CONSTITUTIONAL LAW—PROCEDURAL DUE PROCESS—AT-WILL PUBLIC EMPLOYEE ENTITLED TO PROCEDURAL DUE PROCESS HEARING PRIOR TO TERMINATION—*Nicoletta v. North Jersey Dist. Water Supply Comm'n*, 77 N.J. 145, 390 A.2d 90 (1978).

On March 19, 1974, Nicholas Nicoletta, a sergeant in the Wanaque Reservoir Police Force,[1] and Patrolman Raymond Russomano, a fellow officer, entered into a violent physical altercation at police headquarters.[2] Seven days later, Nicoletta received a telegram notifying him of his indefinite suspension without pay.[3] The Commission subsequently notified Nicoletta that a hearing would be held to "confer on complaints," and to discuss his failure to follow the requests of the chief of the police force.[4] At this hearing, the interrogation initially centered on the conflict, but then broadened into

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[1] Nicoletta v. North Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 149, 390 A.2d 90, 92 (1978). The North Jersey District Water Supply Commission (Commission) was created by statute to develop and protect public water supplies in the northern half of New Jersey. N.J. STAT. ANN. § 58:5-1 (West 1966). By virtue of N.J. STAT. ANN. § 58:5A-2 (West 1966), the Commission was not subject to the rules of the Civil Service. 77 N.J. 150 n.2, 390 A.2d at 92; *see* note 76 *infra*. For the protection of the district the Wanaque Reservoir Police Force was established under the jurisdiction of the Commission. N.J. STAT. ANN. §§ 58:5A-1, -2 (West 1966). It was not contended that Nicoletta was employed for a "fixed term or was other than an employee at will, unprotected by any statutory tenure, contractual commitment or collective negotiation agreement." 77 N.J. at 150, 390 A.2d at 92. N.J. STAT. ANN. § 58:5-6 (West 1966) states in pertinent part:

> Each said commission [North and South Jersey Water Supply Commission] . . . may from time to time appoint and at its pleasure remove a secretary, counsel and such engineers, assistants, agents, officers and servants as it may deem necessary to carry out the purposes of this chapter, and may determines their duties and compensation.

N.J. STAT. ANN. § 58:5-6 (West 1966).

[2] Nicoletta v. North Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 151, 390 A.2d 90, 93 (1978). At approximately seven a.m., Patrolman Russomanno arrived at the Commission's headquarters in Wanaque, whereupon Sergeant Nicoletta initiated a verbal confrontation with him concerning Patrolmen Benevolent Association (PBA) funds. Petition on Behalf of Nicholas Nicoletta at 3a, Nicoletta v. North Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 390 A.2d 90 (1978) [hereinafter cited as Petition on Behalf of Nicoletta]. Sergeant Nicoletta then physically assaulted Russomanno in three separate attacks, resulting in Nicoletta's having to be restrained by witnesses to the incident. 77 N.J. at 151, 390 A.2d at 93.

[3] Petition on Behalf of Nicoletta, *supra* note 2, at 1a.

[4] *Id.* at 2a. The New Jersey supreme court interpreted the letter as advising Nicoletta of only one area of inquiry, namely "complaints that [he] did not follow requests of [the] Chief." Nicoletta v. North Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 151, 390 A.2d 90, 93 (1978). The notice, however, actually stated two areas of investigation—complaints lodged against Nicoletta and his failure to follow the Chief's orders. Petition on Behalf of Nicoletta, *supra* note 2, at 2a.

eleven other areas of review.[5] When the hearing concluded, the Commission informed Nicoletta that further investigation was warranted.[6] Shortly thereafter, on May 9, 1974, the Commisssion adopted a resolution terminating Nicoletta's employment with the force.[7]

Nicoletta filed a complaint on November 26, 1974, in the Superior Court of New Jersey, Chancery Division, challenging the validity of his termination.[8] The complaint alleged a denial of due process and equal protection under the fourteenth amendment[9]

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[5] Nicoletta v. North Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 151, 390 A.2d 90, 93 (1978). The additional areas of inquiry concerned:

(a) the alleged shooting of a phone booth in Ringwood;
(b) the method of filing reports by Sgt. Nicoletta;
(c) alleged threats made by Sgt. Nicoletta;
(d) the excitability of Sgt. Nicoletta;
(e) an elleged [*sic*] incident where Sgt. Nicoletta fired a warning shot;
(f) Sgt. Nicoletta's prior employment history;
(g) the results of a PBA vote to oust Sgt. Nicoletta;
(h) Sgt. Nicoletta's police training;
(i) Sgt. Nicoletta's prior record;
(j) whether or not each witness would work with Sgt. Nicoletta;
(k) each witness' opinion of Sgt. Nicoletta.

Petition on Behalf of Nicoletta, *supra* note 2, at 7–8.

[6] Nicoletta v. North Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 152–53, 390 A.2d 90, 94 (1978). Seven other members of the force were interviewed concerning the nature of the fight, and their opinions were elicited regarding Nicoletta's stability as a police officer. *Id.* Neither Nicoletta nor his counsel requested to be present at this inquiry, and the Commission did not notify them of the specific date of the hearing. *Id.*

[7] Nicoletta v. North Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 152, 390 A.2d 90, 93 (1978). Prior to the adoption of the resolution, the Commission invited Nicoletta's attorney to submit to the Commission any further information which he believed would be useful in the consideration of the matter. *Id.* at 153, 390 A.2d at 94. At that time, the attorney offered the Commission Nicoletta's resignation "to save him the embarrassment of a judgment which could be adverse." *Id.* (quoting the Commission minutes of May 9, 1974, at 14a). After it was indicated that the resignation would be accepted, Nicoletta's counsel requested that the Commission pass a resolution publicly thanking Nicoletta for his performance on the force. Counsel for the Commission responded that it would be "insincere and inappropriate" for the Commission to do so. *Id.* Sergeant Nicoletta then left the meeting with his counsel to draft a letter of resignation, but within an hour Nicoletta reneged on his offer to resign. *Id.*

[8] Nicoletta v. North Jersey Dist. Water Supply Comm'n, No. A-1620-74, slip op. at 3 (N.J. Super. Ct. App. Div. Oct. 6, 1975) (per curiam) (unpublished opinion), *rev'd*, 77 N.J. 145, 390 A.2d 90 (1978).

[9] Petition on Behalf of Nicoletta, *supra* note 2, at 4–6, 10–12. The verified complaint was subsequently amended to seek a declaration that N.J. STAT. ANN. § 58:5A-2, (West 1966) giving the Commission sole control over the employment and management of the force, be declared unconstitutional. Nicoletta v. North Jersey Dist. Water Supply Comm'n, No. A-1620-74, slip op. at 3 (N.J. Super. Ct. App. Div. Oct. 6, 1975) (per curiam) (unpublished opinion), *rev'd*, 77 N.J. 145, 390 A.2d 90 (1978). Nicoletta later withdrew this claim at oral argument. *Id.* at 3 n.1. Counsel for Nicoletta proceeded solely on federal constitutional grounds, without alleging a cause of action under the New Jersey constitution. *See* notes 107–10 *infra* and accompanying text.

based upon Nicoletta's discharge which was executed without notice and a full and fair hearing on the charges against him. Since the matter involved the review of an action taken by a state administrative agency, the chancery division transferred the case to the appellate division.[10] Due to the inadequate record below, the appellate division remanded the matter to the Commission for the filing of transcripts of the " 'hearings' " and "basic findings of fact."[11] Upon receipt of the requested information, the appellate division determined that the submitted findings buttressed the termination decision of the Commission.[12] Thus, there was "no sound reason or justification for disturbing that result."[13]

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[10] Nicoletta v. North Jersey Dist. Water Supply Comm'n, No. C-1194-74, (N.J. Super. Ct. Ch. Div. Feb. 6, 1975) (Civil Action Order). Such action was pursuant to New Jersey Court Rule 2:2-3(a)(2) which allows appeals to be taken to the appellate division as of right to review the final decision of an administrative agency of the state.

[11] Nicoletta v. North Jersey Dist. Water Supply Comm'n, No. A-1620-74, slip op. at 4 (N.J. Super. Ct. App. Div. Oct. 6, 1975) (per curiam) (unpublished opinion), *rev'd*, 77 N.J. 145, 390 A.2d 90 (1978). In light of the missing documents, the court could not "conscientiously pass upon the Commission's decision." *Id.* at 3.

[12] Nicoletta v. North Jersey Dist. Water Supply Comm'n, No. A-1620-74, slip op. at 5 (N.J. Super. Ct. App. Div. Aug. 27, 1976) (per curiam) (unpublished opinion), *rev'd*, 77 N.J. 145, 390 A.2d 90 (1978). The Commission, in its findings of fact, determined

> 1. That on March 19, 1974 Sgt. Nicoletta without provocation initiated a violent altercation with Ptl. Russomanno. . . .
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> 2. [T]hat Sgt. Nicoletta attempted to persuade Ptl. Saum not to report the assault upon Russomanno to higher authorities. . . .
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> 3. That Sgt. Nicoletta deliberately withheld for two months a report of an alleged criminal episode, but entered a report attributing culpability to Ptl. Russomanno . . . in an effort to discredit Russomanno. . . .
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> 4. That Sgt. Nicoletta engaged in conduct wholly inconsistent with his position and duties in the constabulary in that he had on several occasions engaged in repeated episodes of violent temperamental [*sic*] outbursts directed to other members of the force. . . .
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> 5. That Sgt. Nicoletta was incapable of maintaining discipline and morale among his subordinate officers due to his own behavior.

Petition on Behalf of Nicoletta, *supra* note 2, at 3a–5a.

