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ENGLISH NATURAL JUSTICE AND AMERICAN DUE PROCESS: AN ANALYTICAL COMPARISON

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Among the most actively litigated areas of American constitutional law in recent years has been the issue of the availability of a hearing when governmental administrative action causes some harm to the individual. The significant actions now requiring some right to be heard include deprivation of welfare benefits,[1] dismissal of a government employee,[2] suspension of a student,[3] official injury to reputation,[4] and revocation of parole or probation.[5] This right, of course, stems from the fifth and fourteenth amendments to the Constitution, which together provide that neither the federal government nor the states shall deprive any person of life, liberty, or property without due process of law. The surge of procedural due process litigation in the last six years, based on constitutional provisions of long standing, can be attributed, at least in part, to the proliferation of administrative power and the correspondingly broader range of administrative decisions which can and do have major consequences for individuals. In addition, much of today's wealth is in the form of various governmental entitlements,[6] and thus the administrative procedures by which these entitlements are granted, modified, allocated, and withdrawn have become a major force in American life.

The importance of the administrative process is not, of course, peculiar to the United States. In the United Kingdom there exists an administrative structure probably more capable of affecting the lives of individuals, and just as there has been an American "due process revolution," so also has there been a parallel development in British legal principles. Yet, without a written constitution and therefore without a close analogue to our due process clause, the British protection of the individual in the administrative process

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

2. Connell v. Higginbotham, 403 U.S. 207 (1971). *But see* Bishop v. Wood, 96 S. Ct. 2074 (1976).

3. Goss v. Lopez, 419 U.S. 565 (1975).

4. Wisconsin v. Constantineau, 400 U.S. 433 (1971). *But see* Paul v. Davis, 96 S. Ct. 1155 (1976).

5.Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

6. *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

has developed along rather different lines. This Article will analyze the procedural protection of the individual in the English legal system, with particular emphasis on a comparison of the American and English approaches to common legal and practical problems in this area. Much of this Article therefore will be devoted to comparing how the English and American systems have responded to the growing demands for procedural protection in areas such as deprivation of "privileges" and revocation of licenses where such protection traditionally has not been granted.

The basis of procedural protection in the English system is the concept of *natural justice.*[7] Natural justice is not, despite its name, a general natural law concept; the name is a term of art that denotes specific procedural rights in the English system.[8] Natural justice includes two fundamental principles. The first, *audi alteram partem,*[9] relates to the right to be heard; the second, *nemo debet esse judex in propria sua causa* or *nemo judex in re sua,*[10] establishes the right to an unbiased tribunal. Although it has been suggested that there are other fundamental components of natural justice, such as the right to counsel, the right to a statement of reasons, the right to prior notice of the charges, and similar procedural safeguards, the generally accepted view is that these rights, if they exist at all, must be found as parts of the two basic principles and do not exist as separate rights.[11] The first part of this Article will examine the history and development of natural justice and the basic protections granted by its fundamental principles.

Two initial problems arise in the definition and administration of

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7. There are a number of general works dealing, at least in part, with the concept of natural justice. Among the most prominent are D. BENJAFIELD, PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW (4th ed. 1971); S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (2d ed. 1968); D. FOULKES, INTRODUCTION TO ADMINISTRATIVE LAW 149-67 (3d ed. 1972); J. GARNER, ADMINISTRATIVE LAW 111-25 (3d ed. 1970); J. GRIFFITH & H. STREET, PRINCIPLES OF ADMINISTRATIVE LAW 154-58 (5th ed. 1973); P. JACKSON, NATURAL JUSTICE (1973); H. MARSHALL, NATURAL JUSTICE (1959); O.H. PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW (5th ed. 1973); H. WADE, ADMINISTRATIVE LAW 172-216 (3d ed. 1971).

8. The concept of natural justice, as will be shown, originated with the English courts and is now an established part of the legal system of those former and present members of the British Commonwealth, such as India, Australia, and New Zealand, whose legal systems are derived from the English system. The term "English" will be used throughout this Article to denote this system that originated in the English courts, though the cases discussed will include those from other parts of Great Britain and other countries within the Commonwealth.

9. The literal translation from the Latin is "hear the other side."

10. Literally, this phrase means "no man should be judge of his own cause."

11. *See* 1 HALSBURY'S LAWS OF ENGLAND, *Administrative Law* ¶ 64 n.1 (1973).

any system of procedural fairness. One is the need to identify the types of proceedings to which the protection is applicable; this will be called the *reach* of the protection. The other is the task of specifying, in terms of procedural devices, exactly what protection is required; this will be termed the *scope* of the protection. The second part of this Article will explore the reach of natural justice in non-judicial proceedings:[12] To what public administrative bodies do the rules apply, and to which decisions of these bodies? Because natural justice applies similarly to some decisions by bodies in the private sector, the extent of this application also will be discussed. Thus, in analyzing the reach of natural justice, the task will be to locate those decision-making bodies, and the decisions of those bodies, that call into effect the rules of natural justice, and to see if any principled basis exists for determining the reach of the rules of natural justice. The third section of this Article will consider the scope of the rules of natural justice and will explore the extent to which and the circumstances under which the *audi alteram partem* rule requires notice, hearing, right to counsel, statement of reasons, confrontation and cross-examination of witnesses, and other components of a full trial. As will be seen, not all of these component rights are guaranteed by natural justice in every action; the process by which certain elements of the right to a hearing are determined to be essential will be analyzed in depth.

An Introduction to the Concept of Natural Justice

The Sources of Modern Natural Justice

Although the expression "natural justice" now has no connection with the concept of natural law, the modern notion of natural justice does have natural law origins. Thus, the earliest usage of the term "natural justice" appeared during the seventeenth and eighteenth centuries when it was used interchangeably with "natural law."[13] At the time, however, natural law was more than the general jurisprudential concept the term now denotes. It was thought that the law

12. The concept of natural justice serves, as does the concept of procedural due process, to define the procedural protection in the criminal process and in civil litigation. The procedural rights in these judicial contexts, which are rather well established, are beyond the scope of this Article.

13. R. v. Chancellor of Cambridge, Fortescue 202, 92 Eng. Rep. 818 (K.B. 1723) (Dr. Bentley's Case); Moses v. Macferlan, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760); Master v. Miller, 4 T.R. 320, 100 Eng. Rep. 1042 (K.B. 1791), *aff'd*, 5 T.R. 367, 101 Eng. Rep. 205 (Ex. 1793).

of nature was a specific source of positive law to be applied by the courts along with case law and statutory law.[14] The courts often relied on the natural law to justify decisions when no statute or precedent was available to guide them.[15] Among the array of rights, duties, and legal principles that were attributed to the law of nature were some very basic procedural rights, the preservation of which was thought to be commanded by natural law. One of these procedural rights was the right to an unbiased tribunal. Thus, in *Dr. Bonham's Case,*[16] the principle that no man may be judge of his own cause is expressed as a tenet of "common right and reason," which controls even a contrary act of Parliament. The principle appears even more clearly in *City of London v. Wood*[17] and in another famous case, *Day v. Savadge,*[18] in which it is characterized as an immutable force.[19] The principle of *nemo debet esse judex in propria sua causa*, then, arises not from any positive law, but from the seventeenth century view that this principle was so fundamental as to be a law of God and of nature.[20]

The other basic principle of natural justice, *audi alteram partem*, the right to a hearing, has similar natural law origins, but recognition of the right in the case law is of slightly more recent vintage. In *R. v. Chancellor of Cambridge (Dr. Bentley's Case),*[21] Lord For-

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14. Calvin's Case, 7 Co. Rep. la, 77 Eng. Rep. 377 (Ex. 1608).

15. *See* H. MARSHALL, *supra* note 7, at 7.

16. 8 Co. Rep. 107a, 118a, 77 Eng. Rep. 638, 652 (C.P. 1610).

17. 12 Mod. 669, 88 Eng. Rep. 1592 (K.B. 1701).

> [W]hat my Lord Coke says in *Dr. Bonham's case* . . . is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be judge and party, for the Judge is to determine between party and party, or between the Government and the party; and an Act of Parliment can do no wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the Government he lives under, and restore him to the state of nature: but it cannot make one who lives under a Government Judge and party.

