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**SYMPOSIUM: THE LEGACY OF GOLDBERG v. KELLY: A  
TWENTY YEAR PERSPECTIVE: BEYOND THE NEW PROPERTY: AN  
ECOLOGICAL VIEW OF DUE PROCESS.**

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**SUMMARY:**

... Remote actions by government or corporate management, wholly beyond the individual's control, can leave a person destitute. ... I believe that in a centrally managed economy, such as we have today, the due process clause gives every person in America a constitutional right to minimum subsistence and housing, to child care, education, employment, health insurance, retirement, and to a clean and healthy natural environment. ... Under the due process clause, there is a second question to be addressed: when does government "deprive" an individual of the life support described above? Like the other major concepts in the Constitution, "deprivation" must be interpreted according to the realities of a changing economic system. ... To sum up, in a centralized, managed economy which provides most jobs, owns most resources and supplies most services, where alternate means of survival have been taken away, the due process clause must mean that no person can be denied the means to economic survival. The ecological approach is concerned with needs, and with survival.

**TEXT:**

[\*731] We live in a society where the economic security of the individual is constantly threatened by outside forces. Illness, accident, inflation or recession may wipe out an individual's resources. Remote actions by government or corporate

management, wholly beyond the individual's control, can leave a person destitute. Often the victims are children, often the aged, but any individual can be destroyed in this way. The question is: how much responsibility should the community take for the protection of the individual?

The community must choose among three responses. It can deny social responsibility entirely. It can make economic protection of the individual a goal, but balance this goal against other goals which may be given an equal or higher priority. Or the community can make individual security an absolute right. *Goldberg v. Kelly* took the middle ground. It was a modest, moderate decision giving procedural protection to welfare recipients. *Goldberg v. Kelly* was only a beginning, but it deserves recognition as a landmark in the evolution of social justice.

Twenty years later, we must confront the fact that the road opened by *Goldberg v. Kelly* has not been taken. Instead there has been retreat. The goal of individual economic protection has been weakened, subordinated to other goals, and viewed negatively by powerful elements in society. In *Mathews v. Eldridge*,<sup>n2</sup> the Supreme Court limited the *Goldberg v. Kelly* principle by holding that an evidentiary hearing was not required prior to the termination of disability benefits. The Court reached this result by a balancing test in which what the Court described as "the private interest" was weighed against "the Government's interest, including the function involved and the fiscal and administrative [\*732] burdens that the additional or substitute procedural requirement would entail.,,"<sup>n3</sup> The Court said that disability benefits are "not based **upon financial need**" **because such benefits are** "wholly unrelated to the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards, tort claims awards, savings" and the like.<sup>n4</sup>

What the Court failed to say is that its entire list of "many other sources" of support is purely speculative; the disability benefits in question might, in fact, be the worker's sole source of support. This is not a serious approach to the question of individual need. Then the Court added this: "Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited."<sup>n5</sup> Again pure speculation is used in place of facts. The Court assumed that the government's resources are so limited that hearings can be held only at a cost to the "deserving."

*Mathews v. Eldridge* represents an outlook that treats the government's claims as having greater urgency than the claims of individuals -- even when there is nothing to justify the government claims. This represents judicial acceptance of the idea that

the economic support of individuals may disappear if the government says it has no money. The middle of the road approach cannot survive such judicial indifference.

Today we have the most severe economic insecurity I have seen in my lifetime. Even during the Great Depression, which I remember as a child, there was never the visible and hidden suffering in our cities as now. And what will happen next year, and the year after that? Will there be twice the number of homeless, or ten times the number? Will all of our public spaces be filled by human beings struggling to survive in cardboard boxes? will even more children be denied an adequate start in life? Will even more old people be abandoned and alone?

Judged by the experience of twenty years, the moderate, due process, cost-benefit approach to individual security must [\*733] surely be deemed a failure. We have given it a fair trial, and it does not work. We must therefore choose between one of the two other courses. We can allow economic forces unrestrained sway, and take no communal responsibility for individual security. or we can give economic security the status of a constitutional right which must be honored ahead of the other goals of society. If individual protection is our goal, nothing less than a full constitutional guarantee will do.

