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WRONGFUL DEATH ACTIONS AND SECTION 1983†

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> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice.[1]
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> This, then, is what is offered to the people of the United States as remedy for wrongs, arsons, and murders done. This is what we offer to a man whose house has been burned, as a remedy; to the woman whose husband has been murdered, as a remedy; to the children whose father has been killed, as a remedy.[2]
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> [I]t defies history to conclude that Congress purposefully meant to assure to the living freedom from such unconstitutional deprivation but that, with like precision, had meant to withdraw the protection of the Civil Rights statutes against the peril of death. The policy of law and the

1. CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871) (Rep. Lowe).
2. CONG. GLOBE, 42d Cong., 1st Sess. 807 (1871) (Rep. Butler).

> legislative aim are certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence that would cripple.[3]

INTRODUCTION

This article examines the use of 42 U.S.C. § 1983[4] in cases in which violations of federal law by state or local officials result in a death and the rules that govern the existence of the cause of action and the available damages.[5] State remedies for the protection of individual rights from official misconduct are often inadequate,[6] and public protection is frequently unavailing.[7] Thus, many plaintiffs seek alternative remedies, and in recent years the estates, personal representatives and survivors of victims of wrongful killings have increasingly turned to federal law and federal courts.[8] Section 1983, however, is a threadbare statute, and federal courts have generally looked to state law to supply details concerning its use as a wrongful death remedy. This article reviews these developments and 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.

Actions by public officials that result in a death raise fundamental questions about the reach of federal constitutional law. Although the United States Supreme Court has recently held that the excessive use of deadly force by the police may be the basis for a § 1983 damage action to enforce the fourth amendment,[9] it is unclear whether the due process clause of the

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3. Brazier v. Cherry, 293 F.2d 401, 404 (5th Cir.) (Brown, J.), *cert. denied*, 368 U.S. 921 (1961).

4. 42 U.S.C. § 1983 (1982) is derived from § 1 of the Civil Rights Act of 1871, 17 Stat. 13, and provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

5. Although this article focuses on § 1983 actions, a similar analysis applies to the civil action against private conspiracies to deprive persons of the equal protection of the laws, which was adopted in § 2 of the Civil Rights Act of 1871, 17 Stat. 13, and is now contained in 42 U.S.C. § 1985(3) (1982). *See infra* notes 534-37 and accompanying text.

6. *See* Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 496-504 (1955); Note, *Civil Rights Act Section 1983: Abuses By Law Enforcement Officers*, 36 IND. L.J. 317, 320-21 (1961).

7. *See* R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS (1947).

8. *See generally* P. SCHARF & A. BINDER, THE BADGE AND THE BULLET (1983) (discussing the misuse of deadly force by the police and the increase in litigation involving allegedly wrongful killings).

9. Tennessee v. Garner, 105 S. Ct. 1694 (1985) (statute authorizing use of deadly force to apprehend unarmed, nondangerous, fleeing felons violates the fourth amendment).

fourteenth amendment, standing alone, protects deprivations of life when no substantive constitutional provision is violated.[10] Nonetheless, some actions by public officials that result in death also violate specific constitutional guarantees and give rise to § 1983 actions for damages.[11] This article focuses on the technical and often complex rules that determine the availability and scope of § 1983 actions brought to assert the constitutional rights of decedents.[12] There is an old German saying that "the devil lies in the details,"[13]

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10. The fourteenth amendment to the United States Constitution protects life itself: "nor shall any State deprive any person of life . . . without due process of law . . . ." The Court, however, has not decided whether the excessive use of deadly force violates this provision and gives rise to a § 1983 action. Under § 2 of the Civil Rights Act of 1866, 14 Stat. 27 (codified at 18 U.S.C. § 242 (1982)), the federal criminal civil rights statute on which § 1 of the Civil Rights Act of 1871 was patterned, excessive use of deadly force is equated with summary punishment and is a violation of due process. Screws v. United States, 335 U.S. 91 (1945). The Court has held that neither negligent nor intentional deprivations of property violate the due process clause of the fourteenth amendment where states maintain adequate post-deprivation remedies, *see* Parratt v. Taylor, 451 U.S. 527 (1981); Hudson v. Palmer, 104 S. Ct. 3194 (1984), and lower courts have applied *Parratt* to deprivations of life and liberty. *See, e.g.*, Daniels v. Williams, 748 F.2d 229 (4th Cir. 1984) (en banc), *cert. granted,* 105 S. Ct. 1168 (1985); Wilson v. Beebe, 770 F.2d 578 (6th Cir. 1985) (en banc); Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984); Enright v. Board of School Directors, 114 Wis. 2d 124, 346 N.W.2d 771, *cert. denied,* 105 S. Ct. 365 (1984). A leading commentator has observed that the logical extension of *Parratt* would limit Monroe v. Pape, 365 U.S. 167, 183 (1961), which established § 1983 as a supplement to state tort remedies, and has welcomed such a reexamination. *See* Bator, *Some Thoughts on Applied Federalism*, 6 HARV. J. LAW & PUB. POL. 51, 56-58 (1982). However, most courts that have addressed the continued vitality of *Monroe* in cases involving substantive constitutional provisions, including violations of substantive due process, have held that § 1983 is available regardless of the adequacy of state post-deprivation remedies. *See* Wilson v. Beebe, 770 F.2d 578 (6th Cir. 1985) (en banc); Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) (en banc); *see also* Augustine v. Doe, 740 F.2d 322, 326 (5th Cir. 1984), and cases cited; *cf.* Roman v. City of Richmond, 570 F. Supp. 1554, 1555-56 (N.D. Cal. 1983) (rejecting argument that state wrongful death action constitutes adequate post-deprivation remedy to preclude § 1983 action for wrongful killing).

11. The Court has held that the deliberate indifference to the medical needs of a prisoner constitutes an eighth amendment violation and is actionable in both actions directly under the constitution and § 1983 actions. *See* Carlson v. Green, 446 U.S. 14 (1979); Estelle v. Gamble, 429 U.S. 97 (1976). It has also held the excessive use of deadly force to be a violation of the fourth amendment. Tennessee v. Garner, 105 S. Ct. 1694 (1985). Because these violations of federal law can result in death, *some* wrongful killings give rise to § 1983 claims and implicate the survival and wrongful death issues addressed in this article, regardless how the Court resolves whether deprivations of life and liberty are actionable under the due process clause.

12. This article does not address the broad empirical question of whether, as some have claimed, the availability of damage actions against public officials and the political entities that employ them deters the inappropriate use of deadly force. Nor does it address whether, as critics of the expansion of official and entity liability have argued, the availability of such remedies deters appropriately aggressive police activity. Rather, the article proceeds on the assumption that effective remedies should exist to compensate victims and survivors of illegal governmental actions, and that civil damage remedies can help deter inappropriate uses of deadly force while spreading the cost of compensating victims to society as a whole. *Cf.* Owen v. City of Independence, 445 U.S. 622, 650-58 (1980) (public interest in deterring illegal conduct and spreading the cost of compensation supports denying municipalities a qualified immunity in § 1983 actions). For a review of mechanisms other than private litigation to regulate the improper use of deadly force by the police, see P. SCHARF & A. BINDER, *supra* note 8, at 181-230.

13. The origin of this expression, which in German is *"der Teufel steckt im Detail,"* is unclear, but it must have come into the German language after the late 18th century when "Detail" was incorporated into German from French. *See* Letter from Helmut Walther, Lan-

and an important detail of § 1983 litigation involving wrongful killings is the rules that determine whether and to what extent § 1983 actions survive the death of the victim and are available to compensate survivors who have been injured by the victim's death.[14]

The 1961 decision of the United States Supreme Court in *Monroe v. Pape*[15] established § 1983 as a damage remedy to enforce the fourteenth amendment when state remedies were inadequate in theory or practice. *Monroe* also guaranteed plaintiffs direct access to federal courts without having to demonstrate the inadequacy of state remedies or the absence of sympathetic state forums and established § 1983 as a supplement to state tort remedies by permitting § 1983 damage actions when the objectionable conduct also violated state law.[16]

As a result of *Monroe,* § 1983 emerged as the principal modern remedy for the private enforcement of federal law against state and local defendants, and the volume of federal court § 1983 litigation has increased sharply.[17] A significant percentage of the § 1983 cases filed in federal courts, including *Monroe,* involve allegations of the excessive use of force,[18] although relatively few of the underlying incidents resulted in the victims' deaths.[19] Nonetheless, § 1983 litigation often follows wrongful killings, especially those alleged to have been caused by the improper use of deadly force by police or other law enforcement officials, and the entire matter frequently becomes a highly

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guage Advisor for the Gesellschaft für deutsche Sprache (Organizations for German Language) to Steven H. Steinglass (Aug. 13, 1985) (on file with the *Indiana Law Journal).* The phrase appears in a number of current German dictionaries. *See, e.g.,* 5 R. KLAPPENBACH & W. STEINITZ, WÖRTERBUCH DER DEUTSCHEN GEGENWARTSSPRACHE 3723 (1976); 6 DUDEN, DAS GROSSE WÖRTERBUCH DER DEUTSCHEN SPRACHE 2583 (1981); 6 BROCKHAUS WAHRIG DEUTSCHES WÖRTERBUCH 212 (1984).

14. In focusing on this aspect of the remedial problems that arise where governmental actions result in the deprivation of life, this article is less concerned with "issues of the definitions of rights . . . than [with] the creation of a machinery of jurisdiction and remedies that can transform rights proclaimed on paper into practical protections." Schmidt, *Juries, Jurisdiction and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1413 (1983). The article, however, does not address other remedial issues that often arise in § 1983 litigation involving wrongful killings such as the scope of official immunities, *see* Scheuer v. Rhodes, 416 U.S. 232 (1974); the official policies that can be the basis for municipal liability, *see* City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985); or the reach of the state action doctrine, *see* Belcher v. Stengel, 522 F.2d 438 (6th Cir. 1975), *cert. dismissed as improvidently granted,* 429 U.S. 118 (1976).

15. 365 U.S. 167 (1961).

16. *Id.* at 183.

17. Although no precise statistics are available on the volume of § 1983 as contrasted to other civil rights litigation, the increase in civil rights litigation since *Monroe* has been dramatic and § 1983 cases constitute a substantial part of this increase. *See* Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review,* 38 U. MIAMI L. REV. 381, 391 n.38 (1984).

18. *See* Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study,* 67 CORNELL L. REV. 482, 550-51 (1982) (13.8% of the nonprisoner § 1983 cases filed in the Central District of California in 1975 and 1976 involved allegations of assaults, batteries or shootings).

19. Between 1975 and 1979 the rate of justifiable homicides by the police in 50 major cities was .66 per 100,000 population. The rate among cities, however, differed markedly. For example, the rate in New Orleans was approximately 30 times the rate in Sacramento. *See* P. SCHARF & A. BINDER, *supra* note 8, at 184-91.

charged, controversial political and legal issue.[20] Moreover, the financial implications of § 1983 actions involving wrongful killings can be significant, and substantial verdicts and settlements are becoming common.[21] Finally, the stakes have been increased by Supreme Court decisions expanding municipal liability under § 1983[22] and by the application of state indemnification statutes[23] and insurance coverage to § 1983 actions.[24]

When actions by state or local officials result in a death, plaintiffs often frame damage actions under § 1983 not only to gain access to federal courts but also to avoid state survival and wrongful death policies. Survival policies determine whether the death of a litigant requires a pending action to abate or prevents a new action from being filed. When the decedent is the plaintiff who brought the action or the individual whose estate or other representative is suing, the action is the one the decedent would have had but for his death, and the damages are measured in terms of the injuries to the decedent. On the other hand, in wrongful death actions survivors seek compensation for losses they suffered as the result of the wrongful killing, but the cause of action is also the one the decedent would have had if the wrongful act had not taken his life.[25]

Although all states have modified the harsh rules of the common law under which actions for personal injuries abated upon the death of the

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20. *See* P. SCHARF & A. BINDER, *supra* note 8, at 233 ("Virtually every police shooting that leads to injury or death can be expected to lead to a civil suit in the 1980s, no matter how justified the [police] action may seem to the outside observer.").

21. *See, e.g.*, Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) (upholding $1.04 million of judgment in case involving police killing and racially motivated coverup); Roman v. City of Richmond, 570 F. Supp. 1554 (N.D. Cal. 1983) ($3 million jury verdict upheld in consolidated trials involving two shooting deaths); Prior v. Woods, No. 973818, 25 ATLA L. Rep. 172 (E.D. Mich. Oct. 19, 1981) (jury verdict of $5.75 million in compensatory and punitive damages, including $3 million punitive against city under pendent state claim); Burkholder v. City of Los Angeles, No. C291 783, 26 ATLA L. Rep. 123 (L.A. Sup. Ct. Oct. 20, 1982) (jury verdiet of $425,750). For a collection and summary of jury verdicts and settlements in police misconduct cases many of which involved wrongful killings, see A. LLOYD, MONEY DAMAGES IN POLICE MISCONDUCT CASES: A COMPILATION OF JURY AWARDS AND SETTLEMENTS (1983).

22. *See* Owen v. City of Independence, 445 U.S. 622 (1980); Monell v. Department of Social Servs., 436 U.S. 658 (1978). *But see* City of Oklahoma City v. Tuttle, 105 S. Ct. 2927 (1985) (reversing $1.5 million jury verdict for a police shooting death because the plaintiff failed to establish the existence of an official policy).

23. *See, e.g.*, Bell v. City of Milwaukee, 746 F.2d 1205, 1268-72 (7th Cir. 1984) (state indemnification statute makes city liable for judgment against law enforcement officials, including punitive damages); *see also* Williams v. Horvath, 16 Cal. 3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976) (state indemnification statute applicable in § 1983 action); Rosacker v. Multnomah County, 43 Or. App. 583, 603 P.2d 1216 (1979) (state tort claims act makes municipalities liable for employees' violations of § 1983).

24. *Cf.* Harris v. Racine County, 512 F. Supp. 1273 (E.D. Wis. 1982) (insurance available to satisfy § 1983 award). Although the broader implications of municipal liability, state indemnification statutes and insurance coverage have not been fully explored, an immediate result of bringing such "deep pockets" into the litigation is the increased likelihood that larger awards will be made against public employees and will be satisfied. *See generally* P. SCHUCK, SUING GOVERNMENT (1983).

25. *See infra* notes 58-66 and accompanying text.

victim, and survivors—no matter how close their relationship with the decedent—had no actionable interest in the life of the decedent, state policies vary markedly, and significant limitations on state causes of action, especially with respect to the available damages, are common.[26] Federal courts, nonetheless, generally look to state law to determine the survival of § 1983 actions as well as the availability of § 1983 as a wrongful death remedy.[27] This approach draws support from Supreme Court § 1983 decisions requiring initial resort to state law on survival issues, but the Court has required an independent examination of whether borrowed state survival policies are consistent with § 1983's purposes of compensation and deterrence.[28] The Court has also avoided state law in actions authorized by *Bivens v. Six Unknown Federal Narcotics Agents*[29] against federal officials directly under the Constitution by rejecting the use of state policies that require actions to abate when death resulted from the complained-of conduct, and has suggested it would reject state policies in similar § 1983 actions against state or local officials.[30] Nonetheless, the Court has not provided guidance on the availability of § 1983 as a wrongful death remedy in which survivors seek compensation for their own losses, despite the importance of the issue, the Court's demonstrated interest in it, and the existence of divergent approaches by federal and state courts.

The use of state survival and wrongful death policies in § 1983 actions has left federal and state courts in the uncomfortable position of having to review the consistency of state policies with § 1983 rather than to develop federal policies that meet the purposes of § 1983. Moreover, in scrutinizing state policies, many courts have taken conflicting approaches to these issues. For example, some courts have considered the availability and adequacy of state wrongful death remedies in deciding whether to follow state policies that require actions to abate when the complained-of conduct resulted in death, but others have required survival actions to stand or fall on their own.[31] Likewise, courts reviewing state policies that limit the damages in survival actions have often failed to sort out the different interests at stake in survival and wrongful death actions. Thus, some courts have followed state policies that limit the compensatory and punitive damages that survive while others have defined damages broadly to compensate for the taking of life and have provided damages for lost earnings, conscious pain and suffering, and punitive damages.[32]

With respect to wrongful death claims, most courts entertaining § 1983 actions have followed state policies to determine which survivors can pursue

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26. *See infra* notes 51-57 and accompanying text.
27. *See, e.g.*, Brazier v. Cherry, 293 F.2d 401 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961).
28. Robertson v. Wegmann, 436 U.S. 584 (1978).
29. 403 U.S. 388 (1971).
30. Carlson v. Green, 446 U.S. 14 (1979).
31. *See infra* notes 444-62 and accompanying text.
32. *See infra* notes 463-78 and accompanying text.

a wrongful death action but have rejected state policies that limit damages to pecuniary losses or that impose statutory ceilings on recoveries. Some courts, however, have gone further and awarded § 1983 wrongful death damages for the mental anguish or grief of survivors and punitive damages. However, both state and federal courts in Alabama, the one state that limits wrongful death damages to punitive damages, have denied the availability of a § 1983 wrongful death action for compensatory damages.[33]

It is the thesis of this article that state and federal courts have often limited the scope of § 1983 actions involving wrongful killings by failing to distinguish adequately issues of survival and wrongful death,[34] and have been too quick to apply the borrowing approach used for § 1983 survival issues to wrongful death claims. This excessive reliance on state law has resulted from the failure to examine the legislative history and purposes of the Civil Rights Act of 1871, which contains the predecessor to § 1983 and which supports a construction of § 1983 as an independent wrongful death remedy regardless of state law. Although the impact of the borrowing approach has been somewhat ameliorated by the willingness of many federal courts to reject state policies that limit wrongful death actions, the Supreme Court may be less willing to find state policies inconsistent with the purposes of § 1983. Moreover, the borrowing approach has contributed to an unfortunate rush to constitutionalize the wrongful death issue by providing surviving relatives a constitutionally based and actionable familial interest where state law does not recognize a cause of action or where it limits the available damages.[35] Finally, the lack of guidance by the Court on whether there is a uniform federal rule on the use of § 1983 as a wrongful death remedy has led courts to look initially to state law not only on the availability of the cause of action but also on the applicable damage rules, thus departing from the general policy of approaching § 1983 damage issues under uniform federal standards.[36]

Part 1 of this article identifies differences between survival and wrongful death policies and reviews the treatment of these issues at common law. It also describes the varied state legislative responses to the common law, including the state of the law in 1871 when the predecessor to § 1983 was enacted. The focus is on cases in which the victim dies from the complained-of conduct, and this review suggests why many plaintiffs avoid state remedies in litigation involving wrongful killings. It also illustrates the range and

33. *See infra* notes 479-90 and accompanying text.

34. Parties litigating state law claims have also ignored the difference between survival and wrongful death actions to their detriment. *See, e.g.*, Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (refusing to permit plaintiffs in a state wrongful death action in which punitive damages were prohibited to amend to raise a survival claim in which punitive damages were available). *See also infra* note 43.

35. *See infra* notes 400-33 and accompanying text.

36. *See infra* notes 305-18 & 572-74 and accompanying text.

complexity of issues that arise when state law governs the availability of a cause of action and the damages in § 1983 actions involving wrongful killings.

Part II examines the Supreme Court's approach to survival issues in § 1983 and *Bivens* actions as well as the Court's unsuccessful attempts to resolve whether state wrongful death policies may limit § 1983 actions. It also reviews the Court's approach to survival and wrongful death claims in federal statutes that have no provisions directly on point and under the admiralty jurisdiction.

Part III looks to the approaches the Supreme Court has taken in determining whether to fill other gaps in § 1983 with uniform federal policies—despite the absence of clear legislative guidance—or with rules borrowed from state law. This inquiry is made unique by the presence of a civil rights choice of law statute, 42 U.S.C. § 1988,[37] which supplements the more generally applicable Rules of Decision Act[38] and limits the power of federal courts to develop a federal common law to govern § 1983 litigation. Thus, the threshold question in any case is whether independently or through § 1988 there is a uniform federal policy that obviates the need to look to state law. Even when initial resort must be made to state law, however, the courts must determine whether particular state policies are appropriate for incorporation, and whether borrowed policies should be rejected as being inconsistent with the purposes of § 1983.

Part IV reviews the approaches state and federal courts have followed in addressing survival and wrongful death issues under § 1983 and concludes that they have often been too quick to apply the borrowing approach used for survival issues to § 1983 wrongful death actions. Moreover, this approach has contributed to the rush to constitutionalize the interest of the survivor in the continued life of the victim. Part IV also examines the treatment by state and federal courts of state policies that limit the damages available in survival and wrongful death actions. Although courts have sought to maintain minimum federal standards by scrutinizing state damage limitations in light of the purposes of § 1983, this approach may yield results not justified by § 1988, and the Supreme Court may not be as willing to reject state policies.

Part V reviews the language, legislative history and purposes of § 1983 and concludes that § 1983 ex proprio vigore constitutes a wrongful death remedy regardless of state law. Section 1983 can be read to authorize a wrongful death remedy by treating the survivor of the person whose rights were violated as the "party injured" under § 1983. Although this construction transforms § 1983 into a third-party standing statute, the approach is consistent with prudential limitations on the ability of parties to assert the rights of others.

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37. 42 U.S.C. § 1988 (1982).
38. 28 U.S.C. § 1652 (1982).

Finally, Part VI reviews briefly the framework courts can use to address who may bring § 1983 wrongful death actions, the damages available in § 1983 actions involving wrongful killings, and how to distribute the proceeds from successful suits.

I. THE INADEQUACIES OF STATE SURVIVAL AND WRONGFUL DEATH POLICIES

Plaintiffs with claims against police and other state and local defendants arising out of wrongful killings often attempt to avoid state law and state courts by framing civil actions under § 1983. On one level this reflects the widespread belief that federal courts are a more sympathetic forum for the protection of individual rights.[39] This view is most widely held where victims of putatively illegal killings are members of racial or ethnic minorities or are engaged in suspect conduct immediately prior to their death.[40] Even where this is not the case, actions alleging abuses of governmental power by police or other government officials are inevitably controversial, and many plaintiffs reject state courts for the greater insulation of the federal courts.[41] Moreover, plaintiffs often consider state law on survival and wrongful death actions and the available damages inadequate. State policies in these areas reflect the legacy of the common law,[42] and often contain a complex array of limitations that confuse both courts and litigants.[43] Thus, when a death results from the actions of state or local government officials, state policies that preclude survival or wrongful death actions or limit the available damages give plaintiffs an incentive to frame their actions under § 1983 and argue for the rejection of state law.

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39. *See generally* Neuborne, *The Myth of Parity,* 90 HARV. L. REV. 1105 (1977) (discussing factors that make federal courts better forums for parties enforcing individual federal rights).

40. *See* Foote, *supra* note 6, at 500-01.

41. The mere selection of a federal forum does not obviate the problem of litigating unpopular cases against the police and other governmental officials. *Cf.* Project, *Suing the Police in Federal Court,* 88 YALE L.J. 781 (1979) (arguing for new approaches to § 1983 in light of the low recoveries and general lack of success by plaintiffs in police abuse cases). *But cf.* Chevigny, *Politics and Law in the Control of Local Surveillance,* 69 CORNELL L. REV. 735, 767-82 (1984) (discussing use of state courts in cases challenging police surveillance).

42. Smedley, *Wrongful Death—Bases of the Common Law Rules,* 13 VAND. L. REV. 605, 605 (1960) (The common law "serves to perpetuate the force of some rules beyond the period of their usefulness and to maintain their influence after the reason for their existence has been long forgotten."). *See also* Comment, *The Inefficient Common Law,* 92 YALE L.J. 862 (1983).

43. *See* Schumacher, *Rights of Action Under Death and Survival Statutes,* 23 MICH. L. REV. 114, 114 (1925) ("A confusion of the underlying principles of modern statutes which give these rights and actions, and an apparent inability to distinguish between the rights thus given has developed a state of the law which could well be described as chaotic."). Litigants who confuse survival and wrongful death actions can be denied damages to which they might otherwise be entitled, *see supra* note 34, and this can also happen in § 1983 litigation. *See, e.g.,* Gilmere v. City of Atlanta, 737 F.2d 894, 898 n.8 (1984) (upholding district court's treatment of claim solely as a survival issue and its refusal to permit the plaintiff to amend the judgment to treat the claim as a wrongful death action), *vacated on other grounds,* 774 F.2d 1495 (11th Cir. 1985) (en banc).

To a large extent this distaste for state law is based on factors independent of state survival and wrongful death policies. The use of § 1983 to supplement state tort remedies not only permits plaintiffs to bring actions in federal courts but also enables them to avoid state policies that limit governmental accountability. Although state law may be more favorable to plaintiffs than § 1983 in certain cases,[44] plaintiffs using § 1983 may avoid state immunity doctrines,[45] ignore the notice of claims requirements of tort claims acts,[46] and avoid restrictive state policies on damages.[47] Finally, the availibility of attorney fees to prevailing parties in § 1983 litigation makes counsel more readily available, especially in cases not likely to result in substantial verdicts.[48] Thus, even plaintiffs who prefer state forums often attempt to avoid state law by challenging its constitutionality[49] or by framing state court actions involving wrongful killings under § 1983.[50]

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44. *See* Steinglass, *supra* note 17, at 431-34 (comparing § 1983 to state law remedies).

45. *See, e.g.*, Martinez v. California, 444 U.S. 277 (1980) (permitting state immunity defense to a state wrongful death claim but not to a § 1983 claim). *See also* Foote, *supra* note 6, at 502-03.

46. *See, e.g.*, Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1983) (en banc), *cert. denied*, 105 S. Ct. 2153 (1985); Donovan v. Reinbold, 433 F.2d 738, 741-42 (9th Cir. 1970); Williams v. Horvath, 16 Cal. 3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976); Overman v. Klein, 103 Idaho 795, 799, 654 P.2d 888, 892 (1982). *But see* Mills v. County of Monroe, 59 N.Y.2d 307, 451 N.E.2d 456, 464 N.Y.S.2d 709 (1982) (requiring notice of claim in private action under 42 U.S.C. § 1981), *cert. denied*, 104 S. Ct. 551 (1983).

47. *See* Orr v. Crowder, 315 S.E.2d 593 (W. Va. 1983) (state policy denying damages for mental anguish where there is no physical injury not applicable in § 1983 actions), *cert. denied*, 105 S. Ct. 384 (1984); Thompson v. Village of Hales Corners, 115 Wis. 2d 289, 340 N.W.2d 704 (1983) ($25,000 statutory ceiling on recoveries against municipalities not applicable in § 1983 actions). *But see* Ricard v. State of Louisiana, 390 So. 2d 882 (La. 1980) (punitive damages not available in Louisiana courts in state or § 1983 claims).

48. Although the Court has suggested that the degree of success may be relevant in determining an appropriate attorney fee, *see* Hensley v. Eckerhart, 461 U.S. 424 (1983), it has not precluded significant fees in cases involving only small recoveries. Moreover, lower courts have construed *Hensley* as permitting fee awards that exceed the plaintiffs' monetary recovery. *See, e.g.*, Rivera v. City of Riverside, 763 F.2d 1580 (9th Cir), *cert. granted*, 106 S. Ct. 244 (1985); Jaquette v. Black Hawk County, 710 F.2d 455, 461 (8th Cir. 1983); Phillips v. Smalley Maintenance Servs., Inc., 711 F.2d 1524, 1530 (11th Cir. 1983).

49. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968) (holding unconstitutional Louisiana statute precluding wrongful death actions by illegitimate children); Thompson v. Estate of Petroff, 319 N.W.2d 400 (Minn. 1982) (Minnesota statute denying survival of intentional torts but permitting other personal actions to survive violates state equal protection clause). *But cf.* Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (upholding under state and federal constitutions the denial of punitive damages in California wrongful death actions); Cogger v. Trudell, 35 Wis. 2d 350, 151 N.W.2d 146 (1967) (Wisconsin statute denying children wrongful death actions in favor of surviving spouse does not violate state or federal constitutions). Federal courts entertaining state wrongful death claims in diversity actions have also entertained constitutional challenges to limitations on punitive damages. *See, e.g., In re* Air Crash Disaster near Chicago, Ill., 644 F.2d 594 (7th Cir. 1981) (rejecting challenge to denial of punitive damages); Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979) (same).

50. *See, e.g.*, Carter v. City of Birmingham, 444 So. 2d 373 (Ala. 1983), *cert. denied*, 104 S. Ct. 2401 (1984); Martinez v. State, 85 Cal. App. 3d 430, 149 Cal. Rptr. 519 (1978), *aff'd*, 444 U.S. 277 (1980); Jones v. Hildebrant, 191 Colo. 1, 550 P.2d 339 (1976), *cert. dismissed as improvidently granted*, 432 U.S. 183 (1977); Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981),

Despite the adoption by every American state of statutes governing the availability of survival[51] and wrongful death actions,[52] the common law background of state law and the 19th-century legislative approach of the English continue to influence the law in this area.[53] Legislative efforts at reform have often met resistance.[54] Moreover, the statutory origin of both survival and wrongful death actions has made state courts reluctant to review the common law[55] with the vigor with which they have approached and updated common law aspects of tort law.[56] With a few notable exceptions, state courts have confined their role to that of construing statutory remedies.[57]

At common law the issue of survival was governed by the maxim *actio personalis moritur cum persona*—personal actions die with the person. The origins of this maxim are unclear but probably lay in the vindictive and quasi-criminal nature of suits for damages and the futility of trying to punish a wrongdoer after his death.[58] Nonetheless, the no-survival rule applied to

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cert. dismissed for want of jurisdiction, 456 U.S. 430 (1982); Peaches v. City of Evansville, 180 Ind. App. 465, 389 N.E.2d 322 (1979); Ascani v. Hughes, 470 So. 2d 207 (La. Ct. App.), *appeal dismissed,* 106 S. Ct. 517 (1985); Cook v. City of Detroit, 125 Mich. App. 724, 337 N.W.2d 277 (1983); Falkenstein v. City of Bismarck, 268 N.W.2d 787 (N.D. 1978); State v. Brosseau, 470 A.2d 869 (N.H. 1983) (§ 1983 wrongful death counterclaim); Jenkins v. Kreiger, 67 Ohio St. 2d 314, 423 N.E.2d 856 (1981), *cert. denied,* 454 U.S. 1124 (1983); Enright v. Board of School Directors, 114 Wis. 2d 124, 346 N.W.2d 771, *cert. denied,* 105 S. Ct. 365 (1984).

51. W. PROSSER, THE LAW OF TORTS § 126, at 900 (4th ed. 1971) ("All jurisdictions have modified the common law to some extent, if only to provide that causes of action for injuries to all tangible property, personal or real, shall survive the death of both parties.").

52. *See* 1 S. SPEISER, RECOVERY FOR WRONGFUL DEATH 35 (2d ed. 1975) ("Each of the fifty states has some statutory system under which damages may be awarded for wrongful death."); Note, *Wrongful Death Damages in North Carolina,* 44 N.C.L. REV. 402, 402-03 (1966) ("Lord Campbell's Act in 1846 created the first statutory right of action for wrongful death, and such rights of action now exist by statute in all fifty states and in the territories of the United States.").

53. *See* RESTATEMENT (SECOND) OF TORTS § 925, at 528 (1977).

54. *See* Smedley, *supra* note 42, at 624.

55. *See* F. HARPER & F. JAMES, THE LAW OF TORTS 1285 (1956) ("[R]estrictions imposed on the [wrongful death] remedy . . . are often applied with especial strictness because the right itself originated in the statute which imposed the limitation.").

56. *See, e.g.,* L. Baum & B. Canon, *State Supreme Courts as Activists: New Doctrine in the Law of Torts,* in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM (M. Porter & G. Tarr ed. 1982); *see generally* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (discussing the role of common law courts in reviewing obsolete statutes).

57. *See* W. PROSSER, *supra* note 51, § 126, at 900 n.32 (noting that four jurisdictions authorize survival of personal actions as a result of judicial decisions); *see also* Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972) (allowing a common law remedy for beneficiaries who would have been barred by the statutory wrongful death remedy, and overturning a 124-year-old precedent). *Cf.* Moragne v. States Marine Lines, 398 U.S. 375 (1970) (finding a common law wrongful death action based on unseaworthiness under the federal maritime law).

