Summaries of

5th Circuit Cases

Dealing with

Parental Rights

Compiled by Jerald C. Finney

For the Alliance Defense Fund

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granted both appellee's custody petition and the request for counsel for indigent parents. Appellant circuit judges asserted that the district court erred in holding there was a right to counsel for indigent parents in child dependency proceedings, or in the alternative, that such a right should be determined on a case-by-case basis. The court affirmed the judgment of the district court, holding that the right to protect one's family was fundamental and outweighed the government's economic interest and, therefore, indigent parents should be afforded assistance of counsel. The court agreed that counsel had to be provided in all dependency proceedings, but vacated the award of attorney's fees. ' 1980 U.S. App. LEXIS 16881.)

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Davis v. Page, 40 F.2d 599; 1981 U.S. App. LEXIS 18962 (5th Cir. 1981)("In a dependency proceeding where plaintiff indigent parent was not represented by counsel, plaintiff's son was determined to be a dependent child and committed to the temporary custody of the Department of Health and Rehabilitative Services. Plaintiff then filed a class action against defendants, court officials, that challenged the constitutionality of child dependency proceedings against indigent parents when parents were not provided with counsel at the state's expense. The court affirmed the declaratory relief granted by the lower court that rendered null and void the state decree that determined that plaintiff's son was a dependent child. The court held that the recognized weight of plaintiff's interest in the custody of her son demanded that she received the full procedural protection necessary to avoid the erroneous deprivation of that interest. The court held that in a formal adjudication of dependency where prolonged or indefinite deprivation of parental custody was threatened, due process required that an indigent parent be offered counsel and that counsel be provided unless a knowing and intelligent waiver was made." 1981 U.S. App. LEXIS 18962.)

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Dike v. School Board of Orange County Florida, 650 F.2d 783; 1981 U.S. App. LEXIS 11300 ("5th Cir. 1981)(Plaintiff teacher wanted to breastfeed her baby during her lunch hour, and defendants, school board and superintendent, refused. She filed suit against defendant under *42 U.S.C.S. § 1983,* characterizing breastfeeding as a constitutional right with which defendant had unduly interfered. The district court dismissed plaintiff's complaint and awarded attorney's fees to defendant, deeming the action frivolous. The court reversed the dismissal. The court held that plaintiff's interest in breastfeeding was entitled in some circumstances to protection against state infringement because it was similar to marriage, procreation, contraception, abortion, and family relationships, which were afforded special protection. However, the court also found that the justifications that defendant may have had for restricting plaintiff's exercise of her right during the work day were equally critical, and that defendant had a legitimate interest in preventing disruption of performance of duty. Therefore, plaintiff's complaint should not have been dismissed, nor attorney's fees awarded, because a question remained as to whether plaintiff could prove facts that would have entitled her to relief." 1981 U.S. App. LEXIS 11300.)

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Kite v. Marshall, 661 F.2d 1027; 1981 U.S. App. LEXIS 15838 (5th Cir. 1981)(" Appellant interscholastic league contended that the district court erred in holding that its eligibility rule was unconstitutional. The court agreed and reversed the district court's order. First, the district court erred in holding that parents possess a fundamental right to send their children to summer athletic camps; therefore, appellant's rule restricting participation for students who attend athletic camps was subject to a lower level of scrutiny. Second, the rule did not violate substantive due process under U.S. Const. amend. XIV because it had a rational basis. Appellant's rule had a meaningful relationship to the achievement of appellant's purpose in making interscholastic athletics fairer and more competitive. And third, the rule did not violate the Equal Protection Clause of U.S. Const. amend. XIV because appellant's classification was not premised on impermissible, suspect grounds and did not impinge on the exercise of fundamental rights. Further, the rational basis test was satisfied because the rule was rationally related to the legitimate purpose of achieving a balance in interscholastic athletics." 1981 U.S. App. LEXIS 15838.)

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Laurenzo v. Mississippi High School Activities Aassociation Inc., 662 F.2d 1117; 81 U.S. App. LEXIS 15517 (5th Cir. 1981)("Appellant minor student sued under *42 U.S.C.S. § 1983* challenging the constitutionality of a rule prescribed by appellee association, and subscribed to by appellee school district, which did not allow students to participate in athletic activities unless they were living with the parent who had legal custody. Appellant lived with the parent who had no legal custody. Appellant sought declaratory and injunctive relief, damages, and attorney's fees. The district court found that the complaint failed to raise a substantial federal question as participation in high school athletics was not a constitutionally protected right, and dismissed the complaint for lack of jurisdiction. On appeal, the court noted that the state conclusively presumed that any child who changed residence to live with a parent without legal custody was necessarily "school shopping." The operation of the rule posed a substantial federal question. Yet, the case was not a class action suit, and appellant had graduated from high school. There was no reasonable expectation that the same complaining party would be subjected to the same action again, so the issue was moot." 81 U.S. App. LEXIS 15517.) 15

Brantley v. Surler, 718 F.2d 1354; 1983 U.S. App. LEXIS 15362 (5th Cir. 1983)("Plaintiff employee worked at a public school, and was fired after enrolling her son in a private, segregated academy. Plaintiff filed a series of unsuccessful state court actions, and then filed an action under *42 U.S.C.S. § 1983,* alleging a violation of her constitutionally protected interest in educating her son. The district court dismissed plaintiff's action on the pleadings. The court reversed and remanded for further proceedings. The U.S. Constitution protects familial relationships and practices. The parental interest in the direction and control of a child's education is central to the family's constitutional protected privacy rights. Although a state may set forth minimum education standards, it may not pre-empt the educational process by requiring children to attend public schools. Exhaustion of available state administrative remedies is not a prerequisite to commencement of an action in federal court under § 1983. Res judicata did not apply because plaintiff's § 1983 action involved the determination of facts and issues distinct from those posed in plaintiff's prior state court litigation." 1983 U.S. App. LEXIS 15362.) 16

Hodorowski v. Ray, 844 F.2d 1210; 1988 U.S. App. LEXIS 6493 (5th Cir. 1988)("Appellant child protective service workers investigated a report of a father chasing his children with a chain and found the bruised children alone at home. One child told them there were more severe bruises under their clothing. Appellants removed the children without a court order, and appellee parents filed a claim under 42 U.S.C.S. § 1983 that appellants interfered with family integrity in violation of U.S. Const. amend. XIV. The district court denied appellants' motion to dismiss holding that they could claim neither absolute nor qualified immunity, and appellants sought review. The court reversed finding that qualified immunity shielded appellants from liability. The court held that appellants were not entitled to absolute immunity because their removal of the children was not an integral part of the judicial process entitled to absolute protection. However, the court held that appellants were entitled to qualified immunity from § 1983 claims if their actions did not violate a clearly defined right. The court found that family integrity was a nebulous right, and appellants' actions were objectively reasonable and as a matter of law violated no clearly established right." 1988 U.S. App. LEXIS 6493.) 18

Port v. Heard, 764 F.2d 423; 1985 U.S. App. LEXIS 30768 (5th Cir. 1985)("Appellants, husband and wife, were called to testify before a state grand jury that was investigating their son's involvement in a murder. They refused to testify. A state court found them in contempt, fined them, and ordered that they be incarcerated. Appellants petitioned for a writ of habeas corpus. 28 U.S.C.S. § 2254. The district court denied the petition. The court first determined that appellants' release from custody did not moot their appeal because the state court imposed fines that were punitive in nature and appellants could obtain relief therefrom if successful on appeal. The court then affirmed the dismissal of the petition, holding that the familial right of privacy, U.S. Const. amends. IX and XIV, did not compel recognition of a parent-child testimonial privilege. The court also rejected appellant's equal protection argument, holding that the state's refusal to recognize a parental privilege was rationally related to its

interest in the pursuit of truth in its legal proceedings. The court also held that appellants' right to free exercise was not violated because the state had a compelling interest in pursuing the truth regarding the murder." 1985 U.S. App. LEXIS 30768.) 20

Arnaud v. Odom, 870 F.2d 304; 1989 U.S. App. LEXIS 5221 (5th Cir. 1989)("Appellee doctor, in an effort to gather empirical data to support his expert opinion in another case, performed grisly controlled experiments on the bodies of two infants who had died of Sudden Infant Syndrome. The experiments consisted of holding the corpse by the feet, dropping the corpse head-first from a height of one meter onto a concrete surface. Appellee then x-rayed the skull of the infant and recorded the results. Thereafter, appellee performed the mandatory autopsy. Four months later, appellants, the parents of the deceased infants, learned about the experiments from appellee. Appellants brought an action against appellee under 42 U.S.C.S. § 1983. The district court dismissed the actions under Fed. R. Civ. P. 12(b)(6). On appeal, the court affirmed and modified. The court determined that because adequate state postdeprivation process was available to remedy the injury of appellants, the parents of one infant, they did not suffer a constitutional invasion of any property right pursuant to § 1983. The court found that there was no liberty or privacy interest created by the U.S. Constitution to cover the injury of appellants, the parents of the other infant." 1989 U.S. App. LEXIS 5221.) 21

Fyfe, v. Curlee, 902 F.2d 401; 1990 U.S. App. LEXIS 8840 (5th Cir. 1990)("On appeal, plaintiff former school secretary contended that her unrebutted evidence established as a matter of law that defendant school district violated her constitutional rights. The court found that plaintiff's transferring her daughter to private school enjoyed constitutional protection under U.S. Const. amend. I and the penumbra of recognized familial privacy rights. The court further found that plaintiff sufficiently demonstrated that her protected conduct was a substantial or motivating factor in the decision to transfer her to another position, noting that defendant failed to present any other reason for the transfer. The court then held that plaintiff's transfer to a less responsible, more menial job at the same wage amounted to a constitutional deprivation actionable under 42 U.S.C.S. § 1983, finding that defendant produced no evidence of substantial interference with its effectiveness as a result of the daughter's enrollment in private school. The court accordingly vacated the order under review and remanded the case, finding that plaintiff was entitled to nominal damages and ordering a trial on the appropriate remedy to which plaintiff was entitled." 1990 U.S. App. LEXIS 8840.) 23

Wooley v. City of Baton Rouge, 211 F.3d 913; 2000 U.S. App. LEXIS 22430 (5th Cir. 2000)("Appellant mother obtained a court order (later deemed void) transferring custody of her infant to appellant friend. The following month, appellant mother's parents (the grandparents) obtained an order from a different court giving them custody of the child. Relying on the second order, appellee police officers removed the infant from appellants' home and delivered him to the grandparents. Ultimately the juvenile court returned custody to appellant mother. Appellants sued, alleging appellees, the City and the police officers, violated appellants' U.S. Const. amend. V, XIV rights. The district court granted summary judgment to appellees based on qualified immunity. The judgment was affirmed in part, and vacated and remanded in part. Appellant friend had no clearly established right to continued custody of the infant, but the infant had a clearly established right to remain in the control of appellant mother. The grandparents' court order did not specifically direct the police to effectuate the custody transfer. Without such authorization it was not objectively reasonable for appellee officers to have believed the order empowered them to seize the infant." 2000 U.S. App. LEXIS 22430.) 25

Littlefield v. Forney Independent School District, 268 F.3d 275; 2001 U.S. App. LEXIS 20973 (5th Cir. 2001)("The disputed uniform policy required students to wear solid color polo-type shirts with collars, oxford-type shirts, or blouses with collars in one of four colors (white, yellow, red, or navy blue). The policy prohibited the wearing of certain clothing items. Plaintiffs argued that the policy acted as a form of 'coerced speech' in that it forced the students to convey a state-approved message that students did not wish to send, and that the policy acted as a 'prior restraint' by preventing the

Summaries of 5th Circuit Cases Dealing with Parental Rights

***Ingraham v. Wright*, 498 F.2d 248; 1974 U.S. App. LEXIS 7427**
(5th Cir. 1974)

PROCEDURAL POSTURE: Plaintiff students appealed the decision from the United States District Court for the Southern District of Florida, which dismissed their action against defendant school officials, brought pursuant to *42 U.S.C.S. § § 1981*-1988, for alleged constitutional violations in the use of corporal punishment.

OVERVIEW: Plaintiffs filed a complaint containing three counts. 498 F.2d 250. Counts One and Two were individual actions for compensatory and punitive damages brought by two junior high school students under *42 U.S.C. § § 1981*-1988, with jurisdiction claimed under *28 U.S.C. § 1331* and § 1343. *Id.* The students claimed personal injuries resulting from corporal punishment administered by certain defendants in alleged violation of their constitutional rights. *Id.* Count Three of the complaint was a class action, also brought under *42 U.S.C. § § 1981*-1988, with jurisdiction claimed under *28 U.S.C. § 1331* and § 1343. *Id.* This class action filed on behalf of all students in the public school system of Dade County sought injunctive and declaratory relief against the use of corporal punishment throughout the county school system. *Id.* After plaintiffs presented their evidence in a week long trial before the court the court granted defendants motion to dismiss and dismissed all three counts.

The 5th Circuit ("the court") first rejected defendants assertion that there was no federal jurisdiction over Count Three under *42 U.S.C. § § 1981*-1988 and *28 U.S.C. § 1331* and § 1343, because the Dade County School Board and the Superintendent of Schools in their official capacities are not "persons" amenable to civil rights actions. *Id.* at 251-52.

Under Count Three of the complaint, plaintiffs sought injunctive relief restraining the defendants, their agents and employees from inflicting any form of corporal punishment upon students in the Dade County public school system. *Id.* at 252. Plaintiffs did not request an injunction restraining the enforcement of any specific Florida statute, and in oral argument before this Court, counsel for plaintiffs stated, "We are not challenging the constitutionality of the Florida statute." Section 232.27 of Florida Statutes Annotated, provides:

> "Each teacher or other member of the staff of any school shall assume such authority for the control of the pupils as may be assigned to him by the principal and shall keep good order in the classroom and in other places in which he is assigned to be in charge of pupils, but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in its nature."

Id. at 252-53. The court pointed out that the statute did not mandate or require corporal punishment, however, nor did it compel local school boards to adopt regulations providing for corporal punishment and that the statute did not prevent a local board from prohibiting corporal punishment in certain grade.

Dade County School Board Policy 5144 expressly authorizes the use of corporal punishment, and prescribes the procedures to be followed where a teacher feels that corporal punishment is necessary. *Id.* at 254-255. During the 1970-71 school year, Policy 5144 provided, among other things, that the punishment be administered "in kindness and in the presence of another adult" and that "no instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck." *Id.* (See p. 255 for a recitation of the relevant parts of Policy 5144).
evels or throughout a county system. *Id.* at 253.

The corporal punishment used in the Dade County School System was primarily or exclusively paddling. *Id.* at 255. The evidence revealed "a rather widespread failure to adhere to School Board policy regarding corporal punishment." *Id.* The evidence showed that only one school in Dade County, Charles R.

Drew Junior High School, administered severe punishment. *Id.*[1]

CRUEL AND UNUSUAL PUNISHMENT

The court held that

> "at the present time corporal punishment *per se* cannot be ruled violative of the Eighth Amendment." Mild or moderate use of corporal punishment as a disciplinary measure in an elementary or secondary school normally will involve only transitory pain of a non-intense nature and will not cause intense or sustained suffering or permanent injury. For this reason, although many might object to corporal punishment for a variety of reasons, such punishment *per se* cannot presently be held to be "excessive" in a constitutional sense, or so "degrading" to the "dignity" of school children as to violate the Eighth Amendment. Although the scope of the Eighth Amendment admittedly is not "static" and must draw its meaning from "evolving standards of decency," *Trop v. Dulles, 1958, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630,* it is significant that a large number of states continue to authorize the use of moderate corporal punishment, and that corporal punishment apparently is still utilized in many school systems. Faced with this evidence of what is apparently considered appropriate by the American people, we would be loath to suggest that at this time corporal punishment is "unacceptable to contemporary society," *Furman v. Georgia, supra, 408 U.S. at 277-279, 92 S. Ct. 2726* (Brennan, J., concurring), or that it is "abhorred" by popular sentiment, *Furman v. Georgia, supra, 408 U.S. at 332, 92 S. Ct. 2726* (Marshall, J., concurring).

