



2021

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Recommended Citation

Brescia, Raymond H. (2021) "Private Largess in the Digital Age: Privacy in Reich's the New Property," *Touro Law Review*. Vol. 36 : No. 3 , Article 11.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol36/iss3/11>

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**PRIVATE LARGESS IN THE DIGITAL AGE:
PRIVACY IN REICH'S *THE NEW PROPERTY***

*Raymond H. Brescia**

I. INTRODUCTION

One of the often-overlooked aspects of Charles Reich's landmark work *The New Property*¹ in the *Yale Law Journal* is his treatment of the notion of privacy and its connection to his theory of property interests. Many know the legacy and legend of this Article, one of the most cited articles in legal scholarship² and one that had a clear and direct influence on the landmark Supreme Court decision in *Goldberg v. Kelly*.³ In addition, embedded in Reich's vision of a new property was an appreciation for the role that privacy also plays in advancing human dignity and autonomy; in fact, the notions of property and privacy are deeply entwined in *The New Property*.

Unlike the threats Reich saw regarding what he would call government largess, the threats to dignity and autonomy today, I will argue, come mostly from the private sector in the form of the absence of digital privacy. Indeed, I will discuss the role of privacy in

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¹ Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964).

² See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 760, 766 (1996) (at the time, ranking Reich's *The New Property* as the fourth most-cited law review article of all time).

³ *Goldberg v. Kelly*, 397 U.S. 254, 261-66 (1970) (recognizing property interest in continued receipt of welfare benefits); see Paul R. Verkuil, *Revisiting The New Property after Twenty-Five Years*, 31 WM. & MARY L. REV. 365, 367 (1990) (noting the Supreme Court's majority opinion in *Goldberg v. Kelly* "virtually adopted *The New Property* for its analytical framework").

Reich's *The New Property* and explore the ways that the threats to privacy today reflect and create many of the fears Reich portrayed as the consequences of the public interest state where the individual was a beneficiary of public largess.⁴ That public largess was, in turn, subject to manipulation and control by government officials.⁵ In contrast, what we have today with respect to privacy, particularly digital privacy, is a private interest state that is no less threatening to the dignity and autonomy that Reich's new property was supposed to protect in relation to government. Before discussing Reich's views of property and privacy and what I call the private interest state, I will first discuss, briefly, Reich's conception of property.

II. THE CONCEPT OF PROPERTY IN *THE NEW PROPERTY*

In addition to having a dramatic impact on how scholars, and the courts, view property, Reich's *The New Property* also inspired generations of legal services lawyers to think about the weight of the state on their clients and the weightlessness many of those clients feel when they are unanchored to the status that property protections afford.⁶ For fifteen years prior to joining the academy, I was one of those legal services lawyers and found the core concepts of freedom and dignity that Reich associated with the types of protections that property rights could deliver to my clients led many of them, most of whom were low-income tenants, to dream of one day owning their own homes.⁷ I was fortunate enough to have helped hundreds of

⁴ Reich, *supra* note 1, at 785 (describing dangers of the public interest state and public largess).

⁵ Reich also recognized that private, corporate interests would at times act at the behest of the government to ingratiate themselves to that government so as to obtain or maintain the forms of largess they received. *Id.* at 764-68 (describing ways in which government power can be used to aid private interests).

⁶ This notion of individuals adrift within a system that anchors them only through their connection to the buoys that state-sponsored interests afford them permeates *The New Property*. For a reflection on the impact of poverty law advocacy—where this effect may be most profound—after *Goldberg v. Kelly* and *The New Property*, see generally Sylvia A. Law, *Some Reflections on Goldberg v. Kelly at Twenty Years*, 56 BROOK. L. REV. 805 (1990).

