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CIVIL RIGHTS

SUMMARIES

PRATT v. SUMNER: NOTHING FRIVOLOUS HERE

I. INTRODUCTION

In *Pratt v. Sumner*¹ the Ninth Circuit held that the plaintiff raised legal issues pertaining to the constitutionality of a total ban on a felony prisoner's receipt of books from sources other than bookstores and publishers that neither the Supreme Court nor the Ninth Circuit had resolved.² Accordingly, the court concluded that Pratt's complaint alleging that he was denied meaningful access to the courts was not frivolous and had to be reviewed by the district court.³

The Nevada State Prison "publisher or bookstore only" regulation provides that all hard-cover and soft-cover books sent to prisoners be returned unless they originate from a publisher or bookstore.⁴ Pratt⁵ solicited law professors for legal texts that they had authored. Books sent to Pratt by the law professors were returned by prison officials.⁶

1. 807 F.2d 817 (9th Cir. 1987) (per Reinhardt, J.; the other panel members were Alarcon, J. and Boochever, J.).

2. *Id.* at 820.

3. *Id.*

4. *Id.* at 818.

5. *Id.* "Ray Donald Pratt is an inmate at the Nevada State Prison, a maximum security facility in Carson City." *Id.*

6. *Id.*

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Pursuant to 42 U.S.C. § 1983,⁷ Pratt brought this civil rights action claiming that he was denied meaningful access to the courts because the law books were returned. Pratt alleged that law professor James Jeans sent a soft-cover copy of his book, *Trial Advocacy*,⁸ and that without notice or a hearing, the prison officials returned the book to Jeans.⁹ Pratt alleged that the "publisher or bookstore only" regulation was overly broad and that the information in the text was not otherwise available to him because of deficiencies in the prison's law library.¹⁰ Pratt sought a declaratory judgment, arguing first that notice and a hearing were required before such printed materials could be returned. Second, he contended that the soft-cover books were not a threat to security and should not be banned under a "publishers or bookstore only" regulation. Third, Pratt argued that law books should receive preferential treatment. Finally, he sought damages and injunctive relief.¹¹

The action was submitted to a magistrate to determine whether Pratt should be allowed to proceed without payment of filing fees.¹² The magistrate allowed him to do so but concluded that the action was frivolous under 28 U.S.C. § 1915(d) and that the court lacked subject matter jurisdiction.¹³ The district court adopted the magistrate's recommendation and dismissed the complaint.¹⁴ Pratt appealed pro se to the Ninth Circuit.

7. 42 U.S.C. § 1983 (1982). Section 1983 provides:

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

Id.

8. J. Jeans, *Trial Advocacy* (1975).

9. *Pratt*, 807 F.2d at 818.

10. *Id.*

11. *Id.* The damages that Pratt sought were the cost of the book, punitive damages in the amount of the book and postage costs for James Jeans. *Id.*

12. *Id.* 28 U.S.C. § 1915 provides for proceedings in forma pauperis which allow any court to waive the payment of fees and costs provided that the person seeking the waiver makes an affidavit that he is unable to pay such costs. 28 U.S.C. § 1915 (1982).

13. *Pratt*, 807 F.2d at 818. 28 U.S.C. § 1915(d) provides in pertinent part that "[t]he court . . . may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous and malicious." 28 U.S.C. § 1915(d) (1982).

14. *Pratt*, 807 F.2d at 819.

II. THE COURT'S ANALYSIS

In *Pratt*¹⁵ the Ninth Circuit considered the propriety of the district court's dismissal of Pratt's complaint for lack of subject matter jurisdiction and on the merits.¹⁶ The Ninth Circuit explained that a complaint can be dismissed for lack of jurisdiction when it is "wholly insubstantial and frivolous."¹⁷ It also noted that because the action was submitted pursuant to 28 U.S.C. § 1915,¹⁸ it could be dismissed if it was "frivolous or malicious."¹⁹ The court defined a frivolous action as one which lacked an arguable basis in law or fact.²⁰

