

# PROCEDURAL DUE PROCESS CLAIMS

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## I. INTRODUCTION

This morning I will be talking about procedural due process. The Fifth and Fourteenth Amendments provide that neither the federal or state government can deprive a person of life, liberty or property without due process of law.<sup>1</sup>

As you know, the Supreme Court has interpreted these two clauses of the Constitution as giving rise to a couple of doctrines, substantive due process and procedural due process. Substantive due process concerns whether the government has an adequate reason for taking away a person's life, liberty or property. While procedural due process, which is my focus, concerns whether the government has followed adequate procedures in taking away a person's life, liberty or property.

All procedural due process questions can be broken down into three sub-issues. First, is there a deprivation? Only if there is a deprivation does the court need to go any further in its procedural due process analysis. Second, is there a deprivation of life, liberty or property? Only if a person is deprived of life, liberty or property does the court need to proceed with a procedural due process analysis. Third, what procedures are required? Only if the procedures of the government are inadequate is there a deprivation of due process. The combination of these three sub-issues, phrased somewhat differently, is that there is a denial of procedural due process only if there is a deprivation of life, liberty or property without adequate procedures.

In any given case, as few as one or possibly all three of these might be at issue, but, the three steps are analytically always present in procedural due process cases. I will deal with these

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<sup>1</sup> See, U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." *Id.*; N.Y. CONST. art. I, § 6. This provision states that: "No person shall be deprived of life, liberty or property without due process of law." *Id.*

three questions individually. First, is there a deprivation; second, does the deprivation constitute a deprivation of life, liberty or property; and third, what procedures are required?

## II. DEPRIVATION

As to the first question of whether this is a deprivation, usually this is clear. Often, it is obvious from the fact that the person has lost life, liberty or property. However, sometimes the issue is litigated and most frequently two questions arise.

One is what mental state is required in order to have a deprivation? The key Supreme Court case here is *Daniels v. Williams*<sup>2</sup> from 1986. *Daniels* involved a prisoner who slipped on a pillow that had been negligently left on a prison step.<sup>3</sup> He sued the prison officials, claiming that their negligence had deprived him of his liberty, his bodily safety, without due process of law.<sup>4</sup> The Supreme Court ruled that negligence is insufficient to state a claim under the due process clause.<sup>5</sup> The court said generally, not just in the prison context, negligence is insufficient to have a constitutional deprivation.<sup>6</sup>

The companion case decided with *Daniels* was *Davidson v. Cannon*<sup>7</sup>, which involved a prisoner who was threatened by another prisoner.<sup>8</sup> The prisoner left a note for the warden saying, "I've been threatened. I need protection."<sup>9</sup> Subsequently, the warden left on a long weekend and did not do anything to provide protection.<sup>10</sup> The prisoner was assaulted by the prisoner who

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<sup>2</sup> 474 U.S. 327 (1986). The Court revisited *Parratt v. Taylor*, where the Court determined that "the alleged loss, even though negligently caused amounted to a deprivation." *Id.* at 328. (quoting *Parratt v. Taylor*, 451 U.S. 527 (1981)).

<sup>3</sup> *Id.* at 328.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 332.

<sup>6</sup> *Id.* at 328. The Court concluded that the Due Process Clause is not triggered when an official's negligent act causes "unintended loss of or injury to life, liberty, or property." *Id.*

<sup>7</sup> 474 U.S. 344 (1986).

<sup>8</sup> *Id.* at 345.

<sup>9</sup> *Id.* The Court took no further action, aside from writing the note to inform prison authorities of the danger of an attack, petitioner did not ask to be put into protective custody. *Id.* at 346.

<sup>10</sup> *Id.* at 345-46.

threatened him and was significantly injured.<sup>11</sup> The case arose in Connecticut where the prisoner had no state law remedies against the prison officials<sup>12</sup>, so the prisoner said, “In order to be able to get any remedy, I need to be able to bring the constitutional claim.”<sup>13</sup> The Supreme Court said, as it did in *Daniels*, the prisoner here has alleged only negligence which is insufficient for a claim under the due process clause.<sup>14</sup>

Interestingly, the Supreme Court did not return to this issue of mental state for twelve years, until 1998, when it decided *County of Sacramento v. Lewis*.<sup>15</sup> *Lewis* involved a high speed police chase.<sup>16</sup> As is often the case with high speed chase cases, the chase ended in tragedy. One police officer misunderstood another police officer and gave chase to a boy on a motorcycle.<sup>17</sup> The chase ended in a crash and a passenger on the motorcycle, a teenage boy, died as a result of the accident.<sup>18</sup>

The issue concerned what test was to be used in order to establish liability in the high speed chase context.<sup>19</sup> The United States Court of Appeals for the Ninth Circuit ruled that deliberate indifference was the proper test to meet *Daniels* and *Davidson*.<sup>20</sup>

However, the United States Supreme Court unanimously reversed the Ninth Circuit.<sup>21</sup> Writing for the Court, Justice Souter said that, in an emergency situation such as this, the government is liable only if its officers’ behavior, “shocks the conscience.”<sup>22</sup> In order to demonstrate that the government officers’ behavior shocks

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<sup>11</sup> *Id.* at 346.

<sup>12</sup> *Id.*

<sup>13</sup> 474 U.S. at 348 (1986).

<sup>14</sup> *Id.* at 347. The Court held in *Daniels* that Due Process Clause protections, substantive or procedural, are not activated when prison officials act with lack of due care. *Id.* at 348.

<sup>15</sup> 523 U.S. 833 (1998).

<sup>16</sup> *Id.* at 837.

<sup>17</sup> *Id.* at 836.

<sup>18</sup> *Id.* at 837.

<sup>19</sup> *Id.* at 839. (granting certiorari to resolve the disagreement among the Circuits regarding the level of culpability of the officers of law enforcement when Substantive Due Process is violated in a pursuit case).

<sup>20</sup> *Id.* at 838.

<sup>21</sup> 523 U.S. at 855 (1998).