Id. at 687-88, 88 Eng. Rep. at 1602.

18. Hob. 85, 80 Eng. Rep. 235 (C.P. 1614).

19. "[E]ven an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in itself; for jura naturae sunt immutabilia, and they are legis legum." *Id.* at 87, 80 Eng. Rep. at 237.

20. As early as 1518, the principle appears as a statement of the established "custom" of England that peers of a jury "be not of affinity to none of the parties." C. SAINT GERMAIN, DOCTOR AND STUDENT, 23-24 (Muchall ed. 1886).

21. 1 Str. 557, 93 Eng. Rep. 698 (K.B. 1723). Other reports of the case, in different stages, can be found at 8 Mod. 148, 88 Eng. Rep. 111; Lord Raym. 1334, 92 Eng. Rep. 370; Fortescue

tescue observed: "Besides, the objection for want of notice can never be got over. The laws of God and man both give a party an opportunity to make his defense, if he has any."[22]

This Article, of course, does not purport to trace in depth the history of the development of the modern concept of natural justice. Such historical analyses are available elsewhere.[23] Similarly, it is enough merely to mention that the American concept of procedural due process, though based on specific language in a written constitution, has roots that to some degree parallel the origins of natural justice.[24] But the natural law sources of natural justice are important in understanding why natural justice includes only the most fundamental notions of procedural fairness. The more subtle procedural rights, as will be seen, have attached themselves to the rules of natural justice only with some difficulty, in large part because of the natural law basis of the two major principles of natural justice.

Natural Justice and the Power of Parliament

The concept of procedural due process in this country is, of course, a constitutional concept. Because the power of judicial review of federal[25] and state[26] legislation is no longer an open question, we take it for granted that any legislation that violates the constitutional principles of procedural due process is, to that extent, void. This judicial power to review the procedural fairness of legislation, thus putting basic procedural rights beyond the power of a legislature to abrogate them, does not exist in the English parliamentary

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202, 92 Eng. Rep. 818. Coke called the right to be heard a principle of divine justice. 3 COKE, INSTITUTES *35.

22. The passage continues: "I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence." 1 Str. at 567, 93 Eng. Rep. at 704.

23. *See, e.g.*, H. MARSHALL, *supra* note 7, ch. 2; de Smith, *The Right to a Hearing in English Administrative Law*, 68 HARV. L. REV. 569, 570-77 (1955).

24. The American concept of procedural due process has antecedents both in the concept of natural justice, as it had developed to the time of the embodiment of due process into the American Constitution, and in a natural law view of procedural fairness. *See generally* Schwartz, *Administrative Procedure and Natural Law*, 28 NOTRE DAME LAW. 169 (1953). *See also* note 44 *infra*.

25. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); C. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960); Cappeletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207 (1966); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

26. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

system, and the absence of this judicial power is an important limitation on the rules of natural justice.

When natural justice was thought of as a natural law concept, an act of Parliament that violated the rules of natural justice was considered void because the laws of God and the law of nature took precedence over laws made by mere mortals sitting in Parliament.[27] This pre-eminence of the rules of natural justice, however, was a function of equating natural justice with natural law. The supremacy of the rules of natural justice therefore ended upon the decline of the concept of natural law in the judicial interpretation of positive law. Thus, it has been clear since the middle of the nineteenth century that the court of England cannot declare void the acts of Parliament, and that the rules of natural justice do not stand above the power of Parliament.

> It was once said . . . that if an Act of Parliament were to create a man judge in his own case, the Court might disregard it. That dictum, however stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. . . . If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but so long as it exists as law, the Courts are bound to obey it.[28]

Thus, the power of the rules of natural justice is subject to limitation by the power of Parliament.[29] Should Parliament specifically

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27. Thus, in Dr. Bonham's Case, 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610), Day v. Savadge, Hob. 85, 80 Eng. Rep. 235 (C.P. 1614), and City of London v. Wood, 12 Mod. 669, 88 Eng. Rep. 1592 (K.B. 1701), acts of Parliament that allowed the same body to be both a party and the judge were deemed void. *See* notes 16-20 *supra* & accompanying text.

The interpretation of *Dr. Bonham's Case* has been a *cause celebre* in the jurisprudence of judicial review. For an excellent analysis, see Berger, *Doctor Bonham's Case: Statutory Construction or Constitutional Theory?*, 117 U. PA. L. REV. 521 (1969). *See also* Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1927).

28. Lee v. Bude & Torrington Junction Ry., L.R. 6 C.P. 576, 581 (1871).

"As to what has been said of an Act of Parliament not binding if it is contrary to reason, that can receive no countenance from any Court of Justice whatever. A Court of Justice cannot set itself above the legislature." Logan v. Burselem, 4 Moore P.C. 284, 296, 13 Eng. Rep. 312, 317 (P.C. 1842) (Sierra Leone). *See also* Gibbs v. Guild, 9 Q.B.D. 59, 74 (1882); R. v. Local Gov't Bd. *ex parte* Arlidge, [1914] 1 K.B. 160, 175.

29. *See* Phillips, *Self-Limitation by the United Kingdom Parliament*, 2 HASTINGS CONST. L.Q. 443 (1975); Comment, 4 ANGLO-AM. L. REV. 112 (1975). In 1960, the Parliament of Canada adopted a Bill of Rights, which includes "the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law." CAN. REV. STAT. App. III c. 44 Part I, § 1(a) (1970). Although this creates general procedural rights throughout the dominion, it is, as an Act of Parliament, subject to repeal or to exclusion as to particular legislation. *See generally* Rand,

state that in a certain type of proceeding there is no right to be heard or that a party *may* be judge of his own cause, such legislation would supersede any contrary rule of natural justice. This power, however, does not affect in any significant way the scope of natural justice adjudication for Parliament rarely exercises this power. The cases that turn on the issue of legislative intent as to whether or not a right to a hearing was envisaged[30] demonstrate that Parliament, which can exclude the rules of natural justice and provide for summary procedures, must do so explicitly. Otherwise, it will be assumed that it was the intention of Parliament that the rules of natural justice be followed.[31] This presumption in favor of the rules of natural justice is analogous to the opinion of the United States Supreme Court in *Greene v. McElroy*.[32] In *Greene*, an engineer was denied a security clearance without the right to confront and cross-examine adverse witnesses. The Court held that there was insufficient statutory authority for the Department of Defense to eliminate confrontation and cross-examination: "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected the traditional safeguards of due process."[33] Thus, when basic procedural rights are involved, the Court will avoid the constitutional issue by assuming that the procedural rights are incorporated in the statute sub silentio. Similarly, the English courts will assume that the rules of natural justice are incorporated in any statute not specifically excluding them. The difference, of course, is that Parliament *can* exclude the requirements of procedural fairness generally, whereas American law-makers can do so only when there is no deprivation of life, liberty, or property.[34]

Because of this fundamental difference as to the legal position of the rules of procedural fairness, litigation involving the rules of natural justice more often raises questions of statutory interpretation

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Except by Due Process of Law, 2 OSGOODE HALL L.J. 171 (1961); Comment, *The New Canadian Bill of Rights*, 10 AM. J. COMP. L. 87 (1961).

30. *See, e.g.*, Warringah *Re* Barnett, [1967] 87 W.N. (pt.2) N.S.W. 12 (Australia), commented on in Nettheim, *The Right to be Heard: From Jaffna to Warringah*, 42 AUSTL. L.J. 303 (1968). *See also* Patterson v. Dist. Comm'r of Accra, [1948] A.C. 341 (P.C.) (West Africa); *Re* Berkhamsted Grammar School, [1908] 2 Ch. 25.

31. *See* Durayappah v. Fernando, [1967] 2 A.C. 337 (P.C.) (Ceylon); D. BENJAFIELD & H. WHITMORE, *supra* note 7.

32. 360 U.S. 474 (1959).

33. *Id.* at 507.

