

California and Federal Administrative Due Process: Development, Interrelation and Direction

The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also.¹

The interest of the citizen subject to the adjudicatory power of an administrative body may not reach the enormity of Adam's, but the agency, too, differs from Adam's Judge. However omnipotent and omnipresent the agency may appear to the citizen, it lacks omniscience. Evidence must be marshalled, therefore, before judgment decreed. In the administrative fact-finding process the citizen meets his most crucial challenge in dealing with those who seek to regulate or reprimand him. His quickest, cheapest, and most probably successful opportunity to achieve his goals is the administrative hearing. Even if no expectation of success exists, still the hearing must be used to build a proper record for a reviewing court.² It is therefore appropriate to begin this volume with a survey of the right to a hearing

¹The King v. The Chancellor, Masters and Scholars of the University of Cambridge, 1 Str. (K.B.) 557, 567, 93 Eng. Reports. 698, 704 (1723) (Fortescue J.).

²See, e.g., *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967).

where an agency proposes to take adjudicatory action and of the procedural rights which must be observed in the conduct of a hearing.

Although procedural and substantive due process are closely intertwined, this article focuses upon the former. The procedural right, however, is no better than the substantive right it protects; the conduct of national security employment hearings is ample attestation.³ Yet without procedural protection, substantive rights may be useless.⁴

Administrative law is a field beset with definitional difficulties.⁵ This article deals with the function most often known as adjudication; that function is differentiated from legislation primarily by its narrow focus upon particular parties and events.⁶ A successful definition of adjudication which fits the purposes of this inquiry is "administrative action characterized by the resolution of factual issues surrounding the application of legal consequences to those parties based upon this determination."⁷ "Hearing" is operationally defined in the text by its constituent parts.

I. THE RIGHT TO A HEARING – THE DEVELOPMENT OF CALIFORNIA LAW

A. WHERE STATUTE REQUIRES A HEARING

Many of the statutes and ordinances which authorize adjudicative administrative action expressly require hearing.⁸ Refusal or failure to grant a hearing in the face of a statutory requirement is both an abuse of discretion and a failure to proceed ac-

³Greene v. McElroy, 360 U.S. 474 (1959).

⁴Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970). See Connell v. Higginbotham, 403 U.S. 207 (1971).

⁵See Davis, *The Requirement of Trial Type Hearing*, 70 HARV. L. REV. 193 (1956).

⁶Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 123 (1926).

⁷Burrus and Fessler, *Constitutional Due Process Hearing Requirements in the Administration of Public Assistance: The District of Columbia Experience*, 16 AM. U.L. REV. 199, 201 (1967) (hereinafter cited as Burrus).

⁸The list of state adjudicatory activities is long. One source sets out in 100 pages what is by no means a complete listing of state-level adjudicatory activities. DEERING, CALIFORNIA ADMINISTRATIVE MANDAMUS, App. A, 289-396 (CEB, 1966). This source will appraise the novice of the wide scope of state administrative adjudication as well as the scope of application of the Administrative Procedure Act. See CAL. GOV'T. CODE § 11501 (West 1968).

ording to law, justifying mandamus under the Administrative Mandamus provisions of the Code of Civil Procedure.⁹

B. WHERE THE STATUTE IS SILENT

The first California case to meet the question of whether due process requires a notice and hearing where administrative action imposes a penalty answered in the affirmative but invoked the now outmoded remedy of totally expunging the authorizing statute.¹⁰ There the plaintiff leased fishing nets which the lessees subsequently, without the plaintiff's knowledge, used illegally. The Penal statute commanded a forfeiture of the nets. The Court held that there was no constitutional requirement that the plaintiff have any fault in the crime, but that due process required a hearing on the issue of whether the nets were "the guilty instrument."¹¹ The sheriff's administrative function was treated as an unpermitted judicial act, and the act was therefore held unconstitutional. The Court apparently did not consider implying a hearing procedure from the nature of the statute.¹²

A true administrative due process question reached the Court twenty years later in *Matter of Lambert*,¹³ a challenge to the Insanity Law. The authority of commitment was vested in Superior Court judges, not *qua* judges, but as special statutory officers. Proceedings were not part of court record, and were not appealable. Thus, the judge was an early administrative officer.¹⁴ The commitment proceeding was entirely *ex parte*; notice was not required. The Court held the statute violative of due process, rejecting the implication of a hearing procedure:¹⁵

⁹CAL. CODE OF CIV. PROC. § 1094.5(b) (West 1954): "The inquiry in such a case shall extend to the questions...whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law...."

¹⁰*Hey Sing Ieck v. Anderson*, 57 Cal. 251, 40 Am. Rep. 115 (1881); *Accord*: *H. Moffat Co. v. Hecke*, 68 Cal. App. 35, 228 P. 546 (1924), holding the entire Cattle Protection Act void for violating due process in its hearingless seizure of cattle without proper identification.

¹¹*Hey Sing Ieck v. Anderson*, 57 Cal. at 252-3.

¹²*Id.* at 253-4.

¹³*In re Lambert*, 134 Cal. 626, 66 P. 851 (1901); Ch. 277 (1897) Cal. Stats. 311.

¹⁴*In re Lambert*, 134 Cal. at 630, 66 P. at 853.

¹⁵There were indicia of intent which might have negated implication of a hearing. *Id.* at 632, 66 P. at 853-4.

What constitutes due process of law may not be readily formulated in a definition of universal application, but it includes, in all cases, the right of the person to such notice of the claim as is appropriate...and the right to be heard.... If his right to a hearing depends upon the will or caprice of others or upon the discretion or will of the judge who is to make a decision upon the issue, he is not protected....¹⁶

Lambert remains good law in its due process analysis, but not in its solution.¹⁷

In 1911 the Supreme Court ruled in *Bannerman v. Boyle*¹⁸ and *Welch v. Ware*¹⁹ that where a substantively valid authorization of administrative action offends procedural due process in failing to provide notice and hearing, a hearing will be required by the courts. *Bannerman* overturned the summary dismissal of a member of the San Francisco Board of Education whose statutory term of office could be interrupted only for cause.²⁰ In *Welch* the plaintiff was summarily dismissed from the positions of county game warden and fire warden. The Court mandated the receipt of his pay in the game warden position because the state law authorizing counties to appoint wardens called for dismissal for cause only.²¹ But the Court also held that summary dismissal from the fire warden position was valid because the state act authorizing county compensation for the state-designated officers left unfettered discretion in the board of supervisors.²² Without elucidating the birthplace of the rule—statute, due process or judge-made conception of fairness—the Court simply said, “The words ‘for cause,’ without more, imply good cause: the existence of some facts which would constitute a reasonable cause for removal.”²³ From the discussion of the plaintiff’s claim for his pay as fire warden, however, it is mani-

¹⁶*Id.* at 633, 66 P. at 854.

¹⁷*Sokol v. Public Utilities Commission*, 65 Cal. 2d 247, 254, 418 P.2d 265, 269, 53 Cal. Rptr. 673, 679 (1966).

¹⁸*Bannerman v. Boyle*, 160 Cal. 197, 116 P. 732 (1911).

¹⁹*Welch v. Ware*, 161 Cal. 641, 119 P. 1080 (1911).

²⁰*Bannerman v. Boyle*, 160 Cal. at 203-4, 116 P. at 734-5.

²¹*Welch v. Ware*, 161 Cal. at 645, 649, 119 P. at 1081-3.

²²*Id.* at 644, 119 P. at 1083.

²³*Id.* at 647, 119 P. at 1082, quoting *Bannerman v. Boyle*, 160 Cal. at 206, 116 P. at 735.

fest that the Court saw an employee's right to notice and hearing as a creature of statute alone.²⁴

The growth of administrative adjudication drew the courts' attention increasingly to protection of the right to a hearing. Unsophisticated reasoning still pervaded the field. As late as 1933 the Third District Court of Appeal, in requiring that a county board of supervisors sitting as a liquor licensing agency grant a hearing to all applicants, was confused by the conclusion that an individual "has no vested right to sell liquor," was unable to base its holding upon any clear statutory or constitutional principles, and was unable to find any better authority than *Corpus Juris* to support its condemnation of "arbitrary power of issuing licenses and regulating businesses subject only to...caprice."²⁵

The watershed came in *Carroll v. California Horseracing Board*²⁶ where an apprentice race horse trainer was suspended after an *ex parte* hearing. The Horseracing Board contended that the omission of a notice and hearing requirement in the statutes authorizing its action permitted *ex parte* procedures. The trainer, who neglected to raise a due process claim, requested relief upon statutory interpretation alone.²⁷ The statute simply stated that no license could be revoked "without just cause." Other provisions purported to establish the rudiments of agency procedure; there was mention of hearing only with respect to the removal by the governor by a member of the board.²⁸ The Court held, nevertheless, that the statute should be read to include a requirement of a hearing. "Just cause," the court held, implies the hearing of any defense. Citing, *inter alia*, *Bannerman*, *Welch*, and *Martin*, the Court also said that the legislature intended to incorporate prior judicial interpretations in the regulatory statute.²⁹

²⁴Welch v. Ware, 161 Cal. at 648, 119 P. at 1083.

²⁵Martin v. Board of Supervisors, 135 Cal. App. 96, 101, 102, 26 P.2d 843, 845 (1933).

²⁶Carroll v. California Horse Racing Board, 16 Cal. 2d 164, 167, 105 P.2d 110, 111 (1940).

²⁷*Id.* at 166, 105 P.2d at 111.

²⁸*Id.* at 166, 168, 105 P.2d at 111.

²⁹*Id.* at 167, 168, 105 P.2d at 112.

Federal courts had previously construed state regulatory statutes silent upon the hearing question to contemplate the hearing required by due process. "A statute must be construed, if fairly possible, so as to avoid...the conclusion that it is unconstitutional..."³⁰ That the *Carroll* Court omitted his decisive argument evinces the primitive state of administrative due process in 1940.

Carroll, however, established the implication of a hearing as an inexorable conclusion wherever administrative action was taken upon adjudicative facts:

The rule is firmly established that if by statute an officer or civil service employee may not be removed or discharged except for cause, the clear implication is that there be afforded an opportunity for a full hearing...; that unless the statute expressly negatives the necessity of a hearing, common fairness and justice compel the inclusion of such a requirement.³¹

There remains no doubt that whenever an administrative agency, pursuant to a statute authorizing action "for cause" or for specific offenses proposes to effect discipline, seizure, or denial of any right or privilege, the court, upon the threshold question of statutory interpretation, will require a hearing, absent specific legislative intention to deny a hearing.³²

C. HEARING REQUIREMENTS OF CALIFORNIA ADMINISTRATIVE DUE PROCESS—DE MINIMIS, SUMMARY PROCEEDINGS AND COERCIVE POWERS

Minor disciplinary and summary proceedings are ordinarily intended by legislative bodies to reach a result without a hearing,

³⁰*Bratton v. Chandler*, 260 U.S. 110, 115 (1922).

³¹*Steen v. Board of Civil Service Comm'rs.*, 26 Cal. 2d 716, 723, 160 P.2d 816 (1945). *Steen* interpreted the Los Angeles Charter and overruled a prior holding upon the identical section thereof. Compare *Krohn v. Board of Water & Power Comm'rs.*, 95 Cal. App. 289, 272 P. 757 (1928). Three justices dissented in *Steen* following *Krohn* and considering that no constitutional right was infringed by deprivation of public employment. *Steen v. Board of Civil Service Comm'rs.*, 26 Cal. 2d at 731, 160 P.2d at 823; Accord with *Carroll*: *Ratliff v. Lampton*, 32 Cal. 2d 226, 195 P.2d 792 (1948) (driver's licenses); *Covert v. State Board of Equalization*, 29 Cal. 2d 125, 173 P.2d 545 (1946) (liquor license).

³²See *Patton v. Board of Harbor Comm'rs.*, 13 Cal. App. 3d 536, 540, 91 Cal. Rptr. 832 (1970).

or through a substantially abbreviated process. The rule of hearing implication is inapposite because of specific intent to deny a hearing, and the only control over administrative action becomes the Due Process Clause of the Fourteenth Amendment. Administrative agencies may also act pursuant to a power so broad that no specific statutory authority can be consulted or construed; due process again is the single control. In all cases the dispositive issue is whether, on balance, the individual or governmental interest is more compelling.³³

1. MINOR DISCIPLINARY PROCEEDINGS—THE RULE OF DE MINIMIS.

The Second District Court of Appeals held in *Patton v. Board of Harbor Commissioners* that the suspension of a public employee without a full hearing for a maximum of five days in any twelve month period does not controvert the employee's right to procedural due process.³⁴ The opinion interpreted sections of the Los Angeles Charter which expressly excluded such suspensions from the ordinary hearing procedure. The Court found that it could not rely upon the traditional right-privilege dichotomy. It therefore found that the employee's detriment "while not negligible, is, in our view, not sufficient to justify a holding that a hearing is the employee's constitutional right...."³⁵ The Court failed to explore the governmental interest aspect of the due process balancing test. However, the clear need for a swift and uncomplicated disciplinary system to control the minor infractions of public servants justifies the decision.³⁶ It is fair to say, then, that the rule of *de minimis* has been incorporated in California administrative due process.

