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Due Process, State Remedies and Section 1983

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DUE PROCESS, STATE REMEDIES, AND SECTION 1983*

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I. INTRODUCTION

Federalism,[1] overdeterrence,[2] overburdened courts,[3] and trivialization of the Constitution[4] have recently emerged as dominant concerns in discussions of constitutional tort doctrine. Foremost among the

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On January 21, 1986, after this Article went to press, the Supreme Court decided Daniels v. Williams, 106 S.Ct. 677 (1986) and Davidson v. Cannon, 106 S.Ct. 668 (1986), which held that more than negligence is required for deprivations of liberty and property in both procedural due process and substantive due process cases. These two cases, which are discussed in their circuit court posture in this Article, are consistent with the major thesis of this Article regarding the proper scope of Parratt v. Taylor, 451 U.S. 527 (1981). Moreover, the Court adopted a due process—state of mind strategy suggested here whereby certain potentially difficult due process issues are avoided. See AUTHOR'S NOTE following this Article.

1. *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976), in which the Court, in the course of holding that one's interest in reputation, standing alone, is neither a liberty nor a property interest, expressed concern that 42 U.S.C. § 1983 not become a "font of tort law," thereby displacing state tort law. *Id.* at 701. Compare similar judicial concern in The Civil Rights Cases, 109 U.S. 3 (1883), in which the majority held § 1 of the Civil Rights Act of 1875 unconstitutional because it went beyond the scope of § 5 of the fourteenth amendment. The Court asked: "If this legislation is appropriate for enforcing the prohibitions of the [fourteenth] amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of *all* rights of life, liberty, and property?" *Id.* at 14 (emphasis added).

2. *E.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982) (expanding the protection for defendants of the qualified immunity test because of a fear of overdeterrence). *See generally* Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Immunity*, 62 WASH. U.L.Q. 221 (1984).

3. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980).

4. *See, e.g.*, Justice Powell's concurring opinion in Parratt v. Taylor, 451 U.S. 527 (1981) ($23.50 section 1983—due process based claim trivialized the Constitution).

constitutional torts is 42 U.S.C. section 1983,[5] which creates a fourteenth amendment action for damages against state and local government officials and local governments themselves.[6] Because of the close relationship between section 1983 and the fourteenth amendment,[7] fourteenth amendment doctrine is, in effect, incorporated into section 1983 in a manner analogous to the incorporation of various provisions of the Bill of Rights through the fourteenth amendment itself.[8] Thus, violations of the equal protection clause, of incorporated provisions of the Bill of Rights, and of procedural and substantive due process may be actionable under section 1983.

The concerns with federalism, overdeterrence, overburdened courts, and trivialization of the Constitution especially emerge in connection with due process claims under section 1983. The due process clause is an open ended constitutional provision whose interpretation and application cannot be determined conclusively through originalism.[9] The heated debate several decades ago regarding incorporation is one example of its open-ended nature.[10] Another is the controversy surrounding the substantive due process right of privacy holding of *Roe v. Wade*.[11] The broad language of section 1983 gives claims based on the due process clause the potential to become a "font of tort law,"[12] with the result that many, if not most, torts committed by

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5. 42 U.S.C. § 1983 (1982) reads as follows:

> 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

6. Monroe v. Pape, 365 U.S. 167 (1961) (officials); Monell v. Department of Social Servs., 436 U.S. 658 (1978) (local governments).

7. Section 1983's title is "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes." Pub. L. No. 96-170, § 1, 93 Stat. 1284, 1284 (1979).

8. *See* Monroe v. Pape, 365 U.S. 167, 171 (1961).

9. The original and core meaning of due process seems to be procedural, but due process interpretation has gone well beyond originalism, an approach to constitutional interpretation "that accords binding authority to the text of the Constitution or the intentions of its adopters and is significantly guided by one or both of these sources." P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 395 (2d ed. 1983).

10. Compare the opinions of Justices Frankfurter and Black in Adamson v. California, 332 U.S. 46 (1947). Justice Frankfurter opposed incorporation of the provisions of the Bill of Rights through the due process clause, while Justice Black argued that the entire Bill of Rights was meant to apply to the states.

11. 410 U.S. 113 (1973).

12. *E.g.*, Paul v. Davis, 424 U.S. 693, 701 (1976).

government officials may be actionable in federal court as fourteenth amendment violations.

The scope of section 1983 may be directly diminished by curtailing the scope of both the procedural and substantive components of due process. This would force much of the litigation with state and local government officials and local governments into state courts[13] and would therefore promote federalism, reduce the burden on federal courts, and avoid trivializing the Constitution. In addition, if state immunity doctrines were protective of government officials and governments, this likely would reduce the perceived danger of overdeterrence. At the very least, states would fashion their own immunity rules. This Article does not deal broadly with the question of whether any or all of these concerns have been seriously overstated in the section 1983 due process setting.[14] Rather, its purpose is to analyze critically the developing jurisprudence of the Supreme Court and federal courts regarding procedural and substantive due process.

The first part of this Article deals with procedural due process and the revolution potentially brought about by *Parratt v. Taylor*.[15] It argues that the Court's "new" due process methodology makes good sense in a procedural due process context so long as *Parratt*'s postdeprivation remedy approach is not used in an unthinking manner and so long as the postdeprivation remedies resorted to are truly adequate. It is also crucial to the proper use of *Parratt* that courts distinguish properly between procedural and substantive due process.

The second part deals with substantive due process.[16] It contends that *Parratt*'s postdeprivation remedy approach should not apply to incorporated provisions of the Bill of Rights. It also argues that *Parratt* should not apply to cases in which substantive due process stands alone. Those cases typically deal either with claims of excessive use of force or with assertions that governments and their officials breached affirmative duties. The Article concludes with observations on the potential of the Court's post-*Parratt* due process methodology and its relation to several important themes in constitutional adjudication.[17]

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13. That is, § 1983 plaintiffs would have demonstrated no constitutional violations. Thus, their only recourse would be state remedies.

14. *See* Eisenberg, *Section 1983: Doctrinal Foundations and An Empirical Study*, 67 CORNELL L. REV. 482 (1982).

15. 451 U.S. 527 (1981). *See* text accompanying notes 25-69. Recent articles dealing with *Parratt* include the following: Smolla, *The Displacement of Federal Due Process Claims By State Tort Remedies:* Parratt v. Taylor *and* Logan v. Zimmerman Brush Company, 1982 U. ILL. L. REV. 831 [hereinafter cited as Smolla]; Friedman, Parratt v. Taylor: *Opening and Closing The Door on Section 1983*, 9 HASTINGS CONST. L.Q. 545 (1982); Note, *Due Process and Section 1983: Limiting* Parratt v. Taylor *to Negligent Conduct*, 71 CALIF. L. REV. 253 (1983); Comment, Parratt v. Taylor: *Don't Make a Federal Case Out of It*, 63 B.U.L. REV. 1187 (1983).

16. *See infra* text accompanying notes 69-155.

17. *See infra* text accompanying notes 155-61.

II. PROCEDURAL DUE PROCESS: THE PROPER USE OF *Parratt v. Taylor*

The Supreme Court's current procedural due process approach stems from *Board of Regents v. Roth*.[18] Before *Roth*, the Court had collapsed the questions of whether a hearing was due, what kind of a hearing it should be, and when it should be held. After the unexpected decision in *Roth*, the first question—once state action was present—in all procedural due process cases was whether the state had deprived a person of a liberty or property interest. If the answer was yes, then the next questions to be answered, by using the cost-benefit analysis later set out by the Court in *Mathews v. Eldridge*,[19] were what kind of a hearing should the accused get and when should it be held. These two steps allowed the Court to avoid troublesome due process questions at the outset by finding that no interference with a liberty or property interest had occurred.[20] In a very real sense, this approach was a response to the demand of some Justices for a full scale predeprivation due process hearing when something less than a full hearing could also have satisfied due process.[21] To avoid the "all" approach of these Justices, the "nothing" approach of others occasionally prevailed.

This was not permanent, however. Gradually, the Court began to acknowledge that even when the state deprived people of a liberty or property interest, a full scale predeprivation hearing was not always required. This had long been the rule with respect to the timing of hearings in emergency situations.[22] The Court began to develop the same flexibility for other attributes of a due process hearing and occasionally ruled that a full scale hearing was not necessary.[23] It was this procedural due process flexibility that gave rise to *Parratt v. Taylor*.[24]

In *Parratt*, an inmate brought a section 1983 suit for damages of $23.50 against two prison officials for their alleged negligence in causing the loss of hobby materials ordered by the plaintiff through the mail. The plaintiff's complaint was couched in terms of a deprivation of property without due process. The district court entered summary

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18. 408 U.S. 564 (1972).

19. 424 U.S. 319 (1976). On the individual's side, the Court assesses the importance of the liberty or property interest and inquires into the extent to which the desired procedure will reduce the possibility of erroneous decisionmaking. On the government side, the Court assesses the governmental interest in avoiding the increased administrative and fiscal burdens.

20. *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976) (the interest in reputation alone is not a liberty or property interest).

21. *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

22. *E.g.*, North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

23. *E.g.*, Board of Curators v. Horowitz, 435 U.S. 78 (1978); Goss v. Lopez, 419 U.S. 565 (1975).

24. 451 U.S. 527 (1981).

judgment in favor of the plaintiff, holding that negligence was actionable under section 1983, that the defendants had deprived the plaintiff of property in violation of the due process clause, and that the defendants were not protected by qualified immunity. The Eighth Circuit Court of Appeals affirmed in an unpublished opinion.

Reversing the Eighth Circuit in an opinion by Justice Rehnquist, the Supreme Court first addressed the question of whether negligence is actionable under section 1983. The Court ruled that although a section 1983 cause of action does not require scienter, state of mind may be relevant to the constitutional violation asserted through section 1983.[25] The Court then found that the plaintiff's loss, though only negligently caused, constituted a deprivation of property, which implicated the due process clause. Nevertheless, the Court ultimately concluded that the defendants' conduct did not violate the due process clause. An apparently adequate tort remedy existed under state law—a postdeprivation hearing, in effect—which the plaintiff could use to seek redress. Additionally, a predeprivation hearing was not practicable for the state because the plaintiff's loss had been caused not by a formal and established state procedure but by "random and unauthorized" acts of state employees. The Court emphasized the necessity of this due process result. Otherwise, every injury caused by a state official under color of law—for example, an injury arising out of an automobile accident—would constitute a due process violation actionable under section 1983. This would improperly render section 1983 a "font of tort law."[26]

Parratt was clearly designed to remove most, if not all, negligent deprivation of property cases from the federal courts and send them to the state courts. The Supreme Court limited its role to determining whether the plaintiff was negligently deprived of a property interest,

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25. These parts of the opinion are sound. *See generally* S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: A GUIDE TO SECTION 1983 § 3.02 (1979 and Supp. 1985); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974).

26. 451 U.S. at 544. Justice Stewart concurred, doubting whether a negligently caused loss was a deprivation of property for due process purposes. Justices White and Blackmun also concurred, stressing, among other things, that they did not read the Court's due process discussion of negligent deprivations as applicable to deprivations of life or liberty. They also asserted that a state's providing a postdeprivation hearing might not satisfy due process where state employees acted intentionally to deprive one of property. *Id.*

Justice Powell concurred only in the result and argued at length that due process was not implicated in *Parratt* because a negligently caused loss of property did not constitute a deprivation of property under the due process clause. Rather, an intentional act was required for such a deprivation. He also criticized the Court's opinion for focusing solely on procedural due process and ignoring substantive due process. Finally, he suggested that the Court's opinion created the risk that both the due process clause and § 1983 would become trivialized and gave as an example the $23.50 *Parratt* case itself. *Id.* at 546. Justice Marshall concurred in part and dissented in part, contending that it was not at all clear that plaintiff had been told there was a state law remedy available to him. *Id.* at 554.

whether a predeprivation hearing was feasible, and, if it was not, whether the state provided some kind of "adequate" postdeprivation hearing in state court or elsewhere. The Court apparently thought that removing these cases from the federal courts would advance federalism interests, minimize overdeterrence of government officials, reduce the burdens on federal courts, and avoid trivializing the Constitution for $23.50.

Parratt immediately raised the question of its own due process scope. Did it apply only to deprivations of property and, if so, only to those that were negligent? Did it also apply to deprivations of liberty and, if so, only to those negligently brought about? What were the implications of *Parratt* for substantive due process and other constitutional violations? Taken to an extreme, *Parratt* could radically change due process jurisprudence in particular and constitutional jurisprudence in general. These questions were apparent to the concurring Justices, several of whom contended that *Parratt* should be limited to negligent deprivations of property.[27]

A. Feasibility of a Predeprivation Hearing

1. Tortious Deprivations of Property

Parratt was quickly limited in *Logan v. Zimmerman Brush Co.*[28] The *Logan* Court held that *Parratt*'s inquiry into the existence of an adequate postdeprivation remedy was irrelevant to a case in which a state system, by operation of law, destroyed a property interest through failure to convene a timely conference for the purpose of considering a claim of an unfair employment practice. In such a case, using an established state procedure, a predeprivation hearing was surely feasible. The Court emphasized that it did not matter whether the state's failure to convene the timely conference was negligent, intentional, or malicious: "*Parratt* was not designed to reach such a situation."[29]

Despite *Logan*, the procedural due process rationale supporting *Parratt*'s inquiry into the existence of an adequate postdeprivation remedy—that a predeprivation hearing was not feasible—could not remain confined to *negligent* deprivations of property. Circuit courts began to recognize this shortly after *Parratt*,[30] and, in *Hudson v.*

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27. *See supra* note 26.

28. 455 U.S. 422, 435-37 (1982).

29. *Id.* at 436.

30. *E.g.*, Wilkins v. Whitaker, 714 F.2d 4 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 3586 (1984); Wolf-Lillie v. Sonquist, 699 F.2d 864 (7th Cir. 1983).

Palmer,[31] the Supreme Court unanimously held that *Parratt* also applied to certain *intentional* deprivations of property.

In *Hudson*, the plaintiff inmate alleged, in addition to a fourth amendment claim, that the defendant prison guard had intentionally destroyed his personal property during a shakedown search of his cell. Making a *Parratt* inquiry into the existence of an adequate postdeprivation remedy, and agreeing with the Fourth Circuit, the Court reasoned that there was no "logical distinction" between negligent and intentional deprivations of property with respect to the practicability of providing predeprivation process and noted that "[t]he State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct."[32] Further, the Court distinguished *Logan v. Zimmerman Brush Co.* from *Hudson* because the *Logan* property deprivation was "effected pursuant to an established state procedure."[33] Hence, because in *Hudson* a meaningful postdeprivation state remedy was available to the plaintiff under Virginia law, procedural due process was not violated.

Justices Stevens, Brennan, Marshall, and Blackmun concurred on the due process issue while dissenting at length on the fourth amendment issue. They added their "understanding" that the Court's due process holding did not apply to conduct that violates a substantive constitutional right or to "cases in which it is contended that the established prison procedures themselves create an unreasonable risk that prisoners will be unjustifiably deprived of their property."[34]

2. Deprivations of Contract Rights

Parratt's postdeprivation remedy approach is not limited to random and unauthorized *tortious* conduct of government employees.[35] Since contract rights may be property interests for procedural due process purposes, a *Parratt* inquiry into the existence of an adequate postdeprivation remedy can also be made when public employees are negligently or intentionally deprived of contract rights. Even before

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31. 104 S. Ct. 3194 (1984).
32. *Id.* at 3203.
33. 455 U.S. 422 (1982).
34. 104 S. Ct. at 3207, 3208 n.4 (Stevens, J., dissenting).
35. Nor is it limited to the prison setting. *But see* Wilkerson v. Johnson, 699 F.2d 325 (6th Cir. 1983), in which the Sixth Circuit initially considered *Parratt* applicable to a case in which plaintiffs claimed that the defendant officials intentionally misapplied state licensing law to keep them from obtaining a barbershop license. Finding that there was no adequate state remedy for intentional conduct of the sort alleged, however, the court incorrectly went on to observe in passing: "To apply the holding of *Parratt* outside the prisoners' rights context is inconsistent with *Monroe* and *Patsy*." *Id.* at 329.

Hudson, the Seventh Circuit Court of Appeals struggled with the implications of *Parratt* in such a case. In *Vail v. Board of Education*,[36] the Seventh Circuit held that a *Parratt* postdeprivation remedy inquiry need not be made for the plaintiff's section 1983 suit against a school board for violating due process in connection with the nonrenewal of his contract. The court first found, after considerable discussion of the meaning of "property," that the plaintiff had a constitutionally protected property interest in continued employment. Next, distinguishing *Parratt* and relying on *Logan*, the court suggested that the case before it did not concern a "random and unauthorized act by a state employee," for which a predeprivation hearing would be impractical or inappropriate. Rather, such a hearing could have been and should have been provided.

Judge Posner dissented,[37] elaborately criticizing the court's holding that a property interest was implicated: "[A] contract right, as such, is not property" when the only remedy the law provides is damages. He went on to suggest that even if there were a property interest, under the rationale of *Parratt* the existence of a state contract remedy would provide all the process due. In his view, a *Parratt* postdeprivation remedy inquiry must be made even for intentional deprivations of property.[38]

Even after *Hudson, Vail* is still good law. The difference between the majority's and Judge Posner's reading of *Parratt* is subtle but crucial. According to the majority, the postdeprivation remedy inquiry of *Parratt* and *Hudson* should not automatically be undertaken whenever there has been a negligent or intentional deprivation of property. Rather, the appropriate procedural due process question is when should a hearing take place, with the answer depending in part—as an aspect of a cost-benefit analysis—on whether a predeprivation hearing is feasible.[39] In contrast, Judge Posner would apply the postdeprivation remedy inquiry of *Parratt* (and now *Hudson*) to *all* deprivation of property cases, regardless of the feasibility of a predeprivation

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36. 706 F.2d 1435 (7th Cir. 1983), *aff'd by an equally divided court*, 104 S. Ct. 2144 (1984). Even before *Vail*, in Wolf-Lillie v. Sonquist, 699 F.2d 864 (7th Cir. 1983), the Seventh Circuit indicated that, for *Parratt* purposes, there was no difference between negligent and intentional deprivations of property.

37. *Vail*, 706 F.2d at 1449.

38. *Id.* at 1453. It was also significant to Judge Posner that the state was not involved in plaintiff's alleged deprivation, but only the "isolated action of a single school board." *Id.* at 1455. Highly critical of the majority, he concluded that the Constitution was being trivialized. *Id.* at 1456. Judge Eschbach concurred in the majority opinion, but wrote separately in order to respond to Judge Posner's "strongly worded dissenting opinion." *Id.* at 1441 (Eschbach, J., concurring). He, too, extensively discussed due process-property case law as well as the proper reading of *Parratt* and concluded that the majority's use of precedent was correct. *Id.* at 1441-47.

39. Mathews v. Eldridge, 424 U.S. 319 (1976). Whether a predeprivation hearing is feasible is part of the question of whether, all costs and benefits considered, a predeprivation hearing is worth it.

hearing, in the belief that public employment contract cases like *Vail* belong in state court.[40]

3. Deprivations of Liberty and the Crucial Distinction Between Procedural and Substantive Due Process

Parratt raised more serious issues about its scope than those dealing with deprivations of property.[41] Although the Court in *Logan* ruled that the postdeprivation remedy inquiry of *Parratt* was not to be applied to a deprivation of property "effected pursuant to an established state procedure," such an inquiry might nevertheless be made in certain deprivation of liberty situations. In general, cases that concern the applicability of *Parratt* to deprivations of liberty have proved especially troublesome. It is in such cases that courts often encounter considerable difficulty in distinguishing between procedural and substantive due process.

Parratt itself is the source of some confusion with regard to this distinction. While the Court characterized the inmate's complaint in *Parratt* as a procedural due process claim, it appears that the inmate was not challenging the absence of some kind of a hearing relating to the loss of his property; rather he was arguing that the officials

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40. A later Seventh Circuit case, Brown v. Brienen, 722 F.2d 360 (7th Cir. 1983), demonstrates the continuing difficulty with public employment cases. In *Brown*, employees of a county sheriff's department, who had accrued compensatory time off through overtime pursuant to an ordinance, sued various defendants for refusing to allow them to take this accrued time off. The plaintiffs claimed due process violations. The district court ruled that there had indeed been deprivations of property but, given the availability of a state breach of contract remedy, there was no violation of due process. The Seventh Circuit, following this line of reasoning, affirmed in an opinion clearly concerned with the potential of innumerable § 1983 suits whenever public employment contracts and other public contracts are in dispute. Thus, there was no due process violation in *Brown* even though superficially a predeprivation hearing was possible. *Id.* at 365.

While the result in *Brown* at first seems inconsistent with *Vail*, the two decisions are reconcilable. In *Brown*, unlike *Vail*, there was no termination of employment. Thus, the individual interest was not as weighty as that in *Vail*. Also, a pretermination hearing would have been extremely costly and would not likely have aided in preventing an erroneous determination. In addition, the state breach of contract remedy was adequate and appropriate for such a relatively "tenuous loss." Thus, the court used cost-benefit analysis in reaching this conclusion. What is more significant is that it did not blindly use *Parratt*'s postdeprivation remedy approach.

Equally significant in this regard is the Supreme Court's recent procedural due process decision in Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487 (1985), which held that a public employee with a property interest in employment is entitled to a predeprivation hearing. This case is important by negative implication for what it did *not* do: the Court did not address the applicability of *Parratt* to this intentional deprivation of property case. This omission, if knowing, was sound because there was no random or unauthorized act by government employees to which the *Parratt* approach was relevant.

41. The relevance of *Parratt* to taking law and other land-use issues is an open question. However, to the extent that taking law is fifth amendment law applied to the states through incorporation, then *Parratt*, strictly speaking, should not be applicable. *But cf.* Williamson County Regional Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108 (1985) (applying *Parratt* by analogy to "temporary takings"). *See infra* text accompanying notes 69-79.

should not have lost his property at all. In short, the suit was really a challenge to the fact of loss, not to the procedures. Yet the Court insisted on using *Parratt* as a vehicle for a procedural due process analysis.

The danger of blurring the lines between procedural due process and substantive due process is even more pronounced in deprivation of liberty cases than in deprivation of property cases. One must keep in mind what a section 1983 plaintiff is really challenging. If a plaintiff seeks some kind of a hearing regarding a deprivation of liberty, then asking whether *Parratt* applies is meaningful. If a plaintiff attacks the conduct itself regardless of the presence or absence of a predeprivation or postdeprivation hearing, then, as will be seen, asking whether *Parratt* applies may be inappropriate. The latter situation includes cases involving substantive due process and incorporated provisions of the Bill of Rights.

A good example of a procedural due process claim to entitlement of a hearing in a deprivation of liberty setting is the Court's pre-*Parratt* decision in *Ingraham v. Wright*.[42] The plaintiff student challenged the application of corporal punishment on various grounds, one of which was procedural due process. The Court was confronted with an intentional deprivation of liberty, that is, the student's interest in freedom from physical punishment. In dealing with the student's claim that there should have been a prior hearing of some kind, the Court found that procedural due process was not violated. The Court emphasized the availability under state law of a postdeprivation remedy. It rejected the argument that a predeprivation hearing was required. Instead, using a cost-benefit analysis that focused on the institutional costs of predeprivation hearings, it emphasized the availability of common law protections afforded students against the use of improper corporal punishment.

If one looks to the availability of an adequate postdeprivation remedy under state law, then *Ingraham* appears consistent with the later decision in *Parratt*. However, *Ingraham* seemed to go somewhat beyond *Parratt* insofar as the Court in *Ingraham* did not contend that a predeprivation hearing would have been utterly unworkable, only that it would have been socially costly because it would "significantly burden the use of corporal punishment as a disciplinary matter."[43] Furthermore, the corporal punishment inflicted was not the result of a random and unauthorized act of a school official. Only if one gives considerable weight to the common law historical background of corporal punishment and the judicial reluctance to intervene in school disciplinary matters can *Ingraham* be satisfactorily reconciled with *Parratt* and thus limited.

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42. 430 U.S. 651 (1977).
43. *Id.* at 680.

However, regardless of what one thinks of the Court's approach and result in *Ingraham*, the Court properly focused on the question of what kind of a hearing, if any, was due. Contrast that focus with an example commonly but erroneously thought to raise primarily a procedural due process issue—an example used by the Court as part of its "parade of horribles" in *Paul v. Davis*.[44] Suppose a police car negligently driven by an on-duty police officer collides with the plaintiff's car and causes the plaintiff serious physical harm. Conceivably, a procedural due process challenge, based on a negligent deprivation of liberty,[45] could be made against the police officer, but it seems strange to suggest that the wrongful conduct of the police officer related to the absence of some sort of a hearing. Only if this peculiarity is ignored may *Parratt* be applied to such a purported procedural due process challenge. After all, the police officer's conduct was random and no predeprivation hearing was workable or feasible. Thus, the availability of a postdeprivation remedy should undercut any procedural due process challenge.

However, what the plaintiff is really challenging in such a case is the negligent driving itself, regardless of any procedural safeguards. Whatever the outcome on the merits, the court should use a substantive due process test for evaluating the defendant's conduct. If *Parratt*'s postdeprivation remedy approach is limited in principle to procedural due process, then the presence or absence of an adequate state postdeprivation remedy is irrelevant to the substantive due process decision.

The same observation about the need to focus on just what the plaintiff is seeking in a due process case can be made about a recent Fourth Circuit decision, *Daniels v. Williams*.[46] In *Daniels*, an inmate claiming a negligent deprivation of liberty sued for injuries allegedly brought about by his falling over a pillow and newspapers negligently left on some steps by the defendant deputy sheriff. A *Parratt* postdeprivation remedy inquiry could have some relevance in a case like *Daniels* if such a plaintiff characterized his claim as a procedural due process violation, perhaps in order to take advantage of the perceived absence of an adequate state postdeprivation remedy.[47] But

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44. 424 U.S. 693 (1976).

45. This assumes that liberty interests can be negligently deprived for procedural due process purposes. The Court may well treat deprivations of liberty as requiring more than negligence—in contrast to deprivations of property—in a procedural due process setting, thereby avoiding the *Parratt* postdeprivation remedy inquiry entirely in such cases. Substantive due process violations which involve deprivations of liberty require more than negligence. *See* Rochin v. California, 342 U.S. 165 (1952) (conduct that shocks the conscience). *See also infra* text accompanying notes 65-69 Davidson v. O'Lone, 752 F.2d 817 (3d Cir. 1984) (en banc), *cert. granted sub nom.* Davidson v. Cannon, 105 S. Ct. 2673 (1985).

46. 748 F.2d 229 (4th Cir. 1984) (en banc), *cert. granted*, 105 S. Ct. 1168 (1985).

47. Note that this procedural due process—postdeprivation remedy issue can be avoided

insofar as the challenge is to the deputy sheriff's conduct, it is a substantive due process challenge to which, as discussed later,[48] a *Parratt* postdeprivation remedy inquiry has no relevance.[49]

Reasoning functionally from *Parratt, Hudson*, and *Ingraham* to other procedural due process cases of deprivations of liberty—assuming that negligence may bring about a deprivation of liberty—leads to the conclusion that a postdeprivation remedy may be all the process required so long as a predeprivation hearing is not feasible. This conclusion should not be surprising, since it applies the previously articulated cost-benefit analysis of *Mathews v. Eldridge*[50] to the issues of timing and forum. Moreover, this result is sensible insofar as it encourages states, in appropriate cases, to develop adequate state remedies, either judicial or administrative,[51] for the torts of their employees. Further, legitimate concerns of federalism, overburdened federal courts,[52] and trivialization of the Constitution will be reduced, even if the development of adequate state remedies would not entirely eliminate the Court's apparent sensitivity to overdeterrence of state

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entirely by requiring more than negligence for a finding of deprivation of liberty as well as by concluding that an inmate has no liberty interest. *See infra* text accompanying notes 65-69 and note 69.

48. As discussed *infra* in text accompanying notes 90-96, given the open-ended nature of substantive due process and important federalism concerns, one might contend that the availability of an adequate postdeprivation remedy should be relevant in determining whether challenged conduct "shocks the conscience." This argument, though, is ultimately unpersuasive.

49. A recent decision of the Fifth Circuit took an essentially procedural due process approach to *Parratt* even though it should have made clear that the case before it was also a substantive due process case. In Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984), the plaintiff, a pretrial detainee, sued various officials under § 1983 for their alleged negligence (in violation of procedural due process) in failing to supervise the jail housing him, thereby allowing another detainee to set fire to the jail and injure him. He did not, however, allege any deficiency in the jail's procedures. Analyzing *Parratt, Hudson*, and *Ingraham*, the court ruled that there was no reason to distinguish between liberty and property interests for *Parratt* purposes. So long as the acts charged were random and unauthorized such that a predeprivation hearing could not feasibly be provided, the existence of an adequate state postdeprivation remedy precluded a finding of a procedural due process violation. The court correctly rejected the argument that this amounted to an improper exhaustion of judicial remedies requirement: its decision went to the constitutional merits. The court also disagreed with plaintiff's contention that liberty interests are different from property interests because liberty deprivations, unlike property deprivations, cannot be fully compensated. It observed that liberty deprivations are compensated routinely in the litigation process. *Id.* at 336-39.

50. 424 U.S. 319 (1976).

51. *See* the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e (1982), which allows federal courts to impose an exhaustion of administrative remedies requirement in certain cases where government institutions have established fair administrative procedures consistent with federal guidelines.

52. Federal courts may end up having to struggle long and hard to develop standards for adequacy. This would be especially ironic, since it would mean that the federal § 1983 due process caseload would not decrease, but would instead focus on a different level of the due process analysis.

and local government employees.[53] In short, if *Parratt* is applied properly to true procedural due process cases, it is defensible.[54]

B. The Adequacy of Postdeprivation Remedies

Standards for determining the adequacy of postdeprivation remedies after *Parratt* are crucial for several reasons. First, an inadequate state postdeprivation remedy will not foreclose a procedural due process challenge even when *Parratt* is otherwise applicable. Second, whether a postdeprivation remedy is adequate should—given the procedural due process focus of *Parratt*—depend on whether that remedy provides a hearing consistent with procedural due process together with the possibility of being made whole. This inquiry requires courts to apply federal constitutional standards to state remedial schemes, a role which does not necessarily extricate federal courts from the job of second-guessing state action in procedural due process cases. In fact, this role may result in substantial federal involvement in state remedial schemes for governmental torts.

In *Parratt*, the Court made clear that a state remedy was adequate even though it did not provide relief coextensive with that of section 1983.[55] Thus, the absence of a jury trial and the unavailability of punitive damages and attorney's fees did not render a state remedy inadequate. This is sound because a procedural due process challenge focuses on the presence and nature of a hearing. Procedural due process requires a meaningful opportunity to be made whole. Clearly, procedural due process does not guarantee winning. Moreover, as several circuits have already suggested, a state may satisfy procedural due process through a nonjudicial postdeprivation hearing, one that is, for example, provided through arbitration[56] or an administrative

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53. *See supra* note 2 and accompanying text. On the other hand, state and local governments might be expected to balance the individual and governmental interests involved in such a way as to minimize overdeterrence while at the same time providing an adequate state remedy. One way to accomplish both objectives is to render the governmental body liable on a respondeat superior basis. Another is to provide indemnification for all good faith conduct. A third way is for governments to pay the costs of defending.

54. The Fifth Circuit put the proper reading of *Parratt* most aptly in a recent decision:

> *Parratt v. Taylor* is not a magic wand that can make any section 1983 action resembling a tort suit disappearing into thin air. *Parratt* applies only when the plaintiff alleges a deprivation of procedural due process; it is irrelevant when the plaintiff has alleged a violation of some substantive constitutional proscription. Further, in the context of procedural due process, *Parratt* applies only when the nature of the challenged conduct is such that the provision of predeprivation procedural safeguards is impracticable or infeasible.

Augustin v. Doe, 740 F.2d 322, 329 (5th Cir. 1984).

55. Parratt v. Taylor, 451 U.S. 527, 544 (1981). *See also* Loflin v. Thomas, 681 F.2d 364 (5th Cir. 1982); Bumgarner v. Bloodsworth, 738 F.2d 966 (8th Cir. 1984).

56. *See* Parratt v. City of Connersville, 737 F.2d 690, 696-97 (7th Cir. 1984) (arbitration proceeding insufficient), *cert. dismissed*, 105 S. Ct. 828 (1985).

proceeding.[57] This too is sound even when state judicial review is not available so long as such proceedings have fundamentally fair procedures.[58]

The Supreme Court may soon address the question of adequacy in a section 1983 *Parratt* setting in *Daniels v. Williams*.[59] Here, the Fourth Circuit initially ruled that the availability of absolute tort immunity under Virginia law to all of the potential defendants in a postdeprivation tort action did not render the remedy inadequate.[60] Thus, the plaintiff inmate who claimed a negligent deprivation of liberty lost on his procedural due process claim despite the lack of a meaningful opportunity to be made whole. Upon en banc reconsideration, the Fourth Circuit found that the federal plaintiff in reality had a tort action under Virginia law which was adequate. There was thus a meaningful opportunity to be made whole, and hence no procedural due process violation under *Parratt* existed. The court did not have to reach the initial question addressed in the panel decision: does absolute immunity preclude a finding of adequacy of a state remedy?

Whether the Supreme Court ultimately reaches this question in *Daniels*,[61] and regardless of how the Court resolves it, the relevance of immunity to the adequacy of a postdeprivation remedy should be clear: when all of the potential defendants are absolutely immune under state law so that the merits of the plaintiff's state claim cannot be reached, then the state remedy should be considered inadequate. If procedural due process requires a meaningful opportunity to be heard, it is hard to see how the answer could be otherwise.[62]

It is impossible to foresee where an inquiry into the adequacy of postdeprivation remedies will end. State immunity doctrines may be in for constitutional scrutiny, a scrutiny rather ironic in light of *Parratt*'s avowed goal of reducing federal judicial intervention in local matters. The ultimate result could be inconsistent with the Court's apparent "hands-off" approach to state immunities in *Martinez v. California*.[63] In *Martinez*, parole board officials were sued for their decision to parole a person who thereafter murdered the plaintiffs' decedent.

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57. Oberlander v. Perales, 740 F.2d 116 (2d Cir. 1984).

58. Steffen v. Housewright, 665 F.2d 245 (8th Cir. 1981).

59. 748 F.2d 229 (4th Cir. 1984) (en banc), *cert. granted*, 105 S. Ct. 1168 (1985). *See supra* note 46 and accompanying text.

60. 720 F.2d 792 (4th Cir. 1983).

61. *See supra* notes 45, 47.

62. The same position is taken in Smolla, *supra* note 15, at 871. However, absolute immunity should be distinguished, for example, from time-barring a state's postdeprivation remedy; in the latter situation, the plaintiff at least once had the chance to pursue a postdeprivation remedy, unlike the absolute immunity case.

63. 444 U.S. 277 (1980). Smolla, *supra* note 15, at 875, questions whether *Martinez* is still good law after *Parratt* and *Logan*.

The Court rejected the contention that California's absolute tort immunity rule was an unconstitutional deprivation of the plaintiffs' property interest in their tort claim against the defendant parole board officials. The Court stated: "[T]he State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational."[64] According to the Court, the state's decision to provide absolute immunity was reasonable in light of its interest in preventing inhibition of the exercise of parole board discretion. Consequently, there is considerable tension between *Martinez* and extensive federal judicial scrutiny of state immunity rules under *Parratt*. Moreover, such scrutiny would necessarily entail the expenditure of significant federal judicial resources, another outcome apparently not foreseen by those Justices joining in the *Parratt* opinion.

These concerns have already led the Third Circuit in *Davidson v. O'Lone*[65] to avoid applying *Parratt* to a purported procedural due process violation. The plaintiff inmate claimed a negligent deprivation of liberty because he was injured by another inmate through the alleged negligence of prison officials. There was no substantive due process violation because, according to the court, more than negligence is required for a deprivation of liberty. As to procedural due process, and the possibility of a *Parratt* inquiry into an adequate postdeprivation remedy, it was clear that such an inquiry would result in a finding of inadequacy because state law accorded absolute immunity to the potential defendants. The court was extremely sensitive to what it termed the "almost unlimited . . . implication of [plaintiff's *Parratt*-based] procedural due process claim . . . [which] would subject to procedural due process scrutiny every state decision to immunize a public entity and employee from discrete claims . . . ."[66] The court ruled, as an end-run around this problem, that more than negligence is required for a deprivation of liberty in a procedural due process setting as well. It also relied on *Martinez* for the proposition that states are free to fashion their own substantive defenses or immunities for use in adjudication.

Two concurring judges argued that even if negligence could constitute a deprivation of the plaintiff inmate's liberty interest, the

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64. 444 U.S. at 282. The Court also ruled that the parole board officials themselves had not deprived the plaintiffs' decedent of her life and liberty, thereby rejecting the plaintiffs' substantive due process claim as well.

65. 752 F.2d 817 (3d Cir. 1984) (en banc) (Seitz, C.J., Gibbons, and Higginbotham, J.J., dissenting), *cert. granted sub nom.* Davidson v. Cannon, 105 S.Ct. 2673 (1985). The plaintiff also raised a substantive due process claim which was rejected by the court on the ground that negligent conduct was insufficient.

66. 752 F.2d at 830.

appropriate procedural due process analysis in such cases involved the balancing of the individual's interest against the state's interest "in crafting its own tort laws and immunities."[67] Therefore, a state postdeprivation remedy was not always required even after *Parratt*. These judges seemed to argue that the cost-benefit analysis appropriate in procedural due process cases to the question of *what kind* of a hearing and *when* also applied at a higher level of generality to the question of *whether* there should be *any* hearing at all for negligent deprivation of liberty committed by government employees. Thus, in confronting this troublesome issue head on, they concluded by suggesting that there are cases in which one whose liberty interest is deprived is entitled to no hearing at all at any time.

The difficulty in *Davidson* and similar negligent deprivation of liberty cases—such as the negligently driven police car—regarding federal judicial intervention in state governmental tort immunity schemes is a real one. It could be argued that such federal intervention is an appropriate role and that, come what may, *Parratt*'s postdeprivation remedy inquiry should apply to negligent deprivations of liberty for procedural due process purposes. To this extent *Martinez* would be modified. This argument, for procedural due process purposes, treats deprivations of liberty like *Parratt*'s deprivations of property. Alternatively, federal judicial intervention could largely be avoided, as the majority in *Davidson* contended, by insisting that for both substantive due process and procedural due process, negligence is insufficient for a deprivation of liberty.[68] This approach would avoid federal judicial

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67. *Id.* at 831. Three judges dissented, arguing that a negligent deprivation of liberty, in the absence of an adequate postdeprivation remedy, violated due process.

68. An even more direct way of avoiding such problems in negligent deprivation of liberty cases is to insist that such cases are to be treated as substative due process cases and not as procedural due process cases because the challenge is to the conduct irrespective of a hearing. Such an approach is analogous to the Court's insistence that a distinction be drawn between inmate challenges to conditions of confinement as to which a § 1983 action will lie—and challenges to the fact or duration of confinement—as to which only habeas corpus will lie. *See* Preiser v. Rodriguez, 411 U.S. 475 (1973). To the argument that a plaintiff still might wish to characterize his or her claim as a procedural due process claim so as to take advantage of the absence of an adequate postdeprivation remedy, the following response might be made to demonstrate the error in allowing such a characterization. Suppose there is in fact no adequate postdeprivation remedy because of absolute immunity. The plaintiff then will be permitted to prove in federal court the damages attributed to the absence of such a postdeprivation hearing. The defendant, however, can come forward under Mount Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977), and prove that even with a state hearing the plaintiff would have lost on the merits because, under state law, the defendant's conduct was protected by absolute mmunity and was therefore not wrongful. Hence, damages would be limited to one dollar in all such cases. Punitive damages would not be allowed because only negligence is implicated. This suggests that the plaintiff's challenge is not really to the absence of a hearing, but to the defendant's conduct itself, a substantive due process challenge. Precluding a procedural due process challenge under this approach would mean that no inquiry into the adequacy of a postdeprivation remedy need be made. This argument, however, seriously calls into question *Parratt*'s holding that

scrutiny of a state's governmental tort immunity scheme in negligence cases—those situations often covered by absolute immunity—but reserve such scrutiny in reckless and intentional conduct cases—situations that are less often covered by absolute immunity.

At first blush, this approach is inconsistent with *Parratt* because no meaningful distinction between property and liberty deprivations is immediately apparent. It also, ironically from a plaintiff's perspective, treats deprivations of property more favorably than deprivations of liberty. On the other hand, it may be enough to argue from consequences that to allow negligent deprivations of liberty to constitute procedural due process violations when adequate state remedies are absent amounts to making section 1983 into a "font of tort law." Regardless of what the Court does in *Davidson*,[69] it should make clear the important differences between substantive and procedural due process, and it should rule explicitly that *Parratt*'s postdeprivation remedy approach is not applicable to substantive due process.

III. SUBSTANTIVE DUE PROCESS: THE POSSIBLE ABUSE OF *Parratt v. Taylor*

A. Incorporated Substantive Constitutional Provisions

Various provisions of the Bill of Rights are selectively incorporated by the fourteenth amendment and applied to the states.[70] These provisions are often thought to be incorporated through the term "liberty" in the fourteenth amendment.[71] Nevertheless, the incorporated provisions carry with them their own constitutional standards, so that first, fourth, fifth, and eighth amendment standards, for example, are the same regardless of whether it is a state or federal official who does not comply with them.[72]

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negligent deprivations of *property* can constitute procedural due process violations where no adequate state remedies exist.

69. The Court could also avoid the matter entirely by holding that an inmate has no liberty interest to be deprived, especially when a state absolute immunity rule is applicable to a prison official's conduct. The Court instead could insist that such cases as *Davidson* and Daniels v. Williams, 748 F.2d 229 (4th Cir. 1984), be treated only as eighth amendment cases. *Compare* Hudson v. Palmer, 104 S. Ct. 3194 (1984), in which the Court held that an inmate has no fourth amendment expectation of privacy. *But cf.* Ingraham v. Wright, 430 U.S. 651 (1977) (a student has a liberty interest in his or her physical integrity).

70. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968).

71. *E.g.*, Gitlow v. New York, 268 U.S. 652 (1925) ("we . . . assume that the freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause").

72. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968). Justices Fortas and Harlan, however, argued against selectively incorporating an entire clause "jot-for-jot and case-for-case." *See also* Justice Powell's opinion in Apodaca v. Oregon, 406 U.S. 404 (1972), which takes the latter position as well.

The Court in *Parratt* apparently concluded that a postdeprivation remedy inquiry is not applicable to violations of these incorporated provisions because it distinguished *Monroe v. Pape*[73] on the basis that *Monroe*, unlike *Parratt*, concerned substantive constitutional violations.[74] This distinction makes sense. A first or fourth amendment violation is no less so for being committed after a due process hearing. It is conduct unrelated to a hearing that is challenged when a Bill of Rights attack is mounted. Consequently, the availability of a postdeprivation remedy under state law should not preclude the finding of a Bill of Rights violation. This is not to say, of course, that a postdeprivation remedy may not be relevant to finding such a violation. The Court in *Estelle v. Gamble*[75] held that the negligent provision of medical services to a prisoner was not an eighth amendment violation, in part because state law would ordinarily provide a malpractice remedy. Similarly, the Court in *Paul v. Davis*[76] ruled that the interest in reputation, standing alone, was not a property or liberty interest, in part because of state defamation remedies. Even in these cases, however, state postdeprivation remedies were not determinative.[77]

The argument that *Parratt*'s procedural due process focus should not apply to incorporated Bill of Rights provisions is even stronger than it is for substantive due process. Incorporated provisions of the Bill of Rights are not open-ended; they have their own relatively well-established constitutional criteria.[78] In contrast, substantive due process, even in the constitutional tort setting, is plagued by vague standards reminiscent of the reasonableness standard of the *Lochner* era.[79] In addition, applying *Parratt* to incorporated provisions would be fundamentally inconsistent with *Monroe v. Pape*. In *Pape*, the Court rejected Justice Frankfurter's "color of law" interpretation, which limited section 1983 cases to conduct authorized by state law, and excluded conduct violative of state law. Indeed, this would go well beyond Justice Frankfurter's *statutory* interpretation view insofar as it would impose a *de facto* exhaustion of state judicial remedies requirement[80] as a matter of *constitutional* interpretation.

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73. 365 U.S. 167 (1961) (seminal § 1983 case dealing with police officer violations of the fourth amendment).

74. Parratt v. Taylor, 451 U.S. at 536.

75. 429 U.S. 97 (1976).

76. 424 U.S. 693 (1976).

77. That is, the availability of a postdeprivation remedy did not automatically, standing alone, result in a finding of no constitutional violation.

78. The Court may be somewhat less afraid of judicial policy making, in the guise of constitutional decisionmaking, for incorporated provisions than for substantive due process. *See, e.g.*, Adamson v. California, 332 U.S. 46, 69 (1947) (Black, J., dissenting) (criticizing the substantive due process standard that asks whether conduct "constitutes 'civilized decency' and 'fundamental liberty and justice' ").

79. Lochner v. New York, 198 U.S. 45 (1905) (explanation of the reasonableness standard).

80. In the sense that the § 1983 plaintiff would have to pursue his or her state judicial remedies.

B. Substantive Due Process Standing Alone and the Use of Excessive Force

Apart from incorporation, current substantive due process doctrine in the federal courts has at least four components. First, *Roe v. Wade*[81] and its progeny established the substantive due process right of privacy, including the right of a woman to decide whether to have an abortion. Second, governmental conduct that is arbitrary or capricious—without rational basis—may also violate substantive due process.[82] Because of the deferential nature of this standard, it is a difficult hurdle for most plaintiffs to overcome. A third component of substantive due process, discussed in this part of the Article, arises most frequently where claims of government use of excessive force are made. The fourth component, discussed later in this Article,[83] deals with the increasingly prominent area of governmental failures to prevent harm and to rescue.

The dominant test used in substantive due process cases concerning the excessive use of force comes from *Rochin v. California*:[84] whether the conduct shocks the conscience.[85] Still another test frequently used, premised on *Rochin*, stems from the Second Circuit's decision in *Johnson v. Glick*[86] in which the following factors were set out as relevant:

> the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.[87]

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81. 410 U.S. 113 (1973). This Article does not separately discuss the relevance of *Parratt* to Roe v. Wade. In light of this Article's conclusion that *Parratt* should not affect substantive due process, the right to an abortion is similarly not controlled by the availability of state remedies.

82. Nectow v. City of Cambridge, 277 U.S. 183 (1928).

83. *See infra* text accompanying notes 108-40. Another kind of substantive due process, not discussed in this Article, deals with the standards for determining whether state courts have personal jurisdiction over certain nonresidents. *See, e.g.*, International Shoe Co. v. Washington, 326 U.S. 310 (1945).

84. 342 U.S. 165 (1952). For the suggestion that *Rochin* should be the touchstone in substantive due process cases, as well as a discussion of the four factors—recklessness, motive, disproportion, and control—the authors deem relevant to the scope of substantive due process, see Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201 (1984).

85. *See supra* notes 71-80 regarding the need to distinguish between substantive due process, which likely requires more than negligence, and procedural due process, which may not.

86. 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

87. *Id.* at 1033. Recently, the Circuit Court of Appeals for the District of Columbia applied these factors in Norris v. District of Columbia, 737 F.2d 1148 (D.C. Cir. 1984), in which an inmate, without provocation, was beaten, maced, and kicked by correction officials. As a result the inmate became temporarily blind, had immediate pain, lingering blurred vision, and a bruised and swollen left arm. The district court found no substantive due process violation

The potential impact of *Parratt v. Taylor* on excessive use of force cases is unclear. The Supreme Court's recent decision in *Tennessee v. Garner*[88] treated police use of deadly force as raising a fourth amendment issue on the grounds that such a restraint on "the freedom of a person to walk away" is a "seizure" subject to the fourth amendment's reasonableness requirement.[89] If this holding ultimately applies to all excessive use of force cases, then the *Parratt* issue will largely disappear from these cases. Even if the substantive due process issue remains, several circuits have recently held, unfortunately with little analysis, that *Parratt* does not apply to substantive due process.[90]

If the dominant purpose of *Parratt* was to remove as many due process cases from the federal courts as possible, then it may be argued that substantive due process violations ought not be found when there are adequate postdeprivation remedies. This argument would apply not only to excessive use of force cases but also to the troublesome duty to act cases discussed later in this Article.[91] Substantive due process has traditionally been characterized by an open-ended nature capable of almost unlimited and standardless expansion.[92] This raises troublesome federalism and judicial review issues.[93] Whether official

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on the ground that there were no permanent injuries. The court balanced the *Johnson* factors, found that there was a substantive due process violation, and reversed the district court decision. The *Rochin* test was not applicable because the allegations of "unprovoked, brutal beatings by correctional officers . . . can serve no legitimate governmental objective." *Id.* at 1151. The court conceded that unprovoked but minor shoves or pushes in a prison setting were not substantive due process violations, but nevertheless found that the incidents in question went far beyond such minor conduct. *Id.* at 1150-51.

88. 105 S. Ct. 1694 (1985).

89. *Id.* at 1699.

90. *E.g.*, Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) (rehearing en banc). In *Gilmere* the plaintiff's decedent alleged that various defendants had violated the decedent's procedural and substantive due process rights in killing him while trying to arrest him. The Eleventh Circuit applied *Parratt* to plaintiff's procedural due process claim of deprivation of life and liberty because the defendants' conduct was random and unauthorized; hence, plaintiff had to resort to the available postdeprivation remedy. But in ruling against the plaintiff on the substantive due process contention as well, the court apparently applied only the substantive due process tests of "conscience-shocking" conduct, and conduct "inconsistent with the concept of ordered liberty." It did *not* apply *Parratt*. Upon en banc reconsideration, the Court of Appeals for the Eleventh Circuit reversed the panel's substantive due process decision and held that decedent's substantive due process rights were violated, as were decedent's fourth amendment rights. In its decision, the en banc court made it even clearer than had the panel that *Parratt* does not apply to substantive due process. *See also* Wilson v. Beebe, 743 F.2d 342 (6th Cir. 1984). *But see* Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345 (9th Cir. 1981), *aff'd on other grounds sub nom.* Kush v. Rutledge, 460 U.S. 719 (1983) (applied *Parratt* to a substantive due process claim).

91. *See supra* notes 95-111 and accompanying text.

92. *See* Lochner v. New York, 198 U.S. 45 (1905). This open-ended nature is also apparent from the affirmative substantive due process duties discussed later. *See supra* notes 95-111 and accompanying text.

93. *E.g.*, the substitution of the Court's own judgment for that of a politically accountable body and the lack of predictability.

conduct shocks the conscience could depend, at least in part, on whether the relevant governmental body provides an adequate remedy. Under this approach the challenged conduct would not be isolated from the state's remedial scheme. By limiting this approach to substantive due process, the constitutional standards for Bill of Rights violations would not be changed. In a very real sense, Justice Frankfurter's restrictive section 1983 "color of law" interpretation set out in the dissent in *Monroe v. Pape*[94] would be resurrected for the narrow purpose of defining the scope of substantive due process.

This position, however, would immediately encounter serious problems. It would be yet another situation in which the Supreme Court, sensitive to the breadth of a constitutional *remedy*, has moved to cut back on the underlying constitutional provision. The Court has done this in the fourth amendment setting because of its concern with what it perceived to be the adverse effects of a broad exclusionary rule.[95] The effect of such a judicial response to the wide-ranging remedy provided by the section 1983 damages action is obvious: the constitutional provision is cut back even when the remedy seems appropriate in a particular case. For example, a *Parratt* approach to substantive due process would apply not only to section 1983 damages actions, but would also apply to fourteenth amendment actions for injunctive relief based on substantive due process.[96]

The same approach could apply to *Bivens* actions[97] against federal officials based on the fifth amendment's due process clause.[98] However, this would be inconsistent with *Carlson v. Green*[99] in which the Court held that Congress must have explicitly intended to designate an alternative congressionally provided federal remedy as a substitute for a *Bivens* action in order to preclude the latter. This result would be especially ironic because *Parratt's* approach was responsive to federalism concerns that are surely not relevant to *Bivens* actions against federal officers. The result would be to dilute substantive due process limits on *federal* power, despite the fear in *Parratt* and other section 1983 decisions of the Court that section 1983 not displace *state* tort law. This dilution effect is reminiscent of the argument of Justice

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94. 365 U.S. 167, 202 (1961) (Frankfurter, J., dissenting).

95. Recent decisions that appear to cut back on the scope of the fourth amendment include New Jersey v. T.L.O., 105 S. Ct. 733 (1985) (probable cause inapplicable to student searches) and Hudson v. Palmer, 104 S. Ct. 3194 (1984) (fourth amendment inapplicable to inmates). The Court also has carved out an exception to the exclusionary rule. United States v. Leon, 104 S. Ct. 3405 (1984).

96. Suppose, for example, that a person wishes to enjoin the repeated use of excessive force against him by police officers.

97. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

98. Davis v. Passman, 422 U.S. 228 (1979).

99. 446 U.S. 14 (1980). *But cf.* Bush v. Lucas, 462 U.S. 367 (1983); Chappell v. Wallace, 462 U.S. 296 (1983) (adopting a more restrictive approach to *Bivens* actions).

Harlan in *Williams v. Florida*[100] that incorporating the provisions of the Bill of Rights "jot for jot" was "diluting constitutional rights within the federal system itself" in order to "allow the States more elbow room in ordering their own criminal systems."[101]

There is an even more significant aspect of a *Parratt* approach to substantive due process: nowhere in federal constitutional law does the existence of a constitutional violation depend primarily, not to say exclusively, on the adequacy of a postdeprivation state remedy.[102] To the extent that *Parratt* might be used in this way, it would represent a dramatic new approach to fourteenth amendment interpretation and to constitutional interpretation in general.

It is true that the Supreme Court has long been concerned with the federalism impact of its fourteenth amendment decisions; the *Slaughterhouse Cases*[103] and the *Civil Rights Cases*[104] are good examples. Nevertheless, a proper sensitivity to federalism concerns seems a far cry from making a substantive due process violation turn on the availability of a state postdeprivation remedy. Only if substantive due process were considered different *in kind* from other fourteenth amendment guarantees because of a perceived danger of "Lochnerizing" could such a posture of federal-state interdependence be maintained. If the Court were to adopt this position—and the Court should not—it would mean that the judicial reaction to *Lochner* had finally significantly affected judicial standards for noneconomic regulation fifty years after it dramatically changed judicial standards for economic regulation by making them extremely deferential.

This position, if adopted, would also require the application of a postdeprivation remedy approach to claims of substantive due process affirmative duties to act. At first blush this seems a convenient way of removing these difficult substantive due process cases from federal courts. However, this would only be true when state postdeprivation remedies for failures to act existed. When such remedies do not exist, the result could well be a dramatic expansion of governmental affirmative duties to act, especially if the absence of such remedies were considered not only necessary but sufficient for a substantive due process violation. Such an expansion would be comparable to the unbridled use of *Parratt* in *procedural* due process cases to challenge state immunity rules.[105] In both situations federal intervention in matters

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100. 399 U.S. 78 (1970).

101. *Id.* at 118, 129 (Harlan, J., dissenting).

102. The obvious exception, of course, is procedural due process in connection with postdeprivation hearings.

103. 83 U.S. 36 (1873). In holding that the fourteenth amendment's privileges and immunities clause was limited in scope, the Court was clearly influenced by the spectre of federal judicial and legislative power overwhelming the states, a classic federalism concern.

104. 109 U.S. 3 (1883).

105. *See supra* notes 55-63 and accompanying text. Interestingly, these affirmative duty

previously considered to be governed primarily by state and local law would increase significantly.

C. *Affirmative Duties*

Substantive due process is troublesome to courts in a constitutional tort setting largely because of the difficulty of articulating meaningful judicial standards. As mentioned earlier, this difficulty is at least as old as *Lochner*[106] and is especially apparent in a new and potentially significant breed of section 1983 cases going well beyond claims of excessive use of force. In these cases, plaintiffs make substantive due process claims that local governments or their employees have brought about constitutional deprivations by *failing to act* in certain ways.

The fourteenth amendment in general and the due process clause in particular may be viewed as creating individual rights and governmental duties or, put another way, a special legal relationship between citizens and state and local governments.[107] There is, of course, no magic in the word "duty" as applied to government obligations. The term is useful for present purposes, however, because claims that governments or their employees caused constitutional deprivations by failing to act amount to assertions that the due process clause gives rise in appropriate circumstances to *affirmative duties to protect and/or rescue*. In such cases, *Parratt*'s emphasis on the existence of adequate postdeprivation remedies could encourage courts to look to such state remedies.

Uncritical reliance on *Parratt* for the stated purpose of disposing of these admittedly difficult cases would be even more misplaced here than it was for the excessive use of force cases. One reason, as discussed later, is that these newer cases raise fundamental questions about the citizen-government relationship under the fourteenth amendment that cannot be disposed of exclusively on *Parratt* postdeprivation grounds. In addition, since many, if not most, states and local governments do not as a matter of state law impose affirmative duties to act,[108] a *Parratt* postdeprivation remedy approach could very well

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cases are *not* considered by the circuits to raise procedural due process issues. It is as if the focus on the existence of an affirmative duty precludes any inquiry into the question whether the defendant, by failing to act, deprived plaintiff of a liberty interest. If the Court ultimately holds in Daniels v. Williams and Davidson v. O'Lone, *see supra* notes 60-69 and accompanying text, that more than negligence is required for a liberty deprivation for *both* substantive and procedural due process, then most, if not all, of the following failure to act cases could be disposed of against plaintiffs on that ground as well.

106. Lochner v. New York, 198 U.S. 45 (1905).

107. *Cf.* United States v. Guest, 383 U.S. 745 (1966).

108. *See generally* 18 E. MCQUILLEN, MUNICIPAL CORPORATIONS § 53.04b (3d ed. 1977); Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821 (1981); Wells & Eaton, *Affirmative Duty and Constitutional Tort*, 16 J. L. REFORM 1, 3-13 (1982).

result in a marked *increase* in federal judicial intervention in state and local matters.

Affirmative individual duties are, of course, well established in the common law of torts, although difficult questions still remain regarding private persons' obligations to be their brothers' and sisters' keepers.[109] To a considerable extent, affirmative duties—another way of speaking about one aspect of the nature and scope of the citizen-state relationship—already exist in constitutional law as well. Consider, for example, the sixth amendment duty to provide counsel in certain criminal cases,[110] the procedural due process duty to provide a predetermination hearing in many situations,[111] the substantive due process duty to provide reasonably safe conditions of confinement for, and to avoid unnecessary bodily restraints on, involuntarily committed persons,[112] and the substantive due process duty to take an injured arrestee to the hospital, even if not to pay his bills.[113] Note that in all of these cases there was a relationship of some kind between the state and the particular private person in question, a factor that looms large in the substantive due process affirmative duty cases that follow. The state had power over each of these persons—all of whom were placed in their dependent positions by the state itself.

However, a causal relationship between the state's failure to act and the harm suffered by a private person is not always sufficient to give rise to an affirmative due process duty. The Court's refusal for strict scrutiny equal protection purposes to expand the category of fundamental interests to include sustenance, shelter, and education surely demonstrates this.[114] It should not be surprising that just as tort affirmative duty issues are ultimately policy issues, so too are due process affirmative duty issues. In due process cases, though, the policy issues are fourteenth amendment issues of considerable complexity and national significance.

These issues have recently arisen largely as a result of the Supreme Court's decision in *Monell v. Department of Social Services*,[115] which held that local governments are suable persons who can be liable for compensatory damages[116] under section 1983 for their unconstitu-

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Illustrative cases are Riss v. City of New York, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968) and Warren v. District of Columbia, 444 A.2d 1 (App. D.C. 1981).

109. W. PROSSER & W. KEETON, THE LAW OF TORTS 373-85 (5th ed. 1984).

110. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

111. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975).

112. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307 (1982).

113. *See* City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239 (1983).

114. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Dandridge v. Williams, 397 U.S. 471 (1970).

115. 436 U.S. 658 (1978).

116. However, local governments are not liable for punitive damages. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

tional[117] official policies or customs. The Court expressly rejected respondeat superior as a possible basis for section 1983 liability. After *Monell*, increasing numbers of cases have dealt with the question of whether a local government's failure to act is an actionable official policy or custom. These cases often present the following situations: (a) When those in government custody, such as prison inmates, assert a due process right to be protected from others similarly in government custody;[118] (b) when members of the public assert a due process right to be protected from the conduct of those under government control or supervision, such as police officers;[119] (c) when members of the public assert a due process right to be protected from the conduct of those released from government custody;[120] and (d) when members of the public assert a due process right to be protected from the wrongful conduct of others in general.[121] These asserted rights are not limited to protection and prevention; occasionally they amount to claims of duty to rescue (and beyond) as well.[122]

This discussion of substantive due process affirmative duties is different from others that have dealt with the imposition of affirmative governmental duties to prevent harm and rescue[123] because its purpose is to comment on some of the relevant doctrinal and institutional factors that may give rise to affirmative constitutional duties and to relate the topic to *Parratt* and to fourteenth amendment due process doctrine in general.

1. Persons in Government Custody

When inmates or arrestees are beaten by other inmates or arrestees, it is generally agreed that supervisory officials may be liable for violating the substantive due process rights of those injured, especially when

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117. It is likely that the official policies or customs must themselves be unconstitutional. *See* City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985); Polk County v. Dodson, 454 U.S. 312 (1981). *See generally* Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1 (1982).

118. *See infra* notes 123-26 and accompanying text.

119. *See infra* notes 130-38 and accompanying text.

120. *See infra* notes 139-47 and accompanying text.

121. *See infra* notes 148-52 and accompanying text.

122. *See, e.g.*, Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1325 (1984) discussed *infra* in text accompanying note 151. A claim going beyond the duty to rescue was made and rejected in Dollar v. Herelson County, 704 F.2d 1540 (11th Cir.), *cert. denied*, 464 U.S. 963 (1983). The plaintiffs' daughters had died attempting to cross a rain-swollen pond, but the court ruled that there was no constitutional duty on the part of the county to have constructed a bridge over that pond.

123. Wells & Eaton, *supra* note 108. These authors, however, put their analysis in constitutional common law terms, rather than as one of substantive due process. In addition, they rely on the "jurisprudential" factors of concern and respect borrowed from R. DWORKIN, TAKING RIGHTS SERIOUSLY 272 (1977).

the supervisors either knew of the danger or were reckless about it. For example, in *Stokes v. Delcambre*,[124] the Fifth Circuit affirmed a jury's verdict against the defendant sheriff and deputy for their failure to prevent other arrestees from brutally beating the plaintiff arrestee. The court asserted that "[A]ll jailers owe a constitutionally rooted duty to their prisoners to provide them reasonable protection from injury at the hands of their fellow prisoners."[125] From an affirmative duty point of view, this type of case poses little difficulty because those injured were in the custody of the government and were powerless to do much, if anything, to protect themselves. In addition, those who caused the harm were also in the custody of the government with the result that the government could control them. Further, the defendants often have acted more than negligently. These factors in combination give rise to a due process relationship that can be put in affirmative duty terms: officials in charge of prisons have a duty to protect those in their custody from attacks from others in their custody.

The notion of government custody has properly been extended beyond the prison situation. In *Doe v. New York City Department of Social Services*,[126] the Second Circuit held that a city's department of social services breached a due process duty to a foster child by failing properly to supervise her placement in a foster home where she was abused. In *White v. Rochford*,[127] the Seventh Circuit held that police officers breached a due process duty to minors who were injured as a result of being left alone at night in a car adjacent to a busy highway. The police had arrested the driver, the minors' uncle, and taken him to a police station.

Government custody is important in other situations as well. For example, the Supreme Court has made clear that the state owes a due process duty to involuntarily civilly committed persons to provide reasonably safe confinement and freedom from unnecessary bodily restraint.[128] Also, an arrested person shot by police officers has a due process right, according to the Court, to be taken to a hospital for medical treatment.[129]

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124. 710 F.2d 1120 (5th Cir. 1983).

125. *Id.* at 1124. *Cf.* Withers v. Levine, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980), in which the court held that the eighth amendment imposes an affirmative duty to provide reasonable protection against the risk of harm to prisoners when either all prisoners or an identifiable group of them are exposed to such risks. Here, a prisoner complained of sexual assaults by other prisoners and of the related failure of prison officials to devise procedures to protect him from sexual assaults by other prisoners.

126. 649 F.2d 134 (2d Cir. 1981).

127. 592 F.2d 381 (7th Cir. 1979).

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

129. City of Revere v. Massachusetts Gen. Hosp., 103 S. Ct. 2979 (1983).

2. Members of the Public and Persons Under Government Control

Cases in which only those causing the harm are under governmental control or supervision typically deal with the misconduct of police officers. Here, plaintiffs claim that the use of excessive force by police officers was the result of a failure to control or supervise by supervisory officials or by the governmental bodies themselves. While there are often difficult issues centering around both the existence of an official policy or custom[130] and the question of the appropriate state of mind required for such alleged substantive due process constitutional violations,[131] the point remains that in certain circumstances affirmative constitutional duties are imposed on governments and supervisors to prevent those under their control from causing harm to citizens.

In *Webster v. City of Houston*,[132] the plaintiff, on behalf of a decedent shot and killed by police officers, sued the officers and the City of Houston for damages. The Fifth Circuit affirmed a jury verdict against the defendants. There was sufficient evidence regarding the City to show that it was police department policy or custom to use a "throw-down" gun to be put near an unarmed suspect who had been shot by police officers, so as to make the shooting appear justified.[133]

Even though it did not involve police officers, *Avery v. County*

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130. *E.g.*, City of Oklahoma City v. Tuttle, 105 S. Ct. 1161 (1985) (single incident of police officer misconduct insufficient to establish actionable official policy or custom).

131. While it is clear from *Parratt* that negligence may be sufficient for procedural due process, *Parratt* is silent on the state of mind requirements for substantive due process. Conscience-shocking conduct, however, suggests more than ordinary negligence. *Cf.* Davidson v. O'Lone, 752 F.2d 817 (3d Cir. 1984) (en banc), *cert. granted sub nom.* Davidson v. Cannon, 105 S. Ct. 2673 (1985), discussed *supra* in text at notes 65-69.

132. 689 F.2d 1220 (5th Cir. 1982), *vacated on reh'g*, 735 F.2d 838 (5th Cir.), *reinstated per curiam*, 739 F.2d 993 (5th Cir. 1984).

133. Among other things, the "throw-down" was almost universally used in the police department; recruits learned to protect themselves in this way while still in the police academy; 20 police officers stood around decedent after he was shot and debated the use of a "throw-down"; the use of "throw-downs" was widely known to high officials in the police department, but they never told officers to stop; and officers knew they could get away with using "throw-downs." All of this encouraged police officers in their illegal activities, including the shooting of decedent and the subsequent attempt to cover up by all levels of the police department.

Webster is in marked contrast to Berry v. McLemore, 670 F.2d 30 (5th Cir. 1982). The Fifth Circuit, ruling for the city, emphasized the absence of any official policy encouraging police to use excessive force in making arrests, as well as the absence of any evidence demonstrating that the use of excessive force by police was so customary as to show the existence of an "unarticulated municipal policy." One isolated incident involving the plaintiff was not enough. Also, insufficient evidence was introduced showing that the city had been "grossly negligent" in hiring, training, or disciplining the police officer who shot plaintiff. *Cf.* City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985).

of Burke[134] is an informative case for its thoughtful analysis of the bases of affirmative duties. In *Avery*, the Fourth Circuit reversed the district court's grant of summary judgment in favor of a county, its board of health, and its board of social services. The plaintiff had sued under section 1983 alleging that the defendants wrongfully caused her sterilization after erroneously telling her through its employees that she had sickle cell traits. After observing that the government entities could be liable even if their board members did not personally participate in, or authorize, her sterilization, the court said: "[T]he conduct of the boards may be actionable if their failure to promulgate policies and regulations rose to the level of deliberate indifference to [plaintiff's] right of procreation or constituted tacit authorization of her sterilization."[135]

While an isolated incident was not sufficient to prove this issue of "fact," it would be enough, according to the court in *Avery*, if the plaintiff could ultimately prove that an identifiable group of people (including the plaintiff) was subject to constitutional deprivations through the defendants' inaction. After considering the defendants' state statutory duties, the Fourth Circuit concluded that a trier of fact could reasonably find that the defendants, by reason of their inaction, had not discharged those duties. Among other things, two nurses who had recommended the plaintiff's sterilization had no special training in handling sickle cell cases and the social worker trainee who counseled the plaintiff did so only eight days after she was hired. Thus, summary judgment for the defendants was improper.[136]

The defendants in *Webster* and *Avery* had a monopoly over the services performed and placed the injured persons in situations in which they had little or no choice but to rely to their detriment.[137] Also, the defendants acted recklessly or with deliberate indifference to the plaintiffs' safety. These factors—similar to those mentioned earlier for persons in government custody—provided the basis for a "special relationship" from which affirmative governmental duties to protect were derived.[138] A *Parratt* inquiry into the existence of adequate state postdeprivation remedies would have been misplaced—regardless of the outcome—because such an inquiry would not focus on governmental control and plaintiffs' reliance, which are important considerations in the affirmative duty analysis.

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134. 660 F.2d 111 (4th Cir. 1981).

135. *Id.* at 114.

136. *Id.* at 114-15.

137. The significance of these factors is dealt with in M. SHAPO, THE DUTY TO ACT (1977). *See also* Wells & Eaton, *supra* note 108.

138. For a survey of the case law dealing with "special relationships," see Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 1754 (1985). *See also infra* text accompanying notes 146-48.

