Ex Parte Proceedings in Domestic Violence Situations: Alternative Frameworks for Constitutional Scrutiny

Nadine Taub
EX PARTE PROCEEDINGS IN DOMESTIC VIOLENCE SITUATIONS: ALTERNATIVE FRAMEWORKS FOR CONSTITUTIONAL SCRUTINY

Nadine Taub*

INTRODUCTION

American society has recently discovered the problem of violence between cohabiting adults. Defined usually as the assault of one spouse by another, the problem also occurs between lovers and former mates, and encompasses emotional as well as physical abuse. While either sex may be the victim of such violence, in actuality the overwhelming majority of victims are women. It has been estimated that one-third to one-half of married women have been subjected to spousal violence during their married lives. The pervasiveness of abuse against women may be explained by sex-role socialization that permits and encourages men to vent their general frustrations and assert their dominance over women through violence, and by economic discrimination, lack of child-

* Associate Professor of Law, Rutgers University. B.A., 1964, Swarthmore College; LL.B., 1968, Yale University; Diploma in Graduate Legal Studies, 1973, Stockholm University.


5. It has been estimated, for example, that between 1.8 and 3.3 million women per year are beaten by their husbands while 280,000 men are abused by their wives over this same period of time. 1978 Senate Hearings, supra note 1, at 18 (statement of Steve Y'Barn). Such studies have indicated that men have been, more often than previously thought, the victims of spouse abuse. However, in view of the greater seriousness of wife beating, and the relative lack of options available to women, see text accompanying notes 26-27 infra, the problem remains of greater concern to women.


care, and other social pressures that prevent women from escaping the battering relationship. The incidence of violence has been associated specifically with alcohol and drug abuse and family changes such as pregnancy.

The consequences of allowing battering to continue can be serious. Experts believe that domestic violence is likely to escalate in cyclical fashion, at times resulting in the woman’s death. Women caught in the cycle of abuse may, in the process of defending themselves, kill their assailant. Children exposed to such patterns of violence not only may suffer immediate emotional distress, but also may reproduce their parents’ behavior patterns as adults.

Public attention has focused increasingly on the failure of legal institutions to respond to the needs of battered women. Police and prosecutors have been criticized for refusing to enforce criminal assault laws and for minimizing the seriousness of the alleged abuse. The judiciary has likewise been criticized for failing to take assault complaints seriously, often suggesting divorce as a reasonable response. Some critics have argued that existing remedies, particularly civil remedies, are inadequate, while others have main-


10. R. Langley & R. Levy, supra note 6, at 100-05.


12. In one study of homicides in Philadelphia, for example, it was found that forty-one percent of all women killed were killed by their husbands. M. WOLFGANG, STUDIES IN HOMICIDE 23 (1967).


15. See D. Martin, supra note 1, at 101-18; Eisenberg & Micklow, supra note 8, at 150, 159; Truninger, Marital Violence: The Legal Solutions, 23 HASTINGS L.J. 259, 263-64 (1971); Note, supra note 8, at 151-52, 161-62.

tained that traditional equitable doctrines can be used more vigorously.\textsuperscript{17}

As of 1980, at least 34 states had passed legislation providing civil and criminal remedies and supportive services for domestic-violence victims.\textsuperscript{18} Despite some litigation directed at criminal-law enforcement,\textsuperscript{19} much of the law-reform effort has emphasized the availability of civil remedies for household violence.\textsuperscript{20} Pennsylvania's Protection From Abuse Act,\textsuperscript{21} adopted in 1976, has served as the model for many of these bills. This law, like most of the others, provides for civil protective orders, which may include vacate or eviction orders granted on an ex parte basis.\textsuperscript{22}

Civil protective orders supplement the criminal law, divorce law, and social services for battered women in important ways. Some women do not wish to involve their husband or lover in the criminal justice system, perhaps because they seek relief from the beatings without specifically punishing their assailant or because they fear a loss of income that might result from incarceration of their mate or lover.\textsuperscript{23} Those who do are, as already noted,\textsuperscript{24} often unsuccessful in invoking the sanctions that are theoretically available under the criminal law.\textsuperscript{25} Moreover, if a convicted assailant is given a fine or probation rather than a custodial sentence, the criminal process may not effect the physical separation sought by the victim. Divorce, of course, provides a legal basis for permanent separation. However, unless the divorce proceeding includes \textit{pendente lite}\textsuperscript{26} relief providing for eviction or barring harassment, it may fail to address the victim's immediate need for protection. Further, it is unreasonable to expect all women to seek divorce of

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\item[19.] For an analysis of some of these suits, see Woods, \textit{Litigation on Behalf of Battered Women}, 5 \textit{WOMEN'S RIGHTS L. REP.} 7 (1978).
\item[22.] \textit{Id.} § 10186(a)(2)-(3).
\item[23.] D. Martin, \textit{supra} note 1, at 72-86; Note, \textit{supra} note 8, at 138-41.
\item[24.] See authorities cited note 15 \textit{supra}.
\item[25.] Eisenberg & Micklow, \textit{supra} note 8, at 146-51.
\item[26.] \textit{Pendente lite} relief is relief issued during the course of litigation.
\end{enumerate}
their abusers. Some may believe it will be possible to control the violence and remain together; some may be opposed to divorce for religious reasons; and others may simply need breathing space to determine what they will ultimately do.

Shelters and safehouses may provide a realistic alternative for victims, particularly those of limited economic means; however, these options are extremely limited in number. Moreover, in order to take advantage of such social services, a woman must leave her home and neighborhood, and unless she abandons them, her children will most likely be required to change schools and lose contact with their friends. In short, although a range of legal and social remedies applies to the battering situation, only the civil protective order directly addresses the victim's need to be secure in her home.

This Article explores the serious constitutional questions posed by the issuance of such relief without a prior adversary hearing in light of a jurisprudence that has developed examining the circumstances under which such a hearing is constitutionally mandated. Following the Supreme Court's decision in Fuentes v. Shevin, it became apparent that the fourteenth amendment requires procedural safeguards whenever one is deprived of a significant property interest, even temporarily. Wolff v. McDonnell made clear that analogous procedural safeguards are due liberty interests. Whether a particular government scheme satisfies the procedural due process requirements of the fourteenth amendment, however, turns on the answers to two separate questions: (1) whether the interest asserted is protected by the fourteenth amendment, and (2) if so, whether the procedural protection afforded that interest is adequate.

The first section of the Article reviews the procedures involved in obtaining an ex parte order. The second section considers the nature of the defendant's interest in remaining in the home.

27. T. DAVIDSON, CONJUGAL CRIME 237-52 (1978). Davidson points out that the limited number of facilities that do exist are both understaffed and underfunded. Id. at 237.
29. Id. at 86.
31. Id. at 556-58.
32. See Board of Regents v. Roth, 408 U.S. 564, 570-77 (1972). But see Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 847 (1977) (plurality opinion assumed that fourteenth amendment protected foster parents' interest in custody and then held procedures adequate).
The following sections then examine the process due that interest under the two major approaches utilized by the Supreme Court and in terms of values served by the procedural guarantees of the fourteenth amendment. It is ultimately concluded that despite the importance of the affected interest, ex parte eviction procedures can withstand constitutional scrutiny in the domestic-violence context.

**EX PARTE ORDERS**

Whether sought pursuant to special domestic-violence legislation or general tort law, the civil protective order should issue when the traditional grounds for equitable relief are shown; that is, when imminent harm is threatened, when legal remedies are inadequate, and when the balance of hardships favors the party seeking the order. However, prior to the entry of a final order of this type, preliminary relief may issue on an ex parte basis. Generally, ex parte "motions are applications made to the court in behalf of one or the other of the parties to the action in the absence and usually without the knowledge of the other party or parties." As a statutory matter, the standards for ordinary relief may be somewhat general, e.g., "for good cause shown," or, on the other hand, related to specific conduct, e.g., "that family violence has occurred and . . . is likely to occur in the foreseeable future." However, the standard for ex parte relief is likely to stress immediacy more than the ordinary standard. The ex parte criterion may thus require a showing of great or irreparable injury before the matter can be heard on notice, immediate and present danger of
abuse, or “substantial likelihood of immediate danger of abuse.”

