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PROTECTION AGAINST GOVERNMENT ABUSE OF POWER: HAS THE COURT TAKEN THE SUBSTANCE OUT OF SUBSTANTIVE DUE PROCESS

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"The touchstone of due process is protection of the individual against arbitrary action of government."[1]

I. INTRODUCTION

Although on its face, the due process clause appears to assure only procedural protection, the United States Supreme Court has long recognized that the clause contains a substantive element as well.[2] It is through the due process clause of the fourteenth amendment that most of the Bill of Rights have been incorporated and made applicable to the states.[3] The Court accomplished this incorporation by finding that such rights as freedom of expression and religion are substantive values included within the word "liberty."[4] It is also through substantive due

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1. Dent v. West Virginia, 129 U.S. 114, 123 (1889).

2. The Supreme Court first used substantive due process to invalidate state economic measures it found to be unduly restrictive of individual liberty. Lochner v. New York, 198 U.S. 45 (1905). The source and history of substantive due process are traced *infra* notes 27-50 and accompanying text. *See also* Daniels v. Williams, 474 U.S. 327, 337 (1986) (identifying the three types of protection encompassed by the due process clause, i.e., incorporation of the specific guarantees in the Bill of Rights; the guarantee of procedural fairness; and substantive due process which is the bar against arbitrary government actions).

3. *See* Zinermon v. Burch, 110 S. Ct. 975, 983 (interim ed. 1990).

4. The first incorporation case was Gitlow v. New York, 268 U.S. 652 (1925). This case found that free expression was a substantive liberty protected by the fourteenth amendment against state intrusion. Through a gradual process of incorporation almost all of the provisions in the first eight amendments have been deemed to apply to the states through the fourteenth amendment due process clause. This process of incorporation accelerated during the Warren Court period and included both substantive (first amendment speech, press, religion clauses and fourth amendment guarantees against unreasonable searches and seizures) and procedural rights (right to counsel, privilege against self-incrimination, right to speedy, public trial by jury in criminal cases, and protection against double jeopardy). The only rights which have not been incorporated are the second amendment right to bear arms, the fifth amendment prohibition of criminal trials without a grand jury indictment and the seventh amendment right to a jury trial in civil cases. In deciding which provisions to incorporate, the Court has asked whether the right is "essential to our scheme of ordered liberty." *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Kadish, *Methodology and Criteria in Due Process*

process that non-explicit rights, found to have their source in the liberty clause of the fourteenth amendment, have been designated by the Court as "fundamental" and afforded extraordinary protection. Thus, before government can interfere with marital, procreative, or familial privacy, it must demonstrate a compelling interest and that the regulation is no more restrictive of these rights than necessary.[5] Because the choice of "super-protected" rights appears to be circumscribed only by the individual Justices' notions of "history and tradition," the fundamental rights doctrine of substantive due process has come under sharp attack.[6] Less attention has been paid to the aspect of substantive due process, which dictates that even where fundamental rights are not implicated the due process clause substantively protects against arbitrary government action.[7]

Adjudication—A Survey and Criticism, 66 YALE L.J. 319 (1957).

5. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing a fundamental right to marital privacy which triggered the beginning of modern substantive due process analysis). The right to privacy recognized in *Griswold* was extended to include the controversial right to terminate a pregnancy, Roe v. Wade, 410 U.S. 113, 153-55 (1973), as well as the right to make basic familial decisions, Moore v. City of East Cleveland, 431 U.S. 494, 501-06 (1977). In Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (interim ed. 1990), four Justices (Brennan, Marshall, Blackmun and Stevens) recognized a fundamental privacy right to be free of unwanted medical treatment. Justice O'Connor found this to be a protected liberty interest without addressing the fundamentality question. Three Justices (Rehnquist, White and Kennedy) assumed without deciding that a competent individual has a liberty interest in being free of unwanted treatment, including artificial hydration and nutrition. Justice Scalia argued that since the right to die has not been historically and traditionally protected, no substantive due process claim could be maintained.

6. *See, e.g.*, J. NOONAN, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE 70'S 189 (1979) ("The liberty established by the Abortion Cases has no foundation in the Constitution of the United States. It was established by an act of raw judicial power."); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 928-33 (1973) (asserting that *Roe* is a more glaring example of indefensible judicial value infusion than *Lochner* and that it totally lacks constitutional support); Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, WIS. L. REV. 1305, 1306 (1985) ("The Court has been unable to conclude whether privacy analysis is based on textual, consensus, traditional or autonomy interests. No expressed theory offers even an approximate explanation of the various decisions, and the Court has apparently given up the attempt.") (footnotes omitted). Many commentators have noted that the Supreme Court's recent decisions, including *Webster v. Reproductive Health Ser.*, 109 S. Ct. 3040 (1989) (suggesting that a majority of the Court may no longer support the privacy right of a woman to an abortion) and *Bowers v. Hardwick*, 478 U.S. 186 (1986) (refusing to recognize sexual preference as a fundamentally protected privacy right) signal the demise of modern substantive due process as far as its extraordinary protection of so-called fundamental rights. *See* Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1987); Rubenfield, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

7. The substantive component of the due process clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 U.S. 327, 331 (1986). Basically substantive due process forbids government from interfering with our liberty or property for reasons which are purely arbitrary or vindictive. Initially this limitation was recognized with regard to legislative enactments. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (invalidating a state statute which prohibited children from being instructed in a

Supreme Court decisions continue to acknowledge that substantive due process requires that legislative enactments as well as the actions of the executive and judicial branches of government, be held to a standard of reasonableness.[8] The notion that government cannot deal with its citizens in an arbitrary fashion appears quite straightforward and simplistic. Nonetheless, a survey of lower court decisions over the past decade suggests that the Supreme Court has failed to provide guidance as to when this concept applies.[9]

Since the due process clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law,"[10] some courts have demanded that a plaintiff initially identify a property or liberty interest before triggering the guarantee against arbitrary governmental conduct.[11] The question of whether a plaintiff has a "constitutionally" protected property or liberty interest has generated much confusion. Although a century ago the Supreme Court broadly defined the term 'liberty' to "embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways,"[12] federal courts today appear reluctant to adhere to this expan-

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foreign language: "liberty may not be interfered with, under the guise of protecting the public interest by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."). Later substantive due process was recognized as a guarantee against egregious misconduct by the executive branch. *See* Rochin v. California, 342 U.S. 165 (1952) (action of deputy sheriffs in pumping the stomach of the accused "shocks the conscience" and thus violates substantive due process); *see also* Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 406-07 (1977) (the "overriding consensus [is] that every individual 'interest' worth talking about is encompassed within the 'liberty' and 'property' secured by the due process clause and thus entitled to some constitutional protection, if only that of the 'baseline requirement of rationality' ") (quoting Ely, *supra* note 6, at 928).

8. *See* Daniels v. Williams, 474 U.S. 327, 331 (1986) (the fourteenth amendment's due process clause was intended to prevent government from abusing its power, or employing it " 'for purposes of oppression' "); *see also* Perry, *Substantive Due Process Revisited,* 71 NW. U.L. REV. 417, 419 (1976) ("[S]ubstantive due process refers to the principle that a law adversely affecting an individual's life, liberty, or property is invalid, even though offending no specific constitutional prohibition, unless the law serves a legitimate governmental objective."). Although during the post *Lochner* era the Court significantly restrained the use of due process to review state legislative enactments, it never formally abandoned the notion that government regulation must further a public interest. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 451 n.17 (1978); *see also* Burnham, *Separating Constitutional and Common Law Torts,* 73 MINN. L. REV. 515, 519 (1989) ("deprivations caused by official conduct that 'shocks the conscience' violate[s] due process"); Karst, *The Freedom of Intimate Association,* 89 YALE L.J. 624, 665 (1980) ("Even the severest critics of the current revival of substantive due process appear to recognize that it is here to stay. . . ."); Monaghan, *supra* note 7, at 433 (" 'liberty' should be interpreted to proscribe *any* governmental conduct which so invades a decent respect for a person's personal integrity that, if not fairly justified, the result would outrage public sensibility").

9. *See infra* notes 174-91 and accompanying text.

10. U.S. CONST. amend. XIV, § 1.

11. *See* cases cited *infra* note 180.

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

sive interpretation. Some courts have found that if the deprivation concerns only a property or "nonfundamental" interest, substantive due process protection should be denied.[13] Others have held that if the property or liberty interest is state created, rather than federally protected, there is no federal cause of action where the state affords its own tort remedies for the violation.[14] Much of the confusion regarding the need to identify protected "property" or "liberty" interests stems from mixed signals from the Supreme Court on this question, as well as the tendency in the lower courts to confound the treatment of procedural and substantive due process claims.

A second area of confusion involves the appropriate standard to use in assessing a substantive due process violation. The Supreme Court decisions involving challenges to state statutes have applied a highly deferential approach, allowing a statute to stand, provided it is supported by any reasonable basis.[15] In the context of government official misconduct, the Supreme Court, in an early decision, asked whether the misconduct was so egregious as to "shock the conscience" of the Court.[16] Later Supreme Court analysis in the area of medical or educational decision-making has focused on whether the government official's conduct was "a substantial departure from professional judgment."[17]

In recent years, the Supreme Court has exhibited an obvious unfriendliness toward substantive due process claims.[18] First, the Court

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13. *See* cases cited *infra* note 182.

14. *See* cases cited *infra* note 186.

15. *See, e.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) ("It is by now well established that [economic] legislat[ion] . . . come[s] to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.").

16. Rochin v. California, 342 U.S. 165, 172 (1952), discussed *infra* notes 51-54 and accompanying text.

17. Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985), discussed *infra* notes 92-99 and accompanying text; Youngberg v. Romeo, 457 U.S. 307 (1982), discussed *infra* notes 59-60 and accompanying text.

18. *See* Bowers v. Hardwick, 478 U.S. 186 (1986). The Court stated:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930s, which resulted in the repudiation of much of the substantive gloss that the Court placed on the Due Process Clause of the Fifth and Fourteenth Amendments . . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses.

Id. at 194-95; *see also* Michael H. v. Gerald D., 109 S. Ct. 2333, 2344 n.6 (interim ed. 1989) (although recognizing that the due process clause substantively protects unenumerated rights " 'rooted in the traditions and conscience of our people,' " Justice Scalia argued that the relevant traditions must be identified and evaluated at the most specific level of generality possible) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). Justice Scalia echoed these concerns in

has made clear that the standard continues to be a highly deferential one when reviewing federal, state, or local legislation.[19] Second, in the context of government official misconduct, the Court has clarified that substantive due process is unavailable where more explicit rights are implicated, such as fourth or eighth amendment rights.[20] Third, a substantive due process claim has been rejected in situations where the plaintiff cannot identify an affirmative duty on the part of government to provide protective or other services. This requirement limits government liability for its failure to act.[21] Fourth, the Court has clarified that official misconduct must be based on more than a lack of due care or negligence in order to be actionable under due process.[22] Fifth, it has confused the line of demarcation between substantive and procedural due process claims and has limited the latter claims by holding that available state remedies defeat the federal claim.[23]

While there has been much criticism leveled against the Court for these inroads into substantive due process,[24] little attention has been given to the lower federal courts which have superimposed restrictions that go beyond these five limitations. Significant confusion exists in the various circuits regarding the use of substantive due process to reach arbitrary government conduct in such areas as employment, land use, corporal punishment in schools, and police and prosecutorial miscon-

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his concurring opinion in Cruzan v. Director, Mo. Dep't. of Health, 110 S. Ct. 2841, 2859 (interim ed. 1990) (Scalia, J., concurring). He asserted that "no substantive due process claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against State interference." *Id.* at 2859-60. Later he stated that the Supreme Court "has no authority to inject itself into every field of human activity where irrationality and oppression may theoretically occur, and if it tries to do so it will destroy itself." *Id.* at 2863.

19. Williamson v. Lee Optical, 348 U.S. 483 (1955) ("rationally related to a legitimate state interest").

20. *See* Graham v. Connor, 109 S. Ct. 1865 (interim ed. 1989) (fourth amendment); Whitley v. Albers, 475 U.S. 312 (1986) (eighth amendment).

21. *See* DeShaney V. Winnebago County Dept. of Social Servs. 489 U.S. 189 (1989).

22. Daniels v. Williams 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986).

23. Parratt v. Taylor, 451 U.S. 527 (1981).

24. *See, e.g.*, Oren, *The State's Failure to Protect Children in Substantive Due Process: DeShaney in Context*, 68 N.C.L. REV. 659 (1990) (attacking the Court's use in *DeShaney* of an abstract philosophy about constitutional duty for "government services" and its adoption of a mechanical test of liability based on custody); Burnham, *supra* note 8, at 548-54 (arguing that, provided a loss is caused in the process of some exercise of government power, it should be protected by due process even if the government actor is merely negligent); Brown, *De-Federalizing Common Law Torts: Empathy for Parratt, Hudson and Daniels*, 28 B.C.L. REV. 813 (1987) (arguing that, although the Court's concern in not allowing the due process clause to become a "front of tort law" is justifiable, *Parratt* rests on a misconstrued application of state action theory and *Daniels* provides an incomplete solution to the problem); Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201 (1984) (arguing that *Parratt* fails to provide meaningful guidelines as to the boundary between constitutional and ordinary tort by characterizing the claim as procedural rather than substantive due process).

duct.[25] The lower courts' differing approaches to the treatment of substantive due process in these areas suggest the obvious need for Supreme Court clarification. Unfortunately, various members of the Court have given mixed signals as to the appropriate analysis for substantive due process claims.[26]

Part I of this article traces the origin and development of substantive due process in the Supreme Court, focusing attention on recent decisions which have narrowed the reach of this doctrine. Part II surveys the lower federal court decisions which have imposed further unwarranted limitations on substantive due process by (1) requiring identification of fundamental rights, (2) limiting the reach of substantive due process to liberty interests or severely circumscribing its application to property rights, (3) confusing substantive with procedural due process analysis, and (4) imposing unduly restrictive standards as to when the guarantee of substantive due process will be deemed violated. Part III discusses the policy concerns which have been cited to justify a narrow interpretation of substantive due process. This article further proposes standards to mitigate the policy concerns and yet leave substantive due process intact as a meaningful guarantee against misuse of state power.

II. ORIGINS AND DEVELOPMENTS OF SUBSTANTIVE DUE PROCESS IN THE SUPREME COURT

A. Using Substantive Due Process to Attack State Economic Legislation

The concept of substantive due process has strong historical roots dating back to the Magna Carta and Lockean tradition which first found its way into American jurisprudence in the 1870s. History confirms that the framers were concerned that natural rights retained by the people be protected and that government be allowed to legislate only for the good of society.[27] The Supreme Court first used substantive due process to invalidate economic legislation that it considered to be unduly restrictive of liberty. In *Allgeyer v. Louisiana*,[28] the Court invalidated a state statute which prohibited anyone from obtaining insurance on Louisiana property from a company which failed to comply with state law. The Court reasoned that the law interfered with the

25. *See infra* notes 214-43 and accompanying text.

26. *See infra* notes 80-99 and accompanying text.

27. For an indepth history of this development see Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911); Koehlinger, *Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 IND. L.J. 723, 734-36 (1990); Monaghan, *supra* note 7, at 411-14.

28. 165 U.S. 578 (1897).

liberty of the individual "to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."[29]

Allgeyer was the forerunner of the well-known *Lochner v. New York*[30] decision, which invalidated on substantive due process grounds a New York law prohibiting the employment of bakery employees for more than ten hours per day or sixty hours per week. The Court relied upon "the right to make a contract" which was protected by the liberty clause from arbitrary, irrational state legislation.[31] In determining whether the statute was a reasonable, appropriate exercise of state police power, the Court scrutinized the statute closely. Having determined that redistribution of wealth and paternalism were not valid state interests, the Court found that due process had been violated.[32] Although the Supreme Court has subsequently repudiated the close scrutiny to which the New York statute was subjected, the basic concept that substantive due process protects against arbitrary legislation remains intact,[33] and the Court's expansive definition of liberty has never been formally rejected.[34] Thus, in *Williamson v. Lee Optical*,[35]

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29. *Id.* at 589. The statute was intended "to prevent persons, corporations or firms from dealing with marine insurance companies that habr not complied with [state] law." *Id.* at 579.

30. 198 U.S. 45 (1905).

31. *Id.* at 53.

32. *Id.* at 57.

33. *See* Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 877 (1987); *see also* Moore v. City of East Cleveland, 431 U.S. 494 (1977). Justice Powell described substantive due process: "[a]s the history of the *Lochner* era demonstrates, there is reason for concern lest the limits to such judicial intervention becomes the predilections of those who happen at the time to be members of this Court. That history counsels caution and restraint. But it does not counsel abandonment." *Id.* at 502. Legal authorities have voiced numerous objections to Lochnerism, including that there is no justification for protecting liberty of contract by way of the due process clause; that the Court lacked textual warrant for the entire notion of substantive due process because the concern of the clause is limited to process; that the Court's methodology required it to exercise legislative judgment; and that the Court resorted to "natural law" which is a vague open-ended subjective source of substantive constitutional rights. Nevertheless, the "only prevailing objection to Lochnerism" has been "that liberty of contract is of insufficient constitutional significance to support the relatively stringent review standard imposed in *Lochner*." Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 987 n.23 (1979). Lupu explains that at the same time the Court developed economic due process, it "infused that clause with a noneconomic substantive content that has survived subsequent pruning." *Id.* at 988.