[13] Nicoletta v. North Jersey Dist. Water Supply Comm'n, No. A-1620-74, slip op. at 5 (N.J. Super. Ct. App. Div. Aug. 27, 1976) (per curiam) (unpublished opinion), *rev'd*, 77 N.J. 145, 390 A.2d 90 (1978). At argument before the appellate division, Nicoletta contended that the scope of the Commission's hearing "'was impermissibly broad'" since he had neither advance notice of the additional eleven areas of inquiry, *see* note 5 *supra*, nor the opportunity to confront the witnesses who testified. Nicoletta v. North Jersey Dist. Water Supply Comm'n, No. A-1620-74, slip op. at 4 n.1 (N.J. Super. Ct. App. Div. Aug. 27, 1976) (per curiam) (unpublished opinion), *rev'd*, 77 N.J. 145, 390 A.2d 90 (1978). The appellate court failed to address the issue of notice, instead focusing its attention on the reasonableness of the Commission's findings. Since the first, third, fourth and fifth findings could have been reached by an examination of Nicoletta alone, and these findings adequately supported the dismissal, the court reasoned that the denial of Nicoletta's right of cross-examination had no effect upon the Commission's determination. *Id.* at 4–5. Nicoletta further contended that the adoption of the proposed findings of fact by the

The Supreme Court of New Jersey granted certification,[14] and in *Nicoletta v. North Jersey District Water Supply Commission*,[15] the court[16] reversed the decision of the appellate division.[17] Chief Justice Hughes, writing for a plurality of the court,[18] held that Nicoletta's employment constituted a " 'liberty' interest" protected by the fourteenth amendment, and, therefore, was subject to the dictates of procedural due process.[19] Since the Commission's hearing did not comport with the requirements of due process,[20] the court concluded that the remedy required was a "post-termination hearing . . . designed to restore to the employee as nearly as possible the procedural right to which he was deprived, a hearing, albeit a pre-termination hearing, before his employer."[21]

Historically, employment by the government was deemed a privilege rather than a right, and as such, the public employee has no entitlement to constitutional protections.[22] This "right-privilege"

Commission was improper in that one of the two Commissioners voting had not heard all of the testimony. The court, however, found "no infirmity in the fact that less than the full membership of the Commission attended the hearings," and thus affirmed the Commission's action. *Id.* at 5.

[14] 73 N.J. 42, 372 A.2d 308 (1976).

[15] 77 N.J. 145, 390 A.2d 90 (1978).

[16] The use of the word "court" in a general context includes both the plurality and concurring opinions of the *Nicoletta* decision. All citations to the opinion refer to the plurality unless otherwise indicated.

[17] 77 N.J. at 171, 390 A.2d at 103–04.

[18] Justices Mountain and Handler joined the plurality opinion, while Justice Pashman concurred in the court's decision. The dissent, authored by Justice Schreiber with Justices Sullivan and Clifford joining, fundamentally disagreed with the analysis of the majority of the justices, and concluded that the most Nicoletta was entitled to was "a statement of the reasons for his discharge." *Id.* at 198, 390 A.2d at 117 (Schreiber, J., dissenting).

[19] *Id.* at 162, 390 A.2d at 98–99. For the court's analysis of why a non-tenured, at-will public employee has a liberty interest on his continued employment, see notes 87 & 88 *infra* and accompanying text.

[20] 77 N.J. at 163, 390 A.2d at 99. For an analysis of the requirements of procedural due process in the termination of a protected interest, see notes 73–80 *infra* and accompanying text.

[21] 77 N.J. at 170, 390 A.2d at 103. Although the court declared that Nicoletta was "only entitled, if he wishes it, to a post-termination hearing," *id.* at 168, 390 A.2d at 102, in effect "[t]he remedy projected by the majority is a 'pretermination' hearing at which the employer may, *nunc pro tunc*, reconsider the firing." *Id.* at 192, 390 A.2d at 114 (Schreiber, J., dissenting). After Nicoletta receives the fair hearing to which he is entitled, "the Commission is free to reaffirm or not its prior decision." *Id.* at 171, 390 A.2d at 103.

[22] An early Supreme Court decision relegated public employment to that of a privilege, rather than a right, to be held at the discretion of the employer. *Ex parte* Hennen, 38 U.S. (13 Pet.) 225 (1839). The Court noted that the Constitution certainly did not intend that inferior offices be held for life so that "it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment." *Id.* at 259. The lack of constitutional protections inherent in this "privilege" status was stated by Justice Holmes, speaking for the Massachusetts supreme court:

distinction increasingly became challenged in the courts, and the application of the doctrine was particularly nebulous where the abandonment of first amendment rights preconditioned the granting of governmental employment.[23] In response to these challenges, the courts tempered the doctrine by formulating the "unconstitutional conditions exception,"[24] which prevented the government from con-

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> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman . . . . [T]he servant . . . agree[s] to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract.

McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517–18 (1892).

In 1950, the United States Court of Appeals for the District of Columbia held that government employment was neither property nor liberty within the meaning of the due process clause. Bailey v. Richardson, 182 F.2d 46, 57 (D.C. Cir. 1950), *aff'd by an equally divided court*, 341 U.S. 118 (1951).

The *Bailey* decision followed a long line of earlier cases which reached similar results. *E.g.*, Taylor & Marshall v. Beckham (No. 1), 178 U.S. 548, 573, 576 (1900) (public office not property); Keim v. United States, 177 U.S. 290, 293 (1900) (removal from office incident to power of appointment; courts have no supervisory power over such determination); Crenshaw v. United States, 134 U.S. 99, 104 (1890) (officer appointed for definite time or during good behavior has no vested interest or contract right to office); Butler v. Pennsylvania, 51 U.S. (10 How.) 402, 417 (1850) (appointment to office created for public use and receipt of salary are not vested, personal rights which are constitutionally protected). *But see* Wilson v. North Carolina, 169 U.S. 586, 596 (1898) (where removal in accordance with statutory procedures constitutes plain and substantial departure from fundamental principles of government, jurisdiction exists); Foster v. Kansas, 112 U.S. 201, 206 (1884) (removal from state office not repugnant to Constitution if due process followed); Kennard v. Louisiana, 92 U.S. 480, 480–81 (1875) (removal of associate justice raised question whether state had deprived him of office without due process).

For a detailed discussion of the right-privilege doctrine, see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[23] Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960). The author therein commented:

> The rapid rise in the number of government regulatory and welfare programs, coupled with the multiplication of government contracts resulting from expanded budgets, has greatly increased the total benefits extended, thus affording the government countless new opportunities to bargain for the surrender of constitutional rights. The potential erosion of fundamental liberties through the use of this bargaining technique has prompted the development of the doctrine of "unconstitutional conditions."

Id. at 1596 (footnotes omitted); *see* note 24 *infra* and accompanying text; *see, e.g.*, Greene v. McElroy, 360 U.S. 474 (1959); Schware v. Board of Bar Exam., 353 U.S. 232 (1957); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952).

[24] Van Alstyne, *supra* note 22, at 1445–49; Note *supra* note 23, at 1596. Professor Van Alstyne states:

> Essentially, this [exception] declares that whatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly. As a consequence, it seems to follow that the first amendment forbids the government to condition its largess upon the willingness of the petitioner to surrender a right which he would otherwise be entitled to exercise as a private citizen. The net effect is to enable an individual to challenge certain conditions imposed

ditioning its benefit on the limitation of a right expressly protected by the Constitution.[25] This exception, however, has seldom been utilized for protection other than those explicitly provided for in the

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upon his public employment without disturbing the presupposition that he has no "right" to that employment.

Van Alstyne, *supra* note 22, at 1445–46; *e.g.*, Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[25] Thus, while there may be no abstract right to public employment, "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend mass or take any active part in missionary work.'" United Pub. Workers v. Mitchell, 330 U.S. 75, 100 (1947).

The rationale for the exception with respect to state regulation was stated in Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926). In *Frost*, the Court struck down state legislation which attempted to prohibit private carriers from the state highways unless they submitted to the regulations prescribed for common carriers. 271 U.S. at 592, 599. The Court noted that a private carrier could not be forced to become a common carrier by legislative command under the fourteenth amendment, and that the state may not "bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege." *Id.* at 592. Should the opposite result be reached, the "consitutional guaranties, so carefully safeguarded against direct assault, [would be] open to destruction by the indirect but no less effective process of requiring a surrender." *Id.* at 593; *see, e.g.*, Graham v. Richardson, 403 U.S. 365, 374 (1971) (denial of welfare payments to non-citizens and aliens who did not meet prescribed residency requirements); Shapiro v. Thompson, 394 U.S. 618, 627 (1969) (welfare payments); Sherbert v. Verner, 374 U.S. 398, 404–05 (1963) (unemployment benefits denied for religious beliefs); Speiser v. Randall, 357 U.S. 513, 528–29 (1958) (denial of tax exemptions for refusal to take loyalty oath).

For specific application of the unconstitutional conditions exception to public employment, see, *e.g.*, Elrod v. Burns, 427 U.S. 347, 359–60 (1976) (dismissal of employee who was affiliated with opposing political party); Gardner v. Broderick, 392 U.S. 273, 278–79 (1968) (dismissal of policeman for refusal to waive privilege against self-incrimination); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (dismissal of teacher for publishing letter criticizing school board); Keyishian v. Board of Regents, 385 U.S. 589, 605–06 (1967) (dismissal of employee for refusing to sign unconstitutionally broad loyalty oath); Elfbrandt v. Russell, 384 U.S. 11, 17 (1966) (loyalty oath); Cramp v. Board of Pub. Instruction, 368 U.S. 278, 288 (1961) (loyalty oath); Torcaso v. Watkins, 367 U.S. 488, 495–96 (1961) (dismissal from public employment for refusal to declare belief in God); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (dismissal of teacher for refusal to list all organizations of which employee is member or has contributed); Slochower v. Board of Higher Educ., 350 U.S. 551, 555 (1956) (dismissal from public employment for invoking privilege against self-incrimination); *Cf.* Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (self-incriminating statements by police officer coerced where given choice between self-incrimination and job forfeiture).

The Supreme Court later departed from the holding in Slochower v. Board of Higher Educ., 350 U.S. 551 (1956), by drawing a factual distinction between the employee's exercise of his fifth amendment privilege, and his refusal to answer questions relating to his employment. *E.g.*, Nelson v. County of Los Angeles, 362 U.S. 1, 7 (1960) (due process not violated by discharge of county employee for insubordination as a result of refusal to answer questions presented by congressional subcommittee relating to subversive activities); Lerner v. Casey, 357 U.S. 468, 476 (1958) (due process not violated by discharge of public employee for doubt as to his trustworthiness and reliability because of refusal to answer questions as to communist party membership); Beilan v. Board of Pub. Educ., 357 U.S. 399, 400 (1958) (discharge for incompetency, evidenced by teacher's refusal to answer Superintendent's questions concerning loyalty not violative of due process).

Constitution.[26] Furthermore, the courts have strictly applied the exception to constitutionally protected rights so as to preclude a determination of the reasonableness of the restriction imposed by the government.[27] In order to alleviate such rigid application, the United States Supreme Court in *United Public Workers v. Mitchell*[28] blended the unconstitutional conditions exception with a more flexible balancing of the interests approach.[29] In upholding a portion of the Hatch Act which prohibited federal officers and employees from taking " 'any active part in political management or in political campaigns,' ".[30] the Court noted that the interference with free expression must be balanced with the "requirements of orderly management of administrative personnel."[31] While certain rights are "fundamental," they are not absolutes, and "[t]he essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery."[32]

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[26] Van Alstyne, *supra* note 22, at 1447 n.32.

