THE YALE LAW JOURNAL FORUM
MARCH 16, 2020

Charles Reich's Unruly Administrative State

Kali Murray

ABSTRACT. This Essay considers Charles Reich's legacy in administrative law. It contends that Reich's work was crucial in establishing microlevel administrative law, which provides a legal framework for an individual's encounters with the state. I outline three aspects of microlevel administrative law that Reich inspired: the claim that microlevel administrative law should be understood through the "spaces" of the administrative state, the claim that microlevel administrative law invokes a broad range of values, and the claim that administrative law should consider the social and political vulnerability of the individual in encounters with the state.

Charles Reich's notoriety in administrative law derives from the important claim undergirding his seminal work *The New Property*[1]: certain procedural[2] and constitutional rights[3] should accompany the removal of entitlements. He termed these entitlements "the new property" and viewed them as arising from government-created "wealth," including income and other benefits, jobs, occupational licenses, franchises, contracts, subsidies, use of public resources, and services.[4] In *Goldberg v. Kelly*,[5] the Supreme Court cited Reich's theory of new property entitlements with approval, and since then, Reichian entitlement theory—its

1. Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).
2. *Id.* at 751-55 (outlining basic procedural rights and entitlements).
3. *Id.* at 760-64 (outlining basic constitutional issues raised by entitlements, including the right against self-incrimination, the right against unreasonable searches, and First Amendment rights).
4. *Id.* at 734, 786-87.
5. 397 U.S. 254, 263 n.8 (1970) ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'" (first citing Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965); and then citing Reich, *supra* note 1)).

ongoing vitality[6] and, more controversially, its decline—has been a key area of debate in administrative-law scholarship.[7]

We would, however, profoundly understate the impact of Reich's scholarship if we focused solely on his contribution to entitlement theory. Reich's legacy in administrative law stems also from his exploration of individuality within the administrative state. When it comes to this latter contribution, the closest analogue to Reich is not another legal scholar; rather it is the noted documentarian Frederick Wiseman, who has studied the daily interactions of individuals in such institutional spaces as mental hospitals, libraries, universities, high schools, and

---

6. Reich's influence has been recognized by recent precedent. *See, e.g.*, Hillcrest Prop., LLP v. Pasco Cty., 915 F.3d 1292, 1298 n.8 (11th Cir. 2019) (citing Reich for his definition of new property); George Washington Univ. v. District of Columbia, 318 F.3d 203, 207 (D.C. Cir. 2003), *as amended* (Feb. 11, 2003) (outlining use of "new property" inquiry in land-use decisions); Cook v. Principi, 318 F.3d 1334, 1353 (Fed. Cir. 2002) (Gajarsa, J., dissenting) (citing Reich for the claim that statutory entitlements are new property subject to the Due Process Clause); Hixson *ex rel.* Hixson Farms v. U.S. Dep't of Agric., No. 15-CV-02061, 2017 WL 2544637, at *6 (D. Colo. June 13, 2017) (citing Reich to support the claim that a farm subsidy is an entitlement subject to the Due Process Clause); Ames Constr. Co. v. Dole, 727 F. Supp. 502, 504-05 (D. Minn. 1989) (citing Reich to support the claim that a payment due under a government contract is a type of property under the Due Process Clause); Am. Int'l Gaming Ass'n, Inc. v. La. Riverboat Gaming Comm'n, 838 So. 2d 5, 21-22 (La. Ct. App. 2002) (Gonzales, J., concurring) (citing Reich for the claim that "a license, once issued, albeit a privilege cannot be withdrawn by state action without affording the holders of that license the full procedural protection of due process"). Additionally, Reich's influence has been reinforced by recent scholarship. *See, e.g.*, Gregory Ablavsky, *The Rise of Federal Title*, 106 CALIF. L. REV. 631, 679 (2018) (noting the resemblance between "new property" and "old property" in assessment of federal title); Ronald A. Cass & Jack M. Beermann, *Throwing Stones at the Mudbank: The Impact of Scholarship on Administrative Law*, 45 ADMIN. L. REV. 1, 12 (1993) (discussing scholarship related to procedural due-process claims and noting that "[th]e apparent effect of Reich's work in confirming the instinct of Justices forming the *Goldberg* and *Roth* majorities (that procedural guarantees should cover claims to government benefits) stands in marked contrast to the apparent disinterest of courts in the body of scholarship telling courts what to do next"); Danielle Keats Citron, Comment, *A Poor Mother's Right to Privacy: A Review,* 98 B.U. L. REV. 1139, 1152-55 (2018) (outlining Reich's influence on the due-process rights afforded to the indigent); Bethany Y. Li, *Now Is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification,* 85 FORDHAM L. REV. 1189, 1215 (2016) (discussing Reich's analysis of procedural rights with respect to the new property).

7. Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1974-80 (1996) (outlining a receding commitment to the "due process revolution" initiated by the expansive claims of Reich and their acceptance by the Supreme Court in *Goldberg v. Kelly*); Thomas W. Merrill, *Jerry L. Mashaw, the Due Process Revolution, and the Limits of Judicial Power*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 39, 58-59 (Nicholas R. Parrillo ed., 2017) (contending that the threshold interests in life, liberty, and property should be read narrowly as opposed to in broad Reichian fashion).

public housing. Richard Brody spoke of Wiseman's documentary film *Welfare*[8] in terms that would have equally applied to Reich's work: "[w]hat makes it not merely smart but profoundly moving is his alertness to the tension between the order of institutions — which, after all, is a key form of social glue — and the unruly, passionate, authentic needs and desires of individuals."[9]

Reich's scholarly contribution to administrative law, exemplified by his trilogy of articles written in the 1960s — *Midnight Welfare Searches and the Social Security Act*,[10] *The New Property*,[11] and *Individual Rights and Social Welfare: The Emerging Legal Issues*[12] — arises, much like Wiseman's contribution, from this desire to engage with the often unruly relations of individuals and institutions and the law's intervention in those relations. Reich's focus on individual encounters with the state offers a new way of understanding what I term "microlevel administrative law." Microlevel administrative law is interested in how the law shapes an individual's encounters with agencies of the administrative state.[13] Microlevel administrative law differs from the bulk of administrative law — which concerns itself with examining macrolevel relationships between agencies and the legislative, executive, and judicial branches of government — in three key ways.

First, Reich identified spatiality — the actual interactions between an administrator and an individual in a particular space[14] — as key to the assessment of microlevel administrative law. He examined a series of spaces — the automobile,[15]

8. WELFARE (Zipporah Films 1975). *Welfare* examines the day-to-day life of a welfare office in New York in the 1970s.

9. Richard Brody, *DVD of the Week: Welfare*, NEW YORKER, https://www.newyorker.com/culture/richard-brody/dvd-of-the-week-welfare [https://perma.cc/UA7F-JF4K].

10. 72 YALE L.J. 1347 (1963).

11. Reich, *supra* note 1.

12. 74 YALE L.J. 1245 (1965).

13. Reich should be situated in a broader movement in the 1950s and 1960s that directed the administrative state from macrolevel perspectives to a microlevel perspective on administrative law. *See, e.g.*, Bernard Schwartz, *Crucial Areas in Administrative Law*, 34 GEO. WASH. L. REV. 401, 406 (1965) ("Rather, we shall attempt to touch upon three representative areas that are bound to be of crucial concern to the administrative lawyer of the next quarter century. The first of these is that of administrative power over the physical person itself; the second, that of administrative intrusion into physical privacy; and the third, that of administrative largess in the Welfare State.").

14. Here, I adopt a definition of spatiality articulated by Nicholas Blomley. *See* Nicholas Blomley, *Law, Property, and the Geography of Violence: The Frontier, the Survey and the Grid*, 93 ANNALS ASS'N AM. GEOGRAPHERS 121, 122-23 (2003) (outlining the socio-legal context of the term space).

15. Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1166-67 (1966) (outlining interactions of citizens with police and noting that "[m]ost of these [police] practices have grown up around the automobile").

the home,[16] and the highway[17]—and explored the changing ways in which the law mediated the experience of those spaces. For example, Reich thought of welfare inspections as raiding the "space" of the home and analyzed questions about the scope of civil searches under the Fourth Amendment (including the ability of a welfare recipient to consent to such a search, the use of criminal process against a welfare recipient, and the reasonableness of welfare searches) with that spatial sensitivity. As Sarah Seo observes in her penetrating treatment of Reich's use of the space of the "automobile" to frame the individual's systematic encounters with the state, Reich's work reveals "how the due-process revolution in criminal procedure emerged from the same set of historical circumstances that made due-process rights essential to preserving individual liberty in the regulatory state."[18]

Reich's insight into administrative spatiality was, and still is, radical because it takes a systematic approach to an individual's experience with the state. An individual, according to Reich, does not experience the state in an administrative-law silo or a criminal-law silo. Rather, an individual's experience with the state might be a mix of shifting and often casual encounters shaped by the space in which these encounters take place.

The sidelining of Reich's perspective in administrative spatiality has left the field largely unresponsive to events that should have significance for administrative law. For example, the Department of Justice's investigation of Ferguson, Missouri is not often discussed as an administrative-law moment.[19] This changes, however, if we see that the Department of Justice, by focusing on the space of that "town," provided a unifying lens by which to view how an individual encounters the state in two key ways. First, in a way similar to the welfare home raid Reich described, the Report uses the space of the "town" to emphasize how the state—exemplified by a systematic matrix of police and administrative actions—captured individuals in a web of civic surveillance that eroded community trust and caused significant social conflict.[20] Second, the Report focuses on

16. Reich, *supra* note 10 (outlining welfare raids at home).

17. Charles A. Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227, 1227-28 (1966) (outlining disputes regarding the planning process associated with highways in which protestors occupied the planned sites of new highways).

18. Sarah A. Seo, *The New Public*, 125 YALE L.J. 1616, 1622 (216).

19. Joshua Chanin, *Police Reform Through an Administrative Lens: Revisiting The Justice Department's Pattern and Practice Initiative*, 37 ADMINISTRATIVE THEORY AND PRACTICE 257-74, 260 (2017) (examining why public administration scholars have ignored the Department of Justice's pattern and practice orders as an element of administrative police reform).

20. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 15-70 (Mar. 4, 2015) (outlining the police and municipal practices that lead to the erosion of community trust).

the space of the "town" to reveal how intersections between different areas of law may have a cumulative impact on how a person's encounters with the state may shape their ideas of its political legitimacy. Namely, the more fraught encounters a person has with the state may make it less likely that the person may be less likely to view the state as a political legitimate actor. Thus, spatiality performs an integrative function in administrative law by providing a richer context for understanding an individual's encounters with the state.

Our discussions of the state's administrative legitimacy often focus on the structural relationships between agencies and their supervising forces, such as judicial review.[21] Reich showed that an agency's legitimacy is also shaped by citizens' experiential encounters with the state. A Reichian perspective, consequently, suggests a number of analytic innovations. For example, an interdisciplinary approach to administrative law grounded in anthropology may be just as useful as one grounded in political science.[22] Or, administrative law scholarship may map an individual's dynamic, shifting relationships to multiple local, regional, and federal authoritative entities within a given regulatory regime.[23]

Second, Reich's microlevel approach generated the insight that individual interactions with the state implicate more than one constitutional value. By focusing on Reich's arguments about procedural fairness, we have ignored Reich's insight that microlevel administrative actions raise other constitutional issues as well, including privacy, equality, and dignity. In *Individual Rights and Social Welfare*, for instance, Reich argued for two other constitutional values in addition to fair agency procedures: equal protection under the law and privacy owed to a

---

21. Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy,* 47 WAKE FOREST L. REV. 463, 467-71 (2012) (outlining models of administrative legitimacy, including the rationalist-instrumental paradigm and the deliberative-constitutional paradigm).

22. For an example of this approach, see Sameena Mulla, *Sexual Violence, Law, and Qualities of Affiliation*, *in* WORDING THE WORD 172, 175 (Roma Chatterji ed., 2014) (using an anthropological approach to assess a sexual-assault victim's encounter with the state).

