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The New Public

ABSTRACT. By exploring the intertwined histories of the automobile, policing, criminal procedure, and the administrative state in the twentieth-century United States, this Essay argues that the growth of the police's discretionary authority had its roots in the governance of an automotive society. To tell this history and the proliferation of procedural rights that developed as a solution to abuses of police discretion, this Essay examines the life and oeuvre of Charles Reich, an administrative-law expert in the 1960s who wrote about his own encounters with the police, particularly in his car. The Essay concludes that, in light of this regulatory history of criminal procedure, putting some limits on the police's discretionary power may require partitioning the enforcement of traffic laws from the investigation of crime.

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INTRODUCTION

"The most powerful elements of American society devised the official maps of the culture: inscribing meaning in each part of the body, designating some bodily practices as sexual and others as asexual, some as acceptable and others as not; designating some urban spaces as public and others as private . . . . Those maps require attention because they had real social power, but they did not guide the practices or self-understanding of everyone who saw them."

– George Chauncey, 1994[1]

"Although Meg still could not move her arms or legs she was no longer frightened as she lay in her father's arms, and he carried her tenderly towards the trees. For the moment she felt completely safe and secure and it was the most beautiful feeling in the world. So she said, 'But Father, what's wrong with security? Everybody likes to be all co[z]y and safe.'

'Yes,' Mr. Murry said, grimly. 'Security is a most seductive thing.'

'Well – but I want to be secure, Father. I hate feeling insecure.'

'But you don't love security enough so that you guide your life by it, Meg. You weren't thinking of security when you came to rescue me with Mrs Who, Mrs Whatsit, and Mrs Which.'"

– Madeleine L'Engle[2]

In 1966 Charles Reich, then a professor at Yale Law School, wrote about his "disturbing number of encounters with the police," particularly the "many times" while driving a car.[3] The traffic stops happened in several states, from New York to Oregon, and "always in broad daylight."[4] The officers would ask to see his license and wanted to know "where [he] was going, where [he] was

1. GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940, at 26 (1994).

2. Madeleine L'Engle, A Wrinkle in Time 162 (unpublished manuscript) (emphasis omitted), http://graphics.wsj.com/documents/doc-cloud-embedder/?sidebar=1#1881486-a-wrinkle-in-time-excerpt [http://perma.cc/6VJU-Q887]. The published version of *A Wrinkle in Time*, which was released in 1962, did not include the excerpt quoted above.

3. Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1161-62 (1966).

4. *Id.* at 1162.

coming from, and [his] business."[5] Each time, Reich asked why the officer had "flagged [him] down with sirens and flashing light," only to receive the dismissive reply that he was "just checking."[6] When one officer informed Reich that he "had the right to stop anyone any place any time—and for no reason," Reich decided that he "had better write an article."[7]

In the article that followed, published in the *Yale Law Journal* and titled *Police Questioning of Law Abiding Citizens*, Reich articulated a "special need for privacy in public" in a world of seemingly unlimited police discretion.[8] This inside-out claim harkened back to a constitutional understanding that prevailed from the nineteenth century into the early twentieth. What scholars today refer to as classical legal thought divided the world into public and private spheres to delineate the reach of legitimate government action.[9] Whatever the law labeled "public," the state could govern. For instance, in 1928, the New York City Police Commissioner defended aggressive, even unconstitutional, police tactics on the ground that "[a]ny man with a previous record is *public* property."[10] In the private realm, however, free men (and they were *men*)[11] enjoyed the presumption of the right to be left alone and do as they pleased. The classic private sphere was the home, where individuals enjoyed

5. *Id.*

6. *Id.*

7. *Id.* at 1161.

8. *Id.* at 1165. Although this quotation refers to the "special need" of teenagers who, Reich believed, were particularly harmed by police questioning, his analysis of the problem of police discretion and his proposed solution applied to everyone.

9. Scholars have provided numerous accounts of how the erosion of the public/private distinction paved the way for social legislation. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979); Keith D. Revell, *The Road to* Euclid v. Ambler*: City Planning, State-Building, and the Changing Scope of the Police Power*, 13 STUD. AM. POL. DEV. 50 (1999). Few, however, have paid attention to the history of this dualistic thinking in criminal law. *See* Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 558-59 (1996) (analyzing the public/private distinction as one facet of Fourth Amendment jurisprudence during the *Lochner* Era).

10. MARILYNN JOHNSON, STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY 120 (2003) (emphasis added).

11. *See* BARBARA YOUNG WELKE, LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES 2, 6-13 (2010) (arguing that ability, race, and gender defined the borders of legal personhood and citizenship in the nineteenth century).

the inviolability of their proverbial castles[12] – at least until what they did inside their homes affected the "public interest."[13] As this burden-shifting process suggests, complete freedom from state regulation in the private sphere was never the reality. The public/private dichotomy was more like a continuum from more regulation to less, and somewhere along that spectrum was a line between free and not free. This dualism was an analytic framework that powerfully shaped how legal minds conceived and articulated arguments for individual rights or social legislation.

Reich was thinking of the legally constituted private realm when he wrote that "[t]he good society must have its hiding places – its protected crannies for the soul."[14] Only in these sanctuaries, hidden from the intrusive gaze of the state, could individuals live freely. But by "hiding places," Reich referred not to the sanctity of one's home, but rather to the road and the automobile. This was an odd claim as a matter of law. Ever since Henry Ford perfected the mass production of the Model T, courts had held that automobiles were not private property like houses.[15] Rather, they were more like public property, judges reasoned tautologically, because the state regulated them. Courts accordingly

12. The ACLU's brief in *Monroe v. Pape* included a memo "on the historic significance of the individual's right to privacy in his home," which listed quotes from a number of patriots, members of Congress throughout the nation's history, and esteemed Justices of the Supreme Court. Brief for Petitioner app. A at 67-76, Monroe v. Pape, 365 U.S. 167 (1961) (No. 39); *see also* Cloud, *supra* note 9, at 588 ("The home is the site where locational privacy is most important. Property and privacy rights coexist here . . . .").

13. *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 149-89 (1996); Revell, *supra* note 9 (describing the difficulty of passing and defending New York City's 1917 zoning ordinance within the nineteenth-century constitutional understanding). *But see* Christopher Tomlins, *Necessities of State: Police, Sovereignty, and the Constitution*, 20 J. POL'Y HIST. 47, 59 (2008) (arguing that in reality the police power had very few limits and that "*Lochner* had no 'era'").

14. Reich, *supra* note 3, at 1172.

15. *See, e.g.*, People v. Case, 190 N.W. 289, 290 (Mich. 1922); Commonwealth v. Street, 3 Pa. D. & C. 783, 789 (Ct. of Quarter Sess. 1923), *reprinted in* Substituted Brief for the United States on Reargument at 78, Carroll v. United States, 267 U.S. 132 (1925) (No. 15), 1924 WL 25788, at *78; *see also* South Dakota v. Opperman, 428 U.S. 364, 364 (1976) (distinguishing cars from houses based on the extensive government regulation of cars). Only a few dissenting judges in the 1920s argued that cars fell under the category of "effects" and thus should receive the full protections of the Fourth Amendment. *See, e.g.*, Moore v. State, 103 So. 483, 496 (Miss. 1925) (Ethridge, J., dissenting) (arguing that "the automobile would fall within the meaning of either" "effects" under the U.S. Constitution or "possessions" under the state constitution); State v. De Ford, 250 P. 220, 225 (Or. 1926) (acknowledging that an automobile is an "effect"). When Justice Scalia wrote in *United States v. Jones*, 132 S. Ct. 945, 949 (2012), that the government needed a warrant to attach a GPS tracking device to the defendant's Jeep Grand Cherokee because an automobile is "private property," he overlooked the line of cases where the weight of authority concluded that cars were public property for Fourth Amendment purposes.

concluded that the automobile was not entitled to all the rights that the private sphere afforded. Relying on the public/private framework, courts interpreted the Fourth Amendment to require warrants for searches of the private sphere—"persons, houses, papers, and effects" as enumerated in the text—but this requirement did not apply to whatever the law classified as public.[16] This was precisely why police officers could stop Reich in his car without a warrant. So why did Reich think of the automobile as a private hiding place, and what did he mean by privacy in public?

Reich had made a similar topsy-turvy move in his more well-known article *The New Property*, published in the *Yale Law Journal* two years earlier in 1964.[17] To protect individuals who relied primarily on "government largess" for their livelihood,[18] Reich proposed turning that largess—that is, *public* benefits—into *private* property. Reich sought to reconceptualize the automobile in much the same way. In *Police Questioning*, he described an automotive society that relied increasingly on policing to maintain order and provide security. To guard against invasive policing in what the law deemed public but that he experienced as private, Reich suggested turning the public into the private. The automobile would become a new private space.

The two articles shared more than an analytic kinship. The "public interest state" that Reich portrayed in *The New Property* was, in fact, one and the same with the "security" state in *Police Questioning*.[19] Understanding how Reich connected abuse of police discretion with the dangers of the administrative state can elucidate how the police's discretionary authority metastasized from the regulation of the automobile. To be sure, post-New Deal process theorists explained that discretion is inherent in all governance.[20] But the fact that

16. *Carroll*, 267 U.S. at 162 (setting forth an automobile exception to the Fourth Amendment's warrant requirement).

17. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); *see infra* note 49 and accompanying text.

18. Reich uses the phrase "government largess" throughout *The New Property*. *See, e.g.*, Reich, *supra* note 17, at 737-46.

19. *Id.* at 756; *see* Reich, *supra* note 3, at 1171 ("We live in a society that is increasingly concerned with safety . . . .").

20. *See* William N. Eskridge, Jr. & Philip P. Frickey, Commentary, *The Making of* The Legal Process, 107 HARV. L. REV. 2031, 2044 (1994); Geoffrey C. Shaw, *H. L. A. Hart's Lost Essay:* Discretion *and the Legal Process School*, 127 HARV. L. REV. 666, 669, 691, 697 (2013). Process theorists, however, focused on judicial discretion, not police discretion. In 1963, police scholar Herman Goldstein argued that law-enforcement officers also exercise discretion—and must do so—and that government policy should recognize this fact. Herman Goldstein, *Police Discretion: The Ideal Versus the Real*, 23 PUB. ADMIN. REV. 140 (1963); *see also* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969) (discussing police

discretion is a built-in part of enforcing and applying the laws does not obviate the need for a historical account of how particular officials and institutions have come to exercise discretion over specific matters or even how discretion came to be understood as a problem that requires a solution. Police discretion has such a history. Moreover, Reich's story can illuminate 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.

By reading Reich's seemingly unrelated writings on his life and the law together, this Essay argues that modern Fourth Amendment jurisprudence—"modern" in the sense that it focuses on procedural remedies that attempt to regulate police conduct[21]—has its roots in the governance of an automotive society. It traces this history, beginning with the need to provide for public safety in a fast and dangerous world, then leading to the justification of discretionary policing, and finally culminating with the threat that the demands of security might completely consume private individual rights. Once courts conceded that requiring automobile warrants would endanger the public[22] and accordingly sanctioned discretionary policing under the Fourth Amendment,[23] creating zones of privacy in cars—free from state regulation and

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discretion); HERMAN GOLDSTEIN, POLICING A FREE SOCIETY 12, 93-130 (1977) (arguing that exercising discretion is "what policing is all about").

21. *See, e.g.*, Dan M. Kahan & Tracy L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1155 (1998) (defining the "modern regime of criminal procedure" as comprising "doctrines that regulate police conduct"); Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850-1940*, 62 RUTGERS L. REV. 447, 523 (2010) ("Modern criminal procedure requires courts to supervise police-initiated and police-conducted investigations."); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1702 (2005) ("In often minute detail, criminal procedure law regulates how and when the police can conduct searches, seizures, and interrogations.").

22. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 153 (1925) ("[I]t is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."); People v. Case, 190 N.W. 289, 292 (Mich. 1922) ("The automobile is a swift and powerful vehicle of recent development . . . . [It] furnish[es] for successful commission of crime a disguising means of silent approach and swift escape unknown in the history of the world . . . ."). But at least one state judge during the Prohibition Era claimed that the police actually did have plenty of time to secure automobile warrants. *See, e.g.*, Moore v. State, 103 So. 483, 499 (Miss. 1925) (Ethridge, J., dissenting).

23. The automobile exception did not simply exempt cars from the Fourth Amendment's warrant requirement, but actually expanded common-law exceptions to that requirement. For example, under established precedent, warrantless arrests for a misdemeanor required the officer to actually see the offense take place. Kurtz v. Moffitt, 115 U.S. 487, 498-99 (1885). But the automobile exception allowed individual officers to determine for themselves, on the spot, whether they had reasonable cause for believing—not actual

policing—existed only as a theoretical possibility. A few people, including Reich, did imagine a constitutional right that would shield individuals from the police in their cars, which had become for many a space and means for private pleasures and freedom. But when American society depended on policing as the enforcement apparatus of the administrative state, a substantive private right in the public sphere of cars and roads proved untenable. Instead, proceduralism in criminal law would place some limits on police discretion.

This regulatory history of criminal procedure unfolds in five Parts. Before delving into the life and oeuvre of Charles Reich, Part I explains why the methodology and sources of this Essay are necessary to fully understand the development of Fourth Amendment jurisprudence specifically and criminal procedure more generally. Part II begins the narrative before Reich's time, with the nascent administrative state's response to the mass chaos that ensued from the mass production of the automobile. It then picks up at midcentury with Reich's awareness of the automotive society as a regulatory-security state in which a long list of public rights that regulated the automobile had granted the police too much discretionary power. Alongside this transformation in policing, the automobile was also revolutionizing individual mobility and, with it, the meaning of individual liberty. Part III examines Reich's memoirs and the Supreme Court's 1972 decision in *Papachristou v. City of Jacksonville* to describe the ways that automobility changed how many people at midcentury experienced freedom. But this preeminent symbol of personal liberty had simultaneously become one of the most heavily policed aspects of American life. To protect the automobile as a realm of individual autonomy, Reich argued for private rights, and specifically the right to keep the police out, in a space that the law considered public: the automobile. Part IV unpacks this right to "privacy in public," which at first sounded like a substantive due process right to be free from policing but morphed into a procedural right upon elaboration, a concession to society's need for security. Part V offers a coda that considers how this history can inform the interpretation of current and future Fourth Amendment jurisprudence.

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knowledge—that a misdemeanor was being committed. *Carroll*, 267 U.S. at 155-56. This greatly enlarged their discretionary authority.

I. A SOCIO-LEGAL, CULTURAL, AND INTELLECTUAL HISTORY OF THE FOURTH AMENDMENT

A. Why Cars

In the twentieth century, the guarantee to be secure against unreasonable searches and seizures focused on the relationship between individuals and the police. Accordingly, no account of the Fourth Amendment would be complete without examining how the automobile transformed policing.[24] With mass production, a broad swath of the population – everyone who drove and rode in a car[25] – became subject to discretionary policing. This was unprecedented. The police were not always the main institution enforcing legal and social norms. Before the automobile, communities largely policed themselves through customs and common-law suits,[26] and patrolling officers mainly bothered those on the margins of society: drunks, vagrants, prostitutes, and the like.[27] But, as Part II discusses, the automobile's ubiquity and speed created danger, and managing that danger came to depend on police law enforcement.

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24. Surprisingly, given the automobile's manifest presence in twentieth-century American law, society, and culture, few scholars have given Fourth Amendment car stops and searches a full historical treatment. Much of the scholarship has focused on current problems, particularly the problem of racialized policing, rather than the legal history of the automobile and the Fourth Amendment. *See, e.g.*, CHARLES R. EPP, ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP (2014); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271. For a historical examination of the automobile and law enforcement, see G. EDWARD WHITE, LAW IN AMERICAN HISTORY, VOLUME II: FROM RECONSTRUCTION THROUGH THE 1920S, 281-311 (2016), particularly the chapter on "The Treatment of Crimes."

25. *See infra* note 65 and accompanying text; *infra* text accompanying note 113.

26. *See, e.g.*, NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940, at 24-25 (2013) ("The norm enforced often took the form of custom or common law . . . . Responsibility for initiating enforcement and providing the information on which to base it rested largely with lay community members themselves, either when they personally suffered a wrong and came forward to air their grievance or when they served in short-term, rotating bodies like the grand jury, whose members kept an ear open to the troubles of their neighbors, sorted through them, and together 'presented' the transgressions that they felt demanded admonition or reprimand."); Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 579 (1936) ("[U]ntil quite modern times police duties were the duties of every man.").