[27] *Id.* at 1447–48.

[28] 330 U.S. 75 (1947).

[29] *Id.* at 95–96. By utilizing such an approach, the Court is not restricted to actions which infringe upon only express constitutional protections, nor is the Court required to invalidate all such restricting activities. The Court must "balance [the] competing public and private concerns to determine whether the regulation as applied has a sufficient connection with important enough state interests to outweigh the incidental effect on the constitutional rights of the affected class." Van Alstyne, *supra* note 22, at 1449.

[30] 330 U.S. at 78. A violation of this portion of the Act required the "immediate discharge and a permanent ban against re-employment in the same position." *Id.* at 106 (Black, J., dissenting).

[31] *Id.* at 94. Appellants contended, *inter alia*, that the provision deprived them of their fundamental rights of freedom of speech, press and assembly in violation of the first amendment. *Id.* at 83 n.12.

[32] *Id.* at 95 (footnote omitted). "[T]his Court must balance the extent of the guarantees of freedom against a Congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of the government." *Id.* at 96. The Supreme Court used similar language in striking down an Arkansas statute which required a teacher, as a condition of employment in a state-supported school, to submit an affidavit listing every organization to which he belonged, or made regular contributions to, within the preceding five years. Shelton v. Tucker, 364 U.S. 479, 480 (1960). The Shelton Court noted that a requirement compelling disclosure of every associational tie would "impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Id.* at 485–86 (citations omitted). The Court recognized the state's legitimate interest in investigating the competence and fitness of persons in its employ. *Id.* at 485. The interest, however, in this area was insufficient to "broadly stifle fundamental liberties when the end can be more narrowly achieved." *Id.* at 488 (footnote omitted); *see, e.g.*, Slochower v. Board of Higher Educ., 350 U.S. 551, 555–56 (1956) (where terms of public employment are reasonable, lawful and nondiscriminatory, and, further, comport with due process requirements, employee has no constitutional right to governmental employment); Wieman v. Updegraff, 344 U.S. 183, 188 (1952) (government is not powerless to meet threat of dis-

A second major inroad to the right-privilege doctrine was the recognition that the employee's interest in continued governmental employment may, under certain circumstances, be protected by the fifth[33] and fourteenth[34] amendments of the Constitution. The threshold question in determining whether governmental action must comply with procedural due process protections is whether a deprivation of life, liberty or property has occurred.[35] The terms liberty and property necessitate a very broad interpretation to meet the needs of a changing society.[36] In the past, the Supreme Court has determined that property or liberty rights arise from statutory entitlements,[37] possessory interests,[38] implicit promises of freedom,[39] or the interest in pursuing lawful employment.[40]

In *Cafeteria Workers v. McElroy*,[41] the Court specifically addressed the issue of whether an employee's interest in government

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loyalty, but in adoption of means to do so, legislature must balance its national security interest with conflicting individual rights); *Cf.* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) (invalidating municipal health ordinance under commerce clause where less onerous alternatives available).

[33] The due process clause of the fifth amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

[34] The due process clause of the fourteenth amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

[35] *E.g.*, Ingraham v. Wright, 430 U.S. 651, 672 (1977); Board of Regents v. Roth, 408 U.S. 564, 569 (1972); Perry v. Sindermann, 408 U.S. 593, 599 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Fuentes v. Shevin, 407 U.S. 67, 84 (1972).

[36] *E.g.*, Ingraham v. Wright, 430 U.S. 651, 672–74 (1977); Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954).

[37] Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (welfare benefits are "entitlement" which must be afforded procedural due process protections); Boddie v. Connecticut, 401 U.S. 371, 380 (1971) (right of access to courts to dissolve marriage is protected by due process).

[38] Fuentes v. Shevin, 407 U.S. 67, 86 (1972) (interest in continued possession and use of chattels under conditional sales contract within purview of due process clause); Bell v. Burson, 402 U.S. 535, 539 (1971) (possession of issued drivers license is protected interest).

[39] Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (interest of parolee in continued freedom is right within meaning of fourteenth amendment).

[40] Dent v. West Virginia, 129 U.S. 114, 121 (1889). In *Dent*, the Court enunciated the proposition that every citizen had the right "to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition." *Id.* It was recognized that the "interest" in pursuing any vocation was of great value and could not be arbitrarily taken away. *Id.* The Court held that there was no arbitrary deprivation of petitioner's rights where the regulation imposed by the state was intended to secure skill and learning in the medical profession. *Id.* at 123; *e.g.*, Willner v. Committee on Character and Fitness, 373 U.S. 96, 102 (1963) (practice of law); Schware v. Board of Bar Examiners, 353 U.S. 232, 238–39 (1957) (qualify for profession); Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (freedom to engage in common occupation of life); Truax v. Raich, 239 U.S. 33, 41 (1915) (common occupations of community); Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (to earn livelihood by any lawful calling).

[41] 367 U.S. 886 (1961).

employment was protected by the due process clause.[42] The government denied the employee continued use of her identification badge on the grounds that she had failed to meet the security requirements of the Naval Gun Factory where she was employed.[43] As a result, she was barred from continued employment at the installation.[44] The Court acknowledged that the employee had a protected interest against some forms of governmental intrusion.[45] The circumstances of the case, however, did not mandate that the government provide specific reasons for the withdrawal of security clearance or a hearing to contest those reasons.[46] The Court stated that, although the government did not have the same freedom of action as private employers, "to acknowledge that there exist constitutional restraints upon state and federal governments in dealing with their employees is not to say that all such employees have a constitutional right to notice and a hearing" prior to their dismissal.[47] Thus, while

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[42] *Id.* at 894. In the earlier case of Greene v. McElroy, 360 U.S. 474 (1959), the Court was presented with a similar constitutional issue, but decided the case on other grounds. An executive for a firm which produced goods for the armed services, was discharged from employment solely because the government revoked his access to classified information. 360 U.S. at 475–76. Since such security clearance was necessary for him to obtain similar jobs, the revocation precluded him from further employment in the field. *Id.* At a series of hearings, although the petitioner testified and presented witnesses in his behalf, investigatory reports and statements from confidential informants not made available to him were relied upon in reaching the decision to revoke his clearance. *Id.* at 479. By way of dictum, the Court commented that the right to follow a chosen profession comes within the liberty and property rights of the fifth amendment, *id.* at 492, 493 n.22, however, the Court decided the case on narrower grounds. The government's action in barring the petitioner access to classified information severely limited his opportunities for future work, albeit work for the government, so that without explicit authorization by either Congress or the President, a hearing which failed to comport with fair procedures could not be validated. *Id.* at 508.

The constitutional issue which the Court professed to avoid, *id.* at 509 (Harlan, J., concurring); *id.* at 511 (Clark, J., dissenting), was reached in *Cafeteria Workers* where the authority for the actions taken by the government was expressly given. *Cafeteria Workers*, 367 U.S. at 894.

[43] 367 U.S. at 888. In 1956, the individual petitioner was employed as a short-order cook at a cafeteria operated by a private concessionaire which was located on the premises of the naval installation. *Id.* at 887. Identification badges were issued to all persons authorized to enter the premises, and for six years, the petitioner had such identification. *Id.* Thereafter, the Security Officer determined that her identification badge should be revoked for her failure to meet the security requirements. A request for a hearing on the grounds for dismissal was denied by the commanding officer of the installation. *Id.* at 888.

[44] *Id.* at 888, 896. Pursuant to contract, the cafeteria was prohibited from employing personnel who failed to meet the security requirements. *Id.*

[45] *Id.* at 897–98; *see* note 48 *infra*.

[46] 367 U.S. at 894. The Court specifically noted that the issue of procedural due process in this case could not be summarily answered by asserting that the petitioner had no constitutional right to be on the base so that the government's action denied neither liberty nor property. *Id.*

[47] *Id.* at 898.

the Court recognized the interest of the petitioner in her continued employment, this interest was not sufficient to require the constitutional safeguards of notice and hearing when balanced against the governmental interests involved.[48]

In 1972, the Court attempted to develop guidelines for determining whether action taken by the government affected a public employee's right to "liberty" or "property."[49] In *Board of Regents v. Roth*,[50] it was held that the state's refusal to rehire a non-tenured

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[48] *Id.* at 895. The Court held that in order to determine what procedures due process mandated, the "precise nature of the government function involved as well as . . . the private interest that has been affected by governmental action" must be weighed against each other. *Id.* As for the interest alleged by the petitioner, the case was clearly distinguishable from those cases where the right to pursue a chosen occupation had been denied. The petitioner remained free to work as a short-order cook—"[a]ll that was denied her was the opportunity to work at one isolated and specific military installation." *Id.* at 896, *Compare* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Truax v. Raich, 239 U.S. 33 (1915); and Dent v. West Virginia, 129 U.S. 144 (1889) *with Cafeteria Workers*. In addition, the federal government had "traditionally exercised unfettered control" in the area of government employment. 367 U.S. at 896; *see* note 22 *supra* and accompanying text. However, the Court then cited *United Public Workers* and Wieman v. Updegraff, 344 U.S. 183 (1952), for the proposition that "an individual's interest in government employment [has been] recognized as entitled to constitutional protection." 367 U.S. at 897; *see* notes 29–32 *supra* and accompanying text. For a discussion of this "puzzling passage," see Roth v. Board of Regents, 310 F. Supp. 972, 977 (W.D. Wis. 1970), *aff'd*, 446 F.2d 806 (7th Cir. 1971), *rev'd*, 408 U.S. 564 (1972). Nevertheless, the employee's interest did not entitle him to notice and a hearing when the reason given for the disbarment from a security position was "entirely rational." 367 U.S. at 898. The majority held that the reason for the exclusion, *i.e.*, that petitioner failed to meet the security requirements of the base, was not "patently arbitrary or discriminatory" which would have been constitutionally impermissible. *Id.*

Justice Brennan, dissenting, along with Chief Justice Warren and Justices Black and Douglas, recognized the weakness of the majority's position and subjected the government to a higher standard. He indicated that the mere assertion by the government that the petitoner was a security risk was not sufficient to nullify her constitutionally protected right—whether liberty or property—to be free from arbitrary treatment. Under the majority's decision,

> unless the government official is foolish enough to admit what he is doing—and few will be so foolish after today's decision—he may employ "security requirements" as a blind behind which to dismiss at will for the most discriminatory of causes.