34. *See* Goss v. Lopez, 419 U.S. 565 (1975); Arnett v. Kennedy, 416 U.S. 134 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

and legislative intent than does litigation of procedural due process questions. Nonetheless, basic issues as to the reach and scope of the procedural protection afforded by the rules of natural justice parallel those issues in regard to procedural due process. Before turning to this, however, an introduction to the current meanings of the two rules of natural justice should clarify the following discussion.

Nemo Judex In Re Sua — The Right to an Unbiased Tribunal

The principle that no man shall be judge of his own cause is, of course, so obvious today that the issue does not often arise in situations in which the judge is actually a party, but rather when some less direct interest either exists or appears to exist. The leading modern case on this rule is *Dimes v. Grand Junction Canal*,[35] decided by the House of Lords in 1852. In this suit a bill in equity had been filed by a corporation of which the Lord Chancellor was a substantial stockholder. At one point in the proceedings, the Lord Chancellor had affirmed the granting of relief to the corporation, an action that was subsequently reversed because of his interest in the subject matter.

> No one can suppose that [the] Lord [Chancellor] could be, in the remotest degree, influenced by the interest that he had in this concern; but . . . it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applied to a cause in which he has an interest. . . . This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest but to avoid the appearance of labouring under such an influence.[36]

Although *Dimes* involved a higher court, its principles have been applied to courts at all levels,[37] as well as to members of numerous administrative agencies that make decisions regarding individuals.[38]

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35. 3 H.L.C. 759, 10 Eng. Rep. 301 (H.L. 1852).

36. *Id.* at 793-94, 10 Eng. Rep. at 315. *See also* R. v. Hammond, 9 L.T.R. 423 (1863); *Re* Hopkins, E.B. & E. 100, 120 Eng. Rep. 445 (Q.B. 1858); R. v. Cambridge Recorder, 8 E. & B. 637, 120 Eng. Rep. 238 (Q.B. 1857); R. v. Cheltenham Comm'rs, 1 Q.B. 467, 113 Eng. Rep. 1211 (Q.B. 1841).

37. *See, e.g.*, R. v. Hertfordshire Justices, 6 Q.B. 753, 115 Eng. Rep. 284 (1845); Cottle v. Cottle, [1939] 2 All E.R. 535 (Prob.); Leeson v. General Medical Council, 43 Ch. D. 366 (1889). Arbitrators and referees also are covered by this principle. Scott v. Liverpool Corp., 3 De G. & J. 334, 44 Eng. Rep. 1297 (Ch. 1858).

38. *See, e.g.*, Hannam v. Bradford Corp., [1970] 1 W.L.R. 937 (C.A.); R. v. Hendon Rural

There are actually two strands of analysis as to what type of interest will violate this rule of natural justice. The first deals with pecuniary interest and clearly involves the stricter standard. If there is any financial interest whatsoever, regardless of how small, the proceedings are invalid.[39] If there is such a financial interest, there is no inquiry into whether or not any actual bias existed. "The law does not allow any further inquiry as to whether or not the mind was actually biased by the pecuniary interest."[40] The reason for this has been expressed in terms of insuring confidence in the judicial system: "It is of fundamental importance that justice should both be done and be manifestly seen to be done."[41] Thus, proceedings have been voided when the judge, or one member of a tribunal, was a stockholder in a corporate party,[42] had a business connection with a party,[43] or even had a financial interest as a taxpayer.[44]

Dist. Council *ex parte* Chorley, [1933] 2 K.B. 696; R. v. Kent Police Authority *ex parte* Gadden, [1971] 2 Q.B. 662 (C.A.). Labor unions exercising disciplinary powers also are included. Taylor v. National Union of Seamen, [1967] 1 W.L.R. 532 (Ch.) (the lack of necessity of "state action," as we know it, is discussed in the text accompanying notes 64-84 *infra*.).

39. R. v. Rand, L.R. 1 Q.B. 229, 232 (1866); R. v. Farrant, 20 Q.B.D. 58, 60 (1887); Leeson v. General Medical Council, 43 Ch. D. 366, 384 (1889); R. v. Starks, 5 W.R. 563 (1857); R. v. Recorder of Cambridge, 8 E. & B. 637, 120 Eng. Rep. 238 (Q.B. 1837).

40. Leeson v. General Medical Council, 43 Ch. D. 366, 384 (1889). *See also* R. v. Sunderland Justices, [1901] 2 K.B. 357 (C.A.); R. v. Rand, L.R. 1 Q.B. 230 (1866).

41. R. v. Sussex Justices *ex parte* McCarthy, [1924] 1 K.B. 256, 259. "[I]n considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal . . . . The court looks at the impression which would be given to other people." Metropolitan Properties Ltd. v. Lannon [1969] 1 Q.B. 577, 599 (C.A.) (Lord Denning, M.R.). *See also Re* Godden, [1971] 3 All E.R. 20 (C.A.). But some decisions have questioned whether there can ever be a violation of natural justice if there is not an actual likelihood of bias. R. v. Barnsley Licensing Justices, [1960] 2 Q.B. 167 (C.A.). The authority on this point remains confusing. Hannam v. Bradford Corp., [1970] 1 W.L.R. 937, 942-45 (C.A.).

42. Wakefield Local Bd. of Health v. West Riding & Grimsby Ry., L.R. 1 Q.B. 84 (1865).

43. R. v. Hendon Rural Dist. Council *ex parte* Chorley, [1933] 2 K.B. 696.

44. R. v. Gaisford, [1892] 1 Q.B. 381; Great Charte Parish & Kennington Parish, 2 Str. 1173, 93 Eng. Rep. 1107 (K.B. 1742). The disqualification because of financial interest as a "ratepayer" has been largely eliminated by statute. *See, e.g.*, COURTS ACT 1971, s. 56(1), Sch. 8, Part II, 18.

It is interesting to note that it is in this area of potential financial bias that the United States Supreme Court has acknowledged most clearly the natural justice basis of some concepts of procedural due process. In Tumey v. Ohio, 273 U.S. 510 (1927), the Court invalidated a procedure whereby the mayor, as presiding justice, had a personal financial interest in fines received by the court. The same issue later arose in Ward v. Village of Monroeville, 409 U.S. 57 (1972).

The significance of *Tumey* is that the result was based extensively on English natural justice precedents: "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule. *Dimes* v.

If, on the other hand, the interest of the judge in the proceedings is not based on financial connections with either the parties or the outcome, the test applied tends to be somewhat more lenient. If there is no pecuniary interest, there generally must be some bias on the part of the judge or tribunal, not merely a set of circumstances that would give the appearance of bias, for the proceedings to be voided.[45] The distinction often is made between the two situations in terms of "legal" (pecuniary) interest and bias, or between "interest" (pecuniary) and favor (bias).[46] Regardless of the terminology used, the principle remains that even if there is no pecuniary interest, the judge or tribunal must be free of any actual bias. Thus, it has been held that a judge or a member of an administrative tribunal should not serve when he actually has indicated some partisanship,[47] when there is personal friendship or hostility towards a party,[48] when there is some family relationship,[49] when a member of the tribunal is a member of an organization that is a party,[50] or when a judge was counsel to one of the parties at an earlier stage of the case.[51]

Audi Alteram Partem — The Right to a Hearing

The other great principle of natural justice is the right to a hearing, *audi alteram partem.* In its most basic form the rule requires that parties to proceedings in the courts, or parties whose rights may be affected by court proceedings, must be given notice and an op-

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Grand Junction Canal." 273 U.S. at 522. "Indeed, in analogous cases it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable. *Bonham's case,* . . . *City of London v. Wood* . . . *Day v. Savadge* . . . ." 273 U.S. at 524.

45. R. v. Barnsley Licensing Justices, *ex parte* Barnsley & Dist. Licenses Victuallers' Ass'n, [1960] 2 Q.B. 167 (C.A.); R. v. Hain Licensing Justices, 12 T.L.R. 323 (D.C.) (1896); R. v. Rand, L.R. 1 Q.B. 229 (1866); R. v. Meyer, 1 Q.B.D. 173 (1875); R. v. Sunderland Justices, [1901] 2 K.B. 357 (C.A.); Allinson v. General Medical Council, [1894] 1 Q.B. 750 (C.A.); R. v. Camborne Justices, [1955] 1 Q.B. 41; R. v. Grimsby Borough Quarter Sessions, [1956] 1 Q.B. 36.