27. *See, e.g.*, LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910, at 75, 79-86 (1981); ERIC H. MONKKONEN, POLICE IN URBAN AMERICA, 1860-1920, at 34-35 (1981); ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE, PHILADELPHIA, 1800-1880, at 41, 121-26 (1989).

Twentieth-century Fourth Amendment jurisprudence developed within the context of expanding "police powers," a legal term of art that referred to a sovereign's inherent power to govern for the public welfare,[28] and the accompanying expansion of the powers of police officers. The automobile thus appears prominently in this larger history.

Car-search cases also serve as valuable source materials to discern how people experienced and understood the problem of discretionary authority, for traffic stops soon became one of the most common settings for individual encounters with the police. In 1945, a captain of the Pennsylvania State Police remarked that traffic-law enforcement provided "many contacts between police and citizens."[29] All the more so twenty years later when Charles Reich identified the traffic stop as the "*chief point* of personal contact between the individual citizen and the law."[30] By the end of the century, legal scholar David Sklansky observed that "[m]ost Americans never have been arrested or had their homes searched by the police, but *almost everyone* has been pulled over."[31]

Consequently, the automobile has served as an "arena of conflict" – that is, a setting where individuals and police officers contended for their vision of

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28. *See, e.g.*, *Ex parte* Daniels, 192 P. 442 (Cal. 1920); Brinegar v. State, 262 P.2d 464, 474 (Okla. Crim. App. 1953) ("There are one-way streets, no-parking zones, zones restricted to parking of particular kinds of vehicles, zones restricted to pedestrian traffic, no-left turn corners, some left turn after stop, some by mere arm signal. In some places a tail light signal is sufficient to indicate a turn or a stop, and other places require an arm signal; there are various lanes in some metropolitan areas, some restricted exclusively to various classifications of traffic, and requiring a genius to get out of after once getting in, without violating the law."); Kalich v. Knapp, 145 P. 22, 28 (Or. 1914) (stating that police powers include the authority "to regulate and control for any and every purpose the use of the streets, highways, alleys, sidewalks, public thoroughfares, public places, and parks of the city; to regulate the use of streets, roads, highways, and public places for foot passengers, animals, bicycles, automobiles, and vehicles of all descriptions"); NOVAK, *supra* note 13, at 115-48; CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT 2 (St. Louis, F.H. Thomas Law Book Co. 1886) ("By this general police power of the State, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State . . . ." (citations omitted)).

29. Captain T.N. Boate, Pa. State Police (June 1945) (on file with the Bancroft Library, University of California, Berkeley, August Vollmer Papers, Carton 2, Folder "Articles and Speeches by Vollmer") (blurb for State Traffic Law Enforcement).

30. Reich, *supra* note 3, at 1164 (emphasis added).

31. Sklansky, *supra* note 24, at 271 (emphasis added); *see also* EPP ET AL., *supra* note 24, at 2 ("Police stops matter. No form of direct government control comes close to these stops in sheer numbers, frequency, proportion of the population affected, and, in many instances, the degree of coercive intrusion . . . . Nationally, 12 percent of drivers are stopped per year by the police . . . . Being stopped is a potent experience.").

rights.[32] This conflict lay at the center of the Fourth Amendment, which, by prohibiting unreasonable searches and seizures, governs the first moments that an officer makes contact with an individual. Since the 1920s, car stops and searches have comprised a significant portion of Fourth Amendment cases.[33] And the salience of the automobile as a site of Fourth Amendment litigation has endured, as evidenced by the fact that few issues come before the Supreme Court as frequently. During the most recent term, the Court ruled that prolonging a traffic stop to conduct a dog sniff violated the Fourth Amendment.[34] Just four months before that decision, the Court ruled that a police officer's reasonable mistake of law could justify a traffic stop.[35] And less than a year before that, the Justices determined that the police could pull over a car based on an anonymous tip that the driver had run another car off the road.[36] The list goes on.[37]

The frequency of car-search cases reflects not just the contentiousness of the issue,[38] but also the fact that the holdings are so factually nuanced. The nation's highest court has taken on the task of refereeing encounters between drivers and the police in which every square inch of the automobile and every factual scenario are up for grabs. The Supreme Court has had to decide, for

32. My analytic framing of car-search cases as an "arena of conflict" is indebted to Hendrik Hartog's classic article, Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 934-35.

33. A Westlaw search executed on July 29, 2015, of all federal cases ("All Federal") and all state cases ("All States") for the phrase "Fourth Amendment" and a search within those results for the term "automobile" provide a rough approximation of car cases as a proportion of Fourth Amendment cases. This search was divided into decades from 1920 to 1980, and cases with the term "automobile" within cases with the phrase "Fourth Amendment" ranged between thirty-one percent to forty-six percent of state-court cases and twenty-five percent to thirty-six percent of federal-court cases. The same search produced no Fourth Amendment cases with the term "automobile" between 1900 and 1910, and one out of sixty-five state cases and two out of eighty federal cases between 1910 and 1920.

34. Rodriguez v. United States, 135 S. Ct. 1609, 1612 (2015).

35. Heien v. North Carolina, 135 S. Ct. 530, 534 (2014).

36. Navarette v. California, 134 S. Ct. 1683, 1686 (2014).

37. *See, e.g.*, Florida v. Harris, 133 S. Ct. 1050, 1059 (2013) (holding that a drug-detection dog's alert on the exterior of a vehicle provides probable cause for a warrantless search); United States v. Jones, 132 S. Ct. 945, 954 (2012) (holding that a warrant was required for police to attach a GPS tracking device to a vehicle); Arizona v. Gant, 556 U.S. 332, 351 (2009) (holding that the search of a vehicle while the defendant is handcuffed and placed in a squad car violates the Fourth Amendment); *see also* Sklansky, *supra* note 24, at 272-73 (noting that from May 1996 to February 1997, the Supreme Court "has given vehicle stops an unusual amount of attention").

38. *Cf.* Sklansky, *supra* note 24, at 272 (arguing that "the Supreme Court's application of the Fourth Amendment to traffic stops can offer important clues to the overall status and future of search and seizure law").

example, whether the police may examine tires and take exterior paint samples,[39] grab a weapon protruding under the driver's seat when reaching in to move papers from the dashboard,[40] and disassemble a gas tank at a border stop.[41] Searches of the glove compartment have produced their own cluster of case law addressing whether the police may search the compartment even when the driver is not inside the vehicle,[42] open containers found inside there,[43] look inside the compartment while the car is parked at the police station or impound lot,[44] or bend down to get a better look when the driver opens it to retrieve his license.[45] The trunk of the automobile has created its own collection of decisions.[46]

This intense judicial oversight is precisely how scholars describe "modern" criminal procedure as a body of laws that relies on "exacting judicial scrutiny of routine policing functions" to tame police discretion.[47] An examination of warrantless car-search cases can provide insight on this turn to proceduralism. To be sure, the Fourth Amendment's warrant requirement itself is a procedural protection. Making the police appear before a magistrate prior to searching and seizing has been the established method of constraining discretionary policing in the private sphere.[48] But what is especially illuminating about car searches lies in the fact that the law has placed the automobile within the public sphere of regulation. Policing, despite its imposition on individual privacy and freedom, arose as one of the main modes of governance in the twentieth-century American state. A legal history of the automobile thus reveals how

39. Cardwell v. Lewis, 417 U.S. 583, 596 (1974) (holding the search constitutional).

40. New York v. Class, 475 U.S. 106, 119 (1986) (holding the search constitutional).

41. United States v. Flores-Montano, 541 U.S. 149, 156 (2004) (holding the search constitutional).

42. Thornton v. United States, 541 U.S. 615, 624 (2004) (holding the search constitutional); Michigan v. Long, 463 U.S. 1032, 1054 (1983) (holding the search constitutional).

43. New York v. Belton, 453 U.S. 454, 460-61 n.4 (1981) (holding constitutional searches of containers found inside the passenger compartments of cars), *abrogated by* Arizona v. Gant, 556 U.S. 332 (2009).

44. Michigan v. Thomas, 458 U.S. 259, 261-62 (1982) (holding constitutional an inventory search conducted while the defendant was in police custody); South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976) (holding the inventory search constitutional).

45. Texas v. Brown, 460 U.S. 730, 744 (1983) (holding the search constitutional).

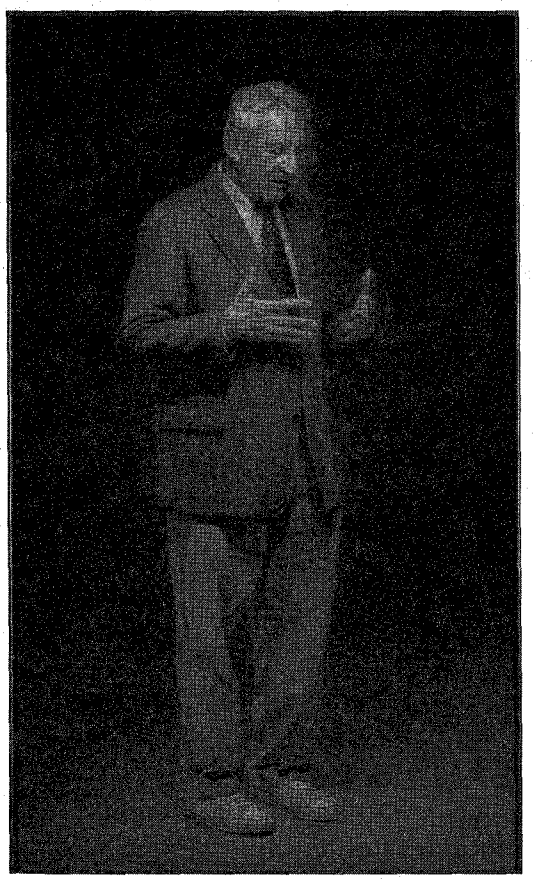
46. *See* California v. Acevedo, 500 U.S. 565, 581 (1991) (holding constitutional the search of a brown paper bag inside the trunk); United States v. Chadwick, 433 U.S. 1, 16 (1977) (invalidating the search of a double-locked footlocker inside the trunk).

47. Kahan & Meares, *supra* note 21, at 1158-59; *see also* sources cited *supra* note 21 (discussing similar concepts).

48. *See* DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 45-46 (2008).

much the proliferation of rules regulating the police has been intended to accommodate, not just to restrain, police discretion. In fact, this history shows that the defense of liberty was not simply about restricting the police's power. Rather, the challenge was figuring out how to incorporate policing within the meaning of freedom itself.

B. Why Reich



Portrait by Daniel Duffy, 2002.
Photo courtesy of the Yale Law School.

While it would be wrong to causally link Reich's ideas or words with the turn to proceduralism, the significance of *Police Questioning* on criminal procedure was similar to the influence of *The New Property* on public law, albeit

with less fanfare.[49] Both articles described how American law and society had undergone larger, structural transformations that necessitated a reconceptualization of individual rights. Reich's observations resonated, at the least, with sitting Justices on the Supreme Court. Just as Justice Brennan cited *The New Property* in *Goldberg v. Kelly*, which extended due-process rights to welfare proceedings, Justice Douglas cited *Police Questioning* in *Papachristou v. City of Jacksonville*, which attempted to solve the problem of police discretion the modern way by proceduralizing it.[50]

But using one person's perspective as a lens to examine the socio-legal, cultural, and intellectual histories of the Fourth Amendment is revealing not merely because Reich's scholarship made it into Supreme Court opinions. More significantly, contextualizing Reich's writings on the law with his biography shows how the histories of the automobile, policing, criminal procedure, and the regulatory state were profoundly connected. The legal academy's tendency to segregate administrative law and criminal procedure into distinct fields has obscured their intertwined histories. But Reich analyzed the problem of police discretion as he experienced it personally, as an administrative-law scholar during the automobile's golden age and as a closeted gay man at the epicenter of the lavender scare in the 1950s District of Columbia,[51] when even a rumor could end careers or silence those suspected of homosexuality.[52] His background and circumstances positioned Reich as a keen

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49. HORWITZ, *supra* note 9, at 245-46; Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012) (ranking *The New Property* seventh in a list of the most-cited law review articles); Paul R. Verkuil, *Revisiting* The New Property *After Twenty-Five Years*, 31 WM. & MARY L. REV. 365, 367 (1990) ("In *Goldberg v. Kelly*, the majority opinion virtually adopted *The New Property* for its analytic framework.").

50. *See infra* notes 230-234 and accompanying text; *see also* RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S (2016) [hereinafter GOLUBOFF, VAGRANT NATION] (describing *Police Questioning* and Justice Douglas's opinion in *Papachristou* as engaging in "a conversation"); Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1377 (2010) [hereinafter Goluboff, *Dispatch*] (describing how *Papachristou* "proceduralized the issue" of police discretion).

51. CHARLES REICH, THE SORCERER OF BOLINAS REEF 63, 81 (1977) (revealing that he had been a "secret homosexual" when he lived in the District of Columbia in the 1950s).

52. *See generally* DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT (2004) (examining the history of purges of suspected homosexuals from government service during the Cold War); K.A. Cuordileone, *"Politics in an Age of Anxiety": Cold War Political Culture and the Crisis in American Masculinity, 1949-1960*, 87 J. AM. HIST. 515 (2000) (describing the preoccupation with masculinity in U.S. politics during the Cold War); John D'Emilio, *The Homosexual Menace: The Politics of Sexuality in Cold War America*, *in* PASSION AND POWER 226 (Kathy

observer of how the regulation of the automobile implicated individual privacy and freedom. His insights point to a larger, important history about how the police and the modern state have grown in tandem: how their developments are, in fact, entwined.

This history of the law-enforcement arm of the state can resolve several puzzling aspects of Fourth Amendment jurisprudence. First, legal scholars have been unsure of what to make of the Supreme Court's 1967 decision in *Katz v. United States*, which declared that "the Fourth Amendment protects people, not places."[53] On the one hand, *Katz* presented an important shift from a property to a privacy analysis; but on the other hand, this reframing seems to have made little difference in subsequent case law.[54] This is perplexing only because legal scholarship has tended to lavish attention on "mandarin" sources, that is, appellate court opinions that often do not connect the dots in order to reduce context down to just the applicable, most persuasive facts.[55] Studying Reich provides the larger context. He understood that the public/private distinction underlying Fourth Amendment doctrine functioned not simply as a spatial framework, but more broadly as a conceptual one that has endured in American legal thought. Decoding what Reich meant by "privacy in public" can elucidate how *Katz*'s expectations-of-privacy standard did not abandon the paradigm of public order and private freedom, but instead reflected how the meanings of public and private themselves changed over the twentieth century.

Peiss & Christina Simmons eds., 1989) (analyzing the antihomosexual political campaigns during the 1950s).

53. Katz v. United States, 389 U.S. 347, 351 (1967). The status of *Katz*'s reframing is all the more uncertain after *United States v. Jones*, 132 S. Ct. 945 (2012). The Court unanimously concluded that attaching a GPS device to a car without a warrant constituted an unlawful search under the Fourth Amendment. But the Justices divided on whether to analyze the issue as a trespass to property or as a violation of reasonable expectations of privacy.

54. *See* Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013) ("One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property [*i.e.*, house] to gather evidence is enough to establish that a search occurred."); *Jones*, 132 S. Ct. at 949 (requiring a warrant to attach a GPS tracking device to an automobile by identifying the automobile as "private property"); *see also* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV 67, 69-70 ("But there is much less of a difference in how the Supreme Court has interpreted searches before and after *Katz* than has been realized . . . . In the *Katz* era before *Jones*, an expectation of privacy was very likely to be reasonable when backed by a property right."); David Alan Sklansky, *"One Train May Hide Another": Katz, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 885 (2008) ("At the level of results . . . Justice Harlan [in *Katz*] has proved prescient. In case after case, the Court has read the Fourth Amendment to provide protections that are place-specific.").

55. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 120-24 (1984).

