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Keeping Civil Rights Actions Against State Officials in Federal Court: Avoiding the Reach of *Parratt v. Taylor* and *Hudson v. Palmer*

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I. Introduction

In the 1961 decision of *Monroe v. Pape*,[1] the United States Supreme Court revitalized 42 U.S.C. § 1983[2] by holding that individuals deprived of constitutional rights by state officers could sue those officers directly in federal court.[3] The Court specifically rejected the argument that if the defendants' actions subjected them to state tort liability, a plaintiff would normally be relegated to bringing a tort action in state court.[4] The Court held that the § 1983 action was "supplementary"[5] to any state tort action, and that the plaintiff could bring the federal lawsuit regardless of whether relief might be available under state law.[6] *Monroe* led to what has been termed an "explosion"[7] or "flood"[8] of § 1983 actions

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1. 365 U.S. 167 (1961).

2. This statute provides:

> 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.

42 U.S.C. § 1983 (1982).

3. 365 U.S. at 187.

4. *Id.* at 224-46 (Frankfurter, J., dissenting).

5. 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. Hence the fact that Illinois by its Constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court. *Id.* at 183.

6. This article focuses on § 1983 actions against state officials. The Court extended the *Monroe v. Pape* rationale to suits against federal officials in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 390-91 (1971). Most of the arguments contained herein should be applicable to *Bivens* actions.

7. Christina Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5, 6 (1980).

8. Wayne McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 Va. L. Rev. 1 (1974).

in federal courts.[9] This statute has been of paramount importance in enforcing rights guaranteed by the United States Constitution.[10]

The Court seemed to retreat somewhat from this position in the 1981 case of *Parratt v. Taylor*.[11] Taylor, an inmate of a Nebraska state prison, brought a § 1983 suit against prison officials for negligently losing a hobby kit that had been mailed to him. Taylor's theory of the case was that state officers had deprived him of his property without affording him any sort of hearing, thus violating his fourteenth amendment right to due process. The Supreme Court agreed that in some cases the due process clause obligated the state to provide a hearing *before* depriving an individual of his property by state action.[12] The Court noted, however, that when it is impracticable for the state to provide a predeprivation hearing, due process may be satisfied if the state provides a postdeprivation remedy to compensate the individual.[13] It was impossible for the state to predict the "random and unauthorized"[14] negligent actions of its employees; therefore, the due process clause obligated the state to provide only a postdeprivation proce-

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9. The number of civil rights actions, excluding prisoner petitions, filed in the federal courts increased from 296 in 1961 to 13,168 in 1979. State prisoners filed 11,195 civil rights petitions in 1979. Administrative Office of the United States Courts, 1979 Annual Report of the Director 6, 61. Separate statistics are not kept for § 1983 claims. These figures also include actions brought under other federal civil rights statutes. The great majority of federal civil rights actions probably contain a § 1983 claim.

10. "With all its procedural complexities, § 1983 has served as the procedural vehicle which permitted the lower federal courts to implement the expansive vision of the Bill of Rights enunciated by the Warren Court." Norman Dorsen, Paul Bender, Burt Neuborne, Sylvia Law, 2 Political and Civil Rights in the United States 499 (4th ed. 1979).

Section 1983 cases fall into two general categories: law reform cases and constitutional torts. Law reform cases challenge and seek to change state laws and procedures which violate the Constitution and laws of the United States. Many such cases are brought by members of minorities and other oppressed groups challenging unequal treatment under the equal protection clause, *e.g.*, Plyler v. Doe, 457 U.S. 202 (1982) (alienage discrimination); Washington v. Davis, 426 U.S. 229 (1976) (race discrimination); Reed v. Reed, 404 U.S. 71 (1971) (sex discrimination).

Constitutional tort claims seek monetary damages from public officials and governmental bodies to redress harm caused to plaintiffs by unconstitutional governmental action. The archetypical constitutional tort case is *Monroe v. Pape*, 365 U.S. 167 (1961) (damages for police officers' fourth amendment violations).

11. 451 U.S. 527 (1981).

12. *Id.* at 537.

13. *Id.* at 538-39. The Court noted that earlier cases had recognized

> that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process.

Id. at 539.

14. *Id.* at 541.

dure to redress the loss. Because the state had established a postdeprivation tort claims procedure which could have compensated him for his loss, it did not deprive Taylor of his property *without due process of law*. Therefore, Taylor could not maintain his § 1983 action.[15]

If the Court had limited the *Parratt* holding to its facts, a negligent deprivation of property, *Parratt* would have had little effect on most civil rights litigation.[16] In the recent case of *Hudson v. Palmer*,[17] however, the Court extended the *Parratt* rationale to *intentional* deprivations of property.[18] It appears possible, if not probable, that the Court will further extend the holding to deprivations of life or liberty as well.[19] The possibility of this extension has prompted some commentators to note fearfully that "[i]f the *Parratt* decision is followed to its logical extreme, it would undermine the basis for most § 1983 cases now brought in federal court."[20] Even if extended to intentional deprivations of life or liberty, the *Parratt* rationale, if properly applied, should not affect the great majority of § 1983 cases, leaving them in federal court as required by *Monroe*.

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15. *Id*. at 543-44.

16. In fact, the *Parratt* decision will open the door to some § 1983 actions based on negligence, if a specific constitutional right has been violated. A secondary holding of *Parratt* is that § 1983 does not contain a state of mind requirement and that negligent conduct may be actionable if the conduct deprived a person of rights secured by the Constitution and laws of the United States. *Id*. at 534-35.

17. 104 S. Ct. 3194 (1984).

18. In *Hudson*, plaintiff claimed that prison guards had intentionally destroyed his personal property during a shakedown search. The Supreme Court first held that prisoners had no reasonable expectation of privacy entitling them to the protection of the fourth amendment. *Id*. at 3200-01. Then, as in *Parratt*, the Court held that plaintiff's due process rights had not been violated because the state provided adequate postdeprivation remedies. Chief Justice Burger stated:

> While *Parratt* is necessarily limited by its facts to negligent deprivations of property, it is evident, as the Court of Appeals recognized, that its reasoning applies as well to intentional deprivations of property. The underlying rationale of *Parratt* is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply "impracticable" since the State cannot know when such deprivations will occur. We can discern no logical distinction between negligent and intentional deprivations of property insofar as the "practicability" of affording predeprivation process is concerned. The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent.