Id. at 900 (Brennan, J., dissenting). Without affording the petitioner notice as to the reasons for the exclusion, or the opportunity to show that the true reasons for the action were ones forbidden by the Constitution, the majority recognized a right in name only. *Id.* at 901 (Brennan, J., dissenting). The dissent's position was expressly rejected by the Court in Board of Regents v. Roth, 408 U.S. 564 (1972). The mere assertion by the petitioner that the exclusion was based on arbitrary grounds is insufficient to require notice and a hearing. The petitioner must prove that the decision was based on such grounds. 408 U.S. at 574–75 & n.14. The dissenter's further commented that the labeling of a person as a "security risk" placed a " 'badge of infamy' " on the person which should not be affixed absent notice and hearing. 367 U.S. at 901–02 (Brennan, J., dissenting). *But see* Paul v. Davis, 424 U.S. 693 (1976); notes 66–69 *infra* and accompanying text.

[49] Board of Regents v. Roth, 408 U.S. 564, 569–71 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[50] 408 U.S. 564 (1972).

university teacher after the expiration of his contract did not impair his constitutional rights.[51] In so deciding, the Court employed a two-step procedural due process analysis. This analysis consists of first, a determination of whether an "interest" within the meaning of the constitutional protection against deprivation of liberty or property had been implicated.[52] If the court should find that such an interest had been affected, it would then decide what procedural protections are necessary to secure these interests.[53]

The Court recognized that circumstances may exist where a state's refusal to re-employ an individual would implicate his liberty interest.[54] Any state action which seriously damaged the employee's standing in the community would trigger procedural due process.[55]

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[51] *Id.* at 568–69. Roth had been hired as an assistant professor at Wisconsin State University, Oshkosh, for a one year term. Under Wisconsin law, a teacher obtained tenure as "a permanent" employee after four years of continuous employment. After the completion of Roth's one year term, he was informed that he would not be rehired for the next year. *Id.* at 566. No reason for the decision was offered nor was Roth given the opportunity to contest the determination not to rehire. *Id.* at 568.

In the federal district court, Roth alleged both that the decision was predicated upon his criticism of the University's administration in violation of his right to freedom of speech, and that the failure to provide him notice and a hearing violated his right to procedural due process. Roth v. Board of Regents, 310 F. Supp. 972, 974 (W.D. Wis. 1970), *aff'd*, 446 F.2d 806 (7th Cir. 1971), *rev'd*, 408 U.S. 564 (1972). The district court granted summary judgment for Roth on the procedural issue, thus making no determination as to the substantive allegation. *Id.* at 983. This decision was affirmed by the court of appeals. Roth v. Board of Regents, 446 F.2d 806, 810 (7th Cir. 1971), *rev'd*, 408 U.S. 564 (1972). As a result, the only question presented to the Court on appeal was whether Roth had a right to procedural due process. 408 U.S. at 569.

[52] 408 U.S. at 571.

[53] *Id.* at 570–71. For a discussion of the procedural protections required, see notes 73–80 *infra* and accompanying text.

[54] *Id.* at 573.

[55] *Id.* "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); *e.g.*, Goss v. Lopez, 419 U.S. 565, 574–75 (1975); *see, e.g.*, Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring); Cafeteria Workers v. McElroy, 367 U.S. 886, 898 (1961). *But see* Paul v. Davis, 424 U.S. 693, 709–10 (1976). For a further explanation of the *Paul* case, see notes 63–65 *infra* and accompanying text. *See generally* Wieman v. Updegraff, 344 U.S. 183, 191 (1952) (when employee is excluded from public employment on disloyalty grounds, badge of infamy is placed on him in the view of community); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 139 (1951) (effect of placing organization on subversive list where no appropriate determination was made as to truth of such designation interfered with reputation and activities of organization).

The *Roth* Court used as an example of damage to the employee's standing in the community, the state's nonrenewal of an employment contract based upon charges of dishonesty or immorality. In such a case, the employee is entitled to a hearing to contest the charges against him. 408 U.S. at 573. The Court indicated in a footnote that "[t]he purpose of such notice and hearing is to provide the person an opportunity to clear his name." *Id.* at 573 n.12. This statement has been interpreted to mean that the opportunity to clear his name is the sole reason for the hearing, and thus could be granted after the termination of employment. *See* note 71 *infra*.

The Court, however, found that Roth sustained no injury to his " 'good name, reputation, honor, or integrity' " from the state's refusal to rehire him.[56] The Court similarly acknowledged that a liberty interest would be implicated if the state action had "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities."[57] The state, in declining to re-employ Roth, however, did not produce such a result.[58]

The Court then examined the respondent's property interest, noting that procedural protection in this area is designed to safeguard "the security of interests that a person has already acquired in specific benefits."[59] In order to have such an interest, there must exist a "legitimate claim of entitlement" to the benefit, rather than the mere expectation of its continued receipt.[60] As Roth was only employed for a one year term, he had no claim to continued employment.[61]

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[56] 408 U.S. at 573 (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)). No reasons were given for the decision not to rehire Roth and thus his reputation had not been impaired. *Id.*

[57] *Id.*; *e.g.*, Willner v. Committee on Character and Fitness, 373 U.S. 96, 102 (1963); Schware v. Board of Bar Examiners, 353 U.S. 232, 238 (1957); Peters v. Hobby, 349 U.S. 331, 352 (1955) (Douglas, J., concurring); Dent v. West Virginia, 129 U.S. 114, 121 (1889); *cf.* United States v. Lovett, 328 U.S. 303, 314, 316 (1946) (act which prohibited payment of salary to respondents effectively barred them from holding government position; such punishment constitutes bill of attainder prohibited by Constitution).

[58] 408 U.S. at 574 n.13, 575. Roth remained free to seek employment in any other public school system. "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." *Id.* at 575 (citation omitted). The fact that the employee is "less attractive" to future employers because of his nonretention "would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.' " *Id.* at 574 n.13. For a discussion of *Cafeteria Workers*, see notes 42–48 *supra*.

[59] 408 U.S. at 576.

[60] *Id.* at 577. An abstract need or desire for the benefit is not sufficient. *Id.* This has become known as the 'entitlement' theory of property interests. *See* note 37 *supra* and accompanying text. *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[61] 408 U.S. at 578. Property interests are not constitutionally created, but rather derive from "existing rules or understandings that stem from an independent source such as state law." *Id.* at 577. This phrase has been distorted to mean that property interests are to be defined solely "by reference to state law." Bishop v. Wood, 426 U.S. 341, 344 (1976) (footnote omitted). In *Bishop*, a city policeman was terminated from employment without a hearing as to the sufficiency of the charges against him. *Id.* at 342. By virtue of a city ordinance, he could only be discharged if he failed to perform adequately. *Id.* at 344. Under the state's construction of the ordinance, the employee's position was terminable at will. *Id.* at 345–46. Therefore the Court was forced to conclude that the "petitioner's discharge did not deprive him of a property interest." *Id.* at 347. Justice Brennan, in his dissenting opinion, indicated that the majority's narrow reading of the definition of a property right "resurrect[s] . . . the discredited rights/privileges distinction, for a State may now avoid all due process safeguards attendant upon the loss of even the necessities of life, *cf.* Goldberg v. Kelly, 397 U.S. 254 (1970), merely by labeling them as not constituting 'property.' " *Id.* at 354 n.4 (Brennan, J., dissenting).

Since the state's refusal to retain Roth as a professor did not implicate a property or liberty interest, procedural due process protections were not required.[62]

In *Roth's* companion case, *Perry v. Sindermann*,[63] the Court held that where a university maintains a de facto tenure system, and the employee is tenured under that system, his ability to prove entitlement to continued employment may be sufficient to invoke procedural due process protections.[64] Thus, an explicit tenure provision was not required in order for the employee to assert a property right in re-employment. Instead, a court could imply such a right from the circumstances of each case.[65]

Four years later, in *Paul v. Davis*,[66] the Court narrowed the scope of inquiry by holding that injury to a person's reputation alone constitutes neither liberty nor property within the meaning of the due process clause.[67] The majority concluded that in addition to the

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[62] 408 U.S. at 579. Justice Marshall in his dissent viewed government employment as both a liberty and property right of every citizen who applies for such a position. *Id.* at 588–89 (Marshall, J., dissenting). Therefore, should the government deny a citizen employment, fail to renew an employee's contract or terminate him, the government has the obligation to state the reasons for its action. *Id.* at 589, 591 (Marshall, J., dissenting). This is essentially the position taken by the dissenters in *Cafeteria Workers*. *See* note 48 *supra*. Thus, unless reasons for the state action are given, there can be no determination as to whether there exists an infringement of the substantive right to be free from arbitrary government action. 408 U.S. at 589, 591 (Marshall, J., dissenting).

[63] 408 U.S. 593 (1972).

[64] *Id.* at 600–02. Sindermann had been employed as a teacher in a Texas state college, under a series of one-year contracts, for a period of four consecutive years. *Id.* at 594. Thereafter, his contract was not renewed. *Id.* at 595. Sindermann alleged a property interest in his continued employment as secured by a mutual understanding that he would have permanent tenure as long as his work was satisfactory and he remained cooperative. *Id.* at 600. The Court held that "[a] teacher . . . who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure." *Id.* at 602.

The Court further noted that proof of a property interest merely would entitle him to a hearing, not to reinstatement. *Id.* at 603.

[65] *Id.* at 601–02.

[66] 424 U.S. 693 (1976).

[67] *Id.* at 701. *Paul* involved the posting of a list of active shoplifters by Kentucky police officers in approximately 800 neighboring business establishments. Davis had been charged with shoplifting and his name and picture were printed on the bulletin prior to any determination as to his guilt or innocence. *Id.* at 694–96. It was alleged that such listing inhibited his activities within the area and harmed his prospects for future employment, thus infringing upon a liberty interest protected by the fourteenth amendment. *Id.* at 697. By holding that no liberty or property interest was impaired, the Court was precluded from examining the second level test as espoused by *Roth*—once a constitutional right has been implicated, a balancing process is used to determine which level of procedural protection is appropriate. *Roth*, 408 U.S. at 570–71; *e.g.*, Goss v. Lopez, 419 U.S. 565, 575–76 (1975); Colm v. Vance, 567 F.2d 1125, 1127–28 (D.C. Cir. 1977); Mazaleski v. Treusdell, 562 F.2d 701, 709 (D.C. Cir. 1977).

alleged defamation of the individual, there must also exist "an accompanying loss of government employment"[68] or deprivation of some "right or status previously recognized by state law."[69]

Codd v. Velger[70] further restricted the *Roth* analysis, holding that a discharged employee is stigmatized for due process purposes "[o]nly if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination."[71] Therefore, unless the grounds for the discharge are alleged to be substantially false and publicly distributed, a government employee is not entitled to a due process hearing regardless of how stigmatizing the release from public employment.[72]

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[68] 424 U.S. at 706.

