University of Oklahoma College of Law

From the SelectedWorks of Harry F. Tepker Jr.

2000

The Arbitrary Path of Due Process

Harry F. Tepker, Jr., *University of Oklahoma College of Law*

Available at: https://works.bepress.com/harry_f_tepker/16/

HEINONLINE

Citation: 53 Okla. L. Rev. 197 2000

Content downloaded/printed from
HeinOnline (http://heinonline.org)
Tue Mar 27 16:28:17 2012

-- Your use of this HeinOnline PDF indicates your acceptance
of HeinOnline's Terms and Conditions of the license
agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from
uncorrected OCR text.

-- To obtain permission to use this article beyond the scope
of your HeinOnline license, please use:

https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0030-1752

THE ARBITRARY PATH OF DUE PROCESS

HARRY F. TEPKER, JR.*

"Due process," one of the most familiar of legal phrases, is a promise of our culture's legal tradition. In the Fifth and Fourteenth Amendments to the Constitution of the United States, the people exercised their original will to define fundamental rules restricting the governments of the Union to insist that no person shall suffer loss of life, liberty, or property without due process of law.[1] Yet, for scholars, students, lawyers, and judges, "[d]ue process doctrine subsists in confusion,"[2] perhaps because it grew far beyond its original dimensions and purposes. Virtually unknown to most citizens, and not so well known to those learned in law, is that due process has been transformed. Interpretation may seem strange to anyone who concludes, sensibly, that the words of the due process clauses suggest that the guarantee is primarily concerned with procedure — that is, the methods and the manner by which government officers act in the execution and enforcement of the law.

In *County of Sacramento v. Lewis*,[3] the U.S. Supreme Court unanimously concluded that legal doctrines rooted in due process have little or nothing to say about the fate of a sixteen-year-old boy killed by a deputy sheriff's vehicle in a high-speed police chase. The case is a landmark in the transformation of due process that may be little noted, nor long remembered. Still, the case may be significant as a "periodic" reminder, deemed necessary by John Hart Ely, "that 'substantive due process' is a contradiction in terms — sort of like 'green pastel redness.'"[4]

This article questions whether constitutional doctrine adequately account for the Supreme Court's preference for close scrutiny of legislation, while all but abdicating a role when human life is taken because of arbitrary, thoughtless action. Part I discusses *Lewis*. Part II focuses on a controversial element of due process doctrine,

---

* Floyd & Irma Calvert Chair of Law and Liberty & Professor of Law, University of Oklahoma; J.D., Duke University School of Law, 1976; B.A., Claremont Men's College, 1973.

The author wishes to thank the United States Court of Appeals for the Tenth Circuit, which afforded the opportunity to examine the issues of this article when it appointed the author as amicus curiae for the court in scheduled briefing for rehearing en banc in *Williams v. Denver City*, 99 F.3d 1009 (10th Cir. 1996). Substantial portions of parts II and III of this article are drawn from the author's brief in the *Williams* case.

The author would also like to thank his research assistants Jamie Husserl, Jamie Watkins, and Holly Clarke for their work.

1. U.S. CONST. amends. V, XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

2. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review and Constitutional Remedies*, 93 COLUM. L. REV. 309, 309 (1993).

3. 523 U.S. 833 (1998).

4. JOHN HART ELY, DEMOCRACY AND DISTRUST 18 (1980).

HeinOnline -- 53 Okla. L. Rev. 197 2000

the "conscience-shocking" language of *Rochin v. California*[5] that developed into something of a test for judicial review of alleged police misconduct reaffirmed in *Lewis*. Part III traces the theme of "substantive due process" that governmental action must be rational. Next, this article suggests that the traditional insistence on rationality would better protect citizens from arbitrary police behavior, while allowing for reasonable police discretion to deal with an emergency.

I. County of Sacramento v. Lewis

The facts of *Lewis* followed a tragically familiar pattern. After two sheriff's deputies responded to a call, they observed a motorcycle approaching at high speed. It was operated by an eighteen-year-old and carried a sixteen-year-old passenger. The officers ordered the boys to stop, to no avail. The boys recklessly fled at high speed, and one of the officers pursued, in apparent conscious disregard of the department's policy against such police chases. The end came when the speeding motorcycle tipped over as the driver attempted a sharp left turn. The older boy was thrown clear, but the younger was luckless. The officer slammed on his brakes. The patrol car skidded into the 16 year old. The boy was pronounced dead at the scene.

The boy's parents brought an action under 42 U.S.C. § 1983 against the county, the sheriff's department, and the pursuing officer. They alleged that the officer's conduct deprived the boy of life without due process. The district court granted summary judgment for defendants. Dismissing the claim against the officer, the court reasoned that even if he had violated the Constitution, he was entitled to qualified immunity. No state or federal opinion published prior to the alleged misconduct held that a law enforcement officer violated principles of substantive due process by engaging in a high speed pursuit, even if the officer violated state law or police regulations.

The Court of Appeals for the Ninth Circuit reversed. It took a position that was, to say the least, unusual among the circuits.[6] The appellate court held that "the appropriate degree of fault to be applied to high-speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security."[7]

The U.S. Supreme Court confronted the issue, as Justice Souter phrased it, "whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference

---

5. 342 U.S. 165 (1952).

6. *Compare* Lewis v. Sacramento County, 98 F.3d 434, 441 (9th Cir. 1996) (applying "deliberate indifference" or "reckless disregard"), *with* Evans v. Avery, 100 F.3d 1033, 1038 (1st Cir. 1996) ("shocks the conscience"), *cert. denied*, 520 U.S. 1210 (1997); Williams v. Denver City, 99 F.3d 1009, 1014-15 (10th Cir. 1996) (same); Fagan v. Vineland, 22 F.3d 1296, 1306-07 (3rd Cir. 1994) (en banc) (same); Temkin v. Frederick County Comm'rs, 945 F.2d 716, 720 (4th Cir. 1991) (same), *cert. denied*, 502 U.S. 1095 (1992); Checki v. Webb, 785 F.2d 534, 538 (5th Cir. 1986) (same); *compare also, e.g.*, Jones v. Sherrill, 827 F.2d 1102, 1106 (6th Cir. 1987) (applying "gross negligence" standard for imposing liability for harm caused by police pursuit) *with* Foy v. Berea, 58 F.3d 227, 230 (6th Cir. 1995) (disavowing the notion that "gross negligence is sufficient to support a substantive due process claim").

7. Lewis v. Sacramento County, 98 F.3d 434, 441 (9th Cir. 1996).

HeinOnline -- 53 Okla. L. Rev. 198 2000

to life in a high-speed automobile chase aimed at apprehending a suspected offender."[8] The Court answered no. Justice Souter's explanation was a test for future claims of the same type: "[I]n such circumstances only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation."[9]

A majority of the Court joined Justice Souter's primer on due process. The opinion reaffirmed prior decisions that the due process clauses "guarante[e] more than fair process" in the application and enforcement of law.[10] The "substantive sphere" of due process bars "certain government actions regardless of the fairness of the procedures used to implement them."[11] However, this substantive due process case challenged not the policy of a state statute, but the individual conduct of a law enforcement officer. Specifically, as Justice Souter summarized the plaintiff's theory, the officer's "actions in causing Lewis's death were an abuse of executive power so clearly unjustified by any legitimate objective of law enforcement as to be barred by the Fourteenth Amendment."[12]

The *Lewis* opinion divides due process's "protection of the individual against arbitrary action of government,"[13] into three parts. Category one is the familiar concept of "procedural due process," which ensures against "denial of fundamental procedural fairness,"[14] and generally focuses on the conduct of the courts or other agencies performing adjudicatory functions.

