CASE COMMENT

PARRATT V. TAYLOR: UNAUTHORIZED DEPRIVATIONS AND THE CONTENT OF AN ADEQUATE REMEDY

INTRODUCTION

In 1981, in *Parratt v. Taylor*,[1] the United States Supreme Court ruled that a person who has been wrongfully deprived of property by a state official cannot bring a federal constitutional claim based on the due process clause of the fourteenth amendment[2] if state law provides an adequate remedy. While the

1. 451 U.S. 527 (1981), *rev'd in part*, Daniels v. Williams, 474 U.S. 327 (1986).

2. The fourteenth amendment reads in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law". U.S. CONST. amend. XIV, § 1.

Supreme Court subsequently held that *negligent* state conduct that invades a fourteenth amendment interest can *never* amount to a constitutional deprivation,[3] *Parratt* still governs *intentional* and reckless state action. The *Parratt* decision was fueled both by the general perception that the federal court dockets are seriously overburdened with section 1983 actions[4] and by then-Justice Rehnquist's[5] long-standing desire to clear the federal courts of meritless,[6] or meritorious yet trivial,[7] suits against state officials. *Parratt*'s intended — and actual — effect was to funnel a significant percentage of civil rights claims into state courts and administrative claims tribunals. These claims are then subject to state law remedies, immunities, defenses and procedures.

Prior to the Court's decision in *Parratt*, it was generally understood that an individual deprived of a property or liberty interest by a state official had a federal action for damages under section 1983,[8] based on the fourteenth

3. Daniels v. Williams, 474 U.S. 327 (1986).

4. *See, e.g.*, Davidson v. O'Lone, 752 F.2d 817, 853 (3rd Cir. 1984) (en banc) (Gibbons, J., dissenting) (accusing majority of engaging in "a quixotical quest for devices which will make our burgeoning caseload disappear"), *aff'd sub nom* Davidson v. Cannon, 474 U.S. 344 (1986); Vicory v. Walton, 721 F.2d 1062, 1067 (6th Cir. 1983) (Bertelsman, J., concurring) ("I am in great sympathy with the desire . . . to find some interpretation of § 1983 that will limit frivolous and *de minimus* actions brought under this statute"), *cert. denied*, 469 U.S. 834 (1984); Eaton v. City of Solon, 598 F. Supp. 1505, 1509 (N.D. Ohio 1984) ("[section 1983] has thus become the basis for untold numbers of claims in the federal courts . . . This substantial expansion of the federal docket with cases which are not infrequently frivolous has discouraged and concerned many federal courts.") *Cf.* Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 256 n.243 (1984) ("reduction of the federal court caseload is a wholly inappropriate basis upon which to define the scope of constitutional protection of life, liberty, and property"). *See generally*, Note, *Federalism, Section 1983 and State Law Remedies: Curtailing the Federal Civil Rights Docket by Restricting the Underlying Right*, 43 U. PITT. L. REV. 1035, 1035-36, 1045-50 (1982).

5. Hereinafter "Justice Rehnquist" when discussing opinions rendered prior to his ascension to the position of Chief Justice.

6. *See* Smith v. Wade, 461 U.S. 30, 91 (1983) (Rehnquist, J., dissenting) ("[t]he torrent of frivolous claims under [section 1983] threatens to incapacitate the judicial system's resolution of claims where true injustice is involved"). Justice Rehnquist's dim view of section 1983 suits is not hard to understand. In Friedman v. Village of Skokie, 763 F.2d 236 (7th Cir. 1985), a section 1983 due process action was instituted after the plaintiff lost $.50 in a video game at a municipal skating rink. And in Harbulak v. County of Suffolk, 654 F.2d 194 (2d Cir. 1981), a motorist sued for $25,000 under section 1983, alleging that a police officer's action of reaching through the motorist's open window to place a traffic citation on his dashboard after the motorist refused to accept it violated his constitutional privacy rights.

7. *See generally*, City of Columbus v. Leonard, 443 U. S. 905, 910-11 (1979), *denying cert. to*, 565 F.2d 957 (5th Cir. 1979) (Rehnquist, J. dissenting from the denial of cert.) ("[T]he time may now be ripe for a reconsideration of the Court's conclusion in *Monroe* [Monroe v. Pape, 365 U.S. 167 (1961)] that the 'federal [section 1983] remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.' "); Paul v. Davis, 424 U.S. 693 (1976) (arguing that a body of general federal tort law cannot be derived from the "procedural guarantees of the Due Process Clause");

8. Congress originally passed section 1983 as section 1 of the Ku Klux Klan Act of 1871, 1876 c.22, 1, 17 Stat. 13 (19871), under the power granted it by section 5 of the fourteenth amendment to enforce the amendment through appropriate legislation. Section 1983 provides a federal damages claim to redress the deprivation of federal statutory and constitutional rights by state officials. It reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage,

amendment's due process clause. The availability of state law remedies was irrelevant.[9] After *Parratt*, however, no federal constitutional due process claim can be brought where the alleged deprivation was "random" and "unauthorized"[10] if an adequate state remedy is available.[11] A "random" or "unauthorized" deprivation occurs when a defendant-state official acts contrary to, or outside of state-defined authority and discretion.[12] Pre-*Parratt* doctrine, however, was left intact for cases where the deprivation occurred through the operation of "established state procedures." These cases involve actions or procedures which the state or relevant state entity authorized. Since the state itself has contravened the plaintiff's rights, the remedies provided by the state are viewed as irrelevant to the occurrence of an actionable constitutional deprivation.[13]

Courts and commentators agree that *Parratt* has been an extremely difficult decision to decipher[14] and apply.[15] But more important than its imprecision is the ruling's potential impact on the capacity of the fourteenth amendment's due process clause to protect citizens from state officials' reckless and intentional unauthorized abuses of state authority. After *Parratt*, it may be consistent with due process for citizens to be intentionally deprived of life, liberty or property by a state official's intentional but unauthorized and

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of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1982). It is important to note that the statute grants no substantive rights, but simply provides a remedial vehicle when independent rights are violated. *See generally*, Monroe v. Pape, 365 U.S. 167, 171 (1961). *Parratt's* 'adequate state remedy' holding in no way involved interpretation of this statute, but only of the due process clause itself.

9. Indeed in *Parratt* itself, the plaintiff won summary judgment in the federal district court, which judgment was affirmed *per curiam* by the court of appeals. *See Parratt*, 451 U.S. at 529-30.

10. Logan v. Zimmerman Brush Company, 455 U.S. 422, 435-36 (1982).

11. Though *Parratt* involved the deprivation of a *property* interest, the courts of appeals have extended *Parratt's* holding to protect entitlements in *life* and *liberty*. *See infra* note 62.

12. *See, Parratt*, 451 U.S. at 543; *see also infra* note 82 and accompanying text.

13. *Parratt*, 451 U.S. at 541; *Logan*, 455 U.S. at 436.

14. *See*, Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979 (1986). According to Professor Monaghan, *Parratt* "is among the most puzzling Supreme Court decisions of the last decade, and the lower federal courts have been thrown into considerable confusion in their efforts to implement it." *See also* Note, *Parratt v. Taylor Revisited: Defining The Adequate Remedy Requirement*, 65 B.U. L. REV. 607, 616 (1985) (noting "confusion and controversy among lower courts" concerning the decision's scope).

15. The United States Court of Appeals for the Fifth Circuit has noted that "[a]pplication of the *Parratt* decision by the federal district and circuit courts has hardly been a model example of uniform judicial decision making." Thibodeaux v. Bordelon, 740 F.2d 329, 335 (5th Cir. 1984). *See also* Alavarado v. Dodge City, 238 Kan. 48, 708 P.2d 174, 179 (1985); Enright v. Milwaukee Sch. Directors Bd., 118 Wis. 2d 236, 251, *cert. denied*, 469 U.S. 966 (1984).

unlawful state action and yet be denied a remedy.[16]

From a civil rights perspective, the problem with *Parratt* is not that some injured plaintiffs are forced to litigate their claims in state court, since where the inquiry into adequate state remedies is applied as formulated in this Comment, those with meritorious claims will receive some compensation or relief.[17] Limited to non-egregious deprivations, *Parratt* is defensible.[18] The problem is that through an incorrect application of the inquiry into the adequacy of state remedies, some plaintiffs with meritorious claims[19] will receive no redress at all.[20] This scenario of "rights without remedies" occurs when a federal court has dismissed the plaintiff's case, assuming that adequate remedies exist under state law, but the plaintiff subsequently goes uncompensated because state substantive or procedural law turns out to be more restrictive than its federal counterpart. Typically, the offending state provision is an immunity which grants the state official more protection than she would receive under federal law.[21] Different rules governing the construction of pleadings,[22] qualitatively different measures of damages,[23] or the imposition of filing fees beyond the means of indigent plaintiffs may also prevent or limit redress for the plaintiff.[24] "If these cases [where plaintiffs with meritorious claims receive no redress] are correct, then the scope of constitutional protection of life, liberty, and property could be very narrow."[25] This Comment argues that state court remedies that are marked by certain restrictive substantive or procedural

16. Professor Bator has reasoned that "[t]he *Parratt* analysis takes a very large step toward interpreting the Due Process Clause to be a mere procedural enactment. . . . This notion creates a tremendous threat to the concept of direct, substantive federal commands directed to the behavior of state officials." Bator, *Some Thoughts on Applied Federalism*, 6 HARV. J. OF L. & PUB. POL'Y 51, 57 (1982). Certain applications of the decision would render "the scope of constitutional protection of life, liberty and property . . . very narrow . . . [and] constitutionally sanction . . . leav[ing] uncompensated those injured by government action." *See* Note, *supra* note 14, at 640-41 n.213 (1985). But "the extent to which [it] has that effect depends on what the court decides adequate state remedies [must] include"—the precise focus of this Comment. Wells & Eaton, *supra* note 4, at 212-13.

17. *See, e.g., Parratt,* 451 U.S. at 544 (state remedies could have "fully compensated" plaintiff for his injury).

18. *See infra* notes 164-86 and accompanying text.

19. Meritorious is used here to refer to claims that establish all other elements of a due process violation in this context — except a breach of the process due — i.e., injury to an entitlement recognized by state or federal law, causation, deprivation, and state action. The question is then whether leaving such a claim uncompensated is consistent with *Parratt* and the due process clause itself.

20. *See infra* notes 236-43, 316-19 and accompanying text.

21. *See, e.g.*, Rittenhouse v. DeKalb County, 764 F.2d 1451, 1457-59 (11th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1985); Davidson v. O'Lone, 752 F.2d 817, 830, and concurring opinions, 831-33 (3d Cir. 1984) (en banc), *aff'd on other grounds sub nom.*, Davidson v. Cannon, 474 U.S. 344 (1986).

22. *See* Al-Mustafa Irshad v. Spann, 543 F. Supp. 922, 927-28 n.2 (E.D. Va. 1982).

23. *See* Rutherford v. United States, 702 F.2d 580, 583-84 (5th Cir. 1983); *See also* Note, *supra* note 14, at 632-33.

24. *See* Walker v. Scurr, 617 F. Supp. 679, 681 (D. Iowa 1985).

25. Wells & Eaton, *supra* note 4, at 213.

rules cannot be considered adequate state remedies consistent with either the Court's opinion in *Parratt* or the mandate of the fourteenth amendment.

In *Parratt* and subsequent relevant decisions, the Supreme Court has made it clear that the "adequacy inquiry" has both substantive/remedial and procedural components. Adequate state remedies can range from informal administrative claims processes[26] to fully endowed tort litigation,[27] and in some cases, include simple appellate review.[28] With respect to *procedure*, these remedies must satisfy the minimum requirements of traditional procedural due process *and* provide that *extra* measure of procedural protection demanded of state systems when federal rights are to be adjudicated.[29] With respect to *substantive* law, adequate state remedies must guarantee relief sufficient to make the plaintiff "whole" upon proof of a constitutional deprivation by a state actor of a protected entitlement to life, liberty, or property.[30]

Under this formulation of adequacy, an inquiry into the facts of each case and the corresponding state law is mandated. General rules, however, may be formulated to deal appropriately with some clear cases. On the one hand, states may impose reasonable procedural requirements, such as a one-year statute of limitations or a notice-of-appeal requirement, and a plaintiff's failure to comply with such requirements, barring relief at the state level, will not render an otherwise adequate remedy inadequate.[31] Conversely, insurmountable obstacles to redress, such as absolute immunities or filing fees beyond the victim's means, will preclude a determination that a state offers adequate postdeprivation process.[32] In between these extremes, where the state system does offer some type of relief, but the relief is subject to a moderately restrictive procedural or substantive rule, such as a limitation on damages or a harsh antiplaintiff pleading rule, the relief should be considered adequate only where the offensive feature is not "inconsistent" with the underlying constitutional right to due process of law.[33]

Section I of this Comment will first discuss the *Parratt* doctrine itself and its general treatment in the lower courts. It will also consider the post-*Parratt* Supreme Court cases that today shape the constitutional claim for an unauthorized deprivation without due process. Section II will begin with a close look at how the adequacy test has been applied in the "easy cases," where clearly adequate relief was apparently available for the plaintiff under state law. It will also analyze the due process implications of these cases in the broader context of general constitutional and policy-oriented concerns. Sec-

26. *See infra* notes 142-44, 249-50 and accompanying text.

27. *See infra* notes 140-42 and accompanying text.

28. *See infra* notes 144-49, 157-64 and accompanying text.

29. *See infra* notes 245-75 and accompanying text.

30. *See infra* notes 277-79, 283-98 and accompanying text. The propriety of qualified immunities is the one caveat to this formulation. *See infra* notes 356-61 and accompanying text.

31. *See infra* notes 251-52 and accompanying text.

32. *See infra* notes 253-58, 276-79, 330-37 and accompanying text.

33. *See infra* notes 338-61 and accompanying text.

tion III will scrutinize the "hard cases," where courts recognize that no postdeprivation remedy is available under state law, and ascertain whether the judiciary's resolutions are consistent with *Parratt* and, especially, the mandate of the fourteenth amendment. Section IV will develop the concepts of "substantive" and "procedural" adequacy and respond to scholarly commentary and cases which have maintained that immunity-barred state remedies *are* in fact "adequate." This Comment will conclude that *Parratt* imposes a sensible regime on section 1983 due process claims as long as state postdeprivation remedies adequately protect constitutional rights.

I.
THE *PARRATT* DOCTRINE

A. Parratt v. Taylor

Parratt v. Taylor's procedural innocence and simplistic splendor threaten to mask its potentially drastic impact on the substantive breadth of fourteenth amendment rights against abuse of state power.[34] The respondent Bert Taylor, an inmate at the Nebraska Penal and Correctional Complex, had ordered "hobby materials" valued at $23.50.[35] When his package arrived, Taylor was housed in administrative segregation. Upon his return to the mainstream prison population he tried to collect his property, but it had been either lost or stolen.

Taylor concluded that he had been deprived of property without due process of law in violation of the fourteenth amendment. Using 42 U.S.C. section 1983,[36] he commenced suit in the federal district court[37] against Warden Parratt and the Prison Hobby Manager for the value of the hobby kit.[38] The district court granted Taylor's motion for summary judgment.[39] The Court of Appeals for the Eight Circuit affirmed, per curiam.[40] The Supreme Court,

34. *See, e.g.*, Monaghan, *supra* note 14, at 981 (1986) ("*Parratt*'s limited compass does not diminish its practical importance"). *Accord* Wells & Eaton, *supra* note 4, at 212-13 (1984); *see also supra* note 16.

35. The facts are recited in *Parratt*, 451 U.S. at 529-31.

36. *See supra* note 8. *See generally* Monroe v. Pape, 365 U.S. 167, 171 (1961).

37. Jurisdiction was provided by 28 U.S.C. § 1343(3). This statute provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Taylor was forced to invoke section 1343(3) because in 1976, when he commenced his action, the general federal question jurisdictional grant of 28 U.S.C. section 1331 still had the $10,000 amount in controversy requirement.

38. For an in-depth examination of the *Parratt* litigation from beginning to end, *see* Friedman, *Parratt v. Taylor: Opening and Closing the Door on Section 1983*, 9 HASTINGS CONST. L.Q. 545 (1982).

39. *See Parratt*, 451 U.S. at 530-31.

40. 620 F.2d 307 (8th Cir. 1980).

however, was less favorably inclined towards Taylor's recovery.

According to Justice Rehnquist, the case raised a difficult[41] and recurring problem involving the relationship between common law torts committed by state officials and violations of the United States Constitution.[42] The Court had previously struggled with the issue in four important cases[43] and had failed to synthesize a coherent doctrine.[44] With *Parratt*, the Court was determined to construct a satisfactory analysis for the lower courts to apply to claims "which allege facts that are commonly thought to state a claim for a common law tort normally dealt with by state courts, but instead are couched in terms of constitutional deprivation . . . [with] relief . . . sought under section 1983."[45]

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41. "[W]e must deal . . . with the complex interplay of the Constitution, statutes, and the facts . . ." 451 U.S. at 531-32.

42. As Professor Monaghan describes the project,

> *Parratt* is one part of an ongoing effort by the Supreme Court, particularly Justice Rehnquist, to reorient fourteenth amendment jurisprudence. The goal is to keep the lower federal courts out of the business of monitoring the routine day-to-day administration of state government in areas that only marginally implicate constitutional values. Philosophically, this development embodies a belief that a clear distinction can be drawn between constitutional violations and state law wrongs.

Monaghan, *supra* note 14, at 979-80 (1986) (footnotes omitted). *See* Jackson v. City of Joliet, 715 F.2d 1200, 1201 (7th Cir. 1983) ("[n]o problem so perplexes the federal courts today as" understanding the difference between constitutional and common law wrongs), *cert. denied*, 465 U.S. 1049 (1984). *See generally* Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Company*, 1982 U. ILL. L. REV. 831, 836-53(1982); Wells & Eaton, *supra* note 4, at 205-10, 215-18; Note, *Unauthorized Deprivations of Property Under Color of Law: A Critique of the Supreme Court's Due Process Analysis in Parratt v. Taylor, and a Proposed Alternative Analysis*, 36 RUTGERS L. REV. 179, 182-93 (1982). One aspect of the confusion flows from the fact that it is often state common law which creates the very entitlement that triggers due process protection. *See* Board of Regents v. Roth, 408 U.S. 564 (1972). This was the source of confusion in Paul v. Davis, 424 U.S. 651 (1976), where the Court mistakenly held that Kentucky did not recognize a liberty entitlement to non-interference with one's reputation. *See* Smolla, *supra*, at 844-47 ("one inverts logic to say that an interest is disqualified from constitutional protection because it is protected by the common law of torts, because the law of torts may bring the interest into legal existence in the first place").

43. Baker v. McCollan, 443 U.S. 137 (1979) (plaintiff mistakenly arrested and held for three days was not deprived of liberty without due process); Paul v. Davis, 424 U.S. 651 (1976) (distribution of false and defamatory circular by police chief did not implicate liberty interest); Ingraham v. Wright, 430 U.S. 693 (1976) (corporal punishment in public schools not violative of procedural due process); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (liberty deprivation found where city posted signs in public banning the sale of alcohol to plaintiff for one year).

44. "The Supreme Court has labored to develop a doctrinal basis to exclude from the scope of constitutional tort those due process claims traditionally controlled by common law tort . . . but actually has disposed of the cases on other grounds or has written opinions that are too incoherent to provide any guidance." Wells & Eaton, *supra* note 4, at 203, 205 (1984).

45. *Parratt*, 451 U.S. at 533. As Justice Rehnquist noted in *Davis*, not every state law tort becomes a federally cognizable constitutional tort simply because it is committed by a state official. 424 U.S. at 700-01 (quoting Justice Douglas in Screws v. United States, 325 U.S. 91 (1945)). Similarly, in *Baker*, Justice Rehnquist made it clear that "section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state courts under traditional tort-law principle." 443 U.S. at 146.

The Court first addressed a threshold statutory issue left open by previous cases: do allegations of simple negligence satisfy the deprivation requirement of section 1983? Justice Rehnquist concluded that neither the language nor legislative history of section 1983 limited its scope to intentional deprivations.[46] He stated that there is no "express requirement of a particular state of mind" in order for section 1983's civil remedy for deprivations of federal rights by actions under color of state law to apply.[47] Hence, Taylor's claim, alleging only negligent conduct, was thus far on solid ground.

The Court then discussed the elements of a fourteenth amendment procedural due process claim. It found that Taylor's claim unquestionably satisfied the first three elements: 1) state action, 2) which causes a deprivation, 3) of life, liberty or property.[48] The court, however, pointed out that the fourteenth amendment does not protect individuals against *all* "deprivations of life, liberty, or property." Rather, a deprivation must be shown to have been effected "without due process of law."[49] The Court framed the due process question[50] before it as "whether the [available state] tort remedies . . . satisfy the requirements of procedural due process."[51]

The concept of procedural due process, as expressed in previous case law, had almost invariably required predeprivation due process, some process *before* the occurrence of the plaintiff's injury. That is, wherever a government body, agency, or official proposed to terminate or impair a citizen's property or liberty interests, the constitutional rule required that the process due *precede* the deprivation.[52] The Court, however, distinguished these cases from the facts before it. In the prior cases, predeprivation process could be offered

46. *Parratt*, 451 U.S. at 534.

47. *Id.* at 535. The Court relied on the *Monroe* Court's conclusion that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.* (quoting *Monroe*, 365 U.S. at 187).

48. *Parratt*, 451 U.S. at 536-37. Earlier in the opinion, the Court had briefly discussed the state action and entitlement elements. First, under Nebraska law respondent had a "property interest in the hobby materials." *Id.* at 529 n.1. Second, because petitioners held state "positions of considerable authority," their alleged conduct satisfied the 'under color of state law' requirement. *Id.* at 535-36. As to the deprivation element, the Court held without discussion that a negligently inflicted injury constituted a deprivation within the meaning of the fourteenth amendment. *Id.* at 536-37. It was this narrow aspect of *Parratt* that led Justice Powell to concur only in the result, and that was overruled five years later by the companion cases Daniels v. Williams, 474 U.S. 327 (1986), and Davidson v. Cannon, 474 U.S. 344 (1986). *See infra* notes 84-94 and accompanying text.

49. "Standing alone, however, these three elements do not establish a violation of the Fourteenth Amendment. Nothing in that Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations 'without due process of law.' " 451 U.S. at 537 (citation omitted).

50. As the Court noted earlier, it had "never directly addressed the question of what process is due a person when an employee of a State negligently takes his property." 451 U.S. at 537.

51. *Id.*

52. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (pre-termination evidentiary hearing necessary to provide welfare recipient with procedural due process).

because established state procedures authorized the particular deprivation.[53]

The Court pointed out that in other cases where the state had to act quickly, or where it was simply impracticable to provide "meaningful predeprivation process," the Court had sustained the constitutionality of statutory schemes that dispensed with predeprivation notice and opportunity to be heard, as long as they provided a "meaningful means by which to assess the propriety of the State's action at some time *after* the initial taking."[54] It concluded that the provision of a hearing "at a meaningful time and in a meaningful manner," the essence of due process, requires only that "some kind of hearing" be granted "before a State *finally* deprives a person of his property interests."[55] Although the latter group of cases, finding postdeprivation process constitutionally adequate, involved situations where predeprivation process was impracticable as a result of legitimate, authorized and established state procedures, the Court applied the rationale of these cases to random and unauthorized state action as well. The extension of the principle holding postdeprivation process was based on the following relationship: where authorized state action resulting in a deprivation must, of necessity, take place quickly, predeprivation process is *impracticable*, where random and unauthorized state action results in a deprivation, predeprivation process, from the state's perspective, is *impossible*.[56]

Turning back to the facts before it, the Court concluded that because Nebraska *did* offer postdeprivation process, in the form of a statutory tort claim against the state, it provided constitutionally adequate process. Taylor had been deprived of property, but *not* without due process of law.[57] The

53. *Parratt*, 451 U.S. at 537-38. The Court discussed Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950) (judicial settlement of private trust accounts require personal notice); Fuentes v. Shevin, 407 U.S. 67 (1972) (prejudgment replevin statute); Bell v. Burson, 402 U.S. 535 (1971) (revocation of driver's license when driver's livelihood involved).

54. 451 U.S. at 538-40 (emphasis added). The Court examined North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (summary seizure and destruction of allegedly unwholesome food); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (summary seizure and destruction of drugs); Fahey v. Mallonee, 332 U.S. 245 (1947) (seizure of bank's assets); Bowles v. Willingham, 321 U.S. 503 (1944) (emergency rent control orders to landlords).

55. 451 U.S. at 540 (emphasis added). The procedural due process focus of *Parratt* has been partially responsible, along with the continued vitality of Monroe v. Pape, 365 U.S. 167 (1961), for the courts of appeals' unanimous refusal to extend the holding of *Parratt* to claims based on the Bill of Rights or substantive due process. Justice Blackmun had raised the substantive due process issue in his concurring opinion, 451 U.S. at 545, but the majority did not speak to it.

56. *Id.* at 540-41. Judge Jones of the Sixth Circuit has questioned this aspect of *Parratt*'s rationale: "It is not the responsibility of an intermediate court to challenge the wisdom of applying an exception developed to promote vital governmental interests to cases such as *Parratt* which involve lawless conduct." Wilson v. Beebe, 770 F.2d 578, 595 (6th Cir. 1985) (en banc) (separate opinion). One commentator has argued that the extension of the postdeprivation holdings into the random and unauthorized context is legitimate only if the burden of proof in the postdeprivation hearing is placed on the defendant state official. *See* Note, *supra* note 42, at 225-31.

57. *Parratt*, 451 U.S. at 543-44. There were four other opinions; eight Justices concurred

Court cited two previous cases, *Bonner v. Coughlin*[58] and *Ingraham v. Wright*,[59] to support its conclusion. *Bonner v. Coughlin*, like *Parratt*, involved a random and unauthorized deprivation. The *Bonner* plaintiff charged that the defendant-prison guards had negligently left his cell open, thereby facilitating the theft of his trial transcripts.[60] Then-Judge Stevens concluded that there was no due process violation because under state law, "the plaintiff is entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards."[61] *Ingraham v. Wright*, on the other hand, involved a challenge to a *state-authorized* practice, the infliction of corporal punishment in some of Florida's public schools.[62] As in *Parratt*, the *Ingraham* Court had found the first three elements of a due process claim satisfied, but held that "the traditional common law remedies are fully adequate to af-

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with various qualifications in the reasoning of the Rehnquist opinion, while Justice Powell concurred only in the result. Justice Blackmun, joined by Justice White, expressed his understanding that the decision did not apply to deprivations of life or liberty, to claims alleging violations of substantive due process rights, or to intentional deprivations of property when the state is able to provide predeprivation process. *Id.* at 545-46. Justice Marshall agreed that for negligent property deprivations, adequate postdeprivation process would be constitutional, but argued that Taylor should be allowed to recover for a fourteenth amendment violation because the prison officials had not informed him of the tort claims procedure. *Id.* at 554-56. Justice Powell agreed that Taylor had not suffered a deprivation of his property without due process of law, but on the ground that negligent conduct could not "constitute a deprivation within the meaning of the Fourteenth Amendment." *Id.* at 546-54. Justice Stewart also expressed doubts whether negligence could work a deprivation. *Id.* at 544-45. Powell's construction of "deprive" became the majority view five years later. *See infra* notes 83-93 and accompanying text.

