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DOMESTIC RELATIONS AND THE EIGHTH CIRCUIT COURT OF APPEALS

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PURPOSE

The purpose of this paper is to analyze decisions by the federal court system in general, and the Court of Appeals for the Eighth Circuit in particular, from an unusual perspective—their impact on domestic relations law.¹ Despite the Eighth Circuit's view to the contrary, the authors believe it is playing an increasingly influential role in family law matters.

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1. The states within the Eighth Circuit are Minnesota, North and South Dakota, Iowa, Nebraska, Missouri and Arkansas.

I. RESTRICTIVE JURISDICTIONAL POLICY

If one asked an Eighth Circuit Court of Appeals judge if he² thought the court's decisions had a significant impact on domestic relations matters, the initial response would probably be no. One reason for the response lies with the traditional view of two well-recognized, judicially created, exceptions to the exercise of federal jurisdiction: the probate exception and the domestic relations exception.³ These exceptions have been influential in how the Eighth Circuit has viewed its role in domestic matters, that is, one of very limited involvement!⁴

The traditional doctrine, which until recently has seen little scholarly criticism,⁵ is not premised on explicit statutory language that limits the jurisdictional authority of federal courts. Indeed, the jurisdictional statute used by many plaintiffs to bring suits grants original jurisdiction to federal district courts "in all civil actions" that meet the jurisdictional amount and diversity of citizenship requirement.⁶ Rather, the traditional view is based upon dicta by the dissent in *Barber v. Barber*⁷ and

2. There are currently no female judges on the 8th Circuit Court of Appeals.

3. *Overman v. United States*, 563 F.2d 1287, 1292 (8th Cir. 1977). The court declared: "Federal courts should be extremely wary of becoming general arbiters of any domestic relations imbroglio." *Id.*

4. *Id.* Again, the court maintained: "There is, and ought to be, a continuing federal policy to avoid handling domestic relations cases in federal court in the absence of important concerns of a constitutional dimension." *Id.*

5. *Poker, A Proposal for the Abolition of the Domestic Relations Exception*, 71 MARQ. L. REV. 141 (1987) (domestic relations and probate, the two judicially created exceptions to federal jurisdiction, have not been subjected to much scholarly criticism). See *Atwood, Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571, 574 (1984) (no valid jurisdictional theory justifying automatic invocation of the domestic relations exception in every case of intrafamilial dispute); Comment, *Enforcing State Domestic Relations Decrees in Federal Courts*, 50 U. CHI. L. REV. 1357, 1358-59 (1983) (Domestic relations exception began with a group of nineteenth-century cases concerned with jurisdiction over the enforcement of custody and alimony decrees. *In re Burrus*, 136 U.S. 586 (1890) is the case most frequently cited for the proposition that federal courts do not have jurisdiction over domestic relations.); Comment, *Federal Jurisdiction and the Domestic Relations Exception: A Search for Parameters*, 31 UCLA L. REV. 843, 844-45 (1984) (domestic relations exception arose in Supreme Court dictum in 1858, and federal courts have observed a hands-off policy since then); Note, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824 (1983) (federal courts refuse to exercise diversity jurisdiction over cases deemed to involve domestic relations disputes); Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective*, 60 NOTRE DAME L. REV. 1, 30 (1984) (federal courts should follow narrowly defined domestic relations exception).

6. 28 U.S.C. § 1332 (1988).

7. *Barber v. Barber* 62 U.S. (21 How.) 582 (1858). Justice Daniel, dissented:

by the majority in *In re Burrus*.⁸

Barber is the cornerstone of the traditional view. For the first time, the Supreme Court entertained an action filed in federal court in Wisconsin by a wife residing in New York. She sought to enforce a New York state court decree, which granted her separation and alimony. Over objection, the federal district court ruled that it had subject matter jurisdiction over the controversy. On appeal, the Supreme Court upheld the district court's decision. The majority commented:

Our first remark is—and we wish it to be remembered—that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction. The court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud.

We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.⁹

Justice Daniel, writing for the dissent, stated that federal courts had absolutely no jurisdiction over the subjects of divorce and alimony. He supported this view by analogy to the English Chancery Courts, noting that the English Ecclesiastical Courts had exclusive jurisdiction over marriage and divorce. Because chancery jurisdiction was never extended to actions of divorce or alimony, and the federal courts were courts of chancery, along the lines of their English counterparts, he reasoned they did not possess jurisdiction over such matters.¹⁰

In *Burrus*, the federal jurisdictional exception was enlarged to include child custody matters. In this case, a father and a grandfather were embroiled in litigation over the custody of a child and a habeas corpus statute provided the procedural basis for deciding the issue. The Supreme Court held that the federal court lacked jurisdiction declaring the father was im-

⁸ "It is not in accordance with the design and operation of a Government having its origin in causes and necessities, political, general, and external, that it should assume to regulate the domestic relations of society . . ." *Id.* at 602.

⁸ *In re Burrus*, 136 U.S. 586 (1890). Justice Miller, in dicta, said: "The whole subject of the domestic relations of the husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Id.* at 593–94.

⁹ *Barber*, 62 U.S. (21 How.) at 584.

¹⁰ *Id.* at 603–05. Chief Justice Taney and Justice Campbell joined Justice Daniel in dissent.

properly imprisoned for disobeying a child custody order issued in the habeas corpus proceeding.¹¹ In dictum the Court observed that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”¹² The Court subsequently reaffirmed its hands-off policy in domestic matters in *Simms v. Simms*.¹³

By 1906, the dicta from *Barber* and *Burrus*, and the affirmation in *Simms*, had firmly established a restricted domestic relations jurisdictional doctrine within the federal system. For example, in *De La Rama v. De La Rama*,¹⁴ the Court observed:

It has been a long established rule that the courts of the United States have no jurisdiction upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or an incident of a divorce or separation, both by reason of fact that the husband and wife cannot usually be citizens of different States, so long as the married relation continues (a rule which has been somewhat relaxed in recent cases), and for the further reason that a suit for divorce in itself involves no pecuniary value.¹⁵

Finally, in *Ohio ex rel Popovici v. Agler*,¹⁶ the Court held that the constitution and statutes must be interpreted in light of the common understanding that “jurisdiction of the Courts of the United States over divorces and alimony always has been denied.”¹⁷ Despite its inaccuracy and subsequent calls by a few federal courts for abandonment,¹⁸ the traditional view has prevailed. More recently, however, courts have shifted to a somewhat different rationale to limit federal court involvement in domestic matters.

The contemporary rationale for the exception is premised on policy considerations. Federal courts reason that: (1) states have a strong interest in domestic relations matters and have

11. *Burrus*, 136 U.S. at 596. Diversity jurisdiction was not an issue.

12. *Id.* at 593-94.

13. 175 U.S. 162, 168 (1899) (ruling, however, it had jurisdiction to review a divorce and alimony decree granted by Arizona's territorial court).

14. *De La Rama v. De La Rama*, 201 U.S. 303 (1906).

15. *Id.* at 307.

16. 280 U.S. 379 (1930).

17. *Id.* at 383.

18. See, e.g., *Sutter v. Pitts*, 639 F.2d 842, 843 (1st Cir. 1981) (historical inaccuracies of the exception recognized but had endured too long to be now abandoned); *Spindel v. Spindel*, 283 F. Supp. 797, 800 (E.D.N.Y. 1968) (in spite of the exception, the court has heard appeals in divorce actions).

developed an expertise in settling family disputes; (2) such disputes often require ongoing supervision, a task for which federal courts are not suited; (3) federal adjudication of such disputes increases the chances of incompatible or duplicative federal and state court decrees; and (4) domestic relations cases have no federal interest, while crowding the federal court calendar.¹⁹ Regardless of whether the traditional or contemporary view is used, the result is the same—the dispute is rejected.

Federal courts look beyond the label attached to a dispute in deciding whether or not to hear a matter and typically focus their inquiry on the type of determination necessary to resolve the underlying claim. Thus, a domestic claim submitted to federal court in the guise of contract or tort does not automatically fall outside the domestic relations exception.²⁰

Consequently, the vast majority of domestic disputes continue as the exclusive province of state courts.²¹ Only occasionally do federal courts touch on traditional domestic relations issues.²² Exceptions include, for example, a dispute over payment of attorney fees arising out of dissolution litigation.²³ Or, an agreement for alimony or support, which may

19. *Rykers v. Alford*, 832 F.2d 895, 899–900 (5th Cir. 1987); *Ruffalo v. Civiletti*, 702 F.2d 710, 717 (8th Cir. 1983).

20. *Compare Rykers*, 832 F.2d at 899–900 (Domestic relations exception bars husband's tort claims against his common law wife. The claims arose out of his arrest for allegedly kidnapping the couple's child and would require a determination of the husband and wife's respective rights to custody of the child.) and *Bennett v. Bennett*, 682 F.2d 1039, 1042–44 (D.C. Cir. 1982) (tort action brought by father against former wife for allegedly kidnapping their children falls within the domestic relations exception which precludes granting injunction setting future custody and visitation rights) with *McIntyre v. McIntyre*, 771 F.2d 1316, 1318 (9th Cir. 1985) (Domestic relations exception does not apply to claim alleging past breach of visitation rights granted by state court because claim did not require determination of spousal or parental status) and *Cole v. Cole*, 633 F.2d at 1083, 1087–89 (4th Cir. 1980) (Domestic relations exception does not bar husband's tort claims against former wife for arson, conversion, and malicious prosecution because determination of case does not require the court to adjust family status or establish duties.).

21. See Baron, *The Evolution of Domestic Relations Cases in Our Federal Courts*, 1985 S. ILL. U.L.J. 353; Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

22. *Zimmermann v. Zimmermann*, 395 F. Supp. 719, 721 (E.D. Pa. 1975) (jurisdiction taken of suit by wife against husband for breach of an agreement for support where parties had been separated for nine years and no pending state court proceeding).

23. *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509 (2d Cir. 1973).

be enforced on the theory the obligation is a contract.²⁴ Furthermore, tort claims involving intentional infliction of emotional distress,²⁵ child enticement,²⁶ and tortious interference with the custody of a child are occasionally heard by federal courts.²⁷

While some lower federal courts have heard declaratory actions involving the Parental Kidnapping Prevention Act,²⁸ especially where state courts have made conflicting decisions regarding custody of a minor child,²⁹ the Supreme Court recently discouraged such activity. In an opinion without dissent, it held that federal courts should not play an enforcement role when two states disagree over which parent is entitled to custody of a child.³⁰

Federal courts continue to decline to exercise diversity jurisdiction in divorce or annulment matters, support payment disputes and child custody matters.³¹ The reluctance to become involved where diversity jurisdiction is claimed has influenced the applicability of the domestic relations exception in the con-

24. See, e.g., *Crouch v. Crouch*, 566 F.2d 486 (5th Cir. 1978).

25. See, e.g., *Wasserman v. Wasserman*, 671 F.2d 832 (4th Cir. 1982), cert. denied, 459 U.S. 1014 (1982).

26. See *id.*

27. See *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982).

28. 28 U.S.C. § 1738A (1988).

29. See, e.g., *Hickey v. Baxter*, 800 F.2d 430 (4th Cir. 1986) (federal jurisdiction exercised to enforce one of two conflicting state custody orders); *McDougald v. Jensen*, 786 F.2d 1465 (11th Cir. 1986) (federal court can exercise jurisdiction over custody matter to resolve conflicting provisions of state court decrees); *Heartfield v. Heartfield*, 749 F.2d 1138 (5th Cir. 1985) (federal district courts have jurisdiction to enforce compliance with Parental Kidnapping Prevention Act); *DiRuggiero v. Rodgers*, 743 F.2d 1009 (3d Cir. 1984) (federal district court can exercise federal question jurisdiction in Parental Kidnapping Protection Act claims); *Flood v. Braaten*, 727 F.2d 303 (3d Cir. 1984) (federal district court has jurisdiction when state court improperly asserts jurisdiction under the Parental Kidnapping Prevention Act).

30. *Thompson v. Thompson*, 484 U.S. 174 (1988) (holding that the Parental Kidnapping Prevention Act of 1980 does not provide an implied cause of action in federal court to determine which of two conflicting state custody decisions is valid).

31. See, e.g., *Gonzalez Canevero v. Rexach*, 793 F.2d 417 (1st Cir. 1986) (federal district court does not have jurisdiction over matrimonial property dispute action); *Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982) (federal district court cannot grant injunctive relief in spousal kidnapping case); *Csibi v. Fustos*, 670 F.2d 134 (9th Cir. 1982) (federal district court lacks subject matter jurisdiction to hear marital status action); *Sutter v. Pitts*, 639 F.2d 842 (1st Cir. 1981) (child custody claim not within jurisdiction of federal district court); *Cole v. Cole*, 633 F.2d 1083 (4th Cir. 1980) (federal district courts have no jurisdiction to grant divorces, award alimony, or determine child custody); *Solomon v. Solomon*, 516 F.2d 1018 (3d Cir. 1975) (no federal jurisdiction in child custody case).

text of other sources of federal jurisdiction.³² Nevertheless, it remains unclear how great that influence is on disputes brought under the federal question statutes.³³

Historically, the Eighth Circuit has attempted to adhere to the restrictive domestic relations view espoused by the Supreme Court and the other Federal Circuit Courts of Appeal. However, in a subtle, but nevertheless remarkable and increasingly important manner, several of its decisions are having a major impact on domestic relations matters within the circuit's jurisdiction.

