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Parratt v. Taylor: Limitations on the *Parratt* Analysis in Section 1983 Actions

In *Parratt v. Taylor*,[1] a 1981 case, the United States Supreme Court significantly modified due process analysis in section 1983 federal actions.[2] Section 1983 provides relief for the deprivation of any right, privilege, or immunity secured by the Constitution which has been caused by any person acting under color of law.[3] If, for example, an individual took another's automobile, he would deprive that person of his property interest in the car. However, he would violate section 1983 only if: 1) he had acted under color of law, and 2) he had not given the owner of the car due process of law (a meaningful chance to protect his property interest and voice his position) in conjunction with the deprivation.[4] This second element is critical because the fourteenth amendment does not guard against all deprivations of property; rather, it protects individuals only from deprivations conducted without due process of law.[5] At the time of the *Parratt* decision, section 1983 actions had become an increasingly large segment of the federal court docket and a burden on those courts.[6]

Parratt has become a major decision in the section 1983 field be-

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1 451 U.S. 527 (1981). The opinion is discussed at Part I *infra*, notes 21-67 *infra* and accompanying text.

2 *Id.*

3 Section 1983 reads, in pertinent part:

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

42 U.S.C. § 1983 (Supp. V 1981).

4 Parratt v. Taylor, 451 U.S. 527, 535 (1981).

5 The fourteenth amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added).

6 One cannot establish a direct causation between the number of section 1983 claims brought in federal court and the Supreme Court's *Parratt* decision. Nevertheless, the large volume of cases and the resulting problems have been well documented. *See* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 5-12, 26-30 (1980); *see also Parratt*, 451 U.S. at 554 n.13; Vicory v. Walton, 721 F.2d 1062, 1065 n.4 (6th Cir. 1983).

cause, although it did not alter the previous analysis, it redefined the threshold issue for establishing a section 1983 claim.[7] In *Parratt*, the Court held that when the State provides an adequate tort remedy for the deprivation, even though the remedial process comes a substantial time after the deprivation has occurred, the state remedy *itself* constitutes all the necessary due process required by the fourteenth amendment.[8] Therefore, in such cases, there is no deprivation of a protected interest without due process, and, accordingly, a section 1983 action will not lie.[9]

The federal courts have utilized the *Parratt* approach for three years, dismissing certain section 1983 actions when it has appeared that an adequate existing state procedure could remedy the deprivation.[10] However, *Parratt* has precipitated at least three conflicts. The first concerns whether *Parratt* can be reconciled with *Patsy v. Board of Regents*,[11] a post-*Parratt* decision wherein the Supreme Court reaffirmed that section 1983 plaintiffs need not first exhaust all possible state remedies before pursuing a section 1983 action in federal court.[12] Although an exhaustion requirement is analytically distinguishable from the *Parratt* approach, both positions can yield the same result.[13]

The second and third conflicts concern the scope of *Parratt's* application. Factually, *Parratt* dealt only with the deprivation of property interests.[14] Nevertheless, its approach seems to apply equally to all interests protected by the fourteenth amendment, thus additionally encompassing life and liberty interests.[15] Furthermore, conflict exists as to whether both negligent and intentional actions will fall within the *Parratt* analysis.[16] While *Parratt* discussed only negligent deprivations of property rights, some courts have extended the *Parratt*

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7 The full scope of *Parratt's* reach has yet to be determined. Although it applies to constitutional torts as a general category, Parts III and IV will discuss both its potential application and its justifiable application. Recently, the Supreme Court extended the *Parratt* analysis to intentional deprivations of property. *See* note 121 *infra*.

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

9 *Id.* at 544.

10 *See, e.g.*, Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983).

11 457 U.S. 496 (1982).

12 *Id.* at 516.

13 An exhaustion requirement recognizes a federal action but delays its entry into a federal forum. *Parratt*, in appropriate circumstances, defeats the federal action entirely. However, both effectively relegate the plaintiff to state court. *See* notes 69-72 *infra* and accompanying text.

14 *Parratt*, 451 U.S. at 529, n.1.

15 *See* notes 102-109 *infra* and accompanying text.

16 *See* notes 121-136 *infra* and accompanying text.

analysis to encompass intentional actions as well.[17]

Part I of this note examines the contours of the *Parratt* opinion. Part II identifies the source of the conflict between *Parratt* and the rejection of an exhaustion requirement. It examines *Parratt's* holding in light of not only *Patsy*, a post-*Parratt* decision, but also *Monroe v. Pape*,[18] the pre-*Parratt* decision which some commentators suggest is responsible for today's large-scale use of section 1983.[19] Part III analyzes whether *Parratt* pertains only to property interests or whether it should be expanded to cover life and liberty interests as well. In this regard, Part III considers *Ingraham v. Wright*,[20] a pre-*Parratt* case which applied a *Parratt*-like analysis to the liberty interest implicated by corporal punishment in public schools. Part IV discusses the relative merits of limiting *Parratt* to negligent conduct or allowing it to encompass both negligent and intentional deprivations of due process rights. Part V offers suggestions for the practitioner. It outlines the *Parratt* due process analysis currently being applied and discusses the most recent pleading requirements in section 1983 actions. Part VI concludes by suggesting that only a limited application of *Parratt* can be justified if the Supreme Court desires to harmonize *Parratt* with its other due process jurisprudence.

I. The Contours and Highlights of *Parratt*

Parratt v. Taylor[21] effectively resolved the problems presented by the vast number of constitutional tort[22] cases brought in federal court;[23] it did so by redefining what constitutes the deprivation of a protected interest without due process of law.[24] Under traditional

17 *See* notes 121 and 124 *infra* and accompanying text.

18 365 U.S. 167 (1961).

19 Whitman, *supra* note 6, at 5-7.

20 430 U.S. 651 (1977).

21 451 U.S. 527 (1981).

22 International Soc'y for Krishna Consciousness v. City of Evanston, 89 Ill. App. 3d 701, 411 N.E.2d 1030 (1980), *cert. denied*, 454 U.S. 878 (1981), defines "constitutional tort" as follows:

> The term has been used to describe an area of the law encompassing that which is not quite a private (common law) tort, but which contains tort elements; it is not a "constitutional law" matter per se, but it employs a constitutional test. Involved in such a claim is an alleged deprivation of one of the rights secured by the Constitution (the tort) by one acting under color of State law.

Id. at 707, 411 N.E.2d at 1036 (citations omitted).

23 *See* note 6 *supra*.