To analyze whether Pratt's complaint was frivolous, the Ninth Circuit examined *Bell v. Wolfish*,²¹ a Supreme Court case about regulations affecting the receipt of hard-cover books by inmates. In *Wolfish*, pretrial detainees brought a class action suit challenging the constitutionality of conditions at a short-term federal correctional facility.²² The Supreme Court addressed the facility's "publishers only" regulation that limited the books and magazines that detainees could receive to those mailed from publishers or book clubs.²³ The Supreme Court held that a "publisher and bookstore only" regulation limited to hard-cover books was a reasonable time, place, and manner restriction and did not violate the first amendment.²⁴ The Court explained that hard-cover books are difficult to search effectively and that contraband could be easily smuggled in the bindings. It concluded that the limited restriction was a reasonable response to the government's interest in prison security.²⁵

15. 807 F.2d 817 (9th Cir. 1987).

16. *Id.* at 819.

17. *Pratt v. Sumner*, 807 F.2d 817, 819 (9th Cir. 1987) (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)).

18. 28 U.S.C. § 1915 (1982).

19. *Pratt*, 807 F.2d at 819.

20. *Id.* This definition had been previously used by the Ninth Circuit in *Franklin v. Murphy*, 745 F.2d 1221, 1225 (9th Cir. 1984). *Id.*

21. 441 U.S. 520 (1979).

22. *Id.* at 523. The Supreme Court defined pretrial detainees as "those persons who have been charged with a crime but who have not yet been tried on the charge." *Id.*

23. *Id.* at 549.

24. *Id.* at 550-52. The Court noted, however, that it did not express a view "as to the validity of those portions of the lower courts' rulings that concern magazine or soft-cover books." *Id.* at 550 n. 31.

25. *Id.* at 550-51.

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The Ninth Circuit noted that the *Wolfish* Court's holding was influenced by factors that were not present in the instant case.²⁶ In *Wolfish*, soft-cover books were not susceptible to the "publisher or bookstore only" regulation and, therefore, soft-cover books were viewed as alternatives to obtaining hard-cover reading material. In *Pratt*, there were no such alternatives because the "publishers or bookstore only" regulation applied to both soft-cover and hard-cover books.²⁷ Also the policy in *Wolfish* affected pretrial detainees who were incarcerated for not more than 60 days where Pratt was serving a felony sentence presumed to be significantly longer.²⁸ The Ninth Circuit reasoned that, because Pratt's complaint concerned a soft-cover book and there were differing factors involved, his complaint raised issues that the Supreme Court had not decided.²⁹

The court noted that the two Supreme Court cases³⁰ on which the district court had relied did not involve the first amendment or an inmate's complaint that he was denied meaningful access to the courts.³¹ The Ninth Circuit then distinguished the Fifth Circuit decision in *Guajardo v. Estelle*,³² which upheld a "publisher and bookstore only" regulation regarding publications in general.³³ The Ninth Circuit reasoned that because *Guajardo* was decided before *Wolfish*, it could not rely on *Guajardo*'s holding.³⁴ The court also explained that no case had examined a prohibition of books mailed directly from an author to inmates.

26. *Pratt*, 807 F.2d at 819.

[T]he Court in *Wolfish* was 'influenced by several other factors,' including (1) the fact that there were sufficient, unburdensome alternative means of obtaining reading materials, i.e., *softcover* [sic] books from any source and a 'relatively large' library for inmate use and (2) the fact that the policy affected only pretrial detainees, whose stays in the institution were limited to approximately 60 days.

Id. (quoting *Bell v. Wolfish*, 441 U.S. 520, 551-52 (1979)) (emphasis in original).

27. *Pratt*, 807 F.2d at 819-20.

28. *Id.*

29. *Id.* at 819.

30. *Block v. Rutherford*, 468 U.S. 576 (1984); *Hudson v. Palmer*, 468 U.S. 517 (1984).

31. *Pratt*, 807 F.2d at 818, 820.

32. 580 F.2d 748 (5th Cir. 1978).

33. *Id.* at 762.

34. *Pratt*, 807 F.2d at 820.

The Ninth Circuit held that Pratt's claim was not frivolous because it raised legal issues that neither the Supreme Court nor the Ninth Circuit had decided.³⁵ The court, therefore, reversed the judgment below and remanded the case to the district court.³⁶

III. CONCLUSION

The Ninth Circuit carefully examined the issues raised and relevant case law and found that neither the Supreme Court nor the Ninth Circuit had resolved the constitutionality of a total ban on felony inmates receiving books from sources other than publishers and bookstores. The court determined that Pratt's claim that he was denied meaningful access to the courts because prison officials returned law books sent by their authors constituted a bona fide complaint that deserved a hearing on its merits.