34. Even the *Lochner* dissenters did not deny that the fourteenth amendment protected liberty of contract; rather their concern was that the judiciary defer to the legislative judgment "unless it be, beyond question, plainly and palpably in excess of legislative power." *Lochner*, 198 U.S. at 67-68 (Harlan, J., dissenting). *See also* Monaghan, *supra* note 7, at 416-17 (noting that objections to substantive due process focused on the rejection of rational state justifications for legislation and not the expansive concept of liberty to encompass the right to engage in free enterprise). Although the Supreme Court has subsequently restricted the definition of property and

the Court described the substantive due process standard as "whether a law involving economic or property interests is rationally related to a legitimate state interest."[36] Applying this standard in *Duke Power Company. v. Carolina Environmental Study*,[37] the Court sustained the validity of the Price-Anderson Act, which imposed a limitation on the amount of recovery available as a result of injury due to nuclear accidents. The purpose of the dollar ceiling was to encourage private development of nuclear energy. However, the lower court held that the Act violated due process because the limitation was not rationally related to potential losses; it tended to encourage irresponsibility in matters of safety and environmental protection, and there was no quid pro quo for the liability limitations.[38]

In reversing the lower court holding, the Supreme Court stated that this was a classic example of economic legislation, and thus the plaintiff carried the burden "to establish that the legislature ha[d] acted in an arbitrary and irrational way."[39] The Court found the limitation reasonable in light of the small risk of a nuclear accident involving claims in excess of the statutory $560 million ceiling, and noted that Congress would likely enact extraordinary relief in the event of such an incident.[40] In reaching its holding, the Court questioned whether the due process guarantee applies at all if the plaintiff cannot identify a property or "vested" interest.[41] The Court assumed, however, that a right did exist, but that the Act provided a reasonably just substitute for the common law or state law remedy it displaced.[42] Justice Stewart, in a concurring opinion, noted that the claimed deprivation of a property right consisted of a "state created right to recover full compensation for tort injuries."[43] *Duke Power* is significant in that (1) the Court suggested the need to first identify a property or liberty interest before substantive due process may be triggered, but then (2) it apparently

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liberty for purposes of procedural due process, *see infra* notes 81 and 82 and accompanying text, it has never imposed this narrow approach on substantive due process, *see infra* notes 190-94 and accompanying text.

35. 348 U.S. 483 (1955).

36. *Id.* at 487-88.

37. 438 U.S. 59 (1978).

38. *Id.* at 82.

39. *Id.* at 83 (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).

40. *Id.* at 85.

41. *Id.* at 88-89, n.32. The Court noted that because individuals have no vested interest or property right in any rule of common law, due process may not require that a legislatively enacted compensation scheme provide "a reasonable substitute remedy." *Id.* at 88.

42. *Id.*

43. *Id.* at 94 (Stewart, J., concurring).

acknowledged that a *state-created* property interest could provide the basis for triggering the federal right.[44]

Although the *Duke Power* Court stressed the need to apply a highly deferential approach to economic legislation, especially in the context of a challenge to an act of Congress,[45] it still recognized that substantive due process imposes limits on the legislative branch of government by prohibiting the legislature from passing arbitrary, capricious statutes which unduly interfere with individual rights.[46] In the context of state or federal legislative enactments, which are usually the result of lengthy, thorough debate, the likelihood of a legislative body enacting a totally arbitrary, capricious statute may be slim. In fact, the Supreme Court has not invalidated a statute on substantive due process grounds where only economic rights are implicated since the Lochnerean period.[47] Nonetheless, *Duke Power* suggests that federal courts still have a legitimate role to play in making sure that individual interests have not been sacrificed in an arbitrary, capricious fashion.

In several recent decisions invoking the equal protection clause, the Supreme Court has recognized that state legislatures, or local governing bodies, at times do indeed enact laws which are irrational and which create impermissible classifications among citizens.[48] It is certainly possible that a legislative body may pass a law which does not discriminate against an identifiable class, but which nonetheless interferes with the right of the individual to be free from the arbitrary exercise of governmental power. This likelihood increases when the legislative body is a zoning board, town council, or other local governing agency whose decisions are not subject to the careful analysis which precedes the enactment of state or federal laws.[49] Yet, there is some

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44. Both of these "suggestions" have found their way into lower court assessments of substantive due process claims. *See* cases cited *infra* note 180.

45. 438 U.S. at 83-84.

46. *Id.* at 84.

47. G. GUNTHER, CONSTITUTIONAL LAW 472 (11th ed. 1985).

48. *See, e.g.*, Quinn v. Millsap, 109 S. Ct. 2324, 2332 (1989) (state constitutional provision limiting participation in state governmental reorganization plan to property owners is not rationally related to any legitimate interest); Allegheny Pittsburgh Coal v. County Comm., 109 S. Ct. 633, 639 (interim ed. 1989) (failure over a ten-year period to make adjustments in tax assessment resulting in more recent property owners paying up to 35 times the rate of neighboring property owners creates an irrational classification contrary to the equal protection guarantee); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 450 (1989) (denial of permit for home for mentally retarded violates equal protection because it stemmed from irrational fears and prejudices); Zobel v. Williams, 457 U.S. 55, 65 (1985) (Alaska dividend distribution plan which created distinctions between citizens based on the duration of their residence within the state did not serve any valid state interests and thus violated equal protection).

49. *See, e.g.*, Marks v. City of Chesapeake 883 F.2d 308, 313 (4th Cir. 1989) (evidence that council's deliberations were impermissibly tainted by "irrational neighborhood pressure" based on religious prejudice supports court's conclusion that council acted arbitrarily

uncertainty in the lower courts as to whether arbitrary legislative decisions affecting purely economic rights may ever be successfully challenged under substantive due process.[50]

B. *Protecting Liberty from Abuse of Power by Government Officials*

In addition to serving as a limitation on legislative enactments, the Supreme Court has recognized that substantive due process protects against government official misconduct. In *Rochin v. California*,[51] the Court invoked substantive due process defensively to exclude evidence in a criminal proceeding that was obtained by pumping the defendant's stomach.[52] Although the suit was not brought as a classic constitutional tort damage action, the Court stated that "substantive due process is violated by state conduct that 'shocks the conscience' or constitutes force that is 'brutal' and as such 'offend[s]' even hardened sensibilities."[53] This language from *Rochin* has been cited in numerous Supreme Court and lower court decisions in determining whether government official misconduct intrudes upon individual liberty so severely as to violate substantive due process.[54]

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and capriciously, contrary to substantive due process guarantee).

50. *See e.g.*, Pineman v. Fallon, 842 F.2d 598, 601-02 (2d Cir. 1988) (decision by Connecticut legislature to cut retirement fund and retirement benefits afforded a strong presumption of constitutionality); Bradley v. Austin, 841 F.2d 1288, 1295-96 (6th Cir. 1988) (plaintiff's due process claims failed, based on the erroneous premise that [recipients] enjoy a constitutionally protected right against having the amount of their benefits modified by Congress); Costello v. Town of Fairfield, 811 F.2d 782, 784 (2d Cir. 1987) (substantive due process does not apply to arbitrary state action relating to property); Weaver v. New York City Employment Retirement Sys., 717 F. Supp. 1029, 1043 (S.D.N.Y. 1989) (since receipt of pension payments is not a fundamental right, "the most deferential standard of review [is used] and [a decision] will not be overturned 'unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment' ") (quoting Mathews v. De Castro, 429 U.S. 181, 185 (1976)); *cf.* Anthony v. Franklin County, 799 F.2d 681, 684-85 (11th Cir. 1986) (county's decision to discontinue ferry service to plaintiff's property merely involves withdrawal of a benefit once conferred rather than infliction of governmental harm and thus cannot be deemed to be a violation of substantive due process). Many of these decisions reflect the right/privilege distinction long since discredited in the context of procedural due process. *But see* Smolla, *The Reemergence of the Right—Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982) (arguing that the concept was resuscitated by the Burger Court under the guise of the "entitlement" theory).

51. 342 U.S. 165 (1952).

52. *Id.* at 173.

53. *Id.* at 172-73.

54. United States v. Salerno, 481 U.S. 739, 746 (1987) (" 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience' "); Whitley v. Albers, 475 U.S. 312 (1986) (citing *Rochin* with approval); Dugan v. Brooks, 818 F.2d 513, 517 (6th Cir. 1987) (alleging defendant without cause or warning struck plaintiff from behind with a nightstick, causing severe injury); Fernandez v. Leonard, 784 F.2d 1209, 1215-16 (1st Cir. 1986) (defendant gunned down an innocent hostage by firing at him at point-blank range without reason or provocation); Rutherford v. City of Berkeley, 780 F.2d 1444, 1446 (9th Cir. 1986) (alleging defendant police officers detained plaintiff, threw him to the ground, punched, kicked and handcuffed him). Although *Rochin* involved physical abuse by police officers, the Supreme Court, as well as

Rochin involved interference with liberty in its most classic form; freedom from physical restraint. In subsequent decisions the Supreme Court has given a fairly broad interpretation to the term liberty, although continuing to recognize that, in the absence of fundamental rights, a deferential standard must be used. The Court has held that pretrial detainees have a liberty interest in being free from arbitrary punishment and that substantive due process creates a duty to provide needed medical care to such individuals.[55] It has held that those committed to state mental institutions have a "historic liberty interest" in personal security which is "protected substantively by the due process clause."[56] Further, the Court has recognized a liberty interest requiring the state "to provide minimally adequate or reasonable training to insure safety and freedom from undue restraint,"[57] while maintaining that deference be given to the judgment of qualified professionals whose decisions must be deemed presumptively valid.[58] Thus, in *Youngberg v. Romeo*,[59] the Court held that decisions made by state officials regarding the treatment of the mentally incompetent will be found to violate substantive due process only if such decisions constitute "a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[60]

Other Supreme Court decisions similarly reflect an expansive ap-

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lower courts, have recognized that the doctrine can apply to other outrageous government conduct, presenting a triable issue of substantive due process. *See* Gunderson v. Schlueter, 904 F.2d 407, 410-11 (8th Cir. 1990) (law enforcement authorities inducing defendants into violating the law); Wood v. Ostrander, 879 F.2d 583, 589 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 341 (1990) (officials show callous disregard for plaintiff's physical security in seizing her vehicle and leaving her in high crime area where she is raped); Nishiyama v. Dixon County, 814 F.2d 277, 282-83 (6th Cir. 1987) (sheriff and his deputy permitted inmate to have unsupervised use of official patrol car, whereby latter was able to stop plaintiffs' daughter and beat her to death).

The *Rochin* Court also stated that the due process clause protects personal immunities "so rooted in traditions and conscience of our people as to be ranked as fundamental." *Rochin*, 342 U.S. at 169. Subsequent Supreme Court decisions and lower court decisions have not focused on this language which could be interpreted to limit the substantive due process guarantee to claims that involve interference with fundamental rights. As to the latter, the Supreme Court has applied strict scrutiny requiring any interference with the so-called fundamental right to meet compelling interest/no less drastic means analysis. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965). The thesis of this article is that even in the absence of fundamental rights, substantive due process mandates that government misconduct be required to meet the much less onerous rationality standard.

55. City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244 (1983); Bell v. Wolfish, 441 U.S. 520, 535 (1979).

56. Youngberg v. Romeo, 457 U.S. 307, 315 (1982).

57. *Id.* at 318-19.

58. *Id.* at 323.

59. 457 U.S. 307 (1982).

60. *Id.* at 323.

proach to the meaning of the term "liberty" in the due process clause. In *Kelley v. Johnson*,[61] the Court, although holding that substantive due process is not violated by a prohibition regarding the dress code of police officers, assumed without deciding that "the citizenry at large has some sort of liberty interest in matters of personal appearance."[62] In *Board of Regents v. Roth*,[63] the Court defined federally protected liberty to denote:

> not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men.[64]

More recently in *Bowers v. Hardwick*,[65] the Court, in refusing to recognize a privacy right to engage in homosexual conduct, noted that it has repudiated "much of the substantive gloss that the Court had placed on the due process clause," and that there should be "great resistance to expand the substantive reach" of due process where fundamental rights are alleged.[66] It proceeded, however, to analyze the law under the rational basis test.[67] The Court found that the state's interest in protecting its own moral choices sufficiently justified the state's sodomy laws,[68] but again the Court recognized that, even in the absence of a fundamental right, due process imposes a minimum requirement that laws be supported by a rational justification.

Similarly in *Washington v. Harper*,[69] the Court recognized a liberty interest in avoiding the unwanted administration of antipsychotic drugs, but held that, in the prison context, the strict scrutiny used to protect fundamental rights was inappropriate. Instead, it held that the decision to administer such drugs only had to be reasonably related to

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61. 425 U.S. 238 (1976).

62. *Id.* at 247-48; *see also* Rathert v. Village of Peotone, 903 F.2d 510, 514 (7th Cir. 1990) (although rule prohibiting police officers from wearing earstuds while off-duty implicates a constitutionally protected liberty interest, it bears a rational relationship to a legitimate public interest and does not violate substantive due process).

63. 408 U.S. 564 (1972).

64. *Id.* at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

65. 478 U.S. 186 (1986).

66. *Id.* at 195.

67. *Id.* at 196; *cf.* Moore v. City of East Cleveland, 431 U.S. 494, 541-551 (1977) (White, J., dissenting). Justice White objected to the plurality's use of a "careful examination approach to invalidate a city zoning ordinance" because the plaintiff's interest in living with her children and grandchildren was not "implicit in the concept of ordered liberty." Yet, he proceeded to apply traditional substantive due process analysis, and found that a rational government interest, namely the objective of maintaining family-oriented neighborhoods, justified the action. *Id.* at 549.

68. 478 U.S. at 196.

69. 110 S. Ct. 1028, 1038 (interim ed. 1990).

legitimate penalogical interests.[70] Although the Court sustained the government action in all these cases, it did so only after subjecting the challenged conduct to the "reasonableness" standard imposed by "traditional" substantive due process.[71] If the finding of a "fundamental" liberty interest were a precondition for applying substantive due process protection, this "reasonableness" inquiry would have been unnecessary.

C. *Protecting Property from Abuse of Power*

During the Lochner era, the Supreme Court defined liberty quite broadly to encompass such interests as the right to gainful employment, the right to contract freely, and, perhaps even more broadly, as the right to be free from arbitrary government decisions.[72] The cases did not draw any distinctions between substantive due process claims implicating property as opposed to liberty restrictions. Thus, in *Village of Euclid v. Ambler Realty Co.*,[73] the Court in 1926 held that plaintiffs could establish a substantive due process violation if the government action affecting real property was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[74] Subsequently, in *Nectow v. Cambridge*,[75] the Court found that a zoning ordinance did not bear a substantial relation to public health, safety and morals and that it could not find a necessary basis for the serious invasion of property rights.[76] Thus, the government conduct was found to violate the fourteenth amendment.[77] This standard came to provide the governing principle regarding challenges to zoning and building permit cases, which the lower courts continue to

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70. *Id.* at 1036-37; *see also* White v. Napoleon, 897 F.2d 103, 111-13 (3d Cir. 1990) (prisoners retain a qualified right to be free from unjustified intrusions into the body, the related right to refuse unwanted medical treatment, and the right to sufficient information to intelligently exercise those rights; however, the judgment of prison authorities will be presumed valid unless it is shown to be a substantial departure from accepted professional judgment).

71. The modern role played by substantive due process has been described as a requirement that "government must treat individuals with some minimal level of concern and respect for their well-being." Wells & Eaton, *supra* note 24, at 230 (arguing that abusive governmental conduct violates this "government duty" justifying sanctions under a substantive due process/constitutional tort theory).

72. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (liberty includes "the right of the individual . . . to enjoy those priveleges long recognized at common law as essential to the orderly pursuit of happiness by free men"); *see generally* Monaghan, *supra* note 7, at 411-16.

73. 272 U.S. 365 (1926).

74. *Id.* at 395.

75. 277 U.S. 183 (1927).

76. *Id.* at 188-89 ("governmental power to interfere by zoning regulations with the general rights of the land owner . . . is not unlimited and [where police power justification] is wanting, the action of the zoning authorities . . . cannot be sustained").

77. *Id.* at 189.

apply today.[78] Nonetheless, some courts have adopted an unduly deferential approach, questioning whether substantive due process claims should be actionable at all where only property is implicated or where state remedies already exist to vindicate such rights.[79]

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78. *See, e.g.*, Del Monte Dunes v. City of Monterey, 920 F.2d 1496, 1508 (9th Cir. 1990) (allegation that city council members in response to political pressure from neighbors abruptly rejected previously approved project after plaintiff concededly complied with 15 conditions stated a viable substantive due process claim which survived summary judgment); Marks v. City of Chesapeake, 883 F.2d 308, 312 (4th Cir. 1989) (if city council denied plaintiff's permit application solely in an effort to placate members of the public who expressed "religious" objections to proposed use of property, it acted arbitrarily and capriciously in violation of the due process clause); Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1408-09 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1317 (interim ed. 1990) (government officials set on destroying plaintiff's property for no legitimate reason states a claim for violation of substantive due process); Greene v. Town of Bloomingrove, 879 F.2d 1061, 1064 (2d Cir. 1989) (arbitrary deprivations through zoning are actionable under substantive due process, but challenged reclassification was rationally related to legitimate state interest); Jackson Court Condos v. City of New Orleans, 874 F.2d 1070, 1078 (5th Cir. 1989) (city council's moratorium on time-share arrangements was rationally related to city's interest in avoiding neighborhood noise, litter and vandalism and does not violate substantive due process); Brady v. Town of Colchester, 863 F.2d 205, 215 (2d Cir. 1988) (substantive due process assures property owner's right to be free from arbitrary or irrational zoning actions); Bateson v. Geisse, 857 F.2d 1300, 1303 (9th Cir. 1988) (city's denial of building permit to individual who met all requirements was such an arbitrary discriminatory administration of local regulations as to constitute a violation of substantive due process); Bello v. Walker, 840 F.2d 1124, 1129 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988) (municipality that improperly interferes with permit process by acting for partisan political or personal reasons unrelated to the merits of the permit application, violates substantive due process as a "deliberate and arbitrary abuse of government power"); Neiderhiser v. Burough of Berwick, 840 F.2d 213, 217 (3d Cir.), *cert. denied*, 109 S. Ct. 67 (interim ed. 1988) (allegation that city's denial of special exemption from zoning plan was arbitrary and irrational states a viable substantive due process claim); Burrell v. Kankakee, 815 F.2d 1127, 1129 (7th Cir. 1987) (substantive due process protects against arbitrary refusals to zone, although plaintiffs must establish that proposal is unreasonable, bearing no substantial relationship to public health, safety or welfare); Littlefield v. City of Afton, 785 F.2d 596, 603-06 (8th Cir. 1986) (listing cases from numerous circuits which have recognized that an arbitrary, capricious or illegal denial of a building permit states a substantive due process claim); Scott v. Greenville County, 716 F.2d 1409, 1419-21 (4th Cir. 1983) (moratorium on building permits which affected only one piece of property states a substantive due process claim); Wheeler v. City of Pleasant Grove, 664 F.2d 99, 100 (5th Cir. 1981), *cert. denied* 456 U.S. 973 (1982) (city which passed an ordinance forbidding construction of new apartments following a community uproar and referendum showing resistance to proposed housing projects acted in an arbitrary, capricious fashion); Creekside Assoc. v. City of Wood Dale, 684 F. Supp. 201, 205 (N.D. Ill. 1988) (plaintiffs stated a cognizable claim since a trier of fact could conclude that the city's failure to annex and zone a parcel for development was arbitrary, capricious and for reasons other than the promotion of a legitimate public policy); *see also* Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D.L. REV. 161, 182-88 (1989) (discussing the use of procedural due process to challenge biased zoning decisions); Note, *Growth Control and the Constitution*, 88 MICH. L. REV. 1245 (1990) (due process clause continues to be used to challenge land use regulation).

