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# Prisoner Property Deprivations: Section 1983 and The Fourteenth Amendment

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# Notes

## Prisoner Property Deprivations: Section 1983 and The Fourteenth Amendment

Few areas of the law have undergone such rapid and recent change as that of prisoners' rights. Under section 1983 of the Civil Rights Act,[1] and its incorporation of the fourteenth amendment, state prisoners are provided a federal forum in which to challenge various aspects of their incarceration.[2] Claims arising from personal property deprivations at the hands of the state's agents, however, have received uneven treatment in the midst of section 1983's visible growth. These deprivations occur both negligently[3] and intentionally[4] and are uniformly challenged under section 1983 and its

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[1]Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.

42 U.S.C. § 1983 (1970).

Section 1983 was originally passed as part of the Civil Rights Act of 1871, otherwise known as "the Ku Klux Klan Act," "the Third Civil Rights Act," and "the third 'force bill'." The wording of this section is substantially the same as the original. Very few actions were brought under the Act until the Supreme Court revealed is tremendous potential in Monroe v. Pape, 365 U.S. 167 (1961), ninety years after the Act was adopted.

[2]Specific rights that have been held applicable to the states through the fourteenth amendment are also covered by the "double incorporation" of section 1983. In fact, it has been this very "double incorporation" of constitutional rights that has made section 1983 such a powerful guarantor of personal rights to prisoners. *See, e.g.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972) (freedom of speech); McCleary v. Kelly, 376 F. Supp. 1186 (M.D. Pa. 1974) (access to the news media); Cooper v. Pate, 378 U.S. 546 (1964) (religious discrimination); Andrade v. Hauck, 452 F.2d 1071 (5th Cir. 1971) (access to the courts); Brown v. Dugger, 456 F.2d 1260 (5th Cir. 1972) (availability of legal documents); Hancock v. Avery, 301 F. Supp 786 (M.D. Tenn. 1969) (solitary confinement examined); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (cruel and unusual punishment); Wolff v. McDonnell, 418 U.S. 539 (1974) (withdrawal of good time credit without proper due process protection).

[3]*E.g.*, Carter v. Estelle, 519 F.2d 1136 (5th Cir. 1975); Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975); Watson v. Stynchombe, 504 F.2d 393 (5th Cir. 1974); Clayton v. Wade, 487 F.2d 595 (5th Cir. 1973).

[4]*E.g.*, Diamond v. Thompson, 523 F.2d 1201 (5th Cir. 1975); Carroll v. Sielaff, 514 F.2d 415 (7th Cir. 1975); Hansen v. May, 502 F.2d 728 (9th Cir. 1974); Montana v. Harrelson, 469 F.2d 1091 (5th Cir. 1972); Weddle v. Director, Patuxent Insti., 436 F.2d 342 (4th Cir. 1970), *rev'd mem.*, 405 U.S. 1036 (1972); Urbano v. Calissi, 384 F.2d 909 (3d Cir. 1967), *cert. denied*, 391 U.S. 925 (1968); Howard v. Higgins, 379 F.2d 227 (10th Cir. 1967); Butler v. Bensinger, 377 F. Supp. 870 (N.D. Ill. 1974).

jurisdictional counterpart, section 1343(3),[5] which requires no minimum amount in controversy.

Although on many occasions prisoner property claims have been sustained,[6] the underlying sentiment is that they do not pose proper issues for federal litigation. This sentiment has found expression in dismissals based on notions of judicial abstention or non-intervention,[7] the characterization of claims as frivolous and inconsequential,[8] and the simple conclusion that personal property deprivation claims must be heard in state courts.[9] One of the most notable cases exemplifying the problem is *Russell*

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[5]This jurisdictional section grants original jurisdiction to the federal district courts over any civil action authorized by law and commenced by any person:

> 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.

28 U.S.C. § 1343(3) (1970).

[6]Diamond v. Thompson, 523 F.2d 1201 (5th Cir. 1975); Kimbrough v. O'Neil, 523 F.2d 1057 (7th Cir. 1975); Carter v. Estelle, 519 F.2d 1136 (5th Cir. 1975); Carroll v. Sielaff, 514 F.2d 415 (7th Cir. 1975); Hansen v. May, 502 F.2d 728 (9th Cir. 1974); Russell v. Bodner, 489 F.2d 280 (3d Cir. 1973); Montana v. Harrelson, 469 F.2d 1091 (5th Cir. 1972); Weddle v. Director, Patuxent Insti., 436 F.2d 342 (4th Cir. 1970), *rev'd mem.*, 405 U.S. 1036 (1972).

[7]*See* Howard v. Swenson, 426 F.2d 277 (8th Cir. 1970). Prisoner, seeking return of several pairs of civilian shoes and $250,000 in damages, alleged a deliberate confiscation. His complaint was dismissed by the court noting that the plaintiff was "attempting to make a federal case over 'several pairs of black low-cut civilian shoes.' " *Id.* The court based its dismissal primarily on the notion that except in extreme cases, courts may not interfere with the conduct of the prison, its regulations, or disciplinary actions by prison authorities. *See also* Butler v. Bensinger, 377 F. Supp. 870, 875 (N.D. Ill. 1974); Argentine v. McGinnis, 311 F. Supp. 134, 137 (S.D.N.Y. 1969). This doctrine is generally known as the "hands off" doctrine and was also expressed in earlier prisoner rights cases: "[I]t is not the function of the Courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined." Adams v. Ellis, 197 F.2d 483, 485 (5th Cir. 1952). For further discussion of the "hands off" doctrine see Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962). In recent years, however, the importance of the doctrine has faded considerably. In Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971), it was noted that courts necessarily must review the decisions of prison officials to preserve constitutional protections for incarcerated persons. *Id.* at 1232. The Supreme Court in Wolff v. McDonnell, 418 U.S. 539 (1974), has recently cited various instances in which courts inquired into constitutional protection to be afforded prisoners. The Court appears to have abandoned allegiance to the "hands off" doctrine in stating: "There is no iron curtain drawn between the Constitution and the prisons of this country." *Id.* at 555-56.

[8]*See* Pitts v. Griffin, 518 F.2d 72 (8th Cir. 1975). Often dismissals are based on 28 U.S.C. § 1915(d) (1970), which allows federal district courts to dismiss actions brought in forma pauperis if the court is satisfied that the action is frivolous or malicious. Unfortunately, it is too easy for the courts to invoke this protective device in response to what is truly a good faith claim which happens only to involve a very small amount in controversy. *See also* Almond v. Kent, 321 F. Supp. 1225 (W.D. Va. 1970), *rev'd on other grounds*, 459 F.2d 200 (4th Cir. 1972).

[9]In Butler v. Bensinger, 377 F. Supp. 870 (N.D. Ill. 1974), the court stated that "while the federal courts certainly did not condone the conversion of an inmate's property, they necessarily insist that such allegations and charges be heard in the state courts." *Id.* at 875. *See* Urbano v. Calissi, 384 F.2d 909 (3d Cir. 1967), *cert. denied*, 391 U.S. 925 (1968), where the court found:

*v. Bodner*,[10] in which a section 1983 claim was brought in a federal district court by a state prisoner alleging an unconstitutional deprivation of property without due process. The interesting, if not shocking, fact in this case was that the property over which the district court had been convened consisted of seven packages of cigarettes. The district court dismissed the prisoner's complaint, but the Court of Appeals for the Third Circuit reversed and remanded for trial in a per curiam opinion.[11] One judge, in a separate concurring opinion, observed:

> Having been reluctantly persuaded that the ancient maxim "de minimis non curat lex" does not apply to civil rights actions . . . it is my view that this Court has no choice but to conclude that the district court erred in dismissing the complaint as frivolous.
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> This result may well be expected to come as a surprise to the district judge who dismissed the complaint. It will also no doubt generate a certain amount of disbelief in those taxpayers and citizens generally, not to mention judges and lawyers, who will ask how federal courts have come to be concerned with a case in which a state prisoner alleges simply that his constitutional rights were violated when a prison guard took seven packages of cigarettes from him. I have yet to answer this question satisfactorily for myself.[12]

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Plaintiff, without warrant, is deliberately seeking to avoid his obvious State remedy. His complaint is simply a vague assertion that the defendants appropriated some of his personal property to their own use. He sets out in essence a simple common law offense for which complete relief is readily available under New Jersey law.

