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Michael A. Pavlick

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CASE COMMENTS

ZINERMON V. BURCH: THE COURT SHOOTS DOWN A *PARRATT*

"I don't know whether I'm coming or going, Can't cover up because it's obviously showing. It's a state, state of confusion . . . . We're in a state, state of confusion."

The Kinks[1]

UNDER 42 U.S.C § 1983,[2] a plaintiff can sue state government officials in federal court upon showing that the officials committed a violation of federal law while acting under color of state law.[3] However, in a series of cases beginning in 1981, the Supreme Court of the United States sharply circumscribed the ability of plaintiffs to use section 1983 when alleging a fourteenth amendment procedural due process violation.[4] The Court's recent decision in *Zinermon v. Burch*,[5] though, seemingly demonstrates a new-found willingness to give procedural due process plaintiffs a section 1983 remedy.

A "hurt and disoriented" Darrell Burch was discovered roaming a Florida highway and taken to a private mental health

1. The Kinks, *State of Confusion*, STATE OF CONFUSION, 1983 Arista Records, Inc.

2. 42 U.S.C. § 1983 (1982). Section 1983 reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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 . . . ."

3. *See* Monroe v. Pape, 365 U.S. 167 (1961) (discussed *infra* notes 24-26 and accompanying text).

4. Parratt v. Taylor, 451 U.S. 527 (1981); Hudson v. Palmer, 468 U.S. 517 (1984); Daniels v. Williams, 474 U.S. 327 (1986). For a more detailed discussion of these cases, see notes 27-39 and accompanying text.

5. 110 S. Ct. 975 (1990).

care facility in Tallahassee on December 7, 1981.[6] After signing consent forms, Burch was treated with psychotropic medication and subsequently diagnosed as a paranoid schizophrenic. Several days later, Burch was referred for further care to Florida State Hospital (FSH) in Chattohoochee, a state-run facility for the mentally ill. On December 10, Burch signed various forms, including one entitled "Request for Voluntary Admission,"[7] whereupon he was admitted for treatment at FSH as a voluntary patient.[8] Under Florida law, a voluntary patient is any adult "making application [for admission to the mental hospital] by express and informed consent," provided he is "found to show evidence of mental illness and to be suitable for treatment."[9]

Doctor Marlus Zinermon, a staff physician at FSH, examined Burch the day he was admitted, noting that the patient was " 'refusing to cooperate,' would not answer questions, 'appears distressed and confused,' and 'related that medication had been helpful.' "[10] The next day, a "nursing assessment form" stated that "Burch was confused and unable to state the reason for his hospitalization and still believed that '[t]his is heaven.' "[11] On December 29, a report prepared by Dr. Zinermon stated that "on

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6. *Id.* at 979. The mental health care facility was Apalachee Community Mental Health Services (ACMHS). Although a named defendant in Burch's suit, ACMHS did not petiition for certiorari. *Id.* at 979, n.4.

7. *Id.* at 979-80.

8. Fla. Stat. Ann. § 394.465(1)(a) (West 1986). The statutory definition of "express and informed consent" is "consent voluntarily given in writing after sufficient explanation and disclosure . . . to enable the person . . . to make a knowing and willful decision without any element of force, fraud, deceit, duress, or other form of constraint or coercion." Fla. Stat. Ann. § 394.455(22) (West 1986).

Under Florida law, a person can be admitted to a state mental facility in four different ways. As discussed above, one can be a "voluntary patient." Second, a person can be admitted "for short term emergency administration." *Zinermon*, 110 S. Ct. at 981. This involves a maximum stay of 48 hours, provided the person is mentally ill, in need of care, and lacks the capacity to be admitted as voluntary patient. *Id.* Third, a person may be detained for up to five days pursuant to a court order. *Id.* Finally, a person may be held as an involuntary patient, provided that person is likely to injure himself, and is in need of care "and . . . the facility administrator and two mental health professionals recommend involuntary placement. *Id.* "Before involuntary placement, the patient has the right to notice, a judicial hearing, appointed counsel, access to medical records and personnel, and an independent expert examination." *Id.* The person can be held for a maximum of six months, unless a court order extends the detention. *Id.*

This is a description of the 1981 statutory scheme, under which Burch was admitted for treatment. Since 1981, Florida has amended these statutes. *See id.* at 981, n.10.

