

NOTES

clearly within the no-strike clause. The presumption of legality requirement is wholly appropriate in order to protect legal strikes from injunctions since the burden of clear draftsmanship should fall on the employer given the absolute provisions of the Norris-LaGuardia Act. Similarly, although only a preponderance standard is necessary in suits filed under section 301,¹⁴⁶ the requirement that the employer prove illegality by convincing evidence also seems appropriate given the possibility of ambiguous no-strike clauses.¹⁴⁷

If conscientiously applied by the district courts, these stringent safeguards should represent a significant obstacle to an employer seeking to obtain injunctive relief in a sympathy strike situation. Accordingly, the proposed accommodation, buttressed by these safeguards, could both provide an employer with the opportunity to guard against sympathy strikes by unambiguously making that intention manifest in the collective bargaining agreement, and could protect legitimate union activity from injunctions.

CONCLUSION

While the refusal to accommodate in the *Buffalo Forge* decision can be analyzed as consistent with the landmark accommodation in *Boys Markets, Inc. v. Retail Clerks Union*, it remains possible to justify an independent accommodation in a sympathy strike situation. It has been noted that if the process of accommodation is "broadly" conceived as a means of reconciling apparently inconsistent statutory aims, rather than "narrowly" relegated to reconciling the Norris-LaGuardia Act to the congressional preference for arbitration, then an accommodation in a sympathy strike situation can be reached which would support a panoply of congressional objectives while still retaining the core purpose of the Norris-LaGuardia Act.

KENNETH J. MALLOY

Constitutional Law—Due Process—the Interests in Reputation and Employment—*Paul v. Davis*¹ and *Bishop v. Wood*²—In two recent cases, the Supreme Court has had occasion to reconsider the extent to

¹⁴⁶ See, e.g., *Bartels v. Lithographers' & Photo-Engravers' Union No. One-P*, 306 F. Supp. 1266, 1272, 73 L.R.R.M. 2154, 2158 (S.D.N.Y. 1969), *aff'd per curiam* 431 F.2d 1205, 75 L.R.R.M. 2400 (2d Cir. 1970).

¹⁴⁷ There is some support for a higher standard of proof in § 6 of the Norris-LaGuardia Act since it requires "clear proof" of participation or ratification of unlawful acts before a member of a union can be held liable. See, e.g., *Ramsey v. United Mine Workers*, 401 U.S. 302, 307-10 (1971).

¹ 424 U.S. 693 (1976).

² 426 U.S. 341 (1976). Both cases are noted in *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 86-104 (1976).

which the due process clause protects interests in reputation and in public employment. *Paul v. Davis*, decided in March of 1976, involved a claim of state impairment of an individual's interest in reputation. Interests in both reputation and employment were involved in *Bishop v. Wood*, decided last June. Due process safeguards were denied in both cases, in opinions which, in this note's analysis, represent a narrowing of the protection previously afforded these interests.

The reputation claim advanced in *Paul v. Davis* arose when the respondent, Davis, was identified as an "active shoplifter" by name and photograph in a flyer distributed to shopkeepers in Louisville, Kentucky, by the petitioners, who were chiefs of police in Louisville and Jefferson County.³ Although Davis had been arrested once for shoplifting, no determination of guilt had been made when the flyers were distributed.⁴ Davis brought suit under section 1983 of Title 42 of the United States Code,⁵ claiming a violation of his constitutional rights without due process of law.⁶ The United States District Court for the Western District of Kentucky dismissed the claim, finding that no constitutional right was infringed.⁷ The United States Court of Appeals for the Sixth Circuit reversed.⁸

On writ of certiorari,⁹ the Supreme Court, in a five to three decision,¹⁰ reversed the judgment of the court of appeals and HELD that reputation, in order to be protected by the due process clause, must either be connected with "some more tangible interest"¹¹ or be "recognized and protected" by state law.¹² The Court's first holding rested on an analysis of prior decisions which revealed, in the

³ 424 U.S. at 694-95.

⁴ *Id.* at 696. The charge against Davis was later dismissed. *Id.*

⁵ 42 U.S.C. § 1983 (1970), provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

⁶ 424 U.S. at 696. Davis relied on the due process clause of the fourteenth amendment to the United States Constitution: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV § 1.

⁷ 424 U.S. at 696.

⁸ *Davis v. Paul*, 505 F.2d 1180, 1184 (6th Cir. 1974).

⁹ 421 U.S. 909 (1975).

¹⁰ Justice Stevens did not participate. 424 U.S. at 714.

¹¹ 424 U.S. at 701; *see id.* at 701-10.

¹² *Id.* at 710; *see id.* at 711-12. The Supreme Court also held that respondent had not suffered an invasion of a constitutionally protected right of privacy. While "zones of privacy" created by specific constitutional guarantees qualify for protection, respondent's claim did not fall within these areas. Constitutional support of privacy extends to matters relating to family, procreation, child rearing, education, and the like. Arrest records are not of this order and lie beyond the pale of protection. *Id.* at 713.

The Court also rejected the notion that the due process clause, in combination with 42 U.S.C. § 1983 (1970), makes actionable under federal law all torts committed by state officials. *Id.* at 698-700.

NOTES

majority's view, that the reputation interest had heretofore been accorded constitutional protection only in conjunction with government invasion of some other, more "tangible" interest such as employment.¹³ The second holding derived from the Court's observation that a variety of interests have over the years merited the protection of the due process clause by virtue of the recognition and protection initially afforded them by state law.¹⁴ The Court noted that the law in Kentucky confers no guarantee of continued enjoyment of reputation.¹⁵ Accordingly, as the respondent here was asserting an impairment of reputation alone, unconnected with any tangible interest, and unprotected by state law, due process was not required.¹⁶

An opportunity was soon presented to the Court to apply its holding in *Davis* that injury to reputation is constitutionally cognizable when connected with deprivation of a "tangible" interest. *Bishop v. Wood*¹⁷ involved a claim of state impairment of two constitutionally protected interests: a property interest in employment and a liberty interest in reputation.¹⁸ Petitioner Bishop was dismissed for alleged misconduct from his position as a police officer in the city of Marion, North Carolina.¹⁹ Contending that the reasons for his discharge were false, Bishop maintained that he was entitled to a pretermination hearing.²⁰ He brought suit under section 1983 of Title 42 of the United States Code²¹ against the city manager and the chief of police. Bishop claimed a property interest in employment on two grounds.²²

¹³ 424 U.S. at 701.

¹⁴ *Id.* at 711. The Court cites, for instance, *Bell v. Burson*, 402 U.S. 535 (1971), which required due process prior to revocation of a driver's license and vehicle registration. *Id.* at 542-43. This holding that constitutional significance attaches to reputation which has been legally guaranteed by the state suggests a property interest under the definition in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), which requires "a legitimate claim of entitlement." The entitlements doctrine has been applied to interests which were initially conferred by the state. *E.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (welfare benefits); *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972) (public employment); *Goss v. Lopez*, 419 U.S. 565, 573 (1975) (public education). Reputation would seem to differ from such entitlements in that it is not initially conferred by the state but is acquired and maintained solely by the individual's own effort. This casenote does not further examine the Court's conditioning of constitutional protection of reputation upon recognition by state law. For a fuller treatment of this aspect of the *Davis* opinion, see *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 86-104 (1976).

¹⁵ 424 U.S. at 711.

¹⁶ *Id.* at 712. Justices Brennan, Marshall, and White dissented. Justice Brennan, writing for the dissenters, insisted that "[o]ur precedents clearly mandate that a person's interest in his good name and reputation is cognizable as a 'liberty' interest within the meaning of the Due Process Clause, and the Court has simply failed to distinguish those precedents in any rational manner in holding that no invasion of a 'liberty' interest was effected in the official stigmatizing of respondent as a criminal without any 'process' whatsoever." *Id.* at 734.

¹⁷ 426 U.S. 341 (1976).

¹⁸ *Id.* at 343.

¹⁹ *Id.* at 342.

²⁰ *Id.* at 343.

²¹ For the text of 42 U.S.C. § 1983 (1970), see note 5 *supra*.

²² 426 U.S. at 344.

First, a city ordinance²³ prescribing certain grounds for dismissal of permanent employees was asserted as conferring tenure.²⁴ Second, various circumstances of Bishop's employment—his period of service, his designation as a "permanent" as opposed to "probationary" employee, and the infrequency of discharge in the department—were cited as inducements of a valid expectation of continued employment.²⁵ Bishop claimed that this legitimate expectation constituted a property interest cognizable under the due process clause, and that state deprivation of that property interest could not constitutionally be accomplished without due process of law.²⁶ In addition, Bishop contended that the false charges of misconduct²⁷ impaired his reputation and thereby infringed his interest in liberty, also protected by the due process clause.²⁸ The United States District Court for the Western District of North Carolina granted summary judgment for the defendants, finding no infringement of a constitutional right in the dismissal.²⁹ The United States Court of Appeals for the Fourth Circuit affirmed.³⁰

On writ of certiorari,³¹ the Supreme Court, in a five to four de-

²³ Article II, § 6, of the Personnel Ordinance of the City of Marion, N.C., provided:

Dismissal. A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice.

The ordinance is quoted at 326 U.S. at 344 n.5.

²⁴ 326 U.S. at 344. The principle that a property interest in public employment may be created by statute was established in *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972). In *Arnett v. Kennedy*, 416 U.S. 134 (1974), six Justices agreed that a statute creates such a property interest when it conditions discharge upon cause. See note 190 *infra*.

²⁵ See 326 U.S. at 344; *id.* at 354 n.5 (Brennan, J., dissenting). In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), the Court had expressed the view that a purpose of the institution of property is to protect the legitimate claims of entitlement upon which people rely. In *Perry v. Sindermann*, 408 U.S. 593, 602 (1972), the Court concluded that a legitimate claim of entitlement to public employment may arise from the facts and circumstances surrounding that employment.

²⁶ See 426 U.S. at 343-44.

²⁷ 426 U.S. at 343. The Court accepted Bishop's version of the facts because the district court granted summary judgment against him, and in so doing was required to resolve all material facts in his favor. *Id.* at 347 & n.11.

²⁸ *Id.* at 343. The Court in *Wisconsin v. Constantineau*, 417 U.S. 433, 437 (1971), had held that "where a person's good name [or] reputation . . . is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." The Court in *Goss v. Lopez*, 419 U.S. 565, 576, 574-75, (1975), found that due process requirements apply to state deprivation of "the liberty interest in reputation."

²⁹ 377 F. Supp. 501, 505 (W.D.N.C. 1973).

³⁰ 498 F.2d 1341, 1341 (4th Cir. 1974). After granting a rehearing en banc, this decision was affirmed without opinion by an equally divided court. 426 U.S. at 343 n.3.

³¹ 423 U.S. 890 (1975).

NOTES

cision, affirmed the court of appeals, and HELD first, that under a "tenable" interpretation of state law proffered by the lower federal courts, and accepted by the Supreme Court, Bishop did not have a protected property interest in his employment;³² and second, that in cases of impairment of reputation accompanied by deprivation of another, tangible, interest,³³ due process intervenes only where there has been prior public disclosure of the defamatory statements.³⁴

Deference to the district court's "tenable"³⁵ interpretation of the ordinance governing discharge, an interpretation which received the affirmance of an equally divided court of appeals, was considered appropriate because the federal judge sitting in North Carolina had acquired expertise in North Carolina law.³⁶ The Court dismissed Bishop's claim that a property interest was implied in the circumstances of his employment by noting that such claims must be based on state law,³⁷ and North Carolina law provided that a protected interest in employment must derive from a statutory or contractual guarantee.³⁸ The Court proceeded to examine and reject Bishop's claim relating to the ordinance, with no further discussion of a possible contract guarantee. Bishop, in fact, did not have a written contract.³⁹ Yet, the Court disregarded the possibility of a contract implied in the state's non-statutory conduct relating to public employment.

