Time to Bury the Shocks the Conscience Test

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The Supreme Court has acknowledged that "the Due Process Clause, like its forebear in the Magna Carta, was 'intended to secure the individual from the arbitrary exercise of the powers of government' . . . to prevent governmental power from being 'used for purposes of oppression.'"[1] *Historically, Magna Carta was aimed at limiting the power of the king. Today, substantive due process is invoked to challenge arbitrary deprivations of life, liberty, and property by officials, such as police officers, jail guards, public-school educators, public employers, and members of zoning boards. However, the Supreme Court has emasculated its efficacy as a limitation on executive power. In 1998, in* County of Sacramento v. Lewis*, it held that the "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue."*[2] *Whereas legislative enactments are subject to varying levels of scrutiny depending on the nature of the rights at stake, the Court asserted that only the most egregious executive misconduct, that which "shocks the conscience," will be actionable.*[3]

Since 1998, Lewis *has created significant confusion and division in the appellate courts, severely restricting the ability of detainees, students, government employees, and landowners, to bring substantive due process challenges to the arbitrary exercise of power. Some circuits have required that litigants prove that executive misconduct both infringe on a fundamental right and shock the conscience. Because neither employment nor property are regarded as fundamental rights, most allegations of arbitrary treatment brought by government employees and landowners are dismissed. Other appellate courts allow substantive due process challenges to the deprivation of non-fundamental property or liberty interests only where the litigant demonstrates the inadequacy of state law remedies, thereby permitting the vagaries of state tort law to determine the fate of constitutional claims.*

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1 Daniels v. Williams, 474 U.S. 327, 331 (1986) (citations omitted).

2 County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

3 *Id.*

Further, the appellate courts have interpreted the "shocks the conscience" test to impose a draconian standard, mandating, for example, that detainees demonstrate unnecessary and wanton infliction of pain or that students prove intentional malice or sadism in order to challenge excessive, unwarranted corporal punishment.

The thesis of this Article is that the "shocks the conscience" test, which is founded on a false dichotomy between substantive due process challenges to executive and legislative action, should be rejected. First, it is historically untenable. The core concern of Magna Carta, the source of substantive due process, was to limit executive abuse of power. This was the understanding of those who framed and ratified the Due Process Clause. Thus, it is counterintuitive to make it more difficult for plaintiffs to challenge executive misconduct. Second, Lewis *rests on shaky precedent and has not been consistently adhered to by the Supreme Court in subsequent cases. Third, the concern cited by the Court to justify a more stringent standard for executive action—fear of converting § 1983 substantive due process claims into a "font of tort law"—is unfounded and exaggerated. Section 1983 should not drive constitutional interpretation, and immunity defenses already significantly insulate government officials and entities sued for § 1983 damages. Fourth, the numerous circuit conflicts demonstrate that the test has proven to be an unworkable analytical tool.*

To restore substantive due process as a meaningful safeguard against arbitrary abuse of government power, Lewis *should be overturned. Recognizing, however, the concerns of subjectivity and unbridled discretion that have surrounded the substantive due process conundrum, this Article proposes a new test with specific criteria, extrapolated from various Supreme Court and appellate court decisions, to guide courts in determining when government misconduct should be viewed as an unconstitutional abuse of power.*

INTRODUCTION

The Supreme Court has recognized substantive due process as a limitation on all three branches of government—legislative, executive, and judicial. In the nineteenth century, substantive due process was invoked to strike down laws that interfered with economic liberty.[4] Although the Supreme Court subsequently

[4] In *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897), the Court held that a state statute restricting property owners from obtaining insurance from companies that failed to comply with state law interfered with the liberty of the individual "to earn his

repudiated the close scrutiny to which the *Lochner* Court subjected economic legislation, the concept that substantive due process protects against arbitrary legislation remains intact. Under economic substantive due process, laws need only be "rationally related to a legitimate state interest."[5] The challenger has the burden to prove that the legislature "acted in an arbitrary and irrational way."[6] However, when a statute interferes with certain personal rights heightened scrutiny is used. Under the classic formulation, when a right is classified as fundamental, the state carries the burden of proving that infringement of the right is narrowly tailored to meet a compelling government interest.[7] Further, the Court has at times invalidated laws that interfere with non-fundamental, but core, liberty interests by imposing an undue burden test[8] or a balancing test.[9]

livelihood by any lawful calling." *Allgeyer* was the forerunner of *Lochner v. New York*, 198 U.S. 45 (1905), which invalidated on substantive due process grounds a New York law prohibiting the employment of bakers for more than ten hours per day or sixty hours per week. *Id.* at 52. The historic source for substantive due process is discussed, *infra* Part II.A.

5 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (explaining the deferential standard that applies to economic legislation).

6 Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).

7 Washington v. Glucksberg, 521 U.S. 702, 721 (1997). In his concurring opinion, Justice Souter cites Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), as providing the basis for the modern doctrine of substantive due process and unenumerated personal rights. *Glucksberg*, 521 U.S. at 762–63 (Souter, J., concurring).

8 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (holding that substantive due process prohibits state regulation that unduly burdens the abortion decision).

9 Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that public morality alone could not justify a state sodomy statute targeting only same-sex conduct, which intruded "into the personal and private life of the individual"). *Lawrence* has created a circuit split as to the appropriate standard of review to apply when a liberty interest in sexual intimacy is implicated. It has also created conflicting opinions as to whether public morality may justify laws that intrude on this personal liberty interest. *See, e.g.*, Seegmiller v. LaVerkin City, 528 F.3d 762, 771–72 (10th Cir. 2008) (holding that *Lawrence* did not recognize a broad-based fundamental right to engage in sexual conduct, but rather applied only rational basis analysis and, under this standard, private reprimand of female officer for off-duty private sexual conduct with another officer at a training conference does not violate substantive due process); Cook v. Gates, 528 F.3d 42, 56 (1st Cir. 2008) (acknowledging that some courts have read *Lawrence* to apply a rational basis test while others see the case as mandating strict scrutiny, but then interpreting *Lawrence* as having recognized a protected liberty interest for adults to engage in private, consensual sexual intimacy, which triggered a balancing test that cannot fit neatly under either strict or rational basis analysis); Witt v. Dep't of Air Force, 527 F.3d 806, 819, 821 (9th Cir. 2008) (holding that *Lawrence* mandates application of a heightened level of scrutiny to the claim of Air Force nurse alleging that defendants violated her substantive due process rights by suspending her from duty because of her sexual relationship with a civilian woman; although rejecting a facial challenge to the military's "Don't Ask, Don't Tell" policy, the court remanded for heightened scrutiny of the policy "as applied" to the plaintiff); Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 743–45 (5th Cir. 2008) (holding that, after *Lawrence*, an interest in public morality is

In addition, the Supreme Court has invoked substantive due process to limit "grossly excessive" punitive damage awards imposed by the judicial branch of government.[10] Despite the fact that property, not fundamental liberty, is at stake, such awards have been deemed to violate a defendant's substantive due process right not to be arbitrarily deprived of one's property.[11] The Court established a three-prong test for arbitrariness, looking to the reprehensibility of the defendant's conduct (the most important consideration), the ratio between compensatory and punitive damages (which rarely should exceed single digits), and fines/punishments for the same conduct under state law.[12]

As to the executive branch, the Supreme Court in 1952 recognized that substantive due process protects against wrongdoing by government officials. In *Rochin v. California*,[13] the Court invoked substantive due process defensively in a criminal proceeding to exclude evidence that was obtained by pumping the defendant's stomach.[14] The Court stated that substantive due process is violated by conduct that "shocks the conscience" or constitutes force that is "brutal" and "offend[s] even hardened sensibilities."[15] The shocks the conscience standard appeared to emerge as the test for determining whether misconduct by government officials was so egregious as to violate substantive due process.[16]

In 1998, the Supreme Court, in *County of Sacramento v. Lewis*,[17] invoked *Rochin*'s shocks the conscience test to limit the availability of a § 1983 damage action brought against a deputy

insufficient to justify laws that regulate private sexual conduct, unless it relates to prostitution, the potential for injury or coercion or public conduct; thus, state ban on the promotion or commercial sale of sex toys is invalid "[b]ecause the asserted governmental interests for the law does not meet the applicable constitutional standard announced in *Lawrence v. Texas*"); Williams v. Morgan, 478 F.3d 1316, 1320 (11th Cir. 2007) (holding, contrary to the Fifth Circuit, that Alabama's interest in public morality is a rational constitutional justification for the state's sexual devices statute, which prohibits commercial distribution of any device primarily used for stimulation of human genitals); Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004) (holding that *Lawrence* mandates only application of a rational basis standard of review, and, under this standard, Florida statute prohibiting adoptions by homosexuals does not violate substantive due process).

10 BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996).

11 *Id.* *See also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 412, 418 (2003) (holding that a $145 million punitive damage award was grossly excessive in a case where the jury awarded only $1 million in compensatory damages).

12 *State Farm*, 538 U.S. at 418. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 596–99 (3d ed. 2006) (discussing the procedural and substantive due process limits the Court has imposed on punitive damages awards).

13 342 U.S. 165 (1952).

14 *Id.* at 173–74.

15 *Id.* at 172–73.

16 *See infra* Part I.B.

17 523 U.S. 833 (1998).

sheriff who conducted a deadly high-speed chase of two young boys riding a motorcycle after they failed to obey an officer's command to stop.[18] The Court asserted that, although substantive due process may be used to challenge abuses of executive power, the criteria for such challenges are different from challenges to legislation—they must be limited to the most egregious official conduct.[19] To guard against converting substantive due process into a "font of tort law," only an abuse of power that shocks the conscience is actionable.[20]

Lewis has led to significant confusion in the appellate courts. Because the Court imposed a unique test for abuses of executive power, some appellate courts have rejected substantive due process challenges, even where fundamental rights are implicated, unless the plaintiff can further prove that the government action was "conscience-shocking."[21] Thus, those injured by egregious government wrongdoing must prove both a fundamental right *and* conscience-shocking behavior in order to state a cause of action. This restriction has eliminated substantive due process in many circuits as a source of protection from arbitrary employment decisions or land use decisions that implicate only non-fundamental property or liberty interests.[22] Further, even with regard to fundamental rights, the shocks the conscience standard has been interpreted to limit claims to only the most egregious misconduct "inspired by malice or sadism."[23]

This Article contends that the Supreme Court took a wrong turn in *Lewis* when it held that substantive due process claims brought against the executive branch must be subjected to a different, more rigorous standard than challenges to legislative or judicial abuses of power. Part I of this Article describes the birth of the shocks the conscience test and its history from *Rochin* in 1952 until *Lewis* in 1998, as well as the appellate courts' conflicting interpretations of *Lewis*, which demonstrate that the test has proved to be an unworkable analytic tool. Part II critiques *Lewis* and explains how the case created a false dichotomy between challenges to legislative versus executive action and imposed an unwarranted standard on those challenging executive misconduct. It describes how the dichotomy is contrary to public originalism and to Supreme Court precedent, both before and after *Lewis*. Further, it

18 *Id.* at 836–37, 854.
19 *Id.* at 846.
20 *Id.* at 846–48.
21 *See infra* Part I.D.
22 *See infra* Part I.D.
23 *See infra* Part I.D.

challenges the underlying rationale for the test. Part III proposes a new test for analyzing challenges to executive power that draws on the Supreme Court's treatment of substantive due process challenges to legislation and punitive damage awards, as well as the appellate courts' interpretation of the shocks the conscience test.

I. THE BIRTH AND DEVELOPMENT OF THE SHOCKS THE CONSCIENCE TEST

A. Stomach Pumping to Secure Evidence Shocks the Conscience

The Supreme Court first utilized the shocks the conscience language in a 1952 decision holding that a conviction based on the use of morphine capsules, which were obtained by pumping the defendant's stomach to induce vomiting, violated the Due Process Clause of the Fourteenth Amendment.[24] The Court did not draw a distinction between using substantive due process to challenge legislative as compared to executive action. Nor did the Court state that only executive misconduct that shocks the conscience violates substantive due process. Rather, the case must be understood in the context in which it was decided.

In 1952, the Supreme Court Justices were engaged in a battle as to whether the provisions in the Bill of Rights, more specifically the criminal procedural safeguards in the Fourth, Fifth, and Sixth Amendments, applied to the states through the Fourteenth Amendment.[25] Justice Frankfurter, who authored the *Rochin* opinion, did not believe that the framers of the Amendment intended for it to incorporate these specific guarantees. Rather, he argued that substantive due process protected against any practices that "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[26] Justices Black and Douglas concurred in the judgment that the evidence so obtained must be excluded, but they relied instead on the explicit Fifth Amendment Self-Incrimination Clause, which they believed applied equally to the states.[27] Justice Black attacked Justice Frankfurter's use of

24 Rochin v. California, 342 U.S. 165, 174 (1952).

25 In *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the Supreme Court held that the provision in the Bill of Rights applied only to the federal government and not to state or local governments. For a history regarding the debate as to whether the Fourteenth Amendment Privileges and Immunities Clause or the Due Process Clause was intended to incorporate the first eight amendments, see CHEMERINSKY, *supra* note 12, at 491–503.

26 *Rochin*, 342 U.S. at 169 (citing Malinski v. New York, 324 U.S. 401, 416–17 (1945)).

27 *Id.* at 174–79 (Black, J., and Douglas, J., concurring).

substantive due process as lacking fixed content, thereby permitting the Justices to impose their own personal predilections of what offends "a sense of justice" or what runs counter to the "decencies of civilized conduct."[28] He challenged "the evanescent standards of the majority's philosophy" as no different from that used during the *Lochner* period to nullify state laws enacted to suppress evil economic practices.[29]

To justify his use of substantive due process, rather than an "incorporated" Fifth Amendment, Justice Frankfurter conceded that substantive due process lacked specificity, but he protested that "[t]he vague contours of the Due Process Clause do not leave judges at large."[30] He believed that judges would be guided by "considerations deeply rooted in reason and in the compelling traditions of the legal profession."[31] It is in this context that he stated that conduct that "shocks the conscience" or "is bound to offend even hardened sensibilities" clearly violates the due process requirement that states "respect certain decencies of civilized conduct."[32] Justice Frankfurter used the shocks the conscience language, among many other descriptive clauses, to establish that judges may legitimately invoke substantive due process to reach practices that "offend the community's sense of fair play and decency."[33]

Significantly, the Justices did not treat Rochin's claim as a substantive due process challenge to *executive* action. Rochin challenged the "state rule" that permitted evidence to be introduced despite the fact that it was obtained through coercive means. Indeed, Justice Douglas, in his concurring opinion, questioned how a "rule" that the majority of states followed, which permitted evidence to be used to convict even if it was forcibly extracted, could be viewed as contrary to established tradition.[34] Although Justice Frankfurter focused on the conduct at issue in rejecting the state's evidentiary rule, his opinion did not draw a distinction between substantive due process challenges to executive as compared to legislative action. As the

28 *Id.* at 175 (Black, J., concurring). Justice Douglas similarly opined that inquiry into "decencies of civilized conduct" permits determinations to turn "on the idiosyncrasies of the judges who sit here." *Id.* at 179 (Douglas, J., concurring).

29 *Id.* at 177.

30 *Id.* at 170.

31 *Id.* at 171. He also asserted that the judicial exercise of judgment should not be avoided by "freezing 'due process of law' at some fixed stage of time or thought"; rather, judges must reconcile the needs "both of continuity and of change in a progressive society." *Id.* at 171–72.

32 *Id.* at 172–73.

33 *Id.* at 173.

34 *Id.* at 177–78 (Douglas, J., concurring) (noting that evidence so obtained would be excluded in only four states).

concurrence noted: "What the majority hold is that the Due Process Clause empowers this Court to nullify any *state law* if its application 'shocks the conscience,' offends 'a sense of justice' or runs counter to the 'decencies of civilized conduct.'"[35] The majority gave no citation to its use of shocks the conscience language, nor did it state that this is *the* test that must be used. Rather, this was merely descriptive language, explaining why admitting the ill-begotten morphine capsules to obtain a conviction violated due process.

B. Shocks the Conscience from 1952 through 1998

Over the next forty-six years, from 1952 until the *Lewis* decision in 1998, the shocks the conscience language from *Rochin* was utilized in only a handful of majority opinions. The Supreme Court did not distinguish legislative from executive misconduct, nor did it consistently invoke the shocks the conscience test. The three key cases that *Lewis* relied upon did not support its analysis. The first, *Breithaupt v. Abram*, applied the shocks the conscience standard in rejecting a habeas petition challenging a police mandate that a physician collect an evidentiary blood sample of an unconscious arrestee.[36] In rejecting the substantive due process claim, the Court explained that numerous states had laws permitting this practice.[37] The Court focused on a legislative rule, which it found did not violate substantive due process.

A second case, *United States v. Salerno*, considered a substantive due process challenge to the pretrial provisions of the Bail Reform Act of 1984.[38] The Court cited both *Rochin*'s shocks the conscience standard and fundamental rights analysis: "substantive due process prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty."[39] The case clearly involved a challenge to legislative action, not executive misconduct. *Rochin* was simply invoked as an alternative way to prove a substantive due process violation where fundamental rights were not implicated.

The third case cited to support the *Lewis* analysis, *Youngberg v. Romeo*, more clearly involved a challenge to executive action. However, the Supreme Court in *Youngberg* did not even mention *Rochin*, nor did it use the shocks the conscience

35 *Id.* at 175 (Black, J., concurring) (emphasis added).
36 Breithaupt v. Abram, 352 U.S. 432, 436–37 (1957).
37 *Id.* at 436, 437 nn.3–4.
38 United States v. Salerno, 481 U.S. 739, 741 (1987).
39 *Id.* at 746 (internal quotation marks and citations omitted).

standard.[40] The case raised the substantive due process rights of those who have been involuntarily committed to state institutions.[41] Although recognizing that the decisions of qualified professionals regarding the treatment and conditions of confinement should be deemed presumptively valid, the Court acknowledged that the liberty interest required the state "to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint."[42] Balancing the competing concerns, the Court held that substantive due process is violated if professional decisions constitute "such 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."[43] The Court did not mandate that arbitrary professional decisions shock the conscience in order to be actionable.

An analysis of every Supreme Court citation to *Rochin* from 1952 to 1998 demonstrates that, outside the context of the evidentiary exclusionary rule,[44] the shocks the conscience test was cited much more frequently in dissenting opinions,[45] often rejected,[46] and strongly criticized.[47] It was never considered to be

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

41 *Id.* at 309.

42 *Id.* at 318–19.

43 *Id.* at 323.

44 *See* Linkletter v. Walker, 381 U.S. 618, 631–32 (1965) (stating that the "shocks the conscience" test is used to determine whether evidence must be excluded). *See also* Illinois v. Gates, 462 U.S. 213, 259 n.14 (1983) (White, J., concurring) (reasoning that evidence obtained as part of a search that "shocks the conscience" must be excluded based on due process).

45 *See* Herrera v. Collins, 506 U.S. 390, 435–37 (1993) (Blackmun, J., dissenting) (opining that the majority's explanation for failing to address the substantive due process "shocks the conscience" argument was "fatuous" and arguing that substantive due process permits defendants to make a claim of actual innocence); Bell v. Wolfish, 441 U.S. 520, 578 (1979) (Marshall, J., dissenting) (arguing that the Court should have found that requiring pretrial detainees to submit to a visual body cavity search after a contact visit "shocks the conscience"); Shotwell Mfg. Co. v. United States, 371 U.S. 341, 378–79 (1963) (Black, J., dissenting) (reasoning, in dissent, that allowing a highly ranked government actor to induce confessions "shocks the conscience"). *Cf.* Fikes v. Alabama, 352 U.S. 191, 193, 201 (1957) (Harlan, J., dissenting) (arguing for application of the "shocks the conscience" test to the confession of an African-American defendant of below-average intelligence after several days of questioning, but ultimately determining that the conduct in question did not shock the conscience).

46 *See* Albright v. Oliver, 510 U.S. 266, 271, 275 (1994) (holding that arrestee's malicious prosecution claim must be judged under the Fourth Amendment, not substantive due process with its "scarce and open-ended" "guideposts"); Graham v. Connor, 490 U.S. 386, 393–94 (1989) (rejecting use of the "shocks the conscience" substantive due process test where a more explicit constitutional right was at stake); Whitley v. Albers, 475 U.S. 312, 327 (1986) (relying on the Eighth Amendment, rather than substantive due process, in a challenge to conditions of confinement, although mentioning that conduct which "shocks the conscience" would likely violate both provisions); Mapp v. Ohio, 367 U.S. 643, 663–66 (1961) (Black, J., concurring) (explicitly

the only standard for challenging executive misconduct,[48] nor was it viewed as supplanting fundamental rights analysis.[49]

C. Lewis Adopts "Shocks the Conscience" as the Exclusive Test to Assess Substantive Due Process Challenges to Executive Misconduct

In 1998, the Supreme Court, in *County of Sacramento v. Lewis*, addressed a substantive due process challenge in the context of a § 1983 damages action.[50] At issue was the alleged reckless conduct of a deputy sheriff who conducted a deadly high-speed chase of two boys riding a motorcycle after they failed to obey an officer's command to stop.[51] Phillip Lewis, the

rejecting the "shocks the conscience" test in favor of a "liberally construed" reading of the Fourth and Fifth Amendments).

47 *Herrera*, 506 U.S. at 428 (Scalia, J., concurring) (opining that if convicting a defendant using proper procedures "shocks the conscience" of the dissenting Justices, they may want to reconsider the usefulness of the "shocks the conscience" test); Carlson v. Green, 446 U.S. 14, 46 n.12 (1980) (Rehnquist, J., dissenting) (lamenting that the "shocks the conscience" test imposes a constitutional standard "sufficiently general that it is difficult to predict in advance whether a particular set of facts amounts to a constitutional violation"); McGautha v. California, 402 U.S. 183, 225–26 (1971) (Black, J., concurring) (reasoning that conviction should be reversed if rights written in the Constitution are violated, not if members of the Court believe the procedures were "shocking to [their] conscience"); *In re* Winship, 397 U.S. 358, 381–82 (1970) (Black, J., dissenting) (discussing how the "shocks the conscience" test gives the judiciary wide latitude to declare laws unconstitutional and disregards the concept of a government of limited power); Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 350–51 (1969) (Black, J., dissenting) (citing the "shocks the conscience" test as an example of a "natural law" test that the Court uses to set its own subjective standards); Foster v. California, 394 U.S. 440, 450 (1969) (Black, J., dissenting) (arguing that the "shocks the conscience" test invites the Court to make its own rules based on personal opinions of individual Justices); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 519–20 (1969) (Black, J., dissenting) (citing the "shocks the conscience" test as an example of a flexible standard that gives the Court no guidance as to when it should find a law unconstitutional); Griswold v. Connecticut, 381 U.S. 479, 511 n.4, 512 (1965) (Black, J., dissenting) (citing the "shocks the conscience" test as an example of the phrase used to decide cases based on judicial "appraisal of what laws are unwise or unnecessary"); Jackson v. Denno, 378 U.S. 368, 407 (1964) (Black, J., dissenting in part and concurring in part) (citing the "shocks the conscience" test as one that impermissibly gives the Justices wide discretion to strike down laws).

48 In addition to the *Youngberg* decision, discussed, *supra* notes 40–43 and accompanying text, see Moran v. Burbine, 475 U.S. 412, 417–18, 433–34 (1986), where the majority used the language "shocks the sensibilities of civilized society" to determine that the police behavior in not making defendant aware that an attorney had been retained on his behalf prior to questioning did not violate this standard. The dissent found that, even if the conduct was not deemed to be conscience-shocking, the circumstances surrounding the defendant's confession were not fair and thus violated due process. *Id.* at 466–68 (Stevens, J., dissenting). *See also* United States v. Russell, 411 U.S. 423, 432 (1973) (using a standard, which it referred to as "shocking to the universal sense of justice," but concluding that it did not shock this universal sense of justice for a police officer to infiltrate a drug ring to obtain evidence).

49 *See supra* notes 38–39 and accompanying text (discussing *Salerno*).

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

51 *Id.* at 836–37.

passenger, was struck and killed.[52] The Court confirmed that substantive due process could be used to challenge abuses of executive power: "Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action . . . ."[53] The majority cautioned, however, that the "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue."[54] With regard to the latter, only "the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"[55] The Court then invoked *Rochin* to rule that only an abuse of power that "shocks the conscience" will be actionable.[56]

In *Lewis*, the Court further refined the *Rochin* test. It reasoned that government officials who act with "deliberate indifference" to constitutional rights "shock the conscience"—citing, for example, prison guards who are deliberately indifferent to the medical needs of pretrial detainees.[57] However, because deliberate indifference implies the opportunity for actual deliberation, the Court determined that the standard could not reasonably apply to police officers who face a situation calling for fast action. Thus, the Court held that injuries resulting from "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment."[58] Because the deceased's family members did not allege that the deputy acted with intent to harm, they failed to meet the shocks the conscience test.[59]

Of key concern to this discussion is the Court's assertion that substantive due process challenges to executive misconduct must be treated differently than challenges to legislation. As noted, when laws allegedly violate due process, the standard of review depends on the threshold determination of whether the legislative enactment infringes on a fundamental right.[60] In *Washington v. Glucksberg*,[61] the Court stated that this inquiry must be made "before requiring more than a reasonable relation to a legitimate state interest to justify the action."[62] Only

52 *Id.* at 837.
53 *Id.* at 845–46.
54 *Id.* at 846.
55 *Id.* (quoting Collins v. City of Harker Heights, 503 U.S. 115, 129 (1992)).
56 *Id.*
57 *Id.* at 851–52.
58 *Id.* at 854.
59 *Id.* at 855.
60 *See supra* note 7 and accompanying text.
61 521 U.S. 702 (1997).
62 *Id.* at 722.

fundamental rights or liberty interests "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" will trigger strict scrutiny analysis.[63]

With regard to claims of executive misconduct, the Supreme Court has never clearly articulated how this fundamental rights inquiry affects the analysis.[64] Obviously, the importance of the right will inform the shocks the conscience judgment because deprivation of a fundamental liberty interest will be more likely to upset our sensibilities. However, the Court has never ruled that without a fundamental right all judicial inquiry must cease.[65]

In *Lewis*, Justice Souter recognized the inherent conflict between *Glucksberg*, which begins its analysis by asking whether a fundamental right is implicated, and the analysis in *Lewis*, which asks whether executive misconduct shocks the conscience.[66] Specifically, he explained in a footnote:

> [E]xecutive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law. Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. That judgment may be informed by a history of liberty protection, but it necessarily reflects an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them. Only if the necessary condition of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action, and only then might there be

63 *Id.* at 720–21 (internal citations and quotations omitted).

64 In *Rochin*, the Court invoked the shocks the conscience test without first identifying a fundamental right. *See supra* Part I.A.

65 In *Glucksberg*, 521 U.S. at 722, the Court described the "threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action." The Court did not rule that the absence of a fundamental right ends the constitutional inquiry. Rather, this simply means that the government action will be tested by a lower level of scrutiny. *Id.* Even Justice Scalia, an outspoken critic of substantive due process, acknowledged that laws not implicating a fundamental right are subject to "the ordinary 'rational relationship' test." *See* Michael H. v. Gerald D., 491 U.S. 110, 131 (1989). Further, the text of the Fourteenth Amendment does not say that government cannot deprive persons of a "fundamental right;" rather, it prohibits all deprivations of "life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Court has acknowledged that the scope of "liberty" is broad: "[A] rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ." Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

66 County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

> a debate about the sufficiency of historical examples of enforcement of the right claimed, or its recognition in other ways.[67]

Under Justice Souter's approach, the question whether particular behavior shocks the conscience would depend in part on a historical review of traditional executive practices. However, this analysis does not appear to mandate further inquiry into the fundamental nature of the right. As held in *Rochin*, which Justice Souter affirmed as binding precedent, conscience-shocking behavior that deprives a person of liberty itself violates substantive due process.[68]

Several Justices in *Lewis* questioned the new dichotomy between executive and legislative action. Justice Kennedy, in a concurring opinion, acknowledged that the challenged action—conducting a reckless high-speed chase—implicated an explicit fundamental liberty interest because a life was lost.[69] He asserted that the shocks the conscience test "can be used to mark the beginning point in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning."[70] His major concern was that, regardless of whether a plaintiff challenges legislative or executive action, "objective considerations, including history and precedent, are the controlling principle."[71]

Justice Scalia questioned why substantive due process "protects some liberties against executive officers but not against legislatures."[72] He opined that Justice Souter's approach would result in greater, not lesser, substantive due process protection against the actions of executive officers than against the actions of legislatures, apparently because he believed the "threshold question" of egregiousness would overwhelm any consideration of the historical inquiry, thus abandoning the strict fundamental-rights approach articulated in *Glucksberg*.[73]

The various opinions in *Lewis* have led the appellate courts to disagree about whether the shocks the conscience standard *replaces* the fundamental rights analysis set forth in *Glucksberg*, or whether the standard *supplements* the historical inquiry into the nature of the asserted liberty interest, as Justice Kennedy's

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67 *Id.* at 848 n.8.

68 *See* Rochin v. California, 342 U.S. 165, 172–74 (1952); *Lewis*, 523 U.S. at 846–47.

69 *Lewis*, 523 U.S. at 856 (Kennedy, J., concurring). Justice O'Connor joined this opinion.

70 *Id.* at 857.

71 *Id.* at 858.

72 *Id.* at 861 n.2 (Scalia, J., concurring). Justice Thomas joined this opinion.

73 *Id.* at 860–61 (Scalia, J., concurring).

concurrence suggests.[74] Several different perspectives have emerged in the appellate courts.

D. Appellate Courts' Conflicting Interpretations of Lewis

Lewis' shocks the conscience test has proven to be an unworkable analytical tool. It has led to circuit splits on several issues. The appellate courts are divided as to whether only violations of fundamental rights, as opposed to non-fundamental liberty or property interests, are actionable. They also disagree as to whether the existence of state tort remedies defeats the federal cause of action. Further, there are disputes as to what constitutes conscience-shocking behavior, including what "state-of-mind" requirement should be imposed. Finally, there is uncertainty as to whether the conscience-shocking determination is a judge or jury question. The following sections explicate these circuit splits.

1. Conduct Must Infringe on a Fundamental Right *and* Shock the Conscience

The appellate courts have taken various approaches in seeking to reconcile the *Glucksberg* analysis, which first examines whether a fundamental right is implicated to determine the appropriate standard of review,[75] with *Lewis*, which focuses on the egregiousness of the government misconduct. Some appellate courts have ruled that absent a fundamental right, no substantive due process claim challenging executive action may be brought. For example, in *Christensen v. County of Boone*, the Seventh Circuit rejected a substantive due process claim brought by a couple who complained that they were stalked and trailed by an officer in his squad car as a result of a personal vendetta.[76] Because the couple could not identify a fundamental right that was directly and substantially interfered with by the officer's conduct, their substantive due process claim failed.[77] Similarly, in *Flowers v. City of Minneapolis*,[78] the Eighth Circuit rejected claims brought against a police lieutenant who directed his officers to conduct a month-long patrol of a private residence because he did not like the occupants, who had a previous encounter with the police, moving into his neighborhood.[79] The court held that absent a showing that the

74 *Id.* at 857–58 (Kennedy, J., concurring).

75 *See supra* notes 61–63 and accompanying text.

76 Christensen v. County of Boone, 483 F.3d 454, 461–65 (7th Cir. 2007).

77 *Id.* at 465.

78 478 F.3d 869 (8th Cir. 2007).

79 *Id.* at 871–72. The lieutenant offered a steak dinner for any officer who made an arrest leading to the conviction or eviction of anyone living at the residence. *Id.*

misconduct violated a fundamental constitutional right *and* shocked the "contemporary conscience," no substantive due process violation could be asserted.[80]

The requirement that conduct infringe on a fundamental right has led the majority of appellate courts to reject all claims brought by government employees alleging arbitrary demotions, suspensions, or terminations. Government employees who allege constructive discharge or injury to future ability to earn a living fail to state a substantive due process claim because they cannot identify a fundamental property or liberty interest.[81] A few courts have recognized a very limited right to substantive due process review of employment decisions where, for example, the government totally prohibits someone from engaging in a calling,[82] but such claims generally are dismissed.[83]

In sharp contrast, the appellate courts, as well as the Supreme Court, have permitted substantive due process challenges to land use regulation (both legislative and executive),

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80 *Id.* at 872–74. *See also* Martin v. St. Mary's Dep't Soc. Servs., 346 F.3d 502, 511–12 (4th Cir. 2003) (Traxler, C.J., dissenting) (reasoning that when courts assess whether action shocks the conscience they should evaluate whether the action violates a right that is rooted in history and tradition; however, because defendants allegedly violated parents' right to custody of their children, a fundamental right was at issue, and the alleged conduct would shock the conscience); Nicholas v. Pa. State Univ., 227 F.3d 133, 139–40 (3d Cir. 2000) (holding that substantive due process is violated only if executive action violates a fundamental right *and* is arbitrary or "shocks the conscience").

81 *See* Hill v. Borough of Kutztown, 455 F.3d 225, 234 n.12 (3d Cir. 2006). *See also* Young v. Twp. of Green Oak, 471 F.3d 674, 684–86 (6th Cir. 2006) ("[a]bsent the infringement of some 'fundamental right', however, this court has held that 'the termination of public employment does not constitute a denial of substantive due process.'"); Silva v. Bieluch, 351 F.3d 1045, 1047 (11th Cir. 2003) (stating that employment rights are state-created and not "fundamental" rights protected by the Constitution); *Nicholas*, 227 F.3d at 142–43 (observing that the great majority of appellate courts have concluded that a public employee's interest in continued employment is not so "fundamental" as to be protected by substantive due process; thus, professor's property interest in his tenured professorship was not entitled to substantive due process protection). *Cf.* Seegmiller v. LaVerkin City, 528 F.3d 762, 767–72 (10th Cir. 2008) (holding that a female officer who was given a private reprimand for off-duty sexual conduct with another officer could establish a substantive due process violation either by showing that the reprimand violated a fundamental right or by showing that the decision was so arbitrary as to shock the conscience; however, the court concluded that *Lawrence* did not recognize a broad-based fundamental right to engage in private sexual conduct, and that the decision was not so arbitrary as to violate substantive due process).

82 *See, e.g.*, Engquist v. Or. Dep't of Agric., 478 F.3d 985, 996 (9th Cir. 2007), *aff'd on other grounds*, 128 S. Ct. 2146 (2008) (holding that employee "stated a valid claim . . . under substantive due process by alleging that Defendants' actions prevented her from pursuing her profession").

83 *See* Flowers v. City of Minneapolis, 478 F.3d 869, 874 (8th Cir. 2007) (acknowledging a "fundamental right to engage in one's chosen occupation," and cautioning that the right does not encompass a brief interruption of work in a desired occupation, but only the "complete prohibition of the right to engage in a calling;" because plaintiffs only alleged that the officers' action caused some loss of business, their substantive due process claim was not actionable).

even though property has not been designated a fundamental right.[84] Further, the Supreme Court's recognition of substantive due process as a limitation on punitive damages awards[85]—again a property interest—draws into question any notion that substantive due process reaches only the infringement of a fundamental right.

2. Substantive Due Process Claims Are Actionable Only Where No State Remedies Are Available

Other appellate courts require that litigants challenging executive misconduct demonstrate the inadequacy of state remedies in order to maintain a substantive due process claim. These courts have focused on the Supreme Court's concern expressed in *Lewis* that substantive due process not become a "font of tort law," supplanting state law.[86] Thus, the Fourth Circuit held that "where a claim sounds both in state tort law and substantive due process, state tort law is the rule and due process the distinct exception."[87] Accordingly, judges should recognize a strong presumption against § 1983 substantive due process claims that overlap state tort law.[88] For example, the Fourth Circuit threw out claims brought by parents alleging that county fire department personnel violated their trainee son's substantive due process right by conducting a strenuous training session outside in extreme heat without bringing water or medical supplies, thereby causing the young man's death.[89]

84 In *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005), the Court ruled that substantive due process prohibits land regulation that does not rationally advance a government interest: "a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *See also* Maldonado v. Fontanes, 568 F.3d 263, 272–73 (1st Cir. 2009) (rejecting the argument that substantive due process claims are not actionable where only deprivation of property is at stake, because "[i]t is the *effect* on the person from the deprivation of the interest in life, liberty, or property which may be shocking to the conscience"); A Helping Hand, L.L.C. v. Baltimore County, 515 F.3d 356, 371–73 (4th Cir. 2008) (finding that a methadone clinic operator whose facility was shut down pursuant to a county zoning ordinance stated a valid substantive due process claim since he had a vested property interest); United Artist Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392, 397 & 400–02 (3d Cir. 2003) (joining the majority of circuits in holding that landowners who challenge executive action must establish that the official's actions shock the conscience, but, then-Judge Alito held that denial of a permit to a theater that refused to pay a very high impact fee stated a cause of action under the "shocks the conscience" standard). *Cf.* Clark v. Bosher, 514 F.3d 107, 112–13 (1st Cir. 2008) (recognizing substantive due process challenge to the denial of permits or licenses, the court held that run-of-the-mill land-use decisions generally will not rise to the level of behavior that shocks the conscience).

85 *See supra* note 11.

86 *See supra* notes 20 and 67 and accompanying text.

87 Waybright v. Frederick County, 528 F.3d 199, 204–06 (4th Cir. 2008).

88 *Id.*

89 *Id.* at 201–03.

Because their constitutional claim overlapped with state tort law, it was not actionable.[90]

Similarly, the Seventh Circuit has ruled that whenever substantive due process challenges involve only property, the plaintiff must show "either the inadequacy of state law remedies or an independent constitutional violation."[91] Thus, government employees alleging arbitrary employment decisions[92] or landowners claiming arbitrary deprivation of their property[93] will have their claims dismissed unless they can prove that state law does not provide them relief.[94]

Finally, many courts have rejected substantive due process claims brought by students alleging excessive corporal punishment where the state provides an adequate remedy. For example, the Fifth Circuit has asserted that so long as the state affords an adequate remedy, public students cannot claim denial of substantive due process, irrespective of the severity of their injuries.[95] The Eleventh Circuit has similarly suggested that if a remedy may be pursued under state tort law, the federal

90 *Id.* at 205–06.

91 Lee v. City of Chicago, 330 F.3d 456, 467 (7th Cir. 2003). *See also* Ali v. Ramsdell, 423 F.3d 810, 814 (8th Cir. 2005) (holding that because state conversion law provided an adequate remedy, the claim that officers seized and stole $4,920 while executing a search warrant did not state a substantive due process claim).

92 *See* Montgomery v. Stefaniak, 410 F.3d 933, 939 (7th Cir. 2005) (holding that absent a violation of another constitutional right or the inadequacy of available state remedies, a wrongful termination claim could not be brought under a substantive due process theory); Galdikas v. Fagan, 342 F.3d 684, 691 (7th Cir. 2003) (reasoning that even if officials acted arbitrarily and irrationally, because state law provided an adequate remedy for the violation of state-created contract rights, no substantive due process violation may be found). *See also* Habhab v. Hon, 536 F.3d 963, 968 (8th Cir. 2008) (holding that the plaintiff could not "avail himself of federal constitutional principles of substantive due process" to pursue a state law claim for tortious interference with contracts).

93 *See* Taake v. County of Monroe, 530 F.3d 538, 541–42 (7th Cir. 2008) (holding that land purchaser who alleged a substantive due process violation based on the county vendor's breach of contract failed to state a claim because the prospective land purchaser could not show violation of a fundamental right or that available state remedies were inadequate); Gen. Auto Serv. Station v. City of Chicago, 526 F.3d 991, 1008 (7th Cir. 2008) (holding that in order to bring a substantive due process claim, property owner must show both a property right and the inadequacy of state remedies to address the deprivation before a judge should consider whether the interference with property was arbitrary or irrational).

94 *See Montgomery*, 410 F.3d at 939; *Taake*, 530 F.3d at 541–42.

95 *See* Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 874–75 (5th Cir. 2000) (stating that injuries resulting from corporal punishment do not give rise to substantive due process claims if there are adequate state remedies to redress the harm inflicted); Fee v. Herndon, 900 F.2d 804, 807–08 (5th Cir. 1990) (acknowledging that corporal punishment caused child to spend six months in a psychiatric ward at a cost of $90,000, but holding 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").

courthouse door should be closed to substantive due process claims.[96]

Courts that have dismissed claims based on the existence of an adequate state remedy have confused substantive with procedural due process. The Supreme Court, in *Parratt v. Taylor*,[97] held that the existence of state tort remedies defeats a *procedural* due process claim where the deprivation is random and unauthorized.[98] The Court reasoned that in cases involving random, unauthorized official misconduct, the state provides all the process that is feasible if it affords the individual a post-deprivation remedy.[99] Procedural due process often presents a timing question—whether pre- or post-deprivation process is necessary—and the impossibility of providing pre-deprivation process then defeats the federal claim. Substantive due process, however, does not focus on the state's failure to provide sufficient process. Rather, it is the raw abuse of power that violates the Constitution, and such abuse is unaffected by the existence of state remedies.

Recognizing this distinction, the Supreme Court, in *Zinermon v. Burch*,[100] reiterated that substantive due process "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'"[101] Acknowledging that the constitutional violation is complete when the wrongful act occurs, the Court stated that state tort remedies were irrelevant.[102] Nothing in *Lewis* suggested that *Zinermon* was wrong, nor can *Lewis* be read to impose this restriction.

96 Dacosta v. Nwachukwa, 304 F.3d 1045, 1048–49 (11th Cir. 2002) (finding that a battery perpetrated by an instructor upon a college student did not shock the conscience and concluding that remedies for this type of battery should be pursued under state tort law).

97 451 U.S. 527 (1981).

98 *Id.* at 541, 543–44.

99 *Id.* at 543–44.

100 494 U.S. 113 (1990).

101 *Id.* at 125 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

102 *Id.* at 124–25. *See also* Mark R. Brown, *De-Federalizing Common Law Torts: Empathy for* Parratt, Hudson *and* Daniels, 28 B.C. L. REV. 813, 819 (1987) ("[s]ubstantive due 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."); Irene Merker Rosenberg, *A Study in Irrationality: Refusal to Grant Substantive Due Process Protection Against Excessive Corporal Punishment in the Public Schools*, 27 HOUS. L. REV. 399, 424–37 (1990) (reasoning that state remedies are no more relevant to substantive due process claims involving corporal punishment than they are 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").

3. Only Intent to Harm, Malice, or Wantonness Will Shock the Conscience

A third restriction on substantive due process claims imposed by the appellate courts deals with the state-of-mind requirement. As explained in *County of Sacramento v. Lewis*, the shocks the conscience standard may sometimes be met when government officials act with deliberate indifference to constitutional rights.[103] The Court cited as examples prison guards who were deliberately indifferent to the medical needs of pretrial detainees and personnel at a state mental institution who failed to provide minimally adequate rehabilitation to those who were involuntarily committed.[104] However, because deliberate indifference implies the opportunity for actual deliberation, the Court determined that the standard could not reasonably apply to police officers who face a situation calling for fast action. Thus, the Court held that injuries resulting from "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment."[105]

Relying on *Lewis*, most appellate courts initially applied a deliberate indifference test in non-emergency situations.[106] Recently, however, many courts have held that even where there is time to deliberate, if the government official must balance competing legitimate interests, the shocks the conscience standard must be ratcheted up a notch. These courts have relied on the assertion in *Lewis* that "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another."[107] Thus, courts must carefully analyze the specific circumstances before condemning an abuse of power as

103 County of Sacramento v. Lewis, 523 U.S. 833, 850–53 (1998).

104 *Id.* at 849–50 & 852 n.12.

105 *Id.* at 854. Because the decedent's family members did not allege that the deputy acted with "intent to harm," they failed to meet the shocks the conscience test. *Id.*

106 *See, e.g.*, Estate of Owensby v. City of Cincinnati, 414 F.3d 596, 602–03 (6th Cir. 2005) (affirming the application of the deliberate indifference test to a pretrial detainee's claim that he was denied adequate medical treatment; although only six minutes passed between the time detainee was taken into custody and the time medical care was provided, the officers had adequate time to fully consider the potential consequences of their conduct); Bradich v. City of Chicago, 413 F.3d 688, 691–92 (7th Cir. 2005) (reversing the district court's grant of summary judgment to defendants regarding claims that members of jail staff acted with deliberate indifference in failing to seek outside assistance for ten minutes after finding an arrestee hanging in a jail cell); Hernandez v. Tex. Dep't of Protective & Regulatory Servs., 380 F.3d 872, 880–81 (5th Cir. 2004) (holding that although only the most egregious misconduct will violate substantive due process, deliberate indifference standard is met even if the government actor does not know of a specific risk to the victim's health or safety).

107 *Lewis*, 523 U.S. at 850.

"conscience shocking."[108] The Court in *Lewis* characterized the situation facing the officers pursuing juveniles on a motorcycle as not only one that "call[ed] for fast action," but also one where the deputy faced "obligations that tend[ed] to tug against each other."[109] However, it justified the use of an "intent to harm" standard based on the unfairness of imposing liability under a "deliberate indifference" test in situations where the officials truly had no time to deliberate.[110] Nonetheless, many courts have seized upon this language in *Lewis* to reject substantive due process claims absent evidence of intent to harm.

For example, in *Matican v. City of New York*,[111] the appellate court conceded that "officers had ample opportunity to plan the [drug] sting in advance."[112] However, the officers were subject to the "pull of competing obligations," because harm was likely to occur no matter what the government officials did.[113] Thus, the officers' disclosure to a drug dealer of the confidential informant who had set him up could not be said to "shock the contemporary conscience."[114] Similarly, although the EPA administrator who falsely assured residents that it was safe to return to their homes after 9/11 may not have been subject to the same weighty concerns that justified the initial decision encouraging workers to promptly return to the site,[115] she still faced an array of competing obligations that precluded a substantive due process claim "in the absence of an allegation that the Government official acted with *intent to harm*."[116]

Other appellate courts have similarly rejected the rule that "time to deliberate" is the "determining factor" in deciding

108 *Id.*

109 *Id.* at 853.

110 *Id.*

111 524 F.3d 151 (2d Cir. 2008).

112 *Id.* at 158.

113 *Id.* at 159 (citing County of Sacramento v. Lewis, 523 U.S. 833, 834 (1998)).

114 *Id.* at 158–59. *Cf.* Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 431–32 (2d Cir. 2009) (applying the deliberate indifference standard to determine whether police officers' conduct shocked the conscience because "[t]he serious and unique risks and concerns of a domestic violence situation are well known and well documented" and the officers had "ample time for reflection and for deciding what course of action to take in response to domestic violence." Further, a reasonable trier of fact could conclude that the officers' conduct demonstrated deliberate indifference to plaintiff's rights because of "the serious implications of [plaintiff's] complaints over a fifteen-month period," the officers' "failure to appreciate the gravity of the situation," and the officers' conduct could not "be explained away by the pull of competing obligations").

115 Benzman v. Whitman, 523 F.3d 119, 127–28 (2d Cir. 2008).

116 *Id.* (emphasis added). *See also* Lombardi v. Whitman, 485 F.3d 73, 74–75, 84–85 (2d Cir. 2007) ("[W]hen agency officials decide how to reconcile competing governmental obligations in the face of disaster, only an intent to cause harm arbitrarily can shock the conscience in a way that justifies constitutional liability.").

whether deliberate indifference shocks the conscience.[117] Several courts have held that a higher culpability standard must apply both where a state actor must respond in haste and under pressure *and* where the state actor must make a "judgment between competing, legitimate interests."[118] Although the need to weigh difficult competing concerns may defeat a finding of deliberate indifference, a flat rule mandating "intent to harm" is contrary to the admonition in *Lewis* that courts carefully analyze specific circumstances in assessing whether "deliberate indifference" may be proved.[119]

In addition, appellate courts have ratcheted up the intent to harm standard to impose an almost impenetrable obstacle. For example, although the Supreme Court has recognized a liberty interest on behalf of students to be free from "appreciable physical pain,"[120] most appellate courts demand some showing of intentional malice or sadism to impose liability. Thus, the Sixth Circuit has explained that corporal punishment does not violate substantive due process unless the student proves that "'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.'"[121] Similarly, the Eleventh Circuit

117 Waybright v. Frederick County, 528 F.3d 199, 206 (4th Cir. 2008). *See also* 77 U.S.L.W. 1207 (U.S. Oct. 7, 2008) (No. 13) (noting the circuit split on this issue).

118 Schieber v. City of Philadelphia, 320 F.3d 409, 419 (3d Cir. 2003). *See also* Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ., 542 F.3d 529, 542–43 (6th Cir. 2008) ("even where the governmental actor is subjectively aware of a substantial risk of serious harm" to the plaintiff, and he has time to deliberate about his decision, where "some countervailing, mandatory governmental duty motivated that action" and the police face agonizing choices, the action will not "shock the conscience" except in "extreme cases"; in addition to time to deliberate, courts should examine whether the government actor was pursuing a legitimate government purpose that justified taking the risk).

119 *See* County of Sacramento v. Lewis, 523 U.S. 833, 850 (1998) ("Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.").

120 Ingraham *ex rel.* Ingraham v. Wright, 430 U.S. 651, 674 (1977). The Court recognized this liberty interest; however, the plaintiffs pled only procedural, not substantive, due process. *Id.* at 653.

121 Ellis *ex rel.* Pendergrass v. Cleveland Mun. Sch. Dist., 455 F.3d 690, 700 (6th Cir. 2006) (quoting Webb v. McCullough, 828 F.2d 1151, 1158 (6th Cir. 1987)). Note, however, that the court ruled that a student whose head was slammed against the board, thrown on the ground and choked for approximately one minute, resulting in contusions on the neck and post-traumatic stress disorder, stated a substantive due process claim against her teacher where this action was taken simply because the student forgot to bring a pencil to class. *Id.* *See also* Smith v. Half Hollow Hills Cent. Sch. Dist., 298 F.3d 168, 172–73 (2d Cir. 2002) (emphasizing that not all wrongs perpetrated by school officials violate due process and holding that teacher's slapping of a student could not be fairly viewed as so brutal or offensive to human dignity as to shock the conscience); Harris *ex*

requires proof of willful, malicious intent to injure a student, regardless of whether there is time to deliberate or whether competing interests must be balanced.[122]

The imposition of an unnecessarily high threshold in corporal punishment cases is unfounded. It is particularly inexplicable when compared to the appellate courts' treatment of substantive due process claims brought by pretrial detainees. Many appellate courts permit detainees, unlike students, to bring substantive due process claims based on a deliberate indifference standard, except in cases involving prison riots where there is no time to deliberate.[123] The Supreme Court in *Lewis* cited to the detainee cases to support its adoption of the intent to harm standard where quick action is required.[124] It recognized, however, that a deliberate indifference standard applies to cases in which detainees challenge the conditions of confinement or the failure to protect them from other inmates.[125] Indeed, even convicted felons who bring claims under the Eighth Amendment may recover under a deliberate indifference standard, albeit one that requires both objective and subjective deliberate indifference.[126]

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rel. Harris v. Robinson, 273 F.3d 927, 930–31 (10th Cir. 2001) (holding that a teacher's disciplinary action was not inspired by malice or sadism so as to demonstrate that degree of "outrageousness and a magnitude of potential or actual harm that is truly conscience shocking"); Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916, 919–21 (8th Cir. 2001) (holding that student's allegations that she was called "retarded" and "stupid" in front of her classmates and was struck in the face with a notebook by her teacher failed to establish that the conduct was sufficiently shocking to state a substantive due process claim); Saylor v. Bd. of Educ., 118 F.3d 507, 514–15 (6th Cir. 1997) (holding that teacher's beating of a student, which involved five licks of the paddle on the student's buttocks, causing bruising, was not severe or so inspired by malice or sadism as to shock the conscience).

122 Davis v. Carter, 555 F.3d 979, 980–81, 984 (11th Cir. 2009) (holding that coach's conduct in depriving student of water after he exhibited signs of overheating and not summoning immediate medical care after he collapsed on the football field did not state a cause of action under substantive due process because the complaint could not support a finding that the coach acted willfully or maliciously with an intent to injure the student; deliberate indifference, without more, does not rise to the conscience-shocking level required for a constitutional violation).

123 *See infra* note 130.

124 *Lewis*, 523 U.S. at 852–53.

125 *Id.* at 850. The Court noted:

> Since it may suffice for Eighth Amendment liability that prison officials were deliberately indifferent to the medical needs of their prisoners, it follows that such deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial.

Id. (citations omitted).

126 Farmer v. Brennan, 511 U.S. 825, 837–38 (1994) (holding that inmate must prove guard's actual knowledge that inmate faced a substantial risk of serious harm and yet acted with deliberate indifference to this risk). *See also* Whitley v. Albers, 475 U.S. 312, 327 (1986) (holding that convicted inmates who allege excessive force must prove "unnecessary and wanton infliction of pain").

On the other hand, detainees bringing substantive due process claims have faced other obstacles. Most appellate courts have ignored the Supreme Court's admonition that a less rigorous Due Process, rather than the Eighth Amendment, standard applies to pretrial detainees. Unlike convicted felons, who are protected only from "cruel and unusual punishment," the Court has held that pretrial detainees cannot be constitutionally subjected to punishment in any manner.[127] Further, "if a restriction or condition [of pretrial detention] is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees."[128]

Despite the distinction between pretrial detainees and convicted felons drawn by the Supreme Court, most appellate courts have required detainees alleging excessive force, deliberate indifference to serious medical needs, or unconstitutional conditions of confinement, to meet the same standard that convicted felons must meet under the Eighth Amendment. Thus, detainees must prove that the deprivation be objectively serious, that the prison official be subjectively aware of facts from which an inference of substantial risk could be drawn, and that the official have a culpable state of mind in the sense of subjective criminal recklessness.[129] Only a handful of

127 Bell v. Wolfish, 441 U.S. 520, 535 (1979). The Court stated: "if a restriction or condition is not reasonably related to a legitimate goal-if it is arbitrary or purposeless-a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees." *Id.* at 539. *See also* Graham v. Connor, 490 U.S. 386, 395 n.10 (1989) (acknowledging "that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment"); City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) (reasoning that where there has been no "formal adjudication of guilt . . . the Eighth Amendment has no application").

128 *Wolfish*, 441 U.S. at 539.

129 *See, e.g.*, Krout v. Goemmer, 583 F.3d 557, 567–68 (8th Cir. 2009) (holding that although the Due Process Clause, not the Eighth Amendment, governs the treatment of pretrial detainees, the standard is the same and thus detainee must show he suffered from objectively serious medical needs and that correctional officers actually knew of and deliberately disregarded those needs); Lewis v. Downey, 581 F.3d 467, 473 (7th Cir. 2009) (holding that although pretrial detainees cannot be punished "in any way," claims of deliberate indifference to medical needs are treated the same as Eighth Amendment claims brought by convicted inmates); Caiozzo v. Koreman, 581 F.3d 63, 71 n.4 (2d Cir. 2009) (citing decisions from several circuits holding that the rights of pretrial detainees are coextensive with those of convicted inmates and, therefore, the *Farmer* test governs); Martinez v. Beggs, 563 F.3d 1082, 1088–89 (10th Cir. 2009) (holding that pretrial detainees challenging the denial of medical attention must meet Eight Amendment standards, and even obvious risks may not justify an inference that officials subjectively knew of the specific risk of harm and were deliberately indifferent to that risk); Fennell v. Gilstrap, 559 F.3d 1212, 1217–20 (11th Cir. 2009) (holding that deputy's conduct in kicking pretrial detainee in the face, which resulted in severe fractures and the necessity for surgery, did not constitute excessive force because there was no evidence that deputy acted maliciously and sadistically, as required under the Eighth Amendment);

decisions recognize the need to distinguish claims brought by pretrial detainees who, because they have not yet had a "guilt" adjudication, cannot be subject to conditions of confinement that are imposed for the purpose of punishment, and who should not be required to prove "wanton infliction of pain" in order to

Klebanowski v. Sheahan, 540 F.3d 633, 639–40 (7th Cir. 2008) (holding that jail officials who ignored plaintiff's request for a transfer after he was beaten and after he pleaded that he feared for his life could not be held liable for deliberate indifference to the risk of housing gang members with non-gang members because plaintiff could not show officers were actually aware of a substantial risk of harm to plaintiff's safety and yet acted with the equivalent of criminal recklessness; detainee never told officials that the attack was inflicted by gang members because of his non-gang status, and thus nothing would have led officers to believe plaintiff faced this specific threat); Grieveson v. Anderson, 538 F.3d 763, 771–72, 775, 779 (7th Cir. 2008) (reasoning that although detainee's claim should be analyzed under the Due Process Clause, the inquiry is essentially the same as that under the Eighth Amendment, namely, plaintiff must show that jail officials knew the detainee faced substantial risk of serious harm and yet they disregarded that risk by failing to take reasonable measures to abate it); Phillips v. Roane County, 534 F.3d 531, 539–40 (6th Cir. 2008) (holding that pretrial detainees asserting a claim of deliberate indifference to serious medical needs must meet the Eighth Amendment standard, which requires proof that officials actually drew the inference that inmate faced a serious medical risk and then disregarded that risk); Burnette v. Taylor, 533 F.3d 1325, 1331–32 (11th Cir. 2008) (requiring that plaintiff demonstrate both an awareness of facts from which an inference of serious risk could be drawn and evidence that the official actually drew this inference; although arresting officers were warned by detainee's step-father that detainee was strung out on drugs, jailer was not deliberately indifferent to serious medical needs of pretrial detainee who died after ingesting a lethal combination of drugs while in custody in the county jail because, although jailer found the bottle of prescription pills and observed that detainee was intoxicated, no one told the jailer that detainee needed medical help or observation); Gish v. Thomas, 516 F.3d 952, 954–55 (11th Cir. 2008) (holding that to establish liability for pretrial detainee's suicide while in a police car, plaintiff must meet Eighth Amendment standard, which defines deliberate indifference as subjective knowledge of the strong likelihood that serious harm will ensue and disregard for this risk; although evidence demonstrated that official was aware of detainee's suicidal tendencies, plaintiff produced no evidence that official was aware that the security screen in his car might have been unlocked, enabling handcuffed detainee in the rear seat to access loaded firearm in the front seat); Butler v. Fletcher, 465 F.3d 340, 344–45 (8th Cir. 2006) (holding that although the Due Process Clause protects detainees prior to an adjudication of guilt, the same Eighth Amendment deliberate indifference standard applies to "claims that prison officials unconstitutionally ignored a serious medical need or failed to protect [a] detainee from a serious risk of harm"); Gray v. City of Detroit, 399 F.3d 612, 616 (6th Cir. 2005) (holding that pretrial detainee's right to adequate medical treatment is the same as that afforded prisoners under the Eighth Amendment, and thus plaintiff must show that defendants acted with deliberate indifference to his suicidal behavior and that defendant actually knew detainee was at risk of committing suicide); Burrell v. Hampshire County, 307 F.3d 1, 7–8 (1st Cir. 2002) (asserting that although pretrial detainees are protected under the Due Process Clause, rather than the Eighth Amendment, the standard is the same—namely, a pretrial detainee must demonstrate that he was incarcerated under conditions imposing a substantial risk of serious harm and that prison officials were deliberately indifferent in that they were subjectively aware of facts from which an inference of substantial risk could be drawn and they actually drew such an inference); Brown v. Harris, 240 F.3d 383, 388–89 (4th Cir. 2001) (acknowledging that regardless of whether plaintiff is a pretrial detainee or convicted felon, the standard is the same in assessing deliberate indifference to serious medical needs—the deprivation must be objectively sufficiently serious, and the official must have a culpable state of mind in the sense of subjective recklessness).

establish excessive force.[130] Because the *Lewis* Court adopted the loaded shocks the conscience language, it is not surprising that the majority of appellate courts have ratcheted up the due process standard to parallel that used in adjudicating claims brought by convicted inmates.[131]

130 *See* Lewis v. Downey, 581 F.3d 467, 473–74 (7th Cir. 2009) (holding that the standard for excessive force claims brought by detainees is different "because the Due Process Clause, which prohibits all 'punishment,' affords broader protection than the Eighth Amendment's protection against only punishment that is 'cruel and unusual'"); Hubbard v. Taylor, 538 F.3d 229, 231–32 (3d Cir. 2008) (asserting that pretrial detainee's due process rights are violated where detainees are punished prior to an adjudication of guilt, and thus court must determine whether conditions are imposed for the purpose of punishment or whether such are but an incident of a legitimate government purpose); *Phillips*, 534 F.3d at 539–42 (finding that district court erred in applying stringent Eighth Amendment standard that requires plaintiff to show the existence of a sufficiently serious medical need and that defendant actually perceived facts from which to infer a substantial risk to the inmate); Iqbal v. Hasty, 490 F.3d 143, 169 (2d Cir. 2007), *rev'd on other grounds*, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) ("We explicitly rejected analogies to the Eighth Amendment that would require a showing of wantonness on the part of the prison official, or a showing that the alleged conditions were so inhumane as to constitute cruel and unusual punishment.") (citations omitted); Jones v. Blanas, 393 F.3d 918, 931 (9th Cir. 2004) (holding that district court erred in using the Eighth Amendment, rather than the substantive due process standard, in judging a claim brought by an individual detained while awaiting civil commitment proceedings: "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed").

131 There is also a circuit conflict at the other end of the spectrum, *i.e.*, as to when the Fourth Amendment guarantees end for arrestees and detainees, and the less protective substantive due process standard begins. The majority of circuits hold that, at least in cases where an arrest is made without a probable cause hearing, the Fourth Amendment standard continues to apply. *See* Drogosch v. Metcalf, 557 F.3d 372, 378 (6th Cir. 2009) (holding that arrestees are protected by the Fourth Amendment until a probable cause hearing occurs and only thereafter does due process apply); Williams v. Rodriguez, 509 F.3d 392, 402–03 (7th Cir. 2007) (holding that claims regarding conditions of confinement for pretrial detainees who have not yet had a judicial determination of probable cause are governed by the Fourth Amendment's "objectively unreasonable" standard, which is less difficult than the deliberate indifference standard imposed by the Eighth and Fourteenth Amendments); Lopez v. City of Chicago, 464 F.3d 711, 719 (7th Cir. 2006) ("the Fourth Amendment governs the period of confinement between arrest without a warrant and the preliminary hearing at which a determination of probable cause is made, while due process regulates the period of confinement after the initial determination of probable cause."); Bryant v. City of New York, 404 F.3d 128, 135–39 (2d Cir. 2005) (holding that claims of individuals arrested without a warrant that defendants failed to issue desk appearance tickets, thereby prolonging their detention, was governed by the Fourth Amendment, which the Supreme Court has held requires a prompt judicial determination of probable cause with regard to warrantless arrests; the district court erred in analyzing constitutional claims under the substantive due process conscience-shocking test because it is well established that the Fourth Amendment governs the procedures applied during some period following an arrest); Gibson v. County of Washoe, 290 F.3d 1175, 1197 (9th Cir. 2002) (holding that the Fourth Amendment governs claims of excessive force arising during a pretrial detention); Wilson v. Spain, 209 F.3d 713, 715–16 (8th Cir. 2000) (adopting a "continuing seizure approach," that Justice Ginsburg developed in *Albright v. Oliver*, 510 U.S. 266, 276–81 (1994) (Ginsburg, J., concurring), to hold that a malicious prosecution claim should be based on the Fourth Amendment, rather than substantive due process); Torres v. McLaughlin, 163 F.3d 169, 174 (3d Cir. 1998) ("Although the Supreme Court has repeatedly defined when a Fourth Amendment seizure occurs or begins, it has not determined when that seizure ends and Fourth Amendment protections

4. Whose Conscience Must Be Shocked: Judge or Jury?

Lewis did not settle the question of who makes the determination of what is conscience-shocking behavior, and this has led to conflicting decisions in the appellate courts. For example, within the Eighth Circuit, there are cases asserting both that this is an issue of law for the judge, *and* that the issue is one for the jury.[132] Most appellate courts appear to treat this as a jury question,[133] permitting the case to go to the jury unless no rational jury could find that the conduct was conscience-shocking.[134] Other courts, following the analysis that is used to assess the qualified immunity defense,[135] recognize that if there are questions of fact in need of resolution, these questions should

no longer apply." Acknowledging that the Supreme Court has left that question open, the Third Circuit stated: "there may be some circumstances during pre-trial detention that implicate Fourth Amendment rights; however we refer to the Fourth Amendment as applying to those actions which occur between arrest and pre-trial detention."); Gaylor v. Does, 105 F.3d 572, 574–75 (10th Cir. 1997) (following the Seventh Circuit holding that the Fourth Amendment applies between arrest and determination of probable cause, while the Fourteenth Amendment controls after probable cause is determined).

On the other hand, the Fourth and Fifth Circuits have determined that claims brought by pretrial detainees, regardless of whether there has been an arrest pursuant to a warrant, are adjudicated under the less protective substantive due process standard. *See* Orem v. Rephann, 523 F.3d 442, 446 (4th Cir. 2008) (holding that the claim of an arrestee not formally charged "require[d] application of the Fourteenth Amendment" rather than the reasonableness standard of the Fourth Amendment); Hill v. Carroll County, 587 F.3d 230, 237 (5th Cir. 2009) (holding that sheriff's failure to monitor suspect who died from positional asphyxiation while being transported in the back of a patrol car is governed by substantive due process, not the Fourth Amendment, because the initial incidence of the seizure had ended); Brothers v. Klevenhagen, 28 F.3d 452, 456 (5th Cir. 1994) (holding that a pretrial detainee receives the protection of substantive due process, not of the Fourth Amendment).

132 *Compare* Terrell v. Larson, 396 F.3d 975, 981 (8th Cir. 2005) (en banc) ("Because the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury.") *with* Moran v. Clarke, 296 F.3d 638, 643 (8th Cir. 2002) (en banc) ("[W]hether the plaintiff has presented sufficient evidence to support a claimed violation of a substantive due process right is a question for the factfinder, here the jury.").

133 *See, e.g.*, Davis v. Hall, 375 F.3d 703, 719 (8th Cir. 2004) ("[W]hether the defendants' conduct constituted deliberate indifference is a classic issue for the fact finder."); A.M. v. Luzerne County Juvenile Det. Ctr., 372 F.3d 572, 587–88 (3d Cir. 2004) ("[W]e believe the evidence, viewed in the light most favorable to A.M., is sufficient to present a jury question on whether the child-care workers and their immediate supervisor were deliberately indifferent to A.M.'s right to security and well-being."); Walker v. Bain, 257 F.3d 660, 672 (6th Cir. 2001) ("[T]he jury found that . . . the defendants' actions did not constitute an egregious abuse of power or otherwise shock the conscience."); United States v. Walsh, 194 F.3d 37, 53 (2d Cir. 1999) ("Walsh argues that the District Court should have instructed the jury on the 'shocks the conscience' standard applicable to due process claims under the Fourteenth Amendment . . . ."); Boveri v. Town of Saugus, 113 F.3d 4, 6–7 (1st Cir. 1997) ("[T]he question is not whether the officers' decision to dog the Honda was sound—decisions of this sort always involve matters of degree—but, rather, whether a rational jury could say it was conscience shocking.").

134 *See Boveri*, 113 F.3d at 6–7.

135 *See* Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982) ("[q]ualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official.").

initially be sent to the jury with the ultimate question of whether a substantive due process violation has occurred to be determined by the court.[136] This line of cases again demonstrates that the test enunciated in *Lewis* has created much uncertainty and frustration in the lower federal courts.[137]

In short, the test established in *Lewis* has proved to be unworkable. First, there are conflicting views as to how to reconcile the fundamental rights analysis used to contest legislation with the shocks the conscience standard used for challenging executive misconduct.[138] Second, the circuits disagree as to whether the existence of state remedies defeats the federal claim.[139] Third, the circuits are divided as to when deliberate indifference, as opposed to an intent to harm standard, must be met.[140] Fourth, there is confusion as to how the test is satisfied, depending on who the litigant is. With regard to pretrial detainees, most courts use a stringent Eighth Amendment deliberate indifference test.[141] With regard to students alleging excessive corporal punishment, only an intent to harm that demonstrates ill will, malice or sadism is deemed to shock the conscience.[142] With regard to government employees,

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136 See Armstrong v. Squadrito, 152 F.3d 564, 577 (7th Cir. 1998) where the court stated:

> [T]he question of whether the defendants' conduct constituted deliberate indifference is a classic issue for the fact finder. . . . [B]ecause this question is a factual mainstay of actions under § 1983, we do not believe it should receive consideration as a question of law. Any concern about allowing the fact finder to determine a constitutional question is ameliorated by the overlap between this inquiry and the third step in our analysis—an examination of the totality of the circumstances—which is a question of law.

Id. *See also* Luckes v. County of Hennepin, 415 F.3d 936, 940 (8th Cir. 2005) (stating that determining whether conduct "shocks the conscience" is a question of law); Terrell v. Larson, 396 F.3d 975, 981 (8th Cir. 2005) (en banc) ("Because the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury."); Crowe v. County of San Diego, 359 F. Supp. 2d 994, 1030 (S.D. Cal. 2005) (stating that the determination of whether defendants' conduct "shocks the conscience" is an issue of law for the court); Tun *ex rel* Tun v. Ft. Wayne Cmty. Sch., 326 F. Supp. 2d 932, 945 (N.D. Ind. 2004) (determining whether conduct "shocks the conscience" is a question of law); Mason v. Stock, 955 F. Supp. 1293, 1308–09 (D. Kan. 1997) ("[T]he 'shocks the conscience' determination is not a jury question. . . . Under the rules pertaining to summary judgment, a plaintiff who wishes to assert a *Collins*' claim must, at minimum, point to conduct or policies which would require the court to make a 'conscience shocking' determination.").

137 At a conference on June 9, 2009, sponsored by the Federal Judicial Center, I discussed this substantive due process issue with district court judges and magistrates. Several expressed concern about the judge-jury question, particularly their discomfort in applying their own vision of what is conscience-shocking behavior with few guidelines from the United States Supreme Court or from their individual circuits.

138 *See supra* Part I.D.1.

139 *See supra* Part I.D.2.

140 *See supra* Part I.D.3.

141 *See supra* note 129 and accompanying text.

142 *See supra* notes 121–22 and accompanying text.

most appellate courts will not recognize any substantive due process challenge to a termination or other adverse employment action because of the absence of a fundamental right.[143] Yet, as noted, substantive due process challenges to land use decisions and excessive punitive damage awards have not been subjected to the "fundamental rights" requirement.[144] Finally, there is disagreement as to who should decide whether government misconduct is conscience-shocking.[145]

II. WHY *LEWIS* SHOULD BE OVERTURNED

The *Lewis* Court erred in creating a false dichotomy between challenges to executive and legislative action and in imposing a restrictive and untenable shocks the conscience standard. Although *stare decisis* mandates that Supreme Court decisions not be lightly rejected, it is also clear that "[*s*]*tare decisis* is not an inexorable command."[146] Generally, the Court asks (1) whether reliance interests are involved; (2) whether the reasoning has been questioned by subsequent decisions; and (3) whether the rule has proved to be unworkable.[147] All of these factors weigh in favor of reconsidering the *Lewis* holding.

First, this is not a situation where "reliance" is an issue. Government officials have not "relied" on a promise that they may engage in wrongdoing with impunity provided their behavior is not conscience-shocking. Second, its reasoning has often been challenged. As discussed in Part I, the Justices in *Lewis* were deeply divided. The majority determined *for the first time* in 1998 that substantive due process jurisprudence should depend on whether executive or legislative action is being challenged and that only conscience-shocking behavior rises to the level of a substantive due process violation.[148] Four of the concurring Justices challenged both the dichotomy as well as the new test. Justice Souter, who authored the opinion, conceded that "the measure of what is conscience-shocking is no calibrated yardstick,"[149] and the concurring opinion of Justice Scalia, joined by Justice Thomas, as well as Justice Kennedy's concurrence,

143 *See supra* notes 81–83 and accompanying text.

144 *See supra* notes 84–85 and accompanying text.

145 *See supra* Part I.D.4.

146 State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).

147 *See, e.g.*, Pearson v. Callahan, 129 S. Ct. 808, 816–17 (2009); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992). *See also* Payne v. Tennessee, 501 U.S. 808, 829–30 (1991) (stating that where a decision has "been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts," these factors weigh in favor of reconsideration).

148 County of Sacramento v. Lewis, 523 U.S. 833, 846–48 (1998).

149 *Id.* at 847.

joined by Justice O'Connor, attacked its subjectivity.[150] Further, this section will explore subsequent Supreme Court decisions that have implicitly rejected its analysis. Third, as discussed in Part I.D, the decision has led to considerable confusion and numerous circuit splits in the last decade since its pronouncement. It has clearly proved to be an unworkable test.

In addition to exploring contrary Supreme Court precedent, the next section critiques *Lewis* as contrary to public originalism. Further, the Court's purported justification—a concern for not permitting substantive due process to become a "font of tort law"—is revealed as both ill conceived and exaggerated.

A. The Court's Weakened Protection Against Abuse of Executive Power Is Contrary to the Historical Understanding of the Due Process Clause

Although substantive due process jurisprudence has been subjected to a consistent sharp attack, it is well accepted that it stems from Magna Carta.[151] In a recent article providing an originalist defense of substantive due process as a limitation on legislative power, Professor Frederick Mark Gedicks traces the development of Magna Carta and "higher-law" constitutionalism as the foundation for the widely shared understanding of the Due Process Clause in the late eighteenth century.[152] He explains that although Magna Carta initially may have been intended to reach only the procedures that the king used to deprive citizens of their rights, Sir Edward Coke reinvigorated the provision in the seventeenth century to attack the royal power of the Stuart Kings—a substantive limitation on executive power.[153]

The American colonies relied upon "Coke's reading of substance into due process" to challenge the conduct of the British king during the American Revolution.[154] Further, the

150 *Id.* at 861 (Scalia, J., concurring) (sarcastically describing the standard as "the *ne plus ultra*, the Napoleon Brandy, the Mahatma Ghandi, the Cellophane of subjectivity") (paraphrasing Cole Porter, *You're the Top* (1934)); *id.* at 857 (Kennedy, J., concurring) (opining that shocks the conscience "has the unfortunate connotation of a standard laden with subjective assessments" and, therefore, "must be viewed with considerable skepticism"). *See also supra* notes 69–73 and accompanying text.

151 *See supra* note 1 and accompanying text.

152 Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009).

153 *Id.* at 598–99.

154 *Id.* at 595. Professor Gedicks explains that "[r]evolutionary Americans adopted these propositions wholesale, and carried them into independence and beyond." *Id.* at 657. Professor Gedicks concedes that "[i]t is less clear whether Coke really thought that the law of the land bound Parliament," but he concludes that revolutionary Americans

ratification controversy over the Constitution's lack of a Bill of Rights reflected this same understanding of "higher-law" constitutionalism. Those who argued against adoption of a Bill of Rights asserted that an enumeration of rights was unnecessary because higher-law constitutionalism already protected "natural and customary rights," thus rendering enumeration in a written constitution superfluous.[155]

Applying either an originalist perspective that focuses on those who framed and ratified the substantive due process guarantee, or a public-meaning originalism that looks to the public meaning at the time it was drafted and ratified, it is clear that the Due Process Clause was understood as a limitation on the arbitrary use of executive power.[156] Coke "equated the law of the land with the due process of law," and "understood both to have imposed substantive limitations on actions of the king."[157] Because the Supreme Court has acknowledged that Magna Carta is the source of modern day substantive due process, and because it is well accepted that, at a minimum, Magna Carta, as originally understood and as developed by Sir Edward Coke in the seventeenth century, was a limitation on executive power,[158] it is counterintuitive to interpret substantive due process as providing less protection for arbitrary executive acts that violate natural or customary rights than for legislative acts.

B. Supreme Court Precedent both Before and After *Lewis* Conflict with Its Analysis

As discussed in Part I, the Supreme Court in *Rochin*, the source of the shocks the conscience test, did not suggest a different treatment of substantive due process challenges to executive action, as opposed to legislative enactments.[159] Further, the shocks the conscience language was merely one of several descriptive phrases used by Justice Frankfurter to explain why the introduction of evidence obtained through

believed that substantive due process was a limitation on legislative power, as well as executive power. *Id.*

155 *Id.* at 634–38.

156 *Id.* at 656–57.

157 *Id.* at 657.

158 Professor Gedicks contends that Sir Edward Coke's notion of "higher law" constitutionalism was understood as limiting parliamentary lawmaking as well as the Crown's prerogatives. *Id.* at 598–608. Key opponents of this broad interpretation of substantive due process and Magna Carta argue that Magna Carta was intended as a limitation only on the king and his agents, because no parliament or other legislative entity existed in early thirteenth century England. *See* Raoul Berger, *"Law of the Land" Reconsidered*, 74 NW. U. L. REV. 1, 18–20, 24, 30 (1979).

159 *See supra* notes 34–35 and accompanying text.

pumping someone's stomach violated substantive due process.[160] Finally, the sparse citations in *Lewis* did not support its conclusions.[161]

Notably, at the time *Lewis* was decided, the Supreme Court did not follow this legislative/executive dichotomy in assessing violations of other constitutional rights. In fact, in cases involving both "takings" and equal protection claims, the Court acknowledged the need to be more, not less, vigilant of executive/administrative decisions because of the greater risk of arbitrary decision making. For example, in *Allegheny Pittsburgh Coal Co. v. County Commission*,[162] the Court unanimously invalidated a county tax assessor's practice of valuing real property at fifty percent of its most recent sale price.[163] Since property would not be reassessed until it was again sold, properties with identical values would have widely divergent assessments depending on the timing of the sales.[164] Although reiterating the basic principle that the judiciary generally applies a highly deferential equal protection analysis to distinctions drawn in tax laws, the Court found, nonetheless, that the county assessor's practices were arbitrary.[165] Therefore, landowners were denied the equal protection of the law.[166] A few years later, in *Nordlinger v. Hahn*,[167] the Court upheld a California statute that limited property taxes and permitted reassessment only when sold, thereby resulting in the same property tax disparities challenged in *Allegheny*.[168] Nonetheless, the Court held the law was rationally related to a legitimate government purpose.[169] The only difference in the two cases was the Court's greater willingness to review the practices of the tax assessor as opposed to a tax statute enacted by the legislature.

The Supreme Court has recognized this same heightened concern for arbitrary executive decision making in its takings cases. In *Dolan v. City of Tigard*,[170] the Court acknowledged that a land regulation generally must be upheld if it "substantially advances legitimate state interests and does not deny an owner economically viable use of his land."[171] However, it reasoned that

160 *See supra* notes 32–33 and accompanying text.
161 *See supra* notes 36–43 and accompanying text.
162 488 U.S. 336 (1989).
163 *Id.* at 338.
164 *Id.* at 344.
165 *Id.* at 345.
166 *Id.* at 345–46.
167 505 U.S. 1 (1992).
168 *Id.* at 5, 18.
169 *Id.* at 12.
170 512 U.S. 374 (1994).
171 *Id.* at 385 (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

when city officials make "an adjudicative decision to condition petitioner's application for a building permit on an individual parcel," the deferential approach used to assess legislative determinations "classifying entire areas of the city," is inappropriate.[172] Instead, such decisions are subject to a test that mandates an "essential nexus" between a "legitimate state interest" and the permit condition exacted by the city, and "rough proportionality" between the exaction and the projected impact of the proposed development.[173] Justice Scalia's rationale for this strict test was the greater need for courts to be wary of adjudicative decisions by administrative officials that affect individual landowners, as compared to legislative determinations that classify whole areas of the city, such as zoning laws.[174]

The Court's contrary position with regard to substantive due process confounds the question of a constitutional rights violation with the question of liability. Arguably legislation represents an act of the government, making entity liability more justifiable.[175] In contrast, executive misconduct may be an isolated act that is difficult to control. However, the entire purpose of § 1983 is to hold individuals who act under color of state law accountable for their unconstitutional misconduct. Section 1983 already provides numerous mechanisms that significantly limit entity, as well as individual, liability for damages.[176] The critical question is whether the official has arbitrarily deprived persons of liberty or property. If so, the guarantee of substantive due process has been breached.

The Court's unwillingness to hold executive officials liable for substantive due process violations also stands in sharp contrast to the law of immunity that governs § 1983 litigation. The Court has acknowledged that government officials who engage in legislative conduct enjoy *absolute* immunity from liability, whereas members of the executive branch have only *qualified* immunity.[177] Indeed, the same year that the Court in *Lewis* granted greater protection for executive misconduct, it ruled in *Bogan v. Scott-Harris*,[178] that legislative acts should be

172 *Id.* at 385.

173 *Id.* at 386, 391.

174 *Id.* at 391 n.8. *See also* Michael L. Wells & Alice E. Snedeker, *State-Created Property and Due Process of Law: Filling the Void Left by* Engquist v. Oregon Department of Agriculture, 44 GA. L. REV. 161, 191–92 (2009) (reasoning that because legislation is enacted by a group, it is less likely to be based on ill motive, and because it usually affects many people in the same way, there is an inherent "check on abusive legislation" and less "need for judicial oversight").

175 *See infra* note 223.

176 *See infra* notes 217–22 and accompanying text.

177 *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

178 523 U.S. 44 (1998).

given greater deference because "the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability."[179] Legislative decisions, even if made by executive officers, *i.e.*, the mayor in *Bogan*, are shielded by absolute immunity, whereas executive decisions trigger only qualified immunity.[180] The Court distinguished decisions that have broad prospective implication, where there is less likelihood of abuse of power, from those that apply only to a particular individual, where the decision may be characterized as "executive," rather than legislative.[181] The Court's interpretation and development of immunity doctrine recognizes the greater need to rein in abuses of executive power.

As to substantive due process claims, the Supreme Court in recent years has neither consistently adhered to the executive/legislative dichotomy nor to the shocks the conscience test. Two opinions from 2003 are illustrative. In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*,[182] developers sued the city challenging the city engineer's refusal to issue a building permit until a referendum petition—which called for repeal of a municipal housing ordinance authorizing construction of a low-income housing complex—could be submitted.[183] The developer alleged violations of the Fair Housing Act, equal protection, and substantive due process.[184] The latter claim was discussed in a brief paragraph, citing *Lewis* for the proposition that "the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct."[185] Blatantly omitted

179 *Id.* at 52.

180 *Id.* at 55. *See also* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) ("[F]or executive officials in general, however, our cases make plain that qualified immunity represents the norm.").

181 *Id.* at 55–56. The lower federal courts have recognized this same distinction between broad policymaking decisions that are legislative in character and decisions that apply to a specific party, which are viewed as executive and not shielded by immunity. *See, e.g.*, Thornton v. City of St. Helens, 425 F.3d 1158, 1163–64 (9th Cir. 2005) (holding that a city manager and a city planner did not enjoy legislative immunity from a claim that they improperly delayed processing a wrecking-yard owner's applications for city approval of his license renewal because processing an individual application is not a legislative function); Bryan v. City of Madison, 213 F.3d 267, 273 (5th Cir. 2000) (holding that a mayor's repeated vetoes of a developer's site plans and the use of delay tactics to prevent approval of the plans were not protected by legislative immunity because the decisions did not involve broad policymaking); Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1392 (11th Cir. 1993) (distinguishing the promulgation of zoning ordinance and general moratoriums on development plans, which trigger absolute immunity for local legislators, from land use decisions that simply apply policy to a specific party and thus are not insulated by legislative immunity).

182 538 U.S. 188 (2003).

183 *Id.* at 191–93.

184 *Id.* at 193.

185 *Id.* at 198.

from the opinion was the shocks the conscience language. Although the Court cited *Lewis* for the proposition that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'"[186] the next sentence explained that the challenged mandate to deny the permits while the petition was pending "represented an eminently rational directive,"[187] thereby creating confusion in the appellate courts as to whether land use regulation decisions should be analyzed under the legislative (rational basis) or executive (shocks the conscience) test.[188]

More significantly, in *Chavez v. Martinez*,[189] a three-Justice plurality analyzed a challenge to executive action under *both* the fundamental rights strand *and* the shocks the conscience strand of substantive due process, and six Justices agreed that the fundamental rights strand applied to claims involving executive action.[190] Martinez was being treated for gunshot wounds received during an altercation with police when Chavez, a patrol supervisor, began interrogating him without providing a *Miranda* warning.[191] Because Martinez was never charged with

186 *Id.* (quoting County of Sacramento v. Lewis, 523 U.S. 823, 846 (1998)).

187 *Id.* at 198–99.

188 *See, e.g.*, Shanks v. Dressel, 540 F.3d 1082, 1088–89 (9th Cir. 2008) (citing *Lewis* and *Cuyahoga Falls* for the principle that when executive action is challenged only "egregious" conduct can be said to be "arbitrary in the constitutional sense"; thus, land decisions that rest on an erroneous legal interpretation or that violate state law do not give rise to a substantive due process violation unless there is evidence that a decision reflects malice, bias, or pretext); Chainey v. Street, 523 F.3d 200, 220 (3d Cir. 2008) (holding that allegations of improper motive are insufficient absent evidence of corruption, self-dealing, or additional facts that suggest "conscience-shocking behavior"); Clark v. Boscher, 514 F.3d 107, 112–13 (1st Cir. 2008) (holding that run-of-the-mill land-use decisions, such as the denial of permits, generally do not rise to the level of behavior that shocks the conscience and such is limited to "truly horrendous situations"); Ferran v. Town of Nassau, 471 F.3d 363, 369–70 (2d Cir. 2006) (holding that although town's use of a landowner's parcel as a turnaround for its snow plows and its paving of a road that encroached on the property was "incorrect and ill-advised," it was not the type of conscience-shocking, outrageous behavior that implicates substantive due process). Other appellate courts have used the shocks the conscience test even in challenges to zoning ordinances. *See* Koscielski v. City of Minneapolis, 435 F.3d 898, 902–03 (8th Cir. 2006) (holding that zoning ordinance that restricted where firearms dealerships could be located did not violate substantive due process since this mandate is not "so egregious or extraordinary as to shock the conscience"). *Cf.* A Helping Hand, L.L.C. v. Baltimore County, 515 F.3d 356, 372–73 (4th Cir. 2008) (upholding jury instruction that stated that a substantive due process violation could be found if the decision to shut down methadone clinic operator based on a county zoning ordinance was "clearly arbitrary and unreasonable, with no substantial relationship to a legitimate governmental purpose"; the court reasoned that this was a valid statement of the law even though other cases articulated a different, more stringent substantive due process test).

189 538 U.S. 760 (2003).

190 Justice Thomas wrote the opinion, joined by Chief Justice Rehnquist and Justice Scalia, which examined whether a fundamental right was implicated. *Id.* at 775. Justice Kennedy, in an opinion joined by Justices Stevens and Ginsburg, argued that the police conduct implicated a fundamental liberty interest. *Id.* at 796, 799.

191 *Id.* at 764.

a crime, the answers elicited during the interrogation were never used against him in any criminal proceeding.[192] As a result, Justice Thomas concluded that the Fifth Amendment's Self-Incrimination Clause did not apply to this situation.[193]

Proceeding to examine the claim under substantive due process, Justice Thomas invoked *Lewis* and *Rochin* for the proposition that "unauthorized police behavior . . . might 'shock the conscience' and give rise to § 1983 liability."[194] After determining that the officer's conduct was not "conscience shocking," the plurality recognized that the Due Process Clause also protects "fundamental liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest."[195] Although holding that freedom from unwanted police questioning was not a fundamental right,[196] the plurality engaged in a fundamental rights analysis despite the fact that the case involved a challenge to executive, not legislative, action.[197] Further, in a concurring opinion, Justice Stevens stated that "[t]he Due Process Clause of the Fourteenth Amendment protects individuals against state action that *either* 'shocks the conscience,' *or* interferes with [fundamental] rights 'implicit in the concept of ordered liberty.'"[198]

The significance of the two-prong analysis in *Chavez* has not been lost on the lower courts. For example, the Tenth Circuit invoked *Chavez* to challenge a district court ruling that improperly "compartmentali[zed]" substantive due process based on whether the government conduct complained of was "executive" or "legislative."[199] Although conceding that *Lewis* appeared to create an executive/legislative distinction, the court explained that "an overly rigid demarcation between the two lines of cases is neither warranted by existing case law nor helpful to the substantive analysis."[200] The court, perhaps somewhat disingenuously, asserted that the Supreme Court in *Lewis* did not "establish an inflexible dichotomy."[201] Further, it

192 *Id.*

193 *Id.* at 766.

194 *Id.* at 774 (citing County of Sacramento v. Lewis, 523 U.S. 833, 850 (1998)).

195 *Id.* at 774–75.

196 *Id.* at 776.

197 *Id.* at 775–76.

198 *Id.* at 787 (Stevens, J., concurring in part and dissenting in part) (citation omitted) (emphasis added).

199 Seegmiller v. Laverkin City, 528 F.3d 762, 767 (10th Cir. 2008).

200 *Id.*

201 *Id.* at 768. Most appellate courts have interpreted *Lewis* to require different treatment of executive and legislative action. *See* Dias v. City & County of Denver, 567 F.3d 1169, 1182–84 (10th Cir. 2009) (holding that the district court erred in applying a "shocks the conscience" test to plaintiff's challenge to a pit bull ordinance because this

reasoned that rejecting the dichotomy "makes good sense, for the distinction between legislative and executive action is ancillary to the real issue in substantive due process cases: whether the plaintiff suffered from governmental action that either (1) infringes upon a fundamental right, or (2) shocks the conscience."[202] A total of six Justices agreed in *Chavez* that the fundamental rights strand of substantive due process applied to claims involving executive action,[203] thus negating any "hard-and-fast rule requiring lower courts to analyze substantive due process cases under only the fundamental rights or shocks the conscience standards."[204]

In short, the Supreme Court in *Lewis* manufactured a false dichotomy between legislative and executive misconduct that had not been used in prior cases, and it imposed a draconian shocks the conscience test that has led to nothing but mischief in the appellate courts. Further, the Court itself, in *Chavez*, ignored the rigid dichotomy. The next section explores why the Court's

inquiry is reserved for cases challenging executive, not legislative, action); Martin v. St. Mary's Dep't Soc. Servs., 346 F.3d 502, 511 (4th Cir. 2003) (citing the *Lewis* dichotomy as mandating use of "shocks the conscience" test to evaluate all executive action); Putnam v. Keller, 332 F.3d 541, 547 (8th Cir. 2003) (applying the *Lewis* dichotomy between legislative and executive action to assess whether challenged conduct by campus officials violated substantive due process); Leebaert v. Harrington, 332 F.3d 134, 139 (2d Cir. 2003) (noting that there is a different standard for determining arbitrary action depending upon whether the action is executive or legislative); Hawkins v. Freeman, 195 F.3d 732, 738 (4th Cir. 1999) (commenting that there are different tests for determining whether an executive or legislative act is "fatally arbitrary"; however, because the facts could be interpreted as either an executive or legislative act, the court proceeded to evaluate plaintiff's claim under both standards).

202 *Seegmiller*, 528 F.3d at 768. *See also* United States v. Salerno, 481 U.S. 739, 746 (1987), discussed *supra* notes 38–39 and accompanying text. *Cf.* Bowers v. City of Flint, 325 F.3d 758, 764 (6th Cir. 2003) (Moore, J., concurring) (while agreeing that plaintiff failed to state a viable substantive due process claim, concurring opinion advised that a three-step substantive due process analysis should be used, wherein the court first considers whether the asserted interest constitutes a fundamental right and, if so, strict scrutiny is applied; second, the court determines whether the conduct shocks the conscience; third, if the conduct does not shock the conscience, the court considers whether the conduct is rationally related to a legitimate state interest).

203 A three-Justice plurality analyzed executive conduct under both the fundamental rights strand and the shocks-the-conscience strand of substantive due process. *Chavez*, 530 U.S. at 775. Three additional Justices: Kennedy, Stevens, and Ginsburg, employed a fundamental rights analysis in their concurring opinions. *Id.* at 783, 789, 799.

204 *Seegmiller*, 528 F.3d at 768. In this case, an officer was reprimanded for her off-duty sexual conduct and the court asserted that her substantive due process claim could be established either by identifying a fundamental right or by demonstrating that the conduct shocks the conscience. *Id.* at 764, 767. Ultimately, the court decided that plaintiff failed under both approaches. *Id.* at 769. The Supreme Court similarly rejected the rigid two-tier approach to substantive due process analysis of legislative claims, opting instead for a more nuanced balancing approach. *See* discussion of *Lawrence v. Texas*, *supra* note 9 and accompanying text. Further, the Court in *State Farm Mut. Auto. Ins. Co. v. Campbell* developed a multi-factor test for determining when punitive damage awards are so arbitrary as to violate substantive due process. *See* discussion of *State Farm*, *supra* notes 11–12 and accompanying text.

justification for treating executive misconduct differently, namely a concern for transforming constitutional litigation into a "font of tort law," is ill conceived and exaggerated.

C. Overlap with Tort Law Does Not Justify Restricting the Substantive Due Process Guarantee

The Supreme Court, in *Lewis*, explained its rationale for the executive/legislative distinction and the shocks the conscience test as follows: "[E]xecutive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law."[205] Several lower appellate courts have relied on this rationale to demand truly conscience-shocking behavior in order to survive dismissal of a substantive due process claim.[206] Others have barred substantive due process claims unless the litigant establishes the inadequacy of state tort remedies.[207]

The overlap with state tort remedies should not determine the fate of federal constitutional violations. The Supreme Court is clearly driven by a concern that § 1983 not be used to supplant traditional tort law, despite federalism concerns.[208] However, in *Monroe v. Pape*,[209] the Supreme Court held that the federal remedy for vindicating constitutional deprivations under § 1983 supplements state remedies.[210] Indeed, the whole purpose of § 1983 was to interpose the federal courts between the states and the people and to provide greater protection for constitutional

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205 County of Sacramento v. Lewis, 523 U.S. 833, 848 n.8 (1998). The "font of tort law" language first appeared in a Supreme Court decision addressing a procedural due process claim brought by a litigant who was branded an active shoplifter in a flyer circulated by the police chief. Paul v. Davis, 424 U.S. 693, 695–96, 701 (1976). The Court explained that the procedural due process challenge "would appear to state a classical claim for defamation actionable in the courts of virtually every State." *Id.* at 697. The Court opined that permitting a Due Process Clause claim "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 701. *See also* Martinez v. California, 444 U.S. 277, 282 (1980) (observing that each state has a paramount interest "in fashioning its own rules of tort law"); William Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 544 (1989) (alleging that many due process claims are merely state tort actions "masquerading" as civil rights suits).

206 *See, e.g.*, Christensen v. County of Boone, 483 F.3d 454, 464–65 (7th Cir. 2007) (reasoning that "*Lewis* calls for judicial modesty in implementing a federal program of constitutional torts" and mandates that official misconduct, which may be harmful and unjustified by any legitimate interest, must be left to "ordinary tort litigation" unless it can be characterized as truly conscience-shocking).

207 *See supra* Part I.D.2.

208 Daniels v. Williams, 474 U.S. 327, 332–33 (1986) (quoting *Paul*, 424 U.S. at 701).

209 365 U.S. 167 (1961), *overruled in part on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 664–65 (1978).

210 *Id.* at 183.

rights.[211] Until or unless § 1983 is repealed or amended, it should not be interpreted contrary to its historic purpose. Further, liability for the arbitrary abuse of power by executive branch officials should not be relegated to the vagaries of state tort law. Several constitutional scholars have noted the illogic and danger of limiting the substantive scope of constitutional rights based on the existence of state torts.[212]

A related argument developed by Professor Richard H. Fallon, Jr. contends that substantive due process should serve only as a check on legislative enactments that have a broad impact on society, rather than to correct individual injustices that can be vindicated through individual tort actions.[213] On the other hand, it can be argued that the judicial invalidation of laws raises greater concerns regarding federalism and judicial activism. As Justice Scalia has opined, "'[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'"[214] It is when the judiciary strikes down democratically enacted laws that it "thwarts the will of representatives of the actual people."[215] In

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211 *Id.* at 171–72.

212 *See* Robert Chesney, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 SYRACUSE L. REV. 981 (2000). Chesney noted:

> [I]t makes little sense to define the scope of a constitutional right with reference to the availability of tort remedies . . . merely on the ground that the federal civil damages remedy through which the right might be asserted appears to overlap with tort concepts. . . . [D]efining the range of constitutional protections in the context of alleged executive infringements by reference to the apparently undesirable convergence of tort and constitutional law tailors the remedy poorly to the perceived problem. If convergence with 'mere' tort law is the problem, then a response specific to the federal civil damages action vehicles . . . is appropriate[.]

Id. at 1013–14; Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 94 (2006) (arguing that substantive due process "serves a *nationalizing function*" because "[w]hen the Court recognizes substantive due process rights, they are national rights that every state and locality must honor"); Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 661 (1997) (contending that attempts to prevent overlap with state tort law have resulted in decisions that limit the substantive scope of constitutional rights: "[t]he danger posed by focusing on the way in which § 1983 damage actions against state officials . . . are like or unlike tort actions is that problems raised by specific remedies will drive thinking about constitutional substance").

213 Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 327 (1993). *See also The Supreme Court, 1997 Term—Leading Cases*, 112 HARV. L. REV. 122, 199 (1998) ("[S]ubstantive due process analysis is on its firmest footing when applied to systematic governmental action.").

214 Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) (quoting Gregg v. Georgia, 428 U.S 153, 175 (1976)).

215 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–18 (1962) (describing judicial review as a "deviant

contrast, when plaintiffs use substantive due process to remedy arbitrary abuses of government power by its officials, no harm befalls democratically enacted laws. When a member of the executive branch violates a constitutional duty and deprives an individual of life, liberty, or property, a judicial remedy does not undermine democracy. When judges and jurors determine that government officials have engaged in arbitrary behavior, no plausible counter-majoritarian difficulty exists. Further, Professor Fallon's distinction ignores the reality that actions of law enforcement officials, government employers, government educators, and other members of the executive branch may have a significant and broad corrosive impact, thereby raising the same systemic concerns triggered by legislative action.[216]

The allegation that recognizing "constitutional torts" will cause a deluge of federal litigation and government liability is also highly exaggerated. The Supreme Court has already made it clear that plaintiffs cannot base a substantive due process claim on mere inaction, *i.e.*, failing to protect individuals from acts of violence or dangerous situations that the government did not create.[217] Further, the Supreme Court has protected against vexatious, frivolous litigation by awarding fees to prevailing defendants pursuant to the Civil Rights Attorney's Fees Awards Act of 1976,[218] as well as by imposing sanctions under Rule 11 of the *Federal Rules of Civil Procedure*.[219] Together with recent

institution" in American democracy and coining the phrase "counter-majoritarian difficulty" to describe the tension he perceived).

216 *See infra* note 278.

217 DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197 (1989). The Court reasoned that unless government officials, by an affirmative exercise of power, restrain an individual's liberty, rendering him unable to protect himself, there is no cause of action under the Due Process Clause. *Id.* at 201. This narrow view of substantive due process has been challenged by many constitutional scholars. *See, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273 (1990) (arguing that when "conclusory incantation[s]"—such as "[g]overnmental inaction is not actionable"—allow so many harms "to flourish unchecked by the Constitution," then "the language, and the concepts it describes, must be scrutinized with care"). *See also* Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 536–41 (2008) (demonstrating how many lower federal courts have refrained from finding a "custodial relationship," which would trigger a duty to protect, or a state-created danger, thereby rendering *DeShaney* a formidable obstacle).

218 42 U.S.C. § 1988 (2006). The statute provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." § 1988(b). Where the defendant prevails, fees may be awarded 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).

219 Rule 11 of the *Federal Rules of Civil Procedure* requires that an attorney who signs "a pleading, written motion, or other paper" thereby certifies that "the factual contentions have evidentiary support" and that the claims are "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law." FED. R. CIV. P. 11(b).

Supreme Court decisions permitting more effective use of motions to dismiss[220] and summary judgment procedures,[221] weak cases are disposed at the earliest stages of litigation. In addition, the doctrines of absolute and qualified immunity, which safeguard individual officials, significantly mitigate damage liability.[222] Finally, the Supreme Court's rejection of the doctrine of *respondeat superior* in § 1983 litigation insulates government entities from monetary liability unless a policymaker's conduct is challenged or a custom or policy is established.[223]

In light of these significant safeguards and limitations on liability, the concerns raised by the Court in *Lewis* are exaggerated, as well as unfounded. Federal courts should not be reluctant to recognize substantive due process claims where the plaintiff demonstrates arbitrary deprivation of a property or liberty interest. Executive branch officials, no less than legislators and judges imposing punitive damage awards, should be liable for substantive due process violations in order to permit this historic guarantee to play a vital role in remedying abuses of government power.

Another key rationale for constricting the use of substantive due process is the concern, voiced by several Justices, about

220 In *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009), the Court extended *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), to apply to all civil actions. To survive a motion to dismiss, a plaintiff must now allege sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 129 S. Ct. at 1949. The Court explained that judges should reject "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" and that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they no more than conclusions, are not entitled to the assumption of truth." *Id.* at 1949–50. In addition, *Iqbal* rejected the supervisory liability theory, which allowed supervisors to be held liable for the constitutional violations of their subordinates if there was evidence of knowledge and acquiescence. The majority stated that "the term 'supervisory liability' is a misnomer . . . each Government official . . . is only liable for his or her own misconduct." *Id.* at 1949. The dissent lamented that the majority eliminated the broader understanding of supervisory liability that governed prior to this ruling. *Id.* at 1957–58 (Souter, J., dissenting).

221 *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986) (holding that to avoid summary judgment an opposing party must show a "genuine issue as to any material fact" that impinges upon a decisive question of law); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 251–52 (1986) (holding that to survive summary judgment, the non-movant must present a "genuine factual dispute"—*i.e.*, one that "presents a sufficient disagreement to require submission to a jury").

222 Harlow v. Fitzgerald, 457 U.S. 800, 806–08 (1982) (stating that absolute immunity extends to judges, legislators, and prosecutors performing their duties as well as executive officials when they engage in legislative, judicial, or prosecutorial functions, whereas qualified immunity shields most executive officials from damage liability unless they violate clearly established law).

223 Monell v. Dep't of Soc. 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.").

judicial activism in an area where there are few objective guideposts. Opponents complain that allowing substantive due process challenges means that judges, based only on their own subjective preferences, will second-guess executive or administrative decisions.[224] Arguably, the largely undefined labels "arbitrary" and "capricious" can be attached to all sorts of government misconduct, potentially creating an undue strain on federal judicial resources as well as on state-federal relations.[225] However, the Court's adoption of the shocks the conscience test has not eliminated the vagueness or subjectivity problems. Responding to this criticism, Part III proposes a new test to guide lower courts in determining when executive misconduct is sufficiently arbitrary to rise to a constitutional level.

III. PROPOSED STANDARD FOR ASSESSING SUBSTANTIVE DUE PROCESS ABUSE OF POWER CLAIMS

In assessing whether government misconduct violates substantive due process, courts should return to the "essence of substantive due process," which is "protection of the individual from the exercise of governmental power without reasonable justification."[226] Focusing on this core question reveals the fallacy of *Lewis* and its progeny, including the tests the appellate courts have developed to further emasculate the meaning of substantive due process. More specifically, I propose four underlying principles that should govern substantive due process analysis and then explicate a new approach.

First, the legislative/executive dichotomy established in *Lewis* and the imposition of a more restrictive shocks the conscience test for executive misconduct should be rejected. The

224 *See, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) ("[G]uideposts for responsible decisionmaking in this uncharted area are scarce and open-ended."); Griswold v. Connecticut, 381 U.S. 479, 507–13 (1965) (Black, J., dissenting) (challenging substantive due process as a mechanism whereby Supreme Court Justices may interject their own predilections and determine what they believe to be fair); Gumz v. Morrissette, 772 F.2d 1395, 1404–06 (7th Cir. 1985) (Easterbrook, J., concurring) (asserting that "[s]ubstantive due process is a shorthand for a judicial privilege to condemn things the judges do not like or cannot understand") *overruled on other grounds by* Lester v. Chicago, 830 F.2d 706 (7th Cir. 1987).

225 *See* Justices Scalia's and Kennedy's descriptions of the shocks the conscience test, *supra* note 150. *But see* the majority opinion in County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998) ("While the measure of what is conscience shocking is no calibrated yard stick, it does, as Judge Friendly put it, 'poin[t] the way.'" (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

226 *See* Christensen v. County of Boone, 483 F.3d 454, 468–69 (7th Cir. 2007) (Ripple, J., concurring in part and dissenting in part) (emphasis omitted) (arguing that the majority erred in failing to recognize that government officials who act unreasonably and who use their positions "not in connection with any official duty but for [their] own purposes" have abused their power contrary to the guarantee of substantive due process).

question of whether government officials abuse their power should not depend on whether they are members of the executive, legislative, or judicial branch of government.[227]

Second, rejection of the shocks the conscience standard should include elimination of a rigid intent to harm, wantonness, malice, or sadism test.[228] Arbitrary abuse of power should not be insulated by imposing draconian burdens of proof on the victims. Although negligent misconduct may not be viewed as an unconstitutional abuse of power, the Supreme Court in *Lewis* recognized that government officials who act with deliberate indifference to the serious harm their actions might cause, have breached the constitutional guarantee of due process.[229] Although the Court opted for an intent to harm standard in emergency situations where there is no time to deliberate,[230] the Court's carefully constructed exception does not justify the broad use of the sadism, wantonness, and malice standards for students and detainees who bring substantive due process claims.[231]

Third, the conclusion reached by some appellate courts that substantive due process protects only fundamental rights should be rejected. As discussed, this fundamental rights restriction has permitted courts to dismiss claims involving significant property and liberty interests.[232] The Fourteenth Amendment does not say that government cannot deprive persons of a "fundamental right"; rather, it prohibits all deprivations of "life, liberty, or property, without due process of law."[233] The Supreme Court has acknowledged that the scope of "liberty" protected by the Due Process Clause is broad: "[A] rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ."[234]

The Supreme Court has never repudiated the broad definition of "liberty" first enunciated in the 1920s as encompassing a wide range of interests "recognized at common law as essential to the orderly pursuit of happiness by free men."[235] The Court's opinion in *Lawrence v. Texas*[236] implicitly

227 *See supra* Parts II.A and B.
228 *See supra* Part I.D.3.
229 *See supra* note 57 and accompanying text.
230 *See supra* note 58 and accompanying text.
231 *See supra* notes 121–22, 129 and accompanying text.
232 *See supra* Part I.D.1.
233 U.S. CONST. amend. XIV, § 1.
234 Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (quoted in Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion)).
235 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
236 539 U.S. 558 (2003).

recognized this "continuum approach." The majority failed to follow the strict fundamental-rights analysis that the Court enunciated in *Glucksberg*.[237] *Lawrence* is noteworthy because, under *Glucksberg*, where no fundamental right is implicated, legislative enactments are presumed valid and will be struck down only if totally arbitrary and capricious.[238] Nonetheless, the Court in *Lawrence* invalidated Texas' sodomy law as arbitrarily interfering with the liberty interests of individuals to enter into personal relationships.[239]

Many constitutional scholars have suggested that *Lawrence* marked the demise of *Glucksberg*'s strict two-tier analysis.[240] Although post-*Lawrence* decisions have not demonstrated a sea change,[241] lower courts that have interpreted *Glucksberg* to preclude *any* review of executive misconduct absent a fundamental right are misguided. They ignore the "second tier" of the *Glucksberg* analysis and thereby deprive litigants of the opportunity to show that they have been subjected to "substantial arbitrary impositions and purposeless restraints."[242] Although government interference with property and liberty normally will not trigger strict scrutiny, this should not mean

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237 *Id.* at 586, 588 (Scalia, J., dissenting) (criticizing the majority's failure to articulate *any* standard of review). *See also* Troxel v. Granville, 530 U.S. 57, 68, 72–73 (2000) (plurality opinion) (applying a "combination of several factors" to hold that a state's visitation statute, as applied, unconstitutionally infringed on parents' fundamental right to rear their children); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (applying an "undue burden" test, rather than strict scrutiny or rational basis, in assessing the constitutionality of state abortion laws); Russ v. Watts, 414 F.3d 783, 789 (7th Cir. 2005) (noting the confusion between different Supreme Court approaches to substantive due process analysis, including *Glucksberg*'s fundamental rights analysis, the *Lewis* "shocks the conscience" test, and *Troxel's* "combination of factors" test).

238 *See* Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

239 *Lawrence*, 539 U.S. at 567. Justice Kennedy asserted that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Id.* at 562. He concluded that the Texas statute furthered "no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 578.

240 Conkle, *supra* note 212, at 65 (contending that *Lawrence* "includes untapped insights . . . that might inform a substantial reconceptualization and reformation of substantive due process"); Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 285 (2005) ("*Lawrence* dramatically shifted the tide, reinvigorating substantive due process both by sharpening the doctrine's affirmative rationale and by tightening the restrictions it imposes on government regulation."). *See also* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, *in* CATO SUPREME COURT REVIEW: 2002–2003 21, 41 (James L. Swanson ed., 2003) (recognizing *Lawrence* as a case adopting a Libertarian interpretation of the Constitution that creates a "presumption of liberty" whereby all laws that restrict "liberty" are presumptively unconstitutional); Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1899 (2004) ("*Lawrence* significantly altered the historical trajectory of substantive due process . . . .").

241 *See supra* note 9.

242 *See* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

that government officials, including those in the executive branch, may violate "non-fundamental" rights with impunity.

Fourth, a focus on abuse of power demonstrates the irrelevance of the existence of state remedies. Many appellate courts have erroneously rejected claims brought by students, landowners, and government employees based on the availability of state tort remedies.[243] As has been explained, the existence of state remedies has relevance with regard to some procedural due process claims, but not substantive due process claims.[244] Clearly this criterion has nothing to do with the level of arbitrariness of the constitutional deprivation and thus should be rejected.

Once these four principles are understood, the question of what is an unconstitutional abuse of power can be assessed by borrowing from the Supreme Court's analysis of substantive due process challenges to legislative or judicial power, as well as appellate court decisions that have struggled with this question. The following sections set forth a proposed standard.

A. Strict Scrutiny for the Deprivation of Fundamental Rights

Where fundamental rights are implicated, federal courts should follow the Supreme Court's lead in *Chavez*, which analyzed a challenge to executive power under both the fundamental rights strand *and* the shocks the conscience strand.[245] In *Chavez*, the Court ignored the strict dichotomy imposed in *Lewis* and instead recognized that the violation of fundamental rights, whether by legislative or executive action, triggers strict scrutiny.[246] In determining whether a Supreme Court decision should be reversed, one key factor is whether the legal foundations of the decision have been eroded by subsequent rulings. *Lewis* itself was a deeply divided decision, and the dichotomy that it created between legislative and executive decisions was eroded by the *Chavez* opinion.[247]

B. A Nuanced Balance Test for Substantive Due Process Claims Not Implicating Fundamental Rights

Because the Supreme Court has been reluctant to expand the category of fundamental rights and has indeed narrowed the

243 *See supra* Part I.D.2.

244 *See supra* notes 97–102 and accompanying text.

245 *See supra* notes 189–98 and accompanying text.

246 *See supra* note 195 and accompanying text.

247 *See supra* notes 199–202 and accompanying text (discussing appellate courts that have interpreted *Chavez* as eliminating this rigid dichotomy).

scope of recognized rights,[248] adopting a strict scrutiny analysis for the deprivation of fundamental rights, with no meaningful check on the deprivation of non-fundamental interests, provides insufficient protection against abuses of government power. Further, the Supreme Court has not consistently followed *Glucksberg*'s strict two-tier substantive due process analysis,[249] which ultimately depends on how broadly or narrowly the Justices decide to characterize the liberty or property interest.[250] For example, in *Michael H. v. Gerald D.*,[251] a biological father challenged a California law that created an irrebuttable presumption that a married woman's husband was the father of her child.[252] The Court ruled that a biological father who had established a relationship with the child had no right to a hearing to determine paternity and that he could be denied all parental rights.[253] Justice Scalia, however, asserted that the specific liberty interest implicated was the alleged right of a father to have a relationship with a child who is conceived as a result of an adulterous relationship with a married woman—a right that has not traditionally been recognized and thus cannot be viewed as fundamental.[254] Justice Brennan, in dissent, argued that it was well established that fathers have a

248 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 874 (1992) (describing the right to terminate a pregnancy as a liberty interest, not a fundamental right, and abandoning strict scrutiny in favor of an "undue burden" test, which permits, prior to viability of the fetus, state regulation that does not unduly burden the abortion decision).

249 In addition to *Casey*, see District of Columbia v. Heller, 128 S. Ct. 2783, 2817–22 (2008) (holding that the right to possess a handgun in one's home for self-defense is protected by the Second Amendment, but then reasoning that "[u]nder any of the standards of scrutiny" applied to enumerated rights, the ordinance in question failed to pass constitutional muster; the Court did not define the right as fundamental, nor did it apply strict scrutiny analysis); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (recognizing a liberty interest in intimate homosexual relationships, but neither asserting fundamental-rights status nor the need to apply strict scrutiny); Troxel v. Granville, 530 U.S. 57, 66–67 (2000) (requiring that parental rights be given significant weight in deciding visitation matters, but not using strict scrutiny language); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–80 & n.7 (1990) (recognizing a liberty interest in refusing unwanted medical treatment but not denominating this interest as a fundamental right that necessarily triggered strict scrutiny and, instead, balancing the competing interests).

250 *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) ("The selection of a level of generality necessarily involves value choices."); Mark Tushnet, *Can You Watch Unenumerated Rights Drift?*, 9 U. PA. J. CONST. L. 209, 216 (2006) (contending that "questions about unenumerated rights are questions about the level of abstraction on which we are to understand constitutional language" and that "there is no *analytic* basis for selecting one rather than another level of generality or specificity").

251 491 U.S. 110, 113 (1989).

252 *Id.* at 113.

253 *Id.* at 124–27.

254 *Id.* at 127 (majority opinion).

fundamental right to have a relationship with their biological children.[255]

The same characterization problem surfaced in *Lewis* where officers killed a youth on a motorcycle during a high-speed chase.[256] The liberty interest could be defined broadly as implicating the fundamental right to life, as Justice Kennedy did,[257] or, more narrowly, as a "right to be free from 'deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender,'" which Justice Scalia found was not rooted in history or tradition and thus not protected under substantive due process.[258]

Borrowing from the Supreme Court's more recent substantive due process decisions, which have eschewed the strict two-tier analysis established in *Glucksberg*,[259] courts should apply a balance test that examines certain key factors that relate directly to whether an abuse of power has occurred. First, courts should assess the nature and significance of the interests at stake and the extent to which these interests have been violated, as the Supreme Court did in *Lawrence*, *Troxel*, and *Heller*.[260] Second, in determining arbitrariness, a critical factor should be whether the government's action is a substantial departure from professional judgment. The Supreme Court adopted this standard to determine whether executive officials violated the substantive due process rights of those involuntarily committed to its mental institutions.[261] There is no reason why public school officials, jailers, and government employers should not be held to a similar standard of "professionalism."

Third, borrowing from the Supreme Court's analysis of arbitrary punitive damage awards, courts should examine the reprehensibility of the government official's misconduct,[262] which the Court has held is "the most important indicium of the

255 *Id.* at 141–45 (Brennan, J., dissenting).

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

257 *Id.* at 856 (Kennedy, J., concurring).

258 *Id.* at 862–63 (Scalia, J., concurring) (quoting *id.* at 836 (majority opinion)). *See also* Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308 (2009). Whereas the majority characterized plaintiff's § 1983 claim as a "freestanding right to access DNA evidence for testing," which is not rooted in history, the dissent called this a "fundamental mischaracterization" of the liberty interest, and instead framed the claim as the "most elemental" liberty right to be "free from physical detention by one's own government." *Id.* at 2322–23, 2331, 2334 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004)).

259 *See supra* note 249. See also cases which have read *Lawrence* to require a balancing test, *supra* note 9.

260 *See supra* note 249.

261 *See supra* note 43 and accompanying text.

262 *See supra* note 11–12 and accompanying text.

reasonableness of a punitive damages award."[263] Reprehensibility measures culpability and callousness, which are directly relevant to whether a constitutional abuse of power has occurred. In *State Farm*, the Court set forth the following considerations regarding reprehensibility:

> Whether . . . the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.[264]

The first consideration suggests that a defendant who causes physical harm, *i.e.*, who deprives a plaintiff of liberty rather than property, often acts more callously than a defendant who causes economic harm. The second mirrors the deliberate indifference or reckless disregard test that generally governs substantive due process claims. The third—financial vulnerability of the victim—may have little relevance in most substantive due process claims, but is highly relevant to culpability when broadened to include an inquiry into whether the defendant targeted especially "vulnerable" victims, such as students or detainees. Finally, the fourth and fifth criteria are clearly indicia of abuse of power since repeated actions or those inspired by malice or deceit indicate the unreasonableness and arbitrariness of the defendant's conduct.[265] This does not mean that evidence of malice or sadism is required to demonstrate a substantive due process violation. Indeed, any categorical "intent to harm" test insufficiently protects individual liberty.[266]

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263 *See supra* note 11; State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).

264 *State Farm*, 538 U.S. at 419.

265 In a more recent punitive damages case, *Philip Morris U.S.A. v. Williams*, 127 S. Ct. 1057 (2007), the Court held that the trial court improperly rejected a jury instruction regarding the allowable use of evidence of harm to non-parties in assessing punitive damages. The Court reasoned that a jury may not use punitive damages to directly punish the defendant for harm caused to non-parties to the litigation, but it may consider this harm in determining reprehensibility. *Id.* at 1065. The Court cast its decision as a procedural due process case, *id.*, but it can be argued that the Court's focus on amount of harm as an indication of reprehensibility may also have implications for substantive due process challenges. *See* Jeremy T. Adler, Comment, *Losing the Procedural Battle but Winning the Substantive War: How* Philip Morris v. Williams *Reshaped Reprehensibility Analysis in Favor of Mass-Tort Plaintiffs*, 11 U. PA. J. CONST. L. 729, 743 (2009) (arguing that "even though *Philip Morris* was a procedural due process decision, the Court's conception of reprehensibility should be equally applicable to substantive due process challenges to punitive damages judgments"). The Court stated that "conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." *Phillip Morris*, 127 S. Ct. at 1065. This would be an important criterion in cases such as *Lewis* that involved a high-speed chase, which posed a significant risk of harm to others.

266 *See supra* notes 228–31 and accompanying text.

In assessing reprehensibility, courts should also look to the mitigating factors raised in *Lewis*, such as whether the government officials had to act in haste or whether they had time to deliberate.[267] Further, where government officials are forced to weigh conflicting legitimate interests, this should be taken into account.[268] However, unlike *Lewis* and the appellate courts' interpretation of *Lewis*, these factors should not lead inexorably to imposition of an intent to harm standard. Rather, they should be viewed as just two of several relevant criteria in assessing the reprehensibility of the defendant's conduct.

An example will help illustrate the significance of this new substantive due process analysis. In *Christensen v. County of Boone*,[269] plaintiffs asserted that a police officer, acting out of a personal vendetta, engaged in "a pattern of on-duty conduct designed to harass, annoy, and intimidate" plaintiff and his girlfriend.[270] The couple alleged that the officer repeatedly followed them while they were driving, that he parked his squad car in front of the girlfriend's place of employment, and that he sat in his police car outside of businesses that the plaintiffs were visiting.[271] The Seventh Circuit reasoned that even if a fundamental right to intimate association was at stake, the claim failed because the adverse consequences of the officer's actions were not sufficiently serious: "[o]fficial conduct that represents an abuse of office . . . violates the substantive component of the due process clause only if it 'shocks the conscience.'"[272] The court stressed that "*Lewis* calls for judicial modesty in implementing a federal program of constitutional torts . . . leaving to ordinary tort litigation conduct of the sort in which Deputy Krieger is alleged to have engaged."[273] Even if unjustified by any legitimate government interest, the claim was not actionable.[274]

One dissenting judge recognized that the majority's approach ignored the essence of substantive due process, namely "protection of the individual from the exercise of governmental power without reasonable justification."[275] Relying on Justice Kennedy's concurrence in *Lewis*, Judge Ripple asserted that courts should examine the objective character of the conduct to

267 *See supra* note 58 and accompanying text.
268 *See supra* notes 107–18 and accompanying text.
269 483 F.3d 454 (7th Cir. 2007).
270 *Id.* at 457.
271 *Id.*
272 *Id.* at 464.
273 *Id.* at 464–65.
274 *Id.* at 465.
275 *Id.* at 468 (Ripple, J., concurring in part and dissenting in part) (emphasis omitted).

determine whether such is consistent with traditions, precedents, and the historical meaning of the Constitution.[276] Judge Ripple explained that this was a situation where the official

> embarked upon a scheme of retaliation against the plaintiffs in which he used the power and authority of his office to injure their relationship. This systematic vendetta had no conceivable legitimate governmental purpose. It amounted to the raw use of the power—power that comes with a badge, a service revolver, and the power to arrest—in order to make it difficult for this couple to maintain a romantic relationship that our constitution protects as a fundamental right.[277]

Judge Ripple believed that a fundamental right was at stake and he concluded that this perverse use of police authority shocked the judicial conscience and sent a dangerous message to law enforcement personnel.[278] Under the approach suggested in this Article, deprivations of fundamental rights would automatically trigger strict scrutiny, as they do for legislative enactments. However, if the court failed to recognize a fundamental right to maintain a romantic relationship or found that the challenged conduct did not infringe on that right, it would then weigh the importance of the right and the extent of the infringement, whether the officer's conduct was a substantial departure from professional judgment, and the reprehensibility of the conduct. Applying these factors, a substantive due process violation is apparent. First, even if the right is not "fundamental," the liberty interest is significant, and "stalking" constitutes a significant impairment of the interest. Second, the officer's conduct was a substantial departure from professional police conduct. Third, the conduct could readily be described as reprehensible. It interfered with personal liberty, it involved repeated actions, and there was evidence of ill will and an intent to harm. Further, the officer was not facing exigent circumstances nor was he forced to weigh competing legitimate government interests. In short, the officer's conduct was a raw

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276 *Id.*

277 *Id.* at 469.

278 *Id.* Judge Ripple opined:

> Today's decision also will have a very practical and harmful effect on municipal governance throughout this circuit. The panel majority's failure to recognize the situation here as a willful abuse of governmental power and its failure to characterize the conduct as conscience shocking will have a direct and immediate effect on efforts to maintain discipline and professionalism in the countless number of small municipal police forces that dot our landscape. . . . Today, the highest federal court in this region of the United States sends a surely unintended, but nevertheless unwelcome, message that minimizes the significance of a raw use of municipal police power.

Id. at 469–70.

abuse of government power unjustified by any government interest and thus a clear violation of substantive due process. The Seventh Circuit's contrary conclusion demonstrates why *Lewis*' shocks the conscience test must be overturned. Although other cases may mandate a more nuanced balance of competing considerations, the criteria identified in this proposal will provide judges with guideposts that are lacking under *Lewis*.

CONCLUSION

Historically, substantive due process has been interpreted as a guarantee against arbitrary deprivations of life, liberty, or property, whether perpetrated through legislative enactments or by the misconduct of government officials. The Supreme Court broadly defined the term "liberty" to deter and punish abuses of government power. In *Lewis*, however, the Court significantly gutted the Due Process Clause by creating a false dichotomy between legislative and executive misconduct and by imposing a draconian shocks the conscience standard. The problem has been compounded by appellate court decisions holding that the judicial conscience will not be shocked absent evidence of malice, sadism, or wantonness. Further, the appellate courts have imposed additional obstacles that have no relevance to the question of whether an abuse of power has occurred, such as the requirement that plaintiffs establish deprivation of a fundamental right or prove there is no state remedy for the injury. *Lewis*' shocks the conscience test and its progeny should be rejected in favor of an approach that restores the Due Process Clause to its historical position as a core guarantor against raw abuse of power by members of all three branches of government.