The Actionability Under Section 1983 of a Negligent Deprivation of a Liberty Interest in Light of Daniels and Davidson

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COMMENT


INTRODUCTION

On occasion, an official acting under color of state law deprives an individual of a liberty interest without due pro-

1. Officials include, but are not limited to, police officers, deputy sheriffs, school boards, teachers and prison officials.

2. For a plaintiff to state a section 1983 cause of action, the deprivation of a constitutional right must have been caused by state action. This requirement comes from two sources: 1) 42 U.S.C. section 1983, which has as one of its elements acting "under color of state law," and 2) the state action language of the fourteenth amendment. See S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, A GUIDE TO § 1983 38 (1979).

3. This Comment is limited only to deprivations of liberty. To precisely define a "liberty" interest is rather difficult, but it is this concept that is the primary limitation on the states with respect to individual rights. N. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 533 (1983) [hereinafter cited as NOWAK]; see generally Monaghan, Of Liberty and Property, 62 CORNELL L. REV. 405 (1977). Judicial interpretation has given the word "liberty" a very expansive definition, so much so that it has been said that it embraces every form and aspect of individual rights that are not necessarily taken away by some valid law for the common good. 16A AM. JUR. 2D Constitutional Law § 553 (1979) (citing Wright v. Hart, 182 N.Y. 330, 75 N.E. 404 (1905), overruled, Klein v. Maraveas, 219 N.Y. 383, 114 N.E. 809 (1916)); see also National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) ("Great concepts like . . . liberty . . . were purposely left to gather meaning from experience.”).

In Meyer v. Nebraska, 262 U.S. 390, 399 (1923), the Court offered this discussion of "liberty":

While this court has not attempted to define with exactness the liberty . . . guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness.

Thus, "liberty" which is protected by the due process clause does not merely denote an individual's freedom from physical or bodily restraint, but also includes liberty of the
cess of law, in violation of the fourteenth amendment of the United States Constitution. To redress such a deprivation, one may commence an action under 42 United States Code section 1983. This statute was enacted by Congress to protect certain rights "secured by the constitution and laws" mind as well as liberty of action. Palko v. Connecticut, 302 U.S. 319 (1937), overruled on other grounds, Benton v. Maryland, 395 U.S. 784, 793 (1969).

Prior to Daniels v. Williams, 106 S. Ct. 662 (1986) and Davidson v. Cannon, 106 S. Ct. 668 (1986), it was thought that negligence could implicate a person's liberty interest. The court of appeals in Daniels held that bodily injury resulting from a state official's negligence deprives a person of a liberty interest protected by the fourteenth amendment. Daniels v. Williams, 720 F.2d 792, 795 (4th Cir. 1983), aff'd, 106 S. Ct. 662 (1986).

A further attempt at explaining "liberty" was made by the Court in Board of Regents v. Roth, 408 U.S. 564 (1972). In that case, the Court broadly defined "liberty" as not only freedom from bodily restraint, but also, freedom "to enjoy those privileges long recognized . . . as essential to orderly pursuit of happiness by free men." Id. at 572.

Historically, "liberty" includes the right to be free from "unjustified intrusions on personal security." Ingraham v. Wright, 430 U.S. 651, 673 (1977).

In Ingraham, children claimed that they were deprived of liberty without due process of law. They claimed that they had been spanked without due process or some type of hearing. The Court agreed that corporal punishment, in the form of a spanking, implicated students' interest in liberty, but held that prior notice and a hearing were not necessary if later post-deprivation remedies were adequate. There is no indication that the Court decided this way because it felt that educators needed to maintain discipline in the schools. Id. at 672-76.

In the police misconduct context, the police usually infringe on an individual's liberty interest by restraining and/or inflicting harm on that person. Although the Court in Ingraham suggested that there is a de minimis level of imposition with which the Constitution is not concerned, "liberty" interests are otherwise implicated whenever state authorities bodily restrain or punish an individual. Id. at 674. It is, therefore, possible that bodily injuries resulting from a police officer's negligence could deprive a person of a liberty interest. However, a deprivation of a liberty interest alone is insufficient to afford protection under the fourteenth amendment. To have a fourteenth amendment violation, one has to be deprived of a liberty interest without due process of law. Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

4. The fourteenth amendment's due process clause reads: "[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.


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

Id. [hereinafter 42 U.S.C. § 1983 shall be referred to as section 1983].
against infringement by the states. Under the proper facts, section 1983 can be used to provide the plaintiff with a number of very significant advantages vis-a-vis police departments, municipalities and "others acting under color of state law."  

Usually, a deprivation of a liberty interest without due process occurs as a result of an intentional act. In some instances, however, a negligent act could result in a deprivation of a fourteenth amendment liberty interest. Prior to the United States Supreme Court case of Parratt v. Taylor, the question of whether negligence was actionable under section 1983 had been an issue of much debate in the lower federal courts. Although Parratt settled the controversy to some extent by stating that negligence was actionable, it raised new discord by holding that if there was an available state tort remedy, then a negligent deprivation of a property interest would not be actionable under section 1983. In other words, the Court in Parratt used a due process analysis to preclude

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6. S. Nahmod, supra note 2, at 2. This work is highly recommended for any person involved in section 1983 litigation.


9. See supra note 2. The term "acting under color of state law" has caused numerous interpretational problems which are beyond the scope of this Comment.

10. RESTATEMENT (SECOND) OF TORTS § 282 (1965) provides the following definition: "In the Restatement of this Subject, negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregarding of an interest of others." See generally W. Prosser & W. Keeton, LAW OF TORTS §§ 29-34 (5th ed. 1984).

11. See infra note 175 and accompanying text.

12. 451 U.S. 527 (1981); see infra notes 56-65 and accompanying text.

13. See infra notes 40-50 and accompanying text.

14. See infra notes 73-75 and accompanying text.
plaintiffs from seeking redress under section 1983 for the negligent deprivation of a property interest.

Recently, the Court in Daniels v. Williams and Davidson v. Cannon set aside the Parratt analysis with respect to negligence and held that negligent acts of state officials are not due process violations. The Court in Daniels and Davidson overruled Parratt to the extent that the mere lack of due care by a state official may no longer "deprive" an individual of life, liberty, or property under the fourteenth amendment. Presumably, however, the Parratt analysis still survives for non-negligent acts.

After Parratt and prior to Daniels and Davidson, the Supreme Court and a number of lower courts expanded the scope of the Parratt analysis. The Court in Hudson v. Palmer extended the Parratt analysis to include intentional deprivations of property. Further, the Parratt analysis was extended to include negligent and intentional deprivations of liberty. By doing so, those courts effectively precluded plaintiffs from seeking redress in the federal courts under section 1983 for liberty deprivations whenever a state action sounding in tort existed. This phenomenon should be examined in light of the Court’s decisions in Daniels and Davidson.

The scope of this Comment is limited to the issue of whether a negligent deprivation of a liberty interest is actionable under section 1983. Because of the complexity of this issue, a brief history of section 1983 is necessary. Part I deals with a history of section 1983, focusing primarily on negligent conduct. Further, Part I looks at the Parratt decision. Part II examines the Daniels and Davidson decisions. Part III explains the two types of due process — substantive due process and procedural due process and discusses the effect of Parratt,

18. Hudson v. Palmer, 104 S. Ct. 3194, 3204 (1984), the Court extended the analysis to include an intentional deprivation of property. Thus, the availability of a state tort remedy providing for recovery in intentional deprivation of property cases precludes recovery under section 1983.
19. See infra note 79 and accompanying text; see, e.g., Thibodeaux v. Bordelon, 740 F.2d 329, 337-38 (5th Cir. 1984).
Daniels and Davidson on both of these types of due process. Finally, Part IV offers an analysis and recommendation concerning why a negligently deprived liberty interest which rises to a substantive due process violation should be considered a constitutional violation and therefore actionable under section 1983. With respect to procedural due process violations of a liberty interest, this Comment proposes that gross negligence be the minimum degree of culpability required to maintain an action under section 1983.

I. BRIEF HISTORY OF SECTION 1983 AND ITS APPLICATION TO NEGLIGENT ACTS

A. Legislative History

In the South after the Civil War, atrocities committed against white republicans and blacks were numerous and widespread. A number of groups were responsible, the Ku Klux Klan being the most notable among them. As a result, President Grant sent a message to the 42nd Congress requesting the enactment of legislation to curb this deplorable state of affairs. Congress responded by passing the Civil Rights Act


23. The message of March 23, 1871, stated:

A condition of affairs now exists in some States of the Union rendering life and property insecure . . . . That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.

See Globe, supra note 21, at 244.
Section 1 was commonly referred to as the Ku Klux Klan Act. The primary purpose of the Act was to en-

24. A notable proponent of the legislation was Representative Samuel Shellaburger, a Republican from Ohio, who chaired a select committee which received President Grant's message of March 23, 1871. Rep. Shellaburger stated that there could be no doubt of the right of Congress to enact the proposed legislation:

And how can there be a doubt about a question like that? To say in our Constitution that all our people in the States shall be United States citizens, and also citizens of the States; to add this as a curative, new and additional part of the instrument, and in it to say that State laws shall not be made or enforced to abridge the rights or not be made or enforced to abridge these rights of United States citizens nor the States deny protection of these rights under law, and that Congress may enforce these provisions securing these rights, and then to say that Congress can do no such thing as make any law so enforcing these rights, nor open the United States courts to enforce any such laws, but must leave all the protection and law-making to the very States which are denying the protection, is plainly and grossly absurd.

GLOBE, supra note 21, at app. 68.

There was also vociferous opposition to the bill. Representative Michael Kerr of Indiana was one of the most staunch opponents. His criticism is as follows:

This section gives to any person who may have been injured in any of his rights, privileges, or immunities of person or property, a civil action for damages against the wrongdoer in the Federal courts. The offense committed against him may be the common violations of the municipal law of his State. It may give rise to numerous vexatious and outrageous prosecutions, inspired by mere mercenary considerations, prosecuted in a spirit of plunder, aided by the crimes of perjury and subornation of perjury, more reckless and dangerous to society than the alleged offenses out of which the cause of action may have arisen. It is a covert attempt to transfer another large portion of jurisdiction from the State tribunals, to which it of right belongs, to those of the United States. It is neither authorized nor expedient, and is not calculated to bring peace, or order, or domestic content or prosperity to the disturbed society of the South. The contrary will certainly be its effect.

GLOBE, supra note 21, at app. 50; see also Cook, supra note 21 at 1-318.

25. The Act states:

Forty-Second Congress, Sess. I Ch. 22, 1871.