As an evidentiary matter, ex parte relief may require clear and convincing evidence, while ordinary relief may be obtained by the preponderance of the evidence. Both ordinary and ex parte eviction orders may be granted on oral application by the complainant or on papers. If jurisdiction is statutory, a hearing will usually be required within five to twenty days at which time the complainant has the burden of proving that the order should be continued. Where ex parte relief is granted under the court’s general equity jurisdiction, the subsequent hearing date is presumably set within a reasonable time.

The importance that advocates for battered women accord the availability of immediate relief is reflected in their efforts to obtain around-the-clock access to the courts. Thus a number of statutes recently enacted to deal with domestic abuse include provisions for weekend and night-time applications. Doubts about the efficacy of such orders in view of enforcement difficulties have apparently been addressed by statutory provisions fortifying the enforcement powers and duties of the police and by informal arrangements with sheriffs’ offices.

A defendant subject to an ex parte eviction order may have difficulty posing objections to its issuance, whether factual, statutory, or constitutional. If the eviction order expires, objections are moot, and if the eviction order is continued following an adversary hearing held soon after issuance of the ex parte order, the injury and illegality of the ex parte order are difficult to perceive. While the defendant may succeed in having the order dissolved, that success may not forestall a subsequent ex parte order. And the defendant who violates an ex parte order may not be able to raise ob-

42. N. Taub & A. M. Boylan, supra note 20.
43. CAL. CIV. PROC. CODE § 527(a) (West Supp. 1980).
45. N. Taub & A. M. Boylan, supra note 20.
46. See, e.g., KAN. STAT. § 60-3105(a) (Supp. 1979) (weekends); MASS. GEN. LAWS ANN. ch. 209A, § 5 (West Supp. 1980) (weekends); N.Y. JUD. LAW § 821(4) (McKinney Supp. 1980) (when family court is not in session, application may be made to criminal court on weekends and nights); PA. STAT. ANN. tit. 35, § 10188(a) (Purdon 1977) (weekends).
47. See N. Taub & A. M. Boylan, supra note 20.
48. See id.
Questions concerning the constitutionality of such ex parte proceedings may, however, arise in other contexts. Judges who doubt that such orders comport with due process may decline to issue them, even in the absence of a defendant who specifically raises constitutional objections. Once defendants are brought before the court, they may seek to make, and judges may be willing to hear, all possible objections to the legislation. Additionally, previous defendants and others who may plausibly claim that they are likely to be subjected to future ex parte orders may bring affirmative litigation to enjoin the issuance of such orders without a prior hearing. Finally, questions concerning the constitutionality of ex parte orders may cause legislators to resist the enactment of special domestic-violence legislation specifically authorizing such emergency relief.

Few judicial opinions have directly addressed the procedural due process problems posed by the issuance of these orders on an ex parte basis. One reported federal case, Geisinger v. Voss, involved the constitutionality of state legislation providing for the issuance of ex parte eviction orders in divorce proceedings where the petitioning spouse fears that his or her legal rights will be jeopardized if the other remains in the home. The court in Geisinger recognized the importance of one's interest in non-eviction, stating:

> There is an old saw that a man's house is his castle. If modern times will not permit him moats and battlements, it still remains, I strongly suspect, that the constitution insists that he be allowed, except in exceptional circumstances, a few words before the sheriff escorts him out the door. In light of Fuentes, I find it probable that a wife may not obtain an ex parte order ordering

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49. See Walker v. City of Birmingham, 388 U.S. 307 (1967) (upholding contempt conviction for violation of injunction issued pursuant to statute subsequently found unconstitutional).

50. See [1979] 5 FAM. L. REP. (BNA) 2916 (analyzing Boyle v. Boyle, No. M 475 (C.P. Allegheny County Sept. 10, 1979)) (where defendant failed to convince court that Pennsylvania's Protection From Abuse Act was unconstitutional).

51. See Geisinger v. Voss, 352 F. Supp. 104 (E.D. Wis. 1972). Younger v. Harris, 401 U.S. 37 (1971), and its progeny have, of course, made federal litigation of this sort far more difficult. Nevertheless, affirmative litigation raising the constitutional issue in state court remains a definite possibility.


her husband to vacate the family household unless she demonstrates to the Family Court Commissioner's satisfaction that she will likely be subject to physical abuse and that she is unable to temporarily reside elsewhere pending a hearing.\textsuperscript{54}

There was, however, no definitive decision in the case. The matter was dismissed as moot when the defendants voluntarily consented to restrict the issuance of the eviction orders to emergent cases involving threats of violence.\textsuperscript{55} The case held simply that the constitutional question posed by the practice merited the convening of a three-judge court.\textsuperscript{56}

An unreported state lower-court decision, \textit{Boyle v. Boyle},\textsuperscript{57} upheld the Pennsylvania Protection From Abuse Act\textsuperscript{58} against various constitutional attacks. Finding the ex parte issue troublesome, the court pointed to the increased risk of domestic violence in the absence of a mechanism for issuing an ex parte determination, the case-by-case nature of the adjudication, and the ability of the hearing judge to personally observe injuries.\textsuperscript{59} On this basis the court upheld the statutory authority to issue temporary orders. The decision does not, however, review either the pertinent case law or the functions served by the due process guarantee.

In considering whether an ex parte order amounts to an unconstitutional deprivation of a protected interest, courts must be sensitive to the implications of the substantive decision as well as the values jeopardized by circumvention of full adversarial process. Accordingly, there is a need for a two-stage examination. At first, the court must consider the nature of the interest at issue to determine whether any procedural protection is required. And second, if some procedural protection is warranted, the court must determine what the components of that procedure are, bearing in mind the nature of the interest as well as other competing interests. The

\textsuperscript{54} 352 F. Supp. at 111.


\textsuperscript{56} \textit{Id.} Under 28 U.S.C. \textsection 2281 (repealed 1976), a three-judge court was to be convened in suits to enjoin laws of statewide applicability on constitutional grounds whenever the constitutional question was not insubstantial or frivolous. \textit{See Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962)}. The three-judge court requirement was repealed in 1976.

\textsuperscript{57} No. M 475 of 1979 (C.P. Allegheny County, Sept. 10, 1979).


\textsuperscript{59} No. M 475 of 1979, slip op. at 6-7.
following sections of this Article will examine the competing roles of these factors.

THE NATURE OF THE INTEREST

The interest in non-eviction may be articulated as either an interest in property or an interest in liberty. Property interests are defined by reference to independent sources such as state law, and it would seem relatively obvious that where the lease or title is in a person's name, that person has a protectable property interest in continued possession of a dwelling. In *Lindsey v. Normet*, for example, the Supreme Court accepted without question that tenants were entitled to challenge the adequacy of state-enforced eviction procedures under the fourteenth amendment. It is also possible that non-signatory parties may have a protectable property interest in the continued possession of their homes under common law or statutory provisions. Moreover, the interest in possession is protected even as against short-term interruptions.

It has been suggested that since property rights are subject to the state's police powers, which authorize the state to protect the mental and physical safety of its citizens by removing an abuser, ex parte orders do not present a constitutional problem. While this argument suffices to answer a claim that eviction orders in abuse cases violate substantive due process, it does not adequately answer the procedural due process objection.

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60. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). A similar analysis can be found in Goss v. Lopez, 419 U.S. 565, 574, 576 (1975).

61. 405 U.S. 56 (1972).

62. Id. at 64-68.

63. For example, the very provisions that authorize battered spouses to obtain eviction orders even where they are non-signatories may be used to establish that interest.

64. See North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975). "The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause." Id. (quoting Fuentes v. Shevin, 407 U.S. 67, 86 (1972)).


66. Cf. Boyle v. Boyle, No. M 475 of 1979, slip op. at 6 (notice requirement would better serve fourteenth amendment values, but would also increase risk of domestic violence). This is not to say that substance and procedure can be sharply distinguished in this context. See L. Tribe, AMERICAN CONSTITUTIONAL LAW § 10-12, at 537 (1978) (discussing Mathews v. Eldridge, 424 U.S. 319 (1976), and Lindsey v. Normet, 405 U.S. 56 (1972)).
A superficially more compelling, though ultimately less appealing, argument can be based on Bishop v. Wood. In that case, the Supreme Court held that a police officer was not constitutionally entitled to a pre-termination hearing where the pertinent state law permitted his termination at will. In other words, the underlying substantive interest “is created by ‘an independent source such as state law,’” and where, under the terms established by that independent source, there can be no legitimate expectation of entitlement, the interest is not protected. Thus, it could be argued that under the law of a given state a tenant or property owner’s claim to possession is one which is subject to ex parte termination under a special domestic-violence statute or as a matter of common law, and that therefore by definition the tenant or property owner can assert no interest in the protection of the due process clause. This argument has a definite catch-22 aspect since it allows states to define away a large portion of the fourteenth amendment. It appears, moreover, to have been rejected by a majority of the present Court. Furthermore, the eviction case is distinguishable from Bishop v. Wood, for unlike the employment interest in Bishop, the occupancy interest here is not terminable at will. Rather, it is terminable “for cause,” e.g., domestic violence, non-payment of rent, etc. In this sense, it is analogous to other interests which the Supreme Court has found entitled to procedural protection.

