

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-6470

TITLE ROBERT DAVIDSON, Petitioner V. JOSEPH CANNON, ET AL.

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT DAVIDSON,

Petitioner

V.

JOSEPH CANNON, ET AL.

No. 84- 6470

Washington, D.C.

Wednesday, November 6, 1985

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at
1:55 p.m.

APPEARANCES:

JAMES D. CRAWFORD, ESQ., Philadelphia, Pennsylvania;
on behalf of the Petitioner.

MRS. MADELEINE W. MANSIER, ESQ., Deputy Attorney
General of New Jersey, Trenton, New Jersey; on
behalf of Respondents.

CHARLES FRIED, ESQ., Solicitor General, Department
of Justice, Washington, D.C.; as amicus curiae,
in support of Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Crawford, I think you may proceed when you are ready.

ORAL ARGUMENT OF JAMES D. CRAWFORD, ESQ.

ON BEHALF OF THE PETITIONER

MR. CRAWFORD: Mr. Chief Justice, and may it please the Court:

I filed a reply brief in support of the petition of certiorari for Robert Davidson because I anticipated two questions that this Court might address in the Daniels case. I asked that the cases be set down together. The Court saw fit to do so.

Those two questions were the question of damages which might happen in some non-prison context, damages common to the non-prison context, and the question of whether the immunity was clear.

What makes the Davidson case a good solution or a good vehicle for the Court to solve those questions is that Robert Davidson was injured when prison officials negligently failed to look into his suggestion that another prisoner was going to attack him. The prisoner did, indeed, attack him and injured him seriously, plainly a prison negligent situation not otherwise common.

It is also clear that in New Jersey there is simply no liability whatever when -- to either a public entity or

1 an official for an injury caused to one prisoner by another.
2 That would also be true, one inmate of a psychiatric institution
3 to another, that sort of situation.

4 Accordingly, although I think that the Daniels case
5 and the argument which you have heard in it solves the problems
6 that face me and that perhaps this argument was unnecessary,
7 I do want to address those issues and some other related issues
8 which make this case a clear case in which the rules which
9 this Court announced, I thought with unquestioned clarity
10 in Parratt versus Taylor and in Palmer versus Hudson, apply
11 here.

12 Indeed, I am intrigued with the theory that somehow
13 losing a hobby kit or stealing a couple of papers from a
14 prisoner's cell plainly implicates the Fourteenth Amendment.
15 There is a deprivation of property there, but when a prisoner's
16 face is repeatedly gouged with a fork so that the prisoner suffers
17 damages which Judge Brotman thought could be compensated at
18 \$2,000 and which I am sure that is minimal compensation, that
19 that is not a deprivation of liberty interest.

20 I am intrigued particularly by Justice Stevens' question
21 as to whether we are talking about substantive or procedural
22 due process. And, I believe we are talking procedural due
23 process but in a peculiar sense. I think that prisoners,
24 because of their circumstance, perhaps have a substantive
25 right to procedural due process that is meaningful. And,

1 I say that because you work from a situation in which the
2 prisoner has a right, not just from South v. Maryland, but
3 from English and American cases stretching back well before
4 the Constitution and coming forth in cases like Youngberg
5 versus Romeo, where you recognize that people in custody simply
6 are dependent upon their custodians, and because a prisoner
7 at least, probably someone in a sheriff's care or in a
8 psychiatric or institution for the retarded, can't do the
9 things the rest of us do to protect ourselves from attacks
10 by other prisoners.

11 I assume -- The first thing I do is I run. Maybe
12 before I run I went out and I bought insurance to protect
13 me from various things that might threaten me. If I felt
14 it was wise to do so, I might buy a weapon. I suppose I could
15 hire a guard. I could certainly fight back and nobody is
16 going to say to me you are one of two prisoners who is going
17 to be put in solitary confinement for fighting. So, there
18 are a lot of things that I do or you do or anyone in this
19 courtroom does to protect against threats of attack from others.
20 They are not open to prisoners.

21 And, for that reason, it is clear that, just as
22 the state must make some kind of a meaningful remedy available
23 for lost hobby kits that come through the mail, that the state
24 certainly must have some sort of a procedure that says when
25 prison authorities are warned that one prisoner is going to

1 attack another prisoner and they forget to do anything about
2 it, the prisoner can look to relief from the court system.

3 Normally what you do, and I think the civilized --
4 That is unfair to New Jersey. What you would do in those
5 states which do not have extreme sovereign immunity doctrines,
6 states which haven't done what New Jersey did, and Judge Gibbons,
7 an opinion that is full of learned language and obscure ideas,
8 says what is peculiar to the New Jersey sovereign immunity
9 statute is that it is introduced with a clause that says you
10 can't give the state a duty to do everything.