58. 517 F.2d 1311, 1312 (7th Cir. 1975), *modified*, 545 F.2d 565 (7th Cir. 1976) (en banc), *cert. denied*, 435 U.S. 932 (1978).

59. 430 U.S. 651 (1977).

60. *See Parratt*, 451 U.S. at 541.

61. *Id.* at 542, (quoting *Bonner*, 517 F.2d at 1319).

62. *Ingraham*, 430 U.S. 651, 672-74, involved core liberty interests, to which Justices Marshall and White would not have applied *Parratt*. 451 U.S. at 545. The lower courts, however, have extended the postdeprivation concept to procedural due process challenges involving random and unauthorized deprivations of liberty and life, relying on *Parratt*'s focus on the procedural component of due process, as well as its invocation of *Ingraham*. *See e.g.*, Burch v. Apalachee Comm. Mental Health Services, 804 F.2d 1549, 1554-56 (11th Cir. 1986); Wilson v. Beebe, 770 F.2d 578, 584 (6th Cir. 1985) (en banc) (liberty); Toney-El v. Franzen, 777 F.2d 1224, 1227 (7th Cir. 1985) (liberty), *cert. denied*, 476 U.S. 1178 (1986); Rittenhouse v. DeKalb County, 764 F.2d 1451, 1457 (11th Cir. 1985) (life), *cert. denied*, 475 U.S. 1014 (1986); Thibodeaux v. Bordelon, 740 F.2d 329, 335-38 (5th Cir. 1984) (liberty); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1351-52 (9th Cir. 1981) (liberty), *aff'd on other grounds sub nom.*, Kush v. Rutledge, 460 U.S. 719 (1983); De Smet v. Snyder, 653 F. Supp. 797, 806 (E.D. Wis. 1987); King v. Pace, 575 F. Supp. 1385, 1388 n.1 (D. Mass. 1983) (life); Temple v. Marlborough Div. of the Dist. Court Dep't., 395 Mass. 117, 126 (1985) (liberty); Enright v. School Directors of Milwaukee, 118 Wis.2d 236 (1984) (life), *cert. denied*, 469 U.S. 966 (1984); Cline v. United States Dep't of Justice, 525 F.Supp. 825, 828 (D.S.D. 1981) (5th amendment liberty). *But see* Wilson v. Beebe, 770 F.2d 578, 595-97 (6th Cir. 1985) (en banc) (opinion concurring in part and dissenting in part) (not applicable to liberty). Brewer v. Blackwell, 692 F.2d 387, 394-95 (5th Cir. 1982) (not applicable to intentional deprivations of liberty); Wakinekona v. Olim, 664 F.2d 708, 715 (9th Cir. 1981) (not applicable to liberty), *rev'd on other grounds*, 461 U.S. 238 (1983). *See generally*, Nahmod, *Due Process, State Remedies, and Section 1983*, 34 U. KAN. L. REV. 217, 225-29; Moore, *Parratt, Liberty and the Devolution of Due Process: A Time for Reflection*, 13 WEST ST. L. REV. 201, 221 n.174, 221-34 (1985); Note, *supra* note 14, at 618-23.

ford due process."[63]

Although *Parratt* and the genre of unauthorized deprivations have been characterized as *procedural* due process cases, in fact they may be better understood as *substantive* due process cases.[64] The typical unauthorized deprivation claim really represents a hybrid of substantive and procedural due process norms. The "pure" procedural due process claimant concedes the legitimacy of the government's goals, challenging only the timing, fairness or accuracy of the procedures employed to implement the deprivation.[65] A suit challenging the constitutionality of a public school's use of corporal punishment, for example, might concede that under certain, specific circumstances the state can properly impose such punishment, but assert that the procedures being employed to determine whether those circumstances have occurred are deficient.

Conversely, a "pure" substantive due process claim asserts that the government's end is inherently illegitimate and unconstitutional, regardless of the procedures that may precede or follow the deprivation.[66] Here, the corporal punishment claimant would challenge the legitimacy of the practice itself. In between these polar examples, the due process clause embodies guarantees of "general substantive freedom from arbitrary and unreasonable restraints on 'liberty' and 'property.' "[67] These norms give rise to the hybrid claims, which allege neither violations of express constitutional rights nor state actions which "shock the conscience,"[68] but which nevertheless challenge the state

63. *Ingraham*, 430 U.S. at 672.

64. *E.g.*, Daniels v. Williams, 474 U.S. 327, 342 n.19 (1986) (Stevens, J., concurring in the result) (suggesting that process is an inappropriate remedy for an officer's negligent conduct); McClary v. O'Hare, 786 F.2d 83, 86 n.3 (2d Cir. 1986)pure procedural due process is not applicable to a negligent deprivation, which "would be unjustified regardless of what procedures preceded it"); Wilson v. Beebe, 770 F.2d 578, 594-95 (6th Cir. 1985) (en banc) (opinion concurring and dissenting in part) (discussing difficulty of analyzing unauthorized deprivations as procedural due process claims); Enright v. School Directors of Milwaukee, 118 Wis. 2d 236, 242 (1984) (*Parratt* did not indicate whether it concerned substantive or procedural due process"), *cert. denied*, 469 U.S. 966 (1984); Wells & Eaton, *supra* note 4, at 215-21; Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 *Yale* L.J. 71, 100 (1984) (*Parratt*'s "procedural due process analysis is defective" because it does not fit the circumstances of the case); Monaghan, *supra* note 14, at 984-86 (procedural due process explanation of *Parratt* "will not work"); Note, *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 102 (1982) ("although framed as a procedural due process case [*Parratt*] was arguably a substantive challenge to the deprivation.").

65. *E.g.*, Carey v. Piphus, 435 U.S. 247, 259-60 (1978); *Daniels*, 474 U.S. at 338-40 (Stevens, J., concurring in judgment); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 663 (2d ed. 1988); Redish, *supra* note 64, at 100.

66. *E.g.*, *Daniels*, 474 U.S. at 330-32; *Parratt*, 451 U.S. at 545 (Blackmun, J., concurring); Wells & Eaton, *supra* note 4, at 215.

67. Knudson v. City of Ellensburg, 832 F.2d 1142, 1144 (9th Cir. 1987) (procedural due process protects against "unjustified deprivations"); Joslyn v. Kinch, 613 F. Supp. 1168, 1179 (D.R.I. 1985) ("[s]ubstantive due process protects a person from another's arbitrary and capricious actions in depriving him of his property"); Monaghan, *supra* note 14, at 985. *Accord* Comment, *Parratt v. Taylor: Don't Make a Federal Case out of It*, 63 B.U. L. REV. 1187, 1218 (1983) (*Parratt* implies a "*substantive* right to be compensated for arbitrary or irrational deprivations of property") (emphasis in original).

68. Haag v. Cuyahoga County, 619 F. Supp. 262, 278 (N.D. Ohio 1985), *aff'd mem.*, 798

action as illegitimate in itself.[69] The intentional and unwarranted destruction of a person's property by a police officer, for example, could not be rendered constitutional by a full predeprivation hearing because the deprivation proposed would be arbitrary and unreasonable. Yet under *Parratt*, because the deprivation did not rise to the level of egregiousness required to state a pure, substantive claim, postdeprivation process remains constitutionally significant. That is, the *actual* injury, though complete, only becomes a complete *constitutional* injury if the state "fail[s] to provide an appropriate procedural response."[70]

In holding that unauthorized deprivations become full-blown constitutional violations only when the state fails to provide an adequate postdeprivation remedy, the *Parratt* Court placed this genre of claims in the procedural corner. Consequently, *Parratt* and postdeprivation process principles have almost invariably been held inapplicable to claims based on substantive due process or on constitutional guarantees independent of the due process clause; in those cases, the deprivation completes the violation, eviscerating the curing capacity of postviolation state process.[71] The requirement of an adequate state remedy, however, is unaffected by the categorization of the hybrid or unauthorized claim. The question remains: under what circumstances, if any, may a plaintiff who has suffered a deprivation of life, liberty, or property by state action be denied redress?[72]

F.2d 1414 (6th Cir. 1986) (noting possibility of hybrid claim that alleges substantive due process violation even though conduct does not shock the conscience; state must provide adequate state remedy to redress such a deprivation). *Cf.* Redish, *supra* note 64, at 100; Wells & Eaton, *supra* note 4, at 219.

69. *Parratt* may have been such a claim. In *Parratt* the claimant did *not*, as a purely procedural due process claimant would, concede the legitimacy of the prison warden's negligent action. Rather, he challenged the legitimacy of the action itself; no "procedures" could have rendered that action legitimate, so the claim approximated a substantive due process challenge. *Cf.* Hewitt v. City of Truth or Consequences, 758 F.2d 1375, 1379-80 (10th Cir. 1985) *cert. denied*, 474 U.S. 844 (1987) (where deprivation does not shock the conscience, state's failure to provide adequate remedy is viewed as the "abuse of power," completing the substantive constitutional violation).

70. *Daniels*, 474 U.S. 339 (Stevens, J., concurring.)

71. *See* Morello v. James, 810 F.2d. 344, 348 (2d Cir. 1987). *See also* Sizemore v. Welleford, 829 F.2d 608, 611 (7th Cir. 1987); Tavarez v. O'Malley, 826 F.2d 671, 675 (7th Cir. 1987); Williams v. St. Louis County, 812 F.2d 1079, 1081 n.3 (8th Cir. 1987); Hall v. Sutton, 755 F.2d 786, 787-88 (11th Cir. 1985). *But see* Mann v. City of Tucson Dep't of Police, 782 F.2d 790, 799 (9th Cir. 1986) (concurring opinion) (*Parratt* should apply to all random and unauthorized deprivations of rights actionable under section 1983); Gumz v. Morrissette, 772 F.2d at 1409 (Easterbrook, J., concurring) (courts should rethink inapplicability of *Parratt* to substantive constitutional guarantees). *Cf.* Rodman v. Aeh, 815 F.2d 705 (6th Cir. 1987) (alternative holding) (failure to plead inadequacy of state remedies defeats fourth amendment claim); Curry v. Baker, 802 F.2d 1302, 1316-17 (11th Cir. 1986) (discussing adequacy of state remedies in an illegal ballot case alleging substantive due process violation). The Supreme Court has not addressed the question, but has impliedly accepted the judgment of the courts of appeals. *See infra* note 97.

72. As will be developed in Section II, adequacy is comprised of substantive and procedural components. Its dual nature is related to this hybrid composition of the protection

In examining the adequacy of the state remedy before it, the *Parratt* Court stated:

> [T]he State of Nebraska has provided respondent with the means by which he can receive redress for the deprivation. The State provides a remedy to persons who believe they have suffered a tortious loss at the hands of the State. . . . Through this tort claims procedure the State hears and pays claims of prisoners. . . . It is argued that the State does not adequately protect the respondent's interests because it provides only for an action against the State as opposed to its individual employees, it contains no provisions for punitive damages, and there is no right to trial by jury. Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under section 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process. The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process.[73]

This passage instructs the lower courts not to find state remedies inadequate simply because the state remedy may be less advantageous than the federal remedy. But it fails to explain the extent to which other potential differences between the rules and procedures applied in a federal action under section 1983 and those applied in a state administrative claims procedure or tort action should affect the adequacy determination.[74] This silence is problematic because several common discrepancies, such as immunities, rules of pleadings, damage measurements, and attorneys fees, may be determinative of the case's outcome. That is, the result reached in the state forum may depend on a variant substantive or procedural state rule. *Parratt* was an easy case, because Taylor would at least have an opportunity to be fully compensated under state law. A hard case arises when a variant, extrarestrictive state law rule or procedure has an outcome-determinative effect, such that the claimant does not have a meaningful opportunity for compensation. Where such a procedure is deemed adequate, the fourteenth amendment's guarantee of due process is undermined.[75] Thus, it is necessary to examine seriously the requirements for adequate state remedies, the "content of adequacy."

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against unauthorized deprivations provided by the due process clause. *See infra* notes 243-81 and accompanying text.

73. *Parratt*, 451 U.S. at 543-44.

74. "[T]he *Parratt* solution . . . is fatally flawed as presently articulated . . . [T]he Court has not yet indicated what, if any, constitutional restrictions it will place on the state tort rules used to decide these cases. The opinion . . . provided no standards, and gave no hints on how this question should be answered." Wells & Eaton, *supra* note 4, at 210-14.

75. *See* Smolla, *supra* note 42, at 871 (*Parratt* doctrine "places enormous definitional pressure on the meaning of 'adequate' "); Wells & Eaton, *supra* note 4, at 213-14. *See also supra* note 16 and accompanying text.

B. Post-Parratt Developments

Parratt left open several obvious questions. Should the adequate postdeprivation remedy analysis apply when the official acted intentionally rather than negligently, when the injury is to an interest in life or liberty as opposed to property, or when the actor is federal rather than state, triggering the fifth amendment's due process clause instead of the fourteenth's? Precisely what type of state action constitutes an established state procedure? Can pure and simple negligence by a state actor work a constitutional deprivation?

In the several years since *Parratt*, the Supreme Court has spoken to the issue of random and unauthorized deprivations on three-and-a-half occasions.[76] In *Hudson v. Palmer*,[77] the Court examined whether *Parratt* should apply to claims of intentional, rather than negligent, deprivations of property by state officials.[78] Palmer, an inmate in a Virginia state prison, alleged in a section 1983 action that Hudson, a prison officer, had conducted a shakedown search of his cell solely to harass him and that during the search, the prison officer had intentionally destroyed several noncontraband items of Palmer's personal property, thereby violating Palmer's fourteenth amendment due process rights.[79] The Supreme Court unanimously affirmed the lower court's extension of *Parratt* to intentional deprivations of property,[80] holding that before a fourteenth amendment violation could be found, postdeprivation state remedies must be deemed inadequate. As in *Parratt*, the "impracticability" of predeprivation process controlled the Court's holding. Then-Chief Justice Burger explained:

> The underlying rationale of *Parratt* is that when deprivations of

76. The "half" refers to Weiss v. Lehman, 642 F.2d 265 (9th Cir. 1981), *vacated and remanded*, 454 U.S. 807 (1981), *on remand*, 676 F.2d 1320 (1982), *cert. denied*, 459 U.S. 1103 (1982). After a *Bivens* case was remanded to the court of appeals for reconsideration in light of *Parratt*, the court found an adequate remedy in the Federal Tort Claims Act. The court, however, failed to address the issue of whether adequate postdeprivation process should be capable of negating a fifth amendment due process claim. Though textually and doctrinally there would be no persuasive reason to deny parallelism, *e.g.*, Paul v. Davis, 424 U.S. 693, 702 n.3 (1976), the policy judgments driving *Parratt* — federalism and the federal courts' overburdened dockets — are meaningless in the *Bivens* context since the plaintiff remains in federal court with a federal remedy against a federal defendant either way. *See* Nahmod, *supra* note 62, at 237 (*Parratt*'s "federalism concerns . . . are surely not relevant to *Bivens* actions"); Note, *supra* note 4, at 1061 ("in *Bivens*-type litigation, the federalism concerns that arise in suits against state officials are irrelevant" and thus the rationale for "contracting the underlying [due process] rights" in the section 1983 context may be inappropriate). *Parratt*, however, has been applied to fifth amendment cases. *See, e.g.*, Rutherford v. United States, 702 F.2d 580, 583 (5th Cir. 1983); Slade v. Petrovsky, 528 F. Supp. 99, 100-01 (M.D. Penn. 1981); Cline v. United States Dep't of Justice, 525 F. Supp. 825, 828 (W.D.S.D. 1981).

77. 468 U.S. 517 (1984).

78. When *Hudson* was decided, the circuits had split four to three on this question, four extending *Parratt* to intentional conduct and three restricting it to negligence. *Id.* at 531 n.10.

79. *Id.* at 520.

80. On the fourth amendment claim the Court reversed, five to four, holding that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell," thereby precluding fourth amendment protection. *Id.* at 526.

> property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur. We can discern no logical distinction between negligent and intentional deprivations of property insofar as the 'practicability' of affording predeprivation process is concerned. The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. . . . Accordingly, we hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available.[81]

The Court resisted the plaintiff's efforts to blur the distinction between the defendant official and the state itself. The plaintiff had argued that predeprivation process was *not* impracticable here because the defendant *himself* could have granted plaintiff a "hearing" in advance of the deprivation. The Court responded that the "controlling inquiry" goes to the *state's* ability to provide predeprivation process, not the individual employee's.[82] A com-

81. *Id.* at 533.

82. *Id.* at 534. The lower courts have had a difficult time distinguishing between established state procedures and random and unauthorized conduct. The confusion stems from disagreement over whether the dispositive factor is the ability/inability to provide predeprivation process or the authorized/unauthorized nature of the defendant's actions, and from *Parratt*'s silence on the status of deprivations caused by supervisory-level state employees. Compare the concurring and dissenting opinions in Vail v. Board of Educ. of Paris Union School Dist. No. 95, 706 F.2d 1435, 1439-56 (1983), *aff'd by an equally divided court*, 466 U.S. 377 (1984). In some cases, the debate has taken on the attributes of the analysis utilized in Pembauer v. City of Cincinnati, 475 U.S. 469, 480 (1986) (single decision by local officer with final policy-making authority qualifies as policy for purposes of municipal liability under section 1983).

Thus far five circuits have held that where a high enough official or entity is responsible for the deprivation, *Parratt* is inapplicable even though the conduct was unauthorized. *See* Tavarez v. O'Malley, 826 F.2d 671, 677 (7th Cir. 1987) (not all *ultra vires* conduct is random and unauthorized; acts of high-level officials are established state procedures even if unauthorized by statute or ordinance); Messick v. Leavins, 811 F.2d 1439, 1443 (11th Cir. 1987) (decision by city commissioner, sufficient to satisfy *Pembauer* policy requirement, renders deprivation authorized and established), *reh'g denied*, 817 F.2d 761 (11th Cir. 1987); Dwyer v. Regan, 777 F.2d 825, 832 (2d Cir. 1985) (*Parratt* inapplicable to "decisions made by officials with final authority over significant matters, which contravene the requirements of a written municipal code"), *modified*, 793 F.2d 457 (1986); Stana v. School Dist. of Pittsburgh, 775 F.2d 122, 130 (3d Cir. 1985) (*Parratt* is inapplicable when an official acts "in a supervisory position, . . . within the area of his authority, [because] the governmental entity was in a position to provide some predeprivation process"); Wolfenbarger v. Williams, 774 F.2d 358, 365 (10th Cir. 1985) (*Parratt* inapplicable to "[o]fficial acts initiated and controlled by a district attorney."), *cert. denied*, 475 U.S. 1065 (1986). *Cf.* Bretz v. Kelman, 773 F.2d 1026, 1031-32 (9th Cir. 1985) (en banc) (*Parratt* inapplicable to malicious prosecution conspiracy), *cert. denied by* Holloway v. Walker, 479 U.S. 984 (1986).

Two circuits have rejected this *Pembauer*-like theory of *Parratt*'s reach. *See* Vinson v. Campbell County Fiscal Court, 820 F.2d 194, 199 (6th Cir. 1987); National Communications Sys., Inc. v. Michigan Pub. Serv. Comm'n, 789 F.2d 370, 372 (6th Cir. 1986), *cert. denied*, 479 U.S. 852 (1986); Yates v. Jamison, 782 F.2d 1182, 1184-85 (4th Cir. 1986) (deprivation caused

plaint alleging an intentional unauthorized deprivation by a state official, therefore, like complaints alleging a negligent deprivation, must also allege the inadequacy postdeprivation state remedies to state a constitutional claim.

Turning to the adequacy of Virginia's remedies, the Court accepted the lower court's assertion that adequate state remedies were available.[83] Palmer had argued that state relief was uncertain because Hudson might be granted sovereign immunity, but the Court found this complaint "unconvincing." It thereby deftly avoided the necessity of resolving the tension between immunities and adequacy.

In the companion cases *Daniels v. Williams*[84] and *Davidson v. Cannon*,[85] the Supreme Court further limited procedural due process in the context of unauthorized drprivations. The Court affirmed the lower courts' holdings that the *lack* of a predeprivation state remedy does not mandate access to federal courts when a *negligent* deprivation of a *liberty* interest has occurred.[86]

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by city council in violation of state statutes and city code was random and unauthorized and *Parratt* therefore applies). *See generally*, Monaghan, *supra* note 14, at 994; Moore, *supra* note 62, at 217 n.137; Rittenhouse v. DeKalb County, 764 F.2d 1451, 1456 n.5 (11th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986). Three circuits have held that a policy-like adherence to unauthorized conduct can rise to the level of established state procedure, thereby disabling *Parratt*. *See* Brower v. Inyo County, 817 F.2d 540, 544-45 (9th Cir. 1987) *cert. granted*, 108 S. Ct. 2869 (1988); Platt v. MacDougall, 773 F.2d 1032, 1036 (9th Cir. 1985) (en banc); Bacon v. Patera, 772 F.2d 259, 264 (6th Cir. 1985); Hicks v. Feeney, 770 F.2d 375, 378-79 (3d Cir. 1985). *See also*, Gregory v. Town of Pittsfield, 470 U.S. 1018 (1985), *denying cert.* to 479 A.2d 1304 (Maine 1984) (O'Connor, J., joined by Brennan and Marshall, JJ., dissenting from denial of cert.) *Contra* Wolfenbarger, 774 F.2d at 367 (dissenting opinion) (characterizing local officials as policymakers to avoid random and unauthorized category "is not responsive to *Hudson* and *Logan*" and "destroys the balance between state and federal courts"). *Cf. Pembauer*, 475 U.S. at 485-87 (White, J., concurring) (policy-like adherence to unauthorized conduct cannot always establish municipal liability).

83. The Court stated, "it is evident . . . that the State has provided an adequate postdeprivation remedy." 468 U.S. at 536. Since *Parratt*, the Court has used the existence of adequate federal postdeprivation remedies to restrict the availability of other types of suits against the state and federal governments. *See* Bush v. Lucas, 462 U.S. 367 (1983) (federal civil service remedy adequate, though not identical to *Bivens*-type damage action); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (Congress can supplant federal 1983 relief where the statutory remedy is "sufficiently comprehensive"). *See also* Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987) (sustaining section 1983 claim under *Sea Clammers* analysis). *See generally*, Note, *Two Approaches to Determine when an Implied Cause of Action Under the Constitution is Necessary: The Changing Scope of the Bivens Action*, 19 GA. L. REV. 683, 702-08 (1985); Note, *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 91, 290-99 (1981) (discussing *Sea Clammers*).

84. 474 U.S. 327 (1986), *aff'g* 748 F.2d 229 (4th Cir. 1984) (en banc). In *Daniels* the plaintiff, an inmate, claimed that defendant's negligence in leaving a pillow in a stairwell causing him to slip and fall constituted a violation of a fourteenth amendment liberty interest.

85. 474 U.S. 344 (1986), *aff'g* Davidson v. O'Lone, 752 F.2d 817 (3d Cir. 1984) (en banc). In *Davidson*, the plaintiff, also an inmate, was the subject of a brutal attack by fellow inmates. Two days earlier the plaintiff had warned prison officials of the likelihood of such an attack. Plaintiff claimed that the negligent failure of the prison to prevent the attack resulted in eighth and fourteenth amendment violations. In both *Daniels* and *Davidson* the circuit court of appeals held that mere negligence could not result in a fourteenth amendment violation.

86. *Daniels*, 748 F.2d at 231-32; *Davidson*, 752 F.2d at 829. In *Daniels*, the Court also ruled that even if the plaintiff had suffered a deprivation of liberty *Parratt* would apply and that

In *Daniels* eight members of the Supreme Court voted to overrule the assumption in *Parratt* that "mere" negligence by a state official may result in a fourteenth amendment deprivation of life, liberty or property.[87] (*Parratt* had expressly addressed the issue of negligent state of mind only as it pertained to the proper construction of section 1983.)[88] Justice Rehnquist reasoned that the Constitution is directed at "the large concerns of the governors and the governed," not at commonplace "injuries that attend living together in society."[89] The latter, Rehnquist noted, are the subject of traditional tort law, and failure to distinguish between the two concerns would impermissibly convert the fourteenth amendment into "a font of tort law to be superimposed upon whatever systems may already be administered by the States."[90] The Court feared that the establishment of an action under the fourteenth amendment negligent deprivation would "not only trivialize, but grossly . . . distort the meaning and intent of the Constitution."[91] By limiting fourteenth amendment claims to situations where an official or the state acted in a *deliberate* or highly reckless manner,[92] the Court sought to keep the federal judiciary out of mundane matters better addressed by state tort law.

Since both petitioners failed to meet the intent threshold articulated by the Court in *Daniels*, the majority concluded that it did not have to consider whether the *Parratt* adequacy test would apply in the context of liberty interests.[93] Justice Stevens, concurring only in the judgment, disagreed with the majority on the level of intent required and found that both petitioners had

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an adequate postdeprivation remedy was available. 748 F.2d at 232. In *Davidson*, two judges concurring in the *en banc* decision concluded that even if negligence could work a deprivation of liberty, *Parratt* would apply and that plaintiff had an adequate state remedy notwithstanding the absolute immunity of the defendants under state law. 752 F.2d at 831-32. *See infra* note 317 and accompanying text.

87. 106 S.Ct. at 665. Justices Brennan, Blackmun, and Marshall dissented from the result in *Davidson*, arguing that the defendants' failure to protect the plaintiff from attack rose to the level of recklessness or deliberate indifference and that such conduct could constitute a deprivation. *Davidson*, 474 U.S. at 349 (Brennan, J., dissenting), *id.* at 356-60 (Blackmun, Marshall, JJ., dissenting). The *Daniels/Davidson* majority opinion, while not reaching the issue of recklessness in *Davidson*, did say that "the difference between one end of the spectrum, negligence, and the other, intent, is abundantly clear." 474 U.S. at 335. *See* Vinson v. Campbell County Fiscal Court, 820 F.2d 194, 199-200 (6th Cir. 1987) (gross negligence constitutes deprivation after *Daniels*); McClary v. O'Hare, 786 F.2d 83, 85 (2d Cir. 1986) (holding allegations of recklessness sufficient to state a claim after *Daniels/Davidson*). On the relationship of recklessness and constitutional deprivations, see Wells & Eaton, *supra* note 4, at 241-46.

88. *See supra* notes 46-47 and accompanying text.

