NEW MEXICO LAW REVIEW

Volume 13
Issue 1 *Winter 1983*

Winter 1983

Constitutional Torts and the New Mexico Torts Claims Act

Ruth L. Kovnat
University of New Mexico - Main Campus

CONSTITUTIONAL TORTS AND THE NEW MEXICO TORTS CLAIMS ACT

RUTH L. KOVNAT*

I. INTRODUCTION

When an employee of a governmental entity causes harm to an individual, compensation in damages is sometimes the only appropriate remedy to redress the injury. A police officer may unnecessarily or excessively beat a person during an arrest. An inmate in a jail may physically attack a fellow inmate because of the negligence of a jailer, or a guard may deny a prisoner access to medical treatment.[1] In such cases, the victim can be made whole only if the actor responsible for the harm, or his employer, can be made to pay compensation. Victims of torts should be entitled to recover compensatory damages under such circumstances, whether or not the person who committed the tort is on the public payroll.

Such a recovery would serve both private and public interests. The victim would be compensated and official misconduct would be deterred. Further, imposition of liability would satisfy the ideal of providing equal justice for persons similarly situated.

Despite the virtues of treating misconduct by public officials and misconduct by private parties in the same way, the doctrine of sovereign immunity has often intervened to prevent this similarity of treatment. Legislators have thought that exposure of public treasuries to the risks of paying damages which ostensibly benefit only an individual, rather than the public at large, to be so serious a problem that it outweighs the importance of tort recovery for the victims of tortious conduct of government employees.[2] Some form of sovereign immunity to protect governmental entities against tort liability exists virtually everywhere in the United States.[3] New Mexico, with its Tort Claims Act,[4] is no exception.

---

*Professor of Law, University of New Mexico School of Law.

1. *See* Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).

2. Immunity doctrines do not flow exclusively from the need to protect public treasuries from diversion to private judgments. Doctrines which immunize governmental officials are aimed at protecting the governing process itself. Governing requires countless decisions which often must be made quickly and without the benefit of good information. Fear of personal liability for error might cause officials to make decisions which are not in the best interests of the public. For the argument that the present mix of immunity doctrines fails to perform optimally and for a proposed solution, see Schuck, *Suing Our Servants*, 1980 Sup. Ct. Rev. 281.

3. Thirty-three states have abolished several areas of immunity by judicial decision. *See* Davis, *Administrative Law Treatise*, § 25.00 (Supp. 1980).

4. N.M. Stat. Ann. §§ 41-4-1 to -29 (Repl. Pamp. 1982) (hereinafter sometimes referred to as "the Act" or "the Tort Claims Act").

The tension between the idea of making tort victims whole and that of protecting public treasuries becomes particularly acute when the official conduct not only breaches a duty imposed by the common law of tort, but simultaneously deprives a victim of his constitutional rights. Although a state legislature may have taken care to protect state treasuries against tort judgments through the enactment of governmental immunity laws, the public treasuries may nevertheless be exposed to such invasion by a "civil rights" judgment pursuant to Section 1983 of the Civil Rights Act.[5] Section 1983 furnishes a cause of action in damages to vindicate deprivation of federal constitutional rights.[6]

Two observations proceed from the recognition that the same conduct may be the basis for both a tort action and a civil rights action against the government. First, state efforts to protect their treasuries are undermined to the extent that federal law gives a right to damages for constitutional deprivations. Second, some confusion about the nature of the federal civil rights action is inevitable. In fact, a prominent feature of section 1983 litigation is the relationship between the federal remedy for constitutional deprivations and state law remedies that redress tortious conduct. That relationship is the general subject of this article.

Some have argued that virtually any time a public employee commits a tort, a constitutional deprivation takes place and a section 1983 claim is available.[7] On the other hand, governmental entities have argued that the existence of a state tort remedy precludes a section 1983 claim; (1) either because conduct which is unlawful as a matter of state tort law is not "under color of law" within the meaning of section 1983,[8] or (2) because the state tort remedy supplies "due process," so that the loss, whatever it is, does not amount to a constitutional deprivation.[9] Neither of these extreme positions is, however, the law. Indeed, a doctrine appears to be emerging which differentiates among three different sorts of federal due process deprivations—each of which is redressable through section 1983 actions: denials of (1) incorporated rights, (2) substantive rights,

---

5. 42 U.S.C. § 1983 (1976).

6. Section 1983 provides:

> 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.

7. In Paul v. Davis, 424 U.S. 693, 701 (1976), the United States Supreme Court rejected the notion that § 1983 is a "font of tort law."

8. In Monroe v. Pape, 365 U.S. 167 (1961), the United States Supreme Court rejected this argument.

9. *See* Parratt v. Taylor, 451 U.S. 527 (1981); Ingraham v. Wright, 430 U.S. 651 (1977).

and (3) procedural rights. Further, the emerging view seems to recognize that the impact of the availability of a state tort action on the section 1983 claim differs depending on whether the section 1983 claim is based on a procedural deprivation, as distinguished from either a substantive or incorporated right deprivation. The first part of this article will give specific attention to a description and elaboration of this developing notion.

The Tort Claims Act governs the availability of the tort action in New Mexico. Even though development of the doctrine that an available claim under the state Act may in itself result in preclusion of a section 1983 claim arising out of the same conduct, it remains true that for at least some kinds of section 1983 claims, the federal and New Mexico claims coexist. The last section of this article concerns some of the issues which emerge from the intersection of a section 1983 action and the New Mexico State Tort Claims Act.

II. ACTIONABLE CONDUCT PURSUANT TO SECTION 1983

The relationship between state tort law (including its immunity law) and an action under section 1983 is not simple. To begin to understand that relationship, it is important to examine the extremes of a spectrum of possibilities. The defendants' position in the famous case of *Monroe v. Pape*[10] is at one end. In *Monroe*, defendants contended that the availability of a remedy under state tort or state constitutional law totally excluded the remedy afforded by section 1983. This argument relied on the section 1983 requirement that the conduct giving rise to liability be "under color of law." Under this argument, if the victim is able to obtain a state law remedy, the defendant has necessarily acted contrary to state law and therefore did not act under its "color." Only if the victim is unable to obtain a judgment under state law would an allegation that the defendants acted "under color of law" be proper within the meaning of section 1983. The effect of this position is that an action under section 1983 is conditioned on the plaintiff's exhaustion of state judicial remedies.[11] The United States Supreme Court rejected that proposition in *Monroe* and concluded that section 1983 provides a federal remedy "supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[12]

10. 365 U.S. 167 (1961).

11. This is distinct from the contention made in other cases that exhaustion of state *administrative* remedies is a precondition to a § 1983 action. In Patsy v. Bd. of Regents, 50 U.S.L.W. 4731 (U.S. June 21, 1982), the United States Supreme Court held that exhaustion of state administrative remedies is not a condition precedent to filing a § 1983 action.

12. 365 U.S. at 183.

In *Paul v. Davis*,[13] the United States Supreme Court rejected the other extreme in the spectrum of possibilities. The plaintiff in *Paul* argued that whenever a public official engages in conduct which is tortious under state law, he necessarily has deprived a person of a right secured by the federal Constitution, and therefore has engaged in conduct actionable under section 1983. The *Paul* court rejected a reading of section 1983 which would make it a "font of tort law to be superimposed upon whatever systems may already be administered by the States."[14] The Supreme Court's rejection of these two extremes begins to focus the question. The inquiry is not whether the availability of a state tort claim against a public official precludes the availability of a constitutional claim based on the same conduct.[15] *Monroe* and *Paul* indicate that a section 1983 action is neither excluded nor guaranteed by the existence of state law governing the tort. The problem becomes identification of the different sorts of section 1983 constitutional claims and deciding whether the availability of a state tort remedy[16] has a different significance for the section 1983 claim depending on the kind of constitutional claim the plaintiff makes.[17]

A. Rights Incorporated into the Fourteenth Amendment

Section 1983 of the Civil Rights Act is striking for its lack of substantive provisions. Nowhere does the statute spell out the conduct for which it provides a remedy. Therefore, in order to try to define that conduct, one must look outside the statute. It is certain that section 1983 incorporates the rights secured by the federal Constitution.[18] Because Congress clearly enacted the statute to enforce the fourteenth amendment,[19] it is there that one must look to find what conduct gives rise to a claim under section

13. 424 U.S. 693 (1976).

14. *Id.* at 701.

15. It is not the author's intention to discuss judicial jurisdiction here. The assumption of this section is that § 1983 claims, although federal, may be litigated in state court, and that state claims arising out of the same factual setting as the § 1983 claims are properly within the pendent jurisdiction of the federal court. Therefore, the discussion of the scope of the § 1983 claim is intended to apply irrespective of the judicial forum in which it is litigated. *See* Martinez v. California, 444 U.S. 277 (1980).

16. A state tort remedy is not always available because of the operation of a state's immunity law. *See infra* note 123 for text of The New Mexico Tort Claims Act.

17. The § 1983 action has advantages for the plaintiff. The Tort Claims Act limits liability, prohibits an award of punitive damages, and provides no opportunity for attorney's fees for the prevailing party. *See infra* note 123.

18. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979). Although violation of rights secured by some federal statutes clearly amounts to claims under § 1983, this article is confined to an examination of the constitutional claims under § 1983. *See* Maine v. Thiboutot, 448 U.S. 1 (1980). *Cf.* Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).

19. 42 U.S.C. § 1983 was derived from § 1 of the Civil Rights Act of 1871. *See* 17 Stat. 13. For an exhaustive reexamination of the legislative history of the Civil Rights Act of 1871, see Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978).

1983. The operative provision of the fourteenth amendment,[20] however, does not much advance the inquiry. The first clause of section 1 of the fourteenth amendment protects federal privileges and immunities from state abridgement. The second clause protects life, liberty and property from state deprivation without due process of law. The third clause guarantees equal protection of the laws.

Early judicial interpretation of the fourteenth amendment suggests that at least with respect to the privileges and immunities clause, the amendment is largely devoid of meaning.[21] Therefore, in the area of federal privileges and immunities there is little for section 1983 to protect. In fact, it was not until the long process of Supreme Court decision-making incorporated parts of the Bill of Rights into the due process clause that section 1983 became a fruitful claim for someone injured by a person acting under color of state law.[22] For example, a violation of the fourth amendment now clearly gives rise to a section 1983 action. The reason that Justice Douglas had no trouble finding that plaintiff had stated a claim under section 1983 in *Monroe v. Pape* was that "the guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment."[23]

---

20. The relevant provision provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

21. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). For an excellent examination of the early development of the fourteenth amendment and civil rights legislation, see Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952). For the argument that the privileges and immunities of citizens of the United States guaranteed by the fourteenth amendment are natural rights and included, at a minimum, the right to contract, own, and dispose property, to travel without restriction, and to have protection in the enjoyment of his personal security, personal liberty and private property, see J. TenBrock, Equal Under Law (1965).

22. The Supreme Court has never held that the Bill of Rights was fully incorporated into the fourteenth amendment. Rather, the Court has selectively incorporated various amendments and parts of amendments. The due process clause of the fourteenth amendment limits the power of states and protects individual freedom in the same way as the Bill of Rights limits the federal government with respect to: the first amendment (freedom of speech, *see, e.g.*, Fiske v. Kansas, 274 U.S. 380 (1927); freedom of the press, *see, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931); freedom of assembly, De Jonge v. Oregon, 299 U.S. 353 (1937); freedom of petition, Hague v. CIO, 307 U.S. 496 (1939); free exercise of religion, Cantwell v. Connecticut, 310 U.S. 296 (1940); non-establishment of religion, Everson v. Bd. of Education, 330 U.S. 1 (1947)); the fourth amendment (freedom from unreasonable searches and seizures, Wolf v. Colorado, 338 U.S. 25 (1949)); the fifth amendment (freedom from compulsory self-incrimination, Malloy v. Hogan, 378 U.S. 1 (1964)); the sixth amendment (freedom from double jeopardy, Benton v. Maryland, 395 U.S. 784 (1969); right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963); speedy trial, Klopfer v. North Carolina, 386 U.S. 213 (1967)); and the eighth amendment (freedom from cruel and unusual punishment, Robinson v. California, 370 U.S. 660 (1962)).

23. Monroe v. Pape, 365 U.S. at 171.

One way, then, of stating a claim under section 1983 is to allege facts constituting a deprivation of a right which has been incorporated into the fourteenth amendment. Those rights form part of the substance that the fourteenth amendment protects, but they by no means exhaust the due process clause. In fact, the due process clause of the fourteenth amendment performs at least three functions. It is the clause which incorporates most of the Bill of Rights and therefore limits the states just as the Bill of Rights limits the federal government.[24] It protects persons from irrational or outrageous state governmental behavior (substantive due process). Further, it guarantees that states will afford certain procedural safeguards when depriving persons of life, liberty or property (procedural due process). Separate consideration of substantive and procedural due process is warranted because it appears that where there is an available state tort remedy the United States Supreme Court treats section 1983 claims based on substantive due process differently from those based on procedural due process. It appears that a section 1983 claim based on a denial of procedural due process may be precluded if there is an available state tort remedy. If the section 1983 claim is based on a denial of substantive due process, or a denial of incorporated rights, however, the availability of a state remedy does not appear to affect the section 1983 claim.

B. Substantive Due Process

The due process clause of the fourteenth amendment protects individuals from substantial and arbitrary governmental impositions and restraints. The guarantee of liberty is not defined only in terms of the freedoms expressly articulated in the Bill of Rights.[25] The guarantee extends to a general interest in freedom. With this understanding, the Court has held that the due process clause protects various kinds of freedom in a variety of situations. For example, the clause protects individuals from state interference in private family life,[26] and prohibits

24. This article will not discuss the "incorporation" rights in any depth. Insofar as § 1983 actions are concerned, violations of "incorporation" rights are treated similarly to substantive due process violations.

25. *See* Poe v. Ullman, 367 U.S. 497, 522–55 (1961) (Harlan, J., dissenting); *see also* Moore v. City of East Cleveland, 431 U.S. 494 (1977).

26. See, e.g., Harris v. McRae, 448 U.S. 297 (1980), for the proposition that the " 'liberty' protected by the Due Process Clause of the Fourteenth Amendment includes not only the freedoms explicitly mentioned in the Bill of Rights, but also a freedom of personal choice in certain matters of marriage and family life. This . . . includes the freedom of a woman to decide whether to terminate a pregnancy." *Id.* at 312. *See also* Tribe, American Constitutional Law, 569–575 (1978), and Roe v. Wade, 410 U.S. 113 (1973) (women's right to decide whether to terminate pregnancy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to use contraception); Loving v. Virginia, 388 U.S. 1 (1967) (freedom to marry person of another race).

corporal punishment in public schools unrelated to any legitimate educational objective.[27] Courts have also held the due process clause prevents involuntary civil commitment in mental health institutions without minimally adequate treatment,[28] and prohibits the use of excessive force in effecting arrests[29] or in maintaining discipline in correctional facilities.[30] The courts appear to employ modern substantive due process analysis in three main categories of cases.

1. The Personal Choice Cases

The first group of substantive due process cases are those in which the challenge is to arbitrary governmental intrusion into an area of personal choice deemed to be so private as to be entitled to be shielded from regulation. This group includes cases involving abortion and contraception.[31] It is clear that the Supreme Court of the United States is most comfortable when applying substantive due process to these private or family decision-making cases,[32] and is dubious about extending substantive due process outside this narrowly constrained circle.[33]

Nevertheless, it would be wrong to conclude that the sanctity of family life is the only liberty protected by the modern notion of substantive due process. Cases which involve freedom of choice concerning personal appearance have also undergone substantive due process analysis.[34] In

27. *See generally* Ingraham v. Wright, 430 U.S. 651 (1977); Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980).

