Pepperdine Law Review

Volume 5 | Issue 2 Article 9

1-15-1978

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Recommended Citation

Scott H. Racine and Stephen J. Spinello *From Goss To Bishop: The Demise of the Entitlement Doctrine*, 5 Pepp. L. Rev. 2 (1978)
Available at: http://digitalcommons.pepperdine.edu/plr/vol5/iss2/9

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From *Goss* To *Bishop*: The Demise of the Entitlement Doctrine

INTRODUCTION

This comment reviews the recent procedural due process cases[1] decided by the United States Supreme Court. The purpose of this comment is to develop a paradigm, consistent with the entire body of due process case law, which will assist attorneys attempting to determine whether a particular right or benefit is protected by the due process clause of either the fifth or fourteenth amendment.[2]

The Court has explicitly recognized that constitutionally protected property interests are not contained in any narrowly defined class.[3] It is apparent that those interests in liberty which are similarly entitled to due process protection are not any more susceptible to a precise definition.[4] It is not surprising therefore, that the vague and dynamic parameters of protected interests do not lend themselves to a single comprehensive approach. Accordingly, the analysis of recent due process cases resulted in the development of three separate models which are herein proposed.

The scope of this article is limited to the question of whether a particular right or benefit is afforded protection by the due process clause.[5] The discussion does not extend to the issue of

1. Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976).

2. "No person shall be deprived of life, liberty, or property without due process of law . . ." U.S. CONST. amends. XIV, § 1, V.

3. Perry v. Sindermann, 408 U.S. 593, 601 (1972) "We have made clear . . . that 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms."

4. Board of Regents v. Roth, 408 U.S. 564, 572 n.11 (1972).

5. This discussion will address the development of Court recognition of state created rights as protected entitlements, the subsequent license afforded states to so define such interests as to limit the protection to which they are entitled, or to preclude their attainment of a protected status, and the method for determining when and if a state created interest is protected by procedural due process requirements. The discussion will then address the concurrent development of two additional theories upon which may be premised a claim that an interest is entitled to procedural due process protection. One theory

whether there is sufficient state action to invoke the due process clause; nor does it address the question of what level of protection is required once it is determined that an interest is protected.[6] Furthermore, although the due process clause applies equally to deprivations of life, liberty, or property,[7] cases involving deprivation of life are so unique as to require a separate review of the issues attendant to the less severe taking of liberty and property. Thus, deprivation of life is not addressed in this comment.

It is clearly established that "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money."[8] Similarly, constitutionally protected liberty interests are not limited to the "formal constraints imposed by criminal process."[9] It is with these expanded concepts of property and liberty that this comment is concerned, not with the more precisely defined and traditional interests which pose little problem in their identification.[10]

STATE CREATION OF RIGHTS

The Development of State Created Property Rights

In two companion cases, *Board of Regents v. Roth*[11] and *Per-*

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recognizes that two interests may cumulatively comprise a sufficient expectation to justify due process protection even though each interest alone would not be entitled to such protection. The other theory, which rests heavily upon equitable considerations, allows the provision of due process protection when no practical alternative protection exists and the result, absent due process protection, reflects a basic lack of fairness. The discussion of these additional theories also includes a method for determining when such interests suffice to achieve a protected status thereby invoking the constitutional protections of procedural due process.

6. For additional comment *see* Friendly, *Some Kind of Hearing*, 123 U. PENN. L. REV. 1267 (1975).

7. U.S. CONST. amend. XIV.

8. 408 U.S. at 571-572.

9. *Id.* at 572.

10. *See* Arnett v. Kennedy, 416 U.S. 134, 207 n.2 (1974), "Society today is built around entitlement [and m]any of the most important of these entitlements now flow from government . . . . Such sources of security . . . are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity." Quoting from Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965). Some interests are obviously protected. Fee simple ownership in realty acquired through a legal conveyance, freedom from physical incarceration, and similar interests will certainly require procedural due process prior to any state deprivation of such interests. In such cases the inquiry is normally concerned with the existence of state action and the level of due process required, the sufficiency of the interest to invoke such protection being tacitly presumed.

11. 408 U.S. 564 (1972). Roth was a non-tenured state university teacher hired for a one-year probationary period, after which he was dismissed without prior notice or opportunity for a hearing. The Court held that unless Roth could

ry v. Sindermann[12], the Court announced a broad standard to be employed in determining whether a claim to a particular benefit is sufficient to create a protected property interest. Expanding the concept of property interests to include more than full ownership, the Court explained:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[13]

This broad standard opens procedural due process to a plethora of benefits which do not fit traditional concepts of property interests. In *Roth*, the Court found governmental employment not to be a protected property interest as there was no "state statute . . . that secured [the employee's] interest in re-employment or that created any legitimate claim to it."[14] In a reference to *Goldberg v. Kelly*[15], the Court elaborated on the declaration that such claims of entitlement may be attributable to state law[16], explaining:

> Thus, the welfare recipients in *Goldberg v. Kelly, supra*, had a claim

establish a vested "property" interest in continued employment, or an implicated liberty interest in his reputation, procedural safeguards would not be required.

12. 408 U.S. 593 (1972). Sindermann was also a non-tenured teacher but had previously taught in the state system for ten years. The Court held that de facto tenure existed which created a property right in his continued employment and thus he was entitled to procedural safeguards upon his dismissal.

13. 408 U.S. at 577.

14. *Id.* at 578.

15. 397 U.S. 254 (1970). The Court held that persons receiving welfare benefits had an interest in continued receipt of those benefits, and such interest was entitled to due process protection.

16. Perhaps the divergent results reach in *Roth* and *Goldberg* may be partially ascribed to a fundamental distinction between welfare and employment. In regard to welfare, most individuals who are qualified to receive such payments do, in fact, receive them. In contrast, governmental employment is not available for all, or even most of those who may be qualified. The refusal to provide due process protection to employment interests may therefore result, at worst, in providing that same position to another who is equally qualified to hold it. Deprival of such an interest results in no greater number of people without the benefit, but only a shifting of scarce interests among different members of society. Although this is of little solace to the individual who is discharged, the commensurate benefit to some other equally deserving individual tends to ameliorate any aspect of inequity inhering to the deprival of due process protection.

