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DEPRIVED WITHOUT DUE PROCESS: THE FOURTEENTH AMENDMENT AND ABUSE OF POWER

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The fourteenth amendment forbids "any state" to "deprive any person of life, liberty, or property, without due process of law." Shortly after the amendment was adopted, Congress enacted the Civil Rights Act of 1871, part of which is now 42 U.S.C. § 1983, giving a civil action for redress to any person deprived under color of state law of a right secured by the Constitution or by federal law. This cause of action is enforceable either in state or federal court.¹

Because the scope of section 1983 was restrictively construed,² the cause of action was little utilized for almost a century. Then, in 1960, the Supreme Court held, in *Monroe v. Pape*,³ that section 1983 permitted a damage action against police officers for breaking into a private person's home, beating him and his wife and children, and illegally holding him for ten hours before releasing him and dropping vague charges against him. In *Monroe* the court said, "section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."⁴ In the twenty-five years since then, section 1983 has been frequently invoked; in 1984, for example, more than 20,000 cases using section 1983 as a basis for relief were filed in federal district court, in excess of ten percent of all cases filed.⁵ The

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1. 28 U.S.C. § 1343 (1982).

2. See *Carter v. Greenhow*, 114 U.S. 317 (1884); *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873). The history of the early construction and later reinterpretation of § 1983 is examined in Note, *Section 1983 and the Independent Contractor*, 74 Geo. L.J. 457 (1985).

3. 365 U.S. 167 (1961); see *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978) (expanding § 1983 liability to municipalities and other local government units).

4. 365 U.S. at 187.

5. The ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE lists 10,738 civil rights suits, excluding prisoner petitions; 822 actions by federal prisoners; and 18,034 by state prisoners. Although these figures include suits filed under other civil rights acts, if my docket is typical, a majority invoked Section 1983. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS at 143, 145-47 (1984). But see Eisenberg and Schwartz, *The Realities of Constitutional Tort Litigation*, 13 CORNELL L.F. 7 (1986) in which the authors state that the number of constitutional tort cases is much smaller.

complaints asserted have ranged from the negligent infliction of relatively trivial injuries to the deliberate abuse of authority by state officials inflicting grievous harm and even loss of life.

The Supreme Court did not intend, and the lower federal courts did not understand, that by virtue of the decision in *Monroe v. Pape* the fourteenth amendment would be held violated by every tortious act committed by a state agent. Under varying circumstances, and for different reasons, the courts have continued to hold that the state or its agents might injure persons in some ways, even in ways subject to legal redress, that do not deprive the injured person of life, liberty, or property without due process of law. The courts have had difficulty, however, in drawing a line between tortious conduct and a constitutional violation.

For more than twenty-five years the Supreme Court has attempted to define the scope of section 1983 by focusing on the nature of the "life" or "liberty" interests protected by the Constitution, differentiating those from lesser, unprotected injuries, and by looking to what is and what is not required to satisfy due process. More recently the Court has also considered whether the injury was inflicted intentionally or negligently.

This term the Supreme Court has taken a new approach, suggested but never adopted in the past. The Court is now focusing on the term "deprive" as used in the fourteenth amendment to determine whether the wrongful action was an abuse of governmental power, as distinguished from an isolated, albeit wrongful, act by a state official. Although three of the 1986 cases are damage suits by state prisoners and the fourth is by a pretrial detainee, the decisions are broad in impact, extending beyond the prison-inmate context and reshaping the Court's interpretation of section 1983 and perhaps of the fourteenth amendment itself. Taken together, these decisions limit federal civil rights actions against the state and its officers to deliberate abuses of state power in contrast to episodic or occasional action by state officials in violation of state law. This paper attempts to interpret these decisions and to examine their significance.⁶

I. THE 1986 DECISIONS

In February, in *Moran v. Burbine*,⁷ the Court considered whether a prisoner's substantive due process rights had been violated when the police intentionally gave a lawyer false information about whether her client would be questioned and failed to inform the prisoner of his lawyer's efforts to reach him. It held that the conduct of the police did not "deprive [the prisoner] of the fundamental fairness guaranteed by the Due Process

6. This paper presents only reflections upon reading the decisions. They do not forecast a decision in any case that might come before me.

7. 106 S. Ct. 1135 (1986).

Clause of the Fourteenth Amendment,"⁸ saying, "on these facts, the challenged conduct falls short of the kind of misbehavior that so shocks the sensibility of civilized society as to warrant a federal intrusion into the criminal processes of the States."⁹ The Court added, however, "We do not question that on facts more egregious than those presented here police deception might rise to a level of due process violation."¹⁰

The next case decided, *Daniels v. Williams*,¹¹ was a suit to recover damages for injuries suffered when an inmate in a Richmond, Virginia, jail slipped on a pillow negligently left on a stairway by a sheriff's deputy. Daniels asserted that the deputy's negligence deprived him of his liberty. He sought to avoid the effect of a 1984 Supreme Court decision, *Hudson v. Palmer*,¹² which held a postdeprivation tort action in state court adequate to satisfy the requirements of procedural due process for deprivation of property, contending that, unlike the plaintiff in *Hudson*, he had no adequate state remedy because the deputy might assert the defense of sovereign immunity. Writing for six justices in *Daniels*, Justice Rehnquist borrowed from Justice Powell's concurring opinion in *Parratt v. Taylor*,¹³ which concluded that mere negligence could not work "a deprivation in the constitutional sense,"¹⁴ because in Justice Powell's view, the federal courts should not be open to lawsuits if there had been no "affirmative abuse of power."¹⁵ "[T]he Due Process Clause," the *Daniels* opinion states:

like its forbear in the Magna Carta, . . . was "intended to secure the individual from the arbitrary exercise of the powers of government." By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions.¹⁶

The Constitution does not "purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."¹⁷

In *Davidson v. Cannon*,¹⁸ decided the same day as *Daniels*, the Court considered a claim by a New Jersey state prisoner who had been threatened

8. *Id.* at 1147.