24 The Court also suggests that the burden on the federal courts could have been somewhat relieved had Congress added a minimum dollar limitation on 28 U.S.C. § 1343 (Supp. V 1981), the predicate for federal court jurisdiction in this matter. *Parratt*, 451 U.S. at 529. The total loss alleged in this case was only $23.50. *Id.*

analysis, an individual's due process rights were violated if he was denied the opportunity to voice his opinions and protect his interests in life, liberty, or property prior to the government action which impaired those protected interests.[25] *Parratt* delays the necessary process until a state tort action can be initiated,[26] thus allaying the fears of some in the judiciary that "every alleged injury which may have been inflicted by a state official acting under 'color of law' [would turn] into a violation of the Fourteenth Amendment cognizable under § 1983."[27]

In *Parratt*, a prison inmate sued prison administrators under section 1983,[28] claiming that prison employees negligently lost hobby materials which he had ordered.[29] The inmate filed this federal action even though Nebraska's tort claims procedure would have provided him relief.[30] Justice Rehnquist, speaking for the Court, held that the Nebraska tort remedies were "sufficient to satisfy the requirements of due process"[31] and denied the section 1983 claim.[32]

The Court began its opinion by considering the elements of a section 1983 action. It said that to state a claim under section 1983, a plaintiff must meet two requirements.[33] First, the alleged conduct must have been committed by a person acting under color of state law.[34] In *Parratt*, the Court did not question the satisfaction of this requirement; it simply cited to its earlier holding in *Monroe v. Pape*[35] which expansively defined the phrase "under color of law."[36] Sec-

25 J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 559 (1983) Exceptions to this rule are found for emergency or public health cases, specific replevin actions (*see* note 82 *infra* and accompanying text), and certain property rights (*see* Part III *infra*).

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

27 *Id.*

28 *See* note 3 *supra*.

29 The loss occurred at the Nebraska Penal and Correctional Complex. The hobby materials arrived at the prison and two employees (one civilian, one inmate) signed for them. The respondent was in segregation detention at the time; when he was released and able to receive the packages, they could not be found. *Parratt*, 451 U.S. at 529-30.

30 *Id.* at 530.

31 The Court said: "The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process." *Id.* at 544. With repect to this remedy, it is also interesting that the Court noted: "[A]lthough the state remedies may not provide the respondent with all the relief which may have been available under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process." *Id. See also* Smith v. Wade, 103 S. Ct. 1625 (1983) (in a proper case, punitive damages may be available under § 1983.).

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

33 *Id.* at 535.

34 *Id.*

35 365 U.S. 167 (1961).

36 *Monroe* reaffirmed the definition of "under color of law" which was given in United

ond, the alleged conduct must have deprived a person of "rights, privileges or immunities secured by the Constitution or laws of the United States."[37] In *Parratt*, the alleged deprivation was of a property interest secured by the fourteenth amendment. However, since the fourteenth amendment only protects against deprivations committed without due process,[38] the Court turned to a determination of whether the prisoner received due process from the state.[39]

Due process analysis presupposes two types of hearings: a predeprivation hearing afforded before the state impairs a life, liberty, or property interest,[40] and a postdeprivation hearing following the government's impairment of rights.[41] In most cases, the normal *predeprivation* hearing will satisfy the requirements of due process because the deprivation is "pursuant to some *established state procedure* and 'process' [can] be offered before any actual deprivation" takes place.[42] But, the *Parratt* Court has also determined that in some cases, *postdeprivation* procedures will also satisfy due process requirements.[43] The cases where postdeprivation process has been allowed

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States v. Classic, 313 U.S. 299 (1941) and affirmed in Screws v. United States, 325 U.S. 91 (1945). The *Classic* Court said: "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Classic*, 313 U.S. at 326. This definition is firmly rooted in the Court's jurisprudence. *See* Polk County v. Dodson, 454 U.S. 312 (1981). In *Polk County*, the plaintiff alleged that Shepard, an attorney in the Polk County Offender Advocate's office, had failed to represent him adequately in an appeal by withdrawing as counsel because his claims were frivolous. The Court found that Shepard did not act under color of law.

Polk County is novel in that it adopted a "functional" color of law test. Although the employment relationship will be a relevant factor, it is not the sole factor in determining whether an individual acts "under color of law." *Id.* at 321. In *Polk County,* the public defender's "functions and obligations were in no way dependent on state authority." *Id.* at 318. An argument could be made which would remove *Parratt* and like cases from "under color of law" by suggesting that when a prison employee loses a package or commits similar negligent harm, he is not acting with special power or authority vested only by the state.

37 *Parratt*, 451 U.S. at 535.

38 *See* note 5 *supra* and accompanying text.

39 In outlining the two necessary elements for a § 1983 action, the Court rejected any state of mind requirement. *Parratt*, 451 U.S. at 534. In so doing, the Court again relied on *Monroe* as support that negligence is sufficient to state a claim under § 1983:

> [I]t is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, *neglect* . . ., state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Id. at 534-35 (emphasis added).

40 *Id.* at 537.

41 *Id.* at 538.

42 *Id.* at 537 (emphasis added).

43 *Id.* at 538.

"recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process" is a proper predicate for looking to a meaningful postdeprivation remedy in due process analysis.[44] Notably, in constitutional tort cases, a meaningful predeprivation hearing is at best impractical, and very often impossible. The *Parratt* approach, then, requires a predeprivation hearing when the deprivation is the result of an established state procedure; however, in cases of emergency or where a predeprivation hearing is impractical, an adequate postdeprivation remedy will satisfy due process.[45]

Given this perspective, the *Parratt* Court assumed that a court must consider the total state action, both before and *after* the deprivation, to determine whether due process has been afforded.[46] This assumption is pivotal, for it precludes basing a violation upon the initial deprivation alone. In acknowledging this point, the *Parratt* Court said: "We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law . . . ."[47] The facts of *Parratt* presented a classic example of a deprivation without the denial of due process. The alleged deprivation, loss of the prisoner's hobby materials, did not result from an "established state procedure."[48] Rather, the loss occurred as a "result of a

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44 *Id.* at 539. For a considerably different characterization of the cases allowing postdeprivation process, see Fuentes v. Shevin, 407 U.S. 67 (1972):

> Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the state has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food.

Fuentes, 407 U.S. at 90-92 (footnotes omitted).

45 *See* notes 42-44 *supra* and accompanying text.

46 This policy assumption is unstated by the Court. Nevertheless, the assumption is essential if the Court is to allow state postdeprivation remedies to satisfy due process and defeat a § 1983 cause of action.

47 *Parratt*, 451 U.S. at 542 (quoting Bonner v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975), *cert. denied*, 435 U.S. 932 (1978)).

48 *Parratt*, 451 U.S. at 541. Actually, the prison employees deviated from the normal procedure in which no inmate other than the recipient would sign for the package. *Id.* at 530.

random and unauthorized act by state employees."[49] As in most tort cases, the prison officials in *Parratt* could not precisely predict when any loss would occur. The Court thus examined the postdeprivation process to determine whether due process had been afforded the injured party.[50]

The Supreme Court clarified and affirmed the *Parratt* opinion one year later in *Logan v. Zimmerman Brush Co.*[51] In *Logan*, the Court explained that *Parratt* applies only in situations that require the state to act quickly, or where it could not otherwise provide predeprivation process.[52] The Court said that under no circumstances would postdeprivation process satisfy due process when the deprivation was effectuated through an established state procedure.[53]

In *Logan*, the Court distinguished *Parratt* by emphasizing that the tortious loss in *Parratt* was the result of a random and unauthorized act.[54] The property loss in *Logan*, however, resulted from an established state procedure.[55] In *Logan*, the Illinois Fair Employment

49 *Id.* at 541. *Parratt* apparently is not limited to state employees but extends to federal employees as well. In Weiss v. Lehman, 676 F.2d 1320 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 725 (1983), a case once remanded for consideration in light of *Parratt*, the defendant (Lehman) was a Forest Service employee. Thus, inferentially, the Supreme Court applied *Parratt* to federal employees.

