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On the evening of October 24, 1976, Barbara McDowell, her brother Ramon White, and their cousin Cheri Ballanger, all minors, were passengers in an automobile driven by their uncle Charles DeGeorge. DeGeorge was stopped on the Chicago Skyway by two Chicago police officers, charged with drag racing, and placed under custodial arrest. Since none of the children were of age to drive, DeGeorge asked the officers to take them at least as far as a telephone booth so that they could contact their parents. The policemen refused the request, however, and the children were left in DeGeorge's automobile at the side of the freeway. After some time, the three decided to leave the car, and were forced to cross eight lanes of traffic and walk along the freeway to find a telephone. They contacted Barbara's and Ramon's mother who, unsuccessful in her attempts to enlist assistance from the police department, eventually sent a neighbor to find them. All three children were ultimately retrieved, but the cold weather had adversely affected five-year-old Ramon, an asthmatic, and he was hospitalized for a week following the incident.

The lawfulness of DeGeorge's arrest was not contested, but Eugene and Shirley White, parents of Barbara and Ramon, brought a civil action under 42 U.S.C. § 1983[1] in United States District Court against the two arresting police officers and the superintendent of police. They claimed that deprivation of their children's constitutional rights had ultimately led to the children's physical and emotional injury.

The district court granted the defendants' motion to dismiss the complaint for failure to state a constitutional claim upon

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† White v. Rochford, 592 F.2d 381 (7th Cir. 1979).

1. Section 1983 provides:

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

42 U.S.C. § 1983 (1976).

which relief could be granted. The Court of Appeals for the Seventh Circuit affirmed the dismissal as to the superintendent of police, but reversed and remanded to the trial court the claim against the arresting officers.[2] In so ruling, the Seventh Circuit held that the officers' alleged actions amounted to a deprivation of constitutional rights actionable under section 1983—specifically, that the children's rights under the due process clause of the fourteenth amendment had been breached by the policemen's refusal to lend them aid.[3]

I. The Due Process Guarantee: Selection of an Appropriate Framework

The fourteenth amendment specifically prohibits a state from depriving "any person of life, liberty, or property, without due process of law."[4] While it has been observed that the basic function of due process is to protect individual interests from arbitrary governmental action,[5] what actually constitutes a protectible interest under the rubric of "life, liberty, or property," and what satisfies the state's obligation to observe "due process of law" when deprivation of any such interest is in issue, have proved elusive. Actual definitions of due process and of the interest it protects vary with specific factual contexts.[6] It is nevertheless clear that, depending on the nature of the challenge, the guarantee of due process of law may be examined from two different—though not in all respects distinct—perspectives: procedural or substantive.

A. Historical Overview

Literally, the term "due process of law" denotes the proce-

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2. White v. Rochford, 592 F.2d 381, 386 (7th Cir. 1979).

3. *Id.* at 383.

4. U.S. Const. amend. XIV, § 1 (the "due process clause").

5. Wolff v. McDonnell, 418 U.S. 539, 558 (1974); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).

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

The Court has said, "[T]here is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require . . . . " Davidson v. New Orleans, 96 U.S. 97, 104 (1877). *See also* Rochin v. California, 342 U.S. 165, 172 (1952) (state action that "shocks the conscience" violates due process); Malinski v. New York, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring) (state action that transgresses "those canons of decency and fairness which express the notions of justice of English-speaking peoples" is violative of due process guarantees).

dure that governmental entities or representatives must follow in dealing with the individual. The drafters of the due process clause of the fifth amendment intended simply that it provide assurance that government could act to deprive an individual of life, liberty, or property only by following proper procedure.[7] For nearly a hundred years, however, judicial interpretation of the phrase has not been limited to this literal meaning.

In *Mugler v. Kansas*,[8] an 1887 case challenging a state prohibition of alcoholic beverages, the Supreme Court first indicated its willingness to use an expanded due process test to scrutinize the substance of state statutory restrictions, even if appropriate legislative procedures had been followed in their enactment.[9] Although the particular statute at issue in *Mugler* was upheld, the Court's opinion firmed the philosophical foundation of substantive due process.[10] Justice Harlan's majority opinion stated that a statute must have a real and substantial relation to the promotion, protection, or preservation of the public health, safety, or morals to be a legitimate exertion of a state's police powers and thereby to satisfy due process requirements.[11] This method of focusing on the content of state regulation was first used to strike down a state statute in *Allgeyer v. Louisiana*.[12] The *Allegeyer* Court refined the test suggested in *Mugler*, how-

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7. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783 (1833). *See also* Graham, *Procedure to Substance—Extra-Judicial Rise of Due Process, 1830-1860*, 40 CAL. L. REV. 483, 485-87 (1952).

8. 123 U.S. 623 (1887).

9. Use of the due process argument to attack the *substance* of state regulations was earlier employed by Justice Bradley, dissenting in the famous Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 122 (1873), and concurring in Butchers Union Co. v. Crescent City Co., 111 U.S. 746, 765 (1884). In neither case, however, did a majority of the Court adopt Justice Bradley's point of view.

10. This substantive approach was born of a concern that if the sole issue reviewable by the judiciary was whether state governments followed proper procedures, any law enacted according to the required process would be valid. Consequently, any proceeding under that law, however arbitrary, would accord with "due process of law." *See* Poe v. Ullman, 367 U.S. 497, 518 (1961) (Douglas, J., dissenting).

11. 123 U.S. at 661. Justice Harlan's opinion was joined by six other members of the Court. Justice Field filed a separate opinion.

12. 165 U.S. 578 (1897). The Court there overturned a Louisiana statute that prohibited any conduct within the state aimed at insuring property with any insurance company not properly licensed to do business in the state.

The constitutional challenge to this limitation on contracting powers was not a *procedural* one; rather the contention was that a right to contract existed which, though not specifically mentioned in the fourteenth amendment, was sufficiently tied to the concepts of liberty and property so as to make the state limitations involved in that case *of themselves* a deprivation without due process. *Id.* at 591.

ever, and it became apparent that the new due process standard required more of a state than a simple showing of a reasonable basis for its legislative actions. The Court instead required convincing evidence that the substantive theories underlying the restrictions were valid, *i.e.*, that the statute would actually achieve the ends sought in its enactment. In *Lochner v. New York*,[13] a landmark case arising from a due process challenge against a New York statute prohibiting employment of bakery workers for more than sixty hours a week, the Court rejected in only a few words the argument that the law was a valid labor regulation: "There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. . . . [W]e think that [the law in question] involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by the act."[14] The Court also rejected the argument that the statute related to public health interests, responding that it was looking for something more than "mere rationality":

> The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a *more direct relation,* as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.[15]

The Court further explained: "There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law . . . . "[16]

The substantive due process analysis employed by the Court in *Lochner* did more than allow the Court to adopt the posture of a "super legislature," concerned with the wisdom, and not merely the constitutionality, of particular legislative means and ends.[17] It also expanded the scope of interests considered to

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13. 198 U.S. 45 (1905).

14. *Id.* at 57.

15. *Id.* at 57-58 (emphasis added).

16. *Id.* at 58.

