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## REVISITING THE NEW PROPERTY AFTER TWENTY-FIVE YEARS

PAUL R. VERKUIL\*

Undoubtedly, *The New Property*<sup>1</sup> was one of the pathbreaking articles in American law when it appeared twenty-five years ago. Charles Reich rethought the existing legal categories and produced a new synthesis. As one who first read that article in law school, I remain fascinated by its willingness to reexamine the relationship between law and social values in contrast to much of the legal scholarship produced at that time.<sup>2</sup> The concept of the new property has become commonplace in our jurisprudence; it has been the primary technique for converting the due process clause into a tool of civil justice.

But twenty-five years is a fair test of any proposition, and enough has changed in the law and in society over that time to justify its reexamination today. That is why this symposium is so appropriate. It offers us an opportunity to rethink established assumptions and some neglected questions. After listening to and reading Charles Reich's paper, it is safe to say that one thing has not changed: Professor Reich remains an unreconstructed Reichian. Thus the task is left to others to point out the cracks in the foundation of the new property.

### I. THE INSIDE/OUTSIDE DILEMMA

Perhaps the best place to start is with Reich's airline flight analogy.<sup>3</sup> One is either on the airplane or not; if on the flight, one's freedom will be restricted by seatbelts and tyrannical flight attendants. Reich makes this sound like an unreasonable intrusion upon

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

2. The other article in *The New Property* issue of the *Yale Law Journal* demonstrates the contrast. See Shanker, *An Integrated Financing System for Purchase Money Collateral*, 73 YALE L.J. 788 (1964).

3. See Reich, *The Liberty Impact of The New Property*, 31 WM. & MARY L. REV. 295, 296-97 (1990).

personal freedom. But the "sacrifices" one makes on that airplane are endured for the benefits of travel received. Reich focuses on the rights of insiders and thereby ignores a whole category of outsiders—those left out of the airplane altogether; not just those who missed the flight, but those with no hope of such travel. There is an almost blithe assumption that all are eligible for the same treatment, and therefore the treatment is the issue rather than access to it.

But the interests of the excluded also demand consideration. To calculate the social utility of any public activity requires a broader inquiry. My major criticism of the Reichian approach is that it lacks an awareness of the need to make choices, and of the absence of choice for many. Reich refers to the game of musical chairs and implies that society views those who cannot secure a chair as somehow inadequate.<sup>4</sup> But he offers no analysis of this apt analogy. Life is all about rationing and scarcity. We are all living without enough chairs, which is why tradeoffs are necessary. Reich seems to suggest the contrary: that one can solve the dilemma of musical chairs by providing one more chair.

Unfortunately, rationing is an inevitable condition of life. It controls whatever we do, even in the law. In the last twenty-five years the growth of another profound movement in the law—that of economic analysis<sup>5</sup>—has made this necessity to choose very clear. In a sense, the law and economics movement is a reaction to *The New Property*.<sup>6</sup> It seeks to balance questions of rights against equally hard questions of the allocation of resources to fulfill those rights. Economics also inquires about the intended and unintended effects of policy.

The point is not that one must choose between Reich and Epstein,<sup>7</sup> but that one cannot make sense of the law without considering both views. Reich completely ignores the impact of economic analysis upon his views. In some ways, this unreconstructed liberalism is admirable in its proclamation of the importance of the in-

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4. *Id.* at 301-02.

5. See generally R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d. ed. 1986).

6. For a contemporary reaction to the new property way of thinking, see Leff, *Unconsciousness and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

7. See Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375 (1990).

dividual. In other ways, it is frustrating because it ignores the impact of individually focused decisions upon larger groups. The airline analogy is again revealing in this regard. Reich laments that "[i]ndividual liberty is threatened by economic control over people and the resulting excessive dependency."<sup>8</sup> The idea that dependency upon economic status is threatening must seem jejune to those who do not enjoy it. Who would not trade the temporary confinement of the airplane for the opportunity of worldwide travel?