9. *Zinermon*, 110 S. Ct. at 980.

10. *Id.*

11. *Id.*

admission, Burch had been 'disoriented, semi-mute, confused and bizarre in appearance and thought . . . not cooperative to the initial interview,' and 'extremely psychotic, appeared to be paranoid and hallucinating.' "[12]

Approximately five months after admission to FHS, Burch was released. No hearing on his hospitalization and treatment was held during that period.[13] Upon release, "Burch complained that he had been admitted inappropriately to FHS and did not remember signing a voluntary admission form."[14] A state agency[15] investigated the complaint, finding that although Burch had indeed signed a voluntary admission form, "there was 'documentation that you were heavily medicated and disoriented on admission and . . . you were probably not competent to be signing legal documents."[16] Moreover, "the hospital administration was made aware that they were very likely asking medicated clients to make decisions at a time when they were not mentally competent."[17]

In February, 1985, Burch brought suit under section 1983 against eleven individuals who worked at FHS, alleging that they "deprived him of his liberty without due process of law, by admitting him to FSH as a 'voluntary' mental patient when he was incompetent to give informed consent to his admission."[18] Specifically, Burch argued that since he was wrongly admitted as a voluntary patient, he did not receive the procedural safeguards afforded by Florida law to those patients classified as "involuntary."[19]

The United States District Court for the Northern District of Florida dismissed the case under Rule 12(b)(6) of the Federal Rules of Civil Procedure for a failure to state a claim.[20] A panel of the United States Court of Appeals for the Eleventh Circuit

12. *Id.*

13. *Id.*

14. *Id.*

15. The Florida Human Rights Advocacy Committee investigated the complaint. The Committee is part of Florida's Department of Health and Rehabilitation Services. *Id.*

16. *Id.* These findings were summarized in a letter sent to Burch dated April 4, 1984.

17. *Id.*

18. *Id.* at 977.

19. *Id.* at 977. For a description of the procedural safeguards provided by the "involuntary" admission process, see *supra* note 8.

20. Burch v. Apalachee Community Mental Health Services, Inc., 804 F.2d 1549 (11th Cir. 1986).

affirmed,[21] but upon a rehearing in banc, the Court of Appeals reversed the district court's decision.[22]

After granting *certiorari*, the Supreme Court affirmed the in banc Court of Appeals, holding that Burch had stated a procedural due process claim under section 1983.[23] Not only was the Court's decision surprising, given its previous reluctance to allow such claims, but it seemed to signal a retreat from what had been a firm rule for dealing with cases of this type. This Comment will focus on the *Zinermon* decision, its departure from earlier precedent, and the confusion the decision is bound to generate.

I. BACKGROUND

In *Monroe v. Pape*,[24] the Supreme Court held that government officials could be sued in federal court under section 1983, irrespective of whether a state remedy already existed.[25] To be successful, a section 1983 plaintiff must prove that the officials committed a violation of federal law while acting under color of state law.[26] Beginning in 1981, however, a trilogy of Court decisions added a new twist to certain section 1983 claims: the availability of state remedies.

The first case in the trilogy was *Parratt v. Taylor*.[27] Respondent was an inmate in a Nebraska prison who ordered hobby materials through the mail.[28] Although he paid for the materials, and although they were delivered to the prison, the respondent never received them.[29] A suit was brought under section 1983 to recover the value of the materials.[30] Respondent alleged that the prison warden and hobby manager "deprived him of property

21. *Zinermon*, 110 S.Ct. at 978.

22. Burch v. Apalachee Community Mental Health Services, Inc., 840 F.2d 797 (11th Cir. 1988).

23. *Zinermon*, 110 S. Ct. 990.

24. 365 U.S. 167 (1961).

25. *Id.* at 183 ("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.").

26. *Id.* at 171-87 (The Court, in a lengthy discussion, determined that the scope of section 1983 extended to state officials acting under the authority of state law.) Subsequent cases extended Monroe to suits against the government itself, Monell v. Department of Social Services, 436 U.S. 658 (1978), and allowed suits not only for federal constitutional violations, but for violations of federal statutory law as well. Maine v. Thiboutout, 448 U.S. 1 (1980).

