Civil Rights - Under Section 1983 Prison Officials Are Not Liable to Prisoner for Injuries Inflicted as Result of Officials' Negligence

Donna M. Wright

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Civil Rights and Discrimination Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol30/iss3/12

This Issues in the Third Circuit is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
1985]

CIVIL RIGHTS—UNDER SECTION 1983 PRISON OFFICIALS ARE NOT LIABLE TO PRISONER FOR INJURIES INFLECTED AS RESULT OF OFFICIALS' NEGLIGENCE

Davidson v. O'Lone (1984)

Section 1983 of title 42 of the United States Code\(^1\) protects an individual from "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States by a person acting under color of state law.\(^2\) As a result of its broad language, this section has been frequently invoked in federal litigation over the past two decades.\(^3\) While section 1983 clearly reaches intentional deprivations,\(^4\) much confusion exists as to whether section 1983 reaches negligent conduct.\(^5\)

The Third Circuit recently confronted this issue in Davidson v. O'Lone,\(^6\) when an inmate brought a section 1983 action against state

---

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

   Id.

2. Id.


4. See, e.g., Snowden v. Hughes, 321 U.S. 1, 8 (1944) (absence of showing of purposeful discrimination by defendants in depriving state assembly candidate of nomination defeated § 1983 claim); Fulton Market Cold Storage Co. v. Fullerton, 582 F.2d 1071, 1080 (7th Cir. 1978) (§ 1983 suit against county and state tax officials could be maintained where plaintiff's constitutional rights were intentionally violated or recklessly disregarded), cert. denied, 439 U.S. 1171 (1978); Kirkpatrick, Defining a Constitutional Tort Under Section 1983: The State-of-Mind Requirement, 46 U. CIN. L. REV. 45, 45 (1977). Professor Kirkpatrick notes that constitutional violations committed under color of state law are distinct from state common law tort violations. Id.


(958)
prison officials based on the officials' negligence. Sitting en banc, the Third Circuit rejected the prisoner's claim, holding that negligence was not actionable under section 1983.

The controversy arose when Robert Davidson, an inmate at New Jersey's Leesburg State Prison, was threatened by another inmate, McMillian, after the two left a disciplinary hearing on December 19, 1980. Davidson described the threat in a note addressed to the hearing officer, Arthur Jones. Because Jones was not part of the prison administration, he directed that the note be passed to appropriate prison authorities. The note was then delivered to Joseph Cannon, the assistant superintendent of the prison. Since Cannon did not consider the matter urgent, he instructed a guard to deliver the note to Corrections Sergeant Robert James. James received the note approximately two hours later but left it on his desk without reading it while he attended to his responsibilities in other parts of the prison. James returned to his office briefly that day, but by that time had forgotten about the note.

---

7. Id. at 819-20. The claimant alleged that because prison officials were negligent in failing to respond to a threat against the claimant by another inmate, the claimant was seriously injured. Id. Consequently the claimant contended that his interest in being free from bodily injury was violated. Id. at 820. For a discussion of the Third Circuit's treatment of this claim, see infra notes 26-55 and accompanying text.
8. 752 F.2d at 830-31.
9. Id. at 819. The disciplinary hearing concerned a December 17, 1980, fight between McMillian and a third inmate, in which Davidson intervened. Id.
10. Id. The contents of Davidson's note were as follows:
   When I went back to the unit after seeing you McMillian was on the steps outside the unit. When I was going past him he told me "I'll f--- you up you old mother-f---ing fag." Go up to your cell. I be right there.
   I ignored this and went to another person's cell and thought about it. Then I figured I should tell you so "if" anything develops you would be aware.
   I'm quite content to let this matter drop but evidently McMillian isn't.
   Thank you, R. Davidson
Id. Davidson testified that he wrote the note to exonerate himself in case McMillian started a fight and that he also wanted McMillian to be reprimanded. Id.
11. Id. It is unclear from the record whether Jones actually read the note.
12. Id. Cannon received the note at 11:40 a.m. and read it at that time. Id.
13. Id. Cannon testified that Davidson's failure to contact him directly, as Davidson had done in the past on various occasions, indicated to him that the matter was not urgent. Id.
14. Id. However, when the note was delivered, shortly after 2:00 p.m., the guard delivering the note informed James that the note reported a threat by McMillian against Davidson. Id.
15. Id. Between the time he received the note and the time he came off duty that night, James spent only about 10 minutes in his office. Id. James testified that if he had read the note, he would have interviewed the inmates involved and posted the note to alert the officers coming on duty. Id. Neither Cannon nor James worked the next two days. Id.
No preventive measures were taken by prison personnel in response to McMillian’s threat. On December 21, 1980, McMillian attacked Davidson with a fork, causing severe wounds.

Precluded from recovering in state court under the New Jersey Tort Claims Act, Davidson sued Jones, Cannon, James, and the prison superintendent, Edward O’Lone, in the United States District Court for the District of New Jersey, under 42 U.S.C. § 1983. The district court granted summary judgment in favor of O’Lone, but found that Cannon and James negligently deprived Davidson of his constitutionally protected liberty interest in freedom from assault without due process of law. The Third Circuit, sitting en banc, reversed the district court’s judgment as it applied to Cannon and James.

Judge Sloviter, writing for the majority, began her analysis by addressing defendants’ first assertion that the district court erred in find-

16. Id.
17. Id. Davidson suffered stab wounds to the face, neck, head, and body; additionally, he sustained a broken nose which required surgery. Id.
18. N.J. STAT. ANN. § 59:5-2b(4) (West 1982). The New Jersey Tort Claims Act provides in pertinent part: “Neither a public entity nor a public employee is liable for: . . . b. any injury caused by: . . . (4) a prisoner to any other prisoner.” Id. § 59:5-2. The provision was enacted in response to a New Jersey Superior Court case in which prison officials were held liable in negligence for the failure to prevent one inmate’s assault of another inmate when the officials had warning of the assault. Id. § 59:5-2 comment (citing Harris v. State, 118 N.J. Super. 384, 297 A.2d 561 (App. Div. 1972)).
19. 752 F.2d at 819-20. For the text of § 1983, see supra note 1. For a summary of Davidson’s fourteenth amendment claim, see supra note 7. Davidson also contended that defendants’ conduct violated the eighth amendment proscription against cruel and unusual punishment. 752 F.2d at 820.
20. 752 F.2d at 820. The Third Circuit succinctly described the district court’s reasoning as follows:

Cannon and Jones [sic] were negligent; as a result of that negligence, Davidson was injured; freedom from bodily injury is a liberty interest which is protected by the Fourteenth Amendment of the Constitution; New Jersey does not provide prisoners, such as Davidson, with a remedy in state court because it immunizes its employees against claims for injuries to a prisoner caused by another prisoner; ergo Davidson can recover under § 1983.
Id. at 822. Compensatory damages of $2,000 were awarded under § 1983. Id. at 820.

The district court, however, found that Davidson did not establish an eighth amendment violation because the defendants “did not act with deliberate or callous indifference” to his medical needs, and because “the incident complained of was a single attack.” Id.
21. Id. at 820, 831.
22. Id. at 818-31. Judge Sloviter was joined in her majority opinion by Chief Judge Aldisert, and Judges Hunter and Becker. Judge Garth wrote a concurring opinion in which Judge Weis joined. See id. at 831 (Garth, J., concurring). Judges Seitz and Gibbons dissented in separate opinions, and Judge Higginbotham joined both of those dissents. See id. at 833 (Seitz, J., dissenting); id. at 835 (Gibbons, J., dissenting); id. at 854 (Higginbotham, J., dissenting).
ing that the defendants were negligent. Judge Sloviter explained that the “clearly erroneous” standard was the applicable standard for reviewing the findings of a trial court sitting without a jury. Applying this standard, the Third Circuit accepted the trial court’s finding of negligence on the part of prison employees.

