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Due Process: Application of the Parratt Doctrine to Random and Unauthorized Deprivations of Life and Liberty

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DUE PROCESS: APPLICATION OF THE *PARRATT* DOCTRINE TO RANDOM AND UNAUTHORIZED DEPRIVATIONS OF LIFE AND LIBERTY

INTRODUCTION

In *Parratt v. Taylor*,[1] respondent Taylor, an inmate in a Nebraska state prison, had ordered a hobby kit by mail.[2] Because Taylor was in administrative segregation when the kit arrived, the prison staff accepted it.[3] By negligently failing to follow the established procedures for acceptance, however, the staff lost the kit.[4] Taylor sued the prison warden, under section 1983,[5] for deprivation of property without due process.[6]

The Supreme Court held that suit under section 1983 was not permissible because no constitutional violation[7]—specifically, no violation of the fourteenth amendment's due process clause[8]—had occurred.[9] Although convinced that the kit constituted property within

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1. 451 U.S. 527 (1981).
2. *Id.* at 529.
3. *Id.* at 530.
4. *Id.*
5. 42 U.S.C. § 1983 (Supp. V 1981). Section 1983 provides in part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

6. *Parratt*, 451 U.S. at 530.
7. Section 1983 confers no substantive rights on plaintiffs. Maher v. Gagne, 448 U.S. 122, 129 n.11 (1980); Davis v. Passman, 442 U.S. 228, 238 n.16 (1979); Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979); Dollar v. Haralson County, Ga., 704 F.2d 1540, 1543 (11th Cir.), *cert. denied*, 104 S. Ct. 399 (1983); Nilsen v. City of Moss Point, 701 F.2d 556, 559 n.3 (5th Cir. 1983). Rather, it allows only suits based on violations of the Constitution or federal laws. *Parratt*, 451 U.S. at 535; Baker v. McCollan, 443 U.S. 137, 146 (1979); Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970); Wise v. Bravo, 666 F.2d 1328, 1331 (10th Cir. 1981).
8. The fourteenth amendment provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.
9. *Parratt*, 451 U.S. at 543-44. The Supreme Court in recent years has decided several other cases involving claimed deprivations of property or liberty without due process in violation of the fourteenth amendment. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Baker v. McCollan, 443 U.S. 137 (1979); Ingraham v. Wright, 430 U.S. 651 (1977); Paul v. Davis, 424 U.S. 693 (1976). The mode of analysis employed in deciding *Parratt* and these cases reveals that the Court views the due process clause as primarily a guarantee of procedural regularity. *See Parratt*, 451

the meaning of the due process clause, that Taylor had been negligently deprived of that property, and that the deprivation had occurred under color of state law,[10] the Court held that Taylor had an available remedy under the Nebraska Tort Claims Act[11] capable of fully compensating him for the loss, and therefore, sufficient to satisfy due process.[12] The *Parratt* doctrine thus stands for the proposition that when an interest protected by the due process clause is jeopardized, a predeprivation hearing must be held if practicable.[13] When, however, there can be no predeprivation hearing, either because immediate action by the state is required to protect vital public interests or because the deprivation could not have been predicted, postdeprivation remedies under state law may be sufficient to satisfy due process.[14]

The effect of denying a plaintiff the opportunity to bring suit under section 1983 is significant. Suit under section 1983, "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution,"[15] allows for jury trial,[16] attorney's fees for the prevailing party,[17] and punitive damages when appropriate.[18] These may be unavailable to plaintiffs suing under

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U.S. at 552 (Powell, J., concurring); *Paul*, 424 U.S. at 710-11; Kupfer, *Restructuring the* Monroe *Doctrine: Current Litigation Under Section 1983*, 9 Hastings Const. L.Q. 463, 471-72 (1982); Note, *Constitutional Law—Civil Rights—Negligent Injury by the State is Not Cognizable Under 42 U.S.C. Section 1983 When the State Provides Adequate Tort Claims Procedure*, 56 Tul. L. Rev. 1441, 1450 (1982) [hereinafter cited as *Negligent Injury*].

10. *Parratt*, 451 U.S. at 536-37.

11. Neb. Rev. Stat. §§ 81-8,209 to -8,239 (1981).

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

13. *See id.* at 537-38.

14. *Id.* at 539; *see, e.g.*, Love v. Coughlin, 714 F.2d 207, 208-09 (2d Cir. 1983) (per curiam); Wilkins v. Whitaker, 714 F.2d 4, 6-7 (4th Cir. 1983); Moore v. Gluckstern, 548 F. Supp. 165, 167 (D. Md. 1982); Whorley v. Karr, 534 F. Supp. 88, 90 (W.D. Va. 1981); Ragusa v. Streator Police Dep't, 530 F. Supp. 814, 816 (N.D. Ill. 1981); Graham v. Mitchell, 529 F. Supp. 622, 626 (E.D. Va. 1982); *cf.* Slade v. Petrovsky, 528 F. Supp. 99, 101 (M.D. Pa. 1981) (fifth amendment due process case).

15. Mitchum v. Foster, 407 U.S. 225, 239 (1972).

16. The seventh amendment provides in part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII; *see* C. Wright, Federal Courts § 92 (4th ed. 1983); *cf.* Carlson v. Green, 446 U.S. 14, 22 (1980) (jury trial available in *Bivens* action).

17. 42 U.S.C. § 1988 (Supp. V. 1981); *see* Maine v. Thiboutot, 448 U.S. 1, 9 (1980); Lynn v. City of New Orleans Dep't of Police, 567 F. Supp. 761, 766 (E.D. La. 1983); Schiller v. Strangis, 540 F. Supp. 605, 624 (D. Mass. 1982).

18. *E.g.*, Smith v. Wade, 103 S. Ct. 1625, 1628-29 (1983); Carlson v. Green, 446 U.S. 14, 22 (1980); Carey v. Piphus, 435 U.S. 247, 257 & n.11, 266 (1978); Clark v. Taylor, 710 F.2d 4, 14 (1st Cir. 1983); Grimm v. Leinart, 705 F.2d 179, 182 (6th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3626 (U.S. Feb. 28, 1984) (No. 83-1054); Lynn v. City of New Orleans Dep't of Police, 567 F. Supp. 761, 765-66 (E.D. La. 1983); Schiller v. Strangis, 540 F. Supp. 605, 622 (D. Mass. 1982).

state tort law.[19] Nevertheless, provided state remedies are adequate to compensate plaintiffs for their losses, the requirements of due process are satisfied.[20]

The *Parratt* doctrine has been applied consistently when plaintiffs have been deprived of property,[21] but when the deprivation has involved life or liberty, the results have not been as consistent.[22] For example, assume that a court is faced with a physical injury caused by the negligent actions of a police officer. Such negligence violates no specific provision of the Bill of Rights,[23] but would amount to a

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19. The seventh amendment right to trial by jury does not apply to the states. Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211, 217 (1916); Letendre v. Fugate, 701 F.2d, 1093, 1094 (4th Cir. 1983); Melancon v. McKeithen, 345 F. Supp. 1025, 1048 (E.D. La.), *aff'd sub nom.* Hill v. McKeithen, 409 U.S. 943 (1972); *see* J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 413 (2d ed. 1983) [hereinafter cited as J. Nowak]. Punitive damages may be unavailable under state law. Barnier v. Szentmiklosi, 565 F. Supp. 869, 879 n.19 (E.D. Mich. 1983); Restatement (Second) of Torts § 908 comment f (1979); Note, *Defining the Parameters of Section 1983*: Parratt v. Taylor, 23 B.C.L. Rev. 1219, 1224 (1982) [hereinafter cited as *Parameters*]; *see* Schiller v. Strangis, 540 F. Supp. 605, 615, 624 (D. Mass. 1982); Vinson v. Freeman, 524 F. Supp. 63, 66 (E.D. Pa. 1981); Friedman, Parratt v. Taylor: *Opening and Closing the Door on Section 1983*, 9 Hastings Const. L.Q. 545, 573 (1982); Attorney's fees are typically unavailable under state law. Restatement (Second) of Torts § 914 (1979); Kupfer, *supra* note 9, at 468; *Parameters*, *supra*, at 24.