79. *See* Estate of Himelstein v. City of Fort Wayne, 898 F.2d 573, 577 (7th Cir. 1990) (actions of the zoning board in requiring the plaintiffs to appear before it in a hotly contested zoning dispute was neither irrational nor arbitrary so as to give rise to a substantive due process claim; government decisions motivated by local interests do not violate substantive due process and federal courts should be reluctant to assume the role of a zoning board of appeals); Harding v.

Outside the context of real property, Supreme Court as well as lower court decisions reflect even greater uncertainty as to when and if substantive due process protection applies.[80] The area which has generated the most confusion is employment. Using a Lochnerean approach, it can be argued that the liberty interest in gainful employment should provide the source for triggering substantive due process.[81] However,

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County of Door, 870 F.2d 430, 431-32 (7th Cir. 1989) (even though county revoked building permit after construction of housing project had commenced and Wisconsin Court of Appeals determined the action to be illegal, the court still reasoned that the zoning decision was not sufficiently invidious or irrational so as to deny substantive due process); Shelton v. City of College Station, 780 F.2d 475, 479-83 (5th Cir.), *cert. denied*, 477 U.S. 905 (1986) (since zoning decisions are legislative determinations which should be given the same deference as statutes enacted by state legislatures, federal judicial interference under substantive due process is proper only if the governmental body could have had no legitimate reason for its decision; zoning board's denial of parking variance that is allegedly arbitrary and capricious, but is at least rationally related to city's parking problem does not deny substantive due process); Roy v. City of Augusta, 712 F.2d 1517, 1524 (1st Cir. 1983) (only on rare occasions can the denial of a land use permit provide the basis for a substantive due process claim, i.e., only where the refusal to license is totally without reasonable sanction and reflects deliberate disregard for the state's fundamental process); Smithfield Concerned Citizens v. Town of Smithfield, 719 F. Supp. 75, 82-83 (D.R.I. 1989) (substantive due process does not require a legislative body to perform any particular studies or prepare any particular analyses to justify its decisions; with respect to land use and other forms of social and economic regulation, it requires only that a legitimate state purpose be discernible and that the means chosen to accomplish that purpose be arguably rational).

The Seventh Circuit has imposed a fairly impenetrable barrier to bringing substantive due process challenges to zoning decisions by finding that such claims are not actionable if state remedies are adequate. *See* Polenz v. Parratt, 883 F.2d 551, 558-59 (7th Cir. 1989); Albery v. Redding, 718 F.2d 245, 251 (7th Cir. 1983). *But see* Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1407-08 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1317 (1990) (existence of state remedies does not affect plaintiffs' claim that defendant's conduct by breaching a dam adversely affected their property and violated their right to substantive due process); Vinson v. Campbell County Fiscal Court, 820 F.2d 194, 198 (6th Cir. 1987) ("when a violation of substantive due process is claimed, the existence of state post-deprivation remedies has no bearing on whether a cause of action exists"); Littlefield v. City of Afton, 785 F.2d 596, 607 (8th Cir. 1986) (placing arbitrary conditions on granting a building permit may violate substantive due process and is unaffected by the existence of state remedies since *Parratt* applies only to procedural due process claims).

80. *See, e.g.*, Irvine v. California, 347 U.S. 128, 133 (1954) (apparently limiting *Rochin* to cases involving "coercion, violence or brutality to the person"); Braley v. City of Pontiac, 906 F.2d 220, 226 (6th Cir. 1990) (Supreme Court has never ruled whether a malicious prosecution claim may be maintained under substantive due process where there is neither excessive force nor physical brutality, yet the "shock the conscience" standard becomes fuzzy and there is a dearth of previous decisions on which to base the standard); Torres v. Superintendent of Police, 893 F.2d 404, 410 (1st Cir. 1990) (where plaintiff has not been physically abused, detained or prosecuted contrary to the equal protection clause, courts are reluctant to find "conscience-shocking" conduct that would implicate a constitutional violation); Weimer v. Amen, 870 F.2d 1400, 1405-06 (8th Cir. 1989) (plaintiffs extending substantive due process doctrine into new areas carry a heavy burden; claim that state officials conspired to induce depositors to place money in an insolvent bank alleges illegal acts under state law which are not the type of abusive governmental action prohibited by due process, and fails to state an actionable claim).

81. *See* Monaghan, *supra* note 7, at 434-35 (freedom of contract as well as more generally the right to acquire, own and use property were treated by the Supreme Court as aspects of

Supreme Court decisions involving procedural due process have characterized employment as a "property" interest and have questioned the extent to which such an interest should be protected by the federal constitution.[82] This in turn has generated much confusion in the lower federal courts as to whether violation of a property right, especially if related to employment, is actionable under substantive due process. In refusing to recognize a substantive due process claim in the context of employment, several courts have relied upon statements in *Bishop v. Wood*[83] wherein the Supreme Court rejected a police officer's claim that a constitutional liberty interest was violated when he was discharged for allegedly false reasons. Although the case raised only a procedural due process claim, the Court made the following broad statement:

> In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The due process clause of the Fourteenth Amendment is not a guarantee against incorrect or ill advised personnel decisions.[84]

While *Wood* has been relied on by some courts to reject all due process challenges to arbitrary employment decisions, whether substantive or procedural,[85] other courts have turned to language in *Harrah*

"liberty" secured by due process at the turn of the century); *cf.* Harrah Indep. School Dist. v. Martin, 440 U.S. 194, 197-98 (1978), discussed *infra* notes 86-90 and accompanying text, (suggesting job tenure is a protected liberty interest once it is conferred by contract); Sullivan v. Brown, 544 F.2d 279, 283 (6th Cir. 1976) (recognizing a liberty interest in continuing employment opportunity).

82. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972). "It stretches the concept too far to suggest that [one] is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." *Id.* at 575. As to property, the Court held that one "must have more than a unilateral expectation"; rather a "legitimate claim of entitlement" must be proved. *Id.*

83. 426 U.S. 341 (1976).

84. *Id.* at 350, *see also* Connick v. Myers, 461 U.S. 138, 146-47 (1983) ("ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable").

85. *See* Lee v. Hutson, 810 F.2d 1030, 1032 (11th Cir. 1987) (alleged arbitrary conduct at employment hearing resulting in dismissal fails to constitute a viable substantive due process claim since there is no "liberty interest" implicated and *Bishop* held that a constitutional right to liberty is not violated even where the discharge is for allegedly false reasons); Brown v. Brienen, 722 F.2d 360, 366-67 (7th Cir. 1983) (substantive due process does not provide protection for state- created property interest in employment); Buhr v. Buffalo Pub. School Dist., 500 F.2d 1196, 1202 (8th Cir. 1974) (plaintiff must have at least a property or liberty interest sufficient to trigger procedural due process before substantive due process will apply); Guntharp v. Cobb County, 723 F. Supp. 771, 776 (N.D. Ga. 1989) (allowing substantive due process to be used in employment discharge cases would substantially trivialize substantive due process whose "protections have

Independent School District v. Martin[86] to support a substantive due process limitation on the treatment of government employees.[87] The *Harrah* Court stated that an interest in employment does not approach the substantive due process rights recognized in previous cases, namely those rights which have been labeled "fundamental" such as freedom of choice in the areas of family, marriage and procreation.[88] Nonetheless, it went on to analyze the lower court's finding that the school board's action was arbitrary.[89] The Court's treatment of the employment denial question under the traditional arbitrary and capricious standard has led some lower courts to recognize a substantive due process right in the context of public employment, although acknowledging that employees have a heavy burden of proving that an employment decision was totally arbitrary and capricious.[90]

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heretofore been triggered only by government conduct so egregious as to 'shock the conscience' or to 'offend even hardened sensibilities' ") (quoting *Rochin*, 342 U.S. at 172); Pedersen v. Ramsey County, 697 F. Supp. 1071, 1080 (D. Minn. 1988) (since the right to public employment does not reside in the Constitution but is rather a creature of state law, even an arbitrary deprivation of this property right should not be found to violate the due process clause); *see also* Lum v. Jensen, 876 F.2d 1385, 1389 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 867 (interim ed. 1990) (conflicts in the circuits regarding a clearly established substantive due process right to be free of arbitrary, capricious or pretextual discharges from employment require granting immunity to government officials charged with such violations).

86. 440 U.S. 194 (1978).

87. *See, e.g.*, Moore v. Warwick Pub. School Dist., 794 F.2d 322, 329 (8th Cir. 1986) (*Harrah* provides that substantive due process creates right to be free from arbitrary, capricious state action in public school employment; however, employee has burden to show there is no rational connection between agency's action and the interest purportedly advanced by that action).

88. 440 U.S. at 198.

89. *Id.* at 199. Other Supreme Court decisions have indicated that even if a private employee does not have a legally enforceable agreement with his employer, the government is prohibited by the due process clause from arbitrarily interfering with a continuing employment relationship. *See, e.g.*, Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 237 (1988); Greene v. McElroy, 360 U.S. 474, 492 (1959); Truax v. Raich, 239 U.S. 33, 38 (1915). These cases establish that the substantive due process guarantee is triggered regardless of whether a "vested" property interest, as required for procedural due process, is implicated. *See also* Chernin v. Lyng, 874 F.2d 501, 504-06 (8th Cir. 1989) (lower court confused the *Roth* analysis of procedural due process with the substantive due process guarantee against arbitrary government interference with employment relationships; the latter is protected even where the private employment relationship is "at will").

90. Morris v. Clifford, 903 F.2d 574, 577 (8th Cir. 1990) (plaintiff had a clearly established substantive due process right as a tenured faculty member to be discharged only for adequate cause); Newman v. Massachusetts, 884 F.2d 19, 25 (1st Cir. 1989) (allegations that school authorities made an arbitrary, capricious decision which significantly affected a tenured teacher's employment status does state a viable substantive due process claim); Lebbos v. Judges of Superior Court, 883 F.2d 810, 818 (9th Cir. 1989) (allegations that court appointed receiver and creditors' attorneys deprived debtor of ability to practice law states a claim for violation of substantive due process); Silverstein v. Gwinnett Hosp. Auth., 861 F.2d 1560, 1566 (11th Cir. 1988) (seeking staff privileges at a public hospital is a protected liberty interest since liberty has been interpreted to protect an individual's right to engage in a common occupation of life); Gutzwiller v. Fenik, 860 F.2d 317, 328-29 (9th Cir. 1988) (sex discrimination in denial of tenure is a substantive

The confusion regarding substantive due process protection of "property" has been further fueled by the Supreme Court's hesitancy to recognize protected interests in *Board of Curators v. Horowitz*[91] and *Regents of the University of Michigan v. Ewing*.[92] In *Ewing*, the Court assumed *without deciding* that the plaintiff possessed a constitutionally protected property interest in his continued enrollment in a medical school program and that this property interest was protected by the substantive component of the due process clause.[93] Earlier, in *Horowitz*, the Court similarly avoided defining the scope of protected property for purposes of substantive due process.[94] Instead, it merely "assumed without deciding" that federal courts can review academic decisions under a substantive due process standard.[95] After making the assumption that there is a "constitutionally protectable property interest in the plaintiff's continued enrollment free from arbitrary state action," the Court held in both cases that the dismissals were not the product of such action.[96] The University's decision in *Ewing* was made "conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career," and therefore did not constitute such a "substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actu-

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due process violation); Honore v. Douglas, 833 F.2d 565, 569 (5th Cir. 1987) (although the Court's admonishment in *Bishop* counsels judicial restraint in employment cases, it does not require "slavish deference to a university's arbitrary deprivation of a vested property right"); Schaper v. City of Huntsville, 813 F.2d 709, 716-17 (5th Cir. 1987) (police captain terminated from his position had substantive due process property right to continued employment); Moore v. Warwick Pub. School Dist., 794 F.2d 322, 329 (8th Cir. 1986) (substantive due process creates a right to be free from arbitrary, capricious state action in the context of public school employment); Barnett v. Atlanta Hous. Auth., 707 F.2d 1571, 1577-78 (11th Cir. 1983) (deprivation of a property interest for an improper motive and by pretextual means constitutes a substantive due process violation); Gargiul v. Tompkins, 704 F.2d 661, 668 (2d Cir. 1983) (substantive due process requires that actions impairing a tenured teacher's property interest in continued employment must have a rational relation to a proper governmental purpose), *vacated on other grounds*, 465 U.S. 1016 (1984); Hearn v. City of Gainesville, 688 F.2d 1328, 1332 (11th Cir. 1982) (substantive due process proscribes deprivation of a property interest for an improper motive and by means that are pretextual, arbitrary and capricious; termination due to false information provided by the state implicates substantive due process since it suggests "malicious corruption" of government process).

Other circuits have similarly found that public employees who have a property interest in continued employment can establish a substantive due process violation if they prove their terminations were the result of arbitrary and capricious action. *See e.g.*, Thompson v. Bass, 616 F.2d 1259, 1267 (5th Cir.), *cert. denied*, 449 U.S. 983 (1980); Brenna v. Southern Colorado State College, 589 F.2d 475, 476-77 (10th Cir. 1978).

91. 435 U.S. 78 (1978).
92. 474 U.S. 214 (1985).
93. *Id.* at 222-23.
94. 435 U.S. at 82.
95. *Id.* at 91-92.
96. *Ewing*, 474 U.S. at 225; *Regents*, 435 U.S. at 84-85.

ally exercise professional judgment."[97] In reaching its conclusion, the Court stressed that it must be especially wary in using substantive due process to invalidate government decisionmaking since the substantive content of the due process clause is not suggested by the language or pre-constitutional history.[98] Further, it noted that federal courts should be reluctant to tread on the prerogatives of state and local educational institutions in the area of academic freedom.[99]

In a concurring opinion, Justice Powell expressed these concerns more poignantly. He argued that even if property rights derived from state law were found for purposes of procedural due process, "substantive due process rights are created only by the Constitution."[100] Justice Powell found that Ewing's interest in continued enrollment in school was essentially a state law contract right that bore little resemblance to the fundamental rights that have been deemed protected by the Constitution.[101] He stated that the mere fact that the state of Michigan may have labeled this interest "property" did not entitle it to federal substantive due process protection.[102] This concurrence has oftentimes been cited by those courts that have refused to recognize substantive due process challenges to government conduct which does not implicate "constitutionally" protected rights.[103] Justice Powell's analysis, how-

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97. 474 U.S. at 225. The Court stated that so long as the dismissal was supported by a reason "not beyond the pale of reasoned academic decisionmaking" no substantive due process violation would be found. *Id.* at 227-28; *see also* Huang v. Board of Governors of Univ. of N.C., 902 F.2d 1134, 1142 (4th Cir. 1990) (even assuming a substantive due process right to continued employment free from arbitrary state action, University's decision to transfer plaintiff could not be deemed to be "beyond the pale of reasoned academic decisionmaking") (quoting *Ewing*, 474 U.S. at 227-28).

98. 474 U.S. at 225. The Court cited to Justice White's statement that "the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable." *Id.* at 226 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 543-44 (1977) (White, J., dissenting)).

99. 435 U.S. at 91.

100. 474 U.S. at 229 (Powell, J., concurring).

101. *Id.*

102. *Id.* at 230 ("While property interests are protected by procedural due process even though the interest is derived from state law . . . substantive due process rights are created only by the Constitution").

103. Nollan v. Douglas County, 903 F.2d 1546, 1553-54 (11th Cir. 1990) (although a substantive due process violation occurs where an employer deprives an employee of his job for an improper motive by pretextual, arbitrary and capricious means, plaintiff must initially prove that he possessed a property interest in his continued employment); Weimer v. Amen, 870 F.2d 1400, 1406 (8th Cir. 1989) (defendant's conduct does not violate substantive due process simply because it is contrary to state law; complaint alleging nothing more than a violation of state law should be dismissed); Gutzwiller v. Fenik, 860 F.2d 1317, 1328 (6th Cir. 1988) (a federally recognized interest in liberty or property must be impaired for substantive due process to be violated); Neuwirth v. Louisiana State Bd. of Dentistry, 845 F.2d 553, 558 (5th Cir. 1988) (plaintiff had no constitutionally protected interest in practicing dentistry in Louisiana without taking an examination and such constitutionally protected interest is a prerequisite to asserting a substantive due

ever, appears to confuse the doctrine that substantive due process provides "heightened" protection to so-called fundamental rights with the generic concept that substantive due process protects against arbitrary, capricious government decisionmaking.[104] As to the former, it is clear that the Court has applied an exceedingly stringent test before identifying a nontextual, unenumerated right as "fundamental."[105] The consequences of such a finding are grave, since the government carries the burden of proving a compelling interest for its regulation which is no more restrictive than necessary.[106] In sharp contrast, traditional substantive due process requires the challenger prove the total arbitrariness of government conduct, and thus the Court's decisions more broadly defining "liberty" should control.[107]

D. Recent Supreme Court Decisions Limiting the Reach of Substantive Due Process

As previously explained, the Supreme Court has significantly limited the efficacy of the substantive due process guarantee in the area of economic legislation through its application of a highly deferential standard, allowing courts to invalidate only those state laws which are wholly arbitrary and capricious. In addition, some Justices have cast doubt on whether substantive due process may be used to protect "property" or "liberty" where the interest cannot be characterized as "federally" protected. At the same time, the Supreme Court has made other significant inroads into the reach of substantive due process. This section describes the leading Supreme Court decisions which have circumscribed substantive due process, as well as the expansion and misapplication of these decisions by the lower courts.

