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Section 1983 Wrongful Death and Survival Actions in the Seventh Circuit: An Indiana Litigant's Guide to Claims After *Russ v. Watts*

MICHELLE R. GOUGH*

INTRODUCTION

The availability of survival and wrongful death damages in 42 U.S.C. § 1983 cases is an area that involves both changing precedent and unaddressed issues within the Seventh Circuit.¹ In both of the aforementioned types of claims, the cases will necessarily involve the tangled application of both state and federal law, and the Seventh Circuit and other federal courts of appeals have struggled to provide a clear, coherent approach to these issues. Indeed, there is strong disagreement among the circuits.² Dean Steven H. Steinglass offered the most comprehensive discussion of the nature of both types of claims under § 1983 in *Wrongful Death Actions and Section 1983*, which was published in the *Indiana Law Journal* in 1985.³ However, a subsequent shift in precedent in the Seventh Circuit has significantly impacted the nature and availability of claims under the circumstances giving rise to wrongful death and survival claims.

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1. Survival and wrongful death claims may be pursued in the context of § 1983 when the behavior that infringed upon the constitutional rights of an individual also led to the individual's death or when a decedent has passed with a pending § 1983 claim but whose death was unrelated to the state action.

2. See *infra* notes 66, 85–91 and accompanying text.

3. Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559 (1985) [hereinafter Steinglass, *Wrongful Death Actions*]. Dean Steinglass also offered a less detailed discussion of these concepts in a two-part article, Steven H. Steinglass, *Circumventing the State Limitation in Sec. 1983 Wrongful-Death Claims*, NAT'L L.J., June 9, 1986, at 20 [hereinafter Steinglass, *State Limitation*]. More recently, in 2003, Steinglass joined Professor Martin A. Schwartz, Richard Emery, Esq., and Ilann Margalit Maazel, Esq. for a roundtable on wrongful death claims and § 1983, which was moderated by the Honorable George C. Pratt and included comments by Professor Erwin Chemerinsky and the Honorable Victor Marrero. Martin A. Schwartz, Steven Steinglass, Richard Emery & Ilann Margalit Maazel, Roundtable Dialogue, *Wrongful Death Actions Under Section 1983*, 19 TOURO L. REV. 707 (2003). For discussion of the circuit split regarding parental liberty rights in the § 1983 wrongful death context, see Ilann Margalit Maazel, *Wrongful Deaths Cases: Substantive Due Process Claims*, N.Y. L.J., Jan. 10, 2007, at 3; Meir Weinberg, Note, *The Fourteenth Amendment Due Process Right of Companionship Between a Parent and His or Her Adult Child: Examination of a Circuit Split*, 43 NEW ENG. L. REV. 271 (2009); Isaac J.K. Adams, Note, *Growing Pains: The Scope of Substantive Due Process Rights of Parents of Adult Children*, 57 VAND. L. REV. 1883, 1884–85 (2004).

The shift in the Seventh Circuit began when the court overruled *Bell v. Milwaukee* by *Russ v. Watts* in 2005, and the effects of *Russ* have extended far beyond the claims of Indiana litigants.⁴ Steinglass described *Bell* as “the leading federal court of appeals § 1983 wrongful death case.”⁵ After its decision in *Russ*, the Seventh Circuit is now, in some respects, on the other side of a circuit split.⁶ While this role is signified as federal courts in other circuits address *Bell* and *Russ*,⁷ the extent of the *Russ v. Watts*⁸ holding remains unclear.

This Article provides an updated discussion of the contours for wrongful death and survival claims asserted under § 1983 by Indiana claimants proceeding in the Seventh Circuit for damages when a loved one dies as the result of a state actor’s behavior that violated § 1983 or when a loved one dies with a pending § 1983 claim.⁹ Where the precedent is unclear or has not reached an issue, I will acknowledge the lack of clear guidance and explain the most tenable solution under the existing precedent and through reference to the relevant scholarly literature. Thus, this Article strives to be both a pragmatic and theoretical discussion for Indiana litigants pursuing these claims in federal court through 42 U.S.C. § 1983.

4. See *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005), *overruling* *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984).

5. Steinglass, *Wrongful Death Actions*, *supra* note 3, at 631; see also *id.* at 631 n.424 (stating that “*Bell* has become the starting point in the analysis of § 1983 wrongful death actions” and citing to the Third, Ninth, and Tenth Circuits; the federal district court in Colorado; and a state court in Louisiana).

6. See *Russ*, 414 F.3d at 783.

7. See *McCurdy v. Dodd*, 352 F.3d 820, 828–29 (3d Cir. 2003); Michael D. Moberly, *For Whom Bell Tolls: A Decedent’s Right to § 1983 Pain and Suffering Damages in the Ninth Circuit*, 40 SANTA CLARA L. REV. 409, 409 n.† (2000) (discussing wrongful death and section 1983 in the Ninth Circuit generally and noting, “[w]ith deference to Ernest Hemingway, the title reference is to *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), which has been characterized as the ‘leading § 1983 wrongful death case’ by one Ninth Circuit court analyzing the issue discussed in this article”); Sarah E. Ricks, *Evolution of a Doctrine: The Scope of the Parental Liberty Interest Protected by Substantive Due Process After McCurdy*, 3 RUTGERS J.L. & URB. POL’Y 138 (2005).

8. See *Russ*, 414 F.3d at 788 (surveying sister circuits that have precedent in contrast to the Seventh Circuit’s holding in *Bell*).

9. For a thorough discussion of § 1983 litigation, see MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION (Fed. Judicial Ctr. ed., 2d ed. 2008). See also 1B MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES §§ 13.01–.04 (4th ed. 2010) (the 2003 edition of this treatise was recently cited by the Seventh Circuit in *Rodriguez v. Plymouth Ambulance Servs.*, 577 F.3d 816, 826 (7th Cir. 2009)).

I. WRONGFUL DEATH AND SURVIVAL CLAIMS IN THE CONTEXT OF § 1983

Neither wrongful death nor survival claims grow out of the common law, and neither of the claims are directly available under 42 U.S.C. § 1983.¹⁰ Under the common law, claims abated at death; however, over time wrongful death and survival actions developed under state statutes to remedy the harsh common law rule.¹¹ Following the United States Supreme Court decision in *Monroe v. Pape*,¹² litigants increasingly began to pursue these claims in 42 U.S.C. § 1983 actions.¹³ Enacted by Congress, § 1983 provides a right of action to individuals who have been deprived of “any rights, privileges, or immunities secured by the Constitution and laws” by state action.¹⁴ The Supreme Court has established that § 1983 does not create substantive rights, but rather provides a remedy for already established rights.¹⁵ However, survival and wrongful death claims become available in federal § 1983 claims through the application of § 1988.¹⁶ Federal courts fill in the deficiencies of the remedies available under § 1983 by applying state laws that create survival actions so long as the state law is not inconsistent with the policies underlying § 1983.¹⁷

The Supreme Court articulated the rule under which we borrow states’ survival statutes in *Robertson v. Wegmann* in 1978.¹⁸ In *Robertson*, Clay Shaw filed a § 1983 claim four years prior to his death. At the time of his death, trial over the

10. For additional discussion of the development of state remedies to the common law rule that required abatement of claims upon death, see Steinglass, *Wrongful Death Actions*, *supra* note 3, at 564–65.

