacated the judgment and remanded because the Department of Housing and Urban Development had initiated new procedures by which a tenant can be convicted. (Per Curiam). In his concurrence, Justice Douglas stated that, "the nature and theory of our institutions of government do not mean to leave room for the play and action of purely personal and arbitrary power." Any suggestion to the contrary "resembles the philosophy of feudal tenure."

2. *Goldberg v. Kelly*, 397 U.S. 254 (1970)

Welfare benefits are a matter of *statutory entitlement* for qualified persons and procedural due processes applicable to their termination. A pre-termination evidentiary hearing is required for due process. Quoting Reich, *Individual Rights and Social Welfare*, 74 Yale 1245, 1255 (1965), the Court reiterated that, "Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipient they are essentials."

3. *Wyman v. James*, 400 U.S. 309 (1971)

Visitation by an AFDC caseworker to the home of a beneficiary does not violate any rights granted by the 4th and 14th Amendments. Visit does not have to be consented to or supported by a warrant based on probable cause. In his dissent, Justice Douglas noted that, "The most important forms of property is government largess which some call the 'new property.'"

4. *Richardson v. Belcher*, 404 U.S. 78 (1971)

Section 224 of the Social Security Act, which requires a reduction in Social Security benefits to reflect Worker's Compensation payments, has a rational basis and does not violate the Due Process clause of the 5th Amendment. Justices Marshall and Brennan, dissenting, criticized the majority's reliance on *Flemming*, citing *The New Property*.

5. *Arnett v. Kennedy*, 416 U.S. 134 (1974)

A non-probationary employee in civil service was discharged without a pre-removal hearing. The Court held that the Lloyd-LaFollette Act requirements of *post-termination* hearings were sufficient to protect the liberty interests of federal employees. In his dissent, Justice Marshall stated that, "The decisions of this Court have given constitutional recognition to the fact that in our complex modern society, wealth and property take many forms," quoting *The New Property* at 738.

6. *Scott v. Macy*, 349 F.2d 182 (D.C. Cir. 1965)

The U.S. Civil Service Commission may not exclude an applicant on the grounds that he had engaged in 'immoral conduct.' The classification is too broad and vague and government must justify the necessity for such a classification. The commission must at least specify why that conduct related to "occupational competence or fitness," citing *The New Property* at 782.

7. *Gomez v. Florida State Employ. Serv.*, 417 F.2d 569 (5th Cir. 1969)

Migratory farm workers who accept work through employment systems set up by the Wagner-Peyser Act and regulations promulgated pursuant thereto have rights and remedies for violations when they are deprived of protection and benefits of wages and working conditions promised by the Act. "The 'property' limitation on § 1983 first articulated in . . . *Hague v. CIO* may be giving away to changing concepts of 'property.' "

8. *Smith v. Arbaugh's Rest. Inc.*, 469 F.2d 97 (D.C. Cir. 1972)

In a personal injury action, the court held that classification of the injured person as a licensee, trespasser, etc. was irrelevant. "Personal status no longer depends on one's relation to real property," citing *the New Property* at 739.

9. *In re Ming*, 469 F.2d 1352 (7th Cir. 1972)

Appellant was suspended from the practice of law following a conviction for failure to file tax returns. He was given no hearing prior to the suspension. The court held that a misdemeanor conviction was not grounds for suspension without a hearing and was thus a violation of due process. "Both licenses to practice law and welfare payments can be viewed as a type of 'new property', the deprivation of which has drastic consequences to the individual."

10. *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973)

The action of a gas company in cutting of services was conceded to be the type of deprivation that is afforded due process protection. The "service is a specialized type of property which presents distinct problems in our economic system, the taking of which may impose tremendous hardship upon customers."

11. *Geneva Towers Tenants Org. v. Federated Mrtg. Investors*, 504 F.2d 483 (9th Cir. 1974)

In an action by tenants of federally funded housing project seeking rescission of rent increases, the court held that the interest of tenants in not having rents raised was an interest entitled to protection under the due process clause. Thus, notice must be given of rent increase, opportunity to object and statement of reasons provided. A hearing was not required, however. In a dissenting opinion, Judge Hufsteadler stated that: "To say that interests are entitlements only if they are property interests is not helpful because the term property embraces multiple concepts that have differing consequences depending upon the kind of property involved, and the setting in which the concepts are involved," citing *The New Property* at 739. Thus, that an interest is legally protected is both a prerequisite to and a consequence of its being termed property.

