



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 21 | Number 3

Article 3

December 2014

Qualified Immunity: 1983 Litigation in the Public Employment Context

Erwin Chemerinsky

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), [Fourteenth Amendment Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Chemerinsky, Erwin (2014) "Qualified Immunity: 1983 Litigation in the Public Employment Context," *Touro Law Review*. Vol. 21: No. 3, Article 3.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol21/iss3/3>

This Selected Excerpts: Practising Law Institute's Annual Section 1983 Civil Rights Litigation Program is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lrross@tourolaw.edu.

Qualified Immunity: 1983 Litigation in the Public Employment Context

Cover Page Footnote

21-3

QUALIFIED IMMUNITY: § 1983 LITIGATION IN THE PUBLIC EMPLOYMENT CONTEXT

*Erwin Chemerinsky**

We want to focus a little time this morning on § 1983 litigation involving public employees.¹ The reason is obvious. A good deal of § 1983 litigation involves claims of public employees.² When talking about due process, there is the possibility that a claimant can bring both procedural and substantive due process claims.³ In general, public employees have a better chance of succeeding when they bring procedural due process claims than when

* Professor Erwin Chemerinsky is a former Sydney M. Irmas Professor of Law and Political Science, University of Southern California Law School. He is presently a faculty member of Duke Law School where he is an Alston & Bird Professor of Law. Professor Chemerinsky is a renowned federal constitutional law scholar and has published extensively in the area of constitutional law. This article is based on a transcript of remarks given at the Practicing Law Institute's 21st Annual Program on § 1983 Civil Rights Litigation.

¹ 42 U.S.C. § 1983 (1996), provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

² Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 914 (1997) (discussing the frequency of suits of public employees arising out of 42 U.S.C. § 1983).

³ *Bd. of Regents v. Roth*, 408 U.S. 564, 568 (1972) (stating that respondent brought the action in violation of both his substantive and procedural rights under the Fourteenth Amendment).

they bring substantive due process claims.⁴

First, I will address procedural due process claims by public employees. Any procedural due process issue can be broken down into two sub-questions.⁵ First, has there been a deprivation of life, liberty or property?⁶ Second, if so, what procedures are required?⁷ Let me focus on the initial question under procedural due process. Mostly when public employees are suing, they are suing about a deprivation of property,⁸ in which case, the question then becomes, when does a public employee have a property interest that would trigger due process?⁹

The starting point here is *Board of Regents v. Roth*¹⁰ and *Perry v. Sindermann*,¹¹ two cases decided by the Supreme Court on the same day in 1972. In the former case, Roth worked as an assistant professor for the University of Wisconsin on a year-to-year contract.¹² Each contract made it clear that employees should have

⁴ *Perry v. Sindermann*, 408 U.S. 593, 601, 603 (1972) (stating that, “[p]rocedural due process protection[s] are not limited by a few rigid, technical forms,” and that when a property interest exists, the public employee is entitled to a hearing on his non-retention, therefore providing more protections and a greater chance of success if such a hearing was not provided for).

⁵ *See Roth*, 408 U.S. 564, 569-70 (stating that the two-part test asks whether there has been a “deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property” and if so, what type of hearing or protections are necessary).

⁶ *Id.*

⁷ *Id.*

⁸ *See Perry*, 408 U.S. at 602 (stating that when teachers bring a “claim of entitlement to job tenure” via § 1983, it is logically inferred that they will be suing under a property interest).

⁹ *See Roth*, 408 U.S. at 569-70 (stating that “the range of interests protected by procedural due process is not infinite” and therefore the court must inquire as to whether the public employee’s property interest is of the type that warrants due process protections).

¹⁰ *Id.* at 564.

¹¹ *Perry*, 408 U.S. at 593.

¹² *Roth*, 408 U.S. at 566.

no expectation that their contracts would be renewed.¹³ When Roth's contract was not renewed, he sued.¹⁴ Roth argued that he should have been given due process with regard to the non-renewal of the contract.¹⁵ The Court found that Roth was not entitled to due process because he had no reasonable expectation that the contract would be renewed.¹⁶ The Supreme Court explained that property interests are not created by the Constitution, but are created by the positive law of the state.¹⁷ If the state creates a reasonable expectation of continued employment, then there is a property interest.¹⁸ However, if the state does not create a reasonable expectation, then no property interest exists.¹⁹ Roth was deemed to lack a property interest.²⁰

The companion case, *Perry v. Sindermann*, involved an individual who worked for a community college in Texas.²¹ Not only did the employee claim that he had a property interest, but he also claimed that he was fired for exercising his First Amendment right to

¹³ *Perry*, 408 U.S. at 598 (finding that although respondent was employed for ten years as a professor in the Texas State College system, his contracts were for one year periods and state college never adopted a tenure system); *Roth*, 408 U.S. at 566 (finding that the notice of appointment stated that the "respondent's 'appointment basis' was for the 'academic year' ").

¹⁴ *Roth*, 408 U.S. at 568.

¹⁵ *Id.* at 569 (arguing that respondent was entitled to a hearing on non-renewal).