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104. When Justice Powell cautioned the Court to examine the asserted "liberty" interest to see if it "merits the protection of substantive due process," he cited Roe v. Wade, 410 U.S. 113 (1973) and Griswold v. Connecticut, 381 U.S. 479 (1965), which involved the fundamental right to privacy, i.e., "heightened" protection cases. *Ewing*, 474 U.S. at 229 (Powell, J., concurring). Other courts have similarly applied fundamental rights analysis (i.e., whether the interest is so rooted in the traditions and conscience of our people as to be ranked as fundamental) in determining that substantive due process does not apply where "only" state-created contract or property rights are implicated. *See also* Ramsey v. Board of Education of Whitley County, 894 F.2d 1268, 1274-75 (6th Cir. 1988) (ready availability of routine state law remedies is a useful factor in determining whether a given interest should be recognized as "constitutionally fundamental"); *see also* cases cited *infra* notes 181-82.

105. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986).

106. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

107. *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578 (1987); Lochner v. New York, 198 U.S. 45 (1905); *see also* Rosenberg, *A Study in Irrationality: Refusal to Grant Substantive Due Process Against Excessive Corporal Punishment in Public Schools*, 27 HOUS. L. REV. 399, 435 (1990) (noting the differences between substantive due process "which protects persons from a broad range of conduct by government" and procedural due process which "tends to be narrower").

In *Parratt v. Taylor*,[108] prison authorities were charged with failing to deliver a package of hobby materials which the inmate ordered through the mail. The Supreme Court held that a negligent, random and unauthorized deprivation of a prison inmate's property did not give rise to a due process claim where state law provided an adequate post-deprivation remedy.[109] Although the opinion treated the challenge as a procedural due process question, it is arguable that the Court in effect redefined a substantive due process claim as a procedural due process claim.[110] In understanding the distinction between substantive and procedural due process, it must be asked whether the prisoner in *Parratt* was really claiming that he had a right to a hearing before his property was negligently lost or whether he was instead challenging the arbitrariness of the government misconduct. Framed in this manner, the absurdity of the procedural challenge is clear. On the other hand, the situation presented in *Parratt*, where hobby materials valued at twenty-three dollars were negligently misplaced, certainly does not appear to rise to the level of "shocking the conscience" or even arbitrary, capricious government misconduct necessary to successfully invoke substantive due process. Although the Court's characterization of Taylor's claim as "procedural" was thus inconsequential, lower courts have seized upon the decision and have borrowed its inquiry into adequate state remedies to preclude what previously were viable substantive due process claims.[111] Since the procedural due process claim allegedly

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108. 451 U.S. 527 (1981).

109. *Id.* at 543.

110. *See* Burnham, *supra* note 8, at 521 n.30 (*Parratt* and *Hudson* "transformed many of what previously would have been substantive due process cases into procedural ones," leaving only deprivations "so outrageous that no amount of process would cure them" to be treated as substantive due process claims); Wells & Eaton, *supra* note 24, at 214-15 (*Parratt's* ambiguity results from the Court's failure to clearly address the question of what limitations substantive due process places on governmental power to injure life, liberty or property).

111. *See* New Burnham Prairie Homes v. Village of Burnham, 910 F.2d 1474, 1481 (7th Cir. 1990); Polenz v. Parratt, 883 F.2d 551, 558-59 (7th Cir. 1989) (where a substantive due process claim is based merely on a state-created property right, "plaintiff must also show a separate constitutional violation or the inadequacy of state law remedies"); Albery v. Redding, 718 F.2d 245, 251 (7th Cir. 1983) (maladministration of zoning laws does not violate substantive due process if state remedies are adequate); Pedersen v. Ramsey County, 697 F. Supp. 1071, 1081 (D. Minn. 1988) (prompt post-termination hearing meets the requirements of due process in cases alleging arbitrary termination and, since the county provided process to redress the deprivation, plaintiff's claim fails even if she proves the arbitrariness of the termination decision).

Other courts have reasoned that the limitations of *Parratt* may not be evaded by pleading violation of substantive as opposed to procedural due process. Weimer v. Amen, 870 F.2d 1400, 1406 (8th Cir. 1989) (state action cannot be arbitrary or capricious if neither authorized nor preventable by the state; thus *Parratt* cannot be avoided by characterizing a claim as substantive rather than procedural because such would impose a duty to protect against state officials who wander outside of their authority, acting for themselves and not the state); Schaper v. City of Huntsville, 813 F.2d 709, 717 (5th Cir. 1987) (permitting substantive due process claim for depri-

raised in *Parratt* presents a timing question, whether pre or post-deprivation process is necessary, the impossibility of providing pre-deprivation process and the existence of an adequate state post-deprivation remedy are arguably relevant to the procedural due process claim.[112] The focus under substantive due process, however, is not on state culpability for failing to provide enough process; rather, it is an abuse of power and whether that abuse is complete at the time of the act and is unaffected by the existence of state remedies.

The Supreme Court, in *Zinermon v. Burch*,[113] recently distinguished three categories of due process claims: (1) claims arising out of the clause's incorporation of specific protections defined in the Bill of Rights; (2) claims alleging violation of the substantive component that "bars certain arbitrary wrongful government actions 'regardless of the fairness of the procedures used to implement them;' " and (3) procedural due process claims.[114] As to the first two types of claims, the Supreme Court noted that the constitutional violation was complete when the wrongful act occurred and thus the existence of state tort remedies was irrelevant.[115] It is only with regard to the third type of

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vation of a property right where adequate state law remedies in existence would effectively eviscerate the holding of *Parratt*); Guntharp v. Cobb County, 723 F. Supp. 771, 778 (N.D. Ga. 1989) (claim that deprivation of state-created property rights violates substantive due process is an attempt to undermine *Parratt* and without more does not give rise to substantive due process claim, but rather is subject to *Parratt*); Kauth v. Hartford Ins. Co., 852 F.2d 951, 958 (7th Cir. 1985) (in light of *Parratt* and *Hudson*, "we believe that in cases where the plaintiff complains that he has been unreasonably deprived of a state-created property interest, without alleging a violation of some other substantive constitutional right or that the available state remedies are inadequate, the plaintiff has not stated a substantive due process claim").

112. The Court in *Parratt* reasoned: "[we] recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." 451 U.S. at 539; *see also* Ingraham v. Wright, 430 U.S. 651 (1977) (procedural due process does not require notice and an opportunity to be heard prior to imposition of corporal punishment); Mathews v. Eldridge, 424 U.S. 319 (1976) (due process does not require a hearing prior to termination of Social Security disability benefits; a prompt post-deprivation remedy provides sufficient protection against erroneous deprivation). *But see* Loudermill v. Cleveland Bd. of Educ., 470 U.S. 532 (1985) (employee must be provided an opportunity to respond to charges before termination); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (some administrative procedure for entertaining customer complaints prior to termination is required to afford assurance against erroneous or arbitrary withholding of essential services); Goldberg v. Kelly, 397 U.S. 254 (1970) (due process requires a hearing before welfare benefits are terminated).

113. 110 S. Ct. 975 (interim ed. 1990).

114. 110 S. Ct. at 983 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

115. *Id.*; *see also Parratt*, 451 U.S. at 545 (Blackmun, J., concurring) ("there are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process"). Justices Stewart, White and Powell, expressed similar reservations concerning Justice Rehnquist's purely procedural approach to due process. *Id.* at 544-54; *see also* Brown, *supra* note 24, at 819 ("[S]ubstantive due

due process claim, procedural due process, that the *Parratt* analysis takes on meaning.[116]

A second way in which the Supreme Court has limited substantive due process is by imposing a more stringent "state of mind" requirement on such claims. The *Parratt* Court had held that allegations of mere negligent deprivation of property were actionable under the due process clause, at least where the state failed to provide an adequate post-deprivation remedy.[117] The Court reversed this aspect of *Parratt* in *Daniels v. Williams*,[118] holding that mere lack of due care by a state official no longer states a viable claim under the due process clause.[119] The Court, however, specifically left open the question of whether intent was necessary, or whether deliberate indifference, gross negligence, or recklessness would trigger due process protection.[120]

In *Daniels*, a prisoner was injured when he slipped on a pillow that a guard negligently left in the stairway.[121] A much more compelling fact situation presented itself in the companion case of *Davidson v. Cannon*,[122] where a prisoner was attacked by a fellow inmate after notifying prison officials that this inmate had threatened him.[123] The majority of the Court nonetheless treated the two cases the same, stressing that the word "deprive" means more than mere negligence, it requires that plaintiffs prove "an affirmative abuse of power."[124] The Court

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process, in contrast, [to procedural due process] assesses the propriety of a state's substantive decision. The rationale . . . is that there are certain normative decisions the state simply cannot make regardless of the majority's wishes and regardless of any process.").

116. *See* Hudson v. Palmer, 468 U.S. 517, 533 (1984) ("the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy"). The Court in *Zinermon v. Burch* held that, although generally *Parratt* extends to deprivations of liberty, it did not apply in this case because a state hospital's action in holding the plaintiff in its facility for 152 days without any hearing concerning his ability to consent to treatment could not be characterized as "random and unauthorized" conduct. Distinguishing *Parratt*, the Court emphasized that the deprivation was not unpredictable, pre-deprivation process was not impossible, and the officials' conduct could not be deemed unauthorized where the state delegated to them the power and authority to initiate procedural safeguards. 110 S. Ct. at 989-90.

117. 451 U.S. at 535.

118. 474 U.S. 327 (1986).

119. *Id.* at 328 ("We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property.").

120. *Id.* at 334 n.3. This question remains unanswered. *See* DeShaney v. Winnebago County Dep't. of Social Servs., 489 U.S. 189, 198 n.10 (1989).

121. 474 U.S. at 328.

122. *Id.* at 344.

123. *Id.* at 345-46.

124. *Id.* at 330 (quoting *Parratt*, 451 U.S. at 548-49 (Powell, J., concurring)). The majority characterized the situation in *Davidson* as one involving a government official who "mistakenly believed that the situation was not particularly serious, and . . . simply forgot about the note." *Id.* at 348. Justice Brennan in dissent agreed that negligence should not be actionable, but he believed that the facts in this case sufficiently established recklessness or deliberate indifference so as to create a cause of action. *Id.* at 349 (Brennan, J., dissenting).

clarified, in *Davidson*, that its holding applies to both substantive and procedural due process claims.[125]

The majority of the lower courts have interpreted *Daniels* and *Davidson* to require that there be "an element of deliberateness in directing the misconduct toward the plaintiff" before due process is implicated.[126] Although most courts agree that allegations of gross negligence are insufficient,[127] there remains some question as to whether reckless conduct can trigger the protection of the due process clause.[128] At a minimum, however, the deliberate indifference standard which finds support in Supreme Court decisions interpreting the eighth amendment should be deemed to satisfy the scienter requirement for substantive due process claims. In *Estelle v. Gamble*,[129] the Court held that if prison officials showed "deliberate indifference" to an inmate's medical needs, such indifference would offend "evolving standards of

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125. The Court stated that "[t]he protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials." *Id.* at 348.

126. Archuleta v. McShan, 897 F.2d 495, 498 (10th Cir. 1990). Mere callousness or unwise excessive zeal, even amounting to an abuse of official power, may not be enough to establish liability for a due process claim in the absence of the requisite scienter. Thus a bystander who witnessed police action but who was not himself an object of that action cannot assert the kind of deliberate deprivation of rights necessary to state a due process claim. *See also,* Redman v. County of San Diego, 896 F.2d 362, 365-68 (9th Cir. 1990) ("jail officials' conduct toward pretrial detainees must reach the level of deliberate indifference before a . . . claim can be . . . based upon violation of . . . due process right to personal security"; assignment of detainee to cell with known homosexual does not reflect deliberate indifference and jailers at best had mere suspicion of possible attack, thus claim is not actionable). *But see* Ostrander v. Wood, 879 F.2d 583, 589-90 (9th Cir. 1989) (allegations that police abandoned plaintiff in a high crime area where she was subsequently attacked by a stranger supports a finding of deliberate indifference actionable under substantive due process), *cert. denied*, 111 S. Ct. 341 (interim ed. 1990). The intent question has also been important in assessing claims for loss of companionship where the decedent was a victim of a civil rights violation; *see, e.g.,* Trujillo v. County Comm'rs, 768 F.2d 1186, 1190 (10th Cir. 1985) (plaintiff must establish that state official acted with specific motive of severing parent-child relationship in order for survivor to bring a substantive due process claim).

127. *See, e.g.,* Archie v. City of Racine, 847 F.2d 1211, 1220 (7th Cir. 1988) (en banc) (although reckless conduct can trigger the protections of the due process clause, gross negligence cannot), *cert. denied,* 109 S. Ct. 1338 (interim ed. 1989).

128. *Compare* Ramirez v. Garcia, 898 F.2d 224, 227 (1st Cir. 1990) (although gross negligence is an aggravated lack of care, recklessness and callous indifference constitute a lower level of intentional conduct which "still may exemplify the 'arbitrary exercise of the power of government' required by . . . *Daniels*") (quoting *Daniels,* 474 U.S. at 331) *and* Colburn v. Upper Darby Township, 838 F.2d 663, 669 (3d Cir. 1988) (evidence that defendants should have known that prisoner was a suicide risk and yet failed to take necessary precautions demonstrates reckless indifference which is actionable under the due process clause) *and* Nishiyama v. Dickson County 814 F.2d 277, 282-83 (6th Cir. 1987) (defendant's wanton disregard in allowing convicted felon unsupervised use of official patrol car was sufficient to establish substantive due process violation) *with* DeJesus Benavides v. Santos, 883 F.2d 385, 388 (5th Cir. 1989) (grossly negligent or reckless conduct by prison officials which results in injury to prison guards by third parties states only a traditional state tort claim and not a constitutional wrong).

129. 429 U.S. 97 (1976).

decency" contrary to the eighth amendment.[130] Certainly, if a deliberate indifference standard protects prisoners whose constitutional rights have allegedly been violated, the same showing should suffice to trigger substantive due process protection for nonprisoners whose liberty interests have been adversely affected by government abuse of power. Indeed, in the subsequent case of *City of Revere v. Massachusetts General Hospital*,[131] the Court stated that a criminal suspect's due process claim for medical care was "at least as great as" that afforded prisoners under the eighth amendment.[132] Thus, in cases where government official misconduct manifests deliberate indifference to the rights of an individual, a violation of substantive due process should be recognized.

As previously noted, the fact situation presented to the Court in *Davidson* involved the failure of prison officials to act to protect an inmate from the violence of other inmates.[133] Although the Court disposed of the issue on the grounds that the plaintiff could not show the required state of mind to trigger due process,[134] the case raised the more general question of when government's failure to act triggers a substantive due process violation.[135] Arguably, deliberate indifference which causes injury should be actionable regardless of whether the injury results from government action or inaction.[136] However, where the

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130. *Id.* at 106.

131. 463 U.S. 239 (1983).

132. *Id.* at 244; in *Whitley v. Albers*, the court noted the parallel between the eighth amendment and substantive due process guarantees:

> It would indeed be surprising if, in the context of forceful prison security measures, "conduct that shocks the conscience" or "afford[s] brutality the cloak of law," and so violates the Fourteenth Amendment, were not also punishment "inconsistent with contemporary standards of decency" and "repugnant to the conscience of mankind," in violation of the Eighth".

475 U.S. 312, 327 (1986) (citation omitted). The *Whitley* Court suggested that due process affords at least the same protection to those "persons enjoying unrestricted liberty." *Id.* (quoting *Rochin*, 342 U.S. at 172-73); Estelle v. Gamble, 429 U.S. 97, 103, 106 (1976). However, the deliberate indifference standard required under the eighth amendment is more stringent than the gross negligence standard which several circuits have adopted under substantive due process. *See, e.g.*, Archie v. City of Racine, 847 F.2d 1211, 1220 (7th Cir. 1988) (adopting recklessness standard); Colburn v. Upper Darby Township, 838 F.2d 663, 669 (3d Cir. 1988) (reckless indifference suffices); Nishiyama v. Dixon County, 814 F.2d 277, 282 (6th Cir. 1987) (gross negligence is sufficient).

133. 474 U.S. at 345-46.

134. *Id.* at 348.

135. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986); Comment, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048 (1986).

136. *See* Burnham, *supra* note 8, at 568. "Arbitrary exercise of the powers of government include instances in which governmental power is arbitrarily applied as well as instances in which it is arbitrarily withheld." *Id.* Burnham goes on to explain, however, that where failure to act is the basis for the due process claim the plaintiff will have a more difficult burden to prove that the government official had focused on the plaintiff's situation and yet failed to act. *Id.* at 569.

harm is perpetrated through the conduct of nongovernment officials, the Supreme Court has been troubled by questions regarding "causation" and "affirmative duty." Although recognizing an obligation to provide medical, protective, and other services to inmates or individuals whom the state has involuntarily committed to institutions,[137] the Supreme Court has generally interpreted the Constitution as containing prohibitions against government misconduct, rather than as imposing affirmative obligations or duties on the part of government to provide protective or other types of services for its citizens.[138]

Many lower courts have relied upon the distinction between government action and government inaction to deny due process claims even where the failure to act manifests deliberate indifference which could be labeled arbitrary and capricious.[139] Other cases hold that if the government does not itself place the injured party in the position of danger, but merely fails to protect such victims as members of the general public, there is no basis for imposing governmental liability.[140] In

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137. Youngberg v. Romeo, 457 U.S. 307 (1982) (individuals involuntarily committed); Estelle v. Gamble, 429 U.S. 97 (1976) (prisoners). Authors Wells and Eaton explain that in such cases state action is found through the state's assumption of custody: "[t]he act of confinement preempts potential rescuers and reduces the inmate to a position of helplessness and dependency." Wells & Eaton, *Affirmative Duty and Constitutional Tort*, 16 U. MICH. J.L. REF. 1, 15 (1982); *see also* Martinez v. California, 444 U.S. 277 (1980) (acknowledging that if a special relationship could be shown between a victim and the government and problems of proximate cause could be overcome, a person injured by a released felon could have an actionable claim for a state's failure to warn or protect); Oren, *supra* note 24, at 669-83 (tracing the development in the lower courts relying on *Martinez, Youngberg* and *Estelle* to hold government liable for failing to perform duties).