[69] *Id.* at 711. In order to reach this conclusion, the Court had to distinguish a series of cases dealing with the termination of employees and the resulting stigma that attached from such discharge. *Id.* at 701–06; *see* Wisconsin v. Constantineau, 400 U.S. 433 (1971); Cafeteria Workers v. McElroy, 367 U.S. 886 (1961); Wieman v. Updegraff, 344 U.S. 183 (1952); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); United States v. Lovett, 328 U.S. 303 (1946). The *Paul* Court found that in each of the termination cases where procedural due process was required, there had been a resulting infringement of a protected right as a result of the injury to the individual's reputation. 424 U.S. at 701.

[70] 429 U.S. 624 (1977) (per curiam).

[71] *Id.* at 628. Respondent Velger, a New York City police patrolman, alleged that certain information contained in his personnel file concerning an apparent suicide attempt caused his discharged by a new employer and further prevented him from obtaining other similar employment. Thus his dismissal without notice violated procedural due process. *Id.* at 625–26. The Court assumed that the respondent presented a claim of stigmatization pursuant to *Roth* and Bishop v. Wood, 426 U.S. 341 (1976) but held that

> the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely "to provide the person an opportunity to clear his name." If he does not challenge the substantial truth of the material in question, no hearing would afford a promise of achieving that result for him.

Id. at 627–28.

In his dissenting opinion, Justice Stevens noted that neither *Roth* nor *Bishop* held that name-clearing is the sole remedy where a deprivation of liberty rights had occurred. *Id.* at 634–35 n.6 (Stevens, J., dissenting). For a further discussion of the type of hearing due process requires, see notes 74–80 *infra* and accompanying text.

In addition, Justice Stevens commented that the denial of procedural due process might in itself "give rise to damages unrelated to the possible outcome of the hearing." 429 U.S. at 635 (Stevens, J., dissenting) (footnote omitted). This proposition was directly addressed by the Court in Carey v. Piphus, 435 U.S. 247 (1978). The Court held:

> [T]he right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertion . . . [and] that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.

435 U.S. at 266 (citations and footnote omitted). The Court further stated that if actual damages are proven, then 42 U.S.C. § 1983 is available to fully compensate the individual for the injury sustained as a result of the deprivation of his constitutional rights. *Id.*

[72] 429 U.S. at 628; Sumler v. City of Winston-Salem, 448 F. Supp. 519, 530–31 (M.D.N.C. 1978). *But see* Carey v. Piphus, 435 U.S. 247, 266 (1978) (right to procedural due process not

Once the action taken by the government implicates constitutionally protected interests, procedural due process is required.[73] The question then arises as to what procedural protections are necessary to secure the individual's constitutional rights.[74] "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' "[75] While there exists a requirement of notice and a hearing, the nature of the formalities and procedures vary with the importance of the competing interests between the individual and the government.[76] The notice and hearing must be given at a " 'meaningful

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dependent upon merits of claim); Bishop v. Wood, 426 U.S. 341, 349 (1976) (truth or falsity of charge neither "enhances nor diminishes" claim that liberty interest has been infringed); Fuentes v. Shevin, 407 U.S. 67, 87 (1972) (procedural protections required regardless of final result of hearing if property interest is infringed).

[73] 408 U.S. at 569–70. The district court balanced Roth's interest in re-employment with the state's interest in summarily denying his re-employment, and determined that procedural due process was required. Roth v. Board of Regents, 310 F. Supp. 972, 977–79 (W.D. Wis. 1970), *aff'd*, 446 F.2d 806 (7th Cir. 1971), *rev'd*, 408 U.S. 564 (1972). The Supreme Court in *Roth* expressly rejected this approach, noting that

> a weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place . . . [w]e must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.

408 U.S. at 570–71 (emphasis in original) (citation and footnote omitted).

[74] Morrissey v. Brewer, 408 U.S. 471, 481 (1972). "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." Boddie v. Connecticut, 401 U.S. 371, 378 (1971) (footnote omitted); *e.g.*, Fuentes v. Shevin, 407 U.S. 67, 83–84, 86 (1972); Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

Regardless of the procedural protections required in a given situation, once a protected interest has been implicated by the government's action, "the right to some kind of prior hearing is paramount." 408 U.S. at 569–70 (footnote omitted).

[75] Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863)). *See also*, Morrissey v. Brewer, 408 U.S. 471, 488–89 (1972); Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970); Willner v. Committee on Character and Fitness, 373 U.S. 96, 105 (1963); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951).

[76] Boddie v. Connecticut, 401 U.S. 371, 378 (1971). This requires a balancing process in which "the need of the government to act as it did should be balanced against the harm resulting to the individual from the action taken." Comment, *The Due Process Clause and Dismissal from Government Employment*, 2 HOUS. L. REV. 120, 125 (1964) (footnote omitted); *e.g.*, *Roth*, 408 U.S. at 570; Goldberg v. Kelly, 397 U.S. 254, 263 (1970). Put another way, the government's interest in "ensur[ing] efficient, non-disrupted service to the public, and . . . [in] the power to dismiss an employee who is lazy, inefficient, insubordinate, or incompetent" must be weighed against the employee's interests implicated by the dismissal. Comment, *Substantive Due Process: The Extent of Public Employees' Protection From Arbitrary Dismissal*, 122 U. PA. L. REV. 1647, 1647 (1974). In *Cafeteria Workers*, the Court noted that

> [the] consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the gov-

time and in a meaningful manner,' "[77] and the opportunity to be heard must be afforded before the government deprives a person of a protected property right.[78]

Where, however, the alleged deprivation is damage to an individual's liberty interest, the purpose of the notice and hearing is merely to provide the person with an opportunity to " 'clear his name.' "[79] In such a case, a post-termination hearing sufficiently complies with the requirements of procedural due process, as the liberty offended is not the dismissal from employment itself, but rather the "dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee."[80]

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ernment function involved as well as of the private interest that has been affected by governmental action.

367 U.S. at 895; *e.g.*, Goss v. Lopez, 419 U.S. 565, 576–77 (1975).

In Morrissey v. Brewer, 408 U.S. 471 (1972), the Court listed the minimum requirements of procedural due process. Included are:

> (a) written notice of the claimed violations . . .; (b) disclosure . . . of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses . . .; (e) a "neutral and detached" hearing body . . . members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for [taking the decided action].

408 U.S. at 489.

The Court, however, in Arnett v. Kennedy, 416 U.S. 134 (1974), rejected a nonprobationary Civil Service employee's asserted right to a trial-type hearing prior to his discharge. The applicable federal statute specified the grounds for an employee's removal and the administrative procedures required for such termination. 416 U.S. at 137, 140. The plurality opinion of Justice Rehnquist held that where the property interest of an employee was "itself conditioned by . . . procedural limitations which . . . accompan[y] the grant of that interest," no further procedural protections were constitutionally mandated. *Id.* at 155. Justice Rehnquist's view, however, in which Chief Justice Burger and Justice Stewart joined, was rejected by the remainder of the Court, and thus does not reflect the opinion of the majority of Justices. For a further discussion of the *Arnett* decision, see note 80 *infra*.

[77] Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

[78] *E.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971). The *Boddie* Court commented:

> [the] root requirement [of procedural due process is] that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.

Id. at 379 (emphasis in original) (footnotes omitted); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 16 (1978); Fuentes v. Shevin, 407 U.S. 67, 81–82 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971).

[79] *Codd*, 429 U.S. at 627; *Roth*, 408 U.S. at 573 n.12; *see* notes 55 & 71 *supra*.

[80] Arnett v. Kennedy, 416 U.S. 134, 157 (1974) (plurality opinion by Rehnquist, J.). The purpose of the hearing is not to cause a reinstatement of the employee to his former position. "Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons." *Roth*, 408 U.S. at 573 n.12. In determining whether the hearing must be prior to termination, a balancing process is invoked, similar to that used in determining what procedural protections are required once protected liberty or prop-

In *Nicoletta*, the New Jersey supreme court extended this to require that the public employee receive a pre-termination hearing at which he may challenge the grounds for his dismissal. Chief Justice Hughes utilized the "two-step" analysis espoused in *Roth* and *Perry* to determine whether any protected interests were infringed upon so as to trigger procedural due process protections.[81] Turning first to the property right involved, the court determined that Nicoletta possessed no such interest in his continued employment.[82] Similarly, the court held that the case was not one where the appellant's employment was grounded on an unconstitutional condition so as to require his reinstatement.[83] A plurality of the Court decided, however, that the termination of Nicoletta's employment implicated a liberty interest.[84] The "removal of the employee from public employ-

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erty interests have been affected. *See* note 76 *supra* and accompanying text.

In *Arnett*, it was determined that the interest of the government in maintaining employee efficiency and discipline so as to "perform its responsibilities effectively and economically," was substantial and outweighed the employee's interest in continued employment prior to a hearing. 416 U.S. at 168 (Powell, J., concurring in part). "Since appellee would be reinstated and awarded back pay if he prevails . . . appellee's actual injury would consist of a temporary interruption of his income during the interim." *Id.* at 169 (Powell, J., concurring in part). The stigma imposed by the dismissal is only temporary since the employee has the opportunity to remove it at the post-hoc hearing. *Id.* at 169 (Powell, J., concurring in part); *see id.* at 219 & n.19 (Marshall, J., dissenting). Therefore, he would not be foreclosed from future employment. However, as noted by Justice Marshall, the stigma would remain with the employee during the interim period and hinder his obtaining alternate employment. *Id.* at 219 & n.19 (Marshall, J., dissenting).

[81] *See* notes 52–62 *supra* and accompanying text.

[82] 77 N.J. at 154–55, 390 A.2d at 94–95. The determinative factor in ascertaining if a property interest is involved is whether there is an "entitlement" to the position. *Id.* at 154, 390 A.2d at 94. The statute establishing the Water Supply Commission authorizes the creation of a separate police force under the jurisdiction of the Commission. N.J. STAT. ANN. § 58:5A-1 (West 1966). The Commission has "sole control of the appointment, compensation, terms and duration of employment and management of the said constabulary, for the securing of proper discipline and efficiency among the members thereof." N.J. STAT. ANN. § 58:5A-2 (West 1966). Under the statute, the Commission is not subject to the ordinary Civil Service rules which protect employees of the state and municipalities subject to Title 11 of the Revised Statutes, Civil Service. *Id.*; 77 N.J. at 150 n.2, 390 A.2d at 92 n.2.

The court likened Nicoletta's position to that of the professor in *Roth* where there was only an abstract concern in re-employment which is insufficient to require procedural due process protections. 77 N.J. at 155, 390 A.2d at 95; *see* notes 59–61 *supra* and accompanying text.