384 F.2d at 910. *See also* Lingo v. Boone, 402 F. Supp. 768, 772 (N.D. Cal. 1975).

[10]489 F.2d 280 (3d Cir. 1973).

[11]*Id.*

[12]489 F.2d at 282. Chief Justice Burger has expressed his concern over federal courts handling three dollar prisoner property claims as well. In an address to the American Bar Association the Chief Justice said:

> In one case a prisoner in a state penitentiary filed a complaint in a federal district court under the Civil Rights Act, claiming that a prison guard had arbitrarily taken seven packages of cigarettes from him without justification. The district judge dismissed the complaint. The prisoner then took an appeal to the Court of Appeals for the Third Circuit, where three circuit judges, after reading briefs and considering his arguments, wrote an opinion remanding the case to the district court with directions to conduct a trial on the merits. . . . Under established procedures the three circuit judges first had to submit their proposed opinion and the concurring opinion of one of the three to the other six members of the court of appeals who were not assigned to the case. . . .
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> The first reaction of many people would be that such a case was governed by the ancient maxim of the law that courts need not take notice of trifles. But to a man confined in prison, more often than not in a cell six-by-eight feet, seven packages of cigarettes do not seem a trifle. Apart from being private property, cigarettes are a source of comfort to some people. When the district judge received the court of appeals' opinion, he plaintively asked if he could dispose of the whole lawsuit by sending the prisoner three dollars or seven packs of cigarettes.
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> Some would hope that prisoners would find more comfort in seven books or seven candy bars, but whether books, candy, or cigarettes, the grievance was real to the man who lost them. What most people will find difficult to understand about this case is why the people who make and construe the laws — Congress and judges

The obviously troubling aspect of prisoner property claims is that the property seized or lost is seldom of more than trifling value.[13] It is ironic that federal judicial energy is expended on cases involving small pecuniary amounts, particularly where such cases do not raise issues generally cognizable as of federal interest. Most of these cases involve elementary tortious conversions, redress of which has traditionally been left to the state courts.[14] The problem is further aggravated by the fact that federal courts are already seriously overloaded with prisoner complaints.[15] On the other hand, it clearly cannot be said that a prisoner's rights in property are

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— have not thought to deal with such a problem without, to use the vernacular, "making a federal case out of it."

Burger, *Report on the Federal Judicial Branch — 1973*, 59 A.B.A.J. 1125, 1128 (1973).

[13]*See, e.g.*, Pitts v. Griffin, 518 F.2d 72 (8th Cir. 1975) (portable radio); Cruz v. Cardwell, 486 F.2d 550 (8th Cir. 1973) (about $200 in cash); Weddle v. Director, Patuxent Insti., 436 F.2d 342 (4th Cir. 1970), *rev'd mem.*, 405 U.S. 1036 (1972) (cigarettes, toothpaste and other personalty with an aggregate value of about $3.50); Howard v. Swenson, 426 F.2d 277 (8th Cir. 1970) (several pairs of civilian shoes); Urbano v. Calissi, 384 F.2d 909 (3d Cir. 1967), *cert. denied*, 391 U.S. 925 (1968) (items of clothing); Lingo v. Boone, 402 F. Supp. 768 (N.D. Cal. 1975) (transistor radio with batteries); Butler v. Bensinger, 377 F. Supp. 870 (N.D. Ill. 1974) (art equipment, art effects and commissary goods); Almond v. Kent, 321 F. Supp. 1225 (W.D. Va. 1970), *rev'd on other grounds*, 459 F.2d 200 (4th Cir. 1972) (prisoner's shoes).

[14]The Supreme Court has recently commented upon the extention of federal jurisdiction to cases traditionally actionable only in the state courts. In Paul v. Davis, 424 U.S. 693 (1976), plaintiff's name and photograph were included in a flyer distributed among merchants by police chiefs. The flyer was captioned "Active Shoplifters." The Court held that reputation alone does not implicate any "liberty" or "property" interests sufficient to require due process protection, and that a simple defamation by a state official is insufficient to establish a valid claim under section 1983. The Court also observed:

> Respondent brought his action, however, not in the state courts of Kentucky, but in a United States District Court for that State. He asserted not a claim for defamation under the laws of Kentucky, but a claim that he had been deprived of rights secured to him by the Fourteenth Amendment of the United States Constitution. Concededly if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law. But, he contends, since petitioners are respectively an official of city and of county government, his action is thereby transmuted into one for deprivation by the State of rights secured under the Fourteenth Amendment.
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> . . . .
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> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

*Id.* at 697-98. *See also* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557.

[15]*See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 88-89 (1973); H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 330-375 (2d ed. 1973); Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557; Burger, *Report on the Federal Judicial Branch — 1973*, 59 A.B.A.J. 1125 (1973); Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971); McCormack, *The Expansion of*

altogether inconsequential; even a package of cigarettes can be very important to a man confined in prison.[16]

In view of the Supreme Court's express rejection of any distinction between personal liberty and property rights *for purposes of federal jurisdiction* under section 1983 and 1343(3),[17] the federal courts are deprived of one simple method by which to avoid hearing civil suits over small

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*Federal Question Jurisdiction and the Prisoner Complaint Caseload,* 1975 WIS. L. REV. 523.

[16]The view that such cases pose proper issues for federal litigation has been expressed by Professor McCormack:

> The burden on federal judges can be tested by the famous three dollar cigarette case, *Russell v. Bodner.* The allegations in the complaint were that a prison guard had taken food from a prisoner, the prisoner complained, the guard asserted plenary power to take anything from a cell and demonstrated by taking several packages of cigarettes from the plaintiff. These facts are so simple that it is difficult to imagine a trial to determine their truth taking more than one hour, if a trial were needed. The objection that this case has occupied the attention of many federal judges could have been obviated if the district judge had not dismissed it as frivolous, requiring an appeal. Why do judges think this case will shock the taxpayers? Precisely because it is so simple and involves so little money. Of course, the plaintiff could have made this a $10,000 case simply by praying for punitive damages much as diversity plaintiffs pray for pain and suffering damages to create jurisdiction. As a taxpayer I am immeasurably more shocked at the vast amount of judicial resoruces that are expended on a five-year antitrust case between two corporations that were wealthy at the start, will be wealthy at the conclusion, and who have contributed substantially to the wealth of their lawyers at the expense of the American public.
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> If cases such as *Russell* take even a full half-day of trial, they are worth the trouble. The allegations involved much more than seven packs of cigarettes; they involved alleged official corruption of power in the prison system. If true, then they should be redressed. More importantly, if they are false, then they should be so labelled only after a full judicial trial and not after a mere administrative investigation.

McCormack, *The Expansion of Federal Question Jurisdiction and the Prisoner Complaint Caseload,* 1975 WIS. L. REV. 523, 549-50.

[17]The distinction between personal and property rights, originally articulated by Justice Stone in his concurring opinion in Hague v. CIO, 307 U.S. 496, 518 (1939), directed that the Civil Rights Act of 1871 protected only rights based in personal liberty, " . . . not dependent for [their] existence upon the infringement of property rights . . . ." *Id.* at 531. This conclusion, according to Justice Stone, was necessary in order to reconcile 28 U.S.C. § 1343(3), and its grant of federal jurisdiction to protect against deprivation of rights, with 28 U.S.C. § 1331 and its minimum amount in controversy requirement.

The property rights exception expressed by Justice Stone drew considerable criticism from both judges and legal writers. *See, e.g.,* Penn v. Stumpf, 308 F. Supp. 1238, 1245 (N.D. Cal. 1970); Collins v. Bolton, 287 F. Supp. 393, 401 (N.D. Ill. 1968); Hornbeak v. Hamm, 283 F. Supp. 549, 554-556 (M.D. Ala. 1968) (dissent), *aff'd per curiam,* 393 U.S. 9 (1968); Joe Louis Milk Co. v. Hershey, 243 F. Supp. 351, 354, 357 (N.D. Ill. 1965); Laufer, *Hague v. C.I.O.: Mr. Justice Stone's Test of Federal Jurisdiction — A Reappraisal,* 19 BUFFALO L. REV. 547 (1970); Note, *Section 1343 of Title 28 — Is the Application of the "Civil Rights-Property Rights" Distinction to Deny Jurisdiction Still Viable?,* 49 B.U.L. REV. 377 (1969); Note, *The "Property Rights" Exception to Civil Rights Jurisdiction — Confusion Compounded,* 43 N.Y.U. L. REV. 1208 (1968).