9. *Id.* at 1148 (emphasis added).

10. *Id.* at 1147.

11. 106 S. Ct. 662 (1986).

12. 468 U.S. 517 (1984).

13. 451 U.S. 527 (1984).

14. *Parratt v. Taylor*, 451 U.S. 527, 548 (1984) (Powell, J., concurring in the result).

15. *Id.* at 549, cited by Justice Rehnquist in *Daniels v. Williams*, 106 S. Ct. 662, 664-65 (1986).

16. 106 S. Ct. at 665 (citations omitted).

17. *Id.* at 666.

18. 106 S. Ct. 668 (1986).

by a fellow inmate. Davidson reported the threat to a prison official who failed to take precautions against the possible attack. Two days later, the inmate attacked Davidson and seriously injured him. Davidson sought damages for this negligent failure to protect his liberty interest in bodily security. The Court held that "where a government official is merely negligent in causing [an] injury, no procedure for compensation is constitutionally required."¹⁹ Such a lack of care "does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent."²⁰ The Court then added: "As we held in *Daniels*, the protections of the Due Process Clause, *whether procedural or substantive*, are just not triggered by lack of due care by prison officials."²¹

Finally, in *Whitley v. Albers*,²² the Court considered the claims of a prisoner who, while trying to assist prison officials during a prison riot, was shot by the officials in the mistaken belief that he had been participating in the disorder. The prisoner contended that he had been the victim of cruel and unusual punishment in violation of the eighth amendment, and, independently, that his substantive due process rights had been violated. Writing for five members of the Court, Justice O'Connor held that a prisoner who invokes the eighth amendment to challenge actions taken to maintain prison security must "allege and prove the unnecessary and wanton infliction of pain."²³ The Court quickly dismissed his due process argument, holding that "in these circumstances the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause."²⁴

II. EFFORTS TO DISTINGUISH TORT VIOLATIONS FROM CONSTITUTIONAL VIOLATIONS

The Court has stated that broadening the scope of the due process clause to encompass any and all common law tort offenses by governmental officials would "trivialize" the fourteenth amendment.²⁵ In its attempts to distinguish between constitutional violations and other wrongs, the Court has in some decisions focused on the nature of the constitutional right, attempting to define the terms "liberty" and "property" so as to differentiate between the constitutional meaning of these terms and other less egregious wrongful injuries. In other cases, it has looked into the mind of the state agent, inquiring whether his actions were intentional

19. *Id.* at 670.

20. *Id.*

21. *Id.* at 671 (emphasis added).

22. 106 S. Ct. 1078 (1986).

23. *Id.* at 1085.

24. *Id.* at 1088.

25. See *Parratt*, 451 U.S. at 545 (Stewart, J. concurring); *id.* at 549 (Powell, J., concurring in the result); *Davidson*, 106 S. Ct. at 674 n.6 (Blackmun, J., dissenting).

or negligent. It has also looked to the remedy contemplated by the phrase "due process," and found that, even when a constitutionally protected interest had been invaded, the Constitution was not violated if due process was afforded by state procedures, even though those procedures could not be invoked until after the injury had been inflicted.

These approaches have not been adequate, either alone or in conjunction with one another, to enable lower courts readily to separate those torts that violate the Constitution from those that are not constitutionally protected. Yet each of them is significant and each excludes a category of state-inflicted torts. Therefore, whether a person injured by state action was deprived of liberty or property without due process of law necessarily involves three inquiries: What amounts to a deprivation? What constitutes injury to "life, liberty, or property" in the constitutional sense, as distinguished from lesser injuries? And, if there has been a deprivation of life, liberty, or property in the constitutional sense, what does due process demand?

III. RIGHTS PROTECTED BY DUE PROCESS: PROCEDURE AND SUBSTANCE

As the Supreme Court first pointed out over a century ago,²⁶ and Justice Stevens has most recently repeated in a concurring opinion in *Daniels v. Williams*,²⁷ the due process clause provides two different kinds of protection. First, as the words of the clause directly indicate, it is a guarantee of fair procedure. Even when the state has the right to take a person's property or affect his liberty, it must follow some procedure prescribed by law rather than act by executive fiat. In some instances, due process requires that the state give advance notice of its intention and accord the person who will be affected a chance to voice his opposition before proceeding.²⁸ In others, it may suffice if the state gives the person who is deprived an opportunity to seek redress after the state has acted.²⁹ In either case, what is required is fairness to the individual.

The due process clause also proscribes arbitrary state action. This is a substantive right: state action violates due process unless it has at least a rational relationship to a proper state objective.³⁰ In addition, the Court has held that the state may not deprive a person of some rights no matter how fair the process.³¹ The clause thus guarantees certain substantive

26. *Carter v. Greenhow*, 114 U.S. 317 (1884).

27. 106 S. Ct. 662, 677 (1986) (Stevens, J., concurring).

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

29. *See, e.g., Ingraham v. Wright*, 430 U.S. 651 (1977); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

30. *Daniels*, 106 S. Ct. at 665 (citing *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Dent v. West Virginia*, 129 U.S. 114, 123 (1889); *Hurtado v. California*, 110 U.S. 516, 527 (1884)).

