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PROCEDURAL ERROR? SEVENTH CIRCUIT FAILS TO RECOGNIZE "NO PROCEDURE" IS NOT "ADEQUATE PROCEDURE"

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INTRODUCTION

The screech of a siren disrupts a calm suburban neighborhood air as a police cruiser pulls up along the sidewalk. Two young men, unremarkable in most ways, freeze. An officer jumps out of the passenger side of the vehicle. Residents of the nearby apartment complex peer out their windows as the officer directs the men to place their hands above their heads. The officer recites the Miranda warning as he handcuffs the suspects. His partner opens the back door of the vehicle and they place the young men inside.

The preceding paragraph details an arrest and nothing more. An inquisitive observer may ask themselves why these men were placed under arrest. Are they suspected of committing a crime? Are they guilty? Perhaps they just have the unfortunate luck of matching the wrong description? But the answers to these questions are not included in the paragraph above. The answers to these questions are irrelevant. Regardless of what the young men did or did not do, regardless of their eventual guilt or innocence, the two young men in the above

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scenario were placed under arrest. Had this arrest of taken place in the Village of Woodridge in early 2011, these young men would have been required to pay a $30.00 booking fee. They would have been required to pay this fee without any form of a pre-depravation hearing, and without any opportunity to challenge the fee or seek reimbursement.

In *Markadonatos v. Village of Woodridge*,[1] the Seventh Circuit looked at whether this required booking fee was a violation of either procedural or substantive due process. The procedural claim hinged on opposing arguments regarding the risk of erroneous deprivation under the ordinance. The substantive claim turned on whether, and to what degree, the petitioner had standing. Judge Hamilton decried the "substantive due process detour,"[2] stating that under the procedural issue the deprivation was always erroneous due to inability of the arrestee to contest the fee. In determining the question of standing for the substantive claim, the courts relied heavily on the issues of probable cause for the arrest and the petitioner's eventual criminal proceedings. Judge Hamilton faulted his co-judges for their reliance of these facts as those matters remained irrelevant in the accessing of the booking fee.

Judge Hamilton's opinion that the booking fee was a violation of due process was correct and should have been adopted by the court. Requiring the payment of a booking fee upon arrest in the absence of any procedural process is a violation of procedural due process.

The Seventh Circuit granted a rehearing en banc vacating the panel opinion, however, because no position by the en banc court commanded a majority, the judgment of the district court to grant Woodridge's Motion to Dismiss was affirmed.[3]

Part I discusses the factual and procedural background of the *Markandonatos* cases, and will provide a brief history of procedural and substantive due process jurisprudence. Part II reviews the two district court opinions, the two Seventh Circuit opinions, and their

[1] Markadonatos v. Vill. of Woodridge (*Markadonatos III*), 739 F.3d 984 (7th Cir. 2014).

[2] *Id*. at 995.

[3] Markadonatos v. Vill. of Woodridge (*Markadonatos IV*), 760 F.3d 545 (7th Cir. 2014).

corresponding concurrences and dissents relating to this matter. Finally, part III analyzes why Judge Hamilton was correct and why the Seventh Circuit should have adopted his analysis.

I. BACKGROUND

A. Factual Background

On January 8, 2011, the petitioner, Jerry Markadonatos was arrested for shoplifting, an Illinois Class A misdemeanor, in the Village of Woodridge, Illinois.[4] At the time, Woodridge had enacted Municipal Code 5-1-12(A), which imposed a $30.00 booking fee on any person subject to a custodial arrest.[5] The Woodridge, Illinois, Municipal Code 5-1-12 provided in pertinent part:

> "The fees for the following activities and purposes shall be as follows:
>
> A. Booking Fee: When posting bail or bond on any legal process, civil or criminal, or any custodial arrest including warrant $30.00."[6]

Woodridge collected this booking fee without any hearings, and did not offer arrestees any opportunity to challenge the deprivation or seek reimbursement.[7] When Mr. Markadonatos arrived at the police station, he paid the booking fee, posted bond, and was released without being jailed.[8]

Eventually, Mr. Markadonatos was ordered to undergo 12 months of court supervision and to pay fees and fines totaling $785 (not

[4] *Markadonatos IV*, 760 F.3d at 545.
[5] *Markadonatos III*, 739 F.3d at 986.
[6] Markadonatos v. Vill. of Woodridge (*Markadonatos I*), No. 11 C 7006, 2012 U.S. Dist. LEXIS 3115, at *n. 1 (N.D. Ill. Jan. 6, 2012).
[7] *Id*.
[8] *Markadonatos IV*, 760 F.3d at 545.

including the $30 booking fee).[9] Upon successful completion of his supervision, Mr. Markadonatos charges were to be dismissed "without adjudication of guilt," pursuant to 730 ILCS 5/5-6-3.1(f).[10] Despite the favorable adjudication, Mr. Markadonatos was never given an opportunity to contest the booking fee and Woodridge's policy provided no means for a refund regardless of the outcome of the arrestee's case.[11]

B. Procedural Background[12]

On October 4, 2011, Mr. Markadonatos filed a suit on behalf of himself and all of the arrestees who had been charged the booking fee, pursuant to 42 U.S.C. § 1983,[13] arguing that Woodridge violated their right to procedural due process.[14] On January 6, 2012, the district court granted Woodridge's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.[15]

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[9] *Id*. at 546.

[10] "Discharge and dismissal upon a successful conclusion of a disposition of supervision shall be deemed without adjudication of guilt and shall not be termed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime . . . ." 730 ILCS 5/5-6-3.1(f).

[11] Markadonatos v. Vill. of Woodridge (*Markadonatos II*), No. 11 C 7006, 2012 U.S. Dist. LEXIS 83128, at *3 (N.D. Ill. June 11, 2012).

[12] This section is meant to provide a brief overview of the procedural history of this matter. A more in depth look at the opinions and holdings in each case can be found in part II of this article.

[13] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. § 1983

[14] *Markadonatos II*, No. 11 C 7006, 2012 U.S. Dist. LEXIS 83128, at *1.

[15] *Id*. at *1-2.

Mr. Markadonatos was granted leave and filed his First Amended Complaint raising both procedural due process and substantive due process challenges.[16] On June 11, 2012, that district court again granted Woodridge's Motion to Dismiss.[17] Mr. Markadonatos appealed to the Seventh Circuit arguing that the district court erred in dismissing his amended complaint.[18] On January 8, 2014, the Seventh Circuit affirmed the ruling to the district court granting Woodridge's Motion to Dismiss.[19] Mr. Markadonatos petitioned for and was granted a rehearing en banc.[20]

On July 21, 2014, the Seventh Circuit issued a divided opinion.[21] Judges Posner, Flaum, and Kanne interpreted Woodridge's ordinance to apply only to individuals posting bail or bond and voted to affirm the judgment of the district court.[22] Judges Easterbrook and Tinder also voted to affirm and opined that Mr. Markadonatos' claim should be categorized as a substantive due process claim and that Mr. Markadonatos only had standing to contest the application of the ordinance to persons arrested with probable cause.[23]

Judge Sykes voted to remand with instruction to dismiss the case for want of standing to sue.[24] She opined that Mr. Markadonatos lacked standing to contest the application of the ordinance under either procedural or substantive due process claims since he was lawfully arrested with probable cause.[25] The final four judges, Judges Hamilton, Wood, Rovner, and Williams, opined that Mr. Markadonatos had standing and voted to reverse the judgment of the district court.[26]

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[16] *Id*. at *2.

[17] *Id*.

[18] Markadonatos v. Vill. of Woodridge (*Markadonatos III*), 739 F.3d 984, 987 (7th Cir. 2014).

[19] *Id*.

