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Harold Hongju Koh

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**CHARLES REICH:
DUE PROCESS IN THE EYE OF THE RECEIVER**

*Harold Hongju Koh**

I start and end with the same story: of Charles Reich and his purple chair. It is a tale of personhood and community, and how one fosters the other.

I came to know and love Charles around 1990, when Yale's greatest and most generous Dean, Guido Calabresi, brought Charles back home to teach at Yale Law School after many years away. On our way back after a remarkably warm introductory lunch, Charles and I stopped by my office, which stood just a few doors down from his. Mid-conversation, Charles suddenly spied in the corner of my office a purple chair, which I had picked up from the hallway trash a few years earlier. "Where. Did. You. Get. That. CHAIR?" he asked in a trembling voice. But before I could answer, he kicked it over, revealing

*Sterling Professor of International Law and former Dean, Yale Law School. This memorial essay is based on remarks given on January 30, 2020 at the conference on *Charles A. Reich: A Commemoration of the Life and Legacy* at the Jacob D. Fuchsberg Law Center at Touro College in Central Islip, New York. I thank Dean Elena Langan, Professor Rena Sepowitz and the faculty and staff of the Touro Law Center, the editors of the *Touro Law Review*, the Reich family, and most especially my remarkable friend, Associate Dean Rodger Citron, for organizing and inviting me to this outstanding and moving conference. By happy coincidence, another distinguished attendee at the Reich Conference, Columbia administrative law professor Peter L. Strauss, served as Professor Reich's Yale Law Journal editor on *The New Property*, then as Justice Brennan's law clerk, and later as principal author of the Solicitor General's amicus brief in *Goldberg v. Kelly*, conceding the applicants' right to due process and citing *The New Property*. Thanks to Michael Loughlin, Yale Law School '21 for his fine research assistance. I am especially grateful to my beloved Yale Law School colleagues Judge and Dean Guido Calabresi, Doug Kysar, Judith Resnik, and Denny Curtis for all they have done to keep Charles's memory alive. I dedicate this piece to Owen and Irene Fiss, who opened my eyes to *Goldberg v. Kelly*.

underneath in large capital letters the name “REICH!” “My purple chair!” he howled with childlike joy. “May I have this back?” What could I say? Even while I was nodding yes, he raced from the room carrying the chair back to his own visiting office. He swung the door open and proudly placed the chair next to its exact twin: an identical purple chair!

He turned back to me smiling. “When I left Yale 20 years ago, I asked Burke Marshall to keep these two chairs for me. But when I returned, there was only one. I felt lost without its companion. But now,” Charles beamed, “I’m home and I’m whole.” As if to underscore the point, he sat down proudly in the chair, pleased and satisfied, wearing a delighted look of childlike glee.

I will return to this story later, but in the 30 years since, the story of Charles and the Purple Chair has come to epitomize the man I knew. His story is an inspiring tale of personhood, community, and how one fosters the other. Of the many distinguished chairs at Yale Law School, there is none more distinguished than Charles Reich’s purple chair. And although it took me a year to replace that chair—leaving forlorn student visitors pacing around my office—I will never forget how finding that chair finally created within Charles the priceless sense that he was whole and at home.

The joy on Charles’s face when he rediscovered his chair reminded me of the impish look on the face of the protagonist of my favorite childhood book, *Harold and the Purple Crayon*.¹ For Charles always reminded me of that Child Harold: endlessly young and curious in his outlook, a traveler and trekker, inventive, a bit mischievous, yet stunningly able with his pen to create great worlds that others could only dimly see.

As always, Guido Calabresi put it best:

Charlie was one of those very rare people who for some reason are always slightly out of phase with the canonic view of their time. And, as a result, they see things everyone else misses. When one combines that fundamental difference of vision with great intelligence and superb writing skills, one has the rarest of things: a

¹ CROCKETT JOHNSON, *HAROLD AND THE PURPLE CRAYON* (1955). You can guess why this book and its many sequels were my favorites: an extensive childhood search revealed that they were the only works in Eisenhower-era children’s popular literature to feature a character named “Harold.”

true visionary, a prophet. . . . Charlie was that again and again²

But how did Charles's unique vision arise? What exactly was Charles's intellectual journey that led him to that vision?

Let me suggest that Charles Reich engaged in a lifelong struggle to answer three questions, of *identity, community, and power*. The question of identity—who am I?—guided his memoir, *The Sorcerer of Bolinas Reef*.³ The question of community—who are we?—drove his landmark, *The Greening of America*.⁴ And the question of power—how do we oppose the system?—was the message of his final book, *Opposing the System*.⁵ How do we as a society prevent the forces that we have created, but lost control of, from destroying the law, individuals, and communities that make us human?

Interestingly, Charles's answer to all three questions was the same: that human beings must shape the law to be a servant to human needs, not the other way around. Lawyers and judges should recognize that intellectual concepts of property and due process must be viewed from the eye of the receiver—the person on the receiving end of state power—not the state that delivers that coercive punch. Properly understood, the concepts of “new property” and “new due process” that Charles pioneered can empower individuals with the tools of law, to force a stubborn state both to respect their communities and to give them the space that individual personhood needs to flourish.

I. CHARLES REICH'S FIRST QUESTION: WHO AM I?

Who was Charles Alan Reich?⁶ This unexpected rebel was born in New York City to a school administrator and a hematologist: from his mother, he acquired an interest in left-wing politics; from his

² Guido Calabresi, *Introduction to the Collection*, 129 YALE L.J. F. 690 (2020), <https://www.yalelawjournal.org/forum/introduction-to-the-collection>.

³ CHARLES A. REICH, *THE SORCERER OF BOLINAS REEF* (1976) [hereinafter *SORCERER*].

⁴ CHARLES A. REICH, *THE GREENING OF AMERICA* (1970) [hereinafter *GREENING*].

⁵ CHARLES A. REICH, *OPPOSING THE SYSTEM* (1995) [hereinafter *OPPOSING*].