27. 451 U.S. 527 (1981).

28. The value of the materials was $23.50. *Id.* at 529.

29. *Id.*

30. *Id.* at 530.

without due process of law in violation of the Fourteenth Amendment."[31] The Court rejected the fourteenth amendment procedural due process claim, holding that no section 1983 remedy existed when a state employee, acting randomly and without authorization, negligently deprived an individual of property, provided that the state makes available a meaningful post-deprivation remedy.[32]

Three years later, the Court expanded upon the *Parratt* holding in *Hudson v. Palmer*.[33] During a "shakedown" search, Virginia state prison officers allegedly destroyed the personal property of Palmer, a prison inmate.[34] Palmer sued the prison officials, alleging that he was intentionally deprived of property without due process. The Court ruled against Palmer holding that unauthorized and random intentional deprivations of property by a state employee do not give rise to a section 1983 procedural due process claim unless the state post-deprivation remedy is inadequate or non-existent.[35]

Finally, in 1986, *Daniels v. Williams*[36] was decided. In *Daniels*, a Virginia state prisoner slipped on a pillow negligently left in a stairway.[37] As with the earlier cases, the plaintiff sued his jailers under a section 1983 procedural due process theory, alleging that the state employees' negligence deprived him of liberty without due process, in violation of the fourteenth amendment.[38] Once again, the Court refused to entertain the claim. More importantly, the Court overruled *Parratt*, in part, by stating that the due process clause is never implicated by a negligent act of an official that causes an unintended loss of life, liberty, or property.[39] Thus, the question of whether or not adequate post-deprivation remedies existed was irrelevant; due process can never be violated where the state official acts negligently.

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31. *Id.*

32. *Id.* at 543-44. The rationale for the decision was that the state cannot predict when loss of property will occur where the loss is occasioned by a random, unauthorized act. Thus, a predeprivation hearing would be difficult, if not impossible to provide. Hence, a post-deprivation remedy was sufficient to satisfy the due process requirements of the fourteenth amendment. *Id.* at 541.

33. 468 U.S. 517 (1984).

34. *Id.* at 519-20.

35. *Id.* at 533.

36. 474 U.S. 327 (1986).

37. *Id.* at 328.

38. *Id.*

39. *Id.* at 330-31.

Taken together, *Parratt*, *Hudson*, and *Daniels* seemed to stand for two simple propositions. First, random, unauthorized, intentional deprivations of property did not constitute grounds for a section 1983 procedural due process claim, so long as adequate state post-deprivation remedies were available. Second, random, unauthorized, negligent deprivations of life, liberty, or property would never give rise to a section 1983 procedural due process claim. While the second of these propositions remains unchanged by the decision in *Zinermon v. Burch*, the validity of the first proposition is now in question.

II. *ZINERMON V. BURCH*

A. The Majority Opinion

At issue before the Supreme Court was whether the procedural due process violations alleged by Burch were sufficient to state a claim under section 1983. Writing for a majority of five, Justice Blackmun held that Burch's complaint did indeed make out a section 1983 claim.[40]

The Court began its analysis by characterizing Burch's allegations as falling within the confines of procedural due process — a deprivation of life, liberty, or property without due process of law.[41] As such, "the existence of state remedies *is* relevant in a special sense,"[42] because the constitutional violation does not become actionable "unless and until the State fails to provide due process."[43]

To comply with the requirements of procedural due process, the state must usually provide a pre-deprivation hearing.[44] However, in certain cases, "postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the

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40. Zinermon v. Burch, 110 S. Ct. 975, 990 (1990). Since this was a Rule 12(b)(6) dismissal, the Court did not pass on the merits of Burch's claim. *Id.* at 979. Joining Justice Blackmun's opinion were Justices Brennan, White, Marshall, and Stevens. *Id.* at 977.

41. *Id.* at 983-84. The Court stated that there are "three kinds of section 1983 claims that may be brought against the State under the Due Process Clause of the Fourteenth Amendment." *Id.* at 983. The first category includes violations of those rights enumerated in the Bill of Rights which were incorporated into the due process clause of the fourteenth amendment. Substantive due process violations make up the second category, while the third category consists of procedural due process violations. *Id.*

42. *Id.* at 983.

