Parratt v. Taylor: Opening and Closing the Door on Section 1983

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Introduction

On May 18, 1981, the United States Supreme Court decided *Parratt v. Taylor*,[1] one of the most significant cases brought under 42 U.S.C. section 1983[2] of the last decade. The suit, brought by Bert Taylor, Jr., a prisoner in a Nebraska state institution, involved the grand total of $23.50—the cost of a hobby kit that Mr. Taylor had ordered through the mails but which had been lost after it reached the Nebraska prison.[3] It was Taylor's theory that the warden of the prison, Robert Parratt, and the "hobby manager," Francis Lugenbill, were negligent in allowing the hobby kit to be signed for by, and delivered to, persons other than Taylor, contrary to prison regulations. The regulations specifically required that the hobby materials be delivered only to the prisoner ordering them and that the prisoner sign for them upon receipt. Because Taylor was in segregation at the time the hobby kit arrived, he was not permitted to receive it nor was he in a position to sign a receipt, but two other persons (one civilian and one inmate) signed for it.[4] The regulations apparently did not cover this situation, and Taylor claimed that the two supervisors—who knew nothing about Taylor's kit themselves—"negligently" allowed the regulations to be violated by persons under their supervision. Rather than suing the two people who signed for the kit, Taylor named only the warden and hobby manager as defendants in a section 1983 suit.

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1. 451 U.S. 527 (1981).

2. "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, 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." 42 U.S.C. § 1983 (1976).

3. 451 U.S. at 529.

4. *Id.* at 530.

Although both the district court and the court of appeals upheld Taylor's claim,[5] the Supreme Court reversed and dismissed the suit. In doing so, the Court settled an issue that had deeply divided the federal courts and one with which the Supreme Court itself had grappled fruitlessly twice before,[6] namely, whether or not a section 1983 claim can be based on *negligent* conduct by a state actor. The Supreme Court, deciding that the statute covers negligent deprivations of constitutional rights, examined still another troubling issue in section 1983 jurisprudence: the effect an alternative state remedy has on a section 1983 claim if the state remedy would compensate the victim in state court for the injury he suffered at the hands of a state official. The Court held that at least in the context of a claim similar to that made by Taylor—dealing with the loss of *property* because of the *negligent* actions of a state officer—the existence of an alternative state remedy precludes a section 1983 claim.[7] In the words of the plurality opinion, the existence of "postdeprivation remedies made available by the State,"[8] which give a victim everything he lost, provides him with due process. Under these circumstances, a prospective plaintiff in a section 1983 claim has not been deprived of property without due process of law in violation of the Fourteenth Amendment. He has been deprived of property but *with due process of law, i.e.*, a later, alternative state remedy that makes him whole by giving him back exactly what he lost—under the facts of *Parratt*, the $23.50 the plaintiff spent for the hobby kit.

The implications of the decision are enormous for section 1983 litigation. If the *Parratt* decision is followed to its logical extreme, it would undermine the basis for most section 1983 cases now brought in federal court. Since *Monroe v. Pape*,[9] it has been the law that an individual who has been deprived of a constitutional right under color of state law is not required first to pursue common law tort remedies in state court, or worse, to litigate exclusively in state court. In *Monroe*,

5. Taylor v. Parratt, No. 76-L-57, slip op. at 3 (D. Neb. Oct. 25, 1978). The district court decision was not reported but is reproduced in Petitioners' Brief on the Merits at app. B, Parratt v. Taylor, 451 U.S. 527 (1981). The court of appeals' summary affirmance is reported at 620 F.2d 307 (8th Cir. 1980).

6. The two prior Supreme Court cases dealing with the negligence issue were Baker v. McCollan, 443 U.S. 137 (1979), and Procunier v. Navarette, 434 U.S. 555 (1978). *See Parratt*, 451 U.S. at 532-33. The division in the lower federal courts on the issue is referred to by Justice Rehnquist in *Parratt*. *Id.* at 533. In addition, see Clappier v. Flynn, 605 F.2d 519 (8th Cir. 1979); Morris v. Gulley, 527 F. Supp. 322 (N.D. W.Va. 1981); Watson v. McGee, 527 F. Supp. 234 (S.D. Ohio 1981); Cline v. United States, 525 F. Supp. 825 (D.S.D. 1981). *See also Parratt*, 451 U.S. at 549 n.6 (Powell, J., concurring).

7. 451 U.S. at 543-44.

8. *Id.* at 538.

9. 365 U.S. 167 (1961).

the Supreme Court rejected the argument advanced in Justice Frankfurter's dissent in *Monroe*: that unconstitutional acts by state officers would subject those officers to common law remedies under state law but would not give rise to a separate action under section 1983.[10] Justice Frankfurter argued that the only proper path for a victim of such acts was to sue for a common law tort in state court unless the acts were done pursuant to a state statute or were "within the range of executive discretion in the enforcement of a state statute."[11] Precisely the same argument was made and rejected with regard to suits against federal officials in *Bivens v. Six Unknown Named Agents*.[12] *Parratt* raises the same arguments rejected in *Monroe* and *Bivens* but in a wholly new context. The issue is no longer whether or not "under color of Law" means in conformity with state law or in violation of it, as Justice Frankfurter argued.[13] *Parratt* simply requires an examination of state remedies to see whether or not they are adequate to compensate a victim where negligent losses of *property* are alleged. If the principle is to extend further—to intentional deprivations of property or liberty,[14] and negligent invasions of liberty interests,—then section 1983 would be stripped of much of its force.

State and local officials followed the progress of the *Parratt* case quite closely. Thirty-one states filed amici briefs urging reversal of the lower courts' decisions.[15] Since the Supreme Court handed down its decision in that case, states' attorneys have argued in a series of cases that the *Parratt* rationale should be applied across the board to intentional deprivation of property,[16] negligent deprivation of liberty,[17] and even intentional deprivation of life.[18] In *Patsy v. Board of Regents*,[19] lawyers for the University argued that *Parratt* should be applied to

10. *Id.* at 224 (Frankfurter, J., dissenting).

11. *Id.* at 246.

12. 403 U.S. 388, 390-91 (1971). *Bivens* permits a federal action against federal officials who violate the Constitution. *See* text accompanying notes 114-16 *infra*.

13. Monroe v. Pape, 365 U.S. at 246 (Frankfurter, J., dissenting).

14. The extension to intentional loss of liberty has already been suggested by the Supreme Court in Ingraham v. Wright, 430 U.S. 651 (1977). *See* notes 105-07 *infra*.

15. *See* 451 U.S. at 528-29 n.*.

16. Sheppard v. Moore, 514 F. Supp. 1372 (E.D.N.C. 1981) (*Parratt* should apply where law enforcement officers intentionally seized a coin, gun, and knife collection of a citizen).

17. Haygood v. Younger, 527 F. Supp. 808 (E.D. Cal. 1981) (*Parratt* should apply where state prison officers negligently kept an inmate in prison four and one-half years beyond his maximum sentence).

18. Brief for Petitioners at 13–14, O'Dell v. Espinoza, 633 P.2d 455 (1981), *cert. granted*, 102 S. Ct. 969 (1981); (*Parratt* should apply where the police were accused of deliberately shooting and killing a subdued suspect who was lying on the ground).

19. 634 F.2d 900 (5th Cir. 1981), *cert. granted*, 102 S. Ct. 88 (1981).

equal protection claims where an administrative grievance procedure within the University could be invoked.[20] The general theory behind the states' arguments in these cases is that *Parratt* requires an examination of all state remedies whenever a section 1983 case is filed. If the state can compensate the victim of official wrongdoing through its administrative or judicial processes, then a section 1983 claim cannot be filed in federal or state court; existing state procedures supply the due process necessary to satisfy the Fourteenth Amendment.

Can *Parratt* be read that broadly? Did the Supreme Court mean to overrule *Monroe v. Pape* or even to start down that road? Are individual acts of official misconduct to be relegated to state courts?[21] What logical limits are there to the *Parratt* holding, and how does the case fit with earlier pronouncements by the Court that section 1983 stands as an independent and separate cause of action, distinct and different from common law tort claims? This article examines these questions.

