

Constituting Security and Fairness: Reflecting on Charles Reich's Imagination and Impact

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I first “met” Charles Reich by reading his 1964 *Yale Law Journal* article, *The New Property*,¹ when I was a college student taking a course on social welfare. Reich wrote that “in a society that chiefly values material well-being,” control over property was “the very foundation of individuality.”² Because government had become a “major source of wealth” through its provision of “money, benefits, services, contracts, franchises, and licenses,”³ what was “property” had changed.

Reich saw the vulnerability that such power generated. He knew that governments always invoked “the public interest” to explain decisions to grant or withdraw benefits, services, and licenses. He understood that the phrase masked “conflicting values” about political and personal ordering.⁴ Reich called for limiting government power through a theory for which he is famous: that benefits, services, contracts, and licenses were not government “largess,” but “rights.”⁵ Instead of unfettered government discretion, Reich proposed substantive and procedural constraints on governments’ distribution and revocation.

Not long after reading Reich, I was teaching him. As I had learned in college, the U.S. Supreme Court had turned aspects of Reich’s insights into law. *Goldberg v. Kelly* held that states could not cut off welfare recipients’ benefits without first

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

2. *Id.* at 733.

3. *Id.* at 733.

4. *Id.* at 787.

5. *Id.* at 785-86.

providing an in-person hearing at which they could contest the claims against them.⁶

Writing for the Court in 1970, Justice Brennan explained that these “benefits are a matter of statutory entitlement for persons qualified to receive them.”⁷ Justice Brennan cited *The New Property* for that proposition. He added that it “may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’”⁸ Quoting Reich, he explained that entitlements (from “long term contracts for defense, space and education” to “social security pensions for individuals”) were “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.”⁹

The remedy that the Court crafted in *Goldberg* aimed to provide part of what Reich called for: effective enforcement for “the poor.” The Court equated a set of procedures (notice, an opportunity to respond, and an impartial decision-maker limited to ruling on the record and required to provide reasons) with substantively fair outcomes. Those procedures (which Justice Brennan characterized as “rudimentary”)¹⁰ looked a good deal like what courts understood themselves to provide.¹¹

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6. 397 U.S. 254 (1970). The backdrop to and litigation of the case is the subject of the history by Martha Davis. See MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973* (1993).
 7. *Goldberg*, 397 U.S. at 262.
 8. *Id.* at 262 n.8 (quoting Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L.J.* 1245, 1255 (1965)) (citing Reich, *supra* note 1).
 9. *Goldberg*, 397 U.S. at 262 n.8.
 10. *Id.* at 267.
 11. My phrasing is deliberate, as the failures of many courts to live up to what they understand themselves to provide is vivid today. The Department of Justice’s report on Ferguson and the subsequent litigation and settlement provide one of many examples. See CIVIL RIGHTS DIV., U.S. DEP’T OF JUST., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* (2015) [hereinafter *FERGUSON REPORT*], https://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/Z52X-KFTW]; see also JUDITH RESNIK, ANNA VANCLEAVE, KRISTEN BELL, SKYLAR ALBERTSON, NATALIA FRIEDLANDER, ILLYANA GREEN & MICHAEL MORSE, YALE LAW SCH., ARTHUR LIMAN CTR. FOR PUB. INTEREST LAW, *WHO PAYS? FINES, FEES, BAIL, AND THE COST OF COURTS* (2018), https://law.yale.edu/sites/default/files/area/center/liman/document/liman_colloquium_book_04.20.18.pdf [https://perma.cc/PE7V-AD8T]; JUDITH RESNIK, ANNA VANCLEAVE, ALEXANDRA HARRINGTON, JEFF SELBIN, LISA FOSTER, JOANNA WEISS, FAITH BARKSDALE, ALEXANDRA EYNON, STEPHANIE GARLOCK & DANIEL PHILLIPS, YALE LAW SCH., ARTHUR LIMAN CTR. FOR PUB. INTEREST LAW, *ABILITY TO PAY* (2019), https://law.yale.edu/sites/default/files/area/center/liman/document/liman_colloquium_book_combined_cover_march_21_2019.pdf [https://perma.cc/NG4N-SDR8].