The interest in non-eviction is at least as persuasive when articulated as a liberty interest in terms of the trauma which results

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68. Id. at 347.
70. Id. Memphis Light, however, does make clear that the sufficiency of the claim of entitlement is a matter of federal constitutional law. Id. at 11-12.
71. See Vitek v. Jones, 100 S. Ct. 1254, 1262 n.6 (1980). See also Bishop v. Wood, 426 U.S. at 350-55 (Brennan, J., dissenting); id. at 355-61 (White, J., dissenting); id. at 361-62 (Blackmun, J., dissenting).
72. In Memphis Light, the Supreme Court found utility customers asserted a protectable interest “because [the company] may terminate service only ‘for cause.’” 436 U.S. at 11-12 (footnote omitted) (quoting Arnett v. Kennedy, 416 U.S. 134, 166 (1974)). The Court there relied on Arnett v. Kennedy, where a split Court concluded that an employee who could only be discharged for cause had a property interest entitled to constitutional protection. 416 U.S. at 154-55; see Memphis Light, Gas & Water Div. v. Craft, 436 U.S. at 11 n.11; Bishop v. Wood, 426 U.S. at 345 n.8. In Barry v. Barchi, 443 U.S. 55 (1979), the Court found a protectable property interest in a trainer’s license because, absent provision for suspension of the license at the discretion of the racing authorities, state law engenders a “clear expectation of continued enjoyment of a license absent proof of culpable conduct by the trainer.” Id. at 64 n.11.
from being uprooted. The interest "in establishing a home in which he can enjoy quiet repose," it has been argued, is well within the case concept of any definition of liberty. The significance of the home as a foundation of individual privacy is reflected in the Third Amendment, prohibiting the peacetime quartering of soldiers, in the Fourth Amendment, expressly recognizing "[t]he right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures," and in countless judicial opinions from Entick v. Carrington, 19 St. Tr. 1029 (1765) to Stanley v. Georgia, 394 U.S. 557 (1969).

The liberty interest may also be seen to implicate issues of character. In Goss v. Lopez, the Court, per Justice White, wrote that the "Due Process Clause also forbids arbitrary deprivations of liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him' the minimal requirements of the Clause must be satisfied." One forcibly removed from his or her home may be subject to a loss of this liberty interest, so defined. In the domestic-violence context, however, the question is necessarily fact sensitive. Third-party knowledge of forcible removal may depend, for example, on whether the alleged spouse batterer leaves home peaceably upon service of the eviction order by the abused spouse or, alternatively, local law-enforcement officials need be dispatched to the home to forcibly remove the abuser.

It is unlikely that, particularly as compared with female victims of abuse, men who have been excluded from their homes will lack either the financial or social resources to find temporary accommodations. Nevertheless, to be handed a court document re-
quiring one to leave one's home immediately constitutes at least a significant disruption of one's peaceful possession. In addition, to the extent that the service of process is public or that the proceedings are otherwise known, judicially imposed stigma attaches to the eviction, and thus adds to the trauma of the experience. Thus, a liberty interest in the Goss v. Lopez sense is implicated by the use of ex parte proceedings in domestic-violence situations.

The distinction drawn here between liberty and property interests may serve only an expository purpose, since the Supreme Court has yet to articulate a functional difference between the two analyses. In Goss, for example, the majority articulated the deprivation at stake in both property and liberty contexts, yet concluded, albeit implicitly, that either analysis would lead to the ultimate result reached. In the words of the Court, regardless of the nature of the interest, "[o]nce it is determined that due process applies, the question remains what process is due." In short, it is essentially inconceivable that the right to possession of one's premises, whether analyzed as a property interest or a liberty interest, will not be considered a legitimate claim of entitlement within the protection of the due process guarantee. Indeed, as the Geisinger court observed, given the protection accorded the possessory interest in mere household goods in Fuentes v. Shevin, even though full title was lacking, "it would seem . . . that there would be little room to argue that temporary deprivation of one's home is not a deprivation of an interest encompassed within" the fourteenth amendment.

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79. At least for purposes of determining whether an interest is protected, the argument that a temporary deprivation "may cause the recipient to suffer only a limited deprivation is no argument. It is speculative . . . [I]t is also no argument that a worker, who has been placed in the untenable position of having been denied disability benefits, may still seek other forms of public assistance." Mathews v. Eldridge, 424 U.S. 319, 350 (1976) (Brennan, J., dissenting, joined by Marshall, J).
81. 419 U.S. at 576, 581.
82. Id. at 577 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).
The Mathews v. Eldridge Calculus

It is now well settled that any final deprivation of a protected interest must be preceded by some form of hearing. The necessity for an evidentiary hearing prior to an interim ruling, however, is much less clear. Questions concerning the nature of that hearing and, in particular, whether it must precede even a temporary deprivation of the protected interest, are presumably governed by the analysis set forth by Justice Powell in Mathews v. Eldridge. That decision, which held that an evidentiary hearing was not constitutionally required before social security disability benefits were provisionally terminated, identified three factors to be considered in determining the process due a particular interest:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The fact that the third factor refers to the "Government's interest," that it was enunciated in an administrative context, and that the approach has been utilized exclusively since then in cases involving governmental functions, such as school discipline, licensure, and imprisonment, might raise an initial question as to whether the calculus applies to disputes between private parties. The Court's citations, however, suggest fairly clearly that its analysis is intended to be consistent with past decisions concerning pro-

87. Id. at 339.
88. Id. at 335 (citation omitted).
89. See generally S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 661-92 (1979). Note particularly that the authors question whether post-Eldridge "decisions indicate that Eldridge has not greatly restrained lower court efforts to deal with perceived inadequacies in governmental assistance programs by imposing procedural formalities," and "suggest that the lower federal court [may be] concerned about objectives other than accuracy." Id. at 692.
90. See, e.g., Ingraham v. Wright, 430 U.S. 651, 682 (1977) (no evidentiary hearing required prior to subjecting student to corporal punishment).
91. See, e.g., Mackey v. Montrym, 443 U.S. 1, 17 (1979) (no hearing required prior to suspension of driver's license for refusal to take breath-analysis test).
92. See, e.g., Greenholtz v. Inmates of the Neb. Penal and Correctional Complex, 442 U.S. 1, 11 (1979) (formal hearing not required prior to denying parole where state statute provides only for possibility of parole).
cedural devices utilized in property disputes between private parties and will apply in future cases concerning such programs. Thus, in emphasizing the flexible nature of procedural due process, Justice Powell refers to *Sniadach v. Family Finance Corp.*, invalidating a state program permitting ex parte wage garnishment, and *Fuentes v. Shevin*, invalidating state replevin schemes permitting ex parte orders.

The applicability of the *Eldridge* calculus to private parties is, of course, confirmed by the language of the fourteenth amendment, which does not distinguish between types of property. Moreover, it makes sense that the process due in disputes between private parties be gauged by the same standard as that due in disputes between the government and private parties. Whether the source of the property at stake is a governmental appropriation, or a governmental rule allocating rights between individuals without using the taxing or spending power, would seem to have little bearing on the propriety of governmental action dispossessing a person of that property. In both cases it is ultimately the state that is imposing the deprivation on the private party.

