

## THE NEW PROPERTY

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THE institution called property guards the troubled boundary between individual man and the state. It is not the only guardian; many other institutions, laws, and practices serve as well. But in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality.

One of the most important developments in the United States during the past decade has been the emergence of government as a major source of wealth. Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale.

The valuables dispensed by government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth — forms which are held as private property. Social insurance substitutes for savings; a government contract replaces a businessman's customers and goodwill. The wealth of more and more Americans depends upon a relationship to government. Increasingly, Americans live on government largess — allocated by government on its own terms, and held by recipients subject to conditions which express "the public interest."

The growth of government largess, accompanied by a distinctive system of law, is having profound consequences. It affects the underpinnings of individualism and independence. It influences the workings of the Bill of Rights. It has an impact on the power of private interests, in their relation to each other and to government. It is helping to create a new society.

This article is an attempt to explore these changes. It begins with an examination of the nature of government largess. Second, it reviews the system of law, substantive and procedural, that has emerged. Third, it examines some of the consequences, to the individual, to private interests, and to society. Fourth, it considers the functions of property and their relationship to "the public interest." Finally, it turns to the future of individualism in the new society that is coming. The object is to present an overview — a way of looking at many seemingly unrelated problems. Inevitably, such an effort must be incomplete and tentative. But it is long past time that we began looking at the transformation taking place around us.

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## I. THE LARGESS OF GOVERNMENT

A. *The Forms of Government-Created Wealth*

The valuables which derive from relationships to government are of many kinds. Some primarily concern individuals; others flow to businesses and organizations. Some are obvious forms of wealth, such as direct payments of money, while others, like licenses and franchises, are indirectly valuable.

*Income and benefits.* For a large number of people, government is a direct source of income although they hold no public job. Their eligibility arises from legal status. Examples are Social Security benefits, unemployment compensation, aid to dependent children, veterans benefits, and the whole scheme of state and local welfare. These represent a principal source of income to a substantial segment of the community. Total federal, state, and local social welfare expenditures in 1961 were almost fifty-eight billion dollars.<sup>1</sup>

*Jobs.* More than nine million persons receive income from public funds because they are directly employed by federal, state, or local government.<sup>2</sup> The size of the publicly employed working force has increased steadily since the founding of the United States, and seems likely to keep on increasing. If the three to four million persons employed in defense industries,<sup>3</sup> which exist mainly on government funds, are added to the nine million directly employed, it may be estimated that fifteen to twenty percent of the labor force receives its primary income from government.<sup>4</sup>

*Occupational licenses.* Licenses are required before one may engage in many kinds of work, from practicing medicine to guiding hunters through the woods.<sup>5</sup> Even occupations which require little education or training, like that of longshoremens, often are subject to strict licensing.<sup>6</sup> Such licenses, which are dispensed by government, make it possible for their holders to receive what is ordinarily their chief source of income.

1. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 283, Table 374 (1963).

2. *Id.* at 435, Table 567.

3. In 1961 it was estimated that up to 7,500,000 Americans were employed by defense. This is 10% of the entire labor force, and supports between 19,500,000 and 22,500,000 people. Four million comprise the non-governmental working force, and 3,500,000 work directly for the Defense Department. Its payroll is more than twice the payroll of the entire automobile industry. N.Y. Times, May 21, 1961, p. 48, col. 1.

4. The total number of the employed civilian labor force in March, 1963 was estimated to be 67,148,000. U.S. DEP'T OF COMMERCE, *op. cit. supra* note 1, at 219, table 286.

5. See generally GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 105-51 (1956); COUNCIL OF STATE GOVERNMENTS, OCCUPATIONAL LICENSING LEGISLATION IN THE STATES (1952). Typical statutes are: WYO. STAT. ANN. tit. 23, § 55 (1957) (guides); CAL. BUS. & PROF. CODE §§ 5615-81 (landscape architects), 6500-6625 (barbers); PA. STAT. ANN. tit. 63, §§ 281.1-81.32 (pawnbrokers), 471-79.20 (funeral directors) (1959).

See also Note, *Entrance and Disciplinary Requirements for Occupational Licenses in California*, 14 STAN. L. REV. 533 (1962).

6. N.J. STAT. ANN., Waterfront Commission Act, tit. 32, ch. 23, §§ 19-24 (stevedores), §§ 27-28 (longshoremens) (1953). See N.Y. Times, April 10, 1962, p. 86, cols. 7-8.

*Franchises.* A franchise, which may be held by an individual or by a company, is a partial monopoly created and handed out by government. Its value depends largely upon governmental power; by limiting the number of franchises, government can make them extremely remunerative. A New York City taxi medallion, which costs very little when originally obtained from the city, can be sold for over twenty thousand dollars.<sup>7</sup> The reason for this high price is that the city has not issued new transferable medallions despite the rise in population and traffic. A television channel, handed out free, can often be sold for many millions. Government distributes wealth when it dispenses route permits to truckers, charters to bus lines, routes to air carriers, certificates to oil and gas pipelines, licenses to liquor stores, allotments to growers of cotton or wheat, and concessions in national parks.<sup>8</sup>

*Contracts.* Many individuals and many more businesses enjoy public generosity in the form of government contracts. Fifty billion dollars annually flows from the federal government in the form of defense spending.<sup>9</sup> These contracts often resemble subsidies; it is virtually impossible to lose money on them. Businesses sometimes make the government their principal source of income, and many "free enterprises" are set up primarily to do business with the government.<sup>10</sup>

*Subsidies.* Analogous to welfare payments for individuals who cannot manage independently in the economy are subsidies to business.<sup>11</sup> Agriculture is

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7. A New York Taxi Medallion is a piece of tin worth 300 times its weight in gold. No new transferable medallions have been issued since 1937. Their value in 1961 was estimated at \$21,000 to \$23,000; banks will lend up to \$13,000 on one. The cabbie pays the City only \$200 a year for his medallion. There is a brisk trade in them: out of 11,800, about 600 changed hands in 1961. One company, National Transportation Co., sold 100 medallions at \$21,000 each, a transaction totaling \$2,100,000. A non-transferable license, of which there are a few, has no market value. N.Y. Times, Dec. 5, 1961, p. 46, col. 3.

8. Even the right to locate juke boxes may be a valuable franchise if the law limits the right, as in the City of Seattle. *Ragan v. City of Seattle*, 58 Wash. 2d 779, 364 P.2d 916 (1961).

9. In January, 1962 it was estimated that the nation's annual defense expenditures would rise in that year to a plateau of \$50,000,000. N.Y. Times, Jan. 8, 1962, p. 81, col. 2. \$49.7 billion was asked for the fiscal year beginning July 1, 1962. N.Y. Times, April 29, 1962, § 3, p. 1, cols. 5-6. Defense procurement is governed generally by 10 U.S.C. §§ 2301-14 (1958), as amended, 10 U.S.C. §§ 2304, 06, 10-11 (Supp. IV, 1962); 10 U.S.C. §§ 2352-57 (1958), as amended, 10 U.S.C. § 2358 (Supp. IV, 1962). See generally PECK & SCHERER, *THE WEAPONS ACQUISITION PROCESS: AN ECONOMIC ANALYSIS* (1962).

10. In the waning weeks of 1961, the National Aeronautics and Space Administration handed out a series of huge holiday presents. They were contracts concerned with the nation's effort to put a three man expedition on the moon. . . .

The total of all the recently announced contracts is about \$1,000,000,000. . . . It was estimated that by 1964 space exploration expenditures would reach a plateau of five billion dollars annually.

N.Y. Times, Jan. 8, 1962, p. 118, cols. 1, 3.

11. See generally JOINT ECONOMIC COMMITTEE, 86TH CONG., 2D SESS., *SUBSIDY AND SUBSIDYLIKE PROGRAMS OF THE U.S. GOVERNMENT* (1960); HOUSE OF REPRESENTATIVES

subsidized to help it survive against better organized (and less competitive) sectors of the economy, and the shipping industry is given a dole because of its inability to compete with foreign lines.<sup>12</sup> Local airlines are also on the dole.<sup>13</sup> So are other major industries, notably housing. Still others, such as the railroads, are eagerly seeking help.<sup>14</sup> Government also supports many non-business activities, in such areas as scientific research, health, and education. Total federal subsidies for 1964 were expected to be just under eight and a half billion dollars.<sup>15</sup>

*Use of public resources.* A very large part of the American economy is publicly owned. Government owns or controls hundreds of millions of acres of public lands valuable for mining, grazing, lumbering, and recreation; sources of energy such as the hydroelectric power of all major rivers, the tidelands reservoirs of oil, and the infant giant of nuclear power; routes of travel and commerce such as the airways, highways, and rivers; the radio-television spectrum which is the avenue for all broadcasting; hoards of surplus crops and materials; public buildings and facilities; and much more. These resources are available for utilization by private businesses and individuals; such use is often equivalent to a subsidy. The radio-television industry uses the scarce channels of the air, free of charge; electric companies use publicly-owned water power;<sup>16</sup> stockmen graze sheep and cattle on public lands at nominal cost;<sup>17</sup> ships and airplanes arrive and depart from publicly-owned docks and airports; the atomic energy industry uses government materials, facilities, and know-how, and all are entitled to make a profit.

*Services.* Like resources, government services are a source of wealth. Some of these are plainly of commercial value: postal service for periodicals, news-

COMMITTEE ON AGRICULTURE, 86TH CONG., 2D SESS., GOVERNMENT SUBSIDY HISTORICAL REVIEW (1960).

The sugar subsidy is one illustration. See 61 Stat. 922 (1948), as amended, 65 Stat. 318 (1951); 70 Stat. 217 (1956); 74 Stat. 330 (1960); 75 Stat. 40 (1961); 76 Stat. 156 (1962); 76 Stat. 169 (1962).

12. Maritime subsidies amounted to \$300,000,000 in 1962, according to Rep. H. C. Bonner, Chairman of the House Committee on Merchant Marine and Fisheries. N.Y. Times, May 22, 1962, p. 61M, col. 2. See 46 U.S.C. §§ 1101-1294. See also U.S. DEP'T OF COMMERCE, *op. cit. supra* note 1, at 394, table 517. It was recently disclosed that the U.S. would pay a subsidy of \$14.55 a ton for cargo shipments to and from the Far East. Per ton rates vary from \$25 to \$33. N.Y. Times, Nov. 6, 1963, p. 82, col. 6. During this same period, Secretary McNamara asserted that there was no military reason for government-subsidized construction of passenger ships. N.Y. Times, Apr. 19, 1962, p. 62, col. 1.

13. 49 U.S.C. § 1324 note (1958); 49 U.S.C. § 1380 (1958), as amended, 49 U.S.C. § 1380 (Supp. IV, 1962).

14. See, e.g., N.Y. Times, Dec. 31, 1963, p. 39, col. 5 (on the needs of the New Haven Railroad).

15. U.S. DEP'T OF COMMERCE, *op. cit. supra* note 1, at 394, table 517.

16. Federal Power Act, 41 Stat. 1063 (1920), as amended, 16 U.S.C. §§ 791-828 (1958).

17. Taylor Grazing Act, 48 Stat. 1269 (1934), 43 U.S.C. § 315 (1958), as amended, 43 U.S.C. § 315 (Supp. IV, 1962).

papers, advertisers, and mail-order houses; insurance for home builders and savings banks; technical information for agriculture. Other services dispensed by government include sewage, sanitation, police and fire protection, and public transportation. The Communications Satellite represents an unusual type of subsidy through service: the turning over of government research and know-how to a quasi-private organization.<sup>18</sup> The most important public service of all, education, is one of the greatest sources of value to the individual.

### B. *The Importance of Government Largess*

How important is governmentally dispensed wealth in relation to the total economic life of the nation? In 1961, when personal income totalled \$416,432,000,000,<sup>19</sup> governmental expenditures on all levels amounted to \$164,875,000,000.<sup>20</sup> The governmental payroll alone approached forty-five billion dollars.<sup>21</sup> And these figures do not take account of the vast intangible wealth represented by licenses, franchises, services, and resources. Moreover, the *proportion* of governmental wealth is increasing. Hardly any citizen leads his life without at least partial dependence on wealth flowing through the giant government syphon.

In many cases, this dependence is not voluntary. Valuables that flow from government are often substitutes for, rather than supplements to, other forms of wealth. Social Security and other forms of public insurance and compensation are supported by taxes. This tax money is no longer available for individual savings or insurance. The taxpayer is a participant in public insurance by compulsion, and his ability to care for his own needs independently is correspondingly reduced. Similarly, there is no choice about using public transportation, public lands for recreation, public airport terminals, or public insurance on savings deposits. In these and countless other areas, government is the sole supplier. Moreover, the increasing dominance of scientific technology, so largely a product of government research and development, generates an even greater dependence on government.<sup>22</sup>

Dependence creates a vicious circle of dependence. It is as hard for a business to give up government help as it is for an individual to live on a reduced income. And when one sector of the economy is subsidized, others are forced to seek comparable participation. This is true of geographical areas; government contracts can fundamentally influence the economy of a region.<sup>23</sup> It is

18. Communications Satellite Act, 76 Stat. 419 (1962). See Editorial, *The Space Communications Satellite*, N.Y. Times, July 10, 1962, p. 32, col. 1.

19. U.S. DEP'T OF COMMERCE, *op. cit. supra* note 1, at 328, table 439.

20. *Id.* at 417, table 546.

21. *Id.* at 434, table 564.

22. See generally STOVER, *THE GOVERNMENT OF SCIENCE* (Center for the Study of Democratic Institutions, 1962). The vast scope of the government's research and development program is described by Lawrence Gallon in *Will Space Research Pay Off on Earth*, N.Y. Times, May 26, 1963, § 6 (Magazine), p. 29. He estimates government research expenditures of 15 billion dollars in Fiscal 1964.

23. The profound effect of research and developments contracts on the relative economic position of various regions of the country is described by James Reston in *The*

also true of different components of the economy. If one form of transportation is subsidized, other types of transportation may be compelled to seek subsidies.<sup>24</sup> When some occupations are subsidized, others, which help to pay the bill, find themselves disadvantaged as a class. Thus, it is not strange to find musicians seeking a subsidy — perhaps to pay food bills that are made artificially high because of another subsidy.<sup>25</sup> Nor is it strange to find that an unemployed worker replaced by a machine seeks government funds to re-train, when in many cases the machine was created through government subsidized research and development. And it is not surprising that subsidies may be needed to enable workers to live in our large cities;<sup>26</sup> they must buy necessities at prices inflated to meet others' subsidized ability to pay.

The prospect is that government largess will necessarily assume ever greater importance as we move closer to a welfare state. Such a state, whatever its particular form, undertakes responsibility for the well-being of those citizens who, because of circumstances beyond their control, cannot provide minimum care, education, housing, or subsistence for themselves. This responsibility can only be carried out by means of what we have defined as government largess.

### C. *Largess and the Changing Forms of Wealth*

The significance of government largess is increased by certain underlying changes in the forms of private wealth in the United States. Changes in the forms of wealth are not remarkable in themselves; the forms are constantly changing and differ in every culture. But today more and more of our wealth takes the form of rights or status rather than of tangible goods. An individual's profession or occupation is a prime example. To many others, a job with a particular employer is the principal form of wealth. A profession or a job is frequently far more valuable than a house or bank account, for a new house can be bought, and a new bank account created, once a profession or job is secure. For the jobless, their status as governmentally assisted or insured persons may be the main source of subsistence.

The automobile dealer's chief wealth is his franchise from the manufacturer which gives him exclusive sales rights within a certain territory, for it is his

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*Scientific Revolution in America*, N.Y. Times, Aug. 1, 1962, p. 30, col. 3. See also *U.S. Aids Midwest in Arms Job Race*, N.Y. Times, Sept. 30, 1962, § 1A, p. 80, col. 3; *Dyna-Soar Loss Shocks Seattle*, N.Y. Times, Dec. 15, 1963, p. 38, cols. 3-8; *Space Funds Stir Political Storm*, N.Y. Times, March 1, 1964, p. 1, col. 3 ("The regional competition for the research and development dollars, which in many ways have become the modern-day 'pork barrel' for Congressmen, undoubtedly will intensify in the years ahead." P. 60, col. 3).

24. Greater transportation subsidies will soon be needed. See Text of President's Message to Congress on Nation's Transportation Problems, N.Y. Times, April 6, 1962, pp. 18-19. In 1962, by way of illustration, Eastern Airlines sought a 23.8 million dollar subsidy. N.Y. Times, July 10, 1962, p. 41, col. 5.

25. See N.Y. Times, Nov. 16, 1961, § 2, p. 1, col. 1.

26. Subsidies have been proposed for low and middle income apartment tenants in New York City. N.Y. Times, April 8, 1962, § 8, p. 1, col. 8.

guarantee of income. His building, his stock of cars, his organization, and his goodwill may all be less valuable than his franchise. Franchises represent the principal asset of many businesses: the gasoline station, chain restaurant, motel or drug store, and many other retail suppliers.<sup>27</sup> To the large manufacturer, contracts, business arrangements, and organization may be the most valuable assets. The steel company's relationships with coal and iron producers and automobile manufacturers and construction companies may be worth more than all its plant and equipment.

The kinds of wealth dispensed by government consist almost entirely of those forms which are in the ascendancy today. To the individual, these new forms, such as a profession, job, or right to receive income, are the basis of his various statuses in society, and may therefore be the most meaningful and distinctive wealth he possesses.<sup>28</sup>

## II. THE EMERGING SYSTEM OF LAW

Wealth or value is created by culture and by society; it is culture that makes a diamond valuable and a pebble worthless. Property, on the other hand, is the creation of law. A man who has property has certain legal rights with respect to an item of wealth; property represents a relationship between wealth and its "owner." Government largess is plainly "wealth," but it is not necessarily "property."