⁶ For the definitive biography, see 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*].

father he learned diagnostic techniques that he later tried to apply to the law.⁷ Charles excelled scholastically at Oberlin and after some indecision, applied only to Yale Law School, where he wrote two student pieces on criminal justice that earned him selection as Editor-in-Chief of the *Yale Law Journal*.⁸ From that position, he edited a comment on the constitutional issues raised by denial of passports, which started to shape his view of the relationship between the state and the individual.⁹

After graduation, Charles clerked for the great Justice Hugo Black during the epoch-defining October Term 1953, when *Brown vs. Board of Education* was decided.¹⁰ Justice Black's wife had just passed away, so Charles and his co-clerk spent that year actually living in Justice Black's house. During that transformative year, Charles spent nearly every waking hour with Justice Black, discussing everything but the Court's impending decision in *Brown*.¹¹ Charles later recalled how that year profoundly renewed his idealism and belief that justice is the foundation of society.¹²

Like Justice Black, Charles came to see his role as a defender of the living Constitution and a protector of the individual to whom the Constitution belonged.¹³ As Black's law clerk, Reich became distressed about a New York doctor whose license to practice medicine had been suspended by the state because of his conviction for the

⁷ *Id.* at 389-90, 390 n.8.

⁸ See Comment, *Pre-Trial Disclosure in Criminal Cases*, 60 YALE L.J. 626 (1951); Note, *New York's New Indeterminate Sentence Law for Sex Offenders*, 60 YALE L.J. 346 (1951). Based on his personal interviews with Reich, Professor Citron reports that Charles chose to apply only to Yale Law after two interviews: with Harvard Law Dean Erwin Griswold, who told him "he did not belong in the law and, instead, should pursue a career in sociology," and with Yale Law Professor Tom Emerson, who instead advised him "that Yale focused on public policy and that the law school was a training ground for the nation's leaders." *Charles Reich's Journey*, *supra* note 6, at 390-91.

⁹ See Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L.J. 171 (1952).

¹⁰ 347 U.S. 483 (1954).

¹¹ For riveting accounts of that year, see Charles A. Reich, *A Passion for Justice*, 26 TOURO L. REV. 394 (2010) [hereinafter *Passion*]. Charles A. Reich, *Deciding the Fate of Brown, The Populist Voices of Earl Warren and Hugo Black*, 7 GREEN BAG 137 (2004) ("We talked about everything but the school segregation cases" because "the Justices had agreed to keep their deliberations secret.").

¹² *Passion*, *supra* note 11, at 401 ("Later, when I became a teacher, I often wished that my students could have shared my experience in the Judge's study. It profoundly renewed my idealism and belief that justice is the foundation of society.").

¹³ *Id.* at 399.

“crime” of resisting an arguably unconstitutional congressional subpoena.¹⁴ In a dissent that strongly foreshadowed Charles’s later argument in *The New Property*, Justice Black argued that the doctor’s “right to practice” was not just a government-granted privilege, but a “very precious part of the liberty of an individual physician” that the Due Process Clause protected from “arbitrary infringement.”¹⁵ Justice Black foreshadowed Charles’s greatest article when, referring to a physician’s license to practice his profession, he acknowledged that “[i]t may mean more than any property.”¹⁶

After that, Charles became a young corporate lawyer, working first at the Cravath firm in New York, and then at the Arnold and Porter law firm in Washington, D.C. From that vantage point, Charles observed the exercise of power first-hand, in a way that he found deeply alienating. In his later memoir, he described the *anomie* of the young corporate lawyer, which so many law graduates have experienced first-hand. Charles confessed:

The truth was that I was spending my life in ways that were never what I really wanted to do. I did not want to be in Washington. I did not want to work for a law firm or even be a lawyer, I did not feel drawn to the people I spent time with. I wanted to be somewhere else, doing something totally different, with people who were exciting and adventurous. . . . In my practice, there was no grandeur, no public service, no commitment to a cause. No people to be close to. No sky, no sea, no forests, no mountains.¹⁷

So even though beautifully dressed and richly paid, Charles became deeply disconnected from his own personhood. One of the few people who helped him address his intense loneliness was his second great mentor, Justice William O. Douglas. The charismatic, mercurial Douglas would call him and ask: “Want to go for a walk, Charlie?”¹⁸ As Reich recalled, Douglas was one of our earliest environmentalists,

¹⁴ *Barsky v. Bd. of Regents of Univ.*, 347 U.S. 442 (1954).

¹⁵ *See id.* at 457-58 (Black J., dissenting).

¹⁶ *Id.* at 459.

¹⁷ *SORCERER*, *supra* note 3, at 36-37. Reich called Douglas “the Sun God himself, radiating in all directions. . . . The Sunday mornings when I walked the canal with Bill Douglas were times of new space and magic.” *Id.* at 61.

¹⁸ *Id.* at 60.

“knowledgeable about plants, fish, and animals, but concerned about climate, pollution, land use before most people had heard anything at all about these subjects.”¹⁹ With Douglas, Charles took innumerable walks down the C&O Canal towpath, a tradition he continued alone and with other companions for many years to come. Reich had himself bonded with nature since childhood, when he spent all of his teenage summers in Long Lake, New York, climbing forty-five of the forty-six high peaks of the Adirondacks.²⁰

Charles finally escaped his life as a Washington lawyer by being hired back to the Yale Law School faculty in 1958 in a remarkable class that included Guido Calabresi and Bob Stevens. Not all of his mentors were equally dazzled by his teaching appointment. A letter Charles received soon thereafter from Justice Douglas told him, “it’s time to seize some of the ramparts. The intellectual life at Yale will not be particularly exciting. But there is great challenge in that citadel of reaction.”²¹

In his initial professorial writing, Charles focused on the individual versus the state. His first piece, a tribute to *Mr. Justice Black and the Living Constitution*, identified what the individual is working against: the trend in America away from its individualist traditions toward strong central government, economic collectivism, and controlling organizations.²² Not surprisingly, another early Reich article bemoaned the inadequacy of existing law to protect the environment.²³ As Reich put it decades later—in an unfinished, posthumously published book proposal on “The Individual Sector”:

[t]he crisis of the natural environment is . . . a failure of the rule of law. Human beings have created power so immense that it has escaped the rule of law.

¹⁹ *Passion*, *supra* note 11, at 408.

²⁰ Rather than join those who had climbed all 46, after climbing 45 by age sixteen, Reich “decided that imagining the last peak would be better than scaling it.” Judith Resnik, *Constituting Security and Fairness: Reflecting on Charles Reich’s Imagination and Impact*, 129 YALE L.J. F. 707, 713 (2020), https://www.yalelawjournal.org/pdf/Resnik_ConstitutingSecurityandFairness_8misiedi.pdf.

²¹ Letter from William O. Douglas, J., to Charles Reich (Jan. 6, 1958) (on file with the Library of Cong.) (copy on file with Professor Rodger Citron), cited in *Charles Reich’s Journey*, *supra* note 6, at 396 n.45.

²² Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963).

