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NOTE

The Constitutionality of Employer-Accessible Child Abuse Registries: Due Process Implications of Governmental Occupational Blacklisting

Michael R. Phillips

INTRODUCTION

Every state has enacted legislation authorizing governmental intervention into the traditionally sacrosanct domain of the family in order to protect children from abuse.¹ The comprehensiveness of these laws reflects the seriousness and pervasiveness of this country's child abuse problem.² As part of this offensive, most states have established comprehensive indexes of their received child abuse reports known as child abuse registries. These registries actually originated in municipal governments,³ but state governments quickly adopted them as well.⁴ State child abuse registries proliferated during the early 1970s,⁵

1. See, e.g., Child Protection Act of 1987, COLO. REV. STAT. §§ 19-3-301 to -316 (Supp. 1992); Children and Family Services Act, 20 ILL. COMP. STAT. 505/1-505/41 (1992); Missouri Child Protection and Reformation Act, MO. REV. STAT. §§ 210.110-.189 (1986 & Supp. 1992); Child Protective Services Act, N.Y. SOC. SERV. LAW §§ 411-428 (McKinney 1992).

2. Recent data collection studies show between 1.4 and 2.2 million reported cases of child abuse and neglect annually. Based on these figures, between 22.6 and 34 children in every 1000 suffer maltreatment each year. VERNON R. WIEHE, *WORKING WITH CHILD ABUSE AND NEGLECT* 19-23 (1992). These statistics exclude unreported cases of child maltreatment, and other methodology indicates that the actual incidence of abuse may be substantially higher. Some studies have fixed the proportion of children suffering from parental physical abuse at 620 per 1000. *Id.* at 18 (citing Murry A. Straus & Richard J. Gelles, *Societal Change and Change in Family Violence from 1975 to 1985 as Revealed by Two National Surveys*, 48 J. MARRIAGE & FAM. 465, 469 (1986)). In addition, public opinion surveys have found that as many as 38% of women report experiencing sexual abuse as children. *Id.* at 16 (citing DIANA E. RUSSELL, *THE SECRET TRAUMA* 61 (1986)). Aside from physical injury, child abuse can cause cognitive and learning impairment, language delay, disturbed interpersonal behavior, distorted social perceptions, lowered self-esteem, emotional problems, self-abusive behavior, and criminal proclivities. TIMOTHY J. IVERSON & MARILYN SEGAL, *CHILD ABUSE AND NEGLECT* 86-109 (1990). See generally MARGARET A. LYNCH & JACQUELINE ROBERTS, *CONSEQUENCES OF CHILD ABUSE* (1982); RAYMOND H. STARR & DAVID A. WOLFE, *THE EFFECTS OF CHILD ABUSE AND NEGLECT* (1991) (describing consequences and effects of child abuse).

3. Denver, Los Angeles, and New York City established central registries in 1964, and Cincinnati and Milwaukee followed in 1965. Douglas J. Besharov, *Putting Central Registers to Work: Using Modern Management Information Systems to Improve Child Protective Services*, 54 CHI.-KENT L. REV. 687, 689 (1978).

4. California, Illinois, Virginia, and Maryland all instituted central registries between 1965 and 1966. *Id.*

5. *Id.* at 689-90.

spurred by the urgings of commentators and child abuse specialists.⁶ Currently, forty states and the District of Columbia maintain such listings.⁷

Originally, child abuse registries had quite limited goals. Experts viewed the registries' function as aiding doctors and social service workers in detecting child abuse and providing researchers with statistical data.⁸ Since their inception, however, registries have evolved into tools of crime prevention as well as crime detection. Social service agencies now use them to identify a class of child abusers and isolate these individuals from potentially harmful contact with children.⁹ This change in the use of child abuse registries has serious ramifications for child care workers who may be listed in them.¹⁰

When states make their child abuse registries available to employ-

6. See, e.g., Brian G. Fraser, *Towards a More Practical Central Registry*, 51 DENV. L.J. 509 (1974).

7. See ALA. CODE § 26-14-8 (1992); ALASKA STAT. § 47.17.040 (1990); ARK. CODE ANN. § 12-12-505 (Michie Supp. 1991), as amended by Act of Apr. 14, 1993, 1993 Ark. Acts 1088; CAL. PENAL CODE § 11170 (West Supp. 1993); COLO. REV. STAT. § 19-3-313 (Supp. 1992); CONN. GEN. STAT. 17a-101(g) (1992); DEL. CODE ANN. tit. 16, § 905(c) (Supp. 1992); D.C. CODE ANN. § 6-2111 (1989); FLA. STAT. ch. 415.504(4)(a) (1992); GA. CODE ANN. § 49-5-181 (Michie 1990); HAW. REV. STAT. § 350-2(c) (Supp. 1992); IDAHO CODE § 16-1623(c) (Supp. 1993); 325 ILL. COMP. STAT. 5/7.7 (1992); IOWA CODE § 235A.14 (1983); KAN. STAT. ANN. § 38-1520 (1986); MD. FAM. LAW CODE ANN. § 5-714 (1991); MASS. ANN. LAWS ch. 119, § 51F (Law. Co-op. 1975 & Supp. 1993); MICH. COMP. LAWS § 722.627(1) (1992); MISS. CODE ANN. § 43-21-257(3) (1993); MO. REV. STAT. § 210.145.2 (Supp. 1992); NEB. REV. STAT. § 28-718 (1989); NEV. REV. STAT. § 432.100(1) (1991); N.H. REV. STAT. ANN. § 169-C:35 (1990); N.J. REV. STAT. § 9:6-8.11 (1993); N.Y. SOC. SERV. LAW § 422(1) (McKinney 1992); N.C. GEN. STAT. § 7A-552 (1989); N.D. CENT. CODE § 50-25.1-05.5 (Supp. 1991); OHIO REV. CODE ANN. § 2151.42.1(F) (Anderson Supp. 1992); OKLA. STAT. tit. 21, § 846(D) (Supp. 1993); OR. REV. STAT. § 418.765(1) (1991); 23 PA. CONS. STAT. § 6331 (Supp. 1993); R.I. GEN. LAWS § 42-72-7(a) (1988); S.C. CODE ANN. § 20-7-680 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 26-8A-10 (1992); TENN. CODE ANN. § 37-1-408 (Supp. 1992); TEX. FAM. CODE ANN. § 34.06 (West Supp. 1992); VT. STAT. ANN. tit. 33, § 4916 (1991 & Supp. 1992); VA. CODE ANN. § 63.1-248.7(K) (Michie 1993); WYO. STAT. § 14-3-213 (1986); Act of May 12, 1993, § 11, 1993 Ind. Acts 142 (to be codified at IND. CODE § 31-6-11-12.1(a)) (registry must be "fully operational" by June 30, 1994); Act of June 10, 1993, § 1, 1993 La. Acts 505 (to be codified at LA. CHILDREN'S CODE art. 616(A)).

8. See CHILDREN'S BUREAU, U.S. DEPT. OF HEALTH, EDUC. & WELFARE, REPORT OF THE U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES ON THE IMPLEMENTATION OF PUBLIC LAW 93-247, THE CHILD ABUSE PREVENTION AND TREATMENT ACT 13-14 (1975); Besharov, *supra* note 3, at 690; Fraser, *supra* note 6, at 510-11.

9. Compare Besharov, *supra* note 3, at 695 and Fraser, *supra* note 6, at 510-11 and Monrad G. Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 25 (1967) (reflecting an early view of registries' purpose) with Patrick T. Beaty & Mary R. Woolley, *Child Molesters Need Not Apply: A History of Pennsylvania's Child Protective Services Law and Legislative Efforts to Prevent the Hiring of Abusers by Child Care Agencies*, 89 DICK. L. REV. 669, 670 (1985) (discussing 1984 amendment to Pennsylvania's registry law) and Walter E. Forehand, *Are New Procedures Correction Enough for Florida's Child Abuse Registry Statute?*, 18 FLA. ST. U. L. REV. 371, 373 (1991) ("[T]he reporting system is intended to identify children who have been harmed in the home and to prevent further harm.").

10. This Note defines a *child care worker* as any employee whose job involves direct contact with children. This definition includes teachers, camp counselors, and any person employed at a child care or day care facility, even in a noncaretaking capacity.

ers and potential employers, as many do,¹¹ child care workers risk disciplinary action and foreclosure of employment opportunities if they are identified as child abusers.¹² Thus, by maintaining an employer-accessible child abuse registry, a state indirectly may deprive its citizens of important liberty and property interests based on the loss of employment and reputation. Such consequences necessarily raise the issue of whether the state action violates the Due Process Clause of the Fourteenth Amendment.¹³

This Note discusses the due process implications of permitting employer access to state child abuse registries when disclosure affects registry members' employment. Part I describes the operation of child abuse registry statutes and applies selected registry statutes to a hypothetical case to illustrate the standards and procedures they employ. It also examines the constitutional challenges that child care workers have brought against employer-accessible registry statutes. Part II examines how the courts have applied the Due Process Clause to various other forms of governmental blacklisting, including the loyalty-security program, debarment from government contracting, and the denial of professional and business licenses. Part II also demonstrates that the courts consistently have held governmental occupational restrictions to due process scrutiny and argues that courts should apply similar standards to the analogous constitutional issues that employer-accessible child abuse registries raise. Part III assesses the constitutionality of current child registry statutes by identifying the protected interests involved and applying the three-part test of *Mathews v. Eldridge*.¹⁴ Part III concludes that permitting employer access to state child abuse registries impinges upon blacklisted child care employees' protected property interests in employment and upon the liberty interest in employment that all child care workers possess. By weighing the three factors of the *Mathews* test — the private interests of the affected workers, the government's interest, and the risk of error — this Part further concludes that many employer-accessible child abuse registries violate the Due Process Clause. Part IV proposes specific procedural protections that states should provide before they may constitutionally disclose the contents of a child abuse registry to private employers. With these procedural safeguards, states can remedy the constitutional defects in child abuse registry statutes and balance their legitimate interest in protecting children from abuse with the constitutional rights of child care workers.

11. See *infra* text accompanying notes 33-38.

12. See *infra* text accompanying notes 46-48.

13. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty or property, without due process of law").

14. 424 U.S. 319 (1976).

I. CHILD ABUSE REGISTRIES

This Part explains how state child abuse systems typically operate and the role that registries play in those systems. It also illustrates the inability of many child abuse reporting and investigation methods to screen accurately the reports they receive and surveys the resulting constitutional challenges. Section I.A describes how states handle child abuse reports and notes variations between states when appropriate. This section also explains the access policies that states follow with respect to their child abuse registries. Section I.B presents a hypothetical case to show how state agencies may construe innocent conduct as child abuse and how these governmental conclusions can result in loss of employment in states that provide employers access to the state child abuse registry. Section I.C describes courts' mixed rulings in cases challenging the constitutionality of child abuse registry statutes.

A. *Child Abuse Registry Procedures*

Although registries are firmly established weapons states use to combat child abuse, their role and function differ from state to state. These variations result not only from divergence in the statutes themselves, but also from differences in the way state agencies maintain and deploy their registries.¹⁵ In lieu of surveying each of the forty-one child abuse registry statutes currently in force, this section describes how state child abuse systems typically function, based primarily on the laws of Colorado, Illinois, Missouri, New York, and Pennsylvania. This depiction notes some of the differences in state laws but unfortunately obscures many others. It is a generalization of the various state laws, not an expression of their uniformity.

1. *Establishment and Recording*

Central registries are created by statute and placed under the authority of an administrative agency, usually the department of youth or family services.¹⁶ The names of accused child abusers find their way onto the central registry in several ways. In some states, the registry directly receives the initial report of abuse.¹⁷ The registry then dispatches the relevant information to the investigative arm of the re-

15. See Besharov, *supra* note 3, at 691, 706. While few states still keep their registries in shoeboxes as Besharov describes, contemporary variations likely involve whether the registry is computerized and the sophistication of the database used.

16. See, e.g., COLO. REV. STAT. § 19-3-313 (Supp. 1992); 325 ILL. COMP. STAT. 5/7.7 (1992); MO. REV. STAT. § 210.145.2 (Supp. 1992); N.Y. SOC. SERV. LAW §§ 422(1), 424(2) (McKinney 1992).

17. See, e.g., 325 ILL. COMP. STAT. 5/7 (1992); N.Y. SOC. SERV. LAW § 422(2)(a) (McKinney 1992).

sponsible state agency or to local child protective authorities.¹⁸ In other jurisdictions, local child protection units or law enforcement agencies receive the original report and then make a report to the central registry.¹⁹ In both cases, reports of child abuse reach the central registry unfiltered; individuals' names appear prior to any substantiation of the claims made against them.²⁰

2. Investigation of Report

Child abuse statutes require the state's child protection agency to investigate all child abuse reports, usually within twenty-four hours of receipt.²¹ Frequently, state laws mandate deadlines for completion of the investigation in order to ensure expeditious treatment of child abuse claims.²² This investigation focuses on determining whether the report is "indicated," a standard typically defined as whether "some credible evidence of the alleged abuse or maltreatment exists."²³ Once an agency uncovers such evidence, it designates the report as "indicated" in the child abuse registry.²⁴

3. Expungement

Nearly every state has procedures whereby subjects of its child abuse registry can request that their names be expunged.²⁵ In some cases, though, the subject's ability to request expungement lapses after a relatively brief period of time. This creates only a short window

18. See, e.g., 325 ILL. COMP. STAT. 5/7 (1992); N.Y. SOC. SERV. LAW § 422(2)(b) (McKinney 1992).

19. See, e.g., COLO. REV. STAT. § 19-3-307(1) (Supp. 1992); N.J. REV. STAT. § 9:6-8.11 (1993).

20. Some states do limit their abuse registries to substantiated reports. See, e.g., OR. REV. STAT. § 418.765(1) (1991) (providing that Children's Services Division will report to the registry only when an investigation has shown "reasonable cause to believe" that abuse has occurred); 23 PA. CONS. STAT. § 6331(2) (Supp. 1993) (including only founded and indicated reports on the registry); S.C. CODE ANN. § 20-7-680(B) (Law. Co-op. Supp. 1992) (providing that "[r]eports of child abuse and neglect must be maintained on the registry in one of four categories: Suspected, Unfounded, Indicated, or Affirmative Determination"). This Note discusses the adequacy of these standards at *infra* text accompanying notes 50-52.

21. See, e.g., 325 ILL. COMP. STAT. 5/7.4(2) (1992); MO. REV. STAT. § 210.145.6 (1986); N.Y. SOC. SERV. LAW § 424(6) (McKinney 1992).

22. See, e.g., 325 ILL. COMP. STAT. 5/7.12 (1992) (period can be extended for 30 days if "good cause" is shown); N.Y. SOC. SERV. LAW § 424(7) (McKinney 1992) (60 days).

23. N.Y. SOC. SERV. LAW § 412(12) (McKinney 1992); *cf.* 325 ILL. COMP. STAT. 5/3 (1992) (adopting "credible evidence" standard).

24. In those states that require a report to be indicated prior to its inclusion on the registry, these events trigger its initial entry. See *supra* note 20.

25. See, e.g., COLO. REV. STAT. § 19-3-313(7) (Supp. 1992); 325 ILL. COMP. STAT. 5/7.16 (1992); IOWA CODE § 235A.19(2) (Supp. 1992); MICH. COMP. LAWS § 722.627(3) (1992); N.Y. SOC. SERV. LAW § 422(8) (McKinney 1992); 23 PA. CONS. STAT. § 6341(A)(2) (Supp. 1993). This right accrues, however, only after the state has completed its investigation and, in some states, has designated the report "indicated," so the accused remains on the registry while the state agency investigates.

during which an individual can alter his status on the registry.²⁶ If the state agency refuses an expungement request, the subject may seek a hearing. While the state generally bears the burden of proof,²⁷ this burden entails proving only that "some credible evidence" supports the classification.²⁸ Child abuse statutes are generally silent on such matters as the right to counsel and the right to confront and cross-examine adverse witnesses.²⁹ In fact, some statutes prevent the agency from disclosing accusers' identities or any information that would reveal their identities.³⁰ Moreover, the laws do not require a neutral arbiter to preside over the hearing. The subject presumably retains a right to judicial review of the hearing officer's decision,³¹ but courts likely will defer to the administrative decision.³²

4. Access to Child Abuse Registries

The scope of access to a state's child abuse registry is a crucial factor in due process analysis.³³ State statutes have taken three different stances on employer access to child abuse registries. The first position is essentially no position at all: several statutes defer regulation of access to the state agency that administers the registry.³⁴ Other states strictly limit access to their registries and deny access to employers.³⁵

26. See, e.g., 325 ILL. COMP. STAT. 5/7.16 (1992) (60 days); N.Y. SOC. SERV. LAW § 422(8)(a)(i) (McKinney 1992) (90 days).

27. See, e.g., COLO. REV. STAT. § 19-3-313(7)(a) (Supp. 1992); 325 ILL. COMP. STAT. 5/7.16 (1992); N.Y. SOC. SERV. LAW § 422(8)(b)(ii) (McKinney 1992).

28. The statutes typically permit expungement only upon a finding that the record "is inaccurate or it is being maintained in a manner inconsistent" with the statute. COLO. REV. STAT. § 19-3-313(7)(a) (Supp. 1992); see also 325 ILL. COMP. STAT. 5/7.16 (1992); N.Y. SOC. SERV. LAW § 422(8)(a)(i) (McKinney 1992). Because these laws authorize the state to maintain an individual's name on its registry if there exists "some credible evidence" of abuse, the state's burden entails merely proving this fact.

29. Administrative regulations of the child protection agency may confer these rights, but it is significant that states have not established them by statute. For a discussion of the importance of confrontation and cross-examination of witnesses and the presence of counsel in child abuse determination proceedings, see *infra* sections IV.D and IV.G, respectively.

30. See, e.g., MO. REV. STAT. § 210.150 (Supp. 1992).

31. At least one state statute explicitly provides a right to judicial review. See IOWA CODE § 235A.19(3) (1992).

32. Most state administrative procedure acts mandate judicial deference to administrative decisions. See, e.g., 735 ILL. COMP. STAT. 5/3-110 (1992).

33. See *Bishop v. Wood*, 426 U.S. 341 (1976) (holding that government assertions about an individual cannot form the basis of a due process violation unless they are publicized).

34. See CONN. GEN. STAT. § 17a-101(g) (1992); DEL. CODE ANN. tit. 16, § 905(c) (Supp. 1992); HAW. REV. STAT. § 350-1.4 (1992); MASS. ANN. LAWS ch. 119, § 51F (Law. Co-op. 1975 & Supp. 1993); NEV. REV. STAT. § 432.120 (1991); N.H. REV. STAT. ANN. § 169-C:35 (1990); OR. REV. STAT. § 418.770(2) (1991); S.D. CODIFIED LAWS ANN. § 26-8A-12 (1992); TEX. FAM. CODE ANN. § 34.08 (West Supp. 1993); VA. CODE ANN. § 63.1-248.8 (Michie 1993); Act of June 10, 1993, § 1, 1993 La. Acts 505 (to be codified at LA. CHILDREN'S CODE art. 616(A)).

35. ALASKA STAT. § 47.17.040 (1990); D.C. CODE ANN. § 6-2113 to -2114 (1989 & Supp. 1992); GA. CODE ANN. § 49-5-185(a) (1990); IDAHO CODE § 16-1623(f) (Supp. 1993); KAN. STAT. ANN. § 38-1520(e) (1986); MD. FAM. LAW CODE ANN. § 5-714(c) (1991); MISS. CODE

Finally, a significant number of states allow access only to specified parties, including some types of employers.³⁶ A handful of states within this third group take employer access a step further by requiring child care employers to consult the child abuse registry before hiring a prospective employee.³⁷

Because they preclude employer access, the second category of statutes raises no due process issues within the scope of this Note.³⁸ The due process ramifications for the first class of statutes depend upon whether the state agency's rules permit employer access. Only statutes in the last category — those that permit access to specified employers — facially implicate the due process issues that are the subject of this Note.