46. Brookes v. Earl of Rivers, Hardres 503, 145 Eng. Rep. 569 (Ex. 1668); H. MARSHALL, *supra* note 7, at 32-33.

47. Taylor v. National Union of Seamen, [1967] 1 W.L.R. 532; R. (Donoghue) v. Cork County Justices, [1910] 2 I.R. 271.

48. Cottle v. Cottle, [1939] 2 All E.R. 535 (Prob.); R. v. Abingdon Justices *ex parte* Coursins, 108 Sol. Jo. 840 (1964).

49. R. v. Rand, L.R. 1 Q.B. 229 (1866); Becquet v. Lempriere, 1 Knapp. 376, 12 Eng. Rep. 362 (P.C. 1830); Metropolitan Properties Ltd. v. Lahnan, [1969] 1 Q.B. 577 (C.A.).

50. R. v. Gaisford, [1892] 1 Q.B. 381; R. v. Sussex Justices *ex parte* McCarthy, [1924] 1 K.B. 256; R. v. Essex Justices *ex parte* Perkins, [1927] K.B. 475.

51. Thellusson v. Rendlesham, 7 H.L.C. 429, 11 Eng. Rep. 172 (H.L. 1859).

portunity to be heard at those proceedings.[52] The application of the basic principles of natural justice to civil and criminal proceedings in the courts is firmly established and rarely subject to dispute, just as it is clear in this country that the basic principles of procedural due process apply to judicial proceedings.[53] And in England, as here, natural justice problems in judicial proceedings most often arise in connection with the enforcement of foreign judgments.[54]

Originally, the view of the English courts was that there was a right to a hearing in judicial proceedings but that there was no right to a hearing in administrative proceedings.[55] As it came to be recognized that administrative bodies often exercised judicial functions with substantially the same effect on the individual as if the proceeding had taken place in a court, an increasing range of decisions of administrative bodies were labelled judicial, or quasi-judicial, which meant that the right to a hearing had to be granted.[56] At times this was expressed as the duty to act judicially; when this duty existed, a right to a hearing was necessary.[57] This rigid categorization of proceedings as administrative, judicial, or quasi-judicial, largely, though not completely, has passed into disfavor,[58] but no consistent principle for determining the applicability of a right to a hearing has emerged in its place. The English courts seem to have experimented with various tests, but none of them has emerged as an accepted standard.

When the rule of *audi alteram partem* is held to apply, it requires only the basic rudiments of procedural protection.[59] Although notice of the proceedings and some opportunity to make a presentation

52. Grimishaw v. Dunbar, [1953] 1 Q.B. 408 (C.A.); R. v. Benn & Church, 6 T.R. 198, 101 Eng. Rep. 509 (K.B. 1795).

53. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

54. Robinson v. Fenner, [1913] 3 K.B. 835; Buchanan v. Rucker, 9 East 192, 103 Eng. Rep. 546 (K.B. 1808); Macalpine v. Macalpine, [1958] P. 35. Analagous American cases hold that judgments are unenforceable which have not provided notice and an opportunity to be heard. Von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601 (1968); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 92, 98 (1971).

55. R. v. Leman St. Police Station Inspector *ex parte* Venicoff, [1920] 3 K.B. 72; H. WADE, *supra* note 7, at 186-90.

56. Stafford v. Minister of Health [1946] K.B. 621; Cooper v. Wandsworth Bd. of Works 14 C.B. (N.S.) 180, 143 Eng. Rep. 414 (1863); S. DE SMITH, *supra* note 7, at 141-51.

57. R. v. Electricity Comm'rs, [1924] 1 K.B. 171, 204-05.

58. Ridge v. Baldwin [1964] A.C. 40 (H.L.); de Smith, *The House of Lords on Natural Justice*, 26 MOD. L. REV. 543 (1963).

59. Pett v. Greyhound Racing Ass'n Ltd. (No. 2), [1970] 1 Q.B. 46; University of Ceylon v. Fernando, [1960] 1 All E.R. 631 (P.C.).

always are required, it is doubtful whether the right to be heard includes in all instances the right to be heard orally.[60] Reasons for the decision of the tribunal generally need not be given,[61] and it is doubtful that legal representation must be permitted.[62] Confrontation and cross-examination of witnesses is not always a requirement.[63] As might be expected, the exact procedures required vary with the type of proceeding involved and, on occasion, with the severity of the available sanctions. In general, however, the amount of procedural protection available is far less than that to which we are accustomed in the United States. The particular procedural devices that may or may not be required in order for a hearing to be deemed fair, and therefore in compliance with the rules of natural justice, will be dealt with in connection with the section on the scope of natural justice.

THE REACH OF NATURAL JUSTICE

The Irrelevance of State Action

It is a truism that the fifth and fourteenth amendments to the United States Constitution are restrictions on governmental action only and not on private action. In common legal parlance, there is a "state action" requirement that is a prerequisite to the applicability of the concept of procedural due process. Thus, regardless of the potential severity of the action to the affected individual, a privately owned utility need not provide notice and a hearing prior to termination of electric service.[64] A private school or college need not grant procedural protection before dismissing a student on disciplinary grounds,[65] but a state-owned school or college must do so.[66] Dis-

60. R. v. Judge Amphlett, [1915] 2 K.B. 223; Board of Educ. v. Rice, [1911] A.C. 179 (H.L.); 1 HALSBURY'S LAWS OF ENGLAND, *Administrative Law* ¶ 76 at 93 (1973).

61. R. v. Gaming Bd. for Great Britain *ex parte* Benaim [1970] 2 Q.B. 17 (C.A.).

62. Pett v. Greyhound Racing Ass'n Ltd. (No. 2) [1970] 1 Q.B. 46. *See generally* Alder, *Representation Before Tribunals, 1972* PUBLIC LAW 278.

63. University of Ceylon v. Fernando, [1960] 1 All E.R. 631 (P.C.); T.A. Miller Ltd. v. Minister of Housing & Local Gov't, [1968] 1 W.L.R. 992 (C.A.). *Cf. Re* W.L.W., [1972] Ch. 456; Marriott v. Minister of Health, [1937] 1 K.B. 128 (C.A.).

64. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

65. *See, e.g.*, Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970). Of course, privately owned institutions may come under the state action umbrella if there is a sufficient type and amount of state involvement, state regulation, or state funding. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957); Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

66. Goss v. Lopez, 419 U.S. 565 (1975); Dixon v. Alabama State Bd. of Educ., 294 F.2d

missal of an employee by a purely private employer never is governed by constitutional restrictions, but dismissal from public employment may be.[67]

To the affected individuals, these distinctions are of little importance. The state action requirement is not based on the potential harm to the individual.[68] Rather, it is a function both of the specific words of the Constitution[69] and of the nature of our Constitution as a strict delineation of the powers of the government. There is, of course, no prohibition on the federal or state government providing, by legislation, for procedural protection substantially identical to or greater than that guaranteed by the due process clause.

In a system without a written constitution, such as the English system, there is no textual justification for distinguishing between private and governmental action. Similarly, because the English system is not based on the principles of federalism found in our Constitution nor on the concept of a government of enumerated powers, many of the policy or philosophical justifications for a state action requirement also are eliminated. Finally, it must be remembered that Parliament is supreme, with the power to eliminate *any* application of the rules of natural justice.[70] Therefore, any arbitrary distinction between public and private action would be meaningless, because the same body would have the power to eliminate procedural protection in the public sector and to require it in the private sector.

It therefore is not surprising that there is nothing resembling a state action requirement in determining whether the rules of natural justice apply. The application of the rules of natural justice does not in any way depend on whether the judicial body is governmental or non-governmental. Thus, in one of the most common areas of natural justice application, labor unions have been required to provide notice and a hearing in a number of circumstances. Most common are the cases requiring notice or a hearing before a union member may be expelled from membership in the union.[71] Similarly, the

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150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

67. Perry v. Sindermann, 408 U.S. 593 (1972).

68. Arguably, however, an individual suffers greater emotional or psychological harm when he feels that the government is acting unfairly towards him than when he feels an individual is acting unfairly towards him. *Cf.* Brown v. Board of Educ., 347 U.S. 483, 494 (1954).

