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**INTRODUCTION TO THE CONFERENCE:
COMMEMORATING THE LIFE AND LEGACY OF
CHARLES A. REICH**

*Rodger D. Citron**

I. INTRODUCTION

Charles Reich looms large in the history of American law and society of the second half of the twentieth century. His Yale Law Journal article *The New Property*¹ influenced Supreme Court case law and continues to influence how Property and Constitutional Law are taught today. His best-selling book *The Greening of America*, explained the 1960s counterculture.² After Reich died, in the summer of 2019, some of the scholars who knew him well decided to celebrate his life and commemorate his legacy with a conference at Touro College, Jacob D. Fuchsberg Law Center.

The conference was held in late January 2020. The timing was fortuitous. The pandemic had not yet arrived in the United States, so we were able to gather in person. The conference was extraordinary. Everyone who spoke presented their remarks with the same passion that Charles brought to his life and work.³ I will say more about the conference and the articles that grew out of it below. Before doing that, I will provide a

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¹ 73 YALE L.J. 733 (1964).

² Charles Reich, *THE GREENING OF AMERICA* (1970) (hereinafter “THE GREENING”).

³ The presentations were recorded. In order to view the recordings, see *Charles A. Reich-A Commemoration of His Life & Legacy*, TOUROLAW.EDU, <https://www.tourolaw.edu/AboutTouroLaw/Reich-videos>.

biographical sketch of Charles Reich so that you have a sense of who he was and what he accomplished.

II. A BRIEF BIOGRAPHY OF CHARLES A. REICH⁴

Charles was born in New York City in 1928, before Franklin D. Roosevelt was elected and ushered in the New Deal. His father, Carl, was a doctor who specialized in hematology. His mother, Eleanor, pursued a career in school administration, eventually becoming director of the Bank Street nursery school that Charles attended. His younger brother Peter was born in 1931.

Charles attended progressive schools in New York City. After high school, Charles attended Oberlin College, where he excelled as a liberal arts student. Uncertain about what to do after graduation, Charles decided to apply to Yale Law School. He made this decision after speaking with Tom Emerson, who was a family friend and professor at the law school.

Reich was admitted to Yale Law and matriculated in the fall of 1949. Although he often shied away from speaking in class, Reich was an excellent law student. His strong academic performance earned him an early slot on the *Yale Law Journal*. Later, he was elected editor-in-chief of the *Yale Law Journal*.

During his last year of law school, Reich applied for a clerkship with Justice Hugo Black. He found Black's dissents in a number of civil liberties cases inspiring and enlisted support from Dean Wesley Sturges, Professor Emerson, and Professor David Haber for his application. In his letter of recommendation, Haber noted that "despite an outer appearance of reticence and modesty, [Reich] proves to be an extremely warm and outgoing person, quite sensitive to, and aware of some of the problems of leading a life that has integrity and meaning."⁵

Reich interviewed with Justice Black and was offered the clerkship. Black was unable to hire Reich immediately after he graduated law school in 1952, so Reich worked at Cravath Swaine & Moore in New York for a year.

⁴ This account of Charles Reich's life work draws on my article, Rodger D. Citron, *Charles Reich's Journey from the Yale Law Journal to the New York Times Best-Seller List: The Personal History of the Greening of America*, 52 N.Y.L. SCH. L. REV. 387 (2008) (hereinafter "*Charles Reich's Journey*").

⁵ *Id.* at 392 n.17.

Reich appreciated his clerkship with Justice Black during the 1953-54 term as the realization of a dream.⁶ Black recently had become a widow. Because his children did not want the justice to live alone, Black's law clerks lived with him at his house in Alexandria, Virginia.

At the Supreme Court, Reich and his co-clerk engaged in a year-long discussion with the justice.⁷ Much of the education and training from the clerkship came from that ongoing conversation. The most important case on the Supreme Court's docket during the term was *Brown v. Board of Education*,⁸ involving a challenge to the constitutionality of segregated public schools, which had been held over from the previous term.

There were a number of other important cases decided during the 1953-54 term. For Reich, the most influential was *Barsky v. Board of Regents*.⁹ In *Barsky*, the Court upheld, by a six-to-three vote, the suspension of a physician from the practice of medicine because he had been convicted of failing to produce documents in response to a subpoena from the House Un-American Activities Committee even though there had been no showing that he was not a competent doctor, or that he had acted improperly towards his patients.¹⁰ Justice Black's dissent in *Barsky* – which insisted upon broad constitutional protection for an individual's rights against the state¹¹ – contained the seeds for a set of ideas that Reich later developed in *The New Property*.

