Fordham Urban Law Journal

Volume 14 | Number 2 Article 6

1986

Section 1983 Actions by Family Members Based on Deprivation of the Constitutional Right to "Family Association" Resulting from Wrongful Death: Who Has Standing?

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SECTION 1983 ACTIONS BY FAMILY MEMBERS BASED ON DEPRIVATION OF THE CONSTITUTIONAL RIGHT TO "FAMILY ASSOCIATION" RESULTING FROM WRONGFUL DEATH: WHO HAS STANDING?

This then is what we offer to a man whose house has been burned, as a remedy; to the woman whose husband has been murdered, as a remedy; to the children whose father has been killed, as a remedy.[1]

I. Introduction

In 1871, in response to the tragic outbreak of violence toward blacks in the South at the end of the Civil War, violence which in large part was abetted or simply ignored by the local and state governments, Congress passed the Ku Klux Klan Act,[2] section I of which is codified in section 1983 of title 42 of the United States Code.[3] With this section Congress sought to provide remedies to those deprived of constitutional rights by others acting under color of state law.[4] Widely and extensively used since its enactment, section

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1. CONG. GLOBE, 42d Cong., 1st Sess. 807 (1871) (remarks of Congressman Butler in floor debate on Ku Klux Klan Act of 1871).

2. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1982)).

3. Section 1983 is entitled "Civil action for deprivation of rights." Section 1983 provides:

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

42 U.S.C. § 1983 (1982).

4. The Supreme Court has stated that the "central objective" of section 1983 is to "ensure that individuals whose federal Constitutional or statutory rights are abridged may recover damages or secure injunctive relief." Burnett v. Grattan, 104 S. Ct. 2924, 2932 (1984). In Allen v. McCurry, 449 U.S. 90 (1980), the Court noted "the corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the Southern States" after the Civil War. *Id.* at 98. The main objective of the act was to "override" this corrupting influence. *Id.*; *see* Mitchum v. Foster, 407 U.S. 225, 240-41 (1972); Griffin v. Breckenridge, 403 U.S. 88, 99-101 (1971); McNeese v. Board of Educ., 373 U.S. 668, 671-72 (1963); Monroe v. Pape, 365 U.S. 167, 174-80 (1961), *overruled in part sub nom.* Monell

1983 has been a particularly potent weapon in the war against civil rights invasions.[5] Recently, section 1983 has been invoked in a rather extraordinary cause of action: where the plaintiffs seek to redress deprivations of constitutional rights resulting from wrongful death.[6] The constitutional rights being asserted are not those of the decedent, however, but those of his surviving family members. Which constitutional rights are involved and to whom they extend are issues in dispute.[7] In addition, there is a question, not yet resolved by the Supreme Court, as to whether the standing rules of state wrongful death statutes should be applied in determining the standing of these family members to bring actions under section 1983.[8]

This note will set forth current doctrine regarding standing to sue in the federal courts.[9] It will then examine the issue of whether the standing requirements of state wrongful death statutes should be incorporated into these section 1983 actions.[10] After concluding that they should not, it will attempt to define the constitutional right that is being asserted by the surviving family members—in essence a right to associate with the dead family member—and will determine that such a right exists, although in an amorphous state.[11] Addressing the resulting standing issue, this note will then examine the unclear parameters of this "right," will indicate to which family members and family relationships this right has been found to extend in cases of wrongful death,[13] and will offer a suggestion as to the analysis and reasoning which should be used in making future determinations.[14]

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v. Department of Social Servs., 436 U.S. 658, 663 (1978); *see also* S.H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION, A GUIDE TO § 1983, at 3-4 (1979) [hereinafter cited as GUIDE TO § 1983].

5. *See* Note, *Limiting The Section 1983 Action In The Wake Of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1487 & n.12 (1969) (section 1983 is one of the most heavily litigated federal laws). In the year 1983 alone 38,162 suits were brought under the statute. K.C. DAVIS, CONSTITUTIONAL TORTS 213 (1984).

6. See *infra* Section II for a hypothetical scenario and Section V for a discussion of recent cases applying section 1983 to alleged deprivations of the right to parenthood, the reciprocal right of a child to associate with his parents, the right to a sibling relationship, and to rights of association outside the nuclear family.

7. *See infra* notes 115-249 and accompanying text.

8. *See infra* notes 48-111 and accompanying text.

9. *See infra* notes 18-36 and accompanying text.

10. *See infra* notes 37-114 and accompanying text.

11. *See infra* notes 115-56 and accompanying text.

12. *See infra* notes 157-249 and accompanying text.

13. *See id.*

14. *See infra* Section VI.

II. The Cause of Action

Perhaps the best way to introduce the issues is to develop a not altogether unlikely, though unfortunate, scenario and to examine the rights of the persons involved. In this scenario, a young man is shot and killed by police, apparently for no legitimate reason. He is survived by his wife, child, parents, sister, and a paternal grandfather. The young man's father, acting in his capacity as administrator of the estate, brings a wrongful death action against the police officer under the applicable state statute.[15] In this capacity, the father also brings a section 1983 action on his son's behalf for deprivation of his son's right to life.[16] These actions are brought in federal district court, with the state claim attached under the doctrine of pendent jurisdiction.[17]

There is nothing unique about what has occurred thus far. It is at this point, however, that the father does something unusual: he brings a section 1983 action in his own name and on his own behalf for deprivation of *his* constitutional rights, alleging that his constitutional right to parenthood has been deprived by his son's death. In addition, an action is brought by the decedent's child under section 1983, alleging a deprivation of his constitutional right to association with, care of and support by his father. The wife, sister and grandfather bring like actions in their own names and on their own behalves. In issue is whether any of the surviving family members have standing to bring such an action. This standing issue, though clearly involving the underlying question of the constitutionality of

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15. The fifty states, the U.S. Virgin Islands, and the District of Columbia have statutes authorizing wrongful death actions brought on behalf of the decedent's estate. Each statute lists the persons capable of maintaining the action. For example, in New York the executor or administrator of the decedent's estate may maintain the wrongful death action. N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney 1984). For a discussion of various state wrongful death statutes and those persons authorized to maintain actions thereunder, see *infra* notes 74-79 and accompanying text.

16. Generally, the courts apply the wrongful death statute of the forum state in determining who has standing to pursue the decendent's section 1983 claim for deprivation of the right to life. Typically, the personal representative or administrator of the estate of the decedent will be granted standing under the state's wrongful death statute. For a discussion of the survival of section 1983 actions based on the deprivation of the right to life due to wrongful death, see *infra* notes 48-62 and accompanying text.

17. Pendent jurisdiction exists whenever the state and federal claims "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them all in one proceeding." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); *see* C.A. WRIGHT, LAW OF FEDERAL COURTS 105 (4th ed. 1983).

the rights asserted, is distinct: there is a question, presupposing the existence of a constitutional right, of how to determine standing in this case.

III. Standing to Sue in Federal Court for Actions Brought Under Section 1983

A. Current Standing Doctrine

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[18] This question must "be considered in the framework of Article III [of the Constitution] which restricts judicial power to 'cases' and 'controversies.' "[19] Beyond that, however, Justice Douglas, writing for the Court, opined in *Association of Data Processing Service Organizations, Inc. v. Camp*,[20] that any "[g]eneralizations about standing to sue are largely worthless as such."[21] Nevertheless, Justice Douglas went on to outline a two-part test for the determination of a party's standing: (1)"whether the plaintiff alleges that the challenged action has caused him injury in fact;"[22] and (2) "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guaranty in question."[23] This test was immediately criticized in a concurring opinion by Justice Brennan, who, joined by Justice White, argued that only the first portion of the test was necessary in order to determine standing.[24] In light of this criticism and several recent Supreme Court decisions

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18. Warth v. Seldin, 422 U.S. 490, 498 (1975).

19. Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 151 (1970). In Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), the Supreme Court explained the restriction imposed on the courts by the "Case or Controversy" requirement: "The power to declare the rights of individuals and to measure the authority of governments . . . 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.' " *Id.* at 471 (quoting Chicago & Grand Trunk Railway Co. v. Wellman, 143 U.S. 339, 345 (1892)). For an examination of the theoretical underpinnings of the case or controversy requirement, see Brilmayer, *The Jurisprudence of Art. III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979).

20. 397 U.S. 150 (1970).

21. *Id.* at 151.

22. *Id.* at 152.

23. *Id.* at 153.

24. The concurring opinion appears at the end of the companion case to *Data Processing*, Barlow v. Collins, 397 U.S. 159, 167 (1970).

which made no reference to it,[25] the current validity of the "zone of interests" test has recently been called into question.[26]

In *Allen v. Wright*,[27] however, the Supreme Court reaffirmed the place of the "zone of interests" test in the conventional standing doctrine.[28] In *Allen*, the Supreme Court acknowledged that the determination of standing was far from a "mechanical exercise" and that "the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition."[29] The Court then listed these concepts,[30] taken from previous Supreme Court decisions on the issue of standing which, if combined, may serve to form a fairly rational three-part test.[31] Under this test the plaintiff must show a distinct and palpable injury to himself,[32] that this injury is caused by or is traceable to the challenged activity,[33] and that this injury is apt to be redressed by a remedy that the court is prepared to give.[34] In addition, the Court in *Allen* acknowledged several prudential considerations limiting the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint

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25. *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978).

26. The validity and consistency of use of the "zone of interests" test was questioned by the Second Circuit in B.K. Instrument, Inc. v. United States, 715 F.2d. 713, 719 (2d Cir. 1983). *Accord* 4 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 24:17 (2d ed. 1983) (questioning the current validity of the "zone of interests" test). The Second Circuit subsequently applied the "zone of interests" test, however, in Doe v. Blum, 729 F.2d 186, 189 (2d Cir. 1984).