The fifth and fourteenth amendments provide that no person shall be deprived of life, liberty or property without due process of law. I believe that in a centrally managed economy, such as we have today, the due process clause gives every person in America a constitutional right to minimum subsistence and housing, to child care, education, employment, health insurance, retirement, and to a clean and healthy natural environment. n6

This interpretation of the due process clause is contrary to the longstanding view that the clause imposes no affirmative duties on government, a view that the Supreme Court reiterated recently in *Deshaney v. Winnebago county Department of Social Services*. n7 No doubt the framers would be surprised at my interpretation. But the framers would be even more surprised at the kind of economy we now have in America. They would be shocked at the extreme concentration of economic power, amazed at the way national economic policy is set by government, and stunned by the individual's loss of the capacity to earn a living independent of large organizations. The framers would be dismayed at the impossibility of saving money due to inflation, the astronomical costs of health care, the tight control of housing and the disappearance of open land. They would be aghast at the cumulative loss of the individual's economic independence.

The framers were deeply concerned about any abuse of power by government. They tried to provide protection against the abuses they knew. The great increase of governmental power has brought with it an equal rise in the forms of abuse of power

that are possible. The interpretation of due process that I propose [\*734] is not a claim for "new" rights so much as it is an effort to protect against new wrongs.

The approach I take has much in common with the developing legal protection of the natural environment. The crisis of the natural environment and the crisis of the unprotected individual are similar. Both crises derive from the destructive aspects of our modern economic system. The lakes, trees, and wildlife dying from acid rain and the human beings dying on our city streets are alike in that they are victims of an economic system out of control in that it denies and displaces its costs. Protecting the natural environment and the social environment must go together. But protection of the social environment has lagged behind protection of the natural environment because of outmoded thinking. We do not blame trees or spotted owls for their own demise, but we continue to blame the human victims of the same forces. We realize that the death of nature threatens our own survival, but we continue to believe that the destruction of the more vulnerable members of a human community is not threatening to the community as a whole. It is time we took an ecological approach to the plight of human beings.

An ecological approach to individual economic rights would begin with the question of what kinds of habitat, nurture, and protection from harm are needed to produce a healthy individual. This is the starting point for plants or animals -- why not for human beings?

Such an approach has long been taken in constitutional law with respect to governmental powers. From the time of John Marshall, the powers granted to government by the framers have been interpreted so as to ensure that government will possess the means to survive. The approach has been functional, allowing a vast expansion of governmental power in accordance with need. Government, said Marshall, must be able to deal with the unforeseeable crises of the future, not merely with the known needs of 1789. n8 Accordingly, when the Great Depression required national economic regulation, the Court undertook what some have called a constitutional revolution in order to allow governmental powers unimaginable to the framers, but necessary to the survival of the nation. After the Second World [\*735] War, the Court promulgated yet another constitutional revolution to permit an international security system. Where once the war power was reserved to Congress, the President has been allowed to conduct major and minor wars on his own. Whenever this vast extension of governmental power was challenged, the Court spoke of national security and the ultimate value of selfpreservation.

Does it not seem strange that the same Constitution that is capable of unlimited expansion in the name of national self-preservation does not also grant the individual the means to survive? with all the talk about national security is there no equal validity to an adequate concept of individual security? What is the purpose of the

security of the state if it does not apply to the security of the individuals for whom the state exists? Can such a Constitution allow the individual to be left isolated, defenseless, cut off from the absolute necessities of life?

Let us invoke the spirit of John Marshall when we read the due process clause. It refers to life, liberty and property; to me it makes sense to run these three words together -- "life-liberty-property" because they are overlapping and inseparable. Read together they seem as functional as any other provision of the Constitution. They are more sweeping and general than the word "commerce"; they are more organic than taxing and spending. To me, life-liberty-property represents security and survival. These ancient words can also be seen as modern and functional. They imply the grant of the power to survive.

In 1964 I published an article entitled "The New Property,"<sup>9</sup> which started me on the road to a functional, need-based concept of individual power. I argued that the function of property was to confer power on the individual -power to control one's own life and to provide for one's own survival. Property is to the individual as the enumerated powers are to government. But I also pointed out that traditional property was no longer serving its function. It was being replaced by non-traditional interest, such as government benefits, which represent the individual's share in a society where value derives from relationships with organizations more than it derives from separate ownership of land or other assets. Accordingly, these non-traditional, relational interests should be treated as "new property."