20. *Parratt*, 451 U.S. at 544; Daniels v. Williams, 720 F.2d 792, 797 (4th Cir. 1983); Graham v. Mitchell, 529 F. Supp. 622, 626 (E.D. Va. 1982); Vinson v. Freeman, 524 F. Supp. 63, 66 (E.D. Pa. 1981); Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies:* Parratt v. Taylor *and* Logan v. Zimmerman Brush Company, 1982 U. Ill. L. Rev. 831, 858; *Parameters*, *supra* note 19, at 1239; *see* Note, *Federalism, Section 1983 and State Law Remedies: Curtailing the Federal Civil Rights Docket by Restricting the Underlying Right*, 43 U. Pitt. L. Rev. 1035, 1062-63 (1982) [hereinafter cited as *Civil Rights Docket*]; *cf.* Cline v. United States Dep't of Justice, 525 F. Supp 825, 828 (D.S.D. 1981) (Federal Tort Claims Act adequate to redress property deprivation despite unavailability of jury trial or punitive damages).

21. *See, e.g.*, Love v. Coughlin, 714 F.2d 207, 208-09 (2d Cir. 1983) (per curiam); Wilkins v. Whitaker, 714 F.2d 4, 6-7 (4th Cir. 1983); Tigner v. State of N.Y. Comm'r of Dep't of Corrections, 559 F. Supp. 25, 27 (W.D.N.Y. 1983); Brown v. Brienen, 553 F. Supp. 561, 564-66 (C.D. Ill. 1982); Buck v. Village of Minooka, 552 F. Supp. 298, 300 (N.D. Ill. 1982); McCulloch v. County of Washoe, 551 F. Supp. 1022, 1023-24 (D. Nev. 1982), *aff'd*, 720 F.2d 1020 (9th Cir. 1983); Romeu v. Housing Inv. Corp., 548 F. Supp. 1312, 1326 (D.P.R. 1982); Peters v. Township of Hopewell, 534 F. Supp. 1324, 1333-34 (D.N.J. 1982).

22. *See, e.g.*, Daniels v. Williams, 720 F.2d 792, 797 (4th Cir. 1983) (deprivation of liberty alone insufficient to support § 1983 claim); Haygood v. Younger, 718 F.2d 1472, 1480 (9th Cir. 1983) (same); State Bank v. Camic, 712 F.2d 1140, 1147 (7th Cir.) (deprivation of life alone insufficient to support § 1983 claim), *cert. denied*, 104 S. Ct. 491 (1983); Clark v. Taylor, 710 F.2d 4, 8, 10 (1st Cir. 1983) (deprivation of liberty states claim under § 1983); Brewer v. Blackwell, 692 F.2d 387, 395 (5th Cir. 1982) (same).

23. *See, e.g*, State Bank v. Camic, 712 F.2d 1140, 1146 (7th Cir.) (failure to protect against prisoner's suicide does not violate eighth amendment), *cert. denied*,

deprivation of liberty.[24] A court facing such a situation could simply apply *Parratt* to this negligent deprivation of a liberty interest. If the state provides adequate postdeprivation remedies, such as a recognized cause of action in negligence, no due process violation has occurred.[25] Not all courts, however, would follow *Parratt* under these circumstances. Courts faced with such situations have held that substantive due process renders the applicability of the *Parratt* doctrine irrelevant to deprivations of life or liberty,[26] that the doctrine is inapplicable to such deprivations,[27] or that it applies, but that state remedies are inadequate to redress such deprivations.[28]

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104 S. Ct. 491 (1983); Mills v. Smith, 656 F.2d 337, 340 n.2 (8th Cir. 1981) (negligent act will support § 1983 cause of action only if accompanied by deprivation of a federal right, negligent shooting claim dismmissed); Ellsworth v. Mockler, 565 F. Supp. 110, 112-13 (N.D. Ind. 1983) (misconduct in automobile accident does not give rise to claim under ninth amendment); *see also* Paul v. Davis, 424 U.S. 693, 698 (1976) (survivors of innocent bystander mistakenly shot by police officer would not have claim under § 1983).

24. Daniels v. Williams, 720 F.2d 792, 796 (4th Cir. 1983); *see* State Bank v. Camic, 712 F.2d 1140, 1146 (7th Cir.), *cert. denied*, 104 S. Ct. 491 (1983); Williams v. Kelley, 624 F.2d 695, 697 (5th Cir. 1980), *cert. denied*, 451 U.S. 1019 (1981); Roman v. City of Richmond, 570 F. Supp. 1554, 1555-56 (N.D. Cal. 1983); *cf.* Haygood v. Younger, 718 F.2d 1472, 1480 (9th Cir. 1983) (negligently prolonged detention of prisoner).

25. *E.g.* Daniels v. Williams, 720 F.2d 792, 797-99 (4th Cir. 1983); Haygood v. Younger, 718 F.2d 1472, 1480 (9th Cir. 1983); State Bank v. Camic, 712 F.2d 1140, 1147 (7th Cir.), *cert. denied*, 104 S. Ct. 491 (1983); King v. Pace, 575 F. Supp. 1385, 1388 (D. Mass. 1983); Ellsworth v. Mockler, 565 F. Supp. 110, 112-13 (N.D. Ind. 1983); Hickman v. Hudson, 557 F. Supp. 1341, 1347 (W.D. Va. 1983); Flores v. Edinburg Consol. Indep. School Dist., 554 F. Supp. 974, 978 (S.D. Tex. 1983); Juncker v. Tinney, 549 F. Supp. 574, 579 (D. Md. 1982); Holmes v. Wampler, 546 F. Supp. 500, 503 (E.D. Va. 1982); Peery v. Davis, 524 F. Supp. 107, 108 (E.D. Va. 1981); Eberle v. Baumfalk, 524 F. Supp. 515, 518 (N.D. Ill. 1981); Meshkov v. Abington Township, 517 F. Supp. 1280, 1286 (E.D. Pa. 1981).

