Applying the *Parratt/Hudson* Doctrine: Defining the Scope of the *Logan* Established State Procedure Exception and Determining the Adequacy of State Postdeprivation Remedies

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Introduction: The Basic Tenets of Section 1983 Litigation

Regardless of one's point of view, the recent "trend to repeal section 1983[1] by court decree"[2] cannot be ignored or dismissed. The new composition of the United States Supreme Court suggests the likelihood of an even more rigorous campaign to substantially limit the circumstances under which the federal remedy provided for under section 1983 will be available. The Court's primary concern is that the statute not become a "font of tort law."[3] The potential for overloading the section 1983 receptacle derives from the Court's own interpretation of the statute in the watershed case of *Monroe v. Pape*.[4]

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1. Title 42 U.S.C. § 1983 (1982), provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. Haag v. Cuyahoga County, 619 F. Supp. 262, 272 (N.D. Ohio 1985). *See generally* Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1 (1985); *see also* Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 504-25 (1985) (noting various "limiting doctrines" with which the Court has attempted to restrict the tide of litigation under section 1983); Nahmod, *Due Process, State Remedies, and Section 1983*, 34 U. KAN. L. REV. 217, 217-18 (1985) (noting recent concerns with "federalism, overdeterrence, overburdened courts, and trivialization of the Constitution").

3. Paul v. Davis, 424 U.S. 693, 701 (1976).

4. 365 U.S. 167 (1961).

In *Monroe*, thirteen Chicago police officers conducted a search and made an arrest under circumstances which clearly violated both state tort law and federal constitutional law.[5] The Supreme Court had to determine two issues: (1) whether the police officers' conduct was "under color of state law;" and (2) if it was, whether it could be remedied under section 1983. In upholding the availability of the federal remedy, the Court established three basic tenets to govern section 1983 litigation in future cases. First, conduct unauthorized by state law would still satisfy the "under color of state law" requirement of section 1983 when such conduct stemmed from power "possessed by virtue of state law."[6] Second, the availability of the federal remedy is in no way dependent upon the lack of an adequate remedy under state law.[7] Thus, *Monroe* established a doctrine of "no-exhaustion" for section 1983 claimants, a doctrine reaffirmed in *Patsy v. Board of Regents*.[8] Finally, section 1983 *per se* imposes no state-of-mind requirement as a condition for liability.[9]

Twenty-five years after *Monroe*, the basic tenets of the section 1983 remedy established by that decision have withstood a wide range of assaults. In recent years, however, the Court has been developing what Professor Nahmod has called a " 'new' due process methodology"[10] which has caused speculation as to whether the seeds have been planted for *Monroe*'s destruction.[11] The two key cases giving birth to this new methodology are *Parratt v. Taylor*[12] and *Hudson v. Palmer*[13] A third case, *Logan v. Zimmerman Brush Co.*,[14] must also be viewed as an essential component of the analytical scheme, for it is in *Logan* that the Supreme Court establishes an important limitation on the new methodology.

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5. *Id.* at 172.

6. *Id.* at 184 (quoting United States v. Classic, 313 U.S. 299 (1941)).

7. *Id.* at 183 ("It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.").

8. 457 U.S. 496 (1982).

9. 365 U.S. at 187.

10. Nahmod, *supra* note 2, at 219.

11. *See, e.g.*, Friedman, *Parratt v. Taylor: Opening and Closing the Door on Section 1983*, 9 HASTINGS CONST. L.Q. 545, 546 (1982) ("If the *Parratt* decision is followed to its logical extreme, it would undermine the basis for most section 1983 cases now brought in federal court."); *see generally* Note, *Unauthorized Conduct of State Officials Under the Fourteenth Amendment: Hudson v. Palmer and the Resurrection of Dead Doctrines*, 85 COLUM. L. REV. 837 (1985) (discussing possibility that *Parratt* and *Hudson* may represent a repudiation of core principles established in *Monroe*).

12. 451 U.S. 527 (1981). *Parratt* was overruled in nonrelevant parts in Daniels v. Williams, 106 S. Ct. 662 (1986).

13. 468 U.S. 517 (1984).

14. 455 U.S. 422 (1982).

This Article inquires into the scope and meaning of the Supreme Court's decisions in *Parratt*, *Hudson*, and *Logan*, and, more particularly, focuses on recent developments and problems in the application of the *Parratt/Hudson* doctrine.[15] In addressing "all the hard questions"[16] left open by the Court in *Parratt*, *Hudson*, and *Logan*, this Article takes the position that the *Parratt/Hudson* doctrine should apply to nonproperty deprivations, but must be confined to the procedural due process context. Furthermore, the doctrine should be limited in its application by an interpretation of the *Logan* "established state procedure" exception which is consistent with the concept of official policy developed by the Court in the section 1983 municipal liability cases.[17] Finally, the postdeprivation remedy analysis dictated by the doctrine should be concerned primarily with systemic fairness as opposed to adequacy in fact. Given these guidelines, the new due process methodology can be an effective and legitimate tool for avoiding the "font," without destroying the basic tenets of the section 1983 remedy as established in *Monroe*. This Article concludes by summarizing, from the perspective of both plaintiffs and defendants, the status of the law regarding the application of the *Parratt/Hudson* doctrine and what arguments must be made to either avoid or procure a dimissal on *Parratt/Hudson* grounds.

I. The *Parratt/Hudson* Doctrine

A. *Parratt v. Taylor*

In *Parratt*, an inmate sought redress under section 1983 for the negligent loss of hobby materials valued at $23.50. Taylor asserted that through their negligence, the warden and hobby manager of the prison deprived him of his property without due process of law.[18] The United States District Court for the District of Nebraska agreed with Taylor and granted summary judgment in his favor.[19] The Eighth Circuit affirmed the judgment.[20]

15. The *Parratt/Hudson* doctrine embodies principles gathered from the holdings of both cases, applied to determine whether a plaintiff has a procedural due process claim which can be remedied under § 1983. The *Parratt/Hudson* doctrine is the equivalent of Professor Nahmod's "new" due process methodology. *See supra* note 10 and accompanying text.

16. Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 257 (1984).

17. *See, e.g.*, Pembaur v. City of Cincinnati, 106 S. Ct. 1292 (1986); City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985); Monell v. Department of Social Services, 436 U.S. 658 (1978).

18. 451 U.S. at 530.

19. *Id.* at 529.

20. Parratt v. Taylor, 620 F.2d 307 (8th Cir. 1980) (*per curiam*).

Justice Rehnquist, writing for a plurality of the Supreme Court, noted the four elements necessary to maintain a fourteenth amendment procedural due process claim: (1) the defendants must have acted under color of state law; (2) the affected interest of the plaintiff must be one recognized and protected by the Constitution; (3) the alleged loss or impact on the affected interest must amount to a constitutional deprivation; and (4) the deprivation must be accomplished without due process of law.[21]

The Court quickly concluded that the first three elements of the due process claim had been satisfied. Relying on *Monroe*, the Court first reaffirmed the basic proposition that one who acts pursuant to authority possessed by virtue of state law, is acting under color of state law, even when the challenged conduct violates or is unauthorized by state law.[22] Second, the inmate's hobby materials clearly constituted a property interest protected by the Fourteenth Amendment.[23] Finally, the Court concluded that, although the loss had been effected through simple negligence, the loss still amounted to a deprivation within the meaning of the Due Process Clause of the Fourteenth Amendment.[24]

In concluding that negligence could trigger a constitutional deprivation, the Court reaffirmed the *Monroe* proposition that section 1983 imposes no particular state-of-mind requirement.[25] In his concurrence, Justice Powell criticized the plurality's recognition of constitutional deprivations premised upon the negligent acts of state officials.[26] He would limit due process claims to those alleging deliberate or intentional acts by someone acting under color of state law.[27] The Court has recently adopted Justice Powell's position, overruling *Parratt* to the extent that it recognized mere negligence as sufficient to cause a deprivation under the Due Process Clause of the Fourteenth Amendment.[28]

Despite this limited overruling of *Parratt*, an important aspect of *Parratt* remains untouched: the Court's limitation on the fourth element of a due process claim. This element requires that for a deprivation of property to violate the Due Process Clause of the Fourteenth Amend-

21. 451 U.S. at 536-37.
22. *Id.* at 535.
23. *Id.* at 537.
24. *Id.* at 536-37.
25. *Id.* at 535.
26. *Id.* at 546 (Powell, J., concurring).
27. *Id.* at 548-49.
28. *See* Daniels v. Williams, 106 S. Ct. 662, 665 (1986); Davidson v. Cannon, 106 S. Ct. 668, 671 (1986); *see also* Williams v. City of Boston, 784 F.2d 430, 434 (1st Cir. 1986) ("[A]llegations of common law negligence, without more, do not state a claim for deprivation of liberty without due process of law.").

ment, it must occur without the opportunity to be heard at a meaningful time and in a meaningful manner.[29] *Parratt* holds that when a deprivation of property results from the random and unauthorized conduct of a state employee and predeprivation process would have been impracticable, if not impossible, due process is not violated so long as the state provides some meaningful postdeprivation opportunity to redress the loss.[30]

B. *Hudson v. Palmer*

In *Hudson*, the Court extended the rationale of *Parratt* to a claim involving an intentional taking of property by a prison guard. Palmer claimed that during the course of a "shakedown" search of his cell for contraband, Hudson, a prison employee, intentionally destroyed certain of his noncontraband personal property. Palmer alleged that this destruction constituted a deprivation of his property without due process of law.[31] In affirming the Fourth Circuit's application of *Parratt* to deny section 1983 relief, the Supreme Court held:

> [A]n 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. For intentional, as for negligent deprivations of property by state employees, the State's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy. . . . The controlling inquiry is solely whether the State is in a position to provide for predeprivation process.[32]

Hudson answered affirmatively the question of whether *Parratt* applies to intentional, as well as negligent, deprivations of property. The Court's extension of *Parratt* to intentional deprivations of property was foreshadowed in *Parratt* by its discussion of *Ingraham v. Wright*.[33] In *Ingraham*, the Court held that when (1) predeprivation process would be impracticable, and (2) the state had in place adequate postdeprivation remedies to provide redress for any erroneous deprivations, then subjecting students to corporal punishment without providing them with a predeprivation hearing did not violate the Due Process Clause of the Fourteenth Amendment.[34]

29. 451 U.S. at 540.
30. *Id.* at 543.
31. 468 U.S. at 520.
32. *Id.* at 533-34.
33. 430 U.S. 651 (1977).
34. *Id.* at 683.

Although it is now settled that *Parratt* applies to both negligent and intentional deprivations of property, conflict remains among the lower federal courts as to whether the *Parratt/Hudson* doctrine will extend to procedural due process claims involving unauthorized deprivations of life or liberty interests.[35] Such an extension has only been hinted at by the Supreme Court. In *Temple v. Marlborough Division of the District Court Department*,[36] the Supreme Judicial Court of Massachusetts noted the division among the lower federal courts on *Parratt*'s application to nonproperty interests. Adopting the view that *Parratt* applies to claims involving deprivations of liberty interests, the court observed that "[t]he controlling inquiry . . . is not the nature of the interest, but whether the state was in a position to provide predeprivation process and whether it supplies adequate postdeprivation process."[37] This author takes the position that the nature of the interest is relevant to, but not independently determinative in, ascertaining what process is due under the Fourteenth Amendment. Thus, the nature of the interest may indirectly affect the application of the *Parratt/Hudson* doctrine.[38]

35. Compare those cases indicating that *Parratt* should not be extended beyond deprivations of property, Voutour v. Vitale, 761 F.2d 812, 826 (1st Cir. 1985) (Bownes, J., concurring), *cert. denied*, 106 S. Ct. 879 (1986); Conway v. Village of Mount Kisco, 758 F.2d 46, 48 (2d Cir. 1985), *cert. granted sub nom.* Cerbone v. Conway, 106 S. Ct. 878 (1986); Martin v. Afflerbach, 623 F. Supp. 565, 568 (D. Me. 1985); Thompson v. City of Portland, 612 F. Supp. 390, 392 (D. Me. 1985); with Thibodeaux v. Bordelon, 740 F.2d 329, 336-37 (5th Cir. 1984) (no reason to distinguish between liberty and property interests) and King v. Pace, 575 F. Supp. 1385, 1388 n.1 (D. Mass. 1983) (*Parratt* applies to deprivations of life and liberty). Commentators are likewise in disagreement. *Compare* Note, *Defining the Parameters of Section 1983: Parratt v. Taylor*, 23 B.C.L. REV. 1218 (1982) (*Parratt* should not apply to nonproperty deprivations) *with* Note, *Due Process Application of the Parratt Doctrine to Random and Unauthorized Deprivations of Life and Liberty*, 52 FORDHAM L. REV. 887 (1984) (*Parratt* should apply to nonproperty deprivations); *see also* Zagrans, *supra* note 57, at 521-22 (suggesting *Ingraham* may have represented an extension of the *Parratt/Hudson* doctrine to a deprivation of liberty).