11. See *Robertson v. Wegmann*, 436 U.S. 584, 589 (1978) (“State statutes governing the survival of state actions do exist These statutes . . . were intended to modify the simple, if harsh, 19th-century common-law rule: ‘[A]n injured party’s personal claim was [always] extinguished . . . upon the death of either the injured party himself or the alleged wrongdoer.’” (quoting *Moor v. County of Alameda*, 411 U.S. 693, 702 n.14 (1973))); *Southlake Limousine & Coach, Inc. v. Brock*, 578 N.E.2d 677, 679 (Ind. Ct. App. 1991) (“[W]rongful death actions are in derogation of common law.”).

12. 365 U.S. 167 (1961).

13. Steinglass, *Wrongful Death Actions*, *supra* note 3, at 563–64.

14. 42 U.S.C. § 1983 (2006).

15. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617–18 (1979).

16. See 42 U.S.C. § 1988 (2006).

17. *Robertson v. Wegmann*, 436 U.S. 584, 589–90 (1978) (“As we noted in *Moor v. County of Alameda*, and as was recognized by both courts below, one specific area not covered by federal law is that relating to ‘the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant.’ State statutes governing the survival of state actions do exist, however. . . . Under § 1988, this state statutory law, modifying the common law, provides the principal reference point in determining survival of civil rights actions, subject to the important proviso that state law may not be applied when it is ‘inconsistent with the Constitution and laws of the United States.’” (citation and footnotes omitted)).

18. *Id.* at 588.

claim had not yet begun.¹⁹ The issue before the Court was whether the federal court should look to the Louisiana state rule regarding survivorship, in which case the claim would abate because Shaw died with no surviving relatives that would align with the requirements of the state survivorship statute, or whether the federal district court “was free instead to create a federal common-law rule allowing the action to survive.”²⁰ The Court held that the claim abated under the Louisiana state law because the estate’s executor did not fall within those specified by the survivorship statute.²¹ However, in the process, the Court established a procedure for using § 1988 to fill in the gaps by looking to the state law and then determining whether the state law was consistent with the underlying policy of § 1983.²² If the policies of § 1983 are not inconsistent, then the federal court may apply the state law. Accordingly, under the facts of the case, *Robertson* was limited to survival claims and did not address wrongful death claims. To date, the Supreme Court has not addressed the availability of wrongful death claims under § 1983, which allows room for disagreement among the circuits.²³

II. INDIANA WRONGFUL DEATH AND SURVIVAL ACTS

As held in *Robertson*, the federal courts may look to state statutes to fill in the holes for damages recoverable under § 1983 as long as those statutes do not conflict with the policies behind § 1983.²⁴ Indiana has enacted two different articles potentially applicable to families of the deceased who pursue litigation for harms suffered by the decedent or for their own harms: Wrongful Death²⁵ and Survival.²⁶ Under Indiana law, wrongful death and survival actions are distinct. Wrongful death actions include claims by relatives of the decedent to recover for their own

19. *Id.* at 585.

20. *Id.*

21. *Id.* at 590–91.

22. *Id.*

23. See SCHWARTZ, *supra* note 9, at § 13.01–.04; SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION 60 (Mary Massaron Ross & Edwin P. Voss, Jr. eds., 3d ed. 2006); *infra* note 93.

24. For additional discussion about the history and legislative intent of 42 U.S.C. § 1983, see Steinglass, *Wrongful Death Actions*, *supra* note 3, at 645–54.

25. See IND. CODE § 34-23 (2008) (Wrongful Death Generally, Adult Wrongful Death, and Wrongful Death or Injury of a Child). Indiana actually has three separate causes of action for wrongful death: the general wrongful death statute (“GWDS”), the adult wrongful death statute (“AWDS”), and the child wrongful death statute (“CWDS”). For discussion of these three statutes and disagreement over the availability of attorney’s fees under the ADWS, see *Indiana Patient’s Compensation Fund v. Brown*, 934 N.E.2d 168 (Ind. Ct. App. 2010) (holding that attorney’s fees are available under the AWDS) and *McCabe v. Commissioner, Indiana Department of Insurance As Administrator of Indiana Patient’s Compensation Fund*, 930 N.E.2d 1202 (Ind. Ct. App. 2010) (holding that attorney’s fees are not available under the AWDS).

26. See § 34-9-3 (Survival of Cause of Action After Death of Party).

injuries caused by the death of their loved one;²⁷ in contrast, survival actions are based upon the decedent's own individual claims that he would have been entitled to file for his own injuries.²⁸ Under the statutes that create the actions, both claims are circumscribed such that only plaintiffs who fall under the specified relationship chain may proceed under the claim, and such plaintiffs may only seek the damages specified in the statute.²⁹

Distinguishing the claims is crucial when assessing their availability and applicability at both the state and federal levels. When discussing the Indiana wrongful death statute in a state action, the Indiana Court of Appeals explained, “[T]he statute creating this right of action must be strictly construed. . . . [O]nly those damages prescribed by statute may be recovered. . . . This statute was not created to compensate for the loss of life of the decedent.”³⁰

In *Ellenwine v. Fairley*, the Indiana Supreme Court described that the Indiana Survival Act

sets forth a series of rules dictating when particular claims or causes of action may and may not be brought by or against the representative of the deceased party. Sections 1 and 4 of the Survival Act provide that *if an individual who has a personal injury claim or cause of action dies, the claim or cause of action does not survive and may not be brought by the representative of the deceased party unless the individual dies from causes other than those personal injuries.*³¹

As illustrated by *Ellenwine*, Indiana law does not allow survival claims in state law cases where the personal injuries that form the basis of the claim are also alleged to have led to the death of the individual. Indiana state law has the additional limitation that “[a] defendant may be held liable under a Wrongful Death claim or a Survival claim, but not both.”³²

27. See § 32-23-1-1.

28. See § 34-9-3-1.

29. §§ 32-23-1-1, 34-9-3-1.

30. *Southlake Limousine & Coach, Inc. v. Brock*, 578 N.E.2d 677, 679 (Ind. Ct. App. 1991).

31. *Ellenwine v. Fairley*, 846 N.E.2d 657, 660–61 (Ind. 2006) (citing §§ 34-9-3-1, -4; *Kohn v. Norfolk & Western Ry. Co.*, 966 F.Supp. 789, 791 (N.D. Ind. 1997); *Goleski v. Fritz*, 768 N.E.2d 889, 891–92 (Ind. 2002)) (emphasis added).

32. *Baumgart ex rel. Baumgart v. Defries*, 888 N.E.2d 199, 206 (Ind. Ct. App. 2008). *But cf. infra* notes 35–38 and accompanying text.

III. SEVENTH CIRCUIT PRECEDENT REGARDING WRONGFUL DEATH AND
SURVIVAL CLAIMS IN § 1983 LITIGATION

A. *Survival Claims*

Following *Robertson*, district courts considering survival claims in the Seventh Circuit have drawn from applicable state laws but found that § 1983 supersedes aspects of applicable state laws that conflict with the policies of the federal statute.³³ For litigants whose claims invoke the Indiana Survivorship statute, this has meant applying the statute with the exception of the two restrictions mentioned in Section II: the prohibition of survival claims when the personal injuries that form the basis of the claim are also alleged to have led to the death of the individual, and the prohibition that defendants may not be held liable under both a wrongful death claim and a survival claim.³⁴

These aspects of the Indiana statutes are not given effect because, as indicated by the Court in *Robertson*, state law restrictions do not apply if they are inconsistent with the policies behind § 1983.³⁵ The two main policies of § 1983 litigation are compensation and deterrence.³⁶ Both of the Indiana statutory limitations cease to apply in § 1983 claims because they are inconsistent with the policies behind § 1983.³⁷ In the context of the chapter of the survival statute that prohibits recovery when a victim dies, the policies behind § 1983 warrant overriding the statutory limitation because it makes it “more advantageous to the unlawful actor to kill rather than injure.”³⁸ Similarly, prohibiting a survival action

33. See *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), *overruled on other grounds by* *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005).