12. *Ralphy v. Bell*, 569 F.2d 607 (D.C. Cir 1977)

A provision of the Micronesian Claims Act, governing finality and conclusiveness of a decision by the Claims Commission, did not preclude judicial review of a claim that the Commission had violated constitutional and statutory directives. "[T]he distinction drawn 20 years ago . . . between 'a right' and 'a privilege' has given way to a far different definition of property interests under the Fifth Amendment. . . . [A] statute

that bestows an entitlement must do so in accordance with the dictates of the due process clause.”

13. *Vruno v. Schwarzwald*, 600 F.2d 124 (8th Cir. 1979)

The court held that a criminal offender was not entitled to public employment under a state policy of rehabilitation. Therefore, removing the appellant's name from a list of eligible candidates for employment in a civil service position was not a deprivation of due process or equal protection of laws guaranteed by the 14th Amendment. The appellant followed an extension of the principals articulated in *The New Property*, and argued a concept of legitimate expectation to certain procedures in the nature of entitlement.

14. *Beitzell v. Jeffery*, 643 F.2d 870 (1st Cir. 1981)

In failing to provide a professor with tenure, a university did not deprive him of “property” within the meaning of the 14th Amendment. Moreover, during tenure proceedings, the university did not interfere with any protected interests in “liberty,” citing *The New Property*.

15. *United States v. Hensel*, 711 F.2d 1000 (11th Cir. 1983)

Statute criminalizing attempts to injure or act of injuring any vessel within the United States does not amount to an unconstitutional taking of private property. “The new property described by appellants relates to social entitlements, not to destruction of tangible property.” Citing *The New Property* at 734-37.

16. *Doran v. Houle*, 721 F.2d 1182 (9th Cir. 1983)

No constitutionally protected property interest in government issued permits to veteranarians. “To have a property interest in any government benefit, a person must have more than an abstract need or desire for it; he must have a legitimate claim of entitlement.”

17. *Winston v. City of New York*, 759 F.2d 242 (2d Cir. 1985)

Tenured city school teachers have a property interest in their pension rights that is protected under the due process clause of the 14th Amendment. Absent a determination that a teacher was guilty of misconduct, termination of his or her constitutional right to a pension was deprivation of property without procedural due process of law, citing *The New Property* at 769.

18. *Arcoren v. Peters*, 811 F.2d 392 (8th Cir. 1987)

The court upheld an action by borrower against Farmers Home Administration for violation of due process right to a hearing before repossession of his cattle. "If prior notice is required for welfare 'entitlements,' the new-fangled type of property described by Professor Reich, would it not be required *a fortiori* before permitting conversion of a type of personal property long recognized at common law?"

19. *Di Silvestro v. United States*, 268 F. Supp. 516 (E.D.N.Y. 1966) (rev'd on other grounds, 405 F.2d 150 (2d Cir. 1968))

In an action concerning disputed national service life insurance dividends and Veteran's benefit payments, the court held that a no-review clause would not be applied to preclude plaintiff from obtaining judicial review of evidentiary basis of governments' claimed right of setoff. "[T]he law of government largess has developed with too little regard for those procedural safeguards which, in other areas, have proved successful in preventing the arbitrary exercise of power. The need for such safeguards is especially acute where the benefits are awarded." Quoting *The New Property* at 785-86.

20. *Madera v. Board of Education*, 267 F. Supp. 356 (S.D.N.Y. 1967)

The court held invalid a New York school board regulation prohibiting attendance of a student's and parent's attorney at guidance counseling sessions. The valuable right to a public school education should not be invaded or denied without proper safeguards of procedural fairness; these should mirror the safeguards in disciplinary proceedings for state employees and in revocation of state licensing proceedings.

21. *Albaum v. Carey*, 283 F. Supp. 3 (E.D.N.Y. 1968)

In an action by teacher alleging that he was denied tenure for exercising his rights of free speech, Judge Weinstein cited *The New Property* in support of the principle that conditions of government employment may not stifle fundamental liberties.