> of entitlement to welfare payments that was grounded in the statute defining eligibility for them . . . . Just as the welfare recipients "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment . . . was created and defined by the terms of his appointment.[17]

The Court found great significance in the fact that the state had made no provision for renewal of Roth's employment contract. The opinion impliedly indicated that such provision might have to be conditioned on an absence of "sufficient cause"[18] not to renew. This is not to say, however, that all state created entitlements need be explicitly supportive of a legitimate expectation, as the decision in *Perry v. Sindermann* found an implied promise by the state that the employee had a valid expectation of continued employment.[19]

The propensity of the broad standard established in *Roth* and *Sindermann* to application in a wide variety of situations was quickly evidenced in subsequent decisions. In *Bell v. Burson*[20] the Court held that there is an entitlement to a driver's license which was granted by state law and, therefore, the state must afford due process of law before a deprivation can be effected. Similarly, in *Goss v. Lopez*[21] the Court found that Ohio law created a right to attend school and an act of suspension involved a denial of that right sufficient to invoke due process protection.[22]

Thus, the state, which must afford due process, has the broad capability of creating those very interests which are protected,[23] this power existing in a wide variety of contexts including contractual,[24] statutory,[25] and regulatory.[26]

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17. 408 U.S. at 577.

18. *Id.* at 578. It would appear that even at this early date the court envisioned a need for some affirmative guarantee by the state before a protected interest would be created.

19. 408 U.S. 593. The implication arose from the state's de facto tenure program which supported the employee's expectation of continued employment.

20. 402 U.S. 535 (1971). Bell held a valid Georgia driver's license and was involved in an automobile accident. The law required an immediate suspension of his license because he had no liability insurance but did not provide for any procedural due process.

21. 419 U.S. 565 (1975).

22. *Id.* at 574-75.

23. It is often said, in a variety of situations, that the power to create is the power to destroy. The applicability of such a statement to the due process issue is discussed later.

24. 408 U.S. 593; *see also* Arnett v. Kennedy, 416 U.S. 134 (1974), and Codd v. Velger, 429 U.S. 624, 631 (1977) (Stevens dissenting). An employee has a claim of entitlement or a property interest if by virtue of a contract, or an applicable regulation or a statute, he could only be dismissed for cause.

25. Bell v. Burson, 402 U.S. 535 (1971).

26. Goss v. Lopez, 419 U.S. 565 (1975).

The Development of State Created Liberty Rights

The expansion of protected interests beyond traditional concepts into various areas of state created entitlements was not restrained to property, but grew in a parallel fashion in the area of liberty interests also entitled to due process protection. In *Wolff v. McDonnell*[27] the Court found a constitutionally protected liberty interest in statutorily created "good time credit" to convicts.[28] This recognition of a liberty interest within the meaning of the due process clause was expressly noted to be analogous to the method of determining a protected property interest.[29] Also commensurate with the holdings in *Roth*,[30] the Court implied a need for some affirmative guarantee of this entitlement by placing significance on the fact that the interest here could only be forfeited by serious misconduct.[31]

In *Morrissey v. Brewer*[32] the Court's identification of a protected liberty interest evinced still more similarity to the development of property interests. In determining that a parolee's interest in continued parole was entitled to procedural due process, the Court found a state guarantee that this expectation was legitimate as the state had implicitly promised that revocation of parole was conditioned on a failure to adhere to the requirements of parole.[33]

It would appear therefore, that the opportunity for newly developing rights to ascend to the level of constitutionally protected entitlements is no less applicable to liberty interests than to property interests. Furthermore, although not premised upon any constitutional guarantees, explicit or implicit, "[a] person's liberty is equally protected, even when the liberty itself is a statutory creation of the state."[34]

27. 418 U.S. 539 (1974).
28. *Id.* at 556-57. The Court found that where a state provided a statutory right to good time credit for satisfactory behavior while in prison, and when the statute specified that such credit is to be forfeited only for serious misbehavior, such credit was a protected liberty interest entitled to due process.
29. *Id.* at 557.
30. 408 U.S. 564. *See also* note 18.
31. 418 U.S. at 557.
32. 408 U.S. 471 (1972), where a parolee was returned to prison for parole violation, without a hearing.
33. *Id.* at 482.
34. 418 U.S. at 558.

Refining and Restricting the Theory of State Created Rights: The Power to Create is the Power to Limit

If *Goldberg* and its progeny[35] served to initiate a prolific expansion of the purview of procedural due process protections so as to include any entitlement secured by an "independent source", one might ask what limitations remain. Although there must be a "legitimate claim of entitlement"[36] to a benefit, and more than an "abstract need" for, or "unilateral expectation" of such benefit, such criteria conceivably encompasses a remarkable spectrum of interests suddenly entitled to due process protection.

However, as recent cases illustrate,[37] the concern need not be for any drastic over-extension of the requirement to afford due process, as the power to create a protected entitlement has proven to be a double-edged sword. As one commentator has asked,[38] "What would happen if the state carefully tailored its statute to negate any inference that it was conferring a property right . . . ?"[39]

This question was first reached in *Arnett v. Kennedy*,[40] where the Court construed the Lloyd-Lafollett Act[41] as creating a pro-

35. Perry v. Sindermann, *supra* note 12; Board of Regents v. Roth, *supra* note 11; Bell v. Burson, *supra* note 20; Goss v. Lopez, *supra* note 21; Wolff v. McDonell, *supra* note 27; Morrissey v. Brewer, *supra* note 32.

36. 408 U.S. at 577.

37. Arnett v. Kennedy, 416 U.S. 134 (1974); Paul v. Davis, 424 U.S. 693 (1976); Bishop v. Wood, 426 U.S. 341 (1976).

38. Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89 (1974).

39. Still another consideration was raised by *Friendly, supra*, note 6, at 1276. "It should be realized that procedural requirements entail the expenditure of limited resources, that at some point the benefit to the individuals from an additional safeguard is substantially outweighed by the cost of providing such protection, and that the expense of protecting those likely to be found undeserving will probably come out of the pockets of the deserving." In light of these practical considerations, one might expect the development of a floor, below which a benefit is considered too insignificant an interest to compel due process protections. *Roth* specifically rejects this approach and finds the balancing test an erroneous standard by which to determine whether a property interest existed. *See* 408 U.S. at 571 n. 8. "The Constitutional requirement of opportunity for some kind of hearing before deprivation of a protected interest, of course does not depend on such a narrow balancing process."

40. 416 U.S. 134 (1974). Kennedy, a non-probationary federal employee, was discharged after being notified of certain administrative charges upon which the dismissal was based. In that notice he was advised of his rights under Civil Service regulations to reply to the charges and to review the material upon which the notice was based. Kennedy refused to respond to the charges directly, asserting instead, that the charges were unlawful in the absence of a pre-termination, trial-type hearing.

