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COMMENTS

Parratt v. Taylor and Liberty Interests Under the Fourteenth Amendment

In *Parratt v. Taylor*,¹ the United States Supreme Court held that, under certain circumstances, procedural rights under the due process clause of the fourteenth amendment to the United States Constitution² are satisfied when an adequate remedy is provided by state law for a deprivation of property under color of state law. Therefore, when an adequate postdeprivation remedy exists, an intentional or negligent deprivation of property by the state will not violate the due process clause, and will not be actionable in federal court under section 1983, as long as no other constitutional rights are alleged to be infringed.³ But property is only one of the interests which is protected by the due process clause. The *Parratt* Court did not discuss whether a postdeprivation remedy will provide due process when the state infringes upon an individual's liberty or life interests. Lower federal courts have addressed the liberty issue in a number of cases, and a split of opinion has developed among the circuits. Two recent decisions, *Wilson v. Beebe*,⁴ decided by the Sixth Circuit, and *Gilmere v. City of Atlanta*,⁵ decided by the Eleventh Circuit, demonstrate this intercircuit division, and provide a framework for analyzing the precedents and policies involved.

I. *PARRATT V. TAYLOR*⁶

An understanding of the issues involved in *Wilson* and *Gilmere* requires an examination of the *Parratt* decision, wherein the Supreme Court first enunciated the rationale in regard to property interests which the circuit courts have imported to the context of liberty interests.

In *Parratt*, respondent Taylor, an inmate in a Nebraska prison, brought an action under section 1983 alleging deprivation of property without due process and under color of state law. Named as defendants were the warden and the hobby manager of the prison. Taylor had ordered by mail hobby materials worth \$23.50. Normal prison procedures required that when a package ar-

1. 451 U.S. 527 (1981).

2. The due process clause states, "[n]or shall any State deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1.

3. Section 1983, which grants a civil action for the deprivation of rights, states:

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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1981).

4. 743 F.2d 342 (6th Cir. 1984).

5. 737 F.2d 894 (11th Cir. 1984), *reh'g granted*, No. 82-8457, 82-8760 (11th Cir. Oct. 1, 1984).

6. 451 U.S. 527 (1981).

rived by mail, the inmate to whom it is addressed must sign a receipt for it. When the package in question arrived, Taylor was in segregation, where he was not permitted to have the hobby materials. Therefore, a receipt for the package was signed by two prison employees who worked at the hobby center. When Taylor was released from segregation, he tried to locate the package, but it could not be found. Neither Taylor nor the prison officials were ever able to locate the package, or discover how it had disappeared.⁷

In 1976 Taylor brought an action in federal district court to recover the value of the hobby materials. Taylor could have proceeded in a tort action against Nebraska under state law; nonetheless, he chose to proceed only under federal law, alleging deprivation of property without due process under section 1343⁸ and section 1983.

The district court granted Taylor's motion for summary judgment. The court ruled that negligent actions by state officials are actionable under section 1983; that prison officials are not immune from damage actions of that kind; and that the deprivation of the hobby kit denied Taylor due process. The Court of Appeals for the Eighth Circuit affirmed, and the Supreme Court granted the certiorari petition of the prison official. The Supreme Court reversed, in an opinion written by Justice Rehnquist and joined by Chief Justice Burger, and Justices Stewart, White, and Blackmun.

Justice Rehnquist began his opinion by analyzing the issue of whether a negligent action committed under color of state law is actionable under section 1983. Citing *Monroe v. Pape*⁹ and *Baker v. McCollan*,¹⁰ Justice Rehnquist concluded that section 1983 imposes no intent requirement, and therefore provides a remedy for negligent actions. Justice Rehnquist stated that the instant case clearly met three of the elements of a due process denial: the actions of the prison officials were performed under the color of state law, the hobby kit was a property interest under the fourteenth amendment, and the loss of the hobby kit was a deprivation.

Rehnquist noted, however, that a fourth element is necessary to establish a violation of the fourteenth amendment: even if the other elements are present, the deprivation must occur without due process of law. As was earlier mentioned, Taylor could have proceeded under Nebraska law to obtain compensation for the hobby kit. Therefore, Rehnquist defined the issue as whether

7. *Parratt*, 451 U.S. at 530.