The Court of Appeals defeated the § 1983 action since the plaintiff would have had an adequate remedy under the Federal Tort Claims Act. A dissent suggested that *Parratt* should not be used to weigh between two federal forums.

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

51 455 U.S. 422 (1982). In *Logan*, Zimmerman Brush Co. discharged the plaintiff purportedly because his short left leg made it impossible for him to continue as a shipping clerk. Logan brought his unlawful discharge complaint to the Illinois Fair Employment Practices Commission. However, the Commission, apparently through inadvertence, scheduled the necessary conference for five days after the expiration of the statutory limitation period for claims. The Illinois Supreme Court held that Logan's claim was thereby extinguished. The United States Supreme Court reversed.

52 The Court said that "absent 'the necessity of quick action by the State or the impracticality of providing any predeprivation process,' a postdeprivation hearing here would be constitutionally inadequate." *Id.* at 436.

53 In *Logan* the Court said: "Unlike the complaint 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." *Id.*

54 The *Logan* Court stated:

> In *Parratt,* the Court emphasized that it was dealing with "a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure." Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the [Illinois Fair Employment Practices 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.*

Id. at 435-36 (emphasis added).

55 *Id.*

Practices Commission inadvertently scheduled a conference on the plaintiff's fair employment charge for five days past the statutory limitation period, thereby depriving him of his complaint.[56] The loss to Logan, then, happened by operation of law. The Court clearly stated that "*Parratt* was not designed to reach such a situation."[57]

Much confusion has arisen in the courts of appeals with respect to the extent of *Parratt's* applicability.[58] The seeds of this confusion are found in the concurring opinions in *Parratt*. Justice Blackmun, concurring with Justice White, read the majority opinion narrowly, limiting it to cases involving unintentional deprivations of property interests.[59] According to Justice Blackmun, the *Parratt* decision would not include deprivations of life or liberty, nor would postdeprivation process suffice in any case of intentional deprivation.[60] Unfortunately, neither Justice Blackmun nor Justice White offered an authority or rationale for his statements.

However, *Ingraham v. Wright*,[61] a pre-*Parratt* case dealing with corporal punishment, may lessen the importance of Justice Blackmun's remarks with respect to liberty interests. In *Ingraham*, the Court applied a *Parratt*-type analysis to a liberty interest in personal safety.[62] The Court found that corporal punishment in public schools implicates a constitutionally protected liberty interest.[63] But, the Court held that the traditional common law remedies against teachers and school administrators are fully adequate to afford due process.[64] As in *Parratt*, these common law remedies are postdeprivation remedies.

In summary, *Parratt* set the stage for the controversy which now prevails. In the face of a growing number of section 1983 claims in federal courts, *Parratt*, in effect, permitted more claims by holding that negligence may be sufficient to state a claim under section 1983.[65] However, *Parratt* also held that in situations where predeprivation process is impractical, an adequate postdeprivation

56 *Id.* at 426.

57 *Id.* at 436.

58 *See* Parts III-IV *infra*.

59 *Parratt*, 451 U.S. at 545-46.

60 *Id.*

61 430 U.S. 651 (1977). In *Ingraham,* several junior high school students filed charges seeking damages and equitable relief as a result of alleged harm due to excessive disciplinary corporal punishment. The Supreme Court affirmed the dismissal of the charges.

62 *Id.* at 674.

63 *Id.* at 672.

64 *Id.*

65 *See* note 122 *infra* and accompanying text.

state remedy will afford sufficient due process.[66] In allowing a postdeprivation remedy to suffice, the Court assumed that all state action, both before and after the deprivation, must be treated as one transaction for due process analysis.[67]

II. The Exhaustion Requirement In Light of *Parratt*

A considerable theoretical difference exists between an exhaustion requirement and the holding in *Parratt v. Taylor*.[68] Under *Parratt*, a section 1983 claim will be *defeated* if the State provides an adequate postdeprivation remedy through which the plaintiff can seek relief.[69] Conversely, an exhaustion requirement begins by *recognizing* the section 1983 cause of action, but simply compels the section 1983 plaintiff to pursue all appropriate state remedies before entering federal court.[70] At its worst, an exhaustion requirement would delay the federal action; it would not, however, defeat it.[71]

Although theoretically different, both *Parratt* and an exhaustion requirement have the same net effect. An exhaustion requirement forces the plaintiff to seek relief in state court. Initial recourse to a federal forum is foreclosed even if the state itself inflicted the harm.

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66 *See* notes 43-44 *supra* and accompanying text.

67 *See* notes 46-47 *supra* and accompanying text. In *Parratt*, the Court revised its definition of due process because the Court believed the state remedies were sufficient to make recourse to the federal courts unnecessary. Notably, the Court has adopted this approach in considering securities law. At least twice the Court has refused to expand its definition of "security" because federal securities law was unnecessary to regulate the instrument. In International Bhd. of Teamsters v. Daniel, 439 U.S. 551 (1979), the Court refused to expand the Securities Act to include employee pension plans because the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829 (1974), was designed to encompass pension plans. *Id.* at 569-70. In Marine Bank v. Weaver, 455 U.S. 551 (1982), the Court refused to include a bank Certificate of Deposit within the definition of a security and said: "It is unnecessary to subject issuers of bank certificates of deposit to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under federal banking laws." *Id.* at 559.

68 For a contrary opinion, see Juncker v. Tinney, 549 F. Supp. 574, 578 (D. Md. 1982); *see also*, Smolla, *The Displacement of Federal Due Process Claims By State Tort Remedies*, 1982 U. ILL. L. REV. 831, 863-68 (1982). Professor Smolla believes that the "post-deprivation concept" can be reconciled with the rejection of an exhaustion requirement. *Id.* at 863. His article traces the history of the "post-deprivation due process concept" and concludes that its use "could render the Supreme Court's whole approach to procedural due process more flexible and coherent." *Id.* at 835.

69 *See* note 31 *supra* and accompanying text.

70 "[Exhaustion] does not defeat federal-court jurisdiction, it merely defers it. It permits the States to correct violations through their own procedures, and it encourages the establishment of such procedures." Patsy v. Board of Regents, 457 U.S. 496, 532-33 (1982) (Powell, J. dissenting) (footnotes and citations omitted). *See also* Vicory v. Walton, 721 F.2d 1062, 1064 n.3 (6th Cir. 1983).

71 *See* note 70 *supra*.