3. Persons Released from Custody

More problematic than the previous substantive due process cases are those in which governments or their officials have released private persons from custody, only to discover that they thereafter injure or kill others. What is challenged is the decision to release, and federal courts have generally held that in the absence of actual knowledge or recklessness with respect to endangering the injured person *specifically*, there was no substantive due process duty owed to the injured person. A good example is *Martinez v. California*,[139] in which the plaintiffs, the decedent's survivors, sued state parole board officials for damages under section 1983 in connection with their allegedly negligent and reckless decision to release one Thomas, who killed the decedent five months later. The Supreme Court, in an opinion by Justice Stevens, held that no section 1983 cause of action was stated. The Court found that Thomas, and not the state, had "deprived" the decedent of her life. The Court concluded that the decedent's death was "too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law."[140] Clearly, this "remoteness" language was another way of saying that the defendants' conduct was not the proximate cause of decedent's death.[141]

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139. 444 U.S. 277 (1980).

140. *Id.* at 559.

141. The Court, however, did not use a clearly articulated proximate cause test. It first observed that it was irrelevant to the § 1983 liability of the defendants whether under state tort law the parole board either had a duty to the decedent to prevent harm to her or proximately caused her death. The Court then emphasized the following factors underlying its "remoteness" conclusion:

1. Thomas killed the decedent five months after his release.
2. Thomas was in no sense an agent of the parole board.
3. The parole board was not aware that the decedent faced any special danger; whatever danger she faced was as a member of the public at large.

Interestingly, the Court did not spell out why these factors led it to conclude that the defendants' parole decision was not the proximate cause of the decedent's death; the Court simply referred to the "particular circumstances of this parole decision." Several observations may nevertheless be made. First, the plaintiffs had alleged that the defendants knew, or should have known, that Thomas' release "created a clear and present danger that such accident would occur." Because the complaint was successfully demurred to at the trial level, these allegations must have been taken as true on appeal, and therefore, what occurred to the decedent (although not her identity) was foreseeable to the defendants. Despite this, the Court found no proximate cause, thus indicating that foreseeability of some risk of harm to another is not always sufficient for § 1983 proximate cause purposes.

Second, the Court may have given little guidance on the § 1983 proximate cause issue in *Martinez* because its initial interest was in whether parole board officials were entitled to absolute immunity or merely to qualified immunity. From this perspective, the Court's rather conclusory finding of no proximate cause in *Martinez* to avoid this scope of immunity issue is another example of how proximate cause terminology, whether in tort or § 1983 litigation, frequently will mask troublesome policy issues of whether and to what extent defendants whose job it is to make parole decisions should be subjected to potential liability resulting from the attendant

The Court expressly said that it was not deciding that parole board officials could never be liable under section 1983 where a parole decision led to another's death. Perhaps if the parole board in *Martinez* had known of specific threats or danger to the decedent emanating from Thomas' and if Thomas had killed the decedent almost immediately after parole, the proximate cause result would have been different. If "remoteness" had not been a problem, the Court would have had to directly address the question whether due process was violated[142] and then, assuming a due process violation, the scope of immunity of parole board officials.

Had the Court reached the due process issue in *Martinez*, it would have been confronted with several difficult issues previously discussed in this Article. First, the Court would have had to decide whether *Martinez* was a procedural or substantive due process case. Second, if it had gone on to conclude incorrectly that it was a procedural due process case,[143] then it would have had to deal with the reality, significant after *Parratt*, that the plaintiffs had no state postdeprivation remedy available because there was absolute immunity under state law for such parole decisions. Finally, had the Court correctly concluded that *Martinez* was a substantive due process case, then it would have had to decide what state of mind was required for such claimed substantive due process violations. If more than negligence (and recklessness) is required for a deprivation of liberty for both procedural and substantive due process, then the plaintiffs in *Martinez* would have lost on that ground as well.[144]

While the Court in *Martinez* avoided all of the above by taking a narrow and fact-specific proximate cause approach, its reasoning and conclusion could just as well have been put in broader substantive due process affirmative duty terms.[145] That is, under the circumstances,

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second guessing of such decisions, especially since a risk of some harm to society typically arises out of every parole decision. *Martinez* makes clear only that parole board officials are not liable under § 1983 for making parole decisions in fact situations comparable to *Martinez*.

142. This issue was treated *arguendo*. 100 S. Ct. at 558 n.9.

143. *See supra* text accompanying notes 65-69.

144. *See id.*

145. A Fourth Circuit case similar to *Martinez* was dealt with expressly in duty terms. In Fox v. Custis, 712 F.2d 84 (4th Cir. 1983), the plaintiffs sued state correctional employees who were responsible for the post-release supervision of a parolee. The defendants allegedly were negligent in failing to reincarcerate the parolee who burned one plaintiff's home, raped, beat, and set fire to another plaintiff, and shot and stabbed still another. The court stated the issue as follows: "[T]he right asserted is the right to be protected by the state from the possible depredations of a convicted criminal with known dangerous propensities who is under the direct supervision of the state's agents." *Id.* at 88.

There was no such right here, the court noted, because there was not a special custodial or other relationship assumed by the state respecting the plaintiffs, who were members of the general public. The Fourth Circuit in this respect followed the Seventh Circuit's decision in Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982) which asserted that in the absence of a

the defendant parole board officials owed no substantive due process duty to the decedent to use reasonable care to protect her from the parolee's criminal conduct. The decedent was no different from any other member of the public in this regard since there was no special relationship between her and the parole board.

This result in *Martinez*-like cases is consistent with the use of ordinary tort doctrine and its emphasis on the requirement of some kind of "special relationship" for the imposition of an affirmative tort duty.[146] But regardless of the direction in which it cuts in a particular kind of case, ordinary tort doctrine should surely not be determinative of the existence of constitutional duty; these cases involve the possible imposition on governments of substantive due process affirmative duties that have a very different focus than tort doctrine. Borrowing the tort concept of a "special relationship"—a conclusory term obscuring analysis—and then applying it with blinders to constitutional law issues, is misdirected.[147] The real questions are *what kind* of relationship should be necessary for the imposition of affirmative substantive due process duties in constitutional tort cases, and *what factors* are relevant in making such a determination? To what extent, for example, should government act paternalistically regarding its citizens; at what cost; and who should decide? These questions implicate the nature of the citizen-state relationship which is at the core of the fourteenth amendment. This right-duty relationship[148] should not depend solely on the outcome of a *Parratt* inquiry into the existence of state postdeprivation remedies. Such remedies are at most only one facet of the citizen-state relationship and to overstate their importance misapprehends the fourteenth amendment which transferred important powers from the states to the federal government.

4. Duties to the Public at Large: The Fourteenth Amendment as a "Charter of Negative Liberties"

Perhaps the most famous recent affirmative constitutional duty case is *Bowers v. DeVito*,[149] a Seventh Circuit decision. The *Bowers*

"special relationship" between the state and a victim, there was "no constitutional right to be protected by the state against . . . criminals or madmen" and no "constitutional duty [on the part of the state] to provide such protection." *Id.* at 618.

146. *See* RESTATEMENT (SECOND) OF TORTS §§ 314A ("Special Relations Giving Rise to Duty to Aid or Protect") and 315 ("General Principle" regarding "Duty to Control of Third Persons") (1966). *See also supra* note 138.

147. *See* Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974) (*prima facie* § 1983 cause of action). *Cf.* Justice Harlan's concurring opinion in Monroe v. Pape, 365 U.S. 167, 192 (1961), in which he emphasized the difference between tort injuries and constitutional deprivations.

148. *See infra* text accompanying notes 149-66.

149. 686 F.2d 616 (7th Cir. 1982). Strictly speaking, *Bowers* is a case involving a person

rule, often cited by other circuits, is that there is no affirmative constitutional duty on the part of government to protect or rescue members of the public at large. This rule has been applied to situations in which members of the public have been harmed by mentally ill persons or criminals,[150] and in which members of the public have not been rescued by police or fire department personnel.[151]

In *Bowers*, the plaintiff's decedent was killed by a mentally ill person. The plaintiff sued various defendants for violating due process by allegedly failing to keep the killer incarcerated, "knowing that he was dangerous" when they released him, and "acting recklessly in doing so." Affirming the district court's grant of summary judgment in favor of the defendants, the Seventh Circuit stated:

> There is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law. But there is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. *The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.* Discrimination in providing protection against private violence could of course violate the equal protection clause of the Fourteenth Amendment. But that is not alleged here. All that is alleged is a failure to protect [decedent] and others like her from a dangerous madman, and as the state of Illinois has no federal constitutional duty to provide such protection its failure to do so is not actionable under section 1983.[152]

The *Bowers* position regarding the fourteenth amendment citizen-state relationship is that there are situations in which a citizen has no legally enforceable right against the state because the citizen and

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released from government custody. But *Bowers* goes well beyond this kind of situation in its reasoning.

150. *E.g.*, Fox v. Custis, 712 F.2d 84 (4th Cir. 1983); *Bowers*, 686 F.2d 616.

151. *E.g.*, Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1325 (1984), discussed *infra* in text accompanying note 122.

152. 686 F.2d at 618 (citations omitted and emphasis added). The court further stated:

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit. It is on this theory that state prison personnel are sometimes held liable under section 1983 for the violence of one prison inmate against another. But the defendants in this case did not place [decedent] in a place or position of danger; they simply failed adequately to protect her, as a member of the public, from a dangerous man. That failure may be actionable under the common law of Illinois.

Id. Judge Wood dissented, arguing that summary judgment was inappropriate in light of Martinez v. California.

the state are in effect strangers. Several assumptions are implicit in this position. First, it is ordinarily only where the state has somehow changed the status quo of the citizen that a duty may arise. Second, it would be difficult if not impossible to draw meaningful due process lines between failures to prevent harm and to rescue, and failures to provide governmental services in general. Third, federal courts using an affirmative duty approach would have to require state and local governments to allocate resources in certain ways which would possibly be contrary to the wishes of their taxpayers. Finally, and more generally, a position contrary to *Bowers* would resurrect the spectre of the substantive due process doctrine of *Lochner* as well as possibly create government due process duties to feed, clothe, and shelter its citizens. These considerations led the Seventh Circuit to find there was no substantive due process duty in *Bowers*.[153]

Despite repeated references in *Bowers* and other cases to special relationship doctrine, the existence of a special relationship for tort purposes does not necessarily give rise to a special relationship for due process-affirmative duty purposes. For example, in *Jackson v. City of Joliet*,[154] police and fire department personnel were accused of causing the deprivation of the plaintiffs' decedents' liberty and lives through their negligence or gross negligence in failing to rescue the decedents who died in a burning car. Among other things, the plaintiffs alleged that the defendants either should have aided the decedents directly, should have called an ambulance, or should *not have directed potential rescuer traffic away from the scene of the accident*.

The district court denied the defendants' motion to dismiss the complaints for failure to state a claim. Reversing on interlocutory appeal, the Seventh Circuit, in an extensive opinion by Judge Posner, ruled that "an attempt by state officers to assist at an accident is not a deprivation of life without due process of law under the Fourteenth

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153. Similar reasoning, with reliance on *Bowers*, was used by the Eleventh Circuit in Wright v. City of Ozark, 715 F.2d 1513 (11th Cir. 1983), in which the court confronted another difficult due process duty issue: Whether the defendants' allegedly deliberate suppression of information about prior rapes in the defendant city violated due process because the plaintiff would not have been in the high crime area, where she was raped by an unknown person, had the information not been suppressed. In answering in the negative, the Eleventh Circuit first noted that the result was the same whether the question was put in duty or causation terms. It then concluded that "[t]he due process clause of the Constitution provides no basis for imposing liability . . . on state officers who either negligently or even recklessly facilitate the criminal actions of a third party, absent some special relationship between the victim and the criminal or between the victim and the state officer." *Id.* at 1516. Because there was no such special relationship in *Wright*, plaintiff failed to state a claim.