The Supreme Court may soon resolve the conflict surrounding *Parratt's* application to nonproperty interests. In *Conway*, 758 F.2d at 48, the Second Circuit refused to apply the *Parratt/Hudson* doctrine to dismiss a claim of malicious prosecution, concluding that such a claim implicated a deprivation of liberty actionable under section 1983, and that the existence of parallel state tort remedies was irrelevant. The Court need not reach the merits of the *Parratt/Hudson* question on appeal, however, if it concludes that allegations of malicious prosecution do not rise to the level of a consitutional tort.

36. 395 Mass. 117, 479 N.E.2d 137 (1985).

37. *Id.* at 124-25, 479 N.E.2d at 143. *Accord* Wilson v. Beebe, 770 F.2d 578, 584 (6th Cir. 1985) (*en banc*).

38. *See infra* notes 77-84 and accompanying text.

II. Claims to which the *Parratt/Hudson* Doctrine does Not Apply

It is helpful to sort out the claims to which the *Parratt/Hudson* doctrine does not generally apply. As Justice Stevens has noted, three kinds of rights are protected by the Due Process Clause of the Fourteenth Amendment.[39] First, are rights secured by the Bill of Rights and made applicable to the states through the Fourteenth Amendment Due Process Clause.[40] Second, is the right to be protected from arbitrary or irrational government conduct: a right to substantive due process.[41] Third, is the right to fair procedure, or procedural due process.[42]

A. Claims Based on Violations of Rights Protected By The Bill of Rights

If a plaintiff asserts that a right guaranteed by the Bill of Rights has been violated, the *Parratt/Hudson* doctrine will not apply and the adequacy of the state remedy is irrelevant.[43] Justice Rehnquist distinguished the Bill of Rights claims in cases like *Monroe v. Pape*[44] and *Estelle v. Gamble*,[45] from the type of claim asserted in *Parratt*.[46] *Monroe* involved a fourth amendment violation, while *Estelle* involved an eighth amendment violation. Virtually all the lower federal courts agree that the *Parratt/Hudson* doctrine is not implicated when a plaintiff alleges that constitutional rights protected by provisions independent of the Fourteenth Amendment have been violated.[47]

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39. Daniels v. Williams, 106 S. Ct. 677 (1986) (Stevens, J., concurring).

40. *Id.* at 678.

41. *Id.*

42. *Id.*

43. *Id. See also* Akbarr-El v. Shelley, 631 F. Supp. 1235, 1237 n.1 (N.D. Ill. 1986) (it is now clear that the substantive rights guaranteed by the Bill of Rights and made applicable to states through the Due Process Clause of the Fourteenth Amendment remain unaffected by the *Parratt/Hudson* doctrine).

44. 365 U.S. 167 (1961).

45. 429 U.S. 97 (1976).

46. 451 U.S. at 536.

47. *See, e.g.*, Gilmere v. City of Atlanta, 774 F.2d 1495, 1502 (11th Cir. 1985) (*en banc*), *cert. denied*, 106 S. Ct. 1970 (1986) (the existence of state tort remedies does not preclude the direct assertion of a fourth amendment claim in federal court); Robins v. Harum, 773 F.2d 1004, 1009 (9th Cir. 1985) (distinguishing a fourteenth amendment due process claim from violation of the Fourth Amendment); Augustine v. Doe, 740 F.2d 322, 326 (5th Cir. 1984) (to apply *Parratt* to an alleged fourth amendment violation would be to write *Monroe* out of existence). *But see* Farrell v. Miklas, 605 F. Supp. 202, 206 (E.D.N.Y. 1985) (the *Parratt/Hudson* doctrine should apply where predeprivation process is not practicable or possible and an adequate postdeprivation remedy exists, regardless of whether the alleged deprivation violates a specific provision of the Bill of Rights).

B. Claims Alleging Violations of Substantive Due Process

The Due Process Clause of the Fourteenth Amendment can also be the source of a substantive due process claim.[48] As Justice Blackmun stated in *Parratt*, "there are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of Due Process."[49] The thrust of the substantive due process claim is that the challenged governmental conduct is so egregious, so "inherently impermissible," that the conduct is prohibited regardless of the procedural safeguards accompanying the conduct.[50]

Some controversy exists regarding the degree of culpability and the severity of harm that must be established in order to make out a prima facie substantive due process claim. However, the general consensus holds that if a substantive due process claim is alleged, the *Parratt/Hudson* doctrine does not bar the availability of the section 1983 remedy: "When a state actor violates substantive rights, the constitutional violation is complete at the time of the deprivation, irrespective of the postdeprivation procedures that might be available for redressing the wrong."[51]

1. Claiming Excessive Use of Force by the Police

Claims of excessive use of force by police officers are generally treated as claims asserting substantive due process violations. Clearly, a complaint alleging excessive use of force by the police should not be conceived "as only a right to have recourse to certain procedures before or after the attack. . . ."[52] In *Johnson v. Glick*,[53] the Second Circuit established the guiding standard for substantive due process claims in this context:

48. Daniels v. Williams, 106 S. Ct. at 678 (Stevens, J., concurring).

49. 451 U.S. at 545 (Blackmun, J., concurring).

50. Schiller v. Strangis, 540 F. Supp. 605, 614 (D. Mass. 1982).

51. Holland v. Breen, 623 F. Supp. 284, 288 (D. Mass. 1985). *Accord* Daniels v. Williams, 106 S. Ct. at, 678 (Stevens, J., concurring); *see also* Mann v. City of Tucson, 782 F.2d 790, 793 (9th Cir. 1986) (*Parratt* not applicable to denial of substantive due process); Gilmere v. City of Atlanta, 774 F.2d 1495, 1500 (11th Cir. 1985) (*en banc*), *cert. denied*, 106 S. Ct. 1970 (1986); Ramos v. Gallo, 596 F. Supp. 833, 838 (D. Mass. 1984). *But see* Mann v. City of Tucson, 782 F.2d 790, 798 (9th Cir. 1986) (Sneed, J., concurring) (*Parratt* should apply to "all unforeseeable deprivations of life, liberty, and property as well as all unplanned violations of 'substantive' due process rights"); Farrell v. Miklas, 605 F. Supp. 202, 206 (E.D.N.Y. 1985) (the *Parratt/Hudson* doctrine should apply even where the alleged deprivation violates substantive due process); *see also* Comment, *Parratt v. Taylor: Don't Make a Federal Case Out of It*, 63 B.U.L. REV. 1187, 1217-22 (1983).

52. Buranen v. Hanna, 623 F. Supp. 445, 449 (D. Minn. 1985).

53. 481 F.2d 1028 (2d Cir.), *cert. denied sub nom.* John v. Johnson, 414 U.S. 1033 (1973).

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.[54]

The standard, as formulated by the Supreme Court, is whether the challenged police conduct "shocks the conscience" of the court.[55]

Since the Supreme Court's 1985 decision in *Tennessee v. Garner*,[56] plaintiffs would be well advised to characterize an excessive force claim as a fourth amendment as well as a substantive due process claim. In *Garner*, the Supreme Court held that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[57] In the wake of *Garner*, some lower federal courts now analyze excessive force claims arising from police-citizen encounters under both the Fourth Amendment and substantive due process.[58] However, some federal judges have indicated that the Fourth Amendment might be the *only* source of protection when a plaintiff's claim is based on the use of excessive force in the course of an arrest.[59]

In a court which (1) applies the same standard to determine "reasonableness" under the Fourth Amendment as it does to determine what "shocks the conscience" under the substantive due process doctrine, and (2) views the *Parratt/Hudson* doctrine as inapplicable to either claim, the characterization of the claim under either the Fourth or the Fourteenth Amendment will be insignificant as a practical matter. It is possible, however, that courts may apply different standards for the fourth amend-

54. *Id.* at 1033.

55. Rochin v. California, 342 U.S. 165, 172 (1952).

56. 105 S. Ct. 1694 (1985).

57. *Id.* at 1699.

58. *See, e.g.*, Gilmere v. City of Atlanta, 774 F.2d 1495, 1502 (11th Cir. 1985) (*en banc*), *cert. denied*, 106 S. Ct. 1970 (1986) (beating and shooting of the plaintiff was held actionable under the Fourth Amendment); Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985) (excessive use of force by police officer in transporting arrestee supports a fourth amendment claim); Gumz v. Morrissette, 772 F.2d 1395, 1399 n.3 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1644 (1986) (recognizing propriety of fourth amendment analysis of excessive force claims); Bibbo v. Mulhern, 621 F. Supp. 1018, 1023-24 (D. Mass. 1985) (inquiry in excessive use of force case focuses on reasonableness of "seizure").

59. *See, e.g.*, Gilmere v. City of Atlanta, 774 F.2d at 1507 (Tjoflat, J., concurring and dissenting) (the Fourth Amendment is the exclusive constitutional vehicle for analyzing seizures involving excessive use of force); Gumz v. Morrissette, 772 F.2d at 1405 (Easterbrook, J., concurring) (use of the Due Process Clause to achieve substantive ends has no support in the Constitution; claimed right to be free from intentional infliction of emotional distress in the course of arrest is properly analyzed under the Fourth Amendment).

ment analysis than for the substantive due process analysis.[60] Thus, the characterization of the claim becomes crucial.

While the Supreme Court has made it clear that simple negligence cannot give rise to a fourteenth amendment procedural or substantive due process claim, the Court has left open the question of "whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause."[61] Some lower federal courts have held that a substantive due process claim requires an allegation of an intentional act or a "purposeful infliction of injury."[62]

On the other hand, the analysis for a fourth amendment violation calls for a balancing of the nature and extent of the intrusion on the individual's rights against the governmental interests allegedly furthered by the intrusion.[63] In the fourth amendment context, the courts apply an objective standard to determine whether the officer's conduct was a reasonable response to particular facts: "The officer's pure heart provides no defense if his conduct was unreasonable in light of the facts he knew or should have known; the officer's evil design does not invalidate his acts if the facts otherwise support his deeds."[64] Thus, state of mind may be irrelevant in the fourth amendment setting.[65]

Given the strong possibility that courts will require proof of intent or malice when a claim rests on substantive due process grounds, and that the state-of-mind inquiry will not be relevant in the fourth amendment analysis, a plaintiff claiming excessive use of force in the course of an arrest would be wise to frame the complaint in fourth amendment terms. Yet, if there is any uncertainty as to whether excessive use of force occurred during the course of a search or seizure, and therefore would be subject to fourth amendment constraints, the substantive due process claim should be included as well. In some cases, people who have not been the subject of a search or seizure by law enforcement officials have raised excessive use of force claims on substantive due process

60. Gumz v. Morrissette, 772 F.2d at 1407 (Easterbrook, J., concurring) ("The most significant difference between substantive Due Process and reasonableness under the Fourth Amendment is that one requires scrutiny of motive and the other forbids it.").

61. Daniels v. Williams, 106 S. Ct. 662, 667 n.3 (1986).

62. Wilson v. Beebe, 770 F.2d 578, 586 (6th Cir. 1985) (*en banc*). *See also* Holland v. Breen, 623 F. Supp. 284, 288 (D. Mass. 1985) (acknowledging that most cases raising substantive due process claims against police officers involve conduct that was intentional).