26. *E.g.*, Clark v. Taylor, 710 F.2d 4, 10 (1st Cir. 1983); Brooks v. School Bd. of Educ., 569 F. Supp. 1534, 1536-39 (E.D. Va. 1983); Dandridge v. Police Dep't, 566 F. Supp. 152, 154-56 (E.D. Va. 1983); Juncker v. Tinney, 549 F. Supp. 574, 580-81 (D. Md. 1982); Holmes v. Wampler, 546 F. Supp. 500, 505 (E.D. Va. 1982); Henderson v. Counts, 544 F. Supp. 149, 152-53 (E.D. Va. 1982); Martin v. Covington, Ky., 541 F. Supp. 803, 804 (E.D. Ky. 1982).

27. *E.g.*, Brewer v. Blackwell, 692 F.2d 387, 395 (5th Cir. 1982); Wakinekona v. Olim, 664 F.2d 708, 715 (9th Cir. 1981), *rev'd on other grounds*, 103 S. Ct. 1741 (1983); Lynn v. City of New Orleans Dep't of Police, 567 F. Supp. 761, 764 (E.D. La. 1983); Howse v. DeBerry Correctional Inst., 537 F. Supp. 1177, 1180 (M.D. Tenn. 1982); *see* Sager v. City of Woodland Park, 543 F. Supp. 282, 293 (D. Colo. 1982).

28. *E.g.*, Roman v. City of Richmond, 570 F. Supp. 1554, 1556 (N.D. Cal. 1983); Clark v. Michigan Dep't of Corrections, 555 F. Supp. 512, 516-17 (E.D. Mich. 1982); Flores v. Edinburg Consol. Indep. School Dist., 554 F. Supp. 974, 978 (S.D. Tex. 1983).

This Note examines the application of the *Parratt* doctrine to random, unauthorized deprivations of life and liberty.[29] Part I argues that substantive due process has no place in the context in which the *Parratt* doctrine applies and demonstrates further that the logic of the doctrine applies equally well to deprivations of life or liberty as to those of property. Part II demonstrates that state remedies are, in most instances, adequate to redress random and unauthorized deprivations of life and liberty. This Note concludes that the *Parratt* doctrine should be applied to deprivations of life and liberty when no predeprivation hearing is possible. If the postdeprivation remedies provided by the state are adequate to compensate for such deprivations, the plaintiff has no claim under section 1983.

I. Judicial Attempts to Avoid Applying the *Parratt* Doctrine to Deprivations of Life or Liberty

A. *The Substantive Due Process Rationale*

In certain situations, courts have circumvented the *Parratt* doctrine by holding that deprivations of life or liberty are violations of substantive due process.[30] This approach is premised on the distinction drawn in *Parratt* between conduct that deprives a person of a protected interest but does not amount to a constitutional violation if attended by adequate postdeprivation remedies, and conduct that in itself violates a constitutional right.[31] Although postdeprivation remedies may be adequate to redress deprivations of protected interests, they cannot "cure" the unconstitutional nature of an act which itself amounts to a constitutional violation.[32] For example, in *Monroe v. Pape*,[33] the state officials' conduct itself violated the fourth amendment prohibition of

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29. Deprivations authorized by established state systems are outside of the application of the *Parratt* doctrine, because predeprivation hearings are possible, and thus required, in such instances. Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-37 (1982) (unfair employment practices claim destroyed by operation of state remedial system); *see* Palmer v. Hudson, 697 F.2d 1220, 1222 n.2 (4th Cir. 1983); Barnier v. Szentmiklosi, 565 F. Supp. 869, 880-81 (E.D. Mich. 1983); Friedman, *supra* note 19, at 572; Smolla, *supra* note 20, at 859-62.

30. *E.g.*, Clark v. Taylor, 710 F.2d 4, 8, 10 (1st Cir. 1983); Henderson v. Counts, 544 F. Supp. 149, 152-53 (E.D. Va. 1982); Schiller v. Strangis, 540 F. Supp. 605, 618-19 (D. Mass. 1982); *see* Brooks v. School Bd. of Educ., 569 F. Supp. 1534, 1536 (E.D. Va. 1983); Dandridge v. Police Dep't, 566 F. Supp. 152, 156-59 (E.D. Va. 1983); Sellers v. Roper, 554 F. Supp. 202, 205-06 (E.D. Va. 1982).

31. *Parratt*, 451 U.S. at 536-37; Vance v. Bordenkircher, 533 F. Supp. 429, 434 & n.8 (N.D.W. Va. 1982).

32. *Id.*, at 545-46 (Blackmun, J., concurring).

33. 365 U.S. 167 (1961), *overruled in part on other grounds*, Monell v. New York City Dep't of Social Services, 436 U.S. 658, 663 (1978).

unreasonable searches and seizures.[34] That constitutional violation having occurred, section 1983 permitted an action for damages without regard to any existing state remedies.[35] In *Parratt*, on the other hand, the respondent relied on the due process clause alone; no substantive rights were implicated.[36] The *Parratt* doctrine does not apply to conduct violating a substantive constitutional right.[37]

Thus, a court may, by finding a violation of a substantive constitutional right, circumvent the *Parratt* doctrine and ignore the issue of the adequacy of state remedies. Many types of conduct by state officials, however, fall outside the prohibitions of specific provisions in the Bill of Rights.[38] Courts faced with allegations of the use of excessive force by police and correction officers have nevertheless been reluctant to remit plaintiffs to state tort remedies.[39] Instead, these courts have turned to substantive due process, that "ubiquitous oxymoron,"[40] as a substantive guarantee of freedom from unnecessarily harmful conduct by law enforcement officers.[41] In effect, a new con-

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34. *Id.* at 171; *see Parratt*, 451 U.S. at 536.

35. *Monroe*, 365 U.S. at 183; *see* Friedman, *supra* note 19, at 546.

36. *Parratt*, 451 U.S. at 536; *see* Friedman, *supra* note 19, at 561 n.111.

37. *Parratt*, 451 U.S. at 536; Daniels v. Williams, 720 F.2d 792, 796 n.3 (4th Cir. 1983); State Bank v. Camic, 712 F.2d 1140, 1147 n.5 (7th Cir.), *cert. denied*, 104 S. Ct. 491 (1983); Wolf-Lillie v. Sonquist, 699 F.2d 864, 871-72 (7th Cir. 1983); Palmer v. Hudson, 697 F.2d 1220, 1222 n.2 (4th Cir.), *cert. granted*, 103 S. Ct. 3535 (1983); Duncan v. Poythress, 657 F.2d 691, 704-05 (5th Cir. 1981), *cert. dismissed*, 103 S. Ct. 368 (1982); Barnier v. Szentmiklosi, 565 F. Supp. 869, 879 n.20 (E.D. Mich. 1983); Granet v. Wallich Lumber, 563 F. Supp. 479, 483 (E.D. Mich. 1983); Moorhead v. Government of Virgin Islands, 556 F. Supp. 174, 176 (D.V.I. 1983); Smolla, *supra* note 20, at 863; *Civil Rights Docket*, *supra* note 20, at 1071-73.

38. *See, e.g.*, Brooks v. School Bd. of Educ., 569 F. Supp. 1534, 1536 (E.D. Va. 1983) (teacher pierced arm of student with pin as corporal punishment); Martin v. Covington, Ky., 541 F. Supp. 803, 804 (E.D. Ky. 1982) (suspect in drug case forced by police to solicit homosexual sex); Schiller v. Strangis, 540 F. Supp. 605, 614 (D. Mass. 1982) (false imprisonment).

