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## THE LIBERTY IMPACT OF THE NEW PROPERTY

CHARLES A. REICH\*

A fundamental conflict exists in American life. We don't very often think about it, and yet it pervades almost everything that happens to us. It is the conflict between our democratic ideals—our ideals of liberty, democracy, living under law, equality and owning property in an individual way—and the fact that we spend most of our lives in large institutions that are quite opposed to those ideals. These large institutions are authoritarian, not democratic; they reject individual liberty on the job, and no such thing as individual ownership of property exists within them. There is also little concept of due process or the rule of law within these institutions. Far from being based upon equality, they are based upon inequality and extreme hierarchy. So, the ideals that we cherish as our democratic heritage struggle with the reality that most of our lives are spent in a setting that denies those ideals.

An article I wrote twenty-five years ago, *The New Property*,<sup>1</sup> was a first attempt to explore this fundamental conflict and to look at the possibility that property, liberty and life are really one idea. Life, Liberty and Property are not really separable; a person has no real freedom unless that freedom is supported in some way by a base of economic security. I pointed out that the wealth that sustains us today is mostly wealth derived from organized society—the jobs we hold, plus benefits, credentials, licenses, public welfare and all of the other kinds of valuables that come from large organizations and government.<sup>2</sup>

When the nation was founded, there were no large corporations or other institutions. The liberty of the individual was secured by traditional forms of property such as land or a house. "New property," by contrast, does not quite belong to individuals; wealth, such as a job, a license or welfare may be taken away, regulated, or

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

2. *Id.* at 738.

subjected to conditions. New property does not provide the security that owning a home or land might give a person. This led me to wonder what was going to happen to the liberty of Americans in a society in which most citizens are dependent upon a type of wealth that has the role of property, but has not been given the protected status of property.

It is now twenty-five years later. A great deal has happened. Indeed, so many developments in this area have occurred that I cannot keep up with them. This field has proven to be very dynamic because of the increasing prevalence and centrality of what I call "the new property." Once it seemed more the exception than the rule. Today, it is the rule rather than the exception.

Today, we are dealing with the mainstream when we talk about the dependence of individuals upon large organizations. Every reader is probably either seeking or has achieved some position within a large organization or within the system. Your education, your professional license, your academic appointment or job with a law firm mean as much to you as the private property, such as a home or land, that you might hold. We have made individuals dependent upon the state, with consequences to liberty that are largely unrecognized.

I write today to suggest some broader perspectives on this problem than I offered twenty-five years ago. I hope to suggest a new way of looking at these issues as we develop into an ever more corporate society. My basic thesis remains the same, but is now more urgent. Individual liberty is threatened by economic control over people and their resulting excessive dependency. This is an inescapable fact about our present society. The issue is whether we can place limits on such control.

First of all, I would like to point out that your liberty varies a great deal depending upon the social environment in which you find yourself. If you are on a United Airlines jet, your liberty is exceedingly limited. You are under the command of a captain, and the entire crew has the right to give you orders. You are not even free to get up and walk around without permission. If you are employed by a law firm or a law school, many limitations upon your personal freedom are implicit in your position. Even such an untouchable right as free speech is limited within organizations. By contrast, if you are on a wilderness outing, your liberty is much

greater. You may dress as you please; you may shout, run or sleep all afternoon.

In 1789, individuals could provide themselves with food, shelter and meaningful life through their own labors, as a farmer or tradesperson, independent of organizations. Individuals had the opportunity to make a living on their own terms as long as they were willing to work. For much of our history, free land was available—especially under the Homestead Act.<sup>3</sup> Even after the rise of Corporations, one who could not fit into an organization had access to forty acres of land to provide support and a home, forty acres that an employer or the state could not take away.

We have been moving steadily away from a model of independence to a model in which most of us could not survive—certainly not in the way that we want—except on the inside of the system, on the inside of some large organization. Today, the outside has become a desert—an area in which there is not enough nurture for even the hardest working person to survive. An individual cut off from institutional sources of wealth may no longer be able to find resources of his own.