II. BANKRUPTCY AND PENSIONS

The Eighth Circuit's recent three-judge panel decision in *Bush v. Taylor*,³⁴ which permits future pension awards to be discharged in bankruptcy proceedings, was heard en banc April 10, 1990.³⁵ If the decision is affirmed en banc, it will have a wide-spread, dramatic impact on divorced traditional homemakers who were awarded pension benefits but did not execute a Qualified Domestic Relations Order (QUADRO). Unfortunately, because QUADROs were not available until 1984, a large number of traditional homemakers involved in divorces before that year³⁶—and those whose lawyers failed to execute QUADROs after 1984—may be directly affected.³⁷

32. See *Ingram v. Hayes*, 866 F.2d 368, 370-72 (11th Cir. 1988) (discussing the varying approaches taken by other circuits to determine whether the domestic relations exception applies to cases brought under the federal question statute).

33. See, e.g., *Overman v. United States*, 563 F.2d 1287 (8th Cir. 1977); *Carquille v. Woodruff*, 153 F.2d 1011 (6th Cir. 1946).

34. *Bush v. Taylor*, 893 F.2d 962 (8th Cir. 1990).

35. While completing this section of the article, the authors learned that the court of appeals reheard the case en banc on April 10, 1990. This article will be published before the en banc decision is handed down. The authors believe that the decision will be reversed by the full panel of the Eighth Circuit.

36. In 1981, the number of annual divorces climbed to a record 1.21 million. During the ten year period 1975-1985, there were annually one million or more divorces in the United States. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 85 (109 ed. 1989). It is estimated that more than half the civil cases pending before the courts in this nation involve family disputes. It is also estimated that 49 percent of all existing marriages will end in divorce. NATIONAL INSTITUTE FOR CHILD SUPPORT ENFORCEMENT, OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, ESSENTIALS FOR ATTORNEYS IN CHILD SUPPORT ENFORCEMENT, xix (1985).

37. The Retirement Equity Act of 1984 amended ERISA and the Internal Revenue Code of 1954 to create a limited exception to the prohibition of assignment or alienation of qualified plan benefits if a Qualified Domestic Relations Order

Moreover, most divorcing couples have only a few assets, other than their homestead and pension, to distribute. Therefore, removing a future right to receive pension benefits may leave a traditional homemaker unexpectedly penniless. Finally, *Bush* has created a new headache for state courts charged with distributing property fairly in dissolution proceedings: it has injected an additional element of uncertainty into the decision-making process; it has placed state courts in the awkward position of having to decide whether it is legally possible to reopen old property settlements; and it will generate large scale efforts to modify existing maintenance awards.³⁸

In a nutshell, the Eighth Circuit declared in *Bush* that because property obligations created by state divorce decrees are debts,³⁹ and because pensions are considered property,⁴⁰ a spouse may discharge a pension obligation under the Bankruptcy Code⁴¹ via a bankruptcy action. For reasons set forth below, we believe the decision is incorrect.

(QUADRO) is issued pursuant to state law. QUADROs are exempt from the preemptive and spendthrift provisions of ERISA. Special rules provide for the distribution of pension benefits pursuant to divorce actions. The Tax Reform Act of 1986 rewrote many of the rules regarding QUADROs. See Pub. L. No. 99-514, 100 Stat. 2953 (1986).

The Retirement Equity Act brought consistency to the pension area. First, it provided a limited exception to the ERISA prohibition against assignment or alienation of qualified plan benefits as long as a state court order met the requirements of the newly defined QUADRO. Second, new rules were written to facilitate distribution of plan benefits to the divorced spouse. Finally, plan administrators were insulated against breach of fiduciary responsibility as long as they complied with a court order which met the requirements of the newly defined Qualified Domestic Relations Act.

38. See Note, *Pension Awards in Divorce and Bankruptcy*, 88 COLUM. L. REV. 194 (1988); Freeburger & Bowles, *What Divorce Court Giveth, Bankruptcy Court Taketh Away: A Review of the Dischargeability of Marital Support Obligations*, 24 J. FAM. L. 587 (1985-1986); Ravin & Rosen, *The Dischargeability in Bankruptcy of Alimony, Maintenance and Support Obligations*, 60 AM. BANKR. L.J. 1 (1986).

39. See generally K. REDDEN, FEDERAL REGULATION OF FAMILY LAW § 9.2(A)(1) (1982).

40. See *Janssen v. Janssen*, 331 N.W.2d 752 (Minn. 1983); *Laster v. Laster*, 197 Mont. 470, 643 P.2d 597 (1982).

41. *Bush v. Taylor*, 893 F.2d at 965 (discussion of the application of 11 U.S.C. § 101(4)(11) (1988)). Vested and immature unvested pensions are considered marital assets. A pension is vested if the right to the pension is guaranteed, even though employment ends. A vested, immature pension is one where there are remaining conditions, such as retirement, that must occur before an employee can receive pension payments. See Blumberg, *Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, or Replacement, Analysis*, 33 UCLA L. REV. 1250 (1986).

Historically, both the Supreme Court and Congress have protected the rights of a dependent spouse, and the children involved in a divorce, from the impact of bankruptcy. For example, while the purpose of the Bankruptcy Code is to promote a debtor's fresh start by discharging past debts, the code does not permit a former spouse to discharge child support, alimony, and attorney fees awarded in divorce decrees,⁴² regardless of the hardship on the bankrupt individual.⁴³ This ninety-two year view can be traced back to the original 1898 Act. While marital support is not exempt from discharge in bankruptcy,⁴⁴ the Supreme Court, when confronted with the question, has declared that there existed a "natural and legal duty of the husband to support the wife."⁴⁵ The Court held that a dependent spouse had a right to a portion of the wage earning spouse's assets, regardless of the subsequent bankruptcy.⁴⁶ Thus the Court has judicially created a marital obligation exception. In 1903, Congress codified the marital exception, which remained essentially unchanged⁴⁷ until

42. See, e.g., *Foster v. Childers*, 416 N.W.2d 781 (Minn. Ct. App. 1987) (holding attorney fees are not dischargeable in bankruptcy proceedings). *Id.* at 785.

43. 11 U.S.C. § 523(a)(5)(B) (1982 & Supp. V 1987) provides that:

(a) A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or other order of a court of record . . . or property settlement agreement, but not to the extent that . . .

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support.

Id.

44. Bankruptcy Act of 1898, ch. 541, § 17, 30 Stat. 544, 550-51 (1898).

45. *Audubon v. Shufeldt*, 181 U.S. 575, 577 (1901). The Supreme Court reasoned that because alimony was not a provable debt, it could not be discharged under the Bankruptcy Act. The debt did not arise under a business transaction or contract but involved a husband's duty to support his wife. See also *Wetmore v. Markoe*, 196 U.S. 68 (1904). The Court said, "[Alimony is] a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children." *Id.* at 74; Note, *Dissolution of Marriage and the Bankruptcy Act of 1973: "Fresh Start" Forgotten*, 52 IND. L.J. 469, 473 (1977). Judicial views of the marital discharge exception indicate that "the non-bankrupt spouse's need for continued maintenance and support outweighs the bankrupt's need for a fresh start." *Id.*

46. *Audubon*, 181 U.S. at 580.

47. Act of February 5, 1903, ch. 487, § 5, 32 Stat. 797, 798 (1903) (repealed 1979). Congress has made it clear that only federal law can distinguish between what is property and what is support. The Eighth Circuit granted rehearing of *Bush* on February 27, 1990. Oral arguments were heard on April 10, 1990. The en banc

1978,⁴⁸ when Congress reaffirmed the rule that support awarded in a divorce is not dischargeable in a bankruptcy proceeding.⁴⁹

The issue before the Eighth Circuit in *Bush*,⁵⁰ was whether Taylor, a debtor under Chapter 7 of the Bankruptcy Code, was entitled to a discharge of his ongoing obligation under a state court divorce decree which required him to remit to his former wife one-half of the payments he received under a pension plan. The Bankruptcy Court denied the discharge on two grounds. First, it ruled that the prospective obligation to turn over a percentage of the pension payments was not a "debt" subject to discharge. Second, it ruled that Taylor held his ex-wife's portion of the pension only as a constructive trustee. While the district court affirmed the bankruptcy judge's ruling, the Eighth Circuit in a 2-1 decision reversed, holding that the obligation to remit a portion of pension payments falls within the broad and flexible definition of debt under the Code.⁵¹ The majority reasoned that the obligation arises from a property settlement, a species of debt that Congress chose not to exempt from discharge. The facts underlying the decision reflect its harsh impact.

When Taylor and Bush divorced in 1975, the divorce decree awarded Bush one-half of Taylor's benefits under an employment pension plan. However, upon retirement, Taylor refused to send Bush her half of the benefits. By 1982, several thousand dollars in pension arrears had accumulated, and Bush returned to divorce court seeking redress. Although it is not entirely clear, the couple appeared to reach a repayment agreement which contained a covenant not to execute on the judgment. Under the agreement, Taylor promised to pay Bush one-half of the \$16,412.52 in benefits he retained through June 30, 1982, and the remainder in monthly increments of \$500.00. He also agreed to pay, as originally ordered, one-half of his pension, plus one-half of all subsequent

decision will be the last word on what is property and what is support in the Eighth Circuit's jurisdiction, absent review by the Supreme Court.

48. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2590 (codified as amended at 11 U.S.C. § 523(a)(5) (1988)).

49. *Id.* Congress rejected the original Bankruptcy Commission's proposal that would have eliminated the property-support distinction.

50. 893 F.2d 962 (8th Cir. 1990).

51. *Id.* at 965-66.

increases in the amount of monthly pension benefits he received for the rest of his life. Bush agreed to withhold execution of the judgment on the arrears if Taylor paid her \$8,500.00 immediately, made \$500.00 monthly payments on the remainder, and remitted one-half of all future pension benefits. If Taylor was more than twenty days late in making any of his payments under the agreement, the covenant automatically terminated, allowing Bush to employ any legal means necessary to collect the full amount of the agreed upon judgment and order.⁵²

In 1987, Taylor and his new wife filed a Chapter 7 bankruptcy petition and listed among their debts Taylor's ex-wife's future claim to one-half of his pension benefits. His ex-wife objected to the discharge and the Bankruptcy Court agreed, ruling she was entitled to one-half of all future pension benefits as her separate property. Taylor appealed to the district court. The United States District Court for the Eastern District of Arkansas affirmed the bankruptcy ruling, relying in part on *In re Teichman*.⁵³ In *Teichman*, the Ninth Circuit Court of Appeals held that because future pension payments had not yet become due and payable at the time of a bankruptcy petition, they did not represent dischargeable debts under the Code.⁵⁴ Alternatively, the district court held that Taylor had been placed in a fiduciary position by the divorce court and merely held the pension payments for Bush's benefit, as a constructive trustee for future payment. Finally, the district court declared that, without regard to the Taylors' needs, it would be inequitable for Bush to be deprived of her "sole and separate property" in the bankruptcy proceedings.⁵⁵

The Eight Circuit Court of Appeals firmly rejected the reasoning and analysis of the bankruptcy judge and the district court.⁵⁶ It held that Taylor's ongoing obligation to provide his

52. *Id.* at 964.

53. 774 F.2d 1395 (9th Cir. 1985).

54. *Id.* at 1397-98. See also 11 U.S.C. § 727(b) (1988) (discharge covers debts arising before order for relief).

55. *Bush*, 893 F.2d at 964.

56. *Bush*, 893 F.2d at 967. See also *In re Chandler*, 805 F.2d 555, 557 (5th Cir. 1986), cert. denied, 481 U.S. 1049 (1987) (ex-husband could not discharge the portion of army benefits awarded to wife since the benefits had become her sole property); *Teichman*, 774 F.2d 1395, 1397-98 (9th Cir. 1985) (ex-husband not obligated to pay former wife until Air Force paid him; therefore, debt did not arise until the payment was due); *In re Hall*, 51 Bankr. 1002, 1003 (S.D. Ga. 1985) (although former wife held

ex-wife with one-half of his pension was nothing more than a debt for property settlement, the payment of which is not yet due. It supported its ruling by defining the meaning of "debt" provided by the Bankruptcy Code as simply "liability on a claim."⁵⁷ A "claim" was in turn defined as a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured, or a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.⁵⁸ The majority reasoned that "Congress chose this broad definition of 'claim' so that 'all legal obligations of the debtor, no matter how remote or contingent, [may be] dealt with in the bankruptcy case,' thus allowing the 'broadest possible relief in the bankruptcy court.'"⁵⁹ Therefore, Bush could not argue that she had a "claim" against Taylor for a share of the pension payments in the months and years to come regardless of its contingent or unmatured nature. The court observed that:

Because Bush has a claim for which Taylor is liable, there is a debt that came into existence when the state court made Taylor liable on the claim. Although a debt for alimony, maintenance, or support is not subject to discharge, 11 U.S.C. § 523(a)(5), Bush stipulated below that the obligation was for a property settlement. The debt is therefore dischargeable.⁶⁰

Consequently, whenever a debt arising from a division of

"claim" for pension benefits, liability for claim rested on Army, which made direct payments, not on ex-husband); *In re McNierney*, 97 B.R. 648, 651 (Bankr. S.D. Fla. 1989) (future payments of retirement benefits to ex-wife not dischargeable); *In re Mace*, 82 B.R. 864, 868 (Bankr. S.D. Ohio 1987) (ex-husband was merely a "conduit" for payments due to former wife from share of pension fund that belonged to her); *In re Manners*, 62 B.R. 656, 658 (Bankr. D. Mont. 1986) (United States, not debtor, is liable for pension benefits); *In re Thomas*, 47 B.R. 27, 33 (Bankr. S.D. Cal. 1984) (court had no power to modify ex-wife's interest in her separate property).