B. Child Abuse Registry Statutes Exemplified

This section presents a hypothetical false accusation of child abuse and examines how the child abuse systems of two states, Missouri and Pennsylvania, would handle such a report. This hypothetical, which mirrors the facts of an actual case,³⁹ describes the operation of child abuse registries in more salient terms than section I.A and highlights

ANN. § 43-21-261 (1993); N.C. GEN. STAT. § 7A-552 (1989); N.D. CENT. CODE § 50-25.1-11 (1989); OHIO REV. CODE ANN. § 2151.42.1(H)(1) (Anderson Supp. 1992); OKLA. STAT. tit. 21, § 846(E) (Supp. 1993).

36. ALA. CODE § 26-14-8(d) (1992); ARK. CODE ANN. § 12-12-506 (1992); CAL. PENAL CODE § 11170 (West Supp. 1993); COLO. REV. STAT. § 19-1-120 (Supp. 1992); FLA. STAT. 415.51 (1992), as amended by Act of May 12, 1993, 1993 Fla. Laws ch. 214 (effective Oct. 1, 1993); 325 ILL. COMP. STAT. 5/11.1 (1993); IOWA CODE § 235A.15 (Supp. 1992), as amended by Act of May 3, 1993, §§ 3-4, 1993 Iowa Legis. Serv. 79 (West); MICH. COMP. LAWS § 722.627(1) (1992); MO. REV. STAT. § 210.150.1 (Supp. 1992); NEB. REV. STAT. § 28-726 (Supp. 1992); N.J. REV. STAT. § 9:6-8.10a(b) (1993); N.Y. SOC. SERV. LAW § 422(4) (McKinney 1992), as amended by Act of July 26, 1993, § 3, 1993 N.Y. Laws 441 (effective Apr. 1, 1994); 23 PA. CONS. STAT. ANN. § 6344 (Supp. 1993); R.I. GEN. LAWS § 42-72-8(b) (Supp. 1992); S.C. CODE ANN. § 20-7-690(C) (Law. Co-op. Supp. 1992), as amended by South Carolina Child Fatality Review and Prevention Act, § 11, 1993 S.C. Acts 158; TENN. CODE ANN. § 37-1-408(b) (Supp. 1992); VT. STAT. ANN. tit. 33, § 4919 (Supp. 1992), as amended by Act of June 21, 1993, § 7, 1993 Vt. Laws 100; WYO. STAT. § 14-3-214(b),(f) (1993); Act of May 12, 1993, § 11, 1993 Ind. Acts 142 (to be codified at IND. CODE § 31-6-11-12.1(F)). All of these states provide access only to child care employers, and some permit employer access only when the alleged incident of abuse occurred in the course of the accused's employment. None allow general employer access to their child abuse registries.

37. MISS. CODE ANN. § 43-20-8(3) (1993); N.Y. SOC. SERV. LAW § 424-a (McKinney 1992), as amended by Act of July 26, 1993, §§ 4-7, 1993 N.Y. Laws 441 (effective Apr. 1, 1994), and Act of July 6, 1993, § 2, 1993 N.Y. Laws 203; cf. 23 PA. CONS. STAT. § 6344 (Supp. 1993) (mandating indirect employer access by requiring applicants for child care positions to obtain a report from the abuse registry and submit it to prospective employers).

38. However, other types of due process claims (that is, not employment related) may arise out of the maintenance of child abuse registries. See *Glasford v. New York State Dept. of Social Servs.*, 787 F. Supp. 384 (S.D.N.Y. 1992) (involving claim that membership on the child abuse registry damaged protected interest in family relationships); cf. *Bohn v. County of Dakota*, 772 F.2d 1433 (8th Cir. 1985), cert. denied, 475 U.S. 1014 (1986) (involving claim that state's finding of child abuse violated protected liberty interest in family privacy without procedural due process).

39. *Bohn*, 772 F.2d at 1433.

the difficulties that child abuse investigators face in discriminating between truthful and inaccurate child abuse reports. Again, a caveat is in order. The child abuse registries of the two states surveyed in this section are among the most accessible in the nation. While not all child abuse systems permit so much employer access, most do display the procedural inadequacies that this section describes.

1. *Missouri*

Alan Woodrow works as a supervisor at Little Lambs, a private day care center in Springfield, Missouri. While breaking up a fistfight between his two sons at the family home, Alan throws his younger child to the ground and injures the boy's shoulder. At the hospital, the Woodrow boy tells the treating physician that his father caused the injury by hurling him to the ground. The doctor also notices bruises on the boy's body and a laceration on his lip, which the child asserts his brother inflicted. Believing that he has "reasonable cause to suspect" child abuse,⁴⁰ the doctor complies with his statutory duty by calling the state's telephone hot line and reporting Alan for child abuse.⁴¹

Under Missouri law, when the central registry receives the doctor's allegations it must enter Alan's name on the registry as a suspected child abuser.⁴² The Missouri Division of Family Services, which maintains the registry, informs its local office in Springfield,⁴³ which in turn must commence an investigation within twenty-four hours.⁴⁴ There is no time limit for the completion of its investigation, but the local office must file a report with the central registry within thirty days.⁴⁵ In the meantime, Alan's name remains on the registry as a suspected child abuser.

On advice of counsel, Little Lambs submits monthly requests to the Division of Family Services to check the child abuse registry for information regarding their employees, as the law authorizes them to do.⁴⁶ On the Friday following the incident at the Woodrow home, Little Lambs makes such a request. The Division responds by reporting that Alan's name appears on the registry because he is under investigation for child abuse. Because the division may not identify the

40. See MO. REV. STAT. § 210.115.1 (Supp. 1992), as amended by Act of May 26, 1993, § A, 1993 Mo. Legis. Serv. 65 (Vernon) (effective Jan. 1, 1994).

41. Missouri law requires physicians, among other people, to initiate a child abuse report whenever they have "reasonable cause" to suspect abuse or neglect of a child in their care. MO. REV. STAT. § 210.115.1 (Supp. 1992), as amended by Act of May 26, 1993, § A, 1993 Mo. Legis. Serv. 65 (Vernon) (effective Jan. 1, 1994).

42. MO. REV. STAT. § 210.145.2 (Supp. 1992).

43. See MO. REV. STAT. § 210.145.4 (Supp. 1992).

44. MO. REV. STAT. § 210.145.6 (Supp. 1992).

45. MO. REV. STAT. § 210.145.11 (Supp. 1992).

46. MO. REV. STAT. § 210.150.6 (Supp. 1992).

alleged victim,⁴⁷ it informs Little Lambs only that the report alleges physical abuse. Continuing the employment of a suspected child abuser could subject the children at the facility to possible harm, jeopardize Little Lambs' license, and expose it to negligence liability.⁴⁸ Thus, moral and legal considerations compel Little Lambs to terminate or suspend Alan's employment at the center.

Of course, if the Division finds no evidence of abuse or neglect, it will cease to release Alan's name to his employer.⁴⁹ The disposition of his case is different, however, if the Division determines that there is merely "reason to suspect abuse."⁵⁰ Because Missouri law defines abuse as "any physical injury . . . inflicted on a child other than by accidental means by those responsible for his care, custody and control,"⁵¹ the injuries that motivated the report in the first place could create a reason to suspect abuse. Nothing prevents the Division from simply disbelieving the Woodrow family's accounts of a fight between the boys, especially because there were no outside witnesses. Alan has few formal opportunities to defend himself under the statute. He may seek judicial review, but only after the Division has completed its investigation.⁵² Meanwhile, the Division may notify Little Lambs that the allegations against Alan have been indicated. At this point, Little Lambs likely would take action against Alan.

2. *Pennsylvania*

Alan's experience would be similar if this incident were to occur in Pennsylvania rather than Missouri. There are some important differences, however, in the laws of the two states. First, unlike in Missouri, where judicial review constituted Alan's only recourse, in Pennsylvania Alan can request expungement of his name from the registry at any time.⁵³ If the Secretary of Public Welfare denies this request, Alan is entitled to an appeal hearing before the Secretary or a desig-

47. MO. REV. STAT. § 210.150.6 (Supp. 1992).

48. See *Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211 (Alaska 1991); *Evan F. v. Hughson United Methodist Church*, 10 Cal. Rptr. 2d 748 (Ct. App. 1992); *Kimberly M. v. Los Angeles Unified Sch. Dist.*, 263 Cal. Rptr. 612 (Ct. App. 1989); *Stropes v. Heritage House Childrens Ctr. of Shelbyville, Inc.*, 547 N.E.2d 244 (Ind. 1989); *Worcester Ins. Co. v. Fells Acres Day Sch., Inc.*, 558 N.E.2d 958 (Mass. 1990); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 33, at 203, n.1 (5th ed. 1985 & Supp. 1988); *RESTATEMENT (SECOND) OF AGENCY* § 213(b) cmt. d (1958); *Day-Care Co-Owner Faces Civil Lawsuits*, CHARLOTTE OBSERVER, Apr. 14, 1992, at 5C.

49. However, the Division will retain the information it collects for five years, presumably in case Alan is reported again at a later date. MO. REV. STAT. § 210.152.1 (Supp. 1992).

50. MO. REV. STAT. § 210.152.2 (Supp. 1992).

51. MO. REV. STAT. § 210.110.6 (Supp. 1992).

52. MO. REV. STAT. § 210.152.3 (Supp. 1992).

53. See 23 PA. CONS. STAT. § 6341(A)(2) (Supp. 1993). The only grounds for expungement, however, are that the information is inaccurate or is being maintained in a manner inconsistent with the statute. 23 PA. CONS. STAT. § 6341(C) (Supp. 1993).

nated hearing officer.⁵⁴ Pennsylvania applies a "substantial evidence" standard to determine whether a child abuse report should be listed on the central registry as "indicated."⁵⁵ Although this standard is more stringent than the "some credible evidence" standard that Missouri uses, it nevertheless falls short of the preponderance of the evidence standard employed in most civil cases. Pennsylvania law also differs from Missouri law because it requires administrators of child care facilities to check the child abuse registry before hiring a new employee⁵⁶ and forbids them from hiring those whose names are attached to "founded" reports.⁵⁷

Alan would enjoy more procedural protections if child abuse allegations arose in Pennsylvania rather than Missouri, but the impact of those procedural protections on his employment would change little. Although Alan could receive a hearing in which the Secretary would bear the burden of proof,⁵⁸ the mere fact of physical injury and the admission that Alan caused the harm probably establish "substantial evidence" of child abuse. Even the fairest of hearings may not exonerate Alan under this standard. The statute guarantees that Alan will be identified as a child abuser to all prospective child care employers.⁵⁹ Even if Alan's case is not "founded," such a disclosure effectively will foreclose his employment in the field.

C. Child Abuse Registry Litigation

The reported case law includes a handful of due process challenges to state child abuse registry laws. These claims have yielded varying results. In both *Valmonte v. Perales*⁶⁰ and *Angrisani v. City of New York*,⁶¹ New York district courts held that individuals stated a cause of action under section 1983⁶² based on the violation of their due process rights when their membership on the New York child abuse registry deprived them of employment. In both cases the plaintiffs had been accused of physically abusing minors,⁶³ and the Department of Social Services classified the reports as "indicated." The Department

54. 23 PA. CONS. STAT. § 6341(C) (Supp. 1993).

55. 23 PA. CONS. STAT. § 6303 (Supp. 1993).

56. 23 PA. CONS. STAT. § 6344(B)(2) (Supp. 1993).

57. 23 PA. CONS. STAT. § 6344(C) (Supp. 1993). A "founded" report of child abuse is one verified by a judicial finding. 23 PA. CONS. STAT. § 6303 (Supp. 1993).

58. 23 PA. CONS. STAT. § 6341(c) (Supp. 1993).

59. Those employed before the statute took effect on January 1, 1986 are not subject to its employer access provisions. 23 PA. CONS. STAT. § 6344(k) (Supp. 1993).

60. 788 F. Supp. 745 (S.D.N.Y. 1992).

61. 639 F. Supp. 1326 (E.D.N.Y. 1986).

62. 42 U.S.C. § 1983 (1988).

63. Valmonte allegedly struck her 11-year-old daughter in the face; Angrisani allegedly assaulted a resident at the wayward boys' home where he worked. *Valmonte*, 788 F. Supp. at 748; *Angrisani*, 639 F. Supp. at 1329.

expunged Angrisani's report after a lengthy delay,⁶⁴ but, after granting Valmonte a hearing, refused to expunge her report.⁶⁵ The causation issue also differed in the two cases; while Angrisani's employer terminated him due to his listing on the registry,⁶⁶ Valmonte claimed only that the listing of her name prevented her from obtaining a position working with children.⁶⁷ Despite these differences, both courts held that the state action deprived the plaintiffs of protected liberty interests⁶⁸ and that the procedures employed raised sufficient constitutional questions to withstand a motion to dismiss.⁶⁹

In *Glasford v. New York State Department of Social Services*,⁷⁰ however, the district court rejected a due process challenge to New York's registry statute. The plaintiff in *Glasford* was also the subject of an indicated report of child abuse entered on the registry.⁷¹ Unlike the other New York plaintiffs, he alleged no adverse effects to his employment status. Rather, he claimed that the Department's action interfered with protected liberty interests in his reputation and in his relationship with his family.⁷² The court held that the complaint stated no violation of a protected interest and that, in any case, the Department had granted Glasford all the process that was due by providing an expungement hearing.⁷³ Consequently, the court granted the defendant's motion to dismiss.⁷⁴

The Sixth Circuit also rejected a child abuse registry related due process claim in *Tingle v. Tennessee Department of Human Services*.⁷⁵ Tingle, a day care center employee, was accused of sexually molesting a child at the center where he worked.⁷⁶ The Department of Human Services classified this report as "indicated"⁷⁷ and, pursuant to its administrative rules, granted Tingle an immediate ex parte file review.⁷⁸ The Department then forbade Tingle's employer from reinstating him

64. The Department entered its decision over a year after the alleged abuse was reported. 639 F. Supp. at 1329-30.

65. 788 F. Supp. at 749.

66. 639 F. Supp. at 1330. Because Angrisani lived at the group home, being labeled a child abuser cost him his residence as well. 639 F. Supp. at 1330.

67. 788 F. Supp. at 749.

68. In both cases, the court found that the disclosure to employers or prospective employers violated a liberty interest in reputation. 788 F. Supp. at 751-52; 639 F. Supp. at 1333.

69. 788 F. Supp. at 752-53; 639 F. Supp. at 1334-35.

70. 787 F. Supp. 384 (S.D.N.Y. 1992).

71. 787 F. Supp. at 386.

72. 787 F. Supp. at 387.

73. 787 F. Supp. at 388-89.

74. 787 F. Supp. at 389.

75. No. 88-5035, 1988 U.S. App. LEXIS 16533 (6th Cir. Dec. 6, 1988) (unpublished opinion).

76. *Tingle*, 1988 U.S. App. LEXIS 16533, at *1-2.

77. 1988 U.S. App. LEXIS 16533, at *3.

78. 1988 U.S. App. LEXIS 16533, at *7.

from his leave of absence, and the day care center fired him.⁷⁹ Although the court avoided the constitutional issues by deciding the case on other grounds,⁸⁰ the court nevertheless reviewed the state's emergency notification procedures and found them to comply with the Due Process Clause.⁸¹

These somewhat divergent holdings are not entirely irreconcilable. *Glasford* is clearly distinguishable from the other New York cases because the plaintiff there alleged no employment-related injury arising from his presence on the registry. Likewise, Tennessee's procedures are particularly elaborate,⁸² far exceeding the procedural safeguards provided in New York and in most other states.⁸³ The courts clearly disagreed, though, on the constitutional adequacy of New York's procedural scheme, with the *Glasford* court finding constitutional the same provisions that *Angrisani* and *Valmonte* held possibly to violate the Due Process Clause.⁸⁴ Though divergent holdings exist, these cases support the proposition that permitting employer access to child abuse registries raises serious due process concerns, but they do not settle the issue.

II. GOVERNMENTAL BLACKLISTING AND THE DUE PROCESS CLAUSE

Employer-accessible child abuse registries are but one form of government blacklisting.⁸⁵ While the term *blacklist* carries pejorative connotations, state restriction of employment is in fact an important and widely accepted aspect of the police power that often serves important public purposes.⁸⁶ Blacklists are not inherently constitutionally suspect, but courts have recognized that the Due Process Clause places both substantive and procedural limitations on their use.⁸⁷ This

79. 1988 U.S. App. LEXIS 16533, at *3.

80. The court held that, by failing to object to a magistrate's recommendation upholding the constitutionality of the Department's action, Tingle had waived his right to have his due process claim heard on appeal. 1988 U.S. App. LEXIS 16533, at *7.

81. 1988 U.S. App. LEXIS 16533, at *7-8.

82. Under the Tennessee Child Sexual Abuse Act, an alleged child abuser whose employment involves contact with children receives an immediate ex parte file review prior to the dissemination of any information to his employer. Subsequently, the accused may request an administrative hearing and has a right to judicial review of the outcome. 1988 U.S. App. LEXIS 16533, at *6-7.

83. See *supra* notes 21-32 and accompanying text.

84. Compare *Valmonte*, 788 F. Supp. at 752-53 and *Angrisani*, 639 F. Supp. at 1334-35 with *Glasford*, 787 F. Supp. at 388-89.

85. See *infra* text accompanying notes 90-98, 149-56.

86. See, e.g., *infra* note 153 (citing statutes).

87. See, e.g., *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963) (holding that rejection of bar applicant violated procedural due process); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957) (holding that state board's grounds for rejecting applicant violated substantive due process); *Transco Sec., Inc. v. Freeman*, 639 F.2d 318 (6th Cir.), *cert. denied*, 454 U.S. 820 (1981); *Old Dominion Dairy Prods., Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir.

Part argues that the due process principles that restrain these programs apply with equal force to states' use of child abuse registries as employment blacklists.

This Part describes the approaches that courts have taken in assessing the constitutionality of governmental occupational restrictions and how these approaches apply to employer-accessible child abuse registries. Section II.A describes several different forms of blacklisting that have come under due process scrutiny. Section II.A.1 discusses cases arising out of the loyalty-security programs instituted by the federal government during the 1950s and early 1960s. Section II.A.2 focuses on debarment of government contractors, section II.A.3 deals with revocation or denial of business licenses, and section II.A.4 addresses occupational licensing. Section II.B illustrates the parallels between these programs and employer-accessible child abuse registries, and it argues that the Due Process Clause requires procedural protections similar to those that courts have imposed on other forms of blacklisting.

A. *Forms of Blacklisting*

Governmental occupational restrictions assume many forms, but this section discusses only four. Included in this list is probably the most infamous example of governmental blacklisting in American history: the loyalty-security programs of the Cold War era, commonly described as an element of McCarthyism. Most types of blacklisting are far less notorious, though. In fact, the government frequently imposes restraints upon businesses and other commercial entities similar to those the loyalty-security programs placed upon individuals. Through debarment, the federal government refuses to deal commercially with private business entities because of alleged malfeasance in past transactions,⁸⁸ and by denying or revoking business licenses the government controls participation in a variety of markets.⁸⁹ The state also customarily imposes occupational restrictions on individual citizens through occupational licensing. Although these programs use

1980) (holding that government procedures used in debarment of contractor violated the Due Process Clause); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964) (holding that rejection of liquor license application violated Due Process Clause); *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955) (holding that U.S. Coast Guard violated Due Process Clause in barring seamen from service on private merchant vessels).

88. These cases almost exclusively involve government contracting. See, e.g., *ATL, Inc. v. United States*, 736 F.2d 677 (Fed. Cir. 1984); *Transco*, 639 F.2d at 318; *Old Dominion*, 631 F.2d at 953; *Myers & Myers, Inc. v. United States Postal Serv.*, 527 F.2d 1252, 1259-60 (2d Cir. 1975); *Horne Bros. v. Laird*, 463 F.2d 1268 (D.C. Cir. 1972); *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964); *Art-Metal — USA, Inc. v. Solomon*, 473 F. Supp. 1 (D.D.C. 1978).

89. The issuance of liquor licenses is a prominent example. See *Grendel's Den, Inc. v. Goodwin*, 662 F.2d 88 (1st Cir.), *aff'd. en banc on other grounds*, 662 F.2d 102 (1st Cir. 1981), *aff'd. sub nom. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

different methods, in all of them the government creates criteria for membership in a particular market and uses its power to exclude those not conforming to these requirements.

