

CASE COMMENTS

NEGLIGENT RESCUE RESULTING IN DEATH IS NOT ACTIONABLE UNDER SECTION 1983

Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*,
104 S. Ct. 1325 (1984)

In *Jackson v. City of Joliet*,¹ the United States Court of Appeals for the Seventh Circuit narrowed the reach of federal civil rights law by holding that a negligent deprivation of life is not actionable under section 1983 of the Civil Rights Act of 1871.²

Sandra Jackson and Jerry Ross were driving on a road when their car inexplicably swerved off the road, crashed and caught fire.³ A Joliet policeman arrived at the scene a few minutes later but failed to check the car for passengers or to call an ambulance.⁴ He called the fire department, however, and directed traffic away from the accident scene.⁵ After extinguishing the fire, the firemen discovered Jackson and Ross in the car.⁶ They also failed to assist Jackson and Ross, calling an ambulance instead.⁷ The paramedics left Ross for dead and took Jackson to a hospital, where she died shortly thereafter.⁸

The decedents' representatives brought suit under section 1983 against the city and several individuals.⁹ The plaintiffs alleged that the conduct of various officials deprived the decedents of life without due process of law under the fourteenth amendment.¹⁰ The defendants appealed the

1. 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1325 (1984).

2. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. 1983 (1982); also known as the "Ku Klux Klan Act").

3. 715 F.2d at 1201.

4. *Id.*

5. *Id.*

6. *Id.* at 1202.

7. *Id.* The coroner issued a local directive which forbade firemen from touching corpses until someone from the coroner's office arrived. *Id.* Presumably the firemen thought Jackson and Ross were dead.

8. *Id.* At the time of her death, Jackson was six months pregnant. *Id.* at 1201. The elapsed time between the arrival of the policeman and the ambulance was about one hour. *Id.* at 1201-02. Ross was later pronounced dead by the coroner. *Id.*

9. *Id.* Specifically named as individual defendants were the policemen and firemen present at the scene of the accident, the coroner who issued the directive, *see supra* note 7, and the police and fire chiefs. *Id.*

10. *Id.* Section 1983 expressly authorizes suits against state officials for deprivations of consti-

trial court's denial of their motion to dismiss.¹¹ On appeal, the Seventh Circuit reversed, dismissed the suit and *held*: A negligent¹² or grossly negligent¹³ rescue attempt by state officials resulting in the death of accident victims is not a deprivation of life without due process of law.¹⁴

Congress enacted the language of section 1983 in 1871 to curb official tolerance of, as well as participation in, racial violence in the South.¹⁵ Section 1983 provided a federal remedy to individuals deprived of their constitutional rights by persons acting "under color of" state law.¹⁶ For nearly a century, the courts curtailed section 1983's potentially broad reach by narrowly defining official misconduct¹⁷ and by requiring a showing of intentional misconduct.¹⁸

tutional rights. The fourteenth amendment provides in part that no state shall "deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

11. 715 F.2d at 1201.

12. Negligence refers to conduct that falls below the standard of care established by society to protect others against unreasonable risk of harm. W. PROSSER & W. KEETON, *THE LAW OF TORTS* 169 (5th ed. 1984).

13. Gross negligence defies easy definition, but generally refers to an extreme departure from ordinary care. Some courts define gross negligence to require some element of willful misconduct, while others define gross negligence as more than negligence but less than a conscious indifference to known risks. PROSSER & KEETON, *supra* note 12, at 211-12.

One district court, addressing § 1983, gave the following definition of gross negligence: "an extreme departure from the ordinary standard of care . . . near recklessness or shockingly unjustified and unreasonable action." *Smith v. Hill*, 510 F. Supp. 767, 775 (D. Utah 1981).

Smith illustrates the small degree by which some jurisdictions might distinguish gross negligence from negligent or intentional conduct. In the future, this narrow distinction might mean the difference between state or federal jurisdiction. See *infra* notes 31-40 and accompanying text (discussing *Parratt v. Taylor*, 451 U.S. 545 (1981), and its implications).

This Comment associates gross negligence with conscious indifference. Although the court's holding refers to gross negligence, this reference is dicta, leaving *Jackson* applicable only to negligence actions. 715 F.2d at 1202 & 1206. See *infra* note 50.

14. 715 F.2d at 1206.

15. For a discussion of the political background that accompanied § 1983's enactment, see 1 B. SCHWARTZ, *STATUTORY HISTORY OF THE UNITED STATES—CIVIL RIGHTS* 591-653 (1970); SECTION 1983: SWORD AND SHIELD 23-28 (R. Freilich & R. Carlisle ed. 1983); Note, *Actionability of Negligence under Section 1983 and the Eighth Amendment*, 127 U. PA. L. REV. 533, 536-44 (1978); and Case Comment, *Civil Rights—42 U.S.C. § 1983 Due Process Requirements for Negligent Property Deprivations*, 28 WAYNE L. REV. 1491, 1492 (1982).

