DUE PROCESS AND THE UNTENURED TEACHER: A REVIEW OF *ROTH* AND *SINDERMANN*

Despite the continuing expansion of procedural due process, protection of public school teachers threatened with termination or nonrenewal of their employment[1] has not grown apace. The due process clause applies only to deprivations of life, liberty or property, and recent decisions of the United States Supreme Court, notably *Board of Regents v. Roth*,[2] and *Perry v. Sindermann*,[3] restrict the definition of "liberty" and "property" as they relate to untenured teachers. As a result, such teachers are left with minimal procedural protections when threatened with termination or nonrenewal of employment.

In *Roth* respondent had been employed under a contract "for a fixed term of one academic year."[4] Under Wisconsin law, probationary teachers (those without tenure) in state universities had "no real protection . . . . '[N]o reason for non-retention need be given. No review or appeal is provided in such case.' "[5] The president of the university branch at which respondent taught summarily notified him that his contract would not be renewed for the succeeding academic year. In

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1. There is an obvious distinction between a teacher whose contract of employment is terminated during its term, and one whose contract is not renewed at the conclusion of its term. In the former situation, it is clear that the employee has a "property right" at stake and is entitled to a statement of reasons for the dismissal and a hearing to challenge the factual basis of those reasons. The nonrenewal situation is distinguishable from that of mid-term termination, in which probationary teachers are dismissed during the school year. *Compare* Nichols v. Eckert, 504 P.2d 1359 (Alas. 1973), *with* Van Gorder v. Mantanuska-Susitna Borough School Dist., 513 P.2d 1094 (Alas. 1973), *and* Board of Regents v. Roth, 408 U.S. 564 (1972). *See also* Pratt, *Nichols v. Eckert: Due Process Rights of Non-Tenured Teachers to Pre-Termination Hearings*, 4 U.C.L.A.-ALASKA L. REV. 180 (1974).

2. 408 U.S. 564 (1972).

3. 408 U.S. 593 (1972).

4. 408 U.S. at 566. Under Wisconsin law, then current, no teacher in a state university attained tenure until completion of "4 years of continuous service in the state university system as a teacher." Law of Dec. 20, 1965, ch. 497, § 1 [1965] Wis. Laws 779. The probationary period is now anywhere from zero to seven years. WIS. STAT. ANN. § 36.13(2)(b) (Supp. 1975).

5. 408 U.S. at 567 (quoting university rules promulgated by the Board of Regents).

seeking to have his dismissal enjoined, he alleged that the denial of a statement of reasons and a hearing violated due process and that the dismissal was in fact based on his criticism of the university administration, violating his first amendment rights. The district court granted respondent's motion for summary judgment on the due process issue,[6] and the court of appeals affirmed.[7] The Supreme Court admitted that the lower court had properly interpreted the balancing test used in *Cafeteria and Restaurant Workers v. McElroy*:[8] "a weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake."[9] The due process clause applies only where the plaintiff can show a deprivation of life, liberty or property. The Court found that since

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6. Roth v. Board of Regents, 310 F. Supp. 972, 983 (W.D. Wis. 1970).

7. Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971).

8. 367 U.S. 886 (1961), *aff'g* 284 F.2d 173 (D.C. Cir. 1960). In *Restaurant Workers* a cook who had been employed for six years in a privately-operated cafeteria at a naval gun factory was directed to surrender her security badge, thus terminating her employment, since without security clearance no one could enter the gun factory. *Id.* at 888. The cook's request for a hearing was denied. In an action to recover her security status, the Supreme Court affirmed a grant of summary judgment for the defendant. The Court distinguished the then recent case of Greene v. McElroy, 360 U.S. 474 (1959) (employee's dismissal invalidated because the government had not adopted appropriate regulations), because in *Restaurant Workers* a regulation granting the commander of a naval installation broad powers over tradesmen was in effect. 367 U.S. at 892. To determine the cook's entitlement to due process protection, the Court in *Restaurant Workers* applied a balancing test, considering "the precise nature of the government function involved as well as . . . the private interest that has been affected by governmental action." *Id. at* 895. The balance tipped toward the government: its proprietary interest in "the internal operation of an important federal military establishment" outweighed the private interest of the cook in pursuing her trade "at one isolated and specific military installation." *Id.* at 896. *Cf.* Wieman v. Updegraff, 344 U.S. 183, 191 (1952); United Pub. Workers v. Mitchell, 330 U.S. 75, 101 (1947). The district court in *Roth* applied the test of *Restaurant Workers,* comparing the university's interest in "be[ing] free arbitrarily to decide not to retain a professor," with the teacher's interest in not being dismissed "on a basis wholly without reason." 310 F. Supp. at 978-79. It reached a different conclusion than did the Supreme Court in *Restaurant Workers,* finding the teacher's interest in this particular position stronger than the cook's interest in the particular position in question in *Restaurant Workers. Id.* at 977-78.