1. *The Loyalty-Security Programs*

Like employer-accessible child abuse registries, the loyalty-security programs of the early Cold War era collected reports of citizen misbehavior and used the administrative process to exclude reported individuals from particular employment positions where they could harm governmental interests. The term *loyalty-security programs* encompassed a series of statutes and executive orders that conditioned public employment and some forms of private employment⁹⁰ on the employee's loyalty to the United States and avoidance of "subversive" activities.⁹¹ President Truman established the first major component of the loyalty-security apparatus by executive order in 1947. He declared disloyalty to be cause for dismissal from government employment and created a Loyalty Review Board within the Civil Service Commission (Loyalty Board). The President assigned the Loyalty Board the mission of determining whether there were any "reasonable grounds" to distrust the loyalty of any federal servant.⁹² Several federal agencies also established their own loyalty boards, which had original jurisdiction over personnel security matters arising within that agency.⁹³

Loyalty board adjudications contained few procedural protections for the accused. These boards often relied on secret informants, whose identities sometimes remained unknown even to the boards themselves. The proceedings usually barred accused citizens from reviewing the board's evidence of their disloyalty, from confronting or cross-examining the witnesses against them, or even from knowing the witnesses' identities.⁹⁴ Usually, the boards provided a hearing, but they

90. See *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886 (1961); *Greene v. McElroy*, 360 U.S. 474 (1959); *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955); see also ADOLPH A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 96-102 (1954).

91. See generally ELEANOR BONTECOU, *THE FEDERAL LOYALTY-SECURITY PROGRAM* (1953); RALPH S. BROWN, *LOYALTY AND SECURITY EMPLOYMENT TESTS IN THE UNITED STATES* (1958); JOHN L. O'BRIAN, *NATIONAL SECURITY AND INDIVIDUAL FREEDOM* 27-42 (1955).

92. In 1953 President Eisenhower replaced the "reasonable grounds for belief" standard with a mandate to determine whether the hiring or retention of any individual would "be clearly consistent with the national security." O'BRIAN, *supra* note 91, at 31. Observers interpreted this change as tightening of the government's loyalty requirements. *Id.*

93. See BROWN, *supra* note 91, at 61-91.

94. See *Greene*, 360 U.S. at 478-81; *Peters v. Hobby*, 349 U.S. 331, 335-37 (1955); see also *Peters*, 349 U.S. at 350-52 (Douglas, J., concurring) (condemning government's use of "faceless informers" and general procedural inadequacy of hearing); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 179-80 (1951) (Douglas, J., concurring) (describing case of Dorothy Bailey); BONTECOU, *supra* note 91, at 60-66; Kenneth C. Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 233-43 (1956).

sometimes failed to employ this safeguard.⁹⁵

The Attorney General's list of subversive organizations formed another important component of the government's loyalty-security program. Like the loyalty boards' determinations, the list was prone to inaccuracy and abuse due to a lack of procedural safeguards. The Attorney General defined "subversive" in a vague and flexible manner that essentially left its application to his discretion.⁹⁶ Moreover, the Attorney General could base his findings of subversive activity on "any information, secret or otherwise, which might come into the possession of the executive department."⁹⁷ Placement on the list had devastating effects not only upon the organization itself, but upon its members as well.⁹⁸

The Supreme Court exhibited substantial unwillingness to subject federal loyalty-security programs to constitutional scrutiny.⁹⁹ In every case brought before it, the Court either overturned the result on a nonconstitutional ground or asserted that the case presented no constitutional claim.¹⁰⁰ For instance, in *Joint Anti-Fascist Refugee Committee v. McGrath*,¹⁰¹ several organizations challenged on due process grounds the Attorney General's refusal to substantiate his determination that these groups were subversive. The Court, while admitting that the case would have "bristled with constitutional issues" if the alleged behavior had arisen from the executive order,¹⁰² refused to address these issues. Instead, it overturned the Attorney General's actions as exceeding the authority of the applicable executive order.¹⁰³ The Court used the same rationale in *Peters v. Hobby*¹⁰⁴ to invalidate

95. See, e.g., *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 886 (1961).

96. See BONTÉCOU, *supra* note 91, at 159-73; see also *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 176-77 (Douglas, J., concurring) ("These flexible standards . . . are weapons which can be made as sharp or blunt as the occasion requires. . . . When we employ them, we plant within our body politic the virus of the totalitarian ideology which we oppose.").

97. BONTÉCOU, *supra* note 91, at 160.

98. See *Barsky v. Board of Regents*, 347 U.S. 442, 445-47 (1954) (describing Barsky's loss of his medical license resulting from membership in blacklisted organization); *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 161 (Frankfurter, J., concurring) (discussing consequences of inclusion on Attorney General's list to organizations themselves).

99. See *Davis*, *supra* note 94, at 233 ("Few vital legal problems have been kept for so long in such even balance.").

100. The Court was little more forthcoming in ruling on the due process implications of state loyalty-security programs. See *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960); *Beilan v. Board of Pub. Educ.*, 357 U.S. 399 (1958). But see *Wieman v. Updegraff*, 344 U.S. 183 (1952) (striking down, on due process grounds, state loyalty oath required for public employment); cf. *Slochow v. Board of Higher Educ.*, 350 U.S. 551 (1956) (holding that the Due Process Clause precluded termination of a college professor for invocation of Fifth Amendment rights against self-incrimination).

101. 341 U.S. 123 (1950).

102. *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 135.

103. 341 U.S. at 138.

104. 349 U.S. 331 (1955). *Peters* involved a Yale University professor whom the Loyalty

an act of the Loyalty Board while avoiding the constitutional implications of the claim.¹⁰⁵

*Greene v. McElroy*¹⁰⁶ and *Cafeteria and Restaurant Workers Union, Local 473 v. McElroy*¹⁰⁷ both concerned private sector employees whose terminations resulted from the government's revocation of their security clearances on grounds of disloyalty.¹⁰⁸ The Court again avoided determining whether loyalty-security programs provided due process of law.¹⁰⁹ In *Greene* the Court held that the Board's action violated an executive order,¹¹⁰ and in *Cafeteria Workers* the Court found no constitutionally protected interest in working on a naval base and, therefore, no entitlement to Due Process Clause protection.¹¹¹

The Ninth Circuit's opinion in *Parker v. Lester*¹¹² presents the most complete analysis of the constitutionality of a federal loyalty-security program. In *Parker*, the Coast Guard had excluded a group

Board had barred from public service because of alleged Communist Party associations. The Board refused to reveal the sources of its information or permit confrontation or cross-examination of these secret witnesses.

105. *Peters*, 349 U.S. at 342-43. The Court held that the Board had violated Executive Order 9385 by hearing appeals of agency loyalty board rulings favorable to the accused, rather than just those adverse to the employee, and by adjudicating cases on its own motion. Contemporary commentators recognized the Court's reluctance to wade into the constitutional mire on questions of national security. See Davis, *supra* note 94, at 233 ("The view is widely held that the Supreme Court dodged the issue of the validity of the loyalty program in [*Peters*], where the issue was nicely drawn.").

106. 360 U.S. 474 (1959).

107. 367 U.S. 886 (1961).

108. Petitioner Greene had been the vice president of a manufacturing company whose business was primarily government contracting work. The Board's revocation of his security clearance made him virtually useless to his employer and resulted in his discharge. 360 U.S. at 481-82. The Court also found it relevant that the Board's action prevented him from obtaining any job consistent with his training as an aeronautical engineer. 360 U.S. at 475. The petitioner in *Cafeteria Workers* was a short-order cook employed by a private catering company who was denied admission to the navy factory where the company had assigned her. The government gave no reason for this prohibition and denied her any form of hearing. 367 U.S. at 888. For an excellent description of the impact of the loyalty-security programs on private sector employees, see BERLE, *supra* note 90, at 83-109.

109. Commentators have suggested that the Court's reticence to challenge the constitutionality of loyalty-security programs stemmed from political pressure. The Court reportedly feared that Congress would restrict its jurisdiction over loyalty-security cases. See Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1059 n.73 (1984).

110. *Greene*, 360 U.S. at 507-08. Here, the Court presumed that the executive order did not authorize proceedings that failed to comport with standards of fair procedures, so that any such proceedings violated it.

111. 367 U.S. 886 (1961). This holding represents the invocation of the right-privilege distinction, which held a variety of employment-related interests to be outside the scope of the Due Process Clause because they were privileges granted gratuitously by government, rather than rights inherent in the concept of citizenship. See Davis, *supra* note 94, at 233-36; Rubin, *supra* note 109, at 1058. The Court has since abolished the right-privilege distinction. See Board of Regents v. Roth, 408 U.S. 564, 571 & n.9 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between rights and privileges that once seemed to govern the applicability of procedural due process rights."). The matter of constitutionally protected interests in employment is discussed in much greater detail *infra* in sections III.A.2 and III.A.3.

112. 227 F.2d 708 (9th Cir. 1955).

of seamen from service on *private* merchant vessels because it was not satisfied that their "character and habits of life . . . [were] such as to authorize the belief that [their] presence . . . on board would not be inimical to the security of the United States."¹¹³ While the government provided the barred seamen with a postdeprivation hearing, it placed the burden on them to prove the worthiness of their character.¹¹⁴ Moreover, the Coast Guard failed to inform the seamen of either the information against them or the identities of the government's sources. The court held that "this system of secret informers, whisperers and talebearers"¹¹⁵ provided the plaintiffs with no due process and unconstitutionally abridged their interest in earning a livelihood in one of the common occupations.¹¹⁶

2. Debarment of Government Contractors

The federal government is the largest single purchaser of goods and services in the country¹¹⁷ and consequently controls the economic vitality of many private businesses for whom it is the primary or exclusive customer.¹¹⁸ Naturally, the government has an interest in preventing fraud and overbilling, and in maintaining the quality of the goods and services that it procures.¹¹⁹ It pursues this interest in part through a system of suspension and debarment that bans enterprises that allegedly have engaged in misconduct from bidding on government contracts for a prescribed period of time.¹²⁰ Although the various government agencies make their own determinations with respect

113. *Parker*, 227 F.2d at 710. A 1950 executive order prohibited seamen from serving on American merchant vessels without a certificate from the Coast Guard verifying that they met this standard. 227 F.2d at 710. At least one commentator regarded this program as "the strictest of all restraints imposed by the federal government upon the freedom of the individual." O'BRIAN, *supra* note 91, at 39. It is also unique, and perhaps distinguishable from other loyalty-security programs, because it imposes direct government controls on *private* employment. In this way, it is similar to the occupational licensing cases discussed *infra* in section II.A.4.

114. 227 F.2d at 711-12.

115. 227 F.2d at 719.

116. 227 F.2d at 720.

117. Lisa A. Everhart, Note, "Graylisting" of Federal Contractors: *Transco Security Inc. of Ohio v. Freeman and Procedural Due Process Under Suspension Procedures*, 31 CATH. U. L. REV. 731, 731 (1982).

118. See *Old Dominion Dairy Prods., Inc. v. Secretary of Defense*, 631 F.2d 953, 955 (D.C. Cir. 1980) ("[T]he loss of the Government contract work threatened the very existence of the business."); *Gonzales v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964); *Art-Metal — USA, Inc. v. Solomon*, 473 F. Supp. 1, 4 (D.D.C. 1978).

119. See *Transco Sec., Inc. v. Freeman*, 639 F.2d 318, 322 (6th Cir.), *cert. denied*, 454 U.S. 820 (1981); Everhart, *supra* note 117, at 731-32.

120. 41 C.F.R. § 101-45.602 (1992). The distinction between suspension and debarment is that the former is a temporary sanction pending a formal determination of whether debarment is appropriate, while the latter represents a permanent refusal to deal. Everhart, *supra* note 117, at 732-33; Lawrence Shire, Recent Decision, 50 GEO. WASH. L. REV. 90, 93-94 (1981). Because courts generally treat the two penalties as indistinct, see *Art-Metal*, 473 F. Supp. at 5, the term *debarment* encompasses both forms of exclusion in this Note.

to debarment and "nonresponsibility,"¹²¹ one agency's conclusions will circulate throughout the government and will generally prevent the contractor from receiving any business from the federal government.¹²²

The first actual application of the Due Process Clause to debarment of government contractors occurred in *Old Dominion Dairy Products, Inc. v. Secretary of Defense*.¹²³ Old Dominion was a corporation whose business consisted almost entirely of supplying dairy products to U.S. military bases.¹²⁴ Because of a serious misunderstanding about the terms of one contract, a government auditor determined that Old Dominion "show[ed] a lack of business integrity."¹²⁵ The Defense Department concluded that the company was "nonresponsible" and disseminated this information to the contracting officers of at least two military bases.¹²⁶ As a result, the government refused to award Old Dominion two contracts for which it had submitted the lowest bid.¹²⁷ Nobody informed the company's officials of the allegations regarding the firm's integrity until after the government awarded the contracts to other parties.¹²⁸

In analyzing Old Dominion's due process claim, the District of Columbia Circuit held first that Old Dominion possessed a constitutionally protected liberty interest in freedom from "stigmatizing governmental defamation having an immediate and tangible effect on its ability to do business."¹²⁹ It then found that the government had vio-

121. Nonresponsibility is a judgment made by an agency which, though lacking the formal characteristics of debarment, justifies the government's refusal to contract with a particular vendor. See *Old Dominion*, 631 F.2d at 959; Shire, *supra* note 120, at 108.

122. See *Old Dominion*, 631 F.2d at 963-64; 41 C.F.R. § 101-45.601(c) (1992). But see Shire, *supra* note 120, at 108. While Shire argues that nonresponsibility determinations will not necessarily be communicated between government agencies and may not affect contract awards even if they are, he acknowledges that, in the case of debarment, the GSA circulates a list of debarred companies throughout the government. *Id.* at 108 n.177.

123. 631 F.2d 953 (D.C. Cir. 1980). The District of Columbia Circuit had previously held that the government was required to treat debarred contractors according to principles of "basic fairness." *Horne Bros. v. Laird*, 463 F.2d 1268 (D.C. Cir. 1972); *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964). Because the reasoning in these cases was "quite similar to a constitutional due process analysis," Shire, *supra* note 120, at 95, the actual application of the Due Process Clause to debarment actions was a short but significant step.

124. *Old Dominion*, 631 F.2d at 956.

125. 631 F.2d at 956-57.

126. 631 F.2d at 957-58.

127. 631 F.2d at 957-59. In both cases the court found that Old Dominion would have been awarded the contracts but for the determination of nonresponsibility.

128. 631 F.2d at 958.

129. 631 F.2d at 962-63. In reaching this conclusion, the court distinguished two Supreme Court cases — *Board of Regents v. Roth*, 408 U.S. 564 (1972) (holding that a refusal to rehire a government employee did not implicate a protected interest under the Fourteenth Amendment) and *Paul v. Davis*, 424 U.S. 693 (1976) (holding that injury to reputation alone did not implicate a protected liberty interest). The former case was distinguished on the grounds that Old Dominion had been foreclosed from all governmental employment, not just a particular contract, and the latter on the grounds that the company had been deprived of employment as well as reputa-

lated the Due Process Clause by rejecting Old Dominion's two contract bids without first informing it of the nature of the charges or providing an opportunity for it to contest the allegations.¹³⁰ However, the court expressly did not require a hearing precedent to debarment. Instead, it limited its holding to the principle "that when a determination is made that a contractor lacks integrity . . . notice of the charges must be given to the contractor as soon as possible so that the contractor may utilize whatever opportunities are available to present its side of the story before adverse action is taken."¹³¹

Shortly thereafter, the Sixth Circuit decided *Transco Security, Inc. v. Freeman*,¹³² a case that raised virtually identical issues. Transco, a suspended government contractor, challenged a General Services Administration (GSA) regulation permitting the agency to deny it a hearing if such a proceeding "would adversely affect possible civil or criminal prosecution."¹³³ Under this regulation, the government could suspend Transco for up to eighteen months without any opportunity to be heard.¹³⁴

Relying partially on *Old Dominion*, the court found that GSA's refusal to grant Transco a hearing and to disclose fully the basis for the suspension raised "the possibility of a lengthy suspension based on mere suspicion, unfounded allegation, and clear error"¹³⁵ and violated the company's due process rights. The *Transco* court expanded *Old Dominion* by declaring that the Due Process Clause requires "notice of the charges, an opportunity to rebut those charges and, under most circumstances, a hearing,"¹³⁶ prior to debarment. The court did not, however, order GSA to provide Transco a hearing but required GSA only to make a more complete disclosure of the evidence of Transco's malfeasance to the company.¹³⁷

3. Denial of Business Licenses

The state also effectively can "blacklist" a business by denying or revoking its license. Licensing is necessary for a significant and ex-

tion. 631 F.2d at 963-66. For criticism of the court's reasoning, see Shire, *supra* note 120, at 108-09. Roth and Paul, along with the issue of protecting due process interests, are discussed at length *infra* in section III.B.

130. 631 F.2d at 967.

131. 631 F.2d at 968.

132. 639 F.2d 318 (6th Cir.), *cert. denied*, 454 U.S. 820 (1981).

133. 41 C.F.R. § 1-1.605-4(e) (1992).

134. *Transco*, 639 F.2d at 320. Other applicable regulations provided the Justice Department with 12 months in which to initiate a criminal prosecution and allowed it to apply for a six-month extension. 41 C.F.R. § 1-1.605-2 (1992).

135. 639 F.2d at 324.

136. 639 F.2d at 321.

137. 639 F.2d at 325.

panding number of businesses to operate,¹³⁸ and, as the scope of licensing has grown, so has the state's ability to "allow[] the death sentence to be imposed upon a lawful business."¹³⁹ *Hornsby v. Allen*¹⁴⁰ exemplifies the constitutional limitations on governmental licensing powers.¹⁴¹ The City of Atlanta had rejected Hornsby's application for a liquor license even though she had met all of the official requirements.¹⁴² Atlanta provided Hornsby with no reason for her rejection and no opportunity to contest the findings.¹⁴³ She alleged that Atlanta actually based selection on political factors instead of on these official criteria.¹⁴⁴ The court held that these allegations, if proven, constituted arbitrary conduct which derogated the plaintiff's due process rights.¹⁴⁵ While conceding that "the state has the right to regulate or prohibit traffic in intoxicating liquor," the court asserted that this right "is something quite different from a right to act arbitrarily and capriciously."¹⁴⁶

The *Hornsby* court believed that the licensing process required a variety of procedural safeguards to ensure substantive fairness. It held that the Due Process Clause entitled the plaintiff to a full hearing, an opportunity to know the objective standards she had to meet to obtain a license and the city's evidence that she had failed to meet these standards, and an opportunity to subject this evidence to cross-examination.¹⁴⁷ The court also would have limited the liquor board findings to those that followed from the evidence presented at such a hearing.¹⁴⁸

138. See ERNEST GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS* 106 (1956); John R. Rydell II, Note, *Due Process Limitations on Occupational Licensing*, 59 VA. L. REV. 1097, 1098 (1973). Practicing a profession frequently requires obtaining a government license. See GELLHORN, *supra*, at 106. These types of licenses are discussed *infra* in section II.A.4.

139. Davis, *supra* note 94, at 266.

140. 326 F.2d 605 (5th Cir. 1964).

141. See Rydell, *supra* note 138, at 1126-27.

142. *Hornsby*, 326 F.2d at 607.

143. 326 F.2d at 610.

144. 326 F.2d at 607. Specifically, Hornsby charged that the sponsorship of one or more of the aldermen in the ward where the establishment was to be located was in fact necessary to obtain a liquor license. 326 F.2d at 607.

145. 326 F.2d at 610.

146. 326 F.2d at 609. For other cases finding the procedures used in revoking or denying business licenses to violate the Due Process Clause, see *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375 (9th Cir. 1989), *cert. denied*, 498 U.S. 980 (1990); *Wilkerson v. Johnson*, 699 F.2d 325 (6th Cir. 1983); *Blackwell College of Business v. Attorney Gen.*, 454 F.2d 928 (D.C. Cir. 1971); *In re Carter*, 177 F.2d 75 (D.C. Cir.), *cert. denied*, 338 U.S. 900 (1949); *Standard Airlines v. Civil Aeronautics Bd.*, 177 F.2d 18 (D.C. Cir. 1949).

