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Constitutional Law: Section 1983 and Due Process Liberties

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CONSTITUTIONAL LAW: SECTION 1983 AND DUE PROCESS LIBERTIES—*Kelson v. City of Springfield*, 767 F.2d 651 (9th Cir. 1985).

I. INTRODUCTION

Section 1983 of Title 42 of the United States Code was passed as a result of congressional concern for the social and political disability imposed on blacks during the Reconstruction period after the Civil War.[1] Prior to 1938, section 1983 was used primarily to redress violations of the voting rights of blacks,[2] but since that time the reach of section 1983 has been judicially expanded so that many constitutional claims alleging violations under color of state law may be brought before a federal court.[3] In a recent case, *Kelson v. City of Springfield*,[4] the Court of Appeals for the Ninth Circuit clarified the concept of what liberties are protected under a fourteenth amendment substantive due process analysis in the context of a section 1983 action. In *Kelson*, the court of appeals reversed the district court and ruled that parents have a constitutionally protected liberty interest in the society and companionship of their children.[5] This note will examine the particular requirements necessary to maintain a suit under section 1983, focusing specifically on the essential constitutional claim in which the cause of action must be rooted. It will analyze the implications of the *Kelson* decision with respect to those requirements. Finally, it will discuss the relationship between state procedures and claims under section 1983 and the failure of the court to address these considerations in *Kelson*.

II. FACTS AND HOLDING

On March 15, 1982, Brian Kelson, son of Duane and Eleanor Kelson, confronted his teacher with a thirty-eight caliber revolver, demanding that the teacher place his money on the desk top.[6] The teacher complied and then took Brian to the vice principal, where Brian

1. Representative Garfield of Ohio stated: "[E]ven where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." CONG. GLOBE, 42d Cong., 1st Sess. app. 153 (1871).

2. *See* Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Herndon, 273 U.S. 536 (1927); Myers v. Anderson, 238 U.S. 368 (1915).

3. *See infra* notes 17–19 and accompanying text.

4. 767 F.2d 651 (9th Cir. 1985).

5. *Id.* at 652.

6. *Id.* at 652–53.

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showed the vice principal a suicide note.[7] School officials called the Springfield Police Department who in turn called the Kelsons.[8] Brian and the vice principal were confronted on their way to the vice principal's office by a police officer who told Brian that he was in "trouble with the law."[9] Brian left the vice principal's office, entered the boys' restroom, and fatally shot himself.[10]

The Kelsons filed a complaint under 42 U.S.C. section 1983 in the United States District Court for the District of Oregon. The complaint alleged that the Kelsons' fundamental rights of parenthood, guaranteed by the ninth amendment, were violated without the due process required by the fifth and fourteenth amendments.[11] The Kelsons also alleged violations of their right to association with their son, which was guaranteed by the first amendment. They alleged that these violations occurred without the due process to which they were entitled under the fourteenth amendment.[12] The City of Springfield moved to dismiss the Kelsons' complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted.[13] In granting the city's motion, the district court held that "parents have no constitutionally protected right to the companionship and society of their children."[14]

The Court of Appeals for the Ninth Circuit reversed the district court's holding with respect to the Kelsons' constitutional claim of a right to the companionship and society of their child and remanded the case for the lower court to decide whether the Kelsons had in all other respects fulfilled the requirements of a section 1983 *prima facie* case.[15] In its decision, the appellate court held that parents do possess a constitutionally protected liberty interest in the companionship and society of their child, the deprivation of which is actionable under section 1983.[16] In order to determine the extent to which the *Kelson* decision affects section 1983 claims, it is necessary to examine the history of the purpose and scope of section 1983 and the current controversy surrounding its provisions.

7. *Id.* at 653.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 656.
16. *Id.* at 655.

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III. BACKGROUND

A. *History of Purpose and Scope of Section 1983*

Section 1983 was originally enacted in response to the lawless actions of the Ku Klux Klan, which Southern States and local governments were either unwilling or unable to control during the Reconstruction era.[17] During the first few decades after enactment, the scope of the act was primarily limited to cases involving deprivations of voting rights.[18] Gradually, however, the act was applied to cases involving constitutional claims other than those dealing with the political rights of blacks. In expanding the coverage, the United States Supreme Court has reinterpreted and broadened the application of section 1983.[19] Section 1983 in its present form states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[20]

Section 1983 originally had four main purposes: "[T]o override certain kinds of state laws, to provide a remedy where a state law was inadequate, 'to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice,' and to provide a remedy in federal courts supplementary to any remedy any State might have."[21] In order to effectuate the legislative purpose of section 1983, the courts have interpreted the statute to require essentially two

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17. Senator Pool from North Carolina said the lawless actions of the Klan "impressed the public mind with the conviction that the communities in which they occur are wanting in that moral tone and sentiment which distinguish well-regulated society from a condition of general demoralization and violence." CONG. GLOBE, 42d Cong., 1st Sess. 608 (1871).

18. *See, e.g.*, Nixon v. Herndon, 273 U.S. 536 (1927); Myers v. Anderson, 238 U.S. 368 (1915).