Second, the literature on criminal procedure has left an important question unanswered: why did the Supreme Court create procedural rights rather than establish substantive rights to protect individuals in the criminal-justice system? The 1961 case *Mapp v. Ohio*, which marks the opening shot in the due-process revolution, illustrates this choice. To rectify the police's warrantless entry and search of Dollree Mapp's home, the Court incorporated the procedural rule of exclusion under the Fourth Amendment rather than uphold a substantive First Amendment right to possess obscene literature in one's home, as Mapp's lawyers had argued.[56] According to criminal-justice scholar William Stuntz, there is "no good answer" for why the Warren Court did not adopt an "aggressive substantive review" in favor of a "detailed law of procedure."[57] Amid recent critical assessments of the profusion of procedural rights created in the heady years of legal liberalism,[58] it is helpful to understand not just why individuals needed more rights, but also why those rights took the form they did.

The reasons for Reich's resort to proceduralism offers an explanation for American law's own turn to proceduralism.[59] Because the scholarship on the Fourth Amendment typically focuses on moments of "top-down" doctrinal change, namely the Founding Era and the Warren Court years, it has largely missed the equally dramatic "bottom-up" transformations in policing during intervening periods. Reich lived this history. The police pulled him over one too many times. But he understood that the automotive society in the twentieth-century United States had come to depend on discretionary policing to maintain security and order. Just as Reich did not seek to undo the creation of the administrative state and instead relied on proceduralism in public law to

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56. *See* Mapp v. Ohio, 367 U.S. 643, 660 (1961); CAROLYN N. LONG, MAPP V. OHIO: GUARDING AGAINST UNREASONABLE SEARCHES AND SEIZURES 82-85 (2006); Anders Walker, *"To Corral and Control the Ghetto": Stop, Frisk, and the Geography of Freedom*, 48 U. RICH. L. REV. 1223, 1227-33 (2014). The Supreme Court later invalidated statutes that criminalized private possession of obscene materials in *Stanley v. Georgia*, 394 U.S. 557 (1969).

57. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 211 (2011). By "aggressive substantive review," Stuntz meant the authority of courts to limit legislators' ability to define crimes. As examples of cases that seemed to augur such a substantive possibility but ultimately fizzled, Stuntz offered the Supreme Court's invalidation of statutes criminalizing drug addiction, Robinson v. California, 370 U.S. 660 (1962); the failure of convicted felons to register with the police, Lambert v. California, 355 U.S. 225 (1957); and the sale or use of contraceptives, Griswold v. Connecticut, 381 U.S. 479 (1965). STUNTZ, *supra*, at 210.

58. *See infra* text accompanying notes 244, 249.

59. *Cf.* David Wolitz, *Herbert Wechsler, Legal Process, and the Jurisprudential Roots of the Model Penal Code*, 52 TULSA L. REV. (forthcoming 2016) (describing how Wechsler proceduralized some aspects of substantive criminal law by situating his drafting of the Model Penal Code within the legal-process tradition).

protect individuals against abuse of discretion, he did not argue for the elimination of policing. And so proceduralism also offered a solution to the problematic necessity of police discretion.

Situating the expansion of discretionary policing within the governance of automobility may also explain a seeming disconnect between ends and means in Fourth Amendment law. The dominant narrative of the Warren Court explains the due-process revolution as a response to racial injustice.[60] But, as David Sklansky has observed, "[W]hat is missing" in Fourth Amendment doctrine is "a recognition that car stops and similar police actions may raise special concerns for Americans who are not white."[61] Recent events have made this all too clear.[62] But Reich's critiques of police discretion indicate that even as late as 1966, he did not view racial discrimination as the only problem with police discretion. Reich argued that the policing of the automobile affected everyone without regard to race, wealth, age, or gender—even "law abiding citizens," as the title of his article made clear. Reich was not an outlier in his views. Many scholars and jurists at midcentury, like Reich, understood the implications of policing more as a problem of arbitrary authority than discrimination.[63] Some even perceived lawless policing against racial minorities

60. *See* Kahan & Meares, *supra* note 21, at 1153; *see also* SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES 237-38 (1990) ("[T]he fate of black suspects in the hands of the police spurred a revolution in due process of law that reshaped the entire criminal justice system."); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2203 (2002); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000); Sklansky, *supra* note 54, at 877-78 (noting how "commonplace" it has become to understand "much of the Supreme Court's criminal procedure jurisprudence . . . [as] a form of race jurisprudence, prompted largely by the treatment of black suspects and black defendants in the South"); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 841 (1994).

61. Sklansky, *supra* note 24, at 309. For a more recent example of the racial blind spot in the Supreme Court's Fourth Amendment cases, see *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), which permits warrantless arrests for minor traffic offenses.

62. *See, e.g.*, Roxane Gay, Opinion, *On the Death of Sandra Bland and our Vulnerable Bodies*, N.Y. TIMES (July 24, 2015), http://www.nytimes.com/2015/07/25/opinion/on-the-death-of-sandra-bland-and-our-vulnerable-bodies.html [https://perma.cc/8HWW-ET4W] ("[Sandra Bland] was pulled over for a routine traffic stop. She shouldn't have been pulled over but she was driving while black . . . .").

63. At midcentury, many judges considered how discretionary policing implicated not only the Fourth Amendment rights of the guilty criminal before them, but also the rights of *every* driver. *See, e.g.*, Brinegar v. United States, 338 U.S. 160, 188 (1949) (Jackson, J., dissenting) (arguing that a "search against Brinegar's car must be regarded as a search of the car of Everyman"); Brinegar v. State, 262 P.2d 464, 472-73 (Okla. Crim. App. 1953) (pointing out that the rule of decision in the instant case would apply not only to the defendant, but also to "our most substantive and law-abiding citizenship," including "a physician hurrying to a

as an egregious example of arbitrariness.[64] Revisiting Reich's article can elucidate this distinctly midcentury concern, which makes more sense when contextualized within the longer history of the shift to policing as a mode of governance that, importantly, coincided with the Cold War and the threat of totalitarianism. Others in Reich's time may have also realized the twin developments in public rights and the police's powers. But no one else wrote so poignantly about the troubling prospect that the police could bother anyone and everyone as they pursued their freedom.

II. THE PUBLIC SPHERE OF THE AUTOMOTIVE SOCIETY

A. *Governing the Automotive Society*

The mass production of the automobile created the greatest urban disorder at the turn of the century. On main streets, thousands of motorized vehicles on roads originally intended for fewer pedestrians and slower horse-drawn carriages choked intersections and gave new meaning to the word traffic.[65] The narrow streets, many unpaved, could not handle the number of automobiles that exploded so quickly that municipal officials seemed unprepared to deal with the chaos. In 1924, August Vollmer, Chief of the Berkeley Police

call, . . . a minister of the Gospel on his way to serve the sick or mentally ill, or school girls with their bags packed and on their way to their campus").

64. *See, e.g.*, Jerome Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 143 (1953) (discussing policing in general rule-of-law terms, even though the paper was presented as part of a conference on "Police and Racial Tension"); Sam Bass Warner, *Investigating the Law of Arrest*, 31 AM. J. INST. CRIM. L. & CRIMINOLOGY 111, 115 (1940) (illustrating the problem of illegal searches with the frisking of "all the negro customers" in a saloon and the frisking of two white men walking on the street without noting racial differences in the two examples).

65. The perfection of the Ford assembly line in 1913, five years after the Model T's debut, speedily ushered in the horseless age. Kathleen Franz, *Automobiles and Automobility*, *in* MATERIAL CULTURE IN AMERICA: UNDERSTANDING EVERYDAY LIFE 54 (Helen Sheumaker & Shirley Teresa Wajda eds., 2008). In 1910, fewer than five hundred thousand passenger automobiles were registered in the United States. That figure exploded to five million five hundred thousand by 1918 and to over fifteen million five hundred thoussand in 1924. ROBERT S. LYND & HELEN MERRELL LYND, MIDDLETOWN: A STUDY IN CONTEMPORARY AMERICAN CULTURE 253 n.3 (1929). In contrast, the number of horse-drawn carriages manufactured in the United States shrunk from two million in 1909 to ten thousand in 1923. LYND & LYND, *supra*, at 251 n.1; *see also* PETER D. NORTON, FIGHTING TRAFFIC: THE DAWN OF THE MOTOR AGE IN THE AMERICAN CITY (2008) (recounting how cities and downtown businesses sought to regulate traffic).

Department, asserted that traffic was "the police problem of today."[66] By then, Vollmer had already established himself as a leader of the Progressive Era movement to professionalize law enforcement and generally maintained an optimistic attitude about the capabilities of a modern police department.[67] But he did not think that the traffic problem could possibly be solved within his lifetime.

The modern marvel also created an unprecedented threat to public safety, prompting one court to declare that "[t]he death rate from motor accidents rivals that of our severest wars."[68] Accustomed to horses trotting at about five to ten miles per hour, people were not prepared for the speed of motor-powered cars, which could average thirty to fifty miles per hour.[69] The

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66. Letter from August Vollmer, Chief, Berkeley Police Dep't, to George Martin (Aug. 13, 1924) (on file with the Bancroft Library, University of California, Berkeley, August Vollmer Papers, Box 40, "Letters Written by Vollmer, 1918-Feb. 1930"); *see also Brinegar*, 262 P.2d at 474 ("[T]he motor age was only coming into being during [the 1920s], and the problems presented have so multiplied as to form the main concern of the governing boards of cities and towns throughout the land, chiefly involving the flow of traffic and parking."); Letter from F. M. Kreml, Dir., Dep't of Police, Bureau of Accident Prevention, City of Evanston, Ill., to August Vollmer, Chief, Berkeley Police Dep't (Apr. 4, 1933) (on file with the Bancroft Library, University of California, Berkeley, August Vollmer Papers, Box 36, "Miscellaneous Letters") (citing traffic as "the greatest single problem confronting the Police Department").

August Vollmer's experience with the traffic problem in Berkeley, California, is a representative story. The automobile created similar havoc in communities across the United States, and city planners, government officials, and police officers met regularly to discuss strategies and to exchange ideas. *See, e.g.*, DAVID BLANKE, HELL ON WHEELS: THE PROMISE AND PERIL OF AMERICA'S CAR CULTURE, 1900-1940, at 120 (2007) (describing a "gathering of twelve hundred prominent city, state, and national auto safety reformers on January 7, 1937, in Dallas, Texas"); NORTON, *supra* note 65, at 230-35 (detailing the meetings of the National Conference on Street and Highway Safety in the 1920s).

67. Vollmer gained a national reputation for his police reforms and traveled widely to advise other police departments. As a prolific writer and devoted mentor, his influence spread even further through his publications to a national audience of police executives and through his disciples who went on to become police chiefs or scholars of police administration. *See* ALFRED E. PARKER, THE BERKELEY POLICE STORY 26, 28-29, 30-32, 39 (1972) (describing Vollmer's reputation and influence nationally); Samuel Walker, *Origins of the Contemporary Criminal Justice Paradigm: The American Bar Foundation Survey, 1953-1969*, 9 JUST. Q. 47, 55 (1992) (referring to Vollmer as the "father" of professionalization).

68. *Brinegar*, 262 P.2d at 474; *see also* BLANKE, *supra* note 66, at 90-119 (recounting the social, political, and cultural repercussions of automobile accidents); NORTON, *supra* note 65, at 21-32, 65-79 (arguing that the reconstruction of streets as spaces exclusively for cars arose from the interests of motorists to counter widespread public outrage over automobile fatalities).

69. *See, e.g.*, Workman v. New York City, 179 U.S. 552, 579 (1900) (Gray, J., dissenting) (mentioning a New York City ordinance providing that "no person shall drive or ride any horse through any street in the city faster than five miles an hour"); FRIEDMAN & PERCIVAL, *supra* note 27, at 96 (describing an 1891 Oakland ordinance that limited the speed of horses to nine miles an hour); August Vollmer, The Police Beat (1929) (unpublished manuscript)

previously innocuous act of crossing the street or walking on the sidewalk now risked life and limb. Stories appeared regularly in newspapers of cars suddenly jumping curbs, plowing into pedestrians, striking bystanders and flinging them violently.[70] Even drivers seemed surprised by how fast they could go, as reflected by the large number of accidents that occurred from failure to slow down when turning corners.[71] In 1923, automobile traffic caused ten out of twenty-one accidental deaths and 267 out of 330 injuries in Berkeley, California.[72] The college town was typical in this upward trend. Vollmer cited data from the National Safety Council showing that "[t]raffic fatalities [throughout the country] increased 500 percent between 1913 and 1932; in the same period, the death rate for all other accidents dropped 42 per cent."[73] By 1930, more than four times as many people died in automobile accidents as from crime.[74] This statistic "might be startling," Vollmer maintained, "were it not so familiar."[75]

Local governments responded by enacting a great number of regulations pursuant to their police powers. In addition to speed limits and license requirements, the new laws mandated safety equipment, such as lamps and brakes; prohibited motorized vehicles from certain roads and highways; determined who among cars, horses, carriages, and pedestrians had the right of way; specified how fast a car could overtake horse-drawn coaches and trolleys;

(on file with the Bancroft Library, University of California, Berkeley, August Vollmer Papers, Carton 2, Folder "The Police Beat") (explaining the rising ability of patrolmen using automobiles capable of covering thirty miles during a tour of duty).

70. *See, e.g.*, *Auto Kills Girl; Police Save Driver*, N.Y. TIMES, Sept. 5, 1921, at 3 (reporting eight different automobile accidents in the city the previous day).

71. *See Berkeley Auto Deaths Alarm* (on file with the Berkeley Police Department Records, Berkeley, California, 1909-1932, Box 48).

72. Press Release and Letter from Russell, Cal. State Auto. Ass'n, to C.D. Lee, Chief, Berkeley Police Dep't (Jan. 15, 1924) (on file with the Berkeley Police Department Records, Berkeley, California, 1909-1932, Box 6).

73. AUGUST VOLLMER, THE POLICE AND MODERN SOCIETY 120 (Patterson Smith Publ'g Corp. 1971) (1936); *see also* Letter from D.V. Nicholson, Manager, Pub. Safety Dep't, Cal. State Auto. Ass'n, to Pub. Safety Committeemen (Jan. 23, 1924) (on file with the Berkeley Police Department Records, Berkeley, California, 1909-1932, Box 6) (reporting the California and San Francisco figures); Press Release and Letter from Russell to C.D. Lee, *supra* note 72 (reporting the Oakland figures); August Vollmer, Address at the National Conference on Street and Highway Safety, Washington (Sept. 26, 1931) (transcript available in the Bancroft Library, University of California, Berkeley, August Vollmer Papers, Carton 2, Folder "Articles and Speeches by Vollmer, 1931-1933") (reporting the nationwide figures).

74. August Vollmer, The Police and the Traffic Problem 3 (Dec. 15, 1930) (transcript available in the Bancroft Library, University of California, Berkeley, August Vollmer Papers, Carton 2, Folder "Articles and Speeches by Vollmer, 1930").

75. VOLLMER, *supra* note 73, at 120.

and even regulated "the angle at which motorists should make turns from one street into another."[76]

Many, including Vollmer, viewed all of this law-making activity skeptically. For one thing, too many of these laws were both poorly written and ill conceived.[77] Speed limits provided a good example. One section of California's Motor Vehicle Act of 1915 prohibited driving "at a rate of speed . . . greater than is reasonable and proper"; adding unhelpful specificity to ambiguity, another section described the varying circumstances for which the speeds of ten, fifteen, twenty, thirty, or thirty-five miles per hour would be considered unreasonable and unsafe.[78] In an era before traffic signs were common, what speed was reasonable on a given road could often be anyone's guess—if he even remembered what the law prescribed.

Further contributing to the confusion, Vollmer complained, was that legislators seemed to be writing traffic regulations in knee-jerk reaction to tragic accidents, which generated even more incoherent laws.[79] This criticism echoed a common complaint during the Progressive Era heyday about "the torrent of new laws which are deluging the country to the confusion of

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76. Leon J. Pinkson, *Plan for Marking Turns Is Now Suggested*, S.F. CHRON., Dec. 21, 1913, at 57; *see also* J. Allen Davis & Harry V. Cheshire, Jr., *California Motor Vehicle Legislation*, SEC. 520 http://section520.org/mvl.html [http://perma.cc/SY4Z-Y2V9].

77. *See* VOLLMER, *supra* note 73, at 3 ("In every city, county or state there are some lawmakers or enforcement officials who believe that they have the legal panacea for all of the traffic ills from which society is suffering. Few indeed, are sufficiently acquainted with the facts to pass intelligently upon this difficult problem.").

