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ARTICLES

POVERTY AND LEGALITY: THE LAW'S SLOW AWAKENING*

WALTER GELLHORN**

Two generations ago "liberty" for the weak meant, in effect, unhampered freedom to knuckle under to the strong. When, for example, a New York law of 1897 decreed that bakery employees should no longer "be required or permitted" to work for more than sixty hours in any week, the Supreme Court thought the statute invalid because it did not comport with "the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract." Bakers—who had in fact meekly accepted their loss of liberty to work for excessively long hours—were reassured by the Court that they had now regained the liberty to sell their services as best they could. "Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual," Mr. Justice Peckham declared.¹ Mr. Justice Brandeis had an entirely different matter in mind when he said, some years later, that "the right to be let alone" is "the right most valued by civilized men."² His words—though not his thought—seemed for many decades to provide the un-

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1. *Lochner v. New York*, 198 U.S. 45, 60, 61 (1905). And see also *Ritchie v. Illinois*, 155 Ill. 98, 40 N.E. 454 (1895), invalidating a law that limited female needleworkers to a 48-hour workweek. The worker's "right to contract," that is, to sell the "property" that consisted of his own labor, was of all rights "the most essential to human happiness," according to the judges (but nobody asked the needleworkers).

2. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion).

derlying hypothesis of Supreme Court decisions which equated "liberty" with enfeebled governmental regulation.³

The decisional tide turned in the Supreme Court only a generation ago.⁴ Finally recognizing that liberty to contract is hollow when the contracting parties' strengths are grossly disparate, courts since the mid-thirties have commonly upheld statutes like those previously denounced. Judges no longer seek to prevent legislators from believing that "as between the strong and the weak, it is liberty that oppresses and law that liberates."⁵ Nowadays the forces of law may be mobilized to re-define or to redistribute liberty, instead of idly allowing its contours to be determined by a private tug-of-war which the weaker contestants will surely lose.

Legislative enactments and judicial decisions upholding their validity have as yet gone no farther than asserting power to choose among competing social desiderata. The American Constitution, unlike the fundamental charters of nations founded in more recent years,⁶ does not impose on government an affirmative obligation to create a good life—or, at least, viability—for the citizenry. The Constitution forbids certain governmental interferences with the individual's pursuit of happiness, but it does not command government to establish the minimal conditions of happiness when the individual's pursuit fails.⁷

American constitutional theory reflects the supposition, conceivably valid in an earlier day, that hard work, clean living, and right thinking will bring every able bodied man victory. In that once popular view, poverty was traceable to personal dereliction; it was a failure of the individual, not a failure of a society ever full of promise. Contemporary economic organization has mocked that theory. Although

3. *E.g.*, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

4. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

5. Schwartz, *Crucial Areas in Administrative Law*, 34 GEO. WASH. L. REV. 401, 432 (1966).

6. *See, e.g.*, "Directive Principles of State Policy," CONSTITUTION OF INDIA, part IV, articles 42, 43, 45, 47; and "Principles of Policy," CONSTITUTION OF PAKISTAN, part II, chap. 2.

7. *See, e.g.*, *In re Snyder*, 93 Wash. 59, 160 P.2d 12 (1916). The Mother's Pension Act had provided, among other things, for relief payments to a family long abandoned by its breadwinner. A later amendment ended this benefaction. Its validity, challenged by a woman who had been receiving aid under the old law, was upheld because, as the court said, "the state may care for its indigent and poor in any manner it pleases. . . . Indeed, the state is under no legal obligation to care for its poor at all. While it undoubtedly has a moral obligation to do so, there is no such obligation as can be enforced in law. Such relief as it does provide is legally in the nature of a largess or bounty, which may be discontinued at the legislative will."

unemployment and the deprivations that follow may even today occasionally be a matter of personal choice, nobody doubts that impersonal forces are the main determinants of personnel displacements and personal economic disappointments. The mechanical cotton picker, the automated assembly line, and the computerized record-keeper, which create jobs and prosperity for some, also take away the jobs of others who may not be readily retrainable. War and peace, financial collapse and corporate merger, plant obsolescence and a newly invented better mousetrap, public works and congressional economy drives are beyond the individual wage earner's control. They control him instead. They, not he, will fix his station in economic society. If, even through no choice or fault of his own, his station becomes intolerable, he—and others with him—may plead for help. But his is not a legal plea. It is the plea of a beggar. The extent of response, if any at all, is to be determined by political organs that choose how wealth shall be redistributed through taxation and public expenditure.

The poor, individually and collectively, have therefore been perceived as alms-seekers, not as rights-claimers. In an earlier day the "deserving poor"—those who through misfortune and not through slothfulness were unable to supply their own needs—turned to private charity for succor. Whatever might be given they accepted with as much exterior gratitude as could be mustered. The destitute were well taught not to bite feeding hands, lest fodder be wholly denied. The donors, who responded to inner promptings rather than to legal compulsions to be generous, set the terms they chose.