Id. at 260-61.

The court held that punishments devised by school officials were subject to Eighth Amendment scrutiny. *Id.* at 261. However, the court found no violation of the Eighth Amendment in the specific policies on corporal punishment promulgated by the Dade County School Board since "these policies do nothing more than authorize the mild or moderate use of such punishment." *Id.*

However, the court concluded that the plaintiffs' evidence as to the pattern, practice and usage of corporal punishment at Drew Junior High School was such that the trial court erred in dismissing Count Three under Rule 41(b), F.R.Civ.P., and also erred in dismissing Counts One and Two. *Id.* at 262. The court examined the evidence and held:

> "Taking into consideration the age of the individuals, the nature of misconduct involved, the risk of physical and psychological damage, and the availability of alternative disciplinary measures, we conclude that the system of punishment at Drew was "excessive" in a constitutional sense. The severity of the paddlings and the system of paddling at Drew, generally, violated the Eighth Amendment requirement that punishment not be greatly disproportionate to the offenses charged. Our review of the evidence has further convinced us that the punishment administered at Drew was degrading to the children at that institution."

Id. at 264.

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[1] The court cited many examples of "severe" punishment inflicted by officials of Charles R. Drew Junior High School. 498 F.2d at 256-59. One student, James Ingraham, was held down and given 20 licks with a paddle. A doctor described James' injury as follows: "The patient's subjective [sic] signs of injury included a hematoma approximately six inches in diameter which was swollen, tender and purplish in color. Additionally, there was serousness or fluid oozing from the hematoma." On October 14, eight days after the paddling, this doctor indicated that James should rest at home "for next 72 hours." James testified that it was painful even to lie on his back in the days following the paddling, and that he could not sit comfortably for about three weeks. *Id.* at 256.

DUE PROCESS

Plaintiffs alleged that (1) corporal punishment as administered in Dade County deprives students of due process of law in violation of the Fourteenth Amendment, (2) that students are provided no procedural safeguards before corporal punishment is imposed, and that (3) corporal punishment violates due process because it is arbitrary, capricious and unrelated to the achievement of any legitimate educational purpose. *Id.* at 266. The court then outlined procedures which should be followed in administering corporal punishment and concluded that in Examining the procedures prescribed under Policy 5144 were not inconsistent with the procedures the court had outlined. *Id.* at 268. Although most principals probably already follow the procedural guidelines the courthad suggested, the testimony of students from Drew indicates that this has not uniformly been the case. *Id.*

The court next examined the question of whether corporal punishment was unrelated to the achievement of any legitimate educational purpose and concluded that it was unwilling to say that mild or moderate corporal punishment is unrelated to the achievement of any legitimate educational purpose. *Id.* at 268-69. The court further stated, "However, in this case the severe punishment meted out at Drew went beyond legitimate bounds" and that "In the present case, as regards Drew Junior High School, there exists "a shocking disparity" between the offenses committed by various of the students and the harsh punishment imposed by school officials. Thus, we conclude that the system of punishment at Drew not only violated the constitutional prohibition against cruel and unusual punishment, but also violated due process." *Id.* at 269

RIGHT OF THE PARENT AND CHILD TO PROHIBIT CORPORAL PUNISHMENT BY SCHOOL OFFICIALS

As to the issue of whether parent or child can prohibit the use of corporal punishement, the court said:

> "In the present case, the school authorities have presented no evidence, and so have had no opportunity to demonstrate the extent to which corporal punishment is a useful or necessary disciplinary measure in Dade County. n40 In any event, the approach taken on this issue by the district court in *Ware* deserves re-examination in light of certain recent Supreme Court cases which touch on the relationship of parent and child, and the right of privacy. These cases include *Stanley v. Illinois, 1972, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551; Wisconsin v. Yoder, 1972, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15; Roe v. Wade, 1973, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147.* It is not appropriate at the present time to attempt to resolve this issue. Instead, we suggest that, upon remand, the district court make findings of fact and conclusions of law on this aspect of the case."

Id. at 270.

The court held that the district court erred in dismissing plaintiffs' complaint, and, therefore, it reversed and remanded for further proceedings. The court held that the practice of corporal punishment in the school system as a whole did not violate U.S. Const. amend. VIII. However, the court concluded that the system of punishment at a particular school not only violated the constitutional prohibition against cruel and unusual punishment but also violated due process.

OUTCOME: The court reversed the district court's dismissal of plaintiff students' action against defendant school officials, holding that plaintiffs presented evidence of a pattern, practice, and usage of corporal punishment that precluded dismissal.

Poe v. Gerstein, 517 F.2d 787; 1975 U.S. App. LEXIS 13093 (5th Cir. 1975)

PROCEDURAL POSTURE: The United States District Court for the Southern District of Florida held that the consent provisions of the Florida Therapeutic Abortion Act, Fla. Stat. Ann. § 458.22(3) were unconstitutional.

OVERVIEW: A pregnant married woman, a pregnant minor, and a physician, Dr. Lynn P. Carmichael, filed a complaint seeking declaratory and injunctive relief in the United States District Court for the Southern District of Florida challenging the constitutionality of two provisions of the Florida Therapeutic Abortion Act, Fla.Stat.Ann. § 458.22(3) (Supp.1975-76). 517 F.2d 789.

In order to receive an abortion in the state of Florida, the statute in question required:

> (a) The written request of the pregnant woman and, if she is married, the written consent of her husband, unless the husband is voluntarily living apart from the wife, or
>
> (b) If the pregnant woman is under eighteen years of age and unmarried, in addition to her request, the written consent of her parent, custodian, or legal guardian must be obtained.

Id.

A three-judge district panel entered a declaratory judgment holding both sections of the statute unconstitutional. *Id.* However, the court did not grant injunctive relief because it anticipated that the state would respect the declaratory judgment. *Id.*

I. THE APPLICABILITY OF A WOMAN'S RIGHT TO AN ABORTION TO MINORS

Roe v. Wade, 410 U.S. 113, 153-56, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), which held that the woman's right to an abortion is a "fundamental right" which may be limited only when state interests become "compelling" specifically reserved judgment on the constitutionality of parental consent requirements. The 5th Circuit Court of Appeals ("the court") began its inquiry as to the constitutionality of the parental consent requirement by assessing the applicability of this fundamental right to minors.

In recent years, the Supreme Court has, at least partially, repudiated the common law view that minors of all ages were charges of the family and state, legally unable to act for themselves. *Id.* The Court has concluded that at least some minors are "persons" under the Constitution, and, hence, "possessed of fundamental rights which the State must respect." *Id.* at 789-90.

The Court has specifically extended only certain first amendment, due process, and equal protection rights to minors, addressing these issues primarily in the contexts of the educational system and juvenile court proceedings. *Id.* Moreover, the Court has often noted that the state's authority over children's activities is broader than over like actions of adults. *Id.*

Under Supreme Court decisions involving minors' rights it is possible that either: (1) all fundamental rights apply to minors, but the state may sometimes assert an interest sufficient to justify the state action; or (2) minors do not necessarily have all of the fundamental rights of adults. *Id.* at 790.

As it had always done, the court adhered to a case by case approach -- carefully limiting its language and holding to the facts before it -- in adjudicating minors' rights. *Id.* We therefore must look to the nature of the right itself in order to determine its availability to minors. *Id. In Roe v. Wade, 410 U.S. 113, 152-53, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973),* the Court said that the Constitution guarantees a zone of privacy, but only "fundamental" rights are included within this constitutional guarantee of personal privacy. The Court then concluded that the right of privacy includes the right to an abortion, apparently because of the harm that would occur as a result of its denial. *Id.*

The court then mentioned some "harms" from denial of the right to an abortion:

> "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the

> unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation. *Id. at 153, 93 S. Ct. at 727.*"

Id. at 791.

The court stated that "it would appear that all of the criteria of *Roe* apply with even greater force to an unwed pregnant minor: teenage motherhood involves serious consequences including adverse physical and psychological effects upon the minor and her children, the stigma of unwed motherhood, impairment of educational opportunities caused by the need to drop out of school, and numerous other social dislocations. *Id.* The magnitude of the minor's interest in avoiding these consequences suggests that the developmental differences between adults and minors do not warrant denying constitutional protection to the minor's abortions. *Id.*

The court concluded that the fundamental right to an abortion applies to minors as well as adults. *Id.* Where fundamental rights are involved, "regulations limiting these rights may be justified only by a 'compelling state interest,'" and "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id. citing Roe v. Wade, 410 U.S. 113, 155, 93 S. Ct. 705, 728, 35 L. Ed. 2d 147 (1973)* (citations omitted).

The court then stated

> "the state could arguably rely upon four interests to defend the statute: (a) preventing illicit sexual conduct among minors; (b) protecting minors from their own improvidence; (c) fostering parental control; (d) supporting the family as a social unit. Although some of these interests are extremely important, we do not believe that any bears the relationship to the minor's right necessary to overcome it."

Id. at 792.

According to the court, *Roe v. Wade* -- if only by omission -- clearly indicated that the state interest in deterring illicit sexual conduct among adults would not justify restricting the right of abortion. *Id.* The court readily acknowledged that the state has "an independent interest in the well-being of its youth." *Id.* But the relationship between this interest and the statute is attenuated at best. *Id.* The court listed several reasons for this: (1) the state's ability to legislate directly against illicit teenage sexual activity demonstrated that this statute was not "necessary" to achieve a compelling state interest, and, hence, constitutionally infirm under the test for "fundamental rights;" (2) there is no evidence that a statute of this type would significantly affect illicit sexual conduct among minors; (3) the fact that Florida law allows a physician to prescribe contraceptives for any unmarried minor who "may, in the opinion of the physician, suffer probable health hazards if such services are not provided establishes that the deterrence of teenage sexual conduct is not a rational or reasonable purpose of the statute; (4) although the state is attempting to bring greater wisdom and experience into the decision-making process, but the efficacy of the manner by which the state purports to accomplish this aim is questionable. *Id.* For all these reasons, the court concluded, the statute in question is not drawn with sufficient particularity to express only the state interests at stake. *Id.* at 793.

The court stated that although fostering parental control was also a possible justification for the statute, parental authority is not unlimited. *Id.* The court did not believe that this justification satisfies the constitutional standard. *Id.*

First, for reasons given, the court stated that it had some difficulty accepting parental control as a compelling state interest in the context of this statute. *Id.*

Second, the court did not believe that the statute is "necessary to the achievement" of the state interests. *Id.* The fact that the minor became pregnant and sought an abortion contrary to the parents' wishes indicates that whatever control the parent once had over the minor has diminished, if not evaporated entirely. *Id.* at 793-94. And we believe that enforcing a single, albeit important, parental decision -- at a time when the minor is near to majority status -- by an instrument as blunt as a state statute is extremely unlikely to restore parental control. *Id.* at 794.

II. THE STATE'S INTEREST IN MAINTAINING THE FAMILY STRUCTURE VERSUS THE MINOR'S FUNDAMENTAL RIGHT TO AN ABORTION

The court then addressed what was the final issue according to its reasoning: whether the state's interest in maintaining the family structure is stronger than the minor's fundamental right to abortion, and whether enforcing parental prohibition against abortion is "necessary" to further this interest. *Id.*

The court stated that in the abortion context the requirement of parental permission is unlikely to achieve the state's aim of insuring the preservation of the family. *Id.* If a minor's pregnancy has fractured the family structure, imposition of a parental prohibition of abortion cannot reasonably be expected to restore the family's viability as a unit. *Id.*

Moreover, the court reasoned, while the privacy of the family is constitutionally protected, this protection can be justified as much by first amendment associational value as by "the inherent rights of parents." *Id.* Enforcing parental control is not "necessary" to maintain the integrity of the family unit; in fact, the integrity of the family structure could best be maintained without state encroachment upon the minor's fundamental right to abortion, if the state refrained from interfering with the family decision-making processes at all. *Id.*

The court reasoned:

> "The absence of a parental consent requirement would not portend the lack of parental input into the minor's abortion decision. Rather, in the absence of the statutory requirement, the family will resolve the problem in the manner by which the minor's problems are generally resolved: where the parent-child relationship is strong, the parent will have a great deal of input into the abortion decision; where the parent-child relationship has broken down, the parents will have less direct input. In any case, we believe that the importance of intrafamilial relationship and family privacy is sufficient to outweigh the state's interest in the enforcement of the parental prohibition."

Id.

The court concluded that none of the possible justifications for the parental consent requirement can meet the standard employed by *Roe v. Wade, 410 U.S. at 155, 93 S. Ct. 705,* and the cases upon which it relies. *Id.* Consequently, we affirm the lower court's holding that the parental consent requirement is unconstitutional. *Id.*

III. THE REQUIREMENT FOR SPOUSAL CONSENT TO AN ABORTION

The state asserts two justifications for the spousal consent requirement: (1) the state defends the statute as incidental to its general authority to regulate the marriage relationship; (2) the state contends that the statute is necessary to protect the rights of a husband whose wife desires an abortion. *Id.* at 794-95.

The court stated that it did not believe that the state's societal interests do not justify its intrusion into all aspects of the marriage relationship. *Id.* at 795. The court believed that the state's societal interest in this aspect of the marriage relationship is not sufficiently "compelling" to justify the statute. *Id.* at 795

Although the court recognized the limited, yet expanding, recognition of paternal interests in the children which a father has sired it further stated that that by no means disposed of this case. *Id.* at 795-96. According to the court, one difficulty with this analogy is the statutory requirement, present here, that the woman secure consent from the man who is her husband at the time she desires the abortion. *Id.* at 796. There is no requirement that the husband sire the fetus nor even that the woman be married, at the time of conception, to the same man whose consent is later required for the abortion. *Id.*

The court then gave a more fundamental reason:

> Since the fetus is not a person, *Roe v. Wade, 410 U.S. at 156-158, 93 S. Ct. 705,* neither is it a "child." A fortiori, the father's interest in the fetus is not of equal importance with his interest in children with whom he has a familial relationship. While the father may be able to mitigate -- but only to some extent -- post partum effects upon an unwilling mother, *see Roe v. Wade, 410 U.S. at 153, 93 S. Ct. 705,* we do not believe his

> interest in the fetus is of sufficient weight to force the woman to face the mental and physical dangers of pregnancy and childbirth. Moreover, we believe that the state interest in the husband's interest in the fetus is simply too attenuated to strip the woman of her fundamental right to privacy."

Id. (I must comment on this--this is the most egregious error in this case and in *Roe.* The "fetus" is actually an unborn baby, a living human being, and abortion is murder of a living human being, a person, a child. This blatantly untrue assertion by the court is extremely vexing. If pro-life Americans are unwilling to die to prevent the murder of millions of innocent and helpless human beings, are we willing to die for anything?).

Both procreation and abortion have been held to be fundamental rights. *Id.* The state could secure the man's procreative rights by merely making unconsented abortion a ground for divorce. *Id.* For the reasons set forth above, the decision of the district court is Affirmed.

OUTCOME: The court affirmed the decision, which held that the consent provisions of the Florida Therapeutic Abortion Act were unconstitutional. The state's interests in fostering parental control and protecting the husband's rights were not compelling enough to limit a married woman and minor's rights to an abortion.

***Drummond v. Fulton County Department of Family and Children's Services*, 574 F.2d 835, 1977 U.S. App. LEXIS 10224 (5th Cir. 1977)**

PROCEDURAL POSTURE: Appellant foster parents sought review of a judgment of the United States District Court for the Northern District of Georgia, which concluded that the decision by appellees, various officials of a county Department of Family and Children's Services, not to allow appellants to adopt a mixed race child was not a violation of appellants' rights under *42 U.S.C.S. § 1983,* or of appellants' constitutional rights.