In 1954, after his clerkship, Reich returned to private practice in Washington, D.C., working for Arnold, Fortas & Porter, in early 1955. The firm was small and respected and handled challenging cases, many involving complicated questions of administrative law.

While at Arnold, Fortas & Porter, Reich cultivated a friendship with Justice William O. Douglas. At first blush, the pairing seems unlikely. Reich was shy, thirty years junior to Douglas, and had been raised in New York City. Douglas could be gruff, was often solitary (certainly in his work at the Supreme Court), and was an unmistakable

⁶ For a detailed account of his clerkship with Justice Black, see Charles A. Reich, *A Passion for Justice*, 26 *TOURO L. REV.* 393 (2010), <https://www.tourolaw.edu/Academics/uploads/pdfs/Reich.pdf>.

⁷ See *Charles Reich's Journey*, *supra* note 4, at 393 n.22.

⁸ 347 U.S. 483 (1954).

⁹ 347 U.S. 442 (1954).

¹⁰ See *id.* at 442-43.

¹¹ See *id.* at 456-57 (Black, J., dissenting).

Westerner. But, they shared a passion for hiking and the outdoors and became friends on long Sunday walks along the Chesapeake and Ohio Canal. Douglas's second wife, Mercedes Eicholz, encouraged the friendship.

Since 1955, Reich had been invited to join the Yale Law School faculty, and eventually, decided to leave the law firm and become a professor. In making his decision, Reich consulted Douglas, who provided encouragement. In a letter dated January 6, 1958, Douglas wrote: "I think I have been wrong in advising you not to return to Yale to teach. I think that is an attitude of retreat. I think it's time to seize some of the ramparts."¹²

Reich returned to Yale Law School in 1960. He was assigned to teach the required Property course – a subject he had not considered since he was a law student. Reich immersed himself in the rules and legal principles of property and supplemented his work by offering seminars on the management of natural resources and the environment.

After private practice, Reich was delighted with life in the academy. He was temperamentally suited to be a teacher – patient, diligent in his preparation, and intellectually curious and rigorous. Reich quickly became an impressive legal scholar, publishing articles in the leading law reviews. In 1964, Reich received tenure and was promoted to full professor.

Reich's passion for his work during this time is evident in his legal scholarship. His law review articles covered a number of diverse topics. The most well-known of Reich's law review articles from this period was (and continues to be) *The New Property*.

In the mid-1960s, Reich began to shift his attention away from the law school. Developments outside the law school – in particular the emerging youth movement, which opposed the Vietnam War and rejected the life and institutions of "the establishment" – engaged his attention at the same time he became disappointed with what he viewed as the limits of traditional legal scholarship.

Reich began teaching an undergraduate course, "The Individual in America," offered through Yale's American Studies department. Eventually, Reich gathered his lectures into a book manuscript, published in 1970 as *The Greening of America*. A lengthy excerpt was first published in *The New Yorker* that year and the book became a best-seller, striking a chord with readers. The book drew an

¹² See Charles Reich's *Journey*, *supra* note 4, at 396 n.45.

extensive and divided critical response. To everyone's surprise, including his own, Reich became a celebrity author.

The experience turned Reich's life upside down. Although he continued to be a professor at Yale Law School, Reich also was drawn to the Bay Area, where he lived during the summer of 1967. In 1974, Reich resigned from Yale Law School and moved to San Francisco, where he lived until the end of his life. In 1976, he wrote *The Sorcerer of Bolinas Reef*,¹³ an autobiographical book that he saw as a counterpart of sorts to *The Greening*.

Reich continued to write and teach while living in San Francisco. In 1991, then-Dean Guido Calabresi brought Reich back to Yale Law School as a visiting professor for four years. This teaching experience helped him write another book, *Opposing the System*, which was published in 1995.¹⁴ Reich wrote a number of short articles in the years that followed.¹⁵ He died on June 15, 2019.¹⁶

¹³ CHARLES REICH, *THE SORCERER OF BOLINAS REEF* (1st ed., Random House 1976) [hereinafter *THE SORCERER*].

¹⁴ CHARLES A. REICH, *OPPOSING THE SYSTEM* (Crowing Publishing Group 1995).

