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OVERVIEW

The Tenth Circuit charted a moderate course during this survey period in decisions involving constitutional issues. As is increasingly common, the court was faced with several cases arising from 42 U.S.C. § 1983 claims. On appeal from a case originating in New Mexico, the Tenth Circuit ruled that in a section 1983 action, involving the deprivation of familial association, the plaintiff must allege in his complaint that the defendant intended to deprive him of this right. In a case involving a dispute between Oklahoma police and a local pawnbroker, the Tenth Circuit wrestled with the difficult issue of what constitutes "state action" for purposes of section 1983. In an opinion arising out of a products liability action in Utah, the court expanded the definition of "minimum contacts" to include interstate manufacturers as well as distributors and retailers. Finally, in a case of particular interest to an increasingly credit-dependent society, the court delineated a privacy standard regulating the dissemination of an individual's credit and financial history by a credit reporting agency.

I. FAMILIAL ASSOCIATION UNDER 42 U.S.C. § 1983: *TRUJILLO V. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF SANTE FE*

A. *Facts*

Appellants, Rose Trujillo and her daughter Patricia Trujillo,[1] filed an action under 42 U.S.C. § 1983[2] alleging the wrongful death of their son/brother while he was incarcerated in a New Mexico county jail. Appellants contended that the various public officials and bodies of the City and County of Sante Fe had deprived them of their constitutional right of familial association.[3] The federal district court in New Mexico dismissed appellants' complaint, holding that the Trujillos had not alleged a constitutional right compensable under section 1983.[4]

B. *The Tenth Circuit's Holding*

As a preliminary matter, the court first addressed the issue of whether the Trujillos had standing to bring a section 1983 action. Find-

1. Trujillo v. Board of County Commissioners of the County of Santa Fe, 768 F.2d 1186, 1187 (10th Cir. 1985).

2. 42 U.S.C. § 1983 (1982) provides in pertinent part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action in law, suit at equity, or other proper proceeding for redress.

3. *Trujillo*, 768 F.2d at 1186.

4. *Id.* at 1187.

ing that the Trujillos clearly alleged an injury to their own constitutional rights,[5] that these rights in no way derived from the decedent's personal rights, and that the Trujillo's did not sue on the decedent's behalf, the Tenth Circuit held that the Trujillos had standing to assert a section 1983 claim.[6]

Turning to the issue of whether the Trujillos had a constitutionally protected interest in their relationship with their son/brother, the Tenth Circuit relied upon the Supreme Court's holding in *Roberts v. United States Jaycees*.[7] Citing this case for the proposition that familial relationships warrant constitutional protection,[8] Judge Seymour held that the Trujillos did allege a deprivation of the constitutionally protected relationship with their son/brother.[9]

Finally, the Tenth Circuit turned to the issue of whether the appellants were required to allege that the defendants intended to deprive them of their rights. Citing *Parratt v. Taylor*[10] for the proposition that section 1983 itself does not require a specific state of mind for actionability, the Tenth Circuit nevertheless pointed out that courts must closely examine the nature of the underlying constitutional right to determine whether any intent is required to deprive an individual of that right.[11] Finding that interference with a relationship protected by the freedom of intimate association required an allegation of intent, the Tenth Circuit dismissed the Trujillos' complaint for its failure to allege such intent.[12]

C. *Background*

The United States Constitution makes no explicit mention of a right to association.[13] The Supreme Court, however, has determined that the first amendment contains the theoretical underpinnings upon which a

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5. *Id.*

6. *Id.*; *see also* Bell v. City of Milwaukee, 746 F.2d 1205, 1241 (7th Cir. 1984); Angola v. Civiletti, 666 F.2d 1, 3 (2d Cir. 1981); White v. Talboys, 573 F. Supp. 49, 51 (D. Colo. 1983).

7. 468 U.S. 609 (1984).

8. The son/brother relationship the decedent had with the plaintiffs easily fell into a category of relationships which courts have found to be constitutionally protected. For cases in which the court has recognized liberty interests other than strictly parental or filial ones, see Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion) (zoning ordinance could not prohibit grandmother from living with her grandsons who were cousins); Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (foster parents have a liberty interest in their relationship with foster children); Wilson v. Taylor, 733 F.2d 1539 (11th Cir. 1984) (interference with dating relationship held actionable under section 1983); Rivera v. Marcus, 696 F.2d 1016, 1024-25 (2d Cir. 1982) (half-sister and foster mother had protected interest in relationship with siblings); Drollinger v. Milligan, 552 F.2d 1220, 1226-27 (7th Cir. 1977) (deprivation of grandfather's relationship with grandchild actionable under section 1983).

9. *Trujillo*, 768 F.2d at 1189.

10. 451 U.S. 527 (1981).

11. *Trujillo*, 768 F.2d at 1189.

12. *Id.* at 1190.

13. U.S. CONST. amend. I. While making no reference to a right of association, the Supreme Court has found that the first amendment phrase "[C]ongress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably

peripheral right of association exists.[14] This peripheral right takes two forms, the right of intimate association, and the right of expressive association. Though these two rights are derived from the same source, the nature and degree of constitutional protections afforded them differ.[15]

1. The Right To Intimate Association

The right to intimate association is a "fundamental element of personal liberty"[16] which, from a historical viewpoint, is based on one's status as a person.[17] It protects one's right to freely enter into and maintain "certain intimate human relationships."[18] These relationships are characterized by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[19] Consistent with this characterization, the Supreme Court has found the right of intimate association present in cases involving parent/child relationships,[20] family relationships,[21] marital relationships,[22] and a host of other circumstances involving intimate inter-personal relationships.[23]

2. The Right To Expressive Association

The foundation of the right to expressive association is found in the first amendment's speech and assembly clauses.[24] Expressive associa-

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to assemble" is a basis for finding a right of association. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

14. *NAACP*, 357 U.S. at 462.

15. *Roberts*, 468 U.S. at 609, 618.

16. *Id.*

17. *NAACP*, 357 U.S. at 462. In the classic DEMOCRACY IN AMERICA, Alexander de Tocqueville said:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundation of society.

A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 203 (Bradley ed. 1954).

18. *Roberts*, 468 U.S. at 617-18.

19. *Id.* at 620.

20. Loving v. Virginia, 388 U.S. 1 (1967).

21. *Roberts*, 468 U.S. at 619-20. "Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one's life," and therefore must be secured against undue intrusion by the state. *Id.*

22. Griswold v. Connecticut, 381 U.S. 479 (1965).

23. *See, e.g.*, Cleveland Board of Education v. Lafleur, 414 U.S. 632 (1974) (mandatory termination of pregnant school teachers unconstitutional); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (mandatory sterilization of habitual criminals violated the due process clause of the fourteenth amendment); Meyers v. Nebraska, 262 U.S. 390 (1923) (statute forbidding school children below eighth grade from studying German language is unconstitutional).

24. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958); Staub v. City of Baxley, 355 U.S. 313 (1958); Cantwell v. Connecticut, 310 U.S. 296 (1937); Sigma Chi v. Regents of Univ. of Colorado, 258 F. Supp. 515, 524 (D. Colo. 1966); *see also* Thomas v. Collins, 323 U.S. 516, 530 (1945) (where the Court explained, "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of

tion is said to protect "the right to express one's attitudes or philosophies by membership in a group or by affiliation with it."[25] Whether these goals are political, economic, social, or cultural has no bearing on the right's existence.[26]

3. Section 1983 and the Freedom of Association

A significant number of actions alleging the deprivation of intimate or expressive association have been brought under 42 U.S.C. § 1983. Section 1983 was designed to provide a remedy for those who were deprived of their fundamental constitutional rights by persons acting under color of law.[27] Section 1983 operates as a device enabling the private citizen to seek redress for unconstitutional acts committed by public officials. It pierces the cloak of governmental immunity. Under the statute, only civil liability may be imposed against the violating public official.[28]

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grievances. All these, though not identical, are inseparable."). For a concise note on the development of the right of expressive association, see Sloan, *Constitutional Law - First Amendment Right Of Association* - Roberts v. United States Jaycees, 33 U. KAN. L. REV. 771 (1985).

25. *Griswold*, 381 U.S. at 483.

26. *See NAACP*, 357 U.S. at 460-61, wherein the Court held that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."

27. Comment, *Actionability of Negligence Under Section 1983 and the Eighth Amendment*, 127 U. PA. L. REV. 533 (1978). Black's Law Dictionary defines "color of law" as: "[a]cts 'under color of any law' of a State include not only acts done by state officials within the bounds or limits of their lawful authority, but also acts done without and beyond the bounds of their lawful authority. . . ." BLACKS LAW DICTIONARY 241 (5th ed. 1979). For judicially created definitions of "color of law," see Monroe v. Pape, 365 U.S. 167 (1961) (misuse of power made possible only because wrongdoer is clothed with authority of state law is action under "color of law"), overruled on other grounds by Monnell v. Dept. of Social Services of City of New York, 436 U.S. 658 (1978); Addickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (person acting under "color of law" must do so with knowledge of and pursuant to a state statute); Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (plaintiff must establish not only that defendant acted under color of the statute, but also that defendant's actions are properly attributable to the state whose law was involved).

For a list of individuals and institutions which can and cannot act under under "color of state law," *compare* Lamb v. Farmer's Ins. Co., 586 F.2d 96 (8th Cir. 1978) (Attorney's conduct in representing client does not constitute action under color of state statute) *with* Buller v. Buechler, 706 F.2d 844 (8th Cir. 1983) (attorney who used state's unconstitutional garnishment procedures against civil rights plaintiff was acting under "color of state law"); *compare* Polk County v. Dodson, 454 U.S. 312 (1981) (public defender does not act "under color of state law" when performing lawyer's traditional functions as counsel in criminal proceedings) *with* Smith v. Bacon, 699 F.2d 434 (8th Cir. 1983) (allegations that public defender ineffectively represented civil rights plaintiff because of agreement with state court judge implies actions "under color of state law"); *compare* Meredith v. Allen County War Memorial Hospital Comm., 397 F.2d 33 (6th Cir. 1968) (hospitals action in dismissing physician from staff may be "under color of law" where hospital is only one in county) *with* Kaczananowski v. Medical Center Hospital, 612 F. Supp. 688 (D.C. Vt. 1985) (hospital receiving federal funding, tax exemption, and licensing privileges does not act "under color of law" in denying staff privileges).

28. Section 1983 is the civil provision of the 1871 act. *See* Comment, *Actionability of Negligence Under Section 1983 and the Eighth Amendment*, 127 U. PA. L. REV. 533 (1978). 18 U.S.C. § 242 (1983) is the criminal provision.