19. *See* Screws v. United States, 325 U.S. 91, 111 (1945) (the Court reasoned that officers who fatally beat a young black after arrest were acting under "color of state law" as under color of law meant under pretense of law); United States v. Classic, 313 U.S. 299, 326 (1941) (the Court elaborated on "under color of state law" requirement by defining it as a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."); Hague v. Committee for Indus. Org., 307 U.S. 496, 517 (1939) (the Court affirmed an injunction restraining various city officials from interfering with the right of the plaintiffs to discuss the National Labor Relations Act). For a comprehensive study of the history of section 1983, see Shapo, *Constitutional Tort*: Monroe v. Pape, *and the Frontiers Beyond*, 60 Nw. U.L. REV. 277 (1965).

20. 42 U.S.C. § 1983 (1982).

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21. McNeese v. Board of Educ., 373 U.S. 668, 672 (1963) (citation omitted).

elements before a plaintiff can maintain a section 1983 action.[22] First, the alleged conduct must have been committed by a person acting under color of state law.[23] Second, the alleged conduct must have deprived the plaintiff of "rights, privileges, or immunities secured by the Constitution or laws of the United States."[24]

B. *The Requirement of Action Under Color of State Law*

In order to bring a cause of action under section 1983, the plaintiffs must show that the defendants were not acting on their own initiative, but rather that they were acting pursuant to the execution or implementation of an official government policy.[25] In *United States v. Classic*,[26] the United States Supreme Court held that action taken under color of state law occurs when there is a "[m]isuse of power [which is] possessed by virtue of state law and [which is] made possible only because the wrongdoer is clothed with the authority of state law."[27] Persistent practices of state officials which become custom or common usage may have the force of law so as to meet the color of state law requirement.[28] Repeated actions of state officials may transform unauthorized predilections into acknowledged practices having the same effect as legislative pronouncements.[29]

C. *The Requirement of Constitutional Deprivation*

In order to successfully bring a section 1983 cause of action, plaintiffs must prove that they have been deprived of a right, privilege, or

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22. *See* Parratt v. Taylor, 451 U.S. 527, 535 (1981), *rev'd in part sub nom.* Daniels v. Williams, 106 S. Ct. 662 (interim ed. 1986).

23. *Id.*

24. *Id.*

25. *See* Monell v. Department of Social Serv., 436 U.S. 658, 690 (1978). *See also* Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985). The Court held that in order for the plaintiff to present a section 1983 claim against the city for failure to provide adequate training of its police officers, the plaintiff must prove that there is a conscious adoption of an institutional policy of inadequate training. *Id.* at 2436.

26. 313 U.S. 299 (1941).

27. *Id.* at 326. *See also* Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) (to act under color of state law, it is essential that the individual act with knowledge of and pursuant to that statute); Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1976) (to act under color of state law, the state must affirmatively support and be directly involved in the specific conduct being challenged); Parker v. Graves, 479 F.2d 335, 336 (5th Cir. 1973) ("An action under 42 U.S.C. § 1983 does not lie as against a private person in his individual capacity. It is only where the person acts to deprive another of his federal rights under color of state law that § 1983 provides authority for a federal claim.").

28. *Adickes*, 398 U.S. at 144.

29. *Id.* at 168 (cited with approval in Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 368-370 (1940)). "For custom or usage to constitute state action, it must have the force of law by virtue of persistent practices of state officials." Moore v. City of Pacific, 534 S.W.2d 486, 495 (Mo. App. 1976).

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immunity secured by the Constitution and the laws of the United States.[30] Courts are continually struggling with the limits of what constitutes a deprivation of constitutional rights, privileges, and immunities.

If a court finds a violation of a specifically enumerated constitutional right, it can apply section 1983 without requiring that the plaintiff seek state remedies.[31] Many types of conduct by state officials acting under color of state law, however, fall outside specific prohibitions in the constitution.[32] In such cases, the courts either adopt a liberal interpretation of substantive due process[33] as a substantive guarantee of freedom from unnecessarily harmful conduct, or the courts turn to a procedural interpretation of the due process clause.[34] A due process claim may be analyzed as:

> [A] claim of denial of either procedural or substantive due process, or both. A procedural due process claim alleges that the state has unlawfully interfered with a protected liberty or property interest by failing to provide adequate procedural safeguards. The claim focuses on the procedures used by the state in effecting the deprivation of liberty or property. . . .
>
> A substantive due process claim . . . alleges not that the state's procedures are somehow deficient, but that the state's conduct is inherently impermissible, regardless of any protective or remedial procedures it provides.[35]

1. Substantive Constitutional Guarantees and the Family

In the context of a section 1983 action, if the court interprets an asserted right to be a substantive right protected under the fourteenth amendment due process clause, then the deprivation of that right automatically triggers a federal cause of action under section 1983 only if

30. 42 U.S.C. § 1983 (1982). *See also Adickes*, 398 U.S. at 144; Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977).

31. *See supra* notes 36–44 and accompanying text.