When human wretchedness outstripped private capacity or inclination to relieve it, public agencies became substitute dispensers of alms. Publicly administered charity has had a long history, as everyone knows. Many weary travelers followed the unhappy road "over the hill to the poorhouse" long before the great depression of the early 1930's. Feeble-minded persons, unable to earn a living and lacking families with attics in which mad relatives could be locked, were put behind the walls of insane asylums, to be fed after a fashion if not otherwise to be attended. The needy sick and injured were, at least in the larger cities, hospitalized—though sometimes in a manner that caused poor people to fear hospitals even more than illness. But almost without exception public charity, like its private precursor, was localized, grudgingly extended, and degradingly administered. Only within recent decades has the dispensation of aid to the poor become a nationwide, gigantic activity.

Even when public involvement became a major commitment, the law was slow to perceive any real alteration in the status of the giver or receiver of what had always been regarded as a generosity. The beggar who had sought alms from the passerby had no demands he could enforce. He had only a hope, to be fulfilled or extinguished as the passerby might choose. The citizen, looking toward his government for relief, was generally believed to be in no better position.

Having fully embraced the view that the government, like the passerby, could freely choose whether to grant any benefit at all, the courts at first proceeded uncritically to conclude that government could attach conditions to the grants it did choose to make. Like other "privileges" a sovereign might graciously extend—entry into his realm,⁸ use of his roads,⁹ a passport,¹⁰ a license to sell spirits,¹¹ a pension for a war veteran's widow,¹² for example—the privilege of receiving welfare payments could be withheld, withdrawn, or qualified without successful complaint.¹³

8. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

9. *Doyle v. Kahl*, 242 Iowa 153, 46 N.W.2d 52 (1951) (An automobile driver's license is a mere "privilege" that confers no "right"); *but compare Wignall v. Fletcher*, 303 N.Y. 435, 103 N.E.2d 728 (1952) (a driver's license must not be revoked summarily because, whether or not it be regarded as a "mere privilege," it is in the modern world a thing of "tremendous value to the individual" and, as such, should "not be taken away except by due process"). And see 21 WASH. & LEE L. REV. 163 (1964).

10. See GELLHORN, *AMERICAN RIGHTS: THE CONSTITUTION IN ACTION* 143-149 (1960). *But compare Kent v. Dulles*, 357 U.S. 116 (1958), in which for the first time "the citizens' right of free movement" is characterized by the Supreme Court as a "constitutional right."

11. *Walker v. Clinton*, 244 Iowa 1099, 59 N.W.2d 785 (1953) (summary termination of a beer dealer's license was constitutionally permissible because "a license to handle, sell or otherwise dispense beer, wines and other malt or spiritous liquors is a privilege granted by the state and is in no sense a property right"); *Gamble v. Liquor Control Commission*, 323 Mich. 576, 36 N.W.2d 297 (1949) (since a liquor license "creates no vested or property rights," it "may be revoked whenever the commission deems proper").

12. *Frisbie v. United States*, 157 U.S. 160 (1895) ("No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute or recall, at its discretion").

13. See, e.g., *Wilkie v. O'Connor*, 261 App. Div. 373, 25 N.Y.S.2d 617, 619 (1941) (welfare payments withheld from recipient whose sleeping arrangements, while not forbidden by law, were deemed by the administrator to be insanitary: "One would admire his independence if he were not so dependent . . . [I]n accepting charity the appellant has consented to the provisions of the law under which charity is bestowed"); *Dworken v. Collopy*, 56 Ohio L. Abs. 139, 91 N.E.2d 564, 571, 572 (1950) (unemployment in-

Time and more careful analysis have dissipated this attitude. True, government can decide to do nothing whatsoever to relieve misery. But having chosen to do something, it cannot do anything at all regardless of constitutional limitations. Thus, for example, courts have held in recent years that tenancy in publicly supported housing cannot be conditioned upon the tenant's foregoing his constitutional rights of political expression;¹⁴ that successfully passing a loyalty test cannot be made a prerequisite of receiving unemployment insurance¹⁵ or medical care;¹⁶ that a college student cannot be forced to forfeit his freedom of expression as a condition of his attending a state-supported institution;¹⁷ that an applicant's conscientious objection to Saturday work cannot be made a disqualification for benefits otherwise receivable, since to do so would limit the free exercise of religion;¹⁸ that a grantee of public assistance cannot be prosecuted for refusing to perform whatever manual labor is dictated by the welfare administration;¹⁹ and

surance benefits denied because applicant would not file a disclaimer that he advocates the overthrow of the government; "he is not prevented from the exercise of his right to speak, but . . . it may prevent him from receiving benefits which the government he seeks to destroy provides. . . . In the last analysis, unemployment compensation is a gratuity furnished by the state . . . and the privilege to participate therein has been made conditional upon the recipient not being engaged in efforts to destroy the very source from which he seeks that gratuity"); *Lynch v. United States*, 292 U.S. 571 (1933) (claim for payment under War Risk Insurance Act of 1917 allowed; "War Risk Insurance, while resembling in benevolent purposes pensions, compensation allowances, hospital and other privileges accorded to former members of the army and navy or their dependents, differs from them fundamentally in legal incidents. Pensions . . . are gratuities. . . . The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. On the other hand War Risk policies, being contracts, are property and create vested rights"). See also O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966).

14. *Housing Authority v. Blackman*, 4 Ill. 2d 319, 122 N.E.2d 522 (1954); *Lawson v. Milwaukee Housing Authority*, 270 Wis. 269, 70 N.W. 2d 605, cert. denied 350 U.S. 882 (1955); *Holt v. Richmond Redevelopment & Housing Authority*, 266 F. Supp. 397 (E.D. Va. 1966). And see 53 COLUM. L. REV. 1166 (1953).