[20] Markadonatos v. Vill. of Woodridge (*Markadonatos IV*), 760 F.3d 545, 546 (7th Cir. 2014).

[21] *Id*. at 545.

[22] *Id*. at 551.

[23] *Id*. at 554-55.

[24] *Id*. at 562.

[25] *Id*. at 556.

[26] *Id*. at 545.

Since no group constituted a majority, the district court's judgment was affirmed.[27]

C. Due Process

The origin of due process dates back to the drafting of Magna Carta in 1215 in which clause 39 stated, "No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."[28] As early as 1354, the words "due process of law" were used in English statutes interpreting the Magna Carta.[29] By the end of the 14th century "due process of law" and "law of the land" were interchangeable.[30]

This basic principle was incorporated into early state constitutions[31] and eventually it was included in the Fifth Amendment of the United States Constitution which states that "No person shall…be deprived of life, liberty, or property, without due process of law…"[32] The Fourteenth Amendment further extended this principle to the states.[33]

1. Procedural Due Process

The Supreme Court has held that there are two steps when examining a procedural due process claim.[34] First, the court must determine if there is a liberty or property interest within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment that has been interfered with by the state.[35] Second, the court must

[27] *Id*.
[28] Duncan v. Louisiana, 391 U.S. 145, 169 (1968) (Black, J., concurring).
[29] *Id*. (citing 28 Edw. 3, c. 3 (1354)).
[30] *Id*.
[31] Truax v. Corrigan, 257 U.S. 312, 332 (1921).
[32] U.S. CONST. amend. V.
[33] U.S. CONST. amend. XIV, § 1.
[34] *See* Mathews v. Eldridge, 424 U.S. 319 (1976).
[35] *Id*. at 332.

determine if the administrative procedures leading to the deprivation of the interest are constitutionally sufficient.[36]

In determining if the administrative procedures are constitutionally sufficient, the court considers three factors: first, the private interest that is affected; second, the risk of erroneous deprivation of the interest through the procedures used and any value of additional or substitute procedural safeguards; and finally, the government's interest.[37]

In *Eldridge*, the Court looked at whether the due process required the recipient be afforded an opportunity for an evidentiary hearing prior to the termination of Social Security disability benefit payments.[38] A recipient whose benefits are terminated is allowed to seek reconsideration from the state agency after termination.[39] Since a recipient is awarded full retroactive relief if they ultimately prevail, the private interest affected is only in the uninterrupted receipt of Social Security disability benefit payments.[40] The Court noted that while the hardship imposed upon the erroneously terminated disability recipient may be significant, Social Security is not based on financial need and recipients still have access to private resources or other forms of government assistance should the termination of benefits place the recipient's family below the subsistence level.[41] Therefore, a brief interruption of benefits due to erroneous deprivation would not be so significant as to depart from the Court's ordinary principle that something less than an evidentiary hearing is sufficient prior to adverse administrative action.[42]

In determining the risk of erroneous deprivation, the Court noted that the decision to discontinue disability benefits is determined by a medical assessment based on routine, standard, and unbiased medical

[36] *Id*. at 334.
[37] *Id*. at 335.
[38] *Id*. at 323.
[39] *Id*. at 324.
[40] *Id*. at 340.
[41] *Id*. at 342.
[42] *Id*.

reports by physician specialists.[43] Since the procedural due process rules are shaped by the risk of error inherent in the truth finding process of the procedures provided, the Court held that the potential value of an evidentiary hearing in this context would be minimal.[44]

Finally, the Court looked at the government's interest, which was the burden of the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decisions.[45] Since the resources available for social welfare programs are not unlimited and since it is unlikely that undeserved benefits would be recoverable by the Social Security Administration, the Court opined that the government interest would not be insubstantial.[46]

The Court held that balancing these three factors an evidentiary hearing was not required prior to the termination of disability benefits and that the present administrative procedures, including procedures that provide recipients with an effective process for asserting their claim prior to administrative action, the right to an evidentiary hearing, and subsequent judicial review before the denial becomes final, fully comported with due process.[47] In doing so, the Court noted that the essence of due process is the requirement that an individual in jeopardy of serious loss be given notice of the case against him and the opportunity to meet it.[48]

2. Substantive Due Process

The Supreme Court has held that substantive due process protects fundamental rights and liberties which are so "deeply rooted in this Nation's history and tradition,"[49] that "neither liberty nor justice would

[43] *Id*. at 343-344.
[44] *Id*. at 344.
[45] *Id*. at 347.
[46] *Id*. at 347-48.
[47] *Id*. at 348-49.
[48] Id. at 348.
[49] Moore v. E. Cleveland, 431 U.S. 494, 503 (1977).

exist if they were sacrificed."[50] If the governmental practice does not encroach upon a fundamental right, the Constitution only requires that the practice be rationally related to a legitimate government interest.[51] Essentially, the governmental practice cannot be arbitrary or irrational.[52]

II. MARKADONATOS V. VILLAGE OF WOODRIDGE

A. District Court's Original Holding

The original complaint alleged only that Woodridge violated procedural due process by imposing the $30 booking fee without applying appropriate procedures.[53] Woodridge moved to dismiss for failure to state a claim.[54] Under the legal standard developed in *Bell Atlantic Corp. v. Twombly*[55] and *Ashcroft v. Iqbal*,[56] a complaint must include sufficient facts to state a claim for relief that is plausible on its face. A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.[57] Thus, the district court applied the test set out in *Eldridge* to determine if Markadonatos' claims, if true, made out a plausible procedural due process violation.[58]

Since the parties agreed that Mr. Markadonatos had a property interest in his money the court moved on to the second step of the *Eldridge* test, determining whether the procedures regarding the deprivation of Mr. Markadonatos' property interest were

[50] Washington v. Glucksberg, 521 U.S. 702, 721 (1997).
[51] *Id*. at 728.
[52] Lee v. City of Chicago, 330 F.3d 456, 467 (7th Cir. 2003).
[53] Markadonatos v. Vill. of Woodridge (*Markadonatos I*), No. 11 C 7006, 2012 U.S. Dist. LEXIS 3115, at *4 (N.D. Ill. Jan. 6, 2012).
[54] *Id*. at *1.
[55] 550 U.S. 544 (2007).
[56] 556 U.S. 662 (2009).
[57] *Id*. at 678.
[58] *Markadonatos I*, No. 11 C 7006, 2012 U.S. Dist. LEXIS 3115, at *3-4.

constitutionally sufficient.[59] The court considered the three factors enumerated in *Eldridge*.[60]

First, the court looked at Mr. Markadonatos' private interest in the $30.[61] The court concluded that the amount was small when compared to the types of interests that typically require a pre-deprivation hearing.[62] Specifically the judge pointed to *Sickles v. Campbell County*[63] and *Eldridge* in concluding that any monetary interest short of income constituting the sole means of an individual's subsistence should only be given minimal weight.[64]

Second, the court looked at the risk of erroneous deprivation and the potential value of additional or substitute procedures.[65] Mr. Markadonatos argued that since an arrestee who paid the fee could later be found innocent or released without facing charges that erroneous deprivation is certain in at least some cases.[66] The district court disagreed. Since the fee applied to all arrestees regardless of guilt, the court noted that the only risk of erroneous deprivation would be if someone who was not arrested was charged the fee.[67] Since Woodridge administration made the determination that an individual was arrested, and thus owed the fee, at the time the individual was booked into jail, the chances of charging someone with the fee who was not arrested was zero.[68] Further, the court noted that substitute procedures would not provide additional safeguards or decrease the already negligible risk of erroneous deprivation.[69]

[59] *Id*. at *5.
[60] *Id*. at *5-6.
[61] *Id*. at *6.
[62] *Id*.
[63] 501 F.3d 726 (6th Cir. 2007) (evaluating the private interest in room and board fees deducted from incarcerated individuals canteen accounts).
[64] *Markadonatos I*, No. 11 C 7006, 2012 U.S. Dist. LEXIS 3115, at *7-8.
[65] *Id*. at *8.
[66] *Id.*
[67] *Id*.
[68] *Id*.
[69] *Id*.