*The First Factor: Private Interest*—The inquiry into the private interest, though first articulated as part of a three-pronged test in *Eldridge*, is not new. In *Goss v. Lopez*, decided just one year before *Eldridge*, the majority recognized that “[t]he Court’s view has been that as long as a property deprivation is not de minimus, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause.” What is new, however, is the point at which a deprivation will be considered serious enough to raise constitutional questions. The majority in *Eldridge* departed from the de minimus approach, focusing instead on two characteristics indicative of the gravity, rather than the existence, of the deprivation. Both the degree and duration of deprivation, factors

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94. *Id.* at 342.
96. *Id.* at 96.
100. 419 U.S. at 576.
101. 424 U.S. at 341-42.
previously disregarded in determining the extent of process due, became part of the private-interest inquiry.\textsuperscript{102}

The standard set in these respects by \textit{Eldridge} is a tough one, for though the Court acknowledged that significant hardship may be imposed on the erroneously terminated disability recipient,\textsuperscript{103} it concluded that possible access to private resources\textsuperscript{104} and other forms of government assistance\textsuperscript{105} militated against a prior evidentiary hearing.\textsuperscript{106} The Court, moreover, ignored the potential psychic detriment to workers that might result from the judgment, implicit in decisions to terminate disability benefits, that they are malingerers.\textsuperscript{107} This focus on the practical consequences of the deprivation, in conjunction with the Court's apparent callousness, suggests that only when the deprivation is perceived as implicating a necessity of life will the factor carry much weight in the calculus.\textsuperscript{108} In this respect, \textit{Eldridge} appears to have limited the wage-garnishment and welfare decisions of 1969 and 1970 that required a pretermination hearing.\textsuperscript{109} While this development may at times reflect the assumption that most injuries are compensable after the fact, and if not compensable, de minimus either by virtue of their

\begin{footnotes}
\item[102] Id.
\item[103] Id. at 342.
\item[104] Unlike Aid to Families with Dependent Children (AFDC) and other welfare benefits Social Security disability benefits are not conditioned on exhaustion of savings and other similar resources. Moreover, the Court is apparently willing to presume that private resources may be available even to AFDC recipients. \textit{See} Maher v. Roe, 432 U.S. 464, 474 (1977).
\item[105] The Court cited state and local welfare programs, including home relief and Supplemental Security Income. 424 U.S. at 342 n.27. Although Supplemental Security Income utilizes an identical definition of disability, an evidentiary hearing is available prior to the termination of SSI benefits. However, general assistance and home relief are available only in certain jurisdictions and in varying amounts and circumstances.
\item[106] 424 U.S. at 349. \textit{But see} text accompanying notes 78-80 supra.
\item[108] In Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978), one of only two post-\textit{Eldridge} decisions to invalidate for failure to provide adequate pretermination hearing procedures, the Court emphasized that "[u]tility service is a necessity of modern life; indeed the discontinuance of water or heating for even short periods of time may threaten health and safety." Id. at 18.
\item[109] In Fuentes v. Shevin, 407 U.S. at 89, the Court noted: "While \textit{Sniadach} and Goldberg emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine." Id. (footnote omitted). \textit{See generally} Catz & Robinson, \textit{Due Process and Creditor's Remedies: From Sniadach and Fuentes to Mitchell, North Georgia and Beyond}, 28 RUTGERS L. REV. 541 (1975).
\end{footnotes}
nature or their duration, this assumption has not been explicitly identified by the Court.\textsuperscript{110}

The Second Factor: Additional Procedural Safeguards—The second factor identified in \textit{Mathews v. Eldridge}, the value of additional procedural safeguards, has involved two types of inquiry. In the first, the Court attempts to gauge the accuracy of existing procedures by reference to rates of subsequent reversal,\textsuperscript{111} and in the second, the Court assesses the ability of the challenged procedure to reveal the “information relevant to the entitlement decision.”\textsuperscript{112} Given the relative rarity of empirical data regarding reversal rates, disputes about the proper application of available data, and their inherent limitations,\textsuperscript{113} the Court has focused increasingly on the

\textsuperscript{110} The Court has referred to state damage remedies for unjustified deprivations in the context of procedural safeguards that reduce the risk of error, as in \textit{Ingraham v. Wright}, 430 U.S. 651, 678 (1977), and in the context of declining to find a constitutionally protectable interest in reputation, as in \textit{Paul v. Davis}, 424 U.S. 693, 701-10 (1976). The efficacy and adequacy of such state remedies has been questioned, particularly where state law limits recovery in cases where the injury was inflicted in good faith. See, \textit{e.g.}, \textit{Ingraham v. Wright}, 430 U.S. at 694 n.11 (White, J., dissenting).

Furthermore, although as a practical matter, since its decision in \textit{Mathews v. Eldridge}, the Court has not required prior hearings in property cases where it fails to perceive the private interest as involving necessity of life, it has often acknowledged that “substantial” private interests or “severe deprivations” are at stake. See, \textit{e.g.}, \textit{Barry v. Barchi}, 443 U.S. 55, 64 (1979); \textit{Mackey v. Montrym}, 443 U.S. 1, 11 (1979); Board of Curators v. Horowitz, 435 U.S. 78, 86 n.3 (1978).


\textsuperscript{112} Mathews v. Eldridge, 424 U.S. at 345; \textit{see Mitchell v. W.T. Grant Co.}, 416 U.S. 600, 617 (1974).

\textsuperscript{113} \textit{See Mashaw, supra} note 107, at 43-45, discussing the use of such data in \textit{Mathews v. Eldridge} and pointing out the absence of such an external standard for determining whether the initial or appeal decision was accurate. The following passage from \textit{Eldridge} is illustrative of the problem:

Despite . . . carefully structured procedures, \textit{amici} point to the significant reversal rate for appealed cases as clear evidence that the current process is inadequate. Depending upon the base selected and the line of analysis followed, the relevant reversal rates urged by the contending parties vary from a high of 58.6\% for appealed reconsideration decisions to an overall reversal rate of only 3.3\%. Bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process. Their adequacy is especially suspect here since the administrative review system is operated on an open-file basis. A recipient may always submit new evidence, and such submissions may result in additional medical examinations. Such fresh examinations were held in approximately 30\% to 40\% of the appealed cases in fiscal 1973, either at the reconsideration or evidentiary hearing stage of the administrative process. In this context, the value of reversal rate statistics as one
second inquiry. In so doing, the Court has been both inconsistent and simplistic. For example, in evaluating the propriety of non-adversarial proceedings in particular contexts, the Court appears to have characterized similar inquiries differently. In *Parham v. J.R.*, the Court viewed the question whether civil commitment "is best for a child [as] an individual medical decision that must be left to the judgment of physicians in each case." On the other hand, in considering the propriety of transferring a prisoner to a mental hospital in *Vitek v. Jones*, the Court found that the "medical nature of the inquiry . . . does not justify dispensing with due process requirements. It is precisely ‘[t]he subtleties and nuances of psychiatric diagnoses’ that justify the requirement of adversary hearings.”

The second analytic fault might be described as the Court’s propensity to minimize the difficulty of a needed judgment in an effort to find the determinations presented amenable to existing procedures. As Professor Mashaw has pointed out, the determination at issue in *Mathews v. Eldridge*, rather than turning on a simple medical question, really concerned a difficult value judgment: whether an individual should be exempt from the moral obligation to work. Moreover, in the absence of data to the contrary, the Court also appears increasingly willing to ignore the possibility that public officials will err. Indeed, the Court seems to have abandoned any reliance on the availability of a civil damage remedy under state law as a rationale for validating existing procedures.

Means of evaluating the adequacy of the pretermination process is diminished. Thus, although we view such information as relevant, it is certainly not controlling in this case.

424 U.S. at 346-47 (citation omitted) (footnote omitted). *See also* Fusari v. Steinberg, 419 U.S. 379, 383 n.6 (1975).

114. *Id.* 584 (1979).

115. *Id.* at 607-08.

116. *Id.* 480 (1980).

117. *Id.* at 495.

118. Mashaw, *supra* note 107, at 45. Similarly, in Mackey v. Montrym, 443 U.S. 1, 14 (1979), in sustaining the revocation of a driver’s license without a prior hearing for the refusal to take a breath-analysis test following an arrest for drunk driving, the majority, unlike the dissent, perceived the issues of arrest and refusal as objective facts about which there would be little dispute. *Compare id.* with *id.* at 22-24 (Stewart, J., dissenting).

119. *See, e.g., id.* at 13-17.

120. *Compare id.* (making clear that erroneous deprivation is not compensable under state law) with Ingraham v. Wright, 430 U.S. 651, 678-79 (1977) (victim of unnecessary or excessive corporal punishment may seek remedy under state law). The
The Third Factor: Public Interest—The final factor identified in Mathews v. Eldridge is the public interest. Although Justice Powell articulated this interest in terms of the administrative burden of additional safeguards and their societal costs, it is likely, given his opinion in Mitchell v. W. T. Grant Co., that he at least envisioned this factor as equally applicable to disputes between private parties where analogous state interests are involved.