41. 5 U.S.C. § 7501 (1970).

tected interest by statute.[42] Three Justices, in an opinion by Justice Rehnquist, held that the elaborate statute created a procedural system which did not violate due process despite its comparative insufficiency by constitutional procedural standards.[43] The plurality refused to read any constitutional procedure guarantees into the statute, admitting that Kennedy did have a statutory expectancy, but noting that the very statute which gave him that right "expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution."[44] The inescapable conclusion is that legislatures, while creating a protected right on one hand, can limit procedural protections which accompany the right on the other.[45] The question was not, however, resolved by *Arnett*, as six remaining Justices refused to accept this theory.[46]

42. As the case involved a federal employee and federal statute, the independent source creating a property right was federal and not state law and the relevant constitutional provision was the fifth and not the fourteenth amendment.

43. 5 U.S.C. § 7501(a) provides: "An individual. . . may be removed only for such cause as will promote the efficiency of the service." Subsection (b) sets out the administrative procedures under which a civil servant may challenge his removal as being without cause. Subsection (a) was the basis of the petitioner's claim of a property interest. Although Justice Rehnquist found that the procedures afforded Kennedy were sufficient, Justice Marshall, in his dissent (concurred in by Justices Douglas and Brennan), found them woefully insufficient by the constitutional standards delineated in *Morrissey* and *Goldberg*. Specifically, Justice Marshall attacked the provisions of the Act which left it to the discretion of the hearing officer whether the discharged employee may have the opportunity to cross-examine adverse witnesses and present favorable witnesses on his own behalf; and which did not require the hearing officer to be a disinterested and impartial individual. (Such a disinterested decision-maker was provided but only at a time long after the discharge; *See* 416 U.S. at 217, n. 13).

44. 416 U.S. at 152.

45. *Id.* "[W]e decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement. . . . [T]he property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest." *Id.* at 155. " . . . [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet." *Id.* at 153-54.

46. Justice Powell in his concurring opinion, while viewing the procedures for termination provided by Congress as constitutionally permissible, took exception to the principal expressed by the plurality: "The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of the procedural

The question was clearly answered in *Bishop v. Wood*,[47] where the Court adopted and expanded the holding which was specifically rejected by the majority of Justices in *Arnett*. In *Bishop*, the petitioner challenged the termination of his employment as there was no pre-termination hearing, despite his classification as a permanent employee.[48] The Court, citing local ordinances and state law[49] as construed by state courts, held that Bishop had no right to expect continued employment.[50]

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protections to which he may lay claim. . . . This view misconceives the origin of the right to procedural due process. That right is conferred not by legislative grace, but by constitutional guarantee." *Id.*, at 166-67. It seems that the view of the other six members was, that while a state may define what is and what is not property, once having defined those rights the constitution defines due process (White J. concurring), *Id.* at 185.

47. 426 U.S. 341 (1976). The petitioner, a policeman, was discharged from employment by the City Manager upon the recommendation of the Chief of Police. The petitioner was told privately that his dismissal was due to a failure to obey orders and poor attendance at police training sessions, among other reasons. The petitioner claimed that his status as a permanent employee afforded him a constitutional right to a pretermination hearing as his permanent classification gave him a sufficient expectation of continued employment to constitute a protected property interest under the due process clause of the fourteenth amendment.

48. This would appear to distinguish his position from that of Roth who was non-tenured and more closely align him with Perry who was tenured, albeit implicitly. *See* notes 11 and 12 *supra*. *See also* Buhr v. Buffalo Public School District, 509 F.2d 1196 (8th Cir. 1974). Tenure or non-probationary status may give rise to an entitlement.

49. Two laws were of particular importance to the Court's decision in *Bishop*. The first was a local ordinance which is set out at 426 U.S. at 344, n.5. Under this ordinance a discharged employee is entitled to a written notice setting out reasons for his dismissal and the effective date if he so requests. By its very nature this is essentially an ex post facto notice, coming as it does only after discharge and request. Additionally, at 345, n. 9, the Court notes that under North Carolina law, unless a contract provides otherwise, an employment contract which contains no provisions for duration or termination is terminable at the will of either party, irrespective of the performance of either party. This same ex post facto nature also inheres to the procedures provided in *Fuentes* and *De Chem*, *infra*, note 102 *et seq*.

50. The Court concluded that the ordinance on its face could be fairly read to confer a claim of entitlement. If it had adopted this view, the procedural due process clause would have guaranteed a hearing to determine the cause of his discharge. Instead, the Court adopted without analysis the district court's opinion which concluded that under the local ordinance the petitioner held his position at the "will and pleasure of the city"; reasoning that a judge from the area was better situated to construe a local statute than an appellate court. It is curious that the Court felt bound to accept the district court's interpretation of state law, since the ordinance had never been construed by a state court. This is particularly questionable when viewed in light of the fact that without such a decision, the Court could have justifiably resolved the issue in a different manner. This approach is disturbing for it shows a reluctance by the Court to define and apply constitutional principles. Whether a property interest is created may be a matter of state law (*see Roth, supra*,) but the Court should make the final determination on whether that interest merits constitutional protection.

The Court distinguished *Bishop* from *Arnett*, as in the latter case the statute provided that the employee could only be discharged for cause, thereby giving him a property interest entitled to protection. In *Bishop*, however, the employee had no protected interest since, as a matter of state law, he "held his position at the will and the pleasure of the city."[51] Of particular significance though, is the fact that even had the state law been constructed so as to provide a protected interest, the determination of such an interest would still be predicated on state law and the power of definition would nonetheless reside in state hands.

> 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 Marin.[52]

The Court allowed that a protected interest could derive from ordinance or implied contract but held that in either case "the sufficiency of the claim of entitlement must be decided by reference to state law."[53]

> . . . [A]n enforceable expectation of continued public employment . . . can exist only if the employer, by statute or contract, has actually granted some form of guarantee . . . . Whether such a guarantee has been given can be determined only by an examination of the particular statute or ordinance in question.[54]

The concept, incipient in *Roth* and *Perry*, found clear expression in *Bishop*; a state created benefit does not acquire the attributes of a protected interest absent some form of guarantee. The guarantee required, of course, is that the expectation of continued enjoyment of the benefit is justified; and, the message of *Bishop* is clear that it must be found in the state law which created the benefit. This should come as no surprise for as previously noted, as early as *Roth*[55] and *Wolff*[56] the Court required some state confirmation of such an expectation, whether expressed or implied, in the statute creating the right.