9. 408 U.S. at 570-71.

the first amendment issue was not before it,[10] respondent had not been deprived of liberty.[11] Respondent's property interest in his position was also held insufficient to activate the protection of the clause. The term of his contract was only one year and he had no statutory right to reemployment.[12] The Court accordingly reversed the decision of the court of appeals.

On the same day, the Court decided *Perry v. Sindermann*.[13] Respondent had taught in the Texas state college system for ten years, and at the Odessa Junior College for four years, under a series of one-year contracts.[14] During part of this period he served as president of the Texas Junior College Teachers Association, in which capacity he publicly advocated a proposal to upgrade Odessa to four-year status—a proposal opposed by the Board of Regents. When respondent's contract ran out, the Board of Regents voted not to renew it. Although the Board issued a press release setting forth allegations of respondent's insubordination, it refused to provide him a further statement of reasons for his nonrenewal or a hearing to challenge it.[15]

Respondent, suing in federal court, alleged an entitlement to a hearing on the legitimacy of his dismissal and that the dismissal was based, impermissibly, on his public statements opposing positions espoused by the Board of Regents. The district court granted the Board's motion for summary judgment[16] and the court of appeals

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10. The district court stayed further proceedings on the question of whether the teacher's dismissal was based on constitutionally protected speech because it granted the relief sought on the procedural due process issue. 310 F. Supp. at 983.

11. *See* notes 50-57 and accompanying text *infra*.

12. 408 U.S. at 576-78. The Court stated that there was no "state statute or University rule *or policy* that secured [the employee's] interest in re-employment." *Id.* at 578 (emphasis added). The district court found as uncontroverted fact, however, that "[o]f 442 non-tenured teachers at the university, *four* were given notice that contracts would not be offered them for 1969-1970." 310 F. Supp. at 974 (emphasis added). The rehiring of more than 99% of all untenured teachers would appear to be, at minimum, a "policy" of reemployment; accordingly, the Court's statement is questionable. *See also* 5 CONN. L. REV. 685, 692-94, 697-98 (1973); note 27 *infra*.

13. 408 U.S. 593 (1972).

14. *Id.* at 594.

15. *Id.* at 594-95.

16. Sindermann v. Perry, 430 F.2d 939, 943 (5th Cir. 1970). The opinion of the district court was not reported.

reversed.[17] The Supreme Court held that respondent was entitled to prove his first amendment claim in the district court[18] and that the allegations of his petition, if proved, would establish a valid claim based on a denial of due process.[19]

The Supreme Court dealt with two separate issues in *Sindermann*. As viewed by the Court, respondent's first amendment claim presented a genuine factual dispute. The Court followed numerous previous decisions in holding that the expression of opinion on controversial issues is an improper basis for dismissal.[20] Accordingly, the Court held that granting summary judgment against the respondent's first amendment claim was improper.[21]

The Court's treatment of respondent's due process claim in *Sindermann* distinguishes that case from *Roth*.[22] As in *Roth*, the Court maintained that the simple refusal to rehire a nontenured teacher did not amount to a deprivation of property.[23] But the Court amplified the *Roth* opinion in *Sindermann* by stating that the absence of a contractual right of renewal was not controlling. The employee in *Sindermann* had "alleged that the college had a *de facto* tenure program."[24] The existence of such a program, and respondent's participation in it, would constitute a sufficient interest in property to

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17. *Id.* The reversal was based on the "expectancy test" employed by the Fifth Circuit. *See* note 67 *infra.*

18. 408 U.S. at 598.

19. *Id.* at 602-03.

20. *See* Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

21. 408 U.S. at 598. *Compare* Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972), *with* Duke v. North Texas State Univ., 469 F.2d 829 (5th Cir.), *cert. denied,* 412 U.S. 932 (1973), *and* Tygrett v. Washington, 346 F. Supp. 1247 (D.D.C. 1972).

22. The cases can also be distinguished on the basis of the first amendment claims. In *Roth* those claims were not before the Court; in *Sindermann* they were. This distinction, however, is merely procedural. *Compare* Board of Regents v. Roth, 408 U.S. 564, 578 (1972), *with* Perry v. Sindermann, 408 U.S. 593, 599 (1972).