I. The Lower Court Decisions

As noted above, Taylor's theory was that the two prison officials were responsible for the loss of the hobby kit because they somehow failed to supervise the persons running the hobby office and failed to insure that the prison regulations were followed. As a result of their inaction, two other persons signed for the hobby kit who were not permitted to do so. The state raised three issues at the district court level in response to Taylor's claim. First, the state argued that negligence could not be the basis for a section 1983 action under any circumstances. Since the claim against the prison officials could only be characterized as negligence, the claim must fail. Second, the state argued that penal complex officials were immune from damages in cases of this kind. Third, the state argued that the amount involved—$23.50—was

20. Brief for the Appellant at 29-30, Patsy v. Board of Regents, 634 F.2d 900 (5th Cir. 1981).

21. Such an argument was made in one of the first comments on the *Parratt* case. *See* Kirby, *Demoting 14th Amendment Claims to State Torts*, 68 A.B.A. J. 166 (1982) "[T]he rationale of Justice Rehnquist's majority opinion in that apparently trivial case marks a trail that, followed to its logical conclusion, could lead to a sweeping curtailment of federal civil rights litigation in favor of state courts and remedies. It ultimately may restrict 14th Amendment due process or equal protection litigation to challenges to official policies or practices directly attributable to the state as an entity, leaving individual acts of official misconduct by state officers to be remedied under state law." *Id.* at 167.

so trivial that this loss could not be the basis for a section 1983 action.[22]

The district court granted summary judgment for Taylor.[23] Responding to the first issue, the court held that "negligence can form the foundation for an action under section 1983."[24] There was no significant discussion by the district court of precisely what acts of Parratt and Lugenbill could be considered negligent. Was it the issuing of regulations that did not cover the precise problem involving Taylor, namely, the inability of a prisoner to receive the hobby materials when he was in segregation? Or was it negligent to permit the regulations to be violated by two strangers signing for the hobby materials? The district court suggested that it was the latter, noting that the defendants had failed "to follow their own policies concerning the distribution of mail."[25]

In his discussion of the legal principles at issue, the district court judge saw no complications with respect to the intent issue and found that "negligence can form the foundation for an action under section 1983."[26] The district court relied on a passage from a Third Circuit decision, *Howell v. Cataldi*,[27] that generally discussed the need for showing "culpable negligence" in tort law[28] and on the famous oracular passage of Justice Douglas in *Monroe v. Pape*: "The word 'wilfully' does not appear in Section [1983] . . . . Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[29]

The issue is, of course, far more complicated. The lower courts are badly split on the issue, largely because of a failure to distinguish between the intent requirement in section 1983 cases generally and whether or not a constitutional right was in fact violated. Lower federal courts, and to some extent the Supreme Court,[30] have confused the definition of the constitutional right at stake with the intent require-

22. Petitioners' Petition for Certiorari at app. B, app. 5, Parratt v. Taylor, 451 U.S. 527 (1981). Two other issues, later asserted before the Supreme Court, were not raised at the district court level. *See* text accompanying notes 63-64 *infra*.

23. Petitioners' Petition for Certiorari at app. B, app. 4-9, Parratt v. Taylor, 451 U.S. 527 (1981).

24. *Id.* at app. 6.

25. *Id.* at app. 9.

26. *Id.* at app. 6.

27. 464 F.2d 272 (3d Cir. 1972).

28. *Id.* at 279, *quoted in* Taylor v. Parratt, No. 76-L-57, slip op. at 3 (D. Neb., Oct. 25, 1978).

29. *Monroe*, 365 U.S. at 187, *quoted in* Taylor v. Parratt, No. 76-L-57, slip op. at 3 (D. Neb., Oct. 25, 1978).

30. *See* note 6 *supra*.

ment in section 1983 actions.[31]

The district court opinion also failed to discuss whether or not the defendants were personally negligent in their supervision of the hobby office. In a stipulation of facts that served as a basis for the motion for summary judgment, there was no mention of any actions taken by Parratt or Lugenbill, nor was there any indication that they had failed to supervise their subordinates.[32]

The case law on the liability of superiors requires that some "personal involvement"[33] must be shown before immediate superiors can be held liable in a section 1983 action. Section 1983 actions are unlike common law tort actions in that the mere right of a superior to control his subordinates does not justify holding him liable for any unconstitutional acts of subordinates. The Supreme Court explained in *Monell v. Department of Social Services*,[34] "By our decision in *Rizzo v. Goode*, we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability."[35] The converse of this statement appears to state the correct legal proposition: If (1) control and direction are exercised, and (2) there is a failure to supervise, then (3) liability will attach to a superior.

Thus, a sheriff who generally supervises the day-to-day activities of his deputies,[36] the warden who generally supervises the activities of his guards,[37] or even the head of an administrative agency who generally supervises the activities of agency workers[38] would meet the first part of the test. The result might well be different when we look at the control that the mayor of a large city has over police officers on the beat—for example, as in *Rizzo v. Goode*,[39] a case in which control and direction were too attenuated, at least as to the actions complained of in that case.

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31. *See* text accompanying notes 122-43 *infra*.

32. Petitioners' Petition for Certiorari at app. 1-3, Parratt v. Taylor, 451 U.S. 527 (1981).

33. Similar phrases have been used in numerous court cases. Rizzo v. Goode, 423 U.S. 362 (1976) ("affirmative link"); McLaughlin v. City of LaGrange, 662 F.2d 1385, 1388 (11th Cir. 1981); Jones v. Denton, 527 F. Supp. 106, 109 (S.D. Ohio 1981) ("personally participated"); Carter v. Parsons, 526 F. Supp. 297 (N.D.N.Y. 1981); Rucker v. Grider, 526 F. Supp. 617, 621 (W.D. Okla. 1980) ("personal participation").

34. 436 U.S. 658 (1978).

35. *Id.* at 694 n.58 (citation omitted).

36. Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980); Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979).

37. Withers v. Levine, 615 F.2d 158 (4th Cir. 1980); Woodhous v. Virginia, 487 F.2d 889 (4th Cir. 1973); Redmond v. Baxley, 475 F. Supp. 1111 (E.D. Mich. 1979).

38. Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977).

39. 423 U.S. 362 (1976).

To meet the second part of the test, it is not necessary that the superior actually order the unconstitutional act of the agent.[40] If he did not order the specific acts, a principal or superior could be liable under the following circumstances: (1) if the superior establishes or promotes a policy "which sanctioned the type of action which caused the violations";[41] (2) if the superior fails to perform a specific statutory duty that leads to the injury;[42] (3) if the superior fails to perform a duty arising from actual knowledge and that failure leads to a constitutional injury;[43] and (4) if the superior fails to establish reasonably adequate protective procedures when he should have known of constitutional dangers to persons coming in contact with his agents.[44]

Under these tests, neither Parratt nor Lugenbill would be liable for the illegal acts of the person who signed for the hobby kit. They did not direct a policy that allowed others to sign for a prisoner's property; indeed, they directed the opposite. They did not violate any statutory duty. There was no evidence offered to show that they knew about the practice at issue (if it was a practice) or about the specific event involving Taylor, nor was there any proof offered to show that they should have known about this problem. Thus, the governing law would have protected them from personal liability had the issue been properly raised in the district court.

Responding to the second issue raised by the state at the district court level, namely, that prison officials should be absolutely immune, the court correctly found that only a qualified immunity applied. In section 1983 cases, the only persons who can claim absolute immunity are officials who act in a special institutional setting that requires greater protection against the possibility of frivolous litigation. Thus, judges,[45] prosecutors,[46] witnesses,[47] and perhaps defense attorneys[48]

40. If the superior did order the agent to perform unconstitutional acts, the superior could also be liable under basic tort concepts that impose liability on a principal for illegal acts ordered by him. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949). "The agent is himself liable whether or not he has been authorized or even directed to commit the tort. This, of course, does not mean that the principal is not liable nor that the tortious action may not be regarded as the action of the principal." *Id.* at 694.

41. Duchesne v. Sugarman, 566 F.2d 817, 831 (2d Cir. 1977).

42. Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978).

43. Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979); Byrd v. Birshke, 466 F.2d 6 (7th Cir. 1972); Redmond v. Baxley, 475 F. Supp. 1111 (E.D. Mich. 1979).

44. Withers v. Levine, 615 F.2d 158 (4th Cir. 1980); Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974).

45. Stump v. Sparkman, 435 U.S. 349 (1978).

46. Imbler v. Pachtman, 424 U.S. 409 (1976).

47. Briscoe v. Lahue, 663 F.2d 713 (7th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3765 (1982).

have an absolute immunity,[49] but all executive branch officials, including the governor of a state, have only qualified immunity.[50] Qualified immunity requires the injurious conduct to have been performed in good faith; that is, the individual who was seeking to cause the injuries to a person must have sincerely believed his conduct was legal (*i.e.*, subjective good faith), and his belief in legality must have been reasonable (*i.e.*, objective good faith).[51]

The application of the qualified immunity/good faith defense raises some difficulties under the facts of *Parratt*, since there was no proof that Parratt and Lugenbill did anything or that they had any belief in the legality of what their subordinates did. Once again, however, the state did not focus on the question of what the prison officials did as individuals but pressed an absolute immunity defense that simply did not apply. Since the burden of proof as to the existence of the qualified immunity/good faith defense rests with the defendant[52] and no proof was offered on the issue, the district court could properly reject that defense.

The final issue raised by the state was that the amount of money involved, only $23.50, was *de minimis* and could not serve as the basis for a section 1983 claim.[53] The federal courts have indeed established some kind of minimum value for section 1983 claims, particularly where only property loss was at stake. In *Fuentes v. Shevin*,[54] the Supreme Court suggested that there is a *de minimis* requirement for section 1983 loss-of-property claims. After *Fuentes*, however, lower federal courts did not merely focus on the *de minimis* requirement. They would decide property seizure cases (especially when prisoners were involved) based on other factors, including whether or not the

48. Black v. Bayer, 672 F.2d 309 (3d Cir. 1982).

49. The rationale for granting absolute immunity for these people is that the institutions in which they operate have built-in safeguards to insure against misuse of power and that disgruntled litigants would be too prone to bring suit, thereby obstructing the administration of justice. Pierson v. Ray, 386 U.S. 547, 554 (1967). Mistakes of judges or prosecutors can always be corrected by appeals courts and protected against by the openness in which courts work. Moreover, criminal sanctions would still be available against gross abuses. Imbler v. Pachtman, 424 U.S. 409 (1976).