63. Tennessee v. Garner, 105 S. Ct. 1694, 1699 (1985).

64. Gumz v. Morrissette, 772 F.2d at 1407 (Easterbrook, J., concurring).

65. *See* Davidson v. Cannon, 106 S. Ct. 668, 674 n.6 (1986) (Blackmun, J. dissenting) (suggesting the Court has recognized that negligent behavior may result in a fourth amendment violation).

grounds to avoid a *Parratt/Hudson* dismissal.[66]

2. *Claiming Illegal Denial of Building Permits and Zoning Variances*

Considerable authority supports treating complaints of arbitrary, capricious, or illegal denials of building permits or zoning variances as substantive, rather than procedural, due process claims.[67] Once such claims are characterized in terms of substantive due process, it is likely that courts will not apply the *Parratt/Hudson* doctrine and the existence and adequacy of state remedies will be irrelevant. The First Circuit stands in the minority in this area, consistently holding that local decisions involving land use planning, zoning variances, building permits, or licenses do not implicate due process, "at least when not tainted with fundamental procedural irregularity, racial animus, or the like. . . ."[68] Even when local officials have clearly violated state law, the First Circuit has not found that the claim rises to the level of a substantive due process violation.[69] Recently, after rejecting a section 1983 claim for denial of a gravel removal permit, the First Circuit made the following observation:

> While the Supreme Court has yet to provide precise analysis concerning claims of this sort, we feel confident that where, as here, the state offers a panoply of administrative and judicial remedies, litigants may not ordinarily obtain federal court review of local zoning and planning disputes by means of 42 U.S.C. § 1983.[70]

Thus, in the First Circuit, absent the operation of a constitutionally impermissible discriminatory factor in the decision making process, or a constitutional deficiency in established state procedures, a plaintiff with a dispute concerning zoning, licensing, or permit decisions will be forced to pursue his state administrative or judicial remedies in lieu of a section 1983 claim based on a violation of substantive due process.

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66. *See, e.g.*, Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (corporal punishment of student gave rise to substantive due process claim); Hall v. Ochs, 623 F. Supp. 367, 375 (D. Mass. 1985) (recognizing substantive due process claim of daughter who was struck by an officer while removing her father from car); Brooks v. Miller, 620 F. Supp. 957, 962 (N.D. Miss. 1985) (substantive due process implicated when acting mayor shot plaintiff in attempt to enforce ordinance against drinking in public places); Borek v. Town of McLeansboro, 609 F. Supp. 807, 809 (S.D. Ill. 1985) (claim for relief was stated under substantive due process when the town supervisor allegedly used excessive force on the plaintiff).

67. *See, e.g.*, Littlefield v. City of Afton, 785 F.2d 596, 603-07 (8th Cir. 1986) (discussing the law and opinions of other circuits and adopting the majority position that "denial of a building permit under some circumstances may give rise to a substantive due process claim").

68. Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982).

69. Roy v. City of Augusta, 712 F.2d 1517, 1523 (1st Cir. 1983).

70. Raskiewicz v. Town of New Boston, 754 F.2d 38, 44 (1st Cir.), *cert. denied*, 106 S. Ct. 135 (1985). *See also* Cloutier v. Town of Epping, 714 F.2d 1184 (1st Cir. 1983); Chiplin Enterprises, Inc. v. City of Lebanon, 712 F.2d 1524 (1st Cir. 1983).

In *Roy v. City of Augusta*,[71] the First Circuit recognized the limited circumstances under which there was a possibility of a federal due process claim as a result of a license denial. The plaintiff in *Roy* had been denied a renewal of his pool hall license and had pursued his state court remedies. He proved that city officials had flouted a ruling by the Maine Supreme Judicial Court, thus rendering the state's process a nullity. He further claimed that it was impossible for the state courts to correct the harm that had occurred.[72] Although the First Circuit did not specify the nature of the due process claim a plaintiff might establish in a case like *Roy*, arguably it was a procedural due process claim that could be asserted only after the plaintiff had established that his remedies under state law were inadequate to correct the wrong that had resulted from the defendants' flouting of the state's process.[73] Given this interpretation, *Roy* remains consistent with the First Circuit cases refusing to acknowledge substantive due process claims in the land use context.

C. Procedural Due Process Claims Involving Deprivations Effected by Established State Procedure

It is important to understand that the *Parratt/Hudson* doctrine does not eliminate the section 1983 remedy for procedural due process violations, but rather restricts the availability of the remedy by defining what is a procedural due process claim and when it is "ripe" for assertion under section 1983. As the Fifth Circuit has noted, "*Parratt* merely limits the group of claims that *allege* procedural due process violations; once a bona fide procedural due process claim is asserted, the *Monroe v. Pape* rule applies."[74]

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71. 712 F.2d 1517 (1st Cir. 1983).

72. *Id.* at 1523-24. In this respect, *Roy* is distinguishable from Park View Sand & Gravel, Inc. v. Town Bd. of Rochester, 625 F. Supp. 456 (E.D. Wis. 1985). In *Park View*, the defendants had failed to comply with two state court judgments ordering the defendants to allow the plaintiff to operate a gravel pit on its land. The federal court dismissed the plaintiff's section 1983 claim for damages, concluding that "there [were] adequate state procedures through which the plaintiff [could] seek relief." *Id.* at 457.

73. In an analogous context, the Supreme Court has recently held that claims under the Just Compensation Clause are not ripe for review under section 1983 until the plaintiff has exhausted procedures made available by the state for providing compensation, and has been denied recompense for the taking. Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 105 S. Ct. 3108, 3121 (1985). *See also* Golemis v. Kirby, 632 F. Supp. 159, 163-64 (D.R.I. 1985) (applying *Williamson*).

74. Findeisen v. North E. Indep. School Dist., 749 F.2d 234, 238 n.5 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 2657 (1985) (emphasis in original). In this respect, the Second Circuit failed to undertake the appropriate analysis in Conway v. Village of Mount Kisco, 758 F.2d 46, 48 (2d Cir. 1985), *cert. granted sub nom.* Cerbone v. Conway, 106 S. Ct. 878 (1986), when it concluded that an application of *Parratt* and *Hudson*, resulting in the dismissal of a section

The Supreme Court has repeatedly characterized the fundamental requirement of procedural due process as an opportunity to be heard "at a meaningful time and in a meaningful manner."[75] Once a plaintiff has established a deprivation of a constitutionally protected interest, the question of what procedural requirements must attend that deprivation is a matter of federal law.[76]

In *Mathews v. Eldridge*,[77] the Supreme Court developed a test which balances the governmental and private interests affected to decide whether a hearing is required prior to a given deprivation:

> [I]dentification of the specific dictates of Due Process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[78]

In the determination of whether predeprivation process should be constitutionally compelled, the nature of the interest affected by the deprivation seems relevant. A court might be more inclined to find predeprivation process required where the interest affected is life or liberty rather than property. The *Mathews* test, which considers the private interest affected by the challenged official conduct, supports this view.[79]

It is clear, however, that Supreme Court decisions applying the *Mathews* balancing test do not turn solely on the nature of the interest in question. In *Cleveland Board of Education v. Loudermill*,[80] the Supreme Court held that a public school employee was entitled to some kind of hearing prior to the deprivation of his constitutionally protected property interest in employment.[81] In *Ingraham v. Wright*,[82] on the other hand, the Court concluded that due process did not require teachers to afford

1983 procedural due process claim where adequate state remedies were available to redress an alleged deprivation of a liberty interest, would be tantamount to overruling *Monroe v. Pape*.

75. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

76. Vitek v. Jones, 445 U.S. 480, 491 (1980).

77. 424 U.S. 319 (1976).

78. *Id.* at 335.

79. *See id.*; *see also* Mitchell v. W.T. Grant Co., 416 U.S. 600, 611 (1974) (usual rule has been that "[w]here *only* property rights are involved, mere postponement of the judicial enquiry is not a denial of due process. . . .") (emphasis added); Wilson v. Beebe, 770 F.2d 578, 596 (6th Cir. 1985) (*en banc*) (Jones, J., concurring and dissenting) (in determining what process is due, distinctions between property and liberty become controlling).

80. 105 S. Ct. 1487 (1985).

81. *Id.* at 1493.

82. 430 U.S. 651 (1977).

students a hearing prior to the infliction of corporal punishment.[83] The Court reasoned that postdeprivation state tort remedies provided sufficient due process even when the challenged conduct resulted in an intentional deprivation of a liberty interest.[84]

The plaintiffs in both *Loudermill* and *Ingraham* asserted the kind of procedural due process claims that should survive *Parratt/Hudson* dismissal and be heard as section 1983 claims. In both cases, the plaintiffs claimed the right to be heard before the deprivation of a constitutionally protected interest was effected through established state procedure.[85]

Similarly, in *Logan v. Zimmerman Brush Co.*,[86] the state commission's failure to convene a conference on the plaintiff's claim within the statutorily mandated time period deprived the plaintiff of his property interest.[87] In upholding the procedural due process claim, the *Logan* Court distinguished *Parratt*:

> In *Parratt*, the Court emphasized that it was dealing with "a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not [as] a result of some established state procedure." Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference. . . . *Parratt* was not designed to reach such a situation. Unlike the complainant in *Parratt*, Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.[88]

In *Logan*, the Supreme Court determined that the plaintiff was entitled to have the state commission hear the merits of his claim before the claim was terminated.[89] Otherwise, the operation and application of the state statutory scheme deprived the plaintiff of his property without the requisite procedural safeguards.

In procedural due process cases like *Logan*, *Loudermill*, and *Ingraham*, in which a plaintiff alleges that predeprivation process is possible and constitutionally required but not provided by the established state procedures effecting the deprivation, the courts should continue to acknowledge the availability of the section 1983 remedy. Where a

83. *Id.* at 682.

84. *Id.* at 672.

85. *See* Nahmod, *supra* note 2, at 226 (noting that the corporal punishment inflicted in *Ingraham* was not the result of the random and unauthorized act of an official).

86. 455 U.S. 422 (1982).

87. The property interest was a cause of action under the Illinois Fair Employment Practices Act. *Id.* at 424.

88. *Id.* at 435-36 (citations omitted).

89. *Id.* at 434.

pretermination hearing, mandated under *Mathews*,[90] is not afforded to an individual, a postdeprivation remedy will not necessarily render the deprivation meaningless.[91] On the merits, the courts may decide that the state is required to provide predeprivation process, as in *Logan* and *Loudermill*, or that a prior hearing requirement could be too intrusive and not proportionately beneficial, as in *Ingraham*. These claims, however, should not be dismissed on *Parratt/Hudson* grounds.

In *Parratt* and *Hudson*, the plaintiffs alleged deprivations resulting from random, unauthorized, and unpredictable conduct of state officials. In neither case did the plaintiff claim that he had been deprived of life, liberty, or property by an established state procedure which denied predeprivation process in a situation in which such process was practicable.

The central premise of the *Parratt/Hudson* doctrine is that the state cannot provide predeprivation process when state employees effect a deprivation by acting contrary to established state procedures, on a random basis and under unforeseeable circumstances.[92] When predeprivation process cannot be provided, the sole inquiry is whether postdeprivation remedies are adequate to redress any erroneous or wrongful substantive deprivation that has occurred.[93]

A number of federal circuit courts have taken the position that when a deprivation results from established state custom or policy, the state is able to predict and anticipate such conduct, and therefore must provide predeprivation process reducing the risk of an erroneous deprivation.[94]

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90. *See supra* notes 77-79 and accompanying text.

91. Stana v. School Dist. of Pittsburgh, 775 F.2d 122, 129 (3d Cir. 1985) ("Nothing in *Parratt v. Taylor* suggests that when a pretermination hearing is required under the *Matthews* [sic] balancing, there is nevertheless no 'deprivation' in a constitutional sense as long as the state provides some forum for post-deprivation redress.").

92. Hudson v. Palmer, 468 U.S. 517, 531-33 (1984).

93. *See infra* notes 153-179 and accompanying text.