23. 408 U.S. at 599.

24. *Id.* at 600. The Court quoted the college's official Faculty Guide: "*Teacher Tenure*: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors . . . ." *Id.*

entitle him to a hearing before dismissal.[25] The Supreme Court felt the Fifth Circuit went too far in deciding that a "mere subjective 'expectancy' is protected by procedural due process."[26] But the Court was convinced on the basis of an existing "*de facto* tenure" system that the petitioner should have been given an opportunity to demonstrate that he had a property interest in continued employment.[27]

The rules that emerge from these cases are easily stated. First, it is clear that a public employee is not entitled to procedural protection from termination of employment unless he has at stake an interest protected by the due process clause,[28] *i.e.* the dismissal must deny the employee "liberty" or "property." Secondly, it appears that even when the employee's "liberty" or "property" is threatened, the degree of

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25. The Court defined such a property interest as "a person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Id.* at 601. The limits of a public employee's property interest in his employment are not created by the Constitution, but rather are a function of the "rules or understandings" issued by an independent source, such as the state government. *Id.* at 577. *See, e.g.*, National Educ. Ass'n v. Lee County Bd. of Pub. Instruction, 467 F.2d 447, 449 (5th Cir. 1972); Wilson v. Pleasant Hill School Dist., 465 F.2d 1366 (8th Cir. 1972). *See generally* Seitz, *Due Process for Public School Teachers in Nonrenewal and Discharge Situations*, 25 HASTINGS L. REV. 881, 887 (1974).

26. 408 U.S. at 603.

27. The different results in *Roth* and *Sindermann* are explained, in part, by the presence in the latter case of a "binding understanding fostered by the college administration" that professors would be rehired. *Id.* at 599-600. "[R]espondent alleged that the college had a *de facto* tenure program, and that he had tenure under that program." *Id.* at 600. But when one considers the fact that in *Roth* the university had rehired all but four of 442 untenured teachers, the conduct of the parties in *Roth* becomes more difficult to distinguish from the conduct of the parties in *Sindermann*: the *Roth* facts, if taken in the light most favorable to the respondent, begin to resemble a *de facto* tenure system.

The Court discusses this aspect of the case and dismisses it in a perfunctorily brief footnote. 408 U.S. at 578 n.16. It may well be that the Court was aware of the potential conflict in the decisions and deliberately made little of this aspect of *Roth*. If so, the approach seems to have been successful, since some commentators have overlooked this aspect of *Roth*. *See* Griffis & Wilson, *Constitutional Rights and Remedies in the Non-Renewal of a Public School Teacher's Employment Contract*, 25 BAYLOR L. REV. 549, 560-67 (1973). Yet this cluster of facts seems to undercut the Court's own "property right" distinction of the cases. The net result is that the right to a statement of reasons and a hearing depends on whether or not "understandings" are "binding," and this is a difficult question to resolve.

28. 408 U.S. at 571.

protection provided by the due process clause will be determined by balancing the governmental with the private interests.[29]

The fact that these rules may be stated readily does not, however, mitigate the difficulty of applying them to a given set of facts. The Supreme Court believed *Roth* and *Sindermann* to be distinguishable on their facts;[30] it did not plot the location of a boundary beyond which due process requires a hearing.[31] Nor does the *Sindermann*

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29. Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961). It is far from clear, however, that the *Restaurant Workers* test is still relevant. The Court distinguished *Restaurant Workers* in reaching its conclusion in *Roth*. 408 U.S. at 573-74. In reaching a contrary conclusion in *Sindermann*, the Court did not cite *Restaurant Workers*. Arguably the Court's decisions in *Roth* and *Sindermann* liberalize the *Restaurant Workers* rule, particularly in light of the Court's comment in *Roth* that "[t]he constitutional requirement of opportunity for *some* form of hearing before deprivation of a protected interest, of course, does not depend upon . . . a narrow balancing process." *Id.* at 570-71 n.8. This statement may or may not be dictum, but since the Court rejected the *Restaurant Workers* rationale, the phrase at least indicates which way the Court is leaning on the matter.

30. *But see* note 12 *supra*. For an excellent attempt to distinguish the fact situations in *Roth* from *Sindermann* see Griffis & Wilson, *supra* note 27, at 561, 565; Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 365-66 (1974).