Thus disposing of Bishop's employment claim, the Court turned to the assertion that the injury to reputation demanded due process. Without alluding to the *Paul v. Davis* denial of constitutional stature to reputation alone,⁴⁰ and also without explicitly defining the "tangibility" of the accompanying employment interest in *Bishop*, the Court proceeded to examine the merits of the reputation claim.⁴¹ The Court disallowed this claim, not on the ground that the interest in reputation which plaintiff asserted was not constitutionally cognizable, but because the reasons for discharge were not made public before this

³² 426 U.S. at 345-47.

³³ See *id.* at 348 n.12. Under *Paul v. Davis* this combination renders the reputation interest constitutionally significant. See *Davis*, 424 U.S. at 701-10. See text at note 13 *supra*.

³⁴ 426 U.S. at 348; see *id.* at 348-49.

³⁵ *Id.* at 347.

³⁶ *Id.* at 345. The Court noted that the district court's decision was affirmed by the court of appeals and expressed reluctance to disturb their combined judgment. *Id.* at 345-46.

³⁷ *Id.* at 344.

³⁸ *Id.* at 345.

³⁹ *Bishop v. Wood*, 377 F. Supp. 501, 502 (W.D.N.C. 1973).

⁴⁰ See text at note 13 *supra*.

⁴¹ The decision in *Bishop* can be read consistently with the *Davis* denial of due process to injured reputation alone, if the Court intended that Bishop's employment constituted a "tangible" interest under *Davis*. That the Court did so intend is suggested by *Davis'* emphasis on employment as an example of a "tangible" interest, 424 U.S. at 701, and the *Bishop* Court's footnote reference to *Davis'* "discussion of the interest in reputation allied to employment . . ." 426 U.S. at 348 n.12 (emphasis added).

suit was instituted.⁴² The Court observed that the reasons for discharge were stated privately to Bishop and were also given in writing in answer to interrogatories after this litigation commenced. Neither of these communications constituted prior publication, however, and the Court reasoned that to allow them as bases for a claim for due process protection of reputation would penalize candor between employer and employee and between litigants.⁴³

This note will consider the narrowing of the constitutional recognition of the interests in reputation and employment presented by the *Davis* and *Bishop* decisions. The focus of this analysis is the threshold question presented by any due process claim, that is, whether a protected interest exists whose infringement by the state requires some degree of due process.⁴⁴ The interest in reputation is the subject of the first section, which examines the requirement that injury to reputation be accompanied by deprivation of some more tangible interest, added by *Davis*, and *Bishop*'s suggestion that the injury to reputation must be actual rather than potential; that is, that publication of injurious statements must precede a claim for due process protection of reputation. The interest in employment is considered in the second section, which examines the two aspects of the property claim in *Bishop*. First, *Bishop*'s assertion that the ordinance governing his employment engendered an enforceable expectation of continuity is studied. Attention is then given to the second aspect of the property claim, which concerns the understanding fostered by the circumstances surrounding *Bishop*'s employment. The third section of this note considers the attention awarded to the interests of the state by the *Bishop* and *Davis* opinions, and compares that attention with the balancing of state and individual interests in previous due process decisions. Prior opinions suggest that consideration of these competing interests is relevant to a determination not of the existence of a protected interest but of the degree of process required after a protected interest, endangered by the state, has been identified. It is suggested that the *Bishop* and *Davis* opinions have departed from recent decisions in permitting consideration of the interests of the state to influence the determination of whether a protected interest exists.

⁴² 426 U.S. at 344.

⁴³ *Id.* at 345. Four Justices dissented. In an opinion written by Justice White, the dissenters, Justices White, Brennan, Marshall and Blackmun, interpreted the ordinance governing discharge as conditioning discharge upon cause and thereby conferring a property interest. *Id.* at 355. That opinion did not discuss *Bishop*'s other claims. In another opinion, Justice Brennan, joined by Justice Marshall, addressed *Bishop*'s reputation claim, concluding that the stigma imposed required a hearing in order for *Bishop* to clear his name. *Id.* at 350-52. Justice Brennan also found that the ordinance conferred a property interest and that even if it did not, the circumstances surrounding *Bishop*'s employment deserved examination for implied representations of continuity. *Id.* at 353-54.

⁴⁴ Due process cases present a second question for analysis, namely, the degree of process required in a given instance. See e.g., *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). A discussion of *Davis* and *Bishop* in relation to this second question is beyond the scope of this note.

NOTES

I. THE INTEREST IN REPUTATION

Government impairment of reputation has been the subject of several Supreme Court cases.⁴⁵ Although not uniform in their treatment, many of these decisions have appeared to extend constitutional protection to reputation under the due process clause.⁴⁶ The interest in reputation first drew substantial constitutional attention during the loyalty trials of the 1940's and 1950's.⁴⁷ The severely stigmatizing effect of government imposition of the label of "subversive" or "Communist" was noted in several cases.⁴⁸ One of the first of these was *United States v. Lovett*,⁴⁹ where the Court struck down as an unconstitutional bill of attainder an act of Congress which forbade payment of compensation for government employment to named persons deemed to be subversive.⁵⁰ Although the punishment which the legislature unconstitutionally sought to inflict was identified as exclusion from government employment, the Court also noted that serious injury to reputation was involved.⁵¹

Impairment of reputation arose in a due process context in *Joint*

⁴⁵ E.g., *Goss v. Lopez*, 419 U.S. 565 (1975); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Jenkins v. McKeithen*, 395 U.S. 411 (1969); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951).

⁴⁶ E.g., *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Jenkins v. McKeithen*, 395 U.S. 411, 424-25, 428-29 (1969). The rules governing state and federal impairments of reputation under the fourteenth and fifth amendments are the same. See *Davis*, 424 U.S. at 702 n.3. This analysis treats the due process clauses of both amendments as relevant.

Protection under the due process clause has generally been extended under the heading of "liberty" rather than "property," see, e.g., *Goss v. Lopez*, 419 U.S. 565, 576 (1975), referring to "the liberty interest in reputation," although conceptually either characterization might be appropriate. In denying protected status to the reputation interest asserted in *Davis*, the Court took care to note that that interest was neither liberty nor property, suggesting that reputation might, under other circumstances, constitute either. See 424 U.S. at 712. Reputation would seem to deserve protection as a liberty interest under the Court's broad definition of liberty as embracing "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, . . . and bring up children, . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), quoted in *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972), because an individual's good name is often crucial to the enjoyment of these rights. On the other hand, reputation could be viewed as an intangible property interest. The *Davis* Court's conclusion that constitutional significance attaches to reputation which has been legally guaranteed by the state, 424 U.S. at 711, also suggests a property interest. State conferrals of benefits have been found to create property interests under the entitlement theory. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). For a discussion of the application of the entitlement theory to the interest in reputation, see note 14 *supra*.

⁴⁷ See, e.g., *Wieman v. Updegraff*, 344 U.S. 183, 190-91 (1952); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring); *United States v. Lovett*, 328 U.S. 303, 314 (1946).

⁴⁸ See note 47 *supra*.

⁴⁹ 328 U.S. 303 (1946).

⁵⁰ *Id.* at 316.

⁵¹ *Id.* at 314.

Anti-Fascist Refugee Committee v. McGrath.⁵² In that case several organizations designated as Communist by the Attorney General sued to have this designation rescinded.⁵³ Five Justices, in separate opinions and on varying grounds, reversed the lower court dismissals.⁵⁴ A number of the Justices comprising the majority found that the stigma imposed by this designation implicated the due process clause.⁵⁵ Subsequently, in *Wieman v. Updegraff*,⁵⁶ the Court invalidated a state law that excluded persons from public employment on disloyalty grounds. The statute's constitutional infirmity was found in its arbitrary and discriminatory determination that association with proscribed organizations, whether innocent or knowing, was conclusive evidence of disloyalty.⁵⁷ In reaching this result, the Court emphasized the severe injury to reputation—a "badge of infamy"—resulting from denial of employment for reasons of disloyalty.⁵⁸

Stigmatizing labels besides those of "Communist" and "subversive" have been accorded due process attention in recent cases. *Wisconsin v. Constantineau*,⁵⁹ for example, addressed the official labeling of a person as an alcoholic. That case, decided in 1971, involved a state statute which authorized designated persons to post notices forbidding sales of liquor to any individual accused of habitual intoxication.⁶⁰ The Court found the statute to be unconstitutional in failing to provide due process to affected persons.⁶¹ In reaching this result, the Court noted that the case involved the official branding of

⁵² 341 U.S. 123 (1951).

⁵³ *Id.* at 124-25.

⁵⁴ Justices Frankfurter and Jackson reversed on due process grounds, *id.* at 172-74 & 186; Justice Black found an unconstitutional bill of attainder, *id.* at 143-44; and Justices Burton and Douglas found that the Attorney General had exceeded his authority and invaded the plaintiffs' "Common-law right to be free from defamation," *id.* at 139. The Justices' reasons for reversing the lower court dismissals are set forth at note 100 *infra*.

⁵⁵ See text at notes 105-22 *infra*.

⁵⁶ 344 U.S. 183 (1952).

⁵⁷ *Id.* at 191.

⁵⁸ "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. . . . Yet under the . . . [challenged] Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly." *Id.* at 190-91. Other deleterious consequences of the Act were the inhibition of "democratic expression and controversy at one of its chief sources" (the university), and the exclusion from government employment. *Id.*

Later due process cases similarly appeared to suggest that reputation merits constitutional protection. For example, the Court in *Cafeteria & Restaurant Workers, Local 43 v. McElroy*, 367 U.S. 886 (1961), in denying a due process claim, distinguished *Wieman* as involving an impairment of reputation. *Id.* at 898-99. *Cafeteria Workers* was a case of exclusion from employment at a Navy ordnance installation on security grounds. Due process was not mandated because no badge of disloyalty or infamy was imposed; security clearance could be denied for non-pejorative reasons. *Id.*

⁵⁹ 400 U.S. 433 (1971).

⁶⁰ *Id.* at 434-35 & n.2.

⁶¹ *Id.* at 437, 439.

NOTES

a person with a degrading label, and held that such state impairment of one's "good name" demands due process.⁶² The Court did not provide an elaborate rationale for this holding, but cited the *Wieman* concern over state imposition of a "badge of infamy" and Justice Frankfurter's concurring opinion in *Anti-Fascist*, which found due process to be required in that case.⁶³

Although the statute struck down in *Constantineau* touched both the plaintiff's good name and her ability to purchase liquor, the critical injury appeared to be the damage to reputation.⁶⁴ This was the reading given *Constantineau* by several courts and commentators.⁶⁵ The Court of Appeals for the Fifth Circuit, for instance, concluded that "[t]he Supreme Court held [the Wisconsin] statute to be an unconstitutional denial of 'liberty' since the persons whose names were posted were exposed to public embarrassment and ridicule."⁶⁶ Similarly, one commentator observed that "[a]lthough the restriction on drinking by itself might be cause for a right to a hearing, the decision turned on the stigma resulting from the attendant publicity."⁶⁷

The Supreme Court itself appeared to adopt this reading of *Constantineau* in the 1975 case of *Goss v. Lopez*.⁶⁸ The Court in *Goss* held that a temporary suspension of high school students requires procedural safeguards by virtue of the resulting injury to reputation as well as to a property interest in education benefits.⁶⁹ The Court cited *Constantineau* for the proposition that government impairment of an individual's good name demands due process.⁷⁰ Noting that the charges of misconduct could injure the students' standing with their fellow pupils and their opportunities for future education and employment, the Court concluded that the state's unilateral action "immediately collides with the requirements of the Constitution."⁷¹

Thus, the law prior to *Paul v. Davis* appeared to recognize reputation as an interest sufficient by itself to merit constitutional safeguards. The rule enunciated in *Davis*, that reputation attains constitutional significance only in alliance with a more tangible interest, thus constitutes a narrowing of due process protection of reputation.