Category two, in turn, is subdivided into two parts of its own, which focus on the exercise of state or federal governmental power lacking "any reasonable justification in the service of a legitimate governmental objective":[15] (a) challenges against legislation and (b) challenges against executive action. After performing this initial analytical classification, the Court announced that "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue."[16] As many of the classic, controversial "substantive due process" cases show, the Court remains ready and willing to intervene against the work of legislatures if statutes burden fundamental values or if they reflect hysteria or irrationality. The full range of judicial scrutiny is the standard for the laws written by ordinary political processes. The federal courts are to be suspicious, skeptical, or deferential depending on whether a law threatens a

8. County of Sacramento v. Lewis, 523 U.S. 833, 836 (1998).

9. *Id.*

10. *Id.* at 840 (quoting Washington v. Glucksberg, 521 U.S. 702, 719 (1997)).

11. *Id.* (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

12. *Id.*

13. *Id.* at 845 (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)).

14. *Id.* at 845-46 (citing Fuentes v. Shevin, 407 U.S. 67, 82 (1972) (applying procedural due process to arbitrary takings)).

15. *Id.* at 846 (citing *Daniels*, 474 U.S. at 331) (stating that substantive due process protects against government's arbitrary and oppressive exercise of power).

16. *Id.*

HeinOnline -- 53 Okla. L. Rev. 199 2000

fundamental right or merely an ordinary liberty interest. In any case, government's legislative actions cannot be arbitrary, which means a statute must be rational.[17]

Executive action, however, need not be rational; it need only be behavior other than murder, torture, or other abuse shocking to the judicial conscience. "[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"[18] The Court seems to be both clear and united on this point. The Court does not seek, and will not permit, federal judicial supervision of all executive officers of all governments of the Union. And so, the Court adhered to its much-criticized view that only "conscience-shocking" executive action will offend the substantive component of the due process guarantee.[19] At least, the standard is a long-standing one, as Justice Souter explained:

> To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience. We first put the test this way in *Rochin v. California*,[20] . . . where we found the forced pumping of a suspect's stomach enough to offend due process as conduct "that shocks the conscience" and violates the "decencies of civilized conduct."[21] . . . . Most recently, in *Collins v. Harker Heights*,[22] . . . we said again that the substantive component of the Due Process Clause is violated by executive action only when it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." While the measure of what is conscience-shocking is no calibrated yard stick, it does, as Judge Friendly put it, "poin[t] the way."[23]

As applied to the police chase situation in *Lewis*, proof that an officer had violated prevailing departmental safety procedures was not enough. Neither was proof that the officer acted with "deliberate or reckless indifference to life."[24] In the Court's words, "in such circumstances only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation."[25]

---

17. *See id.* (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

18. *Id.* (quoting Collins v. Harker Heights, Texas, 503 U.S. 115, 129 (1992)).

19. *Id.*

20. 342 U.S. 165 (1952).

21. Justice Souter cited a number of cases decided after *Rochin*. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 746 (1987) (substantive due process principles prevents government from engaging in conduct that shocks the conscience); Whitley v. Albers, 475 U.S. 312, 327 (1986) (same); Breithaupt v. Abram, 352 U.S. 432, 435 (1957) (due process bars misconduct that "'shocked the conscience' and was so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency").

22. 503 U.S. 115, 126 (1992).

23. *Lewis*, 523 U.S. at 846-47 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973)).

24. *Id.* at 852.

25. *Id.* at 836.

HeinOnline -- 53 Okla. L. Rev. 200 2000

In defense of the Court's reluctance, Justice Souter quoted the famous dictum of Chief Justice John Marshall in *McCulloch v. Maryland*:[26] "[I]t is a constitution we are expounding."[27] Marshall's dictum — sometimes described as the most important sentence among all of the Court's opinions,[28] but also as authority of last resort when the Court intends to ignore text, history, and precedent[29] — obscures the more specific reasons for the Court's decision.

The Court understands that "the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault."[30] It is not at all certain whether the Court wants the law to be clear. After all, according to Justice Souter, the concept "points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability."[31] What does seem certain is that the Court does not want to transform the concept of substantive due process into "a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm."[32]

The Court's primary motivation appears to be respect for federalism and the separate constitutional existence of the States. The Court pointed to *Paul v. Davis*,[33] in which the Court resisted expansion of the Fourteenth Amendment and its Due Process Clause into a "font of tort law to be superimposed upon whatever systems may already be administered by the States."[34] The Court also quoted *Daniels v. Williams*: "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."[35] So, as the Justices recognized in *Lewis*, the Court "rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct."[36] These principles mean "the Constitution does not guarantee due care on the part of state officials."[37] Also, "liability for negligently

---

26. 17 U.S. (4 Wheat.) 316 (1819).

27. *See Lewis*, 523 U.S. at 846 (quoting Daniels v. Williams, 474 U.S. 327, 332 (1986) and McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

28. Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 219 (1955).

29. *Compare, e.g.*, Phillip Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts to Say What the Law Is*, 23 ARIZ. L. REV. 582, 591 (1981), *with* National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 647 (1949) (Frankfurter, J., dissenting) ("Precisely because 'it is a *constitution* we are expounding,' we ought not to take liberties with it.") *and* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 853 (1989) (Marshall's dictum is not authority for nonoriginalist or broad interpretation of Constitution).

30. *Lewis*, 523 U.S. at 848.

31. *Id.*

32. *Id.*

33. 424 U.S. 693 (1976).

34. *Id.* at 701.

35. 474 U.S. 327, 332 (1986).

36. *Lewis*, 523 U.S. at 848-49 (citing *Daniels*, 474 U.S. 327, 328 (1986) and Davidson v. Cannon, 474 U.S. 344, 348 (1986) (clarifying that *Daniels* applies to substantive, as well as procedural, due process)).

37. *Id.*

HeinOnline -- 53 Okla. L. Rev. 201 2000

inflicted harm is categorically beneath the threshold of constitutional due process."[38]

After setting aside traditional tort standards because they would be too intrusive, the Justices focused on "behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim."[39] In the Court's view, the touchstone of constitutional responsibility is intentional misconduct. The seminal case is *Rochin*, which the Court identified as "the case in which we formulated and first applied the shocks-the-conscience test."[40] The Court sees *Rochin* as a prototype for its approach, though the case does not quite live up to the specific standard articulated by the Court for police chase cases. As the Court admitted in *Rochin*, "[I]t was not the ultimate purpose of the government actors to harm the plaintiff,"[41] at least not for reasons unrelated to a legitimate police purpose. The police officers "apparently acted with full appreciation of what the Court described as the brutality of their acts."[42] The Court hedged its explanations by saying such deliberately harmful action is "most likely . . . to rise to the conscience-shocking level."[43] Still, though the Court appears to be willing to apply an even more demanding standard than *Rochin*, it found in the landmark case the portents and roots of an intentional misconduct standard. *Rochin*'s result and language — if not, the holding[44] — were enough to confirm the Justices' historical sense that "this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property."[45]

The essential lesson of *Lewis* appears to be that the Court wants to reduce potential litigation over the "closer calls" when "injuries are produced with culpability falling within the middle range [of theoretical tort liability], following from something more than negligence but 'less than intentional conduct, such as recklessness or "gross negligence."'"[46] The Court distinguished cases in which the State would have special duties because it held persons in custody.[47]

> Rules of due process are not . . . subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environ-

---

38. *Id.*
39. *Id.*
40. *Id.* at 849 n.9.
41. *Id.*
42. *Id.*
43. *Id.* at 849.
44. *See* discussion *infra* Part II.
45. *Lewis*, 523 U.S. at 849 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).
46. *Id.*
47. *Id.* at 849-50. Justice Souter cited and discussed several cases. *See, e.g.*, City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983) (explaining that "the due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner" (quoting Bell v. Wolfish, 441 U.S. 520, 535 n.16, 545 (1979)); Barrie v. Grand County, Utah, 119 F.3d 862, 867 (10th Cir. 1997) (deliberate indifference of prison officials to medical needs of prisoners may violate Eighth Amendment and must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial); Weyant v. Okst, 101 F.3d 845, 856 (2nd Cir. 1996) (same).