78. Act of May 10, 1915, ch. 188, § 22(a), 1915 Cal. Stat. 397, 409 (current version at CAL. VEH. CODE § 22350 (West 2014)). *See also Ex parte* Daniels, 192 P. 442, 444-46 (Cal. 1920) (describing the Motor Vehicle Act of 1915 as prohibiting driving "at an unsafe and unreasonable rate of speed"). Apparently, some states intentionally used vague language. According to one legal commentator, the purpose of motor-vehicle laws was "the protection of the life and safety of pedestrians and drivers," but too many factors determined whether a person was driving safely:

> A normal, sober driver can operate a car more safely at 45 miles per hour than a one-armed driver or a drunken driver at 30 miles per hour. A speed which at noon at a crowded corner would be most hazardous might not be at all dangerous or reckless at the same spot at midnight.

Ben Connally, Comment, *Constitutional Law—Declaring a Statute Unconstitutional Because of Indefinite Terminology*, 11 TEX. L. REV. 212, 216 (1933). So instead of mandating a one-size-fits-all rule, some legislatures passed indefinitely defined provisions criminalizing, for example, "'reckless driving,' or driving at a speed 'greater than is reasonable or prudent' or at an 'unreasonable speed . . . .'" *Id.* at 216.

79. VOLLMER, *supra* note 73, at 143 ("Legislation was passed to meet every situation; indeed, in the beginning, every major traffic accident was followed by some form of legislation designed to prevent its recurrence, and many petty regulations were drafted to overcome the problems encountered in a particular community.").

everyone, lawmakers included."[80] The Motor Vehicle Act of 1919 contained so many provisions, many of which were not intuitive to the average driver, that police chiefs in California agreed to "avoid making arrests except in cases of deliberate violations" for sixty days after the new law became effective (they did not mention, however, how officers would determine "deliberate violations").[81] The state legislature had amended the Act so many times that, in the observation of the attendees at the 1922 Motor Vehicle Conference in California, many sections, clauses, and phrases began with "provided, however," "provided further . . . except that," or "provided further, however, anything to the contrary herein notwithstanding," all but rendering the cumbersome language indecipherable.[82] "So numerous [were] the . . . laws regulating traffic," Vollmer asserted, "that few indeed are the persons who can travel the streets or highways without violating one or many of them every hour of the day."[83]

Delegating the enforcement of traffic laws to the police seemed logical, perhaps even inevitable. Police officers' duties, after all, were to preserve the peace, maintain order, and protect life and property.[84] The mass volume of cars disrupted order, endangered life, and damaged property. Still, entrusting the police with traffic duties was not a foregone conclusion simply because lawmakers dealt with the traffic problem as a criminal matter. Many police chiefs complained that traffic control was "a separate and distinct type of service"—i.e., it was not their job.[85] Vollmer pointed out that assigning bureaucracies with specific and limited duties was not without precedent. He noted that the federal government had different departments that enforced different types of laws: the Treasury Department had secret-service agents, the

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80. Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 72-73 (2006) (quoting *Excessive Lawmaking the Bane of America*, 74 CURRENT OPINION 461, 461 (1923)).

    Interestingly, the German political theorist Carl Schmitt referred to the dramatic increase in the quantity of statutes in the twentieth century as the "motorization" of legislation. *See* William E. Scheuerman, *Motorized Legislation? Statutes in an Age of Speed*, 88 ARCHIVES FOR PHIL. L. & SOC. PHIL. 379, 379 (2002) (citing CARL SCHMITT, DIE LAGE DER EUROPÄISCHEN RECHTSWISSENSCHAFT [THE STATE OF EUROPEAN JURISPRUDENCE] (1950)).

81. Minutes of Special Meetings Called for the Purpose of Organization and Education Held in the Cities of Fresno, Oakland and Los Angeles 2 (June 10, 1919) (on file with the Berkeley Police Department Records, Berkeley, California, 1909-1932, Box 48).

82. Davis & Cheshire, *supra* note 76.

83. VOLLMER, *supra* note 73, at 144.

84. *See infra* text accompanying note 88.

85. August Vollmer, Vice and Traffic-Police Handicaps 5 (Mar. 2, 1928) (transcript available in the Bancroft Library, University of California, Berkeley, August Vollmer Papers, Carton 2, Folder "Articles and Speeches Written by Vollmer, 1926-1929").

Post Office had its own inspectors, and the Department of Justice had its agents, "all having separate duties and all performing their duties satisfactorily."[86] Likewise, Vollmer preferred the creation of a separate governmental unit to deal with traffic. But he recognized that a lack in political will to foot the bill for yet another bureaucratic entity meant that traffic regulations would "ultimately place themselves at the door-step of police departments."[87] By the 1930s, the police's motto of "protecting lives and property, and preserving the peace" meant that the police had to "maintain the peace, pursue criminals and regulate traffic."[88] Police enforcement of both traffic laws and the criminal laws would have immense consequences.

B. Policing the Regulatory State

As American life revolved increasingly around the automobile, the state exerted a growing presence in everyday life as it managed the public disorder and safety hazards that cars wrought. But the history of the state's expanding powers with the rise of automobility offers more than just a chapter of a larger history of public law in the twentieth-century United States. It also shows how the problem of police discretion emerged from a modern state's regulatory activities. In the automobile context, delegating the management of traffic safety to police officers, as part of their overall responsibility for the enforcement of criminal laws, posed a new threat to individual rights.

Reich sounded this alarm in a series of law-review articles in the 1960s that, altogether, described the administrative apparatus surrounding cars as part and parcel of the dangers of bureaucracy writ large. *The New Property*, the most cited of the articles, warned of the inclination of the administrative state to encroach on personal liberty.[89] Reich portrayed the state as a "gigantic syphon" that dispensed an enormous number of benefits, from welfare to government contracts, licenses, and more.[90] Nearly everyone received some sort of "government largess" or entitlement, which had largely replaced

86. *Id.* at 7.

87. August Vollmer, Police Problems 5 (Feb. 26, 1932) (transcript available in the Bancroft Library, University of California, Berkeley, August Vollmer Papers, Carton 2, Folder "Articles and Speeches by Vollmer, 1932-1935").

88. *Id.* at 1; August Vollmer, Notes on Address to Japanese Police Officials 1 (1932) (on file with the Bancroft Library, University of California, Berkeley, August Vollmer Papers, Carton 2, Folder "Articles and Speeches by Vollmer, 1931-1933").

89. Reich, *supra* note 17.

90. *Id.* at 733.

traditional forms of wealth like private property.[91] The shift from private property to public benefits had created what Reich called a "feudal" relationship in which citizens depended on the state for their subsistence.[92] This dependence empowered the state to govern and monitor even the most intimate aspects of its citizens' lives. In a 1963 article, *Midnight Welfare Searches and the Social Security Act*, Reich wrote about the "common practice for authorities to make unannounced inspections of the homes of persons receiving public assistance," often "without warrants and in the middle to the night" to check for "an adult man capable of supporting the family."[93]

The specter of the police invading the privacy of one's home, no less in the middle of the night, must have been a harrowing thought for Reich. His own fears that someone might suspect his "secret homosexual feelings" undoubtedly informed his observations of American society at midcentury.[94] Though these surveillance practices certainly seemed like the repressive tactics of a totalitarian regime, Reich never used the phrase "police state."[95] He wanted to provoke his readers, namely lawyers, judges, and fellow academics. But he would not have risked the controversy associated with such a loaded term in the middle of the Cold War. He later recalled that, as a member of the Yale Law School faculty, he was careful not to leave "the slightest left-wing or activist thing" on his record.[96] Reich first learned this lesson earlier, during his third year of law school. Two Harvard Law School students, Jonathan and David Lubell, had refused to testify before the Senate Subcommittee on Internal Security, invoking the First and Fifth Amendments.[97] Jonathan was subsequently ousted from the *Harvard Law Review* at the behest of the dean, and his twin brother David was similarly removed as president of the student

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91. *Id.*

92. *Id.* at 768.

93. Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347, 1347 (1963).

94. REICH, *supra* note 51, at 81.

95. *Cf.* SKLANSKY, *supra* note 48, at 16-18 (tracing the history of the term "police state" beginning with its original Prussian context in the seventeenth and eighteenth centuries, which referred to a system of regulation overseen by a surveillance apparatus, to the Anglo-American understanding of totalitarianism in the twentieth century).

96. LAURA KALMAN, YALE LAW SCHOOL AND THE SIXTIES 50 (2005) (quoting Reich). Reich remembered himself and his fellow Yale Law professors as "relentlessly ambitious and politically timid," "fearful of taking risks, [and] 'extremely averse to any form of activism . . . .'" *Id.*; *see also* Rodger D. Citron, *Charles Reich's Journey from the* Yale Law Journal *to* The New York Times *Best-Seller List: The Personal History of* The Greening of America, 52 N.Y.L. SCH. L. REV. 387, 401 (2007) ("Reich generally did not question existing legal and political institutions in his academic scholarship . . . .").

97. Citron, *supra* note 96, at 392.

newspaper, the *Law School Record*.[98] This incident "personalized the McCarthy era for Reich" and made clear the "immediate and swift" consequences of expressing dissenting views.[99] Given the prevailing political culture, Reich tempered his charge and instead referred to the society formed from the mound of government largess as the "public interest state"[100] and warned that it was not being "faithful to American traditions."[101]

Reich sought to show how policing affected everyone and not just welfare recipients or people like him who may not have seemed to fit in. From this perspective, it is unsurprising that the automobile example pervades *The New Property*. To make his case, he described the state's regulation of the automobile, for driving had become one facet of American life that most people had in common.[102] Reich began by noting that the use of one's automobile, which many Americans had come to see as a birthright, actually depended on a bevy of public benefits like roads and highways.[103] One court opinion that Reich cited accordingly maintained that as "an elementary rule of law . . . the right to operate a motor vehicle upon a public street or highway is not a natural or unrestrained right, but a *privilege* which is subject to reasonable regulation under the police power of the state in the interest of public safety and welfare."[104] The legal distinction between a right and a privilege, in conjunction with the "gratuity principle" that the giver could rescind a handout, had enlarged the government's power just as in other welfare contexts.[105] This rendered all drivers beholden to the "wealth flowing through the giant government syphon."[106]

Reich illustrated this heavily lopsided relationship by describing the state's administration of driver's licenses. No one could drive without one, and so the state's control over its distribution magnified its power.[107] As an example,

98. *Id.*

99. *Id.*

100. Reich, *supra* note 17, at 756.

101. Reich, *supra* note 93, at 1360.

102. In the 1950s, there was a registered car for every 3.5 Americans, EARL SWIFT, THE BIG ROADS: THE UNTOLD STORY OF THE ENGINEERS, VISIONARIES, AND TRAILBLAZERS WHO CREATED THE AMERICAN SUPERHIGHWAYS 203 (2011), and fifty-seven percent of the driving-age population had a license to drive, Office of Highway Policy Info., *Licensed Drivers*, U.S. DEP'T TRANSP., http://www.fhwa.dot.gov/ohim/onhoo/onh2p4.htm [http://perma.cc/LZ62-SGZV].

103. Reich, *supra* note 17, at 740.

104. *Id.* (quoting Lee v. State, 358 P.2d 765, 769 (Kan. 1961)).

105. *Id.* (emphasis omitted).

106. *Id.* at 737.

107. *See id.* at 741-42.

Reich pointed out that the New York Supreme Court had upheld a law requiring a motorist to submit to a sobriety test, thereby forcing the driver to waive his right against self-incrimination or else lose his driver's license.[108] The court had reasoned that because "highway safety is a matter of great concern to the public, it may not be held that it is unreasonable or beyond legislative power to put such a choice to a motorist who is accused upon reasonable grounds of driving while intoxicated."[109] New York also revoked the driver's license of any motorist convicted under the Smith Act for advocating overthrow of the government.[110] As another example, the Director of the Division of Motor Vehicles in New Jersey could suspend a license even if a court of law had acquitted the individual of any criminal charge or, in the event of a conviction, affirmatively decided not to suspend his or her license.[111]

Considering how much of American life in the twentieth century depended on the automobile, the revocation of a driver's license may very well have felt like a criminal sanction that restricted the freedom of movement.[112] Indeed, as American society became an automotive society, mobility increasingly came to mean automobility. Road trips, Sunday drives, and commutes—significant chunks of daily routines—depended on the automobile. The poet Edward Hirsch was not exaggerating by much when he described the automobile as "a central, constitutive feature of American life."[113] Without a car, maintaining a social life would have been more difficult.[114] With limited public transportation options, financial stability would not have been within reach for many without cars as jobs and homes moved ever farther apart.[115] Similarly, as commercial areas became segregated from residential neighborhoods, people had to drive

108. *Id.* at 776.

109. *Id.* (quoting Schutt v. Macduff, 127 N.Y.S.2d 116, 122-23 (Sup. Ct. 1954)).

110. *Id.* at 748-49.

111. *Id.* at 754.

112. This is still true today. Recently, *The New York Times* reported that some states suspend driver's licenses for unsatisfied debts stemming from criminal cases and traffic fines, which creates a cycle of debt. Shaila Dewan, *Driver's License Suspensions Create Cycle of Debt*, N.Y. TIMES (Apr. 14, 2015), http://www.nytimes.com/2015/04/15/us/with-drivers-license-suspensions-a-cycle-of-debt.html [http://perma.cc/7YEU-JLR5]. People with suspended licenses are forced to drive anyway in order to commute to work to pay off those debts, but then get hit with more fines for "driving while suspended." *Id.*

113. Edward Hirsch, *Preface* to DRIVE, THEY SAID: POEMS ABOUT AMERICANS AND THEIR CARS, at xv, xv (Kurt Brown ed., 1994); *see also* Lars Erik Larson, *Free Ways and Straight Roads: The Interstates of Sal Paradise and 1950s America*, *in* WHAT'S YOUR ROAD MAN?: CRITICAL ESSAYS ON JACK KEROUAC'S ON THE ROAD 35, 37 (Hilary Holladay & Robert Holton eds., 2009).

114. *See, e.g.*, LYND & LYND, *supra* note 65, at 251-53.

115. *See, e.g.*, ANDRÉS DUANY ET AL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM 124-27, 129-33 (2000).

to run errands, go shopping, and take care of the business of everyday life.[116] In the automotive society of twentieth-century America, driving a car had become essential to almost every aspect of life. Thus, characterizing driving as a mere "privilege" effectively enabled the state to punish violators without due-process rights. In the twentieth-century administrative state, police powers appeared more punitive than regulatory.

Granted, most people had never been convicted of a crime, nor had they advocated the overthrow of the government. So most had little reason to fear that the state would revoke their licenses. But many did share an experience that demonstrated the force of the state's police powers: the increasingly common practice of car stops and searches. In addition to stops, the public interest in highway safety rationalized roadblocks for inspection of vehicles and driver's licenses, which Reich called "institutionalizations" of police questioning that "have grown up around the automobile."[117] In *Police Questioning of Law Abiding Citizens*, Reich described the legal uncertainties surrounding these encounters, which further bolstered the police's leverage. He found no reported court decisions that addressed whether the police could stop an innocent person, on which subjects the police could inquire ("Name? Address? Occupation? Age? Marital status?"), whether a citizen could refuse to answer, and what actions the officer could take if an individual attempted "to claim some rights."[118] Reich discovered that within this legal lacuna, the police were able to claim tremendous discretionary authority and often used that authority in the manner of petty tyrants.

Interestingly, Reich was apparently unaware of decades of legal scholarship and reform efforts to update the law of arrests to clarify the respective rights of individuals and police officers.[119] What may explain his oversight is that Reich was not a scholar of criminal law and procedure. In analyzing the problem of

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116. *See, e.g.*, *id.* at 115-27 (describing the automobile's role in the creation of suburban sprawl and its effects on everyday life).

117. Reich, *supra* note 3, at 1162-63. For instance, the Philadelphia branch of the ACLU received so many questions about the legality of roadblocks that it asked the national office for more information. Letter from Spencer Coxe, Exec. Dir., ACLU Greater Phila. Branch, to Alan Reitman, Assoc. Exec. Dir., ACLU (July 28, 1959) (on file with the Mudd Library, Princeton University, ACLU Records, Box 1075, Folder 9).

