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wife's separate portion of the recovery been properly submitted in earlier cases, courts would have reached different conclusions.[38]

V. CONCLUSION

Franco and *Kirkpatrick* have put forth the best arguments for the constitutionality of article 4615. The inequity of denying a spouse separate property recovery for injuries to his or her person would now appear to be alleviated. The reasoning and result in the two cases are supported both by the legislative history of the new article 4615[39] and the comments of those who have argued the inequity of the community property defense.[40]

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Prior Notice and Hearing Before Attaching a Badge of Disgrace

A Wisconsin statute gave certain persons the power to prevent the sale of intoxicating beverages to "drunks."[1] The justification for this power was to prevent such an individual from endangering the well-being of himself, his family, and his community.[2] The police chief of Hartford, Wisconsin, acting pursuant to the statute, caused Mrs. Constantineau's name to be "posted" in all local retail liquor outlet stores as one to whom intoxicating beverages could not be sold. The statute did not require a hearing before posting, and Mrs. Constantineau had no prior notice or opportunity to contest the posting of her name. Mrs. Constantineau sought and was granted injunctive relief by a three-judge federal court.[3] That court found the statute unconstitutional on procedural due process grounds—the absence of any provisions for prior notice and opportunity to be heard. The United States Supreme Court noted probable jurisdiction.[4] *Held, affirmed*: "Where a person's good name, reputation, honor, or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

tion of art. 4615, see Reeves v. Rodriguez, 458 S.W.2d 546 (Tex. Civ. App.—Beaumont 1970), where the court held that fact situations which occurred prior to Jan. 1, 1968 (effective date of art. 4615) were not affected by art. 4615. The court did not deal with the constitutional issue but merely said that "under the statutory and case law as it existed at the time the cause of action accrued, the recovery of the plaintiffs for the injury would have been community property." 458 S.W.2d at 548.

[38] No. 8026, at 11 (Tex. Civ. App.—Texarkana, Sept. 28, 1971).

[39] McKnight, *Personal Injury as Separate Property*, 3 TEX. TRIAL LAW. F. 7 (1968).

[40] Green, *The Community Property Defense in Personal Injury and Death Actions*, 33 TEXAS L. REV. 88 (1954).

[1] "[T]he wife of such person, . . . supervisors, . . . mayor, chief of police, . . . aldermen, . . . trustees, . . . superintendent of the poor, . . . chairman of the county board of supervisors, . . . district attorney, . . . may . . . forbid all persons knowingly to sell or give away to such person any intoxicating liquors . . . ." WIS. STAT. § 176.26 (1957). *Id.* § 176.28 makes the sale or gift of liquor to such persons a misdemeanor.

[2] *Id.* § 176.26.

[3] Constantineau v. Grager, 302 F. Supp. 861 (E.D. Wis. 1969).

[4] Wisconsin v. Constantineau, 397 U.S. 985 (1970).

I. DUE PROCESS REQUIREMENTS

"It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."[5]

The concept of due process is elusive and incapable of precise definition.[6] It has been described as "the primary and indispensable foundation of individual freedom . . . the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."[7] Central to this concept are the requirements of notice and opportunity to be heard,[8] which are essential to the preservation of our adversary system of justice.[9]

A. *Notice and Opportunity To Be Heard*

The opportunity to be heard before condemnation of property or person is a notion deeply rooted in the common law.[10] Indeed, the right to be heard has been called "the fundamental requisite of due process"[11] and "prerequisite to due process."[12] The requirement of a hearing, however, is far from absolute. Rather, it is prefaced with the existence of a "sufficient" interest in the aggrieved party and the absence of an "overriding" interest in the government.[13] It is the relative weight of these interests which determines the necessity of prior hearing.

What constitutes a sufficient interest or right is a problem which plagues the courts less now than it did in the past.[14] The well-known doctrine of

[5] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

[6] 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contents . . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

Hanna v. Larche, 363 U.S. 420, 442 (1960).

[7] *In re* Gault, 387 U.S. 1, 20 (1966).

[8] "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." *Ex parte* Wall, 107 U.S. 265, 289 (1882) (quoting Daniel Webster's definition of due process from Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 581 (1819)).