17. It has been observed that later judicial reference to the seminal *Allgeyer* case was normally with respect to its "significance in opening the door to substitution of the Justices' notions of public policy and fundamental values for legislative choices." G.

be protected by the due process guarantee. For example, due process "liberty," a concept earlier limited to freedom of movement or absence of physical restraint,[18] took on a much broader meaning under substantive due process and grew to encompass a broad panoply of "liberties" nowhere explicitly described in the Constitution.[19] Perhaps the best description of this expanded concept is the Court's own statement in *Meyer v. Nebraska*,[20] a case involving a Nebraska statute that prohibited the teaching of foreign languages to any child below the eighth grade:

> While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the fourteenth amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes *not merely freedom from bodily restraint* but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[21]

Ruling that the "calling of modern language teachers, . . . the opportunities of pupils to acquire knowledge, and . . . the power of parents to control the education of their own"[22] were all within the area of protected liberty, the Court concluded that "[n]o emergency ha[d] arisen which render[ed] knowledge by a child of some language other than English so clearly harmful as

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GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 557 (9th ed. 1975). For examples of the *Allgeyer-Lochner* line of cases, see Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908).

18. 1 W. BLACKSTONE, COMMENTARIES *130; *see* Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365 (1890). The Supreme Court expressly rejected the limits of this traditional view in *Allgeyer*, 165 U.S. at 589.

19. The history of this expansion is recounted in Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

20. 262 U.S. 390 (1923). *Meyer* is historically significant since it is one of two cases from the *Lochner* era in which the Court invalidated state regulations based on noneconomic personal liberties. The other case, Pierce v. Society of Sisters, 268 U.S. 510 (1925), struck down an Oregon law requiring that all children, ages eight through sixteen, attend public rather than parochial schools. The Court determined that the state's intrusion into recognized areas of personal liberty was without a reasonable basis. *Id.* at 534-35.

21. 262 U.S. at 399 (emphasis added).

22. *Id.* at 401.

to justify its inhibition with a consequent infringement of rights long freely enjoyed."[23] The Court accordingly held the statute unconstitutional as being "arbitrary and without reasonable relation to any end within the competency of the State."[24]

Although the Court's use of this substantive due process approach had significant impact on state legislation during the first part of this century,[25] its vitality did not endure. In the mid-1930's the Court began to abandon its strict scrutiny of economic and social legislation,[26] and this trend continued until 1941 when the *Lochner*-type approach was expressly repudiated.[27] Nonetheless, repudiation of *Lochner* did not effect a complete burial of the basic concept of substantive due process.

B. A "New" Substantive Approach

The post-1930 withdrawal from strict judicial review of economic regulation was not paralleled by a similar trend in the area of certain noneconomic personal interests.[28] In fact, the now

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23. *Id.* at 403.

24. *Id.* For a contrasting case of this era, in which the Court found the deprivation of recognizable liberty interests *justifiable*, see Jacobson v. Massachusetts, 197 U.S. 11 (1905). The plaintiff in that case claimed that the state's compulsory vaccination statute unconstitutionally deprived him of "the inherent right of every freeman to care for his own body and health in such a way as to him seems best." *Id.* at 26. The Court answered by holding that liberties secured by the Constitution are not entirely immune from restraint and that the dangers of widespread smallpox justified the statute. *Id.* at 31.

25. Nearly two hundred statutes thought by state legislatures to be wise and necessary fell to the Supreme Court's "judicial veto" during the thirty-year *Lochner* era. *See* post-1905 cases cited by Justice Frankfurter at F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT app. I (1st ed. 1938).

26. *See* West Coast Hotel v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934). The shift marked by these cases and others was actually a shift of the burden of persuasion, rather than of the focus of examination. Analysis remained centered on the balance between state interests and the resulting limitations on individual interests, but the Court increasingly deferred to the state's own ability to effect this balance. "With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal." Nebbia v. New York, 291 U.S. at 537.

27. Olsen v. Nebraska, 313 U.S. 236 (1941) (notions of public policy should not be read into the Constitution in such a manner as to give rise to *constitutional* restraints on state legislative action).

28. *Meyer* and *Pierce* were never overruled. *But see* note 41 *infra*. Using the substantive approach, the court had actually begun incorporation of *specific* Constitutional rights into the fourteenth amendment at the height of the *Lochner* era. *See, e.g.*, Gitlow v. New York, 268 U.S. 652 (1925), in which the Court first assumed that freedoms of speech and press under the first amendment were "among the fundamental personal rights and 'liberties' " protected by the fourteenth amendment's due process clause. *Id.* at 666.

famous footnote 4 in *United States v. Carolene Products*[29] suggested a double standard of judicial review, under which the Supreme Court would assume a deferential stance in areas of commerical regulation, but would maintain an interventionist stance in other areas. Justice Stone, the author of the majority opinion, based this suggestion on a theory that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a *specific prohibition* of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[30]

This theory has proved to be more than merely a passing thought. Indeed, one commentator has observed that it has had a "pervasive influence" on the approaches taken by the Court.[31] Without referring to a standard of "substantive due process,"[32] the Court has continued to strictly scrutinize legislation that infringes on certain aspects of personal liberty. However, important limitations have attached to this new in-depth review that distinguish it from the *Lochner* approach. Whereas the only practical bounds to judicial intervention in the *Allgeyer-Lochner* line of cases may ultimately have been the personal predilections of the Court at the time,[33] the Court's "new" substantive approach has become an approach with self-limiting parameters. Rather than engaging in strict judicial scrutiny in all instances of legislative infringement of any of the panoply of rights that were easily interpreted under *Lochner* as protected liberty interests, the Court has reserved the compelling state interest standard for protection of individual rights either (1) specifically contained in the language of the Constitution itself or (2) otherwise deemed by the Court to be "fundamental."[34] Although the

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29. 304 U.S. 144 (1938).

30. *Id.* at 152 n.4 (emphasis added).

31. G. GUNTHER, *supra* note 17, at 593.

32. The term "substantive due process" had become synonymous with the *Lochner* approach and attending images of judicial rulings on the wisdom, rather than on the mere constitutional propriety, of certain state activities. One Supreme Court Justice had in fact critically noted that the Court's substantive approach caused it to act more as a "super-legislature" than as a judicial body. Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 534 (1924) (Brandeis, J., dissenting).

33. *See* Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977).

34. Considerable disagreement has arisen, even among members of the Court, over whether fourteenth amendment due process limitations on state action encompass only the guarantees specifically enumerated in the Bill of Rights, or whether they incorporate all "fundamental" rights. Justice Black was one in particular who was very much op-

reserved power to define "fundamental" essentially grants the judiciary the same unlimited freedom of definition it enjoyed during the *Lochner* era, the Court has effectively imposed bounds on the word's meaning. In addition to the specific guarantees contained in the first eight amendments[35] the Court has added as "fundamental" only a limited number of rights which, though not explicitly enumerated in the Constitution, have been viewed as *implied* by its protections and therefore tied directly to it: (1) freedom of association,[36] (2) a right to vote,[37] (3) a right to interstate travel,[38] and (4) a right to privacy and some freedom of choice in marital,[39] sexual,[40] and family[41] matters.

The threshold examination under the new substantive ap-

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posed to a "fundamental rights" test, because of the unlimited power of definition the Court could exercise in the name of "natural law." *See* Adamson v. California, 332 U.S. 46, 68-93 (1947) (Black, J., dissenting).