Next, Judge Sloviter turned to defendants’ second contention that Davidson had no constitutionally protected liberty interest to be free from physical attack by other prisoners. The court noted that the fourteenth amendment protects individuals from “unjustified intrusions

23. Id. at 820. The district court made the following conclusions with respect to Cannon and James:
We find that these two defendants negligently failed to take reasonable steps to protect plaintiff, and that he was injured as a result. Both of these officials had the responsibility to care for plaintiff’s safety, actual notice of the threat by an inmate with a known history of violence, and an opportunity to prevent harm to plaintiff.

Id. (citing Davidson v. O’Lone, No. 81-253, slip. op. at 18 (D.N.J. Dec. 15, 1982)).

The defendants alleged that the district court erred in finding: (1) that defendants knew about McMillian’s past; (2) that defendants failed to exercise reasonable care to protect Davidson; and (3) that defendants’ failure to follow prison procedures proximately caused the injury. Id.

24. Id. (citing Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982) (finding that company did not intentionally discriminate was factual in nature, and as such could only be rejected by appellate court if “clearly erroneous”); Fed. R. Civ. P. 52(a) (findings of fact will not be set aside unless clearly erroneous)).

The Davidson court further explained that the “[defendants] thus bear the heavy burden of convincing us that the district court determination either ‘is completely devoid of minimum evidentiary support displaying some hue of credibility,’ or ‘bears no rational relationship to the supportive evidentiary data.’” 752 F.2d at 820 (quoting Krasnov v. Dinan, 465 F.2d 1298, 1302 (3d Cir. 1972)).

25. 752 F.2d at 820-21. The Third Circuit acknowledged that the fact-finder could have concluded differently on the issue of negligence, but refused to overturn the district court’s finding, since the issue could not be decided as a matter of law and since the Third Circuit was not “left with the definite and firm conviction that a mistake has been committed.” Id. at 821 (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

The Third Circuit explained that the proper standard of care owed by prison custodians in New Jersey was articulated in Harris v. State. Id. (citing Harris v. State, 61 N.J. 585, 297 A.2d 561 (1972)). In Harris, a prisoner returned to his cell after a meal, and was stabbed by another prisoner who had been hiding in the cell. 61 N.J. at 587, 297 A.2d at 562. The New Jersey Supreme Court held that in such a situation prison officials were liable to the injured prisoner only if they had warning of the attack. Id. at 590-93, 297 A.2d at 563-65. Applying the Harris standard, the Third Circuit concluded that the district court’s finding that the defendants had “actual notice of the threat by an inmate with a known history of violence,” satisfied the warning requirement. 752 F.2d at 820.

26. 752 F.2d at 821. The Third Circuit recognized that since § 1983 only protects rights “secured by the Constitution and laws” of the United States, Davidson had to establish as a threshold matter that such a right was infringed in order to assert a § 1983 claim. Id. (citing Paul v. Davis, 424 U.S. 693, 700-01 (1976) (because plaintiff in defamation suit failed to show that any specific constitutional guarantee had been violated, his § 1983 suit was dismissed); Smith v. Spina, 477 F.2d 1140, 1143 (3d Cir. 1973) (§ 1983 “permits recovery for only
on personal security." 27 In addition, the court determined that Davidson's status as a prisoner would not deprive him of the right to assert this fourteenth amendment protection. 28 Consequently, the court rejected defendants' assertion and concluded that Davidson did have a constitutionally protected liberty interest in personal security. 29

The majority proceeded to focus on the central issue before the court: whether section 1983 liability extends to state prison officials' failure to investigate threats against a prisoner made by a fellow inmate. 30 The majority recognized the diverse approaches followed by various courts in resolving the issue. 31 Beginning its own analysis, the Third

27. 752 F.2d at 821 (citing Ingraham v. Wright, 430 U.S. 651, 673 (1977)).
28. Id. at 821. Judge Sloviter observed that because the inmate is involuntarily confined and forced to live with other prisoners, the state is responsible for the prisoner's safety. Id. The majority also relied on a recent Supreme Court decision which held that individuals do not lose all their constitutional rights upon incarceration. Id. (citing Hudson v. Palmer, 104 S. Ct. 3194, 3198 (1984) (prisoners should "be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration").)

Judge Sloviter noted that the due process clause is an appropriate basis for a § 1983 claim when a prisoner is injured by another prisoner. Id. (citing Curtis v. Everett, 489 F.2d 516, 518 (3d Cir. 1973) (plaintiff's assertion that defendant prison officials prevented him from defending himself from attack by fellow prisoner was sufficient to implicate fourteenth amendment "right to be secure in his person"), cert. denied, 416 U.S. 995 (1974)).

The Third Circuit also noted that the Supreme Court has never restricted this right to freedom from attack to attacks by the officials themselves. Id. at 822. The court pointed out that an official's negligence could contribute to a prisoner's injury as readily as if the official had committed an intentional tort. Id. The court used the example of an official opening a prison door with a Lynch mob waiting outside. Id. The Third Circuit also relied on the Supreme Court's holding in Youngberg v. Romeo that a fourteenth amendment liberty interest was implicated in a § 1983 claim against institution officials for failing to protect a mentally retarded resident from his own violence and that of other residents. Id. (citing Youngberg v. Romeo, 457 U.S. 307 (1972)).

29. 752 F.2d at 822. For a discussion of the Davidson dissent's discussion of this liberty interest, see infra notes 75-76 and accompanying text.
30. 752 F.2d at 822-23. The Third Circuit pointed out the Supreme Court's characterization of the issue as "elusive." Id. at 823 (citing Baker v. McCollan, 443 U.S. 137, 140 (1979)). For Judge Gibbons' description of the issue, see infra note 75.
31. 752 F.2d at 823 (citing Parratt v. Taylor, 451 U.S. 527, 533 (1981) ("The diversity in approaches [among the various federal courts] is legion."). Compare Bonner v. Coughlin, 545 F.2d 565, 567 (7th Cir. 1976) (en banc) (prison guard's negligence in leaving cell door open, resulting in someone taking claimant's trial transcript, not actionable under § 1983), cert. denied, 435 U.S. 932 (1978) and Hoit v. Vitek, 497 F.2d 598, 601 (1st Cir. 1974) (§ 1983 complaint by prisoners seeking damages from extended lockup dismissed for failure to allege either intent to harm inmates or injuries serious enough to require medical attention) and Dewell v. Larson, 489 F.2d 877, 882 (10th Cir. 1974) (standard of liability in § 1983 suit against city and its police chief for failing to provide adequate medical care for diabetic prisoner was whether exceptional circumstances
Circuit examined the Supreme Court's treatment of the question in *Monroe v. Pape*, one of the earliest cases interpreting section 1983. Judge Sloviter observed that the *Monroe* Court had rejected any willfulness requirement for a section 1983 claim.

However, Judge Sloviter explained that the language and holdings of subsequent Supreme Court decisions rejected the idea that every tort committed by a state official under color of state law ipso facto constituted a cause of action under section 1983. Although noting the Supreme Court's recognition of the need for a conclusive answer to the issue of whether negligence will suffice for a section 1983 claim, Judge

and conduct so incompetent, inadequate or excessive as to shock the conscience could be shown) *with* Carter v. Estelle, 519 F.2d 1136, 1136-37 (5th Cir. 1975) ("civil rights action lies for wrongful confiscation or loss by prison officials of inmate's property") and *Fitzke v. Shappell*, 468 F.2d 1072, 1077 (6th Cir. 1972) (denial of medical care to incarcerated individual stated claim under § 1983) *and* Carter v. Carlson, 447 F.2d 358, 365 & n.20 (D.C. Cir. 1971) (police officials could be held liable under § 1983 for negligent training and supervision of subordinates if that resulted in constitutional deprivation), *rev'd on other grounds sub nom. District of Columbia v. Carter*, 409 U.S. 418 (1973).