OVERVIEW: The issue in this case was whether in the adoption process the state has deprived the plaintiff white foster parents who contend that they have been unconstitutionally denied by Georgia state officials the right to adopt a mixed race child solely on account of race of a protectable interest under the Fourteenth Amendment without procedural due process or has denied them equal protection of the laws as guaranteed by the Fourteenth Amendment. 574 F.2d at 837.

The child, Timothy ("Timmy"), was born out of wedlock to a white mother and black father. *Id.* He was taken from his mother and placed in the care of appellant foster parents, a white couple. *Id.* Appellants decided they wished to adopt Timmy. *Id.* Appellees told Appellants that it would be in Timmy's best interests to be adopted by black parents and denied appellants the right to adopt him.

"LIBERTY" RIGHTS AS REQUIRING DUE PROCESS

In *Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1966),* speaking of a state statute that prohibited the intermarriage of black and white persons, the Court said:

> "These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of vital personal rights essential to the orderly pursuit of happiness by free men."

Id. at 851. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. *Id.* at 851-852. The right to have a home and rear children, while not as fundamental as the right to marry, is within the liberty guaranteed by the Fourteenth Amendment. *Id.* at 852. It seems clear that a person who seeks to exercise the right enjoyed by all other persons to adopt a child has the same liberty interest to protect as does a person who seeks the right to marry. *Id.* at 853. Neither can be denied or hedged about by arbitrary classifications, nor solely on the basis of race. *Id.*

EQUAL PROTECTION AND PROCEDURAL DUE PROCESS

Appellants claim that even should the Court decide that they had no liberty right to be protected by the due process clause, they nevertheless were entitled to the benefits of the equal protection clause of the Fourteenth Amendment. *Id.* They say that this right had been denied them because they had been denied the opportunity to adopt a mixed race child because of a rule or policy of the defendant Board that such a child would, as a matter of course, be placed for adoption only with black parents, if available. *Id.* They said further that whether such policy exists and was the basis for the rejection of their claim to adopt Timmy could not be resolved in the manner in which the defendants acted, but could be determined only after a hearing before an adequate state administrator or tribunal with at least minimal procedural due process. *Id.*

As is already clearly indicated, neither appellants nor Timmy were accorded elemental due process in the proceedings that resulted in the termination of the Drummonds' familial relationship with the child and in his being finally and irreversibly taken away from the only parents he had known during his infancy. *Id.* It is apparent that such decisions as were made were made ad hoc by discussions, conferences or committee votes without those participating having any established standards for decisionmaking. *Id.* Moreover, it was perfectly clear that the record now available is strongly suggestive of the fact that the decision was made before the first time the Drummonds were interviewed and that at no time thereafter were they given an opportunity to meet any set of required standards either by evidence or other proof. *Id.* at 853-54.

The court concluded that it was just not possible for the trial court, here, to determine whether proper criteria were used by the defendants in denying the Drummonds the right of adoption. *Id.* at 854. This follows from the fact that no amount of analysis or explanation of the documents prepared and utilized by the defendants would support a finding of any basis on which they actually decided that the Drummonds were not suitable as adoptive parents. *Id.* Under the law of this Circuit as announced in *Megill*, the Drummonds were entitled to have a hearing with at least some of the elements of procedural due process before they can be bound by a bald determination (which, in fact, was not even made by the defendants here) that no impermissible standards of race controlled their action. *Id.* at 855.

TIMMY'S RIGHTS

The next issue is whether Timmy, as a child, was entitled to Fourteenth Amendment protection generally, despite his essential "ward" status created pursuant to the state's parens patriae power, whether he has also alleged a specific protectable interest under the due process clause of the Fourteenth Amendment, and a "right" which he chooses to denominate a "right to a stable environment. *Id.* at 856. Timmy clearly had a right under Rule 24(a) F.R.C.P. to intervene, and the trial court was ordered to so order on remand. *Id.* at 856-57.

We conclude that Timmy should be permitted to intervene and that this shall be accomplished by an order of the trial court on remand, which court will also determine the need of having a guardian ad litem appointed in addition to having counsel represent the child. The trial court shall also determine by order the minimum requirements for the holding of a due process hearing within the administrative agency which will give to all interested parties a full opportunity to be heard, to inquire into the policies, customs and procedures that prevail with regard to a child of Timmy's characteristics and into the qualifications of the foster parents as claimants of the right to adopt Timmy. Optimistically, these parts of the trial court's order can be arrived at by agreement or upon submission of a plan or procedure by the parties.

The court reversed and remanded the lower court's decision, and held that the child be allowed to intervene upon the lower court's order.

DISSENT: RONEY, Circuit Judge. The question accurately put was this: may a state agency, charged with the responsibility of placing for adoption a child in its legal custody, take into consideration the race of the child and the race of prospective adoptive parents without violating the Constitution of the United States? *Id.* at 857. The record does support the fact that race was taken into consideration in a rather substantial way in the agency decision that the child would be better placed in a home other than the plaintiffs'. *Id.* at 858.

No interpretation of the Constitution by any case cited to this Court prevents a state child placement agency from looking to the best interests of a child in its custody, as judged by agency determined criteria,

in deciding where that child should be placed for permanent adoption. *Id.*

OUTCOME: The judgment finding that a denial of appellant foster parents' application for adoption based on racial considerations was not a violation of their federal civil rights was reversed, and the cause was remanded, because appellants had a constitutionally protectable interest in a child that they had a close familial relationship with, and such interest could not be denied without due process of law. The child also had a right to intervene.

Davis, v. Page, 618 F.2d 374; 1980 U.S. App. LEXIS 16881; 29 Fed. R. Serv. 2d (Callaghan) 1236 (5th Cir. 1980)

PROCEDURAL POSTURE: Appellant circuit judges sought review of a judgment from the United States District Court for the Southern District of Florida., which required that indigent parents in child dependency proceeding be provided with counsel. Appellants asserted that the district court erred in holding that there was a right to counsel for indigent parents in dependency proceedings, or in the alternative, such right should be determined on a case-by-case method.

OVERVIEW: This was an appeal from a Florida district court's ruling that (1) the Federal Constitution required that indigent parents in child dependency proceedings be provided with counsel in all cases unless they waived that right, beginning immediately following service of a petition on the parent or seizure of the child and that (2) the plaintiffs were entitled to a reasonable attorney's fee, pursuant to the Civil Rights Attorney's Fees Awards Act, P.L. No. 94-559, *42 U.S.C. § 1988* as amended. 618 F.2d 375

Dade County, Florida, pursuant to Florida law, denied plaintiff mother's request for legal assistance in a child custody proceeding. The plaintiff, because of her poverty, was unable to hire counsel for the March 4 hearing. She appeared at a formal hearing unrepresented by counsel, and the circuit judge never asked her at the hearing about the failure to obtain counsel. Plaintiff was ignorant of the law of evidence, and of the substantive law governing dependency proceedings. She sat silently through most of the hearing, and fearful of antagonizing the social workers, reluctantly consented to what she believed would be the placement of her child with the state for a few weeks. *Id.* at 376. She was unaware that a finding committing the child to the temporary custody of the left the child in the state's custody "until terminated by the court or until the child reaches 18." *Id.* The child was put into state custody. After the hearing, she tried to contact a lawyer, but did not know of her right to appeal. *Id.*

Plaintiff obtained counsel and filed a petition for writ of habeas corpus in the Florida Supreme Court seeking return of her son. *Id.* That petition was denied. *Id.* She subsequently filed suit in federal court on two counts. First, she sued officials of the D.H.R.S. in order to regain custody of her son. *Id.* Second, she filed a class action on behalf of all indigent parents who were defendants in child dependency and neglect proceedings seeking a declaratory judgment that counsel must be afforded to them at state expense in these proceedings. *Id.* The plaintiff also sought to enjoin dependency hearings in which counsel was not provided to indigent parents. *Id.*

The district court concluded that while a dependency proceeding was not a criminal proceeding, it was substantially similar and that therefore, as in criminal cases, counsel had to be provided to indigent parents. *Id.* The court ruled that counsel should be provided to indigent parents in all dependency proceedings, rather than assigned on a case-by-case basis. *Id.* The court said such a right could not be waived prior to notice and that such a waiver to be effective had to be "knowing and intelligent." *Id.*

RIGHT TO COUNSEL FOR INDIGENT PARENTS IN DEPENDENCY PROCEEDINGS

The state's primary contention on appeal is that the district court erred in holding that there was a right to counsel for indigent parents in dependency proceedings. *Id.* at 378. The court stated that there can be no doubt that Ms. Davis had a constitutionally protected liberty interest at stake in the dependency proceeding the right to family privacy or the integrity of the family unit. *Id.* That right has been recognized since 1923. *Id. citing Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042 (1923);* see *Pierce v. Society of Sisters, 268 U.S. 510, 518, 45 S. Ct. 571, 69 L. Ed. 1070 (1925).* "The fundamental right of family integrity has found protection under the *Due Process Clause of the Fourteenth Amendment*

Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 842, 97 S. Ct. 2094, 2108, 53 L. Ed. 2d 14 (1977), the *Equal Protection Clause of the Fourteenth Amendment Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655 (1942),* and the Ninth Amendment see *Roe v. Wade, 410 U.S. 113, 153, 93 S. Ct. 705, 726, 35 L. Ed. 2d 147 (1973).* See *Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551 (1972)." Id.*

The court then analyzed whether he process that is due a parent in a dependency proceeding includes the right to counsel. In order to make this determination, beginning with an analysis of the precise nature of the government's interest and of the private interest involved. *Id.*

The court stated:

> "(I)dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. * * * [A] parent's interest in the custody of his or her child is among the most basic and fundamental of the liberties protected by the Constitution. Loss of a child is one of the severest possible sanctions that can be taken against a parent; it is a deprivation which can be equated with imposition of a fine or imprisonment through criminal proceedings. Indeed it is not unlikely that many parents would choose to serve a prison sentence rather than to lose the companionship and custody of their children. In addition the determination that a parent has abused or neglected a child may lead to criminal proceedings against the parent, and certainly carries with it a stigma which may be as traumatizing to the parent as imprisonment. Since the process that is due an individual is influenced by the extent to which the person 'may be 'condemned to suffer grievous loss,' ' *Goldberg v. Kelly, 397 U.S. 254, 263, 90 S. Ct. 1011, 1018, 25 L. Ed. 2d 287 (1970),* the state's interest in refusing to provide counsel in dependency proceedings must be great in order to overcome the parent's interest in protecting the family unit.

Id. at 379.

The court also considered the risk that a parent will erroneously be deprived of custody of a child under the present procedures, and the probable value of counsel in preventing an erroneous result. Under the complex rules of procedure and issues considered in a Florida dependency proceeding, the court stated that the value of counsel in a dependency proceeding is inestimable. *Id.* at 380-81.

The court then balanced the fundamental interest of the parents implicated in dependency proceedings and the possibility of an erroneous adjudication of dependency against the state's primary interest in conducting these proceedings in protecting the health and welfare of the child, an interest which will not be affected by the appointment of counsel for indigent parents. *Id.* at 381. The court did not agree with the state's contention that its interest in saving public money outweighed the parents' interest in not being unfairly deprived of the custody of a child. *Id.*

right to counsel for indigent parents in dependency proceedings. See, e. g., Ala.Code tit. 12, § **[**26]**

The court also noted that the equal protection clause of the Fourteenth Amendment supported a rule requiring the provision of counsel to indigent parents in dependency proceedings. *Id.* at 383.

Furthermore, the because the court was of the opinion that a case-by-case method in deciding whether a parent was indigent was unworkable, we hold instead that an indigent parent in a dependency proceeding has an absolute right to counsel absent a knowing and intelligent waiver of that right. *Id.* at 383-384. The court stated that it was only recognizing here the principle laid down by the Court in Edwards almost forty years ago. *Id.* at 386. A judicial system is not fair which has a built in opportunity for the rich to receive a different treatment than the poor. *Id.* A judicial system is not equitable or consistent when counsel is provided in criminal cases but not in child custody proceedings. *Id.*

DISSENT: JOHN R. BROWN, Circuit Judge, concurring in part and dissenting in part. Justice Brown was concerned that the principles of Federalism and the demands of comity were defeated by this action and therefore dissented from this intrusion.

I concurred in the affirmance of the District Court judgment only because he agree that Mrs. Davis should have been appointed counsel at her child's dependency hearing. However, he would have imposed a less strict rule on Florida judges.

He also felt that the need for counsel should be determined on a case by case basis, considering such factors as the length of potential separation of the parent and child, the presence or absence of parental consent or disputed facts, and the parent's ability to present his or her case, to deal with documents and to examine witnesses.

OUTCOME: The court affirmed the holding of the trial court except as to the award of attorney's fees..

***Davis v. Page*, 40 F.2d 599; 1981 U.S. App. LEXIS 18962 (5th Cir. 1981)**

PROCEDURAL POSTURE: The United States District Court for the Southern District of Florida, granted summary judgment in favor of plaintiff indigent parent who filed a class action that challenged the constitutionality of child dependency proceedings against indigent parents when parents were not provided with counsel at the state's expense.

OVERVIEW: This class action challenges the constitutionality of child dependency proceedings against indigent parents in the Circuit Court of Dade County, Florida, when parents are not provided with counsel at the state's expense. 40 F.2d 600. The district court granted summary judgment to the plaintiff. *Davis v. Page, 442 F. Supp. 258 (S.D.Fla.1977),* and a panel of this court affirmed except as to the issue of attorneys' fees. *Id. citing Davis v. Page, 618 F.2d 374 (5th Cir. 1980).*

Plaintiff's child was taken from her when she took the child to the hospital with a broken arm. *Id.* at 601 A formal adversary proceeding was held in accordance with Florida law. *Id.* Plaintiff's child was declared to be a dependant child and was committed to temporary custody of DHRS. *Id.*. Temporary custody continues until terminated by the court or until the child reaches the age of 18. *Id. citing* Fla.Stat. § 39.41(1)(c). While a parent may petition to regain custody of his or her child, in the subsequent proceedings, known as "disposition hearings," the state no longer bears the burden of proof. *Id.*

Ms. Davis was not advised by the judge at the adjudicatory hearing of her right to appeal. *Id.* After the 30-day appeal period had expired, she retained counsel. On May 11, 1976, she filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court seeking the return of her son. The Florida Supreme Court denied her petition without opinion and this litigation followed.

The central question of this appeal was whether the failure to offer Ms. Davis the assistance of counsel violated constitutional requirements of due process. *Id.* at 602.

To determine whether due process in this case includes the right to counsel, the court examined more precisely the weight of the liberty interest presented by the plaintiff and the competing interests asserted by the government. *Id.* The Supreme Court has noted that three distinct factors are involved in such a determination: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3), the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 602-3.

Plaintiff's interest in the proceeding was the loss of her child, and the court stated that a parent can suffer no greater loss. *Id.* Next, the risk of loss with the aid of an attorney was found to be high and an attorney is likely to alleviate significantly the risk that a child will erroneously be found dependent. *Id.* As to the government's interest, where the right to counsel is essential to the protection of a liberty so basic to the fabric and philosophy of our society, the interest in saving an uncertain sum will not defeat that right. *Id.*

The court then gave various reasons why a case-by-case method used by the Florida courts to determine when to provide counsel was unacceptable. *Id.* at 604.

The court made clear that this decision in no way obliges the State of Florida to provide counsel when two purely private parties litigate the issue of child custody. *Id.* at 605.

DISSENT: JOHN R. BROWN, Circuit Judge, with whom COLEMAN, AINSWORTH, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, GARZA, HENDERSON and REAVLEY, Circuit Judges, join,

dissenting:

Justice Brown began by saying that what this case involves was succinctly described in his panel dissenting opinion (with partial concurrence) adding, "Further reflection and study convince me that my concurrence in part in the panel opinion was a mistake since I believe the habeas corpus was not a permissible vehicle to reach the Court's due process decision."

OUTCOME: The court affirmed the declaratory relief granted by the district court that rendered null and void the state decree that determined plaintiff indigent parent's son was a dependent child. The court held that due process required that an indigent parent be offered counsel at a dependency hearing.