43. *Id.*

44. *Id.* at 984 (citing seven cases supporting this proposition).

State could be expected to provide."[45] In these situations, the *Parratt/Hudson* rule is utilized for section 1983 claims.[46]

According to the Court, however, application of the *Parratt/ Hudson* rule is not automatic. The rule will not control if "predeprivation procedural safeguards could address the risk of deprivations of the kind" the plaintiff alleges.[47] To determine whether the rule applies, a two step analysis is required.

First, the Court must identify the risk involved. In the present case, there was a danger of a person "being confined indefinitely without benefit of the procedural safeguards of the involuntary placement process."[48] In other words, the risk was that a person would be admitted to a mental hospital as a voluntary patient despite being unable to give the requisite consent by reason of his incompetence.

Second, the effectiveness of predeprivation safeguards in relationship to the identified risk must be evaluated. For three reasons, the Court held that predeprivation remedies "would be of use in preventing the kind of deprivation alleged."[49] To begin with, the deprivation of Burch's liberty was predictable because it occurred "at a specific . . . point in the admission process — when a patient is given admission forms to sign."[50] This made the case different from *Parratt*, because "[w]hile [the state] could anticipate that prison employees would occasionally lose property through negligence, it certainly '[could not] predict precisely when the loss will occur.' "[51]

45. *Id.* at 985.

46. The primary rationale behind the *Parratt/Hudson* rule was that the random, unauthorized nature of the alleged constitutional violation was so unpredictable as to make pre-deprivation safeguards impossible to provide. *Id.* at 985.

A threshold issue in the *Zinermon* case was whether *Parratt* and *Hudson* applied to the deprivation of liberty. *Parratt* and *Hudson* involved deprivations of property, and several Courts of Appeals had limited application of the *Parratt/Hudson* rule to property cases. *See id.* at 978, n.2; *id.* at 986 n.16. However, the Court refused to make "a categorical distinction between a deprivation of liberty and one of property," *id.* at 986, holding that "the fact that a deprivation of liberty is involved in this case does not automatically preclude application of the *Parratt* rule." *Id.* at 987.

47. *Id.* at 987.

48. *Id.*

49. *Id.* at 990.

50. *Id.* at 989.

51. *Id.* (quoting Parratt v. Taylor, 451 U.S. 527, 541 (1981)). Similarly, "in *Hudson*, the State might be able to predict that guards occasionally will harass or persecute prisoners they dislike, but cannot 'know when such deprivations will occur.' " *Id.* (quoting Hudson v. Palmer, 468 U.S. 517, 533 (1984)).

Another reason for the Court's decision was that the State could have provided adequate predeprivation process.[52] In fact, there was an involuntary admissions procedure already in place.[53] The real problem was that the state employees failed to follow procedure.[54] It was therefore incumbent upon the state to limit and guide "petitioners' power to admit patients."[55] The Court suggested that such limitations on admitting patients could easily have been formulated prior to the deprivation of Burch's liberty.[56] On the other hand, predeprivation process was impossible in *Hudson* and *Parratt*.[57]

A final reason was that Florida delegated to its employees "the power and authority to effect the very deprivation complained of here . . . and . . . the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement."[58] Thus, the majority seemed to characterize the petitioners' actions as "authorized." In contrast, the behavior of the employees in *Parratt* and *Hudson* was "unauthorized" since they "had no similar broad authority to deprive prisoners of their personal property, and no similar duty to intitiate . . . the procedural safeguards required before deprivations occur."[59]

To summarize, the Court held that the *Parratt/Hudson* rule was inapplicable, given the risks involved in *Zinermon*, because the deprivation was predictable and authorized, and because predeprivation process was possible. Hence, Burch's complaint stated a section 1983 procedural due process claim, despite the availability of post-deprivation remedies.

B. The Dissent

Justice O'Connor, in a dissenting opinion joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, argued that the

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52. *Id.*

53. *See supra* note 8; *Zinermon*, 110 S. Ct. at 989.

54. *Zinermon*, 110 S. Ct. at 989.

55. *Id.* at 989. The Court remarked that "it would indeed be strange to allow state officials to escape § 1983 liability for failing to provide constitutionally required procedural protections, by assuming that those procedures would be futile because the same state officials would find a way to subvert them." *Id.* at 990.