Government largess has given rise to a distinctive system of law. This system can be viewed from at least three perspectives; the rights of holders of largess, the powers of government over largess, and the procedure by which holders' rights and governmental power are adjusted. At this point, analysis will not be aided by attempting to apply or to reject the label "property." What is important is to survey — without the use of labels — the unique legal system that is emerging.

### A. *Individual Rights In Largess*

As government largess has grown in importance, quite naturally there has been pressure for the protection of individual interests in it. The holder of a broadcast license or a motor carrier permit or a grazing permit for the public lands tends to consider this wealth his "own," and to seek legal protection against interference with his enjoyment. The development of individual interests has been substantial, but it has not come easily.

From the beginning, individual rights in largess have been greatly affected by several traditional legal concepts, each of which has had lasting significance:

27. For a report on the growth of investment in private franchises, see *N.Y. Times*, Oct. 6, 1963, § 3, p. 1, col. 3.

28. A story in the *New York Times* reports the plight of Stanley P. Truchlinsky, a one-armed newsdealer who lost his 26-year job at a kiosk opposite Carnegie Hall because he could not retain a license to operate the stand. Attempting to overcome his bitterness, Mr. Truchlinsky said he would take an aptitude test to see "what I can do." *N.Y. Times*, March 11, 1964, p. 34, col. 2.

*Right vs. privilege.* The early law is marked by courts' attempts to distinguish which forms of largess were "rights" and which were "privileges." Legal protection of the former was by far the greater. If the holder of a license had a "right," he might be entitled to a hearing before the license could be revoked; a "mere privilege" might be revoked without notice or hearing.<sup>29</sup>

*The gratuity principle.* Government largess has often been considered a "gratuity" furnished by the state.<sup>30</sup> Hence it is said that the state can withhold, grant, or revoke the largess at its pleasure.<sup>31</sup> Under this theory, government is considered to be in somewhat the same position as a private giver.

*The whole and the parts.* Related to the gratuity theory is the idea that, since government may completely withhold a benefit, it may grant it subject to any terms or conditions whatever. This theory is essentially an exercise in logic: the whole power must include all of its parts.<sup>32</sup>

*Internal management.* Particularly in relation to its own contracts, government has been permitted extensive power on the theory that it should have control over its own housekeeping or internal management functions. Under this theory, government is treated like a private business. In its dealings with outsiders it is permitted much of the freedom to grant contracts and licenses that a private business would have.<sup>33</sup>

Quite often these four theories are blurred in a single statement of judicial attitude. The following illustrations are typical:

It is an elementary rule of law that the right to operate a motor vehicle upon a public street or highway is not a natural or unrestrained right, but a *privilege* which is subject to reasonable regulation under the police power of the state in the interest of public safety and welfare.<sup>34</sup>

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A taxicab is a common carrier and use by it of the public streets is not a right but a privilege or license which can be granted on such conditions as the Legislature may impose.<sup>35</sup>

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The practice of medicine is lawfully prohibited by the State except upon the conditions it imposes. Such practice is a privilege granted by

29. See generally GELLHORN, *op. cit. supra* note 5, at 105-51.

30. For example, the District of Columbia Court of Appeals declared that veterans' disability benefits "fall within the legal principles respecting gratuities." Thompson v. Gleason, 317 F.2d 901, 906 (1962).

31. See, *e.g.*, Lynch v. United States, 292 U.S. 571, 577 (1934).

32. See Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1609 (1960), which rejects the theory and states that the imposition of such conditions is "a distinct exercise of power which must find its own justification."

33. Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940):

Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.

34. Lee v. State, 187 Kan. 566, 570, 358 P.2d 765 (1961).

35. Stewart v. District of Columbia, 35 A.2d 247, 248 (D.C. Munic. Ct. App. 1943).



the State under its substantially plenary power to fix the terms of admission.<sup>36</sup>

One court put the idea in somewhat more pithy form: ". . . in accepting charity, the appellant has consented to the provisions of the law under which the charity is bestowed."<sup>37</sup>

These sentiments are often voiced in the law of government largess, but individual interests have grown up nevertheless. The most common forms of protection are procedural, coupled with an insistence that government action be based on standards that are not "arbitrary" or unauthorized. Development has varied mainly according to the particular type of wealth involved. The courts have most readily granted protection to those types which are intimately bound up with the individual's freedom to earn a living. They have been reluctant to grant individual rights in those types of largess which seem to be exercises of the managerial functions of government, such as subsidies and government contracts.

*Occupational licenses.* After some initial hesitation, courts have generally held that an occupational or professional license may not be denied or revoked without affording the applicant notice and a hearing.<sup>38</sup> Doctors, lawyers, real estate brokers, and taxi drivers may not be denied their livelihood without some minimum procedure.<sup>39</sup> In addition to requiring notice and hearing, some courts may also review the evidence for sufficiency, to see if a basis for the official action exists in fact.<sup>40</sup> The need for procedural protection for occupational licenses is sufficiently well accepted that hearings have been required on denial of security clearances when these are tantamount to occupational licenses.<sup>41</sup>

*Drivers' licenses.* Licenses not specifically tied to a particular occupation, such as drivers' licenses, have to some extent been assimilated under the umbrella of occupational licenses. New York's highest court declared that a driver's license is "of tremendous value to the individual and may not be taken

36. *Barsky v. Board of Regents*, 347 U.S. 442, 451 (1954).

37. *Wilkie v. O'Connor*, 261 App. Div. 373, 25 N.Y.S.2d 617, 620 (Sup. Ct. 1941).

38. *E.g.*, *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963).

39. See, *e.g.*, *Hecht v. Monaghan*, 307 N.Y. 461 (1954). See generally Kneier, *Licensing by Local Governments in Illinois*, 1957 U. ILL. L.F. 1 (1957); Note, *Entrance and Disciplinary Requirements for Occupational Licenses in California*, 14 STAN. L. REV. 533 (1962).

40. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Green v. Silver*, 207 F. Supp. 133 (D.D.C. 1962). In the *Schwartz* case the Court said:

A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. . . . A state can require high standards of qualification, such as good moral character or proficiency in its law; before it admits an applicant to its bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.

353 U.S. at 238-39.

41. *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955); *Graham v. Richmond*, 272 F.2d 517 (D.C. Cir. 1959); *Homer v. Richmond*, 292 F.2d 719 (D.C. Cir. 1961).

away except by due process."<sup>42</sup> Another court treated a driver's license not as an economic right but as an aspect of personal liberty:

Therefore it is unimportant whether, for one purpose or another, a license to operate motor vehicles may properly be described as a mere personal privilege rather than as a property right. We have no doubt that the freedom to make use of one's own property, here a motor vehicle, as a means of getting about from place to place, whether in pursuit of business or pleasure, is a "liberty" which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process of law.<sup>43</sup>

*Franchises.* A franchise is less of a "natural right" than an occupational license, because it confers an exclusive or monopoly position established by government. But the courts early took the position that certain types of franchises were "property" protected by the Constitution.<sup>44</sup> And even air route certificates, which are clearly not like the old-time franchise, are given judicial protection. The courts recognize the existence of "business and investment property" which must be protected.<sup>45</sup> Arguing that Congress intended an air carrier to enjoy "security of route," the Supreme Court has insisted on procedural safeguards before modification of a route.<sup>46</sup>

*Benefits.* With somewhat greater reluctance, the courts have moved toward a measure of legal protection for benefits. The District of Columbia Court of Appeals rejected an argument that a Veterans Administration decision (imposing a forfeiture of benefits because the veteran had rendered assistance to an enemy) is not reviewable by the courts.<sup>47</sup> The same court also questioned whether Congress could authorize an administrator to revoke a veteran's disability pension without some standards to guide him.<sup>48</sup> And the U.S. Supreme Court held that a state cannot deny unemployment benefits on grounds which interfere with freedom of religion.<sup>49</sup> In California, the courts held that unemployment compensation may not be denied one who refuses a job because he feels unable to take a required loyalty oath.<sup>50</sup>

42. *Wignall v. Fletcher*, 303 N.Y. 435, 441, 103 N.E.2d 728, 731 (1952). See also *Hecht v. Monaghan*, 307 N.Y. 461, 121 N.E.2d 421 (1954).

43. *Wall v. King*, 206 F.2d 878, 882 (1st Cir. 1953).

44. *City of Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U.S. 58 (1913); *Frost v. Corporation Commission*, 278 U.S. 515 (1929); *Seatrains Lines v. United States*, 64 F. Supp. 156 (D. Del. 1946).

45. *Great Lakes Airlines, Inc. v. CAB*, 294 F.2d 217, 225 (D.C. Cir. 1961). On the procedures required for modifying an air carrier's certificate, see *CAB v. Delta Airlines, Inc.*, 367 U.S. 316, 331-32 (1961).

46. *CAB v. Delta Air Lines, Inc.*, 367 U.S. 316 (1961). The trend toward judicial protection of franchises is further illustrated by a Fifth Circuit decision that arbitrary denial of a liquor license gives rise to a cause of action under the Civil Rights Act. *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

47. *Wellman v. Whittier*, 259 F.2d 163 (D.C. Cir. 1958), *rev'd per curiam on other grounds*, 354 U.S. 931 (1959).

48. *Thompson v. Gleason*, 317 F.2d 901, 906 (D.C. Cir. 1962).

49. *Sherbert v. Verner*, 374 U.S. 398 (1963).

50. *Syrek v. California Unemployment Ins. App. Bd.*, 2 Cal. Rptr. 40, 47 (1960), *aff'd*, 54 Cal. 2d 519, 7 Cal. Rptr. 97, 354 P.2d 625 (1960). See also *Ault Unemployment*

*Subsidies.* A subsidy to a business is like a benefit to an individual, but the concept of "rights" in a subsidy is somewhat more attenuated. However, when the Postmaster General found the contents of Esquire Magazine to be objectionable, the Supreme Court made a strong stand for protection of the second class mail subsidy against arbitrary withdrawal.<sup>51</sup> And another court held that a condition attached by the Maritime Board to a subsidy could be attacked by the company which accepted the condition on the ground that it was illegally retroactive and discriminatory.<sup>52</sup>

*Use of public resources.* Although it is frequently stated that there are no property rights in public resources, the courts have afforded a measure of protection. They have given the holder of a grazing permit the right to prevent interference by others.<sup>53</sup> And the California Supreme Court has held that the use of a public school auditorium cannot be denied to a group because it refuses to sign a loyalty oath. The court said: "The state is under no duty to make school buildings available for public meetings. . . . If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. . . ."<sup>54</sup>

*Contracts.* Government contracts might seem the best possible example of a type of valuable which no one has any right to receive, and which represents only the government's managerial function. But even here, at least one court has said that a would-be contractor may not be wholly debarred from eligibility as a consequence of arbitrary government action:

While they do not have a right to contract with the United States on their own terms, appellants do have a right not to be invalidly denied equal opportunity under applicable law to seek contracts on government projects.<sup>55</sup>

The District of Columbia Court of Appeals held that sellers of petroleum stated a valid cause of action when they charged that the government was in-  
 Compensation Case, 398 Pa. 250, 157 A.2d 375 (1960); Darin Unemployment Compensation Case, 398 Pa. 259, 157 A.2d 407 (1960); Fino v. Maryland Employment Security Bd., 218 Md. 504, 147 A.2d 738 (1958); but see Ostrofsky v. Maryland Employment Security Bd., 218 Md. 509, 147 A.2d 741 (1958).

51. Hannegan v. Esquire, Inc., 327 U.S. 146 (1946).

52. American President Lines, Ltd. v. United States, 291 F.2d 931, 936 (Ct. Cl. 1961):

The administration of a statute cannot be carried on like horse-trading or haggling in a market place for private trading. What one can be induced to agree to, after he has become deeply involved with the Government by several years of action based upon reasonable assumptions, cannot impair his right under the statute to non-discriminatory treatment, and freedom from unreasonably retroactive treatment.

53. Oman v. United States, 179 F.2d 738 (10th Cir. 1949). The court indicated that it would protect rights as between private parties even though the government could revoke the permit at any time. *Id.* at 742.

54. Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 545, 171 P.2d 885 (1946). See also ACLU v. Board of Educ., 55 Cal. 2d 167, 10 Cal. Rptr. 647, 359 P.2d 45 (1961).

55. Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368, 370-71 (D.C. Cir. 1961).

sisting without authority that it would purchase oil only from companies agreeing to abide by its "Voluntary Oil Import Program."<sup>56</sup> In New York a state Supreme Court justice overruled an action by the City Board of Education barring two contractors from doing business with the Board in the future. The court called the action arbitrary and capricious.<sup>57</sup>

In all of the cases concerning individual rights in largess the exact nature of the government action which precipitates the controversy makes a great difference. A controversy over government largess may arise from such diverse situations as denial of the right to apply, denial of an application, attaching of conditions to a grant, modification of a grant already made, suspension or revocation of a grant, or some other sanction. In general, courts tend to afford the greatest measure of protection in revocation or suspension cases. The theory seems to be that here some sort of rights have "vested" which may not be taken away without proper procedure. On the other hand, an applicant for largess is thought to have less at stake, and is therefore entitled to less protection.<sup>58</sup> The mere fact that a particular form of largess is protected in one context does not mean that it will be protected in all others.

While individual interests in largess have developed along the lines of procedural protection and restraint upon arbitrary official action, substantive rights to possess and use largess have remained very limited. In the first place, largess does not "vest" in a recipient; it almost always remains revocable. For example:

The policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed.<sup>59</sup>

Likewise, veterans' disability benefits are by statute made subject to forfeiture:

Any person shown by evidence satisfactory to the Administrator to be guilty of mutiny, treason, sabotage, or rendering assistance to any enemy of the United States or of its allies shall forfeit all accrued or future benefits under laws administered by the Veterans' Administration.<sup>60</sup>

Forfeiture may take place because the public interest demands it, despite the absence of any fault in the holder. In a recent case the Civil Aeronautics Board

56. *Eastern States Petroleum & Chem. Corp. v. Seaton*, 271 F.2d 457 (D.C. Cir. 1958). On remand, the District Court denied relief, 165 F. Supp. 363 (D.D.C. 1958).

57. *N.Y. Times*, Oct. 26, 1961, p. 1, col. 1.

58. For example, the grant of a valuable federal savings and loan association charter is said to rest in the virtually unreviewable discretion of the Federal Home Loan Bank Board. *Federal Home Loan Bank Bd. v. Rowe*, 284 F.2d 274 (D.C. Cir. 1960).

59. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). See also § 3 of the Taylor Grazing Act, 48 Stat. 1270 (1947), 43 U.S.C. § 315(b) (1958):

So far as consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this chapter shall not create any right, title, interest or estate in or to the lands.

60. 72 Stat. 1240 (1958), 38 U.S.C. § 3504(a) (1958). See *Thompson v. Gleason*, 317 F.2d 901 (D.C. Cir. 1962).

took the position that "the public interest" would be furthered by cancelling the certificate of the most successful of four competing air carriers in order to help the others, which needed government subsidies.<sup>61</sup>

When the public interest demands that the government take over "property," the Constitution requires that just compensation be paid to the owner. But when largess is revoked in the public interest, the holder ordinarily receives no compensation. For example, if a television station's license were revoked, not for bad behavior on the part of the operator, but in order to provide a channel in another locality, or to provide an outlet for educational television, the holder would not be compensated for its loss. This principle applies to largess of all types.<sup>62</sup>

In addition to being revocable without compensation, most forms of largess are subject to considerable limitations on their use. Social Security cannot be sold or transferred. A television license can be transferred only with FCC permission. The possessor of a grazing permit has no right to change, improve, or destroy the landscape. And use of most largess is limited to specified purposes. Some welfare grants, for example, must be applied to support dependent children. On the other hand, holders of government wealth usually do have a power to exclude others, and to realize income.

The most significant limitation on use is more subtle. To some extent, at least, the holder of government largess is expected to act as the agent of "the public interest" rather than solely in the service of his own self-interest. The theory of broadcast licensing is that the channels belong to the public and should be used for the public's benefit, but that a variety of private operators are likely to perform this function more successfully than government; the holder of a radio or television license is therefore expected to broadcast in "the public interest." The opportunity for private profit is intended to serve as a lure to make private operators serve the public.

The "mix" of public and private, and the degree to which the possessor acts as the government's agent, varies from situation to situation. The government contractor is explicitly the agent of the government in what he does; in theory he could equally well be the manager of a government-owned factory. Only his right to profits and his control over how the job is done distinguish his private status. The taxi driver performs the public service of transportation (which the government might otherwise perform) subject to regulation but with more freedom than the contractor. The doctor serves the public with still greater freedom. The mother of a child entitled to public aid acts as the

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61. *Pan American World Airways, Inc. v. Boyd*, 207 F. Supp. 152 (D.D.C. 1962), *vacated*, 321 F.2d 394 (D.C. Cir. 1963).

62. See *Osborn v. United States*, 145 F.2d 892, 896 (9th Cir. 1944), holding that a grazing permit on public lands may be revoked without payment of just compensation, and see *ibid.*, n.5 for other illustrations. Compare *Kanarek v. United States*, 314 F.2d 802 (Ct. Cl. 1963), holding that withdrawal of the security clearance of a government contractor's employee, causing him to lose his employment, was not a taking of property for public use entitling the employee to compensation.

state's agent in supporting the child with the funds thus provided, but her freedom is even greater and the responsibility of her agency still less defined.

The result of all of this is a breaking down of distinctions between public and private and a resultant blurring or fusing of public and private. Many of the functions of government are performed by private persons; much private activity is carried on in a way that is no longer private.