50. *See generally* Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974). Friedman, *The Good Faith Defense in Constitutional Litigation*, 5 HOFSTRA L. REV. 501 (1977).

51. Friedman, *supra* note 50, at 515.

52. Gomez v. Toledo, 446 U.S. 635 (1980); Wolfel v. Sanborn, 666 F.2d 1005 (6th Cir. 1982).

53. Petitioners' Brief for Writ of Certiorari at app. 8, Parratt v. Taylor, 451 U.S. 527 (1981).

54. 407 U.S. 67, 90 n.21 (1972).

property was contraband[55] and could be seized regardless of value, whether or not the taking was negligent,[56] and whether or not the prison had an administrative scheme for handling minor complaints about property loss.[57] When an intentional taking of property has occurred that did not involve contraband and no alternative administrative scheme exists, small amounts of property—as minimal as seven packs of cigarettes—have been given protection by section 1983.[58] Thus, a claim for $23.50 was arguably above the *de minimis* amount.

The state appealed the district court decision. In a brief *per curiam* opinion, the Eighth Circuit Court of Appeals affirmed without discussing the legal issues involved. "We have thoroughly examined the record and now determine that, based upon the records and the oral arguments, the judgment of the trial court should be affirmed."[59]

The state filed a petition for certiorari to the Supreme Court. Two of the questions presented were the same as those argued in the district court:[60] "Whether simple negligence, if proven, may form the basis of a judgment under 42 U.S.C. § 1983,"[61] and "whether certain types of property are so *de minimis* as to not be protected by the Fourteenth Amendment under 42 U.S.C. § 1983."[62] The state also raised two new questions: "Where a state prisoner claims to have suffered a tortious loss of property, whether the existence of a state tort claims remedy available to that prisoner provides him with such a level of due process as to satisfy the requirements of the Fourteenth Amendment,"[63] and "whether this record supports a finding of negligence on the part of either defendant."[64] The Supreme Court granted certiorari on all questions.[65]

Once the Supreme Court granted certiorari in *Parratt*, it was obvious to anyone following the Supreme Court's section 1983 jurisprudence that the Court was going to reverse the lower courts' decisions.

55. Pitts v. Griffin, 518 F.2d 72 (8th Cir. 1975); Howard v. Swenson, 426 F.2d 277 (8th Cir. 1970).

56. Ferranti v. Moran, 618 F.2d 888 (1st Cir. 1980); Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980).

57. Secret v. Brierton, 584 F.2d 823, 825 (7th Cir. 1978).

58. Russel v. Bodner, 489 F.2d 280 (3d Cir. 1973). *But see* Nickens v. White, 536 F.2d 802 (8th Cir. 1976) (value of mail order catalogue too small for § 1983 claim).

59. Parratt v. Taylor, 620 F.2d 307 (1980).

60. *See* text accompanying note 22 *supra*.

61. Petition for Writ of Certiorari at 2, Parratt v. Taylor, 451 U.S. 527 (1981).

62. *Id.*

63. *Id. See also* 451 U.S. at 537 n.3.

64. Petition for Writ of Certiorari at 3, Parratt v. Taylor, 521 U.S. 527 (1981).

65. 449 U.S. 917 (1980).

Members of the Court had indicated in many different decisions that the huge increase in section 1983 cases,[66] particularly in prisoner section 1983 actions,[67] was a matter of the greatest concern. Congress also had shown concern by enacting the Civil Rights of Institutionalized Persons Act in 1980,[68] which requires exhaustion of administrative remedies before resort to a section 1983 action by a prisoner is possible. Parratt's action was precisely the kind of trivial, time consuming case, inappropriate for federal court consideration, that the Supreme Court justices had warned about. It served as the archetype—the worst horrible example—of how section 1983 had "burst its historical bounds."[69]

Taylor, his lawyers, and other public interest groups saw which way the wind was blowing. They had no doubt that the Supreme Court took the case to reverse it, and many prisoners' rights groups saw it as potentially a very serious threat to a broad range of section 1983 suits brought on behalf of prisoners. Taylor took the unusual step of trying to have his case dismissed before it was heard by the Supreme Court—even though he had won in the lower courts—claiming that he had received the $23.50 from other sources and was not interested in pursuing the action.[70] Taylor's motion to dismiss asked that the Supreme Court dismiss the writ of certiorari and remand the case to the trial court so that the complaint could be dismissed. The Supreme Court denied his motion without comment;[71] the case was to be determined on its merits.

II. The State's Strategy

Because it was so likely that the Court favored the position of the Nebraska Attorney General, he could almost pick and choose how to win the case. He could concentrate on the negligence point,[72] press the *de minimis* point, or emphasize the applicability of *Ingraham v.*

66. *See, e.g.*, Parratt v. Taylor, 451 U.S. at 554 n.13 (Powell, J., concurring) (citing Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980)).

67. There were 218 filings of § 1983 cases by prisoners in 1966, but 12,397 filings of § 1983 cases by prisoners in fiscal year 1980. *See* Parratt v. Taylor, 451 U.S. at 554 n.13; AD. OFF. OF U.S. CTS. ANN. REP. 62 (1980).

68. Pub. L. No. 96-247, 94 Stat. 349. *See* 42 U.S.C.A. § 1997e (West 1981).

69. Parratt v. Taylor, 451 U.S. at 554 (Powell, J., concurring).

70. Respondent's Motion to Dismiss the Writ of Certiorari at 2, Parratt v. Taylor, 451 U.S. 527 (1981) ("Respondent has been paid by a person not a party to this action all sums due and owing him under" the order of the district court).

71. 449 U.S. 1074.(1981).

72. The negligence point was an issue that the Supreme Court had considered in Procunier v. Navarette, 434 U.S. 555 (1978), and Baker v. McCollan, 443 U.S. 137 (1979), but had not decided.

Wright,[73] in which the Court had prohibited a section 1983 action because an alternative state remedy existed. Although the Nebraska Attorney General did discuss the negligence[74] and the *de minimis*[75] points, the major argument was based on *Ingraham*.

A. Alternate State Remedy

The *Ingraham* case was another action that tested the reach of section 1983. *Ingraham* involved the practice of corporal punishment of students in certain schools in Dade County, Florida. Pursuant to a state statute, the school board in that county authorized, for disciplinary reasons, the paddling of students with a flat wooden paddle approximately two feet long, four inches wide, and one-half inch thick.[76] One student who was so severely paddled that he had to stay home for a week and another who was deprived of the full use of his arm for a week were the named plaintiffs in a class action brought on behalf of all students in the Dade County schools.[77] The district court dismissed the action at the close of the plaintiffs' case. The Court of Appeals for the Fifth Circuit, sitting *en banc*, after an initial vote to reverse,[78] affirmed on rehearing.[79]

The Supreme Court, in a five-to-four decision, also upheld dismissal of the action.[80] In his majority opinion, Justice Powell found that no Eighth Amendment right could be asserted by the students. The Court reasoned that only convicted criminals—not students "punished" by paddling, no matter how severe—can claim Eighth Amendment rights.[81]

The students had also asserted that their Fourteenth Amendment due process rights were violated by corporal punishment. They had claimed that they were deprived of liberty without due process of law since the paddling was done by a teacher or principal immediately after the student was accused of misconduct, without "process" or hearing of

73. 430 U.S. 651 (1977).

74. *See* text accompanying notes 122-46 *infra*.

75. The first point in the state's brief was a one paragraph argument that $23.50 was too small an amount to invoke the Fourteenth Amendment. Petitioners' Brief on the Merits at 7-8, Parratt v. Taylor, 451 U.S. 527 (1981).

76. 430 U.S. at 656.

77. *Id.* at 657.

78. Ingraham v. Wright, 498 F.2d 248 (5th Cir. 1974).

79. *Id.* at 258; Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976) (*en banc*).

80. Ingraham v. Wright, 430 U.S. 651 (1977).

81. 430 U.S. at 664 ("An examination of the history of the Amendment and the decisions of this Court . . . confirms that it was designed to protect those convicted of crimes.").

any kind. The plaintiffs relied on *Goss v. Lopez*,[82] which held that students cannot be suspended from school without some kind of rudimentary hearing required by the due process clause, to support their claim that the imposition of corporal punishment requires at least the same kind of protection.

Nevertheless, the Supreme Court rejected the analogy and found no due process violation. The Court agreed that the imposition of corporal punishment implicated the students' interest in liberty,[83] but held that prior notice and hearing were not necessary if later postdeprivation remedies were adequate. Whereas the postdeprivation remedies to deal with student suspension in *Goss v. Lopez* were clumsy and inadequate and thus required some kind of prior informal hearing, the Court found that the postdeprivation remedies available for corporal punishment were not only adequate but also "may be viewed as affording substantially *greater* protection to the child than the informal conference mandated by *Goss*."[84] Teachers can be sued for assault if they use excessive or unnecessary force, and, in cases of gross abuse, criminal sanctions are possible.[85] It was the existence of these postdeprivation remedies and their deterrent effect on excessive punishment that provided the students with due process.