HeinOnline -- 53 Okla. L. Rev. 202 2000

> ment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking.[48]

This language appears to be designed first to preserve a more demanding standard of care imposed on government in custodial cases, but also to preserve a broader flexibility in substantive due process cases generally. Justice Souter quoted from *Betts v. Brady*,[49] a seminal case on the issue of procedure:

> The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.[50]

Such language echoes the flexible formula embraced by Justice John Harlan in *Griswold v. Connecticut*[51] and resurrected in Justice Souter's opinion in the so-called "right-to-die" case.[52] However, the Court's hedging language is easier to highlight than its explanations for its specific ruling in the police chase case. To be sure, the Court sees cases of normal pretrial custody and high-speed law enforcement chases as presenting "markedly different circumstances" than custody cases or its other decisions to intervene against the fruits of ordinary legislative deliberation. Deliberate indifference shocks the judicial conscience when imprisonment is at issue, because "forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare."[53] Justice Souter also refers to *DeShaney v. Winnebago County Department of Social Services*:[54]

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — e.g., food, clothing, shelter,

48. *Lewis*, 523 U.S. at 850.
49. 316 U.S. 455 (1942).
50. *Lewis*, 523 U.S. at 850.
51. 381 U.S. 479 (1965).
52. *See* Washington v. Glucksberg, 521 U.S. 702 (1997) (Souter, J., concurring).
53. *Lewis*, 523 U.S. at 851.
54. 489 U.S. 189 (1989).

HeinOnline -- 53 Okla. L. Rev. 203 2000

> medical care, and reasonable safety — it transgresses the substantive limits on state action set by the . . . Due Process Clause.[55]

The Court in *Lewis* also believed that the custodial situation was unusual, in that it did not involve "any substantial countervailing interest."[56] Neglect of a prisoner's medical care, for example, does not conflict with other governmental interests (except, of course, budgetary).[57] On the other hand, the Court hints that it is not even sure that "it makes sense to speak of indifference as deliberate in the case of sudden pursuit."[58]

The Court wants to preserve a reasonable measure of executive discretion for emergency and other situations when deliberation is difficult and second-guessing is all too easy. The Justices prefer that "a much higher standard of fault than deliberate indifference has to be shown for officer liability in a prison riot."[59] Specifically, a victim of governmental use of force or violence should depend on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[60] By analogy, the standard for police liability in car chases is similar.

> Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made "in haste, under pressure, and frequently without the luxury of a second chance." . . . A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to everyone within stopping range, be they suspects, their passengers, other drivers, or bystanders.[61]

As a rationale and explanation for its decision that the "conscience-shocking" language is the appropriate approach to the facts of *Lewis*, the Court's analogy between the prison riot and the police chase seems to be all there is.

---

55. *Id.* at 199-200 (citation and footnote omitted).

56. *Lewis*, 523 U.S. at 851.

57. *See id.* at 852 ("[T]he State's responsibility to attend to the medical needs of prisoners [or detainees] does not ordinarily clash with other equally important governmental responsibilities." (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986))); *see also, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 319-25 (1982) (holding that personnel at a mental institution violated the due process rights of a severely retarded person by failing to exercise professional judgment and by denying him training and habilitation).

58. *Lewis*, 523 U.S. at 853.

59. *Id.* at 852-53.

60. *Id.* at 853 (quoting Whitley v. Albers, 475 U.S. at 320-21).

61. *Id.* (internal citations omitted).

HeinOnline -- 53 Okla. L. Rev. 204 2000

> Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for Due Process liability in a pursuit case. Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressable by an action under [section] 1983.[62]

The Court explained that the plaintiff's allegations against police authorities in *Lewis* were rooted in versions of negligence, gross negligence, recklessness, or "conscious disregard" of duty. And mistakes, even serious mistakes, in times of emergency are not enough to shock the judicial conscience, as the Court explained:

> [The officer] was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause [the motor cycle operator's] high-speed driving in the first place, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at breakneck speed forcing other drivers out of their travel lanes. [The operator's] outrageous behavior was practically instantaneous, and so was [the officer's] instinctive response. While prudence would have repressed the reaction, the officer's instinct was to do his job as a law enforcement officer, not to induce [the operator's] lawlessness, or to terrorize, cause harm, or kill. Prudence, that is, was subject to countervailing enforcement considerations, and while [the officer] exaggerated their demands, there is no reason to believe that they were tainted by an improper or malicious motive on his part.[63]

In short, it mattered not whether the police officer was reasonable (or rational); whether his conduct offended the duties imposed by the laws of tort; or whether the officer's judgment passed muster in light of "law enforcement's own codes of sound practice."[64] The chase of a speeding suspect did not "shock the conscience" because it was not intended to harm. For the Justices, that factual conclusion ended the need for constitutional analysis under due process and 42 U.S.C. § 1983.

II. The Conscience-Shocking "Test"

After *Lewis*, the story of the "conscience-shocking" language may be only a matter of historical interest, but it reflects the uncertainty and subjectivity of the Court's constitutional analysis of "substantive due process." Before *Lewis*, there was good reason to doubt that the *Rochin* "shock the conscience" language was a definitive test for any case. Few would question the basic objective of *Lewis* that the doctrines of American constitutionalism must make some allowance for

62. *Id.* at 854.
63. *Id.* at 855.
64. *Id.*

reasonable, good-faith judgments of police officers and other executive officials who are forced to cope with emergency. However, there seems to be a gap in the Court's reasoning in *Lewis*. It does follow that the "conscience-shocking" language is the best way to balance the competing claims of order and legal obligations to the rights of the individual. Even in *Rochin*, the Court used the "shock the conscience" language not as a definition of "arbitrary" governmental conduct, but as a way of explaining its unwillingness to "afford brutality the cloak of law."[65] A close reading of *Rochin* reveals that the Supreme Court never required proof of conduct that "shocks the conscience" as an essential element for a substantive due process violation. Instead, the Court used the phrase only to express outrage:

> [T]he 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. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.[66]

In short, the Court saw *Rochin* as an unusual case, not as a landmark delineating boundaries between permissible and impermissible conduct. Proof of conscience-shocking conduct justified judicial intervention to overturn a conviction, because a judicial sanction of brutal conduct "would . . . discredit law and . . . brutalize the temper of a society."[67] The Court never said that such proof was essential.

Although Justice Frankfurter's opinion for the Court contains an illuminating analysis of the origins and evolution of due process, it appeared that the holding or the well-known "conscience-shocking" language did not endure as a test for deciding actual cases. The dual problems of vagueness and indefiniteness were present at the creation in *Rochin*, as Justice Frankfurter conceded.[68] Justice Douglas concurred in the result and, apparently, with Justice Frankfurter's confession. He could not join in the majority opinion, because the *Rochin* standard "is to make the rule turn not on the Constitution but on the idiosyncrasies of the judges who sit here."[69] Almost twenty years later, Justice Black argued:

> With a 'shocks the conscience' test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test wilfully throws away the certainty and

65. *Rochin v. California*, 342 U.S. 165, 173 (1952).
66. *Id.* at 172.
67. *Id.* at 174.
68. *Id.* at 172.
69. *Id.* at 179.

> security that lies in a written constitution, one that does not alter with a judge's health, belief or his politics.[70]

To be sure, the Court used the phrase on rare occasions, though never as a decisive standard to explain the limits of a government's duty under the Due Process Clause. As Judge Cowen pointed out in his exhaustive dissenting opinion in *Fagan v. City of Vineland*,[71] "Since *Rochin*, the Supreme Court has never employed the 'shocks the conscience' test as part of its holding in any case."[72] His statement was historically accurate until *Lewis*.

