They Asked For More: Noncriminal Procedural Due Process

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THEY ASKED FOR MORE: NONCRIMINAL PROCEDURAL DUE PROCESS

The plight of the hapless individual confronted with the overwhelming and often capricious power of a Kafkaesque bureaucracy has been a pervasive motif of this century. The exponential growth of government within the framework of the welfare state brought increased intrusion into the affairs of individuals. Though new social programs provided benefits to many, those benefits were conferred at the government's discretion. The government was insulated from the constitutional constraints of due process by the right-privilege doctrine, by a definition of property limited to interests in real or liquid assets, and by a definition of liberty apprehended within the context of criminal or tort law.

In recent years, the Supreme Court evidenced a willingness to expand the concept of property rights. In a series of decisions beginning with Sniadach v. Family Finance Corp. and Goldberg v. Kelly, the Supreme Court recognized the relative impotence of the impecunious citizen and found the individual's reliance on statutorily conferred benefits to be a property interest substantial enough to warrant the protection of constitutional due process. The right-privilege distinction was discredited and generally considered to be abandoned. The protection of the individual subjected to serious consequences by government action became a prime concern of the Supreme Court. Consistent with this new attitude of the Court, the concept of liberty was similarly broadened to afford further protection to an individual subjected to government-inflicted injury.


4. Goldberg and Sniadach were followed by a series of decisions expanding due process rights to new interests in new contexts. See, e.g., Fuentes v. Shevin, 407 U.S. 67 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); and, more recently, Wolff v. McDonnell, 418 U.S. 539 (1974); Goss v. Lopez, 419 U.S. 565 (1975), and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 691 (1975). See also Stewart, supra note 1: “But with the expansion of the governmental role, it became less and less tolerable that the government should wield the degree of potentially arbitrary power over the lives of individuals . . . .” Id. at 1718. Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975), speaks of a “due process explosion.” Id. at 1288.
5. Goss v. Lopez, 419 U.S. 565 (1975); Wisconsin v. Constantineau, 400 U.S. 433
During the 1975 Term, dissenting Justices accused the majority of returning to the right-privilege distinction by permitting legislative bodies to set due process limitations within statutes conferring property interests. These dissenter were particularly concerned that the procedural limitations could be immune from constitutional scrutiny by the Court. Evidence to support this concern may be found in the current marked reluctance to admit to the existence of property rights absent a clear and unequivocal statutory entitlement. This contrasts with recent holdings which recognized justifiable reliance and reasonable expectancy as bases for entitlement to due process review. The Supreme Court similarly restricted the scope of liberty interests by requiring that prior to constitutional review of alleged deprivations, a complainant show that government action which impugned his or her reputation resulted in actual loss.

When the Court undertook constitutional review of statutorily prescribed procedures, it was unclear whether the Court approved a procedure because a legislature had adopted it or whether the Court subjected such requirements to genuine constitutional scrutiny. Courts undertake consideration of procedures to decide the scope of process necessary to protect the individual's constitutional rights. This determination generally requires an interest-balancing analysis which weighs the individual's potential "grievous loss" against the government's fiscal and administr-
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Noncriminal due process demands were presented to the Supreme Court last Term in cases involving termination of public employment, termination of social security disability benefits, and prisoners' rights. Appeals for due process, or for more adequate process, were denied in each of these cases.

Due process decisions do not reach the merits of a case. Litigants hope to win only the right to a fair hearing with a record for appeal, a neutral arbiter, and some opportunity to confront or cross-examine witnesses. Noncriminal due process is a flexible concept which can be adapted to provide appropriate safeguards in the wide variety of contexts in which it has been invoked.

The right to some sort of hearing before deprivation of a property or liberty interest is an integral part of the Constitution. It would seem incontestable that a prior hearing is required whenever an individual may suffer a loss by action of the government. It is worth noting, therefore, the negativism with which the present Court has met attempts to require or expand constitutionally mandated process. Although there had been indications in recent sessions that the Court was reassessing previous expansive decisions, the Court was reassessing previous expansive decisions.

13. See Justice Stevens's dissent in Meachum v. Fano, 96 S. Ct. 2532, 2540-43 (1976), which discusses the limits of legislative power.


15. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV § 1.

20. See cases cited in note 4 supra.
sions, constraint was more evident and more successful this Term.

Examination of recent decisions discloses a variety of reasons underlying the Court's shift in attitude. Both the opinions of the Court\(^2\) and those of commentators\(^2\) have voiced concern for the high cost to the government of providing Court-mandated procedure as well as for the inefficiency and delay attributed to adequate procedures. There has been particular dismay at the increased intervention by federal courts into the affairs of state and local governments, and at the increased litigation stemming from the broad-based and multitudinous claims of due process denial.\(^2\)

These problems are present in all their complexity when the Court considers an appeal by a public employee claiming to have been arbitrarily discharged or denied renewal of employment. In its consideration of the rights of public employees, the Court has frequently faced issues of federalism as well as problems of cost, delay, and proliferation of litigation financed by organized groups of employees.\(^4\) The Court that decided *National League of Cities v. Usery*\(^2\) obviously heeded criticism that federal courts have become adjuncts to the personnel offices of municipal and state agencies.\(^2\) Justice Stevens, writing for the majority in *Bishop v. Wood*,\(^2\) stated: "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."\(^2\)


\(^{22}\) Friendly, supra note 4, at 1276, 1284 n.91; Stewart, supra note 1, at 1784. See generally Verkuil, supra note 1. But see Note, Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing, 88 Harv. L. Rev. 1510 (1975).


\(^{25}\) 96 S. Ct. 2465 (1976). In a five-four decision, Justice Rehnquist, writing for the majority, opined that the 1974 Amendments to the Fair Labor Standards Act, extending wage and hours regulations to public employees of states and their political subdivisions, were invalid.

