

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF  
DAVIS, IN THE CITY OF DAVIS**

**CIVIL ACTION NO. 3:99 CV-805-P**

**Amy and Andrew SPARKS,**

**PLAINTIFFS**

**v.**

**CITY OF DAVIS; Davis Child Protective  
Services; Eunice Memorial Hospital;  
Officer R.P. Coltrane; Felicia Ferguson;  
Mario Pistone, Ph.D.; Lena Rozas; Rodes  
Harlin, M.D.; Henry Charey, M.D.,**

**DEFENDANTS**

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**ORDER AND OPINION**

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Andrew and Amy Sparks live in the City of Davis with their six year-old daughter, Kirsten, and their four year-old son, Tate. Although Andrew and Amy maintain relationships with most of their relatives, they have had no contact with Amy's sister, Felicia Ferguson, for the last eighteen months. In April of 1997, Ferguson, who suffers from multiple personality disorder, made an unsubstantiated report to Davis Child Protective Services ("DCPS") alleging that Andrew was sexually abusing Kirsten. DCPS investigated but found no credible evidence to support the allegations. As a result, no action was taken against Andrew Sparks. However, Andrew and Amy remained angry at Ferguson and terminated their relationship with her.

The events of the following year constitute the basis for this suit. In early 1998, Ferguson was hospitalized in a nearby psychiatric

facility for her disorder. During a session with hospital therapist, Dr. Mario Pistone, one of Ferguson's alter personalities reasserted her suspicions of Kirsten's sexual abuse. Ferguson also informed Dr. Pistone that there was a history of cult membership in both her and Andrew's families, and that Andrew may be forcing the children to participate in the cult's rituals. Dr. Pistone explained to her that there was nothing he could do about her allegations, but that it was crucial she begin immediate therapy for her illnesses. Ferguson complied and remained at the institution for over eight months.

During that time, Ferguson's mental health improved significantly. She attended regular therapy sessions with Dr. Pistone. The hospital provided her with a part-time job and she was slowly reintroduced into society.

On September 19, 1998, Ferguson was finally released from the hospital, and she sought to reconcile with her sister. Though still suspicious of her brother-in-law and interested in her sister's possible participation in the abuse, she claimed to want to reestablish the formerly close relationship with Amy. The day after her release, Ferguson visited the Sparks home. She found Tate in the home with a bruised face and what appeared to be a broken arm. The arm was in a cast, but according to Ferguson, the boy still appeared to be in pain. Though Kirsten was nowhere to be found, Ferguson could see Andrew and Amy in the backyard. They were arguing loudly. Fearing what would happen if Andrew and Amy returned from their argument to find her in the house with the distressed young boy, Ferguson left the home.

Suspecting that Andrew may have been the cause of Tate's injuries and that her sister may have been his accomplice, Ferguson immediately related the story to Dr. Pistone.

Pistone, a marriage and family counselor, was required by Davis law to report instances of suspected child abuse. According to Pistone, Ferguson's story seemed very believable and in his professional opinion, her disposition was calm and rational during the entire encounter. Disturbed by this recent encounter, he telephoned Lena Rozas at DCPS on September 20, 1998. Rozas told Pistone that she needed more information before she could refer the matter to an emergency response unit. Pursuant to this request, Pistone sent Rozas a letter stating that in his professional opinion, Ferguson appeared credible and that based upon this evaluation of her, a true threat may exist to Kirsten and Tate Sparks. The letter recounted all of the details of the Sparks' allegedly abusive behavior and supposed cult membership. It also told of a ritualistic murder potentially planned for September 23, 1998.<sup>1</sup>

Rozas submitted this letter to her supervisor, who advised her to contact the Davis Police Department. She did so. The Police Department, in turn, assigned the case to Officer R.P. Coltrane. Rozas told Coltrane about the contents of Pistone's letter, but she asserts that she has no memory of telling anyone at the Davis Police Department or at DCPS that the children should be removed from their parents' custody immediately. Regardless, DCPS assigned her as the case's "emergency response social worker" on September 21. Her job was to coordinate the efforts of the police and the district attorney in preparation for taking the children from parental custody. Rozas' notes show that she communicated with Coltrane in an effort to

locate the Sparks' home, and that on September 22, a district attorney named Gary Ransdall had told her that "we have enough to pick up the kids."