104 S. Ct. at 3203.

19. *See infra* text accompanying notes 64-73.

20. Leon Friedman, Parratt v. Taylor: *Opening and Closing the Door on Section 1983*, 9 Hast. Const. L.Q. 545, 546 (1982).

Most § 1983 claims will survive because *Parratt* and *Hudson* do not impose an across-the-board exhaustion requirement for § 1983 actions. The cases represent, rather, restriction on the underlying right to *procedural* due process. They should have no affect on § 1983 actions based on violations of *other* constitutional provisions,[21] including violations of protections afforded by the Bill of Rights, the equal protection clause of the fourteenth amendment, and the substantive component of the due process clause. They should not even affect the majority of procedural due process claims, only those in which it was impossible for the state to provide a predeprivation hearing because the harm was inflicted by the unanticipated actions of state officers.[22]

Fortunately, both the Supreme Court and the lower federal courts seem to be keeping the *Parratt* rationale within these limitations.[23] If the courts continue to observe these limitations, then the great majority of § 1983 claims should be unaffected. Section II of this article explains these limitations in more detail. By keeping these limitations in mind, plaintiffs' attorneys should be able to keep most § 1983 cases from preclusion by available state remedies. This article provides suggestions for dealing with cases in the grey area, where the reach of *Parratt* is unclear.

The greatest challenge facing plaintiffs' attorneys in this area will come from cases involving excessive use of force, usually by police. Where the use of excessive force is not the result of official policy and not accompanied by a violation of a substantive constitutional prohibition, it may be more difficult to avoid the reach of *Parratt* and *Hudson*. Section III of this article advances arguments which could help keep such claims from being relegated to state assault and battery cases.

Finally, section IV offers tactical suggestions for dealing with cases that seem to fall within the *Parratt* and *Hudson* holdings. The important issues in these cases are whether the state remedy is adequate to provide due process and in close cases whether plaintiffs' attorneys should choose a federal or state court in the first instance.

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21. *See infra* notes 40-47 and accompanying text.

22. *See infra* notes 24-29 and accompanying text.

23. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (*Parratt* not applicable to deprivation of property occurring pursuant to state procedures). *See, e.g.*, Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984) (*Parratt* applies only to asserted violations of procedural due process, not to substantive constitutional restrictions applicable to the states) and other cases collected *infra* note 42.

II. Exceptions to the Holding of *Parratt v. Taylor*

A. Challenging Established State Procedure

The Supreme Court indicated in *Parratt* that postdeprivation remedies satisfied due process only when the deprivation was the result of a random and unauthorized action by a state employee.[24] The holding and reasoning of *Parratt* do not apply where the deprivation was "a result of some established state procedure. . . ."[25]

The Court clarified and reaffirmed this portion of the *Parratt* opinion in *Logan v. Zimmerman Brush Co.*[26] *Zimmerman* held that an Illinois statute which prevented aggrieved persons from pursuing employment discrimination claims violated the due process clause. The Court distinguished *Parratt* on the ground that the deprivation occurred pursuant to state procedures.[27]

Comparing the facts of *Parratt* with a slight variation illustrates the difference between losses caused by random, unauthorized action and losses caused by established state procedure. In *Parratt*, the Nebraska prison authorities had established procedures designed to ensure the delivery of packages to inmates and to minimize chances of loss.[28] The packages were lost because prison employees negligently failed to follow the procedures. If, however, Nebraska prison regulations had authorized prison employees to dispose summarily of packages addressed to inmates, then any loss occasioned by employees acting pursuant to those regulations would have constituted a due process violation under *Logan v. Zimmerman*, regardless of state postdeprivation remedies. The majority of important civil rights actions challenging governmental activity challenge unconstitutional regulations and procedures, rather than "random and unauthorized" actions by public officers.[29] Therefore, *Parratt*, if correctly applied, should

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24. 451 U.S. at 541.

25. *Id.*

26. 455 U.S. 422 (1982).

27. 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 . . . [n]ot a result of some established procedure." 451 U.S. at 541. 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—whether the Commission's action is taken through negligence, maliciousness, or otherwise. *Parratt* was not designed to reach such a situation. *See id.* at 545 (Blackmun, J., concurring). 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. 455 U.S. at 435-36.

28. 451 U.S. at 530.

29. This conclusion is based on several assumptions and value judgments about what constitute important civil rights actions. First, actions challenging unconstitu-

have little effect in this area.

There is, however, an unclear and troublesome middle ground. What if the deprivation is not made "pursuant to" established procedures, yet in some sense is "caused by" state procedures? In *Parratt*, for example, Nebraska prison regulations detailed a procedure which, if followed, would have protected against the loss of property. If plaintiff had proved that prison employees were never adequately informed of or trained in the implementation of these procedures, then any loss would not have occurred "pursuant to" state procedures, but could have been "caused by" state procedures (in this case, inadequate training procedures). Similarly, if the state had not established procedures for dealing with inmate packages, any loss would not be "pursuant to" state procedures, but could have been "caused by" the lack of regulations.

The language of *Parratt* is not very helpful in determining whether such situations would be covered by the holding, due to Justice Rehnquist's various formulations describing *Parratt*'s reach. At some points he stated that a due process violation would exist if the deprivation were "pursuant to"[30] or "authorized by"[31] established procedure, thus implying that the above examples would not constitute due process violations. However, at another point, he formulated the issue as whether the loss is "a result"[32] of some established procedure, and finally whether or not the loss is "beyond the control of the State."[33] Both of these phrases would favor treating such cases as due process violations.

