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The Invention and Reinvention of Welfare Rights

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THE INVENTION AND REINVENTION OF WELFARE RIGHTS

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This essay contrasts the jurisprudence of welfare entitlement developed by social workers during and after the New Deal with the lawyers' welfare jurisprudence of the past two decades.

I find this contrast interesting for two reasons. First, it brings to light an episode in the intellectual history of the American welfare state that lawyers have ignored—the development of an understanding of welfare as a legal right by another profession long before Charles Reich's *The New Property*[1] and the literature that followed it made such a notion current among lawyers. Second, the contrast between the social workers' and the lawyers' welfare jurisprudences raises questions about the legal and political significance of the idea of welfare rights.

I hope I can convince you that these concerns are still vital. The idea of welfare rights no longer inspires jurisprudential controversy or liberal reform. Some aspects of the New Property jurisprudence have been so assimilated into the legal culture that they are taken for granted. Other aspects appear so rooted in the Great Society idealism of the 1960s that they seem quaintly anachronistic. I think that both the success and the failure of the New Property stems from its tendency to ignore and even obscure some of the

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1. 73 YALE L.J. 733 (1964).

most important legal and political implications of the idea of welfare rights. One of the many virtues of the social workers' jurisprudence is to suggest that the idea of welfare rights is both more problematical and more provocative than contemporary legal discussion suggests.

I. SOCIAL WORK JURISPRUDENCE

Reich styled *The New Property* as an attack on Progressive jurisprudence, which he thought had become "a doctrine monstrous and oppressive."[2] As he saw it, the essence of this doctrine, in the form that had come to dominate the postwar public interest state, was that "a man or woman . . . has no rights which may not be taken away to serve some public policy."[3] For him, one of the ugliest manifestations of the doctrine was the philosophy of welfare administration of the public interest state.

Reich and his followers did not describe comprehensively the welfare doctrine they were reacting against, and they are perhaps not entirely responsible for the historical account of welfare rights that became conventional among liberal lawyers in the years following *The New Property*, but they contributed to it. According to this account, welfare benefits were not regarded as rights prior to the 1960s.[4] They were regarded as gratuities to be dispensed in accordance with administrative whim. The welfare system was dominated by social workers committed to an ideology of condescending moralism. These social workers considered poverty a symptom of personal failing and considered poor people, like children and lunatics, to be incapable of rational and responsible choice. They sought to condition material assistance on recipients' submission to supervision of their housekeeping, child rearing, and sexual practices. Such supervision was designed to get the recipient to act like, and ultimately to transform her into, the middle class person's ideal of a working class person—industrious, economizing, sexually ascetic, politically complacent, and socially unambitious. The "man-in-the-house" rules that disqualified families on the basis of the mother's sexual conduct, and the "midnight raids" designed to enforce such rules, typified this regime. The regime went unchallenged—so the story goes—until lawyers and the federal judiciary intervened in the

2. *Id.* at 771.

3. *Id.* at 769.

4. "Welfare benefits" here refers principally to public assistance. The liberal lawyers recognized that social insurance benefits had been accorded some of the attributes they associated with rights prior to the 1960s.

1960s. The lawyers and judges established the principle that welfare was a legal right and, under the banner of this principle, purged the system of condescending moralism and arbitrary administration. The critical milestones in this account are Reich's 1964 article, the 1968 case of *King v. Smith*,[5] in which the Supreme Court struck down the "man-in-the-house" rules, and the 1970 case of *Goldberg v. Kelly*,[6] in which the Court held that due process required a hearing prior to the termination of a welfare benefit.[7]

I do not mean to dispute that condescending moralism was influential within the welfare system prior to the 1960s. The views described by the liberal lawyers were widely held and often explicitly defended, notably by a social work tradition prominent in the late nineteenth and early twentieth centuries that drew on the themes of what might be called small town Progressivism: anti-urbanism, privatism, moralism. This tradition was committed to the provision of assistance through private charitable organizations and through a practice of moralistic lay intervention called "friendly visiting."[8] Nor do I mean to dispute that lawless administration was a problem with the system. There are innumerable horror stories of lawlessness, and while no one defended it per se, some argued that welfare administration should be exempt from traditional legal safeguards.[9] What the conventional account ignores is that both condescending moralism and administrative lawlessness had been attacked with significant success for decades before the lawyers entered the picture,

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5. 392 U.S. 309 (1968).

6. 397 U.S. 254 (1970).

7. My principal source for the conventional account is conversations with lawyers and law students over the past few years. Although there is nothing as crude or as comprehensive as the summary above in the literature, elements of the account are pervasive. *E.g.*, J. HANDLER, THE COERCIVE SOCIAL WORKER 8 (1973) ("traditional social work for the poor . . . rests comfortably on the pathology theory of poverty"); Glaser, *Prisoners of Benevolence*, in DOING GOOD 107, 118 (1978) (social service professionals "failed utterly to resist the impulse toward paternalism" and "opposed the rights of their clients"); Rosenblatt, *Legal Entitlement and Welfare Benefits*, in THE POLITICS OF LAW 262, 263 (Kairys ed. 1982) ("Prior to the mid-1960s, recipients of benefits under programs such as AFDC were not seen as having 'rights' to benefits or even to a fair process for deciding individual cases."); Sparer, *The Place of Law In Social Work Education*, 17 BUFFALO L. REV. 733, 734 (1968) ("social work ideology . . . holds [that] [t]hose who have public or quasi-public power . . . should use that power to determine the place, manner, and habits of life for those who are helpless and dependent because of poverty").

8. *See* R. LUBOVE, THE PROFESSIONAL ALTRUIST 12-17 (1965); K. WOODROOFE, FROM CHARITY TO SOCIAL WORK 77-100 (1962).

9. *See, e.g.*, W. BELL, AID TO DEPENDENT CHILDREN 34-35 (1965) (racist administrative practices); A. KEITH-LUCAS, DECISIONS ABOUT PEOPLE IN NEED 77-78 (1959) (noting hostility to judicial review).

and attacked precisely under the banner of the principle that welfare is a legal right.

The attack had been waged by a segment of the social work profession that won influence over federal welfare policy during the New Deal. During the 1910s and 1920s, social work had been transformed by reformers seeking to model its institutions on those of the established professions and its doctrine and practice on those of psychology and psychiatry. Both of the two schools of thought that emerged from this transformation repudiated the lay tradition of "friendly visiting" and the doctrines of condescending moralism.[10] Both schools drew on the themes of what might be called big city Progressivism: cosmopolitanism, pragmatism, and public responsibility.[11] The school most concerned with public assistance, which I call social work jurisprudence, was inspired less than its rival by psychiatric models that focused on early childhood experiences and more by psychological theories that focused on the interaction of individual experience and social context.[12] Social work jurisprudence differed further from the rival school in being centrally committed to combining social reform with individual assistance, integrating financial assistance with the provision of professional services, and promoting the public assumption of welfare responsibilities previously left to private charities. The principal academic home of social work jurisprudence was the University of Chicago School of Social Service Administration.

From 1935 to the late 1960s, the Federal Bureau of Public

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10. For a general discussion of social work reform in the early twentieth century, see R. LUBOVE, *supra* note 8, at 22-156; K. WOODROOFE, *supra* note 8, at 101-47.

11. On the different styles of Progressivism, see O. GRAHAM, AN ENCORE FOR REFORM 24-150 (1967).

12. *See* Keith-Lucas, *The Political Theory Implicit in Social Casework Theory*, 47 AM. POL. SCI. REV. 1076, 1083-89 (1953). The best known exponents of social work jurisprudence include Jane Hoey, Grace Marcus, and Charlotte Towle. For examples of their work, see C. TOWLE, COMMON HUMAN NEEDS: AN INTERPRETATION FOR STAFF IN PUBLIC ASSISTANCE AGENCIES (1945); Hoey, *The Significance of the Money Payment in Public Assistance*, SOC. SECURITY BULL. Sept., 1944, at 3; Marcus, *Reappraising Aid to Dependent Children As a Category*, SOC. SECURITY BULL. Feb., 1945, at 3. Edith Abbott and Grace Abbott were both predecessors and allies of these writers, but their work seems in some respects closer to the preprofessional tradition. *See* E. ABBOTT, PUBLIC ASSISTANCE (1940); G. ABBOTT, FROM RELIEF TO SOCIAL SECURITY (1941).

Although the psychological doctrines of social work jurisprudence and its central concern with public assistance made it a minority position within the profession, many of its specific tenets about public assistance, including the three discussed *infra* in the text accompanying notes 15-27, had come to be accepted by most professional social workers by the post-war period. *See* H. BISNO, THE PHILOSOPHY OF SOCIAL WORK 35-67 (1952).

Assistance, which administered the most controversial federal welfare program—Aid to Families with Dependent Children (AFDC)—as well as the old age and disability welfare programs, was dominated by social work professionals committed to this perspective.[13] From their base in the Bureau, the social workers sought to reform welfare administration by promoting federal legislation to protect recipients, by policing state compliance with such legislation, and by promoting the staffing of frontline welfare positions with social workers schooled in their doctrine. Their efforts were hampered by the recalcitrance of state administrators with strong support in Congress and by the reluctance of a series of presidents and senior executive officials to back the social workers in disputes with the states. Nevertheless, the accomplishments of these social workers were substantial and in important respects paved the way for the later achievements of the lawyers.[14]

The fullest and most influential exposition of social work jurisprudence is Charlotte Towle's *Common Human Needs: An Interpretation for Staff in Public Assistance Agencies*, which the Bureau of Public Assistance commissioned and published in 1945.[15] Towle's book was as

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13. *See* M. DERTHICK, THE INFLUENCE OF FEDERAL GRANTS 74, 159 (1979). Hoey, Marcus, and Towle were all affiliated with the Bureau of Public Assistance, Hoey as its director from 1935 to 1953. The Bureau was an agency of the Federal Security Board, later renamed the Social Security Administration. It had responsibility at the federal level for the four public assistance programs—covering dependent children, the aged, the blind, and the disabled—created by the Social Security Act. Each program provided for federal grants to the states for benefits dispensed by the states within federal guidelines. In 1974, the three "adult categories" were federalized as the Supplemental Security Income program, administered entirely by the Social Security Administration. AFDC has retained its original basic structure as a federal grant-in-aid program. *See* 42 U.S.C. §§ 601-615 (1982).