During this time, Coltrane had officially been assigned to the case and was monitoring the family. A member of the Department for only three months, Coltrane testified that on September 22, Rozas told him that Gary Ransdall had in his possession a pick-up order that authorized the police to remove the Sparks children from their home in accordance with Davis law.<sup>2</sup> Coltrane also testified that he had asked his supervisor, Sergeant Julia Malek, whether he should wait for a written copy of the order to come to the Police Department before seeking out the children. Malek had recently transferred in from the Horse Cave Police Department in neighboring Hart County, so she asked Officers Maxwell Santini and Leroy DiPasquale what this Department normally did. They told Malek to go ahead and pick up the children. Both Santini and DiPasquale were later identified by the Department as the

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<sup>2</sup> The applicable Davis laws are:

§1247-666: Where the City of Davis, the Davis police, or any other agency specified by city statute has reasonable cause to believe that minors under the age of 18 are at risk for substantial, bodily injury while in the custody of their natural or adoptive parents or other legal guardians, the Davis police shall have the authority to remove the minors from such custody and do all that is in the children's immediate best interests. The Davis police shall be authorized to investigate the facts and circumstances surrounding the injury so long as the investigation is tailored to preserving the best interests of the minors and both the federal and state constitutional rights of the parents.

§1247-667: When the Davis police take custody of a minor pursuant to Davis Stat. §1247-666, the removal of such minors may only be pursuant to a court order specifying that reasonable cause for the removal exists. In cases of imminent harm, the court order may be obtained at a reasonable time after the minor's safety is assured.

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<sup>1</sup> According to Ferguson, Andrew Sparks' cult considered the Fall Equinox to be a High Holiday. The cult's orthodoxy required the sacrifice of a young, male child on the evening of these holy days. This year, the Fall Equinox would take place on September 23, 1998. Because this was the same day as Tate's birthday, Ferguson feared for his safety.

people most knowledgeable about the Department's practices in regards to taking protective custody of minors.

It is undisputed that no order ever existed and that the district attorney had not yet even petitioned the court for the children's removal.

During discovery and at trial, Coltrane, Malek, Santini, and DiPasquale all testified that at the time, the Davis Police Department routinely took "at face value" telephone representations from DCPS concerning court orders to remove children from parental custody. DiPasquale testified that "[i]t was not unusual for DCPS workers to call and ask for our units to respond to a particular scene, telling us that a petition's been filed or an order is on its way to the precinct. That happened fairly often." Santini testified that the Police Department did nothing to verify that a pick-up order existed because there was a longstanding, unofficial agreement between agencies that "if someone tells you they have a pick-up order, it would be taken at face value that they did, in fact, have a pick-up order."<sup>3</sup> Indeed, Santini testified that this was settled practice within the Department.

Later that day, the police sought to enforce the purported court order. They knocked on the Sparks' front door. According to Coltrane, the officers identified themselves as soon as Amy opened the door and told her that they needed to "check on" the children. Aside from Tate's injuries, Coltrane testified that both children appeared healthy. The children were asleep when the officers entered, and Officer Coltrane acknowledged that there were no other suspicious signs of abuse. Nevertheless, Coltrane decided to

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<sup>3</sup> Unlike arrest warrants, court orders to seize children were not at that time part of any computerized database and there was no established procedure for verifying such orders, by xerox, fax, computer, or otherwise.

"interview" Kirsten. He ordered Andrew and Amy to awaken Kirsten so that he could question her. The parents resisted, but eventually agreed. According to Coltrane, the six year-old became extremely agitated by the officers' presence. When Coltrane asked her whether "anybody had ever given her bad touches," she denied that anyone had. However, her agitation worsened and she began to cry. Coltrane has testified that, in his opinion, her reaction seemed "unreasonable for a child who was not abused."