One possible explanation is the evolving deference the Court has shown toward local construction of state laws. *See* Chief Justice Burger's concurring opinion in *Roth* at 593 and his dissent in Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971).

51. 426 U.S. at 345 n.8.
52. *Id.* at 349 n.14.
53. *Id.* at 344.
54. *Id.* at 345.
55. 408 U.S. 564 (1972). *See also* note 18, *supra*.
56. 408 U.S. 593 (1972). *See also* note 19, *supra*.

The rule in *Bishop* found equal application to the determination of liberty rights. In *Meachum v. Fano*[57] the Court held that a prisoner had no protected liberty interest in his desire to avoid transfer to a different prison with greater restraints and less desirable conditions because no such interest had been created by state law.[58] The standard delineated in *Bishop* was clearly applied to an asserted liberty interest in *Meachum* and the result was the same.[59] The determination of a protected interest was premised on an examination of state law in order to reveal the existence of a guarantee; and as none was found, the interest failed to achieve a protected status.[60]

The Determinaton of a State Created Right: Model #1

The first model proposed is based on the aforementioned principles that a property or liberty interest created by state law must include some affirmative guarantee that the interest supports a legitimate claim of entitlement; and that same law may so define the right as to proscribe the provision of any due process in excess of procedures afforded by the creating statute

57. 427 U.S. 215 (1976).

58. *Id.* at 226-27.

59. Although the Court applied the *Bishop* standard to a liberty interest it should be obvious that the analogy is imperfect. The *Bishop* standard will not, or at least should not, lend itself to as wide a range of applications in the area of liberty interests as it does to property interests. Unlike property interests, certain liberty rights are not only fundamental, but are expressly recognized in the Constitution. It is doubtful that the Court would allow a State to engage in any such self-determination of restraints in regards to deprivations of certain types of liberty rights. It would be unjustifiably speculative to anticipate to what extent the Court will apply this standard to expectations of liberty, other than to assert that it will find some application in the right circumstances.

In his dissenting opinion, Justice Stevens found even a limited application to liberty to be inappropriate.

"The Court indicates that a 'liberty interest' may have either of two sources. According to the Court, a liberty interest may 'originate in the Constitution,' ante at 226, or it may have 'its roots in state law.' *Ibid.* Apart from those two possible origins, the Court is unable to find that a person has a constitutionally protected interest in liberty.

"If man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.

"I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations." 427 U.S. at 230.

60. *See also* Lombardo v. Meachum, 548 F.2d 13 (1st Cir. 1977).

itself. Therefore, in order to constitute a constitutionally protected interest the following three questions must, as applied to the interest in question, be answered in the affirmative.

1) Has the interest been created or recognized by state law?

2) Has that law provided some form of assurance that an expectation of continued enjoyment of the particular benefit is justified?

3) Is there an absence of provisions affording specified procedures for termination of the benefit which fall short of procedures afforded by the procedural due process clause?

Problems Attendant to State Created Rights

Although this first model reflects current law as propounded in *Bishop*, it serves to demonstrate a serious deficiency in the existing policy. The basic fallacy of conditioning the availability of due process protection on law is the obvious fact that such protection exists only under such terms as the sovereign deems proper. The very entity sought to be restrained by the constitution is now enabled to determine for itself when and if those restraints will have effect. There is nothing in the Court's reasoning which prevents the sovereign from defining entitlements so as to emasculate the procedural due process clause.[61]

There is, however, a less harsh interpretation of *Bishop*, although the end result is no less debilitating. It is possible that the issue was seen by the Court not as a deprivation of any interest, but rather as a determination of the nature of an interest which is given. By way of analogy, the lessor, in terminating a periodic tenancy, does not deprive the lessee of any vested right, but merely exercises a predetermined, albeit flexible, boundary of the estate originally granted. It is not a taking of something already owned but only appears as such since the process of defining what has been given may continue well past the initial vesting of an interest and not be completed until the interest has expired; not by any externally initiated deprivation, but by virtue of inherent limitations inextricably impressed on that interest at its inception. The confusion is attributable to the fact that

61. For California's approach to this problem *see* Skelly v. State Personnel Bd., 15 Cal. 3d 194, 539 P.2d 774, 124 Cal. Rptr. 14 (1975).

with traditional rights the state normally operates as a third party. However, more recently recognized entitlements find the state as both the grantor and the entity constitutionally restrained in any efforts to deprive some interest. Although this interpretation may be somewhat less repugnant to traditional concepts of due process, it suffers from an uncomfortable similarity to the previous distinction between rights and privileges, a distinction rejected by the Court.[62]

CUMULATIVE VESTING

Two Unprotected Interests May Combine to Equal A Protected Right

Concurrent with the development of the principle that protected entitlements may be created, defined and limited by state law, a second development occurred and the resulting concept may prove to represent an alternative to the harsh limitations of the first model.

It was long held that an interest in reputation or the right to a good name was a protected liberty interest. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[63] Likewise, due process rights would attach where the state has imposed a "stigma or other disability that foreclosed his freedom to take advantage of other employment."[64]

From these statements one might conclude that either harm to reputation or foreclosure of employment is actionable under the

62. *See* Morrissey v. Brewer, 408 U.S. at 481-82; Graham v. Richardson, 403 U.S. 365, 374 (1971); Bell v. Burson, 402 U.S. at 539; Goldberg v. Kelly, 397 U.S. at 262; where the Court had "rejected the wooden distinction between rights and privileges." *See also* Bishop v. Wood (Brennen, J., dissenting) 426 U.S. at 353, n.4: "By holding that States have 'unfettered discretion' in defining 'property' for purposes of the Due Process Clause of the Federal Constitution, . . . the Court is, as my Brother White argues, effectively adopting the analysis rejected by a majority of the Court in Arnett v. Kennedy . . . . More basically, the Court's approach is a resurrection of the discredited rights/privileges distinction, for a State may now avoid all due process safeguards attendant upon the loss of even the necessities of life . . . merely by labeling them as not constituting 'property.'"

Basically, the rights/privileges doctrine was predicated on a distinction between interests founded in the Constitution, whether expressed or implied, which were "rights," and therefore impervious to any state impingement; and interests created by the state, which were "privileges," and therefore subject to impingement by the state without recourse.

63. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

64. 408 U.S. at 573.

due process clause. Indeed, for some time this was considered an accurate representation of the law.[65] However, as previously discussed, neither interest would currently be entitled to protection absent sufficient state law endorsement. It is not surprising then, that in *Paul v. Davis*[66] the Court rejected the contention that "stigma to one's reputation is somehow different in kind from infliction by a state official of harm to other interests protected by state law."[67] In so doing, however, the Court's discussion of earlier cases produced a previously undetected pattern of distinguishing between protected and unprotected interests; a pattern which serves as the foundation for the second model proposed.

In *Paul* the respondent was included on a list of "Active Shoplifters."[68] However, although he had been arrested, the charges had been dropped, so he was never called on to stand trial.

In explaining the basis for holding that this injury did not constitute a deprivation of liberty, the Court turned to several prior decisions. The Court interpreted *United States v. Lovett*[69] as requiring due process protections because the act of deprivation in that case, not only "stigmatized [the employees'] reputation", but also prohibited "their ever holding a government job."[70]

65. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951); Wieman v. Updegraff, 344 U.S. 183 (1952); Cafeteria Workers v. McElroy, 365 U.S. 886 (1961); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Bell v. Burson, 402 U.S. 535 (1971); Morrissey v. Brewer, 408 U.S. 471 (1972); Goss v. Lopez, 419 U.S. 565 (1975); and Board of Regents v. Roth, 408 U.S. 564 (1972).

66. 424 U.S. 693 (1976). Majority opinion by Justice Rehnquist.

67. *Id.* at 701. The clear implication being that the previous understanding that harm to reputation was sufficient to invoke due process protection must now give way to the requirements that any liberty interest, including one related to reputation, must be recognized by state law with requisite guarantees.

68. 424 U.S. at 695. At the top of each page was a mug shot and a statement addressed "To: Business Men in the Metropolitan Area. The Chiefs of Police of the Jefferson County and City of Louisville Police Department in an effort to keep their officers advised on shoplifting activity, have approved the attached alphabetically arranged flyer of subjects known to be active in this criminal field. This flyer is being distributed to you, the business man so that you may inform your security personnel to watch for these subjects. There persons have been arrested during 1971 and 1972 or have been active in various criminal fields in high density areas".

69. 328 U.S. 303 (1946).

70. 424 U.S. at 702.

The *Paul* opinion, in referring to *Joint Antifascist Refugee Committee v. McGrath*, a plurality decision,[71] pointed out:

> . . . [A]t least six of the eight Justices who participated in that case viewed any "stigma" imposed by official action of the Attorney General of the United States, divorced from its effect on the legal status of an organization or a person, such as loss of tax exemption or loss of government employment, as an insufficient basis for invoking the Due Process Clause of the Fifth Amendment.[72]

In discussing *Wieman v. Updegraff*[73], the Court noted a dual concern in that case as it involved both a " 'badge of infamy' which might arise from being branded disloyal by the government" and "[a resulting loss of] teaching positions at a state university."[74]

Paul also cites with emphasis from *Cafeteria Workers v. McElroy*.[75] In that opinion, the Court stated: "Finally it is noted that this is not a case where government action has operated to bestow a badge of disloyalty or infamy, with attendant foreclosure of other employment opportunities."[76]

The majority concludes with an unexpected explanation of this line of cases stating that mere defamation absent accom-

71. The Court never reached the petitioner's due process claim; it held that the Attorney General had exceeded his authority granted by executive order to brand organizations as subversive.

72. 424 U.S. at 704-05. Also, it should be noted that petitioners had alleged violation of their constitutional rights by a federal official and, therefore, had sought to invoke the fifth amendment's due process guarantee. Interestingly, though the court failed to mention it, later cases relying on *Joint Anti-Fascist* (including the lower court in Davis v. Paul, 505 F.2d 1180 (6 Cir. 1974)), have quoted Justice Frankfurter's concurring opinion which in part states: "The right to be heard before being condemned to suffer grievous loss of any kind even though it may not involve the stigma or hardship of criminal conviction is a principal basic to our society . . . ." 341 U.S. at 168. Justice Jackson in his concurrence also made the point that although the Attorney General might have a legal right to brand these people as subversives, this does not mean that he could do it illegally, *i.e.*, without affording them procedural due process. 341 U.S. at 185.

73. 344 U.S. 183 (1952).

74. 424 U.S. at 705. Note that the *Wieman* Court actually decided on other grounds. It is not the decision in *Wieman* which is of real interest here, but rather the *Paul* Court's eager effort to interpret its dicta in a specific manner. Under attack in that case was an Oklahoma statute requiring state employees to take a loyalty oath. The oath included, *inter alia* a vow that the employee had not been a member of any organization listed as subversive. The Court found the statute unconstitutional as violating due process proscriptions against arbitrariness.

75. 367 U.S. 886 (1961). This case involved a government employee dismissed from her job for security reasons.

76. 424 U.S. at 705. But it is apparent that the majority in *Cafeteria Workers* did not recognize that employment foreclosure was a precondition for a protected liberty interest. The fact that no other employment was foreclosed bolstered their argument that no stigma attached, but was not essential to that holding.

panying loss of employment was insufficient to invoke procedural due process guarantees.[77]

> Two things appear from the line of cases beginning with *Lovett*. The Court has recognized the serious damage that could be inflicted by branding a government employee as "disloyal," and thereby stigmatizing his good name. But the Court has never held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment.[78]

The opinion in *Paul* then turns to a second line of cases which had seemed to hold that reputation was a protected liberty interest. In *Wisconsin v. Constantineau*,[79] pursuant to a state statute, the local police chief could post the names of individuals who exhibited certain traits, such as exposing his family to want or becoming dangerous to the community. Having been "posted" an individual was prohibited from purchasing alcoholic beverages. Such "posting" was done without prior notice or an opportunity to be heard. While the court recognized that it was constitutionally within the power of the state to pass the ordinance, the court stated:

> Where a persons's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[80]

The *Paul* opinion recognized this could be taken to mean that if a governmental official defames a person, without more, the procedural requirements of the due process clause of the fourteenth amendment are brought into play. The Court, however, interpreted the governmental action as more than harm to Constantineau's reputation. The government was also denying him the right to purchase liquor, a right extended to all other

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77. 424 U.S. at 706 n. 4. The Court relegates to a footnote a discussion of *Jenkins v. McKeithen*, 395 U.S. 411 (1969). In that case there were no accompanying employment interests. It involved the constitutionality of the Louisiana Labor-Management Commission of Inquiry which was empowered to be used and was allegedly used to find named individuals guilty of violating criminal laws and to brand them as criminals in public. This case seems to illustrate that when the state makes accusations even though it does not directly deprive an individual of liberty (*i.e.*, freedom from bodily restraint) an accusation of wrongdoing is enough to bring due process into play. This seems to be the same issue in *Paul*, and it is strange that it did not merit much attention from the majority.