## B. *Largess and the Power of Government*

### 1. *Affirmative powers*

When government — national, state, or local — hands out something of value, whether a relief check or a television license, government's power grows forthwith; it automatically gains such power as is necessary and proper to supervise its largess. It obtains new rights to investigate, to regulate, and to punish.<sup>63</sup> This increase in power is furthered by an easy and wide-ranging concept of relevance. A government contractor finds that he must comply with wage-hour and child labor requirements.<sup>64</sup> Television and radio licensees learn that their possible violation of the antitrust laws,<sup>65</sup> or allegedly misleading statements to the FCC,<sup>66</sup> are relevant to their right to a license. Doctors find they can lose their licenses for inflating bills that are used as a basis for claims against insurance companies in accident cases,<sup>67</sup> and theaters are threatened with loss of licenses for engaging in illegal ticket practices.<sup>68</sup> The New York State Board of Regents includes in its definition of "unprofessional conduct" by doctors, dentists, and other licensed professions any discrimination against patients or clients on the basis of race, color or creed.<sup>69</sup> Real estate brokers can be suspended for taking advantage of racial tensions by the practice called "blockbusting."<sup>70</sup> California has used its power over the privilege of selling alcoholic beverages in order to compel licensed establishments to cease discriminating.<sup>71</sup>

63. For a general description of the powers gained by the government through contracting, see Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27 (1955); Miller, *Administration by Contract: A New Concern for the Administrative Lawyer*, 36 N.Y.U.L. REV. 957 (1961). On the powers derived from unemployment compensation, see Note, *Charity versus Social Insurance in Unemployment Compensation Laws*, 73 YALE L.J. 357 (1963).

64. 49 Stat. 2036 (1942), 41 U.S.C. § 35 (1958).

65. *Philco Corp. v. FCC*, 293 F.2d 864 (D.C. Cir. 1961). See also *Mansfield Journal Co. v. FCC*, 180 F.2d 28 (D.C. Cir. 1950).

66. *FCC v. WOKO*, 329 U.S. 223 (1946). The court said that even if the facts concealed were not material, and did not affect the Commission: "The fact of concealment may be more significant than the facts concealed." *Id.* at 227.

67. N.Y. Times, Jan. 13, 1962, p. 23, col. 8.

68. N.Y. Times, Feb. 8, 1962, p. 33, col. 8.

69. N.Y. Times, Oct. 27, 1962, § 2, p. 1, col. 1.

70. N.Y. Times, Nov. 2, 1962, p. 1, col. 1.

71. 6 RACE REL. L. REP. 658 (1960). For proposals concerning other ways in which largess could be used to advance the cause of civil rights, see THE POTOMAC INSTITUTE, STATE EXECUTIVE AUTHORITY TO PROMOTE CIVIL RIGHTS (1963).

One of the most significant regulatory by-products of government largess is power over the recipients' "moral character." Some random illustrations will suggest the meaning and application of this phrase. The District of Columbia denied a married man in his forties a permit to operate a taxi partly because when he was a young man in his twenties, he and a woman had been discovered about to have sexual intercourse in his car.<sup>72</sup> Men with criminal records have been denied licenses to work as longshoremen and chenangoes<sup>73</sup> and prevented from holding union office for the same reason.<sup>74</sup> A license to operate a rooming house may be refused for lack of good character.<sup>75</sup> Sonny Liston was barred from receiving a license to box in New York because of his "bad character."<sup>76</sup> Louisiana attempted to deny aid to dependent children if their mothers were of bad character.<sup>77</sup>

Political activities are also regulated by use of largess power. The Hatch Act forbids federal employees to engage in political activities on pain of loss of their jobs;<sup>78</sup> the act was also made applicable to state employees engaged in activities aided by the federal government.<sup>79</sup> But political activities thought to be subversive or communistic have been the chief area of concern. One of the earliest illustrations is the Emergency Relief Appropriation Act, which sought to prevent any member of the Communist Party or Nazi Bund from getting work under the act.<sup>80</sup> Another example is the effort — ultimately frustrated by the courts — to bar communists or subversives from occupying public housing.<sup>81</sup> Attempts to justify such restrictions followed these lines:

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New York City officials proposed to invest city pension funds solely in the securities of companies that do not practice racial discrimination, but the City was told by the Corporation Counsel that it had no such authority under existing law. N.Y. Times, Dec. 20, 1963, p. 1, cols. 3-4; p. 24, cols. 1-2.

72. *Green v. Silver*, 207 F. Supp. 133 (D.D.C. 1962). The court held that the finding that the applicant lacked good moral character was not supported, and ordered the issuance of a license.

73. N.Y. Times, April 10, 1962, p. 86, cols. 7-8.

74. *DeVeau v. Braisted*, 363 U.S. 144 (1960); *Serio v. Liss*, 189 F. Supp. 358 (D.N.J. 1960), *aff'd*, 300 F.2d 386 (1961).

75. *Brown v. Tobriner*, 218 F. Supp. 754 (D.D.C. 1963).

76. N.Y. Times, April 28, 1962, p. 18, col. 1.

77. LA. REV. STAT. ANN. tit. 46, § 233 (1950). Louisiana sought to define as an "unsuitable home" one in which a parent "has had an illegitimate child after having received a public assistance check," [§ 233 D(10)] and sought to provide that "in no instance shall assistance be granted to an illegitimate child if the mother of the illegitimate child in question is the mother of two or more illegitimate children unless it should be determined that the conception and birth of such child was due to extenuating circumstances . . ." (§ 233 C). See Memorandum from Secretary of Health, Education and Welfare to Commissioner of Social Security, Jan. 16, 1961.

78. See *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

79. *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947).

80. Emergency Relief Appropriation Act of 1941, § 15(f), 54 Stat. 611, 620 (1941).

81. See *Peters v. New York City Housing Authority*, 283 App. Div. 801, 128 N.Y.S. 2d 712, *rev'd*, 307 N.Y. 519, 121 N.E.2d 529 (1954); *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605 (1955), *cert. denied*, 350 U.S. 882 (1957); *Chicago Housing*

. . . since low-rent housing projects are subsidized by taxpayers' money, the special benefits thereof shall be available only to loyal tenants, and not to those who elect to join and support organizations whose purposes are inimical to the public welfare.<sup>82</sup>

Membership in the Communist Party or subversive organizations has been considered relevant to the right to pursue a number of important occupations and professions, including that of the lawyer,<sup>83</sup> the radio-telegraph operator,<sup>84</sup> and the port worker.<sup>85</sup> The District of Columbia Court of Appeals reasoned as follows:

It seems to us it would be difficult to imagine a question more relevant or more material to the qualification of a radio operator. . . . Radio beams are the operational essence of quick modern communication and the control of modern weapons. Not only the power to use these electronic devices but the power to interfere with waves being used by others should, it might properly seem to the Commission, be lodged in those whose loyalty to the United States is made to appear.<sup>86</sup>

Nor does the list stop at occupations. Ohio required a loyalty oath to receive unemployment compensation.<sup>87</sup> For a time a loyalty oath was required under the National Defense Education Act.<sup>88</sup> New York has provided for the man-

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Authority v. Blackman, 4 Ill. 2d 319 (1954); Rudder v. United States, 105 A.2d 741 (D.C. Munic. Ct. App. 1954), *rev'd*, 226 F.2d 51 (D.C. Cir. 1955); Housing Authority v. Cordova, 130 Cal. App. 2d 883, 279 P.2d 215 (1955).

82. Rudder v. United States, 105 A.2d 741, 745 (D.C. Munic. Ct. App. 1954), *rev'd*, 226 F.2d 51 (D.C. Cir. 1955). See also Peters v. New York City Housing Authority, 283 App. Div. 801, 802, 128 N.Y.S.2d 712, 714 (1954), *rev'd*, 307 N.Y. 519, 121 N.E.2d 529 (1954), where the Appellate Division said:

Furthermore, in the present day context of world crisis after crisis, it is our opinion that the danger Congress is seeking to avoid (i.e. infiltration of government housing by subversive elements) justifies the requirement that tenants herein choose between government housing and membership in an organization they know to have been found subversive by the Attorney General.

Both these expressions of philosophy are taken from cases that were reversed on appeal.

83. Konigsberg v. State Bar, 366 U.S. 36 (1961); *In re Anastaplo*, 366 U.S. 82 (1961).

84. Borrow v. FCC, 285 F.2d 666 (D.C. Cir. 1960); Blumenthal v. FCC, 318 F.2d 276 (D.C. Cir. 1963). Among the evidence used to identify radio operators of unsuitable character were: subscribing to Communist publications, activities of applicant's wife and father-in-law, Communist Party membership, etc., Homer v. Richmond, 292 F.2d 719, 721-22 (D.C. Cir. 1961).

85. Parker v. Lester, 227 F.2d 708 (9th Cir. 1955).

86. Borrow v. FCC, 285 F.2d 666, 668-69 (D.C. Cir. 1960). See also Homer v. Richmond, 292 F.2d 719, 723 (D.C. Cir. 1961):

In view, especially at this period of our national life, of the sensitive nature of the positions involved — radio-telegraph operators on vessels of the Merchant Marine — positions closely associated with the nation's security, we think consideration of the ideological matters referred to is permitted under the statute. . . .

*Id.* at 723.

87. Dworken v. Colopy, 91 N.E.2d 564 (C.P. Ohio 1950); State v. Hamilton, 92 Ohio App. 285, 110 N.E.2d 37 (1951).

88. 20 U.S.C. § 401-549 (1958).



datory revocation of the driver's license of any motorist convicted under the Smith Act of advocating the overthrow of the government.<sup>89</sup>

The restrictions which derive from these expanded notions of relevance are enforceable not merely by withholding largess, but also by imposing sanctions. Along with largess goes the power to punish new crimes. Misuse of the gift becomes criminal, and hence new standards of lawful behavior are set: government can make it a crime to fail to spend welfare funds in such a manner as accords with the best interests of the children.

Government largess not only increases the legal basis for government power; it increases the political basis as well. When an individual or a business uses public money or enjoys a government privilege or occupies part of the public domain, it is easier to argue for a degree of regulation which might not be accepted if applied to businesses or individuals generally. Objections to regulation fade, whether in the minds of the general public or legal scholars, before the argument that government should make sure that its bounty is used in the public interest. Benefits, subsidies, and privileges are seen as "gifts" to be given on conditions, and thus the political and legal sources of government power merge into one.

## 2. *The magnification of governmental power by administrative discretion*

Broad as is the power derived from largess, it is magnified by many administrative factors when it is brought to bear on a recipient. First, the agency granting government largess generally has a wide measure of discretion to interpret its own power. Second, the nature of administrative agencies, the functions they combine, and the sanctions they possess, give them additional power. Third, the circumstances in which the recipients find themselves sometimes makes them abettors, rather than resisters of the further growth of power.

The legislature generally delegates to an administrative agency its authority with respect to a given form of largess. In this very process of delegation there can be an enlargement of power. The courts allow the agencies a wide measure of discretion to make policy and to interpret legislative policy. Sometimes a legislature gives the agency several different, possibly conflicting policies, allowing it (perhaps unintentionally) to enforce now one and now another.<sup>90</sup>

89. N.Y. VEHICLE AND TRAFFIC LAW § 510, ¶ 2(b). Before the enactment of this law, the Commissioner of Motor Vehicles attempted to deny a license to a convicted Communist on the ground that he was not a "fit" person, but this action was overturned in *Davis v. Hulst*, 24 Misc. 2d 954, 204 N.Y.S.2d 865 (Sup. Ct. 1960). The legislature then hastened to amend the statute.

90. For example, in California the State Board of Barber Examiners may dispense certificates for operating barber colleges in any given area after considering:

- (a) The economic character of the community.
- (b) The adequacy of existing barber shops and barber colleges in that community.
- (c) The ability of the community to support the proposed barber college.

There is little if any requirement of consistency or adherence to precedent, and the agency may, instead of promulgating rules of general application, make and change its policies in the process of case-to-case adjudication.<sup>91</sup> For example, New Jersey's Waterfront Commission has power "in its discretion" to deny the right to work to any longshoreman if he is a person "whose presence at the piers or other waterfront terminals in the Port of New York is found by the commission on the basis of the facts and evidence before it, to constitute a danger to the public peace or safety."<sup>92</sup> The discretion of an agency is even broader, and even less reviewable, when the subject matter is highly technical. In such fields, which are increasing in number, "experts" or professionals come to power, and their actions are even harder to confine within legislatively fixed limits. Discretion as to enforcement or punishment is one of the greatest of agency powers. A licensing agency often has power to choose between forgiveness, suspension, and permanent revocation of a license after a violation.<sup>93</sup>

Different agency powers can augment each other, as the story of New York's television channel thirteen illustrates. When channel thirteen was put up for sale, the Federal Communications Commission wanted the transferee to be an educational television station. But although the FCC has plenary power to dispense channels initially, Congress expressly denied it the authority to pass on the comparative merits of would-be transferees. In this case a non-educational organization was the higher bidder, and would have been the purchaser if the seller followed its natural self-interest. But the FCC can cause costly, indefinite delay by commencing a general investigation. Here it used this power as a threat. The seller was given reason to fear that a time-consuming, expensive investigation would be commenced unless it sold to the lowest bidder, an educational group. Pressed by circumstances, the seller bowed. The FCC thus exercised a power denied it by Congress.<sup>94</sup>

Most dispensing agencies possess the power of delay. They also possess the power of investigation and harassment; they can initiate inquiries which will prove expensive and embarrassing to an applicant. Surveillance alone can make a recipient of largess uncomfortable. And agencies have so many criteria to use, so many available grounds of decision, and so much discretion, that they, like the FCC, can usually find other grounds to accomplish what they cannot do directly. This is a temptation to the honest but zealous administrator, and

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(d) The character of adjacent communities and the extent to which the college would draw patrons from such adjacent communities.

(e) The social and economic effect of the establishment of a barber college on the community where it is proposed to be located, and on the adjacent communities.

CAL. BUS. AND PROF. CODE §6534.7.

91. See generally JAFFE & NATHANSON, ADMINISTRATIVE LAW ch. 3 (1961).

92. NEW JERSEY STAT. ANN. § 32:23-29(c) (1963).

93. See *Associated Securities Corp. v. SEC*, 293 F.2d 738, 741 (10th Cir. 1961).

94. Guthman, *The Channel 13 Case: FCC Intervention in a § 310(b) License Transfer*, 1962 (unpublished paper in Yale Law Library).

an invitation to the official who is less than scrupulous. In addition, the broader the regulation, the greater the chance that everyone violates the law in some way, and the greater the discretion to forgive or to punish. But even if a dispensing agency is self-restrained and scrupulous beyond the requirements of statutes, the function of dispensing will make its power grow. The dispensing of largess is a continuing process. The threat of an unfavorable attitude in the future should be sufficient persuasion for today.

The recipients of largess themselves add to the powers of government by their uncertainty over their rights, and their efforts to please. Unsure of their ground, they are often unwilling to contest a decision. The penalties for being wrong, in terms of possible loss of largess in the future, are very severe.<sup>95</sup> Instead of contesting, recipients are likely to be overzealous in their acceptance of government authority so that a government contractor may be so anxious to root out "disloyal" employees that he dismisses men who could probably be retained consistently with government policy. Likewise a "think institute" existing primarily on government contracts, may be more eager to "think" along accepted lines because it has its next month's bills to "think" about.<sup>96</sup>

This penumbral government power is, indeed, likely to be greater than the sum of the granted powers. Seeking to stay on the safe side of an uncertain, often unknowable line, people dependent on largess are likely to eschew any activities that might incur official displeasure. Beneficiaries of government bounty fear to offend, lest ways and means be found, in the obscure corners of discretion, to deny these favors in the future.

### C. *Largess and Procedural Safeguards*

The procedural law of government largess is as distinctive as the substantive. In addition to the general law governing the grant and revocation of largess, there are special aspects of unusual interest: the power to conduct trials of persons for alleged violations of law, and the authority to apply sanctions and punishments.

#### 1. *Procedures: in general*

The granting, regulation, and revocation of government largess is carried on by procedures which, in varying degrees, represent short-cuts that tend to augment the power of the grantor at the expense of the recipient. In the first place, the tribunal is likely to be an arm of the granting agency rather than independent and impartial. For example, when disputes arise over government contracts, the tribunal may turn out to be the government contracting

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95. The dangers of contesting are shown by *Nadiak v. CAB*, 305 F.2d 588 (5th Cir. 1962). A pilot of 12 years' experience was suspended for 60 days because of a minor violation. He contested this order and appealed to the Civil Aeronautics Board. Thereupon the Board commenced a full scale investigation of his entire 12-year career, an investigation which ended with revocation of all of his certificates for a minimum period of one year. *Id.*, 590-91.

96. See Hart, *The Research Enterprise and Defense Planning*, May, 1963 (unpublished paper in Yale Law Library).

officer, himself a party to the dispute, followed by a series of contract appeals boards likewise composed of government contracting officials. More commonly the initial tribunal is a hearing officer, but the final decision is by the dispensing agency itself. Thus a charge that a television licensee is violating the terms of its license is ultimately passed upon by the FCC itself. A pilot can be suspended by the CAB, which previously investigated the accident out of which the suspension resulted, and earlier found in a "probable cause" investigation and hearing that the accident was due to pilot error.<sup>97</sup>

These tribunals not only lack independence; they may fail to provide other safeguards as well. Sometimes decisions are based upon evidence not in the record or upon evidence which the recipient has no opportunity to test by cross-examination or upon "expert" opinions which are virtually immune to adversary procedures familiar to the courtroom. The agency's own "expertise" may also be a factor of importance in the decision. Sometimes there is no hearing at all; for example, the SEC has been upheld in suspending, without a hearing, a broker-dealer license for alleged violations.<sup>98</sup> Drivers licenses are also sometimes suspended without a hearing.<sup>99</sup>

Decisions concerning government largess are not always subject to effective review in the courts. An application for a savings and loan charter can be granted or denied without judicial review. The matter rests in the "vast discretion" of a federal board.<sup>100</sup> A local agricultural committee, exercising authority under the federal soil bank subsidy program, has virtually unreviewable authority to find a farmer in violation of the rules of the program, making him subject to statutory forfeitures.<sup>101</sup> At present there is a trend toward more judicial review, but the important question is what kind of review; review limited to constitutional or jurisdictional questions may prove inadequate to curb possible agency abuses.

