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De-Federalizing Common Law Torts: Empathy for Parratt, Hudson and Daniels

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DE-FEDERALIZING COMMON LAW TORTS: EMPATHY FOR *PARRATT, HUDSON* and *DANIELS*

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INTRODUCTION

Principles of federalism and the proper ordering of state and federal relations have long directed the United States Supreme Court's approach to federal litigation.[1] The Court consistently has recognized that to properly maintain a federal system of government the federal judiciary must respect state government authority.[2] Toward this end the Court has established various protective devices, among them exhaustion and abstention principles, with an eye to directing certain disputes to the states for resolution instead of allowing the federal judiciary to immediately intercede.[3] But following the expansive interpretation of Title 42 United States Code, section 1983,[4] the Court has found it more difficult to maintain balance between the federal and state judiciaries.[5]

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[1] *See generally* C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4251–4255 (1978 & Supp. 1987).

[2] *See* Younger v. Harris, 401 U.S. 37, 44 (1971) (federalism represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States").

[3] *See, e.g.*, Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941) (federal court should abstain from deciding state law issue until state courts render interpretation); Younger v. Harris, 401 U.S. 37 (1971) (federal court should not enjoin state criminal proceeding); Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 106 S. Ct. 2718 (1986) (federal court should not enjoin state civil rights commission proceedings); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (federal court should not enjoin lawyer disciplinary proceedings); Trainor v. Hernandez, 431 U.S. 434 (1977) (extending *Younger* to state civil action); Juidice v. Vail, 430 U.S. 327 (1977) (extending *Younger* to state civil contempt proceeding); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (extending *Younger* to civil action to close movie house as a nuisance); Samuels v. Mackell, 401 U.S. 66 (1971) (applying *Younger* to federal declaratory judgment in state criminal proceeding); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964) (federal court should abstain from deciding state law issue until state courts render interpretation); Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959) (abstention principle extends to diversity suits); Burford v. Sun Oil Co., 319 U.S. 315 (1943) (abstention proper where state law decided by state agency); McCord v. Louisville & N.R.R., 183 U.S. 483 (1902) (exhaustion required in relation to state administrative process); Petroleum Exploration, Inc. v. Public Serv. Comm'n, 304 U.S. 209 (1938) (same); Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908) (same). Congress also imposed federalistic restraints through legislation such as the Tax Injunction Act, 28 U.S.C. § 1341 (1982), and the Anti-Injunction Act, 28 U.S.C. § 2283 (1982). For a more detailed discussion of federalism in this regard, see Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

[4] Act of Apr. 20, 1871, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1982)). The section states in part:

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

42 U.S.C. § 1983.

[5] The Supreme Court has found that exhaustion principles do not apply to cases brought under 42 U.S.C. § 1983. Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982). Moreover, comity itself is no bar to immediate relief under § 1983. *Compare* Monroe v. Pape, 365 U.S. 167, 183 (1961) ("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"); *with* Fair Assessment in Real Estate Ass'n, Inc. v.

For this reason, the Court has looked for other methods to properly allocate dispute resolution between the federal and state courts. Among the Court's most recent efforts lies a trilogy of cases, *Parratt v. Taylor,*[6] *Hudson v. Palmer,*[7] and *Daniels v. Williams.*[8]

The problem addressed in each of these three cases involves the use of the fourteenth amendment's due process clause to convert state common law tort claims involving governmental agents into federal civil rights cases. Due process forms the basis of the underlying constitutional right because in a tort context it is generally impossible for a state to provide process prior to the injury.[9] Hence, the argument is that the injury, the deprivation, is inflicted without prior process and thereby without due process of law.[10]

The Court in *Parratt, Hudson* and *Daniels* properly recognized that this use of the due process clause would effectively federalize all personal injury or property damage claims against governmental employees.[11] The Court warned that the due process clause could become a "font of tort law"[12] and destroy the proper balance in dispute allocation between state and federal courts. The Court thus attempted, in both *Parratt* and *Hudson,* to avoid this re-ordering or, perhaps better put "disordering," of federal-state relations by permitting the postponement of process. Where a governmental agent tortiously injures an individual, the Court determined, due process is not offended until and unless the state fails to provide a remedy.[13] Soon after *Hudson,* however, the Court discovered this analysis could not do what was intended.[14] Rather than apportioning dispute resolution, the *Parratt-Hudson* postponement-of-process analysis merely refocused the federal question. No longer was the agent's conduct the concern, but the state's remedy formed the basis of the federal inquiry.[15] Hence, in *Daniels* the Court reassessed its position in *Parratt* and again attempted to work a solution. The solution offered by *Daniels* is simple: negligent conduct does not implicate due process. Thus, with *Daniels,* the Court has successfully deflected at least some common law torts from the federal courts.

This Article explores the Court's attempts in *Parratt, Hudson,* and *Daniels* to achieve a workable solution to the problem of properly apportioning dispute resolution under

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McNary, 454 U.S. 100, 116 (1981) (holding principles of comity apply where § 1983 action challenges tax assessment scheme). In addition, the Court has found that the Anti-Injunction Act, 28 U.S.C. § 2283 (1982), does not preclude a federal court from enjoining a state court proceeding under § 1983. Mitchum v. Foster, 407 U.S. 225, 242–43 (1972). As *Younger v. Harris* made clear, however, basic federalism concerns still act to limit actions brought under § 1983. 401 U.S. 37 (1971). *See generally* Blackmun, *Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or Fade Away?* 60 N.Y.U. L. REV. 1 (1985).

[6] 451 U.S. 527 (1981). *See infra* notes 77–92 and accompanying text.

[7] 468 U.S. 517 (1984). *See infra* notes 106–18 and accompanying text.

[8] 106 S. Ct. 662 (1986). *See infra* text accompanying notes 138–84.

[9] *See infra* text accompanying notes 42–44.

[10] *See infra* text accompanying notes 42–44, 77–79.

[11] *Daniels,* 106 S. Ct. at 665; *Hudson,* 468 U.S. at 535–36; *Parratt,* 451 U.S. at 544.

[12] *See 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 . . . . 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.'") (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

[13] *Hudson,* 468 U.S. at 536.

[14] *See, e.g., Daniels,* 106 S. Ct. at 665; Davidson v. Cannon, 106 S. Ct. 668, 670 (1986).

[15] *See infra* notes 193–228 and accompanying text.

the federal system. The Article concludes that although the Court has adopted a sound premise in attempting to deflect certain cases from the federal courts — that due process should not become a "font of tort law" — it has been unsuccessful in constructing a workable model to achieve this goal. Specifically, both *Parratt* and *Hudson* reflect ill-fated applications of state action theory[16] which at best simply delay the federal question and at worst seriously jeopardize traditional tort law. *Daniels*, in contrast, though from a practical standpoint offering a more manageable and less dangerous solution to the problem, nevertheless remains woefully incomplete.[17]

The Court has failed to recognize that the problem of converting state tort claims into viable federal actions is not a function of any one legal theory. Rather, the problem arises out of three separate yet concurring legal developments: first, the ever-broadening interpretation of section 1983, particularly relaxation of exhaustion doctrine; second, the construction of state action theory which charges the state with not only authorized action, but also the unauthorized and even illegal action of its agents; and finally, the blossoming of due process in its procedural sense, the principle emerging that process is generally due prior to any adverse governmental action.[18]

Only by linking these three developments does the possibility of converting state tort claims into federal actions ever materialize, since the absence of any one would effectively alleviate the problem. For example, a narrower construction of section 1983 could restrict the federal remedy, thereby limiting the federal avenue of relief.[19] Retracting state action theory by imputing only authorized conduct to the state would likewise defeat the federal action. Without state action there would exist no underlying violation, and consequently no cognizable claim under section 1983.[20] Finally, altering due process theory could also deflect federal actions by simply undermining the protected right. Again, with no underlying federal violation there could be no section 1983 claim.[21]

Consequently, three options present themselves, any one of which could successfully provide a solution to the problem of constitutionalizing tort law. The Court, however, has repeatedly refused to give any sort of restrictive interpretation to section 1983, a position it reasserted in *Parratt*.[22] Hence, when faced with the possibility of converting state law into federal law in *Parratt* and *Hudson*, the Court effectively limited itself to a choice between either of two solutions. The Court could have either reassessed its concept of state action or attempted to refine due process. Unfortunately, the Court did neither. Instead, it bastardized both alternatives by skewing the concept of state action,[23] and then, without considering the consequences, applying due process.[24]

This Article submits that by either wholly reassessing state action theory *or* thoroughly analyzing due process the Court could have achieved a workable solution to the problem of federalizing common law claims. Though the decision in *Daniels* corrected this deficiency in the *Parratt-Hudson* analysis by attempting to refine notions of due process, the resulting model is imperfect and does not address the whole problem.

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[16] *See infra* notes 265–75 and accompanying text.
[17] *See infra* notes 370–82 and accompanying text.
[18] *See infra* notes 34–37 and accompanying text.
[19] *See infra* notes 46–51 and accompanying text.
[20] *See infra* notes 52–54, 265–75 and accompanying text.
[21] *See infra* notes 55–74 and accompanying text.
[22] *See infra* notes 46–51 and accompanying text.
[23] *See infra* notes 265–75 and accompanying text.
[24] *See infra* notes 276–325 and accompanying text.

This Article suggests that although three possible solutions to the problem of constitutionalizing tort law exist, due process itself, and not section 1983 or state action theory, should be reexamined in an effort to prevent the federalization of common law claims.[25] Though state action theory, if drastically altered, could achieve a workable solution, such an approach would strike far beyond the contours of the problem. The same would prove true if section 1983 were to be given a restricted reading. The more judicious approach is to reevaluate due process, for therein lies the answer.

This Article concludes that procedural due process was misapplied in *Parratt* and *Hudson*, and improperly interpreted in *Daniels*. Procedural due process is not relevant in every case where the plaintiff asserts a protected interest. Rather, it is only material in those situations where either the state or its agent possesses an "opportunity" to afford prior process,[26] *and* where a "reason" for supplying that process exists.[27] Thus, in *Parratt* and *Daniels* there existed no procedural due process violation because there was no opportunity for prior process. *Parratt* was therefore wrong to the extent that it found that procedural due process required a state remedy, while *Daniels* effectively erred in its reasoning of why procedural due process was not a concern. *Hudson*, in turn, presented no procedural due process violation because no reason for prior process existed in that case.

Toward this end, Part I of this Article explores the basic problem presented in *Parratt* and *Hudson*. This part includes an illustration of the problem in generic form[28] together with a study of relevant due process cases up to and including both *Parratt* and *Hudson*.[29] Part II examines the Court's solution to the problem found in *Daniels*.[30] In this part, *Daniels* is critically evaluated and an explanation is offered for the Court's change of direction. Part III then returns to *Parratt* and *Hudson* in an attempt to demonstrate the errors found in those cases, and to further establish that the *Daniels* solution is unnecessary once these errors are corrected.[31] In order to correct the errors underlying *Parratt* and *Hudson* this part offers an alternative solution, one accentuating the rationale behind procedural due process.[32] Finally, Part IV of this Article presents recent developments regarding substantive due process, the expectation being that those interests left unprotected by procedural due process may find a safe haven in other provisions of the Constitution.[33]

I. Converting Tort into Absence of Process

The fourteenth amendment to the United States Constitution prohibits states from "depriv[ing] any person of life, liberty, or property without due process of law . . . ."[34] This language establishes the underlying principle that before a state takes a person's

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[25] *See infra* notes 46–57 and accompanying text.
[26] *See infra* notes 276–310, 327–69 and accompanying text.
[27] *See infra* notes 311–23, 327–69 and accompanying text.
[28] *See infra* notes 38–44 and accompanying text.
[29] *See infra* notes 58–137 and accompanying text.
[30] *See infra* notes 138–265 and accompanying text.
[31] *See infra* notes 265–392 and accompanying text.
[32] *See infra* notes 326–69 and accompanying text.
[33] *See infra* notes 383–434 and accompanying text.
[34] U.S. Const. amend. XIV, § 1; *see also* U.S. Const. amend. V.

life, liberty, or property, some process must be afforded that individual.[35] Process, in turn, generally means notice and an opportunity to be heard.[36] The reason for this requirement is quite simple: to insure that the state, when it decides to act, does so in accordance with established substantive rules.[37] Without prior process, the risk exists that the state might erroneously deprive a person of life, liberty, or property. Process brings fairness and confidence to the state's enforcement decision.[38] To illustrate this concept, suppose that a state decides to engage in urban renewal and passes a law which requires demolition of all houses built before the year 1900. Procedural due process requires that before the state sends out its bulldozers, individualized process be afforded to determine those homes that were built before the given year, and those that were not. Hence, a homeowner must be given notice of the state's decision to demolish her home and must be afforded the opportunity to present facts pertaining to its age. The hearing helps

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[35] *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 (1978) ("ordinarily, due process of law requires an opportunity for 'some kind of hearing' prior to the deprivation of a significant property interest"); Regents v. Roth, 409 U.S. 564, 570 n.7 (1972) ("Before a person is deprived of a protected interest, he [or she] must be afforded opportunity for some kind of hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event'") (citation omitted); Bell v. Burson, 402 U.S. 535, 542 (1971) ("it is fundamental that except in emergency situations . . . due process requires that when a State seeks to terminate (a protected) interest . . . , it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective"). *See also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982) ("it has become a truism that '*some* form of hearing' is required before the owner is finally deprived of a protected property interest") (citation omitted); Perry v. Sindermann, 408 U.S. 593 (1972); *Parratt*, 451 U.S. at 540 ("Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his [or her] property interests.").

The exceptions to this proposition are explored later in this article. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977); Mathews v. Eldridge, 424 U.S. 319 (1976). For a more thorough discussion, see *infra* notes 70, 286–305 and accompanying text.

[36] *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

[37] Conversely, where no substantive rules exist, there is no reason for process. For example, the Court found, in *Board of Regents v. Roth*, that because no legitimate claim of entitlement to public employment existed, no substantive rule had to be followed; therefore, no constitutional requirement regarding process existed. 408 U.S. 564, 578 (1972).

[38] Procedural theory applies in like fashion to the federal government through the fifth amendment's due process clause. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974). Because this Article addresses *Parratt v. Taylor* and its "adequate *state* remedy" approach to procedural due process, the procedural theory addressed here will focus on the states and not the federal government. But the approach advanced by this Article should apply with full force to the federal government. Indeed, even though *Parratt* itself is partially grounded in federalism concerns, courts have applied it to actions of federal officials. *See, e.g.*, Rodriquez-Mora v. Baker, 792 F.2d 1524, 1527 (11th Cir. 1986) ("we hold that *Parratt v. Taylor* and its progeny apply with full force to cases brought under the Fifth Amendment due process clause"); Stalnaker v. Boeing Co., 186 Cal. App. 3d 1291, 231 Cal. Rptr. 323 (1986) (finding *Parratt* applicable to federal officials, yet holding that *state* workers compensation law provided adequate remedy). Similarly, and perhaps with sounder reasoning, courts have also applied *Daniels* to actions of federal officials. *See, e.g.*, General Elec. Co. v. United States, 813 F.2d 1273, 1278 (4th Cir. 1987); *Stalnaker*, 186 Cal. App. 3d at 1291, 231 Cal. Rptr. at 332–33.

insure that the state, acting in accordance with its substantive rule, demolishes only those houses actually built before 1900.

Substantive due process, in contrast, assesses the propriety of a state's substantive decision. Though the contours of this substantive evaluation are hard to mark, the underlying theory is quite simple, at least once one becomes comfortable with the idea that the will of the majority may not always prevail. The rationale behind substantive due process is that there are certain normative decisions the state simply cannot make regardless of the majority's wishes and regardless of any process. Using the illustration outlined above, one might challenge the law's substance by claiming that the state has no right to demolish a house based on the year of its construction.[39] The argument is that even if the state supplied process in its adjudicative sense, its substantive rule is still invalid.

When speaking solely in terms of "the state," the illustration as outlined above remains quite simple. The state, however, as an artificial entity, only acts through its agents — human beings. The United States Supreme Court held long ago, in *Home Telephone & Telegraph Co. v. City of Los Angeles*, that when an agent acts on the state's behalf, she is in effect "the state," even when she acts beyond the scope of her duties, and even when the state expressly declares her actions illegal.[40] Therefore, under both procedural and substantive due process, an *individual's* actions might be unconstitutional, even without the state's approval or acquiescence, and even in spite of its prior disapproval. Instructive again is the hypothetical law requiring demolition of all houses built before the year 1900. Suppose that state law also required notice and a full-fledged hearing prior to any action, and further suppose that the bulldozer operator, acting under cloak of state law, demolished a home before the homeowner received notice. The state, through its laws, has satisfied procedural due process. It intended and required that the homeowner receive process. Through its actor, however, the state has violated procedural due process.[41] The problem thus bifurcates under modern principles of state action: the state both does and does not satisfy due process.

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[39] A challenge might also be based on the takings clause of the fifth amendment, as applied to the states through the fourteenth amendment's due process clause. *See* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987). Based on this challenge, assuming a "taking" is found to have occurred, just compensation must be paid. *See* First English Evangelical Lutheran Church v. City of Los Angeles, 107 S. Ct. 2378 (1987). Before a federal claim for relief "ripens," however, the plaintiff must exhaust all state remedial procedures, including any state action for inverse condemnation. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985). Consequently, as noted by the Court in *Hamilton Bank*, analysis under the takings clause is virtually identical to that applied under the due process clause in *Parratt* and *Hudson*.

[40] 227 U.S. 278, 287 (1913). *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 171–72 (1961) ("Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."); *Home Tel. & Tel.*, 227 U.S. at 287 ("the theory of the [Fourteenth] Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power"). *See also* Owen v. City of Independence, 445 U.S. 622 (1980); Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967); Roberts v. Acres, 495 F.2d 57, 59 (7th Cir. 1974).

[41] *But see* Gregory v. Town of Pittsfield, 479 A.2d 1304 (Me. 1984), *cert. denied*, 470 U.S. 1018

Moreover, a state official when acting on behalf of the state might possess any one of a number of mental states.[42] Consider once again the aforementioned hypothetical, and further suppose the bulldozer operator did not intend to demolish the house. Again, the state through its laws satisfied procedural due process. The state, through its actor, however, provided no prior process, giving neither notice nor a hearing. Therefore, arguably the homeowner has been deprived of property without due process of law, even though neither the state official nor the state had a chance to provide prior process.[43]

One quickly realizes that if this argument were accepted, then every time a state actor tortiously injured another in person or property a constitutional violation would occur.[44] The nature of tort is such that prior process is almost never readily available, and thus every injury inflicted by a state actor, regardless of state law requirements, could be characterized as a procedural due process violation. The result would be a veritable federalization of state tort law in cases where a government official is somehow responsible for injury. That such a result conflicts with common notions of federalism[45] appears unassailable, if for no other reason than because a new federal tort law would be superimposed on that already in place in the states. The problem, therefore, is easily identified — how to avoid the federalization of all common law tort claims brought against state actors so as to preserve traditional tort principles adopted by the states.

(1985). In *Gregory*, state law required notice and a hearing prior to the denial of general assistance benefits. *Id.* at 1307. See also *infra* notes 121, 327, and 381 for a discussion of *Gregory*. Town officials, who were charged with administering the plan, however, failed to provide prior notice to an individual who was denied benefits. *Id.* at 1305. Hence, though the state satisfied procedural due process through its laws, it arguably did not through its agents, the town officials. The Supreme Judicial Court of Maine ultimately found no due process violation, holding that *Parratt* controlled and that state remedies would suffice. *Id.* at 1308.

Likewise, in *Burch v. Apalachee Community Mental Health Serv., Inc.*, agents of the state failed to provide a prior hearing to one being involuntarily committed to a mental hospital even though state law required such a hearing. 804 F.2d 1549, 1552 (11th Cir. 1986), *vacated and reh'g en banc granted*, 812 F.2d 1339 (1987) (discussed *infra* notes 327 and 381). Thus, although state law satisfied due process, the state action — here the conduct of the agents — arguably did not. As in *Gregory*, the court in *Burch* found that *Parratt* dictated the outcome of the case. *Burch*, 804 F.2d at 1557.

Contrast Messick v. Leavins, which involved the intentional destruction of property by municipal agents without notice in a manner inconsistent with state law, a law that arguably satisfied due process by requiring some form of prior notice. 811 F.2d 1439 (11th Cir. 1987). *See also infra* notes 217 and 381. The court in *Messick* concluded that irrespective of the state law, the municipal policy violated procedural due process, and further found that *Parratt* was not controlling. *Messick*, 811 F.2d at 1442–43. The court instead held that the destruction took place pursuant to an established municipal procedure. *Id.* at 1443. This procedure was inconsistent with state law, and thus prior process which had not been afforded was required. *Id.* at 1442–43 (citing Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)). As this Article demonstrates, the result in *Messick* is correct. In any event, the *Parratt* holding should not even have been a problem in any of these cases simply because the deprivations were not unauthorized. What was unauthorized was the failure to provide process, a wholly different problem. *See also infra* notes 337–77 and accompanying text.

[42] *Contrast Parratt*, 451 U.S. at 525 (finding that due process requires no specific mental state) *with Daniels*, 106 S. Ct. at 663 (holding simple negligence not enough to implicate due process).

[43] As this Article later makes clear, *Parratt* attempted to solve this problem by holding that post-deprivation remedies satisfy procedural due process. *See infra* notes 77–92 and accompanying text. After the *Daniels* decision, simple negligence does not implicate due process in the first instance. *See infra* notes 138–84 and accompanying text.

[44] *See supra* notes 12–14 and accompanying text.

[45] *See supra* note 1.

Solving the problem has proved more difficult than stating it. Because section 1983 provides the primary vehicle for redressing constitutional violations, a plausible solution would be to limit that relief mechanism, thereby preventing federalization of the claim.[46] Though such a solution might work, it suffers two major obstacles. First, the Supreme Court has consistently refused to give section 1983 a limiting construction and has, instead, methodically over the years given it a more and more expansive reading. For instance, in *Monroe v. Pape*[47] the Court held that section 1983 could be used to remedy conduct of state officials found abusive even under state law, thus drawing a direct parallel to the result in *Home Telephone & Telegraph*.[48] Later, the Court in *Monell v. New York City Department of Social Services* extended section 1983 liability to reach municipalities as well as the agents they employ.[49] Even *Parratt* gave section 1983 an expansive reading, finding it imposed no independent *mens rea* requirement before allowing recovery.[50] In addition, the Court in *Patsy v. Board of Regents* found that section 1983 does not require exhaustion of available state administrative remedies,[51] and accordingly permitted the plaintiff immediate access to federal court. Second, and perhaps more importantly, a narrowing construction of section 1983 conceivably could affect all constitutional claims, and not just those involving due process. Therefore, even if the Court were willing to somehow narrow its interpretation of section 1983, this approach would be drastic indeed, for it could de-federalize a large number of claims worthy of federal protection.

Another plausible solution rests in completely overhauling *Home Telephone & Telegraph*'s concept of state action. In that case the Court found that:

> [A] state officer cannot on the one hand as a means of doing a wrong forbidden by the [Fourteenth] Amendment proceed upon the assumption of the possession of state power and at the same time for the purpose of avoiding the application of the Amendment, deny the power and thus accomplish the wrong.[52]

Altering state action theory to do away with the Court's conclusion in *Home Telephone & Telegraph* would resolve the problem, since as a general matter torts are unauthorized. Without state action the tort would be just that — a tort, and nothing else.[53] This approach, however, like that of narrowing section 1983, would implicate most all con-

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[46] *See, e.g.*, Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 429 (1977) (suggesting that § 1983 might be read narrowly so as not to embrace all liberty and property interests); Blackmun, *supra* note 5, at 23 (recognizing that § 1983 itself might be read in a more restrictive fashion); Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1, 7–9 (1982) (criticizing *Parratt* Court's interpretation of § 1983).

[47] 365 U.S. 167 (1961).

[48] *See supra* note 40.

[49] 436 U.S. 658, 694 (1978).

[50] *Parratt*, 451 U.S. at 535. *But see* discussion *infra* note 83 and accompanying text.

[51] 457 U.S. 496, 516 (1982).

[52] Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 288 (1913).

[53] Section 1983 is merely a remedial device, the application of which turns on the violation of some federally protected right, whether statutory or constitutional. *See* Maine v. Thiboytot, 448 U.S. 1, 7 (1980). For there to be a violation of the fourteenth amendment, the primary repository of protected rights, there must be some form of state action. *See* The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Cruikshank, 92 U.S. 542 (1875). *See generally* Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221. Because the fourteenth amendment is the primary underlying right used in relation to § 1983, the absence of state action would undermine the right and also the remedy under that statute.

stitutional constraints.[54] Hence, again this would be a drastic solution to the problem, one that, as this Article will establish, is wholly unnecessary.

The final solution, and that ostensibly adopted by the Court in *Parratt* and *Hudson*, is to define due process in a way that avoids constitutionalizing common law tort claims.[55] As evident from *Parratt*, *Hudson*, and *Daniels*, however, this is easier said than done. In *Parratt* and *Hudson* the Court purported to limit due process by providing post-deprivation remedies. But, as evinced by *Daniels*, this methodology is inherently flawed. At best it merely delays the federal question by refocusing judicial scrutiny on the after-the-fact remedy instead of the plaintiff's injury, and by so doing seriously threatening well-established immunity doctrine.[56] At worst, the post-deprivation remedy rationale converts procedure into substance,[57] defining a substantive right to be free from government-inflicted injury. *Daniels* presents a welcome change in direction, with the Court focusing exclusively on the heart of the matter — due process.

A. *The Due Process Explosion: Groundwork for* Parratt

The 1970s marked a renaissance in procedural due process. Beginning with *Goldberg v. Kelly*,[58] the Supreme Court began to unravel arcane distinctions between rights and privileges, only the former traditionally receiving procedural protection in the courts.[59] Instead of continuing this semantic exercise, the Court substituted the unified principle that before a state takes adverse action against a person it must afford prior process.[60]

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[54] The only constitutional limitation left unaffected would be that found in the thirteenth amendment, the prohibition of slavery. State action is not a requirement in this regard. *See* U.S. CONST. amend. XIII, § 1; The Civil Rights Cases, 109 U.S. at 20. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 812–13 (3d ed. 1986).

[55] *See, e.g.*, Blackmun, *supra* note 5, at 22. ("Many complaints about § 1983's ostensible impact on federalism really are complaints about the breadth of the underlying constitutional rights — a separate issue that surely deserves to be debated on its own terms.").

[56] *See infra* notes 193–228 and accompanying text.

[57] *See infra* notes 276–305 and accompanying text.

[58] 397 U.S. 254, 262 (1970).

[59] Not until the Court's decision in *Board of Regents v. Roth* was the "right/privilege" distinction finally laid to rest: "the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." 408 U.S. 564, 571 (1972) (footnote omitted). *See also* Graham v. Richardson, 403 U.S. 365, 374 (1971). Years earlier, the Court reached an analogous conclusion in relation to the first amendment in *Sherbert v. Verner*. There, the Court held that a Jehovah's Witness was denied the right of free exercise of religious beliefs because South Carolina refused her unemployment compensation after she was discharged for refusing to work on her Sabbath. 374 U.S. 398, 404 (1963). The Court found that though there exists no "right" to unemployment compensation, the constitution still applies. *Id.* The Court rejected a recent attempt to revive the right/privilege distinction in the first amendment context, albeit in a different manner, just this past term. *Compare* Bowen v. Roy, 106 S. Ct. 2147, 2152 (Burger, C.J.) (plurality opinion found a clear distinction between the freedom of individual belief, which is an absolute right, and the freedom of individual conduct, which is not absolute but rather a privilege in nature) *with* Hobbie v. Unemployment Appeals Comm'n, 107 S. Ct. 1046, 1051 (1987) (Court found that first amendment protects the free exercise of employees' religious beliefs).

[60] *Goldberg*, 397 U.S. at 262–63. Situations in which the Court has found process required prior to adverse governmental action include termination of public employment, Perry v. Sindermann, 408 U.S. 593, 602 (1972); suspension from public high school, Goss v. Lopez, 419 U.S. 565, 574 (1975); termination of public utilities, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 6 (1978); revocation of a prisoner's good time credits, Wolff v. McDonnell, 418 U.S. 539, 557 (1974);

But only a short time passed before the Court, or at least part of it, saw a need to establish limits, lest federal law swallow all of state law under the guise of due process.[61]

The Court has employed two techniques in order to avoid this subjugation of state law: one definitional and the other more analytical in nature.[62] First, the Court has given a restrictive meaning to both "property" and "liberty"[63] so as to avoid implicating due process.[64] This approach, of course, has generated lively debate among commentators, as the traditional thought had been that the phrase "life, liberty and property" encompassed "every individual interest worth talking about."[65] That debate notwithstanding, the Court has successfully limited the reach of due process under this analysis, as evidenced in a series of cases in the 1970s, including *Board of Regents v. Roth*,[66]

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revocation of parole, Morrissey v. Brewer, 408 U.S. 471, 482 (1972); denial of parole in certain situations, Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979); and transfer within a prison to administrative segregation, Hurwitz v. Helms, 459 U.S. 460, 466 (1983).