*Christopher W. Coffey**

SMITH V. CITY OF FONTANA: NINTH CIRCUIT UPHOLDS CIVIL RIGHTS ACTION DESPITE STATE POST-DEPRIVATION REMEDIES

I. INTRODUCTION

In *Smith v. City of Fontana*,¹ the Ninth Circuit held, *inter alia*, that a civil rights action, brought under 42 U.S.C. § 1983,²

35. *Id.* at 819-20.

36. *Id.* at 820.

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1. 807 F.2d 796 (9th Cir. 1986)(per Norris, J.; the other panel members were Tang, J.; Alarcon, J.)

2. 42 U.S.C. § 1983 (1982) provides in pertinent part:

Every person who, under any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be

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could be maintained for violation of a decedent's substantive due process rights even where there exists a post-deprivation state remedy.³ The court also held that the constitutional interest in familial companionship warranted children's claims for violation of their personal substantive due process rights when their father died as a result of excessive force used by two policemen during his detention.⁴ Construing the facts most favorably to the plaintiffs, since material disputes existed as to the factors necessary to state a substantive due process claim, the Ninth Circuit held that dismissal of the action was improper.⁵ The court reversed and remanded to try the disputed issues.⁶

The suit arose from the death of Rufus A. Smith, a black man, slain by two police officers during an investigation of a domestic quarrel.⁷ The officers detained Mr. Smith in the parking lot of his apartment complex to question him concerning an alleged domestic quarrel.⁸ According to the allegations, as Mr. Smith attempted to comply with the officers' orders to place his hands on his head, the officers assaulted him.⁹ Mr. Smith was unarmed and offered only instinctive resistance against the attack.¹⁰ One of the officers then drew his revolver and shot Mr. Smith in the back.¹¹ Mr. Smith died later in surgery.¹²

Plaintiffs brought suit in the federal district court against the two police officers, the City of Fontana and various city officials, claiming the defendants' conduct violated the due process

subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Id.

3. *Smith*, 807 F.2d at 798-99.

4. *Id.* at 802.

5. *Id.* at 799. The district court dismissed pursuant to Fed. R. Civ. P. 12(b)(6) which states the defense of failure to state a claim upon which relief can be granted. *Id.* at 797.

6. *Smith*, 807 F.2d at 805.

7. *Id.* at 798.

8. *Id.*

9. *Id.* One officer clenched Mr. Smith in a chokehold while the other officer kned him in the groin and struck him in the face. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

and equal protection clauses of the fourteenth amendment,¹³ and the first, fourth, fifth and eighth amendments of the United States Constitution.¹⁴ Mrs. Smith sued as administratrix of the decedent's estate to vindicate Mr. Smith's civil rights.¹⁵ Mrs. Smith and her children also sued to vindicate their own civil rights.¹⁶ The suit was brought under 42 U.S.C. § 1983.¹⁷

The district court dismissed the action for failure to state a claim on the ground that California's post-deprivation remedies for violation of state tort law were sufficient to protect the plaintiffs from suffering any cognizable constitutional injury.¹⁸ The Ninth Circuit reversed and remanded.¹⁹

II. THE COURT'S ANALYSIS

The Ninth Circuit began its analysis by reviewing *Parratt v. Taylor*,²⁰ a Supreme Court case relied upon by the district court, and found that dismissal of plaintiffs' 42 U.S.C. § 1983 claims was improper.²¹

In *Parratt v. Taylor*,²² the Supreme Court held that a state's post-deprivation remedy satisfied constitutional due process when a state actor negligently deprived a prisoner of a mi-

13. *Id.* U.S. CONST. amend. XIV, § 1 states in pertinent part: "[No State shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1.

14. *Smith*, 807 F.2d at 798.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 805.