8. 28 U.S.C. § 1343 states:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. § 1343 (1976).

9. 365 U.S. 167 (1961).

10. 443 U.S. 137 (1979).

the Nebraska postdeprivation tort remedy provided Taylor with due process sufficient to satisfy the fourteenth amendment.

The hearing provided under Nebraska law was, by practical necessity, postdeprivation. In some instances the Supreme Court has held that due process requires a predeprivation hearing; however, in other instances the Court has recognized that a postdeprivation remedy will satisfy the fourteenth amendment when there is a necessity of quick action by the state, or when it is impractical or impossible to provide a meaningful predeprivation remedy.¹¹ As stated in the opinion, "[t]he usual rule has been, '[w]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process if the opportunity given for ultimate judicial determination of liability is adequate.'"¹²

Rehnquist concluded that the deprivation of Taylor's property had not occurred as the result of an established state procedure, and that a meaningful predeprivation hearing would have been impossible because of the unforeseeability of the negligent deprivation of Taylor's property. In addition, Taylor had made no showing or allegation that the Nebraska remedy was inadequate. The Court held that Nebraska had provided due process, and the fourteenth amendment had been satisfied by the state procedures. Therefore, Taylor's section 1983 action was dismissed for failing to state a claim for relief, because his procedural due process rights had not been infringed upon, and he had alleged infringement of no other constitutional rights.

Justice Blackmun, in a concurring opinion joined by Justice White, wrote separately to emphasize his narrow reading of the majority opinion. Blackmun wrote that he understood the *Parratt* rationale to apply only to deprivations of property, and not to deprivations of life and liberty. Blackmun also stated that there are some governmental actions that, even if undertaken with a full panoply of procedural protections, are in and of themselves antipathetical to fundamental notions of due process.

Parratt is limited by its facts, and by the precedent it employs, to cases dealing with deprivation of property under color of state law. The majority opinion makes no reference to liberty or life interests, and they are explicitly distinguished in Blackmun's concurrence. It is also of extreme importance to note that Taylor alleged only infringement of his due process rights, and of no other right, privilege, or immunity secured by the Constitution. The *Parratt* opinion deals only with Taylor's *procedural* due process rights, the issue of whether the state provided him with a meaningful hearing at an appropriate time. There is no inquiry into the adequacy of the Nebraska remedy, since Taylor did not challenge it on those grounds.

In addition, the facts of *Parratt* lend themselves well on a practical level to the result reached by the Supreme Court. The deprivation of \$23.50 seems a relatively minor dispute, and there is no indication that the deprivation occurred as a result of willful or wanton misconduct by the prison officials. The original source of section 1983 was the Civil Rights Act of 1871, popularly

11. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); *Fahey v. Mallonee*, 332 U.S. 245 (1947); *Bowles v. Willingham*, 321 U.S. 503 (1944); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908).

12. *Parratt*, 451 U.S. at 539-40 (citing *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974) and *Phillips v. Comm'r*, 283 U.S. 589, 596-97 (1931)).

referred to as the Ku Klux Klan Act. The Act was designed to combat denials of justice by state officials for the huge number of atrocities committed against Southern blacks in the wake of the Civil War.¹³ It is not difficult to infer that the loss of a hobby kit was not among the types of ills Congress wanted to remedy by passing the Civil Rights Act. Of course, it is also not difficult to imagine deprivation of property with more serious consequences, such as deprivations of dwelling places or of tools used for a means of livelihood. When the deprivation involves serious impairment of a liberty interest, the contrast with *Parratt* becomes even sharper. *Gilmere v. City of Atlanta*¹⁴ and *Wilson v. Beebe*¹⁵ illustrate that contrast.

II. *GILMERE V. THE CITY OF ATLANTA*¹⁶

Gilmere involved an action brought by the administratrix of the estate of Thomas Patillo, who was injured and killed in an encounter with two Atlanta policemen. The district court found that on New Year's Day 1980, plaintiff's decedent Patillo, after an afternoon of heavy drinking, was involved in a near collision with a van. In an ensuing argument, Patillo allegedly threatened the driver of the van with a gun. The driver retreated and called the police. Officers Craig and Sampson answered the call. The officers, in the company of the van driver, walked to Patillo's house and knocked on the door. Eventually, Patillo emerged and was identified by the driver of the van. Some of Patillo's friends began to congregate at the door of the house, so the officers decided to question Patillo away from the house.

Patillo attempted to escape twice on the way to the patrol car, and was restrained both times. On the second occasion the officers struck Patillo about the head with their hands. At the patrol car, Patillo broke away and dislodged Officer Craig's holstered revolver, which fell to the ground. Patillo then lunged at Officer Sampson, who was standing on the opposite side of the patrol car. Fearing that Patillo had Craig's gun, Sampson shot Patillo twice in the abdomen. Patillo was declared dead thirty minutes later.

Emma Gilmere, administratrix of Patillo's estate, brought an action in federal district court against the City of Atlanta, the mayor, the public safety director, the chief of police, and the two officers. The first count of the complaint alleged deprivation of life and liberty without due process and under color of state law, and other federal claims under the fourth, eighth, and fourteenth amendments. The second count advanced survival actions under state tort law.

At the conclusion of the trial, the district court asked the parties to brief the issue of whether *Parratt v. Taylor* barred plaintiff's claim under section 1983; however, the court did not reach the issue in its dispositive order. The district court denied all of the plaintiff's claims except the claim under section 1983. The court held that plaintiff had been deprived of a protected liberty interest, the right to be free from the infliction of unnecessary physical force in

13. See *Monroe v. Pape*, 365 U.S. 167 (1961), for an analysis of the legislative intent behind § 1983.

14. 737 F.2d 894.

15. 743 F.2d 342.

16. 737 F.2d 894.

a police-citizen encounter.¹⁷ Liability was predicated both upon the shooting and the striking about the head of Patillo. The court held both officers liable for the beating, and held Officer Sampson and the city liable for the shooting—the city because it had trained Sampson in a manner which the court found to be grossly negligent. The district court dismissed the counts against the remaining defendants and dismissed the state law claims as repetitive of the section 1983 claim.

The Eleventh Circuit Court of Appeals held that the plaintiff's section 1983 action was barred by *Parratt* because the postdeprivation remedy provided by the state survival actions provided due process and did not violate Patillo's fourteenth amendment rights.¹⁸ The court of appeals affirmed the denial of the remaining counts, except for the pendent state claim for assault and battery. This claim had originally been dismissed as duplicative of the federal claim, but was remanded to the district court for further proceedings.

In *Gilmere*, the Eleventh Circuit extended the *Parratt* rationale to encompass deprivations of liberty interests. The opposite conclusion was reached by the Sixth Circuit in the case of *Wilson v. Beebe*.¹⁹

III. *WILSON V. BEEBE*²⁰

Defendant Thomas Beebe, a Michigan State Trooper, responded to a call to assist in the apprehension of a suspect in a breaking-and-entering incident. Beebe was informed that guns and ammunition had been taken from the scene of the crime. Beebe spotted a person matching the suspect's description, but the person fled into the woods. Beebe established a position nearby, on a roadway within the Huron National Forest.

Between 7:00 and 8:00 P.M., Beebe spotted Larry Wilson, whom Beebe believed to be the suspect. Wilson was approaching the patrol car, and Beebe shined a spotlight on Wilson's face. Beebe ordered Wilson to put his hands on his head and stop, and tried unsuccessfully to radio for help. As Beebe continued to seek assistance over the radio, he ordered Wilson to approach the patrol car and place his hands on the hood.

Beebe placed his shotgun and walkie-talkie into the patrol car and drew his revolver. Beebe cocked his revolver and asked Wilson if he had heard it and understood what it meant. Wilson said that he did. Beebe ordered Wilson to lie on the ground, and frisked him. The search revealed no weapons.

Beebe attempted to handcuff Wilson, but could not do so because of the bulk of Wilson's coat. Beebe then ordered Wilson to stand, and again attempted to handcuff him. Beebe's revolver then accidentally discharged, striking Wilson in the back. Wilson sustained injuries to the spine, intestines, and gall bladder. As a result, he experienced atrophy of the calf muscles, severely decreased sensation in his genitals bordering on impotence, reduced control of

17. *Id.* at 899.

18. The Eleventh Circuit dealt only with the deprivation of Patillo's liberty, even though he died as a result of his encounter with officers Craig and Sampson. The court justified this by stating that even though plaintiff had made a claim for deprivation of life under § 1983, plaintiff had claimed damages only in survival actions, and not in an action for wrongful death, under Georgia law. This unconvincing rationale is found in *Gilmere*, 737 F.2d at 894-898 nn.8-9.

19. 743 F.2d 342.

20. *Id.*

his sphincter muscles, partial loss of sensation and mobility in his lower extremities, and urinary problems.

Wilson brought an action in federal district court against Beebe, Beebe's supervisors, the Michigan State Police Department, and the State of Michigan. Wilson claimed that his civil rights pursuant to Michigan common law had been violated, and he sued under section 1983. A federal magistrate determined that *Parratt* barred Wilson's section 1983 claim, and ruled that Wilson was entitled to damages under Michigan negligence law. The district court affirmed the decision of the magistrate, but reduced the recommended damages.

The Sixth Circuit on appeal held that *Parratt* did not bar a section 1983 claim where liberty or life interests are involved, regardless of the existence of a state postdeprivation remedy. The circuit court also affirmed as to liability under state law, and remanded for addition of interest under a Michigan statute.

IV. RATIONALES AND POLICY CONSIDERATIONS

The Eleventh Circuit in *Gilmer* began its analysis by noting that the deprivation of liberty interests suffered by plaintiff's decedent Patillo was beyond the immediate control of the state, and therefore no meaningful predeprivation hearing was possible (as was the situation in *Parratt*). The *Gilmer* court cited cases and commentators who maintain that the handling of liberty interests in the same manner as the handling of property interests under *Parratt* is the most logically consistent position.²¹ The *Gilmer* court also noted that section 1983 grants no substantive rights,²² and stated that liberty interests were to be treated differently than property interests.

The first argument, that liberty and property interests should be treated in a like manner because it is intellectually symmetrical to do so, could be dismissed on the grounds that laws are not made, nor cases decided, as an exercise in logic, but in response to the needs of those governed by the laws and decisions. Behind this argument, however, lies a less explicitly stated consideration. One of the primary functions of *Parratt*, and of cases like *Gilmer*, is to exclude from federal courts an entire class of potential section 1983 litigation. This class of litigation would be composed of instances when a fourteenth amendment interest was deprived under color of state law, when the deprivation was not a result of an established state procedure, when a meaningful predeprivation hearing would be impracticable or impossible, and when an adequate postdeprivation remedy is provided by the state.

This class of litigation is potentially very large, and it is fairly obvious that the rationale of *Parratt* and *Gilmer* has as one of its purposes the conservation of federal judicial resources by denying this litigation a federal forum. As meritorious a purpose as this may be in some situations, it must yield utterly to the purpose of vindicating constitutional rights, if those rights are indeed infringed upon. This proposition shifts the inquiry to the central questions: What is the nature of the right at issue; and, is the right adequately protected by *Parratt* and its progeny?

21. 737 F.2d at 908.

22. *Id.* at 910.

Parratt defined the right at issue to be a right of procedural due process; that is, a right involving the timing and adequacy of the remedy. The plaintiff in *Parratt* alleged violations of no other rights protected by the Constitution. The *Gilmere* court extended this rationale, one which was formulated in a case in controversy involving an inexpensive hobby kit, to the shooting death of a suspect in police custody. The common sense distinction between these two deprivations is apparent. The *Wilson* court proposed a distinction between the constitutional rights involved which is meaningful and which suggests a legal standard for determining when this distinction exists.

The *Wilson* court considered the right at issue to be the *substantive* due process right to enjoy the security of life and limb. The distinction can be expressed by stating that procedural due process rights guarantee the mechanisms by which substantive rights are protected. The *Wilson* court's definition of the right finds support in the Supreme Court case of *Rochin v. California*.²³ In *Rochin*, the conduct of California policemen in executing a search of a suspect was held to be so barbaric that it shocked the conscience of the Court, and rose to the level of a substantive due process violation. The police officers, while making a lawful search of premises, observed a suspect swallowing what they believed to be evidence of a drug-related offense. The policemen seized the suspect and attempted to induce vomiting by forcing their fingers into the suspect's throat. Failing to accomplish their objective, they took the suspect to a hospital and had his stomach pumped.

The drugs obtained by the stomach pump were excluded from evidence by the Supreme Court, despite the fact that probable cause existed for the search. The Court's finding was based upon the egregiousness of the conduct by the officers in carrying out the search. Applying this analysis to *Gilmere* and *Wilson* could achieve the same results as were actually reached by the respective courts. In *Wilson*, the act of holding a cocked gun and of negligently discharging it into an unarmed and unresisting suspect can be seen as acting with wanton disregard for the safety of the suspect, and therefore appears highly egregious in nature. In *Gilmere*, the shooting of a resisting and possibly armed suspect seems less egregious in regard to the action of the police officer.

The *Wilson* court inquiry, however, was not conduct oriented, but result oriented. The inquiry focused on the harm done to the plaintiff. This distinction is, if anything, more meaningful than the one proposed in *Rochin*. The bodily security of the suspect in *Rochin* was invaded only briefly, and he suffered no long-term physical damage. The suspects in *Wilson* and *Gilmere* suffered profound and permanent impairment of their constitutional liberty interest in bodily security.

It is a settled proposition that the due process clause affords not only a procedural guarantee against the deprivation of liberty, but also protects substantive rights.²⁴ Some of the substantive liberty interests that the due process clause has been held to protect include the right of a woman to terminate a pregnancy,²⁵ the right of a father to custody of his illegitimate child,²⁶ and the

23. 342 U.S. 165 (1952).

24. *Kelley v. Johnson*, 425 U.S. 238, 244 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972).

25. *Roe v. Wade*, 410 U.S. 113 (1973).

right of married and unmarried people to use contraception.²⁷ It cannot rationally be argued that the right to bodily security, the right to be free of permanently crippling injury at the hands of individuals acting under color of state law, is less substantive and fundamental than the liberty interests mentioned above.

The *Wilson* court noted that not every negligent tort committed under color of state law is a constitutional question. But the *Wilson* court also stated, "However, where the tort committed violates substantive due process rights and shocks the conscience of the court, section 1983 liability may also be found in addition to liability for damages to the plaintiff's physical and economic interests."²⁸ The problem with this standard is that some courts, including the lower courts which admitted the evidence in *Rochin*, do not shock very easily, and so the *Wilson* standard is highly susceptible to uneven application. A better approach might be to express the two elements of the *Wilson* standard as a disjunctive: section 1983 liability will be found when the tort committed violates a substantive due process right by impairing a protected fourteenth amendment right in a serious and long-term manner, or when the manner in which the tort is committed shocks the conscience of the court. This approach can be termed a modified *Wilson* standard.

This disjunctive test would apply to cases like *Rochin*, where the conduct was egregious but the long-term physical damage slight or *Gilmere*, where the conduct (although negligent) seems less barbaric, but the harm to the victim is profound and permanent. This test is also consonant with the Supreme Court case of *Ingraham v. Wright*,²⁹ one of the leading cases cited by the *Gilmere* court for the proposition that liberty interest may also be subject to a *Parratt* analysis. *Ingraham* dealt with the liberty interest in bodily security which a class of school children alleged had been deprived without due process by disciplinary paddling. The Court found that a predeprivation hearing was impracticable, and held that postdeprivation tort remedies available under Florida law provided due process. Although *Ingraham* did not enunciate a general rule for liberty interest and due process, the case did involve liberty interest and was brought under section 1983.

Applying a modified *Wilson* standard would in all likelihood achieve the same result as did the *Ingraham* Court. Mere disciplinary paddling, in which excessive force is not used, is a widely accepted practice and is probably not egregious conduct. The infringement on liberty interests is light where reasonable force is used and no real physical harm is done, and therefore does not rise to the level of a substantive due process violation. Under these circumstances, the issue can rightly be expressed as one of procedural due process, which can be satisfied by state postdeprivation tort remedies.

The *Gilmere* court acknowledged in dicta the conduct-oriented "conscience of the court" standard. However, the court rejected a distinction between liberty and property interests based on the notion that a deprivation of liberty interest could not be economically compensated, as could a deprivation of property interest. The court stated summarily that this argument is con-

26. *Stanley v. Illinois*, 405 U.S. 645 (1972).

27. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

28. 743 F.2d at 350-51.

29. 430 U.S. 651 (1977).

trary to elementary notions of tort law. The *Gilmere* court may have been correct insofar as the suggested distinction lies between liberty and property interests. The modified *Wilson* standard, however, does not distinguish along that line. If liberty and property interests are envisioned as separated by a vertical line, the modified *Wilson* standard can be seen as a horizontal line bisecting the sets of both liberty and property interests. Below the horizontal line lie deprivations of liberty and property conducted in a non-egregious manner, and resulting in harm that is neither serious or long-term. These cases involve only procedural due process issues, which can be satisfied by states' postdeprivation remedies so long as the requirements stated in *Parratt* are satisfied. Above the line lie deprivations of liberty or property interests conducted in an egregious manner, or resulting in severe, long-term harm to fourteenth amendment interests. These cases would, by the nature of the conduct or the harm, rise to the level of substantive due process violations, and be actionable in federal court under section 1983. If this rationale is extended to life interests, presumably a deprivation of life is a harm so serious that due process can never be satisfied by a state postdeprivation hearing.

The advantage of the modified *Wilson* approach is that it answers one of the main concerns expressed in *Parratt*, that section 1983 litigation not be used to take the place of state tort law. However, under this new rationale legitimate constitutional interest can be protected in the appropriate federal forum. Thus, a conservation of federal judicial resources is accomplished, the domain of state tort law is not unduly invaded, and the fourteenth amendment rights of individuals are protected.

V. OTHER CIRCUITS

While there is a split of opinion among the circuits, a majority seem to be in accord with the notion that the *Parratt* rationale applies to section 1983 actions involving liberty interests. Under a modified *Wilson* standard some of those cases would be decided differently, while others would achieve the same result.

The Second Circuit, in *Engblom v. Carey*,³⁰ ruled that an adequate state postdeprivation remedy provided due process where privacy interests, a specie of liberty interests, were at issue. In this case, striking correctional officers were barred from their residences, located in the prison facility. The court held that the officers had both liberty and property interests in their residences, but that *Parratt* foreclosed their section 1983 claims. The court applied the *Parratt* rationale because there was a necessity for quick action on the part of the prison administration in dealing with reported vandalism by the striking officers.

Under a modified *Wilson* rationale, the result in *Engblom* might not change. The conduct of the prison administrators in barring the striking officers seems justified in light of the emergency situation, and the deprivation was temporary. In this situation, the property interests might better serve as the basis of the section 1983 claim, since the deprivation is one of a dwelling place.

30. 677 F.2d 957 (2d Cir. 1982).

In *Ellis v. Hamilton*,³¹ the Seventh Circuit applied *Parratt* to a liberty interest involving the custody rights of adoptive relatives, and the right of families to be free from arbitrary disruption by state agencies. In this case, adopted children, after the death of their adoptive parents, were placed by the state in foster homes rather than in the custody of their adoptive grandparents. The grandparents brought a § 1983 action, which was held to be foreclosed by *Parratt*.

In *Ellis* the modified *Wilson* standard might not produce a different result. The conduct does not seem egregious, but careful inquiry would be appropriate to determine the nature of the harm. If the only harm found is interruption of custody, the harm would seem to be short-term and remediable.

In *Mills v. Smith*,³² the Eighth Circuit held *Parratt* applicable to the liberty interests of a prisoner who was negligently shot while being handcuffed after an attempted escape. The conduct of the officer was probably less egregious than that of Beebe in *Wilson* because *Mills* involved allegations of active resistance by the prisoner. However, the severity of the harm would permit a § 1983 action under a modified *Wilson* standard.

In *Rutledge v. Arizona Board of Regents*,³³ the Ninth Circuit held that *Parratt* applied to an alleged assault and battery upon a defensive back by the Arizona State University football coach. The conduct alleged, while certainly not praiseworthy, does not seem the kind that rises to the level of a fourteenth amendment violation. The availability of section 1983 under the modified *Wilson* approach would depend on the severity of the injuries suffered.

The district court in *Howse v. DeBerry Correctional Institute*³⁴ held that *Parratt* did not apply to the liberty interest of prisoners to be free from guard brutality. Here the alleged conduct was egregious and the potential for recurring harm great. Therefore, the modified *Wilson* rationale would produce the same result.

CONCLUSION

The purpose of § 1983 and one of the primary duties of the federal courts is to provide a forum for the vindication of constitutional rights. When anyone acting under color of state law deprives someone of a fourteenth amendment interest, due process must be given. When the deprivation occurs in an egregious manner or produces severe and long-term impairment of fourteenth amendment interests, substantive due process ought to require that a postdeprivation hearing under state law will not vindicate these essential constitutional rights. A hearing in federal court is the appropriate forum, and section 1983 the appropriate vehicle.

Parratt addresses a legitimate problem in the over-extension of section 1983 litigation into the proper domain of state tort law. However, mere intellectual symmetry cannot justify extending this rationale into areas involving due process rights of a substantive nature. The majority in *Parratt* deals solely with property interests and procedural due process rights, and where these

31. 669 F.2d 510 (7th Cir. 1982).

32. 656 F.2d 337 (8th Cir. 1981).

33. 660 F.2d 1345 (9th Cir. 1981).

34. 537 F. Supp. 1177 (M.D. Tenn. 1982).

rights alone are involved, the *Parratt* rationale can be seen as a constitutionally valid approach. However, when substantive due process rights are involved, a different approach is necessary. Denial of a federal forum based on a distinction between liberty and property interests does not adequately address the constitutional issue. The line separating substantive rights from procedural rights should be the line that *Parratt* does not cross.

FRANCIS D'ERAMO

POSTSCRIPT

In October of 1985, when this issue was in the final stage production, *Gilmere v. City of Atlanta*,³⁵ decided by a three judge panel of the Eleventh Circuit of Appeals, was reconsidered by the court of appeals *en banc*.³⁶ The panel which initially considered *Gilmere* ruled that under *Parratt* the plaintiff's section 1983 action for violation of liberty interests was barred because the state survival statute provided an adequate postdeprivation remedy sufficient for constitutional violations in general. No distinction was made by the court between substantive and procedural interests.

The court of appeals *en banc* in reconsidering the case, however, stressed that violations of procedural due process were distinguishable from other, substantive constitutional violations, and that *Parratt v. Taylor* was not intended to turn all section 1983 claims into torts under state law. The court held that while negligent destruction of property³⁷ or intentional destruction of property³⁸ may not be actionable in federal court under section 1983 where an adequate postdeprivation remedy exists in state law, intentional and unjustified beatings or killings are not relegated to state tort remedies by *Parratt*.

By affirming the district court opinion on this point, the Eleventh Circuit joins other federal circuit courts in distinguishing between procedural and substantive due process under section 1983. This decision further illuminates the wisdom of the author's analysis on this subject.—Eds.

35. 737 F.2d 894 (11th Cir.), *aff'd on rehearing* 774 F.2d 1495 (11th Cir. 1985) (*en banc*).

36. 774 F.2d 1495 (11th Cir. 1985) (*en banc*).

37. *Parratt v. Taylor*, 451 U.S. at 527 (1981).

38. *Hudson v. Palmer*, ___ U.S. ___, 104 S. Ct. 3944 (1984).