Coltrane then told the parents that their children were being taken away from them. He testified that he did not know the specifics of how DCPS laid the foundation for getting the children removed, but that the police took custody of Kirsten and Tate "because of the order and because the DCPS had already conducted an investigation." Coltrane did not interview Amy or Andrew because "we had an order and so I wasn't that concerned about it." In addition, neither Amy nor Andrew ever expressed concern that the police did not have a court order with them. At 1:00 a.m. on September 23, 1998, the police took Kirsten and Tate to Shady Brook Children's Home. The children were not allowed to see their parents and cried for them constantly. Of course, Amy and Andrew Sparks expressed their opposition to having the police take their children away from them, but they were subdued and taken to the police station for questioning.

On the afternoon of September 23, Coltrane picked up Kirsten and Tate from Shady Brook and took them to Eunice Memorial Hospital. At the hospital, Coltrane ordered evidentiary physical examinations of both children in accordance with police policy. The examinations were performed in order to determine whether either child had been sexually abused. The parents were not

notified in advance that the examinations would be conducted. They were not given any opportunity to object to the intrusive examinations, to suggest conditions under which they might take place, or to be present when they occurred.

The procedures, conducted by Dr. Rodes Harlin, included internal body cavity examinations of the children. Harlin took photographs of both the inside and outside of Kirsten's vagina and rectum and Tate's rectum. Rozas, who observed the examinations, reported (not surprisingly) that Kirsten and Tate were very upset by the procedures. The children asked for both of their parents during the ordeal. Following the examinations, Dr. Harlin reported to Rozas that the results disclosed definite medical evidence that both children had been molested, and that Dr. Henry Charey, a specialist from the hospital's Sexual Abuse Unit concurred with her findings. On September 24, 1998, Rozas filed a petition in Juvenile Court requesting custody of the children since both had been sexually abused and since Andrew's cult membership posed an additional physical threat. The Juvenile Court judge specifically rejected the allegations regarding occult sacrifice as a basis for retaining custody of the children. However, the judge decided that since Harlin's report provided substantial evidence of sexual abuse, the children were to remain in protective custody. Andrew and Amy were granted only one supervised visit per week. They continued to vehemently deny all allegations of abuse. They also asserted that Tate's broken arm and bruises were the result of a car accident and that the argument that Ferguson had witnessed concerned Tate's medical expenses from the accident.

Two months later, Dr. Charey asked Dixie Cohen, a colleague from the Sexual Abuse Unit, to help him review Dr. Harlin's report.

As it turned out, at the time of the initial report, Dr. Charey did not have full access to all the examination records. After reviewing the complete file, the doctors found the examinations to be inconclusive. Both Charey and Cohen testified that the examinations produced evidence that could be interpreted as abuse, but which could also be common physiological abnormalities. They offered no ultimate opinion as to the correct interpretation. Dr. Charey notified Rozas of the potential inconsistency. Four days later, Rozas released the children to Amy's mother's custody, and quickly moved to dismiss the case in Juvenile Court pending further investigation. On December 6, 1998, Kirsten and Tate were returned by court order to the custody of their parents.

Andrew and Amy Sparks initiated an action in this court against defendants Felicia Ferguson, Mario Pistone, Lena Rozas, Officer R.P. Coltrane, Dr. Rodes Harlin, Dr. Henry Charey, Davis Child Protective Services, Eunice Memorial Hospital, and the City of Davis alleging, *inter alia*, violations of 42 U.S.C. § 1983 as well as various state law claims. Dr. Harlin, Dr. Charey, and Eunice Memorial Hospital reached out of court settlements with the Sparks, while Ferguson, Pistone, Rozas, Coltrane, and DCPS have been granted summary judgment on various grounds addressed in other opinions of this court. The City of Davis remains as the only defendant in this particular action, and it has gone to trial solely on the § 1983 claim. At the close of evidence, the defense moved for Judgment as a Matter of Law pursuant to FED. R. CIV. P. 50.