33. 752 F.2d at 823 (citing *Monroe*, 365 U.S. 167). Judge Sloviter acknowledged that prior to *Monroe*, most civil rights actions against state officers involved 18 U.S.C. § 242, a criminal provision analogous to § 1983. *Id.* Section 242 provides as follows:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, *willfully* subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

34. 752 F.2d at 823 (citing *Monroe*, 365 U.S. at 187). Judge Sloviter explained that the *Monroe* Court distinguished § 1983, which has no willfulness requirement, from § 242, which does have such a requirement. *Id.* For the text of § 1983, see *supra* note 1. For the text of § 242, see *supra* note 33.
35. 752 F.2d at 823-24 (citing Estelle v. Gamble, 429 U.S. 97, 106 (1976) ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); Paul v. Davis, 424 U.S. 693, 699-701 (1976) (tort committed by state officials, without more, does not constitute § 1983 cause of action); *Screws* v. United States, 325 U.S. 91, 108 (1945) (not all violations of local law result in deprivation of federal rights)). In her earlier discussion of *Monroe*, Judge Sloviter focused on Justice Harlan's concurring opinion which distinguished between violations of a federal constitutional right and a state right in tort law. 752 F.2d at 823 (citing *Monroe*, 365 U.S. at 196 (Harlan, J., concurring)). Judge Sloviter quoted Justice Harlan's statement that "deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Id.* (emphasis supplied by Judge Sloviter).
Sloviter observed that no Supreme Court decision through 1979 supports the notion that a state official's negligence resulting in injury to a person deprives the person of a fourteenth amendment right. 36

The Third Circuit went on to examine the district court's reliance on Parratt v. Taylor, 37 for its holding below that section 1983 may be based on negligence. 38 In Parratt, a prisoner brought a section 1983 claim against prison officials alleging that they negligently lost his "hobby materials . . . in violation of his right under the fourteenth amendment not to have his property taken without due process of law." 39 Although the Supreme Court found that the availability of state remedies in Parratt satisfied due process requirements, 40 the district court in Davidson focused on Justice Rehnquist's consideration, in dicta, of the scope of section 1983:

Nothing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. In Baker v. McCollan we suggested that simply because a wrong was negligently as opposed to intentionally committed did not foreclose the possibility that such action could be brought under § 1983. 41

Judge Sloviter considered this language in the context of other Supreme Court cases 42 and concluded that the district court's finding that negligence was sufficient for a constitutional deprivation under the

36. 752 F.2d at 825. The Third Circuit explained that the two cases in which the Court addressed the issue were ultimately decided on other grounds. Id. at 824-25 (citing Baker v. McCollan, 443 U.S. 137 (1979); Procunier v. Navarette, 434 U.S. 555 (1978)). In Navarette, the question presented was "whether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983." 434 U.S. at 559 n.6. The Court never answered this question, Judge Sloviter explained, because the defendants were found to have qualified immunity as a matter of law. 752 F.2d at 824.

In Baker, the plaintiff alleged that an arresting officer was negligent in falsely imprisoning the wrong man. See id. at 825 (citing McCollan v. Tate, 575 F.2d 509, 513 (5th Cir. 1978)). Judge Sloviter explained that the Baker Court held that no constitutional right was violated because the officer had a valid arrest warrant. 752 F.2d at 824 (citing Baker v. McCollan, 443 U.S. 137, 143-44 (1979)).

38. 752 F.2d at 825 (citing Davidson v. O'Lone, No. 81-253, slip op. at 20 (D.N.J. Dec. 15, 1982)). Judge Sloviter found that the district court read Parratt to hold "that a state official's negligence is sufficient to constitute a 'deprivation' for due process purposes." Id.
39. 451 U.S. at 530.
40. Id. at 537-44. In fact, the case was decided on procedural due process grounds. Id. at 543.
41. 752 F.2d at 826 (quoting Parratt, 451 U.S. at 534-35). For a discussion of Judge Gibbons' interpretation of Parratt in his dissenting opinion in Davidson, see infra note 87.
42. 752 F.2d at 823-26 (citing Baker v. McCollan, 443 U.S. 137 (1979); Procunier v. Navarette, 434 U.S. 555 (1978); Paul v. Davis, 424 U.S. 693 (1976);
Parratt dicta was erroneous.\textsuperscript{43} First, Judge Sloviter considered it unlikely that the Parratt Court would overrule its earlier pronouncements on this important issue without more detailed analysis or explicit language.\textsuperscript{44} She observed that Justice Rehnquist's language merely repeated earlier statements, in \textit{Monroe} and \textit{Baker v. McCollan},\textsuperscript{45} that the presence of an intentional deprivation of constitutional rights is not a prerequisite for a section 1983 claim.\textsuperscript{46} Judge Sloviter emphasized that such a proposition does not imply that negligence would suffice for a section 1983 claim.\textsuperscript{47} In so concluding, the Third Circuit relied on its own opinions,\textsuperscript{48} those of other courts,\textsuperscript{49} and its interpretation of the

---


43. 752 F.2d at 826. Judge Sloviter admitted, however, that a literal reading of Justice Rehnquist's dicta in \textit{Parratt} would suggest that negligence could deprive a person of a constitutional right, and thus, state a claim under § 1983. \textit{Id.}

44. \textit{Id.} The majority considered it significant that in \textit{Baker v. McCollan}, decided two years before \textit{Parratt}, and in \textit{Paul v. Davis}, the Court had rejected the idea that torts, cognizable at state law, become constitutional violations for § 1983 purposes simply because they were committed by persons acting under color of state law. \textit{Id.} (citing Baker v. McCollan, 443 U.S. 137 (1979); Paul v. Davis, 424 U.S. 693 (1976)). The Third Circuit noted that if the Court was ruling in \textit{Parratt} that negligence would suffice for a § 1983 claim, that would amount to a 180-degree turnaround from \textit{Baker} and \textit{Paul}. \textit{Id.}


46. 752 F.2d at 826. For a discussion of the holding in \textit{Monroe}, see supra note 34 and accompanying text. For a discussion of the holding in \textit{Baker}, see supra note 36.

47. 752 F.2d at 826. Judge Sloviter observed that there is a broad range of actions between negligent and intentional conduct. \textit{Id.} Judge Sloviter concluded that since the \textit{Parratt} Court passed over the question of whether negligence by a state official constituted a due process deprivation of property, nothing in the majority's opinion in that case could lead to the conclusion that negligent conduct by state officials constitutes a constitutional deprivation encompassed by § 1983. \textit{Id.}


Furthermore, in a footnote to her discussion of \textit{Rhodes}, Judge Sloviter noted that a recent Third Circuit opinion read \textit{Parratt} too broadly because it held "as a general matter, that § 1983 affords a remedy for negligent deprivation of federally protected rights by persons acting under the color of state law." \textit{Id.} at 827 & n.6 (quoting \textit{Holman v. Hilton}, 712 F.2d 854, 856 (3d Cir. 1983)). In \textit{Holman}, the Third Circuit struck down a New Jersey statute that barred prisoners from taking legal action against any public entity or public employee until released.
legislative purpose of section 1983.\textsuperscript{50}

Judge Sloviter pointed out that the court's holding in no way lessens the importance of section 1983 as a cause of action to be used when state employees violate a person's constitutional rights, and cited examples of such action that would fall under section 1983, including unnecessary or unreasonable use of force by police officers or prison officials,\textsuperscript{51} intentional or reckless indifference to a prisoner's safety by prison officials,\textsuperscript{52} and established state procedures that infringe on an individual's liberty or property interests.\textsuperscript{53} However, after noting that

\begin{quote}
from confinement. \textit{Holman}, 712 F.2d at 863 (citing N.J. STAT. ANN. § 59:5-3 (West 1982)). The claimant sought compensation for personal articles destroyed in a prison fire, after an administrative claim was rejected. \textit{Id.} at 856. The Third Circuit ruled that the failure to afford the prisoner the opportunity for a hearing violated his right to due process. \textit{Id.} at 862-63. For a discussion of the dissent's analysis of \textit{Holman}, see infra notes 84-85 and accompanying text.