58. Smedley, supra note 42, at 606-09; *see also* W. PROSSER, THE LAW OF TORTS § 103, at 950-51 (1st ed. 1941) ("The best conjecture on the subject is that it was a result of the development of the tort remedy as an adjunct and incident to criminal punishment in the old appeal of felony and the action of trespass which superseded it. Since the defendant could not be punished when he was dead, it was natural to regard his demise as terminating the criminal action, and tort liability with it. If it was the plaintiff who died, the early cases usually were those of homicide, for which the crown executed the defendant and confiscated all his property, so that nothing was left for tort compensation; and if not, it was still to be expected that lesser crimes should be redressed by the crown rather than the successors of the deceased.").

the death of the victim as well as the tortfeasor and, despite exceptions in contract and real property actions,[59] generally required pending personal actions to abate and prevented new ones from being commenced.[60] In so favoring the wrongdoer or his estate, the common law even precluded a cause of action when a death resulted directly from the complained-of conduct.[61]

In addition to prohibitiug the survival of personal actions, the common law did not recognize a civil action based on the death of another.[62] This doctrine, which has its roots in the felony merger rules of English law rather than the no-survival maxim,[63] limited recoveries in common law actions involving killings to the value of services between the time of injury and the time of death.[64] Thus, a master could sue for the loss of services occasioned by an injury to his servant but not for the losses flowing from the servant's death;[65] similarly, the incapacitation of a family breadwinner gave financially dependent family members a cause of action but his death did not.[66]

Although English common law precedents on survival and wrongful death were widely criticized,[67] they became part of the common law in this country. Judicial acceptance of the prohibition on wrongful death actions, however, was uneven. In the late 18th and early 19th centuries, a number of state courts recognized common law actions for wrongful death,[68] but the 1848

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59. *See* F. POLLOCK, THE LAW OF TORTS 41-43 (1877); Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1046-47 (1965). Most tort actions not affecting real property did not survive; for a listing of common law tort actions that did not survive, see W. KEETON, D. DOBBS, R. KEATON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 125A, at 940-41 (5th ed. 1984) [hereinafter cited as W. PROSSER & W. KEETON].

60. Under the common law, pending actions abated upon the death of a party, and new actions could not be commenced. Some state survival statutes, however, distinguished these situations and permitted some pending suits to survive while requiring similar actions not yet begun to abate. *See* F. HARPER & F. JAMES, *supra* note 55, at 1288.

61. Smedley, *supra* note 42, at 619-20. The existence of statutory wrongful death actions and the fear of double recoveries may have contributed to the reluctance to reject historical limitations on survival actions where the complained-of conduct caused death. *See* Malone, *supra* note 59, at 1051-52. *But see* Schumacher, *supra* note 43, at 128-29 (fcars of double recoveries only have a basis where wrongful death damages are available under enlarged survival statutes), and *infra* note 93.

62. *See* F. POLLOCK, *supra* note 59, at 42.

63. Malone, *supra* note 59, at 1052-58.

64. F. TIFFANY, DEATH BY WRONGFUL ACT 17-18 (1st ed. 1893).

65. F. POLLOCK, *supra* note 59, at 41-42.

66. Smedley, *supra* note 42, at 623-24.

67. Malone, *supra* note 59, at 1050-51 n.36. Much of the criticism of the rule prohibiting wrongful death actions was directed toward Baker v. Bolton, 1 Camp. 493, 170 Eng. Rep. 1033 (K.B. 1808), the English decision that first articulated it, and Lord Ellenborough, its author. *See, e.g.*, Holdsworth, *The Origin of the Rule of* Baker v. Bolton, 32 L. Q. REV. 431 (1916); *see also* W. PROSSER, *supra* note 58, § 103, at 955 ("[I]n 1808, Lord Ellenborough, whose forte was never common sense, held without citing any authority that a husband had no action for the loss of his wife's services through her death, and declared in broad terms that in a civil court the death of a human being could not be complained of as an injury!").

68. Gross v. Guthery, 2 Root 90 (Conn. 1794); Ford v. Monroe, 20 Wend. 210 (N.Y. 1838). These cases, however, were later overruled. *See* F. TIFFANY, *supra* note 64, at 7-8, 12-14.

decision of the Supreme Judicial Court of Massachusetts in *Carey v. Berkshire R. Co.*[69] rejected a common law wrongful death claim and is widely credited with marking a turning point.[70] Other jurisdictions fell into line and denied recognition to common law wrongful death actions, despite the uniquely English origins of the prohibition.[71] Thus, in 1877 the United States Supreme Court, in refusing to permit an insurance company that had paid on a life insurance policy to sue the killer of the insured, was able to observe: "The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question."[72]

Ironically, during the very period in which American courts were reaffirming the common law prohibition on wrongful death actions, state legislatures were radically changing the American law of wrongful death. The adoption in England of the Fatal Accidents Act of 1846,[73] more popularly known as Lord Campbell's Act, which rejected the English common law rule,[74] was a catalyst for similar legislation in this country. Lord Campbell's Act did not alter the common law no-survival rule but created an exception to it by establishing a new and independent cause of action in which a statutorily designated beneficiary could recover losses suffered as a result of the death of a close relative.[75] Nonetheless, the cause of action was still the

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69. 55 Mass. (1 Cush.) 475, 48 Am. Dec. 616 (1848). *Carey* involved an action by a widow to recover for the negligent killing of her husband, and the companion case of *Skinner v. Housatonic R. Corp.* was an action by a father for the loss of services of his 11-year-old son. In rejecting these claims, the Massachusetts court relied on English cases including *Baker v. Bolton*. It has been noted, however, that Massachusetts had adopted a limited wrongful death statute, and that this legislation might have made the Massachusetts court even more reluctant to act. *See* Malone, *supra* note 59, at 1069. Nonetheless, this limiting interpretation did not detract from *Carey's* prominence in the 19th century, and it was heavily relied upon by courts and commentators.

70. Malone, *supra* note 59, at 1071. The decision in *Carey* was specifically rejected in Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972), in which the Supreme Judicial Court of Massachusetts authorized a parallel common law wrongful death action on behalf of a survivor who had no cause of action under the state wrongful death statute.

71. The issue of the availability of a common law wrongful death action often arose when relief was sought in circumstances not covered by state wrongful death legislation. Given the legislative entry into the field, however, courts were even more reluctant to act than they otherwise might have been. Malone, *supra* note 59, at 1067-73.

72. Mobile Life Ins. Co. v. Brame, 95 U.S. 754, 756 (1877).

73. 9 & 10 Vict., ch. 93.

74. Lord Campbell's Act reflected the settled nature of the common law prohibition on actions for wrongful death by stating in its preface:

> Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person, and it is oftentimes right and expedient that the Wrongdoer in such Case should be answerable in Damages for the Injury so caused by him . . . .

Fatal Accidents Act of 1846, 9 & 10 Vict., ch. 93, *cited in* Malone, *supra* note 59, at 1058.

75. *See* Oppenheimer, *The Survival of Tort Actions,* 16 TULANE L. REV. 386, 387 (1942); F. POLLOCK, *supra* note 59, at 44.

one the decedent would have had at the time of his death had the wrongful act not resulted in death.[76]

Legislative change in this area was rapid. Prior to the adoption of Lord Campbell's Act in 1846, a few American jurisdictions had responded to specific evils such as dueling or the new dangers posed by the railroad and steamboat travel by creating narrow wrongful death remedies tied to those activities.[77] After 1846, however, most states went further and enacted general wrongful death statutes patterned after Lord Campbell's Act. Thus, at the time of the introduction of the Civil Rights Act of 1871, thirty of the thirty-seven American states had enacted general wrongful death statutes,[78] and before the end of the century every American state and territory had done so.[79]

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76. Lord Campbell's Act provided as follows:

> That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Deatb had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony.

Lord Campbell's Act also precluded survival actions:

> III. Provided always, and be it enacted, That not more than One Action shall lie for and in respect of the same Subject Matter of Complaint. . . .

77. *See, e.g.,* Act of Feb. 14, 1839, ch. 1214 KY. ACTS 166 (authorizing wrongful death suits by widow and children of persons killed in a duel); 1840 MASS. ACTS, ch. 80 (railroads and other common carriers liable for fines of up to $5,000 payable to the wife and heirs of decedents killed by negligence). No state, however, had enacted a comprehensive wrongful death statute before the adoption of Lord Campbell's Act, but after 1846 several states quickly adopted wrongful death statutes patterned after Lord Campbell's Act. *See* Malone, *American Fatal Accident Statutes—Part I: The Legislative Birth Pains,* 1965 DUKE L. J. 673, 678-82.

78. Of the 37 states in the Union on March 28, 1871, when the Civil Rights Act of 1871 was introduced, the following 30 states had general wrongful death statutes: Alabama: ALA. REV. CODE §§ 2297-2298 (1867); California: Act of Apr. 26, 1862, Cal. Stat. ch. 330, §§ 1, 3; Connecticut: CONN. GEN. STAT. tit. 1, ch. 6, § 98 (1866); Delaware: Act of Jan. 26, 1866, 13 Del. Laws ch. 31, § 2; Georgia: GA. CODE § 2920 (1867); Illinois: ILL. STAT. pp. 422-23, §§ 1-2 (1858); Indiana: 2 IND. REV. STAT. pt. II, ch. 1, § 784 (1852); Iowa: IOWA CODE § 2501 (1851); Kansas: KAN. GEN. STAT. ch. 80, § 422 (1868); Kentucky: Act of Mar. 10, 1854, Ky. Acts ch. 964, § 3; Maryland: MD. CODE art. 65, §§ 1-2 (1860); Michigan: MICH. COMP. LAWS §§ 5003-5004 (1857); Minnesota: MINN. GEN. STAT. ch. 77, § 2 (1867); Mississippi: MISS. REV. CODE § 676 (1871); Missouri: MO. REV. STAT. ch. 51, §§ 3-4 (1865); Nevada: Act of Feb. 28, 1871, *cited in* NEV. GEN. STAT. §§ 3898-3899 (1885); New Jersey: Act of Mar. 3, 1848, N.J. Acts §§ I-2 at 151; New York: Act of Dec. 13, 1847, N.Y. Laws ch. 450, §§ 1-2, *amended by* Act of Apr. 7, 1849, N.Y. Laws ch. 256, § I; North Carolina: 1868-69 N.C. Pub. Laws ch. 113, §§ 70-71; Ohio: OHIO REV. STAT. ch. 87, §§ 636-637 (1860); Oregon: OR. LAWS § 367 (1866); Pennsylvania: Act of Apr. 15, 1851, Pa. Laws No. 358, § 19, *amended by* Act of Apr. 26, 1855, Pa. Laws No. 323; Rhode Island: R.I. REV. STAT. ch. 176, § 21 (1857); South Carolina: Act of Dec. 22, 1859, S.C. Acts No. 4480, §§ I-II; Tennessee: TENN. CODE §§ 2291-2292 (1858); Texas: Act of Feb. 2, 1860, *cited in* 1822-97 Tex. Laws ch. 35, §§ 1-3; Vermont: VT. GEN. STAT. ch. 52, §§ 15-17 (1863); Virginia: Act of Jan. 14, 1871, Va. Acts ch. 29, §§ 1-2, *cited in* VA. CODE tit. 44, ch. 145, §§ 7-8 (1873); West Virginia: W. VA. CODE ch. 103, §§ 5-6 (1868); Wisconsin: WIS. REV. STAT. ch. 135, §§ 12-13 (1858). *See also* G. FIELD, A TREATISE ON THE LAW OF DAMAGES § 629, at 493 n.5 (1876) (quoting numerous state wrongful death statutes); T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 696 n.2 (6th ed. 1874).

79. In 1893 Francis B. Tiffany observed in the first edition of his pioneering treatise *Death by Wrongful Act* that every American jurisdiction had followed the English lead and created a wrongful death remedy. F. TIFFANY, *supra* note 64, at 21.

During the same twenty-five-year period between the passage of Lord Campbell's Act in 1846 and 1871, the well-established common law no-survival rule also began to give way. In England the rule survived largely because of exceptions that had evolved,[80] but in this country state legislatures in the mid-19th century began to permit personal actions to survive the death of the victim and the wrongdoer. A number of states enacted general survival statutes,[81] but early survival statutes were often not available in cases of wrongful killings. These survival statutes often contained specific exceptions requiring personal actions involving injuries to the person to abate. In such cases, however, statutorily identified beneficiaries could assert the decedent's rights while suing to recover their own losses in state wrongful death actions.[82]

Modern state survival policies permit most personal actions to survive the death of the victim or the wrongdoer, and there has been a continuing trend toward expanding the actions that survive. This trend has been accomplished primarily through the adoption of general survival statutes that narrowly limit the actions that abate.[83] In many states, however, the relevant legislation does not enumerate all actions that survive but rather defines the survival policy with references to the common law or to personal actions;[84] thus,

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80. *See* F. POLLOCK, *supra* note 59, at 41 (criticizing the English no-survival policy as "a barbarous rule . . . made at all tolerable for a civilized country only by a series of exceptions"). England did not enact a general survival statute until 1934, *see* Law Reform Act (Misc. Provisions) 1934, 24 & 25 Geo. 5, ch. 41, and it was largely because of the dangers of another form of modern transportation—the automobile. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 378 (5th ed. 1956).

81. *See, e.g.*, ARK. STAT. ch. 4, § 94 (1858); CONN. GEN. STAT. § 98 (1866); IOWA CODE § 3467 (1860); TENN. CODE §§ 2845-46 (1858); 1858 WIS. LAWS ch. 135, §§ 1-2.

82. *See, e.g.*, ALA. REV. CODE §§ 2297, 2555 (1867); 2 IND. REV. STAT. pt. II, ch. 1 §§ 782, 784 (1852); MINN. GEN. STAT. ch. 77, §§ 1-2 (1867); OR. LAWS §§ 365, 367 (1863).

83. In 1971 a leading commentator predicted that it is likely in the near future that all personal actions will survive. *See* W. PROSSER, *supra* note 51, § 126, at 901. *But see* W. PROSSER & W. KEETON, *supra* note 59, § 126, at 943.

84. Some states permit the survival of actions that would have survived at common law and then enumerate additional actions that survive. *See, e.g.*, WIS. STAT. § 895.01 (1983) ("In addition to the actions which survive at common law the following shall also survive . . ."). *Accord* ILL. ANN. STAT. ch. 110 1/2, § 27-6 (Smith-Hurd 1978 & Supp. 1985); KAN. STAT. ANN. § 60-1801 (1983); MASS. ANN. LAWS ch. 228, § 1 (Michie/Law. Co-op. Supp. 1985); OHIO REV. CODE ANN. § 2305.21 (Page 1981); R.I. GEN. LAWS § 9-1-6 (1969); W. VA. CODE ANN. § 55-7-8a (Michie/Law. Co-op. 1981). Other states define their survival policies in terms of "personal" actions. *See, e.g.*, KY. REV. STAT. § 411.140 (1970) ("No right of action for personal injury or for injury to real or personal property shall cease or die with the person injuring or injured, except . . . ."); ME. REV. STAT. ANN. tit. 18-A, § 3-817 (1980) ("No personal action . . . shall be lost by the death of either party . . . except that actions . . . for the recovery of penalties and forfeitures of money under penal statutes and proceedings in bastardy cases shall not survive the death of the defendant."). All these statutes require courts to look to the common law in interpreting the statutory language.

Other states permit all actions to survive but enumerate specific exceptions. *See, e.g.*, HAWAII REV. STAT. § 663-7 (1976); NEB. REV. STAT. § 25-1402 (1979); N.C. GEN. STAT. § 28A-18-1 (1973); N.D. CENT. CODE § 28-01-26.1 (Supp. 1985); TENN. CODE ANN. § 20-5-102 (1980). Finally, some states permit all actions to survive without any exceptions by type of action. *See, e.g.*, FLA. STAT. ANN. § 46.021 (Harrison-West 1969) ("No cause of action dies with the person. All causes of action survive . . . ."); *see also* IOWA CODE § 611.20 (1946); LA. CIV. CODE ANN. art. 2315 (West 1979); MISS. CODE ANN. § 91-7-233 (1972); MONT. CODE ANN. § 27-1-501 (1985); S.D. CODIFIED LAWS ANN. § 15-4-1 (1984); WASH. REV. CODE § 4.20.060 (1974).

courts in those states have to look to the common law to construe the statute and to determine which actions survive.[85]

State survival statutes generally provide that civil actions may be pursued in the name of the estate or the personal representative of the deceased and permit the action to continue as if the death had not occurred. The cause of action, however, is that of the decedent, and the damages are the losses suffered by the decedent.[86] Wrongful death actions, on the other hand, seek to compensate survivors for the losses they suffered as a result of the wrongful killing of another.[87] Although influenced by Lord Campbell's Act, states have followed several distinct statutory approaches to wrongful death actions, especially as to the available damages.[88] These developments, however, have been primarily legislative and state courts have been reluctant to interfere with even inadequate statutory resolutions.[89]

Modern wrongful death actions are generally pursued in the name of either statutorily designated beneficiaries or the estate of the decedent, and damages are generally measured in terms of the loss either to the survivors or to the estate.[90] Some jurisdictions, however, have addressed wrongful death issues through their survival statutes by permitting the personal action of the decedent to survive but by enlarging the available relief to include wrongful death claims.[91]

When a death results from the same conduct on which the cause of action is based, principles of both survival and wrongful death are implicated. The decedent has a potential cause of action for injuries suffered between the time of his initial injury and his death. In addition, the killing itself will deprive the decedent of the enjoyment of the balance of his life and may violate his legal rights, although the invasion of such interests rarely are directly compensable under state law.[92] Finally, survivors, especially those with close financial or emotional ties on the decedent, may suffer injuries beyond those of the decedent.

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85. The federal government has followed a different approach than most states and has not enacted a general survival statute. Although federal law sometimes addresses the survival of particular statutory actions, federal courts often have no legislative guidance and follow a common law policy under which civil actions survive unless they are penal. *See* Schreiber v. Sharpless, 110 U.S. 76 (1884); *see also infra* notes 230-41 and accompanying text. This formulation of the common law permits the survival of a greater range of federal civil actions than those state policies that do not permit "personal" actions to survive. For example, federal law permits nonpenal personal actions to survive.

86. F. HARPER & F. JAMES, *supra* note 55, at 1334; W. PROSSER & W. KEETON, *supra* note 59, § 126, at 942-43.

87. *See* W. PROSSER & W. KEETON, *supra* note 59, § 127, at 946; 1 S. SPEISER, *supra* note 52, at 35-36.

88. 1 S. SPEISER, *supra* note 52, at 29; RESTATEMENT (SECOND) OF TORTS § 925 comment b, at 529-30 (1977).

89. CALABRESI, *supra* note 56, at 217 n.37. *But see supra* note 70.

90. *See generally* 1 S. SPEISER, *supra* note 52, at 29.

91. W. PROSSER & W. KEETON, *supra* note 59, § 127, at 949-50; D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 555-56 (1973).

92. *See infra* note 103 and accompanying text.

Because the survival and wrongful death actions protect different interests, they may be pursued simultaneously without providing double or overlapping recoveries,[93] but states often require the actions to be consolidated.[94] A few states, however, require plaintiffs to elect one of their remedies,[95] and some require the decedent's personal action to abate in favor of the survivors' wrongful death claims,[96] but most permit both actions to be maintained.[97] Nonetheless, the likelihood of substantial recoveries in either action is often reduced by state limitations on the availability of the action and the damages recoverable.

When a death results from the complained-of conduct, most states permit the action for personal injuries to survive,[98] but policies on damages vary considerably. Damages in survival actions are measured in terms of the injuries suffered by the decedent between the time of injury and death,[99] and generally include loss of earnings and medical expenses during this period[100] as well as conscious pain and suffering.[101] In addition, most jurisdictions that have ruled on the issue permit the survival of claims for punitive damages based on the culpability of the wrongdoer.[102] On the other hand, most states limit the damages that survive to consequential damages and do not independently award damages for violation of the underlying right; nor do they make awards for the deprivation of life itself.[103]

In states that allow survival of claims for conscious pain and suffering and for punitive damages, the estate may recover substantial sums above lost earnings when a death was not instantaneous.[104] The potentially open-ended nature of awards for pain and suffering and punitive damages, how-

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93. *See* D. DOBBS, *supra* note 91, at 554; F. HARPER & F. JAMES, *supra* note 55, at 1334-35; W. PROSSER & W. KEETON, *supra* note 59, § 127, at 957-58; *see also* St. Louis, I.M. & S. Ry. v. Craft, 237 U.S. 648, 658 (1915) (one of the actions "begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong").

94. 1 S. SPEISER, *supra* note 52, at 56-58.

95. *See, e.g.*, Plaza Express Co. v. Galloway, 365 Mo. 166, 280 S.W.2d 17 (1955); *see also* D. DOBBS, *supra* note 91, at 553 & n.21; F. HARPER & F. JAMES, *supra* note 55, at 1334.

96. *See infra* note 109.

97. *See* 1 S. SPEISER, *supra* note 52, at 56-58.

98. *See* W. PROSSER & W. KEETON, *supra* note 59, § 126, at 943; 1 S. SPEISER, *supra* note 52, at 56; RESTATEMENT (SECOND) OF TORTS § 926 comment a, at 533 (1977).

99. D. DOBBS, *supra* note 91, at 554; F. HARPER & F. JAMES, *supra* note 55, at 1334.

100. Survival damages generally also include funeral expenses, although this expense is incurred after death. *See* D. DOBBS, *supra* note 91, at 566.

101. 2 S. SPEISER, *supra* note 52, at 430-32. *But see infra* note 105.

102. 3 M. MINZER, J. NATES, C. KIMBALL, D. AXELROD & R. GOLDSTEIN, DAMAGES IN TORT ACTIONS § 21.41; *see, e.g.*, CAL. PROB. CODE § 573 (West Supp. 1985) (claims for punitive damages survive). *But see infra* note 106.

103. *See* Bell v. City of Milwaukee, 746 F.2d 1205, 1240 n.41 (7th Cir. 1984); *see also* R. POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS 121-22 (1982).

104. Where death was instantaneous, some states do not permit the action to survive on the ground that the decedent did not have a cause of action before his death. *See* W. PROSSER, *supra* note 51, § 127, at 902; 2 S. SPEISER, *supra* note 52, at 415, 434-40.

ever, has led many states to limit them; some do not permit any claims for pain and suffering to survive,[105] while others bar survival of claims for punitive damages.[106]

In addition to statutory limitations on the damages that survive, the circumstances surrounding the death and the financial status of the decedent often result in little or no damages being awarded. Where a victim never regains consciousness, damages for pain and suffering are not available because of state policies limiting such claims to conscious pain and suffering.[107] This precludes a significant portion of potential damage awards when a decedent lingers in a comatose state between the time of injury and death or when death is instantaneous. Moreover, when death is instantaneous, there is no loss of earnings between the time of injury and death. Likewise, the death of a person without a significant recent employment history will not result in lost earnings regardless of the length of time between the injury and death. Finally, when medical or funeral expenses are provided through public facilities or programs, the decedent's estate may not be able to claim these items of damages.[108] Thus, state limitations on recoveries in survival actions can result in an absence of compensable losses in many cases.

There are a substantial number of states, albeit a minority, that still do not permit personal actions to survive the victim's death when the complained-of conduct caused the death.[109] No state, however, denies all remedies in such case.[110] By clinging to the common law no-survival rule and remitting parties to their wrongful death remedies, these states follow most closely the

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105. *See, e.g.*, Martin v. United States Servs., Inc., 314 So. 2d 765 (Fla. 1975); ARIZ. REV. STAT. ANN. § 14-3110 (West 1975); CAL. PROB. CODE § 573 (West Supp. 1985); COLO. REV. STAT. ANN. § 13-20-101(1) (1973); UTAH CODE ANN. § 78-11-12 (1967); R.I. GEN. LAWS § 9-1-8 (1969).

106. Froud v. Celotex, 98 Ill. 2d 324, 456 N.E.2d 131 (1983) (claims for punitive damages do not survive under Illinois law); COLO. REV. STAT. ANN. § 13-20-101 (1973) (punitive damages unavailable in actions that survive); IDAHO CODE § 5-327 (1979) (claims for punitive damages do not snrvive under Idaho law).

107. Many states are also reluctant to award substantial damages for pain and suffering during the few seconds preceding nearly instantaneous deaths, or for brief periods of terror prior to death.

108. Under the collateral source rule, a plaintiff may generally recover for losses that were compensated by others. Thus, where insurance payments cover medical costs, the defendant is not given a windfall, and the plaintiff may recover the cost of medical care. *See generally* D. DOBBS, *supra* note 91, at 581-87. A different rule may apply, however, where public programs absorb the medical costs. *See, e.g.*, WIS. STAT. ANN. § 49.65 (West Supp. 1984) (giving county welfare agencies a claim against the proceeds of any recovery).

109. *See* 2 S. SPEISER, *supra* note 52, at 415-17. A number of states do not permit the survival of actions for personal injuries which result in death. *See, e.g.*, Carlson v. Green, 446 U.S. 14 (1980) (personal actions causing death abate in Indiana); Heath v. City of Hialeah, 560 F. Supp. 840 (S.D. Fla. 1983); Jones v. George, 533 F. Supp. 1293 (S.D. W. Va. 1982); O'Connor v. Several Unknown Correctional Officers, 523 F. Supp. 1345 (E.D. Va. 1981); Carter v. City of Birmingham, 444 So. 2d 373 (Ala. 1983), *cert. denied*, 104 S. Ct. 240 (1984); *cf.* Ascani v. Hughes, 470 So. 2d 207 (La. Ct. App.) (personal actions of decedents in Louisiana survive in favor of enumerated relatives but not estates), *appeal dismissed*, 106 S. Ct. 517 (1985).

110. *See* 1 S. SPEISER, *supra* note 52, at 35; F. HARPER & F. JAMES, *supra* note 55, at 1287-88.

model of Lord Campbell's Act.[111] The result of such policies, however, is the elimination of the survival action as a vehicle for recovering potentially substantial out-of-pocket losses such as lost earnings as well as the conscious pain and suffering of a decedent whose death does not closely follow the wrongful act.[112]

Although all states make wrongful death actions available to some survivors, the adequacy of state wrongful death remedies in specific cases depends on the particulars of state statutes,[113] and on the decedent's legal, financial and emotional relationships with those who claim to have been injured by his death.

State wrongful death statutes fill the void in the common law by addressing who may sue, what damages may be sought, and how the proceeds of successful suits are distributed. Most state wrongful death statutes permit suits to be brought on behalf of designated beneficiaries, but a few states give the cause of action to the estate either directly or through an enlarged survival action.[114] The approach utilized by a particular state, however, has implications not only for the ultimate distribution of any recovery, but also for the elements of damages that are available and their measurement.

Under the prevailing "loss to survivors" approach, state wrongful death statutes enumerate a list of beneficiaries and give these beneficiaries, individually or through a personal representative of the deceased, the right to sue for damages they have suffered.[115] The available damages vary based on the relationship of the survivors to the decedent, and in some cases, the absence of a designated survivor precludes a suit.[116]

In states which give the wrongful death action to the estate or measure damages in terms of the estate's losses, the statutory representatives or the estate bring the suit, and damages are distributed based on either the law of intestate succession or the decedent's will.[117] Under these statutes, damages

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111. Lord Campbell's Act expressly made the wrongful death cause of action the exclusive remedy for wrongful killings. *See supra* note 68.

112. When actions abate under state law because the complained-of conduct resulted in death, some but not all of the damages to which the decedent would have been entitled can be recovered in the wrongful death action.

113. The dependence of wrongful death damage policies on the peculiar provisions of the state wrongful death statute is illustrated by this unusual reminder in the RESTATEMENT (SECOND) OF TORTS § 925 (1977): "The measure of damages for causing the death of another depends upon the wording of the statute creating the right of action and its interpretation."

114. *See generally* 2 S. SPEISER, *supra* note 52, at 412-13.

115. *See* Note, *supra* note 52, at 423-24; W. PROSSER & W. KEETON, *supra* note 59, § 127, at 947.

116. *See* F. HARPER & F. JAMES, *supra* note 55, at 1330; W. PROSSER & W. KEETON, *supra* note 59, § 127, at 948; 2 S. SPEISER, *supra* note 52, at 213-14. *But see* Bell v. City of Milwaukee, 746 F.2d 1205, 1241-42 (7th Cir. 1984) (interpreting Wisconsin law to allow the survival of wrongful death claims).

117. Because the distribution in states that give the wrongful death action to the estate follows either state law of intestate succession or the decedent's will, it is possible for wrongful death awards to benefit persons who had no legal relationship with the decedent or who did not suffer even indirectly from the death. *See* Note, *supra* note 52, at 423-24.

are not calculated in terms of losses to particular survivors, but are based on the losses to the estate that flowed from the death. Thus, there is no overlap with damages available on the survival claim, which are measured by the losses to the decedent between the time of injury and death.[118]

State policies on the damages available in wrongful death actions differ dramatically and this diversity is reflected in the wrongful death statutes adopted by states during the 19th century.[119] Lord Campbell's Act authorized the jury to award "such Damages as they may think proportioned to the Injury,"[120] but in 1852 in *Blake v. Midland R. Co.*,[121] the Queen's Bench rejected a widow's claim for a solatium for mental suffering because of her husband's death and limited the recovery in wrongful death actions to pecuniary losses. This limitation was widely followed in this country,[122] and many states, unlike England, included provisions in their statutes limiting damages to pecuniary injuries.[123] On the other hand, some states expressly

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118. *See supra* notes 61 & 93.

119. State wrongful death statutes also vary considerably as to the specificity with which the available damages are defined. *See* D. DOBBS, *supra* note 84, at 556; F. HARPER & F. JAMES, *supra* note 55, at 1286; C. MCCORMICK, DAMAGES 344 (1935); 1 S. SPEISER, *supra* note 52, at 104.

120. The second section of Lord Campbell's Act, 9 & 10 Vict., ch. 93, An Act for compensating the Families of Persons killed by Accidents (August 26, 1846), provided as follows:

> And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit such Action shall be brought . . . .

Lord Campbell's Act was the model for many state laws. *See* D. DOBBS, *supra* note 91, at 553 n.13; W. PROSSER & W. KEETON, *supra* note 59, § 127, at 949, 951; 1 S. SPEISER, *supra* note 52, at 104.

121. 18 Q.B. 93, 118 Eng. Reprint 35 (1852).

122. *See* T. COOLEY, A TREATISE ON THE LAW OF TORTS 271 (1st ed. 1878) ("[I]n this country as well as in England, the ground of recovery must be something besides an injury to the feelings and affections, or a loss of the pleasure and comfort of the society of the person killed; there must be a loss to the claimant that is capable of being measured by a pecuniary standard."); T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 646-48 n.2 (5th ed. 1869) ("In most of the American acts, as in their English model, compensation for the pecuniary loss only is contemplated, and . . . nothing is to be allowed for . . . the grief of his surviving relatives."); *see also* Illinois Cent. R.R. v. Barron, 72 U.S. (5 Wall.) 90 (1866) (discussing the role of the jury under the Illinois statute limiting damages to "fair and just compensation with reference to pecuniary injuries" and observing that the available damages would be greater had the decedent not died).

123. *See* G. FIELD, *supra* note 78, § 631, at 502; *see, e.g.*, Act of Dec. 13, 1847, N.Y. Laws ch. 450, § 2, *amended by* Act of Apr. 7, 1849, N.Y. Laws, ch. 256, § 1 (defining damages as "fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death"); OHIO REV. STAT. ch. 87, § 637 (1860) (same); WIS. REV. STAT. ch. 135, § 13 (1858) (same); ILL. STAT. pp. 422-23, § 2 (1858) (same). A number of states also limited available damages to pecuniary losses through the use of language similar to that used in New York but without the ceiling on damages. Act of Mar. 3, 1848, N.J. Acts § 2, at 151; 1868-69 N.C. Pub. Laws, ch. 113, § 71; VT. GEN. STAT. ch. 52, § 17 (1863).

authorized punitive damages.[124] Most states, however, did not define the available wrongful death damages, and courts generally interpreted these statutes narrowly to limit the available damages to pecuniary losses and to deny claims for loss of society, mental anguish and punitive damages.[125] A few state courts, however, found the absence of an express limitation of damages to pecuniary losses to be significant and awarded damages for nonpecuniary losses.[126]

By 1871, few state courts had addressed the damage issues in wrongful death actions. Although most published decisions had limited damages to pecuniary losses and denied claims for loss of society, mental anguish, and punitive damages, the law was in a state of flux. Moreover, even when damages were limited to pecuniary losses, the definition of pecuniary varied, and some state courts construed the phrase broadly to award damages for intangible services that closely resembled loss of society.[127] Thus, it is difficult to characterize any policy on damages for loss of society as being well established in 1871.[128] Likewise, by 1871, few courts had addressed the availability of damages for mental anguish or punitive damages, although

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124. *See, e.g.*, Act of Apr. 26, 1862, Cal. Stat. ch. 330, § 3 ("in every such [wrongful death] action, the jury may give such damages, pecuniary and exemplary, as they shall deem fair and just"); Myers v. San Francisco, 42 Cal. 215 (1871) (allowing punitive damages in suit for death of an infant); KY. GEN. LAWS app. § 1, at 681 (1866) (allowing "vindictive damages" in wrongful death cases involving deadly weapons); Chiles v. Drake, 59 Ky. (2 Met.) 146 (1859) (punitive damages allowed); Act of Feb. 28, 1871, Nev. Stat. § 2, *cited in* NEV. GEN. STAT. § 3899 (1885); *see also* TEX. CONST. of 1869, art. 12, § 30 (providing expressly for exemplary damages to the surviving husband, widow, and heirs in cases of homicide through willful act or omission).

