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# From *Parratt* to *Zinermon*: Authorization, Adequacy, and Immunity in a Systematic Analysis of State Procedure

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# NOTES

# FROM *PARRATT* TO *ZINERMON*: AUTHORIZATION, ADEQUACY, AND IMMUNITY IN A SYSTEMIC ANALYSIS OF STATE PROCEDURE



## INTRODUCTION

When a state official damages a person's property, a tort remedy is often available under state law. The defendant's governmental connection, however, has also provided plaintiffs with the option to allege a constitutional violation—a deprivation of property without due process.[1] The expansive availability of this constitutional tort[2] has raised

[1] See Parratt v. Taylor, 451 U.S. 527, 533 (1981), overruled in part, Daniels v. Williams, 474 U.S. 327 (1986). For a discussion of how *Daniels* overruled *Parratt*, see infra note 22.

[2] The constitutional tort emerged from Monroe v. Pape, 365 U.S. 167 (1961), overruled in part on other grounds, Monell v. Department of Social Servs., 436 U.S. 658 (1978), which held

concerns over federal interference with state functions,[3] overburdening of federal courts,[4] as well as trivialization of the Constitution.[5] While courts and commentators have made various suggestions to curtail the availability of the federal forum,[6] the most coherent limiting doctrine emerged in *Parratt v. Taylor*,[7] where the Supreme Court began to clarify the nature of the underlying due process right itself.[8] *Parratt* held that even if a state official's unauthorized act deprives a person of her property without a hearing, no procedural due process violation occurs if the state provides an adequate remedy.[9] In so doing, the decision significantly expanded the role of state courts in procedural due process analysis.

A number of scholars have read *Parratt* as another attempt by the Court to draw a *substantive* distinction between the types of governmental actions that violate the Constitution and those that are sim-

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that a damage claim under the Constitution was supplementary to any state law claim that might be available.

[3] The Supreme Court has sought to distinguish cases "which allege facts that are commonly thought to state a claim for a common law tort normally dealt with by state courts, but instead are couched in terms of a constitutional deprivation." *Parratt*, 451 U.S. at 533; accord Paul v. Davis, 424 U.S. 693, 701 (1976) (section 1983 should not become a "font of tort law" thereby displacing state adjudicatory systems); Brown, De-Federalizing Common Law Torts: Empathy for *Parratt*, *Hudson*, and *Daniels*, 28 B.C.L. Rev. 813 (1987); Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 Cornell L. Rev. 482 (1982); Nahmod, Due Process, State Remedies, and Section 1983, 34 U. Kan. L. Rev. 217 (1985); Wells & Eaton, Substantive Due Process and the Scope of Constitutional Torts, 18 Ga. L. Rev. 201 (1984); Whitman, Constitutional Torts, 79 Mich. L. Rev. 5 (1980); 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, 1051-56 (1982) (collecting commentary). But see Nichol, Federalism, State Courts and Section 1983, 73 Va. L. Rev. 959 (1987) (the purpose of section 1983 is to displace state law).

[4] Whitman, supra note 3; Note, *Parratt v. Taylor* Revisited: Defining the Adequate State Remedy Requirement, 65 B.U.L. Rev. 607-08 (1985).

[5] *Parratt*, 451 U.S. at 549 (Powell, J., concurring).

[6] See, e.g., Patsy v. Board of Regents, 457 U.S. 496, 533-34 (1982) (Powell, J., dissenting) (exhaustion of state remedies should be required before bringing a section 1983 suit); Wisconsin v. Constantineau, 400 U.S. 433, 443 (1971) (Burger, C.J., dissenting) (federal courts should defer review to state courts in non-urgent cases); H. Friendly, Federal Jurisdiction: A General View 100-01 (1973) (exhaustion of state remedies should be required); O'Connor, Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge, 22 Wm. & Mary L. Rev. 801, 809-810 (1981) (same); Wiehl, Drastic Moves Urged to Ease U.S. Court's Load, N.Y. Times, Mar. 23, 1990, at B5, col. 3 (panel, established by Congress, urges curtailing jurisdiction of federal courts).

[7] 451 U.S. 527 (1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327 (1986).

[8] See infra note 27. This Note uses the phrase '*Parratt* analysis' to refer to the doctrine born in *Parratt* as modified by subsequent Supreme Court cases. See, e.g., Zinermon v. Burch, 110 S. Ct. 975 (1990); Daniels v. Williams, 474 U.S. 327 (1986); Hudson v. Palmer, 468 U.S. 517 (1984); Logan v. Zimmerman Brush, 455 U.S. 422 (1982).

[9] *Parratt*, 451 U.S at 543-44.

ply state law torts by state actors.[10] This Note argues that *Parratt* is not concerned with the nature of the official's impropriety, but rather with the procedural system within which she acts. Though the decision has been called "among the most puzzling of the last decade,"[11] much of the confusion stems from the refusal to consider *Parratt* in procedural due process terms.

Part I of this Note examines *Parratt* itself, and relates the case to the constitutional tort background against which it is set. Part I then argues that *Parratt* brings a sensible application of procedural due process principles to the realm of state wrongs and remedies, and in doing so, strikes an effective balance between competing concerns: affording constitutional protection to property interests[12] and respecting the proper role of the states. Part II explores the systemic conception of procedural due process that the Supreme Court has created and fits *Parratt* within its structure. Building on the systemic procedural due process conception of *Parratt*, Part III formulates standards that should be used to determine whether a state remedy is adequate. Part III then uses these standards to evaluate the most troubling question regarding the adequacy of state remedies: Does official immunity which would defeat recovery render the remedy inadequate?

## I. BASIC DOCTRINE

### A. *The Leading Cases*

In *Parratt v. Taylor*,[13] Bert Taylor, an inmate of the Nebraska Penal and Correctional Complex, ordered a hobby kit through the mail.[14] Because Taylor was in segregation when his package arrived, prison rules did not permit him to have the materials.[15] Prison offi-

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10 See infra notes 53-55 and accompanying text.

11 Monaghan, State Law Wrongs, State Law Remedies, and the Fourteenth Amendment, 86 Colum. L. Rev. 979 (1986).

12 This Note does not distinguish between liberty and property interests, except to the extent that the federalism-based arguments do not apply to liberty interests created directly under the Constitution. See infra note 33. The Supreme Court has recently held that *Parratt* applies to liberty as well as property interests. Zinermon v. Burch, 110 S. Ct. 975 (1990); see also Comment, *Parratt v. Taylor*: Don't Make a Federal Case Out of It, 63 B.U.L. Rev. 1187, 1206-12 (1985) (*Parratt* should apply to liberty interests). Generally, the procedural analysis proffered in this Note should apply to liberty as well as property interests, but there may be circumstances in which they should be treated differently. Such an inquiry is beyond the scope of this Note.

13 451 U.S. 527 (1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327 (1986).

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

15 Id. at 530.

cials disregarded normal procedures for handling the package and, as a result, lost it.[16] Taylor brought suit under section 1983[17] alleging that because no predeprivation hearings had been held, he had been deprived of the hobby kit without due process of law.[18] The case reached the Supreme Court after the Eighth Circuit affirmed[19] the district court's grant of summary judgment in favor of Taylor.[20]

The Supreme Court found that Taylor had established the threshold elements of a section 1983 due process violation: state action and the deprivation of a constitutionally protected interest.[21] After pointing out that the Constitution does not protect against all deprivations—it protects only against those accomplished without due process of law—the Court considered whether Taylor had received "the requirements of procedural due process."[22]

At issue was whether Nebraska's provision of a postdeprivation remedy for Taylor's loss defeated his claim of a procedural violation. Previous due process cases had established that, subject to limited exceptions, the state was obligated to provide hearings *before* it worked a deprivation of property.[23] In *Parratt*, however, the Court reasoned that because the negligent act of the state official was "random and

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16 Id.

17 42 U.S.C. § 1983 (1982) [hereinafter § 1983] provides 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.

18 *Parratt*, 451 U.S. at 530.

19 Taylor v. Parratt, 620 F.2d 307 (8th Cir. 1980) (per curiam), rev'd, Parratt v. Taylor, 451 U.S. 527 (1981), overruled in part, Daniels v. Williams, 474 U.S. 327 (1986).

20 *Parratt*, 451 U.S. at 530-31.

21 *Id.* at 536-37.

22 *Id.* Another issue was whether the guard's negligent action could work a denial of due process at all. The Court concluded that it could. Id. Justice Powell argued that negligent conduct could simply not work a "deprivation" in the constitutional sense. Id. at 546. (Powell, J., concurring). His position was later adopted in Daniels v. Williams, 474 U.S. 327, 333 (1986), and it was this part of *Parratt* that was overruled. While *Parratt* is no longer good law with respect to negligent deprivations of property, its holding with respect to the role of postdeprivation remedies remains the standard. See Zinermon v. Burch, 110 S. Ct. 975 (1990); Hudson v. Palmer, 468 U.S. 517 (1984).

23 *Parratt*, 451 U.S. at 540; Brown, supra note 3, at 816. The cases in which postdeprivation process had been found constitutional were based on particular assurances of accuracy even without the predeprivation hearing. *Parratt*, 451 U.S. at 539; see, e.g., Barry v. Barchi, 443 U.S. 55, 65 (1979) (summary suspension of horse-trainer's license justified because expert's judgments were sufficiently reliable). Another basis for constitutionality was the "necessity of quick action by the state." *Parratt*, 451 U.S. at 539; see, e.g., Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950) (immediate seizure of drugs necessary to protect public); Fahey v. Mallonee, 332 U.S. 245 (1947) (same for bank's assets); Bowles v. Willingham, 321 U.S. 503

unauthorized":[24]

> [T]he State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action "under color of law," is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation.[25]

Thus, the Court reasoned that where a state actor works an unauthorized deprivation, the lack of predeprivation process will not invariably render a deprivation unconstitutional.[26] Where an unauthorized action deprives a person of her property, however, the state will be constitutionally liable to the property owner unless the state provides an adequate remedy.[27] Concluding, without thorough analysis, that the state tort action was an adequate postdeprivation remedy, the Court reversed the Eighth Circuit.[28]

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(1944) (emergency required rent controls); North American Cold Storage v. Chicago, 211 U.S. 306 (1908) (same for food).

[24] *Parratt*, 451 U.S. at 541.

[25] Id. at 541. Justices Blackmun and White concurred, understanding the holding inapplicable to deprivations of life or liberty as well as intentional deprivations. Id. at 545-46 (Blackmun, J., concurring). Both Justices nevertheless joined in Hudson v. Palmer, 468 U.S. 517 (1984), unanimously extending *Parratt* to intentional deprivations. *Hudson*, 468 U.S. at 518; see infra notes 29-30 and accompanying text. Justice Marshall agreed with the majority, but argued that the prison official needed to inform Taylor of the tort procedure. Id. at 554-56 (Marshall, J., concurring in part and dissenting in part). Justice Powell argued that negligent actions do not work "deprivation[s] in the constitutional sense." Id. at 548 (Powell, J., concurring). Justice Stewart wrote separately, concurring with both the majority and Justice Powell. Id. at 544-45 (Stewart, J., concurring).

[26] See Zinermon v. Burch, 110 S. Ct. 975 (1990); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (emphasizing that a deprivation must be unauthorized in order for postdeprivation remedies to be relevant under *Parratt*); see infra note 89 (describing how the term 'authorization' is used in this Note).

[27] *Parratt* was based, in large part, on an opinion written by Justice Stevens when he was a circuit judge. See *Parratt*, 451 U.S. at 541-42 (quoting Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975), modified, 545 F.2d 565 (1976) (en banc), cert. denied, 435 U.S. 932 (1978)).

The adequate state remedy inquiry should not be confused with an exhaustion requirement. Exhaustion requirements are clearly forbidden in § 1983 suits. Patsy v. Board of Regents, 457 U.S. 496 (1982). The issue of whether state procedures are adequate necessarily goes to the *merits* of a claim that the procedures provided were unconstitutional. This is evidenced by the Court's willingness to rule on the adequacy of the Nebraska procedures instead of requiring plaintiff to attempt them before bringing his action. *Parratt*, 451 U.S. at 544; see Note, supra note 3 (arguing that refining the underlying constitutional right poses dangers to protection of individual liberties).

[28] *Parratt*, 451 U.S. at 543. The opinion provided little guidance regarding the meaning of adequacy, noting only that "[a]lthough the state remedies may not provide the respondent with all the relief which may have been available . . . under section 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process." Id. at 544.

*Hudson v. Palmer*[29] extended *Parratt*'s holding to intentional deprivations.[30] In deciding to extend the adequate state remedy inquiry of *Parratt* to intentional acts, the Court reasoned that

> "[t]he state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent.[31]

Taken together, these cases require a court to determine (1) whether the action by a state official was unauthorized, and, if so, (2) whether there exists an adequate state remedy. If the action was unauthorized, *Parratt*'s postdeprivation concept allows adequate state remedies to satisfy the procedural requirements of the Constitution.

### B. Parratt *and Constitutional Torts*

The constitutional and common-law torts seem to cover the same actions because rarely, if ever, is a tort preceded by a hearing. Thus, where a state official commits a tort, she is not likely to stop and provide her victim with notice and an opportunity to be heard. Prior to *Parratt*, however, the lack of a hearing had a far-reaching impact

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[29] 468 U.S. 517 (1984).

[30] The Court was unanimous on this issue despite reservations expressed in the *Parratt* concurrences regarding its application to intentional deprivations. See supra note 25.

[31] *Hudson*, 468 U.S. at 533. Professor Tribe's objections point up the eleventh amendment questions lurking behind *Hudson*. He states that "Dirty Harry violated the Constitution even if the state made it possible for his victims to sue him. Any contrary intimation in the needlessly broad language of *Hudson* ought to be regarded as dictum, and should be reconsidered when a suitable case presents itself." L. Tribe, American Constitutional Law 729 (2d ed. 1988). While Dirty Harry may have been a bad man, the issue in this constitutional suit premised on state action, is the *state's* role and liability. *Hudson*, 468 U.S. at 534; accord Zinermon v. Burch, 110 S. Ct. 975, 985-86 (1990).