11 Sovereign immunity isn't here because we are going
12 to absolve the state from liability. In New Jersey peculiarly
13 we actually absolve the state from duties. And, it seems
14 to me that if the Fourteenth Amendment did nothing else, it
15 gave the state a duty to protect life, liberty, and property
16 and says that a state cannot deprive anyone of those without
17 due process of law.

18 And, when New Jersey decided to take that duty away,
19 it seems to me they did it in an unconstitutional statute.
20 The Solicitor General makes much of the fact that my client,
21 who was filling out a form -- and this Court has seen plenty
22 of the forms that come up through the prison system -- filling
23 out the form of complaint when he wanted relief, didn't say
24 he wanted the statute held unconstitutional. So, plainly
25 he was satisfied with the statute.

1 He said, I have been injured and I want relief which
2 I can't get elsewhere, so please give me that relief and whatever
3 other relief is appropriate to me. I suppose appropriate
4 relief might well have been to strike down the statute.

5 I did not think it was necessary when I argued this
6 case in the Third Circuit and I am the first lawyer that my
7 client got to see. I thought that Parratt versus Taylor made
8 it very clear that you could have that kind of a statute,
9 but you couldn't take away relief from the prisoner who brought
10 a case to redress that deprivation. If I have erred, I suppose
11 the case should go back down for a determination as to whether
12 the statute is unconstitutional. That seems to me an inappropriate
13 way to use the Court's time now when the question framed
14 repeatedly on whether negligence can give rise to a 1983 action
15 is here and is here under exactly those circumstances which
16 allow it to be decided once and for all.

17 The deprivation question which troubled Justice
18 O'Connor at the beginning of the preceding argument, it seems
19 to me, could come down either way if you were construing
20 language. I would assume if the state were building a highway
21 across the back of my property and the engineer designed it
22 properly and said I am going to have to take the back two
23 acres -- I don't have two acres -- but assume a large property
24 to go with it -- going to have to take the back two acres,
25 the state would compensate me. If they, on the other hand,

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1 had hired an engineer who said I can save you a lot of money,
2 I will design you a cheaper highway, and he only took one
3 acre off the back of my property, I am compensated for that.
4 Then the fill is put in and, of course, the first rain storm
5 it flows over the additional acre, because he negligently
6 has designed a highway that takes two acres of my property
7 and pretended it was a one-acre piece of property that needed
8 to be taken.

9 That would be a taking and I would go to court and
10 I would get compensation because the property was negligently
11 taken.

12 QUESTION: There you could argue that the state
13 actor did, in a general sense, intend the taking and meet
14 a general intent requirement.

15 MR. CRAWFORD: I suppose, Justice O'Connor -- I
16 can't say and I wouldn't say that the prison authorities here
17 intended that Robert Davidson have his face chopped up with
18 a fork. But, I think that their duty toward Davidson says
19 that if they aren't careful of him in a prison situation,
20 that they have deprived him of rights, because the only way
21 somebody locked up with a bunch of prisoners, many of them
22 violent, can have any liberty at all is if the prison authorities
23 undertake what I think is their clear duty of protection and
24 that is a common law duty that is in state law, it is in federal
25 law, it antedates Swift versus Tyson, it antedates both the

1 Fifth and Fourteenth Amendments.

2 And, for that reason, I would say here there is
3 a deprivation. This is why I, like Mr. Saltzburg, don't see
4 1983 action showing up when police officers drive down the
5 streets, or as I was asked in the course of the orgal argu-
6 ment in this case --

7 QUESTION: You too would limit recovery to the prison
8 setting I would conclude.

9 MR. CRAWFORD: I limit it to the prison setting
10 because it seems to me we can find a clear duty here that
11 is much more easily defined than you find in the general driving
12 on the streets. How the body politic deals with the question
13 of whether private citizens hit by police cars or ambulances
14 are going to be compensated. It works in that whole political
15 system we have. The people who are walking the streets vote,
16 they are also taxpayers, and they make decisions with their
17 government as to what is going to go on about compensating
18 ambulance accidents. You don't need a federal court action
19 there. I don't think it would foreclose one, but you
20 certainly don't need one, and you can distinguish it.

21 Yes, Justice Stevens.

22 QUESTION: May I ask, when you say we have a clear
23 duty here, what is the source of that duty? Is it federal
24 law or state law, the duty not to be negligent in the --

25 MR. CRAWFORD: I think it is a federal law duty,

1 Justice Stevens. It seems to me --

2 QUESTION: It is in the Due Process Clause?

3 MR. CRAWFORD: I think the Due Process -- That is
4 why I conclude that there is some piece of substance involved
5 here. While I think procedure is all that you have to do
6 for the prisoner --

7 QUESTION: So, I guess you would give me the same
8 answer that was given in the previous case, that if a visitor
9 was injured by an inmate by reason of negligent supervision
10 by the guards, the visitor would have no cause of action.
11 Say he injured both the visitor and an inmate, but the inmate
12 would.