Chps. XXII

An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for Other Purposes

Be it enacted by the Senate and House of representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, customs, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appearance, review upon error, and other remedies provided in like cases in such courts, under the
force the fourteenth amendment through the imposition of civil liability.\textsuperscript{26} Although one target of the Act was the Ku Klux Klan, its principle focus was against those who represented the state in some capacity and who were unable or refused to enforce state laws.\textsuperscript{27}

With respect to the level of culpability required, no standards were set forth in the Act.\textsuperscript{28} From the speeches of the legislators, there is some indication that the Civil Rights Act of 1871 provided a remedy for negligent as well as intentional deprivations of constitutional liberties.\textsuperscript{29} The legislative history demonstrates that the Civil Rights Act of 1871 was intended to be a far-reaching remedy which was designed to

provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication'; and the other remedial laws of the United States which are in their nature applicable in such cases.


\textsuperscript{26} See Actionability of Negligence, supra note 21, at 537; see also Monroe, 365 U.S. at 173-74. The Supreme Court in Monroe elucidated three purposes of the Ku Klux Klan Act. The first purpose was to "override certain kinds of state laws." Second, it was to provide a remedy where a state law was inadequate. The third aim, which was much broader, was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. Id.

\textsuperscript{27} Monroe, 365 U.S. at 175-76; Actionability of Negligence, supra note 21, at 540.

\textsuperscript{28} Actionability of Negligence, supra note 21, at 540-41.

\textsuperscript{29} Id. at 543. Representative Arthur noted that law enforcement officials could be held liable "for a mere error in judgment," although they were "as pure in duty as a saint and seraph." GLOBE, supra note 21, at 365. Further, Senator Thurman, one of the most vociferous opponents of the bill, cautioned:

It authorizes any person who is deprived of any rights, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts.

\textit{Id.} at 216 (emphasis added).

In Monroe v. Pape, 365 U.S. 167 (1960), Justice Douglas stated, after an exhaustive study of the legislative history:

It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts, because, by reason of prejudice, passion, \textit{neglect}, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

\textit{Id}. at 180 (emphasis added).
encompass acts or omissions resulting in constitutional deprivations, including negligent acts.\textsuperscript{30} However, in the years after the enactment of the statute, the Supreme Court was quick to limit the application of the Act.\textsuperscript{31} Eventually, the Court\textsuperscript{32} excluded civil rights cases from actionability under the Civil Rights Act of 1871.\textsuperscript{33} As a result, the statute lay dormant for nearly ninety years.

\textbf{B. Section 1983 and the Actionability of Negligence \nPrior to Parratt} 

In 1961, a new breath of life was given to section 1983.\textsuperscript{34} In \textit{Monroe v. Pape},\textsuperscript{35} the Supreme Court held that Congress had intended in 1871 to create a remedy for persons deprived of their constitutional rights by an official's abuse of power.\textsuperscript{36}

\begin{footnotesize}
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\item Actionability of Negligence, supra note 21, at 544.
\item See, e.g., \textit{Slaughter-House Cases}, 83 U.S. (16 Wall.) 36 (1873).
\item Note, \textit{supra} note 31, at 1157; \textit{cf.} Lane v. Wilson, 307 U.S. 268 (1939). Plaintiffs seeking redress under section 1983 were sometimes successful; however, these cases were limited to vindicating the deprivation of voting rights. \textit{See also} Barnier \textit{v. Szentmiklosi}, 565 F. Supp. 869, 872 (E.D. Mich. 1983).
\item 365 U.S. 167 (1961), overruled on other grounds, Monell \textit{v. New York City Dep't of Social Servs.}, 658 U.S. 663 (1977). The facts of \textit{Monroe v. Pape} are as follows: The petitioners, a black family of eight people, were sleeping in their house when 13 City of Chicago police officers broke into the home without any warrant for search or arrest. The police officers routed the family from bed and made them stand naked in the living room. While the family was standing naked, the police officers ransacked every room, emptying drawers and ripping mattress covers. Then the father was taken to the police station and detained on "open" charges for 10 hours while he was interrogated about a murder that occurred two days earlier. During this 10-hour period, the father was not taken before a magistrate, though one was available. Furthermore, he was not permitted to call his family or his attorney. Finally, he was released without any criminal charges being filed against him.

The father and his family brought an action against the Chicago Police Department claiming that the invasion of their home and the detention of the father without a warrant constituted a deprivation of their civil rights. \textit{Id.} at 168-70. "The City of Chicago moved to dismiss the complaint on the ground that it was not liable under the Civil Rights Act nor for acts committed in performance of its governmental function." \textit{Id.} at 170.

The Court ruled that the officials who perpetrated the deprivation could be liable under section 1983; however, the Court held that Congress did not intend to bring municipal corporations within the sphere of section 1983. \textit{Id.} at 187.
\item \textit{Id.} at 172.
\end{enumerate}
\end{footnotesize}
After a thorough study of the legislative history, Justice Douglas indicated that one reason the legislation was passed was to afford a remedy in federal court, without which, due to prejudice, passion, neglect or otherwise, state laws may not be enforced and the enjoyment of rights guaranteed by the fourteenth amendment may be denied.\textsuperscript{37} Furthermore, the Court refused to interpret a specific intent requirement into section 1983.\textsuperscript{38} Indeed, the Court stated that "[section 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."\textsuperscript{39} This language in \textit{Monroe}, implying that negligence could be actionable under section 1983, caused much disagreement in the lower federal courts.\textsuperscript{40}

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37. \textit{Id.} at 180.
38. \textit{Id.} at 187.
39. \textit{Id.} Additionally, the Court rejected the proposition that state remedies must be exhausted before recovery is allowed under section 1983. Specifically, the Court indicated:

It is no answer that the State has a law which if enforced would give relief. 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. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court. \textit{Id.} at 183. It should be noted that this decision was not unanimous; Justice Frankfurter dissented. The thrust of Frankfurter's dissent was that the Court should be careful about applying the Civil Rights Act to dubious new issues. \textit{Id.} at 244.

40. The Circuits that generally hold negligence to be actionable: FIFTH CIRCUIT: Fox v. Sullivan, 539 F.2d 1065, 1065-66 (5th Cir. 1976); Sims v. Adams, 537 F.2d 829, 832 (5th Cir. 1976); Parker v. McKeithen, 488 F.2d 553, 556 (5th Cir.), \textit{cert. denied}, 419 U.S. 838 (1974); Beverly v. Morris, 470 F.2d 1356, 1357 (5th Cir. 1972); Roberts v. Williams, 456 F.2d 819, 826 (5th Cir.), \textit{cert. denied}, 404 U.S. 866 (1971); Whirl v. Kern, 407 F.2d 781, 788 (5th Cir. 1969) ("The Supreme Court's use of the term 'neglect' and the expansive phrase 'or otherwise' appears to us directly contrary to the 'improper motive' requirement."). Such language suggests that a federal forum is no less desirable for the inadvertent than for the malicious violation of constitutionally protected rights.). SIXTH CIRCUIT: Fitzke v. Shappell, 468 F.2d 1072, 1077 (6th Cir. 1972); Puckett v. Cox, 456 F.2d 233, 234 (6th Cir. 1972) ("We believe it is incorrect as a general rule, and misleading in this particular case, to state that the negligent conduct of a person acting under color of state law cannot be the basis for relief under § 1983."). DISTRICT OF COLUMBIA CIRCUIT: Carter v. Carlson, 447 F.2d 358, 365 (D.C. Cir. 1971), \textit{rev'd on other grounds sub nom.} District of Columbia v. Carter, 409 U.S. 418 (1973).

The circuits that generally hold negligence to be actionable but on occasion have held otherwise: SECOND CIRCUIT: Doe v. New York City Dep't of Social Serv., 709 F.2d 782, 786-87 (2d Cir. 1983). \textit{But see} Williams v. Vincent, 508 F.2d 541, 546 (2d Cir. 1974); Holmes v. Goldin, 615 F.2d 83, 85 (2d Cir. 1980). THIRD CIRCUIT: Norton v. McKeon, 444 F. Supp. 384, 387 (E.D. Pa. 1977), \textit{aff'd mem.}, 601 F.2d 575 (3d Cir.)
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A number of arguments were offered by courts and commentators in favor of holding negligent conduct actionable under section 1983. By far, the most prominent argument was


The fourth circuit has on occasion held that section 1983 does not impose any culpability requirement. Once the plaintiff proves his prima facie case, he need not prove any further culpability to prove damages. Withers v. Levine, 615 F.2d 158, 162 (4th Cir.), cert. denied, 449 U.S. 849 (1980); Pritchard v. Perry, 508 F.2d 432, 435 (4th Cir. 1975); Jenkins v. Averett, 424 F.2d 1228, 1232-33 (4th Cir. 1970); Street v. Surdyka, 492 F.2d 368, 373 (4th Cir. 1974); cf. McCray v. Maryland, 456 F.2d 1, 5-6 (4th Cir. 1972) (negligence is redressable under section 1983).

The first circuit has generally held negligence not to be actionable. Page v. Sharpe, 487 F.2d 567, 569 (1st Cir. 1973); cf. Leite v. City of Providence, 463 F. Supp. 585, 589 n.3 (D.R.I. 1978) (first circuit has not specifically addressed the standard of culpability under section 1983).

The seventh circuit has repeatedly held that section 1983 requires at minimum a reckless or intentional act. Stringer v. Rowe, 616 F.2d 993, 1000 (7th Cir. 1980); White v. Rockford, 592 F.2d 381, 385 (7th Cir. 1979); Beard v. Mitchell, 604 F.2d 485, 494 (7th Cir. 1979); Bonner v. Coughlin, 545 F.2d 565, 568-69 (7th Cir. 1976) (en banc), cert. denied, 435 U.S. 932 (1978).


that the language in *Monroe*\(^{41}\) appeared to permit liability founded upon negligence.\(^{42}\) Further, language which stated that section 1983 should be read against the background of tort liability,\(^{43}\) coupled with the fact that the Court rejected the notion that state remedies be exhausted before recovery,\(^{44}\) suggested that negligence was actionable.\(^{45}\) Another argument was that some constitutional provisions could indeed be violated by negligence.\(^{46}\) If the plaintiff were injured as the result of a violation of a constitutional provision by a state officer, then redress of the plaintiff's injuries should not turn on whether the state officer acted negligently or intentionally.\(^{47}\)

The arguments against negligence being actionable under section 1983 were equally compelling. First, some commentators expressed a philosophical concern about the substitution of federal for state law remedies.\(^{48}\) By injecting the federal courts into the arena of local police, municipal, and prison regulation, there would be an upset in the balance of authority between the federal and state governments.\(^{49}\) Further, there

41. See *supra* notes 34-40 and accompanying text.
43. See *supra* note 39 and accompanying text.
44. See *supra* note 39.
47. *Id.*
49. See *Shapo, supra* note 34, at 324. ("The question may be turned around by asking whether it would violate the tenth amendment if Congress passed *Monroe* and its police-tort descendants as a statute. A cogent argument could be made that the punishment of police offenses clearly is reserved to the states.""). But see Note, *Civil Rights — Personal Injury — Intent to Injure Is Not a Prerequisite to Recovery for Police Abuse Under Section 1983*, 23 Vand. L. Rev. 1341, 1345-46 (1970) ("[T]he criticism that section 1983 claims inject the federal courts into essentially local regulatory matters and disrupt the federal-state relationship must be balanced against the legitimate federal interest in protecting the constitutional rights of citizens.").