The eleventh amendment implications in this area are beyond the scope of this Note. They are also immaterial to this Note's thesis. To the extent the deprivation is possible because of the official's position, it does not matter which of its various manifestations the state is named as; it still must pay in some way. Even if a judgment is rendered against an officer in his individual capacity, the state will either repay the officer, operate as insurer, attract employees by raising salaries to compensate for their possible exposure, or simply be less able to attract qualified employees because of the risk of suit. Cf. Demery v. Kupperman, 735 F.2d 1139, 1146-48 (9th Cir. 1984) (state indemnification of officials liable in their individual capacity does not raise eleventh amendment bar). Furthermore, the analysis proffered in this Note would apply to section 1983 actions brought in state courts, Maine v. Thiboutot, 448 U.S. 1, 9 n.7 (1980); Nevada v. Hall, 440 U.S. 410 (1979); see also Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.2 (1985); cf. Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989) (states are not "persons" under § 1983), to actions against Municipalities, Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978), to actions seeking injunctive relief, *Ex Parte* Young, 209 U.S. 123 (1908), and to actions seeking prospective relief, Edelman v. Jordan, 415 U.S. 651 (1974).

on federal-state relations. Common-law torts had become constitutional violations simply because the tortfeasor was on the state's payroll. The constitutional tort doctrine threatened the states' abilities to protect individual liberties, preempted their rights to set standards of behavior for their own officers, and reduced the contribution of state law makers to federal law, all in a legal process that was less democratic, less flexible, and difficult to change.[32]

More specifically, the Supreme Court generally takes a positivist approach to property: no property interests[33] exist unless state law grants them.[34] Similarly, state law, not federal law, determines whether a deprivation is justified.[35] As a result, in constitutional actions alleging a deprivation of property without due process, state law issues are critical. Repeated adjudication of these issues in federal court under the guise of constitutional tort displaces the state courts' position as the primary arbiters of state law.[36]

In *Paul v. Davis*,[37] the Court first articulated its concerns surrounding the emerging constitutional tort doctrine.[38] While *Paul* highlighted the problems surrounding constitutional torts, its solution

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32 Wells & Eaton, supra note 3, 209-10; Whitman, supra note 3, at 5, 30-40; Note, supra note 3, at 1048-49.

33 This Note refers to property interests as interests created by state law. See infra note 34. Liberty interests can also be defined by state law, see P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, Hart & Wechsler's the Federal Courts and the Federal System, 577 (3d ed. 1988) [hereinafter Hart & Wechsler], and to the extent that they are, the analysis proffered in this section applies with as much force. Liberty interests, however, can also be established without reference to state law. Id. The jurisprudential preference for state adjudication, of course, does not apply to these.

34 The positivist-entitlement approach to the definition of property is the touchstone of Supreme Court due process jurisprudence. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." Board of Regents v. Roth, 408 U.S. 564, 577 (1972); accord Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Bishop v. Wood, 426 U.S. 341 (1976). See also Martinez v. California, 444 U.S. 277 (1980) (states are free to define their tort law so long as it is not irrational); infra note 44.

35 See Carey v. Piphus, 435 U.S. 247, 260 (1978); Memphis Community School Dist. v. Stachura, 477 U.S. 299, 307-08 (1986).

36 Paul v. Davis, 424 U.S. 693, 697-701 (1976); see California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97, 111-12 (1979); *Bishop*, 426 U.S. at 341; United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966) ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."); H. Friendly, supra note 6, at 90-92; Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 Law & Soc. Ord. 557, 560-63 (current title Arizona State Law Journal); Brown, supra note 3; Developments in the Law-Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1172-75 (1977); Note, supra note 3.

37 424 U.S. at 693.

38 Id. at 701.

was not a good one. In *Paul*, the state posted notices claiming that plaintiff was an "active shoplifter" without affording him any prior hearings. Plaintiff claimed that the damage to his reputation deprived him of a liberty interest without the proper hearings, a claim amply supported by precedent.[39] The Court, however, denied plaintiff's claim. Although plaintiff complained of a procedural wrong—lack of a hearing—and it was the procedural guarantees that the Court feared would subsume state tort law,[40] the decision did not focus on procedural issues.[41] The Court instead looked to the state tort of defamation in making a substantive distinction between constitutional wrongs and state law wrongs. The injury suffered, defamation, was solely a matter of state law.[42] Since the state tort law regulated this behavior, the interest the plaintiff lost was not protected by the Constitution, but rather by the state.[43] The interest, therefore, did not qualify for any procedural protection at all. Scholars commonly acknowledge, however, that *Paul*'s use of state tort law to define away constitutionally protected interests was defective: the existence of protection by state law should *prove* the existence of a constitutionally protected interest, not negate it.[44]

Although *Paul* was motivated by the concern that substantive constitutional norms would supplant state tort law, *Paul*'s substantive distinction does not work precisely because the problem it addresses is not substantive. Professor Smolla, for instance, argues that if the plaintiff in *Paul* had been allowed to pursue his claim in federal

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39 See Wisconsin v. Constantineau, 400 U.S. 433 (1971); Jenkins v. McKeithen, 395 U.S. 411 (1969).

40 *Paul*, 424 U.S. at 710 n.5.

41 See id. at 714 (Brennan, J., dissenting); G. Gunther, Constitutional Law 581 (11th ed. 1985).

42 "[Plaintiff's] interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions." *Paul*, 424 U.S. at 712.

43 Id.

44 "[O]ne inverts logic to say that an interest is disqualified from constitutional protection because it is protected by the common law of torts, because the law of torts may bring the interest into legal existence in the first place." 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, 846; accord Monaghan, Of "Liberty" and "Property," 62 Cornell L. Rev. 405, 425 n.136 (1977). But see Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 93-94 (Marshall, J., concurring) (there exist certain "core" property rights independent of positive law); Zensky, *Parratt v. Taylor*: Unauthorized Deprivations and the Content of an Adequate Remedy, 16 N.Y.U. Rev. L. & Soc. Change 161, 225 (1987-88) (the hobby kit in *Parratt* was " 'property pure and simple,' but not because Nebraska granted him a tort remedy.' ") (citation omitted). The Court also implicitly rejected the "bitter with the sweet" argument—the tort remedy is part of the right itself. See Smolla, supra at 836, 844; infra note 64 (describing the Court's rejection of this approach).

court, an entire body of substantive state libel law, such as the truth defense or the state of mind requirement, would have been displaced.[45] Concern over the displacement of state substantive law, however, is inapposite. Substantive issues such as the truth of the allegation or the conduct of the defendant should be at issue in federal court because these matters determine whether any protected interest was lost.[46]

Thus, the relevant concern is not that the federal courts would ignore the state substantive law. On the contrary, the concern is that by consistently adjudicating state law issues, the federal courts threaten to supplant the primacy of state adjudicatory *systems*.[47] State procedures to litigate disputes against its officers represent the state's own balance of the competing concerns of disciplining its officers, allowing government to proceed efficiently, and compensating its citizens for errors. Additionally, there is a strong jurisprudential preference for state adjudication of state law.[48] While a single deprivation does not cause these concerns to vanish, state systems would be irrelevant if, as in *Parratt* itself, a mere showing of loss caused by a state actor without a hearing, would entitle a grievant to federal sum-

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[45] Smolla, supra note 44, at 841.

[46] See Carey v. Piphus, 435 U.S. 247, 260 (1978); supra notes 34, 44. In *Carey* a student was discharged from school for disciplinary reasons without requisite hearings. The Court held that even where procedural due process was violated, no damages will be awarded for the deprived interest if the federal court determines that the deprivation was proper under state substantive law, in other words, if the deprivation would have occurred even with a hearing. Thus, if plaintiff actually were a disciplinary problem, he would not recover for the days he missed from school. *Carey* is a logical extension of positivist doctrine. Plaintiff had no protected interest in attending school while being unruly. Under the facts of *Paul*, to the extent that there was a state law which provided for "posting" under certain conditions, this law would have vested an interest in the plaintiff, and whether these conditions had been met would be an issue of substantive state law that had to be resolved in federal court under *Carey*. It appears, however, that there was no such law, and the police chief undertook the actions on his own initiative. See *Paul*, 424 U.S. at 694-95. Thus, the only state law conferring a property right was the tort law. See Smolla, supra note 44, at 845-46; see also Holmes, Natural Law, 32 Harv. L. Rev. 40, 42 (1918) (a "right" is just a prophecy that the state will punish and compensate upon certain conditions). Whether the law conferring a right to attend school allows the right to be abrogated for disciplinary reasons as in *Carey*, or the law conferring a right to reputation allows that it may be abrogated by truth or negligence as did the tort law underlying *Paul*, see e.g., Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927), these substantive issues would have to be litigated in federal court. If both of these laws existed, plaintiff would have overlapping positivist interests conferred by the state. A federal court hearing the claim would be taking on a task peculiarly suited for state courts—deciding which standard of conduct governed the official's behavior, the tort law or the law allowing posting upon certain specified conditions.

[47] The fourteenth amendment should not become "a font of tort law to be superimposed upon whatever *systems* may already be administered by the States." *Paul*, 424 U.S. at 700-01 (emphasis added).

[48] See supra note 36.

mary judgment in his favor.[49] There would be no incentive for states to tailor their systems to provide efficient and accurate resolution of these state law issues because no astute lawyer would use them.[50]

The task facing the Court in both *Parrat* and *Paul* was to protect property while still assuring state systems a primary role in matters of state law. *Paul* did not assure the primacy of state systems since any deprivation of protected interest would effect the displacement of state procedures regardless of their efficacy. At the same time, *Paul* denied constitutional protection to an interest that clearly deserved it. Thus, *Paul's* substantive analysis neither protected property nor satisfied federalism concerns. A procedural focus would assure a primary role for state systems by allowing them to operate unless they are defective.[51] Moreover, such a focus would protect property, since, by definition, any deprivation made pursuant to constitutional procedures is not without due process of law. Rather than addressing the substantive question of whether the state already prohibited defendant's actions, the *Paul* Court should have focused on the procedural issue—*how* it enforced that policy choice.

In contrast to *Paul*, the Court stated the issue in *Parratt* as whether the procedures available to the plaintiff "satisfy the requirements of procedural due process."[52] Nevertheless, courts and commentators consistently refuse to accept the Supreme Court's own characterization.[53] Some argue that the decision is really about sub-

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[49] Taylor v. Parratt, No. 76-L-57 (slip op.) (D. Neb. Oct. 25, 1978), aff'd, 620 F.2d 307 (8th Cir. 1980) (per curiam), rev'd, 451 U.S. 527 (1981), overruled in part, Daniels v. Williams, 474 U.S. 327, 331 (1986).

[50] See Smolla, supra note 44, at 870; Wells & Eaton, supra note 3, at 209-10; Zensky, supra note 44, at 188; Note, supra note 3, at 1048. The states would lose a significant aspect of their status as 'Brandeisian laboratories.'

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); accord Smolla, supra note 44, at 870 ("States have the initial responsibility both to define and to protect interests in property or liberty, and they are normally given the freedom to discharge those duties through the checks and balances of the common law tradition.").

[51] Of course, it could be argued that this statement begs the question because the fact that no predeprivation hearing was held means that there was a procedural defect. As this Note discusses in Parts II and III, however, *Parratt* recognized that the lack of a predeprivation hearing is not determinative—state systems include procedural mechanisms that operate both before and after a deprivation.

[52] *Parratt*, 451 U.S. at 537.

[53] See, e.g., Wilson v. Beebe, 770 F.2d 578, 594-95 (6th Cir. 1985) (Jones, J., concurring in part and dissenting in part) (en banc) (unauthorized deprivations might be better analyzed under substantive due process); Enright v. School Directors of Milwaukee, 118 Wis. 2d 236,

stantive due process,[54] while others simply claim that the procedural analysis of *Parratt* is not proper.[55] Many commentators seem to agree that because both decisions refer to state tort law, *Parratt* extends the reasoning of *Paul* in an attempt to distinguish, on the basis of sub-

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242, 346 N.W.2d 771, 774 (1984), cert. denied, 469 U.S. 966 (1984) (*Parratt* did not indicate that it concerned procedural rather than substantive due process); Hart & Wechsler, supra note 33, at 1274; Monaghan, supra note 11, at 984-86 (procedural due process analysis of *Parratt* "will not work"); Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 Yale L.J. 71, 100 (1984) (*Parratt*'s "procedural due process analysis is defective"); Wells & Eaton, supra note 3, at 219 ("it is exceedingly difficult to see any procedural element in the plaintiff's claim in *Parratt*"); Zensky, supra note 44, at 171 (*Parratt* and its progeny "may be better understood as *substantive* due process cases. The typical unauthorized deprivation claim really represents a hybrid of substantive and procedural due process norms."); The Supreme Court, 1981 Term, 96 Harv. L. Rev. 62, 102 (1982) (Parratt was "arguably a substantive challenge to the deprivation."); Comment, supra note 12, at 1217 ("*Parratt* cannot be easily pigeonholed into a procedural due process slot.").

[54] Professor Nahmod summarized the rationale of the substantive due process analyses: *Parratt* "was really a challenge to the fact of loss, not to the procedures." Nahmod, supra note 3, at 226. The conclusion of the substantive due process analysis is that "a plaintiff cannot allege a substantive due process violation in cases in which there exists an effective state remedy." Supreme Court, 1981 Term, supra note 52, at 102.

The "fact of the loss" however, must be further dissected; as a substantive due process matter it can manifest in two ways. First, it could be argued that "negligent loss of property is always a [substantive] constitutional wrong." Wells & Eaton, supra note 3, at 220, 222-23. This has been quite emphatically rejected: the negligent deprivation of property is *never* a violation of due process. Daniels v. Williams, 474 U.S. 327 (1986). Even before *Daniels*, plaintiffs whose only successful challenge to a deprivation was to the procedure by which it was effected rather than the ultimate merits, were entitled only to nominal damages. Memphis Community School Dist. v. Stachura, 477 U.S. 299, 307-08 (1986); Carey v. Piphus, 435 U.S. 247, 260 (1978). This is true, of course, so long as the 'procedure' did not, in itself, violate substantive due process. See Rochin v. California, 342 U.S. 165 (1952) (manner of obtaining evidence "shock[ed] the conscience" and was therefore a violation of substantive due process). If the property were deprived in a manner which violates substantive due process in itself, *Parratt* would not apply. Zinermon v. Burch, 110 S. Ct. 975, 983 (1990). The Supreme Court has only recently made this holding explicit, but most courts have understood *Parratt* in the same way. See, e.g., McLary v. O'Hare, 786 F.2d 83 (2d Cir. 1986); Mann v. City of Tucson Dep't of Police, 782 F.2d 790, 797 (9th Cir. 1986) (per curiam); Augustine v. Doe, 740 F.2d 329 (5th Cir. 1984); Brown, supra note 3, at 871 n.387 (collecting cases); Zensky, supra note 44, at 191 ("[n]o Court has held or suggested that *Parratt* applies to violations of rights protected by the Bill of Rights or to pure substantive due process"); Comment, supra note 12, at 1216. But see *Mann*, 718 F.2d at 797 (Sneed, J., concurring) ("the procedural-substantive due process distinction has no roots in logic").

The second argument centers on the substantive right to be free from "arbitrary" decisions. See Comment, supra note, 12 at 1218. *Parratt*, however, merely delays any claim for arbitrariness by extending the temporal bounds within which the state may make its decisions which can be evaluated for arbitrariness. See infra note 109.