34. See *id.*; see also SCHWARTZ, *supra* note 9, § 13.03[D], at 13-26 n.97 (“Dictum in *Felder v. Casey*, 487 U.S. 131, 142 (1988), states that state statutory limits on monetary recovery are preempted by § 1983 because ‘partial immunities inconsistent with section 1983 must yield to the federal right.’ Application of this principle to wrongful death claims substantiates the conclusion that state limits on wrongful death recovery may not be applied to § 1983 claims.”).

35. *Robertson v. Wegmann*, 436 U.S. 584, 585 (1978).

36. *Id.* at 590–91 (“The policies underlying § 1983 include *compensation* of persons injured by deprivation of federal rights *and prevention* of abuses of power by those acting under color of state law.”) (emphasis added); *Bell*, 746 F.2d at 1239 (“[T]he fundamental policies behind Section 1983 are twofold: *compensation for and deterrence of unconstitutional acts committed under state law.*”) (emphasis added); see also Steinglass, *Wrongful Death Actions*, *supra* note 3, at 659.

37. See *Robertson*, 436 U.S. at 590 (“[S]tate law may not be applied when it is ‘inconsistent with the Constitution and laws of the United States.’” (quoting 42 U.S.C. § 1988)). See Steinglass, *Wrongful Death Actions*, *supra* note 3, at 561, for a discussion of the “tensions inherent in the incorporation of state law to fill gaps in the § 1983 cause of action when it is often the inadequacy of state law that influenced plaintiffs’ choice of federal remedies in the first place.” See also SCHWARTZ, *supra* note 9, § 13.03[D], at 13-26 n.97.

38. *Bell*, 746 F.2d at 1238; see *Moberly*, *supra* note 7, at 428; Steinglass, *Wrongful Death Actions*, *supra* note 3, at 635; see also *O’Connor v. Several Unknown Correctional*

when there are related wrongful death claims fails to compensate all of the individuals whose rights have been abrogated and also lessens the deterrent effect. An additional change between Indiana state survival actions and § 1983 claims that borrow the Indiana survival statutes is that federal courts have allowed claimants to provide hedonic evidence to establish damages in survival claims.³⁹ Highlighting the differences for litigating such claims in state versus federal court, testimony regarding hedonic value was held to be inadmissible in the Indiana case *Southlake Limousine & Coach, Inc. v. Brock*.⁴⁰

B. Wrongful Death Claims

While Indiana state law prohibits litigants from recovering for both survival and wrongful death claims, as noted in the preceding section, this state law limitation does not apply in the context of § 1983.⁴¹ However, there is disagreement among the circuits as to whether plaintiffs may claim wrongful death damages under § 1983.⁴² The Seventh Circuit acknowledged the split and referenced the other circuits' stances in the *Russ* opinion.⁴³

Officers, 523 F. Supp. 1345, 1348 (E.D. Va. 1981) (“After *Robertson* and *Carlson*, . . . state law governs the survivability of § 1983 actions, but a federal rule of survival supersedes any state law requiring abatement in an action where the acts of the defendants caused the death of the injured party.”); Moberly, *supra* note 7, at 440–43 (discussing overlap of policy in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and § 1983 claims, and quoting *O'Connor*).

39. See *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988); see also *White v. Gerardot*, No. 1:05-CV-382, 2008 WL 4724000, at *2 (N.D. Ind. Oct. 24, 2008) (“Now that White has conceded that she is not seeking hedonic damages or damages for loss of love and companionship, this evidence has little if any probative value”); Susan Poser, Brian H. Bornstein & E. Kiernan McGorty, *Measuring Damages for Lost Enjoyment of Life: The View from the Bench and the Jury Box*, 27 LAW & HUM. BEHAV. 53, 53–68 (2003). For discussion of hedonic damages in the context of civil settlements, see John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, Essay, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516 (2008).

40. 578 N.E.2d 677, 680 (Ind. Ct. App. 1991).

41. See *supra* notes 35–38 and accompanying text.

42. Compare *Claybrook v. Birchwell*, 199 F.3d 350, 357 (6th Cir. 2000) (holding that § 1983 is personal to the victim, and only he, “or his estate’s representative(s), may prosecute a section 1983 claim; conversely, no cause of action may lie under section 1983 for emotional distress, loss of a loved one, or any other consequent collateral injuries allegedly suffered personally by the victim’s family members”), with *Kelson v. City of Springfield*, 767 F.2d 651, 655 (9th Cir. 1985) (holding that parents had a constitutionally protected liberty interest in the companionship and society of their fourteen-year-old son and stated claim under § 1983 against school officials after their son committed suicide while at school), construed in *Russ v. Watts*, 414 F.3d 783, 788 (7th Cir. 2005).

43. See *Russ*, 414 F.3d at 787–88 (surveying sister circuits that have precedent in contrast to the Seventh Circuit’s holding in *Bell*, including *Trujillo v. Board of County Commissioners*, 768 F.2d 1186, 1190 (10th Cir. 1985); *Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 9 (1st Cir. 1986); *McCurdy v. Dodd*, 352 F.3d 820, 830 (3d Cir. 2003); *Claybrook v. Birchwell*, 199 F.3d 350, 357–58 (6th Cir. 2000); and *Shaw v. Stroud*, 13 F.3d 791, 804–05

1. *Bell v. City of Milwaukee*

In 1984, the Seventh Circuit decided *Bell v. City of Milwaukee* and issued a lengthy and influential opinion regarding decedents' family members' pursuits of wrongful death and survival claims under § 1983.⁴⁴ *Bell* was an "extraordinary" case involving allegations by family members that police officers unlawfully deprived Daniel Bell of his life following a foot chase and then conspired to conceal the facts surrounding Bell's death.⁴⁵ The court broke the claims down into four categories all alleged as compensable under § 1983:

First, (a) Daniel Bell's Fourth and Fourteenth Amendment rights were violated in the excessive use of force by Grady in the chase, and (b) his Fourteenth Amendment rights were violated in the unlawful killing. . . . Second, the Fourteenth Amendment rights of Daniel's father Dolphus Bell were infringed by the unlawful killing; specifically, the father allegedly possessed a constitutionally protected liberty interest in the continued association of his child. . . . Third, Daniel's siblings proffer a Fourteenth Amendment theory similar to that of the father's estate Fourth, . . . defendants . . . conspired to conceal the facts of the shooting and killing, [and] the conspiracy interfered with their ability to pursue their claims . . . [and] deprived them of their due process and equal protection rights⁴⁶

The damages claimed by Bell's father and siblings were loss of society and companionship.⁴⁷ The Seventh Circuit held that the Federal Constitution entitled parents of an adult victim to recover for loss of society and companionship in a § 1983 action where the decedent died as a result of unconstitutional actions taken under color of law, but the court held that the Federal Constitution does not confer such a right on siblings.⁴⁸ However, in 2005, the court reexamined *Bell* in *Russ v. Watts* and explicitly overturned the *Bell* holding regarding the availability of such incidental claims by parents of adult children who are victims of § 1983 infringements.⁴⁹

(4th Cir. 1994)); *see also* Santos v. United States, 461 F.3d 886, 891 (7th Cir. 2006), *aff'd*, 553 U.S. 507 (2008) (construing *Russ* as "discussing when other circuit opinions might present a compelling reason to overrule circuit precedent").