28. Scott v. Plante, 641 F.2d 117 (3d Cir. 1981); Goodman v. Parwatikar, 570 F.2d 801 (8th Cir. 1978).

29. Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); *cf.* Melton v. Shivers, 496 F. Supp. 781 (M.D. Ala. 1980).

30. King v. Blankenship, 636 F.2d 70 (4th Cir. 1980); Meredith v. Arizona, 523 F.2d 484 (9th Cir. 1975).

31. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

32. See Harrah Indep. School Dist. v. Martin, 440 U.S. 194 (1979), in which the Supreme Court observed that the due process clause of the fourteenth amendment protects substantive aspects of liberty against impermissible governmental restrictions, and appeared to recognize that claim when the interest resembled "freedom of choice with respect to certain basic matters of procreation, marriage, and family life." *Id.* at 198.

33. In *Harrah, id.*, the Court upheld the action of the school board and reversed the Tenth Circuit which had found the school board's failure to renew a teacher's contract arbitrary and therefore in violation of the due process clause. The Court noted that the official action challenged did not encroach into the sanctity of family life. The Court's reluctance to analyze questions in terms of substantive due process undoubtedly stems from the criticism the early Court received when it reviewed economic legislation in terms of substantive due process. The notion of due process enforced by the Court under the old substantive due process analysis guaranteed free trade and prohibited economic regulation, in contradiction to legislative aims. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918); Lochner v. New York, 198 U.S. 45 (1905).

34. *See* Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975) (faculty members' facial hair may be regulated only when regulation has some relevance to legitimate administrative or educational functions). *Cf.* Kelley v. Johnson, 425 U.S. 238 (1976) (police officer may be required to comply with hair length regulation because rational to determine discipline, uniformity and *esprit de corps* of civilian police group).

Kelley v. Johnson, [35] a case involving the validity of a hair-length regulation, the Court described the constitutional issue as the determination of whether the regulation is so irrational that it may be branded arbitrary and therefore a deprivation of a liberty interest in freedom to choose a hairstyle.[36] In *Ingraham v. Wright,*[37] the Court treated the question of substantive due process as if it were distinct from incorporated rights or procedural due process. In *Ingraham,* school children who had been subjected to corporal punishment petitioned the Court to decide whether the defendants' conduct amounted to a due process deprivation. The Court granted the school children's petition to decide whether disciplinary corporal punishment violates the eighth amendment prohibiting cruel and unusual punishment[38] and whether the procedural requirements of the fourteenth amendment require a hearing before the imposition of corporal punishment.[39] The Court denied review of the substantive due process question presented in the petition for certiorari which asked: "Is the infliction of severe corporal punishment upon public school students arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the fourteenth amendment?"[40] The separate treatment of the question supports the notion that substantive due process restraints on governmental behavior exist outside of the narrow sphere of personal choice cases.

2. The Physical Integrity Cases

A second group of modern due process cases illustrates the idea that substantive due process is distinct from both incorporated due process rights and procedural due process rights. In these cases, the substantive due process strand of the fourteenth amendment prohibits unjustified violations of physical integrity by government officials. Arbitrariness of government conduct is the hallmark of the constitutional claim. When a police officer shoots an arrestee without a reasonable apprehension that his own life is in danger, the officer has violated the substantive due

35. 425 U.S. 238 (1976).

36. *Id.* at 248.

37. 430 U.S. 651 (1977).

38. The Court decided that the eighth amendment did not apply to school disciplinary practice. *Id.* at 671.

39. The Court found the existing procedural safeguards to be adequate. *Id.* at 682. *See infra* text accompanying notes 69–73.

40. 430 U.S. at 659. *See* Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980). In *Hall,* the Fourth Circuit Court of Appeals read *Ingraham* to recognize that state action might infringe a liberty not incorporated into the fourteenth amendment, and may also at the same time satisfy procedural requirements and yet be so arbitrary as to violate the substantive due process strand of the fourteenth amendment.

process clause of the fourteenth amendment.[41] Similarly, when a police officer twists a person's arm, strikes him in the ribs and detains him for five to ten minutes and then releases him without undertaking formal arrest procedures, the officer has violated the substantive due process clause.[42]The substantive due process clause of the fourteenth amendment prohibits the use of force in the prison setting unless there is a showing of need to maintain or restore discipline.[43] Therefore, when the chairman of a prison disciplinary committee informs a prisoner that disciplinary charges have been dropped, but then throws the inmate to the floor and pulls his beard out of his cheek, the chairman has violated the fourteenth amendment.[44]

The same notion of arbitrariness runs through the cases which recognize that the government must respect the physical integrity of persons involuntarily committed to mental health or mental retardation facilities. In *Romeo v. Youngberg*,[45] the Third Circuit recognized "those aspects of personal autonomy recognized from the time of Blackstone—the power of locomotion without restraint and the right to personal security—as well as the right to freedom from punishment, require continued respect."[46] The government can only incarcerate a profoundly mentally retarded individual who is not dangerous to others for the purpose of protection and treatment. Incarceration without such protection and treatment is arbitrary confinement, even if procedural safeguards required by the procedural due process aspect of the fourteenth amendment accompany the initial confinement. Accordingly, in *Romeo*, the court approved a jury instruction that shackling of such an individual "may be justified only by a compelling necessity, *i.e.*, that the shackling was essential to protect the patient or treat him"[47] or in the alternative, that shackling was the least restrictive method of dealing with the patient. Although the United States Supreme Court did not agree with the precise standard articulated by the Third Circuit for finding an infringement of rights, it clearly agreed

41. Jenkins v. Averette, 424 F.2d 1228 (4th Cir. 1970). There may be an overlap between this notion and the idea that fourth amendment protection is incorporated into the fourteenth amendment. *See also* White v. Rochford, 592 F.2d 381 (7th Cir. 1979); Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963). *Cf.* Melton v. Shivers, 496 F. Supp. 781 (M.D. Ala. 1980).

42. *See* Bellows v. Dainack, 555 F.2d 1105 (2d Cir. 1977).

43. King v. Blankenship, 636 F.2d 70 (4th Cir. 1980).

44. *Id.*

45. 644 F.2d 147 (3d Cir. 1980), *vacated*, Youngberg v. Romeo, 50 U.S.L.W. 4681 (U.S. June 15, 1982).

46. 644 F.2d at 157.

47. *Id.* at 160. The court also dealt with the question of relationship between state tort law (malpractice claims) and constitutional claims. The court concluded that the existence of treatment issues in a claim of constitutional infringement does not transform the claim into a malpractice action. *Id.* at 157.

that the source of the rights of an involuntarily confined retarded individual is the substantive due process clause of the fourteenth amendment.[48]

In *Rennie v. Klein*[49] the Third Circuit Court of Appeals recognized the right of involuntarily committed mentally ill patients to refuse administration of anti-psychotic drugs unless reasonable treatment alternatives had been ruled out.[50] The Eighth Circuit has also held that mentally retarded persons judicially committed to state institutions have a constitutional right to treatment.[51] The same circuit also held that the state has a duty to provide a humane living environment which includes a duty to protect inmates from assault by fellow inmates and staff; and if the state callously disregards its duty, that disregard may constitute a violation of civil rights.[52]

3. The "Shocks the Conscience" Cases

The third line of cases which fall within the substantive due process category of constitutional deprivation began with *Rochin v. California*.[53] In *Rochin,* the Supreme Court described due process of law as "a summarized constitutional guarantee of respect for those personal immunities which . . . are so rooted in the traditions and conscience of our people as to be ranked as fundamental."[54] *Rochin* involved the validity of a drug possession conviction based on evidence acquired by forcefully inducing

---

48. The Court stated:

> In deciding this case, we have weighed those post-commitment interests cognizable as liberty interests under the Due Process Clause of the Fourteenth Amendment against legitimate state interests and in light of the constraints under which most state institutions necessarily operate. We repeat that the state concedes a duty to provide adequate food, shelter, clothing and medical care. These are the essentials of the care that the state must provide. The state also has the unquestioned duty to provide reasonable safety for all residents and personnel within the institution. And it may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training. In this case, therefore, the state is under a duty to provide respondent with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints. It may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence.

Youngberg v. Romeo, 50 U.S.L.W. 4681, 4685 (U.S. June 15, 1982).

49. 653 F.2d 836 (3d Cir. 1981).

50. *See also* Mills v. Rogers, 50 U.S.L.W. 4676 (U.S. June 18, 1982). In this case, the principal question on which the Supreme Court granted certiorari was whether an involuntarily committed mental patient has a constitutional right to refuse treatment with anti-psychotic drugs. It declined to answer the question, however, because of uncertainty about a question of state law. It vacated the judgment of the First Circuit Court of Appeals.

51. Welsch v. Likins, 550 F.2d 1122 (8th Cir. 1977).

52. Goodman v. Parwatikar, 570 F.2d 801 (8th Cir. 1978).

53. 342 U.S. 165 (1952).

54. *Id.* at 169.

the suspect to vomit. The court concluded that more than some "fastidious squeamishness" was offended: "This is conduct that shocks the conscience."[55] In a later case involving the alleged unprovoked attack of a prison inmate by a guard,[56] Judge Friendly of the Second Circuit concluded that *Rochin* stood for

> the proposition that, quite apart from any specific of the Bill of Rights, application of undue force by law enforcement officials deprives a suspect of liberty without due process of law. . . . The same principle should extend to acts of brutality by correctional officials, although the notion of what constitutes brutality may not necessarily be the same.[57]

In *White v. Rochford,*[58] the Seventh Circuit applied the *Rochin* definition to a substantive due process claim against a police officer who arrested an adult driver for drag racing and left three children who had been in the arrestee's care abandoned on the side of the road. The *Rochford* plaintiffs alleged that the children suffered mental pain and anguish and that one child, a five-year old asthmatic, had to be hospitalized. The court concluded that abandoning the children and leaving them to the dangers of traffic and cold was "conduct so clearly deserving of universal reprobation,"[59] that it was difficult to understand how it could fall outside of the protections of the due process clause. Similarly, in *Salinas v. Breier,* strip and body searches of the wife and young children of a person arrested for transporting heroin "shocked the conscience."[60] The degrading and humiliating searches could not be justified even if the "arrest" of the family of the suspected drug dealer were legal.[61] The court found that the plaintiff had stated a constitutional claim.

These three strands of substantive due process do not exclude each other. There is undoubtedly substantial overlap between the notions of freedom of private decision-making from governmental control, freedom

55. *Id.* at 172.
56. Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973).
57. *Id.* at 1032.
58. 592 F.2d 381 (7th Cir. 1979).
59. *Id.* at 386.
60. 517 F. Supp. 1272, 1275 (E.D. Wis. 1981). In Johnson v. Glick, *supra* note 56, Judge Friendly acknowledged the difficulty of applying the "shocks the conscience" standard. He recognized that state tort law may provide a remedy for every unconsented touching, but all of these do not amount to a deprivation of substantive due process. To determine whether the constitutional line has been crossed, Judge Friendly would look to such factors as need for force, relationship between the need and the amount of force, 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 purpose of inflicting harm. 481 F.2d at 1033.
61. 517 F. Supp. at 1275.

from arbitrary intrusions into personal and physical integrity, and freedom from governmental conduct which shocks the conscience. Indeed, there is overlap between these concepts and protection of liberties incorporated into the due process clause of the fourteenth amendment. The important point for the purposes of this article is that these sorts of violations of "substantive due process" are at the core of the rights which are secured by the Constitution of the United States and thus comprise the sort of conduct which gives rise to actions for damages under 42 U.S.C. § 1983.[62]

C. Procedural Due Process

A denial of procedural due process is also a proper section 1983 claim. Much has been written about procedural safeguards required by the fourteenth amendment,[63] and it is not the purpose of this article to review the development of the doctrine. It is sufficient to say that, at a minimum, this aspect of the fourteenth amendment requires that there shall be notice and opportunity for a hearing when there is a grievous governmental deprivation of life, liberty or property. The kinds of interests recognized as liberty or property interests may be open to question,[64] and the timing and kind of process considered to be "due"[65] in order to satisfy the fourteenth amendment may vary. The fundamental notion, however, is that "no better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."[66] It is clear that deprivations of life, liberty or property without procedural due process constitute a deprivation of rights which is redressable by a claim for damages under 42 U.S.C. § 1983.[67]

---

62. It is worth stating here, even though the point is elaborated later, that conduct amounting to violations of the substantive due process strand of the fourteenth amendment are generally those that cannot, as a practical matter, be cured or prevented by procedural safeguards: the unprovoked attack of an inmate by a guard or strip searching of children. On the other hand, certain procedural safeguards may prevent the governmental action from being the arbitrary kind prohibited by the substantive due process branch of the fourteenth amendment. For example, in Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981), the Third Circuit approved a range of procedures designed to assure that administration of anti-psychotic drugs to an unwilling, institutionalized patient was based on an exercise of professional judgment, and was therefore not arbitrary. *Id.* at 850.

63. *See generally* Tribe, American Constitutional Law 501–563 (1978); Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. Cal. L. Rev. 355 (1978); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 Yale L.J. 319 (1957).

64. The Court has expressly recognized several liberty and property interests: Perry v. Sindermann, 408 U.S. 593 (1972) (implied tenure); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (admission to bar). *But see* Paul v. Davis, 424 U.S. 693 (1976) (reputation is neither a property or liberty interest).

65. *See* Matthews v. Eldridge, 424 U.S. 319 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974).

66. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring).

67. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622 (1980); Carey v. Piphus, 435 U.S. 247 (1978).

The interesting issue for purposes of this article is whether the availability of a civil action under state law automatically supplies the procedural safeguards required by this branch of the fourteenth amendment. If so, we have reached a partial answer to the problem initially posed. In the case where a state tort claim is available and the section 1983 claim is based on governmental conduct which denies procedural safeguards to an individual, defendants would argue that the conduct does not amount to a constitutional deprivation. Because state law provides redress, even though it comes after the deprivation, procedural due process is afforded. If there is a state remedy, there is no denial of procedural due process and thus, no claim pursuant to 42 U.S.C. § 1983.[68] The consequence of the acceptance of this argument is that, at least with regard to claims of denial of procedural due process, a valid tort claim under state law excludes a section 1983 action. The practical importance of such a result cannot be overstated. If a state tort claim can exclude a section 1983 claim, state legislatures will gain more control over their treasuries. Attorneys' fees and punitive damages may be limited as a matter of state law. Limitations on liability may be imposed. None of the limits exist in the present section 1983 action.

1. The Ingraham/Parratt Principle

The ramifications of the procedural due process question can best be explored through an examination of two recent United States Supreme Court decisions, *Ingraham v. Wright*[69] and *Parratt v. Taylor.*[70] *Ingraham* supports the proposition that a valid state tort claim excludes a section 1983 action. The case involved a section 1983 action for damages against teachers who had inflicted disciplinary corporal punishment on junior high school students. In considering whether defendants' conduct involved a deprivation of procedural due process, the Supreme Court undertook a two-stage analysis. First the Court considered whether the interests asserted by the individuals were encompassed within the fourteenth amendment protection of life, liberty or property. Second, the Court looked to what procedures constitute due process of law. The Court concluded that corporal punishment in public schools does implicate a constitutionally protected liberty interest, but that traditional common-law remedies are fully adequate to afford procedural due process. Accordingly, the Court found that no constitutional right had been denied,

68. This is distinct from, but certainly a relative of, the argument posed by defendants in Monroe v. Pape. *See supra* text accompanying notes 8–12.

69. 430 U.S. 651 (1977). For a discussion of the substantive due process aspects of this case, *see supra* text accompanying notes 37–40.