Similarly, *Parratt* forces the plaintiff to seek relief in state courts by denying access to a federal forum specifically because the plaintiff could have sought relief from the state. With both *Parratt* and an exhaustion requirement, then, section 1983 plaintiffs must seek relief from the state. As such, *Parratt* and the *rejection* of an exhaustion requirement for section 1983 actions are simply inconsistent.[72]

Three Supreme Court opinions, *Monroe v. Pape*,[73] *Fuentes v. Shevin*,[74] and *Patsy v. Board of Regents*,[75] substantiate the irreconcilable differences between the Court's approach in *Parratt* and the rationale underlying the rejection of an exhaustion requirement. *Monroe v. Pape*, decided twenty years before *Parratt*, concerned a damage action for an illegal home invasion by thirteen Chicago police officers.[76] *Monroe* is important for its expansive reading of "under color of law"[77] and additionally for two points relevant to exhaustion requirements. First, the Court stated that once a plaintiff proves a deprivation[78] and the conduct causing the deprivation satisfies the requirements of "under color of law," the plaintiff has stated a cause of action and must be afforded access to a federal forum.[79] The existence of an adequate state remedy is unimportant.[80] Notably, this position finds support in the Supreme Court's series of cases dealing with state replevin statutes. In *Fuentes v. Shevin*,[81] the first of the series, the Court stated that "a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment."[82] Therefore, even though there may be a tort remedy

72 The rejection of an exhaustion requirement means that § 1983 plaintiffs need never resort to state courts. *Parratt* forces potential § 1983 plaintiffs to use only the state courts. It accomplishes this by defeating the federal cause of action. This tactic is impermissible in light of the legislative history of § 1983.

73 365 U.S. 167 (1961).

74 407 U.S. 67 (1972).

75 457 U.S. 496 (1982).

76 *Monroe*, 365 U.S. at 169.

77 *See* note 36 *supra*. The *Parratt* Court relied on *Monroe* for its definition of "under color of law." *Parratt*, 451 U.S. at 535.

78 The type of deprivations referred to in *Monroe* would be "initial" deprivations in *Parratt's* terms.

79 *Monroe*, 365 U.S. at 170, 172, 187.

80 *Id.* at 183. The *Monroe* Court acknowledged that Illinois had a remedy sufficient to afford the petitioners full redress for their harm. *Id.* at 172.

81 407 U.S. 67 (1972).

82 *Id.* at 85. The continued validity of *Fuentes* is questionable. Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), seems to have abandoned much of the rationale which *Fuentes* stood on. However, one year later, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), apparently gave new life to *Fuentes*. Yet, even assuming that *Mitchell* replaced *Fuentes* as the controlling precedent in terms of postdeprivation remedies, the *Parratt* Court fares no

subsequent to the deprivation, that possibility cannot change the character of the initial deprivation. Thus, both *Monroe* and *Fuentes* reject *Parratt's* assumption[83] that postdeprivation state remedies can transform an initial deprivation into a constitutionally harmless act which does not violate due process.

Second, *Monroe* stated that even if a state remedy exists, it need not be exhausted since the federal remedy was designed to supplement the state remedy.[84] The Court succinctly stated:

> *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.[85]

Monroe, then, clearly supports the rejection of an exhaustion requirement.[86] The same rationale in *Monroe* which defeats an exhaustion requirement, however, also undercuts the *Parratt* Court's policy decision to limit certain constitutional tort cases to state courts.[87] *Parratt* is simply inconsistent with the purpose of section 1983 as outlined in *Monroe*.[88]

Patsy v. Board of Regents,[89] a post-*Parratt* case, also suggests that *Parratt* cannot comfortably coexist with the rejection of an exhaustion requirement. *Patsy* is the most recent of the numerous decisions

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better. The *Mitchell* court only advocated the postdeprivation process because the subsequent hearing was immediate. *Mitchell*, 416 U.S. at 611, 618. "Under Louisiana procedure, however, the debtor, Mitchell, was not left in limbo to await a hearing that might or might not 'eventually' occur . . . . Louisiana law expressly provides for an *immediate* hearing and dissolution of the writ 'unless the plaintiff proves the grounds upon which the writ was issued.' " *Id.* at 618 (emphasis added) (citation omitted). Obviously, in a *Parratt* situation, requiring the injured party to initiate a state tort remedy does not afford an immediate hearing.

Mitchell can also be distinguished from *Fuentes* because the *Mitchell* Court emphasized that both the plaintiff and the defendant had interests in the property. No such situation exists in *Parratt*.

83 *See* note 46 *supra* and accompanying text.

84 *Monroe*, 365 U.S. at 183.

85 *Id.* (emphasis added).

86 In analyzing "under color of law," the *Monroe* court realized that for § 1983 actions, recourse to a state forum was at best supplementary but never mandatory. As such, it supports the rejection of an exhaustion requirement.

87 Obviously, given the predicate offense of a deprivation under color of law where no recourse to the state courts is required, *Parratt* cannot consistently support a definition of due process which defeats a federal action by simply making recourse to the state an element affecting whether the deprivation in fact occurred.

88 This tension was mentioned in Vail v. Board of Educ., 706 F.2d 1435, 1454 (7th Cir. 1983) (dissenting opinion). For contrary opinions, see note 68 *supra*.

89 457 U.S. 496 (1982). Georgia Patsy alleged that her employer, Florida International University, had denied her employment opportunities solely on the basis of race and sex.

in which the Supreme Court has rejected an exhaustion requirement for section 1983 actions.[90] In *Patsy*, a case alleging race and sex discrimination, the Court of Appeals for the Fifth Circuit imposed a requirement that section 1983 plaintiffs exhaust any "adequate and appropriate" administrative remedies.[91] In doing so, the court adopted a five point test to determine whether a state remedy was adequate and appropriate.[92] Rejecting the Fifth Circuit's decision, the Supreme Court quoted extensively from the legislative history in support of section 1983 and said:

> The 1871 Congress intended [section 1983] to "throw open the doors of the United States courts" to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights, and to provide these individuals *immediate access to the federal courts notwithstanding any provision of state law to the contrary*.[93]

The legislative history of section 1983 therefore indicates that someone who has been deprived of a protected interest by the state need never enter a state court to obtain relief or redress.[94] In fact, many legislators thought section 1983 would provide concurrent forums in the state and federal systems, allowing a plaintiff to choose between them.[95]

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90 *Patsy*, 457 U.S. at 500, 516. *See also* McNeese v. Board of Educ., 373 U.S. 668, 671 (1963).

91 *Patsy*, 457 U.S. at 498.

92 The Fifth Circuit had held that before bringing a federal action, a plaintiff must exhaust state remedies with the following five characteristics:

1) the state remedy must provide for an orderly system of review or appeal;
2) the agency administering the remedy can grant relief approximately commensurate with the claim;
3) relief is available within a reasonable time;
4) the procedures are fair, not unduly burdensome, and not used to harass or discourage those with legitimate claims; and
5) interim relief is available to prevent irreparable injury during the process.

Where the above five requirements are met, "a court must further consider the particular administrative scheme, the nature of the plaintiff's interest, and the values served by the exhaustion doctrine in order to determine whether exhaustion should be required." *Id.* at 499.