15. *Syrek v. Unemployment Insurance Board*, 54 Cal. 2d 519, 354 P.2d 625 (1960), with which compare *Dworken v. Collopy*, 56 Ohio L. Abs. 139, 91 N.E.2d 564, 571, 572 (1950).

16. *Reed v. Gardner*, 261 F. Supp. 87 (C.D. Cal. 1966).

17. *Dickey v. Alabama*, 36 U.S. L.W. 2167 (M.D. Ala. Sept. 19, 1967).

18. *Sherbert v. Verner*, 374 U.S. 398 (1963), with which compare *Kut v. Albers Super Markets*, 146 Ohio St. 552, 66 N.E.2d 643 (1946), appeal dismissed 329 U.S. 669 (1947).

19. *New York v. Pickett*, 19 N.Y.2d 170, 225 N.E.2d 509 (1967) (statute imposing a penalty for willful act designed to interfere with administration of public assistance provides for penal sanctions only for acts motivated by fraudulent intent; refusal to accept employment, if unaccompanied by a charge of fraud, is not punishable); *New York v. La Fountain*, 21 App. Div. 2d 719, 249 N.Y.S.2d 744 (1964) (refusal to work in

that racially discriminatory policies are not immunized from attack by being linked with dispensation of benefits.²⁰ Legislatures may still constrict or repeal benefactory statutes enacted in the past; a policy choice, once having been made, does not create in beneficiaries a vested interest that can never be diminished by later laws.²¹ But legislatures may not drastically undercut constitutional rights by manipulating benefactory statutes. In this field, as in others, judges have been increasingly and realistically aware that denying a benefit or withholding a privilege can constrain liberties as compellingly as can a penal sanction, a tax levy, or the imposition of a duty.²²

The main focus of attention has now begun to shift from legislation to administration. Running "county farms," as institutions for the poor were sometimes called in the old days, was a petty activity. Running today's social welfare organs is one of the biggest businesses in America. The nation's general prosperity tends to obscure the dimensions of its poverty. In 1966 some thirty million Americans existed below even the unrealistic "poverty level" that had been officially defined for statistical purposes.²³ Close to half were children under the age of eighteen.

deep snow is not a "willful act" designed to interfere with welfare administration). *Compare* *Commonwealth v. Pouliot*, 292 Mass. 305, 198 N.E. 256 (1935), upholding a conviction in somewhat similar circumstances.

20. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Detroit Housing Commission v. Lewis*, 226 F.2d 180 (6th Cir. 1955). *Compare* *People ex rel. King v. Gallagher*, 93 N.Y. 438 (1883). A Negro child objected to New York's enforced school segregation and unsuccessfully sought entry into an all-white school. Said the court: "... the privilege of receiving education at the expense of the State, being created and conferred solely by the laws of the State, and always subject to its discretionary regulation, might be granted or refused to any individual or class at the pleasure of the State." *Cf. Griffin v. Prince Edward County*, 377 U.S. 218 (1964) (Negro students were denied equal protection of the law when public schools in Prince Edward County were closed down while public schools remained in operation in the rest of the state).

21. *See, e.g., Flemming v. Nestor*, 363 U.S. 603 (1960) (Congress could "modify" old age insurance law after entitlement had already been achieved so long as its action cannot be said to be "utterly lacking in rational justification"); and *see Beutel v. Foreman*, 288 Ill. 106, 123 N.E. 270 (1919) (conditions of entitlement to police pension could be changed even after conditions previously set by statute had been fulfilled by present applicant).

22. For recent Supreme Court elaborations of this view *see* *Speiser v. Randall*, 357 U.S. 513 (1958) (tax exemption conditioned on political orthodoxy); *Spevack v. Klein*, 385 U.S. 511 (1967) (license conditioned on waiver of privilege against self-incrimination); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (public educational employment conditioned on not teaching or supporting forbidden doctrines). Highly illuminating discussion appears in Reich, *The New Property*, 73 YALE L. J. 733 (1964); Schwartz, *supra* note 5; 73 HARV. L. REV. 1595 (1960).

23. DEPT. OF COMM., CURRENT POPULATION REPORTS. Table 8, at 6 (1967). The

They lived in families that had incomes too low to provide adequate nutrition on budgets allowing, as one analyst has shown, well under a dollar a day for each family member's food.²⁴ By no means were all of these deprived children fatherless; on the contrary, two out of every three poor children lived in a home with a man at its head, and close to six million belonged to families that had a full-time wage earner throughout the preceding year.²⁵ Non-whites face the risk of poverty to a far greater degree than others, but sixty-eight out of one hundred poor families are white.²⁶ Far from all of the poor, probably no more than one in four, receive public help from any source—federal, state, or local.²⁷ In fact, of the many millions of children known to be needy at the close of 1966, only three and a half million were being aided by social security or welfare benefits;²⁸ and most of those who did obtain some form of public assistance continued to be "maintained below the poverty line."²⁹ Low though the scale of benefits may have been, the aggregate expenditures by federal, state, and local welfare agencies in 1966 amounted to roughly fifty-five billion dollars, close to a twelfth of the Gross National Product.³⁰ Disbursements by the federal Social Security Administration alone during that year aggregated \$39,263,100,000, distributed among almost twenty-two million men, women, and children, one out of every nine Americans.³¹ The gigantic programs these figures suggest require administrators to form almost unbelievably numerous and wide-ranging judgments. Yet only now have courts begun to grapple energetically with the question of whether

"poverty level" established by the Social Security Administration varies from a gross annual income of \$1560 for an "unrelated female" to \$5440 for a family of seven or more members.