27. 104 S. Ct. 3315 (1984).

28. Id. at 3325.

29. *Id.*

30. One concept listed by the Court in *Allen* was that "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.; see* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). The others included the "distinct and palpable injury" standard of Warth v. Seldin, 422 U.S. 490, 501 (1975), and subsequent variations on that theme (*e.g.*, injury must not be "abstract" or "hypothetical"). *Id.; see* City of Los Angeles v. Lyons, 461 U.S. 95, 100 (1983); O'Shea v. Littleton, 414 U.S. 488, 494 (1974). For a discussion of the history of standing doctrine, see C.A. WRIGHT, A.R. MILLER & E.H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3531.1 (1982) [hereinafter cited as FEDERAL PRACTICE].

31. 104 S. Ct. at 3324-25 (1984); *accord* FEDERAL PRACTICE, *supra* note 29, § 3531.1, at 390.

32. 104 S. Ct. at 3325.

33. *Id.*

34. *Id.*

fall within the *zone of interests* protected by the law invoked.[35] These prudential considerations, when examined in conjunction with the conceptual test enunciated in *Allen*, serve to form the Supreme Court's current standing doctrine.[36]

B. Standing to Sue Under Section 1983

Application of the *Allen* standing doctrine to claims brought under section 1983 indicates that only the requirements for stating a cause of action under that section need be consulted in most cases[37] to determine the standing of plaintiffs to bring such actions. In *Gomez v. Toledo*,[38] the Supreme Court concisely set forth the requirements necessary to state a cause of action under section 1983:

> By the plain terms of section 1983, two—and only two—allegations are required in order to state a cause of action under the statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.[39]

Comparing these requirements with the *Allen* standing test, it can be seen that in both cases the plaintiff must initially allege an injury.[40] The standing requirement that this injury be distinct and palpable is paralleled by the section 1983 requirement that the plaintiff allege a deprivation of a federal right.[41] In addition, the standing requirement that the plaintiff allege that the activity caused the injury, is implicit in the requirements for stating a cause of action under section 1983.[42] Finally, section 1983 is a means by which plaintiffs deprived of constitutional rights under color of state law may obtain a civil remedy "in an action at law, suit in equity, or other proper proceeding for redress."[43] Thus, in meeting the requirements for

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35. *Id.* at 3324-25; *see* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474-75 (1982).

36. *Accord* FEDERAL PRACTICE, *supra* note 30, § 3531.1 at 390.

37. A problem is presented when the plaintiff in a section 1983 action dies. When this occurs, standing is determined by looking to the standing rules of the survival and wrongful death statutes of the forum state. This will be discussed *infra* notes 48-62 and accompanying text.

38. 446 U.S. 635 (1980).

39. *Id.* at 640; *see also* Parratt v. Taylor, 451 U.S. 527, 535 (1981).

40. *See supra* notes 31, 39 and accompanying text; Allen v. Wright, 104 S. Ct. 3315, 3325 (1984); Gomez v. Toledo, 446 U.S. 635, 640 (1980).

41. *See supra* note 40.

42. *Id.* The person acting under color of state law, and his action which has allegedly deprived plaintiff of a federal right, is the cause of plaintiff's injury.

43. 42 U.S.C. § 1983 (1982); *see supra* note 3.

stating a cause of action under section 1983, the plaintiff automatically assures himself that his injury may be redressed by a remedy the court is prepared to give.

Examining the self-imposed judicial limitations enunciated in *Allen*[44] in determining a party's standing, as compared to the requirements for stating a cause of action under section 1983, it can be seen initially that section 1983 encompasses the zone of interests test. Under section 1983, the scope of actions which may be brought under the statute is limited to deprivations of federal rights under color of state law.[45] In addition, section 1983, by its terms, bars the raising of another person's legal rights by explicitly requiring that the cause of action accrue to the "party injured."[46] As a result, it is clear that only section 1983 and the requirements for stating a cause of action thereunder need be turned to in most cases in determining the standing of parties to bring actions under the statute. This last requirement, however, has created a problem in the determination of the standing of parties to bring section 1983 actions where the claim is based on wrongful death.[47]

IV. Determination of Standing to Sue Under Section 1983 Where Claim Arises From Wrongful Death

A. The Initial Question

Initially, the issue in section 1983 actions which were brought to redress deprivation of constitutional rights resulting from wrongful death was whether the action, brought on behalf of the decedent and alleging a deprivation of the right to life, could be maintained, and if so, by whom.[48] In this situation, it is clear that the decedent would have had no difficulty asserting his standing to maintain the section 1983 action.[49] The problem that arises, however, is that he obviously cannot. The resultant issue, in light of the maxim that a person may not assert the constitutional rights of another,[50] is: who may maintain the action?

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44. *See supra* note 35 and accompanying text.

45. *See supra* note 39 and accompanying text.

46. 42 U.S.C. § 1983 (1982).

47. *See infra* notes 48-82 and accompanying text.

48. The leading case addressing this issue is Brazier v. Cherry, 293 F.2d 401 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961). *See infra* notes 54-57 and accompanying text.

49. In losing his life, the decedent has clearly suffered a distinct and palpable injury. Under section 1983 this injury may be redressed in an action at law for damages.

50. Allen v. Wright, 104 S. Ct. 3315, 3325 (1984) ("general prohibition on a

Section 1983 itself provides no enlightenment as to the determination of who has standing to pursue a claim in the case of death of the plaintiff.[51] It simply states that the cause of action will accrue to the "party injured."[52] However, in order to prevent occurrence of the harsh nineteenth century common law rule that an injured party's personal claim was extinguished upon the death of either the injured party or the alleged wrongdoer,[53] the Fifth Circuit, in *Brazier v. Cherry*,[54] when confronted with a section 1983 action brought by the widow of a man beaten to death by police, turned to section 1988 of title 42 of the United States Code.[55] Under section 1988, courts determining cases based on federal law are authorized to resort to state law when the applicable federal law is "deficient in the provisions necessary to furnish suitable remedies," so long as the state law "is not inconsistent with the Constitution

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litigant's raising another person's legal rights"); United States v. Raines, 362 U.S. 17, 22 (1960) ("a litigant may only assert his own constitutional rights or immunities"). *See generally* C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS, CIVIL PRACTICE § 54, at 99 (2d ed. 1980).

51. *See* 42 U.S.C. § 1983 (1982).

52. *Id.*

53. W.P. KEETON, PROSSER AND KEETON ON TORTS, 940-42 (5th ed. 1984). Under early English common law, three restrictive rules concerning the death of a person in personal injury cases were enforced:

> 1. If the tortfeasor died before the victim recovered for the tort, the victim's right of action died with him.
> 2. If the victim of a tort himself died (from whatever cause) before he recovered in tort, the victim's right of action also died.
> 3. If the tortfeasor caused a victim's death, relatives and dependents of the victim who were deprived of financial support or who suffered emotional loss, had no cause of action of their own.

Id. at 940 (footnotes omitted).

54. 293 F.2d 401 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961).

55. Section 1988 is entitled "Proceedings in vindication of civil rights," and states in pertinent part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

42 U.S.C. § 1988 (1982).

and the laws of the United States."[56] Finding section 1983 to be deficient in providing for survival of such actions, the court in *Brazier* circumvented the survivorship and standing problems by looking to the state survival and wrongful death statutes and applying those standing rules.[57] In *Moor v. County of Alameda*,[58] the United States Supreme Court noted, with apparent approval, the method followed in *Brazier*[59] and later adopted this method in *Robertson v. Wegmann*.[60] Consequently, plaintiffs who die as a result of the infringement of their constitutional rights do not lose the right to have their section 1983 claims pursued.[61] This, as noted in *Brazier*, is clearly the correct result, and in keeping with the purposes of section 1983.[62]

B. The Paradox

The principle of incorporating into section 1983 the standing provisions of state survival and wrongful death statutes so as to prevent loss of the action by the injured party, has subsequently been applied to determine the standing of surviving family members to bring section 1983 actions on their own behalves.[63] This was initially done by the Eighth Circuit in *Mattis v. Schnarr*,[64] where the court applied the standing rules of Missouri's wrongful death statute[65] to determine whether a father had standing to bring a

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56. *Id.*

57. 293 F.2d 401, 408-09 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961); *see* GUIDE TO § 1983, *supra* note 4, §§ 3.16-.17.

58. 411 U.S. 693.

59. *Id.* at 702 n.14; *see* GUIDE TO § 1983, *supra* note 4, § 3.16, at 89 n.191.

60. 436 U.S. 584 (1978). In *Robertson*, the Supreme Court noted that "federal law simply does not 'cover every issue that may arise in the context of a federal civil rights action,' " *id.* at 588 (quoting Moor v. County of Alameda, 411 U.S. 693, 702 (1973)), and "[w]hen federal law is thus 'deficient,' § 1988 instructs us to turn to 'the common law, as modified and changed by the constitution and statutes of the [forum] State,' as long as these are 'not inconsistent with the Constitution and laws of the United States.' " *Id.* (quoting 42 U.S.C. § 1988 (1982)).

61. GUIDE TO § 1983, *supra* note 4, § 3.16.

62. In ruling that the standing rules of the Georgia survival statute should be applied so as to allow the action to survive the injured party's death, the Fifth Circuit stated in *Brazier*: "[I]t defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes against the peril of death." Brazier v. Cherry, 293 F.2d 401, 404 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961).

63. *See* Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974); Smith v. Wickline, 396 F. Supp. 555 (W.D. Okla. 1975).

64. 502 F.2d 588 (8th Cir. 1974).