The substantial infirmity of *Patton* is the Court's indulgence in the non-sequitur that because the plaintiff was not entitled to a hearing he was not entitled to judicial review to determine

³³See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

³⁴*Patton v. Board of Harbor Comm'rs.*, 13 Cal. App. 3d at 542, 91 Cal. Rptr. at 836.

³⁵*Id.* at 541, 91 Cal. Rptr. at 835.

³⁶See, *inter alia*, *Wilson v. City of Minneapolis*, 283 Minn. 348, 168 N.W.2d 19 (1969); *Joyce v. Webber* 157 Me. 234, 170 A.2d 705 (1961); *Yantsin v. City of Aberdeen*, 54 Wash. 2d 787, 345 P.2d 178 (1959), all cited in *Patton v. Board of Harbor Comm'rs.*, 13 Cal. App. 3d at 542, 91 Cal. Rptr. at 836.

whether action taken against him was arbitrary and capricious.³⁷ This holding permits administrative officers to act wholly without cause, perhaps for constitutionally impermissible causes such as race bias. The abridgement of freedom from such intrusions is a severe deprivation on its face, regardless of the *de minimis* nature of the financial deprivation.

2. SUMMARY PROCEEDINGS – THE CALIFORNIA HISTORY.

Automobile financial responsibility laws created the first California adjudication of the propriety of summary proceedings in *Escobedo v. State of California*.³⁸ An uninsured indigent was involved in a traffic accident causing more than \$100 damage. Pursuant to the financial responsibility law his driver's license was suspended upon his failure to post bond after the Department of Motor Vehicles' determination, without hearing, that a reasonable probability of his suffering a judgment existed. The rules of statutory construction were inapposite because of specific intent to preclude a hearing.³⁹ The California Supreme Court held that, "The use of highways... is not a mere privilege, but a common and fundamental right..."⁴⁰ Therefore the Due Process Clause of the Fourteenth Amendment protected the licensee. But the state, through the police power had a legitimate interest in regulating the use of the highways. The Court, in balancing the competing interests, held that the public concerns of encouraging financial responsibility, curtailing careless driving, and avoiding the administrative expense of hearings in a potential 1,300 cases per month outweighed the individual's right to use the highways.⁴¹ Justice Carter in dissent vigorously attacked the conclusion that a public safety emergency in deter-

³⁷Patton v. Board of Harbor Comm'rs., 13 Cal. App. 3d at 542, 91 Cal. Rptr. at 836.

³⁸Escobedo v. State of California, 35 Cal. 2d 870, 222 P.2d 1 (1950).

³⁹Ch. 431, § 7 (1947) Cal. Stats. 1325.

⁴⁰Escobedo v. State of California, 35 Cal. 2d at 876, 222 P.2d at 5.

⁴¹*Id.* at 876-7, 222 P.2d at 5-6.

ring carelessness existed. The failure to post security constituted no evidence of negligence. He concluded,

The sole need is that a private person shall have security for the payment of any damages caused to him by another individual. Surely that presents no urgency for immediate action....⁴²

Despite the cogency of the dissenter's analysis, *Escobedo* was approved in 1969.⁴³ Again indigents challenged the financial responsibility law, and without further elucidation of its rationale, a unanimous court found the hearingless determination of probable fault from accident reports congruent with due process, subject only to review by the Superior Court upon a substantial evidence test.⁴⁴

Intertwined with the financial responsibility cases there developed authority that where statute commanded administrative action upon judicially determined or uncontrovertable facts no right to a hearing existed.⁴⁵ Thus where statute declared that the State Board of Education "shall forthwith revoke" the credential of any teacher found guilty of a sex crime, the Court held that the mandatory nature of the administrative action and the absence of any issue of fact obviated a hearing.⁴⁶ The cryptic opinion fails to mention the balancing test, but a subsequent case elucidates the compelling state interest in swiftly and permanently removing the sexually disturbed from contact with school children.⁴⁷

⁴²*Id.* at 880, 222 P.2d at 8. Justice Carter had the better of the argument upon constitutional authority also. See *Bourjois v. Chapman*, 301 U.S. 183 (1937) upholding the pre-hearing seizure of allegedly adulterated cosmetics only because of the irreparable injury caused by the failure to remove them from public consumption.

⁴³*Orr v. Superior Court*, 71 Cal. 2d 220, 223, 454 P.2d 712, 716, 77 Cal. Rptr. 816, 818 (1969).

⁴⁴*Id.* at 225-8, 454 P.2d at 717, 77 Cal. Rptr. at 821.

⁴⁵*DiGenova v. State Board of Education*, 45 Cal. 2d 255, 288 P.2d 862 (1955); *Vogulkin v. State Board of Education*, 194 Cal. App. 2d 424, 15 Cal. Rptr. 335 (1961); *Hough v. McCarthy*, 54 Cal. 2d 273, 353 P.2d 276, 5 Cal. Rptr. 668 (1960); *Cook v. Bright*, 208 Cal. App. 2d 98, 25 Cal. Rptr. 116 (1962).

⁴⁶*Di Genova v. State Board of Education*, 45 Cal. 2d at 260, 288 P.2d at 865. The Court did, however, remand to determine if the offenses charged were in contemplation of the statute. 45 Cal. 2d. at 263, 288 P.2d at 867.

⁴⁷*Vogulkin v. State Board of Education*, 194 Cal. App. 2d at 430, 15 Cal. Rptr. at 339. See *Adler v. Board of Education*, 342 U.S. 485, 493 (1955).

The compelling safety interest in removing drunk drivers from the highways has upheld similar ministerial acts under statutes commanding the suspension of driver's licenses upon conviction.⁴⁸ *Hough v. McCarthy*⁴⁹ is extraordinary because, although conviction mooted any issue of fact, still the director's power to suspend seemed discretionary. The director had chosen to suspend in every case. The four-judge majority concluded that because conviction alone formed the basis for suspension, no showing of unfitness to drive was necessary, nor would a showing of extreme hardship avail the licensee. The Court held in cryptic terms that the discretion vested in the department was legislative, not adjudicative.⁵⁰ The dissenters interpreted the statute to confer discretion to suspend based upon case-by-case adjudicative factfinding.⁵¹ Constitutional principles therefore required a hearing. The dissenters had the better of the argument, and it is probable that the majority was more enmeshed in a hatred of drunk driving than it was concerned with protection of constitutional rights; the case can rightly be considered *sui generis*.⁵²

California anticipated to some extent the federal court developments in administrative due process by refusing to extend *Hough* to non-emergency pre-hearing discontinuance of communication services in *Sokol v. Public Utilities Commission*.⁵³ The challenged regulations of the Public Utilities Commission provided that whenever local police informed a telephone company that there existed reason to believe that a subscriber was using a telephone for illegal gambling purposes, the telephone company was to discontinue service.⁵⁴ The Attorney General argued that the substantial public interest in curtailing gambling called for abrupt discontinuance of service without advance

⁴⁸*Hough v. McCarthy*, 54 Cal. 2d 273, 353 P.2d 276, 5 Cal. Rptr. 668 (1960); *Cook v. Bright*, 208 Cal. App. 2d 98, 25 Cal. Rptr. 116 (1962).

⁴⁹54 Cal. 2d at 280-5, 353 P.2d at 280-3, 5 Cal. Rptr. at 672-5.

⁵⁰*Id.* at 286, 353 P.2d at 284-5, 5 Cal. Rptr. at 676-7.

⁵¹*Id.* at 289-91, 353 P.2d at 286, 5 Cal. Rptr. at 678 (dissenting opinion of Peters, J.).

⁵²*Id.* at 285, 353 P.2d at 284, 5 Cal. Rptr. at 676. The dissenters viewed the case in these terms. *Id.* at 289, 353 P.2d at 286, 5 Cal. Rptr. at 678 (dissenting opinion of Peters, J.).

⁵³*Sokol v. Public Utilities Commission*, 65 Cal. 2d at 254, 418 P.2d at 271, 53 Cal. Rptr. at 679.

⁵⁴*Id.* at 249-50, 418 P.2d at 267, 53 Cal. Rptr. at 675.

notice. Notice, he argued, would merely allow the gamblers time to change their base of operations. But the Court found the sword to be two-edged: a legitimate business (which holds a vested right in its communication services both upon First Amendment grounds and because of economic necessity) would be as quickly destroyed by the procedure.⁵⁵ The minimum protection required by the unanimous court was a judicial *ex parte* hearing to determine probable cause and a prompt post-disconnection adversary hearing.⁵⁶ Pre-hearing action in any form may no longer be proper.⁵⁷

Summary proceedings remain proper, however, where facts are indisputable and administrative action is ministerial. For example, the Court sustained the suspension of a seeing-eye dog training academy license for failure to retain a competent trainer upon the basis of the compelling interest to care properly for the handicapped.⁵⁸

3. COERCIVE POWERS AND SHAM HEARINGS – REGULATING COROLLARY POWERS

Occasionally an administrator's express statutory power will create a corollary coercive power over parties not within his ordinary jurisdiction. The lack of statutory framework admits the potentiality of gross abuses of individual rights through secret coercive action against the individual's employers or clients and through the creation of non-binding informal "hearings" to redress grievances. No statutory violation exists to support mandamus, nor can the construction rule implying a hearing rescue the individual. The California Supreme Court remedied this defect in the unique case of *Endler v. Schutzbank*.⁵⁹ There the Commissioner of Corporations, who had licensing power over personal property brokerage houses but not individual employees,⁶⁰ attempted to discipline an experienced brokerage house manager because of unconfirmed hearsay

⁵⁵*Id.* at 254-5, 418 P.2d at 270, 53 Cal. Rptr. at 678.

⁵⁶*Id.* at 256, 418 P.2d at 271, 53 Cal. Rptr. at 679.

⁵⁷See discussion accompanying footnotes 66-133.

⁵⁸*Eye Dog Foundation v. State Board of Guide Dogs for the Blind*, 67 Cal. 2d 536, 432 P.2d 717, 63 Cal. Rptr. 21 (1967).

⁵⁹68 Cal. 2d 162, 436 P.2d 297, 65 Cal. Rptr. 297 (1968).

⁶⁰CAL. FIN. CODE § 22000 *et. seq.* (West 1968).

charging the manager with forgery. The Commissioner first threatened to commence revocation proceedings against the manager's employer. After the employer investigated the substance of the charge and found it to be untrue, he refused to fire the manager, and the revocation proceeding was instituted. The employer was forced to sell out, and the buyer acceded to the Commissioner's demands. The Commissioner immediately terminated the proceedings, but he issued a general order that any brokerage house hiring the man would be subject to discipline for retaining an incompetent manager. When Endler demanded a full hearing, the commissioner offered him an informal interview which would not be legally binding upon anyone.⁶¹ Endler refused and sought judicial relief. The Supreme Court, over the sole dissent of McComb, J., held the demand for injunctive, declaratory, and mandamus relief good against demurrer. The Court, *per* Justice Tobriner, held that Endler had the right, as a matter of due process, to be heard in defense of the charges:

We hold that the alleged conduct of the commissioner, rendering the plaintiff unemployable without affording him a full hearing on the charges against him, transgresses the fundamental principle that the state may deprive no man of liberty or property without due process of law.⁶²

Further, the informal interview could not satisfy the guarantee because it was not legally binding.⁶³ Significantly, the court did not question the Commissioner's power to revoke a brokerage license if Endler was truly an incompetent or untrustworthy manager.⁶⁴

The vitality of *Endler* was somewhat diminished when it harmonized with the holding in *Orr*.⁶⁵ However, it provided a significant due process overlay to the statutory rules requiring hearings, it closed the significant gap in those rules as applied to actual agency practices and it anticipated the federal developments condemning deprivations prior to adjudication or upon summary procedures.

⁶¹*Endler v. Schutzbank*, 68 Cal. 2d at 166-7, 436 P.2d at 166-7, 65 Cal. Rptr. at 300-1.

⁶²*Id.* at 165, 436 P.2d at 299, 65 Cal. Rptr. at 299.

⁶³*Id.* at 168, 436 P.2d at 301, 65 Cal. Rptr. at 301.

⁶⁴*Id.* at 169 n. 3, 436 P.2d at 301-2 n. 3, 65 Cal. Rptr. at 301-2 n. 3.

⁶⁵*Orr v. Superior Court*, 71 Cal. 2d at 224-5, 454 P.2d at 715, 77 Cal. Rptr. at 819.

II. SNIADACH AND GOLDBERG—THE FEDERAL LANDMARKS, THEIR PROGENY AND THEIR EFFECT UPON CALIFORNIA LAW

Although California administrative law has developed, as elucidated, with little Federal influence, the recent expansion of Federal administrative due process law has caused many revisions of California positions. The effects cannot help but become more profound. It is therefore necessary to review federal decisions in order to understand the status and direction of California law.

The United States Supreme Court held, in *Sniadach v. Family Finance Corp.*,⁶⁶ that pre-judgment garnishment of wages is an abridgement of due process of law. The majority *per* Justice Douglas found that wages were “a specialized type of property” which deserved special protection. Garnishment, the Court found, created such creditor leverage that the debtor was forced to concede even fraudulent claims in order to survive.⁶⁷ Although the Court expressly approved those decisions which countenance summary procedure in the face of danger to health or safety or financial stability, it held that no state interest justified special protection of the creditor.⁶⁸

In *Goldberg v. Kelly*⁶⁹ the Court held that a welfare recipient’s interest in survival outweighed the governmental interest of conserving fiscal and administrative resources by terminating welfare benefits prior to an evidentiary hearing.