49. 752 F.2d at 827 (citing Hull v. City of Duncanville, 678 F.2d 582, 584 & n.2 (5th Cir. 1982); Mills v. Smith, 656 F.2d 337, 340 & n.2 (8th Cir. 1981) (per curiam)). The Third Circuit, however, acknowledged apparently contrary views in Howard v. Fortenberry, 723 F.2d 1206, 1209 & n.6 (5th Cir. 1984) and McKay v. Hammock, 730 F.2d 1367, 1373 (10th Cir. 1984).

50. 752 F.2d at 826 & n.5 (citing Civil Rights Cases, 109 U.S. 3 (1883)). Judge Sloviter explained that § 1983 was enacted as part of the Civil Rights Acts of 1870 and 1871, designed to enforce the post-Civil War constitutional amendments. \textit{Id.} Judge Sloviter quoted Justice John Harlan's dissent in \textit{Civil Rights Cases}, which stated that the purpose of those amendments was to insure "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him". \textit{Id.} (quoting Civil Rights Cases, 109 U.S. at 44 (Harlan, J., dissenting)).

51. 752 F.2d at 827-28 (citing Black v. Stephens, 662 F.2d 181, 188 (3d Cir. 1981); Martinez v. Rosado, 614 F.2d 829, 831-32 (2d Cir. 1980); Howell v. Caldera, 464 F.2d 272, 282 (3d Cir. 1972)).

52. \textit{Id.} at 828 (citing Wade v. Haynes, 663 F.2d 778, 780-81 (8th Cir. 1981), aff'd on other grounds sub nom. Smith v. Wade, 461 U.S. 30 (1983); Holmes v. Golin, 615 F.2d 83, 85 (2d Cir. 1980)). Judge Sloviter noted that the ability to recover for intentional conduct or reckless indifference to a prisoner's safety is consistent with the Third Circuit's holding in \textit{Curtis v. Everett}. \textit{Id.} at 828 (citing Curtis v. Everett, 489 F.2d 516, 518 (3d Cir. 1973) (prisoner who charged guards with "intentional conduct" in preventing him from defending himself from another inmate's attack stated claim under § 1983), cert. denied, 416 U.S. 995 (1974)).

53. 752 F.2d at 828 (citing Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (state procedure that permitted claim to be terminated through no fault of claimant declared invalid); Holman v. Hilton, 712 F.2d 854 (3d Cir. 1983) (New Jersey law barring prisoners from suing public entities or public employees in tort invalidated)).

The Third Circuit also noted other examples of conduct that would fall within the ambit of § 1983. \textit{Id.} (citing Stokes v. Delcambre, 710 F.2d 1120, 1124 (5th Cir. 1983) (if jail "was administered in a manner virtually indifferent to the safety of prisoners," prisoners' constitutional rights could be held to have been violated); Black v. Stephens, 662 F.2d 181, 189-90 (3d Cir. 1981) (police chief's issuance of regulation delaying disciplinary hearings into policemen's conduct until adjudication of underlying arrest charges which proximately caused police officers to file unwarranted charges against claimant fell within scope of § 1983);
the availability of a state remedy does not preclude a section 1983 claim where a liberty interest is violated, the court concluded that the prison officials’ negligence in Davidson did not deprive the plaintiff of his right to due process under the fourteenth amendment. Finally, the court considered Davidson’s claim of deprivation of procedural due process. The Third Circuit noted that Davidson did not challenge the constitutionality of the New Jersey law immunizing the state and its employees, and concluded that a due process argument was misplaced. Additionally, the court found that no substantive right under the fourteenth amendment was infringed upon by the defendants’ negligence, a necessary element for a procedural due process claim. Consequently, the Third Circuit rejected Davidson’s claim, refusing to restrict the state’s attempt to avoid liability.

Murray v. City of Chicago, 634 F.2d 365, 366 (7th Cir. 1980) (where law enforcement officials failed to “establish or execute appropriate procedures for preventing such serious malfunctions in the administration of justice,” § 1983 claim could be stated), cert. dismissed sub nom. Finley v. Murray, 456 U.S. 604 (1982)).

54. 752 F.2d at 828. The Third Circuit distinguished Parratt, which held that a post-deprivation remedy available at the state level would preclude a § 1983 action, where a property interest was violated. Id. (citing Parratt, 451 U.S. at 543-44). Judge Sloviter emphasized the liberty interest at issue in Davidson. Id. For a discussion of this liberty interest, see supra notes 26-29 and accompanying text.

55. 752 F.2d at 829. Judge Sloviter explained that the officials’ conduct was not so outrageous as to constitute a deprivation of a constitutional right. Id. Judge Sloviter described the conduct as follows: One official simply failed to check on a subordinate’s handling of the problem, while the subordinate forgot to investigate the note, which was not specific in its threat and which did not seem to pose an immediate emergency. Id. The court characterized this conduct as “mere negligence” insufficient to involve a § 1983 deprivation of a constitutional right. Id. The Third Circuit observed that a contrary holding would mean that § 1983 claims based on the fourteenth amendment would be judged under a standard of care more stringent than the standard applied to prisoners’ eighth amendment claims or claims of involuntarily confined mental patients. Id. at 829 n.9. (citing Youngberg v. Romeo, 457 U.S. 307 (1982); Estelle v. Gamble, 429 U.S. 97 (1976)).

56. Id. at 830. Davidson contended that his right to procedural due process was violated by enactment of the state statute prohibiting a suit against the state or prison employees by a prisoner injured by another prisoner. See id. (citing N.J. STAT. ANN. § 59:5-2(b)(4) (West 1982)). For the text of this statute, see supra note 18.

57. 752 F.2d at 830. Judge Sloviter noted that Davidson’s claim was only for money damages. Id. For a discussion of the dissent’s approach to this issue, see infra note 85 and accompanying text.

58. 752 F.2d at 830 (citing Bishop v. Wood, 426 U.S. 341, 344 (1976); Meachum v. Fano, 427 U.S. 215 (1976)). The court added that Davidson did not allege the deprivation of any statutory or other entitlement, the presence of which might have triggered a due process analysis. Id. See also J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 528 (2d ed. 1983) (impairment of interest in life, liberty, or property necessary for due process clause to apply).

59. Id. at 830-31. The court noted that there is no constitutional right to pursue a negligence cause of action in state court given that a state’s right to
Judge Garth, in a concurring opinion,60 contended that even if mere negligence could deprive Davidson of a liberty interest, the absence of a state law remedy did not mean that a remedy must be available under section 1983.61 Applying a procedural due process analysis,62 Judge Garth balanced the state’s interest in protecting its officials from liability against the individual’s interest in monetary damages for injuries suffered through another’s negligence.63 Judge Garth emphasized the importance of the state’s interest in structuring its own tort law, as long as the individual can still challenge “state action that is wholly arbitrary or irrational.”64 Because Judge Garth found that the state’s interest outweighed that of the individual in this case, he concluded that Davidson had “all the process which is his due,” and thus

immunity has been securely established. Id. at 830 (citing Owen v. City of Independence, 445 U.S. 622, 637-38 (1980)).

60. Judge Weis joined Judge Garth’s concurrence. Id. at 831.

61. Id. Judge Garth observed that the mere fact that Davidson had no state law remedy did not mean that he must have a remedy somewhere. Id. (emphasis in original). Judge Garth suggested that such a result would frustrate the state’s ability to structure its tort law, by allowing plaintiffs to avoid the immunity statute and recover against the state or its employees in a different forum. Id. at 832 & n.4 (Garth, J., concurring). For the text of the immunity statute, see supra note 17. Judge Garth cited the example of a person negligently struck by a police car, while the police were chasing a criminal. 752 F.2d at 832 & n.4 (Garth, J., concurring). Judge Garth opined that the availability of a federal cause of action in such a case would trivialize § 1983 actions and would be inconsistent with the statute’s purpose. Id.