16. 42 U.S.C. § 1983 (1982). See *infra* note 20 (discussing "under color of" state law).

17. Between 1871 and 1936, only 19 reported decisions rested on § 1983. Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1486 n.4 (1969). In 1960, about 300 civil rights suits were filed in federal courts. See Note, *Due Process and Section 1983: Limiting Parratt v. Taylor to Negligent Conduct*, 71 CALIF. L. REV. 253, 258-59 n.22 (1983); see also Note, *Municipal Liability Under Section 1983: The Failure to Act as "Custom or Policy,"* 28 WAYNE L. REV. 1225, 1227 (1983) (discussing the narrow construction of official misconduct).

18. See, e.g., *Agnew v. City of Compton*, 239 F.2d 226, 231 (9th Cir. 1956) (defendant must act

In *Monroe v. Pape*,¹⁹ a 1961 decision, the Supreme Court ended nearly a century of restraint by expanding the meaning of conduct “under color of” state law²⁰ and rejecting the notion that a section 1983 violation requires intentional misconduct.²¹ Justice Douglas, writing for the majority, suggested that section 1983 contemplated no specific state of mind.²² Nevertheless, courts and commentators continue to fashion state-of-mind requirements for section 1983, despite *Monroe*’s indication that no such requirements apply.²³

“with a purpose to deprive” a person of his rights); *Bottone v. Lindsley*, 170 F.2d 705, 707 (10th Cir. 1948) (same). *But see* *Picking v. Pennsylvania R.R.*, 151 F.2d 240, 249 (3d Cir. 1945) (arguing that § 1983 makes no reference to defendant’s state of mind).

19. 365 U.S. 167 (1961). In *Monroe*, thirteen policemen broke into the plaintiffs’ home without a warrant, routed them from bed, and made them stand naked during a search of the house. *Id.* at 169. After the search, the police took Mr. Monroe to the station, where they questioned him for ten hours without allowing him to call his family or an attorney. *Id.* The police later released Monroe without charging him. *Id.* at 169.

20. The definition includes anyone vested with state authority who acts in accordance with or beyond his official capacity. *Id.* at 172-87. Justice Douglas rejected the argument that because the police transcended their authority by acting without warrants, the misconduct could not be “under color of” state law. *Id.* at 172. According to Justice Douglas, § 1983 applies “against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.” *Id.*

21. *Id.* at 187. Additionally, the *Monroe* Court rejected exhaustion of state remedies as a precondition for access to the federal courts and granted cities immunity from § 1983 liability. *Id.* Justice Douglas contended that § 1983’s federal remedy supplemented any state remedies. *Id.* at 183. Since *Monroe*, all circuits have followed the “no exhaustion” rule with respect to state judicial remedies. *See* NAHMOD, CIVIL RIGHTS & CIVIL RIGHTS LITIGATION § 103 (1979). One exception, however, is prisoner-confinement challenges. *Id.* Another exception exists when the plaintiff has state criminal proceedings pending against him. *See* *Younger v. Harris*, 401 U.S. 37 (1971); *see also* NAHMOD, *supra* at 148-57 (explaining the *Younger* rule).

The city of Chicago, also a defendant in *Monroe*, argued that, as a municipality, it was not liable for the policemen’s actions. 365 U.S. at 187. The Court agreed, stating that Congress did not intend to “bring municipal corporations within the ambit of [§ 1983].” *Id.* The Court construed the word “person” in § 1983 to exclude cities and counties. *Id.* at 188-92. Seventeen years later, however, the Court rejected the municipal immunity created in *Monroe*. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

22. 365 U.S. at 187. Justice Douglas relied on the language of the statute, which contains no reference to a particular state of mind. Notably, the legislative history is silent on the appropriate state of mind in § 1983 actions. *See generally* SCHWARTZ, *supra* note 15 (documenting § 1983’s legislative history). Justice Douglas also refused to analogize § 1983 to its criminal counterpart, 18 U.S.C. § 242 (1982), which requires the defendant to act “willfully.” He concluded that § 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.” 365 U.S. at 187. Considerable debate exists on whether this language eliminates any state-of-mind requirement for § 1983 liability.

23. Much of the confusion surrounding § 1983’s mental state analysis is attributable to the ambiguity of Justice Douglas’ language in *Monroe*. *See supra* note 22.

Intentional misconduct²⁴ clearly is actionable under section 1983.²⁵ The typical cause of action since *Monroe* involves a deliberate deprivation of life or liberty.²⁶ With few exceptions, less than intentional conduct may also fall within the statute.²⁷ It appears well settled that gross negligence, either by a defendant's action²⁸ or inaction,²⁹ satisfies section

24. Conduct is intentional when the actor desires the consequences or is substantially certain that the consequences will occur. PROSSER & KEETON, *supra* note 12, at 34.