57. *Bush*, 893 F.2d at 965. See 11 U.S.C. § 101(11) (1988).

58. *Bush*, 893 F.2d at 965 (citing 11 U.S.C. § 101(4) (A) (B) (1988)).

59. *Bush*, 893 F.2d at 965 (citing S. Rep. No. 989, 95th Cong., 2d Sess. 21-22, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5807-08; H.R. Rep. No. 595, 95th Cong., 2d Sess. 309, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6266).

60. *Bush*, 893 F.2d at 965.

marital property is discharged, the nondebtor spouse is thereby deprived of his or her separate interest in property. Therefore, reasoned the majority, despite the divorce decree's ruling giving her a "sole and separate" property interest in the pension, the debt was dischargeable.⁶¹

The dissenting judge was not persuaded by the majority's reasoning:

The Court's decision is indefensible. It permits a dead-beat husband to use the Bankruptcy Code's grace for honest debtors as a slick scheme for euchring his former wife out of her "sole and separate property" in one-half of the benefits he receives under a pension plan. Under the Court's decision, the former wife's entitlement to one-half of the pension benefits—a property right established by judicial decree when the marriage was dissolved—becomes merely another debt dischargeable in bankruptcy. The result is that, post-bankruptcy, the husband will enjoy 100 percent of the monthly pension benefits for as long as he lives, and his ex-wife will be deprived forever of her half of these benefits. Short of outright thievery, it is hard to imagine a more compelling case of unjust enrichment.

If I truly thought that Congress had commanded such a bizarre and unjust result, I would join the Court's opinion.⁶²

While we agree with the dissenter's emotional perspective, we also believe there are additional reasons for not allowing the discharge. We suggest that the majority should have focused more on the conceptualization of "debt" and "due and owing," as those terms are used in the Bankruptcy Code. To illustrate, assume that a wife is awarded a future one-half interest in her husband's pension upon retirement, and her husband seeks to have the obligation discharged via a bankruptcy proceeding. Conceptually, he is not seeking discharge of a "debt" because the liability has not yet arisen. And logically, because no liability exists, it cannot be discharged.

To illustrate further, assume that a husband in a divorce proceeding is ordered to pay his ex-wife \$10,000 as a lump sum cash settlement and following the divorce, he seeks to have the award discharged. Because the lump sum is "due and owing" as a "debt," we believe, under the current state of law, it can

61. *Id.* at 965–66.

62. *Id.* at 967 (Bowman, J., dissenting).

be discharged. Similarly, if an ex-wife is awarded a portion of the present value of a pension, it is likewise dischargeable in a bankruptcy proceeding because it is a "debt," which is "due and owing" at the time the bankruptcy action occurs. However, a discharge of future pension obligations conceptually fails the debt "due and owing" analysis.

Another reason for distinguishing future pension benefits from debts "due and owing" lies in the assumption underlying bankruptcy actions and the unjust enrichment of the husband. To illustrate, a husband who asks a bankruptcy court to discharge a debt does so on the assumption he does not have sufficient funds with which to pay it. Conceptually, that is not the situation when he seeks discharge of a future liability to pay over portions of a pension award. In that instance, the husband is asking that funds payable in the future to his ex-wife simply be diverted to him.

Finally, it is difficult to believe that Congress ever intended the Bankruptcy Code to achieve such an unjust result. In particular, the opinion may cause further injury to that large group of divorced women, who are nearing or have reached retirement age and for whom no QUADRO has been executed. Moreover, the ruling may add to the economic injury already suffered by many within this group who never received adequate child support.

Many traditional homemakers entered into long-term marital relationships with conventional values. They performed traditional homemaker duties, only to suffer economic disaster when divorced.⁶³ Upon divorce they found they were unable to maintain or achieve the standard of living enjoyed during the marriage relationship. They were unable to obtain employment which provided income approaching that of their male partner. Moreover, they discovered they faced a difficult, uncertain battle in attempting to obtain permanent maintenance. Because of the *Bush* decision, the portion of a couple's pension *earned* by the traditional homemaker through her work as cook, housekeeper, nurse, nanny, and lover is being taken from her, leaving little or nothing on which to live in her de-

63. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L. Q. 351 (1987).

clining years.⁶⁴

The harsh impact of the Eighth Circuit's opinion will be felt the most by the divorced traditional homemaker, who during her mid-forties receives custody of the couple's children. Between 1963 and 1975, the national divorce rate increased 100 percent and increased 100 percent again in each year thereafter until 1981. In 1981, the number of divorces in the United States reached a record 1.21 million. It is further estimated that forty-nine percent of all existing marriages will end in divorce.⁶⁵ Of the women who were to receive child support in 1985, sixty-three percent had court-ordered payments, while thirty-three percent had a voluntary agreement.⁶⁶ Women with court-ordered payments received only fifty-six percent of the amount due.⁶⁷

In 1986, of the 8.8 million women raising children whose fathers were not living in the household, sixty-one percent or about 5.4 million were awarded child support by the courts.⁶⁸ Of the women who had support awards due about one half received full payment from the father.⁶⁹ Other data indicate that the poverty rate for female-headed, single-parent families is three times the national average for all families.⁷⁰ It is clear that millions of American children with divorced parents are living in poverty.⁷¹ The *Bush* decision only adds to the serious

64. Ironically, in the case of Ms. Bush, Taylor's new wife stands to gain from the bankruptcy.

65. NATIONAL INSTITUTE FOR CHILD SUPPORT ENFORCEMENT, OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVICES, *ESSENTIALS FOR ATTORNEYS IN CHILD SUPPORT ENFORCEMENT*, xix (1985).

66. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, P-23, No. 152, *CHILD SUPPORT AND ALIMONY: 1985*, 6 (1981).

67. *Id.* at 6. As of spring 1986, of women with children whose father was absent from the home, about thirty-two percent (2.8 million) had incomes below the poverty level. *Id.* at 4.

68. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, P-23, No. 152, *CHILD SUPPORT AND ALIMONY: 1985*, 1 (1987), reviewed by 13 Fam. L. Rep. (BNA) 1568 (Sept. 22, 1987); see also NATIONAL CHILD SUPPORT ENFORCEMENT REFERENCE CENTER, OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *Secretary Heckler Announces Child Support Initiative*, Child Support Rep. (special issue) Aug. 1984, at 2.

69. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, P-23, No. 152, *CHILD SUPPORT AND ALIMONY: 1985* 1 (1987), reviewed by 13 Fam. L. Rep. (BNA) 1568 (Sept. 22, 1987).

70. Roberts, *Ameliorating the Feminization of Poverty: Whose Responsibility?*, 18 CLEARHOUSE REV. 883, 884 (1984).

71. NATIONAL CHILD SUPPORT ENFORCEMENT REFERENCE CENTER, OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *Nonsup-*

problems already experienced by such women who were also awarded a future interest in their former husband's pension.

It is difficult to accept the majority view that Congress was not aware of the plight of the divorced homemaker and the implications of allowing her husband to bar her from sharing in his pension. Fortunately, in the case of most divorces since 1984-85, we believe that the execution of a Qualified Domestic Relations Order completely divests a husband of any right in the future payments, and a wife is protected from the consequences of the *Bush* decision.⁷² However, for the large group of divorced traditional homemakers without QUADROs, the decision is a disaster! This decision should be reversed by the Eighth Circuit.

III. FAMILY WIRETAPPING

Despite recent reforms aimed at reducing the acrimony associated with dissolving marital relationships,⁷³ new matrimonial weapons are being forged by judicial blacksmiths and handed to warring couples. One of the newest weapons involves the right of spouses to sue each other for violating the federal wiretap law.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, with few exceptions, purports to prohibit any third-party electronic eavesdropping.⁷⁴ In pertinent part, 18 U.S.C. § 2511(1) provides that:

Except as otherwise specifically provided in this chapter any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

.....

port and Poverty are Topics at Charleston, Child Support Rep., Dec. 1985 at 4. "Children . . . constitute 40 percent of all poor people . . ." See OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, 9TH ANNUAL REPORT TO CONGRESS 5 (1984).

72. Note that the panel declined to decide this issue.

73. Domestic disputes, in particular dissolutions of marriage relationships, consume a major portion of America's civil court calendars. They have escalated at an astounding rate with the national divorce figures rising from 479,000 in 1965 to 1,200,000 in 1983. Zaal, *Family Law Teaching in the No-Fault Era: A Pedagogic Proposal*, 35 J. LEGAL EDUC. 552, 556 (1985) (citing A.A.L.S. tape recording: Proceedings of a Conference on the Teaching of Family Law, Tape 1, Side B (1982)).

74. 18 U.S.C. § 2511 (1988).

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection⁷⁵

shall be fined not more than \$10,000 or imprisoned not more than five years, or both.⁷⁶

Recovery for damages in a civil cause of action is authorized by 18 U.S.C. § 2520, which provides in part:

[A]ny person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.⁷⁷

The statutory definition of “person” includes “any individual.”⁷⁸ An exception to the coverage of the act is provided for use of an extension phone or similar device in 18 U.S.C. § 2510:

(5) “electronic, mechanical, or other device” means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business⁷⁹

The question of whether the Act was intended to cover spousal wiretapping was initially raised by a battling couple in the Fifth Circuit.⁸⁰ The eventual defendant, Simpson, suspected his wife was unfaithful and obtained a device for tapping and recording telephone conversations. He attached the device to phone lines within his home, and intercepted conversations between his wife and another man. The conversations were “mildly compromising” establishing that the other man was making advances, and that while the wife was resisting, she was not doing so in a firm and final fashion. Simpson played

75. 18 U.S.C. § 2511 (1)(a)(c) (1988).

76. 18 U.S.C. § 2511 (4)(a) (1988).

77. 18 U.S.C. § 2520 (a) (1988).

78. 18 U.S.C. § 2510 (6) (1988).

79. 18 U.S.C. § 2510 (5)(a)(i) (1988).

80. *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974).

the tapes, or portions thereof, to neighbors, family members and for a lawyer, on whose advice the wife agreed to an uncontested divorce.⁸¹

When the uncontested divorce became final, Simpson's ex-wife brought a civil action against him under 18 U.S.C. § 2520 (1974).⁸² After losing her claim at the district court level, she appealed asserting she was entitled to constitutional protections of privacy and "emerging concepts of women's rights."⁸³ The Fifth Circuit firmly rejected the theory that the statute was intended to cover domestic partners, observing:

[W]e are of the opinion that Congress did not intend such a far-reaching result, one extending into areas normally left to states, those of the marital home and domestic conflicts. We reach this decision because Congress has not, in the statute, committee reports, legislative hearings, or reported debates indicated either its positive intent to reach so far or an awareness that it might be doing so. Given the novelty of a federal remedy for persons aggrieved by the personal acts of their spouses within the marital home, and given the severity of the remedy seemingly provided by Title III, we seek such indications of congressional intent and awareness before extending Title III to this case.

Our independent search of legislative materials has been long, exhaustive, and inconclusive. To summarize the results, we have found no direct indications that Congress intended so much, and only several scattered suggestions that it was aware that the statute's inclusive language might reach this case.⁸⁴

The Fifth Circuit noted that not only would the result sought by Ms. Simpson create a federal remedy for marital grievances, but would also override the interspousal immunity for personal torts⁸⁵ accorded by the majority of states.⁸⁶

81. *Id.* at 804.

82. The 1974 version of 18 U.S.C. § 2520 under which Simpson sued is in substance the same as the present version. *See supra* text accompanying note 75.

83. *Simpson*, 490 F.2d at 804.

84. *Id.* at 805-06.

85. *See* W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 122 at 901-04 (5th ed. 1984). The common law doctrine of interspousal immunity was based on the legal fiction of marital identity. In the eyes of the law, husband and wife were considered one person and that person was the husband. For this reason, it was impossible at common law to maintain a tort action between man and wife. However, husbands and wives were always regarded as separate individuals in criminal law.

86. Discussions of the rules followed by the various states may be found in

Two years after *Simpson*, the Sixth Circuit took a contrary position on an almost identical question. In *United States v. Jones*, a husband was criminally indicted for allegedly intercepting, recording, and using his wife's telephone conversations.⁸⁷ The district court dismissed the indictment ruling that the husband's conduct was not covered by the wiretap act. The Sixth Circuit reversed, holding that:

[T]he plain language of the section and the Act's legislative history compels interpretation of the statute to include interspousal wiretaps. It is not for this Court to question the wisdom of Congress and to establish an implied exception to a federal statute by judicial fiat.⁸⁸

However, the *Jones* panel also distinguished *Simpson*:

The most telling difference between this case and *Simpson* however, is that we are here concerned with construing the scope of a criminal statute. Even in states which recognize interspousal immunity, that immunity does not apply to criminal prosecutions. As noted above, Title III protects the privacy of all parties to an intercepted communication, and the fact that one party to a tapped conversation is the spouse of the defendant should have no bearing whatsoever on the availability of criminal penalties.⁸⁹

The Second Circuit considered the issue in *Anonymous v. Anonymous*.⁹⁰ In that dispute, the couple were married in 1958 and separated in 1972. Due to the wife's unstable mental condition at the time, their two minor children were temporarily placed in their father's custody. In 1973, the wife abducted their daughter, taking her to Florida. When later the wife returned to New York, she was arrested and her visitation rights suspended. Shortly thereafter, the family court issued an order directing her to refrain from using foul and abusive language during telephone calls to her husband and children.⁹¹

After the New York decree was entered, the ex-wife brought

H. CLARK, *THE LAW OF DOMESTIC RELATIONS*, 252-56 (1968). See also W. PROSSER & W. KEETON, *THE LAW OF TORTS*, 901-04 (5th ed. 1984). See *Baumrind v. Ewing*, 276 S.C. 350-51, 279 S.E.2d 359-60, cert. denied, 454 U.S. 1092 (1981). The court held: "Domestic conflicts are traditionally and properly matters of state interest." The conduct of a husband, in taping his wife's phone conversations was held to be "beyond the grasp of federal statute." *Id.*

87. 542 F.2d 661, 663 (6th Cir. 1976).