93 *Id.* at 504 (quoting remarks of Rep. Lowe, CONG. GLOBE, 42d Cong., 1st Sess. 376 (1871)). Section 1 of the Civil Rights Act of 1871 was the precursor to § 1983.

94 Furthermore, opponents of the bill gave it the same reading and specifically criticized it on this very point:

> [Section 1983] does not even give the State courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the fourteenth amendment, fairly or not. It takes the whole question away from them in the beginning.

Patsy, 457 U.S. at 505 n.7 (quoting remarks of Rep. Storm, CONG. GLOBE, 42d Cong., 1st Sess., App. 86 (1871)).

95 *Patsy*, 457 U.S. at 506.

Patsy, then, further demonstrates the confusion in the Supreme Court's analysis. The Court has consistently held that a section 1983 plaintiff need not enter a state court or exhaust state relief.[96] The *Parratt* Court reversed this position by requiring an injured party to enter state court even though the state itself inflicted the injury. *Parratt* accomplished this by manipulating the definition of due process to make a federal alternative impossible.[97] The *Patsy* decision later rejected an exhaustion requirement again, thus undercutting the rationale behind *Parratt*.

Parratt is an anomaly. By denying a federal forum because state remedies are available, *Parratt* is inconsistent with *Monroe* and *Patsy* which have both considered the exhaustion requirement question.[98] This inconsistency arises only because of the way *Parratt* defined due

96 *See* notes 85, 93, and 94 *supra* and accompanying text.

97 *See* notes 31 and 47 *supra* and accompanying text.

98 Two other notable inconsistencies have been sparked by *Parratt v. Taylor*. The first inconsistency centers around the similarity between the majority's result in *Parratt* and Justice Frankfurter's dissent in Monroe v. Pape, 365 U.S. at 202-59. *Parratt* held that an adequate postdeprivation remedy would suffice for due process as long as the constitutional tort was not pursuant to an established state procedure or done by the State with such forethought that there was time for predeprivation process. With only a few variations, this was also the result reached by Justice Frankfurter in his dissent in *Monroe*. *Parratt* is inconsistent in that it reaches a result similar to that of the *Monroe* dissent, yet adopts the *Monroe* majority's definition of "under color of law." *Parratt*, 451 U.S. at 535. Justice Frankfurter reached his result by offering a new understanding of "under color of law." He believed that "all the evidence converges to the conclusion that Congress by [§ 1983] created a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some 'statute, ordinance, regulation, custom, or usage' sanctioned the grievance complained of." *Monroe*, 365 U.S. at 237 (Frankfurter, J. dissenting). In essence, unless there is some affirmative state pronouncement (much like *Parratt's* "established state procedure") or well-confirmed custom which caused the deprivation, the ensuing government action would not be under color of law and thus would not be a proper subject of a § 1983 action. Justice Frankfurter stated:

> If a plaintiff can show that defendant is acting pursuant to the specific terms of a state statute, [§ 1983] will apply. If he can show that defendant's conduct is within the range of executive discretion in the enforcement of a state statute, or municipal ordinance, [§ 1983] will apply. Beyond these cases will lie the admittedly more difficult ones in which he seeks to show some " 'custom or usage' which has become common law."

Id. at 246 (citations and footnote omitted). He continued:

> As to the adequacy of state-court protection of person and property, there seems a very sound distinction, as a class, between injuries sanctioned by state law (as to which there can never be state-court redress, if at all, unless (1) the state courts are sufficiently receptive to a federal claim to declare their own law unconstitutional, or (2) the litigant persists through a tortuous and protracted process of appeals, after a state trial court has found the facts, through the state-court system to this Court) and injuries not sanctioned by state law. To make this line of distinction determine the incidence of Civil Rights legislation serves to cover the bulk of cases where federal judicial protection would be needed.

process in constitutional tort actions. If the *Parratt* Court had not included postdeprivation state remedies as an integral part of its determination as to whether due process has been afforded an injured party, *Parratt* would not have run afoul of the underlying rationale in *Fuentes* and the legislative history of section 1983. Both before and after *Parratt*, the Court has given the legislative history of section 1983 consistent readings. *Parratt*, however, rejects the stated intent of the legislators.

Id. at 249-50.

Thus, Frankfurter's definition of "under color of law" encompassed only those violations which were pursuant to an established state procedure. All other violations could not be brought under § 1983 because they did not meet the "under color of law" test. *Parratt* left § 1983 and its "under color of law" test intact. However, it defeated "non-established procedure" actions by adjusting the definition of due process to take into account postdeprivation state remedies, a position expressly contrary to the legislative intent behind § 1983.

The second inconsistency arises because of the difference in degree between the harm in *Parratt* and the type of harm sought to be corrected by § 1983. Section 1983 "was enacted to deter *real abuses* by state officials in the exercise of governmental powers." *Parratt*, 451 U.S. at 549 (emphasis added). Arguably, the conduct alleged in *Parratt* should not have fallen under the scope of § 1983. Section 1983 was intended, in part, to provide a federal remedy where state law provided a theoretically adequate remedy which was not available in practice. *See Monroe*, 365 U.S. at 174; *see also* note 99 *infra* and accompanying text. As the Congress contemplated this federal remedy, it was primarily attempting to curb the abuses brought by the Ku Klux Klan in the South. *Monroe*, 365 U.S. at 174-75. (Although the existence of the Ku Klux Klan motivated § 1983, the statute actually aimed at those state agents who were unwilling or unable to carry out their duties because of the Klan's strong influence.) The legislative history of § 1983 contains the following example of the type of harm Congress sought to correct:

> If every sheriff in South Carolina refuses to serve a writ for a colored man and those sheriffs are kept in office year after year by the people of South Carolina, and no verdict against them for their failure of duty can be obtained before a South Carolina jury, the State of South Carolina . . . has denied that protection.

Monroe, 365 U.S. at 177. The negligent loss of hobby materials valued at $23.50 in *Parratt* seems quite removed from the intentional and pervasive refusal to serve writs as suggested in the previous example. By placing the trivial loss and alleged conduct in *Parratt* within § 1983, the *Parratt* Court misses the mark. In terms of degree, one must incredibly stretch § 1983 to protect against a state employee who negligently misplaces a package.

In this regard, see Johnson v. Miller, 680 F.2d 39 (7th Cir. 1982). In *Johnson*, the plaintiff sued for damages resulting from two arrests pursuant to two incorrectly issued arrest warrants. In affirming the dismissal of the claims, the Seventh Circuit noted that "[t]he Fourth Amendment and section 1983 have higher objects in view than getting arresting officers to backstop the mistakes of their superiors." *Id.* at 42.

Although the two previously mentioned inconsistencies may appear to support the *Parratt* approach which limits federal actions, they actually do not. Rather, these inconsistencies suggest that the problem caused by the volume of § 1983 actions is centered in *Monroe v. Pape* and its expansive definition of "under color of law." These two inconsistencies do not advocate the *Parratt* solution which redefines due process for constitutional tort cases. Instead, they create an atmosphere of uncertainty which magnifies the problems *Parratt* created with respect to its scope of application and its incompatability with the rejection of an exhaustion requirement.