<sup>22</sup> *Id.* at 854. The Court determined that Deputy Smith’s actions failed to meet the shocks-the-conscience standard. *Id.* at 855.

the conscience it must be proven that the officers acted with the intent of causing harm to the victims.”<sup>23</sup> Notice how difficult that standard is to meet. It has to be shown that the police officers gave chase not to apprehend the individual, but with the motive of causing harm to the victims.<sup>24</sup>

There are two things that I think are essential to understanding *Lewis*, with regard to mental state. First, the court makes clear that in emergency situations the standard is shocks the conscience.<sup>25</sup> This standard applies not just in high speed chase cases, but in any emergency context. Justice Souter said that deliberate indifference is the appropriate standard if the circumstances allow the opportunity for deliberation.<sup>26</sup> But if it is an emergency, there is not the chance for reflection, then shocks the conscience is the required mental state that must be used.<sup>27</sup> Second, the clear implication is that in nonemergency situations deliberate indifference is sufficient to state a claim under due process.<sup>28</sup> In fact, my previous examples illustrate that this is what the lower courts have been saying ever since *Daniels* and *Davidson*.

*Stemler*<sup>29</sup> and *Hill*<sup>30</sup> both held that deliberate indifference or recklessness would be sufficient to state a claim under due process, but negligence would not.<sup>31</sup> Most of the lower courts, though not all, have gone in the direction of the *Davis* case,<sup>32</sup> that gross negligence is also insufficient.<sup>33</sup>

This seems to me to be a matter of using the right words in pleading if you are the plaintiff. You want to allege intent if it is there. If it is a non-emergency situation, allege deliberate indifference, allege recklessness, but do not allege negligence or

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<sup>23</sup> *Id.* at 849.

<sup>24</sup> *Id.* at 854.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 852.

<sup>27</sup> 523 U.S. at 854 (1998). The Court determined that when unanticipated circumstances require an officer’s instant assessment, even abrupt recklessness falls short of harmful purpose required to shock the conscience. *Id.* at 853.

<sup>28</sup> *Id.* at 851.

<sup>29</sup> 126 F.3d 856 (6th Cir. 1997).

<sup>30</sup> 93 F.3d 418 (7th Cir. 1996).

<sup>31</sup> *Id.* at 421, *Stemler*, 126 F.3d at 868.

<sup>32</sup> 90 F.3d 1346 (8th Cir. 1996).

<sup>33</sup> *Id.* at 1353.

gross negligence. Now, if it is an emergency situation, then you have to allege shocks the conscience and then try to meet the very difficult standard announced in *Lewis*.

The second issue that sometimes comes up with regard to whether there is a deprivation is often referred to as the *Parratt v. Taylor*<sup>34</sup> issue; Are the existence of state procedures sufficient to prevent a finding of a deprivation?<sup>35</sup>

*Parratt*, a 1981 Supreme Court case, involved a Nebraska prisoner who had a hobby kit that was worth about \$23 lost by the prison.<sup>36</sup> He sued the prison officials, saying that their negligence had caused the loss of the hobby kit and that therefore he was deprived of his property without due process.<sup>37</sup> The Supreme Court said that section 1983 does not have a mental state requirement, so negligence was sufficient.<sup>38</sup> Notice that five years later in *Daniels v. Williams*<sup>39</sup> the Supreme Court said due process does have a mental state requirement and negligence is not sufficient.<sup>40</sup>

What is important about *Parratt* to this day is that the Court's opinion, by then Justice Rehnquist, said there was no denial of due process.<sup>41</sup> Rehnquist stated that all the inmate was seeking is a post-deprivation remedy.<sup>42</sup> The prisoner was not saying he should have been given notice and a hearing before his hobby kit was lost. Rather, he is seeking a post-deprivation remedy and compensation for the loss.<sup>43</sup> Rehnquist said that here Nebraska provided an adequate post-deprivation remedy.<sup>44</sup> In other words, the court says that where an individual is seeking a post-deprivation remedy and the state provides an adequate post-deprivation remedy, then it

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<sup>34</sup> 451 U.S. 527 (1981).

<sup>35</sup> *Id.* at 542.

<sup>36</sup> *Id.* at 529.

<sup>37</sup> *Id.* (seeking to recover their value, respondent sued under 42 U.S.C. § 1983).

<sup>38</sup> *Id.* at 534-35.

<sup>39</sup> *Daniels*, 474 U.S. at 327.

<sup>40</sup> *Id.* at 330-31.

<sup>41</sup> *Parratt*, 451 U.S. at 542. The Court concluded that respondent was deprived of his property under state law, however, the deprivation was not the result of an instituted state procedure, therefore, alleged no violation of the Due Process Clause. *Id.* at 543.

<sup>42</sup> *Id.* at 529.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 544.

cannot be said that the government has denied the individual of due process.<sup>45</sup>

Well, immediately commentators recognized that *Parratt* could be extended very broadly, potentially to all constitutional claims because the Bill of Rights is applied to state and local governments by the due process clause of the Fourteenth Amendment. All anyone suing for damages is ever seeking is some remedy after the loss, and so long as the state provides some remedy it then can be said there is no denial of due process? Would not *Parratt* extended this far, in essence, undermine *Monroe v. Pape*,<sup>46</sup> by requiring that a plaintiff always has to use state remedies whenever you are trying to vindicate a constitutional right in any kind of due process situation?<sup>47</sup> Some lower courts, most notably the Fifth Circuit, began to take *Parratt* in that direction.

The Supreme Court returned to *Parratt* a short time later in *Hudson v. Palmer*,<sup>48</sup> which also involved a prisoner. In this case prison officials intentionally destroyed the prisoner's property by ripping down posters from his walls and destroying his personal possessions.<sup>49</sup>

The Supreme Court said once more that there was no denial of due process because the inmate was seeking only a post-deprivation remedy.<sup>50</sup> Since, the state provided an adequate post-deprivation remedy, there was no deprivation of due process.<sup>51</sup> In essence, *Hudson* extends *Parratt* from the negligent deprivation situation to the intentional deprivation circumstances.<sup>52</sup>

The key case limiting *Parratt*, in fact the only case which has since clarified *Parratt* in a majority opinion, is *Zinermon v. Burch*.<sup>53</sup> In *Zinermon*, the Supreme Court tried very hard to add

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<sup>45</sup> *Id.* The Court held that remedies were available to fully compensate the respondent for his loss of property, which are sufficient to fulfill the Due Process requirements. *Id.* at 544.