In Eldridge and subsequent decisions, the evaluation of the public-interest factor has involved considerable deference to the body formulating the procedure. Cost estimates are rarely available, utilization rates of particular procedures may be difficult to project, and the costs of postponing adverse decisions are not always measurable. At times the Court has minimized countervailing factors by articulating the agency's interest as congruent with those of the individuals subject to its decisions. Thus, in

Ingraham majority seemed to have picked up on Professor Monaghan's suggestion that prior hearings need not be required where state remedies are available after the fact. See Monaghan, Of "Liberty" and "Property," 62 CORNELL L. REV. 405, 431 (1977). See also 430 U.S. at 701 (Stevens, J., dissenting) (suggesting this as the real rationale for Paul v. Davis, 424 U.S. 693 (1976)). However, this focus on the availability of a subsequent state remedy as a safeguard that prevents erroneous deprivation may enable the state to subject individuals to egregious deprivations without a prior hearing, while the lack of a state remedy may militate in favor of hearings in far less serious matters.

122. 424 U.S. at 335.
123. Id. at 347.
124. 416 U.S. 600, 624 (Powell, J., concurring).
125. See id. at 624-25 (Powell, J., concurring) (ex parte sequestration of property in which creditor has security interest serves governmental function of providing reasonable and fair framework of rules which facilitate commercial transactions on credit basis). At any rate, even if one disregards Justice Powell's articulation of governmental function in this context, there is clearly a judicial cost of providing more stringent safeguards than those present in the ex parte order context. This judicial burden, analogous to the administrative burden discussed in Eldridge, 424 U.S. at 343, would seem to implicate the same governmental interest. Cf. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1298 (1975) (discussing desirability of various procedural safeguards in number of circumstances including evictions from privately owned, state-subsidized housing).
126. Or if available, hard to evaluate. See, e.g., Mathews v. Eldridge, 424 U.S. at 347 (Court declined to name figure in face of wide variation in parties' estimates).
127. Mashaw, supra note 107, at 46.
128. For example, it may be possible to estimate medical expenses incurred as a result of accidents due to the failure to suspend licenses of drunken drivers, but the physical and mental pain which accompanies such accidents is a much more troublesome matter.
Memphis Light, Gas & Water Div. v. Craft, the Court noted that "a utility—in its own business interests—may be expected to make all reasonable efforts to minimize billing errors and the resulting customer dissatisfaction and possible injury." The Court has also pointed to the agency’s ability to minimize costs associated with increased procedural protections. But lacking a basis for quantifying the costs of additional safeguards, the Court is generally insecure in making independent qualitative judgments regarding the importance of retaining existing procedures. The Court’s most recent procedural due process decisions thus reflect an extreme deference to the public interest, a deference akin to that found when the Court considers substantive equal protection and due process challenges.

The Court’s recent decisions also reflect a tendency to confuse the public interest in avoiding a predeprivation hearing and the general interest justifying the entire program at issue. This confusion may be a natural one in the case of welfare programs, where the direct and indirect costs of administering prior hearings may

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130. Id. at 18; see Goss v. Lopez, 419 U.S. at 583.
131. "Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities." Goldberg v. Kelly, 397 U.S. 254, 266 (1970); see Memphis Light, Gas & Water Div. v. Craft, 436 U.S. at 18-19. Although the Social Security Administration in Eldridge, like the welfare department in Goldberg v. Kelly, was presumably able to minimize payments to ineligibles by speeding up the hearing process, this possibility was considered insufficient in Eldridge to justify requiring a prior hearing. 424 U.S. at 348.
132. Traditionally, great deference has been accorded the state in identifying a public interest sufficient to establish a rational basis when faced with an equal protection attack. See, e.g., San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). If this deference is equally accorded in considering whether an adequate public interest exists to overcome concededly substantial private interests in the procedural due process context, those programs satisfying substantive requirements may in practice, if not by definition, satisfy procedural requirements as well. In Barry v. Barchi, 443 U.S. 55 (1979), for example, the Court noted, in discussing the substantive validity of a suspension mechanism, that "the magnitude of a trainer's interest in avoiding suspension is substantial; but the State also has an important interest in assuring the integrity of the racing carried on under its auspices." Id. at 64. Later in the same opinion, the Court noted, when distinguishing between thoroughbred and harness racing, that the "State could reasonably conclude that swift suspension of harness racing trainers was necessary to protect the public from fraud and to foster public confidence in the harness racing sport." Id. at 68 (emphasis added). Thus, the same state interest offered in justification of the general suspension scheme was utilized in justifying the extraordinary nature of the "swift suspension" scheme.
threaten benefit levels. But in many cases it further distorts the balancing process and makes it even more improbable that a particular procedure will be invalidated.

This confusion is evident from a reading of Mackey v. Montrym. The majority there cited the interest in public safety as justification for the summary license suspension of persons refusing to take breath-analysis tests upon arrest for drunk driving. The public's interest in removing drunk drivers from the road is no doubt advanced by the threat of license suspension; however, the summary nature of the suspension adds little to the compulsion presented by the possibility of similar action after a hearing. Thus, the general interest supporting the overall governmental action does not similarly support a prehearing deprivation.

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135. "[T]he very existence of the summary sanction of the statute serves as a deterrent to drunk driving." Id. at 18.

136. See id. at 25-27 (Stewart, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.).

137. One might, of course, argue that a summary suspension would remove the offending driver from the road during the interim period. The statute in Mackey, however, did not uniformly have this result. As Justice Stewart noted in dissent, The breath-analysis test is plainly not designed to remove an irresponsible driver from the road as swiftly as possible. For if a motorist submits to the test and fails it, he keeps his driver's license—a result wholly at odds with any notion that summary suspension upon refusal to take the test serves an emergency protective purpose. A suspension for refusal to take the test is obviously premised not on intoxication, but on noncooperation with the police. Id. at 26 (Stewart, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.) (emphasis in original).

Moreover, if the public-interest factor could be satisfied solely on the basis of time saved, then the factor would in effect be read out of the analysis, a result, presumably, no Court majority would sanction. See, e.g., id. at 18, where the majority cites two concerns in addition to time as influencing the public-interest factor.

Such confusion was less likely under Justice White's articulation of this factor prior to Eldridge. Encompassing both governmental and private actions, Justice White's separate opinion in Arnett v. Kennedy, 416 U.S. 134 (1974), speaks of "the danger to the party claiming possession occasioned by alerting the current possessor to the lawsuit, and then leaving the property in his hands pending the holding of the preliminary hearing." Id. at 192 (White, J., concurring in part and dissenting in part).

The confusion evident in Mackey may not be harmful in cases involving domestic violence. In this instance, the general interest justifying removal of a spouse after
Taking all three factors together, it is particularly apparent that the review of state procedural protections under the Mathews v. Eldridge analysis is by now a toothless one. Since the decision was announced, only two cases have found state procedures inadequate to satisfy due process requirements for failure to provide a prior hearing, although the question has arisen in at least six other cases. Under this minimal form of review, it is not unlikely that statutory or common law rules providing for ex parte eviction of alleged abusers would survive constitutional attack, even granting the importance of the defendant's interest.

**BALANCING ACCORDING TO MATHEWS V. ELDRIDGE**

In granting an ex parte order in domestic-violence situations, deprivation of the private interest involved—access to one's home—would seem to implicate a necessity of life. On the other hand, the deprivation is by definition short term, and thus would not seem as a general matter to jeopardize health or safety. Even where the burden appears greatest, where a low-income defendant is required to meet the expense of two rents, the likely eligibility of the evicted spouse for public assistance lessens the gravity of the economic implications, although the psychological harm remains unmitigated. Given the diminished importance of the private interest, and the procedural due process developments since Mathews v. Eldridge, ex parte schemes are likely to be upheld. Nonetheless, the second factor, the risk of erroneous deprivation, remains troublesome because of the relative lack of empirical evidence and

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the difficulty encountered in assessing the value of additional pro-
cedural safeguards.\textsuperscript{140} Because requests for ex parte orders in do-
monic violence situations can arise in a variety of factual contexts, a
more detailed analysis of this factor is in order.