94. *See, e.g.*, Berlanti v. Bodman, 780 F.2d 296, 301 (3d Cir. 1985) (the plaintiff's debarment from bidding on public contracts without prior notice and hearing was not the result of random and unauthorized conduct when supervisory officials as a matter of custom or usage failed to employ state administrative procedures that would have afforded predeprivation process); Piatt v. MacDougall, 773 F.2d 1032, 1036 (9th Cir. 1985) (*en banc*) (*Parratt* not applied when deprivation resulted from prison director's "routine failure" to compensate prisoners for work done, a practice contrary to state law requirements); Hicks v. Feeney, 770 F.2d 375, 378 (3d Cir. 1985) (plaintiff's admission and confinement to state hospital was the result of established state procedure when the state hospital followed its usual policy for court commitments, even though this policy violated state law and the hospital's own internal regulations). Three Supreme Court Justices have expressed views consistent with this position. *See* Gregory v. Town of Pittsfield, 105 S. Ct. 1380, 1382 (1985) (O'Connor, J., joined by Brennan and Marshall, J.J., dissenting from denial of petition for writ of certiorari) (*Parratt* should not apply when the deprivation resulted from the town's policy of not providing written notice to applicants denied general assistance, even though this policy was contrary to state law).

Thus, conduct pursuant to official state custom or policy, although a violation of formally enacted state law, will be sufficient to invoke the established state procedure exception of *Logan*.[95] The lower courts' logic is sound: when the challenged conduct is contrary to formally enacted state law but is clearly representative of official operating procedures, the conduct, though unauthorized, is hardly random or unpredictable.[96] The state is in the position of being able to provide predeprivation process and should not be able to avoid section 1983 liability by "the mere *promulgation* of laws and regulations which, if followed, would preserve the most fundamental of rights."[97]

To invoke the established state procedure exception to the *Parratt/Hudson* doctrine, a claim must be made that the state was able to, but did not, provide an opportunity to be heard prior to a deprivation that was effected through formally enacted state law or through a course of conduct which, though unauthorized, reflected government custom or policy.[98]

III. Deprivations Unauthorized by State Law, Custom, or Policy: Single Incident Deprivations by Policymaking Officials

When a deprivation results from state law, custom, or policy, a strong argument can be made that the state is in a position to provide predeprivation process and that the constitutional violation is complete when the deprivation has taken place without due process. The question remains whether the state would be responsible for a lack of predeprivation process when the deprivation is the result of anything short of state law, custom, or policy. In other words, can the established state procedure exception be applied when the conduct of a state official resulting in a deprivation is unauthorized by state law and is not pursuant to a repeatedly followed governmental policy?

95. 455 U.S. at 435-36.

96. The reasoning of these cases is also consistent with, and analogous to, the analysis applied in municipal liability cases under Monell v. Department of Social Services, 436 U.S. 658 (1978) (holding that a government entity may be held liable for constitutional violations resulting from official policy or custom).

97. Patterson v. Coughlin, 761 F.2d 886, 891 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 879 (1986) (emphasis in original).

98. *See, e.g.*, McClary v. O'Hare, 786 F.2d 83, 87 (2d Cir. 1986) ("*Parratt's* 'established state procedure' exception was intended to apply only where the procedure deprives the claimant of predeprivation process it would otherwise be possible to provide.").

A. Single Incident Deprivations as Random and Unauthorized Conduct

Some courts appear to be rejecting the application of the established state procedure exception to single incident deprivations, effected by officials acting contrary to state law, regardless of the rank or responsibility of the official involved. For example, in *Yates v. Jamison*,[99] a house owned by the plaintiffs was inspected by the Superintendent of Building Inspection and condemned as unfit for human habitation. The city destroyed the house without affording the owners notice or a predeprivation hearing as required by both state and local law.[100] The state and local procedures required a predeprivation hearing when possible, imposing on local officials a duty "to exercise reasonable diligence to ascertain the identities and whereabouts of property owners."[101] The plaintiffs alleged that the failure to locate them and provide them with notice and an opportunity to be heard constituted "willful and reckless negligence" on the part of the Superintendent.[102] The plaintiffs further asserted that failure to exercise the requisite diligence in searching public records represented official policy or custom of the City of Charlotte.[103] The Fourth Circuit, in reversing the district court, concluded that dismissal was required on *Parratt/Hudson* grounds, and distinguished *Logan* as a case in which the state procedure was set forth in a state statute.[104] According to the Fourth Circuit, the plaintiffs in *Yates* were not complaining about established state procedure, but rather about random and unauthorized conduct which failed to comply with established state procedure.[105]

99. 782 F.2d 1182 (4th Cir. 1986).

100. *Id.* at 1183.

101. *Id.* (citing N.C. GEN. STAT. § 160A-445 (1982)).

102. *Id.* at 1183.

103. *Id.* at 1184.

104. *Id.* at 1184-85.

105. *Id.* at 1185. It is unclear from the court's opinion whether the Fourth Circuit was rejecting the possibility of the established state procedure exception applying in cases where official conduct violates state law, or whether the court would acknowledge the exception's application when the evidence suggests a pattern of unauthorized conduct supporting a finding of custom or policy. Judge Ervin, dissenting in *Yates*, noted that "[t]he fact that the city and its agents may have violated state law and city regulations will not vitiate the plaintiffs' cause of action if it was city policy or custom to do so." *Id.* at 1190 (Ervin, J., dissenting). In Esquivel v. Village of McCullom Lake, 633 F. Supp. 1199 (N.D. Ill. 1986), the court criticized *Yates* and refused to grant summary judgment in favor of the Village and its attorney on facts remarkably similar to *Yates*. *Id.* at 1206-07. Although this author agrees that *Yates* misapplied *Parratt* and *Hudson*, the court in *Esquivel* was also somewhat confused in its application of the doctrine. In refusing to grant summary judgment in favor of the individual defendant, the Village attorney, the court concluded that the practicality of predeprivation process made the *Parratt/Hudson* doctrine inapplicable. The question of the attorney's conduct being random and unauthorized was discussed not in the context of whether there was any due process violation at all, but only in the context of whether municipal liability could be demonstrated.

In *Temple v. Marlborough Division of the District Court Department*,[106] the Supreme Judicial Court of Massachusetts took a position consistent with that of the Fourth Circuit in *Yates*. In *Temple*, the plaintiff was taken into custody under a state warrant of apprehension.[107] After being interviewed by a court psychiatrist, the plaintiff was involuntarily committed pursuant to an order of commitment signed by a state district court judge.[108] The plaintiff claimed he had been denied his rights to elect voluntary commitment and to consult with counsel—rights clearly established by state statute.[109] The court concluded that "[s]ince the judge and the court psychiatrist were allegedly acting in violation of an established State procedure[110] . . . it would have been impossible for the Commonwealth to have provided a predeprivation hearing. In such a situation, all that *Parratt* requires is that the postdeprivation remedy be adequate."[111] The *Temple* court never addressed the question of whether the psychiatrist or district court judge knew or should have known that their conduct would result in an unauthorized deprivation. Furthermore, the court failed to discuss the relevance of the psychiatrist's and judge's positions, as persons responsible for affording the req-

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For a discussion of the relationship between the *Parratt/Hudson* doctrine and the cases relating to the issue of municipal liability, see *infra* notes 137-145 and accompanying text.

106. 395 Mass. 117, 479 N.E.2d 137 (1985).

107. *Id.* at 120, 479 N.E.2d at 140.

108. *Id.*

109. MASS GEN. LAWS. ANN ch. 123, §§ 10, 12(c) (West 1984).

110. MASS. GEN. LAWS. ANN. ch. 123, § 10(a) (West 1986) provides:

> Pursuant to departmental regulations on admission procedures, the superintendent may receive and retain on a voluntary basis any person providing the person is in need of care and treatment and providing the admitting facility is suitable for such care and treatment. The application may be made (1) by a person who has attained the age of sixteen, (2) by a parent or guardian of a person on behalf of a person under the age of eighteen years, and (3) by the guardian of a person on behalf of a person under his guardianship. Prior to accepting an application for a voluntary admission, the superintendent shall afford the person making the application the opportunity for consultation with an attorney, or with a person who is working under the supervision of an attorney, concerning the legal effect of a voluntary admission. The superintendent may discharge any person admitted under the provisions of this paragraph at any time he deems such discharge in the best interest of such person, provided, however, that if a parent or guardian made the application for admission, fourteen days notice shall be given to such parent or guardian prior to such discharge.

MASS. GEN. LAWS ANN. Ch. 123, § 12(c) (West 1986) provides:

> No person shall be admitted to a facility under the provisions of this section unless he, or his parent or legal guardian in his behalf, is given an opportunity to apply for voluntary admission under the provisions of paragraph (a) of section ten and unless he, or such parent or legal guardian has been informed (1) that he has a right to such voluntary admission, and (2) that the period of hospitalization under the provisions of this section cannot exceed ten days. At any time during such period of hospitalization, the superintendent may discharge such person if he determines that such person is not in need of care and treatment.

111. 395 Mass. at 127-28, 479 N.E.2d at 144.

uisite predeprivation process, to the feasibility of the Commonwealth providing for such process.

In both *Yates* and *Temple*, the courts' conclusions suggest that a state is never in a position to provide for predeprivation process when an employee or official fails on a single occasion to follow state law. The problem with this approach is that it fails to recognize that a violation of procedural due process has occurred in situations where predeprivation process was constitutionally mandated under federal law and required by state law, but was simply not provided. The focus of the *Yates* and *Temple* approach is the adequacy of postdeprivation remedies in redressing erroneous substantive deprivations, with no concern for redressing the harm which results from the procedural deprivation.[112]

One federal court has expressed the possibility that a single incident deprivation may reflect state policy. In *Holloway v. Walker*,[113] the plaintiffs alleged that they were deprived of property through the conspiratorial acts of a state court judge and the opposing party in a state court lawsuit over which the judge presided.[114] In an attempt to avoid a *Parratt/Hudson* dismissal of their procedural due process claim, the plaintiffs argued that their property was taken pursuant to established state procedure in the form of a judicial proceeding.[115] The Fifth Circuit, employing reasoning similar to that of the Fourth Circuit in *Yates* and the Massachusetts Supreme Judicial Court in *Temple*, determined that the complaint did not involve any established state procedure of Texas,[116] but instead concerned the allegedly arbitrary or corrupt conduct of an individual judge.[117] Unlike the plaintiffs in *Yates*, the plaintiffs in *Holloway* did not allege that the conduct of the state court judge amounted to or reflected official policy in any sense. The court concluded that "[i]n the absence of any challenge to the established judicial procedure of Texas or allegation that Judge Walker's conspiratorial acts 'represented

112. In Carey v. Piphus, 435 U.S. 247 (1978), the Court recognized that a denial of constitutionally required predeprivation process gives rise to a claim for damages distinct from any remedy due for an erroneous substantive deprivation. *Id.* at 266.

113. 784 F.2d 1287 (5th Cir. 1986).

114. *Id.* at 1288.

115. *Id.* at 1292.

116. See, e.g., Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1145 (2d Cir.), *cert. granted*, 106 S. Ct. 3270 (1986), where Texaco's procedural due process claim was sustained because "the undisputed facts indicate[d] that the automatic enforcement of the Texas lien and bond requirements against Texaco's property to the extent of $12 billion lack[ed] any rational basis, since it would destroy Texaco and render its right to appeal in Texas an exercise in futility." Thus, where the application of established state procedure would reduce the right to appeal to "a meaningless ritual," federal due process rights are implicated. *Id.* at 1154.

117. Holloway v. Walker, 784 F.2d at 1292-93.

official policy,' . . . the *Logan* exception is inapplicable. . . ."[118] As a result of *Holloway*, it appears that the door may be open in the Fifth Circuit to invoke the established state procedure exception of *Logan* when a defendant's conduct, though unauthorized by state law, can be shown to reflect official policy.