Section 1983 provides a mechanism to rectify official misconduct,[29] yet it does not contain language describing the conduct required to trigger the mechanism. There are no express standards delineating what elements must be present in an official's conduct before a section 1983 action can be initiated by a private citizen.[30] The task of developing such criteria has largely been left to the courts.

Neither the actual provisions of section 1983 nor the legislative history of the Act indicate that a defendant must act with intent before being subject to a section 1983 action.[31] In spite of this, the courts' decisions prior to the Supreme Court's findings in *Monroe v. Pape*[32] were almost uniform in requiring that the defendant's conduct be accompanied by an intent to deprive the defendant of a constitutionally protected right.[33]

In *Bottone v. Lindsey*,[34] the Tenth Circuit held that a defendant must have acted with intent to deprive a plaintiff of a right protected by either federal law or the Constitution. The court noted that as a condition precedent to recovery, the plaintiff must show that "the state court proceedings [which led to the alleged violation] must have been conducted with a *purpose* to deprive a person of his property without due process of law."[35]

An additional rationale underlying the courts' intent requirement was revealed as one of judicial economy. The First Circuit has commented that to literally interpret section 1983 would "reach results so bizarre and startling that the legislative body would probably be shocked into the prompt passage of amendatory legislation."[36] One such "bizarre" result was a burgeoning number of civil rights cases being brought in federal court.[37] The courts have also noted that allowing section 1983 actions which do not require intent would require the development of a substantial body of federal tort law which would significantly undermine the original understanding of the proper balance

29. Section 1983 provides for "action at law, suit in equity, or other proper proceedings for redress." 42 U.S.C. § 1983 (1982).

30. A facial examination of the language of section 1983 uncovers no standard of conduct requirements. *See* Note, *Basis of Liability in a § 1983 Suit: When is the State-of-Mind Analysis Relevant?*, 57 IND. L.J. 459 (1982).

31. *See* Comment, *Actionability of Negligence Under Section 1983 and the Eighth Amendment*, 127 U. PA. L. REV. 533 (1978).

32. 365 U.S. 167 (1961), *rev'd on other grounds*, Monell v. Dept. of Social Services of City of New York, 436 U.S. 658 (1978) (overruling the holding in *Monroe* that a municipal corporation is not a person within the meaning of 42 U.S.C. § 1983 (1982)).

33. *See* Snowden v. Hughes, 321 U.S. 1 (1943) (intent required to bring an equal protection action under section 1983); Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953) (section 1983 liability exists only where defendant subjectively realized acts would deprive plaintiff constitutional rights); Bottone v. Lindsey, 170 F.2d 705 (10th Cir. 1948).

34. 170 F.2d 705 (10th Cir. 1948), *cert. denied*, 336 U.S. 944 (1949).

35. *Id.* at 707 (emphasis added).

36. Francis v. Lyman, 216 F.2d 583, 587 (1st Cir. 1954).

37. The First Circuit's fear appears well-founded. The number of civil rights suits brought in federal courts under section 1983 has increased from 296 in 1961 to 12,944 in 1980. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 61 (1980).

between the national and state governments.[38]

An alternative explanation for the court's insistence that there be a "purposeful" intent may be found in the language of section 1983's criminal counterpart, 28 U.S.C. § 242.[39] In order to pursue a remedy under section 242, the plaintiff is required to allege that the defendant's acts were "willful." Thus, in *Screws v. United States*,[40] the Supreme Court threw out a defendant's conviction because the trial judge failed to instruct the jury that the defendant's conduct had to be willful in order to be culpable under section 242.[41] It is possible that because of the similarities between section 242 and section 1983, the courts have applied the intent standards interchangeably.

In *Monroe v. Pape*,[42] however, the court changed direction and made it abundantly clear that purposeful intent was no longer the requirement for section 1983 actions. Writing for the majority, Justice Douglas stated:

> In the *Screws* case we dealt with a statute that imposed criminal penalties for acts "wilfully" done. We construed that word in its setting to mean the doing of an act with "a specific intent to deprive a person of a federal right. . . . We do not think that gloss should be placed on § 1979 which we have here. The word "wilfully" does not appear in § 1979. Moreover, § 1979 provides a civil remedy, while in the *Screws* case we dealt with a criminal law challenged on the ground of vagueness.[43]

Twenty years later the Supreme Court echoed *Monroe* in *Parratt v. Taylor*[44] by holding that section 1983 affords a civil remedy for depriva-

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38. For an in-depth analysis of the repercussions of section 1983 on the federal courts see Brockett, *Federalism, Section 1983 And State Law Remedies: Curtailing The Federal Civil Rights Dockets By Restricting The Underlying Right*, 43 U. PITT. L. REV. 1035 (1982).

39. 18 U.S.C. § 242 (1982) provides: "Whoever, under color of any law, statute, ordinance, regulation, or custom, *willfully* subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of United States . . . shall be fined . . . or imprisoned . . ." (emphasis added).

40. 325 U.S. 91 (1945).

41. *Id.* at 104.

42. 365 U.S. 167 (1961). In *Monroe*, plaintiff alleged that police broke into his home without a warrant, forced him and his family to get out of bed, beat him and his family, ransacked his home, and held him in custody for ten hours without filing any charges. The police did not allow Monroe to make a phone call to his attorney or to appear before a magistrate. *Monroe*'s holding that municipal corporations were not "persons" within the meaning of 42 U.S.C. § 1983 was overruled by Monell v. Dept. of Social Services of City of New York, 436 U.S. 658 (1978), wherein Justice Brennan held that municipalities and other local governmental units are included among those "persons" to whom 42 U.S.C. § 1983 does apply. The holding in *Monroe* concerning the role intent plays in section 1983 actions seems to have escaped intact.

43. *Id.* at 187. Section 1979 was incorporated into 42 U.S.C. § 1983 in 1979. Thus, the *Screws* discussion of the requisite elements for a section 1979 action applies also to section 1983. The impact of *Monroe* on the relationship between the federal judiciary and the American citizen was inestimable. It acted to bring the federal court system down from its ivory tower and into the mainstream of American life. Professor Bernard J. Ward of the University of Texas observed that "prior to [the *Monroe*] decision the work of the federal courts had as much importance in the life of the average American citizen as did the poetry of Algernon Swinburne." Powell, *Bernard J. Ward*, 61 TEX. L. REV. 1, 2 (1982).

44. 451 U.S. 527 (1981) (lack of due care does not rise to the level of a constitutional

tions of federally protected rights "without any express requirement of a particular state of mind."[45] Yet, in spite of this reaffirmation, *Monroe* and *Parratt* have proven to be unhelpful. "State of mind" remains an important element in section 1983 actions. A particular state of mind may be required to make out a violation of the constitutional right involved. As pointed out by the Tenth Circuit in *Trujillo*, it is well-established that recovery for deprivations of equal protection requires proof of discriminatory intent on the part of the state actor.[46] Deprivations under the eighth amendment require a showing of *deliberate* indifference,[47] and some infringements of first amendment rights require proof that the state's action was intended to deprive an individual of his protected speech or right of association.[48]

In *Baker v. McCollan*,[49] the Court noted that some constitutional violations may, by their nature, require an element of intent.[50] As such, the relevant inquiry must focus not on what state of mind section 1983 requires, but on what state of mind, if any, is required to prove a violation of the underlying constitutional right.[51] Under this analysis, the allegation of wrongful intent is required only when recovery for the underlying deprived right is dependent upon a showing of wrongful intent.

D. *Analysis*

In *Trujillo v. Board of County Commissioners of County of Sante Fe*,[52] the Tenth Circuit correctly identified the underlying intent analysis as the proper approach. It cited *McKay v. Hammock*[53] for the proposition that a court must closely examine the nature of the underlying constitutional right to determine if the section 1983 deprivation of that right requires intent. Yet, in spite of recognizing the proper test, the court actually performed very little analysis along the *McKay* guidelines. In fact, the Tenth Circuit never determined if the deprivation of intimate association, by itself, requires intent.

Instead, the court stated that the freedom of intimate association can be juxtaposed with the freedom of expressive association in order to

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deprivation under section 1983), *rev'd on other grounds*, Daniels v. Williams, 106 S. Ct. 662 (1986).

45. *Parratt*, 451 U.S. at 535.

46. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (discriminating impact of hiring practices in light of the fourteenth amendment equal protection clause).

47. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976) (standard of care in medical claims brought pursuant to the eighth amendment).

48. *See, e.g.*, Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977) (section 1983 claim can be brought only if employer's decisive motive behind terminating employment was to punish for the exercise of constitutional rights).

49. 433 U.S. 137 (1979), *on remand*, 601 F.2d 903 (5th Cir. 1979).

50. *Id.* at 140.

51. *See* Comment, *The Evolution Of The State Of Mind Requirement Of Section 1983*, 47 TUL. L. REV. 870 (1973); Kirkpatrick, *Defining A Constitutional Tort Under Section 1983: The State Of Mind Requirement*, 46 U. CIN. L. REV. 45 (1977).

52. 768 F.2d 1186 (10th Cir. 1985).

53. 730 F.2d 1367 (10th Cir. 1984).

determine the necessity of intent.[54] Stating that deprivations of expressive association must require intent, Judge Seymour completed the analogy by holding that deprivations of intimate association must also require intent. Yet the manner in which the Tenth Circuit arrived at its conclusion, that deprivations of expressive association require allegations of intent, is unclear. Nowhere in its decision does the Tenth Circuit cite an authoritative source for its conclusion that the deprivation of expressive association requires allegations of intent. Rather, the Tenth Circuit observed in a footnote that since the common law torts of invasion of privacy and interference with the marital relationship required allegations of intent, so too must interference with expressive association.[55]

The court's selection of expressive association as an analogy to intimate association is equally confusing in light of the Supreme Court's holding in *Roberts v. United States Jaycees*.[56] In *Roberts*, the Jaycees argued that their choice to exclude women from the ranks of their membership was protected by their freedom of association.[57] The Court's first step in deciding the case was to determine the nature of the constitutional claims and their attendant protections.[58] The Supreme Court held, consistent with its earlier decisions,[59] that the degree of constitutional protection given freedom of association varies depending upon whether the claim involves expressive[60] or intimate association.[61] Finding that the Jaycees' claims involved expressive association, the Court held that the states' compelling interest in prohibiting gender discrimination justified any adverse impact that the Jaycees would suffer by admitting women.[62]

Disturbingly, the Tenth Circuit cited *Roberts* in support of its decision to analogize intimate with expressive association. The Tenth Circuit cited *Roberts* for the proposition that " '[t]he intrinsic and instrumental features of constitutionally protected association may, of course, coincide.' "[63] Indeed, they may. However, a closer reading of Justice Brennan's decision in *Roberts* reveals that the majority viewed the two

54. *Trujillo*, 768 F.2d at 1189-90.