70. 451 U.S. 527 (1981).

and that no claim had been stated under section 1983.[71] The Court reasoned that no advance procedural safeguards were needed because "reasonable discipline" is privileged under common law and that Florida law provided an action for damages if the privilege were abused.[72] The Court believed that the cost of an administrative procedure prior to the administration of discipline outweighed the benefit of an additional safeguard to the affected individual. The state tort law action for damages, which would be brought after the deprivation, provided sufficient due process to exclude a section 1983 claim.

Justice White, joined by Justices Brennan, Marshall and Stevens, dissented from Justice Powell's majority decision. The dissenters would have allowed the section 1983 claim and thought civil remedies under state tort law were inadequate for two reasons. First, the state law remedy could not protect against a good faith mistake of disciplinarians.[73] Second, the dissenters did not agree that a remedy available after the punishment was sufficient to satisfy procedural due process requirements. They reasoned that the very purpose of a prior hearing is precisely to prevent deprivation based on mistaken facts. A post-deprivation hearing could not serve this purpose. More important, the dissenters believed that, although it might be feasible to compensate persons for deprivations of property wrongfully taken through post-deprivation procedures, infliction of physical pain is final and irreparable. It cannot be undone in a subsequent proceeding, and thus a post-deprivation state remedy could not supply the process that is required by the fourteenth amendment.

In spite of the misgivings of the dissenters in *Ingraham,* the notion remained that the availability of state civil remedies subsequent to a deprivation is sufficient procedural due process and thus prevents the individual who has suffered the loss from stating a constitutional claim for damages pursuant to 42 U.S.C. § 1983. The Court elaborated this view in *Parratt v. Taylor.*[74]

---

71. Recall that the Court did not consider whether punishment involved in this case constitutes a denial of substantive due process. It denied the petition for certiorari on that question. *See supra* text accompanying notes 37–40.

72. The Court used the balancing approach announced in Matthews v. Eldridge, 424 U.S. 319 (1976), in reaching these conclusions. 430 U.S. at 682. That approach is:

> [D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

73. 430 U.S. at 693–94. Good faith was a defense to the tort action under Florida law.

74. 451 U.S. 527 (1981).

Parratt involved the claim of an inmate at a Nebraska prison who ordered hobby materials worth $23.50. He claimed that prison officials negligently lost his property[75] and that this conduct deprived him of rights secured by the fourteenth amendment. Therefore he claimed that he was entitled to relief under 42 U.S.C. § 1983. Nebraska had a tort claims procedure which provided a remedy to persons who suffered losses through torts of the state's employees. The Court explained that in any section 1983 action, the initial inquiry must focus on whether the conduct was committed under color of state law, and whether the conduct deprived a person of rights, privileges, and immunities secured by the Constitution or laws[76] of the United States.

In analyzing the inmate's constitutional claim, the Court separated procedural due process claims from those claims arising out of the fourteenth amendment "incorporated rights" doctrine. The Court noted that Parratt was not asserting any right held to be applicable against the states by virtue of incorporation into the fourteenth amendment. The Court concluded that the plaintiff's constitutional claim amounted to a deprivation of property without the procedural safeguards necessary to satisfy the fourteenth amendment. The Court did not address the possibility that the plaintiff's claim fell within the cases which have been held to be a denial of substantive due process.[77]

After characterizing the constitutional claim as a procedural due process claim, the Court proceeded to decide whether the inmate had made out his claim.

> Unquestionably, respondent's claim satisfies three prerequisites of a valid due process claim: the petitioners acted under color of state law; the hobby kit falls within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation.[78]

However, the Court continued, the fourteenth amendment protects only against deprivations without due process of law. To determine whether plaintiff's deprivation was without due process, the Court considered whether Nebraska's tort remedies as redress for property deprivations satisfied the requirements of procedural due process. The Court concluded

75. The question of whether negligence is a basis for § 1983 liability has split the circuits. This issue is addressed *infra* at text accompanying notes 149–177. *See also* Baker v. McCollan, 443 U.S. 137 (1979); Procunier v. Navarette, 434 U.S. 555 (1978).

76. *See* Maine v. Thiboutot, 448 U.S. 1 (1980). *But see* Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).

77. The conduct of the prison officials, negligent handling of inmate's property, neither arbitrarily intruded on personal integrity, or areas of private decision-making, nor does it "shock the conscience." The conduct simply does not fit into the substantive due process mold.

78. 451 U.S. at 536.

that the "fundamental requirement of due process is the opportunity to be heard and it is an opportunity which must be granted at a meaningful time and in a meaningful manner."[79] As in *Ingraham*, the *Parratt* Court noted that procedural due process does not always require a hearing prior to the initial deprivation of property. When property is lost through the random and unauthorized act of a state employee,[80] a pre-loss hearing is impossible as a practical matter. The Court ruled that the Nebraska tort claims procedures were adequate to satisfy due process, even though not all the relief available under section 1983, i.e., punitive damages and a jury trial, are available under the Nebraska procedure.

Although the concurring justices in *Parratt* suggested misgivings with and limitations to the opinion[81] a principle emerges from the case. Negligent conduct of state officials resulting in the deprivation of an individual's property clearly does not state a claim under 42 U.S.C. § 1983—if there is an available procedure for redress under state law. This is so even though the remedy under state law is not as complete as it might be under 42 U.S.C. § 1983.[82]

Parratt and *Ingraham*, taken together, may bar section 1983 actions in procedural due process cases whenever there is a state remedy. *Parratt* makes it clear that an adequate state procedure bars section 1983 actions where the deprivation of property was negligent. *Ingraham* can be understood to establish the principle that even intentionally caused liberty deprivations do not state a claim under section 1983 if state tort claims

---

79. *Id.* at 540.

80. This is reminiscent of the defendants' argument in Monroe v. Pape. *See supra* text accompanying notes 8–12.

81. A number of separate concurring opinions in *Parratt* highlight the questions left open by the Opinion of the Court. Justice Stewart doubted that negligently caused property loss is a deprivation of property within the meaning of the fourteenth amendment. In his view, to so hold would trivialize the guarantee of the amendment. 451 U.S. at 545. Justice Blackmun concurred in the judgment but emphasized its narrow reach. He did not read the Court's opinion as applicable to a case concerning deprivation of life or liberty, nor to a cause involving denials of substantive due process. He continued "to believe that there are certain governmental actions that, even if undertaken with a full panoply of procedural protections are, in and of themselves, antithetical to fundamental notions of due process." *Id.* at 545. Furthermore, Justice Blackmun believed that in the majority of cases of "intentional" (as distinguished from negligent) deprivation of property, procedural due process would require pre-deprivation hearings. *Id.* at 545–46.

Justice Powell concurred only in the result. He believed that negligent acts of state officials causing property losses do not amount to a deprivation of property within the meaning of the fourteenth amendment. Instead, § 1983 was limited to redress for intentional acts. Justice Powell was also disturbed by the implication in the Court's opinion that only procedural rights are created by the due process clause. He believed the due process clause includes substantive limitations on state actions and that in certain cases, these limitations apply even where compensation is available under state law. *Id.* at 552–53.

82. Even Justice Marshall, who dissented in part, agreed that the state remedies were sufficient to satisfy the requirements of due process even though they would not have afforded plaintiff all the relief that would have been available in a § 1983 action. *Id.* at 554–55.

are available against the defendants.[83] Justice Stevens seemed to have something like this in mind in his dissent in *Ingraham*.[84] After *Parratt* and *Ingraham*, it appears that a section 1983 claim based on a deprivation of procedural due process will be rare, because most states provide some state tort remedies.[85]

Parratt has already influenced the lower federal courts, which have given it a broad application. In *Peery v. Davis*,[86] the court dismissed a prisoner's section 1983 claim which alleged that he had suffered physical injury as a result of defendant's negligence in failing to supply him with safety glasses. The court concluded after a review of Supreme Court precedent that tort claims are consistently dismissed where state remedies are available.[87] In *Rutledge v. Arizona Board of Regents*,[88] the Ninth Circuit Court of Appeals concluded that the plaintiff failed to state a section 1983 claim by alleging, among other things, conduct of a university football coach which amounted to assault and battery. That court had previously held that an unprovoked assault and battery by a guard in a prison stated a claim under section 1983.[89] The Ninth Circuit Court had, however, left open the question whether less reprehensible conduct would suffice to state a section 1983 claim. In light of *Parratt*, the court now believed it unnecessary to pursue the issue. Even assuming that assault and battery implicated a liberty interest, plaintiff had tort remedies available under Arizona law. Therefore, the court believed, *Parratt* required a dismissal. "That the effect of our holding is to relegate appellant to his tort law remedy under Arizona law for Kush's assault and battery should surprise no one. That is the consequence of *Parratt v. Taylor* as applied to this action of Kush."[90]

83. It appears that The New Mexico Tort Claims Act immunizes public school teachers and their employers from liability precisely in the *Ingraham* setting. *See* Garcia v. Albuquerque Pub. Schools, 95 N.M. 391, 622 P.2d 699 (1980). Thus, even if *Ingraham* stands for the broad proposition stated in the text, the immunity provided under The New Mexico Tort Claims Act deprives plaintiffs of a state tort remedy against either the governmental entity or the individual defendants, and presumably the § 1983 claim is available.

84. 430 U.S. at 701–702 (Stevens, J., dissenting).

85. One commentator has suggested that even claims brought under the equal protection clause of the fourteenth amendment might feel the impact of the *Parratt* analysis. *See* Kirby, *Demoting Fourteenth Amendment Claims to State Torts*, 68 A.B.A. J. 166 (1982).

86. 524 F. Supp. 107 (E.D. Va. 1981).

87. The court relied on Baker v. McCollan, 443 U.S. 137 (1979), and Paul v. Davis, 424 U.S. 693 (1976), as well as on *Parratt v. Taylor*. 524 F. Supp. at 108.

88. 660 F.2d 1345 (9th Cir. 1981), *cert. granted sub nom.* Kush v. Rutledge, 50 U.S.L.W. 3998.27 (U.S. July 2, 1982) (No. 81-1675).

89. Meredith v. Arizona, 523 F.2d 481 (9th Cir. 1975).

90. 660 F.2d at 1352. There is nothing surprising about this result. The problem is that *Parratt* seems to have encouraged the Ninth Circuit to foreshorten the inquiry as to what kind of due process claim is presented, just as Justice Powell predicted in his concurrence in *Parratt*. The facts of the *Rutledge* case, however, do make it clear that the only kind of due process conceivably involved is procedural due process.

In *Meshkov v. Abington Township*,[91] plaintiff alleged that police officers who had been called to revive his son did so, but then took the son to the police station and placed him in a cell where he could not be observed (and which contained bedsheets) even though he had threatened suicide and even though there was a hospital directly across the street from the station. Plaintiff's decedent hanged himself with the bed sheets in the cell and attempts to resuscitate him were unsuccessful. He died after nearly two months in a coma. The court granted defendant's motion to dismiss, apparently reasoning that the negligence of the police officers did not rise to the level of a constitutional claim. The court also applied Justice Rehnquist's reasoning in *Parratt* to conclude that allegations of negligent deprivation of "life" did not state a claim under section 1983, because the plaintiff had a state court action and could proceed to prosecute his negligence claims in that forum.

Courts have also invoked *Parratt* in cases involving negligent deprivations of property by state officers. In *Engblom v. Carey*,[92] striking state prison correction officials sustained personal property damage allegedly caused by the negligence of National Guard personnel brought in to carry out the strikers' duties. The court held that because plaintiffs had failed to pursue a state remedy, they could not be said to have suffered deprivation of property under color of state law without due process of law. At least one court, however, declined to extend the logic of either *Parratt* or *Ingraham* to a case where property was intentionally destroyed by state officers. In *Tarkowski v. Hoogasian*,[93] the court distinguished intentional conduct from negligence and recognized a section 1983 claim based on such allegations of intentional conduct, even though a tort remedy was available under state law.

The Fifth Circuit considered the implications of *Parratt* in an entirely different setting. In *Duncan v. Poythress*,[94] Georgia voters brought a section 1983 action to challenge state officials' appointment of a judge to fill a vacancy rather than holding a special election as required by Georgia law. The state officials argued that even if the appointment illegally disenfranchised the Georgia electorate, the violation of state law does not rise to the level of a constitutional deprivation. The Fifth, Seventh and Eighth and Second Circuits[95] had held that not every election irreg-

91. 517 F. Supp. 1280 (E.D. Pa. 1981).

92. 522 F. Supp. 57 (S.D. N.Y. 1981). *See also* Sheppard v. Moore, 514 F. Supp. 1372 (M.D. N.C. 1981); Parker v. Rockefeller, 521 F. Supp. 1013 (N.D. W. Va. 1981).

93. 50 U.S.L.W. 2518 (N.D. Ill. Feb. 19, 1982).

94. 657 F.2d 691 (5th Cir. 1981).

95. *See* Gamza v. Aguirre, 619 F.2d 449 (5th Cir. 1980); Hennings v. Grafton, 523 F.2d 861 (7th Cir. 1975); Pettengill v. R-1 School Dist., 472 F.2d 121 (8th Cir. 1973); Powell v. Powell, 436 F.2d 84 (2d Cir. 1970).

ularity amounts to a constitutional deprivation. The *Duncan* court, however, concluded that where the particular conduct is part of a pattern to erode democratic processes, or if the election process reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under section 1983 may be in order.

The *Duncan* court rejected defendants' reliance on *Parratt*. The Court recognized that:

> *Parratt* concerned procedural due process rather than substantive due process. The *Parratt* court was not required to define the limits of those substantive rights which are grounded in the Bill of Rights and applied to the states because of their incorporation into the fourteenth amendment. . . .
>
> The voters in this case, by contrast, do not base their § 1983 claim upon any inadequacy in Georgia's judicial remedies. Their due process claim is not procedural, but substantive. . . . *Parratt* provides no support to the Georgia officials, however, because this case turns on the substantive guarantees of the due process clause.[96]

2. Implication of the Ingraham–Parratt Principle

Although the ultimate contours of the formulations demanded and suggested by *Ingraham* and *Parratt* are uncertain, it is possible to draw from them at least some tentative conclusions about the relationship between constitutional claims pursuant to section 1983 and available state tort remedies. First, the Court recognized that the procedural claims and the incorporated and substantive rights claims are distinct section 1983 constitutional claims even though they are all based on the due process clause of the fourteenth amendment. Second, it is common that conduct which gives rise to one or several of these kinds of constitutional claims is also a tort under state law. *Parratt* counsels that if the conduct under scrutiny is negligence (and therefore actionable under state law), and results in a loss of or deprivation of property, there is no constitutional claim. Neither *Parratt* nor *Ingraham* suggest that conduct amounting to a denial of an incorporated right fails to state a claim under section 1983, even though state tort law is available to grant relief for the conduct. For example, searches and seizures held to be unreasonable under the fourth and fourteenth amendments frequently consist of conduct amounting to trespass, assault, and occasionally battery.[97] There is nothing in *Parratt* to suggest that this kind of conduct ceases to be a constitutional violation merely because it is also a tort and therefore actionable under state law. Indeed, Justice Rehnquist, writing for the Court in *Parratt*, distinguished the claim

96. 657 F.2d at 704.