32. *See, e.g.*, Brooks v. School Bd. of Richmond, 569 F. Supp. 1534, 1536 (E.D. Va. 1983) (teacher pierced arm of student with a pin as a means of corporal punishment); Martin v. Covington, Ky., 541 F. Supp. 803, 804 (E.D. Ky. 1982) (suspect in drug case forced by police to solicit homosexual act).

33. *See, e.g.*, Ellis v. Hamilton, 669 F.2d 510 (7th Cir. 1982), *cert. denied*, 459 U.S. 1069 (1982).

34. The fourteenth amendment provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law . . . .

U.S. CONST. amend. XIV, § 1.

35. Ramos v. Gallo, 596 F. Supp. 833, 837 (D. Mass. 1984).

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the conduct which resulted in the deprivation was committed by a person acting under color of state law. No amount of notice with an opportunity to be heard will serve to remedy the deprivation. The United States Supreme Court routinely applies substantive due process analysis to promote certain historical concepts of what is fundamental to the Anglo-Saxon tradition.[36] One particular area of the law in which the Supreme Court has actively extended substantive due process protection is the area involving the protection of family interests.

The Supreme Court began its protection of family interests in *Griswold v. Connecticut.*[37] In *Griswold*, the Supreme Court determined that the constitution embodies a right of privacy involving decisions concerning procreation. The Court found that the first amendment freedoms of speech, association, and the press;[38] the third amendment prohibition against quartering of soldiers in time of peace;[39] the fourth amendment right against unreasonable searches and seizures;[40] the fifth amendment protection against self-incrimination;[41] and the ninth amendment instruction that the enumeration of specific rights is not meant to deny others retained by the people[42] combine to form a right to privacy emanating from the penumbra of the Bill of Rights.[43] The Supreme Court similarly applied the right to privacy to an issue involving the right of procreation in *Roe v. Wade.*[44]

Since breaking ground with *Griswold*, the Supreme Court has regularly continued to make decisions directly protecting family interests.[45] The Supreme Court has strived to protect the vitality of the fam-

36. Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (housing ordinance defining family unit too strictly found unconstitutional).

37. 381 U.S. 479 (1965). The *Griswold* case posed the issue of whether a state could lawfully fine or imprison those who chose to use means of contraception or those who provided such information. *Id.* at 480.

38. *Id.* at 482–83.

39. *Id.* at 484. *See also* U.S. CONST. amend. III.

40. *Griswold*, 381 U.S. at 484; *see also* U.S. CONST. amend. IV.

41. *Griswold*, 381 U.S. at 484; *see also* U.S. CONST. amend. V.

42. *Griswold*, 381 U.S. at 484; *see also* U.S. CONST. amend. IX.

43. *Griswold*, 381 U.S. at 484.

44. 410 U.S. 113 (1973).

45. *See, e.g.*, Parkham v. J.R., 442 U.S. 584 (1979). The Court held that formal adversary hearings are not required when parents seek to commit their children to a mental institution. *Id.* at 606–13. The Court noted that parents have a traditional responsibility of raising their children and that the family is a unit with the parents exercising traditional parental authority over minor children. *Id.* at 602. *See* Zablocki v. Redhail, 434 U.S. 374 (1978). The Court invalidated a Wisconsin law which provided that any residents having minor children, not in their custody and whom they must support, could not marry without court approval. *Id.* at 390–91. The Court focused on the right to marry as a fundamental liberty interest under the due process clause. *Id.* at 383–86. *See also Moore*, 431 U.S. 494. The Court invalidated a zoning ordinance limiting the occupancy of a dwelling to members of a nuclear family. *Id.* at 506. In holding the ordinance to be unconstitutional, the Court recognized that basic liberty under the fourteenth amendment in-

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ily unit against state action which seeks to interfere with the family.

2. The Court's Treatment of Substantive Versus Procedural Due Process

If the United States Supreme Court concludes that a right is substantively protected, the due process clause of the fourteenth amendment requires notice and an opportunity to be heard[46] before any person may be deprived of that right. When an individual has been unconstitutionally deprived of a substantive right, section 1983 makes no requirement that state remedies be pursued before a claim is filed under section 1983.[47] Section 1983 was enacted partly in response to a distrust of state enforcement of constitutional rights.[48] Where an individual is deprived of an interest other than a substantive constitutional right, such as an interest in property, he or she is still protected by the due process clause. Deprivation without adequate state process is in itself a constitutional violation, actionable under section 1983.[49] In this situation, the availability of a state remedy is of paramount importance in determining whether or not there has been "due process" and thus, whether or not the claimant's rights have been constitutionally violated.[50] In a 1981 decision, *Parratt v. Taylor*,[51] the Supreme Court, applying a *procedural* due process analysis, held that when a constitutional violation occurs and the state provides an adequate tort remedy for the deprivation of that right, then the state remedy itself constitutes all the necessary due process required by the fourteenth amendment such that there has been no *unconstitutional* deprivation.[52] The Court's decision in *Parratt* reflects a change in attitude toward the efficacy of state enforcement of constitutional rights and suggests that the relationship between state remedies and section 1983 should be examined where substantive as well as procedural rights are involved. While the Court of Appeals for the Ninth Circuit in *Kelson v. City of Springfield*[53] remanded many of the section 1983 issues to the lower court, the

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cluded the right of the family to live together. *Id. Id.*

46. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

47. Friedman, Parratt v. Taylor: *Opening and Closing the Door on Section 1983*, 9 HASTINGS CONST. L.Q. 545, 546 (1982).

48. *See supra* notes 17–24 and accompanying text.

