

Though the calculus may vary, cases not involving detention also are determined on a case-by-case basis using a balancing standard.<sup>753</sup>

For instance, in a case involving a state proceeding to terminate the parental rights of an indigent without providing her counsel, the Court recognized the parent's interest as "an extremely important one." The Court, however, also noted the state's strong interest in protecting the welfare of children. Thus, as the interest in correct fact-finding was strong on both sides, the proceeding was relatively simple, no features were present raising a risk of criminal liability, no expert witnesses were present, and no "specially troublesome" substantive or procedural issues had been raised, the litigant did not have a right to appointed counsel.<sup>754</sup> In other due process cases involving parental rights, the Court has held that due process requires special state attention to parental rights.<sup>755</sup> Thus, it would appear likely that in other parental right cases, a right to appointed counsel could be established.

### The Procedure That Is Due Process

#### *The Interests Protected: "Life, Liberty and Property".—*

The language of the Fourteenth Amendment requires the provision of due process when an interest in one's "life, liberty or property" is threatened.<sup>756</sup> Traditionally, the Court made this determination by reference to the common understanding of these terms, as embodied in the development of the common law.<sup>757</sup> In the 1960s, how-

<sup>753</sup> 452 U.S. at 31–32. The balancing decision is to be made initially by the trial judge, subject to appellate review. *Id.* at 32.

<sup>754</sup> 452 U.S. at 27–31. The decision was a five-to-four, with Justices Stewart, White, Powell, and Rehnquist and Chief Justice Burger in the majority, and Justices Blackmun, Brennan, Marshall, and Stevens in dissent. *Id.* at 35, 59.

<sup>755</sup> *See, e.g., Little v. Streater*, 452 U.S. 1 (1981) (indigent entitled to state-funded blood testing in a paternity action the state required to be instituted); *Santosky v. Kramer*, 455 U.S. 745 (1982) (imposition of higher standard of proof in case involving state termination of parental rights).

<sup>756</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1982). "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite." *Board of Regents v. Roth*, 408 U.S. 564, 569–71 (1972). Developments under the Fifth Amendment's Due Process Clause have been interchangeable. *Cf. Arnett v. Kennedy*, 416 U.S. 134 (1974).

<sup>757</sup> For instance, at common law, one's right of life existed independently of any formal guarantee of it and could be taken away only by the state pursuant to the formal processes of law, and only for offenses deemed by a legislative body to be particularly heinous. One's liberty, generally expressed as one's freedom from bodily restraint, was a natural right to be forfeited only pursuant to law and strict formal procedures. One's ownership of lands, chattels, and other properties, to be sure, was highly dependent upon legal protections of rights commonly associated with that ownership, but it was a concept universally understood in Anglo-American countries.