¹⁶ *Id.* at 578 ("The important fact in this case is that they [Washington State University] specifically provided that the respondent's employment was to terminate on June 30 . . . [t]hus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year.").

¹⁷ *Id.* at 577 ("Property interests, of course, are not created by the Constitution . . . they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .").

¹⁸ *Id.* at 577-78.

¹⁹ *Roth*, 408 U.S. at 578.

²⁰ *Id.* (stating that respondent's property interest lie in his contract and, therefore, will expire when his contract expires).

²¹ *Perry*, 408 U.S. at 594.

free speech.²² The Supreme Court distinguished a claim alleging a denial of free speech from a claim alleging a denial of a property interest, and explained that free speech is a liberty interest and would therefore trigger due process.²³ The Court, reaffirming its holding in *Roth*,²⁴ stated that property interests are created by the law and are determined by whether there is a reasonable expectation of continued employment.²⁵

The other major Supreme Court case dealing with property interests in the employment context is *Bishop v. Wood*.²⁶ This case involved a probationary employee in the North Carolina Police Department.²⁷ The terms of probation made it clear that the individual could be terminated.²⁸ After being terminated, the individual claimed that he was entitled to due process.²⁹ Following the decision in *Roth*, the Supreme Court in *Bishop* reasoned that the employee had no reasonable expectation of continued employment³⁰ because the terms of the employment made it clear that the employee was probationary and the government had the authority to fire the

²² *Id.* at 595 (arguing that respondent's termination was the result of his "public criticism of the policies of the college and administration").

²³ *Id.* at 597-98.

²⁴ *Id.* at 599.

²⁵ *Id.* at 601 (explaining that the Constitution requires the opportunity for a hearing only when the claimant can show that he was deprived a "property" interest in continued employment).

²⁶ 426 U.S. 341 (1976).

²⁷ *Id.* at 343. The individual was hired as a probationary policeman whose position would become "permanent" after six months. *Id.*

²⁸ *Id.* at 345 (deferring to the opinion of the North Carolina District Judge, who stated that the claimant "held his position at the will and pleasure of the city").

²⁹ *Id.* at 343-44 (contending that he had an expectancy to continued employment, thus creating a protected property interest).

³⁰ *Id.* at 350 (reasoning that based on state law, only when an employer has explicitly given some form of a guarantee of continued employment can the public employee's

individual.³¹ *Bishop* has been interpreted as standing for the principle that an employee does not have a property interest if the employee is on probation because there is no expectation of continued employment.³²

Some of the lower court cases are interesting because they go beyond the mere firing of an employee.³³ These cases explain that if a person has a reasonable expectation to a particular position, then that constitutes a property interest.³⁴ For example, in *Ciambriello v. County of Nassau*,³⁵ the denial of a promotion was held to be a deprivation of property if the employee had a reasonable expectation to that particular position.³⁶ In *Ezekwo v. NYC Health & Hospitals Corp.*,³⁷ an employee claimed a property interest in the designation of chief resident.³⁸ The court held that this was enough to constitute a property interest.³⁹

These cases make clear that there must be a tangible loss in

expectations be enforceable).

³¹ *Bishop*, 426 U.S. at 345-46.

³² *Id.* at 345, 347. Before concluding that the District Court Judge was correct in finding no viable expectation in continued employment, they stated that “the ordinance may also be construed as granting no right to continued employment but merely conditioning an employee’s removal on compliance with certain specified procedures.” *Id.*

³³ See, e.g., *Greenwood v. Office of Mental Health*, 163 F.3d 119, 122 (2d Cir. 1998) (holding that psychiatrists have a property interest in their clinical privileges; these privileges are an entitlement under state law); *Winston v. New York*, 759 F.2d 242, 244 (2d Cir. 1985) (holding that teachers have a property interest in their contractual right to a pension after fulfilling the New York statutory provisions, regardless of whether or not the teacher was dismissed).

³⁴ See, e.g., *Greenwood*, 162 F.3d at 123; *Winston*, 759 F.2d at 244-45.

³⁵ 292 F.3d 307 (2d Cir. 2002).

³⁶ *Id.* at 318.

³⁷ 940 F.2d 775 (2d Cir. 1991).

³⁸ *Id.* at 779-80 (arguing that the defendants denied her the promised position of chief resident based on her outspoken criticism of the hospital program).

³⁹ *Id.* at 783 (holding that the interest was neither “trivial” nor “insubstantial” because the hospital’s policy had entitled the employee to the position of chief resident).

order to constitute a deprivation of property.⁴⁰ An example of this would be *Kelly v. Borough of Sayreville*.⁴¹ In *Kelly*, the court found that adverse employment actions that did not result in any financial harm did not establish a deprivation of property.⁴² *Kelly* involved an individual who claimed that his employer continuously stated that it was going to take action against him, but nothing ever came from it.⁴³ The court found this was not enough to establish a deprivation of property because the tangible loss requirement did not exist.⁴⁴

Today, the cutting edge issue is whether or not a government contract is sufficient to create a property interest in employment.⁴⁵ There were a number of cases in courts around the country that addressed this issue, and the jurisdictions are split.⁴⁶ Some cases say that a property interest can be created by a contractual provision.⁴⁷ They explain that if a government employee has a contract, the

⁴⁰ See *Ciambriello*, 292 F.3d at 313, 316-17 (holding that a promotion is a legitimate property interest); *Ezekwo*, 940 F.2d at 782-83.