⁷ For a description of some of the benefits of homeownership for low-income households, see CHRISTOPHER E. HERBERT, ET AL., IS HOMEOWNERSHIP STILL AN EFFECTIVE MEANS OF BUILDING WEALTH FOR LOW-INCOME AND MINORITY HOUSEHOLDS (WAS IT EVER?) 3-10 (2013). *But cf.* KEEANGA-YAMAHTTA

such clients to move from what Reich might call the feudal state of tenancy⁸ to one in which they would find dignity and autonomy through homeownership.⁹ I saw first-hand the positive psychological effects that the drive for such dignity and autonomy had on my clients and the benefits that would accrue to them once they achieved it.¹⁰ While one of Reich's critical insights was, of course, that this very "old" style of property protection—homeownership—should be extended to newer forms of relationships, hence, the so-called New Property, the benefits or consequences of property protections are the same: they afford the individual a degree of dignity and autonomy that the individual does not enjoy when her life is subject to the whims and caprice of others, whether that is the government, private actors, or the market in general.¹¹

Contrary to what one might expect from legal scholarship that was attempting to create a new class of property protections based on the nature of particular interests, Reich did not make an essentialist argument for why certain classes of interests, like welfare benefits and state-issued licenses, should receive greater protections.¹² Al-

TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 258 (2019) (describing "reflexive[]" sense that homeownership is beneficial for low-income people).

⁸ See Reich, *supra* note 1, at 768-71 (describing the "New Feudalism").

⁹ See, e.g., MIRIAM AXEL-LUTE, NAT'L HOUS. INST., Homeownership TODAY & TOMORROW: BUILDING ASSETS WHILE PRESERVING AFFORDABILITY 22-25 (2010) (describing economic independence as a benefit of homeownership for low- and moderate-income households), http://www.nhi.org/pdf/NHI-Case-Studies_CP_10_10.pdf. What is more, as Margaret Jane Radin has argued, ownership of property also reflects our character, sense of self, and notions of our personhood. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 968 (1982) (arguing that notions of and expectations in property, including owning a home, enable the individual to "express[] one's character through property"). For a discussion of the role of client self-sufficiency and empowerment in community development advocacy, see, e.g., Anthony V. Alfieri, *Faith in Community: Representing "Colored Town,"* 95 CAL. L. REV. 1829, 1847 (2007).

¹⁰ For a collection and review of the literature on the benefits of homeownership, see William M. Rohe et al., *The Social Benefits and Costs of Homeownership: A Critical Assessment of the Research* 11-22 (Harvard Univ. Joint Ctr. for Hous. Studies, Working Paper No. LIHO- 01.12, 2001).

¹¹ As Bruce Ackerman has argued, autonomy does not have to be "the only good thing: it suffices for it to be the best thing that there is." BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 368 (1980).

¹² NICHOLAS L. GEORGAKOPOULOS, PRINCIPLES AND METHODS OF LAW AND ECONOMICS 22 (2005) (describing differences between essentialist and consequentialist theories).

though he would say that “[p]roperty is a legal institution the essence of which is the creation and protection of certain rights in wealth of any kind,”¹³ with the very next breath he pronounced that “[t]he institution performs many different functions.”¹⁴ Indeed, instead of saying there was something inherent in these interests, he made what was a more consequentialist argument.¹⁵ First and foremost, he took the position, common at the time, that property interests were not derived from some essential truth about the nature of property, but, rather were “the creation of law.”¹⁶ In turn, “property represents a relationship between wealth,”¹⁷ which, for Reich, was created by “culture” and “society,” and that property’s owner.¹⁸ Reich’s normative move was to say that we had to widen the aperture and recognize a broader class of interests as enjoying protection as property. But again, this was not because of the nature of these interests. Rather, this protection was necessary for these broader interests because the critical benefits that would accrue to individuals were such interests to receive recognition through the law.

The reason he would do so is that Reich saw a growing problem with what he called government largess.¹⁹ Individuals and corporations were, more and more, becoming dependent on the government for their livelihood and well-being.²⁰ Such largess took many forms: welfare benefits, professional licenses, employment, franchises like television channels and the ability to operate a business, agricultural subsidies, etc.²¹ Individuals and big business, like airlines and railroad companies, were all “on the dole,” as Reich would argue.²² But Reich’s ultimate argument that these types of interests should enjoy property protections was not a function of the nature of the interests, but, rather, the consequences of government largess: the fact that government, by dispensing these items to individuals and corporations, could just as easily take them away without rhyme or reason.²³

¹³ Reich, *supra* note 1, at 771.

¹⁴ *Id.*

¹⁵ GEORGAKOPOULOS, *supra* note 12, at 22 (describing consequentialism).