¹⁵ See, e.g., Charles's article about working at the law firm of Cravath, Swaine & Moore in the early 1950s. The article is discussed here: https://www.abajournal.com/news/article/cravath_in_1952_no_billables_pressure_no_fancy_offices_and_no_women.

¹⁶ It is a sign of Reich's broad appeal that obituaries written about him appeared not only in national newspapers like the New York Times, Washington Post, and Los Angeles Times but also in Rolling Stone and on the website of the libertarian Cato Institute. See Sam Roberts, *Charles Reich, Who Saw 'The Greening of America,' Dies at 91*, NY TIMES (Jun. 17, 2019), <https://www.nytimes.com/2019/06/17/books/charles-reich-dead.html>; see also Matt Schudel, *Charles Reich, Author of 1970 Best Seller 'The Greening of America,' Dies at 91*, WASHINGTON POST (Jun. 18, 2019 at 9:24pm), https://www.washingtonpost.com/local/obituaries/charles-reich-author-of-1970-best-seller-the-greening-of-america-dies-at-91/2019/06/18/87c13664-91d6-11e9-aadb-74e6b2b46f6a_story.html; Hillel Italie, *Charles Reich, Counterculture Author Who Wrote 'The Greening of America,' Dies At 91*, LA TIMES (Jun. 18, 2019), <https://www.latimes.com/local/obituaries/la-me-charles-reich-greening-america-dead-20190618-story.html>; Jon Blistein, *Charles Reich, Counterculture Intellectual Behind 'Greening of America,' Dead at 91*, ROLLING STONE (Jun. 18, 2019 at 3:53pm), <https://www.rollingstone.com/culture/culture-news/charles-reich-author-greening-of-america-dead-obituary-849555/>; Walter Olson, *Looking Back: Charles Reich and His Era*, CATO INSTITUTE (Jun. 19, 2019), <https://www.cato.org/blog/charles-reich-era>.

III. THE CONFERENCE¹⁷

The conference began with a dinner on January 29, 2020. We were honored to be joined by Charles's family – his nephew, Daniel Reich, and his wife, Mary Draper, his niece, Alice Reich, and his sister-in-law, Lee Reich. After dinner, Charles was recalled with love by his dear friend Guido Calabresi. Judge Calabresi's remarks were insightful in every way. Among other things, he noted that Reich often was “out of phase,” and it was that quality that contributed to Reich's originality and the new paradigms he developed in works like *The New Property*. We adjourned for the evening, dazzled.

A. First Session

The panel sessions began the next morning. The first panel was focused, broadly, on *The New Property*. Professor Harold Hongju Koh set the stage with a concise yet thorough summary of Reich's career and scholarship organized around three themes that informed Reich's work: (1) Identity - who am I? (2) Community - who are we? And (3) Power - How do we go about opposing the system?

Professor Gillian Metzger examined Reich's work from an administrative law perspective, discussing how he conceptualized the state and administrative agencies.

Professor Judith Resnik concluded the formal presentations with an account of her life-long engagement with Reich's work. She discussed how *The New Property*, cited by the Supreme Court in *Goldberg v. Kelly*¹⁸ in 1970, informed the Court's decision in *Wolff v. McDonald*,¹⁹ involving prisoners' rights to “due process hearings” before “good-time credits” could be revoked.

The session concluded with comments by one of Reich's former students, Professor Peter Strauss. He recalled working on *The New Property* when he was the editor-in-chief of the *Yale Law Journal* and discussed Reich's influence on his work as a lawyer and a law professor.

¹⁷ The conference program is available at https://www.tourolaw.edu/Pdf/Reich_Program_2020.pdf and includes the professional title and biography of each speaker.

¹⁸ See 397 U.S. 254, 262 n.8 (1970).

¹⁹ 418 U.S. 539 (1974).

B. Second Session

In the second session, the panelists dived deeper into certain aspects of Reich's life and work. Professor John Q. Barrett explained why he views Reich as a "Son of the New Deal." Growing up, Reich admired President Franklin D. Roosevelt. Yet, as Barrett noted, although Reich supported the administrative state that FDR created, he also criticized the state as it evolved for failing in certain ways to protect individual rights and liberties.

Professor Karen Tani recounted the history of Reich's work on the legal rights of welfare recipients. Much of the story was about the influence of two women, Justine Wise Polier and Elizabeth Wickenden, on Reich. As Tani explained, their concern for the legal and constitutional rights of welfare recipients and their awareness of what actually was occurring on the ground inspired Reich to write about "midnight raids." This led to Reich's article, *Midnight Welfare Searches and the Social Security Act*.²⁰

Professor Doug Kysar discussed Reich's contributions to environmental law and described two book proposals that Reich wrote (though he never completed the books).²¹ Kysar explained that what makes the two proposals especially profound and necessary is that Reich revives political economy by placing ideas about nature at the heart of his analysis.