The airline analogy also applies to the "spaceship earth" itself. The United States of America cannot satisfy the enormous immigrant demand for entry. Choices must be made about who can enter and how entry should be determined.<sup>9</sup> These are both substantive and process decisions. The liberty values inherent in the new property are not of very much help. An inherent tension exists between those who have achieved a certain status, whether it be evidenced by airline travel or entry into our country, and those who have not. The new property concept is largely unhelpful in making determinations about who should get in.<sup>10</sup> It avoids the issue of entry and legitimacy by confining itself to serving those eligible for benefits. It involves due process for those already "on board." In Reich's context, of course, being on board also refers to those already in the country or those in businesses or professions as opposed to those for whom such opportunities are not available.

## II. THE *GOLDBERG* COMPLICATION

The best way to elucidate the problem of those on the outside is through the very due process cases that owe so much to Reich's profound ideas. In *Goldberg v. Kelly*,<sup>11</sup> the majority opinion virtually adopted *The New Property* for its analytical framework. In so doing, however, it also exposed the weaknesses of that concept. *Goldberg* is an ideal laboratory for measuring the social utility of

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8. Reich, *supra* note 3, at 296.

9. See, e.g., Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141 (1984).

10. Under immigration law, no due process protection is afforded to those who have not "entered" the United States. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1952). As far as I am aware, the new property concept does not contradict this doctrine.

11. 397 U.S. 254 (1970).

Reich's due process contribution. *Goldberg* involved the question of whether it was constitutional to terminate welfare benefits of those who already had them—those on the inside if you will—without a full-blown adversarial trial.<sup>12</sup> In the New York welfare system, the party facing benefits termination did not get all of the attributes of a full trial, such as the right to contest evidence, the right to cross examination and various other judicial trial attributes.<sup>13</sup> The Supreme Court majority, referring to *The New Property* and other articles of Charles Reich,<sup>14</sup> constitutionalized a judicial-like procedure for deciding welfare cases. Those who already had welfare could not be denied it without the equivalent of an administrative trial.<sup>15</sup>

Justice Brennan's rhetoric for the majority is very powerful, but Justice Black's dissent bears up exceedingly well.<sup>16</sup> Because Charles Reich was a law clerk to Justice Black, he must be familiar with the Justice's arguments. Justice Black saw Justice Brennan's approach as exemplifying the Constitution run rampant.<sup>17</sup> What Justice Brennan said is that although New York's legislature had implemented a certain process for putting people on the welfare system and taking them off, under the Constitution New York could not do it that way. The Court saw its role as giving the legislature explicit constitutional directions under the due process clause.<sup>18</sup> Justice Black argued that the due process clause did not require such explicit controls and that the Court's action represented judicial legislation of the worst kind.<sup>19</sup> In so doing, the Court jeopardized the social welfare experiment itself, which the Court could in no way compel the states to provide. Justice Black spoke in terms of "gratuities," which makes one doubt whether he really bought the idea of public welfare at all.<sup>20</sup> But non-acceptance of the underlying substantive values behind the welfare state

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12. *Id.* at 255.

13. *Id.* at 259.

14. *Id.* at 262 n.8, 265 n.13.

15. *Id.* at 269.

16. *Id.* at 271 (Black, J., dissenting).

17. *Id.* at 276-77 (Black, J., dissenting).

18. *Id.* at 274-75 (Black, J., dissenting).

19. *Id.* at 274, 276-77 (Black, J., dissenting).

20. *Id.* at 272 (Black, J., dissenting).

did not disqualify Justice Black from questioning the necessity of constitutionalizing the administrative process that surrounds these individual awards.<sup>21</sup> In retrospect, Justice Black had a very strong point.<sup>22</sup>

In effect, the Court in *Goldberg* chose to favor, under the Constitution, those already receiving benefits as against those outside the system.<sup>23</sup> In its welfare program, New York utilized what amounted to a self-certification process. Applicants stated that they needed welfare benefits, had so many children, had so much income, and signed a form to get on the rolls.<sup>24</sup> The purpose was to make it easy to get benefits in order to provide immediate aid to those who needed it. But under that kind of a program who else got on the rolls? Obviously, people fabricated their income levels or number of children. The advantage of the system in New York was that it could as quickly remove people who did not qualify as it could enroll those who were deserving. The *Goldberg* due process requirements ensured that once a person got on the system, it was hard for them to be removed.