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

in *Parratt* from such an incorporated rights claim.[98] Nor is there anything in *Parratt* which requires dismissal of a section 1983 action based on arbitrary, shocking governmental abuses or intrusions into protected spheres of privacy—a substantive due process claim— even though state tort law might provide remedies based on the same conduct. But Justice Rehnquist's failure expressly to recognize the possibility of the coexistence of substantive and procedural due process claims in the *Parratt* opinion[99] is troublesome. Because the opinion does not give guidance in distinguishing procedural claims from substantive claims, and mentions only the differentiation between incorporated and procedural claims, a court might conclude that if a section 1983 complaint does not state an incorporated rights claim, it is necessarily a procedural due process claim. The court might then erroneously grant a motion to dismiss if there were available state tort remedies, without grappling with the difficult question of whether the complaint states a substantive due process claim.[100]

3. An Alternative to the Parratt–Ingraham Approach

There is an even more important failure in both *Ingraham* and *Parratt*. If lower courts rely on the availability of state remedies to decide whether a constitutional claim exists, there is a risk of establishing a merely mechanical test to determine the shape of a claim rather than attempting to define constitutionally objectionable government behavior. This is particularly dangerous if lower courts fail to make the distinction between claims based on denial of procedural, substantive and incorporated rights and instead consider the availability of state tort remedies relevant to the existence of a section 1983 claim, irrespective of the nature of the claim.

98. If *Parratt* were read to mean that a claim could not rise to the level of a constitutional claim any time state law was available to redress the conduct, *Parratt* would have substantially overruled *Monroe v. Pape*.

99. In Mills v. Rogers, 50 U.S.L.W. 4676 (U.S. June 18, 1982), Justice Powell did recognize that a mixed question of procedure and substance exists in a case where the issue is whether an involuntarily confined patient can be forced to take anti-psychotic drugs. In that case, the Court reached neither question because of uncertainty about state law.

100. Unprovoked attacks by police officials or guards on pretrial detainees may present the clearest example of this problem. Because the eighth amendment protections against cruel and unusual punishment generally come into play only after conviction for a crime, a complaint alleging this kind of conduct does not present an eighth amendment incorporation-type § 1983 claim. To conclude that the availability of post-deprivation state tort remedies prevents such attacks from giving rise to constitutional claims at all would, however, surely be wrong. Such conduct is not merely a matter of denial of procedural due process. It is a governmental abuse which is not corrected by the provision of procedural safeguards. *See* Parratt v. Taylor, 451 U.S. at 553 (Powell, J., concurring). See also Bell v. Wolfish, 441 U.S. 520 (1979), in which the Supreme Court recognized that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535.

Without examining the grievousness of the constitutional harm, or even the adequacy of the state remedy, courts might routinely dismiss section 1983 actions merely because some state remedy exists. This may undermine the courts' ability to guarantee constitutional rights. Attention to the task of describing constitutionally invalid conduct serves the desirable objective of educating public officials on the kind of conduct the Constitution forbids. The United States Supreme Court has not exercised leadership in accepting the invitation presented in cases starting with *Monroe v. Pape,* which encouraged courts to delimit and define the conduct which gives rise to the supplemental relief allowed by 42 U.S.C. § 1983. Instead, in *Parratt* and *Ingraham,* the Court seems to have focused on the wrong question—the question of whether state remedies are available to redress the wrong. In deciding whether an action exists under section 1983, courts must initially consider whether an abuse of governmental power has taken place rather than considering the question of the presence of state law. It is the abuse of governmental power that the fourteenth amendment forbids. The availability of state tort remedies is at best only tangentially germane to the issue of abusiveness. Furthermore, if the governmental conduct is not abusive, but merely random, careless, and unauthorized, a constitutional claim ought not to exist, even when the immunity law of a state forbids a tort remedy.

It is, admittedly, exceedingly difficult to determine the sorts of governmental behavior which amount to abuse and therefore constitute constitutional claims, whether or not those abuses are also torts. The use of some mechanical formula to sort out state law cases from constitutional cases is appealing for that reason. Focusing on availability of state remedies rather than on the nature of the conduct, however, will not only fail to guide public officials in their conduct, but will present more state law questions to federal courts than would otherwise be presented. Issues involving interpretation of often obscure state immunity laws, such as the New Mexico Tort Claims Act, will be present in any case where availability of state law is in question.

There is an alternative to the mechanical applications of the "availability of state law" approach. If the conduct can be characterized as *governmental* abuse of an individual (or group) rather than the random, accidental conduct of a state employee or official, then it is a deprivation of a constitutional right. Some factors which the courts might consider are: (1) the likelihood that the conduct will cause unjustified intrusion into an individual's personal or physical integrity or property rights; (2) the degree to which the defendant's conduct is a misuse of power which he possesses solely by virtue of his official or public position; and (3)

whether the conduct is highly arbitrary, discriminatory or "shocking to the conscience."[101]

For example, a guard who uses excessive force in dealing with a prisoner is abusing the power which he has by virtue of his position, and that should be sufficient for a showing of governmental abuse. Similarly, a supervisor abuses his power when he fails to discipline guards whom he knows or has reason to know are using excessive force; his failure to discipline increases the risk of unjustified intrusion into the physical integrity of inmates.[102] If, on an application of such factors, the court can conclude that governmental abuse exists, then it is appropriate to go on to the question of whether the abuse can be cured by compensation available under remedial provisions other than a section 1983 damages action. Presumably, conduct which would "shock the conscience," is highly arbitrary, or is discriminatory, cannot be made right even if there is a flawless procedure preceding the conduct. Occasionally, the objectionable governmental conduct is a denial of a hearing. The denial is objectionable precisely because provision of the hearing itself would reduce the risk of unjustified physical, personal or property invasion.[103] The sort of government abuse which denies a hearing presents a procedural due process claim.[104] It is only this kind of section 1983 claim which should be affected when state tort remedies are available to supply adequate process. Even this kind of constitutional claim ought to survive as an independent section 1983 claim when a pre-deprivation hearing is necessary to satisfy procedural due process.

III. SECTION 1983 AND THE NEW MEXICO TORT CLAIMS ACT

The preceding exegesis considers when the existence of a state tort remedy will, and also when it should, prevent the existence of a claim pursuant to section 1983. It should be clear that in a large number of

101. This analysis suggests a slightly different basis for the *Parratt* decision. Under this approach, it ought to be clear that the random, unauthorized, carelessness of a state employee which results in a property loss or bodily injury does not amount to a constitutional claim. This is not the sort of governmental abuse that the fourteenth amendment was designed to correct or prevent. Often state law is available to remedy these kinds of losses; even if it is not, the conduct simply does not violate the Constitution.

102. *See* McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979).

103. The kinds of cases that come to mind in this category are those involving discharge of public employees who had some expectancy (created by state law) of retention. Certainly some cases that are on the edge of arbitrariness, such as subjecting mentally retarded individuals in a state institution to electric shock can be saved from arbitrariness by requiring a hearing, and therefore, are properly analyzed as either denials of substantive or procedural due process. *See, e.g.*, Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981).

104. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

cases, the section 1983 claim and the state tort claim may coexist, at least so long as The Tort Claims Act waives immunity for the tort action. This article now turns to an examination of the points of intersection between section 1983 claims and state tort claims available pursuant to the New Mexico Tort Claims Act.

In 1975, the New Mexico Supreme Court abolished sovereign immunity as a defense in tort actions.[105] During the next legislative session in 1976, the legislature enacted the Tort Claims Act[106] to re-establish the defense. Initial confusion about the legislative goals, amendments to the Act,[107] and judicial construction of the Act have combined to make the content and the limits of the doctrine of sovereign immunity in New Mexico uncertain. Some things, however, are clear.

The basic structure of the Act has been set forth elsewhere.[108] The legislature has altered the Act only slightly by amendment. The Act immunizes from liability both the governmental entity and any public employee acting within the scope of his duty,[109] except as waived by express provisions of the Act.[110] The governmental entity must defend and pay a settlement or judgment for any public employee who commits a tort while acting within the scope of his duty unless an insurance carrier provides a defense.[111]

A governmental entity and its public employees may assert any defense available under state law.[112] The statute of limitations is two years after the date of the occurrence causing injury,[113] and a plaintiff must present a notice of claim to a specified official within ninety days after the occurrence to establish jurisdiction.[114] The Tort Claims Act is the exclusive

105. Hicks v. New Mexico, 88 N.M. 588, 544 P.2d 1153 (1975).

106. N.M. Stat. Ann. §§41-4-1 to -29 (Repl. Pamp. 1982).

107. 1977 N.M. Laws ch. 386; 1978 N.M. Laws ch. 166.

108. Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico*, 6 N.M.L. Rev. 249 (1976); Note, *Torts—Government Immunity Under the New Mexico Tort Claims Act*, 11 N.M.L. Rev. 475 (1981).

109. N.M. Stat. Ann. §41-4-4(A) (Repl. Pamp. 1982).

110. Waivers of immunity are set out in N.M. Stat. Ann. §§41-4-5 to -12 (Repl. Pamp. 1982). Waiver is limited to and governed by N.M. Stat. Ann. §§44-4-13 to -25 (1978 & Cum. Supp. 1982).

111. N.M. Stat. Ann. §§41-4-4(B), (D) (Repl. Pamp. 1982).

112. The New Mexico Supreme Court abolished contributory negligence as a complete defense in New Mexico and accepted comparative negligence as a matter of common law. Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981).

113. N.M. Stat. Ann. §41-4-15 (Repl. Pamp. 1982).

114. N.M. Stat. Ann. §41-4-16 (Repl. Pamp. 1982). See Martinez v. City of Clovis, 95 N.M. 654, 625 P.2d 583 (1980), which holds that §41-4-16 does not impose obligation of notice of claim on persons seeking to impose liability on a public employee as distinguished from the governmental entity. As for the statutory requirement that a mayor of a municipality be presented with notice of the claim, notice to the municipality's insurer satisfied the statute in *Martinez*, at least where there was evidence that the insurer, not the mayor, investigated the accident claim. *Id.* at 656–57, 625 P.2d at 585–86.

state remedy against a governmental entity or public employee,[115] with exclusive jurisdiction in the state district courts.[116] There is no waiver of the state's immunity from suit in federal court under the eleventh amendment to the United States Constitution.[117] Liability of governmental entities or public employees is limited under the Act,[118] and punitive damages are prohibited.[119]

The New Mexico Supreme Court has made no secret of the rule of construction which is applicable to the Tort Claims Act. After *Hicks v. New Mexico*,[120] sovereign immunity is not available as a common law defense to a tort claim in New Mexico. Because the Tort Claims Act is in derogation of the common law, the Act must be strictly construed.[121] In a case involving a close question of statutory construction, the courts will decide against immunity.[122]

A. Overlap Between the Act and Section 1982

The majority of waivers of immunity in the Tort Claims Act address situations that are unlikely to present constitutional claims.[123] The law

115. N.M. Stat. Ann. § 41-4-17(A) (Repl. Pamp. 1982). In cases where § 1983 claims were joined with state tort claims, defendants have urged a construction of this provision which would prohibit a plaintiff from bringing an action under the Act when he also pursues an action pursuant to § 1983. The supreme court rejected this construction in Wells v. County of Valencia, ___ N.M. ___, 644 P.2d 517 (1982). *See supra* text accompanying notes 136–140.

116. N.M. Stat. Ann. § 41-4-18 (Repl. Pamp. 1982).

117. N.M. Stat. Ann. § 41-4-4(F) (Repl. Pamp. 1982). *See* Korgich v. Regents, 582 F.2d 549 (10th Cir. 1978).

118. N.M. Stat. Ann. § 41-4-19(A) (Repl. Pamp. 1982) provides: (1) $100,000, property damage to any person arising out of a single occurrence. (2) $300,000 damages to any person for damage for other than property damage arising out of a single occurrence. (3) $500,000 for all claims arising out of a single occurrence.

119. N.M. Stat. Ann. §41-4-19 (Repl. Pamp. 1982). In 1982, the Act was amended to permit payment of punitive damages by a governmental entity if they are awarded under the substantive law of a jurisdiction other than New Mexico. N.M. Stat. Ann. 41-4-4(C) (Repl. Pamp. 1982).

120. 88 N.M. 588, 544 P.2d 1153 (1975).

121. *Id.*

122. *See* Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980); Holiday Management Co. v. City of Santa Fe, 94 N.M. 368, 610 P.2d 1197 (1980).

123. N.M. Stat. Ann. §§ 41-4-5 through -12 (Repl. Pamp. 1982) state:

> 41-4-5. Liability; operation or maintenance of motor vehicles, aircraft and watercraft.
>
> The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any motor vehicle, aircraft or watercraft.
>
> 41-4-6. Liability; buildings, public parks, machinery, equipment and furnishings.
>
> The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public em-

ployees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings. Nothing in this section shall be construed as granting waiver of immunity for any damages arising out of the operation or maintenance of works used for diversion or storage of water.

41-4-7. Liability; airports.

A. The immunity granted pursuant to Subsection A of Section 4[41-4-4 NMSA 1978] of the Tort Claims Act does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of airports.

B. The liability imposed pursuant to Subsection A of this section shall not include liability for damages due to the existence of any condition arising out of compliance with any federal or state law or regulation governing the use and operation of airports.

41-4-8. Liability; public utilities.

A. The immunity granted pursuant to Subsection A of Section 4[41-4-4 NMSA 1978] of the Tort Claims Act does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of the following public utilities and services: gas; electricity; water; solid or liquid waste collection or disposal; heating; and ground transportation.

B. The liability imposed pursuant to Subsection A of this section shall not include liability for damages resulting from bodily injury, wrongful death or property damage:

(1) caused by a failure to provide an adequate supply of gas, water, electricity or services as described in Subsection A of this section; or

(2) arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.

44-4-9. Liability; medical facilities.

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of any hospital, infirmary, mental institution, clinic, dispensary, medical care home or like facilities.

44-4-10. Liability; health care providers.

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees licensed by the state or permitted by law to provide health care services while acting within the scope of their duties of providing health care services.

44-4-11. Liability; highways and streets.

A. The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the maintenance of or for the existence of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area.

B. The liability for which immunity has been waived pursuant to Subsection A of this section shall not include liability for damages caused by:

(1) a defect in plan or design of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area; or

enforcement officers' waiver of immunity,[124] however, presents the occasion for overlap between section 1983 and state tort claims.[125] For example, a complaint alleging that a police officer shot an unarmed suspect without any reason to believe that the suspect endangered the police officer almost certainly states a section 1983 claim.[126] It also may state a claim against the police officer and the governmental entity which employs him[127] on a battery theory. Section 12 of the Tort Claims Act provides that the general immunity granted by the Act does not apply to liability for, among other things, bodily injury resulting from battery which was caused by a law enforcement officer while acting within the scope of his duties. Accordingly, both federal and state remedies are available.[128]

An Indiana case, *Roberts v. Indiana*,[129] exemplifies another fact pattern which presents coexisting state and federal claims. The plaintiff, a prison inmate, was walking in the exercise yard when 200 inmates gathered to

---

(2) the failure to construct or reconstruct any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area.

44-4-12. Liability; law enforcement officers.

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

124. N.M. Stat. Ann. § 41-4-12 (Repl. Pamp. 1982) states:

Liability; law enforcement officers.

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

125. Although it is obvious that the waiver of liability most frequently involved in cases which present possible § 1983 claims is the law enforcement officers' waiver of immunity, others may come into play. For example, in a number of actions arising out of the New Mexico Penitentiary riot of February, 1980, the waiver of immunity contained in N.M. Stat. Ann. § 41-4-6 (Repl. Pamp. 1982), relating to negligent maintenance and operation of any building, is prominent in the litigation. A variety of civil rights claims also arose from the riot.

126. Violation of the fourth and fourteenth amendment prohibitions against unreasonable searches and seizures gives rise to an incorporated due process claim, and an arbitrary violation of personal integrity presents a substantive due process claim. *See, e.g.*, Jenkins v. Averette, 424 F.2d 1228 (4th Cir. 1970).