Despite Rehnquist's equivocations, the reasoning behind *Parratt* clearly supports the argument that any loss caused by state procedures is a deprivation without due process if it could have

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tional policies and procedures benefit a much larger group of people than actions challenging random and unauthorized actions. Second, those oppressed groups most in need of federal court protection, *e.g.*, minorities, women, the poor, etc., are more likely to be oppressed by means of policies and regulations. Oppression against such groups often tends to be institutionalized and hence fits under *Logan v. Zimmerman*. Random and unauthorized actions by government officials have a greater likelihood of harming members of the general public. This is especially true of negligent violations. The Supreme Court cannot be faulted for its underlying reason for the *Parratt* decision. Not every tort committed by a state official *should* become the basis for a § 1983 due process federal lawsuit. 451 U.S. 544, citing Paul v. Davis, 424 U.S. 693 (1976). If the harm inflicted upon a member of an oppressed group is truly "random" (the harm was not directed at the plaintiff because of his or her status as a member of the oppressed group) then there may be no great need for a federal, as opposed to a state remedy.

30. 451 U.S. at 537.

31. *Id.* at 538.

32. *Id.* at 541.

33. *Id.*

been anticipated that the procedures in question could have led to a loss. The basic premise of *Parratt* is that because it is often impossible to anticipate random negligent losses by government personnel, the state cannot be expected to provide predeprivation process.[34] In extending *Parratt* to intentional but unauthorized violations, the Court stated in *Hudson*: "The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct."[35] This statement would imply that when the state can and should "anticipate and control in advance" the conduct of its employees and fails to do so, any loss as a result of such conduct is a deprivation without due process. In his concurring opinion in *Parratt*, Justice Blackmun wrote, "[w]hen it is possible for a State to institute procedures to contain and direct the intentional actions of its officials, it should be required, as a matter of due process, to do so."[36]

This line of reasoning is not unfamiliar to civil rights attorneys. Since the 1978 Supreme Court decision in *Monell v. Department of Social Services*,[37] federal courts could hold municipalities liable for constitutional violations committed by their employees. However, municipal liability cannot be based on a *respondeat superior* theory. Rather, the governmental employer's own policy or custom must be responsible for the injury before a municipality may be held liable for constitutional violations committed by its employees.[38] Therefore, civil rights attorneys have used theories of inadequate training, supervision, or procedures to try to extend damage liability from the municipal employee to the municipality itself.[39] Attorneys will have to make these same arguments after *Parratt* in cases involving unauthorized deprivations by lower

34. *Id.*

35. Hudson v. Palmer, 104 S. Ct. 3194, 3203 (1984).

36. Parratt v. Taylor, 451 U.S. 527, 546 (Blackmun, J., concurring).

37. 436 U.S. 658 (1978).

38. *Id.* at 694. Governmental responsibility may be based either on policy (practices formally approved through official decision-making channels) or custom (practices which although not authorized by written law are permanent and well settled). *Id.* at 690-91. A governmental entity is responsible for its policy or custom "whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy. . . ." *Id.* at 694.

39. *See, e.g.*, Herrera v. Valentine, 653 F.2d 1220, 1225 (8th Cir. 1981) (failure to supervise overzealous police force); Murray v. City of Chicago, 634 F.2d 365, 367 (7th Cir. 1980), *cert. dismissed*, 456 U.S. 604 (1981) (failure to establish or execute procedures to avoid illegal arrests). Much of the case law in this area has been clouded by a cryptic and apparently contradictory statement in *Monell*, citing Rizzo v. Goode, 423 U.S. 362 (1976): "[T]he mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability." 436 U.S. at 694 n.58.

level government employees. Only now the stakes are higher. Failure to show that the deprivation was caused by governmental policy not only negates municipal liability, but may remove the deprivation from the realm of procedural due process violations entirely.

B. Violations of Specific Constitutional Rights

Another limitation on the scope of the *Parratt* doctrine is that it applies only to violations of procedural due process. It is not applicable to violations of other constitutional rights contained in the Bill of Rights and made applicable to the states by virtue of the fourteenth amendment. Justice Rehnquist clearly distinguished *Parrat* from cases such as *Monroe v. Pape*,[40] where plaintiff's fourth amendment rights had been violated. In such cases, the Supreme Court held that plaintiff could maintain a § 1983 action irrespective of any available state remedy:

> The only deprivation respondent alleges in his complaint is that "his rights under the Fourteenth Amendment of the Constitution of the United States were violated. That he was deprived of his property and Due Process of Law." App. 8. As such, respondent's claims differ from the claims which were before us in *Monroe v. Pape*, *supra*, which involved violations of the Fourth Amendment, and the claims presented in *Estelle v. Gamble*, 429 U.S. 97 (1976), which involved alleged violations of the Eighth Amendment. Both of these Amendments have been held applicable to the States by virtue of the adoption of the Fourteenth Amendment. See *Mapp. v. Ohio*, 367 U.S. 643 (1961); *Robinson v. California*, 370 U.S. 660 (1962). Respondent here refers to no other right, privilege, or immunity secured by the Constitution or federal laws other than the Due Process Clause of the Fourteenth Amendment *simpliciter*.[41]

Civil rights plaintiffs have not had trouble getting the federal courts to recognize this distinction.[42] It is important to keep this distinction in mind when representing clients who have been deprived of life, liberty, or property by government employees. For example, if the police have, without authorization, destroyed written material belonging to a client, the client cannot bring a due process claim in federal court because state court remedies would provide adequate due process. However, if police destroy the ma-

40. 365 U.S. 167 (1961) (overruled on other grounds).

41. Parratt v. Taylor, 451 U.S. 527, 536 (1981).

42. *See, e.g.*, Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984) (eighth amendment); Wolf-Lillie v. Sonquist, 699 F.2d 864, 871-72 (7th Cir. 1983) (fourth amendment); Duncan v. Poythress, 657 F.2d 691, 704-05 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012 (right to vote).

terial during an illegal search and seizure, the client should bring a fourth amendment claim. If the police destroy the material to suppress ideas contained therein, the plaintiff should bring a first amendment claim. If the material was a communication between a prison inmate and his or her attorneys, the inmate should claim a deprivation of the sixth amendment right to counsel.[43] Fourteenth amendment equal protection claims are also not subject to the *Parratt* analysis.[44] Therefore, a person more harshly treated because of race, sex or other characteristics, even by the random and unauthorized action of a government employee,[45] retains a federal cause of action.