Because of these conflicts with the exhaustion requirement question, the Court needs to reassess, or at least refine, its assumption that due process analysis should reach past the actual deprivation and consider possible postdeprivation remedies. Section 1983 originally had four main purposes:[99]

1) to override certain kinds of state laws;
2) to provide a remedy where state law was inadequate;
3) to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice; and
4) to provide a remedy in the federal courts supplementary to any remedy a state might have.

Parratt's assumption that a postdeprivation hearing will satisfy due process seems to allow the second factor to negate the fourth factor. However, practically speaking, the fourth factor subsumes the second and both may peacefully coexist.

III. Should the *Parratt* Analysis Expand Beyond Property Interests?

Parratt, if held strictly to its facts, only considered alleged deprivations of *property* interests.[100] In *Parratt*, the plaintiff claimed that prison employees had deprived him of hobby materials which he had ordered. However, several courts of appeals have applied *Parratt* beyond the deprivation of property interests to also encompass the deprivations of both life and liberty interests.[101]

The circuit courts which extend *Parratt* to include both life and liberty interests often employ a two-part rationale.[102] First, these courts straightforwardly extend the logic of the *Parratt* opinion. The logic argument focuses on whether the alleged state conduct was random and unauthorized. If this is taken as the threshold issue, then *Parratt* cannot be rationally limited to property interests alone. In *Juncker v. Tinney*,[103] Judge Young's stance exemplifies the position taken by these courts:

> The logic of *Parratt* permits no principled distinction between deprivations of property and liberty interests. If a deprivation

99 McNeese v. Board of Educ., 373 U.S. 668, 671-72 (1963).

100 *Parratt*, 451 U.S. at 529, n.1.

101 *See, e.g.*, Daniels v. Williams, 720 F.2d 792 (4th Cir. 1983); Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983); Wolf-Lillie v. Sonquist, 699 F.2d 864 (7th Cir. 1983); Johnson v. Miller, 680 F.2d 39 (7th Cir. 1982); Ellis v. Hamilton, 669 F.2d 510 (7th Cir. 1982) *cert. denied*, 103 S. Ct. 488 (1982); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345 (9th Cir. 1981).

102 *E.g.* Daniels v. Williams, 720 F.2d 792 (4th Cir. 1983).

103 549 F. Supp. 574 (D. Md. 1982).

> results from a "random and unauthorized act" by a state official, the State is no more able to predict the deprivation, and a pre-deprivation hearing is no more possible, when the deprivation involves a liberty interest than when it involves a property interest.[104]

Based only on the logic of *Parratt*, life and liberty interests join property interests in being amenable to the *Parratt* analysis.

The second rationale for extending *Parratt* is found in *Ingraham v. Wright*,[105] a case cited by *Parratt* with approval.[106] *Ingraham* applied a *Parratt*-like analysis to the liberty interest implicated by corporal punishment in schools.[107] The *Ingraham* Court found no deprivation of liberty without due process because the traditional state common law remedies for personal injury were sufficient to satisfy the due process requirements.[108] As in *Parratt*, these common law remedies were postdeprivation, providing relief only after the state injured the plaintiff. The courts that use *Ingraham* to extend *Parratt* use a pure syllogism: *Ingraham* applied a *Parratt*-like analysis to a liberty interest, and *Parratt* followed the *Ingraham* decision, therefore, the *Parratt* Court intended its analysis to apply to liberty interests as well as property interests. The syllogism is sound; however, its broad application may be somewhat weakened by the facts of *Ingraham*. *Ingraham* concerned corporal punishment in schools, an area which the *Ingraham* Court admitted to be a special circumstance in common law history.[109]

Arguing against this expansionist movement, Justice White and Justice Blackmun, concurring in *Parratt*, understood that *Parratt* would not apply to cases concerning deprivations of life or liberty.[110] Unfortunately, neither of the Justices explained the rationale for this position. Some courts of appeals have also limited *Parratt* to property interests.[111] But, they too have not explained why they have imposed

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104 *Id.* at 576.

105 430 U.S. 651 (1977).

106 *Parratt*, 451 U.S. at 542.

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

108 *Id.*

109 *Id.* at 660-63, 674-75.

110 "I do not read the Court's opinion as applicable to a case concerning deprivation of life or of liberty." *Parratt*, 451 U.S. at 545 (Blackmun, J. concurring).

111 *See, e.g.*, Burtnieks v. City of New York, 716 F.2d 982 (2d Cir. 1983); 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*, 103 S. Ct. 1741 (1983). *See also*, Beard v. O'Neal, Nos. 82-1893; 82-2096 (7th Cir. filed Feb. 22, 1984) (Swygert, J., dissenting) (suggesting that *Parratt* should not apply to deprivations of life interests).

this restriction. For example, in *Wakinekona v. Olim*,[112] the Court of Appeals for the Ninth Circuit relied simply on Justice Blackmun's concurring opinion, without explanation, as support for limiting *Parratt*.[113] This unembellished reliance seems misguided since a majority of the Court adopted the *Parratt* opinion without Blackmun's restriction.[114]

However, there is a means to add some substance to the concurring opinions in *Parratt*. American jurisprudence traditionally recognizes that property interests, while worthy of protection, should in times of exigency acquiesce more readily than liberty or life interests. In essence, there seems to be a hierarchy of constitutionally protected interests. Passages from two Supreme Court decisions suggest this hierarchy. In *Mitchell v. W.T. Grant Co.*,[115] a case dealing with state replevin statutes, the Court stated that "[t]he usual rule has been '[w]here *only property rights* are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination is adequate.' "[116] In *Parratt*, the Court quoted this passage with approval.[117] Additionally, in *Hodel v. Virginia Surface Mining and Reclamation*,[118] the Court discussed a provision of the Surface Mining Control and Reclamation Act which allowed immediate cessation orders if the mining operation created immediate danger to health and safety.[119] In upholding the orders, the Court stated: "It is sufficient, where *only property rights are concerned* that there is at *some* stage an opportunity for a hearing and a judicial determination."[120]

Thus, the bare words of the concurring opinions in *Parratt* can be made meaningful by reading them in light of this traditional hierarchy of constitutional interests. This hierarchy suggests that due process may be delayed until after the deprivation only when property interests are involved; no delay is permissible for either life or

112 664 F.2d 708 (9th Cir. 1981), *rev'd on other grounds*, 103 S. Ct. 1741 (1983).

113 *Id.* at 715.

114 *See Haygood*, 718 F.2d at 1479. The property "limitation appeared neither in the Court's opinion, which commanded five votes in addition to those of Justices White and Blackmun, nor in the concurrence of Justice Stewart, one of those who joined the majority. Moreover, Justice Blackmun provided no rationale for the limitation he suggested." *Id.*

115 416 U.S. 600 (1974).

116 *Id.* at 611.

117 *Parratt*, 451 U.S. at 540.

118 452 U.S. 264 (1981).

119 Id. at 298.

120 *Id.* at 303 (quoting Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599 (1950)) (emphasis added).

liberty interests. This subordination of property interests supports a limited application of *Parratt* to its facts.