49. *Parratt*, 451 U.S.at 543–44.

50. *Id.*

51. 451 U.S. 527 (1981).

52. *Id.* at 543–44.

53. 767 F.2d 651 (9th Cir. 1985). Once the Ninth Circuit Court of Appeals had decided that the Kelsons did have a constitutional right that had been violated, the court remanded the case to the lower court for that court to decide whether the plaintiff had met the under color of

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appellate court applied a substantive due process analysis to the Kelsons' claimed liberty violation but failed to consider an equally tenable application of procedural due process analysis as developed in *Parratt*.

IV. ANALYSIS

In *Kelson v. City of Springfield*,[54] the Court of Appeals for the Ninth Circuit applied a section 1983 analysis to determine that parents do have a constitutionally protected liberty interest in the care and companionship of their children. While this decision was firmly rooted in the Supreme Court's tradition of protecting family interests through a substantive interpretation of the due process clause,[55] the court of appeals failed to consider the applicability of the Supreme Court's procedural due process approach in *Parratt* to alleged violations of liberty interests. In examining the propriety of the court's decision, it is necessary to examine the foundations of both the *Kelson* and the *Parratt* decision.

A. *Requirement of Constitutional Deprivation*

The Court of Appeals for the Ninth Circuit decided that the appellants had a *substantive* constitutional liberty interest that had been violated.[56] In so ruling, the court stood on firmly established ground, since the United States Supreme Court routinely applies substantive due process analysis to protect the vitality of the family unit.[57] In reaching its decision, the appellate court relied on several Supreme Court opinions which reflected the Court's protective attitude toward the family. In one case relied upon by the *Kelson* court, *Little v. Streater*,[58] the Court found that an indigent defendant in a paternity proceeding has a fourteenth amendment procedural due process right to receive blood grouping tests.[59] In reaching this result, the Court balanced the interests of the state in not affording such tests against the interests of the individual in establishing familial bonds.[60] The Court reasoned that state interference with the family through a paternity suit demanded procedural fairness because of the historical importance

state law requirement. *Id.* at 656. Specifically, the plaintiff must show that the city had an official policy, custom, or practice of inadequate training for its police officers to hold the city liable. *Id.* In order for the court to hold the individual defendants liable under section 1983, the plaintiff has to show that the defendant's conduct was the product of state policy. *Id.* at 656–57.

54. 767 F.2d 651 (9th Cir. 1985).
55. *See supra* notes 38–44 and accompanying text.
56. *Kelson*, 767 F.2d at 655.
57. *See* cases cited *supra* notes 33 & 35.
58. 452 U.S. 1 (1981).
59. *See id.* at 17.
60. *Id.* at 5–12.

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of familial bonds.[61]

The Court of Appeals for the Ninth Circuit then cited *Lassiter v. Department of Social Services*,[62] where the United States Supreme Court decided that an indigent defendant was not entitled to counsel as a matter of procedural due process. In *Lassiter*, the Court weighed the private interests at stake—the government interest in not affording counsel and the risk that the procedures utilized would lead to erroneous results.[63] In focusing on the individual interests in *Lassiter*, the Court considered the parents' "desire for and right to 'the companionship, care, custody, and management of his or her children.' "[64] The Court found the parents' interest in their children to be "an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.' "[65]

A third Supreme Court case relied upon by the Court of Appeals for the Ninth Circuit in making its decision offers particularly strong support for the court's holding. In *Santosky v. Kramer*,[66] the Court held that natural parents have a constitutionally protected liberty interest in the care, custody, and management of their child.[67]

After citing direct authority for its finding that parents have a constitutionally protected interest in the care and companionship of their children, the *Kelson* court then examined the cases in which courts have held that such deprivation is actionable under section 1983. The primary case relied upon was *Morrison v. Jones*,[68] in which the Court of Appeals for the Ninth Circuit reasoned that the liberty interest in the companionship and society of children exists and that government interference with this interest gives rise to a section 1983 action for damages.[69] The *Morrison* court stated that the interests of a mother in preserving her access to her child are based on familial concepts recognized by custom and practice for generations and that these inter-

61. *Id.* at 13.

62. 452 U.S. 18 (1981) (cited in *Kelson*, 767 F.2d at 654).

63. *Id.* at 27.

64. *Id.* (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

65. *Id.* (quoting *Stanley*, 405 U.S. at 651).

66. 455 U.S. 745 (1982).

67. *Id.* at 752–57.

68. 607 F.2d 1269 (9th Cir. 1979), *cert. denied*, 445 U.S. 962 (1980) (cited in *Kelson*, 767 F.2d at 654).