55. *Id.*

56. 468 U.S. 609 (1984).

57. *Id.* at 621.

58. *Id.* at 617-18.

59. *Compare* Loving v. Virginia, 388 U.S. 1 (1967) *with* Railway Mail Association v. Corsi, 326 U.S. 88 (1945). *See generally*, Runyon v. McCrary, 427 U.S. 160 (1976) (Powell, J., concurring).

60. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Larsen v. Valente, 456 U.S. 228 (1982); *In re* Primus, 436 U.S. 412 (1978); Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

61. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion); Wisconsin v. Yoder, 406 U.S. 205 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). Justice Brennan clearly views family relationships as falling under intimate expression, commenting that the relationships which are entitled to the protections attendant to intimate association are "those that attend the creation and sustenance of a family . . ." *Roberts*, 468 U.S. at 619.

62. Speaking for the majority, Justice Brennan disposed of the action by holding that the "[J]aycees chapters lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women." *Roberts*, 468 U.S. at 621.

63. *Trujillo*, 768 F.2d at 1190 (quoting *Roberts*, 468 U.S. at 618).

types of associations as falling into two distinct categories. The validity of equating two rights which the Supreme Court has held to be distinct from one another is at best, questionable.

Furthermore, the Tenth Circuit's result herein is also questionable in light of other circuit courts' holdings, namely, that section 1983 actions may be based upon gross negligence claims which, by definition, do not require intent.[64] In *Jenkins v. Avrett*,[65] wherein a police officer negligently shot the plaintiff, the Fourth Circuit held that a section 1983 action could be based on a claim of gross negligence. The Fifth Circuit in *Roberts v. Williams*[66] followed the Fourth Circuit's lead by finding that a section 1983 claim could be brought against a grossly negligent prison superintendent. If, as the Fourth and Fifth Circuits have held, section 1983 claims may be based on causes of action which do not require intent, then the Tenth Circuit's discussion of whether the deprivation of familial association requires intent appears to be ill-considered.

Even though the Tenth Circuit's analysis conflicts with those of the Fourth and Fifth Circuits, it does comport with Justice Rehnquist's statement that section 1983 should not be interpreted to "result in every legally cognizable injury, which may have been inflicted by a state official acting under 'color of law.' "[67] Therefore, the 1970 and 1971 decisions of the Fourth and Fifth Circuits may no longer follow the Supreme Court's section 1983 philosophy because they do not conform to the spirit of Justice Rehnquist's warning in *Paul v. Davis*.[68]

E. *Conclusion*

It is apparent that *Trujillo* represents an extension of the judiciary's current trend towards limiting the availability of section 1983 actions. This reaction is understandable. In the last decade, the analysis adopted in *Monroe v. Pape* has created problems unforeseen by the *Monroe* court. The creation of a tremendous backlog of cases, a dual system of remedies available to the injured plaintiff, and a threat to the principles of federalism are significant policy considerations that may have influenced the Tenth Circuit's holding in *Trujillo*.[69]

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64. It should be noted that gross negligence involves a particularly high probability of foreseeable injury and is thus only a short step away from intentional conduct. For a more detailed discussion of the amenability of gross and simple negligence claims to section 1983 actions, see Kirkpatrick, *supra* note 51.

65. 424 F.2d 1228 (4th Cir. 1970).

66. 456 F.2d 1228 (5th Cir. 1971), *cert. denied*, 92 S. Ct. 83 (1972).

67. Paul v. Davis, 424 U.S. 693, 699 (1976) (Police Chief's distribution of flyers having petitioner's name and photograph which warned area merchants against shoplifters held not to violate fourteenth amendment).

68. *Id.*

69. For an insightful article on these criticisms, see, Blackmun, *Section 1983 and Federal Protection of Individual Rights - Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1 (1985).

Blackmun finds the "backlog of cases" argument least persuasive. Asserting that all must agree with the proposition that any case load burden is worth bearing when the action is meritorious, Blackmun concludes that the critics are necessarily assuming that most section 1983 suits are without merit. Blackmun is not ready to make this conclusion,

However, the fundamental fairness with which the Tenth Circuit treated the Trujillos' case is questionable. In deciding this issue of first impression, the court held that intent must be specifically plead in section 1983 claims alleging the deprivation of familial association. Yet instead of remanding the case and allowing the Trujillos' the opportunity to amend their complaint in conformity with the holding, the Tenth Circuit took a harsher course and upheld the dismissal of the action.

II. Due Process Rights of a Pawnbroker in Consigned Property: *Wolfenbarger v. Williams*

A. Facts

Appellant, Margaret Wolfenbarger, operated a pawnshop in Lawton, Oklahoma. Acting on a report of stolen property, police entered appellant's shop and discovered the allegedly stolen property.[70] In accordance with then-current police policy, a "hold" was placed on the property.[71] This "hold" was an official police request that the pawnshop not sell or dispose of items that might be needed in criminal investigations.[72]

Subsequently, the Lawton District Attorney issued a directive to the police department advising that a new procedure was to be followed when stolen property was discovered in pawnshops.[73] The directive stated that all suspected stolen property was to be seized, placed on property receipt with the police department, and then, pursuant to Title 22, sections 1321 of the Oklahoma Statutes,[74] disposed of in accordance

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knowing no statistics or reports showing section 1983 actions to be more frivolous than actions not involving section 1983.

Addressing the concern over the creation of a dual system of remedies available to an injured plaintiff, Justice Blackmun believes that the combined effect of the Court's holdings in *Parratt*, Hudson v. Palmer, 468 U.S. 517 (1984), and Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984), allays these fears. These cases have made it difficult for a plaintiff who has only a state-law tort claim against a state official to hale the official into federal court under the guise of a section 1983 action.

Turning to section 1983's effects on federalism, Blackmun reminds us that it is important to remember that section 1983 is but one source of protection in the "legal universe." Justice Blackmun goes on to say that much of the criticism aimed at section 1983 is misdirected. What critics are really concerned with is the breadth of the constitutional rights underlying the section 1983 action - a separate action which, according to Blackmun, deserves to be debated on its own grounds.

70. Wolfenbarger v. Williams, 774 F.2d 358, 359 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 1376 (1986).

71. *Id.*

72. *Id.* at 359-60.

73. *Id.* at 360.

74. Okla. Stat. tit. 22, § 1321 (1986) provides:

> Stolen property to be held by officer. When property alleged to have been stolen or embezzled, comes into the custody of a peace officer, he must hold it subject to the order of the magistrate authorized by [section 1322] to direct the disposal thereof.

Okla. Stat. tit. 22, § 1322 (1986) provides:

> Stolen property - Magistrate to order delivery, when. On satisfactory proof of the title of the owner of the property, the magistrate before whom the information is laid, or who examines the charge against the person accused of stealing or embezzling the property, may order it to be delivered to the owner on his paying the

with a magistrate's determination of proper title.

Acting on this directive, police returned to appellant's pawnshop and seized the property previously placed on "hold." Police Officer Williams, upon direct orders from the Lawton assistant district attorney turned the property over to the party who reported it stolen.[75] This action, however, did not follow the procedure set forth in sections 1321 and 1322, as there was no judicial determination as to who held proper title to the disputed property before it was released.[76]

Appellant filed a replevin action against Officer Williams in state district court.[77] The state court found the action moot because Williams was no longer in possession of the property.[78] Appellant then filed this action under 42 U.S.C. § 1983[79] in federal district court alleging that the defendants' conduct had deprived her of constitutionally protected due process rights. The federal district court held that a pawnbroker does not have any property interest in stolen goods which have been consigned for sale.[80] Absent a property interest, no due process rights were present[81] and the court granted defendants' motion for summary judgment.[82]

B. *The Tenth Circuit's Holding*

The Tenth Circuit, Judge Seth dissenting, reversed the judgment of the federal district court and remanded the cause for proceedings consistent with its opinion.[83] The Tenth Circuit held that the district court erred on both issues presented: whether a pawnbroker has a property interest in stolen property acquired in good faith,[84] and whether the post-deprivation remedies available pursuant to Oklahoma law were adequate to prevent a violation of Wolfenbarger's due process rights.[85]

The court, relying upon *Snethen v. Oklahoma State Union of Farmer's Educational & Cooperative Union*,[86] held that a good faith purchaser of stolen property, while unable to hold title against the true owner, has a "qualified possessory interest" in the property and has "lawful possession against all the rest of the world."[87] In light of this, the appellant was held to have a substantial economic interest in the stolen items and

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reasonable and necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand and receive the property.

75. *Wolfenbarger*, 774 F.2d at 360.
76. *See supra* note 74 and accompanying text.
77. *Wolfenbarger*, 774 F.2d at 360.
78. *Id.* at 360-61.
79. *See supra* note 2 and accompanying text.
80. *Wolfenbarger*, 774 F.2d at 361.
81. *Id.*
82. *Id.*
83. *Id.* at 365.
84. *Id.* at 362.
85. *Id.* at 365.
86. 664 P.2d 377 (Okla. 1982) (a person can have an insurable interest in stolen property).
87. *Wolfenbarger*, 774 F.2d at 361 (citing *Snethen*, 664 P.2d at 381).

was therefore entitled to due process protections.[88]

The panel's decision regarding the applicability of post-deprivation procedures to remedy potential due process violations was guided by *Lavicky v. Burnett*.[89] There, the court reasoned that where an official's conduct, resulting in the invalid deprivation of property, was *planned* and *authorized*, post-deprivation remedies were not sufficient to prevent a violation of due process.[90]

Adopting this line of thought, the Tenth Circuit held that because the nature of the district attorney's directive and the assistant district attorney's order were planned and authorized,[91] the post-deprivation remedies available to Wolfenbarger could not prevent her from bringing an action under the due process clause.[92]

C. *Background*

1. Pawnbroker's Property Interest In Pledged Items

All due process queries must involve a two-step analysis. It must first be determined if the action involves an interest worthy of due process protections. Then, if the first requirement is met, it must be determined whether the procedures protecting the interest comply with the due process clause.[93]

The Tenth Circuit relied upon Oklahoma statutory law[94] and common law in determining the nature and extent of Wolfenbarger's property interest in the stolen property. According to the Oklahoma Pawn Shop Act,[95] a pawnbroker is merely the pledgee of property consigned to her until thirty days after the date fixed as the maturity date in the pawn agreement.[96] As such, the pawnbroker holds no title to the pledged property until those thirty days have expired.[97] Rather, the pawnbroker has a special property interest in the items pledged.[98]

This special property interest was held to be sufficient to merit due process protections when the Oklahoma Supreme Court held: "[a] good faith purchaser for value acquires an interest that is lawful and enforceable against all the world but the legal owner. Although it is only a qualified and possessory interest, it is lawful and enforceable to a very

88. *Id.* at 362.
89. 758 F.2d 468 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 882 (1986).
90. *Id.* at 477.
91. *Wolfenbarger*, 774 F.2d at 365.
92. *Id.*
93. J. NOWAK, R. ROTUNDA, J. NELSON YOUNG, CONSTITUTIONAL LAW 477 (1978).
94. OKLA. STAT. tit. 22, §§ 1321, 1322 (1986); *see supra* note 74.
95. OKLA. STAT. tit. 59, §§ 1502-12 (1972).
96. OKLA. STAT. tit. 59, § 1510(d) (1972).
97. OKLA. STAT. tit. 59, § 1511(b) (1972) states that "pledged goods not redeemed within thirty (30) days following the last fixed maturity date may thereafter, at the option of the pawnbroker, be forfeited and become property of the pawnbroker."
98. *Wolfenbarger*, 774 F.2d 358 (quoting Miller v. Horton, 69 Okla. 147, 170 P. 509, 511 (1917)).

large extent."[99] Therefore, Wolfenbarger's possession of the consigned items vested in her a lawful interest in those items.