Finally, the court looked to the government interest in defraying administrative costs in processing arrestees.[70] The court held that Woodridge's interest was legitimate.[71] However, like Mr. Markadonatos' private interest in the money, Woodridge's interest in such a small amount of money was also minimal.[72]

Upon balancing these factors, the court determined that the dispositive factor was the nonexistent risk of erroneous deprivation.[73] The court held that since there was no risk that Woodridge would charge the fee to an individual who was not arrested, and since no alternative procedures would significantly decrease that risk, Woodridge's current procedures were constitutional.[74] Thus, the district court held that Mr. Markadonatos failed to state a claim that Woodridge violated his procedural due process rights.[75]

B. District Court's Holding on First Amended Complaint

Concurrently with his first dismissal, the district court granted Mr. Markadonatos leave to amend his complaint.[76] The factual allegations in the complaint remained unchanged but Mr. Markadonatos now brought both procedural and substantive due process claims.[77]

Since Mr. Markadonatos did not add any additional factual allegations the court held that his procedural due process claim was barred by the law of the case doctrine.[78] However, the court noted that even upon reconsideration, Mr. Markadonatos' procedural claim

[70] *Id*. at *10
[71] *Id*.
[72] *Id*.
[73] *Id*.
[74] *Id*. at *11.
[75] *Id*.
[76] Markadonatos v. Vill. of Woodridge (*Markadonatos II*), No. 11 C 7006, 2012 U.S. Dist. LEXIS 83128, at *2 (N.D. Ill. June 11, 2012).
[77] *Id*.
[78] The law of the case doctrine "expresses the practice of courts generally to refuse to reopen what has been decided." *Id*. at *4. (quoting Messenger v. Anderson, 225 U.S. 436, 444 (1912)).

would still fail.[79] Mr. Markadonatos attempted to clarify his procedural due process claim by pointing out that the *Eldridge* test was meant to determine what procedures are required prior to deprivation, and should not be applied in a way the indicates the absence of any procedure at all is acceptable.[80] The court pointed out that Woodridge did provide minimal process before charging the fee.[81] Specifically, the court noted that the fee was applied at the time of booking and any individual would be able to point out any error at that time.[82] The court noted that a person who was not actually under arrest would simply have to convey that information to avoid erroneous deprivation.[83]

Next, the court examined Mr. Markadonatos' substantive due process claim.[84] The court noted that property interest in a $30 booking fee was not a fundamental right, and thus the proper analysis under substantive due process for this case was the rational basis test.[85] The court noted that under the rational basis test, the court must ask if Woodridge's practice of charging a booking fee to all arrestees, regardless of legality of the arrest or the disposition of the arrestee's case, is arbitrary or irrational.[86]

The court held that Mr. Markadonatos lacked the standing to challenge the rationality of Woodridge's policy under the substantive due process claim for individuals who may have been arrested without probable cause or released without being charged because Mr.

[79] *Id*. at *7-8.

[80] *Id*. at *8. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

[81] Markadonatos v. Vill. of Woodridge (*Markadonatos II*), No. 11 C 7006, 2012 U.S. Dist. LEXIS 83128, at *9 (N.D. Ill. June 11, 2012).

[82] *Id*.

[83] *Id*. at *9-10.

[84] *Id*. at *10.

[85] *Id*. at *12-13. "[T]he Supreme Court has never held that a property interest so modest is a fundamental right." Idris v. City of Chicago, 552 F.3d 564, 566 (7th Cir. 2009). (explaining there is no fundamental right involved in a small sum such as a $90 traffic fine).

[86] *Markadonatos II*, No. 11 C 7006, 2012 U.S. Dist. LEXIS 83128 at *13.

Markadonatos was arrested with probable cause and was charged.[87] Instead, the court noted that Mr. Markadonatos could only challenge the rationality of the policy as it applied to individuals arrested with probable cause, charged with crimes, and subjected to conviction.[88] The court held that charging booking fees to such arrestees was rational since Woodridge had a legitimate interest in defraying the cost of such arrests, and it was rational for Woodridge to share the cost of incarceration with the individuals who, through their actions, necessitated those costs.[89] Since Woodridge's fees were rational as applied to Mr. Markadonatos, the court granted Woodridge's motion to dismiss for failure to state a claim.[90]

C. Seventh Circuit's Panel Opinion

1. Opinion of the Court

After his second dismissal, Mr. Markadonatos appealed to the Seventh Circuit arguing that the district court erred in dismissing his amended complaint.[91] First, the Seventh Circuit Court looked to the issue of standing.[92] The court noted there are essentially three elements for standing.[93] First, the plaintiff must have suffered an "injury in fact," requiring an invasion of the plaintiff's legally protected interest that is both concrete and particularized and actual or imminent.[94] Second, the injury must have been caused by the conduct complained of.[95] Third, it must be likely that a decision in the plaintiff's favor would redress his injury.[96]

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[87] *Id*. at *13-14.
[88] *Id*. at *14.
[89] *Id*. at *14-15.
[90] *Id*. at *15.
[91] Markadonatos v. Vill. of Woodridge (*Markadonatos III*), 739 F.3d 984, 987 (7th Cir. 2014).
[92] *Id*. at 988.
[93] *Id*.
[94] *Id*.
[95] *Id*.
[96] *Id*.

The court held that Mr. Markadonatos had standing to bring a procedural due process claim because he had pled that he was deprived of $30 without a legally adequate opportunity to challenge that deprivation.[97] Next the court looked to Mr. Markadonatos' standing to bring a substantive due process claim.[98] Unlike the district court, the Seventh Circuit opinion recognized that Mr. Markadonatos eventual conviction and adjudication were irrelevant as the fee was collected on the basis of arrest and not on subsequent guilt.[99] However, the court held that the fact Mr. Markadonatos was a for-cause arrestee was relevant, and thus Mr. Markadonatos only had standing as an individual arrested with probable cause.[100]

The court then analyzed Mr. Markadonatos' procedural due process claim using the *Eldridge* test.[101] The Seventh Circuit agreed with the district court that Mr. Markadonatos had some interest in his money, even if that interest need only be given minimum weight.[102]

The Seventh Circuit also agreed with the district court that the risk of erroneous deprivation was practically non-existent since the fee was charged to all arrestees regardless of probable cause.[103] The court opined that a Woodridge employee determining whether to charge a booking fee is presented with a binary choice, if the person was arrested charge the fee, and if the person was not arrested do not charge the fee.[104] Since the collection of the fee occurred as the arrestee was being booked, the court said it could not envision any situation in which a person who was not arrested would be charged the booking fee.[105] Thus, the potential for erroneous deprivation was practically non-existent.[106] The court also noted that any additional procedures would not reduce the risk of erroneous deprivation and

[97] *Id*.
[98] *Id*.
[99] *Id*. at 989.
[100] *Id*.
[101] *Id*.
[102] *Id*.
[103] *Id*. at 989-90.
[104] *Id*. at 990.
[105] *Id*.
[106] *Id*.

would be largely meaningless since such a hearing would only need to establish that the arrestee was arrested and booked.[107]

Finally, the Seventh Circuit agreed with the district court that Woodridge had an interest in offsetting costs associated with detaining arrestees.[108] Further, the court noted Woodridge had an interest in avoiding additional hearings before or after taking the fee because such administrative procedure would entail substantial additional costs.[109]

Upon balancing the *Eldridge* factors, the court held that Woodridge's interest in covering booking costs outweighed Mr. Markadonatos' interest in his $30, especially when considering the low likelihood of erroneous deprivation.[110] The court noted that this holding was consistent with the opinions of other circuits which have determined that routine accounting and deduction of fees from detainees is not constitutionally problematic due to the low amount of discretion and minimal risk of error.[111] Additionally, although the ordinance didn't formally provide an opportunity to challenge the fee or seek reimbursement, the court opined that an arrestee could argue to the arresting officer or later to a judge that the fee should not be charged to them or should be returned.[112] Finally, the court noted that even if there was some potential for erroneous deprivation, for example in instances of false arrest, other state remedies were available to address such wrongs under which arrestees would be entitled to the return of their booking fee.[113]

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[107] *Id*.

