Monell, Parratt, Daniels, and Davidson: Distinguishing a Custom or Policy from a Random, Unauthorized Act

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In Monell v. Department of Social Services the Supreme Court held that municipalities can be sued under section 1983 of Title 42. This decision transformed section 1983 into a potent remedy against governmental abuse. It also led to a substantial increase in the number of section 1983 cases filed in federal court. Concerned about this increase, some jurists

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   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.

Monell held that municipalities were “persons” within the meaning of § 1983, see 436 U.S. at 690, overruling the decision in Monroe v. Pape, 365 U.S. 167, 191-92 (1961), which had reached the opposite conclusion. See infra note 81 and accompanying text.

3. See Owen v. City of Independence, 445 U.S. 622, 650-51 (1980). Monell, however, has been criticized for construing municipal liability too narrowly. Some jurists and scholars argue that § 1983 would be a more potent remedy if Monell had allowed municipalities to be held liable on a respondeat superior theory. See City of Oklahoma City v. Tuttle, 105 S. Ct. 2427, 2446-47 (1985) (Stevens, J., dissenting); P. Schuck, SUING GOVERNMENT 119-20 (1983); infra notes 88-89 and accompanying text.

4. See Patsy v. Board of Regents, 457 U.S. 496, 533 (1982) (Powell, J., dissenting) (“In 1961, the year that Monroe v. Pape was decided, only 270 civil rights actions were begun in the federal district courts. Annual Report of the Director of the Administrative Office of the U.S. Courts, 238 (1961). In 1981, over 30,000 such suits were commenced. Annual Report of the Director of the Administrative Office of the U.S. Courts 63, 68 (1981)” (citation and footnote omitted)). The sharp increase has been attributed largely to Monell, 436 U.S. 658, 690 (1978) (holding that municipalities are “persons” within the meaning of § 1983). See P. Schuck, supra note 5, at 47-49 (1983); Whitman, Constitutional Torts, 79 Mich. L. Rev. 5, 6 (1980). Maine v. Thiboutot, 448 U.S. 1 (1980), which held that § 1983 can be used to challenge state laws that are inconsistent with any federal law, even if the federal law is unrelated to protecting civil rights, see id. at 6-8, has also been identified as a possible reason for the increase. See Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 CORNELL L. REV. 482, 523 (1982) (predicting Thiboutot may be fertile source of new cases). However, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), significantly limited the impact of Thiboutot by barring use of § 1983 if the federal law contains a comprehensive enforcement scheme. See id. at 20-21.
have begun to develop theories dedicated to stemming the tide of section 1983 claims.\(^5\)

Some of the theories attempting to limit section 1983 recognize that not every injury to an individual's life, liberty, or property caused by a government employee is a deprivation without due process of law. Instead, some of these injuries are state torts that raise no federal question and therefore deserve a different remedy even though the same act is a violation of a state right and therefore warrants a federal forum, from the common-law tort action which is couched in equitable restraint, see Rizzo v. Goode, 423 U.S. 362, 379-80 (1976); O'Shea v. Littleton, 414 U.S. 488, 499 (1974). For further discussion, see Blackmun, Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?, 60 N.Y.U. L. Rev. 1, 24-26 (1985); Whitman, supra note 4, at 6-7.

Concurring in Monroe v. Pape, 365 U.S. 167 (1961), Justice Harlan observed that "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." See id. at 196 n.5 (Harlan, J., concurring). Courts and scholars have labored to distinguish the constitutional tort action, worthy of a federal forum, from the common-law tort action which is couched in constitutional terms simply because the defendant is a governmental actor and is therefore undeserving of a place on the federal docket. See, e.g., Wells & Eaton, Substantive Due Process and the Scope of Constitutional Torts, 18 Ga. L. Rev. 201, 201 (1984); Whitman, supra note 5, at 14-25; see also cases cited infra note 10.

Procedural due process claims like those in Parratt, Daniels v. Williams, 106 S. Ct. 662 (1986), and Davidson v. Cannon, 106 S. Ct. 668 (1996), are particularly susceptible to the charge that they are simply common-law tort actions which, but for the fortiety of a governmental defendant, would be relegated to a state forum. This susceptibility arises from the fact that the life, liberty, and property interests that the fourteenth amendment protects are often defined with reference to state tort law. See Glennon, Constitutional Liberty and Property: Federal Common Law and Section 1983, 51 S. Cal. L. Rev. 355, 356-58 (1978). See generally Monaghan, Of "Liberty" and "Property", 62 CORNELL L. REV. 405 (1977).

In Parratt v. Taylor, 451 U.S. 527 (1981), Justice Rehnquist raised the spectre, as he earlier had in Paul v. Davis, 424 U.S. 695 (1976), that the failure to identify common-law tort actions and exclude them from the reach of § 1983 "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." Parratt, 451 U.S. at 544 (quoting Paul, 424 U.S. at 701).


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Distinguishing a Policy from a Random Act

In Parratt and Daniels, the Supreme Court attempted to provide a clear, workable test for distinguishing due process violations remediable under section 1983 from common-law torts confined to state remedies. The Court, however, failed to achieve these goals.

Parratt attempted to draw the line between due process deprivations and common-law torts by distinguishing the government's acts from its employees' acts. It held that an act does not implicate due process unless it is attributable to the government, and that "random, unauthorized acts" of government employees do not implicate due process if the state provides adequate postdeprivation remedies. Daniels attempted to draw the line by narrowing the term "deprivation" to encompass only intentional acts. It held that a due process violation requires an abuse of government power, and that a negligent act is not an abuse of power.

Neither test succeeds in providing a clear standard for distinguishing due process deprivations from common-law torts. Parratt fails because it is unclear. It neither defines "random, unauthorized acts" nor distinguishes them from the acts of the government. Its lack of clarity has caused courts to misapply Parratt and improperly exclude from federal court claims based on government wrongdoing. Daniels, although clear, also fails to achieve its goal. Davidson v. Cannon, decided the same day as Daniels, demonstrates that Daniels cannot properly distinguish common-law torts from serious abuses of state power.

Davidson exemplifies a trend toward relegating to state court governmental wrongs other than those committed pursuant to a statute or ordinance. This Article demonstrates that this trend is misconceived. Allegations of governmental wrongdoing raise the most serious issues of abuse of official power, for which the federal forum is most necessary.

This Article examines the importance of preserving the federal forum for claims against the government based on its policies and customs as well as constitutional violations. The Court has often addressed the issue of whether a particular cause of action is constitutionally based or merely sounds in tort. See, e.g., Baker v. McCollan, 443 U.S. 137, 146 (1979) (wrongful arrest under valid warrant did not violate fourth amendment); Estelle v. Gamble, 429 U.S. 97, 107 (1976) (medical malpractice harming prisoner not eighth amendment violation); Bishop v. Wood, 426 U.S. 341, 350 (1976) (loss of employment did not raise due process issue); Paul v. Davis, 424 U.S. 693, 713-14 (1976) (damage to reputation and invasion of privacy did not implicate due process clause). In Daniels and Parratt, however, the Court specifically articulated its perception that the lower courts were having difficulty distinguishing common-law torts from constitutional violations, and its intention to devise a standard lower courts could follow. Daniels, 106 S. Ct. at 664; Parratt, 451 U.S. at 533.

11. Parratt, 451 U.S. at 537.
13. See infra text accompanying notes 40-63.
16. See infra text accompanying notes 66-81.
18. See infra text accompanying notes 139-80.
It suggests a theory for distinguishing due process claims from mere torts\(^{20}\) and demonstrates that the *Parratt* doctrine can make this distinction if its crucial terms are defined.\(^ {21}\) The heart of this theory is its discovery of a definition for the term "random, unauthorized act," which is contained in *Monell*.\(^ {22}\)

*Monell* holds the government liable for the harms it causes through its statutes, policies, or customs.\(^ {23}\) *Parratt* fails to identify when the government, rather than its employees, has caused harm—a distinction crucial for its application.\(^ {24}\) *Monell* supplies the concept of causation. *Parratt* and *Monell* are correlatives. Where causation by the government ends, random and unauthorized acts of its employees begin.\(^ {25}\)

If given their proper scope, *Parratt* and *Monell* provide an accurate way of relegating common-law tort claims to state court, while preserving the federal forum for constitutional violations by the state. Interpreted as correlatives, *Parratt* and *Monell* possess both clarity and ease of application. These qualities are sorely lacking in current attempts at forum allocation under the *Parratt* doctrine, as the lower court opinions,\(^ {26}\) as well as the Supreme Court's false step in *Daniels* and *Davidson*, attest.\(^ {27}\)

Part I of the Article explains the theory that *Parratt* and *Monell* are correlatives that distinguish random, unauthorized acts of government employees from the customs and policies of the government. This distinction is consistent with the most important purposes of section 1983 and the due process clause, and also achieves the aims articulated in *Parratt* and *Daniels*. Part I also explains why *Davidson*, which cannot be harmonized with these aims, is misconceived.

In part II, the theory is applied to clarify specific areas of confusion: the failure to determine what process is due;\(^ {28}\) the incorrect use of *Parratt* when the government is capable of providing due process;\(^ {29}\) and the procedural problems raised by determining the applicability of *Parratt* on the pleadings.\(^ {30}\)

### I. Distinguishing a Custom or Policy from a Random, Unauthorized Act

To state a procedural due process claim,\(^ {31}\) a plaintiff must cross several

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19. See id.
21. See id.
24. See infra text accompanying notes 40-63.
25. See infra text accompanying notes 117-38.
27. See infra text accompanying notes 66-81.
28. See infra text accompanying notes 223-54.
29. See infra text accompanying notes 255-415.
31. *Parratt* applies only to deprivations of property without due process of law, see 451 U.S. at 541, as does Hudson v. Palmer, 468 U.S. 517 (1984), which extended *Parratt* to intentional
thresholds. A plaintiff must first allege a deprivation of life, liberty, or property by the government. The plaintiff must next allege that the deprivation occurred without due process of law. If the claim is based upon failure to receive a hearing "at a meaningful time and in a meaningful manner," the governmental defendant may object that a timely hearing was impracticable, but that it will provide one at its first opportunity. Parratt then requires the plaintiff to allege the inadequacy of this remedy. The plaintiff who cannot meet each of these requirements has no federal claim. Application of both the Parratt doctrine and the Daniels and Davidson holdings requires the court to determine whether a claimed deprivation is attributable to the government or to one of its employees.

A. The Parratt Doctrine Bars Random and Unauthorized Acts from Federal Court

I. Parratt v. Taylor

In Parratt v. Taylor, the respondent had ordered hobby materials to be delivered to the prison at which he was an inmate. In a departure from normal prison procedures, another inmate and a civilian signed for the materials. When the materials could not be located, Taylor sued the warden and hobby manager of the prison for the value of the materials, alleging infringement of his due process rights. The Court took the opportunity to consider "what process is due a person when an employee of a State negligently takes his property." The Court upheld the taking of property without predeprivation process, reasoning that:

The justifications which we have found sufficient to uphold takings of property without any predeprivation process are appli-
cable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the 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.42

In Parratt the Court drew a distinction between the government employee43 who caused the deprivation44 and the governmental entity

42. Id. at 541. The Court characterized Taylor's suit as a claim of a deprivation of procedural, as opposed to substantive, due process. See id. at 537. "In particular, we must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process." Id. There is some question whether this was a correct characterization. Taylor alleged in his pro se pleadings that "his property had been negligently lost by prison officials in violation of his rights under the Fourteenth Amendment" and that he had "been deprived of property without due process of law." See id. at 529. It is not clear that his complaint was directed at the failure to provide adequate procedures before the wrongful taking, as opposed to the wrongfulness of the taking itself. See, e.g., Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 Yale L.J. 71, 100, 101 (1984) [hereinafter Redish, Abstention]. Professor Redish states:

"The Court's characterization of Parratt as a procedural due process case is erroneous. The essence of the constitutional deprivation in the context of procedural due process is the loss of a protected interest absent adequate procedure. It is incorrect to suggest that the end result of a negligent loss of a prisoner's property is rendered legitimate and appropriate . . . by the provision of proper procedures . . . . Though of course such negligent loss may be subsequently compensated, the same is true of any illegal behavior. This fact in no way renders the behavior legitimate."

Id. For a similar view, see Note, Unauthorized Conduct of State Officials Under the Fourteenth Amendment: Hudson v. Palmer and the Resurrection of Dead Doctrines, 85 Colum. L. Rev. 837 (1985). The Note argues that the Court in Parratt and in Hudson v. Palmer, 468 U.S. 517 (1984), failed to distinguish a claim for damages for failure to provide a prior hearing, as in Carey v. Piphus, 435 U.S. 247, 255-54, 266-67 (1978), from a claim for substantive damages; e.g., the claim for lost education in Carey, or for the lost hobby kit in Parratt. See also Wells & Eaton, Substantive Due Process and the Scope of Constitutional Torts, supra note 6, at 218-20. Several lower courts have held that Parratt does not extend to claims of substantive due process. See, e.g., Gilmere v. City of Atlanta, 774 F.2d 1495, 1500 (11th Cir. 1985); Augustine v. Doe, 740 F.2d 322, 327 (5th Cir. 1984).

43. The Court in Parratt actually distinguished between deprivations that occur as a result of a "random and unauthorized act by a state employee" and those that are "a result of some established State procedure" and thus within the control of the State. See 451 U.S. at 541. The terms "governmental employee" and "governmental entity" are substitutes for the terms "state employee" and "state" in order to avoid confusion stemming from the fact that the state itself is immune from suit. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98 (1984); Hans v. Louisiana, 134 U.S. 1, 21 (1890). It has been suggested that in fact the Court uses the term "state" literally to suggest that due process is violated only when the state itself is at fault for not providing process. See Comment, Parratt v. Taylor: Don't Make a Federal Case Out of It, 63 B.U.L. Rev. 1187, 1204 n.126 (1983). Because the state cannot be sued for damages, Edelman v. Jordan, 415 U.S. 651, 663 (1974), and arguably cannot be sued for declaratory relief, Green v. Mansour, 106 S. Ct. 423, 428 (1985), this interpretation would have debilitating consequences for § 1983.

44. The question of whether the actions of the employees in Parratt resulted in the
itself, which is capable of providing predeprivation process.\textsuperscript{45} The governmental entity, which has authority to conduct a hearing, has no notice that the deprivation will occur, and thus cannot conduct a hearing prior to the deprivation.\textsuperscript{46} The governmental entity's first possible opportunity to provide a hearing arises after the deprivation occurs.\textsuperscript{47} Therefore the provision of the postdeprivation hearing is all the process that the due process clause requires.\textsuperscript{48}

In \textit{Hudson v. Palmer},\textsuperscript{49} the Court extended the \textit{Parratt} doctrine to intentional acts.\textsuperscript{50} In \textit{Hudson} petitioner Palmer alleged that during a "shakedown" search of his cell for contraband, a prison official intentionally destroyed some of his noncontraband personal property, violating his due process rights.\textsuperscript{51} The Court held that even if the property was intentionally destroyed, the state had not violated the petitioner's due process rights.\textsuperscript{52} Under the \textit{Parratt} rationale, a predeprivation hearing would have been impracticable.\textsuperscript{53} If the state could provide adequate postdeprivation remedies for the loss of property, due process would be satisfied.\textsuperscript{54} The Court,

deprivation was complicated by a flaw in the proof of causation required to state a cause of action under § 1983. A cause of action under § 1983 is stated when the defendant "subjects, or causes to be subjected, [any person] to the deprivation of any rights, privileges and immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (1982). Although the defendants were the warden and the hobby manager, arguably the deprivation was caused by neither. The Court acknowledged that Taylor's allegation against the defendants appeared to be based solely on respondeat superior liability; that is, that the defendants' subordinates had violated established procedures. \textit{See Parratt}, 451 U.S. 527, 537 n.3. The Court noted that it has held respondeat superior to be an unacceptable substitute for proof of causation under § 1983, but declined to consider the causation issue because it had not been raised in the district court. \textit{Id.} Thus in \textit{Parratt} the government actors who had in fact caused the deprivation were not sued, and the parties who were sued had been powerless to prevent the deprivation because they had not caused it and had no notice that it would occur. "This suit... was brought only against supervisory personnel, whose simple 'negligence' was assumed but, on this record, not actually proved." \textit{Parratt}, 451 U.S. at 545 (Blackmun, J., concurring).

45. Commentators have observed that this distinction between the government and the government official is a departure from precedent regarding state action. \textit{See}, e.g., Comment, \textit{Federalism, Section 1983 and State Law Remedies: Curtailing the Federal Civil Rights Docket by Restricting the Underlying Right}, 43 U. Prrr. L. Rev. 1035 (1982); Note, \textit{supra} note 42, at 837, 845-46. Both of these commentators argue that a holding that a state official is not acting on behalf of the state and is not involving the state in unconstitutional activity whenever the official himself is violating state law would require overruling years of precedent beginning with \textit{Home Tel. & Tel. Co. v. City of Los Angeles}, 227 U.S. 278, 283-84, 287 (1919), which held that a state court decision as to the legality of the challenged conduct under state law is not necessary before the conduct can be considered state action within the meaning of the fourteenth amendment. \textit{See Comment, supra}, at 1081-82; Note, \textit{supra} note 42, at 845-46. As these commentators recognize, the distinction is fundamentally at odds with the holding in \textit{Monroe v. Pape} that action "under color of state law" includes action not authorized by that law. \textit{See infra} notes 128, 142 and accompanying text.

47. \textit{See id.}
48. \textit{See id.} at 539.
50. \textit{See id.} at 533.
51. \textit{See id.} at 520.
52. \textit{See id.} at 533.
53. \textit{See id.}
54. \textit{See id.}
in extending the Parratt doctrine to intentional acts, reaffirmed that "[t]he underlying rationale of Parratt is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur."\textsuperscript{55} Thus, the random and unauthorized act by a state employee is the gravamen of the Parratt doctrine.

2. Hudson v. Palmer

The Parratt Court did not directly address the issue of why the government employee was not able to provide due process before he effected the deprivation.\textsuperscript{56} Prior to Hudson, it was arguable that the Court had found that the state employee could not provide predeprivation process because the employee's act was negligent, and thus neither the employee nor the state could predict when it would occur. Hudson, however, dispelled this notion.

In Hudson the Court extended Parratt's rationale, reasoning that a state can no more anticipate its employees' "random and unauthorized intentional conduct" than it can similar negligent conduct.\textsuperscript{57} Intentional acts may be even more difficult to anticipate because one might well take steps to conceal the intent.\textsuperscript{58} The Court swiftly laid to rest the notion that the individual employee in Hudson, unlike the negligent employee in Parratt, could have predicted in advance the deprivation of rights and thus could have provided a hearing.

Respondent . . . contends that, because an agent of the state who intends to deprive a person of his property "can provide predeprivation process, then as a matter of due process he must do so." . . . This argument reflects a fundamental misunderstanding of Parratt. There 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.\textsuperscript{59}

Hudson explained that the Parratt doctrine distinguishes the govern-

\textsuperscript{55} Id.
\textsuperscript{56} See Parratt, 451 U.S. at 537-44.
\textsuperscript{57} See Hudson, 468 U.S. at 533. Unfortunately, neither Parratt nor Hudson provides a more complete discussion of the meaning of the crucial term "random and unauthorized." See infra text accompanying notes 47-53. The only other Supreme Court decision to consider the issue, Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), also fails to clarify the term. See infra text accompanying notes 298-310. Logan reaffirms that Parratt "was not designed to reach . . . a situation where the deprivation is the result of an established state procedure," Logan, 455 U.S. at 436, but the distinction between random and unauthorized acts and acts that result from established state procedures does not emerge clearly from these three cases.
\textsuperscript{58} See Hudson, 468 U.S. at 533.
\textsuperscript{59} Id. at 534 (emphasis in original) (quoting Brief for Respondent and Cross-Petitioner) (citation omitted).
ment from the governmental employee, and considers the government the sole entity capable of providing due process. The doctrine is premised on the assumption that the government cannot deter the random, unauthorized act of a government employee, whether negligent or intentional. The government employee, either because she cannot predict in advance her own negligent acts, or because she is bent on committing an intentional deprivation, is undeterable.

Conversely, the government, because it is capable of providing due process, can be deterred from failing to do so. If the government knows or should know in advance that a deprivation will occur, it may be required to provide a predeprivation hearing, and failure to do so may violate due process. If the deprivation is random and unauthorized, and therefore unpredictable, the government can be expected to provide process only after the deprivation occurs. If it provides postdeprivation process, no federal cause of action will accrue.

3. Daniels v. Williams and Davidson v. Cannon

Daniels v. Williams expressly overruled Parratt's holding that a negligently caused injury can be a deprivation of due process. In Daniels, a low level prison official left a pillow on a staircase, causing the petitioner to slip and sustain injuries. The Court held that the official did not deprive the petitioner of liberty within the meaning of the due process clause. The Court reasoned that the word "deprive" in the due process context...
connotes not merely a negligent act, but an abuse of power, and that no such abuse had occurred in this instance.69

In Davidson v. Cannon, the companion case to Daniels, several officials were implicated in the alleged deprivation of liberty, including the assistant superintendent of the prison.70 The officials, despite actual notice that the petitioner had been threatened by another inmate, failed to take the usual preventative measures.71 The petitioner was assaulted and seriously injured.72 The Court, relying on Daniels, held that the officials' failure to take steps to protect the petitioner was merely negligent and therefore did not amount to a violation of due process.73

Daniels and Davidson do not merely overrule Parratt's holding that a section 1983 suit may be based on a negligent act. These cases stand for the much broader proposition that only the government, through its statutes and policies, can cause violations of procedural due process actionable under section 1983. The Parratt doctrine prohibits suits based on individual acts, whether negligent, reckless, or intentional.74 Daniels and Davidson bar claims for negligent governmental acts.75 All that remain are the intentional acts of the government. Presumably government adoption of statutes and policies is intentional and therefore actionable, but its negligent failure to follow them is not actionable.76

Daniels and Davidson raise the first threshold for claimants alleging a due process violation. The litigant must allege a deprivation of life, liberty, or property, and must allege that the person causing the deprivation did not act negligently.77 An allegation that a governmental employee intended the result complained of, although it will comply with Daniels and Davidson, will not meet the Parratt threshold.78 Parratt will bar the due process claim

69. See id.
70. See Davidson, 106 S.Ct. at 669.
71. See id.
72. See id.
73. See id. at 670.
75. See infra text accompanying notes 181-213.
76. See infra text accompanying notes 203-06.
77. Recklessness or gross negligence may also be actionable. See Daniels 106 S. Ct. at 667 n.3 (refusing to decide whether recklessness or gross negligence may trigger due process protections).
78. The Court appears to require not only that the defendant intended to commit a particular act causing the complained of result, but also that the defendant intended to achieve that result.