⁴¹ 107 F.3d 1073 (3d Cir. 1997).

⁴² *Id.* at 1077.

⁴³ *Id.* at 1075 (explaining that preliminary notice of disciplinary action was as far as the employer went).

⁴⁴ *Id.* at 1078; see also *Sturm v. Clark*, 835 F.2d 1009, 1012 (3d Cir. 1987) (“Absent the alteration or extinguishment of a more tangible interest, injury to reputation is actionable only under state defamation law.”).

⁴⁵ See Zachary D. Krug, *Due Process and the Problem of Public Contracts: A Critical Look at the Current Doctrine*, 89 CORNELL L. REV. 1044, 1045 (2004) (discussing courts’ hesitancy to expand procedural protections to contracts with the government).

⁴⁶ See Hansen Clarke, *Contract Law II: The First Amendment Rights of Government Contractors*, 76 MICH. B.J. 1205, 1205 n.3 (1997).

⁴⁷ See, e.g., *United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31, 34 (6th Cir. 1992) (explaining that a legitimate due process claim can be brought by showing that the contract bidder “was actually awarded the contract” or that local rules limited the discretion of state officials as to whom the contract should be awarded); *Brockell v. Norton*, 688 F.2d 588, 591 (8th Cir. 1982) (stating that a due process claim can be brought based on property interest by showing “common practices and agreements derived from the employer-employee relationship which would create a sufficient expectancy of common employment”).

violation of the contract would be a deprivation of property.⁴⁸ However, there are other cases that expressly state that a contract does not create a property right for public employees.⁴⁹

Termination of the contract's term may create an action for breach of contract, but any other infringement of contract may also lead to a breach of contract claim.⁵⁰ However, generally an interest in a contract is not a property interest that triggers due process.⁵¹ Some cases try to take the middle course and explain that if the government formally approved the contract, then it can create a property interest.⁵² It is hard to know why a formally approved contract would be the key to finding a property interest. The point is that the jurisdictions are split on the issue of whether a contract creates a property interest for government employees.⁵³

⁴⁸ See *Perry*, 408 U.S. at 601 (“[A] written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher’s claim of entitlement to continued employment.”); *Vinyard v. King*, 728 F.2d 428, 432 (“[P]roperty interest is determined by whether terms of employment created by contract . . . ‘create a sufficient expectancy of continued employment to constitute a property interest, which must be afforded constitutionally guaranteed due process.’”) (quoting *Hall v. O’Keefe*, 617 P.2d 196, 200 (Okla. 1980))).

⁴⁹ See, e.g., *Horn v. Kean*, 796 F.2d 668, 674 (3d Cir. 1986) (holding that constitutional protections need not be extended to contractors who are New Jersey motor vehicle agents); *Downtown Auto Parks v. Milwaukee*, 938 F.2d 705, 711 (7th Cir. 1991) (refusing to find a property interest that would bind the municipality to renewing their lease with a corporation).

⁵⁰ See, e.g., *Harris v. Board of Educ. of the City of Atlanta*, 105 F.3d 591, 596-97 (11th Cir. 1997); *Braden v. Texas A & M Univ. Sys.*, 636 F.2d 90, 93 (5th Cir. 1981).

⁵¹ See, e.g., *Cabrol v. Town of Youngsville*, 106 F.3d 101, 105 (5th Cir. 1997) (explaining that in order for due process to apply, an employee must prove through some “independent source” that he or she had a property interest in that employment); *Gaumont v. City of Melissa, Texas*, 227 F. Supp. 2d 627, 631 (E.D. Tex. 2002) (“A plaintiff asserting a due process claim in the public employment context must demonstrate that he has a clearly established property interest in his employment . . . The existence of a property interest must be determined by reference to state law.”).

⁵² See, e.g., *Bd. of Regents v. Roth*, 408 U.S. 564, 578 (1972); *Gaumont*, 227 F. Supp. at 631.

⁵³ See, e.g., *Hulen v. Yates*, 322 F.3d 1229, 1240 (10th Cir. 2003) (holding that contracts created by state agencies present property interests); *Wells v. Hico Indep. Sch. Dist.* 736

The second sub-question is whether there has been a deprivation of liberty, which would, like a deprivation of property, trigger due process.⁵⁴ Mainly, this issue arises in the context of an employee who claims that the government has hurt her reputation and that the harm to her reputation resulted in a loss of liberty.⁵⁵ The key Supreme Court case dealing with this issue is *Paul v. Davis*,⁵⁶ decided thirty years ago.