118. Reich, *supra* note 3, at 1162-63.

119. *See, e.g.*, Warner, *supra* note 64, at 121; Sam Bass Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 325 (1942); Note, *Philadelphia Police Practice and the Law of Arrest*, U. PA. L. REV. 1181, 1212-16 (1952); *Uniform Arrest Law Adoption Urged by* [District Attorney of Los Angeles S. Ernest] *Roll*," L.A. TIMES, May 13, 1955, at A28 (on file with author); *see also* Sarah A. Seo, The Fourth Amendment, Cars, and Freedom in Twentieth-Century America 10-11 (2016) (unpublished Ph.D. dissertation, Princeton University) (on file with author) (analyzing the Uniform Arrest Act as an attempt to renegotiate the citizen-police encounter).

police discretion, he applied his knowledge as an administrative-law scholar and focused on the regulatory roots of that problem.

Reich's insight was that public rights to the automobile—the rules that regulated its use—in combination with officers' power to arrest anyone who violated those rules magnified the police's discretion. In fact, the multitude of traffic laws gave the police what amounted to a general warrant to stop anyone. Reich noted that the justifications for stopping a car were not limited to a suspicion of violent crime.[120] The motorist could "always be charged with having faulty equipment or an obstructed window, or with careless driving."[121] It did not matter whether an officer's charge would lead to a conviction. The mere possibility of "arrest, delay, a night in jail, frantic calls to relatives and lawyers, the expense and trouble of a trial, and the undeniable uncertainty about whether a local magistrate's court might, in fact, convict" posed enough of a threat that it made Reich "think twice" before he told an officer that the reason for being out and about was "none of his business."[122]

The police's "virtually unlimited sanction" made a difference in their interactions with citizens in seemingly small, but important, ways.[123] At the top of Reich's list of "fundamental issues" at stake in these encounters was the officer's tone of voice.[124] He recalled one occasion when a policeman pulled him over near Boston and, after inspecting his driver's license, asked, "'What were you doing in Boston, Charlie?'"[125] Reich identified "something deeply offensive in familiarity which is deliberately used by a person in authority for the purpose of causing humiliation."[126] This indignity was not just a matter of courtesy. The automobile stop constituted the "chief point of personal contact between the individual citizen and the law."[127] At stake in this brief encounter, then, was the relationship between citizens and their government.

It may be that the police singled out Reich because they suspected his homosexuality. But letters written to the American Civil Liberties Union (ACLU) at midcentury suggest otherwise; police mistreatment had become a common source of indignation even among people who never would have

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120. *See* Reich, *supra* note 3, at 1165-66.

121. *Id.* at 1166.

122. *Id.*

123. *Id.*

124. *Id.* at 1163.

125. *Id.*

126. *Id.* at 1164.

127. *Id.*

expected themselves to contact an organization "riddled with Communists."[128] In 1959, T.R. Mathews, a self-identified "old stock American, of the old school," from Birmingham, Michigan wrote bitterly about an argument with a cop over a ticket for parking his car just six inches over a yellow line "for a moment in front of property owned by me."[129] The ordeal concluded five months later with a jury finding him liable only for the parking violation and overturning the other two tickets that the officer had written out in retaliation. The "hatred that Americans can bestow upon others for no crime at all" had made him "afraid of my own Nation."[130] He implored the ACLU to "do something that is tangible to prevent the inward destruction of our Nation."[131]

In 1964, Eugene Weiner, a corporate executive in Philadelphia, wrote to Police Commissioner Howard Leary and Mayor James Tate to complain about a "very frightening" experience during a car stop.[132] Because he had not been speeding or violating any other traffic laws, he asked why he was stopped. Only after searching the trunk did the officer explain that he was performing a routine road check for stolen Chevrolets. When Weiner then asked how long the road check would last, the officer told him to "get back in [his] car and shut-up."[133] Stunned, Weiner wrote down the officer's name and badge number (Officer Trievel, Badge No. 5559), which prompted Trievel to take Weiner to the police station in the patrol wagon so that the lieutenant on duty could "explain the fundamentals of a car check."[134] After the lieutenant heard the story, he returned Weiner to his car and told him "to forget the incident."[135] But the incident was "difficult to ever forget."[136]

These letters reveal an inkling that American society had fundamentally changed if the police could mistreat upstanding citizens without good reason. They were respectable people as they pointed out in both subtle and not so subtle ways. In his telling, Mathews not only identified himself as an old-stock

128. Ross Cunningham, *"Civil Liberties" and Their Relation to Coddled Criminals*, SEATTLE TIMES, Oct. 20, 1963 (on file with the Mudd Library, Princeton University, ACLU Records, Box 1075, Box 1079, Folder 6).

129. Letter from T.R. Mathews to Alan Reitman, Assoc. Exec. Dir., ACLU (Feb. 18, 1959) (on file with the Mudd Library, Princeton University, ACLU Records, Box 1075, Folder 1).

130. *Id.*

131. *Id.*

132. Letter from Eugene Weiner to Howard R. Leary, Comm'r, Phila. Police Dep't (Mar. 4, 1964) (on file with the Mudd Library, Princeton University, ACLU Records, Box 1079, Folder 19) (copying Philadelphia Mayor James Tate and also sending the ACLU a copy).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

American, but also recounted that another police officer had to inform the offending cop "who I was."[137] Weiner wrote his letter on company letterhead and included his title as vice president under his signature. Both Mathews and Weiner struggled in their letters to make sense of what had happened to them. Weiner wrote that it was "a shame for one officer to hurt the dignity and respect which the Philadelphia Police Department deserves," suggesting that the problem might have been a few bad apples.[138] But Weiner must have sensed that Officer Trievel's behavior fell within a broader pattern of police misconduct. After all, Weiner sent a copy of his letter to the ACLU so that the advocacy group could include his experience in its investigation into systemic abuses of the police's power. When people like Weiner, Mathews, and Reich encountered the police in their cars, they grappled with an unsettling question: shorn of political labels, what kind of society had the United States become?

The individuals who wrote letters to the ACLU did not expressly articulate the thought that they lived in a police state rather than a free society, but some people did. In 1958, Kenneth Johnson of West Hartford, Connecticut made regional news and the pages of *Time Magazine* (under the cheeky title "Heil to Pay") when he paid a two-dollar parking ticket and then received an additional fifty-dollar fine for having written his check to the "West Hartford Police Gestapo."[139] The papers did not detail what inspired Johnson's particular insult. But the story resonated because, in the car culture of American life, unpleasant run-ins with the police were becoming a common motif. Johnson's slur referred to the same phenomena Reich described in his law-review articles. But Reich offered more than just a sanitized version. He made the further, important point that police harassment affected not just minorities and hippies, but even ordinary white men like him.

Notably, *Police Questioning of Law Abiding Citizens* did not pay much attention to how race aggravated the problem of police discretion. Reich did acknowledge at one point that "the police are far more likely to stop a Negro than a white man; far more likely to question a shabbily dressed man than one in an expensive suit."[140] To the extent that Reich noticed discriminatory policing, it was further evidence of the same problem that affected people like him, people he knew like his psychiatrist brother, and people who were the

137. Letter from T.R. Mathews to Alan Reitman, *supra* note 129.

138. Letter from Eugene Weiner to Howard R. Leary, *supra* note 132.

139. *Miscellany*, TIME, Oct. 13, 1958, at 10; *Parker Fined $50 for Sense of Humor*, BRIDGEPORT POST, Sept. 11, 1958, at 31.

140. Reich, *supra* note 3, at 1164.

"law abiding citizens" in the title of his article.[141] Reich's fears did not emanate solely from the concerns of race or class. If anything, the "one minority group" that, in Reich's opinion, "deserve[d] special mention in connection with police questioning" was not African Americans who were fighting for equal rights, but "teenagers," who had "insufficient privacy at home" and so spent a lot of their time in public where they were "easily identified and easily harrassed [sic]" by the police.[142] Reich's attention to the plight of the youth is more understandable given his admiration of the challenges they mounted against the establishment.[143] Although in hindsight his relative inattention to race appears shortsighted, Reich sought to make the point that policing affected everyone.

Reich exposed the darker underbelly of the automotive society in 1966, but the regulatory-security state continued apace. In 1976, Donald Opperman had left his car parked illegally overnight, and after the police had issued two tickets, they towed the car.[144] At the impound lot, an officer inventoried its contents pursuant to standard police procedures.[145] During this search, the officer found marijuana in the glove compartment.[146] When Opperman arrived at the police station to claim his property, he was arrested and ultimately convicted for possession of less than one ounce of marijuana.[147] To justify the warrantless search, Chief Justice Burger relied on the public rights governing the use of motor vehicles:

> Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise,

141. *Id.* at 1163-64 (describing an incident when an officer stopped his brother: "He called my brother by his first name. After looking at identification papers belonging to their friend, he said, in a tone that carried insult, 'What kind of a doctor are you, Ellie?'").

142. *Id.* at 1165.

143. In *The Greening of America*, which made *The New York Times* bestseller list in 1970, Reich offered a paean to the 1960s' youth movements. CHARLES A. REICH, THE GREENING OF AMERICA (1970).

144. South Dakota v. Opperman, 428 U.S. 364, 364 (1976).

145. *Id.*

146. *Id.*

147. *Id.*

> are noted, or if headlights or other safety equipment are not in proper working order.[148]

The government's duty to protect the safety of the people—what the Court characterized as the police's "community caretaking function[]"—had turned into a criminal investigation.[149] In disregarding whatever separation existed between regulatory law and criminal law, the Burger Court was not forging into new legal territory. As early as 1923, a Philadelphia court similarly declared:

> The right to stop and search an automobile for liquor is no different from the right to stop and search an automobile to see whether or not it contains an infernal machine, opium or a bandit concealed beneath a laprobe, or, indeed, to discover whether or not the operator of the vehicle has in his possession the license card provided by the automobile statutes of the State.[150]

The court ruled, based on the public nature of cars, that it was not illegal for the sheriff to come upon a parked Ford truck, enter the vehicle, discover bottles of whisky banned during Prohibition, and seize the truck and its contents—all without a warrant or even probable cause.[151]

By midcentury, Reich observed that the governance of automobility had amounted to more than bureaucratic inconveniences for drivers. Public rights to the automobile had served as the handmaiden to a new kind of society that seemed less bound by law and more subject to the whims of police discretion. It was a society in which the state, through its police agents, crept ever more forcefully into spaces that people experienced as a realm of freedom.

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148. *Id.* at 368.

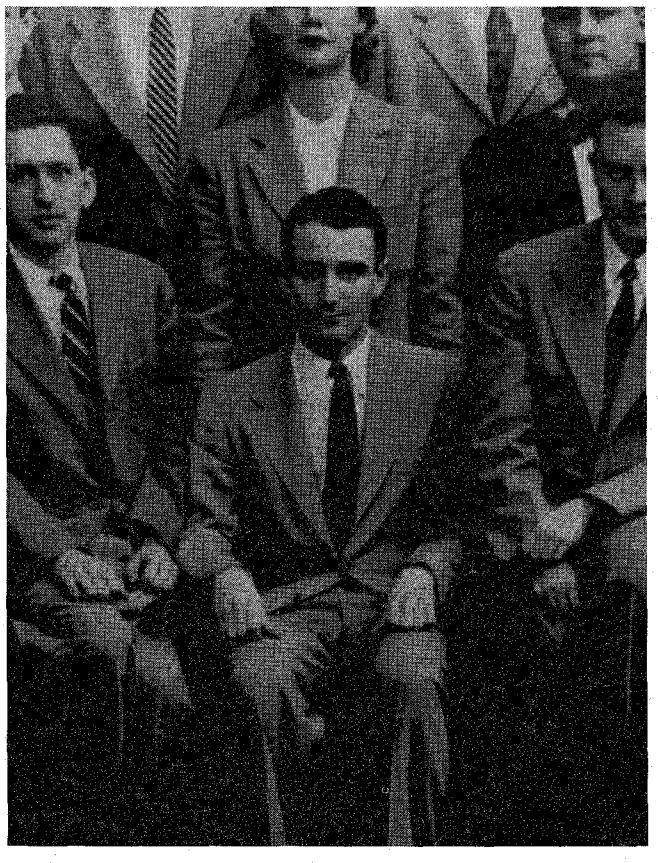
149. *Id.*

150. Commonwealth v. Street, 3 Pa. D. & C. 783, 788 (Ct. of Quarter Sess. 1923), *reprinted in* Substituted Brief for the United States on Reargument at 87, Carroll v. United States, 267 U.S. 132 (1925) (No. 15), 1924 WL 25788, at *87.

151. *Id.* The breathtaking expansion of the police's power, which rested on the authority to enforce both traffic and criminal laws, would reach its zenith in the 1996 case *Whren v. United States*, 517 U.S. 806 (1996). There, the Supreme Court unanimously ruled that an officer could stop a car with probable cause that the driver had violated a traffic law *even if* that particular violation was not the reason for the stop. The decision essentially sanctioned pretextual stops.

III. THE NEW PRIVATE SPHERE OF AUTOMOBILITY

A. Reich and the Road to Freedom



Reich posing with Volume 61 of the Yale Law Journal.
Photo courtesy of the Yale Law Journal.

In 1954, with a J.D. from Yale Law School and a Supreme Court clerkship with Justice Black on his resume, Reich settled into an upwardly mobile life as a young, single lawyer at a white-shoe firm in Washington, D.C.[152] Even though he had secured the highest accolades in his profession and a promising career lay ahead of him, Reich had misgivings about the life he was pursuing. Visiting a friend who had the life that society upheld as ideal—family, a

152. REICH, *supra* note 51, at 22-24.

suburban house, and a respectable job—sent him into a depressive state.[153] That life was within his reach, but it did not appeal to him. Reich dated several impressive women, but his heart was not in it.[154] He saw no way out of his despair. By midcentury, heteronormativity had concretized into a nonnegotiable social mandate, especially in the context of the Cold War when the nuclear family formed a bulwark against the threat of communism.[155] His longings for a different life than the one that "[t]he most powerful elements of American society" had devised seemed an impossible fantasy.[156]

To escape the stifling environment of the 1950s District of Columbia, Reich went for long drives, often with David, his secret crush.[157] As he later recalled in his memoir:

> Driving around was always something special. In the first place, unlike anything older people did, it was always unpredictable. I never knew where we were going next, and David simply let the ideas come to him. We might suddenly veer off our route to ring the front door of a friend's house, spend a few minutes, and then zoom away. We might stop unexpectedly for jelly doughnuts.[158]

Reich experienced driving as freedom. It gave him the ability to be spontaneous and independent and, more importantly, to decide what to do on a whim rather than according to the dictates of social convention. Reich also associated driving with rock 'n' roll, which was always playing in the car and represented "the glimmer of an authentic opening to greater freedom."[159] Even on his lonely walks in the middle of the night, feeling "intense depression," Reich could find comfort when passing an Esso station:

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153. *Id.* at 55-59.

154. *Id.* at 71, 73, 75-76.

155. *See* MARGOT CANADAY, THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 1-15 (2009) (describing the "straight state," where government policies that defined the boundaries of inclusion within the polity, on matters ranging from welfare benefits to military service and immigration, simultaneously excluded homosexuals and made heteronormativity imperative); Elaine Tyler May, *Cold War—Warm Hearth: Politics and the Family in Postwar America*, *in* THE RISE AND FALL OF THE NEW DEAL ORDER 1930-1980, at 153, 153-57 (Steve Fraser & Gary Gerstle eds., 1989) (arguing that postwar Americans turned to the nuclear family for security in the atomic age); sources cited *supra* note 49.

156. CHAUNCEY, *supra* note 1, at 26.

157. REICH, *supra* note 51, at 79-81.

158. *Id.* at 79-80.

159. *Id.* at 80.