[9] "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence . . . . " *In re* Oliver, 333 U.S. 257, 273 (1947).

[10] Galpin v. Page, 85 U.S. (18 Wall.) 350 (1873). *See also* Hovey v. Elliot, 167 U.S. 409 (1897); Windsor v. McVeigh, 93 U.S. 276 (1876); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 581 (1819).

[11] Grannis v. Ordean, 234 U.S. 385, 394 (1914).

[12] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring).

[13] "The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet . . . unfavorable evidence of adjudicative facts, except in rare circumstances when some other interest, such as national security, justifies an overriding of the interest in a fair hearing." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 412 (1958) [hereinafter cited as DAVIS].

[14] "No longer is the usual inquiry the relatively crude one of whether a party is entitled

"privilege" is so riddled with exceptions that it may be fairly classified as nonexistent in the fields in which it was once problematic.[15] Many cases have held that a constitutional challenge cannot be answered by the argument that the private interest involved is only a "privilege" and not a "right."[16] The courts are no longer willing to rely on such an inflexible classification; instead, they are taking a realistic look at the impact of the governmental action in determining the reach of due process.[17]

To be balanced against the sufficient private interest is the interest behind the governmental action.[18] As a general rule, an emergency or an overriding interest is not enough to dispense with a hearing requirement altogether.[19] But summary governmental action may be deemed justified under certain circumstances and the hearing suspended until a later date.[20] Some sort of belated hearing requirement is generally found, even in the face of a situation too urgent for a prior hearing.[21] Such a situation usually places the preservation and repose of the community or the protection of a large class

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to 'hearing.' More often it is, as it should be, into the question of what kind of hearing is appropriate. 1 DAVIS § 7.20, at 367 (Supp. 1970).

[15] The basic idea of "privilege" is that a person does not have a right to something the government has provided gratuitously or something which has not been enunciated as a right per se. Under the "privilege" doctrine, if a private citizen had an injured interest which was not a right per se, he was precluded from asserting hearing requirements and other due process protections. The interest of the citizen, in effect, was not worthy of protection. For a comprehensive discussion see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[16] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); Thorpe v. Housing Auth., 386 U.S. 670 (1967) (public housing); Spevack v. Klein, 385 U.S. 511 (1967) (disbarment); Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment compensation); Fleming v. Nestor, 363 U.S. 603 (1960) (social security); Slochower v. Board of Educ., 350 U.S. 551 (1955) (public employment); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964) (liquor store license); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961) (education at state college). *Contra*, Dyer v. SEC, 287 F.2d 773 (8th Cir. 1961); Smith v. Board of Comm'rs, 259 F. Supp. 423 (D.D.C. 1966); *In re* Tucker, 486 P.2d 657, 95 Cal. Rptr. 761 (1971).

[17] *See* Boddie v. Connecticut, 401 U.S. 371 (1971), in which the Court found that a cost requirement for divorce proceedings offended due process because it deprived a certain class of the opportunity to be heard. "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons . . . must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that '(w)herever one is assailed in his person or his property, there he may defend.' " *Id.* at 377.

[18] Goldberg v. Kelly, 397 U.S. 254 (1970). In this case the Court formally abandoned the traditional notion of viewing welfare benefits as a mere gratuity subject to summary action. A balancing test was substituted, and the Court held that the plaintiff's interest (in a means of survival) outweighed the "government's interest in conserving fiscal and administrative resources." *Id.* at 265.

[19] An exception appears in national security cases, in which a hearing requirement may be completely overridden by the governmental interest in suppressing evidence and sources. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) (private employee denied access to military base for "security" reasons). *See also* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). This exception has been criticized by Justice Brennan: "[T]he government official . . . may employ 'security requirements' as a blind behind which to dismiss at will for the most discriminatory of causes." 367 U.S. at 900 (Brennan, J., dissenting).

[20] *See, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (seizure of mislabeled vitamin product); Fahey v. Mallonee, 332 U.S. 245 (1947) (action of conservator taking possession of a bank); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (seizure of food not fit for human use); R.A. Holman & Co. v. SEC, 299 F.2d 127 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962) (suspension of exemption from stock registration requirement).