In *Paul*, Louisville, Kentucky had a practice of posting shoplifters' pictures in department stores.⁵⁷ An individual's picture was wrongly posted and he sued, claiming that the government deprived him of his liberty without due process.⁵⁸ The Supreme Court ruled against him.⁵⁹ In an opinion by Justice Rehnquist, the Court held that harm to reputation by itself is not a loss of liberty.⁶⁰ The Supreme Court explained that harm to reputation becomes an interest that triggers due process only if it is accompanied by some tangible harm.⁶¹ This decision led to the rule that there has to not just

F.2d 243, 255 (5th Cir. 1984) (holding that no property interest was created by a state initiated one year teaching contract).

⁵⁴ See, e.g., *Paul v. Davis*, 424 U.S. 693, 701 (1976); *Roth*, 408 U.S. at 571-72.

⁵⁵ See, e.g., *Paul*, 424 U.S. at 701; *Greenwood v. Office of Mental Health*, 163 F.3d 119, 123-24 (1998).

⁵⁶ 424 U.S. 693 (1976).

⁵⁷ *Id.* at 694-95.

⁵⁸ *Id.* at 696-97.

⁵⁹ *Id.* at 713-14 (holding that no liberty interest protected by the Fourteenth Amendment was violated).

⁶⁰ *Paul*, 424 U.S. at 702 ("[T]he weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

⁶¹ *Id.* at 701 (explaining that in order for defamation to invoke the protections of due process, "some more tangible interests such as employment," must be coupled with the harm to reputation).

be stigma, but stigma plus.⁶²

These stigma plus cases can be generalized into a couple of principles. First, the public employee has to show that the statements about him or her are false.⁶³ The burden is placed on the employee to demonstrate that false things were said, which were injurious to her reputation.⁶⁴ For example, *Codd v. Velger*⁶⁵ and *O'Neill v. City of Auburn*⁶⁶ clearly established falsity as a requirement.⁶⁷ The second requirement is termination of employment.⁶⁸ Almost without exception, these cases have said that in order to meet the requirement of stigma plus in the public employment context, there must be a termination of employment.⁶⁹ *Siebert v. Gilley*⁷⁰ is the leading Supreme Court case on this issue. In *Siebert*, an individual claimed that negative letters written by his former employer regarding the employee's work history was a deprivation of his liberty.⁷¹ The Supreme Court reaffirmed *Paul v. Davis* and held that harm to reputation is not enough.⁷² Again, there has to not just be stigma, but

⁶² *Martz v. Inc. Vill. of Valley Stream*, 22 F.3d 26, 31-32 (2d Cir. 1994); *see also* *Siebert v. Gilley*, 500 U.S. 226, 234 (1991).

⁶³ *See, e.g.,* *Abramson v. Pataki*, 278 F.3d 93, 101 (2d Cir. 2002); *Cannon v. City of West Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001).

⁶⁴ *See, e.g.,* *Sadallah v. City of Utica*, 383 F.3d 34, 38 (2d Cir. 2004); *Patterson v. City of Utica*, 370 F.3d 322, 330 (2d Cir. 2004); *Donato v. Plainview-Old Bethpage Cent. Sch. District*, 96 F.3d 623, 630-32 (2d Cir. 1996).

⁶⁵ *Codd v. Velger*, 429 U.S. 624 (1977).

⁶⁶ *O'Neill v. City of Auburn*, 23 F.3d 685 (2d Cir. 1994).

⁶⁷ *Codd*, 429 U.S. at 627-29; *O'Neill*, 23 F.3d at 691, 693-94.

⁶⁸ *Paul*, 424 U.S. at 710; *Martz*, 22 F.3d at 32.

⁶⁹ *Martz*, 22 F.3d at 32; *Brandt v. Bd. of Coop. Educ. Servs.*, 820 F.2d 41, 45 (2d Cir. 1987).

⁷⁰ 500 U.S. 226 (1991).

⁷¹ *Id.* at 228-29.

⁷² *Id.* at 233-34.

Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation. The facts alleged by *Siebert* cannot,

stigma plus.⁷³

Two cases, *Martz v. Valley Stream*⁷⁴ and *Cannon v. City of West Palm Beach*,⁷⁵ clearly hold that there has to be termination to meet the “plus” requirement for stigma plus. *Martz* holds that there has to be termination.⁷⁶ *Cannon* explains that it is not enough for the employee to show that he or she was demoted, not promoted, or transferred.⁷⁷ Case law makes it clear that if the employee can prove falsity of statements and termination, then the employee is going to meet the requirements of *Paul v. Davis*.⁷⁸ For example, *Morris v. Lindau*,⁷⁹ *Donato v. Plainview-Old Bethpage Central School District*,⁸⁰ and *Velez v. Levy*⁸¹ all hold that since the employee pled false statements, injurious reputation, and termination, the employee

in the light of our decision in *Paul v. Davis*, be held to state a claim for denial of a constitutional right . . . if the defendant acted with malice in defaming him, what he describes as the ‘stigma plus’ test of *Paul v. Davis* is met. Our decision in *Paul v. Davis* did not turn, however, on the state of mind of the defendant, but on the lack of any constitutional protection for the interest in reputation.

Id.