As Justice Blackmun pointed out in his Davidson dissent, the defendants made several deliberate, conscious decisions regarding the actions they would or would not take in response to the petitioner's note reporting threats to him. See Davidson, 106 S. Ct. at 675 (Blackmun, J., dissenting). The majority found that “respondent Cannon mistakenly believed that the situation was not particularly serious, and respondent James simply forgot about the note.” See id. at 670. The implication is that because the respondents had not intended, or at least recklessly disregarded the risk of, the resulting assault, their actions were merely negligent. This raises the question of why the intent to achieve the substantive result, in this case the assault, should be relevant. Since the petitioner has alleged a deprivation of procedural due process, it seems he is complaining about a failure to provide a hearing or procedure, and that the relevant inquiry should be whether the respondents intended to deprive him of this hearing or procedure. Arguably the result in Davidson would have changed under this analysis.
as random and unauthorized unless the litigant can meet the burden of showing that available state remedies are inadequate.\footnote{29} Only an allegation that the government caused the deprivation, through its statutes, customs, or policies, will be sufficient.\footnote{80} Therefore, to apply the Parratt doctrine it is crucial to distinguish the government from the governmental employee. This distinction is contained not in Parratt or its progeny, but in Monell.

\section*{B. Monell Permits Suits Against the Government for its Customs and Policies}

In\textit{Monell}, the Supreme Court held that municipalities are persons under section 1983.\footnote{81} The Court then confronted the task of determining the circumstances under which a municipality could "subject [a person] or cause [a person] to be subjected" to the deprivation of the rights protected by the Constitution, within the meaning of the statute.\footnote{82} The difficulty of this task lies in the bureaucratic nature of government.\footnote{83} A government must work through "human agents"—its decisions and policies must

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The requirement that the result, rather than the action, be intended is arguably inconsistent with the usual usage of the intent requirement in tort law, as Justice Blackmun points out in his Davidson dissent. "Where occurrence of the harm is substantially certain, the law imputes to the actor an intent to cause it." Davidson, 106 S. Ct. at 673 n.2 (Blackmun, J., dissenting) (citing Restatement (Second) of Torts § 8A, Comment b (1965)). In criminal law, there is ambiguity regarding the meaning of the term intent. It may mean variously the intent to do the act or the intent to cause the result. The Model Penal Code substitutes the word "purpose" to connote a desire to achieve a certain result, and "knowledge" to connote an awareness that the result is likely to occur from one's actions. See Model Penal Code § 2.02(2) (a), (b); see also W. LaFave & A. Scott, supra note 61, at 197 (1973). In some areas of constitutional law, however, intent to achieve the result is required. See, e.g., Washington v. Davis, 426 U.S. 229, 239, 241, 248 (1976) (invidious discriminatory purpose required for claim of racial discrimination under equal protection clause).

\footnote{79} In Hudson v. Palmer, for example, Palmer alleged that Hudson had intentionally destroyed his personal property. See 468 U.S. at 530. Even though the Court assumed the truth of his allegations, it rejected his claim because the destruction of property was random and unauthorized, and adequate state remedies existed. See id. at 530-33.

\footnote{80} When the government acts pursuant to statute, custom, or policy, its acts are authorized, and thus not barred by Parratt. Parratt applies to acts that are both random and unauthorized. See Parratt, 451 U.S. at 541; see also supra notes 37-53. Likewise, because the government adopts its policies intentionally, wrongful acts caused by those policies should be considered deprivations, and thus not barred by Daniels and Davidson. Daniels and Davidson hold only that negligent conduct cannot be considered to cause a deprivation of due process rights. See Davidson, 106 S. Ct. at 670; Daniels, 106 S. Ct. at 665.


\footnote{82} See Monell, 436 U.S. at 691.

\footnote{83} See Schnapper, supra note 81, at 217; Note, A Theory of Negligence for Constitutional Torts, 92 Yale L.J. 683, 696-99 (1983).}
originate with individuals. The issue is which of these individuals, and which actions, are attributable to the municipality itself.

In Monell, the plaintiffs challenged a policy of the New York Department of Social Services requiring pregnant employees to take unpaid leaves of absence. The Board of Education and the Department of Social Services delegated authority to the employee's agency to determine when the forced leave would begin. The Social Services Commissioner's discretion on these matters had been delegated to an Assistant Deputy Administrator for Personnel Management.

One option available to the Court was to adopt a respondeat superior theory of liability. The Court, however, concluded from section 1983's legislative history that a municipality should not be held liable based on respondeat superior theory. Causation by the municipality could instead be demonstrated if the allegedly unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or when the deprivation occurs "pursuant to government custom even though such a custom has not received formal approval through the body's official decisionmaking channels."

By rejecting respondeat superior liability, the Court limited municipal liability to situations in which the wrongful activity can be attributed to the municipal employer rather than the employee. It began the process of identifying the employer as one who promulgates the decisions and policies of the municipality. It did not attempt a full exploration of those circumstances, but limited itself to resolving the immediate issue.

The Monell Court stated that the case before it "unquestionably involve[d] official policy as the moving force of the... violation." It has been noted that the Court did not indicate "whether it was basing its conclusion on the existence of the regulation, on the assistant administrator's exercise of discretion, or both."

85. See 436 U.S. at 660, 661.
86. See id. at 660-61 & n.2.
87. The regulation "did not require in all cases that a pregnant employee go on leave after her fifth month of pregnancy, but merely directed that if the employee wished to work after the fifth month she had to secure 'agency medical approval to work and the approval of the agency head.'" Schnapper, supra note 81, at 220 (footnote omitted).
88. Under respondeat superior theory, an employer could be held liable for the wrongful acts of the employer's agents, even those contrary to specific instructions. See City of Oklahoma City v. Tuttle, 105 S. Ct. 2427, 2443 (1985) (Stevens, J., dissenting). As Justice Stevens has pointed out, this standard has long been applied to municipal corporations. See id. at 2442-47.
89. See Monell, 436 U.S. at 691-94. Justice Stevens, dissenting in City of Oklahoma City v. Tuttle, makes a cogent argument that this portion of the Monell opinion was dicta, and that respondeat superior liability should be imposed under § 1983. See 105 S. Ct. at 2446-47 (1985) (Stevens, J., dissenting); see also supra note 88 and accompanying text.
90. Monell, 436 U.S. at 691.
91. See id. at 695.
92. See id. at 694.
93. See Note, Failure to Act, supra note 81, at 1229.
however, that a municipal policy can be inferred from the acts of officials with delegated policymaking authority.94

Thus after Monell, the government may be implicated by proving a breach of duty by policymaking officials or by persons acting through delegated authority. Activities by low level employees acting pursuant to its customs may also implicate the government. The Court provided little clarification on the meaning of "custom," but implied that liability may derive from a municipality's control or direction of employees, or from its failure to supervise them.95

The basic principle underlying Monell is that a municipality may be liable only if it is found to have knowledge, or constructive knowledge, of its agent's wrongdoing.96 A municipality with knowledge of its employee's wrongdoing "causes" the wrongdoing by directly ordering it, by condoning it, or by failing to exercise its duty to prevent or contain the wrongdoing. Knowledge may exist if the wrongful act was pursuant to express policies,97 or the act of an official who is part of the responsible government structure, or the act of one to whom the official has delegated responsibility.98 Knowledge also may be imputed if low level employees take actions that the municipality had a responsibility to control or supervise.99

Monell leaves large gaps in the theory of municipal liability. Beyond sketching basic principles, the Court has largely left to lower courts the task of shaping the contours of municipal liability.100 It is not clear who

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94. See Monell, 436 U.S. at 694. The Court stated that the execution of policy or custom may be accomplished by "its lawmakers or those whose edicts or acts may fairly be said to represent official policy." Id.; see also Schnapper, supra note 81, at 219-23.

95. The Court noted that it had "appeared to decide" in Rizzo v. Goode, 423 U.S. 362 (1976) that "the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability." See Monell, 436 U.S. at 694 n.58.

96. The Monell Court's rejection of the Monroes Court's reliance on the Sherman Amendment confirms this principle. The Monell Court found that the Sherman Amendment, CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871) (amendment proposed by Senator Sherman, rejected by Senate), unlike the current § 1983, imposed liability on the municipality whether or not it had notice of the illegal activities of its employees. See 436 U.S. at 669; see also City of Oklahoma City v. Tuttle, 105 S. Ct. 2427, 2435-36 (1985).

97. See Monell, 436 U.S. at 690.

98. See id. at 694.

99. See id. at 691.

100. The Court in Monell found that an unconstitutional policy existed, and therefore did not address "what the full contours of municipal liability under § 1983 may be." See id. at 695; see also supra text accompanying notes 66-86. After declining to address the full contours of municipal liability in Monell, the Court has rarely returned to the issue. In City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985), the Court took a "small but necessary step toward defining those contours." See id. at 2429. The Court recognized that "subsequent decisions have added little to the Monell Court's formulation, beyond reaffirming that the municipal policy must be 'the moving force of the constitutional violation.' " See id. at 2434 (quoting Polk County v. Dodson, 454 U.S. 312, 326 (1981)).

In Webster v. City of Houston, 735 F.2d 838 (5th Cir.), aff'd en banc 739 F.2d 993 (5th Cir. 1984), Judge Williams noted that "[t]he Supreme Court recognized it was presenting only the faintest pencil sketch of the 'full contours of municipal liability under § 1983' in Monell. It expressly deferred 'further development of this action to another day.' The Supreme Court's 'other day' has yet to arrive." See id. at 850 (Williams, J., dissenting) (citation omitted).
constitutes a policymaking official,\textsuperscript{101} or when a policymaking official has delegated his or her authority to another.\textsuperscript{102} Even less clear are the parameters of “custom,” under which a municipality may be liable for the acts of low level employees.\textsuperscript{103}

The predictable result of \textit{Monell} has been a lack of clarity and uniformity among the circuits. Since proper application of \textit{Parratt} turns on determining when the governmental entity has caused harm and is therefore responsible, the confusion surrounding \textit{Monell} and the issue of municipal causation has had a direct impact on the scope of the \textit{Parratt} doctrine.

\textbf{C. Parratt and Monell are Correlatives}

\textbf{1. The Need to Define the Governmental Entity}

If a governmental entity deprives a citizen of life, liberty, or property without adequate procedure, it violates rights guaranteed by the federal constitution.\textsuperscript{104} Although an allegation that a governmental entity has violated federal rights appears to state a valid basis for federal jurisdiction,\textsuperscript{105} \textit{Parratt} significantly limits access to a federal forum. \textit{Parratt} created a special rule of access for due process claimants by redefining due process.\textsuperscript{106}

Under \textit{Parratt} a due process violation takes longer to ripen\textsuperscript{107} than do other constitutional deprivations. The government violates the first amendment the moment it interferes with an individual’s right to speak or associate. The government’s willingness to pay damages to the wronged individual affects neither the first amendment claim nor access to a federal forum. A deprivation of liberty or property, however, violates the fourteenth amendment only if it is effected without due process of law.\textsuperscript{108} If a low level official without the power or duty to conduct a hearing deprives an individual of liberty or property, this action is not the final action of the government.\textsuperscript{109} The government is afforded the opportunity to provide

101. See infra text accompanying notes 283-321.
102. See infra text accompanying notes 321-58.
103. See infra text accompanying notes 339-415.
106. See supra text accompanying notes 40-63.
107. The term “ripen,” as used herein, does not refer to the justiciability doctrine of ripeness. See Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). Rather, the term indicates the point at which a deprivation becomes “complete,” or “final,” and thus actionable under \textit{Parratt} is a violation of due process. In this context, a “ripe” deprivation is distinct from an “initial” deprivation, which is not actionable under \textit{Parratt}. If the state fails to provide post deprivation remedies after an initial deprivation, the deprivation ripens into a due process violation.
108. This discussion assumes that the \textit{Parratt} rationale has been extended to deprivations of liberty. See supra note 31 and accompanying text.
109. A hearing is just one example of the kinds of due process the government may be required to provide. See infra text accompanying notes 265-82.
due process. Only if the government fails to act is due process denied.\textsuperscript{110}

As Professor Smolla has pointed out, this special treatment of the due process clause makes sense only if it is viewed as a clause which, unlike the free speech or equal protection clauses, contemplates a "sharing of power and responsibility between the state and federal sovereigns."\textsuperscript{111} Parratt allows the government what Professor Smolla terms a "second stab" at providing due process through the government's own systems.\textsuperscript{112} Another way of looking at the Parratt doctrine is that it gives a governmental entity one chance to provide due process. The fact that state employees have caused an arbitrary deprivation does not preclude the government from rectifying the deprivation at its earliest opportunity. Only the government's refusal to do so gives rise to a due process claim that will justify federal intrusion into state processes.

The delicate balance between federal and state sovereignty would break down if litigants claiming deprivations by a governmental entity were confined to whatever redress the entity chose to provide, and were barred from an independent determination of their federal rights by a federal forum.\textsuperscript{113} The states would become the ultimate arbiters of the availability and scope of federal rights; a result at odds with the post-Reconstruction federalist order.\textsuperscript{114} It is therefore crucial to develop a means of distinguishing the governmental entity responsible for failing to provide due process from the government employee who is not responsible.

Parratt provides little guidance in drawing this distinction.\textsuperscript{115} Parratt does suggest that it is the random and unauthorized nature of the employee's act that renders the act unpredictable, and that if instead the act were the result of "some established state procedure," the act would be attributable to the government.\textsuperscript{116} Although the Court has never made the


\textsuperscript{111} See Smolla, supra note 110, at 863.

\textsuperscript{112} See id. at 870.

\textsuperscript{113} Professor Redish has stated:

Courts have long recognized a due process right to have the scope of constitutional rights determined by an independent judicial body. The reason for this right is that unless the adjudicatory tribunal is sufficiently independent of the governmental unit that has allegedly violated constitutional rights, the individual cannot reasonably expect to receive a truly fair adjudication of his rights.


\textsuperscript{114} [R]egardless of whether the ability to define the mutual rights and obligations of citizens . . . is a necessary attribute of sovereignty, the fact remains that a national community adhering to national constitutional values has effectively stripped the states of much of their function in the definition of civil rights." Developments in the Law: Section 1983 and Federalism, 90 HARV. L. REV. 1133, 1182 (1977) [hereinafter Developments].

\textsuperscript{115} See supra text accompanying notes 40-63.

\textsuperscript{116} See 451 U.S. at 541. A year later, in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), the Court distinguished Parratt, restating that Parratt applied only to deprivations resulting from random and unauthorized acts by state employees, not to those resulting from established state procedures. See id. at 435. Lower courts seized on Logan as delineating the boundaries of Parratt. See, e.g., Rittenhouse v. DeKalb, 764 F.2d 1451, 1454 (11th Cir. 1985) (distinction between "random and unauthorized" actions and "established state procedure" is basis of Logan); Cohen v. City of Philadelphia, 736 F.2d 81, 84 (3d Cir.) (same), cert. denied, 469
connection expressly, the case that delineates the reach of Parratt is Monell, which was decided three years before Parratt. All procedural due process claims fall within either Monell or Parratt. Monell defines the universe of situations in which the deprivation is not random and unauthorized, but is chargeable to the governmental entity. Parratt controls all other procedural due process claims: they fail to state a federal claim because the deprivation is chargeable not to the governmental entity, but to an employee who could not have provided due process.

Monell and Parratt thus provide a largely successful means of allocating due process claims between state and federal forums, reserving serious constitutional claims for federal scrutiny, and relegating common-law tort claims to state court. Although Daniels alone does not necessarily impinge on the allocative scheme, its extension in Davidson raises troubling questions about access to the federal forum for due process claims.

2. Monell Defines the Governmental Entity

Parratt, in redefining due process,117 redefined the elements of a section 1983 suit alleging a due process violation. Justice Rehnquist stated that his purpose in deciding Parratt was to provide assistance to lower courts in analyzing claims that allege facts "commonly thought to state a claim for a common-law tort . . . but [which] instead are couched in terms of a constitutional deprivation" and which seek relief under section 1983.118 The Court's attempt to clarify the scope of section 1983 must be read in conjunction with its other pronouncements on the statute.

Monell provides the Court's most complete exposition thus far on the subject of municipal liability.119 The question raised by Parratt is when, in a due process claim under section 1983, a government employee's acts are attributable to the employee and when they are attributable to the govern-
DISTINGUISHING A POLICY FROM A RANDOM ACT

Despite the existence of Monell's pronouncements on the issue of when a branch of government may be liable under section 1983, the Court has not incorporated Monell into its treatment of the Parratt issue. Thus, Monell and Parratt precedent have developed along separate tracks. This is especially odd in light of the fact that in Parratt the Court recognized that an act is attributable to the governmental entity if its established procedures caused the act. The concept of "established procedure" appears identical to what Monell terms "custom or policy."

3. The Acts of the Governmental Entity are Authorized Acts

One ambiguity in Parratt and its progeny is the use of the words "random and unauthorized" with no indication of whether these words have separate meanings or are simply synonymous. The most sensible interpretation is that "random" and "unauthorized" have separate, but overlapping, meanings. "Unauthorized" has a traditional meaning in fourteenth amendment and section 1983 jurisprudence. It describes actions of state officials that are not in accordance with state statutes, ordinances, customs, or usages.

The Monell Court, in considering the circumstances under which a municipality may cause a deprivation, elaborated on the "statute, ordinance, regulation, custom, or usage" language of section 1983. Under Monell, a municipality may "authorize" actions in three ways: 1) by statute, ordinance, or formal policy; 2) by policy approved by high policymaking
Thus, even under a narrow definition of “authorized” action, an action attributable to the municipality under Monell is always authorized because it is pursuant to the municipality’s statutes, policies, or customs. Because Parratt applies only to acts that are both random and unauthorized, it cannot apply to the acts of a municipality consistent with Monell.

Once the governmental entity is implicated in a deprivation, that deprivation is authorized and the frequency of its occurrence is irrelevant under Parratt. If the government fails to provide postdeprivation process, the deprivation is complete and federal redress is available.

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126. See 436 U.S. at 694; Schnapper, supra note 81, at 216.
127. See 436 U.S. at 691; Schnapper, supra note 81, at 216. Justice Stevens, dissenting in City of Oklahoma City v. Tuttle, 105 S.Ct. 2427, 2445 (1985) (Stevens, J., dissenting), referred to the congruence between “official policy” under Monell, and “authorized acts,” under Monroe v. Pape, 365 U.S. 167 (1961), when he observed that:

“In Monroe the only issue that separated the members of the Court was whether liability could attach without proof of a recurring ‘custom or usage.’ In terms of today’s decision, the question was whether it was necessary for the petitioners to prove that the conduct of the police officers represented the city’s official ‘policy.’” See Tuttle, 105 S.Ct. at 2445 (Stevens, J., dissenting).

128. Parratt expressly found that the defendant’s pleadings satisfied the color of law requirement of § 1983. It frequently has been observed that Parratt, by excluding from federal court deprivations that were contrary to state law where an adequate remedy exists, comes close to adopting Justice Frankfurter’s dissent in Monroe v. Pape, 365 U.S. 167, 235-36 (1961) (Frankfurter, J., dissenting), which argued that only acts pursuant to state law, custom, or usage should be considered to be under color of law. See, e.g., Zagrans, Under Color of What Law: A Reconstructed Model of Section 1983 Liability, 71 Va. L. Rev. 499, 518-25 (1985). Professor Zagrans argues that Parratt is an ad hoc attempt to temper the broad construction of “under color of law” which results in undermining the underlying due process right. Zagrans suggests that a better approach would be to redefine “under color of law” in accord with Justice Frankfurter’s dissent. See also, Kupfer, Restructuring the Monroe Doctrine: Current Litigation Under Section 1983, 9 Hastings L.J. 463 (1982); Comment, supra note 43.

This Article maintains that Parratt does adopt Justice Frankfurter’s dissent for procedural due process cases and that, contrary to Zagrans’ theory, this does exclude meritorious cases from their proper forum—the federal court. This Article will further demonstrate that there is danger of the definition of “authorized” becoming narrower than that suggested by Justice Frankfurter. See infra text accompanying notes 255-415; see also supra note 45 and accompanying text.

129. 451 U.S. at 541; see also Hudson, 468 U.S. at 533.
130. See Zagrans, supra note 128, at 512. “Monell made the distinction between authorized and unauthorized conduct the appropriate boundary of local governmental liability, whereas Monroe had rejected that line as the proper measure of individual liability.” Id. Professor Schnapper makes a similar point. He equates authorization, as Justice Frankfurter used it in his Monroe dissent to define “under color of state law,” with “sanction by any state organ ‘responsible . . . for the formulation and administration of local policy,’” which he argues was the proper test for municipal liability under Monell. See Schnapper, supra note 81, at 220 & n.30.