138. Kadrmas v. Dickinson Pub. Schools, 487 U.S. 450, 462 (1988) (there is no constitutional requirement that a school district offer free bus service even to families who cannot afford this cost); Lyng v. Northwest Indian Cemetery Protective Assoc., 485 U.S. 439, 451 (1988) ("the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government"); Harris v. McRae, 448 U.S. 297, 318 (1980) (states need not fund medically necessary abortions because the Constitution imposes no affirmative obligation to fund the exercise of fundamental rights); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (state has no obligation to provide adequate housing); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) ("the Constitution is a charter of negative rather than positive liberties"); *see also* Currie, *supra* note 135, at 864-67, 886-87; Wells & Eaton, *supra* note 137, at 14.

139. Widman v. Shallowford Community Hosp., 826 F.2d 1030, 1033-36 (11th Cir. 1987) (since the county did not cause the medical emergency that plaintiff faced nor did her condition arise while she was in the county's custody, it had no affirmative constitutional duty to provide any particular type of emergency medical service, and thus, patient who died as a result of ambulance service going to the wrong hospital has no cause of action); Washington v. District of Columbia, 802 F.2d 1478, 1480-82 (D.C. Cir. 1986) (state officials' reckless failure to provide prison guard with safe working environment did not violate due process clause); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984) (due process does not furnish a remedy to the estate of a person incinerated in his car while police officers directed traffic around the blaze).

140. Commonwealth of Pa. by Zimmerman v. Russell, 825 F.2d 12, 15-17 (3d Cir. 1987)

part, these cases rely upon *Martinez v. California*,[141] where the Supreme Court rejected a due process claim brought by the estate of a fifteen year-old girl who was tortured and murdered by a parolee five months after his release from prison. The Court reasoned that the decedent's death was too remote a consequence of the parole officers' actions to hold the government responsible.[142]

The Supreme Court has confirmed this line of cases, holding that, aside from the creation of a "special custodial or other relationship," such as arises in the context of incarceration or involuntary commitment to state institutions, government has no constitutional duty to provide protective services. In *DeShaney v. Winnebago County Dep't. of Social Services*,[143] the Court limited the reach of substantive due process by giving the concept of "special custodial relationship" a narrow construction. It rejected a due process claim brought against a county welfare department for failing to intervene to protect a child against the arguably known risk of violence at his father's hands, reasoning that "a State's failure to protect an individual against private violence simply does not constitute a violation of the due process clause."[144] Since the state by an affirmative exercise of power had not restrained the child's liberty, rendering him unable to protect himself, there was no cause of action under the Constitution.[145] Although the evidence in-

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(deaths caused by escaped convict cannot form the basis of imposing liability where government defendants were unaware of any particular threat to deceased); Carlson v. Conklin, 813 F.2d 769, 772 (6th Cir. 1987) (placement of inmate in halfway house was too remote from crime committed to impose liability); Ketchum v. County of Alameda, 811 F.2d 1243, 1247 (9th Cir. 1987) (plaintiff raped by an escaped convict has no due process claim because there was no special relationship between herself and government officials); Bradberry v. Pinellas County, 789 F.2d 1513, 1517 (11th Cir. 1986) (county's failure to provide adequately trained lifeguards did not deprive swimmer of his life without due process of law since the peril was not created by the government); Gilmore v. Buckley, 787 F.2d 714, 721 (1st Cir.), *cert. denied*, 469 U.S. 882 (1986) (although plaintiff's decedent had previously complained about threats to her life from her murderer and the state had hospitalized the man for a mental evaluation, there was no basis for imposing liability on the government for the private individual's action).

141. 444 U.S. 277 (1980).

142. *Id.* at 285. *But see* Wells v. Walker, 852 F.2d 368, 371 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 1121 (interim ed. 1989) (government used the victim's store as a pickup point in transporting released prisoners, placing the victim in a unique encounter with a person who had exhibited violent propensities and thus established the special relationship necessary to invoke due process); Nishiyama v. Dickson County, 814 F.2d 277, 281 (6th Cir. 1987) (en banc) (due process was triggered where murder was committed by convicted felon placed on "trustee" status by sheriff and his deputies and permitted to use the sheriff department's patrol car without supervision); White v. Rochford, 592 F.2d 381, 383-84 (7th Cir. 1979) (police officer's conduct in leaving children in a car by the side of the road without adult supervision on a cold evening after taking the adult driver into custody constitutes a deprivation).

143. 109 S. Ct. 998 (interim ed. 1989).

144. 109 S. Ct. at 1004.

145. 109 S. Ct. at 1006.

dicated that the state was aware of the dangers faced by the child, it played no part in creating the danger nor did it do anything to render the child more vulnerable.[146] Thus, no matter how arbitrary or capricious the welfare department employees' omissions appeared, no federal guarantee was implicated. The state admittedly took temporary custody of the child, but when it returned him to his father's custody, the child was in no worse position than had the state not acted at all. Since the state does not become "the permanent guarantor of an individual's safety by having once offered him shelter," the Court refused to recognize a constitutional duty to protect the child.[147]

The *DeShaney* Court rejected a broad concept of "special relationship" in favor of an interpretation of the due process clause which protects the individual only where the state actually takes custody through "incarceration, institutionalization, or other similar restraint[s] of personal liberty."[148] It suggested that if the state by an affirmative exercise of power had removed the child from society and placed the child in a foster home operated by its agents, the situation might be different.[149] What remains unclear is whether government can ever be held responsible for its inaction in situations short of actual custody. For example, does *DeShaney* foreclose a due process claim against a fire department whose dispatcher responds to an emergency call from a citizen having a heart attack by telling him to blow into a paper bag

146. *Id.*

147. *Id.*

148. *Id.* Until *DeShaney*, some circuits had given a more liberal construction to the special relationship requirement to include situations where the state has knowledge of an individual's danger and expresses its intent to protect. *See, e.g.*, Balistreri v. Pacifica Police Dep't, 855 F.2d 1421, 1426 (9th Cir. 1989) (affirmative undertaking of duty to protect and state's awareness of danger to specific person create special relationship), *rev'd*, 901 F.2d 696 (1990). The decision was reversed in light of *DeShaney*.

149. 109 S. Ct. at 1006 n.9; *see also* Meador v. Cabinet for Human Resources, 902 F.2d 474, 476 (6th Cir. 1990) (children in state-regulated foster homes have a due process right to be free from infliction of unnecessary harm and thus state officials accused of deliberate indifference to reports of abuse are amenable to suit under substantive due process); Stoneking v. Bradford Area School Dist., 882 F.2d 720, 723-24 (3d Cir. 1989) (student's argument that she was in "functional custody" of school authorities when she was sexually abused by a teacher because mandatory school attendance law effectively restrained her freedom of movement was not necessarily inconsistent with *DeShaney's* interpretation of the special relationship requirement), *cert. denied*, 110 S. Ct. 840 (interim ed. 1990). *But see* J.O. v. Alton Community Unit School Dist. 11, 909 F.2d 267, 272-73 (7th Cir. 1990) (despite compulsory state attendance laws, state does not have a "special relationship" to school children necessary to impose an affirmative duty to provide for their safety and to prevent abuse by school teacher); Weller v. Department of Social Serv., 901 F.2d 387, 392 (4th Cir. 1990) (transfer of custody from one parent to the other did not make the state the permanent guarantor of the child's safety such that any harm inflicted at the hands of the new custodial parent can be attributable to the state); Milburn v. Anne Arundel County Dep't of Social Servs., 871 F.2d 474, 476 (4th Cir.) (harm suffered by a child at the hands of his foster parents is not harm inflicted by state agents), *cert. denied*, 110 S. Ct. 148 (interim ed. 1989).

rather than sending a rescue squad? Although there is no intervening private wrongdoer to blame for the heart attack victim's injury or death, under *DeShaney* it can be argued that the state did not cause the disease nor hinder the plaintiff from seeking other sources of assistance.[150] Compare this to the situation of a woman abandoned by the police without transportation late at night in a high crime area where she was attacked by a stranger after the police arrested her companion and confiscated the car.[151] Although there is an intervening third party, clearly the state "caused" the woman's dangerous predicament. Certainly, in both of these situations, government official conduct manifests deliberate indifference to the life and liberty of the individual. Nonetheless, in the first situation, the Seventh Circuit held that *DeShaney* mandated dismissal of the case because the state played no part in the creation of the problem since it did not "cause" the heart attack.[152] In the second situation, government officials did create the danger but they did not restrain the woman's liberty to protect herself by taking her into custody. Nevertheless, the Ninth Circuit held the case survived *DeShaney*.[153]

Relying on *DeShaney*, several lower courts have denied due process claims no matter how egregious the government official misconduct because the danger was not created by the government,[154] the injury

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150. *See* Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988) (en banc) (rejecting the due process claim), *cert. denied*, 109 S. Ct. 1338 (interim ed. 1989).

151. *See* Ostrander v. Wood, 879 F.2d 583 (9th Cir. 1989) (finding a viable substantive due process claim), *cert. denied*, 111 S. Ct. 341 (interim ed. 1990).

152. *Archie*, 847 F.2d at 1220-23 (since state did not cause plaintiff's disease, propel her into danger, take her into custody, or hinder her from seeking other sources of aid, it did not violate her rights under the due process clause).

153. *Ostrander*, 879 F.2d at 590 (state trooper's conduct toward plaintiff distinguishes her from general public and triggers duty of police to afford her some measure of safety). The Court in *DeShaney* specified that the state "played no part" in the creation of the dangers that Joshua faced "nor did it do anything to render him any more vulnerable to them." 109 S. Ct. at 1006. This suggests that where the state indeed has placed a person in a position of danger, liability may still be imposed; in *Bowers v. Devito*, the court stated:

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an act of a tortfeasor as if it had thrown him into a snake pit.

686 F.2d 616, 618 (7th Cir. 1982).

154. Bryson v. City of Edmond, 905 F.2d 1386, 1393 (10th Cir. 1990) (although police surrounded post office when summoned to scene, city did nothing to place postal employees in hostage situation and thus had no duty to protect those trapped inside who were being killed and injured by gunman); Griffith v. Johnston, 899 F.2d 1427, 1438 (5th Cir. 1990) (claims against adoption agency for failing to provide additional information to prospective parents or to train prospective parents regarding care of handicapped children is barred by the holding in *DeShaney* that the due process clause does not demand positive assistance from government); Milburn v. Anne Arundel County Dep't. of Social Servs., 871 F.2d 474, 476-79 (4th Cir.), *cert. denied*, 110 S. Ct. 148 (interim ed. 1989) (youth cannot maintain suit against abusive foster parents since foster parents and the state were not in an agency relationship and it was the parents and not the

was perpetrated through the action of third parties,[155] or because government officials "did not render the individual incapable of caring for him or herself."[156] Although *DeShaney* severely restricts due process by imposing a mechanical "special custodial relationship" rule which focuses attention away from the arbitrary, egregious nature of the official's misconduct, it should not be interpreted to affect claims for harm more directly attributable to government misconduct. Thus, it has no relevance with regard to claims of arbitrary official decisionmaking or misconduct in the areas of employment, land use, corporal punishment or detainee abuse where the harm is directly perpetrated by government actors.[157]

The fourth way in which the Supreme Court has limited substantive due process is by clarifying that where the government misconduct

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state that placed the child in the foster home); Widman v. Shallowford Community Hosp., 826 F.2d 1030, 1033-36 (11th Cir. 1987) (no cause of action for patient who died as result of ambulance going to wrong hospital since county did not cause the medical emergency).

155. Doe by Nelson v. Milwaukee County, 903 F.2d 499, 502 (7th Cir. 1990) (county department's failure to initiate prompt investigation of suspected child abuse did not violate substantive due process where department made no effort to intervene on child's behalf); Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 700 (9th Cir. 1990) (although state actors knew plaintiff was being harassed and vandalized by her former husband and affirmatively committed to protect her by issuing a restraining order, under *DeShaney* mere knowledge of plight and expression of intent to help are insufficient to create a special relationship triggering protection under the due process clause); Weller v. Department of Social Serv., 901 F.2d 387, 392 (4th Cir. 1990) (since transfer of custody did not make state the permanent guarantor of the child's safety, any harm suffered in his new home is not harm inflicted by the state); Benavides v. Santos, 883 F.2d 385, 387-88 (5th Cir. 1989) (since prison guards enlist voluntarily, state cannot be held responsible where prisoners injure them in attempting to escape even where injury would not have occurred but for prison officials' callous indifference or grossly negligent failure to prevent or to guard against attempted escapes and inmate violence); Philadelphia Police & Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia, 874 F.2d 156, 167 (3d Cir. 1989) (*DeShaney* forecloses relief where harm is actively caused by a source other than the state); Milburn v. Anne Arundel County Dep't. of Social Serv., 871 F.2d 474, 476 (4th Cir.), *cert. denied*, 110 S. Ct. 148 (interim ed. 1989) (since abused child was voluntarily placed in foster home by natural parents, and injuries were not sustained by child while in state's custody, no due process claim lies against any state actors); *but see* Horton v. Charles, 888 F.2d 454, 458 (3d Cir. 1989) (where sergeant used his official status to allow a private club to continue custodial interrogation of an employee even though the employee was in fear of his safety, state was a participant in the custody which led to the victim's death and thus may be held accountable); Cornelius v. Town of Highland Lake, 880 F.2d 348, 355-59 (11th Cir. 1989) (district court erred in dismissing due process claim against town officials who utilized inmate squads where town clerk was abducted from town hall and terrorized by inmates, because a special relationship may have been created between town officials and their employees).

156. J.O. v. Alton Community Unit School Dist., 909 F.2d 267, 272 (7th Cir. 1990) (by mandating school attendance, state has not made a child unable to care for himself so as to impose liability for teacher abuse); Piechowicz v. United States, 885 F.2d 1207, 1214-15 (4th Cir. 1989) (federal agents' failure to prevent contract killing does not state a substantive due process violation because deceased parties were not affirmatively restrained by the government).

157. *See* Rosenberg, *supra* note 107, at 422 ("[*DeShaney*] applies only to state action in preventing injury by private actors. When the state acts affirmatively through its own agents to cause injury, custody is irrelevant.").

implicates a right explicitly protected by the Bill of Rights, the more general substantive due process claim will not be heard. The first major substantive due process case involving official wrongdoing, *Rochin v. California*,[158] involved pumping the stomach of an arrestee in order to recover alleged illegal drugs. The case was decided by the Court before the fourth amendment was incorporated into the fourteenth amendment to prohibit states from engaging in unreasonable searches and seizures.[159] Many substantive due process claims which challenge egregious or shocking government misconduct have arisen in the context of arrests or the mistreatment of prisoners.[160] Recent Supreme Court decisions significantly foreclose the use of substantive due process in these areas.

The Supreme Court, in *Whitley v. Albers*,[161] held that in the prison context, the substantive component of the due process clause affords inmates no greater protection than does the eighth amendment.[162] As a practical matter, *Whitley* eliminated the efficacy of a substantive due process challenge to the mistreatment of prisoners.[163] Subsequently, in *Graham v. Connor*,[164] the Court held that claims that law enforcement officials used excessive force in the course of an arrest, investigatory stop, or other seizure of a person must be analyzed under

158. 342 U.S. 165 (1952).

159. Although in Wolf v. Colorado, 338 U.S. 25, 33 (1949), the Court held that the fourteenth amendment incorporates the fourth amendment, it was not until the 1960s that all of the guarantees of the fourth amendment were made applicable to the states. Mapp v. Ohio, 367 U.S. 643, 665 (1961) (exclusionary rule applicable to fourth amendment claims applies to the states through the fourteenth amendment); Ker v. California, 374 U.S. 23, 30-31 (1963) (identical standards regarding fourteenth amendment claims exist against federal and state governments).

160. White v. Roper, 901 F.2d 1501, 1507 (9th Cir. 1990) (listing cases using substantive due process to challenge "egregious government conduct in the form of excessive and brutal use of physical force"); Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 559-60 (1st Cir. 1989) (evidence that three-man police squad alighted from unmarked police car in plain clothes, approached parked automobile with guns drawn without identifying themselves as policemen, and shot plaintiff in the back as he drove away supports conclusion that officer acted with reckless or callous indifference to due process rights); Harris v. Maynard, 843 F.2d 414, 416 (10th Cir. 1988) (wanton or obdurate disregard or deliberate indifference to prisoner's right to life is a substantive constitutional deprivation whether it falls under due process or the eighth amendment); Richardson v. Penfold, 839 F.2d 392, 395 (7th Cir. 1988) (prison officials who act with deliberate or callous indifference towards inmate violate due process clause where jury could reasonably believe that prison officials in effect permitted attacks on inmate despite knowledge of strong likelihood of such occurring).

161. 475 U.S. 312 (1986).

162. *Id.* at 327.

163. *See, e.g.*, Colon v. Schneider, 899 F.2d 660, 671 (7th Cir. 1990) (prisoner maced by prison guards cannot allege cruel and unusual punishment and since *Whitley* states that the substantive component of the due process clause affords no greater protection than the eighth amendment, there is no basis for a substantive due process claim).