89. 474 U.S. at 332. *See* Wells & Eaton, *supra* note 4, at 239-41 (negligence is "far removed from the Constitution's focus on individual autonomy against abuse of government power").

90. *Id.* (quoting Paul v. Davis, 424 U.S. 693 (1976)).

91. *Parratt*, 451 U.S. at 545 (Stewart, J., concurring) (*quoted in Daniels*, 474 U.S. at 331).

92. Justices Blackmun and Marshall dissented from *Davidson* also on the ground that even though negligence "ordinarily" will not amount to a deprivation, in the case of a state's failure to protect one prisoner from another, it could because upon incarceration the state denies prisoners of the means to defend themselves and thereby assumes "sole responsibility" for their physical security. *Davidson*, 474 U.S. at 349-55.

93. *Daniels*, 474 U.S. at 331 n.1; *Davidson*, 474 U.S. at 347-48.

suffered the deprivation of a fourteenth amendment liberty interest.[94] Stevens, therefore, had to consider adequacy under *Parratt* with respect to petitioners' liberty interests. He distinguished "three different kinds of constitutional protection" within the due process clause: the incorporated provisions of the Bill of Rights, substantive due process, and procedural due process. Alternative state postdeprivation remedies, he argued, are wholly irrelevant in assessing the sufficiency of federal claims alleging violations of the Bill of Rights or substantive due process.[95] Conversely, postdeprivation process is relevant to procedural due process cases because when the state provides "an appropriate procedural response" to a random and unauthorized deprivation, there is no loss.[96] Supplying the victim of a procedural due process violation with procedure makes her "whole." Justice Stevens characterized petitioners' claims as allegations of procedural due process violations of liberty interests, and concluded that *Parratt* was applicable.[97] Stevens found no due process violation because the states' alternative remedies were adequate under *Parratt*.[98]

Perhaps the most significant post-*Parratt* development came in *Logan v. Zimmerman Brush Company*,[99] decided less than one year after *Parratt*. Petitioner filed a complaint with the Illinois Fair Employment Practices Commis-

94. 474 U.S. at 336. Justice Stevens focused on "the victim's infringement or loss" rather than the "actor's state of mind." He noted that the "harm to a prisoner is the same whether a pillow is left on a stair negligently, recklessly, or intentionally." *Id.* at 341.

95. *Id.* at 336-38. In the wake of *Parratt*'s silence on this point, the courts of appeals have unanimously reached the same conclusion as Justice Stevens. *See supra* note 71 and accompanying text. It can be inferred that the Court as a whole agrees that *Parratt* has no application in either the incorporation or substantive due process contexts. Since *Parratt*, the Court has had several cases before it involving section 1983 claims for violations of rights protected by the first eight amendments and substantive due process. Nowhere has it intimated that *Parratt* would have any relevance to these claims. *See* Whitley v. Albers, 475 U.S. 312, (1986) (eighth amendment, substantive due process); Tennessee v. Garner, 471 U.S. 1, (1985) (fourth amendment wrongful death suit for use of deadly force); Smith v. Wade, 461 U.S. 30 (1983) (punitive damages upheld in eighth amendment claim); Youngberg v. Romeo, 457 U.S. 307 (1982) (substantive due process rights of involuntarily committed mentally retarded persons). *But see* Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194-97 & n.14 (1985) (*Parratt* postdeprivation logic applied to fifth amendment takings clause case).

96. 474 U.S. at 336-38.

97. *Id.* at 338-40. The majority of the courts of appeals have taken this position. *See supra* note 62. This Comment assumes that the *Parratt* doctrine should apply to all three entitlements protected by procedural due process. *But see* Moore, *supra* note 62, at 239-43, 251-59 (*Parratt* cannot be extended to liberty because it "was based on assumptions which could only be made due to the fungible nature of property"); *Ingraham v. Wright*, 430 U.S. 651 at 695-700 (White, J., dissenting), and 700-02 (Stevens, J., dissenting) (comparing liberty and property deprivations).

98. 474 U.S. at 341-42. Justice Stevens found the alternative state remedies adequate notwithstanding the absolute immunity of the defendants in *Davidson*; his analysis on this point will be discussed in detail in section II.B. *See infra* notes 318-319 and accompanying text. Justices Blackmun and Marshall, dissenting in *Davidson*, reached the adequacy issue after finding a deprivation, *see supra* note 92, and assumed arguendo that *Parratt* could apply in the liberty context. They disagreed with Justice Stevens and found no meaningful postdeprivation remedy. *Davidson*, 474 U.S. at 336-38.

99. *Logan*, 455 U.S. 422 (1982).

sion, pursuant to a state statute that established a detailed administrative process for the adjudication of claims alleging employment discrimination based on physical handicaps.[100] The statute mandated that complaints be filed with the Commission within 180 days of the alleged unlawful occurrence and that the Commission hold a fact-finding conference within 120 days of the filing.[101]

Logan filed his complaint with the Commission five days after he was discharged from his job at Zimmerman Brush, alleging that his dismissal was due to a physical handicap.[102] The Commission, however, inadvertently failed to schedule a fact-finding conference until after the statutory time limit.[103] At the conference, the employer, Zimmerman Brush, moved to dismiss because of the scheduling error, and the Commission refused. Zimmerman Brush then sought an original writ of prohibition in the Illinois Supreme Court that would direct the Commission to dismiss Logan's complaint.[104]

The Illinois Supreme Court found that the State Legislature intended that the 120 day hearing requirement be jurisdictional, rejected Logan's due process claim, and dismissed the case.[105] The United States Supreme Court reversed. Seven justices held[106] that the employment discrimination filing procedure was itself a form of property[107] worthy of due process protections. Justice Blackmun stated that the right to a statutory claims procedure was "an individual entitlement grounded in state law, which cannot be removed except 'for cause.' "[108] The Court held that the Illinois Supreme Court's construction of the statutory 120-day hearing requirement had deprived Logan of property without due process because it had irreversibly divested him of the ability to have the Commission consider the merits of his claim.[109] Applying the familiar *Mathews v. Eldridge*[110] due process balancing test,[111] the Court noted that

100. Illinois Fair Employment Practices Act, Ill. Rev. Stat., ch. 48, par. 851 (repealed 1980). *See Logan*, 455 U.S. at 425 n.1.

101. Ill. Rev. Stat., ch. 48, par. 858(a), (b) (repealed 1980).

102. 455 U.S. at 426.

103. *Id.*

104. *Id.*

105. *Id.* at 426-28. Logan also raised equal protection claims.

106. *Id.* at 428-38. The majority opinion, written by Justice Blackmun, was joined by then-Chief Justice Berger and Justices Brennan, Marshall, White, Stevens and O'Connor. Justice Blackmun wrote a concurring opinion based on equal protection, which Justices Brennan, Marshall, and O'Connor joined. *Id.* at 438-42. Justices Rehnquist and Powell concurred in the judgment on a narrow equal protection ground. *Id.* at 443-44.

107. The Illinois Supreme Court had concluded that the State Legislature could mold the property rights it creates with reasonable procedures for their adjudication and that since the 120-day hearing requirement was a reasonable procedure, Logan's entitlement could be made to depend on the Commission's compliance for its fruition. *Id.* at 431-32. *See generally* Smolla, *supra* note 42, at 860-61.

108. *Logan*, 455 U.S. at 429-31.

109. *Id.* at 433-35. The statute was deficient in that it failed to provide corrective process to undo the Commission's negligence. Similarly, where a state fails to provide adequate postdeprivation process to "correct" the unauthorized deprivations of its employees, it denies due process.

110. 424 U.S. 319 (1976).

the private interests impaired by the requirement were substantial, while the government interests were insubstantial. The Court also noted that the challenged procedure "present[ed] an unjustifiably high risk that meritorious claims will be terminated" since claims such as Logan's would be dismissed randomly and arbitrarily.[112]

Zimmerman Brush argued that the Commission's negligence alone had cause the deprivation, rendering predeprivation process impracticable, and thereby remitting plaintiff to available state tort remedies under *Parratt*.[113] The Court, however, held the state system, rather than the Commission, responsible for the destruction of plaintiff's property interest.[114] A deprivation caused by the operation of a statute, either through application of its express terms or through judicial construction, must be the result of an "established state procedure." The Court, therefore, rejected defendant's argument that *Parratt* applied and found the question of adequate state remedies irrelevant.[115]

Viewed another way, the absence of any formal mechanism to correct the injurious results of the Commission's negligence had the same effect as would a state's failure to provide adequate postdeprivation process: it made the due process violation complete. Note, however, that if Logan had brought a section 1983 suit against the Commissioners in their *individual* capacities[116] rather than appealing the state court's issuance of the writ, the focus would have been on *their negligence* instead of on the constitutionality of the statutory scheme. *Parratt* would then have been triggered, requiring the federal court to inquire into the adequacy of the available state remedies. In any event, *Logan* resolved that a deprivation caused by an established state procedure is constitutionally complete. Plaintiffs, therefore, can challenge the constitutionality of substantive or procedural aspects of the deprivation without first having to show inadequate state remedies as required under *Parratt*. The Court's conclusion that the plaintiff's employment discrimination claim was "property," moreover, has potentially expansive implications since it rejects the proposition that state-created property rights can be limited by accompa-

111. *Id.* at 334-35 (procedural due process challenge to state procedural regime requires balancing of "private interest that will be affected by the official action," "the risk of an erroneous deprivation of such interest through the procedures [currently] used, the value, if any, of additional or substitute procedural safeguards," and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional substitute procedural requirement would entail.")

112. *Id.* at 434-35.

113. *Logan*, 455 U.S. at 435.

114. *Id.* at 436. "*Parratt* was not designed to reach such a situation . . . [the plaintiff] is challenging not the Commission's error, but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards." *Id. See supra* note 82 (discussing how the established state procedure exception has been applied).

115. *Logan*, 455 U.S. at 436.

116. The eleventh amendment would have precluded a suit for damages against the Commission, the State, or the Commissioners in their official capacities. *See* Brandon v. Holt, 469 U.S. 464, 471-73 (1985); Edelman v. Jordan, 415 U.S. 651 (1974).

nying arbitrary procedures.[117]

Parratt, *Logan*, *Hudson*, and *Daniels/Davidson* frame the parameters of the constitutional tort for unauthorized deprivation of life, liberty, or property without due process of law and instruct the state and lower federal courts with relative clarity *when* it is appropriate to consider state postdeprivation process and its capacity for providing the process that is due.[118] These decisions, however, are nearly devoid of guidance on the *substantive content* of the adequacy inquiry itself where such consideration is appropriate.[119]

The next section first examines how the analysis of postdeprivation process has been handled in the "easy" cases and concludes that where the remedies are in fact adequate, *Parratt* represents a defensible system of forum allocation. Section III will discuss the "hard" cases, where substantive or procedural state law blocks relief, and will review some of the cases that have expressly addressed the problem. Section III will also discuss the minimum requirements of adequacy imposed by *Parratt* and the fourteenth amendment. It concludes that certain types of restrictive substantive provisions or procedural rules can render a particular state remedy inadequate even though the state system otherwise meets the minimal requirements of pure procedural due process.

II.
THE CONTENT OF ADEQUACY

A. Judicial Application of Adequacy

Since *Parratt*, nearly all of the section 1983 due process cases to reach the adequacy inquiry[120] have been resolved with a finding that the State *did* provide adequate postdeprivation process, resulting in either dismissal of the action for failure to state a claim or summary judgment.[121] Nearly every circuit has rendered opinions that resolve the adequacy issue in a single paragraph, by merely citing the relevant state case law, statute, or procedure.[122] Some

117. *See infra* note 375 and accompanying text.

118. *See supra* notes 71, 80-82, 113-17 and accompanying text.

119. *See supra* note 74 and accompanying text.

120. These are the claims able to establish the first three elements of the due process claim, state action, deprivation, and an entitlement. *See supra* notes 48-51 and accompanying text.

121. The author's reading of roughly 100 cases turning on the adequacy of state remedies showed that eighty-five to ninety percent resulted in a finding of adequacy.

122. *See, e.g.*, Davis v. Robbs, 794 F.2d 1129, 1131 (6th Cir.), *cert. denied*, 479 U.S. 992 (1986); King v. Massarweh, 782 F.2d 825, 827 (9th Cir. 1986); Wright v. Collins, 766 F.2d 841, 849 (4th Cir. 1985); Friedman v. Village of Skokie, 763 F.2d 236, 239 (7th Cir. 1985); Allen v. City of Kinlock, 763 F.2d 335, 336-37 (8th Cir.), *cert. denied*, 474 U.S. 946 (1985); Vasquez v. City of Hamtramck, 757 F.2d 771, 773 (6th Cir. 1985); Burgess v. City of Houston, 718 F.2d 151, 154-55 (5th Cir. 1983); Love v. Coughlin, 714 F.2d 207, 209 (2d Cir. 1983) (per curiam); Fiallo v. de Batista, 666 F.2d 729, 733 (1st Cir. 1981); Harper v. Edgewood Bd. of Educ., 655 F. Supp. 1353, 1355 (S.D. Ohio 1987); Clemans v. Beaverhead County, Mont., 655 F. Supp. 68, 71 (D. Mont. 1986); Germano v. City of Mayfield Heights, 648 F. Supp. 984, 986 (N.D. Ohio 1986), *aff'd*, 833 F.2d 102 (6th Cir. 1987); Alvarado v. City of Dodge City, 238 Kan. 48, 55, 708 P.2d 174, 180 (1985). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 10-14, at

courts, however, have apparently gone beyond this minimal degree of judicial review. While dismissing the federal claim, they have pointed out that in state court, at least one defendant will be amenable to suit[123] or that the claim will not face sovereign immunity or some other absolute bar to recovery.[124] A few courts have actually analyzed whether the state law remedy encompassed the *factual situation* presented by the complaint,[125] whether it authorized awards sufficient to cover the claimed damages,[126] or whether the remedy would be

725-28 (2d ed. 1988); *cf.* Steffen v. Housewright, 665 F.2d 245, 247-48 (8th Cir. 1981) (per curiam) (state law remedy held adequate with no analysis *after* plaintiff had utilized it but recovered less than one-fourth of his claimed damages).

123. *See* Daniels v. Williams, 748 F.2d 229, 232 (4th Cir. 1984), *aff'd on other grounds*, 474 U.S. 327 (1986); Waterstraat v. Central State Hosp., 533 F. Supp. 274, 276 (W.D. Va. 1982); Temple v. Marlborough Div. of the Dist. Ct. Dep't, 395 Mass. 117, 129, 479 N.E.2d 137, 147 (1985). These cases also point out that the inability to sue the defendant of one's choice does not render the available state remedy inadequate. *See* Weber v. City of Cedarburg, 129 Wis. 2d 57, 74-76, 384 N.W.2d 333, 343 (1986) (*Parratt* and due process do not guarantee "redress against a specific entity"). Indeed, *Parratt* made this perfectly clear when it rejected Taylor's argument that the Nebraska tort claim was inadequate because he could sue only the state, and not the individual state employee. *Parratt*, 451 U.S. at 543-44.

124. *See* Hudson v. Palmer, 468 U.S. at 535-36; Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 830 F.2d 977, 984 n.7 (9th Cir. 1987); National Communication Sys., Inc. v. Michigan Pub. Serv. Comm'n, 789 F.2d 370, 373 (6th Cir.), *cert. denied*, 479 U.S. 852 (1986); McIntyre v. Portee, 784 F.2d 566, 567 (4th Cir. 1986); Gumz v. Morrissette, 772 F.2d at 1395, 1404 (7th Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986); Burgess v. City of Houston, 718 F.2d 151, 154-55 (5th Cir. 1983); Baltz v. Shelley, 661 F. Supp. 169, 181 (N.D. Ill. 1987) (a state false imprisonment claim held adequate but court dismissed on condition that defendants had "waived any immunity defenses" in state court); Barrett v. United States, 651 F. Supp. 615, 621 (S.D. N.Y. 1986) (immunity would not apply, and limitations bar would be avoided in state court via application of newly discovered evidence rule); Adams v. State, 622 F. Supp. 1478, 1486 n.2 (D. Indiana 1985) (elaborate analysis of state case law demonstrates plaintiff will not be barred by notice of claim statute); Cerva v. Fulmer, 596 F. Supp. 86, 94-95 (E.D. Pa. 1984) (plaintiff's claim will not face immunity defense in state court); Kidd v. Bradley, 578 F. Supp. 275, 276-77 n.6 (N.D. W. Va. 1984). *But see* Cohen v. City of Philadelphia, 736 F.2d 81, 86-87 (3d Cir.), *cert. denied*, 469 U.S. 1019 (1984) (though no longer available, state judicial review was adequate remedy); *see also infra* notes 251-52.

125. *See National Communication Sys., Inc.*, 789 F.2d at 373 (defendant commissioners would enjoy qualified immunity in state law claim but the complaint's allegations, if proved, would defeat it); Economic Dev. Corp. v. Stierheim, 782 F.2d 952, 955 (11th Cir. 1986) (allegations of complaint will render county amenable to suit in state court); Wilkins v. Whitaker, 714 F.2d 4, 6-7 (4th Cir. 1983) (noting that state law could cover claim for deprivation of property because any exercise of right of ownership to exclusion of plaintiff's rights would violate state law), *cert. denied*, 468 U.S. 1217 (1984); Engblom v. Carey, 677 F.2d 957, 965 n.16 (2d Cir. 1982) (complaint may override state law sovereign immunity if plaintiff shows government was acting as landlord or created special relationship); Baltz v. Shelley, 661 F. Supp. 169, 181 (N.D. Ill. 1987) (comparing allegations of complaint and elements of state claim); Barrett v. United States, 651 F. Supp. 615, 621 (S.D.N.Y. 1986) (allegations, if proved, would override state law immunity and new evidence would prevent statute of limitations block); James v. Price, 602 F. Supp. 843, 848 (D. N.J. 1985) (plaintiff's theory will override state law immunity); Dobson v. Green, 596 F. Supp. 122, 125 (E.D. Pa. 1984) (allegations of willful misconduct will negate state law immunity); *see also* Gilmere v. City of Atlanta, 774 F.2d 1495, 1514 (11th Cir. 1985) (en banc) (dissenting opinion), *cert. denied*, 476 U.S. 1115 (1986) (state law remedy adequate if deprivation resulted from random acts committed under color of state law); Daniels v. Williams, 748 F.2d at 235-36 (4th Cir. 1984) (opinion dissenting in part and concurring in part) (noting difficulty of ruling on adequacy when state law is unclear).

126. *See* Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 830 F.2d 977, 982 n.5

available in substance or practice.[127]

These are the "easy cases," in which courts find at least one seemingly available state law remedy. For each plaintiff, the respective courts were able to identify *some* type of relief lurking in the corpus of state law and available upon proof that a state actor deprived the plaintiff of a protected entitlement. The logical question to pose is why the overwhelming majority of courts that have addressed an adequacy issue have been able to locate constitutionally adequate redress with so little difficulty?

There seem to be two major reasons. First, *Parratt* has been construed to place the burden of pleading and proving the absence of an adequate remedy on the plaintiff.[128] The section 1983 due process claimant "must plead and prove that available state remedies are inadequate or systemically defective in order to state or prove a proper procedural due process claim."[129] Because *Parratt* held that the absence of an adequate, state postdeprivation remedy was

(9th Cir. 1987) (noting that both damages and injunctive relief are available with state remedy); Culebras Enter. v. Rivera Rios, 813 F.2d 506, 513-14 (1st Cir. 1987) (undertaking elaborate analysis of recent state court decisions in order to predict if state would recognize inverse condemnation damage action); Economic Dev. Corp. v. Stierheim, 782 F.2d at 955-56 (state remedy allowing for up to $100,000 judgments held adequate for complaint seeking $100,000 in compensatory damages); Wadhams v. Procunier, 772 F.2d 75, 78 (4th Cir. 1985) ($25,000 cap on state remedy "is unlikely to occasion any embarrassment" to plaintiff claiming for seven days of extra confinement); Loftin v. Thomas, 681 F.2d 364, 365 (5th Cir. 1982) (state remedy with $10,000 ceiling adequate for claimant seeking $10,158); Adams v. State, 622 F. Supp. 1478, 1486-87 (N.D. Ind. 1985) (sufficient damages available in state court).

127. "[T]he fact that statutes, rules, regulations, ordinances, or procedures provide the form of due process does not mean that due process was afforded in every case. It is necessary to look both at the substance of due process as well as the form . . . to determine the adequacy of state remedies." Eaton v. City of Solon, 598 F. Supp. 1505, 1511 (N.D. Ohio 1984). *See* Sullivan v. Town of Salem, 805 F.2d 81, 86 (2d Cir. 1986) (remanding for district court to consider how allegedly adequate state remedy has been construed and applied by state courts); Gilmere v. City of Atlanta, 774 F.2d 1495, 1514 (11th Cir. 1985) (en banc) (dissenting opinion) (the cases mandate "that no section 1983 claim will lie where there is not only state law and procedure 'on the books,' but it can be known to be adequate in fact"), *cert. denied*, 476 U.S. 1115 (1986); Daniels v. Williams, 748 F.2d at 236 (opinion dissenting in part and concurring in part) (noting difficulty of predicting adequacy of state law where it is not clear); Jones v. Clark, 607 F. Supp. 251, 257 (E.D. Pennsylvania 1984) (alternative holding) (state remedy inadequate where court was not "certain that plaintiff could convince a state court under any circumstances to void the decision of the [prison] disciplinary committee"); Note, *Due Process: Application of the Parratt Doctrine to Random and Unauthorized Deprivations of Life and Liberty*, 52 FORDHAM L. REV. 887, 901-02 (1984) ("courts must be assured that [theoretically adequate] remedies are adequate in practice before dismissing . . . As with any due process question, this must be determined on a case-by-case basis."); Note, *supra* note 14, at 634.

128. *E.g.*, Culebras Enter. v. Rivera Rios, 813 F.2d 506, 515 (1st Cir. 1987); Collins v. King, 743 F.2d 248, 254 (5th Cir. 1984); Economic Dev. Corp. v. Stierheim, 782 F.2d at 955-56; Germano v. City of Mayfield Heights, 648 F. Supp. 984, 985 (N.D. Ohio 1986), *aff'd*, 833 F.2d 1011 (6th Cir. 1987); Eaton v. City of Solon, 598 F. Supp. at 1514-15 (N.D. Ohio 1984). *But see* Ausley v. Mitchell, 748 F.2d 224, 228 n.2 (4th Cir. 1984) (opinion concurring in part) (*state* must "offer proof demonstrating the availability and the complete efficacy of any postdeprivation remedy relied on to invoke . . . *Parratt*"), *cert. denied*, 474 U.S. 1100 (1986).

129. Campbell v. Shearer, 732 F.2d 531, 532 (6th Cir. 1984). *But see* Note, *supra* note 14, at 635-36 (adequacy is an affirmative defense to be proved by the defendant moving for dismissal or summary judgment).

an *essential element* of due process claims based on random and unauthorized conduct,[130] it follows that one must plead and prove inadequacy just as one must plead and prove state action, a deprivation, and injury to an entitlement.[131] Indeed, Justice O'Connor, concurring in *Hudson*, stated that the *Parratt*-type plaintiff "must either avail himself of the remedies guaranteed by state law or prove that the available remedies are inadequate."[132]

A second, more important reason is that *Parratt* and *Hudson* have given the concept of "adequacy" a great deal of substantive flexibility.[133] The *Parratt* Court explained that "[a]lthough the State remedies may not provide respondent with all *the relief* which may have been available if he could have proceeded under section 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process."[134] Viewed in the specific factual context of *Parratt*, this sentence does not mean that state remedies offering *quantitatively* less compensation are adequate. In *Parratt*, the complainant argued that the state law remedy was inadequate "because it provides only for an action against the State as opposed to its individual employees, it contains no provisions for punitive damages, and there is no right to trial by jury."[135] None of the defects alleged by the complainant would have had any direct effect on the *amount* of compensation available. Hence, it would be reasonable to limit the scope of state law variances authorized by the *Parratt* Court, in response to the complainants' argument, to those with no effect on compensation.[136] In *Hudson*, however, the Court further expanded

130. "The failure of the State to provide a remedy . . . becomes the heart of a due process violation." Note, *supra* note 42, at 223. *See* Baltz v. Shelley, 661 F. Supp. 169, 181 (N.D. Ill. 1987) (where adequate state remedy exists complaint fails to state claim).

131. Campbell v. Shearer, 732 F.2d 531, 532 (6th Cir. 1984); Vicory v. Walton, 721 F.2d 1062, 1063 (6th Cir. 1983), *cert. denied*, 469 U.S. 834 (1984). The role of the adequate state remedy here thus differs from the context of exhaustion doctrine. *See* Thibodeaux v. Bordelon, 740 F.2d 329, 337-38 (5th Cir. 1984); Cohen v. City of Philadelphia, 736 F.2d 81, 86-87 (3d Cir.), *cert. denied*, 469 U.S. 1019 (1984). *But see Campbell*, 732 F.2d at 541 (dissenting opinion). *See generally*, DAVIS, ADMINISTRATIVE LAW TREATISE, sec. 26.1 (1983) (an exhaustion defect goes to timing, principles of comity, or jurisdiction, not to the very accrual of a constitutional violation). Similarly, the role of the adequate state remedy differs from that of the "equally effective alternative" remedy sufficient to defeat the implication of a *Bivens*-type claim. In the *Bivens* context the burden of proof is on the defendant to demonstrate that Congress provided an equally effective alternative, Carlson v. Green, 446 U.S. 14, 18-19 (1980), but only after the plaintiff properly alleges a completed constitutional wrong.

132. Hudson v. Palmer, 468 U.S. 517, 539 (1984). Placing the burden of proof on the plaintiff helps avoid "a detailed, probing, case-by-case federal judicial inquiry into the adequacy of substantive and procedural state remedies [which would entail] a significant increase in the federal courts' workload and in the frictions of judicial federalism," contrary of course to the very foundations of the *Parratt* doctrine. Redish, *supra* note 64, at 111.

133. Redish concludes, "Most states will provide theoretically adequate tort remedies." Redish, *supra* note 64, at 111. *See also* Note, *supra* note 127, at 899 ("[o]rdinarily . . . a remedy will be available at state law").

134. Parratt v. Taylor, 451 U.S. 527, 544 (1981).

135. *Id.* at 543-44.

136. *See* Note, *supra* note 14, at 634 n.183. Further, it is unclear if the court meant that these ancillary aspects of relief were not required by due process in Taylor's case, or that they would never be required to render a state remedy adequate. The analysis developed in section

the parameters of "adequacy" when it stated that the possibility of not recovering "*the full amount*" under state law which might be obtained in a section 1983 action is not by itself "determinative of the adequacy of the state remedies."[137]

The Supreme Court has thus impliedly imbued the concept of adequacy with a large range of substantive flexibility. Its breadth qualified a vast range of state law processes and claims as adequate postdeprivation remedies.[138] Most obviously the claim may be based on either statute[139] or common law.[140] Administrative grievance procedures[141] and workers' compensation claims,[142] however, have been found adequate as well, notwithstanding occasional restrictions limiting potential recovery to amounts less than that which the plaintiff would have received under section 1983.[143] In the limited context of deprivations caused by an alleged unauthorized abuse of established state administrative or judicial processes, compensationless remedies, such as administrative appeals,[144] arbitration,[145] mandamus,[146] rehearings,[147] and judicial

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II concerning the various components of adequacy would suggest that the latter is the case. *See infra* notes 253-58, 264-75 and accompanying text.