131. See supra text accompanying notes 104-14. Thus, although the acts of a governmental entity may be isolated, and therefore random, the fact that they are always authorized precludes application of Parratt to even the random acts of the entity. See supra text accompanying notes 123-30.
4. The Nonrandom Acts of Governmental Employees are the Customs of the Governmental Entity

The governmental entity's authorized acts are most easily identified when they are pursuant to a statute or official policy.132 The concept of "randomness" becomes relevant when low-level nonpolicymaking officials without clearly delegated authority cause deprivations.133 If acts occur with sufficient frequency or regularity, an inference may arise that the governmental entity caused them, either by condoning them directly or by failing to contain them. The acts become attributable to the government through its customs.134 Thus the point at which the acts of low-level officials stop being random and become authorized by the municipality is the point at which they become customs or usages.

Monell, by requiring proof of direct causation by the municipality as a requisite to municipal liability,135 distinguishes between official and individual liability under section 1983.136 Monell provides that a municipality is liable only for acts it has directly authorized (official acts) and not for

132. See infra note 285 and accompanying text.
133. The definition of who is a policymaking official or a delegated policymaker is by no means clearcut. See infra text accompanying notes 283-358; see also Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1299-1300 (1986).
134. Monell held that local governments could be sued under § 1983 not only for their official policies, but also for "constitutional deprivations" visited pursuant to governmental "custom," even though such custom has not received formal approval through the body's official decisionmaking channels. See Monell, 436 U.S. at 691. Justice Harlan explained that "Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials.... Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." See Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970), cited in Monell, 436 U.S. at 691.
One of the few lower courts to attempt to distinguish the terms "random" and "unauthorized" was the Ninth Circuit in its recent en banc reconsideration of Piatt v. McDougall, 773 F.2d 1032 (9th Cir. 1985) and Bretz v. Kelman, 773 F.2d. 1026 (9th Cir. 1985). In Piatt, the court focused on the word "random" to connote that the activity was the action of a state employee, rather than the state itself, holding that a "routine failure to compensate prisoners under [a state statute] was not random ...." See 773 F.2d at 1036. Piatt held that Parratt was not applicable to the challenged activity because it was not random, but routinely done—although the activity was unauthorized under state law—and that "the considerations underlying Parratt are simply inapplicable to deliberate, considered, planned or prescribed conduct by state officials, whether or not such conduct is authorized." See id. at 1036. This interpretation seems to equate nonrandom acts of state employees with the customs of the state itself. It fails to realize, however, that customs are not unauthorized.
In Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985), the Ninth Circuit noted that a conspiracy by public officials could not be random, and thus was not controlled by Parratt. Id. at 1031. The court reasoned that a conspiracy constituted corruption of the state process, and that because the state process was being challenged, Parratt was not controlling. See id. The fact that the conspiracy might be unauthorized by the state governmental apparatus was held to be irrelevant because "so is much of the state action which has historically led to liability under § 1983." See id. at 1031. Again, the court fails to realize that if the processes of the state itself are implicated, the challenge is to authorized action. For a similar view, see Note, supra note 42, at 859 (arguing that if "random" means that activity cannot be anticipated by state itself, "random" becomes synonymous with "unauthorized").
authorized acts of its employees (individual acts).\textsuperscript{137} \textit{Parratt} holds that the governmental entity is not accountable for the random and unauthorized acts of its employees.\textsuperscript{138} Until the governmental entity fails to provide adequate process, no constitutional violation has occurred. The deprivations that \textit{Parratt} calls random and unauthorized thus coincide with the deprivations that \textit{Monell} excludes from the realm of municipal liability.

5. \textbf{Acts Attributable to the Governmental Entity Require a Federal Forum}

If a section 1983 complaint fails to state a claim under \textit{Monell} the complainant cannot sue the municipality, but can sue the government official in her individual capacity.\textsuperscript{139} If the claim alleges a deprivation of procedural due process, \textit{Parratt} will bar the section 1983 suit against the individual. The sole remedy against the official will be in state court.\textsuperscript{140} In short, the federal forum is reserved for claims of government wrongdoing, while wrongdoing by government employees that contravenes a statute, policy, or custom is relegated to a state forum.\textsuperscript{141} Although commentators have properly criticized this limitation on federal power,\textsuperscript{142} the major

\begin{itemize}
\item \textsuperscript{137} See \textit{supra} text accompanying notes 81-103.
\item \textsuperscript{138} See \textit{supra} text accompanying notes 40-63.
\item \textsuperscript{139} Government liability is not available for acts that are not caused by the customs, policies, or laws of the municipality. See \textit{Monell}, 436 U.S at 690-91; \textit{supra} text accompanying notes 81-103. Section 1983, however, provides for suit against any person, acting under color of law, who deprives another of federal rights.
\item \textsuperscript{140} The suit against the individual officer who did not act pursuant to custom, statute, or policy will be barred because the officer's acts are random and unauthorized. See Blackmun, \textit{supra} note 5, at 25. Justice Blackmun states:
\begin{quote}
Although \textit{Parratt} and \textit{Hudson} were careful not to say so, they suggest a reluctance on the part of the Court to find a constitutional violation in a state official's conduct if it is neither pursuant to an official state policy nor authorized by the State, unless and until the State declines to act to redress the injury.
\end{quote}
\end{itemize}

\textit{Id.}

\textsuperscript{141} A finding that \textit{Parratt} is applicable is a finding that no \textit{§} 1983 cause of action arises. Thus, the complainant may not bring a \textit{§} 1983 claim in federal court or in state court. (The Supreme Court has held that state courts may entertain \textit{§} 1983 actions. See Maine v. Thiboutot, 448 U.S. 1, 10 (1980); Martínez v. California, 444 U.S. 277, 283 n.7 (1980)). A complainant, may, however, bring a common-law tort action in state court.

\textsuperscript{142} See, e.g., Wells & Eaton, \textit{supra} note 6, at 203; Note, \textit{supra} note 42, at 837, 861-63, 869; see also Redish, Abstention, \textit{supra} note 42, at 102 (arguing that \textit{Parratt} flouts intent of Congress to provide federal forum for all \textit{§} 1983 claims). This author's opinion is that this allocative scheme does not succeed in reserving the federal forum for constitutional claims, while relegating mere common-law tort claims to state court, as Justice Rehnquist hoped \textit{Parratt} would do. See 451 U.S. at 533. Serious abuses of state power that rise to a constitutional magnitude may be caused by the random, unauthorized acts of government employees. This was the premise upon which Justices Douglas and Harlan relied in concluding, in \textit{Monroe v. Pape}, that the Civil Rights Act provides a remedy for unauthorized as well as authorized acts. Justice Douglas argued that the presence of state laws on the books did not guarantee their enforcement:
\begin{quote}
It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.
\end{quote}

concern here is with further limitations. Even if the federal forum is not available to redress isolated procedural due process violations by government employees, it must at least be preserved for claims of deprivations authorized by the governmental entity's statutes, policies, customs, and usages.\(^{143}\)

The \textit{Parratt} doctrine bars federal constitutional claims for violations of due process when: 1) the government could not provide a hearing and 2)\[
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Justice Harlan was less certain than the majority that the Civil Rights Act was meant to provide a remedy for "an isolated abuse of state authority by an official," as opposed to recurrent abuses. Nevertheless, he was able to join the majority "without being certain that the enacting Congress would not have regarded actions by an official, made possible by his position, as far more serious than an ordinary state tort, and therefore as a matter of federal concern." See 365 U.S. at 193 (Harlan, J., concurring).

Police misconduct and brutality suits are a case in point. Several courts have held that when a police officer inflicts unjustified bodily injury upon a suspect, \textit{Parratt} applies because the officer's actions were random and unauthorized, and thus a hearing could not have been provided prior to the deprivation of liberty or life. This was the approach of a panel of the Eleventh Circuit in \textit{Gilmere v. City of Atlanta}, 737 F.2d 894 (11th Cir. 1984), \textit{aff'd on rehearing}, 774 F.2d 1495 (11th Cir. 1985) (en banc), a suit alleging that the unjustified use of deadly force deprived the decedent of life and liberty. On rehearing the court characterized the allegation as one of substantive due process, to which \textit{Parratt} did not apply. See 774 F.2d at 1499; \textit{see also}, \textit{e.g.}, \textit{Wilson v. Beebe}, 770 F.2d 578, 584, 585 (6th Cir. 1985) (negligent discharge of police officer's service revolver while officer was handcuffing unresisting suspect did not violate procedural due process because adequate state remedies were available; substantive due process claims distinguished); \textit{Garcia v. County of Los Angeles}, 588 F. Supp. 700, 705-04 (C.D. Cal. 1984) (severe beating by deputy sheriffs did not violate procedural due process; if force was needed it was required immediately, thus hearing was impracticable; distinguishing substantive due process claims); \textit{Barnier v. Szentmiklosi}, 565 F. Supp. 869, 879 (E.D. Mich. 1983) (severe beating of arrestee's mother, father, and son by police did not violate procedural due process, because state remedies provided adequate process; stating that decision not applicable to substantive due process claims).

It has often been pointed out that \textit{Monroe v. Pape} itself concerned a police misconduct claim, and in fact a claim of unauthorized misconduct by police officers, see 365 U.S. at 169-70. Since \textit{Monroe} involved a fourth amendment violation and not a procedural due process violation, it is not overruled by \textit{Parratt} and its progeny. However, the factual similarity between \textit{Monroe} and a case like \textit{Gilmere}, in each of which the defendants acted contrary to state law and in each of which adequate state remedies were found to exist, raises questions about how the two results can coexist on a principled basis. See, \textit{e.g.}, \textit{Gilmere}, 774 F.2d at 1499, 1504 (rejecting application of \textit{Parratt} because harm resulted from kind of official brutality that prompted passage of Civil Rights Act); \textit{see also} \textit{Frost v. Honolulu}, 584 F. Supp. 356, 363 (D. Haw. 1984); \textit{Spallone v. Village of Roselle}, 584 F. Supp. 1387, 1391 (N.D. Ill. 1984). Much of the confusion in these cases derives from the difficulty in distinguishing procedural from substantive due process claims, a confusion which in this context is arguably traceable to \textit{Parratt} itself. \textit{See Redish, Abstention, supra}, note 42, at 100-01; \textit{supra} note 42 and accompanying text. An additional problem is that the answer to whether an allegation of police misconduct states a claim for substantive or procedural due process may turn on whether the police actions shock the conscience. See, \textit{e.g.}, \textit{Rochin v. California}, 342 U.S. 165, 172 (1952); \textit{Johnson v. Glick}, 481 F.2d 1028, 1033 (2d Cir. 1973). Because this may be a factual question, summary dismissal on \textit{Parratt} grounds is inappropriate. \textit{See infra} text accompanying notes 416-51.

In \textit{Tennessee v. Garner}, 105 S. Ct. 1694 (1985), the Court held that use of deadly force on a fleeing nondangerous felon violates the fourth amendment's prohibitions on unreasonable searches and seizures. \textit{See id.} at 1706. A claim arising from such an act therefore is not vulnerable to attack on \textit{Parratt} grounds. If a claim is for a violation of one of the specific constitutional guarantees of the Bill of Rights, a plaintiff may invoke § 1983 regardless of the availability of a state remedy. \textit{See Daniels}, 106 S. Ct. at 678 (Stevens, J., concurring).

\(^{143}\) The lower federal courts frequently dismiss, on \textit{Parratt} grounds, claims of deprivations by the government itself. \textit{See infra} text accompanying notes 214-20.
an adequate state remedy exists. In these cases, the state tort remedy is the sole relief afforded the injured party. The Parratt Court justified the loss of the federal forum by holding that the underlying due process claim does not ripen into a constitutional violation until the government itself has refused to provide due process.\textsuperscript{144} Therefore, Parratt is inapplicable if the procedures of the government are at fault.\textsuperscript{145} Once the government has refused to provide due process, the constitutional violation is complete, and the federal courts should be available for redress.\textsuperscript{146} There is no basis for allowing the government a second opportunity to violate the constitution before allowing federal intervention.\textsuperscript{147}

Nevertheless, there is risk that Parratt will be extended to situations in which the government has failed to provide due process.\textsuperscript{148} The extension occurs incrementally each time Parratt is incorrectly employed to dismiss a meritorious Monell claim alleging that the government caused a deprivation of due process.\textsuperscript{149} In Davidson v. Cannon, the Supreme Court in effect extended Parratt to acts which, while not pursuant to consciously adopted policies, are nevertheless the wrongful acts of the government.\textsuperscript{150} The consequence of the extension is the loss of a remedy for serious constitutional violations.

If the Parratt doctrine is extended to due process violations caused by the official policies, customs, and usages of the government, section 1983 will cease to provide a remedy for violations of procedural due process. The

\begin{footnotesize}
\begin{enumerate}
\item[144.] See supra text accompanying notes 40-63.
\item[145.] See 451 U.S. at 542.
\item[146.] In Patsy v. Board of Regents, 457 U.S. 496 (1982), the Court stated:

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

\textit{Id. at 504 (citation omitted) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 376 (1871) (remarks of Rep. Lowe)).}

\item[147.] Concurring in City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985), Justice Brennan stated:

\textit{A rule that a city should be entitled to its first constitutional violation without incurring liability \ldots would be a legal anomaly, unsupported by the legislative history or policies underlying \$ 1983. A \$ 1983 cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims; by exposing a municipal defendant to liability on the occurrence of the first incident, it is hoped that future incidents will not occur.}

\textit{Id. at 2440-41 (Brennan, J., concurring); see also Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1299 (1986).}

\item[148.] See, e.g., Zagrans, supra note 128, at 523 n.124. Zagrans predicted the possible extension of Parratt to "cases in which an established state procedure either causes a deprivation of constitutionally protected rights or creates an unreasonable risk of such a deprivation." Id. He suggested that "if the Court were to shift its due process focus from the impracticability of predeprivation hearings to the nonessentiahity of such hearings so long as a postdeprivation remedy is available and adequate, the established state procedure limitation would no longer be necessary." See id.


\item[150.] See infra text accompanying notes 181-213.
\end{enumerate}
\end{footnotesize}
solem remedy will be in state court. The premise of the extension would presumably be that state courts are equally or better able to compensate for the loss of life, liberty, or property. Once this premise is accepted, it would encompass violations of the substantive provisions of the Bill of Rights and would relegate all constitutional deprivations to the state court level. That is, it would virtually nullify section 1983.

The most obvious objection to this result is that it flouts the intent of Congress by voiding one of its major enactments. In enacting section 1983 Congress expressed its intention that federal courts were to serve as the primary guarantors of constitutional rights, regardless of whether any other legal or administrative remedies were available.

In addition, the premise that state courts are equally able to enforce constitutional rights is flawed. Federal courts, finding a violation of constitutional rights, may use the full panoply of remedies provided by

151. Parratt would allow the claims to be brought in federal court only if the state remedy were inadequate. See 451 U.S. at 540-45. If Parratt were extended to apply to due process violations by the government itself, this would mean that even though the due process violation was complete, it would still not be actionable in federal court if an adequate state tort claim existed. The due process right would be extinguished, and the sole relief available to the plaintiff would be state tort remedies. This extension, by ending federal review of due process claims, would virtually nullify the notion of uniform national enforcement of constitutional due process rights. See O. Fiss, The Civil Rights Injunction 63 (1978); Developments, supra note 114, at 1182.

152. The sole reason Parratt advanced for treating due process rights differently from substantive rights, as Professor Smolla explained, see supra text accompanying notes 111-12, was the assumption that the state government should be given the opportunity to provide process before the federal courts intervene. That assumption is irrelevant once the government itself has declined the opportunity and violated due process rights. Therefore, if the Parratt doctrine were extended to situations in which the state itself had declined to "construct [its] own due process norms," see Smolla, supra note 110, at 870, and had instead finally deprived the plaintiff of due process, there would no longer be any special reason to limit it to due process claims. The sole rationale for the extension would then have to be that even ripe constitutional claims could be adequately litigated in state court. This rationale is equally applicable to the substantive provisions of the Bill of Rights.

153. Once constitutional violations were removed from the ambit of § 1983, its sole remaining function would be to provide a cause of action to challenge federal statutory violations. See Maine v. Thiboutot, 448 U.S. 1, 5 (1980) (holding that phrase "and laws" embraces all federal statutes).

154. See Redish, Abstention, supra note 42, at 73-75, 102.

155. See Mitchum v. Foster, 407 U.S. 225, 242 (1972). In Mitchum the Court stated:

This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed these failings extended to the state courts.

Id.

As Justice Blackmun succinctly put it, "[t]he Reconstruction Congress vested individuals with three distinct kinds of protection against state governments, protections that were absent in the prewar structure: federal rights, federal remedies, and federal forums." Blackmun, supra note 5, at 6; see also Patsy v. Board of Regents, 457 U.S. 496, 503 (1982) ("[T]he Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power.").

section 1983 to compensate the injured and to deter wrongdoers from inflicting future injury.\textsuperscript{157} Federal courts have shaped the available remedies to effectuate these purposes and have gained expertise in using these remedies that state courts have not matched.\textsuperscript{158}

If a claim against an official is relegated to state court under Parratt, its constitutional basis is extinguished.\textsuperscript{159} Thus no declaration, or “affirmation,” of federal rights can occur.\textsuperscript{160} If all due process claims were transformed into state tort claims, the ideal of uniform federal interpretation and enforcement of the due process guarantee would be lost.\textsuperscript{161}

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\textsuperscript{157} Fed. R. Civ. P. 54(c). The goals of the Civil Rights Act are compensation of persons whose civil rights have been violated and prevention of the abuse of state power. See Burnett v. Grattan, 468 U.S. 42, 53 (1984); Owen v. City of Independence, 445 U.S. 622, 651 (1980).

\textsuperscript{158} Professor Schuck noted that:

Congress accompanied many of the new substantive and procedural rights with private remedies designed to secure official accountability to citizens. The federal courts, for their part, not only shaped the contours of the new legal rights but transformed the nature, scope, and efficacy of the relief that individual citizens could obtain to vindicate those rights.

P. SCHUCK, supra note 4, at xv.

\textsuperscript{159} If an adequate state remedy exists, no constitutional due process violation has occurred. See Parratt 451 U.S. at 541. Parratt appears to establish a rebuttable presumption that state remedies are adequate. Justice Rehnquist stated in that case that “[t]here is no contention that the procedures themselves are inadequate...” Id. at 543. Justice O’Connor’s concurrence in Hudson placed the burden of proving the inadequacy on the plaintiff. See 468 U.S. at 539 (O’Connor, J., concurring) (“the claimant must either avail himself of the remedies guaranteed by state law or prove that the available remedies are inadequate”).

There has been virtually no discussion, either in Parratt or Hudson or in the numerous lower court cases discussing on Parratt grounds, of how the plaintiff may meet the burden of proving that state remedies are inadequate. This is especially problematic if the plaintiff must plead and prove inadequacy after the plaintiff who has been barred from federal court has litigated the claim in state court. Although theoretically, at least, the plaintiff may return to federal court if state remedies prove inadequate, there is no authority on how the plaintiff could avoid the res judicata effect of an adverse state judgment, see 28 U.S.C. § 1738 (1982); Allen v. McCurry, 449 U.S. 90, 105 (1980), and the apparent loss of a federal question. See supra note 151. There is a more basic objection. Placing the burden on the plaintiff seems to reverse the presumption embodied in § 1983, see supra note 155. As Professor Fiss said in the context of injunctive relief:

There is no sound way of second-guessing or reviewing [the claimant’s decision to utilize a federal forum]. ... [To do so] the federal court must either (a) engage in irrebuttable presumptions (e.g., that state courts are fair) or (b) place the state courts on trial. The first alternative... flies in the face of the little we know from experience, particularly the civil rights experience. The second alternative... would defeat the very interest to be served. The federal court inquiry itself would be a massive affront to state officials.


\textsuperscript{160} “Affirmation of the right” is the phrase that Professor Whitman uses. See Whitman, supra note 4, at 52; see also Blackmun, supra note 5, at 26 (referring to symbolic importance of § 1983 as demonstration of national commitment to civil rights).

\textsuperscript{161} The Supreme Court has appellate jurisdiction over issues of federal law raised in state courts. See Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat) 304, 341 (1816). Appellate review, however, may be insufficient to insure the uniformity and supremacy of federal rights. See infra note 162 and accompanying text.
Although money damages may be available in a state tort claim, there will, as Justice Harlan observed, "be many cases in which the relief provided by the state to the victim of [an abuse] of state power . . . will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right."\textsuperscript{162} Even if a damages remedy is available, it may be the least effective and most disruptive means of securing constitutional rights.\textsuperscript{163}

The most glaring inadequacy of state courts may be the lack of effective remedies for systemic wrongdoing. Injunctive relief may be unavailable in state court.\textsuperscript{164} There may be no provision for class action suits.\textsuperscript{165} Even to the extent these remedies are available in theory, they may be unavailable in practice.\textsuperscript{166} Federal remedies are therefore essential to effecuate the purposes of the Civil Rights Act.

The extension of Parratt would bar the federal courts from remedying governmental violations. Yet, when the government is being sued, the availability of the section 1983 remedy becomes even more important. The possibility of state court bias, a central concern of Congress in enacting section 1983,\textsuperscript{167} is greatest in suits against the state.\textsuperscript{168} In terms of the

\textsuperscript{162} See Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring); see also Bivens v. Six Unknown Named Agents, 403 U.S. 388, 408-09 (1971) (Harlan, J., concurring). State immunities may also bar recovery. Professor Redish has argued that Parratt allows the state to deny compensation because of its own factual findings, which would be insulated from federal review. See Redish, Abstention, supra note 42, at 102. The Daniels Court declined to decide whether the existence of state sovereign immunity rendered a state remedy inadequate because the Court found no constitutional violation. See 106 S. Ct. at 666 n.1. The lower courts have reached various conclusions on the issue of what limitations on damages render a state remedy inadequate. See, e.g., Holman v. Hilton, 712 F.2d 854, 858-59 (3d Cir. 1983) (statute which prohibits prisoners from bringing suit against public entities deprives prisoners of due process); McKenna v. City of Memphis, 544 F. Supp. 415, 418 n.6 (W.D. Tenn. 1982) (suggesting cap on damages under state tort claims act may render it inadequate); Irshad v. Spann, 543 F. Supp. 922, 928 (E.D. Va. 1982) (possibility of sovereign immunity defense for defendants did not render state remedy inadequate); Whorley v. Karr, 534 F. Supp. 88, 90 (D. Va. 1981) (state remedy adequate when defendants not protected by sovereign immunity).