\(^{26}\) Id. at 2471.

\(^{27}\) 96 S.Ct. 2074 (1976).

\(^{28}\) Id. at 2080.
Relevant to the concern for states' rights and judicial economy is the necessity for federal courts to interpret local ordinances or state laws to meet the threshold question of entitlement. Entitlement has been found both in statutory language and, by implication, in the reasonable expectancy\(^2\) of an individual to, for example, continued employment, though clear and specific indication of the employer's intention is lacking. This initial and crucial determination has virtually compelled a case-by-case approach requiring the federal courts to construe the intricacies and purposes of ordinances, statutes, rules, and regulations\(^9\) relevant to a particular claim. Few precedents have been established upon which to decide succeeding cases. *Bishop v. Wood*,\(^3\) decided last Term, presented the issues so ambiguously that little clarification or certainty emerged to guide lower courts. However, a comparison of *Bishop* with *Mathews v. Eldridge*,\(^2\) which presented a claim for a pretermination hearing by a social security recipient, leads to certain conclusions about the Court's attitude toward the interests of the individual (as opposed to the state) and its curious and illogical compartmentalization of due process decisions.

In *Bishop v. Wood*,\(^3\) petitioner, Carl Bishop, had been employed as a policeman in Marion, North Carolina. After six months as a probationer, he was given status as a "permanent employee," subject to dismissal for certain causes listed in the Marion Personnel Ordinance. After two years as a "permanent employee," he was dismissed by the city manager pursuant to the Ordinance's minimal requirements for dismissal.\(^3\)

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29. "[T]he relevant inquiry is whether it was objectively reasonable for the employee to believe he could rely on continued employment." *Id.* at 2082 (Brennan, J., dissenting).


31. 96 S. Ct. 2074 (1976).


33. 96 S. Ct. 2074 (1976).

34. *Id.* Marion, N.C., Personnel Ordinance art. II, § 6 states:
In the Supreme Court, petitioner argued that as a designated "permanent employee" he had a property interest in continued employment and was thereby entitled to constitutional due process, specifically, a pretermination hearing before discharge. Petitioner also argued that discharge for cause stigmatized him, requiring a hearing permitting him to contest the charges and clear his name, in recognition of his liberty interest in reputation.

Unlike Arnett v. Kennedy, the Court's 1974 public employment due process decision in which the petitioner was a federal civil service employee with acknowledged tenure under a statute providing considerable procedure both before and after dismissal, the petitioner in Bishop was employed under a municipal ordinance providing virtually no procedure. A decision in Bishop's favor would have required the Court to order a municipal government not only to afford a fair hearing to Bishop, possibly resulting in reinstatement or revision of his personnel record, but also to rewrite its Personnel Ordinance. The Court in Bishop, reluctant to undertake this kind of intervention in local government, might well have been influenced by the implications of the remedy when it refused to find a property or liberty interest at stake.

**THE PROPERTY INTEREST**

"This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." "The plurality opinion . . . would lead directly to the conclusion that whatever the nature of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time."
The Supreme Court has been ambivalent toward public employees seeking constitutional procedural safeguards. This attitude is manifest in Justice Stevens's majority opinion in Bishop v. Wood, which found "tenable" the district court's conclusion that under the Marion ordinance petitioner had no property interest.\footnote{39} However troublesome the Court's decision to accept uncritically a district judge's construction of an ambiguously phrased ordinance without considering the reasonable expectations that "permanent employee" status induced in the petitioner,\footnote{40} the dictum in Bishop is even more objectionable. This dictum suggests, contrary to the opinions of six Justices in Arnett,\footnote{41} that a statute or ordinance which confers property rights in employment and which includes its own procedures is not subject to constitutional review.\footnote{42} Such a proposition implies that some property may be taken without constitutional due process. The majority

\footnote{Brennan, Marshall & Blackman, JJ.) (emphasis added) (quoting Justice Powell's concurring opinion in Arnett v. Kennedy, 416 U.S. 134, 166 (1974)). Though concurring in Arnett, Justice Powell specifically rejected Justice Rehnquist's view that an employee's only right to due process was that contained within the statute conferring the property interest in employment. He insisted that constitutional analysis was necessary when reviewing the adequacy of statutory procedures for deprivation of a statutorily created property interest. 416 U.S. at 167 (Powell, J., concurring). A comparison of these two statements by Justice Powell (quoted in the text) with his concurrence in Bishop underscores the inconsistency referred to by the dissenters in Bishop.

40. Id. at 2082 (Brennan, J., dissenting) ("[T]he strained reading of the local ordinance . . . ."). See also id. at 2083 (White, J. dissenting); id. at 2085 (Blackmun, J., dissenting) ("[T]he only North Carolina case cited by the Court and by the District Court is by no means the authoritative holding on state law that the Court . . . seems to think it is.").
41. Arnett v. Kennedy, 416 U.S. 134 (1974). Six Justices (White, Brennan, Marshall, Blackmun, Powell & Douglas) disagreed with the opinion written by Justice Rehnquist, which reasoned that the employee's procedural rights were "conditioned by the procedural limitations which had accompanied the grant of that interest . . . ." Id. at 155. They insisted such rights were derived from the constitutional guarantees of the fifth and fourteenth amendments. Only Chief Justice Burger and Justice Stewart joined the Rehnquist opinion in toto.
42. Bishop v. Wood, 96 S. Ct. 2074, 2078 nn. 8 & 9. The Court accepted the lower court ruling that once a city ordinance and state law have been complied with, there is no further need to review the procedure. The majority read the lack of substantial procedure within the ordinance as evidence that no property interest had been conferred. "In this case, whether we accept or reject the construction of the ordinance adopted by the two lower courts, the power to change or clarify that ordinance will remain in the hands of the City Council of the City of Marion." Id. at 2080 n.14. See also id. at 2084 (White, J., dissenting): "The right to his job apparently given by the first two sentences of the ordinance is thus redefined, according to the majority, by the procedures provided for in the third sentence and as redefined is infringed only if the procedures are not followed."}
opinion evoked angry dissents by Justices Brennan, White, and Blackmun, all taking umbrage at the implication that the Court might be returning, at least in termination of employment cases, to the right-privilege distinction theretofore considered defunct.