The test proposed by Justice Stone was subject to several major criticisms: (1) it ignored the great difficulty of distinguishing between personal and property rights in cases where both were affected. *See, e.g.,* Douglas v. City of Jeannette, 319 U.S. 157 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); (2) it is not justified by the language of either section 1983 or 1343(3); and (3) the distinction is not supported by the legislative history of the statute.

amounts of personal property.[18] While dismissals based on doctrines of non-intervention and the like serve a legitimate federal interest in conservation of judicial resources, they fail to provide a sound theoretical basis for exclusion of such prisoner property claims from the federal courts. As the number of prisoner suits continues to grow, so does the need for careful analysis in order to reach a solution that is both effective and credible. This note will outline and discuss one solution that may serve to reconcile the desire to preserve federal judicial energy with the important interest in providing a forum for vindicating wrongful deprivations of property by prison guards. The goal is to remove cases not raising issues of federal interest from the federal courts without foresaking the prisoner's need for a remedy. The success of the approach will turn on its theoretical acceptability and its practical workability.

## THE INCOMPLETE DEPRIVATION THEORY IN NEGLIGENT DEPRIVATIONS OF PRISONERS' PROPERTY

*Bonner v. Coughlin*,[19] a Seventh Circuit decision, illustrates one approach to the dilemma which may prove sound in cases where the loss of an item of property is the result of negligent misconduct of a prison guard. In *Bonner*, an inmate, upon returning to his cell from a prison work detail, found his trial transcript missing. The prisoner brought an action under section 1983 against two prison guards who allegedly caused the loss of the transcript by negligently failing to close the prisoner's cell door after performing a routine "shakedown search." The prisoner alleged that the guards' negligence deprived him of his property in violation of the fourteenth amendment due process clause.[20] The court found that three of the prerequisites of a valid due process claim had been stated: the guards had acted "under color of" state law;[21] the transcript satisfied the definition

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Although the distinction was never formally adopted by the Supreme Court, it was conclusively laid to rest in Lynch v. Household Fin. Corp., 405 U.S. 538 (1972): "This Court has never adopted the distinction between personal liberties and proprietary rights as a guide to the contours of § 1343(3) jurisdiction. Today we expressly reject that distinction." *Id.* at 542.

[18]Weddle v. Director, Patuxent Insti., 436 F.2d 342 (4th Cir. 1970), *rev'd mem.*, 405 U.S. 1036 (1972). In *Weddle* a state prison inmate was deprived of various articles of personal property which had an aggregate value of $3.52. The prisoner sued under section 1983 for a deprivation of his property without due process. The district court dismissed the action for lack of jurisdiction; the Fourth Circuit affirmed, holding that where allegations complained of infringement solely of property rights, federal jurisdiction did not lie unless the minimum amount in controvesy was alleged. The Supreme Court reversed and remanded, however, in a memorandum opinion, "for further consideration in light of *Lynch v. Household Fin. Corp.*" 405 U.S. at 1036. *See* note 17 *supra*.

[19]517 F.2d 1311 (7th Cir. 1975).

[20]Bonner also claimed that the taking of his transcript violated the fourth amendment's prohibition against unreasonable searches and seizures. A third theory of liability, the only one upon which Bonner's complaint was allowed to stand, was that the taking or loss of his transcript had interfered with his right of access to the courts under the sixth amendment.

[21]Judge Stevens noted that before Screws v. United States, 325 U.S. 91 (1945), plaintiff's

of property; and the negligently caused loss amounted to a deprivation.[22] Yet the court concluded that the remaining essential element of a constitutional violation was absent; there had been no denial of due process. This finding was premised on the fact that the state offered the prisoner a remedy against the guards in its own courts.[23] The court, in an opinion written by Judge Stevens,[24] summarized its position:

> It seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the Fourteenth Amendment's prohibition against "State" deprivations of property; in the latter situation, however, even though there is action "under color of" state law sufficient to bring the amendment into play, the state action is not necessarily complete. For in a case such as this the law of Illinois provides, in substance, that the plaintiff is entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards. We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.[25]

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claim would have failed on the theory that unauthorized acts of prison guards should not be treated as acts "under color of" state law.

Originally "under color of" law was read to mean that section 1983 applied only to action *authorized* under state law. *See, e.g.*, Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Herndon, 273 U.S. 536 (1927); Myers v. Anderson, 238 U.S. 368 (1915).

In *Screws*, it was held that under color of state law actually meant "under pretense of law." The approach is more appropriately worded, "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." United States v. Classic, 313 U.S. 299, 326 (1941). *See also* Monroe v. Pape, 365 U.S. 167 (1961), particularly Justice Harlan's concurring opinion. *Id.* at 192.

As illustrated in the prisoner property deprivation cases, it is possible that the meaning presently attributed to the phrase extends section 1983 coverage in some cases beyond originally intended bounds. Regardless of whether wrongful acts of a state agent should be covered, it is clear that at least in this setting, a more narrow reading would accomplish the objective of removing negligent or intentional tortious deprivations of property from the federal courts. Unfortunately such a sweeping revision in the meaning of "under color of" state law would exclude many other desirable and important cases from the federal courts.

[22]517 F.2d at 1318.

[23]Article 13, section 4 of the 1970 Illinois Constitution waives any defense based on sovereign immunity in an action brought against the state, "[e]xcept as the General Assembly may provide by law . . . ." ILL. CONST. art. 13, § 4. The Illinois General Assembly elected to retain the defense of sovereign immunity "[e]xcept as provided in '*An Act* to create the Court of Claims . . . .' " ILL. REV. STAT. ch. 127, § 801. Section 8(d) of the Court of Claims Act allows recovery up to $100,000 for the negligent acts of state employees. ILL. REV. STAT. ch. 37, § 439.8(d). Furthermore, the defendants in *Bonner* appeared to possess no claim to state-created immunity that could prevent their liability in Illinois courts. *Cf.* Kelly v. Ogilvie, 35 Ill.2d 297, 220 N.E.2d 174 (1966).

[24]Judge John Paul Stevens was subsequently named to the United States Supreme Court. He was sworn in on December 19, 1975.

[25]Bonner v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975).

Such reasoning reflects a significant departure from the approach taken by other courts dealing with prisoner property claims based on the fourteenth amendment. The most significant feature of Judge Stevens' approach is the careful scrutiny of the individual elements of the prisoner complaint, and the key to the *Bonner* holding is the analysis of the consitutional "duty" allegedly breached by the guards. Because section 1983 imposes liability only in cases where, by its own terms, a person is subjected to "the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ,"[26] actual constitutional interpretation must take place in every section 1983 claim. Some constitutional right *must* be found to exist and to have been infringed for a prisoner's claim to survive.[27]

Most cases in which the sufficiency of a prisoner property complaint is tested have failed to discuss the contours of the fourteenth amendment due process clause in any significant detail. Implicit in holdings that a section 1983 claim arising out of negligent loss or destruction of property states a cause of action is the notion that there is a completed constitutional violation in the form of deprivation of "rights, privileges, or immunities" once loss or damage to property occurs.[28] It is this type of failure to carefully examine the underlying fourteenth amendment "duty" that has, in some cases, resulted in impractical and unintended extensions of section 1983 liability.[29] Arguably, such an overextension has taken place in the context of prisoner property claims arising out of unauthorized deprivations at the hands of prison guards. Allowance of section 1983 complaints where no constitutional duty is breached transforms the Civil Rights Act from an affirmative protector of federally created rights into a federal tort remedy with no requirement of a minimum amount in controversy.

### *Fourteenth Amendment Due Process and Predeprivation Requirements*

In *Bonner,* the court found only a *potential* fourteenth amendment violation in the guards' loss of prisoner's property.[30] "Incomplete deprivation" suggests that the relevant constitutional inquiry underlying any such section 1983 claim is not exhausted until it is determined that no

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[26]42 U.S.C. § 1983 (1970). See text cited in full at note 1 *supra.*

[27]*See* cases cited at note 65 *infra* & text accompanying.

[28]*See, e.g.,* Carter v. Estelle, 519 F.2d 1136 (5th Cir. 1975); Watson v. Stynchombe, 504 F.2d 393 (5th Cir. 1974); Hansen v. May, 502 F.2d 728 (9th Cir. 1974); Cruz v. Cardwell, 486 F.2d 550 (8th Cir. 1973); Culp v. Martin, 471 F.2d 814 (5th Cir. 1973); Montana v. Harrelson, 469 F.2d 1091 (5th Cir. 1972).