In passing, the Supreme Court emphasized that these postdeprivation remedies were also adequate because other safeguards would militate against abuse of power by teachers or disciplinarians. The Court noted that "the public school remains an open institution."[86] A student is "rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment."[87] A student leaves school at the end of the school day and may even leave during school hours.[88] Furthermore, the community closely supervises the operation of the schools. Finally, there is a "low incidence of abuse."[89]

Four justices dissented in *Ingraham*. Justice White's dissent challenged the majority on both its Eighth and Fourteenth Amendment holdings. He argued that the word "punishment" appears in the Eighth Amendment but that the word "criminal" does not and that this

82. 419 U.S. 565 (1975).

83. 430 U.S. at 672.

84. *Id.* at 678 n.46 (emphasis added).

85. "Teachers and school authorities are unlikely to inflict corporal punishment unnecessarily or excessively when a possible consequence of doing so is the institution of civil or criminal proceedings against them." *Id.* at 678.

86. *Id.* at 670.

87. *Id.*

88. *Id.*

89. *Id.* at 678 n.46.

omission "is strong evidence that the Amendment was designed to prohibit all inhumane or barbaric punishments, no matter what the nature of the offense for which the punishment is imposed."[90] As far as due process is concerned, Justice White claimed that the later tort action available to correct abuses was inadequate for two reasons. First, some persons would be immune from later tort actions because they took action based on "reasonable, good-faith mistake[s] in the school disciplinary process."[91] Second, even if later tort remedies were available, such lawsuits occur "after the punishment has been finally imposed. The infliction of physical pain is final and irreparable; it cannot be undone in a subsequent proceeding."[92]

Justice Stevens dissented separately. Although he agreed with Justice White's dissent, he made a special point of focusing on those situations in which postdeprivation remedies would be "constitutionally sufficient."[93] He wrote a short, prescient opinion, stating in part:

> When only an invasion of a property interest is involved, there is a greater likelihood that a damages award will make a person completely whole than when an invasion of the individual's interest in freedom from bodily restraint and punishment has occurred. In the property context, therefore, frequently a postdeprivation state remedy may be all the process that the Fourteenth Amendment requires.[94]

Justice Stevens had taken the same position in *Bonner v. Coughlin*[95] while sitting as a circuit court judge. In *Bonner*, a prisoner lost a trial transcript because his cell had been left open by some prison guards. The first cause of action alleged that the guards themselves deliberately took the transcript, and the second alleged negligence, that is, by negligently leaving the cell door open, the guards allowed others to steal the material. In *Bonner*, Judge Stevens, writing for the majority, dismissed the second cause of action on the ground that the postdeprivation remedy for the negligent deprivation of property satisfied due process requirements.[96] In *Ingraham*, Justice Stevens dissented on the ground that when liberty interests are at stake and the deprivation was intentional, a postdeprivation remedy will not suffice.

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90. 430 U.S. at 685 (White, J., dissenting).

91. *Id.* at 695.

92. *Id.*

93. 430 U.S. at 701 (Stevens, J., dissenting).

94. *Id.*

95. 517 F.2d 1311, 1318-20 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1978).

96. 517 F.2d at 1319. The *Parratt* plurality opinion, which Justice Stevens joined, cited and relied on *Bonner*. *See* notes 147 & 163 and accompanying text *infra*.

Could *Ingraham* be read as requiring examination of postdeprivation remedies in other areas involving intentional deprivation of liberty interests? What if a police officer used excessive force on an arrestee, or if a prison guard used excessive force on a prisoner? Must the victims be relegated to state common law remedies, as was the student complaining of excessive force imposed by the teacher in *Ingraham*?

There are ways to distinguish *Ingraham* from situations involving police officers and prison guards. Unlike public schools, prisons are neither "open" institutions nor closely supervised by the community. Unlike children, prisoners do not return home at the end of the day, nor are many people available to witness and protest against their mistreatment. Furthermore, one cannot say that there is a low incidence of abuse as far as claims of police or prison guard brutality are concerned.[97] The stakes are also much higher when police and prison guards use physical force. A teacher cannot do a great deal of damage with a flat paddle, but law enforcement officers can and do cause such damage with guns or clubs. Finally, Florida state law allows teachers to paddle students with reasonable force, so that a section 1983 action is invoked when this privilege is abused by hitting too hard. On the other hand, police and prison guards are not even allowed to hit citizens and prisoners lightly as a form of summary punishment. Because we wish to insure proper police conduct and compliance with constitutional mandates in all law enforcement/citizen contacts, prepunishment hearings are crucial due process safeguards. Because other checks on abuse of power are not available when police or prison officials are involved, section 1983 thus serves as a crucial watchdog over abuse of power by state officials.

Furthermore, *Ingraham* decided only that teacher paddling did not implicate any Eighth Amendment or procedural due process rights. The Court quite specifically reserved the question of substantive due process rights: "We have no occasion in this case . . . to decide whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause."[98] Substantive due process rights—which focus on factors such as the motive behind physical force and its disproportionality—involve totally different considerations than those involved in procedural rights or rights under state assault and battery laws. Thus, in a post-*Ingraham* case, *Hall v.*

97. U.S. COMM'N ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES (October 1981). *See also* Ruiz v. Estelle, 666 F.2d 854 (5th Cir. 1982).

98. 430 U.S. at 679 n.47.

Tawney,[99] the Fourth Circuit held that a student could still maintain a section 1983 action against a teacher who allegedly hit her with a thick rubber paddle "without apparent provocation," then "violently shoved [her] . . . against a large stationary desk" and twisted her right arm so that she was hospitalized for ten days.[100] The court found that state assault and battery laws did not make distinctions on which substantive due process rights were based.

> In resolving a state tort claim, decision may well turn on whether "ten licks rather than five" were excessive, *see Ingraham v. Wright*, 525 F.2d at 917, so that line-drawing this refined may be required. But substantive due process is concerned with violations of personal rights of privacy and bodily security of so different an order of magnitude that inquiry in a particular case simply need not start at the level of concern these distinctions imply. As in the cognate police brutality cases, the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience. . . . Not every violation of state tort and criminal assault laws will be a violation of this constitutional right, but some of course may.[101]

For these reasons, the *Ingraham* case has had limited applicability to other section 1983 areas. The Supreme Court has not rushed to apply *Ingraham* wherever alternative common law tort remedies were already in place. For example, the Court has continued to find section 1983 generally available in cases against law enforcement personnel,[102] prison guards,[103] and public employers.[104]

In 1979, however, three members of the Court indicated a willingness to extend *Ingraham*.[105] A group of policemen fired by the City of Columbus, Georgia, brought a section 1983 action after initiating and then abandoning administrative procedures that would have reviewed the basis for their discharges. The district court held that the officers could not switch in midstream from the police hearing board to a federal forum. The Fifth Circuit reversed, holding that there was no re-

99. 621 F.2d 607 (4th Cir. 1980).

100. *Id.* at 614.

101. *Id.* at 613 (citation omitted).

102. Baker v. McCollan, 443 U.S. 137 (1979).

103. Procunier v. Navarette, 434 U.S. 555 (1978).

104. Owen v. City of Independence, 445 U.S. 622 (1980).

105. City of Columbus v. Leonard, 443 U.S. 905 (1979).

quirement of administrative exhaustion,[106] and the city filed a petition for certiorari. Only three justices voted to take the case: Justices Rehnquist and Blackmun and Chief Justice Burger. In dissenting from the denial of certiorari, Justice Rehnquist stated:

> [T]he time may now be ripe for a reconsideration of the Court's conclusion in *Monroe* that the "federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked". . . . [T]he Court believed that this conclusion followed from the purpose of the Civil Rights Act "to provide a federal remedy where the state remedy, although adequate in theory, *was not available in practice*." But this purpose need not bar exhaustion where the State can demonstrate that there is an available and adequate state remedy.[107]

Justice Rehnquist confuses *exhaustion* of *administrative* remedies with the existence of alternative state judicial remedies that would supply due process and be a substitute for section 1983. The issue in *Monroe* concerned only the latter. The confusion between exhaustion, which is merely a detour on the road to section 1983, and preclusion, which is an absolute barrier, is a common one. Exhaustion is, properly speaking, at issue when a state administrative remedy is available that would afford relief similar if not identical to that sought in a section 1983 action. Under such circumstances, some courts have held that a litigant must pursue those administrative remdies before coming back to federal court,[108] but none of these courts have held that the availability of the administrative remedy precludes a section 1983 action or that the administrative decision is conclusive in a later section 1983 action.[109]

If a state court examined the issues involved in a section 1983 action, its final judgment between the parties would be *res judicata* in the federal action,[110] but *preclusion* in the *Parratt* case is an entirely different concept. Preclusion relies on the availability of a state judicial remedy that has not yet been invoked and has not proceeded to final judgment to act as a bar to a section 1983 action. Thus, preclusion goes

106. City of Columbus v. Leonard, 565 F.2d 957 (5th Cir. 1978).

107. 443 U.S. at 910-11 (Rehnquist, J., dissenting) (citations omitted).

108. *See* Patsy v. Board of Regents, 634 F.2d 900 (5th Cir. 1981). *Contra* McCray v. Burrell, 516 F.2d 357, 361-65 (4th Cir. 1975) (*en banc*).

109. *But see* Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883 (1982), in which the plantiff in a Title VII action pursued her administrative remedies through the state Division of Human Rights and then appealed the adverse decision to an appeals court within the judicial system of the state. That court confirmed the administrative decision. The Supreme Court held that the judicial determination upholding the administrative board was *res judicata*.