B. Single Incident Deprivations as Authorized, Foreseeable Conduct

While accepting the premise that the *Parratt/Hudson* doctrine applies where the state cannot anticipate deprivations of constitutionally protected interests and, thus, cannot provide predeprivation process, some courts are confining the concept of unauthorized and random conduct implicit in the *Parratt/Hudson* rationale to the activities of nonpolicymaking officials or employees. In *Lavicky v. Burnett*,[119] the Tenth Circuit found that particular conduct of a prosecutor, although in violation of state law, was not random and unauthorized within the meaning of *Parratt/Hudson*.[120] In *Lavicky*, an Oklahoma deputy sheriff and undersheriff seized a pickup truck owned by a defendant charged with larceny. An Oklahoma statute required the prosecutor to hold the allegedly stolen property subject to the order of a magistrate authorized to direct its disposal. However, the prosecutor allowed a third party claiming ownership to remove the parts of the truck.[121] Thereafter, the defendant brought suit under section 1983 alleging that he was deprived of his property without due process of law.[122]

Rejecting the contention that the plaintiff was restricted to state postdeprivation remedies which would provide constitutionally adequate procedural due process, the Tenth Circuit held that it would not have been impractical for state officials to hold a hearing to determine the ownership of the property before its disposition.[123] Moreover, the court reasoned that the actions of the sheriffs and the prosecutor "constitute[d] an intentional deprivation that may not be characterized as random . . . . This action, planned and authorized, is not the sort of action for which postdeprivation process will suffice."[124] Accordingly, the court ruled that the *Parratt/Hudson* doctrine did not bar the defendant's section 1983 due process claim.[125]

118. *Id.* at 1292.
119. 758 F.2d 468 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 882 (1986).
120. *Id.* at 473.
121. *Id.* at 472.
122. *Id.*
123. *Id.* at 473.
124. *Id.*
125. *Id.*

Relying on *Lavicky*, the Tenth Circuit recently held in *Wolfenbarger v. Williams*[126] that deprivations resulting from the acts of police and prosecutors gave rise to a section 1983 claim when the official acts were initiated and controlled by the district attorney.[127]

The Second Circuit has adopted a position similar to, but arguably narrower than, that of the Tenth Circuit. In *Patterson v. Coughlin*,[128] an inmate of a correctional facility was accused of being involved in an altercation and was immediately placed in disciplinary confinement.[129] The inmate brought an action under section 1983 alleging that he was deprived of liberty without due process in violation of the Fourteenth Amendment.[130] Reversing the district court's dismissal of the prisoner's complaint, the Second Circuit found that predeprivation process was constitutionally required, and indeed was provided for by state law.[131] The court concluded that conduct which causes a deprivation cannot be properly viewed as random and unauthorized within the meaning of *Parratt*, when that conduct is performed by the state official who possesses the final authority to grant a constitutionally required hearing and has the ability to foresee the deprivation.[132] Because the responsible state officials knew that the inmate was in peril of being deprived of his liberty interest, and because no exigency requiring quick state action nor circumstance rendering a predeprivation hearing impossible or impracticable existed, the court held that the prisoner was denied due process.[133]

126. 774 F.2d 358 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 1376 (1986). The Tenth Circuit upheld the section 1983 claim of an Oklahoma pawnbroker who alleged that she was deprived of property without due process. Police, following the directions of a district attorney, seized property from her pawnshop and released it to a third party claiming ownership, without a prior judicial determination of ownership as required by law. After finding that the plaintiff possessed a constitutionally protected property interest in the stolen items sufficient to support a due process claim under section 1983, the court held that the *Parratt/Hudson* doctrine could not preclude the assertion of such claim. *Id.* at 362. The court reasoned that, unlike the situations in *Parratt* and *Hudson*, the state was in a position to provide predeprivation process and explicitly recognized this by enacting a statute which would require that process. The court found that because the district attorney's letter reflected a "conscious decision to alter the department-wide policy" with respect to allegedly stolen property, and because the property was released to a third party only after direct written authorization from the assistant district attorney, acting on the district attorney's behalf, the seizure and subsequent surrender of the items were "planned and authorized." *Id.* at 365. The court concluded that "official acts initiated and controlled by a district attorney cannot be characterized as random or unauthorized." *Id.*

127. *Id.*

128. 761 F.2d 886 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 879 (1986).

129. *Id.* at 888.

130. *Id.* at 889-90.

131. *Id.* at 890-91.

132. *Id.* at 892.

133. *Id.*

Thus, the Second and Tenth Circuits are in general agreement that when a deprivation resulting from conduct contrary to state law, custom, or policy is carried out by responsible state officials, the state must provide predeprivation process and cannot successfully assert that it was impracticable or impossible to do so. Arguably, there is a distinction between the Tenth Circuit's view in *Wolfenbarger*, and the reasoning of the Second Circuit in *Patterson*, concerning whether a state actor's conduct which effects a deprivation should be classified as random and unauthorized for purposes of deciding whether the *Parratt/Hudson* doctrine applies. While *Patterson* could be interpreted as being limited to situations where a plaintiff is denied predeprivation process by officials entrusted under state law with final authority to provide a constitutionally required or state mandated predeprivation hearing, *Wolfenbarger* could be viewed as holding that a deprivation effected by any policymaking official should never constitute random and unauthorized conduct.

There are problems with an approach that would make application of the established state procedure exception turn solely on the status or rank of the state official who has effected the deprivation. Unauthorized and random conduct of upper level policymaking officials can be just as unpredictable and unforeseeable as unauthorized and random conduct of lower level employees. In *Hudson*, the Court stated: "Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the state is in a position to provide for predeprivation process."[134] Thus, for predeprivation process to be feasible, the State must be in a position to foresee the deprivation. If the policymaking official responsible for the substantive deprivation is not the official entrusted by state law with the duty of providing for predeprivation process, then a random and unauthorized deprivation effected by the policymaker is just as unpredictable as the random and unauthorized conduct of a nonpolicymaking state employee. In either case, it is equally impracticable for the state to provide predeprivation process. Therefore, the *Parratt/Hudson* doctrine should apply when adequate postdeprivation remedies exist to redress an erroneous substantive deprivation.[135]

134. 468 U.S. at 534.

135. *See also* Wolfenbarger v. Williams, 774 F.2d 358, 366 (10th Cir. 1985) (Seth, J., dissenting), *cert. denied*, 106 S. Ct. 1376 (1986) (conduct of district attorney should not be viewed as established state procedure nor as a statement of policy by the state itself).

C. Authorized, Foreseeable Conduct as Established State Procedure

Lavicky, *Wolfenbarger*, and *Patterson* can each be interpreted in two different ways. One interpretation is that these decisions merely hold that due to the policymaking authority of the state actors who effected the deprivations, the conduct was not random or unauthorized, the deprivations were foreseeable, and thus the constitutional violations became complete when the deprivations took place without the requisite due process of law. Consequently, the *Parratt/Hudson* doctrine is deemed inapplicable solely on the basis that the rationale underlying the doctrine does not apply to conduct which is not random or unauthorized. Under this view, a *Parratt/Hudson* dismisal would be inappropriate whenever a policymaking official with the requisite authority effected a deprivation, even if the conduct of the official were deemed *not* to reflect established state procedure. That is, a plaintiff could make out a procedural due process claim against the individual official even absent allegations supporting governmental liability.[136]

Conversely, these cases could be interpreted as extending the established state procedure exception of *Logan* to situations in which deprivations are effected by decisions of policymaking officials, even when those decisions are contrary to state law. From this perspective, the rank and responsibilities of the state actor who effects the deprivation become important to indicate not only whether the State is in a position to foresee the deprivation, thus precluding a *Parratt/Hudson* dismissal, but also whether the conduct in question constitutes official policy, thus creating the potential for imposing liability on the responsible government entity.

D. A Consistent Approach to Established State Procedure Under *Logan* and Official Policy under *Monell*

In *Monell v. Department of Social Services*,[137] the Supreme Court held that when the execution of a government's "policy or custom"

136. For example, in Whiteneck v. City of Springfield, 624 F. Supp. 372 (D. Mass. 1985), the court assumed that a violation of the plaintiff's right to procedural due process had occurred when the Police Commission, without the required hearing, revoked the plaintiff's license to deal in second-hand articles. *Id.* at 374. The court refused, however, to find that revocation was made pursuant to municipal policy or custom for purposes of imposing liability, because there was no evidence of a pattern or repeated practice of revoking licenses without a hearing. *Id.* at 375. Although there was no discussion of the *Parratt/Hudson* doctrine in *Whiteneck*, the result illustrates a distinction that might make sense. Denial of a required hearing by a police commission should not be viewed as random or unauthorized conduct calling for a *Parratt/Hudson* dismissal. Such conduct, however, depending upon the facts and circumstances in the particular case, may not reflect official policy for purposes of imposing liability on the municipality for damages.

137. 436 U.S. 658 (1978).

causes a deprivation of constitutionally protected rights, the government, as an entity, is responsible under section 1983.[138] Recently, in *Pembaur v. City of Cincinnati*,[139] the Court considered whether a decision by municipal policymakers on a single occasion could constitute "official municipal policy" within the meaning of *Monell*.[140] *Pembaur* involved a forced entry and search conducted pursuant to a directive issued over the phone by a county prosecutor, instructing deputy sheriffs "to go in and get [the witnesses]."[141] Writing for the plurality, Justice Brennan concluded that municipal liability under section 1983 attaches when "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."[142]

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138. *Id.* at 694.

139. 106 S. Ct. 1292 (1986).

140. *Id.* at 1294. In City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985), a plurality of the Court held that a single incident involving the use of excessive force by a local police officer could not support an inference of a municipal policy of insufficient police training. *Id.* at 2436-37. In Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985), *cert. granted*, 106 S. Ct. 1374 (1986), the Supreme Court will address the applicability of *Tuttle*'s single incident rule to cases of police misconduct involving more than one municipal employee and the appropriateness of the inadequate training theory for imposing liability on municipalities under section 1983.

141. 106 S. Ct. at 1301.

142. *Id.* at 1300. Attaching great significance to the Sixth Circuit's determination that under state law, both the county sheriff and the county prosecutor could establish county policy under appropriate circumstances, a majority of the Court held that in ordering the deputy sheriffs to enter the physician's clinic the county prosecutor "was acting as the final decision maker for the county" and consequently the county could be held liable under section 1983. *Id.* at 1301.

In a concurring opinion, Justice White stated that had the controlling law placed limits on the prosecutor's or sheriff's authority, their acts could not have been interpreted as establishing contrary policy. *Id.* at 1301-02 (White, J., concurring). Thus, Justice White indicated that he would have reached a different conclusion if, at the time of the officials' conduct, federal, state, or municipal law proscribed such actions. *Id.*

In a separate concurrence, Justice O'Connor agreed with Justice White, reasoning that because the course of conduct pursued by the county officials was "consistent with federal, state and local law at the time the case arose, it seems fair to infer that . . . [the] county's policy was no different." *Id.* at 1304 (O'Connor, J., concurring).

Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, dissented, criticizing the plurality for focusing exclusively on the status of the decision maker in determining when policy is created. *Id.* at 1308 (Powell, J., dissenting). Justice Powell found that the question of whether official policy has been formed should properly rest upon "the nature of the decision reached or the action taken . . . and the process by which the decision was reached or the action was taken." *Id.* at 1308-09. According to Justice Powell, the first factor under this inquiry "distinguishes between policies and mere *ad hoc* decisions" and "reflects the fact that most policies embody a rule of general applicability," while the second factor contemplates formal procedures which indicate that resulting decisions realistically represent official policy within the meaning of *Monell*. *Id.* at 1309. In this context, Justice Powell had no trouble concluding that the county prosector's "five word response to a single question over the phone" did not amount to official policy. *Id.* at 1309.

Pembaur raises the question of whether acts deemed to constitute established state procedure for the purpose of precluding a *Parratt/Hudson* dismissal, will be construed consistently with acts deemed to be official policy for the purpose of imposing government liability under *Monell*. If the *Logan* established state procedure exception is limited strictly to state procedures which have been formally implemented or official custom or policy which has been carried out repeatedly, then established state procedure in the *Parratt/Hudson* context is arguably distinguishable from official policy within the meaning of *Monell* and *Pembaur*.