88. *Id.* at 673.

89. *Id.* at 672.

90. 558 F.2d 677 (2d Cir. 1976).

91. *Id.* at 678.

an action in federal district court alleging that during the two years preceding the divorce, her ex-husband had intercepted and tapped her telephone conversations with their daughter, in violation of 18 U.S.C. § 2511.⁹² As the case unfolded it became clear that the ex-husband had purchased an automatic telephone answering machine at a local retail store, and plugged it into the standard telephone company jack in his apartment. The machine answered the phone and then played a recording of his voice, stating that the caller had forty-five seconds in which to identify himself or herself and leave a message. A loudspeaker attached to the machine permitted anyone in the apartment to hear the caller.⁹³ The ex-husband claimed his purpose in installing the answering machine was to avoid speaking to his ex-wife when she telephoned the children at his apartment. If she was heard identifying herself over the machine, one of the children, rather than the husband would pick up the phone. Whether or not someone picked up on the husband's end, the machine normally shut off automatically after forty-five seconds.⁹⁴

The ex-wife alleged, however, that her former husband had instructed their son to turn a knob marked "Record" on the machine whenever his mother called, thus surreptitiously tapping her conversations beyond the forty-five second period. If the husband was at home, the loudspeaker arrangement also enabled him to hear the conversations in another room. If he was not at home, he could later play back the recordings of the conversations.⁹⁵

The district court judge dismissed the wiretap claim and the Second Circuit affirmed, observing:

[I]t appears fairly clear that although Congress's primary concern in enacting the wire interception provisions of the Act was with organized crime, Congress was not unaware of the growing incidence of interspousal wiretaps, and did not intend to blanketly except them from the Act's coverage. The issue becomes at what point interspousal wiretaps leave the province of mere marital disputes, a matter left to the

92. *Id.*

93. The state court had apparently issued an order forbidding the ex-husband from being in the room where the telephone was located if his former wife was talking to one of the parties' children. *Id.* at 678 n.3.

94. *Id.* at 678.

95. *Id.*

states, and rise to the level of criminal conduct proscribed by the federal wiretap statutes. . . . For the reasons below, we conclude that the facts alleged here do not rise to the level of criminal conduct intended to be covered by the federal wiretap statutes, and hence we affirm the dismissal of the complaint.⁹⁶

. . . .
 . . . [W]e . . . assume that "nobody wants to make it a crime" for a father to listen in on conversations between his wife and his eight year old daughter, from his own phone, in his own home. The fact that appellee here taped the conversations which he permissibly overheard, we find, as the Fifth Circuit did in *Simpson*, to be a distinction without a difference.⁹⁷

Several years passed with little activity at the federal circuit level. However, in 1984 the family wiretap issue arose in the Fourth Circuit in *Pritchard v. Pritchard*.⁹⁸ The sole question was whether the district court erred in dismissing a civil claim by Donald Ray Pritchard, who alleged that his ex-wife, Zee Warren Pritchard, had violated the Wiretap Act. Zee Warren relied on *Simpson* for the proposition that the statute impliedly excluded wiretapping of the conversations of one spouse by the other spouse; Donald Ray relied upon *Jones*, and *Kratz v. Kratz*.⁹⁹

96. *Id.* at 677.

97. *Id.* at 679 (citation omitted).

98. 732 F.2d 372 (4th Cir. 1984).

99. In *Kratz*, while their divorce proceeding was pending, the husband attached a recording device to his wife's phone. He recorded her conversations and gathered information about her "activities" to use in the divorce action. 477 F. Supp. 463, 466 (E.D. Pa. 1979). The *Kratz* court held that, contrary to the husband's assertion, Congress clearly prohibited interception of "all wire communications by any person except as specifically provided by Congress." *Id.* at 467 (emphasis added). See *Flynn v. Flynn*, 560 F. Supp. 922, 924 (N.D. Ohio 1983) (interspousal immunity doctrine still recognized but does not determine whether a violation of 18 U.S.C. § 2520 has occurred); *Heyman v. Heyman*, 548 F. Supp. 1041, 1045 (N.D. Ill. 1982) (act prohibits wiretapping between spouses); *Citron v. Citron*, 539 F. Supp. 621, 626 (S.D.N.Y. 1982) (complaint dismissed on grounds that defendant's wiretapping activity was not willful); *Gill v. Willer*, 482 F. Supp. 776, 778 (W.D.N.Y. 1980) (wife had a claim against husband who tapped her phone); *Remington v. Remington*, 393 F.Supp. 898, 901 (E.D. Pa. 1975) (decided in part by distinguishing *Simpson* factually); *Rickenbaker v. Rickenbaker*, 290 N.C. 373, 381-82, 226 S.E.2d 347, 351-52 (1976) (criticized and distinguished *Simpson* factually). *But see* *Baumrind v. Ewing*, 276 S.C. 350, 352-53, 279 S.E.2d 359, 360, *cert. denied*, 454 U.S. 1092 (1981) (South Carolina Supreme Court followed *Simpson*). See also Comment, *Interspousal Electronic Surveillance Immunity*, 7 TOLEDO L. REV. 185 (1975) (criticizing *Simpson* decision in granting interspousal surveillance immunity).

The Fourth Circuit held there was no express exception for instances of willful, unconsented to, electronic surveillance between spouses and concluded from its investigation of the legislative history that the Act did cover the marital home. Observed the court:

The *Simpson* court and other courts faced with the issue have, however, examined the legislative history in an effort to determine the intent of Congress on the issue of wiretapping between spouses. In *Simpson*, the court concluded that its search of legislative materials had been "long, exhaustive, and inconclusive," yielding "no direct indications" that Congress intended for the statute to reach interspousal wiretaps conducted in the marital home although the court had found "several scattered suggestions that [Congress] was aware that the statute's inclusive language might reach this case." In *Jones and Kratz*, however, an analysis of the legislative history led to the conclusion that the legislative history "evinced a congressional awareness of the widespread use of electronic eavesdropping in domestic relations cases, and a congressional intent to prohibit such eavesdropping." Specific references that are persuasive include the testimony before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee of Professor Robert Blakey. Blakey, who is recognized as the author of Title III, commented that "private bugging in this country can be divided into two broad categories, commercial espionage and marital litigation."

The *Kratz* court found further indication of congressional intent in comments made during the Hearings on *Invasion of Privacy Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee*. Senator Long, the chairman of the subcommittee, "noted that the three major areas in which private electronic surveillance was widespread were '(1) industrial (2) divorce cases, and (3) politics.'"

Another explicit acknowledgment of the scope of the statute is found in the comments of Senator Hruska, joined in by Senators Dirksen, Scott and Thurmond that "[a] broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations."

... [W]e find that Title III prohibits all wiretapping activities unless specifically excepted. There is no express exception for instances of willful, unconsented to electronic

surveillance between spouses. Nor is there any indication in the statutory language or in the legislative history that Congress intended to imply an exception to facts involving interspousal wiretapping.¹⁰⁰

With these competing views, the stage was set for the Eighth Circuit's input. Its opportunity came in *Kempf v. Kempf* when a federal district court in Missouri dismissed a claim brought by Jillian Kempf against her former husband Karl seeking civil damages under the Wiretap Act.¹⁰¹ The couple were living together in Missouri when Karl suspected Jillian of having extramarital affairs. To confirm his suspicions, Karl intercepted and recorded her telephone conversations by connecting a cassette tape recorder to the receiver of an extension phone in plain view in the basement of the couple's home. The recorded conversations confirmed Karl's worst suspicions, and he filed for divorce. In the divorce proceeding, tapes of Jillian's conversations were admitted as evidence over her objection.¹⁰²

The marriage was dissolved. Two weeks following entry of the divorce decree, hostilities resumed when Jillian filed suit against Karl in Missouri Federal District Court. She alleged that Karl had violated her right to privacy under Title III, 18 U.S.C. § 2511. She sought compensatory and punitive damages plus attorney fees. The district court dismissed, relying on the reasoning in *Simpson*.¹⁰³ Jillian took the domestic battle to the Eighth Circuit.

A unanimous Eighth Circuit panel reversed the district court, distinguished *White v. Weiss*,¹⁰⁴ and rejected the Fifth Circuit's wiretap view. Observed the court:

Karl would have us insulate him from civil liability on the basis of our ruling in *White v. Weiss*, where we applied Title III to a domestic situation and found liability on the part of a third party detective. However, because we did not address or speculate whether Title III would reach interspousal wiretapping when a third party was not involved, *White* does not answer the question presented here.

100. 732 F.2d at 373-74 (citations omitted).

101. *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989).

102. *Id.* at 971 (Missouri apparently does not apply a pure no-fault standard in divorce proceedings).

103. *Id.*

104. In *White*, the husband hired a private detective to tap his wife's conversations in their home. The court distinguished *Simpson* and held that private detectives hired by a spouse are not exempted from the Act. 535 F.2d 1067, 1071 (8th Cir. 1976).

....

We agree with the Fourth Circuit's conclusion in *Pritchard v. Pritchard*.

Title III prohibits all wiretapping activities unless specifically excepted. There is no express exception for instances of willful, unconsented to electronic surveillance between spouses. Nor is there any indication in the statutory language or in the legislative history that Congress intended to imply an exception to facts involving interspousal wiretapping.

....

... [W]e find no legal basis in Title III or its legislative history to insulate a spouse in this situation from the Title's reach or its civil penalties, we hold that the conduct of a spouse in wiretapping the telephone communications of the other spouse within the marital home, falls within its purview.¹⁰⁵

No sooner had the ink dried on *Kempf*, when a variation on the family wiretapping theme came before the Eighth Circuit. This dispute arose out of a custody and visitation battle involving the four year-old daughter of Stuart and Angela Platt.¹⁰⁶ The Missouri state court had allowed Stuart to maintain regular phone contact (three times per week) with the four-year-old while the couple's divorce petition was pending. However, when Stuart called to talk with the child, her mother, Angela, apparently recorded the conversations. When Stuart discovered that Angela was listening in on the conversations between him and his daughter, he filed suit in federal district court.

In his complaint, Stuart alleged that Angela "installed a tape recording device on [her] telephone in order to intercept, monitor, and record telephone calls' made by 'Stuart to their minor child' to gain an advantage in their dissolution proceeding."¹⁰⁷ Stewart contended that he neither authorized Angela to listen in on the conversations, nor expressly or impliedly

105. *Kempf*, 868 F.2d at 973 (citations omitted) (quoting *Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir. 1984)).

106. *Platt v. Platt*, 685 F. Supp. 208 (E.D. Mo. 1988), *rev'd*, 873 F.2d 1447 (8th Cir. 1989). In an unpublished opinion the Eighth Circuit noted that the issues in *Platt* were similar to those in *Kempf*, and accordingly reversed and remanded. No. 88-1983, slip op. at 2 (8th Cir. Feb. 22, 1989). After dismissal by the district court, Stuart Platt again appealed to the Eighth Circuit. *Platt v. Platt*, No. 88-1983, slip op. (8th Cir. May 10, 1989).

107. *Platt v. Platt*, No. 88-1983, slip op. at 2 (8th Cir. May 10, 1989).

consented to the installation of the recording mechanism. Angela moved to dismiss Stewart's complaint, arguing she did not violate the Wiretap Act because, as natural mother and legal guardian of the minor child, she stood in the place of the minor child and consented to the recording. Furthermore, she contended that the child was not a "person" within the meaning of 18 U.S.C. § 2510(6) and that the claim was barred by interspousal immunity. The Eighth Circuit remanded to determine the exact nature of the recording device itself, as well as the method and manner of the recording that took place. It distinguished between wiretapping and eavesdropping by means of an extension phone.¹⁰⁸

The Eighth Circuit's view which removes interspousal immunity from electronic wiretapping can be sustained on several bases. For example, to the extent that the decision promotes the extension of the "individual rights-centered" philosophy into the family unit, it achieves this objective. Furthermore, if spousal wiretapping posed a serious menace to individual privacy within the family home, the menace has been reduced, at least within the Eighth Circuit. Moreover, the *Kempf* view of spousal wiretapping finds itself in fashionable company in terms of fostering the expansion of tort actions between individuals within the family.¹⁰⁹

On the other hand, one might ask, is it time to exercise greater caution before shifting more power away from the family as a unit to the individuals within it? Especially, should the shift continue at a time when the American family is facing problems never before encountered? Is it time, as some argue, to undertake major efforts to strengthen, rather than weaken the basic fabric of the family unit?

The *Kempf* decision moves too quickly to a result without appropriate in-depth reflection on its ultimate consequences. It may not be desirable, for example, for persons living in such close proximity to each other to bring claims which interfere with the essential fabric of that relationship. There are, after

108. *Id.* at 5. The Eighth Circuit based its distinction on the amount of human supervision necessary. "Extension phone eavesdropping requires a greater degree of human supervision, the presence of the eavesdropper. . . . In contrast, wiretapping requires only a minimum of human supervision. . . ." *Platt v. Platt*, No. 88-1983, slip op. at 5 (8th Cir. May 10, 1989).