Federal welfare administration was repeatedly reorganized and renamed after 1961. Some of these reforms, culminating in those of the second Nixon administration, reduced and eventually eliminated the influence of social work professionals. *See* Randall, *Presidential Power versus Bureaucratic Intransigence: The Influence of the Nixon Administration on Welfare Policy*, 73 AM. POL. SCI. REV. 795, 799-804 (1979).

14. *See* (a) G. STEINER, SOCIAL INSECURITY 90-99 (1966) (efforts to protect client confidentiality); (b) M. DERTHICK, *supra* note 13, at 98-128, 158-89; G. STEINER, *supra*, at 87-90 (efforts to promote merit personnel standards and professionalization); (c) J. CATES, INSURING INEQUALITY 104-35 (1983); M. DERTHICK, *supra* note 13, at 43-70 (efforts to expand eligibility and increase benefits); (d) W. BELL, *supra* note 9, at 20-56, 137-51; M. DERTHICK, *supra* note 13, at 83-90 (efforts to prohibit punitive moralistic eligibility practices); (e) W. BELL, *supra* note 9, at 34-37 (efforts to prohibit racially discriminatory administration).

15. The Bureau stopped distributing it (and destroyed its remaining copies) in 1951 at the behest of an American Medical Association president who found it "socialistic." It was subsequently republished and distributed by the National Association of Social Workers. H. PERLMAN, *Charlotte Towle: An Appreciation*, in HELPING: CHARLOTTE TOWLE

central to social work jurisprudence as Reich's article was to the lawyers' welfare jurisprudence of the 1960s and 1970s, and it was as uncompromisingly opposed to condescending moralism and lawless administration as was the New Property jurisprudence.

Among the central tenets of social work jurisprudence were these:

Beneficiary interests in public welfare programs should be understood as rights. "We place a great deal of emphasis on the individual's *right* to assistance in the belief that it dignifies, that it frees him from humiliation, and that it leaves him unshackled by feelings of personal obligation to the agency . . . ."[16]

This notion of right implied that substantive norms should be explicit[17] and that workers should regard themselves as bound by such norms.[18] It implied further that a recipient denied benefits should have an opportunity to appeal the denial to an independent decisionmaker. *Goldberg v. Kelly* is sometimes mistakenly understood to have established that a person is entitled to a hearing on a claim of wrongful denial of welfare benefits, but in fact *that* principle was established in 1935 through the efforts of the social workers. The public assistance titles of the Social Security Act of 1935 included a provision expressly conferring such a right.[19] The provision was proposed by social workers,[20] and social workers celebrated its enactment as a triumph for the idea of welfare as a legal right in much the same way that lawyers later celebrated the holding of *Goldberg* (that in the case of a current recipient the hearing had to precede termination of benefits) as a triumph for the idea of welfare as a

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ON SOCIAL WORK AND SOCIAL CASEWORK 1, 12 (H. Perlman ed. 1969) [hereinafter cited as HELPING].

16. C. TOWLE, *supra* note 12, at 56 (emphasis in original). *See also* Abbott, *Is There a Legal Right to Relief?*, 12 SOC. SERV. REV. 260, 263 (1938) ("Certainly, [the claimant] has a 'right' to all the benefits specified in the statute providing for persons in need.").

The social workers were by no means the first to speak of welfare as a right. This rhetoric seems to be as old as the idea of welfare as a governmental function. The Elizabethan Poor Law, sometimes taken by modern lawyers to represent the antithesis of welfare entitlement, was widely understood at the time it was in effect as establishing welfare as a right. *See* G. HIMMELFARB, THE IDEA OF POVERTY 4, 74, 148-49 (1983). However, the social workers appear to have been the first in America to develop a jurisprudence around the rhetoric of welfare-as-right. Of course, as I emphasize in the text, the term welfare right is compatible with a variety of distributive and administrative conceptions, and there are important differences among those who have invoked it.

17. *See* H. BISNO, *supra* note 12, at 37.

18. Abbott, *supra* note 16, at 271-74.

19. Pub. L. No. 271, §§ 2(a)(4), 402(a)(4), 49 Stat. 620, 627, 645 (1935).

20. E. WITTE, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT 162 (1962).

legal right.[21] And although the New Deal social workers doubted that welfare claimants had much to gain from judicial review, some were sympathetic to the idea that such review is also implicit in the notion of welfare rights.[22]

Poverty does not indicate moral failing or personal incompetence. Social work jurisprudence held that people generally wanted to be and—given minimal opportunities—were capable of being economically productive. It attributed poverty to a social failure to provide opportunities. The social workers acknowledged that poverty tended to be psychologically as well as physically debilitating, first because psychological strength was partially dependent on the satisfaction of basic material needs, and second, because it was eroded by the experience of humiliation and stigma arising from mistaken lay attitudes toward poverty. But they insisted that the appropriate response to these problems was to increase the amount and accessibility of financial assistance under conditions emphasizing the principle of entitlement. Moreover, the social workers denied that the poor could plausibly be presumed, simply by virtue of their poverty, incompetent to manage their affairs. They condemned the tendency to associate poverty with moral failing or incompetence and the fear that welfare would produce a kind of addictive dependence ("pauperization") as cruel superstitions or primitive "lay attitudes."[23]

Financial assistance should be conditioned solely on need. At its most ambitious, social work jurisprudence rejected the limitation of federal public assistance to single parent families and the aged, blind,

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21. C. TOWLE, *supra* note 12, at 10, 24; Hoey, *supra* note 12, at 4.

22. Hunter, *The Courts and Administrative 'Fair Hearings' in Public Assistance Programs*, 14 SOC. SERV. REV. 481, 481-82 (1940). While expressing his own sympathy for judicial review, Hunter asserts that other social workers were unsympathetic. *Id.* at 498.

Although rarely sought and sometimes denied, judicial review of welfare claims was at least formally available to beneficiaries in some jurisdictions prior to the 1960s. *See, e.g.*, Barnes v. Turner, 280 S.W.2d 185 (Ky. 1955) (review allowed by statute); Wood v. Waggoner, 293 N.W.2d 188 (S.D. 1940) (review allowed by mandamus); S. RIESENFELD & R. MAXWELL, MODERN SOCIAL LEGISLATION 715 (1950) (citing state statutes with review provisions). Nevertheless, whether formally available or not, such review appears not to have played a significant role in the protection of beneficiary interests until recently. *See* Abbott, *supra* note 16, at 263-64.

The assertion in the conventional lawyers' account that welfare benefits were not regarded as rights prior to the 1960s may reflect an assumption—also made by the classicists—that rights are by definition judicially enforceable. Progressive jurisprudence rejected this assumption as arbitrary and parochial. *See* Arnold, *The Role of Substantive Law and Procedure In the Legal Process*, 45 HARV. L. REV. 617, 624-31 (1932).

23. C. TOWLE, *supra* note 12, at 3, 84, 97-98; Towle, *Social Casework In Modern Society*, in HELPING, *supra* note 15, at 106.

and disabled and favored a universal assistance program unencumbered by categorical or status criteria.[24] It condemned rules conditioning eligibility on worthiness or "moral character."[25] It also opposed conditioning eligibility on the waiver of control over matters conventionally considered private. Thus, the social workers rejected the practices of dispensing assistance in kind or through vouchers and of supervising how the client spent her grant. They considered the provision of the Social Security Act requiring that AFDC payments be made in cash rather than in kind as, like the hearing provision, a symbolic repudiation of condescending moralism.[26] The same principle precluded the conditioning of assistance on following or listening to professional advice about marital or parental problems or about work. The social workers believed in the efficacy of professional advice, but they insisted on the right of the recipient to refuse it.[27]

All of these tenets prompted Bureau of Public Assistance social workers to oppose the "suitable home" rules that in some states conditioned AFDC eligibility on, among other things, the mother's sexual conduct. They condemned such rules as inconsistent with the notion of welfare as a legal right because the rules were not explicitly specified or consistently administered. The social workers documented charges of arbitrary administration with investigations demonstrating that the rules were sometimes used as a screen for racial discrimination and for blanket disqualifications of illegitimates. They further condemned the rules for perpetuating the anachronistic "lay" presumption that the poor were morally inferior. And they condemned them for irrationally denying assistance to people in need. Because the legislative history of the Social Security Act specifically sanctioned such rules,[28] the Bureau plausibly believed itself powerless to forbid them, but it strongly recommended that the states abandon them. And in fact, following their recommendation, several states did so.[29] The 1968 case of *King v. Smith*, which held the remaining rules to violate the Act, is quite

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24. *See* H. BISNO, *supra* note 12, at 52-53; Marcus, *supra* note 12.

25. H. BISNO, *supra* note 12, at 52-53; Marcus, *supra* note 12.

26. "[The cash payment] is an indication to [the recipient] and to his family, friends, and neighbors, that he has not, through financial dependency, lost his capacity or responsibility for handling his affairs." Hoey, *supra* note 12, at 4. *See* C. TOWLE, *supra* note 12, at 31. The cash payment provision appears at 42 U.S.C. § 606(b) (1982).