Although the Court has not limited the label "fundamental" to specifics in the Constitution, the runaway definition feared by Justice Black has never materialized. The commonly applied test of the Court was articulated by Justice Cardozo, who maintained that even though all guarantees "may have value and importance," only those which are "implicit in the concept of ordered liberty," and therefore fundamental, should be considered a part of due process. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

35. Thus far, the Court has recognized incorporation into the fourteenth amendment of all the first eight amendments except the second and third, the grand jury indictment requirement of the fifth, and the excessive bail/fines provisions of the eighth. For a detailed discussion of this incorporation, see Duncan v. Louisiana, 391 U.S. 145 (1968).

36. This right has been held to be implied by first amendment guarantees, even though there is no specific textual reference. NAACP v. Alabama, 357 U.S. 449, 460-61 (1958).

37. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (describing a right to vote as including at least the right to participate in elections on an equal basis with other qualified voters); Dunn v. Blumstein, 405 U.S. 330 (1972) (state's durational residence requirement subject to strict scrutiny as a serious restriction on the fundamental interest in voting and as a burden on the right to travel).

38. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Williams v. Fears, 179 U.S. 270 (1900).

39. *See* Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1 (1967).

40. *See* Carey v. Population Services Int'l, 431 U.S. 678 (1976) (right to purchase contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (concept of personal liberty broad enough to encompass a woman's decision whether to terminate her pregnancy); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right not to be deprived of reproductive capability).

41. *See* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). However, it has been noted that had *Meyer* and *Pierce* been decided thirty years later, their holdings would not have been based on a right to freedom in family matters, but "would probably have gone by reference to the concepts of freedom of expression and conscience . . . derived from explicit guarantees of the First Amendment against federal encroachment upon freedom of speech and belief." Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting).

proach thus looks at the type of personal interest allegedly involved. Only if a "fundamental" interest is affected may the Court subjectively inquire into the importance of the state's objective and into the necessity of interference with the individual right as a means of reaching that end.[42] In the absence of a "fundamental" interest, presumptively valid state action will generally be upheld if it simply meets the rational basis test.[43]

C. *The Procedural Formula*

The procedural approach to due process claims actually involves consideration of questions raised by *both* the substantive and procedural elements of the due process guarantee. Not only must it be determined whether asserted individual interests rise to the level of life, liberty, and property for purposes of the due process clause, but if a protected interest is implicated, the court must further decide what process is due,[44] *i.e.*, what kinds of procedural protections are necessary to overcome the constitutional prohibition against deprivation *without* "due process of law."

1. *What interests are protectible?*

Whatever additional definition has attached to due process liberty, the term describes at least an absence of physical restraint, and few would disagree that, even though this physical freedom is not absolute, the state is obliged to protect it from arbitrary intrusion by providing adequate procedural guarantees. The definition of liberty, however, has long exceeded the word's literal meaning, and the line separating interests protected by due process from those for which no direct constitutional shield exists has not been clearly drawn.

In *Cafeteria and Restaurant Workers Union Local 473 v. McElroy*,[45] the Supreme Court seemed to suggest a balancing approach to the protectible interest question, looking to a "determination of the precise nature of the government function in-

42. *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

43. *See, e.g.*, Whalen v. Roe, 429 U.S. 589 (1977); Kelley v. Johnson, 425 U.S. 238 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

44. Ingraham v. Wright, 430 U.S. 651, 672 (1977); Morrissey v. Brewer, 408 U.S. 471, 481 (1972). *See generally* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

45. 367 U.S. 886 (1961).

volved as well as of the private interest that has been affected by governmental action."[46] The Court held in *McElroy* that the due process clause was not violated by the summary denial to a cafeteria employee of entrance to a restricted military installation where she had been working. The Court reasoned that the governmental function of managing the internal operation and security of an important military installation[47] outweighed the individual's personal interest in working at one isolated and specific place,[48] and on that basis concluded that there were no due process requirements of notice and hearing on the specific grounds for the exclusion.[49]

This balancing process was used by the trial court in *Roth v. Board of Regents of State Colleges*[50] to hold that a nontenured university professor had been denied due process when the university failed to notify him of its reasons for not renewing his original one-year contract. The court reasoned from the *McElroy* formula that violation of the due process guarantee had occurred simply because the plaintiff's interest in reemployment at the university outweighed the university's interest in summarily dismissing him.[51] Roth was granted a partial summary judgment, and the Seventh Circuit affirmed.[52]

The Supreme Court reversed *Roth*,[53] however, and clarified the balancing test.[54] It admitted that Roth's "re-employment prospects were of major concern to him—concern which we surely cannot say was insignificant,"[55] and conceded that "a weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedu-

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46. *Id.* at 895.

47. The installation involved was the Naval Gun Factory (later, the Naval Weapons Plant) in Washington, D.C. The factory engaged in the design, production, and inspection of naval ordinance, including the development of highly classified systems. *Id.* at 887.

48. *Id.* at 895-96.

49. *Id.* at 894.

50. 310 F. Supp. 972 (W.D. Wis. 1970), *aff'd*, 446 F.2d 806 (7th Cir. 1971), *rev'd*, 408 U.S. 564 (1972). The district court stated that it considered itself bound to apply the balancing process described in *McElroy*. *Id.* at 977.

51. *Id.* at 977-79.

52. 446 F.2d 806 (7th Cir. 1971), *rev'd*, 408 U.S. 564 (1972).

53. Board of Regents v. Roth, 408 U.S. 564 (1972).

54. The Supreme Court had reiterated the balancing approach in Goldberg v. Kelly, 397 U.S. 254 (1970), suggesting that an individual had a right to invoke the due process requirements any time his "interest in avoiding [grievous] loss outweigh[ed] the governmental interest in summary adjudication." *Id.* at 263.

55. 408 U.S. at 570.

ral due process,"[56] but the Court also made clear that "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake."[57]

Turning to the nature of the interest that had allegedly been deprived in *Roth*, the Court noted that "while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words 'liberty' and 'property' in the Due Process Clause of the Fourteenth Amendment must be given some meaning."[58] Because the threshold requirement of deprivation of a protectible interest had not been satisfied,[59] there was no need to determine, by balancing or by any other means, whether a particular form of process was due.

In *Paul v. Davis*,[60] the Supreme Court further narrowed the scope of interests requiring due process protection. The issue in *Paul* centered on police circulation among merchants of a list of "active shoplifters," which included the petitioner's name and photograph. The petitioner claimed that failure to give him notice and to provide him an opportunity for a hearing before the "defamatory" circular was distributed had deprived him of liberty and property without due process,[61] and he sought damages therefor under section 1983.

Consistent with its approach in *Roth*, the Court began its analysis in *Paul* by considering the nature of the interest involved. It ruled that an interest in one's reputation, affected by defamation alone, was insufficient to merit due process protec-

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56. *Id.* (emphasis in original).

57. *Id.* at 570-71 (emphasis in original).

58. *Id.* at 572.

59. Specifically, "[t]he State, in declining to rehire [the professor], did not make any charge against him that might seriously damage his standing and associations in his community." *Id.* at 573. Nor did the state impose upon him any "other disability that foreclosed his freedom to take advantage of other employment opportunities." *Id.* The Court concluded that it stretches the concept of due process protectible liberty too far "to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." *Id.* at 575.