78. *Id.* at 706.

79. 400 U.S. 433 (1971). This was the primary case the lower court relied on.

80. *Id.* at 437. *See also Roth*, 408 U.S. at 573.

citizens. This denial was the deprivation which invoked the protection of the due process clause.[81]

The *Paul* majority's analysis was next directed at *Roth*[82] and *Goss*.[83] Both of these cases were decided after *Constantineau*. In each of these cases the Court took judicial notice of a relevant liberty interest in reputation. After holding that Roth had no entitlement to continued employment, the Court then stated that though there are cases where a person has no property interest, he may be afforded due process protection where his liberty interests would be implicated.[84] Justice Rehnquist refused to take this to mean that harm to reputation alone would be an actionable denial of due process however. He used *Roth* as support for his position that harm to reputation must occur in conjunction with the loss of a more tangible interest, such as loss of governmental employment or, as in *Constantineau*, loss of the right to purchase liquor, for there to be a denial of due process.

The *Goss* Court found an independent liberty interest in reputation with respect to "the students' standing with their fellow pupils and their teachers as well as . . . later opportunities for higher education and employment."[85] Here, again, the *Paul* majority interpreted *Goss* as meaning that for an actionable due process claim the harm to reputation must occur simultaneously with the deprivation of a property interest; here, the right to public education.

As additional support for the contention that all due process rights, be they liberty or property, attain constitutional protection by virtue of the fact that they were initially recognized and protected by state law the Court cited *Bell*[86] and *Morrissey v.*

81. 424 U.S. at 708. But query, in light of *Bishop*, did *Constantineau* have any statutory right to drink, since his entitlement to that right ended when the police chief made his determination that he was dangerous to the community? *See also* Bishop v. Wood 426 U.S. at 349, truth or falsity neither enhances nor diminishes his constitutional interest in liberty. ***But see*** Codd v. Velger 429 U.S. 624 (1977). Petitioner must first allege falsity before a stigma can attach.

82. 408 U.S. 564 (1972).

83. 419 U.S. 565 (1975).

84. 408 U.S. at 573. "[The State] . . . did not base its nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty or immorality. Had it done so, this would be a different case . . . . In such a case, due process would accord an opportunity to refute the charge before University officials . . . . [H]owever, there is no suggestion whatever that respondent's interests in his 'good name, reputation, honor, or integrity' is at stake." (footnote omitted).

85. 419 U.S. at 575.

86. Bell v. Burson, 402 U.S. 535 (1971).

Brewer.[87] In these cases, as in others discussed, "as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished."[88] In *Bell* the right altered was the right to operate a vehicle on the highways of the state, while in *Morrissey* it was the right to remain at liberty as long as the conditions of his parol were not violated.[89]

The Court in *Bishop* reaffirmed the new position it had announced in *Paul*. In addition to his property claim, Bishop alleged a deprivation of liberty because his dismissal was partly based on charges that he had caused low morale and was involved in conduct unsuited to an officer. Since this harm to reputation accompanied a deprivation of a governmental job, it appears to be the type of liberty interest that would merit protection. However, the Court rejected his claim, holding that no interest in liberty was infringed because there had been "no public disclosure of the reasons for the discharge."[90] Read together, *Paul* and *Bishop* indicate that loss of employment based on stigmatizing allegations which the employee had no opportunity to refute, coupled with some kind of public disclosure of the allegations will constitute a deprivation of liberty proscribed by the due process clause.

In *Collaizzi v. Walker*;[91] the court of appeals for the 7th Cir-

87. 408 U.S. 471 (1972).
88. 424 U.S. at 711.
89. This is a rather confusing portion of the opinion as it seems to imply that harm to reputation must be coupled with a property interest already entitled to protection. In such a case the protection of procedural due process would already be afforded by the Constitution and there would be little need for an accompanying deprivation of one's reputation in order to invoke such protection. This confusion finds resolution when this portion of the discussion is read together with *Bishop*. When both opinions are read in their entirety this portion appears to be merely a reaffirmation of the principle that individually both property and liberty interests must find their legitimazation in state law, and does not necessarily refute the contention that together such interests may individually be insufficient yet cumulatively suffice to invoke due process protections. *See* note 91, *infra*.
90. 426 U.S. at 348. The dissent, however, noted that although no disclosure had been made, it was inevitable that public disclosure would occur when Petitioner sought further employment; prospective employers would no doubt make inquiries concerning the reason for his dismissal. *Id*., at 352. At any rate, public disclosure would appear to be an essential ingredient to any cumulatively vested interest entitled to due process protection which depended upon harm to reputation as one of the interests involved.
91. 542 F.2d 969 (7th Cir. 1976). The Court found a violation of procedural

cuit applied the *Paul* rationale to a situation involving precisely this dual deprivation of both property and liberty interests. The opinion produced a clear articulation of the principle espoused in *Paul*.

> In other words, infliction of a stigma to reputation accompanied by a failure to rehire (or, *a fortiori*, by a discharge) states a claim for deprivation of liberty without due process within the meaning of the Fourteenth Amendment. Moreover, this combination of stigma plus failure to rehire/ discharge states a claim even if the failure to rehire or discharge of itself deprives the plaintiff of no property interest within the meaning of the Fourteenth Amendment. We reach this conclusion because on the facts of *Roth* itself the Supreme Court found that the plaintiff respondent had no claim of entitlement to, or property interest in his job. *Roth, supra*, 408 U.S. at 578, 92 S.Ct. 2701. Since the Court in *Paul v. Davis* specifically approved the *Roth* dictum concerning stigma to reputation, it follows that stigma to reputation (not itself a deprivation of liberty as defined in the Fourteenth Amendment) plus failure to rehire or discharge (not necessarily involving deprivation of property as defined in the Fourteenth Amendment) may nevertheless when found *in conjunction* state a claim under 42 U.S.C. §1983 for deprivation of a Fourteenth Amendment liberty interest without due process.[92]

Apparently, the combination of two or more interests, each alone insufficient to achieve the status of a protected entitlement, may cumulatively comprise a substantial enough expectation so as to constitute a constitutionally protected interest in property or liberty. Admittedly, this principle has only seen expression in the context of a stigma to reputation along with loss of employment.