56. *Id.* at 989.

57. *Id.* at 989-90. *Id.* For example, the prison guard in *Hudson* was "bent upon effecting the substantive deprivation and would have done so despite any and all predeprivation safeguards."

58. *Id.* at 990.

59. *Id.*

Parratt/Hudson rule was controlling, and therefore, the case was properly dismissed by the district court. Although a bit jumbled, the dissent focused on two major flaws in the majority opinion.

Primarily, Justice O'Connor thought that despite the efforts made by the majority to distinguish *Parratt* and *Hudson* from the present case, the *Parratt/Hudson* rule should have applied.[60] Clearly, wrote Justice O'Connor, the employees' actions were random and unauthorized. Without authorization, the defendants failed to follow the procedure set forth by the State. Moreover, the alleged wanton or reckless nature of the deprivation indicated randomness.[61] Therefore, "[t]he State could not foresee the particular contravention,"[62] making predeprivation process impossible to provide. Equally evident was the availability of adequate postdeprivation remedies.[63] On its face, then, *Zinermon* should have been controlled by *Parratt* and *Hudson*.[64]

The dissenters argued that in holding *Parratt* and *Hudson* inapplicable, the majority created non-existent distinctions between the cases. For example, the deprivation in *Zinermon* was quite unpredictable. Although Florida "may be able to predict that over time some state actors will subvert its clearly implicated requirements,"[65] it cannot predict exactly when the loss will occur.[66]

Also, it was impracticable for the State to provide predeprivation remedies in the dissent's view. Even if, as the majority suggested, additional safeguards were in place, the wanton and reckless state actor "so indifferent to guaranteed protections would be no more prevented from working the deprivation . . . than would the mail handler in *Parratt* or the prison guard in *Hudson* . . . . Additional safeguards designed to secure correct results . . . do not practicably forestall state actors who flout the State's command and established practice."[67]

Furthermore, Justice O'Connor disagreed with the majority's

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60. *Id.* (O'Connor, J., dissenting).

61. *Id.* at 992 (O'Connor, J., dissenting).

62. *Id.* (O'Connor, J., dissenting).

63. The adequacy of the post-deprivation remedies was not disputed in *Zinermon. Id.* (O'Connor, J., dissenting).

64. *Id.* (O'Connor, J., dissenting).

65. *Id.* (O'Connor, J., dissenting).

66. *Id.* at 993 (O'Connor, J., dissenting). Justice O'Connor speculated that in *Parratt* and *Hudson*, the state did "provide a range of predeprivation requirements and safeguards guiding both prison searches and care of packages." *Id.* (O'Connor, J., dissenting).

67. *Id.* at 994 (O'Connor, J., dissenting).

suggestion "that this case differs from *Parratt* and *Hudson* because petitioners possessed a sort of delegated power,"[68] a delegation which in effect authorized their actions. To the contrary, the "petitioners no more had the delegated power to depart from the admission procedures and requirements than did the guard in *Hudson* to exceed the limits of his established search and seizure authority, or the prison official in *Parratt* wrongfully to withhold or misdeliver mail."[69] As such, the deprivation of Burch's liberty was caused not by established state procedure but by unauthorized acts.[70] "Each of the Court's distinctions [,therefore,] abandons an essential element of the *Parratt* and *Hudson* doctrines, and together they disavow those cases' central insights and holdings."[71]

The second major flaw in the majority opinion, noted Justice O'Connor, was that the Court improperly considered the adequacy of the State's predeprivation safeguards.[72] By holding that petitioners' discretion could have been more limited by the State, the Court in effect passed judgment on the question of what predeprivation safeguards were mandated by the due process clause. That inquiry would have been better left to a direct challenge against the procedures in place, rather than to a challenge against the propriety of actions taken by state employees pursuant to procedure.[73]

Moreover, argued Justice O'Connor, the Court's analysis of the adequacy of process undermines the due process doctrine embodied in *Mathews v. Eldridge*.[74] Instead of evaluating the procedures at issue using the *Mathews* doctrine, which entails a balancing of government and private interests along with consideration of the effectiveness of additional procedures,[75] a court must now look to *Zinermon* and ask whether a state "fully circumscribed and guided officials' exercise of power and provided additional safeguards, without regard to their efficacy or the nature of the government interest."[76] That inquiry guts *Mathews* by obfuscat-