In a companion case to *Roth*, Perry v. Sindermann, 408 U.S. 593 (1972), the Court assured that due process *is* violated if a public employee is discharged for reasons that would violate *specific* constitutional guarantees, such as freedom of speech. *Id.* at 597. This principle remains constant. *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976); Paul v. Davis, 424 U.S. 693, 710 n.5 (1976).

60. 424 U.S. 693 (1976).

61. Petitioner had been arrested on shoplifting charges that were not dismissed until after the flyer had been circulated. *Id.* at 696.

tion, reasoning (1) that the respondent had "pointed to no specific constitutional guarantee safeguarding the interest he assert[ed] ha[d] been invaded,"[62] and (2) that there is no independent fourteenth amendment right to be free of injury wherever the State may be characterized as the tort-feasor.[63] The Court also answered a separate claim of deprivation of the right of privacy by holding that the alleged interests fell within none of the areas recognized as " 'fundamental' or 'implicit' in the concept of ordered liberty"[64]—areas specifically limited to "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education."[65]

The language of the *Paul* opinion seemed to sharply limit the application of the due process guarantee by restricting the scope of protectible liberty to "fundamentals."[66] Yet in a subsequent case, *Ingraham v. Wright*,[67] the Court admitted that the actual contours of the "historic liberty interest"—an interest which, it noted, included the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"—have yet to be precisely defined.[68]

Even if actual attempts to attach some bounds to the meaning of due process liberty have appeared confusing at times, the Court's underlying concern for some reasonable limits to the due process guarantee is unmistakable. And in this context it is clear that identification of an effect on a recognized and protected interest or right is necessary as a minimum in every instance before a due process requirement arises under the fourteenth amendment.

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62. *Id.* at 700.

63. *Id.* at 701. The Court indicated that to allow such an interpretation would make the fourteenth amendment "a font of tort law to be superimposed upon whatever systems may already be administered by the State," and that, since recognized "constitutional shoals" confront any attempt to derive from even congressional civil rights statutes a body of general tort law, *"a fortiori,* the procedural guarantees of the Due Process Clause cannot be the source of such law." *Id.*

64. *Id.* at 713 (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

65. 424 U.S. at 713.

66. The Court seemed to limit the scope of due process liberty (beyond the foundational freedom from physical restraint) to specific constitutional guarantees, fundamental areas of privacy, and state-conferred status.

67. 430 U.S. 651 (1977).

68. *Id.* at 673 (quoting from the broad definition of liberty offered in *Meyer v. Nebraska*, 262 U.S. at 399).

2. What process is due?

While specific procedural guarantees relating to criminal proceedings and attending effects on physical liberty have been outlined by the Supreme Court,[69] the protections which must attend other types of governmental action affecting liberty or property vary with each fact situation.[70] Beneath the variations, however, the due process foundation is the same and requires that the individual affected by governmental action be given an oportunity to be heard "at a meaningful time and in a meaningful manner."[71] The particular safeguards required by the facts of an individual case are determined most commonly by balancing three factors:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[72]

Basic procedural fairness to the individual under this and similar analysis has in some cases required that government provide individuals a fair notice of planned action and an opportunity for some sort of hearing *before* infringing personal rights.[73] Nevertheless, prior hearings have not been required in every instance. The Court has held that due process is satisfied in some cases by hearings provided *after* the government has acted, or by other adequate procedural safeguards.[74]

In *Ingraham v. Wright*,[75] for example, the Supreme Court reviewed a charge that children subjected to corporal punishment by school officials were deprived of due process when not

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69. *See* notes 34, 35 and accompanying text *supra*.

70. " '"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances.' " Cafeteria Workers v. McElroy, 367 U.S. at 895 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. at 162-63 (Frankfurter, J., concurring)); "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

71. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

72. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

73. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975).

74. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974).

75. 430 U.S. 651 (1977).

granted prior hearings to establish cause. The Court ruled that affected liberty interests were so protected by common law tort remedies that additional administrative safeguards, including a prior hearing, were not required to satisfy due process.[76] Even Justice Stevens, in dissent, noted that "the wording of the command that there shall be no deprivation 'without' due process of law is consistent with the conclusion that a postdeprivation remedy is sometimes constitutionally sufficient."[77]

D. Summary

The due process approach taken in a particular case depends primarily on the type of action challenged. The substantive approach was created for review of legislation or legislative-type activity. The Supreme Court has curbed its energies of the *Lochner* era and in general has allowed great deference to the judgment of state officers, requiring only that the legislation or regulation in issue relate in some reasonable manner to a legitimate governmental end. However, instances of legislative regulation or infringement of rights that the Court has labeled "fundamental" still trigger a more searching judicial examination—one not of legitimacy alone, but of compelling state interest for the action—and commonly are held to violate the Constitution.

By contrast, the procedural guarantees of due process are governed by the general rule that government cannot limit or deny certain individual "rights" without making available a fair procedure to determine the legality of the action. Initial focus under the procedural approach is on the nature, rather than the weight, of the individual interest involved. Consistent with its substantive approach, however, the Supreme Court has generally treated governmental infringement of a fundamental right as a *per se* violation of due process and has not considered the form of the procedures followed.[78] In cases where the interests in "life, liberty, or property" fall short of being "fundamental" but are nevertheless protected by the due process clause, analysis has turned to the additional questions of what process was due under the particular circumstances of each case and whether

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76. The Court further stated that even if the need for an advance hearing had been clear under the facts of the case, the administrative burden of providing such hearing would of itself weigh heavily against requiring it. *Id.* at 680-81.

77. *Id.* at 701 (Stevens, J., dissenting).

78. *See* Perry v. Sindermann, 408 U.S. 593, 597 (1972).

that process or an equivalent one was provided. Only when sufficient safeguards have not been provided in some form is there properly a breach of the due process guarantee and an actionable violation of a constitutional right.[79]

II. *White*'s Approach: Far From United

The complaint in *White v. Rochford*[80] charged the defendant police officers with violations of constitutional rights under three principal headings: (1) interference with a right to interstate travel; (2) interference with a right to liberty and to family integrity; and (3) interference with a right to freedom from intimidation and coercion.[81] However, since much of the Seventh Circuit's attention was focused on classifying the officers' omissive actions as gross or reckless negligence for purposes of liability under section 1983,[82] only a portion of the short opinion was devoted to a discussion of the nature of the due process violation involved.

Aside from an indication in the concurring opinion that procedural issues were considered by the court to be irrelevant to the circumstances of this case,[83] the court did not identify the due process framework applied in its analysis. It simply announced that the plaintiffs had been denied due process based on two grounds: (1) that "chief among [the liberty interests protected by the due process clause] is the right to some degree of bodily integrity"[84] and that this right was intruded upon by the police officers' "unjustified" refusal to lend aid to the children;[85]

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79. *See, e.g.*, Ingraham v. Wright, 430 U.S. at 682.

80. 592 F.2d 381 (7th Cir. 1979).

81. *Id.* at 389; *see* Brief of Plaintiffs-Appellants at 6, Appellees' Brief at 3, White v. Rochford, 592 F.2d 381 (7th Cir. 1979).