125. *See, e.g.*, Macon & Western R.R. v. Johnson, 38 Ga. 409 (1868) (limiting widow to pecuniary losses despite statutory silence); Donaldson v. Mississippi & Mo. R.R., 18 Iowa 280 (1865) (no damages available for the grief and distress of the decedent's family or for the loss of his society).

126. *See, e.g.*, Matthews v. Warner's Adm'r, 24 Va. (29 Gratt.) 570 (1877) (noting the absence of language in the Virginia statute limiting wrongful death damages to "pecuniary injuries" and holding that a surviving mother could recover her mental suffering from the death of her son); *see also* Murphy v. New York & N.H. R.R., 29 Conn. 496 (1861) (exemplary damages not addressed expressly but permitted); Jeffersonville R.R. v. Swayne's Adm'r, 26 Ind. 477 (1866) (allowing damages for loss of society).

127. *See* T. COOLEY, *supra* note 122, at 274 ("In some other States the probable value of the nurture, instruction, and physical, moral and intellectual training which the parent for whose loss the suit is brought might have given to the children, are considered proper elements of damages."); *see also* Beeson v. Green Mountain Gold Mining Co., 57 Cal. 20 (1880) (allowing loss of society); Pennsylvania R.R. v. Goodman, 62 Pa. 329, 339 (1869) (allowing recovery for loss of the "services and *companionship* of the wife," but noting that the companionship did not mean solace: "Certainly the service of a wife is pecuniarily more valuable than that of a mere hireling. The frugality, industry, usefulness, attention, and tender solicitude of a wife and the mother of children, surely make her services greater than those of an ordinary servant, and therefore worth more. These elements are not to be excluded . . . ."). *But cf.* Michigan C.R. Co. v. Vreeland, 227 U.S. 59 (1913) (interpreting FELA to limit damages for a widow's loss of services to those services capable of measurement).

128. *See* Bell v. City of Milwaukee, 746 F.2d 1205, 1248-49 (7th Cir. 1984) (finding the denial of damages for loss of society to be the prevailing state policy in 1871, but noting significant variations).

most that had had found them unavailable.[129] Nonetheless, the availability of these damages was less dependent on the state of the common law than on the language of the applicable state statute and its construction.

The trend since the enaetment of wrongful death statutes in the latter half of the 19th century has been the expansion of the available damages. Virtually all states now provide damages for loss of support,[130] and many states also permit recovery for loss of inheritance.[131] Most states that measure wrongful death damages in terms of the loss to the survivors also include damages for loss of society.[132] In some states this has been done explicitly through legislation,[133] but in others the courts have defined pecuniary loss broadly to include the loss of society.[134] Moreover, the definition of loss of society is not consistent. Some state courts limit loss of society to intangible "services" such as the nurture, training, education, and guidance a child would have received but for the death of a parent, but others define loss of society to include "a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection."[135] An increasing number of states have gone beyond awards for loss of society and permit survivors to recover compensatory damages for the grief or mental anguish they experience

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129. *See, e.g.*, Brady v. City of Chicago, 3 F. Cas. 1196 (C.C.N.D. Ill. 1865) (No. 1,796) (no recovery for loss of society or for sorrow or grief); Hyatt v. Adams, 16 Mich. 180 (1867) (no recovery for punitive damages); Collier v. Executors of Arrington, 61 N.C. (Phil. Law) 354 (1867) (no recovery for punitive damages); Green v. Hudson River R.R., 32 Barb. 25 (N.Y. App. Div. 1860) (denying husband recovery for loss of wife's society or for mental suffering); Lehman v. City of Brooklyn, 29 Barb. 234 (N.Y. App. Div. 1859) (no recovery for mental suffering); Wise v. Teerpenning, 2 Edmond's Select Cases 112 (N.Y. App. Div. 1848) (no recovery for punitive damages); Hall's Adm'x v. Crain, 2 Ohio Dec. Reprint 453 (Scioto County Ct. C.P. 1860) (no recovery for mental suffering); Pennsylvania R.R. v. Vandever, 36 Pa. 298 (1860) (no recovery for wounded feelings or vindictive damages); Potter v. Chicago & N.W. R.R., 21 Wis. 377 (1867) (no recovery for loss of society or punitive damages). *But see supra* note 126.

130. *See* Note, *supra* note 52, at 405-06. Loss of financial support the decedent would have provided or been expected to provide, regardless of a legal obligation to do so, is the primary form of pecuniary loss. The formulas by which lost support is measured, however, vary, especially with respect to deductions for the personal expenses the decedent would have incurred. *See* W. PROSSER & W. KEETON, *supra* note 59, § 127, at 953; 1 S. SPEISER, *supra* note 52, at 140.

131. *See* D. DOBBS, *supra* note 81, at 557; C. MCCORMICK, *supra* note 119, at 340; 1 S. SPEISER, *supra* note 52, at 277-81; Note, *supra* note 52, at 405-06.

132. *See* Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 587 & n.21 (1974) (observing that a majority of states permit recovery for loss of society by express statutory provision or judicial construction).

133. *See* W. PROSSER & W. KEETON, *supra* note 59, § 127, at 951-52.

134. *See* F. HARPER & F. JAMES, *supra* note 55, at 1331 n.15; W. PROSSER & W. KEETON, *supra* note 59, § 127 at 951; RESTATEMENT (SECOND) OF TORTS § 925 comment b, at 529 (1977); 1 S. SPEISER, *supra* note 52, at 113-15; Note, *supra* note 52, at 402, 409 n.39. *But see* Herbertson v. Russell, 150 Colo. 110, 371 P.2d 422 (1962) (limiting wrongful death damages under Colorado law to net pecuniary loss and excluding loss of society).

135. *See* Sea-Land Servs., Inc. v. Gaudet, 414 U.S. at 586-87 (summarizing state law).

as a result of a wrongful death,[136] as well as punitive damages based on the culpability of the wrongdoer.[137] Finally, one state—Alabama—maintains an exclusively penal approach and excludes all compensatory damages and allows only punitive damages.[138]

A few states that measure wrongful death damages in terms of the losses to survivors have adopted a hybrid approach and allow certain designated relatives—usually surviving spouses and financially dependent children or parents—a broad range of pecuniary and nonpecuniary damages, including loss of society, but deny nonpecuniary damages to other surviving relatives. For example, in some states, a dependent parent may obtain nonpecuniary damages on the death of an adult child but a nondependent parent may not.[139]

In states that measure wrongful death damages in terms of the loss to the estate, many of these questions do not arise. The loss to the estate is the accumulation that would have resulted but for the wrongful killing, and it is an exclusively financial measurement based on such factors as the decedent's

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136. W. PROSSER & W. KEETON, *supra* note 59, § 127, at 952 & n.84; *see, e.g.,* Dawson v. Hill & Hill Truck Lines, 671 P.2d 589 (Mont. 1983) (awarding damages for mental anguish for death of child); Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983) (reversing 106-year-old construction of state wrongful death act limiting survivors to pecuniary loss and permitting parents to recover loss of companionship and mental anguish caused by wrongful death of son). A number of states have also adopted statutes expressly allowing survivors to recover for the mental anguish and grief they suffered from the death of the victim. *See, e.g.,* ARK. STAT. ANN. § 27-909 (1979); DEL. CODE ANN. tit. 10, § 3724(d)(5) (Supp. 1984); FLA. STAT. ANN. § 768.21(2)-(4) (West Supp. 1985); KAN. STAT. ANN. § 60-1904 (1983); MD. CTS. & JUD. PROC. CODE ANN. § 3-904(d)-(e) (1984); NEV. REV. STAT. § 41.085(4) (1979); OHIO REV. CODE ANN. § 2125.01(B)(5) (Page Supp. 1984); OKLA. STAT. ANN. tit. 12, § 1053(B) (West Supp. 1984); VA. CODE § 8.01-52(1) (1984); W. VA. CODE 55-7-6(c)(1)(A) (Michie/Law. Co-op. Supp. 1985).

The Supreme Court has noted the difference between damages for loss of society and mental anguish: "Loss of society must not be confused with mental anguish or grief, which is not compensable under the maritime wrongful-death remedy. The former entails the loss of positive benefits, while the latter represents an emotional response to the wrongful death." Sea-Land Servs., Inc. v. Gaudet, 414 U.S. at 585 n.17.

The increasing number of states that permit damages for mental anguish or grief is consistent with the expanding availability of damages for the intentional and negligent infliction of emotional distress. *See* D. DOBBS, *supra* note 91, at 558; F. HARPER & F. JAMES, *supra* note 55, at 1332 n.15; 1 S. SPEISER, *supra* note 52, at 113-15; Note, *supra* note 52, at 411 & n.47; *see generally* Note, Garland v. Herrin: *Surviving Parents' Remedies for a Child's Wrongful Death—the Pecuniary-Loss Rule and Reckless Infliction of Emotional Distress,* 32 CLEV. ST. L. REV. 641 (1983-84).

137. *See, e.g.,* C. MCCORMICK, *supra* note 119, at 357 (noting that in 1935 about 10 states permitted punitive damages in wrongful death actions); W. PROSSER & W. KEETON, *supra* note 59, § 127, at 952 & n.85 (noting the increase in states permitting punitive damages in wrongful death actions); 1 S. SPEISER, *supra* note 52, at 129-30; Note, *supra* note 52, at 421 n.106. *See generally* Case Comment, *Denial of Punitive Damages for Wrongful Death Violates Equal Protection,* 54 N.D.L. REV. 104 (1977-78); RESTATEMENT (SECOND) OF TORTS § 925 comment b (1977).

138. *See* Bruce v. Collier, 221 Ala. 22, 127 So. 553 (1930) (describing the Alabama wrongful death statute as "creating a new cause of action, punitive in character, for the benefit of the next of kin"); *see also* Carter v. City of Birmingham, 444 So. 2d 373, 375 (Ala. 1983), *cert. denied,* 104 S. Ct. 2401 (1984).

139. *See, e.g.,* IND. CODE § 34-1-1-2 (Supp. 1985).

income and resources, life expectancy and spending patterns, as well as the discount rate. Thus, in such states, the loss of society or the mental anguish or grief of the survivors is generally not part of the available wrongful death damages.[140]

Because wrongful death actions were not recognized at common law, remedies under state law are almost exclusively legislative. The role of courts in developing wrongful death remedies has depended largely on the language of the statutes. When legislatures have defined the elements of damages with specificity, the courts have played a minor role in developing the law. On the other hand, when legislatures have delegated responsibility for developing the remedy to the courts or spoken ambiguously, the courts have defined the available damages and, in a few cases, have acted boldly to modernize outmoded statutes.[141] Generally, however, state courts have been unwilling to establish a parallel common law wrongful death action to fill voids in the statutory action, despite the urging of commentators that they do so.[142]

Legislatures have also often proceeded cautiously in creating wrongful death remedies and have been reluctant to give courts broad authority to define the elements of damages. In some cases they have limited the scope of wrongful death remedies by specifying in detail the available damages.[143] In others, they have broadly defined the available damages but have limited awards by placing statutory ceilings on recoveries. These ceilings, which were not used in England,[144] were commonplace in this country[145] and at one time approximately half of the states placed dollar limits on wrongful death recoveries.[146]

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140. *See generally* 1 S. SPEISER, *supra* note 52, at 369-82 (discussing the measure of damages under loss to the estate statutes).

141. *See, e.g.*, Gaudette v. Webb, 362 Mass. 60, 284 N.E.2d 222 (1972) (finding a common law wrongful death action); *see also* RESTATEMENT (SECOND) OF TORTS § 925 comment k, at 532 (1977) (acknowledging a common law role for courts "to fill in unintended gaps . . . or to allow ameliorating common law principles to apply").

142. *See, e.g.*, G. CALABRESI, *supra* note 56, at 38-40; 1 S. SPEISER, *supra* note 52, at 16-19. The Supreme Court, however, has found congressional silence on whether statutory wrongful death actions in admiralty were intended to be exclusive to evidence a lack of intent to preempt the common law role of the federal courts. Moragne v. State Marine Lines, 398 U.S. 375, 393 (1970).

143. The use of these limitations suggests a legislative distrust of courts as well as a recognition of the difficulty courts have in controlling the discretion given juries to award damages. It also reflects the difficulty of placing a value on the loss of life.

144. Lord Campbell's Act contained no ceiling on the amount of damages, but given the narrow definition of the available pecuniary damages, a ceiling was not necessary to limit damage awards.

145. *See generally* C. MCCORMICK, *supra* note 119, at 358; I S. SPEISER, *supra* note 52, at 689-95 (discussing damage limitations).

146. A commonly cited observation based on F. TIFFANY, *supra* note 64, at 175-76, was that in 1893, 22 jurisdictions had ceilings on recoveries. *See also* G. CALABRESI, *supra* note 56, at 39; F. HARPER & F. JAMES, *supra* note 55, at 1285 n.4; C. MCCORMICK, *supra* note 119, at 358; 1 S. SPEISER, *supra* note 43, at 689. In 1871 the most commonly used ceiling was $5,000, and the following states maintained that limitation: Illinois, Indiana, Minnesota, Missouri, New York, Ohio, Oregon, West Virginia and Wisconsin. *See* sources cited *supra* note 78; *see also* T. COOLEY, *supra* note 122, at 274 ("Many of the statutes fix a maximum of recovery, five thousand being a common limitation . . . .").

Statutory ceilings on wrongful death awards, which were updated but only slowly,[147] have been a major obstacle to plaintiffs seeking wrongful death recoveries.[148] The trend in recent years, however, has been to eliminate statutory ceilings,[149] and presently no state maintains an across-the-board ceiling on wrongful death recoveries.[150] Nonetheless, some states achieve the same end by limiting the damages in wrongful death actions to a narrow definition of pecuniary losses. Moreover, some states that define damages broadly for financially dependent survivors have defined damages more narrowly for nondependents,[151] while a few use statutory ceilings to cap the available nonpecuniary damages.[152]

The inadequacies of many state policies on survival and wrongful death, especially as to the available damages, fall disproportionately upon those most likely to be victims of the excessive use of deadly force—young male members of racial minorities.[153] Limitations on wrongful death recoveries to pecuniary losses often exclude or limit awards for loss of society and invariably deny recovery for mental anguish, grief, and punitive damages; thus, the possibility of a significant recovery when the victim is unemployed is virtually eliminated.[154] Moreover, when employed victims have no dependents, there may be no one who can claim that the killing deprived them of financial support.[155] Although in some of these cases the decedent's action may survive, state survival policies often require actions to abate or limit the available damages.[156] Thus, in some states there are virtually no compensable injuries for a wrongful killing of a person who is either unemployed or without dependents when the death is instantaneous or the victim never regains consciousness.[157]

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147. D. DOBBS, *supra* note 91, at 567; F. HARPER & F. JAMES, *supra* note 55, at 1285 n.5.

148. These limitations were often challenged on state and federal constitutional grounds but were invariably upheld. *Cf., e.g.,* Fein v. Permanente Medical Group, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (upholding constitutionality of $250,000 damage ceiling for noneconomic losses in medical malpractice actions), *cert. denied*, 106 S. Ct. 214 (1985). *But see* White v. Montana, 661 P.2d 1272 (Mont. 1983).

149. 1 S. SPEISER, supra note 52, at 691-93; D. DOBBS, *supra* note 91, at 567; W. PROSSER & W. KEETON, *supra* note 59, § 127, at 951.

150. *See* G. CALABRESI, *supra* note 56, at 40.

151. *See supra* note 139.

152. *See, e.g.*, KAN. STAT. ANN. § 60-1903 (1983) ($25,000 ceiling on nonpecuniary damages); WIS. STAT. ANN. § 895.04(4) (West 1983 & Supp. 1985) ($50,000 ceiling on damages for loss of society and companionship).

153. *See* W. Geller, *Deadly Force: What We Know*, in C. KLOCKARS, THINKING ABOUT POLICE: CONTEMPORARY READINGS 313, 317-21 (1983).

154. *See* W. PROSSER & W. KEETON, *supra* note 59, § 127, at 952.

155. Wrongful death actions may be available where no close relative survives in states that give the wrongful death cause of action to the estate and permit the estate to sue for the lost inheritance. *See supra* note 117.

156. *See* 2 S. SPEISER, *supra* note 52, at 413-18, 423-40; D. DOBBS, *supra* note 91, at 553; F. HARPER & F. JAMES, *supra* note 55, at 1334.

157. The absence of compensable injuries in such cases has led some courts entertaining § 1983 actions to award damages for the violation of the federal right itself. *See infra* notes 468-72 and accompanying text.

The impact of state policies limiting wrongful death recoveries to pecuniary losses is illustrated in the treatment of cases involving the death of minor children. In the 19th century, the value of a child was measured in terms of the services he or she could perform on the farm or in the factory, and the value of those services often exceeded the cost of raising the child.[158] That is hardly the case today, yet state wrongful death policies that limit damage awards to net pecuniary losses leave courts and juries in the uncomfortable position of having to conclude that the life of a child is without value.[159] Such conclusions, not surprisingly, were difficult to accept, and courts often gave juries broad discretion to award damages in wrongful death cases involving the killing of children.[160]

A number of state legislatures faced this problem directly by permitting awards for loss of society to be made for the death of children.[161] In other jurisdictions, courts approached this problem indirectly by measuring damages to take into account not only financial support the deceased child was providing at the time of death but also the contributions that might have been made during the life of the parents, even when it extended beyond the majority of the child.[162] Moreover, some state courts have reversed earlier decisions that narrowly construed state statutes, and now allow parents to recover damages for loss of society for the death of a child.[163] Nonetheless, such formulas often fail to compensate parents adequately for the death of children by rarely allowing recovery for grief and other sentimental losses.[164]

Because state law traditionally defines damages in terms of the actual injuries that result from the legal breach, the decedents' estates and survivors are generally unable to claim damages for the invasion of the underlying right.[165] This limitation is less significant when the decedent loses substantial earnings or experiences conscious pain and suffering before his death, since an award for the violation of the underlying right would generally be considered duplicative and not be available.[166] When awards of actual damages are

158. *See* Wycko v. Gnodtke, 361 Mich. 331, 334-36, 105 N.W.2d 118, 119-21 (1960).

159. *See* Courtney v. Apple, 345 Mich. 223, 241, 76 N.W.2d 80, 91 (1956) (Smith, J., dissenting); *see also* D. DOBBS, *supra* note 91, at 559; W. PROSSER & W. KEETON, *supra* note 59, § 127, at 951.

160. *See* F. HARPER & F. JAMES, *supra* note 52, at 1330; C. MCCORMICK, *supra* note 119, at 353; W. PROSSER & W. KEETON, *supra* note 59, § 127, at 951.

161. *See* 1 S. SPEISER, *supra* note 52, at 514; F. HARPER & F. JAMES, *supra* note 55, at 1300 n.11.

162. *See* 1 S. SPEISER, *supra* note 52, at 523; D. DOBBS, *supra* note 91, at 560; C. MCCORMICK, *supra* note 119, at 354.

163. *See, e.g.*, Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d 118 (1960).

164. *But see supra* note 136. Some states also allow punitive damages in wrongful death actions. *See supra* note 137.

165. *See supra* note 103; *see also* Greene v. Texeira, 54 Hawaii 231, 505 P.2d 1169 (1973); Prunty v. Schwantes, 40 Wis. 2d 418, 162 N.W.2d 34 (1968) (rejecting common law survival action for the enjoyment/loss of life). Some states avoid this result by allowing punitive damages as well as awards for mental anguish, grief and outrage in their wrongful death actions. *See* 2 S. SPEISER, *supra* note 52, at 424-25.

166. *See infra* note 169.

unavailable, however, states generally do not provide any more than nominal relief for the violation of the underlying right.[167] States have preferred to limit damages to the more readily ascertainable actual losses and have avoided entering the legal and philosophical imbroglio of determining either the value of a human life or the value of the right that was violated independent of its consequential damages.[168] Thus, survival policies provide estates with damages for losses to the decedent and typically stop short of awarding damages for the illegal killing itself or for the violation of the underlying right. Likewise, state wrongful death policies generally measure damages in terms of losses to the survivors and do not award damages for the loss of decedent's life or for the violation of the underlying right apart from the consequences to the survivors.

The reluctance to award damages for the taking of life or for the violation of the underlying right can be defended in survival actions where actual damages are available and states seek to avoid double recoveries or windfalls.[169] Where actual damages are unavailable, however, these policies deny the decedent, through his representatives, the right to challenge the illegal conduct that led to the wrongful killing. Although in many cases survivors could assert the rights of the decedent in wrongful death actions, in some cases virtually no wrongful death damages will be available under state law; thus, the only vehicle for enforcing the rights of the decedent will be a survival action seeking damages for the violation of the underlying right.

Survival and wrongful death claims pursued in § 1983 actions offer the possibility of avoiding state policies that limit recoveries. To the extent § 1983 authorizes wrongful death actions independent of state law, plaintiffs have an incentive to rely on § 1983 and argue for the application of federal damage rules. Moreover, even when initial resort to state law is required to determine the survival of § 1983 actions or the use of § 1983 as a wrongful death remedy, courts will use federal standards to determine whether to reject state policies inconsistent with § 1983's purposes of compensation and deterrence. Thus, the use of § 1983 offers the possibility that in cases in

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167. Although a majority of states permit the award of nominal damages when there are no actual damages flowing from the wrongful killing, *see* 1 S. SPEISER, *supra* note 52, at 383; D. DOBBS, *supra* note 91, at 562 n.1; RESTATEMENT (SECOND) OF TORTS § 925, at 530 (1977); W. PROSSER & W. KEETON, *supra* note 59, § 127, at 951, nominal damages are of little benefit to plaintiffs other than as a predicate for punitive damages in the jurisdictions that allow them and may not be enough of an incentive to get an attorney to take the case.

168. *See* Smedley, *supra* note 42, at 617.

169. Although there is a danger of double recovery where separate survival and wrongful death claims are being pursued, the actions seek damages based on violations of different interests. Thus, there is no duplication per se from recoveries in both suits. *See supra* notes 61 & 93. To the extent there is a danger of overlapping or duplicate recoveries, states have the ability to minimize such problems by procedural devices such as requiring the actions to be joined or the trials consolidated. *See, e.g.*, Diaz v. Eli Lilly & Co., 364 Mass. 153, 302 N.E.2d 555 (1973). The harder issues, however, involve the possibility of duplicative awards where plaintiffs seek actual damages as well as damages for the violation of decedent's underlying rights or the taking of his life.

which only limited damages are available under state law, courts will apply federal damages policies. Moreover, when actual damages in the survival action are modest, courts may consider the value of the underlying constitutional right as well as the decedent's interest in his continued life in assessing damages.[170]

II. THE SUPREME COURT, WRONGFUL DEATH AND SURVIVAL ACTIONS

The Supreme Court has reviewed § 1983 actions by survivors seeking damages for wrongful killings[171] and has demonstrated interest in resolving whether state law can limit the amount or type of damages available to survivors in § 1983 wrongful death actions.[172] The Court has held that state law should be looked to initially on § 1983 survival issues,[173] but has refused to follow state policies that prohibit *Bivens* actions against federal defendants from surviving where death results,[174] and has suggested that it would reach a similar result in § 1983 cases. Nonetheless, the Court has never squarely addressed whether, or to what extent, § 1983 is available as a remedy for wrongful killings or whether state limitations on wrongful death recoveries are applicable when an action is brought under § 1983. On the other hand, the Court has authorized the use of the federal common law to govern the availability of survival claims under federal statutes that provide only limited guidance and has relied on the federal common law to reverse a century-old admiralty preccdent that precluded nonstatutory wrongful death actions.

A. Wrongful Death and Survival Issues In § 1983 and Bivens *Actions*

1. Jones v. Hildebrant

Jones v. Hildebrant[175] was to have been the vehicle for the Court to address the use of § 1983 as a wrongful death remedy and the applicability

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170. *See infra* notes 468-72 and accompanying text.

171. *See* City of Oklahoma City v. Tuttle, 105 S. Ct. 2927 (1985); Tennessee v. Garner, 105 S. Ct. 1694 (1985). In Scheuer v. Rhodes, 416 U.S. 232 (1974), the Court reviewed a § 1983 damage action by survivors of the students killed by the Ohio National Guard in 1970 at Kent State University without addressing the availability of § 1983 as a wrongful death remedy. *See also* Ashcroft v. Mattis, 431 U.S. 171 (1977), *vacating as moot* Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976); Belcher v. Stengel, 429 U.S. 118 (1976), *dismissing cert. as improvidently granted* 522 F.2d 438 (6th Cir. 1975).

172. *See* Jones v. Hildebrant, 432 U.S. 183 (1977) (per curiam), *dismissing cert. as improvidently granted* 191 Colo. 1, 550 P.2d 339 (1976); O'Dell v. Espinoza, 456 U.S. 430 (1982) *dismissing cert. for want of jurisdiction* 633 P.2d 455 (Colo. 1981). *But see* Carter v. City of Birmingham, 444 So. 2d 373 (Ala. 1983), *cert. denied,* 104 S. Ct. 2401 (1984).

173. Robertson v. Wegmann, 436 U.S. 584 (1978).

174. Carlson v. Green, 446 U.S. 14 (1979).

175. 432 U.S. 183 (1977) (per curiam), *dismissing cert. as improvidently granted* 191 Colo. 1, 550 P.2d 339 (1976).

of state wrongful death damage limitations to § 1983 claims. The plaintiff in *Jones* was the mother of a fifteen-year-old boy killed by a Denver police officer acting in the line of duty. She sued, in state court in her own name, the police officer and two municipal defendants for $1,500,000 in actual and $500,000 in punitive damages under the Colorado wrongful death statute and § 1983.[176] Colorado, however, severely limited the damages available in wrongful death actions by imposing a $45,000 statutory ceiling on recoveries by nondependent parents.[177] In addition, Colorado case law limited wrongful death damages to net pecuniary losses, which excluded punitive damages, damages for grief, and damages for the loss of comfort, society and protection.[178]

Although the plaintiff's state wrongful death claim was limited to the $45,000 ceiling, she argued that the limitation did not apply to her § 1983 claim. The trial court disagreed, and the jury returned a verdict for the plaintiff finding the individual and municipal defendants liable for the intentional killing of plaintiff's son but limiting damages to $1,500, the approximate cost of his funeral.[179]

In affirming the judgment, the Colorado Supreme Court reviewed the relationship between § 1983 and state wrongful death remedies. First, the court held that the Colorado wrongful death remedy was "engrafted" into a § 1983 action but that the state damage policies—the $45,000 ceiling and the net pecuniary loss limitation—were an integral part of the remedy and applied to § 1983 actions.[180] Second, the court held that a § 1983 wrongful death action did not exist independent of state law.[181] Third, the court held the plaintiff could not recover damages because of deprivations of either her son's or her own constitutional rights. She could not pursue the former

176. Although the plaintiff did not specifically refer to § 1983 in her complaint, she claimed that the defendant "while acting under color of law, intentionally deprived . . . [her] of rights, security and liberty secured to her by the Constitution of the United States." Complaint at app. 3, Jones v. Hildebrant, 432 U.S. 183 (1977). The Colorado courts treated her action as having been brought under § 1983 as did the Supreme Court.

177. COLO. REV. STAT. § 13-21-203(1) (1973) ("[I]f the decedent left neither a widow, widower, nor minor children, nor dependent father or mother, the damages recoverable in any such action shall not exceed forty-five thousand dollars.").

178. *Jones,* 191 Colo. at 4, 550 P.2d at 341-42. Colorado law also permitted the survival of personal actions but did not allow damages for pain and suffering or punitive damages. COLO. REV. STAT. § 13-20-101(1) (1973). Although the plaintiff could have also pursued a survival claim under state law, *see id.*, she elected to pursue only her wrongful death claims.

179. *Jones,* 191 Colo. at 3, 550 P.2d at 341.

180. *Id.* at 7, 550 P.2d at 342.

181. The court based this conclusion on "the perceived Congressional intent not to pre-empt the states' carefully wrought wrongful death remedies, the adequacy in a death case of the state remedies to vindicate a civil rights violation, and the overwhelming acceptance of such state remedies in the federal courts." *Id.* at 8, 550 P.2d at 345. Although the court did not explain the basis for its conclusion about the "perceived Congressional intent," it did express concern about having to fashion a § 1983 wrongful death remedy because of the difficulty of developing rules concerning the beneficiaries, the proper parties and the available damages. *Id.* at 8 n.11, 550 P.2d at 345 n.11.

because a party cannot assert the rights of others; the latter was precluded because the state did not "directly . . . restrict her personal decisions relating to procreation, contraception, and child-rearing."[182] Section 1983 was not available to provide compensation for these "collateral" losses resulting from injuries to others, and § 1983's interests were adequately protected under the state wrongful death statute. Thus, the court held that a § 1983 action was not available to recover wrongful death damages not available under state law.[183]

The plaintiff, in her petition for a writ of certiorari, raised the issues of the appropriate measure of damages in a § 1983 action involving a wrongful killing, and of whether state limitations could "cancel and displace" federal policies.[184] The issue of the relationship between § 1983 and state wrongful death remedies had been recurring in the lower federal courts, and the Supreme Court had reviewed actions by survivors but had never directly addressed the issue.[185] After oral argument, however, the Court dismissed the petition as improvidently granted over the strong dissent of Justice White which was joined by Justices Brennan and Marshall.

In dismissing the petition, the Court seized on an apparent shift of strategy by counsel to emphasize petitioner's claim that the killing violated her own constitutional rights, an issue the Court concluded had not been directly addressed by the Colorado courts.[186] Nevertheless, the Court's per curiam

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182. *Id.* at 8, 550 P.2d at 345.

183. In ruling that the limitation on damages in the state wrongful death statute applied in § 1983 actions, the Colorado Supreme Court stated that the "trial court properly ruled that the two actions were merged so that the §1983 claim should be dismissed." *Id.* at 7, 550 P.2d at 344. In fact, the trial court did not dismiss the § 1983 action but only granted the defendants' motion to reduce plaintiff's prayer for damages to $45,000. *See* Memorandum Opinion and Order, Appendix at 15-16, *Jones,* 432 U.S. 183 (1977). Although this characterization did not change the outcome of this case, the reasoning of the Colorado Supreme Court appears to be that a doctrine of "merger" applies to § 1983 cases in state but not federal court. *Jones,* 191 Colo. at 8, 550 P.2d at 344. Such an approach, however, deprives § 1983 of its status as supplement to state remedies. *See* Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring) (finding that the 42d Congress contemplated that the same conduct could give rise to both state tort and § 1983 claims). Moreover, the plaintiff's choice of a state forum should not affect the availability of the federal cause of action. *See* Steinglass, *supra* note 17, at 523-25.

184. The petition presented the question as follows:

> Where the black mother of a 15-year-old child who was intentionally shot and killed by a white policeman acting under the color of state law brings a suit in state court pursuant to 42 U.S.C. § 1983, what is the measure of damages? Particularly, can a state measure of damages cancel and displace an action brought pursuant to 42 U.S.C. § 1983?

185. *Jones,* 432 U.S. 183, 189 (1977) (White, J., dissenting); *see also supra* note 165.