Part of my idea has won acceptance -- the idea that government benefits are valuable interests which deserve at least procedural protection. But many commentators have rejected the larger idea that such benefits are the property of the beneficiary -- that the beneficiary, not the government, owns the benefits. For some of these commentators, the question of who owns the benefits is beside the point. For other scholars the idea of property is even detrimental to what they consider the important issue -- the procedural accommodation of individual and governmental interests.<sup>10</sup> On the other hand, I continue to insist that it makes a vital difference whether or not the individual owns and has sovereignty over the economic means of survival.

If we allow these benefits to be the property of government, the result is to give power to government that ought to belong to the individual. There is a world of difference between allowing government to hold in its hands the individual's survival, and vesting this power in the individual. The former is tyranny, even if administered by the most reasonable bureaucrats. The latter is what this country is supposed to be all about.

Those who would permit government to be the "owner" of benefits needed by individuals are overlooking the vital importance of controlling one's own life. Control is as important as food and shelter. Control is necessary to health, critical to self-esteem. The fact that persons are materially needy ought never to be an excuse for denying them control over their own lives. People who are being controlled are out of control. Lack of control is the problem that underlies many of the issues that hold America's attention today. It is out-of-control people who become dependent on drugs or who engage in violent crime and abuse. The purpose of benefits should be to empower people, not to deny them power. People are better off as owners than as clients [\*737] of a welfare bureaucracy. America should never become a nation of propertyless people.

Thus the idea of the individual's property is ecological. Like an animal's habitat, property represents the individual's means of survival. It is attached to the individual by a biological bond. Indeed, it is a part of the definition of the individual. We would not define a fish in such a way as to exclude the water in which it swims, nor would we define a bird without its nesting site, nor an otter without its food supply. Life does not exist in artificial isolation. If the Constitution protects persons, surely it means to protect viability, not persons as specimens in a museum exhibit. Not for a minute should we concede that existence in a cardboard box on a city sidewalk is "life," in the constitutional sense. Not for a moment should we allow that a person without heat or shelter during a freezing winter possesses life, liberty and property in the constitutional sense. Never should we accept the proposition that a human being can exist disconnected from the human community. Human life developed in organic communities. In primitive societies, the individual is not threatened by starvation or lack of shelter unless the entire community is similarly threatened. Even in societies where existence is at the level of subsistence, the individual is not in danger of starvation as part of a community. The bare or naked individual does not exist in nature. In our so-called "higher" civilization we should recognize that there is no such thing as a "person" without a life support system.

The notion that life support for the individual is the property of the government leads to many unacceptable consequences. It changes the focus of attention from substance to procedure. We become preoccupied with the costs of procedure, the fine points of who is qualified for assistance, the constitutional issue of what "process" is due. A miserly and grudging attitude develops in which procedure comes first and survival second. Moreover, procedure is in the hands of government, not the individual. Delay matters not at all to the government, whereas it may be fatal to the individual. No matter how fair, reasonable and scrupulous the authorities who administer procedure may be, the result is that "they" are deciding the fate of another human being. Instead of asking if the individual can survive, the question becomes whether the government can "afford" the procedures. These two questions should never be deemed [\*738] comparable.

If benefits necessary to the survival of the individual are the property of the government, then these benefits become an instrument of social control. The government can impose conditions, supervise the behavior of recipients, or deny them the control over their own lives that most other citizens take for granted. One state has gone so far as to deny welfare benefits to families if one of their children is guilty of unexcused absences from school. Benefits become an instrument of control and domination, a means of meddlesome invasion of autonomy, an opportunity for abuse of power by government officials. Why should the price of survival be submission to arbitrary government power? Such supervision undermines the principles of a free society. It permits a form of inequality in which some families exist under the thumb of government while others do not. This is discrimination in its most obnoxious form. It creates second-class citizenship. It allows government to exercise powers over individual lives that are inconsistent with the spirit of our Constitution. This smothering invasion of the individual zone of life would not be possible if we held life support to be the property of individuals, not the government. To make need the occasion for deprivation of autonomy is pernicious; it further undermines the individual's ability to survive.

A further reason to consider life support to be the property of the recipient involves priorities. This has become very clear in a time of budget deficits and the accompanying claim that there is no money for social programs. This allows the government to prioritize the use of its money in ways that ignore the needs of individuals. Aid to a foreign country, bailing out the savings and loan System, and raising the salaries of government officials are not only put on a par with the life support of members of our own community, they are given a higher priority. I would deny government the power to make such choices. I would say that the money required to sustain the lives of individuals does not belong to the government and cannot be used for any other purpose. There may be room to **disagree about where to draw** the line marking the border of minimum survival. But within that boundary line, a person who is a member of this community [\*739] should not **be separated** from his or her life support.