[55] In the words of Professor Brown: "[P]laintiff's claim is not that a procedural safeguard could have prevented the injury, but that the injury, with or without process, should not have occurred. Because the destructive conduct . . . was unauthorized, the state could not 'justify' the injury." Brown, supra note 3, at 859. Professor Brown argues that because there was no fact actually in dispute, procedural due process is not implicated at all. Id. In the situations presented by *Hudson* and *Parratt*, he concludes, substantive due process will provide all the protection that is necessary. See infra notes 108, 146 (refuting these arguments).

stance, wrongs that violate the Constitution from those that violate only state tort law.[56] If *Parratt* holds that state substantive law determines both relevant questions—the action was unauthorized and there exists a state remedy—then, indeed, *Parratt* does no more than extend the holding of *Paul* to every action that is a state law tort.[57]

State substantive tort law, however, should not determine whether an act is unauthorized, and plays only a limited role in determining a remedy's adequacy. These are questions of procedure.[58] *Parratt* shifted the focus to procedural issues and allows displacement of state systems only if they are procedurally deficient.[59] In an effect similar to that of *Paul*, the doctrine complements the entitlement ap-

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[56] See, e.g., G. Gunther, supra note 41, at 579 n.4 (*Parratt* echoes the theme of *Paul*); Bandes, *Monell, Parratt, Daniels,* and *Davidson*: Distinguishing a Custom or Policy From a Random Act, 72 Iowa L. Rev. 101, 103 (1986) (*Parratt* was an attempt to "provide a clear workable test for distinguishing due process violations remediable under section 1983 from common law torts confined to state remedies"); Monaghan, supra note 11, at 979-80 ("*Parratt* is one part of an ongoing effort by the Supreme Court . . . to reorient fourteenth amendment jurisprudence. . . . [It] embodies a belief that a clear distinction can be drawn between constitutional violations and state law wrongs."); Smolla, supra note 44, at 834 (*Parratt* placed "state law in ascendancy over federal law in many cases that in an earlier time had been thought to implicate purely federalized due process norms"); Wells & Eaton, supra note 3, at 204-05, 213 (*Parratt* and its predecessors attempt to "define the boundary between constitutional and ordinary tort," and if *Parratt* does not require a remedy where one would exist under the constitutional action, its effects are "more substantive"); Note, supra note 3, at 1051-56 (*Parratt* is a refinement of *Paul*).

[57] See, e.g., Rittenhouse v. Dekalb County, 764 F.2d 1451 (11th Cir. 1985), cert. denied, 475 U.S. 1014 (1986) (dismissing under *Parratt* because of available tort suit without properly discussing whether the act was unauthorized).

[58] See supra notes 89-98, 138-46 and accompanying text.

[59] Zinermon v. Burch, 110 S. Ct. 975, 983-87 (1990); Daniels v. Williams, 474 U.S. 327, 338 (1986) (Stevens, J., concurring).

Professor Redish proffers a different analysis:

> It is incorrect to suggest that the end result of a negligent loss of a prisoner's property is rendered legitimate and appropriate—like the revocation of welfare benefits—by the provision of proper procedures. . . . The point may be better understood when applied in a wholly different context (one in which a number of lower courts have in fact employed the *Parratt* analysis): the physical beating of an individual by state or local officials. It is difficult to imagine that the end result of a beating could ever be justified by the provision of adequate procedures; the case is more analogous to the discrimination against Jews, than to the removal of welfare benefits, because in neither the beating nor discrimination examples can the end result be "purified" by the use of proper procedures.

Redish, supra note 53, at 100-01. His analysis is entirely misplaced. If the beating itself violated some constitutional prohibition, such as substantive due process or the eighth amendment, then state postdeprivation remedies should be irrelevant. See *Zinermon*, 110 S. Ct. at 983; accord Whitley v. Albers, 475 U.S. 312 (1986) (no mention of state remedies in beating of a state prisoner); supra note 54. If it did not, then the only law prohibiting the beating is state tort law, and "purification" under state law can be had in any postdeprivation hearing that satisfies due process. If the beating were determined to have been justified under tort law, because it was in self-defense for example, it would probably be "purified" as Professor Redish uses that term. See Carey v. Piphus, 435 U.S. 247, 260 (1978).

proach by allowing the states, which create the relevant law, to adjudicate the merits of its application where they are capable of properly doing so.[60] Unlike *Paul*, however, the mere existence of tort law does not disqualify the interests it covers from constitutional protection. On the contrary, under *Parratt*, the Constitution requires that the states protect the property they create.

In prior procedural cases, the threshold determinations all converge around an interpretation of state law: the existence of a property interest.[61] *Parratt*, by contrast, may permit federal courts to begin with procedural issues[62] such as availability of counsel or opportunity for oral presentation,[63] which the federal courts are best suited to adjudicate and which implicate none of the concerns regarding displacement of state substantive law.[64] More than this, however, *Parratt*'s procedural analysis is the only proper response to the original claim, seemingly forgotten, which alleged a procedural wrong—lack of a hearing.

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[60] See Smolla, supra note 44, at 834 (*Parratt* is the "near cousin" of the entitlement doctrine).

[61] See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[62] See Hudson v. Palmer, 468 U.S. 517, 534 (1984) (since *Parratt* applies, "we need only decide whether the Commonwealth of Virginia provides respondent with an adequate postdeprivation remedy for the *alleged* destruction of his property") (emphasis added); cf. Vicory v. Walton, 721 F.2d 1062, 1065-66 (6th Cir. 1983), cert. denied, 469 U.S. 834 (1984) (failure to plead inadequacy of state procedures requires dismissal of complaint); Rubin, Due Process and the Administrative State, 72 Calif. L. Rev. 1044 (1984) (due process analysis should not start with "liberty, property, or any other individual interest").

[63] See generally Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267 (1975) (discussing elements of process).

[64] In Arnett v. Kennedy, 416 U.S. 134 (1974), the plaintiff was dismissed in accordance with statutory procedures, procedures that did not include pretermination hearings. The Court determined that the "substance" of the right can be established by the state law, but not the procedures for its abrogation. A majority of the Court rejected the plurality's "bitter with the sweet" argument. Id. at 154-55. That argument, proffered by Justice Rehnquist, suggested that the state law conferring the property right could define the contours of that right by specifying the procedures for its termination; the right to continued employment included a right to no more process than that which the employment statute conferred upon him. Rejecting the argument, Justice Powell recognized that a state creating a property interest, defines the "nature" of the property interest but stated, "the legislature may . . . not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." Id. at 167 (Powell, J., concurring). Later, the Court could hardly have made been more clear: "[t]he categories of substance and procedure are distinct . . . . The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985); accord Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

## II. A SYSTEMIC ANALYSIS OF PROCEDURAL DUE PROCESS AND *PARRATT*

*Parratt* represents the Court's acceptance of Justice Stevens's position that procedural due process is fundamentally different from other constitutional guarantees[65] and must be understood in the context of the protection it is designed to afford. As this section will show, the Supreme Court has established a systemic conception of procedural due process: states must provide systems that, for the generality of cases, assure faithful implementation of state substantive laws.

### A. *Procedural Due Process Mandates a Systemic Analysis*

Claims against the states under the due process clause fall into three categories. First, the clause incorporates specific provisions of the Bill of Rights.[66] Second, substantive due process prohibits certain actions "regardless of the fairness of the procedures used to implement them."[67] Third, the clause guarantees fair procedures.[68] *Parratt* governs only the third type of constitutional violation[69] which, unlike the first two, is closely tied to non-constitutional issues of state law. The state may have had a valid justification under state law to deprive the plaintiff of the interest at issue.[70]

Procedural due process does not focus on the purposes of any particular substantive law. Rather, a procedural analysis simply scrutinizes the methods used in achieving those purposes.[71] In fact, a violation of constitutional procedural requirements will not yield damages for property deprived if the deprivation is ultimately determined to have been substantively correct.[72] The primary function of

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65 Daniels v. Williams, 474 U.S. 327, 338-40 (1986) (Stevens, J., concurring), accord Zinermon v. Burch, 110 S. Ct. 975, 983 (1990); see supra note 27.

66 See, e.g., Benton v. Maryland, 395 U.S. 784 (1969) (fifth amendment); Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment); Robinson v. California, 370 U.S. 660 (1962) (eighth amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment); Douglass v. Jeannette, 319 U.S. 157 (1943) (first amendment).

67 *Daniels*, 474 U.S. at 331.

68 Id. at 337-38.

69 *Zinermon*, 110 S. Ct. at 983.

70 Id.; *Daniels*, 474 U.S. at 338-39 (Stevens, J., concurring).

71 Procedural due process serves "the wholly 'neutral' or 'technical' value of accurately enforcing the state's own positive choices about how competing interests are to be adjusted through rules governing behavior and through formulas allocating scarce resources." L. Tribe, supra note 31, at 717; Resnick, Due Process and Procedural Justice, in NOMOS XVIII: Due Process 209 (J.R. Pencock & J. Chapman eds. 1977) (procedural due process contains no substantive content of its own).

72 Memphis Community School Dist. v. Stachura, 477 U.S. 299, 307-08 (1986) (only nomi-

procedural due process "is to minimize the risk of erroneous decisions"[73] by ensuring that the business of government proceeds in a manner that secures faithful implementation of its laws.[74] Under *Parratt*, like earlier procedural due process cases, the clause has a strong instrumental purpose:[75] it is designed to produce better government.[76]

Even though accuracy of decision making is the primary goal of process, the degree of accuracy that a system is required to provide will be qualified by the burden of providing it. In *Mathews v. Eldridge*,[77] the Court developed three factors to be balanced in determining how much process a state must provide to assure accurate

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nal damages or damages resulting directly from the loss of the hearing itself are available if deprivation is substantively correct); Carey v. Piphus, 435 U.S. 247, 260 (1978) (same).

73 Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 13 (1979); accord Fuentes v. Shevin, 407 U.S. 67, 97 (1972) (purpose of procedural due process is to reduce the risk of substantially unfair or mistaken deprivations); Daniels v. Williams, 474 U.S. 327, 331 (1986) ("[b]y requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process clause promotes fairness in such decisions"). Mathews v. Eldridge, 424 U.S. 319 (1976), makes the point most clearly. Eldridge, a recipient of disability benefits, claimed that the procedures for terminating his benefits were constitutionally inadequate because they failed to provide for a pretermination oral hearing. The Court distinguished Goldberg v. Kelly, 397 U.S. 254 (1970), where oral hearings were required for termination of government benefits, because in *Mathews* the relevant decision was based on medical evidence which would not be made more reliable by the imposition of an oral hearing. *Mathews*, 424 U.S. at 346. Thus, the law was being executed fairly without plaintiff's ability to present oral evidence.

74 See L. Tribe, supra note 31, at 661-62. Procedural due process also serves the dignitary value of insuring an individual that she will not be the subject of unilateral government action; it secures every individual a place in the process to which she is subject. See Marshall v. Jerrico, 446 U.S. 238, 242 (1980); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring); L. Tribe, supra note 31, at 663; Mashaw, The Supreme Court's Due Process Calculus for Administrative Adjudication in *Mathews v. Eldridge*: Three Factors in Search of a Theory of Value, 44 U. Chi. L. Rev. 28, 48 (1976) (dignitary value requires predeprivation hearings even if determinations are accurate without them); Michelman, Formal and Associational Aims in Procedural Due Process, in NOMOS XVIII: Due Process, supra note 71, at 127-28 (procedures vindicate value of participation); Saphire, Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection, 127 U. Pa. L. Rev. 11, 117-25 (fairness and dignity should determine whether and how much process is required). In *Parratt*, because predeprivation process was impossible, all that could be hoped for was a postdeprivation hearing, and dignitary concerns are simply not implicated in whether a person must bring her postdeprivation action to federal or state court. On the other hand, *Parratt* moves strongly away from considering dignitary concerns because these concerns arise whether or not predeprivation process was possible; a constitutional violation, as opposed to a tort suit, would recognize that these concerns exist, and perhaps even award damages for them. But see Carey v. Piphus, 435 U.S. 247, 260 (1977) (no damages for dignitary concerns in loss of hearing).

75 See L. Tribe, supra note 31, at 666-67.

76 "[B]eyond the requirement on institutions that the power they confer be morally justifiable, there is the further moral requirement that there be some effective guarantee that these powers will be exercised only within the limits and subject to the conditions implied by their justifications." Scanlon, Due Process, in NOMOS XVIII: Due Process supra note 71, at 95-96.

77 424 U.S. 319 (1976).

determinations: (1) the risk of erroneous deprivations, (2) the private interest affected by the official action, and (3) the governmental interest including the fiscal and administrative burden on the government in providing the procedure demanded.[78] By balancing accuracy against the private interest and the state's burden, the Court recognized that the Constitution does not place unattainable burdens on the states; instead, it demands only a well-balanced compromise of accuracy and feasibility.

Furthermore, the Supreme Court's systemic approach does not center on the individual grievant at bar; it does not ask whether an additional procedure would have increased accuracy in the particular circumstances of the case it is deciding.[79] Rather, the systemic approach works at the system-wide, or "wholesale,"[80] level without reference to the success of the procedures afforded to the specific plaintiff. The inquiry is solely whether the *system*, as a whole, provides sufficient guarantess of accurate determinations for most cases:[81] "procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions."[82] A claim that a generally adequate system has produced a particular inaccurate result, therefore, does not state a constitutional procedural claim.[83] To prevail, a plaintiff must show

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78 Id. at 335.

79 But see Lassiter v. Department of Social Servs., 452 U.S. 18 (1981) (individualized determination that issues involved were not sufficiently complex that providing counsel to the litigant at bar would have made the decision at issue more accurate). Even if *Lassiter* remains good law, the individual approach has been the exception, the rule being the system-wide evaluation. See, e.g., Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985).

80 S. Bryer & R. Stewart, Administrative Law & Regulatory Policy 783 (2d ed. 1985).

81 See *Mathews*, 424 U.S. at 343-47 (evaluating statistical evidence to determine the general accuracy of the system). This type of analysis parallels that used in exclusionary rule cases where a court essentially evaluates the deterrent effect of exclusion on "the law enforcement profession as a whole." United States v. Leon, 468 U.S. 897, 919 (1984); see also Illinois v. Krull, 480 U.S. 340, 365 (1987) (O'Connor, J., dissenting) ("a legislature's unreasonable authorization of [unconstitutional] searches may affect thousands or millions").

82 *Mathews*, 424 U.S. at 344. Further, the Court placed the emphasis squarely on a systemic level by stating that in order to properly assess the accuracy a system of procedures, one must take into account "the overall rate of error for all denials of benefits." Id. at 344 n.29. Any doubt that procedural systems are to be evaluated in a manner detached from the parties at bar was eliminated by Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985). In that case, a statute limited attorneys' fees in Veteran Administration claims to $10, effectively precluding claimants from retaining counsel. Recognizing that many claims involve complex issues with which an attorney could help, the Court nevertheless found the statute constitutional because it did not adversely effect accuracy in the generality of cases. "It would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law." Id. at 326.

83 "[T]he very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case . . . ."

that she was deprived of property by a system with inadequate guarantees of accuracy and fairness.

### B. Parratt *in a Systemic Analysis*

*Parratt* results from a straightforward application of the systemic procedural due process principles. Where a state deprives someone of property in an unauthorized manner, it would be impossible for the state to provide prior process—the state has no way to anticipate the official's act. As a result, the burden of providing prior process is absolutely prohibitive and *Mathews* will not require it.[84] *Parratt*, in effect, divides process into primary and secondary levels. The primary level of process is the system which is regularly required, directly under *Mathews*, to effect deprivations with similar risks of error, urgency of interests, and governmental burdens.[85] Once the state meets its primary procedural responsibilities by establishing the system *Mathews* requires, the *system* is still the same even if a solitary official violates it.[86] Thus, the state cannot, based on *Mathews* alone,

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*Walters*, 474 U.S. at 321. Appeals or other mechanisms of the adequate system will correct an inaccurate result or it must stand as a deprivation that plaintiff feels is unjust. See Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985) (where grievant was afforded process the only argument available regarding the justification for the decision was that the decision violated substantive due process); Bishop v. Wood, 426 U.S. 341, 349-50 (1976) (Constitution is not a vehicle for litigating the merits of state decisions); cf. Plato, Crito, in The Dialogues of Plato, 36-37 (B. Jowett trans. 1986) (Socrates declines to escape the judgment of the state because he believes his duty is to submit to it, even though he feels it unjust).