²³ See Charles A. Reich, *The Public and the Nation’s Forests*, 50 CAL. L. REV. 381 (1962).

And lawless power must inevitably become destructive power. It has turned against nature, and now it has turned against us, its creators.²⁴

But if Charles's answer was to constrain power with the rule of law, what to do if the law itself entrenches injustice? One of Charles's early pieces, now a canonical work of law-and-literature, grappled with this dilemma in considering Herman Melville's novella *Billy Budd: Sailor*.²⁵ That classic tale recounts how the decent Captain Vere, commanding officer of an English naval ship, is forced to convene a drumhead court to judge a "natural man," sailor Billy Budd, a conscript from a merchant ship tellingly named the *Rights-of-Man*. After endless provocation, Budd finally strikes out and kills his sadistic persecutor, the horrible master-at-arms Claggart. To decide whether Budd should be summarily executed under the English Mutiny Act, Captain Vere must answer the question: "must one enforce the law even when it is unjust?" Captain Vere decides, "yes, in the end you must." Yet haunted by his decision, when mortally wounded at the end of his life, Vere dies repeating the name "Billy Budd, Billy Budd."

Of course, *Billy Budd's* dilemma was felt by many more than just Captain Vere. As my late brilliant colleague Bob Cover argued, Melville's father-in-law, Chief Justice of Massachusetts, Lemuel Shaw—upon whom, Cover argued, Captain Vere was based—struggled with the same dilemma. Shaw reached the same conclusion in upholding the constitutionality of the Fugitive Slave Act of 1850, although he found it morally repugnant.²⁶ At the time, Charles Reich

²⁴ Charles A. Reich, *The Individual Sector: A Book Proposal*, 129 YALE L.J. F. 694, 695 (2020), https://www.yalelawjournal.org/pdf/Reich_TheIndividualSector_6kttw2s5.pdf.

²⁵ HERMAN MELVILLE, *BILLY BUDD, SAILOR* (Frederic Barron Freeman & Elizabeth Treeman eds., Harvard Univ. Press 1948) (1924); CHARLES A. REICH, *THE TRAGEDY OF JUSTICE IN BILLY BUDD* 127-43 (R. Milder ed., 1967).

²⁶ ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 43-45 (1975). Significantly, while still a law student, Cover helped to develop the argument for federal jurisdiction that eventually carried the day in *Goldberg*. See Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 96-97 (1967). See generally Raymond L. Faust, *Law, Morality And The Judge: Robert M. Cover's Justice Accused*, 3 IUSTITIA 112 (1975) (noting that "[t]o a man" all the judges charged with construing the fugitive slave acts "followed Captain Vere."). See generally Rodger Citron, *Herman Melville's Billy Budd: Why this Classic Law and Literature Novel Endures and Is Still Relevant Today*, JUSTIA: VERDICT (June 19, 2019), <https://verdict.justia.com/2019/06/19/herman-melvilles->

argued, Vere made the right choice. The tragedy of justice in *Billy Budd*, Charles lamented, was that law and justice are not always the same; those sworn to uphold the law must sometimes do injustice. People committed to justice may tragically end up becoming prisoners of the law.

So, *Billy Budd* presented Charles with a profound moral puzzle: how can justice break free of the rigid prison of law? Ironically, the answer came to him not through free choice, but command. Early in Charles's teaching career, Yale's great and bold dean Eugene V. Rostow simply ordered Charles to teach a legal subject that was entirely unfamiliar to him: property (so never let it be said that decanal coercion has never produced anything of value!).

In teaching this required subject, Charles found his first hook to solving Captain Vere's dilemma: rethinking property. To escape the law's rigidity, Reich argued, we must reinvent the idea of property to reflect modern reality. As he wrote in closing his *Billy Budd* essay, "[l]aw, as a *creation* of man, needs the imagination and insight of art so that it is not drawn in such a way as to imprison the human spirit."²⁷ Under received law, the traditional concepts of property allowed people to "earn" through labor and inheritance. But Reich argued that in late 20th century, our society needed to make a conceptual transition *from largesse to entitlement*, to the notion that simply by being born human, a person gains against society certain inalienable rights, which gives that person an entitlement to call upon society's resources.

Under Reich's person-centered view, "welfare benefits" are neither welfare nor benefits. They are *entitlements* that the state may not take away without due process of law. The conceptual shift was dramatic and real. To take just one example, for nearly four decades, my wife has been a legal services attorney. But the Legal Aid unit that she long worked in was not called the "Benefits Unit;" it was called the "Entitlements Unit."²⁸

billy-budd-why-this-classic-law-and-literature-novel-endures-and-is-still-relevant-today. For a recent comparison between the fugitive slave laws and the recent use of federal immigration laws to commandeer states, see Sandra Rierison, *Fugitive Slaves and Undocumented Immigrants: Testing the Boundaries of Our Federalism*, 74 U. MIAMI L. REV. 598 (2020).

²⁷ Reich, *supra* note 25, at 143 (emphasis in original).

²⁸ Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965), as cited in *Goldberg*, 397 U.S. at 262 n.8. ("[S]ociety today is built around entitlement. . . . Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen,

Charles's landmark article, *The New Property*, argued that, "to-day more and more of our wealth takes the form of rights or status rather than of tangible goods."²⁹ "Eventually those forms of largess which are closely linked to status must be deemed to be held *as of right*."³⁰ These "Rights of Man," to borrow Melville's phrase, become our bulwark against the state. For "[i]f the individual is to survive in a collective society," Charles wrote, "he must have protection against its ruthless pressures. There must be sanctuaries or enclaves where no majority can reach . . . to build an economic basis for liberty today . . . [w]e must create a new property," which can give us that sanctuary.³¹

Reich's revelation—that the "new property" can create a sanctuary where individual flourishing can occur—led to his reconceptualization of a "new due process." For if the statuses granted to you by the state are protectable property interests, they are not just charity that can be taken away as quickly as granted. This broader reading of the interests that no person may be "deprived of . . . without due process of law," invigorated the Due Process clauses of the Fifth and Fourteenth Amendments by greatly empowering individuals against the state.³² So in one fell swoop, Charles's article—one of the most-cited law review articles in history³³—revolutionized public and private law: including, but not limited to, the fields of property, procedure, constitutional law, administrative law, welfare law, family law, employment law, health and environmental law, and public interest lawyering.³⁴

routes for airlines and channels for television stations; long-term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients, they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.").

²⁹ Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 738 (1964).

³⁰ *Id.* at 785 (emphasis added).

³¹ *Id.* at 787.