## **I. JUDGMENT AS A MATTER OF LAW**

Andrew and Amy Sparks seek to hold the City of Davis liable for constitutional deprivations they claim to have suffered as a

result of the practices employed by the Davis Police Department during the pick-up and detention of their children. Particularly, they assert that because the City of Davis detained the children and subjected them to intrusive medical examinations without providing the parents with the opportunity to be present during the procedures, the City deprived them of their Fourteenth Amendment Due Process right to family association.<sup>4</sup> Moreover, since this deprivation occurred because of the police's "custom" of picking up allegedly abused children before seeing a properly executed court order, the Sparks seek to use a § 1983 action as the means for holding the City of Davis liable.<sup>5</sup>

In considering granting a motion for Judgment as a Matter of Law, more commonly known as a directed verdict, a court must view the evidence in the light most favorable to the non-moving party. A directed verdict is proper only where no reasonable juror could find for the nonmoving party. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

The facts, as detailed above, were presented at trial. For the reasons stated below, the City's motion is granted.

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<sup>4</sup> The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall...deprive any person of life, liberty, or property, without due process of law." The Sparks assert that their liberty interests have been violated because the police prevented them from seeing and comforting their children during the medical treatments.

<sup>5</sup> 42 U.S.C. § 1983 provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be 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 proceeding for redress."

## II. SUBSTANTIVE DUE PROCESS AND THE RIGHT TO FAMILY

This case presents the court with tragic and somewhat novel circumstances. At worst, Andrew and Amy Sparks have physically and sexually abused their very own children. At best, strange and unforeseen circumstances have conspired to falsely implicate them in that abhorrent behavior. It is in this state of ambiguity that this court must decide whether or not Andrew and Amy Sparks can claim a constitutional right to accompany and comfort their children during examinations aimed at detecting child sexual abuse.

The importance of family privacy has long held a highly regarded place in constitutional jurisprudence. Precedent makes it quite clear that fit parents have the right to associate with their family and make decisions relating to the care and well being of their children. *Troxel v. Granville*, 120 S. Ct. 2054 (2000), *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). But with that right comes important responsibilities for a family's health and well being. Therefore, parents do not possess an absolute right to treat their children as they please – whatever the results. The Supreme Court has been more than willing to assert the states' interest in protecting children, even when that interest interferes with a parent's rights. *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Parham v. J.R.*, 442 U.S. 584 (1979).

In short, "[c]hildren remain important assets, not only for parents but also for society..." Woodhouse, Barbara Bennet, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, FAM. L.Q. (Fall 1999). Despite this recognized importance, newspapers and television news



broadcasts constantly remind us of the cruelty with which some parents treat their own children. Therefore, governmental entities have a "traditional and 'transcendent interest'" in protecting children from abuse. *Maryland v. Craig*, 497 U.S. 836, 855 (1990) (citing *Ginsberg v. New York*, 390 U.S. 629 (1968)). See also *New York v. Ferber*, 458 U.S. 747, 757 (1982). Had the Davis police catered to the wishes of these potentially abusive parents, this interest as well as the best interests of the children might have been compromised. When parental fitness is uncertain and a child is threatened, it is the duty of the state to intervene.

For these reasons, this court refuses to extend the substantive rights of parents under the Fourteenth Amendment Due Process Clause. The right to family association is admittedly broad, especially for fit parents, but it will not stretch to shelter those who abuse and neglect their children. Therefore it is the mandate of this court to grant the defendant's motion and refuse the Sparks' claim that they suffered a constitutional deprivation when they were prevented from accompanying their children to the hospital.

### III. § 1983 CUSTOM

The City's motion for a directed verdict also prevails since a cause-of-action under § 1983 cannot be maintained successfully when plaintiffs fail to show that their claimed constitutional deprivation resulted from a policy endorsed by the government. While *Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978) allows § 1983 claims against municipalities like the City of Davis, the Court's subsequent applications of § 1983 demonstrate that the relevant city policy cannot be as free-wheeling as the simple statutory language of § 1983 implies. A random city custom cannot create city

liability; according to the Supreme Court, something more is first required.