137. *Hudson*, 468 U.S. at 535. *Hudson*'s subtle modification of *Parratt*, by substituting "full amount" for "relief", was surely not unknowing; the citation to *Parratt* was preceded by a "see" signal, not a "[no signal]". *See* A UNIFORM SYSTEM OF CITATION, Rule 2.2, at 8, (14th ed. 1986) ("[no signal]" is used when the case "states the proposition"; "*see*" is used when the case "directly supports the proposition").

138. *See generally* Smolla, *supra* note 42, at 883-86.

139. *E.g.*, *Parratt*, 451 U.S. at 543-44.

140. *E.g.*, *Hudson*, 468 U.S. at 520 n.1, 534-35.

141. Lewis v. Hillsborough Transit Auth., 726 F.2d 664, 667 (10th Cir. 1983) (municipal grievance procedure for discharged city employees), *cert. denied*, 469 U.S. 822 (1984); Phelps v. Anderson and Langford, 700 F.2d 147, 149 (4th Cir. 1983) (prison grievance procedure); Engblom v. Carey, 677 F.2d 957, 965 (2d Cir. 1982) (noncompensatory administrative procedures and criminal laws were adequate postdeprivation remedies where prison guards were temporarily ejected from their state-provided housing); Steffen v. Housewright, 665 F.2d 245, 247-48 (8th Cir. 1981) (per curiam) (statewide claims commission); Al-Mustafa Irshad v. Spann, 543 F. Supp. 922, 927 (E.D. Va. 1982) (prison grievance procedure).

142. McClary v. O'Hare, 786 F.2d 83, 87-88 (2d Cir. 1986) (Highway Department employee killed on the job); Hayes v. Vessey, 777 F.2d 1149, 1152 (6th Cir. 1985) (prison school teacher raped by inmates); Wright v. Collins, 766 F.2d 841, 849 (4th Cir. 1985) (inmate injured while working at maintenance duties).

143. *E.g.*, Hayes v. Vessey, 777 F.2d at 1152; Steffen v. Housewright, 665 F.2d at 246-48. *See* Nahmod, *supra* note 62, at 229-30 (finding non-judicial remedies adequate "is sound . . . so long as such proceedings have fundamentally fair procedures"). In the two most recent *Bivens* actions to reach the Supreme Court, the presence of statutory administrative procedures was relied on to reject the need for an implied constitutional damages remedy. Chappel v. Wallace, 462 U.S. 296, 302-04 (1983); Bush v. Lucas, 462 U.S. 367, 385-89 (1983).

144. Sullivan v. Town of Salem, 805 F.2d 81, 86 (2d Cir. 1986) (administrative appeal and judicial review procedures adequate); Grecco v. Guss, 775 F.2d 161, 172 (7th Cir. 1985) (appeal of local board's revocation of liquor license to state commission); Eftekhara v. Ill. Dep't of Children & Family Serv., 661 F. Supp. 522, 528 (N.D. Ill. 1987) (administrative appeal and judicial review provide adequate state remedy); De Smet v. Snyder, 653 F. Supp. 797, 806 (E.D. Wis. 1987) (process of administrative appeals and judicial review adequate to protect parents' liberty interest in custody of children); Eaton v. City of Solon, 598 F. Supp. 1505, 1512-13 (N.D. Ohio 1984) (administrative appeal for denial of building permit); Gregory v. Town of Pittsfield, 479 A.2d 1304, 1308 (Me. 1984) (administrative and judicial review provisions were

review[148] have been held to provide all the postdeprivation process required, even where the plaintiff had sought damages.

In the context of "hard" cases, discussed below in Section III, a summary approach, lacking the case-by-case inquiry advocated by this Comment, is highly suspect. In these "easy" cases, however, judged by reference to "constitutional" and "federalism" concerns, the approach is acceptable.

B. Constitutional Concerns

The cases that result in a quantitatively different outcome — that is, where the plaintiff will get *less, but some* compensation or redress through her state remedies — may at first appear ominous for the protection of civil rights against abuse by state officials.[149] Given the correct and constitutional application of *Parratt*, however, these results are no cause for alarm. An adequate state remedy does not displace a live section 1983 claim; rather, it prevents one from arising in the first place by fulfilling the state's constitutional obliga-

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adequate for claim alleging wrongful denial of general assistance benefits), *cert. denied*, 470 U.S. 1018 (1985).

145. Brown v. Texas A&M Univ., 804 F.2d 327, 336 (5th Cir. 1986) (post-termination arbitration for employee was adequate); Parrett v. City of Connersville, 737 F.2d 690, 696 (7th Cir. 1984) (collective bargaining arbitration process), *cert. dismissed*, 469 U.S. 1145 (1985); Jackson v. Temple Univ., 721 F.2d 931, 933 (3d Cir. 1983) (arbitration).

146. National Communications Sys., Inc. v. Michigan Pub. Ser. Comm'n, 789 F.2d 370, 373 (6th Cir. 1986) (extraordinary writ of appeal procedures adequate), *cert. denied*, 479 U.S. 852 (1986); Ellis v. Hamilton, 669 F.2d 510, 514 (7th Cir. 1982) (mandamus adequate to redress wrongful denial of custody of adopted children), *cert. denied sub nom.*, Ellis v. Judge of Putnam Circuit Court, 459 U.S. 1069 (1982); McIntosh v. City of Live Oak, 609 F. Supp. 590, 594 (M.D. Fla. 1985).

147. Albery v. Reddig, 718 F.2d 245, 249 n.7 (7th Cir. 1983) (motion for zoning board rehearing concerning new evidence was adequate for claim alleging erroneous refusal to grant variance); Temple v. Marlborough Div. of Dist. Court, 395 Mass. 117, 127 (1985) (rule 60(b) motion for relief from final order was one of several adequate remedies available to plaintiff challenging his civil commitment).

148. Pryzina v. Ley, 813 F.2d 821, 823 (7th Cir. 1987) (state court appellate review was adequate remedial process even if bypassed); Alfaro Motors, Inc. v. Ward, No. 86-7076, slip op. (2d Cir. Feb. 27, 1987) (deprivation of property right in medallions for towtrucks could be adequately remedied by judicial review); Holloway v. Walker, 784 F.2d 1287, 1292-93 (5th Cir.) (appellate review of adverse trial court decision allegedly motivated by a conspiracy between the judge and the litigants), *reh'g denied*, 790 F.2d 1170, *cert. denied*, 479 U.S. 984 (1986); Cohen v. City of Philadelphia, 736 F.2d 81, 86 n.12 (3d Cir. 1984) (judicial review of civil service post-termination decisions), *cert. denied*, 469 U.S. 1019 (1984); Haag v. Cuyahoga County, 619 F. Supp. 262, 280 (N.D. Ohio 1985) (judicial review adequate for denial of visitation rights), *aff'd without opinion*, 798 F.2d 1414 (6th Cir. 1986).

149. "Quantitatively different outcome" is used here to distinguish from *qualitatively* different outcomes. In Enright v. School Directors of Milwaukee, 118 Wis. 2d 236, *cert. denied*, 469 U.S. 966 (1984), for example, plaintiffs sued the school board for failing to protect the decedent from being murdered. The state remedies, held adequate, limited the parents' damages for loss of society and companionship to $25,000. If the plaintiffs could have recovered more in a section 1983 action, the discrepancy would have been a quantitative difference. If, however, state law did not recognize any damage claim on behalf of the decedent's siblings but an action would be maintainable in federal court pursuant to the due process clause and section 1983, a qualitative difference would exist. The problem presented by qualitative differences is extremely difficult to work through.

tion.[150] Adequacy thus demands that the relief satisfy the fourteenth amendment, not section 1983; if the state remedy will pass fourteenth amendment scrutiny, any comparison to section 1983 is irrelevant.[151] This result is constitutionally invulnerable. The Constitution guarantees a *constitutional* floor of relief,[152] not a floor of relief established by the historical *judicial application of a statute.*[153] The Second Circuit, for instance, made this perfectly clear when it stated that "[w]hile workers' compensation in this case may not be as fully compensatory as a suit under section 1983 would be, the federal Constitution does not set a standard so high as to require total compensation for all injuries."[154] The cases relegating plaintiffs to *noncompensatory* state processes are likewise on firm constitutional ground.[155] Dissatisfied with the decision of a municipal zoning board or liquor licensing commission, for example, these plaintiffs are short-circuiting often elaborate mechanisms of administrative appeals and judicial review by coming straight to federal court.[156] These routes of appeal and review may have been established to correct good faith errors by the initial decision making body, but they are just as capable of correcting deprivations worked by a malicious abuse of authority.[157] The victims in these

150. Note, *supra* note 127, at 900 ("The *Parratt* doctrine . . . is based on the premise that no constitutional violation has occurred to foreclosure of an opportunity to be heard on a claim").

151. *Id.* (certain remedies and features of section 1983 "are simply not required by due process. Section 1983 . . . did not alter traditional notions of due process"). *Contra* Note, *supra* note 14, at 629 (adequacy must be measured by reference to section 1983).

152. It is not the author's intent to divine the precise content of this floor, but rather to simply argue that it exists, such that a court may not apply *Parratt* so as to deprive plaintiffs with meritorious claims of all relief without violating the Constitution. The "floor" set by the due process clause requires that violations be redressed with meaningful relief, so as to make the victim "whole" and fully protect her substantive interests. For purposes of this effort, the author assumes that if the state provides a damage remedy to redress the particular injury when inflicted by a non-state defendant, and it provides for compensation against the state actor equal to that available against non-state defendants it will most likely satisfy the requirements of the fourteenth amendment.

153. *Parratt*, 451 U.S. at 544; Barrett v. United States, 651 F. Supp. 615, 620 (S.D. N.Y. 1986) (adequacy benchmark is constitutional, not section 1983). Those who argue that the state remedy must provide relief identical to that available under section 1983 have missed this point. *See, e.g.*, Lalrov v. Lalley, 808 F.2d 220, 223 (3rd Cir. 1987) (alternative holding) (state remedies not coextensive with relief provided by section 1983 are inadequate); Roman v. City of Richmond, 570 F. Supp. 1554, 1556 (N.D. Cal. 1983) (state remedy is inadequate because it did "not fulfill the deterrent purpose of section 1983"); Note, *supra* note 14, at 607 (exploring the meaning of adequacy by reference to purpose and application of section 1983). Since Congress could repeal section 1983 at any time, it is hard to see how the legislative purposes or historical application of the statute are dispositive as to the meaning of the Constitution.

154. McClary v. O'Hare, 786 F.2d 83, 88 (2d Cir. 1986). *See* Loftin v. Thomas, 681 F.2d 364, 365 (5th Cir. 1982) ("To satisfy the requirements of due process, the state remedy need not provide relief coextensive with that afforded by section 1983.").

155. Temple v. Marlborough Div. of the Dist. Court, 395 Mass. 117, 128 (1985) ("[s]tate remedies may be adequate even though the plaintiff may not be entitled to recover damages.").

156. *See* City of Columbus v. Leonard, 443 U.S. 905, 905-10 (1979), *denying cert. to* 565 F.2d 957 (5th Cir. 1977) (Rehnquist, J., joined by Burger, C.J., and Blackmun, J., dissenting from denial of cert.).

157. *E.g.*, *Holloway*, 784 F.2d at 1291-93 (normal routes of appellate review were adequate remedies for adverse trial court judgment motivated by conspiracy between judge and litigants).

cases can be made whole without compensation.[158] Put plainly, "[s]ubstantive mistakes by administrative bodies in applying local ordinances do not create a federal claim so long as correction is available by the state's judiciary."[159] In this purely procedural context, the state's corrective system, viewed in its entirety, need satisfy only the *Mathews v. Eldridge*[160] three factor balancing test[161] as applied to the specific plaintiff.[162]

C. *Federalism And Policy Concerns*

These "easy" adequacy cases are not only on firm constitutional ground, assuming the courts' predictions of state law and the available redress were accurate and honest,[163] but also represent a sound structure of relations between state and federal courts as well.[164] By giving the states a preemptive

158. Noncompensatory state process will not be capable of redressing any injuries incurred *prior* to administrative or appellate correction, but if such injuries rise to the level of a deprivation by delay — e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547 (1985); Gregory v. Town of Pittsfield, 470 U.S. 1018, 1022-23 (1985) (O'Connor, J., joined by Brennan and Marshall, JJ., dissenting from denial of cert.), *denying cert. to* 479 A.2d 1304 (1984) — the perpetrator is now the state system itself and not the initial defendant alleged to have caused the unauthorized deprivation, hence under *Logan* a viable suit would lie. "Such delays, in and of themselves, can violate a person's constitutional rights whether the conduct was negligent or intentional." Eaton, *supra* note 142, at 1512. *See also* Parrett v. City of Connersville, 737 F.2d 690, 697 (7th Cir. 1984) (union grievance arbitration is not per se inadequate, but failed to protect plaintiff's property in this case), *cert. dismissed*, 469 U.S. 1145 (1985); Campbell v. Shearer, 732 F.2d 531, 538-41 (6th Cir. 1984) (dissenting opinion); D'Acquisto v. Washington, 640 F. Supp. 594, 618 (N.D. Ill. 1986) (administrative delay can result in denial of due process).

159. Cohen v. City of Philadelphia, 736 F.2d 81, 86 (3d Cir. 1984). *See* Campbell v. Shearer, 533-34 (judicial review adequate to cure errors of state Board of Tax Appeals).

160. 424 U.S. 319 (1976).

161. *Id.* at 334-35 (discussed *supra* note 111).

162. *See* Engblom v. Carey, 677 F.2d 957, 965 (2d Cir. 1982). If the state system is adequate under *Mathews* there has been no violation. Thus in *Engblom*, the plaintiff-prison guards sought, among other things, damages for the temporary eviction from their state-provided dwellings during a strike. The Court said "the key inquiry . . . is whether appellants had adequate post-eviction process to test 'the propriety of the State's action,' " and applying the *Mathews* factors, held that various *noncompensatory* state processes satisfied postdeprivation due process requirements.

In these latter cases where the focus is on corrective process, as opposed to remedial compensation, some courts may hold *Parratt* inapplicable, since the unauthorized deprivation took place in the context of established procedures. *See supra* notes 113-16 and accompanying text. The result, however, should remain the same whether or not *Parratt* is applied. If the court considers the deprivation unauthorized, it will send the plaintiff back to try his unused state postdeprivation remedies if they adequately protect the interest at stake. And if the court sees the deprivation as one worked by an established state procedure, it does not follow that the predeprivation process was constitutionally required and that a due process violation occurred. *See* Oberlander v. Perales, 740 F.2d 116, 121-22 (2d Cir. 1984) ("*Parratt* did not establish . . . that when a deprivation is the result of an established state procedure, a prior hearing is required . . ."); Shabazz v. Odum, 591 F. Supp. 1513, 1517 (M.D. Pa. 1984).

163. According to Wells & Eaton, *supra* note 4, at 214 n.5, the *Parratt* Court itself "failed to mention the possible application of statutory immunity under [certain state law provisions]."

164. *E.g.*, Nahmod, *supra* note 62, at 228-29; Smolla, *supra* note 42, at 870-71. In one respect, however, the *Hudson/Logan* dichotomy is troublesome in the way it selectively makes the federal forum available. Where the deprivation is caused by the operation of the state law system itself, as in *Logan*, it may be subject to political correction by the state's voters. But

choice of forum on behalf of their employees,[165] the "adequacy" standard advances the goals of federalism. Through the provision of adequate postdeprivation remedies, states can avoid federal interference in the operations of their governments[166] and tort law systems, and thereby maintain their own protections of the rights of their citizens.[167] From the federal perspective, to the extent that the states do provide adequate remedies, the federal court case load is decreased[168] and de-trivialized.[169] Systemically, respecting the role of the state courts in enforcing the Constitution enhances the federal system.[170] Should a state choose not to provide adequate remedies, there is no subsequent federal intervention of a prospective or structural nature in the state's legal system. Rather, claims against state officials will continue to be adjudicated in federal court as long as the state chooses not to make adequate redress available.[171]

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where the deprivation results from the unauthorized conduct of a lone employee, the voters' political action can have little direct influence. (The electorate could call for stiffer civil and criminal penalties, or remove the elected officials, but this would have only an indirect effect.) The problem is that the federal forum is available only in the former case, where there is less need for political intervention.

165. There can be no entity liability under section 1983 when the conduct is random and unauthorized, *e.g.*, Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), and the eleventh amendment would bar a damage action against the state in federal court in any event. States thus have a risk-free choice in deciding where to channel unauthorized deprivation cases, and in fact, can provide for entity liability in their own courts if so desired.

166. *See* Mann v. City of Tucson, 782 F.2d 790, 798 (9th Cir. 1986) (concurring opinion) (noting that *Parratt* was in part a response to the problems which section 1983 suits were creating for the functioning of state and local government units). *Cf.* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 115-16 (1981) (federal courts must respect "rightful independence of state governments," citing Matthews v. Rodgers, 284 U.S. 521, 525 (1932).

167. *See* Wells & Eaton, *supra* note 4, at 209 (constitutional tort law "intrudes upon the traditional sovereign prerogative of a state to define for itself the tort rules governing its conduct") (citations omitted); Note, *supra* note 4, at 1048 (federal court adjudication of section 1983 actions "leads to a serious disruption of a state's administration of its tort law"); Smolla, *supra* note 42, at 870 (the "post-deprivation concept" enjoins federal courts from interfering with states' 'due process' norms in their tort systems, thus attaining "a well balanced compromise of federalism"). *See also* Note, *supra* note 4, at 1048 (rightful position of states is as the "primary arbiters of basic standards of duty and conduct").

168. *See* Thurman v. Rose, 575 F. Supp. 1488, 1491 (N.D. Ind. 1983) ("where state law makes available a meaningful postdeprivation remedy, there can be no reason to have a parallel tort law developing in the already overburdened federal courts"). *See also supra* notes 4-7 and accompanying text.

169. Smolla, *supra* note 42, at 886 (if *Parratt* is conscientiously applied "federal courts will be emancipated from the burden of a caseload top-heavy with 'constitutionalized' garden variety torts"); Nahmod, *supra* note 62, at 228.

170. *See* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 623-29 (discussing the "importance of creating and maintaining conditions that assure . . . [that] state courts will be respected and equal partners with the lower federal courts in the enterprise of formulating and enforcing federal constitutional principles"); Kupfer, *Restructuring the Monroe Doctrine: Current Litigation Under Section 1983*, 9 HASTINGS CONST. L.Q. 463, 465-66 (1982).

171. One problem with this defense of the *Parratt* regime is that it could also support extending postdeprivation analysis to cover other unauthorized deprivation cases, including those based on rights protected by substantive due process and the Bill of Rights. This extension has been suggested by at least two federal appellate judges. *See* Mann v. City of Tucson,

By directing these cases into the state courts to be adjudicated under state law, *Parratt* does not sacrifice the established, basic protection of civil rights. The goals of section 1983 are compensation and deterrence.[172] Though the historical goals of the common law and the interests it seeks to protect differ from the goals and concerns of the Constitution and federal civil rights laws,[173] where the state offers a truly adequate remedy, and the deprivation does not rise to the level of a substantive due process violation, application of the common law can also serve the ends of deterrence and compensation. A state actor will surely not feel significantly freer to engage in lawless behavior upon learning that he will be held accountable in state court instead of in federal court.[174] The compensation or redress awarded plaintiffs, moreover,

782 F.2d 790, 798 (9th Cir. 1986) (concurring opinion); Gumz v. Morrissette, 772 F.2d at 1395, 1409 (7th Cir. 1985) (Easterbrook, J., concurring in judgment), *cert. denied*, 475 U.S. 1123 (1986). The *Parratt* logic, however, can be restricted to the due process clause of the fifth and fourteenth amendments.

In *Parratt*, Justice Rehnquist stressed that Taylor's claim differed from the claims involved in *Monroe* (fourth amendment) and in Estelle v. Gamble, 429 U.S. 97 (1976) (eighth amendment), in that he alleged only a violation of the "Due Process Clause of the Fourteenth Amendment *simpliciter*." *Parratt*, 451 U.S. at 536 (emphasis in original). Although these rights rely on the due process clause for incorporation, unreasonable searches and cruel and unusual punishments, like substantive due process infringements, are always proscribed whether or not process is given. Thus, the constitutional wrong is complete at the moment of the deprivation. *See supra* note 66 and accompanying text. These substantive rights may be seen as "superior" to procedural due process, rendering immediate access to federal court more important. Hence, to the author's knowledge no court has held that *Parratt* has any application outside the due process context. *See supra* note 71. To extend *Parratt*, the Court would have to reverse the settled "no exhaustion" rule for section 1983 established by *Monroe*, 365 U.S. 167.

172. *E.g.*, Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978).

173. *Cf.* Daniels v. Williams, 474 U.S. 327, 330-31 (1986) (Constitution does not supplant traditional tort law); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 390-95 (1971). *See generally* Wells & Eaton *supra* note 4, at 228-32 (tortious conduct by government officials differs in scope and character from that of private individuals).

174. *Cf.* Robertson v. Wegmann, 436 U.S. 584, 592 (1978) (knowledge of state rule of abatement held applicable in civil rights claim by potential defendants would not lessen deterrent effect of section 1983); Carey v. Piphus, 435 U.S. 247, 256-57 (1978) ("there is no evidence that [Congress] meant to establish a deterrent more formidable than that inherent in the award of compensatory damages"). Where the state remedy imposes liability on the government entity, deterrence will be fostered by the threat of public condemnation and the ability of the criminal law, both state and federal, to prosecute violations of civil rights. *See* Nahmod, *supra* note 62, at 229 n.53. *But see* Carlson v. Green, 446 U.S. 14, 21 (1980) (A *Bivens* suit "is a more effective deterrent than the [Federal Tort Claims Act] remedy against the United States."); Roman v. City of Richmond, 570 F. Supp. 1554, 1556 (N.D. Cal. 1983) (state wrongful death remedy held inadequate in part because it would "not fulfill the deterrent purpose of section 1983"). If the conduct is particularly egregious the case may remain in federal court as a substantive due process violation. *See infra* notes 178-81 and accompanying text. Further, the loss of deterrence via entity liability is less of a problem after *Daniels/Davidson*. A deprivation now requires some type of intentional or reckless behavior, and states will be less willing to legislate remedial systems which accept *respondeat superior* liability for the reckless and intentional torts of their agents. And because negligence no longer implicates the due process clause, although entity liability may lessen the deterrent effect of tort law on negligent conduct, it is no longer of constitutional concern.

will not be any less valuable because it was ordered by a state court judge.[175]

Finally, the *Parratt* doctrine itself provides a safety valve for those cases which are so egregious that the capacity of the state remedy to achieve the necessary deterrence and provide the requisite compensation becomes suspect. No court has held or suggested that *Parratt* applies to violations of rights protected by the Bill of Rights or to pure substantive due process.[176] Thus, if a court is reluctant to send a plaintiff with a deprivation of life or liberty claim to the state tribunals because of the nature of the defendant's conduct, it can hold that the complaint states a substantive claim, perhaps based on the "shock the conscience" standard. This conclusion would render irrelevant the most adequate of state remedies and would keep the case in the federal forum under the auspices of section 1983.[177] This analysis was used recently by the Eleventh Circuit *en banc*. It held that the unlawful beating and shooting of a suspect by police gave rise to claims based on both the fourth amendment and substantive due process and that *Parratt* was inapplicable even though the conduct was unauthorized.[178] The court reasoned that "[t]he Supreme Court's pronouncements . . . indicate . . . that it would not relegate the victim of an intentional and unjustified beating or killing to state tort law in all circumstances."[179]

Limited to its proper scope, *Parratt* is a sound decision with regard to norms of federalism. As the Sixth Circuit has observed, "Policy considerations do not require a federal hearing in procedural due process cases that can be corrected in state court."[180] The only federal interest here is process.[181] Thus, when common law remedies are adequate, the aggrieved party need not resort to federal court. As a matter of general constitutional jurisprudence, the Supreme Court has squarely rejected the proposition that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court."[182] Therefore, in cases of unauthorized, nonsubstantive due process deprivations, there are only two appropriate

175. *See* Wells & Eaton, *supra* note 4, at 213 (if adequacy requires that the plaintiff be made whole, "then state tort law would provide just as much protection as constitutional tort").

176. *See supra* notes 71, 95, 171 and accompanying text.

177. *See* Tennessee v. Garner, 471 U.S. 1 (1985) (unreasonable use of deadly force against a fleeing felon states a claim under both the fourth amendment and section 1983); McRorie v. Shimoda, 795 F.2d 780, 784-86 (9th Cir. 1986) (prison guard's intentional and egregious attack on prisoner was an intentional deprivation of liberty rising to the level of a substantive due process violation to which *Parratt* does not apply); *cf.* Wilson v. Beebe, 770 F.2d 578, 585-86 (6th Cir. 1985)(en banc) (analyzing *Parratt*-type claim under substantive due process doctrine); Holloway v. Walker, 784 F.2d 1287, 1293-94 (5th Cir. 1986) (same), *reh'g denied*, 790 F.2d 1170, *cert. denied*, 479 U.S. 984 (1986).

178. Gilmere v. City of Atlanta, Georgia, 774 F.2d 1495, 1498-1502 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1115 (1986); *accord* Smith v. City of Fontana, 818 F.2d 1411, 1413 (9th Cir. 1987); Doty v. Carey, 626 F. Supp. 359, 362 (N.D. Ill. 1986).

179. *Gilmere*, 774 F.2d at 1499.

180. Vicory v. Walton, 721 F.2d 1062, 1065 (6th Cir. 1983), *cert. denied*, 469 U.S. 834 (1984).

181. *Supra* note 127, at 900.

182. Allen v. McCurry, 449 U.S. 90, 103-05 (1980).

federal concerns. First, federal courts should ensure that relevant state laws adequately respect the individual's claims to life, liberty, and property entitlements vis-a-vis state intrusions.[183] They also must ensure that state procedures do not undermine otherwise adequate redress which a plaintiff is due under state law.[184] As discussed later,[185] these concerns give content, respectively, to the concepts of substantive and procedural adequacy.