The argument for limiting *Parratt* to property interests is stronger than the argument in support of expansion. However, these opposing views can be reconciled by recognizing the property limitation as a traditional threshold question reached one step before the *Parratt* analysis, thus accommodating both *Parratt* and the hierarchy of constitutional interests. The Court's willingness to expand *Ingraham* beyond its admittedly unique factual circumstance remains the only incalculable variable.

IV. Should Intentional Acts Fall Within the *Parratt* Analysis?

The *Parratt* opinion dealt solely with deprivations resulting from negligent conduct.[121] In fact, *Parratt* represents the first time that the Supreme Court held negligent conduct sufficient to state a claim under section 1983.[122] However, as with the property interest issue, the concurring opinions in *Parratt*, by rejecting the extension of the *Parratt* analysis to intentional conduct, have created conflict among the lower federal courts.[123]

The courts which would extend *Parratt* to intentional conduct use an argument similar to that used by the courts extending *Parratt* beyond property interests.[124] They rely on the straightforward logic of *Parratt* and its focus on whether the state action was random and unauthorized. In *Palmer v. Hudson*,[125] the Court of Appeals for the Fourth Circuit said that "once it is assumed that a postdeprivation remedy can cure an unintentional but negligent act causing injury, inflicted by a state agent which is unamenable to prior review, then that principle applies as well to random and unauthorized intentional acts."[126] This position correctly recognizes that "intentional"

121 *Parratt*, 451 U.S. at 530. After this note had been written, the United States Supreme Court handed down its decision in Hudson v. Palmer, 104 S. Ct. 3194 (1984). In *Hudson*, the Court extended the *Parratt* analysis to *intentional* deprivations of property.

122 Id. at 534.

123 Justices Blackmun and White argue that *Parratt* should be limited to negligent conduct only. *See id.* at 545-46.

124 *See, e.g.*, Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1983); Palmer v. Hudson, 697 F.2d 1220 (4th Cir. 1983); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345 (9th Cir. 1981).

125 697 F.2d 1220 (4th Cir. 1983).

126 *Id.* at 1222. The *Palmer* court further stated:

> *Parratt's* scope cannot easily be limited to negligent deprivations of property. For, if the underlying principle is, as Justice Rehnquist stated in a plurality opinion, that when no practical way to provide a predeprivation hearing exists, a postdeprivation hearing will satisfy the dictates of procedural due process, then it as well applies to an intentional deprivation for which meaningful prior review was impractical.

refers to the state of mind of the actor at the time of the act,[127] but does not alter the characterization of the *act* as random and unauthorized.[128] As such, *Parratt* may apply to intentional acts.

Some courts refuse to extend *Parratt* beyond negligent acts.[129] One rationale suggested for this limitation is that intentional acts, by definition, cannot be random and unauthorized.[130] This position finds support in Justice Blackmun's concurring opinion where he mentioned that "[w]hile 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."[131] This position seems erroneous. To suggest that intentional conduct cannot be "random and unauthorized" in the *Parratt* sense presupposes a detachment on the part of state agents which probably does not exist. The individual committing the harm cannot divorce himself from his conduct and act like a third party state representative whose notice defeats the "random and unauthorized" threshold.

When *Parratt* is read in light of *Logan v. Zimmerman Brush Co.*,[132] it seems that "random and unauthorized" events are those events not carried out pursuant to an "established state procedure."[133] As such, even if one were to assume that intentional acts are premeditated, that does not impart to the state sufficient knowledge and complicity to qualify the acts as pursuant to an "established state procedure." For example, battery is an intentional tort.[134] But it is ridiculous to contend that an intentional battery will always lend itself to

127 W. PROSSER, THE LAW OF TORTS 30 (4th ed. 1971).

128 *Id.* The act's random character with respect to state government planning is unrelated to the actor's state of mind. However, this should be read together with notes 141-46 *infra* and accompanying text.

129 *See* Vail v. Board of Educ., 706 F.2d 1435 (7th Cir. 1983); Weiss v. Lehman, 676 F.2d 1320 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 725 (1983).

130 *See Vail*, 706 F.2d at 1441. The *Vail* court suggests that intentional acts cannot be random and unauthorized. In refusing to extend *Parratt* to intentional acts, the court said: "The Supreme Court had the opportunity but refused to expand *Parratt* beyond 'a tortious loss of property or result of a random and unauthorized act by a state employee.'" *Id.*

131 *Parratt*, 451 U.S. at 546.

132 455 U.S. 422 (1982). *See* note 51 *supra*.

133 *Logan*, *see* note 132 *supra*, creates a universe of state actions which seems to have only two sets. One set consists of all activities accomplished through an established state procedure. The other set consists of those activities which are not pursuant to an established state procedure. Although random and unauthorized activities fall within the second set, it has not yet been determined whether "random and unauthorized" defines the entire content of the second set.

134 W. PROSSER, *supra* note 127, at 34.

predeprivation process or never be "random and unauthorized."[135] Thus, by focusing on the logic of *Parratt* and identifying "random and unauthorized" as the threshold issue, intentional conduct seems to fall within the scrutiny of the *Parratt* approach. However, whether the alleged conduct is negligent or intentional, the postdeprivation remedies must still satisfy due process. With either type of conduct, if a meaningful chance for a predeprivation hearing existed, that fact alone may defeat the adequacy and appropriateness of the postdeprivation remedy and thus render *Parratt* inapplicable.[136]

A better argument exists to limit *Parratt* to negligent actions. There is a belief firmly rooted in the common law that intentional acts are more grave than negligent acts.[137] Intentional acts, therefore, have been given stricter judicial treatment. This distinction in treatment is seen in common law tort actions. For example, courts can award nominal damages for intentional trespass even if the only harm has been a theoretical violation of the owner's sovereignty over his land.[138] But with negligence actions, a plaintiff must show actual damages in order to recover.[139] Given this inherent distinction, a federal court in a section 1983 action may be able to justify retaining the allegedly intentional government actions within its jurisdiction. If nothing else, this will enhance the credibility of the judiciary because if a state agent purposefully inflicts harm on a citizen, the state itself will not be the sole arbiter of the citizen's claim. In fact, we have come full circle since this result was one of the original goals of section 1983.[140]

Unfortunately, the opposing views on the intentional conduct question cannot be meshed as easily as the views on *Parratt's* exten-

135 The proposition is ridiculous because the state agent committing the tort has neither the time nor the detachment from his actions necessary to provide or initiate predeprivation process.

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

137 *See* W. PROSSER, *supra* note 127, at 9-11. In discussing punitive damages, Prosser noted:

> Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton. Lacking this element, there is general agreement that mere negligence is not enough, even though it is so extreme in degree as to be characterized as "gross."

Id. at 9-10 (footnotes omitted).

138 *Id.* at 66.

139 *Id.* at 143-44.

140 *See* note 99 *supra* and accompanying text.

sion to liberty interests. The logic of *Parratt* apparently allows a broad interpretation. The resolution of this issue will turn on the weight an individual court gives the common law concept that intentional conduct requires stricter judicial treatment.