The most rudimentary idea of the social contract should make clear that when people form a society for mutual protection, they do not give up their individual life supports. If, because of the complex interdependence of modern society, some of that life support, such as the water supply, is entrusted to a central authority, this does not allow the authority to withhold the supply from any individual, or to convert it to other uses. No rational person would make a social contract giving up the means to life. And surely this analysis accords with our deepest instinct -- that there is something grotesquely wrong with a society that denies individual life support while spending billions of dollars of public money on anything else. That even one person should be without shelter while the community's wealth is spent

elsewhere is an abomination. It violates the natural order, and it cannot pass muster under a Constitution adopted in the name of human rights.

Under the due process clause, there is a second question to be addressed: when does government "deprive" an individual of the life support described above? Like the other major concepts in the Constitution, "deprivation" must be interpreted according to the realities of a changing economic system. In a centrally managed economy, where employment or housing is regulated by policy makers in Washington D.C. or financial managers in New York, "deprive" will have a very different meaning than the framers could have imagined. Where the means of life are controlled by state-sponsored monopolies, the exclusion of any individual from the benefits of the system is today's equivalent of constitutionally prohibited "deprivation."

Suppose that the present trend toward economic concentration were to continue until there was just one large corporation which was both the sole employer and the sole supplier of resources and services. And suppose that outside of this corporate domain no land remained for agriculture, and no other means were available to sustain life. Citizenship would then be quite an empty concept, and only *membership* in the corporate family would enable individuals to sustain life. Suppose further that this corporation excluded some people from membership -- anywhere from a few individuals to a substantial fraction of the population. surely there could be no doubt that the excluded persons had been constitutionally deprived of life, liberty (\*740] and property. Even if the corporation were not state-owned, the state would be held responsible for giving sanction to such an all-powerful monopoly, and the deprivation would be unconstitutional no matter what justification was advanced. Granted we have not reached this point, but on a scale of one to ten, where one represents the economy of 1789 and ten represents the monopoly conditions I have just described, how far along the way are we?

In recent decades many of the safeguards against economic concentration have ceased to function effectively. The antitrust laws, adopted a century ago to prevent the sort of danger I have described, have for all practical purposes been abandoned. Gigantic mergers have gone forward without any effort to stop them. The next safeguard is the regulatory system, which was perfected in New Deal days and seeks to ensure that the private economy operates in the public interest. Like antitrust, the regulatory protections are now moribund. There is instead a trend toward deregulation. And most of the regulatory agencies have long since become captives of the industries they were supposed to regulate. A third major safeguard was the labor movement, permitting employees a strong voice in decisions affecting workers. In the last ten years the labor movement has largely gone the way of antitrust and regulation. Labor has been battered into submission to the point where the standard of living of workers has fallen despite rising corporate profits. To strike



is suicidal; strikers lose their jobs and join the scrapheap of those excluded from the system. Another safeguard, shareholder democracy, never was very effective, but what power shareholders once possessed has steadily lost ground to management. Another safeguard might be the power of consumers. But here too corporations have gained ascendancy. Nor are our democratic institutions, such as Congress, a significant check on corporate power. By means of major contributions for congressional campaigns, Congress has been remade into a body beholden to business.

It is true that in many areas of the economy there are several large companies rather than only one. But their so-called "competition" is limited, while the ways in which they act in concert have grown. In broadcasting, the three major networks put forth identical programming and have similar employment policies. An individual excluded by one network will probably be excluded on the same grounds by the others. So the "competition [\*741] safeguard" is yet another failure when it comes to limiting corporate power. In summary, on a scale of one to ten we are much closer to the ten than the one. And the longterm trend toward ever greater economic concentration keeps us moving toward the ten.

Now consider the changes in the social environment outside the domain of the corporate giants. No longer is there free land for homesteading, farming, and self-support. No longer is there a large area serviced by independent tradespeople or professionals. The small retail store maintains a marginal existence at best. Not too long ago it could be said that working for the corporate sector was a free choice; the individual could always fall back on independent alternatives. Today, corporate or institutional employment is not a choice but a necessity for most workers. When a corporation lops off five thousand or ten thousand employees, where do they go?