<sup>46</sup> 365 U.S. 167 (1961).

<sup>47</sup> *Parratt*, 451 U.S. at 544.

<sup>48</sup> 468 U.S. 517 (1984).

<sup>49</sup> *Id.* at 520. Petitioners discovered a torn pillowcase in respondent's cell and charged him with the destruction of state property. *Id.* at 544.

<sup>50</sup> *Id.*

<sup>51</sup> 468 U.S. at 533.

<sup>52</sup> *Id.*

<sup>53</sup> 494 U.S. 113 (1990).

clarity to an area where there was enormous confusion among the lower courts. *Zinemon* involved an individual who voluntarily committed himself to an institution.<sup>54</sup> He later sued the state officials who had committed him, claiming that they should have recognized that he was not competent to commit himself voluntarily and that therefore they should have provided him due process, notice and hearing, as would be required in the involuntary commitment situation.<sup>55</sup> The mental hospital official responded by saying that pursuant to *Parratt*, there is no deprivation of due process and that the case should be dismissed out on that ground.<sup>56</sup> The United States Supreme Court held that *Parratt* was inapplicable, stating that *Parratt* only applies in limited circumstances.<sup>57</sup>

Let me highlight the four that I think are most important. First, the Court says *Parratt* applies only if the individual is seeking solely a post-deprivation remedy.<sup>58</sup> If what the individual is complaining about is the lack of pre-deprivation due process, then *Parratt* is inapplicable.<sup>59</sup> In this instance the individual was saying, "I should have been given notice in a hearing before I was committed."<sup>60</sup> That is arguing that there was not adequate pre-deprivation due process. He was not just seeking a post-deprivation remedy, thus *Parratt* is inapplicable.<sup>61</sup>

Second, and I think most important, *Parratt* applies only to random and unauthorized acts by government officials.<sup>62</sup> It does not apply if what is involved is an official government policy. That tremendously limits *Parratt*. Many courts have expressly invoked this distinction between unauthorized acts and government policy. Random and unauthorized acts are the acts of the

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<sup>54</sup> *Id.* at 123. (alleging he was disoriented and medicated when he signed the forms for admission to treatment at t state mental hospital in Florida, he brought suit on the ground of denial of Due Process of law). *Id.* at 115.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 115.

<sup>57</sup> *Id.* at 139. The Court held that the complaint was adequate to state a claim for violation of Due Process under § 1983. *Id.*

<sup>58</sup> *Id.* at 129.

<sup>59</sup> 494 U.S. at 136 (1990).

<sup>60</sup> *Id.* at 115.

<sup>61</sup> *Id.* at 114.

<sup>62</sup> *Id.* at 129. (Stevens, J., concurring in judgment).

individual, whereas government policy seems quite like the definition of what is required in order to establish municipal liability. For instance *Moore v. Board of Education*,<sup>63</sup> a more recent and well-reasoned case, the Court of Appeals said that *Zinermon* makes clear that *Parratt* only applies to random and unauthorized acts.<sup>64</sup>

A third important limitation in *Zinermon* is that *Parratt* only applies in the procedural due process context and not with respect to substantive due process claims.<sup>65</sup> If the person is complaining of inadequate procedure, for example, lack of adequate notice and hearing, then there is the possibility of a *Parratt* claim. However, if it is a substantive due process claim where the person is saying, "The government acted without adequate justification," then *Parratt* is not applicable.<sup>66</sup> The final part of *Zinermon* I should emphasize is that *Parratt* only applies if the state provides adequate procedures.<sup>67</sup> In other words, if there are not adequate remedies at the state level, then *Parratt* would be inapplicable.

Now, what is enough to make the state procedures inadequate? There is no Supreme Court case on point here. There is a large body of lower court cases that are relevant here.

A case that is particularly well written and thoroughly reasoned is *Pena v. Mattox*.<sup>68</sup> The principle established in *Pena* is that if the state is itself taking action to prevent use of the state remedies,

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<sup>63</sup> 134 F.3d 781 (6th Cir. 1998).

<sup>64</sup> *Moore*, 134 F.3d at 785 (explaining that [c]ases in which a due process challenge is made to deprivations resulting from the enforcement of an established state procedure stand in sharp contrast to *Parratt* and *Hudson* cases. In such cases, the actions at issue are not random or unauthorized, and it is both practical and feasible for the state to provide pre-deprivation process to the aggrieved party.

*Id.* (citing *Mertik v. Blalock*, 983 F.2d 1353 (6th Cir. 1993)).

<sup>65</sup> *Zinermon*, 494 U.S. at 139 (stating that "this case does not represent the special instance of the *Mathews* due process analysis where postdeprivation process is all that is due because no predeprivation safeguards would be of use in preventing the kind of deprivation alleged").

<sup>66</sup> *But see*, *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>67</sup> *Zinermon*, 494 U.S. at 125.

<sup>68</sup> 84 F.3d 894 (7th Cir. 1996).

then adequate state remedies are not available.<sup>69</sup> *Pena* involved the police conspiring with the mother of a child to put the child up for adoption over the father's objections and the police themselves arrested the father so he could not use state procedures to protect his rights.<sup>70</sup>

The Court of Appeals said that since the government officials were preventing the use of the state procedures, under those circumstances adequate state procedures are were not available.<sup>71</sup>

Now, for those of you who represent defendants, I would still pay careful attention to *Parratt*. I think there is a real chance that the Supreme Court and some Courts of Appeals are going to go back to *Parratt* and expand it. For instance, Justice Kennedy in a concurring opinion in *Albright v. Oliver*,<sup>72</sup> a 1994 Supreme Court case in which the court said that malicious prosecution claims had been brought under the Fourth Amendment, said this issue should be analyzed under *Parratt*.<sup>73</sup>

In addition, there are a number of Fifth Circuit cases, several written by Judge Edith Jones, that try to revitalize *Parratt*. If you represent plaintiffs, I think you have to be on the lookout for *Parratt* being used to defeat your claim and try to rely on *Zinerman* as a limit on *Parratt*.