The propriety of constitutional oversight of statutory procedure was not reached by the Court's holding in Bishop, which eliminated both the property and liberty claims at the threshold; given another situation the Court might reaffirm the validity of constitutional review upon deprivation of property rights in employment.

In Bishop v. Wood, the swing vote in support of Justice Stevens's opinion was cast by Justice Powell. Because Justices Rehnquist, Burger and Stewart had formed the minority in Arnett, which found statutory grants of permanent employment self-limiting, it was foreseeable that they would not object to the Bishop decision or its controversial underlying rationale. It is difficult to discern whether Justice Powell's concurrence was limited to the holding of the case or whether it included the dictum as well.

As recently as the 1974 decision in Arnett, Justice Powell stated in a separate opinion: "While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." He specifically objected to the plurality reasoning, which concluded that a statute which determines the nature of the property interest may also determine the procedural safeguards to be accorded that interest. Although Arnett dealt with a federal statute, the principle at issue should be the same in a case involving a state statute or a local ordinance. Given a case in which petitioner had clear, undisputed statutory entitlement, Justice Powell

44. Id. at 2083 (White, J., dissenting).
45. Id. at 2085 (Blackmun, J., dissenting).
46. See notes 4 & 6 supra. See also Board of Regents v. Roth, 408 U.S. 564, 571 & n.9 (1972); Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).
48. Id. at 164 (Powell, J., concurring).
49. Id. at 167 (emphasis added).
50. Id. at 166. See note 38 supra and accompanying text.
51. The Lloyd-La Follette Act was involved.
might require a constitutional due process analysis, regardless of the level of government which granted the interest. Justice Powell's position in upcoming employment cases may thus depend on the language granting the entitlement.

Justice Stewart's concurrence with the plurality opinion in Arnett and with the majority in Bishop reflects a curious rejection of his own seminal opinion in Board of Regents v. Roth which, together with Perry v. Sindermann, laid the foundation for the procedural due process claims made by government employees threatened with discharge. His recent attitude toward these demands for due process in public employment cases also contrasts sharply with his earlier enthusiasm for the Court's decision in North Georgia Finishing, Inc. v. Di-Chem, Inc., which invalidated a garnishment statute for insufficient procedural protection.

THE LIBERTY INTEREST

"Notice and full prior hearing must ordinarily be provided where the challenged governmental action imposes upon the individual 'a stigma or other disability that foreclose[s] his freedom to take advantage of other . . . opportunities.'" Justice Rhenquist, writing for the Court in Paul v. Davis, denied petitioner's claim that the distribution of a defamatory flyer had deprived them of a "liberty" interest in reputation, and definitively stated that defamation alone was not sufficient to establish a claim to the procedural guarantees of the fourteenth amendment: "[T]he defamation had to occur in the course of termination of employment." The Paul opinion, written less than three months prior to Bishop, was influenced to some degree by the Court's reluctance to establish a section 1983 general federal tort liability for defamation, which was certainly not an

53. 408 U.S. 564 (1972).
54. 408 U.S. 593 (1972).
issue in Bishop. Yet the Court decided in Bishop that there was no liberty interest at stake when petitioner was discharged for cause, which he claimed seriously stigmatized his reputation. The opinion suggests two reasons for denying a liberty interest in loss of employment cases. The charge may not sufficiently impair the reputation of the discharged employee so as to require the protection of due process, or the employee will not suffer actual injury if the charges are not communicated to others. In Bishop Justice Stevens relied on the latter reason without considering that there would almost certainly be future communication of the petitioner's personnel records to potential future employers; a communication which could effectively discourage future employment and thus impose upon the individual the very "disability that foreclose[s] his freedom to take advantage of other . . . opportunities." This predicament would seem to require the protection of due process under the decisions in Roth and Paul.

After Bishop, it is difficult to predict when defamation of character by government might require the protection of the due process clause. Justice Brennan, dissenting in Bishop, accused the Court of destroying the last remaining "vestige of protection for 'liberty'" after the decision in Paul.

**Social Security Disability Benefits**

Justice Powell, writing for the majority in *Mathews v. Eldridge,* denied a pretermination hearing to a petitioner whose social security disability benefits had been terminated, but did review the constitutional sufficiency of the procedure mandated by the Social Security Act. He undertook this review using an interest-balancing technique. Both the district court and the

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Fourteenth Amendment a font of tort law to be superimposed upon whatever system may already be administered by the States . . . [*A fortiori*] the procedural guarantees of the Due Process Clause cannot be the source for such law."