109. See, e.g., L. KARP & C. KARP, *DOMESTIC TORTS, FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE* (1989).

all, intrinsic values within the family, such as sharing information in and out of the family abode, that application of the wiretap statute may impede. Philosophically, *Kempf* reduces the authority of the family, weakens the partners' marital commitment, and further erodes both family stability and importance.

From our perspective, the Eighth Circuit should have balanced the injury to the family unit caused by spousal wiretapping without liability against the potential injury with liability. Is it necessary, for example, to prohibit wiretapping because it fosters an outmoded view of male dominated households? Or, because it aids in protecting partners and children from abuse by other family members? Does not the real answer to the wiretap issue lie in a deeper understanding of family dynamics? For example, what is the impact of the decision on the following view of the family?

From one perspective, a family can be defined as a community unto itself consisting of a small, relatively permanent group of people. A family is "any group of persons closely related by blood, as parents, children, uncles, aunts, and cousins" or "a group of persons who form a household under one head, including parents and children,"¹¹⁰ who share and experience the whole range of human problems and human emotions.

Family members experience continual responsibilities and obligations toward each other and develop a sense of belonging, from being a member of the family unit. They often share the same name, many of the same sources of pleasure and grief, the same collective reputation, and often face the same sources of conflict. Agreements and disagreements are usually resolved within the family. The most fundamental appreciation of human qualities and values occurs within the family. Values such as truth, empathy, cruelty, indifference, impartiality and many others find their root in the family. A family provides economic security and long term assurance that permit role division in terms of career and child raising.¹¹¹ Perhaps

110. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 696 (2d ed. 1987).

111. B. HOGGETT & D. PEARL, THE FAMILY, LAW AND SOCIETY, CASES AND MATERIALS 11 (1983) (quoting R. FLETCHER, THE FAMILY AND MARRIAGE IN BRITAIN, 26-27 (3d ed. 1973)).

the Eighth Circuit has a different view of the family and its dynamic character. The court, however, did not attempt to identify the "real" factors involved in the *Kempf* decision. A definition and examination of today's family is the starting point. Instead, the court relied on a cold reading of congressional history—one clearly ambiguous—and reached an unsatisfactory result. An analysis of the effect wiretapping has on families would be far more helpful.

IV. PROTECTING THE FAMILY FROM THE STATE

During the past two decades the composition of the American family has changed significantly because divorce is more readily available. Simultaneously, the state's relationship to the family has changed dramatically. Large bureaucracies have been created at substantial taxpayer expense to help troubled families solve their difficulties. An increased awareness of domestic violence and child abuse has generated a large body of state law. Correspondingly, state agencies have been expanded to investigate and resolve claims made by one family member against another.

A proliferation of agencies, complex laws, and widespread invasion by the state of a family's privacy create special problems for the courts. Furthermore, as the state increases its role as guardian and protector of family members, additional problems are created for the courts when the family relies on the state to properly carry out its assumed duties. To whom are families to turn when the state wrongfully invades their privacy? What is the remedy when a state fails to carry out a duty it has voluntarily assumed? And, in the context of the increasingly large and powerful bureaucratic machinery, is there any forum in which a citizen may effectively obtain redress?

One purpose of this section is to examine a number of Eighth Circuit decisions which involved claims of family members against the state. Our analysis is directed at discovering the conditions under which the Eight Circuit will act.

The sensitive issue of child abuse has raised its unbecoming head in the Eighth Circuit in the context of 42 U.S.C. § 1983 actions by parents demanding redress from the state¹¹² claim-

112. For convenience, we will refer to the state as the party being sued, although

ing it improperly interfered with the care, companionship, and love of family members. The court of appeals' treatment of 42 U.S.C. § 1983 disputes plays a significant role in terms of state agency funding, personnel training,¹¹³ and the creation of rules and guidelines for effective supervision.¹¹⁴ Moreover, its views provide citizens with either increased or decreased protection from abuses of state power at a time when allegations of abuse are increasing, and community hysteria regarding child abuse is escalating. The need for the Eighth Circuit to impartially and vigilantly stand between the government and its citizens is never more immediate than when child abuse is the issue.¹¹⁵

With rare exception, families seeking redress by bringing a section 1983 action have little chance of being heard by the Court of Appeals for the Eighth Circuit. The time is ripe, however, for the court to review its hands-off policy. Of particular concern is the community-wide atmosphere of hysteria gener-

states, government agents, and municipalities are all possible defendants under 42 U.S.C. § 1983. The conduct of state officials may also make them personally liable for damages under § 1983. See *Monroe v. Pape*, 365 U.S. 167, 172 (1961); *Ex Parte Young*, 209 U.S. 123, 159-60 (1908) (basis for injunctive relief against the state). Municipalities may also be sued under § 1983 for damages and injunctive relief, where the complaint alleges that the execution of a "policy or custom" of the municipality led to the injury in question. See *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978). However, a state cannot be liable for damages under § 1983 because of the eleventh amendment. U.S. CONST. amend. XI; see also *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (Harlan, J., concurring); *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381-82 (1798).

113. See *City of Canton v. Harris*, 109 S. Ct. 1197 (1989). The Court held: "The inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train in a relevant respect amounts to deliberate indifference to the constitutional rights of persons with whom the police come into contact." *Id.* at 1199. See also *Oklahoma City v. Tuttle*, 471 U.S. 808, 824-25 n.8 (1985).

114. *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134 (2d Cir. 1981). In *Doe*, a child brought an action under § 1983 alleging that her constitutional rights had been violated when the agency which placed her in a foster home failed to adequately supervise her placement and, as a result, she was raped and beaten by her foster father.

115. There are several authors who argue that the state has a duty to provide certain benefits to the oppressed and the impoverished. See, e.g., Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 198. Miller proposes that the judiciary is creating an affirmative constitutional duty which obligates government to act in situations concerning racial relations, legislative reapportionment, administration of criminal law, and administrative law.

However, the authors of this article do not agree with the proposition that government has an affirmative duty to act. See Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

ated by disputes involving abuse and the fear that state courts will not adequately protect a citizen when this occurs.

To illustrate our point, the Minnesota Court of Appeals recently described the community "hysteria" that is associated with child abuse claims:

There is a certain hysteria which has arisen in roughly the last decade concerning child abuse. Although serious, when ranked with homicide, aggravated assaults, armed robbery, burglaries, drug dealing, and other felonies, abuse does not occupy a special or sacrosanct position which puts it apart from the normal rules and codes of conduct, including the Bill of Rights. Yet, no other crimes seem shrouded with the mystique of child abuse. All normal concerns for persons' rights get overridden when someone says, "but we're protecting little children." No matter how heinous the crime, it is antithetical to our judicial system that the innocent can be punished lest an occasional guilty one escape.¹¹⁶

Is the "hysteria" playing a subtle but nevertheless pivotal role in the Eighth Circuit's rejection of section 1983 actions where the state is a defendant? Or, is the court justified in its view that children need to be protected at all costs even if innocent family members are occasionally sacrificed? A need to reexamine the Eighth Circuit's perspective comes at a time when the American family has been afforded constitutional protection by the United States Supreme Court. The Court has held that a constitutionally recognized liberty interest exists between parents and children in the care and companionship of each other.¹¹⁷ It has also said that "[t]he relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection."¹¹⁸ In *Stanley v. Illinois*,¹¹⁹ the Court declared that the interest of an unmarried father "in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."¹²⁰

The interests of a parent in the companionship, care, custody and management of his or her children are said by the

116. *R.S. v. State*, 447 N.W.2d 205, 212 (Minn. Ct. App. 1989).

117. *Lehr v. Robertson*, 463 U.S. 248, 258 (1983).

118. *Id.*

119. 405 U.S. 645 (1972).

120. *Id.* at 651.

Supreme Court to "come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."¹²¹ Frequently, the Court has emphasized the importance of the family, where the right to conceive and to raise one's children is deemed "essential"¹²² and one of the "basic civil rights of man"¹²³ involving "rights far more precious . . . than property rights."¹²⁴ In addition, the Court has noted, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."¹²⁵

Protections for the integrity of the family unit are found in the due process clause of the fourteenth amendment,¹²⁶ the equal protection clause of the fourteenth amendment,¹²⁷ and the ninth amendment.¹²⁸ The liberty interest in family privacy has its "source" and its "contours," not in state law, but in intrinsic human rights as they have been understood in "this Nation's history and tradition."¹²⁹

Despite the constitutional dimensions of the family and profuse statements concerning its importance, the Supreme Court has declared that the rights and liberty interests of the family are not absolute, particularly when minor children are involved. The Court has reasoned that, "[t]he intangible fibers that connect parent and child have infinite variety. . . . It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases."¹³⁰

The Eighth Circuit has recognized that the privacy and au-

121. *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

122. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

123. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

124. *May v. Anderson*, 345 U.S. 528, 533 (1953).

125. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

126. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

127. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

128. *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

129. *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977); *accord Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977).

130. *Lehr v. Robertson*, 463 U.S. 248, 256 (1983). *See also Backlund v. Barnhart*, 778 F.2d 1386 (9th Cir. 1985). In *Backlund*, the court noted that parents have no clearly established right to unlimited exercise of religious beliefs on their children; the state, as *parens patriae*, may for example, enforce school attendance, prohibit child labor and require vaccination. *Id.* at 1389.

tonomy of familial relationships are among the interests which due process protects. Moreover, the court has said it can conceive of no more important relationship, no more basic bond in American society, than the tie between parent and child.¹³¹ It faces the dilemma, however, of what to do when the constitutionally protected family interests collide with the state's interest in protecting children. On this point, the court of appeals has balanced the liberty interest in familial relations against the compelling state interest in protecting minor children, particularly in circumstances where state action is considered necessary to protect the children from parents themselves.¹³²

The Seventh Circuit, has discussed the meaning of clearly established rights. It suggested that if the existence of a right or the degree of protection it warrants in a particular context is subject to a balancing test, the right can rarely be considered "clearly established," unless there is closely corresponding factual and legal precedent.¹³³ The Eighth Circuit, as evidenced by *Myers v. Morris*,¹³⁴ supports this view. It said, "[w]here the state asserts a compelling interest for intruding into the plaintiff's privacy, the balance may weigh against protection of the right, and the intrusion may be justified."¹³⁵ Consequently, the Eighth Circuit seldom permits a family member to bring a section 1983 action against the state, if the state's claimed misbehavior involved protecting a child from abuse. Section 1983 of the Civil Rights Act of 1871 creates a federal cause of action against state officials who deprive citizens of their constitutional rights.¹³⁶ It renders individual state officials liable for

131. *Bohn v. County of Dakota*, 772 F.2d 1433, 1439 (8th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

132. *See, e.g., Fitzgerald v. Williamson*, 787 F.2d 403 (8th Cir. 1986).

133. *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986). *See also Snyder v. Kurvers*, 767 F.2d 489, 497-98 (8th Cir. 1985).

134. *Myers v. Morris*, 810 F.2d 1437 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987).

135. *Id.* at 1463.

136. A § 1983 plaintiff must also show that the defendant was an individual who acted under color of state law. This condition is satisfied if the individual's conduct constitutes "state action" for the purposes of the fourteenth amendment. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 & n.18 (1982).

42 U.S.C. § 1983 (1982), enacted as § 1979 of the Civil Rights Act of 1871, was originally a part of the general civil rights legislation passed by Congress following the Civil War in an effort to give substantive freedom to the emancipated slaves. This essential purpose was noted in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), wherein the Supreme Court noted that the "one pervading purpose" of the

wrongfully depriving citizens of "any rights, privileges, or immunities secured by the Constitution and laws" ¹³⁷

The Eighth Circuit's current view was sculptured from a line of cases beginning with *Bohn v. County of Dakota*.¹³⁸ In *Bohn*, parents who were suspected of child abuse challenged the investigating procedures used by Dakota County, Minnesota.¹³⁹ The Bohns claimed that the county denied them due process by failing to provide them with notice of a finding of child abuse, a statement of the basis for that finding, and notice of their right to appeal.¹⁴⁰ They also argued that various other administrative procedures for contesting or appealing a child abuse finding were deficient.¹⁴¹

The claims arose out of an incident when the father, Wayne Bohn, forcibly broke up a fight between his two sons, one of whom then ran to a neighbor's house. An investigation was launched by the Dakota County Department of Social Services, which concluded that there was "substantial evidence" of family child abuse.¹⁴² The Bohns disputed the conclusion, and the Department of Social Services assigned a child protection worker to the family. The worker met with the family on numerous occasions and apparently was unsuccessful in resolving the presumed problems stemming from the alleged child abuse.¹⁴³

Subsequently, the Bohns attempted to clear the record of the charges lodged against them. Initially they complained to the County Department of Social Services, explaining that they wanted to include their side of the story in the decision-making process. The department refused to hear them claiming the

thirteenth, fourteenth, and fifteenth amendments was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who formerly exercised unlimited dominion over him." *Id.* at 71.

137. 42 U.S.C. § 1983 (1982).

138. *Bohn v. County of Dakota*, 772 F.2d 1433, 1439 (8th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

139. MINN. STAT. § 626.556 (1988) (reporting of maltreatment of minors).

140. *Bohn*, 772 F.2d at 1434.

141. "In addition to MINN. STAT. ANN. § 626.556, the statutes implicated in the Bohns' challenge to the administrative procedures for reviewing [the lower court's finding against them] include MINN. STAT. ANN. § 13.04 and § 14.57-§ 14.70 as well as certain administrative rules." *Id.* at 1434 n.2.