39. *See, e.g.*, Roman v. City of Richmond, 570 F. Supp. 1554, 1555-56 (N.D. Cal. 1983); Holmes v. Wampler, 546 F. Supp. 500, 505 (E.D. Va. 1982); Schiller v. Strangis, 540 F. Supp. 605, 616-19 (D. Mass. 1982); Howse v. DeBerry Correctional Inst., 537 F. Supp. 1177, 1179-80 (M.D. Tenn. 1982).

40. Ellis v. Hamilton, 669 F.2d 510, 512 (7th Cir. 1982), *cert.denied*, 103 S. Ct. 488 (1982).

41. Daniels v. Williams, 720 F.2d 792, 796 n.3 (4th Cir. 1983); Wise v. Bravo, 666 F.2d 1328, 1333-34 (10th Cir. 1981); Brooks v. School Bd. of Educ., 569 F. Supp. 1534, 1536 (E.D. Va. 1983); Dandridge v. Police Dep't, 566 F. Supp. 152, 156 (E.D. Va. 1983); Sellers v. Roper, 554 F. Supp. 202, 204-05 (E.D. Va. 1982); Holmes v. Wampler, 546 F. Supp. 500, 505 (E.D. Va. 1982); Henderson v. Counts, 544 F. Supp. 149, 152-53 (E.D. Va. 1982); Schiller v. Strangis, 540 F. Supp. 605, 615-19 (D. Mass. 1982); Howse v. DeBerry Correctional Inst., 537 F. Supp. 1177, 1180-81 (M.D. Tenn. 1982); *see* Friedman, *supra* note 19, at 558-59; *Negligent Injury*, *supra* note 9, at 1446. Aside from any possible substantive due process right to freedom from intrusions upon bodily integrity, there is a liberty interest in freedom from such intrusions that is procedurally protected. Ingraham v. Wright, 430 U.S. 651, 673-74

stitutional right, in addition to those enumerated in the Constitution, has been created.

These courts, basing their reasoning on *Rochin v. California*,[42] have found the conduct involved so egregious as to "shock the conscience of the court" and, therefore, to amount to *per se* violations of the due process clause.[43] *Rochin* supports, however, not a right to personal security and bodily integrity, but rather a right to fundamental fairness in the process leading to a criminal conviction.[44]

Rochin was decided prior to the Supreme Court's holding in *Mapp v. Ohio*[45] that the fourth amendment's exclusionary rule applies to the states.[46] In *Rochin*, the evidence used to obtain a conviction had been secured by pumping the suspect's stomach without his consent.[47] Because *Rochin* was decided prior to *Mapp*, the Court could rely only on the fourteenth amendment's due process clause to exclude the evidence.[48] The Court, therefore, examined not the conduct of the police officers alone, but "the whole course of the proceedings" to ensure that due process had been accorded the defendant.[49] Examining the totality of the circumstances, the Court found that "the proceedings by which the conviction was obtained . . . shock[ed] the conscience."[50] Admission of evidence procured in such an unsavory man-

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(1977); Daniels v. Williams, 720 F.2d 792, 795 (4th Cir. 1983); *see* Sampley v. Ruettgers, 704 F.2d 491, 495 n.6 (10th Cir. 1983).

42. 342 U.S. 165 (1952).

43. *See, e.g.*, Clark v. Taylor, 710 F.2d 4, 10 (1st Cir. 1983) (unconsented-to search involving application of carcinogenic substance to skin of suspect); Henderson v. Counts, 544 F. Supp. 149, 153 & n.3 (E.D. Va. 1982) (beating of suspect by police officers); Martin v. Covington, Ky., 541 F. Supp. 803, 804 (E.D. Ky. 1982) (suspect in drug case forced to solicit homosexual sex); Schiller v. Strangis, 540 F. Supp. 605, 619 (D. Mass. 1982) (assault on suspect during warrantless search); Vance v. Bordenkircher, 533 F. Supp. 429, 434 (N.D. W. Va. 1982) (prison official failed to intervene during assault on inmate); *see* State Bank v. Camic., 712 F.2d 1140, 1147 (7th Cir.) (dictum), *cert. denied*, 104 S. Ct. 491 (1983); Palmer v. Hudson, 697 F.2d 1220, 1222 n.2 (4th Cir.), *cert. granted*, 103 S. Ct. 3535 (1983).

44. *See* Manson v. Brathwaite, 432 U.S. 98, 113 (1977); United States v. Lovasco, 431 U.S. 783, 790 (1977); United States v. Russell, 411 U.S. 423, 432 (1973); Dandridge v. Police Dep't, 566 F. Supp. 152, 156 n.4 (E.D. Va. 1983); J. Nowak, *supra* note 19, at 818 & n.16; Grano, Kirby, Biggers, *and* Ash: *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 Mich. L. Rev. 717, 778 (1974); Note, *Substantive Due Process Analysis of Nonlegislative State Action: A Case Study*, 1980 B.Y.U. L. Rev. 347, 369-70.

45. 367 U.S. 643 (1961).

46. *Id.* at 655.

47. 342 U.S. at 166.

48. J. Hall, Jr., Search and Seizure § 17:2, at 508-09 (1982).

49. *Rochin*, 342 U.S. at 169 (quoting Malinski v. New York, 324 U.S. 401, 416-17 (1945)).

50. *Id.* at 172 (emphasis added).

ner in order to convict the defendent violated the "canons of decency and fairness" and, therefore, the due process clause.[51]

Since the application of the fourth amendment's exclusionary rule to the states in *Mapp*, however, the Court no longer finds it necessary to rely on the canons of decency and fairness as a guarantee of the right to freedom from unreasonable searches.[52] The Court has abandoned the vague concepts of natural law,[53] turning instead to the protections of specifically enumerated provisions of the Bill of Rights. Thus, in the context of personal security and bodily integrity, the *Rochin* standard of conduct shocking to the conscience has been supplanted by the fourth amendment standard of a reasonable expectation of privacy.[54] Invasions of personal security which do not violate an individual's expectation of privacy do not violate a constitutional right.[55] While *Rochin* may still have some implications for fundamental fairness in the judicial process, it no longer can be fairly cited as a guarantee of personal security and bodily integrity.

Nevertheless, three Supreme Court Justices apparently interpret *Rochin* to establish a constitutional right of substantive due process. The Supreme Court, in *Baker v. McCollan*,[56] held that the false imprisonment of the respondent was not a constitutional violation.[57] Justice Blackmun, concurring, however, cited *Rochin* as a limitation on the majority opinion;[58] *Baker* should not apply to cases of more offensive police conduct.[59] In *Parratt*, Justice Powell criticized the majority's failure to address the substantive due process issue, citing *Rochin* as support for "substantive limitations on state action."[60] Justice White, in *Parratt*, indicated that he also would support a substantive due process approach.[61] Were these three Justices to marshal two

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51. *Id.* at 172-74; United States v. Janis, 428 U.S. 484, 494 n.6 (1976); United States v. Russell, 411 U.S. 423, 431-32 (1973); *see* Manson v. Brathwaite, 432 U.S. 98, 113 (1977) (*Rochin* guarantees fairness of totality of judicial proceedings); Hampton v. United States, 425 U.S. 484, 494 n.6 (1976) (Powell, J., concurring) (same).