82. A continuing difference of opinion exists among the circuits as to the requisite level of negligence necessary to bring unintentional acts within the realm of deprivations of constitutional rights actionable under § 1983. The Seventh Circuit's apparent concern in the instant case for qualifying the level of negligence descriptive of the policemen's actions was because of its earlier adoption of a "reckless disregard" standard in this context. Bonner v. Coughlin, 545 F.2d 565, 569 (7th Cir. 1976). For a discussion of this search for a standard of conduct under § 1983, see Comment, *Actionability of Negligence Under Section 1983 and the Eighth Amendment*, 127 U. Pa. L. Rev. 533 (1978); Note, *Section 1983 Liability for Negligence*, 58 Neb. L. Rev. 271 (1978).

83. 592 F.2d at 387 n.2 (Tone, J., concurring). Judge Tone indicated that questions of procedure were irrelevant because it was not the failure to provide adequate process before leaving the children on the highway that was complained of; rather, it was the unjustified interference with personal security.

84. *Id.* at 383.

85. *Id.*

and (2) that, even though no physical force was used, the police officers' conduct was such as to "shock the conscience" and thus alone violated due process.[86] The court also described a possible third ground—that a protected interest in the "integrity of the parent-child relationship" was harmed by depriving the children of adult care—but relegated discussion of that deprivation to a footnote.[87]

The dissent[88] asserted that the cases cited by the court "[i]n no way . . . support appellants' principal claims that they were deprived of their constitutional rights to liberty, non-interference with family affairs or freedom to travel in interstate commerce."[89] Apart from this criticism, the dissent's major contention was that there was no stated cause for liability because there was no showing of proximate cause or breach of any affirmative duty by the policemen to render assistance to the children.[90]

III. The Case and the Framework: An Uneven Match

As one Supreme Court Justice has observed, "The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria."[91] Although many of the "principles and criteria" that provide contour to the due process guarantee are admittedly imprecise, the courts have not been left to make decisions without direction. Even so, striking inconsistencies exist between the general guidelines offered by Supreme Court due process decisions and the Seventh Circuit's analysis in *White v. Rochford.*

A. *The Apparent Rationale of* White v. Rochford

The Seventh Circuit's failure to consider procedural issues in *White* indicates that it based its decision on what it considered to be purely substantive protections of the due process clause. This presumption is buttressed by the court's unqualified acceptance of the only two specific rights described at any length in its decision: "Not only does the Due Process Clause

86. *Id.* at 385.

87. *Id.* at 383 n.1.

88. The dissenting opinion was written by Judge Kilkenny, Senior Circuit Judge for the Ninth Circuit, sitting on the court by designation.

89. 592 F.2d at 390 (Kilkenny, J., dissenting).

90. *Id.* at 392-93.

91. Poe v. Ullman, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting).

restrain [1] undue incursions on personal security, but also it restrains [2] state activities which are fundamentally offensive to 'a sense of justice' or which 'shock the conscience.' "[92] Since the court reversed the district court's decision on the grounds that at least these two "substantive rights" were affected, the best method for examining its reasoning is to independently test these identified rights and the Seventh Circuit's substantive analysis.

1. Rational basis and unjustified incursion

It is unclear whether the constitutional breach identified by the court in *White* was a deprivation of a protectible liberty interest coupled with a failure to meet a rational basis requirement, or a violation of an independent and fundamental right to be free from all undue intrusions on personal security. Under either interpretation, however, the Seventh Circuit's reasoning departed from the norm set by Supreme Court decisions.

The proposition that the court applied at least some form of rational basis test in *White* is supported by the court's conclusory description of the officers' refusal to take the children into custody as "arbitrary" or "unjustified."[93] In an earlier case, *Jeffries v. Turkey Run Consolidated School District*,[94] the Seventh Circuit described substantive due process and rational basis in similar terms:

> The claim that a person is entitled to "substantive due process" means, as we understand the concept, that state action which deprives him of life, liberty, or property must have a *rational basis*—that is to say, the reason for the deprivation may not be *so inadequate that the judiciary will characterize it as "arbitrary."*[95]

Using this concept as an overlay to the *White* opinion helps explain the court's failure to focus specifically on the presence or absence of a reasonable connection between the intrusion and a legitimate governmental end. The Seventh Circuit in effect ruled that there was no rational basis for the police officers' actions in this case by labeling those actions "arbitrary;" consequently, the

92. 592 F.2d at 383 (emphasis added).

93. *Id.* The appellants' brief also specifically argued that no reasonable basis existed for the appellees' conduct. Brief for Plaintiffs-Appellants at 9.

94. 492 F.2d 1 (7th Cir. 1974).

95. *Id.* at 3-4 (emphasis added).

court only had to describe the results in terms of effects on a protectible interest in life, liberty, or property to find a violation of the due process clause.[96] This requirement was in turn met by holding that the officers' negligence infringed on a liberty interest in bodily integrity and physical security.[97]

Although a form of the rational basis test was adaptable to the facts in *White,* the underlying question remains whether that due process test was proper under the circumstances, *i.e.,* whether the court was correct in its tacit assumption that any deprivation of a protectible liberty interest by means it could characterize as "arbitrary" or "unjustified" violated a right to substantive due process.

In its own discussion of the rational basis test, the Supreme Court has never expressly limited its application to the examination of statutes or other regulatory actions of state instruments. It is reasonable to conclude, however, that such a limitation inheres in the very history and nature of the approach itself, that it is thus an inappropriate due process test for nonlegislative activity, and therefore improperly applied in this case.

The rational basis measuring stick was not created by the Court to resolve due process challenges to all state actions and activities. It was formulated instead to test the validity of *legislative enactments* and to check the exercise of the State's lawmaking power, which it was feared normal procedural requirements could not effectively limit.[98] Even within this limited target area, the rational basis test is of questionable continued validity; it seems to have buckled beneath the weight of judicial deference to the states' exercise of their own powers. Not only did varying standards of "irrationality" and "arbitrariness" under the traditional substantive approach generate serious criticism,[99] but the use today of the rational basis test by the Su-

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96. The *Jeffries* opinion recognized that a lack of rational basis must always be tied to a recognizable right to "life, liberty or property"—that there is not an independent due process right to "freedom from arbitrariness." 492 F.2d at 4 n.8.

97. It is ironic that the concept of liberty could be thus interpreted to include both a right *not* to be taken into another's physical custody and the right *to* be taken into physical custody. This dilemma is not resolved by the court's focus on the facts of resulting emotional and physical injury.

98. The plaintiffs in *White* did not challenge any sort of statute, rule, or regulation. Their complaint was of police negligence in failing to act.

99. *See* Rehnquist, *The Notion of a Living Constitution,* 54 TEX. L. REV. 693 (1976).

preme Court is virtually a signal of state victory.[100] This does not mean that due process protection from legislative action infringing nonfundamental rights is no longer available; rather, the protection is couched in terms of procedural, rather than substantive, rights and limitations.[101]

These doctrinal and practical bounds to the rational basis analysis were seemingly ignored by the Seventh Circuit in *White*. The discretionary actions of police officers, regardless of how wisely exercised in specific instances, are among the various forms of governmental activity that fall outside the *raison d'être* of the substantive approach because they may be effectively controlled and their abuse deterred by procedural methods.[102]

The Seventh Circuit's use of a rational basis substantive test in this case was thus laid on a false foundation. Alone this error might have been harmless, but its impact was compounded by the court's analysis. Not only did the approach attach undue weight to the personal interests involved, but it failed to account for the practical and usually deferential position the Supreme Court has taken toward state action under a rational basis due process examination. In *Kelley v. Johnson*,[103] for example, the

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100. *See* Kelley v. Johnson, 425 U.S. 238 (1976); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952); Nebbia v. New York, 291 U.S. 502 (1934). *See also* Ingraham v. Wright, 430 U.S. 651 (1977); Meachum v. Fano, 427 U.S. 215 (1976); Paul v. Davis, 424 U.S. 693 (1976).