164. 109 S. Ct. 1865 (interim ed. 1989).

the fourth amendment rather than under substantive due process.[165] Read together, these two cases foreclose substantive due process challenges to the deliberate use of excessive force until after the point at which arrest ends and prior to the point of a guilt determination - in other words, only in cases involving the treatment of pretrial detainees.[166] As with the other Supreme Court cases, the lower courts have seized upon these decisions to dismiss substantive due process claims in both the context of arrests[167] and where injuries are inflicted after

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165. *Id.* at 1870-71. Further the Court, in dicta, reiterated that claims of excessive force against convicted prisoners are "at best redundant of that provided by the eighth amendment." *Id.* at 1871 n.10. Every circuit that has considered the question has concluded that the eighth amendment is the primary source of substantive rights of prisoners and that, with regard to the rights of convicted prisoners, the legal standards under the eighth and fourteenth amendments generally are congruous. Meriwether v. Coughlin, 879 F.2d 1037, 1047 (2d Cir. 1989); Unwin v. Campbell, 863 F.2d 124, 127 n.1 (1st Cir. 1988); George v. King, 837 F.2d 705, 707 (5th Cir. 1988); Martin v. Malhoyt, 830 F.2d 237, 261 n.76 (D.C. Cir. 1987) (in dicta); *see also* Daniels v. Williams, 474 U.S. 327, 340 n.16 (1986) (Stevens, J., concurring) ("in these circumstances [inmate injured and attacked by fellow inmate] . . . the substantive constitutional duties of prison officials to prisoners are defined by the eighth amendment, not by substantive due process"); Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security Under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 226-29 (1987) (noting some disagreement among post-*Whitley* cases, but suggesting that eighth amendment standards predominate).

166. 109 S. Ct. at 1871 n.10 ("It is clear . . . that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment"); *see e.g.*, White v. Roper, 901 F.2d 1501, 1503-06 (9th Cir. 1990) (district court erred in granting summary judgment where genuine issue of material fact existed as to whether officer was deliberately indifferent to pretrial detainee's personal safety or intended to punish him by ordering him in cell of another detainee who had a history of violent behavior; right to personal security is a historic liberty interest protected substantively by the due process clause); Williams-El v. Johnson, 872 F.2d 224, 229 (8th Cir.), *cert. denied*, 110 S. Ct. 85 (interim ed. 1989) (district court erred in granting directed verdict for defendant in case involving beating of pre-trial detainee); Wilkins v. May, 872 F.2d 190, 192-95 (7th Cir. 1989) (district court erred in granting defendant's motion to dismiss where defendant put a gun to plaintiff's head during an interrogation occurring after an arrest but before charge); Anderson v. Gutschenritter, 836 F.2d 346, 349 (7th Cir. 1988) (due process protects pretrial detainees both from deliberate exposure to violence and from failure to protect when prison officials learn of strong likelihood that prisoner will be assaulted). *But see* Belcher v. Oliver, 898 F.2d 32, 34 (4th Cir. 1990) (although fourteenth amendment requires that government officials not be deliberately indifferent to serious medical needs of detainees, failure of officers to afford detainee who commits suicide medical treatment and screening and to remove belt and shoelaces does not rise to level of deliberate indifference to serious medical need); Redman v. County of San Diego, 896 F.2d 362, 365-68 (9th Cir. 1990) (jail officials' conduct toward pretrial detainee must reach level of deliberate indifference to constitute substantive due process violations; although transferring plaintiff from "young and tender" unit to cell with homosexual with known aggressive tendencies and then investigating his claim of rape in front of cellmate put jailers on notice of possible attack, mere suspicion does not equate with deliberate indifference); *see also* Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1409 n.13 (9th Cir. 1989) (where plaintiff alleges governmental abuse not covered by another constitutional standard, *Graham* does not control, and the court must look "to such factors as the need for government action in question, the relationship between the need and the action, the extent of the harm inflicted, and whether the action was taken in good faith or for the purpose of causing harm").

167. *See e.g.*, Roach v. City of Fredericktown, 882 F.2d 294, 297 (8th Cir. 1989) (claims

conviction.[168]

In short, through a series of decisions over the past decade, the Supreme Court has placed significant hurdles in the path of plaintiffs seeking to impose governmental liability for substantive due process violations. In addition to requiring the use of a highly deferential standard when challenges are made to state or local ordinances involving economic rights or social welfare,[169] the Court has made it clear that challenges to government misconduct will be dismissed (1) where the plaintiff fails to clearly designate his claim as one of substantive due process as opposed to procedural due process, and thus the existence of state remedies defeats the federal claim;[170] (2) where the plaintiff alleges only a lack of due care rather than a higher level of culpability such as reckless disregard or deliberate indifference;[171] (3) where the plaintiff fails to identify an affirmative duty or seeks to hold the government liable for its failure to act in the absence of a special custodial relationship;[172] or (4) where the claim falls under a more explicit constitutional guarantee, such as the fourth or eighth amendment, thus foreclosing the use of the broader substantive due process safeguard.[173]

III. Substantive Due Process in the Lower Courts: Further Obstacles and Confusion

In addition to the obstacles imposed by recent Supreme Court decisions,[174] many lower courts have imposed their own impediments on plaintiffs seeking to bring substantive due process claims. As suggested earlier, some courts have given an unduly expansive reading to

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of excessive force arising in the context of an arrest or investigatory stop must be assessed under the fourth amendment rather than a generalized excessive force due process standard); *accord* Lewis v. City of Irvine, 899 F.2d 451, 456-57 (6th Cir. 1990); Hay v. City of Irving, 893 F.2d 796, 798 (5th Cir. 1990). The Seventh Circuit adopted this approach even before *Graham*. Lester v. City of Chicago, 830 F.2d 706, 710-11 (7th Cir. 1987) (fourth amendment reasonableness standard rather than substantive due process standard is used to assess injuries occurring during an arrest).

168. *See, e.g.*, Berry v. City of Muskogee, 900 F.2d 1489, 1493 (10th Cir. 1990) (a person whose guilt has been adjudicated formally but who awaits sentencing should be treated the same as an inmate already sentenced and thus the eighth amendment standard applies); Williams v. Boles, 841 F.2d 181, 183 (7th Cir. 1988) (eighth amendment, not substantive due process, standard applies where injuries are inflicted on prisoners); Meriwether v. Faulkner, 821 F.2d 408, 415 (7th Cir. 1987) (claims that state failed to protect inmate from sexual assault and other acts of violence and that he was indefinitely held in administrative segregation may be litigated only under the eighth amendment and not under the due process clause).

169. *See supra* note 45 and accompanying text.

170. *See supra* notes 108-10 and accompanying text.

171. *See supra* notes 116-24 and accompanying text.

172. *See supra* notes 142-48 and accompanying text.

173. *See supra* notes 160-65 and accompanying text.

174. *See supra* notes 160-65 and accompanying text.

DeShaney v. Winnebago County Dep't of Social Servs.,[175] *Daniels v. Williams*,[176] and *Parratt v. Taylor*.[177] Many of the decisions reflect confusion regarding the proper scope of substantive due process as compared to procedural due process. As to the latter, it is now well settled that plaintiffs must initially identify a property or liberty interest in order for procedural due process to apply.[178] Further, where the deprivation occurs as a result of random, unauthorized misconduct, the existence of an adequate state remedy defeats the federal due process claim.[179] Borrowing from this procedural due process analysis, some lower courts have similarly required that a plaintiff initially identify a protected property or liberty interest in order for substantive due process to apply.[180] Other lower courts have added the vague requirement

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175. *See supra* notes 158-56 and accompanying text.

176. *See supra* notes 125-27 and accompanying text.

177. *See supra* note 110 and accompanying text.

178. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 577-78 (1972) (the liberty clause does not protect the right to public employment, and to have a protected property interest one must have a legitimate claim of entitlement to the job). Subsequent cases have further limited the definition of liberty vis a vis procedural due process claims. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 701 (1976) (no liberty interest exists in being free from defamation). *But see* Brown, *supra* note 24, at 873 n.402 (arguing a plaintiff should not need to initially identify a "protected interest" for substantive due process to attach since it protects against arbitrary or irrational government conduct: "Thus, where one is injured by arbitrary government action, there should be a substantive due process violation irrespective of whether there is a 'protected interest.' ").

179. *See* discussion of *Parratt, supra* notes 108-112 and accompanying text.

180. MacKenzie v. City of Rockledge, 920 F.2d 1554, 1559 (11th Cir. 1991) (allegation that plaintiff was arbitrarily denied building permit in violation of due process is meritless since he did not have a property interest in it under state law); Di Martini v. Ferrin, 906 F.2d 465, 467 (9th Cir. 1990) ("a legitimate claim of entitlement to continued employment must be proven before a due process violation can exist from unreasonable government interference with one's employment"); Nolin v. Douglas County, 903 F.2d 1546, 1553-54 (11th Cir. 1990) (although a violation of a public employee's right to substantive due process occurs where the employee is deprived of a property interest for an improper motive and by means that are pretextual, arbitrary and capricious, employee failed to prove that he possessed a property interest in his continued employment and therefore he could assert no substantive due process claim); Griffith v. Johnston, 899 F.2d 1427, 1435 (5th Cir. 1990) ("In order to state a cause of action for violation of the Due Process Clause . . . the [plaintiffs] must show that they have asserted a recognized 'liberty or property' interest within the purview of the Fourteenth Amendment . . . . "); Colon v. Schneider, 899 F.2d 660, 666-67 (7th Cir. 1990) (in order to demonstrate a protectable liberty interest in not being maced, an individual must establish a legitimate claim of entitlement that may arise either from the due process clause itself or from state law); Spence v. Zimmerman, 873 F.2d 256, 258 (11th Cir. 1989) (plaintiff must demonstrate both a constitutionally protected property interest and that government deprived him of that interest for an improper motive and by means that are arbitrary and capricious); Gutzwiller v. Fenik, 860 F.2d 1317, 1328 (6th Cir. 1988) (a federally recognized interest in liberty or property must be impaired in order to trigger substantive due process); Honore v. Douglas, 833 F.2d 565, 568 (5th Cir. 1987) (plaintiff must show a protected property interest as well as the arbitrary capricious deprivation of that interest in order to trigger substantive due process); Buhr v. Buffalo Pub. School Dist., 508 F.2d 1196, 1202 (8th Cir. 1974) (plaintiff must identify a property or liberty interest sufficient to trigger procedural due process before substantive due process will apply).

that the interest be "federally" protected.[181] A few courts have taken an even more stringent approach, finding that substantive due process is not triggered unless a fundamental right[182] or, at minimum, a liberty as opposed to a "mere property" interest is implicated.[183] Other courts have acknowledged the availability of a substantive due process claim for deprivations of liberty or property but have then given a narrow construction to such terms.[184] These courts have erroneously relied on

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181. Charles v. Baesler, 910 F.2d 1349, 1353 (6th Cir. 1990) (since state-created contract rights are not deeply rooted in history or tradition and their breach is not the sort of injustice inherent in egregious abuse of government power, they may not be vindicated under substantive due process); Huang v. Board of Governors, 902 F.2d 1134, 1142 n.10 (4th Cir. 1990) (since plaintiff's entitlement to his position is essentially a state law contract right, not a fundamental interest embodied in the Constitution, it is doubtful that the deprivation is subject to substantive due process review); Merritt v. Broglin, 891 F.2d 169, 172 (7th Cir. 1989) (since state-created procedural rights do not constitute substantive liberty interests, superintendent's denial of inmate's request for leave to attend his stepfather's funeral did not violate a liberty interest protected under the substantive due process guarantee); Weimer v. Amen, 870 F.2d 1400, 1406 (8th Cir. 1989) (complaint alleging nothing more than violation of state law should be dismissed); Ransom v. Marrazzo, 848 F.2d 398, 411-12 (3d Cir. 1988) (since the provision of water and sewer services is not a federally protected right, allegations that such services were arbitrarily denied by the city does not raise the question of a substantive due process deprivation); Neuwirth v. Louisiana State Bd. of Dentistry, 845 F.2d 553, 558 (5th Cir. 1988) (identification of constitutionally protected interest is a prerequisite to asserting a substantive due process violation); Boston Envtl. Sanitation Inspectors Ass'n v. City of Boston, 794 F.2d 12, 13 (1st Cir. 1986) (per curiam) (no substantive due process claim for breach of contractual promotion rights); Pedersen v. Ramsey County, 697 F. Supp. 1071, 1080 (D. Minn. 1988) (since the right to public employment does not reside in the Constitution but is rather a creature of state law, even an arbitrary deprivation of this property right should not be found to violate substantive due process). Other courts have similarly held that where plaintiff claims only deprivation of a state-created property right the substantive component of the due process clause is not implicated. Reich v. Beharry, 883 F.2d 239, 243-45 (3d Cir. 1989); McMaster v. Cabinet for Human Resources, 824 F.2d 518, 523 (6th Cir. 1987) (concurring opinion); Schaper v. City of Huntsville, 813 F.2d 709, 716-18 (5th Cir. 1987); Mangels v. Pena, 789 F.2d 836, 838 (10th Cir. 1986); Brown v. Brienen, 722 F.2d 360, 363-64 (7th Cir. 1983). *But see* Bradley v. Austin, 841 F.2d 1288, 1295-96 (6th Cir. 1988) (although plaintiffs have no constitutionally protected interest against congressional modification of their welfare benefits, courts can review the legislation to determine whether it amounts to arbitrary governmental action).

182. Charles v. Baesler, 910 F.2d 1349, 1353 (6th Cir. 1990) (state-created contract rights do not rise to the level of "fundamental" interests protected by substantive due process); Griffith v. Johnston, 899 F.2d 1427, 1435-37 (5th Cir. 1990) (because there is no fundamental right to adopt a child, plaintiff's substantive due process claim fails; while acknowledging that due process "was 'intended to secure the individual from the *arbitrary exercise* of the powers of government' which resulted in 'grievous losses' for the individual," the court stated that judicial intervention must be sparingly used) (quoting Kentucky Dep't of Corrections v. Thompson, 109 S. Ct. 1904, 1909 (interim ed. 1989)); Anthony v. Franklin County, 799 F.2d 681, 686 (11th Cir. 1986) (since there is no denial of "any fundamental right derived from the Constitution" when the county decides to terminate its ferry service, there can be no violation of substantive due process); Armstrong v. City of Arnett, 708 F. Supp. 320, 326 (W.D. Okla. 1989) (plaintiff must allege violation of a fundamental right in order to recover on a substantive due process claim).

183. *See, e.g.*, Lee v. Huston, 810 F.2d 1030, 1032 (11th Cir. 1987).

184. *See, e.g.*, Archuleta v. McShan, 897 F.2d 495, 497 (10th Cir. 1990) (plaintiff has no liberty interest in benefit of emotional trauma suffered as a result of observing allegedly excessive

Supreme Court decisions which have expressed the need for caution and restraint in defining the scope of the Constitution's protection of property and liberty in the context of the fundamental rights doctrine or procedural due process.[185] Adopting an intermediate position, a few circuits have argued that if the substantive due process claim is based only on a state-created property right, the plaintiff must also prove the inadequacy of the state law remedy, thus superimposing *Parratt's* analysis onto substantive due process.[186]

None of these approaches find support in current substantive due process doctrine as defined by the Supreme Court. First, those courts which have required initial identification of a fundamental right to trigger substantive due process have confused the concept that substantive due process protects certain nontextual interests from government interference absent compelling justification with the generic doctrine that substantive due process shields individuals from arbitrary, capricious government misconduct.[187] Although the Court has discredited the Lochnerean approach of determining the arbitrariness of government action through an unduly stringent review,[188] the basic principle that substantive due process may be used to protect against fundamentally unfair government action remains intact.[189]

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police force directed at plaintiff's father); Neuwirth v. Louisiana State Bd. of Dentistry, 845 F.2d 553, 558 (5th Cir. 1988) (plaintiff has no constitutionally protected liberty interest in practicing dentistry in Louisiana without taking an examination).

185. *See, e.g.*, Lee v. Hutson, 810 F.2d 1030, 1032 (11th Cir. 1987) (since *Bishop* held that procedural due process is not violated where one is terminated from employment for allegedly false reasons, there can be no substantive due process violation regarding the same conduct); Buhr v. Buffalo Pub. School Dist., 508 F.2d 1196, 1202 (8th Cir. 1974) (plaintiff must at least have a property or liberty interest sufficient to trigger procedural due process before substantive due process will apply). The Supreme Court has given a narrow construction to the terms "property" and "liberty" under procedural due process. Bishop v. Wood, 426 U.S. 341, 348 (1976) (liberty protects only from public disclosure of disparaging remarks about one's career); Paul v. Davis, 424 U.S. 693, 701 (1976) (there is no liberty interest in being free from defamation); Board of Regents v. Roth, 408 U.S. 564, 577-78 (1972) (no protected liberty interest exists incident to employment and a property interest must arise from a "legitimate claim of entitlement"). For the Court's concern with expanding the fundamental rights doctrine, see *supra* notes 6, 19.

186. *See, e.g.*, Polenz v. Parratt, 883 F.2d 551, 558-59 (7th Cir. 1989) (where a substantive due process claim is merely based on a state-created property right, plaintiff must either show a separate constitutional violation or the inadequacy of the state law remedies).

187. *See* Lupu, *supra* note 33, at 1030:

> Most liberties lacking textual support are of the garden variety — like liberty of contract — and thus their deprivation is constitutional if rationally necessary to the achievement of a public good. Several select liberties, on the other hand, have attained the status of 'fundamental' or 'preferred,' with the consequence that the Constitution permits a state to abridge them only if it can demonstrate an extraordinary justification.

Id.; *See also* notes 100-107 and accompanying text.

188. Williamson v. Lee Optical, 348 U.S. 483 (1955); Lochner v. New York, 198 U.S. 45 (1905).

189. *See supra* note 33 and accompanying text.

Second, those decisions which have limited substantive due process claims to deprivations of liberty are clearly unfounded in light of the textual language of the due process clause which makes reference to deprivations of life, liberty *and property*. The history and development of substantive due process indicate that the founders were deeply concerned with deprivations of property interests and long ago the Supreme Court recognized the doctrine as a limitation on improper zoning decisions.[190] Further, early decisions broadly defined "liberty" to encompass what are characterized today as "mere" property rights.[191] Thus, lower court opinions which foreclose substantive due process claims by government employees because only "property" interests are at stake are contrary to *Lochner's* holding that the right to gainful employment is an important part of liberty.