Dike v. School Board of Orange County Florida, 650 F.2d 783; 1981 U.S. App. LEXIS 11300 (5th Cir. 1981)

PROCEDURAL POSTURE: An order of the United States District Court for the Middle District of Florida dismissed plaintiff teacher's complaint as frivolous and awarded attorney's fees to defendants, school board and superintendent, in plaintiff's case alleging undue interference by defendant of her constitutional right to breastfeed her baby, pursuant to *42 U.S.C.S. § 1983.*

OVERVIEW: Janice Dike, a teacher in the Orange County, Florida School System, sued the school board and the superintendent of schools under *42 U.S.C. § 1983,* challenging the board's refusal to permit her to breastfeed her child during her duty-free lunch period. 650 F.2d at 784. Dike alleged that she could breastfeed the child in privacy without any disruption of school activities. *Id.* She also alleged that breastfeeding was necessary to her child's health. *Id.* She sought to characterize breastfeeding as a constitutional right with which the school board had unduly interfered. *Id.* The district court dismissed the complaint and awarded attorneys' fees to the defendants because it deemed the action frivolous. *Id.*

Dike breast fed her baby in privacy in a locked room where others could not see each work day after her husband or babysitter brought the child to school at lunch time. *Id.* at 785. On occasions when the school asked Dike to perform duties during her lunch period she would hand the infant to her husband or babysitter. She was thus always available for work even during her duty-free hour. *Id.* She alleges that this routine did not disrupt the educational process at the school or her work performance. *Id.*

After three months of this routine without disruption or incident the school principal directed Dike to stop nursing her child on campus, citing a school board directive prohibiting teachers from bringing their children to work with them for any reason. *Id.* The rule's stated rationale is to avoid possible disruptions by the children of teachers and to avoid the possibility of the children having an accident and subjecting the school board to litigation. *Id.* The principal threatened disciplinary action should Dike continue to nurse the child at school. *Id.*

Dike stopped nursing her child during the school day but the child developed an allergic reaction to formula milk and developed psychological changes that also affected her own well-being The school board denied her requests to resume her earlier procedure in her camper van in the school parking lot. apparently relying on another policy prohibiting teachers from leaving school premises during the school day. *Id.*

A short time later the infant began refusing to nurse from a bottle. Dike thus had no choice but to breastfeed the child. Because the school board denied her permission to breastfeed on campus or off, Dike was compelled to take an unpaid leave of absence for the remainder of the school term. *Id.*

The court evaluated plaintiff's claim in two steps. *Id.* First, the court considered whether her interest in nurturing her child by breastfeeding is entitled in some circumstances to constitutional protection against state infringement. *Id.* The court held that it was. *Id.* Second, and equally critical, concerned the justifications that the school board may have for restricting its employees' exercise of such a right during the work day. *Id.* The court recognized that the school board has legitimate interests in, for example, preventing disruption of the educational process and preventing interference with teachers' efficient performance of their duties. *Id.*

The Constitution protects certain rights of personal privacy or as "fundamental" personal liberties. *Id.* at 785-86 (court lists Supreme Court cases and rights protected). Among these protected liberties are individual decisions respecting marriage, procreation, contraception, abortion, and family relationships. *Id.*

individual decisions respecting marriage, procreation, contraception, abortion, and family relationships. *Id. citing supporting caselaw.* The Supreme Court has long recognized that parents' interest in nurturing and rearing their children deserves special protection against state interference. *Id.* at 786-87 *citing Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925)* (deciding that a statute requiring children to attend public schools violated the Fourteenth Amendment's due process clause because it unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control); *Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)* (deciding that a statute forbidding the early teaching of foreign languages at any school unconstitutionally infringed the Fourteenth Amendment's guaranty of liberty because, among other reasons, it interfered with parents' control of their children's education; labeling the right to bring up children among "essential" liberties); *Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551, 558 (1972)* (deciding that a state could not deny unwed fathers custody of their children without a hearing on parental fitness, stating that a parent's interest in the companionship, care, custody, and management of his or her children warrants particular respect). Cf. *Prince v. Massachusetts, 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 2d 645, 652 (1944)* ("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.").

The court stated:

> "Breastfeeding is the most elemental form of parental care. It is a communion between mother and child that, like marriage, is "intimate to the degree of being sacred," *Griswold v. Connecticut, 381 U.S. at 486, 85 S. Ct. at 1682, 14 L. Ed. 2d at 516.* Nourishment is necessary to maintain the child's life, and the parent may choose to believe that breastfeeding will enhance the child's psychological as well as physical health. In light of the spectrum of interests that the Supreme Court has held specially protected we conclude that the Constitution protects from excessive state interference a woman's decision respecting breastfeeding her child."

Id. at 787.

The Constitution does not prohibit all restrictions of protected liberties, and the school board may establish by appropriate pleading and proof that its regulations prohibiting teachers from leaving campus or bringing children to school, as applied to teachers who wish to breastfeed their children during non-duty time, further sufficiently important state interests and are closely tailored to effectuate only those interests. *Id.* Whether there is a compelling state interest strong enough to justify the school board's regulations, and whether the regulations are sufficiently narrowly drawn, must be determined at trial. *Id.*

Reversal of the dismissal would require reversal of the award of attorneys' fees. *Id.* at 787-88,

OUTCOME: The court reversed the order dismissing plaintiff teacher's complaint. The court concluded that the complaint should not have been dismissed because Dike's interest in breastfeeding during her non-duty time and the school board's interests can only be properly evaluated after factfinding.

Kite v. Marshall, 661 F.2d 1027; 1981 U.S. App. LEXIS 15838 (5th Cir. 1981)

PROCEDURAL POSTURE: The United States District Court for the Southern District of Texas held that the rule of Appellant interscholastic league suspending for one year the varsity athletics eligibility of any high school student who attended certain training camps was constitutionally infirm because it infringed protected parental authority in the child-rearing arena.

OVERVIEW: University Interscholastic League ("UIL") is a voluntary, non-profit association of public schools below collegiate rank in the State of Texas. 661 F.2d 1028 UIL promulgates rules and regulations governing various aspects of competition in speech, journalism, literary and academic contests, drama, music and athletics. *Id.* Although a private organization, UIL's functioning constitutes state action subject to the limitations of the fourteenth amendment to the Constitution. *Id.* The issue to be determined was whether the UIL rule suspending for one year the varsity athletics eligibility of any high school student who

attended certain training camps violates either the due process or equal protection clause of that amendment. *Id.*

The *Pierce* and *Meyer* decisions are based on the premise that the state has no power to "standardize its children," *Pierce v. Society of Sisters, 268 U.S. at 535, 45 S. Ct. at 573,* or to "foster a homogeneous people," *Meyer v. Nebraska, 262 U.S. at 402, 43 S. Ct. at 628,* by foreclosing the opportunity of individuals "to heed the music of different drummers." *Id.* at 1028-29 *citing* L. Tribe, American Constitutional Law, § 15-6, at 903 (1978). "In a thoughtful analysis of Meyer and Pierce, Professor Tribe opined:

> "One subsequent explanation of their joint import has been that they demonstrated judicial solicitude for the Catholics in Oregon and the Germans in Nebraska against whom the invalidated statutes had evidently been directed because of the inability of those groups adequately to safeguard their interests through the political processes of their states. That notion is worth stressing as illustrative of a general technique-that of assessing alleged invasions of personhood in their historical and social context.... A rule that might be sustained as a proper expression of community interest were it to affect the population as a whole might thus be invalidated as a violation of personality when it operates to single out, if not to submerge, a distinct group in the society."

Id. at 1029 *citing* L. Tribe, supra, § 15-6, at 904 (footnotes omitted) (citing *United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4, 58 S. Ct. 778, 783-84, 82 L. Ed. 1234 (1938)).* Such concerns are not present in the matter now before us. *Id.*

The court stated:

> "Recent decisions by the Supreme Court declaring that parents have no constitutional right to educate their children in private segregated academies, *Runyon v. McCrary, 427 U.S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976),* or to demand approval before the administration of corporal punishment in school, *Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977),* or to exercise an absolute veto power over a minor child's decision to terminate a pregnancy via abortion, *Planned Parenthood v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976),* clearly signal that parental authority falls short of being constitutionally absolute. Confronted with these situations which, at first blush, appear to rest at the heart of parental decision making, the Supreme Court refrained from clothing parental judgment with a constitutional mantle.
>
> "The instant case presents a similar inquiry. Reduced to essentials, the legal questions posed are: (1) whether parents possess a fundamental right to send their children to summer athletic camps; and (2) whether the children have a constitutional right to attend such activities. As is frequently the case, in the very postulation of **[**6]** the questions the answer lies. A negative response to both questions is mandated. This case implicates no fundamental constitutional right.
>
> "The determination that no fundamental right to participate in summer athletic camp exists establishes the level of scrutiny to which we must subject the UIL rule. The regulation will pass constitutional muster if it is found to have a rational basis."

Id.

Due Process

Several reasons are advanced in support of the rule, including the need to control over-zealous coaches, parents and communities, the achieving of a competitive balance between those who can afford to attend summer camp and those who cannot, the avoidance of various excessive pressures on students, and the abrogation of the use of camps as recruiting mechanisms. *Id.* at 1030.

We are not prepared to say that the rule bears no meaningful relationship to the achievement of the ideal of making interscholastic athletics fairer and more competitive as concluded by school authorities. *Id.* at 1030. The due process clause of the fourteenth amendment has not been offended. *Id. citing cases.*

Equal Protection

It is correct to examine the rule under the rational basis test as opposed to the strict scutiny test. *Id.* A state action viewed under the rational basis banner is presumed to be valid the burden is not upon the state to establish the rationality of its restriction, but is upon the challenger to show that the restriction is wholly arbitrary. The rule seeks to achieve a balance in interscholastic athletics and is not unconstitutional. *Id.*

OUTCOME: The court reversed the order of the district court. Appellant interscholastic league's rule, which restricted participation by students who attended summer athletic camps, did not infringe on a fundamental right and was rationally related to the legitimate purpose of ensuring that interscholastic athletics were fair and more competitive. Therefore, the rule did not violate either substantive due process or equal protection principles.

***Laurenzo v. Mississippi High School Activities Aassociation Inc.*, 662 F.2d 1117; 1981 U.S. App. LEXIS 15517 (5th Cir. 1981)**

PROCEDURAL POSTURE: The United States District Court for the Northern District of Mississippi found that appellant minor student's *42 U.S.C.S. § 1983* complaint challenging the constitutionality of a rule prescribed by appellee association, and subscribed to by appellee school district, failed to raise a substantial federal question, and dismissed the complaint for lack of jurisdiction.

OVERVIEW: Appellant minor, John Lorenzo, acting by and through his natural father and next friend, filed a complaint pursuant to *42 U.S.C. § 1983,* challenging the constitutionality of a rule prescribed by appellee Mississippi High School Activities Association (Association) and subscribed to by appellee Oxford Municipal Separate School District (School District). 662 F.2d 1118. Appellant sought declaratory and injunctive relief, damages, and attorney's fees. We conclude that the complaint alleges sufficient facts to support federal jurisdiction; however, for the reasons assigned, we find the matter now moot, and the appeal is dismissed.

Facts

John Laurenzo, a minor, lived with his father who was divorced from his mother, although his mother had legal custody. *Id.* at 1118-19. His father lived in the Oxford Mississippi school district, a school district different from the school district where his mother lived. *Id.* John attempted to join the Oxford High varsity baseball team, but was told he could not because of the Constitution and by-laws of the Association which provide: . *Id.*

> "Where the parents of a pupil are legally separated or divorced and legal custody is granted to one of the parents, the pupil must live with this parent in order to be eligible. If a pupil under the above conditions transfers from one parent to the other and the parents live in different school areas, the pupil must remain out of competition for one year before becoming eligible."

Jurisdiction

A district court must entertain such suits unless the federal question alleged is clearly immaterial or is made solely for the purpose of obtaining jurisdiction. *Id.* Since appellant has charged that the regulation creates a conclusive presumption and interferes with freedom of family choice, his arguments present a substantial federal question. *Id.*

Mootness

Under the facts of the case, it is reasonable to conclude that John has now graduated from high school. *Id.* at 1120.

Since this is not a class action suit the case is moot unless it falls under the saving exception. In DeFunis the Court considered a claim relating to entry into law school by DeFunis who, at time of oral

argument, was in his final semester of law school. The Court stated:

Federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. *Id.* The only pertinent exception which might apply in the instant case that of a case which presents a question that is "capable of repetition, yet evading review," and is thus amenable to federal adjudication even though it might otherwise be considered moot. *Id.* That exception requires that "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* Clearly the first prong of this test has been met-this litigation was initiated in March of 1980 and is only now reaching appellate decision. *Id.* The one year period of ineligibility has, in the meantime, elapsed. *Id.* However, the second requirement is found wanting. *Id.*

OUTCOME: The court dismissed the appeal.

***Brantley v. Surler*, 718 F.2d 1354; 1983 U.S. App. LEXIS 15362**
(5th Cir. 1983)

PROCEDURAL POSTURE: Plaintiff employee challenged a decision from the United States District Court for the Northern District of Mississippi, which dismissed her civil rights lawsuit alleging violations of her constitutional rights under *42 U.S.C.S. § 1983.* The district court found plaintiff failed to state a claim upon which relief could be granted, failed to exhaust available state administrative remedies, and that res judicata barred her action.

OVERVIEW:

Facts and Procedural Background

Mrs. Tobie Brantley was hired as a cafeteria worker in the Montgomery County school system in 1966. 718 F.2d at 1355. Sometime before the beginning of the 1976-77 school year the Brantleys decided to transfer their younger son Chris from the local public high school to a private, segregated academy because they believed that Chris would have a better chance of playing varsity sports at the academy. *Id.*at 1355-56.