31. *Rochin v. California*, 342 U.S. 165 (1952), cited by Justice *Rehnquist* in *Daniels*, 106 S. Ct. at 665.

rights, and, in this respect, "serves to prevent governmental power from being used for purposes of oppression."³²

These rights include most but not all of the rights protected by the Bill of Rights,³³ which are called incorporated due process rights, and in addition some rights not expressly mentioned in the Constitution, which may be called generic due process rights.³⁴ The Court has defined the nature of those unenumerated rights protected by substantive due process in various ways. For example, it has referred to them as including:

not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of [one's] own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.³⁵

The Court has also referred to them as those rights "implicit in the concept of ordered liberty,"³⁶ and as the rights so "rooted in the traditions and [collective] conscience of our people as to be ranked as fundamental."³⁷

Thus, the due process clause in its procedural aspect forbids the states to deprive any person of life, liberty, or property without following a proper legal procedure. In its substantive aspect, it disallows not the procedure but irrational state action and its results: due process forbids the states to act arbitrarily and to deprive any person of certain kinds of life, liberty, or property, no matter what the procedure.

IV. PROCEDURAL DUE PROCESS

The distinctions between procedural and substantive due process, and, within the latter, between incorporated and generic rights, are important because the type of fourteenth amendment interest that is involved determines the kind of relief available. A plaintiff who contends that he has been denied procedural due process because the state acted without giving him notice and a hearing does not challenge the validity of the ultimate deprivation. "In such a case," as Justice Stevens has said:

32. *Daniels*, 106 S. Ct. at 665 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856)).

33. J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* 412 (2d ed. 1983) [hereinafter cited as NOWAK].

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

35. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

36. *Palko v. Connecticut*, 302 U.S. 319 (1937), quoted by Justice Harlan in his concurring opinion to *Griswold v. Connecticut*, 381 U.S. at 500.

37. *Griswold v. Connecticut*, 381 U.S. at 487 (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

the deprivation may be entirely legitimate—a State may have every right to discharge a teacher or to punish a student—but the State may nevertheless violate the Constitution by failing to provide appropriate procedural safeguards. The constitutional duty to provide a fair procedure gives the citizen the opportunity to try to prevent the deprivation from happening, but the deprivation itself does not necessarily reflect any “abuse” of state power.³⁸

Procedural due process does not always assure an opportunity to prevent the deprivation by advance notice and a hearing. In *Carey v. Piphus*,³⁹ the Court held that while in some instances a high school must give a student threatened with even a brief disciplinary suspension at least an informal hearing in advance,⁴⁰ urgent conditions may call for immediate action to establish discipline or maintain order. If so, the school authorities may act at once, without any predeprivation procedure, to safeguard its students. Later, in *Ingraham v. Wright*,⁴¹ the Court held that a school teacher who inflicts corporal punishment on a student need not afford the student a hearing before the beating because the traditional common law after-the-fact remedies accorded by state law satisfy due process. This interpretation, that the state satisfies due process by a postdeprivation hearing in its own court, furthers federalism by emphasizing the state’s interests, and also reduces the federal court caseload because it denies the aggrieved party a federal forum.

Assuming, for the moment, that life, liberty, or property interests are sufficiently at stake to require procedural protection, when is a predeprivation hearing essential? In *Mathews v. Eldridge*,⁴² a case involving the termination of Social Security benefits, the Court set out a balancing test: the courts are to consider the importance of the private interest that will be affected by the official action; the extent of the risk that the procedures used will result in an erroneous deprivation; the probable value, if any, of additional or substitute procedures; and, finally, the strength of the government’s interest, including both the nature of the function involved and the fiscal and administrative burdens that the additional or substitute procedure would entail.⁴³

The termination of utility services, for example, is so severe a measure that a governmental utility company was required, in *Memphis Light, Gas and Water Division v. Craft*,⁴⁴ to provide notice of the proposed

38. *Daniels*, 106 S. Ct. at 678 (Stevens, J., concurring).

39. 435 U.S. 247 (1978).

40. *Goss v. Lopez*, 419 U.S. 565 (1975).

41. 430 U.S. 651 (1977).

42. 424 U.S. 319 (1976).

43. *Id.* at 335; see also R. PIERCE, JR., S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 255-77 (1985).

44. 436 U.S. 1 (1978).

termination and of an opportunity to dispute the bill, as well as an administrative hearing in advance of the termination. Conversely, when the need for government action is urgent and there is grave risk of injury if the government does not act, it may take action before holding a hearing.⁴⁵

The availability of postdeprivation remedies may also affect the nature of the predeprivation hearing that is required. A year ago, the Court in *Cleveland Board of Education v. Loudermill*,⁴⁶ applying a traditional *Mathews* analysis, found that a state employee had a property right in continued employment which this entitled him to "some kind of a hearing" before discharge, including a chance to respond to the charges against him. "The need for some form of pretermination hearing . . .," Justice White's opinion said, "is evident from a balancing of the competing interests at stake."⁴⁷ Neither a governmental interest in immediate termination nor the administrative burden and consequent delay outweighed the employee's interest in defending his livelihood. The Court went further, however, and explained the connection between pre- and postdeprivation remedies. Although a pretermination hearing is necessary, the Court said it "need not be elaborate," because "[u]nder state law" the employee is "later entitled to a full administrative hearing and judicial review."⁴⁸

In *Loudermill*, the Court applied the *Mathews* test, weighing the employee's interests and the effect of discharge on him against the government's interests. Like all balancing tests, this permits a decision precisely tailored to the facts of a specific case, but it is difficult, if not impossible, to predict how the scales will tilt without, as Professors Nowak, Rotunda and Young put it, "knowing the personal value systems of those doing the balancing."⁴⁹

For a time, it seemed that the *Mathews* test encompassed all of the factors to be considered in determining whether procedural due process required a predeprivation hearing or could be satisfied by a later remedy. Then, in 1981, the Court introduced new considerations in *Parratt v. Taylor*.⁵⁰ *Parratt* involved a claim by an inmate of a Nebraska correctional institution against prison officials for the negligent loss of hobby materials valued at \$23.50.⁵¹ The Court discussed *Mathews* and noted that a post-

45. *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981); *Mackey v. Montrym*, 443 U.S. 1 (1979); *Barry v. Barchi*, 443 U.S. 55 (1979); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908).