In the context of procedural due process, the Supreme Court has shown a reluctance to interfere with the day-to-day decisionmaking of state and local employers by superimposing a federal *procedural* structure.[192] However, substantive due process is triggered only where an employee can prove a personnel decision is so unfounded and unfair as to meet the stringent "arbitrary, capricious" standard.[193] The Supreme Court has recognized that the meaning of "liberty" under substantive due process is not the same as that under procedural due process, where the focus has been on state-created interests.[194] A majority of

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190. Nectow v. Cambridge, 277 U.S. 183 (1927); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Several authorities have argued that there is no basis for exempting the arbitrary or malicious use of government powers when property is at stake as opposed to life or liberty. *See* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (arguing that "the dichotomy between personal liberties and property rights is a false one . . . . The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right . . . ."); Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1409 (9th Cir. 1989) (due process protects property no less than life and liberty); Pineman v. Fallon, 842 F.2d 598, 601 (2d Cir. 1988) (retirement fund and retirement benefits are protected property rights under substantive due process); Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U.L. REV. 627, 637-38 (1990) (the Bill of Rights were cut from a single constitutional cloth and at common law, ownership of property was evidence of liberty); Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363 (1990) (arguing for greater protection of economic rights under the substantive due process clause).

191. Lochner v. New York, 198 U.S. 45 (1905); *see also* Silverstein v. Gwinnett Hosp. Auth., 861 F.2d 1560, 1566 (11th Cir. 1988) (staff privileges at a public hospital constitute a protected liberty interest since liberty has been understood to include an individual's right to engage in a common occupation of life).

192. *See* Bishop v. Wood, 426 U.S. 341, 350 (1976).

193. *See* cases cited *supra* note 90.

194. *See* Paul v. Davis, 424 U.S. 693 (1976). "[The Court's] discussion [of the source of liberty interests] is limited to consideration of the procedural guarantees of the Due Process Clause and is not intended to describe those substantive limitations upon state action which may be encompassed within the concept of 'liberty' expressed in the Fourteenth Amendment." *Id.* at

the Court has never repudiated the broad definition of liberty first enunciated during the *Lochner* period, which encompasses a wide range of interests "recognized at common law as essential to the orderly pursuit of happiness by free men."[195] Although it may seem anomalous to give different definitions to a single term found in the due process clause, the unique historical roots of the two doctrines, reinforced by a century of case precedent, explains and justifies the distinction.[196]

Third, those courts which have dismissed claims where the state provides an adequate remedy have confused substantive with procedural due process.[197] Procedural due process focuses on whether the state has provided sufficient protection for an interest through its own procedures. Substantive due process, however, focuses on whether the government has abused its power, and any violation is complete as soon as the act is committed.[198] Although, arguably, a plaintiff should not be able to avoid the limitations of *Parratt* by characterizing an essentially procedural due process violation as a substantive due process claim,[199] when it is clear that the challenge is to the egregiousness of the government misconduct or the arbitrariness of its decision, and not to the pro-

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710 n.5. As to procedural due process, the term liberty has been limited to those interests specified in the Bill of Rights, freedom from physical restraint and state-created liberty. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 674 (1977) (corporal punishment in public schools implicates a child's liberty interest); Paul v. Davis, 424 U.S. at 710-11 (state created liberty interest may trigger procedural due process).

195. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See also* Board of Regents v. Roth, 408 U.S. 564, 572 (1972) (defining liberty) (for the quoted definition see *supra* text accompanying note 64); Monaghan, *supra* note 7, at 433 (1977) (liberty "should be read to embrace . . . *any* governmental conduct which so invades a decent respect for a person's personal integrity that, if not fairly justified, the result would outrage public sensibility.").

196. *See* Flemming v. Nestor, 363 U.S. 603, 611 (1960) (even if Social Security benefits do not constitute "accrued" property interest, the interest "is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause" provided "the statute manifests a patently arbitrary classification, utterly lacking in rational justification"); Lupu, *supra* note 33, at 1028-29. *But see* Monaghan, *supra* note 7, at 421 (arguing that *Roth's* narrow interpretation of liberty and property applies to substantive due process even though it arose in a procedural due process case: "Since the probationary employee lacks a 'liberty' or 'property' interest, there is no basis under the due process clause for a substantive due process requirement that a state's conduct meet even the 'base line requirement of rationality.' "). Monaghan also argues that there is no independent substantive right to be free from arbitrary government action. *Id.* at 421 n.112.

197. *See supra* notes 110-11 and accompanying text.

198. *See supra* notes 113-14 and accompanying text; *see also Daniels*, 474 U.S. at 331 (procedural due process "promotes fairness," whereas substantive due process "serves to prevent governmental power from being 'used for purposes of oppression.' "); Wells & Eaton, *supra* note 24, at 222-23 (distinguishing substantive due process claims as those where "plaintiffs contend that the physical, emotional, or dignitary harm they suffer is itself a constitutional wrong, however proper is the procedure used to inflict that harm").

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

cedures it has used, the substantive due process claim should be recognized.

IV. PRESERVING SUBSTANTIVE DUE PROCESS AS A MEANINGFUL GUARANTEE AGAINST MISUSE OF POWER

The concerns that have motivated the Supreme Court to constrict the use of substantive due process and which, in turn, have influenced the lower courts are twofold. First, the Court has been driven by a concern for judicial activism, whereby more and more areas of the law are "federalized" and judges, in essence, second guess legislative, executive, or administrative decisionmaking.[200] Second, the court focuses on state and federal relations and, as exemplified by *Parratt v. Taylor*,[201] the perceived inappropriateness of providing federal remedies where the state already compensates for the wrongdoing.[202] The Court has frequently expressed a reluctance to displace state courts and state tort law with federal courts and federal law.[203] In addition, the largely un-

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200. In general, critics have challenged substantive due process because of a lack of text to warrant judicial intervention and the lack of demonstrable standards to guide its use. *See* Griswold v. Connecticut, 381 U.S. 479, 510-24 (1965) (Black, J., dissenting); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 465 (7th Cir. 1988) ("substantive due process is a tenacious but embattled concept. The strongest criticisms of substantive due process are institutional ones. The concept invests judges with an uncanalized discretion to invalidate federal and state legislation."); Gumz v. Morrissette, 772 F.2d 1395, 1404-06 (7th Cir. 1985) (Easterbrook, J., concurring) (substantive due process has no support in the language or history of the Constitution and instead is a "short-hand for a judicial privilege to condemn things the judges do not like or cannot understand"); Brown, *supra* note 24, at 871 ("The problem . . . lies in the fact that the fourteenth amendment's due process clause provides no explicit guidance concerning what is substantively impermissible;" and that this lack of precision leads to charges that the Court is guilty of "Lochnerization.").

201. 451 U.S. 527 (1981).

202. This concern has been most often expressed regarding the development of so-called constitutional torts, i.e., the allegation that many due process claims are merely state tort actions "masquerading" as civil rights suits. Burnham, *supra* note 8, at 544; *see also* Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 327 (1965) (conduct comprising constitutional tort should be more egregious than in the "garden variety state tort action"); Wells & Eaton, *supra* note 24, at 209 ("Constitutional tort necessarily intrudes upon the traditional sovereign prerogative of a state to define for itself the tort rules governing its conduct"); Wells & Eaton, *supra* note 137, at 29 (most constitutional tort actions are brought against state and local government, thus creating friction between federal and state governments); Whitman, *Governmental Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 225-26 (1986) (dealing with the problem of assessing institutional responsibility in constitutional tort cases); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 10 (1980) (focusing on the cost of using constitutional rights as a basis for imposing tort damage liability);

203. *See* Martinez v. California, 444 U.S. 227, 282 (1980) (each state has a paramount interest "in fashioning its own rules of tort law"); City of Columbus v. Leonard, 443 U.S. 905, 910-11 (1979) (Rehnquist, J., dissenting from denial of certiorari) (expressing his view that "the time may now be ripe for a reconsideration of the Court's conclusion in *Monroe* that the 'federal remedy is supplementary to the state remedy' "); Baker v. McCollan, 443 U.S. 137, 146 (1979) ("false imprisonment does not become a violation of the Fourteenth Amendment merely because

defined labels "arbitrary" and "capricious" can be attached to all sorts of government conduct, thus imposing undue strain on federal judicial resources, as well as on state/federal relations.[204] As to the latter, there is concern that federal court litigation, whether successful or not, may fiscally devastate state and local government entities and deter citizens from assuming public office.[205]

All of these concerns have been amply addressed by the Supreme Court. The limitations which the Court has imposed on substantive due process through *Daniels v. Williams*,[206] *Graham v. Connor*,[207] and *DeShaney v. Winnebago County Dep't. of Social Services*[208] have considerably narrowed the reach of this doctrine. By requiring plaintiffs to establish an affirmative duty and scienter, and by eliminating any overlap with fourth and eighth amendment claims, the range of government misconduct actionable and, thus, the number of suits which may be brought under this clause has already been significantly reduced. Further, the Supreme Court has more generally constricted civil rights litigation, guarding against frivolous suits and limiting the accountability of both government officials and government entities. The availability of fees for vexatious, frivolous litigation pursuant to the Civil Rights Attorney's Fees Act,[209] as well as the increased successful invocation of

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the defendant is a state official . . . [R]emedy for [this] type of injury must be sought in state court under traditional tort-law principles."); Paul v. Davis, 424 U.S. 693, 701 (1976) (the Court should resist making the due process clause "a font of tort law to be superimposed" on state systems); *see also* Shelton v. City of College Station, 780 F.2d 475, 481 (5th Cir.), *cert. denied*, 477 U.S. 905 (1986) (urging a highly deferential approach regarding substantive due process challenges to zoning decisions because such federal interference would inject the courts into "matters historically the business of states and subject to [state] police power").

204. *See, e.g.*, Silverman v. Barry, 845 F.2d 1072, 1079 (D.C. Cir. 1988) ("the Supreme Court has not enunciated a standard by which to determine precisely which state lapses constitutes substantive due process violations . . . ."); Justice v. Dennis, 793 F.2d 573, 577 (4th Cir. 1986) (Rochin v. California, 342 U.S. 165 (1952), provides little guidance to the lower courts as to when substantive due process has been violated); Wells & Eaton, *supra* note 24, at 234-52 (discussing the vagueness and subjectivity of the "shock the conscience" test caused by the Supreme Court's continued failure to confront the scope of substantive due process).

205. *See* Burnham, *supra* note 8, at 541-42 (noting the concern in constitutional tort cases that imposing personal money damage against individual defendant officials raises fairness questions and a concern that such awards will have a chilling affect on governmental decision making and on the overall appeal of public service, and that elevating basic tort issues into constitutional issues will "cheapen the currency" of the Constitution).

206. 474 U.S. 327 (1986).

207. 109 S. Ct. 1865 (interim ed. 1989).

208. 109 S. Ct. 998 (interim ed. 1989).

209. 42 U.S.C. § 1988 (1976). The statute provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the cost." *Id.* The Court has interpreted this provision to allow a prevailing defendant to recover a fee where the suit is "vexatious, frivolous, or brought to harass or embarrass the defendant." Hensley v. Eckerhart, 461 U.S. 424, 429 n.2 (1983).

Rule 11 sanctions,[210] already significantly deter truly unfounded claims. Further, recent Supreme Court decisions have strengthened summary judgment as an effective tool for disposing of weak cases at an early stage in litigation.[211] Damage liability concerns are mitigated by the doctrines of absolute and qualified immunity which safeguard individual officials,[212] and the Court's rejection of the doctrine of respondeat superior insulates government entities from monetary liability unless a policy maker's conduct is challenged or a custom or policy is established.[213] In light of all of these existing safeguards and limitations, federal courts should not be reluctant to recognize substantive due process claims provided the plaintiff (1) identifies a property or liberty interest within the broad, historic meaning of those terms, and (2) alleges arbitrary, capricious misconduct which manifests intentional or deliberately indifferent disregard for the victim's rights. Applying this analysis, substantive due process would continue to play a vital role in remedying government abuse of power in several areas, even where fundamental rights are not implicated.

A. Employment

The right to be free from arbitrary government interference in gainful employment should be recognized as a protected liberty interest, regardless of whether the state or local government employer has created a "legal claim of entitlement" or a property right necessary to

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210. Rule 11 of the Federal Rules of Civil Procedure requires that an attorney who signs "a pleading, motion or other paper" thereby certifies that the contents are "well-grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." FED. R. CIV. P. 11. The rule provides that "appropriate sanctions" may be ordered for its violation. *See* Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989); Grim, *The Horizon of Rule 11: Toward a Guided Approach*, 26 HOUS. L. REV. 535 (1989).

211. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (to survive summary judgment under Rule 56, non-movant must present a "genuine factual dispute," i.e., one which "presents a sufficient disagreement to require submission to a jury"); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (to avoid summary judgment opposing party must show a genuine issue of material fact that impinges upon a decisive question of law); *see also* Braley v. City of Pontiac, 906 F.2d 220, 226 (6th Cir. 1990) (district courts are free to determine that, as a matter of law, certain behavior does not "shock the conscience," thus justifying grant of summary judgment).

212. The Supreme Court has held that immunity defenses which existed for government officials under the common law continue to insulate such officials from current civil rights litigation. Scheuer v. Rhodes, 416 U.S. 232, 244 (1974) (absolute immunity extends to judges, legislators and prosecutors whereas qualified immunity shields most executive officials from damage liability unless they act in violation of clearly established law); *see also* Harlow v. Fitzgerald, 457 U.S. 800 (1982) (defining the scope of qualified immunity).

213. *See* Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978) ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

trigger procedural due process.[214] A government entity which terminates an employee for improper motives or whose decision-making crosses the line of reasonableness should be held accountable.[215] In such a situation, the employee is not arguing that he has an entitlement to a hearing prior to the discharge, but rather is claiming that the reasons for the discharge are impermissible and reflect clear government abuse of power.[216] Thus, an employee who is terminated for refusing to condone or participate in a government entity's wrongdoing should have a viable substantive due process claim even if the employment is "at will" and even if the employee's conduct does not fall within the protection of an explicit federal statutory or constitutional guarantee such as the first amendment.[217] Similarly, employees who are not terminated, but who are subjected to arguably capricious terms of employment should have the right to challenge such abuses of power. The Supreme Court has recognized that government employees do not relinquish their constitutional rights upon accepting government employment.[218] Therefore, there is no reason to allow government employers free reign to impose unreasonable regulations or unsafe working conditions on government employees.[219]

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214. *See supra* notes 184-86 and accompanying text.

215. Morris v. Clifford, 903 F.2d 574, 577 (8th Cir. 1990) (teacher has a substantive due process right to be free from discharge for reasons that are "arbitrary and capricious," i.e., for reasons that are "trivial, unrelated to the education process, or wholly unsupported by a basis in fact"); Yashon v. Hunt, 825 F.2d 1016, 1027 (6th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) (substantive due process violation will be found if hospital fails to prove denial of staff privileges to doctors was "untainted by irrelevant considerations and supported by substantial evidence to free it from arbitrariness, capriciousness, or unreasonableness"); Barnett v. Housing Auth., 707 F.2d 1571, 1577-78 (11th Cir. 1983) (where actual motives for discharge are shown to differ from asserted reasons and evidence suggested that board members improperly discharged plaintiff to assuage public pressure, the employee stated a viable substantive due process violation); Johnson v. Branch, 364 F.2d 177, 181 (4th Cir. 1966) (although a school board has discretion in deciding whether to renew a teacher's employment contract, "[d]iscretion means the exercise of judgment, not bias or capriciousness. Thus it must be based upon fact and supported by reasoned analysis."); *See also* cases cited *supra* note 90.

216. Although loss of a job does not involve the type of physical intrusion recognized in *Rochin*, or in the school corporal punishment or detainee excessive force cases, liability should not rest on severity of measurable harm but rather on the "lack of any good reason to tolerate badly motivated harm and the personal affront suffered by the plaintiff." Wells & Eaton, *supra* note 24, at 249. Further, the right to pursue a gainful occupation traditionally was recognized as sufficiently crucial to warrant protection under the liberty guarantee of the due process clause. *See supra* notes 30-31 and accompanying text.

217. Honore v. Douglas, 833 F.2d 565, 569 (5th Cir. 1987) (genuine issue of material fact as to whether professor's substantive due process rights were violated by an alleged arbitrary termination from employment precludes summary judgment).

218. Branti v. Finkel, 445 U.S. 507, 515-16 (1980); Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967).

219. *See, e.g.*, Pence v. Rosenquist, 573 F.2d 395 (7th Cir. 1978) (substantive due process was violated when school board fired woman for wearing a mustache). *But see* Rathert v. Village

Further, the lower courts should acknowledge a substantive due process limitation on government's power to interfere with the private employment sector. The Supreme Court has recognized "a right to hold specific private employment . . . free from unreasonable governmental interference;"[220] thus, a private employee who loses his job because of arbitrary government conduct should have an actionable claim.[221] This same protection should apply to individuals whose right to gainful employment is curtailed by government's arbitrary refusal to grant a license or permit.[222] There is no reason to provide greater protection to

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of Peotone, 903 F.2d 510 (7th Cir. 1990) (regulation that forbids police officers from wearing earstuds even while off-duty bears a rational relationship to a legitimate public interest and thus does not violate substantive due process); Swank v. Smart, 898 F.2d 1247 (7th Cir. 1990) (restrictions or reprimands on public employees should be found to violate substantive due process only if utterly unreasonable; although terminating police officer for giving a teenage girl a ride home late at night on his motorcycle may appear to be an overreaction to an incident trivial by itself, in light of the surrounding circumstances it does not suggest denial of substantive due process); Anderson v. City of Philadelphia, 845 F.2d 1216 (3d Cir. 1988) (use of polygraph for pre-employment screening did not violate substantive due process); Grusendorf v. City of Oklahoma City, 816 F.2d 539 (10th Cir. 1987) (although the state cannot arbitrarily condition employment upon an agreement to refrain from private, personal activities, fire department's non-smoking regulation that prohibited smoking on and off duty for one year was rationally related to legitimate state purpose and thus survives substantive due process analysis); Walker v. Rowe, 791 F.2d 507 (7th Cir. 1986) (due process does not assure safe working conditions for public employees, and thus government cannot be held liable for deaths and injuries suffered in prison riot).