³² See U.S. CONST. amends. V, XIV.

³³ Fred R. Shapiro, *The Most-Cited Articles from the Yale Law Journal*, 100 YALE L.J. 1449, 1462 (1991) [hereinafter *Most-Cited Yale*] (ranking *The New Property* first); Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012) (ranking *The New Property* seventh in a list of the most-cited law review articles).

³⁴ See *Most-Cited Yale*, *supra* note 33, at 1465 ("Individual Rights and Social Welfare was a call for the development, in the law schools and the profession, of a field of 'public interest law,' for unrepresented but vital interests affected by the managerial state.").

For *The New Property* did not simply reimagine property. It reimagined personhood. Under this vision, individuals are not mere beggars or supplicants, dependent on whatever privileges the state may deign to give them. Instead, they are free and equal rights-bearing citizens entitled to enjoy gateway rights in society—not just welfare benefits, but also housing, education, and health care³⁵—as an integral part of “the blessings of liberty” that the Constitution secures “to ourselves and our posterity.”³⁶ And so, with a single bold scholarly article, Reich breathed life into his mentor Justice Black’s “Living Constitution.”

Writing law review articles is one thing; getting them adopted by the courts is quite another. But six years after *The New Property*, as one leading scholar put it, “[i]n *Goldberg v. Kelly*, the majority opinion virtually adopted *The New Property* for its analytic framework.”³⁷ Citing two of Charles’s articles, Justice Brennan’s majority opinion in *Goldberg*³⁸ addressed two fundamental questions: what is property, and what constitutes due process before it is taken? He answered that property includes public assistance, which the state cannot take without first giving the recipient notice and an opportunity for a pre-termination evidentiary hearing: “[A]n effective opportunity to defend by

³⁵ See *id.* at 1467 (“With respect to entitlements for those in need, today I would argue that the due process clause guarantee against deprivation of life, liberty, or property must be interpreted to mean that there is an affirmative obligation on the part of the state to provide shelter, health care, care for children and the aged, and minimum sustenance to all persons.”).

³⁶ U.S. CONST. pmbl. The majority opinion in *Goldberg* cited this constitutional language just after citing *The New Property*. See *Goldberg v. Kelly*, 397 U.S. 254, 265 & n.13 (1970) (“Public assistance, then, is not mere charity, but a means to ‘promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.’ The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.”).

³⁷ Paul R. Verkuil, *The Bill of Rights at 200 Years: Bicentennial Perspective: Revisiting The New Property After Twenty-Five Years*, 31 WM. & MARY L. REV. 365, 367 (1990) (footnote omitted).

³⁸ 397 U.S. 254 (1970). *Goldberg* cites not just *The New Property*, but also cites Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965). *Goldberg*, 397 U.S. at 262 n.8. Justice Brennan is quoted as stating: “I was looking for a ‘new property’ case. I knew of Charles Reich’s work—I remembered him from his clerkship with Justice Black—but I was interested in the issue before that, back in New Jersey . . . *Goldberg v. Kelly* seemed to be a good vehicle to present the issue.” Tony Mauro, *Fair Hearing: Legacy to the Poor*, in REASON AND PASSION: JUSTICE BRENNAN’S ENDURING INFLUENCE 233, 237 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

confronting any adverse witnesses and by presenting his own arguments and evidence orally.”³⁹

By including within the traditional, thin concept of property what previously had been considered public, the *Goldberg* Court adopted Reich’s “thick theory” of property. And by combining that thickened *substantive* theory of entitlement with a thickened *procedural* theory of the process required before that entitlement can be terminated, *Goldberg* created a “thick theory” of due process: that due process must be viewed not just from the eye of the state, but from the *eye of the receiver*. As Oliver Wendell Holmes, Sr. had memorably reminded us, “[e]ven a dog knows the difference between being kicked and stumbled over.”⁴⁰ In this setting, a thick theory of due process means asking not just whether the procedure the government chose to provide is cost-effective, but also whether the government has treated someone fairly, whether individual dignity has been honored, and whether the state has genuinely acknowledged the worth of that individual.

Exploring the public and private sides of personhood drove Charles’s legal scholarship during the 1960’s. “Making the public private” characterized his attitude toward environmentalism. As he later wrote,

I would . . . extend new property thinking to embrace environmental rights. We should all have a right to a safe, clean, and intact natural environment, a right to be free of toxic threats, a right to participate in the management decisions concerning the public domain. Pollution of the ocean, or lumbering the last ancient forests, or commercial development of the national parks should be held to involve “new property rights” because these actions have a direct impact upon the quality of

³⁹ *Goldberg*, 397 U.S. at 268.

⁴⁰ Oliver Wendell Holmes, Sr., *Quotes*, GOODREADS, <https://www.goodreads.com/quotes/320530-even-a-dog-knows-the-difference-between-being-kicked-and>. Ironically, Reich’s mentor Justice Black dissented in *Goldberg*, objecting to including a “promised charitable instalment” in the category of a person’s property. *Goldberg*, 397 U.S. at 275 (Black, J., dissenting). Reich, by contrast, viewed this issue from the eye of receiver, arguing that the government can impoverish individuals by terminating many forms of new property: not just by cutting off their welfare benefits, but by depriving them of a license to practice their life’s work.

our lives and are part of each person's share in the commonwealth.⁴¹

But if *The New Property* and Charles's environmental scholarship were about "making the public private," then the flipside of Charles's 1960's scholarship explored how to preserve the "special need for privacy in public" in a world of seemingly unlimited governmental discretion.⁴² In challenging police questioning of law-abiding citizens and the illegality of "midnight raids" whereby state agents searched for a "man in the house" as the basis for cutting off benefits, Charles argued for a more nuanced delineation of the public and private spheres that would cabin the reach of government intrusion into one's private life.⁴³

By so saying, Charles was in fact whispering to his own deepest secret, which he had kept private from nearly everyone. As his remarkable memoir later recounted, Charles had at this point revealed nothing to the world about his own homosexual orientation.⁴⁴ One cannot read his memoir today without being moved by the story of how Charles finally came to embrace his own personhood. His memoir shows how his characteristic courage and intellectual honesty created an urgent need to become part of something larger than himself.

By demanding that much of what had been deemed private was in fact public, and that much of what had been deemed public be kept private, Charles was demanding his own zone of autonomy—what he came to call an "individual sector" free from state interference—where one could finally become oneself, the person one was meant to be, defined not by others' expectations, but by one's own.