46. 105 S. Ct. 1487 (1985).

47. *Id.* at 1494.

48. *Id.* at 1495.

49. NOWAK, *supra* note 33, at 560. See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 549-52 (1978); Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Co.*, 1982 U. ILL. L. REV. 831; R. PIERCE, JR., S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 255-77 (1985).

50. 451 U.S. 527 (1981).

51. *Id.* at 529.

deprivation hearing would be procedurally adequate if either quick action by the state were necessary or if it were impractical to provide any meaningful predeprivation process. The Court agreed with the prisoner that his hobby kit was property protected by the Constitution and that its negligent loss by a state employee constituted deprivation within the meaning of the fourteenth amendment. It held, however, that a postdeprivation hearing satisfied the constitutional requirement because, as a practical matter, the state could not anticipate and prevent a random, unauthorized, and negligent deprivation.

On its facts, *Parratt* seems to involve a substantive deprivation as well as a procedural one. The prisoner was deprived of property not only without fair procedures, but also without justification. The Court was explicit, however, that it read the complaint only to allege violation of procedural due process.⁵² The Court's emphasis on the distinction makes clear that what constitutes a denial of procedural due process is different from what constitutes a denial of substantive due process and that it is therefore significant at the outset to determine which right is involved.

Because *Parratt* involved a negligent act, lower courts debated whether its rationale extended to intentional acts. The Court resolved that doubt in *Hudson v. Palmer*,⁵³ a 1984 decision involving an allegedly unjustified shakedown search of a prisoner's cell and the destruction of some of his personal property. The Court held that procedural due process is satisfied by a postdeprivation hearing even when an unauthorized but intentional act causes the loss of property.

Although the results in *Hudson* and *Parratt* were not inconsistent with the results that would have been reached applying the *Mathews* test, these cases emphasized factors that *Mathews* did not expressly include: whether the state might have anticipated its agent's action and thus would have had a reasonable opportunity to accord a predeprivation hearing, and whether the actions constituted an abuse of governmental power as compared to the isolated and unforeseeable act of some state official.

In *Hudson* and *Parratt*, the Court did not attempt to define either what constitutes "a deprivation" or what is "life, liberty, or property" in the constitutional sense. Both opinions assumed the presence of constitutional deprivations and then focused on what constitutes due process. *Hudson* and *Parratt* interpreted this phrase by looking to the adequacy of state procedure, that is, the state remedy available, rather than by examining the nature of the state action or of the right affected.

Because these decisions dealt with property, they did not resolve the question whether a state official might, without violating the Constitution,

52. *Id.* at 536. See also *Hudson v. Palmer*, 468 U.S. 517 (1984); *Augustine v. Doe*, 740 F.2d 322, 326-28 (5th Cir. 1984); *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 1, 105 (1982).

53. 468 U.S. 517 (1984).

deprive a person of liberty in the absence of advance procedural protection. That issue was addressed in two of the 1986 cases, *Davidson v. Cannon*⁵⁴ and *Daniels v. Williams*,⁵⁵ which involved negligent injury to the liberty interests of state prisoners. The Court held, at least inferentially in *Daniels* and expressly in *Davidson*, that the same procedural standards apply to both deprivations of property and to deprivations of liberty. But the *Daniels* Court expressly overruled that part of its holding in *Parratt* finding negligent conduct to constitute a constitutional violation. Adopting Justice Powell's view in *Parratt*, *Daniels* decided that the state action did not require any procedural protection because it did not constitute a deprivation and, hence, did not violate the Constitution. As a result, it was unnecessary to inquire whether the state afforded any remedy or, of course, whether the remedy was adequate.

These two 1986 decisions, read together with earlier decisions, indicate that, in determining a person's right to procedural due process, the same tests apply whether the state action affects the right to liberty or to property and, presumably, to life. The court drew no distinction between the procedure required for what seems to have been the relatively slight injury suffered by *Daniels* when he slipped on the pillowcase and the stabbing inflicted on *Davidson*.

If, however, the state action is found to threaten or constitute the deprivation of a person's life, liberty, or property, the state must accord a procedural remedy. If that remedy is constitutionally adequate, section 1983 does not supply a federal cause of action. Whether a postdeprivation remedy is adequate may depend upon the factors examined in *Mathews* and the practicality of a predeprivation proceeding discussed in *Parratt*.

There is no comparable problem in deciding the adequacy of the remedy for violations of substantive due process rights. Fundamental substantive due process rights, incorporated or generic, are protected against all state action, although in some instances incorporated rights, such as the fourth amendment right to be free from unreasonable seizure may be violated only if a specific procedure, for example, obtaining a warrant, is not followed. An individual who has been deprived of substantive due process is entitled to damages or injunctive relief whether he proceeds in federal or state court, but the question of postdeprivation remedies simply does not arise.

V. DEFINING "LIBERTY" AND "PROPERTY"

After earlier efforts to distinguish between what the Court called rights that are protected by the due process clause and what it labeled privileges

54. 106 S. Ct. 668 (1986).