The board of education met with Mrs. Brantley to discuss the planned enrollment of her son in a private school while she served on the payroll of the public schools. *Id.* at 1356. It appears that members of the board had received complaints from other parents and were concerned that permitting Mrs. Brantley to continue her employment in the public school system while her son was enrolled in a private, segregated academy might "start a precedent that could get out of control and possibly cause dissention" within the schools. *Id.* The board decided to discharge Mrs. Brantley. *Id.*

Mrs. Brantley retained counsel who immediately wrote the Superintendent demanding a hearing and citing Mississippi law which forbade the firing of Mrs. Brantley for the assigned reason. *Id.* The board promptly set a hearing for November 1, 1976. *Id.* In its notice letter to Mrs. Brantley's attorney, the board stated for the first time that Mrs. Brantley was "charged with neglect of duty, failure to provide adequate and palatable food in the cafeteria, and other good causes as reasons for her dismissal." *Id.*

Mrs. Brantley brought suit alleging that she had been discharged, contrary to Miss.Code Ann. § 37-9-59 (1974), for the single reason that her son did not attend the public school system. *Id.* Mrs. Brantley contends that the board's demand that her son be enrolled in the public school system as a condition of her continued public employment constituted a violation of her constitutionally protected interest in educating her son wherever she deemed best as long as the school chosen satisfied the minimum standards imposed by the laws of Mississippi. *Id.*

Analysis

1. *Statement of a Claim upon which Relief can be Granted*

To state a claim upon which relief can be granted under *42 U.S.C. § 1983,* the plaintiff must allege that the defendant acted under color of state law to deprive her of a right, privilege, or immunity guaranteed by either the Constitution or laws of the United States. *Id.* at 1357-58 *citing Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980); Bradt v. Smith, 634 F.2d 796 (5th Cir.1981).* If the plaintiff satisfies this requirement, the federal remedy under § 1983 is available regardless of the availability of an

adequate remedy under state law. *Id. citing Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).*

Although public school authorities may discharge an employee unprotected by a reasonable expectation of continued employment for any job-related reason or for no reason at all, *see Thompson v. Madison County Bd. of Educ., 476 F.2d 676 (5th Cir.1973),* it is well established that they may not do so for a reason which infringes "constitutionally protected interests." *Id. citing Perry v. Sindermann, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697, 33 L. Ed. 2d 570 (1972).*

§ 1983 offers no relief if the employer shows that the employee would have been terminated, in any event, for reasons other than the participation in the constitutionally protected conduct. *Id. citing Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); Montgomery v. Boshears, 698 F.2d 739 (5th Cir.1983).*

Whether Mrs. Brantley stated a claim cognizable under § 1983 thus poses a triad inquiry: (1) did she engage in constitutionally protected conduct which was impermissibly infringed by her discharge? (2) was the fact that her son attended private school a substantial motivating factor in the board's discharge decision? and (3) would she have been fired even if her son had remained a student in the public schools? *Id.*

The Supreme Court has long recognized that the Constitution protects familial relationships and practices. *Id. citing cases.*

Although a state may set forth minimum education standards, "it may not pre-empt the educational process by requiring children to attend public schools." *Id. citing Wisconsin v. Yoder, 406 U.S. 205, 239, 92 S. Ct. 1526, 1545, 32 L. Ed. 2d 15 (1972)* (White, J., concurring). The state's power to control the education of its citizens is secondary to the rights of parents "to provide an equivalent education for their children in a privately operated school of [their] choice." *Id. citing Norwood v. Harrison, 413 U.S. 455, 461, 93 S. Ct. 2804, 2808, 37 L. Ed. 2d 723 (1973). See also Cook v. Hudson, 429 U.S. 165, 166, 97 S. Ct. 543, 543, 50 L. Ed. 2d 373 (1976)* (Burger, C.J., concurring in dismissal of writ of certiorari). The record before us contains no suggestion that the private school involved failed to satisfy Mississippi's minimum educational standards. *Id.* Therefore we conclude that the Brantleys' school selection decision was within the penumbra of familial privacy rights guaranteed by the Constitution. *Id.*

This constitutional protection of familial privacy is not absolute; it must be measured. *Id.* In the realm of public school employment, the court must balance the interests of the school employee with the interest of the state in promoting efficiency in the educational services which it provides through its school employees. *Id. citing Pickering v. Bd. of Educ., 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).* The state may legitimately interfere with the constitutionally protected conduct of a public school employee whenever that conduct materially and substantially impedes the operation or effectiveness of the educational program. *Id. citing Tinker v. Des Moines School Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969); Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir.1980).*

This suit was dismissed on the pleadings. *Id.* On remand, in addressing this issue, the district court must determine whether the enrollment of Chris Brantley in the private school materially and substantially interfered with the operation or effectiveness of the educational program at Kilmichael Elementary. *Id.* If the court finds that it did not, then as a matter of law, Mrs. Brantley's interest in controlling the education of her son takes precedence over the school board's interest in regulating the activities of its cafeteria workers. *Id.* On remand the district court must also determine whether the protected activity played a substantial part in the board's discharge decision. *Id.* If the court finds that it did, then the court must determine whether Mrs. Brantley would have been fired anyway for reasons completely independent of the private school enrollment decision. *Id.*

2. *Exhaustion of State Administrative Remedies*

The exhaustion of available state administrative remedies is not a prerequisite to commencement of an action in federal court under § 1983. *Id.* at 1360 *citing Patsy v. Bd. of Regents of the State of Florida, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982).*

3. *Res Judicata*

Res judicata does not apply because the § 1983 action asserted involves the determination of facts and issues which are distinct from those posed in the state court litigation. *Id.* The constitutionally

protected interests at stake do not arise from a state-created property right but, rather, emanate from the familial privacy right to control the educational path of one's children. *Id.*

CONCUR: GARWOOD, Circuit Judge, concurring:

Res judicata is not available as to this claim. *Id.* As to each of the other points presented by this appeal, I concur fully in the holdings and reasoning of the majority. *Id.*

OUTCOME: The court reversed and remanded for further proceedings to determine if plaintiff's enrollment of her son in a private, segregated school materially and substantially interfered with the operation or effectiveness of the school's educational program.

Hodorowski v. Ray, 844 F.2d 1210; 1988 U.S. App. LEXIS 6493
(5th Cir. 1988)

PROCEDURAL POSTURE: The United States District Court for the Northern District of Texas held that appellant child protective service workers who were seeking review of their holding could claim neither absolute nor qualified immunity for their removal of appellee parents' children from their family home without a court order in the absence of immediate danger.

OVERVIEW: The question presented by this appeal is whether and to what extent Texas child protective service workers are immune from liability under 42 U.S.C. § 1983 for their decision to remove children from the home of their parents without a prior court order. 844 F.2d 1211.

An anonymous informant told the Texas Department of Human Services (TDHS) that John Hodorowski was chasing his two seven-year-old daughters with a chain in the front yard of their Amarillo, Texas home. *Id.* at 1212. Two TDHS investigators found the children at home alone, and saw bruises on exposed parts of one child's body, and one child told them that there were more severe bruises. *Id.* The took the children to the TDHS offices, and photographed the injuries.. At the hospital a doctor examined them and a policeman photographed more bruises. *Id.* John Hodorowski now admits that he caused the children's bruises.

The TDHS workers never obtained a court order authorizing the removal of the Hodorowski children. *Id.* The TDHS attempted to obtain an emergency ex parte court order under Tex.Fam.Code Ann. § 17.02 on Friday, the day it took possession of the children, but claims that the court could not schedule a hearing. *Id.* The children remained in the possession [**3] of the TDHS without court order until Monday, November 8, when the TDHS filed a Suit Affecting the Parent-Child Relationship. *Id.* Tex.Fam.Code.Ann. § 17.03(b). *Id.* After a court hearing that day, the parties agreed that the children would return home, but that for thirty days the TDHS would be Managing Conservator of the children and the parents would obtain counseling and refrain from corporal punishment. *Id.*

The Hodorowskis, filed this suit against several TDHS officials, the informant, several City of Amarillo officials, the Amarillo Police Department, and the Amarillo Hospital District asserting claims under 42 U.S.C. § 1983 and related statutes for interference with family integrity in violation of the fourteenth amendment. *Id.* The motion of appellant TDHS workers, asserted the defenses of absolute and qualified immunity. Although 42 U.S.C. § 1983 ostensibly imposes liability on "every person" who, under color of state law, deprives another of a constitutional right, the courts have long recognized that certain individuals, as a consequence of their function, merit absolute immunity to section 1983 for actions within the scope of that function. *Id. citing cases.* Absolute immunity is much broader than the more common qualified immunity. *Id.* "Qualified immunity shields only that conduct not violative of clearly established constitutional rights of which a reasonable person would have known. *Id.* Absolute immunity, in contrast, precludes any action for damages, so long as the challenged conduct falls within the scope of the immunity." *Id.* at 1212-13.

The court then examined the Supreme Court's rationale as to absolute immunity cases, using the absolute immunity of prosecutors from tort liability at common law as an example. *Id.* at 1213. Noting that prosecutors are absolutely immune, the Court was careful to note, however, that its analysis focused on the prosecutor's function, not on the prosecutor's mere status: "*Id.*

A. Prosecutorial Immunity

Officials with functions analogous to those of prosecutors have been accorded absolute immunity. *Id.* Although child services workers do not initiate criminal proceedings, their responsibility for bringing dependency proceedings, and their responsibility to exercise independent judgment in determining when to bring such proceedings, is not very different from the responsibility of a criminal prosecutor. *Id.* The social worker must make a quick decision based on perhaps incomplete information as to whether to commence investigations and initiate proceedings against parents who may have abused their children. *Id.* The social worker's independence, like that of a prosecutor, would be compromised were the social worker constantly in fear that a mistake could result in a time-consuming and financially devastating civil suit. *Id.*

[The court then gives examples of state employees given absolute by other circuits. *Id.* at 1213-14.] In *Austin v. Borel*, 830 F.2d 1356 (5th Cir.1987), however, this court declined to accord absolute immunity to Louisiana child protective service workers. *Id.* at 1214. We think that the challenged conduct in the present case, like that in *Austin*, is sufficiently removed from the judicial process so that the appellants are not entitled to absolute immunity. *Id.* Seizures of the children without a court order was authorized by the Texas Family Code if a reasonable person would believe that "there is an immediate danger to the physical health or safety of the child and ... there is no time to obtain a temporary restraining order or attachment." Tex.Fam.Code.Ann. § 17.03(a)(4). *Id.* Seizure without a court order in the face of an immediate danger seems to us more akin to the function of police than prosecutors. Policemen, not prosecutors, investigate dangerous situations and are charged with the duty, if necessary, to intervene to prevent injury. *Id.* But policemen, like most other executive officials, are ordinarily not protected by absolute immunity, *Pierson v. Ray*, 386 U.S. 547, 555, 87 S. Ct. 1213, 1218, 18 L. Ed. 2d 288 (1967), unless they are engaged in a function integral to the judicial process, such as testifying as witnesses, *Briscoe v. LaHue*, 460 U.S. 325, 335-36, 103 S. Ct. 1108, 1115-16, 75 L. Ed. 2d 96 (1983). *Id.* Because the appellants' actions in taking possession of the children were not integral to the judicial process, we hold that they may not claim prosecutorial immunity. *See also Robison v. Via*, 821 F.2d 913, 918-19 (2d Cir.1987) (declining to grant prosecutorial immunity to child abuse investigators because the investigation of child abuse and the seizure of children are essentially police functions, and thus not "'intimately associated with the judicial phase' of the matter"). *Id.* at 1214-15.

Appellants note that several district courts have granted absolute immunity to child protective service workers not because of any analogy to prosecutors but for policy reasons. *Id.* at 1215. These courts have concluded that absolute immunity is necessary to allow for proper investigation and intervention in cases of suspected child abuse. *Id.*

The Supreme Court, however, has hesitated to extend absolute immunity beyond the common-law tort immunities that existed when section 1983 was enacted in 1871. *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092, 1097, 89 L. Ed. 2d 271 (1986) ("We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a free-wheeling policy choice. ..."). *Id.* Appellants can cite no authority that the seizure of children without a court order was, in 1871, accorded absolute immunity at common law. Without such a basis in common law, courts should grant absolute immunity only if [a defendant] were able to show that the function at issue is "so sensitive as to require a total shield from liability," *Harlow v. Fitzgerald*, 457 U.S. 800, 812-13, 102 S. Ct. 2727, 2735, 73 L. Ed. 2d 396 (1982), and that absolute immunity is "essential" if that function is to be properly performed, *Butz v. Economou*, 438 U.S. 478, 506-07, 98 S. Ct. 2894, 2910-11, 57 L. Ed. 2d 895 (1978). *Robison v. Via*, 821 F.2d 913, 919 (2d Cir. 1987). *Id.* Our review of the district court decisions, however, has not persuaded us that absolute immunity is necessary to the effective functioning of the child abuse investigation system. *Id.*

If courts allow retaliatory suits, social workers would be inclined to act only in cases in which they are absolutely certain that the alleged conduct occurred. *Id.* But absolute certainty is not always available in situations where the circumstances require an immediate decision to remove a child from a home. *Id.* Without the benefit of immunity, social workers' attention would shift from protecting abused or neglected children to avoiding vexatious litigation. *Id.* This shift could threaten the health and safety of an abused or neglected minor.*Id.*

Although protecting children from child abuse is an important governmental function, it is no more vital than other functions, such as the Attorney General's national security role and police efforts to capture felons, for which absolute immunity has been denied. *Id.* More importantly, we note that qualified immunity protects executive officials as long as their actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* This more limited immunity

provides "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.* In child abuse investigations, state workers must maintain a delicate balance between the family's right to privacy and the state's interest in discovering and preventing child abuse. *Id.* Though we do not wish to restrict unduly the scope of child abuse investigations, we also do not wish to impinge on the "most essential and basic aspect of familial privacy--the right of the family to remain together without the coercive interference of the awesome power of the state." *Id.* We think that qualified immunity, not absolute immunity, strikes the better balance between these concerns. *Id.* III.

OUTCOME: The court reversed the district court's order denying appellant child protective service workers' motion to dismiss finding that they were entitled to qualified immunity. Appellants did not violate any clearly established right of appellee parents to family integrity when they removed appellees' children without a court order. Removal of the bruised children following reports of the father chasing them with a chain was objectively reasonable.

***Port v. Heard*, 764 F.2d 423; 1985 U.S. App. LEXIS 30768**
(5th Cir. 1985)

PROCEDURAL POSTURE: The United States District Court for the Southern District of Texas denied appellants', husband and wife's, petition for habeas corpus relief.

OVERVIEW: Found to be in contempt of a Texas court for refusing to testify before a Texas grand jury, fined $500 each, and confined in the Harris County jail, Bernard and Odette Port petitioned the district court for release by habeas corpus. 764 F.2d 425. The Ports challenge the contempt judgments on two grounds: that their testimony was privileged by a parent-child testimonial privilege, and that it was privileged under the Fifth Amendment despite the state court's grant of use immunity. *Id.*

Appellants' son was charged with murder and they were summoned to appear before the Grand Jury. They appeared but invoked their privilege against sefl-incrimination and refused to testify. They were held in contempt and put in jail. A month later appellants' petition for writ of habeas corpus was granted by the Texas Court of Criminal Appeals. *Id.*

Appellants were again served with subpoenas to appear before a different grand jury. The Ports persisted in their silence and were again found to be in contempt. The district court fined appellants and ordered the sheriff to take the Ports into custody until they purged themselves of the contempt.

Appellant husband appeared and testified, but appellant wife did not.

Appellants articulate three constitutional foundations for the parent-child testimonial privilege. The first foundation is constructed of the pronouncements of the Supreme Court creating a familial right to privacy. *Id.* at 428. We do not think that right supports the claimed privilege. *Id.* That right extends only to "matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 429 *citing Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S. Ct. 1029, 1038, 31 L. Ed. 2d 349 (1972). The privacy decisions "make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in th[e] guarantee of personal privacy." *Id. citing Roe v. Wade*, 410 U.S. at 152, 93 S. Ct. at 726. Thus, the Court has seen fit to protect such private familial activities as marriage, *Id. citing Loving v. Virginia* , 388 U.S. 1, 12, 87 S. Ct. 1817, 1823, 18 L. Ed. 2d 1010 (1967), procreation, *Id. citing Skinner v. Oklahoma*, 316 U.S. 535, 541-42, 62 S. Ct. 1110, 1113-12, 86 L. Ed. 1655 (1942), contraception, *Id. citing Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510; *Id. citing Eisenstadt v. Baird*, 405 U.S. at 453-54, 92 S. Ct. at 1038-39, and child rearing and education, *Id. citing Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972); *Id. citing Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944); *Id. citing Pierce v. Society of Sisters*, 268 U.S. 510, 535, 45 S. Ct. 571, 573, 69 L. Ed. 1070 (1925); *Id. citing Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042 (1923).

All courts which have examined the parent-child testimonial privilege have declined to recognize the privilege even on common law grounds "in the light of reason and experience" under Fed.R.Evid. 501. It is said, the very "sanctity and integrity of the family unit" are threatened by the State's power to compel parents to betray this trust by compelling them to reveal their child's confidences. *Id.* We do not derogate these values, however, if we are unable to find them to be protected by the Constitution. *Id.*

Appellants argue that the parent-child privilege is as justifiable, in terms of the interests concerned, as the marital communications privilege. *Id.* at 430. Be that as it may, the marital privilege has never been placed on a constitutional footing. *Id.* We likewise perceive no justification for extending the right of privacy so as to create a constitutional right against child-incrimination. *Id.*

Appellants further contend that the Fourteenth Amendment guarantees their right to the parental privilege since Texas has recognized a marital privilege. *Id.* at 430-31. We are left only to inquire whether Texas' choice in protecting marital but not parent-child communications is rationally based. *Id.* at 431.

It seems clear to us that the state of Texas has merely balanced the interests at stake and found the interest in the search for truth more compelling than those served by the parental privilege. *Id.* The "judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Id. citing City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 2517, 49 L. Ed. 2d 511 (1976). Texas' refusal to grant a parent-child privilege did not deny the Ports the equal protection of the laws.