52. *See Mapp*, 367 U.S. at 661-66 (Black, J., concurring).

53. *See* J. Nowak, *supra* note 19, at 454-55, 457, 563 n.4.

54. *See* Illinois v. Andreas, 103 S. Ct. 3319, 3323 (1983); Rawlings v. Kentucky, 448 U.S. 98, 106 (1980); Walter v. United States, 447 U.S. 649, 658-59 (1980); Arkansas v. Sanders, 442 U.S. 753, 764 (1979); Smith v. Maryland, 442 U.S. 735, 740 (1979); United States v. Rakas, 439 U.S. 128, 143 (1978); United States v. Chadwick, 433 U.S. 1, 7 (1977); Terry v. Ohio, 392 U.S. 1, 9 (1968); Katz v. United States, 389 U.S. 347, 350-53 (1967); *id.* at 360-61 (Harlan, J., concurring).

55. *See* Walter v. United States, 447 U.S. 649, 658-59 (1980); Smith v. Maryland, 442 U.S. 735, 739-40 (1979); United States v. Rakas, 439 U.S. 128, 143 (1978).

56. 443 U.S. 137 (1979).

57. *Id.* at 146.

58. *Id.* at 148 (Blackmun, J., concurring).

59. *Id.*

60. *Parratt*, 451 U.S. at 552-53 (Powell, J., concurring).

61. Justice White concurred with the majority "but with the reservations stated by [Justice] Blackmun in his concurring opinion." *Id.* at 545. Justice Blackmun in

additional votes, a substantive right to personal security and bodily integrity might be found. Until such time, however, *Rochin* cannot fairly be cited as a precedent for such a holding. Lower courts are unjustified in distinguishing cases of use of excessive force on substantive due process grounds until the Court reverses its present view of the fourteenth amendment as guaranteeing only procedural regularity.

B. *Limiting the Doctrine to Property Deprivations*

A few courts limit the doctrine to deprivations of property, focusing solely on the facts of *Parratt*.[62] Because *Parratt* involved only a property deprivation, these courts hold that the doctrine should be limited to such deprivations.[63] For example, one court faced with an intentional, unjustified shooting of a person by a police officer simply held the *Parratt* doctrine inapplicable to those facts.[64] Limiting the *Parratt* doctrine to deprivations of property, however, reveals a rejection of the fundamental principle of the doctrine.[65] Because the principle of the doctrine is that postdeprivation remedies, if adequate to compensate for the deprivation, satisfy due process when no predeprivation hearing is possible, the doctrine applies to non-property interests as well.[66] The logic of the principle is not affected by the interest violated.

Parratt again referred to substantive due process, but relied on Boddie v. Connecticut, 401 U.S. 371 (1971) and Roe v. Wade, 410 U.S. 113 (1973) rather than *Rochin*. *See Parratt*, 451 U.S. at 545 (Blackmun, J., concurring).

62. *See, e.g.*, Wakinekona v. Olim, 664 F.2d 708, 715 (9th Cir. 1981), *rev'd on other grounds*, 103 S. Ct. 1741 (1983); Roman v. City of Richmond, 570 F. Supp. 1554, 1555-56 (N.D. Cal. 1983); Sager v. City of Woodland Park, 543 F. Supp. 282, 293 n.12 (D. Colo. 1982); Howse v. DeBerry Correctional Inst., 537 F. Supp. 1177, 1180 (M.D. Tenn. 1982).

63. Wakinekona v. Olim, 664 F.2d 708, 715 (9th Cir. 1981), *rev'd on other grounds*, 103 S. Ct. 1741 (1983); Sager v. City of Woodland Park, 543 F. Supp. 282, 293 n.12 (D. Colo. 1982); Howse v. DeBerry Correctional Inst., 537 F. Supp. 1177, 1180 (M.D. Tenn. 1982); *see* Roman v. City of Richmond, 570 F. Supp. 1554, 1555-56 (N.D. Cal. 1982).

64. Sager v. City of Woodland Park, 543 F. Supp. 282, 293 n.12 (D. Colo. 1982).

65. Daniels v. Williams, 720 F.2d 792, 795-96 (4th Cir. 1983); Haygood v. Younger, 718 F.2d 1472, 1480 (9th Cir. 1983); King v. Pace, 575 F. Supp. 1385, 1388 n.1 (D. Mass. 1983); Hickman v. Hudson, 557 F. Supp. 1341, 1347 (W.D. Va. 1983); Clark v. Michigan Dep't of Corrections, 555 F. Supp. 512, 516 (E.D. Mich. 1982); Holmes v. Wampler, 546 F. Supp. 500, 503 (E.D. Va. 1982); Eberle v. Baumfalk, 524 F. Supp. 515, 517-18 (N.D. Ill. 1981).

66. Daniels v. Williams, 720 F.2d 792, 795 (4th Cir. 1983); Haygood v. Younger, 718 F.2d 1472, 1480 (9th Cir. 1983); Hickman v. Hudson, 557 F. Supp. 1341, 1347 (W.D. Va. 1983); Clark v. Michigan Dep't of Corrections, 555 F. Supp. 512, 516 (E.D. Mich. 1982); Holmes v. Wampler, 546 F. Supp. 500, 503 (E.D. Va. 1982); Eberle v. Baumfalk, 524 F. Supp. 515, 517-18 (N.D. Ill. 1981); *see* Kupfer, *supra* note 9, at 473 n.58; *Civil Rights Docket*, *supra* note 20, at 1076-77.

Some courts maintain, however, that deprivations of life and liberty are more serious than mere property deprivations, and thus require predeprivation hearings.[67] In *Brewer v. Blackwell*,[68] for instance, the Fifth Circuit held the *Parratt* doctrine inapplicable to a false arrest that occurred in violation of established procedures.[69] That court recognized that the Supreme Court in *Ingraham v. Wright*[70] applied an analysis similar to *Parratt* to deprivations of liberty.[71] It distinguished *Ingraham*, however, on the ground that the deprivations in that case were but slight in comparison to the burden of predeprivation hearings.[72] On the other hand, deprivations of liberty such as false arrest or serious physical injury outweigh any additional burdens imposed by predeprivation hearings.[73] Therefore, the failure of the state to provide a predeprivation hearing, regardless of its impossibility, amounted to a denial of due process.[74]

Such an analysis rejects the teachings of *Parratt*. While it is true that life and liberty may be more important interests than property and thus should be accorded greater protection, in factual situations to which the doctrine applies, no greater protection is possible:[75] Because the acts involved are random and unauthorized, no predeprivation hearing can be had. Therefore, if any process is to be accorded at all, it must be postdeprivation. Such a postdeprivation hearing is all that *Parratt* requires.[76]

The finality of any deprivation of life or liberty may also suggest limiting the *Parratt* doctrine's applicability to property. Once a plain-

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67. *See* Brewer v. Blackwell, 692 F.2d 387, 395 (5th Cir. 1982); Wakinekona v. Olim, 664 F.2d 708, 715 (9th Cir. 1981), *rev'd on other grounds*, 103 S. Ct. 1741 (1983); Friedman, *supra* note 19, at 574.