The Supreme Court has used § 1983 to punish improper governmental procedures when the policy at issue has been deliberately endorsed by city authority figures or by the officials responsible for establishing the particular policy. See *Monell*, 436 U.S. 658; *Owen v. City of Independence*, 445 U.S. 622 (1980); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). In addition, city failures to train, supervise, or discipline municipal agents have also resulted in § 1983 liability. See *City of Canton v. Harris*, 489 U.S. 378 (1989). These holdings are logical and prudent since they do not allow angered citizens to wage war against municipalities for what may be inadvertent or inconsequential trends in city governance. In fact, in *City of Canton*, the Court highlighted the very strong causation requirement needed in order to impose liability on a municipal body for any action or policy. *Id.* at 385-386. Via these holdings, the Court, *sub silentio*, has wisely chosen to gloss the language of § 1983 to insure that the respectability and functionality of municipal governments are not tarnished or hindered by an onslaught of frivolous lawsuits. The Due Process and Equal Protection violations that often provide the basis for § 1983 claims occur because of the behavior of individual city workers. Allowing recovery against cities because of the discretionary and unrelated decisions of these individuals would mean consistently holding the entire governmental entity responsible for individual acts of free will.

The plaintiffs in this case would improperly open this floodgate. Officer Coltrane relied on the advice of his equals and his similarly inexperienced supervisor when he took custody of Kirsten and Tate before seeing a court order. Although this action did

precipitate the separation of the parents from their children, it certainly does not meet the tests set by the Supreme Court for distinguishing invidious city policies from accidental lapses in judgment. Because *Monell* and its progeny firmly established that only certain types of city policies fall within the purview of § 1983, this court cannot allow the plaintiffs to destroy the contours of that body of judicial precedent.

#### IV. CONCLUSION

Because the plaintiffs fail to demonstrate that they suffered a deprivation of their constitutional rights when they were prevented from seeing their children during their medical examinations and treatments, and because the plaintiffs also fail to show that this supposed constitutional deprivation resulted from an improper municipal policy, the defense's motion for a directed verdict is hereby GRANTED.

This is a final court order capable of being appealed, there being no just cause for delay.

/s/ Judge Capone, United States  
District Court for the Western District of  
Davis

**UNITED STATES COURT OF  
APPEALS FOR THE SIXTEENTH  
CIRCUIT**

**No. 00-1966M**

**Amy and Andrew SPARKS,**

**APPELLANTS/PLAINTIFFS,**

**v.**

**CITY OF DAVIS; Davis Child Protective  
Services; Eunice Memorial Hospital;  
Officer R.P. Coltrane; Felicia Ferguson;  
Mario Pistone, Ph.D.; Lena Rozas; Rodes  
Harlin, M.D.; Henry Charey, M.D.,**

**APPELLEES/DEFENDANTS**

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**ORDER AND OPINION**  
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MINTER, Circuit Judge:

This case involves a conflict between the legitimate role of the state in protecting children from abusive parents, and the rights of parents to be free from arbitrary and undue governmental interference. Such conflicts occur with increasing frequency these days. The problem of child abuse is a critical one with deep personal and social costs. However, it is important to emphasize that in the area of child abuse, as with the investigation and prosecution of crimes, the state and its municipalities are constrained by the substantive and procedural guarantees of the Constitution. The fact that the suspected crime may be heinous – whether it involves children or adults – does not provide cause for the state to ignore the rights of the accused or any other parties.

The tragic case before us illustrates the significant injury that can be created by this type of improper governmental intrusion. It comes to us from the Federal District Court for the Western District of Davis, where the defense was granted a directed verdict at the close of evidence. We reverse.

**I. BACKGROUND**

In granting the directed verdict, the district court was required to view all evidence in the light most favorable to the nonmoving party. As we are satisfied with the lower court's summation of the facts of this case, we need not reiterate them here. *See Sparks v. City of Davis, et al.*, 3:99 CV-805-P, 1-5.

**II. PROCEDURAL HISTORY**

Andrew and Amy Sparks brought an action under 42 U.S.C. § 1983 against the City of Davis, alleging the violation of their federal constitutional right to be free from undue intrusion into their family life. At the close of evidence, the district court granted the City's motion for a directed verdict, stating that the right to family association is not broad enough to allow parental presence during the medical examination of potential child abuse victims. *Sparks*, at 5. The court also found that even if the right to family association was sufficiently expansive, the City of Davis could not be held liable since the supposed deprivation of the constitutional right did not implicate a municipal policy or practice. *Sparks*, at 6. The Sparks appealed.

Because a directed verdict is a finding of law, we review the district court's decision *de novo*. Applying this standard, we find that the district court erred in its hasty grant of the motion.