64. Board of Regents v. Roth, 403 U.S. 564, 573 (1972). See note 57 supra.


Court of Appeals for the Fourth Circuit\textsuperscript{68} had held that Eldridge must be afforded an evidentiary hearing before termination of benefits. The two decisions relied on \textit{Goldberg v. Kelly}\textsuperscript{69} in which the Court, under a different section\textsuperscript{70} of the same Act, found that such hearings were required before termination of welfare benefits. In order to reverse the lower court decision, Justice Powell had to distinguish the situation of the disability petitioner from that of the welfare recipient in \textit{Goldberg}, as well as demonstrate that the interests of the state in \textit{Eldridge} consequently required denial of the petitioner's claim for additional procedure. Justice Powell undertook the balancing of interests by considering those factors which favored the petitioner. He took note of the "torpidity of this administrative review process,"\textsuperscript{71} "the typically modest resources"\textsuperscript{72} of the disabled worker, and the significant hardship to the worker and his family if the agency were in error. Nonetheless the Court concluded that "the disabled worker's need is likely to be less than that of a welfare recipient."\textsuperscript{73} To ameliorate the possibly serious financial position of the erroneously terminated social security recipient, Justice Powell suggested he apply for welfare.\textsuperscript{74} The opinion in \textit{Eldridge} gives considerable weight to the fact that medical records are the basis for the administrative decisions in disability cases, unlike the varied information that may be relevant in a \textit{Goldberg} hearing. "The conclusions of physicians often are supported by X-rays and the results of clinical or laboratory tests, information typically more amenable to written than to oral presentation."\textsuperscript{75} In \textit{Mathews v. Eldridge}, however, the petitioner disputed the nature of his back pain and claimed that he suffered emotional problems. An oral hearing might have contributed significantly to an understanding of his infirmities, and examination of the physicians and their

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\item[68.] 493 F.2d 1230 (4th Cir. 1974).
\item[69.] 397 U.S. 254 (1970).
\item[70.] Welfare beneficiaries were entitled to a pretermination evidentiary hearing under Title IV of the Social Security Act. Disability benefits are paid under Title VI. Social Security Act, 42 U.S.C. § 423 (1970).
\item[72.] Id.
\item[73.] Id.
\item[74.] Id. at 342 & n.27. The dissenters took umbrage with Justice Powell's cavalier attitude: "[I]t is . . . 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." \textit{Id.} at 350 (Brennan & Marshall, JJ., dissenting).
\item[75.] Id. at 345. For a similar attitude with respect to medical reports, see Richardson v. Perales, 402 U.S. 389, 403-05 (1971).
\end{enumerate}
Hofstra Law Review reports could well have uncovered uncertainties in the medical data. In other areas of the law, medical records are more vulnerable to attack.\footnote{76. For less favorable attitudes toward the uncontestability of medical data, see Justice Douglas's dissent in Richardson v. Perales, 402 U.S. 389, 414 (1971). See also Page v. Celebrezze, 311 F.2d 757, 763 (5th Cir. 1963).}

The opinion considered other factors: "[E]xperience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial,"\footnote{77. Mathews v. Eldridge, 424 U.S. 319, 347 (1976).} and "substantial weight must be given to the good-faith judgments of the individuals"\footnote{78. Id. at 349.} administering the system.

This type of analysis does not make clear just how deprived and impecunious the petitioner must be, or how overworked the government bureau must be, to affect the Court's decision regarding the extent of process necessary in a particular situation. By its case-by-case approach, the Court invites ever more litigation over its vague standards.\footnote{79. Richardson v. Wright, 405 U.S. 208, 214 (1972) (Brennan, Douglas & Marshall, J.J., dissenting): "We gain a brief respite for ourselves while the Secretary, state agencies and beneficiaries continue confused and uncertain." Id. Richardson is a case similar to Mathews. A social security recipient sought a hearing before termination of disability benefits. New regulations had been promulgated after the procedural inception of the case, so the Court remanded for reconsideration. The Court's decisions with regard to the constitutionality of sequestration statutes have also been markedly inconsistent. See North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), and Justice Gibbon's concurring opinion in Jonnet v. Dollar Say., 530 F.2d 1123, 1130 (3d Cir. 1976), discussed in text accompanying notes 144-146 infra. See also Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972). For a discussion of this area of the law, see Steinheimer, Jr., Summary Prejudgement Creditor's Remedies and Due Process of Law: Continuing Uncertainty after Mitchell v. W. T. Grant Co., 32 WASH. & LEE L. REV. 79 (1975).}

Justice Powell's opinion in Mathews v. Eldridge,\footnote{80. 96 S. Ct. 893 (1976).} with its elaborate and traditional procedural due process analysis, would plainly be inconsistent with his position in Bishop,\footnote{81. Bishop v. Wood, 95 S. Ct. 2074 (1976).} unless that position is limited to the holding that Bishop had no property or liberty interest requiring constitutional review. The alternative would be to suggest that Justice Powell and perhaps others on the Court would like to compartmentalize procedural decisions, treating certain types of property with more deference than others and giving relatively low status to property rights derived from public employment.
A REVIEW OF LOWER COURT DECISIONS

The Supreme Court has granted certiorari to the Second Circuit's decision in Cawley v. Velgar, which will again present to the Court the issue of a liberty interest in reputation allied to loss of employment. The petitioner, a policeman discharged for cause, seeks a due process hearing to clear his name or, alternatively, a court order to foreclose the communication to prospective employers of stigmatizing material in his personnel file.

An attempt by the Confederation of Police in Chicago to extend due process hearings to course of employment decisions which might have serious consequences for the employee reached the Supreme Court and received summary disposition. It was remanded to the Seventh Circuit for reconsideration in light of Montanye v. Haymes, Meachum v. Fano, and Bishop v. Wood. Montanye and Meachum denied prisoners the right to due process before transfer in the course of imprisonment.

One court, still following Roth, Sindermann and the considered opinion of six Justices in Arnett, was able to find “justified expectation” of continued employment in the nature of a property interest, which entitled a nontenured state university professor to a pretermination due process hearing when he did not receive timely notice of dismissal as required by the university rules. De facto tenure was an issue in two cases: A New York district court found no de facto tenure under state law and terms of employment; a North Carolina district court found no common law entitlement on the facts.