[61] *See, e.g.*, Paul v. Davis, 424 U.S. 693, 699 (1976). In *Paul*, the Court expressed the need to limit due process in the tort context, lest it become a mere "font of tort law." *Id.* at 701. Justice Brennan disagreed entirely with the majority's position. *See id.* at 714 (Brennan, J., dissenting).

[62] Another approach, also definitional in nature, attempted to allow the state or federal government to define the substantive right so as to include whatever procedural protections were also created. *See* Arnette v. Kennedy, 416 U.S. 134 (1974). This approach, however, never captured a majority of the Court, and was finally laid to rest in *Cleveland Bd. of Educ. v. Loudermill*, where the Court concluded that the procedural protection created by the law defining the right is not the limit of procedural protection required by due process. 470 U.S. 532, 540 (1985).

[63] In defining property interests, the Court has made it clear that it looks only to state law or, where the federal government is involved, to federal statutory law. *See, e.g.*, *Roth*, 408 U.S. at 577. The Constitution itself creates no property interests. *See Roth*, 408 U.S. at 577. Liberty interests, in contrast, may arise under state law (*see Greenholtz*, 442 U.S. at 12), federal non-constitutional law, or constitutional law. *See Goss*, 419 U.S. at 574. For a partial list of federally protected liberty interests, see *Roth*, 408 U.S. at 572 ("Without doubt, [liberty] 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 . . . and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men [or women].") (citation omitted). The interest in "life" appears inherently self-defined, though it may be subject to a broader reading. *But see* Roe v. Wade, 410 U.S. 113 (1973) (perhaps "life" is subject to a narrower interpretation).

[64] *See, e.g.*, Codd v. Velger, 429 U.S. 624 (1977); Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972). See also *infra* notes 71–74 and accompanying text for a discussion of *Paul v. Davis*.

[65] Monaghan, *supra* note 46, at 406–07. Interestingly, this same approach has been raised recently in relation to substantive due process. In *Regents of University of Michigan v. Ewing*, a student was dismissed from school after he failed an exam. 474 U.S. 214, 216 (1985). The student challenged his dismissal, claiming it was arbitrary and capricious, thus violating substantive due process. *Id.* at 217. The Court, assuming that a protected interest existed, found no substantive due process violation. *Id.* at 223. *See infra* notes 408–11 and accompanying text. Justice Powell, however, found the claimed property right "dubious at best." He stated:

> Even if one assumes the existence of a property right, however, not every such right is entitled to the protection of substantive due process. While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, . . . substantive due process rights are created only by the Constitution.

474 U.S. at 220 (Powell, J., concurring).

[66] 408 U.S. 564 (1972). In *Roth*, the Court found that to have a protected property interest in

Bishop v. Wood,[67] *Codd v. Velger*[68] and, perhaps most significantly, the 1976 case of *Paul v. Davis.*[69]

As pointed out above, the alternative technique employed by the Court in restricting the reach of procedural due process is more analytical than definitional in nature. This approach recognizes that due process applies — that is, a protected interest exists — but under certain circumstances allows the process to come *after* the deprivation. Basically, allowing for postponement of process reflects a compromise, reached through balancing the state's interests in acting without prior process with the individual's interest in the uninterrupted enjoyment of life, liberty, or property. In *Mathews v. Eldridge* this balancing approach was expressed in terms of three considerations: first, the nature of the protected interest; second, the risk of an erroneous deprivation in the absence of a prior hearing; and third, the public interest in administrative efficiency.[70]

The Court has used the definitional approach to limit due process in relation to only one tort — defamation. In *Paul v. Davis* the Court found that there existed no liberty interest in being free from defamatory remarks made by the government.[71] Therefore, when a state injures a person's reputation no procedural problem arises because no protected interest exists. When the state has physically injured a person or property, however, the Court has avoided definitional limitations of due process, and has instead turned to post-deprivation process analysis. In *Ingraham v. Wright,* a school paddling case, as a definitional matter the Court found a liberty interest in being free from any "appreciable physical pain."[72] The Court, however, used the *Mathews* balancing

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public employment one must have a "legitimate claim of entitlement" to the job. *Id.* at 578. *Roth* also rejected any notion that a protected liberty interest exists incident to public employment. *Id.* at 577.

[67] 426 U.S. 341 (1976). *Bishop* established that liberty protects one only from public disclosure of disparaging remarks about one's character. *Id.* at 348. *Bishop* was a partial response to allusions found in *Wisconsin v. Constantineau,* where the Court suggested that a general liberty interest might exist in one's "good name, reputation, honor, or integrity." 400 U.S. 433, 437 (1970). *See also* Codd v. Velger, 429 U.S. 624 (1977); Paul v. Davis, 424 U.S. 693 (1976).

[68] 429 U.S. 624 (1977). In *Codd,* the Court found a liberty interest in being free from only false information disclosed by the state concerning one's character. *Id.* at 627. *Codd* can be criticized as mixing substance with procedure, in that the requirement that the disclosure prove false involves the merits, or substance, of the claim. Justice Stevens forcefully made this objection in his dissenting opinion. *See* 429 U.S. at 631–32, 635 n.7 (Stevens, J., dissenting). The criticism is well taken, because truth or falsity should have no bearing on whether there need be a hearing; it should only have relevance to the amount of damages. *Contrast* Carey v. Piphus, 435 U.S. 247, 266 (1978) ("Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions . . . we believe that the denial of procedural due process should be actionable . . . without proof of actual injury.") (footnote omitted). *See generally infra* notes 299–305 and accompanying text.

[69] 424 U.S. 693 (1976). Essentially, the *Paul* decision established that no liberty interest exists in being free from defamation; rather, some other interest must be implicated. *Id.* at 701. *See also* Baker v. McCollan, 443 U.S. 137, 143 (1979) (innocence of charge "largely irrelevant to [plaintiff's] claim of deprivation of liberty"). Therefore, for example, the loss of government employment, Bishop v. Wood, 426 U.S. 341 (1976); or the loss of the right to drink alcohol, Wisconsin v. Constantineau, 400 U.S. 433 (1971); along with the alleged defamation would be sufficient to give rise to a procedural due process claim.

[70] 424 U.S. 319, 335 (1976). *See also* Dixon v. Love, 431 U.S. 105 (1977).

[71] *Paul* 424 U.S. at 701. *See also supra* note 69.

[72] 430 U.S. 651, 674 (1977). The actions complained of in *Ingraham* involved severe corporal punishment of junior high school students. One of the students "paddled" suffered a hematoma

approach to conclude that state common law remedies satisfied due process.[73] Now, whether some discernable difference exists between reputation and bodily integrity that justifies the different approaches the Court took in *Paul* and *Ingraham* is an intriguing question that will not be addressed here. For whatever reason, the Court has been unwilling to impose *Paul's* definitional constraints in cases involving injury to person or property, a position this Article readily embraces.[74] Instead, where the harm is more tangible, such as the personal injury in *Ingraham* or the property loss in *Parratt* and *Hudson*, the Court has accepted the protected nature of the interest and looked to post-deprivation process analysis for answers. This Article will demonstrate, however, that although this inquiry was relevant in *Ingraham*, it was not in *Parratt* and *Hudson*.

B. Parratt v. Taylor

Parratt v. Taylor has been characterized by one commentator as "one of the most significant cases brought under section 1983 of the last decade."[75] The facts of the case, however, hardly seem to support such acclaim. An inmate of the Nebraska Penal and Correctional Complex ordered a hobby kit, valued at $23.50, by mail.[76] After delivery, the kit was negligently lost by prison officials[77] and the prisoner filed a section 1983 action for damages.[78] The prisoner's claim was simple and straightforward; he asserted that he had been deprived of property without due process of law in violation of the

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requiring medical attention which kept him from school for several days. Another student was struck about his arms on at least two occasions, once losing the use of an arm for a week. *Id.* at 657.

[73] *Id.* at 676–80. The existence of common law remedies performed two separate functions in *Ingraham*. First, it helped to minimize the risk of an erroneous deprivation; second, it provided the post-deprivation process sufficient to satisfy the Constitution. *Id.* An attempt to apply this same reasoning in cases like *Parratt* and *Hudson* illustrates their fundamentally different nature. In cases like *Parratt* — where the deprivation is the result of negligence, although remedies after-the-fact might minimize the risk of a deprivation by encouraging care — such remedies cannot minimize the risk of an *erroneous* deprivation because the injury is always "erroneous." At least an injury cannot be justified as it was in *Ingraham* where there existed a common law privilege to impose reasonable corporal punishment. Where the deprivation is the result of unjustifiable intentional conduct as occurred in *Hudson*, there can again be no minimization of the risk of error because again the action is always "erroneous." *See infra* notes 311–19 and accompanying text.

[74] *See* Monaghan, *supra* note 46, at 433 (Liberty "should be read to embrace . . . *any* governmental conduct which so invades a decent respect for a person's personal integrity that, if not fairly justified, the result would outrage public sensibility."). Professor Monaghan also argues that "property" has constitutional meaning. *Id.* at 440.

[75] Friedman, Parratt v. Taylor: *Opening and Closing the Door on Section 1983*, 9 HASTINGS CONST. L.Q. 545, 545 (1982). Professor Friedman also worries that taken "to its logical extreme, [*Parratt*] would undermine the basis for most section 1983 cases now brought in federal court." *Id.* at 546. Professor Kenneth Culp Davis has expressed similar concerns, stating that *Parratt* "could possibly cut back the § 1983 cases by ninety percent." K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26.10 at 416 (Supp. 1982).

[76] *Parratt*, 451 U.S. at 530.

[77] The Court accepted the negligence claim as true, but noted the uncertainty of the matter. *Id.* at 537 n.3. Professor Friedman points out that if the case had been properly defended, the district court should have dismissed it solely on the basis of the absence of any negligence on behalf of the named parties. Friedman, *supra* note 75, at 550–51.

[78] *Parratt*, 451 U.S. at 530.

fourteenth amendment.[79] In other words, his property had been taken in the absence of a prior hearing.

In analyzing this argument, the Court speaking through Justice (now Chief Justice) Rehnquist, addressed two issues. First, the Court had to determine whether a negligence charge was sufficient to support a civil rights claim under section 1983.[80] Noting that it had twice before avoided the issue,[81] the Court held, to the surprise of many,[82] that negligence could support a claim under section 1983.[83] The Court next faced the real substance of the case, whether the state deprived the prisoner of property without due process of law. Without this deprivation, no federal action would lie because section 1983 provides only a mechanism for redressing violation of otherwise federally protected rights.

The Court initially determined that "the alleged loss, even though negligently caused, amounted to a deprivation."[84] Following this conclusion, the Court presented the due process issue as a mere timing problem, as in *Mathews v. Eldridge*.[85] Looking to post-deprivation process, the Court framed the issue as "whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process."[86] Turning first to precedent, the Court found that several cases recognized that post-deprivation remedies could satisfy due process.[87] The Court thus concluded that:

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[79] *Id.*

[80] *Id.* at 532–34.

[81] *Id.* at 532. *See* Baker v. McCollan, 443 U.S. 137 (1979); Procunier v. Navarette, 434 U.S. 555 (1978).

[82] *See* Nahmod, *supra* note 46, at 7 ("The court was clearly incorrect when it asserted that section 1983 has no state-of-mind requirement."); Comment, *Federalism, Section 1983 and State Law Remedies: Curtailing the Federal Civil Rights Docket by Restricting the Underlying Right*, 43 U. PITT. L. REV. 1035, 1037 (1982) [hereinafter Comment, *Federalism, Section 1983 and State Law Remedies*] (applauds *Parratt* as "laudable precedent," but criticizes the Court for failing to limit § 1983 itself, "the real source of the problem").

[83] *Parratt*, 451 U.S. at 534–35. At least it appeared that way. For some years following *Parratt*, lower courts still debated whether the Court intended that § 1983 would always provide a remedy where injury resulted from simple negligence. Hence, courts concluded that negligence could not support certain § 1983 claims. Daniels v. Williams, 748 F.2d 229, 232 (4th Cir. 1984) (en banc) (injury to person not protectable interest), *aff'd on other grounds*, 106 S. Ct. 662 (1986); Davidson v. O'Lone, 752 F.2d 817, 826 (3d Cir. 1984) (en banc) ("negligence claims are not encompassed within § 1983"), *aff'd on other grounds sub nom*, Davidson v. Cannon, 106 S. Ct. 668 (1986). *See infra* notes 138–54 and accompanying text. *See also* Hull v. City of Duncanville, 678 F.2d 582, 584 (5th Cir. 1982) (finding mere negligence not enough to support § 1983 claim); Mills v. Smith, 656 F.2d 337, 340 n.2 (8th Cir. 1981) (same). In contrast, *see* Easton v. City of Boulder, 776 F.2d 1441, 1447 (10th Cir. 1985) (citing *Parratt* for proposition that negligence is enough to state a cause of action under § 1983); Kidd v. O'Neil, 774 F.2d 1252, 1256 (4th Cir. 1985) (same); Lowe v. Letsinger, 772 F.2d 308, 314 (7th Cir. 1985) (same); McKay v. Hammock, 730 F.2d 1367, 1373 (10th Cir. 1984) (same); Howard v. Fortenberry, 723 F.2d 1206, 1209 n.6 (5th Cir. 1984). A close reading of the Court's opinion in *Parratt* reveals that it never expressly stated that negligence could support a § 1983 action. *Parratt*, 451 U.S. at 531–35.

[84] 451 U.S. at 536–37. Justice Powell roundly criticized this conclusion in his concurring opinion. *Id.* at 547 (Powell, J., concurring). It was this part of the opinion that *Daniels* subsequently overruled. 106 U.S. at 665. *See infra* notes 159–64 and accompanying text.

[85] *Parratt*, 451 U.S. at 537. *See also supra* note 70 and accompanying text.

[86] *Parratt*, 451 U.S. at 537.

[87] *Id.* at 537–39. The Court relied on cases which generally involved established state procedures; all were cases in which some prior hearing *could* have been provided. *See* Fuentes v. Shevin,

> [E]ither the necessity of quick action by the State or the impracticability of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process.[88]

Under the facts presented, the Court found it significant that the deprivation was wholly random and did not occur pursuant to any state policy or procedure.[89] Thus, the state could not provide a prior hearing because it was virtually impossible to predict when the deprivation might take place.[90] The Court found it easy not to require predeprivation process in "a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee."[91]

The Court accordingly concluded that no due process violation had been alleged.[92] Although the state had deprived the plaintiff of property, the deprivation did not occur "as a result of some established state procedure," nor did the plaintiff "conten[d] that the procedures themselves [were] inadequate" or that a predeprivation hearing was otherwise practicable.[93] Moreover, the state apparently provided a remedy through its tort claims act which would compensate those who had suffered injury "at the hands of the State."[94] Finally, the possibility that the available state law remedies might be something less than those available in federal court did not make them constitutionally suspect.[95] Thus, under the facts presented, the Court concluded there was no due process violation and, therefore, no federal claim.[96]

Justice Powell entered a concurring opinion, one that would eventually capture a majority of the Court.[97] He was of the view that negligent acts could not constitute deprivations within the meaning of the due process clause; instead, only intentional acts could violate due process.[98] Justice Powell expressed his fear that by recognizing negligent acts as deprivations, the Court opened the federal forum to all ordinary tort suits.[99] The better approach, he argued, would be to draw the line at intentional acts, thus disposing of the due process issue once and for all in relation to negligence, without

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407 U.S. 67, (1972); Bell v. Burson, 402 U.S. 535 (1971); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Fahey v. Mallonee, 332 U.S. 245 (1947); Bowles v. Willingham, 321 U.S. 503 (1944). *See infra* notes 284–305 and accompanying text.

[88] 451 U.S. at 539 (footnote omitted).

[89] *Id.* at 541.

[90] *Id.*

[91] *Id.*

[92] *Id.* at 543.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 544.

[96] The Court concluded: "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.* (emphasis added). The Court never stated, however, that the remedies were necessary, although the Court in *Hudson* so read the *Parratt* decision. *See* Hudson v. Palmer, 468 U.S. 517, 531 (1984). This is discussed more fully later in this Article. *See infra* notes 282–84 and accompanying text.

[97] *Parratt*, 451 U.S. at 546 (Powell, J., concurring). *See* Daniels v. Williams, 106 S. Ct. 662, 664–65 (1986). See *infra* notes 159–84 and accompanying text for a discussion of *Daniels*.

[98] 451 U.S. at 548 (Powell, J., dissenting) ("a 'deprivation' connotes an intentional act").

[99] *Id.* at 550 (Powell, J., dissenting).

having to worry about adequate state remedies.[100] Although no other Justice joined with Justice Powell in *Parratt*, just five years later he would convince the Court he was correct.[101]

Justice Blackmun also filed a concurring opinion in which he emphasized the "narrow reach" of the Court's holding.[102] He first stated, "I do not read the Court's opinion as applicable to a case concerning deprivation of life or of liberty."[103] He continued: "Most importantly, I do not understand the Court to suggest that the provision of 'postdeprivation remedies' . . . within a state system would cure the unconstitutional nature of a state official's intentional act that deprives a person of property."[104]

C. Hudson v. Palmer

Hudson v. Palmer was another prisoner's rights case involving a simple property loss.[105] This loss, however, was not the result of negligence, but was a consequence of intentional conduct.[106] In *Hudson*, a prisoner at Virginia's Bland Correctional Center alleged that during a "shakedown" of his cell prison authorities destroyed certain non-contraband property.[107] After rejecting the inmate's fourth amendment claim,[108] the Court, speaking through Chief Justice Burger, addressed the due process issue.

In relation to due process the Court found no logical distinction between negligent and intentional acts. Both types of acts are random when viewed from the state's perspective, and in either case the state has no opportunity to provide a predeprivation hearing.[109] Responding to the argument that the state actor could provide such a hearing because the actor knows what he intends to do, the Court stated: "The controlling inquiry is solely whether the *state* is in a position to provide for a predeprivation process."[110] Thus, the Court drew a distinction between what a state official does and what

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[100] *Id.* at 548–50 (Powell, J., dissenting). Justice Powell based his conclusion both on the reasons supporting the fourteenth amendment's due process clause, and the language used in that clause. *Id.* at 548 & n.4 (Powell, J., dissenting). Specifically, in relation to the language used, Justice Powell argued that the word "deprive" connotes only intentional deprivations, citing Webster's Dictionary. *Id. Contrast* Justice Stevens' concurring opinion in *Daniels* and *Davidson*, 106 S. Ct. at 677, 678–80. *See infra* notes 165–75 and accompanying text.

[101] *See Daniels*, 106 S. Ct. at 663–67. See *infra* notes 159–84 and accompanying text for a discussion of *Daniels*. Justice Stewart and Justice White also offered short concurring opinions in *Parratt*. 451 U.S. at 544 (Stewart, J., concurring); *id.* at 545 (White, J., concurring).

[102] 451 U.S. at 545 (Blackmun, J., concurring).

[103] *Id.* (Blackmun, J., concurring). Justice Blackmun further stated: "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." *Id.* (Blackmun, J., concurring) (citing Roe v. Wade, 410 U.S. 113 (1973); Boddie v. Connecticut, 401 U.S. 371 (1971)).

[104] *Parratt*, 451 U.S. at 545–46. Justice Blackmun apparently later retracted this in view of the Court's holding in Hudson v. Palmer, 468 U.S. 517, 536 (1984). *See infra* note 168 and accompanying text.

[105] *Hudson*, 468 U.S. at 520.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 530. The Court found that an inmate possesses no legitimate expectation of privacy in his or her prison cell, and consequently that the fourth amendment was inapplicable to the facts of the case. *Id.*

[109] *Id.* at 533.

[110] *Id.* at 534 (emphasis added).

he fails to do. Although a state official's intentional act will be imputed to the state for the purposes of satisfying the state action requirement, his failure to provide a hearing, even when possible, will not.[111] Based on this reasoning and its interpretation of *Parratt*, the Court concluded that an adequate state remedy satisfies due process.[112] The Court found Virginia's remedial scheme adequate because the tortfeasor apparently was not protected by sovereign immunity, leaving the prisoner free to seek redress in the state courts.[113]

Justice Stevens concurred in part, though expressing a limited disclaimer:[114]

> I do not understand the Court's holding to apply to conduct that violates a substantive constitutional right — actions governmental officials may not take no matter what procedural protections accompany them, . . . or to cases in which it is contended that the established prison procedures themselves create an unreasonable risk that prisoners will be unjustifiably deprived of their property . . . .[115]

Justice Blackmun joined in this concurrence, thus apparently abandoning his previous opinion that post-deprivation remedies could not satisfy due process in cases involving intentional deprivations.[116] Justice O'Connor entered a separate concurring opinion, voicing her view that the prisoner failed to "state a ripe constitutional claim."[117] This opinion was the first to speak in terms of "exhaustion" for purposes of procedural due process, a view which has gained some support from commentators.[118]

D. *Limitations on* Parratt *and* Hudson*: The* Logan *Decision*

Parratt and *Hudson* established the general rule that where a state official tortiously deprives a person of property, no procedural due process violation occurs absent the denial of some adequate state remedy.[119] This, however, need not always be true. In

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[111] This dichotomy has drawn criticism from several commentators as being directly contrary to the teaching of Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913). *See, e.g.*, Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1113 (1984); Note, *Unauthorized Conduct of State Officials Under the Fourteenth Amendment:* Hudson v. Palmer *and the Resurrection of Dead Doctrines*, 85 COLUM. L. REV. 837, 843 (1985) [hereinafter Note, *Unauthorized Conduct*]. The criticism is much deserved. *See also infra* notes 271–75 and accompanying text.

[112] *Hudson*, 468 U.S. at 534, 535.

[113] In drawing this conclusion the Court accepted the lower courts' interpretation of Virginia law, and also engaged in some discussion of the relevant Virginia cases. *Id.* at 535–36. In doing so, the opinion seems to give more force to the argument that the existence of immunity might leave a state remedy inadequate for purposes of due process.

[114] *Id.* at 541 n.4 (Stevens, J., concurring in part and dissenting in part) (citations omitted).

[115] *Id.*

[116] *Id.* at 541 (opinion of Stevens, J., joined by Blackmun, J.). *See* Parratt v. Taylor, 451 U.S. 527, 545–46 (1981) (Blackmun, J., concurring).

[117] *Hudson*, 468 U.S. at 540 (O'Connor, J., concurring).

[118] At least two commentators share Justice O'Connor's view that exhaustion should be required. *See* Travis and Adams, *The Supreme Court's Shell Game: The Confusion of Jurisdiction and Substantive Rights in Section 1983 Litigation*, 24 B.C.L. REV. 635, 656 (1983) (arguing that traditional exhaustion principles should apply); *see also* Blackmun, *supra* note 5, at 24 ("Although the Court thus far has declined to impose a requirement that § 1983 plaintiffs exhaust state remedies, the Court's holding in *Parratt v. Taylor* has the potential for doing just that.").

[119] There might exist, of course, a violation of some other constitutional right. *See infra* notes 383–434 and accompanying text.

Logan v. Zimmerman Brush Company, the Court refused to extend *Parratt* to a situation where "the state system itself . . . destroys a complainant's property interest, by operation of law . . . ."[120] Thus, where the official acts, tortiously or otherwise, pursuant to some established state procedure,[121] the *Parratt* rationale does not apply. This comports with Justice Steven's concurring remarks in *Hudson*,[122] and with *Parratt's* underlying rationale.[123] The state could not provide prior process in *Parratt* or *Hudson* because the action, being tortious, was random and unauthorized. In these situations the state could not predict when a deprivation might occur. Where, however, the act is authorized or taken pursuant to established procedure, the state theoretically could prevent the deprivation. In this latter situation, the procedure or authorization itself, rather than the act, violates procedural due process.[124]

E. *The Ills of* Parratt *and* Hudson

Parratt and *Hudson* truly opened a Pandora's Box filled with problematic issues, the most visible of which concerns the adequacy of state remedies. The Court provided little guidance in either case concerning what state remedies must include in order to be adequate. The *Parratt* Court did make it clear, however, that the state remedies need not be equivalent to the federal remedies available under section 1983.[125] Thus, states need not provide for attorney's fees, trial by jury, or punitive damages.[126] Furthermore,

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[120] Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982). See *infra* notes 377–82 and accompanying text for a discussion of *Logan*.

[121] Defining what constitutes an established state procedure is not always easy. Often, the official state procedure can differ from the established procedure being followed. For instance, in *Gregory v. Town of Pittsfield*, the statutorily defined state procedure required that certain process be afforded prior to a denial of general assistance benefits. 479 A.2d 1304, 1308 (Me. 1984), *cert. denied*, 470 U.S. 1018 (1985). The established procedure of the municipality charged with administering the general assistance plan, however, was not to provide this required process. *Id.* at 1305. Hence, the established procedure arguably was unconstitutional, but the state procedure was not. The Supreme Judicial Court of Maine found *Parratt*, not *Logan*, applicable. *Id.* at 1308. *See supra* note 41 and *infra* notes 327 and 381.

One commentator argues that because the "concept of 'established procedure' appears identical to what *Monell* [v. Department of Social Services, 436 U.S. 658 (1978),] terms 'custom or policy,'" a case which falls under *Monell* necessarily satisfies *Logan*. Bandes, Monell, Parratt, Daniels *and* Davidson: *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 IOWA L. REV. 101, 117 (1986). Under this approach a municipal policy, irrespective of its consistency with state law, would fall under *Logan*, and *Parratt* consequently would not apply. Therefore, assuming this position is correct, *Gregory* was wrongly decided because a municipal policy existed in that case which, notwithstanding state law to the contrary, should have fulfilled *Logan's* established procedure requirement. At least one federal court has agreed with the reasoning of Professor Bandes. In *Messick v. Leavins*, an apparently abandoned barge was destroyed without prior notice to the owner, which was consistent with municipal policy yet contrary to state law. 811 F.2d 1439, 1441 (11th Cir. 1987). The court found *Logan* and not *Parratt* controlling. *Id.* at 1142. *See supra* note 41 and *infra* notes 327 and 333. *Contrast* Vinson v. Campbell County Fiscal Court, 820 F.2d 194, 199 (6th Cir. 1987) (concluding a custom or policy could exist without there also being an established procedure).

[122] *Hudson*, 468 U.S. at 541 n.4 (Stevens, J., concurring) (citations omitted). *See supra* note 115 and accompanying text.

[123] The *Logan* opinion had its genesis in the language of *Parratt*, where the Court noted that a random and unauthorized act "is not a result of some established state procedure," but instead occurs "as a result of the unauthorized failure of agents of the State to follow established state procedure." Parratt v. Taylor, 451 U.S. 527, 541, 543 (1981).

[124] *Logan*, 455 U.S. at 436.

[125] *Parratt*, 451 U.S. at 544.

[126] *Id.* at 543–44.

relief granted by the state need not come from the tortfeasor's pocket, but may come directly from the state's coffers.[127] Beyond these general guidelines, the Court left the adequacy of any given remedy an open question.

Despite the dearth of guidance given in this area by the Supreme Court, one principle might be drawn from *Parratt* and *Hudson* themselves. In both cases the Court concluded that the tort victim possessed some remedy, against either the tortfeasor or the state. In *Parratt* the prisoner could receive compensation under the state's tort claims act,[128] while in *Hudson* the tortfeasor was personally liable under state law for his intentional acts.[129] Thus, it might be argued that both cases implicitly hold that under state law it must be possible for either the state or the tortfeasor to compensate the victim. So long as one or the other is open to liability the remedy is adequate.[130]

Not all courts and scholars have accepted this reasoning. While some have argued that a true remedy in the form of monetary relief must exist to satisfy the requirements of *Parratt* and *Hudson*,[131] others have suggested that a simple hearing should suffice, even if state law or immunity bars recovery.[132] As demonstrated below,[133] each of these views presents its own unique problems.

Parratt and *Hudson* also pose the question whether their rationale, which the Court expressly applied only to property,[134] should extend to life and liberty interests as well. As might be expected, courts and commentators again have split over this issue.[135] It

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[127] *Id.*

[128] *Id.* at 543.

[129] *Hudson*, 468 U.S. at 535.

[130] The argument also might be made that the *Parratt* Court did not find that post-deprivation remedies were necessary, but only that they were sufficient. See *Parratt* 451 U.S. at 544, discussed *infra* notes 280–84 and accompanying text.