84 See Zinermon v. Burch, 110 S. Ct. 975, 985 (1990) (*Parratt* is an application of, rather than an exception to, the *Mathews* test). Numerous commentators have said that no state interest in *Parratt* was relevant under a *Mathews* balance, and that *Parratt* was an exception to *Mathews*. See, e.g., Bandes, supra note 56, at 134 (*Parratt* was an exception to the *Mathews* balancing test); Wells & Eaton, supra note 3, at 219 (no state interest in the hobby kit); Comment, supra note 12, at 1209 ("Under a balancing test, a predeprivation hearing would have been required because there was *no* state interest involved that outweighed the inmate's private interest in the $23.50 hobby kit."). Although there was no state interest in the hobby kit, the relevant interest under *Mathews* is the burden in providing a particular procedure. *Mathews*, 424 U.S. at 335. There is never a state interest in an item that we define as falling outside the laws justifying destruction of contraband, such as the hobby kit. The issue, of course, is what procedures are required to determine whether it was a hobby kit or some type of contraband. While in hindsight we know that it was a hobby kit because the defendant did not contest the point, the defendant could have argued that the kit contained contraband. Analytically, there must be some sort of procedure before the property can be labelled one or the other.

85 See, e.g., Goldberg v. Kelly, 397 U.S. 520 (1965) (terminating welfare benefits, required pretermination hearings, timely notice, opportunity to confront adverse witnesses and to present evidence orally).

86 Whether the individual official was able to provide a hearing that the Constitution requires "is 'of no consequence,' because the proper inquiry under *Parratt* is 'whether the *state* is in a position to provide predeprivation process.' " Zinermon v. Burch, 110 S. Ct. 975, 986 (1990) (emphasis in original). To the extent the departure was not an isolated incident, the custom or policy which was the day-to-day norm should be used in the *Parratt* analysis. See Bandes, supra note 56 *passim*.

be subject to a procedural claim without transfiguring the initial *Mathews* balance the state has assumptively complied with. Yet, the state is not absolved of any further responsibility if an official deprives a person of property in violation of the state's constitutionally adequate primary system.[87] *Parratt* affords the victim a secondary level of process in the form of postdeprivation remedies. Instead of requiring the state to do the impossible, *Parratt* requires the states to accommodate the victims of unauthorized actions in the best way it can, by providing a postdeprivation remedy. Simply put, *Parratt* requires that states provide generally accurate predeprivation schemes (primary level process) and a safety net of postdeprivation remedies for aberrant behavior of its officials (secondary level process). Where the state has done this, it cannot be guilty of a procedural violation because it could not have done more.[88]

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[87] See supra note 146 (discussing argument that *Parratt adds* substantive rights by requiring the state to provide postdeprivation remedies where prior process is impossible under *Mathews*).

[88] *Zinermon*, 110 S. Ct. at 985. The Court's precise *Mathews* analysis in *Zinermon* is somewhat confused in that it fails to distinguish between primary and secondary level processes. It states that *Parratt* presents "the unusual case in which one of the variables in the *Mathews* equation—the value of predeprivation safeguards—is negligible in preventing the kind of deprivation at issue. Therefore, no matter how significant the private interest at stake and the risk of its erroneous deprivation, the State cannot be required constitutionally to do the impossible by providing predeprivation process." Id. at 985 (citation omitted). But deciding that the value of additional predeprivation procedures is negligible certainly does not force the conclusion that providing them would be "impossible." Here, the Court is treating everything as a question of primary level process; it is trying to decide, under *Mathews*, what procedures would be required to head off a departure from the process *Mathews* requires.

Much of the confusion results from majority's focus on the value of additional primary level procedures for "the kind of deprivation" at issue. Id. at 987-90. The concern is whether the Court has embraced the proper primary level systemic approach, considering all acts with similar *Mathews* factors as the same "kind," or has instead embraced the insupportable position that all *prohibited* acts are of the same "kind."

Where the Court takes into account the prohibited nature of the act in determining how much primary level process is required, it collapses secondary level process into the primary level. The prohibited nature of the act is a characteristic only of the single deprivation at bar, hence it is an improper factor in determining the level of primary process required under *Mathews*. Secondary level process is available only because an unauthorized departure from the primary scheme is impossible to intercept. If all unsanctioned deprivations are of the same "kind," then the majority succumbs to the catch-22 of the dissent which argued that since the state officials were "bent upon departing" from all state practices, additional procedures would be of no help. Id. at 992, 993 (O'Connor, J., dissenting). If the "kind" referred to the prohibited nature of the act, no primary procedures would ever be of any value because the official would contravene those as well. See Id. 989-90. The only time extra procedures would be of any value would be where the departure from state law was negligent, but that can never support a constitutional procedural claim. Daniels v. Williams, 474 U.S. 327 (1986).

While in some places in *Zinermon* the "kind" of deprivation seems to be based on *Mathews* factors, id. at 987-88, the Court elsewhere seemed to agree that all unauthorized depriva-

### 1. Authorization and Systemic Analysis

Resort to secondary level process is allowed only where the deprivation is unauthorized.[89] The proper definition of authorization in a *Parratt* analysis, in turn, is built upon the Supreme Court's earlier parsing of substance and procedure.[90] While an action that violates

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tions were of the same kind. It disagreed with the dissent only on the factual matter of whether the officials were truly "bent" on violating state law. Id. at 989-90.

The Court must first analyze the primary level process question. The reason additional procedures are not required is because *Mathews* should have already dictated whether they were required at the primary level. Once the required procedures under *Mathews* are established—elaborate or not—*then* it becomes impossible for the state to know where the scheme will be violated and provide otherwise required primary level process at that point. This is the *Mathews* 'impossibility' that allows resort to secondary level postdeprivation remedies, not the negligible value of additional procedures. If the value of an additional primary level procedure is truly "negligible," and *Mathews* would not require it, failing to provide it would not be a violation of the Constitution—regardless of postdeprivation remedies. See infra note 104.

89 "Unauthorized" is used in this Note to refer to those actions which would trigger the availability of postdeprivation remedies under *Parratt*. The definition, in turn, suggests that unauthorized acts are those taken in contravention of established state procedural schemes. See infra text accompanying note 92. The Supreme Court has expressed the same concept in various ways such as 'impossibility of providing better procedures' or the 'predictability' of the loss, but all ultimately turn on the action in relation to state law. "Authorization" as defined in this Note encompasses the varying expressions used by the Supreme Court, but serves the added advantage of clarifying the relationship among them—they are all part of a systemic scrutiny of state procedure. For example, an act which is taken in accordance with "established state procedure," Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982), simply refers to the opposite of an unauthorized act. Similarly, the Court has sometimes tested whether postdeprivation remedies will be available under *Parratt* by asking whether the loss was "predictable." *Zinermon*, 110 S. Ct. at 990; Hudson v. Palmer, 468 U.S. 517 (1984). No action of a government official is specifically predictable, and indeed even if they were, not all 'losses' are unconstitutional. If the state official deprived a person of her 'property' in accordance with state law, it would not be the loss of a constitutionally protected interest. *Zinermon*, 110 S. Ct. at 979 n.3; Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Thus, 'unauthorized' as used in this Note encompasses and refines the Supreme Court's other articulated tests because an 'unpredictable' action must, like an 'unauthorized' action, refer to an action which is unpredictable *because* it violates state law. *Zinermon*, 110 S. Ct. at 992 (O'Connor, J., dissenting) ("Petitioner's actions were unauthorized: they are alleged to have wrongly and without license departed from established state practices."). See also supra note 88 (discussing the Court's 'impossibility' test in *Zinermon*).

After the great majority of this Note had been written, the Supreme Court decided *Zinermon* in which 'authorized' was narrowly used to describe only the degree of power invested in the defendants. *Zinermon*, 110 S. Ct. at 990. A defendant's power, however, is again only relevant because it effects how and when she can 'violate' state law. See id. ("The deprivation here is 'unauthorized' only in the sense that it was not an act sanctioned by state law."). In *Zinermon* the acts were in one sense unauthorized because they violated state law, yet in another sense they were not because the state had invested great power in the defendants. The distinction the Court should have drawn is that the acts were substantively incorrect but procedurally authorized. See infra notes 120-21 and accompanying text.

90 See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) ("[t]he categories of substance and procedure are distinct"); supra note 64. Different constitutional doctrines will be employed to evaluate the different types of law. Generally, substantive laws are not strongly restricted by the due process clause. See *Logan*, 455 U.S. at 422; Martinez v. California, 444

any state law may seem unauthorized in a general sense, *Parratt* concerns only procedural rules; violation of substantive law should not render an action 'unauthorized' in the specific way *Parratt* uses that term.[91] Under *Parratt*, an action should be considered authorized unless it meets a two-part test: first, the state must have had constitutionally adequate procedural rules in place (primary level process), and second, the act must have been taken in contravention of these rules.[92]

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U.S. 277 (1980) (state is free to fashion tort law so long as it is not irrational). Unlike substantive laws, procedural rules are narrowly circumscribed by constitutional commands. See *Loudermill*, 470 U.S. at 541; Vitek v. Jones, 445 U.S. 480, 490-91 n.6 (1980).

At the margin, it is often difficult to distinguish substance from procedure. See, e.g., Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Levy v. Steiger, 233 Mass. 600, 124 N.E. 477 (1919). Nevertheless, substance and procedure should be separated because they serve different functions. Substantive law reflects the state's policy choices as to the behaviors it wishes to encourage and the allocation of resources and benefits it wishes to establish. Substantive law refers to laws which reflect "the state's own positive choices about how competing interests are to be adjusted." L. Tribe, supra note 31, at 717. Tort law is an example, including those parts of the tort law which justify actions by state officials that would be torts had they been committed by private citizens. See generally W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Torts 148-57 (5th Ed. 1984) [hereinafter Prosser & Keeton] (describing tort law as applied to official actions). By contrast, procedural laws are designed only to ensure accurate implementation of the policy choice. See supra notes 71-76 and accompanying text.

91 Cf. *Zinermon*, 110 S. Ct. at 975 (failing to recognize that state official's erroneous treatment of a mental patient as competent is a substantive mistake); infra notes 120-121 and accompanying text.

92 Most commentators focus their attention on the adequacy branch of the *Parratt* analysis and assume that an act which violates any state law is unauthorized. See Monaghan, supra note 11, at 994 (assuming that *Parratt* requires an action to be considered unauthorized when it is contrary to substantive law or policy); Smolla, supra note 44, at 874 (stating that when a state authorizes "summary condemnation" procedures, *Parratt* would bar a constitutional action if the state provided a remedy, thus implying that the state could procedurally "authorize" an action yet avoid constitutional liability if it was substantively "unauthorized" under the tort law). Professor Brown apparently thinks that authorization is an issue of substantive law as evidenced by the statement he presents as tautological: "Because the destructive conduct in *Hudson* was unauthorized, the state could not 'justify' the injury." Brown, supra note 3, at 859. Professor Brown's statement is not tautological, it is erroneous. The substantive issue of justification is unrelated to the procedural issue of authorization. An official can "justify" the result of her actions in any federal or state postdeprivation action; damages for the lost property would then not be awarded. If the papers destroyed in *Hudson* turned out to have been blueprints of the prison, the destruction would have been "justified" though it was procedurally unauthorized. Memphis Community School Dist. v. Stachura, 477 U.S. 299, 307-08 (1986); Carey v. Piphus, 435 U.S. 247 (1978).

The Supreme Court has implicitly recognized that authorization is strictly a question of procedure. *Parratt* itself seems to indicate that it is the *procedural* violation that allows characterization of the action as unauthorized: "the deprivation occurred as a result of the *unauthorized failure of agents of the State to follow established state procedure*." *Parratt*, 451 U.S. at 543 (emphasis added); accord *Zinermon*, 110 S. Ct. 975. The Court in *Parratt* uses "random and unauthorized" and "established state procedure" interchangeably, suggesting that random and unauthorized acts are questions of procedure. This is further demonstrated by Logan v. Zimmermann Brush Co., 455 U.S. 422 (1982), where the state's actions were found to be

*Parratt* makes clear that an unauthorized act is an act before which it is impracticable to provide a hearing. Because the state can not "predict" when its agents will violate state law, it is impossible to provide a hearing before they do so.[93] Of course, it can be as impossible to predict a violation of substantive law as it is to predict a violation of procedural law.[94] But, while an act in contravention of substantive law is not specifically predictable, the fundamental premise of procedural due process is that the state must anticipate ambiguities and conflicts as a general matter, and institute procedures to ensure that they are accurately resolved.[95] The state is under an affirmative obligation to provide predeprivation hearings or establish training and supervisory procedures[96] to ensure that the substantive law is carried out with a certain level of accuracy.[97] A state official's departure from substantive law, therefore, is irrelevant to the question of whether the state should be liable for failing to provide adequate predeprivation process. If substantive law could determine authorization, all prior procedural due process cases requiring predeprivation procedures would be meaningless. Once the act became unauthorized by failing to heed the criteria set out in the substantive law, the state, under *Parratt*, would only need to provide postdeprivation remedies. Substantive errors would effectively absolve the state of its responsibility to provide proper process to ensure that such errors do not oc-

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authorized even though they probably violated the substantive law. The Courts of Appeals have generally considered authorization as a procedural question based on the language in *Parratt*. See, e.g., Weimer v. Amen, 870 F.2d 1400 (8th Cir. 1989); Burch v. Apalachee Community Mental Health Servs., Inc., 840 F.2d 797 (11th Cir. 1988) (en banc), aff'd, Zinermon v. Burch, 110 S. Ct. 975 (1990).

93 See supra notes 24-25, 31, 89 and accompanying text.

94 The focus on the postdeprivation remedy of the *Parratt* analysis leads to scrutiny of state tort law and a corresponding concern over the substantive parity between state and constitutional law. See, e.g., Wells & Eaton, supra note 3, at 213; Zensky, supra note 44, at 207, 214; Note, supra note 4, at 629; Comment, supra note 12, at 1218. Professors Wells and Eaton argue that if *Parratt* does not require the state to compensate a grievant for lost property, then its effect is substantive. Wells & Eaton, supra note 3, at 213. However, it is precisely because *Parratt* is based in procedural due process, and is pertinent only where actions are procedurally unauthorized, that the substantive norms do not change. The example of a change in protection of property rights envisioned by Wells & Eaton is the new application of state immunity law via Parratt-tort actions. Wells & Eaton, supra note 3, at 213. While the introduction of state immunity law may be a change worked by *Parratt*, federal immunity should never have been applied to violations of state law norms. See infra notes 160-70 and accompanying text.