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82. 525 F.2d 334 (2d Cir. 1976), rev'd sub nom Codd v. Velgar, 45 U.S.L.W. 4175 (Feb. 22, 1977). The Court divided five to four. Justices Brennan, Marshall, Stewart and Stevens dissented. The majority found against the petitioner without reaching the constitutional issues.

83. City of Chicago v. Confederation of Police, 96 S. Ct. 3186 (1976). The district court and court of appeals’ decisions are reported at 382 F. Supp. 624 (N.D.Ill. 1974), and 529 F.2d 89 (7th Cir. 1976), respectively.

84. 96 S. Ct. 2543 (1976).

85. 96 S. Ct. 2532 (1976).

86. 96 S. Ct. 2074 (1976).


A "substantial delay" in payment of social security benefits for the aged, blind, and disabled was considered a deprivation of property entitling the New York petitioner to a hearing. But in 1975, the Tenth Circuit anticipated *Mathews v. Eldridge* by deciding that an opportunity for a subsequent hearing was sufficient due process when social security benefits are withdrawn completely from a disabled recipient.

Teachers, university professors, policemen, members of the Armed Services, and a physician at a Veterans Administration Hospital took their cases to federal courts to seek a hearing before loss of public employment. It is not yet clear what effect *Bishop* will have on such requests for procedural protection from allegedly arbitrary and capricious decisions by the government as employer.

**LIBERTY BEHIND PRISON WALLS**

Recent decisions of the Supreme Court have established that prisoners do not lose all due process rights as a consequence of incarceration. They have been found to retain the rights to a hearing to challenge the decisions of prison administrators and parole boards that would cause revocation of free time: probation, parole, or good-time credits. During the 1975-1976 Term, however, little was achieved by attempts to expand basic and collateral aspects of due process required by earlier decisions.

In two cases reaching the Court from First and Ninth Circuit
Courts of Appeals, the majority of the Supreme Court found that prison inmates have no right to retained or appointed counsel in disciplinary hearings, and that the procedural safeguards of confrontation and cross-examination of witnesses could be denied by prison officials at their discretion. In an interest-balancing approach, the Court recognized the special problem of protecting the incarcerated witness once his identity was known.

The opinion, written by Justice White, further held that although a prisoner could remain silent at a disciplinary hearing, that silence could be used to support adverse inferences against him. The Court found no need to upset the "reasonable accommodation between the interests of the inmates and the needs of the institution." In the twin cases, *Meachum v. Fano* and *Montanye v. Haymes*, the Court deliberately rejected the idea that "any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause." In a six-three decision, the Court held that an inmate has no constitutional right to a hearing before transfer, whatever the motives of the prison administrator, even if the transfer produced hardship, so long as the conditions of confinement were within the limits of the original sentence.

In a more controversial decision in a related case, the Court split five to four over the holding that an indigent inmate need not be provided with a free trial transcript to attack his conviction on the collateral ground that his attorney was inadequate. The inmate had been granted a hearing on a motion under 28 U.S.C. § 2255 to try to show that, for purposes of obtaining such

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105. There were just two dissenters: Justices Brennan and Marshall.
107. 96 S. Ct. 2532 (1976). *Meachum* and Montanye v. Haymes, 96 S. Ct. 2543 (1976), were considered separately on the same day. Both dealt with transfer from one state prison facility to another. *Montanye* involved a New York statute and *Meachum* involved a Massachusetts law.
108. 96 S. Ct. 2543 (1976).
110. United States v. MacCollom, 96 S. Ct. 2086 (1976). Plaintiff in *MacCollom* sought a free transcript rather than due process per se. The resolution by the Court was consistent with that given due process appeals by prisoners this term.
a transcript, his claim was not frivolous. The dissent maintained that the trial judge could have no rational basis on which to judge the propriety of the claim without the very transcript requested by the petitioner.

Last Term the Court granted certiorari to the Fourth Circuit to hear a case which arose in North Carolina and which raises the question whether the due process clause requires the state Department of Corrections to provide inmates with legal research facilities. The district court found without merit North Carolina’s claim that it was not so required. Access to material from which the inmate can ascertain his legal rights notwithstanding his lack of expertise might well be justified constitutionally, given the many situations in which the prisoner is denied counsel or the indigent inmate is denied assigned counsel.

CIVIL COMMITMENT

Civil commitment also deprives the individual of liberty and requires due process of law. As a result of the Court’s 1975 decision in O’Connor v. Donaldson, limiting the power of the state to confine the mentally ill, there has been increased scrutiny of the sufficiency of the procedure used to incarcerate for incapacity or psychiatric maladjustment. Although there were no commitment due process cases before the Court during the 1975-1976 Term, the Court has noted probable jurisdiction in two cases questioning the rights of parents to waive their children’s procedural rights in precommitment hearings. The district court noted

2255 (1970). The petitioner had not appealed his sentence originally. Two years later he filed a complaint for declaratory judgment and injunctive relief under 28 U.S.C. § 2255 (1970). His motion was dismissed by the district court but, on appeal, the court of appeals reversed and the Supreme Court then granted certiorari.


114. See note 113 supra. See also Kirby v. Blackledge, 530 F.2d 583 (4th Cir. 1976).
in *Bartley v. Kremens* that children's "interest in being free from the wrongful and unwarranted deprivation of their liberty is substantial . . . ." Balancing the interests of the state against those of the child, the court held that no prior hearing was necessary, but an immediate postcommitment hearing on probable cause must be held and, if probable cause is found, a more extensive hearing must follow within two weeks with the right to appointed counsel. Additionally, it was held that "in the absence of evidence that the child's interests have been fully considered, parents may not effectively waive personal constitutional rights of their children."  

Supreme Court decisions in these cases may not only affect due process rights prior to involuntary incarceration, but may affect the substantive rights of children as opposed to those of parents or guardians in a variety of settings.  