The evaluation of the risk factor turns in large part on the na-
ture of the issues to be decided. A court faced with an application
for an ex parte eviction order must determine primarily whether
there is an imminent threat of harm to the applicant.\textsuperscript{141} Resolution
of this question involves a prediction of future conduct, usually on
the basis of historical fact, \textit{e.g.,} past beatings or recent threats.
Thus it is more reminiscent of questions that have traditionally re-
quired adversary hearings\textsuperscript{142} than of predictive questions of an ex-
pert nature that are less frequently held to require such hear-
ings.\textsuperscript{143} Issues of credibility and veracity are involved at least
theoretically. For, in theory, a disgruntled spouse may seek an
eviction order as one weapon in an ongoing marital dispute.\textsuperscript{144}
Likewise, there is a theoretical possibility that a petitioning spouse
may misperceive a mate's intent, and read as threats behavior
which was meant otherwise. And, of course, the battered spouse is
necessarily a partial witness.

A good case can be made, however, that despite the general
factual nature of the relevant inquiry, certain features of the abuse
phenomenon tend to minimize these dangers. Foremost among
these is the public stigma which attaches to those who admit being
battered.\textsuperscript{145} Where women are the victims, this stigma is a result

\textsuperscript{140} See text accompanying notes 111-121 supra.

\textsuperscript{141} If such a threat is found, the court must also frame the eviction order. This
question, however, is much more straightforward, and there appears little necessity
for the defendant's participation in this phase of the proceeding. \textit{Cf.} Carroll v. Presi-
dent and Comm'r's, 393 U.S. 175, 181-84 (1968) (invalidating 10-day ex parte order
restraining white supremacist group from holding meetings and rallies). The opinion
particularly identified the formulation of the least-drastic order possible as a process
calling for the participation of all parties. \textit{Id.} at 180.

\textsuperscript{142} See Mathews v. Eldridge, 424 U.S. at 343-44; Mitchell v. W.T. Grant Co.,
416 U.S. at 603-05. \textit{But see} Mackey v. Montrym, 443 U.S. at 13:
[\textit{W}hen prompt post-deprivation review is available for correction of admin-
istrative error, we have generally required no more than that the prede-
privation procedures used be designed to provide a reasonably reliable basis
for concluding that the facts justifying the official action are as a responsible
government official warrants them to be. \textit{Id.} (citations omitted).

\textsuperscript{143} See text accompanying notes 113-117 supra.

\textsuperscript{144} See Boyle v. Boyle, No. M 475 of 1979 (C.P. Allegheny County Sept. 10,
1979).

\textsuperscript{145} See Ottenberg, \textit{supra} note 9, at 385. While women are most frequently vic-
of societal attitudes that hold women responsible for marital harmony, and thus serves to deter women from initiating proceedings in bad faith.147

Special characteristics of the battering phenomenon similarly suggest that victims may have a particular ability to interpret their abusers' intentions and thus present an accurate picture to the court. Studies suggest that since the victims' survival has depended on their intimate knowledge of their assailants, battered women have learned to attend to signs of escalating violence and to distinguish between different tones of voice and levels of threats and danger.148 Thus, although she is not an agent of the state, the battered woman is by necessity "a trained observer and investigator" and is "by reason of [her] training and experience" at least as well suited for the role accorded her by the equitable scheme as is the arresting or reporting officer on whom the Court relied in Mackey v. Montrym.

Additional safeguards inhere in the process by which ex parte relief is obtained. The determination that the requisite threat of imminent harm is present must, of course, be made by a judge, who not only is detached, but also is performing a task traditionally expected of courts of equity. It is, moreover, based on particularized showings rather than conclusory allegations. At times of battering, male victims may also suffer from stigma due to different sex-role socialization. See 1978 Senate Hearings, supra note 1.

146. See D. Martin, supra note 1, at 81. Under the circumstances, the possibility that complainants may ultimately pay for bad-faith proceedings, either through a civil abuse-of-process suit or reduced property or alimony awards in divorce proceedings, has far less significance.

147. Indeed, women who are actually beaten may decline to report the incidents for this reason. L. Walker, supra note 4, at 19.


149. 443 U.S. at 14.

150. Id.

151. Id.

152. Cf. id. at 16 (finding independent review by "detached public officer" sufficient to correct errors and deficiencies in report of arresting officer).

153. See Mitchell v. W.T. Grant Co., 416 U.S. at 615-17 (emphasizing issuance of process by judicial officer rather than clerical personnel as was case in Fuentes v. Shevin, 407 U.S. 67 (1972)).

154. Id. at 617-18 (emphasizing need for plaintiffs to show specific facts entitling them to possession, as opposed to general allegations which sufficed under scheme struck down in Fuentes).
times the victim's appearance will corroborate her story, and on
other occasions it will be possible to present police or hospital re-
cords documenting prior incidents, although it should be empha-
sized that the applicable legal standards do not hold such evidence
necessary to establish the requisite threat of harm.

Here, as elsewhere, there is little empirical basis for gaug-
ing the accuracy of the procedural mechanism. There are numer-
ous explanations for a high percentage of final hearings failing to
occur, e.g., subsequent consensual arrangements between the par-
ties, the victim's use of the respite afforded her to establish a new
home, or failure to prosecute for fear that any further proceedings
will exacerbate the situation. Similarly, judicial failure to enter a
final order may reflect the view that consensual arrangements are
now adequate or that the initial order chastised the defendant suffi-
ciently to eliminate any immediate threat. The ultimate conclusion
in any given case, then, does not necessarily explain the wisdom of
the initial ex parte order.

The special characteristics of the battering phenomenon sug-
gest that unless the courts are ultimately willing to label the work
of government officials more trustworthy than that of other individ-
uals, the indices of reliability presented by the ex parte proceed-
ings at issue would seem as substantial as those present in schemes
upheld under the current balancing approach. By contrast to the
risk factor, the third factor—public interest—should present even
less difficulty, particularly under the current deferential approach.
The underlying dispute, of course, is one between private parties.
Nevertheless, certainly as compared with the state's interest in fos-
tering confidence in the harness racing sport, the state has a sig-
nificant interest in directly preventing violence which may occur
as a result of an anticipated attack or defensive self-help by the
victim.

Both the immediate need to preserve order and the desire

155. See Mashaw, supra note 107, at 43-45.
156. See Boyle v. Boyle, No. M 475 of 1979, slip op. at 7 (C.P. Allegheny
County Sept. 10, 1979).
157. In those schemes, as here, an important consideration is the availability of
a prompt post-deprivation hearing. See text accompanying notes 141-143 supra.
158. See Barry v. Barchi, 443 U.S. at 64-65; note 132 supra.
159. In Goss v. Lopez, 419 U.S. 565 (1975), the Court made an exception to its
general presuspension hearing requirement for "students whose presence poses a
continuing danger to persons or property or an ongoing threat of disrupting the aca-
demic process." Id. at 582. Cases upholding short-term ex parte detention of the
mentally ill likewise reinforce the conclusion that preventing the infliction of phys-
to avoid forceful self-help have justified summary procedures even prior to the recent relaxation of prehearing requirements.\textsuperscript{160} In spouse-abuse cases where the interests of children are involved, avoiding violence is a particularly compelling interest given the state’s traditional parens patriae function. The state also has a direct financial interest in a procedure which allows abuse victims and their children to remain in their homes since alternative dwellings, whether provided through state-funded shelter services or public assistance, involve additional expenditures. In addition, ready access to civil relief may diminish demands on the police, the criminal courts, and other social agencies. These interests are generally promoted by making temporary eviction orders available prior to an adversary hearing. As long as no closer relation is required between the procedure proposed and the public interest, the public interest in sustaining the summary procedure would appear to be substantial.\textsuperscript{161}

To summarize, although the affected private interest is a substantial one, relating to a necessity of life, the deprivation is tempered by its brief duration.\textsuperscript{162} There are special reasons to believe that the normal predictive dangers inherent in an ex parte proceeding are diminished in the domestic-violence case. These, com-

\textsuperscript{160} See text accompanying notes 85-139 supra.

\textsuperscript{161} These interests bespeak a need for immediate access to a judicial officer which cannot admit the delay necessitated by formal notice to an alleged abuser and a full adversary hearing. They do not, however, explain why informal notice is not possible. Should a more precise relation be required between the public interest and the particular procedural mechanism, it would be necessary to identify a specific public interest in withholding even informal notice. See Mitchell v. W.T. Grant Co., 416 U.S. at 615-17.

\textsuperscript{162} But see Goss v. Lopez, 419 U.S. at 576.
bined with the significant public interest in order and efficient pro-
cedure,¹⁶³ should suffice to establish the constitutionality of ex
parte eviction, particularly under the minimal standards utilized by
the present Court.