147. 326 F.2d at 610.

148. 326 F.2d at 610; see also Rydell, *supra* note 138, at 1127 (arguing that these procedural standards are applicable to all licensing decisions). It is also significant that Hornsby was merely a rejected applicant for a liquor license, rather than a licensee whose rights were being revoked, in light of the view that due process applies less stringently to members of the former class than the latter. See Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1304 (1975).

4. Occupational Licensing

Although occupational licensing commonly is not regarded as a form of blacklisting, the two processes are actually quite similar. While licensing presumptively excludes members of the general populace from an occupation, conventional forms of blacklisting presumptively include all practitioners and then eliminate those the agency deems unsuited. Thus, the government frames licensing as the grant of an exclusive privilege, while blacklisting appears as the denial of a right.¹⁴⁹ Yet, the two merely constitute different approaches to the same objective: restricting unsuited individuals from practicing certain callings.¹⁵⁰ Often simple convenience will determine which form a system of occupational screening takes. When the risk of harm to the public resulting from occupational misfeasance is relatively low, the state finds it more efficient to weed out systematically those who have proven themselves unqualified than to endure the arduous administrative process of licensing every employee.¹⁵¹ As courts have recognized, this difference in approach does not justify a difference in the level of due process scrutiny.¹⁵²

In many fields, the state exerts formal control over admission to an occupation by issuing licenses to those it deems qualified and by making unauthorized practice of the profession a criminal offense.¹⁵³ Licensing requirements apply to a great variety of professions.¹⁵⁴ States typically delegate responsibility for licensing decisions to administrative boards, which often consist of practitioners in that particular

149. This distinction once had great constitutional significance with respect to licensing but since has been discredited. See Davis, *supra* note 94, at 264-66; Rydell, *supra* note 138, at 1100-02; see also Board of Regents v. Roth, 408 U.S. 564, 571 & n.9 (1972); Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957); William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

150. The thin distinction between licensing and blacklisting becomes clear when licensing systems become so inclusive that denial of a license seems like a denial of a right rather than a privilege. See Bell v. Burson, 402 U.S. 535 (1971) (driver's license).

151. In the case of child care employees, licensing of the child care centers themselves renders individual licensing less necessary. This creates strong incentives for centers to regulate and screen their employees stringently because employee misfeasance can jeopardize their license.

152. See Phillips v. Vandygriff, 711 F.2d 1217 (5th Cir. 1983), *cert. denied*, 469 U.S. 821 (1984) (recognizing government blacklisting as a "de facto licensing" scheme and subjecting it to the same constitutional standards as occupational licensing); see also Bannum, Inc. v. Town of Ashland, 922 F.2d 197 (4th Cir. 1990); Phillips v. Vandygriff, 724 F.2d 490 (5th Cir.), *cert. denied*, 469 U.S. 821 (1984).

153. See, e.g., Dental Practice Law of Colorado, COLO. REV. STAT. §§ 12-35-101 to -202 (1991 & Supp. 1992) (dentists and dental hygienists); Illinois Architecture Practice Act of 1989, 225 ILL. COMP. STAT. 305/1-305/40 (1992) (architects); MO. REV. STAT. §§ 333.010-265 (1988) (embalmers and funeral directors); N.Y. EDUC. LAW §§ 6520-6532 (McKinney 1985 & Supp. 1993) (physicians).

154. Licensed occupations include "egg-graders and guide-dog trainers, pest controllers and yacht salesmen, tree surgeons and well diggers, tile layers and potato growers." GELLHORN, *supra* note 138, at 106.

field.¹⁵⁵ These boards review applicants' qualifications and determine which candidates deserve admission. Rejected applicants may seek judicial review of the boards' decisions.¹⁵⁶

Licensing decisions must meet the mandates of the Due Process Clause,¹⁵⁷ but the Supreme Court has vacillated on both the need to have particular procedural safeguards and the type of scrutiny applicable to state licensing decisions.¹⁵⁸ *Barsky v. Board of Regents*¹⁵⁹ represents the Court's most permissive interpretation of the Due Process Clause in the licensing context.¹⁶⁰ Barsky, a doctor, was convicted in Washington, D.C. of violating a federal statute¹⁶¹ by refusing to produce certain papers subpoenaed by the House Committee on Un-American Activities.¹⁶² Subsequently, the New York Board of Regents suspended his medical license for six months. The Court held that the Board had wide discretion in determining who should have a license to practice medicine.¹⁶³ Applying this principle, it concluded that the Board did not violate due process by basing its decision on a criminal conviction in an outside jurisdiction or on the petitioner's association with a controversial political group.¹⁶⁴

The Court exhibited a markedly less deferential stance toward state licensing decisions in *Schware v. Board of Bar Examiners*.¹⁶⁵ The petitioner in *Schware* was an applicant to the New Mexico bar who reported that he had, in the past, used aliases, been arrested on several

155. *Id.* at 140; Rydell, *supra* note 138, at 1100, 1118; *see, e.g., Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963) (three-member panel of practicing attorneys); *Barsky v. Board of Regents*, 347 U.S. 442 (1954) (10 doctors constituting Grievance Committee). The composition of these boards raises particular problems in assuring neutral adjudication. *See* Rydell, *supra* note 138, at 1118-20.

156. *See* Rydell, *supra* note 138, at 1128-29.

157. *See* Davis, *supra* note 94, at 262-63; Friendly, *supra* note 148, at 1297 ("Another category ranking high on the procedural scale is the revocation of a license to practice a profession."); Rydell, *supra* note 138, at 1103.

158. *Compare* *Barsky v. Board of Regents*, 347 U.S. 442 (1954) with *Barry v. Barchi*, 443 U.S. 55 (1979).

159. 347 U.S. 442 (1954).

160. Rydell reports that *Barsky* held a medical license to be a privilege, and therefore unprotected by the Due Process Clause. Rydell, *supra* note 138 at 1100-01. While the Court did categorize the license as a "privilege," *Barsky*, 347 U.S. at 451, it went on to examine fully the petitioner's due process claim.

161. The act involved was not criminal under New York law. *Barsky*, 347 U.S. at 452.

162. Like many of the early licensing cases, *Barsky* involved the loyalty-security programs discussed *supra* in section II.A.1. *See also In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

163. 347 U.S. at 451.

164. 347 U.S. at 456. Justice Black, writing in dissent, would have held the Due Process Clause to require the Board to establish a rational relationship between Barsky's offenses and the practice of medicine, rather than exercising "purely personal and arbitrary power." 347 U.S. at 463 (Black, J., dissenting) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

165. 353 U.S. 232 (1957); *see* Rydell, *supra* note 138, at 1101 (remarking that *Schware* "exemplifies the abandonment of *Barsky*").

occasions, and belonged to the Communist Party. Based on these admissions and on confidential information that the Board of Bar Examiners had received, the Board refused to allow him to take the bar exam on the grounds that he had failed to meet standards of moral fitness.¹⁶⁶ The Board declined to reveal this confidential information to Schware¹⁶⁷ and granted him a hearing in which it called no witnesses and introduced no evidence.¹⁶⁸ The Court held that this conduct violated the Due Process Clause. It declared, in contrast to *Barsky*, that "[a] State can require high standards of qualification . . . before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."¹⁶⁹ Since the suspect events had occurred some fifteen to twenty years earlier, the Court felt that the Board reasonably could not infer bad moral character from the totality of the evidence.¹⁷⁰

Schware failed to discuss the procedural due process aspects of licensing. The Court filled this vacuum in *Willner v. Committee on Character and Fitness*.¹⁷¹ The applicant in *Willner* had spent over twenty-five years unsuccessfully seeking admission to the New York State Bar. He had passed the bar examination on his first attempt, but the State Board of Bar Examiners repeatedly refused to certify him because he did not possess "the character and general fitness requisite for an attorney and counsellor at law."¹⁷² Though the Board conducted several hearings on the issue, it refused to provide Willner with the specific reasons for his rejection, to reveal the evidence it harbored against him, or to permit an outside referee to evaluate his character and fitness.¹⁷³ The Court held that the Board's action violated the

166. *Schware*, 353 U.S. at 234-35 & n.2.

167. 353 U.S. at 235 n.2.

168. 353 U.S. at 236.

169. 353 U.S. at 239; cf. *supra* note 160. The outcomes of *Barsky* and *Schware* undermine Judge Friendly's contention that, for due process purposes, "[r]evocation of a license is far more serious than denial of an application for one." Friendly, *supra* note 148, at 1296. In general, there is no indication that the Supreme Court recognizes such a distinction. See *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963); cf. *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

170. *Schware*, 353 U.S. at 245-47.

171. 373 U.S. 96 (1963). Between *Schware* and *Willner*, the Court decided two other licensing cases — *In re Anastaplo*, 366 U.S. 82 (1961) and *Konigsberg v. State Bar*, 366 U.S. 36 (1961). These two cases, decided on the same day, held that denying bar admission to applicants who refused to answer certain questions put to them by the licensing board did not contravene the Due Process Clause. While these cases represented a slight retrenchment from *Schware* in their substantive respects, neither involved the procedural due process issues decided in *Willner*.

172. *Willner*, 373 U.S. at 100. Willner was actually twice denied a license and five times rejected by the courts on various petitions for relief. Aside from his first application to the Bar, the Board provided him with no reason at all for these denials. 373 U.S. at 100-01.

173. 373 U.S. at 100-02. Apparently, the Board did not divulge its reasons or evidence to the Court either; the opinion does not reveal any such justifications, and the Justices themselves seem rather confused about the Board's true motivations. See 373 U.S. at 109 (Goldberg, J., concurring). Willner claimed that his exclusion resulted from a vendetta by a member of the bar, and

Due Process Clause. In its ruling, it stated flatly that "the requirements of due process must be met before a State can exclude a person from practicing law"¹⁷⁴ and held that the Board's authority consisted of "a discretion to be exercised after fair investigation, with such a notice, hearing, and opportunity to answer for the applicant as would constitute due process."¹⁷⁵ In this context, the Court held that due process attaches a panoply of procedural protections to the licensing process, including a full and fair hearing, an opportunity to know the Board's evidence and the reasons for its action, and the right to confront and cross-examine adverse witnesses.¹⁷⁶

B. *Application to Employer-Accessible Child Abuse Registries*

The government programs exhibited in these cases resemble in many respects the use of child abuse registries for employment screening, which Part I described. Each incorporates a procedural scheme that affords the accused at most only a postdeprivation hearing in front of the governmental entity that made the original adverse findings and conclusions.¹⁷⁷ Frequently, the state limits citizens' knowledge of the factual basis of its conclusions.¹⁷⁸ In all of these programs, as well as in the case of employer-accessible child abuse registries, the government may forbid the accused from knowing the identities of the accusers and from confronting or cross-examining them.¹⁷⁹ Moreover, authorities determine the culpability of the accused according to vague standards that are less stringent than those that a court of law would apply.¹⁸⁰

These forms of blacklisting also parallel employer-accessible child abuse registries in terms of their impact on individual workers and corporations. Just as the state prevents child care workers from pursuing their livelihoods because of their inclusion in the child abuse registry, the government programs described in section II.A deny economic actors the right to participate in particular markets based on the state's determination of malfeasance. Debarment severs govern-

that at one of his hearings the Board had shown him various adverse statements that lawyer had made. 373 U.S. at 101.

174. 373 U.S. at 102.

175. 373 U.S. at 103.

176. 373 U.S. at 104-05. The Court since has reaffirmed and clarified these principles. See *Barry v. Barchi*, 443 U.S. 55 (1979) (suspension of horse trainer's license).

177. Compare *supra* text accompanying notes 27-32, 58-59 with *supra* notes 97, 116, 127-28, 137, 158, 174-75 and accompanying text.

178. Compare *supra* note 30 and accompanying text with *supra* notes 97, 104, 115, 130, 137, 167-68 and accompanying text.

179. Compare *supra* text accompanying notes 29-30 with *supra* text accompanying notes 97, 115, 168; see also *infra* text accompanying notes 378-85.

180. Compare *supra* text accompanying notes 23, 49-52, 55-56 with *supra* notes 96, 98, 113-14, 125-26, 133, 146, 172 and accompanying text.

ment contractors from their principal customer. Denial and revocation of business licenses place a more direct restraint on individual market activity by denying the affected party not just the government's patronage, but the necessary governmental approval for participation in the market. Occupational licensing functions similarly but affects individuals rather than commercial entities. The loyalty-security programs posed the most direct constraints, actually barring certain individuals from government or government-related employment.¹⁸¹ Similarly, the state's identification of a child care worker as an alleged child abuser not only is likely to lead to termination of employment, but also forecloses job opportunities throughout the industry, depriving accused child care workers of their livelihoods.¹⁸²

With the exception of the loyalty-security programs, whose constitutionality the courts never explicitly examined,¹⁸³ the clear import of the cases described in section I.A is that the right to pursue employment remains perhaps "the most precious liberty that man possesses"¹⁸⁴ and that the government must comply with the Due Process Clause before interfering with it. In the area of debarment, the *Old Dominion-Transco* line of cases¹⁸⁵ evinces a judicial willingness to apply the Due Process Clause to these forms of government blacklisting. The holding in *Hornsby* reflects the constitutional necessity of procedural safeguards in the licensing process and presents a more expansive view of due process requirements than *Old Dominion* or *Transco*.¹⁸⁶ *Schware* conclusively demonstrates that the limitations state licensing imposes on occupational liberty must conform to the dictates of due process. Finally, *Willner* illustrates that potent procedural safeguards must accompany these vocational restrictions, even

181. For a description of the impact of the loyalty-security programs on individual employees comparable to the hypotheticals discussed *supra* in section I.B, see BERLE, *supra* note 90, at 92-95.

182. See *supra* note 48 and accompanying text; *infra* text accompanying notes 266-69.

183. But see Davis, *supra* note 94, at 239-40 (suggesting that *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955), establishes the unconstitutionality of loyalty-security programs). Aside from the subsequent history of loyalty-security adjudication, see *supra* text accompanying notes 106-10, there is ample reason to believe that *Parker* does not settle the issue. It is distinguishable from the other loyalty-security cases in several ways: (1) the program affected private sector employment and foreclosed an entire occupational field, so its consequences were unusually broad in scope; (2) the procedures provided were so egregiously deficient and biased as to be meaningless as a practical matter; (3) the case falls within the line of licensing cases described *infra* in section II.A.4. See *supra* note 113. The court in fact compared the seaman in *Parker* to "an attorney who suddenly finds himself disbarred." 227 F.2d at 717.

184. *Barsky v. Board of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

185. Although *Old Dominion* and *Transco* are the landmark cases in this area, many other courts have held governments to due process standards in their dealings with contractors. See, e.g., *Berlanti v. Bodman*, 780 F.2d 296 (3d Cir. 1985); *ATL, Inc. v. United States*, 736 F.2d 677 (Fed. Cir. 1984); *Northeast Ga. Radiological Assocs., P.C. v. Tidwell*, 670 F.2d 507 (5th Cir. 1982); *Mainelli v. United States*, 611 F. Supp. 606 (D.R.I. 1985); *Shermco Indus. v. Secretary of the Air Force*, 584 F. Supp. 76 (N.D. Tex. 1984).

186. See *supra* text accompanying notes 123-37.

when the exclusion of an individual from a given profession serves important public purposes.

The application of such procedural constraints to other forms of blacklisting indicates that similar safeguards are constitutionally prerequisite to the individual occupational restrictions embodied in employer-accessible child abuse registries. As previously illustrated, the state's exclusion of child care workers by providing employer access to child abuse registries bears a strong resemblance to the occupational restrictions scrutinized in the foregoing cases, both procedurally and in terms of its impact on the interests of affected citizens. These parallels demonstrate that the Due Process Clause should apply to employer-accessible child abuse registries as it does to these other varieties of governmental blacklisting.

III. THE CONSTITUTIONALITY OF CHILD ABUSE REGISTRY STATUTES

This Part uses analysis rather than analogy to assess the due process implications of employer-accessible child abuse registries. Procedural due process analysis involves two steps.¹⁸⁷ First, the court must determine whether the state action caused a deprivation of a constitutionally protected liberty or property interest.¹⁸⁸ Second, it must decide whether the state's procedures meet constitutional due process standards, according to the three-part test that the Supreme Court established in *Mathews v. Eldridge*¹⁸⁹ to govern such determinations. This Part applies this two-step analysis to employer-accessible child abuse registry statutes in order to determine their constitutionality.¹⁹⁰ Section III.A discusses the liberty and property interests upon which employer-accessible child abuse registry statutes might impinge. Section III.B applies the three-pronged *Mathews v. Eldridge* test to these statutes. The Part concludes that state child abuse registries that permit employer access intrude upon child care workers' protected liberty interests in employment and, in certain circumstances, their protected property interests in employment. It further concludes that the procedural protections generally provided to accused child abusers do not satisfy due process requirements and result in a constitutional violation.

187. *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972).

188. The Due Process Clause does not protect all forms of individual liberty or all types of property interests from improper governmental deprivation. See generally Henry P. Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977) (discussing the Supreme Court's definitions of "liberty" and "property" in the context of the Due Process Clause).

189. 424 U.S. 319 (1976).

190. As discussed *supra* in section I.A, there exist variations among state statutes, and individual analysis of each state's laws is beyond the scope of this Note. Fortunately, the *Mathews v. Eldridge* analysis does not focus on specific procedures, and enough common threads run through all the statutes to assemble a general assessment of procedural adequacy.

A. Implication of Constitutionally Protected Interests

To formulate a due process claim, plaintiffs first must demonstrate that they possess a constitutionally protected interest in life, liberty, or property, and that state action has deprived them of it.¹⁹¹ At one time, courts and commentators generally believed "that every individual 'interest' worth talking about [was] encompassed within the 'liberty' and 'property' secured by the due process clause and therefore entitled to some constitutional protection."¹⁹² A series of Supreme Court decisions has narrowed the types of interests encompassed by these terms,¹⁹³ however, apparently with the goal of stemming what the Court perceived as an impending avalanche of constitutional tort claims.¹⁹⁴ As the range of protected interests has narrowed, proof of deprivation of a legitimate liberty or property interest has become an increasingly prominent aspect of due process claims.¹⁹⁵ Releasing the names of accused child abusers to employers may impinge upon three individual interests: a liberty interest in reputation, a property interest in employment, and a liberty interest in employment. This section analyzes each of these interests to determine whether the Due Process Clause protects them against governmental deprivation. The section also discusses whether termination of child care employees due to their inclusion in a child abuse registry constitutes state action.

1. Liberty Interest in Reputation

In several early opinions, the Supreme Court suggested or implied that the Due Process Clause protects an individual's interest in preserving his good name.¹⁹⁶ In *Wisconsin v. Constantineau*,¹⁹⁷ the Court appeared to affirm this principle. The case arose out of a Wisconsin

191. See U.S. CONST. amend. XIV, § 1; *supra* note 188.

192. Monaghan, *supra* note 188, at 406-07.

193. *Id.* at 408; see also William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977); Randolph J. Haines, Note, *Reputation, Stigma, and Section 1983: The Lessons of Paul v. Davis*, 30 STAN. L. REV. 191, 198-200 (1977). Compare *Bell v. Burson*, 402 U.S. 535 (1971) (representing earlier, broader view of protected interests) with *Bishop v. Wood*, 426 U.S. 341 (1976) and *Paul v. Davis*, 424 U.S. 693 (1976) and *Board of Regents v. Roth*, 408 U.S. 564 (1972) (representing more modern and restrictive views).

194. See Monaghan, *supra* note 188, at 408-09; Haines, *supra* note 193, at 195-99. See generally Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986).

195. See Monaghan, *supra* note 188, at 443 (asserting that the Court's redefinition of *liberty* and *property* "result[s] in the creation of a technical barrier" to due process claims).

196. See *Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969) (holding that administrative bodies serving an accusatory function must comply with principles of due process); *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) (discussing "badge of infamy" conferred when an employee is dismissed for disloyalty).