⁶² *Id.* at 437.

⁶³ *Id.*

⁶⁴ See text at notes 130-38 *infra*.

⁶⁵ See, e.g., *Ampleman v. Schlesinger*, 534 F.2d 825 (8th Cir. 1976), which distinguished *Constantineau* as involving a stigma. In finding that an honorable discharge from the Air Force did not implicate a liberty interest, the court observed that "[t]he threshold determination to be made is whether or not a stigma is imposed. We are not so persuaded." The court noted that there was no disclosure of reasons underlying the honorable discharge, and that such information was confidential. *Id.* at 828. See also, Note, Kan. L. Rev. 202, 214 (1975).

⁶⁶ *Sims v. Fox*, 505 F.2d 857, 862 (5th Cir. 1974), *cert. denied*, 421 U.S. 1011 (1975).

⁶⁷ 85 HARV. L. REV. 861, 867 (1971).

⁶⁸ 419 U.S. 565 (1975).

⁶⁹ *Id.* at 574, 576.

⁷⁰ *Id.* at 574.

⁷¹ *Id.* at 575.

A further diminution of the protection accorded reputation was achieved by the *Bishop* requirement that to warrant due process, injury to reputation must be actual rather than potential. This represents a narrowing of the *Goss v. Lopez* rule that the threat of future injury to reputation inherent in the recording of damaging information suffices to require due process.⁷² This section will examine these changes in the law governing due process rights in reputation.

A. *The Requirement of an Additional, "Tangible" Interest*

The Supreme Court's decision in *Paul v. Davis* substantially narrows the protection previously thought to be afforded reputation by the due process clause. Under *Davis*, reputation alone does not constitute liberty or property for purposes of the fourteenth amendment,⁷³ but may attain constitutional significance only in connection with "some more tangible interest."⁷⁴ To reach this result, the *Davis* Court reinterpreted *Wisconsin v. Constantineau*⁷⁵ in the light of several cases which, for the most part, concerned concurrent impairments of reputation and of some other interest. According to the *Davis* Court, these cases are properly read to require the presence of another interest before the right to reputation can be constitutionally recognized.⁷⁶

Four cases preceding *Constantineau* were given rather lengthy analysis in *Davis*.⁷⁷ The *Davis* Court's reading of these precedents led it to conclude that the Court has never recognized a due process right in reputation unconnected with loss of government employment.⁷⁸ Although none of the four prior cases involved a denial of due process protection to reputation alone, the Court in *Davis* asserted that those cases did not grant such protection and so could not serve as precedential support for a reading of *Constantineau* which accords constitutional protection to reputation alone.⁷⁹ The analysis which follows questions these conclusions.

The *Davis* Court began its examination of precedent with *United States v. Lovett*.⁸⁰ The Court emphasized that the pivotal factor in find-

⁷² *Id.* See text at notes 161-62 *infra*.

⁷³ 424 U.S. at 701-10.

⁷⁴ *Id.* at 701. The Court also held that constitutional significance attaches to reputation which has been legally guaranteed by the state. *Id.* at 711-12. See note 14 *supra*.

⁷⁵ See discussion on text at notes 128-35 *infra*.

⁷⁶ "[T]he Court has never held that mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment." 424 U.S. at 706.

⁷⁷ These were *Cafeteria & Restaurant Workers, Local 473 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).

⁷⁸ 424 U.S. at 706.

⁷⁹ *Id.* at 706-08.

⁸⁰ 328 U.S. 303 (1946). For a brief summary of the *Lovett* opinion, see text at notes 49-51 *supra*.

ing a bill of attainder in *Lovett* was the exclusion from government employment.⁸¹ However, *Lovett* was not decided on due process grounds, and perhaps for this reason was not discussed in *Constantineau*. *Lovett*'s holding that a legislative infliction of punishment through exclusion from public employment constitutes a bill of attainder appears to have little relevance to the question of due process protection of reputation.

The *Davis* Court also turned attention to *Cafeteria & Restaurant Workers, Local 473 v. McElroy*,⁸² which held that exclusion without a hearing from a navy ordnance installation for security reasons did not offend due process. The Court in *Cafeteria Workers* noted that no badge of infamy "with an attendant foreclosure from other employment opportunity" was imposed.⁸³ The *Davis* Court highlighted the quoted phrase, apparently concluding that foreclosure of employment opportunity is required before a badge of disloyalty takes on constitutional significance.⁸⁴ Yet foreclosure of opportunity is not equivalent to the concurrent deprivation of employment which the Court in *Davis* demands. Moreover, the phrase in *Cafeteria Workers* to which the Court assigns such importance may simply constitute the earlier Court's recognition that foreclosure of employment opportunity generally attends a serious impairment of reputation.

The *Davis* Court also analyzed the two cases that were cited by the *Constantineau* Court to support its holding that due process is required where the state injures reputation;⁸⁵ namely, *Wieman v. Updegraff*⁸⁶ and *Joint Anti-Fascist Refugee Committee v. McGrath*.⁸⁷ The *Davis* Court read these cases as requiring loss of employment before a due process right will attach to injured reputation. An analysis of the two cases suggests, however, that they justify *Constantineau*'s reliance upon them in awarding constitutional protection to reputation alone.

Constantineau relied primarily on *Wieman v. Updegraff*, which was cited in support of the proposition that "where the State attaches 'a badge of infamy' to the citizen, due process comes into play."⁸⁸ The Court in *Wieman* invalidated a statute which conditioned state employment upon the taking of an oath disavowing membership in proscribed organizations but which failed to distinguish between innocent and knowing membership.⁸⁹ The Court in *Davis* emphasized that the question of procedural due process was not reached in *Wieman*.⁹⁰ This

⁸¹ 424 U.S. at 702.

⁸² 367 U.S. 886 (1961).

⁸³ *Id.* at 898-99.

⁸⁴ 424 U.S. at 705-06.

⁸⁵ *Constantineau*, 400 U.S. at 437.

⁸⁶ 344 U.S. 183 (1951). For a brief description of the *Wieman* opinion, see text at notes 56-58 *supra*.

⁸⁷ 341 U.S. 123 (1951). For a brief description of the *Anti-Fascist* case, see text at notes 52-55 *supra*. A fuller description is given in the text at notes 93-101 *infra*.

⁸⁸ *Constantineau*, 400 U.S. at 437, quoting *Wieman*, 344 U.S. at 191.

⁸⁹ 344 U.S. at 192.

⁹⁰ *Davis*, 424 U.S. at 705.

was so because the statute was invalidated as arbitrary, thereby obviating the question of whether procedural due process was satisfied in the form governing the statute's application to individual cases. The *Davis* Court implied that because the Court in *Wieman* did not pass on the procedural due process claim, *Wieman* provides no support for the *Constantineau* insistence on due process protection of reputation.⁹¹ Yet it was the "badge of infamy" that triggered the *Wieman* Court's concern over the statute's arbitrariness.⁹² As a result, it would seem that the Court in *Constantineau* could justly infer that the *Wieman* Court discerned constitutional overtones in the impairment of reputation.

The second case cited in *Constantineau* in support of the demand for due process was *Joint Anti-Fascist Refugee Committee v. McGrath*.⁹³ *Constantineau's* interest in *Anti-Fascist* focused on Justice Frankfurter's recognition of "the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction . . ."⁹⁴ The *Davis* Court interpreted *Anti-Fascist* in general, and Justice Frankfurter's concurring opinion in particular, to reach a result contrary to that reached in *Constantineau*.⁹⁵

The plaintiffs in *Anti-Fascist* were organizations designated as "Communist" by the Attorney General and included in his list of subversive organizations which was transmitted to various federal agencies for use in determining whether present or prospective employees were disloyal.⁹⁶ Plaintiffs sued to have this designation rescinded, complaining of a loss of membership resulting from impairment of reputation and from members' fears of exclusion from government employment.⁹⁷ In addition, plaintiffs' identification as Communists touched off independent governmental actions which revoked their tax-exempt status.⁹⁸ The Court found that these injuries were sufficient to allow suit for equitable relief and remanded for consideration of the merits.⁹⁹ The concurring Justices reached their decisions to reverse the lower court dismissals on various grounds,¹⁰⁰ but most of

⁹¹ See *id.*

⁹² *Wieman*, 344 U.S. at 191.

⁹³ 341 U.S. 123 (1951).

⁹⁴ *Id.* at 168 (Frankfurter, J., concurring), quoted in *Wisconsin v. Constantineau*, 400 U.S. at 437.

⁹⁵ *Davis*, 424 U.S. at 703-05.

⁹⁶ 341 U.S. at 124-25.

⁹⁷ *Id.* at 131, 135.

⁹⁸ *Id.* at 158.

⁹⁹ *Id.* at 142.

¹⁰⁰ For instance, Justice Burton, joined by Justice Douglas, found that the facts alleged in the complaints, which must be taken as admitted by the defendant Attorney General by virtue of his motion to dismiss, indicated that the Attorney General had acted arbitrarily and thereby exceeded the bounds of the authority conferred upon him by the President. *Id.* at 124-125, 137. Stripped of this Presidential authorization, the Attorney General's designation constituted an invasion of the plaintiffs' "common-law right to be free from defamation." *Id.* at 139. Justice Black found an unconstitutional bill of attainder, *Id.* at 143-44, as well as a violation of due process, *id.* at 143; Justice Frank-

NOTES

them included a discussion of due process, finding that due process was required before the government could thus injure plaintiffs' interests.¹⁰¹

As the *Davis* Court read *Anti-Fascist*, most of the Justices who participated, whether concurring or dissenting, viewed stigma alone, apart from revocation of tax exemption or loss of government employment, as insufficient to invoke due process.¹⁰² The *Davis* Court correctly attributed this view to the three dissenters in *Anti-Fascist*, and to one of the five concurring Justices.¹⁰³ The opinion of Justice Frankfurter (and those of Justices Black and Douglas as well¹⁰⁴) is, however, susceptible to a very different interpretation.

In the *Davis* Court's analysis of Justice Frankfurter's opinion, one remark was extracted from its context and cited as controlling. Justice Frankfurter did observe, as noted in *Davis*, that "publicly designating an organization as within the proscribed categories of the Loyalty Order does not directly deprive anyone of liberty or property."¹⁰⁵ Yet he proceeded to conclude that a hearing might nonetheless be required in cases of indirect deprivations because an examination of the course of prior decisions¹⁰⁶ demonstrated that in nearly all cases of government infliction of serious injury, due process was found to be indispensable.¹⁰⁷ Procedural safeguards were denied only in exceptional situations.¹⁰⁸ Justice Frankfurter found that the injury suffered in *Anti-Fascist*, although indirect, was so serious, that even weighed against the admittedly vital security concerns of the government,¹⁰⁹ it served to "place upon the Attorney General the burden of showing weighty reason for departing in this instance from a rule so deeply imbedded in history and in the demands of justice."¹¹⁰ Thus, the thrust of Justice Frankfurter's opinion is that even in cases of serious indirect or consequential deprivations of lib-

furter emphasized a requirement of due process, *id.* at 172-74; as did Justice Jackson, *id.* at 186; and Justice Douglas, in a separate opinion, found due process to be necessary. *Id.* at 178.

¹⁰¹ See note 100 *supra*. The issue of due process was discussed in regard to both the plaintiffs' standing to sue and the merits of their claim. See 341 U.S. at 152, 161 (Frankfurter, J., concurring).