Offering a different theory on the issue, one commentator has indicated that notions of negligence and intentional conduct confuses the prima facie section 1983 cause of action with the affirmative defense of qualified immunity. *Nahmod, Section 1983 and the "Background" of Tort Liability*, 50 Ind. L.J. 5, 18 n.59 (1974) (concern should be on whether a constitutional duty derived from the fourteenth amendment had been
was a fear that section 1983 would create a body of federal tort law.\textsuperscript{50}

Another argument expressed an administrative concern that the increasingly heavy load imposed on the federal courts by civil rights actions would clog the federal courts with trivial litigation and bring the administration of justice to a standstill.\textsuperscript{51} Still another argument was that allowing recovery for a negligent deprivation of a constitutional right would put to offensive use constitutional principles that developed as defensive safeguards.\textsuperscript{52}

Despite these various theories, concerns and rationales expressed by courts and commentators, the Supreme Court on a number of occasions skirted the question of whether negligence was actionable under section 1983.\textsuperscript{53} It was not until

breached); see also S. Nahmod, Constitutional Accountability in Section 1983 Litigation, 68 IOWA L. REV. 1, 3 n.20 (1982); S. NAHMOD, supra note 2, at § 3.01-.22.

50. See Note, supra note 48, at 274.


A crushing weight of cases—whatever their worth—ultimately denigrates all rights because the judiciary is not capable of sympathetically responding to all the claims. Individual judges, as a matter of self-preservation, may begin to read complaints in a grudging manner and to look for narrow resolutions that avoid the most difficult issues . . . . To save time and to avoid conflict, judges may hesitate to suggest changes in their colleagues' drafts, joining when they agree with the conclusion but not the rationale.

\textit{Id.} at 27.

But see Note, supra note 49, at 1345-46 (although the efficient administration of justice is an important policy concern of the courts, a judicial method of decreasing the volume of section 1983 litigation without affecting the practical availability of a remedy to legitimate claimants does not appear to be available). \textit{Id.} Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 CORNELL L. REV. 482, 484 (1982) ("\textit{[S]ection 1983 cases are not overwhelming the federal courts; trivial claims, involving little if any federal policy, do not dominate district court dockets . . . [but] they are not of a kind that warrant restricting either section 1983 or the Constitution.").

52. Comment, Tort Liability of Law Enforcement Officers Under Section 1983 of the Civil Rights Acts, 30 LA. L. REV. 100, 114-15 (1969); see also Chafee, Safeguarding Fundamental Human Rights: The Tasks of States and Nation, 27 GEOF. WASH. L. REV. 519 (1959). "It is very queer to try to protect human rights in the middle of the Twentieth Century by a left-over from the days of General Grant." \textit{Id.} at 529, cited in Monroe, 365 U.S. at 244. But see Note, supra note 49 at 1345-46 ("[T]he essentially defensive nature of the safeguards is admitted but these safeguards define rights that are occasionally infringed, and section 1983 makes these infringements actionable. As constitutional issues are raised under 1983, it is more desirable to decide them on a case-by-case basis than to attempt to establish any final all-encompassing rule of constitutional fault.").

53. In Paul v. Davis, 424 U.S. 693 (1976), the Court did not specifically address the issue. In dicta, however, Justice Rehnquist did not appear to favor negligent culpability as a basis for recovery under section 1983. "[I]t would be difficult to see why the survi-
Parratt v. Taylor\textsuperscript{54} that the issue was specifically addressed, although in a somewhat summary fashion.\textsuperscript{55}

\section*{C. The Parratt Decision and Its Limiting Effect on Section 1983}

In Parratt v. Taylor,\textsuperscript{56} the respondent, Lawrence Taylor, was an inmate at the Nebraska Penal and Correctional Complex.\textsuperscript{57} He claimed that his property was negligently lost by prison officials in violation of his rights under the fourteenth amendment.\textsuperscript{58} Specifically, he asserted that he had been negligently deprived of property without due process of law.\textsuperscript{59} In a

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\item \textsuperscript{54} 451 U.S. 527 (1981).
\item \textsuperscript{55} \textit{See}, \textit{e.g.}, \textit{Supreme Court Journey, supra} note 21, at 598-99.
\item \textsuperscript{56} \textit{Parratt}, 451 U.S. 527 (1981).
\item \textsuperscript{57} \textit{Id.} at 529.
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} \textit{Id.} Taylor had paid for some hobby materials with two drafts drawn on his inmate account. The materials were worth approximately $24. Soon thereafter, the packages arrived at the prison where they were signed for by two employees who worked in the prison hobby center. Taylor was in segregation at the time the materials arrived so he was not permitted to receive them. The standard operating procedure at
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brief treatment of the issue, the Court said that the fact that a constitutional wrong was negligently committed did not preclude the possibility of sustaining an action under section 1983. Citing Baker and Monroe, the Court then stated that "section 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." The Court went on to indicate that the focus must be on whether the two essential elements of a section 1983 cause of 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." Thus, if the constitutional deprivation was caused by negligence, it would be actionable under section 1983. Then the Court used a due process analysis to limit the actionability under section 1983 of a negligent deprivation of a property interest. To understand why the Court limited section 1983 in this manner, one must understand the background prior to Parratt.

In the years prior to Parratt, the Court was concerned that a literal meaning of the Monroe decision would make section 1983 a "font of tort law." As a result, the Court in Parratt began to search for a method to limit the scope of section

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the prison for the handling of mail parcels is that upon arrival they are delivered to the prisoner who signs for them and then goes to pick them up. Only the inmate to whom the parcel is addressed may sign for it. Upon his release from segregation, Taylor went to see various prison officials regarding the whereabouts of his parcels. No one was ever able to find the packages or determine what caused their disappearance.

As a result, Taylor commenced an action against the warden and hobby manager. He sought the recovery of the materials which had been deprived from him on account of the negligence of the petitioners. Id. at 530.

An interesting behind-the-scenes look at Parratt giving details of the state's strategy can be found in Friedman, Parratt v. Taylor: Opening and Closing the Door on Section 1983, 9 HASTINGS CONST. L.Q. 545, 554-67 (1982).

60. See Supreme Court Journey, supra note 21, at 596.
61. Parratt, 451 U.S. at 534.
64. Parratt, 451 U.S. at 535.
65. Id.
66. See Supreme Court Journey, supra note 21, at 591-92 (citing Paul v. Davis, 424 U.S. 693, 701 (1976)); see also supra note 53 and accompanying text.
1983. After the Court concluded that negligence could be actionable, it next examined whether Taylor had suffered an unconstitutional deprivation of property without due process of law. The Court found that although Taylor had been negligently deprived of property, there had been no violation of the fourteenth amendment. The fourteenth amendment protects only against deprivations "without due process of law." The Court reasoned that while Taylor had been deprived of his property, he was not deprived of due process since Nebraska provided a tort remedy granting him a post-deprivation hearing. In other words, although Taylor was deprived of his property, he had not been denied due process. Thus, Parratt limited section 1983 by requiring a plaintiff who has been negligently deprived of a property interest to seek a remedy in the state courts under state tort principles, as opposed to in the federal courts under section 1983.

67. See Supreme Court Journey, supra note 21, at 591-92.
68. Parratt, 451 U.S. at 536-37.
69. Id.
70. Id. at 538-44. "The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process." Id. at 544.
71. This is consistent with Justice Rehnquist's "caveat" in Paul, Procunier and Baker concerning negligent deprivations of constitutional rights under section 1983. Once again in Parratt, Justice Rehnquist voiced his concern:

Our decision today is fully consistent with our prior cases. To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.' Paul v. Davis, 424 U.S. at 701 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

72. A noted commentator has defined the principle of Parratt as follows: "Parratt simply requires an examination of state remedies to see whether or not they are ade-
The implication of this decision caused concern among commentators. The concern was that Parratt would be used to preclude a section 1983 claim where there was a negligent deprivation of a liberty interest. This concern has finally become a reality. In addition to some lower courts applying the Parratt analysis to preclude negligently deprived liberty interests from being actionable

quate to compensate a victim where negligent losses of property are alleged." Friedman, supra note 59, at 547 (emphasis in original).

73. See Friedman, supra note 59, at 546.

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, 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. Id. at 546. See also Blum, The Implications of Parratt v. Taylor for Section 1983 Litigation, 16 URB. LAW. 363, 369 (1984); Note, supra note 45, at 219.

74. See Friedman, supra note 59, at 547 ("If the principle [of Parratt] is to extend further — to . . . negligent invasions of liberty interests, — then section 1983 would be stripped of much of its force."); see also Blum, supra note 73, at 369; Note, supra note 45, at 219.

Recently in Hudson v. Palmer, 104 S. Ct. 3194 (1984), the Court extended the Parratt analysis to intentional deprivations of property. "While Parratt is necessarily limited by its facts to negligent deprivations of property, it is evident, as the Court of Appeals recognized, that its reasoning applies as well to intentional deprivations of property." Id. at 3203.

Further, Justice Blackmun, in his concurrence in Parratt, did not seem to sooth the anxiety of the commentators. Justice Blackmun questioned the Court's opinion with respect to the availability of a subsequent state tort remedy satisfying the due process clause of the fourteenth amendment.

Most importantly, I do not understand the Court to suggest that the provision of 'postdeprivation remedies,' ante, at 538, within a state system would cure the unconstitutional nature of a state official's intentional act that deprives a person of property. 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,' ante, at 541, 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. See Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). In the majority of such cases, the failure to provide adequate process prior to inflicting the harm would violate the Due Process Clause. The mere availability of a subsequent tort remedy before tribunals of the same authority that, through its employees, deliberately inflicted the harm complained of, might well not provide the due process of which the Fourteenth Amendment speaks.