[108] *Id*.

[109] *Id*.

[110] *Id*. at 991.

[111] *Id*. (citing to Sickles v. Campbell Cnty, 501 F.3d 726 (6th Cir. 2007); Slade v. Hampton Rds. Reg'l Jail, 407 F.3d 243 (4th Cir. 2005); Tillman v. Lebanon City Corr. Facility, 221 F.3d 410 (3d Cir. 2000)). However, the court failed to mention that *Sickles* and *Tillman* dealt with inmates who had already been convicted and thus had already received adequate procedural due process, and *Slade* dealt with pretrial detainees who were entitled to a refund if acquitted of charges.

[112] *Id*.

[113] *Id*. (citing Hudson v. Palmer, 468 U.S. 517 (1984); Doherty v. City of Chicago, 75 F.3d 318 (7th Cir. 1996)). Here the court failed to note that these cases

Moving on to the substantive due process claim, the court reiterated that Mr. Markadonatos only had standing to the extent Woodridge's fee applied to him, as a for-cause arrestee.[114] The Seventh Circuit agreed with the district court that a $30 fee was extremely modest and did not rise to the level of a fundamental right.[115] Therefore, the court needed only to determine if Woodridge's booking fee was rational and not arbitrary.[116]

The court held that Woodridge's fee passed the rational basis test.[117] First, offsetting costs of booking arrestees was a legitimate state interest.[118] Second, collecting fees from for-cause arrestees was rationally related to that goal as it took the fee from the individuals whose actions created the cost.[119]

Therefore, the court held that Woodridge's booking fee did not violate procedural or substantive due process and affirmed the district court's decision.[120]

2. Judge Sykes' Concurring Opinion

Judge Sykes' concurring opinion specifically pointed out that the crux of Mr. Markadonatos' substantive due process claim was that it applied to everyone arrested regardless of whether the arrest was lawful or resulted in criminal prosecution.[121] Judge Sykes agreed with the district court that Mr. Markadonatos lacked standing to claim the booking fee was substantively unconstitutional because it applied to

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dealt with deprivation caused by a state employee's random, unauthorized conduct. "*Hudson* represent[s] a special case of the general *Mathews v. Eldridge* analysis, in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide." Zinermon v. Burch, 494 U.S. 113, 128 (1990).

[114] *Id*.
[115] *Id*.
[116] *Id*. at 992.
[117] *Id*.
[118] *Id*.
[119] *Id*.
[120] *Id*.
[121] *Id*.

all arrested persons, whether or not the arrest was lawful, since Mr. Markadonatos admitted he was lawfully arrested.[122]

Judge Sykes characterized Judge Hamilton's dissent as believing that the booking fee was a criminal fine that required some sort of criminal prosecution before being applied.[123] Judge Sykes believed that this argument was about the content of Woodridge's ordinance and thus was a substantive challenge to the village's policy.[124] While she agreed such a claim would be valid, she maintained that Mr. Markadonatos lacked the standing to bring such a claim due to his arrest for-cause.[125]

3. Judge Hamilton's Dissenting Opinion

Judge Hamilton's dissent argued splitting the claim into both procedural and substantive due process claims had unnecessarily complicated the case.[126] Judge Hamilton also opined that the majority was confusing standing with the merits.[127] He argued that making the fee payable upon conviction, after the full procedural protections of the criminal justice system, did not indicate a substantive issue as Judge Sykes believed, but was simply a correction to a facially unconstitutional law.[128]

Judge Hamilton opined that the *Eldridge* framework requires any booking fee to await the outcome of a criminal prosecution.[129] Under Woodridge's ordinance, the final deprivation of property was based on the decision of a single police officer.[130] Thus, the fundamental due process violation inherent in Woodridge's ordinance giving one police officer the power to inflict property deprivation could not be explained

[122] *Id*. at 993.
[123] *Id*.
[124] *Id*.
[125] *Id*.
[126] *Id*.
[127] *Id*.
[128] *Id*.
[129] *Id*. at 994.
[130] *Id*.

away by using the *Eldridge* balancing test.[131] The majority's application of the *Eldridge* test provided circular logic: because the fee is imposed on all arrestees, there is no need for procedure because there is essentially no risk of error.[132] The majority's analysis erred because they failed to appreciate that the booking fee was in essence a criminal fine.[133]

Judge Hamilton opined that the Eldridge framework required any booking fee await the outcome of a criminal prosecution.[134] Applying the *Eldridge* test, first, Judge Hamilton stated a person's interest in their property is protected regardless of the amount.[135] Second, the risk of erroneous deprivation is substantial because the pivotal decision that imposes the deprivation of property is a lone police officer's decision to arrest.[136] Judge Hamilton pointed out that in no other context, even a minor speeding ticket, is a police officer able to impose a fine without judicial review.[137] Finally, Woodridge's interest can only be in charging the booking fee to individuals convicted of a crime.[138] Since the fee is charged at the time of arrest regardless of conviction, Woodridge's interest evaporates.[139] Additionally, the cost for Woodridge to await the outcome of criminal charges before imposing the fee would be marginal.[140]

Judge Hamilton then addressed Judge Sykes opinion that Mr. Markadonatos' claim is correctly categorized as a substantive due process claim.[141] Substantive due process does not prevent the government from imposing a fine or fee, including a booking fee, as part of a punishment for a crime.[142] However, as Judge Hamilton

[131] *Id*.
[132] *Id*.
[133] *Id*.
[134] *Id*.
[135] *Id*.
[136] *Id*.
[137] *Id*.
[138] *Id*. at 995.
[139] *Id*.
[140] *Id*.
[141] *Id*. at 995-96.
[142] *Id*. at 995.

pointed out, the issue in this case is the lack of procedure in imposing that fine.[143] Judge Hamilton's objection was not with the content of Woodridge's ordinance because it imposed a fee, but with the content of the ordinance because it denied procedural protection.[144]

The basic principle of due process is that a person may not be punished for a crime until a neutral fact-finder determines that the elements of the crime have been proven beyond a reasonable doubt.[145] The proof happens through the processes of the criminal justice system, and not when a police officer makes an arrest.[146] An officer is not entitled to impose judgment and punishment.[147] However, Woodridge's booking fee allows an officer to impose just such a punishment.[148] As the district court and majority opinion noted, the governmental interest is in recovering administrative costs of booking from the individuals whose actions caused the costs.[149] By assuming that the arrestee's actions caused the cost, the majority essentially assumes that the arrestee is guilty of the crime, bypassing the question to be decided in the criminal justice process.[150]

As Judge Hamilton pointed out, the majority failed to explain why Mr. Markadonatos' for-cause arrest was relevant when such circumstances do not matter under Woodridge's ordinance.[151] Since every arrestee is deprived of their property at the moment of booking, and since there is no provision in the law for further process or post-deprivation remedy, every arrestee's right not to be deprived of property without due process is violated at the moment of booking, regardless of whether the arrest was with or without probable cause.[152] Although probable cause is a complete defense to a federal