Although both *Sniadach* and *Goldberg* were impliedly, if not expressly, limited in their scope, their effect is not limited to the landslide of reversals their narrowest holdings compel. It is arguable that *Goldberg* and *Sniadach* did no more than restate settled law,⁷⁰ but the effect of the decision is to the contrary.

⁶⁶395 U.S. 337 (1969).

⁶⁷*Id.* at 340-1.

⁶⁸*Id.* at 339.

⁶⁹397 U.S. 254, 264-5 (1970).

⁷⁰*See*, *Garfield v. Goldsby*, 211 U.S. 249, 262 (1908), where the court overturned the summary striking of Goldsby’s name from the Roll of the Chickasaw Nation, saying, ... “[I]t has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard. The right to be heard before property is taken or rights or privileges withdrawn is of the essence of due process of law.”

Earlier opinions cast doubt upon the privilege-right distinction,⁷¹ but only one had expressly refused to follow the distinction in the area of its genesis – the dispensing of government largess.⁷² Justice Brennan, writing for the Court, substituted the balancing test, which traditionally was used after the application of the right-privilege doctrine, in place of the doctrine:

The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may ‘be condemned to suffer grievous loss,’ (citation) and depends upon whether the recipient’s interest in avoiding that loss outweighs the governmental interest in summary adjudication.⁷³

The *Sniadach* Court avoided the right privilege doctrine with the conclusion:

Where the taking of one’s property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (citation) this pre-judgment garnishment violates the fundamental principles of due process.⁷⁴

Despite this powerful language, the deprivation is merely a temporary attachment of a tightly regulated percentage of wages. Justice Harlan, in dissent, recognized, “The ‘property’ of which petitioner has been deprived is the *use* of the garnished portion of her wages during the...garnishment....”⁷⁵ Thus, al-

⁷¹See *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), and *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6 (1969). The distinction was born in the aphorism of Justice Holmes: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517, 517 (1892). The authoritative pre-*Sniadach-Goldberg* analysis is Van Alstyne, *The Demise of the Right Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). See also Reich, *The New Property*, 73 YALE L. J. 733 (1964) and Reich, *Individual Rights and Social Welfare, The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965). A right being no more than that from which legal consequences flow if it is denied, the doctrine resulted in the unseemly reasoning that a court would not act for the displaced beneficiary of government largess because no “right” vested in the beneficiary.

⁷²*Shapiro v. Thompson*, 394 U.S. at 627 n. 6. *Shapiro* was a welfare case also, but the gravamen of the complaint was abridgement of the right to free travel; *Sherbert* considered First Amendment religious freedoms. The sole case which precisely anticipated *Goldberg* is *Camerena v. Dept. of Public Works*, 9 Ariz. App. 120, 449 P.2d 957 (1969).

⁷³*Goldberg v. Kelly*, 397 U.S. at 262-3.

⁷⁴*Sniadach v. Family Finance Corp.*, 395 U.S. at 342.

though nominally limited, *Sniadach* and *Goldberg* affect the most fundamental of questions— who may claim sufficient interest in avoiding loss by governmental action that he is entitled to procedural due process? *Snidach*, although it is more relevant to commercial than administrative law, has become such a frequent companion in citation to *Goldberg* upon the pre-hearing detriment and right to a hearing issue that it is appropriate to consider it in the administrative law context.⁷⁶ The remainder of this section will focus upon the state and federal progeny of the two landmarks in specific areas of law.

A. THE *SNIADACH* PROGENY—THE EXPANSION OF “SPECIAL PROPERTY”

Federal cases following *Sniadach* have extended its rule, with some conflict among circuits, to distraint for rent,⁷⁷ replevin of goods purchased under conditional sales contracts,⁷⁸ and cognovit clauses in residential leases to tenants with less than \$10,000 annual income.⁷⁹ A single case rejected application to an extra-judicial foreclosure procedure.⁸⁰

1. FEDERAL COURT DEVELOPMENTS UNDER *SNIADACH*

The Pennsylvania distraint statute provided that special judicial officers, acting upon affidavit of a landlord, could seize

⁷⁵*Id.* at 342 (Harlan, J., concurring).

⁷⁶*See, e.g.,* Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 722 (N.D.N.Y. 1970).

⁷⁷*Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970); *see Klim v. Jones*, 315 F. Supp. 109 (N.D.Cal. 1970); *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970).

⁷⁸*Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716; *but see Brunswick Corp. v. J. & P. Inc.*, 424 F.2d 100 (10th Cir. 1970), and *Fuentes v. Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1970), *jur. noted*, 401 U.S. 906 (1971). In *Epps v. Cortese* 326 F. Supp. 127 (E.D. Pa. 1971) *prob. jur. noted*, 402 U.S. 994 (1971) a unanimous three-judge district court refused to enjoin operation of Pennsylvania's replevin procedure.

⁷⁹*Swarb v. Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970). The Supreme Court affirmed without reaching the merits. *Swarb v. Lennox*, 405 U.S. 191, 201 (1972). The Pennsylvania official defendants, due to a change in policy in the Attorney General's office, filed no cross-appeal when the plaintiffs appealed seeking to have the statute declared unconstitutional on its face. *Id.* at 201. In *Swarb* and a companion case, *D. H. Overmeyer, Inc. of Ohio v. Frick Co.*, 405 U.S. 174 (1972), the Court (Justices Douglas and Marshall concurring, Justices Powell and Rehnquist taking no part) refused to declare cognovit clauses unconstitutional on their face. In *Overmeyer* the court recognized the potential for due process depriva-

a tenant's property and hold it for sale to satisfy rent due. The tenant could contest only by depositing twice the value of the goods as security and suing in replevin. If no suit was filed within five days of the seizure, a sheriff's sale was held.⁸¹ A unanimous three-judge district court found sufficient state action in the fact that without the statutory officers and procedures, no such sale could take place. It then held that because the statute was so broad as to include the necessities of life the degree of individual deprivation was so great, in comparison to a lack of public interest, that the procedure controverted due process.⁸²

In *Klim v. Jones*⁸³ the district judge found unconstitutional the hotelman's *lein* provisions of the California Civil Code, which are closely analagous to distraint. In a carefully written opinion Judge Levin found that the medieval state and private interests had become but the shadow of a ghost. In current usage, he found, the *lein* primarily affected the "financially embarrassed," struck a worse blow than partial deprivation of wages by depriving the indigent of all his worldly goods, caused loss of employment (the plaintiff was a painter whose brushes and clothes were locked in his hotel room for \$5 rent) and created economic leverage to sustain fraudulent claims. "The imposition of the *lein* may often result in...fraudulent claims being paid by the harried boarder with valid legal defenses being relegated to the dustbin."⁸⁴

tion through *cognovit* judgments but held that the complaining corporation had waived its rights with knowledge in a fair bargain for valuable consideration. 405 U.S. at 186-7. Justice Blackmun, writing the majority opinion, left the waiver issue open to case-by-case determination. "Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the *cognovit* provision, other legal consequences may ensue." 405 U.S. at 188. Thus the "discomfiture" the Court expressed in affirming *Swarb* seems more focused upon the propriety of a class suit to invalidate all waivers than upon the validity of the waiver theory itself. 405 U.S. at 201-2. Neither opinion mentions *Sniadach*, but the cases at least indicate that no great reversal of the *Sniadach* principles is in the offing. Waiver may become a crucial issue as creditors react to *Sniadach* cases. See *Young v. Ridley*, 309 F. Supp. 1308, 1312 (D.C. 1970).

⁸⁰*Young v. Ridley*, 309 F. Supp. 1308 (D. C. 1970).

⁸¹*Santiago v. McElroy*, 319 F. Supp. at 288.

⁸²*Id.* at 292; see *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970).

⁸³315 F. Supp. at 124.

⁸⁴*Id.* at 123. *Klim* was followed in invalidating the Illinois Innkeeper's Lien Law. *Collins v. Viceroy Hotel Corp.* 338 F. Supp. 390 (N.D. Ill. 1972).

Conditional sales contract replevin procedures have resulted in somewhat conflicting rules among the circuits. In *Laprease v. Raymours Furniture Co.*⁸⁵ a three-judge district court in the Second Circuit found New York's procedure in violation of due process where the items seized were necessary household furniture. The furniture was found to be within the special property concept of *Sniadach*; *Goldberg* was held to require a pre-seizure hearing where the creditor remedy was authorized by state statute and carried out by a sheriff.⁸⁶ In *Brunswick Corp. v. J & P, Inc.* the Tenth Circuit upheld a similar statute as applied to business property (bowling alley furnishings) where the debtor had contractually consented to the use of the procedure.⁸⁷ Although *Brunswick* is clearly distinguishable, the true conflict was established when a divided three-judge district court in the Fifth Circuit followed *Brunswick* in a case similar to *Laprease*.⁸⁸ The decision does not mention *Laprease*, and its failure to use a balancing test weakens it substantially.⁸⁹ It is now under consideration in the Supreme Court.⁹⁰

The District of Columbia extra-judicial foreclosure provision was upheld because it provided thirty days notice before any action affecting the rights of the parties became effective, and because the debtor had open access to the courts before that period terminated.⁹¹ It was clear that had the court not been satisfied of the existence of sufficient safeguards to prevent fraud, overreaching, or forfeiture of valid defenses, it would have applied *Sniadach*.⁹²

One can fairly conclude that the federal courts, with the single exception of the *Fuentes* Court, have synthesized *Sniadach* and *Goldberg* to require a balancing test wherever state action affects an interest in property. State courts, too, have broadened, not restricted the operation of *Sniadach*.⁹³ But of

⁸⁵315 F. Supp. at 722, 725.

⁸⁶*Id.* at 722.

⁸⁷*Brunswick Corp. v. J. & P., Inc.*, 424 F.2d at 105.

⁸⁸*Fuentes v. Faircloth*, 317 F. Supp. 954.

⁸⁹*Id.* at 956-8.

⁹⁰401 U.S. 906 (1971).

⁹¹*Young v. Ridley*, 309 F. Supp. at 1310.

⁹²*Id.* at 1312; but the Court incorrectly presumes a narrow future for *Sniadach*.

⁹³*Jones Press v. Motor Travel Services, Inc.*, 286 Minn. 205, 176 N.W.2d 87 (1970) (garnishment of accounts receivable); *Downs v. Jacobs*, 272 A.2d 706 (Supr. Ct. Del. 1970) (distraint).

all jurisdictions, California has been the most enthusiastic in its acceptance of *Sniadach*.⁹⁴

2. CALIFORNIA ACCEPTANCE OF SNIADACH

In *Blair v. Pitchess*⁹⁵ the Supreme Court unanimously invalidated the California Claim and Delivery Law,⁹⁶ in a taxpayer suit.⁹⁷ The Court attacked the statute at both ends of the balancing test: its overbreadth both potentially deprived the indigent of necessities and grossly exceeded the only real public interest—obtaining *in rem* jurisdiction over those about to abscond or secret assets.⁹⁸ The Court, per Justice Sullivan adopted a broad interpretation of the *Sniadach* balancing test:

Under the reasoning of *Sniadach* a taking such as that involved in claim and delivery procedure violates due process if it occurs prior to a hearing on the merits unless justified by weighty state or creditor interests.⁹⁹

The Court expressly adopted the reasoning of *Laprease* over that of *Fuentes* and *Brunswick*.¹⁰⁰

The Court further extended *Sniadach* in holding unconstitutional the attachment of private bank accounts in contract claims actions.¹⁰¹ The unanimous court, *per* Justice Tobriner, said,

(R)ather than creating a special constitutional rule for wages, the *Sniadach* opinion returned the entire domain of pre-judgment remedies to the long-standing principle which dictates that, except in extraordinary circumstances an individual

⁹⁴California quickly followed the narrow holding of *Sniadach*: *McCallop v. Carberry*, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970).

⁹⁵5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971). See *I.A.C. Credit Corp. v. Bass*, 21 Cal. App. 3d 645, 655, 98 Cal. Rptr. 681, 687 (1972) holding *Blair* to be prospective only.

⁹⁶CAL. CODE OF CIV. PROC. § § 509-521 (West 1955) (Supp. 1971).

⁹⁷The shakiness of standing evidences the Court's willingness to invalidate the procedure. *Blair v. Pitchess*, 5 Cal. 3d at 268-9, 486 P.2d at 1248-9, 96 Cal. Rptr. at 48-9.

⁹⁸*Id.* at 278-9, 486 P.2d at 1256-7, 96 Cal. Rptr. at 56-7.

⁹⁹*Id.* at 278, 486 P.2d at 1256, 96 Cal. Rptr. at 56.

¹⁰⁰*Id.* at 280, 486 P.2d at 1257-8, 96 Cal. Rptr. at 57-8.