> It had good smells and good associations. I liked the pungent smell of gasoline and the smell of tires. I thought of long trips with my car, the surge and the rhythm of driving especially at night on unfamiliar highways, brief stops at turnpike gas stations in the blazing sun, checking the tires outside the motel on a fresh morning, something going wrong with the car and the satisfying feeling of successfully getting it fixed. The gasoline smelled like outboard motors, lakes and summertime without city staleness.[160]

The autonomy that driving a car summoned, the roads to new adventures, and the fresh, upbeat music all stirred in Reich a "real feeling" and energy that renewed his faith in the possibility of a full, vibrant life.[161] It was liberation. Throughout *The Sorcerer of Bolinas Reef*, the automobile figured significantly in Reich's "consciousness-raising" journey, from oppression in a society that viewed man and wife as natural, to liberation as a gay man.[162] While on academic leave in San Francisco in 1971, Reich discovered cruising—defined, according to a *Webster's* dictionary that Reich consulted, as "to go about the streets, at random, but on the lookout for possible developments"—as a way to explore the city's gay subculture and publicly acknowledge his sexuality, albeit tentatively.[163] Cruising literally became Reich's first step as a free person.[164]

Paradoxically, Reich did not feel free in the traditional private sphere of the home and domestic life, which were laden with heteronormative expectations, and instead felt more liberated out in the public sphere. Being free—to do the unexpected, to buck social norms, to do what one cared about, to be oneself—happened out in the open.[165] He had come to embrace the social and cultural revolutions of the 1960s that redefined the public. For Reich, the youth seemed to understand freedom better than the adults. Rather than placing "unjustified reliance" on "organizational society for direction, for answers, for the promise of life," students were beginning to question authority and "to see life in very

160. *Id.* at 46-47.

161. *Id.* at 79-80.

162. *Id.* at 55, 79-80, 102.

163. *Id.* at 155.

164. This is my conclusion formed from reading *The Sorcerer of Bolinas Reef*, in which Reich recounts his early life from the 1950s through the early 1970s. In his later years, Reich would come to feel differently about the primacy of his gay identity. *See* twaintrip, *Charles Reich: The Minority of Singleness*, YOUTUBE (Jan. 7, 2012) https://www.youtube.com/watch?v=BJYxoEmolFs [https://perma.cc/GNS2-AT42] (stating that his "sexual orientation has almost no relevance now to [his] life").

165. REICH, *supra* note 51, at 125.

different terms."[166] With a fresh outlook and with their consciousness raised, young people were generating a new creative culture spanning the arts, fashion, literature, and music – and, importantly, many of these activities were happening in public. In the process, young people had created "a new use of the streets, the parks, and other public places . . . ."[167]

To be sure, a similar attitude toward New York City's streets and parks existed even earlier among the immigrant working class, wage-earning young people, and gay men.[168] Parks especially have a long history as a public space for private expression, and the youth of the 1960s took part in that tradition. But the new world of automobility transformed thoroughfares of transportation into another usable space for private or semiprivate pleasures. Moreover, the counterculture claimed the public in new ways. In early twentieth-century New York, for example, many gay men "claimed their right to enjoy the city's public spaces" as a meeting place and the setting for sexual assignations, but this "Gay New York" nevertheless was for the most part invisible to the dominant city.[169] In contrast, in the latter half of the century, experiencing freedom in public posed an outright challenge to prevailing societal norms and realizing this freedom would require that the police stop harassing nonconformists.[170]

Reich embraced the countercultural attitude when he argued that strolling, cruising, and being out in public were not trivial; they deserved constitutional protection. "If I choose to take an evening walk to see if Andromeda has come up on schedule," Reich maintained, "I think I am entitled to look for the distant light of Almach and Mirach without finding myself staring into the blinding beam of a police flashlight."[171] He continued just as resolutely, "If I choose to get in my car and drive somewhere, it seems to me that where I am coming from, and where I am going, are nobody's business."[172]

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166. *Id.* at 140.

167. *Id.* at 125.

168. *See, e.g.*, CHAUNCEY, *supra* note 1, at 179-205; CHRISTINE STANSELL, CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789-1860, at 169-217 (1986).

169. CHAUNCEY, *supra* note 1, at 179.

170. *See* Goluboff, *Dispatch*, *supra* note 50, at 1385 (describing how Justice Douglas thought about a constitutional right "to choose a lifestyle, to some basic notion of personhood, to live as one wishes in both the private and the public spheres").

171. Reich, *supra* note 3, at 1172.

172. *Id.*

B. The Freedom of Movement and the Automobile

In 1972, Justice Douglas opined on the freedom of movement in *Papachristou v. City of Jacksonville*, in which a unanimous Court held unconstitutional a local ordinance prohibiting the "wandering or strolling around from place to place without any lawful purpose or object . . . ."[173] Even though wandering and strolling were "not mentioned in the Constitution or in the Bill of Rights," Justice Douglas identified them as "historically part of the amenities of life as we have known them."[174] He endorsed Reich's sentiments by quoting from *Police Questioning of Law Abiding Citizens* – that if one "[chose] to take an evening walk to see if Andromeda has come up on schedule," one ought to be able to do so without "staring into the blinding beam of a police flashlight."[175]

As the case that overturned vagrancy laws, *Papachristou* stands for the right to amble, to loiter, and to just *be* on the streets. But, in fact, *Papachristou* was fundamentally also a case about the freedom of automobility. Margaret Papachristou and her three companions were in a car on their way to a nightclub at the time of their arrest for vagrancy, or more specifically, "prowling by auto."[176] None of them fit the description of a vagrant, a category under the ordinance that included "[r]ogues and vagabonds, or dissolute persons who go about begging, . . . persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers."[177] Two had full-time jobs, one as a teacher and the other as a tow-truck operator; another was a part-time computer assistant while attending college full-time; Papachristou herself was enrolled in a job-training program at Florida Junior College.[178] Although the police denied it,[179] the fact that Papachristou and her friend were white women with black dates probably played a role in the arrests. The additional fact that the interracial couples were in an automobile, an enclosed space amenable to romantic rendezvous, must have seemed suspicious.

The Supreme Court consolidated four other cases with *Papachristou*, and two of those cases also involved automobiles. In one, the police arrested Henry

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173. 405 U.S. 156, 157 n.1 (1972) (quoting the ordinance in question). Justices Powell and Rehnquist did not take part in the decision of the case. *Id.* at 171.

174. *Id.* at 164.

175. *Id.* at 164 n.6 (citing Reich, *supra* note 3, at 1172).

176. *Id.* at 158.

177. *Id.* at 156 n.1.

178. *Id.* at 158.

179. *Id.* at 159.

Heath and his friend and searched the car after they pulled up the driveway to Heath's girlfriend's house, where police officers were in the process of arresting another man.[180] In the other, the police arrested Thomas Campbell when he reached his home, purportedly for speeding.[181] In the third case, although Jimmy Lee Smith was not in an automobile at the time of his arrest, he had been waiting for a friend with a car so that he could drive to a produce company to apply for a job.[182] In each of these cases, the automobile provided the means to pursue a life and livelihood, from socializing with whomever one wanted, to looking for employment, to coming home. Automobility had become so essential to American life that cars figured prominently in a twentieth-century case about vagrancy.

Although Justice Douglas focused on walking in *Papachristou*, driving was within the decision's ambit. Reich's article, *Police Questioning of Law Abiding Citizens*, which inspired much of the content and language of the opinion, was just as much about driving as it was about walking.[183] The differences between the two "are practical," Reich wrote, but "the similarities are ones of principle," and he treated both "almost interchangeably."[184] For Reich, both walking and driving fostered "independence, boldness, creativity, [and] high spirits"[185]—a list that Douglas had in mind when he wrote that the activities at issue in *Papachristou* "have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity."[186]

Self-confidence, high spirits, creativity—this was an unorthodox association of words to describe the kind of freedom that the Constitution protected. But these feelings reflected a social and cultural revolution in how many twentieth-century Americans experienced personal liberty. Particularly for women and African Americans in the automobile's early years, driving demonstrated their skill, mobility, and liberation.[187] Advertisers trumpeted the "freedom"—albeit a domesticated version—"for the woman who owns a

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180. *Id.* at 160.

181. *Id.*

182. *Id.* at 159.

183. *See supra* text accompanying note 50.

184. Reich, *supra* note 3, at 1167.

185. *Id.* at 1172.

186. 405 U.S. at 164.

187. *See, e.g.*, Franz, *supra* note 65, at 55 ("[W]omen demonstrated their equality with men by driving and often repairing their own cars" and "middle-class African Americans[] bought cars in the 1920s and 1930s to escape the humiliation of Jim Crow segregation on trains.").

Ford."[188] The closed car especially enabled the female driver "to venture into new and untried places . . . safely, surely and without fatigue."[189] In reality, this meant that women could travel in public in their own enclosed spaces, free from the unwanted glances and touches of men. Still, many women felt a greater sense of independence and competence as they mastered the new technology and broadened their "sphere of action."[190] Likewise, for black tenant farmers in the South, according to sociologist Arthur Raper, the "feel of power, even in an old automobile, [was] most satisfying to a man who own[ed] nothing, direct[ed] nothing."[191] Becoming "machinery wise," the ability to drive as fast as the richest planter in the county, and the opportunity to travel "incognito" in a covered car without constantly confronting the significance of their skin color, gave southern blacks a taste of the mobility, freedom, and equality that had not materialized after Reconstruction.[192] American Studies scholar Cotten Seiler has argued that the connections between automobility and agency enabled women and African Americans to use "the driver's seat as a sort of podium from which they staked their citizenship claims."[193]

On a mundane but even more fundamental level, the automobile, by transforming how people moved, changed how people lived.[194] In the process, mobility came to mean more than leaving a place for good and moving on to a brighter future;[195] it meant the ability to live a full and independent life in the present. Poets did not sing of the automobile's virtues because it transported

188. COTTEN SEILER, REPUBLIC OF DRIVERS: A CULTURAL HISTORY OF AUTOMOBILITY IN AMERICA 61 fig.4 (2008).

189. *Id.* By the end of the 1920s, more than ninety percent of cars were covered. David L. Lewis, *Sex and the Automobile: From Rumble Seats to Rockin' Vans*, *in* THE AUTOMOBILE AND AMERICAN CULTURE 123, 131 (David L. Lewis & Laurence Goldstein eds., 1983).

190. SEILER, *supra* note 188, at 56 (quoting *The Woman and the Ford*, a Ford company brochure); Carol Sanger, *Girls and the Getaway: Cars, Culture, and the Predicament of Gendered Space*, 144 U. PA. L. REV. 705, 711-14 (1995).

191. ARTHUR F. RAPER, PREFACE TO PEASANTRY: A TALE OF TWO BLACK BELT COUNTIES 174 (1936); *see also* Thomas J. Sugrue, *Driving While Black: The Car and Race Relations in Modern America*, AUTOMOBILE AM. LIFE & SOC'Y, http://www.autolife.umd.umich.edu/Race/R_Casestudy/R_Casestudy1.htm [http://perma.cc/D2T9-MU7Y] ("From its earliest days, the automobile symbolized mobility and freedom for blacks—but at the same time also reinforced their status as unfree.").

192. RAPER, *supra* note 191, at 174-75.

193. SEILER, *supra* note 188, at 67; *see also* EPP ET AL., *supra* note 24, at 17-18 (discussing "[d]riving as a [c]ondition of [d]emocratic [c]itizenship and [e]quality").

194. *See supra* text accompanying notes 113-116.

195. A literary example is the Joad family's trek to California in a Hudson truck in search of jobs, dignity, and a better future. *See* JOHN STEINBECK, THE GRAPES OF WRATH (1939).

people to their jobs.[196] They did so because automobility fulfilled a deep desire that was vital to human flourishing. In *Papachristou*, Justice Douglas connected the routine activity of walking with the very liberty undergirding the spirit of political freedom: "the right of dissent."[197] In the social context of the 1960s and early 1970s, dissent held greater meaning than simply voicing political opposition. As Risa Goluboff has suggested, the value of physical mobility in Justice Douglas's opinion appeared to lie in its connection to "some still inchoate rights to choose a lifestyle, to some basic notion of personhood, to live as one wishes in both the private and the public spheres."[198] In his paean to mobility, Justice Douglas elevated the choices of nonconformists as an act of independence. This was precisely the meaning of freedom that Reich had imagined and associated with the automobile.

IV. THE NEW PUBLIC

A. *Privacy in Public*

The "blinding beam of a police flashlight," however, threatened the mobility and nonconformity that Reich perceived as essential to being free.[199] As Reich explained in *Police Questioning of Law Abiding Citizens*, the police derived immense discretionary power from the long lists of rules regulating the automobile.[200] These public rights—that is, laws enacted for the benefit of the public—seemed to have swallowed up the private sphere altogether. "Caught in the vast network of regulation," he wrote, "the individual has no hiding place."[201] "If public and private are now blurred," then, Reich reasoned, "it will be necessary to draw a new zone of privacy," a new "hiding place from the all-pervasive system of regulation and control."[202] If, in the twentieth-century administrative state, the private increasingly became public, Reich suggested

196. The poet Stephen Dunn venerated the car as a "sacred place," where one can be "in it alone, his tape deck playing / things he'd chosen." Even young schoolchildren "understood the bright altar of the dashboard / and how far away / a car could take [them] from the need / to speak, or to answer, the key / in having a key / and putting it in, and going." STEPHEN DUNN, BETWEEN ANGELS 55 (1989). These lines spoke to the hallowed privacy ("be in it alone"), individual self-determination ("things he'd chosen"), and the liberating mobility ("and going") that cars provided.

197. Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972).

198. Goluboff, *Dispatch*, *supra* note 50, at 1385.

199. Reich, *supra* note 3, at 1172.

200. *See supra* text accompanying note 121.

201. Reich, *supra* note 17, at 760.

202. *Id.* at 778, 785.

that the way to place some limits on the police and to reclaim the sphere of freedom was to turn the public into the private.

"[P]rivacy in public," as Reich called it,[203] was analogous to "the new property." In his groundbreaking article on the dangers of the administrative state, he had proposed extending the protective functions of property rights to "government largess."[204] Reich implored that "we must try to build an economic basis for liberty today—a Homestead Act for rootless twentieth century man."[205] Handing out public benefits, like that nineteenth-century federal grant of land to individual farmers, paralleled his idea of reconceptualizing the automobile as private. It was a way of recognizing the rights of the private sphere in the public sphere.

By referring to the public/private distinction, Reich followed a traditional way of thinking about rights. His invocation of classical legal thought during the golden age of legal liberalism is peculiar, even more so in light of Laura Kalman's portrayal of Reich as a scholar whose "head lay with legal liberalism."[206] His reliance on property rights as an antidote to the abuses of the "public interest state"[207] seemed to stand in tension with his intellectual inheritance of New Deal liberalism.[208] In *The New Property*, Reich addressed this apparent conflict by revisiting the "old debate" between property and liberty.[209] He wrote that Progressives, in their attack on the abuses of private property rights to thwart social reform, had swung too far and forgotten "the basic importance of individual private property."[210] In the legal tradition of the United States, property performed "the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner."[211] Reich sought to revive this positive aspect of property rights.[212] He was not seeking to be a revolutionary who advocated the annihilation of property as the basis of individual liberty; rather, Reich was being a good lawyer by applying old legal categories in familiar but new ways.

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203. Reich, *supra* note 3, at 1165.

204. Reich, *supra* note 17, at 786-87.

205. *Id.* at 787.

206. KALMAN, *supra* note 96, at 63.

207. Reich, *supra* note 17, at 756.

208. Citron, *supra* note 96, at 400 ("Reich was a child of the New Deal and did not question the propriety of endowing the federal government with the power to regulate.").

209. Reich, *supra* note 17, at 771-74.

210. *Id.* at 773.

211. *Id.* at 771.

212. *See, e.g.*, Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8, 15-21 (1927) (analyzing property and justifications for its existence).

Instead of attempting to overthrow existing institutions, Reich tried to work within them. This is probably why Reich's colleagues, whom he feared would censure the "slightest left-wing or activist" gesture,[213] received his new property analysis with enthusiasm.[214] During the Cold War, Reich offered a proposal for social change without falling into Marxism.

Still, a radical bent lurked in Reich's idea of privacy in public. As the legal basis for this right, he cited the Supreme Court's 1965 decision in *Griswold v. Connecticut*, decided the year before *Police Questioning of Law Abiding Citizens*, which invalidated a state law forbidding married couples from using contraceptives as a violation of the right of privacy.[215] According to Justice Douglas's majority opinion, the prohibition on contraceptive use had a "maximum destructive impact" on the marital relationship, a bond that fell "within the zone of privacy created by several fundamental constitutional guarantees."[216] Finding "repulsive" the very idea that the police may "search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives," the Court kicked the state out of that private space.[217]

In *Griswold*, the right of privacy worked substantively: by designating decisions within a heterosexual marriage as a regulation-free zone, the Court held that married couples had a constitutional right to contraceptives.[218] This understanding of private rights conformed to the binary structure of nineteenth-century legal thought, which functioned like an on/off switch: if public, then the state could regulate; if private, then it had to leave the individual alone. The trick was to persuade the courts that the issue at hand did not belong in the public sphere (or that it did if one sought more government regulation). Once firmly ensconced in the private sphere, the burden then fell to the state to articulate a valid and convincing public interest.[219]

Inspired by *Griswold*, Reich wanted "to see the constitutional right of privacy . . . expand to form a protective shield for the individual against

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213. KALMAN, *supra* note 96, at 50 & n.40 (quoting an interview with Charles Reich in 2002).