127. Issues of *respondeat superior* and supervisory liability are addressed *infra* at text accompanying notes 154–177.

128. If both claims coexist, they presumably may be litigated together either in state or federal court.

129. 307 N.E.2d 501 (Ind. Ct. App. 1974).

protest an administrative action of the prison officials. The plaintiff was not part of the demonstration, but was ordered by the armed guards to sit near the protestors. The guards fired into the crowd, severely injuring the plaintiff. The guards were allegedly negligent in shooting into the crowd and their captain, who had given the order, allegedly breached his duty to the plaintiff to take reasonable precautions to preserve the health, life, and safety of a person in custody.[130] In the *Roberts* fact pattern, the availability of both the section 1983 claim and the state tort claim would be somewhat more complicated than in the case where the defendant's intentional conduct directly causes the plaintiff injury. If the conduct of the guards and their captain were simply negligent, some courts would conclude that no claim is stated under section 1983.[131] There is, however, strong countervailing authority[132] and even where negligence has been held insufficient to state a section 1983 claim, gross negligence or recklessness may be adequate.[133] The question of whether immunity is waived by the Tort Claims Act turns on the construction of "law enforcement officer" in section 41-4-12 and a determination of whether negligence causing bodily injury fits within the waiver.[134] It is likely, however, that both claims are potentially available in such a case.

B. Exclusiveness of Remedy Provision—the New Mexico State Law Does Not Exclude Section 1983

Of course, some cases present only section 1983 claims, and not state tort claims. The absence of an appropriate waiver of immunity in the Tort Claims Act would foreclose a state claim.[135] State claims might also have been foreclosed by virtue of construction of the exclusive remedy provision in the Tort Claims Act.[136] State tort-claim defendants had con-

130. See City of Belen v. Harrell, 93 N.M. 601, 603 P.2d 711 (1979), for the proposition that such a duty exists in New Mexico.

131. *See, e.g.*, Mills v. Smith, 656 F.2d 337 (8th Cir. 1981).

132. *See, e.g.*, Withers v. Levine, 615 F.2d 158 (4th Cir. 1980); Watson v. McGee, 50 U.S.L.W. 2373 (S.D. Ohio Dec. 1, 1981).

133. *See, e.g.*, Smith v. Hill, 510 F. Supp 767 (D.Utah 1981).

134. In Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980), the supreme court addressed these sorts of questions. The court held that a jail guard fit within the definition of "law enforcement officer" in N.M. Stat. Ann. § 41-4-3(D) (Repl. Pamp. 1982). Presumably, a captain of the guard on the scene would be treated similarly. It is not clear, however, whether a prison warden or the Director of the Department of Corrections is a "law enforcement officer" within the meaning of the Act. The court also held that negligence of a law enforcement officer fits within the waiver.

135. An example of this is found in Garcia v. Bd. of Educ., 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980).

136. N.M. Stat. Ann. § 41-4-17(A) (Repl. Pamp. 1982). The Act also contains an exclusive jurisdiction provision. *See* N.M. Stat. Ann. § 41-4-18(A) (Repl. Pamp. 1982). In Nevada v. Hall, 440 U.S. 410 (1979), the Supreme Court diminished the vitality of an exclusive jurisdiction provision similar to New Mexico's. In *Nevada*, the Supreme Court held that Nevada was not immune from suit and judgment in the courts of California despite this exclusive jurisdiction provision.

sistently argued that if a plaintiff decides to pursue a section 1983 claim, the waiver of immunity that might otherwise be applicable is unavailable because of the exclusiveness of remedy provision. Thus, even though the conduct is tortious under state law, sovereign immunity will bar recovery, and only the federal claim remains. The practical impact of this interpretation of section 41-4-17(A) is to prevent the plaintiff who files a section 1983 claim from joining state claims. He must make this decision very early, at a stage when it may be too early to predict the likelihood of success on the constitutional theories. Thus, plaintiff may lose his recovery entirely if his section 1983 action fails.

The question of the meaning of section 41-4-17(A) was certified[137] to the New Mexico Supreme Court in the case of *Wells v. County of Valencia*.[138] In *Wells*, the plaintiff was detained in the Valencia County jail. While awaiting trial, officials separated plaintiff from the prison population for reasons which were in dispute. There was no light in plaintiff's cell. He stepped into an uncovered hole in the floor of the cell, fell, and suffered a head injury. Plaintiff sought redress under both 42 U.S.C. § 1983 and the New Mexico Tort Claims Act. The defendants contended that the filing of a section 1983 claim ought to result in the interposition of a sovereign immunity defense to the joined state tort claim.[139]

In *Wells*, the New Mexico Supreme Court rejected the defendants' proposed construction of the exclusiveness of remedy provision. It held that the legislature did not intend to condition its waiver of sovereign immunity for certain torts by prohibiting a plaintiff from exercising federal rights. The court noted that section 41-4-17(A) does not, by its terms, prohibit the bringing of a federal action. The court concluded that the literal reading urged by defendants would force an abandonment of the federal claim in cases like *Wells*, where the facts alleged would clearly support a finding of negligence under state law, but where ultimate success on a section 1983 claim is not so certain. The court was unwilling to force plaintiff to risk losing his recovery under state law. At the same time, the court felt that it was unfair to force plaintiff to abandon his federal claim. The court recognized that the section 1983 action has at least one practical advantage for plaintiff as compared to the state tort

137. N.M. Stat. Ann. § 34-2-8 (1978) authorizes answer of questions certified to the New Mexico Supreme Court from the federal courts.

138. ___ N.M. ___, 644 P.2d 517 (1982).

139. This is the logical outcome of this construction of N.M. Stat. Ann. § 41-4-17(A) (Repl. Pamp. 1982), whether plaintiff attempts to join claims in either federal or state court. Note that defendants did not argue that § 41-4-17(A) prevents plaintiff from pursuing his § 1983 claim, an argument with serious constitutional problems. *See* Martinez v. California, 444 U.S. 277 (1980). They instead argued that the legislature has power to grant full immunity. It therefore has the lesser power to condition the waiver of immunity on following a particular procedure contained in the Act.

claim—unlimited liability. The court did not mention the other advantages of the section 1983 action from the plaintiff's view, but those advantages also may have influenced the court. A section 1983 action includes the possibility of punitive damages, attorneys fees, and an arguably longer statute of limitation.[140] If plaintiff were required to elect between the section 1983 claim and tort claims, he would have to choose the tort claim if the likelihood of success on that claim seemed greater than the likelihood of success on the section 1983 claim. He would have to give up the advantages of the section 1983 claim, even though it is possible that he might ultimately have prevailed on the section 1983 claim, if he had been permitted to pursue it. The court stated that a chilling effect on the exercise of federal rights is tantamount to a denial of federal rights and that would violate the supremacy clause of the United States Constitution. The court therefore construed the statute to avoid the question of its unconstitutionality. The court recognized that a risk of double recovery exists, if the same conduct is found to be both a tort for which liability has been waived, and a constitutional violation. Nevertheless, the *Wells* court seemed to believe that the general principles militating against double recovery are adequate to avoid the problem.

C. Comparison of Claims Under Section 1983 Claims and Claims Under The New Mexico Tort Claims Act

Although *Wells* concentrated on the advantages of a section 1983 claim to the plaintiff, it is clear that there are cases in which the plaintiff would have a better chance of recovering under a state tort claim. For example, a negligence claim can be made more easily under the Tort Claims Act.[141] Actions against the state, its agencies, and local governmental bodies are expressly within the waivers of immunity in the Tort Claims Act. A city and other like governmental entities are proper defendants under section 1983 only if there is proof of a "policy or custom," which deprives the plaintiff of constitutional rights.[142] The state is a problematic defendant in a section 1983 action, either because it is immune from suit in federal court by virtue of the eleventh amendment[143] or because as a matter of statutory construction, it is not "a person" within the meaning of section 1983.[144] It is useful to compare section 1983 and the Tort Claims Act in more detail from the perspective of these differences.

---

140. Gunther v. Miller, 498 F. Supp. 882 (D.N.M. 1980).
141. *See* Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).
142. Monell v. Dep't of Social Services, 436 U.S. 658 (1978).
143. Quern v. Jordan, 440 U.S. 332 (1979).
144. *See infra* text accompanying notes 192–201.

1. Negligence and Supervisory Liability

a. Tort Claims Act

When the facts of a case support findings of negligent, but not intentional, conduct on the part of the potential defendant, tort claims are a more certain source of compensation to an injured party than a section 1983 claim. This is not self-evident from the language of either section 1983 or the Tort Claims Act. In *Methola v. County of Eddy,*[145] the court was presented with an argument that the statutory waiver existed only when the conduct of the defendant officer is intentional. In the face of this contention, the court interpreted the statutory waiver of liability contained in section 41-4-12 to apply to injuries caused by the negligence of a sheriff, his deputies, and city jailers. *Methola* held that there is a waiver of immunity for the negligent conduct of law enforcement officers. *Methola* did not involve the issue of supervisory liability, but the construction of the statutory waiver of liability addressed in *Methola* also can arise when the defendant's conduct in a supervisory capacity is the indirect cause of an injury. For example, the waiver should apply when a prison warden fails adequately to train guards, and the failure results in the guards' use of excessive force on an inmate. The plaintiff would have to establish a negligence cause of action by alleging and showing that the prison warden's failure increased the risk of the guards' use of force.[146] Once the plaintiff has established the negligence, the only question under state law would be whether the defendant-supervisor is a law enforcement officer under the Act. The statutory definition[147] of law enforcement officer is not limited to persons who are in direct contact with persons in custody, nor is it limited to persons who make arrests. The definition includes public employees whose principal duties are to maintain public order. The core responsibility of police chiefs, prison wardens, directors of departments of corrections, and perhaps other correctional officials in a supervisory capacity, is maintenance of public order. Accordingly, the waiver of immunity for misconduct of law enforcement officers, whether negligent or intentional, ought to be applicable to supervisory level law enforcement officers as well as to law enforcement officers lower in the chain of command.[148]

---

145. 95 N.M. 329, 622 P.2d 234 (1980).

146. *Id.* at 332–33, 622 P.2d at 237–38.

147. Under N.M. Stat. Ann. § 41-4-3(D) (Repl. Pamp. 1982):

> 'law enforcement officer' means any full-time salaried public employee of a governmental entity whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes, or members of the national guard when called to active duty by the governor.

148. It is not likely tht issues of supervisory liability will be the subject of litigation under the Tort Claims Act. A plaintiff seeks compensation in a tort action against a government employee and the governmental entity which employs him. It is not necessary to join everyone in the chain of

b. Section 1983

The issue of whether negligent conduct can be the basis of a section 1983 action normally arises in the context of supervisory liability, but it obviously can be a question even when the alleged negligence is that of the person whose conduct directly causes the injury. For example, in *Mills v. Smith,*[149] the defendant police officer's gun discharged while the police officer was attempting to handcuff the plaintiff. Plaintiff was wounded in the back and sued for damages under section 1983. The federal district court had found that defendant's conduct was at most negligent and therefore was not a basis of recovery under section 1983. The circuit court affirmed. Although the court recognized that under *Parratt v. Taylor,* negligence may be the basis of a section 1983 claim for deprivation of property, the *Mills* court found that the lower court had not erred in concluding that the conduct in this case did not amount to a constitutional deprivation.[150]

---

command. So long as any employee has caused injury within the scope of his employment, the governmental entity is liable through ordinary principles of vicarious liability, provided that the employee's conduct falls within one of the eight waivers of immunity. Indeed, the statute provides that the governmental entity has the duty to defend and pay judgments or settlements against its employees arising out of tortious conduct that occurs within the scope of employment. *See* N.M. Stat. Ann. § 41-4-4 (Repl. Pamp. 1982). The statute also imposes the latter requirement on governmental entities when the plaintiff's constitutional rights have been violated.

149. 656 F.2d 337 (8th Cir. 1981).

150. The doctrine of the good faith defense to a § 1983 claim has sometimes motivated courts to conclude that negligent conduct cannot be the basis of a § 1983 claim. They have reasoned that plaintiff's § 1983 claim must be based on conduct more serious than negligence because a defendant is entitled to immunity for acts done in good faith within the scope of his official duties, even though that good faith conduct results in a constitutional deprivation. In McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979), the Tenth Circuit Court of Appeals said, for example, that "[a]rguably the good faith immunity . . . is recognition that something more than ordinary negligence is required of supervisory personnel." *Id.* at 696.

The good faith defense to § 1983 claims is akin to the common law immunity afforded to governmental officials. Courts have described the defense as a qualified immunity available in varying degree to officials of the executive branch of government. The variation is dependent upon the scope of discretion and responsibility of the official and upon all of the circumstances as they reasonably appeared at the time of the alleged misconduct. The existence of reasonable grounds for the belief, formed at the time and in light of all the circumstances, coupled with a good faith belief, affords a basis for qualified immunity of executive officers. Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974). See also Procunier v. Navarette, 434 U.S. 555 (1978), in which the Supreme Court discussed the good faith defense. The Court held that the defense is unavailable when, at the time of the conduct, there is a clearly recognized constitutional right, the defendant knew or should have known of the existence of the right, and the defendant knew or should have know that his conduct violated the clearly established constitutional right.

In Gomez v. Toledo, 446 U.S. 635 (1980), the Court held that in a § 1983 action, a plaintiff is not required to allege that the official acted in bad faith in order to state a claim for relief. The burden is on the public official to plead qualified immunity as a defense. It should follow that the burden of persuasion as to the immunity is on the defendant as well. Justice Rehnquist, however, in a concurring opinion, noted that the question of burden of persuasion, as distinguished from the burden of pleading immunity, remained open.

It is the author's view that the mere existence of a good faith defense ought not defeat the possibility of a § 1983 claim based on negligent conduct. In a negligence claim, the plaintiff seeks

To understand whether a section 1983 claim can be based on negligence, the ubiquitous case of *Parratt v. Taylor* must once again be examined. In *Parratt,* Justice Rehnquist was willing to assume that deprivation of property, even if caused by merely negligent behavior of governmental officials, could constitute a constitutional deprivation if accomplished without procedural due process. This aspect of *Parratt* has also influenced lower courts.

In *Watson v. McGee,*[151] individuals confined as pretrial detainees at a city jail suffered smoke inhalation, lung damage, and other physical injuries from a fire at the jail. The detainees brought a section 1983 claim against defendants whose negligence had allegedly caused them to be exposed to the fire hazard. The detainees based the action on the theory that they had been deprived of life and liberty in violation of the fourteenth amendment due process clause. The defendants sought dismissal because the complaint was based solely on the negligent conduct of the defendants. The court refused to dismiss the complaint, concluding that *Parratt* recognizes that negligence is cognizable under section 1983. The court said

> [A]lthough there may not have been an express intent on the part of the City of Dayton, or its officials, to punish the Plaintiffs, there nevertheless appears to have been scant justification or purpose for the existence of conditions which endangered the lives of persons who are powerless either to alter those conditions, or to escape their effects.[152]

In *Major v. Benton,*[153] a pre-*Parratt* case, the Tenth Circuit reached a different conclusion. Plaintiff's decedent was killed by a cave-in of a sewer ditch in which he had been working while serving time as an Oklahoma state prisoner. Several serious cave-ins had occurred. The plaintiff alleged that defendants' failure to implement safer conditions for digging resulted in deprivation of decedent's life without due process of law. The court concluded that specific constitutional guarantees must be implicated to give rise to due process claims. Death resulting from the

---

to establish that the defendant acted unreasonably; this is a question for the trier of fact. If the trier of fact finds that the defendant acted unreasonably, two conclusions of law might follow. First, that the plaintiff proved his claim of constitutional deprivation even though the defendant's conduct was merely negligent. Second, that the defendant was not entitled to immunity based on good faith. On the other hand, if the trier of fact finds defendant's conduct to be reasonable, the good faith immunity does apply. In the latter situation, plaintiff does not lose because § 1983 claims can never be based on negligence, but either because reasonable conduct can never constitute a constitutional deprivation, or because reasonable conduct is a defense to a claim of constitutional deprivation. That a good faith defense is available should not be used to prevent plaintiffs from having the opportunity to show that a defendant's unreasonable conduct caused them a constitutional deprivation under § 1983.