## 2. *Trials*

Among the matters which may be relevant to the granting or revocation of government largess are various types of law violations, civil and criminal

97. *Pangburn v. CAB*, 311 F.2d 349 (1st Cir. 1962).

An extreme example of combined functions is the body known as the Board of Regents of the University of the State of New York. Among its other duties, the Board grants licenses for most of the professions except law. It sets the standards for admission to the professions, establishes regulations to govern professional conduct, prefers charges of unprofessional conduct, hears and decides the charges, and metes out punishment. The executive, legislative, and judicial functions are thus combined in a single agency having life-and-death power over an individual's professional life. See *Barsky v. Board of Regents*, 347 U.S. 442, 461 (1954) (Black, J., dissenting).

98. *Holman & Co. v. SEC*, 299 F.2d 127 (D.C. Cir. 1962).

99. *E.g.*, *Wall v. King*, 206 F.2d 878 (1st Cir. 1953).

100. *Federal Home Loan Bank Bd. v. Rowe*, 284 F.2d 274 (D.C. Cir. 1960) (denial of charter for a federal savings and loan association not reviewable). See also *Schwab v. Quesada*, 284 F.2d 140 (3d Cir. 1960) (order of the Administrator of the Federal Aviation Agency, under the Federal Airport Act, 60 Stat. 174, 49 U.S.C. § 1108 (1958), approving aid funds for municipal airport is not reviewable).

101. *Holden v. United States*, 187 F. Supp. 790 (E.D. Ark. 1960).

in nature. Violations of law are normally determined by courts. But in dispensing largess government has not always been willing to rely on courts to determine whether laws have been violated. In an increasing number of cases it has undertaken to make such determinations independently. And thereby it has exercised an extraordinary procedural power — the power to try law violations in the executive branch, without benefit of judge or jury. It is true that these “trials” cannot result in imposition of criminal sanctions. But the ability to conduct trials and adjudications is of great significance in itself, and the denial of benefits which may follow approximates a sanction.

One of the most important federal trial-conducting agencies is the Securities and Exchange Commission, which dispenses broker-dealer licenses and other privileges of great value. The SEC revokes licenses for violations of the Securities Act — violations which it determines for itself.<sup>102</sup> Like power is exercised by other federal agencies. The CAB can take away a pilot’s license on the basis of an agency “trial” proving that he violated regulations.<sup>103</sup> The FCC has “found” that an applicant for a broadcast license was guilty of an attempt to deceive the Commission.<sup>104</sup> State agencies also conduct trials in many different circumstances.<sup>105</sup>

The “trials” just discussed have at least the virtue of relating to matters within the special expertise of the agency. But the power to “try” also extends to matters that are more within the special competence of courts than of the agency conducting the “trial.” This is clearly the case with the FCC, which disclaims any expertise in the area of the antitrust laws, but insists that it can make findings on monopolistic practices without the aid of a court, and deny licenses on the basis of such findings.<sup>106</sup> The District of Columbia Court of Appeals justified such proceedings as follows:

Mansfield alleges that the Commission’s finding of an intent and practice of suppressing competition is equivalent to convicting the appellant of a crime, and that withholding a license on the basis of such a finding is identical to the imposition of a penalty. Thus, it is claimed that the con-

102. *E.g.*, *Associated Securities Corp. v. SEC*, 293 F.2d 738 (10th Cir. 1961).

103. *Nadiak v. CAB*, 305 F.2d 588 (5th Cir. 1962).

104. *FCC v. WOKO*, 329 U.S. 223 (1946); *Immaculate Conception Church v. FCC*, 320 F.2d 795 (D.C. Cir. 1963).

An extreme example of federal trial power is illustrated by *Thompson v. Gleason*, 317 F.2d 901 (D.C. Cir. 1962). The Administrator of Veterans Affairs conducts trials under a statute providing for forfeiture of veterans benefits for conduct including mutiny, treason, and rendering assistance to an enemy. The Administrator originally assumed authority not only to conduct an independent trial, with his own witnesses, evidence, and standards of guilt; he also claimed that he could decide what amounted to rendering assistance to any enemy. The Court of Appeals for the District of Columbia held that the Administrator must be limited to finding that a beneficiary had committed defined criminal acts under a criminal statute. But it left him free to conduct his own trial.

105. See, *e.g.*, *Cornell v. Reilly*, 127 Cal. App. 2d 178, 273 P.2d 572 (1954).

106. Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the “public interest,” merely because its misconduct happened to be an unconvicted violation of the antitrust laws.

*National Broadcasting Co. v. United States*, 319 U.S. 190, 223 (1943).

stitutional right to a trial by jury has been denied. We believe we have made it clear that the findings of the Commission do not constitute conviction of a crime or the equivalent. The ultimate matter in question was not whether Mansfield was innocent or guilty, but whether qualified or unqualified, and the appellant's conduct was considered only in that regard. Nor does the withholding of a privilege, granted by the Government only to fully-qualified applicants, amount to a penalty, when there is sound basis for finding the applicant unfit.<sup>107</sup>

The same practice on a local level is illustrated by the case of a New York City taxicab driver who was brought before a police captain and charged with having withheld change from a passenger. The officer found him guilty, and his license was revoked. The New York Court of Appeals subsequently held that the procedures used by the police violated due process, but the court seemed to agree that the police could "try" taxi drivers if they observed better procedures.<sup>108</sup>

Administrative "trials" are not even limited to conduct that might violate some law. Agencies can deny government largess for "bad" conduct which is lawful. This often happens when a license is denied because of "bad character." Many largess-dispensing agencies are concerned with character — from the SEC to state boxing commissions. The entire federal loyalty-security program for public employees involves trials of character. Here the "gift" of a public job has been the justification for a process by which countless individuals have been "tried" for "offenses" which vary from conduct approaching treason to the most trivial departure from orthodoxy. These security trials, and the character investigations which are made for innumerable licenses and permits, attempt to search out every crevice and recess of an individual's life. The agencies try not an offense but the whole of a man, his strengths and weaknesses, his moments of honor and of temptation.<sup>109</sup>

Perhaps the greatest extreme reached by agency trial power is illustrated by motor vehicle bureaus, which sometimes find motorists "guilty" after courts have found them innocent. In New Jersey the Director of the Division of Motor Vehicles may suspend a driver's license (a) where the individual has been acquitted of the charge by a court or (b) where the individual has been convicted and punished, but the additional punishment of license suspension was expressly withheld by the sentencing court. The New Jersey Supreme Court held that the Director's action was not penal, and that there was no double jeopardy.<sup>110</sup> The District of Columbia Corporation Counsel maintains

107. *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 35 (D.C. Cir. 1950).

108. *Hecht v. Monaghan*, 307 N.Y. 461, 121 N.E.2d 421 (1954).

109. In *Nadiak v. CAB*, 305 F.2d 588 (5th Cir. 1962), the Civil Aeronautics Board undertook a "full scale investigation" of a pilot, which according to the Court "took over 8 months to complete, covering several thousand miles and brought into review 12 years of Nadiak's professional career." *Id.* at 590.

110. *Atkinson v. Parsekian*, 37 N.J. 143, 179 A.2d 732 (1962). See also *Commonwealth v. Funk*, 323 Pa. 390, 186 Atl. 65 (1936). In the *Atkinson* case the court said:

Although the suspension or revocation of a driver's license by the Director may appear to be punishment to the wrongdoer, this is not enough to characterize the

that the motor vehicles director can revoke a permit even though a court acquits the motorist of any charges. He declared that motor vehicle officials "may consult evidence other than court findings." The Director of Motor Vehicles said, reassuringly, that "he would revoke a permit in the face of a court finding only if there was strong evidence that the action was warranted."<sup>111</sup>

### 3. *New and unusual punishments*

Administering largess carries with it not only the power to conduct trials, but also the power to inflict many sorts of sanctions not classified as criminal punishments. The most obvious penalty is simply denial or deprivation of some form of wealth or privilege that the agency dispenses. How badly this punishment hurts depends upon how essential the benefit is to the individual or business affected. The loss of some privileges or subsidies may be quite trivial. But for the government contractor placed on a blacklist the consequences may be financial ruin if the government is one of its major customers. The television station which loses its license is out of business. So is the doctor who loses his medical license.

Although the denial of benefits is consistently held not to be penal in nature, it is perfectly clear that on occasion the government uses this power as a sanction. The FCC has denied a radio or television license as a sanction for the applicant's misrepresentations to the Commission.<sup>112</sup> Government contractors who are guilty of undesirable conduct may be officially "debarred" from contracting for a specified term of years.<sup>113</sup> Persons guilty of prior crimes may

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statutory grant of power as criminal in nature. The primary object of the statute is to foster safety on the highway and not to impose criminal punishment to vindicate public justice.

37 N.J. at 155, 179 A.2d at 738.

111. The Washington Post, Nov. 15, 1961, p. B4, cols. 1-2. Compare *Meyer v. Board of Medical Examiners*, 34 Cal. 2d 62, 206 P.2d 1085 (1949), where a State board of medical examiners suspended a physician's license for conviction of an offense, despite the fact that, under the State's rehabilitation procedures, the sentencing court discharged the physician from probation and dismissed the charges against him. Charges were dismissed under a statute which said that after trial the defendant "shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted." CAL. PENAL CODE § 1203.4.

112. In *FCC v. WOKO*, 329 U.S. 223 (1946), the Court rejected this contention in the following paragraph:

It is also contended that this order inflicts a penalty, that the motive is punishment and that since the Commission is given no powers to penalize persons, its order must fall. . . . A denial of an application for a license because of the insufficiency or deliberate falsity of the information lawfully required to be furnished is not a penal measure. It may hurt and it may cause loss, but it is not made illegal, arbitrary or capricious by that fact.

*Id.* at 228.

113. See, e.g., *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368, 372 (D.C. Cir. 1961). See generally Gantt & Panzer, *The Government Blacklist: Debarment and Suspension of Bidders on Government Contracts*, 25 GEO. WASH. L. REV. 175 (1957); Administrative Conference of the United States, Committee on Adjudication of Claims,

be disqualified from office in waterfront unions.<sup>114</sup> The CAB suspends pilots' licenses for the purpose of punishment:

The Board takes the position that quite apart from the qualifications or competency of a pilot, it has the right under Section 609 to impose a suspension as a "sanction" against specific conduct or because of its "deterrence value — either to the subject offender or to others similarly situated." In short, the Board contends that it may order suspension for disciplinary purposes. We agree with the Board.<sup>115</sup>

Denial of benefits by no means exhausts the list of sanctions available to government. Severe harm can be inflicted by adverse publicity resulting from investigations, findings of violation, blacklisting, or forfeitures for cause. A striking instance is the SEC practice, upheld by the courts, of placing alleged violators of certain of its regulations on a public blacklist.<sup>116</sup> Forfeitures are imposed under agricultural stabilization programs.<sup>117</sup> The mere pendency of proceedings may be harmful, especially if accompanied by costly and harassing investigation and interminable delay.

### III. THE PUBLIC INTEREST STATE

What are the consequences of the rise of government largess and its attendant legal system? What is the impact on the recipient, on constitutional guaranties of liberty, on the structure of power in the nation? It is important to try to picture the society that is emerging, and to seek its underlying philosophy. The dominant theme, as we have seen, is "the public interest," and out of it there grows the "public interest state."

#### A. *The Erosion of Independence*

The recipient of largess, whether an organization or an individual, feels the government's power. The company that is heavily subsidized or dependent on government contracts is subjected to an added amount of regulation and inspection, sometimes to the point of having resident government officials in its plant.<sup>118</sup> And it is subject to added government pressures. The well known episode when the large steel companies were forced to rescind a price rise, partly by the threat of loss of government contracts, illustrates this. Perhaps the most elaborate and onerous regulation of businesses with government contracts is the industrial security system, which places all employees in defense industries under government scrutiny, and subjects them, even high executives, to dismissal if they fail to win government approval.<sup>119</sup>

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Committee Report on Debarment and Suspension of Persons from Government Contracting and Federally Assisted Construction Work (1962).

114. See *De Veau v. Braisted*, 363 U.S. 144 (1960).

115. *Pangburn v. CAB*, 311 F.2d 349, 354 (1st Cir. 1962).

116. *Kukatash Mining Corp. v. SEC*, 309 F.2d 647 (D.C. Cir. 1962).

117. *Holden v. United States*, 187 F. Supp. 790 (E.D. Ark. 1960).

118. PECK & SCHERER, *THE WEAPONS ACQUISITION PROCESS: AN ECONOMIC ANALYSIS* 85 (1962).

119. See, *e.g.*, *Kanarek v. United States*, 314 F.2d 802 (Ct. Cl. 1963).



Universities also feel the power of government largess. Research and development grants to universities tend to influence the direction of university activities, and in addition inhibit the university from pursuing activities it might otherwise undertake.<sup>120</sup> In order to qualify for government contracts, Harvard University was required, despite extreme reluctance, to report the number of Negroes employed in each department. The University kept no such information, and contended that gathering it would emphasize the very racial distinctions that the government was trying to minimize. Nevertheless, the University was forced to yield to the Government's demand.<sup>121</sup>

Individuals are also subject to great pressures. Dr. Edward K. Barsky, a New York physician and surgeon since 1919, was for a time chairman of the Joint Anti-Fascist Refugee Committee.<sup>122</sup> In 1946 he was summoned before the House Committee on Un-American Activities. In the course of his examination he refused, on constitutional grounds, to produce records of the organization's contributions and expenditures. For this refusal he served six months in jail for contempt of Congress. Thereafter the New York State Education Department filed a complaint against him, under a provision of law making any doctor convicted of a crime subject to discipline. Although there was no evidence in any way touching Dr. Barsky's activities as a physician, The Department's Medical Grievance Committee suspended his medical license for six months. The New York courts upheld the suspension. The New York Court of Appeals answered as follows the argument that its holding would subject individuals to arbitrary governmental power:

Appellants suggest that a literal construction of section 6514 (subd. 2, par. [b]) will empower the Board of Regents to destroy a person, professionally, solely on a showing of the commission by him in some other State (or country) of an act which we in New York consider noncriminal, or even meritorious. Two answers are available to that: first, some reliance must be placed on the good sense and judgment of our Board of Regents, in handling any such theoretically possible cases; and, second, the offense here committed, contempt of Congress, is no mere trivial transgression of an arbitrary statute.<sup>123</sup>

On appeal, the suspension was upheld by the United States Supreme Court.<sup>124</sup> The Court declared that New York had "substantially plenary power" to fix conditions for the practice of medicine,<sup>125</sup> and concluded that the state's action

120. Kirk, *Massive Subsidies and Academic Freedom*, 27 LAW & CONTEMP. PROB. 607 (1963). But see Kidd, *The Implications of Research Funds for Academic Freedom*, 27 LAW & CONTEMP. PROB. 613 (1963).

121. Harvard Summer News, July 12, 1962, p. 1, col. 1. The report states that Harvard officials felt that to keep such records would be an invasion of the privacy of the individual, and that a "visual survey" would be "surreptitious and unhealthy and repugnant to the dignity of the individual." However the report said that the government insisted that the check be made.

122. *Barsky v. Board of Regents*, 347 U.S. 442 (1954).

123. *Barsky v. Board of Regents*, 305 N.Y. 89, 97-98, 111 N.E.2d 222, 225-26 (1953).

124. 347 U.S. 442 (1954).

125. *Id.* at 451.

was reasonable, especially "in a field so permeated with public responsibility as that of health."<sup>126</sup>

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. Welfare officials, often with the best of motivations, impose conditions intended to better a client, which sometimes are a deep invasion of his freedom of action.<sup>127</sup> In a memorable case in New York, an old man was denied welfare because he insisted on living under unsanitary conditions, sleeping in a barn in a pile of rags. The court's opinion expresses a characteristic philosophy:

Appellant also argues that he has a right to live as he pleases while being supported by public charity. One would admire his independence if he were not so dependent, but he has no right to defy the standards and conventions of civilized society while being supported at public expense. This is true even though some of those conventions may be somewhat artificial. One is impressed with appellant's argument that he enjoys the life he leads in his humble "home" as he calls it. It may possibly be true, as he says, that his health is not threatened by the way he lives. After all he should not demand that the public at its expense, allow him to experiment with a manner of living which is likely to endanger his health so that he will become a still greater expense to the public.

It is true, as appellant argues, that the hardy pioneers of our country slept in beds no better than the one he has chosen. But, unlike the appellant, they did it from necessity, and unlike the appellant, they did not call upon the public to support them, while doing it.<sup>128</sup>

To envision how sweeping the powers derived from government largess can become, one may turn to New York City, where the Commissioner of Licenses holds sway over a long list of gainful employments. With broad discretion, he dispenses and revokes licenses for exhibitions and performances, billiard and pool tables, bowling alleys, miniature golf, sidewalk cafes and stands, sightseeing guides, street musicians, public carts, expressmen, porters, junk dealers, second-hand dealers, pawnbrokers, auctioneers, laundries, wardrobe concessionaires, locksmiths, masseurs, bargain sales, bathhouse keepers, rooming houses, barbers, garages, refuse removal, cabarets, coffee houses, and

126. *Id.* at 453.

127. A report on the Aid to Dependent Children Program (ADC) in Chicago comments:

The climate in the department which places such emphasis on denying assistance, and the lack of consistent application of IPAC [Illinois Public Aid Commission] policies in the ADC program, is damaging to the applicant or recipient and serves to prolong and perpetuate dependency. Some of the staff treat the families with consideration and decency and try to be helpful and understanding while at the same time adhering strictly to policy. Others are rigid and punitive, with little regard for human dignity. Their attitudes are destructive of personality, ambition and self-respect—and intensify existing problems.

GREENLEIGH ASSOCIATES, INC., *FACTS, FALLACIES AND THE FUTURE, A STUDY OF THE AID TO DEPENDENT CHILDREN PROGRAM OF COOK COUNTY, ILLINOIS* 64 (1960).