Through these cases flows a common thread of emphasis that ready invalidation of state activities under the due process clause may not be compatible with maintenance of state autonomy in our federal system. The Court has noted the following: "We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day adminstration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review of every such error." Bishop v. Wood, 426 U.S. 341, 349-50 (1976). In a similar vein, the Court in *Meachum* observed that interpretation of the due process clause should not "involve the judiciary in issues and discretionary decisions that are not the business of federal judges." Meachum v. Fano, 427 U.S. at 228-29. *See also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502-03 (1977).

101. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). In *LaFleur* the Supreme Court carefully avoided the substantive label in invalidating a school board rule under the due process clause. It instead applied a *procedural* standard and found the rule lacking.

102. This is especially true if sanctions are imposed for breach of those requirements. One such sanction, the exclusionary rule, renders evidence obtained by "unreasonable searches and seizures" inadmissible at trial. On the subject of sanctions, discipline and police misconduct in general, see Brent, *Redress of Alleged Police Misconduct: A New Approach to Citizen Complaints and Police Disciplinary Procedures*, 11 U.S.F. L. REV. 587 (1977).

103. 425 U.S. 238 (1976). This case involved a challenge to a county police regulation establishing a mandatory hair grooming policy for the police force.

Supreme Court placed the burden upon the party making a substantive due process challenge to show the absence of *any* rational connection between the regulation and a legitimate state end.[104] The Seventh Circuit in *White* effectively ignored any such presumption of constitutionality. By independently classifying the defendant officers' behavior as grossly negligent, the court placed upon them the burden of demonstrating any reasonable justification for their actions.[105] This effective presumption of *unconstitutionality* could not be overcome because the defendants' admission of facts in the complaint was required in order to make a motion to dismiss.[106] The outcome thus departed from the deferential position taken by the Supreme Court. In *Kelley* the Court held that the district court's original dismissal following the motion was justified.[107] In *White*, by contrast, the Seventh Circuit held that the district court's dismissal for failure to state a constitutional claim was in error.[108]

2. *Strict scrutiny and fundamental rights*

Certain aspects of the analysis in *White v. Rochford* appear to be based on a higher standard of review than that normally applied in the rational basis context. It will be recalled that under either the "modern" substantive approach or a purely procedural due process analysis, the deprivation of a right the Court has labeled as "fundamental" is usually treated as a *per se* denial of due process.[109] This is effected under what has been

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104. *Id.* at 247. The Court was willing to assume that the right to wear one's own hair at a length of one's own choosing might be a protectible aspect of liberty, but held that the plaintiff failed to carry the burden of showing that no rational basis supported regulation of the length of policemen's hair.

105. The Court placed great weight on its conclusion that there was simply no *apparent* justification, 592 F.2d at 384; yet it did so without considering *possible* reasons for the policemen's refusal to take the children with them in the patrol car. The court also did not openly consider the possible relevance to the policemen's decision of the fact that one of the "children" was actually sixteen years old, Appellee's Brief at 6.

106. 592 F.2d at 382. In considering a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court must accept the well-pleaded allegations of facts as true. *See* Investors Syndicate of America, Inc. v. City of Indian Rocks Beach, 434 F.2d 871, 876 (5th Cir. 1970).

107. 425 U.S. at 249.

108. 592 F.2d at 382.

109. A substantive due process analysis of a *nonlegislative* infringement of even fundamental rights is technically open to the same doctrinal criticism as the rational basis approach discussed in the text accompanying note 98 *supra*. Nonetheless, since the identification of the nature of an affected interest is part of the procedural approach, and since the very definition of fundamental rights precludes any substantial interference by

termed "strict judical scrutiny"—a method of review that places upon the state the burden of demonstrating a compelling interest or necessity to justify any substantial deprivation of a protected personal right.[110] The question thus becomes whether a fundamental interest was involved under the facts of this case.

The complaint in *White* specifically alleged interference with a right to travel interstate, which has been labeled "fundamental" by the Supreme Court,[111] but the Seventh Circuit did not address that contention in its opinion.[112] An argument that the action interfered with a right to family integrity was also raised, but the court mentioned it only in a footnote—an indication of an unwillingness to view this particular interest as a fundamental right under the facts.[113] However, the court did attach some importance in context to a right to physical security.

a. Fundamental interest in personal security? The Sev-

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government authority, *regardless of procedure,* the practical results of a procedural over a substantive analysis in this area are often indistinguishable.

110. Just as "rational basis" generally signals state victory, standards of strict scrutiny and compelling state interest usually mean victory for the individual since the courts invariably can suggest a less burdensome alternative to the action taken by the state. The concurring opinion in *White* spoke specifically of necessity: *"Unnecessarily* endangering the innocent parties in reckless disregard of their safety . . . constituted an unjustifiable intrusion on their federally protected rights." 592 F.2d at 388 (Tone, J., concurring) (emphasis added). The concurring opinion also suggested alternatives. *Id.* at n.3.

111. *See* cases cited note 38 *supra.*

112. Only the dissent touched on this particular argument:

> The fact that the minors were left unattended and were forced to cross the dangerous Skyway does not bootstrap the officers' arrest and detention of DeGeorge into a violation of appellants' constitutional right to travel in interstate commerce. . . . If there was interference with appellants' right to travel in interstate commerce, that action was supplied by their uncle in failing to obey the law.

592 F.2d at 389.

113. *Id.* at 383 n.1. Although the court did not refer specifically to a fundamental right to family integrity, it did refer to cases cited by the Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965), to support the notion of fundamental penumbral rights relating to marriage and sexual relationships. From these cases, however, the *White* opinion distilled what it felt was another common strain—"a particular emphasis by the Due Process Clause on the integrity of the parent-child relationship." 592 F.2d at 383 n.1. If by this reference the court wished to suggest that a fundamental right was breached by the temporary separation between parent and child that occurred in this case, it does not so specify. The court only suggested that "[i]t is difficult to believe that this [parent-child] relationship is any less harmed by depriving children of adult care and stranding them on a freeway than by controlling school curricula." *Id. But see* Griswold v. Connecticut, 381 U.S. at 482, which suggests that *Meyer v. Nebraska* and *Pierce v. Society of Sisters* did not survive the post-*Lochner* demise of substantive due process because of a particular concern for family solidarity, but only because of close ties to first amendment rights of religion and speech.

enth Circuit's inclusion of an interest in personal security or a "right to some degree of bodily integrity"[114] within the scope of "liberty" protected by the due process guarantee of the fourteenth amendment is adequately supported. However, this right, like freedom from physical restraint, has not been granted the same level of immunity from government incursion as have, for example, the specific first amendment rights regarding speech and religion.[115] Incursion on personal security alone would therefore not constitute the *per se* violation of due process seemingly identified in *White*. The Seventh Circuit instead described an independent and apparently fundamental right to be free from *unjustified intrusions* on personal security.[116]

Support for such a position can be found under virtually identical language in cases cited in the *White* opinion, but there are important differences in underlying rationale. In *Jenkins v. Averett*,[117] for example, the Fourth Circuit recognized a right to personal security and found it infringed by reckless conduct resulting in injury to another. However, that case involved the pursuit and arrest of a suspect; the Fourth Circuit tied the suspect's "right to be free from arbitrary intrusions on personal security" to the specific and fundamental fourth amendment rights against unreasonable searches and seizures.[118] By comparison, no fourth amendment deprivation was alleged by the plaintiffs or suggested by the Seventh Circuit in *White*.[119]

The *White* opinion also quoted language from the Supreme Court's opinion in *Ingraham v. Wright*[120] suggesting that a right to physical security actually exists independent of the fourth amendment. As the Seventh Circuit noted, the *Ingraham* Court spoke of an historic liberty in the "right to be free from, and to obtain judicial relief for, unjustified intrusions on personal se-

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114. 592 F.2d at 383.