In *Collins v. City of Harker Heights, Texas*,[73] a case often cited as reaffirming the *Rochin* language, the Supreme Court addressed the question "whether . . . 42 U.S.C. § 1983 provides a remedy for a municipal employee who is fatally injured in the course of his employment because the city customarily failed to train or warn its employees about known hazards in the workplace."[74] Plaintiffs argued, first, "that the Federal Constitution imposes a duty on the city to provide its employees with minimal levels of safety and security."[75] Second, "the city's 'deliberate indifference' to Collins' safety was arbitrary government action that must 'shock the conscience' of federal judges."[76] *Collins* did not hold that federal courts must use the "shock the conscience" standard to evaluate government actions that threaten or injure persons in violation of substantive due process principles. The Court ruled only that the Federal Constitution imposed no duty on the city to provide employees with minimal levels of safety and security in the workplace.[77] The *Collins* Court summarized its view with only a passing reference to the *Rochin* language:

> We . . . are not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical state-law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment. Because the Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society," *Daniels v. Williams*,[78] . . . we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law.[79]

---

70. Boddie v. Connecticut, 401 U.S. 371, 393 (1971) (Black, J., dissenting).
71. 22 F.3d 1296 (3rd Cir. 1994).
72. *Id.* at 1316.
73. 503 U.S. 115 (1992).
74. *Id.* at 117.
75. *Id.* at 126.
76. *Id.* at 127.
77. *See id.* at 126.
78. 474 U.S. 327 (1986).
79. *Collins*, 503 U.S. at 128.

HeinOnline -- 53 Okla. L. Rev. 207 2000

In short, as the Court said, plaintiff's allegations, if proved, were not "arbitrary" or "conscience-shocking" because they amount only to allegations "analogous to a fairly typical state-law tort claim."[80] Importantly, the essence of the Court's analysis in *Collins* was that the city's conduct was a mere omission, not an affirmative act. Thus, *Collins* added little or nothing to *Daniels*. "There was no occasion for the *Collins* Court to consider the implication of conduct that shocks the conscience. Indeed, there was no need to provide a new rule regarding conduct that is more culpable than mere omission."[81] Of equal significance is the fact that the Court emphasized that the plaintiff did not allege either a specific intent to harm or reckless intent.[82] From a full reading of the Court's language and context, it seems unlikely that the Court intended to endorse the "conscience-shocking" formula as a test for arbitrary conduct, or that it intended to use the phrase "conscience-shocking" as the long-awaited answer to the questions left open in *Daniels*. A far more plausible interpretation is that the Court was saying only that the plaintiff's allegations in *Collins* failed to establish her own theory of last resort. Other language in *Collins* placed the issue of arbitrary deprivations in the context of the traditional standards of judicial deference and the rational basis test. The presence of rational justification is the basis for the Supreme Court's judgment in *Collins* that the city was not "arbitrary in a constitutional sense."

> Our refusal to characterize the city's alleged omission in this case as arbitrary in a constitutional sense rests on the presumption that the administration of government programs is based on a rational decision-making process that takes account of competing social, political, and economic forces. . . . Decisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular aspects of those programs, such as the training and compensation of employees, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country. The Due Process Clause "is not a guarantee against incorrect or ill-advised personnel decisions."[83]

Still later, the Court dismissed the plaintiff's claim of governmental deprivation of a liberty interest with the explanation: "[S]he has not alleged that the deprivation of this liberty interest was arbitrary in the constitutional sense."[84] Finally, the Court summarized its holding as "the city's alleged failure to train and warn did not constitute a constitutionally arbitrary deprivation of Collins' life."[85] Most often, the Court uses only the term "arbitrary." Thus, "[i]f the Court's opinion is an indication

---

80. *Id.* at 128.

81. Fagan v. Vineland, 22 F.3d 1296, 1312 (3rd Cir. 1994) (Cowen, J., dissenting).

82. *See id.*

83. *Collins*, 503 U.S. at 128-29 (citations omitted) (quoting Bishop v. Wood, 426 U.S. 341, 350 (1976)).

84. *Id.* at 129.

85. *Id.*

HeinOnline -- 53 Okla. L. Rev. 208 2000

of any standard, that standard appears to be 'arbitrariness.'"[86] Even after *Collins*, substantive due process theory did not seem to depend on proof of conscience-shocking conduct by government officials.[87]

Collins did not alter the longer tradition that proof of "arbitrary" governmental action and proof of "conscience-shocking" governmental behavior were alternative ways to establish a substantive due process violation.[88] In short, proof of brutal or sadistic conduct that "shocks the conscience" still might establish a substantive due process claim, but, prior to *Lewis*, the Court had not said, or even hinted, that such proof is required. *Rochin*'s "shock the conscience" language might be more useful and much clearer, if it was confined to cases in which a plaintiff does demonstrate a state actor acted with malice or with a specific intent to injure or brutalize.[89] Had the Court taken this course in *Lewis*, proof of intentional brutality would be an alternative, additional way to demonstrate culpability when proof approaches specific intent or a criminal state of mind, as in Eighth Amendment cases.[90] On the other hand, if the "conscience-shocking" language is the basic standard, and if the Justices continue to use general terms — such as the plaintiff must show a "high level of outrageousness"[91] — the "test" will continue to be a vague, subjective, almost undefinable formula.[92]

Despite criticisms, many courts of appeals assumed the vitality of the "conscience-shocking" test based on *Rochin*, *Collins*, and a few other brief snippets of language. Nevertheless, the courts' reluctance and discomfort with the "test" was clear. It was hard to find praise or even an overt defense of the *Rochin* language, even when it was invoked. The First Circuit condemned it with faint praise as not "mathematically precise."[93] The Third Circuit sitting en banc confessed that the "shocks the conscience" test is "amorphous and imprecise."[94] And the Ninth Circuit

---

86. *Fagan*, 22 F.3d at 1312 (Cowen, J., dissenting).

87. *See, e.g.*, Riggins v. Nevada, 504 U.S. 127, 133-37 (1992) (noting involuntary administration of antipsychotic drugs during course of trial to defendant); Foucha v. Louisiana, 504 U.S. 71, 80-83 (1992) (noting the statute that permits continuing confinement of person acquitted of crime by reason of insanity based on findings of antisocial personality violates due process).

88. *See id.*

89. *See, e.g.*, Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 582 (1st Cir. 1989) (upholding substantive due process claim because police conduct would shock even an unusually jaded conscience); Checki v. Webb, 785 F.2d 534, 538 (5th Cir. 1986) (finding jury must decide whether police pursuit was inspired by malice amounting to abuse of official power that shocks the conscience).

90. *See, e.g.*, Hill v. Shobe, 93 F.3d 418, 421 n.1 (7th Cir. 1996) ("[T]he Eighth Amendment's definition of 'criminal recklessness' is relevant in Fourteenth Amendment challenges under section 1983."); Salazar v. City of Chicago, 940 F.2d 233, 240 (7th Cir. 1991) ("[D]efinition of punishment is just as relevant in the Fourteenth Amendment context as it is in the Eighth Amendment context.").

91. Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995).

92. When used in other contexts, an "outrageousness" test also operates like language of tort law. Worse, it has "an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the juror's tastes or views." Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) (holding First Amendment violated, despite use of "outrageousness" standard to determine intentional infliction of emotional distress because of tasteless satire of public figure).