65. MO. ANN. STAT. § 537.080 (West Supp. 1985).

section 1983 action for a declaratory judgment as to the unconstitutionality of a Missouri statute authorizing the use of deadly force.[66] The father's action was precipitated by the shooting death of his son by police.[67] He was found to have standing to bring the action in his own right and on his own behalf based, in part, on the fact that under the Missouri wrongful death statute[68] the parents of a deceased minor have standing to bring a wrongful death action on the child's behalf.[69]

In *Smith v. Wickline*,[70] this method of determining the standing of family members seeking to bring section 1983 actions for deprivation of the constitutional right to association resulting from wrongful death was applied in a similar fashion. The District Court for the Western District of Oklahoma also found that the parents of a minor shot and killed by police had standing to bring a section 1983 action in their own right.[71] The *Smith* court, in so finding, referred to the Eighth Circuit's reasoning in *Mattis* and applied the standing rules of Oklahoma's wrongful death statute.[72] Although the surviving family members who brought these section 1983 actions were found to have standing, it is important to note that these cases stand for the proposition that a determining factor is the applicable wrongful death statute of the forum state. If this method were regularly applied in such cases, the ultimate result would be inconsistent with the policies and purposes of section 1983.[73]

C. Standing Rules of the State Wrongful Death Statutes and the Effect of Incorporation into Section 1983

In the United States,[74] there are presently twenty wrongful death statutes which provide that the only person entitled to bring a wrongful death action is the personal representative, executor or administrator of the estate of the decedent.[75] In five other states,

66. *Mattis*, 502 F.2d at 593.
67. *Id.* at 591.
68. MO. ANN. STAT. § 537.080 (West Supp. 1985)
69. 502 F.2d 593-95. The court in *Mattis* also considered whether the killing of plaintiff's son invaded plaintiff's constitutional rights under the due process clause of the fourteenth amendment. *See infra* notes 160-91 and accompanying text.
70. 396 F. Supp. 555 (W.D. Okla. 1975).
71. *Id.* at 560.
72. *Id.* at 558-60.
73. *See infra* notes 74-85 and accompanying text.
74. This includes Puerto Rico, the Virgin Islands, and the District of Columbia.
75. *See* CONN. GEN. STAT. ANN. § 52-555 (West Supp. 1985); D.C. CODE ANN.

the parents may also bring the action, but they may do so only on behalf of a minor child.[76] Several state statutes contain finely detailed lists of who has standing and who would be next in line if such person or persons were not available, chose not to bring the action, or simply did not exist at the time of the death.[77] In Hawaii, the spouse, children, parents or any dependent of the decedent has standing.[78] Only in Delaware, however, does the statute provide that all persons injured may maintain the action.[79]

Incorporation of the standing rules of wrongful death statutes into section 1983 actions brought by persons alleging a deprivation of the constitutional right to associate with family members resulting from wrongful death, would thus result, in many cases, in an outright denial of standing even prior to any consideration of whether such a constitutional right exists. This is so because of the fact that a person may not sue to redress a deprivation of the constitutional

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§§ 16-2701 to -2703 (1981); FLA. STAT. ANN. § 768.20 (West Supp. 1985); ILL. ANN. STAT. ch. 70, §§ 1, 2 (Smith-Hurd 1959 & Supp. 1985); ME. REV. STAT. ANN. tit. 18-A, § 2-804 (1981 & West Supp. 1984); MASS. ANN. LAWS ch. 229, § 2 (Michie/Law. Co-op. Supp. 1985); MICH. COMP. LAWS ANN. § 600.2922 (West 1968 & Supp. 1985); NEB. REV. STAT. §§ 30-809, 30-810 (1979); N.H. REV. STAT. ANN. § 556:12 (1974); N.J. STAT. ANN. tit. 2A, ch. 31, § 2 (West 1952); N.M. STAT. ANN. § 41-2-3 (1982) (except where wrongful death action is brought against a common carrier); N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney 1984); N.C. GEN. STAT. § 28A-18-2 (1984); OHIO REV. CODE ANN. § 2125.02 (Page Supp. 1984); OKLA. STAT. ANN. tit. 12, § 1053 (West Supp. 1984); OR. REV. STAT. § 30.020 (1983); S.C. CODE ANN. § 15-51-20 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. § 21-5-5 (1979); VT. STAT. ANN. tit. 14, § 1492 (1974 & Supp. 1984); VA. CODE § 8.01-50 (1984); V.I. CODE ANN. tit. 5, § 76 (Equity Supp. 1984); W. VA. CODE § 55-7-6 (Michie Supp. 1985); WYO. STAT. § 1-38-102 (Michie Supp. 1985).

In Minnesota, a wrongful death action may only be brought by a "trustee" who is appointed by the court on petition of the surviving spouse or next of kin. MINN. STAT. ANN. § 573.02 (West Supp. 1985).

76. *See* ALA. CODE §§ 6-2-38, 6-5-391 (1977); ALASKA STAT. §§ 9.15.010, 9.55.580 (1983); IND. CODE ANN. §§ 34-1-1-2, 34-1-1-8 (Burns Supp. 1985); IOWA CODE ANN. §§ 611.20, 611.22, 613.15 (West 1950 & Supp. 1985); IOWA R. CIV. P. 8.

In Washington, parents may also bring a wrongful death action for the death of a child who is not a minor, but only if they were dependent on that child for support. WASH. REV. CODE ANN. § 4.24.010 (1962 & West Supp. 1985). Otherwise, they are restricted to bringing such actions only upon the death of a minor child.

77. *See* COLO. REV. STAT. § 13-21-203 (1973); GA. CODE ANN. §§ 51-4-2, 51-4-4 (Michie & Supp. 1985); LA. CIV. CODE ANN. art. 2315 (West Supp. 1985); MO. ANN. STAT. § 537.080 (West Supp. 1985); N.D. CENT. CODE § 32-21-03 (1976); TENN. CODE ANN. §§ 20-5-107, 20-5-110 (1980); WIS. STAT. ANN. § 895.04 (West 1983 & Supp. 1984).

78. HAWAII REV. STAT. § 663-3 (1976).

79. DEL. CODE ANN. tit. 10, §§ 3721-25 (Michie Supp. 1984).

rights of another.[80] As a result, even if any surviving family member of a person killed by someone acting under color of state law was successful in having himself named executor, administrator or personal representative of the estate of the decedent, he would not be able to assert a claim for deprivation of his *own* rights.[81] Assuming that the right to family association does in fact exist, incorporation of the standing rules of state wrongful death statutes into these section 1983 actions would thus arbitrarily deprive many individuals, including, in some cases, entire familial classes, of a remedy for deprivation of their constitutional rights.[82]

D. Section 1988 and the Question of Inconsistency

Section 1983 was created, in part, to serve a remedial function by granting individuals a right to bring a civil action in federal court against those persons who, while acting under color of state law, deprive them of their constitutional rights.[83] In addition, a reading of the legislative history surrounding the Ku Klux Klan Act[84] makes it clear that a primary factor contributing to its passage was an expectation of its deterrent effect on state endorsed violence.[85] These purposes would, to a great extent, be defeated if the standing

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80. *See supra* note 50.

81. The constitutional component of standing doctrine requires that the plaintiff show a distinct and palpable injury to himself; that this injury was caused by the challenged activity; and that this injury is apt to be redressed by a remedy that the court is prepared to give. *See supra* notes 32-34 and accompanying text. A party suing in his capacity as executor, administrator or personal administrator of an estate will not be alleging a direct and palpable injury to himself—in this case the estate of the decedent—by alleging a deprivation of his own constitutional rights. As a result, the executor, administrator or personal representative of an estate will only have standing to assert the claims of the decedent or his estate while acting in such capacity.

82. For example, in those states in which the personal representative of the decedent is the only entity which may maintain a wrongful death action, *see supra* note 75, no familial class would have a right to seek a remedy for deprivation of the right to family association due to wrongful death. In those states in which the only family members entitled to maintain a wrongful death action are the parents of the decedent, *see supra* note 74, all other familial classes would be without a remedy for this constitutional infringement.

83. *See supra* note 4.

84. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1982)).

85. "[D]eterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983." City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 268 (1981); *see* Owen v. City of Independence, 445 U.S. 622, 651 (1980); Robertson v. Wegmann, 436 U.S. 584, 591 (1978). The Seventh Circuit, in *Bell v. City of Milwaukee,* stated:

> The legislative history behind Section 1983 expresses an unequivocal

rules of state wrongful death statutes were applied regularly in the determination of the standing of surviving family members to bring section 1983 actions for deprivation of the constitutional right to family association resulting from wrongful death.

Under section 1988, incorporation of state law into federal law is to be abandoned where the result is "inconsistent with the Constitution and laws of the United States . . . ."[86] The Supreme Court addressed the issue of inconsistency in *Robertson v. Wegmann*,[87] and noted that

> [i]n resolving questions of inconsistency between state and federal law raised under § 1988, courts must look not only at particular federal statutes and constitutional provisions, but also at "the policies expressed in [them]." Of particular importance is whether application of state law "would be inconsistent with the federal policy underlying the cause of action under consideration.". . . [T]his Court has accorded [section 1983] "a sweep as broad as [their] language."[88]

Considering this broad sweep and the obvious inconsistency with the purposes of section 1983 engendered by incorporation, section 1988 may very well be read to discourage incorporation of the standing rules of state wrongful death statutes into the section 1983 actions of surviving family members suing on their own behalves.

The Supreme Court was presented with an opportunity to resolve this issue in *Jones v. Hildebrant*,[89] where a mother of a minor son

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concern for protecting life. President Grant's message to Congress which inspired the Ku Klux Klan Act's passage specifically referred to "[a] condition of affairs in some States of the Union rendering *life* and property insecure * * *." Cong. Globe, 42d Cong. 1st Sess. 244 (1871) (emphasis added). Floor debates on the bill frequently reflected this theme. *See, e.g.*, Statements of Rep. Stoughton, *id.* at 321-322 (the purpose of the Ku Klux Klan Act is to provide federal protection for "life, person, and property."); Statements of Rep. Lowe, *id.* at 447 ("[W]hile murder is stalking abroad in disguise, while whippings and lynchings and banishments have been visited on unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective.").