[29]*See* Nahmod, *Section 1983 and the "Background" of Tort Liability,* 50 IND. L.J. 5, 13-25 (1974). *See also* Fischer v. Cahill, 474 F.2d 991, 992 (3d Cir. 1973); Roberts v. Williams, 456 F.2d 819 (5th Cir. 1971), *cert. denied,* 404 U.S. 866 (1971), *addendum,* 456 F.2d 834 (5th Cir. 1972); Hopkins v. County of Cook, 305 F. Supp. 1011, 1012 (N.D. Ill. 1969).

[30]*See* note 25 *supra* & text accompanying.

remedy is otherwise provided to redress the taking of property. In *Bonner* that saving remedy comes in the form of a state-created statutory cause of action against the tortfeasor guards after the initial taking or loss of property.[31] It is the availability of this state judicial hearing that satisfies procedural due process hearing requirements.

The relevant portion of the fourteenth amendment reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."[32] Generally, due process requires a fair opportunity to be heard and to defend one's rights before the state or its agents interfere with them.[33] In most cases the deprivation of a property right is pursuant to some established state procedure, and the opportunity for a hearing can be easily offered before any actual deprivation takes place.[34] The requirement of a predeprivation hearing in these circumstances is the product of a citizen's natural interest in the continued right "to enjoy what

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[31]For purposes of analysis, the remedy provided by the state of Illinois is considered to be a make-whole remedy providing a tort remedy for:

> All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit . . . provided, that an award for damages in a case sounding in tort shall not exceed the sum of $100,000 to or for the benefit of any claimant.

ILL. REV. STAT. ch. 37, § 439.8(d).

[32]U.S. CONST. amend. XIV, § 1 (1970).

[33]*See* Boddie v. Connecticut, 401 U.S. 371, 377 (1971); Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969); Armstrong v. Manzo, 380 U.S. 545, 550-52 (1965); Best v. Humboldt Placer Mining Co., 371 U.S. 334, 338 (1963); Schroeder v. New York, 371 U.S. 208, 211-12 (1962); Covey v. Town of Somers, 351 U.S. 141, 146 (1956); Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950); Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246 (1944); Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U.S. 673, 678 (1930); Londoner v. Denver, 210 U.S. 373, 385-86 (1908).

The Supreme Court expressed this principle as early as the 1860's when it held in Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1863), that a discharge under a state insolvency law was ineffective against an out of state creditor: "Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence." *Id.* at 233.

[34]*E.g.*, in Fuentes v. Shevin, 407 U.S. 67 (1972), where a prejudgment replevin statute allowed secured creditors to obtain writs in ex parte proceedings, the Court held that due process was violated because of the lack of a prior hearing. The Court reasoned that the debtor's possessory interest in the property and the interest in preventing wrongful seizures outweighed the possibility of harm to the goods while in the debtor's possession.

In Bell v. Burson, 402 U.S. 535 (1971), a state statute provided that after an accident involving an uninsured motorist, the uninsured's license and registration might be taken without a prior hearing to determine possibility of fault and liability. The Court there held that because a driver's license may often be involved in the livelihood of a person, it could not be summarily taken without a prior hearing.

In Wisconsin v. Constantineau, 400 U.S. 433 (1971), the Court held that a state statute allowing "posting" of a person's name in liquor stores and taverns to warn proprietors not to serve those listed because of their "problem drinking" was unconstitutional. The severe public embarrassment and ridicule likely to arise from such a public classification requires an opportunity to be heard before the "posting." *But see* Paul v. Davis, 424 U.S. 693 (1976). *See also* Goldberg v. Kelly, 397 U.S. 254 (1970) (pre-termination hearing required in cases of welfare termination because of obvious need and lack of economic ability to sustain necessities of life pending a final determination).

is his, free of governmental interference."[35] Thus, in cases where deprivations of property are authorized by an established state procedure, due process serves as a check on the state's "monopoly of power." When a property owner is afforded an opportunity to speak on his own behalf, and the state is constitutionally bound to listen to his side of the issue before interfering with property rights, unfair or mistaken deprivations are generally preventable.[36]

Cases sustaining section 1983 prisoner property claims arising out of negligent loss of property by a state agent assume that any interference with property rights under color of state law *must* be measured against this concept of due process and that the interference with such rights must be preceded by an opportunity to be heard. Under such logic courts have allowed prisoners a federal remedy to attack property deprivations in the federal courts. They have concluded that only a predeprivation hearing will satisfy procedural due process and that, therefore, when a state agent takes property before a hearing is provided, the literal procedural requirements of the fourteenth amendment are violated.[37] That conclusion, however, is not unavoidable. Under "incomplete deprivation" analysis, a court takes full advantage of the flexibility necessarily inherent in the due process clause; the requirements of due process in any particular case must be determined by the specific factual setting and the interests involved.[38]

### *Fourteenth Amendment Due Process and Postdeprivation Requirements*

In one specific line of cases the normal predeprivation due process standard has been relaxed so that procedural due process may be satisfied by a hearing at some time subsequent to the initial interference with rights. This line of cases deals primarily with "summary action," that is, interference with a property right without first providing an opportunity to be heard.

Summary action cases have generally been justified by the necessity for

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[35]Fuentes v. Shevin, 407 U.S. 67, 81 (1972). *See also* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

[36]Fuentes v. Shevin, 407 U.S. at 81. The Court cited Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurter, J. concurring), for the proposition that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Id.*

[37]*See* cases cited in note 6 *supra.*

[38]*See* Fusari v. Steinberg, 419 U.S. 379, 389 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600, 610-12 (1974); Boddie v. Connecticut, 401 U.S. 371, 378 (1971); Goldberg v. Kelly, 397 U.S. 254, 263-66 (1970); Cafeteria & Rest. Workers v. McElroy, 367 U.S. 886, 895 (1961); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951). *See also* Arnett v. Kennedy, 416 U.S. 134, 168-69 (opinion of Powell, J.), 190-92 (opinion of White, J.) (1974); Tyler v. Vickery, 517 F.2d 1089, 1103-5 (5th Cir. 1975).

the government or its agencies to act immediately if some vital public interest is to be enforced.[39] In such cases, the normal preincident opportunity to be heard may be relaxed and property rights infringed by the government without first providing a hearing. Thus, summary authority has been invoked to seize adulterated or mislabelled food and drugs,[40] to appoint conservators to take control of floundering and insecure banks,[41] to halt transactions in securities,[42] and to meet the emergency needs of a war effort.[43] While the specific areas in which the government has been allowed to take property from a citizen without first providing a hearing are varied, there are factors common to all such cases: the necessity of quick action by the state, the impracticality of providing any type of meaningful preseizure hearing, and the availability of some means by which to assess the propriety of the state's infringement at some time after the initial taking.

"Incomplete deprivation" analysis seeks to invoke the flexible due process standard illustrated by the summary action cases.[44] Initially the jump from summary action to "incomplete deprivation" and allowance of a postponed due process standard in prisoner property deprivations seems a large one. Obviously no traditional public emergency is created when a negligent guard causes the loss of an inmate's personalty. There are, however, similarities between the two types of cases that justify extension of the relaxed due process standard.

One justification for the summary action postseizure hearing standard

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[39]*See, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); Fahey v. Mallonee, 332 U.S. 245 (1947); Phillips v. Commissioner, 283 U.S. 589 (1931); Corn Exchange Bank v. Coler, 280 U.S. 218 (1930); Central Tr. Co. v. Garvan, 254 U.S. 554 (1921); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908); R.A. Holman & Co. v. SEC, 299 F.2d 127 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 911 (1962).

[40]In North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908), the Supreme Court sustained the state's right to seize and destroy food which is unwholesome without providing a preseizure hearing. The possibility of an erroneous destruction of property was not troubling to the Court since a party whose property was mistakenly destroyed could recover his damages in an action at law after the incident. The Court felt that the public health emergency presented by distribution of unsafe food justified summary action since there could be no delay without risk of injury to the public.

Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 544 (1950), allowed summary seizure and destruction of drugs in the interest of protecting the public health.

[41]Protection of the public interest against economic harm has been held to justify summary action and seizures of property without a prior hearing when substantial questions of malfeasance or incompetence were raised about a bank's management. Fahey v. Mallonee, 332 U.S. 245 (1947).