### III. LIFE, LIBERTY OR PROPERTY

Assuming there is a deprivation, the analysis goes on to the second question. Is the deprivation of life, liberty or property?

Prior to the late 1960s, the Supreme Court drew a distinction between rights and privileges for the purposes of analyzing whether there was life, liberty or property. The Supreme Court used to say that a person had a liberty or property interest only if

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<sup>69</sup> *Id.* at 898 (explaining that "...a defendant who prevents a plaintiff from exhausting his state judicial remedies should not be allowed to set up the plaintiff's failure to exhaust as a defense").

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> 510 U.S. 266 (1994).

<sup>73</sup> *Albright*, 510 U.S. at 285-86 (stating that "[g]iven the state remedy and the holding of *Parratt*, there is neither need nor legitimacy to invoke §1983 in this case").

there was a right. If it was just a privilege, then there was no liberty or property interest and the government did not have to provide due process. Up until the late 1960s the Supreme Court and the lower courts would say that working for the government is a privilege, not a right, so the government does not have to provide due process if it fires somebody or that government benefit programs are privileges, not rights. Therefore, no due process is required for termination of benefits.

*Goldberg v. Kelly*<sup>74</sup> is the key Supreme Court case that departs from that analysis. In *Goldberg*, the Court held that welfare benefits are property and that therefore the government has to provide due process before it can terminate receipt of benefits.<sup>75</sup> The question after *Goldberg* is how is it determined whether a property or liberty interest existed?

There are two different ways of reading *Goldberg*. One is that the importance of the interest determines whether it is a liberty or property interest.<sup>76</sup> If the interest or benefit is significant enough, then there is a liberty or property interest. The other approach focuses on whether a reasonable expectation to continued receipt of the benefit existed.<sup>77</sup> If the government has taken affirmative steps in providing a benefit, thus giving a person a reasonable expectation of continued receipt of the benefit, then a property or liberty interest exists.

Each of these approaches raises different questions for litigation. In the former situation, how do we decide whether the interest is important enough? In the latter situation, will it suffice that the

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<sup>74</sup> 397 U.S. 254 (1970).

<sup>75</sup> *Id.* at 264. Agreeing with the District Court that the stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal. *Id.* at 666.

<sup>76</sup> *Id.* at 262 (explaining that “constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation; or to denial of a tax exemption; or to discharge from public employment”).

<sup>77</sup> *Id.* at 264 (stating that “termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits”).

government could prevent formation of a property interest or liberty interest just by saying, "Do not expect that you're going to continue to receive this," thus just by denying the reasonable expectation?

In *Board of Regents of State Colleges Et. al. v. Roth*,<sup>78</sup> the court returned to this and clarified its approach. *Roth* involved an individual who worked for the University of Wisconsin system on a year-to-year contract.<sup>79</sup> Each contract made it clear that he should have no expectation that the contract would be renewed. The contract was not renewed and he sued claiming that he was deprived of a property interest and he should be given due process regarding the non-renewal.<sup>80</sup> The Supreme Court said he had no reasonable expectation to continued receipt of the property. In *Roth* the Supreme Court said that no longer is the rights/privileges distinction to be used,<sup>81</sup> instead the question of whether somebody has a property interest is whether there is a reasonable expectation to continued receipt of a benefit.<sup>82</sup>

The court extended this to liberty in *Paul v. Davis*,<sup>83</sup> which involved Louisville, Kentucky's practice of posting shoplifters' pictures in department stores.<sup>84</sup> An individual's picture was wrongly posted and he sued, saying that the government had deprived him of his liberty and his reputation without due process.<sup>85</sup> The Supreme Court said that reputation by itself is not a liberty interest.<sup>86</sup> In fact, in *Siebert v. Gilley*<sup>87</sup> the Supreme Court

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<sup>78</sup> 408 U.S. 564 (1972).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 569 (claiming that "the failure of University officials to give him notice of any reason for nonretention and an opportunity for a hearing violated his right to procedural due process of law").

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 577 (explaining that "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined").

<sup>83</sup> 474 U.S. 693 (1976).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 698 (asserting "that he had been deprived of rights secured to him by the Fourteenth Amendment of the United States Constitution").

<sup>86</sup> *Id.* at 701 (explaining that reputation alone is not by itself sufficient to invoke the procedural protection of the Due Process Clause).

<sup>87</sup> 500 U.S. 226 (1991).

reaffirmed *Paul*.<sup>88</sup> The Supreme Court said that harm to reputation by itself is not a loss of liberty.<sup>89</sup>

This remains the analysis to this day with regard to whether there is a property or liberty interest. You have to look the Constitution, federal statutes, state constitutions, and state laws to determine whether there is a reasonable expectation.

*Stone v. Federal Deposit Insurance Corporation*<sup>90</sup> is a recent case that illustrates this. The issue raised is whether or not government employment is a property interest so that a person has to be given notice and a hearing before being fired.<sup>91</sup> In 1999, the Federal Circuit said that the government had given the individual a reasonable expectation that the job would be his or hers. so when the government takes it away, the government has to provide due process.<sup>92</sup>

For those of you who represent defendants, you can often prevent a property interest from vesting by making sure that there is no expectation to continued receipt of the benefit. A Supreme Court case in the 1970s, *Bishop v. Wood*,<sup>93</sup> makes clear that the government, by preventing expectations, can render a plaintiff's claim useless.<sup>94</sup> On the other hand, if you represent the plaintiff, you are going to want to look at all of the circumstances, in arguing that the government's actions have created a reasonable expectation to continued receipt of the benefit.