¹⁶ Reich, *supra* note 1, at 739.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 733.

²⁰ *Id.* at 734-39.

²¹ *Id.* at 733.

²² *Id.* at 734-36.

²³ *Id.* at 749.

For Reich, “[b]enefits, subsidies, and privileges are seen as ‘gifts’ to be given on conditions, and thus the political and legal sources of government power merge into one.”²⁴ These gifts would create a deep sense of dependency of the individual that would undermine her individuality, independence, and self-determination.²⁵

Seeking to stay on the safe side of an uncertain, often unknowable line, people dependent on largess are likely to eschew any activities that might incur official displeasure. Beneficiaries of government bounty fear to offend, lest ways and means be found, in the obscure corners of discretion, to deny these favors in the future.²⁶

Thus, what I think was more important to Reich than naming a new class of property interests was recognizing the reasons for doing so. And those reasons were not a function of the nature of the interests he had identified. There was nothing inherently “property-like” in a welfare benefit. Rather, it was the consequence of not having adequate protections for the interests that were centerpieces of a life lived with dignity and autonomy that rendered the protection of those interests valuable and critical to the individual.²⁷ As Reich would assert: “property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.”²⁸

Reich offered many examples of instances where forms of government largess are critical to individual dignity.²⁹ For example, when speaking about the potential loss of a pension, he explained that “[n]o form [of government largess] is more vital to the independence and dignity of the individual.”³⁰ Similarly, he decried the loss of dignity that the welfare beneficiary suffered by the intrusive nature of the oversight conducted by welfare officials, which, he would claim, “sometimes are a deep invasion of [the recipient’s] freedom of ac-

²⁴ *Id.* Reich would add: “[g]overnment largess not only increases the legal basis for government power; it increases the political basis as well.” *Id.*

²⁵ *Id.*

²⁶ *Id.* at 751.

²⁷ *Id.* at 771.

²⁸ *Id.*

²⁹ *Id.* at 756-64.

³⁰ *Id.* at 769.

tion.”³¹ Indeed, he would continue, “[i]f the businessman, the teacher, and the professional man find themselves subject to the power of government largess, the man on public assistance is even more dependent,” even when welfare officials impose conditions on receipt of benefits “with the best of motivations.”³² What is more, the vesting in government officials of such discretion had harmful effects. Not quite going as far as Lord Acton that “absolute power corrupts absolutely,”³³ Reich would say that “[v]ast discretion tends to corrupt.”³⁴

Reich feared the broad power of government over the lives and interests of the public would eventually lead to the emergence of what he would call the “public interest state,” which, he would also say, was not upon the United States at the time he wrote *The New Property*, but it was coming.³⁵ And, if it were to come, he believed there would be no way to contain government power.³⁶ Complete control of the individual through government largess would create utter dependence, and Reich asked what would this dependence “do to the American character?”³⁷ Furthermore, “[w]ithout the security of the person which individual wealth provides and which largess fails to provide, what, indeed, will we become?”³⁸

This fear was motivated by Reich’s sense that “[t]he pressures on the individual are greatly increased by the interrelatedness of society and the pervasiveness of regulation.”³⁹ Indeed, for Reich, “[c]aught in the vast network of regulation, the individual has no hiding place.”⁴⁰ The answer to these threats was that this array of interests he described as government largess should enjoy the benefits of property protections:

³¹ *Id.* at 758.

³² *Id.*

³³ Letter from John E.E. Dalberg–Action (Lord Acton) to Bishop Mendell Creighton (Apr. 5, 1887), reprinted in JOHN EMERICH EDWARD DALBERG–ACTION, *ESSAYS ON FREEDOM AND POWER* 364 (G. Himmelfarb ed., 1972).

³⁴ Reich, *supra* note 1, at 759.

³⁵ Reich would note that his regime of new property protections was essential for “the society that is coming,” and this was “the challenge of the future.” *Id.* at 787; see also *id.* at 771 (“The public interest state is not with us yet. But we are left with large questions.”).

³⁶ Reich, *supra* note 1, at 771.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 759.

⁴⁰ *Id.* at 760.