55. 106 S. Ct. 662 (1986).

that are not protected,⁵⁶ it rejected, in *Board of Regents v. Roth*,⁵⁷ any such "wooden distinction." The Court there held that a state college's failure to renew the contract of a nontenured faculty member was not a deprivation either of liberty or property, although it refused "to define [liberty] with exactness," noting only that the meaning of "'liberty' must be broad indeed," including freedom from bodily restraint, the right to contract, pursue occupations, marry, worship, and "'enjoy those privileges . . . essential to the orderly pursuit of happiness by free men.'" ⁵⁸

The Court offered a slightly more illuminating definition of property. "The Fourteenth Amendment's procedural protection of property," it said, "is a safeguard of the security of interests that a person has already acquired in specific benefits."⁵⁹ "To have a property interest in a benefit, a person . . . must have a legitimate claim of entitlement to it."⁶⁰ The property interests thus protected are not created by the Constitution but by "an independent source such as state law. . . ."⁶¹ While avoiding a precise definition, the Court has thus pointed out where the definition of property is to be found, providing a guide that can readily be followed.⁶²

Since *Roth*, the Court has never provided, however, a comparably explicit frame of reference for defining liberty. Some liberty rights may, like property rights, be created by state law that provides a legitimate claim of entitlement to the liberty interest.⁶³ Other liberty interests may be defined by federal rather than state law. In *Paul v. Davis*,⁶⁴ a divided Court found that injury to a person's reputation by the distribution of a publication identifying him as an "active shoplifter" was not serious enough to amount to invasion of his "liberty" in the constitutional sense. The Court found a deprivation of a protected liberty interest, however, when the state committed an individual to a psychiatric institution involuntarily under a procedure that required the state to prove only that he was dangerous to himself or others by a preponderance of the evidence: it held, in *Addington v. Texas*,⁶⁵ that the right not to be committed is included within the constitutional meaning of "liberty" and must be protected by at least a "clear and convincing evidence standard."⁶⁶ Writing for a unanimous Court, Chief Justice Burger explained that the societal and constitutional values placed on freedom from physical detention ex-

56. NOWAK, *supra* note 33, at 528-30.

57. 408 U.S. 564, 571-72 (1972).

58. *Id.* at 572 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

59. 408 U.S. at 576.

60. *Id.* at 577.

61. *Id.*

62. *See, e.g.,* *Leis v. Flynt*, 439 U.S. 438 (1979).

63. *See, e.g.,* *Hewitt v. Helms*, 459 U.S. 460 (1983); *Mills v. Rogers*, 457 U.S. 291 (1982).

64. 424 U.S. 693 (1976).

65. 441 U.S. 418 (1979).

66. *Id.* at 433.

acted this level of proof. A year later, in *Vitek v. Jones*,⁶⁷ the Court found a protected liberty interest in a prisoner's right not to be transferred involuntarily to a mental hospital.

On the other hand, the Court has decided that not every physical detention, even in jail, constitutes a deprivation of liberty in the constitutional sense. *Baker v. McCollan*⁶⁸ adjudicated the claim of a person who was arrested under a valid warrant and incarcerated for several days because he was mistaken for his brother. Any of the standard police identification procedures would have revealed the error, but none was promptly employed. The Court acknowledged that a tort claim may have been proper,⁶⁹ but held, without further explanation, that "a detention of three days over a New Year's weekend does not and could not amount to . . . a deprivation"⁷⁰ of a constitutionally protected liberty interest, although it noted that a longer confinement might constitute such a deprivation. The Court emphasized that the fourteenth amendment "protects only against deprivations of liberty accomplished 'without due process of law.'"⁷¹ Because the arrest was made under a valid warrant, and both an identification procedure and a trial would intervene before any lengthy imprisonment, this was not a deprivation of the liberty guaranteed by the Constitution. Thus, the state procedures invoked before and after the detention affected the Court's definition of constitutionally protected liberty. In these cases, and others that followed, the Court has not essayed a consistent definition of "liberty" as the word is used in the due process clause.

The line between property and liberty is itself not always precise. For example, state action affecting employment or the practice of a profession may involve both a justified expectation of property and the liberty to engage in a certain kind of conduct. Indeed, drawing a distinction may be of no importance for due process purposes. Both *Parratt*, the case of the prisoner's lost hobby kit, and *Hudson*, the case of the shakedown search of a prison cell, involved deprivations of property, one negligent, the other intentional. Many lower courts have extended the *Parratt-Hudson* approach to procedural due process cases involving negligent and intentional deprivations of liberty, treating the basic questions involved as whether the right affected could be considered either "liberty" or "property," whether a predeprivation hearing was feasible or possible, and whether the postdeprivation remedy available from the state was adequate. *Daniels* and *Davidson* imply, in their discussion of *Parratt*, that the same standards apply to both protected interests.

67. 445 U.S. 480 (1980).

68. 443 U.S. 137 (1979).

69. *Id.* at 142.

70. *Id.* at 145.

71. *Id.*

Even though the Court has limited and partially overruled *Parratt*, now focusing on what is a deprivation instead of the adequacy of a postdeprivation remedy, the cases do not concentrate on deprivation alone. The conduct complained of in *Parratt* is no longer a deprivation that triggers constitutional safeguards, but the remainder of *Parratt* lives: when there is a constitutional deprivation of procedural due process, postdeprivation procedures in state court may be constitutionally adequate. Furthermore, even if the state action constitutes a deprivation and no postdeprivation remedy provides procedural due process, section 1983 does not confer a cause of action unless what has been taken from the person is important enough to be considered liberty or property in the constitutional sense.

VI. SUBSTANTIVE DUE PROCESS

By their very nature, the rights protected by substantive due process are much more limited than those assured procedural protection. Defining what is and what is not a right so fundamental as to be accorded substantive protection is a normative question that the Court continues to debate.

This was the principal issue in *Moran v. Burbine*,⁷² which involved federal habeas corpus review of the state court denial of defendant's motion to suppress. In that opinion, the Court did not decide whether a prisoner's right to receive communications from his lawyer and to have his lawyer kept fully informed about his being charged and questioned, was or was not a fundamental right per se. Instead it considered, in addition to the nature of the right, the offensiveness of the conduct and the extent of harm done, in holding that the conduct of the police did not "deprive [the prisoner] of the fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment."⁷³ This implies that in determining whether an injury is a constitutional violation of a fundamental right to liberty, the gravity of the injury must be considered.