69. *Id.* at 1275–76. In *Morrison*, county officials transported the plaintiff's son, a German alien and ward of the state, to Germany because allegedly the plaintiff was incapable of providing the special care which her son required. *Id.* at 1271. The plaintiff brought a section 1983 action alleging deprivation of her parental rights without due process of law. *Id.* The Court affirmed that "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment . . . and the Ninth Amendment." *Id.* at 1276.

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ests are protected under the constitution.[70]

The strongest support for the court's decision in *Kelson* came from *Myres v. Rask*,[71] in which the District Court for the District of Colorado held:

> It would be ironic indeed to recognize, on the one hand, the constitutional rights to marry, . . . to procreate, . . . to supervise the upbringing of children, . . . to retain custody of one's illegitimate children, . . . and to live in the same residence with one's 'family,' . . . but on the other hand, to deny parents constitutional protection for the continued life of their child. State action that wrongfully kills one's child certainly interferes with fruition and fulfillment of the fundamental right to procreate. A parent cannot benefit from his constitutionally protected rights to supervise the upbringing, retain custody, or live in the same residence with a child if state action unlawfully takes the child's life. To constitutionally protect families from lesser intrusions into family life, yet allow the state to destroy the family relationship altogether, would drastically distort the concept of ordered liberty protected by the Due Process Clause.[72]

B. *Requirement of Under Color of State Law*

Although the Court of Appeals for the Ninth Circuit decided that the Kelsons did have a constitutionally protected liberty interest in the care and companionship of their child,[73] the court did not address the more complex and significant areas of the section 1983 action pertaining to the liability of local government entities, the liability of the school board, and the liability of the individual appellees.[74]

In order to meet the "under color of state law" requirement needed to hold the city liable, the plaintiff must show that the alleged deprivation of constitutional rights resulted from the execution or implementation of official government policy.[75] The Kelsons must show that the city consciously adopted an institutional policy of inadequate training of its police officers. Furthermore, they must show the causal connection between this execution of an official policy, custom, or practice and the deprivation of the Kelsons' liberty interest.[76] Closely re-

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70. *Id.*

71. 602 F. Supp 210 (D. Colo. 1985).

72. *Id.* at 213.

73. *Kelson*, 767 F.2d at 655; *see also* cases cited *supra* notes 32–33, 35-37 & 44.

74. The appellate court never addressed these issues because the district court erroneously concluded that the plaintiffs did not even have a constitutional claim. *Kelson*, 767 F.2d at 654–57. Before a section 1983 action can be maintained, it is first necessary to establish that a right, privilege, or immunity of the constitution had been violated. *Id.*

75. *See* Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985), *reh'g denied*, 106 S. Ct. 16 (1985); Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978).

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76. The *Monell* requirement of showing a policy or custom was reaffirmed in Verla v. Jones,

lated to the issue of municipal liability is the issue of school district liability. A school board may also be held liable if it can be determined that its actions were "under color of state law" in that it acted pursuant to an official government policy.[77] The burden of proving that the city had an institutional policy of inadequate training of its police officers may be especially difficult for the plaintiffs to bear. Two recent appellate court decisions have held that to establish section 1983 liability against a municipality for failure to adequately train officers, the plaintiff must show more than one isolated instance of unconstitutional conduct by police.[78] In addition, the plaintiff's burden has become more difficult to meet since the Supreme Court requires a showing of gross negligence rather than mere negligence on the part of the defendant.[79]

A second analogous issue that the appellate court left for the lower court to review was whether the *individual* defendants may be held liable under section 1983. Section 1983 requires that for individuals to be held personally liable, they must have been acting under color of state law, which, like the requirement for holding municipalities liable, means that the individual's actions must have been pursuant to an official policy or custom.[80] Imposing liability against the individual defendants may be difficult because the plaintiffs must prove that the defendant acted pursuant to an official policy and not pursuant to his or her own personal predilections. The availability of the common-law tort defenses of good faith and of qualified immunuty which are available to defendants increase the difficulties in proving liability against individual defendants.[81]

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746 F.2d 1413, 1418 (10th Cir. 1984). The *Verla* court held that the city is liable only if its employees deprived the plaintiff of a constitutional right pursuant to a policy or custom of the city. *Id.*

77. *See* Keckeisen v. Independent School Dist., 509 F.2d 1062, 1064–65 (8th Cir. 1975); Harkless v. Sweeney Indep. School Dist., 427 F.2d 319, 321–23 (5th Cir. 1970). *But see* Seaman v. Spring Lake Park Indep. School Dist., 387 F. Supp. 1168, 1170 (D. Minn. 1974) (school district not subject to liability under section 1983, but superintendent and individual members of the board are liable).

78. *See* Vippolis v. Haverstraw, 768 F.2d 40, 44 (2d Cir. 1985) (inadequate training of police officers not inferred from a single episode of alleged unconstitutional conduct); *see also Tuttle*, 105 S. Ct. at 2427; Voutour v. Vitale, 761 F.2d 812 (1st Cir. 1985).