95 See supra notes 71-83 and accompanying text.

96 Bandes, supra note 56, at 136-37; see also City of Canton v. Harris, 109 S. Ct. 1197 (1988) (holding that failure to train government agents can constitute a "policy" sufficient to attach municipal liability under section 1983, and presumably establishing that failure to train can also be a basis for liability).

97 See supra note 73 and accompanying text.

cur. Thus, the mere establishment of substantive policy should have no bearing on the question *Parratt*—and procedural due process generally—seeks to answer: has the state sufficiently assured its citizens that the policy choices it has made will be fairly executed?[98]

Under *Parratt* then, only actions taken in contravention of procedural rules should be considered unauthorized. Implicit in this conclusion is that the state must have established a system of procedures for the official to violate—primary procedures. If the primary procedural system does not satisfy *Mathews*, any deprivation can violate procedural due process regardless of a state remedy. The state cannot claim that it was "impossible" to provide the primary level process *Mathews* regularly requires if it has not, at the very least, established a proper system calling for such process.[99] Furthermore, allowing resort to postdeprivation remedies simply because an official violated the predeprivation system, would completely shield an unconstitutional predeprivation scheme from constitutional review.[100] Thus, a violation of the primary scheme cannot justify resort to secondary

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[98] In Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985), the plaintiff was dismissed from medical school after failing his medical boards. Id. at 215-16. He challenged his dismissal, alleging that because he was the only student not allowed to retake the test, the decision was arbitrary, and his substantive due process rights had been violated. Id. at 217, 223. The procedures the state used in deciding to terminate the plaintiff were quite elaborate. In fact, the Court stated that "[i]t is important to remember that this is not a case in which the procedures used by the University were unfair in any respect; quite the contrary is true." Id. at 225. In light of these elaborate procedures, *Parratt* was not discussed because it was not applicable; Ewing could not claim that the deprivation was unauthorized because all the proper procedures were followed. See also Whitley v. Albers, 475 U.S. 312 (1986) (in tort context, no discussion of postdeprivation remedies where no predeprivation hearing was required). Viewing substantive law as a source of authorization, however, has lead Professor Monaghan to view *Parratt* and *Ewing* as inconsistent.

> The line between "random and unauthorized" official conduct and "authorized" conduct is unstable, as the recent decision in *Regents of the University of Michigan v. Ewing* illustrates. . . . The student alleged that his dismissal was contrary to both the announced policies and the actual practices of the university for students experiencing academic difficulty in this program. . . . The Court did not consider *Parratt*, but the case can be understood in those terms: the heart of the student's complaint was that he was dismissed as a result of the "unauthorized" conduct of state officials.

Monaghan, supra note 11, at 994. The simple reason *Parratt* was not discussed in *Ewing* is that procedural due process was not even arguably violated, and under a proper reading of *Parratt*, the actions could not be considered unauthorized. If the student had been dropped from school without notice or an opportunity to respond even though state law required these procedures, only *then* would postdeprivation remedies be relevant. If the state did not violate predeprivation procedural requirements, there is no need to consider whether postdeprivation remedies can cure a procedural violation.

[99] Bandes, supra note 56, at 137, 140 (if better procedures would have prevented the loss, the government "cannot claim that predeprivation process was impracticable").

[100] Cf. supra text accompanying note 98 (considering substantive law as a source of authorization can shield unconstitutional procedural schemes from judicial review).

level postdeprivation process without a determination that the scheme is constitutional.[101] If *Parratt* is to preserve the ultimate procedural question—whether the state has established a scheme to faithfully execute substantive law—it must incorporate a *Mathews* evaluation of the state's primary procedural system in determining whether secondary level process should be allowed.[102]

In the complete absence of a primary system, any procedure a state official employs is authorized. Where a state has no speed limit, for example, it would be difficult to say that travelling one hundred miles per hour is unauthorized. Similarly, where the state has no relevant procedural law, no procedures can be called "unauthorized."[103] Of course, merely finding that action is authorized does not end the inquiry. It simply prevents the state from employing postdeprivation procedures under *Parratt*. There still may be no procedural violation, regardless of *Parratt*, because the state, under *Mathews*, need not have provided any predeprivation process at the primary level at all,[104] or

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101 Parratt v. Taylor, 451 U.S. 527, 544 (1981) ("There is no contention that the procedures [which the officials violated] themselves are inadequate.").

102 This is the type of situation the Court thought it faced in Zinermon v. Burch, 110 S. Ct. 975 (1990). The Court thought that the defendants had violated the state procedural scheme, but was unsure as to whether the scheme itself was constitutional. Rather than evaluating the scheme as an element of a *Parratt* analysis, the Court apparently felt that a court must decide whether *Parratt* applies before it can evaluate the scheme under *Mathews*. In order to avoid dismissing under *Parratt*, the Court created a rather cryptic standard nominally based on whether the state 'might' have established better procedures. Nominal protestations notwithstanding, the Court actually acted precisely as suggested by this Note: it evaluated the procedures directly under *Mathews*. See infra notes 115-30 and accompanying text.

103 But see Rittenhouse v. DeKalb County, 764 F.2d 1451 (11th Cir. 1985), cert. denied, 475 U.S. 1014 (1986) (misapplying *Parratt* by dismissing a suit and characterizing acts as unauthorized when the official acted in the absence of any established procedures).

104 Cf. Albers v. Whitley, 546 F. Supp. 726, 732 n.1 (D. Or. 1982) (no process at all required before shooting a prisoner during a riot), aff'd in part and rev'd in part on other grounds, 743 F.2d 1372 (9th Cir. 1984), rev'd, 475 U.S. 312 (1986) (citing district court with approval); Monaghan, supra note 44 at 430-31.

If the state was not under an obligation to establish particular procedures, no procedural violation would have occurred regardless of postdeprivation remedies. See Whitley v. Albers, 475 U.S. 312 (1986) (no discussion of *Parratt*'s postdeprivation remedies where there was no violation of predeprivation procedural requirements); Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985) (same). In *Rittenhouse*, 764 F.2d 1451, for example, an accident occurred when the state failed to respond to warnings that a road would freeze over. If the state was not obliged to have a different system for repairing water leaks, no procedural violation could have occurred. Similarly, where a clerk at the local department of motor vehicles commits a battery, no procedural due violation occurs (even if this could be considered state action) because the state is not required, under *Mathews*, to establish procedures for such acts. Such a fact situation could lead to a more expansive interpretation of *Parratt*, however. It could be said that if the state is not empowering the clerk to commit batteries, all the procedural protection *Mathews* requires is that the state not grant procedures to accomplish this. Thus, rather than *Mathews* not requiring any procedural protection, it requires something—the lack of power to commit the act. Under this interpretation, when the clerk hits her victim,

because postdeprivation remedies would be all the procedural protection a *Mathews* balance required at the primary level.[105] The relevant question, however, is properly preserved: Has the state met its obligation to establish a generally accurate procedural system? All actions by state officials then, are procedurally authorized unless the state has, as an initial matter, properly filled the procedural vacuum created by the establishment of substantive law.[106]

A *Parratt* analysis looks to the functional adequacy of an entire system, and therefore the actions of the officials are measured against the procedural law even though the actions may have been completely unrelated. A prison, like the one in *Parratt* for example, probably has rules specifying what property a guard may take, and how she must take it.[107] It seems awkward to claim that these rules are relevant, however, when a guard's actions are completely unrelated to the stated reasons for the rules. The loss of a hobby kit, for example, seems unrelated to a substantive rule allowing guards to confiscate contraband.[108] Because one cannot expect a hearing to determine

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she is violating the state's primary procedural system and *Parratt* requires the state to provide a tort remedy. This interpretation of *Parratt* might require state governments to create something akin to tort claims acts and might conflict with sovereign immunity doctrine.

If procedural rules should have been promulgated but were not, then postdeprivation remedies should also be irrelevant because the state has violated its responsibility under *Mathews*. Bandes, supra note 56 at 137, 140 (if better procedures would have prevented the loss, *Parratt* analysis should not pertain because the government "cannot claim that predeprivation process was impracticable"). This analysis should pertain to establishing procedural policies as well as procedural laws. See generally Bandes, supra note 56 *passim* (*Parratt* should focus on states' customs and policies as well as laws).

105 E.g., Ingraham v. Wright, 430 U.S. 651 (1977).

106 Additionally, in failing to limit authorization to procedural analysis, federal courts would have to interpret state substantive law to determine whether the action was unauthorized in order to determine whether to send the action to state courts, which would then repeat the analysis in order to determine liability. Not only is this nonsensical and inefficient, but it eliminates the main advantage *Parratt* would have established: no longer is the state the primary arbiter of its substantive law. By the same token, the concern over trivialization of the Constitution would not be allayed at all as the federal court would still have to evaluate the substantive merits of many minor state officials' acts.

107 Zinermon v. Burch, 110 S. Ct. 975, 993-94 (1990) (O'Connor, J., dissenting).

108 Professor Brown argues that in *Parratt* and *Hudson* there was no reason for a hearing because there were no facts in dispute—there was no concern that the hobby kit contained contraband. Brown, supra note 3, at 861. Procedural due process, he concludes, is therefore not even implicated in these cases, and they go too far in requiring any remedy at all. Id. at 858-60. It is unclear, however, which forum is to decide whether there are any facts in dispute. His conclusion is still more radical than his reasoning. In such cases, where the threshold constitutional requirement of predeprivation process is most blatantly denied, the only available constitutional protection should be substantive due process. Id. at 870-78.

The flaw in his argument is its focus on the single deprivation at issue. While in *Hudson*, for example, there may have been no reason for a predeprivation hearing, the reasons that concern procedural due process are the broader systemic reasons, namely, reasons for having

whether an official should commit patently illegal acts,[109] some have concluded that procedural analysis—turning on predeprivation procedures—in the case of a negligent or malicious act "borders on the absurd."[110] Nevertheless, *Parratt* is built on the premise that procedural due process is not concerned with the official's state of mind. Rather, it is the state's responsibility, to the extent required by *Mathews*, to anticipate and control the government no matter what the state of mind of the executing officials might be. *Parratt* abolishes the artificial confluence of state and state actor by recognizing that the function of procedural due process is to account for the interdepen-

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hearings in general. See supra notes 71-83 and accompanying text. These are implicated no matter how little procedures may have mattered in relation to one particular deprivation.

109 Brown, supra note 3, at 858. Such analysis leads to the argument that *Parratt* was a substantive due process decision. Substantive due process is implicated, it is said, because Taylor's suit "was really a challenge to the fact of loss, not to the procedures," Nahmod, supra note 3, at 226, or because "plaintiff's claim is not that a procedural safeguard could have prevented the injury, but that the injury, with or without process, should not have occurred." Brown, supra note 3, at 859. Put another way, "[i]f the lack of a hearing were the issue, Taylor would seek compensation for that, as in Carey v. Piphus, 435 U.S. 247, 253-54, 266-67 (1978) [(allowing plaintiffs to recover damages for mental anguish attributable to the loss of the hearing itself)], rather than for the loss of the hobby kit." Bandes, supra note 56, at 138 n.267. The problem in *Parratt*, however, was that Taylor sought compensation for the hobby kit based on the procedural violation. He did not claim the damages for mental anguish because there probably were none attributable to the loss of the hearing itself. He made one of the same claims that the Court rejected in *Carey*: a procedural violation entitles the victim to compensation for the interest lost. See *Carey*, 435 U.S. at 246.

Substantive due process is extremely deferential to the state decisions regarding the implementation of its substantive law. Plaintiffs challenging the application must show that the decision to apply the substantively permissible law was such "a substantial departure" from its purposes as to be arbitrary. See Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225-26 (1985). The deference is even stronger when a fact is in dispute. On appeal to the Supreme Court, any factual determination by the state, "[e]ven where a question of fact may have constitutional significance," Time, Inc. v. Firestone, 424 U.S. 448, 463 (1976), will be accepted "in the absence of exceptional circumstances." California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 111-12 (1980); Lloyd A. Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1952). *Parratt* simply extends the temporal bounds within which the states may constitutionally make decisions which are reviewable for arbitrariness. After, or concurrent with, the postdeprivation tort remedy, a plaintiff should be able to assert the substantive due process claim: the decision on the merits was arbitrary. *Parratt*, then, merely delays any substantive due process challenge.

Quite apart from delaying the substantive claim, *Parratt* may have the effect of preventing the substantive due process claim from being litigated in federal court. That result, however, would be due to the judicial efficiency policies that underlie res judicata principles and the role of the state courts as equal protectors of constitutional rights. Hart, A Dialogue on the Power of Congress to Limit the Jurisdiction of Federal Courts, reprinted in Hart & Wechsler, supra note 33, at 423. The ancillary effect of *Parratt* might be that the section 1983 substantive due process suit will be litigated in state court, but it will be a section 1983 suit nonetheless, as opposed to a procedural claim under section 1983, which would be defeated in any forum by the mere existence of a state tort remedy.

110 Daniels v. Williams, 474 U.S. 327, 342 n.19 (1986) (Stevens, J., concurring); *Zinermon*, 110 S.Ct. 975.

dence of the two. As *Hudson* explicitly noted, whether a particular official's actions violate the Constitution depends on state law.[111] Thus, the identical deprivation may be a constitutional violation in one state, but not so in another. The focal point of the analysis then, is not the substantive nature of the act, the state of mind of the actor, or even the remedy. Instead, the focal point is whether the state has provided the official with constitutionally sufficient procedures to carry out her function. What is relevant is how the state system operates to deter and compensate for the inevitable mistakes that its officers will make.[112]

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[111] Hudson v. Palmer, 468 U.S. 517 (1984), appropriately explained a cross-reference system of liability. The telling passage is:

> [In *Parratt*] we held that postdeprivation procedures satisfy due process because the *state* cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the state is in a position to provide for predeprivation process.

Id. at 534 (emphasis in original); accord *Zinermon*, 110 S. Ct. at 985-86. Thus, whether the official will be liable for her actions depends on whether the state provides a remedy.

[112] In basing its new due process principle, in part, on whether the official departed from state law, some commentators argue that the *Parratt* doctrine directly conflicts with prior state action doctrine of Home Telephone Co. v. Los Angeles, 227 U.S. 278 (1913) (actions in contravention of state law can be imputed to the state for purposes of the fourteenth amendment). See Brown, supra note 3, at 829 n.111; Rubin, supra note 62, at 1113; Note, Unauthorized Conduct of State Officials Under the Fourteenth Amendment: *Hudson v. Palmer* and the Resurrection of Dead Doctrines, 85 Colum. L. Rev. 837, 845-46.

> *Parratt*'s state action theory is in direct conflict with principles thought to be settled by *Home Telephone* . . . . Under *Home Telephone*, the Fourteenth Amendment reaches any executive or administrative conduct that contravenes the Fourteenth Amendment . . . it makes no difference whether the state official is using or misusing state power. Under *Home Telephone*, the constitutionally offensive state action occurs at the point at which the state official acts.