[21] *See, e.g.*, note 20 *supra*.

of people in such jeopardy that an exception to procedural safeguards becomes necessary.[22]

Once a hearing requirement is established, the concerned parties must be informed of the pendency of the hearing. The requirement of notice is an essential complement of the right to be heard. In *Mullane v. Central Hanover Trust Co.*[23] the Supreme Court stated: "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."[24] Notice must be in a form reasonably calculated to apprise the affected parties of the action against them and provide a reasonable time and opportunity to be heard.[25] Thus, post-hearing notice has been held inadequate.[26]

B. *Circumvention of the Privilege Concept*

When a private interest falls short of being a right per se, the courts have taken several approaches in determining whether the interest affected is entitled to due process protections.[27] Three such approaches are: (1) the traditional due process requirements applied to the infringement of a private interest;[28] (2) the newer method of balancing the particular private and governmental interests;[29] (3) the underlying necessity of curbing arbitrary discretion in the hands of officials.[30]

Traditional Due Process. The essence of this approach is that the government must act fairly even though it has the authority to control a particular area. The classification of an interest as a privilege instead of a right has been held not to free the government from its responsibility to act with fairness.[31] *Powell v. Alabama*[32] illustrates this concept. There the Court, in effect, ad-

[22] *See* notes 19, 20 *supra.*

[23] 339 U.S. 306 (1950).

[24] *Id.* at 314.

[25] This standard was said to be an "elementary and fundamental" requirement of due process. *Id.*

[26] *See, e.g.*, Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941); United States v. Illinois Cent. R.R., 291 U.S. 457 (1934); Londoner v. City & County of Denver, 210 U.S. 373 (1908). The above cases dealt with "property" rights, but the principle is the same when the private interest subjected to harm or loss involves "liberty" or "quasi-property" rights. *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971) (suspension of automobile license); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits); Armstrong v. Manzo, 380 U.S. 545 (1965) (failure to give a divorced father notice of pending proceedings for the adoption of his child); Dixon v. Alabama State Bd. of Educ., 194 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (student entitled to notice and opportunity for hearing before he could be expelled from a tax-supported college). *See also* Gayton v. Cassidy, 317 F. Supp. 46 (W.D. Tex. 1970), *rev'd*, 403 U.S. 902 (1971) (in view of Bell v. Burson, *supra*).

[27] *See generally* 1 DAVIS § 7.12 (1958); Van Alstyne, *supra* note 15.

[28] Van Alstyne, *supra* note 15, at 1451.

[29] Goldberg v. Kelly, 397 U.S. 254 (1970).

[30] Slochower v. Board of Educ., 350 U.S. 551 (1955); Weiman v. Updegraff, 344 U.S. 183 (1952).

[31] "One may not have [a] constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law." Homer v. Richmond, 292 F.2d 719, 722 (D.C. Cir. 1961). Judge Fahey's well-known statement supported the court's conclusion that charges of unsuitability for a radio telegraph license required a hearing, and the absence of such a hearing was a denial of due process.

[32] 287 U.S. 45 (1932).

mitted that although the state's provision for court-appointed counsel was not constitutionally required,[33] the right to counsel, if given, must be administered fairly. The government may dispense gratuities, but, unlike private entities, it is bound by the requirements of procedural due process. Thus, an individual may not have a right per se to governmental largess,[34] but he does have a right to fair treatment in the administration of that largess. Even in areas in which the government's power to set substantive standards may be unquestionable, the methods of determining whether such standards have actually been breached must at least comply with minimal procedural safeguards.[35]

Goldberg Balancing Test. In *Goldberg v. Kelly*[36] there was a direct confrontation with the "right-privilege" dichotomy, but the Supreme Court chose to apply a more realistic approach. The approach, which weighs the relative interests of the parties, was not really new. An implicit balancing test was evident in pre-*Goldberg* cases determining whether the important right of the opportunity to be heard should be forfeited. One example is *Cafeteria & Restaurant Workers Union v. McElroy*:[37] "[C]onsideration of what procedures due process may require under any set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."[38]