Nevertheless, many factual situations fall somewhere in between, and whether a particular case is more like *Roth* or *Sindermann* is not always clear. *See, e.g.*, Canady v. Butz, 480 F.2d 314 (4th Cir. 1973) (hearing granted where dismissal based on incompetency); Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972) (hearing granted for nonrenewal of one-year contract after 29 years of service, even though state had no tenure system whatsoever). *Compare* McNeill v. Butz, 480 F.2d 314 (4th Cir. 1973) (no hearing granted where dismissal based on alleged criminal conduct), *and* Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972) (hearing denied where dismissal based on use of the classroom to teach sexual education), *with* Moore v. Knowles, 482 F.2d 1069 (5th Cir. 1973) (hearing granted where nonrenewal predicated on criminal indictment), *and* Stolberg v. Members of Bd. of Trustees, 474 F.2d 485 (2d Cir. 1973) (hearing granted where dismissal based on classroom criticism of Indochina War).

31. The net result of the Court's failure to clarify the proper grounds for entitlement to a hearing is the perpetuation of the conflict which existed prior to *Roth* and *Sindermann*. *See, e.g.*, Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970) (statement of charges, names of those making charges, and opportunity to be heard before impartial tribunal with educational expertise are required before nonrenewal of contract of untenured teacher with expectancy of reemployment). *Compare* Roth v. Board of Regents, 446 F.2d 806 (7th Cir. 1971), *rev'd*, 408 U.S. 564 (1972) (statement of reasons and minimal hearing required before dismissal of untenured teacher), Drown v. Portsmouth School Dist., 435 F.2d 1182, 1185, 1188 (1st Cir. 1970) (dismissal of untenured teacher requires statement of reasons, but not hearing), *and* Sindermann v. Perry, 430 F.2d 939, 944 (5th

opinion outline the procedures required when due process mandates a hearing upon termination of an employee's position. *Sindermann* holds only that a dismissed employee whose interest in his position meets the vague "property right" test may attempt to prove his free speech and due process claims.[32] This is far from a guarantee of a hearing before dismissal.[33]

The broadening of procedural protection for litigants has been the general trend and has been accomplished, in part, by the Supreme Court's expanded recognition of protected "property" interests.[34] A hearing is required *before* garnishment of wages,[35] termination of welfare benefits,[36] revocation of parole[37] or driver's license,[38] or repossession of goods.[39]

Cir. 1970), *aff'd*, 408 U.S. 593 (1972) (untenured teacher with expectancy of renewal of contract must be granted statement of reasons and hearings), *with* Orr v. Trinter, 444 F.2d 128, 135 (6th Cir. 1971) (statement of reasons and hearing not required for nonrenewal of contract of untenured teacher); Thaw v. Board of Pub. Instruction, 432 F.2d 98, 100 (5th Cir. 1970) (no hearing required on nonrenewal of untenured teacher's contract if teacher fails to allege that dismissal was for constitutionally impermissible reasons), *and* Bradford v. School Dist., 364 F.2d 185 (4th Cir. 1966) (no hearing required despite teacher's contention that dismissal was based on race, when district's alleged reason for dismissal was teacher's conviction for public drunkenness and assaulting a police officer). *See also* Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (notice of reasons and hearing required for applicant denied admission to state bar); 85 HARV. L. REV. 1327 (1972) (commenting on the rule of the First Circuit).

32. 408 U.S. at 598, 603.

33. Establishing the right to a hearing may represent a Pyrrhic victory for the employee. First, the hearing itself is likely to occur long after the employee's dismissal. *See* note 64 *infra*. Secondly, the substantive law may provide for termination at will. *See, e.g.*, Wellner v. Minnesota State Junior College Bd., 487 F.2d 153 (8th Cir. 1973) (teacher dismissed after falsely being accused of racism entitled to a hearing and retroactive pay, since dismissal is considered a nullity, but not to reinstatement). For a detailed analysis of available remedies for improper teacher dismissals see Griffis & Wilson, *supra* note 27, at 569-93.

34. The concept of protected "property" interests has been expanded "beyond actual ownership of real estate, chattels, or money" as a "safeguard of the security of interests that a person has already acquired in specific benefits." 408 U.S. at 572, 576. The most noteworthy expansion of due process, however, has been in criminal cases where "life" or "liberty" is at stake. *E.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967). *See* notes 50-57 and accompanying text *infra*.

35. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

36. Goldberg v. Kelly, 397 U.S. 254 (1970).

37. Morrissey v. Brewer, 408 U.S. 471 (1972).

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

39. Fuentes v. Shevin, 407 U.S. 67 (1972).

Roth and *Sindermann* indicate that the breadth of protected interests for untenured teachers, and perhaps for public employees generally, lags somewhat behind this general trend.[40] For example, in *Goldberg v. Kelley*,[41] the Supreme Court applied a balancing test to determine the procedural protection due welfare recipients threatened with termination of benefits. The Court held that efforts to prevent arbitrary termination of welfare benefits by providing a full hearing *after* termination were insufficient; only a pre-termination hearing would suffice.[42] The Court recognized welfare benefits as property,[43]

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40. Traditionally, public employment has been considered a privilege rather than a right. A classic statement of this distinction appears in McAuliffe v. Mayor & Bd. of Aldermen, 155 Mass. 216, 29 N.E. 517 (1892). Responding to the assertion that a policeman had a right to his position, Justice Holmes stated that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* at 220, 29 N.E. at 517. Viewing public employment as a privilege, the courts were hesitant to admit that a government employee who was dismissed from his position had been deprived of life, liberty or property (interests enumerated in the fourteenth amendment which can trigger due process protection). *See, e.g.*, Bailey v. Richardson, 341 U.S. 918 (1951), *aff'g* 182 F.2d 46 (D.C. Cir. 1950). There has, however, been an erosion of the right-privilege distinction in recent years. *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). Several theories have been developed enabling courts to view the employee's interest in public employment under one of the protected categories. Teachers, as well as other public employees, may be entitled to statutory procedural protection. *See, e.g.*, Kraus, *The Effect of the Stull Bill on Teacher Dismissals*, 9 LINCOLN L. REV. 90 (1974); 1 Lab. Rel. Rep. 35 (1971). But such statutory provisions have been strictly construed against the employee. Thus, in Buhr v. Buffalo Pub. School Dist., 509 F.2d 1196 (8th Cir. 1974), the court denied an employee the right to a pre-termination hearing.

> [I]t is clear that those same statutory provisions, which outline the procedures for terminating a teacher's employment, do not provide for full-dress procedural due process. Where, as here, the only "grant of a substantive right [to continued employment] is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant [challenging the termination of employment] must take the bitter with the sweet." Because Ms. Buhr's only "property interest" in re-employment "was itself conditioned by the procedural limitations which had accompanied the grant of that interest," there is no merit to her claimed right to full procedural due process.

Id. at 1200 (footnotes omitted).

41. 397 U.S. 254 (1970).

42. *Id.* at 266.

43. "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within the traditional common-law concepts of property." *Id.* at 262 n.8.

and a fair analogy may be made between a public employee's entitlement to his position and a welfare recipient's entitlement to benefits. The public employee is as dependent on employment income for survival as the welfare recipient is on benefits. Moreover, the public employee's position is more analogous to a traditional contract relationship[44]—and thus to a familiar form of "property rights"—than is the position of the welfare beneficiary, because an agreed-upon exchange exists between the public employee and the government which is absent in the welfare recipient's relationship with the government. Yet the present law grants *all* welfare recipients due process protection when threatened with termination of benefits; many public employees do not enjoy the same right.

The Court also applied the "property" concept more strictly in *Roth* and *Sindermann* than in *Sniadach v. Family Finance Corp.*[45] and *Fuentes v. Shevin.*[46] In *Sniadach* the Court treated wages as "a specialized type of property"[47] not subject to seizure without notice and a prior hearing.[48] In *Fuentes* the Supreme Court refused to allow repossession of chattels purchased under conditional sales contracts without

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In *Roth* the Court attempted to distinguish *Goldberg* on the basis that in *Goldberg* the entitlement to benefits was secured by a statute. 408 U.S. at 577. The distinction, however, is dubious. The statute involved in *Goldberg* was the federal Aid to Families with Dependent Children (AFDC) legislation, codified as 42 U.S.C. §§ 601-610 (1970), *as amended,* (Supp. IV, 1974). The procedures with which *Goldberg* dealt were designed to determine whether particular beneficiaries met the qualifications. The statute was thus more analogous to one creating a public position and setting its minimum qualifications than to a statute granting "tenure" to a public employee.

44. *Cf.* Note, *Implied Contract Rights to Job Security, supra* note 30, at 335.

45. 395 U.S. 337 (1969).