24. Orshansky, *Recounting the Poor—a Five Year Review*, 29 SOCIAL SECURITY BULL. 4, 20, 22 (1966). And see Kahn, *New Policies and Service Models*, 35 AM. J. OF ORTHOPSYCHIATRY 652 (1965).

25. Orshansky, *supra* note 24, Table 3, at 25.

26. CURRENT POPULATION REPORTS, *supra* note 23.

27. DEPT. OF HEALTH, EDUCATION, AND WELFARE, ANNUAL REPORT 1966, at 37.

28. 5 WELFARE IN REVIEW 5, 28, Table 7 (1967).

29. Kahn, *supra* note 24. The average grant under the federally-supported program of Aid to Families with Dependent Children amounted in December 1966 to \$144 per month; general assistance from state welfare programs added \$73 per family. See WELFARE IN REVIEW, *supra* note 28.

30. 30 SOCIAL SECURITY BULL. 6 (1967), Table M-1; and see also DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1967, Table No. 452, at 319.

31. DEPT. OF HEALTH, EDUCATION, AND WELFARE, ANNUAL REPORT 1966, at 5.

these judgments may be exercised uncontrollably (though presumably benignly) or whether they lie within the reach of the rule of law.³²

Well publicized examples have richly shown the need for exploring that question. The administration of aid for necessitous children has provided some of the most telling. This program in its inception reflected the theory that preserving the unity of poverty-stricken families was both emotionally and economically cheaper than sending economically underprivileged children to other homes; most mothers gave their offspring better care at less cost than did most institutions or most foster parents.³³ The theory often failed, however, to shape the practice of aid administrators. Many of them have behaved as though assistance to families with dependent children is a social evil, to be narrowly confined. Families who might worm their way inside the public purse became objects of officials' suspicion rather than of officials' sympathy. Gross invasions of privacy and callous disregard of observable need became commonplaces of law administration. Far from being surreptitious departures from the norm, they were defended as permissible uses of public power against which individuals should utter no complaint because, after all, the individuals in questions were mere alms seekers.³⁴

Not until 1967 was this position authoritatively rejected. A welfare investigator had refused to participate in what he regarded as illegal

32. Compare Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 156 (1958): "In the welfare state, the private citizen is forever encountering public officials of many kinds: regulators, dispensers of social services, managers of state-operated enterprises. It is the task of the rule of law to see to it that these multiplied and diverse encounters are as fair, as just, and as free from arbitrariness as are the familiar encounters of the right-asserting private citizen with the judicial officers of the traditional law."

33. Compare Polier, *Problems Involving Family and Child*, 66 COLUM. L. REV. 305, 311 (1966): "... the increment provided for an additional child to a mother [in the program for aid to families with dependent children] averages less than sixty cents a day. If it is found that the home is inadequate, or the mother unable to cope with the problems of so many children, the child is removed to the home of a stranger, or to the homes of a series of strangers, and assistance payments range up to \$7 a day. If the child is removed to an institution, up to \$14 a day is paid out of taxpayers' funds. Finally, if the child is found to be emotionally disturbed, payments from public funds will range from \$10 to \$25 a day. Thus, while preventive care in the child's own home remains niggardly, the further the child is removed from his family, the more we are ready to pay for his support."

34. For pertinent discussion of some of the more blatant administrative practices, see Connor, *Social Welfare Regulation—The "Man-in-the-House" Rule—Moral and Economic Rationales*, 2 HARV. CIV. LIB.—CIV. RIGHTS L. REV. 299 (1967); Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L. J. 1347 (1963).

searches of his clients' homes. His dismissal for insubordination followed. His appeals through administrative channels and to the lower courts were fruitless. But his pertinacious quest for vindication at last succeeded. The California Supreme Court ordered the investigator's reinstatement in public employment, saying that a government functionary could not be punished for "declining to participate" in mass raids of an unconstitutional character.³⁵ As of July 1, 1967, moreover, the United States Department of Health, Education, and Welfare has announced to all state administrations that they must abandon unrealistic measurements of need³⁶ and must cease practices that disregard relief recipients' rights under the Constitution or, more broadly, under the commonly accepted American conception of human dignity.³⁷

Occupants or would-be occupants of low-rental housing supplied or subsidized by public moneys have similarly had to struggle to preserve their rights as citizens. They constitute a very large group. Local housing authorities are collectively the nation's biggest landlord. Close to two and a half million Americans now live in federally assisted public housing. Several states as well as New York City maintain low-rent housing programs apart from the federally aided projects, thus adding to the total number of residents. Choosing who should be given the opportunity to join that number has been done by a process well described as "non-visible decision making."³⁸ It has afforded applicants scant knowledge of the proceedings affecting them and little opportunity to shape the authorities' conclusions.