¹⁰¹*Randone v. Appellate Dept.*, 5 Cal. 3d 536, 541, 488 P.2d 13,18, 96 Cal. Rptr. 709, 711 (1971).

may not be deprived of his life, liberty, or property without notice and hearing.¹⁰²

The Court held that to be valid an attachment statute must exempt all necessities and operate pre-judgment only where "an actual risk has arisen that assets will be concealed or that the debtor will abscond."¹⁰³

The First District Court of Appeal has declared unconstitutional on the basis of *Sniadach* the provisions of unlawful detainer judgment enforcement which allow a landlord to satisfy an unadjudicated claim for rent or cost out of the property taken when eviction is carried out pursuant to an unlawful detainer judgment.¹⁰⁴

The California courts thus have enthusiastically and uncritically applied the broadest possible scope of the *Sniadach* balancing test, and the balance has weighed heavily in favor of due process.

3. SECURED TRANSACTIONS—A CALIFORNIA— FEDERAL SYNTHESIS AT THE FRINGES OF SNIADACH

Two recent and entirely conflicting holdings of California Federal District Courts reveal the potential alteration of basic economic relations that *Sniadach* may cause. In *Adams v. Egley*¹⁰⁵ District Judge Leland C. Nielsen held the repossession sections of Article 9 of the U.C.C.¹⁰⁶ constitutionally defective and void upon the basis of *Sniadach*.¹⁰⁷ In *Oller v. Bank of America*¹⁰⁸ District Judge Spencer M. Williams held that the federal

¹⁰²*Id.* at 547, 488 P.2d at 19, 96 Cal. Rptr. at 715.

¹⁰³*Id.* at 563, 488 P.2d at 31, 96 Cal. Rptr. at 727.

¹⁰⁴*Gray v. Whitmore*, 17 Cal. App. 3d 1, 94 Cal. Rptr. 904 (1971). Recently Gray was expressly and fully adopted by the California Supreme Court, *Love v. Keays*, 6 Cal. 3d 339, 344-5, 491 P.2d 809, 811-2, 98 Cal. Rptr. 811, 813-4 (1971). *But see* *Property Research Financial Corp. v. Superior Court*, 23 Cal. App. 3d 413, 100 Cal. Rptr. 233 (1972) holding attachment of property of out-of-state debtors valid because of the risks of dissipation. *Accord: Lebowitz v. Forbes Leasing & Finance Corp.* 456 F.2d 979 (3d Cir. 1972) *App. Pndg*, 40 U.S.L.W. 3528 (No. 71-1403).

¹⁰⁵338 F. Supp. 614 (S. D. Cal. 1972).

¹⁰⁶CAL. COM. CODE § § 9304, 9305 (West 1964).

¹⁰⁷*Adams v. Egley*, 338 F. Supp. at 621-2.

¹⁰⁸NO. C-70-2559-SW (N.D. Cal. Feb. 28, 1972).

courts had no jurisdiction to review the same statutes because of a lack of sufficient state action.¹⁰⁹

Judge Nielsen resolved the jurisdictional question¹¹⁰ upon the rationale of *Reitman v. Mulkey*,¹¹¹ which invalidated California's initiative repealer of anti-discriminatory housing legislation.¹¹² *Reitman*, argued on certiorari to the Supreme Court of California, disposed of no jurisdictional issue but decided that the authorization and encouragement of private discriminations was sufficient state action to bring the act within the ambit of the Fourteenth Amendment.¹¹³ Judge Nielsen found that although repossession was an entirely extra-judicial remedy the state encouragement through the Code of an unnoticed and hearingless taking rendered the private acts "under color of state law"¹¹⁴ and thereby conferred jurisdiction.¹¹⁵ Judge Nielsen found *Santiago v. McElroy*¹¹⁶ analogous in accepting jurisdiction of extra-judicial but statutorily authorized distraint procedures.¹¹⁷

Judge Williams denied Civil Rights Act jurisdiction, deciding that the statute invoked no state officers and compelled no private action.¹¹⁸ He denominated repossession "a contractual right which had been judicially approved prior to the adoption of the statutes in question."¹¹⁹ He specifically disagreed with *Adams* and distinguished *Reitman* as a racial discrimination problem which "presented a compelling factual situation to

¹⁰⁹*Id.* at 3.

¹¹⁰The jurisdictional statutes are 28 U.S.C. § 1311 (1966) (federal question), and 28 U.S.C. § 1343 (3) (1962) - 42 U.S.C. § 1983 (1970) (civil rights).

¹¹¹387 U.S. 369 (1967).

¹¹²*Adams v. Egley*, 338 F. Supp. at 617.

¹¹³*Reitman v. Mulkey*, 387 U.S. at 380-1.

¹¹⁴28 U.S.C. § 1343 (3) (1962); 42 U.S.C. § 1983 (1970).

¹¹⁵*Adams v. Egley*, 338 F. Supp. at 618.

¹¹⁶319 F. Supp. 284, 296 (E.D. Pa. 1970).

¹¹⁷*Adams v. Egley*, 338 F. Supp. at 618.

¹¹⁸*Oller v. Bank of America*, slip at 4.

¹¹⁹*Id.* at 4. But the recitation of this history begs the question. Without legal sanction repossession would be conversion. That the legal sanction derives from common law courts is immaterial; judicial enforcement of impermissible remedies is as violative of due process as legislative creation of the remedies. *Shelley v. Kraemer*, 334 U.S. 1 (1948) *Barrows v. Jackson*, 346 U.S. 249 (1953). Title in the creditor is also immaterial under the U.C.C. CAL. COM. CODE § 9202 (West, 1964).

which the Civil Rights Acts and their jurisdictional counterparts were designed to apply."¹²⁰

The Supreme Court has indicated some favor toward expansive jurisdiction over *Sniadach* progeny.¹²¹ In *Lynch v. Household Finance* the Court expressly rejected the personal liberties/proprietary rights distinction erected by some courts interpreting 28 U.S.C. §1343(3).¹²² There is, however, no clear indication whether *Lynch* will be narrowly construed or whether it indicates a trend.¹²³

The jurisdictional question should be of little importance in California; subsequent to *Blair*¹²⁴ and *Randone*¹²⁵ one can expect equally favorable treatment in State and Federal courts.

The substantive validity of the Commercial Code sections turns upon substantially the same question as Federal jurisdiction. Repossession might be distinguished from the bulk of the cases here discussed in that it is an entirely extra-judicial private remedy. *Brunswick*¹²⁶ is the most nearly apposite decision, but if there exists a constitutional right to freedom from prejudgment attachments then *Brunswick* is a waiver case. Adopting, as California has,¹²⁷ the view that the typical retail installment or consumer loan contract more resembles a contract of adhesion than one of arms-length bargaining, the strong presumption against waiver of a right is unruffled.¹²⁸ Perhaps most successful would be a judicial distinction between con-

¹²⁰*Id.* at 4,5. State action has also become a crucial issue where teachers and students seek redress from private schools of all levels. For a short but carefully considered discussion encapsulating most of the applicable authority see *Brownley v. Gettysburg College*, 338 F. Supp. 725 (M.D. Pa. 1972) (held for college).

¹²¹*Lynch v. Household Finance*, 92 S. Ct. 1113 (Mar. 23, 1972). Although three justices dissented, they "would without reservation" join the majority on jurisdiction under 28 U.S.C. § 1343, but would have interpreted differently the anti-injunction statute, 28 U.S.C. § 2283. 92 S. Ct. at 1124.

¹²²*Id.* at 1117. See *Eisen v. Eastman*, 421 F.2d 560, 563 (2d Cir. 1969) and *Hague v. C.I.O.*, 307 U.S. 496, 531 (1939) (concurring opinion of Stone, Jr.).

¹²³See *Lynch v. Household Finance*, 92 S. Ct., n. 19, aligning the jurisdictional concept with *Goldberg, inter alia. But see Swarb v. Lennox*, 92 S. Ct. 767 (Feb. 24, 1972) refusing to reach the merits of a not dissimilar waiver issue. See note 79, *supra*.

¹²⁴5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42.

¹²⁵5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709.

¹²⁶*Brunswick Corp. v. J. & P. Inc.* 424 F.2d 100 (10th Cir. 1970).

¹²⁷*Blair v. Pitchess*, 5 Cal. 3d at 275-6, 486 P.2d at 1254, 96 Cal. Rptr. at 54. See *D.H. Overmeyer, Inc. of Ohio v. Frick Co.*, 92 S. Ct. 775, 783 (Feb. 24, 1972).

¹²⁸*Glasser v. United States*, 315 U.S. 60 (1942).

sumer and commercial security agreements for Article 9 transactions similar to the "between merchants" legislative distinction in Article 2.¹²⁹ Given the nature of most repossession clauses, the infrequency of actual repossession except of automobiles, and the lack of mobility of most ordinary consumers and consumer goods, it is difficult to manufacture a state interest sufficient to sustain the repossession statute.¹³⁰ Nor is the statute so narrowly drawn as to escape scrutiny by exempting "special property."¹³¹

Thus under current California law the substantive result seems assured, regardless of the resolution of the jurisdictional question. Federal cases, assuming no dramatic reversals in the cases *sub judice*, seems to argue the same result in the Ninth Circuit, should it concur with the Southern District on jurisdiction.¹³²

B. DEVELOPMENTS IN SELECTED PROBLEM AREAS

A few narrow cases, notably *Sokol*¹³³ are clearly under attack from the *Sniadach-Goldberg* synthesis. Statutory responses to earlier decisions frequently moot out these narrower questions. It is therefore most important to consider those areas of the law most subject to change in light of the recent landmarks.

1. PUBLIC ASSISTANCE

Goldberg disposed of the question of the right to a hearing where welfare benefits are suspended or terminated. Presumably the applicability of *Goldberg* to other forms is unquestionable: public assistance is always an emergency survival matter, and it is doubtful that a state interest more persuasive

¹²⁹ See CAL. COM. CODE § 2207(2) (West, 1964).

¹³⁰ *Randone v. Appellate Dept.*, 5 Cal. 3d at 541, 488 P.2d at 14, 96 Cal. Rptr. at 711.

¹³¹ *Sniadach v. Family Finance Corp.*, 395 U.S. at 340.

¹³² *Klim v. Jones*, 315 F. Supp. 109 and *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 become controlling, accepting the waiver argument.

¹³³ *Sokol v. Public Utilities Commission*, 65 Cal. 2d 247, 418 P.2d 265, 53 Cal. Rptr. 673 (1966). Another relatively narrow area omitted from this volume is student rights. Law in this area is in its inceptive stage. To date two California cases applying *Goldberg* reasoning have required notice and some form of hearing prior to or immediately subsequent to suspension or expulsion from a public school. *Perlman v. Shasta Joint Jr. College Dist. Bd. of Trustee*, 9 Cal. App. 3d 873, 88 Cal. Rptr. 563 (1970); *Charles S. v. Board of Education*, 20 Cal. App. 3d 83, 97 Cal. Rptr. 422 (1971). For Universities see *Goldberg v. Regents of the University of California*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

than conservation of fiscal and administrative resources could be pressed. Thus the balance would weigh as in *Goldberg*.¹³⁴ The *Goldberg* rationale need not be reached in some cases. *California Human Resources Department v. Java*,¹³⁵ holding that unemployment compensation cannot be withheld during an employer's appeal, was decided by eight justices wholly upon statutory grounds. Justice Douglas would have decided the case upon the basis of *Goldberg*.¹³⁶

Although the Supreme Court refused to decide the exact impact of *Goldberg* upon the reduction of public assistance, it has mandated the consideration of such cases in the light of *Goldberg*.¹³⁷ Lower federal and state courts have decided that benefits may not be reduced upon the basis of disputed facts without a pre-reduction hearing.¹³⁸ In *Merriweather v. Burson*, Sidney O. Smith, C.J., noted that reduction may "so shift the recipient's central concern to finding the means for daily subsistence, that it undercuts his ability to seek redress from the welfare administration."¹³⁹ He held *Goldberg* to require pre-reduction hearings.¹⁴⁰ *Sniadach* provides a stronger rationale for requiring pre-reduction hearings. Garnishment there worked

¹³⁴*Goldberg v. Kelly*, 397 U.S. at 266. In *Wheeler v. State of Vermont*, 335 F. Supp. 856 (D. Ver. 1971), a 3-Judge District Court held *Goldberg* to require hearing prior to termination of unemployment benefits and in *Crow v. California Department of Human Resources* 325 F. Supp. 1314 (N.D. Cal. 1970) the court held similarly, calling the pre-determination hearing "*The constitutional norm.*" *Id.* at 1318 (Court's italics).

¹³⁵402 U.S. 121, 124 (1971).

¹³⁶*Id.* at 135 (concurring opinion of Douglas, J.).

¹³⁷*Daniel v. Goliday*, 398 U.S. 73 (1970), opinion of the District Court, 305 F. Supp. 1224 (1970). Prior to *Goldberg* a 3-Judge District Court had held that the Fourteenth Amendment required a hearing prior to "termination suspension, or reduction" of welfare. In a brief per curiam opinion, the majority vacated, calling for a record from the district court developed entirely upon the issue of reduction. Chief Justice Burger and Justices Black and Stewart dissented. Presumably they would have reversed on the merits. (See their dissents in *Wheeler v. Montgomery*, 397 U.S. 280, 285, 1970).

¹³⁸*Merriweather v. Burson*, 325 F. Supp. 709 (N.D. Ga. 1970); *Woodson v. Houston*, 27 Mich. App. 239, 183 N.W.2d 465 (1970) (decided against recipient on other grounds). Compare *Provost v. Betit*, 326 F. Supp. 920 (D.Ver. 1971) and *State ex rel. Ellis v. Heim*, 83 N.M. 103, 488 P.2d 1207 (1971), both acknowledging the rule for administrative reductions and distinguishing state-wide statutory revisions of general application.