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68. *Id.* (O'Connor, J., dissenting).
69. *Id.* (O'Connor, J., dissenting).
70. *Id.* at 995 (O'Connor, J., dissenting).
71. *Id.* at 996-97 (O'Connor, J., dissenting).
72. *Id.* at 995-96 (O'Connor, J., dissenting).
73. *Id.* (O'Connor, J., dissenting).
74. 424 U.S. 319 (1976).
75. *Id.* at 338.
76. *Zinermon*, 110 S. Ct. at 996 (O'Connor, J., dissenting).

ing the neat line between pre- and post-deprivation safeguards.

These deficiencies in the majority opinion, warned Justice O'Connor, make the "Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[77]

III. ANALYSIS

Whatever the vices of the *Parratt/Hudson* rule, it has one primary virtue: simplicity. Succinctly stated, the rule provides that random, unauthorized, intentional deprivations of a constitutionally protected interest in life, liberty, or property by a state employee are not sufficient to state a procedural due process claim under section 1983, unless the State's post-deprivation remedies are either non-existent or inadequate.[78] Such a rule is straightforward and easy to apply. Few questions need be asked, and there are few lines to draw. Whether post-deprivation remedies exist and whether they are adequate would seem to be the only real determinations a court has to make under the *Parratt/Hudson* approach. Thus, a court utilizing this rule should have little trouble handling a complaint alleging a section 1983 procedural due process claim.

Zinermon though, complicates what was a straightforward, rule-oriented analysis by focusing not on the rule itself, but on the rationale behind the rule and the circumstances giving rise to the claim. The rationale for the decisions in *Parratt* and *Hudson* was that given the random, unauthorized nature of the state employee's action, it would be impossible to predict when a deprivation would occur, and therefore, impracticable to provide a predeprivation process which would eliminate the risk of a deprivation occuring in the first place.[79]

The *Zinermon* majority ignored the rule hatched from the *Parratt/Hudson* rationale, choosing instead to re-examine that rationale. For example, the impossibility of providing predeprivation process no longer is an invariable factor when the state employee acts randomly and in an unauthorized manner. Now, the Court will look at the limits and controls on whatever predeprivation

77. *Id.* (O'Connor, J. dissenting) (quoting Parratt v. Taylor, 451 U.S. 527, 544 (1981)).

78. *See supra* notes 27-35 and accompanying text.

79. Zinermon v. Burch, 110 S. Ct. 975, 985 (1990).

process existed at the time of the constitutional violation.[80] In other words, faced with a section 1983 procedural due process claim based on a random, unauthorized act, the Court will not regard the provision of predeprivation remedies as impossible, which was a prerequisite to applying the *Parratt/Hudson* rule, but will instead examine the sufficiency of the predeprivation process, if any exists.

Although it might be an overstatement to say that by concentrating on the rationale, the *Zinermon* majority eliminated the *Parratt/Hudson* rule, they certainly placed it on the backburner. In effect, the *Zinermon* majority created a two-part test. The Court must first, in a multi-factor analysis derived from the *Parratt/Hudson* rationale, determine "whether predeprivation procedural safeguards could address the risk of deprivations."[81] Included among the Court's considerations during this stage of the analysis are what kind of deprivation is involved; whether there is a certain point where a deprivation is likely to occur; whether there was a predeprivation process already established, and if so, could it it have been more limited and controlled; and whether the state employees had some sort of delegated authority to deprive plaintiffs of a protected interest.[82] Only if the Court determines that predeprivation process would indeed have been impossible and impracticable does the *Parratt/Hudson* rule come into play.