25. See, e.g., *Glover v. Alabama Dep't of Corrections*, 734 F.2d 691 (11th Cir. 1984) (assault); *Brown v. Edwards*, 721 F.2d 1442 (5th Cir. 1984) (false imprisonment); *Tydings v. Dep't of Corrections*, 714 F.2d 11 (4th Cir. 1983) (conversion), *cert. denied*, 104 S. Ct. 3587 (1984); *Mosher v. Saalfeld*, 589 F.2d 438 (9th Cir. 1978) (trespass). But see *infra* note 26 (discussing *Hudson v. Palmer*, 104 S. Ct. 3194 (1984)).

26. Justice Powell recently contended that a "deprivation" under § 1983 "connotes an intentional act." *Parratt v. Taylor*, 451 U.S. 527, 548 (1981) (Powell, J., concurring). He later added that a deliberate omission also constitutes a "deprivation" under § 1983. 451 U.S. at 548. An intentional injury committed "under color of" state law, however, does not automatically trigger § 1983. The victim must suffer an injury to a constitutionally protected right. See *Paul v. Davis*, 424 U.S. 693 (1976), *reh'g denied*, 425 U.S. 985 (1976). In *Paul*, the Court concluded that the state's defamation, though injurious to the plaintiff, failed to rise to the level of a constitutional tort or to implicate any "liberty" or "property" interest. See also Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State-of-Mind Requirement*, 46 U. CIN. L. REV. 45, 55 n.52 (collecting cases representing other interests outside the fourteenth amendment's protection). For a discussion of the constitutional and statutory rights embraced by § 1983, see NAHMUD, *supra* note 21, ch. 2.

In *Hudson v. Palmer*, 104 S. Ct. 3194 (1984), however, the Court held that intentional deprivations of property were not actionable under § 1983 when the defendant could show the existence of an adequate state remedy consistent with the holding in *Parratt*. *Hudson* probably has carved out a huge exception to § 1983, leaving only liberty interests within the statute's reach. See *infra* note 82.

27. Equal protection claims under § 1983 require intentional conduct. See *Washington v. Davis*, 426 U.S. 229 (1976). Similarly, there must be an intentional interception and use of attorney-client information to maintain a sixth amendment claim under § 1983. See *Weatherford v. Bursey*, 429 U.S. 545 (1977).

28. See, e.g., *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970). In *Jenkins*, the plaintiff was shot by a policeman who claimed his gun was fired accidentally. *Id.* at 1231-32. The Fourth Circuit held that gross negligence could support a § 1983 action because once a plaintiff establishes a deprivation of a constitutionally protected interest, no further showing of intent is necessary. *Id.* at 1232. *Jenkins* still retains its vitality. See, e.g., *Daniels v. Williams*, 720 F.2d 792, 796 n.3 (4th Cir. 1983) (citing *Jenkins*); *Ladnier v. Murray*, 572 F. Supp. 544, 548 (D. Md. 1983) (same).

29. See, e.g., *Clark v. Taylor*, 710 F.2d 4, 9 (1st Cir. 1983) (liability under § 1983 may be imposed for failure to act when there is a duty to act); *Martini v. Russell*, 582 F. Supp. 136, 141 (C.D. Cal. 1984) (same). Most inaction cases deal with the state's failure to train or supervise prison and police officials. See, e.g., *Hirst v. Gertzen*, 676 F.2d 1252 (9th Cir. 1982) (failure to supervise prison officials); *Owens v. Haas*, 601 F.2d 1242 (2d Cir. 1979) (same), *cert. denied sub nom.* *County of Nassau v. Owens*, 444 U.S. 980 (1979); *McQuarter v. City of Atlanta*, 572 F. Supp. 1401 (N.D. Ga. 1983) (failure to supervise police officials), *appeal dismissed*, 724 F.2d 881 (11th Cir. 1984); *Popov v. City of Margate*, 476 F. Supp. 1237 (D. N. J. 1979) (same). A recent decision suggests that courts are willing to extend § 1983 liability to inaction outside the usual prison or police contexts. See *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134 (2d Cir. 1981), *after remand*, 709 F.2d 782 (2d Cir.), *cert. denied sub nom.* *Catholic Home Bureau v. Doe*, 104 S. Ct. 195 (1983). In *Doe*, the

1983.