That framework recognized that agencies regularly made adjudicatory decisions in both federal and state governments. People in a host of circumstances therefore also “met” Reich as they enlisted his insights to secure some protection from government decisions that harmed them.¹²

For example, four years after *Goldberg*, the Court applied its template to prisoners facing the loss of statutory “good-time credits.” In 1974, Nebraska prisoners successfully argued that those credits were a protected interest that the state could not take away without fair procedures.¹³ *Wolff v. McDonald* concluded that if prison staff wanted to punish prisoners by revoking good time, the prison had to provide prisoners with an opportunity to be heard and to present evidence on their own behalf.¹⁴ As a consequence, “due process hearings” became commonplace occurrences in prisons, and on occasion, prisoners succeed in limiting the imposition of additional punishment.¹⁵

Two years later, the Court started to cut back on its own partial application of Reich’s insights. In 1976 in *Mathews v. Eldridge*, Justice Powell’s majority refused to require a pretermination oral hearing for a person facing the loss of disability benefits.¹⁶ Thereafter, in a variety of contexts, the Court shifted away from commitments that the Constitution protected historic rights of liberty and property. New majorities, often over distressed dissents, sought to find liberty’s and property’s sources in positive law, and then, even when statutes and regula-

12. Whether court-based models of process produce just results has been debated since. See, e.g., William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983); William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 BROOK. L. REV. 777 (1990); Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861 (1990).

13. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

14. *Id.* at 556–58. Subsequent decisions cabined this ruling. See, e.g., *Meachum v. Fano*, 427 U.S. 215, 225–27 (1976); *Sandin v. O’Connor*, 515 U.S. 472, 477–84 (1994), and notes 16–17 and accompanying text, *infra*. See generally Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People’s “Ruin,”* 129 Yale L.J. F. 365 (2020).

15. One illustration comes from 2018 data in Oregon, when the state confined about 14,000 people in prison. Its Department of Corrections conducted more than 10,000 due process disciplinary hearings, and in some thirteen percent, hearing officers dismissed the case. Telephone interview with the Assistant Inspector General for Hearings, Oregon Department of Corrections (Nov. 15, 2019); E-mail from the Assistant Inspector General for Hearings, Oregon Department of Corrections, to Judith Resnik, Arthur Liman Professor of Law, Yale Law School (Nov. 18, 2019) (on file with author). The relationship between limiting the exercise of arbitrariness and precluding certain forms of punishment is complex, and many commentators are concerned about the adequacy of a focus on process. See *supra* note 12 and *infra* notes 17 and 34.

16. 424 U.S. 319, 340 (1976).

tions appeared to confer or protect liberty or property interests, the Court substituted its own assessment about whether the deprivation was one for which procedural fairness was requisite.¹⁷

Yet even with these restrictions, Reich's formulation as reconceived in *Mathews v. Eldridge* helped propel the Supreme Court in *Hamdi v. Rumsfeld* to require some process for individuals held at Guantánamo Bay after 9/11. The Court rejected the government's assertion that it could hold potentially indefinitely individuals whom it deemed "enemy combatants" and provide them with no chance to contest the government's action to classify and detain them. The Court required what could be understood as *Goldberg*-lite, in that it only obliged the government to create limited opportunities to contest that status.¹⁸ In practice, lower courts have tolerated constraints on the implementation of those "safeguards" and permitted impoverished information to sustain ongoing detention.¹⁹

To recount the legal import of *The New Property* without locating the origins of Reich's insights is to miss how much his passion for humanity and his horror at injustice propelled his stunning scholarly interventions. I learned firsthand about how Reich became concerned with entitlements when I next met him—this time in person—on one of his trips from San Francisco back to Yale Law School.