\textsuperscript{163} Professor Whitman argues that equitable remedies are better able to accomplish the deterrence goals of § 1983 as well as the affirmation of the plaintiff's right, and that compensation would be better served by a system of administrative remedies. See Whitman, supra note 4, at 42.

\textsuperscript{164} See Roman v. City of Richmond, 570 F. Supp. 1554, 1556 (N.D. Cal. 1983).

\textsuperscript{165} See, e.g., Vickers v. Trainor, 546 F.2d 739, 744 (7th Cir. 1976).

\textsuperscript{166} "The legislation . . . had several purposes . . . to override certain kinds of state laws . . . [to] provide[] a remedy where state law was inadequate. . . . [and] to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." Monroe v. Pape, 365 U.S. 167, 173-74 (1961). Section 1983 was passed "to afford a federal right in federal courts because by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment may be denied by the state agencies." Id. at 180.


\textsuperscript{168} See Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines, 126 U. Pa. L. Rev. 515, 548-49 (1978); Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1108-10 (1977). This is the premise of Justice Frankfurter's dissent in Monroe, advocating that § 1983 be available only to redress deprivations authorized by the state. He believed that deprivations sanctioned by the state were less likely to be redressed by the state. Monroe v. Pape, 365 U.S.
efficient use of federal courts, challenging a policy, custom, or statute may deter future systemic violations, whereas a suit against an individual official for a random, unauthorized act deters only one wrongdoer.

The Supreme Court has recognized the value of directing incentives to policymakers, and the diminished effectiveness of suing individuals for "causing" the same violations. Individuals, unlike municipalities, are not positioned to correct systemic problems. Individuals can be deterred only from repeating their own isolated acts. Municipalities, on the other hand, can be deterred from failing to "institute systemwide measures to increase the vigilance with which otherwise indifferent municipal officials protect citizens' constitutional rights."

The responsibility for an individual employee's acts may actually lie with the government. In recognition of this fact, the individual will probably be granted immunity, which will prevent the compensation of the victim.

167, 225-37 (1961) (Frankfurter, J., dissenting). Justice Harlan, although he concurred in the majority's broader definition, found the legislative history ambiguous, but quite definite as to the intent of Congress to provide a remedy when "the claims of citizens . . . might be denied by the state agencies . . . ." Id. at 199 (Harlan, J., concurring).

169. The effect of § 1983 claims on the federal docket has often been discussed by the Court and commentator. See, e.g., Smith v. Wade, 461 U.S. 30, 91 (1983) (Rehnquist, J., dissenting) (arguing that federal courts are flooded with § 1983 cases, many of them frivolous); Whitman, supra note 4, at 6 n.10 (collecting sources). But see Blackmun, supra note 5, at 281 (arguing that meritocratic constitutional cases should be heard in federal court regardless of effect on federal docket); Eisenberg, supra note 4, at 526 (arguing that, numerically, § 1983 suits do not overburden federal courts).

170. In Owen v. City of Independence, 455 U.S. 622 (1980) for example, the Court, in rejecting a good faith immunity defense for municipalities, noted that the threat of municipal liability under § 1983:

[identification omitted]

171. See P. SCHUCK, supra note 3, at 104 ("[S]olitary officials are poor loci for generating deterrence."); Professor Schuck argues that governmental liability would clearly maximize the probability that officially inflicted harms would be adequately compensated. See id. at 100-02. In addition it "would in most cases strengthen general deterrence by focusing at a better location the incentives that the substantive behavioral rule mobilizes." See id. at 103.

172. See Owen, 445 U.S. at 652 n.36.

173. See Whitman, supra note 4, at 59 (warning that individual liability encourages perception of defendant official as wrongdoer, rather than stand-in for government employer); see also P. SCHUCK, supra note 3, at 101-03. Professor Schuck argues that as governmental liability should expand, individual liability should be de-emphasized. "Imposing liability upon individual officers, whose 'objective bad faith' may consist of little more than being an instrument of impersonal bureaucratic, political and social processes over which they have little or no effective control, cruelly mocks . . . [the moral basis of public tort law]." Id.

174. Individual defendants, depending on their function, are generally entitled to qualified, and in some cases absolute, immunity for their unconstitutional conduct. See, e.g., Mitchell v. Forsyth, 105 S. Ct. 2806 (1985) (qualified immunity for U.S. Attorney General when
DISTINGUISHING A POLICY FROM A RANDOM ACT

The individual also may be judgment-proof. The municipality may be the more equitable source of relief and better situated to compensate those harmed. In short, systemic relief for recurrent governmental abuses is central to the compensatory and deterrent goals of section 1983. Relegating claims against municipalities to state court seriously threatens the opportunity to remedy structural governmental flaws.

When Parratt is interpreted too expansively, or Monell too parsimoniously, systemic illegality attributable to the government may be incorrectly viewed as a series of isolated acts by individual employees. "Many such acts . . . can be forestalled by organizational procedures designed to ensure adherence to stated policy." Contraction of governmental liability reduces government accountability. It encourages the government to delegate without supervising, because its employees' acts may then be seen as "random and unauthorized" and thus not the government's concern. Once a wrongful act is labeled "random and unauthorized," it ceases to be the concern of the federal courts and the state is left to clean its own house. The result is that the Constitution imposes no barrier between the citizen and coercive state power.

6. Davidson Denies a Federal Forum for Acts Attributable to the Governmental Entity

Daniels v. Williams overruled Parratt to the extent Parratt had held that a negligent deprivation of liberty or property could violate the due process clause. In Daniels, the Court attempted to assist lower courts in performing investigative functions); Imbler v. Patchman, 424 U.S. 409, 431 (1976) (absolute immunity for prosecutor when engaged in quasi-judicial activities).

175. See Owen, 445 U.S. at 652 n.36.

176. The Owen Court recognized that both the compensatory and deterrent purposes of § 1983 are served more effectively by municipal liability than by personal liability. See 445 U.S. at 654.

177. For example, the Court has recognized that federal injunctive relief "can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." Mitchum v. Foster, 407 U.S. 295, 242 (1972); see also Ex parte Young, 209 U.S. 123, 157-58 (1908). Professor Whitman has argued that equitable remedies are the most effective means of effectuating the aims of the Civil Rights Act. See Whitman, supra note 4, at 47-56. Recognizing that "many constitutional injuries result at bottom from 'systemic problems' within the government institutions, rather than from the specific acts of one who superficially may appear to be responsible," she notes that equitable remedies more efficiently reach the government itself and specifically command it to address its institutional problems in a way that damage remedies are ill equipped to do. Id. at 49-50. Injunctive relief, however, is not always available in state court. See Roman v. City of Richmond, 570 F. Supp. 154, 1556 (N.D. Cal. 1983). Structural injunctive relief of the kind used to remedy systemic wrongs is a creation of the federal courts, which they have developed to restructure state institutions. See O. Fiss, supra note 151, at 4-6, 61-68, 94-95; Developments, supra note 114, at 1187-89. In addition, injunctive relief and particularly structural injunctive relief against state officials may be a remedy that state courts would be reluctant to employ. See O. Fiss, supra note 151, at 64-67.

178. Justice Stevens criticized the plurality in City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985) for its "parsimonious construction of the word 'policy' " in connection with § 1983. See id. at 2446.

179. See Note, supra note 83, at 694.


distinguishing common-law torts from constitutional deprivations. The Court held that injury resulting from a negligent act is not a deprivation within the meaning of the due process clause. The brevity of Daniels’ majority opinion, its absence of dissenting opinions, and the innocuousness of its facts may give the misleading impression that the rule of law is also innocuous. Davidson v. Cannon, however, made it immediately clear that Daniels had important ramifications.

The Daniels analysis differs from the Parratt analysis. In Parratt, the Court held that the defendants had deprived the plaintiff of property, but that the deprivation was not without due process because process was available from the state. The due process claim could still ripen if the state failed to provide adequate remedies. Daniels’ holding that a negligent act cannot cause a deprivation renders the availability of process irrelevant when negligence is alleged. The due process clause does not require a hearing if no deprivation has occurred.

Although the injury caused by the misplaced pillow in Daniels may seem trivial, Davidson demonstrates that the Daniels principle also excludes serious constitutional claims from the federal forum. The majority opinion in Davidson is even shorter than that in Daniels, but the similarity ends there. Only five members of the Court formed the majority in Davidson. As Justice Blackmun’s dissent observed, both the risk that harm would occur and the resultant harm were of a greater magnitude in Davidson than in Daniels.

More significant, the complained of acts in Davidson were

182. See id. at 665.
183. The opinion covered less than five pages in the Supreme Court Reporter. See id. at 662-67.
184. Justice Marshall concurred in the result. Id. at 667 (Marshall, J., concurring). Justices Blackmun and Stevens concurred in the judgment. Id. (Blackmun, J., concurring); id. at 677 (Stevens, J., concurring).
185. The plaintiff, an inmate, claimed a deprivation of liberty occurred when he slipped on a pillow negligently left on the stairs by a correctional officer, causing him to injure his back and ankles. 106 S. Ct. at 663. The Court noted that to hold that this kind of loss is a deprivation of property within the meaning of the fourteenth amendment seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution. Id. at 665.
187. The loss of the hobby kit was held to be a deprivation of property. See 451 U.S. at 536-37.
188. See id. at 543-44; see also supra text accompanying notes 40-63.
189. See supra text accompanying notes 40-63, 107-12.
190. In both instances, failure to establish a violation of due process relegates the plaintiff to state court. The plaintiff barred by Daniels has no federal claim, regardless of the adequacy of the state tort remedy. Thus the Daniels Court does not even consider the argument that the plaintiff has no state remedy because the defendant is entitled to a defense of sovereign immunity in state court. See 106 S. Ct. at 663, 666 n.2.
191. The Daniels majority opinion is five pages long; the Davidson opinion is three pages long. Compare Daniels, 106 S. Ct. at 663-67 with Davidson, 106 S. Ct. at 668-71.
193. See Davidson, 106 S. Ct. at 671-72. Justice Blackmun observed that:
   It is one thing to hold that a commonplace slip and fall, or the loss of a $23.50 hobby kit, . . . does not rise to the dignified level of a constitutional violation. It is a somewhat different thing to say that negligence that permits anticipated inmate violence resulting in injury . . . does not implicate the Constitution’s guarantee of due process.
attributable to the government, and thus were abuses of governmental power bearing no resemblance to common-law torts.\textsuperscript{194}

The failure to provide process in Davidson may have been, in the language of Parratt, random,\textsuperscript{195} but it was not unauthorized.\textsuperscript{196} The defendant, Cannon, had actual notice of the need to provide Davidson with process before the deprivation took place. He had the authority and the responsibility to provide the requisite process.\textsuperscript{197} Thus he was in the position of the government, not the government employee. Therefore his failure to provide process was not "beyond the control of the State." The "state" could have provided meaningful process before the deprivation took place.\textsuperscript{198}

Cannon's act constituted the infliction of injury by one whose acts, in the language of Monell, "may fairly be said to represent official policy"\textsuperscript{199} and thus was a final decision attributable to the government.\textsuperscript{200} Once the government is identified as the cause of a deprivation, it is irrelevant that the government has caused only one deprivation, and that it usually follows adequate procedures.\textsuperscript{201} Monell holds that the government is liable when—

\textit{Id.} at 671. Justice Blackmun argued, as did Justice Brennan in a separate dissent, that the risk of harm was so great that the failure to take steps amounted to recklessness, rather than negligence. \textit{See id.} at 671-72 (Blackmun, J., dissenting); \textit{id.} at 671 (Brennan, J., dissenting). The resultant harm in this case consisted of "stab wounds on [Davidson's] face and body as well as a broken nose that required surgery." \textit{Id.} at 671 (Blackmun, J., dissenting).

\textsuperscript{194} \textit{id.} at 674.

\textsuperscript{195} \textit{See supra} text accompanying notes 131-38. There was no indication that the assistant superintendent had failed to follow established procedures on other occasions; thus it was presumably an isolated instance. \textit{See Davidson}, 106 S. Ct. at 669-71.

\textsuperscript{196} \textit{See supra} text accompanying notes 129-30.

\textsuperscript{197} Cannon personally received a note from Davidson warning him of the threat to his safety. \textit{See 106 S. Ct.} at 672. The normal procedure in these circumstances was for Cannon to separate the inmates in question, place one of them in protective custody, or attempt to ascertain the gravity of the situation. \textit{See id.} at 672.

\textsuperscript{198} \textit{See Parratt}, 451 U.S. at 541; \textit{supra} text accompanying notes 40-63.

\textsuperscript{199} \textit{See Monell}, 436 U.S. at 694.

\textsuperscript{200} \textit{See} Schnapper, \textit{supra} note 81, at 217.

As to any particular decision as to what "the government" will do, there must be one person, or group of persons, who in the ordinary course of government business can make the final decision over what will occur. As to that decision, that individual or group by definition exercises the authority of the governmental unit.

\textit{Id.} The district court's opinion in the 	extit{Davidson} opinion that someone of rank superior to Cannon's had the responsibility to insure that steps be taken to protect Davidson. Rather, the district court's conclusions of law specifically reflected that Cannon and the other respondents had a responsibility to protect Davidson. Davidson, 106 S. Ct. at 672. (Blackmun, J., dissenting).

\textsuperscript{201} In Davidson, each of the defendants apparently diverged from standard procedure. Assistant Superintendent Cannon normally would respond to a report of a threat by taking preventative measures, such as separating the inmates, placing one of them in protective custody, or attempting to ascertain the gravity of the threat by talking to them. \textit{See 106 S. Ct.} at 672. James, the corrections sergeant to whom Cannon delegated the responsibility to investigate, did not follow the normal procedures of interviewing the complainant, otherwise investigating the threat, or notifying the weekend shift of the threat. \textit{See id.} In addition, prison officials ignored a "special report" recommending separation of the inmates. \textit{See id.}

When an act of a low level employee diverges from established policy or procedure, the act is likely to be random and unauthorized under Parratt, because the government could not have predicted it would occur. Under a Monell analysis, until the divergence becomes pervasive enough that the government must be assumed to know about it, and therefore to have "caused" it through inaction, it is not attributable to the government. Once the act is identified
ever it causes the deprivation.  

Presumably, the adoption of inadequate policies or procedures constitutes an intentional act, and the Court will not apply the Daniels/Davidson reasoning to deprivations caused by facially inadequate policies. The government's own deviations from stated policy, however, may no longer violate the due process clause, absent proof that the deviation was expressly intended to deprive the plaintiff of liberty or property.  

Davidson teaches municipalities that they need only adopt facially acceptable policies and practices; their occasional negligent failure to follow them will not be actionable in federal court. This result is irreconcilable with section 1983, and its interpretation in Monell. Section 1983 was intended to deter not only the adoption of unconstitutional policies, but also the failure to implement or adhere to constitutional policies.

as caused by the government, however, its divergence from a governmental procedure is irrelevant; the government is held accountable. See Schnapper, supra note 81, at 229; see also Webster v. City of Houston, 735 F.2d 838, 850 (1984) (Williams, J., dissenting).

202. See 436 U.S. at 694; supra note 96.

203. It seems conceptually absurd to say that the government is capable of negligently adopting policies. Even in this regard, however, Daniels gives cause for concern. It requires that the defendant intend not just the act, but its result. See Davidson, 106 S. Ct. at 670; supra text accompanying notes 61-78. This could lead to a requirement that a facially unconstitutional policy must be adopted with the intent to deprive persons of constitutional rights, before it may be considered to violate due process. Distinguishing negligent acts from reckless or intentional acts may be complicated when dealing with the acts of the government. "[A]n allegation of negligence in an organizational setting may mean many different things: . . . [o]fficial acts, regardless of the state of mind with which they are committed, may manifest an insufficiently articulated policy, or they may be merely the result of mechanical error." Note, supra note 83, at 683, 688.

204. See City of Oklahoma City v. Tuttle, 105 S. Ct. 2426, 2436 n.7 (1985) ("It is open to question whether a policymaker's 'gross negligence' in establishing police training procedures could establish a 'policy' that constitutes a 'moving force' behind subsequent unconstitutional conduct, or whether a more conscious decision on the part of the policymaker would be required.").

205. This was precisely the situation in Davidson. Although the defendants consciously chose not to follow established procedures, they did not do so for the express purpose of depriving Davidson of his liberty, and therefore the Court held they had acted negligently. See 106 S. Ct. at 670.

206. The Davidson Court has more than justified the fears expressed by Justice Blackmun in his recent article. He predicted that "the reasoning of Parratt and Hudson could be used to deny a § 1983 action to anyone claiming a constitutional violation by an official unauthorized to act as he did, as long as the State provides a damages remedy after-the-fact." Blackmun, supra note 5, at 25. Although the Court did not use the Parratt rationale to do so, its holding in Davidson may deny a § 1983 cause of action even for claims that a violation was caused by an official authorized to act as he did, and even despite the absence of a damages remedy after the fact.

The plurality opinion in City of Oklahoma City v. Tuttle, 105 S. Ct. 2426 (1985), contains language that reinforces this impression of Davidson. The Court observed that "the word 'policy' generally implies a course of action consciously chosen from among various alternatives . . . [for example] proof that the policymakers deliberately chose a training program that would prove inadequate." See 105 S. Ct. at 2436. As in Davidson, the Court appears to suggest that if the policymakers adopt a facially acceptable policy they may, at least occasionally and negligently, fail to follow that policy.

207. Daniels and Davidson, like Parratt and Hudson, contract not only the § 1983 cause of action but the underlying due process right as well. See Daniels, 106 S. Ct. at 664.

208. This was Justice Douglas' point in Monroe, when he stated that the presence of state laws on the books does not guarantee their enforcement, and that the Civil Rights Act must be
If the mere existence of . . . a written policy were sufficient to insulate a city from liability for actions to the contrary, a city could completely immunize itself from liability by the simple expedient of adopting the language of the fourteenth amendment and other applicable constitutional provisions as a city ordinance. . . . Such an approach would render Monell a dead letter.209

Davidson and Daniels are incompatible with the due process clause as the Court had previously interpreted it. The "Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures."210 In Davidson, the government caused the loss of the plaintiff's liberty. Stating that the loss did "not work a 'deprivation'"211 cannot obscure the fact that it occurred without adequate and appropriate212 process. This is precisely the kind of situation in which federal courts must intervene; the state should not be given the choice of whether to remedy its own wrong.213

available for situations in which the state fails to enforce the law. See 365 U.S. at 180; see also supra note 124 and accompanying text.

The line between an inadequate policy and an adequate policy that is inadequately enforced may be difficult to draw. The inadequate enforcement may indicate problems with the policy itself, rendering the departure from policy attributable to the government. Holmes v. Ward, 566 F. Supp. 863 (E.D.N.Y. 1983), a case factually similar to Davidson, is illustrative. The plaintiff, an inmate, was attacked by another inmate who then threatened to kill him. The two were put in separate cells, and the supervising official ordered his subordinate to post a notice that the inmates should remain separate. Due either to the disappearance of the notice or the failure of prison personnel to check the bulletin board in accordance with established procedure, the plaintiff and his attacker were let out of their cells at the same time, causing grievous injury to the plaintiff. See 566 F. Supp. at 864. The court denied the defendant's motion for summary judgment, holding that: 1) the actions complained of may have been either pursuant to established procedure or deviations therefrom and 2) the procedure itself may have been so slipshod and minimal that it inadequately prevented deviations such as the one that caused the deprivation of the plaintiff's liberty. See id. at 866.

209. Schnapper, supra note 81, at 231; see infra text accompanying notes 288-94.
211. See Davidson, 106 S. Ct. at 673-74 (Blackmun, J., dissenting).
212. The due process clause requires a hearing "at a meaningful time and in a meaningful manner." Parratt, 451 U.S. at 540. If the government is unable to provide a hearing at the optimum time, Parratt requires it to provide one as soon as practicable. See supra text accompanying notes 40-63. Yet, Daniels holds that when a deprivation is negligent no hearing is required to accompany it, at any time. See 106 S. Ct. at 665, 667. Daniels relies on the reasoning that a negligent deprivation is not the type of abuse of governmental authority the due process clause was meant to prevent. See id. at 665-66. Davidson demonstrates the error of this assumption. In Davidson, the deprivation was caused by the arbitrary failure of the government to follow the procedures it developed to insure the protection of the liberty interests of inmates. See Davidson, 106 S. Ct. at 673-74 (Blackmun, J., dissenting). This is the type of abuse the due process clause was meant to prevent. "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." Daniels, 106 S. Ct. at 665.

213. See supra text accompanying notes 139-80.
II. DISTINGUISHING A CUSTOM OR POLICY FROM A RANDOM, UNAUTHORIZED ACT: SPECIFIC APPLICATIONS

The Parratt doctrine, because it contains no guidelines for defining or applying its most crucial terms,214 has produced tremendous confusion in the lower courts.215 Some courts have employed Parratt as a docket clearing device,216 prompting one court to comment that “Parratt v. Taylor is not a magic wand that can make any section 1983 action resembling a tort suit disappear into thin air.”217 Courts less enamored of Parratt have distinguished it in questionable ways.218 Clarification of the doctrine may enable it to better serve its stated purpose of providing assistance to lower courts.219 In particular, it may prevent the misapplication of the doctrine to situations in which the government rather than an individual is the wrongdoer.