[131] *See, e.g., Davidson*, 106 S. Ct. at 676–77 (Blackmun, J., dissenting) (arguing that immunity defense makes state remedy inadequate) (discussed *infra* at text accompanying note 184); Labov v. Lalley, 809 F.2d 220, 223 (3d Cir. 1987) (suggesting remedy not adequate if not equivalent to that found under § 1983); Burch v. Apalachee Community Mental Health Serv., 804 F.2d 1549, 1556 (11th Cir. 1986) (finding remedy); Byrd v. Stewart, 803 F.2d 1168, 1170 (11th Cir. 1986) (finding remedy), *rev'd and remanded*, 811 F.2d 554 (1987); McClary v. O'Hare, 786 F.2d 83, 88 (2d Cir. 1986) (finding workers' compensation to provide remedy); Weber v. City of Cedarburg, 129 Wis. 2d 57, 76–77, 384 N.W.2d 333, 343 (1986) (finding remedy). *Cf.* Holloway v. Walker, 784 F.2d 1287, 1129 (5th Cir.) (where § 1983 action is against state court judge, right to appeal is adequate remedy), *cert. denied*, 107 S. Ct. 571–72 (1986). *See also* Nahmod, *Due Process, State Remedies, and Section 1983*, 34 U. KAN. L. REV. 217, 230 (1985) [hereinafter Nahmod, *Due Process*] ("when all of the potential defendants are absolutely immune under state law so as that the merits of the plaintiff's state claim cannot be reached, then the state remedy should be considered inadequate").

[132] *See, e.g.*, Daniels v. Williams, 720 F.2d 792, 796 (4th Cir. 1983) (finding adequate remedy irrespective of possible immunity), *aff'd*, 748 F.2d 229, 232 (1984) (en banc) (finding no immunity and thus not addressing issue), *aff'd on other grounds*, 106 S. Ct. 662 (1986); Davidson v. O'Lone, 752 F.2d 817 (3d Cir. 1984) (en banc), *aff'd on other grounds sub nom.* Davidson v. Connor, 106 S. Ct. 668 (1986); Dykes v. Hosemann, 776 F.2d 942, 953 (11th Cir. 1985) (Tjoflat, J., concurring in part and dissenting in part) ("immunization of judges from suit and the corresponding absence of a tort remedy for judicial wrongs [does not] provide[] an injured party less process than he is due"), *cert. denied sub nom.* Dykes v. Dykes, 107 S. Ct. 569 (1986); Temple v. Marlborough Div. of Dist. Court Dept, 395 Mass. 117, 128, 479 N.E.2d 137, 143–44 (1985) (mere opportunity for hearing sufficient irrespective of existence of absolute immunity). *Cf.* Williams v. St. Louis County, 812 F.2d 1079, 1082–83 (8th Cir. 1987) (finding no opportunity to be heard, thus refusing to address question).

[133] *See infra* notes 193–228 and accompanying text.

[134] *See Hudson*, 468 U.S. at 536; *Parratt*, 451 U.S. at 543.

[135] The split over whether the post-deprivation process rationale should extend beyond property

was these two concerns that the Court ostensibly set out to address in *Daniels*[136] and its companion case, *Davidson v. Cannon*,[137] though the Court never resolved either issue.

II. A New Beginning: *Daniels and Davidson*

A. *The Opinions Below*

In *Daniels v. Williams*, the Court of Appeals for the Fourth Circuit addressed the two problems outlined above: first, whether the *Parratt-Hudson* analysis should encompass liberty interests, and second, if it does, whether an adequate state remedy exists when it

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is reflected in the following cases. *Contrast* Gilmere v. City of Atlanta, 774 F.2d 1495, 1500 (11th Cir. 1985) (en banc) (refusing to extend *Paratt-Hudson's* post-deprivation process rationale to case involving intentional infliction of personal injury), *cert. denied*, 106 S. Ct. 1970 (1986); Roberts v. City of Troy, 773 F.2d 720, 728 (6th Cir. 1985) (Celebrezze, J., concurring) (refusing to extend *Parratt-Hudson's* rationale to deprivation of life); Haygood v. Younger, 769 F.2d 1350, 1357 (9th Cir. 1985) (en banc) (recognizing distinction between property and liberty), *cert. denied sub nom.* Cranke v. Haygood, 106 S. Ct. 3333 (1986); Hewitt v. City of Truth or Consequences, 758 F.2d 1375, 1379 (10th Cir.) (apparently distinguishing liberty from property), *cert. denied*, 106 S. Ct. 131 (1985); Conway v. Village of Mount Kisco, 758 F.2d 46, 48 (2d Cir. 1985) (*Parratt-Hudson's* rationale does not extend to liberty), *cert. granted sub nom.* Cerbone v. Conway, 106 S. Ct. 878, *cert. dismissed as improvidently granted*, 107 S. Ct. 390 (1986); Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423, 1434 (10th Cir. 1984) (same), *vacated sub nom.* City of Lawton v. Lusby, 106 S. Ct. 40 (1985); *cf.* Byrd v. Stewart, 803 F.2d 1168, 1170 (11th Cir. 1986) (notes issue undecided), *rev'd and remanded*, 811 F.2d 554 (1987); *and* McClary v. O'Hare, 786 F.2d 83, 88 (2d Cir. 1986) (notes undecided whether *Parratt-Hudson* rationale applies to life); *with Daniels*, 720 F.2d at 795, *as amended*, 748 F.2d 229 (en banc) (*Parratt-Hudson* rationale extends to liberty), *aff'd on other grounds*, 106 S. Ct. 662 (1986); *Burch*, 804 F.2d at 1554 (finding that life, liberty, and property should all be treated equally); King v. Massarweh, 782 F.2d 825, 827 (9th Cir. 1986) (extending rationale to liberty); Toney-El v. Franzen, 777 F.2d 1224, 1227–28 (7th Cir. 1985) (extending rationale to life and liberty); Hayes v. Vessey, 777 F.2d 1149, 1152 (6th Cir. 1985) (extending rationale to liberty); Young v. City of Killeen, 775 F.2d 1349, 1353 (5th Cir. 1985) (extending rationale to life); Wilson v. Beebe, 770 F.2d 578, 584 (6th Cir. 1985) (en banc) (extending rationale to liberty interest); *and* Temple v. Marlborough Div. of Dist. Court Dep't., 395 Mass. 117, 479 N.E.2d 137 (1985).

Commentators, including Justice Blackmun, also have argued that the analysis applied in *Parratt* and *Hudson* should be confined to property. *See* Blackmun, *supra* note 5, at 24–25; Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 Ga. L. Rev. 201 (1984); Levinson, *Due Process Challenges to Governmental Actions: The Meaning of* Parratt *and* Hudson, 18 Urb. Law. 198 (1986); Moore, Parratt, *Liberty and the Devolution of Due Process: A Time for Reflection*, 13 W. St. U.L. Rev. 201, 258–59 (1985). Not all commentators have felt this way, however. *See* Note, *Due Process: Application of the* Parratt *Doctrine to Random and Unauthorized Deprivations of Life and Liberty*, 52 Fordham L. Rev. 887, 902 (1984) [hereinafter Fordham Note] (finding no meaningful distinction between life, liberty and property).

In addition to distinguishing life and liberty from property for purposes of due process, some courts have attempted to avoid the *Parratt* and *Hudson* holdings by simply limiting them to the prisoners' rights context. *See* Bretz v. Kelman, 773 F.2d 1026, 1031 (9th Cir. 1985) (suggesting *Parratt* and *Hudson* might be so limited); *e.g.*, Wilkerson v. Johnson, 669 F.2d 325, 329 (6th Cir. 1983) (same); 423 So. Salina St. v. City of Syracuse, 68 N.Y.2d 474, 485, 503 N.E.2d 63 68 (1986) (same), *cert. denied*, 107 S. Ct. 1880 (1987). *But see* Byrd v. Stewert, 803 F.2d 1168, 1170 (11th Cir. 1986) (refusing to limit *Parratt* and *Hudson* holdings in this manner), *rev'd and remanded*, 811 F.2d 554 (1987).

[136] Daniels v. Williams, 106 S. Ct. 662 (1986).

[137] 106 S. Ct. 668 (1986).

appears that both the state and its tortfeasor are immune from suit.[138] In *Daniels* an inmate slipped on a pillow which a deputy-sheriff negligently left on a stairway.[139] The inmate brought a civil rights action in federal district court under section 1983, alleging that he had been deprived of liberty without due process of law.[140] The original panel of the court (*Daniels I*) held that *Parratt* extends to liberty interests,[141] and that regardless of the presence of both sovereign and official immunity, there existed an adequate remedy for purposes of due process.[142] The court found that this remedy was simply the right to be heard, and not the right to a recovery.[143]

Daniels was considered again by the Fourth Circuit (*Daniels II*),[144] this time sitting *en banc*. In *Daniels II* the court took a different tack than the original panel, though reaching the same result.[145] The *Daniels II* court came to the somewhat startling conclusion that merely claiming negligence by a state actor does not implicate a "protectable liberty interest under the due process clause."[146] The court's conclusion was startling because *Parratt* apparently held only three years earlier that negligence *was* enough to implicate both due process and section 1983.[147] The *Daniels II* court, however, read *Parratt* to apply only to property, and thus felt free to fashion its own rules regarding liberty.[148] As an alternative holding, the *en banc* court found that no official immunity was in fact available for the deputy-sheriff, and thus found it unnecessary to consider whether the existence of total immunity might ever give rise to a procedural due process claim.[149]

Daniels II was not alone in its conclusion that simple negligence could not give rise to a due process violation. The Court of Appeals for the Third Circuit came to the same conclusion, albeit using different reasoning, in *Davidson v. O'Lone*.[150] There, the *en banc* court heard arguments involving prison officials' alleged negligence in failing to protect an inmate who was attacked and injured by other inmates.[151] Finding that an inmate possesses a liberty interest in being free from attack by other prisoners,[152] the court stated that "nothing in the Court's opinion in *Parratt* leads us to conclude that the Court held that merely negligent conduct by state officers constitutes a constitutional depri-

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[138] Daniels v. Williams, 720 F.2d 792, 796, 798 (4th Cir. 1983), 748 F.2d 229 (1984) (en banc), *aff'd*, 106 S. Ct. 662 (1986).

[139] *Daniels*, 720 F.2d at 794.

[140] *Id.*

[141] *Id.* at 795.

[142] *Id.* at 798.

[143] *Id.* at 797. *See also* Davidson v. O'Lone, 752 F.2d 817, 820 (3d Cir. 1984), *aff'd on other grounds sub nom.* Davidson v. Cannon, 106 S. Ct. 668 (1986) (companion case to *Daniels*). In *Davidson* the court similarly found that despite the existence of total immunity, due process was satisfied. 752 F.2d at 830. *See also infra* note 156 and accompanying text.

[144] 758 F.2d 229 (4th Cir. 1984) (en banc), *aff'd on other grounds*, 106 S. Ct. 662 (1986).

[145] *Id.* at 233.

[146] *Id.* at 232.

[147] Parratt v. Taylor, 451 U.S. 527, 534 (1981).

[148] *Daniels II*, 748 F.2d at 231.

[149] *Id.* at 232.

[150] 752 F.2d 817, 820 (3d Cir. 1985), *aff'd on other grounds sub nom.* Davidson v. Cannon, 106 S. Ct. 668 (1986).

[151] *Davidson*, 752 F.2d at 819. The court continuously characterized the case as one involving simple negligence, although Justice Blackmun later characterized the case as possibly involving gross negligence. *See* 106 S. Ct. at 675 (Blackmun, J., dissenting).

[152] *Davidson*, 752 F.2d at 822.

vation encompassed by [section] 1983."[153] Since *Parratt* was not controlling, the court concluded that only "intentional conduct, gross negligence or reckless indifference, or an established state procedure" implicates due process.[154] In the alternative, the court found that even if negligence were enough to support a claim, state law provided an adequate remedy.[155] The court firmly rejected the argument that the possibility of immunity rendered state process inadequate.[156] Instead, like the Fourth Circuit in *Daniels I*,[157] the Third Circuit held that the remedy was adequate even if complete immunity existed.[158]

B. *The Supreme Court's Opinions*

The Supreme Court surprisingly affirmed the position of the lower courts in both *Daniels II* and *Davidson*, holding simple negligence by state actors insufficient to implicate due process.[159] In order to reach this conclusion, Justice Rehnquist, writing for the majority, was forced to reassess and retract his contrary conclusion reached only five years earlier in *Parratt*. The majority, however, refused to decide "whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause."[160]

In support of its conclusion that more than negligence is required to implicate due process, the *Daniels* Court engaged in a summary discussion of the due process clause's purposes.[161] Making no effort to distinguish procedure from substance, the Court found that due process, "like its forebear in the Magna Carta . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government . . . .'"[162] When it finally acknowledged the distinction between the two, the Court found that procedural due process promotes fairness in decisions affecting life, liberty or property, while substantive due process "serves to prevent governmental power from being used for purposes of oppression," despite the fairness of the government's procedures.[163] The Court, therefore, concluded:

> 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. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.[164]

The contrary conclusion found in *Parratt* accordingly was overruled.

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[153] *Id.* at 826.
[154] *Id.* at 828.
[155] *Id.* at 830.
[156] *Id.*
[157] Daniels v. Williams, 748 F.2d 229, 232 (4th Cir. 1985) (en banc) *aff'd on other grounds*, 106 S. Ct. 662 (1986).
[158] *Davidson*, 752 F.2d at 830.
[159] 106 S. Ct. at 666.
[160] *Id.* at 667.
[161] *Id.* at 665.
[162] *Id.*
[163] *Id.*
[164] *Id.*

Justice Stevens concurred in the result, but on wholly different grounds.[165] In an opinion which addressed both *Daniels* and *Davidson*, he found that the fourteenth amendment's due process guarantee encompasses "three different kinds of constitutional protection."[166] First, the due process clause incorporates several of the specific guarantees found in the Bill of Rights.[167] Next, it harbors its own substantive guarantee against certain types of state action.[168] Finally, it guarantees "fair procedure, sometimes referred to as 'procedural due process' . . . ."[169] Finding that *Daniels II* and *Davidson* involved only procedural due process, Justice Stevens concluded that a tortfeasor's mental state is irrelevant to a victim's loss:

> The harm to a prisoner is the same whether a pillow is left on a stair negligently, recklessly, or intentionally; so too, the harm resulting to a prisoner from an attack is the same whether his request for protection is ignored negligently, recklessly, or deliberately. In each instance, the prisoner is losing — being 'deprived' of — an aspect of liberty as the result, in part, of a form of state action.[170]

Based on this reasoning, Justice Stevens determined that a deprivation had occurred and accordingly turned to the state remedy provided in both *Daniels* and *Davidson*.[171] Noting that the *Daniels II* court found that official immunity did not apply, Justice Stevens concluded that the available remedy against the tortfeasor satisfied due process.[172] Turning next to *Davidson* where the Third Circuit had found "no state remedy was available because a New Jersey statute prohibits prisoner recovery from state employees for injuries inflicted by other prisoners,"[173] Justice Stevens still concluded that due process was satisfied. Finding nothing objectionable with immunity grants *per se*, Justice Stevens concluded that due process was only offended where there is "fundamental unfairness [in the immunity grant's] operation."[174] Justice Stevens found nothing to "suggest that the doctrine of sovereign immunity renders a state procedure fundamentally unfair."[175] Thus, Justice Stevens was of the opinion that due process was offended in neither *Daniels II* nor *Davidson*.[176]

Justice Blackmun concurred in the *Daniels* result[177] but, with Justice Brennan, dissented in *Davidson*.[178] Justice Brennan concluded that "official conduct which causes personal injury due to recklessness or deliberate indifference, does deprive the victim

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[165] *Id.* at 677 (Stevens, J., concurring).
[166] *Id.* (Stevens, J., concurring).
[167] *Id.* (Stevens, J., concurring).
[168] *Id.* at 678 (Stevens, J., concurring).
[169] *Id.* (Stevens, J., concurring).
[170] *Id.* at 680 (Stevens, J., concurring).
[171] *Id.* (Stevens, J., concurring).
[172] *Id.* (Stevens, J., concurring).
[173] *Id.* (Stevens, J., concurring).
[174] *Id.* (Stevens, J., concurring).
[175] *Id.* (Stevens, J., concurring).
[176] *Id.* (Stevens, J., concurring).
[177] *Id.* at 667 (Blackmun, J., dissenting).
[178] *Id.* at 671 (Blackmun, J., dissenting); *id.* at 671 (Brennan, J., dissenting). Justice Marshall joined Justice Blackmun's dissent.

of liberty within the meaning of the Fourteenth Amendment."[179] He stated that *Davidson* raised a serious question concerning whether the official's conduct was reckless, and thus he would have remanded the case.[180] Justice Blackmun also found that "recklessness must be sufficient" to implicate due process.[181] Moreover, he disagreed with the majority's "inflexible" rule that negligence never offends due process.[182] Instead, Justice Blackmun opined that "[i]n some cases, by any reasonable standard, governmental negligence is an abuse of power" which should implicate due process.[183] As a final matter, after stating that Davidson had been deprived of a liberty interest, Justice Blackmun concluded that the state denied Davidson "'an *opportunity* . . . granted at a meaningful time and in a meaningful manner' . . . 'for [a] hearing appropriate to the nature of the case,'" thus denying Davidson an adequate remedy.[184]

C. *Alternatives Presented to the Court*

1. Limiting *Parratt* and *Hudson* to Property

Daniels is not as surprising once one recognizes the magnitude of the problems the Court faced. In *Daniels*, the Court essentially was asked to rule upon the constitutionality of state immunity rules, an area of the law traditionally considered free of any difficulty.[185] Of course, the Court did not have to partially overrule *Parratt* to avoid the immunity issue. It instead could have chosen to limit *Parratt* and *Hudson* to property, and thus avoided the immunity problem in section 1983 cases involving either life or liberty.[186]

The Court understandably did not choose this option. Limiting the *Parratt-Hudson* rule to property would be fundamentally inconsistent with the Court's avowed purpose of deflecting common, everyday torts from the federal forum.[187] Had the Court taken this approach, virtually every negligent injury to person would rise to a constitutional level. Moreover, limiting *Parratt-Hudson* to property does not find support in either its own rationale or the language of the due process clause. Tortious activity is just as random in relation to life and liberty as it is to property, making it just as impossible for the state to afford the victim a prior hearing. Moreover, from a semantic viewpoint, the Constitution places life and liberty on an equal footing with property, all three being assured due process.

Still, arguments have been made to the contrary,[188] the most forceful of which is based in the adequate remedy rationale itself.[189] Where property is involved, the argu-

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[179] *Id.* at 671 (Brennan, J., dissenting).
[180] *Id.* (Brennan, J., dissenting).
[181] *Id.* at 675 (Blackmun, J., dissenting).
[182] *Id.* at 673 (Blackmun, J., dissenting).
[183] *Id.* (Blackmun, J., dissenting).
[184] *Id.* at 676 (Blackmun, J., dissenting) (citations omitted).
[185] *See infra* note 204.
[186] Lower courts have split over this issue. *See supra* note 135.
[187] *See supra* note 12 and accompanying text.
[188] *See supra* note 135.
[189] *See, e.g.*, Moore, *supra* note 135, at 258–59:

> When an individual has been wrongfully deprived of life or liberty under color of state law, a post-deprivation remedy may provide some compensation but it does not provide due process. Once life or liberty is gone, it is gone forever and the deprivation

ment goes, the state may provide an adequate remedy by substituting monetary compensation for the damaged or destroyed item. Where life or liberty is at issue, however, no amount of monetary compensation can redress the wrong. Because the state could never adequately remedy loss of life or liberty, the argument continues, a deprivation of due process occurs commensurate with the tort.

Though this argument is appealing, *Hudson* completely undermines it. There the inmate argued that he lost items which were "irreplaceable [sic], and incompensable," their having sentimental and intangible value.[190] In response, the Chief Justice simply wrote: "If the loss is 'incompensable,' this is as much so under section 1983 as it would be under any other remedy."[191] The Court thus was not overly concerned that the nature of the "remedy" in general is monetary. Where property is destroyed, the state cannot give it back, and monetary compensation will have to do. Similarly, if one is physically injured or killed, the state cannot take back the pain or bring the person back to life.[192] Neither can the federal government. Thus, though the argument in favor of distinguishing property from life and liberty is superficially appealing, finding support for such a position is difficult.

2. Adequacy of State Remedies in Light of Immunity

Had the *Daniels* Court reached the question of adequate state remedies, in essence it would have had to rule on the continuing validity of state law immunity. As noted previously, courts and commentators had split on the issue of whether *Parratt* and *Hudson* actually required some remedy,[193] or whether recovery could still be adequate if defeated by immunity.[194] Both the lower courts in *Daniels I* and *Davidson* subscribed to the latter position, finding that the existence of immunity did not affect the adequacy of post-deprivation process.[195] But this *pro forma* approach is difficult to understand in terms of process being due. As this Article explains below,[196] prior process has the advantage of preventing wrongful deprivations and thus need only take the form of a hearing. Post-deprivation process, however, lacks this unique characteristic. When post-deprivation process is required, therefore, it has always taken the form of a remedy, with the purpose of correcting the wrong that was committed.[197] Requiring post-deprivation process, but

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> is complete. Under the *Parratt* due process analysis, before the deprivation is complete a hearing must be afforded. When this is impossible, the deprivation is without due process and the only vindication for the constitutional violation is a section 1983 action.

Id.

[190] 468 U.S. at 535.

[191] *Id.*

[192] *See* Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies*, Parratt v. Taylor *and* Logan v. Zimmerman Brush Company, 1982 U. ILL. L. REV. 831, 842 ("money is often the only remedy that an ordered society can provide for victims of governmental misfeasance . . . . Just as the state cannot be expected to conduct a hearing on whether the reckless squad car driver should go ahead and run over the pedestrian, the state cannot be expected to provide a hearing in advance of any statement by a public officer that injures a citizen's reputation. The only due process the state *can possibly* provide in such cases is money after the fact."). *See also* Fordham Note, *supra* note 135, at 896.

[193] *See supra* note 131.

[194] *See supra* note 132.

[195] *See supra* notes 142–43, 141 and accompanying text.

[196] *See infra* notes 295–96 and accompanying text.

[197] *See infra* notes 297–303 and accompanying text.

allowing this process to simply take the form of a remedyless hearing, relegates the process requirement to a meaningless gesture.

In contrast, requiring that either the state or the tortfeasor compensate the victim obviously conflicts with traditional common law. Sovereign immunity historically has protected the state,[198] whereas the state employee has traditionally received protection by some form of official immunity. This immunity is either absolute or at least qualified in the sense that the official is exposed to liability only when she engages in a "ministerial" as opposed to "discretionary" act.[199] Cases might often arise where the state retains its immunity shield and the tortfeasor-state employee enjoys some form of immunity.[200] Because no state remedy is available under these circumstances, *Parratt* and *Hudson* arguably would support a federal cause of action. Faced with this realization, the state would be placed under some pressure to modify its rules regarding sovereign and official immunity. Though there would be a choice, it would be limited to that of either abrogating its state law immunities to some extent, or permitting the federalization of such claims as a matter of due process.[201]

In addition, the *Parratt-Hudson* rule presents an interesting twist to any state immunity law challenge. Should the challenge succeed, the Court apparently would not find the immunity grant unconstitutional;[202] instead, the immunity, though valid, simply would trigger a due process violation — the claim would "ripen" in light of the immunity.[203] The state or its actor, therefore, would not be liable under state law, but would be potentially liable under federal law for depriving someone of life, liberty, or property in the absence of adequate process. Contrast this with the more common scenario where the Court voids the state procedural rule as being constitutionally infirm.[204] In this

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[198] *See* Smolla, *supra* note 192, at 883 (arguing that *Parratt* naturally calls into question the vitality of this principle). *See also* Nahmod, Due Process, *supra* note 131, at 230 (same).

[199] *See generally* W. KEETON, PROSSER AND KEETON ON TORTS § 132 (5th ed. 1984).

[200] *See, e.g., Davidson*, 752 F.2d at 830 (sovereign immunity exists and tortfeasor entitled to qualified immunity); Temple v. Marlborough Div. of Dist. Court Dep't, 395 Mass. 117, 479 N.E.2d 137 (1985) (sovereign immunity exists and wrongdoer entitled to absolute immunity).

[201] The possibility also exists that the immunity grant might be deemed unconstitutional, an approach that might have quite different consequences. *See* Smolla, *supra* note 192, at 873; Nahmod, *Due Process, supra* note 131, at 230. *See infra* note 204.

[202] *But see Daniels*, 106 S. Ct. at 680–81 (Stevens, J., dissenting). Justice Stevens suggests that only those defenses which render procedures "fundamentally unfair" violate the mandates of the *Parratt-Hudson* rule. *Id.* (Stevens, J., dissenting). Although Justice Stevens does not make his solution for such violations clear, his approach appears to lean toward voiding the unfair procedure. Thus, if the procedure is unfair, it should not be used. *Id.* (Stevens, J., dissenting).

[203] This appears to be the approach lower courts take when finding the remedy inadequate. *See, e.g.*, Williams v. St. Louis County, 812 F.2d 1079, 1083 (8th Cir. 1987) (finding remedy inadequate because of state court's refusal to entertain *in forma pauperis* claim); Labov v. Lalley, 809 F.2d 220, 223 (3d Cir. 1987) (suggesting state remedy inadequate if less than that available under § 1983).

[204] *See, e.g.*, Martinez v. California, 444 U.S. 277 (1980); Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (state rule requiring filing fee for divorce proceeding invalidated as applied to indigents). In *Martinez* a § 1983 action was brought by the parents of a girl murdered by a parolee who had been released only about five months earlier. *Martinez*, 444 U.S. at 279. Before the Supreme Court, the parents argued that the officials responsible for the parole decision had deprived the girl of life without due process of law. *Id.* at 284–85. The Court disposed of this argument simply by finding no state action; the parolee was not a state actor, nor did the officials "deprive" the girl of her life through their action. *Id.* An alternative argument was also presented before the Court which reasoned that a state immunity grant which protected the officials under state law was

situation, no immunity exists and the state or its actor is potentially liable under state but not federal law.[205] This might seem a distinction without much difference until one considers the consequences. For example, under the "ripening" approach a cause of action under section 1983 becomes available with all its benefits.[206] Under the "voiding" approach, in contrast, no federal remedy apparently exists under section 1983 because once the immunity is removed recovery is available under state law.[207] Strangely enough, as a federalism matter, the *Parratt* and *Hudson* "ripening" approach would appear to be the more intrusive of the two.[208]

To complicate matters, assuming some form of remedy is required, procedural and jurisdictional problems abound. Managing these problems could present a nightmare. Because the constitutional violation does not ripen until the state fails to provide an adequate remedy, whatever that might be, a case could conceivably bounce from federal court to state court and then back to federal court again.[209] Of course, courts may use abstention or exhaustion principles to alleviate any jurisdictional and procedural problems,[210] but anyone familiar with federal courts recognizes the potential for

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unconstitutional because it deprived the parents of property (the wrongful death action) without due process of law. *Id.* at 280–81. The Court stated, "even if one characterizes the immunity defense as a deprivation . . . the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizens from state action that is wholly arbitrary or irrational." *Id.* at 282. Applying a deferential standard of review, the Court had "no difficulty in accepting California's conclusion that there 'is a rational relationship between the state's purposes and the statute.'" *Id.* (footnote omitted).

[205] Of course, there could still be a federal violation under some other constitutional provision.

[206] One of the more important benefits of a § 1983 suit is the availability of attorney's fees. *See* 42 U.S.C. § 1988 (1982).

[207] A state's grant of immunity would be a defense to a state law cause of action. Voiding the defense, for whatever constitutional reason, acts to remove the defense and leaves the defendant open to liability under state law. Perhaps an initial action could proceed under § 1983 against *the state*, as opposed to the tortfeasor, in an effort to invalidate the immunity defense, *cf.* Martinez v. California, 444 U.S. 277 (1980). But after the invalidation of the defense there would no longer exist any federal cause of action. Subsequent suits would be brought against the tortfeasor for the injury inflicted, and not against the state for having an immunity defense. The question of immunity would then arise, if at all, as a defense to the state law action, which under the rules of federal jurisdiction does not convert the original claim into one "arising under" federal law. *See* Louisville & N.R.R. v. Mottley, 211 U.S. 149, 152 (1908) (federal claims must appear on face of well-pleaded complaint and not arise as defense.)