A very interesting book called *The Last Intellectuals*<sup>4</sup> by Russell Jacoby describes how only a couple of decades ago a group of independent thinkers and intellectuals in this country remained outside the system.<sup>5</sup> They supported themselves by various freelance activities and criticized society from an outside point of view.<sup>6</sup> Jacoby's thesis is that in the last twenty years these independent intellectuals have virtually disappeared because survival on the outside has become so difficult.<sup>7</sup> Intellectuals have fled into the academy because it is the only place where they can find shelter and the opportunity to make a living.<sup>8</sup>

Today, our country is like a planet with a desolate outside lacking air, water or the potential for agriculture, but with a very luxurious inside space station providing imported air, imported food

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3. Homestead Act, ch. 75, 12 Stat. 392 (1860-63) (repealed 1976).

4. R. JACOBY, *THE LAST INTELLECTUALS: AMERICAN CULTURE IN THE AGE OF ACADEME* (1987).

5. *Id.* at 16-17.

6. *Id.* at 6-7.

7. *Id.*

8. *Id.* at 16-20.

and everything else one might need. Being inside thus becomes the only way a person can be free. Being outside would be prison and exile. In this way a fundamental reversal in our history has occurred. Once, political liberties rested on our economic self-sufficiency. No matter how unpopular the option, a person *could* survive on the outside. Today, political liberty gets no assistance from one's economic position.

Of course, there is not just one source of wealth in America. Many different organizations and institutions exist; they share, however, important characteristics and often act in concert. Undoubtedly, we are heading in the direction of dependence instead of independence. The question then arises: How should the legal system respond to this trend?

Suppose we received word that the planet Earth was doomed and that we all must pile into a huge version of a jet and take off into space. Clearly, we would need new laws to preserve liberty in an environment in which much more discipline, much more organization and much more authority would be necessary. If the framers of the Constitution had imagined other social environments, I wonder what constitutional rules they would have made to ensure some kind of liberty under the changed circumstances.

Our Constitution was set down before the era of the American corporation and big government. What would the framers have said about protecting liberty in a corporate society such as we have today? That is the question we must ask if we are going to talk about constitutional liberty in any modern sense.

As we look around the area of new property created by government, we see how the law continues to treat forms of wealth that have become essentials as mere privileges. A driver's license is a privilege; welfare is a privilege; unemployment insurance is a privilege. But the law denies reality; these are in fact necessities. When we consider the food stamps case the Supreme Court handed down recently,<sup>9</sup> we should be appalled. The Court held that a striker may be denied food stamps.<sup>10</sup> Although striking is a constitutional right,<sup>11</sup> the Court stated that Congress may take away food stamps

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9. *Lyng v. UAW*, 108 S. Ct. 1184 (1988).

10. *Id.* at 1188.

11. *Id.* at 1189-90.

from strikers in order to aid management. Despite the fact that the denial of food stamps had repercussions for the striker's family and children, the Supreme Court saw nothing unconstitutional in taking away food from children because one parent exercised a constitutional right. The Court viewed food stamps as a "gift" bestowed on whatever terms the giver may choose.<sup>12</sup>

How would I go about questioning this assumption? I would say that as the outside has disappeared and as the inside has become indispensable for survival, the idea that food stamps are a privilege has been invalidated by changing reality. Our original condition was a world in which people could support themselves by working on the land. Now we live in a world in which you starve unless you can obtain a contract with an organization. We might see food stamps as a barely adequate substitute for the free land that is no longer available. As individuals, we have exchanged free land for social insurance. Minimal support must now be part of the social contract because large organizations have monopolized the means of survival.

With new property, government is always tempted to use its power over a particular form of wealth to control some unrelated kind of behavior. For example, West Virginia has passed a law providing that students who drop out of high school will have their driver's licenses taken away.<sup>13</sup> The state does not contend that dropping out has anything to do with safe driving. Instead, the state is using its monopoly on drivers' licenses to punish dropouts and pressure them into returning to school. This is a dangerous abuse of power. Can the state revoke drivers' licenses for failing to attend church on Sunday, or for criticizing elected officials? The state has been given the power to regulate driving, not the power to regulate other behavior. Use of a power given for one purpose to achieve a wholly different goal is usurpation and tyranny.

California has enacted a law<sup>14</sup> that works like this: If you are under 21 years old and you are sitting at a campus hang-out having a beer, which is illegal because you are underage, and the police happen to come in and arrest you for illegal consumption of alco-

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12. *Id.* at 1190-91, 1193.