186. In her initial brief the plaintiff had addressed the availability of a § 1983 wrongful death remedy independent of state law as well as borrowed from state law but without the damage limitation. In her reply brief and during oral argument, her counsel emphasized that full damages should be available because the killing violated her constitutional rights. The Supreme Court characterized this as her sole claim, *Jones,* 432 U.S. at 186-87, and dismissed the petition because it had not been clearly presented below. In explaining this disposition, the Court questioned whether the Colorado Supreme Court would have reached the same result had the plaintiff squarely presented the claim that her rights had been violated. *Id.* at 197.

opinion strongly suggests that the statutory limitation on wrongful death recoveries would not logically apply to § 1983 claims based on deprivation of the petitioner's own rights. The question presented to the Court initially only made sense if the injuries in question under the state and federal claims were the same. The Court, however, expressly refused to address whether the petitioner's interest in raising her child was a constitutional liberty interest that was violated by his killing.[187]

In his dissent, Justice White took the position that § 1983 should be available to pursue wrongful death claims. Relying on the criminal statute counterpart to § 1983, he pointed out that in some circumstances actions under color of law that result in death violate the constitutional rights of the victim and argued that the § 1983 remedial issues had been reached by the Colorado court and therefore should be resolved.[188]

The disposition of *Jones* demonstrates the Court's awareness of the differences between wrongful death actions seeking damages because of injuries to survivors and survival actions on behalf of decedents. Moreover, the Court's per curiam opinion illustrates how state wrongful death damage limitations can impinge on § 1983 actions. Finally, the willingness of the Court to grant certiorari, as well as its similar action in a subsequent Colorado case also dismissed without reaching the merits,[189] suggest that these issues warrant plenary consideration. The reluctance to reach the issues, on the other hand, is more difficult to explain. The shift in emphasis by counsel in *Jones* may have highlighted the complexity of the remedial issues. Additionally, the underlying substantive issue concerning the source of the right violated by the wrongful killing seems to have troubled members of the Court who apparently preferred to avoid addressing a difficult constitutional issue.[190] Thus, *Jones* identified but did not resolve a number of important issues concerning the relationship between § 1983 and state wrongful death claims.

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187. *Id.* at 187-89.

188. *Id.* at 189 (White, J., dissenting). Justice White also noted that federal courts had permitted wrongful death suits under § 1983 where they were maintainable under state law, but that the Court had never addressed "whether, independently or in conjunction with state law, § 1983 affords parents a cause of action for a wrongful killing of their child by a state law enforcement officer and, if it does, the further question as to the measure of damages in such case." *Id.*

189. O'Dell v. Espinoza, 456 U.S. 430 (1982), *dismissing cert. for want of jurisdiction*, 633 P.2d 455 (Colo. 1981). In *O'Dell* the Colorado Supreme Court reversed its position on the constitutional issue and held that children may assert a constitutional liberty interest in their continued relationship with their parents, 633 P.2d at 463; thus, the state wrongful death damage limitations did not apply to the survivors' § 1983 actions. The Colorado court, however, did not repudiate its "merger" holding in *Jones* but distinguished it because the § 1983 claim in *O'Dell* was not joined with a state claim and sought relief not available under state law. 633 P.2d at 461-62. The Supreme Court dismissed the petition under its final judgment rule after it became clear that the state court had remanded the case for trial.

190. *Jones,* 432 U.S. at 187-89. The questioning of petitioner's counsel at oral argument suggests that members of the Court were concerned about this issue. Transcript of Oral Argument at 8-16, 22-24.

2. *Robertson v. Wegmann*

A few months after the dismissal of the petition in *Jones,* the Court agreed to address the related issue of the relationship between § 1983 and state survival policies. Unlike *Jones,* which was a wrongful death claim by a survivor, *Robertson v. Wegmann*[191] was a pure survival case in which the death of the plaintiff was unrelated to his § 1983 action.

Clay Shaw, the New Orleans businessman indicted and prosecuted unsuccessfully for conspiring to assassinate President John F. Kennedy, filed a § 1983 action against James Garrison, the prosecuting attorney, and Garrison's financial supporters for instituting bad faith criminal prosecutions. Prior to the scheduled trial, however, Shaw died of causes unrelated to the action. Under Louisiana law, Shaw's action for personal damages could have been pursued by his spouse, children, parents or siblings,[192] but Shaw did not have any of these statutory survivors; thus, his § 1983 claim for personal damages abated.[193]

The Fifth Circuit, which earlier had embraced a borrowing approach to § 1983 survival and wrongful death issues,[194] reviewed the Louisiana survival policies under § 1983 principles of compensation and deterrence and concluded that the state rule was not consistent with federal law. It then applied the federal common law to permit the action to survive.[195]

In reversing the Fifth Circuit, the Supreme Court fully embraced the borrowing approach to survival issues, while identifying circumstances in which courts may reject borrowed state policies as being inconsistent with the purposes of § 1983. Initially, the Court agreed with the Fifth Circuit's conclusion and the "assumption" of the parties that 42 U.S.C. § 1988, a civil rights choice of law statute, governed and that federal law was "deficient" in the sense that it did not "cover" the issue of the survival of the federal cause of action.[196] The Court then looked to state law and concluded

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191. 436 U.S. 584 (1978).

192. LA. CIV. CODE ANN. art. 2315 (West 1979).

193. Under state law, the executor of Shaw's estate could bring an action for property but not personal damages. *Id.*

194. *See* Brazier v. Cherry, 293 F.2d 401 (5th Cir.), *cert. denied,* 368 U.S. 921 (1961).

195. Shaw v. Garrison, 545 F.2d 980, 984-86 (5th Cir. 1977), *rev'd sub nom.* Robertson v. Wegmann, 436 U.S. 584 (1978).

196. *Robertson,* 436 U.S. at 588. In looking to the state law of survival, the Court relied on its statement in Moor v. County of Alameda, 411 U.S. 693, 702 (1973), that federal law does not cover every issue that may arise in a civil rights action. In *Moor* the Court had foreshadowed the borrowing approach to survival issues by making the following observation about the use of state law in § 1983 litigation:

> One such problem has been the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant. Although an injured party's personal claim was extinguished at common law upon the death of either the injured party himself or the alleged wrongdoer . . . it has been held that pursuant to § 1988 state survivorship statutes which reverse the common-law rule may be used in the context of actions brought under § 1983.

Id. at 702 n.14.

that the action would abate under Louisiana's survivorship statute unless that result was "inconsistent with the Constitution and laws of the United States."[197]

In approaching the inconsistency clause of § 1988, Justice Marshall, writing for the Court, rejected a plaintiff-oriented approach to § 1988 under which courts would reject otherwise applicable state policics whenever they caused a plaintiff to lose.[198] Nonetheless, he did not require a direct conflict between the state policy and a federal statutory or constitutional provision. Had such a conflict been the sine qua non for rejecting state law, § 1988 would be reduced to a tautology permitting the rejection of state law only when there was a specific federal requirement to do so, thus making resort to state law unnecessary in the first place. Rather, Justice Marshall looked broadly to the "policies underlying § 1983 [which] include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law."[199]

Despite his willingness to look beyond square conflicts between state and federal law, Justice Marshall applied his test narrowly. He dismissed the argument that the Louisiana statute was inconsistent with the goal of compensating those who were injured by a deprivation of rights by pointing out that the plaintiff was "merely suing as the executor of the deceased's estate."[200] This, however, effectively deprived the goal of compensation of any independent impact in suits brought by legal representatives who did not personally suffer any injuries. With respect to deterrence, he noted that Louisiana law was not hostile to the survival of actions. Many actions not survivable in other states survived in Louisiana, and even § 1983 actions, including Shaw's case, would survive if a spccified relative was available. Thus, Justice Marshall did not view the Louisiana statute as adversely affecting the goal of deterrence, since "to find even a marginal influence on behavior" it would be necessry to assume that state officials contemplating illegal activity were aware of intricacies of Louisiana survivorship law as well as the absence of statutory survivors in a particular case.[201]

Although the Court did not permit the plaintiff's claim to survive, Justice Marshall's opinion in *Robertson* is closely tied to the facts of the case, and he carefully distinguished § 1983 cases in which the death results from the complained-of conduct. First, he left open how state survival policies would be treated where, unlike Louisiana, there was a general inhospitability to

197. 436 U.S. at 588 (quoting 42 U.S.C. § 1988 (1982)).

198. *Robertson,* 436 U.S. at 593 ("A state statute cannot be considered inconsistent with federal law merely because the statute causes the plaintiff to lose the litigation."). Justice Marshall also rejected the Fifth Circuit's argument for nationwide uniformity. He viewed § 1988 as a congressional directive acknowledging state by state variations on issues of civil rights enforcement on which Congress has not spoken. *Id.* at 593-94 n.11.

199. *Id.* at 590-91.

200. *Id.* at 592.

201. *Id.* at 592-93 n.10.

the survival of § 1983 actions. Louisiana neither precluded the survival of tort actions nor significantly restricted the actions that survived; thus, most § 1983 actions would survive if the proper relative had brought it.[202] Second, he pointed out that the Court's holding did not "preclude survival of a § 1983 action when such is allowed by state law . . . nor does it preclude recovery by survivors who are suing under § 1983 for injury to their own interest."[203] Perhaps significantly, Justice Marshall tied the survival issue to state law, but he made no similar reference to state law in suggesting that survivors could bring wrongful death claims under § 1983.[204] Finally, in discussing the impact of state no-survival policies on deterrence, Justice Marshall emphasized the narrowness of the decision and specifically distinguished cases in which the illegal conduct caused the death.[205]

In his dissenting opinion, Justice Blackmun, joined by Justices Brennan and White, argued that § 1983 required a federal policy as the rule, not the exception, and that the proper starting point was the issue conceded by the plaintiffs: whether an appropriate federal rule of law was available. Although Justice Blackmun agreed that § 1983 and federal law did not expressly address the issue of survival, he was unwilling to concede that federal law did not provide an appropriate survival policy. Thus, he saw initial resort to state rules as improper, and he argued for the use of a federal rule in the first instance, rather than only when state law is rejected under § 1988's inconsistency clause.[206] In support of his position, Justice Blackmun pointed to § 1983 decisions on issues of damages and immunities, which involved the development of uniform federal rules despite the absence of specific statutory provisions or relevant legislative history.[207]

Justice Blackmun also disagreed with the Court's application of the inconsistency clause and argued that state rules should be reviewed for their impact on § 1983 litigation as well as on the underlying conduct. For example, he expressed concern about giving a party an incentive to delay litigation in

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202. *Id.* at 591.

203. *Id.* at 592 n.9.

204. *Id.*

205. Justice Marshall carefully limited the ruling by observing that:

> We intimate no view, moreover, about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death. . . . (*cf. Brazier v. Cherry*, 293 F.2d 401 (CA5 1961) (deceased allegedly beaten to death by policemen; state survival law applied in favor of his widow and estate)).

Robertson, 436 U.S. at 594. Justice Marshall was no doubt quite familiar with the Fifth Circuit decision in *Brazier* on which he relied, as he had represented the plaintiff in it. *See infra* note 400.

206. *Id.* at 595-96 (Blackmun, J., dissenting).

207. *Id.* at 596-97. Justice Blackmun relied on Sullivan v. Little Hunting Park, 396 U.S. 229 (1969), a damage action under 42 U.S.C. § 1982, in which the Court construed § 1988 to require courts hearing civil rights actions to search out the federal or state rule which "better serves the policies expressed in the federal statutes." 396 U.S. at 240.

the hope that the intervening death of a litigant would require the litigation to abate.[208]

Robertson is a disappointing decision, not so much for the result but rather because of the approach the Court took to the threshold questions raised by § 1988. *Robertson* was the Court's first § 1983 survival case and the outcome might have turned on whether federal courts could develop federal rules to resolve matters not directly addressed by § 1983. The Court, however, failed to review the language and legislative history of § 1983 to determine whether it provided an appropriate survival policy, or, whether the federal common law of § 1983 justified the development of such a policy. Nor did the Court interpret the deficiency clause of § 1988 to determine whether it authorized resort to the federal common law to fill certain gaps in civil rights statutes.[209] Thus, *Robertson* requires initial resort to state survival policies but offers little guidance on other issues that may arise in § 1983 litigation.

Nonetheless, *Robertson* is an important decision. It rejects an unremittingly pro-plaintiff reading of § 1988 and significantly narrows compensation as a criterion for determining the availability of § 1983 actions on behalf of plaintiffs suing in a representative capacity. *Robertson* also provides guidance in reviewing whether borrowed state policies are consistent with the deterrence purpose of § 1983. In such cases, courts must look both to the general application of the state policy as well as to its application in the particular case. Louisiana law was not generally hostile to the survival of § 1983 actions; nor did the abatement of the particular § 1983 action have an "independent adverse effect on the policies underlying § 1983."[210] Thus, *Robertson* required a two-level analysis of borrowed state policies with respect to deterrence.[211] Finally, Justice Marshall's opinion suggests that even where death results from the complained-of conduct, state survival law is the starting point, but his repeated efforts to distinguish that situation suggest a state policy of abatement would be rejected.

With respect to the use of § 1983 as a wrongful death remedy, *Robertson* provides little guidance. Although Justice Marshall suggests that a no-wrong-

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208. *Robertson*, 436 U.S. at 600 (Blackmun, J., dissenting). In emphasizing the purpose of § 1983 of deterring unconstitutional conduct, Justice Blackmun contrasted federal statutes that are concerned primarily with compensation and loss-shifting. *Id.* at 601.

209. Rather than interpret the deficiency clause, the Court merely relied on its earlier observation that federal law does not cover every issue that may arise in the context of a civil rights action. *See supra* note 196. Although it has been suggested that this was the Court's interpretation of the clause and that "federal law should be considered 'deficient' and courts should turn to the law of the forum state if federal law does not cover the issue," Brown v. United States, 742 F.2d 1498, 1512 (D.C. Cir. 1984) (en banc) (Bork, J., dissenting), *cert. denied,* 105 S. Ct. 2153 (1985), a better explanation of *Robertson* is that the concession of the parties that federal law was deficient contributed to the Court's failure to address this issue.

210. *Robertson,* 436 U.S. at 594.

211. Justice Marshall's opinion does not respond to Justice Blackmun's concern for specific deterrence and his argument that courts should look to the impact of the state policy on the litigation as well as on the underlying conduct.

ful-death policy would adversely affect the interest in compensating survivors as well as the deterrence purposes of § 1983,[212] the decision leaves unclear how to approach the threshold question of whether federal law is deficient in § 1983 wrongful death cases.

3. *Carlson v. Green*

In *Carlson v. Green*,[213] the Supreme Court addressed indirectly one of the issues left open in *Robertson*. *Carlson* was a *Bivens* damage action brought directly under the Constitution against federal prison officials and not under § 1983. The plaintiff was a mother whose son died while a prisoner at a federal correctional center in Indiana, and she sued as the administratrix of his estate. She claimed that the denial of medical care that caused her son's death constituted cruel and unusual punishment. The Supreme Court ultimately found an implied right of action against federal correctional officials in the eighth amendment,[214] but the case also involved the survival of the decedent's action.

The plaintiff had sought $1,500,000 in actual and $500,000 in punitive damages, but the district court dismissed the complaint because it did not meet the jurisdictional amount requirement.[215] In reaching this conclusion, the district court treated Indiana law on both survival and wrongful death as governing the availability of the action and the damages recoverable.[216]

Under Indiana law, actions for personal injuries to deceased parties do not survive where the complained-of acts caused the death.[217] Indiana, how-

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212. *See supra* notes 203-05 and accompanying text.

213. 446 U.S. 14 (1980).

214. The district court had found that the allegations of the complaint stated a violation of the eighth amendment standard set forth in Estelle v. Gamble, 429 U.S. 97 (1976) (deliberate indifference to medical needs constitutes cruel and unusual punishment), and the Seventh Circuit agreed. Green v. Carlson, 581 F.2d 669, 675-76 (7th Cir. 1978), *aff'd*, 446 U.S. 14 (1980). The United States did not contest that determination before the Supreme Court. *Carlson*, 446 U.S. at 17 n.3.

215. *Carlson*, 446 U.S. at 17. The $10,000 jurisdictional amount requirement for suits against federal officers in 28 U.S.C. § 1331(a) was repealed after the district court decision. Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721.

216. *Carlson*, 446 U.S. at 17 n.4.

217. IND. CODE § 34-1-1-1 (1982). The decisions in *Carlson* do not address the proper interpretation of state law on survival, and Indiana law may not have required the action to abate. Under Indiana law, "[a]ll causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to such action . . . except actions for personal injuries to the deceased party, which shall survive only to the extent provided herein." *Id.* In cases within the exception, a wrongful death action is available. Subsequently, the Seventh Circuit held that § 1983 actions based on wrongful killings were not "actions for personal injuries" within the meaning of the state statute, thus permitting a § 1983 action to survive. Blake v. Kattar, 693 F.2d 677 (7th Cir. 1982). *But see* Wilson v. Garcia, 105 S. Ct. 1938 (1985) (treating all § 1983 actions as "personal actions" for purposes of choosing the appropriate state statute of limitations; *cf.* Runyon v. McCrary, 427 U.S. 160, 180-81 (1976) (action for damages under § 1981 is an "action for personal injuries" within the relevant Virginia statute of limitations).

ever, does not preclude all civil remedies in such cases, and wrongful death actions may be brought by the personal representatives of one whose death was caused by a wrongful act or omission.[218] The damages available in such wrongful death actions were open-ended and included, but were expressly not limited to, lost earnings as well as reasonable medical, hospital, funeral and burial expenses;[219] in addition, Indiana case law clearly authorized awards for loss of society.[220] This broad range of damages, however, was only available to a decedent's widow or widower, dependent children or dependent next of kin. When there were no such surviving relatives, wrongful death damages were limited to reasonable medical, hospital, funeral, and burial expenses, as well as the expenses of administering the estate and prosecuting any action. Thus, given the decedent's status as an incarcerated adult without dependents, the plaintiff's only wrongful death damage claim for her son's death was for the minimal cost of administering his estate.

Unlike the district court, which approached plaintiff's claim under both the survival and wrongful death statutes, the Seventh Circuit treated the action only as a survival claim.[221] The court saw the plaintiff as asserting her son's cause of action as the administratrix of his estate and claiming that the action survived his death notwithstanding contrary state law.[222] Thus, the Seventh Circuit's opinion does not address the availability of a wrongful death claim implied from the Constitution or borrowed from state law.

In affirming the Seventh Circuit's conclusion that the state survival policy did not prevent the action from surviving where death resulted from the complained-of conduct, the Supreme Court did not attempt to resolve the conflict over the proper characterization of the plaintiff's claim. The Court only reviewed the Seventh Circuit's treatment of the survival claim, which would have abated under state law even if the decedent had a spouse or dependent relatives who could have obtained a substantial recovery in a state wrongful death action.[223]

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218. IND. CODE § 34-1-1-2 (Supp. 1985) provides in relevant part:
> When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action had he or she, as the case may be, lived, against the latter for an injury for the same act or omission.

219. *See* IND. CODE § 34-1-1-2 (Supp. 1985):
> When the death of one is caused by the wrongful act or omission of another . . . the damages shall be in such an amount as may be determined by the court or jury, including, but not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings . . . .

220. American Carloading Corp. v. Gary Trust & Sav. Bank, 216 Ind. 649, 660, 25 N.E.2d 777, 782 (1940). *Cf.* Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979) (construing Indiana law to allow damages for loss of care, love and affection, and training and guidance of children, but not punitive damages).

221. *Carlson,* 581 F.2d 669, 672 n.4.

222. *Id.*

223. In declining to address whether the plaintiff had also alleged a wrongful death claim, the Court stated cryptically that "[r]esolution of this conflict is irrelevant in light of our holding today." *Carlson,* 446 U.S. at 18 n.4. If the plaintiff was also pursuing a wrongful death claim and seeking damages beyond those allowed under state law, resolution of this issue would have been relevant regardless of the holding on the survival issue. The complaint dealt exclusively with injuries to the decedent and no losses to his mother were pleaded. Moreover, the plaintiff made clear that she was suing to vindicate the victim's rights, and not seeking compensation for survivors under a wrongful death claim. Brief for Respondents at 52-57, *Carlson.*

In approaching the survival issue, the *Carlson* Court was not constrained by § 1988, which does not apply in *Bivens* actions, and concluded that only a uniform federal rule of survivorship was compatible with the goal of deterring the constitutional violations alleged in this case.[224] The Court also pointed out that its holding was consistent with *Robertson,* as the death was alleged to have been caused by the acts upon which the suit was based.[225]

Carlson is significant because it raises the question of the relevance of state wrongful death remedies in considering the adequacy of state survival policies. Had the death been unrelated to the cause of action, Indiana law would have permitted the action to survive. Because the death resulted from the complained-of conduct, however, any action brought on behalf of the decedent for injuries suffered prior to his death and for the taking of his life would have abated under state law.

In its brief, the United States argued that the Court should look at Indiana's survival and wrongful death statutes as a whole and pointed out, correctly, that in Indiana all tort claims survived to some extent.[226] If the victim died from an injury arising out of the complained-of conduct, the personal injury action abated but the survivors had a wrongful death claim. In rejecting the argument that Indiana law should govern, however, the Court focused solely on the survival claim brought by the decedent's representatives and implicitly rejected the argument that the potential wrongful death claim could adequately serve the purposes of compensation and deterrence that *Bivens* and § 1983 actions shared.[227]

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224. *Carlson,* 446 U.S. at 23. In concluding that a uniform rule of survivorship was required where the complained-of conduct resulted in death, the Court noted that the federal government operated its prisons throughout the country and that the states had little interest in applying their survival policies to disputes involving federal officials. *Id.* at 24-25 n.11.

225. In choosing a uniform federal rule of survival for cases where the death is caused by the complained-of conduct the *Carlson* Court focused exclusively on the deterrence rationale of *Bivens* actions and did not address the goal of compensation. *Cf.* Robertson v. Wegmann, 436 U.S. 584 (1978) (compensation not affected where suit brought by executor).

226. The United States argued that the availability of a wrongful death claim justified following a state policy that required the decedent's claim to abate. Brief of United States at 47, *Carlson.* This, however, ignores the fact that the survival and wrongful death actions, although both premised on the violation of the decedent's rights, protect different interests and seek different relief. Moreover, given the absence of recoverable wrongful death damages in this case, remitting the plaintiff to the wrongful death remedies would be akin to denying that action.

227. Despite the availability of wrongful death actions against the federal government under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b) (1982), which borrows state law remedies, such actions do not adequately serve the purposes of *Bivens* actions. In rejecting the argument that the FTCA established an exclusive remedy against the federal government, the *Carlson* Court relied on the absence of jury trials and the unavailability of punitive damages under the FTCA as well as on the increased deterrence that flows from personal liability. *Carlson,* 446 U.S. at 21-23. Given this refusal to permit state defined FTCA survival actions to preclude *Bivens* claims, it would be anomolous to conclude that the wrongful death remedies under the FTCA served the purposes of *Bivens* and justified permitting actions to abate where death resulted from the complained-of conduct. Likewise, any state action a survivor had against individual federal officers under Indiana law, *see infra* note 229, would have been useless given the limitations of the Indiana wrongful death remedy. A more difficult question, however, is whether a *Bivens* wrongful death action free of state damage limitations could preclude a survival claim, *see infra* notes 444-62 and accompanying text, an issue the *Carlson* Court did not discuss in analyzing the survival claim independently.

Although the *Carlson* Court did not resolve how federal courts should use state survivorship law on other issues in *Bivens* actions,[228] it made clear that state law requiring abatement should not be used when a decedent dies from the complained-of conduct. By reconciling that result with *Robertson,* however, the Court did not depart from its holding that state law will be the starting point for § 1983 survival issues regardless whether the complained-of conduct results in death. Nonetheless, the Court's treatment of the deterrence issue leaves little doubt that state policies requiring such actions to abate will be rejected as inconsistent with § 1983. Moreover, *Carlson's* approach suggests that the same result would be reached where the state has an adequate wrongful death remedy. On the other hand, *Carlson* is silent as to the availability of wrongful death claims directly under the Constitution or in conjunction with state law. The administratrix did not seek damages she suffered from her son's death, and the Court did not address the availability of such an action.[229]

B. Survival and Wrongful Death Issues Under Other Federal Statutes

Although the Court has not addressed the relationship between § 1983 and wrongful death actions, it has frequently considered the availability of both survival and wrongful death claims under other federal statutes and under general maritime law. The Court's approach in these areas has been characterized by a willingness to review the legislative history and purposes of congressional enactments despite the absence of statutory language directly on point and to apply the federal common law to the particular statutory actions. Moreover, in admiralty, the Court has reviewed critically the common law and reversed a 19th-century precedent that denied the existence of common law wrongful death claims under general maritime law.

The Court's approach to survival issues under federal statutes that do not specifically address the issue was established in an 1884 case in which the

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228. The Court suggested that the uniform rule of survivorship applied in *Bivens* actions when the complained-of conduct resulted in death might not apply to other survivorship issues, by expressly leaving open whether on certain questions federal law might incorporate state law as a matter of convenience. *Carlson,* 446 U.S. at 24 n.11.

229. By examining the survival issue independently, the Court avoided the need to address the availability of wrongful death actions against individual federal officials. Survivors have a wrongful death remedy against the federal government under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), but the FTCA is not available in actions against federal officials. Nonetheless, the Court could find authority for wrongful death actions against federal officials directly under the Constitution by analogizing to *Bivens* actions that survive a decedent's death. Although the textual support for construing § 1983 directly as a wrongful death remedy is not available for *Bivens* wrongful death actions, *see infra* notes 494-95 and accompanying text, the Court has construed the federal common law to allow nonstatutory wrongful death actions in admiralty. *See infra* notes 246-60 and accompanying text. Moreover, the Court's policy of construing § 1983 and *Bivens* actions similarly, *see infra* notes 303-04 and accompanying text, supports permitting *Bivens* wrongful death actions.

Court relied on federal common law. In *Schreiber v. Sharpless,*[230] a copyright action for penalties and forfeitures, the Court looked to the common law rule requiring the abatement of penal actions and refused to permit the plaintiffs to prosecute the action against the executors of the deceased defendant's estate.[231] Although a state statute would have allowed the action to survive, the Court stressed that the survival of the action was a matter of federal law and dependent on the nature and substance of the cause of action.[232]

Federal courts addressing the survival of federal statutory actions under statutes that provided no guidance on the issue of survival or the choice of the controlling law[233] have generally looked to federal common law for guidance.[234] Although *Schreiber,* in requiring the abatement of penal actions under federal common law, did not address whether all nonpenal actions survived, federal courts have applied an evolving federal common law to permit an increasing number of nonpenal damage actions to survive.[235] Thus, in *Barnes Coal Corp. v. Retail Coal Merchants Association,*[236] the Fourth Circuit permitted the survival of a treble damage claim under the Sherman Act by relying on the modern common law rule of survivability for claims for property rights. In defending the use of an evolving common law standard, the court stated:

> [W]e entertain no doubt as to the survivability of the cause of action when the statute creating it is interpreted in light of the common law rule relating to survival. While there might be some doubt as to this were we to look only to the ancient decisions, we think that the rule is to be determined, not merely by a consideration of the state of the common law at the time of the enactment of the statute de bonis asportatis in the reign of Edward III, or even by a consideration of the common law rule at the time of the American Revolution, but in the light of its subsequent development and the decisions interpreting it. It must be remembered, in this connection, that the common law is not a

230. 110 U.S. 76 (1884).

231. *Id.* at 80.

232. *Cf.* Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913) (refusing to look to state law for the survival of an action under the Federal Employers' Liability Act, 35 Stat. 65 (1908), *amended by* 36 Stat. 291 (1910)).

233. Some federal statutes expressly incorporate state law to govern federal causes of action. *See, e.g.,* Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331, 1333(a)(2)(A) (1982) (requiring use of state procedures); Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982) (explicitly adopting state law to govern the liability of the United States). *See also* United States v. Haskin, 395 F.2d 503 (10th Cir. 1968) (applying state damage ceiling in wrongful death action under FTCA).

234. In some cases where the governing federal statute is silent, the Court has nonetheless found a congressional intent to permit statutory actions to survive. *See, e.g.,* Cox v. Roth, 348 U.S. 207 (1955) (holding that actions under Jones Act survive the death of a defendant despite silence in FELA, which the Jones Act incorporated).

235. *But see* Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 371 (1932) (dictum) (observing that actions for personal injuries did not survive under the maritime law). *See also* Romero v. International Terminal Operating Co., 358 U.S. 354, 373 n.35 (1959).

236. 128 F.2d 645 (4th Cir. 1942).

> static but a dynamic and growing thing. Its rules arise from the application of reason to the changing conditions of society. It inheres in the life of society, not in the decisions interpreting that life; and, while decisions are looked to as evidence of the rules, they are not to be construed as limitations upon the growth of the law but as landmarks evidencing its development.[237]

Moreover, in looking to the common law and its evolution, courts have often considered legislative as well as judicial developments.[238]

In applying the common law, federal courts have been mindful of the difficulty of determining which actions are penal[239] and have looked to the purpose of the statute, the beneficiary of any recovery, and the relationship between the recovery and harm suffered to determine whether an action survives. Such an approach avoids simply asking whether an action is considered "personal" or determining how state law would characterize it.[240] Thus, a federal common law of survival closely tied to the nature of the particular statute has been followed by federal courts in determining the survivability of statutory actions where Congress was silent.[241]

During the 19th century, the Supreme Court followed the approach of the common law in refusing to recognize wrongful death actions. During the ascendancy of *Swift v. Tyson,*[242] when federal courts were free to exercise broad authority over the federal common law in diversity cases, the Court followed state law and refused to permit wrongful death actions unless the underlying state statute provided for such an action. Thus, in *Insurance Co. v. Brame,*[243] a diversity action by an insurance company to recover the proceeds of a life insurance policy paid because of the defendant's killing of the decedent, the Court reviewed the common law and refused to authorize a cause of action that would not have been allowed under the applicable

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237. *Id.* at 648.

238. *See* Sullivan v. Associated Bill Posters & Distribs., 6 F.2d 1000 (2d Cir. 1925) (considering statutory developments in determining the federal common law of survival and concluding that an action under the Sherman Antitrust Act survives the death of a defendant). *Cf.* Moragne v. States Marine Lines, 298 U.S. 375 (1970) (looking to state statutes to define the common law of wrongful death).

239. *Cf.* Huntington v. Attrill, 146 U.S. 657 (1892) (discussing the meaning of penal statutes in different contexts).

240. *See, e.g.,* James v. Home Constr. Co., 621 F.2d 727, 730 (5th Cir. 1980) (applying a three-part test to determine that a remedy under the Truth-in-Lending Act is not a penal sanction and that the action survives).

241. *See, e.g.,* Smith v. No. 2 Galesburg Crown Fin. Corp., 615 F.2d 407 (7th Cir. 1980) (federal common law requires survival of action under § 1640 of the TILA); Asklar v. Honeywell, Inc., 29 FEP Cases 1596 (D. Conn. 1982) (action under the Age Discrimination in Employment Act survives under federal common law); Layne v. International Bhd. of Elec. Workers, 418 F. Supp. 964 (D.S.C. 1976) (action for damages under Labor-Management Reporting and Disclosure Act survives under federal common law, but claims for mental anguish and pain and suffering are personal and do not); *cf.* Bowles v. Farmers Nat'l Bank, 147 F.2d 425 (6th Cir. 1945) (action for treble damages under the Emergency Price Control Act of 1942 is penal and does not survive under the federal common law).

242. 41 U.S. (16 Pet.) 1 (1842).