In deciding which deprivations require a prior hearing and which do not, the Supreme Court has employed a balancing test, weighing the property interest affected and the added protection a predeprivation hearing would give that interest against the government's interest in not providing such a hearing.[100] By form, the outcome of this test depends upon the fact patterns entered into these categories. Thus, the determination of whether post-deprivation procedures are adequate in meeting due process requirements is very fact-specific and largely turns upon the nature of the depriving act.[101]

In *Parratt v. Taylor*,[102] the Supreme Court held that random, unauthorized acts of public officials negligently depriving an individual of property would not violate that individual's due process rights if the state provided for meaningful post-deprivation hearings. The Court recognized that absent either a practical opportunity to provide predeprivation hearings or a necessity for quick action, post-deprivation procedures satisfied due process.[103] Keeping in mind that the conduct complained of is unauthorized and random, the Court reflected that it would be untenable to require the state to provide a predeprivation hearing when the state had no way of knowing when or where the deprivation would occur. The Court stated that:

> [i]t is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under 'color of law,' is in almost all cases beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation.[104]

However, where the random and unauthorized deprivation caused by the official, was not momentary, but rather occurred over a substantial period of time, the courts have held that post-deprivation proce-

99. Snethen v. Oklahoma State Union of the Farmer's Educational & Cooperative Union, 664 P.2d 377, 381 (Okla. 1983).

100. *See* Mathews v. Eldridge, 424 U.S. 319 (1976); *see also*, Foley, *Unauthorized Conduct of State Officials Under The Fourteenth Amendment:* Hudson v. Palmer *and the Ressurection of Dead Doctrines*, 85 COLUM. L. REV. 837 (1985) (criticizing the Court's balancing approach in *Mathews*).

101. *See* Hudson v. Palmer, 468 U.S. 517 (1984); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Lavicky v. Burnett, 451 U.S. 527 (1981); Parratt v. Taylor, 758 F.2d 468 (10th Cir. 1985), *cert. denied sub nom.*, Moore v. Lavicky, 106 S. Ct. 982 (1986); Coleman v. Turpen, 697 F.2d 1341 (10th Cir. 1982).

102. 451 U.S. 527 (1981). *Parratt* involved a state prisoner suing prison officials under section 1983 alleging that the officials had negligently lost Parratt's noncontraband property. Their negligence, according to the prisoner, deprived him of due process under the fourteenth amendment. *But see supra* note 44.

103. *Lavicky*, 451 U.S. at 539. The Court said that "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking . . . satisf[ies] the requirements of procedural due process." *Id.*

104. *Id.* at 541.

dures are not a valid remedy. In *Coleman v. Turpen*,[105] the Tenth Circuit held that a prisoner may assert a claim under section 1983 where the state not only improperly seized the individual's property but retained it as well. The court, instead of focusing on whether the official's acts were random or unauthorized, stressed the practicability with which the state could have held a predeprivation hearing.[106] Because the retention of the prisoner's property spanned some two and a half weeks, the court found that a prehearing to determine the validity of the retention was practical.

In *Hudson v. Palmer*,[107] the Supreme Court extended its rationale in *Parratt* to cover not only cases of negligent conduct by officials but also intentional conduct.[108] The Court realized that a state could no better foresee its employees' random and unauthorized intentional acts then it could foresee their random and unauthorized negligent acts.[109] In dismissing petitioner Palmer's assertion that post-deprivation hearings are inadequate to protect against a violation of due process where an agent of the state is in a position to provide a predeprivation hearing, the Court stressed that "[w]hether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the state is in a position to provide for predeprivation process."[110]

In spite of whether the state official's conduct is negligent or intentional, where the conduct complained of is held to be authorized by the state, the courts have been consistent in holding that post-deprivation

105. 697 F.2d 1341 (10th Cir. 1983).

106. The court stated: "It might have been impractical for the State to give Mr. Coleman a hearing before it seized the [property] during his arrest. However, the deprivation Mr. Coleman challenges is not the seizure of the [property], but its retention by the State until his execution. A hearing to determine the propriety of this retention is not impractical." *Id.* at 1344.

107. 468 U.S. 517 (1984).

108. Thus, implicitly affirming the Tenth Circuit's holding in *Coleman* on the practicability of hearing test. In *Hudson* prison guards conducted a shakedown search of petitioners. During the search the guard found a ripped pillowcase in the cell's trashcan. Thereupon, charges were filed against petitioner Palmer for destruction of state property. The Supreme Court held that a prisoner had no reasonable expectation of privacy in his cell entitling him to the fourth amendment protection against unreasonable searches. *Id.* at 536.

109. The court explained:

> The underlying rationale of *Parratt* is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur. We can discern no logical distinction between negligent and intentional deprivations of property insofar as the 'practicability' of affording predeprivation process is concerned. The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employee than it can anticipate similar negligent conduct.

Id. at 533. For a fuller discussion on the rationale underlying the *Parratt* decision, see Erickson, *Negligent Deprivation of Property*, 7 NAT'L J. CRIM. DEF. 2290 (1981).

110. *Hudson*, 468 U.S. at 534. For an alternative analysis asserting that the Court's decision in *Hudson* turned upon the nature of the inmate's property interest, see Note, *Prisoners' Fourth Amendment Right To Privacy: Expanding A Constricted View*, 22 HOUS. L. REV. 1065 (1985).

proceedings do not suffice to prevent due process violations.[111] This reflects the basic proposition that once a state has conferred a property interest upon an individual, it may not strip that interest away without appropriate procedural safeguards.[112] The Supreme Court expressly adopted this proposition in *Logan v. Zimmerman Brush Company*,[113] by holding that *Parratt* does not apply to section 1983 actions when the deprivation was caused by an established state procedure.

D. *Analysis*

The pertinent question asked by the Tenth Circuit in *Wolfenbarger* was "are the acts of state officials which violate that state's laws 'authorized' acts of that state?" Speaking for the majority, Judge Seymour argued that the courts have extended "authorized state conduct" to include instances where the official's conduct violates both due process safeguards *and* the state procedures conforming with those safeguards.[114] As support, Seymour noted that the Second Circuit rejected the notion that authorized state conduct involves only the legislative promulgation of procedures, and found that individual conduct could constitute state conduct.[115]

Previously, in *Lavicky v. Barnett*,[116] the Tenth Circuit followed a similar conceptual framework, and held that a sheriff's and prosecutor's acts which were in contravention of established state procedures were nevertheless "planned and authorized" state action. Finding that the acts involved several state officials and were first planned and then acted upon, the court held that these types of acts are "not the sort of action for which postdeprivation process will suffice."[117]

Holding the facts of *Wolfenbarger* to be clearly analogous to those in *Lavicky*, the Tenth Circuit found the district attorney's, assistant district attorney's, and police officer's acts to be "authorized" state conduct under the *Lavicky* standard. Since the conduct leading to the deprivation of Wolfenbarger's property interest was "authorized" state conduct, post-deprivation remedies did not suffice in preventing a due process violation.

This result appears to be sound, particularly in view of *Lavicky*'s realistic interpretation of the relationship between states and state offi-

111. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Garcia v. Salt Lake County, 768 F.2d 303 (10th Cir. 1985); Hewitt v. City of Truth Or Consequences, 758 F.2d 1375 (10th Cir.), *cert. denied*, 106 S. Ct. 131 (1985).

112. *Logan*, 455 U.S. at 432 (quoting Vitek v. Jones, 445 U.S. 480 (1980)).

113. 455 U.S. 422 (1982).

114. *Wolfenbarger*, 774 F.2d at 364-65.

115. *See* Patterson v. Coughlin, 761 F.2d 886 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 879 (1986). *Coughlin* points out that allegations of procedural due process violations by certain individual government employees, as opposed to direct challenges to state procedures or the lack thereof, have long been accepted as constituting state action and forming the basis for a claim under the civil rights statutes. *Id.*

116. 758 F.2d 468 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 882 (1986).

117. *Id.* at 473.

cials. As recognized in *Patterson v. Coughlin*,[118] the mere promulgation of regulations by a state does not ensure their enforcement. As the mechanism of enforcement, the state official is the medium through which the state manifests itself. Therefore, state officials assume the position of the state — they become the state. Following this to its logical conclusion, the state official's actions become the state's actions.

Rejecting this argument in his dissent, Judge Seth distinguished the conduct of the state and its actors, stating that the district attorney "is not the 'state' for the purpose of the fourteenth amendment."[119] Accusing the majority of viewing the facts from the point of view of the state employees rather than the state itself, Judge Seth said that the majority's opinion ignored the holdings of *Hudson* and *Parratt*. However, Seth failed to address the majority's interpretation of *Coughlin*. It is from this case that the rationale extending "authorized" state conduct to individual state actors is gleaned.