142. Despite this conclusion, the allegedly abused Bohn boy was examined by a physician who found no evidence of abuse or injury. *Id.* at 1434 n.3.

143. *Id.* at 1434-35.

investigation was complete. Thereafter, the Bohns sought to correct the record through a variety of other means, including a juvenile court action, an appeal to the State Department of Public Welfare, an appeal of the juvenile action to the Dakota County District Court, to the Minnesota Supreme Court, and requests for action through the Dakota County Human Services Board, their county commissioner, and their state representative. When these measures were unavailing, they filed a section 1983 action in federal district court charging that the procedures employed by the state left them without an opportunity to clear their name of the charges brought by the state.¹⁴⁴ The Bohn's action was dismissed by the district court and they appealed.

In its opinion, the Court of Appeals for the Eighth Circuit initially recognized that a family has a constitutionally protected interest, specifically noting that:

[T]he Bohns have a protectible interest in their reputations at stake in this case. By identifying the Bohns as child abusers, investigating the quality of their family life, and maintaining data on them, the County Department exposed them to public opprobrium and may have damaged their standing in the community.

In *Wisconsin v. Constantineau*, the Supreme Court held that "Where the State attaches a 'badge of infamy' to the citizen, due process comes into play. . . . Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." . . .

. . . When the County Department found Bohn to be a child abuser, it drove a wedge into this family and threatened its very foundation. The stigma Mr. Bohn suffers as a reported child abuser undoubtedly has eroded the family's solidarity internally and impaired the family's ability to function in the community. In light of these clear adverse effects on familial integrity and stability, we find that Mr. Bohn's reputation is a protectible interest.¹⁴⁵

However, the court was not persuaded it should hear their dispute. It concluded that the State of Minnesota had afforded the Bohns sufficient procedural avenues to clear their name

144. *Id.* at 1435.

145. *Bohn*, 772 F.2d at 1436 n.4 (citations omitted).

and affirmed the dismissal.¹⁴⁶

The most widely discussed decision of its kind in the circuit is *Myers v. Morris*,¹⁴⁷ which involved sensationalized child sex abuse allegations. An investigation of alleged sexual abuse of a minor child residing with her parents led to numerous child sex abuse complaints. Ultimately, there were 108 counts of sexual abuse filed involving many children and parents. Some children were interviewed numerous times over several months before acknowledging that they had been abused.¹⁴⁸

Eventually, however, all of the charges against the adults were dismissed and some of the children later recanted their accusations. The prosecutor claimed the dismissal was necessary to avoid compromising an investigation of greater magnitude. After the investigation was completed with no charges being filed, the sex abuse charges were not reinstated, consequently the resolution of this case remains in limbo.¹⁴⁹

Some of the parents accused of child abuse brought a section 1983 action in federal district court alleging, *inter alia*, that the prosecutor fabricated charges, coerced testimony, and withheld and destroyed evidence while pursuing the allegations against families. The district court dismissed the complaint and the Eighth Circuit upheld the dismissal on several grounds. In addition to shielding the state from the section 1983 claims by application of prosecutorial immunity, the court of appeals made it clear that negligent conduct by state officials was not actionable under 42 U.S.C. § 1983. Observed the court:

The Supreme Court has recently concluded that negligent conduct by state actors does not implicate any aspect of the due process clause. Thus allegations that the sheriff or other defendants deprived plaintiffs of procedural or substantive due process interests through negligent or "grossly negligent" conduct does not state a claim under 42 U.S.C. § 1983.¹⁵⁰

The *Myers* decision has played a pervasive role in subsequent decisions. For example, it heavily influenced the outcome in

146. *Id.* at 1439.

147. 810 F.2d 1437 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987).

148. *Id.*

149. *Id.* at 1440-45.

150. *Id.* at 1468 (citations omitted).

Doe v. State,¹⁵¹ where a section 1983 complaint against Hennepin County, the City of Mound, Minnesota, and various agencies and individuals engaged in social work was dismissed by the district court. The district court was affirmed by the Court of Appeals for the Eighth Circuit. In *Doe*, parents claimed that their civil rights were violated by the state's inadequate response following reports of sexual abuse of their children. The parents asserted that if proper procedures had been followed, they would not have suffered a traumatic sixteen day separation from their children.¹⁵²

Apparently, city and county agencies had ignored both statutory and administrative regulations by failing to: (1) investigate the first report of child sexual abuse within twenty-four hours; (2) offer the plaintiffs an opportunity to voluntarily place their children; and (3) offer protective services before removing the children. The court of appeals held that assuming the state acted as the plaintiffs alleged, a violation of state statutes and regulations was not the source of a liberty interest or property entitlement giving rise to a constitutional claim.¹⁵³

Lux v. Hansen,¹⁵⁴ followed the *Doe* and *Myers* cases and was similarly resolved. In *Lux*, the court of appeals upheld a summary judgment dismissal of a section 1983 action declaring that a social worker and the employing agency were protected from the aggrieved parents' civil rights claim as long as there was no evidence of "malice" or "improper motive." The court could find no evidence of a policy or custom upon which liability was predicated or of a failure by the employer to properly supervise its employees. It observed:

A government official is entitled to the defense of qualified immunity, unless he has violated clearly established statutory or constitutional rights of which a reasonable person would have known. . . .

. . . As we held in *Myers*, "the parental liberty interest in keeping the family unit intact is not a clearly established right in the context of reasonable suspicion that parents may be abusing children."

. . . Although the facts, especially when viewed in hind-

151. 858 F.2d 1325 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 3161 (1989).

152. *Id.* at 1328.

153. *Id.* at 1328-29. See also *Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Griffin v. Hilke*, 804 F.2d 1052, 1055 (8th Cir. 1986).

154. *Lux v. Hansen*, 886 F.2d 1064 (8th Cir. 1989).

sight, lend themselves to alternative interpretations, they were sufficient to raise a reasonable suspicion that [the minor child] had been sexually abused by her father. Accordingly, we find no evidence of malice or improper motives that might defeat such immunity.¹⁵⁵

In a dispute closely related to but distinct from the child abuse cases, Betty Jean Harpole, a grandmother whose four small children died in tragic circumstances, sought a hearing under section 1983.¹⁵⁶ The action was commenced after two of her grandchildren died from Sudden Infant Death Syndrome and two others died as a result of apnea.¹⁵⁷ Her claims arose out of the death of two and one-half month-old Gary Demay, the last of the four tragic infant deaths.

Gary was born on November 19, 1983 to Betty Demay, the plaintiff's adopted daughter, who was also mother of the other three deceased children. Shortly after Gary arrived home with his mother following his birth, he was readmitted to the Arkansas Children's Hospital to determine if he was apnea prone. After a series of tests, Gary's doctors indicated the likelihood that he was prone to apnea. Gary was discharged from the hospital on December 15, 1983 even though some hospital personnel were uncomfortable with the discharge.¹⁵⁸

On January 8 and 14, 1984, Gary returned to the hospital after he stopped breathing. Within a short time after each admission, Gary was discharged to his mother's care. On February 8, 1984, he stopped breathing and died. On that day Gary's mother had forgotten to activate the apnea monitor, which would have sounded an alarm when Gary's breathing stopped.¹⁵⁹

Harpole filed suit on her own behalf and as administratrix of Gary's estate, alleging that his first, fourth, eighth, ninth, and fourteenth amendment rights were violated because the hospi-

155. *Id.* at 1066-67 (citations omitted).

156. *Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923 (8th Cir. 1987).

157. The court defined apnea as "a sudden suspension of breathing." *Id.* at 924 n.2. Apnea is also defined as "a temporary suspension of breathing." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 85 (2d ed. 1983).

158. *Harpole*, 820 F.2d at 924. When the child was admitted to the hospital, the Arkansas Department of Social Services was notified of possible parental abuse and neglect. The Pulaski County North Office of Social Services conducted an investigation and found no evidence of abuse or neglect. *Id.*

159. *Id.* She had also forgotten to turn on the monitor the day her third child stopped breathing and died. *Id.*

tal violated duties imposed by Arkansas statutes and Titles IV and XX of the Social Security Act. The district court held that, at best, her complaint stated only a negligence claim and to the extent that it sought to require state officials to enforce state law, it was barred by the eleventh amendment.

On appeal, Harpole argued that the hospital was deliberately indifferent to Gary's condition and as a result his constitutional rights were violated. The Eighth Circuit rejected her claims, stating:

At best, defendants may have been negligent when returning Gary to his mother's care, but negligence is not actionable under § 1983. The State of Arkansas does not have a duty to provide around-the-clock services to every sick child, nor must it monitor family relationships closely enough to prevent children from being injured by the negligence of their parents.

The state does not have a duty enforceable by the federal courts to maintain a police force or a fire department, or to protect children from their parents. The men who framed the original Constitution and the Fourteenth Amendment were worried about government's oppressing the citizenry rather than about its failing to provide adequate social services.¹⁶⁰

The court of appeals' consistent refusal to allow section 1983 actions against the state is reflected in its recent decision, *McCuen v. Polk County*.¹⁶¹ Sharon McCuen, mother of five year-old Gloria Kirkpatrick, brought a section 1983 action as next friend to Gloria and on her own behalf. She sought an award of damages against the state for denying their rights by employing improper procedures to obtain *ex parte* orders which temporarily removed the child from its mother's home. The federal district court granted summary judgment and an appeal was taken.¹⁶²

The state had stepped in when McCuen took Gloria to the hospital for treatment of injuries McCuen claimed were suffered in a fall at a neighbor's house. Gloria was admitted to the hospital by the examining physician, who believed the injuries were the result of sexual abuse. A review of the evidence

160. *Id.* at 926 (quoting *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 301 (7th Cir. 1987)) (citations omitted).

161. 893 F.2d 172 (8th Cir. 1990).

162. *Id.* at 173.

and an investigation of the incident, convinced a Polk County juvenile court officer that the abuser was Gloria's great uncle who lived in her home. The officer sought and obtained an *ex parte* order temporarily placing Gloria in the custody of the Iowa Department of Human Services, Foster Care Division.¹⁶³

Following an evidentiary hearing, the juvenile court terminated the temporary removal and Gloria returned to the McCuen home with the proviso that there be no contact between Gloria and her uncle. Believing that Gloria was still in danger, an assistant Polk County attorney, and Gloria's court appointed guardian *ad litem*, obtained a second *ex parte* order staying the referee's decision and authorizing them to remove Gloria from the home on the same day she was returned. At a subsequent hearing, the juvenile court found that the uncle was no longer living in the McCuen home and ordered Gloria returned to her mother.¹⁶⁴ McCuen commenced the section 1983 action alleging that the second *ex parte* order was the result of an official policy of the county and violated her constitutional rights.¹⁶⁵

The Eighth Circuit upheld the district court's dismissal on the ground that it could find no support for the claim that the defendants acted in accordance with official policy and that the social worker involved was entitled to good faith qualified immunity.¹⁶⁶ It did not reach the absolute immunity issue.¹⁶⁷

*Ruge v. City of Bellevue*¹⁶⁸ is a recent Eighth Circuit section 1983 case decided in sharp contrast to *McCuen*. Ruge contended that the City of Bellevue, Nebraska violated her civil rights and those of her deceased son by causing his death. Her son was an employee of the city's sewer department and was killed when a fourteen foot ditch he was working in collapsed.

163. *Id.*

164. *Id.* at 173.

165. *Id.* at 173. "Polk County is subject to liability under § 1983 only if the alleged constitutional deprivation is the result of an official policy of the county." See *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988) (citing *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978)).

166. *McCuen*, 893 F.2d at 174. See *Anderson v. Creighton*, 483 U.S. 635 (1987). The Court said, "qualified immunity from personal liability may be extended to official after review of 'objective legal reasonableness' of official's conduct in light of then 'clearly established law.'" *Id.* at 639.

167. *McCuen*, 893 F.2d at 174. See *Butz v. Economou*, 438 U.S. 478, 515 (1978) (when officials perform prosecutorial-type functions, they receive absolute immunity for those actions). *Id.*

168. 892 F.2d 738 (8th Cir. 1989).

Ruge alleged that the city had a policy of not shoring up the ditches in which it required employees to work and failed to warn them of the dangers. She argued that the policy deprived her son of his life in violation of his fifth amendment right to substantive due process.¹⁶⁹

The district court dismissed the complaint finding the claims merely conclusory and lacking in allegations of fact that could establish such a policy. It held that "in order for negligence to rise to the level of a constitutional violation sufficient to state a claim upon which relief could be granted under § 1983, the plaintiff must allege a policy of reckless disregard, deliberate indifference, or gross negligence on the part of the City."¹⁷⁰

Surprisingly, the Court of Appeals for the Eighth Circuit reversed, observing:

[T]he plaintiff alleged that the City has formulated and adhered to a long standing policy of not shoring up the walls of ditches into which it sends its employees, that the City knew of the dangers of such conduct, that it continued to require its employees to work in such ditches, and that it intentionally failed to warn those employees of the dangers involved in such work. Viewing these allegations in the light most favorable to the plaintiff, we cannot say that it is beyond doubt that the plaintiff will be unable to prove any set of facts in support of her claim that would entitle her to relief.

We note that the complaint alleges conduct of the City being taken "by and through its agents." However, as counsel acknowledged on appeal, liability for the actions or conduct of its agents cannot be extended to the City solely on a theory of *respondeat superior*.¹⁷¹

It explained that although the complaint failed to allege specific facts establishing the city's practice as anything more than a single incident from which an inference of an unconstitutional policy may not be taken,¹⁷² a single incident may establish municipal liability.¹⁷³ According to the opinion, the crucial question, is whether the action that caused the loss was taken

169. *Id.* at 739.