220. Harrah Indep. School Dist. v. Martin, 440 U.S. 194, 199 (1978).

221. *See* Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 240 (1988) (FDIC's suspension of indicted bank president was unconstitutional because "the FDIC cannot arbitrarily interfere with [plaintiff's] continuing employment relationship with the bank"); Di Martini v. Ferrin, 906 F.2d 465, 466 (9th Cir. 1990) (plaintiff "has a clearly established constitutional right to be free from unreasonable government interference with his private employment"); Chernin v. Lyng, 874 F.2d 501, 504-06 (8th Cir. 1989) (employee discharged allegedly due to pressure put on private employer by Secretary of Department of Agriculture has a viable due process claim from arbitrary government interference regardless of whether employer may dissolve the relationship at will). *But see* Merritt v. Mackey, 827 F.2d 1368, 1371 (9th Cir. 1987) (a legitimate claim of entitlement to continued employment must be proven before a due process violation can exist from unreasonable government interference with one's employment).

222. *See* Marks v. City of Chesapeake, 883 F.2d 308, 309-10 (4th Cir. 1989) (plaintiff denied a conditional use permit to operate a palmistry business where city officials "simply succumbed to 'irrational neighborhood pressure' founded in religious prejudice" convincingly established that the council's deliberations were tainted by impermissible considerations in violation of substantive due process; "[i]rrational, arbitrary governmental measures taken against a politically unpopular target on the basis of complaining neighbors' fears or negative attitudes are repugnant to constitutional guarantees"); Wilkerson v. Johnson, 699 F.2d 325 (6th Cir. 1983) (the right to a barber shop license is a liberty interest protected by the Constitution regardless of the existence of state remedies). *But see* Amsden v. Moran, 904 F.2d 748, 754, 757-58 (1st Cir. 1990) (even if board's revocation of surveyor's license was done in excess of statutory authority, it was not sufficiently " 'shocking or violative of universal standards of decency' " as to find a due process violation) (quoting Furtado v. Bishop, 604 F.2d 80, 95 (1st Cir. 1979)); Easter House v. Felder, 879 F.2d 1458 (7th Cir. 1989), *vacated*, 110 S. Ct. 1314 (interim ed. 1990), *aff'd*, 910 F.2d 1387 (7th Cir. 1990) (even if high ranking officials allegedly conspired to deprive private citizen of operating license, existence of state remedies forecloses due process claim; further allegations that licensing

licensing boards than to zoning boards, whose decisions have traditionally been subject to substantive due process limitations.[223]

B. Land Use

An individual who is arbitrarily denied the use of his land by a zoning board or other land commission should be permitted to invoke substantive due process even though only property is implicated and even if the government's conduct may not constitute a taking within the meaning of the fifth amendment.[224] Further, the existence of state remedies should not affect the viability of the claim.[225] Although the instances in which it can be proved that an agency's decision-making is totally arbitrary may be infrequent, case precedent unfortunately suggests that abuses of power do occur.[226] Thus, the substantive due process assurance should continue to serve both to deter such wrongdoing and to provide a remedy when it in fact occurs.

C. Corporal Punishment

A child who has been severely beaten or abused by a school teacher should be allowed to sue that government official for the injuries inflicted.[227] Although the Supreme Court has held that procedural

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officials conducted investigation in a manner calculated to discourage customers and interfere with licensee's business do not rise to the level of a property deprivation of constitutional magnitude); Neuwirth v. Louisiana State Bd. of Dentistry, 845 F.2d 553, 558 (5th Cir. 1988) (because plaintiff "has no constitutionally protected interest in practicing dentistry in Louisiana without taking an examination," he fails to meet a prerequisite to asserting a substantive due process violation).

223. *See supra* notes 72-76 and accompanying text.

224. Nollan v. California, 483 U.S. 825 (1987). It appeared as though the Court might be embarking upon an even more stringent analysis of deprivations of property under the taking clause by requiring police power regulations to "substantially advance" a legitimate state interest. *Id.* at 833. Four Justices, however, challenged the Court's rigid interpretation of the nexus requirement which "creates an anomaly in the ordinary requirement that a state's exercise of its power need be no more than rationally based." *Id.* at 846. (Blackmun, J., dissenting). *See generally* Cordes, *supra* note 78 & Note, *supra* note 78 for further explanation of this development.

225. *See* cases cited *supra* note 79.

226. *See* cases cited *supra* note 78. *See also* Cordes, *supra* note 78, at 168 ("the ad hoc, discretionary nature of [zoning] decisions makes them subject to substantial abuse and unfairness").

227. *See, e.g.*, Metzger v. Osbeck, 841 F.2d 518, 520-21 (3d Cir. 1988) (if evidence establishes that physical education instructor imposed restraints resulting in broken bones and other injuries to student with intent to cause harm, defendant will be subject to liability for crossing "constitutional line" separating common-law tort from deprivation of substantive due process); Garcia v. Miera, 817 F.2d 650, 653 (10th Cir. 1987) (corporal punishment so grossly excessive as to be shocking to the conscience violates a student's substantive due process rights), *cert. denied*, 485 U.S. 959 (1988); Hall v. Tawney, 621 F.2d 607, 610-13, 611 n.4 (4th Cir. 1980) (corporal punishment so severe or so inspired by malice or sadism as to amount to "brutal and inhumane abuse of official power" states a viable claim for violation of substantive due process rights which serves "as a last line of defense against those literally outrageous abuses of official power whose very variety makes formulation of a more precise standard impossible"). *But see* Fee v. Herndon,

due process claims involving the use of corporal punishment are foreclosed, primarily due to the existence of state tort remedies,[228] the Court has left unanswered the substantive due process question.[229] As noted earlier, the existence of state tort remedies should be unrelated to the question of whether school officials have deliberately abused their power.[230] The logic of *Rochin v. California*[231] and *Regents of the University of Michigan v. Ewing*[232] dictates that where the misconduct reflects a substantial breach of sound educational judgment, lower courts should not hesitate to find a violation of substantive due process. As in

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900 F.2d 804, 808 (5th Cir. 1990) (despite findings that child was hospitalized as a consequence of the beating and forced to spend a total of six months in a psychiatric ward at a cost of almost $90,000, court concluded that "injuries sustained incidentally to corporal punishment, irrespective of the severity of these injuries or the sensitivity of the student, do not implicate the due process clause if the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions"); Cunningham v. Beavers, 858 F.2d 269, 272-73 (5th Cir. 1988) (excessive corporal punishment in individual cases does not violate substantive due process), *cert. denied*, 109 S. Ct. 1343 (interim ed. 1989); Wise v. Pea Ridge School Dist., 855 F.2d 560, 564-65 (8th Cir. 1988) (even if corporal punishment is excessive and beyond common-law privilege, it does not violate substantive due process unless it shocks the conscience and amounts to a severe invasion of a student's personal security and autonomy).

228. Ingraham v. Wright, 430 U.S. 651 (1977). The Court found a liberty interest in being free from any "appreciable physical pain," but then concluded that state common law remedies satisfied procedural due process. *Id.* at 674, 676-80.

229. *Id.* at 659 n.12; *see also* Fee v. Herndon, 900 F.2d 804, 808 (5th Cir. 1990) ("the *Ingraham* Court declined to address whether teacher discipline can be so capricious as to violate the amorphous substantive due process guarantees inherent in the fourteenth amendment"); Rosenberg, *supra* note 107, at 403 n.15. The circuit decisions have created four separate and conflicting tests as to whether corporal punishment implicates substantive due process, namely: (1) an absolute refusal to recognize a substantive due process claim (5th Cir.); (2) severe and disproportionate discipline with a requirement of malice (4th Cir.); (3) severe and disproportionate discipline without malice (10th Cir.); (4) severe and disproportionate discipline with a requirement of gross negligence or recklessness (3rd Cir.). This list stems from a brief filed for certiori in the case of Cunningham v. Beavers, 858 F.2d 269 (5th Cir. 1988) (No. 88-1181), *cert. denied*, 109 S. Ct. 1343 (interim ed. 1989). The article provides an in-depth analysis as to why substantive due process should be available to challenge corporal punishment in the schools, focusing especially on the problematic Fifth Circuit position that substantive due process is unavailable because of the existence of state court remedies. *See Herndon*, 900 F.2d at 808 (states that affirmatively proscribe and remedy mistreatment of students by educators do not by definition act "arbitrarily" and thus a necessary predicate for substantive due process cannot be satisfied).

230. *See supra* notes 110-15 and accompanying text. *But see* Coriz v. Martinez, 915 F.2d 1469, 1470 n.1 (10th Cir. 1990) (there are three categories of corporal punishment—those punishments that do not exceed the traditional common law standard and are thus not actionable; those that exceed the standard without state remedies contrary to procedural due process; and those that are so grossly excessive as to shock the conscience and violate substantive due process *without regard to the adequacy of state remedies*); Rosenberg, *supra* note 107, at 424-37 (existence of state remedies is no more relevant to substantive due process claims involving corporal punishment than it is to the racially discriminatory application of corporal punishment: "[i]n Ingraham the state criminal and tort remedies were legally relevant only to plaintiffs' argument that they were entitled to a hearing prior to the infliction of appreciable physical pain").

231. 345 U.S. 165 (1952); *see supra* notes 50-52 and accompanying text.

232. 474 U.S. 214 (1985); *see supra* notes 96-98 and accompanying text.

police brutality cases, judges and juries should be permitted to balance the extent of force in relation to need and the extent of injury, as well as consider evidence of improper motive, to determine whether a school official's conduct amounts "to an abuse of official power that shocks the conscience."[233] The same analysis should be available to protect children who suffer abuse in state-regulated foster homes or other institutions where the "custodial relationship" requirement of *DeShaney* is satisfied.[234]

D. Police and Prosecutorial Misconduct

Pretrial detainees who are entitled to neither fourth nor eighth amendment protection should be permitted to sue under substantive due process when government officials subject them to arbitrary, capricious mistreatment. The concern that substantive due process is a vague, unbridled limitation on government power is significantly mitigated by recognizing that substantive due process merely extends the same well-developed guarantees afforded convicted prisoners under the eighth amendment.[235] As the Court enunciated in *Whitley v. Albers*,[236] the test is "whether the use of force could plausibly have been thought necessary," or whether the action is taken "in bad faith for no legitimate purpose."[237] If there is no basis for inflicting injury or if the injury is totally disproportionate to reasonable need, courts should not

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233. *See infra* notes 237-38. There is some disagreement among the circuits as to whether "significant injury" is a prerequisite to meeting the shocking-conduct standard. *See* Rosenberg, *supra* note 107, at 416-419; *see also* Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) ("[t]he substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience").

234. *See, e.g.*, Meador v. Cabinet for Human Resources, 902 F.2d 474, 476 (6th Cir. 1990) (since substantive due process extends a right to be free from infliction of unnecessary harm to children in state-regulated foster homes, complaint alleging that state officials were deliberately indifferent to reports of abuse in the home states an actionable due process claim).

235. *See supra* notes 160-62 and accompanying text.

236. 475 U.S. 312 (1986).

237. *Id.* at 321. In determining whether excessive force has been used, several courts have applied the standard set forth in Johnson v. Glick, 481 F.2d 1028 (2d Cir.), *cert. denied sub nom.* Employee-Officer John v. Johnson, 414 U.S. 1033 (1973):

> [a] court must look to such factors as the need for the application of force, the relationship for the need and the amount of force that was used, the extent of injury inflicted and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Glick, 481 F2d at 1030. These factors were cited with approval by the Supreme Court in *Whitley*, to find a cognizable due process claim where a guard assaults a pre-trial detainee. 475 U.S. at 321; *see also* Graham v. Connor, 109 S. Ct. 1865, 1868-70 (interim ed. 1989) (discussing the substantive due process standard used to assess excessive force cases under the substantive due process guarantee).

refrain from finding a violation of substantive due process.[238] When coupled with the highly deferential approach the Court uses in assessing substantive due process claims which involve professional decision-making,[239] fears of judicial activism and federal encroachment on state affairs seem misplaced.

Further, substantive due process relief should be available to all those who are injured as a result of a police officer's deliberate indifference to the safety of citizens. Although *DeShaney* places severe restrictions on holding government liable for "failure to act," it should not be expansively read to insulate government officials who recklessly create a dangerous situation.[240]

Finally, the lower courts should recognize viable substantive due process claims for malicious prosecution where government officials abuse their position of power by bringing false claims or entrapping citizens into violating the law.[241] Too many lower courts have adopted the unduly rigid and unwarranted position that anything short of physical abuse cannot meet the "shocks the conscience" standard.[242] Supreme Court case precedent refutes this strained interpretation.[243]

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238. *See* cases cited *supra* note 166; *see also* Urboyna, *supra* note 165, at 177 ("in striking the balance under all three categories of personal security claims, courts have considered the . . . [following] factors—the need for the force, the relationship between the need and the amount of force, and the extent of injury . . . [I]n order to establish consistency in addressing personal security claims, court should recognize that the fundamental inquiry in all of these claims is whether the force was unjustified").

239. *See* discussion of Youngberg v. Romeo, *supra* notes 56-57 and accompanying text; *Ewing*, *supra* notes 92-99 and accompanying text.

240. *See supra* notes 142-53 and accompanying text.

241. *See, e.g.*, Conway v. Village of Mount Kisco, 758 F.2d 46 (2d Cir. 1985), *cert. denied*, 479 U.S. 84 (1986) (seven hours of detention and accompanying humiliation, ridicule and mental anguish state a substantive due process violation); United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), (Drug Enforcement Agency violated substantive due process when it provided defendant with the idea to manufacture drugs, as well as money and a site for the laboratory).

242. *See* Morales v. Ramirez, 906 F.2d 784, 790 (1st Cir. 1990) (even if defendants manipulatively instigated criminal prosecution based on slanted investigation and without probable cause, their conduct was neither conscience-shocking nor so egregious as to violate due process); Braley v. City of Pontiac, 906 F.2d 220, 226 (6th Cir. 1990) (it is doubtful that malicious prosecution outside the realm of excessive force or physical abuse will meet the shock the conscience standard necessary to find a substantive due process violation); Gunderson v. Schlueter, 904 F.2d 407, 410-11 (8th Cir. 1990) (although allegations that law enforcement authorities went too far in manufacturing a crime and entrapping a defendant might state a substantive due process violation, the conduct here was not so objectionable as to rise to the high level needed to prove constitutional wrongdoing); Torres v. Superintendent of Police of Puerto Rico, 893 F.2d 404, 409-11 (1st Cir. 1990) (although claims of malicious prosecution may be actionable under § 1983, where plaintiff has not been physically abused, detained or prosecuted due to racial or political motivation, courts are reluctant to find "conscience-shocking" conduct that would implicate a constitutional violation); United States v. Simpson, 813 F.2d 1462, 1465-68 (9th Cir. 1987) (no substantive due process violation where DEA agents knew their informant was sexually involved with target during several months of investigation).

243. *See* United States v. Russell, 411 U.S. 423, 431-32 (1973) (conduct of law enforce-

V. CONCLUSION

Historically, substantive due process has been available to challenge egregious deprivations of property and liberty, whether perpetrated through legislative or administrative enactments, or by the misconduct of government officials. The Supreme Court has given a broad definition to the term "liberty" to deter and punish abuses of government power, and has also applied the substantive due process guarantee to deprivations of property. Recent Supreme Court decisions have significantly curtailed the reach of substantive due process and have no doubt contributed to the confusion in the lower courts. However, this article contends that many courts have adopted an unduly, expansive interpretation of Supreme Court precedent and have created new obstacles which have no basis in light of current doctrine. Too often, lower courts have denied relief in cases alleging abuse of government power by erroneously finding that substantive due process does not apply at all, either because of the absence of a "constitutionally protected" property or liberty interest or because of the existence of state remedies.[244] Other courts have refused to find that the conduct "shocks the conscience," no matter how egregious.[245]

This article suggests that if the hurdles set forth by the Supreme Court are met, there is no justification for the lower courts' restrictive construction of the substantive due process guarantee. Assuming that a property or liberty interest within the historically broad meaning of those terms[246] has been adversely affected by intentional or recklessly indifferent government misconduct,[247] federal courts should recognize a viable substantive due process claim. They should permit juries[248] to

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ment agents in manufacturing a crime and inducing defendant into it may be so outrageous that due process principles are violated); *accord* Hampton v. United States, 425 U.S. 484, 492-95 (1976) (Powell, J., concurring)

244. *See* cases cited *supra* notes 182-86 and accompanying text.

245. *See* cases cited *supra* notes 79, 126, 227 and 242; *see also* Mark v. Caldwell, 754 F.2d 1260, 1261 (5th Cir.), *cert. denied*, 475 U.S. 945 (1985) (although slaps inflicted by police officer were arguably unnecessary and malicious, conduct was not actionable since there was no severe injury).

246. *See supra* notes 190-91 and accompanying text.

247. *See supra* notes 125-31 and accompanying text.

248. Several courts have acknowledged plaintiff's right to a jury resolution of a substantive due process claim where the evidence creates a genuine issue of material fact as to the arbitrary and capricious nature of the government's conduct. *See, e.g.*, White v. Roper, 901 F.2d 1501, 1503-06 (9th Cir. 1990) (district court erred in granting summary judgment where genuine issue of material fact existed as to whether officer was deliberately indifferent to pretrial detainee's personal safety or intended to punish him by ordering him into a cell with another detainee with a history of violent behavior); Honore v. Douglas, 833 F.2d 565, 569 (5th Cir. 1987) (same); Trujillo v. Goodman, 825 F.2d 1453, 1458-59 (10th Cir. 1987) (the "shocks the conscience" test normally presents a jury question where egregious conduct is alleged); *accord* Robison v. Via, 821 F.2d 913, 927 (2d Cir. 1987); Checki v. Webb, 785 F.2d 534, 538 (5th Cir. 1986).

assess whether government officials have crossed the bounds of reasonableness and fair play, so as to justify the imposition of liability for constitutional wrongdoing.