115. The deprivation of physical liberty by arrest, for instance, does not trigger strict judicial scrutiny even when warrants, which are normally required are not obtained. Physical freedom is still protected, of course, but by procedural, not substantive, controls. *See* Ingraham v. Wright, 430 U.S. at 679-80 (citing United States v. Watson, 423 U.S. 411 (1976)).

116. 592 F.2d at 383 (citing Ingraham v. Wright, 430 U.S. at 673).

117. 424 F.2d 1228 (4th Cir. 1970).

118. *Id.* at 1232. This rationale, as was recognized in the concurring opinion in *White*, is one commonly followed in excessive force cases. 592 F.2d at 387.

119. The court did not address any fourth amendment considerations, not even in terms of labeling the uncle's arrest "unreasonable" because of its effect on the children.

120. 430 U.S. 651 (1977).

curity."[121] This phrase, however, was quoted out of context and is therefore misleading. The more complete quotation, acknowledged by the concurring opinion in *White*,[122] reveals that the Supreme Court did not refer to such a right in absolute terms and did not imply, as the majority opinion in *White* seemed to suggest, that infringement alone would violate a substantive guarantee of due process. *Ingraham* identified this right to be free from unjustified intrusions on personal security as a "liberty preserved from deprivation *without due process*."[123] It seems anomalous to conclude that the same element—freedom from unjustified actions—should entitle a person to due process and at the same time be a part of the process due.

b. The Rochin *test.* While there may be doubt as to the position the Seventh Circuit took toward the children's right to liberty, the alternate thrust of its opinion was absolute. It identified an unqualified right to be free from any "state activities which are fundamentally offensive to 'a sense of justice' or which 'shock the conscience!' "[124] If by the use of this language the court meant to suggest that *Rochin v. California*[125] established a fundamental substantive right, it did so only by an overly broad reading of Justice Frankfurter's opinion in that case.

Rochin was not a substantive due process case at all. Its rationale and holding dealt strictly with the procedural guarantees of the due process clause; the "shocks the conscience" test, to which the *Rochin* decision gave birth, had nothing whatsoever to do with defining an independent and absolute right, as the court in *White* apparently assumed. The liberty interest at stake in *Rochin* was liberty in its classical sense. It was an interest in freedom from physical restraint, a freedom deprived in that case as a result of criminal conviction and incarceration. The *Rochin* opinion was simply addressed to the question of whether the conviction was obtained by methods satisfying "due process of law." The specific inquiry centered on the methods used to ob-

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121. 592 F.2d at 383 (quoting Ingraham v. Wright, 430 U.S. at 673). The opinion also noted that nothing in the Supreme Court's decision in *Paul v. Davis*, that an individual's reputation is not protected by the due process clause, "can be construed as retreating from the position that an individual's right to be free from physical and emotional well-being is protected by the substantive guarantees of that clause." 592 F.2d at 386.

122. *Id.* at 387 (Tone, J., concurring).

123. 430 U.S. at 673.

124. 592 F.2d at 383 (quoting Rochin v. California, 342 U.S. 165, 172-73 (1952)).

125. 342 U.S. 165 (1952).

tain the evidence leading to the defendant's conviction and imprisonment.[126] In Justice Frankfurter's own words: "The *proceedings by which this conviction was obtained* do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience."[127]

Had *Rochin* been decided after later Supreme Court rulings that applied the limitations of the exclusionary rule to the states,[128] or after the right of privacy cases,[129] it presumably could have been based on purely substantive grounds. But it was not, and it is inconsistent with its true rationale to draw from its language a fundamental substantive right independent from the facts of the case. As the Court stated in *Rochin*: "The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function."[130]

B. What the Court Missed

It is interesting that the court in *White* relied upon *Ingraham v. Wright*[131] to demonstrate the existence of a right to personal security, but saw no need under the facts before it to follow *Ingraham's* procedural analysis. It is this procedural approach that is normally followed when an affected right, though protectible, is less than fundamental.[132] *Ingraham* noted that although there is a right to personal security or even a right

126. This well-known case involved a complaint that a criminal defendant's conviction was the result of the admission of evidence obtained in violation of due process. The contested evidence was two capsules containing morphine that were obtained by state narcotics agents who had broken into the defendent's bedroom and had observed him take the capsules from a nightstand near his bed and put them into his mouth. When the agents could not retrieve the capsules by prying the defendant's month open, they had his stomach "pumped" against his will. The Supreme Court termed the admission of the evidence the equivalent of a coerced confession obtained by means "too close to the rack and screw" to be ignored. *Id.* at 172.

127. *Id.* (emphasis added).

128. *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).

129. *See, e.g.*, the "privacy in the marital bedroom" language in Griswold v. Connecticut, 381 U.S. at 485-86.

130. 342 U.S. at 170.

131. 430 U.S. 651 (1977).

132. The right to education, for example, though a recognized right in a greater definition of liberty, is not a fundamental one. Thus, even though a deprivation of the right to attend school requires the satisfaction of certain procedural guarantees, Goss v. Lopez, 419 U.S. 565 (1975), it does not of itself "substantively" violate the due process clause.

against unjustified intrusion upon physical security as a part of an individual's right to liberty, identification of this right in a particular instance is not of itself sufficient to answer the due process question.[133] The Seventh Circuit, however, did not proceed in its analysis beyond the point where it determined that this right to physical security had been affected. It essentially held that this deprivation was alone sufficient to create a cause of action under section 1983.

Because many due process claims are based upon specific Bill of Rights guarantees that have been incorporated into the fourteenth amendment, the two-tiered procedural analysis frequently may be unnecessary. But the Supreme Court did find the procedural questions necessary in *Ingraham*. The *White* court's failure to follow suit, even though it relied heavily upon *Ingraham* to identify a protectible right, implies that it overlooked a portion of the analysis necessary to actually identify a breach of the due process clause.[134]

The determination of what process is due under the circumstances of a particular case is strictly a matter of judicial balancing.[135] There are thus no established rules that would mandate an outcome different from that arrived at by the Seventh Circuit's particular form of nonprocedural analysis in this case. Nevertheless, several important factors were not granted proper weight or consideration in *White v. Rochford*. Principal among these was the underlying nature of the circumstances and alleged violations of the case. The court also failed to consider the possibilities of extraconstitutional common law or administrative remedies for the injuries claimed.