¹⁰² 424 U.S. at 704-05. There was no majority opinion in *Anti-Fascist*.

¹⁰³ The three dissenters found that the Attorney General's designation did not affect protected interests. 341 U.S. at 202. Only Justice Jackson based a demand for due process on the potential exclusion from government employment facing members of the organizations. *Id.* at 184.

¹⁰⁴ See text at notes 117-22 *infra*. The remaining Justice, Justice Burton, did not reach the issue of the due process.

¹⁰⁵ *Anti-Fascist*, 341 U.S. at 164 (Frankfurter, J., concurring), quoted in *Davis*, 424 U.S. at 703.

¹⁰⁶ 341 U.S. at 161-72.

¹⁰⁷ *Id.* at 172.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 164; *id.* at 174 (Douglas, J., concurring).

¹¹⁰ *Id.* at 172.

erty or property, the fundamental right to be heard must be respected.

From Justice Frankfurter's observation that the designation did not directly deprive anyone of either liberty or property, the *Davis* Court inferred that the serious injury that demanded due process was not the stigma imposed but the alteration of legal status involved in denial of government employment and in the revocation of tax-exempt classification.¹¹¹ Yet Justice Frankfurter did not allude to the plaintiffs' tax status in his discussion of the requirement of due process. As to the possibility that members of the listed organizations would be subject to loss of government employment, Justice Frankfurter noted that the Loyalty Order did provide for a hearing in such situations.¹¹² Without examining the sufficiency of that procedure, he concluded that "the wholly summary process for the organizations is inadequate."¹¹³ This suggests that Justice Frankfurter found that the organizations themselves deserved due process for reasons other than their members' potential exclusion from government employment or the alteration of their tax status. Apparently, then, the decisive injury in Justice Frankfurter's view was not the alteration of legal status suggested by the *Davis* Court. Instead, Justice Frankfurter noted the discouraging influence that government use of the designation might have upon "[p]otential members, contributors, or beneficiaries," concluding that "in the conditions of our time such designation drastically restricts the organizations, if it does not proscribe them."¹¹⁴ This emphasis upon the effect that the label of Communist must produce in a time of pervasive anti-Communist sentiment suggests that the injury which required due process was an injury to reputation. Justice Frankfurter's recognition of "the right to be heard before being condemned to suffer grievous loss of any kind,"¹¹⁵ which was cited in *Constantineau*,¹¹⁶ is further indication that Justice Frankfurter did not limit constitutionally cognizable injuries to the alteration of legal status. It would seem, then, that the *Constantineau* Court validly invoked Justice Frankfurter's opinion in *Anti-Fascist* to support the due process demand arising from impaired reputation.

Two other opinions in *Anti-Fascist* appeared to identify the stigma imposed as requiring due process. Justice Black, whose opinion was not discussed in *Davis*, gave his view in these words:

Assuming, though I deny, that the Constitution permits the executive officially to determine, list and publicize individuals and groups as traitors and public enemies, I agree with Mr. Justice Frankfurter that the Due Process Clause of

¹¹¹ 424 U.S. at 704-05.

¹¹² 341 U.S. at 173.

¹¹³ *Id.* (emphasis added).

¹¹⁴ *Id.* at 161.

¹¹⁵ *Id.* at 168 (emphasis added).

¹¹⁶ See note 94 *supra*.

NOTES

the Fifth Amendment would bar such condemnation without notice and a fair hearing.¹¹⁷

Justice Black thus connected the requirement of due process not with a loss of employment, but with the imposition of a stigmatizing label, and read Justice Frankfurter's opinion to do the same.

Justice Douglas also indicated that the injury to reputation engendered a due process claim. The *Davis* Court read Justice Douglas' opinion, as it read that of Justice Frankfurter, to condition the due process requirement upon a change in legal status. This result was reached by focusing upon a portion of Justice Douglas' opinion in which he identified the Attorney General's action as "a determination of status" whose consequences "flow from actions of regulatory agencies that are moving in the wake of the Attorney General's determination" as well as from public opinion.¹¹⁸ Yet in Justice Douglas' view the "status" determined by the Attorney General's action was simply "whether the organization is or is not 'subversive.'"¹¹⁹ This "determination of status" is actually an identification or labelling, and differs from the alteration of legal status through denials of tax exemption and public employment emphasized by the *Davis* Court. That the change in legal status cited in *Davis* was not determinative of the due process right is further suggested by Justice Douglas' observation that "[t]he gravity of the present charges is proof enough of the need for notice and hearing before the United States officially brands these organizations as 'subversive.'"¹²⁰ In fact, he found that "[t]he system used to condemn these organizations is bad enough. The evil is *only compounded* when a government employee is charged with being disloyal."¹²¹

Further evidence that the stigma imposed was central to the demand for due process is found in Justice Douglas' suggestion that the derivative injury of loss of government employment to which members of branded organizations were exposed was most grievous in its effect on reputation. "If condemned, the public servant is branded for life as a person unworthy of trust or confidence. To make that condemnation without meticulous regard for the decencies of a fair trial is abhorrent to fundamental justice."¹²² Thus, not only the opinion of Justice Frankfurter but also those of Justices Black and Douglas lend support to the conclusion that reputation alone commands due process protection.

The *Davis* Courts' use of the *Anti-Fascist* case is troublesome in another respect. As the *Davis* Court read the opinions in *Anti-Fascist*, stigma alone "divorced from its effect on . . . legal status . . . such as

¹¹⁷ 341 U.S. at 143.

¹¹⁸ *Id.* at 175, quoted in *Davis*, 424 U.S. at 703.

¹¹⁹ 341 U.S. at 175.

¹²⁰ *Id.* at 178.

¹²¹ *Id.* (emphasis added).

¹²² *Id.* at 180.

loss of tax exemption or loss of government employment" was insufficient to demand due process.¹²³ Yet in its summation of the line of cases which included *Anti-Fascist*, the Court noted that it had never held that injury to reputation invoked due process "absent an accompanying loss of government employment."¹²⁴ Besides shifting focus from the broader alteration of legal status to the narrower loss of employment, a shift which is corrected by the broad statement of the rule as requiring "tangible" interests.¹²⁵ the Court has revised its own reading of *Anti-Fascist* to now require loss of employment as an accompanying injury rather than as an effect of the imposition of a stigma. Moreover, it is significant that loss of employment was but a potential effect in *Anti-Fascist*. Thus, the *Davis* rule departs from *Anti-Fascist* in apparently demanding a concurrent as opposed to a potential loss of employment or other alteration of legal status. Since potential damage to employment is almost inevitably effected by government defamation, the *Anti-Fascist* decision provides some support for a reading of *Constantineau* as granting due process protection to reputation alone.

The *Davis* Court concluded its interpretation of the cases which composed the "backdrop"¹²⁶ for *Wisconsin v. Constantineau* with the observation that the four cases did not involve the application of a due process right to an impairment of reputation alone,¹²⁷ and proceeded to examine the *Constantineau* decision. *Constantineau* involved a state statute which authorized town officials to post notices forbidding the sale of liquor to any person accused of habitual intoxication. The Court found that due process was required before such a "quasi-judicial determination" could be made.¹²⁸ As interpreted by *Paul v. Davis*, the crucial factor was the combination of the injury to reputation with the deprivation of the right under law to purchase liquor.¹²⁹ To reach this result the Court looked to the following language in *Constantineau*: "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."¹³⁰ The *Davis* Court read the words "what the government is doing to him" as referring not to the imposition of the label of alcoholic but to the deprivation of the right to purchase liquor, concluding that both injuries were essential to the implication of the due process clause.¹³¹ The *Davis* Court disregarded language in *Constantineau* recognizing the state's police

¹²³ 424 U.S. at 705 (emphasis added).

¹²⁴ *Id.* at 706 (emphasis added).

¹²⁵ *Id.* at 701.

¹²⁶ *Id.* at 707.

¹²⁷ *Id.* at 706.

¹²⁸ *Constantineau*, 400 U.S. at 436.

¹²⁹ *Davis*, 424 U.S. at 708-09.

¹³⁰ 400 U.S. at 437, quoted in *Paul v. Davis*, 424 U.S. at 708 (emphasis added in *Davis*).

¹³¹ 424 U.S. at 708-09.

NOTES

power to respond to the problem of excessive drinking through restrictions on the sale of intoxicating liquors, and limiting the opinion to the harm to reputation.

We have no doubt as to the power of a State to deal with the evils described in the Act. . . . The *only* issue present here is whether the label or characterization given a person by "posting," though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard.¹³²

The Court in *Constantineau* concluded that it did.¹³³

Besides omitting that language from its analysis of *Constantineau*, the *Davis* Court dismissed as "ambiguous"¹³⁴ the statement that "certainly where the State attaches 'a badge of infamy' to the citizen, due process comes into play."¹³⁵ Justification for disregarding this "ambiguous" language was based on the Court's interpretation of *Constantineau's* predecessors. To give full effect to these words in *Constantineau* would, in the Court's view, involve a significant broadening of the reconsidered cases.¹³⁶ Yet those cases did not deny due process to reputation alone. Instead, as has been suggested, they contain much language favoring the now repudiated *Constantineau* position that state infliction of a "badge of infamy" by itself mandates due process.¹³⁷ The concern which the Supreme Court evidenced in those prior cases over the damage inflicted by government stigmatization suggests that a reading of *Constantineau* which grants due process to injured reputation by itself accords more closely not only with the explicit language of *Constantineau* but also with the prior course of decisions, than does the construction devised by the *Davis* Court.¹³⁸

As further support for its narrow interpretation of the *Constantineau* holding, the Court in *Davis* cited two cases subsequent to *Constantineau*. In *Board of Regents v. Roth*,¹³⁹ in denying due process to an untenured state university professor whose contract was not renewed, the Court observed that "[t]he State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community."¹⁴⁰ The *Davis* Court interpreted the emphasized phrase as suggesting that a defamatory charge not made in the context of declining to rehire would

¹³² 400 U.S. at 436 (emphasis added). Justice Brennan noted this omission in his dissent in *Davis*. 424 U.S. at 729-30.

¹³³ 400 U.S. at 436.

¹³⁴ 424 U.S. at 707.

¹³⁵ 400 U.S. at 437.

¹³⁶ 424 U.S. at 708.

¹³⁷ See text at notes 80-125 *supra*.

¹³⁸ *Constantineau* has been interpreted as according due process to reputation alone by various federal courts and commentators. For examples, see notes 66-67 *supra*.

¹³⁹ 408 U.S. 564 (1972).

¹⁴⁰ *Id.* at 573, quoted in *Paul v. Davis*, 424 U.S. at 709 (emphasis added in *Davis*).

be insufficient to demand due process.¹⁴¹ Yet there is nothing in *Roth* to suggest that that prepositional phrase was inserted in order to limit protection of reputation. Indeed, the quoted sentence can be read with greater validity as an affirmation of the due process right in reputation. This reading gains support from the *Roth* Court's observation that the purpose of a hearing where a defamatory charge is made "is to provide the person an opportunity to clear his name."¹⁴²

The *Davis* Court derived further support for its reinterpretation of *Constantineau* from the 1975 case of *Goss v. Lopez*.¹⁴³ The Court noted that while *Goss* recognized the seriousness of the injury to reputation inflicted by suspension from high school, "it also took care to point out" that a property interest in education, conferred by state law, was infringed.¹⁴⁴ This is accurate, but incomplete; due process was required in *Goss* by state invasion of two protected interests—the property interest in education and the liberty interest in reputation.¹⁴⁵ The *Goss* Court's discussion of the liberty interest in reputation contained no suggestion that recognition of that interest depended upon the existence of another interest. Instead, the Court's treatment of the two protected interests infringed by the school's actions suggested that they were independent and of equal stature.¹⁴⁶ Thus, both *Roth* and

¹⁴¹ 424 U.S. at 709.