44. *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), *overruled by* *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005). For discussion of the influence of *Bell* in the Third Circuit before *McCurdy v. Dodd*, 352 F.3d 820 (3d Cir. 2003), *see* Ricks, *supra* note 7. For a similar discussion of the Ninth Circuit, *see* Moberly, *supra* note 7. *See generally* Adams, *supra* note 3, at 1884–85 (starting the article with *Bell*); Steinglass, *Wrongful Death Actions*, *supra* note 3, at 631 n.424.

45. *Bell*, 746 F.2d at 1214.

46. *Id.* at 1224.

47. *Id.*

48. *Id.* at 1247.

49. *Russ*, 414 F.3d at 783.

2. *Russ v. Watts*

Russ involved claims arising from the death of twenty-two-year-old Robert Russ, a Northwestern University student, who was fatally shot by a Chicago police officer.⁵⁰ Russ's family sued under § 1983 for loss of society and companionship, citing *Bell*.⁵¹ The Seventh Circuit was thus presented with the opportunity to reconsider *Bell*'s holding that the "parent's constitutional liberty interest in his relationship with his adult son was violated when his son was killed by police."⁵² Here, the Seventh Circuit indicated that § 1983 wrongful death actions cannot be maintained by parents of an adult child unless the behavior of the state actors was "for the specific purpose of terminating [the decedent's] relationship with his family."⁵³

In the *Russ* opinion, the court described how its "sister circuits have considered whether the Constitution protects a parent's relationship with his adult children in the context of state action which has the incidental effect of severing that relationship."⁵⁴ Then the court noted that most of the other circuits had "expressly declined" to find that a constitutional liberty interest had been violated in this context when the state action did not specifically target severing that relationship.⁵⁵ The court expressed concern that "[a]ffording plaintiffs a constitutional due process right to recover against the state in these circumstances would create the risk of constitutionalizing all torts against individuals who happen to have families."⁵⁶ The court next described how courts should cautiously proceed when determining whether an asserted right or an asserted liberty interest should receive constitutional protection.⁵⁷

In the analysis of the asserted liberty right itself, the court initially broached the topic of the complicated landscape regarding the analysis of due process claims. However, while quoting the analyses from *Washington v. Glucksberg*, *County of Sacramento v. Lewis*, and *Troxel v. Granville*, the court then tossed those complications aside in one sweeping comment⁵⁸:

50. *Id.* at 783.

51. *Id.*

52. *Id.*

53. *Id.* at 790.

54. *Id.* at 787.

55. *Id.* *But cf.* *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987) (holding that children may assert Fourteenth Amendment claim via § 1983 for unwarranted state interference with parent-child relationship and describing Ninth Circuit precedent holding that parents may "challenge under section 1983 a state's severance of a parent-child relationship as interfering with their liberty interests in the companionship and society of their children"), *overruled on other grounds by* *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999).

56. *Russ*, 414 F.3d at 790.

57. *See id.* at 789 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

58. *Id.* (citing *Glucksberg*, 521 U.S. at 720–21; *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000)). For discussion of the

In deciding this case, we need not resolve the issue of precisely what level of scrutiny should apply to allegations of government interference with the parental liberty interest. Under any standard, finding a constitutional violation based on official actions that were not directed at the parent-child relationship would stretch the concept of due process far beyond the guiding principles set forth by the Supreme Court.⁵⁹

The Seventh Circuit stated that the precedent upon which the *Bell* decision had relied “all dealt with the right to procreate and make decisions about rearing one’s minor children without state interference” rather than a constitutional liberty interest in a parent’s relationship with his adult child.⁶⁰ Further, the court characterized the relied-upon precedent as all involving state action that “purposefully interfered with the family relationship.”⁶¹

Russ explicitly overruled *Bell* and prohibited the plaintiffs’ claims in the second to last paragraph. The court explained that the claimants did not allege that the state action was for the purpose of severing *Russ*’s familial relationship.⁶² The court then commented that allowing these claims creates a risk of “constitutionalizing all torts against individuals who happen to have families.”⁶³ Ultimately, the court expressly overruled *Bell*, stating, “We therefore overrule our decision in *Bell* insofar as it recognized a constitutional right to recover for the loss of the companionship of an adult child when that relationship is terminated as an incidental result of state action.”⁶⁴ This language suggests that claimants seeking wrongful death claims must allege and provide evidence that the action targeted the relationship itself. However, the court also included a statement that muddies the water, at least in the context of minor children: “although we need not impose an absolute rule that parents of adult children lack any liberty interest in their relationship with their children, we agree with our sister circuits that minor children’s need for the

due process standards following *Glucksberg*, see Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH L. REV. 409 (2006).

59. *Russ*, 414 F.3d at 789–90. *But cf.* *Struck v. Cook Cnty. Pub. Guardian*, 508 F.3d 858, 859 (7th Cir. 2007) (“[T]he plaintiff does have a claim on his own behalf—that the guardian is preventing him from seeing his mother and by doing so is depriving him of liberty protected by the due process clause of the Fourteenth Amendment, liberty that he argues includes the right of an adult child to associate with his parent. Whether the argument has merit . . . remains an open question in this circuit. We need not try to answer it in this case.” (citations omitted)); *Jones v. Brennan*, 465 F.3d 304, 308 (7th Cir. 2006) (“We suggested in *Russ v. Watts* that parents and adult children have *some* constitutionally protected interest in being able to associate with each other.” (emphasis in original) (citation omitted)).

60. *Russ*, 414 F.3d at 790.

61. *Id.* (citing *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31 (1981); *Smith v. Org. of Foster Families*, 431 U.S. 816, 854–56 (1977); *Stanley v. Illinois*, 405 U.S. 645, 649 (1972)).

62. *Id.*

63. *Id.*

64. *Id.* at 791.

guidance and support of their parents warrants ‘sharply different constitutional treatment.’”⁶⁵

Thus the *Russ* holding is based upon either one or both of the following factors: (1) that the claimants did not allege “intentional action by the state to interfere with a familial relationship,” and (2) that *Russ* was not a minor child.⁶⁶ What *Russ* leaves unclear is twofold: (1) whether there exists a constitutionally protected liberty interest for parents to associate with their adult children,⁶⁷ and (2) whether such claims exist for and/or by minor children and spouses,⁶⁸ and if so, the requirements of such claims.⁶⁹

IV. CONSTITUTIONAL FAMILIAL INTERESTS AFTER *RUSS*

This Article now proceeds to look at Seventh Circuit cases following *Russ*, with the aim of determining whether the court has since fleshed out the issues left unclear by *Russ*. I consider whether there is a constitutionally protected liberty interest for parents of adult children, as well as the contours of wrongful death claims in § 1983 claims on behalf of and for the death of a minor child or spouse. Where the Seventh Circuit has not made determinations on these issues, this Article attempts to form the most appropriate resolution. I will begin with a review of Seventh Circuit precedent following *Russ* that has characterized the holding. Then, I will look to the other circuits, with emphasis on those that *Russ* referenced. Finally, I will propose a resolution to both issues that recognizes the constitutional dimensions of these relationships while also responding to the concern for not expanding the availability of wrongful death claims beyond what the Constitution and § 1983 require.