[83] 77 N.J. at 155, 390 A.2d at 95. The court stated that N.J. STAT. ANN. § 58:5A-2 (West 1966) subjects Sergeant Nicoletta to the will of the employer so that he had no "'legitimate claim of entitlement'" to his job. *Id.* (quoting Board of Regents v. Roth, 408 U.S. at 577).

[84] *Id.* at 162, 390 A.2d at 98–99. In reaching this determination, the court did not examine the bearing that the charges of wrongdoing had on Nicoletta's reputation. The charges were not initially made public. Instead, after the dismissal for cause, the reasons were released in response to the litigation commenced by petitioner. *Id.* at 157–58, 390 A.2d at 96–97. The disclosure came after the injury complained of had occurred, *i.e.*, dismissal, and, therefore, could not support his claim retroactively. Bishop v. Wood, 426 U.S. 341, 348–49 (1976). In addition, the court noted that *Bishop* and *Paul* had narrowed the "stigmatic legal implications of a discharge

ment per se exposed him to potential disqualification from further public employment,"[85] and thus infringed upon a fourteenth amendment liberty interest.[86] N.J.A.C. 4:1-8.14(a) requires the Chief Examiner and Secretary of the Civil Service to disqualify from future state service any person who has been removed not in good standing from the public service.[87] Since Nicoletta had been "removed" from the public service, the Chief Examiner and Secretary of the Civil Service had " 'good cause' to invoke all the sanctions of N.J.A.C. 4:1-8.14(a), including automatic disqualification from future state service."[88]

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for blameworthy cause." 77 N.J. at 158, 390 A.2d at 97; *see* notes 61 & 67–69 *supra* and accompanying text.

[85] 77 N.J. at 159, 390 A.2d at 97.

[86] *Id.* at 162, 390 A.2d at 98; *see* note 40 *supra* and accompanying text.

[87] N.J.A.C. 4:1-8.14 provides in part:

> (a) The Chief Examiner and Secretary shall take the following actions for any cause listed in subsection (b) of this Section or for any other good cause:
>
> 1. Reject the application of a person for admission to an examination;
> 2. Refuse to test an applicant;
> 3. Refuse to place the name of a person on the employment list;
> 4. Refuse to certify the name of an eligible person; or
> 5. Remove from the employment list the name of an eligible person.
>
> (b) Any of the following shall constitute good cause for such action by the Chief Examiner and Secretary against any prospective employee who:
>
> . . . .
>
> 6. Has been removed or has resigned not in good standing or has resigned in lieu of removal from the public service, or whose record of employment, public or private, has been unsatisfactory for any reason which casts substantial doubt upon the person's capacity to perform satisfactorily the duties of the position for which the application has been filed or the test held.

N.J.A.C. 4:1-8.14.

[88] 77 N.J. at 160, 390 A.2d at 98. Such analysis coincides with the earlier New Jersey supreme court decision of Williams v. Civil Serv. Comm'n, 66 N.J. 152, 329 A.2d 556 (1974), wherein a unanimous court held that, as a direct result of the application of N.J.A.C. 4:1-8.14, the discharge of a city dog warden may have serious consequences on his ability to obtain future public employment. 66 N.J. at 157, 329 A.2d at 558. To remedy this deprivation of liberty, the court required a "post-termination evidentiary hearing to clear any damage to his reputation." *Id.* An additional purpose of the hearing was to determine whether the discharge was motivated because of the exercise of protected first amendment rights. *Id.* at 157–58, 329 A.2d at 558–59.

Justice Pashman, concurring in *Nicoletta*, expressed the view that the mere dismissal of a public employee, regardless of the underlying reasons for the termination, damaged the individual's prospects for future government employment. 77 N.J. at 1722–74 n.1, 390 A.2d at 104–05 n.1 (Pashman, J., concurring). Whether the reasons for the dismissal are publicized or not has no bearing—it is the "potential negative impact of the termination . . . on future employability" which causes the infringement of liberty. *Id.*; *see* Johnson, *Probationary Government Employees and the Dilemma of Arbitrary Dismissals*, 44 U. CIN. L. REV. 698, 711–13 (1975); Comment, *Due Process and Public Employment in Perspective: Arbitrary Dismissals of Non-Civil Service Employees*, 19 U.C.L.A. L. REV. 1052, 1065–66 (1972). *But see* note 58 *supra*.

Justice Schreiber, however, in his dissent, found no foreclosure from future governmental employment as a result of N.J.A.C. 4:1-8.14(a).[89] Under the dissent's interpretation of the regulation, the required disqualification applied only where a permanent employee in the classified Civil Service had been removed from public service for cause.[90] As Nicoletta was not a permanent member of the classified service, his disqualification was not mandated by N.J.A.C. 4:1-8.14(b)(6), and thus no liberty interest was implicated by his termination.[91]

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[89] 77 N.J. at 189–90, 390 A.2d at 113 (Schreiber, J., dissenting). Justices Sullivan and Clifford joined in the dissent's analysis as to the effect of N.J.A.C. 4:-.14 on an at-will employee's future employment opportunities. Their dissent appears to be somewhat inconsistent with their position as members of the unanimous court in Williams v. Civil Serv. Comm'n, 66 N.J. 152, 329 A.2d 556 (1974). *See* note 88 *supra*.

[90] 77 N.J. at 189, 390 A.2d at 113 (Schreiber, J., dissenting). This conclusion was reached as a result of examining the express words of the regulation as defined by the code. N.J.A.C. 4:1-8.14(b)(6) requires the disqualification of any prospective employee who "[h]as been removed . . . from the public service. "N.J.A.C. 4:1-8.14(b)(6); *see* note 87 *supra*. Justice Schreiber noted that the clause obviously referred only to persons employed by the government. 77 N.J. at 189, 390 A.2d at 113 (Schreiber, J., dissenting). Since the regulations define an "employee" as a person holding a position in the classified service, N.J.A.C. 4:1-2.1, the provision should be read to mean that disqualification is required only where the prospective employee has been removed from the classified service. *Id.* Sergeant Nicoletta "was employed at will and was not subject to civil service." *Id.* at 185, 390 A.2d at 111; *see* note 1 *supra*. Therefore, the dissent concluded that Sergeant Nicoletta did not come within the proscriptions of N.J.A.C. 4:1-8.14. 77 N.J. at 189–90, 390 A.2d at 113 (Schreiber, J., dissenting).

Justice Schreiber found further support for this interpretation in the definition of the word removal—"separation from employment for cause." N.J.A.C. 4:1-2.1. According to the Code, while non-permanent employees may be removed "at the discretion of the appointing authority," permanent employees of the classified service may only be removed for "just cause." N.J.A.C. 4:1-16.8. When the statute uses the term "removed", *i.e.*, separation for cause, "reference is being made only to those who held classified civil service positions." 77 N.J. at 190, 390 A.2d at 113 (Schreiber, J., dissenting). Therefore, this regulation had no effect on Sergeant Nicoletta's future eligibility for public employment:

> [t]he all-embracing scope given to the regulation by the majority will disserve the interests of those government employees who are not in the classified service. They will now be subject to the disqualification of future employment upon discharge from their positions irrespective of the reasons for the discharge.

Id.

Justice Pashman, in his concurrence, commented that the dissent's interpretation of the regulation "seem[ed] unwarranted in view of the absence of any limitation on the definition of 'public service' as used in N.J.A.C. § 4:1-8.14(b)(6) to the 'classified' public service." *Id.* at 172 n.1, 390 A.2d at 104 n.1.

[91] 77 N.J. 189–91, 390 A.2d at 113 (Schreiber, J., dissenting). The dissent further noted that Nicoletta's right to apply for a Civil Service position is the same as that of any other person in the private sector. *Id.* at 191, 390 A.2d at 114. A second clause in the regulation permits the Chief Examiner or Secretary to take foreclosure actions where the prospective employee's record, either public or private, is unsatisfactory. N.J.A.C. 4:1-8.14(b)(6); *see* note 87 *supra*. Thus, "[i]t is not the discharge from a state position in and of itself but rather the subsequent action of the Civil Service Commission which could be said to affect Nicoletta's liberty." 77 N.J. at 191, 390 A.2d at 114 (Schreiber, J., dissenting).

The plurality, having determined that a liberty interest had been infringed upon, turned next to the second level of *Roth's* "two-step" analysis—whether the hearing received by Sergeant Nicoletta complied with procedural due process requirements.[92] The court noted that "[t]he first prerequisite . . . of due process is fair notice so that a response can be prepared and the respondent fairly heard."[93] As the notice to Nicoletta failed to apprise him of the true charge against him and the additional matters subsequently examined at the hearings, the court held that "the 'hearing' was totally deficient as measured by due process notice requirements."[94]

To remedy the procedural due process infirmity, the court held that Nicoletta was entitled to a "post-termination hearing" during which time he could attempt to remove the possible bar to future Civil Service employment from his work record and persuade the Commission to continue his employment.[95] In support of its position, the court relied on language in *Roth* which stated that " 'the purpose of [the] notice and hearing is to provide the person an opportunity to clear his name.' "[96] The plurality held that the statement from *Roth* "could be read to substitute (for the thrust of such opportunity 'to clear his name') the expression 'to contest the basis upon which his discharge and resulting potential employment disqualifica-

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[92] 77 N.J. at 162, 390 A.2d at 99.

[93] *Id.* (citation omitted). For a discussion of the protections required by procedural due process, see notes 74–78 *supra* and accompanying text.

[94] 77 N.J. at 163, 390 A.2d at 99; *see* notes 4 & 5 *supra* and accompanying text. The court reasoned that the deficient notice rendered the hearings "quite meaningless." 77 N.J. at 163, 390 A.2d at 99. Justice Schreiber, in his dissenting opinion, contended that the notice was not intended to apprise Sergeant Nicoletta of the charges against him, but simply to notify him of a conference to discuss certain complaints and his failure to follow the requests of his commander. *Id.* at 197, 390 A.2d at 116–17 (Schreiber, J., dissenting). The Commission was merely "conducting an investigation" into the Sergeant's behavior, and "could not reasonably have been required to set forth specific charges." *Id.*, 390 A.2d at 117 (Schreiber, J., dissenting). In addition, Nicoletta "knew precisely why the meeting was called" and made no objections at the inquiry as to the scope of questioning. *Id.* Furthermore, the Commission's action was so well substantiated by the evidence that Nicoletta was not prejudiced by the hearing. "Certainly, it cannot be contended that the Commission's action was arbitrary or capricious." *Id.* at 198, 390 A.2d at 117 (Schreiber, J., dissenting).