The consequence of misapplying Parratt is the serious erosion of section 1983.220 The Daniels and Davidson decisions compounded the confusion surrounding Parratt and increased the likelihood that Parratt will bar claims of governmental wrongdoing from federal court.221 Daniels and


215. The confusion is reflected in the spate of en banc reversals of appellate court decisions based on Parratt. See, e.g., Gilmere v. City of Atlanta, 737 F.2d 894, 905-06, 908 (11th Cir. 1984), rev'd, 774 F.2d 1495, 1499, 1505 (11th Cir. 1985) (en banc) (finding that, contrary to holding of panel, deprivation was of substantive, not procedural, due process and therefore Parratt was inapplicable); Brezt v. Kelman, 722 F.2d 503, 505 (9th Cir. 1983), rev'd, 773 F.2d 1026, 1036 (9th Cir. 1985) (en banc) (rejecting panel decision that Parratt was applicable, and holding that deprivations were pursuant to established state procedure, not random, unauthorized act); Haygood v. Younger, 718 F.2d 1472, 1480-81 (9th Cir. 1983), rev'd, 769 F.2d 1350, 1357-58 (9th Cir. 1985) (en banc); Piatt v. MacDougall, 709 F.2d 1517 (9th Cir. 1983) (unpublished opinion), rev'd, 773 F.2d 1032, 1036 (9th Cir. 1985) (en banc); Wilson v. Beebe, 612 F.2d 275, 276 (6th Cir. 1980), rev'd, 770 F.2d 578, 585, 586-87 (6th Cir. 1985) (en banc) (reversing panel decision that Parratt was inapplicable, and holding that Parratt was applicable to negligent deprivations of liberty).


218. See, e.g., Wilkerson v. Johnson, 699 F.2d 325, 329 (6th Cir. 1983) (finding Parratt inconsistent with Patsy v. Florida Bd. of Regents, 457 U.S. 496, 516 (1982), and refusing to apply it outside prisoners' rights context); see also Brezt v. Kelman, 773 F.2d 1032, 1036 (1985) (arguing that Parratt is directed at "minor infractions" of prisoners' interests). The gravity of the harm to the plaintiff is not relevant to the Parratt analysis, except possibly on the issue of whether state remedies can provide adequate compensation. See infra text accompanying notes 223-54; note 238 and accompanying text.

219. The Court in Parratt hoped "to be of greater assistance to courts" attempting to distinguish common-law torts from constitutional torts. See 451 U.S. at 533-34.

220. See supra text accompanying notes 139-80.

221. See supra text accompanying notes 181-213.
Davidson, together with Parratt, exclude not only claims against individuals, but claims of governmental negligence. The government's adoption of statutes and policies is intentional, but its failure to follow them, or its toleration of its employees' customs, might be construed as negligent. Thus, Daniels and Davidson increase the importance of properly distinguishing the municipality's policies and customs from the random and unauthorized acts of its employees.

A. Parratt Applies Only When Predeprivation Process is Required but Impracticable

The Parratt doctrine is a narrow, specific exception to the Court's traditional approach to determining the requisites of due process. In most instances, the question of what process is due should be resolved solely by reference to the traditional approach. Yet lower courts often sacrifice clarity and reach incorrect results by importing irrelevant Parratt issues into the due process analysis.

The essential principle of traditional due process, recently reaffirmed, is that "a deprivation of life, liberty or property [must] be preceded by notice and opportunity for hearing appropriate to the nature of the case." The "formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." The Court traditionally has determined the timing and requisites of the hearing by using the three part balancing test set forth in Mathews v. Eldridge, which weighs the risk of an erroneous deprivation, the state's interest in providing specific procedures, and the strength of the individual interest affected by the official action.

Under Mathews, the Court looks to the availability of postdeprivation remedies as one factor in its decision. If postdeprivation remedies appear inadequate in light of the importance of the individual interest, the Court is more likely to hold that due process has been violated. Conversely, depending on the importance of the competing interests and the adequacy of postdeprivation remedies, predeprivation process may be unnecessary. Although in most cases a predeprivation hearing will be required, the Court has found in some instances that the need for a

222. See supra text accompanying notes 77-80.
226. See id. at 335.
227. See Loudermill, 470 U.S. at 542-43. When no constitutional deprivation has occurred, no hearing of any kind is required. See id. For example, in the aftermath of Daniels v. Williams, once a court holds that a deprivation is negligently caused, no further process will be required at any time. See Daniels, 105 S. Ct. at 665. Likewise, if the plaintiff has no constitutionally protected right to life, liberty, or property, the protections of the due process clause are not triggered. See Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
228. See Loudermill, 470 U.S. at 542 n.7.
229. See id. at 542; Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971). However, the Court required a full adversarial evidentiary hearing prior to adverse governmental action in only
Although the Court relied on the summary seizure cases as support for 
Parratt, its reliance is misleading. Parratt is not an application of, but an 
exception to, the Mathews balancing test. The Court could advance no 
governmental interest in seizing Taylor's property without predeprivation 
process. On the contrary, the government's interest was in adherence to 
established procedures, not in having its employees violate those proce-
dures. The risk of erroneous deprivation resulting from failure to accord 
predeprivation process was obvious: an erroneous deprivation had oc-
curred. The private interest at stake was Taylor's recognized property
interest. In short, although the Court considered Taylor's interest 
minimal, there was no countervailing government interest. Applying the 
Mathews test to Parratt's facts would have required the government to afford 
predeprivation process. Parratt, however, created an impracticability excep-
tion to Mathews. If Mathews requires the government to provide predepriva-
tion process and predeprivation process is impracticable, it may instead 
provide postdeprivation process.

The Parratt analysis is relevant only if predeprivation process is 
impracticable and requiring it would be futile. Parratt differs significantly 
from the Mathews approach. First, under Parratt, the importance of the 
individual's protected interest is irrelevant because predeprivation process 
is impracticable no matter what interest is at stake. Second, although the

one case. See Loudenmire, 470 U.S. at 545 (noting that only in Goldberg v. Kelly, 397 U.S. 254 (1970), had Court required full predeprivation adversarial hearing).
230. See, e.g., North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 320-21 (1908) (state interest in immediate seizure of spoiled poultry outweighed individual interest in preseizure hearing); see also Comment, supra note 43, at 1189-91, 1197-99 (discussing inapplicability of summary seizure cases to Parratt rationale).
231. See 451 U.S. at 541-44.
232. See id. at 543.
233. See id.
234. See id. at 536.
235. See id. at 529 ("At first blush one might well inquire why respondent brought an action in federal court to recover damages of such a small amount for negligent loss of property. . . .").
236. The determination of whether the government was capable of providing predepriva-
tion process will be discussed infra text accompanying notes 255-415.
237. Parratt held that predeprivation process could not have been provided by the 
government because "the State [could] not predict precisely when the loss [would] occur. The 
loss . . . [was] beyond the control of the State." See 451 U.S. at 541; see also supra text 
accompanying notes 40-63.
238. If the interest is not protected, due process cannot be implicated. See supra note 227. 
Once due process is held to be implicated, the importance of the plaintiff's interest becomes 
irrelevant under Parratt. While Mathews weighed the plaintiff's interest against the competing 
governmental interest, to determine what kind of process was required, see 424 U.S. at 341, 
347-49, Parratt would not perform this sort of balancing when the predeprivation process 
is simply impracticable, whatever the interests at stake. See 451 U.S. at 541; supra text 
accompanying notes 40-63; see also Note, Due Process: Application of the Parratt Doctrine to 
(arguing that Parratt principle applies whenever prior hearing is impracticable, and therefore 
must apply to deprivations of life and liberty); Comment, supra note 45, at 1076-77 (arguing 
it is doubtful Parratt can be limited to property deprivations). Some courts have relied upon
adequacy of postdeprivation remedies is a factor under both *Mathews* and *Parratt*, the timing and effect of the inquiries differ. Under *Mathews* it is one of several factors that the federal court weighs in determining whether due process has been provided. The adequacy of postdeprivation remedies does not bar a finding that predeprivation remedies were constitutionally required.229 Under *Parratt*, if a court determines that a predeprivation hearing was impracticable, it then determines whether the state can remedy the wrong through postdeprivation remedies.240 If the federal court satisfies itself that adequate state remedies exist, it cedes to the state court responsibility for providing process. It is constitutionally irrelevant whether predeprivation process is preferable.241

When a lower court fails to distinguish the *Mathews* and *Parratt* analyses, the result may be wrongly to deprive a litigant of a federal hearing on the due process claim. For example, in *Lewis v. Hillsborough Transit Authority*,242 the plaintiff alleged that termination of his job had deprived him of property without due process. He was notified of his termination by letter and given no opportunity to respond243 until the posttermination grievance procedure.244

A traditional due process analysis would have determined whether the plaintiff had been deprived of a protected property interest, and if so, would have determined whether a pretermination hearing was constitutionally required.245 At first blush, the court appeared to utilize this approach. Finding that the plaintiff had a protected property interest in continued employment, it held that the pre- and post-termination procedures together satisfied due process.246

The opinion, however, failed to consider the relevant *Mathews* factors. It did not consider the plaintiff’s interest in a pretermination hearing.247
governmental interest in its existing procedure, or any burdens or additional benefits that a predeprivation hearing would impose. Rather than weigh the adequacy of the posttermination remedy against the other relevant Mathews factors, the Court dismissed the plaintiff's claim solely on the basis of the existence of that remedy. It cited Parratt for the proposition that the plaintiff had an adequate state remedy at his disposal and therefore was barred from federal court.248

By applying a Parratt analysis, the court incorrectly ignored the issue of whether predeprivation process was preferable and thus constitutionally required. A Parratt analysis does not consider this issue because it assumes it is irrelevant when predeprivation process is impracticable. In Lewis, however, that assumption did not apply because there was no finding that predeprivation process was impracticable.249 Under Mathews, the plaintiff was entitled to a hearing in a federal forum on the issue of whether the termination procedures were constitutionally adequate.

The consequence of Lewis, and numerous other lower court cases employing similar analyses,250 is the incremental extension of Parratt to

248. The court held that, as in Parratt, "the state has provided respondent with the means by which he can receive redress for the deprivation." See 726 F.2d at 667. It held that he "therefore had an opportunity to rebut the charges," noting that "to accept [plaintiff's] argument would permit every employee to ignore the elaborate grievance mechanism provided in the agreement and to sue in federal court." See id. at 667. On rehearing, the plaintiff argued that this court's holding conflicted with Patsy v. Board of Regents, 457 U.S. 496 (1982), which rejected an exhaustion requirement for § 1983 claimants. The court rejected the argument that it had required exhaustion of administrative remedies, finding that his case "was not dismissed for lack of jurisdiction for failure to exhaust. He lost on the merits for lack of a constitutional violation." 726 F.2d at 669.

The Supreme Court has held that exhaustion of state administrative remedies is not a prerequisite to federal suit under § 1983. See Patsy v. Board of Regents, 457 U.S. 496, 516 (1982). Commentators have raised important concerns about whether Parratt conflicts with this holding. See Redish, Abstention, supra, note 42, at 99 n.120; Travis & Adams, The Supreme Court's Shell Game: The Confusion of Jurisdiction and Substantive Rights in Section 1983 Litigation, 24 B.C.L. Rev. 635, 636 n.15 (1983). The Lewis court's rationale is one commonly used to distinguish Parratt from Patsy. See, e.g., Lee v. Hutson, 600 F. Supp. 957, 963 (N.D. Ga. 1984); Barnier v. Szentmiklosi, 565 F. Supp. 869, 881 (E.D. Mich. 1983); see also Travis & Adams, supra at 654-55. The reasoning is that because Parratt applies only when no due process violation has occurred, it does not require exhaustion in constitutional violation cases and thus is consistent with Patsy. Whatever the merits of this distinction, it is not applicable in cases in which a completed due process violation has occurred.

249. See supra text accompanying notes 42-65. In Lewis the government agents capable of providing a hearing had ample notice that the deprivation was occurring, and in fact were the cause of the deprivation. See 726 F.2d at 666. There was no contention that they were unable to provide predeprivation process; rather the established procedure did not call for additional process. See id. at 666-67.

250. The Sixth Circuit in Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1983), formulated the rule that in § 1983 damage suits for deprivation of property without procedural due process, the plaintiff has the burden of pleading and proving that state damage remedies are inadequate to address the alleged wrong. See id. at 1064-66; see also supra note 159 and accompanying text. The Vicory approach was adopted by the Fifth Circuit, see Marshall v. Norwood, 741 F.2d 761, 764 (5th Cir. 1984), and apparently by the Seventh Circuit, see Wolf-Lillie v. Songquist, 699 F.2d 864, 871 (7th Cir. 1983). The danger of this approach is that it shifts the burden to the plaintiff without articulating any need for the court to find that
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extinguish ripe constitutional claims. Applying the Parratt doctrine to situations in which predeprivation process is practicable extends Parratt to bar completed due process violations from the federal forum if a state provides a remedy for its own violation. This result conflicts with the principles of section 1983. It also conflicts with the Court's long-standing interpretation of the due process clause.

B. Determining When Predeprivation Process is Impracticable

Once it is determined that Mathews requires predeprivation process, it is necessary to determine whether process is impracticable under Parratt. If the government could not have predicted the deprivation, Parratt holds that the government may satisfy due process with postdeprivation procedures because they are all it can practicably provide. The crucial question in applying Parratt therefore is whether the deprivation was attributable to, or authorized by, the governmental entity. If so, the government cannot claim that predeprivation process was impracticable.

Predeprivation process was impracticable. In Campbell v. Shearer, 732 F.2d 531 (6th Cir. 1984), the Sixth Circuit seemed to forget the need for a finding that predeprivation process was impracticable. The court barred from federal court a plaintiff who alleged a deprivation of due process when he was unable to recoup his property after spending five years employing a myriad of state judicial and administrative procedures. The court held that the plaintiff had failed to plead and prove the inadequacy of the state remedies. The state, however, was in no position to argue that predeprivation process was impracticable, after providing it for five years. The real issue, addressed only by the dissent, was whether the process was constitutionally adequate. See id. at 539-44 (Holschuh, J., dissenting); see also Collins v. King, 743 F.2d 248, 252 (5th Cir. 1984); Cohen v. City of Philadelphia, 736 F.2d 81, 84 (3d Cir.), cert. denied, 469 U.S. 1019 (1984); Giglio v. Dunn, 732 F.2d 1133, 1135 (2d Cir.), cert. denied, 467 U.S. 92 (1984).

Begg v. Moffit, 555 F. Supp. 1344 (N.D. Ill. 1983), illustrates the correct approach. The plaintiff, a police officer, sued various city officials alleging that he had been deprived of property—employment opportunities and pay raises—without due process. The court rejected the defendant's Parratt argument, holding that "where it is practicable, and hence constitutionally required that the state provide a predeprivation hearing, the availability of postdeprivation remedies will not be a defense to a § 1983 action." See id. at 1361. The court employed the Mathews balancing test and found that the plaintiff was entitled to a predeprivation hearing because the defendants advanced no justification, compelling or otherwise, for failing to provide a hearing. See id. at 1349-50.

251. See supra text accompanying notes 144-50.
252. See id.
253. See supra text accompanying notes 139-80.
254. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); see also Davis v. Scherer, 468 U.S. 191-92 (1984) (indicating that right to hearing prior to discharge of employee who has constitutionally protected interest in employment is settled federal law); Patterson v. Coughlin, 761 F.2d 886, 892 (2d Cir. 1985) ("Parratt did not alter the fundamental tenets of due process").
255. See supra text accompanying notes 225-30.
256. See 451 U.S. at 541; see also supra text accompanying notes 40-63.
257. If under Mathews no predeprivation process is required, Parratt is irrelevant. See supra text accompanying notes 123-38. For example, in North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908), postdeprivation remedies were all that due process required under the traditional balancing test. Although the government caused the deprivation by its order to seize spoiled poultry and therefore could have provided predeprivation process, it was not required to do so, since the danger to public health from delay outweighed the private interest in an immediate hearing. See id. at 320.
Currently, lower courts frequently dismiss section 1983 complaints on
Parratt grounds, despite a colorable claim that the alleged constitutional
depredation was caused by the government,\(^2\) within the meaning of
Monell.\(^2\) In part this is due to the tendency of courts to view Parratt and
Monell as discrete lines of inquiry.\(^2\) An additional problem for lower
courts attempting to identify the governmental entity is that the Supreme
Court, in Monell and its progeny, has left important questions about the
scope of municipal liability unanswered.\(^2\) Lower courts encounter three
difficulties in applying Parratt, either because of a failure to consult the
principles of Monell or because those principles are themselves inadequately
developed. There is the tendency to define “process” too narrowly,\(^2\) the
problem of identifying the government agents capable of providing pro-
cess,\(^2\) and the issue of implicating the government for causing depriva-
tions through its customs.\(^2\)

1. Process May be More Than Just a Hearing

Traditional procedural due process analysis focuses on whether a
constitutionally adequate hearing was provided before a permanent depri-
vation of property occurred.\(^2\) It is questionable whether Parratt fits this
mold. It has been argued that Taylor’s complaint in that case was not that
his property was taken without a hearing, but that it was taken at all.\(^2\)
Once characterized as a complaint about process, it was inevitable that
Taylor’s claim would be rejected. It is conceptually absurd to expect a
hearing before a negligent and unpredictable loss of property. The state’s
willingness to compensate was all he could reasonably demand.\(^2\)

If, however, Taylor had alleged that the loss of property was predict-
able, and that the government could have taken steps to prevent its
occurrence, the result would have been different. The question then would
not be whether a hearing was feasible in his case, but whether the processes

\(^{258}\) Monell defines the situations in which the government has caused a deprivation. See
the government is an authorized act, outside the scope of the Parratt doctrine. The
government’s failure to provide required predeprivation process is a due process violation,
actionable in federal court. See supra text accompanying notes 123-30. Only when the initial
depredation was beyond the control of the government will its willingness to provide redress
through state remedies be relevant. See Parratt, 451 U.S. at 541.

\(^{259}\) See, e.g., Guenther v. Holmgreen, 738 F.2d 879, 881-82 (7th Cir. 1984), cert. denied,
105 S. Ct. 1182 (1985); Wolf-Lillie v. Sonquist, 699 F.2d 864, 871 (7th Cir. 1983); see also infra text
accompanying notes 433-39.

\(^{260}\) See supra text accompanying notes 117-20.

\(^{261}\) See supra text accompanying notes 81-103.

\(^{262}\) See infra text accompanying notes 265-82.

\(^{263}\) See infra text accompanying notes 283-358.

\(^{264}\) See infra text accompanying notes 359-415.

Eldridge, 424 U.S. 319, 332-35 (1976); Mullane v. Central Hanover Bank & Trust Co., 339

\(^{266}\) See supra note 42 and accompanying text.

\(^{267}\) For a contrary view, see supra note 42 and accompanying text. If 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, 266-37 (1978), rather than for the loss of the hobby kit.
in place for receipt and delivery of mail were inadequate, and whether the inadequacy caused the deprivation. *Parratt* does not bar a claim that the "procedures themselves [were] inadequate."\(^{268}\)

Lower courts often treat the inquiry in procedural due process cases as simply whether a hearing was practicable. Although this narrow focus is understandable given the traditional *Mathews* approach, it is applied in cases that bear little resemblance to *Mathews*. In cases in which a hearing is not possible, other predeprivation process may still be required.

Police misconduct cases illustrate the confusion. Assume, for the sake of argument, that cases alleging police misconduct or brutality are subject to a procedural due process analysis. The absurd question of whether a hearing should be provided before a police officer uses excessive force provides its own answer.\(^{269}\) The more relevant question is whether the government could have provided other forms of predeprivation process, such as better training or supervision. If the police conduct were truly random and unauthorized, the government could not be expected to prevent it. But when the plaintiff alleges that the police conduct was attributable to the government's failure to provide adequate procedures, proof of this allegation imputes liability to the government for deprivation of procedural due process.\(^{270}\) *Parratt*, therefore, should not bar a colorable claim based on the government's failure to adequately train or supervise its officers.\(^{271}\)

The inappropriate focus on hearing, rather than process, also arises in other contexts. For example, in *Rittenhouse v. DeKalb County*\(^{272}\) the plaintiff alleged that failure to repair a leaking water meter, despite actual notice that the meter was leaking onto a nearby road and creating the danger of icy road conditions, caused an automobile accident resulting in grave injury and loss of life.\(^{273}\) The plaintiff further alleged that the failure to repair was due to inadequate procedures for relaying information to road repair crews.\(^{274}\) The court held that *Parratt* barred the claim, reasoning that the county could not have provided the plaintiff with predeprivation process

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\(^{268}\) See *Parratt*, 451 U.S. at 543.


\(^{270}\) In *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427 (1985), Justice Brennan argued that:

> [Police misbehavior] may in a given case be fairly attributable to various municipal policies or customs. . . . In such a case, the city would be at fault for the constitutional violation. Yet it is equally likely that the misbehavior was attributable to numerous other factors for which the city may not be responsible; the police officer's own unbalanced mental state is the most obvious example. In such a case, the city itself may well not bear any part of the fault for the incident; there may have been nothing that the city could have done to avoid it.

*Id.* at 2440 (Brennan, J., concurring) (citations omitted); *see also Wilson v. Beebe*, 770 F.2d 578, 584 (1985) (police misconduct case characterizing *Parratt* issue as whether "the state [could anticipate] and control the conduct of the wrongdoer").

\(^{271}\) For a discussion of the procedural problems raised by *Parratt*, see infra text accompanying notes 416-48.

\(^{272}\) 764 F.2d 1451 (11th Cir. 1985).

\(^{273}\) See *id.* at 1453.