¹⁴² 408 U.S. at 573 n.12. This was also the reading given *Roth* by various lower courts. One district court, for example, cited *Roth* in support of the proposition that "[t]he concept of 'liberty' within the meaning of the Fourteenth Amendment includes charges against a person that might seriously damage his standing and associations in his community." *Hoberman v. Lock Haven Hospital*, 377 F. Supp. 1178, 1185 (M.D. Pa. 1974). Similarly, the Court of Appeals for the Seventh Circuit read *Roth* to mean that "[a] person is deprived of 'liberty' if the state damages his standing in the community by charging him with an unsavory character trait . . ." *Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488, 494 (7th Cir. 1972), cert. denied, 411 U.S. 967 (1973). See also *Lombard v. Board of Education*, 502 F.2d 631, 637 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975). (Untenured teacher discharged on ground of mental disorder entitled to hearing by reason of stigma imposed.)

¹⁴³ 419 U.S. 565 (1975).

¹⁴⁴ 424 U.S. at 710.

¹⁴⁵ 419 U.S. at 576.

¹⁴⁶ The *Goss* Court's holding regarding the liberty interest in reputation was explicit. The Court cited *Constantineau* and *Roth* for the proposition that government impairment of an individual's good name demands due process. *Id.* at 574. Noting that the charges of misconduct could injure the students' standing with their fellow pupils and their opportunities for future education and employment, the Court concluded that the state's unilateral action "immediately collides with the requirements of the Constitution." *Id.* Justice Brennan read *Goss* as involving an independent liberty interest. *Davis*, 424 U.S. at 730 n. 15 (Brennan, J., dissenting). See 24 KANSAS L. REV. 202, 212-13 (1975) where one commentator noted:

The Court's determination in *Goss* that plaintiffs claimed entitlement to education was a protected property interest would in itself have constituted a sufficient basis on which to invoke the due process clause. Nevertheless, the Court provided a second basis for its holding by determining that school suspensions implicate the liberty interest of the due process clause [in their impact on reputation]. . . .

. . . [T]he Court based its conclusion [that a liberty interest was implicated]

NOTES

Goss can readily be construed to support a reading of *Constantineau* which awards due process to reputation alone.

The *Davis* Court's conclusion, after examining these cases, was that reputation has not been found to deserve constitutional protection except where it is connected with a more tangible interest.¹⁴⁷ The Court thus suggests a rule that awards constitutional significance to reputation when an accompanying tangible interest is concurrently impaired. The Court's reconsideration of precedent suggests that the other interest need not, itself, be worthy of constitutional protection. For instance, the Court's discussion of *Roth* identifies the mere refusal to rehire an untenured professor as an example of a deprivation sufficient to render a concurrent impairment of reputation actionable on due process grounds.¹⁴⁸ The reading given *Constantineau* indicates that the requirement of invasion of an additional tangible interest is satisfied by the deprivation of one's "right" to purchase liquor.¹⁴⁹ And in *Bishop v. Wood*,¹⁵⁰ decided subsequent to *Paul v. Davis*, the Court examined the merits of petitioner's reputation claim even though it concluded that his accompanying employment claim did not involve a constitutionally protected interest.¹⁵¹ Why an unprotected interest in reputation should thus acquire constitutional significance merely through association with another unprotected interest is not explained. No precedent appears for this anomalous result of the Court's strained effort to distinguish *Paul v. Davis* from its predecessors. The effect is to deny due process in *Davis* without explicitly overruling prior decisions.

B. *The Requirement That the Injury to Reputation Be Actual Rather Than Potential*

Bishop v. Wood, unlike *Paul v. Davis*, involved concurrent interferences with reputation and employment. The holding in *Davis* admits of a possible requirement of due process protection in such situations.¹⁵² Protection was denied in *Bishop*, however, on the ground that the defamatory charges of misconduct had not been made public, except in answer to interrogatories after Bishop's claim was instituted.¹⁵³ The reasons for discharge were also communicated to

on the principle that official action that injures or damages a person's reputation thereby infringes upon the liberty interest, and such official action must therefore meet the requirements of due process. The rationale . . . is that [such action] . . . may inhibit . . . freedom to pursue later educational or employment opportunities . . .

¹⁴⁷ 424 U.S. at 701.

¹⁴⁸ See the Court's discussion of *Board of Regents v. Roth*, 408 U.S. 564 (1972), in *Davis*, 424 U.S. at 709-10.

¹⁴⁹ See the court's discussion of *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), in *Davis*, 424 U.S. at 707-08.

¹⁵⁰ 426 U.S. 341 (1976).

¹⁵¹ *Id.* at 347-48.

¹⁵² See *Davis*, 424 U.S. at 701.

¹⁵³ *Bishop*, 426 U.S. at 348.

Bishop in a private conversation. The Court concluded that "[s]ince the . . . [oral communication] of the reasons for dismissal was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honor, or integrity' was thereby impaired,"¹⁵⁴ and that the publication made in answer to interrogatories subsequent to the institution of this suit could not provide retroactive support therefor.¹⁵⁵

The Court declined to address the likelihood that recording of these charges would lead to subsequent publication to prospective employers, although Justice Brennan in dissent emphasized the danger.¹⁵⁶ Prior publication, of course, is required in common law defamation actions.¹⁵⁷ But there is no apparent reason why the *potential* for subsequent publication inherent in the filing of defamatory information should not be sufficient to support a due process action. Such potential publication was held to suffice in the 1975 case of *Goss v. Lopez*.¹⁵⁸ There the Court held that the fourteenth amendment is implicated when state action threatens injury to reputation and resulting interference with advantages such as employment opportunities.¹⁵⁹ This threat was found to inhere in the simple recording of charges of misconduct. In *Goss*, a temporary suspension of high school students was deemed a deprivation of both the property interest in education and the liberty interest in reputation sufficient to require procedural safeguards.¹⁶⁰ The impairment of reputation which there required due process was potential rather than actual:

If sustained and recorded, those charges [of misconduct] could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.¹⁶¹

The Court in *Goss* thus recognized the danger of subsequent injury to reputation through publication to prospective employers.¹⁶² The

¹⁵⁴ *Id.*, quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

¹⁵⁵ 426 U.S. at 348.

¹⁵⁶ *Id.* at 352 (Brennan, J., dissenting).

¹⁵⁷ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 113, at 766 (4th ed. 1971), citing *McGuire v. Adkins*, 284 Ala. 602, 603, 226 So. 2d 659, 661 (1969).

¹⁵⁸ 419 U.S. 565 (1975).

¹⁵⁹ *Id.* at 574 (alternative holding).

¹⁶⁰ *Id.* at 574, 575.

¹⁶¹ *Id.* at 575 (footnote omitted).

¹⁶² *Id.* There was, in fact, limited immediate publication in both *Goss* and *Bishop*, because the individual's fellows were necessarily aware, from his absence, that disciplinary measures were taken against him. Although other explanations for this absence might have been devised, it would be reasonable to expect that rumors regarding misconduct would flourish.

Court demanded no proof that such publication would occur. It was necessarily to be expected from the fact of recording and the propensity of employers to inquire regarding conduct and disciplinary actions.

Lower courts have similarly concluded that impending damage to reputation suffices to require due process. In *Warren v. National Association of Secondary School Principals*,¹⁶³ for example, the court found that plaintiff's expulsion from the National Honor Society compelled due process, noting that "this black mark of a dismissal, which will remain a part of the permanent school records, could very well have adverse effects on his future . . ."¹⁶⁴ A like impairment of reputation, resulting in a constriction of employment opportunities, looms in plaintiff Bishop's future if, as we may assume, some record of the reasons for dismissal was made in police department files. Yet no protection against this likelihood is provided under the *Bishop* rule requiring prior publication.

Bishop's requirement of prior publication suggests a view of due process as remedial. The Court declined to award due process as protection against future injury through publication; instead, procedural safeguards were withheld because the communication had not yet been made public. It appears that if the Police Department had publicly condemned Bishop in the course of terminating his employment, due process would have been available. In such situation the purpose of a hearing would be to remedy the harm already accomplished. By contrast, prior cases suggest that the primary function of due process is preventive. "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations . . . can be prevented."¹⁶⁵ This is the function that the Court ascribed to due process in *Fuentes v. Shevin*.¹⁶⁶ The Court further observed in that case that "[i]f the right to notice and a hearing is to serve its full purpose . . . it is clear that it must be granted at a time when the deprivation can still be prevented."¹⁶⁷ Under *Fuentes* and other cases prior to *Bishop*,¹⁶⁸ the right to be heard accrues when loss is impending, rather than after it is suffered.¹⁶⁹

¹⁶³ 375 F. Supp. 1043 (N.D. Tex. 1974).

¹⁶⁴ *Id.* at 1048. *Cf. Sims v. Fox*, 505 F.2d 857 (5th cir. 1974), *cert. denied*, 421 U.S. 1011 (1975), where the court found that the presence of adverse information in confidential files does not infringe a liberty interest, observing that this case involved Air Force regulations which prohibited disclosure of the information to anyone. *Id.* at 863.

¹⁶⁵ *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

¹⁶⁶ 407 U.S. 67 (1972).

¹⁶⁷ *Id.* at 81.

¹⁶⁸ *E.g.*, *Board of Regents v. Roth*, 408 U.S. 564, 570 n.7 (1972); *Bell v. Burson*, 402 U.S. 535, 542 (1971); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1970).

¹⁶⁹ Although prior cases contemplate that the required hearing may be postponed in extraordinary situations, *see, e.g.*, *Board of Regents v. Roth*, 408 U.S. 564, 570 n.7 (1972), the *Bishop* Court has given no indication that this is such a situation. Nor does any compelling state interest sufficient to justify an exception appear. The *Bishop*

Prior cases thus appear to suggest that potential injury to reputation should suffice to require due process. In deciding otherwise, the *Bishop* Court has further restricted the protection accorded reputation.¹⁷⁰

C. *The Impact of Davis and Bishop upon Due Process Protection of Reputation*

Under *Paul v. Davis*, injury to reputation does not create a valid due process claim. Only when accompanied by deprivation of a more "tangible" interest, such as government employment, or explicitly guaranteed by state law does the harm to reputation attain constitutional stature. Previous cases which seemed to recognize a due process right in reputation alone are no longer to be read in support of that proposition. As a result, attempts to vindicate reputation through demands for due process, if not discouraged by *Paul v. Davis*, will now depend upon demonstration of concurrent injury to a "tangible" interest.¹⁷¹ Just what degree of "tangibility" will suffice is unclear. Because the Court's reconsideration of precedent suggests that a mere refusal to rehire an untenured university professor,¹⁷² or deprivation of one's "right" to purchase liquor,¹⁷³ is adequate to cast a constitutional light upon reputation, it appears that the required addi-

opinion, in fact, makes no reference to a possible future hearing, as *Bishop* involves not a postponement, but a denial of due process.

¹⁷⁰ There is no indication that the Court in *Bishop* intended to correspondingly alter the law regarding due process protection of interests other than reputation.