One of the[] functions [of property] is to draw a boundary between public and private power. Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference.⁴¹

As stated previously, Reich would put it more succinctly when he said that property “maintain[s] independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.”⁴²

Now, while there are instances where we talk about “zones” in property law, like, literally, when we talk about “zoning,” it is indeed more common to talk about privacy when we talk about zones, as in the Zone of Privacy in cases like *Griswold v. Connecticut*⁴³ where the Supreme Court first embraces the concept.⁴⁴ As I hope to show, many of the concerns about dignity, individualism, and autonomy would appear to spring from what may have been Reich’s deeper concern with privacy. And although *The New Property* was groundbreaking and impactful, and the fears that the so-called “public-interest state”⁴⁵—a world in which government enjoyed the power to suppress dissent and control the individual⁴⁶—were real at the time and continue to this day, we are facing a new threat to dignity and autonomy, from different institutions, and this threat implicates many of the same concerns that Reich raised when advocating for a new approach to property.

III. THE CONCEPT OF PRIVACY IN THE NEW PROPERTY

A close reading of *The New Property* reveals a deep-seated focus on and concern with privacy. In fact, privacy seems to be the object

⁴¹ *Id.* at 771.

⁴² *Id.*

⁴³ See generally 381 U.S. 479 (1965).

⁴⁴ *Id.* at 483.

⁴⁵ Reich, *supra* note 1, at 756.

⁴⁶ *Id.* at 756-68 (describing the public interest state).

of Reich's desire for the degree of autonomy that the extension of private property to government largess would accomplish: again, a consequentialist rather than an essentialist view of the property interests at stake in government largess. While Reich would argue that there are several privacy-related protections in the Bill of Rights implicated by government largess, namely the First and Fourth Amendments,⁴⁷ he would seem to blend many of the concepts. Indeed, it is extremely difficult to disentangle his notions of property and the consequences of not protecting it, and the importance he places on privacy, with the lack of safeguards for such privacy having many of the same consequences of unchecked government largess. In Reich's mind, the lines between the public and private sectors were becoming so intertwined that privacy would be caught in the middle and strangled. As he would say, "[i]f public and private are now blurred, it will be necessary to draw a new zone of privacy."⁴⁸ What is more, he would assert, "[i]f private property can no longer perform its protective functions, it will be necessary to establish institutions to carry on the work that private property once did but can no longer do."⁴⁹ For Reich, that work, the consequences of private property, included the protection of a private sphere where the individual's dignity and humanity resided. His prescription for how to preserve this dignity and humanity, again, includes references to the importance of privacy and the consequences of not having it.

In order to check the dangers of the public interest state, Reich would identify the need for the following:

First, the growth of government power based on dispensing wealth must be kept within bounds. Second, there must be a zone of privacy for each individual beyond which neither government nor private power can push—a hiding place from the all-pervasive system of regulation and control. Finally, it must be recognized that we are becoming a society based upon relationship and status—status deriving primarily from source of livelihood. Status is so closely linked to personality that destruction of one may well destroy the other. Status must therefore be surrounded with

⁴⁷ *Id.* at 760-64.

⁴⁸ *Id.* at 778.

⁴⁹ *Id.* at 778.

the kinds of safeguards once reserved for personality.⁵⁰

Thus, in Reich's view, the consequences of government largess are inextricably intertwined with human dignity and individual autonomy, which are both at risk due to the proliferation of government largess and the threats to privacy such largess generates.⁵¹ Reich certainly saw the risks of the unchecked expansion of government largess on human dignity, which reflected a concern for human privacy that would come with property protections for such largess. What he may not have anticipated was the risk to privacy from what I call private largess as it exists in the digital world today.

IV. DIGITAL PRIVACY TODAY

Early in the Internet age, in a now-famous line attributed to Scott McNealy of Sun Microsystems, it was proclaimed as follows: "You have zero privacy—get over it."⁵² What we say and do on and through our phones; what we say and do at home in front of our intelligent assistants, home security, and smart speakers; where we drive; whenever we are in public—it is all open for inspection, use, and sale, most of which is without our knowledge, little of it with our informed consent. This information follows us around, creates a sort of digital parallel universe. As someone who went to high school in the early 1980s and lived through the era so wonderfully portrayed in the Netflix series "Stranger Things," I like to call this dark, shadow world that mirrors our own the Digital Upside Down.⁵³ Or, for a slightly more literary reference, we have created Tolkienesque Ringwraiths of ourselves, a Nazgûl version of our digital and analog presence that stalks us everywhere we go, like they would Frodo and

⁵⁰ Reich, *supra* note 1, at 785.