Appellants' final argument in support of their right not to testify against their son finds its basis in the free exercise clause of the First Amendment. *Id.* They have asserted that their sincere adherence to the tenets of their religion -- Judaism -- prohibits them from testifying against their son. *Id.* Without inquiring into the sincerity of their beliefs or the actual presence in the Jewish religion of such a proscription applicable in secular courts, we are still compelled to hold that the Ports' right freely to exercise their religious beliefs was not violated. *Id.*

"The State may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Id. citing Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 718, 101 S. Ct. 1425, 1432, 67 L. Ed. 2d 624 (1981). In *Branzburg v. Hayes*, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972), the public interest in securing complete grand jury investigation of crimes was found to be sufficient to override the free speech claims of journalists who wished to conceal their informants' identities from that body. *Id.*

In *Smilow v. United States*, 465 F.2d 802 (2nd Cir.), *vacated on other grounds*, 409 U.S. 944, 93 S. Ct. 268, 34 L. Ed. 2d 215 (1972), n11 the court, relying on *Branzburg*, denied to a grand jury witness the right to refuse to testify on grounds of religious belief. *Id.*

Were the Ports' testimony unnecessary at the Grand Jury proceeding in this process or reasonably obtainable from other sources, our holding might differ. *Id.* at 433. We leave such questions for another day. *Id.*

The state district court granted appellants immunity from the use in a later prosecution of any testimony given to the grand jury. *Id.* Appellants claim that the court had no power to grant use immunity and that, therefore, it could not compel them to testify over their claim of a Fifth Amendment privilege against self-incrimination. Without statutory authority the judiciary may not grant immunity. *Id.* However, the Texas immunity scheme is derived from statutory authority. *Id.*

OUTCOME: The court affirmed the district court's denial of the habeas corpus petition filed by appellants, husband and wife, because the constitutional right of familial privacy did not compel recognition of a parent-child testimonial privilege and the state did not violate appellants' equal protection or free exercise rights.

Arnaud v. Odom, 870 F.2d 304; 1989 U.S. App. LEXIS 5221 (5th Cir. 1989)

PROCEDURAL POSTURE: The United States District Court for the Western District of Louisiana, dismissed 42 U.S.C.S. § 1983 action of appellant parents against appellee doctor.

OVERVIEW: The bodies of two infants who had died from Sudden Infant Death Syndrome were delivered to Dr. Charles Odom so that Dr. Odom could perform the autopsies mandated by state law. Dr. Odom then performed experiments on the corpses which required dropping them on their heads, doing x-rays and examining the results. His purpose was to gather information to support his expert opinion in another case.

After the parents of the deceased babies discovered what Dr. Odom had done, they each, in

separate actions, filed suit against Dr. Odom and others pursuant to 42 U.S.C. § 1983 seeking damages for the unauthorized medical experimentation by Dr. Odom on the corpses of their infant children. The parents in both complaints were alleging constitutional deprivations of virtually the identical interest--that interest being the right to possess the body of one's next of kin in the same condition as death left that body, free from unwarranted state-occasioned mutilation. 870 F.2d 307. The parents are, however, asserting different sources of authority from which such an interest is derived. *Id.*

This Court has previously enunciated the necessary criteria which a plaintiff must set forth in a complaint to state a claim upon which relief may be granted under section 1983 as follows: To survive a motion to dismiss [pursuant to Rule 12(b)(6)], a pleading that raises a section 1983 claim must allege both that someone violated a right that the Constitution or laws of the United States secures and that the offender did so under color of state law. *Id.* "A district court should refrain from granting a motion to dismiss pursuant to Rule 12(b)(6) unless it appears, from a reading of the plaintiff's complaint, that the plaintiff has failed to set forth facts which, if proven, would establish a violation of a constitutional right." *Id. citing Sisk v. Levings*, 868 F.2d 159, 161 (5th Cir.1989).

Section 1983 provides a remedy for the deprivation of rights "secured by the Constitution and laws" of the United States by persons acting under color of state law. 42 U.S.C. § 1983. *Id.* The parties do not contest the ruling of the district court that Dr. Odom was acting under color of state law in conducting the gruesome experiments on the bodies of Kendall and Christina. *Id.* Rather, the threshold issue on appeal which this Court must resolve is whether the parents of Kendall and Christina have been deprived of a right secured by the Constitution and laws of the United States within the context of section 1983. *Id. citing cases.*

A. PROCEDURAL DUE PROCESS

Appelant parents, the Arnauds, contend that the actions of Dr. Odom constituted a deprivation without procedural due process of a constitutional property or liberty interest in the body of their child after death. *Id.* Initially, it is noted that "property" rights protected by section 1983, such as those asserted by the Arnauds in the instant case, are not created by the Constitution, but are established and created by state law. *Id.* at 307-8 *citing Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S. Ct. 1487, 1491, 84 L. Ed. 2d 494 (1985). "Liberty interests, on the other hand, arise from two sources -- state law and the Due Process Clause of the Constitution. *Id. citing Hewitt v. Helms*, 459 U.S. 460, 466, 103 S. Ct. 864, 868, 74 L. Ed. 2d 675 (1983). *Id.* at 308.

The Arnauds maintain that, by virtue of Louisiana statutory and case law, Louisiana has created in the next of kin of a deceased individual the following constitutionally protected property rights: "the right to possess the body in the same condition in which death left it; the right to control the disposition of the remains; and the right to enjoin disinterment of the deceased." *Id.* After considering the relevant Louisiana statutory and case law regarding the rights of next of kin in the body of a deceased relative, we conclude that Louisiana has indeed established a "quasi-property" right of survivors in the remains of their deceased relatives. *Id.*

This Court has previously recognized that federal constitutional due process concerns may be satisfied by existing state tort remedies where negligent, episodic deprivations of property rights by state officials occur. *Id. citing cases.*

Having recognized the existence of a "quasi-property" right possessed by the Arnauds in the body of their infant daughter Christina by virtue of state law, our inquiry now becomes whether the state post-deprivation tort claims adequately remedy the essential aspects of the property interests alleged by the Arnauds to have been deprived by the actions of Dr. Odom in the instant appeal. *Id.* at 309.

[The court did and analysis and concluded:] The postdeprivation process available to the movants (the Arnauds in the instant case) is responsive to the wrongs asserted in their complaint. *Id.*

Thus, since adequate state postdeprivation process is available to remedy the injuries asserted by the Arnauds in their complaint against Dr. Odom, we must conclude that the Arnauds have not suffered a constitutional invasion of any property right pursuant to section 1983. *Id.* Moreover, because the Arnauds are asserting a deprivation of procedural due process, the above conclusion regarding the adequacy of state postdeprivation remedies is equally applicable to any alleged constitutional deprivation of a liberty interest possessed by the Arnauds in the body of their daughter. *Id.*

B. SUBSTANTIVE DUE PROCESS

The other appellant parents maintain that the actions of Dr. Odom in performing the experiment on the corpse of Kendall deprived them, not of a property interest without procedural due process, but of a liberty or privacy interest derived from the substantive parameters of the due process clause itself. *Id.* at 310. We can discern no precedent in the relevant jurisprudence which would warrant such an extension of the liberty or privacy rights derived from and protected by the Due Process Clause in the Constitution. *Id.* The availability of state postdeprivation remedies is irrelevant to an inquiry into whether the actions of Dr. Odom violated such substantive rights provided by the Constitution. *Id.*

Thus, our focus now becomes whether, from the express rights enumerated in the Constitution, a liberty or privacy interest devolves upon an individual to be free from state-occasioned mutilation to the body of a deceased relative. *Id.* We are persuaded that, despite the egregious wrong suffered by the parents at the hands of Dr. Odom in the instant case, no such liberty or privacy interest is created by the Constitution. *Id.*

While this court has not attempted to define with exactness the liberty thus guaranteed [Fourteenth Amendment guarantee against deprivation of life, liberty, or property without due process of law], the term [*311] and some of the included things have been definitely stated. *Id.* at 310-11. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. *Id.* at 311 *citing Meyer*, 262 U.S. at 399, 43 S. Ct. at 626. Such liberty interests implicit within the substantive parameters of the due process clause include the right of an extended family to share a household, *Id. citing Moore v. City of East Cleveland*, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977); the right of a woman to decide whether to have an abortion, *Id. citing Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); the freedom to marry a person of another race, *Id. citing Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); the right to vote, *Id. citing Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966); the right to use contraceptives, *Id. citing Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); the right of access to the courts, *Id. citing NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963); the right of association, *Id. citing NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958); the right to send children to private schools, *Id. citing Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); and the right to have children instructed in foreign language, *Id. citing Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).

We decline to embrace a new liberty interest in the instant case. *Id.*

OUTCOME: The court affirmed and modified the decision which dismissed the civil rights action of appellants, the parents of deceased infants, against appellee doctor because appellee's mutilation of the infants' corpses in unauthorized experiments did not violate appellants' constitutional rights, either because there was no constitutional invasion of a property right, or because no property or liberty interest existed.

***Fyfe, v. Curlee*, 902 F.2d 401; 1990 U.S. App. LEXIS 8840**
(5th Cir. 1990)

PROCEDURAL POSTURE: The United States District Court for the Northern District of Mississippi rendered a take-nothing judgment rejecting relief to plaintiff former school secretary on her 42 U.S.C.S. § 1983 claim that her employer, defendant school district, and defendant superintendent retaliated against her for exercising her right to enroll her daughter in private school.

OVERVIEW: The plaintiff, Mary Anne Fyfe, was employed a secretary to the Vine Street Elementary School principal. 902 F.2d at 402. The plaintiff and her husband removed their daughter Shannon from the Aberdeen public schools and enrolled her an all-white private school. *Id.* The Fyfes felt Shannon would be happier at Oak Hill. *Id.*

Around April 1987 a number of local black citizens and community leaders began boycotting Aberdeen businesses; primarily to put pressure on the school system to increase the number of black teachers and administrators. *Id.* The School Superintendent twice met with Mrs. Fyfe about Shannon's

enrollment at Oak Hill Academy, and told Mrs. Fyfe that he "would prefer" that she work some place else. *Id.* at 402-3. Mrs. Fyfe refused to resign and the superintendent transferred Mrs. Fyfe to a newly created job at the Resource Center.

Mrs. Fyfe considered her new job undesirable and she filed suit under 42 U.S.C. § 1983 in federal district court in September 1987; she alleged that the retaliatory job transfer violated rights secured to her under the First and Fourteenth Amendments. *Id.* at 403. She sought reinstatement to her former position, nominal damages, damages for mental stress and anxiety, and attorneys' fees. *Id.*

At trial the plaintiff testified to the requests of the superintendent that she find work elsewhere, to her transfer, and to the menial nature of her new position. *Id.* She also testified to knowing about the boycott, but stated that she had never received any threats or complaints from blacks concerning her decision; some blacks had "actually supported" her. *Id.* The school district, in support of pretrial motions, had asserted through affidavits that the school was threatened with adverse effects from Mrs. Fyfe's action, including violence. *Id.* But at trial, the school district adduced no evidence and rested after the plaintiff completed her case. *Id.* The court denied plaintiff's motion for directed verdict, and the jury returned a general verdict in favor of the school district. Plaintiff appeals. After the jury verdict Mrs. Fyfe resigned her position with the school district. *Id.*

Mrs. Fyfe argues on appeal that her unrebutted evidence established as a matter of law that the school district violated her constitutional rights.

To state a claim upon which relief can be granted under 42 U.S.C. § 1983, the plaintiff must allege that the defendant acted under color of state law to deprive her of a right, privilege, or immunity guaranteed by either the Constitution or laws of the United States. *Id. citing Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980); *Brantley v. Surles*, 718 F.2d 1354, 1357-58 (5th Cir. 1983).

The plaintiff has the initial burden of establishing that her conduct was constitutionally protected, and that this conduct was a "substantial" or "motivating" factor in the decision to transfer her to a new position. *Id. citing cases.* The question whether specific conduct or speech is protected by the First Amendment is ultimately a question of law. *Id. citing cases.*

We have no doubt that conduct such as Mrs. Fyfe's in transferring her daughter to private school enjoys constitutional protection. *Id.* Mrs. Fyfe's decision to send her child to a private school was protected under the First Amendment and the penumbra of familial privacy rights recognized by the Supreme Court. *Id.*

Mrs. Fyfe was also required to establish that her protected conduct was a substantial or motivating factor in the decision to transfer her. *Id.* The defendant stipulated that Mrs. Fyfe's "decision to send her child to Oak Hill Academy was a significant and precipitating factor in its decision to transfer the plaintiff to another position." The school district did not present any other reason for the transfer. *Id.*

The only remaining question is whether Mrs. Fyfe's transfer to a less responsible, more menial job at the same wage amounted to a constitutional deprivation. *Id.* Although Mrs. Fyfe was a non-tenured, non-instructional employee-at-will, and had no property interest or claim of entitlement to employment in the school system, or to her job at Vine Street Elementary School. Even though Mrs. Fyfe was an employee-at-will, the school district clearly could not discharge Mrs. Fyfe for exercising her constitutional right to control her child's education, unless it could demonstrate that the conduct materially and substantially interfered with the effectiveness of the school system. *Id.* at 404.

Nor could Mrs. Fyfe be threatened with discharge for putting her child in private school, even if she was never actually fired. *Id.* Furthermore, a public employee will not be foreclosed from § 1983 relief merely because the impermissible retaliation did not result in the termination of his employment. *Id.*

According to Mrs. Fyfe, when Mr. Curlee notified her of her transfer she knew "there was not a job available at the Resource Center. *Id.* at 405. I asked [Mr. Curlee] if he had created a job? He said, yes. I asked him if he wanted me out of the school system. He said yes. I told him there was no job available at the Resource Center, and he said, yes." *Id.* Mrs. Fyfe testified that she was not permitted to go into the schools, and her coworkers were forbidden to take breaks with her. *Id.* We conclude that the uncontradicted evidence reveals that the school district violated rights secured to Mrs. Fyfe under the First and Fourteenth Amendments when it transferred her from a productive, satisfying position to a menial make-work one. *Id.*

The only question that remains is whether the record supports the view that Mrs. Fyfe's protected conduct of enrolling her child in a private school was detrimental to the efficient operation of the appellee's school system. *Id.* The state may legitimately interfere with the constitutionally protected conduct of a public school employee only when that conduct materially and substantially impedes the operation or

effectiveness of the educational program. *Id. citing Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

This balancing is to be conducted by the court as a matter of law, not fact. *Id.*

Because the school district produced no evidence of substantial interference with its effectiveness as a result of Mrs. Fyfe's enrollment of her daughter in private school, Mrs. Fyfe must prevail as a matter of law. *Id.* The record is completely silent on any effect Shannon Fyfe's move to the private school had on the appellee school district. *Id.*

The only remaining issue concerns the appropriate remedy in this case.

Because we find a violation of plaintiff's constitutional rights, Mrs. Fyfe is at minimum entitled to nominal damages of $ 1. *Id.* at 406 *citing cases.*

We remand this case to the district court for a trial on the appropriate remedy to which Mrs. Fyfe is entitled. Nominal damages of $ 1 will be awarded. *Id.* Mrs. Fyfe is entitled to pursue her case in the district court for reinstatement to her original position, damages for mental anguish and for constructive discharge. Because she is the prevailing party, the district court must also consider her claim for attorneys' fees under 42 U.S.C. § 1988. *Id.*

OUTCOME: The court vacated the denial of plaintiff former school secretary's civil rights claim and remanded the matter for trial on the appropriate remedy to which plaintiff was entitled for the constitutional deprivation she sustained with respect to her employment position with defendant school district, which had been orchestrated by defendant in retaliation for plaintiff's decision to transfer her daughter to private school.

Wooley v. City of Baton Rouge, 211 F.3d 913; 2000 U.S. App. LEXIS 22430 (5th Cir. 2000)

PROCEDURAL POSTURE: United States District Court for the Middle District of Louisiana granted appellees Motion for Summary Judgment based upon qualified immunity in an action filed under 42 U.S.C.S. § 1983.