C. Third Session

In the final session of the day, the speakers followed two different paths. The first two professors focused on privacy, a vital theme in Reich's scholarship, while the last speaker returned to Charles's biography. Professor Ray Brescia discussed "private largesse in the digital age." The starting point for his remarks was *The New Property*. Brescia's remarks showed that Reich's scholarship continues to have a broad and vital legacy today.

Professor Sarah Seo explored privacy from another perspective, situating Reich's scholarship in the context of the

²⁰ 72 YALE L.J. 1347 (1963).

²¹ The two proposals are set out in Professor Kysar's tribute to Charles Reich in the Yale Law Journal Forum. See Douglas A. Kysar, *Charles Reich's Unfinished Work*, YALE LAW JOURNAL.ORG (Mar. 16, 2020), <https://www.yalelawjournal.org/forum/charles-reichs-unfinished-work>.

evolution of the concept of privacy. She noted that Reich explores privacy in a number of his law review articles, including *Police Questioning of Law-Abiding Citizens*, published in 1966.²²

The conference concluded with my discussion of Reich's embrace of the humanities and the personal turn in his writing during and after the mid-1960s. This began with several law review articles published after *The New Property* and was fully evident in books like *The Greening of America* in 1970,²³ and *The Sorcerer of Bolinas Reef* in 1976.²⁴ To conclude, Judge Calabresi spoke about the influence of Professors Tom Emerson, and Fred Rodell, on Charles, and Professor Kysar commented on how *The Greening* fits into the history of the environmental law movement.

IV. THE ARTICLES IN THIS ISSUE

The conference adjourned. We dispersed, with memories of Charles rekindled and enriched. Many of us wrote articles, collected here, to further commemorate Reich's life and work. Before we turn to those articles, we begin the issue with a previously unpublished manuscript by Reich. We thank Charles's family and his good friend Greg Marriner for permission to publish and for their assistance with the article.

Charles's article, *Keeping Up: Walking with Justice Douglas*, is a quintessential Reich work. It describes his friendship with Douglas, which developed over the course of hikes along the Potomac River and lasted for more than two decades. As always, Reich displays an acute eye for detail and context. Douglas, for example, was known to be impatient. As Charles recounts, one Sunday morning, Douglas and Reich were to be joined by the Hon. David Bazelon, a federal appeals court judge on the D.C. Circuit. When Bazelon failed to show up at the scheduled time of 9 am in the Great Falls parking lot, Reich writes, "[w]ithout waiting . . . off we went."²⁵

The article is more than a memoir. In describing Douglas's approach to his work as a justice, Reich sets out his understanding of

²² Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966).

²³ See THE GREENING, *supra* note 2.

²⁴ See THE SORCERER, *supra* note 13.

²⁵ Charles A. Reich, *Keeping Up: Walking with Justice Douglas*, 36 Touro L. Rev. 721 (2020).

the Supreme Court as a legal institution and coordinate branch of the federal government. Reich also discusses the evolution of Douglas's views on the right to privacy. In doing so, he illuminates our understanding of Douglas's opinion in *Griswold v. Connecticut*,²⁶ perhaps his most important judicial decision. It is an honor and a privilege to publish Charles Reich's last law review article.

We then present the articles of two former Yale Law School deans, Judge Calabresi and Professor Koh. Calabresi, as noted earlier, provides a number of insights into the life and work of his dear friend. Koh sets out a framework for understanding Charles's scholarship.

Then, tracking the sequence of the speakers at the conference, we have articles by Professor Barrett, Professor Tani and her co-author Professor Felicia Kornbluth, Professor Seo, Professor Brescia, and me. The substance of these articles essentially tracks the authors' presentations, described earlier.

I conclude by thanking everyone at Touro College, Jacob D. Fuchsberg Law Center who helped make this conference possible along with everyone who spoke at the conference and contributed to the articles published in this issue. I thank Charles's family and Greg Marriner for their hospitality and support over the years. Most of all, I thank Charles Reich for his generosity, patience, and friendship. I learned so much from him over the years. I miss him so.

²⁶ 381 U.S. 479 (1965).