46. 407 U.S. 67 (1972). It appeared that the *Fuentes* rule had been crippled by the decision of the Supreme Court in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974). Many commentators saw no practical differences between the two cases, and read *Mitchell* as reversing *Fuentes sub silentio. See* Note, *Provisional Remedies and Due Process in Default—Mitchell v. W. T. Grant Co.,* 1974 WASH. U.L.Q. 653. *But cf.* 10 URBAN L. ANN. 243 (1975). The Court apparently believed them distinguishable, however, and declined to follow *Mitchell,* electing to follow *Fuentes* instead in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). The situation of the *Fuentes* rule may be analogous to that of the rule of *Roth* and *Sindermann.* It appears that the Court may engage in a process of resolving the seizure and garnishment cases by placing them either in the *Fuentes* or the *Mitchell* pigeonhole.

47. 395 U.S. at 340.

48. The Court considered the evil of the Wisconsin wage garnishment procedure to be the deprivation of the use of income without notice and a hearing

a prior hearing: "If the right to notice and a hearing is to serve its full purpose, . . . it must be granted at a time when the deprivation can still be prevented. . . . [N]o later hearing and no damage award can undo the fact that the arbitrary taking . . . has already occurred."[49]

A determination that a public employee has no property right in his position that entitles him to a pre-termination hearing absent a statute, administrative regulation, agreement or policy to the contrary, resolves only part of the due process problem, since the due process clause protects "liberty" as well as "property."[50] The *Roth* court spoke of "liberty" as the right "generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[51] Under the Court's analysis, a violation of an untenured teacher's liberty occurs when his dismissal or nonrenewal will "seriously damage his standing and associations in the community,"[52] or "impose . . . a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities."[53] While accepting the lower

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before the deprivation: "[A] prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing . . . this . . . procedure violates the fundamental principles of due process." *Id.* at 341-42.

49. 407 U.S. at 81-82. The property in question was a gas stove purchased on a conditional sales contract.

50. U.S. CONST. amend. XIV, § 1.

51. 408 U.S. at 572, *quoting* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

52. 408 U.S. at 573.

53. *Id.* "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). *See* Wieman v. Updegraff, 344 U.S. 183, 191 (1952); Wellner v. Minnesota State Junior College Bd., 487 F.2d 153 (8th Cir. 1973); Berry v. Hamblin, 356 F. Supp. 306 (M.D. Pa. 1973); Perkins v. Regents of Univ. of Cal., 353 F. Supp. 618 (C.D. Cal. 1973); *cf.* Black Students v. Williams, 470 F.2d 957 (5th Cir. 1972) (holding that students are entitled to prior hearing to prevent stigmatization from school board actions prior to suspension from public school); Williams v. Dade County School Bd., 441 F.2d 299 (5th Cir. 1971); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). *But cf.* Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 896 (1961); note 8 *supra*. Even the most damaging statements do not trigger due process protection if relegated to confidential files, Buhr v. Buffalo Pub. School Dist., 509 F.2d 1196 (8th Cir. 1974), or disclosed to the employee in a private session, Kaprelian v. Texas Women's Univ., 509 F.2d 133 (5th Cir. 1975) (filing allegations does not itself establish the basis for public stigma).

court's view that nonretention alone creates a serious impediment to a teacher's career,[54] the Court asserted: "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."[55] Critics have challenged the validity of this assertion.[56] In any event, decisions since *Roth* and *Sindermann* have failed to clarify just how great the stigma from nonrenewal must be to constitute a deprivation of liberty.[57]

Infringement upon constitutionally protected rights, other than "life," "liberty" or "property," are also subject to due process restraints. Thus the Supreme Court has repeatedly held that a public employee may not be denied employment for the exercise of first amendment rights, including freedom of expression,[58] freedom of association,[59] and

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54. 446 F.2d at 809.

55. 408 U.S. at 575. *See* Arnett v. Kennedy, 416 U.S. 134, 157 (1974).

56. Justice Douglas, dissenting, strongly disagreed with the majority view: "Nonrenewal of a teacher's contract is tantamount to a dismissal and the consequences may be enormous. Nonrenewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State." 408 U.S. at 585. Others have recognized the practical effects of nonrenewal. *See, e.g.*, Kallen, *The Roth Decision: Does the Nontenured Teacher Have a Constitutional Right to a Hearing Before Nonrenewal?*, 61 ILL. B.J. 464 (1973); Shulman, *Employment of Nontenured Faculty: Some Implications of Roth and Sindermann*, 51 DENVER L.J. 215 (1974); Van Alstyne, *The Supreme Court Speaks to the Untenured: A Comment on Board of Regents v. Roth and Perry v. Sindermann*, 58 A.A.U.P. BULL. 267 (1972).