¹³⁹*Merriweather v. Burson*, 325 F. Supp. at 710.

¹⁴⁰*Id.* at 710-11.

only a partial deprivation of wages; yet a partial deprivation is as devastating as a total extinguishment where the marginal income removed pays the rent or buys the groceries. To call the deprivation of even a few dollars *de minimis* in these circumstances is contrary to the rationale of *Goldberg* and *Sniadach*. The Second Circuit adopted this view respecting rent increases one to five dollars in the case of low rent housing.¹⁴¹

The companion case to *Goldberg*, *Wheeler v. Montgomery*¹⁴² directly overturned the California welfare administrative practice, and *Goldberg* was routinely incorporated into California case law in *McCullough v. Terzian*.¹⁴³

2. PUBLIC HOUSING

Prior to *Goldberg* there was some authority that a public housing tenant was entitled to procedural due process, both in application for tenancy and in eviction.¹⁴⁴ The *Holt* Court enjoined the eviction of a tenant of state operated low-rent housing upon both substantive and procedural due process. The District Court ruled that due process demanded at least a rudimentary hearing, and that the apparent ground for eviction—activity in a tenant union—constituted an impermissible retaliatory eviction contrary to First Amendment assembly rights.¹⁴⁵ The *Thomas* case invalidated a local policy of excluding from public low-rent housing all unwed mothers. The District Court con-

¹⁴¹*Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir. 1970). It has not been the focus of this article specially to consider the problem of denial of initial applications. The same balancing test applies to denials, but, of course, the applicant's interest is weighed less than that of the holder of a right. See, *Martin v. Board of Supervisors*, 135 Cal. App. 96, 26 P.2d 843 (1933); *Davis v. Toledo Metropolitan Housing Authority*, 311 F. Supp. 795 (N.D. Ohio 1970). For a full discussion of applicant rights see Article, *California Welfare Fair Hearings: An Adequate Remedy?* 5 U.C.D. L.REV. 542, 581-2 (1972).

¹⁴²397 U.S. 280.

¹⁴³2 Cal. 3d 647, 470 P.2d 4, 87 Cal. Rptr. 195 (1970).

¹⁴⁴*Holt v. Richmond Redevelopment and Housing Authority*, 266 F. Supp. 397 (E.D. Va. 1966); *Thomas v. Housing Authority of City of Little Rock*, 282 F. Supp. 575 (E.D. Ark. 1967); *Vinson v. Greenburgh Housing Authority*, 29 App. Div. 338 288 N.Y.S.2d 159 (1968); but see *Randell v. Newark Housing Authority*, 384 F.2d 151 (3rd Cir. 1967), and *Thorpe v. Housing Authority of City of Durham*, 386 U.S. 670 (1967) holding that where only a court's judgment can cause eviction there is no procedural due process deprivation.

¹⁴⁵*Holt v. Richmond Redevelopment and Housing Authority*, 266 F. Supp. at 400-401.

cluded that the authority could exclude for cause with notice and hearing.¹⁴⁶ In a sharply divided opinion the New York Supreme Court, Appellate Division, applied procedural due process to public housing tenants in the face of a contract which provided for termination by either party upon thirty days notice. The housing authority had, without, notice, hearing, or stated reason, threatened to evict a family if the wife refused to force the husband to quit the premises. The majority held that regardless of the contract the state may not act arbitrarily, and that procedural due process is the best method of curtailing arbitrary action.¹⁴⁷

The post-*Goldberg* landmark in public housing, *Escalera v. New York City Housing Authority*,¹⁴⁸ required a pre-deprivation hearing and wholeheartedly rejected the right-privilege distinction in favor of a balancing test:

Nor is it conclusive...to argue that there is no constitutional right to continue living in public housing projects (citation¹⁴⁹). The government cannot deprive a private citizen of his continued tenancy without affording him adequate procedural safeguards even if public housing could be deemed to be a privilege.¹⁵⁰

Because of the procedural posture of the case the Housing Authority was not allowed to introduce evidence of its need for expedition in eviction or assessment of penalty rent, but the Court, commanded "a convincing showing at trial that the HA has a compelling need...."¹⁵¹ Presumably the burden could be carried only by a showing that a tenant's continued presence created a health or safety emergency.

An Ohio District Court independently adopted the *Escalera* rationale to grant full procedural due process to applicants for low-cost housing:

¹⁴⁶Thomas v. Housing Authority of the City of Little Rock, 282 F. Supp. at 580.

¹⁴⁷Vinson v. Greenburgh Housing Authority, 288 N.Y.S.2d at 160.

¹⁴⁸425 F.2d 853. *Accord*, *Caulder v. Durham Housing Authority* 433 F.2d 998 (4th Cir. 1970) and *Brown v. Housing Authority*, 340 F. Supp. 114 (E.D. Wis. 1972).

¹⁴⁹*Chicago Housing Authority v. Blackmun*, 4 Ill. 2d 319, 122 N.E. 522 (1954) was the leading case decided upon that ground.

¹⁵⁰*Escalera v. New York City Housing Authority*, 425 F.2d at 861.

¹⁵¹*Id.* at 861.

It seems clear, therefore, that those seeking to be declared eligible for public benefits may not be declared ineligible without opportunity to have an evidentiary hearing.¹⁵²

And *Escalera* has sufficient impact upon HUD to cause a complete revision of the regulations respecting hearing procedures in federally funded projects.¹⁵³

3. PUBLIC EMPLOYMENT

Prior to *Goldberg* procedural due process rights of governmental employees were limited to areas in which no clear statutory authorization precluded notice and hearing. In *Greene v. McElroy*¹⁵⁴ a divided Court condemned the revocation without hearing of an aeronautical engineer's security clearance. Because of governmental involvement in the aerospace industry the petitioner was virtually deprived of his ability to practice his profession. There was no authorization for action without hearing. The Court carefully limited its holding to one of statutory interpretation and barely acknowledged the due process overtones.¹⁵⁵ *Greene* was further limited in *Cafeteria and Restaurant Workers etc. v. McElroy*¹⁵⁶ where the clearance of a cook employed at a naval base was lifted without hearing. The Court found that both explicit regulations and traditional military practice gave the post commander the authority to dismiss without hearing a civilian employee.¹⁵⁷ Considering due process, the Court shed some doubt upon the right-privilege distinction but decided that a governmental employee was entitled only to freedom from arbitrary or capricious dismissal. No procedural rights attached to what amounted to a privilege of holding a job.¹⁵⁸ Justice Brennan, with whom the Chief Justice and Justices Black and Douglas concurred, sharply condemned the right-

¹⁵²*Davis v. Toledo Metropolitan Housing Authority*, 311 F. Supp. 795, 796 (N.D. Ohio 1970).

¹⁵³See *Glover v. Housing Authority of City of Bessemer, Alabama*, 444 F.2d 158 (5th Cir. 1971).

¹⁵⁴360 U.S. 474, 508 (1959).

¹⁵⁵*Id.* at 507-8.

¹⁵⁶367 U.S. 886 (1961).

¹⁵⁷*Id.* at 890-4.

¹⁵⁸*Id.* at 894-8.

privilege distinction and excoriated the majority for failing to recognize that substantive rights can be protected only by procedural due process.¹⁵⁹

Although *Goldberg* cited *Cafeteria and Restaurant Workers*¹⁶⁰ and expressly distinguished the economic status of government employees,¹⁶¹ one may fittingly ask whether the attack upon the right-privilege dichotomy so thoroughly undermined *Cafeteria and Restaurant Workers* that new law in the public employee discipline field is necessary.

The Court of Claims and Seventh Circuit have answered the query in the affirmative. In *Riccucci v. United States*¹⁶² a unanimous panel granted a former governmental employee recovery of pay withheld upon the ground that the summary procedure for dismissal had not been followed. But Judges Collins and Skelton, specially concurring, would have reversed holding the procedure unconstitutional upon the basis of *Goldberg*: "I can see no meaningful difference between this situation and that which existed in *Goldberg v. Kelly*."¹⁶³ The judges considered the express distinction of governmental employment to have little economic and no legal effect. They found the deprivation of employment to be as severe as that of welfare payments.¹⁶⁴ In *Roth v. Board of Regents of State Colleges*¹⁶⁵ a divided panel of the Seventh Circuit held that a non-tenured college professor whose contract was not renewed was entitled to procedural due process in order to protect his substantive right of freedom from arbitrary or capricious dismissal. The rationale precisely tracked the dissent in *Cafeteria*. The majority distinguished *Cafeteria* by taking judicial notice of the fact that a single dismissal amounts, in the tight college job market, to a deprivation of the right to practice the profession.¹⁶⁶ Judge Duffy, dissent-

¹⁵⁹*Id.* at 900-901.

¹⁶⁰*Goldberg v. Kelly*, 397 U.S. at 263; citing *Cafeteria* for a general quotation defining due process, not for its holding, and in a spirit contrary to its holding. Since Justice Brennan wrote both *Goldberg* and the *Cafeteria* dissent, one could conclude he intended *Goldberg* to weaken *Cafeteria*.

¹⁶¹*Id.* at 264.

¹⁶²425 F. 2d 1252, 1256 (Ct. Cl. 1970); *Roth v. Board of Regents of State Colleges*, 446 F.2d 806 (7th Cir. 1971), *jur. noted*, 404 U.S. 909 (1971).

¹⁶³*Riccucci v. United States*, 425 F.2d at 1256 (concurring opinion).

¹⁶⁴*Id.* at 1256-7.

¹⁶⁵446 F.2d at 808. For a traditional pre-*Goldberg* approach see *Jones v. Hopper*, 410 F.2d 1323 (10th Cir. 1969), *cert den.*, 397 U.S. 991 (1970).

¹⁶⁶*Roth v. Board of Regents of State Colleges*, 446 F.2d at 809. See *Harrington v. Taft*, 339 F. Supp. 670 (D.R. I. 1972), same argument as to police officer.

ing, would have followed *Cafeteria*. Although the majority did not discuss the right-privilege doctrine, it adopted the opinion of the District Court, which said, "The time is past in which public employment is to be regarded as a 'privilege' which may be extended upon any conditions which public officials choose to impose."¹⁶⁷

Goldberg thus has fomented a brief revolution in the field of public employee rights.¹⁶⁸ The end of that revolution may be seen when the Supreme Court rules in *Roth*.

Despite *Goldberg* and *Sniadach* the right-privilege doctrine may be entrenched in California law respecting public employee rights. In *Bogacki v. Board of Supervisors of Riverside County*¹⁶⁹ the five judge majority denied any relief to a county building inspector from the decision of a special board of employment termination review which, although it had found his dismissal

¹⁶⁷*Roth v. Board of Regents of State Colleges*, 310 F. Supp. 972, 979 (W.D. Wisc. 1970).

¹⁶⁸See *Cooley v. Board of Education of Forrest City School District*, 453 F.2d 282 (8th Cir. 1972). Holding that the mid-year dismissal of a public school teacher may not be accomplished without notice and hearing; *Drown v. Portsmouth School District*, 435 F.2d 1182 (1st Cir. 1970) *cert. den.* 402 U.S. 972 (1971), requiring notice of reasons for failure to rehire non-tenured teachers but not requiring a hearing; *Woodbury v. McKinnon*, 447 F.2d 839 (5th Cir. 1971) protecting a doctor's surgical privileges in a county hospital, at least to the extent of an informal hearing with confrontation and binding consequences. Recent district court cases have applied some measure of due process to public employee dismissals. Held for employee: teachers under probationary contracts are entitled to procedural due process (notice and pretermination hearing) where mid-year termination is effected [*Schreiber v. Joint School District No. 1, Gibraltar, Wis.* 335 F. Supp. 745 (D. Wis. 1972) and *Bates v. Hinds*, 334 F. Supp. 528 (N.D. Tex. 1971)]; where teacher under probationary contract has a reasonable expectation of re-employment due process requires notice and a hearing upon failure to rehire [*Callaway v. Kirkland*, 334 F. Supp. 1034 (N.D. Ga. 1971), *Duke v. North Texas State University*, 338 F. Supp. 990 (E. D. Tex. 1971) and *Moore v. Knowles*, 333 F. Supp. 53 (N.D. Tex. 1971)]; California State College System must provide teacher with reasons for non-granting of tenure and with a fair and impartial hearing where he may show untruth of grounds or impermissibility of consideration of any matter [*Auerbach v. Trustees of State Colleges*, 330 F. Supp. 808 (C.D. Cal. 1971)]. Held against employee: probationary welfare caseworker has no right to pre-termination hearing, but has a right to judicial determination of whether firing was arbitrary or for constitutionally impermissible grounds [*Wilderman v. Nelson*, 335 F. Supp. 1381 (E.D. Mo. 1971)]; non-tenured teacher rehired on "terminal" contract upon failure to grant tenure had no right to a hearing given that there was over one year notice and ready opportunity to prove unconstitutional conditions allegation in court [*Shields v. Watrel*, 333 F. Supp. 260 (W.D. Pa. 1971)].