However, there appear to be no characteristics inhering to the rationale which would necessarily preclude its application to other types of liberty and property interests,[93] or indeed, even to two interests of the same type.[94]

The Determination of a Cumulatively Vested Interest: Model #2

The second model proposed is predicated on the discussion in

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due process had occurred where former state employees had been discharged with an accompanying press release which impugned their character, and where no hearings had been provided. *See also* Cox v. Northern Virginia Transp. Comm'n, 551 F.2d 555 (4th Cir. 1976). *See also* Staton v. Mayes, 552 F.2d 908 (10th Cir. 1977).

92. 542 F.2d at 973.

93. The extensive recapitulation of prior holdings viewed in a new light fell, unfortunately, somewhat short of comprising a complete and coherent underlying rationale. The discussion in *Paul* is conclusionary and supportive rationale must be implied. A not totally unjustified presumption might be that the *Paul* Court has ignored the precept of *Morrissey*, 408 U.S. at 481 and has looked not to the "nature" but to the "weight" of the cumulative interests at stake.

94. *E.g.*, two separate property interests or, conversely, two separate liberty interests.

Paul as applied in *Colaizzi*, and as such represents an alternative to the first model, affording a second opportunity to establish a protected interest should the expectations fail to meet the criteria of the first model. Therefore, in order to invoke constitutional levels of procedural due process, the following three questions must, as applied to the interests in question, be answered in the affirmative:

1) Are there two separate claims of entitlements at stake?

2) Has each interest failed to ascend to the level of a protected entitlement as determined by Model #1?

3) Would each interest have sufficed to acquire a protected status by pre-*Bishop* and *Paul* standards?

For the less adventurous, the following two questions should be added to the model:[95]

4) Was one interest an expectation of continued employment which lacked only a guarantee by the state?

5) Was the other interest a liberty expectation that one's reputation would not be publicly stigmatized?

PRACTICAL ALTERNATIVE REMEDY

The Development of An Additional Possibility for Invoking Procedural Due Process Protection

Both models discussed to this point reflect doctrines containing fundamental infirmities which might prove precipitous in view of the recognized proclivity of any sovereign to oppressive tendencies. The first allows the state, which, as noted, is becoming the primary source of property rights, to draft its laws so as to negate the intended protections of the procedural due process clause. The second affords an alternative extremely limited in its potential application.[96] In response to this inadequacy in

95. Affirmative answers to these two questions will place the case squarely on point with the factual contexts of *Bishop, Paul* and *Collaizzi*. The applicability of this model can, therefore, be argued with greater certainty.

96. Indeed, were a property interest limited so as to deny state recognition or guarantee and also expressly provided with termination procedures short of Constitutional mandates, even the addition of public disrepute might fail to invoke due process protection.

what is construed to be the current state of the law, a third model is herein proposed. This model is submitted as a possible interpretation of the recent cases already discussed, and, although it is not necessarily as accurate a representation of current due process doctrine as the first two analyses, it is certainly more in accord with traditional concepts[97] of procedural due process.

In *Goldberg*, welfare recipients challenged denial of welfare benefits without a pretermination hearing, while in *Arnett*[98] the due process challenge came from a public employee who was dismissed without a hearing. Concurring in the *Arnett* plurality decision, Justice Powell, joined by Justice Blackmun, differentiated *Arnett* from *Goldberg*.[99] In *Arnett*, if the decision to terminate was found at a later date to be erroneous, Kennedy would be reinstated and awarded back pay. His actual injury would consist only of temporary interruption of his income. Justice Powell then stated:

> To be sure, even a temporary interruption of income could constitute a serious loss in many instances. But the possible deprivation is considerably less severe than involved in *Goldberg* . . . where termination . . . would have occurred in the face of "brutal need." (Citation omitted) Indeed, . . . "the crucial factor in this context—*a factor not present in the case of. . . the discharged government employee* . . .— is that termination of aid pending resolution of a controversy over elibigility may deprive an *eligible* recipient of *the very means by which to live while he waits*."[100]

The contrast can thus be stated, that in effect, the *Goldberg* petitioners were without legal or practical remedy, if the fourteenth amendment were not invoked. There was no place else to look to for assistance other than the state in overcoming their temporary hardship. Arnett on the other hand, had practical remedies available, for the public employee may well have independent resources to overcome any temporary hardship and he may be able to secure a job in the private sector. Alternatively, he will be eligible for welfare benefits.[101]

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97. *E.g.*, that the state cannot entirely sidestep the fourteenth amendment merely by careful drafting of its laws. Some interests will invariably invoke constitutional protections regardless of state efforts to evade the restraints imposed upon it by the Constitution.

98. Similar challenges were made in *Bishop* and *Roth*.

99. In *Goldberg* a right to a pretermination hearing was found to exist while in *Arnett* it was not.

100. 416 U.S. at 169.

101. *Id.* The practical alternative theory would deny all people claiming a deprivation of government employment a due process interest, by the fact that they could seek other employment. Indeed, with the exception of *Perry*, the court has never granted a hearing when the deprivation claimed was governmental employment.

A comparison of *Fuentes v. Shevin*[102] and *North Georgia Finishing, Inc. v. Di Chem, Inc.*[103] with *Mitchell v. W. T. Grant*[104] yields a similar result. In these cases pre-judgment attachments were challenged as denials of due process. *Fuentes* and *Di Chem* held such attachments did violate the due process clause. *Mitchell* reaches a different result, citing among its reasons,[105] the availability of swift judicial review if a party elects to challenge,[106] a feature not available in the statute considered in *Fuentes*.[107] Here the contrast is again apparent. In *Fuentes* and *Di Chem* the state provided no adequate remedy for the debtor to re-obtain possession of his property. In *Di Chem* the Court remarked, "Indeed, it would appear that without the filing of a bond the defendant debtor's challenge to the garnishment will not be entertained whatever the grounds may be."[108] In *Mitchell*, on the other hand, the statute required that there be an immediate remedy available.[109]

In the majority opinion in *Paul*, the Court found that the state had not created any right, but that it had simply provided a tort remedy.[110] The Court felt that allowing Davis's claim would convert every defamation by a public official into an action under 42 U.S.C. §1983.[111] It seemed to place a great emphasis on