\(^{274}\) See *id.*
because it had no prior notice that plaintiff would have an accident. The court rejected the plaintiff's argument as "nothing more than a contention that better procedures would have prevented the accident." The court misapplied *Parratt* to reject plaintiff's claim. If the deprivation was attributable to the government, the government was responsible for providing procedural safeguards. A finding that the government was responsible precludes a finding that the act was "the random and unauthorized act of a state employee," and thus *Parratt* is inapplicable. In fact, the "contention that better procedures would have prevented the accident" is enough to remove a case from *Parratt*, which applies only when "[i]t is no contention that the procedures themselves are inadequate." The focus on a hearing in cases such as *Rittenhouse* is misleading. A court's characterization of a claim as procedural, not substantive, rejects the notion that it involves actions governmental officials may not take no

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275. See id. at 1455.
276. Id. at 1456. The court went on to observe that "[i]f such a contention were sufficient to invoke the 'established state procedure' exception and remove a case from *Parratt*, few instances would remain in which *Parratt* might apply." Id.
277. The court expressed doubt whether there was sufficient proof of causation. "At most, the deficient procedures might have been a contributing proximate cause of the accident, operating concurrently with other causes including the acts of the drivers of the vehicles." Id. at 1455. Causation is an essential element of proof under § 1983. See supra text accompanying notes 96-99.

The more elusive question is whether a traffic accident of this nature should be the basis of a constitutional action, or is simply a garden variety tort claim. There arguably was no constitutionally protected interest at stake, as the district court held. See *Rittenhouse* v. DeKalb County, 575 F. Supp. 1173, 1174 (N.D. Ga. 1983). If there was no constitutionally protected interest at stake, *Parratt* would be inapplicable. See supra note 227. Under *Daniels*, the case would likely have been dismissed as alleging only negligent conduct that did not rise to the level of a deprivation. See supra text accompanying notes 66-80. Although *Daniels* had not yet been decided this seemed to be the court's rationale for rejecting the claim. See *Rittenhouse*, 764 F.2d at 1456. If, however, this was a common-law tort, the *Parratt* formula for identifying common-law torts did not work in this instance. The *Parratt* doctrine applies only when a protected life, liberty, or property interest is implicated. See *Parratt*, 451 U.S. at 536. If a constitutionally protected interest did exist here, and the defendants, acting under color of state law (no question was raised as to the County's duty to repair the roads) caused the deprivation of that interest, the allegation that the deprivation was pursuant to inadequate procedures rendered *Parratt* inapplicable.

278. See 451 U.S. at 543.
279. See, e.g., *Juncker* v. Tinney, 549 F. Supp. 574, 576 (D. Md. 1982). In *Juncker* an inmate sued because despite frequent complaints, the prison did not put covers on hot radiators in the cells, and consequently he was burned. See id. at 575. The court construed his allegation of a due process deprivation as procedural, not substantive, and found that the state could not have predicted the occurrence of the deprivation. Because the state had actual notice of the dangerous condition, and arguably a duty to correct it, this appears, in the language of *Parratt*, to be "a contention that the procedures themselves are inadequate," and therefore not barred by *Parratt*. See 451 U.S. at 543.
280. A court may have difficulty deciding whether a claim is substantive or procedural. For example, the panel discussion in *Gilmere* v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984) characterized a claim based on use of deadly force as procedural. See id. at 910. The court in rehearing en banc recharacterized the claim as alleging a violation of substantive due process. See 774 F.2d 1495, 1499 (11th Cir. 1985) (en banc); see also supra note 42.

In pro se prisoner complaints, the complainant may fail to specify whether the due process claim is substantive or procedural. In these cases courts should be especially careful not to construe the complaint as procedural when a substantive due process claim is equally viable and would survive a motion to dismiss. See *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976).
matter what procedural protections accompany them and implicitly assumes that certain procedural protections will render the actions constitutional. It is disingenuous to couple this assumption with a narrow view of those protections, which holds that the only possible protection is a hearing before a police assault or an accident on an icy road, and that these are of course impossible. The state may provide meaningful due process in these situations by creating adequate systems to insure that wrongful deprivations do not occur. If there is a nonfrivolous allegation that better procedures would have prevented the deprivation, the plaintiff should be allowed to prove that allegation.

2. Identifying the Governmental Agents Capable of Providing Process

Parratt teaches that predeprivation process will be found impracticable if the government had no advance notice that the deprivation would occur. The impracticability inquiry therefore focuses on whether the government knew or should have known of the deprivation in advance and failed to take required steps. This is identical to the inquiry, under Monell, whether the government caused the deprivation.

The most obvious instance of causation by the government occurs when its lawmakers have promulgated a facially unconstitutional policy. The language of section 1983, however, is not confined to this rare circumstance and has not been so interpreted. If a municipality were liable only for promulgating unconstitutional policies, it could easily circumvent the strictures of the constitution. The state would simply need

281. Parratt, 451 U.S. at 545 (Blackmun, J., concurring).
282. For a discussion of the procedural issues, see infra text accompanying notes 416-48.
283. See supra text accompanying notes 40-63.
284. See supra text accompanying notes 104-16.
285. Monell held that governing bodies could be sued for relief when the unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." See 436 U.S. at 690. These are practices "authorized by written law." Id. The Court assumed these were actionable and discussed the situations in which practices not specifically authorized would be actionable. See id. at 691; see also City of Oklahoma City v. Tuttle, 105 S. Ct. 2427, 2435-36 (1985).
286. The language of § 1983 includes "custom or usage." See 42 U.S.C. § 1983 (1982); see also Monell, 436 U.S. at 691 (custom or usage may be "so permanent and well settled" as to have "the force of law").
287. As Professor Schnapper has pointed out, it was not clear in Monell whether the Court based its finding of municipal liability on the existence of the policy or the use of discretion in its implementation. See Schnapper, supra note 81, at 220; see also supra text accompanying notes 81-103.

Justice Frankfurter, dissenting from a broader construction of the statute in Monroe v. Pape, stated: "[T]hat [§ 1983] was meant to reach some instances of action not specifically authorized by the avowed, apparent, written law inscribed in the statute books of the States ... No one would or could deny ... ." See Monroe, 365 U.S. at 235 (Frankfurter, J., dissenting). As Justice Frankfurter had explained more than 20 years earlier:

It would be a narrow conception of jurisprudence to confine the notion of "laws" to what is found on the statute books, and to disregard the gloss which life has written upon it. Settled state practice ... can establish what is state law. ... Deeply embedded traditional ways of carrying out state policy ... are often tougher and truer law than the dead words of the written text.

to adopt a state constitution identical to the federal, and a state statutory scheme consistent with the state constitution. It would then be free to ignore the limitations imposed by its constitution and statutes, since all deviations from expressly adopted policies would be considered unauthorized by the municipality. Any liability would be ascribed to the individual employees who performed the unauthorized acts.\textsuperscript{288} \textit{Parratt} would limit redress to state tort actions against individual employees.\textsuperscript{289}

Although there is agreement that the bases for municipal liability should include written statutes and policies, there is no agreement on what else should be included. The Court has recently suggested that municipal liability should lie only for consciously adopted policies.\textsuperscript{290} The Court implied doubt about the continued viability of municipal liability for policies of omission, such as failure to train or supervise.\textsuperscript{291}

Limiting \textit{Monell} liability to consciously adopted policies thwarts a major purpose of section 1983 by immunizing municipalities for failing to enforce their laws, whether purposely or through mere neglect.\textsuperscript{292} Arguably, the failure to train or supervise when there is a duty to do so is a conscious choice. Nevertheless, it would be difficult to prove liability if doing so required proof that policymakers deliberately chose an inadequate training program.\textsuperscript{293} The result of such a requirement would be to allow

\begin{itemize}
\item \textsuperscript{288} See supra text accompanying notes 40-63.
\item \textsuperscript{289} See supra text accompanying note 17.
\item \textsuperscript{290} See City of Oklahoma City v. Tuttle, 105 S. Ct. 2427, 2436 (1985); see also Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1300 (1986).
\item \textsuperscript{291} See City of Oklahoma City v. Tuttle, 105 S. Ct. 2427, 2436 n.7 (1985). The conscious decision requirement parallels the development in \textit{Daniels} and \textit{Davidson} of a requirement of intent to cause the result. See supra text accompanying note 17.
\item \textsuperscript{292} See Monroe v. Pape, 365 U.S. 167, 193 (1961) (Harlan, J., concurring).
\item \textsuperscript{293} See City of Oklahoma City v. Tuttle, 105 S. Ct. 2427, 2436 (1985).
\end{itemize}
the municipality to immunize itself by taking care not to articulate the unconstitutional policies it carries out.

Identifying when a municipality has acted, other than pursuant to a written or otherwise expressly adopted policy, is difficult. The Court has rarely addressed the issue, and when it has its message has been ambiguous. Since the municipality can act only through its officials, in a sense all its decisionmaking power is delegated: to its branches, to its sub-entities, and to individuals who are its human agents. The difficulty lies in determining when this delegation has occurred. When a deprivation is caused by an official acting pursuant to this delegated authority, it is attributable to the municipality under Monell. When the official has acted independently, the act is unauthorized and therefore any claims arising from it are barred from federal court under Parratt.

Lacking guidance, the lower courts have formulated various tests and reached disparate conclusions regarding the acts attributable to the municipality. This Article's suggested guidelines are addressed specifically to the

294. In Owen v. City of Independence, 445 U.S. 622 (1980), the Court faced a situation in which the question might have been addressed. The plaintiff alleged that he had been deprived of procedural due process when the acting city manager released to a city councilman a confidential investigative report concerning the plaintiff. See id. at 627. The councilman read a prepared statement to the city council alleging misconduct by the plaintiff, and the council released it to the news media. See id. at 628-29. The plaintiff was discharged without being given reasons or a hearing. Id. at 629.

The city charter gave the city manager sole authority to discharge administrative officers and city employees, and did not require a prior hearing. See id. at 625-30. The allegations of municipal liability were thus based on a series of incidents by various government officials including the city council. Some of the actions were authorized by the city charter; others were not addressed by written municipal policy. See id. at 629-31.

The Supreme Court simply accepted the finding of the Court of Appeals that a municipal policy existed. See id. at 635. The lower court holding was ambiguous as to whether it relied solely on the actions of the city council, or on the actions of the city manager and the existence of the city charter as well. See id. at 630-31 n.10. The Supreme Court appeared to rely on all three, referring to "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials." See id. at 659; see also, Note, Owen v. City of Independence: Expanding the Scope of Municipal Liability Under Section 1983, 47 BROOKLYN L. REV. 517, 551 (1981). In City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985), however, Justice Brennan identified the policy in Owen as the city council's release of confidential material about the plaintiff to the press. See id. at 2441 (Brennan, J., concurring).

In most § 1983 cases the Court simply has not had occasion to address the question of whether the defendant exercises policymaking authority, and has assumed the defendant is correctly named under Monell. See, e.g., Loudermilk v. Cleveland Bd. of Educ., 721 F.2d 550, 552 n.1 (6th Cir. 1983), aff'd, 470 U.S. 532, 548 (1985) (defendants were city, board of education, and civil service commission); Patsy v. Florida Bd. of Regents, 457 U.S. 496, 513 (1982) (defendant was Board of Regents of State of Florida).

Brandon v. Holt, 105 S. Ct. 873 (1985), did address the question and held that a suit against the chief of police was in fact a suit against the city. The Court cited Monell, in which the Department of Social Services "had no greater separate identity from the City than did the Director of the Department when he was acting in his official capacity," see id. at 878, and Hutto v. Finney, 437 U.S. 678, 693 (1978), which held that the Commissioner of Corrections was tantamount to the state itself for eleventh amendment purposes. See Brandon, 105 S. Ct. at 878.

295. See City of Oklahoma City v. Tuttle, 105 S. Ct. 2427, 2442 (1985) (Stevens, J., dissenting); see also supra text accompanying notes 81-103.

issue of identifying the policymaking officials in procedural due process cases. To assess whether a claim falls within Monell or Parratt, the determinative issue is whether the municipality was capable of providing a predeprivation hearing.

a. Commission Error

The Court has made clear that a municipality is liable for deprivations caused not only by its unconstitutional laws, but also by specific policies of enforcement. All but the smallest municipalities delegate final authority to various governmental units. It is well established that these units may be considered "the government" for Monell purposes.

When the municipality has delegated final decisionmaking authority to a unit, such as a board or commission, that unit's decisions made pursuant to its delegated authority are the authorized acts of the government under Parratt. Thus the fact that a decision may be contrary to state law, or random (that is, a discrete decision as opposed to a continuing pattern of wrongful decisions), is irrelevant. Parratt is inapplicable unless the decision is both random and unauthorized.

Logan v. Zimmerman Brush Co., though often cited as delineating the boundaries of Parratt, may have instead blurred those boundaries. Several courts of appeals have relied on Logan for the incorrect proposition that Parratt prohibits a complaint that a commission violated the Constitution, when the commission's alleged violation contravened a written statute or ordinance.

In Logan, the plaintiff filed a timely charge with the Illinois Fair Employment Practices Commission (FEPC). The FEPC failed to convene a

297. See supra text accompanying notes 139-80.
298. Limiting municipal liability to unconstitutional laws would substantially dilute § 1983, because state and regional legislatures are absolutely immune from suit. See Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 402-03 (1979); Tenney v. Brandhove, 341 U.S. 367, 376 (1951). The Court has not yet resolved whether local legislative officials are protected by absolute immunity. See Lake County Estates, 440 U.S. at 404 n.26. As Professor Schnapper noted, "proponents of the 1871 Civil Rights Act consistently rejected arguments that only the legislature was 'the state' within the meaning of the fourteenth amendment; they insisted that the state misconduct forbidden by that amendment included action by the other branches of state government as well as by subordinate employees." Schnapper, supra note 81, at 219; see also Mitchum v. Foster, 407 U.S. 225, 240 (1972); Ex parte Virginia, 100 U.S. 339, 346 (1879).
299. Schnapper, supra note 81, at 218.
300. In Monell the government units sued were the New York Department of Social Services and the School Board. See 436 U.S. at 600-61. The Court cited the long-standing rule that school boards are subject to being sued as precedent for its decision to hold municipalities subject to suit See id. at 696-97.
301. See supra text accompanying notes 125-30.
302. See id.
304. See supra note 116 and accompanying text.
305. See, e.g., Cohen v. City of Philadelphia, 736 F.2d 81, 84 (3d Cir.), cert. denied, 469 U.S. 1019 (1984); Giglio v. Dunn, 732 F.2d 1133, 1138 (2d Cir.) (Cardamone, J., dissenting), cert. denied, 105 S. Ct. 328 (1984); Campbell v. Shearer, 732 F.2d 531, 539 (6th Cir. 1984) (Holschuh, J., dissenting); Albery v. Reddig, 718 F.2d 245, 249 (7th Cir. 1983); Roy v. City of Augusta, 712 F.2d 1517, 1522 (1st Cir. 1983).
Distinguishing a Policy from a Random Act

factfinding hearing within the period required by the FEPC’s enabbling statute, but rejected defendant’s request to dismiss the charge.\textsuperscript{306} The Illinois Supreme Court held that the statutory time limit for convening a hearing was mandatory, and that the FEPC therefore lacked jurisdiction over the claim.\textsuperscript{307}

The United States Supreme Court held that the plaintiff had a protected property interest in the claim.\textsuperscript{308} Using the Mathews balancing test, the Court concluded that the plaintiff was entitled to a hearing on the merits before the claim was terminated.\textsuperscript{309} The Court rejected the defendant’s argument that Parratt applied because the state could not have provided a meaningful hearing before the deprivation.

In Parratt, the Court emphasized that it was dealing with “a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure.” Here, in contrast, it is the state system itself that destroys a complainant’s property interest, by operation of law, whenever the Commission fails to convene a timely conference—whether the Commission’s action is taken through negligence, maliciousness, or otherwise. Parratt was not designed to reach such a situation. Unlike the complainant in Parratt, Logan is challenging not the Commission’s error, but the “established state procedure” that destroys his entitlement without according him proper procedural safeguards.\textsuperscript{310}

The Court correctly held that the act of the FEPC in failing to convene a timely hearing was an authorized act. The FEPC was charged with the responsibility of conducting hearings on employment discrimination. Its authority to do so was specifically delegated by the Illinois Legislature.\textsuperscript{311} It could not claim that the provision of the required hearing was beyond its control.\textsuperscript{312} Thus, Parratt was inapplicable.

It is not clear what the Court meant by the phrase “commission error.” Perhaps the Court meant that in Logan, unlike Parratt, the act was authorized because it was upheld by the highest state court, and was not merely the error of the FEPC. However, this distinction was not found in Parratt, which required a state court hearing only when the government body capable of providing a predeprivation hearing was not given the opportunity to do so.\textsuperscript{313} The import of such a holding would be that only acts that received a state court’s imprimatur would be actionable. This

\textsuperscript{306} See 455 U.S. at 426.
\textsuperscript{307} See id. at 427.
\textsuperscript{308} See id. at 429-32.
\textsuperscript{309} See id. at 434.
\textsuperscript{310} See id. at 435-36 (citations omitted).
\textsuperscript{311} The Illinois Fair Employment Practices Act established a comprehensive scheme for adjudicating allegations of discrimination. To begin the process, a complainant had to bring a charge of unlawful conduct before the FEPC, which had 120 days within which to convene a factfinding conference designed to obtain evidence, ascertain the positions of the parties, and explore the possibility of a negotiated settlement. See id. at 424-25. If that proved impossible, it was to issue a formal complaint and hold a formal adversary hearing. Id.
\textsuperscript{312} See Parratt, 451 U.S. at 543.
\textsuperscript{313} See supra text accompanying notes 40-63.
would conflict with the accepted understanding that section 1983 provides a cause of action against any branch of state government. The absence of judicial action is not a bar to suit when the executive or legislative branches of a state violate the Constitution, as the Court has recently reaffirmed in holding that exhaustion of state remedies is not required in section 1983 suits.

Lower courts have interpreted Logan to mean that noncompliance with a lawful policy or statute is not actionable under section 1983, even if the noncompliance is the action of a state agency or policymaking official. For example, in Cohen v. City of Philadelphia, the plaintiff complained that the Philadelphia Civil Service Commission violated his right to due process by denying him back pay to which he was entitled. The Third Circuit found the procedure inadequate, but held that the Commission's error was random and unauthorized because it violated state law.

This result is inconsistent with both Parratt and Monell. Under Parratt, the relevant question is whether the Civil Service Commission could have provided a hearing before the deprivation. The Commission provided a hearing, so Parratt is inapplicable. Under Monell, the issue is whether the City delegated to the Civil Service Commission the authority to provide a hearing. Assuming it did so, the Commission's actions were authorized. The proper analysis for the federal court is to determine under Mathews whether the hearing was constitutionally adequate.

In a procedural due process case, resolution of the Monell issue will also resolve the Parratt issue. If the defendants have final authority to require and provide process under Monell, then it is practicable for them, as representatives of the government, to provide the required process before a deprivation occurs. If the provision of process is practicable, Parratt does not apply. The existence of a facially constitutional statute or ordinance requiring process does not change this result, because it cannot excuse the

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314. "It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against State action, ... whether that action be executive, legislative, or judicial." Mitchum v. Foster, 407 U.S. 225, 240 (1972) (citing Ex Parte Virginia, 100 U.S. 339, 346 (1879)); see also Schnapper, supra note 81, at 219; supra note 298 and accompanying text.


317. See id. at 83-86.

318. See supra text accompanying notes 223-54. This was the Ninth Circuit's approach in Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985) (en banc). The plaintiff, an inmate, alleged that the California Adult Authority had acted unlawfully in interpreting the state continuous term policy to require lengthening his sentence. See id. at 1352. The panel looked to the availability of state corrective processes, and dismissed under Parratt. See Haygood v. Younger, 718 F.2d 1472, 1481 (9th Cir. 1983). This panel opinion was subsequently withdrawn. See 729 F.2d 613, 614 (9th Cir. 1984). The court sitting en banc found that the misinterpretation of state law had deprived the plaintiff of due process. See 769 F.2d at 1358. It reasoned that the misinterpretation was itself an established policy, which denied the plaintiff an opportunity to a hearing before he was forced to serve the erroneous term. See id. Because it was a policy, it was within the control of the state. See id. at 1357. Applying Mathews, it held that the policy violated due process because predeprivation process was required. See id. at 1358.
government from actually providing process. The failure to do so is actionable in federal court.\textsuperscript{319} As the Second Circuit explained:

The . . . due process clauses . . . require the promulgation of laws and regulations providing for regular procedures which the government must follow before it may deprive an individual of life, liberty or property. The execution of those laws and regulations also must conform to due process; otherwise the due process clause, with its guarantees of regular and predictable procedures, becomes a cipher. It is beyond cavil that due process requires more than the mere promulgation of laws and regulations which, if followed, would preserve the most fundamental of rights.\textsuperscript{320}

**b. The Delegated Authority of the Municipality**

The issue of when a governmental body or official possesses the delegated authority of the municipality is not capable of a simple resolution. It is clearest when a statute or other provision designates the body or official as the final authority ("policymaking official") on a particular subject.\textsuperscript{321} The official with nominal final authority, however, may not exercise it in practice. In that case the official who actually exercises the authority should be considered the policymaking official. Often the transfer of decisionmaking authority is not in writing.\textsuperscript{322} If only the acts of policymaking officials are attributed to the municipality, municipalities can immunize themselves from liability by delegating all controversial decisions. To avoid this situation, delegated authority must be identified.