197. 400 U.S. 433 (1971).

statute¹⁹⁸ that permitted government officials to post notices banning the sale of alcohol to citizens they considered to have a drinking problem.¹⁹⁹ Constantineau challenged the constitutionality of her "posting," and the Court held that the statute impinged upon the plaintiff's liberty interest in her reputation without procedural due process. "Where a person's good name, reputation, honor or integrity is at stake," the Court declared, "notice and an opportunity to be heard are essential. 'Posting' . . . is a stigma, an official branding of a person [by the state]. The label is a degrading one. Under the Wisconsin Act, a resident . . . is given no process at all."²⁰⁰

Five years later though, in *Paul v. Davis*,²⁰¹ the Court abruptly extinguished the liberty interest in reputation that *Constantineau* explicitly had recognized. The facts of the two cases were roughly parallel. In *Paul*, the plaintiff's name and photograph appeared on a flyer displaying "active shoplifters" that city and county police officers distributed to local merchants at Christmastime.²⁰² Davis once had been arrested for shoplifting, but the court had not decided his case at the time that the flyers were distributed and subsequently dismissed it.²⁰³ As in *Constantineau*, the plaintiff received no notice that he would be depicted as a shoplifter and no opportunity to contest this classification. Moreover, the flyer soon came to the attention of his employer, who ultimately decided not to terminate his employment but warned him that he "had best not find himself in a similar situation" in the future.²⁰⁴

Despite the obvious similarity to *Constantineau*, the Court held

198. WIS. STAT. § 176.26 (1967) (repealed 1972), discussed in *Constantineau*, 400 U.S. at 434.

199. The statute read, in part:

(1) When any person shall by excessive drinking of intoxicating liquors, or fermented malt beverages mispend, waste, or lessen his estate so as to expose himself or family to want, or the town, city, village or county to which he belongs to liability for the support of himself or family, or so as to injure his health, endanger the loss thereof, or to endanger the personal safety and comfort of his family or any member thereof, or the safety of any other person, or the security of the property of any other person, or when any person shall, on account of the use of intoxicating liquors or fermented malt beverages, become dangerous to the peace of any community, the wife of any such person, [or certain governmental officers], may, in writing signed by her, him or them, forbid all persons knowingly to sell or give away to such person any intoxicating liquors or fermented malt beverages, for the space of one year and in a like manner may forbid the selling, furnishing, or giving away of any such liquors or fermented malt beverages, knowingly to such person by any person in any town, city or village to which such person may resort for the same.

WIS. STAT. § 176.26 (1967) (repealed 1972), quoted in *Constantineau*, 400 U.S. at 434 n.2.

200. 400 U.S. at 437.

201. 424 U.S. 693 (1976).

202. *Paul*, 424 U.S. at 694-95.

203. 424 U.S. at 695-96. Davis was arrested on June 14, 1971. The state arraigned him in September of that year, and he pled not guilty. The judge filed away the charge with leave to reinstate, which technically left the case open in November of 1972, when authorities printed and distributed the flyers. The judge dismissed Davis' case shortly thereafter.

204. 424 U.S. at 696.

that, because “the words ‘liberty’ and ‘property’ as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection,”²⁰⁵ no deprivation of a liberty or a property interest protected by the Due Process Clause had occurred.²⁰⁶ While state denigration of a citizen’s reputation did not itself invade a protected interest, the Court held that the creation of a stigma could be subject to due process scrutiny if a plus factor, such as “alteration of legal status” or deprivation of “a right previously held under state law” accompanied it.²⁰⁷ In *Constantineau*, the Court explained, the state action violated due process because it proscribed the plaintiff from exercising her right to purchase liquor, which was conferred by state law.²⁰⁸

The “stigma-plus” test adopted in *Paul* surely does more to “open[] the constitutional door to state and federal use of official blacklists”²⁰⁹ than it does to protect accused child abusers. Under *Paul*, the state’s imposition of a stigma or denigration of a citizen’s reputation by public labeling as a child abuser does not by itself form the basis for a due process claim. At minimum, the impingement of some other legal status or right conferred by state law must accompany the creation of this stigma in order to impinge upon a constitutionally protected interest.²¹⁰ The opinion is unclear as to whether

205. 424 U.S. at 701. The precise meaning of this statement is not apparent, because the words ‘liberty’ and ‘property’ do not “in terms” single out *any* particular interest for protection.

206. 424 U.S. at 711-12.

207. 424 U.S. at 708-09.

208. 424 U.S. at 708-09. Professor Monaghan notes that *Constantineau*’s “right” to buy alcohol “played an obviously trivial role in the decision of that case.” Monaghan, *supra* note 188, at 424. Even this characterization borders on overstatement. The Court in *Constantineau* emphasized that “[t]he only issue present here is whether the label or characterization given a person by ‘posting’ . . . [is] such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard.” *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (emphasis added). The only mention *Constantineau* made of a right to purchase liquor occurred in a long quotation from the district court’s opinion. 400 U.S. at 435-36. Indeed, the *Paul* court could produce no direct textual reference to such a right in *Constantineau* and instead relied on the phrase “what the government is doing to him” to establish that *Constantineau* actually hinged on the plaintiff’s state-created right to purchase liquor, rather than the protected liberty interest in reputation on which the opinion focused. *Paul*, 424 U.S. at 708 (citing *Constantineau*, 400 U.S. at 437).

Commentators have strongly criticized *Paul*’s treatment of *Constantineau*. See Monaghan, *supra* note 188, at 424 (“The [*Paul*] Court’s re-rationalization of the earlier cases is wholly startling to anyone familiar with those precedents.”); Haines, *supra* note 193, at 192, 220-22 & nn.161 & 169; see also *Paul*, 424 U.S. at 729-35 (Brennan, J., dissenting).

209. Haines, *supra* note 193, at 207.

210. Monaghan, *supra* note 188, at 424-26. This reading of *Paul*, which adheres most closely to the plain language of the decision, essentially subordinates the constitutional protections of the Fourteenth Amendment to the laws of the individual states. Basic principles of federalism aside, it is indeed “an unsettling conception of ‘liberty’ that protects an individual against state interference with his access to liquor but not with his reputation in the community.” *Id.* at 426. But see Thomas J. Stalzer, Note, *Reputation as a Constitutionally Protectible Interest*, 52 NOTRE DAME L. REV. 290, 291 (1976). Stalzer interprets *Paul*’s stigma-plus test as holding that in order for state defamation to be actionable, a deprivation of an independently protected liberty or property interest must accompany the defamation. This view finds support in *Paul*’s statement that some

termination of employment would suffice to elevate the reputational injury to constitutional recognition. Loss of employment per se does not involve any state right that would qualify as a "plus" factor because there is no right to specific employment. On the other hand, *Paul* suggests that employment may qualify as a "legal status" within the context of the "stigma-plus" test.²¹¹ In any case, the Court's ruling precludes citizens from basing due process claims on mere injury to their reputations.

2. Property Interest in Employment

In the context of the Due Process Clause, *property* encompasses a variety of intangible and sometimes unrealized interests²¹² that do not necessarily correspond to traditional definitions of property.²¹³ On the other hand, the scope of the term is not boundless, especially as it pertains to employment.²¹⁴

interests which are considered protected forms of liberty or property "attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law." *Paul*, 424 U.S. at 710. However, in the context of constitutional adjudication, a stigma-plus test so defined necessarily would be meaningless, because if the "plus" in itself supports a constitutional claim, then the presence of a stigma would have no significance, except perhaps for increasing damage claims in § 1983 actions. A challenged statute either would be found constitutional or unconstitutional, and the fact that it implicates two protected interests instead of one would have no practical relevance. Since the reputational interest could only attain and maintain its status vicariously through the protected interest, it would always be either insufficient or superfluous to the constitutional claim. See Stalzer, *supra*, at 298-99.

211. This ambiguity stems mainly from *Paul*'s discussion of *Board of Regents v. Roth*, 408 U.S. 564 (1972). *Paul*, 424 U.S. at 709-10 (citing *Roth*, 408 U.S. at 573). Here, the *Paul* Court quoted *Roth* to the effect that a simple refusal to rehire an employee does not implicate the Due Process Clause unless it places a stigma on the employee that will hinder his prospects of future employment. *Paul* then uses this language to prove precisely the inverse point — that the imposition of a stigma is not actionable unless it involves termination of employment. The Court's suggestion that state denigration of reputation combined with the loss of employment creates a protected liberty interest under the Due Process Clause contradicts its suggestion elsewhere that the necessary "plus" factor must be the violation of a separately protected interest or alteration of a right conferred by state law. *Roth* specifically held that mere termination of government employment did not interfere with a protected property interest, and it is difficult to see how employment can be regarded as a right conferred by state law. This problem has been recognized by the courts. Compare *Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1104-12 (D.C. Cir. 1985) (holding that discharge or refusal to rehire a government employee constitutes a "plus" factor under *Paul*) with *Doe*, 753 F.2d at 1129-31 (MacKinnon, J., dissenting). See also cases cited *infra* note 235.

212. The Supreme Court has held "property" to include not only certain employment interests, but rights in many forms of government largesse. See *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare payments); *Monaghan*, *supra* note 188, at 436-38; *Robert L. Rabin, Job Security and Due Process: Monitoring Administrative Decisions Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 63-64. See generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

213. See generally CHARLES DONAHUE, JR. ET AL., *CASES AND MATERIALS ON PROPERTY* 107-71 (3d ed. 1993) (exploring major theoretical conceptions of "property").

214. See, e.g., *Flemming v. Nestor*, 363 U.S. 603 (1960) (finding no protected property interest in accrued Social Security payments); see also *Van Alstyne*, *supra* note 193 (discussing limits that the Court has imposed on the definition of property).

In the landmark case of *Board of Regents v. Roth*,²¹⁵ the Supreme Court ruled that a nontenured college professor employed on a year-to-year basis had no protected property interest in his employment.²¹⁶ The *Roth* Court conditioned constitutional recognition of a property interest on possession of "a legitimate claim of entitlement," rather than a mere expectation of benefit.²¹⁷ The most obvious sources of this entitlement are tenure agreements, employment contracts prohibiting termination except for cause, and state statutes.²¹⁸ However, employees can secure property interests in their employment through less formal means. In *Perry v. Sindermann*,²¹⁹ a companion case to *Roth*, the Court held that a nontenured teacher possessed a property interest in his employment due to language in the Faculty Guide amounting to a de facto tenure system.²²⁰ *Perry* further stated that a long-term employee "might be able to show from the circumstances of [his] service — and from other relevant facts — that he has a legitimate claim of entitlement to job tenure."²²¹

Among child care workers, unionized employees and some upper-level administrators may enjoy contractually created limitations on their termination. A clause providing that an employer may fire the employee only "for cause" or under specified circumstances should be sufficient to create a legitimate claim of entitlement to the job.²²² For these employees, a state action that affects their employment would affect their protected property interests. The vast majority of child care workers, however, do not fall into this category. Workers who have the most direct contact with the children, and therefore face the greatest risk of false accusation of child abuse, are likely to be terminable at will²²³ and have no legitimate claim to entitlement under the *Roth-Perry* test.²²⁴ Hence, these employees can state no property interest which would entitle them to due process protection.

215. 408 U.S. 564 (1972).

216. 408 U.S. at 578.

217. 408 U.S. at 577.

218. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (recognizing property interest conferred by a state statute setting conditions for termination of civil service employees).

219. 408 U.S. 593 (1972).

220. *Perry*, 408 U.S. at 600. The provision that the Court relied upon stated:

Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.

408 U.S. at 600.

221. 408 U.S. at 602.

222. See *Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir. 1991); *Blanton v. Griel Memorial Psychiatric Hosp.*, 758 F.2d 1540, 1542 (11th Cir. 1985).

223. See, e.g., *Angrisani v. City of New York*, 639 F. Supp. 1326, 1333 (E.D.N.Y. 1986); see also Carol Kleiman, *Child Care Workers Find Field is Maturing*, CHI. TRIB., Oct. 11, 1992, § 8, at 1 (discussing low pay and status of child care workers).

224. See *Angrisani*, 639 F. Supp. at 1333; *supra* text accompanying notes 214-20.

3. *Liberty Interest in Employment*

Like *property*, the Supreme Court has given the term *liberty* a broad construction in the due process context. In an early case, the Court declared that liberty "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"²²⁵ This definition formed the basis for recognition of an independent, constitutionally protected liberty interest in occupation in contemporary procedural due process doctrine.²²⁶ Not every state action that deprives a citizen of employment necessarily abridges this interest,²²⁷ but action that prevents or significantly hinders a person from acquiring *any* employment in a given field does implicate this interest.²²⁸ Thus, a termination can violate an individual's liberty interest in employment, even when no protected property interest exists, if the circumstances surrounding the termination tend to foreclose future employment.²²⁹

Two different Supreme Court approaches suggest this result. Under its "stigma-plus" test, *Paul v. Davis*²³⁰ essentially held that state action that detrimentally affects an individual's reputation can infringe a protected liberty interest if and only if it is accompanied by the impairment of "some more tangible interest[.]"²³¹ Some courts have held that loss of employment or foreclosure of future employment possibilities provides the requisite "plus" in this formula.²³² The

225. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922).

226. See *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972); cf. *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (citing the *Meyer* definition of liberty).

227. See *Roth*, 408 U.S. at 575 ("It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another.").

228. *Roth*, 408 U.S. at 573; see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 185 (1951) (Jackson, J., concurring); *Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1104-05 (D.C. Cir. 1985) (holding that foreclosure of future employment in government service and as an attorney due to termination for unprofessional conduct and dishonesty implicates a protected liberty interest); *Larry v. Lawler*, 605 F.2d 954, 958 (7th Cir. 1978) (holding that debarment from government employment arising from accusations of abusive behavior and alcohol abuse impinges upon a protected liberty interest). But cf. *Mazaleski v. Treusdel*, 562 F.2d 701, 713-14 (D.C. Cir. 1977) (holding termination for unsatisfactory job performance and insubordination to be insufficiently stigmatizing to foreclose future employment). Most courts have held governmental action that forecloses *private* employment to the same standard as that which forecloses *public* employment. See *Chernin v. Lyng*, 874 F.2d 501 (8th Cir. 1989); *Phillips v. Vandygriff*, 711 F.2d 1217 (5th Cir. 1983), cert. denied, 469 U.S. 821 (1984) (holding that state action that induces private employees' termination and forecloses their future employment impinges upon protected interests, although the government does not directly cause either termination or foreclosure).

229. *Doe*, 753 F.2d at 1106-07.

230. 424 U.S. 693 (1976).

231. *Paul*, 424 U.S. at 701. For a more detailed description of the "stigma-plus" test, see *supra* notes 205-11 and accompanying text.

232. See, e.g., *Doe*, 753 F.2d at 1106. This conclusion stems from *Paul*'s specific mention of employment as an interest which could combine with governmental defamation to form a liberty

loss of employment or foreclosure of future employment can thereby activate a latent liberty interest in reputation.

In addition, *Roth* implies an independent liberty interest in pursuing a field of employment. In *Roth*, the Court distinguished the plaintiff's case from one in which the state had "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities."²³³ Had it done so, the Court emphasized, "this . . . would be a different case."²³⁴ Several courts have determined that, if the stigma of not rehiring the employee forecloses other employment opportunities, then an independently protected interest is at stake and the Due Process Clause applies.²³⁵

Dissemination of a child care worker's status on the state child abuse registry to employers undoubtedly precludes that employee from future employment in the field. When a state labels an individual as a child abuser, it does not reflect merely poor job performance or certain personal inadequacies,²³⁶ but it declares that the individual presents potential danger to children and possibly has committed criminal acts. Courts consistently have held that information that creates such inferences of serious misconduct is sufficiently stigmatizing to foreclose future employment.²³⁷ This stigmatization therefore would implicate an employee's protected liberty interest in employment.

Although the Court has narrowed the scope of liberty and property interests that the Due Process Clause protects, most child care workers whose names appear on an employer-accessible child abuse registry will be able to claim state deprivation of some constitutionally protected interest. Courts do not recognize a protected liberty interest

interest. 424 U.S. at 701. It is not clear, however, whether the word "employment" here refers to foreclosure of employment or merely loss of employment, and *Paul* is elsewhere inconsistent as to the term's meaning in this respect. See *supra* note 211; see also *Doe*, 753 F.2d at 1110 n.18. The Second Circuit has read *Paul* narrowly, holding that only defamation occurring "in the course of dismissal from a government job or termination of some other legal right or status will suffice to constitute a deprivation of a liberty interest." *Neu v. Corcoran*, 869 F.2d 662, 667 (2d Cir.), *cert. denied*, 493 U.S. 816 (1989); see also *Easton v. Sundram*, 947 F.2d 1011, 1016-17 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1943 (1992).

233. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).

234. 408 U.S. at 573-74.

235. See, e.g., *Larry v. Lawler*, 605 F.2d 954, 957-58 (7th Cir. 1978); *Knehans v. Alexander*, 566 F.2d 312, 319-20 (D.C. Cir. 1977) (Robinson, J., dissenting), *cert. denied*, 435 U.S. 995 (1978); *Huntley v. Community Sch. Bd.*, 543 F.2d 979, 985-86 (2d Cir. 1976), *cert. denied*, 430 U.S. 929 (1977); *Velger v. Cawley*, 525 F.2d 334, 336-37 (2d Cir. 1975), *revd. per curiam on other grounds sub nom. Codd v. Velger*, 429 U.S. 624 (1977). Because *Roth* predated *Paul*, one cannot interpret this protected liberty interest in avoiding foreclosure of employment opportunities as merely an application of the "stigma-plus" test, but must construe it as an independent right.

236. See *Mazaleski v. Treusdell*, 562 F.2d 701, 714 (D.C. Cir. 1977) (holding that allegations of unsatisfactory job performance and insubordination were not "of such a serious and derogatory nature as to require procedural due process protection").

237. See *Angrisani v. City of New York*, 639 F. Supp. 1326, 1333 (E.D.N.Y. 1986); *supra* note 228.

in reputation unless the governmental stigma is accompanied by some other deprivation, but consequential loss of employment may satisfy this "plus" requirement. Similarly, courts permit workers to claim a property interest in their employment only if they enjoy some form of job security. However, when state action forecloses future employment opportunities, courts have recognized a constitutionally protected liberty interest in employment. Because inclusion on a child abuse registry will effect such a foreclosure of employment for child care workers, the state's procedures come under Due Process Clause scrutiny whenever the procedures permit prospective employers access to the state's child abuse registry.²³⁸

4. State Action

Because the Fourteenth Amendment places restrictions on states rather than on private parties,²³⁹ a citizen claiming the violation of a constitutional right must identify some form of state action causing the deprivation.²⁴⁰ Where a state-owned or state-operated child care facility terminates or refuses to hire a child care worker because of that individual's appearance on an employer-accessible child abuse registry, the element of state action is satisfied. State action is also present if state law requires a private child care employer to terminate an employee who appears on the registry.²⁴¹ However, the state need not act directly in order for a constitutional violation to occur. Even where a private employer makes the final decision to terminate an employee, the state may be involved sufficiently so that the loss of protected rights results from state action.

The Supreme Court has held that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either covert or overt, that the choice must in law be deemed to be that of the State."²⁴² The decisions of the Courts of Appeals in *Chernin v. Lyng*²⁴³ and *Phillips v. Vandygriff*²⁴⁴ demonstrate this principle in the

238. The Court has imposed two additional requirements for application of the Due Process Clause to stigmatizing government statements. First, there must be publication of the stigmatizing statements. *Bishop v. Wood*, 426 U.S. 341 (1976). Permitting employer access to a state's child abuse registry satisfies this condition. *Angrisani*, 639 F. Supp. at 1333. Second, the plaintiff must allege that the defamatory remarks are *false*. *Codd v. Velger*, 429 U.S. 624, 628 (1977) (*per curiam*). This Note assumes *arguendo* that the state's characterization of an individual as a child abuser, signified by the "indicated" designation on its child abuse registry, is inaccurate.

239. The Due Process Clause reads in part, "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1.

240. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1947).