93. Evans v. Avery, 100 F.3d 1033, 1039 (1st Cir. 1996), *cert. denied*, 520 U.S 1210 (1997).

94. Fagan v. City of Vineland, 22 F.3d 1296, 1308 (3rd Cir. 1994).

HeinOnline -- 53 Okla. L. Rev. 209 2000

described it as "troubling, subjective."[95] In sum, before *Lewis*, even the courts that felt bound to use the *Rochin* formula yearned for a better standard. And at least one Justice openly questioned the "usefulness of 'conscience-shocking' as a legal test."[96]

III. Due Process and Rationality in Law Enforcement

In its original conception, due process referred to a general standard imposed on government. The agents of the state were not to act against the life, liberty, and property of the citizen except by regular, common-law procedures as defined by the jurisdiction. As a matter of history and tradition, due process traces back to the promise of the Magna Carta, which ensured that the sovereign's power could not condemn a man to death (deprivation of life) or to prison (deprivation of liberty), or to loss of land and holdings (deprivation of property) except by judgment of his peers or by the law of the land.[97]

The opinion of the Court in *Lewis* does not survey the evidence regarding the original understanding of "due process." For that matter, neither do the concurring opinions of Justice Kennedy or Justice Scalia, which purport to defend using history and tradition to define the reach of the due process guarantee, but which also compound confusion by blurring the problem of defining what liberty interests deserve close judicial attention and the undisputed fact that in *Lewis*, the victim suffered a constitutionally cognizable loss, loss of life. As a fragment of evidence relevant to the problem of arbitrary, unjustified, and lawless conduct causing death, consider the following passage from Sir William Blackstone's commentaries:

> This natural life being . . . the immediate donation of the great creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority. Yet nevertheless it may, by the divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments; . . . . [W]henever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical: and that whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may by prudent caution provide against it. The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity: and the

95. L.W. v. Grubbs, 92 F.3d 894, 898 (9th Cir. 1996).

96. Herrera v. Collins, 506 U.S. 390, 428 (1993) (Scalia, J., concurring).

97. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 20-21, 195 (1977).

> constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law.[98]

In the early years of the republic, the due process concept had already begun to evolve. In his famous argument before the Supreme Court in *Dartmouth College v. Woodward*,[99] Daniel Webster spoke of due process as "law which hears before it condemns; which proceeds upon inquiry; and renders judgment only after trial."[100] Webster's description shows that due process was beginning to become a more demanding standard, which imposed on government a duty to act with care, deliberation,[101] and reasonableness, and not recklessly, arbitrarily, or in conscious disregard of law. At that point in historical development of due process, Alexander Hamilton's description of due process was still accurate: "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of the legislature."[102]

In the late nineteenth century, however, due process began a strange metamorphosis into a phrase of "convenient vagueness."[103] After the Supreme Court rejected the idea that the right to work was among the privileges and immunities of citizenship in the *Slaughterhouse Cases*,[104] the Supreme Court gradually transformed due process into a doctrinal body of economic policies. Due process became a means to evade *Slaughterhouse* and a flexible, potent protection for corporations, businesses, and property rights. Specifically, the Justices ruled that due process ensured the right to just compensation when the state exercises the power of eminent domain;[105] it protected "the right to pursue any livelihood or avocation, and . . . to enter into all contracts which may be proper, necessary and essential";[106] and it even secured the right for railroads to earn a fair profit from state-

---

98. 1 WILLIAM BLACKSTONE, COMMENTARIES *129-30, *reprinted in* Neil H. Cogan (ed.), THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES & ORIGINS 359-60 (1997).

99. 17 U.S. (4 Wheat.) 518 (1819).

100. *Id.* at 581.

101. The duty of deliberation and inquiry — a fair and appropriate decision-making process — prior to a government's action against life, liberty, and property is the special office of procedural due process. *See generally*, Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970). At a minimum, the principles seek to "minimize the risk of erroneous decisions." Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 13 (1979).

102. THE PAPERS OF ALEXANDER HAMILTON 35 (H.C. Syrett & J.E. Cooke eds., 1962), *quoted in* BERGER, *supra* note 97, at 194, 196 n.11. Professor Berger's chapter on due process is a skillful, comprehensive collection of historical materials, in which he concludes: "Whether one can determine 'precisely' what due process meant, however, is not nearly so important as the fact that one thing quite plainly *it did not mean*, in either 1789 or 1866; it did not comprehend judicial power to override legislation on substantive or policy grounds." BERGER, *supra* note 97, at 193-94.

103. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 19 (1938).

104. 83 U.S. (16 Wall.) 36 (1872) (noting Louisiana did not interfere with disgruntled butchers' rights under the privileges and immunities clause of the Fourteenth Amendment when the state created a monopoly as a means of moving slaughterhouses out of New Orleans).

105. *See* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 257-58 (1897).

106. Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

HeinOnline -- 53 Okla. L. Rev. 211 2000

fixed railroad rates.[107] At approximately the same time in history, the Justices chose to deny the more obvious procedural implications of the text, as they ruled against jury trial rights, rights to counsel, and the rights against self-incrimination.[108]

As one historian put it,

> [d]ue process was fashioned from the most respectable ideological stuff of the later nineteenth century. The ideas out of which it was shaped were in full accord with the dominant thought of the age. They were an

---

107. *See* Smith v. Ames, 169 U.S. 466, 522 (1898).

108. The striking contrast between the Court's unwillingness to amplify the procedural contributions of due process and its enthusiasm for judicial review of legislative policy under "substantive due process" notions is easily traced in even a rough timeline of decisions from the late nineteenth century and the first half of the twentieth century: *Munn v. Illinois*, 94 U.S. 113, 125 (1877) (noting in dicta that government price regulation might violate due process); *Hurtado v. California*, 110 U.S. 516, 538 (1884) (holding grand jury indictment or presentment is not an element of due process); *Railroad Comm'n Cases*, 116 U.S. 307, 331 (1886) (noting in dicta that states may not regulate in a way that amounts to a taking of property for public use without just compensation, or without due process of law); *Minnesota Rate Case*, 134 U.S. 418, 458 (1890) ("The question of reasonableness of a rate . . . for transportation . . . [is] eminently a question for judicial investigation, requiring due process of law . . . ."); *Allgeyer*, 165 U.S. at 589 (holding liberty of contract is protected by the Due Process Clause of the Fourteenth Amendment); *Smith v. Ames*, 169 U.S. 466, 547 (1898) (holding rate regulation must guarantee fair return on present value); *Maxwell v. Dow*, 176 U.S. 581, 595-96 (1900) (holding trial by jury may be modified by a state or abolished altogether, even in criminal cases); *Lochner v. New York*, 198 U.S. 45, 64 (1905) (holding state regulation of bakers' work hours was an unreasonable interference with liberty of contract); *Adair v. United States*, 208 U.S. 161, 176 (1908) (holding employers have Fifth Amendment due process right to insist on contract that workers do not join unions, despite federal statute); *Twining v. New Jersey*, 211 U.S. 78, 110 (1908) (holding the privilege against self-incrimination "is not fundamental in due process of law, nor an essential part of it"); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (holding employers have Fourteenth Amendment due process right to insist on contract that workers do not join unions, despite state statute); *Frank v. Mangum*, 237 U.S. 309, 344-45 (1915) (holding prisoner's allegations in habeas corpus petition that a trial, conviction, and death sentence was the result of mob domination presented no issue of due process); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (holding a law forbidding instruction in any modern language other than English unreasonably interfered with parental freedoms to raise their children secured by due process); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (holding mandatory attendance in public schools unreasonably interfered with parental liberty to send children to private schools); *Buck v. Bell*, 274 U.S. 200, 207-08 (1927) (holding involuntary sterilization of inmates found to be afflicted with a heredity form of insanity or imbecility did not violate due process); *United Rys. v. West*, 280 U.S. 234, 252 (1930) (holding, based on due process, a state-fixed rate for railway company allowing a rate of return of only 6.26% was confiscatory; the company had a constitutional right to a return of 7.44% of the value of its assets); *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (holding due process requires state to supply counsel to indigent capital defendants); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (holding torture to obtain confessions violates due process); *Grosjean v. American Press Co.*, 297 U.S. 233, 243-44 (1936) (holding due process guarantees freedom of expression); *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (same); *Palko v. Connecticut*, 302 U.S. 319, 364 (1937) (holding protection against double jeopardy is not guaranteed by Fourteenth Amendment's Due Process Clause); *Adamson v. California*, 332 U.S. 46, 53, 56 (1947) (affirming *Twining* and *Palko*; ruling that prosecutorial comment on a defendant's silence is not a violation of due process); *Wolf v. Colorado*, 338 U.S. 25, 33 (1949) (holding exclusionary rule does not apply to state criminal proceedings).