After *Goldberg*, the New York welfare program did what seemed to be the sensible thing. It made entering the program more protracted. By requiring a hearing before benefits commenced, those who were really deserving had to wait much longer to receive aid.<sup>25</sup> What the Court accomplished was to force the state to favor the interests of those who were on the rolls and who may not be deserving over the interests of those who had a legitimate need to get on. Thus, *Goldberg* was more complicated than it appeared. It in effect favored insiders over outsiders, a dimension that Reich ignored then and now.

### III. DESIGNING A SENSIBLE DUE PROCESS

The hard question remains how to define the role of the due process clause in the mass justice situation. Given the need for new

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21. *Id.* at 277-78 (Black, J., dissenting).

22. See generally J. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983).

23. See *Goldberg*, 397 U.S. at 264.

24. See Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479, 492-500 (1966).

25. See *Goldberg*, 397 U.S. at 279 (Black, J., dissenting)

property, what is the best way to implement it procedurally? A year after *The New Property* appeared, Reich addressed that issue in a subsequent article.<sup>26</sup> He talked about the need to implement and protect new property through "full adjudicatory procedures,"<sup>27</sup> which the *Goldberg* majority had accepted along with *The New Property* itself. The use of trial type adjudication is troubling because it hamstring the administrative system that is trying to do the right thing.<sup>28</sup> Very few challenges are made to the good faith of those implementing the system; they are trying to administer it with millions of claimants, and they are trying to administer to each as correctly as they can.

This is a major social problem. It is not just concerned with welfare benefits, which generate several million cases a year.<sup>29</sup> The problem also extends to a comparable number of social security disability cases.<sup>30</sup> These administrative decisions do not provide the procedural ingredients that *Goldberg* mandated. Indeed, it would have been a due process nightmare if *Goldberg* had been fully vindicated. The system of public adjudication would have ground to a halt. A full-blown hearing at the pre-termination stage could have created a system in which the resources devoted to the substantive benefits might have been expended in the process of administration. That is the fallacy of *Goldberg* that Justice Black foresaw in his dissent. It is also a flaw in the thinking of its academic architect, Charles Reich.

Ever since *Goldberg*, reformers and the courts have been looking for procedural solutions that allow the administrative system to function. Ironically, some of these procedural solutions are more radical than Reich's in that they are not adjudicatory at all. Reich wanted to create a new property, but he wanted to vindicate it by

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

27. *Id.* at 1253.

28. See Verkuil, *The Search for a Legal Ethic: The Adversary System, Liberalism and Beyond*, 60 SOUNDINGS 54, 62-64 (1977).

29. For purposes of this argument, welfare benefits include Aid to Families with Dependent Children (AFDC), Supplemental Security Income (SSI), Medicaid and food stamps. The total number of recipients of welfare benefits exceeded 46 million people in 1987. SOC. BULL.: ANN. STATISTICAL SUPP. 2, 3, 336 (1988).

30. A total of 2.7 million Old-Age, Survivors, and Disability Insurance (OASDI) benefits were awarded in 1987. *Id.* at 2.

using the adversarial procedures employed in the traditional property context. The welfare benefits situation, however, is not really an adversarial one. The government is rarely placed in the position of the enemy.

The government is trying to do the right thing. We could have voted, as Professor Smolla points out,<sup>31</sup> not to give benefits to anyone. But if the public wants to give benefits, the political process generates them. The question is how to administer the system with the least intrusion and at the least cost, so that we can get the maximum return on our investment in the public sector. *The New Property* helped us greatly to understand the relevance of public law to the formerly private world of benefits, but it did not aid us in designing a functional administrative scheme. That work continues.