13 MR. CRAWFORD: I see no reason to find a cause of
14 action for the visitor and the case that is before the Court
15 and the question that should be answered is the question of
16 the inmate. Should the Court feel generous to the protection
17 of the visitor, I can't argue with it, but I don't think the
18 rationale which gives Robert Davidson his right needs to apply
19 to a visitor.

20 QUESTION: Because it is his status as an inmate
21 rather than the fact of immunity that really is the predicate
22 for the federal claim.

23 MR. CRAWFORD: No, Justice Stevens. I think --
24 We found this in Hudson. Even where there is intention, as
25 there was in Hudson, or I think special duties to protect

1 the rights of a prisoner, as there is in the two cases before
2 the Court today, the availability of a due process remedy
3 after the act is sufficient recompense, so the immunity does
4 become crucial to this.

5 These are the random occurrences which really can't
6 be handled by a pre-deprivation remedy. Normally you don't
7 take things without due process in advance.

8 But, all three of the cases, the two cases today
9 and the --

10 QUESTION: Immunity is crucial but it is not sufficient
11 because -- I am not sure under the New Jersey statute, but
12 you conceivably could have an immunity statute which would
13 bar a claim by a visitor as well as an inmate and that wouldn't
14 be sufficient to give them a federal claim though, because
15 you need both the --

16 MR. CRAWFORD: I think that is correct, Justice
17 Stevens.

18 QUESTION: The basis for the claim is that the state
19 has deprived the person of liberty.

20 MR. CRAWFORD: The state has deprived the person
21 of liberty --

22 QUESTION: Through negligence.

23 MR. CRAWFORD: Yes, through negligence.

24 QUESTION: It is still hooked to a deprivation of
25 liberty.

1 MR. CRAWFORD: That is correct, Justice White.

2 QUESTION: And without any remedy for it.

3 MR. CRAWFORD: And without any remedy for it.

4 QUESTION: And, would you say that if there is remedy
5 there never was a deprivation, a constitutional deprivation?

6 MR. CRAWFORD: There is a deprivation, but not a
7 constitutional deprivation as I read the Fourteenth Amendment.
8 What is prohibited is deprivation without due process. You
9 can take the two acres off the back of my property. You can
10 take my life, as this Court has held, either under a sentence
11 of death or under certain circumstances where accidental death
12 is caused. You can do it, but there must be due process,
13 and that is what is lacking here.

14 I think the Court has heard in the previous argument
15 the basic framework of this argument and I won't go on further.
16 I may address some questions at the end of the argument for
17 my opponents. Otherwise, I will not take further time.

18 CHIEF JUSTICE BURGER: General, you may proceed.

19 ORAL ARGUMENT OF MRS. MADELEINE W. MANSIER

20 ON BEHALF OF THE RESPONDENTS

21 MRS. MANSIER: Thank you, Mr. Chief Justice, and
22 may it please the Court:

23 Petitioner here suffered physical injury as a result
24 of a deliberate act by a third party. He now makes a two-
25 part argument here in order to assess liability against the

1 state under Section 1983.

2 He argues first that because Respondents' negligence
3 was in some tort sense law way, causally related to that
4 physical injury; that, therefore, the state has deprived the
5 Petitioner of liberty.

6 The second part of his argument is that that
7 deprivation was without due process simply because the New
8 Jersey state legislature made a decision to immunize negligent
9 conduct for inner-prisoner injury.

10 Respondents urge this Court to reject both parts
11 of that argument. While it is necessary for this Court to
12 reject only one, either one of those parts, and still affirm
13 the judgment in favor of the Respondents by the Third Circuit,
14 we would urge this Court to send out a clear message that,
15 first of all, negligence does not equal a deprivation within
16 the meaning of the Due Process Clause, and, secondly, even
17 when there is a deprivation because the conduct has been worse
18 than negligent, that there is not a deprivation of due process
19 simply because of the existence of an immunity. There is
20 no such per se rule.

21 I would like to begin with the first of those two
22 issues, namely, the question of whether negligence equals
23 a deprivation.

24 Justice O'Connor has asked on a couple of occasions
25 now about this very question; that is it seems to me that

1 behind the question is does deprivation mean simply some kind
2 of causal relationship or does it mean more than that?
3 Respondents would suggest that it means far more than that.
4 We would adopt the definition that was given by Justice Powell
5 in his concurring opinion in Parratt versus Taylor; namely,
6 that deprivation means some kind of an intentional act to
7 deny something to somebody or a deliberate decision to not
8 act to prevent a loss.

9 QUESTION: Well, Mrs. Mansier, don't you think the
10 majority of the Court rejected that sort of definition of
11 deprivation in the Parratt case?

12 MRS. MANSIER: Justice Rehnquist, I do not think
13 that the Court rejected it in the specific sense that it was
14 a part of the holding of the case in Parratt versus Taylor.