HeinOnline -- 53 Okla. L. Rev. 212 2000

> aspect of common sense, a standard of economic orthodoxy, a test of straight thinking and sound opinion.[109]

However, this transformation of individualism, laissez faire, freedom of contract, and social darwinism from (arguably) sound policy into constitutional mandates had little to do with the historic meaning of due process. No matter. "Words on parchment could not be adamant before so powerful a thrust. . . . [A]s a last resort, a vague 'natural rights' as a higher law might have been found to permeate the whole Constitution."[110] The best known case of the era is, of course, the infamous *Lochner v. New York*,[111] in which New York's regulation of the working hours of bakers was struck down as offensive to freedom of contract as secured by the transformed due process guarantees of the Fourteenth Amendment. Great controversy remains regarding why *Lochner* is so universally condemned as a form of judicial sin, though there is little doubt about why it was decided. The Justices condemned New York's labor law as "unreasonable, unnecessary and arbitrary."[112] New York's regulatory strategy lacked "a more direct relation, as a means to an end"[113] to its articulated health objectives, and its unarticulated objective of promoting bargaining equality between employer and worker was deemed to be illegitimate. In sum, after *Lochner*, statutes, the acts of legislatures, were arbitrary in a constitutional sense, if they lacked sufficient justification.[114]

The familiar story of the *Lochner* era ends — or seems to end — when the Supreme Court throws out most of this so-called "economic due process" doctrine after the Great Depression and the New Deal reconstruct attitudes about the proper role of government.[115] Ordinary government measures have sufficient justification if a legislator had a rational basis for concluding that a law furthered legitimate objects, including health, welfare, morals, or even equality.[116] Put another way, such laws were not arbitrary, because they had a rational justification. Judicial activism regarding economic regulations and social welfare measures receded, but the "arbitrary" standard did not die. Substantive due process was temporarily

---

109. Walton H. Hamilton, *The Path of Due Process of Law*, *in* AMERICAN CONSTITUTIONAL LAW: HISTORICAL ESSAYS 131, 153 (Leonard W. Levy ed., 1966).

110. *Id.*

111. 198 U.S. 45 (1905).

112. *Id.* at 56.

113. *Id.*

114. *See, e.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (noting ordinance violates due process only if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (holding that the challenged statute "is arbitrary and without reasonable relation to any end within the competency of the State").

115. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 861-64 (1992).

116. *See* Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) (refusing "to sit as a 'superlegislature to weigh the wisdom of legislation'") (quoting Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952)); United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) ("[T]he existence of facts supporting the legislative judgment is to be presumed."); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398 (1937) (noting as long as legislative responses are not arbitrary or capricious, judges should refrain from reviewing wisdom of laws) (quoting Nebbia v. New York, 291 U.S. 502, 537-38 (1934)).

HeinOnline -- 53 Okla. L. Rev. 213 2000

dormant but potent as a warrant for judicial inquiry into the reasonableness of other laws. And the doctrine bore new and different tasting fruit in the last half of the twentieth century. Judicial deference was to be the rule, but some powerful exceptions were devised to protect individual autonomy in an increasingly powerful welfare state.[117]

Nothing in *Lewis* contradicts or even questions this account of history. And so, Justice Souter could see a constant theme even in a changing, expanding, transformed doctrine: "Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action."[118] To explain and summarize the development of due process, Souter quoted from two nineteenth century decisions that purported to state "[t]he principal and true meaning of the phrase":[119]

> As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.[120]

Modern cases, including the classic decisions recognizing a right of privacy, also teach that due process and the interests it protects form a "a rational continuum which broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[121] Much of this rhetoric was devoted to

---

117. *See, e.g.*, TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 454 n.17, 458 (1993) (plurality opinion) (noting substantive due process principles continue to place some limits against punitive damages that are "plainly arbitrary and oppressive," and "'general concern of reasonableness . . . properly enter into the constitutional calculus'") (quoting Pacific Mutual Life Ins., Co. v. Halsip, 499 U.S. 1, 18 (1991)); Moore v. East Cleveland, 431 U.S. 494, 501-02 (1977) (quoting Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J. dissenting)); *see also TXO Prod. Corp.*, 509 U.S. at 467 (Kennedy, J., concurring) (stating that the Constitution's "fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property"). *But see id.* at 443 (O'Connor, J. dissenting) (urging "sufficient constitutional scrutiny to restore fairness in what is rapidly becoming an arbitrary and oppressive system"); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) ("[T]he question . . . is whether . . . the University acted arbitrarily."); Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("[T]he touchstone of due process is protection of the individual against arbitrary action of government.").

118. County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998).

119. *Id.* at 845 (quoting Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819)).

120. *Id.* (quoting Hurtado v. California, 110 U.S. 516, 527 (1884). In *Lewis*, Justice Souter also cited several other precedents in support of the idea that "the touchstone of due process is protection of the individual against arbitrary action of government." *Id.* (citing Wolff v. McDonnell, 418 U.S. 539, 558 (1974)); *see also, e.g.*, Daniels v. Williams, 474 U.S. 327, 331 (1986) (explaining that the substantive due process guarantee protects against government power arbitrarily and oppressively exercised); Fuentes v. Shevin, 407 U.S. 67, 82 (1972) (noting the procedural due process guarantee protects against "arbitrary takings").

121. Moore v. East Cleveland, 431 U.S. 494, 502 (1977) (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J. dissenting)).

HeinOnline -- 53 Okla. L. Rev. 214 2000

justifying judicial review of the substance of legislative policy, not procedure. Yet, as Judge Richard Posner has written, substantive due process still

> stinks in the nostrils of modern liberals and modern conservatives alike, because of its association with Dred Scott's case[122] and with *Lochner* and the other freedom of contract cases, because of its formlessness, . . . and because it makes a poor match with the right to notice and hearing that is the procedural content of the clause.[123]

In sum, despite the evolving content of constitutional doctrine, and its changing focus, the Supreme Court has never wavered in its conclusion that the core principle of due process protects the individual from arbitrary government action.[124] Before and after *Lochner*, in *Collins*, and even in *Lewis*, the word "arbitrary" — never explicitly defined — has been a favorite tool for defining the essence of substantive due process.[125] Until *Lewis* fused the phrase "arbitrary in a constitutional sense" with "conscience-shocking," there was little reason to suppose that the meaning of the word differed from the many other occasions when federal courts defined due process as a general prohibition against arbitrary restraints. *Blacks's Law Dictionary* offers a number of definitions:

> • "In an unreasonable manner, as fixed or done capriciously or at pleasure."
> • "Without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously;
> • "tyrannical; despotic; . . ."
> • "Without fair, solid, and substantial cause; that is, without cause based upon the law, . . . ; not governed by any fixed rules or standard."
> • "Willful and unreasoning action, without consideration and regard for facts and circumstances presented."
> • "Ordinarily, 'arbitrary' is synonymous with bad faith or failure to exercise honest judgment and an arbitrary act would be one performed

122. Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

123. RICHARD A. POSNER, OVERCOMING LAW 179-80 (1995).

124. *See* Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

125. *Compare, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring) ("Those who won our independence believed . . . that in its government the deliberative forces should prevail over the arbitrary.") *with* WALTER LIPPMANN, THE GOOD SOCIETY ch. 15 (1937), *reprinted in* THE ESSENTIAL LIPPMANN: A POLITICAL PHILOSOPHY FOR LIBERAL DEMOCRACY 172-73 (Clinton Rossiter & James Lare eds., 1963) ("The denial that men may be arbitrary in human transactions is the higher law. . . . By this higher law all formal laws and all political behavior are judged in civil societies. . . . If the sovereign himself may not act willfully, arbitrarily, by personal prerogative, then no one may. His ministers may not. The legislature may not. Majorities may not. . . . This law which is the spirit of law is the opposite of an accumulation of old precedents and new fiats. By this higher law, that men must not be arbitrary, the old law is continually tested and the new law reviewed.").