110. *See* Allen v. McCurry, 449 U.S. 90 (1980).

much further than the cognate concepts of administrative exhaustion and *res judicata*.[111]

The only other Supreme Court action between *Ingraham* and *Parratt* that focused on the problem of alternative remedies was *Carlson v. Green*,[112] a case involving a *Bivens*-type action[113] rather than a section 1983 action. In *Carlson*, the complaint alleged that the plaintiff's son, a federal prisoner, had died as a result of hopelessly inadequate medical treatment that met the standard of "deliberate indifference" required by *Estelle v. Gamble*.[114] The deceased's mother sued various federal prison officials directly under the Eighth Amendment, as permitted by *Bivens*. She also added claims based on the due process clause of the Fifth Amendment. The Justice Department tried to advance an argument similar to that accepted by the Court in *Ingraham*, namely, that the existence of alternative remedies precluded a constitutional cause of action. The alternative remedy asserted was the Federal Tort Claims Act (FTCA), which would have provided relief against the United States for the medical malpractice claims at issue. The Justice Department did not argue that there was no violation of a constitutional right, but merely that the FTCA supplied an adequate remedy to the conduct in question.

Justice Brennan, writing for the majority, noted that *Bivens* stated two exceptions to its rule that actions may be brought in federal court against federal officials who violate the Constitution, even without statutory authorization by Congress: (1) if there are "special factors counselling hesitation in the absence of affirmative action by Congress,"[115] or (2) if Congress has itself provided an alternative remedy which "it explicitly declared to be a *substitute* for recovery directly under the

111. In arguing *Parratt*, the Nebraska Attorney General correctly noted the difference between administrative exhaustion and preclusion: "This position should not be confused with a requirement that state administrative remedies must be exhausted prior to filing a § 1983 action. Not only is this concept directly contrary to the long standing proposition that § 1983 litigants cannot be required to exhaust state remedies, but ignores the fact that a person is only entitled to due process once for one loss. If the state can provide a system which meets the requirements of the Fourteenth Amendment and afford possible redress where property has been lost due to the negligent acts of a state employee, then nothing further need be afforded. No property has been taken without due process. No right secured by the Constitution or laws has been abridged. No basis for an action under § 1983 exists." Petitioners' Brief on the Merits at 12-13, Parratt v. Taylor, 451 U.S. 527 (1981) (citations omitted).

112. 446 U.S. 14 (1980).

113. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

114. 429 U.S. 97 (1976).

115. *Carlson*, 446 U.S. at 18 (quoting Bivens v. Six Unknown Named Agents, 403 U.S. 388, 396 (1971)); Davis v. Passman, 442 U.S. 228, 245 (1979).

Constitution and viewed as equally effective."[116] The Court found no special factors "counselling hesitation" in this case, since prison officials enjoy no independent or special status in the federal government; nor was the FTCA ever viewed as a substitute for a *Bivens*-type action, as it was passed before *Bivens* was decided and was amended in 1974 under circumstances that did not meet the second part of the test. Furthermore, the *Bivens* remedy is more effective. *Bivens* actions are filed directly against the official involved and serve a deterrent purpose, but FTCA actions are filed only against the United States. Punitive damages and jury trials are available in *Bivens* actions, but not in FTCA actions. Finally, unlike *Bivens* actions, FTCA actions depend on local tort laws; such a suit is possible "only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward."[117]

Only Chief Justice Burger and Justice Rehnquist dissented. Chief Justice Burger found the FTCA to provide an adequate remedy under these circumstances.[118] Justice Rehnquist found *Bivens* itself to have been wrongly decided and attacked the whole notion that the Constitution could serve as the basis for any damage remedy in the absence of congressional authorization.[119]

No one mentioned the possible analogy to *Ingraham*, although a plausible argument could be formulated. If *Ingraham* held that alternate *state* remedies could supply due process, why would not an alternate *federal* remedy do the same? Arguably, the FTCA supplied a postdeprivation remedy, satisfying the due process clause of the Fifth Amendment. The problem with this analogy is that the paddling of students by teachers and the death of a prisoner due to medical indifference raise entirely different considerations. In the latter situation, the Court in *Carlson* recognized the importance of a *Bivens* action as a deterrent to insure compliance with constitutional requirements—an issue that was clouded in *Ingraham* because of the limited need for deterrence, the existence of other safeguards, and the Court's explicit holding that substantive due process rights were not at issue. The Court was not ready to expand *Ingraham* to other areas.

Despite the Court's apparent unwillingness to extend *Ingraham* to prisoners' claims, the Nebraska Attorney General saw the value of resurrecting the approach taken in that case. He noted that postdepriva-

116. 446 U.S. at 18-19 (citation omitted).
117. *Id.* at 23.
118. *Id.* at 30 (Burger, C.J., dissenting).
119. *Id.* at 31-32 (Rehnquist, J., dissenting).

tion remedies were held to be adequate under the due process clause in a number of situations involving property deprivations[120] and argued that the Nebraska tort claims procedure under which suits could be brought against the state for losses of this kind fell within the type of procedure previously held acceptable.[121]

B. Negligence

The last argument made by the state in its brief in *Parratt* involved the negligence issue. Here it made the same mistake that numerous lower federal courts have made in discussing whether or not negligence encompasses nonintentional conduct of every kind or only a particular kind of conduct not affecting constitutional rights. If the latter, then no section 1983 cause of action is possible on the basis of such conduct. If the former, an inquiry is necessary to see whether or not constitutional rights were affected and whether or not it was foreseeable that such rights would be violated.

The Supreme Court had expressed its concern, at least as early as *Paul v. Davis*,[122] that section 1983 should not be read to encompass all causes of action recognized by local tort law whenever a state actor is involved. "[S]uch a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[123] The Court saw no reason why, for example, "the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle . . . [should] have claims . . . cognizable under § 1983."[124] This example has struck members of the Court with considerable force. For instance, during the oral argument in *Procunier v. Navarette*,[125] the first case in which the Court explicitly examined the issue of negligence, several justices asked hypothetical questions about a mail truck negligently "going off the road . . . and losing the mail for that reason," or a "mail truck negligently hitting somebody on his way

120. Petitioners' Brief on the Merits of 10-12, Parratt v. Taylor, 451 U.S. 527 (1981).

121. *Id.* at 12. "If a state-afforded, post-loss process is available to a prisoner who has suffered a property loss due to the negligence of a state employee, and if that process otherwise comports with due process requirements, then the prisoner is afforded his Fourteenth Amendment rights by virtue of the existence of that process. If afforded the process due him under the Fourteenth Amendment, the prisoner's rights have not been abridged and no basis for a cause of action exists under § 1983." *Id.* (footnote omitted).

122. 424 U.S. 693 (1976).

123. *Id.* at 701.

124. *Id.* at 698.

125. 434 U.S. 555 (1978).

to church."[126] In *Parratt*, the Court noted that to accept Taylor's argument that he suffered as the result of a constitutional violation "would almost necessarily turn every alleged injury that may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983. . . . Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983."[127]

The state argued in its brief in *Parratt* precisely along the same lines:

> Section 1983 had as its purpose, penalizing abuses of governmental power in an attempt to coerce proper conduct by state officials. Section 1983 cannot, by coercion, prevent simple negligence . . . . Any manner of state neglect, *e.g.*, auto accidents, personal injuries, road repair, could then be litigated in federal court under § 1983.[128]

It is apparent why an automobile accident caused by a negligent state actor should not be the basis for a section 1983 action—no constitutional right is at issue in such an event. The Constitution does not protect one's right to walk down the street free from interference by a negligently driven state vehicle.[129] If, however, police officers negligently drove their vehicle into some marching protesters when patrolling near the parade or demonstration, a section 1983 claim should be allowed if it was foreseeable that the First Amendment rights of the marchers would be affected.

Some courts correctly distinguish between negligence as nonintentional conduct in general and the constitutional right that is being violated, allowing recovery if the constitutional violation is caused by negligence. For example, section 1983 actions have been allowed against a prison administrator who negligently miscalculated the minimum term of a prisoner, causing him to stay in jail four and one-half

126. L. Friedman, Personal Notes Taken During Oral Argument (Oct. 11, 1976) in *Procunier v. Navarette*, 434 U.S. 555 (1978) (on file at offices of *Hastings Constitutional Law Quarterly*).

127. *Parratt*, 451 U.S. at 544.

128. Petitioners' Brief on the Merits at 20, Parratt v. Taylor, 451 U.S. 527 (1981).

129. *See* Walton v. Salter, 547 F.2d 824 (5th Cir. 1976); Mann v. Village of Walden, 482 F. Supp. 154 (S.D.N.Y. 1979). But, if the driver said to his partner, "I am going to get that pedestrian because he insulted me," a constitutional question would be involved. The pedestrian is deprived of liberty without due process of law because he is summarily punished by the police officer for his alleged offense.

years beyond the term he should have served;[130] against a sheriff who imprisoned a citizen because he erroneously believed that certain court costs had not been paid, which would justify imprisonment;[131] and against city officials who caused a citizen to be improperly arrested because although an erroneous warrant for his arrest was recalled, the recall was not properly transmitted.[132] These cases all involve violations of constitutional rights—either the liberty interest of the Fifth and Fourteenth Amendments or the right not to be seized unreasonably of the Fourth Amendment—and therefore give rise to causes of action under section 1983, even though the rights were violated by conduct that was negligent rather than intentional. The victims' interests in protecting and vindicating their constitutional rights were important regardless of whether the state actor's conduct was negligent or intentional. Conversely, section 1983 actions have not been allowed when the negligent conduct did not violate any constitutional right. For example, some police or prison detentions caused by negligence do not give rise to a constitutionally protected liberty interest,[133] just as negligent construction by a state causing injury to property[134] or life[135] does not violate a constitutional right; nor is there a constitutional violation when a guard kills a bat after it has bitten a prisoner and flushes it down a toilet so that the prisoner has to receive painful rabies shots because the bat cannot be medically tested.[136] In each of these cases, the focus is on the right affected, not on the intent with which the act was done.