62. Id. at 831-33 (Garth, J., concurring). Judge Garth noted that a procedural due process analysis presupposes the deprivation of some constitutional or statutory entitlement. Id. at 831 & n.2 (Garth, J., concurring) (citing Bishop v. Wood, 426 U.S. 341, 344 (1976); Meachum v. Fano, 427 U.S. 215 (1976)). Judge Garth explained that since the majority rejected Davidson’s claim that he was deprived of a substantive right under the fourteenth amendment by defendants’ negligence, the majority properly did not conduct this procedural due process analysis. Id.

Judge Garth then suggested that his only reason for conducting such an analysis was the position taken by the dissenting opinions, that Davidson should have a federal cause of action. Id.

63. Id. at 831-82 (Garth, J., concurring). Judge Garth observed that analogous precedent for such a balancing exists in other cases where immunity was upheld. Id. at 831 n.3 (Garth, J., concurring) (citing Nixon v. Fitzgerald, 457 U.S. 731, 754 (1982); Butz v. Economou, 438 U.S. 478, 513-14 (1978); Imbler v. Pachtman, 424 U.S. 409, 420-28 (1976); Pierson v. Ray, 386 U.S. 547, 553-55 (1967)).

64. Id. at 831-32 (Garth, J., concurring) (quoting Martinez v. California, 444 U.S. 277, 282 (1980) (California law that provided absolute immunity for those making parole decisions was not unconstitutional although it defeated state tort claim)). Judge Garth added that Parratt does not restrict the state’s right to fashion its own laws if those laws do not conflict with federal law. Id. at 892 (Garth, J., concurring) (citing Ferri v. Ackerman, 444 U.S. 193, 198 (1979)). Judge Garth also repeated the Supreme Court’s statement in Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982), that “the state remains free to create substantive defenses or immunities for use in adjudication.” 752 F.2d at 832 (Garth, J., concurring).
reached the same result as the majority in deciding that Davidson should be denied recovery.65

In his dissent, then Chief Judge Seitz stated that Davidson satisfied the four essential elements of a section 1983 claim:66 (1) the defendant must have acted under color of state law;67 (2) an interest in life, liberty, or property must be at stake;68 (3) the conduct complained of must amount to a deprivation;69 and (4) the state must have failed to provide due process of law.70 Chief Judge Seitz explained that his principal disagreement with the majority revolved around its finding that there was no deprivation in this case.71 Chief Judge Seitz then pointed out that since

65. 752 F.2d at 832-33 (Garth, J., concurring). Judge Garth insisted that those who advocate a federal constitutional remedy by default (where no state remedy is available) have failed to consider and to balance the state's interest against the interest asserted by the claimant. In failing to do so, they have also failed to recognize that a state may afford appropriate due process without that process necessarily resulting in a recovery for the claimant. Id. at 832 (Garth, J., concurring) (citing Daniels v. Williams, 720 F.2d 792 (4th Cir. 1983)).

66. 752 F.2d at 833 (Seitz, C.J., dissenting) (citing Parratt, 451 U.S. at 535-37). Chief Judge Seitz commented that the Parratt Court itself identified these four elements after looking at the language of the fourteenth amendment and § 1983. Id.

67. Id. Chief Judge Seitz observed that the defendants, being state prison officials, clearly acted under color of state law. Id. (citing Monroe, 365 U.S. at 172-85).

68. Id. On this point, Chief Judge Seitz noted his agreement with the majority that plaintiff's interest in personal security falls within the fourteenth amendment guarantee of liberty. Id. (citing Youngberg v. Romeo, 457 U.S. 307 (1984)). For a discussion of the majority's treatment of this point, see supra notes 26-29 and accompanying text. Chief Judge Seitz further agreed with the majority that a prisoner retains this liberty interest except to the extent that it is "fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." 752 F.2d at 833 (Seitz, C.J., dissenting) (quoting Hudson v. Palmer, 104 S. Ct. 3194, 3198 (1984)). Chief Judge Seitz concluded that Davidson's interest in freedom from attack was not inconsistent with his status as a prisoner. Id.

69. 752 F.2d at 833 (Seitz, C.J., dissenting). Chief Judge Seitz concluded that the conduct in Davidson amounted to a deprivation. Id. (citing Parratt, 451 U.S. at 536-37 (negligent loss of property constituted deprivation); Holman v. Hilton, 712 F.2d 854, 856 (3d Cir. 1983) ("section 1983 affords a remedy for negligent deprivations").

70. Id. at 834 (Seitz, C.J., dissenting). Chief Judge Seitz observed that no post-deprivation remedy was available to Davidson, and that therefore no discussion as to adequacy of procedures was necessary. Id. The lack of any procedural due process, combined with the satisfaction of the other three elements, made plaintiff's claim cognizable under § 1983, according to Chief Judge Seitz. Id.

71. Id. at 835 (Seitz, C.J., dissenting). Chief Judge Seitz pointed out the "essential" language in Parratt, which the majority had ignored, which explained that a loss "even though negligently caused, amounted to a deprivation." Id. (citing Parratt, 451 U.S. at 536-37 (footnote omitted)). Chief Judge Seitz also found it persuasive that in a concurrence in Parratt, Justice Powell indicated that he would not have found that "a negligent act . . . works a deprivation in the
the *Parratt* Court acknowledged that negligence by a state official amounted to a deprivation, and since the other elements were present, a section 1983 claim would be cognizable.\(^{72}\)

Judge Gibbons wrote a lengthy dissent to the majority's opinion.\(^{73}\) After discussing and criticizing the development of New Jersey's immunity statute,\(^{74}\) Judge Gibbons began an analysis of the federal liberty interest involved in *Davidson*.\(^{75}\) Judge Gibbons joined the majority in

\[\textit{constitutional sense.}^{*}\] *Id.* (quoting *Parratt*, 451 U.S. at 548 (Powell, J., concurring) (emphasis in original)). To Chief Judge Seitz this suggested that the *Parratt* majority had concluded that negligence can cause a constitutional deprivation. *Id.*

\(^{72}\) *Id.* Chief Judge Seitz also rejected the argument that a § 1983 claim could not be sustained unless the "deliberate indifference" standard of the eighth amendment had been met. *Id.* at 854 (Seitz, C.J., dissenting). He pointed out that constitutional violations under the eighth and fourteenth amendments are to be measured by entirely different standards; therefore, failure to state a claim under the eight amendment would not preclude reliance on the fourteenth. *Id.*

\(^{73}\) 752 F.2d at 835-54 (Gibbons, J., dissenting). Judge Gibbons, at the outset, characterized the "narrow" issue presented upon appeal:

\[\text{[M]}\text{ay a state, when it involuntarily commits persons to the custody of state agents, thereby depriving those persons of the capacity for flight, self defense, or calls for assistance, consistent with the fourteenth amendment relieve those agents of the duty to take reasonable care to prevent third parties from injuring them.}\]

*Id.* at 835 (Gibbons, J., dissenting). Judge Gibbons emphasized that because the duty of care owed to persons at liberty was not involved, the issue was not any broader. *Id.* Nor was it a narrower one, he asserted, because regardless of the reason for commitment, all those involuntarily committed are in the same position with respect to defending themselves against aggressive acts by others. *Id.*

\(^{74}\) *Id.* at 836-38 (Gibbons, J., dissenting) (citing N.J. STAT. ANN. § § 59:2-4, :5-3, :5-4, :6-2, :6-7 (West 1982)). Judge Gibbons was disturbed by the broad immunity conferred on New Jersey employees. *Id.* He noted with disapproval the legislature's contraction of the state's duty to act for the public good. *Id.* at 837 (Gibbons, J., dissenting). Finally, Judge Gibbons lamented the total immunity afforded state custodians in caring for inmates. *Id.*