HeinOnline -- 53 Okla. L. Rev. 215 2000

> without adequate determination of principle and one not founded in nature of things."[126]

Despite the multiplicity of definitional phrases, there are, at least, two distinct themes. First, arbitrary conduct is capricious, irrational and without "fair, solid and substantial cause." In a second sense, arbitrary conduct is tyrannical, despotic or oppressive.[127] None of the words seem to confine the definition of "arbitrary" to intentional murder or torture.

The distinction between substance and procedure is not always clear and sharp.[128] Unrecognized in *Lewis* is the fact that the police speeding cases — though characterized as substantive due process cases — have more to do with the procedure by which the executive branches act than the policies of law enforcement selected by majorities. In this sense, police recklessness implicates the original values of due process, if not the specific original understandings of the clause. In simplest terms, the core of the due process clause is a command directed to the law enforcement authority of the community that no life, liberty, or property is to be taken except by lawful judicial procedure.[129] When focused on issues of law enforcement procedure, due process rests securely on the notion that it takes "no violent stretching of democratic theory to suppose an expectation on the part of the people that, in employing the criminal sanction, the political branches would abide the judge's sense of what was mete and decent in the way of procedure, just as they abided the discretion of the jury."[130] Due process "must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which compromise substantive law."[131]

Justice Kennedy filed a concurring opinion in *Lewis* that conceded that the "shock the conscience" phrase "has the unfortunate connotation of a standard laden with

---

126. BLACK'S LAW DICTIONARY 104-05 (6th ed. 1990).

127. *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 110 (1971) (defining "arbitrary" as "arising from unrestrained exercise of the will, caprice, or personal preference," "based on random or convenient selection or choice rather than on reason or nature," "given to willful irrational choices and demands," or "characterized by absolute power or authority: despotic, tyrannical").

128. *See, e.g.*, Edward L. Rubin, *Generalizing the Trial Model of Procedural Due Process: A New Basis for the Right to Treatment*, 17 HARV. C.R.-CL. L. REV. 61, 68-69 (1982); *see also, e.g.*, JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 5 (1985) (stating that questions of substance and process are "functionally inseparable").

129. There is, of course, great controversy about the procedural content of the due process clause as originally conceived and understood. Professor Berger concludes that "*'[d]ue process' should . . . be regarded as shorthand for Coke's 'by the due course and process of law' in judicial proceedings.*" BERGER, *supra* note 97, at 198-99. His narrow interpretation contrasts with other scholars who believe "the history of due process shows that it did mean trial by jury and many of the other traditional rights . . . specified separately in the Bill of Rights." LEONARD W. LEVY, JUDGMENTS: ESSAYS IN CONSTITUTIONAL HISTORY 66 (1972).

130. ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 32 (1970).

131. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).

HeinOnline -- 53 Okla. L. Rev. 216 2000

subjective assessments."[132] He recommended "considerable skepticism" about trusting the "conscience-shocking" formula, which the concurring opinion seems to undermine by suggesting that "the test can be used to mark the beginning point in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning."[133] If "conscience-shocking" is only a beginning point and not an end of analysis, Justice Kennedy's opinion may suggest that a different compromise is possible. He recommended a unitary approach based on "objective considerations, including history and precedent, . . . regardless of whether the State's action is legislative or executive in character."[134] Such an approach — well-established, traditional, and consistent with other due process analysis — is the modern formulation of the "arbitrary" standard, the rational basis test.

In *Lewis*, the Court should have ruled that governmental action depriving a person of life or bodily integrity[135] is arbitrary in a constitutional sense, if reckless conduct is "without any reasonable justification in service of a legitimate governmental objective."[136] Applied to a case like *Lewis*, a rationality standard would ensure that due process guarantees are not violated when police or other law enforcement officials make poor judgment calls in emergency situations.[137] Yet it would also permit the possibility of liability — and incentives for training and care — if a police officer kills or injures a person because of recklessly dangerous conduct in a nonemergency situation without plausible or rational justification.

To appreciate the impact of a rationality standard, consider the following case.[138] A police officer hears a radio call requesting backup assistance in the early hours of the morning. There is no emergency. He knows other officers are also responding to the call. The officer drives his vehicle in excess of seventy miles per hour in zones with a posted maximum of thirty-five mph on a major city boulevard that intersects with several other major boulevards. He drives without sirens and without lights. At one intersection, he drives through a red light and collides with a vehicle operated by a young man who is driving safely and had the green light and the right of way. The victim is not negligent and he has nothing whatever to do with the events leading to the call of the officer requesting assistance. The

132. County to Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring).

133. *Id.*

134. *Id.* at 858.

135. In *Lewis*, the beginning point of analysis was clear: a person suffered loss of constitutionally protected interests in life and liberty. The loss required no judicial search for fundamental values, as in privacy and abortion cases, and it required no second-guessing of the substance of a statute adopted by the ordinary majoritarian processes of representative government. *Id.* at 857.

136. *Id.* at 856.

137. *See, e.g.*, Uhlrig v. Harder, 64 F.3d 567, 575-76 (10th Cir. 1995) (holding though a government agency's affirmative acts created or increased danger of violence from a private third party, its acts were not capricious, not irrational, not arbitrary because they were a typical and reasonable response to declining funds and scarce resources).

138. The case is hypothetical, though it is loosely based on the plaintiff's allegations in *Williams v. Denver*, 99 F.3d 1009 (10th Cir. 1996). The facts have been altered to provide a clearer and more persuasive basis for the hypothetical plaintiff's claim.

officer's driving violates both state law and written department procedures for emergency driving. Specifically, both state law and department policy require emergency vehicles to use lights and sirens and to slow down before entering controlled intersections if they are otherwise violating traffic laws. The policies also specifically forbid speeding in nonemergency situations. The officer acknowledges that he knows the applicable policies and that he had no justification for his speeding. Even worse, he has a poor driving record as an officer. He has caused nonfatal wrecks before.

To resolve this case, one need not develop a principle that would make every ordinary accident involving police a federal case. "The key word is 'accident.'"[139] Due process requires proof of more than inadvertence, inattention, or negligence. As the Supreme Court stated in *Daniels v. Williams*, "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property."[140] The holding of *Daniels* has roots in the warnings of the Supreme Court in *Paul v. Davis*.[141] Neither section 1983 nor the Fourteenth Amendment should become "a font of tort law to be superimposed upon whatever systems may already be administered by the States."[142] In *Paul*, the Court anticipated constitutional claims arising from negligent driving of law enforcement officers:

> And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected from state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander . . . negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under [section] 1983.
>
> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result . . . .[143]

---

139. Hill v. Shobe, 93 F.3d 418, 421 n.2 (7th Cir. 1996); *see also, e.g.*, Apodaca v. Rio Arriba County Sheriff's Dep't, 905 F.2d 1445, 1447 (10th Cir. 1990) (holding "negligent operation of a vehicle by a police officer does not rise to the level of a constitutional violation"); Cannon v. Taylor, 782 F.2d 947, 950 (11th Cir. 1986) ("Automobile negligence actions are grist for the state law mill. But they do not rise to the level of a constitutional deprivation.").

140. 474 U.S. 327, 333-34 (1986); *see also, e.g.*, Collins v. Harker Heights, Texas, 503 U.S. 115, 129-30 (1992) (holding that allegations of negligence or omissions do not state a claim for arbitrary misconduct in violation of the Due Process Clause).

141. 424 U.S. 693 (1976).

142. *Id.* at 701.

143. *Id.* at 698-99.