There is one major exception to this analysis and that is prisoner litigation. Initially the Supreme Court applied *Goldberg, Roth* and *Paul* to prisoner litigation, saying that whether a prisoner has, especially a liberty interest but a property interest as well, depends

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<sup>88</sup> 424 U.S. 693 (1976).

<sup>89</sup> *Siebert*, 500 U.S. at 234 (affirming that “[o]ur decision in *Paul v. Davis* did not turn, however, on the state of mind of the defendant, but on the lack of any constitutional protection for the interest in reputation”).

<sup>90</sup> 179 F.3d 1368 (Fed. Cir. 1999).

<sup>91</sup> *Stone*, 179 F.3d at 1374 (stating that “[i]f Mr. Stone does possess such a property interest, then the government cannot deprive him of this property without due process”).

<sup>92</sup> *Id.*

<sup>93</sup> 426 U.S. 341 (1976).

<sup>94</sup> *Id.* at 345 (explaining that the “North Carolina Supreme Court has held that an enforceable expectation of continued public employment in that State can exist only if the employer, by statute or contract, has actually granted some form of guarantee”). *Id.* (citing *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971)).

upon whether the government has created a reasonable expectation.

In *Hewitt v. Helms*,<sup>95</sup> the Supreme Court expressly says that, determining whether or not a prisoner has a liberty or property interest depends on whether the government has given a reasonable expectation to continued receipt of the benefit.<sup>96</sup> There then were a number of Supreme Court cases, and hundreds of lower court cases analyzing particular circumstances to determine whether the government had given a reasonable expectation to continued receipt of the benefit. Various cases involved good time credits, parole revocation, revocation of visiting privileges and so on and each case decided whether the regulations of the prison or the statutes of the state or federal law created a reasonable expectation.

In 1995, the Supreme Court, however, completely changed the analysis in *Sandin v. Conner*.<sup>97</sup> *Sandin* involved prison officials in Hawaii who wanted to subject a prisoner to a body cavity search and he objected vociferously.<sup>98</sup> As a result of his objection, the prison decided to place him in disciplinary segregation for several days.<sup>99</sup> He argued that he should be given due process, notice, and a hearing before he's placed in disciplinary segregation.<sup>100</sup>

The United States Court of Appeals for the Ninth Circuit held that he should have been given procedural due process, reasoning that the Hawaii prison regulations provide that in order to put somebody in disciplinary segregation, there has to be substantial evidence.<sup>101</sup> The court said this means that you have a reasonable expectation to not having disciplinary segregation without there being substantial evidence which requires notice and a hearing.<sup>102</sup>

The United States Supreme Court reversed the Ninth Circuit, in a five-four decision.<sup>103</sup> Chief Justice Rehnquist, writing for the Court, said that the analysis under *Hewitt*, *Goldberg*, and *Roth* was

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<sup>95</sup> 459 U.S. 460 (1983).

<sup>96</sup> *Id.*

<sup>97</sup> 515 U.S. 472 (1995). It should be noted that the author was co-counsel in the Supreme Court in *Sandin*.

<sup>98</sup> *Id.* at 475.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 476.

<sup>101</sup> *Id.* at 477.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

not working well in the prison context.<sup>104</sup> Rehnquist said it has led to a large number of frivolous suits by prisoners, including his favorite example of the prisoner who sued and said due process should have been given before a bag lunch was substituted for a hot lunch.<sup>105</sup>

Second, and I think more significantly, Rehnquist said that the effect of the due process analysis was to give prisons an incentive to not write regulations.<sup>106</sup> If prisons wrote regulations, they then would create reasonable expectations that would give rise to liberty and property interests. However, if prisons did not write regulations and left it just to the discretion of their officials, then expectations would not exist. Since it is good to have regulations, the Supreme Court said this law should not create disincentives to their being written.

So the Supreme Court in *Sandin* articulated a new test for when prisoners have liberty interests. The Supreme Court said a prisoner is deprived of liberty only if there is the loss of a significant freedom which is atypical to the usual conditions of confinement.<sup>107</sup> The Court said here that placing a prisoner in disciplinary segregation did not constitute a loss of liberty because that was not atypical to the usual conditions of confinement.<sup>108</sup>

In fact, in *Sandin v. Conner* the Supreme Court cited only two cases where it had previously found prisoners to have liberty interests under the standard.<sup>109</sup> One was *Vitek v. Jones* which held that prisoners are deprived of liberty if they're transferred from prisons to mental institutions.<sup>110</sup> The other case was *Washington v.*

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 483 (citing *Burgin v. Nix*, 899 F.2d 733, 735, (8th Cir. 1990) claiming that there is a "liberty interest in receiving a tray lunch rather than a sack lunch").

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 477-78 (citing *Wolff v. McDonnell*, 418 U.S. 539 (1974)).

<sup>108</sup> *Id.*

<sup>109</sup> See *Vitek v. Jones*, 445 U.S. 480 (1980); *Washington v. Harper*, 494 U.S. 210 (1990).

<sup>110</sup> *Vitek*, 445 U.S. at 493 (concluding that "a convicted felon also is entitled to the benefit of procedures appropriate in the circumstances before he is found to have a mental disease and transferred to a mental hospital").

*Harper*, which held that prisoners have a liberty interest in not being given antipsychotic medication without their consent.<sup>111</sup>

There is no doubt in the lower courts that *Sandin* dramatically narrows the situations in which prisoners can bring due process claims.<sup>112</sup> However, the Supreme Court has not, except in one instance, referred to *Sandin* or dealt with *Sandin* issues since 1995.<sup>113</sup> Thus there is an enormous amount of confusion in the lower courts.