No comprehensive rule exists, however, regarding the actionability of simple negligence under section 1983. Early lower court decisions reached opposite conclusions.³⁰ In *Parratt v. Taylor*,³¹ the Supreme Court partially resolved the confusion over the sufficiency of negligent conduct in actions under section 1983.³² In *Parratt*, prison officials negligently lost an inmate's hobby materials.³³ The inmate brought suit under section 1983, claiming that the officials deprived him of his property without due process of law.³⁴ Justice Rehnquist, in a plurality opinion, held that a negligent deprivation of property could support a section 1983 claim.³⁵ The deprivation in *Parratt* occurred, however, not because of an established state procedure, but rather as a result of a "random and unauthorized act."³⁶ Although procedural due process ordinarily contemplates a predeprivation hearing,³⁷ negligence, by definition, precludes

plaintiff claimed that the state agency's failure to properly monitor her foster care led to abuse by her foster father. 649 F.2d at 137. The court held that the agency's inaction could amount to "deliberate indifference," sufficient for liability under § 1983. 649 F.2d at 141.

30. For decisions finding negligence actionable, see, e.g., *Carter v. Estelle*, 519 F.2d 1136, 1136-37 (5th Cir. 1975) (prison guards' negligence actionable); *Fitzke v. Shappell*, 468 F.2d 1072, 1077 n.7 (6th Cir. 1972) (negligent failure to provide medical assistance actionable).

For decisions finding negligence insufficient, see, e.g., *Owen v. Haas*, 601 F.2d 1242, 1247 (2d Cir. 1979) (simple negligence insufficient under § 1983), *cert. denied*, 444 U.S. 980 (1979); *Bonner v. Coughlin*, 545 F.2d 565, 567 (7th Cir. 1976) (en banc), *cert. denied*, 435 U.S. 932 (1978) ("mere negligence" insufficient); *Hoitt v. Vitek*, 497 F.2d 598, 601 (1st Cir. 1974) (plaintiff must allege malice or excessive neglect).

31. 451 U.S. 527 (1981).

32. The Supreme Court has twice avoided the issue. See *Baker v. McCollan*, 443 U.S. 137 (1979); *Procunier v. Navarette*, 434 U.S. 555 (1978). The Court decided both cases on alternative grounds, never reaching the negligence issue; see also Friedman, *Parratt v. Taylor: Opening and Closing the Door on Section 1983*, 9 HASTINGS CONST. L.Q. 545, 568-69 (1982) (discussing *Baker* and *Procunier*).

33. 451 U.S. at 529. The plaintiff ordered hobby materials worth \$23.50, which were lost when prison officials negligently failed to follow procedures for handling prisoners' mail. *Id.* at 530.

34. *Id.* The plaintiff sued the warden and the hobby manager of the prison.

35. 451 U.S. at 532-35. Like Justice Douglas in *Monroe*, see *supra* note 22 and accompanying text, Justice Rehnquist refused to analogize § 1983 to 18 U.S.C. § 242 (1982), § 1983's criminal counterpart, which requires "willful" conduct. 451 U.S. at 534-35. The defendant's state of mind, he implied, is irrelevant. Justice Rehnquist contended that § 1983 requires only two elements: (1) conduct committed "under color of" state law and (2) deprivation of a right, privilege or immunity guaranteed by the Constitution or laws of the United States. *Id.* at 535.

36. *Id.* at 541. Justice Rehnquist also stressed that while the plaintiff's loss is "attributable to the State as action under 'color of law,'" these types of losses are almost always unpreventable by the State. *Id.*

37. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).

any predeprivation procedure.³⁸ In the *Parratt* situation, a postdeprivation hearing may be constitutionally adequate.³⁹ Justice Rehnquist concluded that the availability of a state tort remedy satisfies due process.⁴⁰

Parratt dealt with property interests,⁴¹ leaving undecided issues concerning deprivations of other interests. Since *Parratt*, courts have inconsistently treated official negligence resulting in loss of life.⁴² For

38. 451 U.S. at 541. Because negligence is unpredictable, *see supra* note 37, "it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation." *Id.*

39. *See, e.g.,* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908).

40. 451 U.S. at 543-44. Justice Rehnquist relied heavily on a lower court decision "remarkably similar" to *Parratt*, Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975), to conclude that an adequate state remedy satisfies due process. 451 U.S. at 541-42. In *Parratt*, the state had a tort claim procedure directly addressing the plaintiff's grievance. *See* NEB. REV. STAT. §§ 81-8,209 to 8,239.06 (1981).

Justice Rehnquist then considered the possibility that a state remedy might not be "adequate." Although some state remedies might not compensate a victim as fully as § 1983, "that does not mean that the state remedies are not adequate to satisfy the requirements of due process." 451 U.S. at 543-44. Thus, if the state provides a claim procedure addressing the right allegedly deprived by the officials' negligence, then federal jurisdiction is foreclosed. This conclusion, however, is currently under debate. *See infra* notes 48-54 and accompanying text.

The concurring opinions offer diverse viewpoints on the plurality opinion. Justice Blackmun, joined by Justice White, emphasized that the negligence holding applied only to deprivations of property, not of life or liberty. *Id.* at 545 (Blackmun, J., concurring). He also objected to the approval of "postdeprivation remedies," expressing concern that courts might apply *Parratt* to intentional conduct. *Id.* at 545-46.