The challenge here for civil rights attorneys is to be innovative in developing and expanding theories of substantive constitutional violations. The fourth amendment, which heretofore has been litigated more in a criminal than in a civil context,[46] provides a particularly promising opportunity for expansion. For example, if police destroy a person's property during an illegal search, that person can clearly maintain a § 1983 damage claim under the fourth amendment. If, however, that person's property is illegally seized by police and later lost or destroyed while in police custody, it is unclear under present law whether the loss can be treated as a fourth amendment violation.[47] If plaintiffs' attorneys cannot develop such a theory, then under *Parratt* and *Hudson*, plaintiffs would be relegated to a state tort action.

III. Cases Involving Excessive Use of Force

Another area in which expanding the boundaries of the

43. Although the Supreme Court has indicated that a prison inmate "does not have a reasonable expectation of privacy enabling him to invoke the protections of the Fourth Amendment . . .," Hudson v. Palmer, 104 S. Ct. 3194, 3202 (1984), the Court has also held that certain deprivations of an inmate's life or liberty can constitute violations of the eighth amendment right to be free from cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97 (1976), *reh'g denied*, 429 U.S. 1066 (1977). Chief Justice Burger intimated in *Hudson* that some deprivations of inmates' property rights could rise to the level of an eighth amendment violation. 104 S. Ct. at 3202.

44. *See* Patsy v. Bd. of Regents of Florida, 457 U.S. 496 (1982). The issue explicitly decided by the Court involved exhaustion of administrative remedies, but the result (allowing the § 1983 equal protection claim to proceed without regard to available state juridical or administrative remedies) clearly shows that *Parratt* does not apply to equal protection claims.

45. The majority of equal protection cases are challenges to state policy or procedure and thus would also fit within the previously described exception to *Parratt*. *See supra* notes 24-36 and accompanying text.

46. This is due, of course, to the exclusionary rule. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).

47. Hudson v. Palmer, 104 S. Ct. 3194, 3207 (O'Connor, J., concurring).

fourth amendment may be helpful is in providing a cause of action for excessive or unjustified use of force by government employees, especially police.[48] After *Parratt* and *Hudson*, plaintiffs harmed by police will have difficulty bringing a § 1983 claim against police officers for excessive use of force when actions of the police are not the result of established policy,[49] not accompanied by violations of the Bill of Rights,[50] and do not rise to the difficult "shock the conscience" level required for a substantive due process violation.[51] One theory mentioned but not relied on in a recent district court case would make unreasonable use of force a fourth amendment violation. "[The] Fourth Amendment right of people to be secure in their 'persons' is a shield covering the individual's physical integrity and supports an action under 42 U.S.C. § 1983 for reckless and wanton use of excessive force by police. . . ."[52]

Another avenue which plaintiffs could pursue in excessive force cases is the use of the substantive due process clause. The holdings of *Paratt* and *Hudson* should not apply to substantive due process violations, that is, "actions government officials may not take no matter what procedural protections accompany them."[53]

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48. In 1980 the United States Commission on Civil Rights found that "[v]iolations of the Civil Rights of our people by some members of police departments is a serious national problem...." United States Commission on Civil Rights, Police Practices and the Preservation of Civil Rights ii (1980). In 1976 the Supreme Court, in Rizzo v. Goode, 423 U.S. 362 (1976), severely limited the power of federal courts to grant injunctive relief mandating police disciplinary procedures based on the misconduct of individual police officers. *See* Note, *Rethinking Federal Injunctive Relief Against Police Abuse: Picking up the Pieces After* Rizzo v. Goode, 7 Rut.-Cam. L.J. 530 (1976).

The *Rizzo* holding makes individual damage suits for police misconduct particularly important because of their deterrent effect. "Civil suits against individual police officers may help to deter police misconduct." United States Commission on Civil Rights, Who is Guarding the Guardians? A Report on Police Practices 164 (1981). For a compilation of numerous federal cases awarding damages for police abuse, see Norman Dorsen, Paul Bender, Burt Neuborne, Sylvia Law, 2 Political and Civil Rights in the United States 494-96 (4th ed. 1979).

49. *See supra* notes 24-36 and accompanying text.

50. *See supra* notes 40-45 and accompanying text.

51. *See infra* notes 53-61 and accompanying text.

52. Schiller v. Strangis, 540 F. Supp. 605, 615 (D. Mass. 1982) (citing Jenkins v. Averett, 424 F.2d 1228, 1231-32 (4th Cir. 1970)):

> It should not be forgotten that the Fourth Amendment expressly declares "the right of people to be secure in their *persons* * * * against unreasonable searches and seizures." And "this inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." Terry v. Ohio, 392 U.S. 1, 8-9, 88 S. Ct. 1868, 1873, 20 L. Ed. 2d 889 (1968).

53. Hudson v. Palmer, 104 S. Ct. 3194, 3208 n.4 (1984) (Stevens, J., concurring). *See also* Justice Blackmun's concurring opinion in *Parratt*:

> I also do not understand the Court to intimate that the sole content of the Due Process Clause is procedural regularity. I continue to believe

Federal courts, however, have had some difficulty determining exactly what governmental actions rise to the level of substantive due process violations. The standard courts most often use is whether the conduct "shocks the conscience" of the court. The Supreme Court developed this formulation in the 1952 case of *Rochin v. California*,[54] where police officers had pumped a subject's stomach against his will.[55] The Court held that the stomach pumping did "shock the conscience" and reversed Rochin's conviction.[56]

The problem with such a "nebulous"[57] standard is that results will vary greatly from case to case, depending on the sensitivity of the conscience of the individual judge. Although the intentional use of force on a person already subdued and in custody would "shock the conscience" of many persons,[58] most courts require the infliction of serious injuries or an especially brutal attack before finding a violation of substantive due process.[59] Sev-

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that 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.

Parratt v. Taylor, 451 U.S. at 545 (1981) (Blackmun, J., concurring).

54. 342 U.S. 165, 172 (1952).

> Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." Malinski v. New York, *supra*, [324 U.S. 401] at 416-17 [1944]. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, 291 U.S. 97, 105, or are "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325.

Id. at 169.

55. *Id*. at 166.

56. *Id*. at 172, 174.