There is naturally some overlap between the *Goldberg* balancing test and the traditional due process test, which was ostensibly controlling in *Cafeteria Workers*. The key difference in *Goldberg* was the Court's formalization of a consideration of the *actual* interests involved. The impact of the government's action, rather than the perfunctory classification of an interest as a right or privilege, was the controlling issue.[39]

"Grievous loss"[40] (actual, substantial, adverse impact on a private interest) has been used to describe an interest sufficient to require due process protection, and the flexible nature of such a concept allows realistic remedies. When a private interest involves freedom from social stigma or loss of reputation, the familiar label "badge of infamy" has often been applied.[41] The concept of

[33] *Powell* was decided prior to Gideon v. Wainright, 372 U.S. 335 (1963), which made the sixth amendment right to counsel applicable to the states through the fourteenth amendment.

[34] 1 DAVIS § 7.12, at 456 (1958).

[35] Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).

[36] 397 U.S. 254 (1970); *see* note 18 *supra*, and accompanying text.

[37] 367 U.S. 886 (1961). *Cafeteria Workers* is one of the unusual cases dispensing with a hearing requirement. The court based its decision on the fact that plaintiff was only losing a job at a particular military base (her employer had offered her work elsewhere). The Government's asserted interest was in national security. The dissent argued that more than a job was at stake: the Government may have attached a "badge of infamy" by labelling plaintiff a "security risk." *Id.* at 901-02. For a recent balancing case in which an indigent's interest in obtaining a legal divorce was held to outweigh the state's interest in preventing frivolous litigation and maintaining scarce funding, see Boddie v. Connecticut, 401 U.S. 371 (1971).

[38] 367 U.S. at 895.

[39] *See* note 16 *supra*, and accompanying text.

[40] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

[41] The Supreme Court has used language which indicates that an interest in reputation, community standing, or future job opportunity is entitled to constitutional protection. This

"grievous loss" may also apply to the use of one's wages,[42] or public housing,[43] or welfare benefits.[44] A hearing is prerequisite to any such substantial loss caused by the government.[45] It is this flexible, realistic evaluation of the damaged private interest that enables the courts to avoid becoming bogged down with the theoretical determination of whether the interest is life, liberty, or property under the Federal Constitution.[46]

Arbitrary Discretion. While there is strong authority for the proposition that arbitrary laws offend due process,[47] the notion of arbitrary discretion in the hands of public officials has not been frequently used as a controlling issue in determining hearing requirements. However, when courts faced with "hearing" questions have found that a private interest was injured by the arbitrary discretion of a government official, without a hearing, a remedy has been found.[48]

The first application of this test of arbitrary discretion with regard to hearing requirements was in *Weiman v. Updegraff*.[49] Completely disregarding the "privilege" doctrine, the Court said: "We need not pause to consider

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concept developed primarily in disloyalty cases which arose at a time when internal communism was seen as a more serious threat than it is today. *See, e.g.*, Slochower v. Board of Educ., 350 U.S. 551 (1956); Weiman v. Updegraff, 344 U.S. 183 (1952); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951). While loss of reputation as the result of government action exposing an individual's abuse of alcohol has never been a controlling issue, dicta recognizing the problem is provided in Powell v. Texas, 392 U.S. 514 (1968):

> The fact that a high percentage of American alcoholics conceal their drinking problems, not merely by avoiding public displays of intoxication, but also by shunning all forms of treatment, is indicative that some powerful deterrent operates to inhibit the public revelation of the existence of alcoholism. Quite probably this deterrent effect can be largely attributed to the harsh moral attitude which our society has traditionally taken toward intoxication and the shame which we have associated with alcoholism. Criminal conviction represents the degrading public revelation of what Anglo-American society has long condemned as a moral defect, and the existence of criminal sanctions may serve to reinforce this cultural taboo, just as we presume it serves to reinforce other, stronger feelings against murder, rape, theft, and other forms of antisocial conduct.

Id. at 530-31.

[42] Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). *Sniadach* involved another Wisconsin statute that provided for prejudgment wage garnishment. The Supreme Court struck down the statute, refusing to accept the contention that plaintiff had not lost a property right, but merely the use of that property before the hearing. The Court realistically acknowledged the impact on the plaintiff of having his wages inaccessible pending the final outcome.