20. 451 U.S. 527 (1981). According to *Parratt*, in a 42 U.S.C. § 1983 action, two essential elements must be present: (1) The conduct complained of must have been committed by a person acting under color of law; (2) The conduct must have deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Id.* at 531-35. Furthermore, to establish a valid fourteenth amendment claim, a deprivation must occur as a result of an established state procedure. *Id.* at 543. A state's post-deprivation remedies are adequate to protect a victim's due process rights. *Id.* at 538.

21. *Smith v. City of Fontana*, 807 F.2d at 798.

22. 451 U.S. 527 (1981), *overruled* to the extent that mere lack of due care by a state official will not deprive an individual of life, liberty or property under the fourteenth amendment, 54 U.S.L.W. 4090-91 (1986).

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nor property interest.²³ The Ninth Circuit distinguished *Parratt*, finding that *Parratt* applied only when the state's post-deprivation remedies are adequate to protect a victim's *procedural* due process rights.²⁴ Here, the court explained, the plaintiffs' *substantive* due process rights were violated²⁵ for "the constitutional violation [was] complete at the moment the action or deprivation occur[red]."²⁶ Procedural due process violations, on the other hand, occur when the state does not provide adequate safeguards surrounding the action.²⁷ Therefore, the existence of a state post-deprivation remedy will not curtail a cause of action for violation of substantive due process under § 1983.²⁸

A. FOURTH AMENDMENT CLAIMS

The court thus analyzed the claims that the officers' conduct and the city's policies violated the plaintiffs' fourth amendment rights.²⁹ The court held that while Mr. Smith's estate could bring suit on his behalf, Mr. Smith's children could not bring suit in their individual capacities.³⁰

The court noted that deadly force used in an apprehension or a detention is a seizure subject to the reasonableness requirements of the fourth amendment.³¹ A claim of excessive force

23. *Parratt*, 451 U.S. at 541-44. A prison inmate had ordered hobby materials through the mail. The packages were lost through negligence by two prison employees. The Court held that the inmate could not state a § 1983 action for the state had a tort claims procedure which would have fully compensated the inmate for his property loss. *Id.* at 530-44.

24. *Smith*, 807 F.2d at 798-99 (emphasis in original).

25. *Id.* (emphasis in original).

26. *Id.* at 799.

27. *Id.*

28. *Id.* (quoting *Rutherford v. City of Berkeley*, 780 F.2d 1444 (9th Cir. 1986)). Since substantive due process is violated at the moment the harm occurs, "the existence of a post-deprivation state remedy should not have any bearing on whether a cause of action exists under § 1983." *Rutherford*, 780 F.2d at 1447. See *Shah v. County of Los Angeles*, 797 F.2d 743 (9th Cir. 1986) (*Parratt* did not bar a § 1983 suit based on violations of substantive due process where complaint alleged sheriff's deputies assaulted and harassed plaintiff); *McRorie v. Shimoda*, 795 F.2d 780 (9th Cir. 1986) (availability of state court relief did not bar federal relief under § 1983 for alleged prison guard brutality).

29. *Smith*, 807 F.2d at 799-801.

30. *Id.* at 800-01.

31. *Id.* at 799-800. The fourth amendment states in part that the "right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV. The fourth amendment was made appli-

used during a personal seizure states a § 1983 claim for relief predicated on the fourth amendment.³² Such a claim must be analyzed in conjunction with such factors as the officer's safety, the reason for the apprehension, and the extent of injury inflicted.³³

Under 42 U.S.C. § 1988,³⁴ a § 1983 claim that arose before death is actionable after death in California if brought by the decedent's administrator.³⁵ Accordingly, the Ninth Circuit held that Mr. Smith's fourth amendment claim survived his death and could be brought by Mrs. Smith as administratrix of his estate.³⁶ However, since the Supreme Court has held that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted,"³⁷ Mr. Smith's children could not maintain personal causes of action under § 1983 for they were not directly subjected to the excessive use of force.³⁸

B. SUBSTANTIVE DUE PROCESS CLAIMS

1. *The Estate's Substantive Due Process Claim*

The district court in *Smith v. City of Fontana* found that

cable to the states through the fourteenth amendment in *Wolf v. Colorado*, 338 U.S. 25 (1949).

32. *Smith*, 807 F.2d at 800. See *Robins v. Harum*, 773 F.2d 1004 (9th Cir. 1985) (allegation of excessive force used while transporting plaintiffs states a § 1983 claim for fourth amendment violation); *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985) (alleged beating and killing of suspect during detention stated a § 1983 claim for fourth amendment violation).