[95] 77 N.J. at 168–69, 390 A.2d at 102. The court noted that the Commission had the power to dismiss Nicoletta with or without cause and, as no property interests had been implicated, the court had no "authority to reinstate him to his position or award back pay." *Id.* at 169, 390 A.2d at 102. Since the government's action infringed upon a liberty interest, the court only had the power to restore the right related to that interest. *Id.*; *see* notes 79 & 80 *supra* and 96 *infra* and accompanying text.

[96] 77 N.J. at 169, 390 A.2d at 102 (quoting *Roth*, 408 U.S. at 573 n.12).

tion would rest.' "[97] Once this opportunity was afforded, the Commission would be free to affirm or reverse its original determination.[98]

Justice Pashman in his concurrence, espoused the position that the Commission may only terminate Sergeant Nicoletta's employment if there were some reasonable basis for such action. While not requiring "good cause" for the dismissal, something more than "no cause" is required,[99] so that the termination is rationally related to the employee's work record.[100] Justice Pashman, therefore, advocated an inquiry into the reasons for the public employee's discharge, and judicial review of the action which could then "be set aside if [it were] shown to be arbitrary, capricious or otherwise oppressive."[101]

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[97] *Id.* The court commented that such an approach had been prescribed by the Superior Court of New Jersey, Law Division, in Campbell v. Atlantic City Bd. of Freeholders, 145 N.J. Super. 316, 367 A.2d 912 (Law Div. 1976). In *Campbell*, an at-will public employee was dismissed as Emergency Employment Administrator for Atlantic County without notice or hearing as a result of a grand jury indictment. 145 N.J. Super. at 320–21, 367 A.2d at 915. The court determined that he had no property interest in his job, but that his liberty right had been implicated by virtue of N.J.A.C. 4:1-8.14. *Id.* at 326, 328–29, 367 A.2d at 919. The remedy offered by the court was a hearing "to establish the circumstances of [the plaintiff's] removal from the public service and their relevance to the application of N.J.A.C. 4:1-8.14." *Id.* at 330, 367 A.2d at 920. As the plaintiff had received no notice of the charges, it appears that the required hearing was merely to inform him of the reasons for his dismissal and their pertinence to foreclosure from future public employment pursuant to N.J.A.C. 4:1-8.14. The *Nicoletta* court extended this to give the plaintiff the opportunity to contest the reasons for the dismissal and argue for a reconsideration of the decision. 77 N.J. at 168–69, 390 A.2d at 102.

In *Nicoletta*, the plurality opinion may have found stronger support for its position from *Roth*'s statement that where the plaintiff's liberty interest had been affected, "due process would accord an opportunity to refute the charge." *Roth*, 408 U.S. at 573 (footnote omitted). Thus, the entire analysis could have been interpreted by the court to mean that the purpose of the notice and hearing is to allow the person to "clear his name" by refuting the charge against him. *Id.* & n.12. Similarly, *Perry* supports the position that the plaintiff is entitled to challenge the sufficiency of the reasons at the hearing. 408 U.S. at 603. For a further discussion of the purpose of a due process hearing where liberty interests are involved, see notes 79–80 *supra* and accompanying text.

[98] 77 N.J. at 171, 390 A.2d at 103. Should the Commission have found that the charges against Sergeant Nicoletta were completely false and that he had been performing his job satisfactorily, it would still remain free to terminate his employment. Presumably however, the reasons for the discharge would be changed so that the termination would have no adverse affect on his eligibility for future public employment under N.J. Admin. Code 4:1-8.14(a)(6).

[99] *Id.* at 180, 390 A.2d at 108 (Pashman, J., concurring). Justice Pashman recognized the conceptual difficulty in determining whether the action has been based on something less than good cause, but more than no cause. *Id.* According to the justice, the government must act fairly and reasonably in dealing with its employees, and thus may not terminate for "a reason wholly irrelevant to [their] employment, such as, for example, the mere whim of [their] superiors." *Id.* at 182, 390 A.2d at 109 (Pashman, J., concurring).

[100] *Id.* at 181, 390 A.2d at 109 (Pashman, J., concurring) (footnote omitted).

[101] *Id.* at 182, 390 A.2d at 109. While the Supreme Court has utilized an "unconstitutional

In effect the *Nicoletta* court required a "pre-termination" hearing for at-will public employees at which they could contest the reasons

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conditions" approach in reviewing governmental action, *see* notes 23–27 *supra* and accompanying text, the expanded view advocated by Justice Pashman allows the court to set aside the dismissal where the reason for such action was merely the will of the employer. Former Chief Justice Weintraub, concurring in Zimmerman v. Board of Educ. of Newark, 38 N.J. 65, 183 A.2d 25 (1962), argued essentially the same position, noting that this "would not mean the court would not recognize a wide range of 'reasons' or would lightly disagree with the employer's finding." 38 N.J. at 80, 183 A.2d at 33 (Weintraub, C.J., concurring); 77 N.J. at 182, 390 A.2d at 109 (Pashman, J., concurring).

In the private sector, a trend has been developing which is in accordance with Justice Pashman's views concerning the power of an employer to discharge at will. The New Hampshire supreme court has limited the employer's actions by holding that an employer may not validly terminate an employee if the discharge is "motivated by bad faith or malice or based on retaliation." Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974). Such a discharge would not be in the "best interest of the economic system or the public good and constitutes a breach of the employment contract." *Id.*; *e.g.*, Davis v. United States Steel Supply, 581 F.2d 335, 340–41 (3d Cir. 1978) (dicta) (discharge motivated by racial discrimination may contravene public policy and support action for wrongful discharge); Pstragowski v. Metropolitan Life Ins. Co., 553 F.2d 1, 2–3 (1st Cir. 1977) (evidence supported finding that discharge was motivated by malice); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 251–52, 297 N.E.2d 425, 427 (1973) (retaliatory discharge for filing workmen's compensation claim); Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 188–89, 344 P.2d 25, 27 (1959) (discharge of employee for refusal to commit perjury). This "newly emerging theory" has been limited to instances where an express public policy determination by the legislature is offended. *E.g.*, Percival v. General Motors Corp., 400 F. Supp. 1322, 1324 (E.D. Mo. 1975), *aff'd*, 539 F.2d 1126 (8th Cir. 1976) (retaliatory discharge for efforts to correct misleading corporate statements did not involve breach of clear public policy); Geary v. United States Steel Corp., 456 Pa. 171, 183–85 & n.16, 319 A.2d 174, 179–80 & n.16 (1974) (discharge of employee who complained of defects in product by by-passing normal company procedures not violative of "clear and compelling" public policy).

The New Jersey superior court has recently moved towards joining the trend of limiting the employer's right to discharge in private employment. In Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 399 A.2d 1023 (App. Div. 1979), the plaintiff, a physician employed by the defendant corporation, voluntarily resigned from her position as Director of Medical Research/Therapeutics after being demoted. 166 N.J. Super. at 337–38, 399 A.2d at 1024–25. It was alleged that the demotion was a result of her refusal to submit a drug containing a high concentration of saccharin to clinical testing. *Id.* The appellate division denied the defendant's motion for summary judgment, commenting that the growing trend to "permit recovery where the employment termination contravenes a clear mandate of public policy" seemed especially applicable to "professional employees whose activities might involve violations of ethical or like standards having a substantial impact on matters of public interest." *Id.* at 340, 399 A.2d at 1025–26. The court, however, did not take this opportunity to adopt the doctrine, instead remanding the case for a trial on the issues. *Id.* at 342, 399 A.2d 1026–27. Similarly, in O'Sullivan v. Mallon, 160 N.J. Super. 416, 390 A.2d 149 (Law Div. 1978), an X-ray technician alleged that her discharge was in retaliation for her refusal to perform catheterizations which she was legally unqualified to perform. *Id.* at 417, 390 A.2d at 149. The court, in denying the defendant's motion for summary judgment, held that New Jersey's public policy may forbid the discharge of an employee because of the employee's refusal to perform an illegal act." *Id.* at 418, 390 A.2d at 150.

There appears to be no reason why this "public policy" approach would not be equally applicable in the public sector. Where the government can so greatly interfere with the right of private employers' to terminate an employee, clearly the government as an employer may be

for their discharge and compel the reconsideration of the employer's decision.[102] Justice Schreiber in his dissent reasoned that such a requirement bestowed upon an at-will employee a property right in his continued employment[103] "enabl[ing] every employee-at-will to demand a pre-termination hearing merely by alleging that a proposed discharge will adversely affect employment opportunities."[104]

The requirement that an at-will public employee be given a pre-termination hearing where a liberty interest has been infringed appears to be inconsistent with principles enunciated in previous United States Supreme Court opinions. Where the governmental action has affected an employee's liberty interest, *Roth*, *Codd* and *Arnett v. Kennedy*[105] evidence that a post-termination hearing is sufficient to remedy federal constitutional infringements.[106]

The New Jersey supreme court would have been on firmer ground had they based their decision on an interpretation of article I, paragraph 1 of the New Jersey constitution.[107] While the Supreme Court's decisions bind the lower courts as to federal constitutional law, the holdings do not restrict the power of a state court to con-

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similarly restricted. For a further discussion of this emerging cause of action, see generally Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1977); Blumrosen, *Employer Discipline: U.S. Report*, 18 RUTGERS L. REV. 428 (1964).

[102] 77 N.J. at 194, 390 A.2d at 115 (Schreiber, J., dissenting). Throughout the plurality opinion, the court declared that it was requiring a "post-termination" hearing to vindicate Sergeant Nicoletta's right. However, the court subsequently stated that the "post-termination hearing is designed to restore to the employee as nearly as possible the procedural right to which he was deprived, a hearing, albeit a *pre-termination* hearing, before his employer." *Id.* at 170, 390 A.2d at 103 (plurality opinion) (emphasis added); *see* notes 79 & 80 *supra* and accompanying text.

[103] 77 N.J. at 192–93, 390 A.2d at 114–15 (Schreiber, J., dissenting).

[104] *Id.* at 194, 390 A.2d at 115. Justice Schreiber interpreted the majority's holding as requiring "that before an at-will employee may be discharged he is entitled to a specification of charges and a full due process evidentiary hearing." *Id.* at 192–93, 390 A.2d at 114 (Schreiber, J., dissenting). The plurality, while not requiring a "full evidentiary hearing," did require that at least the minimum requirements for a hearing as established in Morrissey v. Brewer, 408 U.S. 471 (1972), be complied with. *Id.* at 170, 390 A.2d at 103; *see* note 76 *infra*.

[105] 416 U.S. 134 (1974).

[106] For a discussion of these three cases and their determinations as to when due process hearings must be given, see notes 77–82 *supra*.