Another troubling aspect of the Court's response to Bishop's reputation claim involves the treatment given the second communication of the reasons for discharge—that made in response to interrogatories in the course of this litigation. The Court found that this publication did not suffice to command due process because it occurred "after petitioner had suffered the injury for which he seeks redress" and so could not "provide retroactive support for Bishop's claim." 426 U.S. at 348. If by "the injury for which he seeks redress" the Court was referring to the impairment of reputation, the Court's reasoning is unclear since that injury was not suffered until the publication occurred. It may be, however, that the Court was referring to the deprivation of employment. If so, it would appear that the Court found that a publication subsequent to dismissal does not require due process. The possibility is thus presented that even as the Court was denying due process protection to reputation which has been placed in jeopardy by the state, it was also foreclosing the opportunity for due process at a later time, when this threat of impairment has become real. This treatment of the publication made in response to interrogatories warns that the requisite connection between impairment of reputation and damage to a more tangible interest might be lost if any delay intervenes between the two. It thus appears that release of false and defamatory information from the files of a former employer might not prove sufficient to compel due process, even though that false information had been connected with a termination of employment. If this was the Court's meaning, the *Bishop* decision has imposed a gloss on the *Davis* requirement of any accompanying injury to a more tangible interest: the deprivations must be *exactly* contemporaneous. Future cases should demonstrate whether this was in fact the Court's intention.

¹⁷¹ A state guarantee of continued enjoyment also suffices to raise reputation to a protected level. 424 U.S. at 710-12.

¹⁷² See text and note at note 148 *supra*.

¹⁷³ See text and note at note 149 *supra*.

NOTES

tional interest need not itself be protected as life, liberty, or property under the due process clause.¹⁷⁴

By virtue of this limitation of the protection afforded reputation, citizens like Davis may be labelled criminals by law enforcement or other state officials, and be foreclosed from making a claim for due process. On the other hand, one who, like Bishop, is accused of a much lesser offense of misconduct or impropriety, provided that this occurs in the course of a termination of employment, will have an opportunity to prove the merits of his claim. Nothing in the Court's opinions explains or justifies this result.

One effect of the *Davis* rule restricting the liberty interest in reputation may be, as Justice Brennan worried in dissent,¹⁷⁵ to induce law enforcement officials to implement a policy of stigmatization to circumvent the inefficiencies of the court system. This is unlikely where state officials are subject to common law defamation actions.¹⁷⁶ The danger is increased, however, where officials are protected by a privilege or immunity.¹⁷⁷ Even a qualified privilege, such as can be overcome by proof of malice on the part of the defamer,¹⁷⁸ erects a substantial bar to the branded individual's attempt to vindicate his good name.¹⁷⁹

In cases where government impairment of reputation is accompanied by deprivation of a more "tangible" interest, such as employment, *Bishop v. Wood* adds the requirement that injury to reputation be realized before a claim for due process is made, rejecting the *Goss* approach, which granted protection against future injury inevitably resulting from current state action. Thus, under the *Bishop* rule, no right to be heard accrues at the time that defamatory information is recorded, even though that information may later be made available to inquirers who might use it to deny advantages such as employment or education. To thus withhold the right to challenge derogatory charges until those charges have been communicated to others is to transform due process from a preventive to an ostensibly remedial measure. As has been demonstrated, prior cases suggest that this is not the function that due process was intended to serve.¹⁸⁰ This

¹⁷⁴ See text at notes 147-51 *supra*.

¹⁷⁵ 426 U.S. at 721 & n.9 (Brennan, J., dissenting).

¹⁷⁶ See *Davis*, 424 U.S. at 697: "[R]espondent's complaint would appear to state a classical claim for defamation actionable in the courts of virtually every state."

¹⁷⁷ See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 114 (4th ed. 1971).

¹⁷⁸ *Id.* at § 115.

¹⁷⁹ The *Davis* Court's denial of constitutional status to reputation alone, 424 U.S. at 701, except where recognized and protected by state law, *id.* at 710-11, suggests, in addition, that the concept of "liberty" for due process purposes may henceforth be severely limited and linked to interests that are in some way "guaranteed" by the state. The expansive definition of "liberty" of earlier cases, as embracing the right "generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), *quoted in* *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972), apparently no longer obtains. See note 14 *supra*.

¹⁸⁰ See text at notes 165-69.

change in function presents two difficulties: first, the affected person may never learn that damaging information has been released; and second, a hearing granted after publication can never fully undo the harm.¹⁸¹ Thus the interest in reputation, already rendered insecure by the *Davis* decision, is placed in an even more uncertain position as a result of *Bishop v. Wood*.

II. THE INTEREST IN EMPLOYMENT

The Supreme Court has indicated that a constitutionally protected property interest may inhere in public employment.¹⁸² In order for a public employee to be entitled to due process prior to termination, however, his interest in employment must fall under the definition of "property interest" formulated in *Board of Regents v. Roth*: "To have a property interest in a benefit, a person clearly must have more than an abstract need or . . . unilateral expectation He must, instead, have a legitimate claim of entitlement to it."¹⁸³ A legitimate claim of entitlement to public employment may arise from a statute¹⁸⁴ or ordinance¹⁸⁵ governing eligibility therefor, from contract,¹⁸⁶ or by implication from the circumstances surrounding the employment.¹⁸⁷ Petitioner in *Bishop v. Wood* pressed a claim of entitlement to his position as a police officer based on an expectation of continued employment deriving both from an ordinance governing discharge and from the circumstances surrounding his employment.¹⁸⁸ This section will examine the Court's treatment of these two grounds for Bishop's property claim.

A. *The Claim To a Property Interest In Employment Conferred By the Ordinance*

The proposition that a statute may confer a property interest in employment was recently reaffirmed by the Supreme Court. In *Arnett v. Kennedy*,¹⁸⁹ six Justices agreed that where a statute conditions dis-

¹⁸¹ Nor is it clear that the *Bishop* Court would recognize a due process right arising upon subsequent publication. It may be that the requisite connection with a tangible interest would be lost in the delay intervening between dismissal and publication. See note 170 *supra*.

¹⁸² *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972).

¹⁸³ 408 U.S. at 577.

¹⁸⁴ The Court in *Board of Regents v. Roth* indicated that a state statute may create a legitimate claim to continued employment. In denying due process to an untenured professor whose contract was not renewed, the Court noted that "[n]or, significantly, was there any state statute . . . that secured his interest in re-employment or that created any legitimate claim to it." *Id.* at 578 (emphasis added). See also *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (protected interest in welfare benefits secured by statute).

¹⁸⁵ *Bishop v. Wood*, 426 U.S. at 345.

¹⁸⁶ *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

¹⁸⁷ *Id.* at 602.

¹⁸⁸ 426 U.S. at 344.

¹⁸⁹ 416 U.S. 134 (1974).

NOTES

charge from employment upon cause, it creates a property right which is protected by the due process requirements of the Constitution.¹⁹⁰ The Justices held also that these constitutional requirements intervene regardless of the procedure governing discharge specified within the statute.¹⁹¹ Thus a statute may not grant a property right and then detract from it through specifications of inadequately protective procedure. The analytic approach of *Arnett v. Kennedy* thus indicates that a statute or regulation governing discharge from public employment must be examined first to see whether it confers a property interest. If it does, the second question is whether the procedure specified therein comports with constitutional demands. If so, the court should then determine whether there was compliance with the procedural specifications.

The plaintiff in *Bishop v. Wood* asserted that a property interest was conferred by a city ordinance which read, in part, as follows:

If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice.¹⁹²

The Supreme Court recognized that this language could be interpreted as conditioning discharge upon cause, thereby inducing an enforceable expectation of continued employment.¹⁹³ The Court determined, however, that it could be otherwise construed as well.¹⁹⁴

¹⁹⁰ Justices Powell and Blackmun, in an opinion written by Justice Powell, reached this conclusion at 416 U.S. at 166. Justice White agreed at 181. Justice Marshall, joined by Justices Douglas and Brennan recorded his concurrence with this principle in a dissenting opinion at 209-210.

A brief discussion of the result in *Arnett* is in order. In *Arnett*, a federal employee asserted a protected interest in his employment and the constitutional inadequacy of the statutory procedure for discharge. *Id.* at 138-139. Justice Rehnquist, joined by Justices Burger and Stewart found that the interest in employment conferred by the statute was conditioned by the accompanying procedural limitations, so that the constitution did not intervene to require any process beyond that specified in the statute. *Id.* at 155. Justices Powell and Blackmun found that a property right was granted but that the adequacy of the statutory procedural safeguards must be measured by the Constitution. *Id.* at 166-67. They found, however, that the procedure specified within the statute in *Arnett* comported with constitutional due process requirements. *Id.* at 171. These five Justices constituted a majority which reversed the judgment of a three judge district court, *Kennedy v. Sanchez*, 349 F. Supp. 863 (N.D. 111. 1972), that the employee had been unconstitutionally denied due process and that the statute in question was unconstitutionally vague. *Id.* at 865, 866.

¹⁹¹ Justices Marshall, Douglas and Brennan reached this conclusion at 416 U.S. at 211. Justice White agreed at 185; Justices Powell and Blackmun did so at 167.

¹⁹² The ordinance was quoted in *Bishop*, 426 U.S. at 344 n.5. For the full text of the ordinance, see note 23 *supra*.

¹⁹³ 426 U.S. at 345.

¹⁹⁴ *Id.*

Choosing to defer to a "tenable" interpretation proffered by the district court, the Court found that the ordinance merely specified procedure, and granted no property right.¹⁹⁵ This deference to the lower court's conclusion was based on the presumed greater expertise of the federal judge who had for many years interpreted local law.¹⁹⁶ The Court also noted that the court of appeals, "albeit by an equally divided Court," upheld the district court.¹⁹⁷

The interpretation which thus received the Court's approval had been rendered by the district court prior to the Supreme Court's decision in *Arnett*. This may explain the fact that the district court never asked the primary question posed by the *Arnett* test¹⁹⁸—whether the ordinance conditioned discharge upon cause, thereby conferring a property right in employment. Instead, the district court addressed Bishop's property interest claim primarily in relation to the surrounding circumstances and state law in general.¹⁹⁹ Consideration of the ordinance focused mainly on the Police Department's compliance with its procedural provisions.²⁰⁰ It may be that the court concluded that because the ordinance did not require notice and a hearing, it conferred no property right. Whatever its intention, the lower court's approach departed from that of *Arnett*, in failing to resolve the threshold question of the existence of a protected interest by examining whether discharge was conditioned upon cause. In adopting the district court's reading of the ordinance, the Supreme Court proceeded as if the lower court had addressed and rejected the claim that the ordinance conditioned discharge upon cause and thereby created a property interest.²⁰¹ Had the lower court so resolved that first question, no error would inhere in its omission of the second issue—that of the constitutional adequacy of the procedure specified within the ordinance. Absent a protected property interest, the procedure for discharge would not need to conform to due process requirements. In that case, the lower court's findings in regard to the third question—that the ordinance's procedural specifications received compliance²⁰²—would properly have concluded the inquiry. Due to the majority's deference to the district court's reading of the ordinance, the cardinal question of whether the ordinance conditioned

¹⁹⁵ *Id.* at 345-47.

¹⁹⁶ *Id.* at 345.

¹⁹⁷ *Id.* at 345-46.

¹⁹⁸ See text following note 191 *supra*.

¹⁹⁹ See 377 F. Supp. 501, 502-04 (W.D. N.C. 1973).

²⁰⁰ See *id.* at 503, 504.

²⁰¹ See 426 U.S. at 345-47 & nn. 8, 9. The Court distinguished *Bishop* from *Arnett* by noting that the lower court in *Bishop* held, on the basis of state law in general, that Bishop "held his position at the will and pleasure of the city." *Id.* at 345 n.8. This does not adequately distinguish the two cases, since the lower court's finding left unresolved the question of whether the ordinance conferred a property interest through conditioning discharge upon cause.

²⁰² 377 F. Supp. 501, 503, (W.D. N.C. 1973).