151. 527 F. Supp. 234 (S.D. Ohio 1981).

152. *Id.* at 241.

153. 647 F.2d 110 (10th Cir. 1981). *See also* Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976) (en banc).

negligent action of a state official does not become a violation of the fourteenth amendment merely because the defendant is a state official. Unlike the court in *Watson*, the *Benton* court paid no attention to the powerlessness of the decedent to protect himself from the unsafe conditions created by the negligence of the defendants and affirmed a summary judgment ruling that defendants were free of section 1983 liability.

The full impact of *Parratt* on this issue remains to be seen. It is worth noticing that *Parratt* appears to have two competing impulses. To the extent that it stands for the proposition that available state tort remedies preclude a section 1983 claim for deprivation of procedural due process, it reduces the number of possible section 1983 claims. To the extent it may recognize negligence as a basis for the section 1983 action, it expands the number of potential section 1983 claims. These counter-directions permit federal judges who believe that section 1983 claims should be broadly available to deter unconstitutional conduct to expand the application of section 1983 in reliance on *Parratt*. Judges who believe that section 1983 is a plaintiff's device to convert state tort actions into federal constitutional actions can restrict section 1983 actions, also in reliance on *Parratt*. It would have been preferable if the *Parratt* Court had announced a definition of governmental abuse which could have been applied uniformly by lower federal courts.

In the particular context of law enforcement, the question of negligence as a basis for a section 1983 action becomes still more complicated when the defendant is a supervisor.[154] The holding in *Rizzo v. Goode*[155] is the major impediment to liability of supervisory officials on simple negligence. *Rizzo* was a section 1983 class action seeking equitable relief, not damages. Its reasoning has, however, influenced lower courts when they are presented with section 1983 damages actions against supervisory law enforcement officers. The plaintiffs in *Rizzo* claimed that there was a pervasive pattern of police mistreatment of minority citizens, in particular, as well as of all city residents. After extensive hearings during which evidence was presented with respect to forty incidents, the district court found that the evidence showed an unacceptably high number of cases of police abuse. The individual officers who were directly involved in the incidents were not named defendants. Rather, the plaintiffs sought to hold the police commissioner, city manager, and mayor responsible for the misconduct. Despite the absence of the individual officers, the district

154. The author has said that supervisory liability is not likely to be a hotly contested issue in litigation under the Tort Claims Act because if any employee acts negligently the governmental entity which employs him is also liable. *See supra* note 148. The principle that the governmental entity is automatically liable does not apply to § 1983 claims. There are problems with entity liability under § 1983. *See supra* text accompanying notes 178–201. It is therefore in the plaintiff's interests to have as many § 1983 claims as possible against individual defendants to assure ultimate recovery.

155. 423 U.S. 362 (1976).

court concluded that the supervisory defendants should be held responsible because of their failure to act in the face of the "statistical" pattern of misconduct. The Third Circuit Court of Appeals affirmed and the Supreme Court reversed.

The Supreme Court's primary reason for reversal was the policy that federal courts should avoid continuing intrusion of their equitable power into the daily conduct of those in charge of state or local government agency, unless there are extraordinary circumstances which justify the intrusion. The Supreme Court appeared unimpressed that the number of documented incidents showed an extraordinary pattern of misconduct which would have justified injunctive relief. Beyond that, the Court was troubled by the fact that plaintiffs had failed to show that the named defendants were directly responsible for the misconduct. The plaintiffs' theory was that defendants' failure to discipline incidents of police misconduct encouraged officers to continue their unconstitutional behavior. The incidents were therefore likely to continue, not with respect to any particular named plaintiff, but rather as to members of the class. The plaintiffs' failure to establish a direct connection between the named defendants' failure to discipline and the occurrence of the particular incidents proved fatal to their case. The Court appeared to require that the plaintiffs demonstrate "an affirmative link," between the conduct of the supervisors and the various incidents of police misconduct. The adoption of a plan or policy[156] by defendants, express or otherwise, showing their authorization or approval of such misconduct would apparently have satisfied this requirement. *Rizzo* stands for the general proposition that supervisory law enforcement officials, who have not directly participated in the conduct which deprives an individual of constitutional rights, are not liable in a section 1983 action unless the plaintiffs establish "an affirmative link."

The perplexing problem is the composition of "an affirmative link." In *Rizzo* itself, the Court considered failure to respond adequately to incidents to be insufficient to establish the required link. The lower courts

156. The idea of a plan or policy foreshadows the Supreme Court's decision in Monell v. Dep't of Social Services, 436 U.S. 658 (1978), which held that municipalities are proper defendants under a § 1983 claim so long as the constitutional deprivation is accomplished pursuant to a municipal policy or usage. Because municipalities can carry out their activities only through the acts of their employees, courts frequently premise municipal liability under § 1983 on the policies or usages of the highest municipal employee responsible for the activity in which the abuse took place. For example, if a city police chief established a policy requiring all suspects be subjected to strip and body searches irrespective of the circumstances, proof of that policy presumably would be sufficient to satisfy the "affirmative link" requirement of *Rizzo*. A person physically invaded by an individual officer without justification could successfully impose liability on the police chief individually, despite his lack of personal participation in the incident. Plaintiff would also have made out a case against the municipality because of the existence of the unconstitutional policy. *See supra* text accompanying notes 154–187.

have fleshed out the "affirmative link" requirement, and often, although not universally, have found that some form of negligence is sufficient to satisfy the *Rizzo* formulation. For example, in *McClelland v. Facteau,*[157] the Tenth Circuit addressed the issue in a case where plaintiff was stopped by a state police officer for speeding. Plaintiff refused to sign a traffic citation and the officer locked Plaintiff in the police car. The policeman than took the plaintiff to a city jail and booked him. Prior to his release, the state police officer beat the plaintiff in the presence of the city jailer. Plaintiff filed a section 1983 claim naming not only the individual officers as defendants, but also the state chief of police and the city chief of police.

The district court granted summary judgment in favor of the police chiefs because they had not personally participated in the misconduct. The court of appeals reversed in part, recognizing that the "affirmative link" requirement of *Rizzo* can be made out by failure to perform a duty if the failure causes deprivation of constitutional rights. The court noted that the Tenth Circuit had previously held that a complaint which alleged that a police chief breached his duty adequately to train or supervise personnel, and that his failure led to plaintiff's constitutional deprivation, stated a section 1983 claim.[158] In *McClelland,* however, the plaintiff could show only that an officer had violated a constitutional right on an isolated occasion. The court held that the plaintiff's evidence was insufficient to raise an issue of fact on adequacy of training. The court did not articulate a legal standard. On the issue of supervision, however, the court acknowledged the existence of a negligence standard for section 1983 claims.[159]

> We agree with those courts that have found a cause of action under section 1983 when the defendant was in a position of responsibility, knew or should have known of the misconduct, and yet failed to act

157. 610 F.2d 693 (10th Cir. 1979).

158. *See* Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974).

159. McClelland v. Facteau is not universally read as stating a negligence standard on failure to supervise. In Smith v. Hill, 510 F. Supp. 767 (D. Utah 1981), the district court relied on *McClelland* in stating that "it is questionable whether simple negligence on the part of a defendant in a section 1983 suit could ever give rise to liability thereunder." *Id.* at 772. The author suggests that the Utah court misunderstood *McClelland.* In *McClelland,* the court treated the issues of training and supervision separately. It decided that evidence of one isolated incident of misconduct was insufficient to raise the issue of failure to train. This does not imply that the standard of care is other than reasonableness in training. On the issue of supervision, the standard which the Tenth Circuit Court of Appeals stated appears to be the classic statement of the negligence standard for nonfeasance. Liability for negligence generally arises in the context of affirmative action. The defendant is deemed culpable where he has acted and his acts do not conform to the standard of a reasonably prudent man as judged against the community ideal of reasonable behavior. *See* Prosser, Law of Torts §§ 53, 54 (4th ed. 1964). The defendant is not usually held to be responsible for inaction. However, where the defendant is under some affirmative duty to act and he fails to act accordingly, he may be held responsible for his negligent omissions. He is responsible if his omission is unreasonable in light of the circumstances. Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972).

> to prevent future harm. The standard to be applied is the conduct of a reasonable person, under the circumstances, in the context of the authority of each police chief and what he knew or should have known. We find there is a genuine issue of fact whether defendants breached this duty.[160]

To establish a breach of the standard, the plaintiff must show that the supervisory defendants had adequate notice of prior misbehavior of the police officers and failed to respond. Adequate notice might be supplied by publicity about abuses of these officers. This is not inconsistent with *Rizzo,* because in *Rizzo* plaintiffs did not show that the supervisory defendants had knowledge of particular abuses by individual officers, nor did he establish a pervasive pattern of unconstitutional police conduct.

In *Withers v. Levine,*[161] the Fourth Circuit explained when negligence is sufficient to state a section 1983 claim against supervisory prison personnel in the context of a case involving a fellow-inmate's sexual assault upon plaintiff:

> [N]egligence by a state official under some circumstances may itself violate a constitutionally protected right; when it does, it is actionable under § 1983. . . .
>
> When there is present in a prison or in an identifiable portion of it, a pervasive risk of harm to all prisoners, or to an identifiable group of them, the constitutional prohibition against cruel and unusual punishment requires that prison officials exercise reasonable care to provide reasonable protection from such unreasonable risk of harm. Given the pervasive and unreasonable risk of harm, negligence by prison officials in their performance of their duty of care is a violation of the constitutional right and actionable under § 1983. The constitutional right would often remain unredressed if a higher standard of care were required.[162]

In *Wilcher v. Curley,*[163] a federal district judge held that allegations that a police commissioner knew that an officer had used excessive force on numerous occasions prior to the incident of which plaintiff complained, and that the commissioner failed to discipline the officer, thereby encouraging the officer to believe that he could use excessive force, was sufficient to defeat defendant's motion for summary judgment. The court held that section 1983 claims may be based on such negligent supervision. Furthermore, evidence of the defendant's knowledge of an officer's rep-

160. 610 F.2d at 697.
162. 615 F.2d 158 (4th Cir. 1980).
162. *Id.* at 162.
163. 519 F. Supp. 1 (D.Md. 1980).

utation for bad temper may be the premise for a section 1983 supervisory claim for negligent hiring.[164]

In all of these cases, the plaintiffs supplied the "affirmative link" requirement of *Rizzo* by evidence of a causal connection between supervisory failures and the deprivation of plaintiff's constitutional rights. It is obvious that the possibility of inconsistency exists between these decisions and *Rizzo* itself.

The Supreme Court has described *Rizzo* as though the case decided that the mere right to control, without any control or direction having been exercised, and without any failure to supervise is not enough to support section 1983 liability.[165] The difficulty with that description is that failure to exercise control in the light of known violations is precisely what may be considered "failure to supervise." Failure to supervise which causes constitutional violations is actionable under section 1983 in some jurisdictions.[166] The delicacy of the problem is illustrated by the very indelicate case of *Salinas v. Breier*,[167] in which police officers subjected plaintiffs to humiliating body searches. The court concluded that the police chief's failure to establish a clear policy governing strip and body cavity searches rendered him liable in a section 1983 action. It was precisely the supervisor's failure to exercise control over his officers which made him liable. The result in *Salinas* is hard to reconcile with the *Rizzo* dicta.

This difficulty, along with the reluctance of federal courts to permit section 1983 to be used as a substitute for a simple tort claim, has motivated some courts to reject mere negligence as the basis for a section 1983 action. In *Owens v. Haas*,[168] the Second Circuit explained its standard in the analogous context of county liability.

> The district court was correct in noting that a mere failure by the county to supervise its employees would not be sufficient to hold it liable under section 1983. *Rizzo v. Goode*. . . . However, the county

164. *See, e.g.*, Brandon v. Allen, 516 F. Supp. 1355 (W.D. Tenn. 1981) (Supervisor had no actual knowledge, but should have known, of officer's temper).

165. *See* Monell v. Dep't of Social Services, 436 U.S. 658 (1978). "By our decision in Rizzo v. Goode [citation omitted] we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability." *Id.* at 694 n.58.

166. A number of cases have held that a failure to train, supervise or discipline subordinate officers is actionable under § 1983. *See, e.g.*, Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979); Sims v. Adams, 537 F.2d 829 (5th Cir. 1976); Wright v. McMann, 460 F.2d 126 (2d Cir. 1972), *cert. denied sub nom.* McMann v. Wright, 409 U.S. 885 (1972). *Cf.* Maclin v. Paulson, 627 F.2d 83 (7th Cir. 1980) (mere acquiescence by police chief when he is on notice of constitutional violations is sufficient to trigger liability under § 1983).

167. 517 F. Supp. 1272 (E.D. Wis. 1981). *See also* Smith v. Jordan, 527 F. Supp. 167 (S.D. Ohio 1981).

168. 601 F.2d 1242 (2d Cir. 1979).

> could be held liable if the failure to supervise or the lack of a proper training program was so severe as to reach the level of "gross negligence" or "deliberate indifference" to the deprivation of the plaintiff's constitutional rights.[169]

In *Leite v. City of Providence,*[170] the court suggested that *Rizzo* demands that the supervisory official act in some grossly negligent way as a condition to imposition of section 1983 liability. The *Leite* court acknowledged, however, that "*Rizzo's* authorization or approval" standards are also satisfied when a supervisory official failed to act or acted inadequately when he had actual or imputed knowledge of a past pattern of police misconduct or knowledge of well-known incidents of police misconduct.[171]

Recently, in *Smith v. Hill*[172] a federal district court court in Utah granted the defendant county commissioners' motion to dismiss a section 1983 claim. The claim arose from an incident during which a county deputy constable entered the plaintiff's house without a warrant, demanded immediate payment of a fine, and threatened to shoot the plaintiff. The plaintiff's complaint against the commissioners alleged that the commissioners had a duty to supervise hiring of deputy constables and to insure proper training. The plaintiff alleged a breach of these duties which proximately caused a deprivation of plaintiff's civil rights. The court explained that, in its view, the essential purpose of section 1983 is to deter future constitutional violations rather than to compensate victims of past abuse. Apparently the federal district court believed that "mere" negligence is not susceptible to prophylaxis, but rather that potential liability deters only "reckless or intentional" conduct. Accordingly, the court required a showing that "defendant's conduct be reprehensible at least to the degree of gross negligence or deliberate indifference to fundamental rights before liability under section 1983 may attach."[173] The court elaborated its understanding of "gross negligence" to imply an extreme departure from the ordinary standard of care characterized by conscious indifference to or reckless disregard of the rights of others. The court also suggested a kind of sliding scale of supervisory liability: "[T]he more remote the actor is from the result, the greater must be his intent in order for him to be liable under the act."[174]

---

169. *Id.* at 1246.
170. 463 F. Supp. 585 (D.R.I. 1978).
171. *Id.* at 590.
172. 510 F. Supp. 767 (D.Utah 1981).
173. *Id.* at 774.
174. *Id.* at 775. *See also* Vaughn v. Trotter, 516 F. Supp. 886 (M.D. Tenn. 1980). *But see* Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973).