102. 407 U.S. 67 (1972).
103. 419 U.S. 601 (1975).
104. 416 U.S. 600 (1974).
105. *See* 416 U.S. at 625-26. Another reason given; in *Fuentes* a clerk could issue the attachment order while in *Mitchell* only a judge could authorize attachment.
106. *Id.* at 616. The Louisiana law provides for judicial control from beginning to end. *See also* North Georgia Finishing Inc. v. Di Chem, Inc., 419 U.S. 601, 607 (1975) where the Court compares both *Fuentes* and *Mitchell* to invalidate a Georgia attachment statute. The Court states: "There is no early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment." *See also* Stanley v. Illinois, 405 U.S. 645 (1972).
107. *Id.* at 616. In *Fuentes* two statutes were considered. The Florida statute provided that the defendant would "eventually" have an opportunity for a hearing, as the defendant in the trial court action for repossession. The Pennsylvania statute was essentially the same but it did not require that there ever be an opportunity for a hearing on the merits.
108. 419 U.S. at 607.
109. Though these cases involve a discussion on how much process is due, they fit into the model, for if the state could actually tailor its statute as the first model asserts then there would be no claim of entitlement after the writ of attachment is filed and, hence, no property interest.
110. 424 U.S. at 712.
111. 42 U.S.C. § 1983 (1970) provides: "Every person who under color of any statute, . . . causes to be subjected, any citizen of the United States . . . to the

this fact, implying that the existence of a state remedy might somehow affect plaintiff's federal cause of action.[112]

Justice Brennan in his dissent, indicated that this was the relevant fact relied upon by the majority and, citing *Monroe v. Pape*,[113] he asserts:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplemental to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.[114]

In *Perry v. Sindermann*[115] the same concept emerged, albeit in an almost imperceptible manner. The determination that Sindermann's interest in employment was a protected property interest relied on an implied promise of continued employment which was found to exist in a de facto tenure program. In making this inference the Court noted that "Odessa College has no tenure system."[116] The language of this portion of the opinion portrayed a concern that, unlike the employee in *Roth*[117] who had access to a system of tenure but had failed to qualify for it, the employee in *Perry* could rely on no employment security absent the provision of due process protection.

In *Sniadach v. Family Finance Corp.*[118], the Court found Wisconsin garnishment procedures to be violative of procedural due process requirements. The protected interest involved was a property right in the use of the garnished portion of wages. The Court demonstrated a clear concern for the alternative available to injured persons if this property right were not afforded the protection of due process.

> For a poor man—and who ever heard of the wage of the affluent being attached?—to lose part of his salary often means his family will go without the essentials. No man sits by while his family goes hungry or without heat. He either files for consumer bankruptcy and tries to begin again, or just quits his job and goes on relief. Where is the equity, the common sense, in such a process?[119]

If there were any doubt that the basis of this decision was the lack of an effective alternative remedy, the dissent by Justice

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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."

112. 424 U.S. at 698-701.

113. 365 U.S. 167, 182 (1961) where an illegal search and seizure by police which was actionable under state trespass laws, was also found to be actionable under 1983 as a deprivation of liberty without due process of law.

114. 424 U.S. at 715.

115. 408 U.S. 593 (1972).

116. *Id.* at 600.

117. 408 U.S. 564 (1972).

118. 395 U.S. 337 (1969).

119. *Id.* at 342 n.9.

Black did not notice it. His dissenting opinion stressed his belief that available remedies were not only sufficient in this case, but an improper basis for determining the existence of a protected interest.[120]

In light of these cases, one can reconcile all the due process decisions by stating that the court is willing to invoke procedural protections whenever the state deprives a person of a benefit and no practical or legal remedy exists. In *Arnett*, practical alternatives are available through a new job, savings, or welfare. The same is true in *Roth* and in *Bishop*. In *Mitchell* a legal remedy existed to challenge the attachment and, just as in *Paul*, the individual could resort to the state courts.[121]

As pointed out in *Goldberg*, there was no viable alternative, nor was there in *Fuentes*. The Plaintiffs in *Goss* had no other means to obtain an education in light of their suspension.[122] In *Bell* there was no legal means for petitioners to drive.[123] In *Morrissey* a resort to practical non-judicial relief would only make the individual's position worse.[124]

The Determination of a Protected Interest Arising from the lack of a Practical Alternative Remedy: Model #3

The third model presented is premised on the principle that a significant interest in liberty or property will suffice to invoke procedural due process protections should the failure to afford it that status result in an absence of any practical alternative remedies, notwithstanding its lack of state recognition or guarantee and despite the absence of any additional interest which might produce a cumulatively justifiable entitlement. Therefore, to constitute a Constitutionally protected interest, the following three questions, as applied to that interest, must be answered in the affirmative:

1) Has a significant interest in liberty or property failed to qualify for a protected status as determined by Models 1 and 2?

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120. *Id.* at 346.

121. Beyond the scope of this paper is the question left unanswered in *Paul*. If the sole remedy for determination by the state is the front action will it not be barred by the privilege held by state officials?

122. 419 U.S. 565 (1975).

123. 402 U.S. 535 (1975).

124. 408 U.S. 471 (1972).

2) Does that interest depend entirely upon the status, as a protected entitlement, for its protection?

3) Is there a complete absence of any practical alternative remedy should the interest be deprived?[125]

While recognizing that this model is based on an interpretation which had not been expressly recognized by the United States Supreme Court, it would appear to have a greater constitutional validity than the first model proposed. It would deny the states any right to deny procedural protections to deprivation of benefits for which no alternative remedy is available. The model does not address the question of how complete the lack of alternatives must be. Given the present composition of the Court, however, there may have to be a substantial lack of alternatives. By couching the due process threshold as a matter of alternatives, a desirable degree of flexibility on the issue of completeness of deprivation will exist. This flexibility, while not as great as with a balancing test, would improve the chances of a litigant who may otherwise be barred from relief.

In conclusion, it is submitted that this third model, wherein a litigant argues his only relief lies in the due process clause, offers some opportunities to avoid the pitfalls of ***Roth***, ***Bishop*** and ***Paul***. This is particularly true when linked to the policy considerations[126] which lead one to reject the principles reflected in the first two models.

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125. Although questions #2 and #3 appear similar they are substantially different in approach. Question #2 addresses a lack of opportunities to protect the particular interest in question. Question #3 addresses a lack of remedy to compensate for injuries sustained when the interest is deprived. Even though no procedures exist to prevent unjust termination of a job (thereby satisfying question #2) adequate unemployment insurance may obviate the need to protect the interest through provision of due process (thereby failing question #3).

126. *E.g.*, the undesirability of allowing the entity sought to be restrained by the Constitution to determine for itself when and if those restraints will be given effect. See the earlier discussion following the first model, in text accompanying notes 61 and 62.