When we consider the situation of persons in need today, we must ask whether their condition is due to choices they made or to choices made by the organized sector of society over which the individuals had no control. Are the needy at fault or are they the dispossessed, refugees, people driven out of their habitat? The whole history of industrialization tells us that we are seeing forced loss of habitat, not a refusal to contribute to society. The story is continuous, unbroken, and dates from sixteenth century England, when people were forced off the common lands. Karl Polanyi writes:

Enclosures have appropriately been called a revolution of the rich against the poor. The lords and nobles were upsetting the social order, breaking down ancient law and custom, sometimes by means of violence, often by pressure and intimidation. They were literally robbing the poor of their share in the common, tearing down the houses which, by the hitherto unbreakable force of custom, the poor had long regarded as theirs and their-heirs'. The fabric of society was being disrupted; desolate villages

and the ruins of human dwellings testified to the fierceness with which the revolution raged, endangering the defenses of the country, wasting its towns, decimating its population, turning its overburdened soil into dust, harassing its people and turning them from decent husbandman into a mob of beggars and thieves. n12

[\*742] Four centuries later, the mob of beggars and thieves is seen again. Why is it that we can view the destruction of nature as a continuation of this process, but cannot accept that today's needy are an endangered species as well, the discarded victims of an economic system that has no use for them? Every time we read about cost cutting, about corporations getting leaner and meaner, and about technology displacing people, we know that our system continues to exclude part of the population from participation in prosperity.

If the world of 1790 had been instantaneously transformed into the world of 1990, so that in a moment people lost the economic independence and opportunity that was considered the backbone of American democracy, then the displaced population would surely have felt "deprived" of life, liberty and property. A system of social support is but a substitute -- a rather poor substitute -- for what has been taken away. We cannot return to the conditions of 1790. But in today's world of ever more concentrated economic power, denial of substitute support to all who need it should be recognized as an unconstitutional deprivation. It is a denial of history to call social support a "new right." Instead it is the birthright of every American, a part of the original understanding when the nation was formed.

Of course, the due process clause applies only to deprivations by the state, and not to those caused by the private sector. But today the state is engaged in active economic management. The state is itself a large employer, its contracts with the private sector are responsible for another large area of employment, and central decision making by the Federal Reserve, the Treasury, and many other agencies of economic management, as well as tax policy and spending decisions, make the government an active and influential participant in the economy. In these ways the state is responsible for the economy, and if the economy denies participation to any group of individuals, the state's responsibility seems direct and clear. To sum up, in a centralized, managed economy which provides most jobs, owns most resources and supplies most services, where alternate means of survival have been taken away, the due process clause must mean that no person can be denied the means to economic survival. Any other interpretation would defeat the purpose of the framers, which was to carry forward the promise of Magna Carta, that no person should be in any manner "destroyed" unless by due process [\*743] of law.

Paradoxically, the more advanced a society becomes, the more severe the consequences of being excluded from the system. I can remember from my childhood many individuals, both in New York City and in the back woods of upstate New York, who somehow managed to survive with no visible means of

support. There was a hermit who lived on Cold River, twenty miles from the nearest road, where he fished and shot game with a bow and arrow. Another hermit went lake fishing for bullheads at twilight. my grandfather, who was a neighborhood doctor in the Chelsea district of New York City, provided health care to the poor, charging one or two dollars for house calls and when necessary charging nothing at all. The world was a more forgiving place then.

Today, by contrast, exclusion is a punishment of such severity that it seems worse than the punishment we mete out to those who break the law. Today the world is like an expensive hotel where even the smallest needs cost money (more every day) and there is not a cranny or a corner that is free or available as a hiding place. Exclusion amounts to a major human rights violation, if measured by suffering.

It is one thing to accept inequality as part of our system, where some enjoy luxury while other lives are comparatively spartan. But what we see today is not the kind of inequality that provides incentive to healthy ambition; it is misery that fills the rest of us with fear and horror. This is too great a punishment for fecklessness or failure; it falls below the line of what any society can morally tolerate.

Suppose that the dispossessed of our society had been sentenced to internal exile because of their political beliefs, because of their religion, or because of their race. If children in foster care, or families in rural poverty, or the people camped out over heating grates were all political dissenters, or Jews, or persons thought dangerous to the regime, we would react very differently to the suffering in our midst.