⁵¹ *Id.* at 778.

⁵² Polly Sprenger, *Sun on Privacy: "Get Over It,"* WIRED MAG. (Jan. 26, 1999), <https://www.wired.com/1999/01/sun-on-privacy-get-over-it/>.

⁵³ See Raymond H. Brescia, *Zoning Cyberspace: Protecting Privacy in the Digital Upside Down*, 2020 UTAH L. REV. (forthcoming 2020). In the Netflix original series "Stranger Things," the "Upside Down" is described as an "alternate reality or dimension existing in parallel to the human world." *The Upside Down*, Stranger Things WIKI, http://strangerthings.wikia.com/wiki/The_Upside_Down (last visited Aug. 19, 2020).

the One Ring.⁵⁴ Whether it is notorious examples of massive breaches, or simply the quotidian monitoring of our digital activities, this is all not a bug but a feature of what Shoshanna Zuboff calls “Surveillance Capitalism,”⁵⁵ where we have obtained services seemingly for free, but, it turns out, we are the product.⁵⁶ Our activities, no matter how personal or identity defining, are practically all for sale on the digital market. We are subject to the whims of private actors, who contain the power to make our most private information public. We thus face a form of private largess.

As the Cambridge Analytica scandal surrounding the 2016 election showed, even the most careful person can only control so much of this data from getting out. There, 300,000 Facebook users participated in one of those silly personality quizzes that were so ubiquitous a few years ago, like, which Downton Abbey character are you.⁵⁷ These 300,000 users accepted the terms of the survey simply by taking it, and by doing so, which it is safe to assume the overwhelming majority did so reflexively, they gave the creator of the survey access to those survey respondents’ private Facebook pages.⁵⁸ But they also consented to give the researcher access to all of their friends’ private pages as well.⁵⁹ As a result, those 300,000 respondents revealed the private information of not 300,000 individuals, not even three million individuals, but eighty-seven million people, a profound example of

⁵⁴ See *Nazgûl*, THE ONE WIKI TO RULE THEM ALL, <https://lotr.fandom.com/wiki/Nazg%C3%BBl> (last visited Jan. 25, 2020) (describing ringwraiths as individuals who are corrupted by the evil lord Sauron who gave them enchanted rings that “eventually rendered their bearers invisible to all but those who could see in the wraith world, and enslaved them to the will of Sauron”).

⁵⁵ SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019).

⁵⁶ *Id.* at 69 (noting that, with online activities, users are “the sources of raw material supply” that is mined by digital companies for profits).

⁵⁷ Carole Cadwalladr & Emma Graham-Harrison, *How Cambridge Analytica Turned Facebook ‘Likes’ into a Lucrative Political Tool*, THE GUARDIAN (Mar. 17, 2018, 9:02 AM), <https://www.theguardian.com/technology/2018/mar/17/facebook-cambridge-analytica-kogan-data-algorithm>; Timothy Summers, *Facebook is Killing Democracy with its Personality Profiling Data*, THE CONVERSATION (Mar. 21, 2018, 6:42 AM), <https://theconversation.com/facebook-is-killing-democracy-with-its-personality-profiling-data-93611>; *Facebook Says Up to 87m People Affected in Cambridge Analytica Data-Mining Scandal*, ABC (Apr. 4, 2018, 6:32 PM), <https://www.abc.net.au/news/2018-04-05/facebook-raises-cambridge-analytica-estimates/9620652>.

⁵⁸ Cadwalladr & Graham-Harrison, *supra* note 57.