A. Seventh Circuit Post-*Russ* Precedent

The Seventh Circuit has continued to apply the *Russ* rule generally without yet addressing the issues left unclear by the opinion. Since the opinions that discuss

65. *Id.* at 790 (quoting *Butera v. District of Columbia*, 235 F.3d 637, 656 (D.C. Cir. 2001); *McCurdy v. Dodd*, 352 F.3d 820, 829 (3d Cir. 2003)).

66. *Id.*

67. For discussion of the circuit split on this issue, see *Adams*, *supra* note 3; *Weinberg*, *supra* note 3.

68. See *infra* note 114 and accompanying text (stating that spouses, like minor children, have a recognized protected liberty interest).

69. For discussion of the open issue of whether a constitutional right exists for an adult child-parent relationship when the relationship is targeted, see *Struck v. Cook Cnty. Pub. Guardian*, 508 F.3d 858, 859 (7th Cir. 2007); *Jones v. Brennan*, 465 F.3d 304, 308 (7th Cir. 2006) (“We suggested in *Russ v. Watts* that parents and adult children have *some* constitutionally protected interest in being able to associate with each other.” (emphasis in original) (citation omitted)). For discussion of the minor-child issue as still open, see *supra* note 60 and accompanying text.

Russ are few, it is both worthwhile and manageable to look at each individually and as part of a larger picture of the Seventh Circuit's stance on these claims.

1. *Jones v. Brennan*—August 2006

Jones v. Brennan involved claims by an adult daughter against various probate judges, guardians, and lawyers involved in probate proceedings of her father's estate for allegedly depriving her of property in the probate proceedings without due process of law.⁷⁰ The Seventh Circuit remanded the case to the district court for further "probing" of whether any of the claims were outside the scope of the probate exception.⁷¹ The court acknowledged that the complaint included the federal claim of a constitutional familial interest and characterized *Russ* as having "suggested . . . that *parents and adult children have some constitutionally protected interest in being able to associate with each other.*"⁷²

2. *Thompson v. City of Chicago*—December 2006

In *Thompson v. City of Chicago*, a decedent's wife and mother pursued wrongful death claims under § 1983 because Thompson's death was the alleged result of unconstitutional state action.⁷³ A jury trial resulted in a judgment for the defendant police officer and city.⁷⁴ While the court upheld the district court on other grounds, the court included a note in the opinion that stated,

[I]t is worth noting that their § 1983 claim was properly dismissed. The Thompsons predicate their argument in this respect on this court's decision in *Bell* However, *Bell* has been expressly overruled by *Russ* In *Russ*, we . . . concluded that "finding a constitutional violation based on official actions that were not directed at the parent-child relationship would stretch the concept of due process far beyond the guiding principles set forth by the Supreme Court." Accordingly, as in *Russ*, *Thompson's mother and wife do not have standing to pursue a § 1983 action . . . , as they have not even alleged that Thompson was killed "for the specific purpose of terminating [Thompson's] relationship with his family."*⁷⁵

3. *Henning v. O'Leary*—February 2007

Henning v. O'Leary involved claims by Garrett Henning's parents and daughter after his death was caused by police officers who shot and killed him during his

70. *Jones*, 465 F.3d 304.

71. *Id.* at 308–09.

72. *Id.* at 308 (emphasis added).

73. 472 F.3d 444 (7th Cir. 2006).

74. *Id.* at 446.

75. *Id.* at 452 n.25 (emphasis added) (citations omitted).

attempt to escape arrest.⁷⁶ In upholding the trial court's judgment that no excessive force was used by the officers, the court described the constitutional claims in a parenthetical, labeling the argument "*a dubious proposition, at least for the parents, after Russ v. Watts.*"⁷⁷ It is noteworthy that the *Henning* opinion characterizes only the parents', and not the minor daughter's,⁷⁸ constitutional claim as dubious. Further, the opinion cites a case from the Ninth Circuit for comparison to *Russ*, and the Ninth Circuit recognizes a constitutional familial interest actionable in § 1983 wrongful death claims.⁷⁹

4. *Jenkins v. Bartlett*—April 2007

In *Jenkins v. Bartlett*, the Seventh Circuit heard an appeal from the federal district court's grant of summary judgment on behalf of the defendants in response to various § 1983 claims filed by Jenkins following the death of her son who was shot and killed by Bartlett, a police officer.⁸⁰ The Seventh Circuit affirmed the district court rulings; however, as in *Thompson*, the court included a note regarding the availability of constitutional familial interests. Here, the court stated,

[o]riginally, Ms. Jenkins also brought claims on behalf of herself and Mr. Jenkins' children for loss of society and companionship. . . . The district court . . . granted Officer Bartlett's motion to dismiss Ms. Jenkins' personal claim for loss of society and companionship following *our decision in Russ v. Watts, which held that surviving parents had no independent constitutional right to recover for loss of society and companionship of an adult child incidental to state action.*⁸¹

5. *Struck v. Cook County Public Guardian*—December 2007

In *Struck v. Cook County Public Guardian*, an adult son had filed in federal court alleging that an Illinois state court had violated his and his mother's constitutional rights by denying his request to revoke his mother's guardian, who had been appointed due to his mother's incompetency.⁸² The Seventh Circuit upheld the district court's dismissal for jurisdictional reasons.⁸³ Here again, as in

76. 477 F.3d 492 (7th Cir. 2007).

77. *Id.* at 495 (emphasis added) (citation omitted).

78. *See Henning v. O'Leary*, No. 05-C-582-S, 2006 WL 995223, at *1 (W.D. Wis. April 14, 2006) (noting that Alyiana was the minor daughter).

79. *See Henning*, 477 F.3d at 495 (citing *Smith v. City of Fontana*, 818 F.2d 1411, 1418–19 (9th Cir. 1987), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999); *see also Moberly*, *supra* note 7).

80. 487 F.3d 482, 484 (7th Cir. 2007).

81. *Id.* at 484 n.1 (emphasis added) (citation omitted). The court noted that the children's claims were dismissed because Ms. Jenkins lacked standing to bring them. *Id.*

82. 508 F.3d 858, 859 (7th Cir. 2007).

83. *Id.* at 860.

Thompson and *Jenkins*, the court included a note about the plaintiff's claim regarding the guardian's prevention of him seeing his mother:

[T]he plaintiff does have a claim on his own behalf—that the guardian is preventing him from seeing his mother and by doing so is depriving him of liberty protected by the due process clause of the Fourteenth Amendment, liberty that he argues includes the right of an adult child to associate with his parent. Whether that argument has merit has split the circuits, as explained in *Robertson v. Hecksel*, but remains an open question in this circuit.⁸⁴

B. Constitutional Interest for Relationship Between Parents of Adult Children After Russ?

The five cases in which the Seventh Circuit has characterized the *Russ* holding regarding the constitutional parental interest answer the first of the two questions identified as having been left unclear by *Russ*, that is, whether *Russ* should be interpreted to preclude a constitutional interest between a parent and his or her adult child. The decisions rendered after *Russ* indicate that the Seventh Circuit considers *Russ* to have not precluded the potential for a limited right.