If we accept the proposition that Justice Brennan's reasoning in *Pembaur* should apply in determining what constitutes established state procedure for *Parratt/Hudson* purposes, the potential distinction between the Second and Tenth Circuits' view of a state actor's policymaking authority becomes important. Since the Second Circuit in *Patterson* relied in part upon the fact that the prison officials possessed the final authority under state law to grant a constitutionally compelled predeprivation hearing when they consciously chose not to provide predeprivation process,[143] the decision can be perceived as consistent with *Pembaur*. In *Wolfenbarger*, however, the Tenth Circuit never expressly determined whether the district attorney, whose conduct effected the deprivation, possessed final authority with respect to the matter in question. To the extent that *Wolfenbarger* stands for the proposition that the conduct of *any* policymaker which effects a deprivation amounts to established state procedure, it cannot be reconciled with *Pembaur*, which held that unconstitutional conduct by a state actor possessing general policymaking authority, without more, will not operate to impose liability on a municipality.[144]

Even assuming the applicability of the established state procedure exception to deprivations caused by official policy, and the consistent interpretation of policymaking authority in the *Parratt* and *Monell* contexts, these two lines of cases are not perfectly analogous. Under *Monell*, a plaintiff must establish that a state actor's admittedly unconstitutional conduct was pursuant to official policy for the purpose of imposing liability on the governmental entity itself. In contrast, under *Parratt/Hudson*, a plaintiff basing a claim on denial of predeprivation process must establish that the deprivation was the result of official policy in order to make

143. *See* Patterson v. Coughlin, 761 F.2d at 892.
144. 106 S. Ct. at 1299.

out a constitutional violation in the first instance.[145]

This difference in the role of official policy, however, is not fatal to the argument that the logic of *Monell* and *Pembaur* should be applied in the *Parratt/Hudson* context. Arguably, official policy for purposes of imposing liability on a municipality should be interpreted much more narrowly than official policy for purposes of determining whether a constitutional deprivation even exists. Thus, in the *Parratt/Hudson* constitutional violation context, official policy should be interpreted at least as broadly as in the *Monell/Pembaur* municipal liability context.

E. Summary

In summary, cases should not be dismissed under *Parratt/Hudson* whenever it is possible and practicable for the state to provide predeprivation process. The Supreme Court stated clearly in *Logan* that *Parratt/Hudson* is inapplicable when a deprivation of property results from the operation of formally promulgated state law or procedure.[146] Lower federal courts are extending the established state procedure exception of *Logan* to cases in which the deprivation was effected by official policy or custom, even if the policy or custom was unauthorized or contrary to state law.[147] If the key inquiry in the *Parratt/Hudson* analysis is whether the deprivation was predictable, enabling the state to provide

145. Rittenhouse v. DeKalb County, 764 F.2d 1451, 1456 n.5 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1193 (1986). The court in Esquivel v. Village of McCullom Lake, 633 F. Supp. 1199 (N.D. Ill. 1986), seems to blur this important distinction in its discussion of the "dovetailing" of the *Parratt/Hudson* doctrine with the *Monell/Tuttle/Pembaur* line of cases. The court states:

> *Parratt* and *Hudson* point out that a governmental entity cannot violate due process by failing to give predeprivation process when the entity could not have foreseen the deprivation. *Tuttle* and *Pembaur* add that governmental entities act only through their policymaking officials and the custom and practice that those officials promote. Under either analysis, an entity is not liable when a nonpolicymaking employee takes a random action in contravention of the custom or policy of due process that the entity seeks to enforce.

Id. at 1207 n.3. What the court fails to acknowledge is that under *Parratt* and *Hudson*, not only is the governmental entity not liable in the described circumstances, but there is no constitutional violation at all.

146. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982).

147. *See supra* notes 94-98 and accompanying text; *see also* Zagrans, *supra* note 2, at 589. Professor Zagrans suggests an interpretation of section 1983 which would make deprivations of federal rights actionable *only* when the challenged conduct has been authorized by formally promulgated state law, custom, or policy. Random, isolated incidents, unauthorized by state law, would never suffice to invoke the established state procedure exception of *Logan* or to preclude dismissal based on the rank or responsibility of the offending official. As Professor Zagrans notes, his "reconstructed model" of section 1983 would make the *Parratt/Hudson* doctrine "functionally irrelevant" to section 1983 litigation. *Id.* at 589.

predeprivation process, then the extension of *Logan* to policy or custom cases is justified.

The most difficult situation occurs when state law, policy, or custom provides for predeprivation process that is constitutionally required under federal law as well, but the official responsible for providing that process intentionally fails to do so in effecting the substantive deprivation. If the views of the Fourth Circuit in *Yates*[148] and the Massachusetts Supreme Judicial Court in *Temple*[149] were to prevail, a plaintiff would never have a fourteenth amendment procedural due process claim based on a denial of predeprivation process, unless the conduct causing the substantive deprivation were authorized by formally enacted state law or established state procedure in the narrowest sense.[150] The posi-

148. Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986). *See supra* notes 99-105 and accompanying text.

149. Temple v. Marlborough Div. of the Dist. Ct. Dep't, 395 Mass. 117, 475 N.E.2d 137 (1985). *See supra* notes 106-112 and accompanying text.

150. This appears to be the position adopted by the court in Tavarez v. O'Malley, 635 F. Supp. 1274 (N.D. Ill. 1986). In *Tavarez*, the plaintiffs sued an inspector of the Cook County Department of Environmental Control, the Director of the Department, and the County, claiming a deprivation of property without due process when county officials, in response to a gas heater malfunction, sealed off the plaintiffs' grocery store and denied them access to the building for a period of four weeks. *Id.* at 1275. The conduct of the County officials clearly violated Cook County, Ill. Ordinance ch. 16, § 16-5.5-3(b), which provided an elaborate set of procedures to be followed and prerequisites to be satisfied before any building could be sealed. *Id.* at 1276 n.2.

In addressing the issue of the County's liability, the court acknowledged that the Director of the Department was arguably the official responsible for establishing final County policy as to certain matters of enviromental control. The court concluded, however, that the Director had no discretion to choose a policy in direct violation of the County ordinance. *Id.* at 1277 n.3. Thus, even under *Pembaur*, conduct by the official possessing final authority on a matter cannot be equated with "municipal policy" if that conduct violates formally promulgated law.

Addressing the question of individual liability on the part of the officials involved, the court concluded that since their conduct was intentional, random, and unauthorized, there was no violation of procedural due process if an adequate postdeprivation remedy existed under state law. *Id.* at 1278-79.

In a subsequent opinion, the court also granted summary judgment in favor of the Village of Schiller Park defendants. Tavarez v. O'Malley, 642 F. Supp. 291, 292 (N.D. Ill. 1986). Unlike the County, the Village apparently had no official policy or procedure to be followed in the sealing of a building. *Id.* at 293. The defendants argued that the absence of such policy precluded liability under section 1983, while the plaintiffs argued that the decision to seal, made by the Deputy Superintendent of the Schiller Park Police Department, constituted municipal policy within the meaning of *Pembaur*. *Id.* The court noted that counsel for both sides were confusing "the analytically distinct constitutional concepts" of "policy," going to the question of municipal liability for unconstitutional conduct of municipal employees, and "established state procedure," going to the question of whether there is a procedural due process claim in the first instance. *Id.*

Although the defendants were sued in their individual and official capacities, the court concluded that since the Village was not a named defendant, *Monell/Pembaur* municipal policy arguments were out of place. The issue to be addressed was "whether there was a suffi-

tion of the Second Circuit in *Patterson*[151] is more persuasive and reflects a logical convergence of the *Logan* established state procedure exception with the *Monell/Pembaur* official policy doctrine: when the substantive deprivation is effected by the same official responsible for providing predeprivation process under state law, the state should be precluded from arguing that it was impossible or impracticable to provide predeprivation process because the state could not foresee or predict the deprivation.[152]

IV. Analysis of Adequate Postdeprivation Remedy

If predeprivation process is not possible or practicable, the *Parratt/Hudson* doctrine dictates dismissal of a procedural due process claim unless the plaintiff asserts that state law provides no adequate postdeprivation remedy for the alleged substantive deprivation. The plaintiff will have the burden of establishing the inadequacy of the state postdeprivation remedy.[153]

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ciently 'established' state procedure such that a predeprivation hearing was constitutionally required." *Id.* Characterizing the acts of the Village officials as "random and *authorized*," the court concluded that such authorization was not tantamount to established state procedure under *Logan*. *Id.* at 294-95 (emphasis in original). Expressly limiting its holding to the facts of the particular case before it, the court concluded that predeprivation process was impracticable under the circumstances and that due process concerns were satisfied by the availability of state postdeprivation remedies. *Id.* at 295 & n.6. Finally, the court observed that where the official vested with decisionmaking authority is also in a position to give notice, as well as authorize the conduct resulting in the deprivation, and the circumstances in which the authorization is given are "less haphazard," due process concerns may be more compelling. *Id.* at 295 n.6.

151. Patterson v. Coughlin, 761 F.2d 886 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 879 (1986). *See supra* notes 128-133 and accompanying text.

152. *See, e.g.*, Freeman v. Blair, 793 F.2d 166 (8th Cir. 1986). In *Freeman*, the plaintiffs complained of a deprivation of property without due process when the license to operate their campground was summarily suspended after their refusal to submit to an administrative inspection without a warrant. *Id.* at 169. The court noted that the *Parratt/Hudson* doctrine did not apply where predeprivation process was practicable and, on the facts presented, determined that a predeprivation hearing was possible where the defendants were senior-level officials who were responsible for the decisions made. *Id.* at 177. In drawing an analogy to *Pembaur*, the court stated: "Surely decisions made by the highest officials in the executive branch of state government who have final authority over matters for which they are responsible do not constitute random and 'unauthorized' acts." *Id.* (citing Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1299 (1986)). *But see* National Communication Sys., Inc. v. Michigan Pub. Serv. Comm'n, 789 F.2d 370, 372-73 (6th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3161 (U.S. Sept. 16, 1986) (No. 86-138) where the court rejected the plaintiff's argument that the *Parratt* requirement of showing the inadequacy of state remedies applies only to deprivations caused by random and unauthorized acts of misconduct, as opposed to the alleged conspiratorial acts involved in the case at bar, where the alleged conspirators were the public officials whose duty it was to see that the plaintiffs were not denied due process.

153. *See* Vicory v. Walton, 721 F.2d 1062, 1063 (6th Cir. 1983), *cert. denied*, 105 S. Ct. 125 (1984) (the plaintiff has the burden of pleading and proving the inadequacy of state remedies to

The Supreme Court has clearly stated that a state remedy is not inadequate merely because the relief provided by the state postdeprivation scheme is not as comprehensive as the relief available under section 1983.[154] Since the plaintiffs in *Parratt* and *Hudson* could be fully compensated for their loss of property under state law remedies, the Court did not confront the issue of whether the state law remedy would be considered adequate if the plaintiff received less than full compensation. However, the Court has recently indicated that the timing of postdeprivation relief is a factor to be considered in assessing the adequacy of a remedy.[155] In *Cleveland Board of Education v. Loudermill*, the Court acknowledged that "[a]t some point, a delay in the post-termination hearing would become a constitutional violation."[156] Although the Court concluded in *Loudermill* that a nine month administrative adjudication period was not unconstitutional per se, it did recognize as appropriate a procedural due process claim based on administrative delay in postdeprivation proceedings.[157]

A. State Sovereign Immunity and its Effect on the Adequacy of the Remedy

The issue that has generated the most controversy and debate in postdeprivation remedy analysis is the effect, if any, state law immunity defenses have on the adequacy of state law remedies. In *Parratt*, Justice Powell suggested that an absolute immunity from suit under state law would render the postdeprivation remedial scheme inadequate.[158] This

redress a claimed wrong). *But see* Note, *Parratt v. Taylor Revisited: Defining the Adequate Remedy Requirement*, 65 B.U.L. REV. 607, 636 (1985) (better approach would require plaintiff to plead the inadequacy of the state remedy, but place the burden of proof on the defendant if the issue is contested) [hereinafter cited as Note, *Adequate Remedy*].