27. C. TOWLE, *supra* note 12, at 31.

28. H.R. REP. No. 615, 74th Cong., 1st Sess. 24 (1935); S. REP. No. 628, 74th Cong., 1st Sess. 36 (1935).

29. W. BELL, *supra* note 9, at 41-56.

plausibly considered a lawyers' triumph, but it was also the fruition of earlier social work efforts. The argument that the Court adopted to dispose of the 1935 legislative history authorizing such rules depended on the social workers' campaign against them. Over the years, Congress had amended the Social Security Act to adopt provisions proposed by the Bureau to protect recipients. Although the amendments did not explicitly address the "man-in-the-house" rules, the Court construed them, somewhat heroically, to impliedly ratify the social workers' campaign against condescending moralism generally.[30]

Thus, the principle of welfare as a legal right had been fully accepted and elaborated within an important sector of the welfare system long before the lawyers took an interest in the system. Yet although social work jurisprudence anticipated and overlapped the New Property in many ways—in its repudiation of condescending moralism, its insistence on the dignity of the recipient, and its attack on arbitrary administration—there were important differences between the social workers' and the lawyers' conceptions of welfare rights. I want to try now to sketch the origin and extent of those differences. Although the differences arise from fairly abstract jurisprudential notions, they have practical implications.

II. THE ORIGIN OF SOCIAL WORK JURISPRUDENCE IN THE PROGRESSIVE CRITIQUE OF CLASSICAL LEGALISM

Social work jurisprudence grew out of the Progressive critique of classical legalism early in this century. By classical legalism I mean the conservative legal thought of the substantive due process era, the era of *Lochner v. New York*.[31] There were three principal elements to the classical conception of a legal right. The first element was the view that the basic value underlying the legal system is individual independence. Independence connoted a Utopian image of autarchy or self-sufficiency. It meant security against the pleas or demands of others. It meant immunity from having to rely on the

30. King v. Smith, 392 U.S. 309, 320-27 (1968).

31. 198 U.S. 45 (1905). My interpretation of classicism derives from Duncan Kennedy and Joseph Singer. *See* Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America*, 3 RESEARCH IN L. & SOC. 3 (1980); Kennedy, The Rise and Fall of Classical Legal Thought 1850-1940 (1975) (unpublished manuscript on file in the Harvard Law Library); Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

I have also been influenced by Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983), and McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism*, 61 J. AM. HIST. 970 (1975).

sympathy or goodwill of others. The greatest threat to independence was the state, which represented the concentrated collective power of the others. A basic purpose of rights was to protect independence from the collective power of the state. The type of rights suitable for this purpose were absolute or categorical. Absolute rights were designed to create zones of nonaccountability; they prescribed certain and unbreachable boundaries of autonomy. Such rights merited recognition regardless of the consequences to others. Rhetorically, they were understood as trumps. They closed dialogue by precluding rebuttal.[32]

The second element of the classical scheme was a set of premises about just distribution. The classicists thought they had deduced from the basic value of independence distributive principles that might be summarized as, first, entitlement to the fruits of one's efforts, and second, the legitimacy of voluntary exchange. For the classicists only wealth acquired through effort or exchange could appropriately be considered a matter of right.[33]

The third element of the classical scheme was a set of legal rules specifying particular rights. These were basically the turn-of-the-century private law rules of contract, tort, and property. The classicists purported to deduce most of these rules from the distributive principles of effort and exchange and in turn from the basic value of independence.

The basic notion of right was thus associated with private law. In contrast, public law consisted of two types of subsidiary norms. One type was designed to further the basic collective goal of rights enforcement. These norms provided for the state to protect the individual's rights against trespasses by other individuals and to prevent the state itself from interfering with rights. The other set of public law norms regulated the residual power of the state to provide for a variety of collective goals other than rights enforcement, goals often grouped under the rubrics of health, welfare, safety, and morals.

Thus, in the classical view, individuals were free to exercise their wills within the spheres defined by rights. So long as they

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32. The "categorical" notion of right defended by Charles Fried in RIGHT AND WRONG 81-85 (1978) is a qualified version of the classical ideal. The term "trump" is associated with Ronald Dworkin, *see* R. DWORKIN, TAKING RIGHTS SERIOUSLY 85 (1977), but his notion of right bears only a very attenuated (and somewhat ambiguous) resemblance to the classical one. *See generally id.* at 90-94, 197-204.

33. Gifts and bequests, which were also considered rights, can be seen either as an exception to the basic principles or as derivative of them.

stayed within these spheres, they were not accountable to others. At the same time, the state was empowered to pursue a variety of residual public goals subject to the basic constraint that it not violate rights.

Within this framework, the interests of welfare beneficiaries were not considered rights. While the notion of right was founded on the morally fundamental value of independence, welfare benefits were held to be inextricably associated with the phenomenon of *de*pendence. To some, welfare beneficiaries were incapable of exercising the autonomy that the system of rights was designed to protect. To them, dependence connoted an impairment of the will. Eligibility for or receipt of welfare was either a cause or a consequence of such an impairment; in either case, welfare status was at least presumptive evidence of incapacity. It resembled in this respect the statuses of infancy and insanity. Classical legalism considered such statuses exceptions to the basic norm of independence calling for regulation based on principles other than the general private rights scheme.[34]

Moreover, even classicists who conceded the competence of welfare beneficiaries could not see welfare as a matter of right because welfare was not consistent with the intermediate distributive premises of effort and exchange. The distributive premise of welfare was need, a concededly important value but one which the classical legalists could not square with their notion of right. From this perspective, dependence connoted the morally inferior status of living on income not acquired through effort or exchange. Finally, the classicists could not fit welfare benefits into their rights scheme because such benefits were not among the interests protected by the private law rules with which classicism associated the idea of right.[35]

The Progressives attacked classical legalism from a variety of angles. Perhaps their broadest and most powerful approach was to

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34. Although poverty was not among the statuses that triggered general legal incapacity, *see* T. COOLEY, CONSTITUTIONAL LIMITATIONS 419-20 (4th ed. 1878), it was sometimes analogized to such statuses, *see* McBurney v. Industrial Accident Comm'n, 220 Cal. 124, 127, 330 P.2d 414, 416 (1934) (pauper on relief is "in a sense a ward of the county"); *cf.* tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 2), 16 STAN. L. REV. 900, 941-43 (1964) (doubts about autonomy of paupers used to justify supervision and work requirements); *see also* R. BREMNER, FROM THE DEPTHS 16-22 (1956) (view of poverty as symptomatic of personal failing widely influential in turn-of-the-century social thought).

35. Welfare benefits were thus at best "privileges" rather than rights. *See* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 593 (1979). For an uncharacteristically extreme classical view that welfare is not even a permissible discretionary state activity, see Auditor of Lucas County v. State, 75 Ohio St. 114 (1907).

argue that the specific regime of private law rights that the classical legalists defended did not follow from any plausible understanding of the basic value of individual independence. In one line of attack, they showed that the classical private right regime did not operate uniformly to provide security, but that it enhanced security for some only at the expense of reducing it for others. They showed how the rules of contract and property could be seen as enforcing the servitude of those who lacked assets and bargaining power to those who had them.[36] These rules had in fact operated to leave the working class in a state of great insecurity and vulnerability to, for example, economic downturn, sickness, and injury. At the same time, another line of attack showed that a variety of public programs not recognized in the classical rights regime (for example, social insurance) *could* be seen as entailed by the fundamental notion of independence. These programs increased the security of their beneficiaries by providing them relatively certain benefits in the event of misfortune.[37]

These attacks had two consequences of particular interest here. First, they undermined the classical distinction between public and private law. Not only did the Progressives show that a panoply of public regulatory and welfare benefits could be rationalized in terms of the basic classical norm of independence (and even in terms of the intermediate distributive premises of effort and exchange), they also showed that a variety of interests associated with classical private rights could be justified, if at all, only in terms of the type of public policy considerations classicism had associated with the police power. For example, the enforcement of a form contract by a business against a consumer represented not the effectuation of a voluntary exchange, but the ratification of a power of regulation in the business, which would be proper only to the extent compatible with public norms of efficiency and fairness.[38]

Second, the Progressive attacks undermined the basic classical distinction between individual right and collective or state power. They portrayed many of the forms of power threatening individual independence as arising from citizens engaged in activities classicism characterized as the exercise of rights. The most prominent example was the large corporation, which the Progressives de-

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36. *See, e.g.*, Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1937); Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1937).

37. *See* A. EPSTEIN, INSECURITY: A CHALLENGE TO AMERICA (2d ed. 1938).

38. *See* Cohen, *The Basis of Contract*, 46 HARV. L. REV. 460, 585-90 (1933).

scribed as a concentration of power rather than as a rightholder. Conversely, the Progressives showed that many of the welfare and regulatory activities of the state could be described—even if one started with the basic moral premises of the classicists—as rights enforcement.