[143] *Id*.
[144] *Id*. at 996.
[145] *Id*. (citing *In re* Winship, 397 U.S. 358 (1970); Sullivan v. Louisiana, 508 U.S. 275 (1993)).
[146] *Id*.
[147] *Id*.
[148] *Id*.
[149] *Id*. at 997.
[150] *Id*.
[151] *Id*.
[152] *Id*.

constitutional claim for wrongful seizure of a person and a state law claim for false arrest, courts have never suggested that probable cause is a sufficient basis for imposing a criminal fine without the further procedural protections of the criminal justice system.[153]

Additionally, Judge Hamilton disagreed with the majority that other state post-deprivation remedies may be sufficient to satisfy due process.[154] Judge Hamilton pointed to *Logan v. Zimmerman Brush Co*.[155], which held that a post-deprivation remedy did not satisfy due process where the property deprivation was effected pursuant to established government procedures.[156] Judge Hamilton also noted that the amount of property taken was too modest for any other remedy to be meaningful without the help of a class action.[157] The filing fee alone for a modest civil claim in the DuPage County courts is $150.[158]

Thus, Judge Hamilton explained that when properly understood Woodridge's booking fee violated the due process rights of all arrestees, and he voted to reverse the judgment of the district court and remand for further proceedings.[159]

D. Seventh Circuit's Rehearing en Banc

After losing on appeal, Mr. Markadonatos petitioned for rehearing en banc and his petition was granted.[160] Five judges voted to affirm the judgment of the district court.[161] Judge Sykes voted to remand with instructions to dismiss for want of standing to sue.[162] The remaining four judges voted to reverse.[163] Since no position commanded a

[153] *Id*.
[154] *Id*.
[155] Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).
[156] *Markadonatos III*, 739 F.3d at 998.
[157] *Id*.
[158] *Id*.
[159] *Id*. at 1001.
[160] Markadonatos v. Vill. of Woodridge (*Markadonatos IV*), 760 F.3d 545, 546 (7th Cir. 2014).
[161] *Id*. at 545.
[162] *Id*.
[163] *Id*.

majority, the judgment of the district court was affirmed by the divided court.[164]

1. Judge Posner's Concurring Opinion

Judge Posner, joined by Judges Flaum and Kanne, voted to affirm the judgment of the district court.[165] Although both Mr. Markadonatos and Woodridge interpreted the ordinance to mean that a person must pay a $30 fee if they are arrested or, alternatively, if they post bail or bond in respect of some other form of legal process, Judge Posner argued that this was not the correct interpretation of the ordinance.[166] The language of the ordinance read that a person must pay the fee "when posting bail or bond on any legal process, civil or criminal, or any custodial arrest including warrant."[167] Judge Posner argued this to mean that an individual must only pay when posting bail or bond in connection with any legal process, including a custodial arrest.[168] Judge Posner admitted that this interpretation makes the "custodial arrest" clause of the ordinance redundant, but he attributed this to poor draftsmanship.[169]

In reaching this opinion, Judge Posner pointed to Supreme Court precedent decisions regarding avoidance of statutory interpretations that raise serious constitutional issues.[170] In the words of Justice Holmes, "the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."[171]

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[164] *Id*.
[165] *Id*.
[166] *Id*. at 548.
[167] *Id*.
[168] *Id*.
[169] *Id*.
[170] Blodgett v. Holden, 275 U.S. 142 (1927) (Holmes, J., concurring); Crowell v. Benson, 285 U.S. 22 (1932); Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936) (Brandeis, J., concurring); Rust v. Sullivan, 500 U.S. 173 (1991).
[171] *Blodgett*, 275 U.S. at 148 (Holmes, J., concurring).

Judge Posner argued that the fee was not a booking fee for individuals who were arrested, but instead was a governmental service fee for the benefit bestowed upon an individual who used the bail or bond system to avoid spending time in jail.[172] Judge Posner noted that it was too late to save the ordinance by invoking the doctrine of constitutional avoidance since Woodridge had already repealed it.[173]

Judge Posner also admitted that using this interpretation may raise serious questions concerning the conduct of the Woodridge police if they were indeed charging the $30 fee to individuals who were arrested and did not post bail or bond, and that such individuals may have state or federal remedies available.[174] However, Judge Posner pointed out that Mr. Markadonatos posted bond and was released, and therefore, he was not a victim of Woodridge's policy outside of the ordinance.[175] Additionally, Mr. Markadonatos only challenged the ordinance and not the policy that existed apart from it.[176]

Since Judge Posner's interpretation rendered the ordinance constitutional, it left no basis for Mr. Markadonatos' claim.[177] Judge Posner admitted the Seventh Circuit had no authority to give a state statute or local ordinance a definitive interpretation, but it remained the court's duty to foresee as best they could the interpretation that the state courts would adopt.[178]

Thus, Judge Posner opined that the case was properly dismissed on the pleadings, because the ground for the dismissal was the answer to a question of law.[179]

[172] *Markadonatos IV*, 760 F.3d at 547.
[173] *Id*. at 550.
[174] *Id*. at 551.
[175] *Id*.
[176] *Id*.
[177] *Id*. at 551-52.
[178] *Id*. at 552.
[179] *Id*.

2. Judge Easterbrook's Concurring Opinion

Judge Easterbrook, joined by Judge Tinder, concurred in the judgment to affirm the judgment of the district court.[180] Judge Easterbrook agreed with Judge Sykes that Mr. Markadonatos lacked standing to contest the application of the ordinance to persons arrested without probable cause.[181] However, Judge Easterbrook declined to join Judge Sykes' opinion, which voted to dismiss the entire suit for want of justiciable controversy, because Mr. Markadonatos had standing to contest the ordinance's application to a person arrested with probable cause.[182]

First, Judge Easterbrook acknowledged that if forced to make an independent assessment of the ordinance's meaning, he would agree with Judge Posner.[183] However, Judge Easterbrook pointed out that only a state court can give an authoritative limiting construction to a local ordinance, and the Seventh Circuit's task is to resolve the dispute brought before them.[184] Since both parties agree that the ordinance imposed a fee on all arrests, the only justiciable subject is whether the Constitution allows the ordinance's application to someone arrested with probable cause.[185]

Next, Judge Easterbrook noted that probable cause justifies substantial burdens.[186] Thus, a $30 fee is not constitutionally excessive

[180] *Id*.

[181] *Id*. at 553. (citing New York v. Ferber, 458 U.S. 747, 767 (1982) ("[A] person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivable be applied unconstitutionally to others in situations not before the Court.")).

[182] *Id*.

[183] *Id*.

[184] *Id*.

[185] *Id*.

[186] *Id*. (citing Atwater v. Lago Vista, 532 U.S. 318 (2001) (Someone arrested with probable cause can be taken to the stationhouse, booked, and held pending bail, even if the offense is punishable only by fine); Riverside v. McLaughlin, 500 U.S. 44 (1991) (A person arrested with probable cause can be held as long as 48 hours before seeing a magistrate); Costello v. United States, 350 U.S. 359 (1956) (Probable cause reflected in a grand jury's indictment justifies holding a defendant in custody pending trial); Kaley v. United States, 134 S. Ct. 1090 (2014) (Probable cause can

in light of deprivations of liberty allowable under arrests with probable cause.[187] Although the Due Process Clause applies to both liberty and property, when there is a distinction, property receives less protection.[188]

Judge Easterbrook failed to recognize any procedural due process claim, noting that Mr. Markadonatos may have been entitled to a hearing (or other informal process) adequate to separate persons arrested with probable cause from persons arrested without.[189] However, since Mr. Markadonatos maintained that the ordinance imposes a fee on every arrest, making probable cause irrelevant, and Mr. Markadonatos concedes his arrest, there is nothing to hold a hearing about.[190] Thus, Judge Easterbrook opined that Mr. Markadonatos' argument is correctly identified as a substantive due process issue.[191]

Judge Easterbrook went on to note that Mr. Markadonatos does not have a fundamental right in his $30.[192] Judge Easterbrook states that *Washington v. Glucksberg*[193] separates the domains of equal protection and substantive due process.[194] Since Mr. Markadonatos does not have a fundamental right in his $30, the equal protection question in this matter is whether it is possible to imagine a rational basis for the ordinance.[195] Judge Easterbrook notes that arrestees may

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justify the seizure of the suspect's assets pending forfeiture, thus making it impossible for the suspect to hire his preferred lawyer and might lead to a conviction, when a better defense could have produced an acquittal)).