[208] One authority suggests that as a practical matter, after the *Daniels* Court's rejection of negligence as a valid basis for a due process claim, immunity is no longer a problem in relation to procedural due process, because "in most states, the immunity defense can be invoked as a shield for negligent conduct, but not for conduct that was reckless or intentional." Blum, *Applying the* Parratt-Hudson *Doctrine: Defining the Scope of the* Logan *Established State Procedure Exception and Determining the Adequacy of State Postdeprivation Remedies*, 13 HASTINGS CONST. L.Q. 695, 725 (1986). Indeed, this is true if the immunity defense available in most states is in fact limited to simple negligence. This is not overly clear, however, because it seems that immunity dissolves in the face of malicious conduct, but not necessarily reckless or intentional conduct. *See* W. KEETON, *supra* note 199, § 132 at 1062. Also, the defense always exists in relation to absolute immunity, even in cases where the action is malicious. *See* W. KEETON, *supra* note 199, § 132 at 1057. *Cf.* Temple v. Marlborough Div. of Dist. Court Dep't, 395 Mass. 117, 479 N.E.2d 137 (1985). Moreover, the defense of privilege could easily fill any void in that one might be privileged even though not immune. The question would then be whether the privilege results in an inadequate remedy. *See infra* note 222.

[209] *See, e.g.*, *infra* note 215.

[210] *See* Travis and Adams, *supra* note 118, at 656 (suggesting that exhaustion principles be

chaos.[211] Consequently, if the Court were to decide some remedy is necessary, it might be leading itself and the lower federal courts into greater problems than it ever imagined.

Moreover, as an additional complicating factor, preclusion issues could come into play.[212] A court often must resolve factual matters in order to assess whether immunity exists. Presumably, resolving these matters in one court precludes relitigation in another.[213] In addition, because state courts must entertain federal civil rights claims,[214] *res judicata* conceivably could present a problem in a subsequent action brought in federal court.[215]

One solution to the various problems raised above might be to require that the states, as a matter of procedural due process, adopt either the same type of immunity

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utilized); Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 982 (1986) (advocating that *Parratt* should be viewed simply as abstention doctrine).

[211] *See generally* Redish, *supra* note 3, *passim*; ALI Study 48–50 , 282–87 (quoted in D. CURRIE, CASES AND MATERIALS ON FEDERAL COURTS 622 (3d ed. 1982)).

[212] The Court has found that issue preclusion applies to a § 1983 action if an issue is actually decided in state court after a full and fair hearing. *See* Allen v. McCurry, 449 U.S. 90, 101 (1980). This has been extended even to state administrative agencies. *See* University of Tennessee v. Elliott, 106 S. Ct. 3220, 3226 (1986).

[213] A full analysis of claim or issue preclusion in relation to *Parratt* and *Hudson* is beyond the scope of this Article. *See generally* C. WRIGHT, THE LAW OF FEDERAL COURTS § 100A (4th ed. 1983). For cases involving the *Parratt-Hudson* rationale and possible claim preclusion, see Alfaro Motors, Inc. v. Ward, 814 F.2d 883, 887 (2d Cir. 1987) (failure to raise claim in state court could possibly be *res judicata*); Punton v. City of Seattle, 805 F.2d 1378, 1383 (9th Cir. 1986) (Norris, J., dissenting) (possible *res judicata* effect of state remedy on § 1983 action), *cert. denied*, 107 S. Ct. 1954 (1987); Deretich v. Office of Admin. Hearings, 798 F.2d 1147, 1153–54 (8th Cir. 1986) (*res judicata* where § 1983 claim raised before state administrative agency).

[214] *See generally* D. CURRIE, CASES AND MATERIALS ON FEDERAL COURTS, 208–11 (3d ed. 1982).

[215] For example, suppose a litigant files a § 1983 claim in federal court alleging a violation of due process for tortious injury to her person. Assume that she does not raise a state law claim arising under the same tortious conduct. Assume further that the federal court finds an adequate state remedy under the *Parratt-Hudson* rationale and dismisses her action for failure to state a claim under FED. R. CIV. P. 12(b)(6). The hypothetical litigant could then attempt to file in state court, but it could be argued that she is precluded by *res judicata* from bringing her action because she had the opportunity to press her state claim in federal court as a pendant claim under United Mine Workers v. Gibbs, 383 U.S. 715 (1966). This scenario could be avoided by joining the state claim with the federal claim in the federal court. *See, e.g., Gibbs*, 383 U.S. at 725. If it were then dismissed, there would appear to be no *res judicata* effect.

Now consider the reverse situation. Suppose the litigant goes to state court first with her state claim. She does not join an action under § 1983, hoping to bring such a claim in federal court if necessary. The state court finds total immunity and dismisses the state law claim. It is possible that when the litigant goes to federal court she will be barred by *res judicata* from pressing her § 1983 claim, because she could have joined that claim in the state court action. The argument against this result is that the federal claim did not arise until the state court ruled in favor of immunity and thus the federal claim could not have been joined with the state claim in the original action.

Finally, suppose the litigant joins her state claim with a § 1983 action in state court. One possibility is that the defendant could attempt to remove to federal court, have the § 1983 action dismissed, and then have the state claim remanded to state court. The defendant might then seek to dismiss the state claim by arguing that it is barred by *res judicata* in state court, but this tactic obviously should not succeed. In any event, the litigant would be back in state court where the federal court's decision in relation to immunity should have some preclusive effect. If her claim does not succeed in state court, she then might bring an action in federal court, where both *res judicata* and issue preclusion could come into play. In that case, the federal district court would have both its own prior decision to deal with, and that of the state court.

available in section 1983 actions generally, or some narrower alternative.[216] This narrower alternative could take the form of either less immunity for the tortfeasor, or perhaps the creation of a tort claims act that would allow recovery from the state for any injury whatsoever. If the state adopted the tort claims act method, recovery would always be available on the state level, and no federal action would ever arise.[217] If the state adopted the federal immunity standard, where the tortfeasor is immunized in state court he would also be immune in federal court. A federal cause of action would not be necessary after the state cause of action because the results would be the same.[218] If by chance the tortfeasor is found not to be protected by immunity, there is a remedy and no violation of due process. Consequently, by requiring equivalency between state and federal immunities, the procedural and jurisdictional problems suggested above conceivably could be avoided.[219]

Although requiring the adoption of a tort claims act appears to present a workable solution, it is hardly supportable as a matter of constitutional law. States have always enjoyed sovereign immunity, with little question of its constitutionality.[220] Although requiring equivalency between immunities might be envisioned as a better solution, this approach is hopelessly flawed in at least two ways. First, although it might be possible to equate absolute immunities,[221] drawing any parallel between qualified good faith im-

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[216] At least two commentators have alluded to this possibility. *See* Blum, *supra* note 208, at 725 ("where state law establishes an immunity defense that would be available to defendants as a matter of federal law as well, it would make no sense to suggest that the limitation created by state law made the state remedy inadequate"). Professor Blum suggests that "[t]he problem may be reduced to the issue of whether the post deprivation process is rendered constitutionally inadequate if the state law immunity defense is broader than the federal immunity defense." *Id.* at 726. *See also* Note, Parratt v. Taylor *Revisited: Defining the Adequate Remedy Requirement*, 65 B.U.L. REV. 607, 638 (1985) ("Equal limitations on recovery in each court do not affect the plaintiff's constitutional rights. However, if state immunity law would bar a claim that would be heard on its merits in federal court, the adequacy of the state remedy is doubtful.").

[217] Under *Parratt* there would be an adequate state remedy and the due process violation would never occur. *See* Parratt v. Taylor, 451 U.S. 527, 543 (1981).

[218] For example, if the action proceeded first in state court and the official were found immune, any action in federal court would be senseless because immunity from damages would also exist there. A fundamental problem with this position appears to be that immunity does not negate the constitutional violation but only protects the defendant from damages. Thus, the argument can be made that the federal action still exists and there could be a need for declaratory or injunctive relief. The response to this argument is that no federal action exists to support declaratory or injunctive relief because due process is satisfied where the state immunity equates with federal immunity. Although this may be a circular argument it appears to be effective reasoning.

[219] This approach appears appealing for the simple reason that it seems awkward to require a recovery under state law when immunity would preclude recovery under federal law. It thus seems simple to find that state immunity laws should be valid to the extent they do not exceed federal immunity rules. As demonstrated below, however, though appealing at first glance, drawing such an equivalency in most situations is neither feasible nor justifiable. *See infra* notes 220–28 and accompanying text.

[220] *See supra* note 198 and accompanying text.

[221] Under § 1983, absolute immunity is generally available in actions against legislators (Tenney v. Brandhove, 341 U.S. 367 (1951)); judges (Pierson v. Ray, 386 U.S. 547 (1967)); and prosecutors (Imbler v. Pachtman, 424 U.S. 409 (1976)). Absolute immunity is also granted in most states to legislators, judges and prosecutors. *See, e.g.*, Blake v. Rupe, 651 P.2d 1096 (Wyo. 1982) (prosecutors); Holland v. Lutz, 194 Kan. 712, 401 P.2d 1015 (1965) (judges). It would thus not appear difficult to equate the two. *See, e.g.*, Rudow v. City of New York, 822 F.2d 324 (2d Cir. 1987) (finding defendant protected by both state and federal absolute immunity).

munity under section 1983 and state law qualified immunity could prove difficult if not impossible. The difficulty lies in the differing natures of the two immunities. State qualified immunity generally focuses on the capacity in which the state agent was acting.[222] Federal good faith immunity, in contrast, focuses on whether a federal right is clearly established.[223] In the context of *Parratt-Hudson*, equating the two appears problematic because the federal right itself, and hence any corresponding immunity, is a function of the state immunity grant.

Federal good faith immunity exists if the right violated is not clearly established.[224] In the context of cases like *Parratt* and *Hudson*, no right exists (and therefore none could be clearly established) unless the state fails to provide an adequate remedy. The adequacy of the state remedy, in turn, depends upon the state grant of official immunity. Because the federal immunity becomes a function of the state immunity — that is, its existence depends on the existence of state immunity — equating the two in any way appears beyond the pale of reason. Absent state immunity, no federal right is violated, and thus no federal immunity issue exists. When state immunity applies, there could be a federal violation and federal immunity would at least be a possibility. But federal immunity would turn on whether state immunity was clearly established at the time of the tortious activity.[225] Equating state immunity with federal immunity would require that a court

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[222] *See generally* W. KEETON, *supra* note 199, § 132 at 1059–60 (5th ed. 1984). Prosser and Keeton define the scope of qualified official immunity as follows:

> The qualified immunity is usually destroyed by 'malice,' bad faith or improper purpose, or in some instances by objectively unreasonable conduct .... It is usually said that the immunity protects acts within the scope of the officer's duty only if the acts are "discretionary." This means, more or less, that the acts involve some fairly high level of policymaking. Acts that do not qualify as "discretionary" acts are usually called "ministerial," and for purely ministerial acts of executive officers or employees there is no immunity.

Id.

In contrast, *see* Blum, *supra* note 208, at 725. Professor Blum argues that the *Daniels* decision which held that negligence cannot support a claim under § 1983 effectively has nullified any problem concerning immunities because immunity generally is not available in the case of an intentional or reckless act. Cases can be imagined, however, where the injury inflicted is intentional or the result of gross negligence, yet is performed in good faith, without malice. Some form of qualified immunity could exist in such a situation. Moreover, absolute immunity exists even in the face of malicious conduct. *See* W. KEETON, *supra* note 199, § 132 at 1057. Thus the *Daniels* decision relieves no strain in this regard. Even if immunity does not exist, however, there may well exist some justification of excuse for the conduct, even if intentional, and thus the defendant would be "privileged." *See* W. KEETON, *supra* note 199, § 16 at 109–10. The vacuum created by the *Daniels* decision in relation to immunity could simply be filled by privilege. *See supra* note 208. Note that because privilege generally takes the form of excuse or justification, it is necessarily intertwined with whether the deprivation is "correct." *See infra* notes 299–302 and accompanying text. Therefore, any challenge to a state's grant of privilege under the *Parratt-Hudson* rationale is simply an attack on the substance of state law, even to a greater extent than an attack on immunity.

[223] *See, e.g.*, Davis v. Scherer, 468 U.S. 183, 197 (1984) ("A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue."); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"); *see also* Anderson v. Creighton, 107 S. Ct. 3034 (1987).

[224] *See supra* note 223.

[225] Because the existence of the federal right necessarily turns on the existence of state immu-

determine whether the tortfeasor should have known he was immune in order to establish whether he is immune![226] Even more bizarre, if the state immunity is not clearly established there is then federal immunity. Because there is equality between the two, state immunity is also available. But this necessarily means that state immunity is only available if it is not clearly established in the first place!!

Second, even if the Court could achieve equivalency between the two types of immunity, the fact remains that federal immunity is not of constitutional dimension.[227] Indeed, it is a simple judicially created device designed to protect government officials from harassment, and to ensure that they can perform their functions without fear of personal liability.[228] The permissible scope of state immunity grants under the *Parratt-Hudson* analysis, in contrast, is a constitutional question. No justification exists for extending a judicially created federal immunity grant to the states as a matter of constitutional law. The only justification imaginable is convenience — a poor excuse for constitutional jurisprudence.

D. *Critical Analysis of* Daniels *and* Davidson

Once one recognizes that the Court faced a difficult immunity problem in *Daniels* and *Davidson* it is easy to understand why it embarked on its due process analysis. But understanding is not agreement. Although the simplicity of *Daniels* is appealing, and for the most part the decision appears to achieve the Court's desired end of preventing section 1983 from becoming a "font of tort law,"[229] the fact remains that the *Daniels*

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nity, the question of whether a clearly established right existed would further require determining whether a clearly established immunity existed.

[226] If the state immunity were clearly established, then the tortfeasor should have known of it and should have known of the federal right; thus there would be no federal immunity. If state and federal immunities are equated, then the issue again becomes whether the state immunity was clearly established.

[227] *See generally* Nixon v. Fitzgerald, 457 U.S. 731, 745–47 (1982) (immunity in relation to § 1983 action question of policy and congressional intent).

[228] *See* Davis v. Scherer, 468 U.S. 183, 195 (1984) ("The qualified immunity doctrine recognizes that officials can act without fear of harrassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated."); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[229] *See supra* note 12. The *Daniels* decision has proven quite effective in fleecing the federal courts of § 1983 claims predicated on due process. *See, e.g.*, Ortega v. Rowe, 796 F.2d 765 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1887 (1987); Strandburg v. City of Helena, 791 F.2d 744 (9th Cir. 1986); General Elec. Co. v. United States, 813 F.2d 1273 (4th Cir. 1987) (*petition for cert. filed* June 9, 1987); Chesney v. Hill, 813 F.2d 754 (6th Cir. 1987); Ketchum v. County of Alameda, 811 F.2d 1243 (9th Cir. 1987); Griffin v. Hilke, 804 F.2d 1052 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3184 (1987); Rascon v. Hardiman, 803 F.2d 269 (7th Cir. 1986); Bowie v. Procunier, 808 F.2d 1142 (5th Cir. 1987); Jones v. City of Chicago, 787 F.2d 200 (7th Cir. 1986); Brunken v. Lance, 807 F.2d 1325 (7th Cir. 1986); Deretich v. Office of Admin. Hearings, 798 F.2d 1147 (8th Cir. 1986); Escamilla v. City of Santa Ana, 796 F.2d 266 (9th Cir. 1986); Johnson v. Barker, 799 F.2d 1396 (9th Cir. 1986); Rodriguez-Mora v. Baker, 792 F.2d 1524 (11th Cir. 1986); Maddox v. City of Los Angeles, 792 F.2d 1408 (9th Cir. 1986); McKenna v. City of Memphis, 785 F.2d 560 (6th Cir. 1986); Partridge v. Two Unknown Police Officers of Houston, 791 F.2d 1182 (5th Cir. 1986); Walker v. Rowe, 791 F.2d 507 (7th Cir.), *cert. denied*, 107 S. Ct. 597 (1986); Dunster v. Metropolitan Dade County, 791 F.2d 1516 (11th Cir. 1986); McIntyre v. Portee, 784 F.2d 566 (4th Cir. 1986); Love v. King, 784 F.2d 708 (5th Cir. 1986); Dodd v. City of Norwich, 815 F.2d 862 (2d Cir. 1987) (opinion vacated and reargued); Lopez v. Houston Indep. School Dist., 817 F.2d 351 (5th Cir. 1987). State courts too have gotten into the act. *See, e.g.*, Stalnaker v. Boeing Co., 186 Cal. App. 3d 1291, 231 Cal.

holding is both unnecessary[230] and bad constitutional law. As a constitutional matter, *Daniels* is disturbing because it reflects the Court's willingness to forego constitutional theory in an effort to achieve what it perceives to be a desirous result. In *Daniels* the Court gave no real reason for its conclusion that due process requires more than simple negligence. Instead, the Court spoke merely of abuses of power and fundamental fairness, never convincingly explaining why negligence could not be an abuse, or why it could not be unfair.[231] Justice Powell provided the only true analysis in his *Parratt* concurring opinion when he attempted to draw a connection between equal protection, the eighth amendment, and procedural due process.[232] Equal protection and the eighth amendment require something more than negligence, he argued, and so should procedural due process.[233]

Justice Powell's analysis is flawed because it assumes that procedural and substantive guarantees are of like character. The reasons for requiring process, however, differ markedly from the concerns that support *mens rea* requirements under the equal protection clause and the eighth amendment. In relation to equal protection and eighth amendment challenges, the Court is generally concerned only where the state makes a conscious choice, as opposed to merely causing a result which is a consequence of some other aim.[234] In the latter situation the political process presumably can rectify any unintended consequence, because it was not the intent of the legislative body to achieve that result.[235] In the former situation, because the legislature intended the result, there is less chance of change in the political forum. Hence, the Court is justifiably more suspicious, and more willing to allow change through adjudication. When examining

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Rptr. 323 (1986); Crowder v. Correctional Medical Sys., 497 So. 2d 486 (Ala. 1986); McDonough v. Jorda, 214 N.J. Super. 338, 519 A.2d 874 (App. Div. 1986); Appleton v. Town of Hudson, 397 Mass. 812, 494 N.E.2d 10 (1986); Mazzilli v. Doud, 485 So. 2d 477 (Fla. Dist. Ct. App.), *review dismissed*, 492 So. 2d 1333 (1986).

Some courts, however, appear to have gone overboard, applying *Daniels* to constitutionally protected rights other than due process. *See, e.g.*, Lunde v. Oldi, 808 F.2d 219 (2d Cir. 1986) (right to vote); Bergquist v. County of Cochise, 806 F.2d 1364 (fourth amendment); McDonough v. Jorda, 214 N.J. Super. 338, 519 A.2d 874 (App. Div. 1986) (fourth amendment). Other courts have recognized, however, that the *Daniels* holding is confined, for the time being, to due process. *See, e.g.*, Labov v. Lalley, 809 F.2d 220 (3d Cir. 1987) (*Daniels* holding does not apply to first amendment); Uberoi v. University of Colorado, 713 P.2d 894 (Colo. 1986) (same).

[230] *See supra* notes 370–82 and accompanying text.

[231] *See supra* notes 161–64 and accompanying text. *See Daniels*, 106 S. Ct. at 673 (Blackmun, J., dissenting).

[232] *See* Parratt v. Taylor, 451 U.S. 527, 547 (1981) (Powell, J., concurring).

[233] *Id.* (Powell, J., concurring). *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 106 (1976) (holding deliberate indifference sufficient to constitute an infliction of cruel and unusual punishment in violation of the eighth amendment). *See also* Whitley v. Albers, 106 S. Ct. 1078, 1086 (1986) (wantonness or willingness that harm occur necessary for eighth amendment violation); Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that before strict scrutiny is applied in a case involving equal protection, there must be purposeful discrimination).

[234] This Article does not purport to support or challenge the Court's adoption of a *mens rea* requirement in relation to equal protection. For an analysis of both sides of the problem, see Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977). *See also* Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

[235] Because no intent to cause the discriminatory result exists, no reason exists to "cleanse" the political process by invalidating the law. *See* Eisenberg, *supra* note 234, at 116.

equal protection claims, for example, the Court requires purposeful discrimination because the Court is only suspicious of intentional governmental decisions that tend to burden a suspect class. Where the discrimination is unintentional, the Court is not as concerned and applies a lower level, deferential standard of review.[236] Similarly, when addressing eighth amendment cruel and unusual punishment claims, the Court only becomes concerned where the purpose of the harm can be characterized as *punishment* — something either intended or at a minimum indifferently allowed.[237] If the state's aim is not punishment there is less need for judicial supervision, because the resultant harm is not intentional.

Of course, this description simplifies the reasons supporting *mens rea* requirements in constitutional adjudication.[238] But one thing is clear; *mens rea* is deemed relevant because normative choices are being made. Procedural due process, however, does not involve substantive choices. Procedural due process does not impede substantive decisions. Because substantive decisions are not being scrutinized, there is no reason to be concerned with whether the decision was intentional, reckless, or negligent. There is no varying level of scrutiny when speaking simply of process in its literal sense. Indeed, in terms of pure process nothing raises or dispels suspicions, because process is merely a mechanism for making decisions and not an ultimate choice. The question simply focuses on when and how much, with the goal of minimizing the risk of substantive error.[239]

In relation to substantive due process, on the other hand, the argument in favor of requiring some level of *mens rea* is much stronger. A definite analogy exists between substantive due process and equal protection because both involve substantive decisions. But the analogy is stretched too far when the Court states that as a threshold matter more than mere negligence is required even to implicate due process.[240] No such requirement exists for equal protection, as the Court has always afforded classifications of any sort at least rationality review.[241] Equal protection applies in such a case, but it is routinely satisfied. The *Daniels* Court went beyond this rationality requirement when it held that negligence does not implicate due process.[242]

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[236] But note that one does not lose equal protection for lack of demonstrating purposeful discrimination. Equal protection still applies, the question being one only of scrutiny. *See* Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982).

[237] Whitley v. Albers, 106 S. Ct. 1078, 1086 (1986); Estelle v. Gamble, 429 U.S. 97, 106 (1976). *See supra* note 233.

[238] *See generally* J. Nowak, R. Rotunda & J. Young, *supra* note 54, at 547–48. In essence, by requiring a certain level of *mens rea*, the Court is searching for a workable method of allocating decision-making authority. This is a recurrent theme throughout constitutional law, with roots that reach back to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). As a benchmark for deciding when to leave resolution of certain problems to the political forum, this approach might work. When speaking of process, however, which in no way deals with substantive choices, it makes no sense to speak in terms of allocating decision-making authority; indeed, the states are free to make whatever decisions they wish. Procedural due process only requires they first consider all the facts.

[239] In contrast, *see* Daniels v. Williams, 106 S. Ct. 662, 680 (1986) (Stevens, J., dissenting in part) ("The harm . . . is the same whether [the injury is inflicted] negligently, recklessly, or intentionally . . . . In each instance, the prisoner is losing — being 'deprived' of — an aspect of liberty as the result, in part, of a form of state action.").

[240] *See Daniels*, 106 U.S. at 665.

[241] *See supra* note 236.

[242] *Daniels*, 106 S. Ct. at 665. Thus, requiring more than mere negligence in order to give rise to a procedural due process action is wholly unsupportable, while there is support for the same requirement in relation to substantive due process. *See infra* notes 422–24 and accompanying text.

It is possible that as a linguistic matter the Court could be correct in finding that more than negligence is required under the fourteenth amendment; at least an argument exists in support of this conclusion. In *Parratt*, Justice Powell cited Webster's Dictionary to support his conclusion that "[a] deprivation connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss."[243] But something more is needed than reference to a modern dictionary to justify such an "interpretivistic" approach. This Article submits that without strong support for what meaning the Framers intended to ascribe to the word "deprive" in the fourteenth amendment, the Court should hesitate to attach any definitive meaning. Where constitutional language is at best ambiguous, the more prudent course is to look for reasons supporting the preference of one mental state over another. Where no supporting rationale exists, the Court should simply make no choice.

E. Daniels *and Municipal Liability*

Aside from being bad constitutional law, *Daniels* and *Davidson* also raise serious questions regarding municipal or institutional liability. Under *Monell v. New York City Department of Social Services*,[244] before a municipality may be held liable under section 1983 for its agents' actions, at a minimum the plaintiff must show that some municipal "custom or policy" caused the injury. For a due process violation to exist, *Daniels* now requires that the plaintiff show that more than mere negligence by the state actor caused the injury. The question thus arises whether the Court intended to extend *Daniels* to municipalities as an additional requirement for liability, or whether all that the plaintiff need establish is the actor's underlying violation along with the predicate causally related custom or policy. Put another way, the question is whether the plaintiff must prove that the municipality possessed culpability beyond mere negligence in formulating the policy which caused the deprivation to occur.[245]

But see Comment, *Civil Rights — 42 U.S.C. § 1983 — The Actionability of a Negligent Deprivation of a Liberty Interest in Light of* Daniels *and* Davidson, 69 MARQ. L. REV. 599, 632 (1986) (agreeing with the *Daniels* decision to the extent it applies to procedural due process).

[243] Parratt v. Taylor, 451 U.S. 527, 548 (1981) (Powell, J., concurring). A perpetual debate concerning the Court's ability to interject its own political and moral values into the Constitution has spawned two distinct schools of thought: one labeled "interpretivism," the other "noninterpretivism." The "interpretivistic" approach looks for the true meaning of the Framers. Thus, the common meaning of words used in the text of the Constitution and its various amendments is a useful tool under this approach. Those who abide by noninterpretivism, however, are more willing to recognize the changing values of society in attempting to give meaning to the Constitution. *Contrast* M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982) *and* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); *with* Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972) *and* Monaghan, *supra* note 46.

[244] *Monell*, 436 U.S. 658, 691, 694 (1978) (municipality cannot be held responsible on *respondeat superior* basis, but must cause constitutional violation). *See also* Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1298 (1986); Tuttle v. City of Oklahoma City, 471 U.S. 808, 818 (1985).

[245] The Court has yet to answer whether there exists any culpability requirement beyond that inherently created by the *Monell* decision. In *Tuttle*, a case involving an alleged policy of inadequate training of police officers, the Court left this question open. *See Tuttle*, 471 U.S. at 824 n.7. *See also* City of Springfield v. Kibbe, 107 S. Ct. 1114, 1115 (1987) (*per curiam*) (dismissing, as improvidently granted, certiorari over question "whether more than *negligence* in training is required in order to establish such liability"). Four Justices dissented from the dismissal of certiorari in *Kibbe* and would have ruled that more than negligence is required for institutional liability where the policy is one of inadequate training. *Id.* at 1116 (O'Connor, J., dissenting).

Consider the scenario where a police officer intentionally injures someone in person or property during the course of an arrest. Because it is intentional the police officer's conduct satisfies the requirements of *Daniels*, thus raising a colorable procedural due process claim (and probably also a fourth amendment claim).[246] Now assume the municipality employing this officer failed to train him or her in any way whatsoever. The plaintiff might also sue the municipality under section 1983 on the grounds that the municipality's failure to train the officer amounted to a policy or custom which caused the constitutional violation.[247] The question now begged by *Daniels* is whether municipal liability requires either gross negligence or intent on the part of the municipality in depriving the individual of life, liberty, or property through its policy or custom, or whether some lesser degree of culpability is sufficient to establish such liability.

Under nearly identical facts to those posed in the above hypothetical, the Court of Appeals for the Ninth Circuit, in *Bergquist v. County of Cochise*,[248] required not only a custom or policy, but also gross negligence before an institution[249] might be held liable

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[246] In *Tuttle*, a police officer intentionally shot a suspect to death, and subsequently a § 1983 suit was brought against the officer and the municipality that employed him. 471 U.S. 808 (1985). In relation to the underlying constitutional violation, which was not at issue before the Court, the plurality noted:

> The facts of this case are, of course, very similar to the facts of *Tennessee v. Garner* . . . . We note that this Court has never held that every instance of use of "unreasonable force" in effecting an arrest constitutes a violation of the Fourth Amendment; nor has this Court held under circumstances such as these that there has been a deprivation of life "without due process of law."

Id. at 817 n.4 (citations omitted).

[247] Suits of this nature have become quite common. *See* Annot., *Liability of Supervisory Officials and Governmental Entities for Having Failed to Adequately Train, Supervise, or Control Individual Peace Officers Who Violate Plaintiff's Civil Rights Under 42 USCS § 1983*, 70 A.L.R. FED. 17 (1984) (collecting cases).

[248] 806 F.2d 1364 (9th Cir. 1986). *See also* Sherrod v. Berry, 827 F.2d 195 (7th Cir. 1987) (superimposing the *Daniels* holding on that of the *Monell* decision); Jones v. City of Chicago, 787 F.2d 200, 203 (7th Cir. 1986) ("it now appears that at least as to certain constitutional deprivations [such as *Daniels*] the plaintiff may have to present proof of fault beyond mere negligence on the part of the City in establishing the policy or tolerating the custom"); Harris v. City of Pagedale, 821 F.2d 499 (8th Cir. 1987) (superimposing the *Daniels* holding on that of the *Monell* decision); Hogan v. City of Houston, 819 F.2d 604 (5th Cir. 1987) (apparently doing the same).