Suppose that the excluded of our society were chosen by a lottery -- a state-wide negative lottery -- because, as in the game of musical chairs, someone must be left out. Again, we would be up in arms at the outrage, the injustice.

What I want to know is this: if we would never tolerate internal exile for political or religious dissent or by lot, why do we [\*744] tolerate it for the innocent people, including children, the aged, and the mentally ill, who are out there now?

The answer is that we do not feel responsible ourselves, and we do not feel that society is responsible. The moment I suggest a hypothetical case where the action of government is responsible for the suffering of those in internal exile, we immediately recognize that this would be intolerable. It is the premise of non-responsibility that allows us to look the other way. What we need to consider is how the structure of our society permits this sense of nonresponsibility. The key element is distancing. There is such a great distance between the choices we make and the consequences of those choices that responsibility vanishes. Beginning with the invention of the

limited liability corporation, non-responsibility is one of our civilization's most remarkable creations.

I am not seeking to blame someone. My point is just the opposite. Where there is no specific responsibility, an environmental approach is needed. The ecological approach is not concerned with blame. I deplore the prosecution of one individual for the Alaska oil spill when the conditions for disaster were created by many different public and private bodies, if not by all of us. The ecological approach says that in order to have healing one must go beyond blame. The ecological approach is concerned with needs, and with survival.

The environmental principle should warn us that, because all life is interconnected, none of us can escape the consequences of suffering in our midst. Everyone in America is worse off today because schools, health services, child-care and urban life are deteriorating. Human deterioration is like the air we breathe -- there is no escape.

Our Constitution and the due process clause were drawn up at a time when it was sufficient to be left alone. Government was given specified powers and all the rest was simply left to the people or to nature. But today it is not enough to leave nature alone. Left alone, nature is everywhere at risk. Only affirmative intervention and protection will preserve nature. The same is true of human beings. And so the negative constitutional guarantee of one era becomes the affirmative obligation of another era -- not because the words of the Constitution have changed, but because those guarantees can no longer be carried out and the Constitution cannot be given its true meaning without affirmative [\*745] action. In the areas of racial and gender discrimination, there is widespread recognition that leaving things alone is not good enough. Even though the constitutional words are negative -- "no person shall be *denied* the equal protection of the law" -- the obligation imposed may call for affirmative action. By the same principle, today the promise that no person shall be *deprived* can only be fulfilled by affirmative action.

The environmental movement and the many different human rights causes -racial minorities, women, gays, the disabled, children and the aged, all need each other. Each is a part of a larger historical event -- the paying of the true costs of our industrial and technological progress. We should welcome the chance to pay our debts, correct our wrongs and injustices, and provide a better future for our posterity. Everyone has a right to a share in the commonwealth. Let the blaming cease, and let the healing begin.

#### **FOOTNOTES:**

n1 397 U.S. 254 (1970).

n2 424 U.S. 319 (1976).

n3 *Id. at* 335.

n4 *Id. at* 340-41.

n5 *Id. at* 348.

n6 See Amar, Forty Acres and a Mule: A Republican Theory of Minimal Entitlements, 13 HARV. J.L. & PUB. POL'Y 37 (1990); Black, Further Reflections on the Constitutional Justice of Livelihood, 86 COLUM. L. REV. 1103 (1986).

n7 489 U.S. 189 (1989).

n8 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 413 (1819).

n9 Reich, *The New Property*, 73 YALE L.J. 733 (1964).

n10 Baker, Property and Its Relation to Constitutionally Protected Liberty, 134 U. PA. L. REV. 741 (1986); Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982); Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985); Simon, Liberty and Property in the Supreme Court: A Defense of Roth and Perry, 71 CALIF. L. REV. 146 (1983); Smolla, The Reemergence of the *Right-Privilege Distinction* in Constitutional Law: *The Price* of Protesting Too Much, 35 STAN. L. REV. 69 (1982); Van Alstyne, The Demise of the *Right-Privilege Distinction* in Constitutional Law, 81 HARV. L. REV. 1439 (1968); Van Alstyne, "Cracks in *the New Property*": Adjudicative Due Process in the Administrative State, 62 CORNELL L. REV. 445 (1977).

n11 Work Incentive Demonstration Program under (AFDC), WIS. STAT. ANN. 49.50(7)(g) & (h) (West. Supp. 1990).

n12 K. POLANYI, *THE GREAT TRANSFORMATION* 35 (1957).