The Tenth Circuit also correctly addressed *Hudson*'s directive that the controlling factor in determining the necessity of predeprivation hearings is whether the state is in a position to provide such a hearing. The majority followed this line of reasoning by pointing out that Oklahoma was not only in a position to provide a predeprivation hearing, but had expressly done so through the passage of sections 1321 and 1322.[120]

The ease with which the Tenth Circuit treats this issue, however, is unsettling because section 1321 does not provide for any *predeprivation* hearing. Rather, as the majority itself points out, sections 1321-22 are a recognition by the Oklahoma legislature that the most "timely and efficient" point at which to adjudicate property interests is "*after* police initially take possession of property and before they release it."[121] The deprivation Wolfenbarger suffered occurred the moment Officer Williams confiscated the allegedly stolen property. Sections 1321 and 1322 come into play only after the confiscation has occurred. It is difficult to understand how the statute provides for a predeprivation hearing when it becomes operational only after the deprivation has occurred.

Nevertheless, the Tenth Circuit's holding represents a logical extension of decisions on the adequacy of post-deprivation hearings. The court not only addressed *Parratt's* authorized/unauthorized act test, but also took into account the reasonableness standard of *Hudson*. Firmly embedded in federal appellate court precedent and armed with a realistic interpretation of the relationship between the state and state actors, the Tenth Circuit's outcome here appears to be both sound and just.

118. 761 F.2d 886 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 879 (1986).
119. *Wolfenbarger*, 774 F.2d at 367 (Seth, J., dissenting).
120. *Id.* at 363.
121. *Id.*

III. MINIMUM CONTACTS: *FIDELITY AND CASUALTY CO. OF NEW YORK V. PHILADELPHIA RESINS CORP.*

A. *Facts*

Appellant, Philadelphia Resins Corporation (PRC), was a manufacturer/distributor of synthetic fiber cables chartered under the laws of Pennsylvania.[122] Appellee Fidelity and Casualty Company of New York was the insurer of Compagnie Generale de Geophysique (CGG).[123]

CGG was involved in a Utah project using seismic equipment to locate oil fields. CGG contracted with Randall Rogers, a helicopter pilot who resided in Arkansas, to transport CGG's equipment and personnel to and from sites in Utah.[124] Upon seeing PRC's advertisement for lifting cables in a national trade magazine, Rogers contacted PRC from Arkansas and ordered their "Phillystran" cables.[125] When ordering, Rogers informed a PRC employee that the cable was to be used in the "rocky mountain region."[126] PRC shipped the cables to Rogers' Arkansas address whereupon Rogers took them to Utah. While lifting CGG's equipment with his helicopter, the "Phillystran" cable snapped, causing the equipment to fall and sustain approximately $120,000 in damages.[127]

CGG brought suit against both Rogers and PRC in the United States District Court in Utah.[128] CGG's insurer, Fidelity and Casualty Company of New York, was substituted for CGG and the case then tried before a jury.[129] The jury's special verdict found Rogers not negligent, CGG 12% negligent, and PRC 88% negligent for selling a defective product unreasonably dangerous to the user.[130] PRC appealed, challenging the validity of Utah's assertion of in personam jurisdiction over it.[131] The Tenth Circuit granted certiorari, considering only the issue of in personam jurisdiction.[132]

B. *The Tenth Circuit's Holding*

The Tenth Circuit reversed the district court's entry of judgment in favor of the appellee and dismissed the action.[133] Looking first to the law of the forum,[134] the Tenth Circuit found that PRC fell under Utah's

122. Fidelity and Casualty Co. of New York v. Philadelphia Resins Corp., 766 F.2d 440, 441-42 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 853 (1986).
123. *Id.* at 441.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 442.
128. *Id.* The suit was based on diversity jurisdiction. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. The question of whether a federal court has in personam jurisdiction over a nonresident defendant in a diversity case is determined by the law of the forum state. Yarbrough v. Elmer Bunker & Associates, 669 F.2d 614 (10th Cir. 1982).

long-arm statute.[135] Then the court turned to the dispositive issue of this case: Were PRC's contacts with Utah sufficient to support the exercise of in personam jurisdiction?

The circuit's determination of this issue hinged upon the quality and extent of PRC's contacts.[136] Factual findings by the trial court that PRC had never sold any "Phillystran" cable to any customer in Utah,[137] and that sales to customers in Utah accounted for less than one tenth of one percent of PRC's gross revenue,[138] led the Tenth Circuit to hold that PRC's contacts with Utah were insufficient to support the exercise of in personam jurisdiction under the due process clause.[139]

In a vigorous dissent, Judge Seymour argued that the majority's decision, expanding *World-Wide Volkswagen v. Woodson*[140] to include manufacturers as well as distributors, misinterpreted the Supreme Court's holding.[141] In view of this, Judge Seymour would have found PRC's contacts with Utah sufficient to exercise in personam jurisdiction pursuant to the stream of commerce theory.[142]

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135. UTAH CODE ANN. § 78-27-24 (Supp. 1983) states that:

> Any person, notwithstanding § 16-10-102, whether or not a citizen or resident of this state, who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any claim arising from: 1) The transaction of any business within this state; 2) Contracting to supply services or goods in this state; 3) The causing of any injury within this state whether tortious or by breach of warranty; 4) The ownership, use or possession of any real estate situated in this state; 5) Contracting to insure any person, property or risk located within this state at the time of contracting; 6) With respect to actions of divorce and separate maintenance, the maintenance in this state of a matrimonial domicile at the time the claim arose or the commission in this state of the act giving rise to the claim; or 7) The commission of sexual intercourse within this state which gives rise to a paternity suit under Chapter 45a, Title 78, to determine paternity for the purpose of establishing responsibility for child support.

The Utah legislature has specifically directed that the statute "should be applied so as to assert jurisdiction over non-resident defendants to the fullest extent permitted by the due process clause." *Philadelphia Resins*, 766 F.2d at 442.

136. *Philadelphia Resins*, 766 F.2d at 443.

137. *Id.*

138. *Id.*

139. The due process clause of the fourteenth amendment provides in part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

140. 444 U.S. 286 (1980).

141. *Philadelphia Resins*, 766 F.2d at 448 (Seymour, J., dissenting).

142. Judge Seymour argued that the Court's decision in *World-Wide Volkswagen* applied only to relatively local distributors and retailers. The judge arrived at this conclusion through a strict reading of *World-Wide Volkswagen* wherein mention is made only to "retailer," "seller," and "concessionaire," in its discussion of the propriety of asserting personal jurisdiction over non-residents. *Id.* at 448 (Seymour, J., dissenting); *see World-Wide Volkswagen* 444 U.S. at 296.

Thus, Judge Seymour argued that *World-Wide Volkswagen* left the standards governing the assertion of personal jurisdiction over manufacturers intact. That standard, first seen in Gray v. American Radiator and Standard Sanitary Corp., 221 Ill. 2d 432, 176 N.E.2d 761 (1961), states that where a manufacturer introduces his products into the stream of commerce with the reasonable expectation that the product might be used by the consumer of the forum state, and the product injures that consumer, the forum state shall have the power to assert personal jurisdiction over the corporation.

C. *Background*

1. Minimum Contacts

It is widely recognized that the assertion of in personam jurisdiction must comport with the principles of the due process clause of the fourteenth amendment.[143] The leading case in the area of "minimum contacts" is *International Shoe Co. v. Washington*.[144] In this decision, the Court held that a state could assert in personam jurisdiction over a nonresident party when that party had "certain minimum contacts"[145] with the forum state such that assertion of personal jurisdiction would "not offend notions of fair play and substantial justice."[146]

The Court, however, was not specific in announcing what kinds of "minimum contacts" would suffice:

> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. . . .
> Whether due process is satisfied must depend rather on the quality and nature of the activity in relation to the fair and orderly administration of laws.[147]

In effect, the Supreme Court was giving notice that the determination of whether "minimum contracts" existed was to be very fact-specific.

One consideration in determining whether "minimum contacts" are present is whether the defendant's contacts are related or unrelated to the plaintiff's claim.[148] In *Perkins v. Benguet Consolidated Mining Co.*,[149] the Court made it clear that in personam jurisdiction over a corporation may be supported by sufficient contacts which are entirely unrelated to

143. *See* Pennoyer v. Neff, 95 U.S. 714 (1878); Kulko v. California Superior Court, 436 U.S. 84 (1978). For a detailed analysis tracing the pre-*International Shoe* origins of authority to assert jurisdiction from the Magna Carta to *Pennoyer*, see Whitten, *The Constitutional Limitations On State Court Jurisdiction: A Historical Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses*, 14 CREIGHTON L. REV. 735 (1981).

144. 326 U.S. 310 (1945).

145. *Id.* at 316.

146. *Id.* The court stated: "[D]ue Process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

In *International Shoe Co. v. Washington*, the state of Washington initiated proceedings against a Delaware-based shoe company seeking unpaid contributions to the state's unemployment compensation plan. The company had salespeople in Washington who were authorized only to exhibit samples and solicit orders. Orders were filled directly F.O.B. from distribution points outside of Washington. Through the efforts of the Washington-based salespeople more than $30,000 dollars worth of business was generated from customers inside the state.

The company maintained no office, stock of merchandise, or agent for service in Washington and was not involved in the interstate delivery of its goods. Nevertheless, the Court, through Justice Stone, found the contacts to be sufficient to warrant in personam jurisdiction.

147. *Id.* at 319.

148. Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952).

149. *Id.*

the plaintiff's claim. The Court held, though, that these contacts must be more substantial than if the contacts are actually related to the claim.[150]

In *Gray v. American Radiator and Standard Sanitary Corporation*,[151] the Illinois Supreme Court laid down guidelines for the assertion of personal jurisdiction in products liability actions. *Gray* held that where a manufacturer places its products in the stream of commerce with the reasonable expectation that some of these products will reach another state, it is within the forum state's power to assert in personam jurisdiction over the non-resident manufacturer.[152]

In *World-Wide Volkswagen v. Woodson*,[153] the U.S. Supreme Court further refined the requirements governing "minimum contacts" in a products liability action. Involving an out-of-state distributor, the Court decided whether jurisdiction could be based upon an isolated incident between the non-resident defendant and forum state.[154] Applying the facts of the case to the concept of "minimum contacts," the Court found that a single fortuitous incident between the plaintiff and defendant would not support jurisdiction over the foreign party. The Court rejected the plaintiff's theory that because it was foreseeable that the defendant's product would reach the forum state, the assertion of jurisdiction would conform to the requirements of the due process clause.[155] Rather, the Court held that the critical point was whether the defendant could "reasonably anticipate being haled into court there."[156] The Supreme Court determined that in light of the paucity of contacts with Oklahoma, World-Wide could not have reasonably antici-

150. *Id.* at 445-47.

151. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

152. For a more detailed examination of *Gray* in the personal jurisdiction context, see Heldman, *Jurisdiction - Foreign Defendants and Their Defective Products: An Application of* World-Wide Volkswagen Corp. v. Woodson, 14 VAND. J. TRANSNAT'L. L. 585 (1981).

153. 444 U.S. 286 (1980). This case sprung from the sale of an automobile by a New York distributorship, World-Wide Volkswagen, to the plaintiffs. While plaintiffs were driving through Oklahoma they were involved in an accident which left the plaintiff's wife and two children severely burned. Plaintiff sought to obtain jurisdiction over World-Wide in the Oklahoma court where a suit based on a products liability theory had been initiated. The trial court found that there were sufficient contacts to merit jurisdiction: defendants appealed. The Supreme Court found that the paucity of contacts coupled with World-Wide's inability to anticipate being sued in Oklahoma rendered the assertion of personal jurisdiction unconstitutional. *Id.* at 295, 297.

154. *Id.* at 295. World-Wide had sold no automobiles in Oklahoma, did not advertise in Oklahoma, and had no agent for service in Oklahoma. The record reflects that the only contact World-Wide had with Oklahoma was that a car it sold had been involved in an accident in that state. *Id.*

155. *Id.* at 295-97. The Court stated: "It is argued, however, that because an automobile is mobile by design and purpose it was 'foreseeable' that the [plaintiff's car] would cause injury in Oklahoma. Foreseeability alone has never been the benchmark for personal jurisdiction under the Due Process Clause." *Id.* at 295.

156. *Id.* at 297. "This is not to say . . . that foreseeability is wholly irrelevant. But the foreseeability that is critical to Due Process analysis is not the mere likelihood that a product will find its way into a forum State. Rather, it is that the defendant's conduct and connection with the forum state are such that the defendant should reasonably anticipate being haled into court there." *Id.*

pated being haled into Oklahoma's courts and was therefore not amenable to Oklahoma's jurisdiction.

Via the "minimum contacts" test, the due process clause of the fourteenth amendment regulates the jurisdiction of state and federal courts. While the "minimum contacts" test is conceptually an easy one to grasp, it has defied consistent application since its 1945 introduction in *International Shoe*. It is against this backdrop that the analysis of *Fidelity and Casualty Co. of New York v. Philadelphia Resins Corp.*[157] proceeds.

D. *Analysis*

1. Does World-Wide's "Single, Fortuitous Event Test" Apply To Manufacturers?

Philadelphia Resins is a products liability action, a field which has proven to be fertile to jurisdictional disputes. Products liability law seeks to secure an adequate remedy for the injured plaintiff[158] and to require manufacturers and sellers who put products in channels of commerce to bear the costs of injuries resulting from their defective products.[159] The seminal cases in this area, and the cases upon which the Tenth Circuit relied herein, are *World-Wide Volkswagen* and *Gray*.

World-Wide Volkswagen's departure from the *Gray* reasoning and to the "single, fortuitous event" test is easily explained. Whereas *Gray* involved the *manufacturer* of a product which was involved in the nationwide sale of its products, *World-Wide Volkswagen* involved a *distributor* of manufactured products operating in a three-state area.

To apply the *World-Wide* "single, fortuitous event" test to a manufacturer, as the Tenth Circuit does here, seems inappropriate. It should be recognized that the analyses in *Gray* and *World-Wide Volkswagen* were specifically tailored to the fact patterns of their respective cases: *Gray*'s "stream of commerce" test originally applied only to manufacturers, although later expanded by *World-Wide Volkswagen* to include distributors; *World-Wide Volkswagen's* "single, fortuitous event" test applied only to distributors and has never been explicitly expanded.

The point at which the majority and dissenting opinions analytically diverge is in the interpretation of *World-Wide Volkswagon* effect on the stream of commerce theory. The majority held that *World-Wide Volkswagon* narrowed the theory by refusing to allow personal jurisdiction to be based only upon a "single, fortuitous event" between plaintiff and non-resident defendant. Thus, the Tenth Circuit applied the "single fortuitous events" test regardless of whether the non-resident was a manufacturer, distributor, or retailer.

Attacking the majority's commingling of these three parties, Judge

157. 766 F.2d 440 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 853 (1986).

158. *See* Henegan, *Long-Arm Jurisdiction in Products Liability Actions: An "Effect Test" Analysis of* World-Wide Volkswagen Corp. v. Woodson, 45 ALB. L. REV. 179 (1980).

159. *See* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 337 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962).

Seymour pointed out in her powerful dissent that the Court in *World-Wide Volkswagen* was "careful to differentiate between defendants who sought to serve a national market [manufacturers] and defendants who sought to serve a local market [distributors]."[160] Seymour noted that the Court's language in *World-Wide Volkswagon* spoke of retailers, sellers, and concessionaires.[161] This deliberate choice of classes by the Supreme Court vividly illustrates that the Court never intended that *World-Wide Volkswagon* be applied to manufacturers. The majority opinion here chose to ignore this differentiation.

A review of state supreme court decisions since *World-Wide Volkswagon* lends additional support to Seymour's stance.[162] These opinions continue to adhere to the *Gray* standard and hold manufacturers accountable for injuries resulting from their defective products where the manufacturer has no direct contacts with the state. Utah's Supreme Court indicated in *Burt Drilling, Inc. v. Portadrill*[163] that they too would apply the minimum contacts test in the *Gray* tradition.

The court dismissed the assertion of jurisdiction under the stream of commerce theory as "too attenuated,"[164] finding that PRC's knowledge of the general destination of its product, national advertising of its product, and previous sales to Utah customers did not prove that PRC had made an effort to sell or transport its products to Utah.[165] This finding is clearly at odds with the Supreme Court's in *World-Wide Volkswagen* which noted that "one persuasive indication that a manufacturer seeks to serve a market for its product in the forum state is its solicitation of business 'through advertising reasonably calculated to reach the state.' "[166] It is clear that PRC's national advertising places it within this framework.

The Tenth Circuit's analysis of the significance of PRC's contacts with Utah is also unsettling. The Supreme Court has recently held in *Keeton v. Hustler Magazine*[167] that a plaintiff's lack of contacts does not always operate to defeat otherwise proper jurisdiction.[168] Thus, there are certain occasions when personal jurisdiction can be based upon a lesser showing of minimum contacts than would otherwise be required.[169] The Tenth Circuit does not address this issue in *Philadelphia Resins*.

Particularly disturbing is the court's treatment of PRC's previous

160. *Philadelphia Resins*, 776 F.2d at 448 (Seymour, J., dissenting).

161. *See supra* note 2 and accompanying text.

162. For other Tenth Circuit region state supreme court decisions following the *Gray* analysis, see Le Manufacture Francaise des Pneumatiques Michelin v. District Court, 620 P.2d 1040 (Colo. 1980); State *ex. rel.* Hydraulic Servocontrols Corp. v. Dale, 294 Or. 381, 657 P.2d 211 (1982).

163. 608 P.2d 244 (Utah 1980).

164. *Philadelphia Resins*, 766 F.2d at 447.

165. *Id.*

166. *World-Wide Volkswagen*, 444 U.S. at 295.

167. 104 S. Ct. 1473 (1984).

168. *Id.* at 1478-79.

169. *See* Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174 (1985).

sales to Utah customers. The court dismisses these sales as inadequate to meet the "minimum contacts" standard in view of the fact that the sales accounted for only one-tenth of one percent of PRC's gross revenues. Because of the demographic realities of the states that comprise the Tenth Circuit, this analysis is inequitable. Tenth Circuit states are sparsely populated[170] and will rarely account for a large percentage of a manufacturer's revenue.[171] Thus, the Tenth Circuit plaintiff, being insignificant in terms of the percentage of a manufacturer's sales accounted for, may be required to bring the action to the manufacturer's home forum, while the resident of a more populous state can force that same manufacturer into his state's courts to defend. The practical result of the court's treatment of PRC's previous sales to Utah customers is to create a heavy burden for Tenth Circuit residents seeking to bring products liability action against foreign corporations.

E. *Conclusion*

For businesses, the Tenth Circuit's holding lessens their exposure to potential liability claims by limiting the injured plaintiff's access to the courtroom. One possible ramification of this is that businesses will prefer to operate, without establishing an actual presence, in those states where the standards governing the assertion of in personam jurisdiction over foreign corporations are strict. In light of this, it could be expected that civic and business leaders wanting to attract new business might indirectly pressure the judiciary to tighten the requirements governing personal jurisdiction over non-resident corporations.

The overall result of the Tenth Circuit's holding in *Philadelphia Resins* is to significantly limit a plaintiff's ability to bring a products liability action in his home state. The expansion by the circuit allowing manufacturers to come under the penumbra of the "single, fortuitous event" test destroys the rationale underlying *Gray*'s "stream of commerce" test. *Gray* was designed with the recognition that manufacturers, distributors, and retailers are inherently different. *Philadelphia Resins*, by diluting this distinction, denudes the *Gray* rationale.

170. The six states comprising the Tenth Circuit; Kansas, Oklahoma, Colorado, Wyoming, Utah, and New Mexico contain 11,489,000 residents, or approximately 5% of the nation's population of 226,505,000. STATISTICAL ABSTRACT OF THE UNITED STATES, (10th ed. 1986).

171. The converse of this is not true. For example, although the sale of ten lifting cables in Utah accounts for only one-half of one percent of PRC's corporate sales, those ten cables may represent 50% of all lifting cables purchased by Utah customers. The smaller populations of the Tenth Circuit states tend to magnify the effect, in terms of market share, of the sale of a single product.

IV. COMMON LAW AND CONSTITUTIONAL RIGHTS TO PRIVACY REGARDING CREDIT REPORTING: *POLIN V. DUN & BRADSTREET, INC.*

A. *Facts*

Appellants Paul and Marsha Polin filed an action against Dun & Bradstreet, Inc. (Dun & Bradstreet) in the United States District Court for the Northern District of Oklahoma alleging an invasion of their constitutional right to privacy.[172] Appellants complaint also alleged that Dun & Bradstreet was in violation of the Oklahoma Credit Rating Act.[173]

The circumstances giving rise to this action occurred some twenty years ago.[174] The Polins worked as business and financial consultants as well as insurance agents.[175] In response to a 1966 inquiry from the Minnehoma Financial Company, Dun & Bradstreet prepared a credit report on Mr. Polin.[176] This report was sent to eight businesses.[177] Pursuant to a 1968 request from the Dallas Aero Service Company, Dun & Bradstreet prepared a similar report regarding the Polins which was sent to seven businesses.[178] In 1969, Dun & Bradstreet updated its report on the Polins and sent the new information to two other companies.[179]

The record indicates that the businesses which received the credit reports on the Polins did so pursuant to Dun & Bradstreet's standard subscription agreement.[180] The defendant never obtained the Polins'

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172. Polin v. Dun & Bradstreet, Inc., 768 F.2d 1206 (10th Cir. 1985).