[187] *Id*. at 553-54.

[188] *Id*. at 554. (Criminal trials require a burden of "beyond a reasonable doubt," whereas civil trials require only a "preponderance of the evidence," and defendants are entitled to counsel at public expense in a criminal trial if they cannot afford a lawyer, whereas a defendant in a civil trial must represent themselves.)

[189] *Id*.

[190] *Id*.

[191] *Id*.

[192] *Id*.

[193] Washington v. Glucksberg, 521 U.S. 702 (1997).

[194] *Markadonatos IV*, 760 F.3d at 555.

[195] *Id*. at 554.

be released without charge, released on bail, or incarcerated, but any of those options would similarly cost Woodridge at least $30 in terms of paperwork and compensation for police officers.[196] Judge Easterbrook states that requiring individuals to reimburse others for the costs they impose is rational.[197]

Judge Easterbrook concluded that Mr. Markadonatos had standing to challenge the collection of a fee from a person arrested with probable cause, but that his argument failed on the merits.[198] Therefore, Judge Easterbrook concurred in the judgment to affirm the judgment of the district court.[199]

3. Judge Sykes' Dissenting Opinion

Judge Sykes summarized the different opinions of the en banc court by noting that they could not agree on what questions this case raised, whether Mr. Markadonatos was the right person to raise them, whether they had been properly preserved, or what doctrinal framework applied.[200] Judge Sykes maintained that Mr. Markadonatos lacked standing on the key substantive aspect of his due process claim, that it is irrational to impose the fee on individuals wrongly arrested, since Mr. Markadonatos was not wrongly arrested.[201] Additionally,

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[196] *Id*. at 555.

[197] *Id*. Judge Easterbrook notes that when a person is arrested with probable cause their own misconduct is the cause of the costs incurred by Woodridge. However, this conclusion is wholly untrue and unsupported. Take for example an individual who is arrested for matching the description of a known burglar, however soon after his arrest the actual burglar is caught and the originally arrestee is released. Such an arrest would still fall under probable cause. But what misconduct has the arrestee done to cause the costs incurred in his arrest? Is it now misconduct simply to look too much like someone else? Judge Easterbrook fails to answer, or even acknowledge these questions.

[198] *Id*.

[199] *Id*.

[200] *Id*. at 556.

[201] *Id*.

Judge Sykes now believed that Mr. Markadonatos lacked standing on the procedural due process claim as well.[202]

Judge Sykes stated that Mr. Markadonatos conflated the procedural and substantive aspects of his due process claim in his initial brief on appeal.[203] Mr. Markadonatos argued the fee was procedurally unconstitutional because it was collected without a pre-deprivation hearing to test the validity of the arrest or a post-deprivation process by which individuals wrongfully arrested, never charged, or found not guilty could obtain a refund.[204] Judge Sykes opined that the way Mr. Markadonatos framed his procedural claim required a prior conclusion about the substance of the ordinance.[205] Judge Sykes explained that because the ordinance did not make the fee contingent on a valid arrest or successful prosecution, in order to resolve the argument about inadequate procedural process the court had to first conclude that the booking fee was substantively unconstitutional as applied to people who are wrongfully arrested, never charged, or found not guilty.[206] However, Mr. Markadonatos isn't in any of those groups, as he was arrested with probable cause, was charged with retail theft, and pleaded guilty as charged.[207]

Judge Sykes noted that Mr. Markadonatos' arguments had evolved during the course of the appeal, but essentially he maintained three possible reasons why the booking fee ordinance should be found unconstitutional: first, the fee was collected without a pre-deprivation hearing or post-deprivation process to obtain a refund; second, the fee was arbitrary and irrational as applied to individuals unlawfully arrested; and third, the fee was arbitrary and irrational as applied to individuals who were never charged or were found not guilty.[208] The

[202] *Id*.
[203] *Id*. at 557.
[204] *Id*.
[205] *Id*.
[206] *Id*.
[207] *Id*.
[208] *Id*. at 559.

first argument is about procedure, and the other two arguments address the substantive terms of the ordinance.[209]

Judge Sykes opined since Mr. Markadonatos conceded probable cause to arrest and admitted his guilt in court, he lacks standing to bring the substantive due process claim as it pressed an argument that the fee was irrational as applied to innocent or wrongfully arrested individuals.[210]

Additionally, Judge Sykes summarized Mr. Markadonatos' procedural claim as arguing that because the fee was not rational as applied to those who are wrongfully arrested, never charged, or found not guilty, a hearing is needed to prevent erroneous application to individuals in those groups.[211] Judge Sykes opined that since Mr. Markadonatos was not a member of any of these groups, he had failed to prove the second element of standing because he had not suffered a harm that was fairly traceable to the alleged deprivation of procedure about which he complained.[212]

Judge Sykes disagreed with Judge Easterbrook's opinion that Mr. Markadonatos had standing to contest the ordinance's application to a person arrested with probable cause under substantive due process because Mr. Markadonatos had never argued that the booking fee was arbitrary and irrational in all circumstances, but instead, he had only argued that the fee could not be rationally applied to persons wrongfully arrested or innocent.[213]

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[209] *Id*.

[210] *Id*.

[211] *Id*. Assuming this is an accurate summarization of Mr. Markadonatos' procedural due process argument, Judge Sykes opinion had some merit to the extent that Mr. Markadonatos' counsel poorly constructed the procedural argument and caused it to become unnecessarily entangled with the substantive argument. The proper issue under a procedural argument does not depend on whether the fee is rational. A perfectly rational fee could still violate procedural due process if the procedures in place in obtaining the fee failed the *Eldridge* test. Of course, since each opinion presented by the Seventh Circuit in this matter interprets Mr. Markadonatos' argument differently it is hard to rely on any one interpretation or summarization of his argument.

[212] *Id*.

[213] *Id*. at 562.