NOTES

discharge upon cause, thereby conferring a protected property interest, was never answered.²⁰³

The dissenters in *Bishop*, however, have provided an answer to this question. Justice White, joined by Justices Brennan, Marshall and Blackmun, determined that "this ordinance plainly conditions petitioner's dismissal on cause—i.e., failure to perform up to standard, negligence, inefficiency, or unfitness to perform the job."²⁰⁴ It is true, as asserted by the majority, that "the ordinance does not expressly . . . prohibit discharge for any other reason . . ."²⁰⁵ In this regard the ordinance in *Bishop* stands in contrast to the statute found to confer a property interest in *Arnett v. Kennedy*. The latter provided that "[a]n individual in the competitive service may be removed or suspended without pay *only* for such cause as will promote the efficiency of the service."²⁰⁶ The ordinance governing Bishop's employment lacks that crucial "only."²⁰⁷ The dissenters in *Bishop*, in effect, have added it by implication. Their implication is entirely reasonable, as it would be illogical for a legislative body to specify grounds for discharge if any ground, or none at all, would suffice. The dissenters' interpretation is buttressed by the ordinance's limitation to *permanent* employees. No grounds are enunciated for discharge of probationary employees, who apparently may be dismissed at will. The ordinance specifically provides, however, that permanent employees may be discharged for cause.²⁰⁸ If permanent employees are also subject to dismissal *without* cause, they are indistinguishable from probationary employees. It is clear, however, that some distinction was intended. It would appear that the construction adopted by the Court was accurately characterized by Justice Brennan as a "strained reading."²⁰⁹

Moreover, because the district court's construction of the ordinance governing discharge was not informed by the Court's subsequent *Arnett* decision, it would appear that deference to that construction was inappropriate. Had the majority examined the ordinance *de novo* and in light of *Arnett*, the interpretation given by the dissenters may well have prevailed.

²⁰³ In the court of appeals' initial consideration of *Bishop*, the brief per curiam opinion affirmed the district court without reaching any express conclusion as to the ordinance. 498 F.2d 1341 (4th Cir. 1974). In dissent, however, Judge Winter explicitly found that "I can only read this ordinance as giving plaintiff a right to continuing employment unless there be good cause for his dismissal." *Id.* at 1341. The court of appeals decision was affirmed on rehearing en banc, without opinion, by an equally divided court. 426 U.S. at 343 n.3.

²⁰⁴ 426 U.S. at 355 (White, J., dissenting).

²⁰⁵ *Id.* at 344.

²⁰⁶ 5 U.S.C. § 7501(a) (1970) (emphasis added), quoted in *Arnett v. Kennedy*, 416 U.S. 134, 140 (1974).

²⁰⁷ The ordinance is quoted in the text at note 192 *supra*.

²⁰⁸ See note 23 *supra*.

²⁰⁹ 426 U.S. at 353 (Brennan, J., dissenting).

B. *The Claim that a Property Interest in Employment was Implied in the Circumstances*

The view that a property interest in employment can be implied in the surrounding circumstances was adopted by the Supreme Court in *Perry v. Sindermann*.²¹⁰ There the Court concluded that "[a] teacher, like the respondent, 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."²¹¹ The Court in *Sindermann* noted that there may be an "unwritten 'common law' [in a particular job setting] . . . that certain employees shall have the equivalent of tenure."²¹² The petitioner in *Bishop v. Wood* attempted to invoke this rule, claiming that various circumstances of his employment had induced an enforceable understanding that he could not be discharged at will.²¹³ These circumstances included his classification as a "permanent," as opposed to "probationary" employee, his period of service, and the infrequency of discharge within the department.²¹⁴ The Court in *Bishop* purported to uphold the *Sindermann* concept of implied rights in employment, observing that "[a] property interest in employment can, of course, be created by ordinance, or by an implied contract,"²¹⁵ yet proceeded immediately to limit it: "[i]n either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law."²¹⁶ The Court may have intended, by this statement, either that a conferral of a property interest in employment may be implied, but implied only in state law and not in the surrounding circumstances; or that implied property rights may arise from circumstances, but only if state law so ordains. In either case, the Court has made the implied property interest in employment dependent upon state law, in an apparent departure from *Sindermann*.

The Court derived support for this limitation of implied rights in employment from a statement in *Board of Regents v. Roth*:²¹⁷

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.²¹⁸

This language does identify state law as a source of property interests,

²¹⁰ 408 U.S. 593, 602 (1972).

²¹¹ *Id.*

²¹² *Id.*

²¹³ 426 U.S. at 344.

²¹⁴ *Id.*; *id.* at 354 n.5 (Brennan, J., dissenting).

²¹⁵ *Id.* at 344.

²¹⁶ *Id.*

²¹⁷ 408 U.S. 564 (1972).

²¹⁸ *Id.* at 577, quoted in *Bishop*, 426 U.S. at 344 n.7.

NOTES

but not the *only* source.²¹⁹ By implying that a property interest in employment is entirely dependent upon state law, the Court has negated the "federal dimension to the definition of 'property' in the Federal Constitution . . .,"²²⁰ and has substantially narrowed the *Sindermann* holding that due process is required before termination from public employment where circumstances have engendered a property right.²²¹ The *Sindermann* recognition of implied property rights deriving from circumstances accords with the purpose of the "institution of property" which, as explained in *Board of Regents v. Roth*, is "to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."²²² The reliance that *Roth* found to be constitutionally protected may, as suggested in *Sindermann*, be produced by facts and circumstances rather than by state law. The *Roth* and *Sindermann* opinions suggest that to decline to examine the circumstances for a guarantee of continued employment may be to undermine arbitrarily employees' legitimate reliance on tacit assurances.

Because, in the Court's view, the sufficiency of Bishop's claim had to be measured by the law of North Carolina, the Court proceeded to examine that law to ascertain the degree of recognition accorded public employment in that state. The Court read North Carolina law as enunciated in the state supreme court's decision in *Still v. Lance*,²²³ as providing that "an enforceable expectation of continued public employment . . . can exist only if the employer, by statute or contract, has actually granted some form of guarantee."²²⁴ Whether the Court meant to include *implied* contracts within the concept of contracts by which the state may guarantee continued employment is unclear. The Court proceeded from this enunciation of the applicable state law to conclude, without further explanation, that the guarantee claimed by Bishop must be found, if at all, in the relevant ordinance.²²⁵ No consideration was given to a potential contract guarantee. The disregard of a possible express contractual guarantee can be explained by the absence of a written contract of employment.²²⁶ It is more difficult to infer a reason for the Court's disregard of an implied guarantee, unless according to the Court's reading of state law such an implication was prohibited.

If this was the Court's understanding of North Carolina law, it conflicts with the state supreme court case cited as the basis of this understanding. That case, *Still v. Lance*,²²⁷ denied due process to a

²¹⁹ See 426 U.S. at 353 (Brennan, J., dissenting).

²²⁰ *Id.*

²²¹ 408 U.S. at 602-03.

²²² 408 U.S. at 577.

²²³ 279 N.C. 254, 182 S.E.2d 403 (1971).

²²⁴ 426 U.S. at 345, citing *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971).

²²⁵ 426 U.S. at 345.

²²⁶ *Bishop v. Wood*, 377 F. Supp. 501, 502 (W.D. N.C. 1973).

²²⁷ 279 N.C. 254, 182 S.E.2d 403 (1971).

teacher whose employment was terminated at the end of a school year.²²⁸ The state court recognized that a protected interest can derive from circumstances: "Where . . . there is a business usage, or other circumstance, . . . which shows that, at the time the parties contracted, they intended the employment to continue through a fixed term, the contract cannot be terminated at an earlier period except for cause or by mutual consent."²²⁹

The Court's intention in invoking *Still v. Lance* is not clear. If the Court did in fact read that case as repudiating implied property interests in employment, this would conflict immediately with the recognition of that right in *Perry v. Sindermann*, and with the language of *Still v. Lance* itself. If, on the other hand, the enunciation in *Bishop* of the *Still* holding includes implied understandings within the concept of "contract . . . actually grant[ing] some form of guarantee," then there is no explanation for the Court's silent refusal to examine the circumstances. In either case, the *Bishop* decision indicates that property interests may not readily be inferred from the circumstances surrounding public employment.

C. *The Impact of Bishop Upon Due Process Protection of Government Employment*

By deferring to the lower court's interpretation of the ordinance governing discharge, the Court in *Bishop v. Wood* has achieved a result that departs from *Arnett v. Kennedy*, without disturbing the precedential import of that decision. The law regarding property claims based upon statute is in no way altered by the *Bishop* decision. But the Court has made clear its reluctance to interfere in "the multitude of personnel decisions that are made daily by public agencies."²³⁰ Where such interference cannot be avoided by the simple technique of deference to another court's interpretation of the relevant statute as denying a property interest, it may be expected that the Court will reach the same result by distinguishing and narrowing precedent. Thus, we may predict that the rule of *Arnett v. Kennedy* will suffer some erosion. This might occur through emphasis of the procedural specifications within a given statute governing discharge, to the detriment of language suggestive of the conferral of a property interest.

Bishop v. Wood's cursory treatment of the claim that a property interest in employment was implied in the surrounding circumstances suggests a weakening of the recognition accorded implied rights in employment by the *Perry v. Sindermann* decision. However, the *Bishop* Court's resort to state law to ascertain the sufficiency of the property claim based upon implication suggests that such claims might derive

²²⁸ *Id.* at 260, 265, 182 S.E.2d at 407, 410.

²²⁹ *Id.* at 259, 182 S.E.2d at 406-07.

²³⁰ 426 U.S. at 349.

NOTES

saving grace from explicit state recognition of implied rights in employment.²³¹

III. THE BALANCING OF COMPETING INTERESTS IN DUE PROCESS DECISION MAKING

In *Paul v. Davis* and in *Bishop v. Wood*, the Court has demonstrated concern for the interests of the state as law enforcer and employer.²³² While the state's interest is relevant in due process decisions to a determination of the *degree* of procedure required,²³³ prior decisions of the Court suggest that a balancing of the competing state and individual interests is not pertinent to the initial question of whether process is due at all.²³⁴ This approach to due process decisions indicates that where a legitimate property or liberty interest is endangered by government action, a certain minimum procedure is

²³¹ This expectation is weakened somewhat by the Court's failure to acknowledge the apparent recognition accorded implied rights by the North Carolina Supreme Court.

²³² See *Davis*, 424 U.S. at 698-99; *Bishop*, 426 U.S. at 349-50. See text at notes 241-46 *infra*.

²³³ *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976); *Goss v. Lopez*, 419 U.S. 565, 579-80 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 91-93 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970).

²³⁴ The Court in *Board of Regents v. Roth*, for instance, has noted that while "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved" . . . [t]he constitutional requirement of opportunity for *some* form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process." 408 U.S. at 570 n. 8 (emphasis in original), quoting *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). The Court in *Roth* determined that "[w]hen protected interests are implicated, the right to some kind of prior hearing is paramount." 408 U.S. at 569-70 n.7. The Court cited *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971), and *Bell v. Burson*, 402 U.S. 535, 542 (1971). In *Goss v. Lopez*, the Court cited *Roth* for the proposition that "in determining 'whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake.'" 419 U.S. at 575-76, quoting *Roth*, 408 U.S. at 570-71 (emphasis in *Roth*).