Rochin v. California,⁷⁴ which also arose on a motion to suppress evidence, provides one criterion for determining when an injury to liberty is a denial of substantive due process. The Court found that the state's action, in forcibly pumping the contents of a drug suspect's stomach to prove that he possessed narcotics, violated substantive due process because it "shocked the conscience,"⁷⁵ the test the Court again applied in *Moran*. Similarly, in police brutality cases involving the use of excessive force by police officers in making an arrest, the lower courts⁷⁶ have looked at the degree to which the force used was excessive. Thus, the Fifth

72. 106 S. Ct. 1135 (1986).

73. *Id.* at 1147.

74. 342 U.S. 165 (1952).

75. *Id.* at 172.

76. See S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION §§ 4.04 & 4.09 (1979 & Supp. 1985).

Circuit, in *Shillingford v. Holmes*,⁷⁷ has said that in determining whether state officers have "crossed the constitutional line that would make" a tort actionable as a deprivation of liberty, "we must inquire into the amount of force used in relationship to the need presented, *the extent of the injury inflicted* and the motives of the state officer."⁷⁸

In *Shillingford*, a policeman making an arrest appeared to be abusing the person being arrested, so a bystander began photographing the event. The policeman struck at the bystander and his camera with a nightstick, damaging the camera and injuring the bystander. The court found an abuse of authority by virtue of the fact that the assault was deliberate, unjustified, and a "misuse of the policeman's badge and bludgeon."⁷⁹ The abuse constituted a substantive due process deprivation when "[t]he degree of force exerted and the extent of physical injury inflicted"⁸⁰ were considered.

In deciding procedural due process cases, the Court has never included a quantitative component, in the sense of requiring some minimal amount of deprivation, although the Court has included the seriousness of the injury as a factor in the *Mathews* test for deciding whether a post-injury hearing is adequate. Thus, *Parratt* begins by noting the slight value of the hobby kit and observing: "At first blush one might well inquire why respondent brought an action in federal court to recover damages of such a small amount."⁸¹ Nonetheless, the Court acknowledges the need to provide procedural due process. Such a slight injury might not have offended substantive due process⁸² unless it constituted a taking of property in the condemnation sense.⁸³

The substantive due process protection accorded rights expressly protected by the first eight amendments has a quantitative component too, but that component is derived from the nature of the right violated, not from the due process clause. While every denial of an incorporated right is redressable, no matter how slight the injury, the degree of injury may itself determine whether the constitutional right has been violated.⁸⁴ *Moran* indicates that, in deciding whether generic substantive due process is violated, the extent of the injury and the offensiveness of the state official's conduct remains a consideration. What conduct is so shocking and what hurt is too much remain to be decided, apparently on an ad hoc basis.

77. 634 F.2d 263 (5th Cir. 1981).

78. *Id.* at 265 (emphasis added).

79. *Id.* at 266.

80. *Id.* at 265.

81. 451 U.S. at 529.

82. *Cf. Moran v. Burbine*, 106 S. Ct. 1135 (1986); *Baker v. McCollan*, 443 U.S. 137 (1979).

83. *See Loreto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

84. *Cf. Estelle v. Gamble*, 429 U.S. 97 (1976).

VII. THE NEW FOCUS ON DEPRIVATION

In *Davidson v. Cannon*⁸⁵ and *Daniels v. Williams*,⁸⁶ involving personal injury to state prisoners resulting from the negligence of prison employees, the Court continued its effort to distinguish between unconstitutional and merely tortious conduct. In these cases, it found a boundary between the two by defining deprivation, thereby altering the approach taken in both *Parratt* and *Hudson*.

Instead of reviewing the adequacy of the state procedure for postdeprivation remedy, the Court inquired whether the Constitution requires any procedure. In both cases the Court concluded that the state or its official did not cause a deprivation in the constitutional sense, and therefore the Constitution did not require the state to provide any post deprivation remedy at all, let alone an adequate one. Taking a phrase from *Parratt*, the *Daniels* Court declined to "trivialize the Due Process Clause," but *Daniels* achieved that result by refusing to apply the due process clause to an action based on the mere negligence of state officials. The Court noted in a footnote that, because *Daniels* had asserted in his pleading only that the prison official was "at most negligent," the "case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or 'gross negligence' is enough to trigger the protections of the Due Process Clause."⁸⁷

The judgment in *Daniels* was unanimous, although Justice Stevens and Justice Blackmun filed concurring opinions, and Justice Marshall concurred only in the result. Justice Stevens' concurrence characterized the issue in *Daniels* as involving only the denial of procedural due process. He viewed *Daniels*' claim as "essentially the same as the claim we rejected in *Parratt*."⁸⁸ In both *Parratt* and *Daniels*, a predeprivation hearing was "definitionally impossible. And, in both cases, the plaintiff had state remedies that permitted recovery if state negligence was established."⁸⁹ He would not, therefore, reject the claim, as the Court did, by "attempting to fashion a new definition of the term 'deprivation' and excluding negligence from its scope."⁹⁰ Justice Stevens would define deprivation by examining the victim's infringement or loss, not the state official's state of mind.

The majority of the Court, however, did not view the case as involving only procedural due process. Unlike Justice Stevens, the majority had

85. 106 S. Ct. 668 (1986).

86. 106 S. Ct. 662 (1986).

87. 106 S. Ct. at 667 n.3.

88. *Id.* at 680 (Stevens, J., concurring).

89. *Id.* at 680 (footnote omitted).