746 F.2d 1205, 1239 (7th Cir. 1984).

86. 42 U.S.C. § 1988 (1982).

87. 436 U.S. 584 (1978).

88. *Id.* at 590 (citations omitted). In *Robertson*, the Court considered the survival of a section 1983 claim which did not result from the decedent's death. Though the Court allowed the action to abate under the applicable state survival statute, the Court noted that the result might be different (i.e., a finding of inconsistency) if the challenged activity had caused the plaintiff's death. *Id.* at 592.

89. 432 U.S. 183 (1977).

shot by police sought to maintain a section 1983 action on her own behalf, independent of the remedial aid of the Colorado wrongful death statute.[90] The Court left the issue unresolved, however, and dismissed certiorari as having been improvidently granted because the issue, though raised in oral argument before the Court, was not the issue for which certiorari was originally granted.[91] In the Court's order for dismissal, it took pains to point out that it did "not intimate, or decide, that a section 1983 claim based on [deprivation of the right to family association] . . . would require remedial assistance from the state wrongful-death statute . . . ."[92] Nevertheless, the Court's decision clearly implied that the application of a wrongful death statute to a section 1983 claim, based on the right of the surviving family member to associate with the decedent, would be inappropriate.[93]

Although the issue currently remains unresolved by the Supreme Court, there has been a developing backlash against incorporation of the wrongful death statute standing rules under section 1988. In *Evain v. Conlisk*,[94] decided prior to *Hildebrant* and *Robertson*, the District Court for the Northern District of Illinois looked simply to the basis of the constitutional right alleged in denying standing to pursue a section 1983 action to the daughter of a man killed by police for deprivation of her right to family association.[95] The court in *Evain* denied standing because they found that the daughter had not been deprived of any constitutional right as a result of her father's death.[96] In *Jones v. McElroy*,[97] also decided prior to *Hildebrant* and *Robertson*, the Pennsylvania district court applied the *Data Processing* test[98] to determine whether the parents and sister of a boy shot and killed by police had standing to bring a section 1983 action.[99]

More recently, courts have looked to the requirements for stating a cause of action under section 1983 to determine whether surviving family members have standing to bring section 1983 actions where

90. *Id.* at 185.
91. *Id.* at 189.
92. *Id.* at 188.
93. *Id.* at 185-86.
94. 364 F. Supp. 1188 (N.D. Ill. 1973).
95. *Id.* at 1191-92.
96. *Id.*
97. 429 F. Supp. 848 (E.D. Pa. 1977).
98. *See supra* notes 22, 23 and accompanying text.
99. 429 F. Supp. at 851.

deprivation of the constitutional right to family association resulting from wrongful death is alleged. The Supreme Court of Colorado did this in *Espinoza v. O'Dell*,[100] in a section 1983 action brought by the children of a victim of a police shooting.[101] Likewise, in *Bell v. City of Milwaukee*,[102] the Wisconsin district court, in an action by both the estate of the father of the decedent and the decedent's siblings, looked solely to section 1983 to determine the plaintiffs' standing.[103] In *Bell*, the court specifically noted that "42 U.S.C. § 1988 directs a court to turn to state law where federal law does not provide a rule of decision." [104] "But," the court continued, "whether a person has a cause of action under § 1983 is an issue for which § 1983 itself provides the rule of decision."[105]

Finally, in *Logan v. Hollier*,[106] the Fifth Circuit vacated and remanded a Louisiana district court decision denying a parent's individual standing to bring a section 1983 claim for deprivation of her constitutional rights resulting from the death of her daughter at the hands of police.[107] The district court had dismissed the mother's section 1983 claim pursuant to the Lousiana wrongful death statute[108] which, at the time the case was decided, prescribed that the mother of a decedent would be pre-empted from filing a wrongful death action if the decedent was survived by a child.[109] The Fifth Circuit, in vacating the district court's decision, remanded the case for determination of the parent's individual right, separate and apart from the Louisiana wrongful death statute, in order to determine plaintiff's standing under section 1983.[110] The *Logan* court noted as "particularly pertinent" to its decision the Supreme Court's decision in *Hildebrant*, which the court felt had cast into doubt the necessity of turning to a state wrongful death statute in order to bring a section 1983 claim for deprivation of the constitutional right of a surviving family member to family association.[111]

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100. 633 P.2d 455 (Colo. 1981), *cert. dismissed*, 456 U.S. 430 (1982).
101. 633 P.2d at 462.
102. 536 F. Supp. 462 (E.D. Wis. 1982), *modified*, 746 F.2d 1205 (7th Cir. 1984).
103. 536 F. Supp. at 468.
104. *Id.*
105. *Id.*
106. 711 F.2d 690 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1909 (1984).
107. *Id.* at 691.
108. LA. CIV. CODE ANN. art. 2315 (West 1979). The current statute may be found at LA. CIV. CODE ANN. art. 2315 (West Supp. 1985).
109. 711 F.2d at 690.
110. *Id.*
111. *Id.* at 691.

E. The State of the Law

The issue of whether to incorporate the standing rules of state wrongful death statutes into section 1983 actions by family members claiming deprivation of the right to family association resulting from wrongful death remains unresolved by the Supreme Court. However, in recent years, the lower courts have consistently decided the issue in favor of looking to the requirements for stating a cause of action under section 1983 as the sole determinant of standing.[112] Considering the parallel between these requirements and the standing test set forth by the Supreme Court,[113] this seems to be a logical course. In addition, the Supreme Court's decisions in *Robertson* and *Hildebrant*, although not dispositive of the issue, may be regarded as tacit approval of this method.[114] Therefore, the only remaining issue to be confronted is whether the constitutional right to family association actually exists.

V. Family[115] Members' Constitutional Right to Association

A. Introduction

At the heart of a section 1983 claim is the allegation that the individual bringing it has been deprived of a federal right.[116] The family member seeking standing to bring a section 1983 action on his own behalf due to wrongful death is asserting, in one form or another, that his right to associate with the deceased family member has been deprived because of the wrongful death.[117] He may assert,

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112. *See supra* notes 100-11 and accompanying text.

113. *See supra* notes 37-46 and accompanying text.

114. *See supra* notes 87-93 and accompanying text.

115. The word "family" is a derivation of the Latin "familia" which originally signified the servants belonging to one master. The meaning was gradually broadened to include the master's wife, children, and all persons related to him by blood or marriage. Einbinder, *The Legal Family—A Definitional Analysis*, 13 J. FAM. L. 781 (1973).

116. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

117. In an article examining the freedom of "intimate association," which was seen as an outgrowth of Griswold v. Connecticut, 381 U.S. 479 (1965), an "intimate association" was described as "a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship." Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 629 (1980). The author noted that "The simplest and most obvious value embraced in the idea of intimate association is the opportunity to enjoy the society of certain other people." *Id.* at 630. It "implies, an expectation of access of one person to another particular person's physical presence, [or] some opportunity for face-to-face encounter." *Id.* (footnote omitted).

depending upon his relationship to the decedent, the right to parenthood,[118] the right to a sibling relationship,[119] or even the right of a grandfather to associate with his grandchild.[120] The "right to family association" arguably embraces all of these rights,[121] yet there is no mention of this right in the Constitution.[122] Its limits, if any, are undefined.[123] As a result, in considering the issue of standing of family members to bring such actions, it must first be determined on what grounds the right is based. Assuming this basis is defensible, it must then be determined to which family members the constitutional protection extends.

B. The Basis and Scope of the Right

The right to association of family members has its basis in a series of Supreme Court decisions in which the right was not only recognized but, in some cases, quite eloquently stated. The right was first recognized in *Meyer v. Nebraska*,[124] where the Court, in examining the fourteenth amendment's due process protection of life, liberty, and property, stated:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right . . . to marry, establish a home and bring up children . . . .[125]

Two years later, in *Pierce v. Society of Sisters*,[126] the Court recognized the "liberty of parents and guardians to direct the upbringing and education of children under their control."[127] In *Prince v. Massachusetts*,[128] the Court took note of these prior decisions and

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118. *See infra* notes 160-91 and accompanying text.
119. *See infra* notes 202-24 and accompanying text.
120. *See infra* notes 231-49 and accompanying text.
121. *See infra* notes 124-56 and accompanying text.
122. The right to family association is based on the due process clause of the fourteenth amendment and its protection of life, liberty and property. See *infra* notes 124-156 for a discussion of the basis of this right.
123. *See supra* note 156 and accompanying text.
124. 262 U.S. 390 (1923).
125. *Id.* at 399.
126. 268 U.S. 510 (1925). In *Pierce*, the Court found unconstitutional a statute which required students to attend public rather than private schools. *Id.* at 534-35.
127. *Id.* at 534-35.
128. 321 U.S. 158 (1944).

stated that the *Meyer* and *Pierce* decisions had "respected the private realm of family life which the state cannot enter."[129]

The parent-child relationship was shown particularly great respect in two subsequent decisions. In *Skinner v. Oklahoma*,[130] the Supreme Court found an Oklahoma statute authorizing the sterilization of habitual criminals to be unconstitutional.[131] In so finding, the Court referred to the right to procreation as one of the "basic civil rights of man."[132] Logically, such a "basic civil right" should not terminate upon the birth of the offspring. This reasoning was subsequently confirmed in *May v. Anderson*,[133] where the Court stated that the rights of parents "to the care, custody, management and companionship" of their children were "[r]ights far more precious . . . than property rights."[134]

Despite its favorable words, however, the Supreme Court had stopped short of recognizing the right to family association as a right protected by the Constitution. However, in *Griswold v. Connecticut*,[135] the Court took a decisive step in according constitutional protection to rights long recognized as basic civil rights, but not clearly enunciated as such in the Constitution. In *Griswold*, the Court determined that the "specific guarantees in the Bill of Rights" are not restricted by their wording, but "have penumbras, formed by emanations from those guarantees that help give them life and substance."[136] Applying this concept to the right to family association, it would seem that the Supreme Court has continually recognized this right to be within the penumbra of the due process guarantees of the fourteenth amendment, and thus, a constitutionally protected right.