22. *Kelly v. Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968)

The court held that a procedure before termination of welfare benefits, in which recipient was permitted to respond in writing but not in person, did not satisfy constitutional due process requirements.

23. *Gomez v. Lewis*, 292 F. Supp 560 (W.D.Penn. 1968)

In an action against trustees of coal miners' retirement fund for determination that plaintiff was entitled to a pension, the court held that the trustees were authorized to amend regulations without giving the plaintiff an opportunity to apply for pension before new requirements took effect. The principles for resolving controversy must be in accordance with trust principles, not considerations which might be appropriate in considering the rights of welfare recipients to fair and equal treatment.

24. *James v. Goldberg*, 303 F. Supp. 935 (S.D.N.Y. 1969)

AFDC officials could not condition receipt of benefits on recipients agreeing to warrantless home visits. The court assumed that AFDC grants are a privilege or government gratuity, although it cited *The New Property* as an argument that welfare benefits are no longer gratuities, but have assumed at least some of the characteristics of rights.

25. *Rothstein v. Wyman*, 303 F.Supp. 339 (S.D.N.Y. 1969)

Welfare payments to recipients in Westchester County were lower than to recipients in New York City. The court held that such a discrepancy was unconstitutional under equal protection where it is undisputed that the cost of living in both locales was similar. According to the court, welfare assistance represents a statutory right, as distinguished from charity. If a person meets the requirements prescribed by statute under a federally assisted program, the agency is obligated to recognize this claim. Citing *The New Property* at 758-86.

26. *Murray v. Vaughn*, 300 F. Supp. 688, 703 (D.R.I. 1969)

Where local selective service board's denied continuation of a registrant's occupational deferment after expulsion from the Peace Corps, the registrant was entitled to pre-prosecution judicial review of the classification. "[I]t is now settled that simply because the government grants a 'privilege' or extends to its citizens the opportunity to exercise their freedom to pursue employment by seeking employment with it, does not mean that the government can attach conditions to the grant of the privilege or the offering of the opportunity, which conditions are inhibitory of constitutional rights." Citing generally *The New Property*.

27. *U.S. ex rel Carioscia v. Meisner*, 331 F. Supp. 635 (N.D. Ill. 1971)

Petitioners were deprived of due process when a parole executive refused to allow petitioners to confront and cross-examine adverse witnesses. The court noted that the question of a due process violation turns on whether the benefit that had been terminated could be classified as right or purpose.

28. *Tindall v. Hardin*, 337 F. Supp. 563 (W.D. Penn. 1972)

The right to receive food stamps is a statutory entitlement. Depreciation of such a right is a denial of property without due process of law.

29. *United States v. Angel*, 362 F. Supp. 445 (E.D. Penn. 1973)

In holding that the government as mortgagee is no different than a private mortgagee, and thus cannot alter or increase the covenanted obligations of the mortgagor, the court quoted the following passage from *The New Property*: "Concentration on a single policy or value obscures other values that may be at stake. Some of these competing values are other public policies. . . . In the regulation of government largess, achievement of specific policy goals may undermine the independence of the individual. Where such conflicts exist, a simplistic notion of the public interest may unwittingly destroy some values." *The New Property* at 774.

30. *Lopez v. Williams*, 372 F. Supp. 1279 (S.D. Ohio 1973)

The suspension of students without a hearing prior to suspension or within reasonable time thereafter, were denied due process of law. The state created right to an education is a protected liberty under the 14th amendment due process clause. "The right to an education is not an interest traditionally considered to be within the concept of 'property,' even though an education undoubtedly has an economic as well as an intangible value. However, governmental entitlements in our modern society take on the incidents of property."

31. *Ortwein v. Mackey*, 358 F. Supp. 705 (M.D. Fla. 1973)

Terminating a state university faculty member without permitting his counsel to actively participate at hearing would deprive him of *liberty* without due process of law. The plaintiff was not, however, deprived of *property* without due process. He had no legitimate expectancy in being continually rehired after leaves of absence. The "taking" of his unilateral

expectancy of reemployment did not rise to the stature of a constitutionally protected property interest. "Property in a 14th amendment context is a necessarily broad concept which should take within its province contemporary knowledge of circumstances and indicia worthy of constitutional protection. [Citing *The New Property*.] The circumstances surrounding plaintiff's employment do not constitute such a property interest."