**Corporal Punishment and the Rights of Students**

The nature and extent of the procedural rights due students subjected to disciplinary action by public school personnel are still in flux following the expansive decision in *Goss v. Lopez*.

In *Goss* a divided Court held that a suspension of a public school student for even one day was not de minimis for the purpose of requiring some form of due process from the school administration. The Court found that such exclusion from the educational process infringed both property and liberty interests and mandated constitutional review. The student's property interest was founded in the state law that required both that an education be provided and that the student attend for a specified length of
time each year. Similarly, there was deprivation of a liberty interest because the record of the suspension in the student's file could affect his reputation among his peers and teachers and restrain his opportunity for future education or employment.\textsuperscript{122} Just four weeks later the Supreme Court decided \textit{Wood v. Strickland},\textsuperscript{123} which held school board members and school officials personally liable for knowing violations of students' constitutional rights. This decision, again by a divided court, reinforced the implications of \textit{Goss} and significantly enhanced the procedural protections for students.\textsuperscript{124}

Last Term the Court took a more moderate stance when, without opinion, it affirmed \textit{Baker v. Owen}.\textsuperscript{125} In a decision by a three-judge court, \textit{Baker} held that a school child may be subjected to corporal punishment, but that the child has a "liberty or property interest, greater than de minimis in freedom from corporal punishment such that . . . some procedural safeguards are required against its arbitrary imposition."\textsuperscript{126} The spanking involved in \textit{Baker} was modest in its effect and the due process required was similarly modest.\textsuperscript{127} However, a more severe case of physical punishment is on the docket this Term. In \textit{Ingraham v. Wright},\textsuperscript{128} a paddling with a wooden stick caused at least one of the students to lose several days of school while he recuperated. The Court of Appeals for the Fifth Circuit held that the paddling did not subject the school child to a grievous loss requiring due process. This court distinguished \textit{Goss} by finding that physical punishment, "unlike the denial itself of educational benefits, does not subject the student to a "grievous loss" for which constitutionally mandated procedural safeguards apply."\textsuperscript{129} Though


\textsuperscript{123} 420 U.S. 308 (1975). \textit{See also} Piphus v. Carey, 545 F.2d 30, 31 n.2 (7th Cir. 1976), petition for cert. filed 45 U.S.L.W. 3606 (Mar. 8, 1977), where the court held that damages and equitable and declaratory relief should have been granted upon a finding that procedural due process rights of public school students had been violated by suspensions without hearings. The court relied on \textit{Wood v. Strickland}, 420 U.S. 308 (1975), and \textit{Hostrop v. Board of Junior College District No. 515}, 523 F.2d 569 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976).

\textsuperscript{124} See Comment, 54 N.C.L. Rev. \textit{supra} note 121, at 641 & n.7.

\textsuperscript{125} 395 F. Supp. 294 (M.D.N.C.), aff'd mem., 423 U.S. 907 (1975).

\textsuperscript{126} \textit{Id.} at 301.

\textsuperscript{127} \textit{Id.} at 302. The court required minimal procedures, clear notice, punishment in the presence of school officials, a written explanation on request of reasons for the punishment, and the name of the second school official present at the application of discipline.

\textsuperscript{128} 525 F.2d 909 (5th Cir. 1976), aff'd, No. 75-6527 (U.S. Apr. 19, 1977).

\textsuperscript{129} Ingraham v. Wright, 525 F.2d 909, 918 n.10 (5th Cir. 1975), aff'd, No. 75-6527
acknowledging Baker, the majority noted that the Supreme Court had affirmed only that part of the lower court judgment that had been appealed to it, which did not include procedural requirements. It refused therefore to be bound by that decision. Five judges dissented, finding a denial of both substantive and procedural due process, marked by a deprivation of liberty and probability of severe psychological and physical injury. The majority, on the other hand, showed concern for the administrative burden of procedural protections when it decided there was no liberty interest great enough to "justify the time and effort that would have to be expended by the school in adhering to [any required] procedures . . . ."  

SELF-HELP AND SUMMARY COURT PROCEDURES

The constitutionality of long-standing prejudgment attachment and summary repossession procedures have been in question since the Supreme Court decisions in Sniadach v. Family Finance Corp. and Fuentes v. Shevin required that adequate notice and a prior hearing be provided for the protection of the debtor. The Court showed particular concern in these cases for those whose wages would be subject to garnishment and for the consumer of limited means who buys goods on installment. Justice Stewart, writing for the majority in Fuentes, noted that some consumer goods might be considered necessities and others luxuries but all were property and entitled to the protection of due process. Although the Court rejected distinctions in property, the context of the cases suggested the Court would limit its constitutional scrutiny to summary procedures depriving the economically disadvantaged of physical property.

Several years after Fuentes, the Court qualified its position requiring a predeprivation hearing in Mitchell v. W. T. Grant Co. It has since reaffirmed the validity of the Fuentes analysis and extended its safeguards to a business corporation. That the property garnished was a sizeable bank account and not the

(U.S. Apr. 19, 1977). "We do not believe that infliction of a paddling subjects a schoolchild to a grievous loss for which Fourteenth Amendment due process standards should be applied." Id. at 917.

130. Id. at 926. James Ingraham was hit 20 times with a wooden paddle. Id. at 927.
131. Id. at 919.
134. Id. at 88-90.
wages of an improvident worker was considered immaterial to the Court’s determination in North Georgia Finishing, Inc. v. Di-Chem, Inc.\(^{138}\) There the Court again held a garnishment statute unconstitutional and required a prior hearing at which the creditor would be required to show probable cause.