57. Barnier v. Szentmiklosi, 565 F. Supp. 869, 879 (E.D. Mich. 1983). Another court has called it a "vague and discretionary standard." Schiller v. Strangis, 540 F. Supp. 605, 616 (D. Mass. 1982).

58. *See* Michael Wells and Thomas Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 Ga. L. Rev. 201 (1984). The authors argue that any intentional tort committed by government officials should be considered a substantive due process violation. *Hudson v. Palmer*, 104 S. Ct. 3194 (1984), see *supra* note 18, however, would seem implicitly to reject such a broad theory.

59. Barnier v. Szentmiklosi, 565 F. Supp. 869, 879 (E.D. Mich. 1983) (no substantive due process violation where police pulled traffic offender "from his vehicle and beat and choked him with their flashlights and hands"); Henderson v. Counts, 544 F. Supp. 149 (E.D. Va. 1982) (plaintiff must submit affidavit showing "severity of the injuries inflicted" even where inflicted "maliciously and without provocation").

eral recent opinions have focused on an explanation by Judge Friendly:

> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. 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.[60]

Although Friendly's formulation has also been criticized because it "does not instruct the factfinder as to how much weight should be given to each factor,"[61] it is certainly more helpful than the "shock the conscience" standard.

Another argument which plaintiffs might consider in cases involving intentional use of excessive force is that *Parratt* is not applicable to cases involving intentional deprivations of life or liberty. This argument had a better chance of acceptance before the recent Supreme Court decision in *Hudson v. Palmer*.[62] By extending *Parratt* to intentional deprivations of property, the Court made it much more difficult to distinguish deprivations of life or liberty because the reasoning behind *Parratt* is not dependent upon the type of deprivation.

Before the decision in *Hudson v. Palmer*, federal courts had split on the issues of whether to extend *Parratt* to cases involving *intentional* deprivations[63] and to cases involving deprivations of *life* and *liberty*.[64] Those courts which refused to extend *Parratt*

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60. Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973), *cited in* Henderson v. Counts, 544 F. Supp. 149, 153 (E.D. Va. 1982) and Schiller v. Strangis, 540 F. Supp. 605, 616 (D. Mass. 1982).

61. Schiller v. Strangis, 540 F. Supp. 605, 616 (D. Mass. 1982).

62. 104 S. Ct. 3194 (1984). *See supra* note 18.

63. Four circuits held that *Parratt* extended to intentional deprivations of property. Palmer v. Hudson, 697 F.2d 1220 (4th Cir. 1983), *aff'd in part, rev'd in part*, 104 S. Ct. 3194 (1984); Wolf-Lillie v. Sonquist, 699 F.2d 864 (7th Cir. 1983); Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345 (9th Cir. 1981), *aff'd sub nom.*, Kush v. Rutledge, 460 U.S. 719 (1983). Three circuits held that it did not. Brewer v. Blackwell, 692 F.2d 387 (5th Cir. 1982); Weiss v. Lehman, 676 F.2d 1320 (9th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983); Madyun v. Thompson, 657 F.2d 868 (7th Cir. 1981).

64. For cases holding *Parratt* not applicable to deprivations of life or liberty, see Brewer v. Blackwell, 692 F.2d 387 (5th Cir. 1982); Wakinekona v. Olim, 664 F.2d 708 (9th Cir. 1981), *rev'd on other grounds*, 461 U.S. 238 (1983); Howse v. DeBerry Correctional Inst., 537 F. Supp. 1177 (M.D. Tenn. 1982); Tarkowski v. Hoogasian, 532 F. Supp. 791 (N.D. Ill. 1982).

For cases extending *Parratt* to deprivations of life or liberty, see Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983), *reh'g en banc granted*, 729 F.2d 613 (1984); Wolf-Lillie v. Sonquist, 699 F.2d 864 (7th Cir. 1983); Ellis v. Hamilton, 669 F.2d 510

did not rely on Justice Rehnquist's reasoning in the opinion. They seemed to assume that *Parratt* established a special rule for cases involving negligent deprivations of property. One district court stated, "[t]his Court does not believe that the Supreme Court intended the rationale of *Parratt* to extend beyond the facts basically similar to those in that case—that is, where only a *negligent* deprivation of *property* is involved."[65] Those courts refusing to extend *Parratt* also relied on the concurring opinion of Justice Blackmun[66] which made it clear that he joined the Court's opinion only with the understanding that the decision did not apply to deprivations of life or liberty or to intentional deprivations of property.[67]

Those courts which extended *Parratt* to intentional deprivations of property or to deprivations of life or liberty concentrated on the reasoning of Rehnquist's opinion, rather than the specific facts in *Parratt*. One court stated, "there is no logical reason to distinguish 'property' and 'liberty' for purposes of determining whether the state has provided due process. . . ."[68]

All courts which have addressed the question since the decision in *Hudson v. Palmer* have decided to extend the *Parratt* holding to deprivations of life and liberty.[69] Why *Hudson*, which extended *Parratt* to intentional deprivations of property, provides a basis for extending *Parratt* to deprivations of life and liberty,

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(7th Cir.), *cert. denied*, 459 U.S. 1969 (1982); Daniels v. Williams, 720 F.2d 792 (4th Cir. 1983); Juncker v. Tinney, 549 F. Supp. 574 (D. Md. 1982); Eberle v. Baumfalk, 524 F. Supp. 515 (N.D. Ill. 1981).

65. Howse v. DeBerry Correctional Inst., 537 F. Supp. 1177, 1178 (M.D. Tenn. 1982) (emphasis in original).

66. Brewer v. Blackwell, 692 F.2d 387, 394-95 (5th Cir. 1982) citing 451 U.S. at 545-46 (Blackmun, J., concurring); Howse v. DeBerry Correctional Inst., 537 F. Supp. 1177, 1178-79 (M.D. Tenn. 1982); Tarkowski v. Hoogasian, 532 F. Supp. 791, 794 (N.D. Ill. 1982).

67. I do not read the Court's opinion as applicable to a case concerning deprivation of life or of liberty. . . .

> Most importantly, I do not understand the Court to suggest that the provision of "postdeprivation remedies" . . . would cure the unconstitutional nature of a state official's intentional act that deprives a person of property.