241. *See, e.g., Tingle v. Tennessee Dept. of Human Servs.*, No. 88-5035, 1988 U.S. App. LEXIS 16533, at *3 (6th Cir. Dec. 6, 1988) (*per curiam*).

242. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

243. 874 F.2d 501 (8th Cir. 1989).

244. 711 F.2d 1217 (5th Cir. 1983).

context of employee terminations. The plaintiff in *Chernin* was an employee of a meat-packing business who had several prior felony convictions. When the U.S. Department of Agriculture (USDA) learned of Chernin's criminal history, it refused to provide necessary inspection services for his employer's plants.²⁴⁵ After months of wrangling, the employer agreed to sever all ties with Chernin, and the USDA agreed to provide inspection services.²⁴⁶ Although the federal government neither terminated Chernin itself nor forced Chernin's employer to do so, the court held that Chernin stated a due process claim.²⁴⁷

In *Phillips*, the nexus between governmental action and the plaintiff's adverse employment consequences was even more tenuous. Phillips was a banker who had been involved peripherally in a savings and loan scandal. In the Texas savings and loan industry, it was customary for employers to contact Vandygriff, the state commissioner, for advice on prospective employees. Even though Phillips never had worked at the scandal-plagued institution, Vandygriff allegedly implicated Phillips in these improprieties and refused to recommend Phillips to other savings and loans. As a result, Phillips claimed, he was unable to find work in the industry.²⁴⁸ Although the plaintiff did not allege that Vandygriff or any other state employee legally prevented or even coerced any employer not to hire him, the court analogized his situation to that of a rejected license applicant and held that the Due Process Clause applied.²⁴⁹

When employers terminate or refuse to hire child care workers as a direct result of their appearance on an employer-accessible child abuse registry, the state uses tactics at least as coercive as the governmental behavior displayed in *Chernin* and *Phillips*. First, when a state incorrectly alleges that a child care worker is a child abuser, it makes a stigmatizing and defamatory statement that devastates that individual's professional reputation. In an industry involving daily contact with children, such a statement is equivalent to labeling a person unqualified for the occupation.²⁵⁰ Second, the government compels child care agencies to terminate employees appearing on the registry by recognizing their liability in tort for negligently hiring or retaining individuals whom the state has identified as child abusers.²⁵¹ Third and

245. *Chernin*, 874 F.2d at 502-03.

246. The parties entered into a Stipulation and Consent Decision as a settlement of litigation brought by the employer against the USDA. 847 F.2d at 503; cf. *Greene v. McElroy*, 360 U.S. 474, 475-76 (1959) (describing a situation in which an employer terminated an employee after the government revoked the employee's security clearance).

247. 874 F.2d at 504.

248. *Phillips*, 711 F.2d at 1219-20.

249. 711 F.2d at 1223.

250. Cf. *Phillips*, 711 F.2d at 1223 (discussing "de facto" licensing); *supra* text accompanying notes 149-56 (discussing occupational licensing).

251. See *supra* note 48 and accompanying text.

most important, the state exercises control over the very existence of child care facilities through licensing and places substantial pressure on these employers to disassociate themselves from employees named on the child abuse registry through the threat of nonrenewal of the necessary licenses. Thus, even where a private child care facility voluntarily terminates an employee because of the worker's appearance on an employer-accessible child abuse registry, there generally will be sufficient state action involved for the affected employee to maintain a due process claim.²⁵²

B. *Applying the Mathews v. Eldridge Test*

The Supreme Court's 1970 decision in *Goldberg v. Kelly*,²⁵³ which held unconstitutional the termination of welfare benefits without a prior hearing, "detonated . . . the procedural 'due process explosion'"²⁵⁴ by opening all forms of administrative decisionmaking to such constitutional scrutiny.²⁵⁵ While *Goldberg* and its progeny greatly expanded the scope of procedural due process applications,²⁵⁶ the Court had developed no method of determining exactly what process was due in a given situation.²⁵⁷ One commentator described the results as "hazy at best, inconsistent at worst."²⁵⁸

In *Mathews v. Eldridge*²⁵⁹ the Court clarified the applicable standard by articulating a three-factor test for evaluating administrative procedures. Justice Powell, writing for the Court, declared:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, 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 fi-

252. The necessary state action also may arise from substantial state funding and control of private child care agencies. See, e.g., *Angrisani v. City of New York*, 639 F. Supp. 1326, 1333-34 (E.D.N.Y. 1986).

253. 397 U.S. 254 (1970).

254. Marc A. Bernstein, Note, *Mathews v. Eldridge Reviewed: A Fair Test on Balance*, 67 GEO. L.J. 1407, 1407 (1979) (quoting Friendly, *supra* note 148, at 1268).

255. These areas included such governmental activities as benefits programs, licensing, mass employment, education, and corrections. Rubin, *supra* note 109, at 1044-45.

256. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971).

257. The closest the Court had come to presenting a standard was its often repeated statement that "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring), quoted in *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). Unsurprisingly, this provided little guidance for lower courts.

258. Bernstein, *supra* note 254, at 1407; see also Mark Andrews, *Aristotle and Mr. Eldridge: A Development of the Calculus in Mathews v. Eldridge*, 20 GONZ. L. REV. 343, 343-44 (1985) (arguing that the *Mathews* test has failed to remedy the problem of vagueness).

259. 424 U.S. 319 (1976).

nally, the Government's interest²⁶⁰

The Court prescribed a balancing of these factors to determine "when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness."²⁶¹

Despite receiving a hostile reception from most legal commentators,²⁶² the *Mathews* test has become the predominant standard for assessing procedural requirements.²⁶³ Consequently, courts should apply the test to child abuse registry statutes to decide whether the procedural protections the registry statutes provide are adequate.²⁶⁴

1. *The Private Interest Affected*

Loss of employment constitutes the most prominent private interest affected by employer-accessible child abuse registries. The Court has regarded continued employment as a substantial interest in itself.²⁶⁵ But governmental characterizations of child care employees as child abusers do not just deprive the workers of their present employment; they effectively bar the employees from the child care industry.²⁶⁶ The state thereby prevents child care workers from supporting themselves and their families, and in doing so implicates one of the most important private interests, the right to earn a livelihood.²⁶⁷ Finally, when a state brands individuals as child abusers and causes their

260. *Mathews*, 424 U.S. at 335. Commentators accurately have described the test as utilitarian because it functions to approve additional procedural protections only when they will benefit society as a whole, rather than just the affected individual. See Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 46-49 (1976); Bernstein, *supra* note 254, at 1411-12.

261. 424 U.S. at 348. The *Mathews* Court, however, decided the case mostly by comparison to *Goldberg*, rather than by an explicit balancing process. See 424 U.S. at 340-47.

262. See Andrews, *supra* note 258, at 344-45 & n.10 (finding only two supporters of *Mathews* out of 11 authors surveyed, one of whom later recanted); Bernstein, *supra* note 254, at 1411 (reporting that both the initial case notes and the subsequent law review articles were overwhelmingly critical). For examples of such criticism, see Mashaw, *supra* note 260; Rubin, *supra* note 109, at 1137-45. But see Bernstein, *supra* note 254, at 1412-27 (calling *Mathews* a sound test).

263. See Bernstein, *supra* note 254, at 1412 ("[F]ederal courts have almost invariably employed the [*Mathews*] balancing test when judging the adequacy of a challenged procedure.").

264. See *supra* section I.A.

265. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) ("[T]he significance of the private interest in employment cannot be gainsaid."); *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (holding that a horse trainer has a substantial interest in avoiding license suspension); see also Bernstein, *supra* note 254, at 1416 & n.91.

266. See *Valmonte v. Perales*, 788 F. Supp. 745, 751 (S.D.N.Y. 1992); *supra* text accompanying notes 236-37. Efforts at linking state child abuse registries to create a national child abuse registry will only increase the depth of the deprivation.

267. Cf. *Goldberg v. Kelly*, 397 U.S. 254, 264 ("[T]ermination of [welfare benefits] pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means to live while he waits."); *Snidach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (holding that a hearing must precede wage garnishment under the Due Process Clause because of the heavy financial burden placed on some workers).

subsequent termination on those grounds, it creates an often indelible stigma which "causes damage more enduring and extensive"²⁶⁸ than the official state sanctions. This stigma will not only damage the individuals' relationships with friends and family, and his standing in the community, but may cause difficulty in securing any form of employment.²⁶⁹

2. Risk of Error

As this Note illustrates in Part I, state child abuse detection systems appear to carry a substantial risk of error.²⁷⁰ The frequent inaccuracy of child abuse reports introduces this risk,²⁷¹ and the low standards of proof that child abuse statutes employ compounds it.²⁷² The Supreme Court has held that the standard of proof "'serves to allocate the risk of error between the litigants'"²⁷³ and "reflects the value society places on individual liberty."²⁷⁴ Specifically, the Court has recognized an inverse relationship between the standard of proof and the risk of error: the lower the standard of proof, the more the individual absorbs the risk of possible error, and the less individual

268. James O. Freedman, *Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1, 33 (1972).

269. Cf. *Board of Regents v. Roth*, 408 U.S. 564, 573-74 (1972) (holding Due Process Clause to be implicated when circumstances of termination preclude future employment); *Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1104-05 (D.C. Cir. 1985); *Larry v. Lawler*, 605 F.2d 954, 958 (7th Cir. 1978) (following *Roth*). While the employment ramifications subsequently can be remedied, the damage to one's reputation sustained when the state publicly levies a charge of child abuse "is sometimes so great that, in effect, the availability of a subsequent hearing is meaningless." Freedman, *supra* note 268, at 34-35.

270. The hypothetical case presented *supra* in section I.B.1 provides an illustration of the magnitude of this risk on an individual level.

271. See DOUGLAS J. BESHAROV, *RECOGNIZING CHILD ABUSE* 12 (reporting that as many as 65% of child abuse reports are unfounded); RICHARD WEXLER, *WOUNDED INNOCENTS* 85 (estimating that state agencies receive over 1.3 million false reports of child abuse annually); Douglas J. Besharov, *Child Abuse and Neglect Reporting and Investigation: Policy Guidelines for Decisionmaking*, 22 FAM. L.Q. 1, 12-13 (1988) (reporting that only 40% of child abuse reports are substantiated and 4% to 10% are knowingly false); David P.H. Jones & Ann Seig, *Child Sexual Abuse Allegations in Custody or Visitation Disputes*, in *SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES* 22, 26 (E. Bruce Nicholson ed., 1988) [hereinafter *SEXUAL ABUSE ALLEGATIONS*] (finding one in five allegations of child abuse arising during custody or visitation disputes to be fictitious); Frances Sink, *Studies of True and False Allegations: A Critical Review*, in *SEXUAL ABUSE ALLEGATIONS*, *supra*, at 37, 40 (reporting study finding only 54% of Colorado sexual abuse reports to be reliable and 7% to be fictitious); Alan Abrahamson, *Child Protective System in S.D. Scored by Grand Jury*, L.A. TIMES, Feb. 7, 1992, at A1 (reporting findings of San Diego grand jury of widespread inaccuracy in child abuse reporting and investigation system); *CBS Evening News* (television broadcast, Nov. 17, 1992) (discussing cases of three men falsely accused of child abuse).

272. See *Valmonte v. Perales*, 788 F. Supp. 745, 753 (S.D.N.Y. 1992); see also *supra* text accompanying notes 49-52.

273. *Addington v. Texas*, 441 U.S. 418, 423 (1979).

274. *Addington*, 441 U.S. at 425 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part), *cert. dismissed per curiam sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972)); accord *Stantosky v. Kramer*, 455 U.S. 745, 755-56 (1982).

rights are valued.²⁷⁵

Most states have adopted a "some credible evidence" standard of proof for inclusion on the child abuse registry.²⁷⁶ Such a standard imposes no duty on the factfinder to weigh conflicting evidence and consequently is a significant step below the "preponderance of the evidence" standard typically used for civil disputes.²⁷⁷ The standard therefore creates a high risk of false positives in child abuse investigations, which translates into a high risk that the state will erroneously place child care workers on its child abuse registry.²⁷⁸

The nature of the evidentiary issues that state agencies adjudicate in child abuse cases further exacerbates the risk of error. Courts and commentators have recognized a distinction between "subjective" and "objective" issues.²⁷⁹ The former issues "are thought to be those bearing on matters such as credibility, sincerity and fault,"²⁸⁰ while the latter depend on statistical or documentary proof.²⁸¹ Courts have generally required greater procedural protections and therefore assessed the risk to be greater when administrative decisions have turned on subjective, rather than objective, criteria.²⁸²

The Supreme Court has recognized that child neglect proceedings "employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge."²⁸³ The same characterization applies to child abuse investigations. These inquiries

275. See *Santosky*, 455 U.S. at 755; *Addington*, 441 U.S. at 423-24.

276. See *supra* notes 23, 28 and accompanying text.

277. The "preponderance of the evidence" standard has been held to "indicate[] . . . society's 'minimal concern with the outcome'" and a conclusion that the litigants should "share the risk of error in a roughly equal fashion." *Santosky*, 455 U.S. at 755 (quoting in part *Addington*, 441 U.S. at 423). The logical extension of this is that the "some credible evidence" standard reflects a virtually nonexistent state interest in whether an individual officially is labeled a child abuser and a judgment that the accused should bear most of the risk of error. This stance is entirely inconsistent with the state's position in other quasi-criminal adjudications. See *Santosky*, 455 U.S. at 756 ("[T]he Court has deemed [an intermediate standard of proof] necessary to preserve fundamental fairness in . . . proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.'" (quoting *Addington*, 441 U.S. at 425-26)); *Addington*, 441 U.S. at 424. See also *infra* notes 357-65 and accompanying text.

278. Cf. *Santosky*, 455 U.S. at 755; *Addington*, 441 U.S. at 423 (describing relationship between standard of proof and risk of error).

279. See *Santosky*, 455 U.S. at 762-63 (describing standards for ascertaining child neglect); *Addington*, 441 U.S. at 427 (discussing standards for civil commitment of the mentally ill); *Mathews v. Eldridge*, 424 U.S. 319, 343-44 (1976) (contrasting criteria for determining disability with those for deciding welfare eligibility); *Andrews*, *supra* note 258, at 362; *Bernstein*, *supra* note 254, at 1419-23.

280. *Bernstein*, *supra* note 254, at 1420-21.

281. *But see id.* at 1421 (defining objective issues as "all issues that are not subjective" and rejecting a definition confining the term to issues well-suited to documentary proof). *Bernstein* further asserts that the lack of definition of these terms leads to difficulty in applying them to actual cases.

282. *Andrews*, *supra* note 258, at 362; *Bernstein*, *supra* note 254, at 1420-21; see also *Santosky*, 455 U.S. at 762-63 & n.12; *Addington*, 441 U.S. at 427; *Mathews*, 424 U.S. at 343-44.

283. *Santosky*, 455 U.S. at 762.

often involve inherently subjective evidence because the incidents of alleged abuse occur in private settings with no disinterested witnesses.²⁸⁴ Physical evidence of abuse, if present, may be ambiguous in nature.²⁸⁵ Many cases will boil down to a simple credibility determination by the investigator who "possesses unusual discretion to underweigh probative facts that might favor the parent."²⁸⁶ Such reliance on circumstantial evidence and sheer subjective opinion undoubtedly undermines the accuracy of the initial determination.²⁸⁷

Finally, states' frequent failure to provide a formal opportunity for the accused to contest the states' findings until after the agency has made its initial decision also heightens the risk of error in the child abuse system.²⁸⁸ While an individual may attempt to tell his side of the story in the course of an investigator's interrogation, the state grants no hearing on the matter until after his name appears on the state child abuse registry.²⁸⁹ This absence of predeprivation procedural protections naturally increases the possibility that the state will rely upon inaccurate or incomplete information, which in turn increases the chance for error.²⁹⁰

A variety of factors contribute to an especially high risk of error in state child abuse investigations. Cases are initiated by a reporting system that includes a substantial percentage of inaccurate allegations. The "some credible evidence" standard of proof that most states employ essentially screens out only accusations that entirely lack foundation. Evidence used to substantiate child abuse charges is frequently of a highly subjective nature, with the result that the outcome of the

284. See, e.g., *Angrisani v. New York*, 639 F. Supp. 1326 (E.D.N.Y. 1986); see also *supra* text accompanying notes 40-41.

285. See, e.g., *supra* text accompanying note 40. A classic parental explanation for such evidence is that the child's injuries were sustained during play, in a fall, or in some similar manner. See *IVERSON & SEGAL, supra* note 2, at 78 ("A common reason for physical abuse to go unreported or untreated is that parents provide accounts that the injuries are accidental in nature, and these accounts are accepted at face value.").

286. *Santosky*, 455 U.S. at 762. The Court also expressed a concern that these judgments would reflect cultural or class biases. 455 U.S. at 763. This determination will not necessarily involve weighing the word of the child against that of the parent; both the alleged victim and the accused may deny that abuse has occurred, forcing investigators to assess credibility in an absolute sense. See *WEXLER, supra* note 271, at 10-14, 96-97, 148-49, 299 (describing actual cases in which this scenario has arisen).

287. Such evidence includes physical injuries to the child, observations of teachers, doctors, and relatives, or second-hand reports.

288. See *Angrisani v. City of New York*, 639 F. Supp. 1326, 1335 (E.D.N.Y. 1986); cf. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (termination of welfare benefits); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (wage garnishment).

289. See *Angrisani*, 639 F. Supp. at 1335; see *supra* text accompanying notes 25-26. In general, a person placed on the child abuse registry may submit a request for expungement, but only after the state agency has completed its investigation. If the state denies this request, the accused can demand a hearing, but in the interim his name remains on the registry.

290. See *Freedman, supra* note 268, at 27 ("When an administrative agency acts on incomplete information, untested by the adversary process and untempered by an opportunity for deliberation, it is far more likely to err.").

investigation often hinges on the discretion of the investigators. Most states' failure to provide accused individuals any formal opportunity to defend themselves until the investigation is concluded further enhances the high rate of inaccuracy. The combination of these factors creates a significant risk that states falsely will label some citizens as child abusers.

3. *The Government's Interest*

The state has at least two interests in maintaining its current procedures for access to child abuse registries. First and most important, the state has a *parens patriae* interest in preserving the welfare of children by limiting children's exposure to potentially harmful adults.²⁹¹ A lack of procedural safeguards facilitates this goal by allowing the state quickly to isolate a child care employee from contact with children upon the first indication of abusive tendencies.²⁹² Imposing procedural protections, such as a predeprivation hearing or an enhanced standard of proof, necessarily will impede this goal either by delaying governmental action or by permitting more false negative findings. On the other hand, these procedures do serve a subsidiary state interest in reducing the number of false positive findings of child abuse.²⁹³

The state also has a clear interest in preventing an increase in its administrative costs.²⁹⁴ Courts often have been reluctant to place heavy fiscal burdens on state agencies by mandating onerous procedures, and they have weighed the financial costs of such measures against their potential benefits.²⁹⁵ The costs to the state of providing additional procedural protections to accused child abusers before disclosing information to their employers may be substantial, as such safeguards usually entail increased paperwork and require a greater resource commitment from agencies often already understaffed and underfunded.²⁹⁶ One ameliorating consideration is that the number of

291. *Cf. Santosky*, 455 U.S. at 766 (noting state's *parens patriae* interest in preserving and promoting the welfare of the child in parental rights termination proceedings).

292. Such a policy choice typifies governmental summary action in that it subordinates "the fundamental values that deliberative hearings are believed to serve: reducing the possibility of error and protecting the individual against precipitate use of governmental authority. . . to others deemed more important." Freedman, *supra* note 268, at 27.

293. *Cf. Santosky*, 455 U.S. at 767-68 (holding that state has interest in accurately determining whether parents are capable of caring for their children and that stricter standard of proof furthers that interest); *Addington v. Texas*, 441 U.S. 418, 426 (1979) (finding state interest in not confining individuals not mentally ill furthered by stricter standard of proof).

294. *See Santosky*, 455 U.S. at 766.

295. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 347-48 (1976) ("At some point the benefit of an additional safeguard to the individual . . . may be outweighed by the cost."). Critics of the *Mathews* test have particularly disparaged the view implicit in this language that the values represented by the Due Process Clause effectively can be placed in monetary terms. *See Rubin*, *supra* note 109, at 1143; *see also Mashaw*, *supra* note 260, at 48.