15 Respondents are well aware that there is language
16 in Parratt versus Taylor to the effect that the alleged loss,
17 though negligently caused, amounted to a deprivation. However,
18 that language was not crucial to or a fundamental part of
19 the holding in that case. And, Respondents say that for this
20 reason. The Court in Parratt versus Taylor framed the issue
21 as to whether negligence would support a claim for relief
22 under Section 1983. The answer was no in that case and rightly
23 so, because what the Court saw there was what Taylor had conceded
24 from the outside which was that there was a state remedy.
25 He had simply chosen not to go into state court.

1 There was a state remedy. Nebraska took care of
2 that and as a result of that, even if there had been a
3 deprivation, even if all of the prerequisites for a due process
4 claim had been made, there still would not have been a deprivation
5 without due process and, therefore, no violation of the
6 Fourteenth Amendment.

7 QUESTION: May I ask the same question I guess I
8 asked earlier, but your submission is that negligence can
9 never constitute a deprivation?

10 MRS. MANSIER: That is --

11 QUESTION: Supposing the warden negligently executed
12 the wrong defendant and killed him by mistake. Would that
13 not be a deprivation of life?

14 MRS. MANSIER: Justice Stevens, I do not envision
15 any execution as a negligent act. There may have been a
16 mistake.

17 QUESTION: What is wrong with my hypothetical?
18 Couldn't they make a mistake? It is conceivable.

19 MRS. MANSIER: There may be a mistake as, indeed,
20 there was a mistake in Baker versus McCollan, and there this
21 Court found there wasn't even a right in the first instance.

22 QUESTION: That is right, but they didn't say that --
23 They didn't rely on the reason of negligence not constituting
24 a deprivation.

25 MRS. MANSIER: That is correct, because they did

1 even need to reach that point. What they found instead was
2 that there was no right --

3 QUESTION: Take that case. Supposing a sheriff
4 makes out a search warrant and negligently they type in the
5 wrong name and search the wrong house. Would there not be
6 a deprivation of the right to be free of an unreasonable search
7 just because it was negligent instead of deliberate? What
8 does that have to do with whether the constitutional right
9 has been violated?

10 MRS. MANSIER: Because here we are dealing with
11 the Due Process Clause and the Due Process Clause has the
12 specific language of the word "deprive." And, the primary
13 issue before this Court, at least initially, is what does
14 deprive mean.

15 QUESTION: So, you are not contending that negligence
16 can never give rise to a 1983 action. You are just saying
17 never give rise to a deprivation of liberty.

18 MRS. MANSIER: That is --

19 QUESTION: Well, I suppose your answer in part to
20 the execution question is that there was an intent to execute
21 someone. It wasn't an unintended consequence of the action.

22 MRS. MANSIER: That is correct, Justice O'Connor.

23 QUESTION: So, it can be deprivation. But, in the
24 circumstance that we just heard about of a pillow on the stairs,
25 it was never contemplated or intended that someone would be

1 physically injured as a result of placement of a pillow on
2 the stairs.

3 MRS. MANSIER: That is correct. And, it was never
4 contemplated here in this case that Davidson would be injured.

5 And, in further response to your question, Justice
6 Stevens, if this Court could go further and declare that even
7 outside the Due Process Clause, even if there were a claim
8 under the First Amendment, a claim under the Fourth Amendment,
9 that nevertheless there could not be a remedy provided by
10 1983 even for negligent conduct, simply because Section 1983
11 is designed to deal with official abuse of power.

12 But, what we are saying in this case is that this
13 Court need not go that far if it does not want to. It can
14 limit its analysis to due process claims which is the precise
15 claim being made here and then one needs to focus on the language
16 of the Fourteenth Amendment. That language has the word "deprive"
17 in it. And, what Respondents say is that negligence never
18 amounts to a deprivation because it is not this intentional
19 act, it is not deliberately doing something. It is the very
20 antithesis of the whole purpose of the Due Process Clause
21 from the outset. That was designed to deal with petty tyranny,
22 to deal with oppression, to deal with situations in which
23 the government would go through the streets and take people
24 off the streets and put them into prison and take away their
25 liberty in that sense.

1 And, even there the government has the right to
2 do that providing it provides due process. But, the Due Process
3 Clause has always been meant to deal with intentional acts,
4 with something far more than simply negligence.

5 And, both this Petitioner and the Petitioner in
6 the other case argue that if negligence can ever be a deprivation
7 within the Due Process Clause, it surely can here. Petitioners
8 have that argument backwards. People who go into prison don't
9 gain rights. They may not lose all of their rights as we
10 well know, but they don't gain new ones. Instead, they retain,
11 as this Court said in Hudson versus Palmer, those rights which
12 are consistent and compatible with incarceration.

13 In Hudson, this Court found that the right to privacy
14 within one's cell was not compatible with incarceration.
15 Respondents would urge here that the right being asserted
16 by the Petitioner is the right to safety. Specifically, they
17 are urging, although perhaps not articulating, the right to
18 absolute safety. Respondents say that the right to absolute
19 safety in a prison setting is not compatible with incarceration.