128. *Wilkie v. O'Connor*, 261 App. Div. 373, 375, 25 N.Y.S.2d 617, 619 (1941).

cannon firing.<sup>120</sup> The license commissioner has used his broad powers to deny licenses to many persons on the basis of "bad character." For example, an application for a junk-cart license was denied because the applicant had been charged with several crimes, even though the most recent charge had occurred over sixteen years before, and all of the charges had been dismissed.<sup>130</sup> A parking lot license was denied to an applicant for failure to disclose arrests for book-making which had occurred some twelve years previously.<sup>131</sup> Whatever the merits of individual denials, the Commissioner seems to have no standards to guide him.<sup>132</sup> Nor has the Commissioner limited himself to denials for bad character. He has used his power of revocation to regulate his licensees in many ways. He threatened to revoke the licenses of theaters if he found them accepting kickbacks on tickets.<sup>133</sup> He warned motion picture houses that their licenses would be revoked if they did not clean up sidewalk displays of "lurid and flamboyant" advertising, saying that such advertising was "a blight over the important area of our city," and declaring, "If I have to close half the theaters in the Times Square area to abate this nuisance, I am ready to do so."<sup>134</sup> He revoked the licenses of three of New York's eight dance halls that provide hostesses, and initiated proceedings against others, charging that they were "lewd" and "offensive to public decency."<sup>135</sup> Many other incidents might be cited. Again, the point is the absence of standards; broad discretion to deny or revoke licenses "for cause" allows a commissioner to do his own legislating and inflict his own punishments.

Vast discretion tends to corrupt. The New York State Liquor Authority, having the power to grant valuable liquor licenses to a favored few, having inadequately objective standards by which to make the choice, and operating in secret, fell into a pattern of corruption in which it would dispense its favors only in return for bribes and pay-offs, refusing to grant privileges to those who were too honest, too ignorant, or too poor to play its game. Thus a dispensing agency of government became little better than a shakedown racket.<sup>136</sup>

The pressures on the individual are greatly increased by the interrelatedness of society and the pervasiveness of regulation. The individual with a black

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129. NEW YORK CITY, ADMINISTRATIVE CODE ch. 32 (1956 & Supp. 1964).

130. Matter of Pinto, 142 N.Y.L.J., Oct. 29, 1959, p. 13, col. 8.

131. Benson Parking Corp. v. O'Connell, 31 Misc. 2d 1037, 220 N.Y.S.2d 1010 (Sup. Ct. 1961) (dismissing petition for review).

132. The cases are collected in notes to NEW YORK CITY, ADMINISTRATIVE CODE ch. 32 (1956 & Supp. 1964). Some articles of chapter 32 specifically refer to "good character" as a qualification (*e.g.*, art. 34, "Garages and Parking Lots"); but the Commissioner applies the same requirement under articles which do not refer to it explicitly (*e.g.*, art. 18, "Junk Dealers"; *cf.* note 130 *supra*).

133. N.Y. Times, Feb. 8, 1962, p. 33, col. 8.

134. N.Y. Times, Nov. 29, 1962, p. 39, col. 4.

135. A lawyer for one of the ballrooms charged that the Commissioner had "taken the law into his own hands." N.Y. Times, Jan. 16, 1964, p. 27, col. 2.

136. See, *e.g.*, N.Y. Times, Dec. 3, 1962, p. 19, col. 3. See Lewis v. City of Grand Rapids, 222 F. Supp. 349 (W.D. Mich. 1963), for a detailed description of how liquor licensing regulations might be used to discriminate against a Negro licensee.

mark against him, merited or unmerited, finds that it dogs him everywhere, from locality to locality, and from one kind of work to another. Even a mountain guide in the west must now be a "person of good moral character" in order to be licensed.<sup>137</sup> And licensing control can reach the point achieved by New York, where all entertainers and cabaret employees must be fingerprinted.<sup>138</sup> As Judge J. Skelly Wright has pointed out, a man's "innermost secrets . . . long buried and known only to himself" may pursue him wherever he tries to find work.<sup>139</sup> Indeed, the consequences of a criminal conviction, no matter how innocuous the circumstances, are so serious and the structure of regulation is so rigid that a bill was introduced in the New York City Council to nullify the effect of criminal convictions growing out of participation in civil rights demonstrations.<sup>140</sup> Caught in the vast network of regulation, the individual has no hiding place.

### B. *Pressures Against the Bill of Rights*

The chief legal bulwark of the individual against oppressive government power is the Bill of Rights. But government largess may impair the individual's enjoyment of those rights.

The Appellate Division of the Supreme Court of New York instituted an inquiry into improper solicitation and handling of contingent retainers in personal injury cases in Brooklyn. Solicitation of legal business is a crime in New York. In the course of the inquiry Albert Martin Cohen, an attorney for thirty-nine years, was called to testify. In reply to approximately sixty questions, he pleaded his privilege against self-incrimination, guaranteed by the state constitution. The unanswered questions related to such matters as his records in contingent retainer cases, the activities of his associates, and whether he had paid others for referring cases to him. After warnings, disciplinary proceedings were instituted against Cohen for refusing to cooperate with the inquest, and he was disbarred by the Appellate Division.<sup>141</sup> On review, the United States Supreme Court upheld the disbarment.<sup>142</sup> The Court quoted

137. WYO. STAT. §§ 23-55 (1957).

138. NEW YORK CITY, ADMINISTRATIVE CODE ch. 32, art. 38, §§ B32-297.0, B32-304.0 (Supp. 1964).

139. *Dew v. Halaby*, 317 F.2d 582, 590 (D.C. Cir. 1963) (dissenting opinion). In this case, the Federal Aviation Agency removed an employee because it found that eight years earlier, and long before his employment, he had committed at least four homosexual acts (some for pay) while still a minor, and had smoked marijuana cigarettes on at least five occasions.

140. The bill provided that "no person shall be denied any license, right, benefit or privilege extended by this code, or suffer any other disability or disqualification thereunder, or be denied the right of employment by the city of New York" because of a conviction resulting from peaceful efforts to achieve equal rights. *N.Y. Times*, May 8, 1962, p. 28, col. 3. The bill was enacted. NEW YORK CITY, ADMINISTRATIVE CODE §§ AA51-1.0, 2.0.

141. In the Matter of Cohen, 9 App. Div. 2d 436, 195 N.Y.S.2d 990 (1959), *aff'd*, 7 N.Y.2d 488, 166 N.E.2d 672 (1960).

142. *Cohen v. Hurley*, 366 U.S. 117 (1961).

with approval the following from the opinion of the New York Court of Appeals:

Of course [petitioner] had the right to assert the privilege and to withhold the incriminating answers. That right was his as it would be the right of any citizen and it was not denied to him. He could not be forced to waive his immunity. . . . But the question still remained as to whether he had broken the "condition" on which depended the "privilege" of membership in the Bar. . . . "Whenever the condition is broken, the privilege is lost . . . ." <sup>143</sup>

Thus the effect of the holding in *Cohen* is that a lawyer may lose his profession if he exercises his constitutional privilege, or may have to relinquish his privilege in order to keep his profession.

Similarly, in a case where a radio operator's license was denied by the FCC because the applicant pleaded the privilege against self-incrimination, the Court of Appeals upheld the Commission, but candidly admitted that the effects of its decision on the privilege might be unfortunate:

Dismissal of an application for refusal of the applicant to fill the informational gap leads to an unhappy result. For it attaches significance to exercise of the privilege, and exerts pressure upon the applicant to waive it. . . . The application is sacrificed though the privilege is preserved. To save both seems impossible. The choice is that of the applicant.<sup>144</sup>

Pressures are also applied against the protection of the fourth amendment. In the case of many public assistance programs, a power to make unannounced searches of recipients' premises is asserted by administrators. The following is typical:

Because the casework staff does not have an opportunity to learn enough about their cases, a special investigation unit is used, primarily for the purpose of ferreting out fraud through surprise visits made to the homes of the recipients either on Sunday morning or after midnight. In ADC it appears that the primary function of this unit is to find men in the home where they [sic] are not supposed to be any, especially fathers, step-fathers or acting fathers who are alleged to be absent.

In the sample of active cases studied some instances were reported in which the special investigation teams in a surprise visit in the middle of the night pushed past the one who answered the door and looked in the closets and under the bed for evidence of male occupancy. One family interviewed in this study complained of repeated harassment of this kind. The family consisted of a mother, her teenage son and younger

143. *Id.* at 125-26 (brackets and deletions by the Court), quoting from 7 N.Y.2d at 495, 166 N.E.2d at 675.

144. *Blumenthal v. FCC*, 318 F.2d 276, 279 (D.C. Cir. 1963). Analogous reasoning has been used to require a driver accused of operating a motor vehicle while intoxicated to submit to a blood test. He must waive his privilege against self-incrimination or suffer suspension of his driver's license. *Lee v. State*, 187 Kan. 566, 358 P.2d 765 (1961). See also *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 939 (1958), for a case of debarment of a government contractor based in part upon his refusal to answer questions before a congressional committee (debarment upheld as validly based upon prior defaults in performance).

daughter. The mother and daughter slept in the combination living room, dining room and bedroom, and the son slept in a small converted closet off the bedroom. One night they were awakened at three o'clock in the morning by loud knocking at their door. The son went to the door, which opened into the bedroom occupied by the mother and daughter. Two men pushed past him without identifying themselves as investigators from the Department of Public Aid, and said they were looking for the father who was reported to have returned home. Without apology they left, but returned several weeks later at one o'clock in the morning, repeating the same performance, again without finding their man. This experience has had an unnerving effect on the entire family.<sup>145</sup>

Since persons receiving public assistance fear the loss of their subsistence, they are unlikely to be able to assert their fourth amendment rights.<sup>146</sup> They, like the lawyers of New York State, must choose between their means of support and one of their constitutional rights.

Largess also brings pressure against first amendment rights. The Pacifica Foundation was for a long period in danger of losing its three radio licenses because of "controversial" broadcasts, including "extreme" political views. For an extended period the FCC delayed action on the Foundation's application for renewals. Then the FCC demanded that the Foundation's directors, officers, and managers give answers disclosing whether they were or had been members of the Communist Party or of any groups advocating or teaching the overthrow of government by force.<sup>147</sup> The Foundation refused to answer.<sup>148</sup> Eventually the FCC renewed the licenses.<sup>149</sup>

145. GREENLEIGH ASSOCIATES, INC., *op. cit. supra* note 127, at 66-67.

146. The Greenleigh Associates report continues:

In another case the mother complained of the special investigator arriving one evening while she was taking a bath. He pushed past her nine year old daughter, who answered the door—looked in the bedroom, all closets and the bathroom searching for a man or evidence of male occupancy. He had no warrant. He did find a suit in a closet belonging to the mother's boy friend, who visited her on weekends and about whom the department had been fully informed. Nevertheless, assistance was discontinued on the assumption a man was living full time with the family and that they should look to him for support—support which the part-time boy friend could not provide. The mother and daughter appeared destitute and malnourished at the time of the interview. Also, they had been so frightened by the visit and the attitude of the special investigator that they were almost immobilized with fear.

While such action is contrary to policy, like other policies it is sometimes ignored in practice. It is inevitable that such abuses take place by overzealous investigators when such a unit exists. There appears to be a serious question of violation of civil rights, about which the department should be concerned.

*Id.* at 67.

147. N.Y. Times, Nov. 8, 1963, p. 62, col. 5.

148. N.Y. Times, Nov. 11, 1963, p. 63, col. 2.

149. *In re* Applications of Pacifica Foundation, FCC 64-43, 45386 (memorandum opinion and order, January 22, 1964). The FCC has also put pressure against the First Amendment rights of radio operators by requiring that they answer questions concerning membership in subversive organizations. Upholding the Commission's power, the Court of Appeals for the District of Columbia said, "An unqualified right to pursue any chosen

It takes a brave man to stand firm against the power that can be exerted through government largess. This is nowhere better shown than by the case of George Anastaplo. In the fall of 1950, Anastaplo passed the Illinois bar examination, and applied for approval to the Committee on Character and Fitness, which in Illinois has the duty "to examine applicants who appear before them for moral character, general fitness to practice law and good citizenship."<sup>150</sup> Anastaplo came from a small town in Illinois, served honorably in the Air Force during World War II, and graduated from the University of Chicago. In his written application, Anastaplo was asked to state his understanding of American constitutional principles. After mentioning such fundamentals as the separation of powers, and protection of life, liberty, and the pursuit of happiness, Anastaplo added this sentence: "And, of course, whenever the particular government in power becomes destructive of these ends, it is the right of the people to alter or abolish it and thereupon to establish a new government."<sup>151</sup> When Anastaplo appeared before a subcommittee of the Character Committee, the members showed great concern about the quoted sentence — despite the fact that it is taken almost word for word from the Declaration of Independence. Anastaplo was questioned in detail about his "views on revolution." In the course of that questioning one member asked him whether he was a member of any organization on the Attorney General's list, or of the Communist Party. Anastaplo refused to answer these questions on the ground that they were political questions which he was privileged not to answer under the first amendment. After further hearings during which Anastaplo stuck to his position, he was notified by the Committee that, solely because of his failure to reply, he had failed to prove such qualifications as to character and general fitness as would justify his admission to the bar of Illinois.<sup>152</sup>

The U. S. Supreme Court upheld the denial of admission, resting its decision on the refusal to answer the question concerning Communist Party membership. It held this question to be material to the issue of the applicant's fitness, contending that the questions were material because of their "bearing upon the likelihood that a bar applicant would observe as a lawyer the orderly processes that lie at the roots of this country's legal and political systems. . . ."<sup>153</sup> As for the first amendment, the Court held that "the State's interest in enforcing such a rule as applied to refusals to answer questions about membership in the Communist Party outweighs any deterrent effect upon freedom of

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occupation, merely by reason of the First Amendment, is a wholly untenable proposition." *Borrow v. FCC*, 285 F.2d 666, 670 (D.C. Cir. 1960). See also *Blumenthal v. FCC*, 318 F.2d 276 (D.C. Cir. 1963).

150. *In re Anastaplo*, 366 U.S. 82, 83 n.1 (1961).

151. *Id.* at 99 (Black, J., dissenting).

152. *In re Anastaplo*, 3 Ill. 2d 471, 121 N.E.2d 826 (1954), *cert. denied*, 348 U.S. 946 (1955); 18 Ill. 2d 182, 163 N.E.2d 429 (1959), *cert. granted*, 362 U.S. 963 (1960).

153. 366 U.S. at 89 n.10.

speech and association. . . ."<sup>154</sup> Justice Black, dissenting, said that the decision would "humiliate and degrade" the Bar by forcing it "to become a group of thoroughly orthodox, time-serving, government-fearing individuals."<sup>155</sup>

The foregoing cases suggest that the growth of largess has made it possible for government to "purchase" the abandonment of constitutional rights. And government, for a variety of reasons, has used this power in many circumstances. In particular, government employees, defense employees, members of licensed occupations, and licensed businesses have felt pressure on their freedom of political expression and their right to plead the privilege against self-incrimination. Recipients of largess remain free to exercise their rights, of course. But the price of free exercise is the risk of economic loss, or even loss of livelihood.<sup>156</sup>

### C. *From Governmental Power to Private Power*

The preceding description has pictured two fundamentally opposite forces: government versus the private sector of society. Emphasis on a sharp dichotomy highlights some of the relationships created by government largess. But to a considerable extent this picture distorts reality. First, the impact of governmental power falls unequally on different components of the private sector, so that some gain while others lose. Second, government largess often creates a partnership with some sectors of the private economy, which aids rather than limits the objectives of those private sectors. Third, the apparatus of governmental power may be utilized by private interests in their conflicts with other interests, and thus the tools of government become private rather than public instrumentalities.

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154. *Id.* at 89.

155. *Id.* at 115-16.

156. Speaking of the attempt to deny public housing to members of certain organizations designated as "subversive," the Wisconsin Supreme Court said:

If a precedent should be established, that a governmental agency whose regulation is attacked by court action can successfully defend such an action on the ground that plaintiff is being deprived thereby only of a privilege, and not of a vested right, there is extreme danger that the liberties of any minority group in our population, large or small, might be swept away without the power of the courts to afford any protection.

The more that government engages in any activity formerly carried on by private enterprise, the more real is the peril. For example, the number of rental units for residence housing in the Authority's Hillside Terrace housing project constitutes a very small percentage of the total of all such units in Milwaukee, so that the number of people subjected to pressure by enforcement of Resolution 513 would constitute but a nominal percentage of the total population of the city. On the other hand, if the government, or an agency thereof, owned 90 per cent of all rental units available for private housing in the nation as a whole, or even in a particular state or municipality, the number of people subjected to pressure by such a plan, of requiring a certificate of nonmembership as a condition of tenancy, would be very considerable. . . .

*Lawson v. Housing Authority*, 270 Wis. 269, 275, 70 N.W.2d 605, 608-09 (1955).