Finally, some courts confuse the distinction between "random and unauthorized" conduct and conduct which is pursuant to an "established state procedure." This confusion arose in *Vail v. Board of Education*,[141] where the defendant school board dismissed the plaintiff, an athletic coach, after one year. The plaintiff sued under section 1983, claiming a property deprivation because he had been promised employment for at least two years when hired.[142] The Court of Appeals for the Seventh Circuit affirmed a district court award in the action. However, the concurring and dissenting opinions in *Vail* argued whether intentional acts, like the school board's decision to fire the plaintiff, should be included within the *Parratt* analysis. The concurring judge felt that intentional acts should not be included; therefore, the plaintiff's section 1983 action could continue because *Parratt* did not apply.[143] The dissenting judge felt that this was an artificial and incorrect construction of *Parratt*.[144]

Much of this debate about intentional conduct is unnecessary. At least one circuit has characterized the type of conduct in *Vail* as conduct pursuant to an established state procedure.[145] This "established state procedure" is the result of "decisions made by officials with final authority over significant matters."[146] The disagreement over *Parratt's* applicability to intentional conduct, then, need not be clouded by these issues, since *Logan v. Zimmerman Brush Co.* effectively removed them from *Parratt's* consideration.

V. Suggestions for Practitioners

Two suggestions with respect to the use of *Parratt* and section 1983 actions may prove helpful to practitioners. The first suggestion concerns the requirement that a section 1983 plaintiff affirmatively plead the absence of an adequate state remedy. The second suggestion offers a step-by-step *Parratt* analysis which may prevent mis-

141 706 F.2d 1435 (7th Cir. 1983).

142 *Id.* at 1436.

143 *Id.* at 1448.

144 *Id.* at 1455.

145 *See* Burtnieks v. City of New York, 716 F.2d 982 (2d Cir. 1983); *see also Vail*, 706 F.2d at 1448.

146 *Burtnieks*, 716 F.2d at 988.

placed time and resources in federal court when only the state courts are available.

A. *The Need To Affirmatively Plead The Absence of An Adequate State Remedy*

Vicory v. Walton,[147] a recent Sixth Circuit case, held that in suits for deprivation of property without procedural due process, the plaintiff has the burden of *pleading and proving* the inadequacy of available state processes.[148] Thus, the plaintiff has a dual burden; not only must he prove wrongful state conduct, but he must also prove the inadequacy of the state's corrective procedure.[149]

Vicory applies to a deprivation of property, whether or not that deprivation resulted from intentional or negligent conduct.[150] However, since *Vicory* dealt only with property interests, plaintiffs would presumably not have to plead the inadequacy of state remedies in cases involving deprivations of either liberty or life interests. However, in these non-property circumstances, and in circuits other than the Sixth, the risk of not affirmatively pleading inadequate state process far outweighs *any* possible benefit. The *Vicory* decision did not simply warn future plaintiffs as to the section 1983 pleading procedure; it reversed an award specifically because the inadequacy of state remedies was not pleaded or proved.[151] Therefore, until the issue receives future consideration, *Vicory* functionally notifies all section 1983 due process plaintiffs that pleading the inadequacy of state remedies is required.

B. *The Proper* Parratt *Analysis*

The *Parratt* analysis only applies to procedural due process allegations. If the action states a claim based on substantive due process, *Parratt* does not apply.[152] Once a procedural due process claim is asserted, the threshold question becomes whether the deprivation occurred through an established state procedure. If the deprivation so occurred, *Parratt* does not apply.[153] The court then need only apply the standard due process test as found in *Matthews v. Eldridge*[154] to

147 721 F.2d 1062 (6th Cir. 1983).
148 *Id.* at 1063.
149 *Id.* at 1066.
150 Id. at 1065.
151 *Id.* at 1066.
152 *See Palmer*, 697 F.2d at 1225; *see also Parratt*, 451 U.S. at 535-36.
153 *Logan*, 455 U.S. at 436.
154 424 U.S. 319 (1976). *Matthews v. Eldridge* presents a three prong balancing test which

determine the sufficiency of the predeprivation process.[155] If the deprivation did not occur as a result of an established state procedure, the *Parratt* analysis applies.

Only random and unauthorized acts fall within *Parratt's* coverage.[156] The plaintiff must then determine which additional actions his particular circuit has exempted from the *Parratt* analysis. For example, the Ninth Circuit may eliminate intentional state acts,[157] while the Fifth Circuit would exclude liberty interests.[158] Only if an action survives these hurdles can a court appropriately apply the *Parratt* approach. If *Parratt* does apply, a court would then use the standard three-prong *Matthews v. Eldridge* balancing test[159] to determine the sufficiency of the full range of process, both predeprivation and postdeprivation, which the state affords.

VI. Conclusion

Parratt created three difficulties with respect to section 1983 actions. First, the *Parratt* decision cannot be reconciled with the Supreme Court's numerous rejections of an exhaustion requirement for section 1983 actions. Additionally, the *Parratt* decision runs contrary to both the letter and the spirit of the legislative history of section 1983. Second, a question remains as to whether *Parratt* may be extended beyond property interests. The straightforward logic of *Parratt* does not reflect any limitation which would exclude life and liberty interests from its analysis. However, a hierarchy of constitutional values firmly set in American jurisprudence allocates to property interests alone a special, albeit subordinate position. This hierarchy may override *Parratt*, or at least become a threshold inquiry before reaching the *Parratt* analysis. Finally, it is not clear whether *Parratt* should apply to intentional conduct as well as negligent conduct. Again, the logic of *Parratt* shows no limitation. The

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weighs: 1) the private interest that will be affected, 2) the risk of an erroneous deprivation of that interest by the procedures being used, and 3) the government's interest in the matter. *Id.* at 335.

155 In *Logan*, the Court foreclosed any consideration of postdeprivation process in cases where the deprivation occurred pursuant to an established state procedure.

156 The act need be either random and unauthorized or incapable of predeprivation process. *See* notes 44 and 49 *supra* and accompanying text. It has not been settled whether these two classifications are coterminous. Although "random and unauthorized" may encompass the remainder set after the "established state procedure" actions have been removed from the universe of state conduct, this issue has not been determined. *See* note 133 *supra*.

157 *See* Weiss v. Lehman, 676 F.2d 1320 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 725 (1983).

158 *See* Brewer v. Blackwell, 692 F.2d 387 (5th Cir. 1982).

159 *See* note 154 *supra*.

best argument limiting *Parratt* to negligent conduct arises from the development of common law torts. Since intentional conduct is treated more strictly than negligent conduct in the common law, by analogy intentional conduct in section 1983 actions should also be treated more strictly by retaining it within federal jurisdiction.

The persuasiveness of the exhaustion requirement, the property interest issues, and the uncertainty in the negligent/intentional conduct question suggest a limited application of the *Parratt* decision. Until the Supreme Court clarifies its position, a broad application of *Parratt* destroys much of the legislative intent behind section 1983 and erodes doctrines firmly rooted in American jurisprudence.

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