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A CULTURAL HISTORIAN'S READING OF CHARLES REICH'S IMPACT ON THE CONTEMPORARY DISCOURSE ON "WELFARE"

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I. CHARLES REICH AND THE "NEW PROPERTY"

Twenty-five years after publication of *The New Property* in the *Yale Law Journal*[1] the situation of welfare recipients and other groups expected to benefit from an enlarged conception of entitlement has not improved so noticeably as to render Charles Reich's earlier criticism and program a memorable, though no longer fact-related, instance of social engagement. Reich's concerns about the state of American society and societal injustices appear essentially unchanged since he first expressed them in 1964; equally unchanged is his strong belief in the virtue of the legal device "new property."

Reich's discussions of "welfare," including those contained in his pathbreaking book *The Greening of America*[2] and his most recent statements at the Sixth Annual Institute of Bill of Rights Law Symposium at the College of William and Mary,[3] can be understood as commentaries on American society and culture, as contributions to political philosophy and as programs of legal intent. This is why they have attracted the attention of a heterogeneous audience and have challenged the "interpreters" of both culture and law. Although Reich's book and articles are replete with sociocultural descriptions, evaluations and considerations, these references are clearly part of a jurist's attempt to lay the groundwork for a legal solution. Reich's works embody cultural criticism in the service of the law.

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1. Reich, *The New Property*, 73 YALE L.J. 733 (1964).
2. C. REICH, THE GREENING OF AMERICA (1970).
3. Reich, *The Liberty Impact of the New Property*, 31 WM. & MARY L. REV. 295 (1990).

A "literary" configuration such as the one characterizing Reich's works carries a message beyond the obvious and calls for a special approach. The reader is tempted to ask questions other than those customarily advanced in textual interpretation. Several questions come to mind almost automatically: What are the source and the significance of the interlinking yet different strands of reasoning in these texts? And, how and to what extent do extralegal considerations partake in the process of problem solving? As Duncan Kennedy demonstrated in another context, the interlinking of different rhetorical or argumentative modes reflects one contemporary trend in legal thinking and is indicative of a modern dilemma: "The opposed rhetorical modes lawyers use reflect a deeper level of contradiction. At this deeper level, we are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future."[4]

As an expression of a new consciousness, or at least as a preferred innovative way of dealing with legal problems and of addressing an audience outside the juristic community at the same time, the interconnection of traditionally unrelated argumentative modes has become part of the legacy of Charles Reich's writings. This interconnection is an outstanding characteristic of not only today's treatises on "entitlement," but even those treatises conceived of as counterstatements to Reich's program.

In the following commentary, I will limit my discussion to two examples, each representing a model of combining legal and extralegal thought. One example, though essentially in accordance with Reich's plea for a legal solution to the welfare problem, is actually a program that goes far beyond a mere uncovering of systemic weaknesses and a subsequent redefinition of legal concepts; it envisages a total reorganization of social and legal structures. The other example is highly critical of social and legal experiments, and is wary of the dangers that might arise from the "constitutionalization" of an issue traditionally regarded as a matter of moral rather than of legal concern. Although most of the quotations are taken

4. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976).

from two publications by Roberto Mangabeira Unger[5] and from one publication by Carl E. Schneider,[6] this paper's actual range of sources is wider, and includes ideas derived from discussions with colleagues and friends, and from lecture and seminar notes.

As a reminder, and in order to avoid future cross-references, I will begin by itemizing those features of Charles Reich's plan for a more just future that reemerge continually in the contemporary discourse on entitlement. First is Reich's general statement that "[s]ociety today is built around entitlement . . . [and] that [i]t is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced."[7] The lack of effective enforcement is related to the fact that society views welfare benefits more or less as donations from the state. This attitude implies that "in dispensing public 'charity'. . . government need only be as fair as the conscience or discretion of the majority dictates."[8]

Society's willingness to support the needy and the conditions of eligibility it imposes are not constant, but tend to change, and often in response to political moods and popular notions. The potential for inconsistency and arbitrariness is enhanced further by the insufficiently circumscribed power and wide range of discretion administrative agencies possess in dealing with dependent persons.