In *Pembaur v. City of Cincinnati*\textsuperscript{323} the Supreme Court decided that a county prosecutor was a policymaking official.\textsuperscript{324} The prosecutor habitually made policy decisions in circumstances similar to those surrounding the alleged deprivation, was statutorily authorized to do so, and acted within this policymaking role in the instant case.\textsuperscript{325} Because the prosecutor had

\textsuperscript{319} See supra text accompanying notes 139-79.
\textsuperscript{320} Patterson v. Coughlin, 761 F.2d 886, 891 (2d Cir. 1985). Unfortunately, the Davidson Court has taken a step toward deciding that the mere promulgation of facially valid regulations will satisfy due process. In holding that the negligent failure to follow correct procedures does not violate the due process clause, the Court has, without clear explanation, departed from the familiar principles of both the due process clause and § 1983. In Davidson, the defendant was an assistant warden who had the authority to provide predeprivation process, and the opportunity to do so. See 106 S. Ct. at 675 (Blackmun, J., dissenting); supra text accompanying notes 66-80. Because his failure to do so was inconsistent with established procedures and was not intended to deprive the plaintiff of due process, the Court held it was merely negligent and therefore not actionable. See id. at 669, 671.
\textsuperscript{321} See Schnapper, supra note 81, at 218. For example, in Marchese v. Lucas, 758 F.2d 181 (6th Cir. 1985), the court found the county liable based on specific language in the Michigan Constitution providing that the sheriff (the wrongdoer) had the authority to make police policy for the county. See id. at 182.
\textsuperscript{322} See Schnapper, supra note 81, at 218.
\textsuperscript{323} 106 S. Ct. 1292 (1986).
\textsuperscript{324} See id. at 1301.
\textsuperscript{325} State law authorized the county prosecutor to make decisions like the one in controversy, id., and it had been the practice of the county to defer to the prosecutor's decisions in similar circumstances. Id. The dissent disagreed with this last proposition, arguing
acted in his policymaking role in making the contested decision, his decision
was attributable to the municipality. The Court rejected the court of
appeals' position that a single decision could not constitute a policy,
holding that "the municipality is equally responsible whether [an action by
a policymaking official] is to be taken only once or to be taken repeat-
edly." Pembaur thus confirmed that the municipality is liable for each of its
unconstitutional acts, not just those that recur. Although the case resolved
this important issue, the decision left other difficult issues unresolved.
Notably, Pembaur did not clarify the standards for determining when
policymaking authority is delegated in the absence of an express statute.

Most lower courts inquire into a variety of factors to determine
whether the official in question exercises final discretionary authority.
For example, the Second Circuit has held that an "official has final
authority if his decisions, at the time they are made, for practical or legal
reasons constitute the municipality's final decisions." The court noted
that an allegation of policymaking authority requires proof of an official's
scope of employment and the official's role within the municipal organiza-
tion. This approach offers no easy formula, but recognizes that the
delegation issue may be a question of fact. It is flexible enough to permit
findings that an official who usually formulates policy may have acted
outside of the policymaking role, or conversely, that an official who does
not usually do so has nevertheless formulated a policy in a particular

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that the prosecutor's decision was not policy but an off-the-cuff answer to a single question. See id. at 1310 (Powell, J., dissenting).
326. See id. at 1297-99.
327. See id.
328. See id. at 1299.
329. Part II B of the opinion indicates that such authority may be delegated despite the absence of a statute, but does not clarify the standards for determining whether authority has been delegated. See id. at 1300. In any case, Part II B failed to command a majority of the Court. Justices Stevens and O'Connor joined the majority opinion, but did not join Part II B. See id. at 1304 (Stevens, J., concurring); id. (O'Connor, J., concurring). Justice Stevens indicated in his concurrence that the opinion did not go far enough in defining the scope of municipal liability. See id. at 1302-04 (Stevens, J., concurring). He reaffirmed his position that respondent superior theory should be incorporated into § 1983 jurisprudence. See id. (Stevens, J., concurring); see also supra note 89 and accompanying text. Justice O'Connor's concurrence indicated that the opinion went too far in defining the scope of municipal liability. See 106 S. Ct. at 1304 (O'Connor, J., concurring). She implied that state law alone should define which officials are policymakers, and further argued that actions in violation of state law cannot constitute policy. See id. (O'Connor, J., concurring).
330. See, e.g., Rookard v. Health & Hosps. Corp., 710 F.2d 41, 45-46 (2d Cir. 1983) (officials had final authority over significant matters involving discretion, based on title and whether superior would overrule decisions); McKinley v. City of Eloy, 705 F.2d 1110, 1116 (9th Cir. 1983) (city manager's hiring and firing of employees did not require approval of city council); Berdin v. Duggan, 701 F.2d 908, 914 (11th Cir.) (ordinance granted mayor full authority to hire and fire employees, therefore decisions represented town policy), cert. denied, 464 U.S. 895 (1983); Brewer v. Blackwell, 692 F.2d 387, 401 (5th Cir. 1982) (police chief did not have "absolute sway" over tasks so actions did not represent town policy).
331. See supra note 3 and accompanying notes 426-29.
instance.\textsuperscript{334}

The Fifth Circuit has taken a different and disturbing path. In \textit{Bennett v. City of Slidell},\textsuperscript{335} the court held that a showing of decisionmaking authority is insufficient to support a finding that a municipal policy exists.\textsuperscript{336} Instead, the government "must expressly or impliedly acknowledge that the agent . . . acts in lieu of the governing body to set goals and to structure and design the area of the delegated responsibility, subject only to [the government's power to discharge or curtail the agent's authority]."\textsuperscript{337}

Although the "implied acknowledgment" requirement might have been construed broadly, so that "express acknowledgment" did not become an onerous burden, the Fifth Circuit soon demonstrated that it would interpret \textit{Bennett} narrowly. In \textit{Webster v. City of Houston},\textsuperscript{338} the court considered a claim that the Houston Police Department had a policy of using excessive force and of using throw down weapons.\textsuperscript{339} The court held that liability depended upon "whether the city council had expressly or impliedly acknowledged that the mayor or the chief of police" had final decisionmaking authority.\textsuperscript{340} This application of \textit{Monell} is unsupportable. Under traditional standards, the chief of police is a policymaking official.\textsuperscript{341} To require additional acknowledgement by the city council that the chief of police runs the police department is to ask the plaintiff to prove something commonsensical but difficult to document.\textsuperscript{342} The test in essence begins with the assumption that the legislative body is "the government" and places a difficult burden on the plaintiff to prove otherwise. Well before \textit{Monell}, however, the Court recognized that governmental liability should

\begin{itemize}
  \item \textsuperscript{334} The dissent in \textit{Pembaur} criticized the majority for its undue emphasis on the status of the decisionmaker, to the exclusion of proper inquiry into whether the decisionmaker was setting policy in the particular case. \textit{See} 106 S. Ct. at 1308 (Powell, J., dissenting). It appears, however, that the majority did consider the particular circumstances under which the prosecutor became involved in directing the sheriff's deputies to break into petitioner's office. \textit{See id.} at 1301. In any case, the dissent is correct that both the status of the decisionmaker and the circumstances surrounding the particular decision are relevant in determining whether policy had been made.
  \item \textsuperscript{335} 728 F.2d 762 (5th Cir. 1984), \textit{cert. denied}, 105 S. Ct. 3476 (1985).
  \item \textsuperscript{336} \textit{See id.} at 769.
  \item \textsuperscript{337} \textit{See id.}
  \item \textsuperscript{338} 735 F.2d 838 (5th Cir. 1984) (en banc) (per curiam).
  \item \textsuperscript{339} \textit{See id.} at 840 & n.1. The court described a "throw down weapon" as a weapon placed near a shooting victim to make it appear the victim was armed. \textit{Id.} at 840. Judge Williams, dissenting, further explained: "To make an unjustified shooting appear justified, a police officer can lay or 'throw down' a gun or knife, which is usually not traceable to the officer, next to the victim." \textit{Id.} at 843 n.1 (Williams, J., dissenting). The plaintiffs alleged that these policies had caused the unjustified, fatal shooting of the decedent and a subsequent departmentally authorized cover up. \textit{See id.} at 843.
  \item \textsuperscript{340} \textit{See id.} at 841. The court had originally held that there was sufficient evidence to support a finding that use of a throw down weapon was a police department policy or custom. \textit{See} 689 F.2d 1220, 1227 (5th Cir. 1982). The court on rehearing en banc found the jury instruction flawed and remanded. \textit{See} 735 F.2d at 841.
  \item \textsuperscript{341} Testimony demonstrated that the establishment of policies of the City of Houston regarding police work was delegated to the Chief of Police and the Houston Police Department by the mayor and the city council. \textit{See} 735 F.2d at 852-53 (Williams, J., dissenting).
  \item \textsuperscript{342} \textit{See supra} text accompanying notes 321-22.
\end{itemize}
not be confined to the legislature's acts. Pembaur reaffirms that the capacity to make policy is not confined to the legislature. Webster appears inconsistent with the holding in Pembaur because it refused to look at the habitual role of the chief of police in setting policy, a refusal that Pembaur might call "disingenuous." Pembaur, however, contains language that could be construed to support the Bennett and Webster holdings. To the extent that the Court limits policy to "a deliberate course of action ... made from among various alternatives" and refuses to recognize policies that conflict with statutes, unconstitutional acts like those in Webster will be immunized from federal review. In fact, Bennett is an invitation to municipalities to avoid liability by adopting facially constitutional policies without expressly or impliedly delegating the duty to enforce them. In Webster, for example, absent ordinances authorizing excessive force and the use of throw down weapons, the city would not be liable for the police department's wrongs unless a plaintiff could prove that the city delegated responsibility to the police department to regulate its own conduct. Moreover, a court might find that because the city council did not expressly or impliedly authorize the department's actions, they were random and unauthorized. This would relegate the plaintiff to a state tort claim for wrongful death against the mayor and various police officials in their individual capacities. Treating the acts as attributable to unauthorized individuals and absolving the city of liability would preclude systemic relief against the municipality.

The Fifth Circuit test limits Monell liability by overlooking the bureaucratic nature of municipal government and treating decisionmakers in different branches of government as discrete individuals. Cases relying on Parratt and Logan achieve the same result without discussing Monell. Courts have employed the Parratt-Logan analysis to insulate the acts of policymaking officials from federal review by labelling errors of the government's nonlegislative branches "random and unauthorized."

The Fifth Circuit's approach and the "commission error" approach both rely on rigid formulae that do not successfully separate

343. See supra note 314 and accompanying text.
344. See 106 S. Ct. at 1298-99.
345. See id. at 1300.
346. See id. at 1300.
347. See id.
348. See supra note 325 and accompanying text.
349. See Bennett, 728 F.2d at 771 (Politz, J., dissenting). Of course if the city council had not delegated the duty to run the police department, then the council would be responsible for doing so, and may have been liable for not discharging its duty to prevent the continuation of the customary use of excessive force and throw down weapons. See infra text accompanying notes 359-413.
350. See Webster, 735 F.2d at 842 (en banc) (per curiam).
351. The plaintiff's allegations included deprivation of life and property without due process. See 735 F.2d at 844 (Williams, J., dissenting).
352. See supra text accompanying notes 139-80.
353. See supra text accompanying notes 253-320.
354. See cases cited supra note 250.
355. See supra text accompanying notes 335-40.
356. See supra text accompanying notes 298-319.
authorized from unauthorized conduct. These approaches lose sight of the ultimate inquiry: whether the government caused, and is therefore responsible for redressing, a constitutional violation. This query may be fact specific. The question is whether the persons who caused the violation possessed the de facto final authority of the municipality with regard to the subject matter of the contested decision. If so, their constitutional violations constitute a clear abuse of state power. This is the crucial inquiry which the courts in Cohen v. Philadelphia, Bennett, and Webster failed to conduct.

3. Customs Attributable to the Municipality

Section 1983’s proscription of wrongful actions under color of law includes actions under color of the “custom or usage” of the state. Congress designed the act to reach conduct that was engaged in permanently or systematically by state officials, and which, through acceptance by administering officers, came to have the cast of law. After Monell held that municipalities were persons under section 1983, the distinction between the acts of state officials and their acceptance by law-administering officers gained added significance. If a practice by state officials becomes so widespread as to be permanent and well settled, it is considered to have the force of law, although not authorized by written law. The municipality is considered to have authorized the practice, and is liable for the harm it has caused.

Custom or usage is therefore an alternative basis of municipal liability. “The purpose of the custom or usage exception is to cover the actions of nonpolicymaking government employees whose actions are tolerated by the policymakers.” This is a necessary component of municipal liability. The municipality acts only through its agents. Just as those with primary responsibility for determining government policy often delegate that responsibility to subordinate officials, the government delegates to its front line employees, or “street level bureaucrats” the day-to-day implementation of its policies.

357. See supra text accompanying notes 283-97.
358. See id.
360. See Monroe, 365 U.S. at 236 (Frankfurter, J., dissenting).
361. “Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials .... Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a ‘custom or usage’ with the force of law.” Monell, 436 U.S. at 691 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970)).
362. Webster v. City of Houston, 735 F.2d 838, 850 n.32 (1984) (Williams, J., dissenting); see also Schnapper, supra note 81, at 229.
364. See supra text accompanying notes 321-58.
365. See M. Lipsky, Street Level Bureaucracy: The Dilemmas of the Individual in Public Services 3-4 (1980); P. Schuck, supra note 3, at 44.
Just as delegation to subordinates does not immunize the government from responsibility for misuse of directly delegated authority, \(^{366}\) neither can delegation to front line employees immunize the government for the misuse of that delegated power. The concept of delegation, however, is considerably more complicated in the latter instance. For example, if a mayor delegates to the police chief the responsibility to run the police department and the police chief promulgates an unconstitutional regulation, this action is attributable to the municipality. \(^{367}\) Even if a constitutional regulation exists and the police chief adopts a contrary unconstitutional policy, that policy is attributable to the municipality. \(^{368}\)

The question of custom arises if, for example, the police chief adopts a constitutional policy that is ignored or transgressed by employees responsible for enforcing it. If the entire police force ignores the policy and engages in a long-standing practice of violating the constitution with the police chief's awareness, the constitutional policy will not immunize the police chief from liability for rampant failure to implement the policy. The municipality has caused deprivations flowing from that failure. At the opposite extreme, if a single police officer violates policy on one occasion, and is immediately disciplined, the violation is not caused by or attributable to the municipality. \(^{369}\) At most, the officer is individually liable for causing the constitutional violation. A municipality, then, causes deprivations committed by its front line employees when it could have foreseen and avoided them. \(^{370}\)

The particular importance of municipal liability for custom lies in the fact that frontline employees, not high ranking officials, are the direct agents of much of the unconstitutional conduct with which section 1983 is concerned. \(^{371}\) In some governmental agencies, for example police departments, frontline employees have primary responsibility for carrying out policy as well as primary contact with the public. \(^{372}\) They are therefore in

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\(^{366}\) See supra text accompanying notes 319-20. \\
\(^{367}\) See supra text accompanying notes 321-34. \\
\(^{368}\) See supra text accompanying notes 313-15. \\
\(^{369}\) Cf. City of Oklahoma City v. Tuttle, 105 S. Ct. 2427, 2436 (1985) (refusing to impose municipal liability based on single incident of unlawful conduct by non policymaking official). \\
\(^{370}\) See id. at 2441 (Brennan, J., concurring). Tort law provides a useful analogy on the issue of foreseeability. Justice Douglas observed in Monroe v. Pape that "[§ 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. 167, 187 (1961). Although causation by a municipality cannot be perfectly equated with causation by a private individual, see Whitman, supra note 4, at 19-20; Note, supra note 203, at 698-99, the general principle of foreseeability establishes that when individual A creates a situation that foreseeably enables individual B to cause harm, individual A may be held responsible for "causing" that harm. See R. Epstein, A Theory of Strict Liability 40-44 (1980). This principle holds true when individual A is the government. When the government gives to its subordinates authority that they would not otherwise have, it is responsible for preventing the foreseeable misuse of that authority. See Note, supra note 203, at 697. \\
\(^{371}\) "The unconstitutional customs with which the supporters of § 1983 were concerned were . . . not 'customary' or informal exercises of final or delegated authorities, but the widespread and persistent practices of ordinary sheriffs, judges, and prosecutors." See Schnapper, supra note 81, at 229. \\
\(^{372}\) Professor Schuck calls these agencies "street level agencies." See P. Schuck, supra note 3, at 131.
the more likely position to cause constitutional harm.\textsuperscript{373} If a municipality is not liable for its frontline employees' wrongful acts that it has not expressly authorized, a municipality can insulate itself from liability for most constitutional violations by promulgating constitutional policies and then failing to enforce them, or by simply failing to adopt any policies at all.\textsuperscript{374} This result is directly contrary to section 1983's animating principles.\textsuperscript{375}

It does not follow, however, that municipalities should be liable for every wrongful act of their employees. \textit{Monell} made it clear that a municipality should not be liable for employees' wrongful acts under color of law merely because the wrongdoer is a government employee.\textsuperscript{376} It should be responsible only for those acts it could have foreseen and prevented.\textsuperscript{377} This definition dovetails with the converse definition in \textit{Parratt}: the municipality does not cause the deprivations of its frontline employees when it could not have foreseen and avoided them. These unforeseeable and unavoidable acts are random and unauthorized, and are attributable solely to the wrongdoing individual employees.\textsuperscript{378} This dichotomy preserves the federal forum for pervasive, systematic violations of the constitution and relegates isolated abuses to state court.\textsuperscript{379} The difficulty with this scheme is the imprecision with which it is currently applied. Supreme Court precedent on the issue has tended only to obscure the issue of how a custom may be proved.

In \textit{Rizzo v. Goode}\textsuperscript{380} the Court considered a claim that a number of incidents of police misconduct amounted to a pervasive pattern of illegality by various Philadelphia officials.\textsuperscript{381} The Court rejected the allegation, finding "no affirmative link" between police misconduct and "any plan or policy . . . express or otherwise" authorizing or approving the misconduct.\textsuperscript{382} \textit{Rizzo} did not fully discuss a municipality's liability for its customs because \textit{Rizzo} was decided before \textit{Monell}.\textsuperscript{383} \textit{Monell} cited \textit{Rizzo} for the proposition that a "mere right to control" without any exercise of control or failure to supervise will not support section 1983 liability.\textsuperscript{384} The natural inference from this statement is that a municipality's exercise of control or

\textsuperscript{373} See Note, supra note 203, at 697.
\textsuperscript{374} See supra text accompanying notes 285-89.
\textsuperscript{375} "There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty." Monroe v. Pape, 365 U.S. 167, 176 (1961). An apparent trend toward a requirement of express authorization is reflected in the Court's decisions in City of Oklahoma City v. Tuttle, 105 S. Ct. 2427, 2435-36 (1985), Daniels v. Williams, 106 S. Ct. 662 (1986), and Davidson v. Cannon, 106 S. Ct. 668 (1986). See infra note 399 and accompanying text; see also Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1300 (1986).

\textsuperscript{376} See supra notes 88-89 and accompanying text.
\textsuperscript{377} See supra text accompanying notes 96-99.
\textsuperscript{378} See supra text accompanying notes 104-16.
\textsuperscript{379} See supra text accompanying notes 159-90.
\textsuperscript{380} 423 U.S. 362 (1976).
\textsuperscript{381} See id. at 366-68.
\textsuperscript{382} See id. at 371.
\textsuperscript{383} See P. Schuck, supra note 3, at 120.
\textsuperscript{384} 436 U.S. at 694 n.58.
failure to supervise will support liability.  

Rizzo may be responsible for confusion in lower court opinions. A finding that the municipality had adopted a policy would implicate the municipality without any further need to prove a custom. The question remains: under what circumstances will the municipality be held liable when it has not promulgated a "plan or policy" expressly authorizing the low level misconduct complained of? Monell imposes liability even though "a custom has not received formal approval through the [governmental] body's official decisionmaking channels," but the Court's guidelines on this subject have been mostly negative.

City of Oklahoma City v. Tuttle attempted to take a "necessary step toward" defining the contours of municipal liability for custom or policy. Albert Tuttle was fatally shot by a police officer. His widow sued the officer and the city of Oklahoma City. She asserted two bases for municipal liability. First, she argued that the circumstances surrounding Tuttle's killing were "so egregiously out of accord with accepted police practice" that the killing alone demonstrated that policies and customs of police training were grossly deficient. Second, she hoped to demonstrate a policy or custom of inadequate training through direct evidence of the nature of the training. The Supreme Court held that section 1983 liability could not be based solely on the officer's actions, without further evidence of a municipal policy or custom. To understand Tuttle, one must distinguish custom from policy and recognize that they represent two separate means of implicating the municipality. The plaintiff's direct evidence of inadequate training procedures that caused her husband's death would have established liability because the evidence established that the city could have avoided

385. See P. Schuck, supra note 3, at 120; Friedman, supra note 238, at 550; Schnapper, supra note 81, at 237.
386. See supra text accompanying notes 283-97.
387. Monell, 436 U.S. at 691.
388. The Court has rejected a claim of "mere administrative negligence" as a predicate for a finding that a custom existed. See Polk County v. Dodson, 454 U.S. 312, 326 (1981) (citing Rizzo v. Goode, 423 U.S. 362, 370-77 (1976)).
390. See id. at 2429.
391. See id. at 2430.
392. See id. at 2437-38 (Brennan, J., concurring).
393. See id. at 2438 (Brennan, J., concurring).
394. See id. at 2436. The trial court had instructed the jury that "a single unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge." Id. at 2431 (quoting jury instructions) (emphasis deleted). This instruction was coupled with an instruction that "deliberate indifference" or "gross negligence" on the part of the city was sufficient to prove the existence of a city policy. See id. at 2431. The Supreme Court held that the jury instructions allowed the jury to infer municipal liability solely from the action of a single police officer. See id. at 2431, 2436. Although the plaintiff had introduced independent evidence of a municipal custom of inadequate training, it was impossible to determine upon which theory the jury had assessed liability. See id.
395. See supra text accompanying notes 359-65.
396. See 105 S. Ct. at 2438 (Brennan, J., concurring).
DISTINGUISHING A POLICY FROM A RANDOM ACT

the death.397 Under the language of Rizzo and Monell, this allegation claimed that the city had adopted a "plan or policy" or had improperly exercised control or direction or had "fail[ed] to supervise."399

A distinct and more difficult issue in Tuttle was the proof necessary to demonstrate a custom of inadequate training absent direct proof of a policy. The alternative to direct proof of a policy was proof that the officer's actions were not the actions of adequately trained police officers, from which it could be inferred that the municipality had a policy of inadequate training.400 The Court held that "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a

397. See id.
399. See Monell, 436 U.S. at 694 n.58; supra text accompanying notes 384-85. The Court "express[ed] no opinion" on the issue of whether a policy that is not facially unconstitutional, such as a policy of inadequate training, "can ever meet the 'policy' requirement of Monell." See Tuttle 105 S. Ct. at 2436 n.7. It also noted that:

[T]he word "policy" generally implies a course of action consciously chosen from among various alternatives; it is therefore difficult in one sense even to accept the submission that someone pursues a "policy" of "inadequate training" unless evidence be adduced which proves that the inadequacies resulted from conscious choice—that is, proof that the policymakers deliberately chose a training program that would prove inadequate.