Monaghan, supra note 11, at 995-96 (citations omitted). Professor Monaghan assumes away the problem by stating that *Home Telephone* holds that the "fourteenth amendment reaches any . . . conduct that contravenes the fourteenth amendment." Id. at 996. This tautology is, of course, equally true after *Hudson*, which merely expands the range of actions that do not violate the Constitution. Nevertheless, rather than being in direct conflict, *Hudson* is simply a long overdue recognition of another facet of the doctrine. Rather than holding that inclusion on the state's payroll is sufficient to constitute state action, *Home Telephone* held that contravention of state law is not sufficient to negate such a conclusion. *Hudson* correctly recognizes that the proper question is whether the state authorizes the wrong *and* provides an adequate remedy for its violation. Thus, the "state" is not absolved of all responsibility when its officer abuses his state-conferred power, nor is it made responsible under procedural due process for every action by anyone on the payroll. The decision exposes to constitutional scrutiny the proper issue under a systemic approach: the system with which the state handles its relation to its own employees. Furthermore, *Home Telephone* was primarily concerned that the mere enactment of state laws would shield state officials actions from constitutional review. The argument the Court rejected was that the mere fact that the actions at issue were repugnant to the state constitution meant, as a jurisdictional matter, that there was not even a federal question. *Home Telephone*, 227 U.S. at 282. If that argument were accepted, it would indeed "render impossible the performance of the duty with which the Federal courts are charged

The *Parratt* analysis also re-dignifies procedural due process by limiting the procedural mandate to one with which it is possible to comply. Holding a state constitutionally liable where predeprivation process is impossible does not further the purposes of procedural due process because it would not increase the likelihood that such process will be employed in the future. At the same time, such liability would displace the primacy of state courts in matters of state substantive law. By contrast, requiring the states to take steps to ensure that their own laws are faithfully executed both furthers the systemic purpose of procedural due process and allows the states critical latitude in tailoring specific procedures to meet their needs.[113] "There is, of course, a critical difference, between using the federal judiciary to make sure that [a state] affords its [claimants] an acceptable procedure for processing their claims, on the one hand, and using the federal courts to do the processing themselves."[114]

### 2. Conflating Substance and Procedure While Splitting *Parratt* and *Mathews*: The Ambiguity of *Zinermon v. Burch*

In the recent case of *Zinermon v. Burch*,[115] plaintiff, Mr. Burch, was admitted to a Florida mental institution under the state's voluntary admission procedures: he signed some papers and was then admitted and confined.[116] Plaintiff alleged however, that he was not competent to sign such forms, and as a result he was confined and denied his liberty without proper procedures.[117] He claimed that he should have been granted the judicial hearings constitutionally re-

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under the Constitution." Id. at 284. *Parratt* and *Hudson* merely changed the federal question to whether the state system can adequately protect people from the erroneous deprivation of property.

113 Immunity laws represent a critical example of the balancing of competing interests in pursuit of an efficient governmental system. See generally Hart & Wechsler, supra note 33, at 1292-97 (discussing the different types of governmental immunity). Other variables, such as the availability of counsel or the opportunity for cross examination for example, can be mixed and matched to tailor procedures effectively. See generally Friendly, supra note 63 *passim* (discussing the flexible nature of procedural due process).

114 Kimbrough v. O'Neill, 523 F.2d 1057, 1066-67 n.12 (7th Cir. 1975) (Stevens, J., concurring), aff'd, 545 F.2d 1059 (7th Cir. 1976) (en banc); accord Daniels v. Williams, 474 U.S. 327, 331 (1986) ("By requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such decisions."). The procedural analysis is similar to that used in administrative law. It "is not for judges to scrutinize the technical merits of each decision. Rather, it is to establish a decision-making process that assures a reasoned decision." Ethyl Corp. v. EPA, 541 F.2d 1, 66 (D.C. Cir.) (Bazelon, J., concurring) (en banc), cert. denied, 426 U.S. 941 (1976).

115 110 S. Ct. 975 (1990).

116 Id. at 979-81.

117 Id. at 977-79.

quired for *involuntary* commitment, as provided for by Florida statute.[118] Because Florida law required that incompetent patients be admitted only by involuntary commitment hearings, the defendants, state-employed doctors and hospital administrators, argued that their conduct was unauthorized.[119] *Parratt*, they argued, required dismissal in view of Florida's tort remedies. The Court correctly held that *Parratt* did not require dismissal. But while that result was correct, the Court's reasoning was quite confused.

*Zinermon* actually presented no *Parratt* issue at all. The defendants erroneously treated the plaintiff as a competent person. By any test, the distinction between competent and incompetent is substantive. Thus, by treating Burch as competent, the defendants committed a *substantive error* under state law, and violation of substantive law should not have made the action unauthorized. The issue to be resolved was what procedures were required to back up the substantive decision as to competence? The statutes did not contain any procedures guiding the substantive determination. In fact, they did not direct any particular official to make such a determination at all.[120] *Procedurally* then, defendants did not contravene any rule; they followed the state's admissions procedures to the letter. While the Court stated that plaintiff "does not claim that he was deprived of due process by an established state procedure,"[121] plaintiff was, in fact, the victim of just such a procedure. *Parratt* and secondary level process should have been seen as irrelevant because the primary procedures were not contravened. Instead, Florida's primary level procedures should have been evaluated solely under *Mathews* to determine if they complied with constitutional requirements.

The Court, however, treated defendant's actions as violative of Florida's primary scheme,[122] but it was also clearly doubtful as to the underlying scheme's constitutionality. Particularly, the Court was concerned with the statutory delegation, which it described as conferring upon the defendants "broad power and little guidance in admitting mental patients."[123] Although the Court should have evaluated the constitutionality of the primary procedural scheme under *Mathews*, the majority apparently believed that it should not undertake a

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118 Id. at 979-82.

119 Id. at 977-79.

120 Id. at 988.

121 Id. at 979 n.3; see also Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (establishing that a deprivation resulting from an established procedure is not unauthorized and *Parratt* analysis will not govern it).

122 See *Zinermon*, 110 S. Ct. at 979 n.3.

123 Id. at 988; see also id. at 989 (delegation of power was "broad" and "uncircumscribed").

complete *Mathews* analysis until *after* it decided whether *Parratt* applied. Instead, the Court steered a middle course, neither acknowledging evaluation of the procedures' constitutionality, nor ignoring its relevance completely. It effectively held that because better procedures *might* have prevented many erroneous commitments, the error was generally "predictable" and *Parratt* did not insulate defendants from liability.[124] While consideration of the feasibility of preventing similar deprivations seems like a proper *Mathews* analysis of the state's primary procedures, the Court repeatedly disclaimed any actual constitutional evaluation.[125] By refusing to decide whether Florida was under any constitutional obligation to provide better procedures than it did, the Court displaced Florida's postdeprivation remedies on the abstract possibility that it might have been required, under *Mathews*, to better its primary scheme.

If *Zinermon* is to be taken literally, it creates the possibility for a violation of procedural due process exactly where *Parratt* says none should be found. This is all but conceded in the Court's rather startling conclusion: "It may be permissible for a State to have a statutory scheme like Florida's . . . . But when [state] officials fail to provide constitutionally required [process] the state officials cannot then escape liability by invoking *Parratt* and *Hudson*."[126]

The conclusion is startling because a proper procedural analysis, scrutinizing the accuracy of the system in the generality of cases, cannot divorce the statutory delegation from the resulting procedural scheme. For example, a state might, as Florida did, delegate to each hospital broad discretion in admitting mental patients. If the resulting procedural schemes were inaccurate, the delegation—and the entire primary procedural scheme—would violate *Mathews*. *Parratt* remedies would, of course, be irrelevant. On the other hand, if most hospitals succeeded in providing adequate procedures but one did not, *Mathews* might say that the state need not revamp its entire statutory scheme. *Mathews* might not require all procedures to be codified in

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124 Id. at 987-90. The Court found that the actions were unauthorized, better process was possible, and the error was predictable. Id. at 989-90. All these evaluations are part of the test of authorization advocated by this Note because they are all elements of one inquiry: did the procedures satisfy *Mathews*? See supra note 89; see also infra note 127 and accompanying text.

125 *Zinermon*, 110 S.Ct. at 979, 989. The Court was undoubtedly reluctant to evaluate the Florida statutes because plaintiff "disavowed any challenge to the statutes themselves." Id. at 979. The Court, however, should have recognized the constitutionality of Florida's statutes as an element of a *Parratt* inquiry. Furthermore, *defendant* might have been required to show that the statutes were constitutional in order to invoke *Parratt*. See Note, supra note 4, at 635-36 (*Parratt* is like an affirmative defense and defendant should bear the burden of proving that *Parratt* applies).

126 *Zinermon*, 110 S. Ct. at 988.

the state statutes at the expense of the advantages of hospital-specific rules. In such a case, the state has done all that *Mathews* requires, and where the delegation scheme was incorrectly implemented by a single official, *Parratt* should allow postdeprivation remedies to satisfy the Constitution. On remand, however, the lower courts will not be free to consider *Parratt*'s postdeprivation secondary process,[127] and might therefore, be forced to find a procedural violation[128] because of the action of a lone official where the state has met its primary level procedural responsibility.

Fortunately, the apparent inconsistency between *Zinermon* and *Parratt* is largely illusory. The Court actually recognized, albeit *sub silentio*, that *Parratt* incorporates a *Mathews* analysis of the predeprivation scheme in order to determine whether a deprivation can be appropriately characterized as an unauthorized act.[129] While the majority was nominally willing to eschew *Parratt* where the state 'might' have provided better procedures, whether the state 'might' have seems doctrinally identical to whether, under *Mathews*, it must have. Though the majority explicitly declined to pass on the constitutionality of the Florida statute, the Court's opinion actually does little else.[130]

Although the Court's approach is correct in result, its stated approach can lead to fundamental misapplication of the *Parratt* doctrine. Its treatment of *Parratt* as a threshold issue results in a compartmentalization of pre- and postdeprivation process antithetical

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127 The opinion could also be read as holding that *Parratt* did not *require* dismissal on a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), and *Parratt* would still be available on remand. The Court's opinion, however, with its long discussion of the merits of the *Parratt* claim, belies that reading. Id. at 989 ("This case, therefore, is not controlled by *Parratt* and *Hudson* . . . .").

128 Id. at 987-88; Vitek v. Jones, 445 U.S. 480 (1980) (commitment to mental institution requires elaborate procedural protection).

129 "While I believe that Burch's complaint and subsequent argument do not properly place before the Court a traditional challenge to Florida's voluntary admission procedures, the Court, without so declaring, has decided otherwise." *Zinermon*, 110 S. Ct. at 996 (O'Connor, J., dissenting).

130 Id. at 988. The Court employed a *Mathews* balance to note the need for greater process than the admitting physician's judgment: "[T]he way in which [plaintiff] allegedly was admitted . . . certainly did not ensure compliance with the [substantive] statutory standard for voluntary admission. . . . We now consider whether predeprivation safeguards would have any value in guarding against the kind of deprivation Burch allegedly suffered." Id. at 988, 987 n.18; id. at 996 (O'Connor, J., dissenting).

The emphasis on familiar *Mathews* factors, such as the benefit of additional procedures, also necessarily followed from the "might" standard because in any situation the state "might" have done more. Id. at 993 (O'Connor, J., dissenting) (the state might have done more in both *Parratt* and *Hudson* themselves). The relevant question is whether the state was under any constitutional obligation to do so.

to *Parratt*, which recognizes that they are both part of *one* system. Until it is known whether the state has met its primary procedural obligations, it is simply impossible to know whether *Parratt*'s postdeprivation procedures should be allowed. *Parratt* is an important and complicated explication of the procedural due process guarantee. It should not be relegated to the position of an unrefined threshold matter, regularly used to dispose of cases on summary judgment or on the pleadings.[131]

## III. SYSTEMIC EVALUATION AND ADEQUATE STATE REMEDIES

### A. *Requirements of an Adequate State Remedy*

Once a deprivation is found to be procedurally unauthorized, the court must next determine whether the state remedy is "adequate." *Parratt* and subsequent cases have offered little guidance on the meaning of adequacy, saying only that in order for a state postdeprivation remedy to be adequate, it should provide a grievant with "an opportunity . . . granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case . . . ."[132]

Many commentators view the adequacy of the state remedy incorrectly by suggesting that the state substantive law must provide redress for procedural errors.[133] These commentators conclude that a state system which comports with procedural due process is still inadequate if the substantive law fails to provide redress where section 1983 would.[134] Where a state law would deny a remedy on substan-

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131 The dissenters argued that this case was exactly like *Parratt*; Florida law required involuntary commitment hearings for plaintiff because he was incompetent, and the failure to provide them was unauthorized. Id. at 990-92 (O'Connor, J., dissenting). The law that was violated in *Zinermon*, however, was *substantive* not procedural. See supra text accompanying notes 120-21. Taking the dissenters view, a violation of the substantive law distinguishing incompetent from competent patients would make the action unauthorized. *Parratt* would then apply, and Florida would have a de facto constitutional imprimatur for its predeprivation scheme. See supra text accompanying note 98 (determining authorization by reference to substantive law prevents unconstitutional predeprivation schemes from being exposed). Thus, the dissenters would also avoid what seems to be the most obvious issue in the case: were Florida's statutory procedures constitutional?

132 Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982) (citations omitted).

133 See, e.g., Zensky, supra note 44, at 201 n.242; Comment, supra note 12, at 1218 ("[T]he *Parratt* decision implies that a person's property is protected by more than procedural restraints. The decision rests on a *substantive* right to be compensated for arbitrary or irrational deprivations of property.") (emphasis in original).

134 [Court's are incorrect in] understanding adequacy to require nothing more than a state system that comports with procedural due process. The *substantive* component of adequacy dictates that *a hearing subject to every conceivable procedural safeguard is an inadequate postdeprivation remedy if the substantive law to be applied fails to make redress available upon proof of a deprivation by a state actor.*

tive grounds, however, it would deny that a property right exists.[135] Section 1983 should never be used to award damages in such a situation; if it does, it is improperly altering the state's definition of property.[136] Thus, reasoning backward to void a state remedy on the basis of a substantive rule which conflicts with section 1983 is misplaced.[137] Because *Parratt*'s secondary level process results from a direct application of *Mathews* principles, the secondary level process is part of the state's procedural system[138] just like the primary level postdeprivation remedies found to be constitutional in *Mathews* itself. Thus, the secondary level postdeprivation remedy should be evaluated in the same manner as a postdeprivation remedy which is established at the primary level—by balancing the *Mathews* factors, without scrutiny of state substantive law.[139]

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Zensky, supra note 44, at 207 (emphasis in original); accord Comment, supra note 12, at 1218.

In evaluating a state remedy commentators suggest that it is "now like any express *federal* constitutional or statutory claim in *state* court." Zensky, supra note 44, at 214 (emphasis in original), or that the remedy is a "surrogate" for a constitutional claim. Smolla, supra note 44, at 835. The state postdeprivation remedies are part of a system; they are not a "surrogate" for constitutional challenges any more than a procedurally adequate system, such as the one in *Mathews*, is a "surrogate" for a constitutional challenge. Zinermon v. Burch, 110 S. Ct. 975, 983 (for constitutional purposes, the process provided by the states includes "any remedies for erroneous deprivations"). Both preclude liability under the due process clause because by providing them, the state has satisfied it.