Sometimes the issues necessarily merge. Since Eighth Amendment violations involve "cruel and unusual punishment," that Amendment has been interpreted as requiring conduct with a particular state of mind associated with it, such as medical treatment characterized by

130. Haygood v. Younger, 527 F. Supp. 808 (E.D. Cal. 1981). *See also* Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969). Even though the prison official did not intentionally deprive the person of liberty, a § 1983 action should lie whether or not a state law remedy exists.

131. Douthit v. Jones, 619 F.2d 527 (5th Cir. 1980), *on remand*, 641 F.2d 345 (5th Cir. 1981). The period of time the citizen was imprisoned was more than the minimum period specified in Baker v. McCollan, 443 U.S. 137 (1979).

132. Murray v. City of Chicago, 634 F.2d 365 (7th Cir. 1980), *cert. granted sub nom.* Finley v. Murray, 454 U.S. 962 (1981), *cert. dismissed*, 102 S. Ct. 2226 (1981).

133. Baker v. McCallon, 443 U.S. 137 (1979) (three days over New Year's weekend does not amount to a constitutional deprivation); Johnson v. City of St. Paul, 634 F.2d 1146 (8th Cir. 1980) (two-hour detention caused by mistaken identity violates no constitutional right); Williams v. Anderson, 599 F.2d 923 (10th Cir. 1979) (defendants' reliance on one-day miscalculation of prison sentence was reasonable).

134. York v. City of Cedartown, 648 F.2d 231 (5th Cir. 1981).

135. Major v. Benton, 647 F.2d 110 (10th Cir. 1981).

136. Ronnei v. Butler, 597 F.2d 564 (8th Cir. 1979).

"deliberate indifference"[137] or physical abuse accomplished with a punitive purpose.[138] In these situations, the constitutional right is defined in terms of the state of mind that must accompany the conduct. Without that state of mind, there is no constitutional violation. To the extent that discriminatory intent must be shown to prove equal protection and Fourteenth or Fifteenth Amendment violations, that state of mind must also be shown.[139] This is true only as to Eighth, Fourteenth, and Fifteenth Amendment violations; First, Fourth, Fifth, or Sixth Amendment violations may occur through negligence.

The lower federal courts have badly confused the issue. Most follow *Estelle v. Gamble*,[140] holding that gross negligence or recklessness is the equivalent of intentional action, but then make distinctions between simple and gross negligence instead of concentrating on the constitutional right at issue.[141] For example, various section 1983 suits were filed against high officials of the Philadelphia police force, claiming that they failed to train, supervise, and discipline their police officers who had used excessive force against civilians. Lower federal courts considered this assertion a claim of "mere negligence" on the part of the supervisors. One court held that mere negligence could not be the basis for a section 1983 claim,[142] while another held the opposite.[143]

The issue is not a question of mere negligence. Civilians have a constitutional right not to be summarily punished by police and deprived of liberty without due process or arrested without probable cause. If a police chief's failure to train and discipline his officers were the proximate cause of resulting injuries, and if it were foreseeable that such an injury to constitutional rights would occur, then liability should be found.[144] To attach the word "negligence" to a superior's failure to supervise and then to analyze the problem as if such failure constituted a common law tort suit simply obscures the problem by confusing the elements that must be shown before section 1983 can be applied. Moreover, considering the broad power of supervisors to con-

137. Estelle v. Gamble, 429 U.S. 97 (1976).

138. Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973).

139. Washington v. Davis, 426 U.S. 229 (1976). *See also* Mobile v. Bolden, 446 U.S. 55 (1980).

140. 429 U.S. 97 (1976).

141. *See* Doe v. Department of Social Servs., 649 F.2d 134 (2d Cir. 1981); Popow v. City of Margate, 476 F. Supp. 1237 (D.N.J. 1979).

142. Schweiker v. Gordon, 442 F. Supp. 1134 (E.D. Pa. 1977).

143. Norton v. McKeon, 444 F. Supp. 384 (E.D. Pa. 1977).

144. Sims v. Adams, 537 F.2d 829 (5th Cir. 1976); Roberts v. Williams, 456 F.2d 819 (5th Cir. 1972). *But see* Hays v. Jefferson County, 668 F.2d 869 (1982).

trol the action of their agents—which in turn affects the constitutional rights of many citizens—use of the term "mere negligence" in the common law sense is particularly inappropriate.

The issue may be further analyzed in terms of the distinction between negligence and intentional conduct. Prosser defines the issue as follows:

> In negligence, the actor does not desire to bring about the consequences which follow, nor does he know that they are substantially certain to occur, or believe that they will. There is merely a risk of such consequences, sufficiently great to lead a reasonable man in his position to anticipate them, and to guard against them. If an automobile driver runs down a man in the street before him, with the desire to hit him, or with the belief that he is certain to do so, it is an intentional battery; but if he has no such desire or belief, but merely acts unreasonably in failing to guard against a risk which he would appreciate, it is negligence.[145]

If there is foreseeable risk to *constitutional* rights by certain negligent actions of a state official, there is no reason why section 1983 should be inapplicable. It will put state actors on notice that they will have to guard against unnecessary risks to their citizens' constitutional interests. Where the "risk-taking" or failure by state officials to perform a duty has the potential for inflicting widespread harm to the individuals they are serving, such acts should be the basis for a section 1983 suit, and so the courts have held.[146]

III. The Supreme Court Decision

The Supreme Court decided *Parratt* on May 18, 1981. The decision produced an unusual line-up among the justices. Justice Rehnquist wrote the plurality opinion for himself, Chief Justice Burger, and Justices Brennan and Stevens. Justice Stevens' vote was predictable, in light of his opinion in *Bonner v. Coughlin* and his dissent in *Ingraham*.[147] Justice Brennan, however, rarely votes with Chief Justice Burger and Justice Rehnquist in a section 1983 action.[148]

145. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 145 (4th ed. 1971).

146. Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974); Beverly v. Morris, 470 F.2d 1356 (5th Cir. 1972); Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972); Roberts v. Williams, 456 F.2d 819 (5th Cir. 1972), *cert. denied*, 404 U.S. 866 (1971).

147. *See* text accompanying notes 93-96 *supra*.

148. Justice Rehnquist and Chief Justice Burger voted on the opposite side of Justice Brennan in the following § 1983 cases mentioned in the text: Owen v. City of Independence, 445 U.S. 622 (1980); Baker v. McCollan, 443 U.S. 137 (1979); Ingraham v. Wright, 430 U.S. 651 (1977); Paul v. Davis, 424 U.S. 693 (1976). *See also* Carlson v. Green, 446 U.S. 14 (1980) (*Bivens*-type action).

The explanation for this unusual line-up was the double holding of the case. In the first part of the opinion, the Court decided the negligence issue in favor of a more expansive reading of section 1983. It held, contrary to the state's assertion, that negligence can be the basis of a section 1983 claim if a constitutional right has been violated. In the second part of the opinion, the Court cut back on the civil rights statute by resurrecting the *Ingraham* strategy. It held that where an alternate state remedy exists in claims such as the one made by Parratt (negligent loss of property), no section 1983 claim will lie, since the victim has been given due process by the state's postdeprivation remedy.

A. Negligence

The Supreme Court has twice before tried to untangle the issue of negligence in the context of a section 1983 claim. In *Procunier v. Navarette*,[149] the Court granted certiorari on that question but decided the case on another ground. The plaintiff claimed that his mail had been negligently lost by prison officials. The Court held that the defendants could not be held liable because they had established a good faith defense as a matter of law: the right at issue—the prisoner's First Amendment right to send mail—had not been established at the time of the acts in question. Nor could the plaintiff prove that the defendant prison official had maliciously intended to injure him. Since the claim was based on the official's negligence, by definition the official did not act maliciously. Thus, by establishing both subjective and objective good faith, the prison official proved his qualified immunity.[150]

In *Baker v. McCollan*,[151] the Court again granted certiorari on the negligence issue. That case involved a three-day imprisonment of a person erroneously thought to be the object of an arrest warrant. The victim's brother had been previously arrested in Amarillo, Texas, and was wanted as a fugitive. The victim had given his brother's name to the police and actually possessed a driver's license with his brother's name, but his own picture, on it. The driver's license was confiscated by the police, an act which indicated that they knew it was false. Nevertheless, the police sent out a bulletin to pick up the victim, whose name was on the driver's license. When the victim was stopped for a routine traffic check in Dallas, the police discovered the outstanding arrest warrant in his name, promptly arrested him, and returned him to Amarillo, where he stayed in jail over a long holiday weekend until the

149. 434 U.S. 555 (1978).
150. *Id.* at 555-66.
151. 443 U.S. 137 (1979).

error was discovered. He sued the sheriff under section 1983 for depriving him of his liberty without due process.