¹⁶⁹5 Cal. 3d 771, 489 P.2d 537, 97 Cal. Rptr. 657 (1971) *cert. den.* 92 S. Ct. 1301 (Mar. 28, 1972).

to be without reasonable cause, had not ordered reinstatement but restored eligibility for county employment.¹⁷⁰ The local remedy was a mere futile gesture because the inspector was unqualified for other county employment, and the sole person who could re-hire him was the department head who fired him.¹⁷¹ The inspector therefore sought reinstatement on mandamus. The inspector was unable to marshal sufficient proof that he was dismissed for exercising First Amendment rights,¹⁷² and his legal theories, that the ordinance creating the review board should be construed to grant a power to reinstate¹⁷³ and that he had a right to be dismissed only for judicially recognizable good cause, were rejected.¹⁷⁴

The county enactments which formed the framework for the *Bogacki* holding were ambiguous. One granted department heads the power to "remove any employee...for cause satisfactory to himself, subject only to the provisions of this ordinance and requirements of law."¹⁷⁵ The other empowered the review board to "make a written finding as to whether or not the employee was dismissed for reasonable cause and...also make a recommendation as to the eligibility of the employee for future employment...."¹⁷⁶ The majority concluded that the statutes expressly forbade the board of review to even suggest reinstatement.¹⁷⁷ Ordinarily the words "for cause" alone trigger the implication of a hearing.¹⁷⁸ The "to himself" gloss probably would have been ignored in the face of "reasonable cause" in the hearing resolution, absent the peculiar constitution of the hearing board.¹⁷⁹ But the apparent denial of full review led the Court to construe the department head's dismissal power as

¹⁷⁰*Id.* at 774, 489 P.2d at 538-9, 97 Cal. Rptr. at 658-9.

¹⁷¹*Id.* at 784, 489 P.2d at 546, 97 Cal. Rptr. at 666 (dissenting opinion of Tobriner, J.).

¹⁷²*Id.* at 778-9, 489 P.2d at 542, 97 Cal. Rptr. at 662.

¹⁷³*Id.* at 781, 489 P.2d at 544, 97 Cal. Rptr. at 664.

¹⁷⁴*Id.* at 782-3, 489 P.2d at 544-5, 97 Cal. Rptr. at 664-5.

¹⁷⁵*Id.* at 775, 489 P.2d at 539, 97 Cal. Rptr. at 659.

¹⁷⁶*Id.* at 776, 489 P.2d at 540, 97 Cal. Rptr. at 660.

¹⁷⁷*Id.* at 781, 489 P.2d at 544, 97 Cal. Rptr. at 664.

¹⁷⁸*Carroll v. California Horse Racing Board*, 16 Cal. 2d 164, 167 105 P.2d 110, 111-2 (1940) and cases cited in note 31, *supra*.

¹⁷⁹*See* the majority opinion, distinguishing *Hollon v. Pierce*, 257 Cal. App. 2d 468, 64 Cal. Rptr. 808 (1967) as a case where the employee was subject to removal only for cause. *Bogacki v. Board of Supervisors*, 5 Cal. 3d at 783, 489 P.2d at 545, 97 Cal. Rptr. at 665.

absolute.¹⁸⁰ This self-reinforcing determination of legislative intention short-circuits the fundamental question, whether a hearing is required to salvage the enactment from constitutional infirmities.¹⁸¹ An affirmative answer would lead to the conclusion that reinstatement power must be vested in the board of review,¹⁸² and the entire construction argument would fall. The majority's construction of the statute therefore decides, *sub silentio*, that the public employee has no right to a meaningful hearing upon dismissal unless provided by the enactment under construction.

On its face the *Bogacki* opinion seems to say that the public employee has no right to freedom from arbitrary and capricious dismissal.¹⁸³ But *Bogacki* is based upon a bizarre trial court record from which neither side could establish the reason for dismissal.¹⁸⁴ Because the trial court found as fact that the inspector's dismissal was not arbitrary and capricious,¹⁸⁵ the case, as the majority's emphasis reveals, decided only upon whom the burden of proof of reason for dismissal must lie.

However it is quite another thing to assert — as petitioner does — that even when a *dismissed employee* serving at the pleasure of the appointing authority fails to show that his dismissal resulted from the exercise of a constitutional right, he neverthe-

¹⁸⁰*Bogacki v. Board of Supervisors*, 5 Cal. 3d at 781, 489 P.2d at 543-4, 97 Cal. Rptr. at 663-4.

¹⁸¹The determination of legislative intention has never been a serious effort to divine the real intention of the body; courts instead have attempted by judicial amendment to avoid directly invalidating the enactment. *See, e.g.* *Greene v. McElroy*, 360 U.S. 474; *Fascination Inc. v. Hoover*, 39 Cal. 2d 260, 246 P.2d 656 (1952); *Carroll v. California Horse Racing Board*, 16 Cal. 2d 164, 105 P.2d 110 (1940). That the inability to frame and enforce a suitable remedy is a fatal defect to an administrative tribunal is settled law. *Endler v. Schutzbank*, 68 Cal. 2d at 168, 436 P.2d at 301, 65 Cal. Rptr. at 301; *United States Alkali Export Ass'n. v. United States*, 325 U.S. 196, 210 (1945); *McNeese v. Board of Education*, 373 U.S. 668, 675 (1963). *See* *Armstrong v. Manzo*, 380 U.S. 545 (1965). (Imposition of unreasonable burdens of proof in adoption proceeding): "A fundamental requirement of due process is 'the opportunity to be heard.' (citation) It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Id.* at 552.

¹⁸²The "requirements of law" clause certainly permits this construction.

¹⁸³*Bogacki v. Board of Supervisors*, 5 Cal. 3d at 783, 489 P.2d at 545, 97 Cal. Rptr. at 665.

¹⁸⁴*Id.* at 782, 489 P.2d at 544, 97 Cal. Rptr. at 664.

¹⁸⁵*Id.* at 782 n. 10, 489 P.2d at 544, n. 10, 97 Cal. Rptr. at 664 n. 10.

less has the right to be reinstated to his employment unless *the appointing authority* is able to demonstrate judicially cognizable good cause for dismissal.¹⁸⁶

Thus *Bogacki* makes no inroad upon the cases which prohibit dismissal for exercising constitutional rights.¹⁸⁷ Neither does the case embrace the right-privilege doctrine; in fact, the elements of a balancing test are discussed in the opinion.¹⁸⁸ Finally, it does not decide whether a dismissal which the employee can prove was arbitrary and capricious—perhaps motivated solely by personal malice—violates the employee's Fourteenth Amendment rights.

This is not to say that *Bogacki* was not a disappointment in the struggle for public employee protection. But given the maverick statute the *sub silentio* procedural due process holding is weak, and the intertwined substantive due process analysis certainly cannot be taken as the final authoritative pronouncement of the Court in the field. In a proper case the scholarly dissent of Justice Tobriner should have some effect.

The California Supreme Court in earlier decisions has limited the scope of *Cafeteria*,¹⁸⁹ and the Second District Court of Appeal has rejected the application of the right-privilege doctrine to public employee cases.¹⁹⁰ California law, then, is as much in flux as Federal law.

4. DRIVER'S LICENSES

Although the California Supreme Court recently approved the

¹⁸⁶*Id.* at 782, 489 P.2d at 544-5, 97 Cal. Rptr. at 664-5.

¹⁸⁷*Bagley v. Washington Township Hosp. Dist.*, 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966); *Rosenfield v. Malcolm*, 65 Cal. 2d 599, 421 P.2d 697, 55 Cal. Rptr. 505 (1967); *Ball v. City Council of Coachella*, 252 Cal. App. 2d 136, 60 Cal. Rptr. 139 (1967).

¹⁸⁸*Bogacki v. Board of Supervisors*, 5 Cal. 3d at 783, 489 P.2d at 545, 97 Cal. Rptr. at 665.

¹⁸⁹*Endler v. Schutzbank*, 68 Cal. 2d at 171, 172, 436 P.2d at 303-4, 65 Cal. Rptr. at 303-4, preferring *Willner v. Committee on Character*, 373 U.S. 96 (1963) and *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 123 (1926), an early but important case requiring notice, hearing, and confrontation before the Board could deny the opportunity to practice before it.

¹⁹⁰*Patton v. Board of Harbor Commissioners*, 13 Cal. App. 3d at 541, 91 Cal. Rptr. at 835. *Sniadach*, since it involved a partial deprivation like *Patton*, may require a broadening of this case. See note 141, *supra*.

California financial responsibility law,¹⁹¹ it may be forced to reconsider its decision in the light of *Bell v. Burson*.¹⁹² The California Court sustained pre-hearing revocation of a driver's license so long as fault was considered by the Department of Motor Vehicles in its decision. Prompt judicial review was held to be necessary. The United States Supreme Court invalidated the similar Georgia financial responsibility law because the statute created a fault-oriented scheme without a proper determination of fault before revocation.¹⁹³ More importantly the Court rejected the state's contention that it could suspend prior to a hearing:

While "(m)any controversies have raged about...the Due Process Clause (citation) it is fundamental that except in emergency situations (and this is not one¹⁹⁴) due process requires... notice and ... hearing before the termination becomes effective.¹⁹⁵

Because the determination of probable fault is one of fact finding, and because the California analysis of state interest was rejected, it is doubtful that the California act sustained in *Orr* continues to pass constitutional muster.

The drunk driving conviction cases, lacking factual issues and bolstered by a compelling safety interest, will probably be unaffected.

¹⁹¹*Orr v. Superior Court*, 71 Cal. 2d 220, 454 P.2d 712, 77 Cal. Rptr. 816 (1969).

¹⁹²402 U.S. 535 (1971). Although the decision is unanimous, the Chief Justice and Justices Black and Blackman concurred without opinion. See *Reese v. Kassab*, 334 F. Supp. 744 (W.D. Pa. 1971) where a 3-judge District Court extend *Bell* to Pennsylvania "point system" revocations. See *McNamara v. Malloy*, 337 F. Supp. 732 (D. Ver. 1971) invalidating the Vermont financial responsibility law.

¹⁹³*Id.* at 541. See *Stanley v. State of Illinois*, 92 S. Ct. 1208 40 U.S.L.W. 4371 (Apr. 3, 1972), holding that the state may not declare children of unmarried parents wards of the state and appoint guardians after the death of the mother without first affording the father a hearing upon his fitness as a parent. The 5-2 decision is a due process—equal protection amalgam.

¹⁹⁴Citing *Fahey v. Mallonee*, 332 U.S. 245 (1947) (Savings and Loan endangering investors) and *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950) (adulterated vitamins); *Bell v. Burson*, 402 U.S. at 542 n. 5. See *Bourjois v. Chapman*, 301 U.S. 183 (1937) (adulterated cosmetics). See *Collins v. Viceroy Hotel Corp.* 338 F. Supp. at 396-7.

¹⁹⁵*Bell v. Burson*, 402 U.S. at 542, citing, *inter alia*, *Sniadach*, *Goldberg*, and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), which interdicted the posting of a citizen on "public drunk" list without notice and hearing.

5. PAROLE REVOCATION

Schizophrenic is the only appropriate description for the post-*Goldberg* decisions determining the right of a parolee to a hearing prior to or immediately after revocation of parole. Three circuits have required some sort of hearing, but for different reasons.¹⁹⁶ One circuit has held that due process requires no hearing.¹⁹⁷ Although *Hahn v. Burke* directly touches the issue of probation revocation, the Court, *per* Judge Kerner, declined to base its holding upon *Mempa v. Rhay*¹⁹⁸ which found probation to be a form of deferred sentencing and therefore part of the initial criminal process. *Hahn*, then, stands for an independent rule embracing parole and probation, that, upon the basis of *Goldberg*, once a state grants freedom to a convicted offender, it may not retract it without affording due process. The right-privilege distinction was expressly rendered immaterial:

While we are mindful that probation is a privilege and not a right and is subject to the conditions of the court (citation), essential procedural due process no longer turns on the distinction between a privilege and a right.¹⁹⁹

The Tenth Circuit, in rejecting claims to specific procedural rights, affirmed its judgment that "The right of a prisoner to be heard at a revocation hearing is inviolative."²⁰⁰ But it specifically refused to reconsider its comprehensive holding in *Alvarez v. Turner*²⁰¹ in the light of *Goldberg*:

¹⁹⁶*Hahn v. Burke*, 430 F.2d 100 (7th Cir. 1970); *cert. den.* 402 U.S. 993 (1971). *Bearden v. State of South Carolina*, 443 F.2d 1090, 1095 (4th Cir., 1971); *Martinez v. Patterson*, 429 F.2d 844 (10th Cir. 1970); see *Winters v. Miller*, 446 F.2d 65 (2d Cir. 1971) *cert. den.* 404 U.S. 985 (1971) rejecting New York's argument that because in dealing with allegedly mentally ill persons it acted as *parens patriae* in attempt to rehabilitate, no hearing was required before involuntary detention in Bellevue Hospital and treatment contrary to the patient's religious beliefs. See also *Hester v. Craven*, 322 F. Supp. 1256 (E.D. Cal. 1971) holding unconstitutional the hearingless redetermination of a prisoner's sentence based upon facts gathered outside the prison. The case expressly does not reach parole revocation.