Now the Progressive critique might have led to a posture of apolitical skepticism or analytical detachment. But most of the Progressives saw their jurisprudence as linked to the liberal politics of the expansion of the welfare-regulatory state. They thus had to face the question of how legal thought could be reconstructed from the rubble of classicism in a manner compatible with their program. Although they and their successors responded to this challenge in many quite complex ways, two strategies are of particular importance to the question of welfare rights. One strategy was to appeal to the notions of entitlement that classicism associated with private law to legitimate the liberal program of regulation and welfare. This strategy would embrace the classical premise of individual independence and the premises of effort and exchange, but insist that these premises supported, not the classical private right regime, but the programs of the New Deal and subsequent liberal administrations.[39]

The second strategy was less compromising. It was inspired not only by the jurisprudential critique of the classical effort to deduce its private rights regime from the ideal of independence, but by a cultural objection that some Progressives pressed against this ideal and its implicit Utopian image of autarchy. The cultural objection was that the classical norms seemed to foster a social order of self-seeking materialism that stultified personal growth, generated alienation, and ironically, promoted conformity. It subverted the kinds of collaboration and conflict essential to both individual development and a vital culture.[40] This second strategy sought to replace or at least revise the ideal of independence in a way that emphasized the social or communal dimension of the self and of legal entitlement. While it did not repudiate the principles of effort and exchange outright, it denied their exclusive status; it portrayed them as two among several legitimate principles of distribution, and it considered need as another such principle of at least equal legitimacy and dignity.

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39. *See, e.g.*, E. BURNS, TOWARDS SOCIAL SECURITY 14-53 (1936).

40. *Cf.* Cover, *The Left, the Right and the First Amendment*, 40 MD. L. REV. 349, 371-86 (1981) (emphasizing the theme in Brandeis' first amendment jurisprudence that conflict promotes a vital political culture).

As it originally emerged, the first strategy was associated with the small town tradition of Progressivism. This tradition employed the rhetoric and imagery of the provinces and the petit bourgeois entrepreneur or professional. It appealed to notions of independence and right quite similar to those of classicism, and it saw the state as the basic threat to individual independence. But it insisted that the classical lines between right and power or public and private had to be redrawn. The liberal reforms that it embraced most enthusiastically were those that treated the large corporation as, like the state, a form of power to be disciplined. When it came to welfare, small town Progressivism was most sympathetic to the reforms that paid homage to the premises of effort and exchange, the social insurance programs. Its attitudes toward public assistance were often hard to distinguish from those associated with classicism.[41]

The second strategy was initially associated with the big city tradition of Progressivism. This tradition employed rhetoric and imagery associated with the cosmopolitan city and the haut bourgeois professional. It tended to be less suspicious of the state and more sympathetic to public assistance. Social work jurisprudence emerged from the tradition of big city Progressivism.

III. THE CONCEPTION OF RIGHT IN SOCIAL WORK JURISPRUDENCE

The big city Progressives did not, as first the classicists and later the New Property jurisprudes accused them of doing, repudiate the ideal of individual independence and embrace an ideal of dependence on the collectivity. Rather they repudiated classicism's rigid distinction between the individual and the collective.[42] The fundamental norm to which the Progressives appealed was neither independence nor dependence but "interdependence."[43] Interdependence has two basic connotations. First, under the conditions of modern industrial society, material welfare requires extensive and complex cooperation. Second, individuality is a social and cultural phenomenon; for a person to develop a plausible, fulfilling sense of himself as autonomous requires that he be recognized and respected as autonomous by his fellows. Both cooperation and recognition require a substantial degree of trust and solidarity.

The notion of right that accompanied the value of interdependence was conditional rather than absolute, dialectical rather than

41. *See* O. GRAHAM, *supra* note 11, at 38, 69-72, 103-04.
42. *See* J. DEWEY, INDIVIDUALISM OLD AND NEW 83-84 (1930).
43. C. TOWLE, *supra* note 12, at 59.

categorical. This meant that particular legal conclusions and particular rights could not be deduced from abstract notions like independence or interdependence. It meant that the validity of an assertion of right depended in important part on its consequences for others. It meant that the characteristic form of reasoning about rights was one in which competing concerns and norms were reconciled and compromised. Rights were not trumps that ended conversations. They facilitated the beginning and middle as well as the conclusion of analysis.

Although Reich was thus correct in characterizing the Progressive approach to thinking about rights as balancing, he was wrong in attributing to Progressivism the "fallacy" of "treating the 'individual interest' as affecting only the party to the case" and thus allowing it to be outweighed routinely by the interests of the collectivity.[44] As Roscoe Pound had shown in response to similar criticisms of the classicists, this characterization presupposed the very distinction between individual and collective that the Progressives disputed. For the Progressives, the commitment to individual freedom and autonomy was a *social* commitment, and claims of right based on this commitment implicated collective concerns just as much as claims based on, say, economic productivity.[45] The enforcement of one person's rights is of concern to the others because it defines the society in which they all live.

The New Property jurisprudes were also wrong to suggest that the Progressives denied the validity of any form of interest in individual nonaccountability or immunity that might limit the kind of inquiry and dialogue implicit in the dialectical notion of right. The Progressives dealt with such interests under the rubric of privacy. (The most influential Progressive legal thinker—Brandeis—is, of course, the father of the modern constitutional and common law doctrines of privacy.)[46] Their approach differed from that of the classicists in three respects. First, the Progressives denied that privacy rights were paradigmatic of rights generally. The point of developing doctrines of privacy is to distinguish interests in immunity

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44. Reich, *supra* note 1, at 781, 776.

45. Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 3-5 (1943) (responding to a similar criticism by Justice McKenna). Thus, Brandeis defended freedom of speech as a social good on the ground that a society that developed its members' capacities for self-expression would have a richer political culture than one that did not. *See* Cover, *supra* note 40 (contrasting Brandeis' view of free speech with a view of free speech as a source of purely individual satisfactions).

46. *See generally* Olmstead v. United States, 277 U.S. 438, 471-85 (Brandeis, J., dissenting); Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

and nonaccountability from other forms of entitlement. Second, unlike the classicists, the Progressives found such interests relatively more important in the sphere of "personal" than of "material" interests. Third, the Progressives denied that the boundaries of even these interests could ever be defined deductively or with certainty.

The social workers proceeded from the basic value of interdependence to the distributive premise of need.[47] Need meant some threshold of material well-being that enabled the person to function as a full member of the society. This was partly a matter of physical health. It was also a matter of dignity, or to use a more recent vocabulary, of relative deprivation.[48] Both self-respect and respect from others require the ability to maintain some culturally determined minimum standard of living. This minimum permits sufficient participation in the mainstream activities of the community to enable the person to be regarded and to regard herself as a member. Below this level, she is subject to feelings of alienation and unworthiness. The social workers did not repudiate the distributive principles of effort and exchange, but they considered need to be the more fundamental. It was a prerequisite to the moral validity of the other principles, since the others presupposed a kind of autonomy that could not exist until need was satisfied.

The notion of right that the social workers associated with these premises was distinguished by what might be called its *regenerative* character.[49] Towle emphasized this character when she wrote in the introduction to her book:

> [N]ot merely what we are doing *for* people but what we are doing *to* them is a question which should be uppermost in the minds of persons responsible for administering public assistance . . . .[50]

The notion has implications for both claimants and officials.

In the regenerative conception of entitlement, the autonomy of the claimant is a goal, rather than, as in classicism, a premise of the system. Unlike the classicists, the social workers did not divide the

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47. *See* C. TOWLE, *supra* note 12, at 1-10.

48. *See* P. TOWNSEND, POVERTY IN THE UNITED KINGDOM 50-52 (1979).

49. The regenerative notion of entitlement attempts to transcend the distinction between "will" and "interest" theories of rights. *See* G. PATON, A TEXT-BOOK OF JURISPRUDENCE 284-90 (4th ed. 1972).

I use the term "regenerative" in preference to the term "therapeutic," which sometimes appears in liberal legalist accounts of social work administration, in order to avoid the connotations of scientism and condescension of the latter. Neither term figures prominently in the literature of social work jurisprudence.

50. C. TOWLE, *supra* note 12, at vii.

world rigidly into those like children and the insane, who were presumed totally incapable of asserting their rights, and the rest of the world, who were presumed fully capable of doing so. They did not take the citizen's capacities as given. They saw these capacities as in part a function of the legal system that could be diminished or enhanced by the way the system responded to the citizen. They emphasized that formally prescribed rights could be effectively nullified by practical obstacles that might be insuperable to many clients and by the attitudes that the system induced in clients. For example,

> [The right to a fair hearing] may be presented in such a way as to make [the claimant] feel that he is unquestionably ineligible and that he has no right to make use of this resource. Or it may be presented so that we convey an evaluation of him as a person with sufficient judgment and trustworthiness to have an opinion which merits consideration. In the latter instance, he will be inclined to use this right realistically, whereas in the former . . . he may give up in spite of his conviction that he has not had just treatment.[51]

While the classicists saw rights enforcement as a matter of the state leaving people alone (or forcing others to leave them alone), the social workers saw it as a matter of helping people define and effectuate their goals. A claim of right was not only a claim *against* others and the state but a claim *for* their assistance. Rights did not exist to effectuate previously willed ends; they were part of the process by which people came to understand their ends. They did not constitute a fortress for the individual against the state, but rather an encounter between the individual and the state in which the identity of each was partly up for grabs.

The social work notion of welfare right involved three types of response to clients. The first was a set of practices designed to foster a general sense of self-respect and autonomy: Welfare offices should be attractively decorated. Clients should not be kept waiting. Personnel should be courteous. The client should be presumed eligible and his statements should be accepted as true unless circumstances warrant doubt. In order to discourage feelings of dependence, the client's own aid should be enlisted in the eligibility process to the extent he is capable of giving it. For example, when documentation is needed or when benefits from other agencies are

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51. *Id.* at 24; *see also id.* at 61 ("Even though our conception is that we proffer public assistance as both a *right* and a helping service, many people will be inclined to *feel* dependent and to assign the agency [only] the identity of helper.").

available, the claimant should be encouraged to get involved in seeking the documentation or benefits (but with whatever professional help, advice and assistance he needs).[52]

The second type of response was to provide the claimant with information about the practical opportunities and benefits available to him, not only from the agency to which he applied, but from the entire network of welfare agencies on which the worker was expected to be an expert.[53] To the extent the client needed assistance in pursuing such benefits through the often labyrinthine bureaucracies of this network, the worker was to run interference for him.