II. CHARLES REICH'S SECOND QUESTION: WHO ARE WE?

By articulating his vision of "who am I?" Charles also started to clarify the question of "who are we?" As he said in discussing *The New Property* a quarter century after its publication:

⁴¹ *Most-Cited Yale*, *supra* note 33, at 1468.

⁴² See generally Sarah A. Seo, *The New Public*, 125 YALE L.J. 1616 (2016).

⁴³ Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347, 1360 (1963); Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1161-62 (1966).

⁴⁴ SORCERER, *supra* note 3, at 71, 92-93 (Charles's confession that he had been a "secret homosexual" while living in the District of Columbia in the 1950s).

A fundamental conflict exists in American life. . . . It is the conflict between our democratic ideals . . . and the fact that we spend most of our lives in large institutions that are quite opposed to those ideals. These large institutions are authoritarian, not democratic; they reject individual liberty on the job, and no such thing as individual ownership of property exists within them. There is also little concept of due process or the rule of law within these institutions. Far from being based upon equality, they are based upon inequality and extreme hierarchy. So, the ideals that we cherish as our democratic heritage struggle with the reality that most of our lives are spent in a setting that denies those ideals.⁴⁵

By so saying, Charles was acknowledging that the new property that he had identified was really double-edged. On the one hand, it could secure a measure of individual freedom against the state. But because the government controls the contours of the new property, it is always tempted to use its power to control some unrelated kind of behavior. In other words, through repeated interactions about what truly “belongs” to the individual, the state and the individual become and remain inextricably linked. “Individual liberty,” Reich concluded, “is threatened by economic control over people and their resulting excessive dependency. This is an inescapable fact about our present society. The issue is whether *we* can place limits on such control.”⁴⁶

So a fundamentally lonely person, Charles Reich, suddenly began asking not just the individualist question—who am I?—but the communitarian question: *who are we?* By so asking, Charles became one of our first modern “communitarian” legal scholars.

As Reich’s discontent deepened, he started to define his community of opposition to authority through acts of public dissent. He broke free of his establishment persona by picketing against Dow Chemical’s production of napalm during the Vietnam War.⁴⁷ Breaking from the straitjacket of law that had bound Captain Vere in *Billy Budd*, he chose to resort to civil disobedience. We are not condemned to

⁴⁵ Charles A. Reich, *The Liberty Impact of the New Property*, 31 WM. & MARY L. REV. 295, 295 (1990).

⁴⁶ *Id.* at 296 (emphasis added).

⁴⁷ *Passion*, *supra* note 11, at 423.

accept unjust laws, Charles reasoned. We not only can, but we must, reform the laws of society to accommodate the laws of nature. “This was hardly the role I imagined for myself when I became a law professor,” he wrote, “But ... [a] law professor does have a legitimate concern with what is being done in the name of constitutional government.”⁴⁸

So gradually, Charles came out in another way: he became a different kind of teacher and writer. He started teaching a popular course called “The Individual in America” at Yale College. He began spending his free time writing in the dining halls at Yale’s Morse and Ezra Stiles Colleges. He spent less time at the Law School and more time surrounded by Yale College students. He grew his hair long, began wearing beads and bellbottom jeans, and started smoking marijuana. He spent the Summer of Love—Summer 1967—in Berkeley, California. He began to find himself as a person by joining the Yale community and finding himself among a generation that was finding itself. His exceptional rhetorical gifts soon made him a leading voice of this new generation of revolution.

As he wrote in his memoir, “It was a self-conscious revolution. The students talked about it all the time. It was never a movement that needed or wanted leaders.”⁴⁹ It was a revolution of personhood:

[e]very person could be great and a genius in some way—that was its rebellion and its vision. The change in the students gave me my chance. Bit by bit I found myself contriving a scheme to become an entirely new kind of teacher and thereby vastly improve my own life. I would teach a college course concerning contemporary American society, in which the problems of alienation would be discussed along with the ideas I had evolved in law school. The course would deal with the stage of new consciousness, and I would try to put it into perspective as a development seeking to reverse the process of alienation.⁵⁰

And so, even while Charles was having his transformative personal experience, he began to explore the relationship between the

⁴⁸ *Id.*

⁴⁹ SORCERER, *supra* note 3, at 146.

⁵⁰ *Id.* at 146–47.

community and the individual. Charles Reich saw the dawn of New Deal, the Rights Revolution, and the antiwar movement as a revolution that he famously dubbed *The Greening of America*. Reich predicted a coming revolution of the new generation. The colorful title was intended not just to signal the impending collapse of the concrete manmade society that he felt had imprisoned us, but also to capture the birth of a vibrant environmental movement.

Reich identified three stages of American Consciousness: Consciousness I, the traditional outlook of the American farmer or small businessman using individualism and hard work to get ahead; Consciousness II: the values of the organizational society that arose following the New Deal, which valued corporations, conformity, consumerism, and degraded the environment; and Consciousness III, the new generation that was trying to break free of these traditional chains. Consciousness III, Reich argued, “promises a higher reason, a more human community, and a new and liberated individual.”⁵¹ When the utopian vision of Consciousness III became a reality, he memorably predicted, the greening of America would break through societal rigidity, emerging from the machine-made environment of the corporate state, “like flowers pushing up through a concrete pavement.”⁵²

Written “[w]ith the rigor of an intellectual but the enthusiasm of a teenager,” *Greening* “connected with and explained a particular cultural moment—the last optimistic gasp of the student counterculture—just before it began to recede.”⁵³ Within his new community Reich became celebrated as the intellectual voice of the movement, and his book climbed the best-seller lists, eventually selling more than two million copies. But within his old community, Charles was mocked.⁵⁴ The *Doonesbury* cartoon strip parodied him as a naïve, aging hippie “Professor Green.”⁵⁵ Yet as Charles noted, even while he was being laughed at, his vision of a new consciousness had become

⁵¹ GREENING, *supra* note 4, at 4.

⁵² *Id.* at 395.

⁵³ *Charles Reich’s Journey*, *supra* note 6, at 387, 388.

⁵⁴ See, e.g., Amity Shlaes, *Blue Collar No More*, WALL ST. J. (Sept. 3, 1999), <https://www.wsj.com/articles/SB936322457176406655>. (“Remember Charles Reich’s mongo bestseller, ‘The Greening of America’? Since then, Mr. Reich’s promise that the baby boomers would rework society into three stages of Consciousness has been revealed as so wacky that its principal value now is as a sort of joke.”).

⁵⁵ See *Doonesbury* Archive, WASH. POST, <https://www.washingtonpost.com/doonesbury/strip/archive/1971/11/03>; Resnik, *supra* note 20, at 713.

so universally adopted that “everybody now feels they wrote the book.”⁵⁶ Consciousness III, he wrote, is “taken as a sort of fantasy that is unreal. It could still be reality but at the moment it’s viewed as something like a fantasy or a dream that people woke up from with a headache.”⁵⁷

“*The Greening of America* did me in as far as academe was concerned,” Reich later recalled. “I would never be the same after that.”⁵⁸ He resigned from the Yale Law School faculty and in 1974 moved to San Francisco. “It was with the goal of being as far away as I possibly could be still in the United States—as far away from New York, where I grew up, New Haven, Washington, D.C.—to get some distance from my former life.”⁵⁹

But shortly after Reich moved west, the Supreme Court eviscerated his greatest constitutional work. Six years after *Goldberg*, in *Mathews v. Eldridge*,⁶⁰ the Burger Court limited the availability of procedural protections by refusing to require a pretermination oral hearing for a person facing the loss of disability benefits. Instead, following the kind of law-and-economics analysis espoused by Chicago School leader Richard Posner,⁶¹ the *Mathews* Court adopted a scientific three-part “balancing” test, whereby the recipient’s private interest was balanced against the public’s interest in preserving the public fisc, and the risk of error.⁶² This cost-benefit approach was more Benthamite than Kantian, more utilitarian than focused on the intrinsic value of fair government procedures to individuals.

As Jerry Mashaw and Frank Michelman later explained in powerful critiques of *Mathews*, the Court offered three factors but no

⁵⁶ Sam Roberts, *Charles Reich, Who Saw ‘The Greening of America,’ Dies at 91*, N. Y. TIMES (June 17, 2019), <https://www.nytimes.com/2019/06/17/books/charles-reich-dead.html>.

⁵⁷ *Id.*

⁵⁸ Loren Ghiglione, *Before Occupy Wall Street there was The Greening of America*, TRAVELING WITH TWAIN: IN SEARCH OF AMERICA’S IDENTITY, (Jan. 7, 2012), <https://travelingwithtwain.org/2012/01/07/san-francisco-ca/before-occupy-wall-street-there-was-the-greening-of-america/>.

⁵⁹ *Id.*

⁶⁰ 424 U.S. 319 (1976).

⁶¹ Cf. Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUDIES 399, 401 (1973) (critiquing the “tendency in the legal discussion of this question . . . to invoke a purely visceral sense of fairness,” and recommending instead that a court or tribunal should “ask first whether error costs would be substantially increased by denial of a trial-type hearing.”).

⁶² 424 U.S. at 347-48.

theory of value. As Mashaw put it, *Mathews* “generates an inquiry that is incomplete because unresponsive to the full range of concerns embodied in the due process clause.”⁶³ In practice, the *Mathews* test expressly pitted an individual’s right to a hearing against the state’s interest in efficient economic administration, a balancing that makes it all too easy to conclude that the individual is encountering a “tolerable” risk of governmental error. Justice Powell, writing for the Court, essentially found by *ipse dixit* that there had been no procedural unfairness in the deprivation, because the plaintiff should implicitly bear the risk of procedural error.

While offering false precision, the *Mathews* Court offered no empirical grounds upon which to measure any of the three balancing factors, nor did it take into account such intrinsic “dignitary values” as equality, dignity, and efficacy, much less the government’s obligations to enforce clear congressional mandates to provide benefits to eligible individuals. Thereafter, in a variety of settings, the Court expanded the reach of *Mathews* by rejecting individual claims that the Constitution protected expanded notions of “liberty” and “property” even where statutes and regulations appeared expressly to confer or protect liberty or property interests.⁶⁴

If *Goldberg* had briefly required a “thick theory of due process,” whereby governments, administrative agencies and courts were required to view due process from the eye of the receiver, *Mathews* substituted a “thin theory,” which viewed due process principally from the eyes of the state. By enshrining into law a cost-benefit calculation whereby the government’s fiscal and administrative interests were given paramount consideration, the *Mathews* test pushed individuals’ need for safety, equality, and dignity to the backburner.⁶⁵

Mathews inaugurated the current era of instrumental explanation in due process jurisprudence, which posits that the Framers’ concept of due process was far more concerned with accuracy, than with such fraternal values as preserving individual dignity, equality, or tradition. In the jurisprudential battle between Posner’s thin theory and

⁶³ Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 30 (1976). See also Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights*, 1973 DUKE L.J. 1153, 1172-77 (1973) (discussing “the values (ends, interests, purposes) that are supposed to be furthered by allowing persons to litigate.”).

⁶⁴ Mashaw, *supra* note 63, at 42-45, 54.

⁶⁵ *Id.* at 57-58.

the Reich/Mashaw/Michelman's thick theory of due process, the Burger Court chose the thin theory, finding efficiency and reducing error costs to be the prime determinants of whether due process has been accorded. By so saying, the Court minimized the reality that the constitutional process of an oral hearing was never just about process; it was about the dignitary right of every individual to have the opportunity to tell her own story, in her own words, about what the termination of welfare rights would mean in practical terms to her and her family.

Even at the time, there were other Justices who pushed back. Years earlier, in *Mullane v. Central Hanover Bank and Trust Co.*, Justice Jackson had reminded us that "when notice is a person's due, process which is a mere gesture is not due process."⁶⁶ In *Fuentes v. Shevin*, decided two years after *Goldberg*, Justice Stewart carefully distinguished between government determinations that are simply inaccurate and those that are substantively unfair.⁶⁷ Constitutional interpretation, Justice Brennan later cautioned, necessarily requires judges to show "more than proficiency in legal analysis." Instead they must become "sensitive to the balance of reason and passion that mark a given age . . . and the ways in which that balance leaves its mark on the everyday exchanges between government and citizen." Or as my late boss Justice Harry Blackmun, another generous reader of the due

⁶⁶ 339 U.S. 306, 315 (1950).

⁶⁷ Justice Stewart's opinion in *Fuentes* took pains to distinguish deprivations that are erroneous from those that are substantively unfair. He wrote:

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

. . . [T]he fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.

Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972) (emphasis added).

process clause put it, the Court cannot “purport[] to be the dispassionate oracle of the law, unmoved by ‘natural sympathy.’”⁶⁸ Thus, when interpreting grandly worded constitutional provisions, the Court should “adopt a ‘sympathetic’ reading, one which comports with the dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.”⁶⁹

But the 1970s ended by dashing Charles’s twin hopes: for a swift greening of America and for a person-centered constitutional jurisprudence committed to due process in the eye of the receiver. On the one hand, he had found himself and his voice within his community. But on the other hand, he now found himself in a kind of self-exile on the West Coast, distanced from the public discussions he had once so influenced.

There is little sign that this self-exile distressed Charles. To the contrary, it was probably a much-needed respite from an exhausting two decades where he was being invoked and attacked in the burgeoning social media that preceded the internet.

And with respite came revelation. The uncompleted work of the revolutions that Charles had championed convinced him that the real enemy was not the government alone, but a “system” rigged against the average person. That “system” told that person what he owned, was entitled to aspire to, and even whom he was free to love. This led Charles, in the final chapter of his life, to his third and final question.

III. CHARLES REICH’S THIRD QUESTION: HOW TO OPPOSE THE SYSTEM?

In moving west, Charles began teaching at the University of California, Santa Barbara and the University of San Francisco School of Law. There he published his autobiography, *The Sorcerer of Bolinas Reef*, the story of how he came to self-awareness.

⁶⁸ *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting).

⁶⁹ *Id.* at 213. For examples of Justice Blackmun’s “thick” due process reasoning, see, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 35 (1981) (Blackmun, J. dissenting). See generally Harold Hongju Koh, *Justice Blackmun and the “World Out There,”* 104 YALE L.J. 23, 24 (1994).

But more and more, he began to think about what he called “opposing the system.” As an extraordinarily able younger man, Charles had felt initially rewarded, but ultimately imprisoned by, “this system,” and his life’s work became about breaking free from its intellectual and emotional straitjacket.⁷⁰ But as time went on, Charles became less and less content with focusing just on his own liberation, or even that of his closest communities. Over time, Charles’s conviction deepened that a “system” that humans had created had come to rule them and deny them their sense of self and community. As the ‘80s became the ‘90s, his conviction only grew stronger and came to dominate the last chapters of his intellectual life.⁷¹

Guido Calabresi’s invitation to return home to Yale reenergized Charles’s academic career. He began to reflect on paths not taken, and how the damage could be repaired. In a 1990 symposium on *Goldberg*, he wrote:

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. . . .

. . . .

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.⁷²

⁷⁰ *Most-Cited Yale*, *supra* note 33, at 1469 (commentary by Charles A. Reich).

⁷¹ During these decades, Charles’s vision of a dystopian world where people labor under a false consciousness that masks their control by forces and machinery beyond their control also came to dominate popular culture, taken to extremes, for example, by the wildly popular film series inaugurated by *THE MATRIX* (Warner Bros. Pictures 1999) and *THE TERMINATOR* (Orion Pictures 1984).

⁷² Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOK. L. REV. 731, 731-32 (1990).

Against this vision, Charles offered instead what he called an “ecological approach to individual rights,” whereby the individual would receive protection not merely through a collection of pinpricks, historically-based rights, but through a broader functional umbrella defining the individual’s domain within a democratic society. Life, liberty, and property would be seen not as separate entities, but as the boundary markers for a constitutionally protected “individual sector” which could empower the individual to limit and balance the powers of the state.⁷³

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. . . .

. . . .

. . . Life does not exist in artificial isolation. . . . Human life developed in organic communities. . . . 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.⁷⁴

When individuals become excessively dependent upon large organizations, Charles argued, soon no one possesses sufficient independence to correct the system when it goes wrong. The result is a loss of human agency, which leads to passivity, apathy, timidity, and increasingly blindered vision. People lose the conviction that they have any ability to control their own lives. And when they perceive that their collective security is threatened—for example, by terrorist attack, pandemic, or an influx of immigrants—they tend to pick security over liberty, deferring to whatever government initiatives are supposedly necessary to keep them safe.

When Charles returned to Yale Law School in the early 1990s, a whole new set of social battles had begun, which echoed the past—the first Gulf War, which Charles saw as leading to a new Mideast

⁷³ *Most-Cited Yale*, *supra* note 33, at 1469 (commentary by Charles A. Reich).

⁷⁴ Reich, *supra* note 72, at 734, 737.

quagmire like Vietnam, intensified struggles over the environment, the battles over the rights of Haitian and Cuban immigrants and refugees, and the renewed struggle between liberty and security reborn on September 11, 2001. With his rare combination of empathy and insight, Charles supported in all of these struggles a new generation of scholar-activists, including me. During that period, as I worked on constitutional and international law issues relating to the Gulf War and Haitian and Cuban refugees, Charles constantly dropped by my office to ask how he could help. And even as he was renewing his intellectual plea for opposing the system, he was giving emotional support to hotly contested actions in the courts and in the streets.

During those years—along with a number of the friends who attended the Reich Conference⁷⁵—I lived the difference between the thin and thick theories of Due Process that Charles had delineated. During extended litigation over Haitian and Cuban refugees in the early 1990s, our Yale Law School Lowenstein Human Rights Clinic won from the Eastern District of New York, a sweeping ruling affording due process to Haitian alien detainees held on Guantánamo. Judge Sterling Johnson, Jr. permanently enjoined the United States government from violating the due process rights of HIV-positive Haitian refugees who had credible fears of persecution, holding that they had been denied procedures available to U.S.-based asylum applicants, been shown deliberate indifference to their medical needs, and subjected to informal disciplinary procedures and indefinite detention.⁷⁶ The Clinton administration, which had inherited the Guantánamo detention facility with visible discomfort, declined to appeal Judge Johnson's permanent injunction and chose to release the Haitians, but only on the condition that Judge Johnson's ruling be vacated by settlement.⁷⁷

When terrorist attacks hit on September 11, 2001, the ensuing vacuum of due process law on Guantánamo encouraged President George W. Bush to bring more than seven hundred alleged Al Qaeda detainees held in Afghanistan there, with no apparent exit strategy.

⁷⁵ The Yale Law students who participated in both the Haitian saga and this Reich Conference included my longtime friends Ray Brescia, Rodger Citron, and Brandt Goldstein, author of *BRANDT GOLDSTEIN, STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS FOUGHT THE PRESIDENT AND WON* (2006). For a retrospective on this litigation, see Harold Hongju Koh, *The Enduring Legacies of the Haitian Refugee Litigation*, 61 N.Y.L. SCH. L. REV. 31 (2016-17).

⁷⁶ See *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993).

⁷⁷ See Koh, *supra* note 75, at 60-61 (explaining how the vacatur came about).