Reich also questions the government's promotion of Youth Service. Reich makes a fair criticism of Youth Service as another method of making one dependent upon government benefits. There is, he says, a "greater and greater tendency . . . to use the leverage of dependency upon work to govern an individual's private life."<sup>32</sup> As he suggests, tying college vouchers to Youth Service has a coercive impact upon low income youths. But this flaw in the program need not be fatal. Senator Nunn advocated connecting youth service to access to college loans,<sup>33</sup> but it was not the linchpin of the program. The Youth Service proposal can be adjusted to account for that criticism. There is no need to throw out the baby with the bathwater.

Youth Service should be voluntary in that participants can earn vouchers, but others could not be penalized for not earning them. Ideally, the service idea should be a way for traditional outsiders to get inside. What Youth Service proposes is to create the very atmosphere that one might expect Reich to applaud: a sense of community and of public service. In Thomas Jefferson's words, Youth Service might revive the concept of "civic virtue." That is a tall order but not a futile one. Moreover, this sense of public duty has

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31. Smolla, *Preserving the Bill of Rights in the Modern Administrative-Industrial State*, 31 WM. & MARY L. REV. 321, 326 (1990).

32. Reich, *supra* note 3, at 302.

33. See S. 3, 101st Cong., 1st Sess. § 305 (1989).



a *Greening of America*<sup>34</sup> twist. Youth Service might be used to create that sense of consciousness of community values for which Reich has longed. Even though it is an example of government intervention in people's lives, Youth Service ought to be given a hearing on Reichian terms before it is rejected.

Reich's efforts to defend job security are a further manifestation of the inside/outside problem. Job security for those who fear losing their middle class status is indeed a poignant problem.<sup>35</sup> But the other side of the issue needs to be addressed as well. What about those who aspire to the middle class status those jobs offer? Unless Reich can add extra chairs to the game through economic expansion, a subject he does not address, the fact remains that those outside have claims equally compelling as those currently inside. Yet their stories are not told or considered.

Even our most rigid organization, the military, deserves more credit than Reich gives it. It is true that the military has not yet satisfactorily resolved the problem of homosexuality.<sup>36</sup> But in some respects the armed forces have opened their ranks to traditional outsiders better than most other organizations, public or private. Consider the success of minorities in reaching the highest ranks of military service in comparison with the dearth of minorities in leadership positions in the private sector. Reich's impressions of the military are distorted. A balanced appraisal provides more signs of progress than he concedes.

#### IV. SEARCHING FOR THE NEW PROCESS

Ultimately, my disagreement with Reich is not over his social concerns, which are admirable, but with his tactics, which are unworkable. Full adjudicatory procedures to implement the rights established by the new property will project us into the kind of regulatory nightmare that Reich abhors. It does not have to be this way.

There is room in the due process clause for procedural innovation. We must confront the dilemma *Goldberg* poses: Too much

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34. REICH, *THE GREENING OF AMERICA* (1970).

35. See Reich, *supra* note 3, at 301-02.

36. But even here, there are signs of progress. See *Rethinking DOD Policy on Gays*, Wash. Post, Nov. 6, 1989, at A11, col. 1.

proceduralization does not make things better; it makes things worse. Process does not ensure anything. An old Yale colleague of Reich's, Grant Gilmore, said it best:

Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.<sup>37</sup>

The real problem is how to achieve the reasonably just society Gilmore envisions. The use of the due process clause is not the answer.

If we can achieve public consensus on the values the new property expresses, the adversarial nature of the decision process should be minimized. Indeed, we have very little choice but to re-think our social values, especially as lawyers and law students. Even at our extravagant production levels, there are not enough lawyers to staff a new property system that guarantees full adjudicatory procedures for everybody. What we need is a system that considers alternatives, that tries to help people make the right decisions, that watches out for them and checks them—but not through trial type procedures and courts. These days the courts are working at full speed just to handle disputes that involve traditional property cases, tort cases, constitutional law cases, and so forth.

We need to take some of Reich's philosophy even further by looking beyond full adjudicatory procedures. If we want to have a new property that works, we need a new process to make it work. That requires a shared sense of common purpose. Perhaps a dose of *The Greening of America* is not a bad start. But that's the subject for another symposium.

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37. G. GILMORE, *THE AGES OF AMERICAN LAW*, 110-11 (1977) (paraphrasing Oliver Wendell Holmes).