79. *See* Rock v. McCoy, 763 F.2d 394, 397 (10th Cir. 1985) (requiring "deliberate indifference"); Carter v. Harrison, 612 F. Supp. 749, 751 (E.D.N.Y. 1985) (requiring "deliberate indifference" or "gross negligence").

80. *See* Harvey v. Andrist, 754 F.2d 569, 572 (5th Cir. 1985); Bellows v. Dainack, 555 F.2d 1105, 1106 n.1 (2d Cir. 1977); Glower v. City of New York, 401 F. Supp. 632 (D.N.Y. 1975).

81. *See* Imbler v. Pachtman, 424 U.S. 409 (1976). The Court held that "section 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Id.* at 418 (citing Tenney v. Brandhove, 341 U.S. 367 (1951). *See also* Pollnow v. Glennon, 757 F.2d 496, 501 (2d Cir. 1985) (school official has a qualified immunity absent a violation of clearly established constitutional or federal statutory rights of which a reasonable person would have known).

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C. Due Process Considerations

Parratt is a case containing a section 1983 claim based on alleged violations of procedural due process[82] and is a landmark case in "constitutional tort"[83] law because it redefines what constitutes the deprivation of a protected interest without due process of law.[84] The *Parratt* Court's holding results in a delay in bringing a federal section 1983 claim until a state tort action can be initiated,[85] thus allaying the fears of some that "every alleged injury which may have been inflicted by a state official acting under 'color of law' [would turn] into a violation of the Fourteenth Amendment cognizable under § 1983."[86]

Due process analysis considers two types of hearings: a pre-deprivation hearing afforded before the state impairs a liberty or property interest[87] and a post-deprivation hearing held following the government's impairment of rights.[88] Normally, the pre-deprivation hearing will be necessary to afford due process protection; however, in *Parratt*, the Court determined that in some cases, post-deprivation procedures will suffice.[89] The courts that have permitted post-deprivation remedies to satisfy the due process requirements "recognize . . . either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process."[90] The *Parratt* approach requires a pre-deprivation hearing when the deprivation is the result of a long-standing state procedure; however, in cases of emergency or where a pre-deprivation hearing is impractical, an adequate post-deprivation

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82. 451 U.S. at 529.

83. *See* International Soc'y for Krishna Consciousness, Inc. v. City of Evanston, 89 Ill. App. 3d 701, 411 N.E.2d 1030 (1980), *cert. denied*, 454 U.S. 878 (1981). The Appellate Court for the First District of Illinois defines "constitutional tort" as follows:

> This term has been used to describe an area of the law encompassing that which is not quite a private (common law) tort, but which contains tort elements; it is not a 'constitutional law' matter per se, but it employs a constitutional test. Involved in such a claim is an alleged deprivation of one of the rights secured by the Constitution (the tort) by one acting under color of State law.

Id. at 707, 411 N.E.2d at 1036 (citation omitted).

84. In *Parratt*, a prison inmate sued prison administrators under section 1983 claiming that prison employees lost hobby materials which he had ordered. *Parratt*, 451 U.S. at 530. The inmate filed a federal action even though Nebraska's tort claims procedure would have provided him relief. *Id.* at 544. Justice Rehnquist, writing for the Court, held that Nebraska tort remedies were "sufficient to satisfy the requirements of due process" thereby denying the section 1983 claim. *Id.* at 544.

85. *Id.* at 544.

86. *Id.*

87. *Id.* at 537.

88. *Id.* at 538.

89. *Id.*

90. *Id.* at 539.

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remedy will satisfy due process.[91] The *Parratt* Court stated that they could "reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law."[92]

The United States Supreme Court later clarified the *Parratt* opinion in *Logan v. Zimmerman Brush Co.*[93] In *Logan*, the Court explained that *Parratt* applies only in situations which require the state to act quickly or where it could not otherwise provide pre-deprivation process.[94] The Court concluded that absent these circumstances, a post-deprivation process would not satisfy due process requirements when the deprivation was effectuated through an established state procedure.[95] The tortious loss in *Parratt* was the result of a "random and unauthorized act."[96] Thus, it would be impractical to require a pre-deprivation hearing. In such cases, post-deprivation remedies satisfy due process. However, in cases where the deprivation was the result of a long-standing state policy or state procedure, post-deprivation remedies would not be sufficient where there had been time for pre-deprivation notice and an opportunity to be heard.[97]

1. The *Kelson* Court's Rejection of *Parratt*

Parratt stands for the proposition that if the property deprivation was the result of a random, unauthorized act where the state had to act quickly or where it could not otherwise provide pre-deprivation process, then post-deprivation state remedies will satisfy the fourteenth amendment due process requirement. Under these circumstances, the plaintiff has suffered no unconstitutional deprivation actionable under section 1983. The facts of the *Kelson* case arguably parallel the *Parratt* situation. In *Kelson*, the situation in the school was undoubtedly tense when

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91. *Id.* at 537–39.

92. *Id.* at 542 (quoting Bonner v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975), *cert. denied*, 435 U.S. 932 (1978)).