68. 692 F.2d 387 (5th Cir. 1982).

69. *Id.* at 393-95.

70. 430 U.S. 651 (1977).

71. *Brewer*, 692 F.2d at 395.

72. *Id.*

73. *Id.*

74. *Id.*

75. Daniels v. Williams, 720 F.2d 792, 795 (4th Cir. 1983); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981), *aff'd on other grounds sub nom.* Kush v. Rutledge, 103 S. Ct. 1483 (1983); Barnier v. Szentmiklosi, 565 F. Supp. 869, 879 (E.D. Mich. 1983); Hickman v. Hudson, 557 F. Supp. 1341, 1347-48 (W.D. Va. 1983); Holmes v. Wampler, 546 F. Supp. 500, 503 (E.D. Va. 1982). See *supra* notes 13-14 and accompanying text.

76. Daniels v. Williams, 720 F.2d 792, 795 (4th Cir. 1983); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981), *aff'd on other grounds sub nom.* Kush v. Rutledge, 103 S. Ct. 1483 (1983); Barnier v. Szentmiklosi, 565 F. Supp. 869, 879 (E.D. Mich. 1983); Hickman v. Hudson, 557 F. Supp. 1341, 1347 (W.D. Va. 1983); Clark v. Michigan Dep't of Corrections, 555 F. Supp. 512, 516 (E.D. Mich. 1982); Holmes v. Wampler, 546 F. Supp. 500, 503 (E.D. Va. 1982). See *supra* notes 13-14 and accompanying text.

tiff has been deprived of life or liberty interests, they cannot be restored. Even under the *Parratt* doctrine, a hearing must be held before one is finally deprived of property protected by the due process clause.[77] The *Parratt* Court, however, reached its result by the definitional device of extending the period over which a property deprivation becomes final.[78] The Court repeatedly stressed that the loss caused by misconduct of state officials was only an "initial deprivation," before which a hearing was not required.[79] That hearing must come, however, before the state action is complete, the deprivation final.[80] If the state provides an opportunity for the plaintiff to be restored to his former position, due process has been provided, even if the plaintiff should eventually lose.[81]

This reasoning depends on the ability of the state to restore the plaintiff to his former position. Accordingly, it has been argued that the uniqueness of life and liberty preclude applying this reasoning to those interests.[82] Because property is typically interchangeable, a damage award obtained under tort law allows a plaintiff to purchase a substitute for his lost property, restoring him to that former position.[83] When a plaintiff cannot be restored to his former position, however, the deprivation must be termed final at its initial occurrence. At that point, if the property lost cannot be replaced by a substitute, the plaintiff has been finally deprived of his property without due process.[84] The constitutional violation is then complete, and a cause of action should lie under section 1983 even if compensation is available at state law.[85] For example, real property is, by

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

78. *See id.* at 540-42; Kupfer, *supra* note 9, at 468; Smolla, *supra* note 20, at 873-75.

79. *Parratt*, 451 U.S. at 539-42.

80. *Id.* at 540-41; *accord* Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982); Burtnieks v. City of New York, 716 F.2d 982, 987 (2d Cir. 1983); Smolla, *supra* note 20, at 858.

81. *See Parratt*, 451 U.S. at 543-44.

82. *See* Barnier v. Szentmiklosi, 565 F. Supp. 869, 877 n.16 (E.D. Mich. 1983); Note, *Civil Rights—Due Process Requirements for Negligent Property Deprivations*, 28 Wayne L. Rev. 1491, 1518-19 (1982) [hereinafter cited as *Due Process Requirements*]; *cf.* Friedman, *supra* note 19, at 572-73 (*Parratt* logic applies only if state remedy makes plaintiff whole); Kupfer, *supra* note 9, at 473 n.58 (*Parratt* should not apply to life interests).

83. *See* D. Dobbs, Law of Remedies § 3.1, at 135 (1973).

84. *See* Burtnieks v. City of New York, 716 F.2d 982, 987 (2d Cir. 1983); *cf.* Mackey v. Montrym, 443 U.S. 1, 21 (1979) (Stewart, J., dissenting) ("When a deprivation is irreversible . . . the requirement of some kind of hearing before a final deprivation takes effect is all the more important.").

85. Burtnieks v. City of New York, 716 F.2d 982, 988-89 (2d Cir. 1983). *But see* Toteff v. Village of Oxford, 562 F. Supp. 989, 995 (E.D. Mich. 1983) (postdeprivation remedies adequate to redress destruction of real property).

definition, unique.[86] Once destroyed, it cannot truly be replaced. Accordingly, such a deprivation would be final at its initial occurrence, and should not fall within the application of the *Parratt* doctrine.[87] Similarly, a deprivation of life or liberty would be final at its first occurrence, and should also fall outside the application of the *Parratt* doctrine.[88]

Plausible though this argument may be, it was implicitly rejected by the majority opinion in *Ingraham v. Wright*.[89] The dissent argued that, because the corporal punishment of students involved could not be retracted once inflicted, postdeprivation hearings were not adequate to satisfy due process.[90] The majority rejected this argument.[91] Regardless of the ability of the state to restore the lost interest to the plaintiff, the deprivation is apparently not final until an opportunity for a hearing is foreclosed,[92] provided that the remedies satisfy due process.[93] It is necessary, therefore, to examine the adequacy of particular postdeprivation remedies.

II. Adequacy of State Remedies

There are no doubt situations when no remedy at state law is adequate to redress a loss of life or liberty. Such a situation would exist if no tort action is recognized for the conduct producing the loss. Wrongful confinement to administrative segregation may be such an instance. While a state may recognize the common-law cause of action for wrongful imprisonment, it is not clear that this action would be available to an individual already confined within the general prison population.[94] Yet such wrongful confinement may deprive an individual of a liberty interest protected by the due process

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86. Burtnieks v. City of New York, 716 F.2d 982, 987 n.3 (2d Cir. 1983); Losee v. Morey & Cramer, 57 Barb. 561, 565 (N.Y. Sup. Ct. 1865); D. Dobbs, *supra* note 83, § 2.5, at 58 (1973); 71 Am. Jur. 2d *Specific Performance* § 112, at 143-44 (1973).

87. *See* Burtnieks v. City of New York, 716 F.2d 982, 987 (2d Cir. 1983); *cf.* Mackey v. Montrym, 443 U.S. 1, 21-22 (1979) (Stewart, J., dissenting) (after-the-fact hearing insufficient when adjudicative facts are involved, unless full retroactive relief can be provided); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 20 (1978) (cessation of utility services "works a uniquely final deprivation" for which state remedies are inadequate).

88. *See* Friedman, *supra* note 19, at 557 (liberty); Kupfer, *supra* note 9, at 473 n.58 (life); *Parameters*, *supra* note 19, at 1246-47 (liberty).

89. 430 U.S. 651, 679-80 (1977).

90. *Id.* at 696-97 (White, J., dissenting); *see id.* at 701 (Stevens, J., dissenting).

91. *See id.* at 679-80.