296. *But cf. Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 544 (1985) (holding that

child care workers accused of child abuse likely will remain small.²⁹⁷ Nevertheless, the state's interests in avoiding additional administrative costs may be an important factor, depending upon the particular procedure.

4. *Balancing the Factors*

Although *Mathews* gives no clear indication of how to translate the three factors into a constitutional prescription,²⁹⁸ the Court's approach in *Santosky v. Kramer*²⁹⁹ provides guidance. *Santosky* arose out of New York State's termination of the plaintiffs' parental rights on the grounds of permanent neglect.³⁰⁰ The Santoskys challenged the constitutionality of the authorizing statute³⁰¹ and alleged that the "preponderance of the evidence" standard that it employed failed to protect their interests adequately under the Due Process Clause.³⁰² After finding that the state action implicated the plaintiffs' fundamental liberty interest in "the care, custody and management of their child,"³⁰³ the Court applied the *Mathews* test. It found a "commanding" private interest,³⁰⁴ a "substantial" risk of error,³⁰⁵ and only a "slight" governmental interest.³⁰⁶ The Court concluded that use of the "preponderance of the evidence" standard in parental termination proceedings offended the Due Process Clause, reasoning that "[t]he individual should not be asked to share equally with society the risk of

providing hearing to discharged employees "would impose neither a significant administrative burden nor intolerable delays" on the state).

297. See Elaine S. Povich, *Day Care, Abuse: New Statistics*, CHI. TRIB., Mar. 22, 1988, § 1, at 3 (discussing study showing that child abuse at day care centers is rare and that 80% of such cases involve a single abuser); Joyce Purnick, *Convictions of 3.8% Found in Updated Day-Care Check*, N.Y. TIMES, Feb. 18, 1985, at B3 (finding that the New York state child abuse registry listed fewer than one percent of New York City child care workers).

298. See Rubin, *supra* note 109, at 1138 ("The Court's frequent answer is to 'balance' or 'weigh' the various factors. This reliance upon 'weight,' which is a useful approach for dealing with bananas, leaves something to be desired where factors such as those in *Mathews* are concerned.").

299. 455 U.S. 745 (1982).

300. 455 U.S. at 752. A family court ordered the actual termination, but the Department of Social Services, which is also responsible for maintaining the child abuse registry and investigating child abuse, made the findings of neglect.

301. N.Y. FAM. CT. ACT § 622 (McKinney 1983 & Supp. 1992).

302. 455 U.S. at 751.

303. 455 U.S. at 753-54 & n.7.

304. 455 U.S. at 758. The Court considered the parents' interest in custody over their children to be a vital interest which irreparably and immeasurably would be harmed by erroneous termination. 455 U.S. at 758-61 & n.11.

305. 455 U.S. at 758.

306. 455 U.S. at 758. The Court identified the same two government interests as employer access to child abuse registries involves — protecting the welfare of children and minimizing administrative costs. 455 U.S. at 766. It reasoned that the use of a more stringent standard of proof would impose little additional fiscal burden on the state, and that since the state's interest in child welfare encompassed an interest in not separating children erroneously from their families, the heightened standard actually would serve this state purpose. 455 U.S. at 766-67.

error when the possible injury to the individual is significantly greater than any possible harm to the state.' ”³⁰⁷

Santosky's approach to balancing the factors of the *Mathews* test can be visualized by placing the first and third elements of the *Mathews* test — the private interest and the government's interest — on either end of a beam. The middle factor, the risk of error, represents the fulcrum of the beam. As the risk of error increases, the fulcrum shifts toward the government's side of the beam; as it diminishes, the fulcrum shifts toward the private interests. Consequently, the greater the risk of error, the more the government's interest must outweigh that of the individual in order for the balance to tilt in favor of the constitutionality of its actions.³⁰⁸

Applying this principle to child abuse registry statutes permitting employer access reveals their unconstitutionality as presently implemented. The registry statutes do not affect the fundamental family-related liberties identified in *Santosky*,³⁰⁹ but they do affect important individual interests in employment and reputation.³¹⁰ The government has a stronger interest in restraining administrative costs than it did in *Santosky*, because the full panoply of procedural safeguards will be more costly than merely enhancing the standard of proof, and the state has less interest in preventing erroneous deprivation of employment than in preventing erroneous dissolution of families.³¹¹ As in *Santosky*, the state has an interest in protecting children from harm.³¹²

The “some credible evidence” standard of proof that child abuse registry statutes employ combined with their meager procedural safeguards create a very high risk of error.³¹³ This shifts the fulcrum sharply toward the government's side of the beam. Thus, if the governmental and private interests equaled each other,³¹⁴ the balance would tilt strongly toward the individual and hence toward the conclusion that these statutes violate the Due Process Clause. Even if the relative interests of the state and the individual tilt slightly in favor of

307. 455 U.S. at 768 (quoting *Addington v. Texas*, 441 U.S. 418, 427 (1979)). The statute in question required the state to prove by a “fair preponderance of the evidence” that a child permanently had been neglected.

308. In *Santosky*, for instance, the “preponderance of the evidence” standard equalized the risk between the parties and therefore placed the fulcrum at the midpoint of the beam. But because the private interests vastly outweighed the governmental interests, the beam tilted toward the individual and the statute was unconstitutional. See 455 U.S. at 758; see also *Addington*, 441 U.S. at 427.

309. See *supra* note 304; cf. *Glasford v. New York State Dept. of Social Servs.*, 787 F. Supp. 384, 388 (S.D.N.Y. 1992).

310. See *supra* notes 265-69 and accompanying text.

311. See *supra* notes 291-97 and accompanying text.

312. See *supra* notes 291-93 and accompanying text.

313. See *supra* notes 270-90 and accompanying text.

314. Such a proposition is itself dubious considering the weight given similar interests in *Santosky*. See *supra* note 304.

the former, they do not balance so disproportionately as to validate the constitutionality of employer-accessible child abuse registries under the procedural schemes that exist today.³¹⁵

IV. CREATING A CONSTITUTIONAL EMPLOYER-ACCESSIBLE CHILD ABUSE REGISTRY STATUTE

Risk of error is the only variable in the foregoing analysis over which the state has any control. Thus, in order for states to create constitutional employer-accessible child abuse registries, they must reduce the risk of error in their child abuse investigations. States can accomplish this by adding and enhancing procedural protections for the accused. This Part argues that, by applying common procedural safeguards, states can create employer-accessible child abuse registries that comply with the requirements of the Due Process Clause.

No formula exists for ascertaining the precise level and type of procedural safeguards the Due Process Clause demands in any given case. "[D]ue process" . . . is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . [It] is not a mechanical instrument. It is not a yardstick. It is a process."³¹⁶ Courts and commentators have recognized that the constitutional adequacy of a scheme depends upon the total procedural picture, so the enhancement of one safeguard may justify the weakening of another.³¹⁷ The government may protect an individual's due process rights through a variety of procedural schemes affording equivalent protection.

The Court has enumerated six safeguards basic to such a scheme: (1) written notice of the claimed offenses; (2) disclosure of evidence against the accused; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a neutral and detached arbiter; and (6) a written statement by the factfinder detailing the reasons for the decision and the evidence relied upon in making that choice.³¹⁸ This list omits only one possibly important element of procedural due process, the right to counsel.³¹⁹ This Part evaluates the necessity of each of these seven elements in assembling a constitutional, employer-accessible child abuse registry system.

315. See *supra* Part I.

316. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring); see also *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

317. See *Friendly*, *supra* note 148, at 1279.

318. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); cf. *Friendly*, *supra* note 148, at 1279-95 (listing 11 such elements).

319. See *Wolff v. McDonnell*, 418 U.S. 539, 559 (1974); *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970); *Friendly*, *supra* note 148, at 1287-91.

A. Notice

The Court has viewed notice as “‘[a]n elementary and fundamental requirement of due process in any proceeding’”³²⁰ Indeed, notice is necessary for the accused to begin mounting a defense³²¹ and to avoid deprivations that the accused could forestall.³²² The notice requirement has two components: timeliness and informativeness. Due process requires the state to maximize both, especially when doing so imposes few additional burdens.³²³ Accordingly, the Court has mandated that notice be “‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’”³²⁴

Because most child abuse investigations involve, at the very least, interviewing the alleged perpetrator, this contact alone will provide some notice, but not the sort that the Due Process Clause demands.³²⁵ Instead, the state should provide the accused written notice when it lodges a child abuse report.³²⁶ Full disclosure of the state's information may conflict with a desire to protect the identity of the accuser,³²⁷ but it easily can supply the accused with the date, time, and location of the alleged incident, and the name of the victim.³²⁸ While this small act will involve inconsequential administrative burdens, it will permit the accused child abuser to understand quickly and conclusively the nature and gravity of the charges against him.

B. Disclosure of Evidence

Many judges have leveled diatribes against the government's use of secret informers,³²⁹ but its use of secret evidence is even more pernicious.

320. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); see also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Morrissey*, 408 U.S. at 486-87; *Goldberg*, 397 U.S. at 270.

321. See *Friendly*, *supra* note 148, at 1280-81.

322. See, e.g., *Armstrong*, 380 U.S. at 551 (opportunity to contest adoption lost due to failure to notify petitioner).

323. See *Friendly*, *supra* note 148, at 1280 (“It is likewise fundamental that notice be given and that it be timely and clearly inform the individual of the proposed action and the grounds for it.”).

324. *Armstrong*, 380 U.S. at 550 (quoting *Mullane*, 339 U.S. at 314); see also *Wolff*, 418 U.S. at 564.

325. The Due Process Clause requires notice sufficient to inform the accused fully as to the nature of the charges. See *Busche v. Burke*, 649 F.2d 509 (7th Cir.), *cert. denied*, 454 U.S. 897 (1981).

326. Courts often have required that notice be in written form. See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Glenn v. Newman*, 614 F.2d 467, 472 (5th Cir. 1980).

327. Since rights of confrontation and cross-examination implicate this concern to an even greater degree, this Note addresses it at length *infra* at notes 374-79 and accompanying text.

328. In the case of an anonymous report of child abuse, the issue of confidentiality would be moot.

329. See, e.g., *Peters v. Hobby*, 349 U.S. 331, 350-52 (1955) (Douglas, J., dissenting); see also *infra* notes 367-68 and accompanying text.

cious. This practice often precludes accused individuals from defending themselves on the merits of the charge. Accused persons may deny wrongdoing generally, proclaim themselves virtuous and exemplary citizens, and submit countless affidavits from prominent individuals proclaiming their good character, but they cannot address any of the facts which ultimately will form the basis of the government's determination.³³⁰ Given this tremendous potential for governmental abuse, it is unsurprising that "no fair dispute [exists] over the right to know the nature of the evidence on which the administrator relies."³³¹

The rationale for compelling full disclosure of evidence applies particularly strongly to child abuse determinations. Child abuse is a fact-specific offense revolving around a particular incident or series of incidents. It often occurs in a context with no disinterested witnesses, and the allegations consequently often rest on the words of children, who may be unreliable as witnesses.³³² Moreover, the available evidence is frequently subject to widely varying interpretation.³³³ For these reasons, it is essential that the state enable alleged child abusers to provide their versions of the incident or incidents that form the basis of the charge.

The administrative costs of evidentiary disclosure are not significant because the state must only copy the documents in its possession or otherwise permit access to its evidence. The state may have an in-

330. Cf. *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 100-01 (1963); *Greene v. McElroy*, 360 U.S. 474, 478-80 (1959); *Peters*, 349 U.S. at 335-36 (describing parties' efforts to defend themselves against charges based on undisclosed evidence).

331. Friendly, *supra* note 148, at 1283.

332. See RALPH C. UNDERWAGER & HOLLIDA WAKEFIELD, *THE REAL WORLD OF CHILD INTERROGATIONS* 27-28 (1990); Stephen J. Ceci et. al, *Age Differences in Suggestibility: Narrowing the Uncertainties*, in *CHILDREN'S EYEWITNESS MEMORY* 79 (Stephen J. Ceci et al. eds., 1987) (concluding that young children are more suggestible than older children or adults); Ronald A. Cohen & Mary A. Harnick, *The Susceptibility of Child Witnesses to Suggestion*, 4 *LAW & HUM. BEHAV.* 201, 208-09 (1980) (finding young children to be less reliable eyewitnesses than adults); Jeffrey J. Haugaard et al., *Children's Definitions of the Truth and Their Competency as Witnesses in Legal Proceedings*, 15 *LAW & HUM. BEHAV.* 253, 267-69 (1991) (finding children's memories less accurate than adult memories); Mary A. King & John C. Yuille, *Suggestibility and the Child Witness*, in *CHILDREN'S EYEWITNESS MEMORY*, *supra*, at 24, 28-30 (discussing children's suggestibility under direct questioning); Aric Press et al., *The Youngest Witnesses*, *NEWSWEEK*, Feb. 18, 1985, at 72. But see Mary Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 *CRIM. JUST. J.* 1, 10-13 (1983) (asserting that children rarely lie about abuse); Christopher B. Reid, Note, *The Sexual Innocence Inference Theory as the Basis for the Admissibility of a Child Molestation Victim's Prior Sexual Conduct*, 91 *MICH. L. REV.* 827, 857 & n.156 (1993) (citing sources attesting to accuracy of children's accusations of abuse). Accusations of child abuse also frequently arise during acrimonious custody battles between parents, which further demeans the credibility of the witnesses. See *WEXLER*, *supra* note 271, at 141; Jones & Seig, *supra* note 271.

333. For instance, physical injuries such as bruises may be acquired in a number of ways, some of which are unrelated to abuse. It may be similarly difficult for investigators to determine whether certain forms of physical contact are intended as sexual interactions. See *BESHAROV*, *supra* note 271, at 69-70, 88; *WEXLER*, *supra* note 271, at 12, 96, 139. But cf. *BESHAROV*, *supra* note 271, at 69-82; *IVERSON & SEGAL*, *supra* note 2, at 73-78 (demonstrating that certain types of physical injury almost always indicate abuse).

terest, though, in protecting the confidentiality of witnesses who fear legal or extralegal retaliation from the accused. Concealing witness' identities may interfere with the accused's efforts to achieve exoneration; nevertheless, when witnesses have reasonable fears of retaliation or have cooperated with the investigation on the condition of anonymity, they deserve some degree of protection. In these circumstances, the state may balance these competing concerns by redacting the names of the accusers but disclosing the substance of their testimony.

In the absence of witness protection concerns, the state should seek to disclose fully to the accused its evidence of child abuse. To accomplish this, the state should release a written statement of its findings to the accused at the conclusion of its investigation and permit the subject to examine all tangible evidence.³³⁴ This informational exchange should occur well in advance of any hearing to give the accused a reasonable opportunity to prepare his case.³³⁵

C. Hearing

When the government deprives citizens of important interests, it must provide "some kind of hearing."³³⁶ The private interests implicated by employer-accessible child abuse registries rise to a sufficient magnitude to warrant such a review.³³⁷ However, this does not answer what type of hearing due process requires. Like many in the due process arena, the question must be decided on an ad hoc basis, by considering "the precise nature of the governmental function involved as well as the private interest that has been affected by governmental action."³³⁸ A few important characteristics merit consideration in light of the purposes behind the hearing requirement.

1. Timing

The first major aspect of the hearing issue concerns whether the

334. In other contexts, specifically national security, one commentator has suggested making special accommodations when the state's evidence is of such a sensitive nature that divulging it would jeopardize fundamental state interests. See Davis, *supra* note 94, at 278-80. No analogous state interests can be discerned in the context of child abuse.

335. See *Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1112 (D.C. Cir. 1985).

336. *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); see also *Morrissey v. Brewer*, 408 U.S. 471, 485-87 (1972); Friendly, *supra* note 148, at 1267; cf. *Goldberg v. Kelly*, 397 U.S. 254, 263-64 (1970) (requiring evidentiary hearing before termination of welfare benefits).

337. See *supra* text accompanying notes 265-69. Although the Court never explicitly has stated as much, "[g]ood sense would suggest that there must be some floor below which no hearing of any sort is required." Friendly, *supra* note 148, at 1275. While the level of this floor is difficult to fix, it most assuredly is beneath the potential loss to employment and reputation the state effects by labeling a person as a child abuser.

338. *Cafeteria & Restaurant Workers, Local 476 v. McElroy*, 367 U.S. 886, 895 (1961); cf. *Wolff*, 418 U.S. at 560 ("[O]ne cannot automatically apply procedural rules designed for free citizens in an open society . . . to the very different situation presented by a disciplinary proceeding in a state prison.").

hearing should occur before or after the deprivation. In the context of employer-accessible child abuse registries, the question is whether the state must hold a hearing prior to entering a child care worker's name on the registry. The Supreme Court has held that the Due Process Clause sometimes requires the state to afford a hearing before inflicting deprivations of protected interests.³³⁹ The Court applied this principle to the employment context in *Cleveland Board of Education v. Loudermill*³⁴⁰ and held that the Due Process Clause requires a hearing before the state may terminate civil service employees possessing protected property interests in their employment.³⁴¹ The *Loudermill* Court reasoned that employment terminations frequently involve factual disputes that only a hearing effectively can resolve.³⁴² Moreover, "[e]ven where the facts are clear, the appropriateness or necessity of the discharge may not be."³⁴³ "[I]n such cases," the Court stated, "the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect."³⁴⁴

Predeprivation hearings may enhance accuracy in other ways as well. In the context of an administrative adjudication, the immediate presence of a hearing compels investigators to proceed more cautiously and thoroughly because they realize that they will have to justify publicly their methods and conclusions before taking action.³⁴⁵ This restraint may be especially necessary in light of the proclivities of administrative staff for taking decisive action that disregards the interests of those it investigates.³⁴⁶

All of these justifications for imposing a predeprivation hearing before discharging a government employee apply to child abuse determinations as well. Investigating allegations of child abuse frequently requires resolution of factual conflicts.³⁴⁷ Even if the state verifies a

339. *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 299 (1981); *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972); *Goldberg*, 397 U.S. at 263-64.

340. 470 U.S. 532 (1985).

341. 470 U.S. at 542; *cf.* *Barry v. Barchi*, 443 U.S. 55, 66 (1979) (requiring prompt hearing subsequent to temporary license suspension).

342. 470 U.S. at 543.

343. 470 U.S. at 543; *see also* *Angrisani v. City of New York*, 639 F. Supp. 1326, 1335 (E.D.N.Y. 1986).

344. 470 U.S. at 543. The Court added that "[t]he governmental interest in immediate termination does not outweigh these interests. . . . [A]ffording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays." 470 U.S. at 544.

345. *See* *Freedman*, *supra* note 268, at 28 ("[T]he risk of arbitrary action is almost surely increased when an administrative agency is permitted to act without the moderating constraint that the prospect of a prior hearing typically imposes. . . .").

346. *See id.* at 31. For evidence of this problem in child abuse investigations, *see* WEXLER, *supra* note 271, at 96-134 (discussing investigative techniques and investigator attitudes that bias the process in favor of finding abuse); Abrahamson, *supra* note 271, at A1 (reporting grand jury findings of antiparent bias of child abuse investigators).

347. *See supra* text accompanying note 332.

report of abuse, it must choose from a range of possible responses. It can make these determinations most accurately by granting the accused an opportunity to be heard. Moreover, placement of a child care worker's name on an employer-accessible child abuse registry inflicts a particularly severe deprivation because the listing effectively forecloses employment in the child care profession.³⁴⁸ Finally, predeprivation hearings are not inherently more costly than postdeprivation proceedings. It therefore follows that the Due Process Clause requires the state to hold a hearing before placing a child care worker's name on an employer-accessible child abuse registry.