\(^{75}\) *Id.* at 838-40 (Gibbons, J., dissenting). Judge Gibbons began by noting that in 1976 the Supreme Court was "flirting with the dangerous notion" that to be protected by the fourteenth amendment a life or liberty interest had to have some foundation in state positive law. *Id.* at 838-39 (Gibbons, J., dissenting) (citing Paul v. Davis, 424 U.S. 699, 710 (1976) (liberty interest in one's personal reputation must be based on state law); Meachum v. Fano, 427 U.S. 215, 228 (1976) (due process clause was not violated where state prisoner was transferred to less desirable prison without hearing, absent some state requirement for such hearing); Montanye v. Haymes, 427 U.S. 236, 243 (1976) (state prisoner's right to resist transfer to worse conditions is dependent on applicable state law)). Judge Gibbons observed that such a trend confused property rights, which are always based on positive law, with life and liberty rights, which are not. 752 F.2d at 839 (Gibbons, J., dissenting). Judge Gibbons went on to note the Court's subsequent abandonment of the requirement of a state law basis for a life or liberty interest and its reaffirmance of the proposition that a fourteenth amendment liberty interest exists independently of state law. *Id.* at 839-40 (Gibbons, J., dissenting) (citing Youngberg v. Romeo, 457 U.S. 307 (1982) (the involuntarily committed do not lose their federally protected interest in personal safety); *Vitek* v. *Jones*, 445 U.S. 480, 490-91 (1980) ("convicted prisoner had a federally protected liberty interest . . . in freedom from confinement in a mental institu-
rejecting New Jersey's contention that Davidson had no constitutionally protected right to safety while confined.\footnote{76}

Judge Gibbons next addressed the issue of a state of mind requirement in section 1983.\footnote{77} He observed that in \textit{Monroe}, the Supreme Court was unanimous in rejecting any such requirement.\footnote{78} Judge Gibbons acknowledged that in later cases the Court considered injecting a state of mind requirement into section 1983;\footnote{79} but he found it significant that in \textit{Martinez v. California},\footnote{80} the Court utilized a traditional tort law analysis in rejecting a section 1983 claim against parole officials responsible for releasing a sex offender who subsequently murdered the claimants' daughter.\footnote{81} Judge Gibbons interpreted the \textit{Martinez} opinion as suggesting that if proximate cause standards had been met, section 1983 would have provided a remedy, regardless of the state of mind.\footnote{82}
Judge Gibbons then examined what he termed the majority's "unprincipled treatment of precedent." Judge Gibbons was particularly disturbed by the majority's attempt to distinguish Holman v. Hilton from the case at bar because in Holman, the plaintiff expressly contested the validity of the state immunity statute, whereas Davidson did not. He further criticized the majority's reliance on a number of Supreme Court rulings for the proposition that the state can relieve its custodians of the duty to exercise reasonable care to protect their charges from harm. Judge Gibbons concluded by suggesting that the majority had liability if causation had been established. Id. (citing Martinez, 444 U.S. at 284-85).

83. Id. at 849 (Gibbons, J., dissenting). Judge Gibbons noted that the majority ignored its own precedent in Holman v. Hilton, as well as Supreme Court precedent. Id. (citing Holman v. Hilton, 712 F.2d 854 (3d Cir. 1983)).

84. 712 F.2d 854 (3d Cir. 1983).

85. 752 F.2d at 850 (Gibbons, J., dissenting) (citing Holman, 712 F.2d at 856). For a discussion of Holman, see supra note 48.

Judge Gibbons noted that Davidson appeared pro se and that therefore his complaint should be judged less strictly than complaints written by attorneys. 752 F.2d at 850 (Gibbons, J., dissenting). Judge Gibbons then addressed the majority's second distinction of Holman from Davidson—that no substantive right in the case at bar was violated by defendants' negligence; whereas, in Holman, the Third Circuit held that a statute barring suits by prisoners against the government or its employees unconstitutionally deprived the prisoner of a fourteenth amendment property interest. Id. at 851 (Gibbons, J., dissenting) (citing Holman, 712 F.2d at 859). Judge Gibbons suggested that the majority had misapplied Holman, either by "lochnerizing" the Holman holding, that is, by affording an interest in liberty less protection than a property interest, or by ignoring it. Id. (citing Lochner v. New York, 198 U.S. 45 (1905); Holman, 712 F.2d at 863).


In Estelle, the prisoner's § 1983 claim of "cruel and unusual punishment" for inadequate medical treatment was dismissed because there was insufficient evidence to show deliberate indifference on the part of prison authorities, the established standard for an eighth amendment violation. Estelle, 429 U.S. at 106. Judge Gibbons construed Judge Sloviter's opinion as interpreting Estelle to state that state agents may be relieved of their duty to provide reasonable care to inmates under their control. 752 F.2d at 852 (Gibbons, J., dissenting). For the majority's discussion of Estelle, see supra note 35 and accompanying text. The dissent contended that such a reading misinterpreted Estelle, in which only an eighth amendment claim was made and found insufficient. 752 F.2d at 852 (Gibbons, J., dissenting). Judge Gibbons noted that the state agents in Estelle were not relieved of any duty to care for prisoners; in fact, the prisoner could still sue in state court on the negligence claim. Id.

Judge Gibbons likewise discounted the majority's reliance on Paul v. Davis for the proposition that state agents may not have to use reasonable care to protect their prisoners from harm. Id. (citing Paul, 424 U.S. 693). For the majority's discussion of Paul, see supra notes 35 & 44 and accompanying text. Judge Gibbons contended that Paul was inapposite because it held only that damage to reputation was insufficient to implicate any interest which would warrant protection under the due process clause. 752 F.2d at 852 (Gibbons, J., dissenting).
formulated a new standard by requiring more than "mere negligence" for a section 1983 claim, and that the case should be remanded to the district court.\footnote{87}

Confronting a difficult question that has been interpreted in a variety of ways,\footnote{88} Judge Sloviter succinctly stated the primary issue in Davidson as whether a prisoner's claim for personal injuries sustained as a result of prison officials' negligence is actionable under section 1983, when no remedy is available under state law.\footnote{89} In resolving this issue, however, it is submitted that the Davidson majority relied too strongly on certain Supreme Court cases and other cases of limited precedential relevance, while failing to adequately address clear language present in both the Court's opinion in Parratt and in the Third Circuit's own decision in Basista v. Weir,\footnote{90} language which contradicts the proposition that negligence is not actionable under section 1983.\footnote{91}

The majority began its examination of the issue in Davidson by discussing Monroe v. Pape,\footnote{92} which involved a section 1983 claim against police officers who broke into the petitioners' home without a warrant.\footnote{93}

Judge Gibbons also criticized the majority's comparison of Davidson with Youngberg v. Romeo. 752 F.2d at 852 (Gibbons, J., dissenting) (citing Youngberg, 457 U.S. 307). He contended that Judge Sloviter read Youngberg to stand for the proposition that a state can relieve its custodians of the duty to exercise reasonable care for the involuntarily committed. \textit{Id.} Judge Gibbons pointed out, however, that the Youngberg Court merely determined the standard of care in such a situation to be that of "accepted professional judgment." \textit{Id.} (Gibbons, J., dissenting) (quoting Youngberg, 457 U.S. at 323).

87. 752 F.2d at 854 (Gibbons, J., dissenting). Judge Gibbons suggested that the majority's holding would create a gross negligence—mere negligence distinction which would be difficult to make as a matter of law. \textit{Id.} Judge Gibbons noted the trial judge's reliance on Parratt for the contention that ordinary negligence sufficed for a § 1983 claim, and concluded that the case should be remanded so the judge could examine the evidence "in light of the new standard" the majority announced. \textit{Id.} (citing Parratt v. Taylor, 451 U.S. 527 (1981)).