57. *See, e.g.*, Lipp v. Board of Educ., 470 F.2d 802 (7th Cir. 1972); Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972); Russo v. Central School Dist., 469 F.2d 623, 630 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); Wilderman v. Nelson, 467 F.2d 1173 (8th Cir. 1972); McDowell v. Texas, 465 F.2d 1342 (5th Cir. 1971); Wellner v. Minnesota State Junior College Bd., No. 4-71 Civil 555 (D. Minn., Dec. 18, 1972); Franz v. Board of Educ., No. 772 Civil 151 (N.D. Ill., Aug. 10, 1972); Hostrop v. Board of Junior College Dist., 337 F. Supp. 977 (N.D. Ill. 1972).

58. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968) (teacher's criticism of school board not grounds for dismissal). Further, the Court has held that requiring an employee to take a loyalty oath has a "chilling effect" on his first amendment rights and is therefore impermissible. Keyishian v. Board of Regents, 385 U.S. 589 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964). *See also* Baird v. State Bar, 401 U.S. 1 (1971); Lamont v. Postmaster General, 381 U.S. 301 (1965). *But see* Laird v. Tatum, 408 U.S. 1 (1972). The imminent threat of dismissal may deter the exercise of first amendment rights as severely as a required loyalty oath, particularly if, as in *Roth*, the dismissing authority is not required even to state the reason for dismissal. *See* 408 U.S. at 578-79. *Cf.* Perry v. Sindermann, 408 U.S. at 598.

59. *See, e.g.*, Whitehill v. Elkins, 389 U.S. 54 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Baggett

free exercise of religion.[60] Nor can a state terminate public employment on grounds that amount to a denial of equal protection.[61] While it is clear that governmental discretion to terminate employment may not be exercised in violation of fundamental substantive rights, *Roth* and *Sindermann* fail to delineate the deprivation that must occur before a public employee is entitled to a hearing.[62] The Supreme Court held only that if there is a "genuine dispute" as to whether the employee's dismissal violated fundamental substantive rights, then is he entitled to a hearing.[63] The Court did not determine the type or time of such hearing.[64]

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v. Bullitt, 377 U.S. 360 (1964). *Cf.* Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Wieman v. Updegraff, 344 U.S. 183 (1952). All the foregoing cases struck down loyalty oaths for public employees. *See also* Shelton v. Tucker, 364 U.S. 479 (1960) (teacher may not be required to submit annually a list of all organizations to which he belonged during the year).

60. *See* Torcaso v. Watkins, 367 U.S. 488 (1961) (applicant may not be denied office of notary public for refusal to declare belief in God).

61. Trister v. University of Miss., 420 F.2d 499 (5th Cir. 1969); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967). It has never been necessary for the Supreme Court to hold that a public employee may not be dismissed on a racial basis, but the Court has often cited United Pub. Workers v. Mitchell, 330 U.S. 75 (1947): "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office'. . . ." *Id.* at 100.

62. In *Roth*, respondent's free speech claim was not before the Court, since the district court had granted summary judgment on the due process issue, 408 U.S. at 569, and stayed proceedings on the first amendment claim, *id.* at 574-75. In *Sindermann* the Court held only that respondent's free speech claim could withstand summary judgment. 408 U.S. at 598. The two opinions do not resolve the question of whether mere allegation by the employee that his dismissal was based on his exercise of first amendment rights entitles him to a hearing. *Cf.* Kaprelian v. Texas Women's Univ., 509 F.2d 133 (5th Cir. 1975).

63. 408 U.S. at 598. The Court did not give any guidelines as to when a "genuine dispute" might be found to exist.

64. The Court did not emphasize the importance of a hearing *before* termination. As a practical matter, even if the employee receives adequate notice of termination, the hearing will follow termination, since the employee must first prove his entitlement to a hearing. Cases following *Roth* and *Sindermann* illustrate that even when an employee is held to be entitled to a hearing, the hearing is likely to occur long after the employee's dismissal. *See* Wellner v. Minnesota State Junior College Bd., 487 F.2d 153 (8th Cir. 1973) (plaintiff's employment terminated on or about June 1, 1971, and hearing granted by effect of appeals decision of Oct. 23, 1973); Canady v. Butz, 480 F.2d 314 (4th Cir. 1973) (plaintiff's dismissal effective Nov. 12, 1970, and hearing granted by effect of court of appeals decision of June 11, 1973); Shumate v. Board of Educ., 478 F.2d 233 (4th Cir. 1973) (plaintiff's dismissal effective on or about June 1, 1972, and

The *Roth-Sindermann* rule is inadequate in terms of procedural due process. The rule narrowly confines the "property" and "liberty" protected by the fourteenth amendment;[65] it fails to protect substantive rights granted by the first and fourteenth amendments and does not clarify the law because of the failure to delineate a workable test to determine the boundaries of protected "property" interests.