Justice Marshall agreed that § 1983 reached negligent conduct and that the state tort remedy satisfied due process considerations. *Id.* at 554-55 (Marshall, J., concurring in part and dissenting in part). He suggested, however, that state officials have an affirmative duty to inform their victims of available state remedies. Failure to do so, he argued, permits a federal action under § 1983. *Id.* at 556.

Justice Stewart doubted that Congress intended § 1983 to embrace negligence but agreed that the state procedure satisfied due process requirements. *Id.* at 544-45 (Stewart, J., concurring).

Finally, Justice Powell rejected negligence as actionable conduct under § 1983, suggesting a much higher standard. He argued that a "deprivation" within the meaning of § 1983 and the fourteenth amendment connotes "an intentional act . . . or, at the very least, a deliberate decision not to prevent a loss." *Id.* at 546-54 (Powell, J., concurring). A higher standard, he argued, avoids "trivializing" the remedy secured by § 1983, a remedy against *abuses* by state officials, not against "merely negligent" actions. *Id.* at 549 & 554 n.13. *See supra* note 15. Justice Powell also disagreed with the alternative state remedy approach. He feared that the unavailability of state remedies would make the fourteenth amendment a "font of tort law." *Id.* at 550 (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

41. *See* text accompanying notes 33 & 34; *see also supra* note 40 (discussing Justice Blackmun's concurring opinion); *see also infra* note 87 (discussing recent developments in the actionability of property deprivations under § 1983).

42. *Compare* Eberle v. Baumfalk, 524 F. Supp. 515 (N.D. Ill. 1981) (dismissing § 1983 claim for negligent deprivation of liberty interest on grounds that the state's postdeprivation hearing provided the victim with due process) *with* Howse v. DeBerry Correctional Inst., 537 F. Supp. 1177

example, in *Meshkov v. Abington Township*,⁴³ a decedent's father brought a section 1983 action alleging negligent deprivation of his son's life.⁴⁴ The court dismissed the case, noting that the father could pursue his claim in the state courts.⁴⁵ Conversely, in *Morrison v. Washington County*,⁴⁶ also an action for negligent deprivation of life,⁴⁷ the court allowed the plaintiff to sue under section 1983 despite the availability of a state tort remedy.⁴⁸

In *Jackson v. City of Joliet*,⁴⁹ the Seventh Circuit faced a section 1983 claim based on simple negligence and failure to act.⁵⁰ Judge Posner, writing for a unanimous panel, first addressed the plaintiffs' claim that the defendants failed to rescue the victims and prevented passersby from doing so.⁵¹ Judge Posner replied that the defendants had no common-law duty to rescue a stranger.⁵² He noted, though, that once the defend-

(M.D. Tenn. 1982) (arguing that *Parratt's* negligence standard applied only to deprivations of property interests). See generally Friedman, *supra* note 32, at 572-78 (discussing the inconsistent holdings following *Parratt*).

43. 517 F. Supp. 1280 (E.D. Pa. 1981).

44. *Id.* at 1283. The father alleged that police officers negligently allowed his son to hang himself in jail and that the township and police chief negligently failed to supervise and train the officers. *Id.*

45. *Id.* at 1286. The court in *Meshkov* also suggested that the Constitution was not meant to protect against "carelessness." *Id.*

46. 521 F. Supp. 947 (S.D. Ala.), *rev'd*, 700 F.2d 678 (11th Cir.), *cert. denied*, 104 S. Ct. 195 (1983).

47. *Id.* at 949-52. In *Morrison*, the victim died in jail after his allegedly negligent transfer from a hospital.

48. 700 F.2d 678, 680, 686-87 (11th Cir. 1983), *rev'g* 521 F. Supp. 947 (S.D. Ala. 1981). The Eleventh Circuit reversed a summary judgment for the defendants, an implicit acknowledgement that the plaintiff could prosecute his claim under § 1983 notwithstanding the existence of an adequate state remedy. See ALA. CODE § 6-5-410 (1975) (providing a cause of action for wrongful death caused by negligence).

49. 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1325 (1984).

50. Although the court's opinion and holding, as well as the complaint, use the words "gross negligence" and "recklessly," 715 F.2d at 1202 & 1206, Judge Posner states the issue as "whether the negligent failure" of state officers to act supports a claim under § 1983. *Id.* at 1201 (emphasis added). References by the *Jackson* court to gross negligence are dicta.

51. *Id.* at 1202.

52. *Id.* See, e.g., *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959) (defendant's failure to rescue the victim after urging and taunting him into the water is not actionable, absent a legal duty to rescue). See generally Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631 (1952) (analyzing duty to rescue under various legal systems).

Judge Posner cites two cases for the proposition that policemen and firemen have no duty to rescue. See *Williams v. California*, 34 Cal.3d 18, 192 Cal. Rptr. 233, 664 P.2d 137 (1983); *Warren v. District of Columbia*, 444 A.2d 1, 3-9 (D.C. App. 1981). But see *Huey v. Barloga*, 277 F. Supp. 864, 872 (N.D. Ill. 1967) ("City officials and police officers are under an affirmative duty to . . . protect the personal safety of persons in the community."); *Nastasio v. Cinnamon*, 295 S.W.2d 117 (Mo.

ants began a rescue, they assumed a duty to exercise due care not to exacerbate the victims' predicament.⁵³ Judge Posner concluded that a duty to exercise due care did arise,⁵⁴ but doubted that the defendants' inaction worsened the victims' situation.⁵⁵

Turning to the state-of-mind issue, Judge Posner reaffirmed the actionability of intentional conduct under section 1983.⁵⁶ With respect to unintentional deprivations, however, he reached a different result.⁵⁷ Where the state's negligence "did not create but merely failed to avert danger,"⁵⁸ the action fell outside section 1983's reach.⁵⁹ Judge Posner noted that the Constitution protects citizens from oppression but does not

1956) (a fireman has a duty to extinguish fires and protect property and life threatening therefrom) (citation omitted).

53. 715 F.2d at 1202-03. See RESTATEMENT (SECOND) OF TORTS § 323 (1965) (a person who undertakes to rescue someone is subject to liability for negligence "if the harm is suffered because of the other's reliance upon the undertaking" or for discontinuing the rescue and leaving the victim worse off).

54. 715 F.2d at 1202-03. Judge Posner argues that some cases strain the notion that potential rescuers will withhold their assistance when they see someone else rendering aid. He concludes, however, that in *Jackson* no one was likely to assist the victims with policemen and firemen present, especially when the policemen directed traffic away from the accident. *Id.* See RESTATEMENT (SECOND) OF TORTS § 314A(4) (supporting the finding of a duty when a person undertakes a rescue and discourages others from assisting).

55. 715 F.2d at 1205. Judge Posner retreated from his earlier position, see *supra* note 54, concluding that "[it] is extremely unlikely that a passing motorist would enter a burning car on the off chance that the occupants were still in it. . . ." *Id.* at 1205.

56. *Id.* at 1202. "It would be a different case if intentional misconduct were alleged," Judge Posner stated. *Id.* The lack of intentional conduct also allowed the court to dismiss the plaintiff's equal protection claim. *Id.* at 1203. See *supra* note 27 (only deliberate discrimination violates equal protection).

57. *Id.* at 1204-05. Judge Posner first examined cases in which state officials were found liable for their unintentional inaction. See *Wood v. Worachek*, 618 F.2d 1225 (7th Cir. 1980) (jailers failed to provide medical attention); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (police arrested driver, leaving children in a driverless car); *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974) (jailers failed to protect prisoner from assault). Judge Posner distinguished these cases from *Jackson*, arguing that when the courts did impose liability, the defendant's inaction created the initial danger to the plaintiffs. 715 F.2d at 1204. Judge Posner overlooked a second and more important distinction. The defendant's conduct in the cited cases resembled gross rather than simple negligence.

Judge Posner then analyzed cases in which state officials did not create danger but merely failed to avert it. See *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982) (Posner, J.) (victim killed by a schizophrenic released by the state); *Hull v. City of Duncanville*, 678 F.2d 582 (5th Cir. 1982) (victims killed after being hit by a train; plaintiff alleged that city failed to enforce its speed limit and maintain its crossing); *Reif v. City of Philadelphia*, 471 F. Supp. 1262 (E. D. Pa. 1979) (victim wounded by robber before police arrived). None of these cases, Judge Posner asserted, presented a § 1983 claim. 715 F.2d at 1205.

58. *Id.* at 1204-05.

59. *Id.* at 1205.

grant them basic services.⁶⁰ To hold the state liable for a botched rescue, he reasoned, would compel the state to provide the basic service of rescue.⁶¹

The state's conduct in this case amounted to mere inaction rather than "oppression."⁶² Judge Posner suggested that proper redress lay in the state courts.⁶³ He feared that an expansive interpretation of section 1983 would intrude on the province of state tort law.⁶⁴ In conclusion, Judge Posner held that when a victim dies as a result of a failed rescue attempt, no due process violation occurs if the rescuer's conduct does not exceed gross negligence.⁶⁵

Although reaching the proper result, the court in *Jackson* employed flawed and unnecessary reasoning. A fact-finder could have concluded that the state officials in *Jackson* breached a duty not to exacerbate the decedents' predicament.⁶⁶ Judge Posner hesitantly concedes the possibility.⁶⁷ Because negligence is actionable under section 1983⁶⁸ and in light of the possible breach of duty, the court's conclusion that the officers' conduct fails to support a claim is wrong.⁶⁹

60. *Id.* at 1203. The Constitution contains negative rather than positive liberties. *Id.* By negative liberties, Judge Posner means that the Constitution prohibits the federal and state governments from interfering with certain fundamental liberties. According to Judge Posner, the drafters of the fourteenth amendment were concerned with "the use of state-created power to kill rather than with the state's failing to prevent death." *Id.* at 1204. Moreover, the difference between harming and helping is precisely the difference between negative and positive liberties. *Id.*

61. *Id.* at 1203. The Supreme Court has refused to find a constitutionally mandated duty to provide basic services on several occasions. *See, e.g.,* *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (no "right" to education); *Lindsey v. Normet*, 405 U.S. 56 (1972) (no "right" to housing); *Dandridge v. Williams*, 397 U.S. 471 (1970) (no "right" to welfare assistance).

62. 715 F.2d at 1205. Arguably, inaction and oppression are mutually exclusive. *See supra* note 32 (discussing actionable omission cases under § 1983). If Judge Posner is suggesting by his insistence on oppressive conduct that the drafters intended mere simple negligence to trigger § 1983, then he has some support. *See, e.g.,* *Parratt v. Taylor*, 451 U.S. 527, 546-49 (Powell, J., concurring).

63. 715 F.2d at 1205. If the state provides inadequate police and fire protection and if elected state judges fail to provide adequate tort remedies, then "political retribution will come swift and sure." *Id.*

64. *Id.* Judge Posner suggested that the imposition of liability in this case would permit any accident victim to gain federal jurisdiction by arguing that a state official should have done more. *Id.* at 1205-06. *See also* *Parratt v. Taylor*, 451 U.S. 527, 541 (1981) (Rehnquist, J.) (same argument presented against expanding scope of § 1983).

65. 715 F.2d at 1206.

66. *See supra* notes 56 & 57 and accompanying text.

67. 715 F.2d at 1202-03. *See supra* notes 57 & 58.

68. *See supra* note 38 and accompanying text.

69. The court must treat all of the nonmoving party's allegations as true in deciding a motion to dismiss. 2A J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 12.08 (1984). Thus, the plain-

Judge Posner could have avoided the lengthy constitutional discussion by extending *Parratt*⁷⁰ to the facts of *Jackson*.⁷¹ In both cases, the source of the plaintiffs' injuries was negligent conduct rather than intentional conduct or an established state procedure.⁷² Also like *Parratt*, the plaintiffs in *Jackson* had an available state remedy.⁷³

In *Jackson*, however, the plaintiffs suffered deprivations of a liberty interest rather than a property interest.⁷⁴ Some courts limit *Parratt*'s application to property interests,⁷⁵ embracing an implicit "hierarchy of constitutionally protected interests."⁷⁶ Extension of *Parratt* to liberty interests would not undermine this hierarchy.⁷⁷ When bare negligence is the alleged misconduct, no logical reason compels treating liberty and property interests differently.⁷⁸ A "random and unauthorized act," regardless of which interest it injures, is unpredictable and amenable only to postdeprivation relief.⁷⁹ Because state remedies provide due process in most negligence cases,⁸⁰ federal relief under section 1983 becomes unnecessary. When actions exceed negligence, and approach intentional, mis-

tiffs' allegations in *Jackson* that the officers' presence discouraged potential rescuers should support a finding of duty to rescue.

70. See *supra* notes 30-43 and accompanying text (discussing *Parratt*).

71. Judge Posner's constitutional arguments against a state's duty to rescue are particularly inappropriate in the context of a motion to dismiss. See *supra* note 69.

72. In *Jackson*, however, the plaintiffs did challenge the directive issued by the coroner, arguably an established state procedure. See *supra* note 7. This challenge, however, was only one of several § 1983 claims.

73. See ILL. REV. STAT. ch. 70, § 1 (1983) ("Whenever the death of a person shall be caused by wrongful act, neglect, or default, there is a cause of action for damages.").

74. Although the plaintiffs in *Jackson* alleged deprivations of life, Judge Posner's discussion dealt with liberty. This anomaly occurs because most courts discuss due process interests only in terms of property or liberty, with life falling under the liberty interest. See, e.g., *Thurman v. Rose*, 575 F. Supp. 1488, 1490 (N.D. Ind. 1983).

75. See Note, *Parratt v. Taylor: Limitations on the Parratt Analysis in Section 1983 Actions*, 59 NOTRE DAME L. REV. 1388, 1403 n.111 (1984) (collecting cases); see also *supra* note 40 (concurring opinion in *Parratt* by Justice Blackmun, suggesting that the decision applies only to deprivations of property).

76. See Note, *supra* note 75, at 1404-05. The author submits that while no hierarchy is expressly mentioned anywhere, American jurisprudence has long recognized that property interests are more yielding than liberty interests. *Id.* at 1404.

77. *Id.* at 1402 n.101 (collecting cases).

78. For example, consider a situation where a fireman negligently leaves some equipment on the sidewalk, causing a pedestrian to slip and fall. It would be illogical to allow the pedestrian to sue under § 1983 if he broke his arm (liberty interest) but not allow him to sue in federal court if he only broke a cane that he was carrying (property interest). Yet, if *Parratt* were limited to deprivations of property, this inconsistency would be commonplace.

79. See *supra* notes 36 & 38 and accompanying text.

80. See *supra* notes 39 & 40 and accompanying text.

conduct, section 1983 will have greater application⁸¹ and the hierarchy of interests will acquire more significance.⁸²

The *Jackson* decision is correct if read against *Parratt's* logic.⁸³ This reading would also reduce the amount of unnecessary civil rights cases in the federal courts.⁸⁴ The Supreme Court denied certiorari in *Jackson*, perhaps tacitly approving a restriction of section 1983.⁸⁵ Still, negligence actions under section 1983 are inconsistent.⁸⁶ Until the Supreme Court

81. See *supra* notes 18-27 and accompanying text.

82. An important reflection of the Supreme Court's attitude towards the "hierarchy of constitutionally protected interests" is *Hudson v. Palmer*, 104 S. Ct. 3194 (1984). In *Hudson*, a unanimous Court extended *Parratt's* alternative state remedy holding, see *supra* note 40 and accompanying text, to intentional deprivations of property to deny a prisoner a cause of action under § 1983. 104 S. Ct. at 3202-04. The Court's willingness to relegate virtually all alleged deprivations of property to state courts perhaps illustrates too well the distinction between property and liberty interests. Because deprivations of property resulting from negligent to intentional conduct are now outside § 1983's reach, assuming an adequate state remedy, liberty remains the only interest weighty enough to invoke § 1983's protection.

83. *Parratt* offers a safeguard to the victim of a state official's negligence, suggesting that the victim will have access to federal courts if there is no alternative state remedy. Though the Court did not reach the question, the conclusion follows, a fortiori, from the Court's discussion about alternative state remedies. Presumably, the Court would not have dismissed the prisoner's § 1983 claim if a state tort claim had not been available.

There are other reasons for extending *Parratt's* alternative remedy rationale to all negligent deprivations. Despite § 1983's neutral language and the Court's recognition that negligence can trigger § 1983, negligence does not do as much violence to the Constitution as intentional or grossly negligent conduct. Cf. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 327 (1960) (suggesting that "the defendant's conduct must be outrageous" to trigger § 1983 (emphasis in original)).

Finally, an unchecked application of § 1983 to negligence cases could swallow up state tort law. See *supra* note 74; see also *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (remedy for violation of duty of due care must be sought in state courts, not under § 1983); *Paul v. Davis*, 424 U.S. 693, 701 (1976) (expanding § 1983 to cover all injuries by state officials would make the fourteenth amendment a "font of tort law").

84. Civil rights cases, including prisoner petitions, accounted for 20.9% of all civil litigation in federal courts for the year ending June 30, 1983. ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 122-23 (4th ed. 1983).

85. 104 S. Ct. 1325 (1984). Lately members of the Court have expressed strong dissatisfaction with the increasing volume of civil rights cases. See *supra* note 26 (restricting § 1983 in *Hudson v. Palmer*); see also *Pulliam v. Allen*, 104 S. Ct. 1970, 1988-89 (1984) (Powell, J., dissenting). In *Pulliam*, Justice Powell suggests that the "lure of substantial fee awards," given to prevailing civil rights plaintiffs under 42 U.S.C. § 1988, assures that suits against state officials will increase geometrically. 104 S. Ct. 1970, 1988-89 & nn. 16-18.

86. See *supra* notes 45-51 and accompanying text; see also *Jackson v. City of Joliet*, 104 S. Ct. 1325, 1325-26 (1984) (White, J., dissenting from denial of certiorari). Justice White, joined by Justice Rehnquist, argued that the inconsistency among the lower courts since *Parratt* is attributable, in part, to the Court's failure to provide guidelines for recognizing a constitutional tort. The *Jackson* case, he concluded, provides an opportunity to resolve this issue. 104 S. Ct. at 1325-26.

provides clearer guidance, lower courts addressing negligent deprivations of liberty should extend *Parratt*⁸⁷ and thereby create a uniform, rational approach to a confused area of civil rights litigation.

C.A.B.

87. The day after the court decided *Jackson*, the Fourth Circuit reached a similar result, expressly extending *Parratt* to negligent deprivation of liberty and dismissing the § 1983 claim in light of an available state remedy. See *Daniels v. Williams*, 720 F.2d 792, 796 (4th Cir. 1983).