MEETING A HIGHER STANDARD

An ability to survive the present Court's deferential review
may not suffice in the longer run.¹⁶⁴ The Mathews v. Eldridge cal-
culus has been criticized not only in practical application, but also
for its failure to respect important process values presumably
served by due process provisions.¹⁶⁵ While few opinions explicitly
identify these values, an inchoate concern for them may account
for the presumption in favor of prior hearings which is found in an
earlier line of cases.¹⁶⁶ Though in recent years the presumption has
appeared primarily in dissenting opinions,¹⁶⁷ an ultimate respect
for process values and the seeming failure of the Eldridge calculus
to provide a middle ground may lead a majority of the Court to
once again embrace this presumptive approach.

Since Eldridge the Court has focused increasingly in the hear-
ing context on legal process as a means of assuring accuracy in the
application of substantive rules.¹⁶⁸ This "instrumental"¹⁶⁹ view con-
trasts sharply with the notion that due process serves important
values, even apart from the contribution it makes to accuracy.¹⁷⁰

Three of the process values, equality, dignity, and participation,¹⁷¹

¹⁶³. See text accompanying notes 180-184 infra.
¹⁶⁴. Even at present, it is quite possible that the due process requirements of
particular states may be more stringent than federal guarantees. See, e.g., State v.
¹⁶⁵. See L. Tribe, supra note 66, § 10-13; Mashaw, supra note 107.
¹⁶⁶. See Board of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972); Fuentes v.
Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Fam-
¹⁶⁷. See, e.g., Mackey v. Montrym, 443 U.S. 1, 20 (1979) (Stewart, J., dis-
senting).
¹⁶⁸. See, e.g., Greenholtz v. Inmates of the Neb. Penal and Correctional Com-
plex, 442 U.S. 1, 13 (1979) ("The function of legal process, as that concept is
embodied in the Constitution, and in the realm of factfinding, is to minimize the risk
of erroneous decisions.")
¹⁶⁹. See note 157 infra.
¹⁷⁰. See Summers, Evaluating and Improving Legal Processes—A Plea for
¹⁷¹. See id. at 20-21. Professor Tribe refers to values similar to these as "intrinsic
values." In his treatise, he argues that due process analysis might begin "with
the proposition that there is intrinsic value in the due process right to be heard, since it
grants to the individuals or groups against whom government decisions operate the
have particular relevance to the prior-hearing question. The equality or fairness value refers in this context to equal access and equal opportunity to influence the decisionmaker. From the individual's perspective, merely having the opportunity to participate to the same degree as one's opponent may satisfy the interest in equal treatment. However, actually participating in the decisionmaking process on an equal basis may also have the "experiential effect" of allowing the participants to feel they have been treated fairly.\textsuperscript{172} The public's perception of evenhandedness in both access and the process itself "generates public confidence and respect for the law . . . ."\textsuperscript{173} Thus, on individual and societal grounds, the equality/fairness value apparently\textsuperscript{174} militates in general against ex parte proceedings.\textsuperscript{175}

The second process value, the dignity value, accords individuals respect and promotes their grounds for self-respect, thus militating against alienating and degrading procedures. Concern for dignity suggests that at least where decisions having a substantial moral content are at issue, the opportunity to be heard—if only to express disagreement or displeasure—is important.\textsuperscript{176} As Professor Tribe has recognized, "[b]oth the right to be heard from, and the right to be told why, are analytically distinct from the [instrumental] right to secure a different outcome; these rights to interchange express the elementary idea that to be a person, rather than a

\textsuperscript{172} Summers, supra note 170, at 35.

\textsuperscript{173} Id. at 10. It is in this broader sense that the equality/fairness value underlies Justice Frankfurter's oft-quoted statement, e.g., Richmond Newspapers, Inc. v. Virginia, 100 S.Ct. 2814, 2825 (1980) (judgment of the Court announced by Burger, C.J.), that "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954) (Opinion of the Court by Frankfurter, J.).

\textsuperscript{174} But see text accompanying notes 211-214 infra.

\textsuperscript{175} It is, of course, true that an individual allowed his or her day in court may not "feel good" about the process if he or she loses at trial, or feels that the trial was in some way unfair; in the broader context, it can also be said that society as an entity may not develop confidence in the judicial system solely on the basis of collective exposure to the equality value. But in both cases, the subjective experiences of individuals, which are necessarily dependent on idiosyncratic settings, contribute only to what Professor Summers termed "outcome efficacy." Summers, supra note 170, at 36. The results of the process, however, cannot be said to negate the intrinsic importance of the equality/fairness value; that is to say, there is a difference between opportunity and no-opportunity.

\textsuperscript{176} See Mashaw, supra note 107, at 49-51 (discussing difficulties in limiting the procedural claims elicited by the dignity theory).
thing, is at least to be consulted about what is done with one."\textsuperscript{177}

Closely related to the notion of individual dignity is the participation value. In a democratic society, the state's legitimacy depends on the citizens' participation in formulating the law that governs, participation that is "the antithesis of power wielded without accountability to those on whom it focuses."\textsuperscript{178} When rules are formulated in general fashion, that participation is usually assured by some provision for making the decisionmakers accountable.\textsuperscript{179} But lawmaking does not end with the formulation of general rules; rules are modified and tempered in their application. Self-determination at this stage takes the form of personal participation at least by the individual whose interests will be directly affected.\textsuperscript{180} This more limited form of participation presumably has an intrinsic justification in the special impact the decision has on the individual's life. It also has an instrumental value in that better rules may result if general principles are subject to the arguments and presentations of those highly motivated to have rules tempered in particular cases. Instrumental value in this better-rule sense obviously presupposes a different view of the law than instrumental value in the \textit{Mathews v. Eldridge}-accuracy sense. In the latter case, the law is seen as fixed and the hearing serves merely to assure that the governmental policies which it embodies are implemented as precisely as possible.

As noted,\textsuperscript{181} few traces of these concerns appear in the case law. The \textit{Fuentes} Court suggested that something besides an accurate outcome is at stake when it said that "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred."\textsuperscript{182} Similarly, in \textit{Memphis Light},\textsuperscript{183} the Court referred to "arbitrary" as well as "erroneous" deprivations,\textsuperscript{184} and in \textit{Goss v.}
Lopez, the Court hinted that positive values inhere in the hearing process itself, at least in the educational context. But more often, in the civil context, if the court mentions values such as dignity at all, it is in the context of a particular program's substance. Thus, in Goldberg v. Kelly, the Court argued that dignity and well-being, as well as the dissipation of social malaise, are furthered by the welfare program, and that the "same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end." Nevertheless, a dawning recognition of these values may add force to the presumptive-hearing approach that has contended historically with the balancing approach embodied in the Eldridge calculus. The presumptive approach holds that "[b]efore a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'" Thus, the burden is on the party opposing the hearing to show extraordinary cause for its circumvention.

Although hearings have often been required and at times the presumptive approach has dominated the Court, that approach ultimately failed to prevail over the balancing approach during a six-year, see-saw Court struggle regarding process in civil litigation. During the period 1969-1975, the Court invalidated ex parte pre-judgment wage garnishment and replevin statutes, approved a

186. Id. at 580. As the Court stated:
But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereelection and to let him tell his side of the story in order to make sure that an injustice is not done.

Id. This statement obviously reflects instrumental values as well as process values.
statutory scheme allowing for ex parte sequestration of personal property,\textsuperscript{191} and finally invalidated a prejudgment garnishment scheme.\textsuperscript{192} This sequence left the impression that, at least when unsecured creditors are involved, ex parte procedures would be severely restricted in civil litigation.\textsuperscript{193} The ultimate outcome, however, was an emphasis on an instrumental concern against mistaken deprivations and the suggestion put forward by Justice Powell that hearings immediately following ex parte deprivations would satisfy due process.\textsuperscript{194}

Despite this turn of events and the consolidation of the balancing approach in \textit{Eldridge},\textsuperscript{195} the presumption in favor of prior hearings has not disappeared from Supreme Court opinions. Indeed, even when the Court purported to utilize the \textit{Eldridge} formulation to require a pretermination hearing in \textit{Memphis Light}, it reaffirmed this general presumption.\textsuperscript{196} Justice Stewart’s emphatic dissent in \textit{Mackey v. Montrym},\textsuperscript{197} however, contains the fullest re-

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  \item \textsuperscript{191} Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).
  \item \textsuperscript{193} Justice Stewart, for example, termed his earlier report in Mitchell of the demise of \textit{Fuentes} “greatly exaggerated.” \textit{Id.} at 608 (Stewart, J., concurring).
  \item \textsuperscript{194} \textit{Id.} at 611-12 (Powell, J., concurring). \textit{See generally Catz & Robinson, supra note 109.}
  \item \textsuperscript{195} Arnett v. Kennedy, 416 U.S. 134 (1974) also reveals these contending lines. However, in that case, Justice Stewart, who is perhaps the most vigorous spokesperson for the presumptive approach on the present court, joined Justice Rehnquist’s limited view of the property interest there at issue. \textit{See text accompany notes 141-161 supra.}
  \item \textsuperscript{196} Thus, the Court stated:

Ordinarily, due process of law requires an opportunity for ‘some kind of hearing’ prior to the deprivation of a significant property interest. On occasion, this Court has recognized that where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures underlying the decision to act are sufficiently reliable to minimize the risk of erroneous determination, government may act without providing additional ‘advance procedural safeguards’. . . .

436 U.S. at 19 (citations omitted) (footnotes omitted). In Vitek v. Jones, 445 U.S. 480 (1980), the only recent decision requiring a prior hearing, the Court made no reference to the presumption. Rather, it appears to rely, without citation, on the \textit{Eldridge} calculus—with an emphasis on the risk-of-error factor—in requiring a hearing before a prisoner is transferred to a mental institution. \textit{See id.} at 495-96. The case may, however, have limited bearing on the prior-hearing issue since the state’s interest in that case centered on denying or limiting the hearing, rather than postponing it. Thus, there was little reason for the Court to perceive the timing of the safeguard as a separate issue.

197. 443 U.S. 1, 19 (1979) (Stewart, J., dissenting). Apparently unwilling to identify his joining with the majority in \textit{Mathews v. Eldridge} as inconsistent with this approach, Justice Stewart not too persuasively distinguishes the prior case as involving a prior opportunity to be heard in writing, an opportunity which was con-
statement of the presumptive approach in recent decisions. Prominent in that restatement is the idea that hearing requirements serve a function in addition to ensuring reliability in the factfinding process. Thus, at least according to Justice Stewart, the "settled principle" which embodies a presumptive requirement of predeprivation notice and hearing serves a useful purpose:

It protects not simply against the risk of an erroneous decision. It also protects a "vulnerable citizenry from the overbearing concern for efficiency . . . that may characterize praiseworthy government officials no less . . . than mediocre ones." The very act of dealing with what purports to be an "individual case" without first affording the person involved the protection of a hearing offends the concept of basic fairness that underlies the constitutional due process guarantee.

If this opinion is any sign, then, Court disputes concerning the hearing process may come to center on the values served by due process protections, rather than on the application of an agreed-upon balancing formula. If this is so, an appreciation of process values as well as dissatisfaction with the very limited protection and unpredictability that obtains under Eldridge may prompt a return to the presumptive approach. It is, therefore, appropriate to consider the constitutionality of ex parte evictions under this more stringent standard as well.

As the approach is formulated by Justice Stewart in his Mackey v. Montrym dissent, prehearing deprivations are justified under the presumptive approach only in cases of genuine emergency. The notion of emergency has two elements: first, there must be a sufficiently important public interest, and second,
swift action must be necessary to protect that interest. So formulated, the approach is reminiscent of the strict scrutiny accorded substantive infringements of fundamental rights. It thus suggests that process values may amount to fundamental interests in themselves, notwithstanding the instrumental concern to utilize a standard which does not inevitably result in affirming existing procedures.

It is not immediately obvious that the summary procedures at issue satisfy the two emergency elements. The state is, after all, intervening in a private dispute, and even though the intervention may be justified by a need to preserve public order, that order is not necessary to permit a governmental function to go forward. If intervention in private domestic-violence disputes is regarded as serving a general public function, how will intervention in private suits of other types be distinguished? Furthermore, the ex parte proceeding—which allows a defendant to be deprived of a protected interest not only prior to an evidentiary hearing on formal notice, but also even in the absence of informal notice—appears to go beyond the needs of the articulated interest in pro-

204. "Emergency situations have generally been defined as those in which swift action is necessary to protect public health, safety, revenue or the integrity of public institutions." Id. at 21 n.1 (Stewart, J., dissenting) (citations omitted). "[P]recedents supporting ex parte action have not turned simply on the significance of the governmental interest asserted. To the contrary, they have relied upon the extent to which that interest will be frustrated by the delay necessitated by a prior hearing." Id. at 25 (Stewart, J., dissenting) (citations omitted). See also Fuentes v. Shevin, 407 U.S. at 90-91 where the Court characterized situations that justify postponing notice and opportunity for a hearing as "truly unusual," and setting out a three-pronged test for their identification:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Id. at 91.

205. See, e.g., Roe v. Wade, 410 U.S. 113, 155 (1973) (requiring restrictions of fundamental interests to be both justified by compelling state interest and narrowly tailored to achieving that interest).

206. E.g., Fuentes v. Shevin, 407 U.S. at 92-93. "The replevin of chattels, as in the present cases, may satisfy a debt or settle a score. But state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health." Id.

207. See, e.g., Goss v. Lopez, 419 U.S. at 582.

208. Certainly the interest in forestalling forceful self-help carries over to a variety of private disputes. See, e.g., Mitchell v. W.T. Grant Co., 416 U.S. at 605.
viding immediate relief. 209

The crucial point, however, is the effect that notice will have on both the complainant and the defendant. Assuming that the case is one in which the defendant presents a substantial threat of harming the complainant (and perhaps her children), the complainant may well believe that if she is required to give notice she will provoke the very violence she is trying to forestall. In such circumstances, the civil remedy becomes a meaningless option. Thus it is the integrity of the entire scheme and indeed the civil courts that is at stake. Both the possibility of proceeding without notice and the possibility of proceeding without delay are required to ensure that the courts can make the desired remedy available. 210 In this sense, the ex parte eviction is analogous to the ex parte attachment to prevent waste or destruction of property that forms the subject of a lawsuit, 211 and is distinguishable from the general ex parte replevin provision struck down in Fuentes. More generally, there is an analogy between the ex parte eviction mechanism in the abuse case and the summary attachment provision which permits a court to establish jurisdiction, 212 and the summary contempt proceedings which allow a court to deal with immediate disruptions of its functioning. 213

Viewed in this light, the ex parte eviction mechanism can be seen to serve values underlying due process guarantees. For while the equality value, the dignity value, and the participation value generally militate against ex parte proceedings, to condition relief on notice and hearing in the domestic-violence case would permit the defendant to defeat the complainant’s access to the courts totally. Thus the initial ex parte order, though not one which normally maintains the status quo, actually enhances the likelihood that the court will hear from both parties, thereby promoting equal access, self-respect, and participation.

209. See Carroll v. President & Comm’rs., 393 U.S. 175 (1968) (invalidating 10-day restraint against rallies and meetings by white supremacist organization issued without formal or informal notice to defendants).


211. It is possible to read Mitchell v. W.T. Grant Co. as limited to this situation. See Catz & Robinson, supra note 109, at 558.


These values are, of course, promoted by any mechanism that promotes access to the legal process. But they have a special dimension in the context of domestic violence. For traditionally the withdrawal of the private domestic sphere from access to the judicial process has been a means by which the world of women has been insulated from legal norms embodying these very values. As such, it has played an important role in confining women to an inferior status. Hence, any steps taken to overcome that isolation will go a long way toward furthering the equality, self-respect, and participation of women.

CONCLUSION

There is little doubt that recent statutory provisions and traditional equitable practices under which alleged abusers are excluded from the home implicate property and liberty interests protected by the fourteenth amendment. It is, therefore, necessary to determine whether ex parte proceedings followed by prompt adversary hearings accord those interests their procedural due. Judged by the presumptive constitutionality of the Mathews v. Eldridge calculus, ex parte eviction of alleged abusers should certainly survive constitutional attack. Judged by a standard of presumptive unconstitutionality, which shows more sensitivity to process values, such ex parte proceedings should also be sustained, for they in fact represent an important mechanism for promoting those values.

214. See generally Powers, Sex Segregation and the Ambivalent Directions of Sex Discrimination Law, 1979 Wis. L. Rev. 55.