Jones, the first of the opinions to address § 1983 wrongful death issues alleged by parents of an adult victim, is the most positive of the cases as the court expressly states that such parents have “some constitutionally protected right.”⁸⁵ *Jenkins* and *Thompson* avoid commenting on whether such a right exists but indicate that in order to proceed a parent must allege that the harm to a potential familial interest was not incidental to state action but was targeted by the state action.⁸⁶ Comparatively, the *Henning* opinion characterizes the parents' wrongful death § 1983 claims regarding their adult child simply as dubious.⁸⁷ Finally, *Struck* did not involve wrongful death and/or § 1983 but characterizes the issue of whether there is a constitutionally cognizable right between an adult child and his parent as remaining “open” after *Russ*.⁸⁸

While the five opinions' characterizations of *Russ* indicate that the issue of whether such a constitutional right exists remains open, the contours of the potential right remain nebulous. What does seem clear from the opinions, particularly *Jenkins* and *Thompson*, is that whether or not the right exists, in order for a parent to allege that the right has been violated in a § 1983 claim, the parent needs to be able to allege that the severing of the relationship was targeted by the

84. *Id.* at 859 (emphasis added) (citation omitted) (citing *Jones v. Brennan*, 465 F.3d 304, 308 (7th Cir. 2006); *Robertson v. Hecksel*, 420 F.3d 1254, 1258–60 (11th Cir. 2005); *Russ v. Watts*, 414 F.3d 783, 790 (7th Cir. 2005)).

85. *See supra* note 60 and accompanying text.

86. *See supra* notes 61, 65 and accompanying text.

87. *See supra* notes 76–78 and accompanying text.

88. *See supra* notes 83–85 and accompanying text.

state action. In other words, the Seventh Circuit has determined the evidentiary requirement for the right without clearly determining whether such a right exists.

This requirement may severely limit, if not prohibit, the opportunities for parents of adult children to recover for the harms that they themselves incur as a result of state action that causes the death of an adult child.⁸⁹ Given the emphasis in *Russ* on the approach of other circuits, it should be noted that the Seventh Circuit's approach of requiring that the state actor target severing the parent-child relationship is not an approach to wrongful death and § 1983 that is consistently shared among the other circuits.⁹⁰

What the Seventh Circuit appears to do is draw from aspects of the various circuit positions to which it cited in *Russ* and the later cases, without adopting the full approach of any, to create a unique approach to § 1983 claims asserting wrongful death claims. For example, the fact that *Russ* indicates a requirement that actors target the harms, and that the harms not merely be derivative, can be interpreted as an attempt to address the holdings in *Claybrook* and *Shaw*, which represent the views of the Sixth and Fourth Circuits respectively, and hold that wrongful death and other derivative rights are flatly unavailable under § 1983 because § 1983 is personal,⁹¹ as well as the approaches of the First, Third, and Tenth Circuits that have all created a similar intention requirement.⁹² However, *Russ*'s comment that minor children should receive different constitutional treatment indicates an area in which the Seventh Circuit diverges from the First and Third Circuits, which both apply the intention requirement to all claims. At the same time, treating minor children differently aligns with the D.C. Circuit.⁹³ Additionally, the Seventh Circuit's approach of leaving open whether a parental liberty interest exists for adult children is distinct from the First, D.C., Eleventh, and Third Circuits as they each have held that a constitutional interest between

89. See *Maazel*, *supra* note 3, at 3 (“In *McCurdy*, because the police officer did not have ‘parent-child relationships . . . on [his] mind when he pulled the trigger,’ the Substantive Due Process claim failed. Of course this limitation essentially eviscerates the claim in wrongful death cases. What police officer would have parent-child relationships on his mind?” (alteration in original) (citing *McCurdy v. Dodd*, 352 F.3d 820 (3d Cir. 2003)). *But cf.* *Weinberg*, *supra* note 3, at 297.

90. Requiring that the state actors have an intention to sever the parent-adult child relationship has been adopted by the Seventh, Third, and First Circuits. See *Adams*, *supra* note 3, at 1911.

91. Compare *Russ v. Watts*, 414 F.3d 783, 788 (7th Cir. 2005), with *Claybrook v. Birchwell*, 199 F.3d 350, 357–58 (6th Cir. 2000), and *Shaw v. Stroud*, 13 F.3d 791, 804–05 (4th Cir. 1994).

92. Compare *Russ*, 414 F.3d at 788, with *Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 9 (1st Cir. 1986), and *McCurdy v. Dodd*, 352 F.3d 820, 830 (3d Cir. 2003), and *Trujillo v. Bd. of Cnty. Comm'rs*, 768 F.2d 1186, 1190 (10th Cir. 1985).

93. Compare *Russ*, 414 F.3d at 788, with *Valdivieso Ortiz*, 807 F.2d at 9, and *McCurdy*, 352 F.3d at 830, and *Butera v. District of Columbia*, 235 F.3d 637, 654 (D.C. Cir. 2001).

parents and adult children does not exist.⁹⁴ Finally, the Seventh Circuit differs from the Ninth Circuit's holding that a parental liberty interest does apply in the context of adult children and the Tenth Circuit's holding that the relationship is protected under the First Amendment.⁹⁵

In summary, the Seventh Circuit's comment that minor children should receive sharply different treatment aligns with parts of the First, Third, and D.C. Circuits' approaches, and the intention requirement aligns with the First, Third, and Tenth Circuits' precedent. However, the Seventh Circuit has not gone as far as the First, Third, Fourth, and Sixth Circuits' holdings that derivative claims are never available under § 1983, not even for spouses or minor children.⁹⁶ Lastly, the Seventh Circuit has distinguished itself by creating a middle ground between the the First, Third, and D.C. Circuits which hold that no constitutional parental liberty interest applies in the context of adult children, and the Ninth and Tenth Circuits, which have recognized a full-bodied constitutionally protected interest for adult children, albeit on different grounds. Thus, the Seventh Circuit's approach to wrongful death and § 1983, by which it requires that the state actor target the parent-adult child relationship, while leaving the issue of whether a constitutional liberty interest exists for parents of adult children and also indicating an interest in treating minor children differently, is distinct from each of the other circuits in some material respect.⁹⁷

V. RESOLUTION

This Article argues that parents of adult children do have a constitutionally protected liberty interest, and that the Seventh Circuit can reconcile its recognition of the interest with the various elements of *Russ*. While the United States Supreme Court precedent has not ever directly addressed the parameters of a constitutional liberty interest in the context of adult children,⁹⁸ related precedent supports

94. See, e.g., *Robertson v. Hecksel*, 420 F.3d 1254, 1259–60 (11th Cir. 2005); *McCurdy*, 352 F.3d at 830; *Butera*, 235 F.3d at 637; *Valdivieso Ortiz*, 807 F.2d at 9; see also *Adams*, *supra* note 3, at 1911.

95. See *Strandberg v. City of Helena*, 791 F.2d 744 (9th Cir. 1986); *Trujillo*, 768 F.2d at 1188–89 (finding constitutional interest under First Amendment); *Adams*, *supra* note 3, at 1910, 1903 n.141; *Weinberg*, *supra* note 3, at 288.

96. The approach of the Fourth and Sixth Circuits differs from that of the First and Third. The First and Third Circuits have held that a § 1983 claim may be had in the context of a parental liberty interest so long as the disruption to the interest was targeted by the state actor and thereby causes the claim to not merely be incidental; however, the Fourth and Sixth Circuits have indicated that all wrongful death claims are by their nature incidental and therefore not available under § 1983. Compare *Claybrook*, 199 F.3d at 357–58, and *Shaw*, 13 F.3d at 804–05, with *Valdivieso Ortiz*, 807 F.2d at 9, and *McCurdy*, 352 F.3d at 830.

97. In *Russ*, the Ninth Circuit, which acknowledges a parental liberty interest with adult children, is referenced only with a “but see” signal and only regarding minor children. *Russ*, 414 F.3d at 788. The Second Circuit is not referenced at all. See *id.*

98. See *Struck v. Cook Cnty. Pub. Guardian*, 508 F.3d 858, 859 (7th Cir. 2007).

recognition of this right and references the Ninth and Second Circuits.⁹⁹ Additionally, the Seventh Circuit's post-*Russ* decisions in *Jones* and *Struck* both indicate the Seventh Circuit's inclination to find some constitutional protection for this relationship, albeit an interest that is characteristically different than the parent-minor child liberty interest.¹⁰⁰

The Supreme Court cases cited by *Bell* and *Russ* for addressing familial rights focused on "the right to procreate and make decisions about rearing one's minor children without state interference."¹⁰¹ However,

The Court has repeatedly reaffirmed that companionship is a separate and distinct aspect of the parental liberty interest. . . . [T]he *Stanley* [*v. Illinois*] Court included companionship among the constellation of the parental liberty interest, and that definition of the interest has been cited repeatedly in the Court's subsequent cases considering the Constitution and the family.¹⁰²

While care, custody, and control may be specific to minor children and children with disabilities, companionship is not so limited.¹⁰³ The Seventh Circuit would thus be well-grounded to hold that the parental liberty interest continues to apply to the companionship between a parent and adult child while also holding that such an interest is a lesser interest than that shared between a parent and minor child¹⁰⁴:

[A] plurality of the Court has recognized the rights of grandparents to live with their grandchildren, at least where those rights do not conflict

(describing the issue as open in Seventh Circuit jurisprudence and therefore necessarily indicating that the Supreme Court has not issued an opinion on the subject); SCHWARTZ & URBONYA, *supra* note 9, at 175 ("The Supreme Court has not resolved whether a wrongful death claim may be brought under § 1983."); Maazel, *supra* note 3 ("The Supreme Court has never expressly addressed the issue."); Adams, *supra* note 3, at 1902 ("The Supreme Court twice had the opportunity to rule on this issue; however, it opted not to do so, holding on both occasions that certiorari had been granted improvidently.").

99. See Maazel, *supra* note 3. The Tenth Circuit is not mentioned because of its unique rationale for finding constitutional protection of the right under the First Amendment. See *supra* note 95 and accompanying text.

100. See *supra* notes 70–72, 82–85 and accompanying text.

101. *Russ*, 414 F.3d at 790 (citing *May v. Anderson*, 345 U.S. 528, 534 (1953); *Prince v. Massachusetts*, 321 U.S. 158 165–66 (1944); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)); see also *McCurdy v. Dodd*, 352 F.3d 820, 829 (3d Cir. 2003) (holding that Supreme Court precedent indicates that the parental liberty interest is limited to "the right of parents to make critical child-rearing decisions concerning the care, custody, and control of minors").

102. Adams, *supra* note 3, at 1920 (footnote omitted) (citing *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 247 (1978); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

103. See Adams, *supra* note 3, at 1921–22.

104. See *id.* at 1922–25. Adams proposes a two-tiered approach towards the parental liberty interest that lessens as the child approaches "the point where the child possesses the full gamut of his constitutional liberties." *Id.* at 1923.

with those of the children's parents. If a grandparent has a liberty interest in the companionship of a grandchild, it would make little sense for a parent not to have a liberty interest in the companionship of an adult child.¹⁰⁵

Such an approach not only aligns with the common sense perception that a parent's role in the care and custody of his or her children lessens as they reach adulthood, but it may also be justified by the reasoning that as the child him/herself develops the full range of constitutional rights by reaching adulthood, these rights would conflict with the parent's similar rights and thus the parent's rights should yield.¹⁰⁶ While a care and custody interest would conflict with the adult child's own liberty interest, the companionship interest would not.¹⁰⁷ At the same time, in the context of children with disabilities for whom a parent's care, custody, and control extends into adulthood, the full parental interest would still attach.¹⁰⁸ Accordingly, while establishing a clear and manageable rule, the approach is consistent with the tone of *Russ* and *Jones* that indicates an inclination by the Seventh Circuit to find some constitutional protection,¹⁰⁹ is responsive to *Russ*'s comment that the parental liberty interest should receive different treatment in the context of minor children than adult children, and also addresses the unique needs of the special circumstances present with disabled children.

Additionally, finding a less full-bodied liberty interest for parents of adult children than that afforded for parents of minor children enables the Seventh Circuit to apply a more stringent test (that the state actor specifically targeted the relationship) to § 1983 claims alleging harms to parents' relationships with their adult children than that applied in wrongful death claims involving minors and spouses in which the full liberty interest is implicated.¹¹⁰

VI. § 1983 WRONGFUL DEATH DAMAGES FOR AND BY MINOR CHILDREN AND SPOUSES AFTER *RUSS*.

Although *Russ* did not involve claims by a spouse, Robert Russ had conceived a child months before his death, and the child had been proven to be his through DNA testing after birth.¹¹¹ However, the federal action, as opposed to the state action in which the estate to which Russ's minor son was the sole heir and received a verdict of \$9.6 million, did not involve claims by Russ's minor child. Accordingly *Russ* provides little guidance for § 1983 claims for harms to the

105. Maazel, *supra* note 3 (citations omitted).

106. *Id.* at 1924.

107. *Id.*

108. *Id.* at 1923–25.

109. See *supra* notes 58–60 and accompanying text for this aspect of *Russ* and notes 69–72 and accompanying text for this aspect of *Jones*.

110. See *Niehus v. Liberio*, 973 F.2d 526, 532 (7th Cir. 1992); *infra* note 115.

111. *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005).

parental liberty interest in the context of minor children. Additionally, since *Russ* was unmarried, the opinion does not provide guidance for spousal claims.

However, that a constitutionally protected liberty interest exists in the family relationships of spouses and parents and minor children is well-grounded in precedent.¹¹² And, *Russ* fully acknowledges that liberty interest and references it as partial grounds for overruling *Bell* by stressing that while the precedent does protect the parental liberty interest under the due process clause, *Bell* was distinct from the scope of those decisions because of the decedent's adult-child status.¹¹³ Thus, the questions raised by *Russ* are not about the scope of the liberty interest for minor children and spouses but the contours of recovering for harms to these liberty interests in the context of wrongful death under § 1983.

As mentioned in the preceding Part, the Seventh Circuit's opinion in *Russ* cites the Fourth Circuit's decision in *Shaw v. Stroud* and the Sixth Circuit's decision in *Claybrook v. Birchwell*, as well as the First and Third Circuits' decisions in *Valdivieso Ortiz* and *McCurdy*.¹¹⁴ Citing to these cases is significant because the Fourth and Sixth Circuits have held that wrongful death damages are unavailable even in the context of minor children and spouses because § 1983 is a personal action. Similarly, the First and Third Circuits have both held that all wrongful death claimants must show that the state action targeted the disruption to the relationship.¹¹⁵ Thus, if citation to these cases indicates the Seventh Circuit's intended adoption of their approaches, the Seventh Circuit would severely restrict litigants from recovering wrongful death damages in the context of § 1983, even when the claims involve the constitutionally protected familial liberty interests of minor children and spouses.