Parratt, 451 U.S. at 545-46 (Blackmun, J., concurring).
under section 1983, \(^{75}\) the Supreme Court in *Daniels* and *Davidson* went even further and held that negligence does not result in a violation of the due process clause. \(^ {76}\) The result is that a negligent deprivation of a liberty interest or any other constitutionally protected interest is not actionable under section 1983.

Prior to *Daniels* and *Davidson*, two interpretations had developed in the lower federal courts with respect to *Parratt* — the narrow interpretation and the broad interpretation. The narrow interpretation of *Parratt* was that *Parratt* encompassed only deprivations of property interests. \(^ {77}\) Therefore, negligent and intentional deprivations of liberty and life were actionable under section 1983. \(^ {78}\) A broad interpretation of *Parratt* encompassed negligent deprivations of life, liberty and property interests. As a result, negligent deprivations of lib-

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75. See infra note 79 and accompanying text.
76. *Daniels*, 106 S. Ct. at 664; *Davidson*, 106 S. Ct. at 670.
77. See *Hudson*, 104 S. Ct. at 3203 (*Parratt* extends to intentional property deprivations).
78. Comment, *Due Process and Section 1983: Limiting Parratt v. Taylor to Negligent Conduct*, 71 CALIF. L. REV. 253, 254. Cases which have adopted a narrow reading of *Parratt*: Wilson v. Beebe, 743 F.2d 342, 348 (6th Cir. 1984), vacated, 770 F.2d 578 (6th Cir. 1983) (en banc) (“Wilson asserts that *Parratt* applies only to negligent deprivations of property which involve ‘a random and unauthorized act by a state employee . . . and that *Parratt* has no application where a negligent deprivation of a life or liberty interest has been alleged. [The court] agreed.’”); Howard v. Fortenberry, 723 F.2d 1206, 1209 n.6 (5th Cir.), vacated in part, 728 F.2d 712 (5th Cir. 1984) (citing *Parratt*, 451 U.S. at 535) (“No particular state of mind is required to state a cause of action under § 1983 for violation of Fourteenth Amendment rights; negligence will suffice . . . . The defendants do not argue that *Parratt* defeats the plaintiff’s claim for deprivations of life and liberty because of the existence of an adequate post-deprivation remedy.”); Vail v. Board of Educ., 706 F.2d 1435, 1441 (7th Cir. 1983), aff’d, 104 S. Ct. 2144 (1984) (“The Supreme Court had the opportunity, but refused to expand *Parratt* beyond ‘a tortious loss of property or result of a random and unauthorized act by a state employee’ ”); see also Brewer v. Blackwell, 692 F.2d 387, 395 (5th Cir. 1982) (“[W]e decline to give *Parratt* the sweeping interpretation required to encompass the intentional deprivation of liberty involved in this case.”); Hirst v. Gertzen, 676 F.2d 1252, 1263 (9th Cir. 1982) (negligent deprivation of life actionable under section 1983); Elam v. Montgomery County, 573 F. Supp. 797, 803 (S.D. Ohio 1983) (“*Parratt* does not stand for the proposition that the existence of any post deprivation remedies satisfies due process of law under the Fourteenth Amendment for deprivation of a liberty interest, or of a substantive constitutional right.”) (emphasis in original); Howse v. De Berry Correctional Inst., 537 F. Supp. 1177, 1178 (M.D. Tenn. 1982) (“[P]laintiff’s claim in this case involves an alleged intentional deprivation of a liberty interest. This Court does not believe that the Supreme Court intended the rationale of *Parratt* to extend beyond facts basically similar to those in that case — that is, when only a negligent deprivation of property is involved.”) (emphasis in original).
erty and life were not actionable under section 1983 because the state court systems provide a due process remedy for those deprivations. In Daniels and Davidson, the Court agreed with the broad interpretation of Parratt to the extent that negligence was not actionable under section 1983. However, the Court in Daniels and Davidson expanded the broad interpretation by holding that negligent conduct does not violate the due process clause.

II. THE DANIELS AND DAVIDSON DECISIONS

Roy Daniels was an inmate at the city jail in Richmond, Virginia. While in jail, he slipped on a pillow that had been negligently left on the stairs by Andrew Williams, a correctional deputy assigned to the jail. Daniels alleged that Williams' negligence deprived him of his liberty interest in being

free from bodily injury. 82 Daniels tried to circumvent the Parratt analysis by asserting that because Williams was entitled to the defense of sovereign immunity in a state tort suit, Daniels was without an adequate state tort remedy. 83 Consequently, Daniels maintained that the deprivation of liberty was without due process. 84

In a somewhat summary fashion, the Supreme Court held that negligence by a state official does not deprive an individual of life, liberty or property under the fourteenth amendment: 85

We conclude that the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property . . . . We think that the actions of prison custodians in leaving a pillow on the prison stairs, or mislaying an inmate’s property, are quite remote from the concerns just discussed. Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. 86

The Court’s rationale was the same as that expressed in earlier cases 87 namely the fear of making the fourteenth amendment “a font of tort law.” 88 Further, the majority felt that to hold that an injury caused by negligence is a deprivation within the meaning of the fourteenth amendment would trivialize due process law. 89

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82. Id.
83. Id.
84. Id. at 664.
85. Id. at 665.
86. Id. at 664-65.
87. Id. at 665-66; see also Paul v. Davis, 424 U.S. 693, 701 (1976); see supra notes 53 and 71 and accompanying text.
89. Id. at 665. It is interesting to note Judge Keith’s response to these remarks about “font of tort law” and “trivialities of the courts” in his dissent in Wilson III, 770 F.2d at 593:

I would like to offer a few comments about Section 1983 actions. For some time now concerns have been expressed throughout the federal courts about Section 1983 actions transforming the fourteenth amendment into “a font of tort law to be superimposed upon whatever system may already be administered by the States” or the frivolous case “trivializing the right of action provided in § 1983.” E.g., Parratt v. Taylor, 451 U.S. at 544, 101 S. Ct. at 1917 (quoting Paul v. Davis, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160, 47 L.Ed.2d 405 (1976)); 451 U.S. at 549, 101 S. Ct. at 1920 (Powell, J., concurring). Notwithstanding these sincere concerns, it strikes me that it has long been settled that “Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a
Apparently the Supreme Court believed that its due process analysis in *Parratt* was not limiting the number of section 1983 claims as was originally intended. As a result, the Court in *Daniels* took a more drastic approach by stating that negligence does not implicate a fourteenth amendment due process deprivation at all.

The companion case to *Daniels* was *Davidson v. Cannon*. In *Davidson*, the Court addressed the same issue as in *Daniels*. Davidson was an inmate at the New Jersey State Prison at Leesburg. He brought a section 1983 action against prison officials for injuries he sustained when they negligently failed to protect him from another inmate. Davidson alleged that he was deprived of his liberty interest in personal security. The Supreme Court, finding *Daniels* controlling, affirmed the Court of Appeals for the Third Circuit, which had held that Cannon's negligence did not amount to a deprivation of a liberty interest within the meaning of the due process clause.

The Supreme Court stated:

> The guarantee of due process has never been understood to mean that the state must guarantee due care on the part of

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91. *Id.* at 669.
92. *Id.* at 669-70.
93. *Id.*
its officials .... As we held in Daniels, the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials.96

In Daniels, the majority did not distinguish between the three types of due process.97 Presumably, since the facts in Daniels involved only a procedural due process claim, the Davidson decision should only apply to procedural due process. However, the sentence in Davidson quoted above, which also refers to substantive due process, raises grave concerns. The majority opinion in Daniels does not mention substantive due process specifically, but Davidson mentions it by referring to Daniels. The question becomes one of discerning to which types of due process the Daniels and Davidson decisions apply—procedural, substantive or both.98 To fully understand the implication of these decisions and how they relate to the negligent deprivation of a liberty interest, one must appreciate the difference between substantive due process and procedural due process.

III. DUE PROCESS DISTINCTION

The due process protection of the fourteenth amendment has three aspects.99 First, it incorporates specific protections found in the first ten amendments to the Constitution.100 Second, the fourteenth amendment contains what is referred to as “substantive due process.”101 Third, the fourteenth amendment also has a procedural due process aspect.102 This Comment shall explain the last two aspects of due process—substantive and procedural—and their implication to Parratt, Daniels and Davidson.

96. Id. at 670-71.
97. However, Justice Stevens in his concurring opinion enumerates the three different types of due process and explains each. 106 S. Ct. at 677-78 (Stevens, J., concurring). See infra notes 99-101, 166-68 and accompanying text.
98. See infra notes 164 & 171-72 and accompanying text.
99. Daniels, 106 S. Ct. at 677-81 (Stevens, J., concurring); see also S. Nahmod, supra note 2, at § 3.08.
100. Daniels, 106 S. Ct. at 677 (Stevens, J., concurring).
101. Id. at 678; see also S. Nahmod, supra note 2, at § 3.08.
102. Daniels, 106 S. Ct. at 678 (Stevens, J., concurring); see also S. Nahmod, supra note 2, at § 3.08.
A. Substantive Due Process

Substantive due process\textsuperscript{103} is a rather nebulous concept. Essentially, substantive due process describes the concept whereby the Court can overrule an item of legislation or declare a particular act unconstitutional because the Court disagrees with its substance under a section of the Constitution that speaks only of a process due an individual.\textsuperscript{104}

The due process clause creates certain substantive rights that are not set forth explicitly in the first ten amendments of the Constitution.\textsuperscript{105} Most substantive rights are derived indirectly from the provisions of the Bill of Rights.\textsuperscript{106} In other words, substantive due process is a phrase to describe the fact that the Supreme Court has interpreted the due process clause of the fourteenth amendment to contain certain substantive rights based mainly, although not explicitly, on the Bill of Rights,\textsuperscript{107} and the privilege and immunities clause.\textsuperscript{108}

The Supreme Court, in \textit{Moore v. East Cleveland},\textsuperscript{109} discussed the fact that a number of protections of substantive due process are not set forth explicitly:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decision it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.

... [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees else-where provided in the Constitution. It is a rational continuum which, broadly


\textsuperscript{104} Nowak, \textit{supra} note 3, at 417-18.

\textsuperscript{105} Henderson v. Counts, 544 F. Supp. 149, 152 (E.D. Va. 1982).

\textsuperscript{106} Id.

\textsuperscript{107} Gilmere v. City of Atlanta, 774 F.2d 1495, 1499-1500 (11th Cir. 1983); Brown v. Brienen, 722 F.2d 360, 366 (7th Cir. 1983).