88. See 752 F.2d at 823 & n.4.

89. \textit{Id.} at 817. For a discussion of Judge Gibbons' characterization of the issue in Davidson, see supra note 73.

Observing that the factual finding of negligence was not so "clearly erroneous" as to merit reversal and that Davidson did have a fourteenth amendment liberty interest in personal safety, an undivided court appropriately dismissed the officials' first two arguments, and focused its attention on the issue thus narrowed. 752 F.2d at 820-22. For a discussion of the majority's treatment of the factual finding of negligence, see supra notes 23-25 and accompanying text. For a discussion of Davidson's liberty interest, see supra notes 26-29 and accompanying text.

90. 340 F.2d 74 (3d Cir. 1965).

91. For a discussion of the majority's reliance on various Supreme Court cases, see supra notes 32-46 and accompanying text. For a discussion of the majority's reading of Parratt, see supra notes 37-41 and accompanying text.


93. \textit{Id.} at 169-70. The petitioners in Monroe sued Chicago police officers who broke into their home, ransacked it, and detained the petitioners' father for
Although noting that the majority in *Monroe* had acknowledged that willfullness was not required for a section 1983 claim, Judge Sloviter focused on Justice Harlan's concurrence, specifically his distinction of the deprivation of a constitutional right from the violation of a state right. The Third Circuit continued its analysis by relying on *Estelle v. Gamble* and *Paul v. Davis* to reject the notion that a state law tort committed by an official acting under color of state law necessarily constitutes a cause of action under section 1983. Though it is entirely reasonable, and in fact is mandated by the language of the statute, that not every tortious action by a state officer is cognizable under section 1983, it is contended that a tort nevertheless may deprive a person of a constitutional right, and in such a case, section 1983 should be available.

To the extent that the Third Circuit relied on *Estelle* and *Paul* to illustrate, for purposes of its analysis in *Davidson*, the situation in which a law was warranted.

94. 752 F.2d at 823 (citing *Monroe*, 365 U.S. at 187). The *Monroe* Court distinguished §1983 from 18 U.S.C. §242, its criminal counterpart, which the Court had previously found to have a willfullness requirement. 365 U.S. at 187 (citing *Screws v. United States*, 325 U.S. 91, 103 (1945)). See 18 U.S.C. § 242 (1982). The *Monroe* Court noted that the word “willfully” was not contained in the language of §1983, nor was vagueness an issue, as it had been in *Screws*. 365 U.S. at 187. The Court concluded that §1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.” *Id.*

95. 752 F.2d at 823 (citing *Monroe*, 365 U.S. at 196 (Harlan, J., concurring)). Justice Harlan asserted in *Monroe* that Congress in enacting §1983 must have intended that “a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.” 365 U.S. at 196 (Harlan, J., concurring).

It is suggested, however, that Justice Harlan's objective was to respond to the *Monroe* dissent's distinction of state-authorized unconstitutional action, which should be actionable under §1983, from unconstitutional conduct not authorized by the state, which the state courts can remedy. *See id.* at 194-98 (Harlan, J., concurring). Justice Harlan noted that such a distinction would serve only a jurisdictional function, increasing the caseload of lower federal courts, while lessening the burden of review of state courts on the Supreme Court. *Id.* at 195 (Harlan, J., concurring). Justice Harlan dismissed such reasoning, concluding that “[t]he statute becomes more than a jurisdictional provision only if one attributes to the enacting legislature the view that a deprivation of a constitutional right is . . . more serious than a violation of a state right.” *Id.* at 196 (Harlan, J., concurring). Thus, it is contended that Justice Harlan's words, taken in their proper context, are inconclusive with respect to the state tort-constitutional violation distinction advanced by Judge Sloviter in *Davidson*.


98. 752 F.2d at 823-24 (citing *Paul*, 424 U.S. 693 (1976); *Estelle*, 429 U.S. 97 (1976)).

99. For the text of §1983, see *supra* note 1 (limiting §1983 actions to deprivations of "rights, privileges, or immunities secured by the Constitution").
state tort does not amount to a constitutional deprivation, it is submitted that these cases are inapposite. In Estelle, a prisoner unsuccessfully brought suit under section 1983 against prison medical personnel for violating the eighth amendment by their allegedly inadequate treatment of the prisoner’s back injury. In Paul, the Court rejected a section 1983 claim that various police chiefs’ distribution of flyers listing the plaintiff as an “active shoplifter” deprived the plaintiff of “some ‘liberty’ protected by the Fourteenth Amendment.” In both cases the Supreme Court concluded that the allegedly tortious conduct failed to infringe upon a constitutionally protected interest. In Davidson, on the other hand, the judges of the Third Circuit were in total agreement that the prison officials’ conduct implicated Davidson’s constitutionally protected liberty interest in personal safety.

Focusing on the primary issue in Davidson, whether a section 1983 claim can be grounded in simple negligence, the Third Circuit relied on Baker v. McCollan to argue that the resolution of this issue may depend on which constitutional right has allegedly been violated. Baker involved a case of mistaken identity where an arrest warrant was issued in the claimant’s name, though the true subject of the warrant was the claimant’s brother. The Court held that fourth amendment requirements were satisfied because the arrest warrant was based on probable cause and therefore validly issued; further, the Court held that the claimant’s detention for three days did not rise to the level of a fourteenth amendment deprivation of liberty without due process. While Judge Sloviter concluded that Baker and Davidson should be analyzed in the same manner because both cases involved state officials obligated

100. 429 U.S. at 98-101. The Court dismissed the claim because the alleged malpractice did not constitute “cruel and unusual punishment,” and held that the appropriate forum for a claim of malpractice was state court under a state tort claims act. Id. at 107.
101. 424 U.S. at 697, 699-700.
102. In Estelle, the standard for a violation of the eighth amendment, “deliberate indifference to serious medical needs of prisoners,” was not met. 429 U.S. at 104-07. In Paul, the Court concluded that damage to personal reputation did not implicate a fourteenth amendment interest. 424 U.S. at 701-02.
103. 752 F.2d at 821-22; id. at 852 (Gibbons, J., dissenting). 752 F.2d at 824-25 (citing Baker, 443 U.S. at 139-40)). In Baker, Justice Rehnquist opined that while negligence might suffice for some constitutional violations under § 1983, other constitutional rights might require more than that. 443 U.S. at 139-40.
104. 443 U.S. at 144. In Baker, the claimant’s brother was arrested, charged, and released in the claimant’s name because the brother was carrying the claimant’s driver’s license. Id. at 141. Later, an arrest warrant was issued and the claimant was taken into custody. Id. After spending three days in jail, the claimant was released. Id.
105. Id. at 143-46. The Court noted that the claimant’s innocence of the charge which was the subject of the warrant would be material to a tort claim of false imprisonment, but was irrelevant to a constitutional claim. Id. at 145.
under state tort law to care for prisoners, it is contended that the similarity between the cases really ends there. In Baker, the Court concluded that due process had been afforded the claimant because there was probable cause for the arrest. In Davidson, on the other hand, it is submitted that the claimant has not received all the process he is due. Rather, he has suffered an injury to a constitutionally protected right as a result of defendants' negligence, and has no remedy available to him.

Realizing that Parratt v. Taylor formed much of the basis for the lower court's decision in Davidson, the Third Circuit concentrated on rejecting the lower court's holding under Parratt that a section 1983 claim could include actions alleging negligence. In Parratt, the Supreme Court held that prison officials' negligent loss of an inmate's property was not actionable under section 1983 where a post-deprivation remedy was available. The Third Circuit conceded that certain language in Parratt indicated that negligence alone might work a constitutional deprivation. The Third Circuit dismissed such an interpretation, however, in light of Supreme Court precedent rejecting the notion that torts become constitutional violations when committed by state officials. But in the two cases cited by the Third Circuit to support its reasoning, Baker and Paul, no constitutionally protected interest was deprived. Had no remedy been available in Parratt, it is suggested that the negligence would have been actionable under section 1983. This does not contradict Baker and Paul, as the Third Circuit suggests, but merely distinguishes the situation where a constitutional right is violated from the situation where a state tort violates no constitutional right.