69. The operative words of the fifth amendment are "Congress shall make no law" and those of the fourteenth amendment are "no state shall."

70. *See* text accompanying notes 25-34 *supra*.

71. Edwards v. Society of Graphical and Allied Trades, [1971] Ch. 354 (C.A.); Lawlor v.

obligation to comply with the rules of natural justice has been held to apply to private clubs,[72] private associations and organizations,[73] professional organizations,[74] religious bodies,[75] and private colleges and universities.[76]

The application of the rules of natural justice to purely private organizations has not been without controversy. Because a club, union, or association is formed by contract, there must be a basis for supplying additional terms to the contract. One earlier view was that a duty to act judicially, or a duty to comply with either or both of the rules of natural justice, must be found in the terms of the contract, either expressed or implied.[77] However, the position that generally has prevailed is that the act of providing, by contract, for a determination implies that the determination will be made in accordance with the rules of natural justice, and any provision or stipulation to the contrary is void as against public policy.[78] In *Dawkins v. Antrobus*,[79] a men's club had expelled the plaintiff for distributing a defamatory pamphlet about another member. In his opinion, Lord Justice Brett assumed the applicability of the *audi alteram partem* rule.

> The first question then is whether there was anything contrary to natural justice. If a decision was come to depriving a gentleman of his position on such a charge as must be made out here

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Union of Post Office Workers, [1965] Ch. 712; Hiles v. Amalgamated Soc'y of Woodworkers, [1968] Ch. 440.

It is true that the labor union occupies a more public position in the United Kingdom, but even if unions were as "public" here as they are in Britain, it is unlikely that they would be subject to direct constitutional restrictions. *See generally* Wellington, *The Constitution, The Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961).

72. Fisher v. Keane, 11 Ch. D. 353 (1878); Dawkins v. Antrobus, 17 Ch. D. 615 (C.A. 1881); Innes v. Wylie, 1 Car. & K. 257, 174 Eng. Rep. 800 (Q.B. 1844); Labouchere v. Earl of Wharncliffe, 13 Ch. D. 346 (1879).

73. John v. Rees, [1970] Ch. 345; Wood v. Woad, L.R. 9 Ex. 190 (1874).

74. Lau Liat Meng v. Disciplinary Comm., [1968] A.C. 291 (P.C.) (Singapore); General Medical Council v. Spackman, [1943] A.C. 627 (H.L.); Law v. The Chartered Inst. of Patent Agents, [1919] 2 Ch. 276; Byrne v. Kinematograph Renters Soc'y Ltd., [1958] 1 W.L.R. 762, 784 (Ch.).

75. Capel v. Child, 2 C. &. J. 558, 149 Eng. Rep. 235 (Ex. 1832); Bonaker v. Evans, 16 Q.B. 162, 117 Eng. Rep. 840 (Ex. 1850).

76. Glynn v. Keele Univ., [1971] 1 W.L.R. 487 (Ch.); R. v. Aston Univ. Senate *ex parte* Roffey, [1969] 2 Q.B. 538; University of Ceylon v. Fernando, 1960 1 W.L.R. 223 (P.C.).

77. Maclean v. Workers Union [1929] 1 Ch. 602.

78. Lee v. Showmen's Guild of Great Britain, [1952] 2 Q.B. 329, 342. Although not expressed in the same terms, this position is supported also by Wood v. Woad, L.R. 9 Ex. 190 (1874); Weinberger v. Inglis, [1919] A.C. 606 (H.L.). *Cf.* Abbott v. Sullivan, [1952] 1 K.B. 189 (C.A.).

> . . . , in my opinion there would be a denial of natural justice if a decision was come to without his having an opportunity of being heard.[80]

Surely there can be few organizations of less public significance and connection than a private men's club. *Dawkins,* therefore, establishes that a decision-making body need not be either governmental or otherwise "public" to be subject to the rules of natural justice. But although a contract seemingly may not exclude the rules of natural justice completely,[81] it still appears that the application of the rules, in some manner, stems from a contractual relationship. In *Byrne v. Kinematograph Renters Society, Ltd.,*[82] an organization of film renters had imposed a "boycott" on the plaintiff, a theater owner, without giving notice or opportunity to be heard. The Chancery Division held that the rules of natural justice were inapplicable because there was no contractual or similar relationship between the plaintiff and the defendant organization.[83]

The English courts have yet to provide the authoritative answer to whether or not certain or all of the principles of natural justice may be excluded by contract.[84] It is clear, however, that there need not be any "state action," as we know it, or any other particularly public function performed by the deciding body to give rise to the application of natural justice principles. In this respect, the reach of the rules of natural justice is considerably broader than the reach of procedural due process in this country.

The Search for a Consistent Theory

One problem of pervasive importance can be seen in both the American procedural due process cases and in the English natural justice cases: Is there any consistent theory by which it can be determined when procedural protection is available and when it is

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79. 17 Ch. D. 615 (C.A. 1881).

80. *Id.* at 631. The court denied the plaintiff's claim, holding that he had waived his right to be heard by refusing to provide an explanation when asked for one by letter.

81. Russell v. Duke of Norfolk, [1949] 1 All E.R. 109 (C.A. 1948); Edwards v. Society of Graphical & Allied Trades, [1971] Ch. 354 (C.A.); John v. Rees, [1970] Ch. 345 (1968); Enderby Town Football Club Ltd. v. Football Ass'n Ltd., [1971] 1 Ch. 591 (C.A. 1970); D. FOULKES, *supra* note 7, at 166-67. *But see* Gaiman v. National Ass'n for Mental Health, [1971] 1 Ch. 317; Lawlor v. Union of Post Office Workers, [1965] Ch. 712.

82. [1958] 1 W.L.R. 762.

83. *See also* Faramus v. Film Artistes Ass'n, [1964] A.C. 925, 941 (H.L.). *Cf.* Nagle v. Feilden, [1966] 2 Q.B. 633 (C.A.).

84. *See* P. JACKSON, *supra* note 7, at 47-52.

not? In other words, does one principle span the various ways in which official action may harm an individual? In both the United States and the British Commonwealth, the courts have experimented with many theories, often rejecting them, and occasionally resurrecting them from the grave.

For many years, the right-privilege distinction was the prevailing method of analysis of procedural due process cases in this country.[85] If an interest were deemed a "right," governmental action that would deprive one of that right had to be preceded by notice and a hearing. But if it were deemed a mere privilege, it could be withdrawn summarily on the theory that because the individual had no right to it in the first place, he could not complain when it was taken away. Thus, hearings were found not to be required in cases involving veteran's benefits,[86] immigration,[87] or licenses.[88] In one of the more famous cases, *Bailey v. Richardson,*[89] government employment was held to be a privilege.

> It has been held repeatedly and consistently that Government employment is not 'property'. . . . We are unable to perceive how it could be held to be 'liberty'. Certainly it is not 'life'. . . . In terms the due process clause does not apply to the holding of a Government office.[90]

The English courts also have used the right-privilege distinction, though its use in England is of more recent origin than in the United States. In *Nakkada Ali v. Jayaratne,*[91] decided by the Privy Council in 1951, a textile license in Ceylon had been cancelled without notice or hearing because the Controller of Textiles believed the holder unfit to retain the license. The procedure (or lack thereof) was approved on the ground that holding the license was only a privilege and that natural justice did not apply to privileges. Similarly, in *R. v. Metropolitan Police Commissioner, ex parte Parker,*[92] it was held

85. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.11-7.13 (1958) and §§ 7.11-7.13 (Supp. 1970). The right-privilege distinction also was used to allow termination of government benefits, such as employment, on grounds that now would be held to violate one of the substantive provisions of the Constitution such as the first amendment. *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

86. Clarke v. Board of Collegiate Authority, 327 Mass. 279, 98 N.E.2d 273 (1951).

87. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

88. Walker v. City of Clinton, 244 Iowa 1099, 59 N.W.2d 785 (1953).

89. 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided court,* 341 U.S. 918 (1951).