20 Yes, we have a duty to protect. Yes, we have a
21 duty to exercise some reasonable care and it is only because
22 we breach that duty that we were found to be negligent. But,
23 the breaching of the duty is simply a question as to whether
24 we were negligent in the first instance. It does not go to
25 separating out prisoners from everybody else in the world

1 with reference to what the Due Process Clause protects them
2 against.

3 QUESTION: Yes, but may I ask this question? You
4 have separated prisoners out in your immunity statute as I
5 read it. The prisoner may not recover for this kind of
6 negligence, but a visitor could. A visitor or a guard could
7 recover if the guard was negligent and an inmate, instead
8 of injuring a fellow inmate, injured either the visitor or
9 the guard. So, you have put the prisoner in a lesser position
10 than the others, is that not correct?

11 MRS. MANSIER: It is true, Justice Stevens, that
12 the immunity that is the focal point here does deal with injuries
13 caused by one prisoner to another prisoner. New Jersey law
14 does also immunize situations in which injury is caused by
15 an escaping or an escaped prisoner.

16 If a visitor comes into the prison and that person
17 is injured by a prisoner, then, yes, it is true that that
18 person would not come within this immunity and, therefore,
19 would have the right to sue under New Jersey law.

20 And, that question of separating out will get to
21 the issue that I would like to deal with in a moment, which
22 is the question of the reasonableness of the immunity and
23 the question of whether immunity automatically and necessarily
24 means that there is no due process.

25 QUESTION: Have you answered Justice Stevens'

1 question? You are giving him fewer rights than anyone else.

2 MRS. MANSIER: We are giving the prisoner fewer
3 rights with reference to injuries caused by other prisoners
4 in the sense that for that plaintiff there is immunity. The
5 answer is yes, Justice Blackmun.

6 QUESTION: Sort of a penalogical fellow-servant
7 doctrine.

8 (Laughter)

9 MRS. MANSIER: That is certainly one way of articulating
10 it. I think the rationale behind it is set forth in the
11 commentary that goes with that statute and I would like to
12 reach that.

13 But, with reference to this question of whether
14 duty goes simply to negligence or goes to something more,
15 since the Petitioner is really saying that he has a right
16 to safety, that is precisely the claim made by the prisoner in
17 Smith versus Wade. In that case, the Court found -- This
18 Court specifically said that if the prison guard had been
19 simply negligent, that there would not be any cause of action
20 there because of the need to protect prison guards in their
21 day-to-day decisions in running a correctional institution.

22 In Smith versus Wade, as it turned out, the conduct
23 of the prison guard was worse than merely negligent. It was
24 deliberately indifferent. He knew or should have know what
25 was going to happen. And, in that instance, this Court

1 recognized the cause of action and rightly so.

2 Smith versus Wade was analyzed under the Eighth
3 Amendment. This Court ought not to take the very same claim
4 of a right to safety against injury by another prisoner,
5 analyze it under a different constitutional portion as the
6 Due Process Clause and apply some lesser standard as the
7 Petitioner would have them do of mere negligence. That would
8 not be consistent. It is the same claim, it is the same argument.
9 The same standard ought to be applied.

10 So, while Respondents say that negligence can never
11 equal deprivation, Respondents say it surely cannot here.
12 The test ought to be at least deliberate indifference.

13 Turning our attention to --

14 QUESTION: Well, what about -- You say negligence
15 never then, is that it, can form the basis? What about a
16 negligence in knowing what the law is, what the governing
17 law is?

18 MRS. MANSIER: We are focusing here on negligence
19 not being a deprivation within the meaning of the Due Process
20 Clause?

21 QUESTION: Yes.

22 MRS. MANSIER: And, we are talking about a negligent
23 taking of life, liberty, or property.

24 QUESTION: Right. What if there is a standard of
25 law -- a standard of conduct imposed by law that says you

1 may not do this or you may or you may not do certain things
2 and some prison guard just doesn't know what the law is and
3 he goes ahead and does it intentionally.

4 MRS. MANSIER: If a prison guard acts intentionally --

5 QUESTION: Yes.

6 MRS. MANSIER: -- and as a result of that a prisoner
7 is injured if we are sticking with the kind of case that we
8 have here, then that is an entirely different case and we
9 would say that an intentional act does equal a deprivation.

10 QUESTION: All right.

11 QUESTION: How about gross negligence or recklessness?

12 MRS. MANSIER: Justice O'Connor, we realize that
13 courts have historically found difficulty in dealing with
14 exactly where the lines are between different standards of
15 conduct. That is especially true between negligence and gross
16 negligence, perhaps in part because of the fact that the word
17 "negligence" appears in both.