¹⁹⁷*Morressey v. Brewer*, 443 F.2d 942 (8th Cir. *en banc* 1971) (Lay, Heaney and Bright, J.J., dissenting) *cert. granted* 404 U.S. 999 (1971).

¹⁹⁸389 U.S. 128 (1967).

¹⁹⁹*Hahn v. Burke*, 430 F.2d at 103.

²⁰⁰*Martinez v. Patterson*, 429 F.2d at 847.

²⁰¹422 F.2d 214 (10th Cir. 1970).

In considering these decisions by the Supreme Court, it is apparent that they are grounded upon factual settings widely differing from a parole revocation proceeding.... Thus neither *Goldberg* nor *Winship* is dispositive regarding due process in the specific factual context of a parole revocation proceeding.²⁰²

The Fourth Circuit, *en banc*, unanimously and with little discussion held due process to require a hearing.²⁰³

The Eighth Circuit, *en banc*, outright rejected the concept that due process requires a hearing in parole revocation; the Court split four-three.²⁰⁴ In *Morressey v. Brewer* that Court reviewed a procedure under Iowa statute which the Iowa Supreme Court had construed to preclude a hearing.²⁰⁵ The majority held that the state interests in public safety and security, rehabilitation, and control of convicts outweighed the mere privilege of "conditional liberty."²⁰⁶ To this it added the *in terrorem* that judicial interference in the parole process would only convince states to stop paroling. State discretion was left nearly unfettered:

Our court is firmly committed to the principle that prison officials are vested with wide discretion in controlling persons committed to their custody.²⁰⁷

In its view of the prisoner's deprivation, the majority clearly reverted to the right-privilege distinction: "the prisoner has no statutory right, even if 'qualified' to be granted conditional liberty...."²⁰⁸ The only right afforded the prisoner was freedom from arbitrary or capricious revocation, to be tested upon habeas corpus.

The dissent was vigorous. It scored the Court for the sophistic and legalistic "conditional liberty" terminology. Every person's liberty is, of course, conditional upon obeying laws; that is no reason to engraft an aneurism upon an artery of fairness.

²⁰²Martinez v. Patterson, 429 F.2d at 847.

²⁰³Bearden v. State of South Carolina, 443 F.2d at 1095.

²⁰⁴Morressey v. Brewer, 433 F.2d at 945.

²⁰⁵*Id.* at 945.

²⁰⁶*Id.* at 948.

²⁰⁷*Id.* at 948.

²⁰⁸*Id.* at 949.

Such provincial and stunted rationalizations cannot square with words of the Constitution. Since logic and justice do not mandate the denial of due process to a parolee I am able to assess its denial in only one light. The denial of due process simply mirrors society's overall attitude of degradation and defilement of a convicted felon.²⁰⁹

The dissenters would abolish the right-privilege dichotomy and rule for the parolee in balancing interests.²¹⁰

Despite contrary pre-Goldberg dicta the Ninth Circuit affords the California parolee notice of grounds for revocation and a chance to deny them and present his own contentions.²¹¹

The divergence of cases is complicated by the failure to establish certainly whether parole revocation is predominantly an administrative or a criminal proceeding.²¹² The depth and intensity of conflict among the circuits calls for a resolution by the Supreme Court.

Apparently the California Supreme Court still follows the ruling, expressed only in dictum since 1960, that parole may be revoked without notice or hearing.²¹³ Because the Adult Authority is considered an administrative agency²¹⁴ the rules of *Goldberg* and *Sniadach* certainly call for a re-examination of the cases.

6. PRISON DISCIPLINE

The emerging field of judicial control of prison discipline may have received substantial impetus from *Goldberg*. The recent decision in *Clutchette v. Procunier*²¹⁵ written by District

²⁰⁹*Id.* at 952 (dissenting opinion of Lay, C.J.).

²¹⁰*Id.* at 955-6.

²¹¹*Dennis v. California Adult Authority*, 456 F.2d 1240, 1241 (1972) (dictum) (Judge Merrill cited *Bearden* in a footnote). *But cf.* *Dorado v. Kerr*, 454 F.2d 892, 897 (1972), refusing to apply *Goldberg* to redetermination of sentence under the indeterminate sentence law. Prior cases: *Williams v. Dunbar*, 337 F.2d 505 (1967) and *Eason v. Dickson*, 390 F.2d 585 (1968).

²¹²*Compare* *Hester v. Craven*, 322 F. Supp. at 1262 with *In re Tucker*, 5 Cal. 3d 171, 486 P.2d 657, 95 Cal. Rptr. 761 (1971).

²¹³*In re Tucker*, 5 Cal. 3d at 176, 486 P.2d at 659, 95 Cal. Rptr. at 763; *In re Gomez*, 64 Cal. 2d 591, 594, 414 P.2d 33, 51 Cal. Rptr. 97 (1966); *In re McClain*, 55 Cal. 2d 78, 84, 357 P.2d 1080, 1085, 9 Cal. Rptr. 824, 829 (1960).

²¹⁴*In re Tucker*, 5 Cal. 3d at 177, 486 P.2d at 659, 95 Cal. Rptr. at 763.

²¹⁵328 F. Supp. 767 (N.D. Cal. 1971).

Judge Alfonso Zirpoli, enjoined the disciplinary procedures of San Quentin Prison until such time as they could be modified to comply with due process. Judge Zirpoli rejected both the right-privilege dichotomy and the "custody is custody" theory:

While prisoners may have no vested right to a certain type of confinement or certain privileges it is unrealistic to argue that the withdrawal of those privileges they do have or the substitution of more burdensome conditions of confinement would not under their 'set of circumstances' constitute 'a grievous loss.'²¹⁶

Judge Zirpoli found that the "substantial danger of an increased term of imprisonment," and the loss of those few privileges which make life in confinement bearable, make the penalties of prison discipline grievous losses.²¹⁷ Although Judge Zirpoli did not explore the state interest in prison discipline thoroughly, the minimum due process requirements he set out easily can be assimilated into the current hearing structure without appreciable delays (maximum of a week) or appreciable depreciation of administrative resources.²¹⁸

This article has singled out *Clutchette* for treatment because of its sweeping intervention into the prison disciplinary system. However, *Clutchette* must be understood in the context of a developing Federal law.²¹⁹ Prior to the holding of the United States Supreme Court that the Constitution follows the prisoner (except for those rights necessarily relinquished),²²⁰ many courts refused to encumber the unfettered discretion of state prison administrators.²²¹ The first cases dealt with deprivation of fundamental rights,²²² and even recent controversies have raged

²¹⁶*Id.* at 780.

²¹⁷*Id.* at 780-1. See *Jones v. Robinson*, 440 F.2d 249 (D.C. Cir. 1971) (transfer of patient accused of crime to maximum security section of hospital).

²¹⁸*Clutchette v. Proconier*, 328 F. Supp. at 780.

²¹⁹See Comment, *42 U.S.C. Section 1983: An Emerging Vehicle of Post Conviction Relief for State Prisoners*, 22 U. FLA. L. REV. 596 (1970) (*hereinafter* cited as Comment).

²²⁰*Johnson v. Avery*, 393 U.S. 483 (1969).

²²¹*United States ex rel. Wagner v. Ragen*, 213 F.2d 294 (7th Cir. 1954); *Stroud v. Swope*, 187 F.2d 850 (9th Cir. 1951) *inter alia*. *Contra*, *Coffin v. Reichard*, 143 F.2d 443 (C.A. Ky. 1944).

²²²*Johnson v. Dye*, 175 F.2d 250 (C.A. Pa. 1949) (*rev'd on other grounds*, 338 U.S. 864). See *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970) (access to courts) [*aff'd sub nom.* *Younger v. Gilmore*, 404 U.S. 15 (1971)].

over such fundamental freedoms as religion²²³ and absence of racial discrimination.²²⁴ Due process arrived later, but there is now good authority that the *Goldberg* balancing test confers substantial protections upon prisoners.²²⁵ The Supreme Court has ruled affirmatively upon this point at least to the extent that the District Courts must hear prisoner claims.²²⁶

Clutchette, therefore represents the fringe of the trend today.²²⁷ State court remedies in the field of prisoner rights to due process remain unexplored.²²⁸

III. COMPOSITION OF A FAIR HEARING— SPECIFIC RIGHTS

A. NOTICE OF PENDENCY OF ACTION.

No independent discussion of notice is necessary; it is inseparable from the right to a hearing. Its establishment as a principle of law harkens to the Eighteenth Century at least.²²⁹ The only substantial question is what form of giving notice at what interval prior to action satisfies the necessities of the situation.²³⁰ Seven days seems to be an absolute minimum.²³¹

B. NOTICE OF THE NATURE AND SUBSTANCE OF CHARGES

The right to know the purported reason for action in sufficient

²²³*Cooper v. Pate*, 378 U.S. 546 (1964) and *Northern v. Nelson*, 315 F. Supp. 687 (N.D. Cal. 1970).

²²⁴*Lee v. Washington*, 390 U.S. 333 (1968); *Johnson v. Avery*, 393 U.S. 483 (1969).

²²⁵*Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) *cert. den.* 405 U.S. 979 (1972). See Article, *Due Process in California Prison Disciplinary Hearings*, 5 U.C.D. L. REV. 384 (1972) for a full discussion. See U.S. *ex rel. Walker v. Mancusi*, 338 F. Supp. 311 (W.D. N.Y. 1971).

²²⁶*Haines v. Kerner*, 92 S. Ct. 594 (Jan. 13, 1972).

²²⁷See *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971).

²²⁸Comment, *supra* note 219.

²²⁹*The King v. The Chancellor, Masters and Scholars of the University of Cambridge*, 1 Str. (K.B.) at 567, 93 Eng. Repts. at 704 (1723). See *Burrus*, *supra* note 7, at 218.

²³⁰*Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950); *Goldberg v. Kelly*, 397 U.S. at 268.

²³¹*Goldberg v. Kelly*, 397 U.S. at 268; *Clutchette v. Procunier*, 328 F. Supp. at 782.

detail to prepare an adequate defense is inseparable in any context from the right to a hearing.²³²

C. ORAL PRESENTATION AND RIGHT TO PRESENT EVIDENCE AND MAKE ARGUMENT

The parent case, *Londoner v. Denver*,²³³ declared, "(A)hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and...by proof, however informal." The only exception is where the sole issue is one of law only.²³⁴ *Goldberg* sustains the rationale of these cases. Oral presentation, the Court concluded, was necessary because the claimants lacked educational attainment to make skilled written presentations, because the claimants must be permitted to tailor their arguments to those issues which the decision-maker finds crucial, and because claimants cannot rely upon second-hand presentations.²³⁵

D. CONFRONTATION AND CROSS-EXAMINATION OF WITNESSES

"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."²³⁶ Pre-*Goldberg* cases required confrontation in most administrative contexts, including occupational licensing.²³⁷ Cases subsequent to *Gold-*

²³²*Goldberg v. Kelly*, 397 U.S., at 268; *Bell V. Burson*, 402 U.S. at 542; *Bearden v. State of South Carolina*, 443 F.2d at 1095; *Martinez v. Patterson* 429 F. 2d at 847; *Carroll v. California Horse Racing Board*, 16 Cal. 2d at 167, 105 P.2d at 111; *Endler v. Schutzbank*, 68 Cal. 2d at 172, 436 P.2d at 304, 65 Cal. Rptr. at 304; *Escalera v. New York City Housing Authority*, 425 F.2d at 862; *Clutchette v. Procunier*, 328 F. Supp. at 782; *Davis v. Toledo Metropolitan Housing Authority*, 311 F. Supp. at 795 (full *Goldberg* rights); *Harrington v. Taft*, 339 F. Supp. at 674.

²³³210 U.S. 373, 386 (1908).

²³⁴*F.C.C. v. W.J.R.*, 337 U.S. 265, 275 (1949).

²³⁵*Goldberg v. Kelly*, 397 U.S. at 269. *Philadelphia Co. v. S.E.C.*, 175 F.2d 808 (1948). *But see Richardson v. Wright*, 92 S. Ct. 788, 789 (Feb. 14, 1972) refusing to decide whether an oral presentation is required prior to termination of disability insurance payments and vacating for redetermination under newly promulgated H.E.W. rules.

²³⁶*Goldberg v. Kelly*, 397 U.S. at 269.