451 U.S. at 545-46 (Blackmun, J., concurring).

68. Barnier v. Szentmiklosi, 565 F. Supp. 869, 877 (E.D. Mich. 1983). The court also held that distinguishing property and liberty "would be contrary to *Ingraham v. Wright*." *Id*. at 878. In *Ingraham*, a pre-*Parratt* case, the Supreme Court held that common law tort remedies provided due process to students whose liberty interests might be violated by unreasonable infliction of corporal punishment. 430 U.S. 651 (1977).

69. *See* Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984); Augustine v. Doe, 740 F.2d 322 (5th Cir. 1984); Dobson v. Green, 596 F. Supp. 122 (E.D. Pa. 1984); Cerva v. Fulma, 596 F. Supp. 86 (E.D. Pa. 1984).

was most cogently stated in *Thibodeaux v. Bordelon*:[70]

> Much of the lack of uniformity in interpretation of *Parratt* stems from a tendency to view *Parratt* as a special rule designed to insulate negligent state actors from lawsuits in federal court. But *Hudson* demonstrates that *Parratt* is not an isolated rule but rather part of a consistent body of procedural due process doctrine. Viewed in the context of this doctrine, *Parratt* lends itself to principled application. . . .
>
> The central question in determining the applicability of *Parratt*, therefore, is whether it is practicable for the state to provide a predeprivation hearing: "The controlling inquiry is solely whether the State is in a position to provide for predeprivation process. . . ." Just as there is no reason to distinguish intentional from negligent deprivations, there is no reason to differentiate between liberty and and property interests.[71]

The *Thibodeaux* court also noted that the *Hudson* opinon was unanimous in regard to extending *Parratt*. Justices Blackmun and White, who had objected to applying the *Parratt* holding to intentional deprivations of property or to deprivations of life or liberty, both joined the Court's opinion in *Hudson* extending *Parratt* to intentional deprivations of property. In his *Parratt* concurrence, Justice Blackmun actually gave a reason for distinguishing negligent from intentional deprivations,[72] whereas he provided no reasons for distinguishing deprivations of property from deprivations of life and liberty. Therefore, the fact that he and Justice White have given up their objections to the extension from negligent to intentional violations provides a fairly good indication that they are also willing to extend the holding to deprivations of life or liberty.[73]

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70. 740 F.2d 329 (5th Cir. 1984).

71. *Id*. at 335-37, citing Hudson v. Palmer, 104 S. Ct. at 3204.

72. While the "random and unauthorized" nature of negligent acts by state employees makes it difficult for the State to "provide a meaningful hearing before the deprivation takes place," . . . it is rare that the same can be said of intentional acts by state employees. When it is possible for a State to institute procedures to contain and direct the intentional actions of its officials, it should be required, as a matter of due process, to do so.

Parratt v. Taylor, 451 U.S. at 546 (Blackmun, J., concurring). In *Hudson*, the Court, in an opinion joined by Justice Blackmun, specifically rejected this argument:

> The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent.

104 S. Ct. at 3203.

73. Another argument, rejected by at least one court, distinguished liberty in-

Any attorney arguing that *Parratt* should not be extended to intentional deprivations of life or liberty will have to focus on the reasons which prompted the *Parratt* decision rather than the reasoning of the opinion itself. The impetus behind the *Parratt* decision was to avoid making the fourteenth amendment a "font of tort law," "turning every alleged injury inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment. . . ."[74] The Court was concerned that "any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983."[75] The Court correctly determined that the drafters of the fourteenth amendment never intended it "to play such a role in our society."[76] The drafters did intend, however, that the amendment would prohibit a law enforcement official from intentionally beating a citizen; and the drafters of § 1983 did intend to provide a federal cause of action for such a violation.

IV. Considerations When *Parratt* Appears to be Applicable

A. Is the State Remedy Adequate to Provide Due Process?

When confronted by a case which *Parratt* appears to relegate to state law, an attorney should examine the available state postdeprivation remedies to determine whether they provide due process. *Parratt* did not retreat from earlier cases that "mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests."[77] This hearing must occur "at a meaningful time and in a meaningful manner."[78] *Parratt* merely made clear that in cases involving random and unauthorized deprivations by state officials, the meaningful *time* requirement is satisfied by a postdeprivation hearing. This postdeprivation hearing must still satisfy the meaningful *manner*

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terests because "a postdeprivation damages remedy can never fully compensate for a loss of liberty." Thibodeaux v. Bordelon, 740 F.2d 329, 338 (5th Cir. 1984). The court noted that "[h]istorically damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* (citing Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 395 (1971)).

> In any case, "[i]f the loss is 'incompensable,' this is as much so under § 1983 as it would be under any other remedy," *Hudson*, 104 S. Ct. at 3204; postdeprivation damages awarded under section 1983 will be no more or less adequate than damages awarded under state law.

740 F.2d at 338.

74. 451 U.S. at 544.

75. *Id.*

76. *Id.*

77. *Id.* at 540.

78. *Id.* (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

requirement. The Court has not fully answered the question of what constitutes a meaningful manner for such a hearing.

Parratt did make clear that the state need not provide a plaintiff "all the relief which may have been available if he could have proceeded under § 1983."[79] The Nebraska state tort remedy was determined to be adequate even though "it provides only for an action against the State as opposed to its individual employees, it contains no provisions for punitive damages, and there is no right to a trial by jury."[80] In fact, although the Nebraska remedy was a tort procedure, administrative remedies will, in some cases, be considered adequate.[81] The standard established by *Parratt* is whether "[t]he remedies provided could have fully compensated the respondent for the property loss he suffered. . . ."[82]

In spite of the Court's recognition in *Parratt* that the state remedies "could have fully compensated" the plaintiff,[83] it is unlikely that the Court will always require the possibility of full compensation before it will consider the state remedies adequate to provide due process. Even a federal § 1983 action does not assure full compensation for a plaintiff who proves he was harmed by unconstitutional action, because various personal and governmental immunities bar damage relief in some cases.[84] Because the *Parratt* Court was willing to accept a state procedure which provided *less* relief than a § 1983 action, it is unlikely that the Court will require a state remedy to provide compensation in a situation where relief would be barred in a federal suit.