Inequalities lie deep in the administrative structure of government largess. The whole process of acquiring it and keeping it favors some applicants and recipients over others. The administrative process is characterized by uncertainty, delay, and inordinate expense; to operate within it requires considerable know-how. All of these factors strongly favor larger, richer, more experienced companies or individuals over smaller ones. Only the most secure can weather delay or seemingly endless uncertainty. A company accused of misusing a license can engage counsel to fight the action without being ruined by the expenses of the defense; an individual may find revocation proceedings are enough to send him to the poorhouse regardless of the outcome. And the large and the small are not always treated alike. For example, small firms which deal with the government are sometimes placed on a blacklist because of delinquencies in performance, thus losing out on all government contracts.<sup>157</sup> But giant contractors who are guilty of similar delinquencies are apparently not subject to this drastic punishment. Similarly, regulation of taxicabs tends to be harder on the individual owner or driver, who may lose his driver's license, while little harm comes to the company controlling a fleet, which may lose drivers but not its precious franchises.<sup>158</sup>

Beside this unacknowledged double standard there is also the fact that sometimes the government quite openly favors one class of applicants — frequently the large and successful. Atomic energy benefits have generally gone to industry giants.<sup>159</sup> Television channels seem to be in the hands of large corporate applicants, often those which control newspapers or other stations. Another illustration of this tendency is in the award of franchises for turnpike restaurants; the business seems to go to large established chains, although they can hardly be said to provide service of outstanding culinary distinction.<sup>160</sup>

All these inequalities modify somewhat the simple picture of a government-private dichotomy. But a second modification is required: government and the private sector (or a favored part of that sector) are often partners rather than opposing interests. The concept of partnership covers many quite different situations. Sometimes government largess serves to aid the private objectives of an industry, as when government supplies grazing land to stockmen, timber to the lumber industry, and scientific know-how to the private investors in Telstar.<sup>161</sup> A second type of partnership exists where governmental action pro-

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157. See Garratt, *Blacklisting of Contractors from Government Contracting and Federally Financed Construction*, November, 1962 (unpublished paper in Yale Law Library).

158. See Taylor, *Licensing and Control of the Taxicab Industry in New York*, November, 1962 (unpublished paper in Yale Law Library).

159. Fraidin, *How AEC Contracts Are Awarded—And To Whom*, April, 1963 (unpublished paper in Yale Law Library).

160. Smith, *Restaurant and Service Station Concessions on the Connecticut Turnpike*, November, 1962 (unpublished paper in Yale Law Library).

161. Cohen, *The Communications Satellite Act of 1962: An Inquiry Into the Use of Research and Development*, November, 1962 (unpublished paper in Yale Law Library).

fects the recipient of largess from adverse forces with which he would otherwise have to contend; this is illustrated by the defense contract, with its virtual guarantee against losses due to most economic or management factors.<sup>162</sup> The Atomic Energy Commission provides insurance against public liability due to negligence.<sup>163</sup> Just as frequently, government largess offers protection against the disadvantages of competition. ICC motor carrier regulation provides partial monopolies for each trucker. CAB routes give partial monopolies to airlines. Professional or occupational licensing limits competition and adds a tone of respectability and reliability as well. Often the leaders in seeking regulation have been the persons affected, and not government or the general community; the professional and occupational groups want government protection just as the property owner wants zoning.<sup>164</sup> Sometimes licensing is a particularly obvious cover for monopoly. An ordinance in Seattle limited to a handful the number of persons or firms who could be licensed to operate juke boxes, but allowed each licensee to have a large number of juke boxes in different establishments; this effectively restricted the business to a small but highly privileged group.<sup>165</sup> The partnership of government and private may give further protection — not merely from the consequences of competition, but also from the legal consequences of eliminating competition. Some privilege-dispensing agencies can exempt their clients from the antitrust laws, and, like the Maritime Board, use this power in connection with the grant of franchises to make lawful all sort of anticompetitive practices that otherwise would violate the Sherman Act.<sup>166</sup>

The federal government's role in defense and research and development has created new forms of partnership. Substantial sectors of the economy become committed to a system of government contracting in which both the contractors and the politicians have a tremendous stake in the continuance of the system:

Increasingly, the success or failure of many politicians depends on their getting Government contracts for their areas, and when they are success-

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162. PECK & SCHERER, *op. cit. supra* note 118, at ch. 2-3.

163. Atomic Energy Act, 68 Stat. 919 (1954), as amended, 42 U.S.C. §§ 2011-2281 (1958).

164. Recent proposals in New York to place restrictions on the number of liquor package store outlets, and to end price control, met with strong opposition from the liquor industry, *N.Y. Times*, Jan. 16, 1964, p. 47, col. 4; p. 54, col. 2.

165. *Ragan v. City of Seattle*, 58 Wash. 2d 779, 364 P.2d 916 (1961). The ordinance apparently had the effect of freezing the juke box licenses in the hands of those presently holding them, but placed no effective limitation on the number of juke boxes in the city each operator could have. The court acknowledged that the ordinance seemed to have this effect, but said that the question was one for the City Council. Mallery, J., dissenting, said: "Licensing legislation is more often than not sought by an organized group of the particular persons to be licensed. Such measures, therefore, must be scrutinized to insure that licenses are available to all eligible persons upon terms of equality to the end that public protection, rather than special privilege, shall be implemented thereby." 58 Wash. 2d at 787-88, 364 P.2d at 921 (1961).

166. See, *e.g.*, *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1957).

ful these contracts are so large that the companies concerned are lavish with campaign contributions, or legal fees, or favors of other kinds.<sup>167</sup>

The so-called "think institute," a product of the fashion for group research and development, raises partnership to a new level. In effect the government hires a private enterprise to do its thinking. The government directs a steady flow of largess to the enterprise, and in return is told what it should think on a variety of subjects; what it is told very likely will have an impact on the future flow of largess. Thus a significant governmental power is actually placed in private hands, and the private group is supported in its power by public funds.<sup>168</sup>

Public-private partnerships attain their greatest significance when they are translated into power. Sometimes private elements are able to take over the vast governmental powers deriving from largess, and use them for their own purposes. Thus, an exercise of governmental power may reflect the standards of the dominant group in an industry or occupation, and represent an effort to enforce these standards on others. The Isbrandtsen Company's troubles with government agencies reflect the difficulties of the rate-cutter.<sup>169</sup> The organized bar's greater concern with "ambulance chasing" than with other ethical failings reflects the dominant group's suspicion of the negligence lawyer. The revocation of the license of a radio station in Kingstree, Georgia, for broadcasting "vulgar" jokes,<sup>170</sup> contrasts sharply with the failure of the FCC to criticize vulgarity on the large television networks. *Barsky v. Board of Regents*,<sup>171</sup> where a physician with a record of unpopular political activities was suspended from practice, might also be deemed an illustration. Licensing creates a guild system, in which an industry or occupational group can police itself.<sup>172</sup> By these means an oligarchy dominates, competition is suppressed, and minority behavior restrained. It need hardly be added that the concept of "good moral character" takes its content from majority values, as does the whole system of security clearances. Industrial security requirements allow management to impose on its employees a degree of orthodoxy foreign to ordinary employment policies or collective bargaining.<sup>173</sup>

167. James Reston, N.Y. Times, Oct. 30, 1963, p. 38, col. 3.

168. See Hart, *supra* note 96.

169. See Smith, *Isbrandtsen — High Stakes on the High Seas*, Fortune, Oct. 1961, p. 223.

170. *In re Palmetto Broadcasting Co.*, 23 Pike & Fisher, Radio Regulation 483 (1962).

171. 347 U.S. 442 (1954).

172. See, e.g., *Beatty v. State Board*, 352 Pa. 565, 43 A.2d 127 (1945), showing how the undertaking profession can make its own definitions of professional misconduct on a case-to-case basis, and enforce them by license revocation.

Under the Agricultural Adjustment Act of 1938, a committee of eligible producers is empowered to make decisions affecting the interests of their fellow producers. See *Kephart v. Wilson*, 219 F. Supp. 801, 827 (W.D. Tex. 1963).

173. When an employer not in defense work, and acting on his own initiative, dismisses an employee on political grounds, government largess may still play a role. The right to unemployment compensation sometimes depends upon whether the claimant was

In any society with powerful or dominant private groups, it is not unexpected that governmental systems of power will be utilized by private groups. Hence the frequency with which regulatory agencies are taken over by those they are supposed to regulate.<sup>174</sup> Significantly, most of these agencies are also the chief federal dispensers of largess. They quarrel with the industries they regulate, but seen in a larger perspective these quarrels are all in the family. In sum, the great system of power created by government largess is a ready means to further some private groups, and not merely an advance in the position of government over that which is "private" in society as a whole.

#### D. *The New Feudalism*

The characteristics of the public interest state are varied, but there is an underlying philosophy that unites them. This is the doctrine that the wealth that flows from government is held by its recipients conditionally, subject to confiscation in the interest of the paramount state. This philosophy is epitomized in the most important of all judicial decisions concerning government largess, the case of *Flemming v. Nestor*.<sup>175</sup>

Ephram Nestor, an alien, came to this country in 1913, and after a long working life became eligible in 1955 for old-age benefits under the Social Security Act. From 1936 to 1955 Nestor and his employers had contributed payments to the government which went into a special old-age and survivors insurance trust fund. From 1933 to 1939 Nestor was a member of the Communist Party. Long after his membership ceased, Congress passed a law retroactively making such membership cause for deportation, and a second law, also retroactive, making such deportation for having been a member of the Party grounds for loss of retirement benefits. In 1956 Nestor was deported, leaving his wife here. Soon after his deportation, payment of benefits to Nestor's wife was terminated.

In a five to four decision, the Supreme Court held that cutting off Nestor's retirement insurance, although based on conduct completely lawful at the time, was not unconstitutional. Specifically, it was not a taking of property without

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discharged from work for misconduct. In *Ault Unemployment Compensation Case*, 398 Pa. 250, 157 A.2d 375 (1960) an employee was discharged after he invoked the fifth amendment in testifying before a Senate committee. Thereafter he was denied unemployment compensation on the ground that he had been guilty of wilful misconduct connected with his work. The Pennsylvania Court reversed. It likewise reversed a denial of compensation where the employer believed the dismissed employee was a Communist. *Darin Unemployment Compensation Case*, 398 Pa. 259, 157 A.2d 407 (1960). The Maryland court reached a result similar to *Ault* in *Fino v. Maryland Employment Security Board*, 218 Md. 504, 147 A.2d 738 (1958). But in *Ostrowsky v. Maryland Employment Security Board*, 218 Md. 509, 147 A.2d 741 (1958) it was held that an employee's refusal to answer questions about communist affiliation at a hearing held by the company (the company being engaged in defense work) did constitute misconduct.

174. See, e.g., Huntington, *The Marasmus of the ICC: The Commission, The Railroads, and The Public Interest*, 61 YALE L.J. 467 (1952).

175. 363 U.S. 603 (1960).

due process of law; Nestor's benefits were not an "accrued property right."<sup>176</sup> The Court recognized that each worker's benefits flow "from the contributions he made to the national economy while actively employed," but it held that his interest is "noncontractual" and "cannot be soundly analogized to that of the holder of an annuity."<sup>177</sup> The Court continued:

To engraft upon the Social Security system a concept of "accrued property rights" would deprive it of the flexibility and boldness in adjustment of ever-changing conditions which it demands . . . It was doubtless out of an awareness of the need for such flexibility that Congress included . . . a clause expressly reserving to it "[t]he right to alter, amend or repeal any provision" of the Act. . . . That provision makes express what is implicit in the institutional needs of the program.<sup>178</sup>

The Court stated further that, in any case where Congress "modified" social security rights, the Court should interfere only if the action is "utterly lacking in rational justification."<sup>179</sup> This, the Court said, "is not the case here." As the Court saw it, it might be deemed reasonable for Congress to limit payments to those living in this country; moreover, the Court thought it would not have been "irrational for Congress to have concluded that the public purse should not be utilized to contribute to the support of those deported on the grounds specified in the statute."<sup>180</sup>

The implications of *Flemming v. Nestor* are profound. No form of government largess is more personal or individual than an old age pension. No form is more clearly earned by the recipient, who, together with his employer, contributes to the Social Security fund during the years of his employment. No form is more obviously a compulsory substitute for private property; the tax on wage earner and employer might readily have gone to higher pay and higher private savings instead. No form is more relied on, and more often thought of as property. No form is more vital to the independence and dignity of the individual. Yet under the philosophy of Congress and the Court, a man or woman, after a lifetime of work, has no rights which may not be taken away to serve some public policy. The Court makes no effort to balance the interests at stake. The public policy that justifies cutting off benefits need not even be an important one or a wise one — so long as it is not utterly irrational, the Court will not interfere. In any clash between individual rights and public policy, the latter is automatically held to be superior.

The philosophy of *Flemming v. Nestor*, of *Barsky*, *In Re Anastaplo*, and *Cohen v. Hurley*, resembles the philosophy of feudal tenure. Wealth is not "owned," or "vested" in the holders. Instead, it is held conditionally, the conditions being ones which seek to ensure the fulfillment of obligations imposed by the state. Just as the feudal system linked lord and vassal through a system

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176. *Id.* at 608.

177. *Id.* at 609-10.

178. *Id.* at 610-11.

179. *Id.* at 611.

180. *Id.* at 612.

of mutual dependence, obligation, and loyalty, so government largess binds man to the state.<sup>181</sup> And, it may be added, loyalty or fealty to the state is often one of the essential conditions of modern tenure. In the many decisions taking away government largess for refusal to sign loyalty oaths, belonging to "subversive" organizations, or other similar grounds, there is more than a suggestion of the condition of fealty demanded in older times.

The comparison to the general outlines of the feudal system may best be seen by recapitulating some of the chief features of government largess. (1) Increasingly we turn over wealth and rights to government, which reallocates and redistributes them in the many forms of largess; (2) there is a merging of public and private, in which lines of private ownership are blurred; (3) the administration of the system has given rise to special laws and special tribunals, outside the ordinary structure of government; (4) the right to possess and use government largess is bound up with the recipient's legal status; status is both the basis for receiving largess and a consequence of receiving it; hence the new wealth is not readily transferable; (5) individuals hold the wealth conditionally rather than absolutely; the conditions are usually obligations owed to the government or to the public, and may include the obligation of loyalty to the government; the obligations may be changed or increased at the will of the state; (6) for breach of condition the wealth may be forfeited or escheated back to the government; (7) the sovereign power is shared with large private interests; (8) the object of the whole system is to enforce "the public interest" — the interest of the state or society or the lord paramount — by means of the distribution and use of wealth in such a way as to create and maintain dependence.

This feudal philosophy of largess and tenure may well be a characteristic of collective societies, regardless of their political systems. According to one scholar, national socialism regarded property as contingent upon duties owed the state; Nazism denied the absolute character of property and imposed obligations conditioning property tenure: "In practice the development seems to have been toward a concept of property based on the superior right of the overlord."<sup>182</sup> In Soviet Russia, the trend reportedly has been somewhat similar, although starting from a different theoretical point. After denying the existence of private property, the Soviets have developed quasi-property, amounting to the right to use and to have exclusive possession for a period of years. Earnings in Russia are also in a sense property, but computed in accordance with the individual's contribution to the state.<sup>183</sup>

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181. See generally BLOCH, *FEUDAL SOCIETY* (1961). Personal dependence was a fundamental element of feudalism, expressed in the concept of being the "man" of another man. *Id.* at 145.

182. Wunderlich, *The National Socialist Conception of Landed Property*, 12 *SOCIAL RESEARCH* 60, 75 (1945).

183. See GSOVSKI, *SOVIET CIVIL LAW* 106-07, 573-74, 582 (1948); HAZARD, *LAW AND SOCIAL CHANGE IN THE U.S.S.R.* 133 (1953).

The public interest state is not with us yet. But we are left with large questions. If the day comes when most private ownership is supplanted by government largess, how then will governmental power over individuals be contained? What will dependence do to the American character? What will happen to the Constitution, and particularly the Bill of Rights, if their limits may be bypassed by purchase, and if people lack an independent base from which to assert their individuality and claim their rights? Without the security of the person which individual wealth provides and which largess fails to provide, what, indeed, will we become?

#### IV. PROPERTY AND THE PUBLIC INTEREST: AN OLD DEBATE REVISITED

The public interest state, as visualized above, represents in one sense the triumph of society over private property. This triumph is the end point of a great and necessary movement for reform. But somehow the result is different from what the reformers wanted. Somehow the idealistic concept of the public interest has summoned up a doctrine monstrous and oppressive. It is time to take another look at private property, and at the "public interest" philosophy that dominates its modern substitute, the largess of government.

##### A. *Property and Liberty*

Property is a legal institution the essence of which is the creation and protection of certain private rights in wealth of any kind. The institution performs many different functions. One of these functions is to draw a boundary between public and private power. 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. It is as if property shifted the burden of proof; outside, the individual has the burden; inside, the burden is on government to demonstrate that something the owner wishes to do should not be done.

Thus, property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner. Whim, caprice, irrationality and "antisocial" activities are given the protection of law; the owner may do what all or most of his neighbors decry. The Bill of Rights also serves this function, but while the Bill of Rights comes into play only at extraordinary moments of conflict or crisis, property affords day-to-day protection in the ordinary affairs of life. Indeed, in the final analysis the Bill of Rights depends upon the existence of private property. Political rights presuppose that individuals and private groups have the will and the means to act independently. But so long as individuals are motivated largely by self-interest, their well-being must first be independent. Civil liberties must have a basis in property, or bills of rights will not preserve them.

Property is not a natural right but a deliberate construction by society. If such an institution did not exist, it would be necessary to create it, in order

to have the kind of society we wish. The majority cannot be expected, on specific issues, to yield its power to a minority. Only if the minority's will is established as a general principle can it keep the majority at bay in a given instance. Like the Bill of Rights, property represents a general, long range protection of individual and private interests, created by the majority for the ultimate good of all.

Today, however, it is widely thought that property and liberty are separable things; that there may, in fact, be conflicts between "property rights" and "personal rights." Why has this view been accepted? The explanation is found at least partly in the transformations which have taken place in property.

During the industrial revolution, when property was liberated from feudal restraints, philosophers hailed property as the basis of liberty, and argued that it must be free from the demands of government or society.<sup>184</sup> But as private property grew, so did abuses resulting from its use. In a crowded world, a man's use of his property increasingly affected his neighbor, and one man's exercise of a right might seriously impair the rights of others. Property became power over others; the farm landowner, the city landlord, and the working man's boss were able to oppress their tenants or employees. Great aggregations of property resulted in private control of entire industries and basic services capable of affecting a whole area or even a nation. At the same time, much private property lost its individuality and in effect became socialized. Multiple ownership of corporations helped to separate personality from property, and property from power.<sup>185</sup> When the corporations began to stop competing, to merge, agree, and make mutual plans, they became private governments. Finally, they sought the aid and partnership of the state, and thus by their own volition became part of public government.