170. *Id.*

171. *Id.* at 740 & n.2 (citations omitted).

172. *Id.* at 740 n.3. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 821-24 (1985).

173. *Ruge*, 892 F.2d at 740 n.3. See *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986) (decisions or conduct of municipal policy makers on a single occasion could constitute a "policy" and provide the grounds for § 1983 liability).

pursuant to a policy of the municipality.¹⁷⁴ The court reasoned:

The death of Curt Manke while working for the City does not, in itself, violate the Constitution. The constitutional violation occurs when his death is caused by an inadequate municipal policy, adopted with the requisite culpability. It is then that an abuse of government authority arises sufficient to state a cause of action under section 1983.

Thus, where the state abuses its governmental power through an alleged policy of actively placing a person into a situation of known danger the Constitution proscribes and limits such action. . . . However, where the state simply commits a tort, there is no misuse of government power when "the event, however tragic, was an accident neither the occurrence of which nor the particular victim of which could have been predicted." We deem a policy, if adopted and proven, that would show a city actively pursued conduct which was deliberately indifferent to the constitutional rights of its citizens, would reach constitutional dimensions and be actionable under the Civil Rights Act. In the present case, the plaintiff has alleged such a policy and, therefore, has satisfied the "state action" requirement for purposes of rule 12(b)(6).¹⁷⁵

DeShaney v. Winnebago County Dep't Social Servs.,¹⁷⁶ recently decided by the United States Supreme Court, reinforces the view that section 1983 actions are not likely to be successful vehicles for citizen use against state officials to redress grievances resulting from either state action or inaction. The *DeShaney* Court ruled that while the State of Wisconsin may have undertaken to protect an abused child from harm caused by his father, it did not have a constitutional duty to protect the child against his father's violence.¹⁷⁷

Ruge provides the only immediate theoretical basis for successfully bringing a section 1983 action. Citizens must show, however, that there is a "formulated" and "long standing" policy, which led to the family member's injury, or alternatively, an "inadequate" policy. However, *McCuen* illustrates the difficulty of successfully pursuing relief even on this theory.

The Eighth Circuit's conservative approach, reinforced by

174. See *Pembaur*, 475 U.S. at 483-84.

175. *Ruge*, 892 F.2d at 741 n.6, 741-42 (citations omitted).

176. *DeShaney v. Winnebago County Dep't Social Servs.*, 109 S. Ct. 998 (1989).

177. *Id.* at 1006-07.

the Supreme Court, strongly suggests that state courts are friendlier forums to seek redress for state violations of family rights, despite a fear that state courts lack constitutional expertise. Furthermore, they are better forums, despite the fact that they may be subject to political and legislative prejudices that hinder fair presentation or bar the possibility of adequate recovery for injury.

For example, in *R.S. v. State*,¹⁷⁸ the Minnesota Court of Appeals held that a county had violated a number of statutory procedures while conducting an investigation of alleged child abuse and that the aggrieved parents had standing to sue.¹⁷⁹ Expressing outrage at the behavior of various state officials, the court declared:

We express a special concern for the actions of the civil servants and educators involved, including, but without limitation, the deliberate backdating of official reports, and the practice at the time of signing statutorily required notices in blank. The performance of mandated duties can be accomplished without resorting to such tactics. In the long run, "ends justifies means" ultimately leads to proper ends not being obtained, as the improper means subvert the process.¹⁸⁰

Interestingly, a concurring judge suggested that federal court was a more appropriate forum for resolving the dispute and that a section 1983 action would be successful,¹⁸¹ rejecting arguments by counsel that the Eighth Circuit holdings in *Doe v. State*,¹⁸² and *Myers v. Morris*,¹⁸³ precluded a section 1983 action.¹⁸⁴ However, our review of the Eighth Circuit's decisions over the past few years leads us to agree with counsel and to respectfully disagree with the state court.

Presently, families lack an effective federal forum in which they can protect themselves from inappropriate invasions by the state, especially when child abuse is alleged. False child abuse charges can ruin reputations overnight, and disrupt family relationships. Sensationalized press coverage of abuse in-

178. *R.S. v. State*, 447 N.W.2d 205 (Minn. Ct. App. 1989).

179. *Id.* at 212. (court based decision on MINN. STAT. § 626.556, subd. 10(c) (1986)).

180. *Id.* at 212 n.1.

181. *Id.* at 213 n.1.

182. 858 F.2d 1325 (8th Cir. 1988).

183. 810 F.2d 1437 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987).

184. *R.S. v. State*, 447 N.W.2d at 213 n.1.

vestigations adds to the enormous potential for community bias and prejudice. It is imperative that state agencies be required to adhere to policies and procedures designed not only to protect children from abuse but also to protect the family unit from unfair treatment. The Eighth Circuit should recognize the important role it plays in promoting the rights of citizens enveloped in this kind of atmosphere and reignite an interest in preserving those rights.

V. CUSTODY OF CHILDREN

The Eighth Circuit's decision in *Ruffalo v. Civiletti*¹⁸⁵ is fascinating because of its pragmatic perspective and its rejection of the historical bar against the Eighth Circuit hearing custody issues. Moreover, a citizen was provided with a federal forum in which to obtain redress against the government and its agents—a rare event in this circuit. The *Ruffalo* court carefully and thoughtfully distinguishes its own decisions and others to arrive at a creative solution to a perplexing problem faced by a mother whose child was snatched from her by a bureaucracy. And in the process, it redefines “liberty interest” in the context of the family and its members.

Donna Ruffalo sought the return of her child, who had been relocated by the federal government along with his father under the federal Witness Protection Program. The dispute over the child's return reached the Eighth Circuit after Donna's efforts to obtain redress through the state courts failed.¹⁸⁶

At the center of the controversy was a son born in 1969 to Donna and Michael Ruffalo, Sr. When the child was three, Donna obtained a default divorce and was awarded legal and physical custody. Michael was given reasonable visitation rights and ordered to pay child support. Subsequently, the couple entered into an “Informal Letter Agreement Re Possession of Child,” which provided that Donna would have “custody” of the minor child, while Michael would have “possession”¹⁸⁷ with possession meaning physical custody.

185. 702 F.2d 710 (8th Cir. 1983).

186. *Id.* at 712-13.

187. *Id.* at 712 n.3. The agreement provided:

1. DONNA RUFFALO shall keep and maintain custody of the child MICHAEL RUFFALO in accordance with the default decree heretofore granted.

Michael was a secret informer for the FBI, which was investigating organized crime in Kansas City, Missouri. In 1978 federal officials received information that Michael's life was in danger and Michael asked for protection. In 1978, both Michael and his nine year-old son were taken into the federal Witness Protection Program.¹⁸⁸ Donna was neither given notice nor an opportunity to be heard in opposition to the removal of her son and learned of his relocation only after the fact. For the next four years, she was not allowed to see or talk with her son.

The government created new identities for Michael and his son and federal officials moved them to a secret location. They were provided with new names, social security numbers, and a temporary residence. In addition, the child received new school records so he could be admitted to a new school without having to produce records from his former school and revealing his true identity.

At the time that Michael and his son went into the Witness Protection Program, federal authorities knew that the child was living with his father and thought he had legal custody. Shortly thereafter, however, they learned that legal custody had been awarded to Donna. Donna contacted federal officials, seeking information about her former husband and child. She was told they were under the Witness Protection Program and that their new identities and location would not be revealed as disclosure would endanger Michael. The Program offered, however, to relay messages to Michael, and the federal Marshals' Service, which runs the Witness Protection Program, told Michael on at least two occasions that Donna wanted to

2. It is further agreed that MICHAEL J. RUFFALO shall keep and maintain possession of said minor child MICHAEL RUFFALO, and that no change of said possession of this child shall be made without mutual agreement of the parties or by further order of the Court in this respect.

3. The father MICHAEL J. RUFFALO shall continue to furnish the support for the child by providing (sic) the same in kind for the child.

4. The mother DONNA RUFFALO shall be entitled to the possession of the child without further order of the Court, on Sunday or Saturday of each week; and they will alternate possession on important holidays . . . and other wise (sic) reasonable visitation right (sic) to Donna.

Id.

188. The federal Witness Protection Program was authorized by Title V of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 501-504 (preceding 18 U.S.C. § 3481 (1976)). It is administered by the United States Marshals Service. *Id.* at 712 n.4.

speak with her son on the phone. Michael did not allow her to speak with her son.

Donna sought and obtained a custody hearing in Missouri state court, which eventually ruled that she should have custody of her son.¹⁸⁹ When the custody order was served on Michael, it was ignored by him and the U.S. government. After her efforts in the state court proved unproductive, Donna began an action for injunctive relief and damages in the United States District Court for the Western District of Missouri. The defendants were her former husband and the federal officials responsible for concealing the child through the Witness Protection Program. She alleged that the defendants violated the due process clause of the fifth amendment to the United States Constitution by unreasonably intruding on her right to family integrity and to a relationship with her son. Her stated reasons were the government's failure to provide her with a hearing before infringing on her constitutionally protected liberty interests, and interference with and destruction of her right to enforce the state court custody orders.¹⁹⁰

Proceedings were stayed in district court to allow Donna to seek another custody hearing in state court.¹⁹¹ When the state court ordered the child returned, and he was not, the federal district court once again took up Donna's motion for partial summary judgment, as well as the defendants' alternative motions for dismissal or for summary judgment.¹⁹² After the district court refused to grant Donna partial summary judgment on her complaint, she appealed. The Eighth Circuit took the matter under advisement and eventually decided to remand.

In its remand order the court of appeals held that Donna's relationship with her son was part of the "liberty" protected by

189. *Id.* at 713. The Eighth Circuit noted, "on July 24, 1979, after Michael had received notice of custody hearings through the Marshals Service and failed to appear, the state court modified its March 19, 1975, order, awarded 'the full care, control and custody of her son' to Donna, and cancelled all Michael's visitation rights or privileges." *Id.*

190. *Id.* A similar constitutional claim was made on behalf of the minor child. The complaint also alleged that the defendants had violated the Administrative Procedure Act, 5 U.S.C. § 706 (1976); had committed various intentional torts, thereby subjecting the United States to liability under the Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1976 & Supp. V 1981); had violated the Freedom of Information and Privacy Acts, 5 U.S.C. § 552, § 552a (1976 & Supp. V 1981). The complaint also alleged that state law had been similarly violated. *Id.* at 713-14 n.5.

191. *Ruffalo v. Civiletti*, 522 F. Supp. 778 (W.D. Mo. 1981).

192. *Ruffalo v. Civiletti*, 539 F. Supp. 949 (W.D. Mo. 1982).

the due process clause of the fifth amendment.¹⁹³ The Eighth Circuit rejected a closely related decision from the Second Circuit, *Leonhard v. Mitchell*.¹⁹⁴ In *Leonhard* the state court had awarded custody of the children of a divorced couple to the mother and visitation rights to the father. When the mother remarried, and her new husband decided to testify for the government in an organized crime case, the entire family was relocated and given new identities. The father obtained a state court order awarding him custody, and sued in federal court seeking a writ of mandamus demanding that the government divulge the whereabouts and new identities of his children. The Second Circuit affirmed summary judgment against the father declaring that there was not a “clear constitutional right to custody or visitation rights.”¹⁹⁵ This rationale was rejected by the Eighth Circuit:

If *Leonhard* may be read to mean that a parent who has been awarded custody of his or her child has no constitutionally protected interest, we must respectfully disagree. Parents have a fundamental “liberty interest” in the care, custody, and management of their children. We need not decide whether a parent’s visitation rights are constitutionally protected, because Donna has more than a right to visitation. . . .

That plaintiff has been deprived of a constitutionally protected right, of course, does not answer the whole question of whether she has a claim for relief. She must also show that she was deprived of this right without due process of law. Ordinarily we would go on at this point to consider what process is due. But here plaintiff got no process at all. At no time was she allowed to challenge, before some impartial authority, the government’s conclusion that it was necessary to take Mike into the WPP, and to keep him there, in order to protect Michael’s life.¹⁹⁶

The court of appeals then held that there was sufficient government action to trigger the due process provision of the fifth amendment. It rejected the district court’s conclusion that Michael was not transformed “into a government actor by virtue of his acting as a witness for the government and entering

193. *Ruffalo v. Civiletti*, 702 F.2d 710, 718–19 (8th Cir. 1983).

194. *Leonhard v. Mitchell*, 473 F.2d 709 (2d Cir.), cert. denied, 412 U.S. 949 (1973).

195. *Id.* at 713.

196. *Ruffalo*, 702 F.2d at 714–15.

the Witness Protection Program.”¹⁹⁷ It reasoned that the government was involved in a sequence of events including taking the child to a new location, giving him a new identity, new social security number, new school records, and paying Michael’s lawyer to contest the state court’s orders and to defend against the custody claim, which culminated in the abrogation of Donna’s right to custody of the child. Furthermore, the court was unconvinced that the government’s role in these events was insignificant. The court observed, “[the government] continues to conceal the whereabouts of both Michael and Mike. To assert, as the government does, that it was Michael’s sole decision to take and retain Mike in defiance of the state court order is wholly unrealistic.”¹⁹⁸

The Eighth Circuit recognized that its decision appeared contrary to that reached by the First Circuit Court of Appeals in *Melo-Tone Vending, Inc. v. United States*¹⁹⁹ but concluded that its holding did not conflict with the *Melo-Tone* rationale.²⁰⁰ It also distinguished an earlier Eighth Circuit decision, *Bergmann v. United States*, where it had reversed a \$69,077.91 award in a wrongful death action under the Federal Torts Claim Act.²⁰¹

197. *Id.* at 716. The court cites *Bennett v. Pasic*, 545 F.2d 1260, 1263–64 (10th Cir. 1976) to support the proposition that witnesses do not act under color of state law.