The Bush Administration went on to deny that detainees have meaningful legal rights on Guantánamo, and in *Hamdi v. Rumsfeld* denied that even an American citizen on Guantánamo would have any due process rights.⁷⁸

Yet Reich's due process reasoning, as reformulated in *Mathews*, helped propel the Supreme Court in *Hamdi* to require *some* process for individuals held at Guantánamo Bay after 9/11. Yaser Esam Hamdi, a 20-year old Louisianan captured on an Afghan battlefield, held initially in Guantánamo, was moved to military brigs in Virginia and South Carolina, where he was held without charge in solitary confinement for more than two years. Hamdi's case directly raised the question: What process is due to an American citizen on American soil, whose liberty is undeniably being deprived? The Supreme Court overwhelmingly held that even an American "enemy combatant" captured on the battlefield has due process rights and applied the *Mathews v. Eldridge* balancing test to counter-terrorism detention.⁷⁹ The plurality in *Hamdi* held

that . . . in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.⁸⁰

Citing two classics of due process law—*Fuentes v. Shevin*⁸¹ and *Mullane v. Central Hanover Bank & Trust Co.*⁸²—Justice O'Connor's plurality intoned that "[t]hese essential constitutional promises may not be eroded." But "[a]t the same time," she concluded that "the exigencies of the circumstances may demand that, aside from these

⁷⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-39 (2004).

⁷⁹ Over Justice Thomas's solo dissent, Justice O'Connor, for a plurality of four, held that due process demanded more process than Hamdi had been given. Justices Souter, joined by Justice Ginsburg, agreed that on remand, Hamdi should have a meaningful opportunity to offer evidence that he was not an enemy combatant. And Justices Scalia and Stevens agreed that the Government had not invoked the Suspension Clause sufficiently to permit detention without the availability of habeas corpus.

⁸⁰ *Hamdi*, 542 U.S. at 509 (O'Connor, J., plurality opinion).

⁸¹ *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

⁸² *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”⁸³

Invoking the *Mathews* test then allowed the Court to invoke the thin theory of due process, whereby the individual’s right to process may be shrunk so that it does not burden the executive. The *Hamdi* plurality allowed hearsay evidence, shifted the burden of proof against the detainee, and foreclosed more process on the ground that it “would have questionable additional value in light of the burden on the government.”⁸⁴ In later cases, the Government finally accepted that detainees on Guantánamo have a procedural right, under both statutory and constitutional law, to challenge their detention.⁸⁵ But taking away with one hand what it had given with the other, the government claimed that despite their procedural right, aliens had no meaningful due process rights to assert on habeas.⁸⁶

Bluntly put, alien detainees on Guantánamo have been left with a procedural right to assert no due process rights. It is hard to imagine a thinner theory of due process viewed through the eyes of the state or a stronger vindication of Charles’s image of a system that refuses to recognize the personhood of individuals stripped of their liberty.

IV. CONCLUSION

So how should we remember Charles Reich today, in the age of Donald Trump? Isn’t it easy to be jaded and cynical about his utopianism? Perhaps Charles never lived to see his different world, but he deserves credit for imagining it. As Guido Calabresi put it:

⁸³ *Hamdi*, 542 U.S. at 533.

⁸⁴ *Id.* at 534.

⁸⁵ *Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁸⁶ See Robert Loeb, *Due Process for Guantánamo Detainees: The D.C. Circuit Rules in Qassim*, LAWFARE BLOG (June 25, 2019), <https://www.lawfare-blog.com/due-process-guantanamo-detainees-dc-circuit-rules-qassim>. Nearly thirty years after Judge Johnson’s due process ruling in the Haitian case, the D.C. Circuit again rejected an alien detainee’s claim that the Due Process clause applies on Guantánamo in *Ali v. Trump*, 959 F.3d 364 (D.C. Cir. 2020). At this writing, the detainee’s petition for rehearing and rehearing en banc has been denied and the detainee has sought Supreme Court review. See *Al Hela v. Trump*, No. 19-5079, 2020 WL 5083438 (D.C. Cir. Aug. 28, 2020). See also Linda Greenhouse, *A Court Just Slammed the Guantánamo Gate Shut*, N.Y. TIMES (Sep. 10, 2020) <https://www.ny-times.com/2020/09/10/opinion/guantanamo-due-process.html>.

Most of us in the mid-1960s thought the world was fine and headed in a comfortably liberal and unified direction Charl[ie] saw it differently and walked the halls of the Law School, in effect, saying, ‘Repent, the end is near.’ . . . Was it completely correct? No; prophets rarely are. Did it see and enlighten what most of us had missed altogether? Absolutely!⁸⁷

Let me urge that we remember Charles Reich’s life journey as an anthem to human rights. His intellectual voyage forms the background for current struggles that continue today: to recognize personhood for minorities, LGBTQ individuals, and immigrants; to address extreme inequality; to establish racial justice; to secure basic entitlements to housing, health care, education, and a sustainable environment. While Charles is now gone, his vision lives on, and continues to provoke and inspire.

Which brings me back, as my remembrance closes, to the story of Charles and the Purple Chair. Looking back, I now understand the story of Charles’s reclaiming his chair as about all three of the questions that he struggled with his entire life. By reclaiming property, and becoming whole again, he was restoring his personhood: answering the question, “Who am I?” By reclaiming his chair, and with it, his rightful place in the Yale Law School community and the social movements and justice battles it has always engaged, Charles was asking and answering the question: “Who are we, and what are we fighting for?” And by saying that from his chair, he was now ready to write his next book, about how to oppose the system, he was asking how we should blend our varied communities to form a more perfect union.

Like Harold and the Purple Crayon, what Charles Reich should be remembered for is the world he imagined: one where the individual rules the system and the natural rules the machine. He envisioned a living constitution of liberty fostering individual self-awareness and equality, treating all as equals based on the content of their character. He sought a community that constantly searched for a more perfect, not a more divided, union. And he offered an ambitious jurisprudence of due process empathetically understood from the eyes of the receiver, not the state.

⁸⁷ Roberts, *supra* note 56.

Was he completely correct? No, prophets rarely are. But did he see and enlighten what most of us had missed altogether? Absolutely! And will we ever get there? Maybe not soon, but that is no reason to stop climbing. As Charles taught us, there is always another summit whose climbing we can still imagine.

So how best to remember Charles Reich's legacy today? He put it most poignantly himself: "I felt lost. But now I'm home and I'm whole."

So welcome home, Charles, to your community. We will continue your work. Thank you for helping us to see what you saw. Yours was a life greatly and honestly lived.