243. 95 U.S. 754 (1877).

state law. Similarly in 1886 in *The Harrisburg*,[244] an action for wrongful death under general maritime law, the Court held that the common law did not authorize wrongful death actions under the federal courts' admiralty jurisdiction.[245]

The most dramatic modern development in the federal common law of wrongful death occurred in 1970 in the area of general maritime law when the Supreme Court decided *Moragne v. States Marine Lines*[246] and reversed the eighty-four-year-old precedent of *The Harrisburg*. In *Moragne*, the Court held that a wrongful death action is available under general maritime law for a death caused by a violation of a maritime duty.[247] The case arose because the survivors of the decedent, a longshoreman killed aboard a vessel in navigable waters within Florida, could not pursue a wrongful death claim for unseaworthiness under state law, and fell between the cracks of the available federal wrongful death legislative remedies. Congress had passed legislation authorizing wrongful death actions for deaths beyond state territorial waters[248] and for seamen regardless of where the death occurred,[249] but neither statute applied to the decedent. Thus, under the prevailing law, his survivors could only recover on a claim for unseaworthiness if authorized under state law.[250]

Despite the congressional entry into this area, the Court held that it was not precluded from addressing the availability of a wrongful death action under general maritime law and, in a careful and scholarly opinion, Justice Harlan reviewed the origins of the common law of wrongful death. Regardless of whether *The Harrisburg* was correctly decided in 1886, Justice Harlan found that intervening developments made clear "that the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law."[251] He looked to the widespread legislative abandonment of the rule and, relying on Roscoe Pound's observation that "today we should be thinking of the death statutes as part of the general law,"[252] held that wrongrul death actions would be available in maritime cases regardless of state law.[253]

In declaring that the common law authorized a wrongful death action in maritime cases, Justice Harlan responded to the argument that the devel-

244. 119 U.S. 199 (1886).
245. *Id.* at 213-14.
246. 398 U.S. 375 (1970).
247. *Id.* at 409.
248. Death on the High Seas Act of 1920, ch. 111, 41 Stat. 537 (current version at 46 U.S.C. §§ 761-67 (1982)).
249. Merchant Marine Act of 1920 (Jones Act), ch. 250, § 33, 41 Stat. 1007 (current version at 46 U.S.C. § 688 (1982)).
250. The Florida Supreme Court construed state law to exclude such claims for unseaworthiness from the state wrongful death remedy. *Moragne*, 211 So. 2d 161 (Fla. 1968) (on certified question).
251. 398 U.S. at 388.
252. Pound, *Comment on State Death Statutes—Application to Death in Admiralty*, 13 NAT'L A. CLAIMANTS COMPEN. ATT'YS L.J. 188, 189 (1954).
253. *Moragne*, 398 U.S. at 390-91.

opment of this nonstatutory action would require the Court to address a myriad of questions that arise in personal injury litigation. He observed that courts can look to analogous areas of federal law to select the appropriate statute of limitations, to identify the proper beneficiaries, and to define the measure of available damages.[254]

The decision in *Moragne,* however, did not resolve all issues as to the availability of wrongful death actions under the general maritime law. In *Sea-Land Services, Inc. v. Gaudet,*[255] the Court addressed the measure of survivors' damages in nonstatutory death actions under the maritime law and held that damages could include compensation for loss of support and services, for funeral expenses, and for loss of society, but not for mental anguish or grief.[256] The Court found that these awards to survivors would not duplicate damages already received by the decedent, and declined to look for guidance to other federal maritime statutes that limited damages to pecuniary losses.[257] In reaching this conclusion, the Court noted that twenty-seven of the forty-four state and territorial wrongful death statutes which measured damages by losses to beneficiaries permitted recovery for loss of society.[258]

The Court, however, has refused to extend the holdings of *Moragne* and *Gaudet* to accidents directly covered by existing federal statutes, thus limiting the availability of claims for loss of society to maritime accidents within territorial waters. In *Mobil Oil Corp. v. Higginbotham,*[259] the Court addressed whether the nonstatutory wrongful death action under maritime law also applied in the territorial waters where the Death on the High Seas Act applied. In concluding that it did not, the Court limited recovery of survivors of persons who died in accidents in territorial waters to their pecuniary losses as the Act excluded recoveries for loss of society.[260] Thus, the Court was not willing to create a parallel wrongful death remedy to cover cases that Congress had directly addressed. Nonetheless, the Court's willingness in *Moragne* to reverse the federal common law and authorize a common law wrongful death action for unseaworthiness under the maritime law demonstrates the extent to which wrongful death actions have become part of the general law.

III. STATUTORY CONSTRUCTION, § 1983 AND THE USE OF STATE LAW

Given the absence of Supreme Court decisions directly addressing the availability of § 1983 as a wrongful death remedy, it is necessary to look

254. *Id.* at 405-08.
255. 414 U.S. 573 (1974).
256. *Id.* at 584-85 & n.17.
257. The Death on the High Seas Act, 46 U.S.C. §§ 761-67 (1982), which limited damages to pecuniary losses, was not literally applicable because the accident took place in territorial waters where the DOHSA does not apply.
258. *Gaudet,* 414 U.S. at 587 n.21.
259. 436 U.S. 618 (1978).
260. *Id.* at 624-25.

to decisions involving other aspects of § 1983. This is not a simple task. Although all cases involving interpretations of § 1983 can be reduced to matters of statutory construction,[261] the Court has often failed to develop clear and consistent approaches to interpreting federal statutes,[262] and § 1983 is no exception. Moreover, it has often not attempted to justify or even explain the approach it has followed, particularly with respect to the role of state law in § 1983 litigation.[263]

There are many possible approaches to the use of § 1983 as a wrongful death remedy, all of which involve the need to construe § 1983 and to determine its relationship to state law. The Supreme Court, when it reaches this issue, will have to decide whether § 1983—independently, through the federal common law, or through the incorporation of state law—is available as a wrongful death remedy. It will also have to address the applicable damage policies and, if state wrongful death causes of action are incorporated into § 1983, whether state damage limitations, such as ceilings on recoveries or prohibitions on awards for nonpecuniary losses, are also incorporated. Finally, if § 1983 incorporates state wrongful death actions and their damage policies, the Court will have to address whether the state policies are consistent with the purposes of § 1983. State law is relevant to these inquiries. A review of state law in 1871 may help explain what members of the 42d Congress, almost two-thirds of whom were lawyers,[264] intended in enacting the predecessor to § 1983. In addition, current state law may give meaning to § 1983 when it was contemplated that particular elements of the § 1983 cause of action would evolve over time. Finally, federal law may require use of the law of the forum state to fill any gaps in § 1983 concerning its availability as a wrongful death remedy.

The search for an applicable policy in § 1983 litigation is made difficult because of the limited legislative guidance, but this is not unique. Federal law is interstitial and federal courts often look to the law of the forum state

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261. *See, e.g.,* Pierson v. Ray, 386 U.S. 547, 554 (1967); Tenney v. Brandhove, 341 U.S. 367, 376 (1951). In his dissenting opinion in Monroe v. Pape, 365 U.S. 162 (1961), Justice Frankfurter criticized treating interpretations of § 1983 as abstract matters of statutory construction in view of their implication on federalism: "So stated, the problem . . . is denuded of illuminating concreteness and thereby of its far-reaching significance for our federal system." *Id.* at 202 (Frankfurter, J., dissenting).

262. *See generally* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court,* 95 HARV. L. REV. 892 (1982) (criticizing the Court's approach to statutory construction); *see also* Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,* 68 IOWA L. REV. 195, 215 (1983) (commenting on inconsistencies in the Supreme Court's approaeh to construing statutes); R. POSNER, THE FEDERAL COURTS 286 (1985) (going further than Judge Wald to suggest that the Court's approach to statutory construction "smacks of disingenuousness and opportunism").

263. *See infra* notes 271-318 and accompanying text.

264. Of the 238 members of the House of Representatives in the First Session of the 42d Congress, 151 listed their occupation as lawyers. CONG. GLOBE, 42d Cong., 1st Sess., ix-xii (1871). Of the 72 memhers of the Senate from 37 states seated at the start of the 42d Congress, 48 were lawyers or had legal training. *See* CONGRESSIONAL DIRECTORY 5-54 (42d Cong. 1st Sess. 1871).

to fill gaps in federal statutes,[265] usually under the general mandate of the Rules of Decision Act.[266] What is unique about § 1983 and other surviving Reconstruction-era civil rights acts, however, is the existence of 42 U.S.C. § 1988, a choice of law statute that may limit the power of federal courts to use the federal common law to supply missing details in § 1983 and other civil rights actions. Under § 1988, federal courts look to state law where federal law is deficient; the most analogous state policy is then applied as the fedcral rule unless it is inconsistent with § 1983's purposes of compensation and deterrence.[267]

Despite the surface simplicity of these steps, its application is more complex.[268] Section 1988 defies a simple construction, and the Supreme Court has provided only minimal guidance as to when courts should develop a uniform federal rule or resort to the law of the forum state. Although the Court has provided answers to many specific questions, courts facing new issues are often uncertain whether to forge ahead to construe ambiguous apsects of § 1983 or to look to state law. Moreover, the Court has not developed standards to be used in selecting the appropriate state policy.[269] Finally, the Court has only begrudgingly applied § 1988's inconsistency clause and has never rejected an otherwise applicable state policy once it made the initial decision to resort to state law.[270]

A. Statutory Construction

The task of construing § 1983 has been made difficult for at least three reasons. First, § 1983 is a threadbare statute and the Court has often been

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265. *See* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 498 (1954).

266. 28 U.S.C. § 1652 (1982). The Rules of Decision Act applies to federal question as well as diversity cases, and requires the use of state law in certain cases in which the underlying statute is silent. *See* Hill, *State Procedural Law in Nondiversity Litigation*, 69 HARV. L. REV. 66 (1955). There are also more specific federal statutes that require the use of state law on both procedural and substantive matters. *See, e.g.*, 28 U.S.C. § 1738 (federal courts required to give state court judgments the same full faith and credit that state courts would give them); Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982).

267. *See* Burnett v. Grattan, 104 S. Ct. 2924, 2928-29 (1984) (discussing steps to follow in applying § 1988).

268. Commentators on § 1988 agree that the statute is complex and confusing. *See, e.g.*, Eisenberg, *State Law and Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499, 501 (1980); Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 613 (1985) (reproducing § 1988 "to remind readers of the full scope of its obscurity"); Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 265 (1979). *See also* Theis, Shaw v. Garrison: *Some Observations on 42 U.S.C. § 1988 and Federal Common Law*, 36 LA. L. REV. 681 (1976) (discussing the complexity of choice of law in civil rights cases).

269. *But see infra* note 354.

270. *But cf.* Burnett v. Grattan, 104 S. Ct. 2924 (1984) (refusing to borrow a limitations period for filing administrative complaints of employment discrimination because it was not an analogous state policy); Carlson v. Green, 446 U.S. 14 (1980) (rejecting state survival policy in *Bivens* action where the victim died from the complained-of conduct).

unable to find answers in its language to issues that arise in § 1983 litigation. Second, § 1 of the Civil Rights Act of 1871,[271] unlike some of its other provisions, was relatively uncontroversial, and members of the 42d Congress did not discuss it in great depth.[272] Finally, the breadth of the cause of action that would result from a literal interpretation of § 1983 was unacceptable to members of a Court sensitive to considerations of federalism and influenced by a tradition of historiography that found suspect much work of the Reconstruction Congresses.[273] Thns, the construction of § 1983 has often involved a search for limiting principles so that it would not override traditional common law and equitable defenses and would not provide a private right of action against all state and local officials and the governmental entities that employed or elected them.

The threshold question in construing § 1983, although rarely addressed expressly, is whether to give § 1983 a uniform interpretation.[274] The Court has generally approached § 1983 with a view toward developing uniform policies without regard to the law of the state in which the federal court sits but has rarely discussed why. Where the language or legislative history of § 1983 directly addresses a particular issue, the Court has had no difficulty requiring a uniform interpretation of § 1983. In addition, where the language of the statute was literally applicable, the Court has applied it uniformly, although it has often limited the statute's reach. Finally, the Court has often looked to the broad purposes of § 1983 to develop uniform policies where the language and legislative history did not address the particular issues or addressed them only obliquely.

The relationship betwcen § 1983 and state law has raised few problems where there are federal standards otherwise applicable in federal court litigation, or where it is necessary to construe § 1983 or other federal statutes. In such cases the Court has developed uniform interpretations of § 1983 and has not looked to state law. Thus, the Court has resolved issues as diverse as the applicable pleading requirements[275] and equitable principles[276]

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271. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1982)).

272. *See* Monell v. Department of Social Servs., 436 U.S. 658, 665 (1978); *see also* Briscoe v. LaHue, 460 U.S. 325, 361 (1983) (Marshall, J., dissenting).

273. Justice Frankfurter's view of the work of the Reconstruction Congress is best summed up in United States v. Williams, 341 U.S. 70, 74 (1951): "The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feeling caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues." *See also* 2 C. WARREN, THE SUPREME COURT IN THE UNITED STATES HISTORY, 600-21 (1926) (criticizing the legislation of the Reconstruction Congress).

274. *Cf.* Eaton, *Causation in Constitutional Torts,* 67 IOWA L. REV. 433, 446-52 (1982) (discussing whether principles of causation in § 1983 should be uniform).

275. Gomez v. Toledo, 446 U.S. 635 (1980) (defendants have a duty to plead official immunity as an affirmative defense).

276. Younger v. Harris, 401 U.S. 37 (1971) (developing cquitable standards that govern the availability of injunction against state judicial proceedings). *Cf.* Patsy v. Board of Regents, 457 U.S. 496 (1982) (despite general equitable policy applicable in federal court, § 1983 guarantees direct access to judicial forums without exhaustion of administrative remedies).

through the development of uniform policies. Likewise, where the interpretation of § 1983 required construction of statutory language for which there is no state counterpart, the Court has looked to the legislative history and purposes of § 1983 to develop a uniform interpretation.[277] Finally, the task of reconciling § 1983 with other federal statutes that create rights or authorize remedies has also resulted in uniform definitions of the scope of § 1983.[278] On the other hand, where § 1983 was enacted against a background of well-developed state law governing litigation and where there was little legislative guidance, the Court has not always made clear how it decided whether to develop a uniform interprctation of § 1983 or to defer to state policies. Thus, issues involving matters such as statutes of limitations, survival, immunities, and damages have presented the Court with the most difficult issues concerning the construction of § 1983 and the use of state law.[279]

Statutes of limitations are the archetypical area for borrowing state law, and the Court has relied on state policies of repose in § 1983 litigation. Prior to looking to state law, however, the Court considered whether there was an available policy based on federal law. In *O'Sullivan v. Felix,*[280] the case in which the Court first applied a state statute of limitations to § 1983, the Court rejected the argument that the federal statute of limitations for suits for penalties or forfeitures applied to all § 1983 actions.[281] Having concluded that § 1983 neither contained a specific limitations period nor provided for a penalty, the Court turned to state law for the applicable period.[282] Nonetheless, the Court has not treated all questions relating to statutes of limitations as being governed initially by state law. Although the Court has looked to state law for the choice of the limitations period as well as for the related rules on tolling[283] and on revival,[284] it has treated the question of which state statute of limitations to borrow as a federal question and has required use of the state limitations period for personal actions.[285] It has also considered the accrual of a cause of action to be a uniquely

277. *See, e.g.,* Maine v. Thiboutot, 448 U.S. 1 (1980) (defining "and laws"); Monell v. Department of Social Servs., 436 U.S. 658 (1978) (defining "persons"); Monroe v. Pape, 365 U.S. 167 (1961) (defining "color of law").

278. *See, e.g.,* Smith v. Robinson, 104 S. Ct. 3457 (1984) (§ 1983 not available to raise equal protection challenges involving the educational rights of handicapped children); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) (§ 1983 not available to raise statutory claims under federal statutes that contain comprehensive remedies); *cf.* Preiser v. Rodriguez, 411 U.S. 475 (1973) (§ 1983 not available in federal court to challenge the fact or duration of confinement).

279. Comment, *Choice of Law and § 1983,* 37 U. CHI. L. REV. 494 (1970).

280. 233 U.S. 318 (1914).

281. *Id.* at 322.

282. *Id.* at 322-25. This borrowing of state law took place without any reliance on or citation to U.S. REV. STAT. § 722, the current version of which is 42 U.S.C. § 1988 (1982).

283. *See* Board of Regents v. Tomanio, 446 U.S. 478 (1980).

284. *See* Chardon v. Fumero Soto, 462 U.S. 650 (1983) (using the state policy on revival but only after first searching for a uniform federal policy).

285. Wilson v. Garcia, 105 S. Ct. 1938 (1985).

federal issue[286] even though state law is not silent on such matters and even though the date selected has a direct impact on the limitations period.

In addressing the survival of § 1983 actions, on the other hand, the Court has departed from the approach used under other federal statutes in which it searched for the appplicable policy in the statute authorizing the action and in the federal common law. Thus, in *Robertson v. Wegmann,*[287] the Court followed a borrowing approach to § 1983 survival issues without considering whether an answer might be available in the language, legislative history, or purposes of § 1983 or in the federal common law.[288]

The willingness of the Court to search for uniform interpretations of § 1983 where the language and legislative history provide little or no guidance is best seen in immunity cases in which the Court provides state and local governmental officials either absolute or qualified immunity from liability for damages. The language of § 1983, if taken literally, creates a broad damage action that allows no immunity. The Court, however, has been uncomfortable with the prospect of imposing what might amount to strict liability on state and local officials for violations of federal law.[289] In developing official immunities under § 1983, the Court has been guided by a test ostensibly based on statutory construction and has developed uniform policies without regard to the policies followed in the forum state. In reaching this result, the Court has not addressed directly why it has rejected state policies but has suggested that the use of state immunities could affect the substance of the § 1983 action.[290]

Even where the Court has determined that a uniform interpretation of § 1983 is required, it has often had difficulty determining what that interpretation should be, particularly where it would lock the cause of action into an 1871 model. In construing § 1983, the Court has generally begun with the language of the statute, but has rarely stopped there. When a provision

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286. *See* Chardon v. Fernandez, 454 U.S. 6 (1981). *Accord* Delaware State College v. Ricks, 449 U.S. 250 (1980).

287. 436 U.S. 584 (1978).

288. *See supra* notes 191-212 and accompanying text.

289. The Court has been similarly reluctant to burden federal officials with strict liability and has applied the same objective good-faitb immunity standard in § 1983 and *Bivens* actions. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982). *But see* Owen v. City of Independence, 445 U.S. 622 (1980) (denying municipalities a good-faith immunity in § 1983 actions).

290. *See* Martinez v. California, 444 U.S. 277, 284 n.8 (1980) ("Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.") (quoting Hampton v. City of Chicago, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied,* 415 U.S. 917 (1974)). The Court's concern about permitting states to encroach on the scope of the § 1983 cause of action by immunizing conduct that would otherwise give rise to liability does not apply to the use of narrower state immunities to broaden the liability of state and local officials. In fact, the Court has suggested that expanded § 1983 liability could be imposed through § 1988. *See* Moor v. County of Alameda, 411 U.S. 693, 704 n.17 (1973). *See infra* notes 357-62 and accompanying text.

is not vague, the Court has occasionally relied on its plain meaning to provide an expansive interpretation of the scope of the action.[291] In other cases, the Court has been reluctant to give the broad general language its full meaning, at least where it qualifies policies generally applicable in federal courts. Thus, the Court was unwilling to interpret § 1983 literally to impose liability on "every person" who violates another's constitutional rights.[292]

When a phrase is vague or the contours of a doctrine are unclear, the Court has looked to the legislative history and purposes of § 1983 but has not always been consistent in identifying what it was seeking. In some cases, the Court has searched for specific evidence that members of the 42d Congress intended a particular result. In other cases, the Court has looked to the broad purposes of the Civil Rights Act of 1871 and construed § 1983 despite the absence of guidance in its language or evidence that the issue was addressed in the debates. For example, in the immunity eases the Court looked for specific evidence of congressional intent to create liability when the immunity in question was well established in 1871.[293] On the other hand, when an immunity did not exist or was not well established, the Court has been willing to construe the statute literally and deny the immunity despite the absence of guidance in the legislative history.[294] This approach, however, has not been consistently followed in other areas. For example, despite the absence of guidance in the language or legislative history on the duty to exhaust administrative remedies, the Court has relied on the broad tenor of the legislative debates to conclude that § 1983 provides litigants direct access to a judicial forum without exhausting administrative remedies.[295]

In looking to the legal background against which the Civil Rights Act of 1871 was enacted, the Court has often focused on the state of the law in 1871.[296] This has invariably involved reviewing case law because official immunities were rarely codified, but the Court has never suggested that it would not consider state statutes that abolished or modified traditional immunities, and has looked to state positive law in determining whether an immunity was well established.[297]

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291. *See* Maine v. Thiboutot, 448 U.S. 1 (1980) (interpreting "and laws" to reach all federal statutes). Nonetheless, the Court has implied limitations on the reach of § 1983 as a remedy for federal statutory violations. *See, e.g.*, Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1 (1981); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).

292. *See generally* Eisenberg, *supra* note 18, at 491-504. Virtually any phrase can be seen as vague if one looks hard enough. *See* Maine v. Thiboutot, 448 U.S. 1, 13 n.1 (1980) (Powell, J., dissenting) (arguing against a broad interpretation of § 1983 by suggesting that the phrase "and laws" literally requires that rights be secured by both the Constitution and laws).

293. *See* Briscoe v. LaHue, 460 U.S. 325 (1983) (police witnesses immune); Pierson v. Ray, 386 U.S. 547 (1967) (judges immune); Tenney v. Brandhove, 311 U.S. 367 (1951) (legislators immune).

294. *See, e.g.*, Tower v. Glover, 104 S. Ct. 2820 (1984) (public defenders not immune); Scheuer v. Rhodes, 416 U.S. 232 (1974) (governors not immune); *cf.* Quern v. Jordan, 440 U.S. 322 (1979) (finding that § 1983 did not override the eleventh amendment because of lack of clear evidence of congressional intent).

295. Patsy v. Board of Regents, 457 U.S. 496 (1982).

296. *See* Tower v. Glover, 104 S. Ct. 2820 (1984); Smith v. Wade, 461 U.S. 30 (1983).

297. *See, e.g.*, Tenney v. Brandhove, 311 U.S. 367, 373-75 (1951) (looking to state constitutions to find legislative immunity well established).

Although the Court has generally asked whether a particular immunity was well established in 1871, it has sometimes considered immunities that appeared later. For example, in *Imbler v. Pachtman,*[298] the Court relied exclusively on post-1871 state court cases to conclude that prosecutors' absolute immunity from suit was well established[299] and extended them an absolute immunity for acts taken as prosecutors. On the other hand, in considering the immunity of public defenders, the Court observed that no such office existed in 1871 and refused to provide them an absolute immunity.[300]

The role of policy in the immunity cases has also been confusing. In developing official immunities for § 1983 cases, the Court has reviewed considerations of public policy and has suggested it would reject an immunity not supported by policy considerations even where the immunity was well established in 1871.[301] The Court, however, has never rejected an immunity solely on policy grounds, and the policy analysis invariably comports with the conclusion based on the legislative history.[302] Moreover, the Court has maintained parity with *Bivens* actions, despite the absence of any historical or statutory constraints,[303] and has relied on § 1983 and *Bivens* cases interchangeably in determining which public officials are immune and in defining the immunity.[304] Thus, although the year 1871 remains a touchstone in addressing immunities in § 1983 cases, the Court has retained the flexibility to avoid locking itself into the policies followed in 1871.

The Court's unwillingness to adopt a methodology that too tightly ties § 1983 to the state of the law in 1871 is most apparent in the treatment of damages. Although § 1983's language and legislative history provide little guidance as to the available damages, the Court has tied the availability of damages to the principles of compensation and has allowed for the evolving nature of the law by not limiting damages to those available in 1871.[305]

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298. 424 U.S. 409 (1976).

299. *Id.* at 421-24 & n.19.

300. Tower v. Glover, 104 S. Ct. 2820 (1984).

301. *Cf.* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-71 (1981) (reviewing considerations of public policy to determine whether municipalities should be subject to § 1983 liability for punitive damages despite settled immunity in 1871).

302. *See, e.g.,* Briscoe v. LaHue, 460 U.S. 375 (1983) (police witnesses absolutely immune from § 1983 claims for perjured testimony); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (cities immune from § 1983 claims for punitive damages). *But see* Tower v. Glover, 104 S. Ct. 2820, 2826 (1984) (claiming no power to give public defenders an absolute immunity based on sound public policy).

303. *See* Butz v. Economou, 438 U.S. 478, 504 (1978) (finding it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials").

304. *See* Harlow v. Fitzgerald, 457 U.S. 800, 811 nn.15-16, 815-19 (1982).

305. Section 1983 authorizes an "action at law" and, in responding to a question of how to measure damages for the presumed neglect that gives rise to an action under § 6 of the Civil Rights Act of 1871 (current version at 42 U.S.C. § 1986), Representative Poland stated: "Precisely the same as you do in a tort action. The question of damages is a question in the sound discretion of the jury." CONG. GLOBE, 42d Cong., 1st Sess. 804 (1871).

In *Carey v. Piphus*,[306] the leading § 1983 damage decision, the Court refused to award substantial damages for a procedural due process violation without actual proof of damages. The Court ruled that the plaintiff, an Illinois high school student challenging a procedurally defective suspension, could not recover uuless he could show he would not have been suspended after a hearing or that he had suffered a mental or emotional injury;[307] such damages, however, would not be presumed, although the Court left open whether damages for the violation of a substantive constitutional right could be awarded where the underlying violation was not procedural.[308]

In addressing these issues under the principles of compensation, the Court identified the source of the principles in the policies followed by the common law. The Court, however, did not look to the Illinois common or statutory law of damages, nor did it look to the damages generally available at common law in 1871. Rather, it identified an evolving body of common law that courts must adapt to provide fair compensation for injuries caused by deprivations of constitutional rights.[309]

In *City of Newport v. Fact Concerts, Inc.*,[310] the Court held that a municipality may not be held liable for punitive damages under § 1983. In addressing the availability of this element of damages, the Court cited *Carey* only in passing[311] and relied on the methodology of the immunity cases. Because the immunity of municipal corporations for punitive damages was settled in 1871, such damages were not available in § 1983 actions absent evidence that the 42d Congress intended to override the immunity. The Court also considered whether the immunity was good public policy and concluded it was.[312] Thus, although *Fact Concerts* involved an element of damages, the Court treated the case as an immunity case and never considered whether evolving principles of compensation justified a different result.[313]

The Court's most recent § 1983 damage case, *Smith v. Wade*,[314] involved the standards that govern awards of punitive damages. *Carey* had suggested

306. 435 U.S. 247 (1978).

307. *Id.* at 263-64.

308. *Id.* at 264-65.

309. *Id.* at 257-59. In emphasizing that the process is one of adapting not borrowing common law damage rules, Justice Powell noted that: "The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." *Id.* at 258. For direct support for this proposition, Justice Powell cited Justice White's dissent in Jones v. Hildebrant, 432 U.S. 183, 190-91 (1977).

310. 453 U.S. 247 (1981).

311. *Id.* at 268.

312. *Id.* at 266-71.

313. *Id.* at 260 & n.21. The Court's only references to the current state of the law were made in passing in the course of reviewing the state of the common law in 1871, and the Court noted that "[j]udicial disinclination to award punitive damages against a municipality has persisted to the present day in the vast majority of jurisdictions." *Id.* at 260. Given this finding and the absence of statutes authorizing punitive damages against municipalities, there was no need for the Court to review in depth the current state of the law.

314. 461 U.S. 30 (1983).

that punitive damages were available in § 1983 actions,[315] and *Fact Concerts'* immunization of municipalities did not undercut that. Still, it was unclear as to the applicable standards and role, if any, of state law. In upholding the use of a "recklessness" standard for punitive damages in § 1983 cases, Justice Brennan, writing for the Court, looked to state law in 1871 and found that the majority of states did not limit punitive damages to cases of intentional misconduct.[316] Justice Brennan, however, also relied on post-1871 cases, and defended this reliance by suggesting that the 42d Congress intended to permit the availability of damages to change as the law evolved.[317]

Despite the Court's willingness to approach damage issues in light of evolving principles of compensation, the policies followed in 1871 have special significance. When it was well established in 1871 that a specific element of damages was unavailable, those damages are unavailable in § 1983 actions unless the law has evolved or considerations of public policy dictate otherwise. Moreover, a curious feature about the § 1983 damage cases is the almost total disregard of § 1988, which the Court had once suggested required damages in civil rights litigation to be based on the state or federal damage policies that best serve the purposes of the federal statutes.[318] *Carey, Fact Concerts* and *Wade,* however, all stand for the proposition that issues of the available damages in § 1983 litigation will be based on uniform federal standards.

In construing § 1983, which was enacted by § 1 of the Civil Rights Act of 1871, the Court has also been willing to seek guidance from debates on other sections of the Act. For example, the Court has looked to the debate

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315. *Carey,* 435 U.S. at 257 n.11.

316. *Wade,* 461 U.S. at 41.

317. In responding to Justice Rehnquist's dissent criticizing his reliance on modern tort decisions, Justice Brennan questioned the premise that "Congress necessarily intended to freeze into permanent law whatever principles were current in 1871, rather than to incorporate applicable general legal principles as they evolve." *Wade,* 461 U.S. at 34 n.2.

In a separate dissent, Justice O'Connor was also willing to look to policy considerations where there was no clear guidance from the common law of 1871. After observing that both Justices Brennan and Rehnquist "display admirable skills in legal research and analysis of great numbers of musty cases," *id.* at 92, she stated that "[t]he battle of the string citations can have no winner." *Id.* at 93. She then argued that where there is a "significant split in authority" courts should look to the policies underlying § 1983 to determine which rule best accords with those policies. *Id.* at 92-93.

318. In Sullivan v. Little Hunting Park, 396 U.S. 229, 239-40 (1969), the Court, relying on § 1983, stated that:

> Compensatory damages for deprivation of a federal right are governed by federal standards . . . .
>
> This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. Cf. *Brazier v. Cherry,* 293 F.2d 401 [5th Cir. 1961]. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired.

Although it is not clear whether the Court was referring to the policies of the forum state or to general state principles of compensation, the former is a more likely explanation given the reliance on *Brazier* which involved borrowing the policies of the forum state. *See infra* notes 395-405 and accompanying text.

on the Sherman Amendment to support a construction of § 1983 as not imposing vicarious liability based on the doctrine of respondeat superior.[319] It has also looked to § 6 of the Act,[320] which was the compromise that resulted from the controversy over the Sherman Amendment, for support for the principles of compensation it found equally applicable to § 1983.[321] Similarly, in concluding that police witnesses had an immunity under § 1983 for testimony given in trials, the Court considered the debates of the 42d Congress on the conspiracy and criminal actions created by § 2 of the Civil Rights Act of 1871.[322]

What is present in varying degrees in all these areas is the Court's reliance on traditional tools of statutory construction—the language, legislative history and purposes of the statute in question—to give meaning to the statute. Even where neither the language nor the legislative history of § 1983 addressed specific issues, the Court has not hesitated to search for a uniform federal definition of elements of the § 1983 cause of action, and state law has played only a limited role. Although the Court rejected early the argument that only federal law could limit federally created § 1983 actions,[323] there is no support in the language or legislative history of § 1983 that Congress prohibited the Court from using the full range of statutory construction tools to resolve issues not specifically addressed in the language or legislative history of § 1983.

B. Section 1988—The Civil Rights Choice of Law Statute and Wrongful Death Actions

Section 1988 of Title 42, which is derived from § 3 of the Civil Rights Act of 1866,[324] requires federal courts entertaining certain civil rights actions

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319. Monell v. Department of Social Servs., 436 U.S. 658, 690-95 (1978).

320. 42 U.S.C. § 1986 (1982).

321. *Carey*, 435 U.S. at 255-56 & n.10.

322. Briscoe v. LaHue, 460 U.S. 325, 336-41 (1983). The *Briscoe* Court also acknowledged that § 1 had its roots in the criminal provisions of § 2 of the Civil Rights Act of 1866, but found no guidance in the earlier Act on the issue of the immunity of police-witnesses in civil suits. *Id.* at 341 n.26.

323. O'Sullivan v. Felix, 233 U.S. 318, 322 (1914).

324. Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27. Section 3 included the following provision:

> The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the law of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

This language is virtually identical to what is now in 42 U.S.C. § 1988, *see infra* note 330, with the significant exception that § 3 only applied to actions created by the Civil Rights Act of 1866.

to look to state law to fill gaps in federal law. This provision was incorporated by reference into § 1 of the Civil Rights Act of 1871[325] and was made generally applicable to civil rights actions in the 1874 codification of the revised statutes.[326] The argument has been made that § 1988 does not apply to original actions filed in federal court, but applies only to state court actions removed to federal court.[327] But the Court has continued to rely on § 1988 to restrict the power of federal courts to develop a uniform federal common law where the civil rights acts are silent.[328] The Court has also rejected a construction of § 1988 that would permit federal courts to select the procedures that enabled plaintiffs to prevail,[329] but § 1988 has had only a minor impact on § 1983. For the most part, the issues on which state policies have been borrowed would have also resulted in borrowing absent § 1988, and the Court has developed uniform national policies on many elements of § 1983 despite the minimal guidance available from its language and legislative history.

Section 1988 is relevant to the use of § 1983 as a wrongful death remedy in three ways. First, § 1988 might be expected to provide guidance on how federal courts should approach the use of § 1983 as a wrongful death remedy and on whether they may look to the federal common law if they determine that no answers are provided by § 1983's language and legislative history. Second, in cases in which neither § 1983 nor the federal common law provides an applicable policy, § 1988 could be the vehicle for engrafting appropriate state wrongful death policies into § 1983. Third, if § 1988 requires the incorporation of state wrongful death policies into § 1983, including damage and other limitations on the cause of action, it also provides explicit authority for scrutinizing borrowed state policies in light of the purposes of § 1983.

1. Section 1988—The Deficiency Clause and the Use of State Law

What is most noteworthy about § 1988's deficiency clause is the limited attention it has received from the Supreme Court. The clause requires courts hearing civil rights actions to follow "the laws of the United States" except

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325. The concluding clause of § 1 of the Civil Rights Act of 1871 provided as follows:

> such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject of the same rights to appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six [Civil Rights Act of 1866] . . . and the other remedial laws of the United States which are in their nature applicable in such cases.

17 Stat. 13 (1871). The only section of the Civil Rights Act of 1866 that dealt with procedural and remedial matters was § 3.

326. U.S. REV. STAT. § 722, 18 Stat. 137 (1874).

327. *See* Eisenberg, *supra* note 268, at 525-41.

328. *See, e.g.*, Wilson v. Garcia, 105 S. Ct. 1938 (1985); Chardon v. Fumero Soto, 462 U.S. 650 (1983); Board of Regents v. Tomanio, 446 U.S. 478 (1980).

329. Robertson v. Wegmann, 436 U.S. 584, 593 (1978).

"where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law." Where federal law is "deficient," courts are required to follow the "common law, as modified and changed" by the law of the state in which the court is sitting.[330]

This clause constitutes the linchpin of § 1988 and should govern the threshold determination whether a court initially looks to state law or follows federal law. Yet, aside from a cryptic comment in a 1969 decision suggesting an open-ended process of looking to state and federal law for the most suitable policy to govern the availability of damages in civil rights actions,[331] the Court has not construed the deficiency clause in any of the § 1983 and other civil rights actions in which it relied on § 1988 to require initial resort to state law.[332] Moreover, the Court has often ignored § 1988 and the deficiency clause in cases in which it developed uniform federal policies to govern various elements of § 1983 despite the absence of specific guidance in the language and legislative history of § 1983.

The failure of the Court to construe the deficiency clause may have resulted from the fact that despite the volume of § 1983 litigation there have been few close questions concerning whether federal courts should initially look to the state law. Moreover, because the Court has been willing to construe even vague provisions of § 1983 based on its broad purposes, it has rarely had to look to the deficiency clause for guidance.

In approaching § 1988, the Court has never made clear whether a court making a deficiency finding should consider the federal common law. Professor Eisenberg has argued against such an interpretation in attempting to demonstrate the incoherence of § 1988 and its inapplicability to § 1983 and other actions filed under the original jurisdiction of the federal courts.[333] In

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330. The text of 42 U.S.C. § 1988 (1982), absent the provision governing attorney fees, is as follows:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

331. Sullivan v. Little Hunting Valley, 396 U.S. 229, 239-40 (1969); *see supra* note 318.

332. In *Robertson,* the Court looked to state law for the applicable survival policy after observing that federal law does not cover every issue, but did not address why federal law, including the federal common law, did not cover the survival issue. 436 U.S. at 588. *See also* Kreimer, *supra* note 268, at 612 n.51 (identifying different Supreme Court formulations of the approach to § 1988).

333. Eisenberg, *supra* note 268, at 513.

addition to a textual argument,[334] he has suggested that the federal common law bears no necessary relevance to § 1983[335] and that reliance on it gives courts the opportunity to manipulate results.[336] Finally, Eisenberg points out that, absent § 1988, federal courts entertaining § 1983 actions will still be able to look to state law for guidance.[337]

An interpretation of § 1988 that considers the federal common law before making a deficiency finding is also subject to the criticism that it deprives § 1988 of independent meaning by making it applicable to § 1983 and other civil rights actions only where no other sources of federal law—the statute, legislative history, statutory purposes, and federal common law—provide an answer.[338] In such cases, however, state law would be relied upon anyway, and the deficiency clause would somewhat lamely only require the use of state law where state law is otherwise applicable.

In applying the federal common law, however, courts do not proceed independently of the underlying federal statutory or constitutional provisions they are enforcing.[339] In fact, in many ways the federal common law represents a set of guidelines for construing federal statutes that have gaps, but the reference point is still the federal statute at issue. Thus, federal courts

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334. Professor Eisenberg's textual argument contrasts the unmodified phrase "laws of the United States" in the introductory language of § 1988 with the phrase "common law," which defines the law relied upon where there is a deficiency. He then discounts the possibility that Congress had two different kinds of common law in mind and concludes that the former refers only to "federal statutory law." *Id.* at 515. However, given the lack of clarity in the drafting of § 1988, which Eisenberg has noted, *id.* at 501, Congress may have expected federal courts entertaining actions to which § 1988 applied to look to the federal common law before borrowing state law. *See generally* Theis, *supra* note 268. Although under the regime of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), the phrase "laws" was read narrowly, in this era federal courts also had broad authority over the federal common law. Moreover, in areas of special federal concern, federal courts still rely on the federal common law. *See* Friendly, *In Praise of* Erie—*And of the New Federal Common Law,* 39 N.Y.U. L. REV. 383 (1964).

335. Eisenberg, *supra* note 268, at 513. Eisenberg makes the same observation about other federal statutes in arguing that the reference to "law" in the deficiency clause should not be construed to permit federal courts to borrow the approaches followed in other statutory actions. *Id.* at 509. *Cf.* Comment, *supra* note 279, at 499-500 (arguing that courts should not rigidly rely on the federal common law in construing § 1988).

336. *See* Eisenberg, *supra* note 268, at 518. Eisenberg has suggested that instead of relying on the federal common law courts should "fill out the federal civil rights program by the same techniques used to fill out other federal programs," whether the policies are derived from state or federal law. *Id.* at 543. It is difficult to see how this approach will be any less subject to manipulation than one that relies on the federal common law.

337. *See id.* at 543.

338. As Professor Eisenberg notes, if one is willing to press hard enough, a federal rule can always be found and federal law will never be deficient. *Id.* at 514. *Cf.* Dobson v. Camden, 705 F.2d 759 (1983) (applying § 1988 to find federal law deficient on the impact of a settlement on an award against a co-defendant, but creating a federal rule after rejecting the state policy under the inconsistency clause), *vacated,* 725 F.2d 1003 (5th Cir. 1984) (en banc).

339. Professor Kreimer makes a similar point in also urging courts to develop a federal common law of civil rights actions. *See* Kreimer, *supra* note 268, at 628-30. He believes, however, that courts should not consider the federal common law in making the deficiency finding, but should interpret the "common law" looked to after federal statutory law is found deficient to include the federal common law. *Id.* at 618-19 & n.86. This is the issue left open in *Robertson,* 436 U.S. at 589-90 n.5.

applying a federal common law of survival to statutory actions may reach different conclusions based on the character of the causes of action and the relief sought, but such an approach is closely tied to the underlying statute.[340] Moreover, given the Court's awareness of the concerns of the 42d Congress and the need to engage in a parallel analysis in *Bivens* actions, courts should be permitted to fill gaps in § 1983 through the use of a common law of § 1983 that seeks to effectuate its dual purposes of compensation and deterrence.

In addition, even if the deficiency clause has no independent force in expanding the issues on which state law is initially looked to, § 1988 taken as a whole still establishes the framework for determining which state policies to borrow and when they should be rejected. Finally, in light of the remedial purposes of the Civil Rights Act of 1871,[341] § 1 of which contained a reference to the predecessor to § 1988,[342] it would be inappropriate to construe § 1988 to preclude federal courts from engaging in the lawmaking that is incidental to adjudicating cases. Whether this is characterized as developing the federal common law or, more narrowly, the common law of § 1983, it can be reduced to a question of statutory construction. In fact, in approaching § 1983, the Court has been reluctant to characterize its actions in terms of the federal common law and has subsumed under the rubric of statutory construction decisions that in other areas have been treated as being governed by the federal common law. Thus, questions of the scope and definition of official immunities and the damages available in federal court litigation are often viewed as matters of federal common law in *Bivens* actions, but in § 1983 litigation, these issues are approached as matters of statutory construction.[343]

Nonetheless, the question remains as to what impact, if any, § 1988 has on limiting the ability of federal courts to develop a federal common law of § 1983. This can be addressed less abstractly by asking how decisions in which § 1988 was relied upon would have been resolved in its absence. Clearly when § 1983 itself—through its language, legislative history, and purposes—requires a particular remedial policy, federal law is not deficient and § 1988 does not alter the outcome. Likewise, if, absent § 1988, federal courts would look to state law, § 1988 is not relevant to the initial issue of whether state law should be borrowed. The difficult question, however, is whether § 1988 precludes or limits the power of courts to look to the federal

340. *See supra* notes 230-61 and accompanying text.

341. CONG. GLOBE, 42d Cong., 1st Sess., app. at 68 (Rep. Shellabarger) ("This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficiently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation.").

342. *See supra* note 325.

343. In fashioning immunities in *Bivens* actions, the Court has maintained parity with § 1983, despite the absence of any statutory requirement to do so. *See supra* notes 303-04 and accompanying text.

common law to resolve issues not addressed by the language, legislative history, or purposes of § 1983.

The statute of limitations cases would probably be resolved similarly absent § 1988, as the Court required the use of state law in § 1983 actions more than seventy years ago without even considering § 1988.[344] The survival issue, however, is more complex. Under an approach based on federal common law, federal courts permit nonpenal federal actions to survive despite the absence of relevant statutory provisions or legislative history.[345] This suggests that § 1983 actions should survive,[346] but the Court in *Robertson v. Wegmann*[347] treated federal law as being deficient and borrowed a state no-survival policy. The *Robertson* Court, however, did not seek an answer to the survival issue in either § 1983 or in the federal common law. This failure to consider whether federal common law permitted the action to survive could mean the Court believed the action would have abated under federal common law, or that the survival of the action under federal common law was not relevant as § 1988 precluded resort to federal common law. In any case, the parties did not argue that federal common law applied, and the Court did not address it independently.[348] Thus, *Robertson* does not provide a clear answer as to whether § 1988 denies or limits the power of federal courts hearing § 1983 actions to exercise their normal discretion to fill the interstices of federal statutes with federal common law.

The confusion in the Court's approach to the § 1988 borrowing issue is also seen in the damage cases. In *Sullivan v. Little Hunting Park*,[349] a § 1982 case arising in state court, Justice Douglas found § 1988 applicable and suggested a construction that would have permitted courts entertaining civil rights actions to look to state and federal law for the most suitable damage policy. Such a construction, however, alters the nature of the § 1988 inquiry and permits courts to reject otherwise applicable federal policies. Moreover, although it is not free from doubt, *Sullivan* appears to require courts to look to the law of the forum state in developing the policy that then becomes the federal policy.[350] This open-ended approach to § 1988,

344. O'Sullivan v. Felix, 233 U.S. 318 (1914). *But see* Chardon v. Fumero Soto, 462 U.S. 650 (1983) (using § 1988 to borrow a state policy of reviving statutes tolled because of pending class actions despite an available federal policy).

345. *See supra* notes 233-41 and accompanying text.

346. In refusing to make applicable to § 1983 a federal statute of limitations based on the limitations period for penalties and forfeitures, the Court concluded that § 1983 was not a penal statute. *See* O'Sullivan v. Felix, 233 U.S. 318, 324-25 (1914).

347. 436 U.S. 584 (1978).

348. *See supra* notes 209-12 and accompanying text.

349. 396 U.S. 229 (1969).

350. *See supra* note 318. *But see* 2 J. COOK & J. SOBIESKI, CIVIL RIGHTS ACTIONS, ¶ 4.06 (1985) (arguing that *Sullivan* presages *Carey* and requires courts to look to the state common law, not the law of the forum state, in developing the applicable federal policy). *Sullivan* can also be viewed as a case in which the Court used § 1988 to borrow a state damage cause of action to enforce 42 U.S.C. § 1982 (1982). Section 1982 prohibits private discrimination in matters affecting property but contains no express remedies, and the Court in Jones v. Alfred H. Mayer

however, has not been followed, and the Court has all but ignored § 1988 and the law of the forum state in its damage cases.[351]

There often have been sharp divisions within the Court on particular constructions of § 1983, but the threshold decision of whether uniform interpretations should be sought has rarely resulted in major disagreements. Although not framed in these terms, the Court has generally developed uniform federal policies on issues that go to the substance of the § 1983 cause of action and that affect the underlying conduct § 1983 was intended to control; but where the policy at issue does not affect this primary conduct, the Court has permitted initial resort to state law. Thus, issues involving the application of official immunities or the elements of damages influence primary conduct, and the Court has consistently applied federal definitions. On the other hand, statutes of limitations and survival policies generally have little effect on the underlying conduct, and initial resort to state law is acceptable, especially given the Court's treatment of the choice of the most analogous state policy as a federal issue and the availability of the inconsistency clause to reject borrowed state policies that are inconsistent with § 1983's purposes.

The failure of the Court to provide adequate guidance when federal law is deficient leaves unclear the proper approach to § 1983 wrongful death claims. Lower federal courts, however, influenced by the Court's treatment of the closely related surivial issue,[352] have generally looked to state law for the applicable policies.[353] Thus, the Court's failure to articulate the standards it has been following to determine whether federal law is deficient has led lower courts to take the path of least resistance and borrow state wrongful death policies rather than to look closely at the language, legislative history, and purposes of § 1983 to see if § 1983 independently or through the federal common law constitutes a wrongful death remedy.

2. Section 1988—The Incorporation of State Wrongful Death Actions

Where federal law is deficient on a particular issue, § 1988 requires federal courts to adopt the most analogous state policy. Often this involves difficult

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Co., 392 U.S. 409, 414 n.14 (1968), left open whether damages were available. Although the *Sullivan* Court's reliance on Bell v. Hood, 327 U.S. 678 (1947), and other cases dealing with implied federal remedies suggests that authority for a damage action came as a direct implication from the federal statute and not from the law of the forum state, the Court relied upon § 1988 to support using state damage policies. Nonetheless, § 1988 did not play a central part in the case. The petitioner's brief primarily addressed the nature of the substantive violation, and only briefly discussed the damages available in § 1982 actions. Petitioner's Brief at 50-54. Although the Court cited § 1988 in its brief discussion of damages, *see supra* note 318, this was apparently the result of the petitioner's having requested the Court to provide guidance on the measurement of the available damages.

351. *See supra* notes 305-18 and accompanying text.

352. *See* Robertson v. Wegmann, 436 U.S. 584 (1978); *see also* Moor v. County of Alameda, 411 U.S. 693, 702 n.14 (1973) (dictum).

353. *See infra* notes 391-433 & 479-90 and accompanying text.

questions as to which competing state policy to use, but the choice of a particular policy is a federal issue.[354] Competing policies are less likely to exist, however, with respect to state wrongful death remedies,[355] but there still may be limitations on the extent to which courts may use § 1988 to incorporate state wrongful death policies into § 1983. Moreover, even if § 1988 can be used to engraft state wrongful death policies that authorize the cause of action, it is unclear whether state damage limitations accompany the wrongful death cause of action and must also be used.[356]

The Supreme Court has construed § 1988 as not permitting the incorporation of new and independent state causes of action. In *Moor v. County of Alameda,*[357] the plaintiffs, who sought damages based on allegations of the improper use of force by county law enforcement officials, argued that § 1988 permitted the use of state law to impose vicarious liability on the county. At the time this case arose, counties had an absolute immunity from § 1983 liability by virtue of their not being within § 1983's definition of "person."[358] Nonetheless, Justice Marshall's opinion for the Court found a more basic reason to dismiss the vicarious liability claim. Even assuming a deficiency in federal law, § 1988 did not permit federal courts to borrow entire causes of action from state law. Section 1988 did not authorize an independent cause of action but only addressed the choice of remedies to be applied in actions arising under the civil rights acts.[359] In so holding, however, the Court distinguished, but did not disapprove, two courts of appeals decisions that used § 1988 to borrow state law and to impose vicarious liability on supervisory law enforcement officials in § 1983 damage cases.[360] These cases

354. Burnett v. Grattan, 104 S. Ct. 2924 (1984). *But see* Wilson v. Garcia, 105 S. Ct. 1938 (1985) (characterizing § 1983 actions as "personal actions" and requiring the use of the state limitations period for such actions).

355. *But cf.* Bell v. City of Milwaukee, 746 F.2d 1205, 1241-42 (7th Cir. 1984) (interpreting ambiguous state law to conclude that father's wrongful death claim for the killing of his adult son survived the father's death and could be brought by his estate); Blake v. Kattar, 693 F.2d 677 (7th Cir. 1982) (interpreting ambiguous state law to conclude that § 1983 damage action for wrongful killing was not personal and, thus, survived).

356. *But see* Jones v. Hildebrant, 191 Colo. 1, 7, 550 P.2d 339, 344 (1976) (finding state damage limitations to be an integral part of § 1983 wrongful death actions), *cert. dismissed as improvidently granted,* 432 U.S. 183 (1977); The Tungus v. Skovgaard, 358 U.S. 588, 592 (1959) (requiring admiralty courts that adopt a state cause of action to "take the right subject to the limitations which have been made a part of its existence").

357. 411 U.S. 693 (1973).

358. Monroe v. Pape, 365 U.S. 167 (1961). *But see* Monell v. Department of Social Servs., 436 U.S. 658 (1978) (overruling *Monroe* and holding that municipalities were "persons" within § 1983). The Court in *Moor* also questioned the use of pendent party jurisdiction and noted the lack of independent jurisdiction over the pendent state law claims against counties. Moor v. County of Alameda, 411 U.S. 693, 710-17 (1973).

359. Moor v. County of Alameda, 411 U.S. 693, 703-04 (1973) ("Properly viewed . . . § 1988 instructs federal courts as to what law to apply in causes of action arising under federal civil rights acts. But we do not believe that the section, without more, was meant to authorize the wholesale importation into federal law of state causes of action—not even one purportedly designed for the protection of federal civil rights.").

360. *Id.* at 704 n.17 (citing Hesselgesser v. Reilly, 440 F.2d 901, 903 (9th Cir. 1971); Lewis v. Brautigam, 227 F.2d 124, 128 (5th Cir. 1955)); *see* Schnapper, *supra* note 268, at 265-66. *But see* Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979) (on rehearing rejecting use of state law on respondeat superior to broaden § 1983 liability).

were distinguishable because § 1983 actions were independently available against the individual defendants; thus, the vicarious liability claims were not based on § 1988 alone. Although this distinction is not altogether clear,[361] the Court seems to have suggested that if a particular defendant is independently amenable to suit under § 1983, § 1988 can be used—state law permitting—to expand the scope of liability.[362]

In *Runyon v. McCrary,*[363] the plaintiff relied on § 1988 to seek attorney fees on a private attorney general theory, but the Court further limited the availability of § 1988 to authorize new remedies.[364] Although state law did not authorize fees, the plaintiff argued that § 1988 independently provided the necessary authority. The Court, however, refused to allow this use of § 1988 as it would incorporate a new and independent remedy[365] as well as conflict with the prevailing policy preventing federal courts from awarding fees absent specific statutory authority.[366]

The application of these principles to wrongful death claims is a close question. Traditionally, wrongful death claims were not available at common law, which did not recognize an actionable interest of survivors in their continued relationship with a decedent. This was changed in this country by

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361. Although § 1983 was not available against the county in *Moor,* a claim for § 1983 liability against individual defendants based on vicarious liability might also be barred under § 1983's rejection of liability based on respondeat superior. *Cf.* Monell v. Department of Social Servs., 436 U.S. 658 (1978) (prohibiting the use of respondeat superior to impose liability on municipalities under § 1983); Rizzo v. Goode, 423 U.S. 362 (1976) (prohibiting use of respondeat superior to subject individual supervisors to claims for injunctive relief under § 1983). In City of Oklahoma City v. Tuttle, 105 S. Ct. 2427, 2441 (1985), Justice Stevens criticized *Monell* and argued in dissent that § 1983 should be construed to impose liability on municipalities based on respondeat superior. In proposing this uniform interpretation of § 1983, Justice Stevens did not address whether § 1988 could be used to expand municipal liability in states which authorized vicarious liability under state law.

362. Even if § 1988 incorporated a new cause of action based on the state law of vicarious liability, *Moor* precluded this expansion of liability under the inconsistency clause, since the borrowed state law directly conflicted with § 1983's interpretation of "person" to exclude municipalities. 411 U.S. at 706-10. Thus, § 1988 may be available to broaden § 1983 liability of those already amenable to suit as long as the expansion of liability is not specifieally barred by § 1983. There is, however, no federal policy prohibiting the use of § 1983 as a wrongful death remedy, and nothing in its legislative history suggests that such a use would be inconsistent with its purposes. *See infra* notes 496-546 and accompanying text. Thus, even if *Monell* bars the borrowing of state law through § 1988 to impose vicarious liability in § 1983 actions against municipalities and supervisory officials, as seems likely, the use of § 1988 to borrow state wrongful death remedies may still be appropriate.

363. 427 U.S. 160 (1976).

364. *Id.* at 182-86.

365. This issue might have been resolved differently had state law authorized attorney fees. In such a case, § 1988 would only be using state law to expand the relief that could be awarded against defendants otherwise amenable to suit. *See supra* note 347. The presence of state authority to award fees should also overcome the Court's independent holding that an award of fees would be inconsistent with the lack of inherent power of federal courts to award fees. Where the borrowing of state law is appropriate, federal courts may rely on state statutes that authorize fee awards. *See* Alyeska Pipeline Servs. Co. v. Wilderness Soc'y, 421 U.S. 240, 259 n.31 (1975) (federal courts may apply state attorney fees statutes in diversity cases).

366. Runyon v. McCrary, 427 U.S. 160, 185-86 (1976); *see also* Alyeska Pipeline Servs. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

the adoption of new and independent statutory causes of action patterned largely after Lord Campbell's Act. The purpose of wrongful death statutes was to avoid the harshness of the prevailing common law rules against the survival of actions, but the statutes did not address directly the issue of whether a decedent's cause of action would survive. Rather, they gave survivors an actionable interest that they did not have at common law.[367]

Wrongful death statutes permit survivors to sue when a killing violated their decedent's rights, but the defendants in such actions are already amenable to survival actions based on the same wrongful acts. Moreover, both survival and wrongful death actions assert the identical legal rights of the decedent. Thus, the effect of using state law to incorporate wrongful death actions into § 1983 is to create new plaintiffs who can seek relief against defendants already amenable to suit as well as to expand the relief available against those defendants.

At one time wrongful death claims were viewed as new and independent actions,[368] and they must still be distinguished from survival claims to keep clear the different interests at stake and the different measure of damages.[369] Nonetheless, the claims are integrally related, and a number of states do not even maintain independent wrongful death remedies; rather, they simply permit wrongful death claims to be pursued in enlarged survival actions.[370] Finally, nothing in § 1983 expressly or by implication precludes wrongful death claims from being heard through § 1983, and, although it is not free from doubt, the better view is that courts should be able to use § 1988 to incorporate state wrongful death actions into § 1983.

Assuming courts may use § 1988 to incorporate state wrongful death and survival policies into § 1983, there is an independent question of whether state limitations on damages are also incorporated. These issues will arise with regard to state ceilings on the amount of damages, state definitions of the elements of compensatory damages, and state policies on the availability of punitive damages.

Most state and federal courts that have addressed this issue assumed that state damage limitations accompany the cause of action and are initially incorporated into § 1983.[371] Moreover, the Supreme Court has required the attributes of the cause of action to accompany the cause of action when federal admiralty courts borrow state causes of action[372] and has also required state courts entertaining federal causes of action to utilize the entire

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367. *See supra* notes 73-79 and accompanying text.

368. *But see* Moragne v. States Marine Lines, 398 U.S. 375 (1970).

369. *See supra* notes 34, 43 & 93.

370. *See supra* note 91 and accompanying text.

371. *See, e.g.*, Bell v. City of Milwaukee, 746 F.2d 1205, 1250-53 (7th Cir. 1984); Jones v. Hildebrant, 191 Colo. 1, 550 P.2d 339, 344 (1976), *cert. dismissed as improvidently granted*, 432 U.S. 183 (1977).

372. *See* The Tungus v. Skovgaard, 358 U.S. 588, 592 (1959).

cause of action.[373] Nonetheless, strong arguments can be made to permit courts entertaining § 1983 claims to look to state law on the threshold issue of the availability of the survival or wrongful death action, yet allow those courts to apply federal policies as to the available damages.[374]

Courts entertaining § 1983 actions that involve wrongful killings have looked initially to state law for survival and wrongful death policies because they have implicitly or explicitly concluded that federal law is deficient. The federal law of damages, however, is not similarly deficient, and courts entertaining § 1983 actions have developed a full body of § 1983 damage law.[375] Moreover, courts borrowing causes of action generated by other jurisdictions have often been under a special obligation to borrow the entire cause of action, including its remedial attributes. For example, state courts entertaining federal causes of action are obligated by the supremacy clause[376] and the interpretation of the federal statute being enforced to borrow the entire cause of action and all of its attributes.[377] Similarly, federal law often expressly requires federal courts to borrow an entire cause of action from state law.[378] On the other hand, § 1988 has a more limited borrowing requirement and contemplates the use of state law only where federal law is deficient.[379] Thus, state and federal courts entertaining § 1983 survival

373. *See* Garrett v. Moore-McCormack Co., 317 U.S. 238, 245 (1942) (federal burden of proof on whether a release was executed freely applicable in state courts entertaining a federal cause of action); Central Vt. Ry. v. White, 238 U.S. 507, 511-12 (1915) (burden of proof on contributory negligence in a FELA case governed by federal law in state courts).

374. This approach, if adopted by the Court, could cut both ways. Although in many cases it would permit federal courts to ignore state damage limitations and award damages otherwise available under federal law, there will be circumstances in which state law authorizes damages not available under federal law. In such cases, the separation of the cause of action from its damage provisions could limit the available elements of damages. *Cf.* Grandstaff v. City of Borger, 767 F.2d 161, 173 n.* (5th Cir. 1985) (Garwood, J., dissenting in part) (arguing that damages for grief over the death of a married adult child, although authorized by state law, should not be available in § 1983 wrongful death action).

375. *See supra* notes 305-18 and accompanying text.

376. U.S. CONST. art. VI.

377. *See, e.g.*, Steinglass, *supra* note 17, at 449-51; Hill, *Substance and Procedure in State FELA Actions—The Converse of the* Erie *Problem?*, 17 OHIO ST. L.J. 384 (1956).

378. *See* Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982) (incorporating state causes of action); *see also* United States v. Haskin, 395 F.2d 503 (10th Cir. 1968) (requiring use of complete state wrongful death cause of action including damage limitations).

379. The separation of the cause of action from its damage policies often takes place when states entertain causes of action created by other states. Although states are obligated by the full faith and credit clause to entertain other states' wrongful death claims, *see* Hughes v. Fetter, 341 U.S. 609 (1951), state courts have declined to apply the survival policies of the states whose law they were borrowing, *see* Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953) (classifying survival as "procedural"), and have borrowed state wrongful death actions without regard to their damage ceilings, *see* Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (treating damage ceiling in borrowed wrongful death action as procedural and refusing to apply the ceiling in light of strong New York public policy against such limitations); *see also* Pearson v. Northeast Airlines, 309 F.2d 553 (2d Cir. 1962) (applying foreign wrongful death action without regard to damage limitations).

and wrongful death actions should be able to rely on state law to authorize the action but ignore state limitations on the available damages.[380]

3. Section 1988—The Inconsistency Clause

Even when courts look to state law for the appropriate policy, the requirement that state law be used is not absolute. The language of § 1988 qualifies that obligation by requiring the use of state law only "so far as the same is not inconsistent with the Constitution and laws of the United States." The inconsistency clause has been interpreted by the Supreme Court to permit courts to reject a borrowed state policy when its application would either conflict with federal law or be inconsistent with the purposes of § 1983—compensation and deterrence.[381]

As with the deficiency clause, the interpretation of the inconsistency clause is far from clear. If an inconsistency arose only when a federal law expressly or implicitly conflicted with a state policy, the clause would have little meaning. Federal courts applying § 1988 already follow federal law as a threshold matter, and a second requirement—after resort to state law—seems unnecessary.[382] In addition, the Court hardly needs the inconsistency clause to justify a refusal to borrow state policies that violate federal law.

When there are direct conflicts between borrowed state law and federal law, the Court has had little need to construe the inconsistency clause. Thus, in *Moor,* the Court relied on the inconsistency clause as an alternative basis for refusing to permit the state law of vicarious liability to support a § 1983 claim against a municipality that was outside the § 1983 definition of "person."[383] Similarly, in *Runyon,* the Court refused to permit § 1988 to authorize an award of attorney fees, in part, because to do so would violate the long-established American rule.[384]

The Court's major interpretation of the inconsistency clause came in *Robertson v. Wegmann.*[385] After concluding that federal law was deficient and that the action would abate under applicable state law, the Court addressed whether such a result was inconsistent with federal law. In interpreting the inconsistency clause, the Court went beyond the literal language of the clause and held that the use of state law would be improper when it

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380. Even if courts entertaining § 1983 actions were required to adopt state damage limitations with the borrowed survival or wrongful death claims, § 1988 requires courts to examine state limitations under the inconsistency clause and reject them if they are inconsistent with § 1983's purposes. *See infra* notes 463-90 and accompanying text.

381. Robertson v. Wegmann, 436 U.S. 584 (1978); *see supra* notes 198-205 and accompanying text.

382. *See* Eisenberg, *supra* note 268, at 518-21.

383. 411 U.S. 693, 706-10 (1973).

384. Runyon v. McCrary, 427 U.S. 160, 185-86 (1976); *see also* Alyeska Pipeline Servs. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (federal courts have no inherent power to award attorney fees to prevailing parties on a private attorney general theory).

385. 436 U.S. 584 (1978).

would be inconsistent with the underlying purposes of § 1983—compensation and deterrence.

Despite this construction, the Court's application of it was timid, and the Court concluded that abatement of the action was consistent with compensation and deterrence. The goal of compensation was disposed of almost summarily. Because the original plaintiff had died, he no longer had an interest in compensation that justified the survival of his action; his estate's interest in obtaining compensation was ignored, but the Court observed that survivors pursuing wrongful death claims based on their own injuries would have an interest in compensation. The deterrence analysis, however, was more complex. The Court embraced a theory of marginal deterrence by reasoning that the purposes of § 1983 would not be undermined if survival of the action was conditioned on the existence of particular relatives. Since defendants would rarely be aware of the composition of their victims' families, it was unlikely that their conduct would be influenced by knowledge that an action would not survive.[386] On the other hand, if state law was hostile to the survival of personal actions, a different assumption would be warranted. Thus, a state policy that required all personal actions to abate would be rejected because of its adverse effect on deterrence. Similarly, a state policy that required actions to abate when death resulted from the complained-of conduct would be inconsistent with the deterrence rationale of § 1983.

Issues involving the inconsistency clause have arisen in the Supreme Court most frequently with respect to state statutes of limitations and related policies. The Court, however, has never rejected an otherwise applicable state policy on the basis of its being inconsistent with the purposes of § 1983. For example, when the Court rejected a six-month statute of limitations borrowed from state employment discrimination administrative procedures, it did so on the basis of the statute's not being the analogous state policy. Thus, although the Court suggested that it would reject an unreasonably short limitations period, it did not have to reach the final step of the borrowing process to determine whether the policy in question was inconsistent with § 1983's purposes.[387]

In *Board of Regents v. Tomanio*,[388] however, the Court reached the inconsistency issue after borrowing a state policy under which the statute of limitations was not tolled during the pendency of a related cause of action. The plaintiff had split her claims and pursued a state claim in state court and a § 1983 claim in federal court, but the statute had run when the latter was filed. In reviewing this policy under the inconsistency clause, the Court

386. *Id.* at 592-93 n.10.

387. Burnett v. Grattan, 104 S. Ct. 2924, 2931 n.15 (1984) (citing with approval Campbell v. Haverhill, 155 U.S. 610, 615 (1895) (a short statute of limitations might not give plaintiffs the "reasonable time to sue" to which they are entitled)).

388. 446 U.S. 478 (1980).

disposed of plaintiff's arguments in a single sentence. Neither compensation nor deterrence were significantly affected because the plaintiff only had to have commenced her suit within the three-year limitations period to avoid the state rule.[389]

Despite the development of a test of inconsistency based on the broad purposes of § 1983, the Court's approach to these issues has been timid, and this may have significant implications for the use of § 1983 as a wrongful death remedy. If the Court holds that § 1983 may be used as a wrongful death remedy only through the incorporation of state law and that state damage limitations accompany the action, the validity of these state damage limitations will become a major remedial issue in § 1983 litigation involving wrongful killings. Thus, the fact that the Court has never rejected an otherwise applicable state policy as inconsistent with the purposes of § 1983 suggests that the Court may require deference to state policies except in unusual situations.