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129. *Id.* at 166. The Court in *Prince* upheld the application of a law prohibiting the sale of merchandise by minors in public places to a nine-year-old child who was distributing religious literature with her guardian, noting that despite the Court's respect for the "private realm of family life," "the family itself is not beyond regulation in the public interest . . . ." *Id.* In this case, the majority found the state's interest in the health and well-being of young people to be significant. *Id.* at 166-67.

130. 316 U.S. 535 (1942).

131. *Id.* at 541.

132. *Id.*

133. 345 U.S. 528 (1953).

134. *Id.* at 533. In *May*, the Court held that an Ohio court, in a habeas corpus proceeding attacking the right of a mother to retain possession of her minor children, was not bound by the full faith and credit clause to give effect to a Wisconsin decree awarding custody of the children to their father, where that decree was obtained by the father in an *ex parte* divorce action in a Wisconsin court that had no personal jurisdiction over the mother. *Id.* at 534-35.

135. 381 U.S. 479 (1965).

136. *Id.* at 484.

This recognition has continued unabated. In *Stanley v. Illinois*,[137] the Court invalidated a statute which denied a hearing to the father of illegitimate children prior to their adoption by another person.[138] In so doing, the Court noted that "[t]he private interest . . . of a man in the children he has sired and raised, undeniably warrants deference and . . . protection."[139] In *Quilloin v. Walcott*,[140] the Supreme Court acknowledged that it had "recognized on numerous occasions that the relationship between parent and child is constitutionally protected."[141] Finally, in *Moore v. City of East Cleveland*,[142] a case decided one year prior to *Quilloin*, the Court, in a plurality decision, delivered its most powerful and encompassing statement to date concerning the constitutional right to association of family members. In striking down an East Cleveland housing ordinance limiting the occupancy of a dwelling unit to members of a single family—with "family" defined to include only a few categories of related individuals[143]—the Court recalled all of the previous

137. 405 U.S. 645 (1972).

138. *Id.* at 658.

139. Id. at 651.

140. 434 U.S. 246 (1978).

141. *Id.* at 255. In *Quilloin*, the Court unanimously rejected the claim of an illegitimate child's father, who sought to veto the adoption of that child by the husband of the natural mother. *Id.* at 256.

In a more recent decision, Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984), the Supreme Court considered the right to family association as part of the more encompassing freedom of intimate association. In determining that application of the Minnesota Human Rights Act to compel the Jaycees to accept women as regular members did not infringe the members' freedom of intimate association or their freedom of expressive association, the Court noted that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State . . . ." *Id.* at 3249. Family relationships, because they include such "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life," were included in this category. *Id.* at 3250.

142. 431 U.S. 494 (1977).

143. The ordinance, section 1341.08 of the Housing Code of the City of East Cleveland, provided:

> "Family" means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:
> (a) Husband or wife of the nominal head of the household.
> (b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.
> (c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

decisions upon which the family right to association was premised,[144] and then boldly stepped forward.[145]

In *Moore*, a grandmother was convicted of criminal violation of the city ordinance because she refused to remove from her home her grandson who, along with his father, had come to live with her after his mother's death.[146] She argued that this violated her constitutional right to associate with her grandchildren[147] and the defendant, City of East Cleveland, responded that none of the decisions recognizing the right to family association had determined that the boundaries of this right extend beyond the nuclear family.[148] In a powerful and extensive rebuttal to the defendant's position, Justice Powell, writing for the Court, replied that although it was true that those cases "did not expressly consider the family relationship presented [in *Moore*], . . . unless we close our eyes to the basic reason why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case."[149] Quoting a long passage from Justice Harlan's dissenting opinion in *Poe v. Ullman*[150] describing the Supreme Court's function under the due process clause,[151]

(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

(e) A family may consist of one individual.

CITY OF EAST CLEVELAND, HOUSING CODE § 1341.08 (1966).

144. 431 U.S. 494, 499-500 (1977); *see supra* notes 124-39 and accompanying text.

145. In an analysis of the two lines of substantive due process decisions by the Supreme Court involving family interests and privacy interests, it was noted that neither of the two lines of decisions provided direct support for Justice Powell's opinion in *Moore*, and thus that *Moore* represented a "significant expansion" in the scope of substantive due process. Casenote, *Constitutionally Protected Notions of Family:* Moore v. City of East Cleveland, 19 B.C.L. REV. 959, 960 (1978).

146. 431 U.S. at 497.

147. *Id.* at 496.

148. *Id.* at 500.

149. *Id.* at 500-01.

150. 367 U.S. 497 (1961).

151. The quoted passage contains a long and eloquent description of the Supreme Court's function under the due process clause:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty

Justice Powell employed the doctrine of substantive due process[152] in identifying the due process clause of the fourteenth amendment as the guarantor not only of the specific rights set forth in the Constitution, but also of the natural rights of man.[153] Noting that history cautions that substantive due process is a "treacherous field" which must be entered into with "restraint,"[154] he nevertheless stated that

> it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family.
>
> . . . .

> of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.
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> . . . [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Moore, 431 U.S. at 501-02 (quoting Poe v. Ullman, 367 U.S. 497, 542-43 (Harlan, J., dissenting) (footnote omitted)).

152. Substantive due process has been described as a reflection of the philosophies of Locke, Blackstone, and Rousseau, blending "several related elements—the original equality and independence of the individual, the sovereignty of the people (before as well as after government is established), limited government by consent of the governed for purposes determined by them, and rights retained under government." Henkin, *Privacy And Autonomy*, 74 COLUM. L. REV. 1410, 1412 (1974). The doctrine of substantive due process is rooted in the opinion of Justice Chase in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). In *Calder*, Justice Chase proposed that the proper role of the Supreme Court was to invalidate legislation which the Justices believed interfered with the rights that natural law had vested in the people. *Id.* at 388. For a brief history of substantive due process analysis through *Moore*, see Casenote, *Constitutionally Protected Notions of Family:* Moore v. City of East Cleveland, 19 B.C.L. REV. 959, 962 n.26 (1978). *See also* J. NOWAK, R. ROTUNDA & J.N. YOUNG, CONSTITUTIONAL LAW 425-51 (2d ed. 1983).

153. *See* Moore v. City of East Cleveland, 431 U.S. 494, 501-02 (1977).

154. *Id.* at 502.

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. . . . Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family.[155]

In *Moore*, the Supreme Court acknowledged the right to family association to be a constitutional right the bounds of which extend beyond the nuclear family. In so doing, however, the Court neither defined nor set any limits upon this right.[156] As a result, the courts below have been left with the task of determining to whom the right extends.

C. To Whom Does the Right Extend?[157]

The issue of standing to sue under section 1983 for deprivation of the right to family association resulting from the wrongful death of a family member has been confronted by the courts in a surprisingly limited number of reported cases. Nevertheless, in determining to which family members and family relationships the right to family association extends, there have been several sharply contrasting decisions.[158]

1. Parents And Children[159]

In *Mattis v. Schnarr*,[160] the Eighth Circuit was confronted with a section 1983 claim for deprivation of the right to parenthood by

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155. *Id.* at 502-05 (footnote omitted).

156. This has been noted in previous analyses of the Supreme Court's decision in *Moore*. *See* Casenote, *Constitutionally Protected Notions of Family:* Moore v. City of East Cleveland, 19 B.C.L. REV. 959, 973 (1978); Comment, Moore v. City of East Cleveland: *Preserving Endangered Families*, 15 URB. L. ANN. 337, 348 (1978).

157. This analysis will focus on only a small number of family groups: parents, children, siblings, spouses, grandparents and grandchildren. There are no reported cases in which a deprivation of the right to family association due to wrongful death has been asserted by a family member outside of these groups.

158. *See infra* notes 160-249 and accompanying text.

159. The reciprocity of associational rights involved in the parent-child relationship requires that an analysis of those rights be treated in a single section. See *infra* notes 192-201 and accompanying text for a discussion of the reciprocal nature of parent and child rights to family association.