OVERVIEW: April Zachary and her seven-month old son, Jordan, moved in with Wooley. 211 F.3d at 917. Wooley became Jordan's primary care giver. *Id.* April sought to transfer custody of Jordan to Wooley by way of an order of the East Baton Rouge Parish Family Court. *Id.* Wooley testified that April wanted to give her custody of Jordan because "she needed some help raising him, and she did not want her parents ... to get custody of him." *Id.* The order granting custody of Jordan to Wooley was later found to be invalid because the East Baton Rouge Family Court lacked subject matter jurisdiction over the controversy. *Id.*

On January 6, 1995, April's parents, Cecil and Sunday Zachary, obtained an order from the Livingston Parish court temporarily transferring to them custody of Jordan [which was later dismissed because proper venue did not lie in that court]. *Id.* The order did not direct law enforcement officers to effectuate the transfer of custody. *Id.*

Rouge City Police went to Wooley's home. *Id.* They took possession of the child over Wooley's pleas for them not to take the child, claiming that Cecil Zachary had abused April Zachary as a child and that she feared the same thing would happen to Jordan. *Id.* at 917-18. They gave Jordan to his grandparents. *Id.* at 918.

Upon further investigation, the police contacted Jordan's grandparents and told them that a mistake had been made, but they refused to return Jordan voluntarily. *Id.* They did so approximately 90 days later. *Id.*

The Livingston Parish court vacated its order, on grounds of improper venue, one week after the police seized Jordan. *Id.* The East Baton Rouge Parish Family Court rendered its custody order null and void for lack of subject matter jurisdiction the next month. *Id.* The East Baton Rouge Parish Juvenile Court ultimately ordered return of custody of Jordan to April. *Id.*

Wooley, individually and on behalf of Jordan, sued the Baton Rouge City Police Department, the Parish of East Baton Rouge, the City of Baton Rouge, Police Chief Greg Phares, and three police Officers. *Id.* In her complaint Wooley claimed that the officers violated her fourth amendment rights against unreasonable searches and seizures and her fourteenth amendment right to family integrity. *Id.* The

complaint also alleged that the police had deprived Jordan of his fourth amendment right against unreasonable seizures and his fourteenth amendment liberty interest in remaining in the custody of his legal guardian. *Id.* Wooley joined Chief Phares and the City of Baton Rouge, alleging that they acted with deliberate indifference and failed to train the officers adequately. *Id.* The claims against the Baton Rouge City Police and the Parish of East Baton Rouge were dismissed voluntarily, and the court declined to exercise its jurisdiction over several pendent state law claims. The district court granted the remaining defendants' motion for summary judgment on qualified immunity grounds, and this appeal followed. *Id.* Appellants do not discuss in their briefs any issue related to the claims against Police Chief Phares and the City of Baton Rouge. Those claims are deemed abandoned. *Id.* We consider only the fourth and fourteenth amendment claims by Debra Wooley and Jordan Zachary. *Id.*

We review a grant of summary judgment *de novo. Id.* Summary judgment is proper under Federal Rule of Civil Procedure 56(c) "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the nonmoving party is entitled to judgment as a matter of law." *Id.* If the movant meets the initial burden of establishing that there is no genuine issue as to a material fact, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine issue for trial. *Id.*

We first conduct a bifurcated analysis to determine whether a defendant is entitled to qualified immunity. *Id.* at 919. The first step is to determine whether the plaintiff has alleged a violation of a clearly established constitutional right. *Id.* The second step is to determine whether the defendant's conduct was objectively reasonable.

Wooley contends that she was deprived of her right to custody of Jordan without due process of law. In addition, *Id.* Wooley and Jordan each contend that the police officers violated their fourteenth amendment right to family integrity by removing Jordan from Wooley's home. *Id.* In order to recover under § 1983 for violations of their due process rights, Wooley and Jordan must demonstrate that they were denied a cognizable liberty or property interest clearly established either by state law or the United States Constitution. *Id.* We conclude that they did not have such a clearly established interest. *Id.*

Wooley did not have legal custody of Jordan under Louisiana law because the order granting custody was rendered by a court that lacked subject matter jurisdiction. *Id.* Under the law of Louisiana, however, any action taken by a court without proper subject matter jurisdiction is absolutely null and without effect. *Id.*

Wooley asserts in the alternative that April Zachary's failed attempt to transfer custody to her was sufficient to grant her provisional custody by operation of mandate under Louisiana law. *Id.* at 920. We are not persuaded. *Id.* As it then existed, the statute required the joint participation of both parents in order to transfer custody by mandate, unless the minor's parents were divorced or separated. *Id.* The statute made no provision for children born out of wedlock. *Id.* Because only Jordan's mother acted to transfer custody, Wooley's right to provisional custody was not clearly established under Louisiana law at the critical time herein. *Id.* Thus, neither Wooley nor Jordan were deprived of any clearly established statutory right when the officers removed Jordan from Wooley's home. *Id.*

We consider next whether the United States Constitution creates a liberty interest that protects the relationship between Wooley and Jordan. *Id.* That the Constitution protects family relationships and a parent's right to the care, custody, control, and management of their children is well-established. *Id.* at 920-21. Indeed, the Supreme Court recognized in Stanley v. Illinois [405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208] that "the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment ...." *Id.* We recognized in Hodorowski v. Ray [844 F.2d 1210] the "most essential basic aspect of familial privacy - the right of the family to remain together without the coercive interference of the awesome power of the state." *Id.* Whether the due process clause protects the relationship between Wooley and Jordan, however, is less clear. *Id.* Defining the concept of "family" and its place in our society is no elementary task. *Id.* Our Constitution protects only those social units that share an expectation of continuity justified by the presence of certain basic elements traditionally recognized as characteristic of the family. *Id.*

That expectation is often justified by a biological link between those asserting the protection. *Id.* "The usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." *Id.*

The existence of a family, however, does not depend entirely on biological relationships. *Id.* Quite to the contrary, the foundation of the traditional family is built upon the marriage relationship between persons who are not blood related. *Id.* The right to privacy within a marriage has occupied considerable

significance in the Court's fourteenth amendment jurisprudence: We deal with a right of privacy older than the Bill of Rights, older than our political parties, older than our school system. *Id.* at 921-22. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. *Id.* at 922. It is an association that promotes a way of life, not causes; a harmony of living, not political faiths; a bilateral loyalty, not commercial or social projects. *Id.* Yet it is an association for as noble a purpose as any involved in our prior decisions. *Id.*

Thus, the Court has recognized that familial expectations might arise not only through biological relationships, but also through the "intimacy of daily association" and the resulting emotional attachments. *Id.* The Court has acknowledged the possibility that a relationship similar to a parent-child relationship might exist between an unrelated adult and child, and implied that some such relationships might enjoy due process guarantees even if not sanctioned by state law. *Id.* The Court stopped short of identifying the foster parent-child relationship as one such relationship, however, because the foster parents' expectations of an enduring companionship were not justified in view of the state law under which the emotional ties originated and the natural parents' recognized liberty interest derived from their blood relationship with their children. *Id.*

There is no dispute about the emotional bonds that developed between Wooley and Jordan during the period that Wooley was Jordan's primary care giver. *Id.* An intimate, loving relationship by itself, however, is not sufficient to create a familial expectation that our society and Constitution are prepared to recognize. *Id.*

The present case is distinguishable from the prior cases in which the right to family integrity has been asserted by persons not biologically related on two obvious and important bases. *Id.* Unlike the cases involving foster families, the contours of the relationship between Wooley and Jordan are not defined by state law, and state law does not supply the justifiable expectations that attend their relationship. In addition, the expectation that the relationship would be a durable one has not been defeated by the child's biological parents. *Id.* Wooley and Jordan contend that under the rubrics of the foregoing cases the emotional ties between a minor and an unrelated adult care giver can create a liberty interest *vis-a-vis* the child's biological grandparents when the relationship is countenanced by the child's natural mother. *Id.* They thus contend that under the circumstances here presented Wooley and Jordan shared a fourteenth amendment protected expectation that the state would not interfere in their relationship. *Id.* However, it is indisputable that, at the time of the events in question, no such fourteenth amendment right could be described as *clearly established. Id.*

We are not hesitant, however, in finding constitutional protection for the relationship between Jordan and his natural mother. *Id.* April Zachary does not assert any claims on her own behalf but, rather, asserts a claim on behalf of Jordan. *Id.* Because a child's right to family integrity is concomitant to that of a parent, we define the scope of Jordan's rights in this context with reference to his mother's rights. *Id.*

A biological relationship traditionally has given rise to familial expectations that are "venerable and deserving of constitutional protection." *Id.* The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases. *Id.*

Although a biological relationship does not conclusively establish a liberty interest, the cases in which that interest has been found lacking have concluded that those familial expectations were defeated by either the biological parent's disassociation from the child or the state's and society's traditional preference for and protection of other inconsistent family models. *Id.* Here we have neither circumstance. *Id.*

Jordan undeniably is entitled to stay with his mother without governmental interference. *Id.* That requires us to consider the nature of the process due Jordan before depriving him of that right. *Id.* The right to family integrity must be balanced against the state's interest in protecting the health, safety, and welfare of children. *Id.* In close cases, the tension between these two interests is pronounced and we occasionally have been unable to conclude that the due process violation involved was "clearly established." *Id.* Defendants claim that this is such a case and that they are entitled to qualified immunity because they acted to protect Jordan and to defuse a potentially explosive situation. *Id.* We are not persuaded. Our cases in which the state's interest has blurred the existence of a family's rights uniformly have involved removal of children by social workers specifically charged with protecting children where there were allegations of abuse. *Id.* There is no indication in this record of any threat to Jordan's safety, nor were the officers investigating allegations that he previously had suffered abuse at the hands of Wooley or April. *Id.* The

requirements of due process may also be satisfied where police officers are authorized to effect a transfer of custody in furtherance of the state's prerogative to protect the welfare of children. *Id.* As mentioned previously, however, the court order obtained by the Zacharys did not direct the police to take any action. *Id.* Under the circumstances, April and Jordan Zachary enjoyed a clearly established right to maintain their relationship free from interference by state actors. *Id.*

Plaintiffs also claim that the officers violated their clearly established fourth amendment rights. *Id.* at 924-925. Wooley alleges that her fourth amendment rights were violated when the officers engaged in a warrantless, non-consensual search of her home and a warrantless seizure of her person. *Id.* at 925. Jordan contends that the warrantless seizure of his person was likewise a violation of his constitutional rights. *Id.* We opt to remand Wooley's claim which was properly before the district court to that court since it failed to consider that claim in this instance, remanding same, and now address the fourth amendment claims of Jordan. That amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Further, identical fourth amendment standards regarding the right to be free from unreasonable searches and seizures apply in both the criminal and civil contexts. *Id.* In assessing the reasonableness of a search or seizure, we must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* n60 The appropriate balance between an individual's interest in remaining free from seizure of his person and the government's interest in enforcing its laws has been reached by requiring a warrant or the existence of probable cause that the individual has committed some criminal act. *Id.*

The defendants concede that they had neither a warrant nor probable cause to seize Jordan. *Id.* The record before us is devoid of a governmental interest sufficient to justify dispensing with constitutional protections. *Id.* There was no evidence of danger to Jordan sufficient to implicate the state's interest in protecting the health, safety, and welfare of minors. *Id.* The officers further contend that they acted to defuse a potentially explosive situation. *Id.* Even if this assertion were true, the interest created by this circumstance is no greater than the interest of law enforcement generally to enforce the laws and keep the peace. *Id.* The seizure of Jordan in order to quell a potentially volatile situation was no more permissible than the seizure of Debra Wooley or Cecil Zachary would have been under the same circumstances. *Id.*

Finally, the officers contend that it was objectively reasonable for them to seize Jordan because: (1) they defused a potentially explosive situation, (2) Cecil Zachary indicated that Jordan was in danger, n62 and (3) the Livingston Parish court order was valid on its face. *Id.* at 925-26. As discussed previously, however, the desire to avoid a domestic dispute cannot form a reasonable basis for depriving Jordan of his fourth and fourteenth amendment rights. *Id.* at 926. Reasonableness in this context must be gauged in light of clearly established law. *Id.* An exception for the preservation of domestic tranquility cannot reasonably be thought to exist as to the right to family integrity or the right to be free from unreasonable seizures. *Id.* The officers' actions, even if they perfectly served this goal, were not reasonably within the bounds of the law. *Id.* Nor was it objectively reasonable for the officers to believe that Jordan was in danger of imminent harm. *Id.* The Livingston Parish order in no way indicated that Jordan's safety might be jeopardized.*Id.* The police were not informed of any abuse prior to arriving at Wooley's home, and they found no evidence of abuse while there. *Id.* Although Cecil Zachary made allegations casting doubt on April Zachary's fitness as a mother, he made no statement that tended to indicate Jordan was unsafe in Wooley's home. *Id.* In fact, April Zachary was not present while the police were deciding what to do, and by all appearances Jordan appeared to be safely in Wooley's care. *Id.*

Finally, it was not objectively reasonable for the officers to rely on the Livingston Parish court order. *Id.* The officers could not reasonably have viewed the order as one granting them authority to effect the transfer of custody of Jordan Zachary in light of the Louisiana statute which requires a civil warrant under such circumstances. *Id.*

The proper and appropriate action by the police officers in an instance as is here presented, and that which on the state of the record as presently constituted appears to have been the procedure followed by the Baton Rouge officers, is pointedly expressed in a letter directive issued a few days after the subject

incident. That letter, the issuance of which warrants our recognition and plaudits, states:

> "The police department is not to be involved in enforcing child custody orders in the absence of a specific order signed by a judge and directed to law enforcement to pick up a certain child and deliver him/her to a certain place. General orders stating that one parent is to have custody of the child from Friday - Sunday, for example, are not to be enforced by this Department. The orders that police officers are to enforce must be an order to law enforcement officers directing officers to pick up and deliver a child. "Civil warrants" are an example of these direct orders to law enforcement, and are enforceable throughout the state just as other warrants are. However, if you are relying simply on a court order that is not a warrant, it must be signed by a judge of this parish. These will be relatively rare, as most judges will choose to style their own orders to law enforcement in the form of a warrant. Whether you are relying on a civil warrant or simply a court order, you must have it in your possession
> [*927] before you take any action. In addition, both civil warrants and court orders, to be enforceable, must be stamped by the Clerk of the Court with the words "Certified True Copy." The stamp must be an original. If those three magic words do not appear on the order, DO NOT ENFORCE THE ORDER (emphasis in original)."

Id. at 926-27. The order presented by Cecil Zachary did not direct law enforcement officers to pick up Jordan and deliver him to a place certain, was not signed by a judge in East Baton Rouge Parish, and was not stamped with the words "Certified True Copy." *Id.* at 927. The proper course of action would have been for the officers to wait for the issuance of a civil warrant by an East Baton Rouge Parish judge. *Id.* At the very least, they should have refrained from acting until they received guidance from their legal or juvenile departments. *Id.* Without specific authorization or the aforementioned guidance, and in light of express state law, it was not objectively reasonable for the officers to have viewed the Livingston Parish court order as empowering them to seize Jordan and to act as they allegedly did. *Id.*

OUTCOME: The judgment was affirmed in part; reasonable officers would not have known their acts implicated rights existing between appellant friend and appellant mother. The court did not err in granting the defendants qualified immunity on that issue but vacated and remanded on appellant friend's fourth amendment claim.

Littlefield v. Forney Independent School District, 268 F.3d 275; 2001 U.S. App. LEXIS 20973 (5th Cir. 2001)

PROCEDURAL POSTURE: The United States District Court for the Northern District of Texas, granted summary judgment to defendants, school district, superintendent, and members of the board of trustees, on plaintiffs', students' and parents', action challenging the school uniform policy as unconstitutional.