33. *Smith*, 807 F.2d at 800 (quoting *McKenzie v. Lamb*, 738 F.2d 1005, 1011 (9th Cir. 1984)). See *Tennessee v. Garner*, 471 U.S. 1 (1985) (lack of probable cause to believe suspect poses a threat of serious harm to officers or others constitutes an unreasonable seizure when deadly force is used to prevent escape).

34. 42 U.S.C. § 1988 (1982) states in pertinent part:

[Where the] laws of the United States . . . are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the [forum] State . . . so far as the same is not inconsistent with the Constitution and laws of the United States, [shall govern].

Id.

35. *Smith*, 807 F.2d at 800. See CAL. PROB. CODE § 573 (West Supp. 1986). "[N]o cause of action [is] lost by reason of the death of any person but may be maintained by . . . his . . . administrator." CAL. PROB. CODE § 573 (West Supp. 1986).

36. *Smith*, 807 F.2d at 800.

37. *Alderman v. United States*, 394 U.S. 165, 174 (1969).

38. *Smith*, 807 F.2d at 801.

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Mr. Smith's estate had asserted only a *procedural* due process claim under the fourteenth amendment.³⁹ The Ninth Circuit held this ruling to be erroneous since it determined that the estate correctly alleged a *substantive* due process claim under § 1983.⁴⁰

In reaching this conclusion, the court relied on numerous circuit court decisions which held that flagrant government actions, such as the use of unwarranted violent physical force, constitutes a violation of substantive due process.⁴¹ Such a claim must be analyzed in light of several factors to determine the reasonableness of the officer's actions.⁴² Since triable issues of fact existed as to whether or not such factors were present in *Smith*, the dismissal was improper.⁴³

2. *The Children's Personal Substantive Due Process Claim*

The Ninth Circuit, after an extensive discussion of case law and legislative history, held that the children of the decedent had validly stated a claim based on the violation of their personal substantive due process rights under § 1983. This claim arose out of the death of their father.⁴⁴

Although the Supreme Court has not yet determined if the death of a family member caused by a government act "deprives other family members of a cognizable liberty interest in contin-

39. *Id.* (emphasis in the original).

40. *Id.* (emphasis added).

41. *Id.* See *Shah v. County of Los Angeles*, 797 F.2d 743 (9th Cir. 1986) (allegations of assault and harassment by sheriff deputies, if true, stated a violation of substantive due process); *McRorie v. Shimoda*, 795 F.2d 780 (9th Cir. 1986) (brutality used during a strip search, if true, constituted a violation of substantive due process); *Rutherford v. City of Berkeley*, 780 F.2d 1444 (9th Cir. 1986) (complaint alleging unprovoked assault and battery, if true, constituted a violation of substantive due process); *Meredith v. Arizona*, 523 F.2d 481 (9th Cir. 1975) (unprovoked assault on prisoner suffering an attack of emphysema would constitute a violation of substantive due process).

42. *Smith*, 807 F.2d at 801. A court must look to the need for the application of force, the amount of force used, and the extent of the injury sustained. *Id.* The court must determine whether "the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.* (quoting *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1446 (9th Cir. 1986) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

43. *Smith*, 807 F.2d at 801.

44. *Id.*

ued association with the decedent,"⁴⁵ the Ninth Circuit found that substantive familial rights are basic civil rights of mankind.⁴⁶ In *Morrison v. Jones*,⁴⁷ for example, the Ninth Circuit held that a mother could bring a § 1983 action for damages to vindicate her familial rights when county officials removed her mentally ill child from her custody on the grounds that she was incapable of providing adequate care for him.⁴⁸

In *Kelson v. City of Springfield*,⁴⁹ parents brought an action under § 1983 for violations of their fundamental parental rights,⁵⁰ alleging that school officials negligently allowed their son to commit suicide.⁵¹ The *Kelson* court held that the plaintiffs could maintain such an action for "a parent has a constitutionally protected liberty interest in the companionship and society of his or her child."⁵² The court in *Smith*, then, extended this liberty interest to protect children against state interference with their relationship with their parents without due process of law.⁵³