\textsuperscript{109} 431 U.S. 494 (1977).
speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the states needs asserted to justify their abridgment.\textsuperscript{110}

Examples of substantive due process protections include the right to pass freely from state to state, to carry on interstate commerce, to contract, to own property, to engage in life's common occupations, to gain and acquire useful knowledge, to marry and have children, to worship God, to be free from illegal searches and seizures of our persons, and to be free from unnecessary violence at the hands of law enforcement.\textsuperscript{111}

The Court has recognized that there are risks associated with substantive due process,\textsuperscript{112} especially when the judiciary is able to give added protection to certain substantive liberties without the guidelines of more specific provisions of the Bill of Rights.\textsuperscript{113} However, the concern that this approach to the due process clause is going to lead judges to roam at large in the constitutional field\textsuperscript{114} is short-lived when it is learned that limits on substantive due process do not come "from drawing arbitrary lines but rather from careful 'respect for the teaching of history [and] solid recognition of the basic values that underlie our society.'"\textsuperscript{115}

The rationale the Court uses to control the substance of legislation or governmental acts under the due process clause is that certain types of lawmaking or state action go beyond any proper aspect of government activity.\textsuperscript{116} In other words, the Court views the act as incompatible with the democratic system of government and individual liberty.\textsuperscript{117} Any life, liberty or property interest limited by such a law or taken by such an act is a constitutional violation because the Constitution never granted the government the ability to pass such a

\textsuperscript{110.} Id. at 501-02 (citing Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).
\textsuperscript{111.} Bullard, 592 F. Supp. at 776.
\textsuperscript{112.} Moore, 431 U.S. at 502; see also Justice White's dissent in Moore at 541-52.
\textsuperscript{113.} Moore, 431 U.S. at 502.
\textsuperscript{114.} Id. at 544 (White, J., dissenting).
\textsuperscript{115.} Id. at 503 (citing Griswold v. Connecticut, 381 U.S. 479, 501 (Harlan, J., concurring)).
\textsuperscript{116.} Nowak, supra note 3, at 418.
\textsuperscript{117.} Id.
law or to commit such an act. Thus, a substantive due process claim alleges that the state's conduct is inherently impermissible, and will remain unjustified, regardless of any protective or remedial procedures it provides.

In the law enforcement context where many liberty interests are implicated, the test used to determine whether there has been a violation of substantive due process is to determine whether the conduct "shocks the conscience" of the court. This test was first enumerated in *Rochin v. California*. The Court explained that a substantive due process violation occurs when the government engages in conduct which offends "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." The Court went on to say that substantive due process is violated by state conduct that "shocks the conscience" of the court or constitutes force that is so brutal so as to offend even hardened sensibilities. In determining whether the state's conduct "shocks the conscience," Judge Friendly in *Johnson v. Glick* offered a number of considerations to take into account:

In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

118. *Id.*


122. *Id.* at 169; see also *Gilmore*, 774 F.2d at 1500.

123. *Rochin*, 342 U.S. at 172; *Gilmore*, 774 F.2d at 1500.


125. *Id.* at 1033.
Thus, in the law enforcement context, the courts have held that a police officer's infliction of personal injury on an individual by an application of undue or excessive force which "shocks the conscience" of the court deprives that individual of liberty without due process and is therefore a substantive due process violation which is actionable under section 1983.\textsuperscript{126}

Prior to Daniels and Davidson, the next question to ask with respect to substantive due process would have been whether a substantive due process violation would be precluded from actionability under section 1983 because there existed an available state tort remedy. Before Daniels and Davidson, there appeared to be a general consensus among the lower federal courts that the Parratt analysis did not apply to substantive due process violations.\textsuperscript{127} However, after Daniels and Davidson, if a substantive due process violation occurs because of a state actor's negligence, it is apparently not actionable under section 1983.

Further, because of the decisions in Daniels and Davidson, there appears to be a question as to whether a negligent act can ever rise to the level of a substantive due process violation.\textsuperscript{128} If a negligent act is such that it "shocks the conscience" of the court, therefore rising to the level of a substantive due process violation, would this be a constitu-

\textsuperscript{126} Gilmere, 774 F.2d at 1501; see Wilson, 743 F.2d at 349 ("This substantive due process right to enjoy the security of life and limb has been extended to include the right to be free from the use of excessive force by law enforcement officers."); Black v. Stephens, 662 F.2d 181, 188 (3rd Cir. 1981), cert. denied, 455 U.S. 1008, reh'g denied, 456 U.S. 950 (1982); Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981).

\textsuperscript{127} Gilmere, 774 F.2d at 1500; Bell v. City of Milwaukee, 746 F.2d 1205, 1239 n.39 (7th Cir. 1984); Wilson, 743 F.2d at 350; Augustine v. Doe, 740 F.2d 322, 327 (5th Cir. 1984) ("Parratt applies only when a plaintiff asserts a violation of procedural due process. Parratt is irrelevant if the plaintiff alleges a violation of a substantive right protected by the Constitution against infringement by state governments."); Guenther v. Holmgren, 738 F.2d 879, 882 (7th Cir. 1984); Daniels, 720 F.2d at 796 n.3; Camie, 712 F.2d at 1147 n.5; Wolf-Lillie v. Sonquist, 699 F.2d 864, 872 (7th Cir. 1983) (district court's conclusion that the plaintiff's fourth amendment rights were violated must not be disturbed on the basis of Parratt); Duncan v. Poythress, 657 F.2d 691, 704 (5th Cir. 1981), cert. denied, 455 U.S. 937 (1982); Kolpak v. Bell, 619 F. Supp. 359, 376 (N.D. Ill. 1985); Bullard, 592 F. Supp. at 775, 778-79; Barnier, 565 F. Supp. at 880; Begg v. Moffitt, 555 F. Supp. 1344, 1362 (N.D. Ill. 1983); Juncofer, 549 F. Supp. at 582; Holmes v. Wampler, 546 F. Supp. 500, 503 (E.D. Va. 1982); Schiller v. Strangis, 540 F. Supp. 605, 613-18 (D. Mass. 1982); see also Blum, supra note 73, at 374.

\textsuperscript{128} See supra notes 85-96 and accompanying text.
tional violation which is actionable under section 1983? The first question that needs to be answered is whether negligence can rise to the level of a substantive due process violation which in turn is a constitutional violation. The second question is what degree of culpability should be actionable under section 1983 for a substantive due process violation. As will be discussed in more detail later in the analysis, this Comment proposes that all types of culpable conduct, negligent or otherwise, which rise to the level of substantive due process violations are constitutional violations and should therefore be actionable under section 1983.

B. Procedural Due Process

There are many injuries inflicted by the government on persons which impinge on their liberty interest to be free from bodily harm but which do not cross the constitutional line to become substantive due process violations. If a claimant were injured by a state actor and the action did not amount to a substantive due process violation, then the claimant could assert a procedural due process violation. One such example is the situation in Daniels, where a prison inmate was injured when he slipped on a pillow negligently left on the stairs by a correctional deputy. Another example involves the Davidson situation, where a prisoner was harmed because of the negligence of a prison official in failing to protect him from a

129. In the lower courts, there also was a question as to what degree of culpability was necessary for a substantive due process violation to be actionable under section 1983. See, e.g., Bullard, 592 F. Supp. at 775 (“[T]his Court can agree with those courts that have interpreted Parratt to encompass at least negligent deprivations of life, liberty and property.”). Furthermore, Justice Rehnquist in his opinion in Daniels indicates that negligence can never implicate due process. See supra notes 85-86 and accompanying text. However, this commentator takes exception to this, see infra notes 164-76 and accompanying text.

130. An example of this situation is where a police officer negligently shoots a person in the foot. This implicates a liberty interest. However, it is unlikely that this conduct “shocks the conscience” and therefore, it is not a substantive due process violation which under the Parratt analysis would not be redressable under section 1983.

It is interesting to note that a shot in the back, as in Wilson, was recognized by Judge Keith as possibly “shocking the conscience” while a shot in the foot may not be recognized as such. See Comment, supra note 119, at 593 (“A standard that measures constitutional deprivations based on the apparent distinction between ‘ten licks rather than five’ is clearly in need of reconsideration.”).

131. Daniels, 106 S. Ct. at 663; see also Thibodeaux v. Bordelon, 740 F.2d 329, 337 (5th Cir. 1984); Daniels, 720 F.2d at 794.
third person. 132 Still another case involved a prison inmate who burned himself on a radiator and alleged a deprivation of liberty because prison officials were negligent in not providing covers for the radiators. 133 Prior to Daniels and Davidson, these non-substantive due process violations appeared to be precluded from actionability under section 1983 because of the Parratt analysis. 134 Now, they are precluded from actionability because Daniels and Davidson indicate that they are not constitutional violations. To understand why claimants brought claims for negligent actions which did not rise to the level of substantive due process violations, one must understand procedural due process.

When an individual asserts a procedural due process claim for a liberty deprivation, as opposed to a substantive due process violation, that person must allege that the state has unlawfully interfered with a protected liberty interest by failing to provide adequate procedural safeguards. 135 Thus, the claim focuses on the procedures utilized by the state in effecting the deprivation of liberty, which the plaintiff asserts were inadequate in light of the importance of the interests involved. 136 Further, it is not enough to assert a deprivation of an interest by a person acting under color of state law. 137 The claimant must also allege that the requirements of due process were not satisfied by available state procedures for challenging the deprivation. 138

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132. Davidson, 106 S. Ct. at 669.
133. Juncker, 549 F. Supp. at 575; see also Thibodeaux, 740 F.2d at 337.
134. Nowak, supra note 3, at 554-62. In this Comment, procedural due process will sometimes be referred to as non-substantive due process.
135. Ramos, 596 F. Supp. at 837; see also Augustine, 740 F.2d at 327; Nowak, supra note 3, at 555-56. The adequate procedural safeguards referred to are:
   (1) adequate notice of the charges or basis for government action; (2) a neutral decision-maker; (3) an opportunity to make an oral presentation to the decision-maker; (4) an opportunity to present evidence or witnesses to the decision-maker; (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present the individual's case to the decision-maker; (7) a decision based on the record with a statement of reasons for the decision.
136. Ramos, 596 F. Supp. at 837; see also S. Nahmod, supra note 2, at § 3.08.
137. Thibodeaux, 740 F.2d at 334.
138. Id.
There are two forms of procedural due process: pre-deprivation due process and post-deprivation due process.\(^{139}\) To fully understand the reasons for pre-deprivation and post-deprivation due process, one must understand the underlying values of due process. The concept of due process incorporates notions of fair notice and warning.\(^{140}\) Furthermore, a fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.\(^{141}\) It has been held that the individual must have the opportunity to be heard before there can be the deprivation of a protected interest.\(^{142}\) Thus, absent the necessity for quick action,\(^{143}\) or the impracticality of providing any pre-deprivation process at all, the Constitution requires pre-deprivation notice and opportunity to be heard.\(^{144}\)

For example, prior to Daniels and Davidson, if an official negligently harmed an individual,\(^{145}\) thereby implicating that person’s liberty interest, and the harm did not rise to the level of a substantive due process violation, then the only avenue that would have been open to the injured party would have been to initiate a claim based upon a violation of procedural due process. The claimant would have asserted that there had been a deprivation of a liberty interest without some sort of pre-deprivation or post-deprivation due process. However, prior to Daniels and Davidson, some lower federal courts used

\(^{139}\) Parratt, 451 U.S. at 538.