154. 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1325 (1984). Under the tort rule set out in RESTATEMENT (SECOND) OF TORTS, § 314A(4) (1965), the defendants' conduct may well have established a special relationship sufficient for duty purposes when they assumed control over the victims.

Amendment when the attempt fails because of the negligence or even gross negligence of the officers or their superiors, and the accident victim dies."[155] The court first emphasized that the outcome might have been different if the defendants had acted intentionally. It then observed that even if the defendants might be liable for failing to rescue under the tort doctrine of gratuitous undertaking,[156] since other potential rescuers were deterred by the presence of the defendants at the accident scene, it did not follow that the defendants were liable under section 1983 for a due process violation. According to the court, which relied on its earlier *Bowers* decision, "the Constitution is a charter of negative rather than positive liberties . . . [and] the concept of liberty in the Fourteenth Amendment does not include a right to basic services, whether competently provided or otherwise."[157] The court may have been worried about the effect of a contrary result on the willingness of state and local governments to experiment.

The court in *Jackson* went on to reject the argument that defendants were liable for negligently depriving the plaintiffs' decedents of their lives. The defendants' conduct was inaction which was not a due process violation because the decedents were in great danger even before the defendants arrived at the scene.[158] Ultimately, the court expressed its belief that section 1983 relief and federal intervention were not necessary; this was not a case where politics or prejudice would undercut incentives to governments to provide "evenhanded" aid and protection to their citizens.[159] To allow a section 1983 remedy here would swallow up state tort law and make section 1983 "a mandate of highway safety."[160]

Underlying the reluctance of the Seventh Circuit and other federal courts to impose affirmative governmental duties is the conviction that cases raising such claims, if they belong anywhere, should be brought in state courts under state law. This avoids imposing a constitutionally required, nationally applicable affirmative duty on *all* local and state governments. Instead, those governments should, under this approach, fashion their own standards and create their own affir-

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155. *Jackson*, 715 F.2d at 1206.

156. *Id.* at 1203 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS 347-48 (4th ed. 1971)).

157. *Jackson*, 715 F.2d at 1203-04.

158. *Id.* at 1205.

159. *Id.*

160. *Id.* at 1206. Similarly, in Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984), the court held, in reliance on *Jackson's* "negative liberties" dictum, that police and fire department officials were not liable for their failure to rescue children from a fire which occurred during a strike of firefighters. The court also noted the absence of any custodial or other special relationship between the state and the children. *Cf.* Dollar v. Haralson County, 704 F.2d 1540 (11th Cir.), *cert. denied*, 464 U.S. 963 (1983), in which the court rejected the plaintiffs' claim that the defendant county breached a due process duty to construct a bridge over a pond. The plaintiffs' daughters had drowned attempting to cross the pond when it was rain-swollen.

mative duties as they see fit. In this way, moreover, the burden on federal courts is reduced. Such factors are, of course, reminiscent of the concerns in *Parratt*. More important, what is also implicated in these due process cases is a particular view of the government-citizen relationship with the Constitution functioning as a charter of negative liberties. Under this view the fourteenth amendment does not and should not impose on state and local governments duties to provide basic services of a certain kind or quality. Rather, such duties are to be imposed either under state decisional law or through state political processes. This view is not at all taken into account by the application of a *Parratt* inquiry into postdeprivation remedies in such cases. A *Parratt* inquiry of this kind is too one-dimensional and ignores the difficult question of the kind of government-citizen relationship called for by the fourteenth amendment.

D. Will (Should) Affirmative Due Process Duties Develop?

The open-ended nature of substantive due process, together with the inherent flexibility of the special relationship test currently used in the circuits, may suggest that certain affirmative due process duties will ultimately emerge in constitutional jurisprudence.[161] Some federal courts may be influenced by the recent appearance in the states of judicially imposed state law affirmative governmental duties to protect and rescue citizens in certain situations.[162] In addition, the greater the involvement of government in the day-to-day activities of its citizens, the more numerous the situations in which government may lead citizens to rely on it to their detriment and thereby give rise to fourteenth amendment relationships.[163] Such reliance is an important factor which state courts have used as a basis to carve out exceptions to the common-law rule that private persons ordinarily have no duty to rescue others.[164]

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161. The Fourth Circuit appears to have so ruled in Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 1754 (1985), which concerned child abuse, even though the defendants ultimately prevailed on qualified immunity grounds.

Affirmative substantive due process duty issues are also beginning to emerge regarding federal officials. *See, e.g.*, Beard v. O'Neal, 728 F.2d 894 (7th Cir.), *cert. denied*, 105 S. Ct. 104 (1984) (an FBI informant owed no constitutional duty to a murder victim).

On the other hand, if the Supreme Court holds that more than negligence is required for substantive due process-deprivation of liberty claims, then this development would likely cease. *See supra* notes 65-69 and accompanying text.

162. *E.g.*, Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984) (local government tort duty to remove drunk driver from highway); Schear v. Board of County Commissioners, No. 15,324, slip op. (N.M. Aug. 6, 1984) (local government tort duty to respond to crime victim's emergency call for assistance).

163. This is comparable to the expanded concept of state action: as governmental involvement in private conduct increases, such nominally private conduct will increasingly be attributed to the state for state action purposes.

164. *See* RESTATEMENT (SECOND) OF TORTS, §§ 321-324A (1965).

Another significant consideration must be mentioned: the judicial review implications of one's view of affirmative duties and the citizen-state relationship under the due process clause of the fourteenth amendment. Substantive due process may be perceived as primarily a vehicle for the judicial creation of rights which reflect the political and moral value judgments of the judges themselves. Those who reject this as a proper judicial role and instead adopt an originalist position[165] will typically prefer to limit the scope of substantive due process and to treat the fourteenth amendment as a charter of "negative liberties" with a correspondingly restricted judicial role. Those who, on the other hand, candidly accept a non-originalist role as the proper one will be willing to confront the open-ended nature of substantive due process head on and attempt to develop substantive due process doctrines using what they consider to be the proper values.[166] In either event, the affirmative due process duty cases, like the substantive due process cases of the *Lochner* era, the incorporation cases, and the abortion cases, raise continuing questions about the legitimate role of the federal judiciary. As demonstrated here, these questions simply cannot be resolved by the use of *Parratt*'s postdeprivation remedies approach.

IV. CONCLUSION

The inquiry into *Parratt v. Taylor* has taken us very far from procedural due process. So long as *Parratt*'s postdeprivation remedy approach is applied sensibly to procedural due process, then *Parratt* may have created a sound relationship between procedural due process and state remedial schemes for government misconduct. However, *Parratt* should not be applied either to incorporated provisions of the Bill of Rights or to substantive due process issues. In the latter situation, especially when affirmative due process duties are contemplated, the use of *Parratt*'s postdeprivation remedy approach may well backfire. Rather then sending such cases to state courts, the result of the use of *Parratt* may be the creation of new affirmative due process duties to protect and rescue because adequate state postdeprivation remedies typically do not exist for such governmental failures to act.

Regardless of whether such remedies exist in a given case, *Parratt*'s postdeprivation remedy approach is misplaced for more basic reasons. Substantive due process challenges are challenges to governmental

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165. *See supra* note 9. Examples of such originalist views appear in Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983) and Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

166. *See, e.g.*, M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

conduct itself, irrespective of the absence of hearings. And affirmative substantive due process duty issues, whatever one thinks of substantive due process in general, are really citizen-state relationship issues that should not be disposed of simply by reference to state postdeprivation remedies. This would mangle due process doctrine in a misguided attempt to promote federalism, minimize the overdeterrence of government employees, conserve judicial resources and avoid trivializing the Constitution. Thus, *Parratt* does not, and should not, provide us with a persuasive unitary due process theory. So long as substantive due process remains an independent component of due process, then its standards will differ significantly from those of procedural due process.[167]

AUTHOR'S NOTE

After this Article went to press, the Supreme Court, on January 21, 1986, decided *Daniels v. Williams*, 106 S.Ct. 677 (1986), *aff'g* 748 F.2d 229 (4th Cir. 1984) (en banc) and *Davidson v. Cannon*, 106 S.Ct. 668 (1986), *aff'g Davidson v. O'Lone*, 752 F.2d 817 (3d Cir. 1984) (en banc), both of which involved claims of negligent deprivations of liberty and both of which are discussed in their circuit court posture at various points in this Article.[168] Emphasizing that due process deals with abuses of governmental power, the Court held in opinions by Justice Rehnquist that negligent conduct is insufficient to give rise to deprivations of liberty in both procedural due process and substantive due process cases. In these cases, therefore, the Court did not have to reach the adequacy of state remedy issue.[169] Also, the Court in part overruled *Parratt* in concluding in *Daniels* that negligence is insufficient for deprivation of property purposes as well.

These decisions by the Court are entirely consistent with the primary contention of this Article that *Parratt*'s postdeprivation remedy approach should be used only in appropriate *procedural* due process

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167. Observe, however, that if the Court were to rule in Daniels v. Williams and Davidson v. O'Lone, *supra* notes 59 & 65, that more than negligence is necessary for a liberty deprivation for *both* substantive and procedural due process, the following would result:

(1) Negligent failures to act would not give rise to substantive due process violations; hence, many affirmative duty cases would be lost to the plaintiffs on this ground.

(2) Negligence would not give rise to procedural due process violations in deprivation of liberty cases; hence, federal judicial scrutiny of state governmental tort immunity schemes in many such cases would be eliminated.

168. *See supra* text accompanying notes 45-69; *see also supra* note 167.

169. However, Justice Blackmun in dissent in *Davidson* correctly contended that absolute immunity under state law means that there is no adequate state remedy. *See supra* text accompanying note 62.

In *Daniels*, Justice Marshall concurred in the result while Justices Blackmun and Stevens concurred in the judgment. In *Davidson*, Justice Stevens concurred in the judgment, while Justices Brennan, Blackmun, and Marshall dissented.

cases. These decisions also make clear, as suggested in this Article,[170] that more than negligence is required for substantive due process deprivations of liberty. Moreover, as observed in this Article,[171] requiring more than negligence for all deprivations of liberty (as well as property), as *Daniels* and *Davidson* now do, is an effective way of minimizing federal judicial intervention in state remedial schemes.

In light of *Daniels* and *Davidson*, at least recklessness or deliberate indifference—if not more—is now required for deprivations of liberty and property. Thus, when procedural due process is implicated through, for example, a reckless deprivation of property, then, as contended in this Article, *Parratt*'s postdeprivation remedy approach may be appropriate. However, when substantive due process is implicated through, for example, an intentional deprivation of liberty, then, as argued here, *Parratt*'s postdeprivation remedy approach should not be used.

Note, furthermore, that many of the substantive due process affirmative duty issues discussed in this Article[172] will no longer be present when only negligence is asserted. In effect, duty issues will not have to be reached because the requisite substantive due process state of mind—more than negligence— is not present;[173] plaintiffs in such cases will hence lose on this ground. However, when recklessness or deliberate indifference is alleged, then difficult substantive due process affirmative duty questions will have to be addressed along the lines suggested in this article.

Daniels and *Davidson* demonstrate that tort-based state of mind requirements will play as significant a role in due process cases as they currently do, *see Washington v Davis*, 426 U.S. 229 (1976) and *Estelle v. Gamble*, 429 U.S. 97 (1978), in equal protection and eighth amendment cases. It remains to be seen whether the Court will further limit the scope of substantive and procedural due process by requiring intentional conduct for a deprivation of liberty or property, a question expressly left open in the Court's opinions in *Daniels* and *Davidson*.

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170. *See supra* notes 45 & 69 and text accompanying notes 65-69.
171. *See supra* text accompanying note 68.
172. *See supra* text accompanying notes 106-66.
173. *See supra* note 167.