[42]*See* R.A. Holman & Co. v. SEC, 299 F.2d 127 (D.C. Cir. 1962), *cert. denied*, 307 U.S. 911 (1962).

[43]In Central Tr. Co. v. Garvan, 254 U.S. 554 (1921), the Supreme Court held that Congress had the power to provide for immediate seizure of property in time of war without prior hearing when such property was believed to belong to the enemy. *See also* United States v. Pfitsch, 256 U.S. 547 (1921) (summary seizures allowed to meet the needs of the war effort).

[44]*See* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). Mr. Justice White, writing for the majority, found an ex parte sequestration procedure valid. The Court discussed the requirements of due process:

is the impracticality of any preseizure hearing. Generally the state has recognized the possiblity that at some time action in the form of seizures will be required. In most cases this foresight is embodied in some statute providing summary authority. The specific instances, however, in which the state will need to exercise its summary authority are not foreseeable. When misbranded or unsafe food is introduced into commerce, or factors suddenly indicate mismanagement and insecurity of a financial institution, the state must take property immediately. No prior hearing is constitutionally required because the specific occurrence that triggers the seizure arises so suddenly that any meaningful prior hearing is effectively precluded. "Incomplete deprivation" calls for similar treatment where the need for a remedial hearing in tortious conversions of prisoners' property is generally anticipated and provided for by statute,[45] but the specific occasions when the actual need for that hearing will arise cannot be accurately foreseen. In the case of a loss of property due to the negligence of a prison guard, the state has no way to know precisely when the loss will occur. In such a situation, it is difficult to conceive of the meaningful hearing that could possibly be provided *before* the deprivation; the taking of property, while attributable to the state as action "under color of" law,[46]

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> Petitioner asserts that his right to a hearing before his possession is in any way disturbed is nonetheless mandated by a long line of cases in this Court, culminating in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and *Fuentes v. Shevin*, 407 U.S. 67 (1972). The pre-*Sniadach* cases are said by petitioner to hold that "the opportunity to be heard must precede any actual deprivation of private property." Their import, however, is not so clear as petitioner would have it: they merely stand for the proposition that a hearing must be had before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing where a full and immediate post-termination hearing is provided. The usual rule has been "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931).

*Id.* at 611. *See also* Arnett v. Kennedy, 416 U.S. 134, 186-90 (1974) (opinion of White, J.). In *Arnett*, a non-probationary employee of OEO was removed from his job by way of a statutory procedure after he was accused of making recklessly false accusations about a superior. The employee was given notice of the proposed adverse action and was informed of his right to reply to charges. Kennedy was then fired after foregoing his reply and was informed of his right to appeal. Kennedy instituted a suit in federal court seeking relief from the government's interference with his property rights without due process. Kennedy argued a violation of due process. A plurality of the Court held that the expectation of future employment under the statute did not create a property interest within the meaning of the due process clause. Thus the case was dismissed before reaching the question of what particular procedural due process safeguards were required. Justice White, writing separately, assumed that the employee's interest in continued employment was a property interest and turned to the due process clause. In determining what form due process procedures must take in the case, Justice White cited various cases indicating that where property rights alone are at stake, the prior hearing may be unnecessary if there is provision for an adequate hearing after the initial taking but before the deprivation becomes final. *Id.* at 186-90.

[45]In the *Bonner* case, it is the statutory tort remedy against state agents. ILL. REV. STAT. ch. 37, § 439.8(d). *See also* note 25 *supra*.

[46]*See* note 21 *supra* & text accompanying.

is beyond the control of the state. Thus, where personalty is taken through the negligent acts of a state agent, the provision for a hearing prior to taking the property is no less impractical than in summary action cases. The impracticality stems from the same basic source: the specific seizures that give rise to the need for a due process hearing of some type are not sufficiently within the control of the state to allow any type of prior hearing.

In cases where facts and interests involved demand this somewhat relaxed due process standard, the courts certainly have not abandoned the requirement of a hearing. The same cases that have excused the prior hearing requirement have consistently made note of some opportunity, subsequent to the initial taking of property, for determination of rights and liabilities.[47] While language used by the courts over the years no doubt indicates a preference for the preseizure hearing when property is taken,[48] what is truly required by the Constitution is that a hearing "be granted at a meaningful time and in a meaningful manner."[49] This standard clearly leaves room for subsequent hearings in satisfaction of due process. In *Mitchell v. W. T. Grant Co.*,[50] the Supreme Court further outlined the flexibility of due process where property rights are taken:

> The usual rule has been "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate."[51]

In *Bonner v. Coughlin*,[52] although unable to provide a hearing before the unanticipated negligent loss of property, the state stood ready to provide a hearing to compensate the loss after the initial taking. The statutory remedial machinery provided by the state would assess the actions of the guards against a suitable standard of care and make whole any loss sustained when that conduct is found to be wrongful.[53]

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[47]*See, e.g.*, Bowles v. Willingham, 321 U.S. 503 (1944), *citing* Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931):

> Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of the liability is adequate. . . . Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied.

*Id.* at 520.

Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950), states:

> It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.

*Id.* at 599. *See also* North American Cold Storage Co. v. Chicago, 211 U.S. at 320.

[48]*See* notes 33-36 *supra* & text accompanying.

[49]Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[50]416 U.S. 600 (1974).

[51]*Id.* at 611.

[52]517 F.2d 1311 (7th Cir. 1975).

[53]*See* note 31 *supra.*

When Judge Stevens made reference to the "important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers,"[54] he implied that in the normal due process violation there are two parts to the constitutional transgression. First, the state must take property from a citizen. It is clear that this has taken place as soon as a guard destroys or takes personalty from an inmate. Second, the state must fail to meet the strictures of due process. Normally this would require that a hearing be given before the first taking of property. In a typical case, where the state cannot justify its failure to provide a preseizure hearing and it takes property from a citizen, a "complete" fourteenth amendment violation has occurred. Under "incomplete deprivation," however, the flexibility of due process permits a postponed hearing where the negligent loss of property is unforeseen and unanticipated. At the moment of deprivation, then, only the first step of a "complete" fourteenth amendment violation has transpired. Under "incomplete deprivation," this potential denial of constitutional rights will only become "complete" if the state fails to provide some subsequent judicial determination of liability. Where the prisoner receives an opportunity to present his property claim in the traditional courtroom adversary setting, due process is satisfied. The federal courts need only conclude that the fourteenth amendment has been violated "completely" when the state provides no opportunity to determine and compensate property rights, or the state remedy, while adequate in theory, is not available in practice.[55]

## THE INCOMPLETE DEPRIVATION THEORY IN INTENTIONAL DEPRIVATIONS OF PRISONERS' PROPERTY

In *Bonner*,[56] the court explicitly avoided the unresolved question of whether section 1983 may be invoked in the case of negligent violations of constitutional rights.[57] The court sought to define the precise nature of the underlying constitutional duty rather than concentrate on the nature of conduct that will breach an existing duty. There is considerable dispute over simple negligent conduct as a basis of section 1983 liability.[58] If, however, it is determined that mere negligence is insufficient to invoke

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[54]517 F.2d at 1319. *See also* note 25 *supra* & text accompanying.

[55]*See* notes 83-84 *infra* & text accompanying.

[56]517 F.2d 1311 (7th Cir. 1975).

[57]The court noted that counsel had argued the question of mere negligence as a basis for a section 1983 recovery in their briefs. The court's treatment of this issue was summary, however, as this broad question need not be decided in the *Bonner* case. 517 F.2d at 1318.