A "better" rule was available to the Court when it decided *Sindermann* and *Roth*. The Fifth Circuit had ruled that an employee was entitled to a hearing before termination or nonrenewal if he had "an expectancy" of continued or renewed employment.[66] In *Sindermann*, however, the Court took the opportunity to dismiss the "expectancy"

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hearing granted by effect of court of appeals decision of Mar. 4, 1973); Stolberg v. Members of Bd. of Trustees, 474 F.2d 485 (2d Cir. 1973) (plaintiff dismissed Feb. 27, 1969, and hearing granted by effect of court of appeals decision of Jan. 29, 1973); Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972) (plaintiff dismissed Apr. 13, 1970, and hearing granted by effect of court of appeals decision of Nov. 20, 1972). The mean length of time between dismissal and the appellate court decision *granting* a hearing in these cases was approximately two years, five months. During this period the employee has lost his job and, arguably, a valuable property right.

65. Justice Marshall, dissenting in *Roth*, took a broad view of protected interests and was willing to recognize the employee's status in the public sector itself as deserving of some due process protection.

> In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying employment. This is the "property" right that I believe is protected by the Fourteenth Amendment and that cannot be denied "without due process of law." And it is also liberty—liberty to work—which is the "very essence of the personal freedom and opportunity" secured by the Fourteenth Amendment.

408 U.S. at 588-89.

66. Sindermann v. Perry, 430 F.2d 939, 943 (5th Cir. 1970), *aff'd*, 408 U.S. 593 (1972); notes 24-27 and accompanying text *supra*. *See* Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970); Pred v. Board of Pub. Instruction, 415 F.2d 851 (5th Cir. 1969). Other circuits had adopted similar positions. *See generally* Greene v. Howard Univ., 412 F.2d 1128, 1135 (D.C. Cir. 1969); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947). In *Bomar* Judge Learned Hand declared: "[W]e assume that . . . [plaintiff's] discharge by the Board was not a breach of contract at all. Nevertheless, it may have been the termination of an expectancy of continued employment, and *that is an injury to an interest which the law will protect.*" *Id.* at 139 (emphasis added).

A comprehensive definition of "expectancy" for these or any other purposes may be difficult to provide. For the purposes for which the term is used, a fair definition of an "expectancy" of continued or renewed employment would be "a reasonable belief" that employment will be renewed or continued. This definition appears to be consistent with those cases employing the expectancy test and sufficiently definite to produce consistent results in varying fact situations.

test.[67] This test is more desirable than the *Roth-Sindermann* rule because it more clearly identifies the minimum property interests to be protected by due process.[68] At the same time, by including some interests not considered "property" under the *Roth-Sindermann* rule, the expectancy test gives more adequate protection to the substantive rights of public employees. Consequently, in terms of both the clarity and the substance of the test, the expectancy doctrine is preferable to the *Roth-Sindermann* approach for determining the applicability of due process to public employee dismissals and nonrenewals.

Paul E. Ground

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67. "We disagree with the Court of Appeals insofar as it held that a mere subjective 'expectancy' is protected by procedural due process." 408 U.S. at 603.

68. At least one writer disagrees, finding the *Roth-Sindermann* test praiseworthy. 61 Ky. L.J. 830, 844 (1973). Reading *Roth* and *Sindermann* together with earlier cases, he asserts that the question of whether a property interest qualifies for due process protection is determined by whether or not it has "vested." *Id.* at 842-44. If this were the case, the rule of *Roth* and *Sindermann* would be more supportable, since its application would be clearer. Unfortunately, as the writer admits, "The full theoretical ramifications of the entitlement, or 'vested right,' idea in the area of governmental largess is as yet highly conjectural." *Id.* at 842.

The lack of clarity in the *Roth-Sindermann* rule may result in part from the incremental decisionmaking style of the present Supreme Court. Professor Van Alstyne discusses this problem in an outstanding article written prior to the decisions in *Roth* and *Sindermann*. His comments on incrementalism are prophetic. *See* Van Alstyne, *Constitutional Rights of Teachers and Professors*, 1970 Duke L.J. 841.