Reviewing the legislative history of the forerunner of § 1983, the Ku Klux Klan Act,⁵⁴ the Ninth Circuit found compelling support for their ruling.⁵⁵ The Act was described as a remedy for wrongs committed "to the children whose father had been killed"⁵⁶ Thus, the court held that Mr. Smith's children could maintain a § 1983 claim for violation of their substantive due

45. *Id.*

46. *Id.* at 802 (quoting *Morrison v. Jones*, 607 F.2d 1269, 1276 (9th Cir. 1979)), *cert. denied*, 445 U.S. 962 (1980), (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

47. 607 F.2d 1269 (9th Cir. 1979), *cert. denied*, 445 U.S. 962 (1980).

48. *Morrison*, 607 F.2d at 1269.

49. 767 F.2d 651 (9th Cir. 1985).

50. *Id.* at 653. The parents claimed the defendants violated their rights guaranteed by the first and ninth amendments without due process of law. *Id.*

51. *Id.*

52. *Id.* at 655.

53. *Smith*, 807 F.2d at 802. The court noted that the Supreme Court case on which *Morrison* and *Kelson* relied concerned suits by parents of minor children. Nevertheless, the court did not believe this would justify protecting only parents and not children. *Id.* The court observed that an argument could be made that a child may have an even greater interest in the protection of parental relationships for though parents may have other biological children, a child cannot replace a biological parent. *Id.* at 802 n.9.

54. Ku Klux Klan Act, c.22, 17 Stat. 13 (1871).

55. *Smith*, 807 F.2d at 803.

56. See CONG. GLOBE, 42d Cong., 1st Sess. 807 (1871).

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process rights under the fourteenth amendment.⁵⁷

C. EQUAL PROTECTION CLAIMS

The estate alleged that Mr. Smith's right to equal protection was violated because the excessive force used in his detention was the result of the city's unwritten policy sanctioning such force against blacks.⁵⁸ The court concluded that the estate could maintain a survival action for damages, for if the allegations were proven, a violation of equal protection based on race would stand.⁵⁹

The children's equal protection challenge was based on possible future race-related discrimination through the use of excessive force against blacks by the police department.⁶⁰ The children alleged that the policy of the city and the propensity of the two police officers involved in the suit to engage in the use of excessive force, threatened the physical security of all black people in the police department's jurisdiction.⁶¹

As with the estate's equal protection claim,⁶² the court determined that if the children's allegations were proven, a violation of equal protection would result.⁶³ Therefore, the children validly asserted a cause of action for injunctive relief for violation of their fourteenth amendment equal protection rights.⁶⁴

D. REMAINING CONSTITUTIONAL CLAIMS

The Ninth Circuit held that the district court properly dismissed the plaintiffs' first, fifth, and eighth amendment claims. The court held that the plaintiffs failed to state a claim upon which relief could be granted.⁶⁵

57. *Smith*, 807 F.2d at 803.

58. *Id.*

59. *Id.*

60. *Id.* at 804.

61. *Id.*

62. See *supra* text accompanying notes 59-60.

63. *Smith*, 807 F.2d at 804.

64. *Id.*

65. *Id.*

With respect to the first amendment claim, the court found that the complaint did not allege that the officers' conduct nor the city's policy interfered with the plaintiffs' right of free speech or association, except that the children's first amendment right to intimate association was relevant to the assertion of their substantive due process claim.⁶⁶ The fifth amendment claim was properly dismissed as repetitive of the fourteenth amendment claim.⁶⁷ Finally, the dismissal of the eighth amendment claim was sustained, since that amendment protects only those who have been convicted of a crime.⁶⁸

III. CONCLUSION

In *Smith*, the Ninth Circuit upheld the right of a plaintiff to assert a claim under § 1983 for violation of the decedent's substantive due process rights in spite of the existence of a state tort remedy. The court determined that *Parratt v. Taylor* barred such § 1983 claims only when they were limited to procedural due process allegations. In so holding, the Ninth Circuit upheld the continued life of substantive due process claims under the fourteenth amendment. This decision preserves important federal avenues of legal redress for those who have been victims of police brutality.

*Maureen Mullane**

66. *Id.*

67. *Id.*

68. *Id.*

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