The present Court will have an opportunity to review its approach to summary court action in two cases accepted on appeal for consideration this term. In Finley v. Hernandez,\(^{137}\) the Court will consider the opinion of an Illinois district court finding that the Illinois Attachment Act\(^{138}\) was “patently violative of the due process clause . . . .”\(^{139}\) The Act provided neither a preattachment hearing nor an immediate postseizure hearing. It was therefore found to be constitutionally insufficient under either a Mitchell or Fuentes-Di-Chem analysis.

The Court recently decided the case of Juidice v. Vail,\(^{140}\) which contained a challenge to the New York Judiciary Law permitting the use of civil contempt to implement postjudgment proceedings for the collection of money judgments. The lower court found that the law failed to provide sufficient notice or warning of the possible consequences of failing to appear at a show cause hearing which could permit an adjudication of contempt and imprisonment.

In an interesting development following Di-Chem, the Third Circuit in Jonnet v. Dollar Savings Bank\(^{141}\) declared Pennsylvania’s foreign attachment procedures unconstitutional “[i]n light of the latest elaborations by the Supreme Court,”\(^{142}\) just four years after sustaining the same procedures. The scrutiny was applied to the attachment of the funds of a corporation. The opinion noted the language of the Supreme Court that both indi-


\(^{138}\) ILL. ANN. STAT. ch. 11, §§ 1, 2, 2a, 6, 8, 10, 14 (Smith Hurd 1963). See also Terranova v. AVCO Financial Serv., Inc., 396 F. Supp. 1402 (D. Vt. 1975) (striking Vermont’s attachment procedure); United States General, Inc. v. Arndt, 45 U.S.L.W. 2081, 2082 (E.D. Wis. Aug. 4, 1976) (invalidating the Wisconsin attachment statute).

\(^{139}\) 405 F. Supp. 757, 762 (N.D. Ill. 1976).


\(^{141}\) 530 F.2d 1123 (3d Cir. 1976).

\(^{142}\) Id. at 1124.
individuals and corporations are protected from arbitrary deprivation.\textsuperscript{143} The concurring opinion preferred to invalidate the procedures under a \textit{Pennoyer v. Neff}\textsuperscript{144} and \textit{International Shoe Co. v. Washington}\textsuperscript{145} analysis, because "the vicissitudinous nature of recent litigation in that Court over the constitutionality of state provisional remedies leads me to believe that any lower court holding grounded thereon may rest on a precarious foundation."\textsuperscript{146}

A district court in Louisiana held unconstitutional a local ordinance assessing parking violators the costs of towing and storage without prior notice or opportunity for a hearing.\textsuperscript{147} In a straight interest-balancing approach, the court found no specific government need for prompt action, beyond the removal of the car to clear the street.

\textbf{Critics of the Court and Alternative Systems of Dispute Settlement}

The Supreme Court has taken an approach to procedural due process claims that requires extensive analysis to identify in each claim a constitutionally protected interest, to evaluate the existing procedure, and to consider by interest-balancing what constitutes sufficient procedure to protect the petitioner under the circumstances of the particular case. This type of case-by-case consideration admittedly allows great flexibility, which the Court regards as desirable\textsuperscript{148} given the vast array of situations which warrant due process protection. It has, however, led the Court into inconsistency and the lower courts and litigants into uncertainty.\textsuperscript{149}

\begin{thebibliography}{99}
\bibitem{143} Id. at 1128.
\bibitem{144} 95 U.S. 714 (1877).
\bibitem{145} 326 U.S. 310 (1945).
\bibitem{146} Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1130 (3d Cir. 1976) (Gibbons, J., concurring).
\bibitem{147} Remm v. Landrieu, 418 F. Supp. 542 (E.D. La. 1976). See also Ricker v. United States, 417 F. Supp. 133 (N.D. Me. 1976) (Farmers Home Administration mortgage foreclosure procedure held inadequate as best possible notice was not used: publication was not sufficient notice when better notice was possible); Johnson v. Riverside Hotel, Inc., 399 F. Supp. 1138 (S.D. Fla. 1975) (holding that Florida's Innkeepers' lien statutes violate the due process clause by permitting seizure of transient guests' property without prior notice or hearing). For a look at the status of debtor-creditor relationships when garnishment is unavailable, see Anderson, \textit{Coercive Collection and Exempt Property in Texas: A Debtor's Paradise or a Living Hell?}, 13 Hous. L. Rev. 84 (1975).
\bibitem{149} See, e.g., cases cited at note 79 supra. See also Richardson v. Wright, 405 U.S.
Perhaps the full implications of the early decisions were not realized at first. The rapid expansion of noncriminal procedural due process examination may have taken unexpected directions as the Court sought to treat the petitioners before it with consistency. The opinions in *Arnett*, *Bishop*, *Mathews*, *Mitchell*, *Enomoto*, and *Meachum* indicate the Court's unwillingness to extend the application of procedural safeguards to logical limits. Though necessarily committed to a traditional due process analysis when property or liberty interests are at stake in the face of government action, a majority of the Justices are concerned with the consequences of applying this analysis in the noncriminal context and are seeking a solution to their dilemma by abridging or altering the usual examination.

Critics of this utilitarian methodology generally fall into two categories. Some approve the present judicial determination of procedural rights but suggest changes; others would prefer to establish an alternative system outside the federal judiciary.
One critic opposed to interest-balancing within the present system noted: "When government limits an individual's constitutional right to due process in order to economize or to streamline administration, the individual's right is sacrificed for reason of majoritarian benefit rather than because of any genuine need to protect the rights of others." This commentator finds "majoritarian benefit" an inadequate reason for abridging a citizen's right to due process. Although he would "direct the analysis . . . toward the content" of the need for procedural safeguards, it would nevertheless leave to the court in each case the particular determination of the goal and the necessary procedure within the circumstances to meet the "basic purposes" of the constitutional right to due process. This approach, though acknowledging the deficiency of the present utilitarian examination in constitutional terms, might further exacerbate other problems of the courts.