[58]The language of section 1983 gives no indication of what state of mind or degree of *mens rea* is required before liability may be imposed under the Act. There are cases falling on both sides of the issue of whether section 1983 liability may be based on negligent acts by the state's agents. For example, many cases indicate that mere negligence may not support a cognizable section 1983 claim. *See, e.g.*, Madison v. Manter, 441 F.2d 537 (1st Cir. 1971);

section 1983, the precise holding of *Bonner* will be moot. Further, the vast majority of prisoner property claims arise out of willful seizures by guards. For these reasons, a question of more importance than that posed in *Bonner* is whether "incomplete deprivation" analysis may be extended to deprivations in which guards intentionally and arbitrarily seize or destroy a prisoner's property.[59]

A major apparent obstacle to this extension is the long recognized rule that intentional misuse of power possessed by virtue of state law, and made possible because the wrongdoer is vested with authority by the state, is sufficient grounds for invoking section 1983.[60] In *Monroe v. Pape*,[61] it was held that the illegal acts of policemen could support a section 1983 action for violation of the fourth amendment. The Supreme Court, after tracing the legislative history of the Civil Rights Act, concluded:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.[62]

The positive language of this statement, read broadly, tends to obscure equally relevant inquiries in extending section 1983 to any given case.[63]

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Joyner v. McClellan, 396 F. Supp. 912 (D. Md. 1975); Hopkins v. County of Cook, 305 F. Supp. 1011 (N.D.Ill. 1969); United States *ex rel* Gittlemacker v. Pennsylvania, 281 F. Supp 175 (E.D. Pa. 1968); Kent v. Prasse, 265 F. Supp. 673 (W.D.Pa. 1967), *aff'd*, 385 F.2d 406 (3d Cir. 1967). There are, however, cases that indicate the contrary. *E.g.*, Brown v. United States, 486 F.2d 284 (8th Cir. 1973); Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972); McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972); Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970). *Also cf.* Anderson v. Nosser, 456 F.2d 835 (5th Cir. 1972); Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969), *cert. denied*, 396 U.S. 901 (1969); Bailey v. Harris, 377 F. Supp. 401 (E.D. Tenn. 1974); Huey v. Barloga, 277 F. Supp. 864 (N.D.Ill. 1967). For discussion of the question of negligence as the basis of section 1983 claims, *see generally*, Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969); Note, *Civil Rights & State Authority: Toward the Production of a Just Equilibrium*, 1966 WIS. L. REV. 831.

[59]Aside from the facts that the majority of cases involve intentional seizures of property and that cases arising out of simple negligent conduct may be dismissed on different grounds, an intentional deprivation at the hands of a prison guard is even more likely to cause an inmate to initiate a Civil Rights action. The feeling that resort must be made to section 1983 as the only effective means for a prisoner to protect his own rights would seem more likely when a prison guard purposefully takes a prisoner's property whether out of spite, display of power, or simply to appropriate the property to his own use.

[60]*See* United States v. Classic, 313 U.S. 299, 326 (1941); Screws v. United States, 325 U.S. 91, 107-13 (1945); Williams v. United States, 341 U.S. 97, 99-100 (1951); Monroe v. Pape, 365 U.S. 167, 180-81 (1961); Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970); Scheuer v. Rhodes, 416 U.S. 232, 243 (1974).

[61]365 U.S. 167 (1961).

[62]*Id.* at 180.

[63]*See* Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 13-25 (1974):

While section 1983 itself gives no indication of the kind of conduct required, it clearly states the necessary result of that conduct: "the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ."[64] Thus, in any section 1983 action two essential elements must be established: the conduct complained of must be that of a person acting under color of state law, and this conduct must have deprived another of rights, privileges, or immunities secured by the Constitution or laws of the United States.[65] It should be apparent that these two distinct inquiries must not be carelessly confused if improper extension of section 1983 is to be avoided. The fact that courts have widely accepted intentional, yet unauthorized, actions of state agents as a basis for section 1983 liability[66] speaks only to one half of the whole question of a federal remedy. The Court's finding in *Monroe,* for example, is a product only of the first inquiry.[67] It indicates that deliberate conduct by state officers, even where it violates the law of the state, is action "under color of" state law.[68] This finding, however, reveals nothing about the successful application of "incomplete deprivation" to intentional seizures of prisoner property.

Where a prisoner's property is taken or destroyed deliberately, the elements of a due process violation are the same as in a negligent deprivation. Regardless of the quality of conduct by the state agents, the underlying constitutional duty remains the same. To find section 1983 liability there must be a deprivation; there must be a property interest within the meaning of the fourteenth amendment; and the deprivation of property must take place without due process of law. The deprivation element of the complete violation is concerned with the harm suffered by the property owner. The state of mind of the guard has no effect upon the harm imposed on property interests; property is no more or less "gone" or "damaged" whether the conduct that leads to the loss is intentional or negligent.[69] Nor is the characterization of "property" altered by the actor's state of mind. Assuming that action "under color of" state law has "deprived" a person of "property," the question becomes whether it is "without due process of law." As preceding discussion has indicated, due process requires more procedural safeguards in some cases than others. The particular facts or interests involved determine the precise dictates of

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> Notions of negligence and intentional conduct tend to obscure the threshold concern in 1983 cases. That concern should be whether a constitutional duty derived from the fourteenth amendment has been breached.

*Id.* at 23.

[64]42 U.S.C. § 1983 (1970). For text of the Act, see note 1 *supra.*

[65]*See* Paul v. Davis, 424 U.S. 693, 696-97 (1976); Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970); Marshall v. Sawyer, 301 F.2d 639, 646 (9th Cir. 1962); Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp 1233, 1237 (D. Kan. 1974).

[66]*See* note 64 *supra.*

[67]That is, the conduct complained of must be that of a person acting under color of state law.

[68]*See* note 62 *supra* & text accompanying.

[69]*But see* Judge Fairchild's dissent in Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975):

due process from case to case.[70] "Incomplete deprivation" allows a post-interference hearing in deprivation cases where special facts do not logically permit any other form of procedural due process. Because a specific negligent loss of property cannot be anticipated to provide a prior meaningful opportunity to be heard, the normal predeprivation hearing requirement imposes an impossible standard.[71] Thus, where the state has done all it possibly can to provide a full judicial hearing and determination after the fact, "incomplete deprivation" deems procedural due process satisfied. Without the breach of some constitutional "duty," the second essential element of section 1983 liability is not met. So long as due process is thus provided in the form of a subsequent hearing, no successful section 1983 claim can be brought.

While it may be possible to conclude that the federal interest in preventing or vindicating intentional and arbitrary misconduct is greater than in negligent deprivation cases, such an increased interest makes the preseizure opportunity to be heard no less impossible to provide. The deliberate seizure of prisoners' property is solely the product of an individual guard's volition, and is not in any way within the control of the state. Such an unauthorized independent act, as opposed to one pursuant to a state order or law, cannot be meaningfully anticipated by the state in order to provide a prior hearing. In such a case "incomplete deprivation" should be applied. Under this analysis, the prisoner is made whole by the state's own remedial procedures, and the federal courts are spared from devoting their time to the analysis of simple torts involving small amounts of property. By providing a federal forum only in cases where a prisoner is unable to obtain adequate redress in state courts, the federal interests in both judicial economy and an adequate remedy for deprivations of property are served.[72]

### INCOMPLETE DEPRIVATION AND THE SUPPLEMENTAL REMEDY DOCTRINE

Perhaps the most significant feature of section 1983 is its role as a fully

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I agree that Bonner's claim that the negligence of the guards caused the loss of his property is not an adequate claim under 42 U.S.C. § 1983. I would base this result on the proposition that the negligence of a state employee which causes loss of property is not state action which deprives the owner of property under the Fourteenth Amendment, nor is it, under § 1983, action under color of state law subjecting the plaintiff to such deprivation.

*Id.* at 1321.

[70]*See* notes 30-55 *supra* & text accompanying.

[71]*See* notes 39-43 *supra* & text accompanying.

[72]Such deprivations, when intentional, may raise other significant constitutional issues distinct from any failure to provide procedural due process. *See* notes 92-94, 96-101 *infra* & text accompanying. One such issue might be whether the willful and arbitrary taking of a prisoner's property by a state officer constitutes a violation of substantive due process by use of state-vested authority to take property in an arbitrary and unjustifiable manner. *See* Kimbrough v. O'Neil, 523 F.2d 1057, 1059-62 (7th Cir. 1975) (Swygert, J., concurring). *Cf.* Jeffries v. Turkey Run Consol. School Dist., 492 F.2d 1 (7th Cir. 1974).

supplemental remedy providing a federal forum for the enforcement of federal rights without first requiring that a plaintiff exhaust available state remedies. The supplemental remedy doctrine was originally articulated in *Monroe v. Pape*,[73] a case arising when a group of Chicago policemen illegally entered and ransacked plaintiff's home, subjecting the occupants to humiliating treatment. The plaintiff was arrested and removed to a police station for several hours before being released uncharged. A section 1983 action was brought against the officers alleging a violation of fourth amendment rights. The defendant argued that section 1983 was inapplicable, in part, because the actions of the police in breaking into plaintiff's home violated both the laws and the constitution of the state.[74] The Court rejected this argument stating:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.[75]

The unconditional availability of a federal forum to vindicate federally created rights is supported by several considerations. Federal courts are generally thought to be more qualified than state courts to deal with the nuances of claims emanating from the federal constitution.[76] The federal court system may also provide more uniform treatment of civil rights claims than the states.[77] Because of its reliance upon the availability of a state remedy for the loss of property in precluding the federal forum,

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[73]365 U.S. 167 (1961). McNeese v. Board of Educ., 373 U.S. 668 (1963), illustrated the first expansion of the *Monroe* supplemental federal remedy theory. The lower courts in *McNeese* had dismissed petitioner's segregation complaints because of a failure to exhaust state administrative remedies. The Supreme Court, however, read *Monroe* and § 1983, "to provide a remedy in the federal courts supplementary to any remedy any State might have." *Id.* at 672, *citing Monroe.* The Supreme Court has continued to restate the rule that a plaintiff need not exhaust state judicial remedies: Huffman v. Pursue, Ltd., 420 U.S. 592, 609 n.21 (1975).