D. Inadequate Remedies and Res Judicata

Before turning to the "hard" cases, this Comment will address one problem concerning the "easy" ones. In some cases, state remedies which the court or the plaintiff believes to be theoretically adequate will be inadequate in practice. Consider the plaintiff who, after losing a defense motion based on *Parratt*, files an action in state court, or the plaintiff who initially brings her claim in state court because she realizes that *Parratt* precludes the assertion of her claim in federal court. Since these plaintiffs will not necessarily win their state actions, under what circumstances will they have some federal recourse if they lose in state court?

The full faith and credit clause[186] of the Constitution, as implemented by 28 U.S.C. section 1738,[187] requires that a federal judge apply the state laws that would govern if plaintiff's pending section 1983 suit had been filed in state court. The federal courts, therefore, must apply the former adjudication rules[188] of any state issuing a prior judgment on a claim which is then being relitigated in federal court.[189] A plaintiff who lost her state claim and seeks to

183. Wells & Eaton, *supra* note 4, at 233.

184. Smolla, *supra* note 42, at 870 (discussing Paul v. Davis). *See supra* note 128.

185. *See infra* section III.B.

186. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State").

187. Section 1738 states, in relevant part, "[t]he Records and judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738 (1982).

188. Former adjudication rules include *res judicata*, or claim preclusion, and collateral estoppel, also referred to as issue preclusion. *Res judicata* bars the litigation of entire claims when they have been previously tried or could have been tried with a related matter. Collateral estoppel works to preclude the relitigation of issues that were necessarily decided in a prior action. Allen v. McCurry, 449 U.S. 90, 94 (1980). *See generally* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE sec. 4401 (1983).

189. *Allen*, 449 U.S. at 90. In *Allen*, the plaintiff, as a defendant in a state court criminal prosecution had challenged the legality of a search of his house with a suppression motion, and lost. The Supreme Court held that the adverse ruling on the legality of the search precluded its relitigation in a section 1983 damages action. As with a *Parratt* plaintiff, the *Allen* plaintiff had *no choice* but to litigate in the state court. *See generally*, Kupfer, *supra* note 167, at 480-83; Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 85 (1984) (extending the *Allen* holding to claim preclusion). Finally, in University of Tennessee v. Elliott, 478 U.S. 788 (1986), the Court extended the application of state former adjudication rules to state administrative fact-finding. This ruling has important ramifications for the *Parratt* doctrine since many of the state remedies held adequate are in fact administrative claims procedures. *See supra* notes 141-44 and accompanying text.

file a claim in, or come back to, federal court is likely to encounter a *res judicata* or collateral estoppel defense.[190] State collateral estoppel rules, however, will not be applied where the plaintiff did not have a "full and fair opportunity to litigate" the issue in the first forum.[191]

If either of our plaintiffs rightly loses her state claim *on the merits* due to adverse findings of fact or mixed fact-law conclusions, such as the guard never hit her, or had justification, her case is of no federal concern.[192] Collateral estoppel will bar the relitigation of these issues in federal court, assuming that the plaintiff had a full and fair opportunity to litigate.[193] If, on the other hand, either section 1983 plaintiff loses her state administrative or judicial claim on a *strictly legal ground*, such as statutes of limitations, lack of jurisdiction, failure to state a claim, or immunity, no problem of *res judicata* or collateral estoppel arises as to the adequacy of the state remedy.[194] Since no disputed facts regarding plaintiff's *prima facie* case have been tried, much less resolved, there can be no issue preclusion.[195] And since under *Parratt* the constitutional due process claim in this context *did not arise* until the state actually denied the plaintiff a remedy, claim preclusion cannot be used for failure to join the federal claim with the state law action.[196] Several courts have recognized the

190. *See* Kupfer, *supra* note 170, at 474-75 (discussing *res judicata* problems for *Parratt* plaintiffs and the decision to commence litigation in state or federal court).

191. *See Allen*, 449 U.S. at 95.

192. Barrett v. United States, 651 F. Supp. 615, 622 (S.D.N.Y. 1986) (possible defects in merits of plaintiff's state law claim do not negate adequacy of remedy); *see also* Carter v. City of Emporia, Kansas, 815 F.2d 617 (10th Cir. 1987) (claim preclusion barred section 1983 suit where plaintiffs had already lost state law claim on the merits).

193. The possibility of a state court loss due to an *erroneous* finding of fact or fact-law conclusion is concededly a problem that results from the combination of *Parratt* and *Allen*. For a federal court to reject the application of an otherwise appropriate collateral estoppel bar, it would have to rule that the facts found were clearly erroneous, that there was not a full and fair opportunity to litigate, or that the fact-finding process itself failed to satisfy the minimum procedural due process requirements of fairness and accuracy. This burden is difficult to meet; consequently, to fully trust in the *Parratt* regime and accept this Note's argument that *Parratt* will yield nearly as much protection for civil rights as long as the adequacy inquiry is correctly handled, *supra* notes 175-78 and accompanying text, one must trust in the honesty, integrity, solicitude, and competence of state administrators, magistrates, and judges. The author believes that such trust is warranted. There are those who agree. *See* Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976); Bator, *supra* note 170, at 606-08 & 626-37. Others do not. *See* Neuborne, The Myth of Parity, 90 HARV. L. REV. 1105 (1977).

194. Mustfov v. Rice, 663 F. Supp. 1255, 1267 n.6 (N.D. Ill. 1987) (if court dismissed claim and if plaintiffs failed to state a claim for relief under elements of state remedy, or if complaint was dismissed because of state law immunity, plaintiffs would be free to reinstate federal complaint); Stewart v. Hunt, 598 F. Supp. 1342, 1349-50 (E.D. N.C. 1984) (no preclusion where state case was dismissed on jurisdictional grounds).

195. Issue preclusion, however, would bar attempts to relitigate the facts surrounding the predicate for the dismissal, for example, the running of the statute of limitations.

196. "This context" implies a background landscape of state law, at the time the state law proceeding was commenced, that could have authorized relief for this specific plaintiff. Redish asserts that under *Allen*, "a failure to raise a section 1983 claim in the course of the state judicial action would bar a subsequent federal suit." Redish, *supra* note 64, at 107. But he fails to see that in this context the *Parratt* plaintiff *has no* section 1983 claim at the time the state proceedings are commenced because he cannot yet claim a violation of due process.

inapplicability of former adjudication defenses to this situation. In dismissing section 1983 complaints on adequacy grounds after predicting that state law will make redress available, courts have cautioned that the section 1983 action may be reinstituted if the state denies relief on legal grounds.[197]

If, however, it is clearly obvious before filing that state law will not allow redress, but the plaintiff nevertheless commences a state court proceeding without joining a section 1983 due process claim, claim preclusion *will* bar a subsequent attempt to initiate a federal claim in either state or federal court. In this situation, the due process claim is *fully actionable* at the time the state claim was brought.[198] The plaintiff should have filed a federal claim initially, prepared to point out the obvious bar to state law redress, and should have prepared to argue that the bar created by state law rendered the state remedy inadequate.[199]

Assuming the state law bar was not obvious when the plaintiff pursued the state remedy, the real question raised by a due process claim brought after a state court defeat on legal grounds is simply *a basic "adequacy" determination*. The legal issue is the same as if the plaintiff had commenced the action in federal court: namely, whether the state system is adequate for purposes of due process notwithstanding the unavailability of relief for this plaintiff. Courts will resolve this case in the same way that they would have resolved it prior to plaintiffs' pursuit of the state remedy.[200] For example, if the plain-

197. *See* Ausley v. Mitchell, 748 F.2d 224, 229 (4th Cir. 1984) (en banc) (opinion concurring in part) (judge would "require the district court to grant, as a condition of dismissal, leave to plaintiffs to reinstate their cases in the event that sovereign immunity is upheld as a defense [in state court]"), *cert. denied*, 474 U.S. 1100 (1986); Thompson v. Steele, 709 F.2d 381, 383 n.3 (5th Cir. 1983), *cert. denied*, 464 U.S. 897 (1983); Loftin v. Thomas, 681 F.2d 364, 365 (5th Cir. 1982) ("If the Texas courts should, for any reason except the lack of merit of his claim, deny relief, Loftin may once again seek section 1983 relief.").

198. *See* Flores v. Edinburg Consol. Indep. School Dist., 741 F.2d 773, 777-79 (5th Cir. 1984) (failure to join section 1983 claim with state tort claims barred subsequent federal section 1983 action where the defendants' statutory immunity to the state claim was perfectly clear in advance).

199. Just how obvious the state bar should be before claim preclusion is properly triggered for failure to join the federal claim is unclear. Perhaps a "clearly established" standard, borrowed from the good faith immunity context used in Harlow v. Fitzgerald, 457 U.S. 800 (1982), would be appropriate. If the standard is too stringent from the plaintiff's perspective, the goals of *Parratt* would be poorly served, since wary plaintiffs would *always* initiate their action in federal court and request a conditional dismissal, unless they could *join* the section 1983 claim with the state law action in state court. But if the test is too lenient, plaintiffs would almost always begin in state court, since an adverse legal decision would almost never preclude a subsequent federal claim.

To achieve the efficiency gains promised by *Parratt*, plaintiffs must decide what type of claim to begin with based on accurate predictions of the likely outcome of each route, and the standard of obviousness must be set at a point that will not skew or inhibit good faith choices based on such predictions. When state law is not clear enough to warrant a federal claim in the first instance, the best litigation strategy would be to begin in state court (assuming the potentially adequate state remedy is judicial) with joint state and federal claims, since in order for the state court to dismiss the federal claim, it would have to commit the state system to providing an adequate remedy.

200. *See* Flores v. Edinburg Consol. Indep. School Dist., 554 F. Supp. 974 (S.D. Tex.

tiff's loss was due to her failure to comply with a reasonable procedural rule, such as a statute of limitations, the state remedy would not thereby be rendered inadequate. But if the defeat in state court is due to a substantive bar or unreasonable procedural requirement, the federal court would have to hear the section 1983 claim.

III.
THE CONTENT OF ADEQUACY: THE HARD CASES

A. Judicial Application Of Adequacy

Most adequacy cases are resolved with little debate because of the substantive flexibility of the adequacy requirement, the allocation of the burden of proof, and the actual availability of some state law redress. In these "easy cases," the courts can predict with some certainty that the plaintiffs will have access to some meaningful remedial procedures under state law. But when a state system offers no prospect of relief, or offers relief too qualitatively different from that essential to provide sufficient redress, most courts have refused to find it adequate. In these "hard cases," where the courts are grappling with a "process due" inquiry, there is a federal question of constitutional magnitude.[201]

This section will first compare the cases that have held state systems

1983) (state remedy held inadequate after plaintiff's state court case was dismissed on immunity grounds), *rev'd on other grounds*, 741 F.2d 773 (5th Cir. 1984); Note, *supra* note 14, at 637 (to reopen a section 1983 suit after a conditional dismissal and subsequent loss on legal grounds in state court, "the plaintiff would have to demonstrate that the state remedy granted was in fact inadequate").

201. *E.g.*, Logan v. Zimmerman Brush Company, 455 U.S. 436 (1982) (absent predicate for application of *Parratt*, postdeprivation remedies are likely to be "constitutionally inadequate"); Parratt v. Taylor, 451 U.S. 527, 544 (1981) ("remedies provided . . . [were] sufficient to satisfy the requirements of due process"); Smolla, *supra* note 42, at 871 (" 'adequacy' is a matter of federal *constitutional* concern"); Nahmod, *supra* note 62, at 229 (the adequacy inquiry "requires courts to apply federal constitutional standards to state remedial schemes"). Since Board of Regents v. Roth, 408 U.S. 564 (1972), ushered in the two-step due process doctrine, it has been hornbook constitutional law that while the entitlement inquiry may involve either state law, constitutional law, or both, the process due inquiry is strictly a constitutional question. *E.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 706-32 (2d ed. 1988). The contrary "bitter with the sweet" due process jurisprudence of Justice Rehnquist, set out in his plurality opinion in Arnett v. Kennedy, 416 U.S. 134, 153-54, *reh'g denied* 417 U.S. 977 (1974), asserts that state-created procedures can escape constitutional scrutiny when they are part of the definition of the entitlement at stake. But this view has never commanded a majority of the court and has recently been expressly repudiated. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) ("it is settled that the 'bitter with the sweet approach' misconceives the constitutional guarantee"); *Logan*, 455 U.S. at 431-32; Vitek v. Jones, 445 U.S. 480, 491 (1980). In any event, by its own terms the "bitter with the sweet" approach is implicated only in the "new property" context of public employment and benefits, where the state truly creates a property interest by positive law in the government recipient/beneficiary relationship, and not in the context of the core liberty and property interests typically interfered with in an unauthorized deprivation case. *See infra* notes 375-93 and accompanying text. Yet, note that the issue is analogous: how much deference should be accorded state remedial/procedural systems, thereby immunizing them from federal constitutional intervention?

"substantively" inadequate with those that have made adequacy a narrow procedural focus of inquiry. Some courts taking the latter approach have held state remedies adequate in spite of the fact, for example, that official immunity would certainly bar plaintiff's suit. The reasoning of these cases will be examined in light of *Parratt*, the fourteenth amendment, and the dual facets of adequacy, substantive and procedural. In cases where state systems denying a true opportunity for compensation have been held adequate, sophisticated and troubling arguments have been presented, warranting separate discussion.

In some situations, the state procedure which the defenders alleges to be an adequate postdeprivation remedy offers relief different *in kind* from that necessary to redress the plaintiff's injury. In *Bumgarner v. Bloodworth*,[202] several local law enforcement officials seized and divided up personal items of sentimental value not covered by a search warrant.[203] The plaintiff sought damages and the return of his property, but the federal district court held that the State Claims Commission procedures provided an adequate remedy and dismissed his suit. The Claims Commission, however, could assert jurisdiction only over the state defendant, and could award only compensatory relief. Since the state remedy did not provide an opportunity to obtain *the relief essential for complete redress* — that is, the return of the property — the court of appeals reversed and held the remedy inadequate, thereby reinstating the section 1983 due process claim.[204] Similarly, in *Roman v. City of Richmond*[205] the court held that even if *Parratt* were to apply to plaintiffs' wrongful death action, the available state remedies were inadequate because "[i]njunctive relief is a very important part of the relief sought . . . [and] the state wrongful death statute does not provide for [it]."[206]

Bumgarner and *Roman* are good examples of the federal judiciary's attempts to make the adequacy inquiry rigorous and meaningful. Both courts considered injunctive relief to be an essential element of the plaintiffs' recovery. The availability of qualitatively different remedies was deemed of little consequence. In fact, these decisions derive strong support from the dictum of *Logan*,[207] where the Supreme Court stated that even if *Parratt* did apply such that state remedies should be considered, the state remedy there available would "in any event" have been inadequate because "[t]he Illinois Court of Claims Act does not provide for reinstatement," which is required to make the plaintiff whole.[208] While this passage may, on the surface, seem to conflict

202. 738 F.2d 966 (8th Cir. 1984) (per curiam).

203. *Id.* at 967.

204. *Id.* at 968. It is unclear how the court would have ruled if the plaintiff had not alleged that the property in question had sentimental value, and instead was assumed to be replaceable.

205. 570 F. Supp. 1554 (N.D. Cal. 1983).

206. *Id.* at 1556.

207. *See supra* notes 99-115 and accompanying text.

208. 455 U.S. at 436-37. *See* Note, *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 103 n. 45 (1982) (to provide the process that is due a state remedy "must adequately redress the individual's injury").

with the flexible concept of adequacy of *Parratt* and *Hudson*, the Court here was concerned with the root requirement of being *made whole*, and not the ancillary aspects of relief held nonessential for adequacy purposes by *Parratt*, such as the right to a jury trial.[209]

Incongruity between the plaintiff's injury and the state remedy is not always a matter of the availability or nonavailability of injunctive relief. In some cases, although the plaintiff may seek only damages, the relief offered by the state is for different injuries or interests. In *Rutherford v. United States*,[210] for example, a fifth amendment due process case, the plaintiffs sought compensatory and punitive damages from an Internal Revenue Service agent for emotional distress allegedly cuased by the willful and malicious wrongful assessment of taxes and for the legal fees expended in recovering such taxes.[211] Although the district court held that the available statutory, administrative and judicial tax recovery procedures were adequate, the court of appeals found that these procedures were "not responsive to the wrong sketched out in the . . . complaint."[212]

The court reasoned that the plaintiffs claimed damages for a deprivation of their interest in freedom from abusive and malicious tax collection,[213] and not for taxes erroneously assessed and collected. Since the statutory refund procedures made "no allowance for mental anguish caused by harassment, or for recovery of legal fees needlessly expended in an attempt to recover clear title to property unjustifiably claimed," such procedures were not the "process that is due."[214] For a state's postdeprivation remedies to satisfy due process under *Parratt*, a court must find "congruity between the substantive interests asserted by the plaintiff and the interests protected by the existing remedial scheme. . . ." A proper application of the *Parratt* and *Logan* principles requires a determination of whether the "available process [can] remedy the *essential* aspects of the interests at stake."[215]

The court of appeals acknowledged that *Parratt* held various procedural mechanisms, such as jury trials and suits against the individual, and ancillary remedies, such as punitive damages, to be outside the scope of procedures required by due process. The court reasoned, however, that this holding operated to *heighten* the inquiry into "the adequacy of the available remedy to protect the essence of the interests claimed."[216] Thus, both the adequacy requirement and due process mandate that remedies provide the injured party

209. *See supra* notes 73, 133-37 and accompanying text.

210. 702 F.2d 580 (5th Cir. 1983).

211. *Id.* at 581, 584.

212. It thus reversed the district court's decision. *Id.* at 584.

213. The court did not address the validity of such a liberty interest because it had not been briefed or passed on below. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 583 n.5 (emphasis added). *See* Note, *supra* note 14, at 632-34, 644-45. *But see* Enright v. School Directors of Milwaukee, 118 Wis. 2d 236, 255-56 (1984) (state wrongful death statute was adequate remedy in suit for loss of society by decedent's parents and siblings

an opportunity to be made whole. While injunctive relief or nonpecuniary damages are not constitutionally mandated remedies in the *abstract*, in the *individual* case, the court must consider the precise nature of the injury suffered and the interest or right involved. In some situations, these forms of relief may be so essential[217] for *meaningful* redress that they are constitutionally mandated *for a particular plaintiff*.[218]

Sometimes there truly is *no* postdeprivation remedy available, either because the state simply does not recognize a cause of action that applies to the facts or because the individual defendants are entitled to absolute immunity under state law. Since a complaint could nonetheless be *filed* in state court, some courts have argued that this is all that adequacy requires.[219] But inasmuch as such complaints could be dismissed on the pleadings, in such cases the right to file a complaint clearly constitutes inadequate process. Such a postdeprivation remedy simply does not provide the plaintiff with a meaningful opportunity to be "made whole," as contemplated by *Parratt* and the fourteenth amendment.

Analysis of the first category of cases, in which the state fails to recognize an applicable claim, is simple and straightforward. Where plaintiffs have no cause of action in state court, there can be no adequate state remedy. In *Wilkerson v. Johnson*,[220] the plaintiffs sued the members of the State Board of Barber Examiners for intentionally and unlawfully denying them a license in order to avoid new competition. The district court ruled that plaintiffs had been deprived of liberty and property without due process and awarded dam-

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although it recognized a damage claim for only the former) (discussed *supra* note 149 and *infra* note 382), *cert. denied*, 469 U.S. 966 (1984).

217. Just how important a certain form of relief must be in order to conclude that it is constitutionally mandated was raised in the debate between Justice Brennan and Justice Harlan in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). *See generally*, Note, *supra* note 83, at 683-84 nn.4-5, 691-94. The relevance of this debate to the adequacy question is manifest.

218. *Accord*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 20-22 (1978) (ability to pursue a pretermination injunction was not an "adequate substitute" for the type of hearing required by due process to protect the plaintiff's interests); Parrett v. City of Connersville, 737 F.2d 690, 697 (7th Cir. 1984) (arbitration was inadequate remedy for city employee because the arbitrator could have given Parrett only a portion of his damages), *cert. dismissed*, 469 U.S. 1145 (1985); Holman v. Hilton, 712 F.2d 854, 860-61 (3rd Cir. 1983) (administrative claims procedure designed to give state notice of impending suits found an inadequate substitute for plaintiff's right to bring tort action, and thus unconstitutional deprivation by statute); Wilkerson v. Johnson, 699 F.2d 325, 329 (6th Cir. 1983) (criminal statute penalizing "official oppression" was inadequate remedy because it "would not redress the injury to the plaintiffs"); Gregory v. Town of Pittsfield, 470 U.S. 1018, 1022-23 (1985), *denying cert. to* 479 A.2d 1304 (Me. 1984) (O'Connor, J., joined by Brennan and Marshall, JJ., dissenting) (a state procedure that "allow[ed] plaintiff to obtain grants of general assistance nearly one year after her application was improperly denied . . . [but] made no provision for the recovery of damages resulting from the town's failure to provide her with notice or a prompt hearing" should not be adequate under *Parratt*); Smolla, *supra* note 42, at 883-84 n.226 (collecting similar cases).

219. *See infra*, notes 234-41 and accompanying text.

220. 699 F.2d 325 (6th Cir. 1983).

ages.[221] On appeal, the defendants contended that state law provided an adequate remedy by allowing the plaintiff to sue for injuries inflicted by negligent state officials.[222] The statute, however, expressly excluded claims based on the "actual fraud, malice or corruption" of state employees, which rendered it useless to these plaintiffs. The appellate court, therefore, affirmed the district court's judgment because given the allegations and proofs in the plaintiffs' case, there was no state process to redress their injury.[223] *Wilkerson* represents the flip side of the "easy cases" discussed in section II.A, where the courts have compared the factual allegations of the complaint to the elements of the relevant state law remedy, and finding a fit declared the remedy adequate.

Similarly, in *Clark v. Michigan Department of Corrections*,[224] an inmate sued for deprivation of liberty after being wrongfully detained in administrative segregation for eleven days following an acquittal. No false imprisonment claim existed under state law for the wrongful segregation of an already convicted and incarcerated person.[225] Since there was no available opportunity for redress, the court denied the defendants' *Parratt* motion to dismiss.[226]

The cases where immunity bars recovery under state law are also readily resolved. In both *Flores v. Edinburg Consolidated Independent School District*[227] and *Frazier v. Collins*,[228] the courts concluded that the defendants' immunities under state law rendered the state systems inadequate to redress the deprivations suffered.[229] In *Flores*, the defendant-school district was entitled to common-law sovereign immunity, and the defendant school teacher enjoyed personal immunity for discretionary acts taken within the scope of his employment. There was, therefore, no state law remedy offering redress for

221. *Id.* at 327. Note that this is precisely the type of case discussed *supra* notes 155-62 and accompanying text, where compensation-less review procedures could conceivably have provided a wholly adequate state remedy. Apparently, none was available, or it was not argued to the court.

222. 699 F.2d at 329.

223. *Id.*

224. 555 F. Supp. 512 (E.D. Mich. 1982).

225. "[A] recognized intentional tort [could not] . . . be culled from the common law of Michigan." *Id.* at 516.

226. *Id.* at 517. *Accord*, Evans v. City of Chicago, 689 F.2d 1286, 1298 (7th Cir. 1982) (state remedy would be inadequate because it had never been used to obtain compensation on the facts presented and, therefore, was merely speculative); Musta v. Rice, 663 F. Supp. 1255 (N.D. Ill. 1987).

227. 554 F. Supp. 974 (S.D. Tex. 1983), *rev'd on other grounds*, 741 F.2d 773 (5th Cir. 1984).

228. 538 F. Supp. 603 (E.D. Va. 1982).

229. *Flores*, 554 F. Supp. at 978; *Frazier*, 538 F.Supp. at 606-07. In both cases the alleged injuries were due to negligence, but since both predated *Daniels/Davidson*, they satisfied the deprivation element of the due process claim. Burch v. Apalachee Comm. Mental Health Services, 804 F.2d 1549, 1556 n.11 (11th Cir. 1986) (adequacy inquiry must include consideration of entity and individual immunities); Lambert v. McFarland, 612 F. Supp. 1252, 1267-68 (N.D. Ga. 1984) (state remedy inadequate where city would possess immunity); Stewart v. Hunt, 598 F. Supp. 1342, 1354 n.16 (E.D. N.C. 1984) (state court sovereign immunity bar could render state remedy inadequate).

the injuries caused by the teacher's negligence.[230] In holding that the plaintiff had alleged a due process claim, the court interpreted *Parratt's* dismissal requirement to apply only where there was a remedy under state law.[231] Without such a remedy, there is a valid fourteenth amendment claim.

In *Frazier*, state law recognized a claim for conversion or detinue against prison officials, but under the facts of the case, the defendant might have been entitled to sovereign immunity.[232] The district court rejected the defendant's argument which relied on an adequate state remedy defense because the state intended to retain the immunity defense which rendered the state remedy inadequate.[233]

Despite the intuitive logic of these results, several courts have reached the opposite conclusion. They have reasoned that the ability to file a complaint and perhaps argue about its sufficiency or the applicability of absolute immunity provides all the process that is due to defeat an unauthorized deprivation claim.[234] This view is simply erroneous.

The original panel opinion in *Daniels v. Williams*[235] provides an example of this erroneous reasoning. The court found the first three elements of the due process claim satisfied. After examining the adequacy of the state's remedies, however, the court could not "confidently predict whether sovereign immunity would apply" and, thus, was forced to "determine whether the

230. 554 F. Supp. at 978. The plaintiff had tried to sue under state law first, but the defendants were granted summary judgment based on these very immunities. *Id.* at 976.

231. *Id.* at 979.

232. 538 F. Supp. at 606-07.

233. *Id.* at 607. *Accord*, Davidson v. Cannon, 474 U.S. 344 (1986) (Blackmun, J., joined by Marshall, J., dissenting); Davidson v. O'Lone, 752 F.2d 817, 834 (3rd Cir. 1984) (en banc) (Seitz, J., dissenting) ("Since some procedural process is due when a person, acting under color of state law, deprives an individual of a liberty interest, the Due Process Clause of the Fourteenth Amendment has been violated in this case . . . [because through statutory immunity the state] has seen fit . . . to deny any postdeprivation remedy"), *aff'd sub nom.* Davidson v. Cannon, 474 U.S. 344 (1986); Daniels v. Williams, 748 F.2d 229, 235 (4th Cir. 1984) (en banc) (opinion concurring in part and dissenting in part) ("if under state law the defendant . . . could avoid liability . . . by the defense of sovereign immunity, the state's post-deprivation remedy does not provide . . . [an] adequate state remedy"), *aff'd*, 474 U.S. 327 (1986); Ausley v. Mitchell, 748 F.2d 224, 227-28 (4th Cir. 1984) (en banc) (opinion concurring in part) ("Hudson v. Palmer [468 U.S. 517 (1984)] . . . strongly suggests that if sovereign immunity is available as a defense [to the state remedy], the requirements of *Parratt* to oust section 1983 jurisdiction would not be met."), *cert. denied*, 474 U.S. 1100 (1986); Subica v. Major Reynolds, No. 82-0025 (E.D. Va. March 22, 1982) (unpublished, discussed in Frazier v. Collins, 538 F.Supp. 603, 607) (vacating earlier grant of summary judgment for defendants made on assumption that sovereign immunity defense would not be raised in state proceeding after State Attorney General informed court of her intent to raise it). *See also* cases cited *supra* note 197, dismissing due process claims on the condition that they could be reinstituted if the state denies relief for nonmeritorious reasons; Baltz v. Shelley, 661 F. Supp. 169, 181 (N.D. Ill. 1987) (court holds state remedy adequate after ruling that defendants waived state law immunity).