The third type of response was to assist the client toward a more reflective and articulate understanding of her interests through a vaguely psychotherapeutic discourse. The client was encouraged to expand on her initial statement of her interests and plans; the worker then responded with alternative interpretations and courses of action; the client was encouraged to respond to the worker. The dialogue was to continue until worker and client felt confident that the client had arrived at a sound understanding of her interests and opportunities or until the client broke it off.

Much of the literature of social work jurisprudence consists of case histories of such encounters. One of Towle's examples tells of a recently widowed mother receiving cash assistance who applies to the agency for a day care placement for her children so that she can go to work. In the classical conception of entitlement, a (procedurally adequate) application for a benefit to which the applicant has a right terminates the conversation. In Towle's example it begins one. In the course of the conversation, the client expresses a sense of failure and frustration as a single parent because she cannot provide adequately for the children's material needs and because her relations with them have become tense. The worker suggests that her decision to seek work may reflect, not just financial need, but an inclination to get away from stresses at home. She describes in-kind benefits available from other agencies that might help the family meet its material needs, offers help with financial planning, and discusses approaches the mother might take to her problems with her children. Eventually the mother decides not to seek work, to apply for the in-kind benefits, and to try some of the worker's suggestions about her children.[54]

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52. *Id.* at 21-24, 28-29.

53. *See* H. WILENSKY & C. LEBEAUX, INDUSTRIAL SOCIETY AND SOCIAL WELFARE 14 (1958).

54. C. TOWLE, *supra* note 12, at 30-31.

The social workers were committed to a few general propositions about people's interests. The most important of these was the proposition that it was in people's interest to accept financial assistance required to meet their basic needs. Beyond a few such general notions, however, the worker's judgments were expected to be intuitive and ad hoc.

Social work jurisprudence did not expect workers to conceal from clients their judgments about the clients' interests.[55] It considered the posture of neutrality in relation to client goals neither possible nor desirable. It was not possible because for the worker to refuse to intrude her own judgments into the relation would not mean deference to the autonomous will of the client; it would mean deference to myriad other social influences that had already conditioned the client's intitial sense of her interests—influences whose pernicious potential was exemplified by the belief widely shared by clients themselves that accepting welfare was degrading. The posture of neutrality was undesirable because it inhibited the kind of dialectical exchange the social workers believed most helpful to the client. The worker's suggestions and interpretations were valuable, not merely because they might be right (the workers recognized they might not be). They were valuable in part because they challenged the client to develop her own formulations, and they gave her something concrete on which to focus her efforts to do so. In addition, they permitted the worker to individualize herself by expressing her own commitments and beliefs. They helped make it possible for the client to see the worker as a distinct individual capable of empathizing and feeling solidarity with her. By contrast, the social workers interpreted the posture of neutrality to imply a faceless bureaucrat incapable of developing understanding of the client as an individual and of establishing a helpful relation with her.

Although social work jurisprudence disdained neutrality, it did not embrace paternalism. The worker could not escape the possibility of influencing the client in the course of the dialogue, but where the client declined to engage in or continue the dialogue, or expressed a decision contrary to the worker's judgment of her interest, the worker was to honor her choice. Ideally both the decision to engage in the dialogue and the decision that emerged from it were for the client to make.[56] The social workers saw no incompatibility

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55. "The social worker's devotion to the idea that every individual has a right to be self-determining does not rule out our valid concern with directing people's attention to the most desirable alternatives." *Id.* at 20.

56. "If, after giving expression to his thinking and feeling [the client] is unable to

between the therapeutic aspects of the relationship and the emphasis on claimant rights. Teaching the claimant to regard herself as a rightholder was a means of enhancing her self-confidence and dignity. It was also a way of enabling the client to respond to and learn from the worker without being oppressed by her. Rights rhetoric was a defense against worker oppression.

It would be a mistake to think that, in refusing to presume claimants fully competent and in emphasizing their need for active assistance in the enforcement process, the social workers were falling back on condescending notions about the poor. The social workers did think that poverty involved pressures that often made people distinctively vulnerable to many forms of incapacity, but they considered it only one of many conditions that might have this effect, and they refused to presume that it routinely did so.[57] The social work rights program treated the poor the same way Progressive jurisprudence treated citizens generally. Its concern with rescuing people from their mistakes and with actively assisting them in pursuing their interests was the same concern expressed in Progressive private law doctrines such as the contract doctrines of good faith, duress, reliance, and mistake.[58]

There is another dimension to the regenerative notion of entitlement, one that concerns the enforcers rather than the holders of rights. Social work jurisprudence demanded that the worker be capable of becoming personally involved without losing her detachment, of providing help without cultivating dependence, of making judgments about the client's interest without imposing those judgments on the client. Like the norm of client autonomy, these norms of enforcer performance were understood more as goals than as premises of the system. Social work jurisprudence saw these goals as pervasively threatened. Like the New Property jurisprudes later, the social work theorists warned about the danger that the worker would unreflectively or unconsciously impose her own objectives on the client. They feared that the worker would allow the "lay attitudes" of condescending moralism to influence her practice in ways that encouraged claimant dependence and subverted the develop-

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accept new thinking [proposed by the worker] but instead must strongly defend himself against our interpretations, we can then know that we have done everything within our capacity to help him." *Id.* at 15; *see id.* at 23, 61; Towle, *The Individual In Relation to Social Change*, in HELPING, *supra* note 15, at 229-33.

57. C. TOWLE, *supra* note 12, at 84.

58. *See generally* Dawson, *Economic Duress—An Essay In Perspective*, 45 MICH. L. REV. 253 (1947); Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).

ment of autonomy.[59] Yet unlike the New Property jurisprudes, the social workers saw a second type of worker pathology as an equally serious danger—the behavior of withdrawal and refuge in bureaucratic formality. The worker "who is not equipped to meet the changing demands of the situation, falls back on automatic behavior."[60] In this pathology, the worker governs his activities at work and his relations with clients by "rigid adherence to the letter of the law, rather than regard for its spirit."[61] For Towle, the principal source of both pathologies was insecurity born of inadequate training and collegial support.

The remedy the social workers proposed for both coercive manipulation and formalistic withdrawal was professionalism. At the outset, the worker was to receive liberal instruction in the general principles of the disciplines and institutions of the welfare state. This instruction was designed to equip her to make complex judgments relating the purposes expressed in the system's rules to the circumstances of particular cases.

More fundamentally, this education was to continue throughout her career in the form of an elaborate collegial process integrated into the process of administrative supervision.[62] The core of the social work theory of public administration was this distinctive notion of supervision. "Supervision in public assistance," Towle wrote, ". . . has been envisaged as a teaching-learning situation, that is, as an educational rather than as a purely administrative process."[63] The principal administrative review of the worker's work was done by a fellow social worker in the same office with extensive knowledge of the worker's cases and the circumstances of her work. Supervision involved a review of the case file and an extensive dialogue between worker and supervisor in which the worker explained her decisions and interpretations, the supervisor reacted, and the worker responded to her reaction. The goal was a consensus as to how the case should have been handled.

A striking feature of the extensive social work literature on supervision is how closely its portrayal of the supervisor-worker relation parallels its portrayal of the worker-client relation.[64] It is

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59. Towle, *The Mental Hygiene of the Social Worker*, in HELPING, *supra* note 15, at 27, 31, 37-39.

60. C. TOWLE, *supra* note 12, at 105.

61. *Id.* at vii.

62. *See id.* at 95-122.

63. *Id.* at 95.

64. *See id.* at 116-22.

expected that, like the client, the worker will sometimes lack information critical to adequate decisionmaking. And it is expected that, like the client, she will be prone to ambivalence and false consciousness. These conditions arise in part from the influence of "lay attitudes" pervasive in the surrounding culture and from the emotional pressures of high caseloads and constant, intimate exposure to the problems of the disadvantaged. The ideal of supervision was close to the ideal of client counseling: a noncoercive therapeutic relation designed to heighten awareness. The worker was to be made aware of and to come to terms with ambivalence and false consciousness through a dialectical exchange with the supervisor. From the worker's point of view, learning through supervision was supposed to be cumulative so that she gained constantly increasing understanding of clients, of the intricacies of the welfare bureaucracy, and of herself. Rights enforcement was thus a process of personal growth on the part of the enforcer.

To some extent, the social workers' conception of the enforcement role was based on a technical premise that later became controversial: that the provision of material assistance to the indigent should be integrated with the provision of counseling services.[65] But the conception was also based on a more fundamental premise—the repudiation of bureaucratic formality. The social workers believed that a well designed program of material assistance—even one divorced from counseling—would provide a complex variety of in-kind and cash assistance responsive to the individual circumstances of the client. They also believed that, regardless of what benefits it provided, a program would have to take some account of the individual capacities and problems of the client in the course of the eligibility process in order to preserve and enhance his sense of dignity and autonomy and even simply to insure that he received the benefits to which he was entitled. Much of social work jurisprudence represents a continuing critique, not only of classical legalism, but of bureaucracy.[66] The social workers parted with those of their fellow Progressives who turned from the repudiation of the self-regulating market of classicism to the embrace of bureaucracy.[67] To them, the self-regulating market and the bureaucracy were two

65. *See generally* Wyers, *Whatever Happened to the Income Maintenance Line Worker?*, 25 SOC. WORK 259 (1980) (summarizing controversy over the integration of financial assistance and counseling).

66. For an early and influential expression of this pervasive social work theme, see M. RICHMOND, SOCIAL DIAGNOSIS 367-70 (1917).