160. 502 F.2d 588 (8th Cir. 1974).

the father of a minor who was shot and killed by police.[161] The Eighth Circuit found, in *Mattis*, that there was indeed such a constitutionally protected right and, in support of its holding, cited the Supreme Court's decisions in *Meyer v. Nebraska*[162] and *Griswold v. Connecticut*,[163] as well as a passage from the Bible.[164] "The familial relationship," the court stated, "is fundamental to our civilization."[165] And the "practical effect" of the police officer's act, though directed at the decedent rather than the plaintiff father, was to "deny the plaintiff the fundamental right to raise his son."[166]

The *Mattis* decision had a strong influence on the outcome of two subsequent cases. In *Smith v. Wickline*,[167] the District Court for the Western District of Oklahoma, quoting extensively from *Mattis*, found that the parents of a minor shot and killed while fleeing from police, had standing to seek a declaration of the unconstitutionality of Oklahoma statutes permitting the use of deadly force.[168] In *Jones v. McElroy*,[169] the District Court for the Eastern District of Pennsylvania also found the parents of a child killed by police to have standing to bring a section 1983 action on their own behalves.[170] The court in *Jones* noted that the Third Circuit had not yet decided the issue of standing to assert a section 1983 claim for deprivation of the constitutional right to parenthood, but considered the reasoning in *Mattis* to be persuasive.[171]

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161. *Id.* at 590.
162. 262 U.S. 390 (1923).
163. 381 U.S. 479 (1965).
164. 502 F.2d at 594.
165. *Id.*
166. *Id.* at 595.
167. 396 F. Supp. 555 (W.D. Okla. 1975).
168. *Id.* at 565.
169. 429 F. Supp. 848 (E.D. Pa. 1977).
170. *Id.* at 853.
171. *Id.* at 852-53. The decision in *Jones* was rendered despite two previous decisions by the District Court for the Eastern District of Pennsylvania which had determined that parents may not maintain a civil rights action for the wrongful death of a child. Anderson v. Erwin, No. 76 Civ. 2020 (E.D. Pa. Dec. 20, 1976) (Van Artsdalen, J.); Strickland v. City of Easton, No. 75 Civ. 93 (E.D. Pa. Oct. 27, 1976) (Fullam, J.). The *Jones* court, however, argued that these decisions misapplied the Third Circuit's holding in Denman v. Wertz, 372 F.2d 135 (3d Cir.) (per curiam), *cert. denied*, 389 U.S. 941 (1967). *Jones*, 429 F. Supp. at 852-53. In *Denman*, an estranged husband took his children from his wife's custody in Ohio, and attempted to transport them to Massachusetts. *Denman*, 372 F.2d at 135. As the children were passing through Pennsylvania, they were picked up by the police and returned to their mother. *Id.* The estranged husband brought suit under 42 U.S.C. §§ 1983, 1985, claiming that the officers had thereby deprived him of his constitutional rights. *Id.* The court affirmed the district court's dismissal for failure to state a cause of action under those sections, *id.* at 135-36, and

Several Colorado district court decisions have discussed the constitutional underpinnings of both the parent-child relationship[172] and the sibling relationship.[173] In *Jackson v. Marsh*,[174] the Colorado district court determined that there was no constitutionally protected right to parenthood.[175] *Jackson* involved section 1983 actions brought by and on behalf of the parents of a son shot and killed by a Colorado police officer.[176] The *Jackson* court, in denying standing, reviewed the Supreme Court decisions upon which the right is arguably based, and determined that the Supreme Court in those decisions was merely trying "to preserve the family unit by protecting it from governmental invasions which, by their very nature, either inhibit the creation of the family or abrogate to the government those decisions which must be reserved to family members."[177] The distinguishing factor emphasized by the *Jackson* court was that none of the Supreme Court decisions relied upon for support of a constitutional right to parenthood had found a family member to have an individual right, arising from the family relationship, which could be asserted against another individual.[178] Subsequently, in *White v.*

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determined that plaintiff had been deprived of no rights by the officers' actions. *Id.* In *Jones*, the Pennsylvania district court proposed that the *Anderson* and *Strickland* decisions had erred in considering *Denman* as controlling, because the plaintiff there "had abducted and unlawfully taken the children away from their mother, to whom legal custody had been awarded." *Jones*, 429 F. Supp. at 852-53. Thus, the police in *Denman* had not deprived the plaintiff father of any right. *Id.* at 853. "That situation," the *Jones* court concluded, "is simply inapposite to the total deprivation of parental rights caused by death . . . ." *Id.*

The Fifth Circuit has, thus far, also refrained from deciding the issue of standing to assert a section 1983 claim for deprivation of the right to parenthood. However, in Logan v. Hollier, 711 F.2d 690 (5th Cir. 1983), *cert. denied sub nom.* Spencer v. Logan, 104 S. Ct. 1909 (1984), it gave strong consideration to the possible existence of a constitutional right to parenthood. *Id.* at 691. *Logan,* a case involving a woman whose daughter was killed by police, was remanded for determination of whether the mother in fact had standing to bring a section 1983 action on her own behalf. *Id.* In issuing the order to remand, the court noted that the Supreme Court had spoken of the "relationship between parent and child in ringing tones." *Id.*

172. White v. Talboys, 573 F. Supp. 49 (D. Colo. 1983); Jackson v. Marsh, 551 F. Supp. 1091 (D. Colo. 1982).

173. Sager v. City of Woodland Park, 543 F. Supp. 282 (D. Colo. 1982); Sanchez v. Marquez, 457 F. Supp. 359 (D. Colo. 1978). See *infra* notes 202-10 and accompanying text for a discussion of these cases in relation to the constitutional protection accorded to the sibling relationship.

174. 551 F. Supp. 1091 (D. Colo. 1982).

175. *Id.* at 1094.

176. *Id.* at 1092.

177. *Id.* at 1094.

178. *Id.*

Talboys,[179] the Colorado district court cited the reasoning in *Jackson* in denying standing to the surviving parents of a child shot and killed by police to bring a section 1983 action for deprivation of the right to a "family relationship."[180]

Despite the reasoning espoused in *Jackson*, two recent circuit court decisions, in cases involving the killing of children, have determined that the right to parenthood is constitutionally protected. In *Bell v. City of Milwaukee*,[181] the estate of the father of a young man shot and killed by a Milwaukee police officer brought a section 1983 action to recover for the loss of the father's constitutional right to family association.[182] The Seventh Circuit, in recognizing the parental right, cited the foundation Supreme Court cases,[183] along with two prior decisions of the Seventh Circuit which had acknowledged the constitutional protection accorded to the parent-child relationship.[184] In addition, the *Bell* court looked beyond the case law on the issue to the legislative history of the Ku Klux Klan Act of 1871,[185] which the court viewed as verification that the Act was meant to create a remedy where the parent-child relationship was interfered with.[186]

In *Kelson v. City of Springfield*,[187] the parents of a teenage boy who committed suicide while at school sought to recover under section 1983 for deprivation of their parental right to the society and companionship of their son.[188] The Ninth Circuit, in refraining

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179. 573 F. Supp. 49 (D. Colo. 1983).

180. *Id.* at 51.

181. 746 F.2d 1205 (7th Cir. 1984).

182. *Id.* at 1224. In addition, section 1983 claims were brought by the siblings of the decedent. *Id.* See *infra* notes 211-24 and accompanying text, for a discussion of the siblings' standing.

183. *Id.* at 1243-44; *see supra* notes 124-56 and accompanying text.

184. 746 F.2d at 1243-44.

185. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1982)).

186. 746 F.2d at 1244. The Seventh Circuit, in *Bell*, based its viewpoint on the comments of Representative Butler which are quoted at the beginning of this Note. *See supra* note 1 and accompanying text. In addition, the *Bell* court cited the Ninth Circuit decision in Morrison v. Jones, 607 F.2d 1269 (9th Cir. 1979), *cert. denied*, 445 U.S. 962 (1980). 746 F.2d at 1244. In *Morrison*, the plaintiff's son, a German alien and ward of the state, was transported by county officials to Germany on the grounds that the plaintiff mother was incapable of providing the special care necessary for the psychologically troubled boy. 607 F.2d at 1271. Citing the Supreme Court's decision in Stanley v. Illinois, 405 U.S. 645 (1972), *see supra* notes 137-39 and accompanying text, the Ninth Circuit held that the plaintiff mother had standing to assert a cause of action under section 1983 for deprivation of her constitutionally protected interests in her relationship with her son. *Id.* at 1275.

187. 767 F.2d 651 (9th Cir. 1985).

188. *Id.* at 653.

from determining the merits of their claim, nonetheless cited its prior decision in *Morrison v. Jones,*[189] Supreme Court precedent,[190] and the decisions in *Bell* and *Mattis* as firmly establishing the existence of a constitutionally protected liberty interest in the companionship and society of their children.[191]

The reciprocal right of children to associate with and be brought up by their parents was addressed rather curtly in *Evain v. Conlisk.*[192] In *Evain*, the District Court for the Northern District of Illinois was confronted with a section 1983 action brought by the daughter of a man shot and killed by police.[193] Without engaging in any discussion as to the basis for its decision, the *Evain* court simply stated that the daughter had not been deprived of any constitutional

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189. 607 F.2d 1269 (9th Cir. 1979), *cert. denied,* 445 U.S. 962 (1980). See *supra* note 186 for a discussion of this case.

190. 767 F.2d at 654. *See* Santosky v. Kramer, 455 U.S. 745 (1982); Lassiter v. Department of Social Services, 452 U.S. 18 (1981); Little v. Streater, 452 U.S. 1 (1981).

191. 767 F.2d at 655. Interestingly, in their analysis, the Ninth Circuit also made note of a recent case from the district of Colorado which also refused to follow White v. Talboys, 573 F. Supp. 49 (D. Colo. 1983), and Jackson v. Marsh, 551 F. Supp. 1091 (D. Colo. 1982), discussed *supra* at notes 174-180 and accompanying text. 767 F.2d at 655 n.4. In Myres v. Rask, 602 F. Supp. 210 (D. Colo. 1985), the parents of a child killed during a struggle with police officers brought an action under section 1983 for deprivation of their constitutional right to family association. *Myres,* 602 F.Supp. at 210-11. The court, in determining that parents enjoy a constitutionally protected right to the companionship and support of their children, summed up:

> It would be ironic indeed to recognize, on the one hand, the constitutional rights to marry, *Loving v. Virginia, supra* [388 U.S. 1 (1967)], to procreate, *Skinner v. Oklahoma, supra* [316 U.S. 535 (1942)], to supervise the upbringing of children, *Pierce v. Society of Sisters, supra* [268 U.S. 510 (1925)], *Prince v. Massachusetts, supra* [321 U.S. 158 (1944)], to retain custody of one's illegitimate children, *Stanley v. Illinois, supra* [405 U.S. 645 (1977)], and to live in the same residence with one's "family," *Moore v. City of East Cleveland, supra* [431 U.S. 494 (1976)], but on the other hand, to deny parents constitutional protection for the continued life of their child. State action that wrongfully kills one's child certainly interferes with fruition and fulfillment of the fundamental right to procreate. A parent cannot benefit from his constitutionally protected rights to supervise the upbringing, retain the custody, or live in the same residence with a child if state action unlawfully takes the child's life. To constitutionally protect families from lesser intrusions into family life, yet allow the state to destroy the family relationship altogether, would drastically distort the concept of ordered liberty protected by the Due Process Clause.