234. Courts have reached the conclusion that the state remedy is adequate notwithstanding the certain application of sovereign immunity on other more sophisticated grounds, discussed below. *See infra* notes 312-15 and accompanying text.

235. 720 F.2d 792 (4th Cir. 1983), *aff'd on other grounds*, 748 F.2d 229 (1984) (en banc), *aff'd*, 474 U.S. 327 (1986).

possibility of a sovereign immunity defense deprives Daniels of an adequate postdeprivation remedy."[236]

Noting correctly that "*Parratt* does not require that the plaintiff actually receive a remedy for the deprivation of his interest," the court reasoned that "under *Parratt* the requirements of due process are satisfied by the provision of a hearing before a tribunal with the power to grant a remedy."[237] The plaintiff pointed out that his claim would clearly be barred if defendant's immunity defense were sustained because the tribunal would lack the power to grant redress.[238] Nevertheless, the state "remedy" was held adequate:

> While we agree that [immunity] . . . could deprive Daniels of a remedy, it does not follow that it would deprive him of his right to present a claim and be heard. To be sure, Daniels will be unable to litigate the merits of his claim if a state court determines that Williams is entitled to sovereign immunity. But while due process may sometimes require a state to consider the merits of a plaintiff's charge before deciding whether to terminate his claim, it does not entitle 'every civil litigant to a hearing on the merits in every case.' Rather, due process requires 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case.'[239]

The same result was reached in *Groves v. Cox*.[240] The *Groves* court reviewed several pure procedural due process cases, observed that they made "no reference to the adequacy of the remedy afforded," and concluded that because "due process specifies the nature of the hearing, not the remedy . . . [*Parratt*] requires [nothing] more than the right to present a claim and be heard."[241]

B. Substantive and Procedural Adequacy

Daniels v. Williams and *Groves v. Cox* are wrongly decided. They err by confusing the substantive and procedural aspects of adequacy and denying the existence of the former.[242] The cases previously discussed holding state reme-

236. 720 F.2d at 797.
237. *Id.*
238. *Id.* at 798.
239. *Id.* (citations omitted).
240. 559 F. Supp. 772 (E.D. Va. 1983).
241. *Id.* at 776-77.
242. *See*, Nahmod, *supra* note 62, at 229 (adequacy depends on "whether [the] remedy provides a hearing consistent with procedural due process *together* with the possibility of being made whole"); Note, *supra* note 14, at 640-41 (noting remedial and procedural aspects of adequacy); Comment, *supra* note 67, at 1218 (distinguishing procedural and substantive aspects of protection implied by *Parratt*); Frazier v. Collins, 538 F. Supp. 603, 605-08 (E.D. Va. 1982) (segregating adequacy analysis into substantive and procedural sections). The courts' failure to grasp the substantive component of adequacy may be seen as a symptom of the confusion created by *Parratt*'s labeling unauthorized deprivations as procedural due process claims, despite their hybrid character. *See supra* notes 64-72 and accompanying text.

dies inadequate, and indeed all of the "easy" ones as well, show that adequacy is primarily a *substantive* doctrine concerned with the capacity of the *relief* made available by state law to redress the injuries and protect the interests of the plaintiff.[243] When a state actor commits an unauthorized deprivation of life, liberty, or property, and the state fails to offer the victim a realistic opportunity to be made whole, the Constitution has been violated since no postdeprivation remedy is available. If the suit is barred by an immunity, for example, the plaintiff simply has no opportunity to be "made whole." This conception of adequacy is not only implicit in *Parratt* itself but is mandated by the fourteenth amendment as shaped by modern constitutional law. *Daniels* and *Groves* misconceive the requirements of adequacy by concentrating solely on the *procedural* elements of the state systems[244] and ignoring the fact that it is the *availability of compensation or relief*, combined with a procedurally sound process, that prevents the deprivation from being a constitutional wrong.

For a state procedural system to provide adequate postdeprivation relief, it must meet the same minimum due process standards of fairness and accuracy applicable to *any* government proceeding that adjudicates rights and liabilities.[245] Thus, procedural adequacy can in part be tested through the settled three-part balancing test.[246] This test is used to analyze many procedural due process issues by balancing the private and public interests at stake and the relative accuracy of the procedures in place.[247] Accordingly, informal, but accurate and fair claims procedures can clearly satisfy the procedural component of adequacy.[248] Professor Smolla correctly points out that "*Parratt* does not require states to provide the equivalent of a federal district court trial for every deprivation . . . [S]tates are certainly free to adopt a wide range of administrative or judicial compensatory systems for handling small claims."[249]

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243. The adequacy discussions in *Parratt*, *Hudson*, and nearly all of the easy adequacy cases point out not the virtues of the states' fact-finding mechanisms, pleading and discovery rules, or appellate review procedures, but the availability of some form of relevant relief. *See* Note, *supra* note 14, at 631 ("language of *Parratt* supports the contention" that adequacy requires opportunity for compensation).

244. *See* Comment, *Circumventing State Statutory and Common Law Sovereign Immunity With Section 1983*, 37 BAYLOR L. REV. 425, 454 (1985) (*Daniels* was concerned only with whether the state system "complie[d] with the technical requirements of due process").

245. *See, e.g.*, Holman v. Hilton, 712 F.2d 854, 862 (3rd Cir. 1983) (analyzing procedural adequacy of administrative claims procedure to serve as substitute for tort claim deprived by statute).

246. *See supra*, note 111.

247. *E.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982); Matthews v. Eldridge, 424 U.S. 319, 334-35 (1976).

248. *See* the discussion of "easy" adequacy cases finding nonjudicial remedies adequate, *supra* notes 141-42 and accompanying text.

249. Smolla, *supra* note 42, at 885. Smolla makes clear that this procedural latitude has no bearing on the basic substantive adequacy requirement that an opportunity for redress be provided. *Id.* at 883-86. *See also*, Nahmod, *supra* note 62, at 220-30; Holman v. Hilton, 712 F.2d 854, 863 (3rd Cir. 1983); Steffen v. Housewright, 665 F.2d 245, 246 n.3 (8th Cir. 1981) (reciting the attributes of the informal oral hearing held adequate). *Cf.* Memphis Light, Gas & Water

Further, reasonable procedural mechanisms such as statutes of limitations, evidentiary rules, and time limits for filing pleadings and appeals are likewise compatible with the requirements of procedural adequacy, even where such mechanisms will bar the plaintiff's state remedy. "[T]he State certainly accords due process when it terminates a claim for failure to comply" with such rules.[250] It follows that an otherwise adequate state remedy is not made inadequate by plaintiff's failure to comply with reasonable procedural requirements.[251]

Procedural adequacy, however, will not tolerate any draconian procedural requirement that unduly threatens the plaintiff's ability to have her case heard on the merits.[252] For a substantively adequate remedy to be meaningful, the plaintiff "must enjoy genuine access to a state court."[253] Thus, a state system that prohibits indigent litigants from appearing *pro se* but refuses to provide them with counsel fails to provide a procedurally adequate remedy.[254] Similarly, the application of filing, service, and witness fees to an indigent plaintiff will render a substantively adequate state remedy procedurally inadequate.[255] These procedural mechanisms fail to satisfy the procedural compo-

Div. v. Craft, 436 U.S. 1, 21-22 (1978) (due process satisfied by informal pretermination meeting between person with claim and person empowered to act on it).

250. *Logan*, 455 U.S. at 437 & 434 n.7. *See also* National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 640 (1976) (discussing constitutional limitations on default judgment procedures).

251. *See* Pryzina v. Ley, 813 F.2d 821, 823 (7th Cir. 1987) (failure to invoke state appellate process not bar to adequacy); Williams v. St. Louis County, 812 F.2d 1079, 1082 n.5 (8th Cir. 1987) (availability of limitations defense "would not make a state court remedy inadequate for *Parratt* purposes."); Holloway v. Walker, 784 F.2d 1287, 1293 (5th Cir.) ("Nothing in *Parratt* or *Hudson* suggests that a postdeprivation remedy is made inadequate merely because it is possible to forfeit the remedy by virtue of the operation of reasonable state procedural rules.") *aff'd on rehearing*, 790 F.2d 1170, *cert. denied*, 107 S.Ct. 571 (1986). *See also* Cohen v. City of Philadelphia, 736 F.2d 81, 87 (3rd Cir.) (otherwise adequate remedies held adequate although plaintiff "waived his state law avenues of relief by . . . inaction"), *cert. denied*, 469 U.S. 1019 (1984); Jones v. Previtt & Mauldin, 634 F. Supp. 1520, 1530-32 (N.D. Ala. 1988) (state remedies adequate despite plaintiff's failure to invoke them). Temple v. Marlborough Div. of the Dist. Court, 395 Mass. 117, 127-29 (1985) (postdeprivation procedures which the plaintiff failed to invoke could be adequate to bar current damage action). Of course, were the rule otherwise, plaintiffs could circumvent *Parratt* entirely simply by defaulting in some manner in the prosecution of their state claim. Jenkins v. McMickens, 618 F. Supp. 1472, 1473-74 (S.D. N.Y. 1985) (notice of claim bar in state court consistent with determination that state remedy was adequate). *Cf.* Kremer v. Chemical Construction Co., 456 U.S. 461, 485 (1982) (plaintiff could not avoid issue preclusion bar on ground that he lacked full and fair opportunity to litigate where any deficiency resulted from plaintiff's failure to invoke available state procedures).

252. *See* Wells & Eaton, *supra* note 4, at 231-32 ("formally adequate state rule . . . devalued by procedural rules" is unacceptable); Note, *supra* note 14 (state court procedure "that places significant obstacles between the plaintiff and adequate compensation" renders state process inadequate).

253. Frazier v. Collins, 538 F. Supp. 603, 608 (E.D. Va. 1982). *See* Parratt v. Taylor, 451 U.S. 527, 555-56 (1981) (Marshall, J., concurring in part and dissenting in part) (defendants must inform victims of state remedies in order to claim they are adequate); Holman v. Hilton, 712 F.2d 854, 858-613 (3rd Cir. 1983) (statute barring prisoner from bringing ripe tort claim while incarcerated held unconstitutional).

254. *See* Coleman v. Faulkner, 697 F.2d 1347, 1349 (10th Cir. 1982) (per curiam).

255. Williams v. St. Louis County, 812 F.2d 1074, 1081-83 (8th Cir. 1987) (otherwise

nent of adequacy because they create an "unjustifiably high risk that meritorious claims will be terminated," and thereby deny "an *opportunity* granted . . . at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case."[256]

Nor will procedural adequacy sanction fundamentally unfair or potentially inaccurate[257] postdeprivation remedies. In *Holman v. Hilton*,[258] the Third Circuit analyzed the capacity of an administrative claims procedure to substitute for a tort claim that had been unconstitutionally deprived by statute. The administrative procedure consisted of the filing of written claims with a reviewing officer empowered to make final and unreviewable decisions. It was held constitutionally inadequate:

> [t]he inherent frailties of procedures that depend *exclusively* upon written presentations for the resolution of individual claims has long been recognized . . . . By depriving Holman of any opportunity to adequately present his case, either before a court or an administrative body of some kind, the State has created "an unjustifiably high risk that Holman's meritorious claims will be terminated". . . . [The remedy is] constitutionally deficient inasmuch as [it] make[s] no provision for "some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilit[ies]."[259]

Procedural adequacy also requires adherance to due process notions of fairness, such as the necessity of a neutral and detached decisionmaker or adjudicator.[260] Smolla asserts that procedural adequacy embodies "elemental notions such as conflict of interest, separation of powers, and accountability," and posits that a claims procedure for prisoners consisting of a petition to the warden with no hearing before independent administrators and no prospect of

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adequate replevin action held inadequate where state court enforced $177.00 filing fee requirement against indigent plaintiff); Walker v. Scurr, 617 F. Supp. 679, 681 (S.D. Iowa 1985). *Cf. Logan*, 455 U.S. at 437 (state may require filing fees "in an appropriate case"); Griffin v. Illinois, 351 U.S. 12, 19-20 (1956) (due process violated where state denied defendants access to appellate review if they could not afford to furnish a bill of exceptions or report of the trial proceedings). *But see* Wood v. Sargeant, 694 F.2d 1159 (9th Cir. 1982) (requirement that plaintiffs pay taxes before commencing action did not render state procedure inadequate).

256. *Logan*, 455 U.S. at 435, 437. Similarly, Laverne Logan was deprived of procedural due process by a state system which for wholly arbitrary reasons extinguished his potentially meritorious action.

257. *E.g.*, Goldberg v. Kelly, 397 U.S. 254, 267 (1970). *See* Brock v. Roadway Express, Inc., 481 U.S. 252 (1987) (analyzing accuracy of procedures preceding reinstatement of discharged truck drivers by Secretary of Labor). *See also* Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 543-44 & nn.8-9 (1985).

258. 712 F.2d 854 (3d Cir. 1983).

259. *Id.* at 862.

260. *E.g.*, Arnett v. Kennedy, 416 U.S. 134, 197-99 (1974) (White, J., concurring in part and dissenting in part) (due process guarantees an impartial decisionmaker, but was violated where "the hearing official was the object of slander that was the basis for the employee's proposed discharge"); Gibson v. Berryhill, 411 U.S. 564, 579 (1973) (administrative adjudicator may not have personal interest in outcome of dispute).

judicial review "should not be deemed adequate under *Parratt*."[261]

Finally, procedural adequacy may at times require *more* than the minimum due process standards of fairness and accuracy applicable to all government proceedings that adjudicate rights and liabilities. For example, the extralenient rules of pleading and judicial help accorded *pro se* complainants in federal courts[262] may also be mandated by procedural adequacy, even though such rules would not be required as a matter of pure procedural due process.[263] This "due process plus" aspect of procedural adequacy stems from the fact[264] that in the due process context of adequate postdeprivation remedies, the state remedy in fact serves as the vehicle for the enforcement of federal constitutional rights.[265] Hence, the same doctrines developed to govern the relation of state procedures and federal rights should also be embodied in the procedural component of adequacy.

State rules and procedures, though constitutional, may be inadequate in other contexts where federal rights are being litigated. In these cases, federal procedures may be imposed on the state rules and procedures to ensure the vindication of implementation of federal rights.[266] Were federal rights not in-

261. Smolla, *supra* note 42, at 885-86.

262. *E.g.*, Haines v. Kerner, 404 U.S. 519, 520 (1972) (*pro se* complaints are held to "less stringent standards than formal pleadings drafted by lawyers"); Gordon v. Leeke, 574 F.2d 1147, 1152 (4th Cir.) (district court should have advised *pro se* plaintiff that he named the wrong defendant and shall have granted him leave to join such defendant), *cert. denied*, 439 U.S. 970 (1978); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (summary judgment for defendant reversed where court failed to inform *pro se* plaintiff of right to file counter-affidavits, and dismissal was the result of his failure to do so).

263. Irshad v. Spann, 543 F. Supp. 922, 927-28 (E.D. Va. 1982) (failure of state to aid *pro se* plaintiffs "might result in a finding that [the state] does not provide a meaningful postdeprivation remedy for misconduct by prison officials").

264. Logan v. Zimmerman Brush Company, 455 U.S. 422, 432-33 (1982); Martinez v. California, 444 U.S. 277, 282 (1980); Ferri v. Ackerman, 444 U.S. 193, 198 (1979). *See infra* notes 308-15 and accompanying text.

265. *See* Wells & Eaton, *supra* note 4, at 213 & n.50, 231-32; Smolla, *supra* note 42, at 871. *See infra* notes 320-29 and accompanying text.

266. Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 362-64 (1952) (jury trial required in F.E.L.A. suit); Brown v. Western Ry. of Alabama, 338 U.S. 294, 296-98 (1949) (state rule construing complaint's allegations most favorably to defendant on motion to dismiss invalid in F.E.L.A. suit as an "unnecessary burden . . . upon rights of recovery authorized by federal law"); Central Vermont Ry. v. White, 238 U.S. 507, 511-12 (1915) (state policy cannot place burden of proof on plaintiff to show freedom from contributory negligence in F.E.L.A. suit). *See* Note, *supra* note 42, at 226-29 (arguing that for state remedy to be adequate defendant must have burden of proof to show propriety of deprivation). *See* Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247 (1931) (state remedy inadequate to vindicate equal protection claim); Ward v. Love County, 253 U.S. 17 (1920) (the substance of due process may require a recoupment remedy not otherwise available); General Oil Co. v. Crane, 209 U.S. 211 (1908) (state courts may have to make injunctions against state officials available to federal claimants). *See generally*, HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 521-26, 567-73 (1973). *Cf.* Martinez v. California, 444 U.S. 277, 283-84 n.7 (1980) (state courts may be required to entertain section 1983 actions); Testa v. Katt, 330 U.S. 386 (1947) (state cannot decline jurisdiction over a federal claim because it conflicts with state policy). *But cf.* Spencer v. South Carolina Tax Comm'n, 316 S.E.2d 386, 388-89 (S.C. 1984) (state court need not entertain section 1983 suit), *aff'd by an equally divided court*, 471 U.S. 82 (1985).

volved, the states could lawfully refuse to make these procedures available to litigants in state court. In other cases, the Court has refused to allow the application of a novel or discretionary state procedural rule, or one that unreasonably burdens the federal right without sufficiently advancing a legitimate state interest, to block Supreme Court review of the federal issue pursuant to the doctrine of independent and adequate nonfederal grounds.[267] The Court has followed this policy even if the state rule would satisfy the requirements of procedural due process as applied to a state-law right.[268] Similarly, when a section 1983 defendant proposes that a state procedural rule be applied in federal court because federal law is deficient, the rule, though plainly constitutional, must "not [be] inconsistent" with the federal constitutional or statutory right being asserted.[269]

This suggests that the vindication of federal rights at times requires *more* procedural protection than that mandated by procedural due process.[270] An

267. *E.g.*, James v. Kentucky, 466 U.S. 341 (1984) (state supreme court refusal to hear merits of defendant's challenge to jury instructions because attorney asked only for an admonition as opposed to an express instruction did not bar Supreme Court review because the rule "was not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights"); Sullivan v. Little Hunting Park, 396 U.S. 229, 232-34 (1970); NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449 (1958). Generally, when a constitutional state procedural rule operates to defeat a litigant's ability to assert a federal right, its application will stand as an independent and adequate nonfederal ground barring Supreme Court review of the claim's merits. *E.g.*, Michel v. Louisiana, 350 U.S. 91 (1955) (where state supreme court refused to pass on defendants' constitutional challenges to their indictments because they failed to raise them within the required three days, Supreme Court lacked jurisdiction to hear challenges). The independent and adequate nonfederal ground doctrine, established by Murdock v. Memphis, 20 Wall. 590, 87 U.S. 590 (1875), prevents the Supreme Court from issuing advisory opinions, in contravention of article III, since review of the undecided federal question would be meaningless where an issue of state law remains dispositive of the case. *See generally*, Michigan v. Long, 463 U.S. 1032, 1037-44 (1983); Henry v. Mississippi, 379 U.S. 443, 446-47 (1965).

268. *See Henry*, 379 U.S. at 447-48 (adequacy of procedural default to bar review is a federal question and is found only if the application of the state rule advances legitimate state interest); Williams v. Georgia, 349 U.S. 375, 399 (1955) (Clark, J., dissenting) (state ground is inadequate "where the state law, honestly applied . . . throws such obstacles in the way of enforcement of federal rights that it must be struck down as unreasonably interfering with the vindication of such rights"); HART & WECHSLER, *supra* note 246 at 544-47, 557-62 (Supreme Court does not believe a procedure must violate procedural due process to be considered an inadequate nonfederal ground).

269. 42 U.S.C. § 1988 (1976). *See* Burnett v. Grattan, 468 U.S. 42, 49-55 (1984) (statute of limitations borrowed from state law, administrative employment discrimination claim was "inappropriate" for use in civil rights case because of "functional differences"); 423 South Salina Street v. City of Syracuse, 68 N.Y.2d 474, 489-93 (1986) (state law requirement that plaintiff notify defendant of intent to sue within ninety days of occurrence held applicable to section 1983 suit and not inconsistent with policies of federal right). *See generally*, Board of Regents v. Tomanio, 446 U.S. 478, 483-92 (1980) (state law rules for tolling statute of limitations not inconsistent with federal law); Robertson v. Wegman, 436 U.S. 584, 590-95 (1978) (state survivorship statute allowing substitution of family members, but not estate, not inconsistent with section 1983).

270. *See* Robertson v. Wegman, 436 U.S. 584, 592 n.8 (1978) ("the fact that a state survivorship statute may be reasonable by itself [does not] resolve the question whether it is inconsistent with the Constitution and laws of the United States"); Ortwein v. Schwab, 410 U.S. 656,

inquiry into procedural adequacy must, therefore, analyze *how* the remedies will be *applied* in the situation specific to each plaintiff rather than simply determine whether state postdeprivation remedies are procedurally sound as an abstract constitutional matter.[271] In *Parratt*, for instance, Justice Marshall's dissent argued that the state's remedy was inadequate specifically for Bert Taylor.[272] Though Marshall agreed that there were no "shortcomings" in the Nebraska tort claims procedure, he argued that it was inadequate *in this case* because Taylor had not been informed of its existence.[273] Thus, prior to state court litigation, if a procedural aspect of the state system would hinder a claimant's ability to obtain redress, there may be a basis for obtaining federal jurisdiction, even though the remedy and the state system were facially constitutional. Similarly, an actual loss in state court based on constitutional, procedural grounds that were unreasonable as applied should lead to a finding of inadequacy.

Since an actual or hypothetical loss in state court based on *reasonable* procedural grounds may be entirely compatible with the requirements of procedural adequacy, the *Daniels* panel was correct when it stated that due process does not demand that *every* civil litigant be given a hearing on the merits.[274] The court went astray, however, by understanding adequacy to require nothing more than a state system that comports with procedural due process. The *substantive* component of adequacy dictates that *a hearing subject to every conceivable procedural safeguard is an inadequate postdeprivation remedy if the substantive law to be applied fails to make redress available upon proof of a deprivation by a state actor.* Where state sovereign immunity may pose a bar to recovery, for example, a full hearing on the issue of sovereign immunity does not create adequate postdeprivation process:

> The substantive right granted by the fourteenth amendment due process clause is the right to certain [remedial] process. This right, like other specific, substantive rights, cannot be violated regardless of the procedures attending the violation. If sovereign immunity to a constitutional claim violates the substantive right to due process, the process of deciding the applicability of sovereign immunity cannot make it constitutional.[275]

659 (1973) (per curiam) ($25 appellate court filing fee could be constitutionally applied to indigent welfare recipients since "one's interest in bankruptcy discharge . . . [or] increased welfare benefits . . . has far less constitutional significance than the interest of the *Boddie [v. Connecticut]* appellants [in obtaining a divorce]").

271. *Cf.* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 20-22 (1978) (availability of regular judicial injunction was not adequate predeprivation process to prevent wrongful termination of utility services).

272. Parratt v. Taylor, 451 U.S. 527, 555-56 (1981) (Marshall, J., concurring in part and dissenting in part).

273. *Id.*

274. Daniels v. Williams, 720 F.2d 792, 798 (4th Cir. 1983).

275. Comment, *supra* note 244, at 455. Consider also Judge Seitz, dissenting in the Third Circuit *en banc* opinion in *Davidson*:

Other commentators agree that in the context of adequate postdeprivation remedies, "[p]rocedural due process requires a meaningful opportunity to be made whole," and, therefore, if immunities will prevent the court from hearing the merits of the plaintiff's claim, "it is hard to see how the [state remedy could be considered adequate]."[276] In short, the fourteenth amendment "was clearly designed to place limits on state action adverse to individuals,"[277] but the *Daniels* and *Groves* "process only" analysis would, in the context of unauthorized deprivations, reduce its guarantee to a nullity whenever a state opted for a policy of noncompensability notwithstanding a state-inflicted deprivation of a protected interest.[278]

C. *The Minimum Content of an Adequate State Remedy Under Parratt and the Constitution*

The substantive component of adequacy, visible to all but the *Daniels* and *Groves* courts, is implicit in the *Parratt* doctrine itself and is mandated by the fourteenth amendment. The state must provide more than a process without remedy for the defendant to contend that the state's remedial system is adequate. *Parratt*, the cases it relied upon most heavily, and *Hudson* held only that because state law provided the victims with opportunities for full compensation, no due process violation had occurred.[279] This holding clearly implies, however, that where state law fails to provide an opportunity for full compensation, the due process clause has been violated. The opinion has been so understood by courts and commentators.[280]

> [T]he mere right to file an action is tantamount to no process at all, since [due to sovereign immunity] the action must be dismissed prior to any proceedings on the merits. It is true that due process does not always require a hearing on the merits. For instance, 'the state certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule.' But this state immunity statute denies any 'opportunity for [a] hearing appropriate to the nature of the case.'

Davidson v. O'Lone, 752 F.2d 817, n.2 (3d Cir. 1984) (en banc) (dissenting opinion) (citations omitted), *aff'd sub nom.* Davidson v. Cannon, 474 U.S. 344 (1986). *See* Note, *supra* note 14, at 630 ("a plaintiff whose claim is barred by a state immunity statute receives no *meaningful* hearing because the plaintiff has no hope of success").

276. Nahmod, *supra* note 62, at 229-30. *See* Note, *supra* note 127, at 902 ("*Parratt* requires that plaintiffs be given an opportunity to be fully compensated"); Note, *supra* note 14, at 630; Comment, *supra* note 67, at 1218. Indeed, if adequacy required only that the state "listen", none of the cases finding state remedies inadequate would make any sense, since the states would have fulfilled their obligation to listen by simply allowing for complaints to be filed in a procedurally adequate system.

277. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 560-67, 1688-91 (2d ed. 1988).

278. "The nature of an action to compensate a taking of life, liberty, or property is similar to an action for damages. To say that due process tailoring of an action for damages would form a procedure in which the state could summarily deny the claim because the state law said so is to say that due process imposes no more obligation upon the state than to pass a law denying constitutional claims against it. Such a view would give the states unfettered power to control due process, when clearly the purpose of the due process clause is to prevent this type of state action." Comment, *supra* note 242, at 457-58. *Accord*, Note, *supra* note 14, at 630-31.

279. *Parratt*, 451 U.S. at 541-44; *Hudson*, 468 U.S. at 535-36.