[74]365 U.S. at 172.

[75]*Id.* at 183. For general discussion of the supplemental remedy doctrine, *see* Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV L. REV. 1352 (1970); Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969); Note, *Civil Rights and State Authority: Toward the Production of a Just Equilibrium*, 1966 WIS. L. REV. 831; Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201 (1968).

[76]*See* Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1356-59 (1970). *But see* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557. Judge Aldisert argues that in fact state trial and appellate judges from eight major American cities process more constitutional issues every day than the whole federal judiciary does in a week. The Judge supports this contention with statistical data. *Id.* at 572.

[77]*See* Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV L. REV. 1352, 1356-59 (1970), arguing that a federal remedy is more likely to be uniformly applied because of the more efficient pyramidal organizaion of the federal court system from distict courts, through the appellate courts, to the Supreme Court. *See also* McCormack, *The Expansion of Federal Question Jurisdiction and the Prisoner Complaint Caseload*, 1975 WIS. L. REV. 523, 529-30.

"incomplete deprivation" appears to conflict with the supplemental remedy doctrine as announced in *Monroe*. Such a dispute is avoidable, however. In *Monroe* the constitutional right underlying the section 1983 claim was the fourth amendment guaranty against unreasonable searches and seizures, applicable to the states through the due process clause of the fourteenth amendment. "Incomplete deprivation" would be inapplicable to such a case because it is based upon the examination of an entirely different constitutional "duty."[78] Under the suggested approach, an evaluation of exceptional factors where a prisoner's *property* is taken by a guard acting beyond the knowledge or control of the state permits the conclusion that a subsequent hearing satisfies the fourteenth amendment.[79] The basis for this constitutional reading is that where property rights, as opposed to liberty interests, are taken away by the state, due process may require entirely different procedures.[80] *Monroe v. Pape*, and most section 1983 cases, invoke constitutional rights which, because they involve interests other than property, or facts which logically permit a hearing before property is taken, cannot be subjected to postponed due process standards. In these cases due process demands a prior hearing. Therefore, when an interference with constitutional rights takes place in the typical setting, there is nothing that can later be done after the initial interference to avoid the completed due process violation. A violation of the fourth amendment protection against unreasonable searches cannot be cured by a later hearing, as can a taking of property which might be returned or compensated after the fact.

Reliance upon a subsequent state remedy to satisfy the due process hearing requirement is not a departure from the supplemental remedy feature because the state remedy plays an entirely different role in *Monroe* from that in *Bonner*. In the former the constitutional violation is complete, and the state remedy serves as no more than an alternate state remedy for a *completed* infringement of constitutional rights. As an alternate source of redress only, *Monroe* holds that the availability of a state remedy cannot preclude the federal forum under the supplemental remedy doctrine. "Incomplete deprivation," however, raises the state remedy to constitutional significance. Because there is no meaningful opportunity for the state to provide a preseizure hearing, a subsequent hearing suffices for purposes of due process. Supplemental remedy language in *Monroe* assumes that a "complete" constitutional violation has already occurred. Under "incomplete deprivation," however, the state tort remedy provides the complainant with a full hearing designed to assess the actions attributed to the state and to make whole any loss wrongfully sustained by the prisoner. The fact that this state remedy is provided avoids any

[78] *See* notes 88-94, 96-100 *infra* & text accompanying.

[79] *See* cases cited in notes 39-44 *supra*.

[80] *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 611 (1974); Arnett v. Kennedy, 416 U.S. 134, 186-90 (1974) (opinion of White, J.); cases cited at notes 39-43 *supra*.

"complete" constitutional violation from every occurring. Thus, the state remedy under "incomplete deprivation" is not merely an alternative, but an actual part of the satisfied constitutional duty. Because the constitutional duty is never "breached," no question of supplemental remedies need ever be encountered.

### Operation of Incomplete Deprivation

Under "incomplete deprivation" analysis the function of the federal judiciary is altered. By allowing prisoner property deprivations under section 1983, the federal courts have themselves provided a federal remedy for tortious conversions at the hands of state agents. A prisoner deprived of his personalty may sue in federal district court for damages sufficient to make whole any loss sustained. It makes no difference, under this arrangement, that the state whose agent commits the tort provides a remedy to compensate that unforeseeable wrong.

Under "incomplete deprivation," however, the state courts are allowed to process these tort claims themselves. Section 1983 and the federal judiciary then become available only when the state fails to provide the subsequent opportunity for a hearing, or that remedy is not in fact available to the prisoner. Thus, the federal courts serve only to insure that an adequate hearing is provided by the state in cases of wrongful loss or seizure. As long as the state provides an adequate remedial hearing for the tortious conversion, a type of remedy which the state courts rather than federal courts have traditionally provided,[81] the federal interest in providing a deprived state prisoner with some fair remedial procedure is vindicated. This arrangement will also allow the states to affect their own interest in policing the internal operation of their prison systems. Clearly the state has an interest in punishing misconduct by its own prison guards. Where the state imposes liability for transgressions by its own agents, a clear policy against such excesses is displayed — perhaps a worthwhile policy in view of general distrust of the correctional system. It might also be expected that the allocation of judicial authority between state and federal courts encouraged by "incomplete deprivation" would improve the state remedies available. By so improving their remedies for mistreated prisoners, the state can avoid federal intervention into the internal affairs and operation of the state's prison system.

"Incomplete deprivation" brings the use of the federal courts and

[81]As Mr. Justice Frankfurter stated in his dissent in *Monroe v. Pape:*

> The jurisdiction which Article III of the Constitution conferred on the national judiciary reflected the assumption that the state courts, not the federal courts, would remain the primary guardians of that fundamental security of person and property which the long evolution of the common law has secured to one individual as against other individuals. The Fourteenth Amendment did not alter this basic aspect of our federalism.

365 U.S. at 237.

section 1983 into line with the traditionally recognized purposes of the Civil Rights Act. In *Monroe v. Pape*,[82] the Court enumerated three basic purposes behind section 1983: 1) to override certain kinds of state laws; 2) to provide a federal remedy where the state law is inadequate; and 3) to provide a federal remedy where the state remedy, though adequate in theory, is not available in practice.[83] When the state provides a remedy for a wrongful loss or seizure of property by its agent, and that remedial hearing also satisfies the requirement that a due process hearing be granted at some time, there is no constitutional violation; nor is there any purpose behind section 1983 providing a federal remedy. There is clearly no specific law to be overridden. Only when the state fails to provide a practically available remedy will the federal courts become involved. To continue to allow prisoner property deprivation cases to be heard in the first instance in a federal court, while the state offers a make-whole remedy, enlarges the Civil Rights Act and the fourteenth amendment to a fully alternate means of processing ordinary common law tort claims.[84] As the Supreme Court has recently noted:

> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.[85]

"Incomplete deprivation" analysis provides, by examination and interpretation of underlying constitutional rights, a credible theory for excluding troublesome cases from the federal courts. The theory itself rests upon an accepted reading of the fourteenth amendment due process clause.[86] Reliance upon the state remedy is crucial only in determining that due process is not violated, thus, abandonment of the supplemental remedy doctrine is not necessary.[87] Regardless of considerations of simple negligence, gross negligence, or intentional conduct, all of which go to the

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[82]365 U.S. 167 (1961).