90. *Id.* at 57 (footnotes omitted).

91. [1951] A.C. 66 (P.C.) (Ceylon).

92. [1953] 1 W.L.R. 1150.

that a taxi license could be revoked summarily because the revocation was merely the exercise of a disciplinary function and did not deprive the license holder of any right.

Nakkada Ali and its progeny have received considerable criticism,[93] in large part because they represent a seemingly sharp break with earlier cases. For example, cases such as *Board of Education v. Rice,*[94] *Local Government Board v. Arlidge,*[95] and *Capel v. Child*[96] always had determined the application of natural justice on the basis of whether or not the affected party had been harmed seriously or had lost something of consequence, and did not recognize the distinction between rights and privileges. In perhaps the most significant modern natural justice case, the reasoning of *Nakkada Ali* and the other "privilege" cases was rejected by the House of Lords. In *Ridge v. Baldwin,*[97] a constable had been tried and acquitted on corruption charges, but thereafter was dismissed from his position without notice or hearing. The House of Lords reversed, holding that a deprivation of property[98] required the application of the rules of natural justice, just as did numerous other official actions causing harm to individuals. *Nakkada Ali* was held specifically to have been decided on incorrect principles.[99]

Despite *Ridge,* however, the notion of privileges still remains. In *R. v. Gaming Board for Great Britain, ex parte Benaim,*[100] a party had been refused a license on the basis of undisclosed evidence. In rejecting a natural justice claim, Lord Denning stated:

> It is an error to regard [the applicants] as having any right of which they are being deprived. . . . What they are really seeking is a privilege - almost, I might say, a franchise - to carry on gaming for profit, a thing never hitherto allowed in this country.[101]

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93. *See, e.g.*, S. DE SMITH, *supra* note 7, at 153-54; Wade, *The Twilight of Natural Justice,* 67 L.Q. REV. 103 (1951).

94. [1911] A.C. 179 (H.L.).

95. [1915] A.C. 120 (H.L.).

96. 2 C. & J. 558, 149 Eng. Rep. 235 (Ex. 1832).

97. [1964] A.C. 40 (H.L.).

98. Because there were substantial pension rights involved, the issue of whether the position itself was property was not before the court.

99. [1964] A.C. at 79. For commentary on *Ridge,* see de Smith, *The House of Lords on Natural Justice,* 26 MOD. L. REV. 543 (1963); Note, *Ridge v. Baldwin: Administration and Natural Justice,* 80 L.Q. REV. 105 (1964); Note, *Ridge v. Baldwin: A Century of Progress,* 1 N.Z. UNIV. L. REV. 317 (1964); Note, *Right to a Hearing and Natural Justice,* 22 FAC. OF L. REV. (Univ. of Toronto) 148 (1964). *See also* Banks v. Transport Regulation Bd., [1968] Aust. L.J.R. 64, noted in 42 AUSTL. L.J. 261 (1968).

100. [1970] 2 Q.B. 417 (C.A.).

101. *Id.* at 429.

The result in this case is not at all surprising. The plaintiffs were only applicants, and regardless of whether a conceptual theory or a functional analysis is employed, it is inconceivable that every rejected applicant for a governmental benefit, or anything else, would have procedural rights. There must be a distinction between rejected applicants for something and the termination of that thing to one who already holds it. Nonetheless, Lord Denning's terminology, retaining the language of rights and privileges, is somewhat troubling. The real problem is that to call one thing a right and another a privilege does not answer the question. It is merely a statement of legal effect. Rights are those things to which we grant procedural protection; privileges are those things that receive no such protection. The issue, however, is to decide which are the rights and which are the privileges.

It is possible that the *Gaming Board* case merely reflects that the source of the interest may be helpful or determinative in analyzing the degree of procedural protection. This is actually the mode of analysis currently in force in this country. As a result of *Board of Regents v. Roth,*[102] the application of due process protection is to be determined in many cases by looking to state or federal law.[103] In other words, whether someone is to be granted procedural protection upon a deprivation may depend on whether or not that which is being taken away is an "entitlement."[104] Therefore, we currently place primary emphasis on interpreting the words "liberty" and "property." If there is a deprivation of liberty or property, procedural protection applies. The amount of such protection varies by balancing the burden on the government against the harm to the individual.[105] But the English system is not bound to the specific words "liberty" and "property." Therefore, English courts perhaps are less restrained in formulating a theory for determining which deprivations demand application of the natural justice principles and which do not.

Possibly because of the lack of a definitive textual starting point for analyzing the reach of procedural protection, some broad statements can be found in the Commonwealth cases. Perhaps the basis

102. 408 U.S. 564 (1972).

103. Bishop v. Wood, 96 S. Ct. 2074 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974).

104. *See generally* Comment, *Entitlement, Enjoyment, and Due Process of Law,* 1974 DUKE L.J. 89.

105. Mathews v. Eldridge, 96 S. Ct. 893, 903 (1976); Goss v. Lopez, 419 U.S. 565 (1975); Board of Regents v. Roth, 408 U.S. 564 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972).

for all modern natural justice cases is *Cooper v. Wandsworth Board of Works,*[106] which stands for the broad proposition that deprivations of property require the application of the rules of natural justice.[107] In *Cooper,* the court held that a hearing was required prior to demolition of a building for failure to comply with building regulations, and noted that it is for the courts to enforce this procedural right unless it is excluded expressly. "[A]lthough there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature."[108]

Deprivations of property still constitute the circumstances under which the *audi alteram partem* principle will be applied most freely.[109] As in this country,[110] property has been defined to include more than just tangible personal or real property, as was involved in *Cooper.* In fact, the traditional view in the English system has been that public offices are property.[111] As a result, cases involving a dismissal from an "office" traditionally have been among the most frequent and consistent applications of natural justice.[112] Recent cases, however, have made it clear that offices held "at pleasure" are not subject to the rules of natural justice, and that holders of these offices may be dismissed without notice or hearing.[113] This parallels the lack of procedural protection for non-tenured employees in this country, other than that provided by statute or contract.[114]

Furthermore, the entire range of "master-servant" relationships has been excluded from the reach of natural justice.[115] This exclu-

106. 14 C.B. (N.S.) 180, 143 Eng. Rep. 414 (1863).

107. "[A] tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity to be heard before it proceeds. . . ." *Id.* at 190, 143 Eng. Rep. at 418 (Willes, J.).

108. *Id.* at 194, 143 Eng. Rep. at 420 (Byles J.).

109. Durayappah v. Fernando, [1967] 2 A.C. 337 (P.C.) (Ceylon); Hopkins v. Smethwick Local Bd. of Health, 24 Q.B.D. 712 (C.A. 1890); Benjafield & Whitmore, *The House of Lords and Natural Justice,* 37 AUST. L.J. 140 (1963); Note, *Ridge v. Baldwin: Administration and Natural Justice,* 80 L.Q. REV. 105 (1964).

110. *See* Board of Regents v. Roth, 408 U.S. 564 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Reich, *The New Property,* 73 YALE L.J. 733 (1964).

111. Benjafield & Whitmore, *supra* note 109, at 143.

112. *See, e.g.,* Ridge v. Baldwin, [1964] A.C. 40 (H.L.). *See also* Clark, *Remedies for Unfair Dismissal: A European Comparison,* 20 INT. & COMP. L.Q. 397, 402 (1971).

113. *See, e.g.,* Hogg v. Scott, [1947] K.B. 759; Cooper v. Wilson, [1937] 2 K.B. 309 (C.A.). *See also* R. v. Governor of S. Austl., 4 C.L.R. 1497 (1907).

114. *See* Board of Regents v. Roth, 408 U.S. 564 (1972).