[249] The court in *Bergquist* repeatedly alluded to the liability of the officers' supervisors under the *Monell* decision, as opposed to the liability of the institution, the county. Apparently, though it is not overly clear from the opinion, the action was brought against the county for its failure to train adequately its police force. *See* 806 F.2d at 1369. Thus, to the extent that the Ninth Circuit addressed supervisors' liability under *Monell* for inadequate training, it presumably addressed such liability in their respective official capacities. An official-capacity suit, of course, is actually one against the institution. *See* Kentucky v. Graham, 473 U.S. 159, 165 (1985); Brandon v. Holt, 469 U.S. 464 (1985).

To the extent that the *Bergquist* decision might be read as involving a personal-capacity suit it is questionable whether the *Monell* holding is even controlling. *See, e.g.*, Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983) (distinguishing personal- from official-capacity suits), *cert. denied sub nom.* Languirand v. City of Pass Christian, 467 U.S. 1215 (1984). *But see* Annot., *supra* note 247, at 28–36 (cases apparently failing to make distinction). The *Monell* decision struck a balance in favor of limited institutional liability, but did not address personal liability. Before supervisors or other policymakers can be held personally liable, a strong argument exists for the position that each individual must be found to have violated the Constitution. *See* Rizzo v. Goode, 423 U.S. 362 (1976) (refusing to allow injunctive relief against supervisors for allegedly unconstitutional acts of agents); DeFeliciano v. Roque, No. 86-1300, slip op. (1st Cir. Aug. 14, 1987) ("supervisory officials may be

for the unconstitutional acts of its agent. In that case, although the policy of inadequate training satisfied *Monell*,[250] the institution was not liable unless it had been at least grossly negligent, relative to the deprivation, in maintaining such a policy.[251] According to the Ninth Circuit, *Daniels* applies both to the agent and the institution.[252] Now, the suggestion that municipal liability should not attach absent gross negligence is not in itself novel,[253] but the manner in which the Ninth Circuit reached this conclusion is.[254] If other courts follow the *Bergquist* lead, *Daniels* could greatly narrow institutional liability, especially in the context of inadequate training.[255]

Bergquist is a difficult case to justify, most significantly because the court failed to recognize that a constitutional violation occurred which was indeed the result of an intentional act.[256] The *Bergquist* court disregarded this fact, and instead required not

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found liable only on the basis of their own acts or ommissions"); Wilson v. City of North Little Rock, 801 F.2d 316, 322 (8th Cir. 1986) ("A cause of action predicated on such a theory [of supervisor liability] may be maintained only if [the supervisor] demonstrated deliberate indifference or tacit authorization of the offensive acts by failing to take remedial steps following notice of a pattern of such acts by his subordinates.") (relying in part on *Rizzo*); *Languirand*, 717 F.2d at 220. Thus, *Bergquist* may be justified as a personal-capacity case even though it cannot be justified when characterized as an official-capacity case. *See infra* notes 250–64 and accompanying text.

[250] The Supreme Court has never decided whether inadequate training can satisfy the "custom or policy" requirement of *Monell*. *See Tuttle*, 471 U.S. at 824 n.7. *Contrast* Oliver, *Municipal Liability for Police Misconduct Under 42 U.S.C. § 1983 After* City of Oklahoma City v. Tuttle, 64 WASH. U.L.Q. 151 (1986) (arguing inadequate training amounts to "custom or policy"). In *Tuttle*, the Court dealt only with whether a jury could infer a municipal custom or policy from a single incident of police misconduct. The Court held that although the single incident is in fact evidence of a custom or policy, it cannot by itself support the conclusion that a custom or policy exists. *Tuttle*, 471 U.S. at 814. *But see* Pembaur v. City of Cincinnati, 106 S. Ct. 1292 (1986) (single incident on part of policymakers enough to support finding of policy or custom).

[251] *Bergquist*, 806 F.2d at 1370.

[252] *Id.*

[253] Several pre-*Daniels* opinions found that something more than mere negligence was required on the part of a municipality before inadequate training might rise to the level of a "custom or policy" sufficient to find liability under *Monell*. In fact, this was probably the majority view even before the *Daniels* decision. *See, e.g.*, Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983). *See generally* Annot., *supra* note 247 (collecting cases). At least one circuit, in contrast, has read the *Parratt* decision as expressly authorizing actions against municipalities based solely upon negligence. *See* Brandon v. Allen, 719 F.2d 151 (6th Cir. 1983), *rev'd on other grounds sub nom.* Brandon v. Holt, 469 U.S. 464 (1985). These cases were involved in interpreting § 1983, however, and did not purport to make rules of constitutional dimension. *See also Kibbe*, 107 S. Ct. at 1114 (Court dismissed certiorari over question whether mere negligence sufficient in case involving inadequate training); *Tuttle*, 471 U.S. at 824 n.7.

[254] *Bergquist*, 806 F.2d at 1370.

[255] As an initial matter, the claim in *Bergquist* centered around a purported unlawful search, thus involving the fourth amendment. *Id.* at 1366–67. The court, however, relied on the *Daniels* decision to hold that mere negligence was not enough to support a fourth amendment claim. *Id.* at 1370. Because *Daniels* was a due process case, however, and not one involving the fourth amendment, the *Bergquist* court apparently erred in its reliance on the *Daniels* decision.

[256] The claim alleging a cause of action under § 1983 charged that certain members of the Cochise County Sheriff's Office, together with several federal Drug Enforcement Administration (DEA) agents, illegally searched plaintiff's farm. *Id.* at 1366–67. The claim thus involved intentional conduct on the part of the officers and not simple negligence. It is worth noting at this point that the logic of the *Daniels* decision has been extended to the fifth amendment's due process clause. *See, e.g.*, General Elec. Co. v. United States, 813 F.2d 1273 (4th Cir. 1987) (extending *Daniels* to federal government); Stalnaker v. Boeing Co., 186 Cal. App. 3d 1291, 231 Cal. Rptr. 323 (1986) (same).

only a constitutional violation by the agent, but an additional independent constitutional violation by the institution.[257] This approach is difficult to square with *Monell*, which rejected the doctrine of *respondeat superior* in relation to institutional liability under section 1983 and held merely that some causal link must exist between an institutional policy or custom and the underlying constitutional violation.[258] *Monell* never suggested that the institution must independently violate the constitution; rather, it found that the agent's conduct becomes the institution's when some causal link exists.[259]

Following *Daniels*, a due process violation occurs only when two factors are present: first, an injury to life, liberty, or property without due process, and second, the requisite mental state.[260] Under *Monell*, it would appear that once the plaintiff establishes the causal connection between the custom or policy and the constitutional violation, the violation is attributed to the institution.[261] This necessarily includes both the injury

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[257] *Bergquist*, 806 F.2d at 1370.

[258] *See supra* note 244.

[259] *See supra* note 244.

[260] *See* Daniels v. Williams, 106 S. Ct. 662, 663 (1986). A similar problem exists in relation to equal protection, because a constitutional violation occurs only where there exists discriminatory effect together with a purpose to discriminate. Washington v. Davis, 426 U.S. 229 (1976). Therefore, in relation to institutional liability, the question is whether the institution must possess discriminatory purpose, or whether a simple custom or policy causing discrimination on the part of an agent, who possesses purpose, is sufficient. It is submitted that the latter of the two approaches is the correct one, although the lower courts do not make this overly clear. For example, in *Wilson v. City of North Little Rock*, the court strongly suggested that in order to be liable for racial discrimination a municipality must independently possess discriminatory purpose. 801 F.2d 316, 324 (8th Cir. 1986). The same is true of the court in Jett v. Dallas Indep. School Dist., 798 F.2d 748, 760–61 (5th Cir. 1986). The above cases might be distinguished from an inadequate training case in that in both of these cases the court was looking for a custom or policy causing the violation on the part of the respective municipality, yet could not identify one. Consequently, it could be argued that the *Wilson* and *Jett* decisions merely reflect attempts and failures to isolate the "final authority" responsible for the violation. *See also* Webb v. City of Chester, 813 F.2d 824, 829 (7th Cir. 1987) (policymaker is one making discriminatory decision and thus there is no difficulty finding municipal liability). *See generally* Mead, *42 U.S.C. § 1983 Municipal Liability: The* Monell *Sketch Becomes a Distorted Picture*, 65 N.C.L. Rev. 517 (1987).

[261] *City of Los Angeles v. Heller*, which was decided in the same term as *Daniels*, can be read to support this view. 106 S. Ct. 1571 (1986). In *Heller*, a charge was brought against certain police officers under § 1983, the underlying constitutional violation resting on the use of excessive force during an arrest. *Id.* at 1572. A claim was also made against the City of Los Angeles under *Monell*, the argument being that the municipality authorized the officers' conduct. *Id.* at 1572–73. The district court held a bifurcated trial, with the action against the individual police officers proceeding first to the jury. *Id.* at 1572. After the jury returned a verdict in favor of the police officers, the district court dismissed the action against the municipality, concluding that without an underlying constitutional violation there could be no municipal liability. *Id.*

The Court of Appeals for the Ninth Circuit reversed, holding that the case against the municipality should have gone to trial because the jury theoretically could have found a constitutional violation on the part of the police officers, yet still held in their favor due to the existence of good faith immunity. 759 F.2d 1371 (9th Cir. 1985). The Supreme Court reversed in a *per curiam* decision. 106 S. Ct. 1571 (1986). The Court first pointed out that no instruction was given on good faith immunity and thus the jury could not have used this as the basis for its judgment. *Id.* at 1573. Instead, the jury necessarily must have found an absence of any constitutional violation. *Id.* Next, the Court concluded that where no constitutional violation by an agent exists, there can be no municipal liability, even if a municipal policy exists which authorizes the violation. *Id.*

The *Heller* Court consequently appears to favor some form of derivative liability; there must be a violation by the agent for the principal to be liable. Although this is not strict vicarious liability,

without due process *and* the agent's mental state. *Bergquist* deviates from *Daniels* by attributing only the injury to the institution, but not the mental state.[262] This bifurcated approach to institutional liability is internally inconsistent, because if an institution can only act through its agents, it can only think through them, too.[263] Charging one but not the other to the institution creates a strange dichotomy indeed, one that the Court could not have intended in *Daniels*.[264]

Moreover, mixing *Monell* and *Daniels* is like, to use an old cliché, mixing apples and oranges. *Monell* presupposes the municipal agent's constitutional violation and focuses on institutional responsibility under section 1983. *Daniels*, in contrast, focuses on the constitutional violation only. Thus, *Monell* is simply a remedial decision under section 1983, while *Daniels* involves the question of whether a constitutional violation actually occured. Any requirement that a plaintiff prove a municipality independently culpable should be made in the context of section 1983, like *Monell*, and not in the constitutional context, as in *Daniels*. In this way, any intent requirement will be the result of statutory interpretation, not constitutional law.

Daniels appears to provide a tidy solution to a sticky constitutional problem. In reality, however, *Daniels* is questionable law with little or no theoretical or precedential support. *Daniels'* only support flows from the fact that it acts to limit the flow of cases into federal court. But this is simply administrative convenience and not sound constitutional reasoning. Moreover, *Daniels* may not be as antiseptic as it first appears, and it does not provide a comprehensive guide to procedural due process. Indeed, the decision creates problems. It leaves wholly unresolved the issue of what constitutes sufficient post-deprivation process in cases of intentional or grossly negligent conduct. Most importantly, as this Article demonstrates below, *Daniels* is unnecessary for the simple reason that both *Parratt* and *Hudson* are flawed. It was the result generated by the earlier two cases that created a need for the *Daniels* decision, and once the *Parratt* and *Hudson* reasoning is corrected, *Daniels* may be dispensed with.

III. Reconsideration of Parratt and Hudson

A. *The Problem With State Action*

Federalizing common law torts involving state officials implicates more than just the fourteenth amendment's due process clause. The concept of state action is equally

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neither is it a requirement that the municipality independently violate the Constitution. Rather, the *Monell* Court's approach to municipal liability seems to fall in between the two extremes, and the *Heller* decision suggests that the Court favors the derivative liability side of the spectrum.

[262] *Bergquist*, 806 F.2d at 1370.

[263] *See* Whitman, *Government Responsibility for Constitutional Torts*, 85 Mich. L. Rev. 225, 250–51 (1986) (pointing out that an institution only possesses a mental state through its agents). Professor Whitman engages in an excellent discussion of municipal responsibility for the constitutional violations of its agents. This Article does not purport to offer any opinion on whether some independent mental state should be required of institutions in general prior to extending liability. All that is suggested is that the *Daniels* decision does not impose such a requirement. *See supra* note 253; *infra* note 264.

[264] There definitely exists enough controversy within the Court concerning the meaning of *Monell* without *Daniels*. *See, e.g.*, Pembaur v. City of Cincinnati, 106 S. Ct. 1292 (1986); City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985).

important.[265] Because a state only acts through its agents, when courts address the constitutionality of a state's conduct the focus often turns instead to the agent's action. When the state authorizes this action courts have little difficulty in equating the agent's actions with those of the state.[266] To use the previous illustration, if state law requires the destruction of homes built prior to 1900, and omits any requirement for prior process, the law as written violates procedural due process. Similarly, if an agent acts pursuant to this law it is not difficult to understand that his conduct, because the state authorized it, violates due process.

But imputing an agent's unauthorized, or perhaps even illegal, conduct to the state is not so easily explained. Despite this difficulty, the Court held in *Home Telephone & Telegraph* that for state action purposes, unauthorized conduct should be imputed to the state.[267] Accordingly, even if state law fully comports with due process, where the state agent acts without providing process, a constitutional violation occurs.

The Court in *Parratt* and *Hudson*, although it spoke in terms of due process, altered *Home Telephone & Telegraph's* rationale. In *Parratt*, the Court held that although the official's unauthorized action is ascribed to the state, no constitutional violation occurs until the state fails to redress the wrong through its tort claims act.[268] The Court thus viewed state action from two planes: through the official in relation to the deprivation, and through the state in relation to the denial of process. But at a minimum, *Home Telephone & Telegraph* stands for the proposition that in assessing the constitutionality of a state actor's conduct, that conduct must be judged independently of state law.[269] *Parratt*

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[265] *See supra* notes 47–57 and accompanying text.

[266] *See Ex parte Young*, 209 U.S. 123 (1908). *Young* made possible the exercise of federal jurisdiction to restrain a state official from violating the Constitution. The argument was made in *Young* that the eleventh amendment divests federal courts of jurisdiction in cases where the state is a party. *Id.* at 149. The *Young* Court rejected this argument, however, finding that federal jurisdiction is not barred where the named party is not the state, but a state official. *Id.* at 159. Therefore, the fiction now exists that although a state official's conduct is state action for purposes of the fourteenth amendment, it is not for purposes of the eleventh. *See generally* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, at § 4231.

[267] Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913). Not long before *Home Tel. & Tel.*, the Court apparently reached the opposite conclusion: that unauthorized action could not be attributed to the state. *See* Barney v. City of New York, 193 U.S. 430 (1904). Though *Home Tel. & Tel.* did not expressly overrule *Barney*, the Court finally laid *Barney* to rest in United States v. Raines, 362 U.S. 17 (1960). *See* C. WRIGHT, THE LAW OF FEDERAL COURTS 290 n.20 (4th ed. 1983).

[268] *See supra* notes 77–96 and accompanying text.

[269] In Note, *Unauthorized Conduct*, *supra* note 111, at 843, the author asserts that *Home Tel. & Tel.* stands for the proposition that "as a matter of constitutional law, a claim is perfected for the purposes of lower federal court adjudication under the fourteenth amendment as soon as the particular state officer or state agency engages in the alleged harm." *Id.* The author further argues that the *Hudson* decision "stray[s]" from this doctrine of "constitutional perfection." *Id.* Taken to its illogical extreme, the *Parratt* decision conceivably could compeletly wipe away the doctrine of *Home Tel. & Tel.* For example, in *Burch v. Apalachee Community Mental Health Serv.*, the plaintiff had been involuntarily committed to a state mental hospital without a prior hearing. He brought suit under § 1983 claiming that he had been deprived of procedural due process. 804 F.2d 1549, 1551 (11th Cir. 1986), *vacated and reh'g en banc granted*, 812 F.2d 1339 (1987). Plaintiff's committal without a hearing, however, was wholly contrary to state law; for this reason the court found that procedural due process did not require a prior hearing. 804 F.2d at 1556–57. The court stated:

> The state has designed its laws to ensure that a person would not be wrongly deprived of his liberty . . . . In light of these facts, we cannot see how Florida could predict that

therefore deviated from this rationale by allowing state law to correct the agent's conduct.[270]

Although *Parratt's* departure from *Home Telephone & Telegraph* is subtle, *Hudson's* is flagrant. Not only is *Hudson* inconsistent with *Home Telephone & Telegraph* because it allows state law to correct its agent's wrongs, but it also rejects the very underpinnings of *Home Telephone & Telegraph* by only imputing part of the agent's conduct to the state.[271] In *Hudson* the agent intentionally destroyed the prisoner's property;[272] thus there clearly existed an opportunity to provide prior process.[273] The *Hudson* Court dismissed this fact as irrelevant, and instead focused on whether the state could possibly provide prior process.[274] Consequently, the *Hudson* Court was willing to impute only an agent's action to the state but not his inaction — that is, the failure to provide a hearing. *Home Telephone*

> in Burch's case its employees . . . would ignore the State's command. Thus, as in *Parratt* and *Hudson*, this case does not present a situation where the state could establish any type of predeprivation hearing, beyond that provided by the statutory commitment procedures, to protect Burch from random and unauthorized acts.

Id. This rationale is only one step removed from requiring state approval of the agent's actions before imputing the conduct back to the state, something the *Home Tel. & Tel.* Court expressly refused to do. 227 U.S. at 285. *See also* Temple v. Marlborough Div. of Dist. Court Dep't, 395 Mass. 117, 479 N.E.2d 137 (1985) (same analysis); *supra* note 41.

[270] Professor Monaghan vehemently criticizes the *Parratt* opinion as being inconsistent with that of *Home Tel. & Tel.* for slightly different reasons, stating:

> *Parratt's* asymmetric treatment of different kinds of official conduct cannot be adequately rationalized in state action terms. No distinction can turn on the adequacy of state corrective process, because that factor can be held constant in all situations.
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> . . . .
>
> More fundamentally, as a means for determining the time when a constitutional violation occurs, *Parratt's* state action theory is in direct conflict with principles thought to be settled by *Home Telephone and Telegraph Co. v. City of Los Angeles* . . . . Under *Home Telephone*, the fourteenth amendment reaches any executive or administrative conduct that contravenes the fourteenth amendment . . . . [I]t makes no difference whether the state official is using or misusing state power. Under *Home Telephone*, the constitutionally offensive state action occurs at the point at which the state official acts.

Monaghan, *supra* note 210, at 994–96. Professor Monaghan concludes that:

> *Parratt* is ultimately grounded in a theory of "state action" that cannot be reconciled with the more general constitutional understanding contained in *Home Telephone* and *Monroe*. Moreover, *Parratt* has consequences that arguably are beyond the power of Congress to alter. These results are unfortunate and unnecessary. Either the remaining aspects of *Parratt* should be overruled, or the decision should be recast.

Id. at 982.

See also K. Davis, *supra* note 75, § 26.10 at 416 ("the technique [used in *Parratt*] . . . could possibly cut back the § 1983 cases by ninety percent"); Note, *Unauthorized Deprivations of Property Under Color of Law: A Critique of the Supreme Court's Due Process Analysis in* Parratt v. Taylor, *and a Proposed Alternative Analysis*, 36 RUTGERS L. REV. 179, 215–16 (1983–1984) [hereinafter Note, *Unauthorized Deprivations*]; Note, *Unauthorized Conduct*, *supra* note 111 at 837–51.

[271] *See* Rubin, *supra* note 111, at 1113. Professor Rubin concludes that although the result in *Parratt* is correct, the Court used an "unjustifiable route" in reaching its conclusion. *Id.* In contrast, Professor Rubin argues that because the Court in *Hudson* failed to recognize that the *state actor*, as opposed to the state, violated due process by not granting a prior hearing, its result is "simply wrong." *Id. See also* Note, *Unauthorized Conduct*, *supra* note 111, at 860–61 (suggesting that although the *Parratt* decision might be squared with that of *Home Tel. & Tel.*, the *Hudson* decision cannot).

[272] Hudson v. Palmer, 468 U.S. 517, 536 (1984).

[273] *See* Rubin, *supra* note 111, at 1113; Note, *Unauthorized Conduct*, *supra* note 111, at 860.

[274] *Hudson*, 468 U.S. at 533. *See supra* notes 110–11 and accompanying text.

& Telegraph, however, requires attributing an agent's conduct to the state whether it is active or passive, at least when the agent "proceed[s] upon the assumption of the possession of state power . . . ."[275]

Whether *Home Telephone & Telegraph* reflects "good" or "bad" constitutional law is not the issue. Of relevance here is that the Court in either *Parratt* or *Hudson* could have achieved its goal of preventing due process from becoming a font of tort law by overruling *Home Telephone & Telegraph*. The debate then would focus on the desirability of that result in terms of state action, and not in terms of due process. The Court in *Parratt* and *Hudson*, however, did not overrule *Home Telephone & Telegraph*, but only skewed its application. Unauthorized conduct still is attributable to the state, only now the state has the opportunity to correct it. Moreover, in *Hudson* the Court indicated that only affirmative conduct that causes injury is charged to the state; passive conduct, such as failing to provide process, is not. State action, therefore, is distorted under the *Parratt* Court's decision, because the state is awarded time to correct its agent's error, and also under the *Hudson* decision, because the Court chooses what portion of the agent's conduct to impute to the state. This bending of state action theory in turn leads to problems with due process, for this methodology fails to achieve the goal of defederalizing common law torts. Instead, it merely postpones the constitutional question.

B. *The Problem With Due Process*

Commentators have almost uniformly criticized the Court's approach in both *Parratt* and *Hudson*, not only for its inconsistency with *Home Telephone & Telegraph*,[276] but also for its apparent dilution of due process.[277] Few, if any, critics suggest, however, that the Court might have in fact expanded constitutional protections under *Parratt* and *Hudson* instead of retracting them.[278] Indeed, most commentators have assumed the worst of

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[275] *Home Tel. & Tel.*, 227 U.S. at 288. *See supra* note 52 and accompanying text.

[276] *See supra* note 270.

[277] *See* Wells & Eaton, *supra* note 135, at 215 (criticizing *Parratt* opinion for failing "to articulate whether the holding is a ruling in procedural due process or substantive due process or both" as well as generally criticizing the decision for wiping away constitutional rights); Rubin, *supra* note 111 (arguing that although the *Parratt* decision might be correct, the *Hudson* decision is categorically wrong); Travis & Adams, *supra* note 118 (the *Parratt* Court confuses substance with jurisdiction); Friedman, *supra* note 75 (the *Parratt* decision could "undermine the basis for most section 1983 cases brought in federal court"); Note, *Unauthorized Conduct*, *supra* note 111; Fordham Note, *supra* note 135; Note, *Unauthorized Deprivations*, *supra* note 270; Comment, *Federalism, Section 1983 and State Law Remedies*, *supra* note 82, at 1037. *See also* Terrell, *"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 GEO. L.J. 861 (1982); Levinson, *supra* note 135; Nahmod, *Due Process*, *supra* note 122; Moore, *supra* note 135, at 258–59 ("When an individual has been wrongfully deprived of life or liberty under color of state law, a postdeprivation remedy may provide some compensation but it does not provide due process.").

[278] That the *Parratt* and *Hudson* decisions might invalidate many states' immunity rules has been recognized by several commentators. *See, e.g.*, Smolla, *supra* note 192, at 873; Nahmod, *Due Process*, *supra* note 131, at 230. In addition, several commentators have found the post-deprivation process analysis proffered by the Court in *Parratt* and *Hudson* to be somewhat curious and perhaps even wrong. *See* Redish, *supra* note 211, at 100–01 (criticizing *Parratt* decision for confusing substance and procedure); Rubin, *supra* note 271, at 111–12 (arguing challenge in *Parratt* was substantive as opposed to procedural since plaintiff "did not allege a deprivation of due process rights, and thus [the case was properly dismissed because plaintiff] failed to state a federal cause of action"); Smolla, *supra* note 192, at 876–77 (recognizing that *Parratt* holding interferes with the states' ability to define property, but praising this result because it provides an "'emergency override' . . . that makes

Parratt and *Hudson*, concluding that they work to unravel constitutional protections.[279] But this Article argues that the most unsettling result of *Parratt* and *Hudson* is not their dilution of constitutional rights, but rather, their creation of new rights.

Courts and commentators generally have read *Parratt* to stand for the proposition that due process is not offended by a negligent deprivation of property where the state provides an adequate remedy.[280] According to this interpretation, *Parratt* requires post-deprivation process. And *Hudson* solidified this rule, as the Court there expressly stated that *Parratt* established the principle that "the Fourteenth Amendment is not violated when a state employee negligently deprives an individual of property, *provided* that the state makes available a meaningful postdeprivation remedy."[281]

That this interpretation of *Parratt* was correct, however, is not so clear. In *Parratt*, the Court concluded that no due process violation had occurred because the plaintiff never contended that the state's procedures were "inadequate," or that prior process was "practicable."[282] In addition, the *Parratt* Court noted that a remedy did exist under state law for the tortious loss of property and this, the Court found, was "sufficient to satisfy the requirements of due process."[283] *Parratt*, therefore, can be read to stand for two propositions. First, where prior process is neither practicable nor challenged as inadequate, procedural due process is not at issue. Second, where the state provides a remedy for its tortious invasion of property rights, this is sufficient to satisfy due process. The argument therefore exists that *Parratt's* discussion of post-deprivation remedies was merely an alternative holding in the case and not the linchpin of the decision. Moreover, even if post-deprivation remedies were crucial to the decision, the Court determined that the state remedies were merely sufficient, and not necessary to satisfy due process.[284]

In any case, *Parratt* currently is accepted as standing for the proposition that when a state agent negligently deprives someone of property, due process is not offended so long as the state provides an adequate remedy. *Parratt's* error, however, lies in its re-

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the decision an eminently practical compromise in federal-state allocations of power"). *See also* Whitman, *supra* note 263, at 268.

[279] *See supra* note 277.

[280] *See supra* notes 77–96 and accompanying text.

[281] *Hudson*, 468 U.S. at 531 (emphasis added and footnote omitted). A majority of the Court joined this opinion.

[282] 451 U.S. at 543.

[283] *Id.* at 544.

[284] Not all of the Justices in *Parratt* interpreted the majority's opinion in this manner. Justice Stewart apparently believed post-deprivation process was in fact a necessity. He stated in his concurring opinion:

> But even if Nebraska has deprived the respondent of his property in the constitutional sense, it has not deprived him of it without due process of law. By making available to the respondent a reparations remedy, Nebraska has done all that the Fourteenth Amendment *requires* in this context. On this understanding, I join the opinion of the Court.

Id. at 545 (Stewart, J., concurring) (emphasis added).

Justice Blackmun also apparently read the majority opinion to require a remedy. *Id.* at 545–46 (Blackmun, J., concurring). *See also id.* at 547 (Powell, J., concurring in the result). Finally, Justice Marshall in dissent found the remedy to be inadequate, resulting in a due process violation. He thus would have *required* a remedy to satisfy due process. *See id.* at 554–57 (Marshall, J., dissenting in part) (finding that although the Tort Claims Act was adequate, an inadequacy existed because inmate never informed of its availability). For this reason, to the extent that the Court's opinion might be interpreted as not requiring a remedy, it is only a plurality opinion.

quiring a remedy in situations where the state simply cannot provide prior process. To the contrary, when no practicable way exists for either the state or its actor to provide predeprivation process in the form of notice or a hearing, and consequently no claim can be made that prior process is somehow inadequate, the conclusion must be that no procedural due process violation exists irrespective of the availability of some post-deprivation remedy.[285]

Parratt invoked the *Mathews* balancing approach in an effort to postpone process. But under *Mathews* the problem is one of timing — the court must decide whether process should come before or after the deprivation.[286] *Mathews* presupposes the possibility of prior process and merely permits its delay in light of overriding state interests. The situation exemplified by *Parratt*, however, is fundamentally different: In *Parratt* the deprivation resulted from negligence, and thus the actor had no opportunity to provide prior process. Similarly, the state itself could not furnish process prior to the loss because the actor's conduct was entirely random and unauthorized.[287] *Parratt* therefore diverges from *Mathews* in that it does not focus on timing or postponing process, but instead requires process in the first instance. This requirement, rather than simply minimizing the risk of erroneous substantive decisions, which is the keystone of process,[288] actually creates substantive rights.