154. Parratt v. Taylor, 451 U.S. 527, 544 (1981); Hudson v. Palmer, 468 U.S. 517, 534 (1984). *See also* McClary v. O'Hare, 786 F.2d 83, 88 (2d Cir. 1986) (while worker's compensation may not be as fully compensatory as suit under section 1983, the United States Constitution does not require total compensation for all injuries); Wilson v. Beebe, 770 F.2d 578, 584 (6th Cir. 1985) (*en banc*) (state remedy not rendered inadequate by nonallowance of attorney's fees). *But see* Bumgarner v. Bloodworth, 738 F.2d 966, 968 (8th Cir. 1984) (relief not adequate under state law where Commission could make only monetary awards and the plaintiff was seeking return of specific property); La Salle Nat'l Bank v. County of Lake, 579 F. Supp. 8, 11-12 (N.D. Ill. 1984) (state remedy inadequate because it did not provide for damages); Roman v. City of Richmond, 570 F. Supp. 1554, 1556 (N.D. Cal. 1983) (state remedy inadequate when no injunctive relief or punitive damages available under wrongful death statute).

155. Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487 (1985).

156. *Id.* at 1496.

157. *Id.*

158. 451 U.S. at 551 n.9 (Powell, J., concurring). *Accord* Nahmod, *supra* note 2, at 230 ("[W]hen all of the potential defendants are absolutely immune under state law so that the merits of the plaintiff's state claim cannot be reached, then the state remedy should be considered inadequate.").

approach may also be inferred from *Hudson*, where the Court concluded that the state postdeprivation remedy was adequate only after rejecting the respondent's contention that his claim would be barred by sovereign immunity.[159]

In neither *Parratt* nor *Hudson*, however, was the Court confronted with a situation in which an immunity defense was clearly available under state law, thus forcing the Court to determine the impact of immunity on the adequacy of postdeprivation process. In *Parratt*, it was clear that the Nebraska tort claims procedure could have fully compensated Taylor for the loss of his hobby kit.[160] In *Hudson*, the Supreme Court accepted the Court of Appeals' determination that adequate remedies were available under state law to compensate the prisoner for his property loss.[161]

In *Davidson v. Cannon*,[162] when three members of the Court reached the issue of immunity, conflicting views were expressed regarding the impact of immunity on the adequacy of the postdeprivation remedy. Justice Blackmun, writing for himself and Justice Marshall, concluded that a state prison inmate had been deprived of a liberty interest without due process of law when prison officials failed to protect the inmate from an attack by another prisoner, and the state's immunity statute precluded any meaningful postdeprivation remedy.[163] The dissent's position was based on the premise that "[c]onduct that is wrongful under § 1983 . . . cannot be immunized by state law."[164] This premise is supported by *Martinez v. California*,[165] in which the Supreme Court held that a state immunity defense cannot be raised to defeat a claim based on the violation of a federal constitutional right.[166]

The problem with Justice Blackmun's view in *Davidson* is that it begs the question of whether a constitutional violation has occurred. When only a procedural due process claim is being asserted, whether conduct will be considered "wrongful" under section 1983 will depend

159. 468 U.S. at 535. *See also* Rittenhouse v. DeKalb County, 764 F.2d 1451, 1457 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1193 (1986) (such an inference strongly suported by *Hudson*); Ausley v. Mitchell, 748 F.2d 224, 227-28 (4th Cir. 1984) (Winter, C.J., concurring) (*Hudson* strongly suggests that application of *Parratt* would not result in dismissal if sovereign immunity defense is applicable).

160. 451 U.S. at 544.

161. 468 U.S. at 535.

162. 106 S. Ct. 668 (1986).

163. 106 S. Ct. at 675-76 (Blackmun, J., dissenting).

164. *Id.* at 676.

165. 444 U.S. 277 (1980).

166. *Id.* at 284 n.8. In *Martinez*, the Court held that a state does not deny procedural due process when a state law tort claim is defeated by a state law immunity defense. *Id.* at 282-83.

upon whether a deprivation has taken place without due process of law. The key issue is whether, in light of the immunity defense, the postdeprivation procedures provide the process that is due under the Fourteenth Amendment. As Justice Stevens noted, "*Davidson* puts the question whether a state policy of noncompensability for certain types of harm, in which state action may play a role, renders a state procedure constitutionally defective."[167] Justice Stevens concluded that defenses that might defeat recovery are not constitutionally defective unless their operation is fundamentally unfair. In this context, he noted that the doctrine of sovereign immunity does not render a state postdeprivation procedure fundamentally unfair or constitutionally inadequate.[168]

The Supreme Court's recent decisions eliminating due process claims based on negligent conduct indicate that state immunity defenses which shield state officials from liability for negligent performance of official duties would simply be irrelevant to pursuing a procedural due process claim under section 1983.[169] Indeed, the Court's elimination of negligence as a source for due process claims will substantially reduce, for all practical purposes, the number of situations in which a state law immunity defense will make compensation unavailable, since, in most states, the immunity defense can be invoked as a shield for negligent conduct, but not for conduct that was reckless or intentional.[170] Furthermore, where state law establishes an immunity defense that would be available to defendants as a matter of federal law as well, it would make no sense to suggest that the limitation created by state law made the state remedy inadequate.[171]

167. Daniels v. Williams, 106 S. Ct. 677, 680 (Stevens, J., concurring).

168. *Id.* at 680-81 (Stevens, J., concurring). *Accord* Rittenhouse v. DeKalb County, 764 F.2d 1451, 1458 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1193 (1986) (state immunity statute must be arbitrary and irrational to implicate procedural due process concerns); Temple v. Marlborough Div. of the Dist. Ct. Dep't, 395 Mass. 117, 128, 479 N.E.2d 137, 144 (1985) (inability to recover damages under state law does not render state remedy inadequate).

169. Daniels v. Williams, 106 S. Ct. 662 (1986); Davidson v. Cannon, 106 S. Ct. 668 (1986).

170. See, e.g., Tavarez v. O'Malley, 635 F. Supp. 1274, 1279-80 (N.D. Ill. 1986), where the court assumes that provisions of the state Tort Immunity Act would not protect officials whose conduct amounted to willful and wanton negligence or intentional or reckless disregard for the safety or property of others; *see also* Nahmod, *supra* note 2, at 232-33.

171. *See* Note, *Adequate Remedy*, *supra* note 153, at 638 (if available immunity is the same in state court as in federal court, the adequacy of the remedy is not affected); *see also* Temple v. Marlborough Div. of the Dist. Ct. Dep't, 395 Mass. 117, 129, 479 N.E.2d 137, 145 (1985) (state remedy not inadequate where immunity under state law is identical to federal immunity doctrine shielding judges from liability in section 1983 context).

B. Adequacy in Fact vs. Systemic Fairness

The problem may be reduced to the issue of whether the postdeprivation process is rendered constitutionally inadequate if the state law immunity defense is broader than the federal immunity defense. Courts must determine whether due process requires that every erroneous substantive deprivation of a constitutionally protected interest be actually redressed by compensation. Some courts have taken the position that an adequate remedy means no more than an adequate opportunity for a hearing.[172] Other judges and commentators have assumed that the availability of a sovereign immunity defense would make any postdeprivation hearing meaningless by precluding compensation.[173]

There are several problems with an approach that requires actual recovery or compensation for a remedy to be adequate. First, it is unlikely that the Supreme Court in *Parratt* or *Hudson* intended a wholesale abrogation of state immunity doctrines whenever they exceed the scope of immunities available under federal law in section 1983 litigation.[174] Second, requiring the federal court to assess the adequacy of a postdeprivation state law remedy on the basis of whether the plaintiff actually may receive compensation for an erroneous deprivation will lead to protracted federal hearings whenever state law is unclear or a factual dispute makes the applicability of a state immunity defense questionable.[175] Third, to insist that the federal court retain the case unless the

172. *See, e.g.*, Davidson v. O'Lone, 752 F.2d 817, 832 (3d Cir. 1984) (*en banc*) (Garth, J., concurring), *aff'd on other grounds sub nom.* Davidson v. Cannon, 106 S. Ct. 668 (1986) ("state may afford appropriate due process without that process necessarily resulting in a recovery for the claimant"); Daniels v. Williams, 720 F.2d 792, 797-98 (4th Cir. 1983), *aff'd en banc*, 748 F.2d 229 (1984), *aff'd on other grounds*, 106 S. Ct. 662 (1986) (due process is satisfied by an opportunity for a hearing before a tribunal authorized to grant a remedy); Groves v. Cox, 559 F. Supp. 772, 775-76 (E.D. Va. 1983); Temple v. Marlborough Div. of the Dist. Ct. Dep't, 395 Mass. 117, 128-29, 479 N.E.2d 137, 145 (1985).

173. *See, e.g.*, Daniels v. Williams, 748 F.2d 229, 233 (1984) (*en banc*) (Phillips, J., concurring and dissenting), *aff'd on other grounds*, 106 S. Ct. 662 (1986) (due process is denied if sovereign immunity is raised as a bar to state postdeprivation remedy); Nahmod, *supra* note 2, at 230; Note, *Adequate Remedy*, *supra* note 153, at 640-41 (due process requires a hearing and a remedy).

174. Rittenhouse v. DeKalb County, 764 F.2d 1451, 1458 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1193 (1986). As Professor Nahmod has noted, in discussing problems raised by the adequate postdeprivation remedy inquiry, "State immunity doctrines may be in for constitutional scrutiny, a scrutiny rather ironic in light of *Parratt's* avowed goal of reducing federal judicial intervention in local matters." Nahmod, *supra* note 2, at 230.

175. *See, e.g.*, Gilmere v. City of Atlanta, 774 F.2d 1495, 1514 (11th Cir. 1985) (*en banc*) (Hill, J., dissenting), *cert. denied*, 106 S. Ct. 1970 (1986) ("not prepared to say that district judges are required to hold hearings and make findings as to the adequacy in fact of recourse to state courts in all of the counties and judicial districts embraced in their federal court districts"); *see also* Nahmod, *supra* note 2, at 228 n.52 ("Federal courts may end up having to struggle long and hard to develop standards for adequacy. This would be especially ironic,

defendant stipulates to facts that would make the state immunity defense inapplicable, allowing state compensation as a remedy, would put unfair pressure on a defendant to admit intent or gross negligence when there may have been none. It is unlikely that a defendant would be willing to admit to liability in order to have the case heard in state court rather than federal court. Furthermore, most defendants would not be willing to waive a state law immunity defense. To require such waiver as a condition for an adequate postdeprivation remedy and dismissal under the *Parratt/Hudson* doctrine would be the equivalent of federal judicial abrogation of state law immunity defenses.

Those advocating this adequacy-in-fact test, which would require a federal court to make a determination that the plaintiff could actually recover for his injuries under state law before dismissing on *Parratt/Hudson* grounds, acknowledge that "[t]he practical result of applying the strict adequacy test in such cases is that section 1983 claims will generally remain in federal court unless the defendant abandons or waives the state immunity defense."[176] This result would not be consistent with a view of the *Parratt/Hudson* doctrine as a device for curtailing the availability of the section 1983 remedy.[177]

A plaintiff concerned about the adequacy in fact of a state law remedy might persuade the federal court to make its *Parratt/Hudson* dismissal conditional, reserving the plaintiff's right to pursue a section 1983 remedy in federal court if the state immunity defense is held to bar relief in state court. This approach has received considerable support from both courts and commentators.[178] Although the conditional dismissal approach avoids the problem of having the federal courts become enmeshed in deciding the applicability *vel non* of state immunity defenses, a federal court should permit resurrection of the section 1983 claim only if allowing an immunity defense in a particular case would be irrational,

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since it would mean that the federal § 1983 due process caseload would not decrease, but would instead focus on a different level of the due process analysis.").

176. Note, *Adequate Remedy*, *supra* note 153, at 640.

177. *See, e.g.*, Blackmun, *supra* note 2, at 23-25 (discussing *Parratt* and *Hudson* as cases reflecting the recent trend of the Supreme Court to "cut back on section 1983 in any way it can"); Nahmod, *supra* note 2, at 219 ("The scope of section 1983 may be directly diminished by curtailing the scope of both the procedural and substantive components of due process.").