135 See Bishop v. Wood, 426 U.S. 341, 344-45 (1976); Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

136 See *Bishop*, 426 U.S. at 344-47; see supra note 46.

137 See Parratt v. Taylor, 451 U.S. 527, 544 (1981) (state remedy need not provide grievant with the same relief as § 1983).

138 Zinermon v. Burch, 110 S. Ct. 975, 983 (1990) ("process the state has provided" includes "any remedies"); see supra notes 85-86 and accompanying text.

139 In Rutherford v. United States, 702 F.2d 580 (5th Cir. 1983), an action based on federal law, the plaintiffs sought damages resulting from wrongful collection of taxes. The court found the statutory remedy inadequate because there was "no allowance for mental anguish caused by harassment or for legal fees needlessly expended." Id. at 584. The court, however, did not explain where this property right in mental serenity or legal fees came from; the legislature had simply never granted that interest to the plaintiff. The proper analysis would have questioned the effect of these issues on the government's compliance with substantive commands. Certainly compensation for mental anguish does not fit well in a systemic procedural analysis: it has no instrumental effect. While the provision *vel non* of attorney fees may affect the accuracy of the system, such an analysis was not undertaken. Likewise, where a state provides a remedy but specifies that only certain defendants are subject to it, the state has also defined, not the procedure, but the "nature" of the property interest. In Bumgarner v. Bloodworth, 738 F.2d 966 (8th Cir. 1984) (per curiam), such a remedy was held inadequate because the officials who had possession of the property were not subject to the system; thus a return of the items was beyond the power of the remedy to effect. Because the items had sentimental value, the statute could not afford complete redress. Id. at 968; Zensky, supra note 44, at 196. Under the analysis endorsed by this Note, the plaintiff's being limited to money damages rather then return of the items taken should not have made the remedy inadequate. Regardless of the procedures used, the plaintiff, like many seeking equitable relief, could not identify the source of a right to return of the item rather than money. What a right is worth is not the

The attendant aspects of hearings, timing, notice provisions, and evidentiary rules are all familiar parts of procedural due process analysis,[140] and should be evaluated under *Parratt* just as they are under *Mathews*.[141] Similarly, tort remedies can factor into a *Mathews* balance, as the specter of personal liability may encourage state officers to be more accurate when working a deprivation.[142] In addition to

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subject of *Parratt*; *Parratt* only requires that the plaintiff have a meaningful opportunity to obtain the value assigned to that right by the state. The value a state places on certain property interests however, should not be completely unreviewable. It should be subject to substantive due process scrutiny, cf. Martinez v. California, 444 U.S. 277, 283 (1980) (substantive due process review of state tort rules), and to the extent a damage limit is so low as to effectively negate compensation, it operates like an immunity, and should be systemically evaluated in a similar manner. See infra notes 143-46, 154-59 and accompanying text.

140 "[T]he State certainly accords *due* process when it terminates a claim for failure to comply with" rules such as statutes of limitation, evidentiary rules, and time limits. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (emphasis in original) (citations omitted) (1982). "In this purely procedural context, the state's corrective system, viewed in its entirety, need satisfy only the *Mathews v. Eldridge* three factor balancing test . . . ." Zensky, supra note 44, at 188 (footnote omitted). See generally Friendly, supra note 63 (discussing the variables in procedural systems).

Although this Note proposes that any matter which would be considered part of the substantive right should not be subject to scrutiny under *Parratt* adequacy, it does not propose to define the precise boundary of this category that has eluded scholars for generations. See supra note 90. Although it is sometimes difficult to distinguish procedure from substance, in the constitutional area they cover discrete inquiries. Thus, if a court evaluates a given provision under *Mathews*, balancing the competing interests against accuracy, most substantive issues will filter out as they are found not to be implicated in such analysis. Matters such as the timing of the hearing, provision of counsel, fees, and independence of the decision maker are all covered by procedural due process doctrine because they affect the accuracy of the implementation of the substantive law. Substantive issues such as who will be the defendant or what form the relief will take, on the other hand, will often not make sense in a procedural analysis. At bottom however, any issue that arguably has an instrumental effect should be systemically tested. Immunity or the amount of compensation awarded, for example, may have instrumental effects since they can seriously affect accuracy in a systemic analysis. See supra notes 143-46, 154-57 and accompanying text.

141 *Parratt* allows the states great flexibility in creating remedies and "does not require states to provide the equivalent of a federal district court trial for every deprivation . . . . [S]tates are certainly free to adopt a wide range of administrative or judicial compensatory systems for handling small claims." Smolla, supra note 44, at 885; see, e.g., Sullivan v. Town of Salem, 805 F.2d 81, 86 (2d Cir. 1986) (administrative appeal adequate), cert. denied, 479 U.S. 852 (1986); Brown v. Texas A&M Univ., 804 F.2d 327, 336 (5th Cir. 1986) (arbitration proceeding adequate); National Communication Sys. v. Michigan Pub. Serv. Comm'n, 789 F.2d 370, 373 (6th Cir.) (extraordinary writ procedures adequate), cert. denied, 479 U.S. 852 (1986).

142 In Ingraham v. Wright, 430 U.S. 651 (1977), the Court allowed teachers to inflict corporal punishment on students without prior hearings. Id. at 682. In deciding whether due process required a hearing, the Court determined that "the available civil and criminal sanctions for abuse . . . afford significant protection against unjustified corporal punishment." Id. at 678. Thus, the Court recognized that the deterrent effect of postdeprivation remedies provides predeprivation protection against unjustified deprivations in the generality of cases.

Tort penalties also secure fidelity to predeprivation procedures themselves, because following the procedures generally absolves the state official from tort liability. Thus, a police

these factors, procedural due process requires that a postdeprivation remedy afford an additional protection: an opportunity for compensation.[143]

The availability of compensation serves two functions: (1) it neutralizes what would otherwise be an inaccurate deprivation, and (2) it lessens a grievant's interest in predeprivation process.[144] Where postdeprivation process is allowed, a deprivation for which the plaintiff is compensated represents a success—an accurate execution of state policy. Until she was compensated, however, such a deprivation was the opposite: unjust under state policy and an inaccurate execution of state law. By providing compensation then, the state is aided in fulfilling its systemic mandate by neutralizing deprivations that would otherwise be counted as inaccurate in a systemic evaluation of "the generality of cases." A system with no opportunity to make informed decisions (predeprivation process) and no opportunity to correct the inevitable errors (postdeprivation compensation), is likely to fail the systemic requirement because its overall accuracy will depend entirely on either luck or intuition. Additionally, if actual relief was not part of the postdeprivation package, a grievant's interest in having *predeprivation* process would be much greater because she would stand to lose possession entirely and not just continuity of possession.[145] Certainly, if the state will not provide compensation for erroneous decisions, the grievant has a stronger interest in having the decision made accurately before her property is taken. But if it is too burdensome to provide the predeprivation process this stronger interest warrants, the state should then be required to include an opportunity for compensation to accommodate the grievant's greater interest.[146]

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officer who follows the required procedural steps will not be liable for false imprisonment. See generally Prosser & Keeton, supra note 90, at 148-52 (an officer may "be liable [in tort] if he departs from the proper procedure, no matter how excellent his intentions").

143 But see Nahmod, supra note 3, at 229 (compensation is a separate matter from procedural adequacy); Zensky, supra note 44, at 202 (same); Note, supra note 4, at 640-41 (same); Comment, supra note 12, at 1217-19 (same).

144 To the extent damages are paid by the offending officer, postdeprivation compensation may also serve the instrumental purpose of deterring unlawful conduct. See supra note 142.

145 The availability of postdeprivation compensation in *Mathews* made the grievant's "sole interest . . . the uninterrupted receipt of this source of income pending final administrative decision on his claim." Mathews v. Eldridge, 424 U.S. 319, 340 (1976); cf. Gregory v. Town of Pittsfield, 470 U.S. 1018, 1022-23 (1985) (O'Connor, J., dissenting from denial of certiorari) (doubting that state postdeprivation remedies are adequate under *Parratt* when they fail to compensate for benefits lost during pendency of claim).

146 At least one commentator has argued that *Parratt* and *Hudson* err by requiring *more* than was required before. Under *Mathews*, it is argued, if a predeprivation hearing is impossible it is not required, and

> [b]y dictating that a state provide an adequate remedy where it has interfered with

## B. *Does Immunity Negate the Adequacy of a State Remedy?*

Since a state remedy must contain an opportunity for compensation, state official immunity poses a troubling question: if the plaintiff could not recover because the defendants are immune from suit, does she a still have an adequate state remedy under *Parratt*?[147] Several courts and commentators have suggested that immunity renders a

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> the property, the Court is granting a greater property interest than initially created by the state. . . .
>
> The argument exists, of course, that if *Parratt's* post-deprivation process defines substantive rights, then so does *Mathews* and all other Supreme Court cases which use post-deprivation process, because those cases also require a remedy. But in every Supreme Court post-deprivation process opinion before *Parratt*, the state could have afforded prior process. Under these circumstances a remedy does not define substantive rights, but merely serves as a proxy for the result that would have obtained had the plaintiff received prior process.

Brown, supra note 3, at 855-56 (footnotes omitted).

At least since Carey v. Piphus, 435 U.S. 247 (1978), a proper element of damages in a section 1983 suit considers whether the deprivation would have been justified had there been a hearing. If the deprivation would have been proper even at the predeprivation hearing, then the most a plaintiff is entitled to recover is damages, such as mental anguish, suffered as a direct result of the loss of the hearing itself. Id. at 262-63. There has never been a suggestion that a state postdeprivation remedy, in order to be adequate, must compensate for mental anguish resulting from, or award nominal damages for, the loss of the predeprivation hearing. Indeed, except for a modification of immunity standards, the elimination of these relatively insignificant awards is the most radical concrete effect grievants should feel as a result of *Parratt*. Although a state could award compensatory damages for the whole property loss just because the hearing was not provided, *Parratt* does not require this. *Parratt* requires a fundamentally fair opportunity to litigate the merits of the deprivation. Daniels v. Williams, 474 U.S. 327, 338-42 (Stevens, J., concurring). In this, the *Parratt* postdeprivation remedy is exactly Professor Brown's "proxy" of a predeprivation hearing.

147 The Supreme Court has never directly decided the immunity issue although it has been implicated in three cases. In Hudson v. Palmer, 468 U.S. 517 (1984), the Court accepted the district court's holding that immunity would not obtain in the state court without questioning whether immunity would make the remedy inadequate. Id. at 535. In the companion cases of Davidson v. Cannon, 474 U.S. 344 (1986), and Daniels v. Williams, 474 U.S. 327 (1986), the plaintiffs were negligently deprived of protected interests by prison officials. In both cases the plaintiffs argued that immunity made their available state remedies inadequate. *Davidson*, 474 U.S at 346; *Daniels*, 474 U.S at 328. The Court partly overruled *Parratt* and held that negligent deprivations are not "deprivations" in the constitutional sense, *Daniels*, 474 U.S. at 330-31; *Davidson*, 474 U.S. at 670-71, and as a result, was not required to decide whether immunity made state remedies inadequate. Justice Stevens found that there was a deprivation but concluded that "the mere fact that a state elects to provide some of its agents with a sovereign immunity defense in certain cases does not justify the conclusion that its remedial system is constitutionally inadequate." Id. at 342 (Stevens, J., concurring). Justice Blackmun found that there was a deprivation and that immunity rendered the remedy inadequate. *Davidson*, 474 U.S. at 359 (Blackmun, J., dissenting). Like most commentators, Justice Blackmun analogized the remedy to section 1983: "[c]onduct that is wrongful under § 1983 surely cannot be immunized by state law." Id. But see Hart & Wechsler, supra note 33, at 1275 ("Doesn't Justice Blackmun put the cart before the horse by assuming the conduct was wrongful under § 1983, without first determining whether the state deprived the plaintiff of liberty without due process?").

remedy inadequate if it removes the grievant's opportunity for compensation.[148] On the other hand, since the Supreme Court has held that states are free to define defenses to tort claims including immunity,[149] some have found it difficult to find a remedy inadequate on that ground.[150] At least one court has held that if immunity law is constitutional when a plaintiff brings an original tort suit, there is no reason to consider it defective when the same suit is brought under *Parratt*.[151]

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148 See, e.g., Flores v. Independent Consol. School Dist., 554 F.Supp. 974, 978 (S.D. Tex. 1983); Frazier v. Collins, 538 F.Supp. 603, 608 (E.D. Va. 1982); Zensky, supra note 44, at 200-03, 213-17; Comment, Circumventing State Statutory and Common Law Sovereign Immunity With Section 1983, 37 Baylor L. Rev. 425, 452-59 (1985); Note, supra note 4, at 623-27, 639-44.

149 Martinez v. California, 444 U.S. 277, 282 (1980) ("the State's interest in fashioning its own rules of tort law is paramount to any discernable federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational"); Ferri v. Ackerman, 444 U.S. 193, 198 (1979) ("when a state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law").

150 See, e.g., Rittenhouse v. DeKalb County, 764 F.2d 1451, 1458 (11th Cir. 1985), cert. denied, 475 U.S. 1014 (1986); Daniels v. Williams, 720 F.2d 792, 798 (4th Cir. 1983), aff'd on other grounds, 748 F.2d 229 (1984) (en banc), aff'd, 474 U.S. 327 (1986); Davidson v. O'Lone, 752 F.2d 817, 830 (3rd Cir. 1983) (en banc), aff'd sub nom. Davidson v. Cannon, 474 U.S. 327 (1986).

151 "The constitutional question in either [a *Parratt*-required tort suit or a direct tort suit is the same:] . . . whether the state procedures, in light of immunity, provide the process required under the Fourteenth Amendment." *Rittenhouse*, 764 F.2d at 1458.

Professor Smolla argues that under *Ferri*, 444 U.S. at 193, Martinez v. California, 444 U.S. 277 (1980), and Bishop v. Wood, 426 U.S. 341 (1976), the states had wide latitude to define immunity as an aspect of the property rights enjoyed by their citizens. *Parratt* and Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), he contends, place substantive limits on this "neat positivist applecart." Smolla, supra note 44, at 877. He argues that, after *Logan*, courts will undertake substantive evaluations of the state tort law under "a level of review slightly more rigorous than the minimum rationality standard . . . but well beneath 'strict scrutiny.' " Id. at 878. Professor Smolla, however, mischaracterizes *Logan* by reading it as a case in which the United States Supreme Court "refus[ed] to allow Illinois to define its own state-created 'entitlement.' " Id. at 835. Because he neglects procedural issues, the only basis he finds for the *Logan* Court's reversal of the Illinois Supreme Court's decision that plaintiff did not have a claim is the substantive evaluation he constructs. See e.g., id. at 877 (under *Parratt*, a constitutional action will lie unless the state provides an adequate remedy—no mention of authorization), 833 ("whenever a postdeprivation remedy exists that will fully compensate the victim for whatever losses the government has inflicted on him, the deprivation was not made without 'due process' ").