Property only has a legal existence as a result of remedies prescribed by the state.[289] As Justice Holmes stated:

> [F]or legal purposes a right is only the hypostasis of a prophecy — the imagination of a substance supporting the fact that the public force will be

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[285] *See infra* notes 286–310 and accompanying text.

[286] *See supra* notes 70 and accompanying text. The general rule is that there must be process prior to the deprivation.

[287] The argument has been made that the state could provide process in the form of prophylactic measures in such a case. As demonstrated below, this would merely be the imposition of substantive duties, and thus cannot be explained as process. *See infra* notes 306–10 and accompanying text.

[288] In Carey v. Piphus, 435 U.S. 247, 259–60 (1978), the Court articulated this principle by stating:

> Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property . . . . Such rules minimize substantially unfair or mistaken deprivations of life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests.

Id. Even when used in the context of "minimum contacts," *see, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 107 S. Ct. 1026 (1987) (before a forum may exercise personal jurisdiction certain minimum contacts must exist); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (same); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (same); International Shoe Co. v. Washington, 326 U.S. 310 (1945) (same); or basic "fairness," *see, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (tribunal must be fair); Johnson v. Mississippi, 403 U.S. 212 (1971) (judge must be unbiased); the Court has basically been concerned with minimizing the risks of an incorrect decision. *See also* Withrow v. Larkin, 421 U.S. 35 (1975) (fairness extends to quasi-judicial agencies).

[289] *See* Smolla, *supra* note 192, at 846 ("Since the early writing of Oliver Wendell Holmes, the modern legal mind has grown accustomed to the recognition that even the most traditional forms of property — real estate and chattels — have legal existence only because of the prediction that the force of the state will be brought to bear upon those who seek to interfere with them."). *See also* Monaghan, *supra* note 210, at 986 n.58 ("both the nature of the substantive duties imposed on state officials by the fourteenth amendment and the extent to which the state must provide remedies for their violation are matters of substantive due process").

> brought to bear upon those who do things to contravene it — just as we talk of the force of gravitation accounting for the conduct of bodies in space.[290]

By dictating that a state provide an adequate remedy where it has interfered with property, the Court is granting a greater property interest than initially created by the state. Such a position is inconsistent with the Court's traditional position that the fourteenth amendment itself does not define property.[291] Even in relation to "liberty," which the fourteenth amendment does at times define,[292] the Court is engaged in defining substantive guarantees rather than procedural ones.

The argument exists, of course, that if *Parratt's* post-deprivation process defines substantive rights, then so does *Mathews* and all other Supreme Court cases which use post-deprivation process, because those cases also require a remedy. But in every Supreme Court post-deprivation process opinion before *Parratt*, the state could have afforded prior process.[293] Under these circumstances a remedy does not define substantive rights, but merely serves as a proxy for the result that would have obtained had the plaintiff received prior process.[294]

When the Court has required process prior to a deprivation, it has at most required that the state provide a hearing, the purpose of which is to protect against a *mistaken* deprivation as opposed to the deprivation itself.[295] There exists no guarantee that a hearing will prevent a deprivation; rather, the assumption is that if the state is made aware of the merits it will not erroneously deprive someone of life, liberty, or property. Thus, so long as the state complies with the hearing requirement, whether a deprivation actually occurs does not affect procedural due process.[296]

Allowing process to follow the deprivation, however, requires alteration of this principle. No longer is a simple hearing sufficient, but instead there must be a remedy.[297] This is so because of the substitute nature of post-deprivation process. Prior process is preferred and thus forms the rule.[298] In light of certain state interests, however, process after-the-fact is sometimes sufficient. For process after-the-fact to achieve the same results as prior process, and thus justify its substitute status, correction of any error is required. There must be a remedy.

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[290] Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918). *See also* Smolla, *supra* note 192, at 846 n.67.

[291] *See supra* note 63. Generally, states define property. The Congress may also create property rights and when it does so, the Court looks to the Congress as it would look to the state legislatures. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976).

[292] *See supra* note 292.

[293] *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977) (paddling of public school pupil).

[294] *See infra* notes 295–305 and accompanying text.

[295] *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 259 (1978). *See also supra* note 288. When speaking of a "mistaken" deprivation, the Court means a deprivation inconsistent with the substantive rule being applied. Substance in relation to property is determined by state law, while in relation to liberty it is defined by both state and federal law. *See supra* note 63. Life appears inherently self-defined, although it might receive a broader, or perhaps even narrower, interpretation. *See supra* note 63. For further analysis dealing with the application of substantive rules and mistaken results, see *infra* notes 317 and 367.

[296] It might, however, be a substantive due process concern, or some other substantive right. *See infra* notes 383–434 and accompanying text.

[297] *See supra* notes 71–73 and accompanying text.

[298] *See supra* notes 58–60 and accompanying text.

In the classical procedural due process case, for example, there are two distinct injuries: first, the injury in being denied prior process, and second, the substantive wrong, if any.[299] As the Court made clear in *Carey v. Piphus*,[300] the absence of process in and of itself generally causes no damage,[301] rather the damage results from an "incorrect" substantive decision. The substantive wrong — the incorrect decision — flows from the procedural wrong, however, and thus to compensate the plaintiff fully for the procedural violation, the substantive violation must also be redressed.[302] Had the state provided prior process it presumably would not have made an incorrect decision; hence, "but for" the procedural error the substantive wrong would not have occurred. Therefore, as a matter of full compensation for damage done, the substantive error must be redressed.

To achieve equivalency with this result, process after-the-fact must take the form of a remedy because, as above, the substantive wrong must be corrected. Therefore, where the Court simply permits the state to postpone process it could have provided before the deprivation, the remedy requirement does not define the substantive limits of life, liberty, or property, but only substitutes for the result that would have obtained had there been prior process. In essence, the Court has told the state to apply its own substantive rules, whatever they might be, after the fact.[303] The same cannot be said of *Parratt*. In that situation, the remedy required cannot act as a proxy for prior process for the simple reason prior process was impossible. Instead of instructing the state to apply its own substantive rules after the fact, *Parratt*, irrespective of state tort law, demands that the state correct what the Court presumes to be an "error."[304] The remedy in such a case, therefore, does not insure the proper application of state substantive rules, but instead acts as a substantive rule that mandates that a state agent not injure another in person or property.[305]

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[299] *See* Carey v. Piphus, 435 U.S. 247 (1978).

[300] *Id.* In *Carey* the Court found a constitutional violation due to the omission of process prior to the deprivation. The deprivation, however, was "correct" in that it was justified by state law. *Id.* at 261. Thus, because there was only a procedural wrong and not a substantive wrong, the Court found only an award of nominal damages to be justified. *Id.* at 266–67.

[301] Even where there exists only a procedural violation, damages for mental and emotional distress are still a possibility. *See Carey*, 435 U.S. at 260. Moreover, punitive damages might be obtained in an appropriate case. *Id.* at 257 n.11. Punitive damages cannot be recovered, however, from a municipality. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). The Court recently reaffirmed *Carey* in *Memphis Community School District v. Stachura*, finding that a jury cannot award damages based on its perception of the "importance" of the rights violated. 106 S. Ct. 2537 (1986). The Court found that "the abstract value of constitutional right may not form the basis for § 1983 damages." *Id.* at 2544.

[302] *See Carey*, 435 U.S. at 261.

[303] *See supra* notes 295 and 284.

[304] Generally, the substance of the interest is defined by the state. *See supra* note 295; *infra* notes 317 and 367. Thus, whether the deprivation amounts to an "error" must be determined by state substantive law and remedied accordingly. The *Parratt* rationale goes beyond this by demanding correction without allowing state law to determine whether there has been an error in the first instance.

[305] In contrast, Professor Bandes states:

> Traditional procedural due process analysis focuses on whether a constitutionally adequate hearing was provided before a permanent deprivation of property occurred. It is questionable whether *Parratt* fits this mold. It has been argued that Taylor's complaint in that case was not that his property was taken without a hearing, but that it was taken at all. Once characterized as a complaint about process, it was inevitable that Taylor's claim would be rejected. It is conceptually absurd to expect a hearing

The suggestion has been made that process includes more than simply notice and an opportunity to be heard,[306] and thus, even under the circumstances of *Parratt*, it has been argued, prior process was possible. Specifically, the argument is that "process" might include prophylactic measures, such as training police officers to avoid the use of excessive force, or taking steps to minimize the risk of injury to inmates.[307] If this argument prevails, however, procedural due process would be converted into a species of tort law. Process would thus become indistinguishable from substance, as this argument essentially urges recognizing a duty by the state to avoid substantive harm.[308] This Article submits that procedural due process was never intended to manufacture substantive rights. Instead, procedural due process finds logic only when it acts as a tool to minimize factual error.[309] Toward this end, "process" simply requires "notice and hearing," albeit in flexible form.[310]

The *Parratt* Court's error thus lies in the fact that it looked for state remedies even after it concluded that process prior to the deprivation was impossible. After finding it impossible to afford prior process, the Court should have dismissed the procedural due process claim. If predeprivation process cannot be afforded, it makes no sense to require that it must. In turn, it likewise is nonsensical to postpone process, thereby requiring a remedy, when no prior process could have been afforded in the first place.

Hudson, in contrast, presented a different state of affairs. Some form of prior process was possible in *Hudson*, if not from the state's perspective, then from the actor's.[311] The

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> before a negligent and unpredictable loss of property. The state's willingness to compensate was all he could reasonably demand.

Bandes, *supra* note 121, at 138 (footnotes omitted).

[306] *See, e.g.*, Whitman, *supra* note 263, at 267–68:

> [T]he fact that a loss is not deliberate does not mean that no predeprivation steps are available to government actors. Where the risk of loss is foreseeable and sufficiently high, due process may be said to require that steps be taken to minimize that risk. Though the loss of the property in a situation like *Parratt* is not intended, the failure to provide these safeguards might itself be either deliberate or inadvertant, depending on whether the risk had been explicitly focused upon in the design of the institutional structure. The Court in *Parratt* did not address that question, perhaps because it assumed that 'process' referred to the sort of safeguards, such as hearings, that might surround individuated decisions made in particular cases. It thought, therefore, only of what could be done for Taylor, and after-the-fact compensation seemed enough.

Id. See also Parratt v. Taylor, 451 U.S. 517, 546 (1981) (Blackmun, J., concurring) ("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.").

[307] *See* Bandes, *supra* note 121, at 138–40 (suggesting "process" might consist of more than notice and hearing, but could also include training); Whitman, *supra* note 263, at 273 (suggesting "process" might include more than "procedures [that] are designed to minimize factual error in government decisionmaking"); Comment, *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 144, 149 (1986) (arguing in favor of prophylactic measures).

[308] *See* Monaghan, *supra* note 210, at 986 n.58.

[309] *See supra* notes 288 and 295. This is what the due process "explosion" was all about. *See* Board of Regents v. Roth, 408 U.S. 564 (1977); Goss v. Lopez, 419 U.S. 565 (1975); Perry v. Sinderman, 408 U.S. 593 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). *But see* Note, *Unauthorized Deprivations*, *supra* note 270, at 212 (arguing that in tort context due process concern must shift from minimization of factual error to minimization of deprivations).

[310] *See* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (discussing flexible nature of procedural due process).

[311] *See supra* note 273 and accompanying text.

tortfeasor in *Hudson* intended his action,[312] and thus conceivably could have stopped to first afford a hearing. Notwithstanding the Court's contrary conclusion,[313] the tortfeasor's failure to afford prior process must be imputed to the state under the rationale of *Home Telephone & Telegraph*.[314] That prior process is possible, however, does not *ipso facto* implicate due process. The other precondition to procedural due process is that there must be a reason for having it — a reason supporting the requirement of prior process.

When speaking in terms of procedural due process, the Court has made it clear that it is speaking of the process necessary to minimize the risk of an erroneous deprivation.[315] In a case like *Hudson*, however, risk of error is simply not at issue. The plaintiff's claim is not that a procedural safeguard could have prevented the injury, but that the injury, with or without process, should not have occurred.[316] Because the destructive conduct in *Hudson* was unauthorized, the state could not "justify" the injury.[317] Where the state cannot justify the conduct, facts are not in dispute, and there is no reason for notice or a hearing; there is no reason for process.[318] The purpose of process is to insure that the state acts in a "correct," or justifiable, substantive manner. In *Hudson* nothing could justify the state's action in destroying the property. The plaintiff did not challenge the lack of process, but the substance of the action. When no factual dispute exists, therefore, there is no reason for prior process and, consequently, procedural due process is not truly at issue.[319]

At first blush this might seem quite strange. Where facts are disputed, that is, where the state might have a good reason for its action, a procedural due process violation conceivably occurs when the state does not provide process. When no justification exists for the state's action, however, no violation occurs. Thus, the more egregious conduct appears to be left unremedied. But this is not necessarily true. Generally, state law provides some remedy when the state actor's conduct is completely unjustifiable. Immunity, the predominant impediment to recovery, is unnecessary in these cases because immunity primarily tempers the advantage hindsight may offer and thereby avoids discouraging state officials from exercising their judgment. Where no reason for the

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[312] *See* Hudson v. Palmer, 468 U.S. 517, 519–20 (1984).

[313] *Id.* at 532.

[314] *See supra* notes 271–74 and accompanying text.

[315] *See supra* text accompanying note 295.

[316] *See supra* notes 278 and 305.

[317] Whether action is "justified" is determined by the same substantive law that creates the interest at issue. If an act is justifiable, it necessarily is "correct." In the case of property, because state law generally creates the interest, state law must be analyzed to determine whether conduct interfering with the interest is justified. Life and liberty, in contrast, find their foundation not only in state tort law, but also in the Constitution. For example, one generally has a liberty interest in being free from the infliction of any appreciable physical pain. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977), discussed *supra* in notes 72–74 and accompanying text. Therefore, substantive constitutional law must be considered along with state justification principles where life and liberty interests are involved in determining whether the conduct is "justified." Because of the generally deferential nature of substantive constitutional law in this regard, however, the decision inevitably focuses on the state rules. *See infra* note 367.

[318] For instance, in *Codd v. Velger*, the Court noted that "if the hearing mandated by the Due Process Clause is to serve any useful purpose, *there must be some factual dispute* . . . ." 429 U.S. 624, 627 (1977) (emphasis added).

[319] But this does not mean that such conduct is constitutional. There could very well be either a substantive due process violation, or a violation of some or other constitutional right. *See infra* notes 383–434 and accompanying text.

actor's conduct exists, however, there is little room for judgment. Hindsight can thus be more prudently applied in this situation, without fear of discouraging future proper conduct.[320] Due process in its procedural sense is only needed in those situations where there might be some reason supporting the action, for only in those situations does the danger exist that an "incorrect" deprivation might occur and yet go unremedied.[321] Immunity has forceful application to these cases and because of this guard against hindsight, the foresight of procedural due process is needed.

In addition, it must be remembered that the conduct may violate substantive due process or some other constitutional right.[322] Thus, it is not so clear that the more egregious conduct lacks a remedy. Even if the more egregious injury were to go unremedied, however, this Article submits that this is not the fault of constitutional jurisprudence. Due process is not an absolute guarantor of correct governmental action. Instead, procedural due process seeks to minimize the risk of incorrect decisions,[323] while substantive due process seeks deferentially to avoid irrational activity.[324] If certain conduct by the state falls between these guarantees, which it inevitably will, then society should attempt to correct the injustice. Due process should not be the panacea for society's failures.[325]

C. *A Proposed Alternative Analysis*

Once it is clear that the *Parratt-Hudson* analysis went too far in requiring a remedy, the next step is to determine how the cases should have been resolved in terms of procedural due process. This Article submits that when neither the state nor its actor

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[320] In cases where no reason justifies a constitutional deprivation, any immunity which might protect the tortfeasor should dissolve. Where there is no justification for the conduct at issue, the conduct generally will be bordering on the malicious. When this is true there generally exists no immunity. *See* W. KEETON, *supra* note 199, § 132 at 1059–60. Moreover, because the conduct is in no way justifiable, by definition, it cannot be privileged. Privileged conduct is that which is justified or excused; the assumption here is that it is neither. *See* W. KEETON, *supra* note 199, § 16 at 108–10. The suggestion that *Daniels* may have done away with the immunity problem in relation to the *Parratt-Hudson* rationale can be distinguished. *Daniels* only bars claims based on negligence. Immunity could thus still arise between the extremes of negligence and malice. In addition, privilege could also be a factor in such cases. *See supra* note 222.

[321] Where there is a possible justification for the action, the possibility of immunity is much greater. The state is generally more willing to allow for immunity in such a situation because it does not want to deter its official from making a decision that might be justifiable. *See generally* W. KEETON, *supra* note 199, § 132 at 1065. Moreover, a privilege on the part of the tortfeasor could also defeat recovery. *Id.*, § 16 at 108–10.

[322] *See infra* notes 383–434 and accompanying text.

[323] *See supra* note 288 and accompanying text.

[324] *See infra* notes 410–14 and accompanying text.

[325] Consider in this regard the perceptive thoughts of Grant Gilmore:

> Law reflects but in no sense determines the moral worth of a society. A reasonably just society will reflect its values in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law and the lion will lie down with the lamb. An unjust society will reflect its values in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will meticulously observe.

Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022, 1044 (1975). In contrast, *see* Monaghan, *supra* note 46, at 427 (arguing that the *Paul* decision makes no sense because "the more reprehensible and subject to legal redress the conduct, the freer the state is to engage in it").

has the opportunity to provide prior process, as in *Parratt*, nor has reason to provide process, as in *Hudson*,[326] procedural due process is not implicated. In other words, before procedural due process should be considered there must exist both an opportunity for prior process *and* a reason for affording process. Therefore, if the state were to pass a law requiring the destruction of all homes built before the year 1900, but provided no mechanism for prior process, the issue of procedural due process would be raised. The state would have the opportunity to require prior process, and a definite reason for such process would exist. Similarly, even if state law did require a hearing and a state agent inadvertantly omitted the hearing and intentionally destroyed a home she believed was built before 1900, procedural due process would again be at issue.[327] Under this variation the agent possessed the opportunity to provide prior process and a reason, determining the vintage of the home, existed for having it.

Even when both an opportunity and a reason for prior process exist, however, it does not mean that such process must in fact be afforded. Once this threshold determination is made, the next questions are whether, what, and when the process should be required. First, in some situations governmental interests might justify dispensing with process altogether.[328] In addition, procedural due process is a flexible concept which can vary between simple notice and a full-fledged hearing.[329] Finally, the timing of the process must be considered; post-deprivation process might also suffice.[330] But before reaching these issues, procedural due process first must be implicated. This threshold question is satisfied only if there is an opportunity and reason for prior process.

The *Parratt* Court itself arguably adopted a similar position, as demonstrated above.[331] Moreover, the Second Circuit Court of Appeals expressly recognized analogous

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[326] Of course, because there was no opportunity for process in *Parratt* there also was no reason for it. Therefore, the question of opportunity is subsumed by the question of reason. This Article, however, will keep the issues separate so as to better analyze *Parratt* and *Hudson*.

[327] *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). In *Logan*, state law mandated a hearing, yet the hearing was "inadvertent[ly]" omitted. *Id.* at 426. Still, the Court found a due process violation. *Contrast* Messick v. Leavins, 811 F.2d 1439 (11th Cir. 1987) (failure to abide by state law requiring process still due process violation); *with* Burch v. Apalachee Community Mental Health Serv., Inc. (11th Cir. 1986) (failure to abide by state law requiring hearing deemed unauthorized, thus making the *Parratt* Court's requirement of post-deprivation process applicable); *and* Gregory v. Town of Pittsfield, 479 A.2d 1304 (Me. 1984) (same).

[328] This author does not wish to speculate on what type of governmental interest might justify such a result, but it is at least conceivable. *See e.g.*, Albers v. Whitley, 546 F. Supp. 726, 732 n.1 (D. Or. 1982), 743 F.2d 1372 (9th Cir. 1984), *rev'd*, 106 S. Ct. 1078 (1986); Monaghan, *supra* note 46, at 431 ("Due process might mean no process, at least no formal adversary process.").

[329] *See* Friendly, *supra* note 310.

[330] *See supra* notes 70–74 and accompanying text.

[331] *See supra* notes 282–84 and accompanying text. Professor Monaghan also espoused a similar position in relation to the Court's holding in *Paul v. Davis*. Professor Monaghan argued that *Paul* took too narrow a view of the term "liberty." Monaghan, *supra* note 46, at 430–31. Instead, he argued, the Court could have found liberty to include the right to be free from defamation, yet still achieved its desired result by simply finding process unnecessary:

> Prior hearings might well be dispensed with in many circumstances in which the state's conduct, if not adequately justified, would constitute a common-law tort. This would leave the injured plaintiff in precisely the same posture as a common-law plaintiff, and this procedural consequence would be quite harmonious with the substantive view that the fourteenth amendment encompasses the same liberties as those protected by the common law.

Id. at 431 (footnote omitted).

reasoning in *McClary v. O'Hare*,[332] a case involving the death of a county highway department employee. In *McClary*, the employee's widow/administratrix brought a section 1983 suit which alleged that his accidental death denied the decedent procedural due process.[333] The Second Circuit, struggling with *Parratt's* logic, took a tortured path before eventually concluding that no procedural due process claim existed.[334] The court's reasoning was based in part on the assumption that *Parratt* did not apply to an interest in life,[335] and therefore did not require post-deprivation remedies in the case at bar. The *McClary* court explained:

> It is difficult for us to see what sort of process the State should or could have provided the deceased. Procedural due process requires that certain procedures be followed before (or under *Parratt* after) the State can properly take life, liberty, or property. Appellant does not claim that any *procedures* the State could have followed would have made the accidental, even if recklessly caused, deprivation of her husband's life proper. Appellant complains that state actors caused her husband's death, not that in doing so they failed somehow to apply the proper procedures. *Procedural due process is simply not implicated in this case at all.*[336]

As an alternative holding the court, assuming *Parratt* applied to an interest in life, found that adequate state remedies were available to the plaintiff.[337] In reaching this conclusion the court rejected the plaintiff's argument that the *Logan* exception should apply.[338] Again struggling to determine how procedural due process was even relevant to the case, the Court stated: "In those cases finding that a deprivation occurred as a result of an established state procedure . . . predeprivation process was *possible*."[339] Consequently, because the decedent's injury was completely accidental (or random) and unauthorized, prior process was impossible; neither the tortfeasors nor the state could have provided it.[340] For this reason the court dismissed the plaintiff's procedural due process claim.[341]

Undoubtedly, the Second Circuit's conclusion in *McClary* is correct. Procedural due process was not implicated there for either of two simple reasons: first, no opportunity for process existed prior to the decedent's injury because of its accidental nature,[342] and second, even if there were an opportunity for prior process the plaintiff's claim was that the death should not have occurred *at all*, not that the state made an erroneous decision.[343] Because facts were not in dispute, no reason existed for providing process. Consequently, without an opportunity or a reason for prior process, procedural due process could not be violated.

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[332] 786 F.2d 83 (2d Cir. 1986).

[333] *Id.* at 84–85.

[334] *Id.* at 87.

[335] *Id.*

[336] *Id.* (emphasis added).

[337] *Id.* at 88.

[338] *Id.* at 87. If *Logan* were applied, the case would fall out of the post-deprivation remedy analysis. *See supra* notes 120–24 and accompanying text.

[339] *Id.* at 87 (emphasis added).

[340] *Id.*

[341] *Id.* at 87–88.

[342] *Id.* at 87.

[343] *Id.* at 87–88.

The Supreme Court continues to struggle with its post-deprivation process analysis even after *Daniels*, and in doing so demonstrates its own uncertainty regarding the soundness of the *Parratt-Hudson* rationale. In *Whitley v. Albers*, decided shortly after *Daniels*, a prisoner, shot in the leg during an uprising, brought a section 1983 action for violations of his eighth and fourteenth amendment rights.[344] The prisoner made both substantive[345] and procedural due process claims under the fourteenth amendment.[346] Though it evidently reached the merits of the procedural due process claim, the Court simply stated that "[t]he District Court was correct in ruling that respondent did not assert a *procedural* due process claim that the State was obliged to afford him some kind of hearing either before or after he was shot."[347] The district court dismissed the procedural challenge (on the merits) for two separate reasons.[348] First, the court found no liberty interest at stake.[349] Second, the court concluded that even if a protected liberty interest existed,

> in the midst of the emergency created by riotous inmates holding a guard hostage, the Constitution simply does not mandate a due process hearing for each inmate potentially affected by remedial action. When prison authorities are reacting to emergency situations in an effort to preserve the safety and integrity of the institution, the state's interest in decisive action clearly outweighs the inmates' interest in a prior procedural safeguard.[350]

While it is not clear which of the two reasons the Supreme Court felt was correct, the Court's reliance on the second conclusion appears more plausible.[351] There can be no serious dispute that the inmate had a protected liberty interest.[352] The fact that any person, whether an inmate, pre-trial detainee, or law professor, has a constitutionally protected liberty interest in being free from bodily harm is virtually unassailable.[353] The district court's reasoning to the contrary is unconvincing.[354] Thus, it appears likely the Court found that the district court's alternative conclusion was essentially correct.

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[344] 106 S. Ct. 1078, 1083 (1986).

[345] In relation to the substantive due process claim the Court deferred to the eighth amendment, finding due process at best protected the prisoner only to the same extent as did the eighth amendment. *Id.* at 1088. The Court found that an eighth amendment claim existed only where the state actor exhibited wanton or willful wrongdoing. *Id.* at 1085. *See infra* notes 408–14 and accompanying text.

[346] 106 S. Ct. at 1088.

[347] *Id.* (emphasis in original).

[348] *See* Whitley v. Albers, 546 F. Supp. 726, 732 n.1 (D. Or. 1982).

[349] *Id.* This conclusion is curious indeed, since courts uniformly have recognized a liberty interest in being free from bodily harm. *See supra* note 72 and accompanying text.

[350] *Whitley*, 546 F. Supp. at 732 n.1 (citations omitted).

[351] *Whitley*, 106 S. Ct. 1088.

[352] *See infra* note 353.

[353] *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 674 (1977) (student has liberty interest in being free from any "appreciable physical pain" inflicted by school authorities). *See also* Davidson v. Cannon, 106 S. Ct. 668, 672–73 (1986) (Blackmun, J., dissenting) ("It is well established that this liberty includes freedom from unjustified intrusions on personal security."); *id.* at 680 (Stevens, J., concurring) ("the interest in freedom from bodily harm surely qualifies as an interest in 'liberty'").

[354] The district court's opinion can only be quoted in hopes of letting the reader judge its persuasiveness:

> The right to be free from infliction of harm without due process as guaranteed by the fourteenth amendment usually applies to pretrial detainees. *E.g., Arroyo v. Schaefer*, 548 F.2d 47, 49–50 (2d Cir. 1977). In limited instances, a regulation or statute may

The significance of the district court's alternative holding is not exactly clear. In finding that prior process was not required, the district court apparently based its conclusion on some form of balance between the state's and inmate's respective interests.[355] But even if a court determines that *prior* process is not required, the question of post-deprivation process still remains. Under *Hudson*, after finding no need for prior process, the court should have analyzed post-deprivation remedies to insure that they were adequate.[356] This the district court did not do. Reconciling the district court's conclusion in *Whitley* with the Supreme Court's holdings in *Parratt* and *Hudson* is thus impossible.[357] *Daniels* offers no help, for the shooting in *Whitley* was clearly intentional.[358] Because the Supreme Court affirmed the district court's rationale, which is wholly contrary to that found in *Parratt* and *Hudson*, it appears that the Court itself has implicitly rejected its *Parratt-Hudson* analysis.

The suggestion might be made that essentially the district court in *Whitley* applied this Article's premise, recognizing that where prior process is impossible procedural due process is not at issue. *Whitley*, however, does not present the proper facts for a total rejection of procedural due process. Procedural due process is a flexible concept, and need not necessarily encompass a full-fledged hearing.[359] Instead, notice alone can satisfy procedural due process under certain circumstances, at least if the notice can minimize the risk of error.[360] In *Whitley* the plaintiff argued that some type of warning should have been given prior to the shooting.[361] Conceivably this warning, or notice, could have formed the basis of a colorable procedural due process challenge. The Supreme Court did discuss the warning aspect of the plaintiff's argument, stating:

> But there would be neither means nor time to inquire into the reasons why each inmate acted as he did . . . . As petitioner's own experts conceded, a verbal warning would have been desirable, in addition to a warning shot, if

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> create a due process interest enforceable by a prisoner. *E.g., Wolff v. McDonnell*, 418 U.S. 539 . . . (1974); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 . . . (1979). Here, no regulation or statute was cited which would give plaintiff an expectation of a due process hearing prior to the alleged deprivation of liberty. *See Hayward v. Procunier*, 629 F.2d 599, 601 (9th Cir. 1980), *cert. denied*, 451 U.S. 937 . . . (1981).