### III. THE RIGHT TO FAMILY ASSOCIATION

The Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV. The Supreme Court has long recognized that the Amendment’s Due Process Clause “guarantees more than fair process.” *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). The Clause also includes a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests.” *Id.* at 720. See also *Reno v. Flores*, 507 U.S. 292, 301-302 (1993).

The liberty interest at issue in this case is the interest of the parents in the care, custody, and control of their children. Families have a long-established right to live together without governmental interference. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The right to family association is an essential liberty interest protected by the Fourteenth Amendment’s guarantee that parents and children will not be separated by the state without due process of law except in an emergency. *Stanley*, at 651; *Campbell v. Burt*, 141 F.3d 927 (9th Cir. 1998); *Hurlman v. Rice*, 927 F.2d 74, 79 (2d Cir. 1991); *Duchesne v. Sugarman*, 566 F.2d 817, 824 (2d Cir. 1977). The Supreme Court has also recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *Stanley*, at 651; *Troxel v. Granville*, 120 S. Ct. 2054, 2060 (2000); *Wisconsin v. Yoder*,

406 U.S. 205, 232 (1972); *Quillion v. Walcott*, 434 U.S. 246, 255 (1978); *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

While the Court has also recognized that the states’ interest in protecting children sometimes trumps the parents’ right to custody, care and control, those cases were grounded on much more conclusive evidence than the case at bar. See *Maryland v. Craig*, 497 U.S. 836 (1990); *New York v. Ferber*, 458 U.S. 747 (1982); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944). In the current case, the facts are simply too blurry for a court to direct a verdict that will have an unknown impact on parents’ fundamental right to be with their children.

Therefore, it is with great confidence that this court believes the right to family association includes the fundamental right of parents to be present during invasive medical procedures. The right to make decisions concerning child care, custody and control would be hollow if at the same time the courts denied a parent the opportunity to comfort a child during frightening and traumatic medical examinations. Parents already have a recognized right to make important medical decisions for their children. *Parham* at 602; *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999); *Van Emrik v. Chemung County Dept. of Social Servs.*, 911 F.2d 863 (2d Cir. 1990). Indeed, so long as a parent is fit, there is a presumption that the parent will act in the best interests of the child. *Troxel*, at 2061; *Parham*, at 602. Certainly, a child’s best interests include receiving comfort during a potentially devastating experience. In the current case, there was never a judicial finding that either Andrew or Amy was an unfit parent, so their presumptive rights have not been put at risk. Regardless, the police brought Kirsten and Tate to the hospital and

subjected them to invasive medical procedures without notifying their parents. This action was based solely on the police's own determination of the children's best interests. Plainly, ignoring the wishes of parents not yet found to be unfit oversteps the boundaries of the Fourteenth Amendment's Due Process Clause.

In light of the above, we conclude that the District Court erred in its grant of the City's motion. The right to family association encompasses the right to be present and provide comfort when emotionally scarring medical procedures are performed. The protective sphere that surrounds family privacy must be vigilantly guarded for fear that the state may one day raise our children.

We must still consider, however, whether the directed verdict was nevertheless proper due to the nature of the municipal custom or policy giving rise to the Due Process violation.

#### IV. MUNICIPAL LIABILITY UNDER § 1983

The text of 42 U.S.C. § 1983 provides as follows:

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

The Sparks argue that because there was an unofficial municipal custom at work in separating the Sparks' from their children, the City must be held liable under § 1983.

Indeed, it is clear from the Supreme Court's decision in *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 690 (1978), that a municipality like the City of Davis can be sued for constitutional deprivations visited pursuant to any governmental custom, not just an official policy or practice.

The long history of § 1983 begins in the aftermath of the Civil War when a Republican Congress passed the Ku Klux Klan Act of 1871. The architects of the original act used the term "custom" to refer to the nefarious unwritten codes of conduct which local officials used to prevent the enforcement of Reconstruction era laws. In *Monell*, the Supreme Court found that "Congress, in enacting [the statute], intended to give a broad remedy for violations of federally protected civil rights." *Monell*, at 685. In the twenty-two years since the Court recognized that liability could be founded upon custom, it has continued to center subsequent cases solely on official policies. See *Board of City Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397 (1997); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989); *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1988); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Tennessee v. Garner*, 471 U.S. 1 (1985); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980). In fact, since *Monell* was based on a clearly unconstitutional official policy, the Court left "to another day" a determination of "the full contours of municipal liability." *Monell*, at 695. Since then, the Court has not encountered a § 1983 claim based solely on custom, and therefore has not had "another day" to more fully define "custom."

That day has come for us. Unlike other courts, we will not ignore the wording of the statute itself. Nor will we ignore the reality that the improper behavior of rank and file officers continues to be the truly animating force behind modern police misconduct. Such customs can be the basis for liability even where "it has not received formal approval through the body's decision-making channels." *Id.* at 691, n. 56. In fact, customs can include the well-settled practices of government officials that are "not authorized by written law." *Id.* at 691.

This view – long since forgotten by our Supreme Court – has witnessed a recent resurgence in the lower federal courts. See *Sharp v. City of Houston*, 1999 WL 10153 \*10 (5th Cir. 1999); *McNabola v. Chicago Transit Auth.*, 10 F.3d 511 (7th Cir. 1993); *Mathias v. Bingley*, 906 F.2d 1047 (5th Cir. 1990); *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988); *Garza v. City of Omaha*, 814 F.2d 553 (8th Cir. 1987); *Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986). Perhaps this is because the lower courts have recognized that custom claims have the potential to address a wide spectrum of recurring unconstitutional conduct on the part of low-level city agents – conduct that simply goes unaddressed by current law. There is no reason for the Sixteenth Circuit not to join our colleagues in recognizing the validity of § 1983 claims based on these types of custom.<sup>1</sup>

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<sup>1</sup> Although today we recognize the validity of custom claims, we, like the Supreme Court in *Monell*, will leave certain questions for another day. What actions are sufficient to constitute a custom is one such question. We believe the current facts present a compelling example of police misconduct pursuant to custom, however we realize that we must leave this issue for jury resolution.

As for the case *sub judice*, it is obvious that the district court was hasty in its conclusion that policy is the only means for imposing municipal liability under § 1983. While both parties seem to agree that the police's removal of the children pursuant to a non-existent court order constitutes a city custom, the lower court summarily decided that a custom cannot satisfy the language of § 1983 after *Monell's* progeny. Not only does this ignore the explicit language of the statute, but it also limits the statute's reach unnecessarily.

## V. CONCLUSION

The District Court clearly erred in granting the defendant's motion for directed verdict. The right of family association easily encompasses parents' right to be present whenever invasive or frightening medical procedures are performed on their children. In addition, the City of Davis is not immune from liability under § 1983 simply because the taking of the children resulted from an unofficial municipal custom.

The order of the District Court is hereby, REVERSED, and this case is REMANDED for proceedings not inconsistent with this opinion.

/s/ Judge Minter, United States Court of Appeals for the Sixteenth Circuit.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 2000

CITY OF DAVIS,

Davis Child Protective Services,  
Eunice Memorial Hospital,  
Officer R.P. Coltrane, Felicia Ferguson,  
Mario Pistone, Ph.D., Lena Rozas,  
Rodes Harlin, M.D., Henry Charey, M.D.,

Petitioners

v.

Andrew and Amy SPARKS,

Respondents

No. 00-01749

August 16, 2000

ORDER

Case below, *Sparks v. City of Davis*, 510 F.3d 666 (16th Cir. 2000).

The petition for writ of certiorari to the United States Court of Appeals for the Sixteenth Circuit is hereby granted limited to the following two questions:

- 1) Whether the Fourteenth Amendment Due Process right to family association includes a parent's right to accompany and comfort his/her children during invasive medical examinations even in cases of suspected child abuse; and
- 2) Whether "custom" is a valid ground for municipal liability under 42 U.S.C. §1983 in light of the Supreme Court decisions subsequent to *Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978).

Probable jurisdiction is noted, and a total of one half hour allotted for oral argument. The briefs of both parties are to be filed with the Clerk of the Court on or before 5:00 p.m. on Friday, September 22, 2000. The case is set for oral argument in the October 2000 term of this Court.