Similarly, in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court stated that "[t]his Court consistently has held that some form of a hearing is required before an individual is finally deprived of a property interest." *Id.* at 333. Beyond the "fundamental requirement of . . . the opportunity to be heard," *id.*, the Court observed that "our prior decisions indicated that identification of the *specific dictates* of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 334-35 (emphasis added). See also *Morrissey v. Brewer*, 408 U.S. 471, 484-85, (1972). But see *Hannah v. Larche*, 363 U.S. 420, 442 (1960); and *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring), which may be read to suggest that a determination of the minimum of due process required by the Constitution is properly achieved through a consideration of the competing interests.

constitutionally imposed.²³⁵ If the interest at stake is protected as life, liberty, or property, then any deprivation thereof²³⁶ requires notice and an opportunity to be heard.²³⁷ A process of weighing the competing state and individual interests enters into a determination of the form of hearing—whether, for example, the right to present witnesses or to be represented by counsel obtains in the particular situation.²³⁸ Where the balance tips in favor of the state, due process may demand merely an informal hearing in which the affected party is told the reasons for the action taken and is allowed to present his side of the story.²³⁹ Where the interest of the individual is greater, a more elaborate hearing is required.²⁴⁰

In both *Paul v. Davis* and *Bishop v. Wood*, the Court determined that the alleged right invaded by the state was not constitutionally protected, thereby obviating the weighing process. Yet it appears that considerations of the interest of the state, considerations hitherto engaged in as part of the weighing process, affected the decision to deny the right to a hearing. If so, the function of examining the interest of the state has shifted from its position in the balancing process which determines how much procedure is due to the threshold position of influencing the decision as to whether a protected interest exists which demands any process at all.

Technically, the Court's decision regarding Bishop's employment was reached by deference to the district court's interpretation of the ordinance governing employment, which denied a property right. The Court thus avoided the weighing process that determines the form of procedure required before a property right may be infringed. The Court, of course, was not bound to adopt the district court's interpretation. The concerns possibly underlying the Court's deference and the resulting denial of due process may well appear in the final paragraph of the opinion:

The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-

²³⁵ *Goss v. Lopez*, 419 U.S. 565, 578-79 (1975), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), and *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); *Board of Regents v. Roth*, 408 U.S. 564, 570 & nn. 7, 8, 573 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

²³⁶ As long as it is not "de minimus." *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

²³⁷ See cases cited in note 235 *supra*.

²³⁸ See, e.g., *Goss v. Lopez*, 419 U.S. 565, 579, 583 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 570 & n.8 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971).

²³⁹ See *Goss v. Lopez*, 419 U.S. 565, 581 (1975). See also *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976).

²⁴⁰ In *Goldberg v. Kelly*, 397 U.S. 254 (1950), the analysis of competing interests indicated that before welfare benefits may be terminated, the affected individual must be provided an opportunity to appear and cross-examine adverse witnesses. *Id.* at 270. He or she must also be allowed to be represented by counsel, although counsel need not be provided. *Id.* at 270-71.

NOTES

day administration of our affairs. . . . The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.²⁴¹

This statement suggests the possibility that the *Bishop* Court's decision to deny due process may have been reached through consideration of the burden which procedural safeguards of notice and a hearing impose upon state agencies.²⁴²

This possibility is suggested again in the *Bishop* Court's treatment of petitioner's reputation claim. The decision to deny this claim was based upon the conclusion that no liberty interest was infringed, as the reasons for discharge had not been made public before the suit was brought. Yet in reaching this result, the Court evidenced concern for the interests of the state as employer. The Court observed that allowing a claim based on charges of misconduct "would penalize forthright and truthful communication between employer and employee" ²⁴³ Yet to allow a claim for due process in such circumstances would "penalize" only the employer, as the employee who brings a due process claim is not penalized in achieving his goal. The Court may, however, have intended to express a concern that frank employer-employee dialogue would be discouraged by the requirement of a hearing. Yet this concern also regards a matter of state interest—the state's interest in healthy labor-management relations. Also, in observing that any impact on petitioner's reputation would be unaffected by the truth or falsity of the charges of misconduct because, in any event, they had not been made public, the Court declared that "[a] contrary evaluation . . . would enable every discharged employee to assert a constitutional claim merely by alleging that his former supervisor made a mistake."²⁴⁴

The Court's appreciation of the state interest involved is apparent, yet its position in the decisional process does not accord with that recommended by recent decisions. Prior cases suggest that concern for the interest of the state is not appropriate to an identification of the status of the interest in question.²⁴⁵ It is properly invoked as an element in the balancing process employed to determine the degree of procedure required once a protected interest has been identified. In that context, the interest of the state is accommodated with that of the individual, producing a result that is hopefully responsive to the concerns of both parties. As employed in *Bishop*, however, consideration of the state interest appears to have acquired increased importance not only because it may have influenced the threshold determi-

²⁴¹ *Bishop*, 426 U.S. at 349-50 (footnote omitted).

²⁴² The quoted statement may have been included as a refutation of Justice Brennan's view in his dissent that property interests have a "federal dimension." 426 U.S. at 353 (Brennan, J., dissenting).

²⁴³ *Id.* at 349.

²⁴⁴ *Id.* at 348-49.

²⁴⁵ See note 234 *supra*.

nation of unprotected status but also because it was not balanced by an assessment of the injury suffered through deprivation of employment.

The Court in *Davis* similarly avoided the balancing process by determining that no protected interest was infringed and that therefore no process was due. This result was accomplished by devising a new, more restrictive rule that rejects a constitutionally protected interest in reputation alone. Yet in *Davis*, as in *Bishop*, the Court was responsive to the interests of the state and troubled by the burden that a holding in favor of due process would impose—in this case, on state law enforcement activities. The entire first section of the opinion is devoted to a consideration of the impediments that a decision in favor of due process would pose to state activities. The Court observed, for instance, that “[i]f respondent’s view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under § 1983.”²⁴⁶ Here, as in *Bishop*, the Court emphasizes the interests of the state, despite the teachings of prior due process decisions, to the effect that concerns regarding state interest and the burdens that due process imposes upon that interest should not determine whether due process requirements apply.²⁴⁷ Rather, considerations of this order are appropriately invoked only after a decision in favor of due process has been reached, in order to determine the form of hearing required. And in its appropriate role, concern for the interest of the state is balanced by an equivalent appreciation of the threatened personal interest.

The result in *Paul v. Davis* and *Bishop v. Wood* is to give overriding importance to the state interest regardless of the severity of injury suffered by the individual.²⁴⁸ The Court could have avoided this result by reserving its consideration of the interest of the state until after the constitutional status of the personal interest had been determined. The analysis of the interests in reputation and employment in the first two sections of this note indicates that a determination in favor of constitutionally protected status would not represent a departure from recent due process decisions. Upon such resolution of the threshold question in favor of constitutional protection, recent cases advise that attention to the state interest is appropriate, provided this attention is awarded in the context of a balancing of competing concerns.²⁴⁹ This weighing process insures that a requirement of due process will not automatically impose an intolerable burden upon the

²⁴⁶ 424 U.S. at 698.

²⁴⁷ See note 234 *supra*.

²⁴⁸ Justice Brennan, dissenting in *Davis*, complained that “[t]here is no attempt by the Court to analyze the question as one of reconciliation of constitutionally protected personal rights and the exigencies of law enforcement.” 424 U.S. at 720 (Brennan, J., dissenting).

²⁴⁹ See note 234 *supra*.

NOTES

state. While notice and a hearing would be required as a constitutional minimum,²⁵⁰ the form of the hearing could be adjusted to reflect the relative importance of the opposing interests.

For example, an evaluation of the law enforcement activity in *Davis* might have indicated that it was subject to error and therefore insufficiently effective to justify the severely stigmatizing charge of criminal behavior and the widespread publication of that charge. Thus a fairly wide range of safeguards²⁵¹ might have been warranted. Although this result might discourage the utilization of the particular law enforcement procedure attacked in *Davis*, it could channel police activity toward alternative procedures that evince greater respect for individual rights and greater effectiveness. A sparser hearing might have sufficed in *Bishop*, where considerations of the legitimate state interest in the conduct of police officers and the burden of an elaborate hearing would weigh more heavily.

Paul v. Davis and *Bishop v. Wood* may thus suggest a regrettable alteration in the form governing due process decision making. It appears that in these two cases the function of measuring the state interest may have been shifted from its prior position as an aid in determining how much process is due, to the threshold position of influencing whether process is due at all. At the same time, the interest of the state has assumed exclusive importance, as the balancing of competing concerns is avoided. This alteration works an unfortunate result for the individual adversely affected by government action.

CONCLUSION

Paul v. Davis and *Bishop v. Wood* represent a narrowing of the protection accorded to reputation and public employment under the due process clause. The rule of *Paul v. Davis* awards constitutional stature to injured reputation only when it is accompanied by deprivation of another, more tangible interest,²⁵² or is explicitly guaranteed by state law.²⁵³ This rule constitutes a departure from previous decisions, which seemed to demand due process protection against government impairment of reputation alone.²⁵⁴ Under *Bishop v. Wood*, due process claims which meet the *Davis* test may yet fail if the alleged impairment of reputation is threatened rather than effected.²⁵⁵ Reputation is no longer protected against future injury inevitably resulting from current state action.

Public employment, after *Bishop v. Wood*, no longer enjoys the

²⁵⁰ See cases cited in note 235 *supra*.

²⁵¹ For example, representation by counsel, right to present witnesses on one's behalf, opportunity to cross-examine adverse witnesses.

²⁵² 424 U.S. at 701.

²⁵³ *Id.* at 710-12.

²⁵⁴ *E.g.*, *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Jenkins v. McKeithen*, 395 U.S. 411, 424-25, 428-29 (1969).

²⁵⁵ *Bishop*, 426 U.S. at 348-49. See text at notes 152-65 *supra*.

security afforded by the rules in *Arnett v. Kennedy*²⁵⁶ and *Perry v. Sindermann*.²⁵⁷ *Arnett v. Kennedy* recognized a protected property interest in public employment deriving from a statute which conditions discharge upon cause.²⁵⁸ *Bishop* indicates that this result may be avoided through deference to another court's interpretation of governing law, even should that interpretation disregard the teachings of *Arnett v. Kennedy*.²⁵⁹ Similarly, expectations of continued employment fostered by circumstances, protected under *Perry v. Sindermann*, now provide an insecure basis for a due process claim, as the *Bishop* decision suggests that property interests in state employment are dependent upon state law,²⁶⁰ which apparently may exclude interests implied in the surrounding circumstances.

Paul v. Davis and *Bishop v. Wood* indicate that the words "liberty" and "property" in the due process clause will no longer be read expansively, as protection of asserted rights is made increasingly dependent upon state law. Moreover, in an apparent departure from recent decisions, the Court in *Davis* and *Bishop* seems to have allowed concern for the state interests implicated in these cases to influence the threshold identification of the personal interest infringed by the state.²⁶¹ In previous cases, consideration of the state interest was reserved for the weighing process which determines the degree of procedure required once a constitutionally protected interest has been identified.²⁶² The *Davis* and *Bishop* opinions thus evidence increased solicitude for the interests of the state to the corresponding detriment of the personal interest at stake.

MAUREEN FOX

Securities Law—Exchange Liability Under Section 6(b) of the Securities Exchange Act of 1934—*Hughes v. Dempsey-Tegeler & Co., Inc.*¹ Plaintiff, Reuben P. Hughes, a businessman and private investor, brought suit against both Dempsey-Tegeler & Co., Inc. (Dempsey) a broker-dealer and member of the New York Stock Exchange (Exchange), and the Exchange itself, to recover losses sustained when certain securities subordinated by Hughes in favor of Dempsey were sold for the benefit of creditors upon Dempsey's liquidation.² Hughes alleged that members of Dempsey had fraudu-

²⁵⁶ 416 U.S. 134 (1974).

²⁵⁷ 408 U.S. 593 (1972).

²⁵⁸ See note 190 *supra*.

²⁵⁹ See § IIA *supra*.

²⁶⁰ See § IIB *supra*.

²⁶¹ See § III *supra*.

²⁶² *Id.*

¹ 534 F.2d 156 (9th Cir.), *cert. denied*, 97 S.Ct. 259 (1976).

² *Id.* at 160. The claims against Dempsey were dismissed by the court. *Id.* at