The various conceptual contentions about the standards governing supervisory liability under section 1983 seem to be misdirected. There appears to be total agreement that personal participation in the constitutional deprivation is not a requisite for supervisors to be liable under section 1983.[175] It also appears that the courts agree about when non-feasance may be the basis of section 1983 liability: when the defendant is in a position of responsibility which imposes a duty and when he has knowledge (actual or constructive) of constitutional violations of his subordinates. Under those circumstances, the supervisor may be personally liable if his inaction, i.e., his unreasonable failure to discipline or to train is causally connected to the subordinate's violation of a person's constitutional rights. This is the classic statement of negligence in non-feasance cases. To call this standard gross negligence or recklessness, as some courts have done, simply distracts from the real question, whether the interest which plaintiff alleges has been infringed is protected under the Constitution.[176] If the supervisor's non-feasance under circumstances which would ordinarily make non-feasance negligent increases the risk that plaintiff's constitutional rights have been violated, then it should be actionable under section 1983.[177]

2. *Governmental Entity Liability*

a. Tort Claims Act

If a public employee commits a tort within the scope of his duties and his conduct fits within one of the waivers of immunity contained in the New Mexico Tort Claims Act, the governmental entity (either state agency or local governmental body) which employs him is also liable. This conclusion follows logically from the structure of the Act itself. It shields both governmental entities and public employees from liability for torts except as that immunity is waived in the Act.[178] The waiver of immunities

175. Black v. Stephens, 662 F.2d 181 (3d Cir.1981); McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979); Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979); Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976).

176. To say that the distinction between negligence and gross negligence in § 1983 cases is incorrect is not to say that it does not make a difference. Depending on the particular facts of a case, it is possible that a court applying a simple negligence standard would reach different results than would a court requiring gross negligence. For example, complaints are filed against a subordinate officer. After each complaint is filed, the supervisor admonishes the officer to discontinue his behavior, but does nothing else. The fourth occasion of misconduct gives rise to a § 1983 action. Other methods of discipline are available, including discharge, suspension, transfer to other duties, and retraining. On these facts, a court which adopts a negligence standard would permit a finding of supervisory liability. Presumably a "gross negligence" court would require a few more instances of misconduct to support supervisory liability.

177. *See* Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976) (Swygert, J., dissenting).

178. N.M. Stat. Ann. § 41-4-4(A) (Repl. Pamp. 1982).

applies to certain acts of public employees, but the immunity waived is that of both the public employee and the governmental entity for which he works.[179] The Tort Claims Act itself provides that: "A governmental entity shall pay any settlement or any final judgment entered against a public employee."[180] The Act includes both local public bodies and agencies and instrumentalities of the state.

b. Local Governmental Entities

The issue of liability of governmental entities is not so clear-cut under section 1983.

For local governmental entities, there is a seminal case. In *Monell v. Department of Social Services*,[181] the United States Supreme Court held that local governing bodies can be sued directly under section 1983 where the allegedly unconstitutional action executes a policy or regulation officially adopted by the body's officials. An unconstitutional "custom or usage" not formally adopted by the entity's official decision-making mechanisms might also be the basis for governmental liability if executed by an official whose action may be considered that of the entity. On the other hand, the Supreme Court rejected governmental liability on the basis of a *respondeat superior* theory:

> [T]he language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.[182]

The difficult cases of governmental entity liability often present facts which fall somewhere between formal policies and customs and mere agency relationships. Frequently they also involve issues of supervisory liability. In *Black v. Stephens*,[183] a jury found that a police officer had used excessive force against the plaintiff[184] and that the chief of police

179. See N.M. Stat. Ann. § 41-4-3(B), (C), (G) (Repl. Pamp. 1982), for definitions of governmental entities.

180. N.M. Stat. Ann. § 41-4-4(D) (Repl. Pamp. 1982). Interesting questions might arise because of uncertainty about whether a particular organization is a governmental entity. These issues are beyond the scope of this article.

181. 436 U.S. 658 (1978).

182. *Id.* at 691. The Court reasserted this holding in 1981 in Polk County v. Dodson, ___ U.S. ___, 102 S.Ct. 445 (1981).

183. 662 F.2d 181 (3d Cir. 1981).

184. The standard for excessive force in the case appeared to be force which "shocks the conscience." 662 F.2d at 188.

had promulgated a regulation which proximately caused the police officer to file unwarranted charges against the plaintiff. The regulation in question was one which provided that if an officer made an arrest, no investigation would be made of police misconduct until the arrest charges were finally adjudicated. Plaintiff complained to the police chief about the officer's conduct. The police chief told the officer about the complaint and thereafter the officer filed three additional charges against the plaintiff. Two of the charges were subsequently dropped and the plaintiff was found not guilty of the third charge. The court of appeals concluded that it was reasonable for the jury to infer that the three additional charges were filed in an effort to delay any disciplinary hearing on the incident involving excessive force. The jury also found a connection between the police chief's "policy" of promoting excessive force and the officer's misconduct. There was evidence that a citizen's complaint was never made a part of an officer's permanent record. The police chief testified that the officer probably would not have been promoted to detective if he had been the type of officer who backed down. While characterizing the evidence as "not overwhelming" on this issue, the court concluded that the evidence was sufficient to make out both a policy of encouraging excessive force and a connection between that policy and the officer's use of excessive force on plaintiff.

Turning to the question of municipal liability, the court rejected the city's contention that it was held liable merely because it employed an employee who acted unconstitutionally. Instead, the court found that the unconstitutional policy or custom is executed by one "whose edicts or acts may fairly be said to represent official policy."[185] The chief of police represents city policy because he is the final authority in charge of the police force in the city. He is a "member of the Mayor's cabinet, prepares and manages the budget and establishes policies and procedures for the entire police department."[186] The court noted that a sufficient basis for municipal liability exists under section 1983 when an official whose actions may be considered to be those of the city violates the Constitution.[187]

In *Avery v. County of Burke*,[188] the Fourth Circuit Court of Appeals described the contours of governmental liability under section 1983. Plaintiff, a fifteen-year-old, brought the action against a county and several individuals alleging that the individuals wrongfully caused her to be

185. *Id.* at 191.

186. *Id.*

187. *Cf.* McLaughlin v. City of La Grange, 662 F.2d 1385 (11th Cir. 1981). In *McLaughlin*, after the plaintiffs filed excessive force complaints with the chief of police, he investigated, notified the officer who had violated rules and then fired the officer. The police chief's and city's motion for summary judgment was granted and affirmed.

188. 660 F.2d 111 (4th Cir. 1981).

sterilized after informing her she had sickle cell trait. She contended that she was wrongfully sterilized because she did not have the trait and because sterilization is not medically appropriate even when the trait is properly diagnosed. The district court granted the county's motion for summary judgment, finding insufficient evidence to establish a policy, custom, pattern, or tacit authorization sufficient to impose liability on the county under section 1983. In reversing the summary judgment, the court of appeals said:

> The county . . . may be liable under § 1983 if their policies and customs actually caused Avery's injuries. [citation omitted]. Avery need not prove, however, that members of the boards personally participated in or expressly authorized, her sterilization. [citation omitted]. Official policy may be established by omissions of supervisory officials as well as from their affirmative acts. . . . Thus, the conduct of the boards may be actionable if their failure to promulgate policies and regulations rose to the level of deliberate indifference to Avery's right of procreation or constituted tacit authorization of her sterilization.[189]

From these cases, it appears that the lower federal courts are developing liability standards for local governmental entities similar to those announced for supervisory officials.[190] It is clear that parallel standards are desirable because a governmental entity can only act through the acts of its employees. The entity can deprive an individual of constitutionally secured rights only through the conduct of natural persons. If there is an "affirmative link" between a governmental employee's conduct and the deprivation, and if that person, because of his position, can be considered to act as the entity, then both the supervisor and the governmental entity are liable under section 1983.[191]

c. The State

The section 1983 liability of the state as an entity is hotly contested.[192]

189. *Id.* at 114.

190. *See supra* text accompanying notes 154–177. As with the issue of supervisory liability, the allegation of a single incident of unconstitutional conduct by a municipal employee is not sufficient for municipal liability, but a pattern of misconduct will raise an inference of municipal liability. *See, e.g.*, Powe v. City of Chicago, 664 F.2d 639 (7th Cir. 1981). Although standards for municipal and supervisory liability are parallel, it is clear that the defenses are not. A city does not share in the qualified immunity that its officers have. Owen v. City of Independence, 445 U.S. 622 (1980).

191. *See, e.g.*, McGhee v. Draper, 639 F.2d 639 (10th Cir. 1981); Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980); Schneider v. City of Atlanta, 628 F.2d 915 (5th Cir. 1980).

192. If a § 1983 claim against a state is litigated in federal court, the eleventh amendment is the limiting factor because it deprives federal courts of jurisdiction over actions where states are defendants. The eleventh amendment and federal judicial jurisdiction is beyond the scope of this article. Excellent surveys of the operation of the eleventh amendment are Field, *Eleventh Amendment and Other Sovereign Immunity Doctrines*, 126 U. Pa. L. Rev. 515–549,1203–1280 (1978), and Thornton, *Eleventh Amendment: An Endangered Species*, 55 Ind. L.J. 293 (1979–80).

In *Quern v. Jordan*,[193] Justice Rehnquist explained for the majority of the Court that section 1983 is no exception to the immunity of states in federal court afforded by the eleventh amendment of the United States Constitution. The majority did not address the question whether a state is a "person" within the meaning of section 1983. The issue is significant because if the state is not a proper defendant within the meaning of section 1983, then, even if a state has otherwise waived its eleventh amendment immunity, it could not be sued under section 1983 in federal court. Further, if that interpretation of section 1983 prevails, then a state could not be a defendant in a section 1983 action in state court even though the eleventh amendment has no applicability to state judicial jurisdiction.

Justice Brennan, in his dissent in *Quern*, saw the question to be whether the word "person" as used in section 1983 was intended to cover states. According to the *Quern* dissent, but not according to the majority, the holding of the case is that a state is not a "person" within the meaning of section 1983. Because the holding of *Quern* is so murky, it is not surprising to find disagreement on the point in the lower federal courts and state courts. Courts in Alaska[194] and Washington[195] have interpreted section 1983 to exclude states as proper defendants. Federal district judges in Montana[196] and Nevada[197] have concluded that *Quern* requires dismissal of section 1983 claims against the state not only because of the eleventh amendment, but also because states are not persons under section 1983.

There is equal authority for the proposition that states and their departments and agencies are "persons" and can be defendants in section 1983 actions. In *Marrapese v. Rhode Island*,[198] the court accepted the interpretation of section 1983 which gives greatest latitude to its broad remedial purposes. The court concluded that states are "persons," but because of the eleventh amendment, each state must consent to the imposition of section 1983 liability in federal court: "This interpretation allows victims of unconstitutional activity the largest possibility for redress, while exacting little cost in terms of federalism."[199] Other federal district courts have reached the same conclusion.[200] The legislative history of section 1983, so exhaustively recounted in *Monell*, appears to be in

193. 440 U.S. 332 (1979).

194. Alaska v. Green, 633 P.2d 1381 (Alaska 1981). In DeVargas v. New Mexico, 97 N.M. 450, 640 P.2d 1327 (Ct. App. 1981), the New Mexico Court of Appeals said in dicta that: "The State and its Department of Corrections are not persons within the meaning of § 1983." *Id.* at 452, 640 P.2d at 1329.

195. Edgar v. Washington, 92 Wash. 2d 217, 595 P.2d 534 (1979).

196. Holladay v. Montana, 506 F. Supp. 1317 (D.Mont. 1981).

197. O'Connor v. Nevada, 507 F. Supp. 546 (D.Nev. 1981).

198. 500 F. Supp. 1207 (D.R.I. 1980).

199. *Id.* at 1212.

200. *See, e.g.*, Harris v. Bd. of Regents, 528 F. Supp. 987 (D.Ariz. 1981); Irwin v. Calhoun, 522 F. Supp. 576 (D.Mass. 1981); Morrow v. Sudler, 502 F. Supp. 1200 (D.Colo. 1980) (citing for the proposition Brogan v. Wiggins School District, 588 F.2d 409 (10th Cir. 1978)).

harmony with the *Marrapese* interpretation. "In both Houses, statements of the supporters of § 1 [predecessor to 42 U.S.C. § 1983] corroborated that Congress, in enacting section 1, intended to give a broad remedy for violations of federally protected civil rights."[201] Nevertheless, consistency has not been the hallmark of the United States Supreme Court section 1983 decisions, so it is difficult to predict how the Court will treat this issue when it chooses to address it.

---

201. Monell v. Dep't of Social Services, 436 U.S. at 685. The Court continued:

> Representative Bingham, the author of § 1 of the Fourteenth Amendment, for example, declared the bill's purpose to be "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guarantied [sic] to him by the Constitution." Globe App. 81. He continued:
>
> "The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws. . . . [And] the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. . . . They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. . . . Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in the States and by States, or combinations of persons?" *Id.*, at 85.
>
> Representative Perry . . . also stated:
>
> "Now, by our action on this bill we have asserted as fully as we can assert the mischief intended to be remedied. We have asserted as clearly as we can assert our belief that it is the duty of Congress to redress that mischief. We have also asserted as fully as we can assert the constitutional right of Congress to legislate." Globe 800.
>
> . . .
>
> Other supporters were quite clear that § 1 of the Act extended a remedy not only where a State had passed an unconstitutional statute, but also where officers of the State were deliberately indifferent to the rights of black citizens:
>
> . . .
>
> Importantly for our inquiry, even the opponents of § 1 agreed that it was constitutional and, further, that it swept very broadly. Thus, Senator Thurman, who gave the most exhaustive critique of § 1, said:
>
> "This section relates wholly to civil suits. . . . Its whole effect is to give to the Federal Judiciary that which now does not belong to it—*a jurisdiction that may be constitutionally conferred upon it, I grant,* but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. . . .
>
> . . .
>
> "*[T]here is no limitation whatsoever upon the terms that are employed [in the bill], and they are as comprehensive as can be used.*" Globe App. 216–217 (emphasis added).

436 U.S. at 685–686 n.45 (1978).

3. Statute of Limitations

The New Mexico Tort Claims Act clearly spells out the limitations period for torts committed by public employees within the scope of their employment:

> Actions against a governmental entity or a public employee for torts shall be forever barred unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death, except that a minor under the full age of seven years shall have until his ninth birthday in which to file. . . .[202]

This has caused relatively little difficulty when the actionable conduct is a tort for which the state has waived immunity under The Act. Limitations questions are seriously contended when the conduct is a constitutional deprivation, however.[203] Two cases illustrate the controversy. In *Gunther v. Miller,*[204] the plaintiff brought a section 1983 action against a city, its chief of police, and one of its police officers. The plaintiff claimed that the police used excessive force in her arrest. The defendants argued that the two-year statute of limitations contained in the Tort Claims Act controlled. Plaintiff asserted that either a three-year period for personal injuries or a four-year period for miscellaneous claims was appropriate. The court explained that in the absence of a federal statute of limitations governing section 1983 claims, the statute of limitations for the most clearly analogous state cause of action should be applied. The court concluded that the general limitations period established by New Mexico law should apply. It reasoned that a section 1983 claim is not analogous to a cause of action brought under a state tort claims act, "because tort claims acts are based on 'state concepts of sovereign immunity alien to the purpose to be served by the Civil Rights Act.' "[205]

The New Mexico state courts do not agree. In *DeVargas v. New Mexico,*[206] in a brief opinion accompanying an order to quash a petition for certiorari, the New Mexico Supreme Court said, "under New Mexico law, the most closely analogous state cause of action [to section 1983] is provided for

202. N.M. Stat. Ann. § 41-4-15(A) (Repl. Pamp. 1982).

203. Arguably the two-year period in the Act applies only to torts and not to constitutional deprivations. The provision addresses only torts. Elsewhere the Act draws a distinction between torts and constitutional violations. *See* N.M. Stat. Ann. §§ 41-4-4(B), 41-4-12 (Repl. Pamp. 1982). If the legislature had intended that the two-year period apply to both torts and constitutional violations, it would expressly have said so.

204. 498 F. Supp. 882 (D.N.M. 1980).

205. *Id.* at 883.