This was the interpretation suggested by the United States District Court for the Southern District of Indiana when it addressed claims for interference with familial relations asserted under § 1983 in *Estate of Perry ex rel. Perry v. Boone County Sheriff*.¹¹⁶ In response to the plaintiff's assertion that *Russ* left open the door for wrongful death claims regarding minor child victims to § 1983 infringements, the court stated,

112. For discussion of the liberty interest in the relationship between parents and minor children, see *supra* note 55 and accompanying text; see also SCHWARTZ, *supra* note 9, at 13–24 n.89 (citing Supreme Court cases' recognition of parents' constitutional rights to raise children). For discussion of liberty interests recognized for spouses as actionable under § 1983, see *Niehus*, 973 F.2d at 532 (“There would be no novelty in interpreting ‘liberty’ to embrace the right of sexual companionship in marriage. The Supreme Court has placed the freedom to marry in the firmament of liberties protected by the due process clause . . .”). For the liberty interest in the relationship of the nuclear family, see *id.* at 533 (“The relationships that define the nuclear family—relationships that for many people are constitutive of their very identity—are protected, as we have seen . . .”).

113. See *supra* note 60 and accompanying text.

114. *Russ*, 414 F.3d at 787–88.

115. See *supra* note 91, 93, and accompanying text.

116. No. 1:05-cv-1153-LJM-WTL, 2008 WL 694696 (S.D. Ind. Mar. 12, 2008).

First, *it is doubtful whether a substantive claim for interference with familial relations even exists under § 1983. The Russ court was certainly careful not to explicitly recognize such a right, and this Court is unaware of any current decision of the Seventh Circuit recognizing such a right.* In fact, at least one Circuit Court has rejected such an argument. In doing so, the [Fourth Circuit] noted that the Supreme Court “has never held that the protections of substantive due process extend to claims based on governmental action which affects the family relationship only incidentally.” Indeed, that the Supreme Court would recognize such a right where the effect is merely incidental seems unlikely given that it has held that negligent infliction of harm is not actionable under § 1983.¹¹⁷

However, this Article takes the position that the “sharply different . . . treatment” language in the second-to-last paragraph of *Russ* is one of several indications that it was not the intention of the *Russ* opinion to apply the same rule to minor children and spouses as it applied with parents of adult children, and that the result in *Russ* would have likely been otherwise if Robert Russ had been a minor child.¹¹⁸ The *Henning* decision also supports that the Seventh Circuit considers the constitutional claims of a minor child to have more protection.¹¹⁹ Further, affording different treatment to minor children to allow enable litigants to pursue wrongful death claims in the context of spouses and children would align with other circuits that have held § 1983 can be used to compensate for and deter state actors from causing harms to the constitutionally protected familial interests in these contexts.¹²⁰

As indicated in the discussion regarding the Seventh Circuit’s requirement that claimants must allege that the state action targeted the disruption of the familial interest, such a requirement would in practice deny wrongful death recovery in most, if not all, § 1983 claims.¹²¹ If the two policy goals of § 1983 are

117. *Id.* at *12 (emphasis added) (citing *Daniels v. Williams*, 474 U.S. 327, 330–31 (1986); *Shaw v. Stroud*, 13 F.3d 791, 805 (4th Cir. 1994)).

118. *See Russ*, 414 F.3d at 787 (“Since *Bell*, several of our sister circuits have considered whether the Constitution protects a parent’s relationship with his *adult children* in the context of state action which has an incidental effect of severing that relationship.” (emphasis added)); *id.* at 790 (“Our finding of a constitutional violation in *Bell* was not appropriately moored to Supreme Court precedents establishing the contours of the parental liberty interest. The decisions on which we relied . . . *all dealt with the right to procreate and make decisions about rearing one’s minor children . . .*” (emphasis added)); *supra* note 54 and accompanying text.

119. *See supra* notes 75–78 and accompanying text.

120. *See Smith v. City of Fontana*, 818 F.2d 1411, 1418–19 (9th Cir. 1987), *overruled on other grounds by* *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999); SCHWARTZ, *supra* note 9, at 13–29 nn.102–05 (describing precedent from the Ninth and Second Circuits that has allowed wrongful death claims asserted by children for loss of parent in § 1983); *see also* *Trujillo v. Bd. of Cnty. Comm’rs*, 768 F.2d 1186, 1190 (10th Cir. 1985).

121. *See supra* note 76 and accompanying text.

compensation and deterrence of these constitutional violations, the intention standard does not serve the policy goals. Rather than compensating for the harms and deterring conduct, this intention standard insulates state actors from accountability for these types of injuries.¹²²

While the *Russ* opinion applies the intention standard when parents of an adult child pursue wrongful death claims under § 1983, the Seventh Circuit can and should recognize the liberty interest present in minor child and spousal familial relationships and afford such relationships greater protection by modifying the intention requirement. First, the requirement could simply be dropped in the context of full familial liberty interests.¹²³ The second manner through which the familial liberty interest could be given effect in wrongful death claims in § 1983 is through the common law transferred intent doctrine that the Seventh Circuit has applied in other § 1983 claims involving derivative constitutional harms caused to family members.¹²⁴ In *Niehus*, the Seventh Circuit indicated that application of the transferred intent doctrine is limited “to the greater deprivations” of a liberty interest.¹²⁵ While that discussion was in the context of explaining why *Bell* was distinct from the lesser consortium interest alleged by the plaintiff, the same logic applies here. Only, now *Bell* represents the lesser liberty interest, that in the context of parents of adult children, for which the transferred intent doctrine may not be utilized to apply § 1983, and cases involving the full familial liberty interests of spouses and minor children represent for which the transferred intent doctrine may be utilized.

CONCLUSION

This Article has described the current state of Survivorship and Wrongful Death actions under § 1983 in the Seventh Circuit. While Survivorship claims have become relatively settled, Wrongful Death actions continue to be the source of changing and unclear precedent along with a split among the circuits. This Article has focused on two issues that remain unclear in the Seventh Circuit in the contest of wrongful death claims asserted under § 1983 following the decision in *Russ v.*

122. See *supra* note 30 and accompanying text.

123. See Maazel, *supra* note 3 (describing the most recent Second Circuit case on this issue) (“Although the plaintiff alleged that the defendants’ conduct ‘was intentionally directed at his family,’ the court went out of its way to note that ‘this Circuit has never held that a challenged action must be directed at a protected relationship for it to infringe on the right to intimate association’ and that such a strict standard finds no support ‘in any of our precedents.’” (citing *Patel v. Searles*, 305 F.3d 130 (2d Cir. 2002))).

124. See *Niehus v. Liberio*, 973 F.2d 526, 533 (“But the common law doctrine of transferred intent protects the holding of *Bell* from attack based on *Daniels*. If A aims at B, and hits C, C can sue A for battery, even though he was not the intended victim and even though battery is an intentional tort. C can of course still sue A if A hits B as well as C. The plaintiff in a survivor’s wrongful-death suit is C, the decedent B, the defendant A—so here Mr. Niehus is B, Mrs. Niehus is C, and the defendants are A.” (citation omitted)).

125. *Id.* at 534.

Watts to overrule *Bell v. Milwaukee*: whether the relationship between a parent and an adult child is a constitutionally protected liberty interest, and the availability of Wrongful Death claims for minor children and spouses. Through a review of United States Supreme Court precedent regarding the liberty interest, precedent within the Seventh Circuit, and reference to other circuits, this Article has proposed that the most appropriate resolution of the parental liberty interest with an adult child is to find a lesser parental liberty interest in the parent-adult child relationship. By finding a lesser liberty interest, the Seventh Circuit may apply a more stringent test of requiring a showing that the state actor intended to disrupt the parental relationship in the adult child context and yet apply a less stringent test in § 1983 claims involving minor children and spouses, where the full liberty interest is involved. This approach appropriately serves the compensation and deterrence policies behind § 1983 when the full liberty interest is at stake and also provides a theoretically consistent method of tailoring the circumstances in which such claims may be pursued and by whom.