214. *Id.* at 62.

215. Reich, *supra* note 3, at 1170 (citing "the Connecticut Birth Control case," Griswold v. Connecticut, 381 U.S. 479 (1965)).

216. *Griswold*, 381 U.S. at 485.

217. *Id.* at 485-86.

218. *Id.*

219. As explained in the *supra* text accompanying notes 12-13, the public/private framework was more conceptual than spatial. For example, a house, which for the most part fell within the private sphere of individual liberty, could fall within the public sphere of moral regulation if deemed "disorderly." *See* NOVAK, *supra* note 13, at 169-70. As William Novak points out, that likelihood increased when the case involved single women and people of color. *Id.* at 170. The homes of respectable white men on the whole remained in the private sphere.

an increasingly intrusive world."[220] The highly personal nature of his article makes it undeniable that he sought to extend the privacy protections that *Griswold* afforded married couples to himself as well. Radically, by basing the right of privacy in public on the same foundation that Justice Douglas laid down in *Griswold*, Reich seemed to be suggesting a substantive due process right to be free from policing in his car, out in public.

B. From Substance to Procedure

Courts never did reconceptualize the automobile as private for Fourth Amendment purposes. Reich himself retreated from proposing a truly substantive right by the end of *Police Questioning of Law Abiding Citizens*.[221] When it came to describing how privacy in public would work in practice, the right withered into a list of detailed rules regulating police conduct—the implication being that the police could continue to exercise a tremendous amount of discretionary authority so long as they followed some guidelines.[222] Chief Justice Warren was not the only legal mind at the time interested in laying down some "hard rules" for the police.[223] Reich was too. The police, Reich insisted, "must live under rules," and he proposed a few.[224]

Reich began his list with the stipulation that the "police should not be allowed to stop anyone unless something particular about him, as distinguished from the mass of people, gives cause to believe that he has committed a crime."[225] Reich did not specify *which* crimes, an omission that is surprising given that he had just analyzed how a long list of traffic offenses, many of them criminal offenses, essentially gave the police carte blanche to stop anyone, anytime, anywhere. Perhaps Reich meant for "crime" to refer to violent crimes or nontraffic crimes. But he still did not go so far as to demand warrants for stopping people on the street or in their cars as was required for houses. Instead, Reich's guidelines became increasingly detailed. The next rule provided that when "a person is stopped, the officer should identify himself, and explain, with particularity, his reasons for stopping the person."[226] In turn, the "person may be questioned, but the person cannot be required to

220. Reich, *supra* note 3, at 1170.

221. *Id.* at 1171-72.

222. *Id.* at 1170-71.

223. GOLUBOFF, VAGRANT NATION, *supra* note 50, at 210 (quoting Justice Douglas's handwritten notes from the December 13, 1967 conference regarding Terry v. Ohio, 392 U.S. 1 (1968)).

224. Reich, *supra* note 3, at 1170-71.

225. *Id.* at 1170.

226. *Id.*

answer."[227] Guiding all encounters was the principle that an officer "must conduct himself in a manner that would be proper in ordinary business relationships between equals."[228] By setting forth ground rules of engagement, Reich essentially sought to proceduralize everyday encounters with the police.

Certainly, Reich's rules, as well as many of the Warren Court's criminal-procedure decisions, functioned like substantive laws by setting forth what officers could and could not do and, conversely, what rights individuals did and did not have.[229] Nevertheless, the rules regulating police conduct in the public sphere were qualitatively different. Substantive rights greatly limit discretionary policing or even prohibit it altogether, as in the case of *Griswold*. But proceduralism allows discretionary policing—*as long as it is reasonable*. This reasonableness requirement functions more as a procedural, rather than substantive, constraint on police authority. Chief Justice Warren and Reich's guidelines for the police were procedural in that they attempted to specify *how* the police should exercise their discretion, rather than to create zones where they could not.

Reich's reliance on *Griswold*'s analysis of substantive due process as the basis for his list of rules was ironically circuitous. In *Griswold*, Justice Douglas fashioned the fundamental right for married people to use contraceptives from the penumbras and emanations of various constitutional amendments that guaranteed criminal-procedure rights. This substantive right, in turn, served as the inspiration for Reich's rules that would put some limits on police discretion. This roundabout logic was necessary to protect the public sphere precisely because the Fourth Amendment had long been interpreted to apply only to the private sphere.

Papachristou similarly "proceduralized the issue" of police discretion, as Risa Goluboff has phrased it.[230] Despite its celebration of the freedom of mobility, *Papachristou* was, after all, a case about the policing of the public sphere, which included the automobile.[231] The Supreme Court did not establish a substantive right to sit in a parked car or to stand on a sidewalk—in short, to be free from policing in those settings. Nor did the Court protect the

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227. *Id.*

228. *Id.*

229. Of course, the distinction between substance and procedure is often more illusory than real. *See* William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 19 (1996) (showing that "procedural differences turn out to imply substantive differences").

230. Goluboff, *Dispatch*, *supra* note 50, at 1377 (discussing Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)).

231. *Papachristou*, 405 U.S. at 158-59.

automobile or the sidewalk like private spaces by requiring warrants before intruding and searching. Instead, *Papachristou* overturned the vagrancy ordinance based on the void-for-vagueness doctrine. The problem with vague laws was not the substance of the laws per se, but their lack of clarity, which created opportunities for discretionary enforcement.[232] According to Justice Douglas, vague vagrancy laws placed "unfettered discretion" in the hands of the police by failing to give them sufficient directions.[233] The void-for-vagueness rationale did not question society's reliance on discretionary policing as a mode of governance. The Court ultimately left intact the police's power to initiate the criminal process through warrantless stops, searches, and arrests.

Indeed, after the Supreme Court's decision, the Florida legislature revised its vagrancy law, which still criminalized loitering and prowling, but—and this was the constitutionally required specificity—"under circumstances that warrant a justifiable and *reasonable* alarm or immediate concern for the safety of persons or property in the vicinity."[234] The statute's reasonableness requirement belied a truly substantive remedy in *Papachristou*. The police still had discretionary authority to police those who loitered and prowled. But after *Papachristou*, they would face the procedural hurdle of articulating reasonable cause.

Likewise, in *Police Questioning of Law Abiding Citizens*, Reich did not brainstorm what substantive rights individuals could have in their cars. Instead, he concluded with procedural rules that presupposed discretionary policing but at least would function to put some fetters on it. In the end, the automobile did not become a new private space. It became the *new public*. Not privacy rights, but proceduralism—that is, the process of hashing out rules determining the bounds of reasonable policing—would protect individuals in this refashioned public sphere.

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232. Indeed, the police had arrested Papachristou and her companions for vagrancy purportedly because they had stopped near a used-car lot that had previously been burglarized, even though no evidence connected them to the incidents and there was no indication of a breaking and entering on the night of their arrest. *Id.* at 159. The all-in-one charge of vagrancy also included speeding and walking back and forth on a public sidewalk while waiting for a friend. *Id.* at 159-60. None of the petitioners could arguably be considered vagrants, but a vague law made it possible for the police to round up anyone who provoked them or ruffled their sense of propriety. *See* GOLUBOFF, VAGRANT NATION, *supra* note 50, at 653-54 (discussing how legal scholars and advocates came to understand the problem of police discretion).

233. *Papachristou*, 405 U.S. at 168-69.

234. GOLUBOFF, VAGRANT NATION, *supra* note 50, at 331 (quoting FLA. STAT. ANN. § 856.021 (West 1972) (emphasis added)). Florida courts upheld the constitutionality of the new vagrancy statute. *See id.*

C. *Public/Private Distinction Redux*

Reich did not explicitly explain his shift from substance to procedure. But he provided a clue. Although he wrote poignantly that under "the pitiless eye of safety the soul will wither," in the end, he recognized that "safety is important and that safety requires measures."[235] By conceding this, he acceded to society's reliance on policing. Reich's capitulation to the value of safety reflected a larger trend underlying constitutional criminal procedure: the transition to police law enforcement as a mode of governing for the public welfare. The regulation of cars played an important role in this development. While the automobile facilitated the pursuit of individual liberty, the resulting mass disorder justified a more proactive style of policing. Delineating bright lines between public and private rights in what was, at bottom, a hybrid space must have seemed impossible to Reich. It may be that the Warren Court's due-process revolution, which was already in full swing by the time he wrote *Police Questioning of Law Abiding Citizens*, had limited Reich's imagination. In any case, the very existence of discretionary policing would have also made it difficult to formulate a fundamental right to be left alone. And so Reich came to the conclusion that individuals would have to rely on procedural rights, both on the streets and in the courts, to ensure their freedom.

This must have been a compromise made with deep reservations. Perhaps more than any member of the legal elite in the 1960s, Reich questioned society's fixation on security and went so far as to doubt whether the police were suited to maintain highway and neighborhood safety.[236] He argued, for example, that "better engineering of cars and roads" was more effective than traffic police at ensuring safety.[237] (Perhaps Reich had read Ralph Nader's *Unsafe at Any Speed: The Designed-In Dangers of he American Automobile*,[238] which came out in 1965, the year before *Police Questioning of Law Abiding Citizens* was published.) Police law enforcement and surveillance were not only ineffective, he argued, but the concessions required came at too great a cost. Even supposing that "we had electric eyes and computers which could catch

235. Reich, *supra* note 3, at 1172.

236. *Id.* at 1171 ("I do not think that prevention is primarily a job for the police . . . . We live in a society that is increasingly concerned with safety, but we give little thought to the price of safety.").

237. *Id.*

238. RALPH NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE (1965).

every traffic violation," Reich did not believe that the relentless pursuit of safety could serve as the basis of a "good society."[239]

Reich had a critical stance toward safety that did not necessarily reflect the sentiments of the general public. He understood that safety entailed conformity, but for many midcentury Americans, threats to safety seemed more dangerous. During the throes of the Cold War, Reich understood that outright challenges to policing, which represented order and security, would have discredited his argument. In fact, the *Yale Law Journal* issue that published *Police Questioning of Law Abiding Citizens* also included an article written by the U.S. Department of State titled *The Legality of United States Participation in the Defense of Viet Nam.*[240] By his own account, Reich censored himself from making any left-leaning remarks as a Yale Law School professor.[241] American society widely accepted the demands of security, so much so that even Reich, despite his powerful appeals to be free from the intrusive gaze of the police, gave in, however reluctantly.

The Cold War threat heightened the need for security, which, in turn, depended on discretionary policing. Paradoxically, this then raised the problem of distinguishing policing in the United States from policing in a totalitarian state.[242] Proceduralism provided a solution. Many scholars today criticize Fourth Amendment jurisprudence for being "complex and contradictory."[243] But this criticism overlooks how increasingly detailed rules represented the workings of a government of laws. In 1953, Justice Jackson declared that "if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common law procedures than under our substantive law enforced by Soviet procedural practices."[244] This choice was in some sense a rationalization. The idea of living in a free society required procedural rights precisely because American society, similar to totalitarian regimes abroad,

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239. *Id.*

240. Office of the Legal Adviser, U.S. Dep't of State, *The Legality of United States Participation in the Defense of Viet Nam*, 75 YALE L.J. 1085, 1085 (1966).

241. KALMAN, *supra* note 96, at 50.

242. *See, e.g.*, Hall, *supra* note 64, at 139 ("At no time in history has it been easier to compare the police of democratic societies with that of dictatorships.").

243. AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 1 (1997); *see also* Cloud, *supra* note 9, at 555 ("Fourth Amendment theory is in tatters at the end of the twentieth century."); Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 479 (2011) ("[J]udicial decisions interpreting the Fourth Amendment are infamous for their byzantine patchwork of protections.").

244. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).

relied on warrantless, discretionary policing for governance.[245] An individual substantive right to privacy in public seemed untenable because it would have greatly constrained the state's ability to provide for public safety. Consequently, the opposite of arbitrary policing would not be freedom from policing. Instead, it became policing under many rules, even if inconsistent and confusing, which ensured a baseline of individual protection against public rights. Critics of the modern Fourth Amendment may be right about its unintended consequences, but they have forgotten how choosing procedural rights over substantive rights not only seemed preferable, but also imperative, during the Cold War.

Although the turn to proceduralism seems all but inevitable given this historical context, the Supreme Court seemed very close to embracing a right to privacy in public at several moments. In 1967, one year after the publication of *Police Questioning of Law Abiding Citizens*, the Supreme Court actually reconceived a public space as private. In *Katz v. United States*, FBI agents had installed a recording device "to the outside of [a] public telephone booth" to listen in on the phone conversations of a suspected bookmaker.[246] In ruling that this constituted a search that required a warrant, the Court memorably stated, "[T]he Fourth Amendment protects people, not places."[247]

Papachristou could have been another moment, but, unlike *Katz*, it did not materialize. Justice Douglas's early draft opinions in *Papachristou* show that he had initially decided to invalidate the vagrancy ordinance as a violation of a fundamental right.[248] Just as surprisingly, the first drafts of *Roe v. Wade*,

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245. *See* Hall, *supra* note 64, at 143 (observing that American police often acted in ways that seemed comparable to "domination by sheer physical force unlimited by law" characteristic of totalitarianism).

246. 389 U.S. 347, 348 (1967).

247. *Id.* at 351.

248. I am indebted to Risa Goluboff's discovery of the early draft opinions in *Papachristou* and *Roe v. Wade* in the U.S. Supreme Court archives. Goluboff, *Dispatch*, *supra* note 50, at 1365.

That the invalidation of the vagrancy statute in *Papachristou* was initially based on substantive due process lends more plausibility to William Stuntz's claim that a constitutional criminal law of substance was "legally possible" and would have avoided the serious problems of the procedure-based criminal justice system that we have today. STUNTZ, *supra* note 57, at 211. According to Stuntz, when the Warren Court's criminal-procedure decisions burdened the police with additional evidence-gathering rules and the courts with new procedural claims, the costs of policing and prosecuting crimes increased, which in turn had two consequences. First, it made defense lawyers more important to criminal litigation, thereby widening the gap between the rich, who could afford the best lawyers, and the poor, who could not. Second, subsequent Supreme Court decisions that permitted waivers of procedural rights, particularly guilty pleas, made the exercise of those rights rarer and increasingly reserved for more well-off defendants. *Id.* at 227-36.

decided in the same term as *Papachristou*, show that the Court had planned to overturn the antiabortion statute based on the void-for-vagueness doctrine.[249] The two cases had switched rationales. Justice Douglas had envisioned a new substantive due process right in public, although the contours of that right were not exactly clear.[250] But in the end, Justice Douglas abandoned the fundamental-rights approach in *Papachristou* to appease other Justices who were already skeptical of privacy rights in what Justice Brennan called the "basic decisions of life."[251]

Why did the Court extend privacy rights in *Katz* but not in *Papachristou*? And why did the Justices decide to match *Papachristou* with procedure and *Roe* with substance instead of the other way around? When situating these cases within the long history of the public/private framework in which the home has been the archetype of the private sphere,[252] the outcomes are not surprising.

In *Katz*, Justice Stewart's statement that the Fourth Amendment guarantee does "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" suggested that he grouped public telephone booths with other places that fell under the Fourth Amendment category of "houses."[253] Justice Harlan chose to adopt this interpretation as well in his concurring opinion, which, significantly, is often cited as stating the holding of the case for its articulation of the "reasonable expectation of privacy" standard.[254] Harlan clarified that he read the opinion of the Court "to hold only . . . that an enclosed telephone booth is an area . . . like a home."[255] When a person "occupies" the booth and "shuts the door behind him," he explained, that booth becomes "a temporarily private place."[256]

In *Roe v. Wade*, the image at the center of the opinion was "the woman and her responsible physician . . . in consultation."[257] In this scene, the decision to terminate a pregnancy takes place in another well-established private sphere,

249. Goluboff, *Dispatch*, *supra* note 50, at 1378.

250. *Id.* at 1378-79, 1384; *see also* Eskridge, *supra* note 60, at 2231 (discussing the Supreme Court's consideration of void for vagueness as grounds for overturning the abortion statute in Roe v. Wade, 410 U.S. 113 (1973)).