67. On the embrace of bureaucracy within Progressivism, see D. TYACK, THE ONE BEST SYSTEM (1974).

variations on the same principle—regulation through formal impersonal rule—and they found the latter as inefficient and stultifying as the former.

The social work view of public administration did not rest on assumptions peculiar to welfare or the poor. Although distinctive in some respects, the basic ideal of informal but complex judgment, decentralized administration, and professionalism was the same one some Progressives applied to the judicial role.[68] In welfare and in other spheres, the proponents of the ideal recognized the dangers of abuse of power. In all these spheres, their proposed solutions were the same—a professional culture in which people were socialized for public responsibility supplemented by relatively decentralized review.

IV. THE NEW PROPERTY

Reich thought that, since the New Deal, the welfare state had become infected pervasively by the pathologies of invasion of privacy, punitive moralism, disrespect for civil liberties, and "capture" by powerful private interests. He didn't exactly blame Progressive jurisprudence for these pathologies, but he thought it powerless to oppose them.[69] His basic proposal was a notion of entitlement alien to Progressivism.

Reich insisted that his proposal did not represent a return to classicism,[70] and in some respects this claim was correct, but the notion of entitlement advanced in *The New Property* was a watered down version of the classical notion. Like the classicists, Reich saw the basic problem as protecting the independent individual from the power of the state. "The institution called property guards the troubled boundary between man and the state," reads the famous opening sentence.[71] He used the term property to connote the zone of immunity or nonaccountability of the classical notion of right.

> Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference.[72]

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68. *E.g.*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1922).
69. *See* Reich, *supra* note 1, at 772-73, 777.
70. *Id.* at 771, 778-79.
71. *Id.* at 733.
72. *Id.* at 771.

Sometimes Reich spoke as if rights simply "shifted the burden of proof;"[73] at other points he spoke more ambitiously of "zones within which the majority has to yield to the owner" or "sanctuaries or enclaves where no majority can reach."[74] At some points he seemed to concede the need for balancing and to argue simply for more weight for individual interests; at others he seemed to repudiate balancing.[75] Although he shied away from the absolutistic rhetoric of classicism, he invoked the same goal—individual independence; portrayed the same danger—the power of the state; and proposed the same solution—rights as immunities.

However, when one turns from the basic notion of entitlement to the level of specific rights and powers, Reich departed strikingly from classicism. He revised the contents of the categories of right and power. One revision was to take large corporations out of the right category and put them in the power category; they were portrayed as part of the problem rather than as part of the solution. Corporations were not seen as right-bearing individuals (or as institutions facilitating the exercise of rights by individuals), but rather as agglomerations of state-created power. Reich rejected the classical public/private, power/right categorization in this area because here government and the private sector "are often partners rather than opposing interests" and government power "aids rather than limits the objectives of those private sectors."[76] As a result, "[t]oday it is the combined power of government and the corporations that presses against the individual."[77] Because of this partnership, interests of large corporations are "not individual property but arbitrary power over other human beings."[78]

Of course, Reich's most famous revision was the recategorization of right. The interests of large corporations were taken out. While a variety of forms of tangible "individual" property remained, they held little interest for Reich. The most prominent occupants of the redefined rights domain were interests in economic "status," notably interests "intimately bound up with the individual's free-

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73. *Id.*

74. *Id.* at 787.

75. *Compare id.* at 781 *with id.* at 785. In an earlier article, Reich, a former clerk to Justice Black, defended Black's approach to first amendment rights as "absolutes" against the competing "balancing" approach. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 736-44 (1963).

76. Reich, *supra* note 1, at 764-65.

77. *Id.* at 773.

78. *Id.*

dom to earn a living" and welfare benefits.[79]

By far the most frequently expressed concern in the article was for occupational interests, and, indeed, with a particular type of occupational interest. Reich showed little concern for the interests of capitalists and managers in earning a living (most of their interests were banished to the realm of power); nor did he say much of relevance to unskilled workers. Most of his heroes and martyrs were small businessmen, professionals, and skilled workers: "[d]octors, lawyers, real estate brokers, . . . taxi drivers" and "the businessman, the teacher, the professional man," all threatened by state licensing and regulatory schemes.[80] Reich's article sounds the theme of the state-as-menace-to-the-petite-bourgeoisie so insistently that about half of it reads like a Chamber of Commerce pamphlet.

So far, Reich's revisions reflected the small town tradition of Progressivism, which was hostile to and suspicious of big business as well as the state, but otherwise sympathetic to many of the commitments of the classical power/right vision. For small town Progressives, and one suspects for most of the small businessmen, professionals, and skilled workers of Reich's day, the radical part of Reich's argument would have been, not that notions of right derived from private law should be applied to government largess, but that they should be applied uniformly to both occupational and welfare interests, and within the welfare category, to both social insurance and public assistance. For this argument ignored a distinction fundamental to classicism, small town Progressivism, and American popular culture generally. This distinction arose from the distributive premises of effort and exchange that mediated between the classical notion of independence and the specific classical private rights scheme. Most occupational interests were fully compatible with the distributive principles of effort and exchange, but welfare interests were more problematical. Social insurance was least so: As long as the benefits paid out could be related to payments made by or work done by the worker, homage could be paid to the principles of effort and exchange. But this was simply not possible with public assistance. It was for this reason that the small town Progressives believed that, unless one abandoned commitment to the primacy of effort and exchange—which they were not willing to—one would have to concede that public assistance had a lower normative status than social insurance and occupational interests.

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79. *Id.* at 741, 785.
80. *Id.* at 742, 758.

Now one response to this assertion was the one made by big city Progressives such as the social workers—repudiate the primacy of effort and exchange and insist that need was also a fundamental distributive premise. But Reich did not take this route. He made no mention of need or of effort and exchange. In fact, he had nothing to say about premises of distribution at all. He simply proceeded from his basic notion of right as immunity to his revised scheme of specific rights, bypassing the distributive issue. For Reich, what welfare benefits had in common with occupational interests was not their grounding in distributive principles, but the fact that they both afforded independence to the individual, and more fundamentally, protected against dangers of oppression by state power. The Chamber of Commerce types and the welfare mothers are all in the same boat: they have the state on their backs. Indeed, from this point of view, it becomes possible to suggest that welfare interests are of even higher normative status than occupational interests: "If the businessman, the teacher, and the professional man find themselves subject to the power of government largess, the man on public assistance is even more dependent."[81] But Reich did not press this suggestion. He showed no inclination to allow priorities among types of property. He recognized that his argument applied more or less uniformly to all forms of economic "status," since all contribute to independence.

Thus the substantive reform implications of the New Property differ significantly from those of social work jurisprudence in that Reich's approach does not assert the primacy of need-based distribution; it is concerned with the protection of interests in economic status generally. Reich sought to convert his redefined category of property interests into zones of immunity or nonaccountability. At its most ambitious, the program contemplated prohibition of the impairment of interests in economic status without compensation. More modestly, it proposed that such interests not be "conditioned" in ways that impaired the claimant's autonomy, and especially on the waiver of constitutionally protected liberties. And still more modestly, it proposed an attitude of deference and respect for property, an attitude that gave substantial weight in any balancing that had to be done to the interests of independence secured by property as a zone of immunity.[82]

Reich's discussion of the interaction of officials and right-hold-

81. *Id.* at 758.
82. *Id.* at 779-81, 782-85.

ers makes clear that for the New Property, as for classicism, autonomy is a stipulated premise of the system. In contrast to social work jurisprudence, he showed no interest in the process by which citizens become aware of and communicate their goals and no concern with ambivalence and false consciousness. For example, the only illustration *The New Property* gave in the area of public assistance was a 1941 New York case upholding a welfare department's denial of cash benefits to an old man because he insisted on living in unsanitary conditions. The man slept on a pile of dirty rags in a barn. Now on the narrow question of whether assistance should be denied on such grounds, social work jurisprudence would have agreed entirely with Reich. But there are important differences between the two approaches. Reich summarily assumed that the old man's choice was a matter of "freedom of action,"[83] and he implied that the old man's rights would have been fully vindicated by a decision awarding him the cash assistance. Things are more complicated in social work jurisprudence. The social work conception cannot be applied without more information about the old man's practical opportunities and about the process by which he made his decision. Did the state enable the old man to secure decent shelter? If not, then its failure to do so is as important an infringement of his autonomy as the withdrawal of cash benefits. If so, one needs the kind of understanding of his choice that can only emerge through dialogue with him before one can decide whether his choice is really autonomous.

The vision of public administration in *The New Property* was also quite different from that of social work jurisprudence. Its most fundamental theme was the repudiation of administrative discretion. The principal reforms Reich proposed were administrative adjudication and judicial review.[84] Others derived from Reich's analysis a more ambitious program diametrically opposed to that of the social workers.[85] Its principal themes were the formalization of entitlement, the bureaucratization of administration, and the proletarianization of the lower tier workforce. They derived this program from the basic Reichian notion of entitlement as the opposite of state power and the Reichian equation of the problem of freedom

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83. *Id.* at 758 (discussing Wilkie v. O'Connor, 261 A.D. 373, 25 N.Y.S.2d 617 (1941)).

84. *Id.* at 783-85.

85. *See, e.g.*, Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479 (1960); Mashaw, *The Management Side of Due Process*, 59 CORNELL L. REV. 772 (1974).

with the control of state power. Formality was supposed to limit state power by limiting the number of factors the state could consider in decisionmaking; bureaucratization was supposed to do so by subjecting initial decisionmakers to the control of higher level decisionmakers; and proletarianization was supposed to do so by recruiting and socializing people who would divorce their personal goals from their work.

Reich's general notion of welfare rights as immunities from state power and the reform program derived from that notion have dominated liberal legal thinking about the welfare system for the past two decades. After Reich wrote, a substantial literature emerged seeking to ground welfare entitlement in natural rights philosophy[86]—an approach Reich specifically declined to take.[87] This literature resembled Reich's article in its individualistic premises, but it resembled social work jurisprudence in its emphasis on need-based distribution. Its implications for public adminstration were more ambiguous than those of Reich's and the social workers' analyses. But it was Reich's rhetoric rather than that of the natural rights lawyers that became the banner of liberal legal reform in the 1960s and 1970s. *The New Property* is quite justly regarded as one of the most influential pieces of legal scholarship ever written, and it can fairly be treated as both source and summary of liberal legal thinking about welfare in the 1960s and 1970s.

V. NOTES TOWARD ASSESSMENT

There are important valid criticisms to be made of social work jurisprudence,[88] but considering it and the New Property as legal theory (rather than, as I'll consider them later, political vision), so-

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86. *See, e.g.*, Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981); Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

87. Reich, *supra* note 1, at 779.

88. Two criticisms seem well taken:

(1) While the conventional lawyers' charge that the social workers' psychological doctrines are riven with condescending moralism is mistaken, it does seem fair to say that these doctrines are often undeveloped and, at worst, both pretentious and vacuous. *See* G. STEINER, *supra* note 14, at 186-96.

(2) While the conventional lawyers' charge that social work doctrine tends to attribute the problems of poverty to personal failing rather than social conditions is also mistaken, it does seem fair to say that this doctrine has no sense of politics. It travels back and forth between the level of the individual client or family and the larger community or society, between counseling and broad scale reform, without much sense of intermediate groups or activities. It recognizes both personal and social dysfunction, but it has very little sense of conflict among different interests or forces in the society. *See*

cial work jurisprudence seems clearly superior. Its superiority lies in the fact that it takes account of the insights of the Progressive critique of classicism. Although Reich claimed to have avoided the defects of classicism, he did not.

The most basic defect of classicism, which Reich repeated, was the reification of individual rights and state power as distinct and opposed entities. The most telling criticism that the Progressives made about the classical notion of (old) property was that it portrayed as a relation between a person and a thing what was really a relation among people.[89] The important legal aspect of old property was not intrinsic to the material objects; it lay in the ability of the right-holder to call upon the power of the state to exclude others or in the ability that this state-backed power of exclusion gave the right-holder to exact concessions from others (again enforceable through state power) in exchange for access to the property.

To put it more generally: Under the interdependent conditions of modern society, very little activity can be seen as affecting only the actor. Moreover, to the extent that activity does affect only the actor, the concept of right is superfluous. Appeals to right occur only when activities and goals conflict; their function is to determine whose side the state will take. A successful claim of right gives the right-holder the opportunity to pursue her activities and goals with the help of the state and without regard to the interests of the other.

In these circumstances, *all* rights involve the state-private partnership that Reich and the small town Progressives associated only with the large corporation. You cannot use rights to limit "arbitrary power over the lives of other human beings"[90] because rights (understood as zones of immunity) *are* arbitrary power over the lives of other human beings. Any redefinition or recategorization of rights could enhance a person's independence only at the expense of diminishing the independence of others. Nor does rights expansion diminish the power of the state; it increases those aspects of state power that derive from its role as rights enforcer.

Piven & Cloward, *Humanitarianism in History: A Response to the Critics*, in SOCIAL WELFARE OR SOCIAL CONTROL? 114-48 (Trattner ed. 1983).

Although both criticisms are important, both could be made with equal merit against the liberal legal doctrines of the past two decades. *See, e.g.*, Horwitz, *The Jurisprudence of Brown and the Dilemmas of Liberalism*, 14 HARV. C.R.-C.L. L. REV. 599 (1979); Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980).

89. *See, e.g.*, Cohen, *supra* note 36; Hale, *supra* note 36. For a contemporary discussion, see Singer, *supra* note 31.

90. Reich, *supra* note 1, at 773.

Now the Progressives did not apply their critique to public law rights because classicism had no scheme of public law rights. But if, as Reich proposes, the idea of rights-as-immunities is to be extended to the material interests of the welfare-regulatory state, then so should the Progressive critique. The Progressives' point may be harder to grasp in public than in private law because of a further misleading practice that the classicists and Reich share: the reification of the state. While in private law rights are in form "against" other individuals, in public law they are in form "against the state." But this usage simply invites us to ignore that the "state" and its agencies exist only through and for people. The enforcement of rights "against the state" really involves the redistribution of wealth and power among the people advantaged and disadvantaged by the welfare and regulatory activitites of state officials.

Consider Reich's heroes, people who work in heavily regulated, licensed occupations. A licensing system both permits incumbents in the profession to practice their trade and prohibits others from doing so. Sometimes Reich is concerned with individuals seeking entrance to a profession, and sometimes he is concerned with incumbents faced with a loss of professional status. But the value of professional status to those who have it varies directly with the extent to which others are excluded from it. The property rights of new entrants often can be recognized only by expropriation from prior entrants who find that the value of their right-to-practice/power-to-exclude has been diminished by competition from new entrants. Looked at from another perspective, regulation limits the rights/powers of members of an occupation in order to protect the common law (old property) interests of clients not to be negligently or fraudulently served. From this perspective, the rights of professionals can be extended only at the expense of diminishing those of their clients.

And by portraying welfare benefits as things that protect the independence of beneficiaries, Reich's analysis obscures the fact that such benefits represent a coercive transfer of wealth from one group of right-holders to another. In Reich's vivid and extensive description of the myriad activities of the expanding welfare state, one kind of state activity receives almost no mention at all: taxation. For the classicists, explicit redistribution from one recognizable group to another—"taking from A to give to B"—was mortal constitutional sin.[91] They could reconcile their rights scheme to welfare

91. *See, e.g.*, Loan Ass'n v. Topeka, 87 U.S. (1 Wall.) 655, 663 (1874).

activities only by asserting that taxation meeting certain formal requirements was not confiscation and that welfare spending was not a matter of distributive entitlement but a matter of public policy. The Progessives refuted these views. They showed both that taxation, like many other forms of government intervention, was indistinguishable from many types of confiscation and that this fact was not incompatible with regarding tax-funded benefits as rights, since all rights were fundamentally a matter of coercive transfer. Reich adopted the point that welfare could be seen as a right (without giving the Progressives credit for it), but he ignored its premise: That right is a form of power, not a safeguard against power.

Reich's failure to heed lessons that the social workers learned from Progressive legal thought accounts for two striking paradoxes of the New Property. The first paradox is that, while Reich's argument is clearly designed to legitimate the redistributive activities of the welfare state, it has curiously conservative and anti-redistributive implications. Reich's most ambitious substantive proposal was to treat interests in government largesse as "vested" and to require "payment of just compensation" for their impairment. But if, as the article suggests, both old and New Property are to be so regarded—if all the material incidents of economic status are to be constitutionalized[92]—then it is hard to see how there could ever be any legitimate impairment, or given such an impairment, how there could be compensation. Compensation for the impairment of one person's property could only be achieved by impairing someone else's. If all wealth is to be regarded as "vested," then there can be no coercive redistribution.

Reich's more modest substantive proposal was that government largesse not be conditioned on waiver of independently protected constitutional rights. He gave as an example the case of *Sherbert v. Verner*[93] in which the Supreme Court held that a state could not disqualify a woman for unemployment insurance benefits because religious activities protected by the first amendment made her unavailable for work on Saturdays. After two decades of development of the doctrine of unconstitutional conditions, it is apparent that, not only does the New Property idea offer nothing that cannot be more easily explained through elaboration of the independently protected rights, but it seems to compound the central difficulty that has arisen with respect to unconstitutional conditions. This diffi-

92. Reich, *supra* note 1, at 785.
93. 374 U.S. 398 (1963).

culty concerns the relationship between constitutional liberties and the distribution of wealth. The problem is to distinguish plausibly a set of particular impermissible conditions, burdens, deprivations, penalties, etc., from the general background regime of state-defined economic rights that determines the distribution of wealth, and in turn, the extent to which people can make use of their constitutional liberties.[94] Since *Sherbert* these distinctions have repeatedly broken down, so that people are constantly arguing that the recognition of a constitutional right entails an obligation to redistribute wealth in a way that makes it possible to exercise the right. Thus, people argue that the right to a criminal appeal requires the state to transfer funds to poor defendants so that they can afford to appeal, or that freedom of expression requires the state to force media owners to afford access for nonowners to their media, or that the right to education requires the state to transfer revenues from wealthy school districts to poor ones.[95] Reich's more modest proposal thus leads to the same paradox as the compensation requirement: It requires a kind of redistribution that can only be accomplished through the infringement of some of the rights it is designed to protect.

The problems with the substantive program are in part a consequence of the fact that Reich's argument bypasses the distributive issues. The paradox of the proposal simply to legalize "economic status" can only be resolved by some criteria for assigning priorities to different types of status to indicate which would warrant enforcement at the expense of others. Similarly, the paradox of the proposal to limit power through rights creation can only be resolved through criteria for distinguishing legitimate from illegitimate power, and this distinction in turn requires judgments about the relative justice of the ends for which different types of power might be used.

Why didn't Reich discuss such criteria? Perhaps part of the answer is that it would have been difficult for him to address the distributive issue directly without making his article more controversial. To do so might have made the piece more controversial jurisprudentially because it would have placed it somewhat at odds with the individualist, anti-state rhetorical tradition on which it

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94. *See* Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1352-78 (1984); Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694, 696-705 (1980).