[107] This provision reads:

> 1. Natural and unalienable rights
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> 1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

N.J. CONST. art. 1, para. 1.

strue its state constitution as imposing greater protections than required under the federal constitution.[108]

Thus, the state supreme court could have determined that while a post-termination hearing is all that is required where there has been a deprivation of liberty under federal constitutional law, the

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[108] *E.g.*, Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting) (state may impose higher police standards than Federal Constitution requires); Oregon v. Hass, 420 U.S. 714, 719 (1975) (state may impose greater restrictions on police than Federal Constitution requires); Sibron v. New York, 392 U.S. 40, 60–61 (1968) (while state is free to develop own search and seizure law, it may not authorize conduct that infringes upon constitutional protections); Cooper v. California, 386 U.S. 58, 62 (1967) (state may impose higher search and seizure standards than Federal Constitution requires); Ker v. California, 374 U.S. 23, 34 (1963) (searches and seizures).

An informative example of the application of this principle is State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975). The *Johnson* court acknowledged the United States Supreme Court decision of Schneckloth v. Bustamonte, 412 U.S. 218 (1973), which held that a state need not show that an individual in a non-custodial setting knew he had the right to withhold his consent to a search, but rather that the consent was voluntarily given. 412 U.S. at 227. The court then noted that the Supreme Court's determination was "controlling on state courts insofar as construction and application of the Fourth Amendment is concerned and is dispositive of defendant's federal constitutional argument." 68 N.J. at 353, 346 A.2d at 67. However, "each state has the power to impose higher standards on searches and seizures under state law than is required by the Federal Constitution." *Id.* (citation omitted). The court determined that under New Jersey constitutional law, the individual was provided greater protection, so that the state must demonstrate that the person voluntarily consented to a search with knowledge that he had the right to refuse consent. *Id.* at 353–54, 346 A.2d at 68. *E.g.*, Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 79, 389 A.2d 465, 477 (1978) ("State Constitutions have been construed to provide analogous or superior protections to . . . citizens"); Planned Parenthood of New York City v. State, 75 N.J. 49, 57–60, 379 A.2d 841, 845 (1977) (per curiam) (Pashman, J., concurring) (protections in state constitutions may be broader than those in Federal Constitution); State v. Miller, 67 N.J. 229, 233, 337 A.2d 36, 38–39 (1975) (the court, while declining to do so, has power under state law to reject Harris v. New York. 401 U.S. 222 (1971)); Robinson v. Cahill, 62 N.J. 473 490 303 A.2d 273, 282, *cert. denied*, 414 U.S. 976 (1973) (while statute may not be violative of equal protection under fourteenth amendment, state constitution may be more demanding); Rodriguez v. Rosenblatt, 58 N.J. 281, 295, 277 A.2d 216, 223 (1971) (prior to Argersinger v. Hamlin, 407 U.S. 25 (1972), New Jersey required that no indigent should be subject to imprisonment without having counsel assigned to him without cost); State v. Horton, 34 N.J. 518, 522, 170 A.2d 1, 3 (1961) (prior to Gideon v. Wainwright, 372 U.S. 335 (1963), New Jersey required appointed counsel for indigent defendants). For a discussion of the application of this doctrine in other jurisdictions, see, *e.g.*, People v. Pettingill, 145 Cal. Rptr. 861, 871–72, 578 P.2d 108, 118–19 (1978) (rejecting Michigan v. Mosley, 423 U.S. 96 (1975)); State v. Kaluna, 520 P.2d 51, 57–60 (Haw. 1974) (rejecting United States v. Robinson, 414 U.S. 218 (1973)); People v. Kelly, 77 Misc. 2d 264, 268–69, 353 N.Y.S. 2d 111, 116–17 (Crim. Ct.), *modified*, 79 Misc. 2d 534, 361 N.Y.S. 2d 135 (App. Div. 1974) (rejecting United States v. Robinson); State v. Santiago, 53 Haw. 254, 263–67, 492 P.2d 657, 662–65 (1971) (rejecting Harris v. New York, 401 U.S. 222 (1971)).

For a general discussion of the doctrine, see *Project Report, Toward an Activist Role for State Bills of Rights*, 8 HARV. C. R.–C. L. REV. 271 (1973); Falk, *The Supreme Court of California, 1971-1972—Forward, The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273 (1973).

New Jersey constitution affords an individual greater protection, and requires a pre-termination hearing prior to a deprivation of a state employee's liberty interest.[109]

Such an extension of constitutional protection seriously draws into question the validity of the term "at-will public employee" in the State of New Jersey. The court recognized that although the Commission may terminate employment for any reason "absent contamination by constitutional violation or like fault,"[110] yet the employee must be granted an opportunity to challenge the reasons for the decision prior to his dismissal.[111] Clearly, such a hearing could be undertaken after dismissal since the purpose of the hearing would be merely to reflect accurately an employee's prior work record so as to better enable the

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[109] Justice Brennan has commented:

> The essential point . . . is not that the United States Supreme Court is necessarily wrong in its interpretation of the Federal Constitution. . . . It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.

Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (footnote omitted). Justice Brennan further encouraged the state courts to determine for themselves the protections required under their own state constitutions and only treat "constitutional decisions by federal courts" as "guideposts when interpreting counterpart state guarantees." *Id.* The Justice finally admonished the state bars, "that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions." *Id.* A nearly identical text of this article was given in a speech by Justice Brennan before the New Jersey State Bar Association at the State Bar banquet on May 22, 1976. *Developments in Constitutional Law*, 99 N.J.L.J. 473 (June 3, 1976).

In *Nicoletta*, the court did not address itself to the state constitutional issue, as it found sufficient grounds for the decision under the Federal Constitution. Counsel for Sergeant Nicoletta did not allege an infringement of state constitutional rights, but instead rested his contention on the fourteenth amendment. *See* Petition on Behalf of Nicoletta, *supra* note 2. The fact that counsel did not raise the state constitutional issue, however, would not prevent the court from considering the matter *sua sponte*. State v. Johnson, 68 N.J. 349, 353, 346 A.2d 66, 67–68 (1975). Moreover, had the court grounded its determination on the New Jersey Constitution, the decision would not have been reviewable by the Supreme Court of the United States and thus not subject to being overturned on appeal. *E.g.*, Department of Mental Hygiene of Cal. v. Kirchner, 380 U.S. 194, 198 (1965); Henry v. Mississippi, 379 U.S. 443, 446–47 (1965); Jankovich v. Indiana Toll Rd. Comm'n, 379 U.S. 487, 490–92 (1965); Hurley v. Street, 81 U.S. (14 Wall.) 85, 86 (1871).

[110] 77 N.J. at 166, 390 A.2d at 101. The court further noted that it had no power to award Sergeant Nicoletta back pay as damages for the constitutional deprivation absent proof that the "deprivation was maliciously intended or with 'such disregard of . . . clearly established constitutional rights that [the] action cannot reasonably be characterized as being in good faith.'" *Id.* at 167, 390 A.2d at 101 (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)). Justice Pashman in his concurrence espoused a different view as to the power of the court to review the decision of the Commission. *Id.* at 180–81, 390 A.2d at 108–09; *see* notes 99–101 *supra* and accompanying text.

[111] 77 N.J. at 169, 390 A.2d at 102; *see* notes 95–98 *supra* and accompanying text.

Civil Service to judge his qualifications for future public employment.[112] The court, however, further provided that the hearing was also to enable the employee to persuade his employer that he should not be discharged.[113] Such a position requires the employer to conduct an evidentiary hearing prior to a dismissal with or without cause.[114] The reason for such a hearing is not altogether clear. If the purpose of the hearing is to compel the employer to reconsider his decision based upon the evidence presented, then, as Justice Schreiber noted, the court has indeed elevated the employee's liberty interest into a property right, and the employment may no longer be "at-will."[115] If however, as the court states, the employer remains free to discharge after the hearing, the right to the hearing is a right

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[112] The finding of the liberty interest itself was predicated on the possibility that the employee would be barred from further public service due to an unsatisfactory employment record. 77 N.J. at 159–60, 390 A.2d at 97–98. The dismissal from employment alone does not implicate a liberty interest, but rather the "dismissal based upon an unsupported charge" which harms his opportunity for future public employment. Arnett v. Kennedy, 416 U.S. 134, 157 (1974) (plurality opinion of Rehnquist, J.). *See also Codd*, 429 U.S. at 627–28; notes 70–72 *supra* and accompanying text. Therefore, the purpose of the liberty interest hearing is to insure that the employee's record is factually supported.

The record was unclear as to whether Sergeant Nicoletta denied the charges against him. It only showed that his account of the initial fight with Patrolman Russomanno "differed widely" from the account given by the patrolman. 77 N.J. at 151, 390 A.2d at 93. If there was no factual dispute as to the charges, then a liberty interest hearing should not have been granted. *Codd*, 429 U.S. at 627–28; notes 66–72 *supra* and accompanying text.

[113] 77 N.J. at 168–69, 390 A.2d at 102. Justice Schreiber commented that this requirement was "incompatible with the authority to discharge." *Id.* at 194, 390 A.2d at 115 (Schreiber, J., dissenting). It may be argued, however, that the court in *Nicoletta* is allowing no more in this regard than previous Supreme Court decisions, in that affording an individual the "opportunity to clear his name," *Roth*, 408 U.S. at 573 n.12, is tantamount to allowing him to persuade the employer to retain his services. While it is true that the employer may change his decision when the reasons for the discharge have been successfully contested, to require the employer to allow the employee to expressly attempt to persuade him creates an adversarial situation which does indeed seem incompatible with the employer's basic discretion to terminate an employee at will.

[114] 77 N.J. at 168–70, 390 A.2d at 102–03. Justice Schreiber pointed out that such a procedure would "prove administratively unduly burdensome." *Id.* at 194, 390 A.2d at 115 (Schreiber, J., dissenting). He commented that:

> After completion of an investigation, it now appears that a formal complaint and specification of charges will have to be drawn and served. Then a full hearing will have to be held which will probably necessitate the testimony again of all witnesses. There will then follow findings of fact and conclusions, presumably subject to judicial review, all of which will serve no useful function in view of the small probability that the employer will change its mind and the broad discretionary authority to discharge without cause.

Id.

[115] *Id.* at 193, 390 A.2d at 114–15.

in name only as it has no effect on the employment decision. The court presumes that the employer may have been in error in his determination and requires that he be sure of his decision before the dismissal may be effected. Whether such a position should be constitutionally mandated remains subject to question. If the employer should realize that he erred and wish to continue the individual's employment, such realization would surely occur at a post-termination hearing where the employee would attempt to "clear his name." To require a pre-termination hearing, while not completely abolishing the doctrine of an at-will employee, seriously erodes the position that an employee at will has no protected interest in his continued employment.

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