93. 455 U.S. 422 (1982). In *Logan*, Zimmerman Brush Company discharged the plaintiff purportedly because his short left leg made it impossible for him to continue working as a shipping clerk. *Id.* at 426. Plaintiff Logan brought his unlawful discharge complaint to the Illinois Fair Employment Practices Commission. *Id.* The Commission, apparently through inadvertence, scheduled the conference for five days *after* the expiration of the statutory limitation period for claims. *Id.* The Illinois Supreme Court held that Logan's claim was thereby extinguished. *Id.* at 427–28. The United States Supreme Court reversed. *Id.* at 438.

94. The Court said that "absent 'the necessity of quick action by the State or the impracticality of providing any predeprivation process,' a postdeprivation hearing here would be constitutionally inadequate." *Id.* at 436 (quoting *Parratt*, 451 U.S. at 539).

95. *Id.*

96. *Id.* at 435–36 (quoting *Parratt*, 451 U.S. at 541).

97. *Id.* at 436 (quoting *Parratt*, 451 U.S. at 541).

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the Kelsons' son held a loaded gun as the police officer encountered him. It was an emergency situation, and there was no time to afford the parents notice and an opportunity to be heard before the police officer took action. As in *Parratt*, no pre-deprivation process could have feasibly been afforded the Kelsons.[98]

In addition to the emergency analogy in *Parratt*, the Court's analysis in *Kelson* also parallels *Parratt* with respect to the under color of state law requirement.[99] Arguably, the police officer's actions meet the "under color of state law" requirement because the power or the authority pursuant to which the police officer acted was possessed by virtue of state law. The police officer was able to take the action that he took only because he was clothed with the authority of state law. However, it could also be argued that the actions were unauthorized, random acts by a single officer just as the acts in *Parratt* were random and unauthorized.

Despite the similarities between the two cases, the *Kelson* court refused to apply a procedural due process analysis to determine whether there was an unconstitutional deprivation. Although *Parratt* involved a claim arising from a dispute regarding a property interest, courts have not limited considerations of the adequacy of state remedies only to cases involving deprivations of property interests. Many courts of appeals have employed a two-part test to extend *Parratt* to include both life and liberty interests.[100] These courts begin by focusing on whether the alleged state conduct was random and unauthorized because if the conduct was the result of a long, well-established state policy, post-deprivation remedies would not be sufficient to satisfy the due process requirement.[101] In *Juncker v. Tinney*,[102] a claimant filed an

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98. The *Parratt* Court recognized:

> [E]ither the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process.

Parratt, 451 U.S. at 539.

99. The requirement of acting under color of state law has been given a broad interpretation under Monroe v. Pape, 365 U.S. 167 (1961), *overruled on other grounds*, Monell v. Department of Social Serv., 436 U.S. 658, 663 (1977). The under color of state law requirement was interpreted to include any state employees who misuse their power which is possessed by virtue of state law. *Id.* at 184-85. The misuse of power is made possible only because the wrongdoer is clothed with the authority of state law. *Id.* at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1946)).

The under color of state law requirement is separate and distinct from the state of mind requirement, requiring more than mere negligence. Daniels v. Williams, 106 S. Ct. 662 (interim ed. 1986).

100. *See, e.g.*, Daniels v. Williams, 720 F.2d 792, 795 (4th Cir. 1983).

101. *Id.*

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102. 549 F. Supp. 574 (D. Md. 1982).

action under section 1983 alleging violations of procedural due process in deprivation of a liberty interest. The *Junker* court argued:

> The logic of *Parratt* permits no principled distinction between deprivations of property and liberty interests. If a deprivation results from a 'random and unauthorized act' by a state official, the State is no more able to predict the deprivation, and a pre-deprivation hearing is no more possible, when the deprivation involves a liberty interest than when it involves a property interest.[103]

In *Ingraham v. Wright*,[104] a case involving a liberty interest implicated by corporal punishment in schools, the United States Supreme Court applied an analysis similar to the one subsequently applied in *Parratt*.[105] The *Ingraham* Court found no deprivation of liberty without due process because the state afforded common-law remedies for personal injury.[106] As in *Parratt*, the remedies offered in *Ingraham* were post-deprivation remedies.

In *Brewer v. Blackwell*,[107] the Court of Appeals for the Fifth Circuit offered reasons for rejecting the application of the *Parratt* doctrine to violations of life and liberty.[108] The court held that where the deprivation was slight when compared with the burden of pre-deprivation hearings, then post-deprivation hearings would satisfy due process requirements.[109] The primary flaw in this approach to the *Parratt* doctrine is that it does not take into account the possibility that regardless of the nature of the deprivation, there may be no time for a pre-deprivation hearing or one may not be feasible if the act is random and unauthorized. In situations like the one in *Parratt*, since the acts involved are random and unauthorized, no pre-deprivation hearing can be held. If any process is to be accorded, it must be post-deprivation.