95. *E.g.*, Griffin v. Illinois, 351 U.S. 12 (1956). J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 316-433 (1970); Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

relied. To defend explicitly the distributive premises of welfare, Reich would have had to take on the claim that welfare cannot be a right because it requires coercive redistribution that infringes the independence of the non-needy. He would have had to take on the further claim that, because the principle of need is hard to limit or because it is sensitive to unexpected contingency, it is incompatible with the kind of absolute or categorical rights required by the value of independence.[96] Moreover, confronting the distributive issue directly might have made the article more controversial by identifying it with a recognizably political program. By sublimating his distributive concerns, Reich created the impression of a distinctively legal program that stood above political conflict.

The second paradox of the New Property is that, while it was clearly designed to legitimate the expansion of the welfare state, it proceeded by portraying the state as a menace. This paradox was partially obscured by the practice of the New Property jurisprudes of characterizing their administrative program of formalization, bureaucratization, and proletarianization as reducing the power or discretion of the state. Yet even if this characterization were accurate, progressive jurisprudence suggests that one cannot say, as a matter of abstract jurisprudence, whether reducing the power or discretion of the state will serve the independence of the individuals with whom it deals. If by discretion we mean, not arbitrariness, but flexible, complex judgment, then discretion may be necessary to help people find their way through the legal system or to respond to unexpected contingencies in their lives. Reducing state power can limit the capacity of officials to harm citizens, but it can also limit their capacity to help them. Here again the individual right/state power framework obscures the real stakes. It makes it hard to understand the ways in which individuals are necessarily dependent

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96. I don't suggest that Reich would have been unable to respond to these claims within his jurisprudential framework, merely that his arguments would have been more controversial had he tried to do so.

Among writers who recently have considered the distributive basis of welfare, Robert Nozick and Charles Fried, both proceeding from categorical notions of right, have concluded by denying welfare rights, Nozick on ground that meeting need requires coercive transfer, Fried on the ground that need cannot be adequately specified and limited. C. FRIED, *supra* note 32, at 120-24; R. NOZICK, ANARCHY, STATE, AND UTOPIA 167-74, 265-68 (1974). On the other hand, Thomas Grey's defense of welfare rights begins by rejecting categorical conceptions of right. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 885-91 (1976). *See also* Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 660 (defending noncategorical definition of welfare rights).

on the state; it makes it impossible to consider that the state might empower individuals.

Moreover, the paradox of the state leads to a more fundamental problem. The thrust of the administrative program is not to limit state power or discretion at all; it is simply to shift it around. In particular, the program tends to shift power from lower tier officials toward upper tier officials and judges. Unless one arbitrarily assumes that upper tier officials and judges are not part of the state, these reforms in no way affect the magnitude of state power.[97]

Reich appears to have misunderstood the Progressive critique of the classical portrayal of the state. He associated the Progressive repudiation of rights-as-immunities and of bureaucratized administration with a naive faith in the expertise or altruism of public officials.[98] It is not unfair to charge the Progressives with naivete in these respects, but the charge is not an adequate response to their arguments that rights are not a plausible solution to the problem of official misconduct (since their enforcement depends on official conduct) and that formality and bureaucracy are as likely to injure as they are to vindicate the interests of the beneficiaries of the welfare-regulatory state. Indeed, Reich's own program is every bit as dependent on official expertise and altruism as the one he criticizes. The only difference is in the identity of the officials on whom he relies.

Just as Reich's substantive program lacks needed criteria to distinguish material interests entitled to protection from competing interests that might be sacrificed, so his procedural program lacks needed criteria for distinguishing types of people or of organization that can be trusted to exercise power from those that cannot be trusted. Although Reich's preferences are clear, they do not follow from the premise of independence and the right/power framework. Here, too, one reason Reich did not address such criteria may be that the effort would have threatened the notion of right-as-immunities by bringing the discussion explicitly into the realm of group conflict and controversial political judgments.

VI. FROM JURISPRUDENCE TO POLITICS

When we look at the New Property in the political context of the 1960s and 1970s, its doctrines seem less paradoxical, but their usefulness also seems more limited. In retrospect, the New Property

97. *See* Arnold, *supra* note 22, at 624-31.
98. *See* Reich, *supra* note 1, at 787.

jurisprudence seems to have been tacitly bound to three sets of social and political circumstances of that period.

The first set of circumstances is the unprecedented peace time economic growth of the 1960s coupled with the explicit avowal of Keynesian economic policies by the national government for the first time in American history.[99] Keynesian doctrine created a non-redistributive rationale for welfare expansion as a macro-economic stimulus, and growth facilitated the practical resolution of the New Property paradox of redistribution. By financing welfare expansion with newly created wealth, the society could expand New Property rights in a way not perceived as the expropriation of old property rights. With the disappearance of growth in the late 1970s, the liability of New Property as a liberal political vision became quite clear. The appeal to property rights simply backfired. In the "zero sum society," the New Property rights of welfare recipients were perceived to conflict with the old property rights of investors and taxpayers, and the latter were considered better grounded in distributive considerations. The New Property provided no basis to challenge such notions.

The second set of circumstances on which the New Property was tacitly premised was the control of the upper levels of the federal administration and the federal judiciary by liberal professionals sympathetic to the poor. The New Property procedural program of formalization and bureaucratization was designed to increase the power of these people over the system, and it made sense only on the assumption that people like them were in control at the top.[100] Even within the framework of this assumption, which was more or less valid in the mid-1960s, the program further assumed that formality and bureaucratic organization would enable these people to

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99. *See* R. LEKACHMAN, THE AGE OF KEYNES 270-89 (1966).

100. This implicit premise of institutional politics is an important part of the explanation for the very different careers of the quasi-classical, absolutist rights model that Reich, following Justice Black, proposed for first amendment adjudication, *see supra* note 75, and the similar model he proposed for the New Property. While the former had lost most of its allure among liberal activists by the end of the 1960s, the latter became one of the most prominent banners of liberal activism. One reason for the decline of the first amendment model may be that it was closely bound up with formalist approaches to interpretation designed to limit enforcement discretion, which by the end of the decade came to be seen as an obstacle to judicial activism. *See, e.g.*, Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). The New Property was also bound up with formalist, discretion-limiting notions of enforcement, but while the first amendment model was prescribed for constitutional enforcement by the courts, the New Property had its greatest effect in the area of statutory enforcement by administrators, especially lower-tier administrators. The discretion-limiting implications that made the quasi-classical model a liability in the judicial sphere made it an asset in the administrative one.

control the lower tier officials. I've tried to show elsewhere that these assumptions were mistaken.[101] The New Property lawyers simply overestimated the extent to which formality and bureaucracy could effectively control a lower tier workforce alienated from the purposes of those at the top. If formalization and bureaucratization reduced the problems of coercive arbitrariness and invasion of privacy, they exacerbated the problems of indifference and irresponsibility. They gave the poor more rights but reduced the availability of the advice and assistance needed to enforce them. They mitigated the experience of punitive moralism, but they also reduced the experience of trust and personal care. These problems were exacerbated in the 1970s as liberal control over the upper tiers of the federal welfare bureaucracy and of the judiciary weakened. The same administrative structures prescribed by the New Property lawyers for the purpose of protecting the poor were pressed into service by conservatives for the quite different purpose of fiscal economy—often with unfortunate consequences for the poor.

The third set of circumstances might be called the masculinization of welfare administration. Many of the themes of social work jurisprudence anticipate the critique of liberal rights rhetoric in the feminist literature of recent years.[102] Like the social workers, some feminists reject individualist in favor of relational notions of entitlement; they reject categorical in favor of dialectical forms of moral discourse, and they reject static in favor of regenerative visions of moral encounter. The feminist critique suggests that these differing moral orientations are related to gender, that they define feminine and masculine cultural styles in our society. I cannot assess this interpretation except to point out that it resonates with a striking social fact about the career of the New Property: The administrative reforms prescribed and rationalized by the New Property had the effect of eliminating the influence over public assistance of a profession dominated by women (social work) in favor of professions dominated by men (law and management). Although this fact seems important, I have no explanation of it. On the one hand, it occurred during a period in which women were gaining access to occupations from which they had previously been excluded. On the other hand, it was also a period in which public assistance assumed increasing political and economic importance. One might speculate that it was easier for men to cede to women minority positions in other areas

101. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

102. *See* C. GILLIGAN, IN A DIFFERENT VOICE (1982).

than to allow them to maintain control of an area that had assumed great importance. This is a crude and unsatisfactory speculation, but it has the virtue of acknowledging that the gender dimension is one of the most striking aspects of the recent history of welfare jurisprudence and administration.

VII. CONCLUSION

The New Property view of welfare rights is incoherent as jurisprudence and exhausted as politics. It is irrelevant to what ought to be the two principal concerns of liberal welfare jurisprudence. The first is to develop doctrines that acknowledge the importance of need as a distributive principle and design programs that adequately respond to need.[103] The second is to develop an ideal and a program of public administration that recognizes the value of a responsible state as well as the dangers of an irresponsible one and that fosters conditions in which the street level public workforce can work responsibly and effectively.[104] These were precisely the central concerns of the New Deal social workers, and contemporary lawyers still have a lot to learn from their efforts.

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103. For important steps in this direction, see Dworkin, *supra* note 86; Grey, *supra* note 96; Michelman, *supra* note 86.

104. For important steps in this direction, see M. LIPSKY, STREET-LEVEL BUREAUCRACY (1980); Tushnet, *The Constitution of the Bureaucratic State*, 86 W. VA. L. REV. 1077, 1113-19 (1984); J. HANDLER, THE CONDITIONS OF DISCRETION (forthcoming).