[43] Thorpe v. Housing Auth., 386 U.S. 670 (1967).

[44] Goldberg v. Kelly, 397 U.S. 254 (1970).

[45] *Id.* at 261. *See generally* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965).

[46] The "privilege" doctrine requires an injury to a vested right (life, liberty, or property) before remedial action under the due process clause becomes available. This has engendered scholastic interpretations of what is included or excluded from life, liberty, or property. *See generally* Van Alstyne, *supra* note 15.

[47] "[T]he guaranty of due process as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious . . . ." Nebbia v. New York, 291 U.S. 502, 525 (1933). *See also* Barsky v. Bd. of Regents, 347 U.S. 442 (1953).

[48] *See, e.g.*, Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Slochower v. Board of Educ., 350 U.S. 551 (1955); Wieman v. Updegraff, 344 U.S. 183 (1952); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Heckler v. Shepard, 243 F. Supp. 841 (E.D. Idaho 1965); State v. Parham, 412 P.2d 142 (Okla. 1966).

[49] 344 U.S. 183 (1952).

whether an abstract *right* to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."[50] The protection embraces not only the specific interest at hand, but also a broader interest in the curtailing of arbitrary action. Hence, the notion that an individual should be free from arbitrary action may be a sufficient interest in itself.[51] Mr. Justice Cardozo has characterized the protection of individuals from arbitrary government action as the essence of due process.[52] Thus, the state may have broad rights in controlling the discharge of its employees[53] or the regulation of its liquor licenses;[54] nevertheless, "this is something quite different from a right to act arbitrarily and capriciously."[55]

The arbitrary discretion test is not without limitations. Difficulty arises when it is impossible for an individual to prove that an official has acted arbitrarily. If arbitrariness cannot be proven, the aggrieved party must show a substantial injury.[56] If neither can be shown, no hearing will be required.[57] For the courts to require a hearing in the face of a compelling government interest, either arbitrary and capricious action must actually be shown, or an equally compelling private injury must exist.[58]

II. Police Power and Intoxicating Beverages

The power of the state to control intoxicating beverages is extremely

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[50] *Id.* at 192 (emphasis added).

[51] Slochower v. Board of Educ., 350 U.S. 551 (1955).

[52] Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 302 (1937). The equal protection clause has also been extended to include this principle. For a case in which Jehovah's Witnesses were denied equal protection through "completely arbitrary and discriminatory refusal" to grant park permits, see, Niemotko v. Maryland, 340 U.S. 268, 273 (1951).

[53] Slochower v. Board of Educ., 350 U.S. 551 (1955); Wieman v. Updegraff, 344 U.S. 183 (1952).

[54] Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964).

[55] *Id.* at 609. *See also* Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964) (disbarment found to be arbitrary and capricious).

[56] In Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961), a citizen was summarily denied her private employment on a military installation for security reasons. The Court specifically assumed that petitioner "could not constitutionally have been excluded . . . if the announced grounds had been patently arbitrary or discriminatory." *Id.* at 898. While this was so, in the absence of evidence that the discharge was arbitrary, the Court denied relief on the theory that a rational reason had been advanced by the Government (security risk).

[57] *Id.*

[58] Professor Davis explains this apparent inconsistency as follows:

> Racial or religious discrimination against a citizen is forbidden by the Constitution in all kinds of governmental activities, whether rights or privileges or gratuities are affected. A citizen who is thus discriminated against has a constitutional right to be free from such discrimination whether the interest that is affected by the discrimination is important or unimportant and whether it is a right or a privilege or gratuity. A citizen's right to be free from racial or religious discrimination is a right which can stand alone, irrespective of the other interests that may be affected or unaffected. But the right to a hearing is by its intrinsic nature dependent upon what interest is involved; if the interest is sufficiently insignificant, a hearing may be wasteful. Furthermore, the right to a hearing may be overridden by opposing interests, such as a national security interest in nondisclosure of secret information.