115. Ridge v. Baldwin [1964] A.C. 40, 65; Taylor v. National Union of Seamen [1967] 1 W.L.R. 532; H. WADE, *supra* note 7, at 205.

sion is not surprising. Because there is no state action requirement, the absence of an exclusion for master-servant relationships would mean that every firing of an employee would require notice and a hearing. Determining which cases are "pure" master and servant cases and which involve office holders may not be accomplished easily. Physicians on the staff of a hospital have been held to be office holders, and thus are entitled to a hearing before dismissal.[116] Professors have been held to be servants, and thus are not entitled to a hearing before dismissal.[117] Lord Wilberforce has defined pure master and servant cases as those "in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection."[118] Although the exclusion of master-servant cases denies natural justice protection to many government employees, dismissal from government service is so rare[119] that this is not a major issue.

According to some authorities natural justice applies whenever action is taken that has any "civil consequences to individuals"[120] or whenever there are "serious consequences."[121] Obviously, such formulations are far too broad to be taken literally, and the case law bears this out. It is generally the more serious actions that the courts have held to be governed by the rules of natural justice, such as imposition of a penalty,[122] deprivation of livelihood,[123] or deprivation of liberty.[124] In this respect, current natural justice analysis best can be compared to procedural due process analysis in this country from the mid-1950's until 1972, when the application of procedural protection was based on the court's evaluation of the seriousness of the potential harm to the individual as the result of adverse governmental action.[125]

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116. Palmer v. Inverness Hosps. Bd., 1963 S.L.T. 124.

117. Vidyodaya Univ. of Ceylon v. Silva [1965] 1 W.L.R. 77 (P.C.).

118. Malloch v. Aberdeen Corp., [1971] 1 W.L.R. 1578, 1595.

119. B. SCHWARTZ & H. WADE, LEGAL CONTROL OF GOVERNMENT: ADMINSTRATIVE LAW IN BRITAIN AND THE UNITED STATES 24-25 (1972).

120. Wood v. Woad, L.R. 9 Ex. 190 (1874); D. BENJAFIELD, *supra* note 7, at 147.

121. Warringah *Re* Barnett, [1967] 87 W.N. (pt. 2) N.S.W. 12; R. v. Electricity Comm'rs, [1924] 1 K.B. 171 (C.A.).

122. Fullbrook v. Berkshire Magistrates' Courts Comm., 69 L.G.R. 75 (1970).

123. R. v. Gaming Bd. for Great Britain *ex parte* Benaim & Khaida, [1970] 2 Q.B. 417 (C.A.); Breen v. Amalgamated Eng'r Union, [1971] 2 Q.B. 175 (C.A.); Schmidt v. Secretary of State for Home Affairs, [1969] 2 Ch. 149 (C.A.).

124. Schmidt v. Secretary of State for Home Affairs, [1969] 2 Ch. 149 (C.A.).

125. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

Although a strict distinction between judicial, quasi-judicial, and administrative actions no longer is followed[126] and the right-privilege dichotomy generally has been rejected,[127] no satisfactory formulation has taken their place. Attempts to select a formula or methodology[128] generally have been unsuccessful. It may be that no uniform, analytically sound theory of applying procedural protection is possible; certainly we have yet to find one in this country. But despite some rather sweeping exceptions, such as the master-servant exclusion, it can be said that the reach of natural justice protection is very broad. It may not be as broad as some of the earlier cases suggest, but its reach does seem to be considerably more extensive than that of procedural due process protection in this country.

The more general application of the principles of natural justice and, in particular, of the *audi alteram partem* rule, does not describe fully the nature of procedural protection. For that we must look to its scope: what the right to a hearing means in terms of particular procedural devices.

THE SCOPE OF AUDI ALTERAM PARTEM

Before discussing the full scope of the hearing requirement, two preliminary matters must be mentioned. First, several recent cases have suggested that the application of natural justice is not coextensive with application of the *audi alteram partem* rule. In other words, there may be times when natural justice does not require a hearing in any form, oral or written.[129] This conclusion, when appropriately limited, does not seem to create significant problems. If the facts of a controversy are not in dispute, or if there is an inquiry only into "legislative" and not "adjudicative" facts,[130] a hearing may serve no purpose. Nonetheless, the parties still seem to be entitled to an impartial tribunal, to the extent that anything must be decided, and therefore a holding that only the *nemo judex in causa sua* rule is applicable is not surprising. Thus, in *Breen v. Amalgamated*

126. *Breen v. Amalgamated Eng'r Union*, [1971] 2 Q.B. 1975 (C.A.); Nettheim, *The Right to be Heard: From Jaffna to Warringah*, 42 AUSTL. L.J. 303 (1968); Seepersad, *Fairness and Audi Alteram Partem*, 1975 PUBLIC LAW 242, 243.

127. Ridge v. Baldwin, [1964] A.C. 35.

128. Durayappah v. Fernando, [1967] 2 A.C. 337 (P.C.) (Ceylon).

129. R. v. Aston Univ. Senate *ex parte* Roffey, [1969] 2 Q.B. 538; Breen v. Amalgamated Eng'r Union, [1971] 2 Q.B. 175 (C.A.). These cases are criticized in Clark, *Natural Justice: Substance and Shadow*, 1975 PUBLIC LAW 27.

130. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.01-.04 (1958).

Engineering Union,[131] in which the decision was entirely discretionary and there could be no issue of disputed facts, natural justice did not include the right to a hearing. And in *R. v. Aston University Senate, ex parte Roffey,*[132] the court suggested that there might be no right to a hearing in "emergency" cases. This conclusion, of course, parallels the American cases that hold that there is no right to a prior hearing in cases of an "emergency" when the public safety or interest is at stake.[133]

There are also cases suggesting that a failure to provide a hearing might not void the proceedings if the reviewing court determines that no prejudice has resulted.[134] Although commentators have criticized such decisions,[135] there seems to be no great problem with this line of cases because the opportunity for the hearing in fact has been granted at the judicial level. Although it might be preferable to hold the hearing at the administrative level, if all the facts have come out in court further administrative proceedings may very well be pointless. American cases generally have followed this rationale.[136] The requirements of particular procedural elements of the *audi alteram partem* rule are flexible, as are those of procedural due process,[137] and vary with the type of proceeding and the gravity of the

131. [1971] 2 Q.B. 175 (C.A.).

132. [1969] 2 Q.B. 538.

133. *See, e.g.,* Fahey v. Mallonee, 332 U.S. 245 (1947); Adams v. Milwaukee, 228 U.S. 572 (1913); North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

134. *See, e.g.,* Glynn v. Keele Univ., [1971] 1 W.L.R. 487 (Ch.); Byrne v. Kinematograph Renters Soc'y Ltd., [1958] 1 W.L.R. 762 (Ch.); Malloch v. Aberdeen Corp., [1971] 1 W.L.R. 1578 (H.L.).

135. *See, e.g.,* Clark, *Natural Justice: Substance and Shadow,* 1975 PUBLIC LAW 27.

136. *See, e.g.,* Barker v. Hardway, 399 F.2d 638 (4th Cir. 1968), *cert. denied,* 294 U.S. 905 (1969).

137. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

> But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . . It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process. . . . The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished — these are some of the considerations that must enter into the judicial judgment.

Id. at 162-63 (Frankfurter, J., concurring).

Although the Supreme Court now looks to the definitions of liberty and property to determine if the guarantees of procedural due process apply at all, the balancing, flexible approach still determines the particular procedures that are required. Mathews v. Eldridge, 96 S. Ct. 893, 903 (1976); Arnett v. Kennedy, 416 U.S. 134, 167-68 (1974) (Powell, J., concurring).

deprivation.[138] However, as in recent American cases,[139] there will be great deference given to any procedures that have been specified by statute.[140] Because the acts of Parliament are controlling as to the rules of natural justice, the intent of Parliament becomes especially important. Therefore, the statements of Parliament, which could exclude *any* right to a hearing, are entitled to literal effect as to the procedures to be used; application of the maxim *expressio unius est exclusio alterius* in general, would prohibit the courts from requiring additional procedural safeguards.[141] If the procedures are not established by statute, determination of the components of the hearing requirement is for the courts. Despite the flexibility of the *audi alteram partem* rule, certain general principles usually are followed.

Perhaps the most basic requirement is that the party or parties affected must be given notice of the proceedings. Obviously, any hearing would be meaningless if the parties did not have, at the least, notice of the existence of the proceedings, the time and place of the hearing, and the charges that are to be met.[142] The notice must be received sufficiently far in advance to give a reasonable opportunity to present an effective defense[143] and, for the same reason, the notice must describe the charges and proceedings with sufficient particularity.[144] Some fairly recent cases, however, have indicated

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138. There are no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.