\(^{140}\) See, e.g., Postscript Enterprises, Inc. v. Whaley, 658 F.2d 1249, 1254 (5th Cir. 1981); Geiger v. City of Eagan, 618 F.2d 26, 28 (8th Cir. 1980).


\(^{143}\) For examples of the exception to the general rule due to need for quick action or impracticality, see Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, (1950) (seizure of harmful drugs); Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947) (seizure of bank’s assets due to doubts about its management); North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 314-15 (1908) (seizure of tainted food from warehouse).

\(^{144}\) Begg, 555 F. Supp. at 1350-51.

\(^{145}\) Another example could involve a police officer who harms an individual intentionally; however, this Comment is limited to only negligently inflicted injuries.
the *Parratt* analysis to preclude procedural due process claims from being actionable under section 1983.146

The Court in *Parratt* enumerated the reasons147 for upholding the taking of property even though the taking had been done without any pre-deprivation due process.148 The Court reasoned that when a state employee commits a random and unauthorized act which results in harm to an individual, the state cannot precisely predict when the injury or loss will occur.149 Thus, the Court opined that it is not only impractical but impossible to provide a pre-deprivation hearing in such situations.150 Further, the Court held that since there was an available post-deprivation remedy — a suit for damages under state tort law — the requirements of due process were satisfied.151 In its concluding paragraph, the Court stated that because the alleged deprivation of property was not without due process of law and, as a result, not a fourteenth amendment violation, there was no cause of action under section 1983.152

As has been stated previously, the Court in *Daniels* and *Davidson* effectively abandoned the *Parratt* analysis for negligent due process deprivations by holding that negligence does not violate the due process clause.153 It is therefore unclear what degree of culpable conduct is actionable under section

146. *Daniels*, 720 F.2d at 796-97. ("*Daniels* alleges that Williams' negligence in leaving a pillow on the stairs deprived him of a liberty interest . . . . [I]t was not] possible for the state to provide a predeprivation hearing since the state could not predict when the alleged loss would occur. Consequently, *Parratt* applies to this case."). In *Juncker*, 549 F. Supp. at 576, the Maryland district court stated:

[T]his case involves . . . a liberty interest, namely, plaintiff's right not to be subjected to physical injury without due process of law . . . . [T]he State is no more able to predict the deprivation, and a pre-deprivation hearing is no more possible, when the deprivation involves a liberty interest than when it involves a property interest. Therefore, if plaintiff has an adequate post-deprivation remedy in state court, that should satisfy the requirements of due process and plaintiff should not be permitted to bring a § 1983 claim in federal court.

Id.; see also *Thibodeaux*, 740 F.2d at 334-35.

147. See supra notes 56-72 and accompanying text.

148. *Parratt*, 451 U.S. at 541; see also *Thibodeaux*, 740 F.2d at 334-35.

149. *Parratt*, 451 U.S. at 541; see also *Thibodeaux*, 740 F.2d at 335; *Daniels*, 720 F.2d at 796-97; *Juncker*, 549 F. Supp. at 576.


151. *Parratt*, 451 U.S. at 541-44; see also *Thibodeaux*, 740 F.2d at 335; *Juncker*, 549 F. Supp. at 576.

152. *Parratt*, 451 U.S. at 544; see also *Thibodeaux*, 740 F.2d at 335.

153. See supra notes 85-98 and accompanying text.
1983 for non-substantive (procedural) due process violations that involve liberty deprivations.\textsuperscript{154} Prior to Daniels and Davidson, some lower federal courts had applied Parratt to negligent deprivations of liberty which involved procedural due process violations.\textsuperscript{155}

With respect to intentional conduct, some lower federal courts applied the Parratt analysis to intentional deprivations of liberty that did not rise to the level of a substantive due process violation.\textsuperscript{156} In light of the Daniels and Davidson decisions, the question remains: what is the minimum degree of culpability for a non-substantive due process liberty deprivations to be actionable under section 1983?

IV. ANALYSIS AND RECOMMENDATION

A. Introduction to Analysis and Recommendation

As stated before, most lower federal courts did not preclude from section 1983 actionability a deprivation of a liberty interest that rises to the level of a substantive due process violation.\textsuperscript{157} However, because of Daniels and Davidson, it is unclear whether a negligently deprived liberty interest that rises to the level of a substantive due process violation is a constitutional violation and whether it is actionable under section 1983.\textsuperscript{158} This Comment proposes in Part B that negligent

\textsuperscript{154} See supra note 3 and accompanying text; see also Bullard, 592 F. Supp. at 777.


\textsuperscript{156} See Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981) ("Under [the Parratt] decision we may assume, without deciding, that the alleged assault and battery deprived the appellee of 'liberty' within the meaning of the Fourteenth Amendment and focus our attention on whether this was done 'without due process of law.' "); Ellis v. Hamilton, 669 F.2d 510, 515 (9th Cir.), cert. denied, 459 U.S. 1069 (1982). Barnier v. Szentmiklosi, 565 F. Supp. 869, 878 (E.D. Mich. 1983) ("Those cases which have extended the reasoning of Parratt and Ingraham to intentional or reckless deprivations of liberty or property appear to be the sounder, more well-reasoned cases.").

\textsuperscript{157} See supra note 127 and accompanying text.

\textsuperscript{158} Of course, this presupposes that negligence can result in a substantive due process violation. In Wilson II, 743 F.2d at 350, Judge Keith said:
conduct which rises to the level of a substantive due process violation is a constitutional violation and should be actionable under section 1983. Consequentially, it should not be rele-

In most cases where section 1983 liability has been found as a consequence of the use of excessive force by law enforcement officials, the offending conduct was intentional. However, this does not foreclose the possibility that the negligent use of excessive force may also provide the basis for section 1983 liability.

Id. (emphasis added).

In Wilson III, 770 F.2d 578, the Court of Appeals for the Sixth Circuit vacated Wilson I. The court, sitting en banc in Wilson III, 770 F.2d at 586, said, "[W]e know of no case in which negligent conduct has been held to constitute a substantive due process violation of the type described in Rochin v. California and Johnson v. Glick, and conclude that a substantive due process violation of this kind does require an intentional act." Judge Keith concurred in part and dissented in part with the majority in Wilson III. Judge Keith in his dissent said, "But even though the majority accurately identifies the substantive constitutional right violated, the majority concludes that a substantive due process violation of the kind found in Rochin and Johnson v. Glick 'require[s] an intentional act.' I cannot agree." Id. at 592 (Keith, J., concurring in part and dissenting in part).

This reasoning is apparent when applied to the following fact pattern: A police officer pulls over a suspect on the highway. The suspect is known by the officer to be non-violent. When the officer gets to the car door window, he is negligent in the handling of his weapon and the gun discharges hitting the suspect in the head and thereby killing him. Could not this negligent conduct by the officer rise to the level of a substantive due process violation? Further, if one applies the Johnson v. Glick factors, 481 F.2d at 1033, see supra notes 124-25 and accompanying text, one can see that the above fact pattern could be an example where negligent conduct could rise to the level of a substantive due process violation.

The first factor to consider is the need for the application of force. Johnson, 481 F.2d at 1033. In the above fact pattern, the suspect was doing nothing but sitting in a car. Further, the suspect was known by the officer to be non-violent. Second, one has to examine the relationship between the need and the amount of force used. Id. There was no need for the amount of force used in the above fact pattern, especially force that killed. Third, the extent of the injury inflicted has to be determined. Id. The suspect was killed, which is arguably the worst injury of all. Finally, one must see whether the force applied was in a good faith effort to maintain or restore discipline or if the force was used maliciously and sadistically for the very purpose of causing harm. Id. Although the force used in the above example was perhaps not used for malicious purposes, it certainly was not used in a good faith effort to restore discipline. The suspect was known by the officer to be non-violent. Further, the suspect was sitting in the car and was not attempting escape or exhibiting any acts which might cause the officer concern. Thus, there was no need for the application of the force, no need for the amount of force used, the force inflicted caused the worst possible injury (death), and there was no good faith effort to maintain order or to restore discipline. Consequently, the above fact pattern illustrates a negligent act which may rise to level of a substantive due process violation. To preclude from actionability a theory because no case to date presents the proper facts for that theory smacks of judicial irresponsibility. This Comment proposes that when the proper facts present themselves for negligent conduct to rise to the level of a substantive due process violation, then this substantive due process violation is, first, a constitutional violation and, second, should be actionable under section 1983.
gated to the state court system for remedy under state tort doctrine.

With respect to procedural due process violations involving a liberty interest, the Daniels and Davidson decisions settled the controversy to some extent by holding that negligence by a state official does not violate the due process clause. However, prior to Daniels and Davidson, some lower courts had improperly applied the Parratt analysis to all degrees of culpability including intentional conduct that resulted in a liberty deprivation.\textsuperscript{159} As a result, those courts precluded reckless and intentional conduct from actionability under section 1983 because of the available state tort remedy analysis expounded in Parratt. Precluding from section 1983 actionability all degrees of culpability which arise in non-substantive due process cases is arbitrary, unfair and should be changed. For example, what becomes of the individual who is harmed by an official whose action did not rise to the level of substantive due process violation, but the liberty deprivation involved a greater degree of culpability than negligence?\textsuperscript{160}

Prior to Daniels and Davidson, which precluded negligence as a basis for a violation of the due process clause, the developing trend was that if the act by the official did not rise to the level of a substantive due process violation, an individual who has been harmed and deprived of a liberty interest by an official exhibiting any degree of culpability, whether it be negligent or intentional conduct, was unable to seek redress in the federal courts under section 1983.\textsuperscript{161} Indeed, one must be sensitive to the fact that because of the fear of trivializing the due process clause and making section 1983 a "font of tort law," there must be a limit on a deprived liberty interest which does not rise to the level of a substantive due process violation. Daniels and Davidson put that limit into place by holding that

\textsuperscript{159} See supra note 79 and accompanying text.