In determining whether a state remedy is adequate to displace a § 1983 action, the problem facing the courts will be to determine to what extent a state may provide immunities from damage liability for itself and its officials. It would make a mockery of the *Parratt* decision to require the state to provide a postdeprivation hearing, and then allow it to immunize itself and

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79. *Id.* at 544.

80. *Id.* at 543-44.

81. *See, e.g.*, Dusanek v. Hannon, 677 F.2d 538 (7th Cir. 1982). *cert. denied*, 459 U.S. 1017 (1982). For a fuller discussion of the issue, see Rodney Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies*: Parratt v. Taylor and Logan v. Zimmerman Brush Company, U. Ill. L. Rev. 831, 883-86 (1982).

82. 451 U.S. at 544.

83. *Id.*

84. *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967) (absolute immunity from damages for judges, good-faith immunity for police officers); Scheur v. Rhodes, 416 U.S. 232 (1974) (good-faith immunity for state executive officials); Edelman v. Jordan, 415 U.S. 651, *reh'g denied*, 416 U.S. 1000 (1974) (sovereign immunity for retroactive monetary awards from the state treasury). *But see* Owen v. City of Independence, 445 U.S. 622, *reh'g denied*, 446 U.S. 993 (1980) (no immunity for municipal corporations).

its officials completely from damages. In *Hudson v. Palmer*, before affirming the lower court's dismissal of plaintiff's due process claim, the Supreme Court determined that his state court damage action would not be barred by sovereign immunity.[85]

It is hard to imagine, however, that the Supreme Court intends to require the states to abolish all forms of personal damage immunity which they presently grant to government officials, for it has deemed at least some of these common law immunities important enough to survive as defenses to § 1983 claims.[86] It also seems unlikely that courts will force other governmental bodies to accept damage liability for their employees on a *respondeat superior* basis, for this, too, has been rejected in § 1983 cases.[87] It seems reasonable, therefore, that the courts will deem a state remedy adequate to displace a § 1983 action, as long as the plaintiff's chances of being fully compensated are not significantly less under state law than under federal law. Yet if governmental bodies retain in their own systems exactly the same immunities for themselves and their employees as they now enjoy under § 1983, some cases of negligent deprivations and even some intentional deprivations will remain uncompensated in both federal and state court. Fortunately, there has been a recent trend, both legislative and judicial, toward restricting sovereign immunity in the state systems,[88] and even if *Parratt* may not require such restrictions, it may encourage them. In any case, an attorney's best chance of challenging a state remedy as inadequate will occur when state immunities are significantly broader than those available in a § 1983 action.[89]

B. Choosing Between the Federal and State Remedy

Before bringing any suit which the *Parratt* doctrine might

85. 104 S. Ct. at 3204-05.

86. *See supra* note 84. *See* Daniels v. Williams, 720 F.2d 792 (4th Cir. 1983), a post-*Hudson* case which held that the "possibility of a sovereign immunity defense" being asserted by a state official did not make the state tort remedy inadequate. *Id.* at 798. The court noted that even in a § 1983 action, plaintiff might have been barred by defendant's assertion of a good-faith immunity from damages. *Id.*

87. Monell v. Dept. of Social Services, 436 U.S. 658 (1978).

88. *See* Prosser and Keeton on the Law of Torts 1044-46 (5th ed. 1984). Two recent examples of state court cases expanding liability, under state tort principles, for negligent infliction of harm by government officials are *Irwin v. Town of Ware*, 392 Mass. 745, 467 N.E.2d 1292 (1984) (municipality may be held liable for negligent failure to remove intoxicated driver from highway) and *Schear v. Bd. of County Commissioners*, No. 15,324 (N.M. Sup. Ct. Aug. 6, 1984) (law enforcement officers may be held liable for negligent failure to respond to crime victim's emergency call).

89. *See* Smolla, *supra* note 81, at 871-81 for a fuller discussion of this issue.

cover, plaintiff's attorney must decide whether to bring a federal § 1983 action or to proceed with state remedies in a state forum. A wrong decision in either direction could prove harmful to the plaintiff. In a case to which *Parratt* is clearly applicable, plaintiff's attorney will have no choice but to bring the action in state rather than federal court. If the attorney files the federal action and the district court holds *Parratt* applicable, it will dismiss the § 1983 action, relegating plaintiff to the state remedy. At the very least, this dismissal will cause the extra expense and delay of beginning a new lawsuit. If the dismissal occurs after the state statute of limitations has run, plaintiff may lose the right of action entirely.

If, however, *Parratt* clearly does not apply (because the action challenges established state procedure or involves violations of constitutional rights other than due process) it should be reasonably safe to bring a federal § 1983 action. An attorney who erroneously assumes that *Parratt* will apply may needlessly cost his client the normally more desirable federal forum.[90] Thus, she will lose any advantages that federal substantive law has over state substantive law, for state tort law rather than federal civil rights law will apply to such issues as liability, amount of damages, immunities, etc.

What should a plaintiff's attorney do, however, in a case in which it is unclear whether *Parratt* applies? In such a case, plaintiff's attorney must carefully weigh the advantages of a federal over a state action against the danger of losing the claim entirely, or at the very least, having to start over again in state court.

There are several approaches that plaintiffs might take to try to establish a § 1983 claim without losing the alternative state claim if *Parratt* is held applicable. Unfortunately, none of them are particularly attractive. First, plaintiff could bring a § 1983 suit in federal court, bringing alternative state claims along under pendent jurisdiction.[91] If *Parratt* is not held applicable until trial, plaintiff may be able to recover under her state claims even though the federal claim is dismissed.[92] If, however, *Parratt* is

90. Civil rights attorneys normally consider a federal forum more desirable because they consider federal judges 1) more technically competent to handle federal questions, 2) more insulated from majoritarian pressures by their life tenure, and 3) as representatives of the federal government more likely to enforce federal rights vigorously at the expense of state interests. Bart Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977).