Shifting the focus from the donor to the recipient, we learn that a beneficiary is exposed not only to sometimes questionable interpretations of the laws and rules applied to welfare, but also to censorious measures justified by his or her allegedly reproachable lifestyle. "Denial, reduction and termination of welfare benefits on vague, unarticulated or clearly illegal grounds is apparently wide-

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5. R. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY (1976) [hereinafter R. UNGER, LAW IN MODERN SOCIETY]; Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983) [hereinafter Unger, *Critical Legal Studies*].

6. Schneider, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on the Constitutionalization of Social Issues*, LAW & CONTEMP. PROBS., Winter 1988, at 79.

7. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965).

8. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 65, 94 (1982).

spread; methods used to check continuing eligibility have also been attacked as legally questionable if not unconstitutional."[9]

As an object of public charity, the beneficiary is expected to conform to rules that are frequently derived from a community's model of ideals rather than from the actual pattern of behavior tolerated in "nondependent" citizens. As Reich and other authorities on the subject suggest, an indigent person will most likely become exposed to decisions that bear the imprint of a world view at odds with reality. Infringements of an indigent person's rights, so we learn, are "common occurrences"; an evaluation of a beneficiary's behavior and attitudes may tip the scales in favor of or against his or her continued enjoyment of government largess.[10]

Although Reich leaves no doubt that the violations of rights and privacy that beneficiaries must tolerate in return for governmental support would cause malaise to the altruist, the specific constellation of modern life is what makes the demand for a remedy more urgent. In a world characterized by the decline of interpersonal relations, the traditional donor-recipient pattern is inadequate, as are the inherited axioms concerning obligation, stewardship, gratitude, work and success. Modern society is not yet able to cope with the exigencies or side effects of technology and science. Unwilling or unable to reassess the reliability of their hypotheses, contemporary welfare agents have failed to see that nonpersonal factors may be responsible for the poor's predicament. They have also failed to acknowledge that "the poor are affirmative contributors to today's society, for we are so organized as virtually to compel this sacrifice by a segment of the population."[11]

Seen from this perspective, politicians and administrators should no longer be burdened with a task they are not prepared to fulfill. Clearly, the law, as the guarantor of an unbiased transfer of benefits, must assume a reformist role. Insistence on a legal solution has its source in the assumption that culture has failed to come to terms with technological and scientific developments, and that automatic regulation is an illusory hope. Demand for a legal solution

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9. J. CARLIN, J. HOWARD & S. MESSINGER, CIVIL JUSTICE AND THE POOR: ISSUES FOR SOCIOLOGICAL RESEARCH 4 (1967) [hereinafter J. CARLIN].

10. "One of the most significant regulatory by-products of government largess is power over the recipients' 'moral character.' " Reich, *supra* note 1, at 747.

11. Reich, *supra* note 7, at 1255.

also has its source in the moral qualms of the altruist, and in the recognition that there are untapped resources in the realm of the law.

In Charles Reich's discourse, the findings of the cultural observer and the convictions of the moral philosopher converge into a request to extend the concept of property rights to welfare benefits. As soon as this request takes shape, a line will be drawn that extralegal considerations cannot overstep; entitlement will become the exclusive responsibility of the jurist.[12]

II. Beyond the "New Property"

In Charles Reich's reflections on "entitlement," the fusion of different argumentative modes ends when ultimate responsibility is delegated to the jurist; at that point a dividing line between competences, and in the same manner between rhetorical modes, is established. This dividing line, however, is erased under a cognate, though far more radical, critical legal studies conception by Roberto M. Unger.[13]

Entitlement, as it appears in Unger's discussion of what the law ought to be, is part of a broad vision aimed at radical change, that is, at recurrent acts of "deconstruction" and subsequent "reconstruction" of society, the economy and the law.[14] It is a vision that refuses to be restrained by givens, whether they are cultural, constitutional, or part of a time-sanctioned juristic creed. Here, the merging of legal and extralegal reasoning is even more emphatic and far-reaching than in Reich's version because it is part and parcel of a strategy destined to dismantle rigid conventions, to disrupt policies created by an allegedly binding world view, and to break up the boundaries that have traditionally separated the world of legal thought and diction from the outside world. The mood of this vision is conveyed by Unger's statement that "[l]egal analysis can

12. "[W]hile the policy of entitlement is one developed by philosophers of welfare, effectuating it (particularly when the ideal must be approached pragmatically) is within the professional competence of lawyers alone." *Id.* at 1256.

13. *See generally* Unger, *Critical Legal Studies*, *supra* note 5.

14. *Id.*

now be made to stand in unashamed communion with its underlying theoretical assumptions."[15]

Because the idea of entitlement can only be realized within a changed and changing framework of society and law according to this perspective, the lines of reasoning leading to a plea for entitlement form an intricate network from which extralegal considerations are never released. The only mode of argumentation that can be considered adequate is one that attempts "to cross both an empirical and a normative frontier: the boundaries that separate doctrine from empirical social theory and . . . from ideological conflict."[16] The essential elements of Unger's method are a thorough knowledge of the existing and developing body of the law, and the willingness and ability of the intellectual to contribute to cultural improvement.

Unger's so-called "expanded doctrine"[17] is inspired by modern social theory and, above all, by the deconstructionist teachings of the "postmodernists" in the humanities. Thus prompted and justified, the new juristic doctrinaire makes use of historiography and critical portrayals of the present to lay open the deficiencies of communal life and to furnish proof that one can look to the problem of equality and, more specifically, to the problem of welfare from other than well-established directions. The new doctrine also uses criticism of the past and present to expose other ways to transform ideas or reform projects into operational or institutional devices, or both, that many persons involved in the welfare issue are unable or unwilling to acknowledge.

Modern society is pictured as carrying the stigma of the failure of traditional ideas and as being "increasingly . . . forced open to transformative conflict."[18] The verdict on contemporary society is severe. Social relations are identified as lacking contour and breadth; the models that inform societal relations are seen as vague and limited in scope; the existing pattern of rights, we learn, is ill-defined, and needs a new categorization. Narrowing the field of concepts used to circumscribe basic rights, as conceived of in

15. *Id.* at 612.
16. *Id.* at 577.
17. *Id.*
18. *Id.* at 579.

this program, to one closer to "welfare," Unger asserts that today's connotations of one of the most relevant terms in this context, "obligation," exemplify the reductionist trend of our times. "For another thing, the still-ruling account of the sources of obligations sees obligations to arise primarily from either perfected acts of will (e.g., the fully formalized, bilateral executory contract) or the unilateral imposition of a duty by the state."[19]

One of the conclusions drawn from a detailed and highly critical analysis of modern life is that "the received ideas about the nature of rights and the sources of obligation cannot readily inform even the existing sorts of communal existence, much less the ones to which we aspire."[20] As one may expect from such an evaluation of the past and present, the program for a better future calls for a radical redefinition of means and goals. This redefinition is labeled "superliberal" and is expected to transcend the "liberal premises about state and society, about freedom from dependence and governance of social relations by the will."[21] The concomitant reconstruction of the system of rights is described as a task to be engineered by "purposive"[22] legal reasoning, a form of reasoning that can transform knowledge about routine and dissent, about ideals and betrayed ideals, into a reformist scheme.[23]

Because the welfare problem is only one symptom of a widespread societal disease, the plea for welfare entitlement, in its most complete visionary form, will not rely simply on thoughts about poverty and its concomitants; it will be the offspring of a process in the course of which legal thinking will be freed from the shackles of the past, and will partake of continuously redefined and improved norms. The idea of entitlement as "new property" will give way to the dialectical mood of this program; it will succumb to the conviction that the era of the "classical" conception of property as "the very model of right"[24] belongs to the past and its still lingering spirit must be defeated.

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19. *Id.* at 597.
20. *Id.* at 598.
21. *Id.* at 602.
22. Kennedy, *supra* note 4, at 1728.
23. *See* UNGER, LAW IN MODERN SOCIETY, *supra* note 5, at 199-200 and *passim.*
24. Unger, *Critical Legal Studies*, *supra* note 5, at 598.

The conviction that legal discourse should no longer be shaped by juristic language and logic alone, but should pay tribute to epistemologies outside the legal realm, is, without doubt, ideological in origin. As of today, however, the fusion of argumentative modes is no longer reserved to the group in which it originated, and it has ceased to establish a common bond among those who acknowledge the virtues and advantages of a discourse unrestrained by the rigid rules of juristic doctrine and diction. How the interconnection of argumentative modes is used and for what reasons are matters of consciousness, of world view and of the respective author's assumptions about the relative strengths of culture and willed change.

From the point of view of the legal visionary, the cores of cultural (social, political, economic) persistence are destined to submit sooner or later to better insight. "[T]he institutional setup, the gradualistic bias of doctrine, and the correlation of forces in contemporary politics and culture all impose constraints upon the recasting of equal protection law . . . . These constraints, however, neither involve high-flown principles nor generate clear-cut boundaries."[25]

III. Defending the Current Conception of Welfare

An opposing view, which I will call conservative for heuristic purposes only, emphasizes that some of the "constraints" to which Unger refers in the above quotation may be informed by vectors that are more powerful, and probably more compatible with and beneficial for society than scholastic principles or conscious efforts at reform; in other words, they may be informed by cultural standards.

> Standards, then, are the means by which society strikes a balance between reality and tradition. They determine not only the conduct and conditions conceived to be intolerable: they also dictate the terms in which the problem is cast, the nature of the solutions sought and, hence, the forms of pressure demanded of its several social institutions.[26]

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25. *Id.* at 615.

26. Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 Yale L.J. 286, 286 (1962).

The strong belief in standards as essential and form-giving elements of the communal order leads to the request that social programming respect the conventions and convictions prevalent in a given society. Therefore, the "imagined" and "made"[27] legal solutions Unger envisages are rejected, and so is the plea for a constitutionalization of social problems, for "society's needs . . . are much more fluid, complex, and opaque than constitutional thought."[28]

As of today, the conservative perspective does not appear to differ widely from earlier kindred versions. Yet its proponents have become disquieted enough by the "postmodern" stance taken by their colleagues in the juristic community to follow the lead and base their argumentation on a broader foundation of social and cultural considerations. Along with legal arguments advising against the inclusion of welfare into a manual of entitlements, today's conservatives advance a series of extralegal reasons that is destined to defend and uphold the present theory and practice of welfare arrangements.

Like the supporters of the entitlement theory, the conservatives start from the presupposition that one can no longer pretend that American life is shaped by a single set of values and one model of morality. The conservative philosophy does suppose, however, that common moral denominators exist in social units of less than national size, and that "morality can also derive and acquire its unity from a pattern of moral injunctions recognized in the experience, ideals, and practices of a group."[29]

One may expect every such pattern to contain several specific injunctions that relate to or define the theme "welfare"; in other words, one may start from the presupposition that a society or group's "canon" of prescriptions and proscriptions will contain normative correspondents of the cultural ideas about human nature,[30] mutualism and obligation, as well as about poverty and its proper therapy. According to the disciples of traditionalism, the treasure of cultural standards or norms, if properly handled by

27. Unger, *Critical Legal Studies*, *supra* note 5, at 579.

28. Schneider, *supra* note 6, at 122.

29. *Id.* at 99 (construing S. HAMPSHIRE, MORALITY AND CONFLICT 82-100 (1983)).

30. *See id.* at 101-06.

lawmakers, could be the source and testing ground for an effective legal apparatus. Standards are qualified to inform social policy when they can be proven to meet at least these three criteria: historical depth, scientific relevance and functional value in communal life.[31] As Carl E. Schneider and others have pointed out, various examples demonstrate that courts have honored this methodological device by conceding that a "statute is adequately founded in empirical reality and social theory."[32]

In both the visionary and conservative conceptions, history and social theory are treated as valuable sources of information and justification. In contrast to the visionary, however, the conservative tends to act upon the message of continuity and persistence, and to ignore the instances of "revolutionary re-creation,"[33] a term Unger uses.

Wary of what Germans call the "watering-can principle," the nondiscriminating distribution of benefits among those claiming to be in need, the defender of the traditional concept may call attention to the "expectation of reciprocity"[34] as an anthropological universal, or to the need for control as a pancultural phenomenon. His resistance to the idea of a "new property" is reinforced by the general disagreement among social scientists as to the sources of poverty and the nature of desirable relations between donors and recipients. The " 'Flawed-Character' argument" and the " 'Restricted Opportunity' argument" continue to co-exist,[35] and whether poverty should be treated in "moral" or "amoral" terms[36] is still undecided. The lack of consensus in historical and sociological interpretations serves, without doubt, as an additional incentive or authorization to continue a program of "individualized justice"[37] and to defend the corresponding measures in terms of the "public interest."

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31. *See id.*

32. *Id.* at 102.

33. Unger, *Critical Legal Studies*, *supra* note 5, at 583.

34. Gregory, *Image of Limited Good, or Expectation of Reciprocity?*, 16 CURRENT ANTHROPOLOGY 73 (1975).

35. B. SCHILLER, THE ECONOMICS OF POVERTY AND DISCRIMINATION 39-40 (2d ed. 1976).

36. Woodard, *supra* note 26, at 293.

37. J. CARLIN, *supra* note 9, at 25.

According to this school of thought, regulation is a concomitant of a society's sense of order, and it is considered basically nondetrimental. Because the rules of regulation are culturally created, one can expect the mode of regulation to be tailored to the interests of all the parties involved.

In an additional effort, destined to give weight to the conservative argument, one may defend the status quo of welfare regulation as a byproduct of public charity in personalistic or community-oriented terms. Thus, one could see beneficiaries who comply with the rules and mores of society as furnishing proof of their basic integrity on the one hand, and of their affirmative attitudes toward the social compact on the other hand; their behavior, one might say, may be a further incentive to altruism. Because communal concerns should take precedence over individual interests, infringements of privacy may be justifiable when they occur in the service of the public good or for integrative purposes, or when they are conceived in such a way as to "inhibit the growth of what might be called an offensive social environment."[38]

One of the central messages of this theory of welfare is that the deficiencies of the present welfare system do not call for radical solutions. Closing gaps, subjecting agencies to closer scrutiny and allowing welfare to progress at the pace set by cultural development will suffice.

In this mode of argumentation, as opposed to the programmatic writings I dealt with earlier in this paper, thoughts on culture, society and morality are not usually "enmeshed" with the juristic discourse, but are rather an epilogue to conclusions that have been arrived at already by legal reasoning. As a concession to the lay reader on the most obvious level, this "epilogue" is also used to reinforce the writer's legal convictions and to refute opposing views by using the opponents' own technique of different rhetorical modes.

Thus, to discredit "entitlement," one may invoke the social scientist's knowledge about a "culture of poverty,"[39] or one may ques-

38. Schneider, *supra* note 6, at 100. For the controversy surrounding these justifications, see *id.*

39. O. LEWIS, LA VIDA: A PUERTO RICAN FAMILY IN THE CULTURE OF POVERTY—SAN JUAN AND NEW YORK xlii-lii (1966).

tion the advisability of rethinking the welfare problem in Reich's or Unger's terms, on the grounds that entitlement presupposes the poor person "will have a sense of himself as a *possessor of rights* . . . [or] will be concerned with holding *authorities accountable to law* . . . [or will] 'know [] his rights' and how to validate them."[40]

The range of rationales advanced extends from psychological reasons to arguments informed by a pluralistic philosophy. One can conclude from the examples given and the statements made in Schneider's article[41] that the units or "communities" most likely to shape and supervise the right kind of welfare program are the states. "Individual states" are more apt to calibrate conflicting interests because they "are more susceptible than whole regions to the influence of cultural traditions."[42]

Highly skeptical of the hopes attached to a principally legal solution to the problem, conservatives warn against the law taking over a domain in which "legislatures speak with more authority than courts,"[43] and in which a "judicial solution" would bar people from the feeling that they have "control over their environments and their lives."[44]

Repeated references to the power and relevance of plural cultural traditions betray the conservatives' deep suspicion of reason[45] as the best guide to social policy, and indicates a distrust of the lawyer-philosopher, who claims he is able to solve the problem at hand by virtue of his intellectual independence. Moreover, conservatives express severe doubts that the persons in need of support will actually benefit from a change in responsible authorities and personnel.

> This broad cultural and political conflict is intensified, I believe, by an attitude that has always been present, but which we may have allowed ourselves to forget. It is the feeling that reason is the best guide to policy . . . and that the educated are . . . better equipped and better entitled to govern. This feeling finds its institutional expression in a preference for extending the au-

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40. J. CARLIN, *supra* note 9, at 62-63.
41. Schneider, *supra* note 6, at 108.
42. *Id.*
43. *Id.* at 102.
44. *Id.* at 117.
45. *Id.*

> thority of courts, the branch of government to which the elite has the easiest and in many ways the most exclusive access.[46]

For the sake of "poetic justice," I will not conclude this paper without recalling attention to an alternative attitude toward culture, the role of the lawyer and the law of the future. Again I refer to Roberto M. Unger, who is convinced that tradition can no longer be regarded as a wholesome force in social life, and who asserts that "the formative order of social life has been subject to continuing conflict and cumulative insight and thereby deprived of some of its halo of naturalness and necessity."[47] Regarding the enhanced role of the legal thinker in the new scheme, Unger does not hesitate to proclaim that the ideal jurist may indeed claim an intellectually autonomous status, and that his independence is warranted by his attitude or belief that he has "no stake in finding a preestablished harmony between moral compulsions and institutional constraints."[48] And finally, playing upon the theme of growth versus willed change, Unger professes his faith in a predominantly rationally constructed future:

> But postliberal, traditionalistic, and revolutionary socialist society are all obsessed, in different ways, with the reconciliation of freedom and community. This alliance is part of a broader responsibility; the sense of a latent or natural order in social life must be harmonized with the capacity to let the will remake social arrangements. To achieve this reconciliation, and thereby to work toward the ideal of a universal community, is the great political task of modern societies. But it is also the precondition to our ability, as theorists, to bridge the gap between subjectivity and objectivity in social understanding and to perfect our vision of social order.[49]

IV. Conclusion

From the perspective of the cultural historian and of the foreigner, contemporary discourse on the welfare issue provides tell-

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46. *Id.* at 109.
47. Unger, *Critical Legal Studies*, *supra* note 5, at 582.
48. *Id.* at 581.
49. R. Unger, Law in Modern Society, *supra* note 5, at 266.

ing examples of the relevance and function of dissenting opinions about society and law. No single opinion can be expected to be fully actualized, yet each is an active component in a process of orchestration that is destined to uphold the principles of an American-style dynamic federalism.

Without doubt, many a jurist will disagree with the selected arguments that I believe are pivotal in the discourse on welfare. I would like to remind those who do disagree, however, that the defenders of a new legal history envisage an interlinking of the diverse approaches to legal text and context, a method which, in its turn, repeats the interlinking of the different argumentative modes I have tried to describe. Cultural history is, or should be, a legitimate partner in the interpretation of legal discourse.