2. Type of Hearing

When the Court mandates a *hearing*, it usually means a trial-type hearing. Professor Davis has defined this proceeding as "a process by which parties present evidence, subject to cross-examination and rebuttal, and the tribunal makes a determination on the record."³⁴⁹ A trial-type hearing often encompasses a right to present evidence and call witnesses on one's behalf.³⁵⁰

The state can vindicate the opportunity to be heard in less costly ways such as written submissions or a single oral presentation by the accused.³⁵¹ However, these forms of hearing do not satisfy due process in all circumstances.³⁵² They disadvantage those without well-developed verbal or oral skills and can preclude a fair hearing if the individual's deficiencies are severe.³⁵³ In addition, these methods are not conducive to credibility assessments³⁵⁴ or ascertaining the veracity of facts that specifically pertain to the activities of the subject.³⁵⁵ In these situations, the give and take of a trial-type hearing will be more illuminating to the factfinder and more likely will lead to correction or prevention of erroneous administrative judgments.

In child abuse determinations, the benefits of a trial-type hearing in

348. See *supra* note 266 and accompanying text.

349. Davis, *supra* note 94, at 194.

350. *Id.*

351. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985) ("‘Something less’ than a full evidentiary hearing is sufficient prior to adverse administrative action."); Davis, *supra* note 94, at 194, 218-22 (referring to oral presentation as an argument-type hearing); Friendly, *supra* note 148, at 1281 (endorsing the use of written submissions).

352. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (holding use of written submissions insufficient to provide due process to terminated welfare recipients).

353. See *Goldberg*, 397 U.S. at 269; Friendly, *supra* note 148, at 1281; cf. *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974) (discussing the capacity of illiterate inmates to avail themselves of the prison disciplinary hearing process in the absence of counsel).

354. See *Goldberg*, 397 U.S. at 269.

355. In Professor Davis' terminology, a trial-type hearing is not necessary for deciding *legislative facts*, which are "issues of law or policy or discretion," but "[f]acts pertaining to the parties and their activities, that is, *adjudicative facts* . . . ought not to be determined . . . without providing the parties an opportunity for trial." Davis, *supra* note 94, at 194, 199 (emphasis added).

ensuring procedural fairness justify its costs. First, the trial-type hearing permits the parties to respond directly to each other's specific allegations and provides a basis for the factfinder to resolve the factual conflicts that child abuse accusations often involve. Second, judgments in child abuse determinations often turn on subjective assessments of credibility, which no tribunal can accomplish without personal interaction with the witnesses and the accused.³⁵⁶ Finally, forums which rely exclusively upon written or argumentative communication may place child care workers at a disadvantage relative to state investigators, who are accustomed to submitting written reports of their findings. For these reasons, the state should grant child care workers a trial-type hearing before entering their names on the child abuse registry.

3. *Standard of Proof*

An important aspect of any hearing involves the sufficiency of proof required for the party who bears the burden of proof. The Court has recognized that the standard of proof allocates the risk of error in a proceeding and that the individual absorbs greater risk with a lower standard.³⁵⁷ It has also noted that "[s]ince the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance."³⁵⁸ There is no formula for performing this calibration, but the Court's decisions in *Addington v. Texas*³⁵⁹ and *Santosky v. Kramer*³⁶⁰ suggest that the more important the individual interest, the more stringent the standard of proof the Due Process Clause requires. In *Addington*, the Court held that the Due Process Clause requires a "clear, unequivocal and convincing evidence" standard in civil commitment proceedings.³⁶¹ Similarly, the *Santosky* court required New York State to prove by clear and convincing evidence that children permanently had been neglected before terminating parental rights.³⁶²

These decisions illuminate by comparison the woeful inadequacy of the "some credible evidence" standard in child abuse proceedings. Despite the high rates of error in child abuse reporting,³⁶³ this standard often does little more than pose a redundant question because the

356. See *supra* notes 283-87 and accompanying text.

357. See *supra* notes 273-75 and accompanying text.

358. *Santosky v. Kramer*, 455 U.S. 745, 757 (1982).

359. 441 U.S. 418, 423-24 (1979).

360. 455 U.S. 745, 754-56 (1982).

361. *Addington*, 441 U.S. at 433. The Court did reject the claim that a "beyond a reasonable doubt" standard was required by the Constitution for this purpose. 441 U.S. at 432.

362. *Santosky*, 455 U.S. at 747.

363. See *supra* note 271.

initial report probably would not have been made without some credible evidence of abuse. The standard provides a safeguard only against bad faith or entirely unfounded reports of child abuse. It does not substantially safeguard against accusations that are reasonable but erroneous, because the same evidence that motivated the report will provide the basis for confirming it.³⁶⁴ In short, the "some credible evidence" standard effectively cannot screen child abuse allegations.³⁶⁵ Given that *Santosky* imposed a clear and convincing evidence standard on child neglect proceedings, the Due Process Clause demands at least proof of child abuse by a preponderance of the evidence before a state can place a child care worker on its employer-accessible child abuse registry.

D. Confrontation and Cross-Examination

The ability to confront and cross-examine adverse witnesses is often the most valuable procedural safeguard available to the accused. Justice Douglas best expressed the dangers of relying on the accounts of informers:

So far as we or the [factfinders] know, they may be psychopaths or venal people . . . who revel in being informers. They may bear old grudges. . . . Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation or memory.³⁶⁶

Providing the accused an opportunity to confront and cross-examine the informant solves the problem of bad faith or erroneous testimony most effectively.³⁶⁷ Even if the allegations do not "disappear like bubbles,"³⁶⁸ the examination of informants at least will provide the factfinder with some grounds for judging their credibility.

364. Much of this evidence will be of questionable probative value, such as minor physical injuries or a child's accusation. See *supra* notes 332-33 and accompanying text.

365. In fact, this standard permits states to place individuals on the registry as indicated child abusers even when *nobody* actually believes that child abuse has occurred, including the accuser — who legally may be obligated to report all suspicions of child abuse — the investigator, or the alleged victim. The hypothetical given in section I.B.1 presents a good example of such a situation. A standard form letter of the Massachusetts Department of Social Services also reflects this reality. The letter informs the accused child abuser that the Department has listed his case in the central registry as "substantiated" because "[a]t least one person said you were responsible for the incident and there was no available information to definitively indicate otherwise." WEXLER, *supra* note 271, at 15.

366. *Peters v. Hobby*, 349 U.S. 331, 351 (1955) (Douglas, J., concurring). For an anecdotal illustration of this problem, see Davis, *supra* note 94, at 213-14 (account of John Jones); see also Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963); *Greene v. McElroy*, 360 U.S. 474, 478-80 (1959).

367. See *Goldberg v. Kelly*, 397 U.S. 254, 269-70 (1970); *Peters*, 349 U.S. at 351 (Douglas, J., concurring) ("Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life."); Davis, *supra* note 94, at 212-13. But see Friendly, *supra* note 148, at 1284-87 (questioning the value of confrontation and cross-examination in relation to its costs).

368. *Peters*, 349 U.S. at 351 (Douglas, J., concurring).

Confrontation and cross-examination are particularly necessary in child abuse cases, which frequently depend on reports of anonymous third-party informants. The context in which such allegations sometimes arise,³⁶⁹ the frequent ambiguity of the evidence,³⁷⁰ and the prevalence of mandatory reporting statutes,³⁷¹ all make reliance on an accuser's testimony imprudent. Unfortunately, in child abuse cases the right to confront and cross-examine one's accuser may conflict with preserving informants' anonymity. If the public perceives that child abuse informants may face legal or extralegal retaliation from the accused, this perception may deter reporting substantially.³⁷² Permitting confrontation and cross-examination also poses problems when the witness is a child, especially when the child witness is the alleged victim, for intimidation alone may substantially alter these witnesses' testimony.³⁷³

In administrative hearings, confrontation and cross-examination rights are not absolute and may yield when they conflict with important state interests. In the prison context, for instance, where identification of inmate informants creates significant risks of physical harm for the accusers, courts have limited confrontation and cross-examination rights accordingly.³⁷⁴ Courts have applied this principle to employment-related hearings, as well.³⁷⁵ Most importantly, the Supreme Court has held that states may curtail defendants' rights to confront and cross-examine child witnesses in criminal child abuse prosecutions.³⁷⁶

These holdings compel the conclusion that states likewise may re-

369. See *supra* note 332.

370. See *supra* notes 332-33 and accompanying text.

371. See *supra* note 365 and accompanying text.

372. Rape shield laws and media policies against revealing the identities of rape victims serve similar purposes in the context of adult sexual assault. See, e.g., COLO. REV. STAT. § 18-3-407 (1986 & 1992 Supp.); 725 ILL. COMP. STAT. 5/115-7 (1993); MO. REV. STAT. § 491.015 (1986); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992).

373. See BILLIE W. DZIECH & CHARLES B. SCHUDSON, ON TRIAL 150, 170 (1989); Avery, *supra* note 332, at 13-14 ("Recanting . . . commonly occurs in sexual abuse cases in which child witnesses are compelled to participate in the judicial process."); Paula E. Hill & Samuel M. Hill, Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 816-17 (1987) (study finding children's testimony less complete in courtroom setting than in more intimate setting).

374. See *Wolff v. McDonnell*, 418 U.S. 539, 568-69 (1974); see also *Baxter v. Palmigiano*, 425 U.S. 308, 321-23 (1976); *Baker v. Lyles*, 904 F.2d 925, 929-30 (4th Cir. 1990); *Freeman v. Rideout*, 808 F.2d 949, 953-54 (2d Cir. 1986), cert. denied, 485 U.S. 982 (1988); cf. *Friendly*, *supra* note 148, at 1286 (arguing that in many contexts, cross-examination should be allowed only when its value outweighs the potential incremental harm to the witness).

375. See *Boston v. Webb*, 783 F.2d 1163, 1167 (4th Cir. 1986) (limiting rights of confrontation and cross-examination in termination hearing of municipal employee); *Beauchamp v. De Abadia*, 779 F.2d 773, 775-76 (1st Cir. 1985) (applying limitation to hearing on revocation of medical license).

376. *Maryland v. Craig*, 497 U.S. 836 (1990); see also *Coy v. Iowa*, 487 U.S. 1012, 1022-25 (1988) (O'Connor, J., concurring).

strict the confrontation and cross-examination rights of accused child abusers in order to protect child witnesses and anonymous accusers. When this is necessary, the state should apply alternative methods of witness examination. Possibilities include videotaping children's testimony,³⁷⁷ placing a screen between the accuser and the accused,³⁷⁸ examination through closed circuit television,³⁷⁹ and in camera examination by the factfinder.

E. *Neutral and Detached Arbiter*

The Due Process Clause does not bar administrative factfinders who are associated with the agency that made the original determination, as long as they personally did not make the decision.³⁸⁰ Nevertheless, the state should provide an arbiter from outside the administrative agency whose decision is under review. As Judge Friendly has put it, "while all judges must be unbiased, some may be, or appear to be, more unbiased than others."³⁸¹ Commentators have noted that members of an administrative agency tend to identify with the mission of the agency to the detriment of those who are regulated,³⁸² and a member of that agency may find it difficult to abandon these sentiments when passing judgment on an agency action. Aside from this, the susceptibility of outsiders to personal bias or agency coercion would be markedly lower.³⁸³ Retaining an administrative law judge for the small number of child abuse cases that involve child care employees would not place great financial burdens on the state and would be worth the cost.

F. *Written Statement of Reasons for the Decision*

Providing the accused with a written statement of reasons for the arbiter's decision promotes fairness in many ways. By restricting the

377. See COLO. REV. STAT. § 18-6-401.3 (1986); MO. REV. STAT. § 491.699 (Supp. 1992); DZIECH & SCHUDSON, *supra* note 373, at 151-53; Avery, *supra* note 332, at 40-41; David Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 1028-32 (1969); Hill & Hill, *supra* note 373.

378. See *Coy v. Iowa*, 487 U.S. 1012 (1988). While the Court in *Coy* held this method to violate the Confrontation Clause when employed in the criminal context, this does not necessarily preclude its use in an administrative hearing, where the Sixth Amendment does not apply. Moreover, the continued vitality of the ruling is questionable in light of the Court's subsequent decision in *Maryland v. Craig*, 497 U.S. 836 (1990), which gave states more latitude to respond to the difficulties caused by child witnesses.

379. See DZIECH & SCHUDSON, *supra* note 373, at 153-56; Avery, *supra* note 332, at 37-40. This solution applies to child witnesses only, because it does not conceal the witness' identity.

380. *Wolff v. McDonnell*, 418 U.S. 539, 570-71 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 486 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

381. Friendly, *supra* note 148, at 1279.

382. See, e.g., Freedman, *supra* note 268, at 31.

383. See Friendly, *supra* note 148, at 1279 ("[T]here is wisdom in recognizing that the further the tribunal is removed from the agency and thus from any suspicion of bias, the less may be the need for other procedural safeguards.").

basis of the decision to the evidence presented at the hearing,³⁸⁴ it functions as "a powerful preventive of wrong decisions"³⁸⁵ and inhibits reliance upon irrelevant or prejudicial considerations. Documenting the basis for a judgment protects the accused from the stigma created by false conjecture about the reasons for the official action³⁸⁶ and forms an essential element of any subsequent review, judicial or administrative.³⁸⁷ Written decisions create a body of precedent, and foster consistency between cases.³⁸⁸ Finally, a written statement of reasons furthers the perception of procedural fairness and may make the outcome more understandable to the parties involved.³⁸⁹ Because written statements provide the accused significant procedural protections at a marginal cost to the state, due process demands that the states require agencies to issue such statements in child abuse proceedings.

G. Counsel

The Court has been reluctant to impose a right to counsel in administrative hearings, principally out of concern that the introduction of lawyers will complicate greatly what otherwise would be a simple proceeding.³⁹⁰ Retention of counsel by the accused will undoubtedly lead the state agency to engage its own attorney. Once placed in an adversarial setting, the lawyers will "present all available evidence and arguments . . . contest with vigor all adverse evidence and views,"³⁹¹ and "caus[e] delay and sow[] confusion,"³⁹² all in the name of zealous pursuit of their clients' interests. This would produce a prolonged and vastly more expensive hearing process that would tax unnecessarily the agency and the accused alike.³⁹³ Consequently, the Court rarely has read the Due Process Clause to impose a general right to counsel in administrative proceedings.³⁹⁴

The Court has conceded that, in some instances, professional rep-

384. See *Wolff*, 418 U.S. at 565; *Morrisey*, 408 U.S. at 487; *Goldberg*, 397 U.S. at 271; *Friendly*, *supra* note 148, at 1292.

385. *Friendly*, *supra* note 148, at 1292.

386. See *Wolff*, 418 U.S. at 565 ("Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding.").

387. *Friendly*, *supra* note 148, at 1292.

388. See *id.*

389. See *id.*

390. See, e.g., *Wolff v. McDonnell*, 419 U.S. 539, 569-70 (1974); *Gagnon v. Scarpelli*, 411 U.S. 778, 787-88 (1973); see also *Friendly*, *supra* note 148, at 1287-88.

391. *Wolff*, 418 U.S. at 569 (quoting *Gagnon*, 411 U.S. at 787).

392. *Friendly*, *supra* note 148, at 1288.

393. But see *Goldberg*, 397 U.S. at 271 ("We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing.").

394. See *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 332-34 (1985); *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 31-32 (1981); *Baxter v. Palmigiano*, 425

resentation is necessary to provide procedural due process.³⁹⁵ The Court has insisted on evaluating the right to counsel on a case-by-case basis, however, based on the private interests at stake, the nature of the administrative proceeding, and the argumentative capabilities of the particular claimant.³⁹⁶ It has refused to grant a general right to counsel to even relatively disadvantaged groups, such as prison inmates³⁹⁷ and indigent parents fighting to retain custody of their children.³⁹⁸

Under these standards, the overwhelming majority of child care workers would not enjoy a right to counsel in child abuse proceedings. First, the Court has suggested that the Due Process Clause confers a right to counsel only when the government action deprives a citizen of physical liberty or the means of daily subsistence.³⁹⁹ The individual's interests in employment and livelihood implicated by employer-accessible child abuse registries are important but do not rise to this level. Second, most child care workers are capable of competently defending themselves in an administrative proceeding.⁴⁰⁰ The fact that "a lawyer might have done more" with the available evidence is insufficient to secure a right to counsel.⁴⁰¹ Hence, the Due Process Clause does not require states to permit child care workers to be represented by counsel at child abuse hearings.

CONCLUSION

Perhaps too little has been said here about the importance of protecting children from abusive adults, about the breadth of this problem in our society, and about the irreparable harms which children suffer when they are subjected to such mistreatment. This Note has not intended to demean these problems or to belittle well-intentioned government efforts to eradicate them, but rather to illuminate the structure that the Constitution mandates for resolving the inevitable

U.S. 308, 314-15 (1976); *Wolff*, 418 U.S. at 569-70; *Gagnon*, 411 U.S. at 787-88. But see *Vitek v. Jones*, 445 U.S. 480, 496-97 (1980); *Goldberg*, 397 U.S. at 270-71.

395. *Gagnon*, 411 U.S. at 788; cf. *Goldberg*, 397 U.S. at 270 ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932))).

396. See, e.g., *Walters*, 473 U.S. at 332-34; *Lassiter*, 452 U.S. at 32-33.

397. See *Baxter*, 425 U.S. at 315; *Wolff*, 418 U.S. at 569-70; *Gagnon*, 411 U.S. at 787. But see *Vitek*, 445 U.S. at 496-97 (granting prison inmates the right to counsel in proceedings to determine their mental competency).

398. See *Lassiter*, 452 U.S. at 31-32.

399. See *Walters*, 473 U.S. at 333 (distinguishing *Goldberg*); *Lassiter*, 452 U.S. at 31 (stating presumption "that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty").

400. See Eileen Ogintz, *Low Wages, Turnover Hurting Day-Care Kids*, CHI. TRIB., Oct. 22, 1992, § 3, at 1 (reporting that many child care workers have some college training).

401. See *Lassiter*, 452 U.S. at 33.

conflicts between individual liberties and collective goals and to accentuate the need to adhere to that structure.

Virtually all government efforts to restrict employment arise because of goals that society desperately wishes to achieve. These objectives range from protecting the national security,⁴⁰² to ensuring the integrity of the legal system,⁴⁰³ to controlling the availability of intoxicating substances.⁴⁰⁴ Whether observers condemn these measures as "blacklists" and "witch hunts"⁴⁰⁵ or endorse them as natural and necessary aspects of the police power depends largely upon the perceived fairness of the government's methods and the degree of respect for the rights of the accused that they express.

The due process difficulties associated with the use of child abuse registries do not stem primarily from an insensitivity to individual liberties. Instead, they represent the "growing pains" of child abuse registry statutes.⁴⁰⁶ The contents of child abuse registries were originally available only to researchers and state agencies, making strong procedural safeguards unnecessary. Recently, though, states have turned their registries into implements of employment screening for the child care industry, thereby imposing harsh sanctions on child care workers appearing therein. Legislatures have accomplished this transformation by amending existing statutes without adequate consideration of the enhanced implications for the accused that result from such a change.⁴⁰⁷ The resulting laws pursue the worthy goal of isolating potentially dangerous individuals from contact with children, but they fail to afford the degree of procedural protection that the Due Process Clause demands.

This Note seeks to rehabilitate rather than reprimand. It has been said that "[t]he essence of justice is largely procedural."⁴⁰⁸ By following this maxim, states can achieve justice both for children and for their adult caretakers. If states desire to use their child abuse registries as occupational blacklists, they must reevaluate and strengthen their administrative procedures to comply with the Due Process Clause. By enacting the procedures described herein, states can create a system of employment screening that sufficiently protects children from abuse and child care workers from unwarranted persecution.

402. See *supra* notes 90-98 and accompanying text.

403. See *supra* notes 165-76 and accompanying text.

404. See *supra* notes 140-48 and accompanying text.

405. The procedural deficiencies described herein have provoked several commentators to apply such labels to child abuse proceedings. See RICHARD A. GARDNER, *SEX ABUSE Hysteria: Salem Witch Trials Revisited* (1991); WEXLER, *supra* note 271, at 300-02; Press et al., *supra* note 332, at 75 (words of Prof. Uelmen).

406. See *supra* notes 8-10 and accompanying text.

407. See, e.g., Beaty & Woolley, *supra* note 9, at 671-82 (recounting legislative history of Pennsylvania's child abuse registry statute).

408. Davis, *supra* note 94, at 274.