91. Under the doctrine of pendent jurisdiction, federal courts have constitutional power to hear state claims which "derive from a common nucleus of operative fact" along with federal claims properly within their jurisdiction. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

92. Pursuant to *Gibbs*, it is within the discretionary power of the district court

held applicable and the federal claim dismissed before trial (pursuant to a motion to dismiss or a motion for summary judgment), then the judge will probably dismiss the state claims as well.[93]

A second alternative would be for plaintiff to file simultaneously a § 1983 suit in federal court and a state law claim in state court. The fact that plaintiff has actually filed a state action, however, may influence the federal court to hold *Parratt* applicable and dismiss the federal claim.[94] Claim preclusion, one aspect of the doctrine of *res judicata*, may also present a problem for this approach.[95] The Supreme Court has held that the doctrine of claim preclusion may prohibit a plaintiff from bringing a federal lawsuit after a state court decides a lawsuit in which the plaintiff could have brought the federal claim.[96] Therefore, if the state suit reaches judgment first, plaintiff may be barred from continuing her federal action.

The third alternative would be to bring both the § 1983 claim and the state law claim in state court.[97] This is the least risky alternative. If the state judge holds *Parratt* applicable and dismisses

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to proceed to try only the pendent state claim, if it dismisses the underlying federal claim at trial. 383 U.S. at 727-29. A major factor in the court's decision to allow the state claim to proceed is whether plaintiff was aware of the relative importance of the state, versus the federal claim.

> For example, it may appear that the plaintiff was well aware of the nature of his proofs and the relative importance of his claims; recognition of a federal court's wide latitude to decide ancillary questions on state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case.

Id. at 727. For an example of a case which allowed the state law claim to proceed after dismissal at trial of the § 1983 claim based on *Parratt*, see Barnier v. Szentmiklosi, 565 F. Supp. 869 (E.D. Mich. 1983): "In view of the time and energy expended by the court and the parties before the federal claim was dismissed, the court properly exercised its authority and discretion to try the state law claims by themselves." *Id.* at 871 n.1.

93. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966): "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."

94. Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981), *aff'd sub nom.*, Kush v. Rutledge, 460 U.S. 719 (1983).

95. Res judicata is a generic term which encompasses both issue preclusion (collateral estoppel) and claim preclusion. Claim preclusion, the modern term which encompasses the traditional doctrines of merger and bar, operates to prevent a court from hearing a claim which was or should have been brought in an earlier lawsuit. *See generally* Allan Vestal, *Rationale of Preclusion*, 9 St. Louis U.L.J. 29 (1964); Restatement (Second) of Judgments, introductory note to § 24 (1982).

96. Migra v. Warren City School Dist. Bd. of Educ., 104 S. Ct. 892 (1984). Although in *Migra* the plaintiff brought state and federal cases sequentially, rather than simultaneously, the Court's reasoning, which was based on the federal full faith and credit statute, 28 U.S.C. § 1738 (1982), would seem to apply any time the state case reaches judgment first.

97. The Supreme Court has held that state courts may decide § 1983 claims. Martinez v. California, 444 U.S. 277, 283 n.7, *reh'g denied*, 445 U.S. 920 (1980).

the § 1983 claim, plaintiff may still pursue the state law claim. In close cases, however, a state judge is probably more likely to hold *Parratt* applicable than a federal judge. Also, even if the state judge does not apply *Parratt* and allows the § 1983 claim to proceed, plaintiff will gain only the benefit of federal law, not a federal forum.

V. Conclusion

Parratt v. Taylor was an attempt by the Supreme Court to prevent negligent torts from becoming the basis for federal civil rights actions merely because they were committed by state officials. The Court held that negligent deprivations of property by state officers do not violate procedural due process unless the state does not provide an adequate postdeprivation remedy to compensate the victim for the loss. The Court recently extended the *Parratt* holding to intentional deprivations of property in *Hudson v. Palmer*. It appears that the courts will further extend the doctrine to encompass negligent or intentional deprivations of life or liberty. This doctrine, if misapplied, could force an enormous number of cases involving constitutional violations by state officials into state courts as tort cases, rather than allowing them to proceed as federal civil rights actions.

In order to keep the federal courts from relegating many deserving § 1983 cases to state tort cases through the *Parratt* doctrine, attorneys must be cognizant of several restrictions on this doctrine. Although after *Hudson*, *Parratt* applies to both negligent and intentional deprivations, it applies only to random and unauthorized actions by state employees. In such cases, because the state could not anticipate or prevent the deprivation beforehand, a state postdeprivation remedy will satisfy due process. If, however, the deprivation occurred pursuant to established state procedures, then the *Parratt* doctrine does not apply and the case may proceed in federal court.

Parratt also applies only to violations of procedural due process, not to violations of the Bill of Rights, the equal protection clause, or the substantive component of the due process clause. Plaintiffs may still redress violations of these other constitutional rights in a § 1983 action regardless of whether the state also provides a remedy.

The most difficult situations for both plaintiffs' attorneys and federal judges to deal with will be cases involving excessive use of force by law enforcement officials. Excessive use of force is usually not authorized by state rules and regulations, and would

therefore seem to fit within the *Parratt* doctrine. If plaintiff can show, however, that the individual officer's actions were the result of inadequate training or screening, then the court might hold that government policy caused the harm, thereby taking the actions outside the reach of the *Parratt* doctrine. Another way for plaintiffs' attorneys to handle excessive force cases is to claim a violation of substantive due process or of the fourth amendment. If the plaintiff can show that the officer's actions were so abusive as to violate substantive due process or interefered with plaintiff's physical integrity in a manner that constituted an unreasonable seizure, then *Parratt* should not apply. It is possible, however, that the *Parratt* doctrine, as extended by *Hudson*, may relegate at least some cases of excessive use of force to state assault and battery cases.

Even in those cases in which a state postdeprivation remedy will satisfy due process, the remedy must be "adequate" in order to displace the federal action. The Supreme Court has not fully defined all the requirements of an adequate state remedy. It must allow plaintiff to have claims heard in a meaningful manner, but need not provide all the relief to which plaintiff would have been entitled in a § 1983 lawsuit.

If attorneys keep these limitations on the *Parratt* doctrine in mind, *Parratt* should not affect the great majority of civil rights cases which they bring to redress constitutional violations committed by state officers.