35. *Parrish v. Civil Service Commission*, 57 Cal. Rptr. 623, 425 P.2d 223 (1967). Compare *Smith v. Board of Commissioners*, 380 F.2d 632 (D.C. Cir. 1967).

36. In determining eligibility for aid, a state administrator may of course—indeed, he must—inquire into the applicant's available resources. But he "must differentiate between resources that can be counted on because they are available for current use on a regular basis and those found not to be available." He must, in short, omit "from consideration in determining need and amount of payment any income or resources merely assumed to be possessed by the individual." DEPT. OF HEALTH, EDUCATION AND WELFARE, HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Part IV, § 3120.

37. *Id.* § 2220. A state plan for public aid to whose cost the Federal Treasury contributes must hereafter "include policies and procedures for determination of eligibility . . . that respect the rights of individuals under the United States Constitution, and Social Security Act, . . . the Civil Rights Act of 1964 . . . and all other relevant provisions of Federal and State laws, and that will not result in practices that violate the individual's privacy or personal dignity, or harass him, or violate his constitutional rights."

38. Rosen, *Tenants' Rights in Public Housing*, in N.Y.U. PROJECT ON SOCIAL WELFARE LAW, HOUSING FOR THE POOR: RIGHTS AND REMEDIES 154, 179 (1967). And see *Manigo v. New York City Housing Authority*, 51 Misc. 2d 829, 273 N.Y.S.2d 1003 (Sup. Ct. 1966), *aff'd* 27 A.D.2d 803, 279 N.Y.S.2d 1014 (1st Dept. 1967).

Nor have those already accepted as tenants had any firm protection against arbitrary termination of their status. "Residents of public housing accommodations," Mr. Justice Fortas recently wrote, "are subjected to inquiries and surveillance concerning their morals and private life, on the theory that this is a permissible condition of the receipt of the benefits of public housing. They are kept on a short string by month-to-month tenure."³⁹

This form of lease usually allows the landlord to give fifteen days' notice to the tenant to vacate the premises at the end of the month. Courts have often held that this contractual arrangement—as to whose terms the tenant has no real choice—permits the housing authority to evict with no discernible cause.⁴⁰ A few judges in years past have cautioned that the power to evict without any reason does not include the power to evict for an altogether bad reason. In a decision saying that tenants could not be forced to affirm their political purity in order to retain occupancy, Judge Edgerton forcefully reminded a housing authority that "The Government as landlord is still the Government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law."⁴¹

But these cautionary words have been imperfectly heard until now. Not long ago a tenant who had been elected chairman of a tenants' organization was notified the very next day that she would have to surrender her apartment at the end of the month. To her request that she be told why, the housing authority blandly replied that it was not required to state its reason for choosing to oust her, though it perfunctorily denied a political motivation. The Supreme Court of North Carolina thought that this sufficed, saying: "It is immaterial what may have been the reason for the lessor's unwillingness to continue the relationship of landlord and tenant after the expiration of the term as provided in the lease."⁴²

39. Fortas, *Equal Rights for Whom?* 42 N.Y.U. L. REV. 401, 412 (1967).

40. See, e.g., *Brand v. Chicago Housing Authority*, 120 F.2d 786 (7th Cir. 1941); *Pittsburgh Housing Authority v. Turner*, 201 Pa. Super. 62, 191 A.2d 869 (1963); *Walton v. Phoenix*, 69 Ariz. 26, 208 P.2d 309 (1949). For full discussion of tenants' rights, see Rosen, *supra* note 38.

41. *Rudder v. United States*, 226 F. 2d 51, 53 (D.C. Cir. 1955). And see *Housing Authority v. Cordova*, 130 Cal. App. 2d 883, 886, 279 P. 2d 215, 216 (1955), *cert. denied* 350 U.S. 969 (1956): "... a public body, a housing authority as here, does not possess the same freedom of action as a private landlord, who is at liberty to select his tenants as he pleases, and in the absence of a letting for a prescribed time, may terminate their tenancy either without any reason or for any reason regardless of how arbitrary or unreasonable it may be."

42. *Thorpe v. Durham Housing Authority*, 267 N.C. 431, 433, 148 S.E.2d 290, 292

Following this reassertion of public authorities' virtually ungovernable power to oust their tenants, the federal Department of Housing and Urban Development issued a circular addressed to all local housing administrators, reading in part as follows:

Within the past year increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects. During that period a number of suits have been filed throughout the United States generally, challenging the right of a Local Authority to evict a tenant without advising him of the reasons for such eviction.

Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish. . . .⁴³

The legal force of this federal directive is as yet unclear. When called upon to review the North Carolina court's decision in the case just outlined, the United States Supreme Court vacated the judgment that had been rendered and remanded the case to the state court with instructions to determine the circular's effect, if any, on the controversy between Mrs. Thorpe and her public landlord.⁴⁴ One cannot yet confidently say that low-rent tenants have achieved a sturdily built protection against administrative error or oppression, but the federal directive is at least a sign that procedural crudities are no longer to be taken for granted. The Department of Housing and Urban Developments seemingly believes, as did Mr. Justice Frankfurter, that "secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness."⁴⁵

(1966). *But cf.* *Holt v. Richmond Redevelopment and Housing Authority*, 266 F. Supp. 397 (E.D. Va. 1966), which did inquire into the reason for a notice of termination, found (despite the housing authority's assertion to the contrary) the reason to be distaste for the tenant's organizational activities, and enjoined the threatened eviction.