Another argument often made against extending *Parratt* to cases involving deprivations of life and liberty is that a post-deprivation remedy will be adequate in the case of a property deprivation because the property may be restored and the plaintiff made whole.[110] However, it is contended that the danger with applying the *Parratt* doctrine to deprivations of life and liberty is that once the deprivation has occurred without notice and an opportunity to be heard, the plaintiff cannot be restored to his or her former position even if there is a post-deprivation

103. *Id.* at 576.
104. 430 U.S. 651 (1977).
105. *Id.* at 672.
106. *Id.* at 668–71.
107. 692 F.2d 387 (5th Cir. 1982).
108. *Id.* at 395.
109. *Id.*
110. *See* Barnier v. Szentmiklosi, 565 F. Supp. 869, 877 n.16 (E.D. Mich. 1983).

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remedy. In *Parratt*, the Court repeatedly stressed that the loss caused by the misconduct of the state official was only an "initial deprivation" before which a hearing was not required.[111] However, the Court reasoned that if the state provides an opportunity for the plaintiff to be restored to his or her former position, then due process has been provided before a "final deprivation." Applying this reasoning to deprivations of life and liberty, if the plaintiff cannot be restored to his or her former position, then the final deprivation has occurred at the same time as the initial deprivation.[112] At that point, if the interest lost cannot be replaced, the plaintiff has been finally deprived of his or her interest without due process protection.[113] The constitutional violation is then complete, and a cause of action should lie under section 1983 even if a remedy is available under state law.[114]

This argument was soundly rejected in *Ingraham v. Wright*.[115] The dissent argued that because the corporal punishment of students involved could not be retracted once inflicted, post-deprivation hearings were not adequate to satisfy due process.[116] The majority rejected this argument holding that the deprivation is not final until the opportunity for a hearing is foreclosed, regardless of the ability of the state to restore the lost interest to the plaintiff.[117]

In deciding that parents have a constitutionally protected liberty interest in the care and companionship of their children, which was deprived in violation of fourteenth amendment due process protections, the Court of Appeals for the Ninth Circuit in *Kelson* failed to consider the application of the *Parratt* doctrine to the deprivation of a liberty interest, despite the factual similarities of the cases. Each case involved a potentially random, unauthorized, negligent act[118] by a state official, and each case also involved a situation where a pre-deprivation hearing was not feasible because of the nature of the circumstances surrounding the acts. The *Kelson* court could have applied the *Parratt* doctrine

111. *Parratt*, 451 U.S. at 539–42.

112. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 20 (1978) (cessation of utility services "works a uniquely final deprivation" for which state remedies are inadequate); Burtnieks v. City of New York, 716 F.2d 982 (2d Cir. 1983).

113. *See Craft*, 436 U.S. at 20.

114. *See Burtnieks*, 716 F.2d at 988–89. *But see* Toteff v. Village of Oxford, 562 F. Supp. 989, 995 (E.D. Mich. 1983) (post-deprivation remedies adequate to redress destruction of real property).

115. 430 U.S. 651, 679–80 n.47 (1977).

116. *Id.* at 696–97 (White, J., dissenting).

117. *Id.* at 679–80.

118. *Kelson*, 767 F.2d at 652–53. The Court of Appeals for the Ninth Circuit did not decide that the individual appellees in *Kelson* were negligent or that their acts were random or unauthorized, but the court did suggest that if the lower court on remand found the acts to be random and unauthorized, then a section 1983 action would fail. *Id.* at 657.

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and held that the plaintiff was foreclosed from seeking a section 1983 remedy because post-deprivation proceedings were available under state law. Certainty of compensation is not required under *Parratt*,[119] although certainty of an opportunity for compensation is required.[120]

Using the *Parratt* doctrine, the *Kelson* court could have decided the case on procedural due process grounds and ruled that there was no substantive constitutional right violated. Certainly, procedural due process considerations should have been addressed by the court.

V. Conclusion

In deciding that the Kelsons had a constitutionally protected interest in the care and companionship of their child actionable under section 1983, the Court of Appeals for the Ninth Circuit failed to consider the extension of the *Parratt* procedural due process analysis to alleged violations of a liberty interest to determine whether there had been an unconstitutional deprivation of that interest. The court remanded to the lower court the issue of whether the appellees were acting under color of state law. In order to establish liability in the lower court against the city, the plaintiffs will have to show that the city had consciously adopted a policy of inadequate training for its police officers. In order to hold the individual defendants liable, the plaintiffs will have to show that the defendants were able to perpetrate the wrongful act because they were clothed with state authority. The under color of state law requirement focuses on the relationship of state procedures and practices to the alleged deprivation which followed. Although section 1983 was enacted without a requirement that state remedies be shown inadequate, it is now time to consider the relationship of state remedies to the alleged deprivation of substantive rights—particularly where unpremeditated actions are involved—to determine whether the deprivation was unconstitutional in the sense contemplated by section 1983.

Susan D. Jansen

119. *Parratt*, 451 U.S. at 542. *See Daniels*, 720 F.2d at 797; Irshad v. Spann, 543 F. Supp. 922, 927 (E.D. Va. 1982).

120. *Daniels*, 720 F.2d at 797; State Bank v. Camie, 712 F.2d 1140, 1147 (7th Cir.), *cert. denied*, 104 S. Ct. 491 (1983); Evans v. City of Chicago, 689 F.2d 1286, 1298–99 (7th Cir. 1982).

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