HeinOnline -- 53 Okla. L. Rev. 218 2000

One need not doubt the wisdom of the *Paul* holding or the Court's speculations about the original meaning of the Fourteenth Amendment to suggest that a reckless killing without rational justification is quite different. Not only is it the sort of incident that might be featured in a novel by Hugo or Dickens, it is the sort of arbitrary behavior that inspired the Magna Carta itself, and its restraints of law against the oppressive discretion of the Crown's agents.[144] Two steps seem sufficient to guard against the Court's fears as expressed in *Daniels* and *Paul*. To avoid an avalanche of constitutional tort litigation, courts need, first, to require proof of reckless intent or deliberate indifference.[145] Almost all courts seem to conclude that the inquiry is, at least in part, a subjective inquiry into the state actor's actual thinking at the time of the alleged constitutional violation.[146]

Second, courts should insist that the recklessness occur in a nonemergency situation, or in circumstances lacking any rational justification. The dual element test should suffice to protect law enforcement from the all-too-tempting second-guess. The judgment call responding to some perceived urgency — even if questionable or controversial or even wrong — deserves the benefit of presumed

---

144. *See supra* note 98 and accompanying text.

145. Judicial definitions of "reckless conduct" seem to follow similar, though not identical, patterns of assessing both objective factors — such as the degree or unreasonableness of risk — and subjective factors — such as awareness, knowledge, and intent. For example, according to the American Law Institute:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

RESTATEMENT (SECOND) OF TORTS § 500 (1965). The Model Penal Code offered the following definition of "reckless" conduct to determine culpability under criminal law:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2)(c) (1985).

146. *Compare, e.g.*, Bryan County v. Brown, 520 U.S. 397, 410 (1997) ("'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his or her action . . . .") *with id.* at 449 (Souter, J., dissenting) ("Deliberate indifference is thus treated, as it is elsewhere in the law, as tantamount to intent, so that inaction by a policymaker deliberately indifferent to a substantial risk of harm is equivalent to the intentional action that setting policy presupposes."). *See, e.g.*, Hill v. Shobe, 93 F.3d 418, 421 (7th Cir. 1996) (stating that culpability standard requires proof a defendant is criminally reckless, which is a proxy for intent); Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 531 (5th Cir. 1994) (stating deliberate indifference suffices to state a substantive due process claim); Archuleta v. McShan, 897 F.2d 495, 499 (10th Cir. 1990) ("[R]ecklessness includes an element of deliberateness — a *conscious* acceptance of a known, serious risk."); Archie v. City of Racine, 847 F.2d 1211, 1219 (7th Cir. 1988) (en banc) (defining recklessness as containing an intent component because reckless disregard of a great risk is a form of knowledge or intent), *cert. denied*, 489 U.S. 1065 (1989).

HeinOnline -- 53 Okla. L. Rev. 219 2000

rationality and constitutionality. Without such presumptions, due process standards will not reflect the realities of law enforcement. Authentic emergency supplies a rational basis in police chase cases.

> Police chases are not only a necessary concomitant of maintaining order in our modern society, but they are also inherently hazardous. By their very nature, they inevitably create some risk of injury to bystanders. Officers must decide the balance between law enforcement and risk to public safety quickly and while under considerable pressure. In such circumstances, permitting the Due Process Clause to serve as a surrogate for state tort law would hamstring the police in their performance of vital duties.[147]

On the other hand, in the absence of emergency or some other rational justification, it is hard to imagine what constitutional value or purpose is achieved by tolerating police recklessness without any plausible warrant. The result is hard to square with the principle that government must not deprive the individual of life except by resort to judicial proceedings. Unwarranted or irrational recklessness is worse than a mistake; it seems to be a deliberate disregard for legal *and* constitutional duty. If anything, the burden of this interpretation will fall most heavily on police and executive law-enforcing authority,[148] the intended targets of the due process obligation, rather than the legislature's law-making power, which was not a target.[149] However, consistent with Justice Kennedy's sentiments in his concurring opinion in *Lewis*, a dual standard would operate in approximately the same way regardless of whether legislative policy or executive action was at issue. It would do no harm to the time-honored "presumption that the administration of government programs [be] based on a rational decisionmaking process."[150]

---

147. Evans v. Avery, 100 F.3d 1033, 1038 (1st Cir. 1996) (finding officers' decision to pursue based on good cause to believe the suspects were trafficking in cocaine).

148. The phrase "due process of law," and its origins in the purposes of the "law of the land" language of the Magna Charta, reflect the desire that government's law enforcement mechanisms could not act against life, liberty, or property of the individual except through "regularized common law procedures, especially grand jury accusation and trial by jury." LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 273 (1988); *see also, e.g.*, BERGER, *supra* note 97, at 198-99 ("due process was *not* a catchall for all other safeguards that the Bill of Rights provided to a defendant; it had a special and limited function: to insure through service of proper, that is, 'due', process that a defendant would be given a chance to answer."). In short, despite the differences in academic interpretations of due process, it is common ground that law enforcement was to proceed through ordinary judicial procedures, and not on its own arbitrary initiative.

149. "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; *they can never be referred to an act of the legislature.*" THE PAPERS OF ALEXANDER HAMILTON 35 (H.C. Syrett & J.E. Cooke eds., 1962), *quoted in* BERGER, *supra* note 97, at 194 n.4 (emphasis added by Berger).

150. Collins v. Harker Heights, Texas, 503 U.S. 115, 128 (1992).

HeinOnline -- 53 Okla. L. Rev. 220 2000

Conclusion

In a historical context, the opinion of the Court in *Lewis*, though firm, clear, and unanimous, remains deeply unsatisfying as an explanation of the Justices' preferred values and doctrinal emphasis. The Justices reaffirmed the principle that government must not be arbitrary, but it turned away from the traditional, legal, and literal meanings of the word "arbitrary." The Justices announced that the doctrines of due process require one set of formulae for reviewing legislation and quite another for the conduct of the executive, with hardly an explanation of why a differential standard emerges from the phrase "due process" or its history. Finally, by adopting a newer, clearer, more rigid formulation of the "conscience-shocking" test, one that seems to require a specific intent to brutalize and harm, the Justices failed to take account of cases in which police act savagely, with raw power, but without thought or justification.

One of the essential elements of the Jeffersonian faith is belief in the moral sense of the common man. Writing from Paris at approximately the same time as the federal convention was completing its work on the Constitution, Thomas Jefferson argued: "State a moral case to a ploughman and a professor. The former will decide it as well, and often the better . . . because he has not been led astray by artificial rules."[151] These Jeffersonian sentiments speak ambiguously to *Lewis*. On the one hand, they counsel against unilateral judicial resolution of the moral case implicit in a police speeding tragedy, and in favor of allowing the political system to develop the remedies, if any, afforded to the victims of police recklessness.[152] On the other hand, if one was to state the moral and legal case to the ploughman, the baker, the homemaker, or the mother and ask, "Which problem is a question of due process: Reckless police speeding causing fatalities? Or birth control, abortion, parenting, sexual intimacy, and family living arrangements?" A thoughtful person blessed with more common sense than legal learning just might conclude that the accretions in due process doctrines have the wrong emphasis and that the entire subject, and subjectivity, of "substantive due process" is one example when judges, lawyers, and professors have been led astray by artificial rules.

151. Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787) *reprinted in* THOMAS JEFFERSON, WRITINGS (Merrill D. Peterson ed., 1984).

152. Jefferson was speaking of professors of moral philosophy, not professors of law and not lawyers. *But see* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 293 (1990) (Scalia, J., concurring) (reasoning regulation of individual choices to die should be left to representative government because "[i]t is quite impossible (because the Constitution says nothing about the matter) that [majorities] will decide upon a line less lawful than the one [the Justices] would choose; and it is unlikely (because we know no more about 'life and death' than they do) that they will decide upon a line less reasonable").

HeinOnline -- 53 Okla. L. Rev. 221 2000

HeinOnline -- 53 Okla. L. Rev. 222 2000