23. Kali Murray & Esther van Zimmeren, *Dynamic Patent Governance in Europe and the United States:* The *Myriad Example*, 19 CARD. INT. & COMP. L. REV. 287, 295 (2011) ("We observe that the idea of network governance is emerging within the context of patent law, and extend this model in two additional ways. First, we claim that within its formal dimensions, the patent system should be analyzed as a whole, focusing on the roles played by various actors, rather than the individual institutional actors themselves. This focus on roles, rather than individual actors, also greatly facilitates comparison of governance systems between different jurisdictions."); Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction,* 57 EMORY L.J. 1, 4 (2007) ("Our collective conceptions of jurisdiction would seem to be in significant flux, with increasing attention to complex patterns of overlap and engagement, not only among courts, but also among social, political, and economic actors more generally.").

welfare recipient by the state.[24] Reich challenged the idea that welfare recipients should be treated differently because they receive benefits:

> [A]nother developing constitutional problem is the degree to which it is valid to impose different standards of behavior upon people because they happen to receive some form of public assistance . . . . [T]he status of being a welfare beneficiary does not necessarily justify all of the differential forms of treatment which now exist under the law.[25]

Likewise, a welfare recipient should enjoy a liberty interest in the "management of personal and family affairs—the sort of things that are, to the average person, nobody else's business, certainly not government's," and an associated right to privacy "centering on home and family."[26]

Reich's perspective has proven to be a durable one. In the context of equal-protection law, Reich's perspective highlights the constitutional debates that are emerging over states' ability to tie "work" requirements to healthcare benefits.[27] Additionally, Reich's claim that welfare recipients deserve privacy in their interactions with the state has proven to be remarkably prescient. Virginia Eubanks, in *Digital Dead End: Fighting for Social Justice in the Information Age*, describes the techno-political experiences of working-class women on public assistance and their need for greater privacy in words that harken back to Reich:

> The rapid sharing of database information between agencies lends credence to clients' fears that they are trapped in a system where every detail of their lives is known and freely shared among powerful players: caseworkers, employers, politicians, and police. Rules for information gathering, sharing, and retrieval are obscure, and mechanisms ensuring accountability are rare.[28]

---

24. Reich, *supra* note 12, at 1254-56.

25. *Id*. at 1254.

26. *Id*.

27. *See, e.g.*, Stewart v. Azar, 313 F. Supp. 3d 237, 269 (D.D.C. 2018) (describing how Section 1396(a) of the Affordable Care Act placed "*all* individuals whose income fell below prescribed levels" into Medicaid's mandatory population. In so doing, the Affordable Care Act "placed this group on equal footing with other 'vulnerable' populations, requiring that states afford them 'full benefits.'"). Although the litigation is ongoing, it appears that a key element of the Affordable Care Act is the fact that the institutional design of its statutory scheme affords equal protection in the treatment of an expanded Medicaid population.

28. VIRGINIA EUBANKS, DIGITAL DEAD END: FIGHTING FOR SOCIAL JUSTICE IN THE INFORMATION AGE 82-83 (2011); *see also* KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 133-79 (2017) (outlining the erosion of informational privacy for working women receiving public

Reich's recognition of the centrality of constitutional values, such as equal protection and privacy, to microlevel administrative action points administrative-law scholars in some directions in which they already have been going: an increased appreciation for agencies' role in advancing and implementing constitutional claims related, for instance, to equal-protection claims under the Fourteenth Amendment.[29] It also points to other directions in which administrative law should go, such as asking how social movements create their own popular conceptions of administrative action and interpretation insofar as such movements necessarily invoke a range of social values that lie outside of those movements' technical understanding and legal claims.[30]

Third and finally, Reich's insight into microlevel administrative actions is grounded in an understanding of the expressive power of such actions for an individual. This is the experiential element of administrative law. Reich appears to have been aware that individuals' preexisting social and political vulnerabilities shape their microlevel administrative interactions. For instance, Reich was concerned about midnight welfare searches because "persons on welfare are mostly unable to protect their own rights"[31] given that they "are often ignorant of their rights, lack adequate representation by counsel, and lack the resources to fight a large public agency."[32]

Reich understood that individuals' encounters with the state are shaped by class, race, gender, sexual orientation, and other markers of social identity. Take, for instance, a subject that clearly sparked Reich's interests: the encounter of African American women with the supervisory welfare state.[33] African American

assistance); JOHN GILLIOM, OVERSEERS OF THE POOR 115-36 (2001) (outlining surveillance tools employed by the administrative state).