43. DEPT. OF HOUSING AND URBAN DEVELOPMENT, TERMINATIONS OF TENANCY IN LOW-RENT PROJECTS (Circular 2-7-67).

44. *Thorpe v. Durham Housing Authority*, 386 U.S. 670 (1967).

45. Concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1950). The passage from which the above words are quoted continues (at 171-172): "No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."

Insensitive substantive policies present issues apart from abrupt methods of enforcing them. Many housing authorities have, for example, been especially aggressive in barring or in ousting families with children born out of wedlock. Only recently have courts begun to believe that extra-marital intercourse is not a privilege reserved for the well-to-do.⁴⁶ Judges have perhaps been influenced by surveys showing the high incidence of teen-age pregnancy before marriage, as well as by the late Dr. Kinsey's studies of American sexual prowess.⁴⁷ The real question—not yet fully answered—is whether public agencies may reasonably conclude that families with “illegitimate” children cannot aspire to be housed as are others (perhaps more “moral,” perhaps simply more lucky) in need of safe shelter.⁴⁸

Recognition that the poor do have legal rights, that being in need does not require meek acquiescence in whatever a public official may

46. See, e.g., *Thomas v. Housing Authority of Little Rock*, (E.D. Ark. May 26, 1967), reported in 9 WELFARE L. BULL. 7 (1967). The Housing Authority had ruled that a family would be ineligible for admittance into or continued occupancy “if any family member residing regularly with the family has a child or children born out of wedlock.” The court thought that this “indiscriminate denial of access to public housing to families unfortunate enough to have or acquire one or more illegitimate children would be to deprive of the real or supposed benefits of this program many of the very people who need it most. . . .” For general discussion of the problem See *Equality for the Illegitimate?* 8 WELFARE L. BULL. 13 (1967).

47. N.Y. Times, Mar. 16, 1966, at 55, cols. 1, 2, reports a survey showing that one out of every six Connecticut girls under the age of twenty becomes pregnant before marriage. New York welfare authorities are reported to believe that New York figures are similar. Christensen, *Studies in Child Spacing*, 18 AMERICAN SOCIOLOGICAL REV. 53, 58 (1963): “. . . it has been conservatively estimated that about one-fifth of all first births within marriage were conceived before marriage.” N.Y. Times, Oct. 29, 1967, at 8, col. 1, reports that 14.8 percent of all recorded births in New York City in 1966 were out of wedlock.

48. Rosen, *supra* note 38, quotes (at 231) the following policy statement of the Talladega, Alabama, Housing Authority: “Effective December 1, 1964, any illegitimate child born to any member of a tenant family will automatically bring about the eviction of that family. . . . [I]f it becomes apparent that a person is expecting an illegitimate child, the family will be evicted immediately. . . . No exceptions will be made.” The Ypsilanti, Michigan, housing authority went a step farther by incorporating in its leases an all-out anti-childbirth policy: “Female heads of family will not be permitted to increase their family while a resident of the project. Increase in the family will be a cause for eviction.” *Id.* at 232.

Recent scholarly writings suggest that the law of marriage and divorce have made marriage a luxury beyond the means of many poor persons, so that births out of wedlock may reflect economic factors far more than they do morality or mores. See, e.g., Foster, and Freed, *Unequal Protection: Poverty and Family Law*, 42 IND. L.J. 192 (1967); ten Broek, *California's Dual System of Family Law*, 16 STAN. L. REV. 257, 900 (1964); *id.* 17 at 614 (1965).

prescribe, is of course a large step toward ending abject mendicancy as an American way of life. But a big distance may still lie between the existence of rights and their successful assertion. The Supreme Court's pronouncements about the proprieties of criminal law endorsement, for example, have not instantly caused every rural sheriff or urban policeman to change established patterns of misbehavior.⁴⁹ Similarly, civil law administration that affects the needy will not instantly become urbane, compassionate, and procedurally sophisticated simply because a few judges have criticized harshness, hostility, and summariness.

Even the promptings of federal agencies that grant moneys to state and local bodies are unlikely in themselves to control day-to-day administration. Cutting off federal support is an extremely drastic action, taken if at all only after elaborate negotiations, lengthy proceedings, and disquieting political conflicts.⁵⁰ That is why, no doubt, litigation remains necessary today to establish that four needy children should not be denied public assistance because their widowed mother, when directed to disprove allegations of her having had a sexual relationship with a married man, had told the investigator that "it wasn't none of *her* business." The children's need was plain; their mother earned only

49. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION, TASK FORCE REPORT, THE POLICE 17 (1967): "Many police administrators are caught in a conflict between their desire for effective, aggressive police action and the requirements of law and propriety. Direct confrontation of policy issues would inevitably require the police administrator to face the fact that some police practices, although considered effective, do not conform to constitutional, legislative, or judicial standards. By adopting a 'let sleeping dogs lie' approach, the administrator avoids a direct confrontation and thus is able to support 'effective' practices without having to decide whether they meet the requirements of law."