178. *See, e.g.*, Ausley v. Mitchell, 748 F.2d 224, 229-30 (4th Cir. 1984) (Winter, C.J., concurring), *aff'd*, 106 S. Ct. 879 (1986) (would require district court to grant leave to plaintiffs to reinstate their claims if the sovereign immunity defense was upheld in state court) (citing Blum, *The Implications of Parratt v. Taylor for Section 1983 Litigation*, 16 URB. LAW. 363, 380-81 (1984)); Thompson v. Steele, 709 F.2d 381, 383 n.3 (5th Cir. 1983), *cert. denied*, 464 U.S. 897 (1983); Note, *Adequate Remedy*, *supra* note 153, at 637 (conditional dismissal recommended as "a tool for federal courts to resolve the adequacy of remedy issue when state law is uncertain").

arbitrary, or discriminatory. Federal district courts should not become forums for disgruntled plaintiffs who wish to invalidate, on federal due process grounds, the kind or amount of recovery awarded under state law or, indeed, the lack of *any* recovery under a fair and rational system.

A plaintiff whose section 1983 claim is dismissed from federal court on *Parratt/Hudson* grounds without a conditional dismissal should be careful to plead the section 1983 claim along with the state law claim in state court. If the state court decides that an immunity defense is applicable, rendering the state remedy inadequate, the court might reinstate the plaintiff's section 1983 claim.[179]

V. Pleading the *Parratt/Hudson* Doctrine

A. The Plaintiff's Perspective

From the plaintiff's perspective, there are several ways to avoid dismissal of a section 1983 fourteenth amendment due process claim on *Parratt/Hudson* grounds.

(1) There is a clear consensus among the lower federal courts that the *Parratt/Hudson* doctrine will not apply if a claim asserts the violation of a right protected by the Bill of Rights, independent of the Fourteenth Amendment.[180]

(2) Where a complaint asserts a substantive due process violation, a *Parratt/Hudson* dismissal is inappropriate.[181] It is recommended that plaintiffs with claims based on excessive use of force in police-citizen encounters frame those claims as both fourth amendment and substantive due process violations.[182] For zoning and land use claims, the majority of federal courts appear willing to entertain complaints under the rubric of substantive due process.[183] The First Circuit, however, has consistently refused to characterize zoning, licensing, or permit claims as fourteenth amendment due process claims.[184]

(3) Although the majority of federal courts are applying the *Par-*

179. *See, e.g.*, Carter v. City of Boston, No. 58892, slip op. (Super. Ct. Apr. 11, 1983) (refusing to dismiss the plaintiff's section 1983 claim after reaching conclusion that the city's exemption from liability under the Massachusetts Tort Claims Act made the postdeprivation remedy inadequate); Carter v. City of Boston, No. 81-1859-C, slip op. (D. Mass. Feb. 17, 1982) (dismissing the plaintiff's section 1983 claim where the applicability of a defense under the Massachusetts Tort Claims Act was unclear); *see also* Blum, *The Implications of Parratt v. Taylor for Section 1983 Litigation*, 16 URB. LAW. 363, 379-81 (1984) (discussing *Carter*).

180. *See supra* notes 39-47 and accompanying text.

181. *See supra* notes 48-51 and accompanying text.

182. *See supra* notes 53-65 and accompanying text.

183. *See supra* note 67 and accompanying text.

184. *See supra* notes 68-70 and accompanying text.

ratt/Hudson doctrine to claimed deprivations of life and liberty[185] as well as property, plaintiffs should continue to argue that a distinction exists until the Supreme Court makes a more definitive statement on the issue.

(4) If a plaintiff has only a procedural due process claim, a *Parratt/Hudson* dismissal can be avoided by alleging that the deprivation was pursuant to established state procedure and predeprivation process was both possible and practicable. There are cases which support an argument that a deprivation is pursuant to established state procedure when the conduct effecting the deprivation is unauthorized by, or contrary to, state law.[186] Conduct pursuant to official policy or custom should be sufficient to invoke the established state procedure exception to the *Parratt/Hudson* doctrine.[187] Furthermore, a plaintiff who is denied predeprivation process by an official or group with the authority to provide a predeprivation hearing admittedly due under both state and federal law, should rely on the Second Circuit's opinion in *Patterson*[188] in arguing against *Parratt/Hudson* dismissal. Finally, there is some support for the argument that when a deprivation is caused by a policymaking official, that deprivation, even if not pursuant to established state procedure, should not be classified as random and unauthorized conduct for purposes of applying *Parratt/Hudson*.[189]

(5) If a plaintiff does not successfully convince the court that the alleged deprivation was pursuant to established state procedure and, therefore, predeprivation process could have and should have been provided, a *Parratt/Hudson* dismissal of the section 1983 procedural due process claim can still be avoided by attacking the adequacy of the state postdeprivation remedy. There is support in *Parratt* and *Hudson* for the argument that the availability of state sovereign immunity defenses would make the state remedy inadequate.[190] In addition, some lower federal courts, as well as commentators, have urged that an adequacy-in-fact analysis be applied.[191] If the applicability of a state immunity defense is unclear, plaintiffs should ask the court to make any *Parratt/Hudson* dismissal of the section 1983 claim conditional, preserving the right to reinstate the federal claim in federal court should the state court deny a remedy in fact.[192]

185. *See supra* note 35 and accompanying text.
186. *See supra* notes 94-98 and accompanying text.
187. *See supra* note 94 and accompanying text.
188. *See supra* notes 128-133 and accompanying text.
189. *See supra* notes 119-124 and accompanying text.
190. *See supra* notes 163-173 and accompanying text.
191. *See supra* note 178 and accompanying text.
192. *See supra* note 179 and accompanying text.

B. The Defendant's Perspective

Defendants will want to persuade the court to dismiss a section 1983 due process claim on *Parratt/Hudson* grounds. The strength of a defendant's position and the likelihood of getting a *Parratt/Hudson* dismissal, will rest on how successfully the following factors can be argued:

(1) The plaintiff's claim does not assert the violation of a right protected by the Bill of Rights.[193]

(2) The plaintiff's complaint does not allege conduct that "shocks the conscience," thereby raising substantive due process concerns.[194] Defendants should focus on the nature of the challenged conduct as well as on the severity of the deprivation to the plaintiff. Even a deprivation of life may not rise to the level of a substantive due process claim if the challenged conduct resulting in the deprivation was merely negligent.[195] In land use, licensing, or permit cases, defendants should advocate the First Circuit's view that decisions by local government units should not implicate federal due process concerns absent some "fundamental procedural irregularity, racial animus, or the like."[196]

(3) Defendants will find considerable support for the view that the *Parratt/Hudson* doctrine is applicable to deprivations of life and liberty, as well as property.[197]

(4) Once the defendant has reduced the claim to a procedural due process claim, the position must be taken that predeprivation process was neither possible nor practicable given the circumstances of the alleged deprivation. To prevail on this point, the defendant must assert that the alleged deprivation resulted from random and unauthorized conduct of state officials rather than from established state procedure.[198] Furthermore, defendants should argue that random and unauthorized conduct by high level policymaking officials is no more predictable by the state than random and unauthorized conduct by lower level employees.[199] In either situation, the state has not deprived the plaintiff of procedural due process where the state was unable to provide predeprivation process, but has available adequate postdeprivation remedies.

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193. *See supra* notes 39-47 and accompanying text.

194. Rochin v. California, 342 U.S. 165, 172 (1952). *See supra* notes 48-55 and accompanying text.

195. Daniels v. Williams, 106 S. Ct. 662, 665 (1986); Davidson v. Cannon, 106 S. Ct. 668, 671 (1986).

196. Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1981), *cert. denied*, 459 U.S. 989 (1982). *See supra* notes 68-70 and accompanying text.

197. *See supra* notes 35-37 and accompanying text.

198. *See supra* notes 99-118 and accompanying text.

199. *See supra* note 134.

(5) If it is clear that predeprivation process was impossible or impracticable, then the only basis for retaining the section 1983 procedural due process claim is that the state postdeprivation remedy is constitutionally inadequate. The *Parratt* Court asserts that the state remedy is not inadequate merely because it fails to provide the same level of relief that the section 1983 remedy might afford under similar circumstances.[200] While the effect of state law immunity defenses on the adequate postdeprivation remedy analysis is unsettled, there is support for an argument that state law immunity limitations on a remedy should not render the remedy inadequate unless the operation of the immunity defense is totally arbitrary, irrational, and fundamentally unfair.[201] Defendants should argue that an adequate postdeprivation remedy does not require adequacy in fact, but merely requires a postdeprivation process which is rational and fundamentally fair.

Conclusion

The *Parratt/Hudson* doctrine is still in its formative stages. To a limited extent, the doctrine has taken on certain predictable contours. The majority of lower federal courts appear to agree that the doctrine is irrelevant where rights protected by the Bill of Rights[202] or substantive due process[203] are involved. There is also a general consensus that the doctrine is inapplicable where claims assert constitutional deprivations effected by conduct pursuant to state law, custom, or policy.[204] Finally, a number of lower courts, both state and federal, are applying the *Parratt/Hudson* doctrine to procedural due process claims involving deprivations of life and liberty, as well as property.[205] Beyond these important, but basically skeletal, components of the doctrine, the full shape and impact of the new due process methodology remain to be seen.

Two major aspects of the doctrine will require clarification by the United States Supreme Court. First, the Court will have to determine the range of the established state procedure exception of *Logan*. This Article has suggested an interpretation of the *Logan* exception which would include not only conduct pursuant to state law, custom, or policy,

200. *See supra* note 154 and accompanying text.

201. *See supra* note 168 and accompanying text.

202. *See supra* notes 39-47 and accompanying text.

203. *See supra* notes 48-73 and accompanying text.

204. *See supra* notes 74-98 and accompanying text.

205. *See, e.g.*, Wilson v. Beebe, 770 F.2d 578, 584 (6th Cir. 1985) (*en banc*); Thibodeaux v. Bordelon, 740 F.2d 329, 336-37 (5th Cir. 1984); King v. Pace, 575 F. Supp. 1385, 1388 n.1 (D. Mass. 1983); Temple v. Marlborough Div. of the Dist. Court Dep't, 395 Mass. 117, 124-25, 479 N.E.2d 137, 142-43 (1985).

but also conduct contrary to or in violation of state law, where that conduct, even if limited to a single incident, amounts to a denial of predeprivation process by the official entrusted under state law with the responsibility for providing such process.[206] The extension of the established state procedure exception to this context preserves one of the basic tenets of *Monroe*, that conduct contrary to state law can be conduct under "color of state law,"[207] yet avoids making section 1983 a "font of tort law,"[208] since the contexts in which the "State" will be found to have denied a plaintiff due process will still be quite limited. This approach also provides some consistency between the concept of what constitutes established state procedure for the purpose of invoking the *Logan* exception to the *Parratt/Hudson* doctrine and what amounts to official policy for the purpose of imposing municipal liability under the *Monell/Tuttle/Pembaur* line of cases.[209]

The second area that calls for further delineation by the Court is the postdeprivation remedy analysis that is to be done in applying the *Parratt/Hudson* doctrine. This aspect of the doctrine has the potential for becoming a Pandora's box if the focus is on adequacy in fact. Federal courts will become more, rather than less involved in matters of state tort law if they are repeatedly called upon to assess the adequacy of state tort remedies.[210] This Article has taken the position that concern in a procedural due process inquiry should be for systemic fairness, rather than for strict adequacy of a state remedy.[211] Thus, state law immunity defenses, if rational and not invoked in an arbitrary or discriminatory fashion, should not affect the adequacy of a state law remedial scheme.

Judge Sneed no doubt expressed the wishful thinking of many practitioners, judges, and law professors when he asserted that "[s]ooner or later the Supreme Court will introduce more reason into this area than presently exists."[212] Although the ultimate configuration of the *Parratt/Hudson* doctrine must await further Supreme Court decisions, this Article has set forth certain principles which the author believes should inform the content and operation of the final product.

206. *See supra* notes 136-152 and accompanying text.

207. Monroe v. Pape, 365 U.S. 167, 184 (1961). *See supra* notes 4-9 and accompanying text.

208. Paul v. Davis, 424 U.S. 693, 701 (1976).

209. *See supra* notes 137-152 and accompanying text.

210. *See supra* notes 175-176 and accompanying text.

211. *See supra* notes 172-179 and accompanying text.

212. Gaut v. Sunn, 792 F.2d 874, 876 (9th Cir. 1986) (Sneed, J., concurring and dissenting).