The end result of *Zinermon* is bound to be confusion. Plaintiffs will argue that *Zinermon* precludes application of *Parratt* and *Hudson*, defendants will argue that their case falls under the *Parratt/Hudson* rule, and the courts hearing these arguments will not know which way to turn. Certainly, the initial inquiry in the *Zinermon* two-step analysis will be difficult to answer. Consider, for example, the issue of whether the deprivation was unpredictable, which is a factor to consider in the *Zinermon* analysis. The majority in *Zinermon* said that the deprivation was predictable because it occured at a specific point — "when a patient is given admission forms to sign."[83] On the other hand, in *Hudson* "the State might be able to predict that guards occasionally will harass or persecute prisoners they dislike, but cannot 'know when such

80. *Id.* at 989-90.
81. *Id.* at 987.
82. *See id.* at 987-90.
83. *Id.* at 989.

deprivations will occur.' "[84]

Another court, however, could have an entirely opposite view of the two cases. The deprivation in *Zinermon* might have been unpredictable because no one could be sure when exactly Burch would be given the admission papers to sign, or on what day he would be admitted to the hospital. Similarly, a court would be justified in finding that the deprivation in *Hudson* was predictable, since it occured at a predictable point in the prison day, specifically, during a routine shakedown search.

Whenever a court entertains a section 1983 procedural due process claim, it will routinely be forced to make these arbitrary decisions —distinctions without a difference. Predictability, which was assured by the *Parratt/Hudson* rule, becomes an elusive goal under the *Zinermon* approach, as evidenced by the obscure distinctions made by the *Zinermon* Court between the facts of that case and the facts of *Parratt* and *Hudson.*[85] As a result, Plaintiff A could lose his case before the United States Court of Appeals for the Sixth Circuit, while Plaintiff B might win a virtually identical claim before the United States Court of Appeals for the Third Circuit.

Thus, there seems to be little left of the *Parratt/Hudson* rule after *Zinermon.* But this might not be all bad. Despite the confusion and headaches that will result from *Zinermon,* the Court's decision has two potential virtues. First, it opens the door to federal court for section 1983 procedural due process plaintiffs. Since the advent of the *Parratt/Hudson* rule, that entrance had been virtually sealed.

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84. *Id.* (quoting Hudson, 468 U.S. at 533).

85. The dissent was correct in asserting that there was no significant factual difference between *Zinermon, Parratt,* and *Hudson. See id.* at 991-92 (O'Connor, J., dissenting).

Courts have just recently begun the confusing process of applying *Zinermon.* In *Caine v. Hardy,* 905 F.2d 858 (5th Cir. 1990), the United States Court of Appeals for the Fifth Circuit found that pre-deprivation procedural due process was not impossible to provide in a case involving the loss of a physician's staff privileges, and therefore held that the plaintiff had stated a section 1983 claim. A vigorous dissent agreed with the majority as to the meaning of *Zinermon,* but not its application to the facts of the case. *Id.* at 863-67 (Jones, J., dissenting). The dissent would have applied the *Hudson/Parratt* rule to deny plaintiff his section 1983 claim. *Id.* at 867 (Jones, J., dissenting).

The debate between the majority and the dissent in *Caine* illustrates the confusion *Zinermon* is bound to engender. This particular debate may not be over because the Fifth Circuit has decided to try their hand on the issue again by agreeing to rehear *Caine* in banc. *Id.* Other courts will no doubt experience similar difficulties in wrestling with *Zinermon.*

More importantly, the decision reverses a possible trend which could have drastically limited the use of section 1983. *Parratt*, *Hudson*, and *Daniels*, on their face, apply only to fourteenth amendment procedural due process claims. However, that trilogy was not expressly limited to such violations. Conceivably, if the State provided adequate remedies for other constitutional violations (*i.e.*, an illegal search and seizure), section 1983 could be unavailable in those cases, too. *Zinermon* might be an admission by the Court, though, that it had gone too far in *Parratt* and *Hudson*. In that case, it would be unlikely that the Court would extend the *Parratt/Hudson* rule beyond the procedural due process area to other constitutional violations.

Zinermon, then, offers a mixed bag: new opportunities for section 1983 procedural due process plaintiffs, retained opportunities for other section 1983 plaintiffs, confusion and unpredictability for litigators, judges, and everyone else. The Court, of course, could have offered interested parties a more consistent package if it had either followed the *Parratt/Hudson* rule, a result easily reached given the factual similarities between the cases, or rejected it. Unfortunately, the Court did neither, with the end result being a very forgettable, virtually useless opinion. Such an important issue deserved a better effort.

MICHAEL A. PAVLICK