Id. at 213.

192. 364 F. Supp. 1188 (N.D. Ill. 1973), *aff'd mem.*, 498 F.2d 1403 (7th Cir. 1974).

193. *Id.* at 1189.

right, and, therefore, lacked standing to bring the suit.[194] However, in *Duchesne v. Sugarman*,[195] the Second Circuit found cause to mention the existence of a reciprocal right based in the child.[196] In *Duchesne*, the court addressed a section 1983 action by a woman whose children had been taken from her and retained by the New York City Bureau of Child Welfare without her consent and without a court order.[197] In granting the woman standing to challenge this action based on the existence of a constitutional right to parenthood, the court stated that "the right of the family to remain together without the coercive interference of the awesome power of the state" is "the most essential and basic aspect of familial privacy."[198] This right, which the court described as the "right to the preservation of family integrity," was found to encompass not simply the right of the parent to associate with her children, but "the reciprocal rights of both parent and children."[199]

This reciprocity was again recognized in *Espinoza v. O'Dell*,[200] where the Supreme Court of Colorado, in a section 1983 action brought on behalf of the children of a man killed by police, also found the constitutionally protected right to family association to apply equally to parents and children, and thereby granted the plaintiffs standing to maintain the action.[201]

2. *Siblings*

"The sibling relationship can be a profoundly important one. It is a relationship of poignancy and power that is watched and worried over by parents, explored and illuminated by novelists."[202] In *Sanchez v. Marquez*,[203] the constitutional support and protection of the sibling relationship was considered. In *Sanchez*, the brothers and sisters of

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194. *Id.* at 1191.
195. 566 F.2d 817 (2d Cir. 1977).
196. *Id.* at 825.
197. *Id.* at 821.
198. *Id.* at 825.
199. *Id.*
200. 633 P.2d 455 (Colo. 1981), *cert. dismissed,* 456 U.S. 430 (1982).
201. 633 P.2d at 463. In upholding the children's standing to bring the section 1983 action on their own behalves, the *Espinoza* court cited the Supreme Court's decision in Stanley v. Illinois, 405 U.S. 645 (1972). *See supra* notes 137-39 and accompanying text.
202. J. DUNN & C. KENDRICH, SIBLINGS: LOVE, ENVY, & UNDERSTANDING 1 (1983).
203. 457 F. Supp. 359 (D. Colo. 1978).

a man shot and killed by a police officer claimed that they had thereby been denied the constitutional right "to their brother's continued life; the right to have their brother be free from physical abuse and death; the right to have their brother freely associate; and the right to have their brother not be denied due process of law."[204] In considering the issue of standing, the Colorado district court compared the right to raise a child with the right to retain a sibling, and found that while "the right to raise, educate and associate with one's own child may rise to constitutional dimensions, the right of siblings to have their brother or sister continue living does not."[205] In thus denying the siblings standing to bring their section 1983 claims, the court reasoned that the difference between the parent-child relationship and the sibling relationship was a difference not simply in degree, but in kind; and "[t]hough one has a constitutional right to have or not have a child, one does not have a constitutional right to have or not have a brother."[206]

In *Sager v. City of Woodland Park*,[207] the Colorado district court again considered the standing of a sibling to bring an action under section 1983 for deprivation of the constitutional right to family association.[208] The action in this case was brought by the parents and sister of the decedent, a teenage boy who had been killed by police.[209] In denying standing to the sister, the court simply referred to its opinion in *Sanchez*.[210]

The issue of whether the constitutional right to family association extends to the sibling relationship, as well as to the parent-child relationship, ceased to be the sole domain of the Colorado district court when the District Court for the Eastern District of Wisconsin confronted the issue in *Bell v. City of Milwaukee*.[211] In *Bell*, the plaintiffs were the brothers and sister of a victim of a police shooting, who, along with the estate of their father, brought a section 1983 action for deprivation of the constitutional right to family association.[212] The court, in characterizing the reasoning of *Sanchez* as

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204. *Id.* at 362.
205. *Id.* at 363.
206. *Id.*
207. 543 F. Supp. 282 (D. Colo. 1982).
208. *Id.* at 290.
209. *Id.* at 285.
210. *Id.* at 290.
211. 536 F. Supp. 462 (E.D. Wis. 1982), *modified*, 746 F.2d 1205 (7th Cir. 1984).
212. *Id.* at 467-68. The father's standing, in the form of his estate, was upheld. See *supra* notes 185-91 and accompanying text for a discussion of that aspect of the decision on appeal to the Seventh Circuit.

"minimal,"[213] looked to the Seventh Circuit's holding in *Drollinger v. Milligan*[214] that the constitutional right to family association extended to the grandparent-grandchild relationship, and to *Moore v. City of East Cleveland*,[215] wherein the Supreme Court "confirmed the Seventh Circuit's view . . . ."[216] Noting that siblings are a part of the nuclear family while grandparents are not, the district court in *Bell* reasoned that the constitutional right to family association should thus surely extend to siblings as well, and granted decedent's brother and sister standing to bring the section 1983 action.[217]

On appeal to the Seventh Circuit, however, the decision in *Bell* regarding the standing of the siblings was reversed.[218] This was done despite the Seventh Circuit's acknowledging "the importance of intrafamily relationships generally, including those between siblings."[219] In addition, the Seventh Circuit upheld the district court's decision regarding the standing of the estate of the father,[220] thereby recognizing the existence of a constitutional right to association among parents and children, and the survivability of an action for deprivation of this right.[221] The court, however, in considering the claims of the siblings, stated:

> [I]f we were to hold that the federal Constitution entitles the siblings to recover for loss of society and companionship, there could be no principled way of limiting such a holding to the immediate family or perhaps even to blood relationships. Obviously many human relationships stem from the "emotional attachments that derive from the intimacy of daily association," but we are unwilling to attach constitutional significance to such attachments outside the closely guarded parent-child relationship.[222]

The plaintiffs argued that the right could be rationally limited to the blood relatives in the nuclear family, the deprivation of which would be a "reasonably foreseeable result of any wrongful death,"[223]

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213. 536 F. Supp. at 468.

214. 552 F.2d 1220 (7th Cir. 1977). See *infra* notes 233-38 and accompanying text for a full discussion of *Drollinger*.

215. 431 U.S. 494 (1977).

216. 536 F. Supp. at 468.

217. *Id.*

218. Bell v. City of Milwaukee, 746 F.2d 1205, 1247 (7th Cir. 1984).

219. *Id.*

220. Bell v. City of Milwaukee, 536 F. Supp. 462, 467-68 (E.D. Wis. 1982), *modified*, 746 F.2d 1205 (7th Cir. 1984); *see supra* notes 185-91 and accompanying text.

221. 746 F.2d at 1241-45.

222. *Id.* at 1247.

223. *Id.*

but the court replied that "such a holding would require us to wander without principled guidance in deciding which, if any, of a decedent's brothers, sisters, aunts, uncles, cousins or even friends could recover under federal law for the deprivation of their association with the decedent."[224]

3. Spouses

In *James v. Murphy*,[225] the only reported case involving an action by a spouse under section 1983 for deprivation of the right to family association resulting from wrongful death, the District Court for the Eastern District of Alabama denied standing, determining that there was no constitutionally protected spousal right.[226] Asserting that the plaintiff, in bringing the action, was alleging a deprivation of her right to property under the fourteenth amendment,[227] the court in *James* looked to the Alabama wrongful death statute[228] to determine whether the rights to consortium and support were property rights thereunder.[229] Noting that the Alabama courts had consistently refused to interpret the allowance of damages for the wrongful death

224. *Id.* This sentiment is echoed in Justice Stewart's dissenting opinion in Moore v. City of East Cleveland, 431 U.S. 494, 531 (1977). *See supra* notes 142-56 and accompanying text. Contrary to the plurality, Justice Stewart disagreed with the plaintiff grandmother's characterization of her right to live with her grandchildren as a constitutional right of association superior to other rights of association protected by the first amendment. *Id.* at 535. "To suggest that the biological fact of common ancestry necessarily gives related persons constitutional rights of association superior to those of unrelated persons is to misunderstand the nature of the associational freedoms that the Constitution has been understood to protect." *Id.* Nonetheless, Justice Stewart recognized the constitutional protection of "private family life" against state interference. *Id.* at 536. However, "[t]o equate [an associational interest in the extended family] with the fundamental decisions to marry and to bear and raise children," he concluded, "is to extend the limited substantive contours of the Due Process Clause beyond recognition." *Id.* at 537.

Despite the aforementioned reasoning and that espoused in the Seventh Circuit' decision in *Bell,* a 1985 Tenth Circuit decision upheld the standing of the sister of a man killed while incarcerated at Santa Fe County Jail to maintain a section 1983 action on her own behalf for deprivation of her constitutional right to family association. Trujillo v. Board of County Comm'rs of County of Santa Fe, 768 F.2d 1186, 1188 (10th Cir. 1985). Noting that "the parental relationship may warrant the greatest degree of protection and require the state to demonstrate a more compelling interest to justify an intrusion on that relationship," the Tenth Circuit nonetheless concluded that it could not "agree that other intimate relationships are unprotected and consequently excluded from the remedy established by section 1983." *Id.* (footnote omitted).

225. 392 F. Supp. 641 (E.D. Ala. 1975).