A reconsideration of Arnett solely in terms of "fairness" to the petitioner might have afforded the claimant an impartial adjudication prior to termination, but it is questionable if it could effectively aid decisionmaking in a Mathews-type case, where the essential fairness of the elaborate statutory procedure was not the only significant factor. The economic effect of an erroneous termination must enter into such a determination under Goldberg unless such early decisions as Goldberg are reassessed. Because "procedural fairness and decency are concepts whose meaning the judiciary must construct rather than discover," the courts may find, though using a more constitutionally justified tool, that they are still left with the task of evaluating many different procedures in as many different situations.

Questions are to be explored rather than refuted and all doubts are to be resolved in favor of the claimant. 38 C.F.R. § 211(a) (1970) also precludes judicial review. However, Gillan, Legal Issues in Veterans Benefit Legislation: Programs for the Elderly, 9 CLEARINGHOUSE RV. 841 (1976), suggests methods of submitting agency decisions to judicial review despite the preclusion. The British investigatory bodies are unrelated to agencies. That factor may contribute to their apparent success. Friendly, supra note 4, at 1279 n.74.

159. Id. at 1538.
160. Id. at 1539.
The emphasis on the individual to the exclusion of other factors might, however, over time, permit more consistency and reliable precedent.

Some proponents of the judicial approach have suggested the establishment of a separate public law branch of the federal judiciary with its own court of administrative appeals. Such courts could concentrate on the development of a body of administrative law and relieve the present system of a considerable burden.165

More innovative alternatives are possible. These include investigatory administrative hearings outside the related agency,166 ombudsmen to act as overseers,167 and arbitration.168 The nonadversarial nature of these alternatives may be permissible if the new interests are classified as a form of property not totally analogous to the traditional constitutional concept of property, and therefore not warranting the full panoply of due process protection. "Indeed, there is reason to question whether a procedural system inspired by the private property, free enterprise and non-interventionist values of Adam Smith should be utilized to adjudicate 'property' rights that emerge from the managed economy inspired by John Maynard Keynes."169

Once having articulated and justified distinctions in the interests at stake and, further, having identified goals as necessarily compatible with the management of public resources,170 it could then become possible to "develop new procedural systems that do not sacrifice traditional values"171 but insure fairness while "negativing the fear of unchecked centralized power."172 This approach, while concerned for the rights of the individual, basically incorporates interest-balancing into its conceptual structure, though taking it out of the decisionmaking.

The primary obstacle to the nonadversarial methods of dispute settlement may be traditional reliance and confidence in the judicial trial-type procedure.173 Although arbitration has become

165. But see note 156 supra; Symposium, 26 Ad. L. Rev., supra note 156, at 91.
166. Friendly, supra note 4, at 1279.
167. Verkuil, supra note 1.
169. Verkuil, supra note 1, at 853.
170. Id.
171. Id. at 855.
172. Id.
173. Id. at 854. "Distrust of the bureaucracy is surely one reason for the clamor for adversary proceedings in the United States." Friendly, supra note 4, at 1279.
an accepted procedure, enforcement is still dependent upon the courts. Investigatory hearings which are mandated to seek facts, promote petitioner's plea, and decline an adversarial role may nevertheless not evoke the respect traditionally given the judicial adversarial hearing in our culture.

If, as recent decisions indicate, the Supreme Court is in general retreating from its former expansive policy toward the procedural protection of individual rights jeopardized by government action, alternative systems for safeguarding such rights may receive support. "There is need for experimentation, particularly for the use of the investigative model, for empirical studies, and for avoiding absolutes."\textsuperscript{174}

\textbf{CONCLUSION}

The twentieth century has seen a marked growth in government and its influence in the affairs of individuals. In order to protect individuals from arbitrary action by the government, the Supreme Court came to acknowledge as property or liberty many interests of individuals that had not previously been so defined. Once having defined interests in such terms, the Court then accorded such interests the protection of the due process clause of the fifth and fourteenth amendments. The recognition of these new rights increased litigation seeking procedural protection. The Court gradually extended constitutional protection to a broad range of interests. The Court was led by its constitutional analysis into evaluating the personnel policies and procedures of local and state government and arms of government as well as federal agencies. It has in addition considered the procedural policies of such diverse institutions as prisons, schools, hospitals, courts, welfare agencies, licensing agencies and parole boards, in any situation where property or liberty interests have been abridged or terminated.

The Court is caught in a dilemma. Once an interest is defined as property or liberty it deserves constitutional procedural

\textsuperscript{174} Friendly, \textit{supra} note 4, at 1316. \textit{See also} Boddie v. Connecticut, 401 U.S. 371 (1971), holding the constitutional right to due process prohibits the state from denying access to the Court for divorce by insisting on court costs or fees.

American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to the courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement.

\textit{Id.} at 375.
protection. To accord all such interests full protection of the due process clause creates administrative, fiscal, and federalism problems that the current Court finds unacceptable in many situations.

There are alternative approaches. The Court might stop its present interest-balancing analysis and mandate sufficient due process irrespective of cost or efficiency. This benefits the public in the most meaningful way by enhancing its respect for government. The Court can narrow the definitions of liberty and property. This, however, would leave many important individual interests subject to arbitrary and capricious government action. The Court can give the new interests which generally are related to or defined in terms of public administration, a status parallel to or different from traditional interests. New means of settling disputes involving these interests could then be established. The courts could remain as a last resort with a strong presumption that the alternative method has been just.

The strong historical reliance of our society on the adversary system suggests that the Court must continue to develop an approach to noncriminal due process analysis which will meet the criticism of uncertainty and inconsistency leveled against it, and yet offer that protection of individual interests which inspires confidence in government.

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