\textsuperscript{160} See Daniels, 106 S. Ct. at 666 n.3 ("[A]ccordingly, this case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or 'gross negligence' is enough to trigger the protection of the Due Process Clause."); see also Davidson, 106 S. Ct. at 671 (Brennan, J., dissenting) ("I do believe however, that official conduct which causes personal injury due to recklessness or deliberate indifference, does deprive the victim of liberty within the meaning of the fourteenth amendment.").

\textsuperscript{161} See supra note 79 and accompanying text.
negligence does not violate the due process clause, although arguably only procedural due process is implicated by those holdings. As a result, this Comment proposes in Part C that gross negligence or recklessness\textsuperscript{162} be the minimum standard for determining which non-substantive due process violations of liberty interests become actionable under section 1983. This minimum standard would take into account both Daniels and Davidson, and would preclude "garden variety" negligence claims from section 1983 actionability.

A deprived liberty interest that is a non-substantive due process violation and which invokes more culpability than negligence, however, would be actionable under section 1983. Thus, gross negligence and intentional conduct should be actionable under section 1983 for any non-substantive due process violation of a liberty interest. This Comment will only discuss the minimum standard of culpability for a deprivation of a non-substantive due process violation of a liberty interest.\textsuperscript{163}

\textsuperscript{162} Restatement (Second) of Torts § 500 (1965) defines reckless disregard of safety:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

See also Restatement (Second) of Torts § 500 comment g (1965):

Negligence and recklessness contrasted. Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference of degree in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

163. Since intentional conduct involves a higher degree of culpability, gross negligence or recklessness would be the minimum level of culpable conduct.
B. Negligent Deprivation of a Liberty Interest Which Rises to the Level of a Substantive Due Process Violation

All conduct which results in a substantive due process violation should be actionable under section 1983. However, the focus in this section pertaining to substantive due process violations will only be on the minimum degree of culpability, negligence. As was stated earlier, the Court in Daniels does limit its holding to a specific type of due process. This Comment agrees with the Daniels decision to the extent that its holding applies to procedural due process. However, this Comment proposes that the Daniels and Davidson decisions should not be applied to negligent deprivations which rise to the level of a due process violation.

If one first examines the Daniels decision from an interpretive standpoint, one can see that there is a question as to whether substantive due process is included in that decision. The majority opinion never specifically mentions the three types of due process. Whether the Court intended to include all three types of due process in its holding is open to speculation.

In his concurring opinion, Justice Stevens agreed with the majority that Daniels could not prevail under section 1983. Justice Stevens noted, however, that the majority failed to distinguish between the three types of due process. Thought-
fully, Justice Stevens distinguished between substantive due process and procedural due process, stating that the cases at hand only involved procedural due process claims. Implicit in his concurrence is the non-applicability of the Daniels and Davidson opinions to substantive due process violations. The implication is that if a negligent act rises to the level of a substantive due process violation, then "the constitutional violation is complete." Thus, when the majority held that negligence does not implicate the due process clause, it implied that negligence does not implicate procedural due process, and if a negligent deprivation is such that it is a substantive due process violation, then it is a constitutional violation.

Although the majority in Daniels did not explicitly mention substantive due process in its holding, the Court did refer to it in Davidson in a reference to the Daniels decision. It is a matter of interpretation whether the Court's holding in

167. Id. at 678-79 (Stevens, J., concurring).
168. Id. at 680 ("[T]he cases [Daniels and Davidson] raise only procedural due process claims"); see also Daniels, 748 F.2d 229, 230 n.1 (4th Cir. 1984) ("There is no claim of any substantive due process violation"), cited in Daniels, 106 S. Ct. at 679, n.16 (Stevens, J., concurring).
169. Daniels, 106 S. Ct. at 679-80 (Stevens, J., concurring).
170. Id. at 678-80 (emphasis added).
171. See supra note 96 and accompanying text.
172. Id.
Davidson encompasses substantive due process because the Court in Daniels did not expressly mention it. The Daniels and Davidson decisions should not be applied to substantive due process violations because: (1) The majority failed to specifically mention substantive due process, and (2) Justice Stevens distinguished substantive due process from procedural due process in his concurring opinion. Furthermore, other support exists for the proposition that if a negligent act "shocks the conscience" of the court and is deemed to be a substantive due process violation, it is then a constitutional violation.

By definition, if a negligent act is such that it causes a liberty deprivation which rises to the level of a substantive due process violation, it in turn would be a prima facie constitutional violation. Further, if a substantive due process violation has occurred, it hardly matters to the victim whether the substantive due process violation was caused by negligence, gross negligence, recklessness or intentional conduct. The fact is that the victim has suffered an injury or harm resulting in a substantive due process violation. To preclude actionability because the official acted with one degree of culpability as opposed to another deviates from the underlying rationale of substantive due process. The denial of substantive due process is a constitutional violation at the moment the harm occurs,173 even if it was caused by negligent conduct.

Moreover, if the Court takes the rigid approach that negligent conduct can never implicate the concerns of the due process clause,174 then the Court is not taking into account all possible circumstances. Several courts observed that it was possible for a negligent act to rise to the level of a substantive

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173. Gilmere, 774 F.2d at 1500.
174. See Davidson, 106 S. Ct. at 673 (Blackmun, J., dissenting).

Finally, I agree that mere negligent activity ordinarily will not amount to an abuse of state power. Where the Court today errs, in this author's view, is in elevating this sensible rule of thumb to the status of inflexible constitutional dogma. The Court declares that negligent activity can never implicate the concerns of the Due Process Clause. I see no justification for this rigid view. In some cases, by any reasonable standard, governmental negligence is an abuse of power.

Id. at 674 (emphasis in original).
due process violation, and which in turn could be actionable under section 1983.\textsuperscript{175}

Finally, if one examines closely the facts in \textit{Daniels} and \textit{Davidson}, neither rises to the level of substantive due process violations.\textsuperscript{176} Only procedural due process is implicated.

Thus, the \textit{Daniels} and \textit{Davidson} decisions should not be applied to substantive due process violations. If an official acts negligently, thereby depriving a person of a protected liberty interest, and the act rises to the level of a substantive due process violation, it violates the fourteenth amendment and is, therefore, a constitutional violation.

\textsuperscript{175} See \textit{Hewitt v. City of Truth or Consequences}, 758 F.2d 1375 (10th Cir. 1985). [N]egligent conduct may under appropriate circumstances give rise to a constitutional deprivation remediable under section 1983.

\ldots In considering when negligent conduct may constitute a substantive denial of due process, we are guided by the analysis applied in cases involving alleged use of excessive force. Not all force used by police rises to a constitutional violation. But the use of \textit{excessive} force on a pretrial detainee deprives the victim of life or liberty without due process in violation of the Fourteenth Amendment. \textit{Id.} at 1378-79 (emphasis in original) (citations omitted). See \textit{Masop v. Coughlin}, 770 F.2d 299 (2d Cir. 1985) (a merely negligent act may give rise to a cause of action under section 1983 in appropriate circumstances). \textit{See also supra} note 158 and accompanying text. The facts of \textit{Wilson I} and \textit{Wilson II} are as follows: State trooper Thomas Beebe was searching for a burglary suspect in a wooded area at night. Soon thereafter, a man fitting the description of the suspect came walking down the road. \textit{Wilson I}, 743 F.2d at 344. Officer Beebe recognized that the suspect fit the description and told the man to stop. \textit{Id.} The man stopped, Officer Beebe removed his thirty-eight caliber pistol and cocked it. Then he attempted to handcuff the man. While attempting to handcuff the suspect a second time, Officer Beebe's gun accidentally went off, striking the suspect in the back. The suspect was identified as the plaintiff, Larry Wilson. Mr. Wilson suffered injuries to the spine, intestine and gall bladder. \textit{Id.} at 343-44. Regarding Officer Beebe's conduct, the United States Court of Appeals for the Sixth Circuit held:

Officer Beebe's negligent act in the instant case is the type which poses the possibility of section 1983 liability. Holding a cocked pistol on a suspect evinces reckless disregard for the rights of the suspect, which would allow a jury to find a constitutional violation and section 1983 liability. Such an act greatly increases the likelihood that the law enforcement officer will serve as the suspect's judge, jury, and executioner before his guilt is determined by a court of law. Although Beebe did not intend to injure Larry Wilson, holding a cocked pistol on him so increased the likelihood that injury would occur that Wilson's due process right to be free from use of excessive police force could have been violated. \textit{Id.} at 350.

\textit{But see} \textit{Bonner v. Coughlin}, 545 F.2d 565 (7th Cir. 1976) This is a \textit{pre-Parratt} decision which held that gross negligence must be shown for all substantive due process violations made actionable under section 1983.

\textsuperscript{176} \textit{See supra} notes 80-98 and accompanying text.
Once it is decided that negligent conduct could indeed rise to the level of a substantive due process violation, then the next question to ask is whether the negligent conduct is actionable under section 1983. Thus, this Comment proposes that if negligent conduct rises to the level of a substantive due process violation and, thus a constitutional violation, it should be actionable under section 1983. The Parratt analysis which would relegate the claim to a state tort remedy should not be applied. A number of reasons support this view.

First, if the negligent deprivation of a liberty interest rises to the level of a substantive due process violation, it becomes a constitutional violation. The existence or non-existence of state post-deprivation remedies has no bearing on whether the plaintiff has a constitutional claim.177

Second, substantive due process embodies rights which may not be taken away under any circumstances.178 The availability of a state tort remedy should not bar a section 1983 action to vindicate the violation of a constitutional right.179

Third, if an official’s conduct, including negligence, is so egregious as to violate substantive due process, the civil rights implication is so great that the federal courts should not be precluded from hearing the case.180 By definition, a substantive due process violation, even if negligently caused, raises constitutional concerns that have to be addressed in federal court.