280. *See, e.g.*, Ausley v. Mitchell, 748 F.2d 224, 227-28 (4th Cir. 1984) (en banc) (opinion

Indeed, Justice Powell, concurring in *Parratt*'s result, read the majority opinion in precisely this way.[281] Justice Powell claimed that while the majority had set out to minimize federal jurisdiction over "garden variety" torts, its holding would have the opposite effect of making " 'the fourteenth amendment a font of tort law' whenever a State has failed to provide a remedy for negligent invasions of liberty or property interests."[282] Powell cited two other cases where relief was sought for negligently inflicted injuries and the state failed to make compensation available. He concluded that under *Parratt* the plaintiffs in both cases would state valid due process claims.[283]

Justice Powell, of course, was attempting to show the "unfortunate" ramifications of the majority's holding that negligence could constitute a constitutional deprivation,[284] but in fact his scorn was constitutionally inevitable: when a state actor has deprived an individual of life, liberty, or property, the due process clauses of the fifth and fourteenth amendments guarantee relief.[285]

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concurring in part), *cert. denied*, 477 U.S. 1100 (1986); Flores v. Edinburg Consol. Indep. School Dist., 741 F.2d 773 (5th Cir. 1984); Holman v. Hilton, 712 F.2d 854, 860 (3d Cir. 1983); Clark v. Michigan Dep't of Corrections, 555 F. Supp. 512, 517 (E.D. Mich. 1982). *But see* Rittenhouse v. DeKalb County, 764 F.2d 1451, 1457-58 (11th Cir. 1985) (noting that the converse can be inferred from *Parratt* and *Hudson* but finding such inference "overborne" by other cases), *cert. denied*, 475 U.S. 1014 (1986); Eberle v. Baumfalk, 524 F. Supp. 515, 518-19 (N.D. Ill. 1981) (refusing to infer converse of *Parratt*'s holding). *See* Smolla, *supra* note 42, at 866-67, 871 ("*Parratt* implied that [a due process claim] . . . would exist in any case in which the state failed to provide an adequate post-deprivation remedy . . . The lower courts have accepted this understanding of *Parratt*."); Comment, *supra* note 242, at 458 (Both "*Parratt* and *Hudson* strongly imply that, but for the availability of adequate common law claims, the individuals would have presented valid section 1983 actions."); Wells & Eaton, *supra* note 4, at 239; Note, *supra* note 14, at 631, 641-42 n.217; *contra* Note, *supra* note 4, at 1078 (availability of "some type of immunity under state law should not necessarily render the state remedy inadequate.").

281. 451 U.S. at 546-54 (Blackmun, J. and Marshall, J., dissenting, also read *Parratt* in this manner.)

282. 451 U.S. at 549-50 (quoting Paul v. Davis, 424 U.S. 693 (1976)).

283. *Id.* at 550-52 nn.8-9.

284. *See supra* note 57.

285. This guarantee relies on dictum from Marbury v. Madison, 5 U.S. 137 (1803), promising a remedy for every right. It has never been clear whether the implied constitutional damages remedy established by Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), is mandated by the Constitution itself, even for plaintiffs for whom it is "damages or nothing." *See id.*, at 395-97, 399-402 (discussing availability of damages as a question of authority and power). *Compare* Monaghan, *The Supreme Court, 1974 Term - Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 24 (1975) (arguing that *Bivens* remedy is not constitutionally required), *with* Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1135-38 (1978) (contending that *Bivens* was a constitutional decision). The Court, however, has never denied an implied damages remedy when a seemingly, constitutionally adequate alternative avenue of relief was not available. *See* Chappell v. Wallace, 462 U.S. 296 (1983).

The Court has also recognized that the purpose of rights (constitutional or otherwise) "is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." Carey v. Piphus, 435 U.S. 247, 254 (1978) (petitioner's argument that victims of procedural due process violations unable to show actual injury should receive nominal damages). "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bell v. Hood, 327 U.S. 678, 684 (1946). Thus, it seems that the Constitution guarantees

The relief guaranteed must make the specific plaintiff "whole," depending on the nature of the injury and protected interest.[286] Further, since after *Daniels* and *Davidson* the intent behind a deprivation must surpass mere negligence to achieve constitutional dimensions,[287] the constitutional norms informing this guarantee of redress for state-inflicted injuries are seriously likely to be implicated in meritorious claims.[288] *Parratt* and *Hudson* did not dilute the basic due process guarantee of relief, but instead concluded that willing states should be allowed to fulfill and enforce it themselves.[289] Justice O'Connor, concurring in *Hudson*, articulated this point:

> [W]hen a prisoner's property is wrongfully destroyed, the [state and federal] courts must ensure that the prisoner, no less than any other person, receives just compensation. The Constitution, as well as human decency, requires no less. The issue in the[se] cases . . . does not concern *whether* a prisoner may recover damages for a malicious deprivation of property. Rather, the[se] cases decide only *what* is the appropriate source of the constitutional right and the remedy that corresponds with it.[290]

Discussing the postdeprivation trend hinted at by *Paul v. Davis*,[291] and *Ingraham v. Wright*,[292] Professor Tribe noted that "access to [postdeprivation judicial relief] is independently presupposed by the due process clause."[293]

A comparison between the role of process where established state procedures threaten deprivations and where they are caused by random and unauthorized conduct is also instructive in considering the guarantee that an

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a remedy for the deprivation of rights - perhaps not damages, but one capable of protecting the plaintiff's interests and in some sense making her whole. The eleventh amendment, "good faith" doctrine and absolute immunity doctrine, and the sovereign immunity of the United States temper this guarantee, but do not undermine it. These immunity doctrines are best understood as shaping and limiting the affected right. *See Logan*, 455 U.S. at 432-33; Martinez v. California, 444 U.S. 277, 282 n.5 (1980). When a plaintiff correctly loses a federal constitutional claim against a prosecutor (for example, due to the defendant's absolute immunity; *see* Imbler v. Pachtman, 424 U.S. 409 (1976)), it suggests that no right of the plaintiff was violated, rather than that he suffered an irremediable deprivation of his rights. Plaintiff's *prima facie* case thus requires a showing that the right is not negated by an immunity. *See infra* notes 357-62 and accompanying text.

286. *See supra* notes 274-78 and accompanying text.

287. *See supra* notes 84-92 and accompanying text.

288. *See* Wells & Eaton, *supra* note 4, at 239-48 (due process principles lead to the conclusion that relief for negligently inflicted injuries by state actors should not be constitutionally mandated, but relief for injuries caused by reckless and intentional conduct must be provided).

289. *See* Smolla, *supra* note 42, at 871. ("[I]n making state tort law a surrogate for due process challenges . . . *Parratt* creates a preference for state over federal forums and for state over federal substantive law. *Parratt*, however, allows states their new freedom from federal interference only when state remedies are 'adequate,' and it is clear from *Parratt* . . . that 'adequacy' is a matter of federal constitutional concern.")

290. Hudson v. Palmer, 468 U.S. 517, 537 (1984).

291. 424 U.S. 693, 712 (1976) (petitioner's reputation protected against defamation by state officials by state tort law, not the due process clause of the fourteenth amendment).

292. 430 U.S. 651 (1977). *See supra* notes 61-62 and accompanying text.

293. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 753 (2d ed. 1988).

adequate state remedy must make the plaintiff whole. In established state procedure cases, predeprivation process ensures that the plaintiff will not be wrongfully deprived of her substantive interests and thereby *will be kept whole.*[294] Where random and unauthorized conduct deprives plaintiff of her substantive interests, predeprivation process is concededly impossible, but postdeprivation process ensures that the entitlement holder will be restored to her former position, thereby *making her whole.* The due process cases relied on by the *Parratt* Court,[295] where predeprivation process was excused, make this precise point. Postdeprivation process was considered constitutionally sufficient only because the victim's interests could be fully restored if the state were in error.[296]

The constitutional guarantee of redress for unauthorized deprivations is grounded in the modern constitutional doctrines of state action, announced in *Home Telephone and Telegraph Company v. Los Angeles,*[297] and due process, established by *Board of Regents v. Roth.*[298] The erroneous application of adequacy by the *Daniels* panel and the *Groves* court, in effect, ignored the dictates of these doctrines. *Roth* established that the "process due" is purely a question of constitutional law, unaffected by the state's belief as to the appropriate process for depriving people of protected entitlements.[299] This doctrine applies even when the entitlement is entirely a creature of state law subject to legislative eradication.[300] But by deferring to state policies of noncompensability, the courts in *Daniels* and *Groves* allowed the *state* to decide what process was due,[301] contrary to the holding of *Roth.*

Home Telephone held that when a plaintiff suffers a constitutional wrong at the hands of a state actor, the wrong constitutes "state action" and falls under the fourteenth amendment whether or not the defendant's conduct was authorized by state law.[302] *Parratt* and *Hudson* support the principle that de-

294. *E.g.*, Carey v. Piphus, 435 U.S. 247, 259 (1978).

295. *See* Parratt v. Taylor, 451 U.S. 527, 538-41 (1981).

296. *E.g.*, Ingraham v. Wright, 430 U.S. 651, 675-77 (1977) (postdeprivation common law remedies sufficient because punishment exceeding justified level can be remedied through damages); North American Cold Storage v. Chicago, 211 U.S. 306, 316 (1908) (postseizure process sufficient because victim could recover full damages afterwards); *see also* Matthews v. Eldridge, 424 U.S. 319 (1976) (sustaining a procedure for terminating Social Security disability benefits without a predeprivation hearing if the former recipient prevailed at posttermination hearing he would receive full retroactive relief).

297. 227 U.S 278 (1913). For a discussion of the state action doctrine, *see infra* notes 276-99 and accompanying text.

298. 408 U.S. 564 (1972).

299. *See id.* at 569-70 nn.7-8. *See supra* note 203.

300. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-41 (1985); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982).

301. Smolla sees *Parratt*'s grant of authority to the states over the "process due" prong as a virtue, yielding a power- sharing arrangement over the content of the due process clause that constitutes a "well-balanced compromise of federalism." Smolla, *supra* note 42, at 868, 870. *See infra* notes 363-70 and accompanying text.

302. 227 U.S. at 286-87. *See e.g.*, Monaghan, *supra* note 14, at 981. *Home Telephone* in effect overruled Barney v. City of New York, 193 U.S. 430 (1904), which held that unauthor-

fendant's unauthorized conduct is state action that triggers fourteenth amendment protection;[303] postdeprivation doctrine is not a partial reversal of *Home Telephone*. A plaintiff who demonstrates that state remedies are inadequate can proceed in federal court with no state action hurdle.[304]

In the limited context of procedural due process, *Parratt* did restructure the content of the substantive right, adding an additional essential element when the deprivation was unauthorized.[305] But a required showing of inadequacy is not equivalent to a required showing that the deprivation was illegal under state law, as mandated by the pre-*Home Telephone* regime. By denying the victims of unauthorized state action the opportunity to obtain redress, the *Groves* and *Daniels* courts drew an illegitimate line between authorized and unauthorized state action. Compensation would clearly have been available in these cases (owing to *Parratt*'s inapplicability) had the plaintiffs' injuries resulted from authorized deprivations, yet both courts rendered it unavailable.

D. Martinez v. California and Federal Constitutional Deference to State Tort Law

Daniels and *Groves* are not the last word on adequacy and state systems that preclude redress. Other courts and commentators have acknowledged the substantive aspect of adequacy, yet reasoned that state systems which provide no opportunity for redress upon proof of a deprivation are nonetheless adequate. They have done so without proposing a departure from *Home Telephone* or *Roth* and have relied mainly on two related arguments.

The primary argument relies on *Martinez v. California*.[306] In *Martinez*, state parole officers released a convicted rapist who killed plaintiffs' decedent five months later. The plaintiffs sued the parole officers under section 1983 in state court.[307] One constitutional claim asserted that a state statute granting the defendants' absolute immunity from state tort law liability deprived the plaintiffs of property without due process. The court agreed that the state's wrongful death claim could be characterized as property and that the statute conferring immunity "could be viewed as depriving the plaintiffs of that property interest."[308] The deprivation of a *state* tort claim, however, like the crea-

ized deprivations did not constitute state action unless the state's courts sanctioned the conduct by denying relief for the state law wrong. *Id.* at 437-39. Though *Barney* and *Home Telephone* involved deprivations that today would fall under the established state procedure exception to *Parratt*, they debated the larger proposition whether conduct illegal under state law can be state action.

303. *Hudson*, 468 U.S. at 533; *Parratt*, 451 U.S. at 535-36. *But cf. Parratt*, 451 U.S. at 552 n.10 (Powell, J., concurring) ("where state officials cause injuries in ways that are equally available to private citizens, constitutional issues are not necessarily raised").

304. *See* Smolla, *supra* note 42, at 866-67.

305. *See supra* notes 128-32 and accompanying text.

306. 444 U.S. 277 (1980).

307. *Id.* at 279-80. One claim simply alleged that the defendants had deprived the decedent of life without due process, to which the Court responded that no deprivation had occurred because the defendants had not caused her to be murdered. *Id.* at 284-85.

308. *Id.* at 281-82.

tion and definition of one in the first place,[309] is subject only to minimum rationality scrutiny: "[T]he State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational."[310] The Court then concluded that the immunity statute obviously furthered a rational and legitimate state goal and held for the defendants.[311]

This reasoning of the *Martinez* opinion was elaborated upon by the *Logan* court:

> [T]he state remains free to create substantive defenses or immunities for use in adjudication or to eliminate its statutorily created causes of action altogether just as it can amend or terminate its welfare or employment programs . . . . [In *Martinez*] the plaintiffs . . . were not . . . deprived of property without due process, just as a welfare recipient is not deprived of due process when the legislature adjusts benefits levels . . . In each case, the legislative determination provided all the process that is due.[312]

Several courts have used this undoubtedly sound reasoning, which mandates federal nonintervention in pure state law matters, to find immunity-ridden remedies constitutionally adequate. In *Rittenhouse v. DeKalb County*,[313] all of the defendants were immune from liability under state law, yet the court found the state remedy constitutionally "adequate" and, therefore, sufficient to defeat an otherwise sufficient constitutional claim:

> We can discern no meaningful distinction between the conclusion in *Martinez* that immunity rules do not in themselves deny due process, and our conclusion here that they do not deny due process by virtue of making state remedies inadequate under *Parratt* . . . . *Parratt* did not intend to abrogate state immunity rules on due process grounds.[314]

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309. *Id.* at 282 n.5. Indeed, the Court agreed that the immunity provision could be seen as an aspect of the property/liberty interest conferred so that " 'when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law.' " *Id.* (quoting Ferri v. Ackerman, 444 U.S. 193, 198 (1979)).

310. *Id.* at 282.

311. *Id.* at 282-83. The Court accepted the state's judgment that the threat of litigation could "inhibit the exercise of discretion" and "impair the State's ability to implement a parole program designed to promote rehabilitation." *Id.* at 283.

312. Logan v. Zimmerman Brush Company, 455 U.S. 422, 432-33 (1982). *See* Davidson v. O'Lone, 752 F.2d 817, 830 (3d Cir. 1984) (en banc) ("nothing in the Constitution insures that a putative plaintiff may maintain a particular type of negligence claim in state court").

313. 764 F.2d 1451 (11th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

314. *Id.* at 1458. As in *Martinez*, the court analyzed the state immunity provisions under the "arbitrary or irrational" standard and found them valid. *Id. See* Davidson v. O'Lone, 752 F.2d at 832 (concurring opinion) (where state provides no remedy, the court should undertake due process balancing of interests to decide if a remedy is required; if balance tips towards state, no redress is mandated since process due has been provided).

Concurring in *Daniels/Davidson*, Justice Stevens, the author of *Martinez*, espoused similar logic. Since Stevens disagreed with the majority and believed that the plaintiffs had suffered deprivations,[315] he addressed the adequacy of the respective states' remedies, one of which precluded recovery by immunizing the defendants. Stevens also relied upon *Martinez*:

> [A] state policy that defeats recovery does not, in itself, [render a state procedure constitutionally defective] . . . . Those aspects of a State tort regime that defeat recovery are not constitutionally invalid, so long as there is no fundamental unfairness in their operation. Thus, defenses such as contributory negligence or statutes of limitations may defeat recovery in particular cases without raising any question about the constitutionality of a State's procedures for disposing of tort litigation. Similarly . . . the mere fact that a State elects to provide some of its agents with a sovereign immunity defense in certain cases does not justify the conclusion that its remedial system is constitutionally inadequate.[316]

E. The Proper Limits Of Martinez v. California: The Deference Ends Where Substantive Federal Rights Begin

The simple response to this rationale is that adequacy questions and *Martinez* questions are entirely different matters; the rationale invoked to resolve the latter is wholly irrelevant to the former. *Martinez* involved the constitutionality of a statute that worked a deprivation of a state-created property right, a wrongful death cause of action, which the state could have chosen not to grant in the first place. But when a defendant "borrows" a state-created cause of action in an attempt to defeat an unauthorized deprivation claim under the fourteenth amendment, the cause of action must sufficiently vindicate a federal constitutional right. This hybrid due process right to redress for unauthorized deprivations by state actors of substantive interests in life, liberty or property[317] is beyond state control.[318] The state remedy now is like any express *federal* constitutional or statutory claim in *state* court. The federal nature of the right to be adjudicated mandates that before a state remedy

315. *See supra* notes 94-98 and accompanying text.

316. 474 U.S. at 342 (Stevens, J., concurring). *See also* Daniels v. Williams, 720 F.2d 792, 798 (4th Cir. 1983) (immunity-barred remedy adequate since "due process is not violated by other affirmative defenses, such as the statute of limitations"), *aff'd on other grounds*, 748 F.2d 229 (1984) (en banc), *aff'd*, 474 U.S. 327 (1986); Groves v. Cox, 559 F. Supp. 772, 776-77 (E.D. Va. 1983) (immunity is a wholly constitutional element of tort claims like statute of limitations and contributory negligence).

317. The posited distinction requires a differentiation of the "property" right which, for example, one holds in a state-created tort action, and the "property" right Taylor possessed in the lost hobby kit. *See infra* notes 374-402 and accompanying text.

318. *See* Comment, *supra* note 244, at 456 ("when a cause of action arises under both state and federal law, the state may create any defenses to the state cause of action, but must follow constitutional provisions and precedent for the constitutional claims"); Note, *supra* note 14, 643-44 (state "may not override federal law").

can be considered adequate, it must be protected from all state law obstructions that prevent its effective implementation, other than reasonable procedural rules with which the claimant can comply.

New York Times Co. v. Sullivan[319] and its progeny, for example, dictate that substantive state tort law must yield in order to give constitutional concerns "adequate" respect. The first amendment radically restricts and rewrites state libel and defamation law to protect constitutional rights of free speech. State tort law cannot award damages to "public figure" plaintiffs absent proof of actual malice,[320] award damages to private plaintiffs based on strict liability,[321] or place the burden of proof as to the truth of the allegedly defamatory statement on the defendant.[322] Just as the first amendment negates certain aspects of state common law, the due process clause shapes the requirements of adequate state remedies.[323]

In the context of adequate postdeprivation remedies, state law is a "surrogate for due process challenges,"[324] and the substantive right to redress emanates from federal constitutional law.[325] *Martinez* is consistent with this state law role. In *Martinez*, the relevant California immunity statute was upheld *only as applied to plaintiffs' state wrongful death claim.* On the other hand, the *Martinez* Court *unanimously stated that the state immunity statute did not control the section 1983 deprivation of life claim because this claim was rooted in the due process clause.*[326] Justice Blackmun, dissenting in *Davidson*,[327] explained the irrelevance of *Martinez* to the issue of adequate state remedies:

> Conduct that is wrongful under section 1983 surely cannot be immunized by state law. A State can define defenses, including immunities, to state-law causes of action, as long as the state rule does not

319. 376 U.S. 254 (1964).

320. *Id.* at 279-80.

321. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

322. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 778-80 (1986).

323. Wells & Eaton, *supra* note 4, at 213; Smolla, *supra* note 42, at 879. The difference of course is that state tort systems *must* comport with these restrictions, whereas failure to satisfy the substantive and procedural requirements of due process for claimants alleging unauthorized deprivations simply results in a finding that the state system cannot adjudicate the victim's claim.

324. Smolla, *supra* note 42, at 871.

325. Wells & Eaton, *supra* note 4, at 213 n.50. "The assertion that state law is 'adequate' implicitly recognizes that state law must be measured by its effectiveness in meeting . . . constitutional concerns." *Id.* at 232.

326. Martinez v. California, 444 U.S. 277, 284 (1980). Recall also that *Logan*'s affirmation of deference to substantive state law was made in the context of Logan's state-created cause of action for employment discrimination which the state was free to "eliminate . . . altogether." Logan v. Zimmerman Brush Company, 455 U.S. 422, 432 (1982). Several state courts, however, have contradicted this seemingly unambiguous mandate by upholding state pleas of sovereign immunity to section 1983 suits brought in state court. *See* Kristensen v. Strinden, 343 N.W.2d 67, 75-77 (N.D. 1983), and cases discussed therein.

327. Since the dissenters believed that Davidson had suffered a deprivation they were forced to proceed to an analysis of the available state remedies. Davidson v. Cannon, 474 U.S. 344, 358-59 (1986) (Blackmun, J., dissenting). *See supra* note 92 and accompanying text.

> conflict with federal law . . . . But permitting a state immunity defense to control in a section 1983 action 'would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.'. . . *It is irrelevant that state immunity as applied to defeat a state-law tort claim is constitutional,* and may be construed as one aspect of the State's definition of a tort claim.[328]

Given the state law immunity would have precluded recovery under the due process clause, Blackmun concluded that "Davidson has been denied 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner . . . for [a] hearing appropriate to the nature of the case' " and that without a meaningful postdeprivation remedy in state court, Davidson was deprived of his liberty without due process of law.[329]

Thus, a state law immunity, or any substantive hurdle over which the claimant is powerless to leap, makes a state postdeprivation remedy inadequate.[330] "When federal law is the source of the plaintiff's claim, there is a federal interest in defining the defenses to that claim, including the defense of immunity."[331] As noted, however, reasonable state law *procedures* may be

328. *Davidson*, 474 U.S. at 359 (Blackmun, J., dissenting) (emphasis supplied; citations omitted).

329. *Id.* at 360 (Blackmun, J., dissenting) (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982)). It should be emphasized that *Parratt* in no way threatened the basic premise of *Martinez*. States retain absolute control over state-created causes of action, subject only to minimum rationality review. When a state-inflicted injury does not invade a constitutionally-protected entitlement or fails to rise to the level of a deprivation, elements of the due process claim are not present, and the state is entirely free to deny compensation or relief under state law. Those courts that have feared the ramifications of accepting the inverse of the *Parratt* holding for all state-inflicted injuries, e.g., *Parratt*, 451 U.S. at 550-51 (Powell, J., concurring); Davidson v. O'Lone, 752 F.2d 817, 832 (3d Cir. 1984) (en banc) (concurring opinion); Eberle v. Baumfalk, 524 F. Supp. 515, 518-19 (N.D. Ill. 1981), have missed this point, which is especially important now that negligently-inflicted injuries are no longer deprivations. Those courts that believed declaring an immunity-barred state remedy inadequate would conflict with *Martinez* and *Logan*, e.g., Rittenhouse v. DeKalb County, 764 F.2d 1451, 1457-58 (11th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986); Davidson v. O'Lone, 752 F.2d 817, 830 (3d Cir. 1984) (en banc), have also failed to see the consistency of *Martinez* and *Parratt*.

When a state remedy is declared inadequate under *Parratt*, its validity as applied to nonconstitutional injuries is in no way jeopardized. It simply means that the plaintiff's suit will remain in federal court. State hegemony over home-grown causes of action is imperiled only when "the state rule is in conflict with federal law," Ferri v. Ackerman, 444 U.S. 193, 198 (1979), and inadequate state remedies only are in conflict with federal law as applied to the plaintiff who has suffered the first three elements of a due process violation.

330. For precisely the same reasons, the Supreme Court has held that a substantive state law defense could not be applied to bar a federal statutory claim. Dice v. Akron, C. & Y. R.R., 342 U.S. 359, 361-62 (1952). In *Dice*, the state court had permitted a fraudulently obtained release to preclude the plaintiff's suit because he had been negligent in failing to read it. *Id.* at 360-61. Similarly, the Court has ruled that a state law rule placing the burden of proof on plaintiffs to prove freedom from contributory negligence could not be applied to a federal statutory claim. Central Vermont Ry. v. White, 238 U.S. 507, 511-12 (1915).

331. Ferri v. Ackerman, 444 U.S. 193, 198 n.13 (1979). *See* Johnson v. Railway Express Agency, 421 U.S. 454, 465 (1975) (in setting the applicable statute of limitations for section 1983 suits "considerations of state law may be displaced where their application would be in-

adequate even if they bar the state postdeprivation remedy when the plaintiff fails to comply.[332] There is, therefore, a dichotomy between reasonable procedural rules and those which bar the plaintiff's claim at its accrual: "[A]bsolute immunity should be distinguished, for example, from time-barring a state's postdeprivation remedy; in the latter situation, the plaintiff at least once had the chance to pursue a postdeprivation remedy, unlike the absolute immunity case."[333]

F. Drawing the Line Between Adequate and Inadequate State Systems

Immunities and simple procedural rules present *easy* examples of state laws that may and may not be part of a state remedial system asserted to be adequate. The more difficult question is posed by state remedies that make redress available but include moderate restrictions, such as limits on recoverable damages by category or amount, rules denying permissive joinder of defendants or claims, rules which allow the defendant to reduce liability based on the plaintiff's comparative fault or procedures which preclude discovery against the government. *Parratt* established only that to be considered adequate, state remedies need not provide relief coextensive with that available under section 1983.[334] It did not address the various remedies between relief exactly similar to that provided by section 1983 and no redress at all.[335]

In addressing the adequacy of moderately restrictive state remedies, courts should use the "analysis" set out by the Supreme Court in *Robertson v.*

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consistent with the federal policy underlying the cause of action under consideration"); Wilson v. Garcia, 471 U.S. 261, 272 (1985) (section 1983 provides a "federal remedy that can 'override certain kinds of state laws' "); Free v. Bland, 369 U.S. 663, 666 (1962) (supremacy clause requires that "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield"); Wells v. County of Valencia, 644 P.2d 517, 521 (N.M. 1982) (state tort claims act could not condition waiver of sovereign immunity on plaintiffs' abstention from filing federal claims because states "cannot enact a law which would have the practical effect of depriving a party of her rights secured by the United States Constitution"); Comment, *supra* note 244, at 456 (federal standards control defenses to deprivations of constitutional interests).

332. *See supra* notes 250-51 and accompanying text.