These changes led to a movement for reform, which sought to limit arbitrary private power and protect the common man. Property rights were considered more the enemy than the friend of liberty. The reformers argued that property must be separated from personality.<sup>186</sup> Walton Hamilton wrote:

As late as the turn of the last century justices were not yet distinguishing between liberty and property; in the universes beneath their hats liberty was still the opportunity to acquire property.

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. . . the property of the Reports is not a proprietary thing; it is rather a shibboleth in whose name the domain of business enterprises has enjoyed a limited immunity from the supervision of the state.

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184. See generally Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938); Hamilton & Till, *Property*, 12 ENCYC. SOC. SCI. 528 (1934); FREUND, *THE SUPREME COURT OF THE UNITED STATES* 31-40 (1961).

185. See generally BERLE & MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); and BERLE, *POWER WITHOUT PROPERTY* (1957).

186. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 732 (1938).



In the annals of the law property is still a vestigial expression of personality and owes its current constitutional position to its former association with liberty.<sup>187</sup>

During the first half of the twentieth century, the reformers enacted into law their conviction that private power was a chief enemy of society and of individual liberty. Property was subjected to "reasonable" limitations in the interests of society. The regulatory agencies, federal and state, were born of the reform. In sustaining these major inroads on private property, the Supreme Court rejected the older idea that property and liberty were one, and wrote a series of classic opinions upholding the power of the people to regulate and limit private rights.

The struggle between abuse and reform made it easy to forget the basic importance of individual private property. The defense of private property was almost entirely a defense of its abuses—an attempt to defend not individual property but arbitrary private power over other human beings. Since this defense was cloaked in a defense of private property, it was natural for the reformers to attack too broadly. Walter Lippmann saw this in 1934:

But the issue between the giant corporation and the public should not be allowed to obscure the truth that the only dependable foundation of personal liberty is the economic security of private property.

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For we must not expect to find in ordinary men the stuff of martyrs, and we must, therefore, secure their freedom by their normal motives. There is no surer way to give men the courage to be free than to insure them a competence upon which they can rely.<sup>188</sup>

The reform took away some of the power of the corporations and transferred it to government. In this transfer there was much good, for power was made responsive to the majority rather than to the arbitrary and selfish few. But the reform did not restore the individual to his domain. What the corporation had taken from him, the reform simply handed on to government. And government carried further the powers formerly exercised by the corporation. Government as an employer, or as a dispenser of wealth, has used the theory that it was handing out gratuities to claim a managerial power as great as that which the capitalists claimed. Moreover, the corporations allied themselves with, or actually took over, part of government's system of power. Today it is the combined power of government and the corporations that presses against the individual.

187. Hamilton, *Property — According to Locke*, 41 YALE L.J. 864, 877-78 (1932); see also Hamilton & Till, *supra* note 184, at 528.

188. LIPPMANN, *THE METHOD OF FREEDOM* 101 (1934). See also Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938):

It is not, however, the use of ordinary property, nor the property of ordinary or "natural" persons that presents today serious problems of adjusting law to new social conditions. Those problems arise in connection with property for power, and therefore primarily in connection with industrial property.

*Id.* at 726.

From the individual's point of view, it is not any particular kind of power, but all kinds of power, that are to be feared. This is the lesson of the public interest state. The mere fact that power is derived from the majority does not necessarily make it less oppressive. Liberty is more than the right to do what the majority wants, or to do what is "reasonable." Liberty is the right to defy the majority, and to do what is unreasonable. The great error of the public interest state is that it assumes an identity between the public interest and the interest of the majority.

The reform, then, has not done away with the importance of private property. More than ever the individual needs to possess, in whatever form, a small but sovereign island of his own.

### B. *Largess and the Public Interest*

The fact that the reform tended to make much private wealth subject to "the public interest" has great significance, but it does not adequately explain the dependent position of the individual and the weakening of civil liberties in the public interest state. The reformers intended to enhance the values of democracy and liberty; their basic concern was the preservation of a free society. But after they established the primacy of "the public interest," what meaning was given to that phrase? In particular, what values does it embody as it has been employed to regulate government largess?

Reduced to simplest terms, "the public interest" has usually meant this: government largess may be denied or taken away if this will serve some legitimate public policy. The policy may be one directly related to the largess itself, or it may be some collateral objective of government. A contract may be denied if this will promote fair labor standards. A television license may be refused if this will promote the policies of the antitrust laws. Veterans benefits may be taken away to promote loyalty to the United States. A liquor license may be revoked to promote civil rights. A franchise for a barber's college may not be given out if it will hurt the local economy, nor a taxi franchise if it will seriously injure the earning capacity of other taxis.

Most of these objectives are laudable, and all are within the power of government. The great difficulty is that they are simplistic. Concentration on a single policy or value obscures other values that may be at stake. Some of these competing values are other public policies; for example, the policy of the best possible television service to the public may compete with observance of the antitrust laws. The legislature is the natural arbiter of such conflicts. But the conflicts may also be more fundamental. In the regulation of government largess, achievement of specific policy goals may undermine the independence of the individual. Where such conflicts exist, a simplistic notion of the public interest may unwittingly destroy some values.

Judges tend to limit their sights to a single issue. In *Nadiak v. CAB*,<sup>189</sup> an airline pilot was grounded for a variety of reasons, some of them admittedly trivial. In upholding the action of the Board, the court said:

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189. 305 F.2d 588 (5th Cir. 1962).

The public—including judges who fly—has a vital interest in air safety. Responsibility for air safety has been placed in the administrative hands of those deemed by Congress to have an expert competence. Air safety was of primary importance in the adjudication of this case. The determination was that air safety would be promoted by the certificate revocation.<sup>190</sup>

*Barsky v. Board of Regents*<sup>191</sup> shows how one-sided the public interest concept may become. New York State suspended a doctor's license because he committed the crime of contempt of Congress. The Supreme Court, upholding this, identified the public interest as the state's "broad power to establish and enforce standards of conduct relative to the health of everyone there,"<sup>192</sup> and the "state's legitimate concern for maintaining high standards of professional conduct."<sup>193</sup> But what about the importance of giving doctors security in their professions? What about the benefits to the state from having physicians who are independent of administrative control? Not only were these ignored by the state and the court; no effort was even made to show how the suspension promoted the one public policy that was named (high professional standards for those concerned with public health). As Justice Frankfurter said,

It is one thing to recognize the freedom which the constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession.<sup>194</sup>

In *Flemming v. Nestor*<sup>195</sup> the concept of the public interest is distorted even more. It was given a meaning injurious to the independence of millions of persons. At stake was the security of the old age Social Security pension system, together with all the social values which might flow from assuring old people a stable, dignified, and independent basis of retirement. Yet Congress and the Supreme Court jeopardized all these values to serve a public policy both trivial and vindictive—the punishment of a few persons for Communist Party membership now long past.

The public interest has also failed to take account of the more specific values of the Bill of Rights. In a case where a radio operator was denied a license for pleading the fifth amendment, the court said :

The Fifth Amendment privilege protects a person who invokes it from self-accusation; but when he seeks a license at the hands of an agency acting under the standard of the public interest, and information substantially relevant to that standard is withheld under the privilege, as may be done, the need for the information and the cooperation of the applicant with respect to it remains. The agency cannot be required to act without the information.<sup>196</sup>

190. *Id.* at 595.

191. *Barsky v. Board of Regents*, 347 U.S. 442 (1954).

192. *Id.* at 449.

193. *Id.* at 451.

194. *Id.* at 470 (dissenting opinion).

195. 363 U.S. 603 (1960).

196. *Blumenthal v. FCC*, 318 F.2d 276, 279 (D.C. Cir. 1963).

Referring to a law that requires a motorist to submit to a drunkenness test, waiving his state privilege against self-incrimination, or lose his driver's license, the New York Supreme Court said:

Bearing in mind the purpose of the statute and that highway safety is a matter of great concern to the public, it may not be held that it is unreasonable or beyond legislative power to put such a choice to a motorist who is accused upon reasonable grounds of driving while intoxicated.<sup>197</sup>

Another court concluded that a radio operator's freedom of political association could be restricted by FCC action in these words:

Borrow says his First Amendment Rights are being infringed. We cannot agree. . . . The public interest must be served. He desires to operate a facility which in the public interest is necessarily licensed by the Government. He has affirmative standards to meet in order to secure a license, just as do doctors, lawyers, barbers, and lenders of money.<sup>198</sup>

One of the most striking instances of public interest definition in the area of constitutional rights is *Konigsberg v. State Bar*.<sup>199</sup> Konigsberg refused to tell the state bar examiners whether he was or ever had been a member of the Communist Party, arguing that such questions infringed his constitutional rights of free thought, association and expression. Despite substantial evidence of his good character, none of which was rebutted, and despite his uncontradicted statement that he did not believe in violent overthrow of the government, and did not belong to any organization advocating violent overthrow, Konigsberg was refused admission to the bar. The U.S. Supreme Court upheld the refusal. Acknowledging that the questions did involve some deterrence of free speech, the Court said that its decision must depend upon "an appropriate weighing of the respective interests involved."<sup>200</sup> It then reached this conclusion:

[W]e regard the State's interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented.<sup>201</sup>

In none of these cases did the courts attempt to assign any weight to the value of unfettered exercise of constitutional rights. Nor did the courts consider what effect their decisions might have on the constitutional rights of motorists, radio operators, businessmen or lawyers generally. Each case was treated as if it existed in isolation—as if each individual's case concerned him alone.

This fundamental fallacy—treating the "individual interest" as affecting only the party to the case—runs through many of the public interest decisions

197. *Schutt v. Macduff*, 205 Misc. 43, 48 (Sup. Ct. 1954).

198. *Borrow v. FCC*, 285 F.2d 666, 670 (D.C. Cir. 1960).

199. 366 U.S. 36 (1961).

200. *Id.* at 51.

201. *Id.* at 52.

concerning largess. In a case where the Securities and Exchange Commission suspended a broker-dealer for an alleged violation—without a hearing—the Court of Appeals for the District of Columbia “balanced” the interests involved as follows: “protection of the securities-purchasing public” against the individual’s “interest in continuing to issue public offerings of securities.”<sup>202</sup> The court found the “public’s interest” to be the weightier. In deciding whether to revoke a broker-dealer registration for misconduct, another court remarked: “The balancing of *private detriment* against *public harm* requires the fair and proper exercise by the Commission of its discretionary powers.”<sup>203</sup> In upholding the suspension of a driver’s license without a hearing, the Court of Appeals for the First Circuit said:

We have no doubt that these provisions of law are reasonable regulations in the interest of safeguarding lives and property from highway accidents. The incidental hardship upon an individual motorist, in having his license suspended pending investigation and review, must be borne in deference to the greater public interest served by the statutory restriction.<sup>204</sup>

If this is the method of balancing, the result is a foregone conclusion:

We conclude that . . . insofar as the circumstances imposed hardship upon the individual, the exigencies of government in the public interest under current conditions must prevail, as they always must where a similar clash arises.<sup>205</sup>

It is not the reformers who must bear the blame for the harmful consequences of the public interest state, but those who are responsible for giving “the public interest” its present meaning. If “the public interest” distorts the reformers’ high purposes, this is so because the concept has been so gravely misstated. Government largess, like all wealth, must necessarily be regulated in the public interest. But regulation must take account of the dangers of dependence, and the need for a property base for civil liberties. Rightly conceived, the public interest is no justification for the erosion of freedom that has resulted from the present system of government largess.<sup>206</sup>

202. *R. A. Holman & Co. v. SEC*, 299 F.2d 127, 132 (D.C. Cir. 1962).

203. *Associated Sec. Corp. v. SEC*, 293 F.2d 738, 741 (10th Cir. 1961) (emphasis supplied).

204. *Wall v. King*, 206 F.2d 878, 883 (1st Cir. 1953). See also *Gnecchi v. State*, 58 Wash. 2d 467, 364 P.2d 225 (1961), where a dissenting judge said: “I cannot conceive of a situation where there is a necessity to suspend a license without a hearing if the suspension imposed is for no more than sixty days. What happens to the safety of the public after sixty days? The purpose of such ‘suspension is primarily punishment, and there is no reason why a hearing should not precede the suspension.’” *Id.* at 477, 364 P.2d at 232.

205. *Bailey v. Richardson*, 182 F.2d 46, 65 (D.C. Cir. 1950).

206. See generally GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS* 105-57 (1956) (Chapter III, “The Right to Make a Living”). Although it speaks in different terms, and is limited to occupational licensing Professor Gellhorn’s discussion is a most perceptive analysis of the meaning of “the public interest.” See also SCHUBERT, *THE PUBLIC INTEREST* (1960) for an elaborate analysis of differing public interest theories.

## V. TOWARD INDIVIDUAL STAKES IN THE COMMONWEALTH

Ahead there stretches—to the farthest horizon—the joyless landscape of the public interest state. The life it promises will be comfortable and comforting. It will be well planned—with suitable areas for work and play. But there will be no precincts sacred to the spirit of individual man.

There can be no retreat from the public interest state. It is the inevitable outgrowth of an interdependent world. An effort to return to an earlier economic order would merely transfer power to giant private governments which would rule not in the public interest, but in their own interest. If individualism and pluralism are to be preserved, this must be done not by marching backwards, but by building these values into today's society. If public and private are now blurred, it will be necessary to draw a new zone of privacy. If private property can no longer perform its protective functions, it will be necessary to establish institutions to carry on the work that private property once did but can no longer do.

In these efforts government largess must play a major role. As we move toward a welfare state, largess will be an ever more important form of wealth. And largess is a vital link in the relationship between the government and private sides of society. It is necessary, then, that largess begin to do the work of property.

The chief obstacle to the creation of private rights in largess has been the fact that it is originally public property, comes from the state, and may be withheld completely. But this need not be an obstacle. Traditional property also comes from the state, and in much the same way. Land, for example, traces back to grants from the sovereign. In the United States, some was the gift of the King of England, some that of the King of Spain. The sovereign extinguished Indian title by conquest, became the new owner, and then granted title to a private individual or group.<sup>207</sup> Some land was the gift of the sovereign under laws such as the Homestead and Preemption Acts.<sup>208</sup> Many other natural resources—water, minerals and timber, passed into private ownership under similar grants. In America, land and resources all were originally government largess. In a less obvious sense, personal property also stems from government. Personal property is created by law; it owes its origin and continuance to laws supported by the people as a whole. These laws "give" the property to one who performs certain actions. Even the man who catches a wild animal "owns" the animal only as a gift from the sovereign, having fulfilled the terms of an offer to transfer ownership.<sup>209</sup>

Like largess, real and personal property were also originally dispensed on conditions, and were subject to forfeiture if the conditions failed. The conditions in the sovereign grants, such as colonization, were generally made explicit, and so was the forfeiture resulting from failure to fulfill them. In the case of the Preemption and Homestead Acts, there were also specific con-

207. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

208. 5 Stat. 453, 455 (Sept. 4, 1841), 12 Stat. 392 (May 20, 1862).

209. *Pierson v. Post*, 3 Cai. R. 175 (1805).

ditions.<sup>210</sup> Even now land is subject to forfeiture for neglect; if it is unused it may be deemed abandoned to the state or forfeited to an adverse possessor. In a very similar way, personal property may be forfeited by abandonment or loss.<sup>211</sup> Hence, all property might be described as government largess, given on condition and subject to loss.

If all property is government largess, why is it not regulated to the same degree as present-day largess? Regulation of property has been limited, not because society had no interest in property, but because it was in the interest of society that property be free. Once property is seen not as a natural right but as a construction designed to serve certain functions, then its origin ceases to be decisive in determining how much regulation should be imposed. The conditions that can be attached to receipt, ownership, and use depend not on where property came from, but on what job it should be expected to perform. Thus in the case of government largess, nothing turns on the fact that it originated in government. The real issue is how it functions and how it should function.

To create an institution, or to make an existing institution function in a new way, is an undertaking far too ambitious for the present article. But it is possible to begin a search for guiding principles. Such principles must grow out of what we know about how government largess has functioned up to the present time. And while principles must remain at the level of generality, it should be kept in mind that not every principle is equally applicable to all forms of largess. Our primary focus must be those forms of largess which chiefly control the rights and status of the individual.

#### A. *Constitutional Limits*

The most clearly defined problem posed by government largess is the way it can be used to apply pressure against the exercise of constitutional rights. A first principle should be that government must have no power to "buy up" rights guaranteed by the Constitution.<sup>212</sup> It should not be able to impose any condition on largess that would be invalid if imposed on something other than a "gratuity."<sup>213</sup> Thus, for example, government should not be able to deny largess because of invocation of the privilege against self-incrimination.<sup>214</sup>

210. The Homestead Act had conditions of age, citizenship, intention to settle was cultivated, and loyalty to the United States. 12 Stat. 392 (1862).

211. *Mullett v. Bradley*, 24 Misc. 695, 53 N.Y. Supp. 781 (1898); *Bridges v. Hawkesworth*, 21 L.J. Rep. 75 (Q.B. 1851).

212. Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1599 (1960).

213. Compare Calabresi, *Retroactivity: Paramount Powers and Contractual Changes*, 71 YALE L.J. 1191 (1962). In the context of legislation dealing with government obligations, Professor Calabresi argues that certain regulation can only be justified by a "paramount power of government" (e.g., the commerce power) rather than power incidental to the obligation itself.