The Supreme Court did not reach the issue of whether or not the sheriff could be held liable for his negligence in establishing the identification system in his office. The Court noted at the outset that the intent question may not be given "a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action."[152] It held instead that no liberty interest was violated because of the short period of time that McCollan had been imprisoned—only "three days over a New Year's weekend [which] does not and could not amount to such a [constitutional] deprivation."[153] Thus, the issue of negligence was again avoided.

The Court in *Parratt* finally confronted the issue. It held that negligence could indeed be the basis for a section 1983 action. Justice Rehnquist noted the absence of the word "willfully" in section 1983, even though it appears in that section's criminal counterpart, 18 U.S.C. section 242.[154] He quoted the familiar language from *Monroe v. Pape* about the "background of tort liability that makes a man responsible for the natural consequences of his actions."[155] He concluded,

> Both *Baker v. McCollan* and *Monroe v. Pape* suggest that § 1983 affords a "civil remedy" for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. Accordingly, in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.[156]

The only justice challenging the Court's holding on negligence was Justice Powell. He concurred in the judgment dismissing the action but found the key feature to be the negligence issue. He thus parted company with the plurality opinion, which discussed the availability of alternate state remedies. According to Justice Powell, Taylor should not be allowed to recover, regardless of whether or not a state remedy existed, because Taylor's claim was based on negligence and thus did not amount to a "deprivation." Justice Powell defined "deprivation" as "an intentional act denying something to someone, or, at the very least,

152. *Id.* at 139-40.
153. *Id.* at 145.
154. 451 U.S. at 534.
155. *Id.* at 535 (quoting Monroe v. Pape, 365 U.S. at 187).
156. 451 U.S. at 535.

a deliberate decision not to act to prevent a loss."[157] He reasoned that this interpretation is not only consistent with most lower court holdings, but also avoids "trivializing the right of action provided in § 1983."[158]

Based on the majority holding in *Parratt*, courts must now avoid the confusion-by-label approach of transforming difficult section 1983 issues into negligence problems and using that concept to determine the answer. They must ignore the issue of intent, except when a constitutional right is defined in terms of a particular state of mind, and must examine the nature of the constitutional right, state action, proximate causation, and injury. The negligence detour is no longer viable.

B. Alternate State Remedy

The crucial part of the *Parratt* decision involved the issue of alternative remedies. Justice Stevens' approach, first suggested in *Bonner v. Coughlin*, was accepted by the Court. Justice Rehnquist noted that *predeprivation* hearings were required in many situations "before the state interferes with any liberty or property interest enjoyed by its citizens."[159] Some postdeprivation hearings by the state, however, have been held to satisfy due process. Justice Rehnquist reasoned as follows:

> The fundamental requirement of due process is the opportunity to be heard and it is an "opportunity which must be granted at a meaningful time and in a meaningful manner." However, as many of the above cases recognize, we have rejected the proposition that "at a meaningful time and in a meaningful manner" *always* requires the State to provide a hearing prior to the initial deprivation of property. This rejection is based in part on the impracticability in some cases of providing any preseizure hearing under a state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available.[160]

Justice Rehnquist found that these justifications—the impracticability of preseizure hearing and the adequacy of postdeprivation remedy—applied in this case, involving the "tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee."[161] First, Justice Rehnquist observed, a predeprivation hearing is obvi-

157. *Id.* at 548 (Powell, J., concurring).

158. *Id.* at 549. Justice Powell continued, "That provision was enacted to deter real *abuses* by state officials in the exercise of governmental powers. It would make no sense to open the federal courts to lawsuits where there has been no affirmative abuse of power, merely a negligent deed by one who happens to be acting under color of state law." *Id.*

159. 451 U.S. at 537-38 (citing such cases as Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969)).

160. 451 U.S. at 540-41 (citation omitted).

161. *Id.* at 541.

ously impossible, since the state "cannot predict precisely when the loss will occur."[162] Second, citing both *Bonner v. Coughlin* and *Ingraham v. Wright* as precedents,[163] he held that the existence of Nebraska's tort claims procedure[164] supplied the necessary due process. The Court further reasoned that the fact that punitive damages and a jury trial are not available in the state proceeding did not mean there was no due process.

> Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process. The remedies provided could have fully compensated the respondent for the property loss he suffered.[165]

Justice Stewart concluded separately in a short opinion that generally endorsed the conclusions of the Court.[166] Justice Blackmun, in a concurring opinion joined by Justice White, emphasized the narrowness of the holding, stating that it is applicable only to deprivations of property, not of life or liberty,[167] caused by a negligent, not an intentional, act.[168] Futhermore, he emphasized that there was more to the due process clause than procedural due process. "I continue to believe that there are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process."[169]

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162. *Id.*

163. "We believe that the analysis recited above in *Bonner* is the proper manner in which to approach a case such as this. This analysis is also quite consistent with the approach taken by this Court in *Ingraham v. Wright*, . . . where the Court was confronted with the claim that corporal punishment in public schools violated due process. Arguably, the facts presented to the Court in *Ingraham* were more egregious than those presented here inasmuch as the Court was faced with both an intentional act (as opposed to negligent conduct) and a deprivation of liberty." *Id.* at 542 (citation omitted).

164. NEB. REV. STAT. §§ 81-8.209 to -8.233 (1976) (allowing claims of prisoners housed in state penal institutions).

165. 451 U.S. at 544.

166. *Id.* at 544-45 (Stewart, J., concurring).

167. "I do not read the Court's opinion as applicable to a case concerning deprivation of life or of liberty. Cf. *Moore v. East Cleveland*, 431 U.S. 494 (1977)." 451 U.S. at 545 (Blackmun, J., concurring).

168. "While the 'random and unauthorized' nature of negligent acts by state employees makes it difficult for the State to 'provide a meaningful hearing before the deprivation takes place,' it is rare that the same can be said of intentional acts by state employees. When it is possible for a State to institute procedures to contain and direct the intentional actions of its officials, it should be required, as a matter of due process, to do so." 451 U.S. at 546 (Blackmun, J., concurring (citation omitted).

169. *Id.* at 545.

Justice Marshall agreed with the Court on the negligence point and also agreed that the Nebraska tort claims procedure could supply due process.[170] He parted company, however, with the Court on the application of the tort claims procedure in this case. He found the fact that Taylor had not been informed of the availability of the procedure decisive:

> In cases such as this, I believe prison officials have an affirmative obligation to inform a prisoner who claims that he is aggrieved by official action about the remedies available under state law. If they fail to do so, then they should not be permitted to rely on the existence of such remedies as adequate alternatives to a § 1983 action for wrongful deprivation of property.[171]

IV. Implication of the Decision

In some sense *Parratt* is a positive decision for civil rights litigants. First, the issue of negligence, which had so confused the lower courts, is now settled. State actors cannot win section 1983 cases by convincing a court that their activity was based on negligence. Further inquiry is necessary.

Second, the holding on alternative state remedies is quite limited. The rationale cannot be applied when the deprivation occurs by operation of state law itself—that is, when state law requires the action that is attacked as unconstitutional. In its first interpretation of *Parratt*, the Supreme Court stated:

> In *Parratt*, the Court emphasized that it was dealing with "a tortious loss of property as a result of a random and unauthorized act by a state employee. . . ." Here in contrast it is the state system itself that destroys a complainant's property interest by operation of law. . . . *Parratt* was not designed to reach such a situation.[172]

Can *Parratt* be applied to intentional deprivations of life, liberty, or property? In light of the votes of the justices, there seems to be little likelihood of any significant movement in that direction. Two of the justices who joined the plurality opinion—Justices Brennan and Stevens—are on record as opposing this approach to intentional deprivations of liberty, by their votes in *Ingraham*.[173] Justices Stevens and Brennan also dissented in *Baker v. McCollan*, which involved a negli-

170. *Id.* at 554-55 (Marshall, J., concurring in part, dissenting in part).

171. *Id.*

172. Logan v. Zimmerman Brush Co., 102 S. Ct. 1426 (1982).

173. 430 U.S. at 700 (Stevens, J., dissenting). Justice Brennan joined Justice White's dissenting opinion in *Ingraham*. *Id.* at 683 (White, J., dissenting).

gent deprivation of liberty.[174] Moreover, Justice Brennan has been one of the staunchest defenders of the section 1983 action.[175] Nor can Justices Blackmun, White, or Marshall be counted on to expand *Parratt* into other areas, since Justice Marshall dissented and Justices Blackmun and White specifically stated in their concurrences in *Parratt* that they would not apply its reasoning to intentional takings of property.[176]

Furthermore, the logic of *Parratt* is quite limited. The alternate remedy provided by Nebraska in this case would truly make Taylor whole. He would have gotten back his loss, $23.50, cent for cent, from the state of Nebraska. He does not need a personal remedy against the prison official that would deter future misconduct. Nor does he need the procedural arsenal of a section 1983 action—punitive damages or a jury trial—to insure future compliance with prison rules.