18 We would urge this Court to take the position that
19 even gross negligence, assuming one can define that as being
20 some kind of negligence but something worse than the negligence
21 that occurred here, would still not equal a deprivation within
22 the meaning of the Due Process Clause, primarily because we
23 go back to the position that deprivation is some kind of an
24 intentional act, and intentional and negligence are different
25 qualitatively regardless of whether we are talking about simple

1 negligence or gross negligence.

2 QUESTION: So, just simple negligence, negligently
3 failing to give medical treatment is not -- doesn't give a
4 cause of action?

5 MRS. MANSIER: That is correct, it does not under
6 Estelle.

7 QUESTION: And, we have held -- Is that because
8 the Eighth Amendment controls?

9 MRS. MANSIER: That is an Eighth Amendment case
10 and the determination was made --

11 QUESTION: Well, would you think that it could be
12 any other kind of a case? I am surprised that you just don't
13 argue that in the prison context the Eighth Amendment should
14 really govern just like it did in Estelle.

15 MRS. MANSIER: Justice White, that is, indeed, what
16 I would have called here the third argument.

17 QUESTION: All right.

18 MRS. MANSIER: That is -- But, I am perfectly willing
19 to reach it now and to skip over for the moment again the
20 argument of whether immunity can -- automatically means that
21 there is no due process.

22 Petitioners really believe here and have argued
23 from the outset that there is no liberty interest in the first
24 instance. The cases that are relied on by the Petitioner
25 and that were relied on, indeed, by the Third Circuit, which

1 admittedly found there was a liberty interest, are completely
2 wrong. They are inapplicable. They were rightly decided,
3 but they have nothing to do with this case. One is Ingraham
4 versus Wright. That stands for the proposition that the
5 government can't hold somebody and punish them. We agree
6 with that, but that is not what happened here.

7 The second is Youngberg versus Romeo. There the
8 Court found that an involuntarily committed person had a liberty
9 interest in safety but that liberty interest was in being
10 free from injury 63 times over a two-year period.

11 But, in both of those cases this Court said if the
12 plaintiff had been a prisoner, then the question would have
13 been whether it was cruel and unusual punishment because that
14 was the issue that was presented and the Court rejected it
15 because the plaintiffs were not prisoners.

16 Here, the plaintiff is a prisoner and Respondents
17 would urge that the only right to safety they have is a right
18 to be free from cruel and unusual punishment and if it doesn't
19 reach that level, there is no interest in safety that is
20 recognized.

21 Finally, on the issue of the immunities, if this
22 Court were to determine that immunities are always -- auto-
23 matically means that there is no due process, you will negate
24 tort immunity, you will call them all into question. You
25 may even call into question the judicially created immunities.

1 You will deprive states of the right to fashion their own tort
2 laws to the right expressly recognized in Martinez versus
3 California, providing that that statute is rationale, is not
4 arbitrary, and in this case this statute is, indeed, rational.
5 It is, in fact, a portion of the very same statute that was
6 in Martinez.

7 And, in addition to that, the New Jersey courts
8 have -- the legislature has indicated that they recognized
9 the practical problems inherent in supervising prisoners and
10 in particular in preventing injuries caused by one prisoner
11 upon another. They realized the problems in that. So, the
12 decision that they have made is that if you are merely negligent,
13 then you will not be liable.

14 However, there is another provision in the same
15 act that says if your act is willful misconduct, actual crime,
16 actual fraud, actual malice, if it is any of those, no immunity
17 applies.

18 And, basically what New Jersey legislature has done
19 is that we recognize that negligence doesn't equal a deprivation.
20 It is perfectly proper to pass this kind of a statute. But,
21 if the conduct gets so bad that it is willful misconduct,
22 we will not protect those people, we will not provide them
23 with any immunity.

24 So, in conclusion, we urge this Court to affirm
25 the decision of the Third Circuit, either by finding that

1 there was no liberty interest in the first place because the
2 Eighth Amendment claim was rejected, or if there was a liberty
3 interest, that the negligent conduct here did not amount to
4 a deprivation within the meaning of the Due Process Clause.
5 And, finally, that the Petitioner is also wrong in saying
6 that the existence of the immunity automatically means that
7 there is no due process.

8 Thank you.

9 CHIEF JUSTICE BURGER: Mr. Solicitor General?

10 ORAL ARGUMENT OF CHARLES FRIED, ESQ.

11 AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

12 MR. FRIED: Thank you, Mr. Chief Justice, and may
13 it please the Court:

14 If I may, before I enter the details of what we
15 consider to be the defects in Petitioner's claim, may I suggest
16 a more distant perspective on this case? A hundred years
17 ago, Oliver Wendell Holmes began the common law by insisting
18 on a distinction which he said was so basic that it is part
19 even of our animal nature, the distinction, in his words,
20 between being stumbled over and being kicked.

21 In this case, Respondent can at most be said to
22 have stumbled. If anyone kicked Petitioner, it was his fellow
23 prisoner, McMillian, against whom, of course, Davidson retains
24 a cause of action.