214. Judge Curtis Bok wrote:

We are unwilling to engraft upon our law the notion, nowhere so decided, that unemployment benefits may be denied because of raising the bar of the [Fifth] Amendment against rumor or report of disloyalty or because of refusing to answer

This principle is in a sense a revival of the old but neglected rule against unconstitutional conditions, as enunciated by the Supreme Court:

Broadly stated, the rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal constitution.<sup>215</sup>

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If the state may compel the surrender of one constitutional right as a condition of its favor, it may in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.<sup>216</sup>

The courts in recent times have gone part of the distance toward this principle. In 1958 the Supreme Court held that California could not use the gratuity theory to deny a tax exemption to persons engaged in certain political activities:

To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the state were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or a "bounty," its denial may not infringe speech.<sup>217</sup>

In 1963 the Court followed this reasoning in the important case of *Sherbert v. Verner*.<sup>218</sup> South Carolina provided unemployment compensation, but required recipients to accept suitable employment when it became available, or lose their benefits. An unemployed woman was offered a job requiring her to work Saturdays, but she refused it because she was a Seventh Day Adventist, to whom Saturday was the Sabbath—a day when work was forbidden. The state thereafter refused to pay her any unemployment benefits. The Supreme Court reversed this action:

The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Nor may the South Carolina Court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon

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such rumor or report. The possible abuses of such a doctrine are shocking to imagine. . . .

Ault Unemployment Compensation Case, 398 Pa. 250, 259, 157 A.2d 375, 380 (1960).

215. *United States v. Chicago, M., St. P. & P.R.R.*, 282 U.S. 311, 328-29 (1931).

216. *Frost & Frost Co. v. Railroad Comm'n*, 271 U.S. 583, 594 (1926); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935). The latter is an elaborate study of the older cases on the Federal conditioning power.

217. *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

218. 374 U.S. 398 (1963).



a benefit or privilege . . . [To] condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.<sup>219</sup>

In a somewhat different setting, the District of Columbia Court of Appeals reached an analogous result. The Civil Aeronautics Board attempted to issue a letter of registration to an irregular carrier in terms making the registration subject to suspension without a hearing. The agency claimed that, since it was granting the carrier an exemption from statutory requirements, a form of gratuity, it could provide that suspension might be without a hearing. The court said:

The government cannot make a business dependent upon a permit and make an otherwise unconstitutional requirement a condition to the permit.<sup>220</sup>

On the state level there have been some rather similar decisions.<sup>221</sup>

The problem becomes more complicated when a court attempts, as current doctrine seems to require, to "balance" the deterrence of a constitutional right against some opposing interest. In any balancing process, no weight should be given to the contention that what is at stake is a mere gratuity. It should be recognized that pressure against constitutional rights from denial of a "gratuity" may be as great or greater than pressure from criminal punishment. And the concept of the public interest should be given a meaning broad enough to include general injury to independence and constitutional rights.<sup>222</sup> It is not possible to consider detailed problems here. It is enough to

219. *Id.* at 404-06.

220. *Standard Airlines v. CAB*, 177 F.2d 18, 20 (D.C. Cir. 1949).

221. In California a political test for use of school auditoriums for holding public meetings was upset:

Nor can it [the State] make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property.

*Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 545-46, 171 P.2d 885 (1946); *ACLU v. Board of Educ.*, 55 Cal. 2d 167, 10 Cal. Rptr. 647, 359 P.2d 45 (1961). See also *Syrek v. California Unemployment Ins. Appeals Bd.*, 2 Cal. Rptr. 40, 47 (Ct. App. 1960), *aff'd*, 54 Cal. 2d 519, 7 Cal. Rptr. 97 (1960).

222. The approach of the Court of Appeals for the Ninth Circuit in *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955) might serve as a model:

What we must balance in the scales here does not involve a choice between any security screening program and the protection of individual seamen. Rather we must weigh against the rights of the individual to the traditional opportunity for notice and hearing, the public need for a *screening system which denies such right to notice and hearing*. Granted that the Government may adopt appropriate means for excluding security risks from employment on merchant vessels, what is the factor of public interest and necessity which requires that it be done in the manner here adopted?

*Id.* at 718.

Later the Court added:

It is not a simple case of sacrificing the interests of a few to the welfare of the many. In weighing the considerations of which we are mindful here, we must

say that government should gain no power, as against constitutional limitations, by reason of its role as a dispenser of wealth.

### B. *Substantive Limits*

Beyond the limits deriving from the Constitution, what limits should be imposed on governmental power over largess? Such limits, whatever they may be, must be largely self-imposed and self-policed by legislatures; the Constitution sets only a bare minimum of limitations on legislative policy. The first type of limit should be on relevance. It has proven possible to argue that practically anything in the way of regulation is relevant to some legitimate legislative purpose. But this does not mean that it is desirable for legislatures to make such use of their powers. As Justice Douglas said in the *Barsky* case:

So far as I know, nothing in a man's political beliefs disables him from setting broken bones or removing ruptured appendixes, safely and efficiently. A practicing surgeon is unlikely to uncover many state secrets in the course of his professional activities.<sup>223</sup>

Courts sometimes manage, by statutory construction, to place limits on relevance. One example is the judicial reaction to attempts to ban "disloyal tenants" from government aided housing projects. The Illinois Court said:

The purpose of the Illinois Housing Authorities Act is to eradicate slums and provide housing for persons of low-income class. . . . It is evident that the exclusion of otherwise qualified persons solely because of membership in organizations designated as subversive by the Attorney General has no tendency whatever to further such purpose. . . . A construction of section 27 which would enable the housing authority to prescribe conditions of eligibility having no rational connection with the purpose of the act would raise serious constitutional questions.<sup>224</sup>

And the Wisconsin Court said:

Counsel for the defendant Authority have failed to point out to this court how the occupation of any units of a federally aided housing project by tenants who may be members of a subversive organization threatens the successful operation of such housing projects.<sup>225</sup>

It is impossible to confine the concept of relevance. But legislatures should strive for a meaningful, judicious concept of relevance if regulation of largess is not to become a handle for regulating everything else.

Besides relevance, a second important limit on substantive power might be concerned with discretion. To the extent possible, delegated power to make

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recognize that if these regulations may be sustained, similar regulations may be made effective in respect to other groups as to whom Congress may next choose to express its legislative fears.

*Id.* at 721.

223. *Barsky v. Board of Regents*, 347 U.S. 442, 472, 474 (1954) (Douglas, J., dissenting).

224. *Chicago Housing Authority v. Blackman*, 4 Ill. 2d 319, 326, 122 N.E.2d 522, 526 (1954). See also *Housing Authority v. Cordova*, 130 Cal. App. 2d 883, 279 P.2d 215 (Super. Ct. 1955).

225. *Lawson v. Housing Authority*, 270 Wis. 269, 287, 70 N.W.2d 605, 615 (1955).

rules ought to be confined within ascertainable limits, and regulating agencies should not be assigned the task of enforcing conflicting policies. Also, agencies should be enjoined to use their powers only for the purposes for which they were designed.<sup>226</sup> In a perhaps naïve attempt to accomplish this, Senator Lausche introduced a bill to prohibit United States government contracting officers from using their contracting authority for purposes of duress. This bill in its own words, would prohibit officials from denying contracts, or the right to bid on contracts, with the intent of forcing the would-be contractor to perform or refrain from performing any act which such person had no legal obligation to perform or not perform.<sup>227</sup> Although this bill might not be a very effective piece of legislation, it does suggest a desirable objective.

A final limit on substantive power, one that should be of growing importance, might be a principle that policy making authority ought not to be delegated to essentially private organizations. The increasing practice of giving professional associations and occupational organizations authority in areas of government largess tends to make an individual subject to a guild of his fellows. A guild system, when attached to government largess, adds to the feudal characteristics of the system.

### C. *Procedural Safeguards*

Because it is so hard to confine relevance and discretion, procedure offers a valuable means for restraining arbitrary action. This was recognized in the strong procedural emphasis of the Bill of Rights, and it is being recognized in the increasingly procedural emphasis of administrative law. The law of government largess has developed with little regard for procedure. Reversal of this trend is long overdue.

The grant, denial, revocation, and administration of all types of government largess should be subject to scrupulous observance of fair procedures. Action should be open to hearing and contest, and based upon a record subject to judicial review. The denial of any form of privilege or benefit on the basis of undisclosed reasons should no longer be tolerated.<sup>228</sup> Nor should the same

226. Compare *Housing Authority v. Cordova*, 130 Cal. App. 2d 883, 889, 279 P.2d 215, 218 (1955):

[W]e fail to find in the act, pursuant to which the plaintiff Housing Authority was created, anything to suggest that it is authorized to use the powers conferred upon it to punish subversives or discourage persons from entertaining subversive ideas by denying to such the right of occupying its facilities. . . .

227. 109 CONG. REC. 3258-59 (daily ed., March 4, 1963). The Senator, while denouncing coercion and government by men rather than laws, failed to discuss the question whether there is any "right" to a government contract.

228. The Administrative Conference of the United States has recommended "drastic changes" in the procedures by which persons or firms may be debarred from government contracting. The Conference said that such action should not be taken without prior notice, which includes a statement of reasons, and a trial-type hearing before an impartial trier of facts, all within a framework of procedures. Thus, protections would surround even that form of largess which is closest to being a matter within the managerial function of government. FINAL REPORT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, p. 15 and Recommendation 'No. 29' (1962).

person sit as legislator, prosecutor, judge and jury, combining all the functions of government in such a way as to make fairness virtually impossible. There is no justification for the survival of arbitrary methods where valuable rights are at stake.

Even higher standards of procedural fairness should apply when government action has all the effects of a penal sanction. In *Milwaukee Social Democratic Publishing Co. v. Burlison*,<sup>229</sup> where the postmaster general revoked the second-class mail privileges of a newspaper because he found its contents in violation of the Espionage Act, Mr. Justice Brandeis wrote a far-seeing dissent on the penal nature of such a denial of government benefits:

. . . It would in practice deprive many publishers of their property without due process of law. Would it not also violate the Fifth Amendment? It would in practice subject publishers to punishment without a hearing by any court. Would it not also violate Article III of the Constitution? It would in practice subject publishers to severe punishment without trial by jury. Would it not also violate the Sixth Amendment? And the punishment inflicted—denial of a civil right—is certainly unusual. Would it also violate the Eighth Amendment?

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The actual and intended effect of the order was merely to impose a very heavy fine, possibly \$150 a day for supposed transgression in the past. But the trial and punishment of crimes is a function which the Constitution, Article III, § 2, cl. 3, entrusts to the judiciary. . . .

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What is in effect a very heavy fine has been imposed by the Postmaster General. It has been imposed because he finds that the publisher has committed the crime of violating the Espionage Act. And that finding is based in part upon "representations and complaints from sundry good and loyal citizens" with whom the publisher was not confronted. It may be that the court would hold, in view of Article Six in our Bill of Rights, that Congress is without power to confer upon the Postmaster General, or even upon a court, except upon the verdict of a jury and upon confronting the accused with the witnesses against him, authority to inflict indirectly such a substantial punishment as this.<sup>230</sup>

Today many administrative agencies take action which is penal in all but name. The penal nature of these actions should be recognized by appropriate procedures.<sup>231</sup>

Even if no sanction is involved, the proceedings associated with government largess must not be used to undertake adjudications of facts that normally should be made by a court after a trial. Assuming it is relevant to the

229. *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burlison*, 255 U.S. 407 (1921).

230. *Id.* at 434-35 (dissenting opinion).

231. Recently the Supreme Court, in a case involving revocation of citizenship for evading the draft, held that any action that is in fact punishment cannot be taken "without a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses." *Kenedy v. Mendoza-Martinez*, 372 U.S. 144, 167 (1963).

grant of a license or benefit to know whether an individual has been guilty of a crime or other violation of law, should violations be determined by the agency? The consequence is an adjudication of guilt without benefit of constitutional criminal proceedings with judge, jury, and the safeguards of the Bill of Rights. In our society it is impossible to "try" a violation of law for any purpose without "trying" the whole person of the alleged violator. The very adjudication is punishment, even if no consequences are attached. It may be added that an agency should not find "guilt" after a court has found innocence. The spirit, if not the letter, of the constitutional ban against double jeopardy should prevent an agency from subjecting anyone to a second trial for the same offense.

#### D. *From Largess to Right*

The proposals discussed above, however salutary, are by themselves far from adequate to assure the status of individual man with respect to largess. The problems go deeper. First, the growth of government power based on the dispensing of wealth must be kept within bounds. Second, there must be a zone of privacy for each individual beyond which neither government nor private power can push—a hiding place from the all-pervasive system of regulation and control. Finally, it must be recognized that we are becoming a society based upon relationship and status—status deriving primarily from source of livelihood. Status is so closely linked to personality that destruction of one may well destroy the other. Status must therefore be surrounded with the kind of safeguards once reserved for personality.

Eventually those forms of largess which are closely linked to status must be deemed to be held as of right. Like property, such largess could be governed by a system of regulation plus civil or criminal sanctions, rather than a system based upon denial, suspension and revocation. As things now stand, violations lead to forfeitures—outright confiscation of wealth and status. But there is surely no need for these drastic results. Confiscation, if used at all, should be the ultimate, not the most common and convenient penalty. The presumption should be that the professional man will keep his license, and the welfare recipient his pension. These interests should be "vested." If revocation is necessary, not by reason of the fault of the individual holder, but by reason of overriding demands of public policy, perhaps payment of just compensation would be appropriate. The individual should not bear the entire loss for a remedy primarily intended to benefit the community.

The concept of right is most urgently needed with respect to benefits like unemployment compensation, public assistance, and old age insurance. These benefits are based upon a recognition that misfortune and deprivation are often caused by forces far beyond the control of the individual, such as technological change, variations in demand for goods, depressions, or wars. The aim of these benefits is to preserve the self-sufficiency of the individual, to rehabilitate him where necessary, and to allow him to be a valuable member of a family and a community; in theory they represent part of the in-

dividual's rightful share in the commonwealth.<sup>232</sup> Only by making such benefits into rights can the welfare state achieve its goal of providing a secure minimum basis for individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny.<sup>233</sup>

#### CONCLUSION

The highly organized, scientifically planned society of the future, governed for the good of its inhabitants, promises the best life that men have ever known. In place of the misery and injustice of the past there can be prosperity, leisure, knowledge, and rich opportunity open to all. In the rush of accomplishment, however, not all values receive equal attention; some are temporarily forgotten while others are pushed ahead. We have made provision for nearly everything, but we have made no adequate provision for individual man.

This article is an attempt to offer perspective on the transformation of society as it bears on the economic basis of individualism. The effort has been to show relationships; to bring together drivers' licenses, unemployment insurance, membership in the bar, permits for using school auditoriums, and second class mail privileges, in order to see what we are becoming.

Government largess is only one small corner of a far vaster problem. There are many other new forms of wealth: franchises in private businesses, equities in corporations, the right to receive privately furnished utilities and services, status in private organizations. These too may need added safeguards in the future. Similarly, there are many sources of expanded governmental power aside from largess. By themselves, proposals concerning government largess

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232. The phrase is adapted from Hamilton and Till's definition of the word "property": "a general term for the miscellany of equities that persons hold in the commonwealth." Hamilton & Till, *Property*, 12 ENCYC. SOC. SCI.

233. Experts in the field of social welfare have often argued that benefits should rest on a more secure basis, and that individuals in need should be deemed "entitled" to benefits. See Ten Broek & Wilson, *Public Assistance and Social Insurance—A Normative Evaluation*, 1 U.C.L.A.L. REV. 237 (1954); KIETH-LUCAS, DECISIONS ABOUT PEOPLE IN NEED (1957). The latter author speaks of a "right to assistance" which is a corollary of the "right to self-determination" (*id.* at 251) and urges public assistance workers to pledge to respect the rights and dignity of welfare clients (*id.* at 263). See also WYNN, FATHERLESS FAMILIES 78-83, 162-63 (1964). The author proposes a "fatherless child allowance," to which every fatherless child would be entitled.

Starting from a quite different frame of reference—the problem of the rule of law in the welfare state—Professor Harry Jones has similarly argued that the welfare state must be regarded as a source of new rights, and that such rights as Social Security must be surrounded by substantial and procedural safeguards comparable to those enjoyed by traditional rights of property. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 154-55 (1958). See also Note, *Charity Versus Social Insurance In Unemployment Compensation Laws*, 73 YALE L.J. 357 (1963).

A group called the Ad Hoc Committee on the Triple Revolution recently urged that, in view of the conditions created by the "cybernation revolution" in the United States, every American should be guaranteed an adequate income as a matter of right whether or not he works. N.Y. Times, March 23, 1964, p. 1, cols. 2-3.

would be far from accomplishing any fundamental reforms. But, somehow, we must begin.

At the very least, it is time to reconsider the theories under which new forms of wealth are regulated, and by which governmental power over them is measured. It is time to recognize that "the public interest" is all too often a reassuring platitude that covers up sharp clashes of conflicting values, and hides fundamental choices. It is time to see that the "privilege" or "gratuity" concept, as applied to wealth dispensed by government, is not much different from the absolute right of ownership that private capital once invoked to justify arbitrary power over employees and the public.

Above all, the time has come for us to remember what the framers of the Constitution knew so well—that "a power over a man's subsistence amounts to a power over his will." We cannot safely entrust our livelihoods and our rights to the discretion of authorities, examiners, boards of control, character committees, regents, or license commissioners. We cannot permit any official or agency to pretend to sole knowledge of the public good. We cannot put the independence of any man—least of all our Barskys and our Anastaplos—wholly in the power of other men.

If the individual is to survive in a collective society, he must have protection against its ruthless pressures. There must be sanctuaries or enclaves where no majority can reach. To shelter the solitary human spirit does not merely make possible the fulfillment of individuals; it also gives society the power to change, to grow, and to regenerate, and hence to endure. These were the objects which property sought to achieve, and can no longer achieve. The challenge of the future will be to construct, for the society that is coming, institutions and laws to carry on this work. Just as the Homestead Act was a deliberate effort to foster individual values at an earlier time, so we must try to build an economic basis for liberty today—a Homestead Act for rootless twentieth century man. We must create a new property.