Reich explained that he started thinking about the impact of the loss of a government license when he was a law clerk for Justice Hugo Black. Both were distressed about a case involving a doctor, Edward K. Barsky, whose license to practice medicine had been suspended by New York because of his conviction of

17. In addition to *Meachum v. Fano*, 427 U.S. 215 (1976), *Montanye v. Haymes*, 427 U.S. 236 (1976), and *Sandin v. Conner*, 515 U.S. 472 (1995), other key decisions include *Kentucky v. Williams*, 534 U.S. 184 (2002) and *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761-62 (2005). As Tom Grey explained, an approach that looked only at the text of state statutes and regulations could fail to recognize what ought to be entitlements that were not codified and could overvalue what some positive law expressly protected. See Thomas C. Grey, *Procedural Fairness and Substantive Rights*, 18 NOMOS: DUE PROCESS 182 (J. Roland Pennock & John W. Chapman eds., 1977).

18. 542 U.S. 507 (2004).

19. *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir. 2011) (Tatel, J., dissenting). Judge Tatel's dissent makes plain that according evidentiary weight to records made in the course of conflict undetermined individuals' capacity to contest the basis for their confinement.

a “crime.”²⁰ That crime was resisting a congressional subpoena that Barsky’s lawyers believed violated the First Amendment.²¹

During the Spanish Civil War, Barsky had worked at an American hospital in Spain. On his return, he chaired the Joint Anti-Fascist Refugee Committee, founded in the 1940s to help refugees fleeing Franco. The House Un-American Activities Committee (HUAC), an artifact of the McCarthy-era hunt for “communists” in America, had sought contributors’ records, and the Refugee Committee declined, arguing that the subpoena was unconstitutional and that record production would endanger lives.²² Along with two colleagues, Barsky was indicted for contempt of Congress, convicted of failing to produce the subpoenaed papers, and sentenced to pay a fine and serve a six-month jail term. New York then suspended his medical license. The New York Court of Appeals upheld that decision over a dissent by Judge Fuld, who argued that the New York legislature could not possibly have meant to have such “meritorious” acts be the basis for the suspension.²³

A majority of the U.S. Supreme Court concluded that the suspension was within the state’s powers and demonstrably not “arbitrary or capricious” because of the “painstaking complete review of the evidence and the issues.”²⁴ Justices Black, Frankfurter, and Douglas each wrote dissents.²⁵ Justice Black argued that the “right to practice” was a “very precious part of the liberty of an individual physician” and therefore protected by the Due Process Clause from “arbitrary infringement.”²⁶ Justice Black pointed to the absence of guidelines to limit the discretion of the State Board of Regents, which had no obligation to provide

20. *Barsky v. Bd. of Regents of Univ.*, 347 U.S. 442 (1954). Additional discussion of the concerns animating Reich’s development of his constitutional theories comes from Karen M. Tani, *Flemming v. Nestor: Anticommunism, the Welfare State, and the Making of “New Property,”* 26 *LAW AND HISTORY REV.* 379 (2008).

21. *See Barsky* at 457-58 (Black J., dissenting).

22. *Id.* at 458 (Black, J., dissenting, joined by Douglas, J.).

23. *In re Barsky v. Bd. of Regents*, 305 N.Y. 89 (1953); *id.* at 105 (Fuld, J., dissenting).

24. *Barsky*, 347 U.S. at 455.

25. *Id.* at 456 (Black, J., dissenting, joined by Douglas, J.), 467 (Frankfurter, J., dissenting), 472 (Douglas, J., dissenting, joined by Black, J.). Justice Frankfurter argued for a remand to the Court of Appeals, which he believed had wrongly failed to ascertain whether the Board of Regents’ judgment rested on impermissible grounds. Justice Douglas discussed the irrelevance of Barsky’s “justifiable mistake concerning his constitutional rights” to his ability to practice medicine. “When a doctor cannot save lives in America because he is opposed to Franco in Spain, it is time to call a halt . . .” *Id.* at 474.