25 The majestic purpose of the Due Process Clause,

1 we suggest, is trivialized for it was intended to protect
2 against oppression and there is no oppression here where a
3 state officer has at most stumbled whether or not the state
4 offers a complete remedy for the harm which is occasioned
5 by that stumbling.

6 Now, turning to the details, Petitioner claims there
7 is a denial of procedural due process and I think we should
8 try to keep distinct whether the claim is a procedural or
9 a substantive one.

10 Petitioner claimed, or at least so it seemed from
11 the papers, claimed there is a denial of procedural due process
12 because of the existence of the state immunity.

13 If that argument is correct, then every state
14 limitation on liability, every gap in the complete garment
15 of compensation gives rise to a due process violation, including
16 such familiar limitations on liability as automobile guest
17 statutes, no fault statutes.

18 More remarkably still Petitioner's argument would
19 put under a constitutional doubt limitations on liabilities,
20 gaps in liabilities which have been established by this Court
21 itself. And, I think most strikingly of Chapel and Wallace in
22 which this Court said that there is ground for grave hesitation
23 before allowing a soldier to bring a cause of action against
24 a military superior and denied the claim.

25 And, I think some of the reasoning in Chapel and

1 Wallace, some of the balancing of interest there is very
2 similar to the balancing of interest which occasioned the
3 New Jersey legislature to find immunity here.

4 It is our suggestion that that process of establishing
5 an immunity where there seems to be good reasons for doing
6 so cannot of itself create a procedural due process claim.

7 QUESTION: Mr. Fried, I suppose the Petitioners
8 in these two cases would say to you, well, we are only concerned
9 about the situation in a prison setting.

10 MR. FRIED: That point was emphasized, particularly
11 in argument, although I must say the Eighth Amendment aspect
12 was not emphasized as the case was litigated so far.

13 We would suggest that the status of Petitioners
14 here as prisoners is constitutionally irrelevant. They have
15 treated as simply part of the factual setting which gives
16 rise to a duty of care and a possible claim of negligence.
17 In this respect, they are like a pedestrian, also involuntarily
18 in the path of a negligently driven automobile, also
19 involuntarily, and the failure to heed poor driving conditions
20 are part of the factual setting. The failure to --

21 QUESTION: What did the prisoner do that was volun-
22 tary? Did he go to jail voluntarily?

23 MR. FRIED: No, he did not.

24 QUESTION: Did he stay there voluntarily?

25 MR. FRIED: No, he did not.

1 QUESTION: Well, how do you get involuntarily?

2 MR. FRIED: He is not there --

3 QUESTION: You compare him with the man in the street
4 struck by an automobile. I fail to see the comparison.

5 MR. FRIED: The man in the street struck by the
6 automobile also does not voluntarily choose to be in the path
7 of a --

8 QUESTION: But, he stood in the street.

9 MR. FRIED: Yes, he did.

10 QUESTION: And, he didn't have to stand there.

11 MR. FRIED: He made no choice.

12 QUESTION: He didn't have to stand in that street.

13 MR. FRIED: No, he did not.

14 QUESTION: So, isn't that the difference? The
15 prisoner has to do whatever the guard tells him to do, whenever
16 he tells him to do it, and however he tells him to do it,
17 and that is the difference between that and an ordinary citizen
18 getting stuck by an automobile.

19 MR. FRIED: With respect, Justice Marshall, that
20 difference is important insofar as it creates a duty of care
21 and the duty of care then is the predicate for the negligence
22 action. I don't understand Petitioners to be claiming here
23 that their Eighth Amendment rights were violated as they were
24 in Youngberg and Romeo. They don't make that claim.

25 Turning to the deprivation point, we suggest no

1 more than that the Court read the word "deprive" in the
2 Fourteenth Amendment as conceptually parallel to its
3 constitutional neighbor's "deny" in the denial of equal
4 protection and "take" in the taking of property. Those terms
5 have clearly been focused on intentional actions and all three
6 of those terms, of course, are intended to guarantee against
7 oppression by the state and that oppression --

8 QUESTION: Well, it took some rather recent cases
9 to make all that so awfully clear.

10 MR. FRIED: But, we hope that it is clear now and
11 that --

12 QUESTION: Well, it may not have been all that clear
13 for a long, long time.

14 MR. FRIED: Yet as clear as it is now it is clear
15 because oppression comes when there is some deliberate --
16 some systematic invasion of right which is what we say is
17 missing here.

18 Now, much is made of the decision of the Parratt
19 case. We would suggest that Parratt is best viewed as a case
20 in which this Court has established --

21 QUESTION: Nevertheless, if it had been all that
22 clear about the Due Process Clause, that language wouldn't
23 have appeared in Parratt.