If we examine further the rationale of section 1983, individual acts of misconduct by state actors that violate both constitutional rights and local tort law should still be cognizable by the civil rights statute. If, for example, a police officer breaks into a person's home without a warrant, he commits both a Fourth Amendment violation and a trespass. If he uses excessive force on an arrestee, he commits a Fourteenth Amendment due process violation and a battery. If a prison guard severely beats and injures an inmate for violating prison rules, he commits an Eighth Amendment violation and a battery. Should the violation be relegated to the state tort remedy in every case? Since the "liberty" concept in the Fourteenth Amendment incorporates the Fourth, Fifth, and Eighth Amendment interests at issue, an argument could be made that the due process clause of the Fourteenth Amendment, on which section 1983 is based, is satisfied by the existence of alternative state remedies. It is only when the remedy is not available in practice that section 1983 comes into play. This argument, as noted above, has been eagerly embraced by state and local attorneys general defending section 1983 cases since *Parratt* was decided.[177]

Nevertheless, this argument overlooks the true basis for section 1983 actions: to serve as a watchdog over abuses of power by state and local officers. The interests protected by the Constitution and by local tort law are different in kind and degree. Justice Brennan explained in

174. 443 U.S. at 149 (Stevens, J., dissenting).

175. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498 (1977).

176. *See* text accompanying notes 169 & 171 *supra*. *See also* Tarkowski v. Hoogasian, 532 F. Supp. 791 (N.D. Ill. 1982) (*Parratt* does not apply to intentional taking of property by state attorney and agents).

177. *See* notes 16-18 and accompanying text *supra*.

Bivens that there was a difference between common law trespass (or assault) by a federal law enforcement officer and a constitutional violation: "[P]ower once granted does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own."[178] The same would be true of state officers. Any law enforcement officer acting unconstitutionally necessarily possesses greater capacity for injury to a citizen than does a trespasser (or private assaulter). The officer is not only physically armed but, more importantly, he is armed with the full power and authority of the state. Furthermore, the interests protected by the Constitution and state tort law "may be inconsistent or even hostile."[179] Although a private trespasser may be resisted by force, no citizen is entitled to resist the execution of a search warrant or forcibly to resist an officer doing his duty.

Justice Harlan explained this issue in greater detail in his concurring opinion in *Monroe v. Pape*, the first case discussing the relationship between section 1983 and common law torts. He examined the issue of whether or not the Congress that enacted section 1983 "regarded actions by an official, made possible by his position, as far more serious than an ordinary state tort, and therefore as a matter of federal concern."[180] He concluded it did. "[T]he tone [of the legislative history] is surely one of overflowing protection of constitutional rights, and there is not a hint of concern about the administrative burden on the Supreme Court. . . ."[181] He then noted the difference in damage remedies between a section 1983 action and local tort law.

> There will be many cases in which the relief provided by the state to the victim of a use of state power which the state either did not or could not constitutionally authorize will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right. I will venture only a few examples. There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools? Even the remedy for such an unauthorized search and seizure as Monroe was allegedly subjected to may be only the nominal amount of damages to physical property allowable in an action for trespass to land. It would indeed be the purest coincidence if the state remedies for violations of

178. *Bivens*, 403 U.S. at 392.
179. *Id.* at 394.
180. Monroe v. Pape, 365 U.S. at 193 (Harlan, J., concurring).
181. *Id.* at 196.

> common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.[182]

Finally, Justice Harlan argued that section 1985,[183] which unquestionably established a federal remedy for conspiracies to deprive a person of equal protection of the laws—certainly not covered by local tort law—was passed by the same Congress that passed section 1983. Congress must have had a similar purpose in mind for due process violations covered by section 1983. Justice Harlan explained:

> If the same Congress which passed what is now § 1983 also provided remedies against two or more non-officials who conspire to prevent an official from granting equal protection of the laws, then it would seem almost untenable to insist that this Congress would have hesitated, on the grounds of lack of full state approval of the official's act, to provide similar remedies against an official who, unauthorized, denied that equal protection of the laws on his own initiative.[184]

Behind these arguments of Justices Brennan and Harlan is the awareness that section 1983 defines the constitutional requirements—it is a watchdog on abuses of power by state officers. Successful suits brought under section 1983 teach state officers what the Constitution demands of them. It would defeat the purpose of the Congress that passed the law to relegate victims of official abuse to state courts. The Congress that passed what is now section 1983 demanded a mechanism by which state officers could be called to account if they violated the Constitution. They were not satisfied with the vagaries of state tort law, which protected different interests at times and gave different remedies. Violation of a constitutional right is more serious than violation of a common law right. An assault or trespass by a police officer who cannot legally be resisted and who acts with the full power of the state behind him is different than an assault or trespass by a neighbor. The common law remedies later available to a victim of a police officer's assault do not supply due process because they do not protect the same interests as section 1983 and do not measure the same violations. To say that the Constitution no longer has a role to play if state officers beat up a citizen or invade her home is to turn history on its head.

Furthermore, the mechanism by which constitutional rights are protected in section 1983 cases is different from those involving state tort actions. Professor Neuborne has argued persuasively that in prac-

182. *Id.* at 196 n.5.

183. 42 U.S.C. § 1985 (Supp. III 1979).

184. *Monroe*, 365 U.S. at 199 (citation omitted).

tice there is no parity between federal forums and state courts protecting constitutional rights.[185] He notes that federal judges are more competent technically to determine difficult constitutional issues and are more attuned to Supreme Court decisions protecting constitutional rights than are state court judges.[186] Federal judges are also more distant from the daily application of state criminal law and do not have to pass on disorderly conduct charges flowing from a political demonstration.[187] Thus, federal judges may view the constitutional issues with more perspective and concern; federal judges are less subject to immediate political and majoritarian pressures.[188] Moreover, many state judges are reelected or reappointed from time to time; thus, it may be difficult for them to find that a police chief or sheriff from the same jurisdiction engaged in excessive force, false imprisonment, or assault in a disputed arrest situation, especially if the state judge is soon to face an upcoming election. Federal judges would not face the same problem in a section 1983 case.

On the other hand, Christina Whitman has argued in her article, *Constitutional Torts*,[189] that there is a serious cost in allowing federal courts in section 1983 actions to be the chief, if not exclusive, guardians of citizens in their encounters with state officers. She claims that if the states are no longer viewed as the "primary guardians" of an individual's person and property, they will lose the capacity or interest to be so. They will (if they can) avoid deciding issues of individual rights and defer to the federal courts whenever possible, leading to some kind of constitutional atrophy in state courts.[190] Furthermore, state courts should be more involved in setting standards for their own officers, rather than giving that function to federal judges.[191] She also claims that common law tort solutions are "more democratic, more responsive to the demands of the whole community."[192] Constitutional adjudications by federal courts in section 1983 cases are more inflexible and cannot easily be changed. Finally, state courts have much to contribute substantively to legal theory by developing new common law torts such as the right to privacy.[193]

185. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).
186. *Id.* at 1121, 1124.
187. *Id.* at 1125.
188. *Id.* at 1127-28.
189. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980).
190. *Id.* at 35.
191. *Id.* at 36.
192. *Id.* at 38.
193. *Id.* at 39.

Professor Whitman's argument fails to take into account the simple fact that "undemocratic federal judges" distant from the state political process are the chief protectors of minority rights against the majoritarian pressures of the state legal system. It is no accident that section 1983 suits are often brought by minority group members, dissidents, prisoners, and school children who lack political power to correct abuses against them by state officials. The majority in the community often are not sympathetic to assertions of rights by these groups. To relegate them to common law remedies in the state courts is to put them at the mercy of the majoritarian pressures that may have led to their complaints. State judges do heed the majority voice in their communities, but the Constitution requires protection of those who displease the majority and the state officers who act on the majority's behalf.

The state attorneys general are attempting to push *Parratt* to its furthest extreme in an effort to eliminate section 1983 cases brought in what they perceive to be unfriendly federal forums. For instance, in a recent Fifth Circuit case, *Duncan v. Poythress*,[194] the state attorney general argued that the existence in the state court system of mandamus to compel the governor to obey the state law precluded a section 1983 action. Apparently, the state thought it irrelevant that the acts of the governor violated substantive First Amendment rights of various voters. Even more outrageous is the claim of the Colorado Attorney General, in another case pending in the Supreme Court, *O'Dell v. Espinoza*,[195] that allegations of police brutality leading to the death of a subdued suspect must be handled as a wrongful death action in the state courts, even though there are damage limitations in such an action. This approach is precisely the one condemned by Justice Harlan in his opinion in *Monroe*. The interests protected by the wrongful death statute are completely different from those protected by the due process clause. If any state officer needs instruction in what the due process clause demands, it is a police officer alleged to have killed a suspect lying on the ground. Such an incident cannot be handled in the same way as an automobile accident involving a private person.

Conclusion

It would be a constitutional scandal of the highest order if the *Parratt* case were used to turn the clock back, not before 1961 when

194. 657 F.2d 691 (5th Cir. 1981), *cert. granted*, 102 S. Ct. 1426 (1982).
195. 633 P.2d 455 (1981), *cert. granted*, 102 S. Ct. 969 (1981).

Monroe was decided, but before 1871 when section 1983 was passed. Even then it was perceived that the Constitution, enforced by federal courts, must illuminate the dark and dangerous shadows cast when official action has injured a citizen's rights. Section 1983 has served an honored role in our fight for justice for over 100 years, and its continued force should not be undercut by a strained reading of the *Parratt* case.