26. *Id.* at 459 (Black, J., dissenting). Justice Black also argued that because the Attorney General’s list of “subversives” had been held unlawful, relying on it was an unconstitutional bill of attainder. *Id.* at 455, 459, 460; *see also* *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

reasons.²⁷ Rather, the “doctor’s right to practice rests on no more than the will of the Regents.”²⁸

It is not without irony that, in 1970, it was Justice Black who filed another dissent, this time objecting to *Goldberg*’s mandate. He refused to put a “promised charitable instalment” into the category of a person’s property.²⁹ Unlike Justice Black, Reich saw the continuity between the loss of the ability to practice a profession and government termination of a host of other forms of property, from contracts to welfare benefits.³⁰

Moreover, as made plain in *The New Property*, Reich never thought that procedure alone was a sufficient constraint, but also called for substantive entitlements to receive government aid. Indeed, in an essay published the year before *The New Property*, Reich explained that government had an obligation to “preserve the independence of those it helps,” as he argued the illegality of “midnight raids” in which state agents searched for a “man in the house” as the basis for cutting off benefits.³¹ And, Reich explained in a 1990 essay, the Due Process Clause “must mean that no person can be denied the means to economic survival.”³² The “ecological approach” to human needs that he proposed interacted with the “environmental principle,” both of which sought to ensure not only survival but also a better future.³³

On one of Reich’s return trips to New Haven just a few years ago, I invited him to join my first-year Procedure class. We had spent weeks exploring the rec-

27. *Id.* at 459 (Black, J., dissenting).

28. *Barsky*, 347 U.S. at 463 (Black, J., dissenting).

29. *Goldberg v. Kelly*, 397 U.S. 254, 275 (1970) (Black, J., dissenting).

30. Reich wrote about the *Barsky* case in *The New Property*. He noted that, whatever the professional’s dependence on government, “the man on public assistance is even more dependent.” Reich, *supra* note 1, at 758.

31. Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347, 1360 (1963). Thanks to Karen M. Tani for reminding me of Reich’s focus on the racist and gendered discrimination in enforcement, which was a central concern and which the National Welfare Rights Organization helped to bring to the fore.

32. Charles A. Reich, *The Legacy of Goldberg v. Kelly: A Twenty Year Perspective*, 56 BROOK. L. REV. 729, 742 (1990). That hope is not, however, what the current law provides. Overviews of available federal programs, the impact of state decision-making, and the limited resources available come from HELEN HERSHKOFF & STEPHEN LOFFREDO, *GETTING BY: ECONOMIC RIGHTS AND LEGAL PROTECTIONS FOR PEOPLE WITH LOW INCOME* (2019) and from HOLES IN THE SAFETY NET (Ezra Rosser ed., 2019). Yet another way to think about Reich’s contribution is that, despite all the efforts to undermine assistance programs, the constitutional framework he shaped remains resilient in some respects, as can be seen from federal mandates to provide health care and food stamps. See Andrew Hammond, *The Old New Property*, 115 Nw. U. L. Rev. (forthcoming 2020).

33. *Id.* at 744-45.

ord and impact of *Goldberg v. Kelly*, and the class then turned to *Mathews v. Eldridge*. Justice Powell, writing for the Court, styled *Goldberg* as the “high water mark” of procedural protections and, as noted, concluded that no prior oral hearing was required for a person facing termination of disability benefits.³⁴ Putting the risk of error on the recipient, the Court sought to buffer its impact by arguing that were the termination decision erroneous, Eldridge could always turn to welfare benefits.³⁵

The class discussed how the Court’s three-part test – the private interest, the public interest, and the risk of error – offered a veneer of precision when, in fact, the Court had no empirical bases by which to measure any of the factors. Moreover, as Jerry Mashaw explained in a powerful critique of the decision, the three factors did not take into account government obligations to treat like cases alike or to enforce administratively the congressional mandate to provide benefits to eligible individuals.³⁶ Ignored were equality, dignity, and efficacy concerns.