198. *Ruffalo*, 702 F.2d at 716.

199. *Id.* at 716 n.12 (citing *Melo-Tone Vending, Inc. v. United States*, 666 F.2d 687 (1st Cir. 1981)).

200. *Id.* In *Melo-Tone* a creditor argued that he had been deprived of property without due process because his debtor entered the Witness Protection Program and the government refused to reveal the debtor’s whereabouts. The First Circuit held that there had been no “taking” of property for which compensation was due because the interference with the creditor’s right to collect and enforce payment of his note was merely an indirect consequence of the exercise of lawful governmental power. The Eighth Circuit stated that even if the *Melo-Tone* analysis could apply to a claim of deprivation of a liberty interest, it was clear that the interference with the mother’s right to custody was a direct consequence of the government taking her child and refusing to reveal his location and identity. *Id.*

201. *Id.* (citing *Bergmann v. United States*, 689 F.2d 789 (8th Cir. 1982)). *Bergmann* held that the discretionary function exception of the Federal Torts Claim Act applied and that the government was not negligent in supervising a protected witness. The government owed no duty to protect the public from the witness. *Bergmann* was distinguishable for two reasons. First, Donna Ruffalo was more than a member of the public: she was the mother of a child taken into the Witness Protection Program by government employees. Second, the protected witness in *Bergmann* killed a policeman without assistance of federal officials. Here, it was unlikely that the boys’ father could have taken the child without government assistance. *Ruffalo*, 702 F.2d at 716 n.12.

Ruffalo is remarkable because the court ignored its long-standing view of federal jurisdiction regarding the use of its injunctive powers, i.e., that ordinarily, a federal court will not grant an injunction to compel a parent to obey a state decree awarding custody of the child to the other parent.²⁰² The decision stands in sharp contrast to the court's recent expression of its views of what constitutes a constitutional "liberty interest" when parents seek redress against state governments by means of section 1983 actions. It reflects both a deep sense of compassion for the plight of a citizen who is struggling against awesome government power and pragmatically recognizes that any other view would leave the citizen with no effective means to redress her grievance.

VI. OTHER DECISIONS

From our survey of the Eighth Circuit, we have found that it has been involved in a variety of other domestic disputes. In this section we have briefly summarized several of the more interesting decisions.

A. Attorney Fees

In *Derheim v. Hennepin Welfare Bd. Dep't of Community Serv.*,²⁰³ a couple had incurred substantial attorney fees in bringing an action against the Minnesota Department of Public Welfare. The agency had taken away their foster parent license but later reissued it upon discovery that the charges could not be substantiated. The Durheims asserted that a federal constitutional question had been successfully pursued before the administrative agency, and therefore, they were entitled to prevail on their fee request.²⁰⁴ The court of appeals rejected their action to recover attorney fees under the Civil Rights Attorneys Fees Award Act of 1976.²⁰⁵ It observed:

202. See *Bennett v. Bennett*, 682 F.2d 1039, 1042-44 (D.C. Cir. 1982) (jurisdiction to grant injunctive relief on custody matters should be left to the states); cf. *Lloyd v. Loeffler*, 694 F.2d 489, 493-94 (7th Cir. 1982) (disapproving an escalating damage award against the absconding parent as the equivalent of an injunction).

203. *Derheim v. Hennepin Welfare Bd., Dep't of Community Serv.*, 688 F.2d 66, 68 (8th Cir. 1982). The trial court's opinion appears at 542 F. Supp. 1321 (D. Minn. 1981).

204. *Derheim*, 688 F.2d at 68 (citing 42 U.S.C. § 1988).

205. *Id.* at 69. The plaintiffs relied on *New York Gaslight Club v. Carey*, 447 U.S. 54 (1979), and *Maher v. Gagne*, 448 U.S. 122 (1980), to support their assertion.

The administrative record, however, belies this assertion. First, the Derheims' memorandum of law submitted to the hearing officer focuses only on issues of North Dakota and Minnesota juvenile law. It refers to no federal constitutional issue and cites no federal cases. Second, Hearing Officer Lunde's findings of fact and conclusions make no mention of any federal constitutional issue. Third, the hearing officer's report—a document distinct from the findings and conclusions—refers to no constitutional issue.²⁰⁶

B. Attorney Malpractice

A dispute involving attorney malpractice in handling a dissolution matter was resolved in favor of the client in *Kuehn v. Garcia*.²⁰⁷ The plaintiff retained the defendant, Garcia, to represent her in a divorce case. He began his representation by interposing a counterclaim to her husband's action. During the pendency of the matter, the plaintiff moved to Wisconsin. When the North Dakota matter was set for trial, Garcia claimed he notified the plaintiff by letter of the date but she denied receiving notice. Judgment was entered by default.

The client filed a claim with the Grievance Committee of the North Dakota Supreme Court, which reviewed it along with several other complaints against the lawyer. The committee found that the facts warranted a conclusion that the defendant had violated Canon 7 of the North Dakota Code of Professional Responsibility for lawyers,²⁰⁸ which requires that a lawyer represent a client zealously within the bounds of the law. Garcia was suspended by the North Dakota Supreme Court.²⁰⁹ After suspension, the client brought an action for legal malpractice in federal court alleging that Garcia negligently permitted judgment to be entered by failing to appear at trial or notify the plaintiff of trial. Consequently, she was denied custody of her children, her share of marital property valued in excess of \$40,000, insurance and expenses of \$800.00.

The district court ordered partial summary judgment on the

206. *Derheim*, 688 F.2d at 69.

207. 608 F.2d 1143, 1148 *petition for reh'g denied*, (8th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980).

208. *Id.* at 1145. Canon 7 requires that a lawyer represent a client zealously within the bounds of the law. The *Kuehn* court noted: "The North Dakota Supreme Court has adopted the American Bar Association Code of Professional Responsibility." *Id.* at n.2.

209. *Id.* at 1145 (citing *In re Garcia*, 243 N.W.2d 383, 385 (N.D. 1976)).

liability issue against Garcia. The Eighth Circuit affirmed holding that the judgment of the North Dakota Supreme Court in a prior disciplinary proceeding against Garcia rendered the issue of Garcia's tort liability *res judicata*, and that Garcia was therefore collaterally estopped from relitigating the issue in the subsequent malpractice action.²¹⁰

C. Judicial Immunity

In *Patten v. Glaser*,²¹¹ an ex-husband brought a civil rights action against a state trial judge who had presided over the husband's divorce case and who found the husband in contempt for violating several orders as to visitation, custody and support payments. The federal district court dismissed the husband's claims and he appealed. The Eighth Circuit held that the state trial judge had jurisdiction to decide the divorce action and that the judge's act of finding the husband in contempt was a judicial act and, therefore, the judge was immune from liability under section 1983.²¹²

D. Intervention

In *S.E.C. v. Flight Transp. Corp.*,²¹³ Joyce Rubin, whose husband was fighting a Securities and Exchange Commission action, filed an action for divorce in Minnesota state court. She then moved to intervene in the SEC action in federal district court to protect her interests in various property owned by the couple. The federal district court denied her motion to intervene, noting that the requirements of Rule 24(a)(2) of the Federal Rules of Civil Procedure had not been met because she was unable to show that the disposition of the action by the S.E.C. would, as a practical matter, impair or impede her ability to protect her interest in her husband's company. The motion was also denied on the ground there was no intervention as a matter of right in Securities and Exchange Commission actions.²¹⁴ The district court also noted that intervention

210. *Kuehn*, 608 F.2d at 1146.

211. 771 F.2d 1178 (8th Cir. 1985).

212. *Id.* at 1179 (citing *Birch v. Mazander*, 678 F.2d 754, 755 (8th Cir. 1982), *Stump v. Sparkman*, 435 U.S. 349, 360-61 (1972) and *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972)).

213. *S.E.C. v. Flight Transp. Corp.*, 699 F.2d 943 (8th Cir. 1983).

214. *Flight Transp. Corp.*, 699 F.2d at 947. The federal district court had relied on *Sec. & Exch. Comm'n v. Everest Management Corp.*, 475 F.2d 1236 (2d Cir. 1972)

would unnecessarily complicate the issues.²¹⁵

The Eighth Circuit reversed, and ordered that Ms. Rubin be allowed to intervene:

The appellees argue that Joyce Rubin's interest in William Rubin's property is inchoate and, therefore, insufficient to support intervention. We disagree. Under Minn. Stat. Ann. § 518.54, Subd. 5, 1982 Minn. Sess. Law Serv. 368, 369 (West),

Each spouse shall be deemed to have a common ownership in marital property that vests not later than the time of the entry of the decree in a proceeding for dissolution or annulment. The extent of the vested interest shall be determined and made final by the court pursuant to section 518.58.

By enacting this provision, the Minnesota legislature intended to confirm

that the division or disposition of marital property . . . incident to a [divorce] . . . is a division of a common ownership by spouses in property for the purposes of the property laws of this state and for the purposes of United States and Minnesota income tax laws.

Chapter 464, § 3, 1982 Minn. Sess. Law Serv. 370 (West). Marital property is, essentially, property acquired by either party during the marriage. Minn. Stat. Ann. § 518.54, Subd. 5, 1982 Minn. Sess. Law Serv. 368 (West). Neither William Rubin nor the SEC suggests that Rubin's assets are not marital property. Thus, Joyce Rubin is virtually certain to become entitled to some of those assets upon division of the property, because of the conclusive presumption "that each spouse made a substantial contribution to the acquisition of income and property while they were living together as husband and wife." Minn. Stat. Ann. § 518.58, 1982 Minn. Sess. Law Serv. 370 (West). It is irrelevant that the precise moment of "vesting" is undetermined.

Finally, the existing parties cannot be expected to represent Joyce Rubin's interests adequately. . . . Joyce Rubin has filed for divorce. Bitter feelings may be expected to result. Under these circumstances, we believe that basic fairness demands that Joyce Rubin be allowed to intervene in order

and Sec. & Exch. Comm'n v. Canadian Javelin Ltd., 58 F.R.D. 182 (S.D.N.Y. 1973). These cases discussed intervention as a matter of right in S.E.C. actions.

215. *Flight Transp. Corp.*, 699 F.2d at 947. On this point, the trial judge cited *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979).

to protect her own interests in the marital property. Even though she and William have, on paper, the same financial interest, she should not have to depend on representation by a person with whom her personal relationship has apparently been irretrievably broken.²¹⁶

E. Adoption

A section 1983 claim brought by a white couple arising from Missouri's refusal to return a black child in their foster case, was upheld in *J.H.H. v. O'Hara*.²¹⁷ The couple argued that Missouri's policy of placing children with foster parents of the same "racial, cultural, ethnic, and religious background" denied them equal protection of the law. The Eighth Circuit distinguished *Palmore v. Sidoti*,²¹⁸ where the Supreme Court held that a mother could not be divested of custody of a child solely because she married a man of a different race and declined to view *Palmore* as establishing a "broad proscription against the consideration of race in matters of child custody and foster care placement."²¹⁹ It reasoned that at most, *Palmore* established that race may not be the sole factor in determining the best interests of a child.²²⁰

F. Standing

In *DeMent v. Oglala Sioux Tribal Court*, the Eighth Circuit ruled that a non-Indian father had standing to seek habeas corpus relief in federal court to secure custody of his children who lived with their mother on a reservation in North Dakota.²²¹ The court of appeals held that while the Parental Kidnapping Prevention Act²²² and the Indian Child Welfare Act²²³ did not entitle him to relief, he had stated a valid claim under the In-

216. *Flight Transp. Corp.*, at 948-49 (citations omitted).

217. *J.H.H. v. O'Hara*, 878 F.2d 240 (8th Cir. 1989), cert. denied, 110 S. Ct. 1117 (1990).

218. 466 U.S. 429 (1984).

219. *O'Hara*, 878 F.2d at 245.

220. *Id.*

221. 874 F.2d 510, 515 (8th Cir. 1989).

222. *Id.* at 513. The Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (1982) does not furnish an implied cause of action in federal court. See *Thompson v. Thompson*, 484 U.S. 174 (1988).

223. *Id.* at 514. The custody of children in a divorce proceeding is not covered under the Indian Child Welfare Act, 25 U.S.C. § 1903 (1982).

dian Civil Rights Act.²²⁴ It rejected the argument by the tribal court that it had exclusive subject matter jurisdiction to decide the issue under the Indian Child Welfare Act.²²⁵

G. Areas Not Covered

We have not covered many other decisions of the Court of Appeals for the Eighth Circuit which may directly affect the families within its jurisdiction. The abortion cases, for example, require an analysis quite apart from the survey we have provided in this article. Furthermore, the decisions involving Native American housing, custody, and adoption are left for another writing.

CONCLUSION

This article demonstrates the significant influence the Eighth Circuit has on domestic matters. Moreover, a number of the Eighth Circuit's decisions must be analyzed from the perspective of their impact on domestic matters. In addition, the Eighth Circuit should reexamine its decision in *Bush v. Taylor*,²²⁶ probe more deeply into the family structure in the wiretap cases, and rethink its tight-fisted handling of section 1983 actions.

224. *Id.* at 514. The Indian Civil Rights Act, 25 U.S.C. § 1302(8) (1982) conferred the father with a federal cause of action.

225. *Id.* at 514.

226. 893 F.2d 962 (8th Cir. 1990).