⁵⁹ *Id.*

how deep and wide our digital networks extend.⁶⁰ While this was a form of breach—the 87 million people did not consent to have their private information shared with this infiltrator—the deep irony was that this kind of practice was both common on Facebook, and did not violate the Facebook terms of service.⁶¹ Moreover, even if one considered this a data breach, most of the information on our phones, the places we visit in the digital world, the places we visit in the analog world—almost all of it is stored somewhere, shared somehow, and, ultimately, likely open to inspection and sale.⁶² And it is getting harder and harder to control this information as technology is moving faster and faster and our laws, oversight, and regulation cannot keep up with it.⁶³ As quoted in the *New York Times* recently, an investor in a facial recognition software company that is being used by private companies and especially law enforcement entities asserted: “I’ve come to the conclusion that because information constantly increases, there’s never going to be privacy . . . Laws have to determine what’s legal, but you can’t ban technology. Sure, that might lead to a dystopian future or something, but you can’t ban it.”⁶⁴

Given the nature of this dystopian state, there is a significant price we pay for the ubiquity of digital service. And there are a lot of different facets and harms associated with the loss of privacy in this dystopian state. Danielle Citron has talked about the importance of sexual privacy, the risks associated with a lack of such privacy for self-determination, and the ways in which a lack of sexual privacy can harm marginalized and oppressed groups.⁶⁵ The same is true for what we might call political privacy—the ability to search for like-minded people, to explore divergent ideas, to collaborate and work

⁶⁰ ZUBOFF, *supra* note 55, at 179.

⁶¹ Cadwalladr & Graham-Harrison, *supra* note 57.

⁶² See ZUBOFF, *supra* note 55, at 67-69 (describing emergence of market in online user activity).

⁶³ Stefan Ducich, *These Walls Can Talk! Securing Digital Privacy in the Smart Home under the Fourth Amendment*, 16 *Duke L. & Tech. Rev.* 278, 279 (2018) (“Privacy law in the United States has not adequately kept pace with these technological developments, and its failure to recognize the unique character of digital information is undermining the security of the home against government intrusion.”).

⁶⁴ Kashmir Hill, *The Secretive Company That Might End Privacy as We Know It*, N.Y. TIMES (Jan. 18, 2020), <https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html>.

⁶⁵ Danielle Keats Citron, *Sexual Privacy*, 128 *Yale L.J.* 1870, 1882-88 (2019).

with others to bring about social change and realize self-determination.⁶⁶ A lack of privacy puts so much of this in jeopardy. What is more, in the era of Zuboff's surveillance capitalism, much of these threats come from private entities.⁶⁷ While we may have moved away from Reich's public interest state, in some ways, with the threats to digital privacy, we are moving towards a sort of private interest state, but not a single individual's private interest, but, rather, corporate private interest writ large. And I think Charlie Reich would have had a lot to say about that.

V. PRIVACY IN THE PUBLIC/PRIVATE INTEREST STATE

In fact, we can see that Reich's description of the hallmarks of the public interest state resemble those of this new private interest state. He would describe the outlines of the public interest state where government largess is the coin of the realm as possessing the following features:

- (1) Increasingly we turn over wealth and rights to government, which reallocates and redistributes them in the many forms of largess; (2) there is a merging of public and private, in which lines of private ownership are blurred; (3) the administration of the system has given rise to special laws and special tribunals, outside the ordinary structure of government; (4) the right to possess and use government largess is bound up with the recipient's legal status; status is both the basis for receiving largess and a consequence of receiving it; hence the new wealth is not readily transferable; (5) individuals hold the wealth conditionally rather than absolutely; the conditions are usually obligations owed to the government or to the public, and may include the obligation of loyalty to the government; the obligations may be changed or increased at the will of the state; (6) for breach of condition the wealth may be

⁶⁶ Frank Michelman, *Law's Republic*, 97 YALE L. J. 1500, 1535 (1988) (describing value of public-law right to privacy to collective self-determination).

⁶⁷ ZUBOFF, *supra* note 55, at 74-81.

forfeited or escheated back to the government; (7) the sovereign power is shared with large private interests; (8) the object of the whole system is to enforce "the public interest" - paramount - the interest of the state or society or the lord by means of the distribution and use of wealth in such a way as to create and maintain dependence.⁶⁸

These features, he would say, were similar to feudalism.⁶⁹ And the current state of digital privacy shares many of these feudal features, just with private and not public actors in charge of our personal information.