108. See 752 F.2d at 825.
109. 443 U.S. at 141. For a discussion of the Baker Court's rejection of the alleged constitutional deprivation in that case, see supra text accompanying note 107.
110. 752 F.2d at 825-26. Judge Sloviter concluded that the lower court's interpretation of Parratt was too broad. Id.
111. Id. (citing Parratt, 451 U.S. at 537-44). The inmate was in isolation when his package arrived. Parratt, 451 U.S. at 530. As a result he was not allowed to receive the property and when he was released from isolation, the package could not be located. Id. The prisoner sued the prison officials under § 1983. Id.
112. 752 F.2d at 826. For this language, see supra text accompanying note 41. As Judge Sloviter put it: "Admittedly, this language standing alone is susceptible of the interpretation placed upon it by the district court that mere negligence can constitute a deprivation that can be redressed by a § 1983 action." Id.
113. See supra notes 35-36 and accompanying text.
114. For a discussion of the Supreme Court's holding in Baker, see supra notes 36 & 104-09 and accompanying text. For a discussion of the Court's reasoning in Paul, see supra notes 35, 44 & 101-02 and accompanying text.
In holding that mere negligence was insufficient for a section 1983 claim, the Third Circuit also relied on its own previous decisions as well as those from other circuits.\footnote{115} However, the Third Circuit failed to discuss at least one case in which it held that state of mind was irrelevant in a section 1983 claim. In Basista v. Weir,\footnote{116} where the victim of an alleged police beating and illegal detention brought suit, the Third Circuit held that a section 1983 claim would be cognizable so long as a person’s federal rights were violated by a state official.\footnote{117} It is suggested that this case should have at least been addressed in Davidson. If the Third Circuit intended to overrule Basista, it should have done so explicitly.

The Third Circuit also pointed to the legislative purpose in enacting section 1983 to support the argument that negligence claims should not be encompassed within the private cause of action created by the statute.\footnote{118} The court noted that historically the Civil Rights Act of 1971 was designed to protect newly freed blacks after the Civil War.\footnote{119} Further, the court opined that section 1983 was aimed at remedying “misuse” of official power,\footnote{120} implying that commission of a negligent tort is not “misuse” of power. It is suggested, however, that the Third Circuit

\footnote{115. For a discussion of the Third Circuit’s reliance on these cases, see supra notes 48-49 and accompanying text.}
\footnote{116. 340 F.2d 74 (3d Cir. 1965).}
\footnote{117. Id. at 81. In Basista, the § 1983 claimant alleged that police assaulted and illegally detained him at the police station. Id. at 77. The Third Circuit rejected any intent requirement, noting that “[w]e are compelled to the conclusion that Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by any officer acting under pretense of federal law.” Id. at 81 (quoting Picking v. Pennsylvania R.R., 151 F.2d 240, 249 (3d Cir. 1945)). The court noted that “the Civil Rights Act is not to be interpreted narrowly.” Id.}
\footnote{118. Other circuits have failed to reconcile conflicting opinions as well. See, e.g., McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984) (claimant who was negligently rearrested twice after release on bond, was successful in § 1983 action despite defendant’s argument that negligence alone would not support such an action); Howard v. Fortenberry, 723 F.2d 1206, 1209 n.6 (5th Cir. 1984) (negligence would suffice for § 1983 claim); Hull v. City of Duncanville, 678 F.2d 582, 584 (5th Cir. 1982) (to constitute § 1983 cause of action conduct must be sufficiently egregious as to be constitutionally tortious); Mills v. Smith, 656 F.2d 337, 340 & n.2 (8th Cir. 1981) (per curiam) (§ 1983 claim dismissed where shooting of escaped prisoner by police was negligent).}
\footnote{119. 752 F.2d at 826 n.5. The majority relied in part on Justice Harlan’s dissenting opinion in Civil Rights Cases, 109 U.S. 3, 35 (1883) (Harlan, J., dissenting) (purpose of Civil War amendments was to secure freedom and protection of newly released slaves). Judge Sloviter also pointed to language in Monroe v. Pape indicating that concern about the Ku Klux Klan also motivated Congress’ passage of post-Civil War civil rights legislation. 752 F.2d at 826 n.5 (citing Monroe, 365 U.S. at 174).}
\footnote{120. 752 F.2d at 827 (citing Monroe, 365 U.S. at 172). Judge Sloviter also relied on language in Paul v. Davis supporting the same proposition. Id. (citing Paul, 424 U.S. at 717 (Brennan, J., dissenting)).}
may have overemphasized the authoritative weight of the statute’s legislative history in light of the recent widespread use of section 1983 by various classes of litigants.121

The Third Circuit’s manipulation of precedent, as well as its narrow construction of a generally worded statute, does not adequately justify its conclusion that Davidson’s claim for damages should be rejected. It is suggested that Judge Gibbons’ approach is more straightforward: he found a breach of the standard of care owed to a state prison inmate and concluded that such a breach resulted in the loss of a constitutionally protected personal liberty interest, and thus amounted to a constitutional deprivation actionable under section 1983.122

The Third Circuit’s holding in Davidson v. O’Lone that some culpable state of mind, and not mere negligence, is required for a section 1983 claim makes it more difficult for claimants alleging injury to constitutionally protected interests to have their day in court. Although this may have a desirable effect of clearing the federal docket, it may leave persons wronged by state officials without a remedy, particularly in jurisdictions providing such officials with statutory immunity from certain state law tort actions. It seems only fair that victims of negligent conduct be able to recover from the tortfeasor. It is suggested that precluding section 1983 suits against negligent prison employees protects negligent conduct in the operation of state correctional institutions;

121. See Aldisert, supra note 3, at 566-67. Chief Judge Aldisert has expressed concern over the burden placed on federal courts by the recent expansion of § 1983 claims, both in number and type. Id.

It is further submitted that the majority’s dismissal of Davidson’s procedural due process claim on improper pleading grounds is, as Judge Gibbons suggested, an “outrageous violation of the standards . . . for measuring the sufficiency of a pro se litigant’s pleading.” 752 F.2d at 850 (Gibbons, J., dissenting). Judge Gibbons observed that Davidson argued his own case throughout the trial and received the benefit of counsel only at the appellate level. Id. The pleadings standards were explained in Haines v. Kerner, wherein the Supreme Court held that courts should judge pro se pleadings less strictly than those written by attorneys. 404 U.S. 519, 519-20 (1972) (prisoner who suffered injuries while in disciplinary confinement was denied due process and should be afforded opportunity to present evidence in court, regardless of adequacy of complaint). Under the Haines standard, it would seem that Davidson’s complaint was scrutinized too carefully, and that the Third Circuit could have assumed that Davidson intended to challenge the constitutionality of the New Jersey statute precluding him from suing the prison officials in a standard tort action. See N.J. STAT. ANN. § 59:5-2b(4) (West 1982). Judge Gibbons stated that it was clear that the trial court assumed that Davidson’s claim was brought under § 1983 because state law precluded him from recovering against the prison officials. 752 F.2d at 850 (Gibbons, J., dissenting). To support his statement, Judge Gibbons noted language the trial court used in analyzing the issues presented before it. Id. at 850 n.28.

122. 752 F.2d at 848-50 (Gibbons, J., dissenting). For a discussion of Judge Gibbons’ analysis in Davidson, see supra notes 73-87 and accompanying text.
whereas an opposite result in Davidson would have helped to deter such conduct.

Donna M. Wright