92. *See id.* at 677.

93. *Id.* at 678 & n.46.

94. *See* Clark v. Michigan Dep't of Corrections, 555 F. Supp. 512, 517 (E.D. Mich. 1982).

clause.[95] Although certainty of compensation is not required under the *Parratt* doctrine,[96] certainty of an opportunity for compensation is required.[97] Plaintiffs should not be remitted to uncertain remedies at state law.[98]

Ordinarily, however, a remedy will be available at state law. False imprisonment, assault and battery, wrongful death, and negligence actions are the most typical causes of action.[99] The inability of any monetary award that might result from these actions to make a plaintiff whole is "simply irrelevant."[100] Aside from the fact that usually only monetary awards are granted in such instances under section 1983,[101] money has always been used at common law to compensate

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95. *See* Hewitt v. Helms, 103 S. Ct. 864, 870-71 (1983); McCrae v. Hankins, 720 F.2d 863, 866-67 (5th Cir. 1983); Clark v. Michigan Dep't of Corrections, 555 F. Supp. 512, 517 (E.D. Mich. 1982); Riley v. Johnson, 528 F. Supp. 333, 340 (E.D. Mich. 1981).

96. Daniels v. Williams, 720 F.2d 792, 797 (4th Cir. 1983); Groves v. Cox, 559 F. Supp. 772, 776-77 (E.D. Va. 1983); Irshad v. Spann, 543 F. Supp. 922, 927 (E.D. Va. 1982); *see* Parratt v. Taylor, 451 U.S. 527, 542 (1981).

97. Daniels v. Williams, 720 F.2d 792, 797 (4th Cir. 1983); State Bank v. Camic, 712 F.2d 1140, 1147 (7th Cir.), *cert. denied*, 104 S. Ct. 491 (1983); Evans v. City of Chicago, 689 F.2d 1286, 1298-99 (7th Cir. 1982); Groves v. Cox, 559 F. Supp. 772, 776-77 (E.D. Va. 1983); Begg v. Moffitt, 555 F. Supp. 1344, 1361 n.52 (N.D. Ill. 1983).

98. *See, e.g.*, Daniels v. Williams, 720 F.2d 792, 797-98 (4th Cir. 1983); Brewer v. Blackwell, 692 F.2d 387, 394 n.10 (5th Cir. 1982); Ellis v. Hamilton, 669 F.2d 510, 514-15 (7th Cir.), *cert. denied*, 103 S. Ct. 488 (1982); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981), *aff'd on other grounds sub nom.* Kush v. Rutledge, 103 S. Ct. 1483 (1983); Roman v. City of Richmond, 570 F. Supp. 1544, 1557 (N.D. Cal. 1983); *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 436-37 (1982) (lengthy and speculative tort action only means of redress at state law).

99. *See* Daniels v. Williams, 720 F.2d 792, 797 (4th Cir. 1983) (negligence); State Bank v. Camic, 712 F.2d 1140, 1147 (7th Cir.) (wrongful death action), *cert. denied*, 104 S. Ct. 491 (1983); Brewer v. Blackwell, 692 F.2d 387, 394 n.10 (5th Cir. 1982) (false arrest); Ellis v. Hamilton, 669 F.2d 510, 514-15 (7th Cir.) (habeus corpus, mandamus, and others), *cert. denied*, 103 S. Ct. 488 (1982); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981) (assault and battery), *aff'd on other grounds sub nom.* Kush v. Rutledge, 103 S. Ct. 1483 (1983); Roman v. City of Richmond, 570 F. Supp. 1554, 1555 (N.D. Cal. 1983) (wrongful death); Barnier v. Szentmiklosi, 565 F. Supp. 869, 879 (E.D. Mich. 1983) (assault and battery, false arrest, malicious prosecution); Schiller v. Strangis, 540 F. Supp. 605, 623 (D. Mass. 1982) (assault and battery, false imprisonment); Haefner v. County of Lancaster, 520 F. Supp. 131, 132 (E.D. Pa. 1981) (assault and battery, false arrest and imprisonment, malicious prosecution), *aff'd*, 681 F.2d 806 (3d Cir.), *cert. denied*, 103 S. Ct. 165 (1982); Meshkov v. Abington Township, 517 F. Supp. 1280, 1286 (E.D. Pa. 1981) (negligence).

100. Haygood v. Younger, 718 F.2d 1472, 1481 (9th Cir. 1983).

101. *See, e.g.*, Clark v. Taylor, 710 F.2d 4, 6 (1st Cir. 1983) (compensatory and punitive damages awarded); Henderson v. Counts, 544 F. Supp. 149, 150 (E.D. Mich. 1982) (plaintiff seeking damages and letter of apology); Schiller v. Strangis, 540 F. Supp. 605, 624 (D. Mass. 1982) (plaintiff awarded damages); Vance v.

losses of any nature.[102] Monetary judgments are the very basis of actions at law.[103]

It has been argued that these tort damage awards are inadequate because they compensate for injuries to interests different from those protected by the Constitution.[104] Instead, compensation for the constitutional violation itself, quite apart from pecuniary loss, must be provided.[105] The *Parratt* doctrine, however, is based on the premise that no constitutional violation has occurred prior to foreclosure of an opportunity to be heard on a claim.[106] For the same reason, policy arguments advocating easy access to federal venues for protection of federal rights[107] are also irrelevant. The federal interest implicated in these situations is process itself. When the state provides due process, no federal right is infringed.[108]

Finally, some plaintiffs have argued that the unavailability under state tort law of punitive damages, jury trial, injunctive relief, and attorney's fees renders the state remedies inadequate.[109] These features of suit under section 1983 are simply not required by due process. Section 1983 may have created a uniquely federal cause of action and remedy, but it did not alter traditional notions of due process.[110] While the requirements of due process cannot be enumerated for all

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Bordenkircher, 533 F. Supp. 429, 431 (N.D. W. Va. 1982) (plaintiff seeking damages).

102. *See* D. Dobbs, *supra* note 83, §§ 3.1, 7.3 (1973); J. Joyce, Damages § 178 (1903); A. Sedgwick & J. Beale, A Treatise on the Measure of Damages § 8 (9th ed. 1920); J. Stein, Damages and Recovery § 3 (1972).

103. A Sedgwick & J. Beale, *supra* note 102, § 8; J. Stein, *supra* note 102, § 3.

104. Rutherford v. United States, 702 F.2d 580, 584 (5th Cir. 1983); Wilkerson v. Johnson, 699 F.2d 325, 329 (6th Cir. 1983); Moorhead v. Government of Virgin Islands, 556 F. Supp. 174, 176-77 (D.V.I. 1983); Schiller v. Strangis, 540 F. Supp. 605, 621 (D. Mass. 1982); Friedman, *supra* note 19, at 573-77.

105. Rutherford v. United States, 702 F.2d 580, 584 (5th Cir. 1983); Wilkerson v. Johnson, 699 F.2d 325, 329 (6th Cir. 1983); Moorhead v. Government of Virgin Islands, 556 F. Supp. 174, 176-77 (D.V.I. 1983); Schiller v. Strangis, 540 F. Supp. 605, 621 (D. Mass. 1982); Friedman, *supra* note 19, at 574-75.