Judge Sykes turned next to Judge Hamilton's analysis on standing.[214] Judge Hamilton argued that Mr. Markadonatos, and everyone else who paid the booking fee, may challenge it simply by virtue of having paid it and that the arrestee's personal circumstances do not matter.[215] Judge Sykes admitted that Judge Hamilton's analysis would be true for a facial constitutional challenge.[216] However, Judge Sykes failed to recognize Mr. Markadonatos' facial challenge to the ordinance under procedural due process, and instead believed both dimensions of Mr. Markadonatos' due process claim rest on the substantive premise that the fee is irrational as applied to individuals wrongfully arrested or innocent.[217]

Judge Sykes voted to vacate and remand with instructions to dismiss the case for lack of jurisdiction because Mr. Markadonatos lacked standing to bring the claims actually raised.[218]

4. Judge Hamilton's Dissenting Opinion

Judge Hamilton pointed out that his opinion shares common ground with Judge Posner's in that both agreed, and thus a majority of the court agreed, that Mr. Markadonatos had standing to challenge the booking fee.[219] Their disagreement lied in Judge Posner's decision not to decide the case presented.[220] Judge Hamilton states that Mr. Markadonatos alleged in his complaint that his rights were violated by Woodridge's actual policy, whether or not that policy complied with the ordinance.[221] Further, there was no dispute between the parties that Woodridge imposed the booking fee on everyone arrested, and that the

[214] *Id*.
[215] *Id*.
[216] *Id*. (citing Ezell v. City of Chicago, 651 F. 3d 684 (7th Cir. 2011).
[217] *Id*.
[218] *Id*.
[219] *Id*. at 563.
[220] *Id*.
[221] *Id*. This is in direct conflict with Judge Posner's argument that Mr. Markadonatos challenged only the ordinance and not the policy.

fee was not related to the bail process.[222] Judge Hamilton pointed out that Judge Posner had transformed an unconstitutional fee for going into jail into an administrative fee for getting out of jail.[223] Judge Hamilton opined that the court should decide the case the parties actually presented.[224]

Judge Hamilton noted that Judge Posner's transformation of the case ignores the most basic constraint in deciding a motion to dismiss for failure to state a claim, to treat as true the factual allegations in the plaintiff's complaint.[225] Mr. Markadonatos' complaint alleged a policy and practice of imposing the fee based solely on the fact of arrest in violation of the Constitution.[226] Judge Hamilton pointed to the direct language of Mr. Markadonatos' complaint,[227] Mr. Markadonatos' counsel's oral argument stating the money paid for release on bond was different from the booking fee, and a receipt[228] attached to the complaint as facts showing that the fee imposed was for arrest and not for release on bail.[229] Additionally, Woodridge never disputed that the booking fee was triggered by arrest.[230] Judge Hamilton opined that Mr. Markadonatos alleged a set of facts that present a viable claim for damages for violation of his federal constitutional rights by reason of municipal policy and that the viability of the claim does not depend on

[222] *Id*.

[223] *Id*.

[224] *Id*.

[225] *Id*. at564.

[226] *Id*.

[227] "The booking fee *policy* is procedurally and substantively unconstitutional." *Id*. (quoting Plaintiff's First Amended Complaint ¶ 1) (emphasis added).

[228] "You are hereby notified that under Village Ordinance #5-1-12, an administrative fee of $30.00 is required upon completion of any custodial arrest/booking procedure. The Complainant named above by its Police Officer, on oath states that you were arrested on: [date of arrest, name, date of birth, and address]." *Id*. (quoting the text of the receipt).

[229] *Id*.

[230] *Id*. at 565.

whether the court can interpret the ordinance better than Woodridge administered it.[231]

Judge Hamilton further noted that constitutional avoidance was incorrectly applied by Judge Posner because Mr. Markadonatos was not seeking injunctive or declaratory relief about how Woodridge should administer the ordinance going forward, but he was seeking damages for an unconstitutional policy practiced in the past.[232] Further, Judge Hamilton noted that Judge Posner failed to cite any cases using the doctrine of constitutional avoidance in this context, and properly understood, constitutional avoidance is a mechanism for saving legislation for the future, not a device for wishing away past violations of constitutional rights.[233]

Judge Hamilton looked next at the merits of Woodridge's policy.[234] Judge Hamilton noted the deprivations occurred at the time of arrest.[235] The ordinance allowed no room for dispute or review.[236] The deprivation occurred based on only the say-so, and perhaps even the whim, of one arresting officer regardless of whether the arrestee was ever prosecuted or convicted, and regardless of whether the arrest was lawful.[237]

Judge Hamilton opined that the due process violation in this case was more fundamental than even procedural or substantive.[238] The booking fee denies due process because it imposes a permanent deprivation of property based on the unreviewable decision of one police office.[239] Even parking tickets are subject to administrative and judicial review.[240] However, Woodridge's booking fee provided neither

[231] *Id*.
[232] *Id*. at 566.
[233] *Id*.
[234] *Id*. at 567.
[235] *Id*.
[236] *Id*.
[237] *Id*.
[238] *Id*.
[239] Id.
[240] Id.

process nor law in any recognizable form.[241] Judge Hamilton compared the booking fee to a fee a police officer might charge merely for subjecting an individual to a traffic stop, a breathalyzer test, or a *Terry* stop and frisk.[242] All of these types of fees would be unacceptable because they impose the will of the government on the people arbitrarily.[243] Supreme Court due process jurisprudence has long reflected that the Due Process Clause was "intended to secure the individual from the arbitrary exercise of the powers of government."[244] A fee based on the unreviewable say-so of one police officer is an arbitrary deprivation of property.[245] Judge Hamilton opined that if the theory is that the arrestee has done something criminal to justify the arrest, and therefore the fee, then that question must be answered through the due process provided by the criminal justice system.[246]

Finally, in regards to standing, Judge Hamilton points out that Judge Sykes' opinion confuses the merits of the plaintiff's claim with his standing to bring it.[247] Standing is an inquiry separate from the merits and is not a difficult hurdle to clear.[248] All that must be alleged is an injury, personal to the person seeking judicial relief, which the court can redress.[249] In the present matter, Mr. Markadonatos suffered an injury when Woodridge took his $30.[250] Mr. Markadonatos alleged the money was taken pursuant to Woodridge's unconstitutional policy of collecting the money from all arrestees.[251] And a court could redress Mr. Markadonatos' injury by finding the policy unconstitutional and

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[241] *Id*.

[242] *Id*.

[243] *Id*. at 568.

[244] *Id*. (quoting Daniels v. Williams, 474 U.S. 327, 331-32 (1986)).

[245] *Id*.

[246] *Id*.

[247] *Id*. at 569.

[248] *Id*.

[249] *Id*. (citing United States v. Funds in the Amount of $574,840, 719 F.3d 648 (7th Cir. 2013)).

[250] Id.

[251] Id.

awarding damages.[252] This is all that is needed to require standing.[253] Standing does not depend on whether Mr. Markadonatos will ultimately prevail on the constitutional claim nor does it depend on whether Woodridge could have justified the fee under a different policy or ordinance that has not been alleged by Mr. Markadonatos or supported by the pleadings.[254]

Judge Hamilton opined that Judge Sykes, like Judge Posner, attempted to resolve the case by hypothesizing a different municipal practice or ordinance than the one alleged.[255] Judge Hamilton summarized Judge Sykes reasoning as believing that since Woodridge could have charged the fee upon conviction Mr. Markadonatos lost standing to challenge Woodridge's actual policy of charging all arrestees at the time of arrest the moment he entered a guilty plea.[256] Judge Sykes' attempt to rewrite Woodridge's policy using standing is no more appropriate than rewriting the policy using constitutional avoidance.[257] Under Woodridge's policy, the due process violation occurred at the moment the arrestee was brought to jail and paid the fee for no other reason than his or her arrest.[258] At that moment, Mr. Markadonatos, or any other arrestee, had a ripe due process claim.[259] Anything that happened after that moment is irrelevant to the constitutional question.[260]

[252] *Id*.
[253] *Id*.
[254] *Id*. at 570.
[255] *Id*.
[256] *Id*.
[257] *Id*.
[258] *Id*.
[259] *Id*.
[260] *Id*.