90. *Id.*

redefinition in mind. It stripped section 1983, and perhaps constitutional, protection from claims for personal injury, at least by prisoners alleging injuries to liberty that do not involve an official process and are inflicted by the negligent action of a state official. If *Daniels* alone did not make this clear, *Davidson* did, for, as already noted, it states that neither procedural nor substantive due process is triggered by lack of due care by prison officials.⁹¹

Professor Ruth L. Kovnat anticipated this analysis. Writing in this review in 1983, she said, "In deciding whether an action exists under section 1983, courts must initially consider whether an abuse of government 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."⁹²

Davidson and *Daniels* make proof of deprivation the first step in a section 1983 claim for denial of due process, whether procedural or substantive, and whether the claim involves loss of life, liberty, or property. Unless an official state process is itself challenged, there is no deprivation by state action unless whatever occurred was intentional or, perhaps, reckless and grossly negligent.

Since each of these cases involves a prisoner's claim and each stresses the nature of the prison environment, some may consider them to be limited to prisoner injuries. Such a construction, however, ignores both the words deliberately used in the majority opinions, particularly in *Davidson*, and the implications of their meaning derived from the direction of the concurring and dissenting opinions. In addition, this limiting construction appears to ignore the attention given to these issues in one term of Court. It is important to protect prisoners from abuse, to define their rights, to safeguard prison officials from unwarranted litigation, and to provide guidelines for lower courts in deciding cases involving these issues. Yet the granting of writs in these cases, the effort devoted to them, and the views expressed in the various opinions seem to reflect an effort to do even more: to redefine the scope of section 1983, and, more significant, to provide an interpretation of the Constitution. The opinions in *Daniels* and *Davidson* appear to be a deliberate effort to define what is a deprivation by state action. Absent such a deprivation in any context, procedural or substantive, the state need not accord any process either pre- or post-injury.

The *Daniels* rule may be limited to procedural and generic substantive

91. 106 S. Ct. at 671.

92. Kovnat, *Constitutional Tort and the New Mexico Tort Claims Act*, 13 N.M.L. REV. 1, 21 (1983).

due process and may not extend to incorporated rights. Thus, the Court in *Daniels* responded to an argument that "some negligence claims are within Section 1983," by stating "we need not rule out the possibility that there are other constitutional provisions that would be violated by mere lack of care. . . ." ⁹³ *Daniels* and *Davidson* do not seem to portend a change in the state-of-mind requirement necessary to constitute a violation of a right guaranteed by the Bill of Rights.

Incorporated rights violations continue to be judged by reference to the particular Bill of Rights provisions involved. For example, to determine whether a state seizure of property or a person is unreasonable and, therefore, violates the fourth amendment, we look to fourth amendment jurisprudence. This at least is what the Court did one year ago, in *Tennessee v. Garner*. ⁹⁴ The Court there held unconstitutional a Tennessee statute permitting a police officer to use lethal force to stop the flight of an apparently unarmed person suspected of committing a felony. The Court relied on the fourth amendment, holding that the killing of the suspect was a seizure of that person.

The Court also proceeded directly to the Bill of Rights in *Whitley v. Albers*, ⁹⁵ the case involving the helpful prisoner who was shot in the mistaken belief that he was participating in the prison disorder. In doing so, it distinguished its decision a decade earlier in *Estelle v. Gamble*, ⁹⁶ in which it held that deliberate indifference to a prisoner's serious medical needs was cruel and unusual punishment. The *Whitley* opinion differentiated *Estelle* on the basis that:

the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities. . . . But, in making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, prison officials undoubtedly must take into account the very real threat the unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used. . . . In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance. ⁹⁷

The test to be applied in such circumstances is "whether force was applied

93. 106 S. Ct. at 666.

94. 105 S. Ct. 1694 (1985).

95. 106 S. Ct. 1078 (1986).

96. 429 U.S. 97, 104 (1976).

97. 106 S. Ct. at 1084-85.

in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."⁹⁸

The eighth amendment, then, incorporates a balancing test that turns on circumstances. Ordinary negligence alone can never constitute cruel and unusual punishment, but deliberate indifference to medical needs may, even if not intended punitively, while actions taken in enforcing prison security do not violate the Constitution unless undertaken in bad faith, maliciously, or sadistically.

Whitley contains another significant ruling. The Court summarily dismissed the prisoner's generic substantive due process claim. The eighth amendment is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, and, therefore, serves "as the primary source of substantive protection to convicted prisoners."⁹⁹ *Whitley* then went on to note:

It would indeed be surprising if, in the context of forceful prison security measures, "conduct that shocks the conscience" . . . and so violates the Fourteenth Amendment, [did not also violate the Eighth Amendment.] . . . [I]n these circumstances, the Due Process Clause affords [prisoners] no greater protection than does the Cruel and Unusual Punishments Clause.¹⁰⁰

Although the Court qualified this statement by stating that "we imply nothing as to the proper answer to that question outside the prison security context,"¹⁰¹ it might, in other circumstances, extend this reasoning to hold that generic substantive due process does not add to the protection accorded any right protected by the Bill of Rights.

Justice Marshall's dissent in *Whitley*, in which three other justices joined,¹⁰² argued that the standard for constitutional violation established by the majority was "especially onerous"¹⁰³ and "inappropriate because courts deciding whether to apply it must resolve a preliminary issue of fact that will often be disputed and properly left to the jury."¹⁰⁴ The dissent thus focuses attention on the availability of early dismissal of federal suits based on a district court's decision that the injury alleged is legally insufficient to violate the due process clause.

Petitioners alleging the violation of due process rights will likely no longer allege negligence but intentional injury. Such petitions will there-

98. *Id.* at 1085 (quoting Judge Friendly's opinion in *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), cert. denied *sub nom.* *John v. Johnson*, 414 U.S. 1033 (1973)).

99. 106 S. Ct. at 1088.

100. *Id.*

101. *Id.*

102. 106 S. Ct. at 1088 (Marshall, Brennan, Blackmun, and Stevens, JJ., dissenting).

103. 106 S. Ct. at 1089.