There are many lower court decisions that consider disciplinary segregation situations which seem to find that even very, very long periods of time in disciplinary segregation do not constitute a deprivation of liberty.<sup>114</sup> In a case from New York, *Delaney v. Selsky*<sup>115</sup>, a prisoner was placed in disciplinary segregation for one hundred and ninety-seven days and yet the federal district court said under *Sandin* that was not a deprivation of liberty that requires due process.<sup>116</sup>

Even further, is *Bonner v. Parke*<sup>117</sup>, a case in Indiana where the prisoner was placed in disciplinary segregation for three years and the Federal District Court said under *Sandin* that is not a deprivation of liberty without due process.<sup>118</sup> My sense, in having read a large number of these post-*Sandin* cases, is that they seem to draw a distinction between occurrences in the prison and out of the prison. If the case involves what the prison is doing within it, then

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<sup>111</sup> *Washington*, 494 U.S. at 229 (determining that “[t]he forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty”).

<sup>112</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 7.3 at 445 (1997) (explaining that “[A]fter *Sandin v. Conner*, a statute or regulation creates a liberty interest for prisoners only if it ‘imposes atypical and significant hardship...in relation to the ordinary incidents of prison life’”).

<sup>113</sup> *Young v. Harper*, 520 U.S.143 (1997).

<sup>114</sup> *See, e.g., Weatherall v. Scherbarth*, No. 99-1222, 2000 U.S. App. LEXIS 3076 (10<sup>th</sup> Cir. Feb. 28, 2000); *Whitford v. Boglino*, No. 97-3715, 1999 U.S. App. LEXIS 26475 (7<sup>th</sup> Cir. Oct. 15, 1999).

<sup>115</sup> 899 F.Supp. 923 (N.D. N.Y. 1995).

<sup>116</sup> *Id.* at 928.

<sup>117</sup> 918 F.Supp. 1264 (N.D. Ind. 1996).

<sup>118</sup> *Id.* at 1270. (holding that “[petitioner’s] placement in disciplinary segregation for three years does not constitute an extreme term of segregation and, by itself, does not create an atypical and significant hardship in relation to the ordinary incidents of prison life”).

courts are very reluctant to find a deprivation of liberty.<sup>119</sup> But if the case involves somebody's release from prison, their freedom from the institution, then courts do find that to be a deprivation of liberty.<sup>120</sup>

The question that might immediately come to some of your minds is what about a work release program? Is that more like an in-the-prison situation where *Sandin* applies or is it more like an out-of-the-prison situation where *Sandin* does not apply? There is a split among the circuits as to that very issue.<sup>121</sup>

The Second Circuit held in the *Kim v. Hurston*<sup>122</sup> that revocation of a work release program constitutes a deprivation of liberty and it requires due process<sup>123</sup>, but the Eighth Circuit in *Callender v. Souix City Residential Treatment Facility*,<sup>124</sup> a couple of years ago, held that the revocation of work release does not constitute a deprivation of liberty and therefore does not require due process.<sup>125</sup> This obvious split between the circuits is going to require resolution by the Supreme Court.

I said there was only one instance since *Sandin* where the Supreme Court's returned to this issue and that was in *Young v. Harper*.<sup>126</sup> *Young* involved a prisoner in the Oklahoma prison system, which like those in many states, were very overcrowded. So the Oklahoma prison officials engaged in pre-parole release of inmates, so that even though the inmate was not yet eligible for parole they allowed him to go out on pre-parole release.<sup>127</sup>

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<sup>119</sup> See, e.g., *Selsky*, 899 F.Supp. 923. (holding that confinement in disciplinary segregation for 197 days is not a deprivation of liberty).

<sup>120</sup> See, e.g., *Young v. Harper*, 117 S.Ct. 1148 (1997). (holding that revocation of preparole release is a deprivation of liberty requiring due process).

<sup>121</sup> The Second and Eighth Circuits are split regarding the issue of work release programs.

<sup>122</sup> 182 F.3d 113 (2<sup>nd</sup> Cir. 1999).

<sup>123</sup> *Id.* at 119 (stating that "[l]iability...exist[ed] for the lack of notice of the ...hearing and the failure to inform [the plaintiff of the correct reason for the removal from the Temporary Release Program.]").

<sup>124</sup> 88 F.3d 666 (8<sup>th</sup> Cir. 1996).

<sup>125</sup> *Id.* at 668 (finding that "[the appellee's] work release program did not provide the sort of substantial freedom that gives rise to a liberty interest inherent in the due process clause").

<sup>126</sup> *Young*, 520 U.S. 143.

<sup>127</sup> *Id.* at 145 (explaining that "[Oklahoma's Preparole Conditional Supervision Program] was in effect whenever population of the prison system exceeded 95%

The inmate was released, he rejoined his family, and he got a job.<sup>128</sup> Then a bed became available within the prison. The prison says, “We want you back”<sup>129</sup> and he said, “No, you’ve got to give me due process,” and obviously due process means more than just showing that a bed had become available, but showing some justification for revoking his pre-parole release.<sup>130</sup>

The United States Supreme Court unanimously sided with the prisoner in an opinion by Justice Thomas.<sup>131</sup> The Supreme Court held, that once the prison has released the individual from formal physical custody, whether it’s called pre-parole release or parole release or anything else, then reincarceration is a deprivation of liberty and the government is going to have to meet all the requirements of due process.<sup>132</sup>

To me this further reinforces the in-custody/out-of-custody distinction. If it is about what the prison does with a prisoner in custody, then the court is very much likely to find that *Sandin* applies, and there is no deprivation of liberty. However, if it involves the release from custody, then the court is much more likely to find that *Sandin* is distinguishable.

One exception to that is the prison retaliation case, *Hines v. Gomez*,<sup>133</sup> which involves the question of whether *Sandin* applies if it is a retaliation situation.<sup>134</sup> The Ninth Circuit says that if what

of its capacity. An inmate could be placed on preparole after serving 15% of of his sentence...”).

<sup>128</sup> *Id.* at 148 (illustrating that “[h]e kept his own residence, he sought, obtained and maintained a job; and he lived a life generally free of the incidents of imprisonment”).

<sup>129</sup> *Id.* at 146 (noting that after “five months outside the penitentiary...the Governor of Oklahoma denied [respondent’s] parole [and ordered him] to report back to prison...”).

<sup>130</sup> *Id.* (stating that “Respondent filed a petition for a writ of habeas corpus in state court complaining that his summary return to prison had deprived him of liberty without due process”).