⁷³ *Id.* at 234 (holding that plaintiff’s claim does not meet “stigma plus” because there is a “lack of any constitutional protection for the interest in reputation” alone); *see also Sadallah*, 383 F.3d at 38 (stating that plaintiffs seek relief under the “stigma plus” doctrine which, in limited circumstances, provides a remedy for government defamation under federal constitutional law); *Martz*, 22 F.3d at 31-32 (“Our cases have interpreted *Paul* to require that some ‘stigma plus’ be established before mere defamation will rise to the level of a constitutional deprivation.”).

⁷⁴ 22 F.3d 26 (2d Cir. 1994).

⁷⁵ 250 F.3d 1299 (11th Cir. 2001).

⁷⁶ *Martz*, 22 F.3d at 32 (citing *Brandt v. Bd. of Coop. Educ. Servs.*, 820 F.2d 41, 45 (2d Cir. 1987)).

⁷⁷ *Cannon*, 250 F.3d at 1303 (quoting *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1486 (11th Cir. 1992)).

⁷⁸ 424 U.S. 693 (1976) (holding that in order for a plaintiff to claim that due process was violated, there must be a showing of stigma plus, which, in this case would be defamation in conjunction with the loss or deprivation of some “tangible interest”).

⁷⁹ 196 F.3d 102 (2d Cir. 1999).

⁸⁰ 96 F.3d 623 (2d Cir. 1996).

⁸¹ 401 F.3d 75 (2d Cir. 2005).

met the “plus” requirement for stigma plus.⁸²

There is a distinct minority of cases that are willing to find the “plus” without termination, one of which is *Merritt v. Reed*.⁸³ In *Merritt*, the court held that including and distributing significant adverse information in an employee’s record was enough to meet the requirements of *Paul v. Davis*.⁸⁴ However, this is the minority approach.⁸⁵ The majority of cases were pro-defendant and held that the employee who meets the requirement, must show termination.⁸⁶

If there is a deprivation of property or liberty, then the court will address the second major question: what procedures are required?⁸⁷ Of course, the court will only address this question if there is a finding that there has been a deprivation of liberty or property.⁸⁸ The leading Supreme Court case is *Cleveland Board of Education v. Loudermill*.⁸⁹ In *Loudermill*, the Supreme Court held that the Constitution determines the required procedures, not state or

⁸² *Donato*, 96 F.3d at 633; *Morris*, 196 F.3d at 114; *Velez*, 408 F.3d at 87 (quoting *Doe v. Dep’t of Pub. Safety*, 271 F.3d 38, 47 (2d Cir. 2001)).

⁸³ 120 F.3d 124 (8th Cir. 1997).

⁸⁴ *Merritt*, 120 F.3d at 126.

⁸⁵ *Id.* at 126; *Valmonte v. Kane*, 18 F.3d 992, 1002 (2d Cir. 1994) (“Here, the fact that the defamation occurs precisely in conjunction with an individual’s attempt to attain employment within the child care field, and is coupled with a statutory impediment mandating that employers justify hiring the individual, is enough to compel a finding that there is a liberty interest implicated.”).

⁸⁶ *Paul*, 424 U.S. 693; *Cannon*, 250 F.3d 1299; *Martz*, 22 F.3d 26.

⁸⁷ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.”).

⁸⁸ *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). “The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount.” *Id.*

⁸⁹ 470 U.S. 532 (1985).

local law.⁹⁰

In the 1970s, the Supreme Court held in *Arnett v. Kennedy*⁹¹ that public employees have to “take the bitter with the sweet.”⁹² Justice Rehnquist explained that if the state or local law creates the reasonable expectation of employment, which includes the procedures or lack of procedures, then that is all that the government employee is entitled to.⁹³ *Arnett* concluded that if property was determined by the expectations of the employee, and if the government said that an employee had a reasonable expectation to her job, but was not entitled to procedures, you have to “take the bitter with the sweet.”⁹⁴ However, *Loudermill* expressly rejected that position.⁹⁵ *Loudermill* held that when there has been a deprivation of property, the termination of procedures is a question of federal constitutional law.⁹⁶

Whenever courts decide what procedures are required, they follow a balancing test that the Supreme Court proscribed in *Mathews v. Eldridge* in 1976.⁹⁷ In *Mathews*, the Supreme Court stated that when there has been a deprivation of life, liberty, or property, three factors must be balanced in order to determine what procedures are

⁹⁰ *Id.* at 541.

⁹¹ 416 U.S. 134 (1974) (plurality opinion).

⁹² *Id.* at 153-54.

⁹³ *Id.* at 151-52. *See also Roth*, 408 U.S. at 577. “Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Id.*

⁹⁴ *Arnett*, 416 U.S. at 153-54.

⁹⁵ *Loudermill*, 470 U.S. at 541.

⁹⁶ *Id.* at 541-42.