1 DAVIS § 7.12, at 337 (Supp. 1970).

broad.[59] The primary source of this power is the twenty-first amendment,[60] which gives the states broad regulatory power over liquor traffic within their own territory.[61] "A state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders."[62] Thus, there can be no question that a state, by the exercise of its authority through the twenty-first amendment, is fully competent to regulate every phase of traffic in intoxicating beverages.[63]

Although the states do have broad power to regulate in this area, that power must be applied in a fair and reasonable manner. This interaction between the power to regulate alcoholic beverages and the due process clause was developed by the Supreme Court in *Ziffrin v. Reeves.*[64]

> Without doubt a state may absolutely *prohibit* the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures *reasonably* appropriate to effectuate these inhibitions and exercise full police authority in respect of them. . . . Having absolutely the power to prohibit manufacture, sale, transportation, or possession, . . . [is] it permissible for [the state] to *permit* these things only under definitely prescribed conditions?[65]

The reasonableness of "definitely prescribed conditions" was discussed by the Fifth Circuit in *Hornsby v. Allen.*[66] That case dispensed with the "privilege" doctrine[67] as it related to the issuance of liquor licenses, and the court held that state regulation must comply with due process requirements.[68]

The state may also have an interest in controlling intoxicating beverages because of the unusual and noxious characteristics of alcohol.[69] The *Hornsby* court dealt with this assertion by stating:

> Neither is the . . . menace to public health and welfare a sufficient answer. . . . The potential social undesirability of the product may warrant absolutely prohibiting it, or . . . imposing restrictions to protect the community from its harmful influences. But the dangers do not justify [the deprivation] of the customary constitutional safeguards. Indeed, the great social interest . . . makes an exceptionally strong case for adherence to proper procedures and access to judicial review . . . .[70]

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[59] *See, e.g.*, Seagram & Sons v. Hostetter, 384 U.S. 35 (1966); Ziffrin v. Reeves, 308 U.S. 132 (1939); Barbour v. Georgia, 249 U.S. 454 (1919); Crane v. Campbell, 245 U.S. 304 (1917); Crowley v. Christensen, 137 U.S. 86 (1890). *See also* Note, *The Twenty-First Amendment Grants States Plenary Power Over the Liquor Industry*, 8 HOUS. L. REV. 587 (1971).

[60] "The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2.

[61] United States v. Frankfort Distilleries, 324 U.S. 293, 299 (1945); *cf.* Nippert v. Richmond, 327 U.S. 416, 425 (1946).

[62] Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 330 (1964).

[63] *Id. See also* note 59 *supra.*

[64] 308 U.S. 132 (1939).

[65] *Id.* at 138 (emphasis added).

[66] 326 F.2d 605 (5th Cir. 1964).

[67] *See* note 15 *supra*, and accompanying text.

[68] 326 F.2d at 609; *see* note 54 *supra*, and accompanying text.

[69] *See* note 59 *supra.*

[70] 326 F.2d at 609.

III. WISCONSIN v. CONSTANTINEAU

In *Wisconsin v. Constantineau*[71] the Supreme Court recognized the broad power of the state to regulate and control the evils described in the state statute.[72] The only issue was whether the label or characterization attached to a person by "posting" established a sufficient interest to warrant due process requirements of notice and hearing.[73] While never so held, it seems unquestionable that a "stigma or badge of disgrace"[74] would qualify under the "grievous loss" concept as a sufficient private interest.[75] The Court, recognizing the primacy of Mrs. Constantineau's interest in her reputation, met the sufficiency issue squarely. Although the Court did not articulate the particular test it used in reaching its decision, its treatment of this case indicates that the balancing test was probably applied.

Using the balancing test, the fact that the interest was not a right per se would not have had any bearing on the existence of a hearing requirement.[76] The lower court dissent[77] provided a good illustration of the older and diminishing "right-privilege" dichotomy. "We note that plaintiff's attorney, both in his brief and in oral argument, conceded the right of his client to drink intoxicating liquors is not a right protected by the United States Constitution."[78] Even though the proper interest at stake was loss of reputation (not plaintiff's inability to drink), the lower court dissent apparently would make no distinction because neither is a right per se under the Constitution. Although the Supreme Court did not explicitly apply a balancing test, it clearly was not content to foreclose consideration after classifying drinking as a non-right. Instead, the impact of the government's action was considered in determining the severity of the injury to plaintiff's overall interest.[79]