251. Goluboff, *Dispatch*, *supra* note 50, at 1380.

252. *See supra* note 12 and accompanying text.

253. Katz v. United States, 389 U.S. 347, 359 (1967) (emphasis added).

254. *Id.* at 361 (Harlan, J., concurring).

255. *Id.* at 360.

256. *Id.* at 361.

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

the doctor's office.[258] *Roe*, in turn, relied on the Court's precedent in *Griswold v. Connecticut*, which located the decision to use contraceptives in "marital bedrooms," another hallmark private space.[259] It is telling that in his dissent, then-Justice Rehnquist tried to defend the antiabortion law by reframing the setting as a "transaction resulting in an operation," which, he argued, "is not 'private' in the ordinary usage of that word."[260] By failing to make the medical procedure the most salient portrayal of the activity in question, Rehnquist had already lost half the battle.

Substantive due process was understandably easier to apply in *Roe* than in *Papachristou*, which involved activities that happen in conventional public spaces: loitering on the sidewalk, walking the streets, and driving along the highway.[261] Once courts conceded the primacy of public order and security in these settings, a substantive right would have been unworkable. Even under the *Katz* standard, courts held that individuals have a lesser expectation of privacy in their cars than in their homes.[262] Juxtaposing *Papachristou* and *Roe* reveals a hardening of the public/private distinction in twentieth-century criminal law and two different kinds of rights mapped onto that dichotomy. Individuals continued to enjoy the right to be left alone with respect to whatever the law labeled private, subject only to the system of warrants. They would have some rights in the public sphere too, but in the form of increasingly detailed procedural rights.

Legal scholars have endlessly debated the efficacy of due-process rights in the post-Warren Court era. But more significant than the choice of legal remedies was the decision over how Americans would govern themselves.[263] Midcentury Americans began to refer to the awesome power of the police as a

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258. *See* Wolf v. Colorado, 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961) (involving a warrantless search of an abortion doctor's office and appointments book).

259. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

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

261. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 158-59 (1972).

262. *See, e.g.*, Cardwell v. Lewis, 417 U.S. 583, 590 (1974) ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects . . . . It travels public thoroughfares . . . .").

263. A decade after 9/11, sociologist Harvey Molotch has questioned the reliance on "command-and-control" procedures that depend on law-enforcement agencies to maintain security and public safety. *See* HARVEY MOLOTCH, AGAINST SECURITY: HOW WE GO WRONG AT AIRPORTS, SUBWAYS, AND OTHER SITES OF AMBIGUOUS DANGER 2 (2012) ("I recommend . . . alternatives to the command-and-control tactics that so often take hold as public policy. Instead of resort to surveillance, walls, and hierarchy, I indicate what I take to be more effective – and happier – solutions.").

"problem" or a "challenge" in a free society.[264] American law resolved that dilemma with a concept of freedom that accommodated robust policing as long as individuals had procedural rights to challenge abuses of discretion. Freedom meant not just the right to be free from discretionary policing in the private sphere, but also the right to due process in the public sphere.

Indicative of the choices that made proceduralism essential, due process was both a cause for celebration and a source of misgivings. On Law Day 1959, the *Indianapolis Times* published a reflection on the significance of "liberty under law" and identified "due process of law" as the "very heart of this matter."[265] The commemoration of procedural rights on May 1 not only coopted May Day, celebrated by workers in the Soviet Union and other socialist parts of the world,[266] but also conveyed an unmistakable message: due process distinguished a government of laws from arbitrary government when both relied on discretionary policing.

Yet, the proceduralization of the Fourth Amendment revolved around a fundamental unease within American society. In 1965, Judge Henry Friendly of the Second Circuit made this point as well, quoting Judge Learned Hand that "constitutions must not degenerate into vade mecums [manuals or handbooks] or codes; when they begin to do so, it is a sign of a community unsure of itself

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264. *See, e.g.*, GOLDSTEIN, *supra* note 20, at 1 ("The police, by the very nature of their function, are an anomaly in a free society . . . . Yet a democracy is heavily dependent upon its police, despite their anomalous position, to maintain the degree of order that makes a free society possible."); PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967), https://www.ncjrs.gov/pdffiles1/nij/42.pdf [https://perma.cc/D4CX-WXF6].

265. *Due Process and Freedom*, INDIANAPOLIS TIMES, May 4, 1959 (on file with the Mudd Library, Princeton University, ACLU Records, Box 1075, Folder 5).

266. *Cf. City and Nation Join Law Day Observances*, N.Y. HERALD TRIB., May 2, 1958, at 2 ("The idea of the special day was originally suggested by judicial and bar associations as an antidote for Iron Curtain May Day celebrations . . . . [G]ov. Harriman and Mayor Wagner urged greater faith in 'the legal process' by judges, lawyers and the public."); *Law Day U.S.A.*, L.A. TIMES, May 1, 1958, at B4 ("Law Day U.S.A. . . . should remind us of the rights each American citizen enjoys through our system of laws and courts. Our legal system is the antithesis of the Communist . . . ."); *May 1 To Be 'Law Day': President Urges Dedication to Government Under Laws*, N.Y. TIMES, Feb. 5, 1958, at 8 (quoting Eisenhower proclaiming "Law Day" to "provide a time of 'national dedication to the principle of government under laws'"); Div. for Pub. Educ., *Law Day History and Archives*, A.B.A., http://www.americanbar.org/groups/public_education/initiatives_awards/lawday_2015/history_and_archives.html [http://perma.cc/683U-QD7Y] (explaining that Eisenhower established Law Day in 1958 to "mark the nation's commitment to the rule of law").

and seeking protection against its own misgivings."[267] The proliferation of codes was another sign of a society uncertain about its increasing reliance on the police to provide security.

V. CODA: THE FUTURE OF THE FOURTH AMENDMENT

Even before *Papachristou*, early car-search cases in the 1920s, when American society was shifting to police law enforcement to maintain order and safety, already exhibited full-blown signs of judicial mediation in the individual-police relationship.[268] Ever since this transformation in policing, proceduralism has been an ongoing process of renegotiating that relationship. *Papachristou* did not begin, but it also did not end, this negotiation. The continual stream of cases that make their way through the courts indicate that Fourth Amendment car-search cases continue to elude consensus up to this day.[269]

The legal history of the automobile may offer some insight into this contested area of law. This history shows, for one thing, that much of the contention arises from the automobile's hybrid nature as public and private. With some cognitive dissonance, many people experience the automobile as hybrid property as well. They associate, for example, individual autonomy and freedom with driving: consider the car commercials that exploit this association.[270] At the same time, they have accepted the fact that the state heavily regulates its use. No one can drive without applying for a driver's license and passing a test. All cars need to be registered with the state, and

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267. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 954 (1965) (quoting LEARNED HAND, *The Contribution of an Independent Judiciary to Civilization*, *in* THE SPIRIT OF LIBERTY 172, 179 (Irving Dilliard ed., 1952)).

268. *See, e.g.*, Lambert v. United States, 282 F. 413, 417 (9th Cir. 1922) ("Whether such search or seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case."); People v. Case, 190 N.W. 289, 292 (Mich. 1922) ("Whether search of and seizure from an automobile upon a highway or other public place without a search warrant is unreasonable is in its final analysis to be determined as a judicial question in view of all the circumstances under which it is made."); Moore v. State, 103 So. 483, 485 (Miss. 1925) ("It is a judicial question to be determined by the court in each case, taking into consideration the place searched, the thing seized, the purpose for, and the circumstances under which the search or seizure was made, and the presence or absence of probable cause therefor.").

269. *See supra* notes 33-46 and accompanying text.

270. *See, e.g.*, New Car Review, *New Dodge Challenger 2011 Freedom TV Ad Funny Car Commercial - 2015 New Car Review HD*, YOUTUBE (Mar. 23, 2013), https://www.youtube.com/watch?v=qBVqj7Gnw9U [https://perma.cc/J7FU-T2YQ] ("Here's a couple of things America got right: cars and freedom.").

most states require owners to carry insurance. And that is just the beginning. Once a person sets out for a drive, speed limits, stoplights, checkpoints, high-occupancy vehicle lanes, and traffic laws restrict how he or she can drive. Break any one of these laws, and the police have the authority to stop the vehicle, issue a ticket, and even make an arrest. No one seriously advocates rebellion against all of this regulation. American society as a whole has accepted it as necessary to maintain order and secure safety.

More than ever before, we live in a world of hybridity. We live "public" lives, not in the reality TV sense, but in the sense that the government has some say in almost everything we do. At the same time, we have an expectation that much of what we do, even if it happens in "public," is important to our personal liberty. As Reich observed fifty years ago, the public and private are blurred. The Supreme Court acknowledged this in 1967 when it recognized in *Katz v. United States* that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[271] *Katz* accordingly introduced a new test for determining Fourth Amendment rights based not on the public/private distinction, but on an "expectation of privacy." But even this is not much more helpful.[272] The answer to the question, "[i]s there an expectation of privacy?" is usually not a "yes" or a "no," but "it depends," "sometimes," or "only to a certain extent." The law is still based on the idea that the public and private can be distinct or that our expectations of privacy are binary. The law likes neat categorization, but modern life with GPS tracking devices, cellphones, and social media is messy. The public/private distinction cannot provide straightforward guidelines for how officers may exercise their discretion. This is why Fourth Amendment jurisprudence is a complicated muddle.[273] It is an area of law in search of a new principle.

Perhaps the legal history of the automobile can suggest an alternative. History rarely, if ever, will determine what course we *should* take. But it does help us to recognize the analytic categories that shape, and often limit, our thinking and may expand our vision of what is possible. Recall how the police's discretionary power burgeoned from its authority to enforce both regulatory and criminal laws. This authority has essentially become a general warrant—

271. 389 U.S. 347, 351-52 (1967).

272. David Sklansky has pondered, "'Reasonable expectation of privacy' sounds nice, but what does it mean? *Katz* itself offers little guidance on this score." Sklansky, *supra* note 54, at 883. In fact, he has observed that "outside the area of electronic surveillance," the issue in *Katz*, "the scope of the Fourth Amendment under *Katz* has looked a lot like the scope of the Fourth Amendment under the old, 'trespass' test . . . ." *Id.* at 885.

273. *See* Sklansky, *supra* note 24, at 291-98 (noting frequent observations that search-and-seizure law is "a mess" and explaining the Fourth Amendment's doctrinal incoherence).

what the Framers actually intended to prohibit[274] – in light of the reality that, at some point, all drivers violate traffic laws.[275] To repeal the twentieth-century version of the general warrant and to put some limits on police discretion may require severing the two sources of power.[276] Berkeley Police Chief August Vollmer had already proposed one way of doing so: establish a separate agency to deal with traffic. Vollmer's intention was to free the police from pesky traffic duties so it could focus on fighting crime.[277] But a division of labor would also curb the use of traffic-law enforcement as a prelude to the criminal process, which, as Reich had pointed out, handed the police too much leverage and created opportunities for abuse.

A second option is to apply different legal standards for different kinds of car stops. In fact, Justice Jackson proposed this exact solution in his dissent in the 1949 case *Brinegar v. United States*, which reaffirmed the automobile exception to the Fourth Amendment's warrant requirement. To contain the police's discretionary power that had expanded from the practice of warrantless car stops and searches, Justice Jackson wanted to require warrants when the purpose was to prevent and detect crime.[278] In fact, he likened such searches to the unlawful entry and search of a private home, which enjoyed the full protections of the Fourth Amendment. When "a car is forced off the road, summoned to stop by a siren, and brought to a halt under such circumstances," he wrote, "the officers are then in the position of one who has entered a

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274. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 619 (1999).

275. *See, e.g.*, Brinegar v. State, 262 P.2d 464, 474 (Okla. Crim. App. 1953) ("The traffic regulations as a whole are so complicated now in cities and towns and even out on highways that it requires a very alert person indeed to escape violating some of the rules and regulations at some time."); Sklansky, *supra* note 24, at 273 ("[V]irtually everyone violates traffic laws at least occasionally . . . ."). In fact, most Fourth Amendment cases begin with a traffic violation. *See* Sklansky, *supra* note 24, at 299 (describing how traffic enforcement has become a tool for criminal investigation and citing 1997 statistics showing that forty percent of all drug arrests begin with a traffic stop).

276. In *Whren v. United States*, 517 U.S. 806 (1996), plainclothes vice-squad agents found illegal drugs in a car they had stopped for a minor traffic violation. In ruling that officers may stop any vehicle as long as they have probable cause to believe that a traffic violation occurred, the Supreme Court disregarded the fact that the Police Department's regulations in this case prohibited plainclothes officers from enforcing traffic laws. *Id.* at 815.

277. *See supra* notes 85-87 and accompanying text.

278. Brinegar v. United States, 338 U.S. 160, 188 (1949) (Jackson, J., dissenting). Charles Epp, Steven Maynard-Moody, and Donald Haider-Markel have recently recommended a similar solution: end investigatory stops, whose purpose is to ferret out crime. They found that racially disparate impact arises more often in investigatory stops than in traffic-safety stops. EPP ET AL., *supra* note 24, at 13-15.

home."[279] But he would allow officers to stop a car to enforce traffic or quarantine regulations – "circumstances which do not imply arrest or charge of crime" and traditionally fell within the public sphere.[280] Jackson did not discard the public/private dichotomy that informed Fourth Amendment law. But by extending the private sphere to include certain car stops, he sought to give individuals more robust protections from policing even while in their cars.

Justice Ginsburg presented a variation of Jackson's proposal in the Court's most recent traffic stop case, *Rodriguez v. United States*.[281] A K-9 officer had stopped the defendant for driving on a highway shoulder, issued a warning for the traffic offense, and then requested to walk his dog around the vehicle. When the defendant refused, the officer detained him until a second officer arrived on the scene to provide assistance while the first conducted the dog sniff. *Rodriguez* concluded that the officer's traffic mission ended when the officer finished the tasks related to that mission (in this instance, at the moment the officer handed over the ticket) and that prolonging a stop beyond that point required an independent individualized suspicion.[282] The authority to pull over a car for a traffic violation, in other words, could not be rolled into a justification for a dog sniff, whose only purpose is to detect evidence of crime.

The rationale that the minor privacy infringement to enforce traffic laws does not itself justify the further intrusiveness of criminal investigations could be extended to more fully disentangle the police's regulatory function from its crime-fighting role. This effort will inevitably raise its own difficult line-drawing questions about what and where the police can search during a traffic stop. Certainly, officers issuing traffic citations should be permitted to frisk a car and its occupants if necessary for their safety.[283] Perhaps the cleanest proposal that balances an individual's privacy interests with the safety interests of both the officer and the public at large is to permit such searches but limit the evidentiary uses of the fruits of such derivative or incidental searches.

All of these options offer different ways to separate the double duty that has entrusted immense discretionary power to a single government agency.

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279. *Brinegar*, 338 U.S. at 188 (Jackson, J., dissenting).

280. *Id.*

281. 135 S. Ct. 1609 (2015).

282. A few state courts have also required separate justification to search for criminal evidence during a traffic stop. *See* People v. Gonzales, 97 N.W.2d 16, 24 (Mich. 1959) (holding unlawful a suspicionless search of an automobile after issuance of a traffic ticket); Gause v. State, 34 So. 2d 729, 731 (Miss. 1948) (holding unlawful a search for alcohol in an automobile during a routine stop to check drivers' licenses).

283. *See* Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977) (permitting a pat-down search when an officer notices a bulge in the driver's jacket after ordering him out of the automobile following a stop for a traffic violation).

Whether there is more political will today than in the past to reconsider and to redelegate police duties is unclear. But the distinction between regulatory enforcement and criminal-law enforcement will certainly be more relevant than the public/private distinction. Some sacrifice of individual liberty and privacy for order and security may be inherent to social living. But individuals need the most protections when facing the full force of the state's power – that is, its power to punish. To be sure, regulatory searches and seizures will still implicate privacy concerns. But at least the trade-offs between the benefits of regulation and the costs to individual rights will not trigger the criminal process. All the better if the interests of public safety and liberty need not be negotiated on the terrain of Fourth Amendment jurisprudence.