IV. The Experience of the Lower Federal and State Courts in § 1983 Wrongful Death Cases

The absence of Supreme Court cases directly addressing the availability of § 1983 as a wrongful death action and the confusion concerning the proper interpretation of § 1988 have left state and federal courts little guidance. Nonetheless, since *Monroe v. Pape,*[390] litigants have frequently relied on § 1983 to pursue wrongful death claims, and courts have generally been receptive to hearing them. Their approach in these cases, however, has changed as new issues have arisen in § 1983 litigation involving wrongful killings.

A. The First Generation—The Pioneering Cases

Most of the early § 1983 cases involving survival and wrongful death issues arose in jurisdictions that authorized the actions under state law, and courts had only to address whether § 1983 could be used to pursue the claims. Nonetheless, the first reported § 1983 case based on a wrongful killing dealt with the availability of § 1983 directly under federal law. In *Davis v. Johnson,*[391] the decedent was allegedly killed by a police officer whose gun discharged when he struck the decedent without provocation. The

389. *Id.* at 574. The *Tomanio* Court also addressed whether considerations of federalism and uniformity justified the rejection of a state policy that denied plaintiffs the ability to present state claims to state courts without foresaking their access to federal forums but upheld the state tolling policies. In rejecting these arguments, however, the Court left open the possibility that in some cases considerations of federalism and uniformity might justify the rejection of a state policy. *Id.* at 489-92.

390. 365 U.S. 167 (1961).

391. 138 F. Supp. 572 (N.D. Ill. 1955).

suit was brought in federal court by the administratrix of the decedent's estate. In rejecting the argument that the action did not survive the death, the court did not distinguish between survival and wrongful death actions but relied on cases permitting other federal statutory actions to survive under principles of common law. The court then looked to the "party injured" language in § 1983 and concluded that the phrase included the administrators of estates. In so holding, it relied on the broad purposes of § 1983 and the injustice of giving defendants an incentive to kill rather than merely injure their victims.[392] Thus, the court did not base its decision on state law,[393] but treated the survival issue as one directly under § 1983 and subject to a uniform national interpretation.[394]

The first reported case clearly permitting a wrongful death claim under § 1983 was the Fifth Circuit's 1961 decision in *Brazier v. Cherry*.[395] The plaintiff claimed that the death resulted from a brutal racially motivated beating by police following an illegal arrest.[396] The decedent's widow, suing as his survivor and as administratrix of his estate, alleged the unconstitutional use of deadly force. Under Georgia law, claims which the decedent had during his lifetime survived and widows had the right to recover "the full value of the life of the decedent"[397] in wrongful death actions. The district court, however, held that § 1983 damage actions did not survive absent express legislative authorization. In so holding, the court relied on the express au-

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392. *Id.* at 574. In construing § 1983 broadly, the *Davis* court relied on Justice Cardozo's statement on wrongful death statutes in Van Beeck v. Sabine Towing Co., 300 U.S. 342, 350-51 (1937) (citations omitted):

> Death statutes have their roots in dissatisfaction with the archaisms of the law .... It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impluse transmitted to the legal system. "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." Its intimation is clear enough in the statutes now before us that their effects shall not be stifled, without the warrant of clear necessity, by the perpetuation of a policy which now has had its day.

393. Although the *Davis* court cited § 1988 and the Illinois wrongful death statute, ILL. REV. STAT. ch. 70, § 1 (1955), it did so in the course of discussing the policy of § 1988 "that 'suitable remedies' shall be extended for the 'protection of all persons in the United States in their civil rights, and for their vindication,' " 138 F. Supp. at 574, and never indicated whether the plaintiff's action survived under state law. In fact, under prevailing Illinois law the action would not have survived because the death was instantaneous. *See* Saunders v. Schultz, 20 Ill. 2d 301, 170 N.E.2d 163 (1960).

394. *See also* Nelson v. Knox, 230 F.2d 483 (6th Cir. 1956) (relying on federal common law to permit § 1983 action to survive plaintiff's unrelated death). *But see* Pritchard v. Smith, 289 F.2d 153 (8th Cir. 1961) (applying Arkansas law to permit an action based on an illegal arrest and beating to survive despite the death of the defendant police chief).

395. 293 F.2d 401 (5th Cir. 1961), *rev'g* 188 F. Supp. 817 (M.D. Ga. 1960), *cert. denied,* 368 U.S. 921 (1961).

396. A fuller account of this incident, which was the subject of an investigation by the United States Commission on Civil Rights, is contained at 5 U.S. COMM'N ON CIVIL RIGHTS REPORT, JUSTICE 9-12 (1961).

397. *See* GA. CODE § 105-1302 (Supp. 1958), *quoted in Brazier,* 293 F.2d at 407.

thority for claims by survivors in 42 U.S.C. § 1986, which also originated in the Civil Rights Act of 1871,[398] and on the inference that Congress would have been explicit had it intended § 1983 claims to survive or to be available to survivors.[399]

On appeal, the plaintiff argued that § 1983 itself should be construed to authorize a wrongful death action.[400] The Fifth Circuit did not reach this issue, however, but held that § 1983 was available as a wrongful death remedy in Georgia by relying on the authority of courts under 42 U.S.C. § 1988 to borrow state-created actions.

In concluding that the decedent's widow could bring a wrongful death claim under § 1983,[401] Judge John R. Brown, one of the leading forces in the Fifth Circuit's efforts to end segregation in the South,[402] considered the legislative history and purposes of the Civil Rights Act of 1871. He looked to the circumstances of the Act's passage and concluded, as had the court in *Davis,* that it would be anomalous to allow a civil rights damage action where a victim was injured but not killed.[403]He then considered § 1988[404] and read it broadly to permit federal courts to use state law when federal remedies are not suitable. In reaching this conclusion, Judge Brown rejected the argument that § 1988 was only "procedural" and thus did not permit the incorporation of new and independent substantive remedies.[405]

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398. 42 U.S.C. § 1986 is the current version of § 6 of the Civil Rights Act of 1871, 17 Stat. 13, the compromise that resulted from Senator Sherman's unsuccessful effort to impose broad liability on counties for failing to prevent private conspiracies to violate federal rights. *See* Monell v. Department of Social Servs., 436 U.S. 658, 664 (1978) (discussing the legislative history of the Sherman Amendment).

399. *Brazier,* 188 F. Supp. at 820-21. *But see infra* notes 538-45 and accompanying text.

400. In arguing that § 1983 provided a cause of action for damages for a "party injured" by the wrongful killing of a husband, appellant's lawyers, who included Jack Greenberg and Thurgood Marshall of the NAACP Legal Defense and Education Fund, Inc., argued that such a construction was consistent with the legislative history of the Act and the requirement that it be liberally construed:

> To recognize that the taking of life in violation of §§ 1983 and 1985 gives rise to a cause of action for wrongful death to the widow who was so injured is entirely consonant with the major legislative purpose of these statutes. The Civil Rights Act of 1871 was, as is well known, a broad remedial statute designed to protect a helpless minority against the very type of act perpetrated in this case. Indeed, Representative Shellabarger stated that the act is remedial and therefore must be construed liberally.

Appellant's Brief at 10, Brazier v. Cherry, 293 F.2d 401 (5th Cir.), *cert. denied,* 368 U.S. 921 (1961).

401. The plaintiff also argued that federal law independently required the decedent's § 1983 action to survive his death, but the Fifth Circuit held that the action survived on the basis of borrowed state law.

402. *See* J. BASS, UNLIKELY HEROES (1981).

403. *Brazier,* 293 F.2d at 404. See *infra* text accompanying note 528 for quotation from holding.

404. At the time *Brazier* was decided, the Supreme Court had not construed § 1988 in a civil action. *But see* United States v. Thompson, 251 U.S. 407, 416 (1920) (construing § 1988 in a case involving the power of grand juries to indict after initial refusals).

405. In reaching the conclusion that § 1988 incorporated substantive aspects of state law, Judge Brown relied on the Conformity Act of 1872, 17 Stat. 196, 197, which required

Brazier's conclusion and methodology were widely followed by federal courts,[406] and on several occasions the Supreme Court cited *Brazier* approvingly.[407] The limitations of *Brazier,* however, gradually became apparent as cases arose in states that did not have broad survival or wrongful death statutes.[408] By tying the availability of § 1983 survival and wrongful death claims to their availability under state law and by addressing the legislative history of § 1983 only to show that Congress permitted the use of § 1983 in cases involving wrongful killings, *Brazier* provided little guidance on whether courts were required to hear § 1983 wrongful death claims where state law did not allow them.[409]

B. The Second Generation—Constitutionalizing the Issue

The second generation of wrongful death cases illustrates the limitations of *Brazier.* These cases arose in jurisdictions that recognized wrongful death actions, but the cases involved claims on behalf of family members who were not statutory beneficiaries or for relief that was not available under state law. Because *Brazier* addressed the availability of § 1983 wrongful death actions only when state law authorized them, litigants in states that did not recognize their claims attempted to constitutionalize the issue.

Plaintiffs who were unable to convince courts that § 1983, standing alone or in conjunction with state law, constituted a wrongful death remedy in

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the "practice, pleadings, and forms and modes of proceeding" in federal courts to "conform, as near as may be, to the practice . . . existing at the time" in the state courts, and argued that limiting § 1988 to the incorporation of state "procedural mechanisms" would have made it superfluous. 293 F.2d at 408 n.18. The Conformity Act of 1872 was passed after the adoption of the Civil Rights Act of 1871, which had incorporated the predecessor to § 1988 and made it applicable to actions created by § 1 of the Civil Rights Act of 1871. *See supra* note 325. Because the Conformity Act rejected the "static conformity" that had locked most federal courts into following state practices established in 1789 or 1828, *see* C. WRIGHT, THE LAW OF FEDERAL COURTS 399-402 (4th ed. 1983), § 1988 and its assumption of "dynamic conformity" can be viewed as a predecessor of the Conformity Act of 1872. *See* Kreimer, *supra* note 268, at 628 n.118. Thus, § 1988 was not superfluous when it was passed. Nonetheless, the fact that both statutes were included in the 1874 codification of federal law, *see* U.S. REV. STAT. §§ 722, 914 (1874) supports Judge Brown's conclusion that § 1988 should be given some substantive meaning. Although the Court in Moor v. County of Alameda, 411 U.S. 693 (1973), held that § 1988 did not authorize the incorporation of new and independent state remedies into § 1983, it has not rejected giving § 1988 some substantive meaning. *See supra* notes 357-62 and accompanying text.

406. *See, e.g.,* Hall v. Wooten, 506 F.2d 564 (6th Cir. 1974); Holmes v. Silver Cross Hosp., 340 F. Supp. 125 (N.D. Ill. 1972).

407. *See, e.g.,* Robertson v. Wegmann, 436 U.S. 584, 594 (1978); Moor v. County of Alameda, 411 U.S. 693, 702 n.14 (1973); Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1969).

408. *See infra* notes 410-34 and accompanying text.

409. Although initial law review commentary on *Brazier* was favorable, *see, e.g.,* 40 TEX. L. REV. 1050 (1962); 15 VAND. L. REV. 623 (1962); 47 VA. L. REV. 1241 (1961), one Note-writer praised the result while criticizing the failure to construe the "party injured" language and suggesting an interpretation of § 1983 as independently authorizing a wrongful death remedy. Note, *Federal Civil Rights Act Incorporates State Wrongful Death and Survival Laws,* 14 STAN. L. REV. 386, 392-94 (1962).

which they could assert the constitutional rights of a decedent have often claimed a constitutional interest in their continued relationship with the decedent. In this way, beneficiaries under state wrongful death acts have attempted to avoid state policies that placed ceilings on the available damages or that limited damages to pecuniary losses.[410] Likewise, deferred beneficiaries under state wrongful death acts and parties suing as individuals in states that give the action to designated personal representatives have often asserted their own constitutional interests.[411] Finally, nonstatutory beneficiaries, with no cause of action under state wrongful death statutes, have also claimed a constitutional interest in the continued life of the decedent.[412]

These arguments have often been advanced by parents whose children were killed by the improper use of deadly force. In arguing that their interest in a continued relationship with their child was of constitutional dimension, these parents frequently have relied on Supreme Court cases establishing fundamental familial rights involving marriage, procreation, and child rearing as the source of a substantive due process right in the parent-child relationship.[413]

State and federal courts that have addressed these issues have disagreed on whether the parent-child relationship was of constitutional dimension and on whether it gave parents a compensable and actionable interest in their continued relationship with their children. Although most courts have found a constitutional interest in the relationship,[414] others have distinguished the right to privacy cases from which this interest is derived to reject damage claims based on the termination of the relationship.[415] On the other hand,

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410. *See, e.g.*, Jones v. Hildebrant, 191 Colo. 1, 550 P.2d 339 (1976), *cert. dismissed as improvidently granted*, 432 U.S. 183 (1977); Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984).

411. *See, e.g.*, Logan v. Hollier, 711 F.2d 690 (5th Cir. 1983) (remanding § 1983 wrongful death action by decedent's mother, a deferred beneficiary who could not sue under state law where the decedent had a surviving child, to determine whether a wrongful killing violated the mother's constitutional rights); *cf.* Cunningham v. Ray, 648 F.2d 1185 (8th Cir. 1981) (brothers may not bring § 1983 survival action for wrongful killing under Iowa's survival statute); Carter v. City of Emporia, 543 F. Supp. 354 (D. Kan. 1982) (only heirs may bring wrongful death actions under Kansas law).

412. *See, e.g.*, Sager v. City of Woodland Park, 543 F. Supp. 282, 290 (D. Colo. 1982) (rejecting constitutional claim of siblings).

413. *See* May v. Anderson, 345 U.S. 528 (1953); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923). Litigants have also looked to cases attaching procedural protections to the liberty interest represented by the parent-child relationship. *See, e.g.*, Lassiter v. Department of Social Servs., 452 U.S. 18 (1981); Little v. Streater, 452 U.S. 1 (1981).

414. *See, e.g.*, Bell v. City of Milwaukee, 746 F.2d 1205, 1242-48 (7th Cir. 1984) (father's interest in relationship with son of constitutional dimension); Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974) (same); Jones v. McElroy, 429 F. Supp. 848, 852-53 (E.D. Pa. 1977); Espinoza v. O'Dell, 633 P.2d 455, 463-65 (Colo. 1981) (partially overruling Jones v. Hildebrant, 191 Colo. 1, 550 P.2d 339 (1976), and holding that children have a constitutional interest in their relationship with their parents), *cert. dismissed for want of jurisdiction*, 456 U.S. 430 (1982). *See also infra* note 424 and accompanying text.

415. *See, e.g.*, White v. Talboys, 573 F. Supp. 49 (D. Colo. 1983); Jackson v. Marsh, 551 F. Supp. 1091 (D. Colo. 1982); James v. Murphy, 392 F. Supp. 641 (M.D. Ala. 1975); Jones v. Hildebrant, 191 Colo. 1, 550 P.2d 339 (1976), *cert. dismissed as improvidently granted*, 432 U.S. 183 (1977).

courts that have considered the availability of § 1983 wrongful death claims by siblings who do not possess the right to sue under state law have generally refused to recognize a constitutional interest that can be enforced through a § 1983 wrongful death damage suit.[416]

Regardless of how these issues involving the use of § 1983 should be resolved, courts entertaining § 1983 wrongful death claims have often reached out to address complex and sensitive constitutional issues that could easily have been avoided. *Mattis v. Schnarr*[417] is typical of these cases. In *Mattis*, the plaintiff was a father whose son was shot to death by police as he was fleeing to avoid apprehension for the commission of a felony. The conduct of the police was consistent with Missouri law, which authorized the use of deadly force in such circumstances, but the decedent's father challenged the constitutionality of the state policy in a § 1983 action in which he sought damages for the losses he suffered from the death of his son. Under the Missouri wrongful death statute, relief was available,[418] and the Eighth Circuit held that the plaintiff had a vested right to sue under state law and was injured by the killing.[419] In finding the claim actionable under § 1983, however, the court also inquired into whether the actions of the defendant violated the plaintiff's constitutional rights rather than the rights of the third party, his deceased son.[420]

In posing this question and resolving it in favor of the father's having a fundamental constitutional right to raise his son,[421] the court complicated the *Brazier* inquiry. Instead of incorporating the apparently adequate state wrongful death remedy into § 1983 or considering whether § 1983 independently authorized a wrongful death action by a father, the court addressed the more complex issue of the father's constitutional rights.

In addition to *Mattis,* a number of courts have decided constitutional issues without first considering whether to incorporate state limitations on wrongful death actions into § 1983, and, if so, whether to reject specific

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416. *See* Bell v. City of Milwaukee, 746 F.2d 1205, 1245-48 (7th Cir. 1984); Sager v. City of Woodland Park, 543 F. Supp. 282, 290 (D. Colo. 1982); Sanchez v. Marquez, 457 F. Supp. 359, 362-63 (D. Colo. 1978). *But see* Trujillo v. Board of County Comm'rs, 768 F.2d 1186 (10th Cir. 1985).

Although the Tenth Circuit in *Trujillo* broadly defined the constitutional interest to recognize a sibling's right to a continued association with her deceased brother, the court required the plaintiffs to plead and presumably prove that the defendant acted intentionally to interfere with the protected relationship. *Id.* at 1190. Thus, the expansion of protected interests in *Trujillo* may be illusory, as survivors will virtually never be able to prove their allegations of intent.

417. 502 F.2d 588 (8th Cir. 1974). For subsequent proceedings, see Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976), *vacated as moot sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977).

418. *See Mattis,* 502 F.2d at 590.

419. *Id.*

420. The Eighth Circuit's discussion of the constitutional basis of plaintiff's standing to sue was distinct from its discussion of the constitutionality of the state policy on deadly force. *Id.* at 593-96.

421. *Id.*

limitations as being inconsistent with the purposes of § 1983.[422] This is seen most starkly in *Bell v. City of Milwaukee,*[423] the leading federal court of appeals § 1983 wrongful death case.[424] The Seventh Circuit, in reviewing the § 1983 wrongful death claim by the estate of a deceased father whose son was wrongfully killed by police,[425] unnecessarily addressed the father's constitutional interest. Wisconsin law gave parents a wrongful death action for the death of a child but placed a $25,000 ceiling on damages for loss of society.[426] Rather than borrow state law and examine the ceiling in light of the purposes of § 1983, the court initially addressed whether the father had an actionable constitutional interest in his continued relationship with his son and concluded that he did.[427] Nonetheless, the Seventh Circuit then considered whether the $25,000 ceiling was inconsistent with the policy underlying § 1983; the court held that it was and affirmed an award of $75,000 for loss of society.[428] The Seventh Circuit, however, could have reached the

422. Courts addressing the constitutional issue have also ignored the possibility that § 1983 may authorize a wrongful death action independently of state law, but that argument, which had been made by the plaintiffs-appellants in the Fifth Circuit in *Brazier* and which is advanced in this article, is rarely made by litigants. *But see* Brief for Amicus Curiae at 44-49, Jones v. Hildebrant, 432 U.S. 183 (1977).

423. 746 F.2d 1205 (7th Cir. 1984).

424. *Bell* has become the starting point in the analysis of § 1983 wrongful death actions. *See, e.g.,* Estate of Bailey v. County of York, 768 F.2d 503, 509 n.7 (3d Cir. 1985) (explicitly following *Bell* to hold that a parent whose child has died as a result of unlawful state action may maintain a constitutionally based § 1983 action for the deprivation of liberty); Kelson v. City of Springfield, 767 F.2d 651 (9th Cir. 1985) (relying on *Bell* to conclude that parents have a constitutionally protected interest in the companionship and society of their children); Trujillo v. Board of County Comm'rs, 768 F.2d 1186, 1189 (10th Cir. 1985) (following *Bell* to hold that parents have a constitutional interest in their continued relationship with their child but rejecting *Bell* to also find a constitutional interest on behalf of siblings); Ascani v. Hughes, 470 So. 2d 207, 211-12 (La. Ct. App.) (relying on *Bell* to reject siblings' constitutional interest in their continued relationship with their deceased brother), *appeal dismissed,* 106 S. Ct. 517 (1985); *cf.* Myres v. Rask, 602 F. Supp. 210, 213 n.4 (D. Colo. 1985) (relying on the district court decision in *Bell* to hold that parents have a constitutionally protected relationship with their child). See *supra* notes 414-15 for pre-*Bell* cases addressing the constitutional interest in a continuing parent-child relationship.

425. Because the father had died before the § 1983 wrongful death action was begun, this claim was on behalf of his estate, and the Seventh Circuit construed Wisconsin law to permit the survival of wrongful death actions. *Bell,* 746 F.2d at 1241-42. However, the court also had to reconcile WIS. STAT. § 895.01 (1983), which permits personal actions to survive, with WIS. STAT. § 895.04(2) (1983), which implies that wrongful death actions do not survive by creating a hierarchy of beneficiaries when an otherwise entitled survivor "dies before judgment." The court resolved this conflict on federal grounds by finding that it would be inconsistent with the purposes of § 1983 for state law to bar completely the survival of the deceased father's wrongful death claim. *Bell,* 746 F.2d at 1251.

426. *See* WIS. STAT. § 895.04(4) (1983). During the pendency of the *Bell* litigation, this $25,000 ceiling was raised to $50,000. *See* WIS. STAT. ANN. § 895.04(4) (West 1983 & Supp. 1985).

427. *Bell,* 746 F.2d at 1242-45.

428. *Id.* at 1250-52. Given the court's constitutionalization of the father's interest and its conclusion that claims for loss of society were available in § 1983 wrongful death actions, 746 F.2d at 1242-50, it is unclear why the Seventh Circuit felt it was necessary to examine the consistency of the $25,000 ceiling with the purposes of § 1983. If federal law independently gives parents a constitutional interest in their relationship with a child, that relationship should be enforceable in a § 1983 action under federal damage policies. In such cases, state limitations on the available damages should not have any special relevance to the damages available under § 1983. *See* Jones v. Hildebrant, 432 U.S. 183, 187-89 (1977). *See supra* text accompanying notes 186-87.

same result without deciding the constitutional issue. First, it could have borrowed the entire state cause of action while rejecting the damage ceiling under the inconsistentcy clause; second, it could have borrowed the state wrongful death action without the damage ceiling while applying a federal law of damages; and third, it could have treated § 1983 as independently authorizing a wrongful death action while applying the same federal law of damages.

The Seventh Circuit's treatment of the siblings' § 1983 wrongful death claim was more puzzling. Under Wisconsin law, siblings were deferred beneficiaries who could bring wrongful death actions when there were no surviving children, spouses, or lineal heirs.[429] Their recovery, however, was limited to pecuniary losses; claims for loss of society were barred.[430] Thus, under Wisconsin law, the siblings had a wrongful death claim, but in the circumstances of the case there were no damages under state law to which they were entitled. In addressing the availability of a § 1983 wrongful death action by the siblings, however, the Seventh Circuit went directly to the constitutional issue. Although the court held that the $25,000 ceiling on loss of society claims by the decedent's father was inconsistent with the purposes of § 1983,[431] it did not address whether the statutory limitation on damages available to siblings was also inconsistent with § 1983. Rather than resolve this or the other difficult statutory issues raised by § 1983 wrongful death claims on the part of siblings,[432] the court immediately considered whether siblings had an actionable constitutional interest in the continued life of their brother and concluded that they did not.[433] Although that constitutional holding is consistent with decisions of most other courts that have addressed it,[434] the Seventh Circuit, before reaching a constitutional decision, should have explored the statutory issues involved in whether § 1983 independently provides siblings a wrongful death remedy. More importantly, the court

429. WIS. STAT. § 895.04(2) (1983).

430. *Id.* § 895.04(4).

431. *Bell,* 746 F.2d at 1251-53.

432. The right of siblings to sue directly under § 1983 because of the wrongful killing of a brother is a more difficult statutory issue than the right of parents, spouses or children. *See infra* note 546.

433. After holding that the siblings did not have a constitutional interest that supported a § 1983 wrongful death action, the court reversed the $100,000 loss of society judgment in favor of the decedent's 12 siblings. *Bell,* 746 F.2d at 1248, 1279.

434. *See supra* note 416. In holding that siblings lacked an actionable constitutional interest in their continued relationship with their deceased brother, the Seventh Circuit relied in part on its uncertainty about the additional deterrence a cause of action would provide when both the decedent's estate and father had an available claim. *Bell,* 746 F.2d at 1247. That concern about marginal deterrence, however, more closely resembles the statutory inquiry made under § 1988's inconsistency clause, *see supra* note 201 and accompanying text, than a constitutional inquiry. In rejecting this aspect of *Bell,* the Tenth Circuit noted that the Supreme Court in Roberts v. United States Jaycees, 104 S. Ct. 3244, 3251 (1984), had not established familial relationships as the outer limits of protected relationships. Trujillo v. Board of County Comm'rs, 768 F.2d 1186, 1189 n.5 (10th Cir. 1985).

should have reviewed the state damage limitation on the siblings' wrongful death action under the inconsistency clause of § 1988.

C. *The Third Generation—State Restrictions on Survival and Wrongful Death Actions*

Although courts are still struggling with the constitutional issues raised by the second generation of § 1983 wrongful death cases, there is a current wave of § 1983 survival and wrongful death cases that raise difficult statutory issues. Arising in jurisdictions that authorize wrongful death actions, these cases involve state policies that either require the personal action of the decedent to abate in favor of the wrongful death claim or limit the damages available in the survival and wrongful death actions. Because most courts that entertain § 1983 actions involving wrongful killings continue to take the path of least resistance and look initially to state law for the cause of action and damage policies, these cases raise questions as to the standards that apply when courts borrow state authorized actions or review state damages policies.

When courts have found the interest of survivors in their continued relationship with a decedent to be of constitutional dimension, it should not be necessary to examine state limitations on damages under § 1988's inconsistency clause.[435] Nor should these issues arise when courts borrow state wrongful death causes of action but not state damage policies. In such cases, courts can address the available damages under the federal standards generally used in § 1983 litigation.

There are however, three important issues under the inconsistency clause of § 1988 that arise when courts review borrowed state survival and wrongful death policies in § 1983 litigation involving wrongful killings. Although litigants cannot avoid these issues in survival actions because of the Supreme Court's adoption of a borrowing approach,[436] they will be able to avoid them in § 1983 wrongful death actions if the Court holds that § 1983 independently authorizes a wrongful death action without regard to state law.

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435. *See* Jones v. Hildebrant, 432 U.S. 183, 188 (1977). *But see* Bell v. City of Milwaukee, 746 F.2d 1205, 1250-53 (7th Cir. 1984) (finding a parent to have a constitutional interest but still reviewing the statutory ceiling on pecuniary damages under the inconsistency clause). Even when survivors are asserting their own constitutional interests, it may be necessary to consider whether an item of damages available under state law may be awarded in a § 1983 action. Thus, punitive damages against municipalities would not be available in § 1983 wrongful death actions even if authorized under state law. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). Similarly, it has been argued that state-authorized damages for mental anguish and grief in wrongful death actions are unavailable in § 1983 actions. *See* Grandstaff v. City of Borger, 767 F.2d 161, 173-74 n.* (5th Cir. 1985) (Garwood, J., dissenting in part). *But see also Bell*, 746 F.2d at 1248-50 (reviewing whether there was a common law limitation on the availability of damages for loss of society and companionship in § 1983 actions).

436. *See* Robertson v. Wegmann, 436 U.S. 584, 593 (1978).

First, it is unclear whether the courts reviewing the consistency of state survival or wrongful death policies with the purposes of § 1983 must consider each cause of action independently. In rejecting the use of a state policy that required personal actions to abate in favor of the wrongful death action in *Carlson v. Green,* [437] a *Bivens* action, the Court looked only to the survival issue. The federal government had argued that the state wrongful death policy should also be considered, but the Court did not directly address that argument. Nonetheless, the Court's exclusive focus on the survival issue suggests it will require borrowed survival and wrongful death actions to stand or fall on their own.[438]

A second issue involves the need to sort out the different interests in compensation in § 1983 cases in which the complained-of conduct results in death. In *Robertson v. Wegmann,*[439] the Court summarily disposed of the executor's interest in compensation by pointing out that the interest in compensation was that of the individual whose rights had been violated—the decedent; because the plaintiff had died during the pendency of the suit, he no longer had an interest in being compensated, and the Court would not rely on § 1983's purpose of compensation in reviewing the state's abatement policy. It is unclear, however, who has the interest in compensation in § 1983 survival and wrongful death actions involving deaths that result from the complained-of conduct. Survivors clearly have an interest in compensation under state law, and the availability of § 1983 to pursue wrongful death claims seems to recognize that interest.[440] On the other hand, survival actions only seek relief to which the decedent was entitled prior to his death, and *Robertson* suggests that this interest in compensation belonged only to the decedent.

The identification of the different interests at stake also has implications on whether survival and wrongful death policies should be looked at separately. If the only interest in compensation is that of the decedent, the case for keeping the survival and wrongful death inquiries separate is weakened. On the other hand, if survivors have a separate interest in compensation in cases involving wrongful killings, the case for independently reviewing state survival and wrongful death policies is strengthened.

Third, it is unclear whether courts that review state damage restrictions in § 1983 actions involving wrongful killings have followed the marginal deterrence approach of *Robertson,*[441] or whether they are required to do so.

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437. 446 U.S. 14 (1979).

438. *See supra* notes 226-29 and accompanying text.

439. 436 U.S. 584 (1978).

440. In *Robertson,* Justice Marshall stated that the Court's holding that the § 1983 claim abated does not "preclude recovery by survivors who are suing under § 1983 for injury to their own interests." 436 U.S. at 592 n.9. The interests of survivors in compensation should be protected by § 1983 regardless of the methodology employed to conclude that a wrongful death claim can be pursued through § 1983.

441. *See supra* notes 200-01 and accompanying text.

When a death results from the complained-of conduct, considerations of deterrence require careful scrutiny of state damage restrictions to determine whether they adequately deter wrongful killings.[442] Nonetheless, all state limitations on damages available in wrongful death actions may not be inconsistent with the purposes of § 1983, and *Robertson* may require courts to review the impact on deterrence of the specific limitation.

1. Section 1983 Survival and Damages Policies

Most courts that have entertained § 1983 actions involving wrongful killings have rejected state policies that require the decedent's personal action to abate. In reaching this result, courts have generally looked at the state survival action independently of the state wrongful death action and have concluded that § 1983's goal of deterrence would be violated if an action did not survive when the complained-of conduct caused the death.[443] A number of courts, however, have reviewed state survival policies in light of the available state wrongful death statutes and have concluded that the wrongful death actions served § 1983's purposes and justified following state policies that required § 1983 actions to abate.

In *Jones v. George,*[444] for example, the plaintiff brought a § 1983 action as administratrix of her deceased husband's estate and a § 1983 wrongful death action in her own name. The plaintiff alleged that the decedent committed suicide while incarcerated on false charges, but, under West Virginia law, a cause of action for injuries to a person resulting in death did not survive.[445]

In reviewing the consistency of the West Virginia abatement policy with the purposes of § 1983, the district court read *Carlson* narrowly as having permitted the survival of the estate's *Bivens* action only because virtually no wrongful death damages were available to the decedent's mother under Indiana law. Thus, the *Jones* court did not view *Carlson* as establishing a uniform federal rule of survivorship when the complained-of conduct caused death; rather, it treated *Carlson* as establishing a variable rule based on the adequacy of alternative remedies and found the same policy applicable in §

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442. *Cf. Carlson,* 446 U.S. at 20-21.

443. *See, e.g.,* Jaco v. Bloechle, 739 F.2d 239 (6th Cir. 1984); Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984); Heath v. City of Hialeah, 560 F. Supp. 840 (S.D. Fla. 1983); O'Connor v. Several Unknown Correctional Officers, 523 F. Supp. 1345 (E.D. Va. 1981); *cf.* Sager v. City of Woodland Park, 543 F. Supp. 282 (D. Colo. 1982) (rejecting damage limitations in state survival statute); Jackson v. Marsh, 551 F. Supp. 1091 (D. Colo. 1982) (same).

444. 533 F. Supp. 1293 (S.D.W. Va. 1982).

445. *Id.* at 1301 ("West Virginia has . . . changed the common law to provide for survivability of 'injuries to the person . . . not resulting in death.' There is no West Virginia law which permits survival of actions for personal injuries which do result in death.").