⁹⁷ *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

required.⁹⁸ First, the court will look to the importance of the interest to the individual.⁹⁹ The more important the interest is to the individual, the more procedures will be required.¹⁰⁰ Second, the court will look to the ability of additional procedures to reduce the risk of an erroneous deprivation.¹⁰¹ The more the court believes that additional procedures will lead to more accurate decisions, the more likely it is that the court will require them.¹⁰² Third, the court will look at the government's interests balanced against the importance of the interest to the individual.¹⁰³ In the context of public employment, the government's main interest is efficiency.¹⁰⁴ The court will look to the operation of the government to make sure that the government can perform its duties with minimal interference.¹⁰⁵

The most recent Supreme Court case addressing this issue is *Gilbert v. Homar*.¹⁰⁶ In *Gilbert*, the Supreme Court held that an employee of the police department was not entitled to a pre-adverse

⁹⁸ *Id.* (citing *Goldberg v. Kelly*, 392 U.S. 254, 263-71 (1976)).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 334 (stating that due process is satisfied in a drivers license revocation without a "full adjudication of . . . liability" while dismissal of a federal employee requires more safeguards, such as prior "notice . . . copy of charge, reasonable time for filing a response, and an opportunity for an oral appearance [as well as] an evidentiary hearing [following dismissal].").

¹⁰¹ *Id.* at 335.

¹⁰² *Eldridge*, 424 U.S. at 344.

¹⁰³ *Id.* at 335.

¹⁰⁴ *Campbell v. City of New York*, 101 F. Supp. 2d 248, 252 (S.D.N.Y. 2000) (stating that one of the three factors a court will look to in deciding what due process procedures shall be afforded a plaintiff is "the government's interest in fiscal and administrative efficiency, and the burden additional or alternative procedures would entail").

¹⁰⁵ *Id.* at 254 ("[W]here [a] plaintiff demonstrates a minimal risk of erroneous deprivation of his liberty or property and the value of additional procedural safeguards is minimal, this state interest [avoiding burdensome costs or procedures] renders additional procedural safeguards unnecessary.").

¹⁰⁶ *Gilbert v. Homar*, 520 U.S. 924 (1997).

notice.¹⁰⁷ The Court had to determine if it was sufficient to give notice in a hearing after the adverse employment action, or must the notice come before the adverse employment action.¹⁰⁸ The Supreme Court used the three-part *Matthews v. Eldridge* test and determined that a post-adverse action hearing was sufficient.¹⁰⁹ Pre-adverse action was not required.¹¹⁰ The lower courts have been consistent in holding that government employees generally are not entitled to notice and a hearing before the adverse employment action.¹¹¹

Substantive due process focuses on whether the government's deprivation of life, liberty, or property is justified by a sufficient purpose.¹¹² Procedural due process, looks to the procedures the government followed.¹¹³ Substantive due process examines whether

¹⁰⁷ *Id.* at 932-33. A pre-adverse hearing is defined as the ability of the accused to present either oral or documentary evidence to the employer, before the adverse employment action occurs, in a formal or non-formal hearing, mainly to ensure that no obvious deprivation of due process has occurred. *Id.* at 928-29.

¹⁰⁸ *Id.* at 926.

¹⁰⁹ *Id.* at 931-32. The Court applied the *Matthews v. Eldridge* test which states; “ ‘[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.’ ” *Id.* In concluding that respondent was not entitled to a pre-adverse hearing because, although his interest in receiving uninterrupted paychecks was legitimate, the state interest (immediately suspending a state worker who has been charged with a felony) outweighed the respondent's. *Id.* The Court found that a pre-adverse hearing would have provided respondent with little benefit because a pre-adverse hearing is given to ensure there is a reasonable ground for said action; here, a pre-adverse hearing was unnecessary because the arrest and drug charge satisfied reasonable grounds to suspend. *Id.* at 931-36.

¹¹⁰ *Id.* at 933, 934.

¹¹¹ *Evans v. Morgan*, 307 F. Supp. 2d 1036, 1043 (W.D. Wis. 2004) (“Failing to provide predeprivation procedures do not always violate due process.”); *Cybulski v. Cooper*, 891 F. Supp. 68, 70-71 (D. Conn. 1995) (holding that the suspension of a public employee without a hearing did not violate due process); *Weg v. Macchiarola*, 729 F. Supp. 328, 338 (S.D.N.Y. 1990), *rev'd on other grounds*, 995 F.2d 15 (2d Cir. 1993) (holding that the public employee was not deprived due process when he was suspended without a preliminary hearing, especially when a post-suspension hearing was given).

¹¹² *Castro Rivera v. Fagundo*, 310 F. Supp. 2d 428, 435 (D.P.R. 2004).

¹¹³ *Hunter v. City of Warner Robbins, Ga.*, 842 F. Supp. 1460, 1467 (M.D. Ga. 1994).

the government has a sufficient reason and adequate justification for what it's doing.¹¹⁴ When a government employee brings a substantive due process claim, it is unlikely the employee will prevail.¹¹⁵ A government employee will have a greater chance of succeeding if she bring either a First Amendment claim on free speech grounds or a Fourth Amendment claim on privacy grounds.¹¹⁶

Government employees are better off asserting a privacy claim under the Fourth Amendment rather than under the Due Process Clause.¹¹⁷ However, only a small number of government employees have brought successful privacy claims.¹¹⁸ For example, in *Kallstrom v. City of Columbus*,¹¹⁹ the government released personnel files of undercover police officers in the course of litigation, and a good deal of information came out about these

¹¹⁴ *McIntyre v. United States*, 336 F. Supp. 2d 87,109-10 (D. Mass. 2004).

¹¹⁵ Case Comment, *Substantive Due Process: The Extent of Public Employees' Protection From Arbitrary Dismissal*, 122 U. PA. L. REV. 1647, 1648-49 (1974) (stating that public employees should be entitled to substantive due process protections but that the courts have been "sparse and unconvincing" in defining and upholding these protections, therefore leaving the public employee without a remedy).

¹¹⁶ Bryan H. Wildenthal, *To Say "I Do": Shahar v. Bowers, Same-Sex Marriage, and Public Employee Free Speech Rights*, 15 GA. ST. U. L. REV. 381, 457 (1998) (stating that the Supreme Court, as well as the lower federal courts, have been consistent in protecting public employee's rights via the First and Fourth Amendment, while they have not used substantive due process in such a way as to protect public employees).

¹¹⁷ John C. Barker, Note, *Constitutional Privacy Rights in the Private Workplace, Under The Federal and California Constitutions*, 19 HASTINGS CONST. L.Q. 1107, 1122-23 (1992) ("[I]n general, Fourth Amendment balancing is a far more lenient analysis than the strict scrutiny required for fundamental rights under substantive due process.").

¹¹⁸ Bryan R. Lemons, *Public Privacy: Warrantless Workplace Searches of Public Employees*, 7 U. PA. J. LAB. & EMP. L. 1, 1-2 (2004). Lemons argues that it is difficult to overcome the privacy test to win at trial because in order to present a prima facie case the plaintiff must: "[f]irst, determine whether the employee has a reasonable expectation of privacy in the area to be searched. If a reasonable expectation of privacy does exist, then any search that ensues must be reasonable under the totality of the circumstances." *Id.*

¹¹⁹ *Kallstrom v. City of Columbus*, 165 F. Supp. 2d 686 (S.D. Ohio 2001).

undercover officers.¹²⁰ The officers claimed that the release of this information infringed on their right to privacy because it put them “at substantial risk of serious bodily harm, possibly even death.”¹²¹ Yet, the district court held that the officers did not have a constitutional privacy interest in the information released.¹²²

The other issue that often arises with regard to substantive due process is whether or not the firing of an employee can be seen as a deprivation of substantive due process.¹²³ If the employee has a property interest in her job for procedural due process purposes, then the government employee has a property interest in the job for substantive due process purposes.¹²⁴ The difference between the substantive and the procedural due process issue is the remedy.¹²⁵ If there is a procedural due process claim, then all a government employee will have a right to, is notice and a hearing.¹²⁶ However, if the claimant argues a violation of substantive due process, then the employee would have a basis for challenging the firing itself.¹²⁷

¹²⁰ *Id.* at 689-90, 703.

¹²¹ *Id.* at 690.

¹²² *Id.* at 695.

¹²³ *Homar v. Gilbert*, 63 F. Supp. 2d 559, 573-74 (M.D. Pa. 1999).

¹²⁴ *See O'Neal v. City of Hot Springs Nat'l Park*, 756 F.2d 61, 63 (8th Cir. 1985) (suggesting that arbitrary and capricious discharge of public employee could violate substantive due process); *Brenna v. Southern Col. State College*, 589 F.2d 475, 476 (10th Cir. 1978) (“Professor Brenna was tenured and thus had a property interest deserving of the procedural and substantive protections of the Fourteenth Amendment.”).

¹²⁵ *See McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (“In substantive due process cases, the claimant seeks compensatory damages for the value of the deprived right. In procedural due process cases, however, although the claimant may seek compensatory damages, the primary relief sought is equitable . . .”).

¹²⁶ *See id.* (explaining that this type of remedy is equitable in that the claimant can receive a “properly conducted pre-termination hearing”).

¹²⁷ *See id.* at 1558 n.10 (explaining that in a substantive due process claim, “the government has deprived a person of a property or liberty interest and must compensate the interest’s owner for the value of the interest taken. In employment cases, if a substantive due

However, the law in this area is pro-defendant, and therefore, government employees rarely seem to succeed when they bring substantive due process claims for termination of employment.¹²⁸ For example, in *Nicholas v. Pennsylvania State University*,¹²⁹ a tenured professor was fired at a state university.¹³⁰ The plaintiff claimed that his termination of employment was a deprivation of substantive due process because he had a property interest in his job, which he was deprived of without sufficient justification.¹³¹ Nonetheless, the court was unwilling to find a substantive due process claim.¹³² Similarly, in *Singleton v. Cecil*, which involved a probationary employee, the court was also unwilling to find a due process violation.¹³³ Finally, in *McKinney v. Pate*,¹³⁴ the Eleventh Circuit demonstrated how pro-defendant the law is in this area,¹³⁵ and explained that the existence of a property interest for procedural due process purposes is irrelevant from a substantive due process

process claim lies, the value is measured in terms of lost wages and benefits”).