The total impact of the government's action was to attach a stigma or badge of disgrace. While the Court used the words "grievous loss" on the plaintiff's behalf and, on the other hand, spoke of the state's broad power to deal with the evils of alcohol,[80] the *Goldberg* balancing test was not enunciated. The result, however, was that the state's interest was held not to override the individual's interest in "good name, honor, or integrity"[81] to the elimi-

[71] 400 U.S. 433 (1971).
[72] *Id.* at 436.
[73] *Id.*
[74] *Id.*
[75] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). For cases on the importance of reputation, see note 41 *supra. See also* Willner v. Zuckert, 371 U.S. 531 (1962); Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964); Heckler v. Shepard, 243 F. Supp. 841 (E.D. Idaho 1965).
[76] The traditional due process approach, on the other hand, would require only procedural fairness in determining whether a state interest had been breached. Using that standard in the principal case, an objective finding that Mrs. Constantineau was indeed abusing the use of alcohol would have been required before the government could "post" her name. Assuming such a finding could be accomplished without a hearing, this might have been a legitimate state action because plaintiff's interest in purchasing and consuming alcohol fell short of being a protected right. The Court did not question Wisconsin's authority to control the sale and consumption of liquor. 400 U.S. at 436.
[77] Constantineau v. Grager, 302 F. Supp. 861, 865 (E.D. Wis. 1969) (Duffy, J., dissenting).
[78] *Id.*
[79] *See* note 17 *supra*, and accompanying text.
[80] 400 U.S. at 436-37.
[81] *Id.* at 437.

nation of notice and hearing requirements. In effect, the Court said the statute would not have been declared unconstitutional: (a) had the private interest been of lesser importance; or (b) if the government's interest had been compelling or based on an emergency.[82]

The Court also used language indicating the presence of the third approach —arbitrary discretion.[83] While this approach was not controlling, it was obviously an influential force in granting relief. Still, following the reasoning in *Cafeteria Workers*, this approach would require a showing of discrimination, arbitrariness, or caprice in order to require a hearing on its own strength. Mrs. Constantineau made no attempt to make such a showing or even deny the allegations against her. Without this, a sufficient private interest (as opposed to the general interest in curbing arbitrary discretion) on which to base the hearing requirement had to be shown.[84] Since arbitrariness was not shown, the right to a hearing apparently was not, in itself, strong enough to overcome the state's interest.[85] Thus, the decision could not be based on arbitrary discretion alone.

IV. CONCLUSION

It is significant that the Court did not limit itself to a consideration of Mrs. Constantineau's inability to purchase alcohol in her home town as her only interest. The lower court dissenting judge allowed himself to be convinced by this argument[86] and implied that relief should have been denied because drinking is a "privilege" and not a "right."[87] This approach would belie the intent of *Sniadach v. Family Finance Corp.*,[88] and *Goldberg*;[89] *i.e.*, that the impact of government action must be viewed in its realistic application—that a loss does not have to be of a "right" to be "grievous," and, hence, entitled to constitutional protection.

The most telling impact of *Constantineau* is that it represents an ever-increasing recognition by the courts of the need of individual protection in areas which have heretofore been deemed insignificant. The citizens who most need judicial protection are generally the ones whose lack of legal

[82] The lack of any hearing requirement could be justified only by the existence of an overriding governmental interest comparable to national security. *See* note 13 *supra*, and accompanying text. The record showed no evidence to substantiate the conclusion that plaintiff's alleged abuse of alcohol was such a threatening and imminent danger.

[83] "She may have been the victim of an official's caprice." 400 U.S. at 437. "And here the Wisconsin law purports on its face to place such arbitrary and tyrannical power in the hands of minor officers and others that these modern bills of attainder can be issued *ex parte*, without notice or hearing of any kind or character." *Id.* at 444 (Black, J., dissenting on abstention grounds).

[84] For a discussion of the state's interest in controlling alcohol and arbitrary discretion, see Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964). *See also* Barskey v. Board of Regents, 347 U.S. 442, 470 (1954) (Frankfurter, J., dissenting): "If a State licensing agency lays bare its arbitrary action, or if the *State* law explicitly allows it to act arbitrarily, that is the kind of State action which the Due Process Clause forbids."

