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CHARLES REICH AND THE LEGAL HISTORY OF PRIVACY

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In 2006, David Kennedy and William Fisher compiled about twenty law review articles that stood out as “moments of methodological innovation which have left lasting traces in the legal reasoning practices of American lawyers and judges” in *The Canon of American Legal Thought*.¹ The editors further accounted for their selections by explaining that “some innovations that once seemed crucial, but were not sustained, were understandably no longer on the tips of tongues. We were sorry, for example, to find little mention of Charles Reich’s 1964 law review article, ‘The New Property,’ among colleagues today.”²

While law professors may have stopped talking about *The New Property* by the early 2000s, historians have rediscovered the groundbreaking essay as well as Reich’s other writings. Karen Tani explored Reich’s place in the history of welfare in *States of Dependency*.³ Another example is Sarah Igo’s recently published book on the history of privacy, *The Known Citizen*.⁴ My own book *Policing the Open Road* includes a chapter that braids Reich’s biography and

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¹ DAVID KENNEDY & WILLIAM W. FISHER III, *THE CANON OF AMERICAN LEGAL THOUGHT* 13 (2006).

² *Id.* at 13-14.

³ KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972* (2016); *see also* Karen M. Tani, *Flemming v. Nestor: Anticommunism, the Welfare State, and the Making of “New Property,”* 26 *LAW & HIST. REV.* 379 (2008); Felicia Kornbluh & Karen M. Tani, *The Poverty Law Education of Charles Reich*, 36 *TOURO L. REV.* 807 (2020).

⁴ *See* SARAH E. IGO, *THE KNOWN CITIZEN: A HISTORY OF PRIVACY IN MODERN AMERICA* (2018).

scholarship with the history of criminal procedure.⁵ More studies of Reich as a historical figure are in the pipeline; for instance, Gabe Levine is currently examining Reich as a theorist of public participation in the administrative state.⁶

Historians' interest in Reich offers a case study of the relationship between historical and legal studies. What can legal scholars learn from historians, and what can historians learn from legal scholarship? This Essay will explore these two questions by focusing on Igo's *The Known Citizen* since she encountered Reich not with the dual citizenship of a legal historian but as an intellectual historian. I will first highlight what legal scholars can learn from historians by summarizing the main arguments in *The Known Citizen*. Then, I will provide an alternative legal account to Igo's history of privacy, which may clear up some questions that Igo raised but could not answer. Finally, this Essay will conclude with Reich himself as a link between historians, who read him as a primary source, and law professors, who read his work as legal scholarship. Reading Reich as both, I argue, can deepen our understanding of the history of privacy in the twentieth-century United States.

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The reality that community life requires some relinquishment of privacy lies at the heart of *The Known Citizen*. In Igo's account, privacy is not so much a thing we have or have lost as it is a discourse about the costs and benefits of modern society. Igo calls this "privacy talk."⁷ To put it another way, when Americans debated the modern state, they talked about privacy. Each chapter illustrates this insight through select topics from the late nineteenth century to the present and highlights the paradoxes of living in a "knowing society" that seeks to govern and to provide for its members by making them more legible.⁸ By recasting privacy as a discourse filled with tensions and tradeoffs, *The Known Citizen* offers a corrective to contem-

⁵ See SARAH A. SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM* 201-30 (2019).

⁶ Gabriel L. Levine, *Standing for Solitude: Charles Reich and the Reimagining of Administrative Politics, 1962-1972* (May 23, 2020) (unpublished manuscript, on file with author).

⁷ See, e.g., IGO, *supra* note 4, at 2, 6.

⁸ See, e.g., *id.* at 1-2.

porary debates that, as Igo puts it, “envision a giant ledger where privacy is slipping ever more swiftly into the deficit column.”⁹

A particularly fascinating example from *The Known Citizen* is the privacy talk on social security numbers.¹⁰ The project of setting up a system that could keep track of every single person paying into the program, link each social security contribution to each individual, and maintain a record of their employment history, changes of address, and age had significant privacy implications. Employees were worried about how their employers, current or potential, would use their personal information. African-American leaders were livid that the application form included a racial designation. Labor union members feared that information about a worker’s previous position, along with a clue to union affiliation, might become available to a prospective boss. Female workers, who had falsified their age or marital status to get their jobs, were concerned that they would be outed and fired. And if they had said they were younger than they were, which many did, then they couldn’t start receiving retirement benefits until some years past their actual retirement age. These were some of the privacy concerns when the social security program was just getting rolled out. Today, social security numbers are connected to much more information about us, including medical and financial records, which facilitate the distribution of welfare, health care, credit, retirement income, and more. All of these benefits of social security necessarily come with some intrusions into our private lives, and most citizens cannot—nor do they wish to—completely shield or remove themselves from the “knowing society.” Talking about privacy thus became a way to debate the changes that the modern state had wrought.

Another chapter discusses privacy concerns with the welfare state in the 1960s, when Reich raised awareness in a series of law review articles about the implications of welfare regulations and enforcement on individual dignity and personal liberty.¹¹ For instance, one article exposed the practice of social security officials inspecting the homes of female welfare recipients during “midnight raids” to

⁹ *Id.* at 16.

¹⁰ *See id.* at 55-98.

¹¹ *See id.* at 174-80.

make sure that a man was not living with them.¹² In Igo's perspective, Reich's scholarship "reveals how privacy talk could challenge the harms of class and potentially enlarge poor people's citizenship claims."¹³ An inspiration for this radical vision of poor people's rights was the 1965 case *Griswold v. Connecticut*,¹⁴ which, for the first time, recognized a constitutional right to privacy in order to establish a fundamental right for married couples to use contraceptives.¹⁵ Although the decision dealt with just one aspect of privacy, *Griswold* "allowed Americans to imagine more robust applications of the 'right to be let alone,'" including the privacy rights of welfare recipients.¹⁶

That the right to privacy made its debut in a reproductive rights case seemed "odd, even accidental" to Igo.¹⁷ In her telling, the Court was a latecomer to the decades-long privacy talk, contraception was not even controversial for many Americans at the time of the *Griswold* decision, and many married women already had access to contraceptives. Igo argues that because *Griswold* was immaterial to larger privacy debates, the decision ultimately narrowed the scope of the constitutional right to privacy. The radical vision never materialized, and jurists did not look to *Griswold* to answer pressing questions about the balance between the benefits of fuller citizenship and intrusions into a person's private, personal life. In Igo's narrative, *Griswold* is a curious blip in the history of privacy.

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There is an alternative legal history of the right to privacy, one that is familiar to law professors. It does not at all undermine Igo's account and, in fact, further supports the history that Igo tells. However, it does provide another perspective that starts long before 1965, casts a different light on the significance and meaning of *Griswold*, and answers some of Igo's lingering questions. This legal history shows that the demise of an expansive constitutional right to pri-

¹² See *id.* at 176 (discussing Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963)).

¹³ *Id.* at 175.

¹⁴ 381 U.S. 479 (1965).

¹⁵ See *id.* at 484-85.

¹⁶ IGO, *supra* note 4.

¹⁷ *Id.* at 155.

vacy lies not in the fact that *Griswold* served as its standard-bearer; rather, it had to do with the conditions of modern society—the very conditions that Igo argues gave rise to privacy talk. In this account, *Griswold* was more of a throwback to an earlier era rather than a radical inspiration and, as such, could never resolve the privacy paradoxes of the twentieth-century United States.

One starting point for the alternative legal history is the (in)famous case, *Lochner v. New York*.¹⁸ In 1905, the Supreme Court invalidated a state law limiting bakers' working hours to ten hours a day and sixty hours a week on the ground that it "interferes with the right of contract between the employer and employees."¹⁹ Rejecting justifications for the law as a health measure, the Court characterized the state as meddling with "a private business."²⁰ For several decades, courts regularly overturned laws intended to address the ills of an industrial society to protect private rights, particularly, the rights to property and contract.²¹ This lasted only so long, especially with cyclical failures in the American economy, and in the late 1930s, the Supreme Court reversed course. Since then, courts have treated economic regulations as presumptively constitutional. With judicial blessing, local and state governments used their broad "police power" to govern for the public's health, safety, and morals and, in the process, helped to build the modern regulatory state.

A generation after the Court's jurisprudential switch, some progressive legal scholars were beginning to question whether the "public interest state" had grown so much as to threaten individual freedom.²² In 1964, Reich published *The New Property* about the dangers of Americans' dependence on the administrative state for much of their livelihood, which included welfare, retirement benefits, and government contracts and licenses. That dependence empowered the state to undermine the exercise of constitutional rights and even

¹⁸ 198 U.S. 45 (1905).

¹⁹ *Id.* at 53.

²⁰ *Id.* at 64.

²¹ See LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* 37 & n.52 (2016) (noting that judicial decisions invalidating social and economic legislation were more common at the state level than at the Supreme Court in the first two decades of the twentieth century). How frequently courts invalidated regulations is not as germane to my point as the fact that *Lochner*-type arguments were available for challengers to make.

²² Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 756 (1964).

monitor the most intimate aspects of citizens' lives. Several of Reich's legal writings in the 1960s raised the question, what might be the limits on state power when private property (like owning a private business in *Lochner*) no longer served its traditional protective function?²³ Reich's own answer was "to draw a new zone of privacy . . . to carry on the work that private property once did but can no longer do."²⁴

The following year, in 1965, the Supreme Court provided a similar answer in *Griswold* by establishing a constitutional right to privacy.²⁵ According to the opinion, forbidding married couples from using contraceptives had a "maximum destructive impact" on the marital relationship, a bond that fell within "the zone of privacy"—the very same phrase Reich had invoked.²⁶ Also like Reich, the Court had to think creatively, for the word "privacy" did not appear in the text of the Constitution. So, the opinion drew "penumbras" and "emanations" from "several fundamental constitutional guarantees" to form an equally fundamental right to privacy.²⁷

Igo is right that *Griswold* served a symbolic purpose of upholding marital intimacy, given that many married women did have access to contraceptives. But *Griswold* also answered an important question about the limits of the knowing state given the established pedigree of anti-contraceptive laws, which fell reliably under the state's authority to regulate public health and morals. In an era when private property rights could no longer be marshaled to overturn a health law as in *Lochner*, the Court tried out a fundamental right to privacy. This was basically Reich's proposal in *The New Property*.

It may have been fortuitous that a challenge to a contraceptive ban became the occasion for the Supreme Court's first privacy decision, but there was nothing accidental or odd about it. The Court again turned to privacy just two years later in a case involving a warrantless wiretap. *Katz v. United States*,²⁸ like *Griswold*, forged new ground when it declared that the Fourth Amendment protected an in-

²³ See, e.g., *id.*; Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

²⁴ Reich, *supra* note 22, at 778.

²⁵ *Griswold*, 381 U.S. at 484-85.

²⁶ *Id.* at 485.

²⁷ *Id.* at 484.

²⁸ *Katz v. United States*, 389 U.S. 347 (1967) (Harlan, J., concurring).

dividual's "reasonable expectation of privacy."²⁹ Up until then, courts had ruled that a Fourth Amendment violation required physical trespass onto a person's private property. Wiretaps, however, allowed the government to eavesdrop without setting foot into someone's house. In *Katz*, the defendant wasn't even in his home; federal agents had wiretapped a public telephone booth that they knew Katz would use. To protect private conversations held in public places, the Court held that the Fourth Amendment protected "people, not places."³⁰ People's reasonable expectations of privacy, that is.

Griswold and *Katz* may not have been obvious choices for constitutional landmark status, but the facts in these cases made it easier for the Supreme Court to establish a right to privacy. In both cases, the government had invaded a space that could be likened to a house—the preeminent private sphere in the Anglo-American legal tradition. Justice Douglas, who authored the *Griswold* opinion, enshrined "the sacred precincts of marital *bedrooms*."³¹ Justice Stewart's opinion in *Katz* insisted that the Fourth Amendment guarantee did "not vanish when the search in question is transferred from the setting of a *home*, an *office*, or a hotel *room* to that of a telephone *booth*."³² In a string of analogies, Stewart associated public telephone booths with the archetypal private sphere.

Tethering the right to privacy to the home had two important consequences. First, it would not be easy to extend *Griswold* or *Katz* to cases where the connection to the home was not as clear. As criminal procedure scholars have observed, reasonable expectations of privacy under the Fourth Amendment turned out to overlap significantly with the physical home.³³ And among the reasons why *Roe*'s right to an abortion proved much more controversial than *Griswold*'s right to birth control was that, unlike in *Griswold*, the analogy to the home in *Roe* was more tenuous: "the woman and her responsible

²⁹ *Id.* at 360.

³⁰ *Id.* at 351.

³¹ *Griswold*, 381 U.S. at 485.

³² *Katz*, 389 U.S. at 359 (emphases added).

³³ See, e.g., David Alan Sklansky, "One Train May Hide Another": *Katz*, *Stonewall*, and the Secret Subtext of Criminal Procedure, 41 UC DAVIS L. REV. 875, 885 (2008) ("In case after case, the Court has read the Fourth Amendment to provide protections that are place-specific. Inside the home, the Fourth Amendment applies with special force; outside the home . . . Fourth Amendment protection drops off dramatically.") (omitting citations).

physician . . . in consultation.”³⁴ This did not really conjure images of a home, and other images seemed more apt to those who opposed abortion.³⁵ Justice Rehnquist argued in dissent that a “transaction resulting in an operation such as this is not ‘private’ in the ordinary usage of that word.”³⁶ Ultimately, the utility of a constitutional right to privacy was limited where the home would be difficult to evoke for the myriad technologies and activities that were regulated in the modern world—the very modernity that inspired all the privacy talk in *The Known Citizen*.

There was a second reason for privacy right’s limited utility. When the Court recognized a right to contraceptives, it crafted that right as a fundamental, substantive right—a right to be free from government intrusion. Like the right to contract in *Lochner*, substantive rights greatly hinder the government from regulating for the public’s interest, which would be untenable in a modern society that depends on government regulation.³⁷ Accordingly, many privacy rights today are procedural in nature, like the Fourth Amendment. *Katz* did not ban the government from electronic eavesdropping. Instead, it required a warrant—a procedural protection—to use a wiretap because flatly prohibiting investigatory mechanisms as privacy violations would impede the government’s ability to enforce its laws.

Igo ends the chapter on *Griswold* with the observation that, “neither *Griswold*’s ‘zones of privacy’ nor the rulings that followed it could resolve the case’s most generative questions.”³⁸ But *Griswold*’s substantive approach would never have been able to resolve modern society’s privacy questions. The fundamental right recognized in *Griswold* was a brief reversion to a period when private

³⁴ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

³⁵ Although *Wolf v. Colorado* treated an abortion doctor’s office as a private space akin to a home, law enforcement’s warrantless search of the office and papers within it made it seem like a home invasion. 338 U.S. 25 (1949).

³⁶ *Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting).

³⁷ The *Lochner* opinion did recognize that the right to contract was not absolute. See *Lochner*, 198 U.S. at 53 (“Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere.”). But because the decision completely disregarded the legislative determination that bakers’ working conditions were hazardous to their health, the *Lochner* decision effectively embraced a substantive approach to constitutional rights.

³⁸ IGO, *supra* note 4, at 182.

rights could trump progressive legislation. Not surprisingly, *The Known Citizen* concludes with a list of laws that includes the Video Privacy Protection Act of 1988, the Driver's Privacy Protection Act of 1994, and the Children's Online Privacy Protection Act of 1998.³⁹ When the blunt tool of constitutional law could not take into account both the benefits and dangers of living in a "knowing society," Americans relied on the flexibility of statutes to protect at least some aspects of their privacy.⁴⁰

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Charles Reich has captivated, first, legal scholars and, more recently, historians because his scholarship can be read either as primary sources or secondary sources, that is, as proposals for legal reform *and* as glimpses of a postwar, progressive thinker grappling with the abuses of the public interest state. What drew me, as a legal historian, to Reich was this dual aspect of his writings. Even more, he personalized the legal history of privacy. He wrote not only history-making law review articles like *The New Property* but also piercing observations of American society and culture in *The Greening of America*, as well as a memoir, *The Sorcerer of Bolinas Reef*. The piece that perhaps most overtly merged the personal with the academic may be *Police Questioning of Law Abiding Citizens*.⁴¹

The essay, published in the *Yale Law Journal* in 1966, described the immense discretionary power that police officers wielded in their enforcement of traffic laws. Reich also recounted his own numerous encounters with the police in his car. These car stops were not just about the annoyances of getting pulled over one too many times. They were also about the invasion of his privacy. As a closeted gay man at a time when sodomy was a crime in all states but one, Reich went for long drives to escape the burdens of keeping his se-

³⁹ *Id.* at 362-63.

⁴⁰ Interestingly, *The Known Citizen* also concludes with various self-help measures for protecting one's privacy in the digital world, which has, in turn, generated an industry of "privacy professionals." *Id.* at 364. I didn't expect to see these varieties of rugged individualism and capitalism in conclusion, but they seem fitting for a book about the history of modern America.

⁴¹ Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966).

cret. So, when the police questioned his whereabouts in his car, they were prying into the most intimate parts of his personal life.⁴²

To protect citizen-drivers on the road from the police, Reich proposed a right to “privacy in public.”⁴³ The “public” referred to the public sphere of the automobile and the road, where the government’s interest in regulating the dangers of automobility justified volumes of traffic laws and a great deal of policing.⁴⁴ As the legal basis for this right to privacy in public, Reich cited *Griswold*, which was decided the year before he published the essay.⁴⁵ But Reich never questioned traffic laws and the need to enforce them, which a *Griswold*-like substantive right to privacy would have undermined.⁴⁶ As a result, when describing how “privacy in public” would work in practice, Reich ended up listing detailed rules regulating police conduct—procedural rights, in other words.⁴⁷

An acolyte of New Deal liberalism briefly flirted with the formalistic structure of *Griswold* when confronting a knowing state that threatened the privacy and dignity of its citizens before eventually turning to proceduralism. Reich made similar moves in *The New Property* as well, where he wrote of the need for “a new zone of privacy . . . to carry on the work that private property once did but can no longer do.”⁴⁸ This sounds like the substantive approach of *Griswold* and *Lochner*, but the privacy rights that protected new properties in the modern state were procedural, not substantive, rights.⁴⁹

⁴² I tell this story in more depth in chapter five of *Policing the Open Road*.

⁴³ Reich, *supra* note 41, at 1165.

⁴⁴ See SEO, *supra* note 5, at 26-27 (on the proliferation of traffic laws), 128-33 (on early twentieth-century courts’ justification of warrantless car stops and searches based on the regulation of traffic for the benefit of public order and safety); *California v. Carney*, 471 U.S. 386, 392 (1985) (“These reduced expectations of privacy [in a car] derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways.”); *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976) (observing that “[a]utomobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls” to justify warrantless inventory search of car).

⁴⁵ Reich, *supra* note 41, at 1170.

⁴⁶ Telephone interview with Charles Reich (Apr. 13, 2017) (reiterating the need for policing cars because everybody violated traffic rules and there were too many scary drivers on the road).

⁴⁷ Reich, *supra* note 41, at 1170.

⁴⁸ Reich, *supra* note 22, at 778.

⁴⁹ See *Goldberg v. Kelly*, 397 U.S. 254 (1970); see also TANI, *supra* note 3, at 19 (“The [modern American] state recognized all citizens, even the poorest, as rights-

The angst we have about the challenge of defining the right to privacy, especially in today's digital society, mirrors Reich's angst about the tensions between his progressive inheritance and his growing unease with the public interest state. Reich's internal conflicts are still present; those at the Charles A. Reich Conference carried on his legacy by continuing to wrestle with the benefits and dangers of the administrative state.⁵⁰ Reich thought and wrote about privacy when trying to reconcile the necessity of the state to meet human needs and the counterbalancing need to protect individual dignity in modern society. In that sense, we have all been engaging in what Igo calls "privacy talk."

bearing members of the national polity, but limited those rights largely to procedural ones. It left substantive rights to the ebb and flow of politics.").

⁵⁰ See Gillian Metzger, *Charles A. Reich - A Commemoration of His Life and Legacy* (Jan. 30, 2020), <https://www.tourolaw.edu/AboutTouroLaw/Reich-videos>; Judith Resnik, *Charles A. Reich - A Commemoration of His Life and Legacy* (Jan. 30, 2020), <https://www.tourolaw.edu/AboutTouroLaw/Reich-videos>.