333. Nahmod, *supra* note 62, at 230 n.62. One might also argue that when absolute immunity shields the defendant from liability, the state's approval of his conduct turns the case into an "established state procedure" situation, rendering postdeprivation analysis irrelevant. *See supra* notes 113-17 and accompanying text. When a person suffers the first three elements of a due process violation and the state offers no redress, is it not the "state system itself that destroys [the] complainant's [entitlement] by operation of law?" Logan v. Zimmerman Brush Company, 455 U.S. 422, 436 (1982). In fact, Smolla attempts to breathe retrospective rationality into Wisconsin v. Constantineau, 400 U.S. 433 (1971), and Paul v. Davis, 424 U.S. 693 (1976), based on this logic. In the former, a claim was stated because state law authorized the conduct and would probably have immunized the defendant, whereas in *Paul* the harm was random. Smolla, *supra*, note 42 at 843 n.51, 861-62.

334. 451 U.S. 527, 544 (1982). *See supra* notes 73, 133-137 and accompanying text. This method was entirely sound since no section 1983 action exists prior to the state's failure to provide a remedy. The remedy must satisfy the due process clause, not section 1983.

335. *See supra* notes 73-74 and accompanying text.

Wegmann[336] for determining when substantive or procedural state law can be applied in a section 1983 action under 42 U.S.C. section 1988.[337] Under section 1988, a three-step analysis is employed: (1) Is federal law lacking in some respect essential for the litigation? (2) if so, state law is searched for an appropriate rule of decision; and (3) once identified, the state law should be applied if it is not "inconsistent with the Constitution and laws of the United States."[338]

In *Robertson*, for example, the Court held that the district court should have applied a state rule of survivorship, which causes an action to abate when the decedent is not survived by an immediate family member, to a section 1983 suit by the decedent's executor.[339] A state law is not inconsistent with federal law "merely because the statute causes the plaintiff to lose the litigation,"[340] but a state rule is not automatically "*consistent*" with federal rights simply because it is "reasonable by itself."[341] Rather, to determine whether state and federal law are inconsistent, "courts must look not only at particular federal statutes and constitutional provisions, but also at 'the policies expressed in [them].' Of particular importance is whether application of state law 'would be inconsistent with the federal policy underlying the cause of action under consideration.' "[342] In *Robertson*, the Court concluded that the state rule of abatement, as applied to a claim of malicious prosecution, was not inconsistent with the federal right because it would defeat neither of section 1983's goals of compensation and deterrence.[343]

In evaluating the adequacy of state remedies, a court must simply conduct the third step of the section 1988 analysis.[344] Thus, the allegedly offensive attributes need be consistent only with the policies of the due process

336. 436 U.S. 584, 590-95 (1978).

337. Section 1988 provides in pertinent part: "The jurisdiction . . . conferred on the district courts . . . for the protection of all persons in the United States in their civil rights, . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . the common law, as modified and changed by the Constitution and statutes of [the forum state] so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ." 42 U.S.C. § 1988 (1981).

338. *Id. See Robertson*, 436 U.S. at 588; Board of Regents v. Tomanio, 446 U.S. 478, 484-85 (1980). *See generally*, Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PENN. L. REV. 499 (1980).

339. *Robertson*, 436 U.S. at 588-95.

340. *Id.* at 593.

341. *Id.* at 592 n.8.

342. *Id.* at 590 (citations omitted).

343. "The goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate. And . . . the fact that a particular action might abate surely would not adversely affect section 1983's role in preventing official illegality . . ." *Id.* at 592.

344. A test designed for applying state law to a federal claim in federal court seems equally relevant for federal courts to use in ruling on state law to be applied to a federal right in state court. *See* Ricard v. State, 390 So. 2d 882, 885 (La. 1980) ("Although section 1988 is directed

clause, not section 1983.[345] This conclusion follows from the *Parratt* Court's observation that although "the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under section 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process."[346] This Comment has argued that the policies underlying the due process clause, in the context of unauthorized deprivations, require redress sufficient to protect the plaintiff's interests by making her whole.[347] Courts must analyze the inconsistency of state and federal law on a case-by-case basis to ensure that such policies are respected.[348] But since deterrence is not a policy embedded in the due process clause, *Parratt* correctly held that punitive damages and suits against the individual are *not* an indispensable element of adequate state remedies.[349]

In *Enright v. Milwaukee Sch. Directors Bd.*,[350] for example, the decedent's parents sued in state court under section 1983 for the deprivation of their constitutionally protected liberty interest in the society and companionship of their child. The court applied *Parratt* and held that the state remedy which authorized recovery of all pecuniary losses and up to $25,000 in nonpecuniary damages for loss of society was adequate, consequently dismissing the section 1983 suit.[351] The propriety of the court's ruling turns on whether the $25,000 limit caused the remedy to insufficiently protect the parents' society interest.

A more difficult question of inconsistency is posed by state remedies marred by *qualified* immunities. In *Irshad v. Spann*,[352] for example, the court held that the *possibility* that the defendant would receive immunity in the state

to federal district courts, it provides, by analogy, even greater justification for a state court to apply state law when the federal cause of action is adjudicated in the state court system.").

345. *See* Note, *supra* note 127, at 900 (certain remedies and features of section 1983 "are simply not required by due process. Section 1983 . . . did not alter traditional notions of due process."). *See supra* notes 149-62 and accompanying text.

346. *Parratt*, 451 U.S. at 544.

347. *See supra* notes 275-95 and accompanying text. In this regard, section 1988 inconsistency cases that involve the *compensatory* goal of section 1983 may be helpful. *See* Sager v. City of Woodland Park, 543 F. Supp. 282, 293-97 (D. Colo. 1982) (statute precluding recovery for parents' nonpecuniary interests inconsistent with policy of compensation); Thompson v. Village of Hales Corners, 340 N.W.2d 704, 711 (Wis. 1983) ($25,000 cap on actual damages inconsistent with federal right where plaintiff proved $80,000 in actual losses). *Cf.* Moor v. County of Alameda, 411 U.S. 693, 706 (1973) (state law rule that would create liability not authorized by section 1983 would be "less than consistent" with federal law). Inconsistency analysis also confirms the adequacy and inadequancy of state law rules at the extremes discussed above.

348. *Cf.* Carey v. Piphus, 435 U.S. 247, 258 (1978) (discussing how compensation should be figured in section 1983 actions) ("In some cases, the interests protected by a particular branch of the common law . . . may parallel closely the interests protected by a particular constitutional right. . . . In other cases, the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law . . . In those cases, the task will be the more difficult one of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right."). *See supra* notes 123-27 and accompanying text (adequacy requires case-by-case inquiry).

349. 451 U.S. at 543-44.

350. 118 Wis. 2d 236 (1984), *cert. denied*, 469 U.S. 966 (1984).

351. *Id.* at 256.

352. 543 F. Supp. 922 (E.D. Va. 1982).

proceeding did not render the state remedy inadequate because qualified immunity in federal courts for state officials "clearly [did] not violate due process."[353]

As the *Martinez* discussion showed,[354] state law immunities can render state remedies inadequate. But having argued that the state remedy, when invoked, is "federalized" to preclude a due process violation from accruing, the author cannot now assert that a *federally recognized qualified immunity*[355] can have no place in an adequate state remedy. Federal immunity technically is not implicated until the claimant makes out a sufficient federal claim.[356] Nonetheless, an available state immunity defense that is no broader than the qualified immunity granted under section 1983 would not be inconsistent with federal law.[357] To the extent that federal immunities shape the contours of federal rights, a state's application of such immunity would not restrict the underlying federal right,[358] and the state remedy would remain adequate.

G. *The Deconstruction of Liberty and Property Interests through State-Law Immunities*

Some argue that the availability of *some* procedure, such as the mere possibility of filing an action in a state remedial system, is an adequate remedy. Relatively greater deference, however, is accorded a state remedial system when state-created causes of action are to be adjudicated (*Martinez*) than

353. *Id.* at 929.

354. *See supra* notes 317-33 and accompanying text.

355. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982) (recognizing federal qualified immunities); Mitchell v. Forsyth, 472 U.S. 511 (1985).

356. The Court has not made clear the source of its authority to immunize unconstitutional conduct from liability. In section 1983 suits against state officials, Congress is viewed as having incorporated only those common law immunities existing in 1871. *E.g.*, Malley v. Briggs, 475 U.S. 335 (1986). But, when granting parallel immunities to federal officials, the Court has not claimed any authorization other than its own judicial policy-making powers. Butz v. Economou, 438 U.S. 478 (1978).

357. Daniels v. Williams, 748 F.2d 229, 235 n.3 (4th Cir. 1984) (en banc) (opinion dissenting in part and concurring in part) (noting an 'element of plausibility' in the Irshad v. Spann argument), *aff'd*, 474 U.S. 327 (1986). *See* Note, *supra* note 14, at 643. Federally-crafted good faith immunity is probably not implicated by the typical unauthorized deprivation claim. Though the lack of state-law authorization for the defendant's conduct does not defeat the defense in itself, deprivations now require at least an element of recklessness, and the right to freedom from reckless or intentional deprivations of life, liberty or property is surely "clearly established," within the meaning of Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). *See* Note, *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 100, 151 (1986) (discussing effect of *Daniels'* change in the deprivation standard on immunities and adequacy).

358. Good faith immunity is a summary judgment question, applying the "clearly established" test to the objective facts of the legal regime at the time of the occurrence. *Harlow*, 457 U.S. at 817-18. By requiring plaintiffs to demonstrate that clearly established rights have been violated, the Court has in effect added a fifth essential element to due process claims. Thus where a state court finds that the plaintiff has not been deprived of a clearly established right, upon the plaintiff's return to federal court, it should not conclude that a complete due process claim has been stated. Supreme Court *cert.* jurisdiction, however, would lie from such a judgment because the determination that an immunity no broader than the relevant federal immunity was correctly invoked would, in this context, be a federal question.

when federal rights are to be vindicated by borrowing a state-created cause of action (*Parratt*). But a second argument has been made regarding the adequacy of immunity-barred remedies.[359] Professor Smolla contends that *Parratt* sought to complete the job left unfinished by *Board of Regents v. Roth*,[360] namely, to "[effectuate] a transfer of responsibility over due process norms from the federal judiciary to other branches and levels of government."[361] This "new federalism" involves giving state legislatures and agencies the power to create state interests while placing them outside the reach of federal intervention.[362]

The "problem" with *Roth* from Smolla's perspective is that it "did nothing . . . to protect the state from federal judicial intervention in those cases in which a recognized interest in life, liberty, or property did exist."[363] As a result, states could not avoid federal oversight where federal help was *least needed*, in those cases where state common law already protected particular interests.[364] *Parratt* addressed this paradox by empowering the states to construct adequate remedial systems which preempt federal intervention.[365]

Smolla further asserts that through their newly granted "step-two" power, states can deconstruct entitlements, and thus win suits for damages caused by unauthorized deprivation, without ever reaching the due process element.[366] For example, if an automobile is destroyed by a state actor,[367] but state law grants the defendant immunity from the owner's conversion claim, it can be argued that the owner had *no property right* in the chattel vis-a-vis this class of tortfeasors.

> If 'ownership' of an automobile is merely the possession of remedial rights backed by the power of the state against those who interfere with the enjoyment of the vehicle, then all limitations that are part of the available remedial package must be regarded as defining the existence of the property interest in the automobile itself . . . [T]he existence of absolute immunity would . . . eliminate any section 1983 action, since the immunity would nullify the 'entitlement' itself. The immunity would not be a deprivation of property without due pro-

359. Smolla, *supra* note 42.

360. 408 U.S. 564 (1972).

361. Smolla, *supra* note 42, at 868.

362. *Roth* requires a two-step analysis: the entitlement question is governed by state law while federal law determines the process due. Prior to *Roth*, the Court merely balanced the private and public interests at stake to determine if due process had been provided. *E.g.*, Bell v. Burson, 402 U.S. 535 (1971) (suspension of driver's license). *See generally*, Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977); L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 678-85 (2d ed. 1988).

363. Smolla, *supra* note 42, at 868, 870.

364. *Id.*

365. *Id.*

366. *Id.* at 872-77.

367. Smolla's hypothetical involves a situation where the deprivation is authorized, rendering *Parratt* inapplicable. Nevertheless, his deconstruction argument is directed at both authorized and unauthorized deprivations.

cess of law, it would rather eliminate the legal existence of any 'property' in the first place.[368]

Smolla does *not* contend, however, that states are *absolutely free* to deconstruct entitlements in this fashion. He notes that common law immunities intended to prevent the chilling effect of potential financial liability on decision making would survive even "the somewhat enhanced level of rationality scrutiny . . . contemplated by the" *Logan* equal protection concurring opinions.[369] According to Smolla, equal protection becomes the issue because the state has granted the automobile owner the right to noninterference by private tortfeasors but has denied him this right vis-a-vis state actors.[370] Under equal protection, he concludes, state remedies marred by immunities intended to free state officials from the chill of potential litigation and liability "would easily" remain adequate because there is a rational basis for these remedies.[371] Only immunities that "eviscerate common law rights without a sufficiently strong state reason" such as an immunity for financial purposes only, would render a state system inadequate.[372]

H. The Reconstruction of Liberty and Property Interests Through Independent Federal Constitutional Grounding

No court, to the author's knowledge, has made or responded to Professor Smolla's argument.[373] The answer to the argument parallels that previously

368. Smolla, *supra* note 42, at 875.

369. *Id.* at 872. *See Logan*, 455 U.S. at 438-42 (Blackmun, J., joined by Brennan, Marshall, and O'Connor, JJ., concurring); *id.* at 443-44 (Powell, J., joined by Rehnquist, J., concurring in judgment). According to Smolla, the level of scrutiny embodied in adequacy "though conducted under the rubric of the due process clause, in fact amounts to a level of review slightly more rigorous than the minimum rationality standard of review familiar in economic equal protection cases, but well beneath 'strict scrutiny.'" Smolla, *supra*, note 42 at 878.

370. *Id.* at 872, 878-79.

371. *Id.* at 872.

372. *Id.* at 872-73, 879-80. Three problems exist with Smolla's suggestion on its own terms. For one, problems of inadequacy sometimes flow from the sheer silence of state law on the matter, *see supra* notes 220-26 and accompanying text, and it is unclear whether Smolla would be willing to infer that such silence constitutes a strong enough state reason to deny the injury entitlement status. *See* Smolla, *supra* note 42, at 872, 880. Second, as pointed out by Wells & Eaton, *supra*, note 4, at 221 n.91, his dichotomy of reasons for immunities "is unconvincing [since all] immunity doctrines are ultimately premised on the belief that potential tort liability will inappropriately inhibit desired conduct." Third, the Court only has suggested, and not held, that an immunity can be viewed as a substantive element of the interest, as opposed to a procedural limitation on its vindication. Martinez v. California, 444 U.S. 277, 282 n. 5 (1980). *Logan* and *Loudermill* indicate that the Court will look very hard at arguments that the procedures supplied for the deprivation of an entitlement actually shape the entitlement itself. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 539-41 (1985); *Logan*, 455 U.S. at 432-33. *See also* Holman v. Hilton, 712 F.2d 854, 859 n.5 (3rd Cir. 1983) (a statute barring inmates from bringing tort actions during the pendency of their incarceration not a substantive component of the state-created tort claim).

373. Related arguments have been made, however. The concurring judges in the Davidson v. O'Lone *en banc* opinion did assert that once the first three elements of a claim are established, the need for redress turns on a balancing of the private and public interest; if the public interest in immunity outweighs the private interest in compensation no remedy would be consti-

given in response to the argument that immunity-blocked remedies are adequate based on *Martinez*.[374] By immunizing defendants, states can deprive citizens of state-created property in the form of causes of action, but when the state cause of action is used to vindicate the plaintiff's federally granted right to redress, this cause of action should be rejected as inadequate if it is barred by a state-created immunity. Similarly, states can deprive citizens of various rights in a chattel or in personal liberty by providing no state procedure for redress against interference. Such entitlement deconstruction should be allowed only when such rights are *not* independently protected by the Constitution.

In other words, when the liberty or property interfered with finds independent substantive protection in the due process clause, a state's failure to provide a cause of action for redress and thereby recognize an entitlement, or its granting of an absolute immunity thereby deconstructing the entitlement, is wholly irrelevant[375] under the Supremacy Clause.[376] The Constitution's protections will supersede the obstacles which the state system creates. States are free to grant substantive constitutional rights that *exceed* the floor set by the federal Constitution,[377] but they cannot cut holes in that floor. Indeed, were it otherwise, the *Martinez* Court would never have entertained the plaintiff's claim that the decedent had been deprived of her life without due process since the state granted the decedent no entitlement in life vis-a-vis the state defendants!

Substantive liberty and property rights clearly exist independently of state law.[378] *Ingraham v. Wright* expressly recognized a substantive federal liberty

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tutionally required. 752 F.2d 817, 832 (1984). In *Parratt*, Justice Powell, concurring in the result, suggested that Taylor's hobby kit may not have risen to the level of property vis-a-vis negligent deprivations because it was not protected from such interference by the criminal law in addition to state tort law. 451 U.S. at 549 n.7. *See also*, Vail v. Bd. of Educ. of Paris Union School Dist., 706 F.2d 1435, 1454-55 (7th Cir. 1983) (Posner, J., dissenting) (property right in government employment contract, with damages but no injunctive relief available under state law, is only deprived when damages are denied after breach), *aff'd by an equally divided court*, 466 U.S. 377 (1984).

374. *See supra* notes 317-33 and accompanying text.

375. *Cf. Martinez*, 444 U.S. at 284 (state immunity statute has no effect on federal claim litigated in state court); *cf.* Ferri v. Ackerman, 444 U.S. 193, 198 (1979) (state may define claims as it pleases provided the state rule is not in conflict with federal law). But *cf.* Hammond v. United States, 786 F.2d 8, 12-14 (1st Cir. 1986) (although "Congress must comply with [substantive] due process when abolishing or substantially modifying a common law cause of action," court would sustain federal statute preempting all state law claims arising out of deaths from nuclear testing under rational basis review); *cf. In re* Consol. United States Atmospheric Testing Litigation, 820 F.2d 982, 990-92 (9th Cir. 1987).

376. U.S. CONST. art. VI ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

377. Mills v. Rogers, 457 U.S. 291, 300 (1982); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).

378. *E.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 691, 710 (2d ed. 1988) (noting Supreme Court's recognition of "core" rights of liberty and property not dependent on state law).

interest in "freedom from bodily restraint and punishment"[379] and, in fact, noted that the case did "not involve any state-created interest in liberty going beyond the fourteenth amendment's protection [of liberty]."[380] More recently, the Court approved various independent federal rights of liberty on behalf of prisoners[381] and involuntarily committed mental patients,[382] and associational rights of substantive liberty between parents and children. [383]

In the context of adequacy determinations, the supremacy of the federal right means that state remedies providing compensation for some aspects of a claimant's injuries, but denying it for others, can be considered adequate only if the interests denied redress lack independent substantive federal recognition. For example, federal courts have recognized liberty interests in parents' "loss of companionship and deprivation of the constitutional liberty interest in and right to raise a child."[384] Similarly, a state court held that a state law restricting wrongful death damages to pecuniary losses could not limit the damages awarded to the decedent's children for the deprivation of their independent constitutional liberty interests.[385] The Supreme Court, in a dismissal of certiorari,[386] did not reach the merits of a mother's claim of substantive liberty rights, but remarked that these rights apparently are not subject to the state limitation on survivors' recovery for wrongs to their property interest.[387] These cases all demonstrate, albeit implicitly, that a state's express refusal to recognize certain liberty entitlements, through the denial of redress for their deprivation, has no effect on claims based on federal constitutional liberty rights[388] since a remedy based on the constitutional right exists regardless of

379. 430 U.S. 651, 673-74 (1977).

380. *Id.* at 674 n.43. *See also* Meachum v. Fano, 427 U.S. 215, 230-33 (1976) (Stevens, J., dissenting).

381. Olim v. Wakinekona, 461 U.S. 238, 247-48 (1983) (recognizing concept of liberty protected by the due process clause but finding no infringement).

382. Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982) (rights of personal safety); Mills v. Rogers, 457 U.S. 291, 298-300 & n.16 (1982) (right to refuse antipsychotic drugs).

383. Moore v. City of East Cleveland, 431 U.S. 494 (1977); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (parents have a "fundamental liberty interest . . . in care, custody and management of their child"); *see also* Vinson v. Campbell County Fiscal Court, 820 F.2d 194, 200-01 (6th Cir. 1987); Smith v. City of Fontana, 818 F.2d 1411, 1417-20 (9th Cir. 1987); Sager v. City of Woodlawn Park, 543 F. Supp. 282, 295 (D. Colo. 1982); Espinoza v. O'Dell, 633 P.2d 455, 463-65 (colo. 1981), *cert. dismissed*, 456 U.S. 430 (1982).

384. Sager v. City of Woodlawn Park, 543 F. Supp. 282, 295 (D. Colo. 1982). The federal district court refused to adopt a state rule of damages in a wrongful death suit because it made no provision for these interests.

385. Espinoza v. O'Dell, 633 P.2d 455, 463-65. (Colo. 1981), *cert. dismissed*, 456 U.S. 430 (1982). *See* Ascani v. Hughes, 470 So. 2d 207, 211-12 (La. 1985) (rejecting federal liberty interest in decedent's siblings but acknowledging that it raises different questions than the application of state law restrictions to a claim based on a state-created entitlement of property), *cert. denied*, 474 U.S. 1001 (1985).

386. Jones v. Hilderbrant, 432 U.S. 183 (1977).

387. *Id.* at 188.

388. *But cf.* Enright v. Bd. of School Directors, 118 Wis. 2d 236, 256-57, 346 N.W.2d 771, 787 (Wis. 1984) (state remedy authorizing up to $25,000 for *parents'* loss of society only was adequate for claims of parents *and* siblings alleging independent constitutional deprivations), *cert. denied*, 469 U.S. 966 (1984).

the plaintiff's ability to gain redress under state law.

Further, though states surely possess more initial authority when it comes to creating property-based rights, there remains a substantive federal floor protecting core rights of ownership and possession.[389] "Protected interests in property are *normally* 'not created by the Constitution,' "[390] but "[t]here is certainly a federal dimension to the definition of 'property' in the Federal Constitution."[391] Smolla himself recognized that

> [m]any interests in life, liberty and property have never been regarded in our constitutional tradition as state-created at all. . . . [U]nder the Lockean philosophy that heavily influenced the constitutional framers, conventional forms of property — real estate and personalty — were thought of as preceding the existence of government, and therefore were subject to due process protection without regard to any notion of entitlement.[392]

Indeed, "Bert Taylor's hobby kit was property, pure and simple,"[393] but not because Nebraska granted him a tort claim against the prison officials.

Consider *Pruneyard Shopping Center v. Robins*,[394] in which the Supreme Court held that a state-granted right to engage in political speech on the premises of a privately owned shopping center did not contravene any federally protected rights of property on behalf of the owner.[395] In the post-*Lochner* era, "[i]t is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property."[396] However Justice Marshall, concurring, stated:

> I do not understand the Court to suggest that rights of property are to be defined solely by [reference to] state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms 'life, liberty, and property' do not derive their meaning solely from the provisions of positive law . . . . Indeed, our cases demonstrate that there are limits on governmental authority to abolish 'core' common-law rights, including rights against trespass, . . . without a compelling showing of necessity or provision for a reasonable alternative . . . That 'core' has not been approached in this case.[397]

Thus, there is no authority for Smolla's contention that a state's deconstruction of a core entitlement, by immunizing the defendant, would authorize

389. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 691-94 (2d ed. 1988).
390. Goss v. Lopez, 419 U.S. 565, 572 (1975).
391. Bishop v. Wood, 426 U.S. 341, 353 (1976) (Brennan, J., dissenting).
392. Smolla, *supra* note 42, at 869.
393. *Id.* at 870.
394. 447 U.S. 74 (1980).
395. *Id.* at 80-85.
396. *Id.* at 81.
397. *Id.* at 93-94.

a federal court to conclude that the claimant had no protected property right.[398] *Parratt* intended to channel unauthorized deprivation claims to state courts when the state remedies would provide adequate redress, but it surely did not grant states the power to rewrite citizens' substantive rights of liberty and property vis-a-vis state officials by offering reasons that satisfy a "minimum rationality" test. Though "underlying interests" are created by state law, "federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement.' "[399]

CONCLUSION

This Comment has attempted to define the content of adequacy. Lower courts presently disagree on what is required of a state remedial system before it can be considered "adequate." The outcome of the inquiry will determine the very breadth of the fourteenth amendment's protection against lawless conduct by state officials.

Where state postdeprivation remedies are truly adequate, *Parratt* makes sense. It has created a system of forum allocation for claims based on unauthorized deprivations, and has furthered comity and federalism interests without detracting significantly from the core of constitutional protections afforded by the fourteenth amendment.

Where a serious question as to the adequacy of the state system exists, courts should take their task seriously. Specifically, the substantive and procedural components of adequacy mandate that the assertedly adequate state remedy satisfy *four inquiries*: 1) Does the state claim satisfy the minimum requirements of procedural due process? 2) By the otherwise lawful inclusion or exclusion of a procedure, does the state system fail to provide the extra level of procedural protection sometimes required when federal rights are adjudicated in state courts? 3) Does the substantive law to be applied guarantee redress sufficient to make the claimant whole upon proof of the first three elements of a due process claim, or does the state remedy contain an insurmountable hurdle on the path to relief (other than qualified immunity no broader than federal immunity)"? 4) Is any aspect of the state remedy "inconsistent" with the underlying norms of due process as applied to this claimant?

398. *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 431-33 (1982) (rejecting conclusion by state supreme court that no property right existed); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (" 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty.").

399. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978). *See* Bishop v. Wood, 426 U.S. 341, 353 (1976) (Brennan, J., dissenting) (*Roth* "held merely that 'property' interests encompass those to which a person has 'a legitimate claim of entitlement' . . . and *can* arise from 'existing rules or understandings' that derive from 'an independent source *such* as state law' "). *Cf.* Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938) (Supreme Court overrides state court judgment that plaintiff had no state-law contract right in Contracts Clause suit); Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42-43 (1944) (state court judgment that plaintiff had no property right in due process case must have "fair and substantial basis").

Finally, the author has tried to demonstrate why the arguments based on *Martinez v. California*[400] and on the deconstruction of entitlements,[401] are incorrect. Both misapply the deference given state substantive law when only state-created rights and entitlements are at issue by contending that such deference should carry over into the determination of the adequacy of postdeprivation remedies.

Parratt and the content of adequacy can only continue to confound the state and federal courts until the Supreme Court provides some guidance on the adequacy of state-created remedies. Several courts of appeal have discussed the matter in one form or another, and the issue may soon be ripe for decision. Until then, there will surely be further conflicting opinions when constitutionally protected rights are at issue. State remedies that do not protect these basic rights are simply inadequate as postdeprivation remedies and cannot be part of a workable *Parratt* regime.

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400. 444 U.S. 277; *see supra* Section III.E.

401. *See supra* Section III.G.

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