[85] *See* note 58 *supra*, and accompanying text.

[86] "Here, it can be stated that while bartenders in Hartford were prohibited from selling intoxicating liquors to the plaintiff, such prohibition was restricted to the city of Hartford and for a period of one year." Constantineau v. Grager, 302 F. Supp. 861, 866 (E.D. Wis. 1969) (Duffy, J., dissenting).

[87] *See* note 77 *supra*, and accompanying text.

[88] 395 U.S. 337 (1969); *see* note 42 *supra*.

[89] 397 U.S. 254 (1970).

sophistication and awareness prevents their assertion of that need.[90] Despite the absence of a theoretically sound, or scholastically interpreted, *right per se,* the wage earner,[91] the welfare recipient,[92] and now an alleged "town drunk" have protection from action by the government without a prior hearing.

The dicta in *Constantineau* maligning the uncurtailed use of discretion is another healthy sign.[93] This area has been comprehensively analyzed by legal scholars,[94] and much has been written indicating that the same arbitrary discretion problems are to be found in the arena of federal agency proceedings.[95] *Constantineau* emphasizes the necessity of hearing guidelines for government officials who are vested with discretionary power over private citizens.[96]

The Court in *Constantineau* did not speak of the right to be heard as one capable of standing on its own strength. However, by expanding constitutional protection to "grievous loss" in the form of a social stigma, the substance of this concept was accomplished. The Court has subsequently inched further towards viewing the opportunity to be heard as a right per se. In *Boddie v. Connecticut,*[97] after speaking of the vital rights of religious freedom, free speech, and assembly, the Court said: "No less than these rights, the right to a meaningful opportunity to be heard, within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals."[98] This dictum might be expanded to include other powers which are particularly susceptible to abuse at the hands of government officials.[99]

The Court's opinion in *Constantineau* reveals a flexible and realistic approach. It strips the due process clause of its dryly logical application and implies that a substantial interest (however unorthodox) may not hereafter by injured without the requirements of prior notice and the opportunity to be heard.

M. Russell Kruse, Jr.

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[90] *See* Reich, *supra* note 45, at 1255.

[91] Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[92] Goldberg v. Kelly, 397 U.S. 254 (1970).

[93] *See* note 83 *supra.*

[94] In a lengthy written debate between Kenneth Culp Davis and Raoul Berger, § 20(e) of the Administrative Procedure Act, 5 U.S.C. § 1009 (1964), was the main topic of dispute. *See* (chronologically): Berger, *Administrative Arbitrariness and Judicial Review,* 65 COLUM. L. REV. 55 (1965); 4 DAVIS § 28.16 (Supp. 1965); Berger, *Administrative Arbitrariness—A Reply to Professor Davis,* 114 U. PA. L. REV. 783 (1966); Davis, *Administrative Arbitrariness—A Final Word,* 114 U. PA. L. REV. 814 (1966); Berger, *Administrative Arbitrariness—A Rejoinder to Professor Davis' "Final Word,"* 114 U. PA. L. REV. 816 (1966); Davis, *Administrative Arbitrariness—A Postscript,* 114 U. PA. L. REV. 823 (1966); Berger, *Administrative Arbitrariness—A Sequel,* 51 MINN. L. REV. 601 (1967).

[95] *See* note 94 *supra.*

[96] *See* note 83 *supra.*

[97] 401 U.S. 371 (1971).

[98] *Id.* at 379-80.

[99] The compilation and maintenance of dossiers on student radicals and other domestic surveillance by Government agencies, such as the U.S. Army, could be very damaging to an individual who has no chance to defend against the allegations. However, the Government could possibly hide behind the cloak of "national security" as an overriding interest. *See* note 19 *supra. See generally* N.Y. Times, Feb. 25, 1971, at 15, col. 1; *id.,* Feb. 24, 1971, at 1, col. 5. At least two elected officials have said they will offer a citizen's privacy bill that would permit individuals to have access to all government files kept on them, to have the right to rebut derogatory statements therein, and to limit disclosure of that data without their permission. *Id.,* Feb. 26, 1971, a 8, col. 3; *id.,* Feb. 24, 1971, at 1, col. 5.