Such features are remarkably similar to those Reich identified as characteristics of the public interest state. We turn over our digital activities to private entities, "which reallocate[] and redistribute[] them in the many forms of largess."⁷⁰ There is a "merging of public and private," as private entities are recruited to assist government actors with surveillance.⁷¹ As Judith Resnik has shown, we are relying more on private arbitration to resolve disputes, especially with respect to disputes over digital practices.⁷² Individuals are at the mercy of the private entity or entities holding their private information, and the terms of possession of digital rights "may be changed or increased at the will of" such private entities.⁷³ The failure to act with an unreasonably high degree of diligence regarding the protection of one's digital privacy rights generally means such rights to control over such information is ceded to private interests, such private interests act with relative impunity with respect to such information, and this imposition of a particular type of legal status "is both the basis

⁶⁸ Reich, *supra* note 1, at 770.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*; see also VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR 121-23 (2017) (describing digital surveillance of welfare recipients).

⁷² Judith Resnik, *Fairness in Numbers: Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 122 (2011) (raising questions about equality and fairness in enforcement of arbitration clauses).

⁷³ Reich, *supra* note 1, at 770; see, e.g., FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 206-07 (2015) (describing overlap between public and private interests in the digital world).

for receiving largess and a consequence of receiving it.”⁷⁴ Finally, in the era of Surveillance Capitalism, where maintenance of a digital existence is essential to functioning in the contemporary world, to paraphrase Reich, “the object of the whole system,” is to promote the corporate interests “in such a way as to create and maintain dependence” on such entities for the ability to participate in the digital world.⁷⁵

We have already seen one of Silicon Valley’s behemoths behaving badly with Facebook’s Cambridge Analytica scandal. Let us look now at another such behemoth, Uber. In 2012, Uber analyzed the mountains of data it had on its customers. Its researchers proudly proclaimed the following in a blogpost on the company’s website, which has since been taken down:

You know that Uber loves you and well, gosh, sometimes it’s nice to think that you love us, too. But we know we’re not the only ones in your life and we know that you sometimes look for love elsewhere. Well, while you’re out loving other human beings, we #UberData nerds are cuddled up with our computers, loving math.⁷⁶

And what were the Uber Nerds doing, cuddled up with their computers? They were tracking what they called “Rides of Glory”: morning trips that left from a location its users had visited the night before that was not their home, what Uber concluded must have been one-night stands.⁷⁷ Now, that might seem frivolous, comical, or just desserts for philanderers, it was remarkably intrusive. But Uber has deployed similar tactics in China, where they tracked the location of Uber drivers to determine if they participated in a taxi drivers’ rally designed to do what? Protest Uber.⁷⁸ One Uber official also threatened that he

⁷⁴ Reich, *supra* note 1, at 770.

⁷⁵ *Id.* For a description of the emergence of an economic model through which free content was delivered in exchange for user “attention,” see TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* 16 (2016).

⁷⁶ *Uber’s Deleted “Rides of Glory” Blog Post, WHO’S DRIVING YOU?* (Dec. 30, 2014), <http://www.whosdrivingyou.org/blog/ubers-deleted-rides-of-glory-blog-post>.

⁷⁷ *Id.*

⁷⁸ Dante D’Orazio, *Uber Is Tracking Its Drivers in China, Will Fire Anyone Attending Taxi Protests*, *The Verge* (June 14, 2015, 10:41 AM),

was prepared to investigate the private lives of journalists who dared to write negative things about the company.⁷⁹ It is clear that such tools can be turned on any one of us, at any time, should we act, speak, or even think in ways that displease the holders of all of this private information they have about us, this private largess.