106. *Parratt*, 451 U.S. at 540-41; Smolla, *supra* note 20, at 833. See *supra* notes 7-14 and accompanying text.

107. *See* Friedman, *supra* note 19, at 573-75; Kupfer, *supra* note 9, at 471-73; Smolla, *supra* note 20, at 833; *Civil Rights Docket*, *supra* note 20, at 1066.

108. *Parratt*, 451 U.S. at 543-44; *see* Logan v. Zimmerman Brush Co., 455 U.S. 422, 435 (1982); Friedman, *supra* note 19, at 561 n.111.

109. *See, e.g.*, Rutherford v. United States, 702 F.2d 580, 583-84 (5th Cir. 1983) (attorney's fees); Roman v. City of Richmond, 570 F. Supp. 1554, 1556 (N.D. Cal. 1983) (punitive damages, injunctive relief); Kupfer, *supra* note 9, at 473 (injunctive relief).

110. *See Parratt*, 451 U.S. at 543. The *Parratt* doctrine, by remitting plaintiffs to state courts for tort remedies, places them in the same position as common-law plaintiffs. This result is consistent with traditional procedural approaches to due

cases,[111] the most fundamental are notice and an opportunity to be heard.[112] *Parratt* explicitly rejected the addition of the relief afforded under section 1983 to those requirements.[113]

While state postdeprivation remedies are thus generally adequate in theory to redress loss of life and liberty, courts must be assured that those remedies are adequate in practice before dismissing such claims under the *Parratt* doctrine.[114] One of the primary concerns that motivated the enactment of section 1983 was that remedies provided by state statutes were not in fact available to certain plaintiffs.[115] Nevertheless, some federal courts have presumed that state courts are as solicitous of individual rights as are federal courts.[116] In light of the

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process. *See* Ingraham v. Wright, 430 U.S. 651, 679 n.47 (1977) (quoting Monaghan, *Of "Liberty" and "Property,"* 62 Cornell L. Rev. 405, 431 (1977)); *Parameters, supra* note 19, at 1238-40.

111. Mathews v. Edlridge, 424 U.S. 319, 334 (1976); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (quoting) Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951)); Friendly, *"Some Kind of Hearing"*, 123 U. Pa. L. Rev. 1267, 1315-17 (1975).

112. Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Grannis v. Ordean, 234 U.S. 385, 394 (1914).

113. *Parratt*, 451 U.S. at 543-44; State Bank v. Camic, 712 F.2d 1140, 1147 (7th Cir.), *cert. denied*, 104 S. Ct. 491 (1983); Kumar v. Marion Cty. Common Pleas Ct., 704 F.2d 908, 910 (6th Cir. 1983); King v. Pace, 575 F. Supp. 1385, 1389-90 (D. Mass. 1983); Barnier v. Szentmiklosi, 565 F. Supp. 869, 879 n.19 (E.D. Mich. 1983); Graham v. Mitchell, 529 F. Supp. 622, 626 (E.D. Va. 1982); Vinson v. Freeman, 524 F. Supp. 63, 66 (E.D. Pa. 1981).

114. Several commentators have stated that a primary goal of the *Parratt* doctrine is reduction of the federal caseload. *See* Friedman, *supra* note 19, at 553-54; Kupfer, *supra* note 9, at 472-73; *Civil Rights Docket, supra* note 20, at 1036. If a plaintiff can raise a substantial question of the fact as to the adequacy of state remedies in practice to redress a deprivation of life or liberty, however, summary judgment will be precluded and trial required, frustrating that goal. *See* C. Wright, Federal Courts § 99, at 664 (4th ed. 1983). The same possibility may arise in deprivation of property cases, however. *Cf.* Parratt v. Taylor, 451 U.S. 527, 543 (1981) (state hears and pays claims under its tort claims procedure). Any inconsistency between the apparent goal of the doctrine and its actual effect are, therefore, intrinsic to the doctrine, rather than a result of its application to deprivations of life and liberty.

115. Monroe v. Pape, 365 U.S. 167, 176 (1961), *overruled in part on other grounds* Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 663 (1978); Cong. Globe, 42d Cong., 1st Sess. 653 (1871) (remarks of Sen. Osborne); *id.* at 334 (remarks of Rep. Hoar); *id.* at 277 app. (remarks of Rep. Porter); *id.* at 315 app. (remarks of Rep. Burchard); Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5, 12 (1980); *Due Process Requirements, supra* note 82, at 1493 n.21.

116. *See* Daniels v. Williams, 720 F.2d 792, 796 (4th Cir. 1983); Palmer v. Hudson, 697 F.2d 1220, 1223 (4th Cir.), *cert. granted*, 103 S. Ct. 3535 (1983); Ellis v. Hamilton, 669 F.2d 510, 515 (7th Cir.), *cert. denied*, 103 S. Ct. 488 (1982).

policy behind the enactment of section 1983,[117] this presumption is perhaps invalid. Moreover, *Parratt* requires that plaintiffs be given an opportunity to be fully compensated.[118] For this reason, a federal court should determine whether state remedies satisfy due process in practice, as well as in theory. As with any due process question, this must be determined on a case-by-case basis.[119] An unreasonable limitation on the amount of recovery, for example, should render state postdeprivation remedies inadequate.[120] In such situations, a claim of a violation of the fourteenth amendment's due process clause would lie under section 1983.[121]

Conclusion

Under the *Parratt* doctrine, a random and unauthorized deprivation of property by a state official does not constitute a violation of due process if the state provides adequate postdeprivation remedies. Although the doctrine has not been uniformly applied to deprivations of life or liberty, no theoretical obstacles bar such application. Reliance on substantive due process in order to circumvent the doctrine is unjustified in light of the Supreme Court's procedural approach to due process. Moreover, neither the finality of life and liberty deprivations, nor the unavailablity under state law of relief afforded under section 1983, renders such deprivations violative of due process. Because random, unauthorized deprivations of life and liberty are no more susceptible of predeprivation hearings than similarly occurring property deprivations, the *Parratt* doctrine should be applied to such deprivations. In applying the doctrine, however, courts must ascertain whether state remedies are available to the plaintiffs in fact, as well as in theory. Only then may dismissal under the *Parratt* doctrine be warranted.

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

118. Logan v. Zimmerman Brush Co., 455 U.S. 422, 433-37 (1982); *Parratt*, 451 U.S. at 545 (Stewart, J., concurring); Daniels v. Williams, 720 F.2d 792, 797 (4th Cir. 1983); State Bank v. Camic, 712 F.2d 1140, 1147 (7th Cir.), *cert. denied*, 104 S. Ct. 491 (1983); Evans v. City of Chicago, 689 F.2d 1286, 1298-99 (7th Cir. 1982).

119. See *supra* note 115 and accompanying text.

120. *Cf.* Loftin v. Thomas, 681 F.2d 364, 365 (5th Cir.1982) (limitation of $10,000 on liability for single occurrence of injury or damage to property held adequate); Hull v. City of Duncanville, 678 F.2d 582, 583 (5th Cir. 1982) (plaintiff claimed $100,000 limitation on recovery for personal injury inadequate).

121. See *supra* notes 96-98 and accompanying text.