The Supreme Court's opinion in *Paul v. Davis*[136] contained language critical of interpretations and beliefs that "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states."[137] It noted that "it would come as a great surprise to

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133. 430 U.S. at 673-74.

134. It is immaterial that the complaint was not leveled specifically at failure to provide adequate notice and hearing prior to leaving the children in the car. If simple failure to allege inadequate procedure made procedural questions irrelevant, plaintiffs could successfully avoid *Ingraham* and similar precedents altogether.

135. The relative weight given to each factor described at text acompanying note 72 *supra*, is determined by the court under the facts of each particular case. They are neither preweighed nor prebalanced.

136. 424 U.S. 693 (1976).

137. *Id.* at 701.

those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result."[138] The *Paul* Court responded to a tendency toward undue expansion of the due process cause of action by placing limits upon the scope of protected "liberty."

Though the ultimate solutions were different from those adopted in *Paul,* the Court's concern for appropriate limits to due process action was again evidenced in its later decision in *Ingraham.* There the Court admitted that a protectible liberty interest was at stake, but reasoned that the fourteenth amendment did not proscribe all deprivations or incursions on that interest—only those deprivations without due process. It thus rejected student claims that the process due had not been afforded when corporal punishment was administered without opportunity for a prior hearing. Because in the Court's view there was sufficient force in proceedings available under the state's common tort laws to remedy any unjustified punishments and to generally deter abuse, no additional safeguards were constitutionally required. A deprivation had occurred, but it was with, not without, due process.[139]

Just as Florida common law allowed tort actions against teachers for abuse of their authority to discipline children—a fact of which *Ingraham* took special notice[140]—Illinois law relevant to the circumstances in *White* provides an established basis of police liability for abuse of their particular duties.[141] Both

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138. *Id.* at 699. *See also* Baker v. McCollan, 433 U.S. 137 (1979). *Baker* was decided by the Supreme Court after the Seventh Circuit's decision in *White,* but it reinforces the observation that the Supreme Court is concerned with federal court inroads into state tort law. The allegation in *Baker* was that the failure of a sheriff's office to exercise reasonable care to ascertain the true identity of an arrested individual, and the detention of that individual over his protests for several days before the error was discovered, amounted to a deprivation of liberty without due process of law.

The Court, however, made it clear that "[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. . . . [F]alse imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official." *Id.* at 126.

139. The due process clause does not guarantee unqualified enjoyment of life, liberty, or property. It only protects against governmental deprivations of those personal interests *without* due process.

140. *See* Ingraham v. Wright, 430 U.S. at 677.

141. *See, e.g.,* Johnson v. Gallatin Cty., 418 F.2d 96 (7th Cir. 1969). The court there recognized that under Illinois law a policeman can be held liable for negligence that proximately causes injury to a third person, even if the negligent act is committed in performance of the policeman's duty. *See also* Gardner v. Village of Chicago Ridge, 71 Ill. App. 2d 373, 219 N.E.2d 147 (1966); Andrews v. Porter, 70 Ill. App. 2d 202, 217

state tort law and applicable criminal provisions[142] were referenced by the Seventh Circuit in its opinion, but only to support its position that the policemen were under an affirmative duty to aid the children.[143] No weight at all was given to either aspect of state law in determining whether there was a lack of necessary process. It is difficult to rationalize this incomplete use of the *Ingraham* approach, especially against the backdrop of voiced Supreme Court concern for possible encroachment by the federal courts, under the guise of the fourteenth amendment, into areas traditionally covered by state laws.[144]

C. *Implications of the* White *Decision: An Emotional Gloss on the Due Process Guarantee*

The court's narrow holding in *White v. Rochford* is less disturbing than its supporting rationale, perhaps because the court did not articulate its exact reasons for drawing the conclusions it did. The fact that no clear precedent supports the Seventh Circuit's uniquely substantive analysis of the type of actions alleged in the case, coupled with the court's refusal to even acknowledge the *Ingraham* rationale, raises the question whether the opinion was more an emotional reaction than a true due process analysis.[145]

This tendency toward judicial subjectivity is the very tendency that engendered the greatest criticisms against the open-endedness of the substantive due process analysis during the early decades of this century.[146] It has no doubt also been instrumental in more recent Supreme Court efforts to darken an ever-fading line between the moral responsibilities commonly governed by state statutes, tradition, or common law, and the nar-

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N.E.2d 305 (1966), *aff'd sub nom.* Andrews v. City of Chicago, 37 Ill. 2d 309, 226 N.E.2d 597 (1967).

142. ILL. REV. STAT. ch. 23, § 2368 (1973) (prohibiting willful abandonment of children to the elements).

143. 592 F.2d at 384.

144. *See* notes 137-139 and accompnying text *supra*. *See also* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

145. "It is difficult to understand how conduct so clearly deserving of universal reprobation can be said to fall outside the protections of the Due Process Clause . . . . " 592 F.2d at 386.

146. "[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

rower, more basic constitutional rules that establish only minimum standards of legitimate government conduct.

White v. Rochford is unique in its approach, even as it is unique in its facts.[147] Time alone will determine whether the vague contours and multiple facets of the court's reasoning will help or hinder the decision's precedential value. While interesting theories may be distilled from it, it will probably only serve as an example of how difficult it is for the judiciary to rid itself of the biases of tort philosophy and to be objective when faced with a purely constitutional challenge, even though the facts may arouse moral sensitivities.

IV. Conclusion: A Constitutional Misstep

In *White v. Rochford*, the Seventh Circuit's conclusion that the offending policemen had deprived the plaintiff children of constitutional rights seem to follow emotional impulses more closely than it follows acceptable principles of due process analysis. The court gave only incomplete reference to appropriate case law, it refused to consider even the relevance of procedural questions, and it failed to note the special relevance that the recent Supreme Court decision in *Ingraham v. Wright* gave to the availability of independent causes of action under Illinois law. In so doing, the court successfully, even if perhaps not purposefully, avoided the balancing that has been commonly used to resolve due process conflicts between nonlegislative state action and constitutionally protected, but less than fundamental, personal interests.

The *White* decision's uniquely substantive approach to the due process issue evidences only an attempt to arrive at a "just" result based on the appellate court's independent evaluation of the officers' alleged actions. The final judicial product is one that is blatantly inconsistent with evident Supreme Court policy that the due process clause is not a valid source of general federal tort liability. If the Seventh Circuit had good reasons to circumvent this policy, it could have masked its efforts more effectively. The holding in *White* could have been at least more clearly reasoned, even if not more solidly based, had it been decided on grounds of procedural insufficiency in the police officers' actions.

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147. The dissent noted that the court "cited to no Civil Rights Act authority, and [it found] none, which [was] even closely akin factually" to this case. 592 F.2d at 389.

Substantive due process analysis has not disappeared from judicial decision making, but the trend, which should continue, has been to carefully limit its scope. Courts that are inclined to adopt a purely substantive approach toward nonregulatory types of state action similar to that challenged in *White* should first insure that the rights involved are within the scope of "fundamentals" that find solid root in specific constitutional language or values. The Seventh Circuit's failure to do so in *White v. Rochford* resulted in an obviously superficial analysis, wanting for necessary procedural considerations and balance.

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