Let me close with this one historical anecdote on the threats to political privacy from surveillance. In July 1775, after the Continental Congress began meeting, just months after the first shots were fired at Lexington and Concord and a full year before independence was declared, these emerging revolutionaries knew they had to do one critical thing immediately: they needed a safe means of communicating.⁸⁰ They feared the postal clerks operating the Crown's postal system in the colonies. They worried that they might be labeled as seditious if the content of their mail, tracts, and other communications—which were subject to inspection by the official clerks and mail carriers—was revealed to the authorities.⁸¹ In response, in one of its first official acts, the group created an independent postal system that stretched from what is now Maine all the way to Georgia.⁸² The Continental Congress knew the ability to communicate was essential to the rebellion, and the printing press played a pivotal role in organizing support and solidifying what was then emerging as a new, national identity.⁸³ As David Ramsay, historian of the revolution would proclaim, in terms of independence, “the pen and the press had merit equal to that of the sword . . . [T]he war was the people's war, and was carried on without funds,” but the army alone would not have won the war “unless the great body of the people had been prepared for it, and also kept in a constant disposition to oppose Great-Britain.”⁸⁴ The written word, distributed through a free and in-

<https://www.theverge.com/2015/6/14/8778111/uber-threatens-to-fire-drivers-attending-protests-in-china>.

⁷⁹ Ben Smith, *Uber Executive Suggests Digging Up Dirt on Journalists*, Buzz Feed News (Nov. 17, 2014, 8:57 PM), <https://www.buzzfeednews.com/article/bensmith/uber-executive-suggests-digging-up-dirt-on-journalists>.

⁸⁰ Joseph M. Adelman, *A Constitutional Conveyance of Intelligence, Public and Private: The Post Office, the Business of Printing, and the American Revolution*, 11 ENTERPRISE & SOC'Y 709, 717-22 (2010).

⁸¹ *Id.*

⁸² *Id.* at 739.

⁸³ PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 66 (2004).

⁸⁴ 2 DAVID RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION 406 (1811).

dependent communication network, was essential to that effort. And this sort of fear of surveillance is only now more pervasive in the digital age, as the Hong Kong protesters are playing what is often called a “cat-and-mouse” game where they are trying to stay one step ahead of the authorities in organizing and coordinating their efforts.⁸⁵

There is not a doubt in my mind, given Reich’s concerns about modern technology and the ways in which our dependence on government threatened individual identity and dignity and undermined the self-determination so critical for a democracy, that the state of digital privacy, particularly political privacy, would give him great pause.

VI. CONCLUSION

In many ways, Charles Reich’s life’s work may seem today like that of a Cassandra who expressed grave concerns about the future.⁸⁶ It is interesting, also, to think that he would write *The New Property* and *The Greening of America*⁸⁷ at a time when he believed a new consciousness was taking hold.⁸⁸ But just as he perceived that this new consciousness was forming, something else was happening too. The late 1960s and early 1970s were also the first moments of the dawning of the digital age when its networked fingers were just starting to emerge in military and university laboratories.⁸⁹ While he would live to see this emergence, he had mostly retired from public life by the time digital and mobile technologies would seem to have a grip on the world, and techno-futurists would proclaim the likelihood of a singularity, yet another new consciousness, through which com-

⁸⁵ Jon Emont, Wenxin Fan & Joyu Wang, *Hong Kong’s Protesters Test Riot Police with Cat-and-Mouse Tactics*, Wall St. J. (Aug. 10, 2019, 10:50 AM), <https://www.wsj.com/articles/hong-kongs-protesters-test-riot-police-in-game-of-cat-and-mouse-11565444342>.

⁸⁶ PIERRE GRIMAL, *THE DICTIONARY OF CLASSICAL MYTHOLOGY* 91 (A.R. Maxwell-Hyslop trans., Basil Blackwell Publisher 1986) (1951) (describing the myth of Cassandra).

⁸⁷ CHARLES A. REICH, *THE GREENING OF AMERICA* (1970).

⁸⁸ *Id.* at 256.

⁸⁹ See, e.g., *Reno v. ACLU*, 521 U.S. 844, 849-50 (1997) (describing emergence of the internet in military and university laboratories as a way to communicate in the face of interruptions in communications capacities in a national emergency).

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puters and human intellect would merge.⁹⁰ This singularity appears to be upon us in some ways with the emergence of the Digital Upside Down. I do not believe Reich would have welcomed it.

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⁹⁰ RAY KURZWEIL, *HOW TO CREATE A MIND* 261 (2012) (describing new consciousness of the so-called singularity); *see also* RAY KURZWEIL, *THE SINGULARITY IS NEAR: WHEN HUMANS TRANSCEND BIOLOGY* 7 (2005) (same).