Id. at 2436. Daniels and Davidson also call into question the future of municipal liability for "failure to supervise." Arguably, a policy that rests on omissions is a negligent policy. Under this formulation, facially invalid statutes and policies would be actionable because intentionally adopted, but customs, since they are generally authorized through toleration and acquiescence, might be labeled negligent and thus barred by Daniels and Davidson. See supra text accompanying notes 203-09.

If the Court were to limit Monell to situations in which a policy were consciously chosen, it would create a situation in which the municipality could immunize itself from liability simply by failing to adopt any policy at all. The Court has, however, identified as a primary purpose of § 1983 its incentive to "err on the side of protecting . . . rights [and] instituting internal rules and programs designed to minimize the likelihood of unintentional infringement on constitutional rights." See Owen v. City of Independence, 445 U.S. 622, 652 (1980). If municipalities were insulated from responsibility for their failure to train or supervise their employees, there would be little incentive to institute corrective procedures, because liability would arise only from affirmative procedures. Professor Schuck has noted the "skewed incentives" that currently exist in favor of official failure to act. See P. Schuck, supra note 3, at 68-71. Removal of the threat of municipal liability would funnel the incentive to change from the entity, which is capable of effecting change, to the low level official, who is not. See supra text accompanying notes 164-77.

Currently, the lower courts are in a state of disarray over the issue of liability for failure to train or supervise. See, e.g., Valera v. Jones, 746 F.2d 1413, 1418 (10th Cir. 1984) (continuing failure to train, supervise, or discipline amounts to custom or policy); Languirand v. Hayden, 717 F.2d 220, 227 (5th Cir. 1983) (requiring gross negligence amounting to conscious indifference), cert. denied, 104 S. Ct. 2656 (1984); Lenard v. Argento, 699 F.2d 874, 885 (7th Cir.) (plaintiff must show that officials implicitly authorized or knowingly acquiesced in violation; must show extremely high degree of culpability for inaction), cert. denied, 464 U.S. 815 (1983); Avery v. County of Burke, 660 F.2d 111, 114 (4th Cir. 1981) (unreasonable failure to adopt policy when one is necessary may give rise to supervisory liability); Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir. 1979) (municipality will be liable for failure to train or supervise only if failure rises to level of gross negligence or deliberate indifference).

400. See 105 S. Ct. at 2438 (Brennan, J., concurring).
municipal policymaker."\textsuperscript{401}

On the issue of proof of custom, when no separate evidence of a policy exists, the Court held that a custom cannot be inferred from a single incident. As the Court seemed to recognize, an unconstitutional municipal policy that has caused harm in only one instance will not excuse the municipality from liability for that harm because the municipality has caused that harm.\textsuperscript{402} The Court's holding on custom, however, appeared to lose sight of the causation issue. A single incident of low level misconduct may be solely the actor's own fault, or it may be the fault of the municipality. The crucial inquiry in making that distinction is whether the municipality could have foreseen and avoided it.\textsuperscript{403}

Lower courts have disagreed about whether a custom can be inferred from a single incident.\textsuperscript{404} At the pleading stage, it may be impossible for the plaintiff to allege more than one incident, and thus dismissal on this ground alone is inappropriate.\textsuperscript{405} As a matter of proof of a custom, the pervasiveness of the misconduct should not be treated as a necessary element, but as one way of demonstrating that the municipality should have foreseen the conduct and therefore prevented it. It is more likely that a municipality will be actually or constructively aware of a pervasive pattern of low level misconduct.\textsuperscript{406} Nevertheless, if a plaintiff can prove that a single harm was foreseeable and preventable, this should be sufficient to implicate the municipality. The law should not require violations of the rights of others before a victim can seek justice.\textsuperscript{407}

\textsuperscript{401} See id at 2436 (Brennan, J., concurring).
\textsuperscript{402} See id at 2440 (Brennan, J., concurring).
\textsuperscript{403} See id. (Brennan, J., concurring). Justice Brennan, however, accepted the plurality's contention that because of this ambiguity, independent proof of a policy was needed. See id. (Brennan, J., concurring).
\textsuperscript{405} See Means v. City of Chicago, 535 F. Supp. 455, 460 (N.D. Ill. 1982).
\textsuperscript{406} See Schnapper, supra note 81, at 229 ("The frequency and pattern of the practice alleged to be a custom or usage must be sufficient to give rise to a reasonable inference that the public employer and its employees are aware that public employees engage in the practice and do so with impunity.").
\textsuperscript{407} Williams v. City of Little Rock, 746 F.2d 431, 438 (8th Cir. 1984), aff'd on rehearing by an equally divided court, 762 F.2d 73 (8th Cir. 1985) (en banc).

That an isolated instance of abuse may support an inference of municipal custom is illustrated in the Sixth Circuit case of Marchese v. Lucas, 758 F.2d 181 (6th Cir. 1985). The court found that the plaintiff had been severely beaten twice in one day by deputy sheriffs while he was in their custody. When he was arraigned the following day, the state court ordered that the circumstances of the beating be investigated. The sheriff failed to conduct the investigation. \textit{Id.} at 182-84. Although the sheriff testified that he was unaware of the beatings, \textit{id.} at 188, the Sixth Circuit found that the undisciplined conduct of his deputies spoke "ab initio of lack of training and discipline." \textit{Id.} The court also relied upon the sheriff's failure to conduct any investigation or to penalize the officers in charge at the time of the assault in finding that the sheriff, in his official capacity, was liable for the assaults. \textit{Id.} at 187-88. Although there was independent evidence of a failure to train in this case, the facts surrounding the single incident permitted an inference that the municipality had caused the incident by failing to train its deputies, and by tolerating and in fact concealing its occurrence. \textit{Id.} at 189.
Distinguishing a Policy from a Random Act

Gilmere v. City of Atlanta, 408 illustrates the limitations of the Tuttle reasoning. As in Tuttle, Gilmere involved a single brutal incident of police misconduct resulting in death. The court dismissed the claim against the city. Relying on Tuttle, it reasoned that even if the failure to train was "the moving force of the constitutional violation" as required by Monell, the plaintiff did not show that "the failure resulted from a custom that was 'so permanent and well settled' as to have 'the force of law.'" 409 If the plaintiff had succeeded in proving that the municipality had caused the deprivation by failing to train the errant employee, it was not determinative that it had not failed to train other employees or that he had killed only one person. The determinative issue was whether the city could have foreseen and prevented the deprivation.

Gilmere also illustrates the consequence of a finding that no custom exists. A panel decision had held that the police officer's actions were random and unauthorized, and that Parratt relegated the plaintiff to state tort remedies. 410 This result would obtain even if the wrongful conduct were less isolated, yet not pervasive enough to qualify as a custom. In Rizzo, for example, the Court held that more than forty incidents of police misconduct did not constitute a custom because of lack of proof that they were caused by high ranking officials. 411 Had Parratt and Monell been decided, a finding that the municipality did not cause the incidents would have been a finding that each was random and unauthorized. 412 Thus each of the forty victims would be relegated to state tort claims. Although this result might be acceptable if the municipality is without fault, it is unconscionable if the municipality had in fact caused the incidents, whether by direct or tacit authorization.

When the municipality has caused wrongdoing, but "custom" is construed too narrowly, a meritorious federal claim may thus be dismissed under Parratt. 413 This result is more disturbing when the wrongdoing is systemic and pervasive and not an isolated act. 414 Nevertheless, an allegation of a single incident of misconduct by the government, which the government could have prevented, is also entitled to a federal forum. When the government is implicated in the deprivation of rights, it should not be permitted the choice of whether to remedy the deprivation in its own courts. The isolated act by a municipality is still an authorized act, and

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408. 774 F.2d 1495 (11th Cir. 1985).
409. See id. at 1504 (quoting Monell, 436 U.S. at 695).
410. See Gilmere v. City of Atlanta, 737 F.2d 894, 901 (11th Cir. 1984). Although the court sitting en banc reversed on the ground that substantive rather than procedural due process had been violated, the court recognized that a procedural due process claim would have been barred under Parratt. See 774 F.2d 1495, 1499-1501 (11th Cir. 1985).
412. See supra text accompanying notes 117-30.
413. See supra text accompanying notes 139-80.
414. Federal courts are ideally suited to redress and deter systemic constitutional violations, in a way that state courts are not. See supra text accompanying notes 139-80. When systemic wrongdoing is incorrectly reduced to a series of purportedly disconnected tort claims, serious abuses of state power go unchecked, because no incentives are directed at the municipality to correct the systemic flaw. See id.
therefore a serious abuse of state power to which the Parratt doctrine should not apply.\textsuperscript{415}

C. The Tension Between Parratt and Monell: The Procedural Issue

The Parratt issue is usually raised in a pretrial motion.\textsuperscript{416} A finding that Parratt applies is a finding that the plaintiff has failed to state a section 1983 claim because the plaintiff has not been deprived of due process.\textsuperscript{417} A Monell claim alleges that the government was directly involved in a deprivation of the plaintiff's constitutional rights.\textsuperscript{418} In the context of procedural due process, it is a claim that the government caused the deprivation of life, liberty, or property by failing to provide adequate safeguards to prevent it. The government may be implicated either by proving a breach of duty by one who represents the government, as a high policymaking official\textsuperscript{419} or through delegated authority,\textsuperscript{420} or by demonstrating that the responsible governmental officials knew or should have known of unconstitutional behavior by their employees, yet failed to take steps to contain it.\textsuperscript{421}

A complaint asserting municipal liability under Monell, assuming the allegation is not frivolous, by definition states a claim that cannot be defeated by a Parratt defense. A colorable allegation of municipal liability precludes the preliminary finding, required by Parratt, that the government was unable to provide predeprivation process. A court cannot grant defendant's motion to dismiss unless it appears that no set of facts will support plaintiff's claim.\textsuperscript{422} The court must determine whether the claimed deprivation was authorized by the municipality, or was random and unauthorized. This is often a question of fact, making summary proceedings inappropriate.\textsuperscript{423} The necessity of conducting discovery and perhaps a

\textsuperscript{415} See supra text accompanying notes 123-30.  
\textsuperscript{416} The vast majority of cases decided under Parratt have been decided under Fed. R. Civ. Proc. 12(b)(6) or Fed. R. Civ. Proc. 56. A notable exception to this procedural pattern occurred in Logan, in which the Parratt issue was raised for the first time in (and rejected by) the United States Supreme Court on direct appeal from the Illinois Supreme Court. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982).  
\textsuperscript{417} See supra text accompanying notes 104-38.  
\textsuperscript{418} See Monell, 436 U.S. at 691-92; supra text accompanying notes 104-38.  
\textsuperscript{419} See supra text accompanying notes 283-97.  
\textsuperscript{420} See supra text accompanying notes 321-58.  
\textsuperscript{421} See supra text accompanying notes 359-415.  
\textsuperscript{422} See, e.g., Powe v. City of Chicago, 664 F.2d 639, 651 (7th Cir. 1981) (motion to dismiss is defeated if reasonable factfinder could conclude that actions which caused deprivation of liberty were product of some municipal policy or custom).  
\textsuperscript{423} In Conley v. Gibson, 355 U.S. 41 (1957), the Court held that a complaint need only set forth "a short and plain statement of the claim showing that the pleader is entitled to relief" that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests. See id. at 47. In Scheuer v. Rhodes, 416 U.S. 232 (1974) the Court held that "[w]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." See id. at 236.  
For a contrary view see United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980), in which the Third Circuit indicated that a civil rights complaint relying on vague and conclusory allegations did not provide "fair notice" and would not survive a motion to dismiss.
trial, however, robs Parratt of its most valued feature: its efficiency in clearing the docket of nonmeritorious claims.\textsuperscript{424} Parratt holds that when a deprivation is random and unauthorized, it is impracticable for the state to provide predeprivation process.\textsuperscript{425} It is often a question of fact whether the provision of predeprivation process was impracticable or impossible.\textsuperscript{426} The court may need evidence of whether the officials responsible for providing the requisite process were capable of doing so prior to the alleged deprivation. For example, in Patterson v. Coughlin,\textsuperscript{427} the Second Circuit reversed the district court's dismissal under Parratt of a prison inmate's claim that he had been placed in segregation without due process.\textsuperscript{428} The court of appeals held that it was "at least a question of fact whether the decision to place . . . [the plaintiff in segregation] was made by 'officials with final authority' over that decision."\textsuperscript{429} The court's decision reflects the inextricability of the Parratt and Monell inquiries. Until the court applied Monell to determine whether the employees who failed to provide a hearing represented the state, it would not apply Parratt to determine whether the provision of a timely hearing was beyond the state's control.

Just as identifying the policymaking officials capable of providing predeprivation process is often a factual matter,\textsuperscript{430} determining whether a deprivation is attributable to a municipality as a custom or usage is a complex factual issue.\textsuperscript{431} "[M]any established state procedures may breed a certain predictable rate of deprivations which, viewed individually, appear random."\textsuperscript{432} For example, in Guenther v. Holmgren,\textsuperscript{433} the plaintiff alleged that a city's failure to train and supervise one of its police officers resulted

\textit{See id. at} 205. The Third Circuit required greater specificity in civil rights suits because it found that a substantial number of them are frivolous, vexatious, or should be litigated in state court. \textit{See id. at} 204-05. Several courts have held that a mere allegation that a policy exists is not sufficient, and have required some indication that the policy actually exists. \textit{See, e.g.,} Strauss v. City of Chicago, 760 F.2d 765, 770 (7th Cir. 1985); Nunn v. City of Chicago, 603 F. Supp. 1193, 1198 (N.D. Ill. 1985).

Such specificity should not be required for pro se complaints filed by prisoners. The Supreme Court has held that these should be liberally construed and can be dismissed for failure to state a claim only if it appears beyond a doubt that the plaintiff could prove no set of facts in support of a claim that would entitle her to relief. \textit{See Estelle v. Gamble, 429 U.S. 97, 106 (1976).}

\textsuperscript{424} \textit{See, e.g.,} Augustine v Doe, 740 F.2d 322, 328 (5th Cir. 1984) (commenting that lower courts improperly use Parratt as "a magic wand that can make any § 1983 action resembling a tort suit disappear into thin air").

\textsuperscript{426} \textit{See} supra text accompanying notes 366-68.


\textsuperscript{433} 738 F.2d 879 (7th Cir. 1984).
in the deprivation of the plaintiff's liberty without due process. The court dismissed citing *Parratt*, finding that adequate state remedies existed, without further mention of the "failure to supervise" allegation. Yet absent a finding that no set of facts could support plaintiff's allegation of municipal liability for failure to supervise, plaintiff was entitled to an opportunity to demonstrate that the city caused the deprivation. The Federal Rules of Civil Procedure did not require plaintiff to allege in detail the particulars of the claim at the pleading stage—a plaintiff may be unable to do so. The victim of an unconstitutional custom or practice may lack information regarding the particulars of the policy or other instances of its application until discovery begins.

The *Guenther* court, by failing to address the *Monell* issue, necessarily failed to resolve the *Parratt* issue. The court incorrectly considered the adequacy of state remedies without finding that the defendants' actions were random and unauthorized. If the state was capable of providing process before the deprivation occurred, *Parratt* is inapplicable and the adequacy of state remedies irrelevant. *Parratt* does not address the plaintiff's allegation that the state could have provided prior process by adequately training and supervising Officer Holmgreen.

Police misconduct cases highlight the dangers of failing to insist that the defendant meet the burden of proof on a motion to dismiss. As a threshold matter, the court may need to determine whether the complaint alleges procedural or substantive due process violations. The resolution of this issue may turn on the factual question of whether the police actions shock the conscience, and dismissal on the pleadings may therefore be inappropriate. Assuming that the complaint alleges only due process violations, the crucial issue under *Monell* may be whether a series of wrongful acts are part of a pattern of illegality of which the municipality should have known, or whether the acts are discrete and unrelated. The court must determine when to charge superior officers with notice of wrongdoing and therefore a duty to discipline subordinates and to train and supervise them to prevent further wrongdoing. If there is a material

434. See id. at 881.
435. See id. at 882.
436. See supra text accompanying notes 422-24.
437. One court has stated that no plaintiff can allege with specificity prior to discovery acts to which he or she personally was not exposed, but which provide evidence necessary to sustain the plaintiff's claim of policy or custom. Thus the particulars must await discovery, motions for summary judgment, and trial. *Means v. City of Chicago*, 535 F. Supp. 455, 460-61 (N.D. Ill. 1982).
438. See supra text accompanying notes 40-63, 238-41.
439. *Guenther* was decided before *City of Oklahoma City v. Tuttle*, 105 S. Ct. 2427 (1985), and did not discuss the issue of whether failure to train or supervise could be inferred from a single act. See *Guenther*, 738 F.2d at 881-82. Even after *Tuttle*, proof of a single act would be sufficient if coupled with independent proof of inadequate training. See supra text accompanying notes 389-403.
440. See supra note 42 and accompanying text.
441. See *Rochin v. California*, 342 U.S. 165, 172 (1952); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973); see also supra note 42.
442. See supra text accompanying notes 359-415.
dispute on these issues, Parratt dismissal is inappropriate. An erroneous Parratt dismissal immunizes the state from liability for its failure to "contain and direct" the actions of its frontline officers despite the egregious and brutal nature of those actions.

A final problem with using Parratt to dispose of claims on the pleadings concerns the adequacy of state remedies. Some circuit courts require that the plaintiff plead and prove the inadequacy of state remedies. The adequacy of state remedies may depend upon the particular facts of the plaintiff's claim and complex issues of state law such as immunities and available forms of relief. A plaintiff also may wish to pursue other theories of inadequacy, such as bias in the state forum. The plaintiff who must plead inadequacy and can raise a material issue of fact is entitled to the opportunity to prove it. Therefore, dismissal on the pleadings on grounds that an adequate state remedy exists also may be inappropriate.

The objections to dismissing complaints containing nonfrivolous Monell allegations under Parratt are not merely technical. It is proper for a claimant alleging municipal wrongdoing to bear the burden of proving the particulars of that wrongdoing. It is improper, however, for the claimant to bear the additional and perhaps insurmountable burden of proving the right to a federal forum for a federal claim. The Parratt rationale justifies assuming state adequacy, if at all, only if the government is not the wrongdoer. Therefore, the plaintiff must be allowed to prove allegations of government wrongdoing.

III. Conclusion

The procedural barriers raised by Monell to using Parratt as a docket clearing device mirror a more basic tension between the underlying assumptions of Monell and Parratt. Monell was a major step toward realizing the goals of the Civil Rights Act. It allows victims of unconstitutional

443. See McClelland v. Facteau, 610 F.2d 693, 697-98 (10th Cir. 1979) (reversing summary judgment when there was factual issue for jury whether police chief had adequate notice of police misconduct and thus had breached duty to supervise); Wilkinson v. Ellis, 484 F. Supp. 1072, 1085 (E.D. Pa. 1980) (holding disposition under Fed. R. Civ. P. (12) (b) (6) inappropriate when plaintiffs had not yet been given opportunity to produce evidence of pattern of police misconduct and of whether police commissioner had knowledge of such pattern).

444. See Parratt, 451 U.S. at 546 (Stewart, J., concurring) ("When it is possible for a State to institute procedures to contain and direct the intentional actions of its officials, it should be required, as a matter of due process, to do so.").


446. See supra note 250 and accompanying text.

447. For example, the adequacy of state remedies may turn on whether the deprivation was intentionally inflicted, because the availability of immunity may hinge on this determination. See Note, supra note 159, at 628.

448. See supra notes 159, 250, and accompanying text.

449. See id.

450. See id.

451. See supra text accompanying notes 144-53.
conduct to sue the government directly, to require that the government compensate them for its wrongs, and to encourage the government to reform its systemic flaws. *Monell* insures that violations of the fourteenth amendment will be corrected in federal court, and thus interposes the federal courts between the individual and the excesses of state power.

*Parratt*, and more recently *Davidson* and *Daniels*, begin from the antithetical assumption that state courts are presumptively adequate to remedy constitutional wrongs. If narrowly construed, these cases can successfully relegate to state court only those claimants who can be adequately compensated there and preserve the federal forum for constitutional claims. The boundary between state court cases and those that belong in federal court is the boundary between isolated, low level wrongdoing and abuse of official power. If a state has abused official power and violated the Constitution, it should not be permitted to choose whether to correct that abuse in its own courts. The interposition of the federal courts between the citizen and the abuses of the state is at the heart of both the Civil Rights Act and the fourteenth amendment.

There is a danger that federal courts will lose sight of this narrow boundary and focus instead on the notions of federalism that underscore *Parratt* and its progeny. This is dangerous because it robs the *Parratt* doctrine of all doctrinal clarity and transforms it into an impressionistic inquiry concerning whether state or federal courts should hear a particular claim. This result is irreconcilable with the Civil Rights Act and the constitutional guarantees it protects.

Although *Parratt*, *Daniels*, and *Davidson* were heralded as answers to the complicated and time-consuming issues faced by lower courts in applying section 1983, their application is not as simple as was promised. They foster the illusion of simplicity by ignoring a body of section 1983 jurisprudence, but they cannot be read in isolation from the principles of section 1983. Informed by those principles, *Parratt* and its progeny provide a useful tool for distinguishing serious abuses of state power from common-law tort claims.