¹²⁸ See, e.g., *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 138 (3d Cir. 2000) (holding that a tenured professor did not have a substantive due process claim after being fired by his public employer); *Indep. Enters. v. Sewer Auth.*, 103 F.3d 1165, 1180 (3d Cir. 1997) (holding that a city who did not accept a contractor’s bids was not “the sort of ‘fundamental’ interest entitled to the protection of substantive due process”).

¹²⁹ 227 F.3d at 133.

¹³⁰ *Id.* at 136.

¹³¹ *Id.* at 138.

¹³² *Id.*

¹³³ 176 F.3d 419, 427 (8th Cir. 1999) (“[T]he Supreme Court has steadfastly refused to find a violation of the Due Process Clause when a public employer discharges an employee for no reason, a bad reason, or even a false reason.”).

¹³⁴ 20 F.3d 1550 (11th Cir. 1994).

¹³⁵ *Id.* at 1564 (Explaining that allowing the creation of a substantive due process right in pretextual termination would waste judicial resources, subject local officials to “indiscriminate blindsiding by their employees,” and improperly use the court’s protective policy as a sword via litigation threats).

perspective.¹³⁶

Government employees also do not have a substantive due process claim for denial of employment.¹³⁷ You might wonder why this is. After all, there is one Due Process Clause and employment is a property interest for procedural due process purposes.¹³⁸ Shouldn't there also be a property interest for substantive due process?

Since 1937, the Supreme Court and lower courts have been completely unwilling to protect economic rights under substantive due process.¹³⁹ The Court has been unwilling to find any form of heightened scrutiny whenever there is a challenge to a government economic regulation, whether it is an employment regulation or consumer protection regulation.¹⁴⁰ These cases reflect that the Court will use rational basis review when a substantive due process claim is brought.¹⁴¹ If the government employee can show that there is no rational basis, and the employer's actions were arbitrary and capricious, then there is a chance that the employee may prevail.¹⁴²

¹³⁶ *Id.* at 1559 (explaining that if a procedural due process claim is satisfied, it will not additionally satisfy a substantive claim).

¹³⁷ *See id.* at 1560.

¹³⁸ *See Gosnell v. City of Troy*, 59 F.3d 654, 657 (7th Cir. 1995). The court expresses sentiment that substantive due process is an "oxymoron," while procedural due process is a "redundancy." *Id.*

¹³⁹ *See id.* (explaining that substantive due process is a disadvantage for plaintiffs after "having been abolished in the late 1930s . . . [and] economic substantive due process is not just embattled; it has been vanquished").

¹⁴⁰ *See id.* at 658 (insinuating that claimants cannot "cry[] 'substantive due process' " with regard to government acts that interfere with property).

¹⁴¹ *See, e.g.,* *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 124 (3d Cir. 2000) (stating that in order to show a violation of substantive due process, it must be shown that he or she was the victim of an irrational governmental action); *Curtis v. Okla. City Pub. Sch. Bd. of Educ.*, 147 F.3d 1200, 1215 (10th Cir. 1998) (explaining that substantive due process "requires only that termination of that interest not be arbitrary, capricious, or without a rational basis" (quoting *Brenna v. S. Colo. State Coll.*, 589 F.2d 475, 477 (10th Cir. 1978))).

¹⁴² *See Woodwind*, 205 F.2d at 124.

HON. PRATT: My recollection is that historically, stigma claims arose in the employment context.¹⁴³ Initially, stigma claims arose if an employee, who was terminated under a cloud of statements that were claimed to be false, was denied a hearing. The idea of stigma plus didn't arise until courts tried to extend the stigma concept outside the employment area, such as in *Paul v. Davis*.¹⁴⁴ You seem to have restructured the concept of stigma plus beyond the employment context. I am not sure that it makes a difference. It is just a different perspective on them.

PROF. CHERMERINSKY: What you say is absolutely right. However, *Paul v. Davis* is the first Supreme Court case to approach the issue of a deprivation of reputation that resulted in a loss of liberty.¹⁴⁵ *Paul v. Davis* requires a showing of stigma plus.¹⁴⁶ Once that standard is articulated, it then gets carried over to the public employment context.¹⁴⁷

¹⁴³ See *Paul v. Davis*, 424 U.S. 693, 701 (1976). The Court stated that since governmental defamation may create a stigma, "this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke . . . the Due Process Clause." *Id.*

¹⁴⁴ *Id.* (reasoning that "liberty" and "property" as per the Fourteenth Amendment do not extend to protection against the infliction of stigmatization by state officials).

¹⁴⁵ See Michael Wells, *Symposium on Section 1983: Constitutional Torts, Common Law Torts, and Due Process Law*, 72 CHI.-KENT L. REV. 617, 624 (1997) (arguing that while *Paul* defined liberty more narrowly than its preceding cases, it was not the first case to focus on reputational harm).

¹⁴⁶ See *id.* at 708 (stating that more is needed under the procedural requirements of the Due Process Clause besides just a government official who defames a person).

¹⁴⁷ See *id.* at 710.