29. *See, e.g.*, Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1898-900 (2013) (discussing how agencies conduct constitutional analyses); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015) (outlining the efforts of the Federal Social Security Board to promulgate a theory of administrative equal protection in the institutional design of welfare assistance).

30. *See, e.g.*, Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865, 888-89 (2007) (examining unsuccessful efforts by abortion advocates to challenge federal and state administrative actions on abortion). This scholarship, however, does not fully incorporate Reich's sensitivity toward individuals before the state.

31. Reich, *supra* note 10, at 1347.

32. Reich, *supra* note 12, at 1246.

33. *See also* AYESHA K. HARDISON, WRITING THROUGH JANE CROW: RACE AND GENDER AND POLITICS IN AFRICAN AMERICAN LITERATURE 3 (2014); Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 239 (1965) (comparing the functional attributes of sex and race); Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMAN. 187, 188 (2006) ("Examining the theory and practice of Jane Crow helps to

women, at the time, were uniquely harmed by the intrusive searches of welfare recipients and, as Priscilla Ocen[34] has described, "[t]he racial profiling of Black women's bodies through social welfare programs such as Section 8" continues today and thus demonstrates that "the intersection of race, gender, and class is essential to . . . the maintenance of racial segregation and the burgeoning punitive welfare state."[35] Thus, Reich's conception of the administrative subject incorporates a claim that administrative law as a field needs to have the capacity to see, and more importantly, to *validate* the claim that not all administrative subjects stand before the state in an equal manner. *Goldberg v. Kelly* is often cited for its recognition of welfare as an entitlement. But it should at least as often be cited for its broader recognition that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."[36]

Reich's sensitivity to the political vulnerability of welfare recipients may have been a consequence of his comfort with the intersection of law and sociology, as a matter of practice and as a matter of method. As a matter of practice, as Martha Davis has emphasized, Reich produced his work in conversation with activists, administrators, and lawyers who sought to reform poverty law. As a matter of method, Reich used a variety of interdisciplinary sociological studies to buttress his theoretical claims. This interdisciplinary turn was not new; the field of poverty law was already firmly interdisciplinary in its approach.[37] But Reich's insight into the situational vulnerability experienced by individuals in their interactions with the state has resonated in other disciplines such as civil-rights law. For instance, Atiba Ellis, studying the procedural due-process burdens associated with recent voter-identification laws, contends that such analysis should take into account "the intersecting vulnerabilities that poor people of color suffer from within the political and economic process. Such vulnerability lies at the heart of both the historical and present day-discrimination within the franchise (and the structures that affect it)."[38] Ellis's useful focus on vulnerability is often absent in mainstream administrative-law teaching and scholarship. Reviving Reich's

elucidate the cultural ramifications of, and interactions among, racial integration, shifting sexual mores, gender politics, and legal change during this period.").

34. *See* Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1559-64 (2012) (outlining the treatment of black women in the modern welfare state).

35. *Id.* at 1548.

36. Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970).

37. MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, at 82-86 (1993) (outlining Reich's relationship with welfare-rights lawyers); *see also* THE LAW OF THE POOR (Jacobus TenBroek ed., 1966) (providing an interdisciplinary review of the law of the poor).

38. Atiba R. Ellis, *Race, Class, and Structural Discrimination: On Vulnerability Within the Political Process*, 28 J. C.R. & ECON. DEV. 33, 34 (2015).

situational insight into the vulnerabilities of individuals in particular spaces offers a way to successfully place individuals' vulnerability at the center of administrative law.

Reich's legacy in administrative law is often reduced to his linking of procedural due-process claims to entitlements and his consequent influence on *Goldberg v. Kelly*. This is a mistake because the unruly richness of Reich's broader vision can teach us many more lessons today. In a political environment charged with questions of inequality, Reich's insights into microlevel administrative law — analyzing administrative spaces to capture the ways in which cross-cutting legal regimes can have a cumulative effect on an individual, highlighting the diverse constitutional regimes that might impact the individual's encounters with the state, and situating the individual's social and political vulnerabilities as she encounters the state — continue to offer a valuable way to interrogate the relationship of the state to its citizenry.

Professor of Law, Marquette University Law School. *I would like to thank Azene Seidoffini for her assistance on this fast-moving project.*