104. *Id.*

fore turn on a question of fact rather than law. Although they will not be vulnerable to motions to dismiss, the emphasis will shift to motions for summary judgment as a vehicle for eliminating untenable claims. The petitioner will have to present some evidence, even if only inferential, of intentional conduct to survive summary judgment.¹⁰⁵

VIII. CONCLUSION

It is difficult to fit the four 1986 term decisions into a logical and historically accurate definition of substantive due process. Separating the protection afforded those substantive due process rights that are generic from those incorporated from the Bill of Rights was presaged by such cases as *Tennessee v. Garner*,¹⁰⁶ but incorporated rights are protected against state encroachment only because they are part of substantive due process. Definition of the word "deprive" is crucial to both applications. It is not clear why the protection given incorporated rights may turn on a different definition of deprivation than that used when generic substantive due process is involved, unless the Court is creating a hierarchy of constitutional values. In addition, if substantive due process, in both definitions, protects rights that cannot be abridged whatever the procedure, it is difficult to see the critical importance of distinguishing state action that could have been foreseen and prevented from action that is "random" or "unauthorized."

I suggest, as a rough outline, the following sequence of analysis (illustrated by the chart appended to this article) for section 1983 claims brought under the fourteenth amendment. First, in determining whether an aggrieved person has a claim under section 1983, we must decide whether the claimant asserts a denial of procedural or substantive due process. If the claimant asserts a denial of both, each claim must be analyzed separately.

If the claim is for denial of procedural due process, the next step is to decide whether the state action constitutes a deprivation, for procedural due process is not required unless it does. When the aggrieved person complains of injury to life, liberty, or property by the negligent, hence random, unauthorized act of a state official, there is no deprivation, for there has been no abuse of state power and it would have been impossible or impractical for the state to foresee the act and provide a hearing. In that event, it is not necessary for the state to provide any remedy, for there has been no constitutional deprivation.

If the state official's action was intentional, or pursuant to an official state policy or procedure, and perhaps even if reckless or grossly neg-

105. See *Fontenot v. Upjohn Co.*, 780 F.2d 1190 (5th Cir. 1986).

106. 105 S. Ct. 1694 (1985).

ligent, the action constitutes a deprivation, triggering the right to procedural due process. Nonetheless, a state postdeprivation remedy may suffice to provide constitutionally adequate procedural due process, depending on the balance of factors set forth in the *Mathews-Parratt* line of cases.¹⁰⁷

If the state action constitutes a deprivation, the right injured must be "life, liberty, or property" in the constitutional sense. These terms may have a more limited definition under substantive due process analysis than under procedural due process. Standards for deciding what is property are largely defined by state law. What is "liberty" is less clearly illuminated: liberty includes freedom both from restraint and from bodily injury, but constitutional liberty does not include protection from every personal injury, however slight, or from every physical detention, however short. There appears to be a quantitative component to liberty, one that may not be present with regard to property.

If the charge is denial of substantive due process, then we must first determine whether the right asserted is an incorporated right or generic substantive due process. If the right is an incorporated one, we look to the particular constitutional provision to determine the required state of mind and extent of injury that will constitute a deprivation of due process and, at least in some circumstances, we need look no further. If, however, the right asserted is generic substantive due process, then whether the right is protected may depend on the nature of the official act, the state of mind of the actor, and the extent of the injury sustained.

The search for the test that divides tort from constitutional violation has resulted in the discovery that there is no single standard, but that a person who alleges a violation of a constitutional right by state action must pass through a set of baffles that are designed to deflect lesser claims. Some of the tests are definite, but others involve the balancing of indefinite, and partially subjective considerations.

The Constitution itself limits the Court and all other federal courts to deciding issues as cases present them. Federal courts do not provide an advance forecast for future adjudication. Courts, however, should be able to define standards that guide other courts, state officials, lawyers, and litigants. As Dean Griswold has pointed out, "the overwhelming proportion of the law is administered by lawyers,"¹⁰⁸ and most of the remainder must be decided by trial courts without appellate court review. Decisions that tell us only how a result has been reached in a specific case provide faint light for guidance. The 1986 decisions raise the level of illumination but leave the text of many issues still too dark to be read.

107. See *supra* text accompanying notes 42-53.

108. Griswold, *Cutting the Cloak to Fit the Cloth*, 32 CATH. U.L. REV. 787, 797 (1983).

DUE PROCESS ACTIONS UNDER § 1983 IN 1986
(STATE ACTION ASSUMED)

Procedural				Substantive			
				Violation of "generic" substantive due process (fundamental rights)			
1. Did state action constitute a deprivation?							
Intentional or Official Policy	Recklessness or Gross Negligence	Negligence	Intentional or Official Policy	Recklessness or Gross Negligence	Negligence		
Deprivation	Query: whether there is a deprivation	No deprivation	Standards are those applicable to federal action alleged to violate specific right involved			Query: whether there is a deprivation	No deprivation
2. Of life, liberty or property in the constitutional sense?							
Property	Liberty						
Defined by state law (<i>Roth</i>) or by federal law creating "entitlements" (<i>Goldberg</i>). There may be a "deprivation" even though there has been no "taking" in the Fifth Amendment sense.	May be defined by state law or by federal law.	Protected interest defined by the Bill of Rights provision involved	Protected interest defined by the Bill of Rights provision involved	Liberty	No additional protection beyond rights protected by Fifth Amendment	Property	Liberty
3. Is a pre-deprivation remedy required?							
A. Does nature of deprivation require a pre-deprivation remedy? Criteria in <i>Mathews v. Eldridge</i> , <i>Carey v. Piphus</i> , etc.				Question does not arise. Remedy for violation of substantive due process is by nature post-deprivation			
B. If not, does state provide an adequate post-deprivation remedy?							