<sup>131</sup> *Id.* at 147-48 (holding that the pre-parole release was equivalent to parole as understood in *Morrissey v. Brewer*, 408 U.S. 471, thus implying a promise that pre-parole will not be revoked unless the preparolee fails to live up to the pre-parole conditions).

<sup>132</sup> *Id.* at 152-53.

<sup>133</sup> 108 F.3d 265 (9th Cir. 1997).

<sup>134</sup> *Id.* at 267. The court questioned “whether there was substantial evidence that [the appellant] charged [the appellee] in retaliation for [appellee’s] use of the prison grievance process.” The appellant argued that the appellee’s

the prisoner is alleging is improper motive on the part of the government, then *Sandin* is distinguishable, and procedural due process will be required.<sup>135</sup> *Mitchell v. Dupnik*<sup>136</sup> states that *Sandin* applies not to pretrial detainees, but only after conviction.<sup>137</sup> Both of these are Ninth Circuit cases and they both distinguish *Sandin v. Conner*, which had been a Ninth Circuit case, so it'll be interesting to see if the Supreme Court goes in that direction.

#### IV. PROCEDURES

Assuming there is a deprivation, assuming life, liberty or property, there is then come the third major question. What procedures are required? I do emphasize the sequence here. If there is no deprivation of life, liberty or property, then we do not ever get to the third question in terms of what procedures are required.

The key case defining what types of procedures are required is *Mathews v. Eldridge*.<sup>138</sup> *Mathews* involved a question of whether or not the government had to provide a pre-termination hearing before cutting off Social Security Disability benefits.<sup>139</sup> The Supreme Court in *Mathews* established a three-part balancing test to determine what procedures are required when there has been a deprivation of life, liberty or property.<sup>140</sup>

First the court says to balance the importance of the interest to the individual.<sup>141</sup> The more important the interest to the individual,

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“punishment of 10-days confinement and television loss did not constitute an ‘atypical and significant hardship’ as required in *Sandin v. Conner*.” *Id.* at 269.

<sup>135</sup> *Id.*

<sup>136</sup> 75 F.3d 517 (9th Circuit 1996).

<sup>137</sup> *Id.* at 523 (stating that “the *Sandin* reference to to ‘ordinary incidents of prison life’ refers to the ordinary incidents of imprisonment under a sentence after conviction”).

<sup>138</sup> 424 U.S. 319 (1976).

<sup>139</sup> *Id.* at 323 (determining “whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing”).

<sup>140</sup> *Id.* at 335.

<sup>141</sup> *Id.* (stating that the first part of the test is “the private interest that will be affected by the official action”).

the more procedural protections the court is going to require.<sup>142</sup> Second, the court must balance the ability of additional procedures to increase the accuracy of the fact finding.<sup>143</sup> The ability of additional procedures to increase the accuracy of the fact finding asks how likely is it that the additional procedures will reduce the risk of an erroneous deprivation.<sup>144</sup> Third, the court says it is going to balance the government's interest in administrative efficiency.<sup>145</sup> The government's interest in administrative efficiency is such that the more expensive the procedures would be, the less likely it is that a court will require them.<sup>146</sup>

As you know, when there is a three-part balancing test like this, courts have enormous discretion and in all likelihood different factors will point in varying directions.<sup>147</sup> There is now a very large body of case law applying *Mathews* to many different circumstances, and each considers how the Supreme Court's balancing test should be applied.<sup>148</sup>

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<sup>142</sup> CHEMERINSKY, *supra*, at 451. (noting that “[t]he more important the interest, the more in the way of procedural safeguards the Court will require”).

<sup>143</sup> *Mathews*, 424 U.S. at 335 (setting out the second part of the test as “the risk of any erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”).

<sup>144</sup> CHEMERINSKY, *supra*, at 451. (explaining that “[t]he more the Court believes that the additional procedures will lead to better, more accurate, less erroneous decisions, the more likely it is that the Court will require them”).

<sup>145</sup> *Mathews*, 424 U.S. at 335 (setting out the third part of the test as “the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail”).

<sup>146</sup> CHEMERINSKY, *supra*, at 451 (stating that “The more expensive the procedures will be, the less likely it is that the Court will require them”).

<sup>147</sup> *Id.* at 452 (explaining that “[t]he reality is that courts have enormous discretion in evaluating each of the three factors and especially how to balance them. Such multi-part balancing inherently provides little constraint on judicial decisions”).

<sup>148</sup> See generally *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1380 (9th Cir. 1989). Day care center brought civil rights action against officials of the Arizona Department of Health Services and the Arizona Department of Economic Security based upon their actions in summarily suspending day care center's license. *Id.* at 1377. *Kraemer v. Hecler*, 737 F.2d 214, 221 (2nd Cir. 1984). Class action was brought challenging policies and procedures relative to termination of medicare coverage of medicare Part A beneficiaries. *Id.* at 214.

It is important to emphasize that what procedures are required is entirely a question of law for the judge. It is not a question of fact, and indeed even more importantly, it is a question of constitutional law, not a question of state law.<sup>149</sup> This is what *Cleveland Board of Education v. Loudermill* teaches us.<sup>150</sup> *Loudermill* involved a security guard who was fired.<sup>151</sup> The government came in and said that the state law specifies the procedures that are required.”<sup>152</sup> Earlier, three justices of the Supreme Court in *Arnett v. Kennedy*<sup>153</sup> said that an individual has to take the bitter with the sweet, that just as the government can define what’s a property interest, so can the government define what procedures are required.<sup>154</sup> The Supreme Court in *Loudermill* rejected that.<sup>155</sup>

The Supreme Court says the issue of what procedures are required is an matter of United States constitutional law.<sup>156</sup> The expectations the government creates can determine whether there is a property interest or not, but once there is a property interest, then it is entirely for the courts under the Constitution to decide what due process requires.<sup>157</sup>

*Vitek v. Jones*, holds the same thing in the context of liberty. That it is not for the government to decide what due process requires, it is for the courts in interpreting the Constitution.<sup>158</sup>

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<sup>149</sup> *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (stating that “[t]he right to due process ‘is conferred, not by legislative grace, but by constitutional guarantee’”).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 539 (explaining that “The Parma Board argues...the property right is defined by, and conditioned on, the legislature’s choice of procedures for its deprivation”).