[83]*Id.* at 173-74.

[84]*See* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557; Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969); Note, *Civil Rights and State Authority: Toward the Production of a Just Equilibrium*, 1966 WIS. L. REV. 831. *See also* note 14 *supra* & text accompanying.

[85]Paul v. Davis, 424 U.S. 693, 698-99 (1976). *See also* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557.

[86]*See* notes 39-44, 47-51 *supra* & text accompanying.

[87]*See* notes 73-80 *supra* & text accompanying.

kind of conduct that constitutes action taken "under color of" state law, "incomplete deprivation" analysis suggests that the constitutional right to a due process hearing when property is taken is not breached. So long as no constitutional duty is violated, no kind of conduct will give rise to a successful section 1983 action in federal courts.[88] Moreover, "incomplete deprivation" does not imply a retreat to a pre-*Lynch v. Household Finance Corp.*,[89] distinction between personal liberty and property rights as the key to federal jurisdiction.[90] Federal jurisdiction over deprivations of property interests is clearly left intact by "incomplete deprivation" analysis. Under "incomplete deprivation" the federal forum is not precluded on a simple characterization as "property" rights; instead unforeseeable and uncontrollable deprivations of prisoners' property are excluded from federal courts because due process requires lesser safeguards in such cases. The approach theoretically achieves a "surgical" removal of prisoner property claims brought on a theory of denial of procedural due process. Because "incomplete deprivation" is based solely on cases outlining the contours of procedural due process in the context of property deprivations, it has no application where a section 1983 claim is brought under some other constitutional right. "Incomplete deprivation" is justified only by the flexibility of procedural due process requirements where a prior hearing is not feasible.[91] Thus, when a prisoner brings a section 1983 suit alleging some other constitutional duty, "incomplete deprivation" is not applicable, and a state remedial hearing offered at some later time will not prevent the conclusion that a "complete" constitutional violation has occurred. For instance, in *Bonner*,[92] the prisoner alleged an alternate theory of liability under section 1983. He argued that the negligent loss of his trial transcript interfered with his constitutional right of access to the courts.[93] Assuming that the loss of the transcript did in fact amount to such an interference, the negligent acts of the guards that gave rise to that interference were no less unforeseeable than those underlying the procedural due process claim. The court, however, vacated the district court's dismissal and remanded for trial on the access claim.[94] Thus, when the underlying constitutional duty alleged becomes one other than procedural due process in the context of a

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[88]*See* notes 56-72 *supra* & text accompanying.

[89]405 U.S. 538 (1972).

[90]For a discussion of this distinction, see note 17 *supra* & text accompanying.

[91]*See* notes 39-44, 47-51 *supra* & text accompanying.

[92]517 F.2d 1311 (7th Cir. 1975). *See also* Butler v. Bensinger, 377 F. Supp. 870 (N.D.Ill. 1974).

[93]*See* Adams v. Carlson, 488 F.2d 619, 632-34 (7th Cir. 1973); Sigafus v. Brown, 416 F.2d 105, 107 (7th Cir. 1969); DeWitt v. Pail, 366 F.2d 682, 685-86 (9th Cir. 1966). *See also* Johnson v. Avery, 393 U.S. 483 (1969), where the Supreme Court noted, in determining that a state may not enforce a regulation which absolutely bars inmates from furnishing legal assistance to other prisoners in preparing petitions for post-conviction relief: "it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Id.* at 485.

[94]Bonner v. Coughlin, 517 F.2d at 1320-21 (7th Cir. 1975). The court noted, however:

deprivation of personalty, "incomplete deprivation" is not justified. Because infringement of the interest in access to the courts cannot be adequately compensated after the fact, as can a pure property deprivation, and the prisoner's interest in continued access to the courts is too great to be subjected to a post-interference hearing standard, "incomplete deprivation" analysis cannot be successfully applied. The required hearing cannot be postponed, thus, the constitutional violation is "complete" as of the effective interference, and section 1983 becomes available.

This narrow effect is desirable to the extent that "incomplete deprivation" analysis precludes the federal forum only in cases at which it is specifically aimed.[95] Where a prisoner is able to state a constitutionally-based claim independently of a procedural due process failure, "incomplete deprivation" does not preclude federal relief. The approach is applicable only where a mere tortious conversion, remediable in the state courts, of otherwise constitutionally insignificant property[96] is alleged. There is, however, a price for the minimal side-effects upon the overall efficacy of section 1983 in the prisoners' rights context; merely be pleading some alternate theory of constitutional infringement, a prisoner can side-step the application of "incomplete deprivation." Thus, when a prison guard takes property from an inmate, "incomplete deprivation" may provide a solution to the procedural due process claim, but the prisoner may still obtain a federal forum on the same facts by claiming the deprivation amounted to an interference with another constitutional right. Such results are possible

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> Until we know whether there has been an interference with Bonner's constitutionally protected right of access to the courts, it is premature to express a somewhat abstract opinion on what kind of knowledge or intent on the part of the officers would make such interference actionable under § 1983.

*Id.* at 1321. The court thus avoided the issue of whether mere negligent conduct that results in deprivation of a prisoner's rights is sufficient to state a claim under section 1983. It is interesting to note, however, that the Supreme Court has recently held that a claim of mere negligent malpractice resulting in injury to an inmate does not state a viable Civil Rights claim of cruel and unusual punishment under the eighth amendment. Estelle v. Gamble, 97 S.Ct. 285 (1976).

[95]Because "incomplete deprivation" is based on the impossibility of providing a prior hearing in case of property deprivations, rather than a generally lesser interest of a prisoner in continued possession of his property, the approach may provide relief from similar types of claims arising outside of the prison setting. The common illustration given for the extent to which a creative plaintiff may stretch section 1983 is:

> *A* walks out of a building and is struck by a truck. The truck is state owned and is operated by *B*, a state employee, acting in the course of his employment. *A* sustains a broken leg. *A* does not have to go into state court; under *Lynch* he can claim a fourteenth amendment deprivation of property . . . .

Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload,* 1973 LAW & SOC. ORD. 557, 571. Because the deprivation is unforeseen and beyond the knowledge or control of the state, "incomplete deprivation" may well preclude federal jurisdiction in such a case so long as the state provides *A* with a make-whole remedy against its agent, *B*, to compensate for the loss of property sustained.

[96]*See* notes 92-94 *supra* & text accompanying.

under the right of access to the courts,[97] the first amendment,[98] the fourth amendment,[99] or the eighth amendment.[100] However, while such artful pleading may avoid "incomplete deprivation," infringements of these rights have traditionally been the grist of section 1983. Extensions of the federal forum to claims of this nature are not troubling, even when they arise out of the same deprivations of personalty.[101] "Incomplete deprivation" seeks to preclude the federal forum in cases stating only a claim for tortious conversion that can be competently and adequately compensated in a state court.

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[97]*See* Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975); notes 92-94 *supra* & text accompanying.

[98]In Nickens v. White, 536 F.2d 801 (8th Cir. 1976), a state prisoner brought suit when his office supply catalogue was confiscated by a prison guard. The inmate's due process claim was dismissed, yet the court held that in light of a recent Supreme Court decision, the prisoner's first amendment rights had been infringed. *Id.* at 804, *citing* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[99]*See* Hansen v. May, 502 F.2d 728 (9th Cir. 1974).

[100]*Cf.* Landman v. Royster, 333 F. Supp. 621, 649 (E.D.Va. 1971), *citing* Wright v. McMann, 321 F. Supp. 127, 139-41 (N.D.N.Y. 1970); Knuckles v. Prasse, 302 F. Supp. 1036, 1061-62 (E.D.Pa. 1969); Hancock v. Avery, 301 F. Supp. 786, 792 (M.D.Tenn. 1969).

[101]Even where "incomplete deprivation" successfully precludes the federal forum, the doctrine of pendent jurisdiction may bring the state conversion claim before a federal court. For instance, a prisoner may state a cognizable section 1983 claim based on the eighth amendment. If in that case, the property deprivation arises from the same nucleus of operative fact, a federal court might be expected to try both the federal and the state claims in one judicial proceeding. *See* Kimbrough v. O'Neil, 523 F.2d 1057, 1059 (7th Cir. 1975). For a general discussion of pendent jurisdiction see H. HART & H. WECHSLER, THE FEDERAL COURTS & THE FEDERAL SYSTEM 917-26 (2d ed. 1973).