206. 97 N.M. 563, 642 P.2d 166 (1982).

by the New Mexico Tort Claims Act. . . ."[207] The court of appeals opinion in *DeVargas*[208] gave a more elaborate description of the analogy:

> Section 1983 provides liability for the deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States. Section 41-4-12 . . . provides for liability (by a waiver of immunity) for a deprivation of any rights, privileges or immunities secured by the court and laws of the United States. Liability under § 1983 and 41-4-12 . . . is consistent, not inconsistent.[209]

Section 1983 does not contain a statute of limitations, but in 42 U.S.C. § 1988, Congress instructs federal courts to refer to state statutes when federal law provides no rule of decision.[210] Federal courts may disregard an otherwise applicable state rule of law only if the state law is inconsistent with the Constitution and federal law.[211] In *Board of Regents v. Tomanio,*[212] the United States Supreme Court specifically held that a New York statute of limitations and its associated tolling rules applied to a section 1983 action saying "the controlling period would ordinarily be the most appropriate one provided by state law."[213]

The overarching question, however, is which state statute of limitations is most appropriately applied to section 1983 actions.[214] The determination of that question is a matter of federal law.[215] Different courts have reached disparate conclusions largely because of the great variety of limitations patterns found from state to state. Generalizations are therefore perilous. Nevertheless, some patterns seem to emerge. In states which have a limitation period for actions "created by statute," the courts consider that limitation period appropriate for section 1983, a statutory liability ac-

---

207. *Id.* at 564, 642 P.2d at 167.

208. 97 N.M. 450, 640 P.2d 1327 (Ct. App. 1981).

209. *Id.* at 454, 640 P.2d at 1331.

210. 42 U.S.C. § 1988 (1976), provides in part:

> The jurisdiction . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States. . . ; but in all cases where they . . . are deficient in the provisions necessary to furnish suitable remedies . . . the common law, as modified and changed by the constitution and statutes of the State where in the court having jurisdiction . . . is held, so far as the same is not inconsistent with the Constitution and laws of the United States. . . .

211. Robertson v. Wegmann, 436 U.S. 584 (1978); Occidental Life Insurance Co. v. E.E.O.C., 432 U.S. 355 (1977).

212. 446 U.S. 478 (1980).

213. *Id.* at 485 (quoting Johnson v. Ry. Express Agency, Inc., 421 U.S. 454 (1975)).

214. In New Mexico there are three possibilities. N.M. Stat. Ann. § 41-4-15 (Repl. Pamp. 1982) (2 years under the Tort Claims Act); N.M. Stat. Ann. § 37-1-8 (1978) (3 years for injury to the person); N.M. Stat. Ann. § 37-1-4 (1978) (4 years for actions not otherwise provided for).

215. U.A.W. v. Hoosier Cardinal Corp., 383 U.S. 696 (1966); *see also* Pauk v. Bd. of Trustees, 654 F.2d 856 (2d Cir. 1981).

tion.[216] The Second Circuit specifically rejected a shorter limitations period contained in a statute governing municipal and municipal employer liability, partly because the shorter period would not be consistent with the broad remedial purposes of section 1983.[217] The Ninth Circuit has consistently characterized section 1983 claims as actions created by statute, but was unable to use that principle in *Rose v. Rinaldi*,[218] a case arising in Washington which had no such statutory period. The *Rinaldi* court examined Washington's other statutes of limitations and selected the statute governing injury to the person, a three-year statute. The court said that "in section 1983 actions the United States has an interest in a limitations period 'sufficiently generous . . . to preserve the remedial spirit of federal civil rights actions.' "[219]

In *Beard v. Robinson*,[220] the Seventh Circuit explained its choice of a period applying to causes of action created by statute:

> We believe our choice . . . is compelled by the fundamental differences between a civil rights action and a common law tort. The Civil Rights Acts do not create "a body of general federal tort law." *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976). Rather, they "creat[e] rights and impos[e] obligations different from any which would exist at common law in the absence of statute. A given state of facts may of course give rise to a cause of action in common-law tort as well as to a cause of action under Section 1983, but the elements of the two are not the same. The elements of an action under Section 1983 are (1) the denial under color of state law (2) of a right secured by the Constitution and laws of the United States. Neither of these elements would be required to make out a cause of action in common-law tort; both might be present without creating common-law tort liability." *Smith v. Cremins*, 308 F.2d 187, 190 (9th Cir. 1962).[221]

In *Schorle v. City of Greenhills*,[222] the court rejected a one-year tort limitation in favor of a four-year period applicable to injuries to rights of plaintiff not arising on contract or out of tort. The court reasoned that

---

216. *See, e.g.*, Pauk v. Bd. of Trustees, 654 F.2d 856 (2d Cir. 1981); Berry v. Battey, 666 F.2d 1183 (8th Cir. 1981); Bratton v. Bethlehem Steel Corp., 649 F.2d 658 (9th Cir. 1980); Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977) *cert. denied sub nom.* Mitchell v. Beard. 438 U.S. 907 (1978); Ganther v. Bd. of Regents, 127 Ariz. 57, 617 P.2d 1173 (Ct. App. 1980).

217. Pauk v. Bd. of Trustees, 654 F.2d 856, 862 (2d Cir. 1981); *see also* Childers v. Indep. School Dist. No. 1, 676 F.2d 1338 (10th Cir. 1982).

218. 654 F.2d 546 (9th Cir. 1981).

219. *Id.* at 547 (quoting Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977)).

220. 563 F.2d 331 (7th Cir. 1977) *cert. denied sub nom.*, Mitchell v. Beard, 438 U.S. 907 (1978).

221. *Id.* at 336–37.

222. 524 F. Supp. 821 (S.D. Ohio 1981).

a well-pleaded cause of action under section 1983 always states a cause of action broader than one for a simple common law tort.

In *Kosikowski v. Bourne*,[223] however, the Ninth Circuit held that the proper limitations period controlling that case was the two-year limitation contained in the Oregon Tort Claims Act rather than the two-year period in the Oregon general torts limitation statute or the six-year statute of limitations for causes of action created by statute. The court felt compelled to so hold because of specific language in the Oregon Tort Claims Act.

> In 1977, the Oregon Legislature again amended Or. Rev. Stat. § 30.265(1), changing the last sentence of the subsection to provide that "[a]s used in *ORS 30.260 to 30.300*, 'tort' includes any violation of 42 U.S.C. section 1983." (Emphasis added.) By applying the provisions of Or. Rev. Stat. § 30.265 to 30.300 to § 1983 actions, the 1977 amendments made applicable the Or. Rev. Stat. § 30.275(3) two-year statute of limitations to § 1983 actions. This was not inadvertent. The legislative history of the 1977 amendment demonstrates that the Oregon Legislature intended to amend Or. Rev. Stat. § 30.265(1) to insure that the two-year statute of limitations applied to § 1983 actions. *See* Minutes of House Committee on Judiciary, May 24, 1977, 59th Oregon Legislative Assembly 4 (1977).
>
> This precise expression of the intent of the Oregon Legislature makes unnecessary a resort to a characterization of appellants' cause of action in the manner employed by this court in *Clark v. Musick*, 623 F.2d 89 (9th Cir. 1980). Such characterization serves no purpose other than to provide guidance in the selection of the applicable state statute. When the state has expressly made that selection the federal courts should accept it unless to do so would frustrate the purposes served by the federal law upon which the plaintiff's claims rest.[224]

---

223. 659 F.2d 105 (9th Cir. 1981).

224. *Id.* at 107. The extent to which a federal court must defer to a state's legislative designation of a period of limitations for a federal claim appears to be unsettled. In Johnson v. Ry. Express Agency, 421 U.S. 454 (1975), a Tennessee statute designating a one-year limitation period for actions brought under the federal civil rights statutes was found to apply to a claim brought under 42 U.S.C. § 1981 (1976). The Supreme Court's grant of the petition for certiorari, however, was limited, and did not include the question of whether the district court had selected the state period of limitations most appropriate for a § 1981 claim. Indeed, the Court made clear that it had not reached the question of whether a state's legislative designation of a period for a federal claim binds a federal court to conclude that the designated period is the most appropriate period.

> Our limited grant of certiorari foreclosed our considering whether some other Tennessee statute, such as Tenn. Code Ann. § 28-309 (1955) (six years for an action on a contract) or § 28-310 (1955) (10 years on an action not otherwise provided for), might be the appropriate one. We also have no occasion to consider whether Tennessee's express application of the one-year limitation period to federal civil rights actions is an impermissible discrimination against the federal cause of action [citation omitted] or whether the enactment of the limitation period after the cause of action accrued [citation omitted] did not touch the pre-existing federal claim.

Id. at 462 n.7.

Except when a state statute specifically provides a civil rights limitation, the choice of the most appropriate period of limitations for section 1983 actions appears, then, to be influenced by three considerations. First, to the extent possible, the courts try to achieve uniformity as to the period within the state.[225] A section 1983 police misconduct case ought not to be governed by a different period of limitations than a case involving termination of public employment without an adequate hearing. This explains the preference for a period of limitations set out in a general provision, such as those which apply to causes of action created by statute, rather than a more specifically enumerated period available in a state code. Second, courts consider that the broad remedial purposes of section 1983 should not be undermined by the choice of the period. This consideration does seem to influence courts to choose a longer period where that is plausible. Finally, most courts have noted that a constitutional violation is distinct from a tort. Therefore, the statute of limitations applicable to torts is not necessarily the most appropriate limitation for section 1983 actions, which, of course, redress constitutional violations and not mere torts.

Application of these principles should result in rejection of the two-year period under the Tort Claims Act period as the most appropriate limit for section 1983 actions in New Mexico. The only large group of cases governed by the Tort Claims Act which may also present section 1983 claims are claims against law enforcement officers.[226] One can imagine a whole array of section 1983 claims for which there are simply no analogies under the Tort Claims Act. For those claims the courts would have to consider other statutes of limitations, and uniformity would be disserved. Both of the other statutes of limitations which are plausibly

---

More recently, in the context of a claim under § 301 of the Labor Management Relations Act, 29 U.S.C. § 301 (1976), the United States Supreme Court said:

> "[T]he timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." [quoting Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 704–705 (1966)]. Our present task is to determine which limitations period is "the most appropriate one provided by state law." [Citation omitted]. This depends upon an examination of the nature of the federal claim and the federal policies involved.

United Parcel Serv. Inc. v. Mitchell, 451 U.S. 56, 60–61 (1981).

But in Spiegel v. School Dist. No. 1, 600 F.2d 264 (10th Cir. 1979), a § 1983 case, the court approved the trial court's application of a Wyoming statute expressly providing a two-year period for all actions upon a liability created by a federal statute, without analyzing whether another period might be more appropriate in light of the federal policies involved in the claim or discussing the extent of deference owed to a state's express legislative designation of the period for a federal claim.

225. The § 1983 limitation period, of course, is not uniform nationally. Because § 1988 directs federal courts to apply state law where federal law is deficient, national uniformity would be an impossibility.

226. N.M. Stat. Ann. § 41-4-12 (Repl. Pamp. 1982). This waiver of immunity expressly covers constitutional violations as well as torts. The Tort Claims Act period of limitations by its own terms applies only to torts.

applicable to section 1983 actions provide longer periods than does the Tort Claims Act.[227] Therefore, choice of the Tort Claims Act limitations appears inconsistent with the goals of section 1983, particularly because the legislative purpose expressed in the Tort Claims Act is to limit governmental liability.[228] Further, in *Wells v. County of Valencia*,[229] the New Mexico Supreme Court recognized the distinction between a constitutional violation and a tort. Indeed, the court pointed out the legislative distinctions drawn between them in the Tort Claims Act itself.[230] Acceptance of the Tort Claims Act limitations period as the one most analogous to section 1983 would blur the distinction between torts and constitutional violations and would be inconsistent with *Wells* as well.

IV. CONCLUSION

One theme persists throughout the inquiry into the impact of state tort law on section 1983 actions. It also appears in the overlap and coexistence of section 1983 claims and New Mexico tort claims. Constitutional tort claims and state tort claims are different from one another even though the same conduct may give rise to both kinds of claims.

The distinction between the claims flows ineluctably from the different interests which they protect. Section 1983 provides a remedy for an individual who has been abused by his state or local government acting through its officials. The precise goal of the Civil Rights Act is to protect the individual from his government.

State tort law, on the other hand, is designed primarily to shift the loss of an injury to the person whose conduct causes the harm. Abusiveness is not the standard used for shifting the loss. Conduct which departs from a community standard of reasonableness is sufficient. If the person who causes the harm is a governmental employee, the interest in protecting both the process of governing and public treasuries competes with the loss shifting interest. In New Mexico, the balance between these interests has been struck in favor of the government. Except as provided in the waivers, the Tort Claims Act protects the government from liability to individuals. Obviously, then, the thrust of state tort law, with its immunity doctrines, is in direct opposition to the purposes of section 1983.

To say that there is a difference between constitutional torts and state torts is not to deny that courts have decided state tort law has impact on

227. *See supra* note 214.

228. The whole structure of The Act is a limitation. It confers blanket immunity, and then makes exceptions from the blanket. There is a limitation on liability even where immunity is waived.

229. ___ N.M. ___, 644 P.2d 517 (1982).

230. *Id.* at ___, 644 P.2d at 520.

section 1983 claims in a variety of ways. This is true largely because of the lack of detail in the federal law. For example, section 1983 is silent on defenses. It would have been possible to conclude, as a matter of statutory construction, that the silence of Congress was purposive and that no defenses were to be recognized to deprivations of constitutional rights. Instead the Supreme Court, in *Scheuer v. Rhodes*,[231] chose to examine the meaning of section 1983 against a general background of tort law and concluded that members of the executive branch of government who acted in good faith were not liable even though their conduct results in a constitutional deprivation. Section 1988 of the Civil Rights Act specifically addresses the problem of deficiency in section 1983, and requires federal courts to look to state law for rules of decision provided such state law is not inconsistent with the purposes of the federal law.

Given this pre-existing pattern of looking to state law to fill in the silence of the federal civil rights act contained in section 1983, it is not surprising that courts have looked to state tort law for guidance on the most fundamental question—the very existence of a constitutional claim. Surely *Ingraham v. Wright*,[232] and *Parratt v. Taylor*,[233] point in that direction. But to the extent that they suggest that the existence of a state tort remedy precludes a section 1983 action, they are misguided. A careful inquiry must be made into the nature of the governmental action. If the action deprives an individual of an incorporated right, or is irrational and arbitrary, or is likely to unjustifiably intrude into an individual's personal integrity or property rights through a misuse of power, a section 1983 claim is stated. With apologies to *Monroe v. Pape*,[234] if there is a state tort remedy available, it is supplementary to the federal remedy. It should not supplant it. If the governmental action is not abusive in the sense stated above, then no section 1983 claim is stated. If state tort law provides redress for the conduct of a governmental employee which causes a loss, the injured individual's interest in shifting his loss will be served. If state immunity doctrine prevents the loss from being shifted, the interest in protecting governing and governments will be served. But in no event should a section 1983 claim be available just because no state tort remedy is available to redress an individual's loss if there is no constitutional deprivation. With respect to the existence of claims, section 1983 and state tort law should operate fully in their respective spheres, thereby best serving the interests they were designed to promote. Only by being con-

231. 416 U.S. 232 (1974).
232. 430 U.S. 651 (1977). *See supra* notes 69–104 and accompanying text.
233. 451 U.S. 527 (1981). *See supra* notes 70–104 and accompanying text.
234. 365 U.S. 167 (1961). *See supra* notes 10–12 and accompanying text.

sistently mindful of the difference between constitutional deprivations and ordinary torts can courts do service to both the protection of the individual mandated by the federal constitution and implemented through section 1983 and the protection of state and local governments reflected in state tort law and immunity doctrines.