Reich was silent during that classroom discussion until I asked him to comment. He initially offered a single word: security. I sought more explanation of his Delphic response, and he pointed to the timing of the opinion – that *Mathews* was decided in 1976, in an era of economic prosperity, not scarcity. Yet, the Court had encoded its ruling in a cost/benefit calculation in which the government’s fiscal and administrative interests played the dominant role. Nowhere in its discussion was value placed on individuals’ need for security, safety, and well-being.

On another of his trips to New Haven, Reich gave a talk about how he came to write *The Greening of America*, which was a remarkably successful book that helped spark the environmental movement. Reich identified the origins of his concern for the environment in his love of the Adirondacks. Since childhood, he had spent all of his summers on Long Lake. Reich recounted that as a teenager he had climbed forty-five of the forty-six “high peaks” of the Adirondacks. The “46ers” is the shorthand for the many individuals who have climbed them all. Rather than join that club, Reich recounted that, when sixteen, he decided that imagining the last peak would be better than scaling it.

Charles Reich was the first rock star law professor – dubbed “Professor Green” by Garry Trudeau in the *Dooniesbury* cartoon strip. Reich gained that fame for seeing the vulnerability of the planet and understanding the need to protect

34. See *Mathews v. Eldridge*, 424 U.S. 319, 340-41, 349 (1976).

35. *Id.* at 342 n.27.

36. See 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, 42-45, 54 (1976). Mashaw did not, however, endorse the *Goldberg* packet of procedures as a necessary remedy to the due process deficit. See *id.* at 58.

the environment. In addition, Reich had remarkable insights into social structures, economic power, and human needs. He wrote one of the few law review articles of the twentieth century that created bedrock principles of constitutional, administrative, and property law, and his insights have since been materialized in statutes, in regulations, and in people's lives.

It is impossible to imagine what twenty-first century American law and life would have looked like without him.

All rights reserved, February 2020. My respect for and love of Charles Reich is shared by many. My thoughts are informed by discussions with Denny Curtis, Tony Kline, Lee Reich, Michael and Elizabeth Varet, and Guido Calabresi, as well as by a remarkable gathering hosted by Rodger Citron at the Touro Law Center in January 2020. There, I was honored to join Guido Calabresi, Harold Koh, Douglas Kysar, and others who provided moving insights into the breadth of Reich's innovations and commitments to a better world. Further, his skill as a teacher has been recounted by many former students (Denny Curtis included) who admired and learned so much from him when Reich taught constitutional law and a course on the law regulating oil and gas.

A few more of the threads need to be woven together. Stephen Wizner provided me with insights about the Goldberg litigation for which Reich's work was pivotal, and about the role played by Robert Cover when, as a law student, he linked Reich's theories with arguments about why the federal courts could have jurisdiction over claims that welfare benefits had been unconstitutionally terminated. When still a law student, Robert Cover helped to craft the argument for federal jurisdiction. See Note, Federal Judicial Review of State Welfare Practices, 67 COLUM. L. REV. 84, 96-97 (1967). Robert Cover and Owen Fiss, in turn, understood the centrality of The New Property and of Goldberg v. Kelly to all procedural regimes. I am indebted to them for inviting me to join in writing a casebook, first published in 1986, which begins with an exploration of the values of a procedural system—and hence with Goldberg v. Kelly and Charles Reich. See ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, PROCEDURE 37-105 (1988); see also OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES 54-116 (2003). In that successor volume, we also began with Goldberg, including excerpts from the docket and related materials. I explain more about the mark that Goldberg made on both courts and administrative agencies in Judith Resnik, The Story of Goldberg: Why This Case Is Our Shorthand, in CIVIL PROCEDURE STORIES 479-508 (Kevin M. Clermont ed., 2d ed. 2008).

And, of course, thanks go to Charles Reich, who became a close friend. Because he lived all his summers in his grandparents' home on Long Lake, and we spent all of ours in the summer cottage that my parents had purchased on Lake George, Denny Curtis and I regularly visited and saw firsthand his love for the environment, as we talked about history, America, politics, Yale, constitutional law, and humanity's needs.