226. *Id.* at 646.

227. *Id.*

228. ALA. CODE § 6-5-410 (1977).

229. *James,* 392 F. Supp. at 646.

of a spouse as establishing a property right, the *James* court thereby determined that no constitutional right had been violated and that the spouse, as a result, lacked standing under section 1983.[230]

4. Beyond The Nuclear Family

The only cases in which the right to family association has been asserted by a family member outside the nuclear family have been cases in which grandparents have asserted a constitutional right to associate with their grandchildren. The Seventh Circuit has played a leading role in determining the scope of this right, through a case decided prior to the Supreme Court's decision in *Moore v. City of East Cleveland*,[231] and a later case in which they re-examined the issue in light of these holdings.[232]

In *Drollinger v. Milligan*[233] the plaintiff, a grandfather who sought relief from the terms of his daughter-in-law's probation, claimed that he was being denied the right to associate with his grandchild.[234] His daughter-in-law had been placed on probation for a period of five years after pleading guilty to the charge of having uttered a forged instrument.[235] By the terms of her probation, she was to adhere to a series of conditions, including the condition that she have no association with the family of her ex-husband, other than to allow her ex-husband to visit their daughter.[236] In an action brought by both the grandfather and the daughter-in-law to challenge the conditions of her probation, the Seventh Circuit concluded that the grandfather had standing.[237] The court reasoned that the grandfather, by being denied the right to associate with his grandchild, had suffered an injury in fact.[238] Subsequently, with the Supreme Court's decision in *Moore*,[239] the scope of the right to family association

230. *Id.*

231. 431 U.S. 494 (1977). *See* Drollinger v. Milligan, 552 F.2d 1220 (7th Cir. 1977); *infra* notes 233-38 and accompanying text.

232. Ellis v. Hamilton, 669 F.2d 510 (7th Cir. 1982), *cert. denied*, 459 U.S. 1069 (1983); *infra* notes 240-49 and acompanying text.

233. 552 F.2d 1220 (7th Cir. 1977).

234. *Id.* at 1223-24.

235. *Id.* at 1223.

236. *Id.* This was further limited in that the home of the plaintiff grandfather could not be used for this purpose. *Id.* These conditions were imposed because the Indiana trial judge who issued the probation believed that the ex-husband or his brother might have been involved in the commission of the crime. *Id.* at 1223 n.1 (term 5).

237. *Id.* at 1226.

238. *Id.*

239. For a discussion of *Moore*, see *supra* notes 142-56 and accompanying text.

was seemingly certified as both encompassing and protecting the grandparent-grandchild relationship.

In *Ellis v. Hamilton*,[240] however, the Seventh Circuit re-examined the issue and, with its decision, cast into doubt the validity of this right. In *Ellis*, the adoptive grandmother[241] of four neglected children who were being put up for adoption sought to adopt them, but was prevented from doing so by the city's welfare and judicial officers.[242] The plaintiff adoptive grandmother claimed that by this action she was deprived of her constitutional right to associate with her grandchildren, citing the arbitrary denial of her petition to adopt the children,[243] and the fact that her right to visit and associate with the children had been taken from her and placed in the hands of the adoptive parents.[244]

In considering the adoptive grandmother's standing to pursue the section 1983 claim, the Seventh Circuit in *Ellis* examined both its prior decision in *Drollinger*, and the Supreme Court's decision in *Moore*.[245] The court noted initially that the decision in *Moore* was surely "relevant" to the case, but concluded that it was not controlling because it "was concerned with the impact [of the zoning ordinance] on the family unit as a whole—that is, with the interests of the child as well as of the grandparent," while the emphasis of the adoptive grandmother's section 1983 claim was "on [her] loss, [her] anguish, rather than the children's."[246] Dismissing its prior decision in *Drollinger*, the court simply stated that it was not necessarily the last word on the subject and, as proof, remarked that *Drollinger* devoted but "a footnote to the question [of] whether grandparents have rights [of association] protected by the due process clause."[247] The *Ellis* court ultimately found the plaintiff indeed had a liberty interest in associating with her grandchildren sufficient to

240. 669 F.2d 510 (7th Cir. 1982), *cert. denied*, 459 U.S. 1069 (1983).

241. The adoptive grandmother was joined in the action by her sister, who was the natural grandmother of the children, and her sister's husband, who had no legal relation to the children. Ellis v. Hamilton, 669 F.2d at 511. The *Ellis* court regarded the claims of the natural grandmother and her husband as "tenuous" and quickly disposed of them. *Id.* at 512.

242. *Id.* Instead the city's welfare and judicial officers arranged for the children to be adopted separately by others. *Id.*

243. The plaintiff adoptive grandmother had been "given the runaround by the defendant court officers, who offered niggling and specious objections to the formal adequacy of the petition for adoption." *Id.*

244. *Id.*

245. *Id.* at 513.

246. *Id.*

247. *Id.*

maintain an action under section 1983.[248] However, this decision was based on the fact that the plaintiff was not only the adoptive grandmother of the children, but also their natural great aunt and, in having taken care of the children during much of their lives in place of "totally inadequate parents," was literally a "*de facto* mother and father all rolled up into one."[249]

VI. Conclusion

The right to associate with family members has long been recognized as a basic human right.[250] Though this right is not clearly enunciated as a constitutional right, numerous Supreme Court decisions in which it was both respected and affirmed seem to have bestowed upon it recognition as a right protected by the due process clause of the fourteenth amendment.[251] Unfortunately, the scope of the right and the identities of the family members and family relationships to which the constitutional protection extends are ambiguous.[252] In determining those persons and relationships to which the right extends, the courts are confronted with an American society and culture in which the breadth of our most cherished family associations and the concept of which such associations should be and are considered most vital to us are perhaps unascertainable.[253]

When confronted with a section 1983 claim for deprivation of the right to family association due to wrongful death, to whom, therefore, should the courts grant standing? To set arbitrary boundaries would not merely be unfair; it would display the worst, most malignant arrogance. The result would be to cut off from section 1983's remedial powers entire familial classes. However, to simply throw up our hands and acknowledge that the designation of which familial relationships are to be accorded constitutional protection and which ones are not is an impossible task—to thus refrain from denying any surviving family member standing to bring a section 1983 action based on deprivation of the right to family association resulting from wrongful death—would lead to unfortunate results. Such action,

248. *Id.* at 513-14.

249. *Id.* at 513. The *Ellis* court noted as particularly important to its decision the fact that the plaintiff adoptive grandmother claimed in this case to have had formal custody of the children before they were taken from her home. *Id.* at 513-14. Noncustodial grandparents would have no "liberty interest" in prospective adoption of their grandchildren.

250. *See supra* notes 124-56 and accompanying text.

251. *Id.*

252. *See supra* note 156 and accompanying text.

253. Moore v. City of East Cleveland, 431 U.S. 494, 502-04 (1977).

or rather inaction, could result in a torrential flood of litigation in the federal courts, along with a menacing threat of massive liability for all state employees.[254]

Perhaps, however, within the problem lies the solution. Of all the family relationships purportedly protected by the right to family association, the parent-child relationship stands out as not only the most fundamental, but the longest recognized by the Supreme Court.[255] This right is a natural outgrowth of another fundamental right, the right to procreation.[256] Beyond this initial relationship, all other family relationships are secondary, if not in importance, in sequence. The sibling relationship, the grandparent-grandchild relationship, and the spousal relationship all come after the initial parent-child relationship. If we were to erect a boundary, it would be at this initial point. Determining a theoretically defensible boundary any place else in the scheme of family relationships could well be an impossible task.

Addendum

In discussing the standing of persons to maintain section 1983 actions for deprivation of the constitutional right to association of family members resulting from wrongful death, this Note has not attempted to distinguish those cases involving wrongful death resulting from intentional or willful conduct from those cases where wrongful death was the product of mere negligence. Previously, such a distinction was unnecessary.[257] However, with the Supreme Court's recent decision in *Daniels v. Williams*,[258] this distinction has become vital. In *Daniels*, the Court determined that negligent conduct on the part of a state official, even though causing injury, generally will not be enough to constitute a deprivation of the rights guaranteed under the due process clause of the fourteenth amendment.[259] This determination, though not clearly requiring that intentional conduct be alleged under section

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254. *See* Bell v. City of Milwaukee, 746 F.2d 1205, 1247 (7th Cir. 1984).

255. *See supra* notes 124-56 and accompanying text.

256. *See supra* notes 130-34 and accompanying text.

257. In Parratt v. Taylor, 451 U.S. 527 (1981), *rev'd in part sub nom.* Daniels v. Williams, 54 U.S.L.W. 4090 (U.S. Jan. 21, 1986) (No. 84-5872), the Supreme Court noted that section 1983 "affords a 'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind." *Id.* at 535.

258. 54 U.S.L.W. 4090 (U.S. Jan. 21, 1986) (No. 84-5872).

259. *Id.* at 4090.

1983,[260] has nonetheless imposed a strenuous burden on those persons who hereafter seek to remedy an alleged deprivation of the right to association of family members resulting from wrongful death.[261]

Peter Biging

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260. *Id.* at 4092 n.3.

261. An additional burden placed on plaintiffs seeking to remedy an alleged deprivation of rights protected under the due process clause of the fourteenth amendment is the requirement that they allege the right to have been deprived without due process. Parratt v. Taylor, 451 U.S. 527, 537 (1981), *rev'd in part sub nom.* Daniels v. Williams, 54 U.S.L.W. 4090 (U.S. Jan. 21, 1986) (No. 84-5872). In order to satisfy this requirement, plaintiff in such an action would have to allege that the postdeprivation process of the state in which the cause of action accrued does not supply an adequate remedy. *Id.* A full discussion of this requirement is beyond the scope of this Note.