24 MR. FRIED: In Parratt what this Court did was
25 establish those conditions which are sufficient to deprive

1 a person of a due process claim. But, I don't think Parratt
2 needs to be read as saying what is necessary in order to satisfy
3 due process. It is simply what is sufficient to satisfy due
4 process. And, I say that because I think of the context of
5 many, many other decisions in this Court. I think particularly
6 of Paul v. Davis and Baker against McCollan, which suggests
7 that the Due Process Clause cannot be allowed to turn into
8 a font of residual tort liability which I think is what would
9 happen were we to accept Petitioners' invitation in these
10 cases.

11 QUESTION: Not if the states have provided remedies,
12 I suppose.

13 MR. FRIED: Well, I say of residual tort liability
14 to the extent that the state does not provide a remedy. And,
15 the state may fail to provide a remedy --

16 QUESTION: Yes, they may.

17 MR. FRIED: -- under circumstances very similar
18 to those in which this Court has said it is appropriate for
19 the federal government to fail to provide a remedy.

20 And, I think, again, the Chapel case is a very good
21 parallel because there there is a similar balancing of the
22 state's needs and the inconvenience of granting a remedy and
23 the Court came out with the conclusion that one ought to
24 hesitate before applying such a remedy. Here, it is the
25 legislature which engaged in that balancing and we suggest

1 that that was not an unreasonable process of balancing. It
2 was a reasonable one and, of course, New Jersey leaves a claim
3 for remedy against the prisoner who himself inflicted the
4 injury. You may say that is a worthless claim. Alas, many
5 persons injured are injured by insolvent defendants.

6 QUESTION: What happens to the state's freedom when
7 the tort is intentional?

8 MR. FRIED: If the tort is intentional, Your Honor,
9 and I think that is an important point for us to seek to clear
10 up, if the tort is intentional, you are very likely to have
11 an Eighth Amendment or the shocks-the-conscience kind of sub-
12 stantive deprivation. You may very well have a Fourth Amendment
13 violation as there was lurking in the wings in Hudson against
14 Palmer.

15 QUESTION: Which would deprive the state of its
16 immunity.

17 MR. FRIED: It would, indeed. It would, indeed.
18 And, I think --

19 QUESTION: Despite the legislature's judgment.

20 MR. FRIED: Oh, I -- The legislature cannot deprive
21 a citizen of his rights. New Jersey legislature cannot deprive
22 a citizen of his rights under the Eighth Amendment.

23 QUESTION: So, your argument really hinges on the
24 construction of the word "deprive."

25 MR. FRIED: I think that is a very important part

1 of it, yes, Your Honor.

2 Thank you so much.

3 CHIEF JUSTICE BURGER: Do you have anything further,
4 Mr. Crawford?

5 MR. CRAWFORD: Four very brief points which I would
6 like to make.

7 ORAL ARGUMENT OF JAMES D. CRAWFORD, ESQ.

8 ON BEHALF OF THE PETITIONER -- REBUTTAL

9 MR. CRAWFORD: First, the Solicitor General's parade
10 of horrors, the awful things that are going to happen if this
11 case is decided in favor of Mr. Davidson or if the case before
12 is decided in favor of Mr. Daniels, that is so only if you
13 give us a great deal more than we ask for. We were careful
14 in our requests and I trust this Court to be even more careful
15 in its opinion.

16 Secondly, a prisoner does not have a right to safety.
17 A prisoner has a right to care. A prisoner doesn't have a
18 right not to be lynched by a lynch mob, he has a right to
19 be protected from a lynch mob to the best of a sheriff's
20 ability. He doesn't have a right not to be struck by a fellow
21 prisoner, he has a right to be protected.

22 QUESTION: Are you making that a distinction between
23 the intentional and the negligent act?

24 MR. CRAWFORD: No. I think a negligent act can
25 still give cause -- can be a deprivation but the mere failure

1 of even a careful jailer to protect his prisoner plainly gives
2 you no relief and Mrs. Mansier's suggestion that you have
3 a right to safety is simply untrue. You have a right to care.

4 Third, the distinction between the Eighth Amendment
5 in Smith and Wade and the Fourteenth Amendment here is that
6 in Smith and Wade had there been any amount of state process
7 it wouldn't have helped. The question is do you have a right
8 to some kind of process when you have a negligent deprivation.

9 We suggest finally that if immunity is read as the
10 Solicitor General and Mrs. Mansier would have it read, that
11 the great promise of Parratt, critized by many as taking away
12 the right to sue directly without turning to state rights,
13 that the promise was that the states would get back to doing
14 the states' business, the federal courts would do their business,
15 that promise is taken away if the states can do their business
16 by saying we will pass an immunity statute and then nobody
17 can help the prisoner.

18 I don't think this Court meant it and I trust it
19 will not now.

20 CHIEF JUSTICE BURGER: Thank you, counsel.

21 The case is submitted.

22 (Whereupon, at 2:41 p.m., the case in the above-
23 entitled matter was submitted.)
24
25

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