The Court's opinion, however, belies the reading Professor Smolla suggests. The issue in *Logan* was whether the *procedures* used to work the deprivation were constitutional. "The 120-day limitation [which barred his claim] . . . is a procedural limitation . . . not a substantive element of the FEPA claim." *Logan*, 455 U.S. at 433. The authorized procedure failed the procedural test because it presented a high risk of inaccurate deprivations. Id. at 435-36. Therefore, the Court could not countenance at all the Illinois Supreme Court's decision regarding the existence of an entitlement. Since the Court has rejected the "bitter with the sweet" argument, its characterization of the deprivation as having been worked by a proce-

Both arguments miss the mark. Analysis of immunity should center, not on its effect in precluding compensation in the case at bar, but on its effect on systemic procedural due process protection as a whole. The evaluation should question whether the immunity causes the system to fail the systemic test: does it make the system ineffective for insuring accurate implementation of the substantive law for the generality of cases?

### 1. Immunities Should Be Evaluated Under Systemic Procedural Principles

In *Martinez v. California*,[152] its leading case on state law immunities, the Supreme Court held that there was no federal interest in state's immunity law, subject to substantive due process limits, and concluded that as long as the immunity is not irrational, it would be constitutional.[153] *Martinez*, however, did not address procedural due process requirements as they pertain to state officials because, until *Parratt*, tort suits were not part of the process permitted under the fourteenth amendment guarantee. By allowing tort suits to become part of the constitutionally permissible processes available to the states, procedural due process scrutiny must now focus on state immunity because immunity has a strong instrumental effect—it affects how accurately the substantive state law is implemented.

To determine if a state system is adequate in light of immunity, immunity must be evaluated like any other aspect of that system—under a systemic analysis, balancing accuracy of the system as a whole against the individual interest and administrative burden on the state.[154] Immunity could affect the system in two ways. First, by fail-

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dural deficiency removed any question as to the state's ability to define substantive entitlement. See supra note 64.

152 444 U.S. 277 (1980).

153 In *Martinez*, a state prisoner was released on parole. The parolee then killed the daughter of the plaintiff who sued the state in tort. The Court discussed the possibility that the claim itself was property and the immunity thus constituted a deprivation without proper process. Id. at 281-82. The Court ruled however, in substantive due process terms, that there was no federal interest as long as the immunity was not irrational. Id. at 282-83. By failing to consider any of the relevant procedural issues such as accuracy or fairness, the Court in essence held that procedural due process is not implicated in a state's tort system; presumably the states could abolish tort systems entirely. If implicated at all, "the legislative determination provide[d] all the process that is due." *Logan*, 455 U.S. at 433; see also *Davidson*, 752 F.2d at 830 ("nothing in the Constitution insures that a putative plaintiff may maintain a particular type of negligence claim in state court"). But see Blum, 13 Hastings. Const. L.Q. 695, 724 n.166 (1986) (characterizing *Martinez* as a procedural due process decision).

154 See supra notes 77-83 and accompanying text; see also *Daniels*, 474 U.S. at 342 (Stevens, J., concurring) (whether a remedy is adequate turns on "fundamental unfairness"); *Davidson*, 752 F.2d at 832. (Garth, J., concurring) (advocating a somewhat similar balance without reference to *Mathews*).

ing to neutralize what would otherwise be inaccurate deprivations, a broad immunity might yield too many unjustified deprivations to allow a system to be considered accurate for the generality of cases.[155] Second, immunity might reduce predeprivation protection by undermining the deterrence that the threat of suit provides.[156] Moreover, immunity applies to varying individual interests, and there is no reason to disregard these interests in determining whether immunity should attach. Immunities which consider only the nature of the official's act and state of mind can lead to application of the same immunity standard whether the acts cause minor inconvenience or death. Instead of leaving the state to consider only its own interests, the systemic balance accounts for the individual-interest, and can bar a state's application of immunity where its interest in immunity is outweighed. For example, if a private interest is so important that no inaccuracies are tolerable, an immunity which prevented any unjustified deprivations from being neutralized, or which even slightly decreased deterrence, would fail the systemic test and render the remedy inadequate.[157]

On the other hand, the state has a strong interest in immunity for its officials—it is often designed to *promote* accurate decision making.[158] Indeed, any argument that immunity leads to generally inac-

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155 See supra text accompanying note 144.

156 See supra note 142 and accompanying text.

157 Professor Smolla argues that equal protection demands a rational reason for differentiating state from private tortfeasors, and that absolute immunities fail this test. Smolla, supra note 44, at 872, 878-80; Zensky, supra note 44, at 221-22. Financial concerns alone, he reasons, are insufficient. "The Lockean universe upon which the Constitution was founded—that the state is formed to provide security for property and person—would be turned on its head if the body politic could cite financial distress as the justification for allowing [harm caused by the state] to go uncompensated." Smolla, supra note 44, at 873. "If the state's only interest is monetary . . . the existence of governmental immunity in what would otherwise be a valid cause of action if the tortfeasor were a private person should render the state liable under *Parratt*." Id. at 872-73. But see Wells & Eaton, supra note 3, at 221 n.91 ("Protecting the public fisc through immunities is but a means to encourage effective action by government officials. It is impossible to separate a government's interest in avoiding paying of tort judgments from its interest in protecting the integrity of its decision-making process.") (citations omitted). It is not equal protection however, that demands a balancing of interests, rather it is the *Mathews* systemic procedural evaluation; the test is not 'minimum rationality' but the *Mathews* systemic balance. See infra note 159.

158 The reasons for immunity were classically stated by the second Justice Harlan:

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Barr v. Matteo, 360 U.S. 564, 571-72 (1959).

curate deprivations must be offset by its effectiveness in encouraging the determinations that are questionable, but nevertheless ultimately accurate.[159] When a decision must be made such as whether some property is contraband, an erroneous decision in either direction is equally a breakdown of the governmental purpose. If it is contraband yet not seized, it is as much a problem as a decision that it is contraband when it is in fact not. Thus, it would be difficult to show that a reasonably well designed immunity would render a system, as a whole, inaccurate. Furthermore, our system's long history of immunity shows that it is unlikely that the average state immunity will be found to so impede faithful government operation as to make the entire governmental system inaccurate. If a given immunity does not fail the systemic test, an opportunity for compensation where immunity does not attach represents the opportunity for compensation *Parratt* requires. Implementation of a systemically sound immunity represents a valid application of a law that violates no constitutional command.

By recognizing that procedural due process scrutinizes state systems, *Parratt* returned to the states day-to-day supervision of their execution of their own laws. Allowing the states to oil their mechanisms with immunity—to the extent the Constitution allows—should be regarded as a benefit of *Parratt*. As the next section will show, *Parratt* freed the states to employ immunity to its constitutional limits.

### 2. Federal Versus State Immunity

Commentators who argue that state immunity renders a state system inadequate uniformly propose that federal immunity law should control the evaluation—the remedy should be seen as inadequate if the state immunity is broader than the federal.[160] This is no

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[159] The difference between official and sovereign immunity is not material; the analysis is the same. An "absolute" or sovereign immunity might require dismissal of a complaint upon proof that the actor was a state official; no compensation is ever possible. This type of immunity shields the state from all damage claims, is based on nothing more than financial concerns, see Smolla, supra note 44, at 872, and runs a high risk of failing the systemic test. Because no compensation is available to 'neutralize' otherwise unjust deprivations, many inaccurate decisions will remain in effect. If this type of immunity is not limited to high-ranking officials and is extended to many day-to-day governmental activities, inaccuracies are likely to abound. Furthermore, where a government's interest is only monetary, it cannot proffer a strong argument that abrogating that immunity is too burdensome. See id. But see Wells & Eaton, supra note 3, at 221 n.91 (all immunities serve instrumental purposes). In federal actions absolute immunity is limited to judicial officers and other high-ranking officials. See, e.g., Nixon v. Fitzgerald, 457 U.S. 731 (1982); Stump v. Sparkman, 435 U.S. 349 (1978).

[160] They necessarily arrive at this position because the state cannot be required to provide *more* protection than the constitutional action would. See e.g., Zensky, supra note 44, at 220;

small matter. Since every state probably provides some form of immunity, every state whose immunity is broader than the federal version would be found lacking an adequate system—the exception would usurp the rule.

In a sense, what these commentators are suggesting is that the states were allowed the freedom in their tort remedies *because* the Constitution separately protected due process rights. Once the constitutional remedy is removed, the states must mimic what it once was. Hence the view that the state remedies must be very similar to section 1983, and the only effect of *Parratt* should be one of forum allocation.[161] But *Parratt* does more than ease the burden on federal courts, it establishes the proper understanding of the underlying procedural due process right.[162] Whether that right was violated will depend on the outcome of a *Mathews* systemic balance. As long as the state system satisfies that balance, the difference between federal and state immunity is not of consitutional significance.

Immunity protects officials who may act wrongly in order to facilitate efficient execution of government generally. Both federal and state law recognize that in order for a government to function, this protection is necessary.[163] Violations of the Constitution and federal law are protected by immunity doctrine as developed by the federal courts through common law.[164] While federal common law immunity

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Note, supra note 4, at 638. Mr. Zensky justifies his position that federal immunity law should govern by insisting that the tort remedy is merely "borrowed" to protect *procedural rights*—rather than as procedure. He states that "[r]elatively greater deference however, is to be accorded a state remedial system when state created the causes of action (*Martinez*) than when federal rights are to be vindicated by borrowing a state-created cause of action (*Parratt*)." Zensky, supra note 44, at 220-21. Since he considers the real issue to be the particular violation of predeprivation procedural norms in the case at bar, he argues that states should not be in the position of immunizing constitutional violations. But *Parratt* teaches that the procedural norms he refers to have not necessarily been violated unless immunity makes the system inadequate. See Hart & Wechsler, supra note 33, at 1275. The real rights being vindicated are the property rights that support a claim of deprivation.

161 See Redish, supra note 53, at 100-04; Wells & Eaton, supra note 3, at 212-14; supra note 134.

162 The *Parratt* doctrine can defeat § 1983 actions in a state court as well as a federal court, see e.g., Enright v. School Directors of Milwaukee, 118 Wis. 2d 236, 346 N.W.2d 771 (1984), cert. denied, 469 U.S. 966 (1984), suggesting that its primary purpose is not simply to shift the procedural due process workload to the states. That could have been accomplished by exhaustion requirements, which although involving overruling prior decisions, see, e.g., McNeese v. Board of Educ., 373 U.S. 668, 671-73 (1963), would have been no less disruptive to the then-existing scheme than *Parratt* was. *Parratt* is more than an exhaustion requirement, it shows that the *power* to interpret state substantive law should not, with an excess of regularity, be used by the federal courts.

163 See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 240, 241 (1974); Barr v. Matteo, 360 U.S. 564, 571-72 (1959); Dalehite v. United States, 346 U.S. 15 (1953).

164 Even in constitutional actions, federal immunity standards are not constitutionally man-

may be entirely proper for most constitutional provisions, a systemic analysis recognizes that procedural due process is different than other constitutional rights—procedural due process contains no substantive content of its own[165] and is inextricably linked with the *state* law whose implementation it controls.[166] Federal courts are in a far worse position than state legislatures to judge how much immunity is desirable for a given state official to carry out her mandate. Moreover, they do not seek to evaluate the merits of state immunity law, but instead use the sweeping generalization that federal immunity controls in section 1983 actions[167] without reference to the needs of state officials in carrying out state law.

Before *Parratt*, violation of the predeprivation procedural requirements was itself a constitutional violation. In this light, state concerns over discretion in providing predeprivation process could be seen as being no greater than state concern over discretion appropriate to the exercise of activities that might violate the first amendment. Application of state immunity would shield violations of federal law. But it is precisely *Parratt's* recognition that the *right itself* is not violated unless the system is inadequate that frees the states from the burden of executing state laws encumbered by federal immunity.[168] *Parratt* changed the fundamental approach to procedural due process: predeprivation process is no longer the be-all and end-all of procedural due process analysis; the focus is the now on the entire system. The fact that federal courts would apply a different immunity standard should not make the entire state system unconstitutional. The systemic balance governs that determination. Since one advantage of *Parratt* is that it allows the states to develop their own procedural norms, it would be a grave error to find that immunities—an integral

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dated. See Harlow v. Fitzgerald, 457 U.S. 800, 806-08 (1982); United States v. Gillock, 445 U.S. 360, 372 n.10 (1980); Imbler v. Pachtman, 424 U.S. 409, 417 (1976); Pierson v. Ray, 386 U.S. 597 (1967); Note, Qualified Immunity for Civil Rights Cases: Refining the Standard, 75 Cornell L. Rev. 462 (1990).

165 See supra notes 71-76 and accompanying text.

166 See, e.g., Carey v. Piphus, 435 U.S. 247, 260 (1978).

167 Hart & Wechsler, supra note 33, at 1293; see, e.g., Wood v. Strickland, 420 U.S. 308 (1975); *Scheuer*, 416 U.S. at 232; see also Ferri v. Ackerman, 444 U.S. 193, 198 (1979) ("when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course the state rule is in conflict with federal law"); see also Howlett v. Rose, 58 U.S.L.W. 4755 (Wis. June 6, 1990) (state sovereign immunity cannot be applied in § 1983 actions brought in state court).

168 Where the original tort suit is brought against the state official in federal court, state immunity law should apply under the *Erie* doctrine. See, e.g., Zeidner v. Wulforst, 197 F. Supp. 23 (E.D.N.Y. 1961); see also Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States, 126 U. Pa. L. Rev. 1203, 1254 n.240, 1264 n.272 (1978) (state immunity law should govern under the eleventh amendment).

part of the governmental system—render a system inadequate simply because they sometimes preclude compensation where the federal courts would grant it.

Those who argue that state compensation-preclusive immunity renders a system inadequate are, in truth, arguing with the entire concept of official immunity. If immunity is to be an accepted part of our governmental system, both state and federal, it is difficult to see why returning primary oversight of state functions to the states should preclude their own immunity rules from applying. After all, it is the state's politically responsive institutions that can determine, for a particular type of official, whether discretion is more important than compensation; it is the states that must balance the need for immunity against the protection of its citizenry.[169] Federal immunity law is in no way superior to state law and is more likely inferior since it must cover a different array of governmental functions. When a state official executes a state policy, she is performing the essence of government. Where both the Constitution and the states allow her freedom from liability under necessary circumstances, she is the quintessential functionary of legitimate governance. Where this action is rendered unconstitutional by imposition of a federal immunity standard, the federal courts are in truth contravening what seems like a platitude: "it is not a tort for the government to govern."[170]

## CONCLUSION

Although *Parratt* has been seen as merely another attempt to reduce the federal courts' case load, it actually represents the application of sensible procedural due process principles to wrongs committed by state actors. Instead of using procedural due process as a vehicle to litigate the substantive merits of state deprivations, *Parratt* placed procedural due process in its proper position as a "once-removed" systemic check on state action. The burgeoning procedural due process doctrine had led many substantive state issues to federal court; *Parratt*, in harmony with the systemic concept of procedural due process, has returned supervision of the day-to-day execution of state government to the states. Procedural due process is no longer a vehicle for circumventing state adjudication of state law.

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169 Cf. Whitman, supra note 3, at 30-40 (the costs of displacing state authority by expansion of the constitutional tort doctrine include the preemption of state authority to set standards of conduct for its own officers).

170 Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting).