

NOVEMBER 2005 UPDATE
EVOLUTION OF A DOCTRINE: THE SCOPE OF THE
PARENTAL LIBERTY INTEREST PROTECTED BY
SUBSTANTIVE DUE PROCESS AFTER *MCCURDY*

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Sometimes a change in legal doctrine happens quickly. The [attached brief](#) was filed in the Third Circuit in December 2002 and the attached original introduction to the brief written shortly thereafter. At that time, the scope of the parental liberty interest protected by substantive due process had split the federal circuits, with the Seventh² and Ninth³ agreeing that parents had a protected interest in companionship with their adult children. At that time, more than a dozen years of district court decisions within the Third Circuit had recognized the same parental substantive due process right, either because they believed the Third Circuit already had endorsed that view,⁴ or because they predicted that the Third Circuit would do so when confronted with the issue.⁵

Today, less than three years after the [attached brief](#) was filed, the legal landscape has changed dramatically. The issue now has been decided in the Third Circuit. In December, 2003, the Third Circuit adopted much of the reasoning of the attached Amici Cities Brief and of the litigant they supported, the City of Philadelphia, holding that “the fundamental guarantees of the Due Process Clause do not extend to a parent’s interest in the companionship of his independent adult child.”⁶ In that case, *McCurdy v. Dodd*, the biological father of an independent, adult son claimed that the father had a federal constitutional right to sue police for the deprivation of the son’s companionship, where the son was killed in a police shooting.⁷ In rejecting the argument that the parent has a protected liberty interest in the companionship of an adult son, the Third Circuit repudiated more than a dozen years of district court decisions within the Third Circuit recognizing such a constitutional right as having “misinterpreted” Third Circuit law.⁸

The Third Circuit appeared to accept both major grounds advocated by the cities for rejecting the father’s constitutional claim. The Amici Brief argued that “[n]either the Supreme Court nor the Third Circuit has ever recognized the constitutional right that

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² *Bell v. City of Milwaukee*, 746 F.2d 1205, 1242-45 (7th Cir. 1984), overruled by *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005).

³ *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986); *Smith v. City of Fontana*, 818 F.2d 1411, 1419 (9th Cir. 1987), overruled on other grounds by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999).

⁴ See, e.g., *Agresta v. Sambor*, 687 F. Supp. 162, 164 (E.D. Pa. 1988) (reading Third Circuit footnote to have adopted Seventh Circuit’s reasoning in *Bell*); *Cooper v. Leamer*, 705 F. Supp. 1081, 1087 (M.D. Pa. 1989) (same).

⁵ *White v. City of Phila.*, 118 F. Supp. 2d 564, 566 n.1 (E.D. Pa. 2000).

⁶ *McCurdy v. Dodd*, 352 F.3d 820, 830 (3d Cir. 2003).

⁷ *Id.* at 821-22

⁸ *Id.* at 828 n.6

[the father] wishes the Third Circuit to declare: that a father has a substantive due process right to companionship with his independent adult son, when the government conduct at issue – a police shooting – was not directed at the parent-child relationship.”⁹ The Amici Brief further argued that the parent’s “expansive view of substantive due process” was inconsistent with Supreme Court and other precedent that recognizes “a parental liberty interest where the child is a minor and the government action at issue was an attempt to preempt parental decision making in the rearing of young children or was otherwise focused on the parent/child relationship.”¹⁰

The Third Circuit held that “a broad expansion of due process protections to encompass [the parent’s] proposed definition is unwarranted”¹¹ because the Supreme Court’s definition of the parental liberty interest “concerns the right of parents to make critical child-rearing decisions concerning the care, custody, and control of minors.”¹² That right “must cease to exist” when the child begins to make decisions for him or herself,¹³ presumably at the state age of majority or when the child is emancipated.¹⁴

The Third Circuit also accepted the other ground advocated in the Amici Cities’ brief. “It would . . . stretch the concept of due process too far if we were to recognize a constitutional violation based on official actions that were not directed at the parent-child relationship.”¹⁵ When the police officer shot the plaintiff’s son, “[h]is actions were directed solely at the person at the center of that volatile situation – [the son] himself. [The mother, the father] and the parent-child relationships between them and their son were not on [the officer’s] mind when he pulled the trigger.”¹⁶

The Third Circuit’s resolution of the parental liberty interest in adult children is not the only change in the legal landscape since the attached Amici Brief was filed. In the summer of 2005, the Seventh Circuit switched sides in the circuit split.¹⁷ In light of other circuits’ rejections of its view, the Seventh Circuit revisited its 21-year-old precedent and overruled it as “wrongly decided,”¹⁸ “not well grounded in the Constitution or Supreme Court case law,”¹⁹ and “not appropriately moored to Supreme Court precedents establishing the contours of the parental liberty interest.”²⁰ Citing *McCurdy* and several precedents on which the Third Circuit had relied, the Seventh Circuit concluded: “[w]e therefore overrule our decision [from 1984] insofar as it recognized a constitutional right to recover for the loss of the companionship of an adult child when that relationship is terminated as a result of state action.”²¹

Within weeks of the Seventh Circuit’s defection to the opposite side in the circuit split, in August 2005, the Eleventh Circuit weighed in on the existence of a parental

⁹ Brief of Proposed Amici Curiae, Cities of Harrisburg, Pittsburgh, Newark and Camden in Support of Affirmance of Judgment for Appellees at 3, *McCurdy v. Dodd*, 352 F.3d 820 (3d Cir. 2003) (No. 02-2708), 2002 WL 32819435 at *3.

¹⁰ *Id.*

¹¹ *McCurdy*, 352 F.3d at 829.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 830.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2003) (overruling *Bell*).

¹⁸ *Id.* at 788.

¹⁹ *Id.*

²⁰ *Id.* at 789.

²¹ *Id.* at 791.

liberty interest in a continued relationship with an adult child, a question of first impression for that court.²² In holding that “the Fourteenth Amendment’s substantive due process protections do not extend to the relationship between a mother and her adult son,”²³ the Eleventh Circuit endorsed the Third Circuit’s analysis insofar as it similarly cabined the parental liberty interest.²⁴

The U.S. Supreme Court has not yet weighed in on the scope of the parental liberty interest in adult children, an issue that it might have addressed in two cases in which the Court dismissed certiorari as improvidently granted.²⁵ While evidence of how current Supreme Court Justice Stephen Breyer might rule on this issue can be gleaned from his participation on the First Circuit panel that rejected the parental claim,²⁶ less can be learned from current Supreme Court nominee Samuel Alito’s participation on the Third Circuit panel that decided *McCurdy*, as Judge Alito concurred in the judgment only, and for other reasons.²⁷

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²² *Robertson v. Hecksel*, 420 F.3d 1254 (11th Cir. 2005).

²³ *Id.* at 1255.

²⁴ *Id.* at 1259. Because the Eleventh Circuit ruled that there is no parental liberty interest in companionship with an adult child, it did not endorse the Third Circuit’s further discussion of the constitutional significance of government conduct not directed at the parent-child relationship. *Id.* It is interesting to note that sitting by designation on the Eleventh Circuit panel was the Hon. Walter K. Stapleton, United States Circuit Judge for the Third Circuit, author of the Third Circuit’s first opinion recognizing the circuit split on the scope of the parental liberty interest. *Schieber v. City of Phila.*, 320 F.3d 409, 423 n. 6 (3d Cir. 2003),

²⁵ *McCurdy*, 352 F.3d at 828, n. 5 (further citation omitted).

²⁶ *Ortiz v. Burgos*, 807 F.2d 6 (1st Cir. 1986).

²⁷ *McCurdy*, 352 F.3d at 831 (concurring in the judgment “for essentially the reasons given by the District Court”).

Below is the original December 2003 Introduction to the Amici Brief, published by the Rutgers Journal of Law and Urban Policy shortly thereafter:

**Substantive Due Process Rights of Parents of Adults:
Local Governments Have a Stake in an Issue That Has Split the Federal
Circuits and is Pending in the Third Circuit (December 2003)**

One person cannot sue for the deprivation of another person's civil rights. Yet parents of adult children allegedly injured by government conduct often have pursued their own independent substantive due process claims against government actors, asserting deprivations of a parental liberty interest in companionship with the injured person, with some success.²⁸ These are potentially very expensive claims. For example, in one recent case in which a parent of an independent adult claimed that a government-inflicted injury deprived the parent of a substantive due process right of companionship with her adult son, the jury awarded the parent \$34,000,000 against the municipal defendants.²⁹

Third Circuit Recognizes Circuit Split on Scope of Parental Liberty Interest

The scope of the parental liberty interest is an open issue in the Third Circuit and has split the federal circuits. In 2003, the Third Circuit already has twice confronted the issue in two separate factual contexts. Should the parents of an independent adult daughter have a federal constitutional right to sue police for deprivation of the daughter's companionship, when the daughter is murdered by a criminal who broke into her home? Should the biological father of an independent adult son have a substantive due process right to companionship with his son when the father had no custody or control of his adult son and the governmental conduct at issue, a police shooting of the adult son, was not focused on the parent/child relationship?

On February 20, 2003, in *Schieber v. City of Philadelphia*,³⁰ the Third Circuit for the first time recognized the federal circuit split on the scope of the parental liberty interest and declined to reach the issue of whether parents have "a liberty interest in the continued companionship of their adult, emancipated child. *Compare* *Trujillo v. Bd. of City Comm'rs*, 768 F.2d 1186 (10th Cir. 1985); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), *with* *Butera v. District of Columbia*, 235 F.3d 637 (D.C. Cir. 2001); *Ortiz v. Burgos*, 807 F.2d 6 (1st Cir. 1986."³¹

The Third Circuit's decision to leave the issue open in *Schieber* is significant for two reasons. First, many district courts within the Third Circuit over the last fifteen

²⁸ See, e.g., *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986) (parent of adult); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1242-45 (7th Cir. 1984) (parent of adult).

²⁹ *Butera v. District of Columbia*, 235 F.3d 637, 645 n.4 (D.C. Cir. 2001) (rejecting parent's substantive due process claim on appeal). Parents and other relatives of people allegedly injured by government conduct have asserted independent constitutional claims in civil rights lawsuits against many government actors within the Third Circuit, also with some success. See e.g., *White v. City of Philadelphia*, 118 F. Supp. 2d 564, 566 n.1 (E.D. Pa. 2000) (mother of murder victim sued police who failed to rescue daughter); *Cooper v. Leamer*, 705 F. Supp. 1081, 1086-87 (M.D. Pa. 1989) (parents of escaped prisoner killed by deputy sheriff); *Pahle v. Colebrookdale Township*, 227 F. Supp.2d 361, 380-84 (E.D. Pa. 2002) (approving independent constitutional claim of wife of arrested driver but rejecting it for procedural reasons).

³⁰ 320 F.3d 409, 423 n.6 (3d Cir. 2003).

³¹ *Id.*

years have adopted the Seventh Circuit's expansive view of the parental liberty interest and allowed parents of adults to assert independent substantive due process claims when their adult children were allegedly injured by government conduct. Some district courts did so in the mistaken belief that the Third Circuit, in a footnote citing a Seventh Circuit decision with approval, had thereby expanded substantive due process rights of parents to include parent-child relationships between two adults.³² That erroneous reading is now put to rest by the Third Circuit's recognition that the issue remains open and undecided in the Third Circuit.

Second, that the Third Circuit did not decide the issue in Schieber means that the next available opportunity for the Third Circuit to take a position on the circuit split is *McCurdy v. Dodd*, an appeal fully briefed and pending as of December 1, 2003.

*Third Circuit to Consider Circuit Split on Scope of Parental Liberty Interest in
McCurdy v. Dodd*

In *McCurdy*, plaintiff Bobby McCurdy has sued several City of Philadelphia police officers and the City itself, alleging that the police shooting death of his son deprived the father of a constitutionally protected right to companionship of his adult, independent son. While the facts of the case are undeniably tragic, Mr. McCurdy cannot prevail unless he can show that the government conduct violated his own constitutional rights, not those of his adult son. But Mr. McCurdy's expansive view of substantive due process is inconsistent with Supreme Court precedent recognizing a parental liberty interest where the child is a minor and the government action at issue was an attempt to preempt parental decisionmaking in the rearing of young children or was otherwise focused on the parent/child relationship.

- a. Mr. McCurdy's view of the parental liberty interest would require the Third Circuit to expand substantive due process in three ways:
- b. to establish a liberty interest in "familial companionship" outside of the context of parental decisionmaking about a child's care, custody and control;
- c. to establish a parental liberty interest in a parent's relationship with an independent adult son; and
- d. to establish a parental liberty interest where the government action complained-of was not concerned with, nor even cognizant of, any parent/child relationship.

Recognition of the overly expansive parental liberty interest asserted by Mr. McCurdy would likely result in a proliferation of claims by relatives of plaintiffs injured by government conduct and would have a potentially catastrophic economic effect on all local governments bound by Third Circuit rulings on federal constitutional claims.

*Cities Within the Third Circuit Filed Amicus Brief in Support of the Municipal
Defendants in McCurdy*

In support of the municipal defendants in *McCurdy*, the New Jersey cities of Camden and Newark and the Pennsylvania cities of Pittsburgh and Harrisburg filed an amicus brief, urging the Third Circuit to reject the father's expansive view of the parental liberty interest. The Amici Cities argue that neither the Supreme Court nor the

³² See, e.g., *Agresta v. Sambor*, 687 F. Supp. 162, 164 (E.D. Pa. 1988) (reading Third Circuit footnote to have adopted *Bell*); *Cooper v. Leamer*, 705 F. Supp. 1081, 1087 (M.D. Pa. 1989) (same).

Third Circuit has ever recognized the constitutional right Mr. McCurdy urges the Third Circuit to declare: that a father has a substantive due process right to companionship with his independent adult son where the government conduct at issue – a police shooting – was not directed at the parent/child relationship.

The Amici Cities' brief further argues that even if the Third Circuit were to expand substantive due process to announce a parental liberty interest in companionship with an adult son, it should decline to expand substantive due process to protect that interest against government conduct which only incidentally affects the parental relationship. Otherwise, parents could bring independent substantive due process claims any time government conduct having nothing to do with the parental relationship – such as an arrest, prosecution, jail suicide – injured a person who happened to have a parent. Recognition of such a broad parental right would serve no Section 1983 deterrent function. On the contrary, this expansion would create a whole new category of unpredictable and financially significant tort claims under cover of the federal Constitution.

The [full brief](#) of Amici Cities of Harrisburg, Pittsburgh, Camden, and Newark is attached. I drafted the brief as a public service. During my seven years as an appellate civil rights attorney for the City of Philadelphia, before I joined the Rutgers-Camden Legal Writing Faculty, I developed an appreciation for how frequently municipalities within the Third Circuit confront similar federal civil rights issues. But while cities and towns often share a common interest in certain legal positions, they may lack the resources necessary to identify common ground or to support each other's positions. I hope to continue to draft pro bono civil rights briefs, both to help local governments within the Third Circuit to support one another in civil rights appeals and, as importantly, to provide Rutgers-Camden law students with real world experience in current issues in civil rights.

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Re: McCurdy v. Dodd, Appeal No. 02-2708

Pursuant to Fed.R.App.P. 28(j), Amici hereby advise the Court of Schieber v. City of Philadelphia, __ F.3d __, 2003 WL 360961 (3d Cir. Feb. 20, 2003). Amici's Brief informed this Court of the pending Schieber appeal, stating "[t]he scope of the parental liberty interest is also pending before this Court in a case where parents of an adult, independent daughter seek to expand substantive due process in the same three ways that Mr. McCurdy does: to establish a right to companionship, to protect a parent's relationship with an adult daughter and to declare such a right where the government conduct is not focused on the parent-child relationship." Amici's Brief at p. 6, n. 1.

This Court in Schieber explicitly declined to reach the issue of "whether the Schiebers, as parents, had a liberty interest in the continued companionship of their adult, emancipated child. Compare Trujillo v. Bd. of Cty. Comm'rs, 768 F.2d 1186 (10th Cir. 1985); Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984), with Butera v. District of Columbia, 235 F.3d 637 (D.C. Cir. 2001); Ortiz v. Burgos, 807 F.2d 6 (1st Cir. 1986)." Schieber, 2003 WL 360961 at *12, n. 6.

This Court's statement in Schieber supports each of the following arguments made in Amici's Brief:

- there is a split in the Circuits on the scope of the parental liberty interest (Amici's Brief at pp. 15-22);
- neither the Supreme Court nor this Court has ever held that the biological parent of an adult child has a constitutionally protected liberty interest in continued companionship with the adult child (Amici's Brief at pp. 5-7);

- no binding authority recognizes “companionship” itself to be an independently protected parental liberty interest (Amici’s Brief at pp. 10-12);
- this Court has not adopted the parental liberty interest holding of Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984), and district court decisions holding otherwise have misread this Court’s footnote in Estate of Bailey v. County of York, 768 F.2d 503 (3d Cir. 1985) (Amici’s Brief at pp. 14-15).

Sincerely,

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