Fourth, if some courts were to hold state tort remedies sufficient in cases which involve a negligent deprivation of a liberty interest that rises to the level of a substantive due process violation, this would result in a preference of state remedies over federal remedies. This would be true even if the plaintiff has a prima facie section 1983 case.181

Fifth, the Court in Parratt addressed only procedural due process, not substantive due process.182 The cases examined

177. Gilmere, 774 F.2d at 1500.
179. Id.
181. Brewer, 692 F.2d at 394 n.10.
182. See Parratt, 451 U.S. at 536; Holmes v. Wampler, 546 F. Supp. 500, 503-04 n.3 (E.D. Va. 1982) ("In Parratt, the Court distinguished between those claims involv-
by the Court uniformly involved procedural due process.\textsuperscript{183} Substantive due process is not mentioned in \textit{Parratt}, except in Justice Blackmun's concurring opinion wherein he intimates that the \textit{Parratt} analysis should only apply to procedural due process. He stated:\textsuperscript{184}

I also do not understand the Court to intimate that the sole content of the Due Process Clause is procedural regularity. 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.\textsuperscript{185}

Finally, by no stretch of the imagination did \textit{Parratt}, which involved a prisoner's hobby kit worth approximately twenty-four dollars, constitute a deprivation which "shocked the conscience" of the court to the extent necessary to satisfy the substantive due process standard.\textsuperscript{186}

Thus, in view of all of these reasons, the negligent deprivation of a liberty interest which rises to the level of a substantive due process violation should be actionable under section 1983. Although some courts believe it is hard to draw a line between those deprivations that implicate substantive due process rights and those that do not,\textsuperscript{187} they should not be afraid to make this distinction.

\textsuperscript{183}Bullard, 592 F. Supp. at 779.
\textsuperscript{184}Id.; see also \textit{Parratt}, 451 U.S. at 545.
\textsuperscript{185}\textit{Parratt}, 451 U.S. at 545; see also \textit{Bullard}, 592 F. Supp. at 779.
\textsuperscript{186}Holmes, 546 F. Supp. at 505.
\textsuperscript{187}\textit{Bullard}, 592 F. Supp. at 776; see also \textit{Madden}, 602 F. Supp. at 1167.
C. Negligent Deprivation of a Liberty Interest Which Does Not Rise to the Level of a Substantive Due Process Violation

A deprivation which does not rise to the level of a substantive due process violation implicates procedural due process. As previously mentioned, Daniels and Davidson held that negligent conduct by a state official does not violate the due process clause. Because of the specific claims involved, both cases involved procedural due process.\textsuperscript{188} Although the harm implicated a liberty interest, both claimants attacked the validity of the procedures provided for prisoners who seek a remedy for physical injury caused by the negligence of prison officials.\textsuperscript{189}

This Comment agrees with the Daniels and Davidson opinions to the limited extent that negligence should not be actionable under section 1983 for procedural due process claims. However, prior to Daniels and Davidson some lower courts, using the Parratt analysis, precluded from section 1983 actionability both negligent\textsuperscript{190} and intentional\textsuperscript{191} deprivations of liberty which involved a non-substantive due process violation. These lower courts went further than Daniels and Davidson in limiting the scope of section 1983.

This Comment proposes that to be actionable under section 1983, a deprivation of a liberty interest which does not rise to the level of a substantive due process violation must, at a minimum, result from gross negligence.\textsuperscript{192} This obviously means that an intentional deprivation of a liberty interest which does not rise to the level of a substantive due process violation would be actionable under section 1983. Since the focus of this Comment is only on the minimum culpability requirement, only gross negligence will be discussed.

This Comment’s rationale for gross negligence being the minimum level of culpability for a non-substantive due process violation is that the Supreme Court has on a number of occasions expressed concern that section 1983 will become a

\textsuperscript{188} See supra notes 80-98 and accompanying text.

\textsuperscript{189} See Daniels, 106 S. Ct. at 679-80 (Stevens, J., concurring).

\textsuperscript{190} See supra note 79 and accompanying text.

\textsuperscript{191} See, e.g., Barnier, 565 F. Supp. at 878.

\textsuperscript{192} See supra note 162 and accompanying text.
“font of tort law,”193 and that both section 1983194 and the due process clause will become trivialized.195 There must be a limitation on the actionability of a negligent deprivation of a liberty interest that does not rise to the level of a substantive due process violation. If negligence were the minimum standard of culpability required for non-substantive due process violations, section 1983 would become very expansive. If one examines particular fact situations, the necessity of this limitation becomes apparent.

For example, a police officer on patrol in a squad car acts negligently and causes an accident with another driver. As a result of the accident, the other driver is injured. If an expansive reading of section 1983 were allowed, the driver would be deprived without procedural due process of a liberty interest to be free from harm by a police officer. Thus, if negligence were actionable under section 1983 for non-substantive due process violations, the negligent police officer would arguably be liable under section 1983.

Further, if negligent action could result in a procedural due process violation, then a slip-and-fall situation could also be actionable under section 1983. This is exactly the type of situation that concerned the Supreme Court in Parratt, Daniels and Davidson. The Court was fearful that section 1983 would be used to hold state actors liable for car accidents.196

194. See supra note 66 and accompanying text.
195. See supra note 89, particularly the dissent by Judge Keith in Wilson III, 770 F.2d at 593.
196. Parratt, 451 U.S. at 544.

To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. 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. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.' Paul v. Davis, 424 U.S. 693, 701 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

See also Friedman, supra note 59, at 563-64; supra note 53.
This is a valid concern because simple car accidents do not rise to the level of constitutional violations.\textsuperscript{197}

One must be sensitive, however, to other possible scenarios. For example, consider the situation in which a police officer recklessly handles a weapon and it discharges, striking a person in the foot. This act definitely deprives the individual of the liberty interest to be free from bodily harm, although it would probably not “shock the conscience” of the court. This would not be a substantive due process violation. Further, under the \textit{Parratt} analysis, pre-deprivation due process would be impractical, if not impossible, under such circumstances. The injured plaintiff described above would only have a tort remedy in the state court system, but should also have a remedy under section 1983. In other words, the \textit{Parratt} analysis should not apply to grossly negligent or intentional deprivations of liberty which do not rise to the level of a substantive due process violation. A number of reasons support this proposition.

First, the deprivation of a liberty interest which does not rise to the level of a substantive due process violation, but which results from the grossly negligent conduct of an official, deserves federal protection. The liberty interest to be free from bodily harm is a jealously protected interest.\textsuperscript{198} It is not like a property interest which can be replaced without any significant harm to the individual. Once someone has been deprived of a liberty interest, it cannot be replaced;\textsuperscript{199} the victim can only be compensated. The fact remains that a person’s liberty was infringed.\textsuperscript{200} However, due to the Court’s decisions in \textit{Daniels} and \textit{Davidson}, a negligently deprived liberty interest which is a non-substantive due process violation is not actionable under section 1983. In contrast, a liberty interest deprived by conduct which is grossly negligent and which is a

\begin{thebibliography}{99}
\bibitem{197} Friedman, \textit{supra} note 59, at 564; \textit{see supra} note 53.
\bibitem{198} \textit{See supra} note 3.
\bibitem{199} \textit{See, e.g.,} Haygood v. Younger, 527 F. Supp. 808, 814 (E.D. Cal. 1981), \textit{rev'd}, 718 F.2d 1472 (9th Cir. 1982).
\bibitem{200} \textit{Id.; see also} Note, \textit{Defining the Parameters of Section 1983: Parratt v. Taylor}, 23 B.C.L. REV. 1219, 1246 (1982).
\end{thebibliography}
non-substantive due process violation should be actionable under section 1983.\textsuperscript{201}

Second, if this Comment's proposal regarding substantive due process is accepted, an inherent unfairness would exist between the outcome in two situations. For example, if an official's negligent conduct is such that it "shocks the conscience" of the court and therefore is a substantive due process violation, then the injured party would be able to bring an action under section 1983.\textsuperscript{202} However, where an official's conduct amounts to gross negligence, but does not rise to the level of a substantive due process violation, then there is the potential that it would not be actionable under section 1983. Notice that even though a higher level of culpability is involved, it is not actionable under section 1983 because it does not rise to a certain level of conscience-shocking. This is plainly not fair. In both cases the plaintiff has been injured and has suffered pain in addition to other damages. In the first case, the plaintiff would be allowed to seek redress in federal court under section 1983, while in the second case, the plaintiff may be barred from the federal court system and forced to seek a remedy in state court, despite having suffered a deprivation of liberty as a result of higher culpability by a state official.

To further understand why the \textit{Parratt} analysis should not be applied to a grossly negligent deprivation of a liberty interest for a non-substantive due process violation, one must examine the policy reasons behind section 1983. Primarily, one must realize the importance of the federal court as the arbiter for the resolution of issues which encompass constitutional dimensions.\textsuperscript{203} As with substantive due process violations, the federal courts are the guardians of an individual's civil rights, and they are to be interposed between the state and the individual.\textsuperscript{204} If the \textit{Parratt} analysis is to prevail, unchecked in the

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\item It should be noted that in \textit{Daniels} the Court did not decide whether gross negligence or recklessness could implicate the protections of the due process clause. "Accordingly, this case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause." 106 S. Ct. at 667 n.3.
\item See \textit{supra} notes 164-87 and accompanying text.
\item A.C.L.U. Brief, \textit{supra} note 203, at 29-30.
\end{enumerate}
\end{footnotesize}
procedural due process realm, then all questions of procedural due process — including questions concerning liberty interests deprived through gross negligence which do not rise to substantive due process violations — are relegated to the state court system. This phenomenon will destroy the search for consistent resolution of constitutional questions.

The second policy concern of section 1983 involves the symbolic importance of the federal court remedy. The function of section 1983, which allows the plaintiff to pursue an action in federal court, is for the most part symbolic. The role of the federal courts is to form a barrier between aggrieved plaintiffs and the state officials who have harmed them. There is no better forum than the neutral atmosphere of the federal courts in which to assure that an individual's constitutional rights are not deprived by offending state actions. Furthermore, the neutral forum of the federal court is preferable to a forum where a state judge reviews the actions of another state official.

**CONCLUSION**

This Comment has proposed that where an official's negligent conduct deprives a person of a liberty interest which rises to the level of a substantive due process violation, a constitutional violation has resulted which should be actionable under section 1983. When an official deprives a person of a liberty interest that does not rise to the level of a substantive due process violation, but the officer's conduct is found to be at least grossly negligent, then there should likewise be a cause of action under section 1983. This limitation on the deprivation of a liberty interest which does not rise to a substantive due process violation precludes from actionability those actions, such as car accidents, which would turn section 1983 into "a font of tort law."

205. *Id.*
206. *Id.*
210. *Id.*
211. *Id.* at 36.
The use of the gross negligence standard for the deprivation of a liberty interest that is a non-substantive due process violation is just and fair. Furthermore, the gross negligence standard maintains the harmony between the concern of trivializing the federal courts\textsuperscript{212} and the policy concerns of section 1983.

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\textsuperscript{212} Whitman, \textit{supra} note 51, at 26-30.