173. *Id.*; OKLA. STAT. ANN. tit. 25, §§ 81-82 (1987). Sections 81 and 82 provide:

> § 81. Persons furnishing ratings to request statement of assets and liabilities. Any person, firm or corporation engaged in or purporting to furnish retail merchants the financial or credit rating of any person who is the actual or prospective customer of such retail merchant shall, before furnishing such rating, submit, either in person or by mailing to his last known postoffice address to the person whose rating is about to be reported, a request asking for a statement of the assets and liabilities of such person.
>
> § 82 Copy of opinion furnished person to whom it relates whenever an opinion in writing upon the financial or credit standing of any person is about to be submitted for the purpose of establishing a financial or credit rating of customers, to be used by the retail business concerns, the person, firm or corporation submitting such opinion shall first mail a copy of such opinion to the person about whom the opinion is given, at his proper postoffice address.

174. *Polin*, 768 F.2d at 1206.

175. *Id.* at 1205.

176. *Id.*

177. *Id.* This report listed four lawsuits filed against Polin for money due on accounts. *Id.* The Tenth Circuit's discussion does not indicate whether the information supplied by Dun & Bradstreet to its subscribers was incorrect. However, appellants asserted in their brief to the Tenth Circuit that the information sent to the Polin's creditors "contained false light half truths [and] misleading information about the personal and private lives of the [Polins] and concerning the conduct of [Polin's] business activities." Brief for Appellant at 2, Polin v. Dun & Bradstreet, Inc., 768 F.2d 1206 (10th Cir. 1985).

178. *Polin*, 768 F.2d at 1205.

179. *Id.*

180. *Id.* at 1205-06. The agreement provided in pertinent part:

> 1. All information furnished to the subscriber by Dun & Bradstreet, Inc. is for the exclusive use of the subscriber as a basis for credit, insurance, marketing and other business decisions and for no other purpose. Such information shall be held in strict confidence and shall never be reproduced, revealed, or made acces-

permission to investigate their financial background. Nor did the Polins ever receive copies of the reports before subscribers received them.[181] In 1966, the Polins requested that Dun & Bradstreet cease and desist from preparing these documents without first following Oklahoma law on making credit reports.[182] Dun & Bradstreet, however, refused to follow the Polins' directive. The appellants renewed this request in 1968, again to no avail.[183]

The Polins initiated this action in 1970. In 1977, at the request of the parties, the district court referred the case to a Special Master.[184] The Special Master granted Dun & Bradstreet's motion for summary judgment pursuant to Fed. R. Civ. P. 56(c),[185] and the district court entered judgment "in conformity with" the Special Master's order.[186] In 1980, the Tenth Circuit (en banc), held that the district court had failed to review the Special Master's finding as mandated by Rule 53(e)(4) of the Federal Rules of Civil Procedure[187] and remanded the case.[188] Upon remand, the district court granted the defendant's motion for summary judgment.[189]

B. *The Tenth Circuit's Holding*

Reviewing the district court's grant of summary judgment for the defendant, the Tenth Circuit held that the Polins failed to state a cause of action for invasion of privacy under Oklahoma law in Count I of their complaint.[190] Finding that Dun & Bradstreet had not made the Polin information "public" for the purposes of section 652(D) of the Second

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sible in any matter whatever to the persons reported upon or to any others. It is expressly understood that the subscriber shall neither request information for the use of others, nor permit requests to be made under this subscription by others.

Id. at 1206.

181. *Id.*

182. *Id.* The Polin's claimed at that time that Dun & Bradstreet was violating OKLA. STAT. ANN. tit. 24, §§ 81-82 (1987).

183. *Polin*, 768 F.2d at 1206.

184. *Id.*

185. FED. R. CIV. P. 56(c) pursuant to the following language allows the special master to grant summary judgment:

> Motion and Proceedings Thereon.
>
> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answer 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 moving party is entitled to a judgment as a matter of law. A summary judgment interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

186. *Polin*, 768 F.2d at 1206.

187. FED. R. CIV. P. 53(e)(4) states:

> Stipulations as to Findings.
>
> The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the reports shall thereafter be considered.

188. *Polin*, 768 F.2d at 1206.

189. *Id.*

190. *Id.* at 1206-07.

Restatement of Torts, Judge Doyle, speaking for the majority, dismissed the deprivation of privacy allegation.[191]

Reviewing Count I further, the Tenth Circuit accepted the district court's contention that Oklahoma law did not require Dun & Bradstreet to obtain the consent of the Polins prior to distributing their credit reports.[192] The Tenth Circuit then held that since the constitutional right of privacy applies only to protect from acts perpetrated by the federal or state government,[193] the Polins' claim against the private firm of Dun & Bradstreet must fail.[194]

Finally, turning to Count II of the Polins' complaint, Judge Doyle held that sections 81 and 82 of the Oklahoma Credit Ratings Act,[195] under which the Polins' claims for monetary damages were brought, simply did not provide for monetary recovery.[196] Thus, the Tenth Circuit affirmed the district court's grant of summary judgment in favor of Dun & Bradstreet.[197]

C. *Background*

1. The Warren and Brandeis Tort: Invasion of Privacy

The tort of invasion of privacy, initially unknown at common law,[198] first gained recognition from an 1890 law review article authored by Sa-

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191. *Id.* at 1207.

192. The Tenth Circuit declined to explain exactly how the district court decided that Oklahoma law did not require Dun & Bradstreet to obtain the Polin's consent before distributing the reports. Rather, the Tenth Circuit, citing Colonial Park Country Club v. Joan of Arc, 746 F.2d 1425 (10th Cir. 1984), merely stated that a "district court's understanding of unsettled law of its state is entitled to deference." *Polin*, 768 F.2d at 1207.

193. *Polin*, 768 F.2d at 1207. For this proposition, the Tenth Circuit cited Griswold v. Connecticut, 381 U.S. 479 (1965).

194. *Polin*, 768 F.2d at 1207. The Tenth Circuit held that the fact that Dun & Bradstreet's reporting operations were regulated by federal and state law was insufficient to create state action. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

195. *See* note 173 and accompanying text.

196. *Polin*, 768 F.2d at 1207. The Tenth Circuit determined that the district court, relied upon Derryberry v. Retail Credit Co., 550 P.2d 942 (Okla. 1976), and correctly concluded that only section 83 of the Oklahoma Statutes provides for monetary recovery. Therefore, since the Polins alleged violations of only sections 81 and 82, no monetary recovery was forthcoming.

Section 83 provides:

> False Rating - Damages - Misdemeanor - Penalty
>
> Any person, firm or corporation who knowingly promulgates or publishes a false opinion or statement in any book or list as to the credit or financial standing of any person, and circulates such book or list among wholesale or retail business concerns, shall be liable in damages to the person about whom the false opinion or statement is made, for the full amount of injury sustained, and in addition thereto for exemplary damages in any sum to be fixed by the jury, and shall also be guilty of a misdeameanor, and upon conviction thereof, shall be fined in any sum not exceeding twenty-five dollars.

OKLA. STAT. ANN. tit. 24, § 83 (1987).

197. *Polin*, 768 F.2d at 1207.

198. *See* Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905), Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). England and the other common-law jurisdictions of Australia, New Zealand, and Canada still have not recognized invasion of privacy as an actionable tort. *See generally* Baxter, *Privacy in Context: Principles Lost or Found?*, 8 CAMBR. L. REV. 7 (1977); Davis, *What Do We Mean by "Right To Privacy?,"* 4 S.D. L. REV. 1, 4 (1959); Winfield, *Privacy*, 47 LAW Q. REV. 23 (1931).

muel D. Warren and Louis D. Brandeis.[199] In this article Warren and Brandeis proposed that the judiciary create a right to privacy in order to protect the private individual's "inviolate personality"[200] from journalistic abuse.[201] Receiving little initial acknowledgment,[202] Warren and Brandeis' proposed tort remained largely unacted upon.[203] However, beginning with a Georgia Supreme Court case,[204] state courts began increasingly to recognize this new tort and incorporate it into American jurisprudence.[205]

Section 652(A) of the Second Restatement of Torts sets forth four distinct categories of invasion of privacy.[206] The right to privacy may be invaded by an unreasonable intrusion upon the seclusion of another,[207]

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199. Warren and Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890). This article has been referred to as an "outstanding example of the influence of legal periodicals upon the American law." Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). For a recent discussion of Warren and Brandeis' seminal work, see Barron, *Warren and Brandeis, The Right To Privacy*, 4 HARV. L. REV. 193 (1890): *Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875 (1979).

200. Warren and Brandeis, *supra* note 199, at 211. Several commentators have astutely pointed out that since corporations have neither "inviolate personality" nor feelings, they have no right to an invasion of privacy action. *See* Clinton Community Hosp. Corp. v. Southern Md. Medical Center, 374 F. Supp. 450 (D. Md. 1974), *aff'd*, 510 F.2d 1037 (4th Cir.), *cert. denied*, 422 U.S. 1048 (1975); *see also* Frazer, *Tort Law-Invasion of Privacy-Public Disclosure of Public Facts-Nevada Supreme Court Expands Newsworthiness Defense.* Montesano v. Downey Media Group, 668 P.2d 1081 (Nev. 1983), *cert. denied*, 104 S. Ct. 2172 (1984), 15 CUM. L. REV. 211 (1985).

201. Warren and Brandeis, *supra* note 199, at 196. Commenting on the characteristics of the late nineteenth century press, the two commentators observed that:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influences of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and duress, greater than could be inflicted by mere bodily injury.

202. For early decisions acknowledging a right to privacy, *see, e.g.*, Corliss v. E.W. Walker Co., 64 Fed. 280 (D. Mass. 1894); Schuyler v. Curtis, 147 N.Y. 434, 42 N.E. 22 (1895); Marks v. Jaffa, 6 Misc. 290, 26 N.Y.S. 908 (1893), Mackenzie v. Soden Mineral Springs, Co., 27 Abb. N. Cas. 4022, 18 N.Y.S. 240 (Sup. Ct. 1891).

203. *See, e.g.*, Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902) (unauthorized lithograph of a woman cannot be enjoined unless it is libelous); Atkinson v. John E. Doherty & Co., 121 Mich. 372, 80 N.W. 285 (1899) (commercial use of a name of likeness of deceased person is not actionable unless it is libelous).

204. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

205. *See, e.g.*, Smith v. Doss, 251 Ala. 250, 37 So.2d 118 (1948); Hinish v. Meier & Frank Co., 166 Or. 482, 113 P.2d 438 (1941); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911).

206. The Restatement has closely followed Professor Prosser's lead in establishing the categories of invasion of privacy. *See* Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). This article is another "outstanding example of the influence of legal periodicals upon the American law" of which Prosser himself spoke. It should be noted that Professor Prosser's propositions in *Privacy* have not been universally accepted. For a spirited rebuttal to Prosser's article, see Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964).

207. The intrusion tort usually involves a physical invasion of a party's privacy. *See, e.g.*,

an appropriation of another's likeness or name,[208] unreasonable publicity given to another's private life,[209] or publicity that unreasonably places the other in a false light before the public.[210]

Focusing on false light invasion of privacy, the Restatement requires that first the matter placing the plaintiff in the false light be made public.[211] The Restatement then requires that the false light in which the objecting party was placed be "highly offensive" and that the actor who placed the objecting party in the false light have knowledge or have acted with reckless disregard as to the falsity of the publicized matter.

D. *Analysis*

1. Privacy Right in Tort

It is the first requirement, that of publication, which the Tenth Circuit focused on to determine the validity of the Polin's common law claim of privacy.[212] Finding that the objectionable material had been sent to only seventeen different parties,[213] the Tenth Circuit mysteriously concluded that Dun & Bradstreet did not make the information

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Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) (intrusive nature of photographer's conduct was actionable despite plaintiff's status as a public figure); Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (hidden camera and microphones were a physical invasion of privacy); Pearson v. Dodd, 410 F.2d 701 (D.C. Cir.) (forced entry onto plaintiff's property), *cert. denied*, 395 U.S. 947 (1969).

208. The tort of appropriation usually occurs when a party's property interest in the commercial value of his name or likeness is misappropriated by an unauthorized party. *See, e.g.*, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (statutory provision that protected a performer's right was violated when the defendant videotaped the entire act of plaintiff being shot out of a cannon).

209. The tort of publication of a private fact usually appears in the context of the media deeming some fact "newsworthy" and the plaintiff claiming emotional harm for the publication of that fact. *See, e.g.*, Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (Cal. Ct. App. 1931) (public screening of a movie depicting the licentious past of the plaintiff invaded her right to privacy); Brents v. Morgan, 201 Ky. 765, 299 S.W. 967 (1927) (the posting of a sign in a store window stating that plaintiff owed the storeowner on an account overdue was actionable).

210. It has been stated that the tort of false light invasion closely parallels the torts of libel and slander. Whereas libel and slander compensate for injuries to a person's reputation, false light invasion of privacy compensates for injuries to a person's feelings. *See, e.g.*, Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974) (feature story on impact on family of father's accidental death sustains "false light" theory); Time, Inc. v. Hill, 385 U.S. 374 (1967) (a play depicting an actual kidnapping of a family as extremely violent when in fact it was, is not actionable). For an insightful article, see Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962).

211. RESTATEMENT (SECOND) OF TORTS § 652(E) (1976) defines false light invasion of privacy as:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

212. *Polin*, 768 F.2d at 1206.

213. The record indicates that eight reports were sent in 1966, seven reports in 1968, and two reports in 1969. *Id.* at 1205.

public.[214] This is particularly confusing when apropos of libel, the act of publication is said to involve "the act of making the defamatory matter known publicly, or disseminating it or communicating it to one or more persons."[215]

It has been contended, and the Tenth Circuit would certainly seem to agree, that since the publication of information in a credit report does not involve communication to the public at large, no real publication exists.[216] This narrow-sighted view fails to take into account that in this case the recipient of the misleading or unauthorized credit report is the one member of the public who requires an accurate portrayal of the consumer. A consumer whose reputation is injured by the report is viewed as damaged goods by the very sector of the public he seeks to impress — the current or potential creditor.[217]

The publication of the information to the relatively few number of creditors causes considerably more harm than if it had been made to the general masses. It would thus seem reasonable to conclude that the publication requirement is met in a situation having such potentially harmful consequences for the victim of the credit report.[218]

2. Constitutional Privacy Right

The Tenth Circuit's treatment of the Polins' constitutional right to privacy appears to be on firmer footing. The constitutional right to privacy, as the Tenth Circuit noted, first appeared in *Griswold v. Connecticut*.[219] Though perhaps best characterized as confusing,[220] Justice Douglas' decision recognized the importance of securing the "sanctity of a man's home and the privacies of life"[221] from *governmental intrusion*. A perusal of cases involving the constitutional right to privacy decided subsequent to *Griswold*, indicates that Justice Douglas' concern and emphasis on governmental intrusion remains intact.[222]

In order to be considered governmental or "state" action, the U.S. Supreme Court has held that either the private entity must be engaged in what is deemed to be a "public function,"[223] which requires some

214. *Id.* at 1206.

215. BLACK'S LAW DICTIONARY 1105 (5th ed. 1979).

216. *See* Vogel v. W.T. Grant Co., 458 Pa. 124, 327 A.2d 133 (1974).

217. This cogent line a reasoning was gleaned from Comment, *Misleading Credit Reports: Alternatives for Recovery*, 15 U. TOL. L. REV. 877, 911 (1984).

218. *Id.*

219. 381 U.S. 479 (1965).

220. Justice Douglas wrote the opinion of the Court. Justice Goldberg wrote a concurring opinion, joined by Chief Justice Warren and Justice Brennan. Justices Harlan and White delivered separate concurring opinions. Justices Black and Stewart each dissented in an opinion joined by the other.

221. *Griswold*, 381 U.S. at 484 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

222. For Supreme Court holdings involving allegations of governmental intrusion into the individual's right to privacy since *Griswold*, see Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (en banc); Eisenstadt v. Baird, 405 U.S. 438 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971); and Loving v. Virginia, 388 U.S. 1 (1967).

223. *See* Flagg Bros. Inc. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan

symbolic nexus between the state and private entity,[224] or a symbiotic relationship between the private entity and the state.[225] The Tenth Circuit analyzed Dun & Bradstreet's actions in the context of the "public function" category. Relying upon *Jackson v. Metropolitan Edison Co.*,[226] Judge Doyle pointed out that where a private party engages in activities not exclusively reserved to the state, no state action will be found.[227] The mere fact that the activity is regulated by the state does not make it state action.[228] As the court found, since Dun & Bradstreet's actions were not state action, their conduct vis-à-vis the Polins could not constitute governmental intrusion. Thus, as the Tenth Circuit holds, the Polins' claim asserting the deprivation of their constitutional right to privacy must fail.

3. Monetary Damages under Oklahoma Law

In conclusion, the court turned to Count II of the Polins' complaint which alleged that Dun & Bradstreet violated the Oklahoma Credit Ratings Act.[229] Noting that neither of these sections provide for any monetary damages, the Tenth Circuit concluded that the complaint failed to state a claim under sections 81 and 82.[230] A reading of the statutory language of section 82, however, clearly reveals that Dun & Bradstreet was in violation of this part of the Oklahoma Credit Rating Act.[231] Section 82 requires that the credit reporting firm mail a copy of the prepared report to the party whom the report refers to. The record indicates that the Polins never received a copy of the reports prepared by the defendant.[232]

Instead of addressing this violation, the Tenth Circuit approved the district court's reliance upon *Derryberry v. Retail Credit Co.*,[233] and con-

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Edison Co., 419 U.S. 345 (1974); Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Marsh v. Alabama, 326 U.S. 501 (1946).

224. *See* Evans v. Abney, 396 U.S. 435 (1970); Bell v. Maryland, 378 U.S. 226 (1964); Pennsylvania v. Board of Trust., 353 U.S. 230 (1957); Shelley v. Kraemer, 334 U.S. 1 (1948).

225. *See* Gilmore v. Montgomery, 417 U.S. 556 (1974); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

226. 419 U.S. 345 (1974).

227. *Polin*, 768 F.2d at 1207.

228. Speaking for the majority, and quoting Nebbia v. New York, 291 U.S. 502 (1934), Justice Rehnquist stated in *Jackson*, 419 U.S. at 353 that

> [I]t is clear that there is no closed class or category of business affected with a public interest . . . . The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. He further stated that doctors, optometrists, lawyers, Metropolitan [the utility in the case], and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such status converts their every action, absent more, into that of the State.

229. *Polin*, 768 F.2d at 1207; *see* OKLA. STAT. ANN. tit. 24, §§ 81-82 (1987).

230. *Polin*, 768 F.2d at 1207.

231. *See supra* note 173 and accompanying text.

232. *Polin*, 768 F.2d at 1206. The record is not clear as to whether or not Dun & Bradstreet complied with the section 81 requirement that a request asking for a statement of assets and liabilities be sent to the Polins.

233. 550 P.2d 942 (Okla. 1976).

cluded that the monetary damages sought by the Polins[234] could only be provided by the unpled section 83 of the Act.[235] Due to their failure to incorporate section 83 in their complaint, the Polins' claim for damages was dismissed, despite their showing of Dun & Bradstreet's violations.

E. *Summary*

In *Polin v. Dun & Bradstreet*, the Tenth Circuit promulgated an inequitable standard for determining if a matter has been made public. Rather than following a quantitative approach where the sheer number of persons receiving the publication determines whether the matter has been publicized, the Tenth Circuit should adopt a more qualitative approach. The major emphasis of this approach should focus on the publication's affect on the plaintiff. As was the case herein, the publication of the objectionable material to only seventeen parties caused more harm to the plaintiffs than if the matter had been publicized to five thousand fishermen in Florida.[236] This is not to suggest that the dissemination of the matter to the five thousand does not satisfy the publication requirement, or that the number of people reached is irrelevant. Rather, it suggests that along with the number of people reached, the reaction of the people and the resulting impact of the reaction on the person about whom the publication concerns should be taken into account.

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234. The Polins sought $1,000,000 actual and $500,000 punitive damages on each count of their complaint. *Polin*, 768 F.2d at 1206.

235. The Tenth Circuit again, as they did in *Trujillo*, refused to remand the case and allow the plaintiffs to bring their complaint in compliance with the Tenth Circuit's holding. The defendant, as alleged by the Polins, was in violation of section 82 of the Oklahoma Crediting Rating Act. The usefulness of a statute, such as section 82, which describes illegal conduct, but provides no mechanism for either punishing the illegal conduct or allowing a party to recover from one engaging in the illegal conduct, is questionable.

236. This assumes that none of the five thousand Florida fishermen were current or potential creditors of the plaintiffs.