32. *Giguere v. Affleck*, 370 F. Supp. 154 (D.R.I. 1974)

In a civil rights action against the Department of Social and Rehabilitative Services for depriving plaintiffs of benefits to which they were entitled, the court held that the plaintiffs' fundamental human right to a nutritionally adequate diet is included in the language of 42 U.S.C. section 1983. Moreover, the court stated that section 1983 is designed to redress violations of *any rights and laws* of the United States. It matters not whether state action is alleged to be a violation of the Constitution or merely of rights secured by federal statute or regulation.

33. *Doe v. Wohlgemuth*, 376 F. Supp. 173 (W.D. Penn. 1974)

Welfare recipients and participants in medical assistance had standing to challenge the state's refusal to provide reimbursement of the cost of abortions, given that relevant constitutional restraints apply to public assistance benefits and their recipients.

34. *Frances v. Cleland*, 433 F. Supp. 605 (D.S.D. 1977)

Suit by veterans, alleging that sections of Veteran's Education and Employment Act were unconstitutional, and that veteran's benefits are a statutory entitlement. They are a class of persons who are recipients of government largess.

35. *NAACP v. Wilmington Med. Ctr.*, 453 F. Supp. 330 (D. Del. 1978)

Failure to accord civil rights plaintiffs a trial hearing with respect to their dissatisfaction with H.E.W.'s voluntary settlement of their complaint did not offend the due process requirements of the 5th Amendment. "[T]here is no aid extended directly to the beneficiaries of [Title VI] that ripens into an enforceable entitlement when certain objective criteria are satisfied. . . . [T]heir interests plainly differ from conventional interests which courts have classified as 'entitlements.' "

36. *South Carolina v. Block*, 558 F. Supp. 1004 (D.S.C. 1983)

Milk price support program is a benefit, not a true right. However, it has long been recognized that governmental benefits and grants have become so critical to the working of our society that it is unrealistic to regard them as a charity or gratuity to be withdrawn in a capricious manner. The term which more realistically describes the milk price support system is 'entitlement.'

37. *Sanders v. State Dept. of Public Welfare*, 472 S.W.2d 179 (Tex. Civ. App. 1971)

The court upheld an action by welfare recipients, which had alleged that a welfare regulation was unconstitutional for vagueness, and that the denial of aid on the basis of the regulation was also not valid. *Goldberg v. Kelly* and *The New Property* were cited for the proposition that the regulations at issue were to be construed in the same manner as statutes.

38. *Lake Transport, Inc. v. Railroad Comm'n of Texas*, 505 S.W.2d 781 (Tex. 1974)

The Court held that a company did not have standing to appeal an order of the Railroad Commission. The dissenting judge argued that the company had a right to challenge the permit revocation. Although the supporting contract had been cancelled, the permit was valid and subsisting. "In my opinion [the carrier] owns something whether we term it a right, privilege, or 'the new property.'"

39. *Teegarden v. Arkansas Employment Sec. Div.*, 591 S.W.2d 675 (1980)

The State Employment Board held a claimant ineligible for benefits on the grounds that she was not making a reasonable effort to seek suitable work, although the board found that claimant was in fact unemployed. The claimant contended that when she went to appear in front of the commissioner, she went prepared only to prove that she was in fact unemployed, and that the issue of her effort to seek work would not be reviewed. The court held, however, that notice to the claimant was sufficient to inform her that all issues regarding her hearing may be discussed on appeal. Even if the claimant was misled by the notice, she had an opportunity to raise the point before the board, which she did not do. In a dissenting opinion, Judge Newbern argued that administrative due process requires either proper notice of the issues to be heard or a basis to find an intelligent waiver. Administrative agencies have slipped into a

complicated procedure for administering governmental largess, citing *The New Property* ("Charles Reich made the point . . . that we must treat this form of wealth distribution as affecting and effecting property rights."). It is important that people do not lose appeals simply because they cannot understand the complicated procedures.

40. *Mortensen v. Employees' Retirement System*, 473 P.2d 866 (Haw. 1970)

In an appeal by applicants to the Retirement System who were denied benefits, the court held that a trial-type hearing is required before termination of welfare benefits. "Although the courts have been slow to accord judicial protection to those entitled to these benefits, such benefits have indeed become 'the new property.'"

41. *Thiboutot v. Maine*, 405 A.2d 230 (Me. 1979)

The right to correct payments of welfare aid is not a property right. The court distinguished *Goldberg* and *The New Property*, stating that, "Not all rights normally associated with ownership of property are available to recipients under the welfare laws and regulations." The court concluded that the defense of state immunity is applicable in welfare rights cases, and cases denying the defense where plaintiff's property has been taken by the state without just compensation cannot be relied on as precedent.

42. *Jackson v. Searsport*, 456 A.2d 852 (Me. 1983)

The court found that a town's failure to follow statutory procedures for processing plaintiff's general assistance application infringed on no constitutionally protected property interest. The statutorily prescribed timetable for the administrative consideration of general assistance applications has not become a right; property and procedure still remain functionally distinct concepts.

43. *In re Advisory Opinion*, 507 A.2d 1316 (R.I. 1986)

In a case revolving around the issue of removal of a Supreme Court justice at a session other than an annual session for election of public officers, the court held that the power of the General Assembly to declare an office of the Supreme Court vacant had been extinguished by amendments to the State Constitution. A Supreme Court justice who has a fully justified expectation of employment until death or resignation has a property interest protected by due process.

44. *Ridge v. Police & Firefighters Retirement and Relief Bd.*, 511 A.2d 418 (D.C. 1986)

The court held that the plaintiff, a retired police officer, had a property interest in his disability annuity. Due process requires that he be given fair and adequate notice of both a threatened finding that he had wilfully failed to provide requested information, and of possible adverse consequences of such finding.

45. *Shively v. Stewart*, 65 Cal. 2d 475 (Cal. 1966)

Action by doctors to compel production of depositions and documents from the State Board of Medical Examiners prior to disciplinary hearing. The court held that disciplinary hearings are punitive in character, citing *The New Property* at 751-55, and its concentration of functions calls for procedural safeguards. *Id.* at 752 n.97.

46. *Hallinan v. Committee of Bar Examiners*, 65 Cal. 2d 447 (Cal. 1966)

Action seeking review of the Committee in refusing to certify petitioner for admission to practice law. In dicta, the court held that stricter substantive and procedural requirements are necessary to sustain an adverse decision in a disciplinary proceeding, because a practicing attorney has a vested property right in maintaining an already established practice. An applicant for admission, however, seeks merely to be accorded a privilege.

47. *Morrison v. Board of Education*, 1 Cal. 3d 214 (Cal. 1969)

Although no person can be denied government employment because of factors unconnected with the responsibilities of that employment, citing *The New Property*, a teacher may be disciplined under the Education Code for homosexual relations if it is proven that such conduct indicates an unfitness to teach.

48. *Ishimatsu v. Regents of Univ. of Calif.*, 266 Cal. App. 2d 854 (1968)

Action by University employee for reinstatement, which was denied. The court noted that although the plaintiff's employment was terminable at will, the rights of government employees have been increasingly scrutinized during the past several years, citing *The New Property*. Thus, the power to dismiss public employees may not be exercised arbitrarily in disregard of the employee's constitutional rights.

49. *Vinson v. Greenburgh Housing Auth.*, 288 N.Y.S.2d 159 (1968)

In a wrongful eviction action, the court held that the housing authority cannot arbitrarily deprive a tenant of his or her right to continue occupancy through exercise of a contractual provision to terminate the lease.

50. *Gould v. Looney*, 304 N.Y.S.2d 537 (1969)

In an action by policeman seeking reinstatement to the force, the court held that the Commissioner is entitled to suspend an officer without a hearing. However, he may not withhold the policeman's pay until after a hearing and determination; "To the individual, the right to receive income may be the most meaningful and distinctive wealth he possesses," quoting *The New Property*.

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