Whitley, 546 F. Supp. at 732 n.1. Apparently, because an inmate rather than a pre-trial detainee was involved, the court felt that some regulation or statute was necessary to create a liberty interest. Because none existed, neither did a protected interest.

[355] *Id.*

[356] *See* Hudson v. Palmer, 468 U.S. 517, 534 (1984).

[357] The argument might be pressed that the district court was applying a compelling interest analysis, concluding that the state possessed a compelling interest in responding to the riot without procedural safeguards. Thus, it might further be argued that the Supreme Court endorsed this conclusion. Though this position is plausible, the Court has yet to apply similar reasoning so as to completely dispense with process both before and after the fact. At most, by balancing interests the Court has allowed for the *postponement* of process. Moreover, the Court in *Whitley* never addressed compelling interests on the part of the state in its discussion of either substantive due process or the eighth amendment. It is thus doubtful that the Court intended to endorse such a theory in relation to procedural due process. Finally, it would not behoove the Court to adopt such a startling approach to procedural due process in so summary a fashion.

[358] Whitley v. Albers, 106 S. Ct. 1087 (1986).

[359] *See supra* note 310 and accompanying text.

[360] *See supra* note 288 and accompanying text.

[361] *Whitley*, 106 S. Ct. at 1087.

> circumstances permitted it to be given without undue risk. While a jury might conclude that the omission was unreasonable, we think that an inference of wantonness could not properly be drawn. First, some warning was given . . . . Second, the prison officials could have believed in good faith that such a warning might endanger the success of the security measure . . . .[362]

The Court thus viewed the warning issue from a substantive perspective, addressing the failure to warn in terms of negligence and wantonness.[363] The issue should have been treated as a procedural one, however, consistent with the approach proposed here. Because the shooting was intentional,[364] state officials had the opportunity to provide some form of prior process.[365] Process is also required because facts were in dispute.[366] Under certain facts the shooting might have been justified while under others it might not.[367] If the prison official warned the inmate before shooting, the inmate might have ceased his action, and consequently avoided the deprivation.[368] The inmate's failure to

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[362] *Id.* (citations omitted).

[363] *Id.*

[364] *Id.*

[365] Opportunity for a form of prior process, of course, would have to be resolved under the facts of the case. In some situations it might be feasible to provide notice, while in others it might not.

[366] *Whitley*, 106 S. Ct. at 1086.

[367] Presumably, the shooting would have been justified under state law to prevent the inmate's escape or to quell a prison riot. Otherwise, it would not have been justified. Under federal law, as eventually determined by the Court in *Whitley*, the shooting would have been justified where "plausibly . . . thought necessary," as opposed to being an "unjustified infliction of harm . . . tantamount to a knowing willingness that it occur." *Id.* at 1085. *See infra* notes 408–14 and accompanying text. Thus, the federal standard is an "arguable" standard, which necessarily incorporates the state justification. Under the federal substantive rule, the question is whether the conduct was arguably justifiable under state law; that is, does some argument exist in support of the conduct. Because the federal rule incorporates the state rule regarding justification, when one is determining whether a reason for process exists — that is, whether facts are in dispute — one must look to state law. This is true even though the liberty interest arises under federal law. *See supra* notes 295 and 317.

The same analysis should prove true in relation to any injury to the person. Where a person is injured, whether an inmate or not, liberty is implicated under the federal Constitution. *See supra* note 72 and accompanying text. In assessing whether a reason for prior process exists, it must be determined whether the conduct is arguably justified. To make such a determination, the substantive right must be analyzed. In relation to the liberty interest in being free from bodily harm, this requires analyzing the constitutionally protected substantive right. In all but a few instances, however, *see e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985); Roe v. Wade, 410 U.S. 113 (1973). The substantive right under constitutional law is simply an "arguable" right; such is the nature of substantive due process. *See infra* notes 396–414 and accompanying text. Thus, as demonstrated above, in assessing whether there might be justification, state law will have to be considered. In those cases where constitutional law supersedes state law, the Constitution controls the justification. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985). *See* in contrast, Carey v. Piphus, 435 U.S. 247 (1978) (liberty interest in being free from suspension arguably arises under Constitution but state law still determines whether deprivation correct); Ingraham v. Wright, 430 U.S. 551 (1977) (same).

[368] Consider also the facts of City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985), a classical "excessive force" case. There a policeman intentionally shot and killed a suspect whom he believed possessed a deadly weapon. *Id.* at 810–11. The *Tuttle* Court failed to address whether there was in fact a constitutional violation, instead resolving only the issue of municipal liability. *Id.* at 817 n.4. The case theoretically presented a colorable procedural due process claim, analogous to that in *Whitley*. The shooting was intentional and therefore there might have been an opportunity for some warning or notice which apparently was not given. *See id.* at 811. As in *Whitley*, facts were in dispute, in that the shooting in *Tuttle* occurred because the policeman erroneously believed the victim was

heed the warning would have, conversely, reinforced the official's conviction that the shooting was required and justified. Of course, as noted earlier, simply passing this threshold issue does not mean this form of prior process is constitutionally required. The Court must take the next step and decide what sort of process the Constitution requires, and must also consider whether, on balance, process should occur prior to the deprivation.[369] When both opportunity and reason for process exist, however, procedural due process is implicated in the first instance.

In summary, before a court should even consider procedural due process, some possibility must exist that prior process could be afforded — an opportunity by the agent who caused the deprivation, or the state through its established procedure, to provide prior process. In cases like *Parratt*, where the agent's negligence caused the deprivation, there is no opportunity for process as such. Because the agent does not know the deprivation will occur, he cannot notify the victim or otherwise provide process. The state also cannot provide process, because the accidental injury is wholly unauthorized. In addition, even when some opportunity for prior process exists, there must also be a reason for it. Facts must be in dispute. Where there exists no purported justification for the deprivation, that is, where no facts support it as in *Hudson*, then there is no reason for process. Unless both conditions are satisfied, procedural due process is not relevant, and is not at issue in the case.

D. *Comparing* Daniels

Consistent with this Article's approach, the argument might be made that because negligent conduct never affords an opportunity for prior process, negligent acts may never implicate procedural due process. Some might suggest that the *Daniels* conclusion is necessarily correct, and provides a more direct route to the same result. The *Daniels* holding does appear to bear some correlation with this Article's proposed analysis. But it is not a perfect correlation[370] and it does not solve the problem presented by those cases which involve gross negligence or intentional conduct. Instead, *Daniels* simply draws a bright line between negligence and other more culpable mental states, leaving the latter to treatment under the *Parratt-Hudson* rationale. Thus, even if it is true that cases involving negligence necessarily present no opportunity for prior process, *Daniels* only solves part of the problem. A more comprehensive analysis is still needed because not all cases involving gross negligence or intentional conduct implicate procedural due process.[371]

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reaching for a gun. *Id.* Notice may have helped resolve this factual dispute. Note that a similar argument might also be made in relation to the situation in Tennessee v. Garner, 471 U.S. 1, 4 (1985), where a policeman shot and killed a suspected fleeing felon. That case was resolved, however, under a fourth amendment analysis. *Id.* at 7. The Court held that Tennessee's justification, which allowed the shooting of *any* fleeing felon, authorized an unreasonable seizure. *Id.* at 20.

[369] In a situation where a person is about to be shot, the interest in one's life or physical well-being should generally outweigh any interests the state might have in delaying process. *Contrast* Mathews v. Eldridge, 424 U.S. 319 (1976) (state's interest in administrative efficiency outweighs individual's interest in receiving social security benefits). Also, the risk of there being an erroneous decision seems much higher than that in *Mathews*, and the harm inflicted, if there were an error, would be much more substantial than that in Ingraham v. Wright, 430 U.S. 651 (1977). Weighing these factors should counsel in favor of prior process.

[370] *See infra* notes 371–72 and accompanying text.

[371] *See supra* notes 311–25 and accompanying text.

As a preliminary matter, the exact holdings of *Daniels* and *Davidson* must be isolated. *Daniels* and *Davidson* stand for the proposition that before procedural due process need be considered there must exist an intentional, or perhaps grossly negligent,[372] *deprivation*. Therefore, the injury — the interference with the substantive interest in life, liberty, or property — must result from intentional, or at least grossly negligent, conduct. Indeed, this principle seems simple when stated, but applying it has proved problematic. In fact, at least two federal circuit courts have misread the *Daniels* and *Davidson* decisions, and instead of focusing on the *mens rea* relative to the protected interest at stake have focused on the mental state relative to the process due. Consequently, in both *Brunken v. Lance*[373] and *Deretich v. Office of Administrative Hearings*,[374] the courts concluded that because the respective states, through their agents, were merely negligent in failing to provide prior process, *Daniels* required dismissal.[375] Each case contained an intentional deprivation, yet the courts held that the negligent failure to provide process did not implicate the due process clause.[376]

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[372] Whether gross negligence will suffice to state a claim was left open by *Daniels*. 106 S. Ct. at 666. *But see Davidson*, 106 S. Ct. at 671 (Blackmun, J., dissenting) (recklessness enough to state a claim); *id.* at 675 (Blackmun, J., dissenting) (same); Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987) (gross negligence enough); *cf.* Bradberry v. Pinellas County, 789 F.2d 1513 (11th Cir. 1986) (noting but not answering the question); DeShaney v. Winnebago County Dept. of Soc. Serv., 812 F.2d 298 (7th Cir. 1987) (assumes, without deciding, gross negligence enough); Bergquist v. County of Cochise, 806 F.2d 1364 (9th Cir. 1986) (gross negligence enough); McClary v. O'Hare, 786 F.2d 83 (2d Cir. 1986) (suggesting, under circumstances, gross negligence enough); Villante v. Deptartment of Corrections, 786 F.2d 516 (2d Cir. 1986) (gross negligence enough); McKenna v. City of Memphis, 785 F.2d 560 (6th Cir. 1986) (suggesting something more than negligence enough to state a claim); Anderson v. City of Pocatello, 112 Idaho 176, 731 P.2d 171 (1986) (something more than negligence enough to state a claim); Uberoi v. University of Colorado, 713 P.2d 894 (Colo. 1986) (same).

[373] 807 F.2d 1325 (7th Cir. 1986).

[374] 798 F.2d 1147 (8th Cir. 1986).

[375] *Brunken*, 807 F.2d at 1331; *Deretich*, 798 F.2d at 1154.

[376] In *Brunken*, a social worker suspected that a minor was being sexually abused by her father. 807 F.2d at 1327. Therefore, a "shelter care hearing" was scheduled, but no notice of this hearing was sent to the father. *Id.* Subsequently the minor was placed in the custody of the Department of Children and Family Services of Illinois. *Id.* The father sued under § 1983 claiming that he had been deprived of liberty without due process of law. *Id.* at 1328. The Court of Appeals for the Seventh Circuit found that the father stated no claim under procedural due process because the failure to send notice was not intentional; rather it was only a negligent oversight on the part of the social worker. *Id.* at 1331. Thus, the court concluded that the *Daniels* decision precluded the claim. *Id.*

In *Deretich*, a state employee was discharged without an adequate hearing. 798 F.2d at 1149–50. The Court of Appeals for the Eighth Circuit, relying on *Daniels*, stated:

> [A] procedural due process claim under section 1983 must show that the constitutional infringement resulted from 'more than lack of due care by a state official.' If OAH's procedures were deficient, Deretich must show that the deficiency resulted from more than mere negligence.

798 F.2d at 1151 (quoting *Daniels*, 106 S. Ct. at 665.)

The courts in both cases incorrectly focused on process rather than on the deprivation suffered. In assessing the applicability of the Court's holding in *Daniels* — that negligence cannot rise to a violation of due process — the courts should have determined whether the deprivation resulted from negligent conduct, rather than focusing on the omission of process. This was aptly explained by the Court of Appeals for the Sixth Circuit in Franklin v. Aycock, 795 F.2d 1253 (6th Cir. 1986), where a Tennessee inmate challenged procedures afforded him prior to his being disciplined. The *Franklin* court stated:

Unquestionably, these cases are wrong. The logic of *Brunken* and *Deretich* would do away with practically all procedural due process claims, leaving subject to constitutional scrutiny only those involving a state agent who consciously, or in a grossly negligent fashion, disregards the requirement of prior process.[377] Thus, a state agent's ignorance of constitutional law could effectively spell a complete defense. Although this might be desirable when considering damages and immunity, it is not desirable when attempting to identify the underlying constitutional violation.

If the *Brunken* and *Deretich* decisions accurately interpreted *Daniels*, then *Daniels* in no way correlates with this Article's analysis. For example, if *Brunken* and *Deretich* correctly interpret *Daniels*, then *Logan*, which held that *Parratt* does not apply when activity pursuant to an established state procedure destroys a property interest, has been overruled. Under the analysis proposed here, in contrast, the *Logan* Court's holding certainly survives. *Logan*, it may be remembered, was a case where the Illinois Fair Employment Practices Commission (the Commission), "through inadvertence," terminated an employment discrimination claim by not convening a timely conference.[378] This inadvertance at best could be deemed negligence, which, under *Brunken* and *Deretich*, cannot support a procedural due process claim. *Logan* would, therefore, be dead. Under the analysis offered here, however, *Logan* surely survives because the Commission clearly had an opportunity to convene a timely conference prior to the deprivation in that case; it simply failed to do so.[379] In addition, the second prong of this Article's analysis is satisfied because facts surrounding the claim's validity were in dispute.[380] A reason existed for prior process, that is, sifting through claims to determine which should and should not proceed.

Even without *Brunken's* and *Deretich's* misinterpretations of the *Daniels* decision, squaring the *Logan* holding with that of *Daniels* might still prove difficult. On the one

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> Under *Daniels*, the focus in determining whether a protected interest is 'deprived' is on the conduct which has allegedly injured the life, liberty or property interest, and on whether that conduct was negligent or involved some greater mental state, *e.g.*, recklessness or deliberateness. The conduct which allegedly injured Franklin's liberty interest, and which is therefore the focus of our *Daniels* inquiry, is the Disciplinary Board's decision to place him in disciplinary segregation, rather than the Board's alleged failure to afford adequate procedures by not rendering a post-hearing written statement.

Id. at 1262. The court's reasoning makes sense. The *Daniels* Court itself distinguished cases involving negligent omissions of process. *See* 106 S. Ct. at 666 ("We think the relevant action of the prison officials [in Wolff v. McDonnell, 418 U.S. 539 (1974)] . . . is their deliberate decision to deprive the inmate of good-time credit, not their hypothetically negligent failure to accord him the procedural protections of The Due Process Clause."). *See also* Sourbeer v. Robinson, 791 F.2d 1094, 1105 (3d Cir. 1986), *cert. denied sub nom.* Patton v. Sourbeer, 107 S. Ct. 3276 (1987). *Cf.* Burch v. Appalachee Community Mental Health Serv., 804 F.2d 1549 (11th Cir. 1986), *vacated and reh'g en banc granted*, 812 F.2d 1339 (1987) (misfocusing on absence of process in applying *Parratt*); Gregory v. Town of Pittsfield, 479 A.2d 1304 (Me. 1984), *cert. denied*, 470 U.S. 1018 (1985) (same); both discussed *supra* notes 41 and 294 and *infra* note 381.

[377] *See* Santiago v. Garcia, 821 F.2d 822 (1st Cir. 1987) (refusing to read *Daniels* decision in this way for fear it would overrule other due process decisions).

[378] Logan v. Zimmerman Brush Co., 455 U.S. 422, 426 (1982).

[379] Note the *Logan* Court's comment in this regard: "[I]t is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference — whether the Commission's action is taken through negligence, maliciousness, or otherwise." 455 U.S. at 436.

[380] *See id.* at 434.

hand, it can be argued that the two are consistent because, even though the state commission in *Logan* was negligent in failing to provide a timely conference, the plaintiff challenged an "established state procedure," and this procedure surely resulted from the state's intentional conduct. Consequently, the argument goes, the state intentionally deprived Logan of property, satisfying the requirement of *Daniels*. The problem with this position is that the state *required* a conference, evidencing its desire not to terminate claims without hearings.[381] The state's intent was not to deprive the victim of his claim, at least not until he had received full process. Saying that the state system intended to deprive certain randomly selected individuals of property is pure fiction. Indeed, the same argument could be made in relation to almost any deprivation, since the "system" is the moving force behind all state actors' conduct.

In contrast, the argument that *Logan* involved only a negligent deprivation is not totally convincing. In *Logan*, the "negligence" was in failing to provide process. Unlike the situations in *Brunken* and *Deretich*, no other action was required to accomplish the deprivation;[382] rather, the state's failure to afford process as a matter of law terminated the interest involved. Thus, in one sense, it seems that the termination — the deprivation — resulted from negligence. Failing to provide process amounted to a deprivation, both of which resulted from the state's negligence. But some might argue that although the failure to afford process resulted from negligence, the claim's termination resulted from an intervening force: the operation of state law. This intervening force must be characterized as intentional, because a state law cannot be negligently enacted. Thus, negligence did not cause the deprivation; the real cause was an intentionally enacted state law. Though "fiction," the argument has some appeal. If it were accepted, perhaps the *Logan* decision could be safely squared with *Daniels*. Reconciling the two decisions, however, is difficult, and this difficulty further illustrates the questionable basis of the *Daniels* holding. Because *mens rea* is always a relative concept, it is often hard to define.

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[381] Thus, to a certain extent *Logan* appears to be a case where although the state itself satisfied due process, the state actor did not. *See supra* note 41 and accompanying text. In this regard, consider Gregory v. Town of Pittsfield, 479 A.2d 1304 (Me. 1984), *cert. denied*, 470 U.S. 1018 (1985); and Burch v. Appalachee Community Mental Health Serv., 804 F.2d 1549 (11th Cir. 1986), *vacated and reh'g en banc granted*, 812 F.2d 1339 (1987), discussed *supra* notes 41, 294, and 328. In *Gregory* state law required that notice be sent prior to the termination of general assistance benefits but, pursuant to the town's own policy, town officials failed to send notice. 479 A.2d at 1305. The Supreme Judicial Court of Maine found the *Parratt* decision controlling. *Id.* at 1308. In dissenting from the Court's denial of certiorari, Justice O'Connor stated:

> [The Supreme Judicial Court's] conclusion rests on a reading of *Parratt v. Taylor* that is more expansive than this Court previously has endorsed . . . . [H]ere the town of Pittsfield had a policy, contrary to the requirements of state law, not to provide written notice to applicants denied general assistance. If we assume, *arguendo*, that due process requires the provision of such notice, it is questionable whether *Parratt* suggests that a municipal policy denying those procedures comports with the Constitution so long as state law makes some remedy available.

470 U.S. at 1021–22. *Contrast* Messick v. Levins, 811 F.2d 1439, 1442 (11th Cir. 1987) (finding *Logan* controlling where municipal policy causes deprivation irrespective of state law).

[382] In most cases, as illustrated by *Brunken* and *Deretich*, the failure to provide process and the deprivation are separate events. For example, in *Brunken*, the child had to be taken away before the father was deprived of liberty. Brunken v. Lance, 807 F.2d 1325, 1327–28 (7th Cir. 1986). In *Deretich*, the prisoner had to be disciplined before a deprivation occurred. Deretich v. Office of Administrative Hearings, 798 F.2d 1147, 1149–50 (8th Cir. 1986). These were separate and distinct from the failure to provide process.

Moreover, although one entity might be merely negligent, another entity may act intentionally. Thus, in *Logan* although the Commission was negligent, the state arguably acted with intent. Forcing the analysis to turn on the mental state is an overly contrived approach to the problem.

The better approach is simply to recognize that the Commission in *Logan* had the opportunity to supply prior process but failed to do so, for whatever reason. Although mental state is not unimportant, it does not constitute the sole operative fact in this Article's analysis. As a general rule, when the agent acts negligently neither that agent nor the state has the opportunity to provide process. But as *Logan* illustrates, in some situations, although the agent is negligent, the state has authorized the action through an established procedure and thereby acted intentionally relative to the deprivation. Moreover, even when an opportunity for prior process exists, so must a reason for it. Equating negligence with lack of opportunity thus would only work to apply part of the proposed analysis. For these reasons, the analysis found in *Daniels* does not present an effective model for determining when procedural due process has not been satisfied, and should accordingly be rejected.

IV. Substantive Due Process

One criticism of this Article's approach to procedural due process lies in its apparent disparate treatment of more egregious conduct by state officials.[383] Conduct which perhaps can be justified receives procedural protection, while conduct which cannot, generally the more egregious of the two, receives none. The rejoinder to this criticism lies in the very nature of process. The process mechanism protects against incorrect substantive decisions by minimizing the risk of their occurrence.[384] Where the substantive action can in no way be justified because it is inherently incorrect, there is no reason for process.[385] Instead, the answer lies only in substance.

For this reason, and to further alleviate the fear that no protection from abusive government conduct exists, substantive due process must be considered. Lower courts have effectively turned to substantive due process in an effort to avoid what they have perceived to be the restrictive nature of *Parratt-Hudson*. In this context, courts have used due process in two ways: to incorporate specific guarantees found in the Bill of Rights,[386]

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[383] *See supra* notes 320–25 and accompanying text.

[384] *See supra* note 288 and accompanying text.

[385] *See supra* notes 311–19 and accompanying text.

[386] In its incorporative sense, due process has been used to protect rights guaranteed by the first amendment, *see e.g.*, Labov v. Lalley, 809 F.2d 220 (3d Cir. 1987); Burton v. Livingston, 791 F.2d 97 (8th Cir. 1986); Jackson v. Procunier, 789 F.2d 307 (5th Cir. 1986); Uberoi v. University of Colorado, 713 P.2d 894 (Colo. 1986); the fourth amendment, *see e.g.*, Mann v. City of Tucson Dep't of Police, 782 F.2d 790 (9th Cir. 1986); Sanders v. Kennedy, 794 F.2d 478 (9th Cir. 1986); King v. Massarweh, 782 F.2d 825 (9th Cir. 1986); Griffen v. Hilke, 804 F.2d 1052 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3184 (1987); Bergquist v. County of Cochise, 806 F.2d 1364 (9th Cir. 1986); Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987); New v. City of Minneapolis, 792 F.2d 724 (8th Cir. 1986); Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986); Dugan v. Brooks, 818 F.2d 513 (6th Cir. 1987); Willson v. City of Des Moines, 386 N.W.2d 76 (Iowa), *cert. denied*, 107 S. Ct. 432 (1986); and the eighth amendment, *see e.g.*, McRorie v. Shimoda, 795 F.2d 780 (9th Cir. 1986); Cay v. Estelle, 789 F.2d 318 (5th Cir. 1986); Bass v. Jackson, 790 F.2d 260 (2d Cir. 1986); Thomas v. Booker, 784 F.2d 299 (8th Cir.), *cert. denied*, 106 S. Ct. 1975–76 (1986); Brown v. Smith, 813 F.2d 1187 (11th Cir. 1987). In addition, apart from due process, application of the holding of *Parratt*

and to independently protect life, liberty, and property.[387] Courts have had little difficulty under the former approach, because the substantive limits found in the applicable specific guarantee become those of substantive due process. For example, following the decision of *Tennessee v. Garner*, which held that the police shooting of a fleeing suspect was a "seizure" for purposes of the fourth amendment,[388] courts have relied on the fourth amendment in their efforts to delineate the boundaries of "excessive force."[389] The fourth amendment's substantive guideline is "reasonableness," a concept tailor-made for judicial interpretation.

Applying substantive due process *simplicter* as an independent check on state action has proven more difficult, especially in the context of constitutional torts. The problem, of course, lies in the fact that the fourteenth amendment's due process clause provides no explicit guidance concerning what is substantively impermissible. Thus, when holding that state action violates substantive due process, a court may be charged with "Lochnerization":[390] substituting a judicial evaluation for that more properly left to other branches of government.

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has been avoided through the invocation of equal protection. *See, e.g.*, Burton v. Livingston, 791 F.2d 97 (8th Cir. 1986) (attack by guard because of race).

[387] *See* Comment, *supra* note 242, at 623 n.127. ("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.") (collecting cases). That proposition remains true even after the decision in *Daniels*. *See, e.g.*, Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987); Dugan v. Brooks, 818 F.2d 513 (6th Cir. 1987); Griffen v. Hilke, 804 F.2d 1052 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3184 (1987); Benny v. Pipes, 799 F.2d 489 (9th Cir. 1986), *as amended*, 807 F.2d 1514 (1987), *petition for cert. filed*, June 9, 1987; McRorie v. Shimoda, 795 F.2d 780 (9th Cir. 1986); Franklin v. Aycock, 795 F.2d 1253 (6th Cir. 1986); New v. City of Minneapolis, 792 F.2d 724 (8th Cir. 1986); Burton v. Livingston, 791 F.2d 97 (8th Cir. 1986); Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986); Archie v. City of Racine, No. 86-1783, slip op. (1st Cir. Aug. 10, 1987); Williams v. City of St. Louis, 783 F.2d 114 (8th Cir. 1986); Rutherford v. City of Berkeley, 780 F.2d 1444 (9th Cir. 1986); Shapiro v. Chapman, 70 Md. App. 307, 520 A.2d 1330 (1987); 423 South Salina Street, Inc. v. City of Syracuse, 68 N.Y.2d 474, 503 N.E.2d 63, 510 N.Y.S.2d 507 (1986), *cert. denied*, 107 S. Ct. 1880 (1987).

[388] 471 U.S. 1, 10–11 (1985).

[389] Several lower courts have found fourth amendment violations arising from police shooting or other forms of brutality. *See, e.g.*, Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987); Dugan v. Brooks, 818 F.2d 513 (6th Cir. 1987); Dodd v. City of Norwich, 815 F.2d 862 (2d Cir. 1987) (*vacated and reargued*); Griffen v. Hilke, 804 F.2d 1052 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3184 (1987); New v. City of Minneapolis, 792 F.2d 724 (8th Cir. 1986); Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986); Gilmere v. City of Atlanta, 774 F.2d 1495 (5th Cir. 1985); Robins v. Harum, 773 F.2d 1004 (9th Cir. 1985); Gumz v. Morrisette, 772 F.2d 1395 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1644 (1986); Kidd v. O'Neil, 774 F.2d 1252 (4th Cir. 1985). The Supreme Court, however, has expressly left open the question of whether "excessive force" amounts to a fourth amendment or due process violation. *See* City of Oklahoma City v. Tuttle, 471 U.S. 808, 817 n.4 (1986). Moreover, other lower courts have been reluctant to use the fourth amendment in excessive force cases. *See, e.g.*, Hayes v. Vessey, 777 F.2d 1149 (6th Cir. 1985); Young v. City of Killeen, 775 F.2d 1349 (5th Cir. 1985); Wilson v. Beebe, 770 F.2d 578 (6th Cir. 1985). In any event, courts have turned to fourth amendment jurisprudence as a way of avoiding the holding of *Parratt*. *See, e.g.*, Sanders v. Kennedy, 794 F.2d 478 (9th Cir. 1986); King v. Massarweh, 782 F.2d 825 (9th Cir. 1986); Mann v. City of Tucson Dept. of Police, 782 F.2d 790 (9th Cir. 1986); Willson v. City of Des Moines, 386 N.W.2d 76 (Iowa), *cert. denied*, 107 S. Ct. 432 (1986). This approach, however, may not be as successful in avoiding the Court's holding in *Daniels*. *See, e.g.*, Bergquist v. County of Cochise, 806 F.2d 1364 (9th Cir. 1986) (applying the *Daniels* decision to fourth amendment claim); McDonough v. Jorda, 214 N.J. Super. 338, 519 A.2d 874 (A.D. 1986) (same).

[390] The great majority of what are called "substantive" rights are created by the states. Others,

For this reason, the Supreme Court and lower courts alike have been somewhat hesitant to invalidate state action under substantive due process, at least where no specific constitutional guarantee acts as a guide. This does not mean, however, that state action is immune from substantive scrutiny under the due process clause. To the contrary, lower courts have willingly reviewed state officials' conduct on a limited basis, generally applying an approach analogous to that found in *Rochin v. California*.[391] In *Rochin*, the Court held that where police illegally entered a suspect's home, struggled with the suspect to open his mouth, and then forcibly pumped his stomach in order to obtain evidence, the conduct so "shocked the conscience" as to violate substantive due process.[392] More recently, courts have applied a similar "we know it when we see it"[393] approach to find "shocking" conduct violative of due process.[394]

Although *Rochin* offers one method of dealing with substantive due process, it is by no means the best method. The problem with *Rochin* is that it offers no syntax, no structure for defining substantive rights.[395] The Court has only recently begun to provide guidance in defining substantive rights in *Regents of University of Michigan v. Ewing*[396] and *Whitley v. Albers*.[397]

In *Ewing*, a case decided shortly before *Daniels*, a student sued his university claiming that the university violated substantive due process because it arbitrarily and capriciously did not allow him to retake an examination.[398] Following a four day bench trial, the

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in contrast, are created by the federal government through the Congress. In modern times the Court has been extremely reluctant to create its own rights under substantive due process, *see, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955), though it has done so in the limited context of privacy. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973). The Court was much more willing to second-guess legislative decisions in the past, thus creating substantive rights under the guise of due process. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905). But "Lochnerization" has fallen by the wayside; since 1937, and the advent of true "rational basis" scrutiny, not one state or federal law has been invalidated under that analysis. G. GUNTHER, CONSTITUTIONAL LAW 472 (11th ed. 1985).