OVERVIEW:

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs-Appellants, students and parents, sued Defendants-Appellees asserting several constitutional challenges to the mandatory school uniform policy ("Uniform Policy" or "Policy") adopted by Forney, Texas Independent School District. 268 F.3d at 279.

Forney, acting pursuant to Texas Education Code § 11.162 adopted a district-wide mandatory Uniform Policy applicable to its students which would, according to research, have the following beneficial effects on the students and the system as a whole: improve student performance, instill self-confidence, foster self-esteem, increase attendance, decrease disciplinary referrals, and lower drop-out rates. *Id.* at 279-80. The district court found that, of the thirty-four percent of parents who responded to a take home survey, approximately sixty percent of that group was in favor of mandatory uniforms. *Id.* at 280. Forney also conducted two "town hall" style meetings on the subject. At these meetings, parents were provided the

opportunity to comment on the proposed Uniform Policy. *Id.* As a result of this information, the Forney School Board made factual findings that the school uniforms would improve the learning environment at the schools, and on April 19, 1999, adopted the Uniform Policy now at issue. *Id.*

The disputed Uniform Policy requires students to wear clothing of specified color, style, and certain types of clothing are strictly prohibited. *Id.*

Forney asserts that the Uniform Policy was adopted to promote school spirit and school values, and "to promote decorum (and thereby the notion that school is a place of order and work), to promote respect for authority, to decrease socioeconomic tensions, to increase attendance, and to reduce drop out rates." *Id.* Forney also asserts that it intended the Policy "to increase student safety by reducing gang and drug related activity as well as the likelihood of students bringing weapons to school undetected and by allowing teachers to more readily distinguish Forney students from outsiders." *Id.*

Failure to comply with the Uniform Policy results in disciplinary action, which could lead to expulsion. *Id.*

In compliance with the requirement of Texas Education Code § 11.162(c), the Uniform Policy includes an "opt-out" provision whereby parents and students with "bona fide" religious or philosophical objections to the wearing of a uniform can apply for an exemption to the Policy. *Id.* at 281.

Plaintiffs-Appellants bring three separate, substantive constitutional challenges to the Uniform Policy:

> "First, [they] assert that the compulsory wearing of uniforms violates the First Amendment because the wearing of uniforms is both a form of coerced speech, in that, it compels them to express ideas with which they may not agree, and, at the same time, it is an infringement on free expression, in that it prevents them from freely expressing particular messages they do wish to convey. Second, the parent-Plaintiffs-Appellants claim that the compulsory Uniform Policy violates their "fundamental" right to control the upbringing and education of their children in violation of the Fourteenth Amendment. Finally, four family-Plaintiffs-Appellants (parents seeking relief on behalf of their children), who sought exemption from the Uniform Policy on religious grounds, allege that the existing opt-out procedures restrict their freedom to exercise their religious beliefs in violation of the Free Exercise Clause of the First Amendment because the opt-out questionnaire and hearing procedures impermissibly delve into the substance of their religious beliefs. Further, these four family-Plaintiffs-Appellants contend that the opt-out procedures favor certain established religions at the expense of other religions and thus violate the Establishment Clause of the First Amendment."

Id. at 281-82.

The district court treated defendant's motion to dismiss as a motion for summary judgment and granted summary judgment in favor of Defendants, concluding that no constitutional violation occurred in this case and did not reach the qualified immunity issue. *Id.* at 282.

II. STANDARD OF REVIEW

[The court first discussed the standard of review in summary judgment situation.]

III. FIRST AMENDMENT EXPRESSIVE CONDUCT CLAIMS

The First Amendment protects not only verbal and written expression, but also symbols and conduct that constitute "symbolic speech." *Id. citing cases.*

While we have rejected the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea, we have acknowledged that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. *Id.* at 282-83. In evaluating whether particular conduct possesses "sufficient communicative elements" to implicate First Amendment protections, courts must ask whether "an intent to convey a particularized message was present, and ... [whether] the likelihood was great that the message would be understood by those who viewed it." *Id.* at 283.

The protection of the First Amendment depends not only on whether the conduct is expressive, but also on the context in which that expression takes place. *Id.* In the public school arena, the free

expression rights of students are balanced by the corresponding interest of furthering the educational mission of schools. *Id.* [Tinker, 393 U.S. at 506 (recognizing that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"), with Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988) ("A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school." (citations and internal quotations omitted)), and Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986) (recognizing that the First Amendment rights of public school students "are not automatically coextensive with the rights of adults in other settings").] Public schools, therefore, while responsible for inculcating the values of the First Amendment necessary for citizenship, are not themselves unbounded forums for practicing those freedoms.] *Id.*

The threshold question is whether the expression at issue is entitled to protection under the First Amendment. *Id.* at 284. A person's choice of clothing is infused with intentional expression on many levels. In some instances, clothing functions as pure speech. *Id.* at 285. A student may choose to wear shirts or jackets with written messages supporting political candidates or important social issues. *Id.* Words printed on clothing qualify as pure speech and are protected under the First Amendment. *Id.* Clothing may also symbolize ethnic heritage, religious beliefs, and political and social views. *Id.* Individuals regularly use their clothing to express ideas and opinions. *Id.* The choice to wear clothing as a symbol of an opinion or cause is undoubtedly protected under the First Amendment if the message is likely to be understood by those intended to view it. *Id.* Finally, students in particular often choose their attire with the intent to signify the social group to which they belong, their participation in different activities, and their general attitudes toward society and the school environment. *Id.* While the message students intend to communicate about their identity and interests may be of little value to some adults, it has a considerable effect, whether positive or negative, on a young person's social development. *Id.*

The First Amendment applies to the expressive conduct implicated in the mandatory Uniform Policy. However, we hold that the Uniform Policy does not violate the First Amendment.*Id.* at 286.

When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id. citing case.* The Uniform Policy will survive constitutional scrutiny if (1) it is within the constitutional power of the government, (2) it furthers an important or substantial governmental interest, (3) the interest is unrelated to the suppression of student expression, and (4) the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest. *Id.*

First, there is no question that, pursuant to state law, Defendants have the power to pass a mandatory school uniform policy. *Id. citing* TEX. EDUC. CODE ANN. § 11.162 (Vernon 1996). Second, improving the educational process is undoubtably an important and substantial interest of Forney and the school board. The interests in the health, safety, and order of public schools are sufficient government interests. *Id.* As has been well recognized, federal courts should defer to school boards to decide, within constitutional bounds, what constitutes appropriate behavior and dress in public schools. *Id.* at 287. Third, the Students have not established issues of material fact sufficient to demonstrate that the Defendants' interest in enacting the Uniform Policy was to suppress expression. *Id. citing case.* The record demonstrates that the Uniform Policy was adopted for other legitimate reasons unrelated to the suppression of student expression. *Id.* We hold that Forney's purpose in enacting the Uniform Policy cannot be deemed an attempt to suppress or coerce speech. *Id.* Finally, we are satisfied that, because of the limited nature of the restriction, "the incidental restrictions on First Amendment activities are no more than is necessary to facilitate [Forney's] interest. *Id.* The restrictions pertain only to student attire during school hours and do not affect other means of communication. *Id.* Students may still express their views through other mediums during the school day. *Id.* The uniform requirement does not bar the important "personal intercommunication among students" necessary to an effective educational process. *Id.*

IV. PARENTAL RIGHTS UNDER THE FOURTEENTH AMENDMENT

The Fourteenth Amendment prohibits States from depriving persons "of life, liberty, or property, without due process of law." See U.S. CONST. amend. XIV, § 1. *Id.* As the Supreme Court recently reaffirmed: "We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment

counterpart, 'guarantees more than fair process.' *Id.* at 287-88.The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Id.* at 288 *citing cases.*

One of "the fundamental liberty interests" recognized by the Court is the "interest of parents in the care, custody, and control of their children." *Id. citing* 530 U.S. at 65-66 ("It cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); see also Meyer v. Nebraska, 262 U.S. 390, 401, 67 L. Ed. 1042, 43 S. Ct. 625 (1923) (recognizing that the liberty interest protected by due process includes the right of parents "to control the education of their own"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35, 69 L. Ed. 1070, 45 S. Ct. 571 (1925) (recognizing that "the liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control"); Prince v. Massachusetts, 321 U.S. 158, 166, 88 L. Ed. 645, 64 S. Ct. 438 (1944) (recognizing that there is a constitutional interest in parents directing the "custody, care and nurture of the [**30] child").

The dispositive question at issue is whether the sweeping statements of the plurality opinion in Troxel regarding the "fundamental" "interest of parents in the care, custody, and control of their children," mandate a strict standard of scrutiny for the Parents' Fourteenth Amendment challenge to the Uniform Policy. *Id.* We do not read Troxel to create a fundamental right for parents to control the clothing their children wear to public schools and, thus, instead follow almost eighty years of precedent analyzing parental rights in the context of public education under a rational-basis standard. *Id.*

Before the Supreme Court's Troxel opinion, the Court had addressed the issue of parental rights in public schools in three major opinions. *Id.* First, in Meyer v. Nebraska, the Court held unconstitutional a law that forbade schools from teaching foreign languages to students below the eighth grade, applying the equivalent of a rational-basis review. n21 See 262 U.S. 390, 396-97, 403, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) ("We are constrained to conclude that the statute as applied is arbitrary, and without reasonable relation to any end within the competency of the state." (emphasis added)). *Id.* at 289-90. The Supreme Court held that the Fourteenth Amendment protects the right "to marry, establish a home, and bring up children." *Id.* at 290.

Two years later, in Pierce v. Society of Sisters, the Court struck down a state law prohibiting parents from sending their children to private school, again utilizing the equivalent of a rational-basis test. *Id. citing* 268 U.S. 510, 530-31, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). The Court invalidated the statute because it "unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id. citing* 268 U.S. 510 at 534-35 (emphasis added).

Finally, in Wisconsin v. Yoder, members of the Old Order Amish religion and the Conservative Amish Mennonite Church argued that mandatory school attendance beyond the eighth grade violated their rights under the Fourteenth Amendment and under the First Amendment's Free Exercise Clause. *Id. citing* 406 U.S. 205, 207, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). The Supreme Court agreed that, as it applied to the Amish, the state law was unconstitutional. *Id. citing* 406 U.S. 205 at 234. Yoder was decided based on the Free Exercise Clause, but it informs the discussion about the balancing of interests regarding parental rights implicated under the Fourteenth Amendment. *Id.* The Court acknowledged both the state interest in providing and regulating a state public education system and the parental interest in controlling a child's religious upbringing and education. *Id. citing* 406 U.S. 205 213-14. TheYoder Court went on to state that "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations." *Id. citing* Yoder, 406 U.S. at 215. Thus, it is clear that the due process interest of parents to direct the upbringing and education of their children, standing alone, warranted no more than rational-basis review. *Id* at 291. A rational-basis review is the appropriate standard in this case. *Id.*

While Parents may have a fundamental right in the upbringing and education of their children, this right does not cover the Parents' objection to a public school Uniform Policy. *Id.* Applying the rational-basis test, we conclude that the Uniform Policy is rationally related to the state's interest in fostering the education of its children and furthering the legitimate goals of improving student safety, decreasing socioeconomic tensions, increasing attendance, and reducing drop-out rates. Therefore, we affirm the district court's summary judgment determination that the Uniform Policy does not violate the Parents' Fourteenth Amendment rights.

V. FREE EXERCISE CLAUSE AND ESTABLISHMENT CLAUSE CLAIMS

We agree with the district court that the Forney opt-out policy neither infringes on the families' free exercise of religion nor violates the Establishment Clause. *Id.*

A. Free Exercise Claim

The Free Exercise Clause of the First Amendment, which has been made applicable to the states by incorporation into the Fourteenth Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id. citing* U.S. CONST. amend. I. In Employment Division, Department of Human Resources v. Smith, the Supreme Court held that a neutral, generally applicable governmental regulation will withstand a free exercise challenge when the regulation is reasonably related to a legitimate state interest. *Id. citing* 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993).

On its face, the opt-out policy enacted by Forney is neutral and of general application, in that it applies to all persons who might wish to attend Forney and choose to opt-out of the Uniform Policy. *Id.* All parties also agree that the opt-out policy was not enacted to inhibit religion and, in fact, recognize that the statutory provision was enacted to protect the reasonable state interest of fostering the free exercise of religion. As a threshold matter, then, the opt-out policy survives constitutional scrutiny under Smith. *Id.*

Section 11.162(c) of the Texas Education Code provides that parents may exempt their children from the Uniform Policy if they can provide a bona fide religious or philosophical objection to the wearing of the uniform. *Id.* In an effort to provide an objective means of determining the sincerity of the "bona fides" of a religious belief, Forney established a process of requiring written objection, the completion of a questionnaire that requests information regarding whether students had worn uniforms in the past, and personal meetings with the parents. *Id.* This process used to determine the sincerity of a religious objection, while fraught with difficulty, is necessary to separate sincere beliefs from fraudulent beliefs. *Id.* This test provides a rational means of differentiating between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud." *Id.*

Because the opt-out procedures are a neutral and rational means to determine sincerity, as a legal matter under Smith, they do not interfere with the free exercise of religion. *Id. citing case.* Further, in practice, "opt-outs" have been granted to parents who have demonstrated a sincere and consistent objection to the wearing of uniforms. *Id.*

Therefore, we conclude that the Families have not created a genuine issue of material fact that the application of Forney's opt-out policy violates their free exercise rights under the First Amendment. *Id.* at 294.

The Families' Establishment Clause argument is equally without merit. *Id.* To withstand an Establishment Clause challenge, a statute must have a secular legislative purpose, the statute's primary purpose must neither advance nor inhibit religion, and the statute must not foster an excessive entanglement with religion. *Id. citing cases.* The uniform policy unquestionably has a secular purpose. *Id.* Next, the principal effect neither advances nor inhibits religion. *Id.* Finally, the policy does not unnecessarily entangle the School Board with religion. *Id.* Finally, we do not perceive an intolerable risk of excessive government entanglement in the requirement that parents demonstrate their consistency and sincerity by explaining the basis of their religious objections to Defendants. *Id.* at 295.

CONCUR:

RHESA HAWKINS BARKSDALE, Circuit Judge, specially concurring: I concur in the result and in all but part III. ("First Amendment Expressive Conduct Claims") of the majority opinion. *Id.*

Concerning part III., our court utilizes assumptions regarding the claims of coerced-speech and restraint on free expression, rather than directly addressing those claims. By doing so, we simply invite, if not encourage, needless, repetitive litigation. *Id.*

The wearing of the uniform at issue is not "expression" for First Amendment purposes. *Id.* Accordingly, there is no coerced speech. *Id.* Likewise, for the restraint-on-free-expression claim, and on this record, the requisite expression has not been demonstrated. *Id.*

Deciding that the wearing of such a school uniform is not expressive conduct alleviates the need to examine the coercion claim under the four-part *O'Brien* test regarding content-neutral restrictions on expressive conduct. *Id.* at 297 *citing United States v. O'Brien*, 391 U.S. 367, 377, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968).

My conclusion that the wearing of the school uniform at issue is not expressive does not, of course, dictate a result with regard to the Students' other First Amendment claim: restraint on free expression. *Id.*

Although "certain choices of clothing may have sufficient communicative content to qualify as First Amendment activity", the present record contains only vague depictions of messages the Students supposedly intend to convey through clothing choice. *Id.*

Because the Students have failed to articulate a particularized message likely to be understood by anyone, I would not examine their free expression challenge under the *O'Brien* test as the majority does. *Id.* Nor would I apply any degree of heightened scrutiny. *Id.* Instead, I would ask simply "whether the regulation is reasonably intended to accomplish a constitutionally permissible state objective". *Id. citing Karr* , 460 F.2d at 616. I conclude it is.*Id.*

In accordance with state law, and in response to a perceived need, FISD has prescribed and controlled the wearing of uniforms in its schools through a uniform policy that is consistent with fundamental constitutional safeguards. We should address this issue head-on. *Id.* at 298.

OUTCOME: The court affirmed the judgment of the district court.