13. W. VA. CODE § 18-8-11 (1988).

14. CAL. VEH. CODE § 13202.5 (West 1987 & Supp. 1989).

hol, you then lose your driver's license although the offense was in no way related to driving.<sup>15</sup> In this situation the state uses its licensing power simply as a punishment. It uses an important economic asset for a purpose never intended. Without a driver's license one cannot easily travel to work. One cannot easily get to school. A driver's license does not just represent pleasure. It is a fundamental aspect of freedom.

An unintended consequence of using so-called benefits as weapons in various social wars is that security is replaced by insecurity, and the purpose of the benefit is undermined. Public housing, for example, is designed to provide the basic security of a home for families unable to afford homes at higher prices. But if the government decides to use eviction from public housing as a punishment for alleged drug dealing, possibly evicting an entire family for the supposed guilt of one member, then everyone in public housing becomes less secure because they cannot know where or when charges will be leveled next. That the government should create homelessness as a punishment is ironic; indeed, why is such punishment not "cruel and unusual"?

As we look at these examples, we see that the public and private sectors are not so different. There is less and less reason, it seems to me, to treat a large private institution any differently than the government with respect to new property issues. In *NCAA v. Tarkanian*,<sup>16</sup> the Supreme Court permitted the National Collegiate Athletic Association to act in a quasi-governmental way by suspending a basketball coach for an infraction of NCAA rules,<sup>17</sup> but the Court failed to require the NCAA to observe constitutional standards of fairness. This public-private mythology is a product of formalistic thinking, and today it can be used to deny individuals needed protection from outsized organizations. Indeed, the NCAA includes among its members many state schools, and so to call it a strictly private agency seems to stretch ideology beyond its limits. I question the unrealistic distinctions the law makes between the large private organization and the large public organization. I think making this distinction will seem increasingly unjust.

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15. *See id.* § 13202.5(d).

16. 109 S. Ct. 454 (1988).

17. *See id.* at 462-65.

A job is perhaps the biggest investment of a person's life. After a number of years, jobs should receive both procedural and substantive protection. The loss of a job can be a disaster for a family, as shown in a remarkable book by Katherine S. Newman, *Falling From Grace: The Experience of Downward Mobility in the American Middle Class*.<sup>18</sup> A longtime job holder may be laid off without any fault, and if the individual is middle-aged, it may be impossible for the individual to find a comparable job. People solidly in the middle class may plunge out of the middle class altogether. They lose their friends and social position; their children lose their friends in school; they lose their home; they lose their whole connection to society.<sup>19</sup>

Yet a large organization can inflict this forfeiture of a job with no due process whatsoever, with no wrongdoing by the individual cast out, and with the result that the institution imposes the cost this person suffers without any responsibility. This kind of fall out of the life for which an individual spent years preparing is a forfeiture of his or her entire investment, of the entire life investment built up over ten, twenty, or thirty years.

The instances in which people are expelled from the system or disciplined by the system in these ways are comparatively few, but the influence of such events is very great because they cast a shadow upon everyone else. Everyone is aware of the danger. Everyone is aware that the well-being enjoyed from the system is always contingent. It is never something that you can own, and therefore you must always be careful; you must obey commands and not think independently. The contingency underlying all our positions within the system serves to undermine our ability to be democratic individuals.

It is not enough to be willing to work and it is not enough to be well trained. Today's society resembles a game of musical chairs. There are just not enough chairs, and after each few bars of music are played, there is one less chair. We do a lot of sociological investigation to find out what is "wrong" with those who cannot find a

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18. K. NEWMAN, *FALLING FROM GRACE: THE EXPERIENCE OF DOWNWARD MOBILITY IN THE AMERICAN MIDDLE CLASS* (1988); see B. EHRENREICH, *FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS* 15 (1989) ("[The middle class] is afraid, like any class below the most securely wealthy, of misfortunes that might lead to a downward slide.").

19. K. NEWMAN, *supra* note 18, at 92-142.



chair. What is the matter with them? What is their problem? Why were they not as quick to sit down as someone else?

The campaign against drugs has been used as a pretext to make war on the job security of American workers. The Attorney General has said he hopes to see the American workplace rid of the "drug lifestyle"<sup>20</sup>—not just the use of drugs, but the "drug lifestyle." If you want to know what the drug lifestyle is, you can do no better than John Kaplan's excellent book, *Marijuana—The New Prohibition*.<sup>21</sup> He describes what is meant by the drug lifestyle; it includes a liking of pleasure, a dislike of authority, a lack of patriotism, a feeling that you have the right to make your own decisions.<sup>22</sup> As Professor Kaplan says, the drug lifestyle is considered, all told, a less worthy lifestyle;<sup>23</sup> it is to be discouraged, if possible, by job-related pressure.

As we look at the way our economic system operates today, we see that in our working life, which is the principal source of individual wealth, a greater and greater tendency exists to use the leverage of dependency upon work to govern an individual's private life in various ways. A "no smoking" rule, one that applies not just on the job but also off the job, may be required for some work. We face the consequences of a discovery first made, I think, during the McCarthy years: You can get at people through their work. This form of control is perhaps more effective than the criminal law. Get at people where it really hurts; get at people through what they really care about—their jobs, careers and futures—and government or industry will be able to make them jump through hoops. The state will be able to control personal decisions. Corporate America will be able to make people conform to whatever the stereotype may be. As we move from a society in which living on the outside was a choice to a society in which living on the outside is no longer a realistic choice, and more and more units of the inside act together, as the Attorney General suggested they should, we must beware of an authoritarian economic structure making it impossible for people to exercise their rights as citizens.

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20. See R. Thornburg, Remarks at News Conference at the Brooklyn Federal Court in New York City (May 4, 1989) (text available in NEXIS, Wires file).

21. J. KAPLAN, *MARIJUANA—THE NEW PROHIBITION* (1969).

22. *Id.* at 5.

23. *Id.*

The future promises to bring a still greater dependency upon an ever increasing array of new property forms. Consider the idea for "Youth Service," as proposed by the Democratic Leadership Council,<sup>24</sup> a group of moderate to conservative Democrats. Youth Service is intended to provide high school graduates with the "opportunity" to serve for two years—either in the armed forces or in a civilian service—at minimal pay, but with the resulting reward of vouchers that would enable them to go to college.<sup>25</sup> Other forms of aid that enable people to go to college today would be withdrawn.<sup>26</sup> Lower income people would have a choice of not going to college at all or doing youth service to earn these vouchers.

The Youth Service proposal would greatly extend governmental control over the individual. The proposal is interesting because it so clearly fits in with today's reality of the outside and the inside. Two years of hard labor can be "encouraged" by the threat of exclusion from the inside. For those who are poor and struggling to get to the inside, Youth Service would be the only way. Those who do not graduate from high school would not be eligible for Youth Service and would not be eligible for aid to go to college; they would be exiled to the outside. On the other hand, those already on the inside would not have to undertake Youth Service and could go directly to college on the fast track, because under this plan if you can finance your own education, you do not have to serve in Youth Service.<sup>27</sup>

I propose that when plans like this are discussed, we ought to have a "liberty impact statement" before any action is taken. The liberty impact statement would resemble an environmental impact statement, but would assess the effect some new proposal might make upon liberty. If we were to take the Youth Service proposal and prepare a liberty impact statement, we would ask systematic questions about the possible effect upon liberty of every aspect of the plan.

One area of inquiry would be the rules and conditions under which young people would live for their two years. First amend-

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24. *The Promise of a 'Citizens Corps'*, N.Y. Times, Jan. 22, 1989, § 4, at 24, col. 1.

25. *Id.*

26. *Id.*

27. *Id.*

ment considerations might include: limits on their reading materials, limits on publishing their own newspaper, limits on organizing their own groups and meetings, and limits on religious observances. For example, a Jew might find that wearing a yarmulke was forbidden, as it can be forbidden in the armed forces.<sup>28</sup> A group might find themselves, like high school students, restricted in what they might write and include in their own newspaper.<sup>29</sup> Would they be subject to indoctrination? Could they question their instructors? What about lifestyle issues—long hair, style of clothing, sex life and music? What would be the status of homosexuals? At present, they are forbidden to serve in the armed forces. Would they be similarly excluded from Youth Service, or discriminated against in other ways?

Next, we must think about procedural due process. With large numbers of recent high school graduates, discipline problems will be a major concern. Accusations of drug use, sexual misbehavior, disobedience and laziness will be made. What system of justice will be used? This leads to the new property aspects of liberty. Two years of service earns a major form of wealth—a voucher entitling the recipient to college financial aid and permitting entry to upper level jobs. What if a person were rejected from college—could the voucher be redeemed in some other form? If a person served twenty-three months of two years and was then expelled for an infraction, would the promised voucher be withheld? Under what conditions might a voucher be forfeited?

Youth Service would represent a major intervention by government authority into the lives of young people at precisely the point when they are attempting to establish their independent identities. Introducing barracks-type discipline, conformity, possibly even indoctrination, for two crucial years might have a profound impact on a democratic society, molding young people at a moment when they should be discovering themselves. A liberty impact statement would at least make an issue of these dangers.

If we are to safeguard liberty in the coming age when new property will predominate over all other forms of wealth, we will have to create more ownership rights than now exist. We should boldly

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28. *Goldman v. Weinberg*, 475 U.S. 503 (1986).

29. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

face this necessity, for otherwise the institution of individual private property will cease to exist for most people, and with this disappearance there will be a fundamental alteration of our social environment away from independence and toward an enervating and stifling dependence upon authority. A society organized into large institutions must rethink and reconceive the idea of property, or the foundation of democracy will disappear. This stance is not anti-institutional. We simply have to recognize that just as the industrial revolution had its costs in environmental losses that eventually demanded new protections, so the organizational revolution of the present time has its costs in individual liberty and security that now demand protection.

Advances in rights occur in response to advances in wrongs. Environmental rights are responses to several centuries of environmental wrongs. The legal system is now challenged to respond to the reality of life inside organizations, or to life subject to the support of organized society. This response may be fashioned by the courts, by national or state legislatures, or by the initiative of organizations themselves. The situation is especially urgent because new property is so deeply implicated in the present extreme maldistribution of wealth, with one form of new property for the poor, other forms for the middle class, and still other forms for the wealthy. Should recipients of welfare receive less due process protection for the form of new property upon which they are dependent than lawyers receive for their licenses? Let us make certain that our society's concept of rights continues to advance.

Virginia holds some very fond memories for me. I spent a year living in Alexandria, Virginia, as a law clerk for Justice Hugo Black. At the time he was a widower, and together with his other clerk, David Vann, who went on to become Mayor of Birmingham, I lived at the Justice's house. From the early morning, when we had the remarkable experience of being awakened by a senior Supreme Court Justice in a bathrobe, we talked and talked. During breakfast, going to work in our own car pool, having lunch in the Court cafeteria, sitting in the Justice's study in the evening, we talked and talked. While we covered other subjects, our most constant subject was liberty.

During that year, the 1953-54 term, we had one case that raised the issue of liberty and the new property, *Barsky v. Board of Re-*

*gents*.<sup>30</sup> Dr. Barsky was a physician who refused to answer certain documentary requests of the House Un-American Activities Committee.<sup>31</sup> He served five months in jail for contempt of Congress.<sup>32</sup> Thereafter, New York State suspended his medical license for the same offense.<sup>33</sup> No suggestion was made that this revocation had anything to do with his ability to practice medicine. A majority of the Court said the state can take away a person's professional license because of unrelated political activities.<sup>34</sup> But three Justices wrote impressive dissents. Justice Frankfurter dissented in a classic statement about due process of law.<sup>35</sup> Justice Douglas in his landmark dissent suggested that the right to work itself should be protected.<sup>36</sup> Justice Black was much opposed to broad notions of due process, yet he was very disturbed by the treatment of Dr. Barsky. That was the first time I tried out the new property idea. Although Justice Black did not accept it, in his *Barsky* dissent Justice Black did make a reference to new property in a sentence saying that a person's professional license may be more valuable than property.<sup>37</sup> I am proud of that sentence. The opinion ends with a quotation from the historic case of *Yick Wo v. Hopkins*<sup>38</sup>—a quotation that is even more pertinent today: "For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails."<sup>39</sup>

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30. 347 U.S. 442 (1954).

31. *Id.* at 445.

32. *Id.*

33. *Id.* at 448.

34. *Id.* at 454-56.

35. *Id.* at 467-72 (Frankfurter, J., dissenting).

36. *Id.* at 472-74 (Douglas, J., dissenting).

37. *Id.* at 459 (Black, J., dissenting).

38. 118 U.S. 356 (1886).

39. *Barsky*, 347 U.S. at 463-64 (Black, J., dissenting) (quoting *Yick Wo v. Hopkins*, 118 U.S. at 369-70).