50. The Department of Health, Education, and Welfare announced on Jan. 12, 1967, that federal grants-in-aid to Alabama would be terminated unless that state could assure non-discriminatory administration of its welfare program. Officials within the Department had first notified Alabama on Aug. 17, 1965, that it was failing to comply with Title VI of the Civil Rights Act of 1964 and was therefore jeopardizing its federal grants. Preliminary discussions having produced no results, formal hearings were begun before a trial examiner on Oct. 21, 1965. The trial examiner found, upon the record made at the hearing, that existing regulations had not been observed. The Department having adopted his findings, decided to cut off further federal funds for Alabama's use. This decision came seventeen months after the possibility had first been broached. Alabama immediately sought to enjoin any halt in the flow of money from Washington. On August 29, 1967, the Court of Appeals for the Fifth Circuit held that an injunction should not issue (*Gardner v. Alabama*, not yet reported). But, upon Alabama's request, the Department's decision to deny funds was held in further abeyance pending action by the Supreme Court on Alabama's petition for certiorari (No. ———, Oct. Term 1967, filed ———). As these words are written, well over two years have passed

\$20 a week though she worked daily as a cook from 3:30 a.m. to noon. But the welfare administration nevertheless terminated payments for the children's benefit, deeming the mother's rumored paramour to be a "substitute father" who should provide support for the widow's youngsters—this, although he and his wife were already working in full-time jobs to provide for their own nine children.⁵¹ Even though the course of action pursued by the state officials bears little resemblance to the federal prescriptions, the representatives of the national government have no practical power to force a change at the state level. The power they do have—that is, cessation of federal financial support—is simply too shattering to be used.

Still, judicially and administratively enunciated standards of propriety are highly important, even when some officials disregard them. The standards shape or reinforce the self-expectations of the many public administrators who are strongly motivated to do and be good. And they encourage at least some among the poor to look toward the law as a friend, not as an enemy; as a tool to be used, not as a bludgeon to be feared.⁵²

Using law as a tool is not, however, as easy as it sounds. Legal services, funded chiefly by the Office of Economic Opportunity, have in the immediately recent past become available to many poor persons other than those charged with crime.⁵³ Nevertheless, lawyers are still

since a termination of federal grants-in-aid was initially threatened—and the threat has not yet been translated into reality.

And see also Meltsner, *Equality and Health*, 115 U. PA. L. REV. 22 (1966), showing how ineffectively federal authorities have used their supposed power to end racial discrimination in medical facilities supported by federal funds.

51. *Smith v. King*, Civil No. 2495-N, (M.D. Ala. 1967).

52. Then Attorney General Robert F. Kennedy, in an address delivered at the University of Chicago Law School, May 1, 1964, declared that the poor man "looks upon the law as an enemy, not as a friend. For him the law is always taking something away." Mr. Kennedy's successor as Attorney General, Nicholas de B. Katzenbach, in an address on June 23, 1965, at a National Conference on Law and Poverty, said: "Too often, the poor man sees the law only as something which garnishees his salary; which repossesses his refrigerator; which evicts him from his house; which cancels his welfare; which binds him to usury; or which deprives him of his liberty because he cannot afford bail Small wonder then that the poor man does not respect law."

53. See Paulsen, *The Expanding Horizons of Legal Services*, 67 W. VA. L. REV. 179, 269 (1965). Shriver, *The OEO and Legal Services*, 51 A.B.A.J. 1064 (1965). The insufficiency of legal services in connection with criminal, let alone civil, matters is tellingly discussed by Solomon, *Justice and Poverty in an Affluent Society* 66 COLUM. L. REV. 248 (1966).

not readily at hand for all who might wish to engage them. Nor, indeed, do most persons regard litigation as a congenial activity even when lawyers are willing to provide professional assistance; sometimes, in fact, plaintiffs cannot be found to demand court protection of incontestable rights that have indubitably been wrongfully withheld.⁵⁴ When the issues in contest are highly debatable and especially when the private contestant will have a continuing relationship with the powerful adversary whose official actions might be challengeable, litigation is an unappetizing prospect. An astute student, having observed that even powerful economic interests often forego procedural rights for fear of arousing official antagonism, has been outspokenly skeptical about the utility of "the traditional adversary methods of establishing rights and providing judicialized procedures to protect those rights against government."⁵⁵

Litigation may, however, become a practical weapon if resorted to not by an isolated, insecure individual, but by a group. Evidence now at hand suggests, for example, that lawsuits may have become surprisingly meaningful instruments in the attack on racial discrimination in

54. Compare Meltsner, *supra* note 50, at 29, discussing the role of lawsuits in eliminating racial discrimination in publicly financed hospitals: "Private litigation in the best circumstances is costly and time consuming A privately initiated federal court suit for injunctive relief against a medical facility raises particular difficulties. The primary object of discrimination—the Negro patient—has but transient personal interest in or knowledge of the terms and conditions of treatment in local hospitals. At the time his interest is greatest—when he is ill—he is least likely to express interest in litigation. Negro physicians, dentists and nurses have litigated the legality of hospital practices, such as restrictive admission of professionals, but many are so successful within the confines of the segregated systems that they have little incentive to change it. Others lag behind the skills of better educated whites and hesitate to challenge racial barriers for fear their ability will be questioned. Others are unable to overcome the imposing evidentiary hurdle of proving they have been rejected for racial and not professional reasons."

55. Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479, 500 (1966). The passage from which the phrases in the text have been quoted continues as follows: "It may be that statutory rights, judicial-type controls, and judicial review will help in eliminating certain obnoxious features of welfare programs and provide redress for the outrageous cases. But how much help and whether there will be a net gain are the crucial questions. The experience of the administration of business regulation and the peculiar problems of welfare administration cast doubt on the benefits to be gained from a program of rights. Its lack of utility in helping to fulfill the broader legislative goals—the rehabilitative or people-changing aspects of welfare programs—is manifest. But what is really unknown are the costs of these reforms—the impact on the informal process, the unintended consequences of formal procedural requirements, lawyers, judicial decisions."

private employments, chiefly because organizations have led the way in asserting legal rights.⁵⁶

The banding together of welfare recipients or public housing tenants may possibly have similar consequences. Until recently opportunities to contest administrative determinations through formal hearings and judicial review have been virtually ignored. During the entire twelve months of 1965, for example, only 109 welfare clients or applicants in New York City formally appealed against unfavorable decisions, and only 14 appeals actually went to hearing.⁵⁷ In the summer of 1967, however, a Citywide Coordinating Committee of Welfare Recipients began systematically to demand fair hearings in behalf of those who were dissatisfied with actions taken upon their requests for aid. At the end of two unusually active months, some 2,000 applications for hearings had been filed, 800 additional requests for hearing were in preparation, 300 hearings had occurred at the rate of approximately 50 per week, and about \$300,000 had been paid out during a single fortnight in amounts varying from \$300 to \$1,000 to settle claims in advance of the scheduled hearings.⁵⁸ Though anonymity and impersonality were impossible because each of these many hundreds of cases had to be decided upon the basis of its peculiar facts, the grouping of so many contests no doubt gave individual litigants a comfort they would have lacked had they proceeded separately.

56. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* (1966), is a scholarly analysis that reaches pessimistic conclusions (pp. 20, 56, 75, 76, 80) about the utility of judicial remedies because few individuals are willing to bear the pain of seeking relief through litigation. A thoughtful review of the Sovren volume by Alfred W. Blumrosen in 14 *U.C.L.A. L. REV.* 721 (1967), cites recent experience that in Prof. Blumrosen's opinion warrants two contrary conclusions (at 724): "First, the historic weakness of the individual suit in the social legislation context depended on the individual being alone and unorganized. This weakness may not exist where the organization, either on the formal or informal level, is effective in procuring adequate legal representation. Second, the individual right to sue under Title VII [of the Civil Rights Act of 1964] is, in reality, a vehicle by which the group interests of minorities can be asserted in the administrative and judicial processes. The emergence of a group interest of minority employees has signaled a new litigiousness which has been one startling fact of the first year of administration of Title VII. The group interest has breathed life into what was once a sterile concept of the individual's right to litigate." And see also Blumrosen, *The Individual Right to Eliminate Employment Discrimination by Litigation*, *PROCEEDINGS OF THE 19TH ANNUAL WINTER MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION* 88 (1966).

57. Experience in welfare law administration is summarized in GELLHORN, *WHEN CITIZENS COMPLAIN* 198 (1966).

58. *N.Y. Times*, Oct. 3, 1967, at 1, col. 5. The coordinating attorney in this litigation campaign, a member of the staff of the Columbia University School of Social Work's

In the end, nonetheless, litigation should be the last resort when citizens and officials disagree. Public administration would be impossible if all—or, even, very many—doubtful issues had to be resolved by formal proceedings. Constant bickering is not a suitable means of establishing the community's emotional equilibrium, nor can the community's manpower be utilized to best advantage in sterile rakings of the ashes of past controversies.

Increased recognition that poor persons' interests are worthy of legal protection is a cause for congratulation and not regret. But one must hope that these interests, like most of the others the law stands ready to protect, will be voluntarily respected in the main. This will require a marked alteration—one might almost say a modernization—of the attitudes of some administrative personnel. It may also require the creation of new mechanisms for inquiring into citizens' grievances concerning officials' actions or failures to act. Adaptations of the ombudsman system,⁵⁹ information centers that resemble the British citizens' advice bureaus,⁶⁰ or, most important of all, intra-administration offices that are truly concerned with inquiring into dissatisfactions may hold more hope for the future than would a more frequent resort to the law courts.

Whatever may prove to be the intermediate steps, one can in any event now confidently foresee an enlargement of the concept of right and a contraction of the concept of privilege in public decisions that touch poor people. The law may have been slow to awake to the realities of modern economic society, but, having awakened, it will not soon again slumber.

Center on Social Welfare Policy and Law, was quoted as saying that two-thirds of New York's 650,000 welfare clients were "just not getting what they're entitled to" and "we are just trying to force the city to do what by law it is required to do." *Id.*, at 34, col. 2.

59. See GELLHORN, *supra* note 57, for discussion of federal, state, and local grievance-handling, and GELLHORN, OMBUDSMEN AND OTHERS (1966), for discussion of the ombudsman plans used in various foreign countries.

60. See KAHN, NEIGHBORHOOD INFORMATION CENTERS (1966). And see St. Louis Post-Dispatch, Oct. 6, 1967, at 6A, col. 3, reporting the creation in St. Louis of a "citizens' service bureau" under the Mayor, to handle complaints and to provide needed information as well as to receive suggestions. "I can assure you that every complaint that is not properly handled will come over my desk," Mayor A. J. Cervantes declared.