[391] 342 U.S. 165 (1952).

[392] *Id.* at 172.

[393] This approach bears a striking resemblance to that once used by Justice Stewart to identify obscenity. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[394] *Compare* Dugan v. Brooks, 818 F.2d 513 (6th Cir. 1987) (finding conduct shocking); Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987) (en banc) (same); Justice v. Dennis, 793 F.2d 573 (4th Cir.) (same), *rehearing en banc granted*, 802 F.2d 1486 (1986); Burton v. Livingston, 791 F.2d 97 (8th Cir. 1986) (same); Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986) (same); *and* Rutherford v. City of Berkeley, 780 F.2d 1444 (9th Cir. 1986) (same); *with* Johnson v. Barker, 799 F.2d 1396 (9th Cir. 1986) (finding conduct not so egregious as to shock conscience); Fitzgerald v. Williamson, 787 F.2d 403 (8th Cir. 1986) (same); *and* Wilson v. Beebe, 770 F.2d 578 (6th Cir. 1985) (en banc) (same). Many of these courts have combined the *Rochin* Court's analysis with a more refined analysis, found in *Johnson v. Glick*, thus giving at least some guidance to what amounts to a substantive due process violation. 481 F.2d 1028 (2d Cir.), *cert. denied sub nom*, Employee-Officer John v. Johnson, 414 U.S. 1033 (1973). *See also infra* note 411. *See, e.g.*, Fundiller v. City of Cooper City, 777 F.2d 1436 (11th Cir. 1985); Gilmere v. City of Atlanta, 774 F.2d 1485 (11th Cir. 1985) (en banc); Rinker v. Napa County, 820 F.2d 295 (9th Cir. 1987); Sampson v. Gilmore, 106 S. Ct. 1993 (1986).

[395] At least one court has had difficulty using the *Rochin* decision as a guide through the quagmire of substantive due process. *See* Justice v. Dennis, 793 F.2d 573, 577 (4th Cir.), *rehearing en banc granted*, 802 F.2d 1486 (1986).

[396] 106 S. Ct. 507 (1985).

[397] 106 S. Ct. 1078 (1986).

[398] *Ewing*, 106 S. Ct. at 508.

district court held that no due process violation had occurred because the university had "good reason" to dismiss the student from the program.[399] The Court of Appeals for the Sixth Circuit, however, reversed, concluding that the university acted arbitrarily in not abiding by its own established practice of allowing students to retake examinations.[400]

The Supreme Court, speaking through Justice Stevens, reversed the Sixth Circuit's determination.[401] Assuming that a protected property interest existed in "continued enrollment,"[402] the Court applied substantive due process guarantees and determined that when reviewing the substance of academic decisions, courts should show deference to the professional judgment of school administrators. "Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[403] According to the Court, the question was whether any reason supported the university's decision.[404] Therefore, so long as the dismissal was supported by some reason "not beyond the pale of reasoned academic decision-making" no substantive violation would result.[405]

From a theoretical plane, this analysis appears to mesh well with the previous discussion of procedural due process. A reason for process exists only where facts are in dispute.[406] In a situation where the state would not be justified in acting under any set of facts, there is no reason for process and thus no procedural due process violation.[407] But where the state acts with no reason, its conduct could very easily be deemed irrational, and thus violate both *Ewing's* tenets and substantive due process.

Ewing, of course, involved a comtemplative decision by a state agency. *Whitley v. Albers* established that the same approach can be applied in a tort context.[408] In *Whitley*, decided shortly after *Daniels*, an inmate who was shot by a prison official during a prison riot subsequently brought a section 1983 action claiming that he had been denied his eighth and fourteenth amendment rights.[409] The Court, speaking through Justice O'Connor, found no substantive due process or eighth amendment violation and established

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[399] *Id.* at 511 (quoting 559 F. Supp. 791, 800 (E. Mich. 1983)).

[400] Ewing v. Board of Regents, 742 F.2d 913, 916 (6th Cir. 1984).

[401] *Ewing*, 106 S. Ct. at 515.

[402] *Id.* at 512. That one must possess a "protected interest" in order to be accorded the benefits of substantive due process is a curious suggestion indeed, perhaps even more so than in relation to procedural due process. *See supra* notes 62–69 and accompanying text. Generally, at least in relation to substantive if not procedural due process, the prevailing opinion of courts and commentators has been that "life, liberty, and property" are not selective terms. *See* Monaghan, *supra* note 46, at 433. Rather, substantive due process at a minimum has provided protection against arbitrary or irrational government conduct. Thus, where one is injured by arbitrary government action, there should be a substantive due process violation irrespective of whether there is a "protected interest." All that need be satisfied are general standing requirements: injury in fact, a causal connection between the conduct and the injury, and the likelihood of redress by a favorable decision. *See, e.g.*, Valley Forge College v. Americans United, 454 U.S. 464 (1982).

[403] *Ewing*, 106 S. Ct. at 513.

[404] *Id.*

[405] *Id.* at 515. The Court also stated: "The question, then, is whether the record compels the conclusion that the University acted arbitrarily in dropping Ewing from the . . . program without permitting a reexamination." *Id.* at 512.

[406] *See supra* notes 332–69 and accompanying text.

[407] *See supra* text accompanying notes 315–19.

[408] 106 S. Ct. 1078, 1088 (1986).

[409] *Id.* at 1083.

the following test: "whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur."[410] The Court also qualified the deferential nature of this analysis, stating: "It does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice."[411]

Though the *Whitley* decision specifically addressed eighth amendment constraints, its rationale also applies to substantive due process. The *Whitley* Court recognized as much and drew a parallel between the guarantees.

> It would indeed be surprising if, in the context of forceful prison security measures, "conduct that shocks the conscience" or "afford[s] brutality the cloak of law," and so violates the Fourteenth Amendment, were not also punishment "inconsistent with contemporary standards of decency" and "repugnant to the conscience of mankind," in violation of the Eighth [Amendment].[412]

In the prison context, the Court accordingly found that "the Due Process Clause affords ... no greater protection than does the Cruel and Unusual Punishments Clause."[413] Though this statement leaves open the possibility that it might afford less protection, this seems unlikely. The Court in *Whitley*, although not ruling on the issue, suggested that due process affords at least the same protection to those "persons enjoying unrestricted liberty."[414] Any other approach would indeed be anomalous. This Article accordingly submits that the *Whitley* Court's analysis, because it is, like *Ewing*, deferential to the states, necessarily reflects the minimum protections available under due process.

Thus, in order to determine whether a substantive due process violation occurs when a state actor injures someone in person or property,[415] the basic test is "whether the use of force could plausibly have been thought necessary."[416] Put another way, the question is whether some reason supports the action. Without a reason, the state's action is taken "in bad faith for no legitimate purpose"[417] and a substantive violation occurs.

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[410] *Id.* at 1085.

[411] *Id. See also* Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973). In *Glick*, which the Court relied upon in *Whitley*, 106 S. Ct. at 1085, the court found a cognizable due process claim where a guard assaulted a pre-trial detainee. *Glick*, 481 F.2d at 1033. Writing for the court, Judge Friendly stated:

> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. 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 for 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.*

Id. (emphasis added).

[412] *Glick*, 481 F.2d at 1088 (quoting Rochin v. California, 342 U.S. 165, 172 (1952), and Estelle v. Gamble, 429 U.S. 97, 103, 106 (1976)).

[413] *Id.* at 1088.

[414] *Id.*

[415] Note that where the injury is to person or property there is no question concerning whether a "protected interest" exists. *See supra* notes 71–74 and accompanying text.

[416] *Whitley*, 106 S. Ct. at 1085.

[417] *Id.*

Analyzing claims that involve random and unauthorized conduct such as that found *Parratt*, *Hudson*, and *Daniels* should proceed along the same lines as found in *Whitley*. Where the state inflicts the injury for no plausible reason, substantive due process is violated. For example, if a police officer incarcerates a suspect and then sexually assaults her, a substantive violation occurs.[418] Clearly no reason supports this conduct — it is "in bad faith and for no legitimate purpose."[419] The same holds true if a police officer strikes a suspect without plausible reason.[420]

Similarly, wanton conduct by state officials might very well offend substantive due process, at least where the wantonness reflects "a knowing willingness that [injury] occur."[421] For example, if the prison guard in *Whitley* shot into a crowd of prisoners without reason, a substantive due process violation would have occurred even though there was no "intent," within the strict sense of that word, to cause injury. Under this analysis, it is enough that the actor knows injury will occur, and yet has no reason for inflicting it.

Where the state actor does not intentionally or wantonly injure a victim, however, *Whitley* indicates that generally no substantive due process violation has occurred.[422]

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[418] *See* Harris v. City of Pagedale, 821 F.2d 499 (8th Cir. 1987). This was essentially the situation in *Harris*, where the existence of a constitutional violation was really not disputed. *Id.* at 500. The major challenge in that case was to possible municipal liability. *Id.* at 501. *See also* Jones v. City of Chicago, 787 F.2d 200 (7th Cir. 1986) (sexual assault by public health physician).

[419] *See Whitley*, 106 S. Ct. at 1085.

[420] *See supra* note 387 (collecting cases).

[421] *See Whitley*, 106 S. Ct. at 1085.

[422] Following the Court's decision in *Daniels*, most courts have found that negligence is insufficient to implicate substantive due process, *see, e.g.*, Lunde v. Oldi, 808 F.2d 219 (2d Cir. 1986); Jackson v. Procunier, 789 F.2d 307 (5th Cir. 1986); Mann v. City of Tucson, Dept. of Police, 782 F.2d 790 (9th Cir. 1986) (indicating negligence insufficient to implicate due process after *Daniels*); McDonough v. Jorda, 214 N.J. Super. 338, 519 A.2d 874 (A.D. 1986), although the *Daniels* decision itself did not clearly address the issue. *Contrast* Comment, *supra* note 242 at 623, 631 ("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," although "arguably only procedural due process is implicated by those holdings"); *with* Nahmod, *Due Process*, *supra* note 131, at 254 (*Daniels* requires more than negligence to implicate both procedural and substantive due process). Irrespective of *Daniels*, however, most cases that have found a substantive due process violation have involved intentional conduct. *See, e.g.*, Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987); Dugan v. Brooks, 818 F.2d 513 (6th Cir. 1987); Morello v. James, 810 F.2d 344 (2d Cir. 1987); Griffin v. Hilke, 804 F.2d 1052 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 3184 (1987); Simmons v. Dickhaut, 804 F.2d 182 (1st Cir. 1986); Benny v. Pipes, 799 F.2d 489 (9th Cir. 1986), *as amended*, 807 F.2d 1514 (1987); Franklin v. Aycock, 795 F.2d 1253 (6th Cir. 1986); McRorie v. Shimoda, 795 F.2d 780 (9th Cir. 1986); New v. City of Minneapolis, 792 F.2d 724 (8th Cir. 1986); Burton v. Livingston, 791 F.2d 97 (8th Cir. 1986); Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986); Williams v. City of St. Louis, 783 F.2d 114 (8th Cir. 1986); Rutherford v. City of Berkeley, 780 F.2d 1444 (9th Cir. 1986); Fundiller v. City of Cooper City, 777 F.2d 1436 (11th Cir. 1985); Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) (en banc), *cert. denied sub nom* Sampson v. Gilmere, 106 S. Ct. 1970 (1986); Gumz v. Morrisette, 772 F.2d 1395 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1644 (1986); Shapiro v. Chapman, 70 Md. App. 307, 520 A.2d 1330 (1987). Even before the *Daniels* decision, courts uniformly recognized that simple negligence would never be sufficient to implicate substantive due process. *See, e.g.*, Young v. City of Killeen, 775 F.2d 1349 (5th Cir. 1985); Wilson v. Beebe, 770 F.2d 578 (6th Cir. 1985) (en banc), although opinions now differ over whether recklessness or perhaps gross negligence could be sufficient to implicate due process. *Contrast* Nishiyama v. Dickson County, 814 F.2d 277, 283 (6th Cir. 1987) (en banc) (gross negligence under certain circumstances might be enough); *and* Justice v. Dennis, 793 F.2d 573, 578–79 (4th Cir.), *reh'g en banc granted*, 803

Where the injury was not intentionally caused, the actor generally will have acted with reason — attempting to accomplish one purpose when another, the injury, somehow results. So long as a legitimate reason supports the first purpose, the conduct should not be deemed irrational. Consequently, the fact that a state actor negligently, or even recklessly, injures someone should not make that conduct irrational and violative of due process.[423] For example, suppose a police officer, while attempting to make an arrest, draws a gun, cocks the hammer, and places the gun in the suspect's back while trying to handcuff the suspect. Assume the gun then accidentally discharges, wounding or killing the suspect.[424] If the police officer's purpose was to make an arrest, but not injure the suspect, then that conduct should withstand scrutiny under substantive due process. Such conduct, though a poor or even grossly negligent method of making an arrest, is

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F.2d 1486 (1986) (same); *and* McClary v. O'Hare, 786 F.2d 83, 89 n.6 (2d Cir. 1986) (same); *with* Waggoner v. Mosti, 792 F.2d 595, 600 (6th Cir. 1986) (Krupansky, J., dissenting) (must be intentional conduct).

[423] A better argument might exist for finding that recklessness violates substantive due process in the context of prisoners or pre-trial detainees being injured. It would appear in such a situation that the government is under some affirmative duty to care for the inmates, a duty which does not exist in relation to the general public. *See e.g.*, Villante v. Deptartment of Corrections, 786 F.2d 516, 519 (2d Cir. 1986) (affirmative duty to protect prisoners). It would appear that before a substantive due process violation occurs, however, there must exist at least deliberate indifference to the needs of the prisoner or detainee. *See, e.g.*, City of Revere v. Massachusetts General Hosp., 463 U.S. 239, 243–44 (1983) (deliberate indifference required); Bell v. Wolfish, 441 U.S. 520 (1979); Partridge v. Two Unknown Police Officers of Houston, 791 F.2d 1182, 1187 (5th Cir. 1986) (same). This standard has been recognized in the context of the eighth amendment. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976); Cay v. Estelle, 789 F.2d 318 (5th Cir. 1986); Johnston v. Lucas, 786 F.2d 1254 (5th Cir. 1986). *See also* Bass v. Jackson, 790 F.2d 260 (2d Cir. 1986) (pre-trial detainee); Thomas v. Booker, 784 F.2d 299 (8th Cir.) (pre-trial detainee), *cert. denied*, 106 S. Ct. 1975 (1986). This makes sense in respect to due process because only in the case of deliberate indifference can it be said that injury was inflicted without reason. Perhaps the better approach is to analyze cases involving prisoners according to eighth amendment principles, *see* Whitley v. Albers, 106 S. Ct. 1078, 1088 (1986); Brown v. Smith, 813 F.2d 1187 (11th Cir. 1987), then achieve equivalency with this eighth amendment standard for pre-trial detainees through due process. *See Bell*, 441 U.S. at 533 ("We do not doubt that the Due Process Clause protects a detainee.").

Youngberg v. Romeo is consistent with this approach. 1457 U.S. 307 (1982). The *Youngberg* Court dealt with whether those involuntarily committed to a state mental institution have substantive due process rights to "(i) safe conditions of confinement; (ii) freedom from bodily restraints; and (iii) training or 'habilitation.'" *Id.* at 309 (footnote omitted). The Court found protected interests in all three categories, but also clearly found that a reviewing court should show deference to the professional judgment exercised by the confining institution. *Id.* at 324. The Court stated, in relation to safety and bodily restraint, that "the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made." *Id.* at 32 (citation omitted). In relation to habilitation, that is, training, the Court again emphasized deference, stating that habilitation decisions "made by the appropriate professional are entitled to a presumption of correctness." *Id.* at 324. Consequently, in relation to those under the state's care, the *Youngberg* Court essentially said that so long as the state has some reason for its action, substantive due process is served. Therefore, substantive due process is violated only where state actors intentionally harm those committed, or are deliberately indifferent to their needs. *See, e.g.*, Taylor v. Ledbetter, 818 F.2d 791, 795 (11th Cir. 1987) (deliberate indifference violates substantive due process).

[424] These are essentially the facts presented in *Wilson v. Beebe*, where a majority of the court found no substantive due process violation. 770 F.2d 578 (6th Cir. 1985). The court relied on the "shock the conscience" test found in Rochin v. California, 342 U.S. 165, 172 (1952), and found that negligent conduct is not so shocking as to implicate substantive due process.

arguably rational because it serves the end of making an arrest. Reason exists for the action, even though it ultimately causes injury.

Between the poles of negligence and malice lies the possibility of intentional harm motivated by some reason other than simple injury. For example, suppose a police officer intentionally shoots a suspect to prevent her flight from the scene of a crime.[425] There should exist no substantive due process violation under these facts because the officer's purpose, or motive, is to stop the suspect's flight and not simply to injure. A reason supports the conduct because stopping flight is a legitimate purpose and the officer's conduct arguably serves this end. The key, therefore, appears to rest in the motivation for the action. Where the motive is simply to harm, or reflects total indifference about whether harm occurs, substantive due process is offended. So long as some legitimate reason exists for the action other than simply inflicting harm, however, there exists no substantive due process violation.

Although *Rochin* offers one method of analyzing substantive due process, its guidelines are vague and offer little help in assessing substantive due process.[426] The problem rests in developing a more workable standard which both provides guidance and operates within the due process framework. Because the phrase "due process of law" literally offers no guidance of its own, the most justifiable approach is one which defers to the judgment of state officials.[427] As made clear by the Court in *Ewing* and *Whitley*, under this deferential analysis a state actor's conduct violates substantive due process only when a state actor inflicts injury without reason.

How *Rochin* can be reconciled with these most recent pronouncements regarding substantive due process is unclear. The Court cited *Rochin* favorably in *Whitley*, and thus it seems that the case has continuing validity.[428] *Rochin* does not, however, appear coextensive with the Court's approach in *Ewing* and *Whitley*. The lower courts have disagreed about whether *Rochin* reaches only intentional conduct or also applies to gross negligence.[429] Under *Whitley*, it appears that only a conscious decision implicates due process.[430] *Whitley* therefore requires either intentional conduct or at a minimum wantonness reflecting the actor's knowledge that injury will occur. *Rochin*, in contrast, although possibly more expansive in relation to the *mens rea*, might at the same time be more restrictive in relation to injury. An intentionally inflicted injury might not be so egregious as to "shock the conscience" of the court under *Rochin*. Moreover, it appears that *Rochin* applies only to personal injury claims, and not to property damage.[431] Apparently, the *Whitley* approach is not so limited.

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[425] *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985) (where suspect is not thought to be dangerous to police officer or others, fourth amendment is violated by shooting). *See also* Annot., *supra* note 247 (collecting other fourth amendment cases). The Court has yet to decide whether cases founded on allegedly "excessive force" are supportable by either the fourth amendment or due process. *See* City of Oklahoma City v. Tuttle, 471 U.S. 808, 817 n.4 (1985) (discussed *supra* note 368).

[426] *See supra* note 395 and accompanying text.

[427] *See supra* note 390 and accompanying text.

[428] *Whitley*, 106 S. Ct. at 1088.

[429] *See supra* note 422.

[430] *See supra* notes 408–11 and accompanying text.

[431] *See* Irvine v. California, 347 U.S. 128, 133 (1954) (limiting *Rochin* to cases involving "coercion, violence or brutality to the person"); *see, e.g.*, Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987) (personal injury); Dugan v. Brooks, 818 F.2d 513 (6th Cir. 1987) (same); Griffin v. Hilke, 804 F.2d 1052 (8th Cir. 1986) (same); New v. City of Minneapolis, 792 F.2d 724 (8th Cir. 1986)

Substantive due process offers a worthy alternative to a procedural analysis. Although no procedural due process claim arises where a state actor intentionally injures a person or property without reason, substantive due process might very well be implicated under either the approach taken in *Rochin* or *Ewing* and *Whitley*.[432] And this approach is preferable because substantive due process, unlike its procedural counterpart,[433] can be used to define the government's substantive duties. Unlike the extreme result generated under procedural due process, where *all* torts inflicted by government officials become federal claims,[434] applying substantive due process would avoid this result by simply defining the limits of the protected rights. In this way, substantive due process, unlike procedural due process, is a flexible tool for defining those interests which need federal protection.

CONCLUSION

Prior to any adverse governmental action which deprives a person of life, liberty, or property, process must be afforded in order to guarantee the factual integrity of the state's decision.[435] Consider one last time the hypothetical law requiring the destruction of all houses built before the year 1900. Clearly, as a matter of procedural due process, before a state can begin clearing away homes it must afford process to insure its substantive rule is properly applied.[436] Thus, when speaking solely in terms of "the state," procedural due process is easily explained.

State action theory, however, has complicated procedural due process. Following the Supreme Court's decision in *Home Telephone & Telegraph*, not only are authorized actions by state agents charged to the state, but also imputed are unauthorized and even illegal actions.[437] Because of this, the state might wholly comport with due process requirements, yet a procedural due process violation might still occur if the state official responsible for destroying homes fails to afford the required process.[438] For example, if

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(same); Fundiller v. City of Cooper City, 777 F.2d 1436 (11th Cir. 1985) (same); Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) (same); Guma v. Marvissette, 772 F.2d 1395 (7th Cir. 1985) (same), *cert. denied*, 106 S. Ct. 1644 (1986); Shapiro v. Chapman, 70 Md. App. 307, 520 A.2d 1330 (1987) (same). For example, in *Costello v. Town of Fairfield*, a case involving alleged arbitrary state action in relation to property, the court refused to apply substantive due process. 811 F.2d 782, 784 (2d Cir. 1987). Likewise, in *Schaper v. City of Huntsville*, the court refused to analyze conduct affecting property from the substantive side of due process, stating:

> Indeed, allowing [a substantive claim] would effectively eviscerate the holding of *Parratt*. It would allow a plaintiff to challenge a deprivation of a property interest on the ground that it resulted from arbitrary and capricious state action, while under *Parratt/Hudson*, he would not be able to state a claim for the deprivation of the same right on the ground that it resulted from a random and unauthorized act of a state official. This remarkable result clearly was not envisioned by the Court in *Parratt* or *Hudson*.

813 F.2d 709, 718 (5th Cir. 1987) (citation and footnote omitted). But it would seem to have been envisioned by the *Ewing* Court!

[432] *See supra* notes 391–428 and accompanying text.

[433] *See supra* notes 286–319 and accompanying text.

[434] *See supra* notes 43–45 and accompanying text.

[435] *See supra* notes 58–60 and accompanying text.

[436] *See supra* notes 34–38 and accompanying text. Assuming, of course, no overriding state interests exist which justify a postponement of process. *See supra* note 70 and accompanying text.

[437] *See supra* notes 52–54 and accompanying text.

[438] *See supra* notes 40–41 and accompanying text.

an official negligently or recklessly allows his bulldozer to destroy a home, this random and unauthorized conduct must be attributed to the state. It thus might be argued that despite state law requiring process, because the official afforded none prior to the deprivation, procedural due process is somehow offended.[439] Yet clearly there should be no procedural due process problem under these facts — not because some bright line distinguishes between negligent, grossly negligent and intentional behavior, and not because the state provides a remedy for the wrong, but because there simply is no reason for process. Where there is no opportunity for the state or its agent to afford prior process, nothing is served by speaking in terms of procedural due process.[440]

Now if the state official intentionally destroyed a home he believed was built before 1900 without affording prior process the result should differ.[441] Because an opportunity for prior process exists in such a situation, the first prong of the proposed analysis is satisfied.[442] The second prong is also satisfied because a reason undoubtedly exists under these circumstances for having prior process.[443] Ascertaining the date of the home's construction is central to applying the rule. Consequently, procedural due process is implicated by these facts despite whether state law authorizes the agent's conduct in not providing a hearing.

If the official destroyed a home not because he believed it was built before 1900 but for no reason whatsoever, procedural due process should not be a concern.[444] Under these circumstances, even though an opportunity for prior process exists, no reason exists for having it. Process would not minimize the risk of error in applying the substantive rule because the substantive decision is inherently erroneous.[445] If there is no reason for an injury no facts can be in dispute, and without factual dispute, process is useless.

This is the fundamental flaw in the *Parratt-Hudson* analysis. Under *Parratt-Hudson*, courts apply procedural due process to fact patterns which in no way implicate procedural concerns. In *Parratt* there was simply no opportunity for prior process, making it impossible for process to minimize the risk of an erroneous decision.[446] In *Hudson*, because the state's decision to destroy property was unauthorized and erroneous, no reason supported it.[447] Process under such circumstances would have been useless because it would not have affected the substantive decision in any way. *Hudson* was not a case where the substantive decision might have been proper under other facts. Rather, the conduct in *Hudson* was unauthorized and resulted in a substantive decision that should not have been made. In the absence of any factual dispute, therefore, procedural due process was not truly at issue.[448]

The analysis offered by this Article might be criticized as an effort to divest individuals of civil liberties and freedoms, since an admitted consequence of this approach

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[439] *See supra* notes 43–44 and accompanying text.
[440] *See supra* notes 286–311 and accompanying text.
[441] *See supra* note 327 and accompanying text.
[442] *See supra* notes 286–311 and accompanying text.
[443] *See supra* notes 311–21 and accompanying text.
[444] *See supra* notes 311–21 and accompanying text.
[445] *See supra* notes 278 and 305 and accompanying text.
[446] *See supra* notes 286–87 and accompanying text.
[447] *See supra* notes 316–17 and accompanying text.
[448] *See supra* notes 318–19 and accompanying text.

would be fewer civil rights actions.[449] Moreover, without further constitutional study, one might argue that the approach effectively de-federalizes the more egregious conduct of state officials,[450] while taking a wholly mechanical approach to procedural due process. Granted, the analysis suggested here is mechanical, but rightfully so, because procedure is merely a tool to be used in forging a hopefully correct substantive decision.[451] In addition, Part IV demonstrates that the more egregious conduct of state officials is not necessarily relegated to state forums. Even though negligent deprivations generally will not implicate procedural due process at all under the proposed analysis,[452] intentional deprivations which fall outside procedural due process should often find protection under substantive due process.[453] The Court in *Ewing* and *Whitley* appears to make clear that where no reason supports a state's deprivation of life, liberty, or property, the action is arbitrary and capricious.[454] Moreover, substantive due process can be used in its incorporative sense, thereby imposing the limits found within the fourth, fifth, and eighth amendments.[455] In short, substantive guarantees exist to protect rights and liberties.

Even more fundamental, however, is that this Article's proposed analysis is indeed a utilitarian approach to rights and liberties. The current Supreme Court has apparently made a conscious decision to protect itself and the lower federal courts from the recent avalanche of section 1983 claims.[456] This is understandable, as the federal courts cannot remedy every wrong that occurs throughout the country. But in order to protect itself, the Court has made unnecessary, and unfounded, statements about the Constitution.[457] Rights and liberties thus risk being snuffed out in the name of docket-control, unless some logical solution exists. The solution urged here would restore procedure to its proper role and permit the future unimpeded development of substantive freedoms and liberties.

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[449] *See supra* note 320 and accompanying text.

[450] *See supra* notes 322–25 and accompanying text.

[451] *See supra* note 288 and accompanying text.

[452] *See supra* note 286 and accompanying text.

[453] *See supra* notes 371–82 and accompanying text.

[454] *See supra* notes 415–32 and accompanying text.

[455] *See supra* note 386 and accompanying text.

[456] Consider the comments of Justice Blackmun in his article, *supra* note 5, at 21:

> Whatever else may be said about these decisions [*Parratt* and *Hudson*], they have made it difficult, if not impossible, for a plaintiff who has only a state-law tort claim against a state official to hale the official into federal court under the guise of a § 1983 action. The Supreme Court gives ample evidence of being able to devise protective measures for itself and other federal courts.

Id. This protection appears necessary in light of recent reports concerning the expansion of the federal courts' caseloads. It is unfortunate, however, that the Constitution is the vehicle for avoiding federal suits.

[457] *See* Daniels v. Williams, 106 S. Ct. 662 (1986).