III. THE COURT SHOULD HAVE ADOPTED JUDGE HAMILTON'S ANALYSIS

A. Procedural or Substantive Issue

A substantial amount of discussion in this case revolved around the issue of whether Mr. Markadonatos' claim is properly categorized as a procedural due process claim or a substantive due process claim. Woodridge attempted to use this to their advantage by adopting a strategy of divide-and-conquer.[261] If the claim was limited to a procedural due process theory, Woodridge defended its lack of procedural process on the theory that there was no serious chance of erroneous deprivation.[262] If the claim was limited to a substantive due process theory, Woodridge argued that Mr. Markadonatos had no fundamental right in such a modest amount of money.[263]

In Judge Hamilton's dissent to the en banc opinion, he argued that since the policy surrounding the booking fee lacked any procedure whatsoever, other than the unreviewable say-so of one police officer, that the policy raised a due process issue that was more fundamental then either procedural or substantive due process.[264] At its heart, the Due Process Clause is intended to secure individuals from the arbitrary exercise of the powers of government.[265] If such a fundamental due process violation can potentially slip through the cracks of procedural and substantive due process then perhaps some new test is needed. However, what seems more likely is that the procedural due process analysis was misapplied by the district court, that Mr. Markadonatos caused his claim to become unnecessarily confusing by adding the substantive due process claim, and that the proper analysis under the procedural claim was the one championed by Judge Hamilton in his dissent to the panel opinion.

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[261] *Id*. at 567.
[262] *Id*.
[263] *Id*.
[264] *Id*.
[265] Daniels v. Williams, 474 U.S. 327, 331-32 (1986).

Judge Hamilton's dissent to the panel opinion argued that since the booking fee was charged without any procedure whatsoever, it raised a procedural due process issue by its very nature and that the substantive due process issue was nothing more than a detour to distract from the procedural issue.

B. "No Procedure" is Not "Adequate Procedure" Under the Due Process Clause

As the Supreme Court noted in *Eldridge*, the purpose of the procedural due process test is to determine if administrative procedures are constitutionally sufficient.[266] The lack of any administrative procedure in the face of the deprivation of property surely cannot be considered constitutionally sufficient or adequate.

In *Roehl v. City of Naperville*,[267] a similar ordinance in Naperville, requiring a $50 booking fee, was examined.[268] The Naperville ordinance did not establish any pre or post-deprivation procedures.[269] The plaintiff, Mr. Roehl, was arrested and charged for driving under the influence of alcohol, was charged the booking fee, and later, was found not guilty and released from jail.[270] Mr. Roehl filed a complaint alleging the ordinance violated his procedural due process rights and Naperville filed a motion to dismiss.[271]

In applying the first factor of the *Eldridge* test, the court noted that Mr. Roehl's property interest in $50 was minimal for substantially similar reasons to those alluded to in *Markadonatos I*.[272]

[266] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
[267] Roehl v. City of Naperville, 857 F. Supp. 2d 707 (2012).
[268] *Id*. at 709.
[269] *Id*.
[270] *Id*.
[271] *Id*.
[272] *Id*. at 713.

The court then moved to the third *Eldridge* factor, the governmental interest, noting that the analysis of the government's interest would inform the discussion on the second *Eldridge* factor, the risk of erroneous deprivation.[273]

The *Roehl*, court realized that the governmental interest varies based on the arrestee.[274] On one end of the spectrum the government has a strong interest in recovering costs from individuals ultimately found guilty, because the governmental costs are incurred due to their illegal conduct.[275] However, on the other end of the spectrum the government has a weak interest, and possibly no interest, in charging booking fees to arrestees who are arrested on invalid warrants (warrants that had been quashed but not yet removed from the system), individuals wrongly arrested because they were incorrectly identified as a person sought on a valid warrant, and individuals ultimately dismissed because there was an absence of probable cause for the arrest.[276]

Finally, the *Roehl* court looked at the second *Eldridge* factor, the risk of erroneous deprivation and probable value of substitute procedural safeguards.[277] The court admitted that since the fee was charged to all arrestees the likelihood of erroneous deprivation to a non-arrestee is virtually zero.[278] However, since the ordinance provided no procedural safeguards to permit arrestees to challenge the fee, there is a one hundred percent chance that someone who should not have been arrested but was will be erroneously deprived.[279] The court then determined the probable value of substitute procedural safeguards.[280] The court noted that it was the presence or absence of

[273] *Id*.
[274] *Id*. at 714.
[275] *Id*.
[276] *Id*.
[277] *Id*. at 715.
[278] *Id*. at 716.
[279] *Id*.
[280] *Id*.

additional safeguards that is important to the *Eldridge* analysis.[281] The court pointed to numerous cases that held that additional safeguards were not needed when adequate procedures were already in place.[282] The court could not hold, as a matter of law, that Naperville's ordinance satisfied procedural due process since it failed to provide any procedural mechanism whatsoever.[283]

This is the correct analysis under the *Eldridge* test. As noted in *Roehl*, there are numerous situations where an individual could be arrested when they should not be.[284] This includes situations where an individual is arrested with probable cause but due to no fault of their own.[285]

The holding by the district court in *Markadonatos I* implied that since the fee was charged to all arrestees regardless of probable cause or eventual guilt, the action of charging the fee to an individual who was wrongfully arrested or innocent of any crime would not be erroneous deprivation.[286] However, that line of reasoning is incorrect because it fails to recognize that Woodridge's interest could not apply to all arrestees equally. This is what Judge Hamilton meant when he opined that Woodridge's interest could only be in charging the booking

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[281] *Id*.

[282] *Id*. at 716-17. (citing Mathews v. Eldridge, 424 U.S. 319, 339-40 (1976) (No additional or substitute procedural safeguards were necessary when the plaintiff had access to detailed post-deprivation administrative procedures which would provide full retroactive relief); Payton v. Cnty of Carroll, 473 F.3d 845, 851-52 (7th Cir. 2007) (Extra procedural safeguards not necessary when bail system contained a number of safeguards for people who could not afford the fee at issue); Slade v. Hampton Rds. Reg'l Jail, 407 F.3d 243, 253-54 (4th Cir. 2005) (No additional procedural due process safeguards necessary for pre-trial detainees who had access to grievance procedures within the jail to contest the fees at issue); Sickles v. Campbell Cnty, 501 F.3d 726, 730-31 (6th Cir. 2007) (Extra procedural safeguards were not necessary for the plaintiff-detainees, where they had notice of and access to internal grievance and post-deprivation administrative procedures)).

[283] *Id*. at 717.

[284] *Id.* at 714.

[285] *Id*.

[286] Markadonatos v. Vill. of Woodridge (*Markadonatos I*), No. 11 C 7006, 2012 U.S. Dist. LEXIS 3115, at *8 (N.D. Ill. Jan. 6, 2012).

fee to individuals convicted of a crime or else its interest would evaporate.[287] Since Woodridge cannot have any governmental interest in charging booking fees to individuals that it wrongfully arrested, any depravation from such individuals would be erroneous. Thus, just as Naperville's ordinance could not be held to satisfy procedural due process because it failed to provide any procedural mechanism whatsoever, Woodridge's policy which similarly fails to provide any procedural mechanism whatsoever should not have been held to satisfy procedural due process.

This is where Judge Sykes attempted to argue that Mr. Markadonatos lacked standing because he was not an individual who was wrongfully arrested or innocent.[288] However, having removed the unnecessary substantive due process claim, this procedural claim is now clearly a facial constitutional challenge and individual application facts do not matter.[289]

CONCLUSION

No Supreme Court opinion has ever held that government deprivation of a private interest in the absence of any pre or post-deprivation procedures, or other safeguards, is acceptable procedural due process. Woodridge's ordinance and corresponding policy failed to provide any procedural mechanism whatsoever, and thus, the Seventh Circuit should have held that there was an adequate claim against Woodridge for violating Mr. Markadonatos' procedural due process rights.

[287] Markadonatos v. Vill. of Woodridge (*Markadonatos III*), 739 F.3d 984, 995 (7th Cir. 2014).

[288] Markadonatos v. Vill. of Woodridge (*Markadonatos IV*), 760 F.3d 545, 562 (7th Cir. 2014).

[289] *Id*.