<sup>153</sup> 416 U.S. 134 (1974).

<sup>154</sup> *Id.* at 152-54 (noting that “[w]here the grant of a substantive right is inextricable intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet”).

<sup>155</sup> *Cleveland*, 470 U.S. at 541 (stating that “it is settled that the ‘bitter with the sweet’ approach misconceives the constitutional guarantee”).

<sup>156</sup> *See, infra*, note 153.

<sup>157</sup> *Cleveland*, 470 U.S. at 541 (explaining that “once it is determined that the Due Process Clause applies ‘the question remains what process is due’”).

<sup>158</sup> *Vitek*, 445 U.S. at 489 (noting that “[o]nce a state has granted a prisoner a liberty interest, we held that due process protections are necessary ‘to insure that the state-created right is not arbitrarily abrogated’”).

*Vitek* held that a prisoner is deprived of liberty if the prisoner is transferred from a prison to a mental hospital and the Court said the determination of due process is for the courts.<sup>159</sup>

A recent case in this area is *City of West Covina v. Perkins*.<sup>160</sup> *Perkins* involved an individual who owned a home and rented it to a tenant.<sup>161</sup> The police had reason to believe that the tenant had committed a crime so they obtained a search warrant for the home.<sup>162</sup> They seized property, including \$2,629 in cash that belonged to the landlord.<sup>163</sup> At the culmination of the case against the tenant, the landlord went to the court and demanded his property back.<sup>164</sup> He went to the court clerk a couple of times and wrote a letter but received nothing for his efforts.<sup>165</sup>

The Ninth Circuit said that just as the government has to give an individualized inventory of what is taken, so does the government have to give notice as to how you get the property back.<sup>166</sup> However, the Supreme Court in a unanimous decision written by Justice Kennedy stated that no individual notice has to be given concerning how to get the property back,<sup>167</sup> for state laws created a procedure that was sufficient.<sup>168</sup>

Finally, I will discuss *American Mutual Insurance v. Sullivan*,<sup>169</sup> in which there is a discussion at the very end of Judge Renquist's opinion about procedural due process.<sup>170</sup> *American Mutual Insurance* involved a Pennsylvania Workers' Compensation law which provided that an insurance company/employer only had to

<sup>159</sup> *See, infra*, note 112.

<sup>160</sup> 119 S.Ct. 678 (1999).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 679.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 680-81 (holding that "the City was required to give respondents notice of the state procedures for return of seized property and the information necessary to invoke those procedures...").

<sup>167</sup> *Id.* at 681-82 (explaining that "Once the property owner is informed that his property has been seized, he can turn to [available state statutes and case law] to learn about remedial procedures available to him. The City need not take other steps to inform him of his options").

<sup>168</sup> 119 S.Ct. at 681-82 (1999).

<sup>169</sup> 119 S.Ct. 977 (1999).

<sup>170</sup> *Id.* at 989-90.

pay reasonable and necessary medical expenses.<sup>171</sup> This law allowed an insurance company to refuse to make payments and instead invoke a utilization review procedure.<sup>172</sup>

The individual sued claiming that he should have been given due process, notice and a hearing with regard to the failure to pay his medical expenses.<sup>173</sup> The Supreme Court held that there was no state action so the Constitution did not apply.<sup>174</sup> The Supreme Court then went on anyway and discussed procedural due process.<sup>175</sup>

The court said here that the individuals did not have a property interest in having their medical bills paid because the law only gave them a right to have reasonable and necessary medical bills paid.<sup>176</sup> They do not have a property interest in having non-necessary medical bills paid.<sup>177</sup>

Well, a couple of things trouble me about this analysis. First, once the Supreme Court held that there was no state action, and that the Constitution and procedural due process were not applicable, there would be no occasion for the Supreme Court to go and in essence gratuitously talk about the procedural due process issue.

Second, the procedural due process analysis is troubling. The question of whether or not the medical expenses are reasonable and

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<sup>171</sup> *Id.* at 980.

<sup>172</sup> *Id.* at 982 (stating that the Pennsylvania statute “created a ‘utilization review’ procedure under which the reasonableness and necessity of an employee’s past, ongoing, or prospective medical treatment could be reviewed before a medical bill must be paid”).

<sup>173</sup> *Id.* at 984 (noting that “[r]espondents alleged that in withholding workers’ compensation benefits without predeprivation notice and an opportunity to be heard, the state and private defendants, acting ‘under color of state law’, deprived them of property in violation of due process”).

<sup>174</sup> 119 S.Ct. at 989 (1999) (concluding that “[w]e conclude that an insurer’s decision to withhold payment and seek utilization review of the reasonableness and necessity of particular medical treatment is not fairly attributable to the State”).

<sup>175</sup> *Id.* at 989-90.

<sup>176</sup> *Id.* (explaining that “[w]hile [the respondents] indeed have established their initial eligibility for medical treatment, they have yet to make good on their claim that the particular medical treatment they received was reasonable and necessary. Consequently, they do not have a property interest...in having their providers paid for treatment that has yet to be found reasonable and necessary).

<sup>177</sup> *Id.*

necessary is the issue to be litigated, assuming that there was state action. The patient is saying, "This is a necessary medical expense." The employer and insurance company is saying, "This isn't a necessary medical expense." For the Supreme Court to say no procedural due process is required if it is not a necessary medical expense is for the Supreme Court to assume the answer to the very question being litigated. The court is assuming that the defendant is going to win (e.g., it is automatically not a necessary medical expense) when the whole point of the plaintiff is that it is a necessary medical expense and state law gives the right. So it is a very puzzling procedural due process analysis.

In conclusion, procedural due process issues can arise in a variety of circumstances. The structure of the analysis is clear, but much else remains uncertain.