Russell v. Duke of Norfolk, [1949] 1 All E.R. 109, 118 (C.A.). *See generally* J. GRIFFITH & H. STREET, *supra* note 7, at 154; Seepersad, *Fairness and Audi Alteram Partem*, 1975 PUBLIC LAW 242.

139. Mathews v. Eldridge, 96 S. Ct. 893 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974).

140. Pearlberg v. Varty, [1972] 2 All E.R. 6, 15 (H.L.); Brettlingham - Moore v. Municipality of St. Leonards, 121 C.L.R. 509 (1969). *See generally* Note, *Some Limits to the Scope of Natural Justice*, 36 MOD. L. REV. 439 (1973). "Expressio facit cessare tacitum. It is easier to imply procedural safeguards when Parliament has provided none than when Parliament has laid down a procedure, however inadequate its critics may consider it to be." Bates v. Lord Hailsham, [1972] 3 All E.R. 1019, 1024 (Ch.) (Megarry, J.).

141. There is a minority view that uses the existence of some statutory provisions "as a springboard for implying more." Note, *Some Limits to the Scope of Natural Justice*, 36 MOD. L. REV. 439, 441 (1973). *See also* Leary v. National Union of Vehicle Builders, [1971] Ch. 34; Malloch v. Aberdeen Corp., [1971] 1 W.L.R. 1578 (H.L.); Cozens v. North Devon Hosp. Management Comm., [1966] 2 Q.B. 330 (C.A.); L'Alliance Des Professeurs v. La Commission Des Relations Ouvrieres, [1953] 4 D.L.R. 161.

142. Annamunthodo v. Oilfield Workers' Trade Union, [1961] A.C. 945 (P.C.) (West Indies); *Re* Wykeham Terrace, Brighton, [1971] Ch. 204.

143. Lee v. Department of Educ. & Science, 66 L.G.R. 211 (1968).

144. R. v. Aylesbury Justices *ex parte* Wisbey, [1965] 1 W.L.R. 339 (Q.B.).

that an insufficient notice will not void the proceedings if there is no prejudice to the affected party.[145] In addition to the obligation to give notice, *audi alteram partem* almost always requires that the affected party have an opportunity to be heard in his own defense.[146] The general requirement is an oral hearing, although this is not always necessary.[147] The strict rules of evidence need not be followed.[148] That an actual trial type hearing may not be required is in accord with recent American developments.[149]

Beyond the matters of notice and of some type of hearing, the requirements of natural justice are even more rudimentary than are the procedures generally required by procedural due process. For example, although the right to confront and to cross-examine opposing witnesses is thought generally to be essential in American hearings, even administrative hearings,[150] this right of confrontation and cross-examination cannot yet be considered a requirement of natural justice.[151] This probably results from the original distinction between judicial and administrative proceedings; the English courts still are inclined to view administrative proceedings as even less judicial than are courts in this country.

Similarly, there is no accepted right to counsel as a component of natural justice. The trend in this country has been to allow legal representation in cases involving more serious consequences,[152] but not in all cases.[153] In the British Commonwealth, cases generally

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145. Sloan v. General Medical Council, [1970] 1 W.L.R. 1130 (P.C.); Glynn v. Keele Univ., [1971] 1 W.L.R. 487 (Ch.). *See* note 134 *supra* & accompanying text.

146. Board of Educ. v. Rice, [1911] A.C. 179 (H.L.); Annamunthodo v. Oilfield Workers' Trade Union, [1961] A.C. 945 (P.C.) (West Indies).

147. R. v. Judge Amphlett, [1915] 2 K.B. 223.

148. R. v. Deputy Indus. Injuries Comm'r *ex parte* Moore, [1965] 1 Q.B. 456 (C.A.).

149. *See* Goss v. Lopez, 419 U.S. 565 (1975); Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir.), *cert. denied*, 402 U.S. 972 (1971).

150. Jenkins v. McKeithen, 395 U.S. 411 (1969); Willner v. Committee on Character, 373 U.S. 96 (1963); Peters v. Hobby, 349 U.S. 331, 337-38 (1955); I.C.C. v. Louisville & Nashville R.R., 227 U.S. 88, 93 (1913). *Cf.* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961), *cited approvingly in* Goss v. Lopez, 419 U.S. 565 (1975); Richardson v. Perales, 402 U.S. 389 (1971).

151. University of Ceylon v. Fernando, [1960] 1 W.L.R. 223 (P.C.); *Re* Pergamon Press Ltd., [1971] Ch. 388 (C.A.); R. v. Gaming Bd. for Great Britain *ex parte* Benaim, [1970] 2 W.L.R. 1009 (C.A.).

152. Goldberg v. Kelly, 397 U.S. 254, 270 (1970); French v. Bashful, 303 F. Supp. 1333, 1338-39 (E.D. La. 1968); Esteban v. Central Mo. State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967).

153. *See* Goss v. Lopez, 419 U.S. 565 (1975); Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va.), *aff'd*, 399 F.2d 638 (4th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 905 (1969); Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967).

have held that natural justice does not require that a party be permitted to be represented by counsel.[154] Again, this seems a product of the tendency of the English courts to treat administrative proceedings as especially informal. Finally, courts generally have held that the rules of natural justice do not require the tribunal to give reasons for its decisions.[155] However, when reasons are required for a particular decision[156] or when the governing statute requires specification of reasons,[157] this general rule does not apply.

CONCLUSION

If it is possible to generalize meaningfully in comparing procedural due process with natural justice, one could say that natural justice applies to a much broader range of decisions and actions, but requires far more rudimentary protective procedural devices than does procedural due process. Although both concepts have roots in the natural law, their reach, that is, the extent of their application, is not the same. Procedural due process is supported by provisions of a written constitution that, by its nature and purpose, serves to limit governmental but not private actions. Accordingly, due process generally is confined by the prerequisite of "state action" and more specifically is limited by the Constitution to matters of life, liberty, or property, which has been construed to include all entitlements. In contrast, natural justice denotes the rights to be heard in one's own defense before an impartial tribunal. Although these rights may be enforced in private as well as in governmental actions, the reach of natural justice is not well defined. The case law indicates that the principles may be applied in all actions with serious consequences and either government involvement or some contractual or similar relationship between private parties. In general, the difficult problem of defining a consistent theory for determining whether procedural protections must attach to a given case has not been resolved in a satisfactory manner in either the British or American system.

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154. Enderby Town Football Club Ltd. v. Football Ass'n Ltd., [1971] Ch. 591 (C.A.); Pett v. Greyhound Racing Ass'n Ltd., [1969] 1 Q.B. 125 (C.A.). *See generally* Alder, *Representation Before Tribunals,* 1972 PUBLIC LAW 278.

155. Davies v. Price, [1958] 1 W.L.R. 434, (C.A.). *See* Akehurst, *Statements of Reasons for Judicial and Administrative Decisions,* 33 MOD. L. REV. 154 (1970); Yardley, *Modern Constitutional Developments: Some Reflections,* 1975 PUBLIC LAW 197.

156. R. v. Sykes, 1 Q.B.D. 52 (1875).

157. Westminster Bank Ltd. v. Beverly Borough Council, [1969] 1 Q.B. 499, 508 (C.A.).

The constitutional basis of due process, which restricts its reach, also guarantees its application regardless of legislative acts or intent. The principles of natural justice, however, are subject to the control of Parliament, although the power to abrogate these basic rights is exercised rarely and will not be presumed by the courts.

That the procedures required by natural justice are less exhaustive than those imposed by due process reflects a difference in attitude between the two countries, especially in regard to administrative proceedings. In general, it can be said that the English system is less "judicial" than the American system, and therefore does not require more than the basic type of hearing. As recent reactions to the argued "overjudicialization" of our administrative process may indicate, the English approach may be more workable, and it may be the direction in which we are heading.[158]

158. Goss v. Lopez, 419 U.S. 565 (1975).