²³⁷*Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103-4 (1963); *Olive (etc.) v. Agricultural (etc.)*, 17 Cal. 2d 204, 210, 109 P.2d 918 (1941); *Langendorf v. I.A.C.*, 87 Cal. App. 2d 103, 195 P.2d 887 (1948); *English v. Long Beach*, 35 Cal. 2d 155, 217 P.2d 22 (1950). Cross-examination: *Ohio Bell Tel. Co. v. P.U.C. of Ohio*, 301 U.S. 292 (1937).

berg have upheld the requirement of confrontation in disputes over public housing,²³⁸ public employment dismissals²³⁹ and prison discipline.²⁴⁰ Confrontation and cross-examination have been limited or denied in parole revocation hearings. Neither *Hahn v. Burke* nor *Bearden v. State* reached the confrontation issue directly, but the *Hahn* Court impliedly limited the parolee's rights to notice and an opportunity to be heard,²⁴¹ and the *Bearden* Court limited the parolee's right to that of calling voluntary witnesses.²⁴² The state's interest in rehabilitation and the protection of society usually form the rationale for the deprivation of confrontation and cross-examination.²⁴³ The state, in theory, should have the discretion to make parole decisions upon an assessment of the whole person, not merely the facts of a given incident. Therefore, every piece of evidence available should be used; confrontation would make this process impossible where evidence would be excluded as a result of non-attendance of witnesses at a hearing. The Second Circuit perhaps best elicited this theory:

It (the parole board) must make the broad determination of whether rehabilitation of the prisoner and the interests of society generally would best be served by permitting him to serve his sentence beyond the confines of prison walls.... In making that determination the Board is not restricted by... procedures developed for the purpose of determining legal or factual issues. It must consider... psychiatric reports,... mental and moral attitudes,... vocational education and training,... physical and emotional health,... intra-personal relations with prison staff and other inmates.... (and)... habits.²⁴⁴

Parole revocations are often made upon the basis of confessions or indisputable evidence;²⁴⁵ it is doubtful that confrontation

²³⁸*Escalera v. New York City Housing Authority*, 425 F.2d at 862; *Davis v. Toledo Metropolitan Housing Authority*, 311 F. Supp. at 795.

²³⁹*Riccucci v. United States*, 425 F.2d at 1257-8 (concurring opinion of Skelton, J.).

²⁴⁰*Clutchette v. Procunier*, 328 F. Supp. at 782-3.

²⁴¹*Hahn v. Burke*, 430 F.2d at 103.

²⁴²*Bearden v. State of South Carolina*, 443 F.2d at 1091.

²⁴³*Martinez v. Patterson*, 429 F.2d at 846-7; *Worley v. Calif. Dept. of Corrections*,

²⁴⁴*Menechino v. Oswald*, 430 F.2d 403, 407 (2d Cir. 1970) *cert. den.* 400 U.S. 1023 (1971).

²⁴⁵*See, e.g., Martinez v. Patterson*, 429 F.2d 844; *In re Tucker* 5 Cal. 3d 171, 486 P.2d 657, 95 Cal. Rptr. 761; *Hester v. Craven*, 322 F. Supp. 1256.

would serve a prisoner interest great enough to overcome the expense of transporting large numbers of witnesses to prison.

E. COUNSEL

1. RIGHT TO THE PRESENCE OF COUNSEL.

Goldberg entrenched the right to counsel in the welfare hearing cases:

'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' (citation) We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires.²⁴⁶

In all but the prison cases, the right to advice and presence of counsel has never been doubted.²⁴⁷ Judge Zirpoli applied the right of counsel or an effective counsel substitute in the prison discipline case.²⁴⁸ There is some conflict between the circuits upon the issue of whether there is a right to counsel in a parole revocation hearing. *Firkins v. Colorado*²⁴⁹ holds that a state may choose to bar counsel from revocation hearings. But in *United States ex rel. Bey v. Connecticut State Board of Parole*,²⁵⁰ the Second Circuit rejected *Firkins* and the right-privilege doctrine, and, by applying the *Goldberg* balancing test, held that the parolee facing revocation had a right to counsel at his hearing. The Court found that the parolee had a substantial interest in continued albeit conditional freedom, and that counsel exercising a proper role as an aide in the fact-marshalling and evaluation process (not a trial court advocate) would have no detrimental impact upon the parole system.²⁵¹

2. APPOINTIVE COUNSEL

As a matter of administrative law, appointive counsel has

²⁴⁶*Goldberg v. Kelly*, 397 U.S. at 270. The somewhat bizarre conclusion in *Merriweather v. Burson* 325 F. Supp. 709, 710-11, that *Goldberg* does not mandate the right to counsel can only refer to appointive counsel.

²⁴⁷*Steen v. Board of Civil Service Comm'rs.*, 26 Cal. 2d at 716, 160 P.2d at 816.

²⁴⁸*Clutchette v. Proconier*, 328 F. Supp. at 783.

²⁴⁹434 F.2d 1232 (10th Cir. 1970) (*per curiam*).

²⁵⁰443 F.2d 1079, 1086 (2d Cir. 1971) *vacated as moot* 404 U.S. 879 (1971).

²⁵¹*Id.* at 1087-9. *But see* *Dorado v. Kerr*, 454 F.2d at 896-7, rejecting this analysis in a challenge to indeterminate sentence law proceedings.

never been required. *Goldberg* avoided the question.²⁵² No post-*Goldberg* case has required counsel be appointed except *Clutchette*, and that requirement was limited to those cases in which the prisoner was charged with a disciplinary offense for which criminal prosecution was also threatened.²⁵³ Surprisingly, a few concessions have been made in parole revocation. In *Bearden v. State*,²⁵⁴ the Fourth Circuit applied the old *Betts v. Brady*²⁵⁵ rule to parole revocations, despite *Betts*' failure in the ordinary criminal context.²⁵⁶ The case was based upon primarily criminal, not administrative principles. The dissenters would have construed *Mempa* to require appointive counsel.²⁵⁷ And an equal protection argument may be successful where the financially able are permitted to have counsel at revocation hearings.²⁵⁸

California, by considering parole revocation hearings "wholly administrative in nature" has avoided both the equal protection and *Mempa* arguments.²⁵⁹ The unequivocal rule is that the parolee is not entitled to appointive counsel, based upon a balancing of the lack of legal right to parole of the prisoner and the anticipated overwhelming drain upon financial and administrative resources caused by appointive counsel.²⁶⁰

F. RULING UPON LEGAL RULES AND EVIDENCE ADDUCED AT HEARING

The *Goldberg* majority considered that a ruling based solely upon legal rules and evidence adduced at the hearing part of essential due process.²⁶¹ The rule is of long standing, and in California it is of statutory command.²⁶² The only legitimate

²⁵²*Goldberg v. Kelly*, 397 U.S. at 270.

²⁵³*Clutchette v. Procunier*, 328 F. Supp. at 783.

²⁵⁴443 F.2d at 1095.

²⁵⁵316 U.S. 455 (1942).

²⁵⁶*Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁵⁷*Bearden v. State*, 443 F.2d at 1096-1101.

²⁵⁸*Earnest v. Willingham*, 406 F.2d 681 (10th Cir. 1969); see *Serviss v. Moseley*, 430 F.2d 1287 (10th Cir. 1970), and *Murphy v. Turner*, 426 F.2d 422 (10th Cir. 1970).

²⁵⁹*In re Tucker*, 5 Cal. 3d at 178-9, 486 P.2d 660, 95 Cal. Rptr. 764 (1971).

²⁶⁰*Id.* at 178-9, 486 P.2d at 660, 95 Cal. Rptr. at 764. See *Dennis v. California Adult Authority*, 456 F.2d at 1241 n.l.

²⁶¹*Goldberg v. Kelly*, 397 U.S. at 271.

²⁶²*U.S. and I.C.C. v. Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924); *Ohio Bell Tel. Co. v. P.U.C. of Ohio*, 301 U.S. 292 (1927); CAL. CODE OF CIV. PROC. § 1094.5(b) (West 1954).

exception is the parole revocation hearing, upon the same ground as the denial of confrontation. The right has been applied to prison discipline upon the authority of *Goldberg*.²⁶³

G. IMPARTIAL DECISION-MAKER

The right to have one's cause heard by an impartial and unbiased decision maker has long been a constituent of essential due process.²⁶⁴ This right, too, has been applied to prison discipline upon the authority of *Goldberg*.²⁶⁵ The intricacies of bias in administrative hearings are the subject of another article.²⁶⁶

H. STATEMENT OF REASONS FOR DECISION

As an element of essential due process a statement setting out the basis for a decision serves to demonstrate compliance with the requirements of ruling upon law and evidence and impartiality. In the informal hearing a brief statement is all that is required.²⁶⁷ In the more formal setting a full blown memorandum of findings of fact and conclusions of law may be required.²⁶⁸

The above nine constituents form the essential due process required by *Goldberg*. There remain many constituents of due process in more formal situations; among them are the right to discovery, the right to have all testimony under oath, the right to compel the presence of witnesses, and the right to correct application of the rules of evidence. It is reasonable to classify administrative hearings, as does Professor Davis, into two distinct forms: basically the formal and the informal. There is

²⁶³*Clutchette v. Procunier*, 328 F. Supp. at 783-4.

²⁶⁴*Tumey v. Ohio*, 273 U.S. 510 (1927); *In re Murchison*, 349 U.S. 133 (1955). See *Duke v. North Texas State University*, 338 F. Supp. at 994-5.

²⁶⁵*Clutchette v. Procunier*, 328 F. Supp. at 784.

²⁶⁶See Article, *Countering Prejudice in an Administrative Decision*, 5 U.C.D. L. REV. ____ (1972).

²⁶⁷*Goldberg v. Kelly*, 397 U.S. at 271.

²⁶⁸*Wichita R. & Light Co. v. P.U.C.*, 260 U.S. 48, 57-9 (1922); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935); *Swars v. Council of Vallejo*, 33 Cal. 2d 867, 871, 206 P.2d 355 (1949).

little middle ground upon which to establish sliding scales of due process entitlements.²⁶⁹ The formal hearing, because it has been of such great concern for several decades, has become almost completely controlled by administrative procedure acts.²⁷⁰ Thus, although courts are occasionally called upon for restatements of such basic principles as "Procedural due process requires notice, confrontation, and a full hearing whenever action by the state significantly impairs an individual's freedom to pursue a private occupation."²⁷¹ the procedural due process case in such a formal setting has become a rarity. Only one aspect of the formalities: —discovery—truly deserves review within the scope of this article.

I. DISCOVERY

The long silence of the California Legislature upon the issue of pre-hearing discovery in occupational license revocation proceedings prompted the California Supreme Court, in *Shively v. Stewart*,²⁷² to promulgate common law rules of discovery. Upon the basis that a defendant in a revocation proceeding was charged with the equivalent of a crime, the criminal discovery rules were held applicable.²⁷³ Although the ordinary administrative activity calling for a *Goldberg* hearing will not present the same compelling interest in discovery, there are cases in which a right to discovery will rise to the level of a constituent of essential due process. In *Escalera* the Housing Authority refused to disclose the contents of the "folder" upon which it based its eviction decision, and it refused to disclose the rules and procedures by which hearings were conducted. Both concealments were held to be contrary to essential due process.²⁷⁴ Although the court's analysis was harmonized with *Goldberg* categories, the ruling to make evidence discoverable or excludable amounts to the creation of a discovery right. Similarly,

²⁶⁹See *McCullough v. Terzian*, 2 Cal. 3d at 657, 470 P.2d at 10-11, 87 Cal. Rptr. at 201-2, refusing to apply more than essential due process to the welfare pre-revocation hearing; and *Martinez v. Patterson*, 429 F.2d at 845, refusing to apply formal hearing requirements to parole revocation.

²⁷⁰CAL. GOV'T. CODE § 11501(b) (West 1968).

²⁷¹*Endler v. Schutzbank*, 68 Cal. 2d at 172, 436 P.2d at 304, 65 Cal. Rptr. at 304.

²⁷²65 Cal. 2d 475, 480, 421 P.2d, 65, 67-8, 55 Cal. Rptr. 217, 219-20 (1966).

²⁷³*Id.* at 480, 421 P.2d at 68, 55 Cal. Rptr. at 220.

²⁷⁴*Escalera v. New York City Housing Authority*, 425 F.2d at 862-3.

the concealment of rights to appeal and to counsel has been condemned.²⁷⁵ Thus, there may be an essential due process right to discovery²⁷⁶ enforceable by exclusionary rules.

The right to avail oneself of compulsory process may be comprehended by fundamental fairness.²⁷⁷ In general this problem is mooted by agency statutory subpoena power.²⁷⁸

IV. CONCLUSION

In all dealings with administrative agencies the citizen and his attorney meet no more crucial test than the administrative hearing. Success in the hearing is conclusive, and success in subsequent proceedings depends upon the record created before the agency. Courts have long been aware of the necessity of basic fairness in the administrative process. California early required that administrative action be taken only when substantial protections were afforded the citizen. Recent Federal landmark decisions have confirmed the right to a hearing prior to the deprivation of any significant interest, subject only to some weighty governmental burden in providing a hearing. Mere governmental inconvenience or expense has been found insufficient to overcome the individual's due process rights. The Federal landmarks have received enthusiastic support in California; in fact the state courts have extended the ambit of several. Yet some anomalies remain in California law, primarily because of erroneous balancing of governmental interests. As rules are extended by public interest and their natural and necessary logic, "due process" promises to effect fundamental changes in basic commercial and citizen-government relationships.

Charles Bird

²⁷⁵Clutchette v. Procnier, 328 F. Supp. at 784; Diaz v. Quitoriano, 268 Cal. App. 2d 807, 74 Cal. Rptr. 358 (1969).

²⁷⁶See Morgan v. United States, 304 U.S. 1, 18 (1938), and see Dick v. United States, 339 F. Supp. 1231 (D.C. 1972).

²⁷⁷Jewell v. McCann, 95 Ohio St. 191, 116 N.E. 42 (1917); see dictum in Missouri *ex rel.* Hurwitz v. North, 271 U.S. 40 (1926); *contra* New Products Corp. v. Zeigler, 352 Mich. 73, 84, 88 N.W.2d 528, 535 (1958).

²⁷⁸See Burrus, *supra* note 7, at 220.