1983 cases.[446] The *Jones* court then looked to the West Virginia wrongful death statute under which the decedent's personal representative could seek a broad range of damages for survivors, including damages for sorrow, mental anguish and solace, reasonably expected loss of income and services, and medical and funeral expenses.[447] Because the plaintiff could maintain wrongful death actions under state law and through § 1983, the court concluded that § 1983's purpose of deterring official misconduct was met and dismissed the § 1983 survival action.[448]

A similar approach has been taken by state and federal courts in Alabama. Under Alabama's wrongful death statute, known as the Homicide Act, only actions for wrongful death may be brought when the complained-of conduct caused death, and actions for damages sustained by a decedent during his lifetime do not survive.[449] In addition, Alabama uses an exclusively punitive approach to wrongful death actions and only permits awards of punitive damages in wrongful death actions.[450]

In *Brown v. Morgan County,*[451] a federal district court rejected the argument that the Alabama no-survival policy was inconsistent with the purposes of § 1983 by relying on § 1983's goal of compensation. Since the person injured by a violation of his constitutional rights was no longer alive, he could not be compensated; thus, any compensatory damages would only accrue to the estate. With respect to the goal of deterrence, the court looked to state law and found that the availability of punitive damages met this purpose of § 1983.[452]

Similarly, in *Carter v. City of Birmingham,*[453] a controversial case involving the killing of an uninvolved bystander by the police,[454] the Alabama Supreme Court followed *Brown* and found the policy of not permitting personal actions to survive to be consistent with the purposes of § 1983. Although

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446. Reading *Carlson* and *Robertson* in peri materia, the *Jones* court found them to stand for the following proposition:

> [W]here death results from civil rights violations . . . survival of a cause of action based on personal injuries resulting from those violations is in keeping with the philosophy behind and policies of the remedy . . . *unless the law applicable to viable claims joined with the personal injury claims satisfies that philosophy and those policies as they apply to personal injury claims.*

533 F. Supp. at 1304. The court then went on to examine the state wrongful death law that applied to survivors' claims.

447. W. VA. CODE § 55-7-6(c)(1) (Michie/Law. Co-op. Supp. 1985).

448. *Jones,* 533 F. Supp. at 1306. In reaching this conclusion, however, the *Jones* court did not discuss whether the abatement of the plaintiff's claim for pain and suffering, which was not recoverable in the state wrongful death action, would have any effect on the deterrence purpose of § 1983.

449. ALA. CODE § 6-5-410 (1984).

450. *See supra* note 138 and accompanying text.

451. 518 F. Supp. 661 (N.D. Ala. 1981).

452. *Id.* at 665.

453. 444 So. 2d 373 (Ala. 1983), *cert. denied,* 104 S. Ct. 2401 (1984).

454. For a more detailed account of this case and its political aftermath, see P. SCHARF & A. BINDER, *supra* note 8, at 14-17.

punitive damages were not available from the municipal defendant under § 1983,[455] the state court concluded that the state wrongful death action for punitive damages satisfied the deterrence purposes of § 1983.[456] Thus, neither survival actions nor wrongful death actions are available under § 1983 against Alabama municipalities, and the only § 1983 wrongful death claims that can be brought against individual defendants in Alabama are for punitive damages.

The Alabama state and federal courts, like the federal court in West Virginia, found the purposes of § 1983 met by the availability of the state wrongful death action and thus concluded that the no-survival policy was consistent with § 1983. The Alabama courts, however, subjected the state wrongful death statute to even less scrutiny than did the federal court in West Virginia. The West Virginia court at least examined the state wrongful death remedy on its face as well as in the circumstances of the pending case. Because survivors could obtain a significant award in the § 1983 wrongful death action to compensate their losses from the decedent's death, it held that § 1983's purposes of compensation and deterrence were met.[457] The Alabama courts, on the other hand, ignored the possibility that survivors' interests in compensation might justify rejecting the no-survival policy and took a narrow view of deterrence which assumed that the purpose of § 1983 was only to discourage reckless or intentional conduct that supported a claim for punitive damages. Moreover, the Alabama Supreme Court in *Carter* only considered the state wrongful death action, as contrasted to a § 1983 wrongful death action for punitive damages, which was not available against municipalities, and thus also ignored the supplementary nature of § 1983 actions.[458]

These approaches to the survival of § 1983 claims when death has resulted from the complained-of conduct have been rejected by other courts. For example, in *Jaco v. Bloechle,*[459] the Sixth Circuit held that a § 1983 claim brought by the administratrix of the estate of a victim of an alleged wrongful killing survived despite Ohio law that required personal actions to abate where death was instantaneous.[460] In reviewing the Ohio law, the Sixth Circuit

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455. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

456. *Carter*, 444 So. 2d at 379.

457. *Jones,* 533 F. Supp. at 1305. In concluding that the state wrongful death statute met § 1983's policies as they related to decedent's abated claim for personal injuries, the court was aware of the different interests served by survival and wrongful death policies. *Id.* at 1305 n.23 ("[T]he court is ascertaining whether or not the purposes of 42 U.S.C. § 1983 *as they relate to the personal injury claims* are complied with in the context of the wrongful death claim . . . . [I]n West Virginia, those considered to be the parties wronged in wrongful death actions are the survivors and not the decedent and/or his estate. Therefore, a 42 U.S.C. § 1983 claim for wrongful death would meet *both* the compensation and deterrence policies of § 1983 *as they relate to that claim.*").

458. Monroe v. Pape, 365 U.S. 167, 183 (1961).

459. 739 F.2d 239 (6th Cir. 1984).

460. Under OHIO REV. CODE ANN. § 2305.21 (Page 1981), personal actions survive the death of the decedent, but Ohio case law prohibits the survival of personal actions where death was instantaneous. *See* Rubeck v. Huffman, 54 Ohio St. 2d 20, 374 N.E.2d 411 (1978). In Ohio, the damages available in personal actions that survive are limited to those resulting from injuries during the decedent's lifetime but not for the resulting death. *See Jaco,* 739 F.2d at 242 n.4.

emphasized the differences between survival and wrongful death actions, and the fact that the decedent's heirs had a wrongful death claim under Ohio law was not relevant to whether the decedent's personal action survived.[461] Although the court came close to considering the decedent's interest in compensation, it relied primarily on § 1983's goal of deterrence which would be threatened if personal actions only survived when there was pain and suffering prior to death but not when death was instantaneous.[462]

Similar issues have also arisen in states that do not require personal actions to abate but that limit the damages that survive. For example, courts entertaining § 1983 actions in cases involving wrongful killings have rejected state policies that deny the survival of claims for pain and suffering, for punitive damages, and for the value of the underlying right to life itself. In reaching these results, courts have not attempted to distinguish the holding of *Robertson,* which provided that the interest in compensation belonged to the decedent; rather they have relied on the additional deterrence that will result if potential defendants know that they may be liable for a full range of compensatory and punitive damages if their victim dies.[463]

In *Guyton v. Phillips,*[464] the plaintiff sued solely as administratrix of the estate of her deceased son who was wrongfully killed by police officers. Under California law, actions for compensatory and punitive damages survived but claims for pain and suffering did not.[465] In rejecting the use of this damage limitation, the court relied upon the substantial impact on deterrence that resulted from the bar on the survival of claims for pain and suffering.[466] On the other hand, the court rejected the claim for loss of future earnings and loss of society, noting that those damages were available in state-authorized wrongful death actions.[467] Although the court observed

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461. *Jaco,* 739 F.2d at 243 n.5 (6th Cir. 1984) ("[T]he claim of . . . [the decedent's] heirs under the wrongful death enactment is a cause of action separate from the civil rights claim . . . . Federal courts look to state survival statutes to determine the validity of the action . . . . Because . . . [Ohio's wrongful death statute] is not adapted to the object of providing for the continuation of personal causes of action, the wrongful death statute is irrelevant to the § 1988 analysis . . . .").

462. *Id.* at 244-45. *Cf.* O'Connor v. Several Unknown Correctional Officers, 523 F. Supp. 1345 (E.D. Va. 1981) (rejecting the argument that the availability of wrongful death actions under Virginia law supports following Virginia's no-survival policy in § 1983 actions when the death was caused by the complained-of conduct).

463. *Cf.* Robertson v. Wegmann, 436 U.S. 584, 592 (1978) (a "state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him.").

464. 532 F. Supp. 1154 (N.D. Cal. 1981).

465. CAL. PROB. CODE § 573 (West Supp. 1985).

466. Guyton v. Phillips, 532 F. Supp. at 1166. ("The inescapable conclusion is that there may be substantial deterrent effect to conduct that results in the injury of an individual but virtually no deterrent to conduct that kills its victim."). The *Guyton* court also listed more than 30 jurisdictions that allow the survival of decedents' claims for conscious pain and suffering. *Id.* at 1166 n.6.

467. The issue of the availability of future earnings and loss of society in the survival claim arose in *Guyton* because plaintiff's state court wrongful death action had been dismissed under the statute of limitations. *Id.* at 1167 n.7. In concluding that wrongful-death-type damages

that the California wrongful death statute was not inadequate, it did so in the course of pointing out the different purposes of survival and wrongful death actions. Thus, this aspect of *Guyton* can best be viewed as recognizing the different interests protected by survival and wrongful death policies.

In addition to $15,000 awarded for pain and suffering and $85,000 in punitive damages, the *Guyton* court awarded the plaintiff damages of $100,000 for the deprivation of life. In deciding to award such damages, the court was concerned with the absence of deterrence that would result if less damages were available when a victim died than when he survived. In setting the amount, however, the court rejected such measures of damages as future earnings and looked to awards in other cases in which victims whose federal rights were violated suffered intangible losses.[468]

The Seventh Circuit in *Bell v. City of Milwaukee*[469] followed a similar approach in assessing the damages available in a § 1983 survival action brought by the estate of a young black male who was wrongfully killed by the police. Although personal actions survived in Wisconsin, no damages were available for the loss of life itself.[470] The Seventh Circuit, however, after finding the Wisconsin policy to have "more than a marginal loss of influence on potentially unconstitutional actors,"[471] found the policy inconsistent with the deterrence purpose of § 1983 and upheld the jury award of $100,000 for the loss of the decedent's life. In reaching this result, the court noted that Wisconsin law permitted claims by survivors and that tort law in general sought to deter wrongful deaths. Nonetheless, because state law did not impose damages for loss of life, the court found § 1983's goal of deterrence not to have been met.[472]

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were not available in survival actions "when appropriate remedies were available and were not precluded by state law," *id.* at 1167, the court intimated that the damages in question might be available in the survival action had California not allowed them in wrongful death actions. The availability of such damages, however, would be inconsistent with the separate interests protected by the two actions. *See* Bass by Lewis v. Wallenstein, 769 F.2d 1173, 1187-90 (7th Cir. 1985) (vacating a $250,000 jury verdict in a survival action because the jury instructions erroneously defined damages in terms of the pecuniary losses of decedent's children, a wrongful death measure of damages).

468. *Id.* at 1168.

469. 746 F.2d 1205 (7th Cir. 1984).

470. *Id.* at 1240 n.41.

471. *Id.* at 1239.

472. *Id.* at 1239-40. The *Bell* court initially borrowed the state damage policy denying damages for loss of life, but found the policy to be inconsistent with the deterrence policies of § 1983 and the fourteenth amendment's protection of life. *Id.* at 1240. The court then found it appropriate to fashion a federal rule under which damages would be available to the estate to provide recovery for loss of life. *Id.* at 1239. *See also* Bass by Lewis v. Wallenstein, 769 F.2d 1173, 1189-90 (7th Cir. 1985) (finding Illinois policy that denied recovery on behalf of estates for loss of life to effectively require abatement of fourteenth amendment claim that defendants deprived the decedent of his right to life). *Cf.* O'Connor v. Several Unknown Correctional Officers, 523 F. Supp. 1345, 1349 (E.D. Va. 1981) (finding the Virginia policy of denying recovery for the deprivation of the deceased's constitutional rights to effectively require the action to abate contrary to the policies of § 1983).

Damages for the loss of life itself have been dubbed "hedonic" damages and have been

The same approach to state damage limitations has generally been taken when states deny the survival of claims for punitive damages. In *McFadden v. Sanchez,*[473] the Second Circuit entertained a § 1983 survival action arising out of a shooting death by a police officer. Under New York law, the action for personal damages survived, but the claim for punitive damages did not.[474] In rejecting the use of the state limitation in a § 1983 action, the Second Circuit relied on *Carlson* and, without identifying or separating the interests at stake, found the state limitation to be "manifestly" inconsistent with federal law.[475]

These analyses of state survival policies independently of state wrongful death policies are closer to the approach utilized by the Court in *Carlson* and seem correct. The Court has often approached § 1983 and *Bivens* actions similarly, despite their different origins, and both have the common purpose of deterring wrongful conduct and providing compensation for victims of illegal governmental conduct.[476]

The deterrence goal of § 1983 and *Bivens* actions is clearly furthered by the availability of wrongful death actions, but survival and wrongful death policies further different interests. Survival actions are brought on behalf of the decedent's estate to obtain compensation for losses prior to death and, thus, enable a decedent to accumulate an estate. Wrongful death actions, on the other hand, whether based on state or federal law, compensate survivors for their losses. The availability of compensation, however, cannot be wholly separated from deterrence for it is the availability of compensatory damages that enables § 1983 and *Bivens* actions to serve their deterrence purpose. Nonetheless, the interest in compensation in survival and wrongful death actions are distinct, and state wrongful death actions may not be adapted to the purposes of survival policies.[477] Thus, even though the Court in *Robertson* discounted the interest of the estate in compensation in pure survival cases, when death results from the complained-of conduct the interest of the estate in compensation for the injuries to the decedent has an inde-

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compared to damages for the loss of enjoyment of life. Blodgett, *Hedonic Damages: A Price on the Pleasure of Life,* A.B.A. J., Feb. 1985, at 25; 28 ATLA L. REP. 102-03 (1985). The latter, however, are a standard element of damages in non-death cases in which injured plaintiffs are denied the ability to fully enjoy the balance of their lives. *See generally* Annot., 34 A.L.R.4TH 293 (1984). In cases involving wrongful killings, however, damages for loss of enjoyment of life look suspiciously like damages that occur after death and are only available in wrongful death actions. *See* Guyton v. Phillips, 532 F. Supp. 1154, 1167 (N.D. Cal. 1981) (refusing to allow damages for loss of earnings after death and loss of society in a survival action).

473. 710 F.2d 907 (2d Cir.), *cert. denied,* 104 S. Ct. 394 (1983).

474. At the time of the injured party's death, New York expressly required claims for punitive damages to abate. This prohibition was subsequently lifted for deaths occuring after Aug. 31, 1982. *See* N.Y. EST. POWERS & TRUSTS LAW § 11-3.2(b) (McKinney Supp. 1984-85).

475. 710 F.2d at 911; *accord* Bell v. City of Milwaukee, 746 F.2d 1205, 1241 (rejecting Wisconsin policy of refusing to permit claims for punitive damages to survive).

476. *See supra* notes 303-04.

477. *Cf.* Burnett v. Grattan, 104 S. Ct. 2924 (1984) (refusing to borrow state statute of limitations that was not adapted to the purposes of § 1983).

pendent impact on deterrence and should not be considered to be met by the availability of a wrongful death action.[478]

2. Section 1983 Wrongful Death and Damages Policies

Courts entertaining § 1983 wrongful death claims by incorporating state wrongful death actions and their damage policies must address many of the issues that arise in survival actions. Because every state permits wrongful death actions, however, courts have not had to consider the availability of survival actions in determining whether § 1983 wrongful death actions are available. Nonetheless, these issues arise when states limit the survivors who can bring wrongful death actions and the available damages, but courts have often constitutionalized these issues and have not approached them as matters of statutory construction.

In addressing state limitations on the availability of wrongful death actions, courts should examine the state policy in light of the purposes of § 1983, and it is necessary to sort out the different interests involved. Although the Court in *Robertson* viewed compensation solely from the perspective of the decedent, in § 1983 wrongful death actions, survivors have an interest in compensation independent of the interest of the decedent or his estate.[479] Similarly, the need for deterrence when the complained-of conduct causes death supports reviewing the availability of wrongful death actions without regard to whether the state would allow an action to survive. The marginal deterrence approach of *Robertson,* however, suggests that a court might rely on the state survival policy because a defendant contemplating an illegal act would unlikely be more deterred knowing that survival actions were available but wrongful death actions were not. Nonetheless, the possibility of eliminating substantial categories of damages for surviving relatives can significantly affect the deterrence purpose of § 1983.

Courts entertaining § 1983 wrongful death actions have generally found statutory ceilings on damages and limitations on the elements of damages to be inconsistent with the purposes of § 1983.[480] To the extent a purpose

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478. The need to analyze survival and wrongful death claims separately may be greater in *Bivens* actions in which there is more uncertainty as to the authority for wrongful death claims. Although the Court could follow its admiralty precedents and incorporate the federal common law of wrongful death into *Bivens* actions, the complexity of such an issue may help explain the decision of the Court in *Carlson* to focus exclusively on the survival of the decedent's personal action. *See supra* note 229.

479. It is possible that, despite *Robertson,* the Court would deal differently with the issue of compensation when death resulted from the complained-of conduct. A purpose of § 1983 is to compensate victims for the violation of their federal rights. When the death is unrelated to the cause of action, however, only the interest of the decedent is considered and that interest is extinguished by the death. On the other hand, when death results from the complained-of conduct, the decedent, through his estate, may still have an interest in compensation.

480. Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) (rejecting $25,000 ceiling on damages for loss of society); Sager v. City of Woodland Park, 543 F. Supp. 282 (D. Colo. 1982) (rejecting $45,000 ceiling and limitation of wrongful death damages to net pecuniary losses).

of § 1983 is to compensate survivors of wrongful killings as well as to deter the wrongful conduct, these decisions seem correct. In reaching these conclusions, however, these courts have not considered the implications of the Court's holding in *Robertson* that § 1983's purpose of compensation is for the individual whose rights were violated, not for his estate.[481]

Courts reviewing the use of state damage restrictions in § 1983 wrongful death cases have generally not addressed whether § 1983 was intended to compensate survivors. Nonetheless, in following the borrowing approach sanctioned by the Court for survival issues, these courts have assumed that § 1983 itself was intended to compensate survivors.[482] Likewise, courts have rarely addressed the extent to which specific limitations on damages reduce the deterrence goal of § 1983. Instead, they have often approached the issue in conclusory terms and have come close to assuming that all state limitations on wrongful death damages are inconsistent with § 1983's purposes.[483] Such an approach, however, may be at odds with the marginal deterrence approach of *Robertson*. Further, as more difficult § 1983 wrongful death cases arise involving state policies denying damages for losses not generally compensated under state law, such as mental anguish and punitive damages,[484] the shortcomings of the borrowing approach become more apparent. These problems, however, are avoided when courts treat § 1983 itself as a wrongful death remedy. In such cases, the inquiry is not whether to reject a state damage limitation but how to construct a federal policy of damages in light of the purposes of § 1983.

Because the interests at stake in § 1983 wrongful death actions differ from those in survival actions, courts entertaining the former should be able to consider the interest of survivors in being compensated in addition to the role of compensatory and punitive damages in deterring prohibited conduct.

The traditional damages available under state wrongful death actions—loss of support, inheritance, services and society—are intended to make survivors whole by providing full compensation. State policies that deny these damages or that place dollar ceilings on them deny survivors full and fair compensation and fail to deter misconduct by prospective defendants. Thus, courts that have reviewed these limitations in § 1983 wrongful death actions have generally rejected them as inconsistent with § 1983's purposes.

More difficult questions, however, are suggested by the increasing number of states that make available wrongful death damages for mental anguish, grief, and sorrow. These damage policies also serve the goal of compensation, albeit more generously, and courts have not hesitated to incorporate them into the borrowed § 1983 wrongful death remedy.[485] The harder question,

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481. *See supra* text accompanying note 200.

482. *See, e.g., Bell,* 746 F.2d at 1251-52.

483. *Cf.* McFadden v. Sanchez, 710 F.2d 907, 911 (2d Cir.), *cert. denied,* 104 S. Ct. 394 (1983) (prohibition on survival of punitives "manifestly inconsistent" with § 1983).

484. *See supra* notes 136-37 and accompanying text.

485. *See, e.g.,* Tuttle v. City of Oklahoma City, 728 F.2d 456, 461 (10th Cir. 1984), *rev'd on other grounds,* 105 S. Ct. 2427 (1985); Grandstaff v. City of Borger, 767 F.2d 161, 172 (5th Cir. 1985).

however, arises when states deny those damages by defining damages narrowly in terms of pecuniary losses. If a central purpose of § 1983 is to provide full compensation to survivors, courts should reject this limitation. Nonetheless, the fact that a state limitation is rejected does not mean that federal courts must allow such damages; rather, their availability should depend on the federal common law of § 1983 damages that the courts have developed in light of the purposes of § 1983.[486]

The interest in compensation may be a stronger basis for rejecting some state limitations on wrongful death damages than the concern for deterrence. For a state limitation on the availability of damages to violate *Robertson*'s marginal deterrence approach, it may be necessary for the prospective defendant to not only be aware of the limitation but also to have some idea how it would affect the intended victim. Of course, when limitations are well known and broadly applicable, the interest in deterrence requires the limitation to be rejected. Thus, state policies that deny wrongful death damages for mental anguish and grief should be rejected. Although a defendant may not have specific knowledge about whether a decedent has survivors who can claim such losses, defendants can generally assume that there will be some survivors who can do so. Likewise, defendants can often assume that certain victims have limited earning potential and are not likely to be providing financial support to dependents at a sufficiently high level to support a large damage award.[487] Finally, Alabama's rejection of all compensatory damages gives prospective defendants the clear message that they only need to avoid reckless conduct to be safe from § 1983 damage awards.

On the other hand, state policies defining the loss of support or prospective inheritance differently or limiting damages for some classes of survivors may encourage prohibited acts only when a prospective defendant is aware of the policy and the impact it will have on the awards to potential survivors. Thus, a technical state policy of deducting personal living expenses from an award measured in terms of an estate to be inherited is unlikely to have even a marginal impact on deterrence, and a court would be justified in not rejecting such a method of calculating damages under § 1988.[488] Likewise, a borrowed state policy that only denied damages for mental anguish and

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486. *See supra* notes 305-18 and accompanying text.

487. For example, Colorado's policy of limiting wrongful death damages to net pecuniary losses, which excludes claims for loss of society and punitive damages, *see supra* text accompanying note 178, applies to significantly limit wrongful death damages regardless of the circumstances of the decedent or the survivors, and should be rejected on its face without regard to whether prospective defendants have specific knowledge of it.

488. When courts entertain § 1983 wrongful death actions independently of state law, they may still be permitted to utilize state measurements of damages as a matter of convenience. *Cf.* Carlson v. Green, 446 U.S. 14, 24-25 n.11 (1980) (suggesting use of state policies for convenience); *see, e.g.*, McQurter v. City of Atlanta, 572 F. Supp. 1401, 1422 (N.D. Ga. 1983) (using Georgia definition of damages to permit survivors to recover the "full value of the life of the decedent" without regard to his living expenses), *appeal dismissed,* 724 F.2d 881 (11th Cir. 1984).

grief to siblings might be consistent with *Robertson*'s narrow approach to deterrence.

State limitations on the availability of punitive damages in § 1983 wrongful death actions, however, raise different issues. Punitive damages are available in § 1983 actions as a matter of federal law for the purpose of curbing malicious or reckless behavior.[489] Because compensation is not one of the purposes of punitive damages, it is not necessary to separate the respective interests of the decedent and his survivors in such damages. The availability of punitive damages, whether in the survival or wrongful death action, serves the identical purpose of deterring otherwise culpable defendants from engaging in extreme conduct. Thus, the deterrence purpose of § 1983 is served by a state policy that made punitive damages available in either the survival or wrongful death action but not in both. On the other hand, a state policy that denied punitive damages in both actions would single out § 1983 actions involving wrongful killings for less favorable treatment than other § 1983 actions and would be inconsistent with the federal law of § 1983 damages and with the purposes of § 1983.[490]

V. SECTION 1983 AS A WRONGFUL DEATH REMEDY: A PROPOSED CONSTRUCTION

It is not necessary to look to state law to fill gaps in the § 1983 cause of action when federal law provides the relevant policies. Thus, when no answer is immediately apparent from the language of § 1983, the language, legislative history, and purposes of § 1983 should nonetheless be examined to determine whether the statute itself constitutes a wrongful death remedy.[491] The Supreme Court has not undertaken this inquiry, and most lower courts that have reviewed the legislative history of § 1983 in this context have done so to determine whether state wrongful death remedies may be incorporated into § 1983,[492] or whether state limitations on wrongful death remedies, once borrowed, should be rejected as inconsistent with the purposes of § 1983.[493]

A. Proposed Construction

There is a clear and simple answer to the question of the availability of § 1983 as a wrongful death remedy independent of state law. That answer,

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489. Smith v. Wade, 461 U.S. 30 (1983).

490. *See supra* notes 473-75 & 483 and accompanying text.

491. A § 1983 wrongful death action can also be established by reliance on the federal common law, *cf.* Moragne v. States Marine Lines, 398 U.S. 375 (1970) (interpreting general maritime law), if § 1988 does not preclude reliance on the federal common law, and if the use of § 1983 as a wrongful death remedy is consistent with its legislative history and purposes.

492. *See, e.g.*, Brazier v. Cherry, 293 F.2d 401 (5th Cir.), *cert. denied* 368 U.S. 921 (1961).

493. *See, e.g.*, Hall v. Wooten, 506 F.2d 564, 566-67 (6th Cir. 1974); Sager v. City of Woodland Park, 543 F. Supp. 282, 287-88 (D. Colo. 1982).

which is applicable uniformly throughout the country, is suggested by § 1983's "party injured" language, which has never been reviewed by the Supreme Court. Although most courts have assumed that the plaintiff—the "party injured" in § 1983—is identical to the "person" whose rights are violated,[494] that is not necessarily the case. A textual argument can be made that § 1983 itself authorizes parties injured by the death of another to recover damages suffered from that injury.[495] Thus, § 1983 may be read as permitting the third-party standing of survivors suing because they were injured by conduct that not only violated the decedent's constitutional rights but also took his life.

Such a proposal may seem bold. It is consistent, however, with the usage in the other sections of the Civil Rights Act of 1871 and with the civil actions created by the other Reconstruction-era civil rights acts. It is also supported by § 1983's legislative history and purposes. Moreover, the use of § 1983 to pursue a wrongful death claim is consistent with the state of the law in 1871 when the predecessor of § 1983 was enacted. Although the common law did not recognize a wrongful death action, the adoption of statutory wrongful death actions by the majority of American jurisdictions demonstrates that in 1871 it was well established that survivors had wrongful death remedies available to them. Finally, the use of § 1983 to authorize third-party standing in cases in which the decedent can no longer seek redress for the violation of his rights is consistent with the Court's willingness to authorize third-party standing in other limited circumstances as well as with the prudential limitations on the case or controversy requirement. Thus, § 1983 can be read as ex proprio vigore establishing a wrongful death remedy, and it is not necessary to consult state law to determine whether § 1983 can be used to pursue a wrongful death claim.

B. Legislative History

The legislative history of the Civil Rights Act of 1871 supports the view that the cause of action created by § 1 should be available to permit survivors to recover damages they suffered as a result of an unconstitutional killing. The 42d Congress was vitally concerned with wrongful killings, and the argument that the new civil actions they created only reach wrongful killings when state law so provides must be rejected.

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494. Although a few courts have construed the "party injured" language in considering whether an estate or personal representative could succeed to a decedent's § 1983 action, *see* Davis v. Johnson, 138 F. Supp. 572 (N.D. Ill. 1955), no reported cases have been found in which courts discussed the phrase in depth or considered whether the party injured may be someone other than the person whose rights were violated.

495. *See* Note, *supra* note 409 (criticizing *Brazier* for failing to look to federal law and interpret the "party injured" language). One commentator, however, has argued that it would be "a strained reading of section 1983 to say that the 'person' deprived of his rights and the 'party injured' were not always identical." Theis, *supra* note 268, at 690. *But see infra* note 552.

The Supreme Court has reviewed the legislative history of § 1 of the Civil Rights Act of 1871 many times to answer questions concerning the scope of § 1983. Although the Court has considered the definition of "person" to determine who may be a defendant in § 1983 actions,[496] it has never reviewed the legislative history for the purpose of addressing who is a "person" with rights secured by § 1983 or a "party injured" under the statute.[497] Nor has the Court considered whether the legislative history and purposes of § 1983 shed any light on the statute's availability as a wrongful death remedy.[498]

The Civil Rights Act of 1871 was a congressional response to widespread lawlessness in the southern states and the inability and unwillingness of state and local officials to curb it.[499] Prior legislation had dealt with official abuses directed toward blacks and Union sympathizers by creating federal criminal remedies and expanding the president's police power.[500] The Civil Rights Act of 1871, however, focused on the private lawlessness and atrocities of the Ku Klux Klan and similar organizations.[501] As ultimately passed, the Act increased the power of the federal government. The president was given expanded power to use the military to protect federal rights[502] and temporary power to suspend habeas corpus;[503] the federal criminal law was expanded to reach private conspiracies;[504] and, a civil cause of action against such

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496. *See, e.g.,* Monell v. Department of Social Servs., 436 U.S. 658 (1978).

497. The Court has looked to the Dictionary Act, Act of Feb. 25, 1871, ch. 71, §2, 16 Stat. 431, for assistance in defining which "persons" may be defendants, *see Monell,* 436 U.S. at 688-89, but the Act provided no guidance. Nor does it shed any light on whether estates, executors, survivors or other personal representatives are "persons" or "parties injured" under § 1983. *See also* 1 U.S.C. §1 (1982) (codified version of Dictionary Act).

498. Lower courts have addressed the meaning of "person" in § 1983 in the course of determining who has rights secured by the fourteenth amendment. *See, e.g.,* Pennsylvania v. Porter, 659 F.2d 306 (3d Cir. 1981) (state has no standing as a plaintiff in a § 1983 case involving police abuses); Adams v. City of Park Ridge, 293 F.2d 585 (7th Cir. 1961) (corporation may assert its constitutional rights under § 1983); Philadelphia Newspapers, Inc. v. Borough Council, 381 F. Supp. 228, 231 n.2 (E.D. Pa. 1974) (corporation may sue as a "person" under § 1983); City of South Portland v. State, 476 A.2d 690 (Me. 1984) (city cannot be a plaintiff in a § 1983 case against the state because it has no constitutional rights against the state); *see also* Note, *The Fetus Under Section 1983: Still Struggling for Recognition,* 34 SYRACUSE L. REV. 1029 (1983) (fetus cannot be a plaintiff under § 1983). The reasoning on these issues, however, is often circular. Courts and commentators have looked to the fact that the putative plaintiffs may not possess the constitutional rights they are seeking to conclude they are not a "person" who can sue under § 1983.

499. *See generally Developments in the Law—Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1153-56 (1977).

500. *Id.* at 1143-44.

501. *See* Wilson v. Garcia, 105 S. Ct. 1938, 1947 (1985); Briscoe v. LaHue, 460 U.S. 325, 336-40 (1983).

502. Section 3 authorized the president to employ the federal militia to suppress "insurrection domestic violence, unlawful combinations, or conspiracies" that violate federal law when state authorities are "unable to protect, or . . . fail in or refuse protection of the people in such rights" and such failures are deemed to be denials of equal protection.

503. The President in his message suggested that the urgent legislation need only be temporary, but only § 4, which authorized suspensions of the writ of habeas corpus, had a sunset provision under which it expired at the end of "the next regular session of Congress."

504. *See* § 2, Civil Rights Act of 1871, 17 Stat. 13.

conspiracies was created.[505] The far-reaching proposals of Senator Sherman to impose an affirmative duty on counties to prevent private violence were rejected, but a compromise civil action for nonfeasance was created.[506] Finally, the Act included a relatively uncontroversial provision creating a civil remedy against persons who acted under color of state law to violate the constitutional rights of persons within the United States.[507]

On March 23, 1871, President Grant had sent an urgent message to Congress describing conditions in the southern states that rendered "life and property insecure" and urging the passage of legislation to "effectually secure life, liberty, and property, and the enforcement of the law in all parts of the United States."[508] At the time the message arrived, Congress had been considering a number of proposals to enforce the fourteenth amendment[509] and had recently received a lengthy investigative report describing the widespread lawlessness in a number of the southern states, particularly North Carolina, and the complicity of state and local officials in that lawlessness.[510]

President Grant's message appears to have been a catalyst for the Republicans who controlled Congress, and on March 28, 1871, five days after that message was received, Representative Shellabarger, the chair of the select committee to which the President's message was sent, presented a bill to the House of Representatives.[511]

Despite the proposal's focus on private lawlessness, it also expanded the available sanctions against state and local officials who acted to deprive persons of their constitutional rights. This was accomplished by creating a civil counterpart to earlier criminal legislation that prohibited actions taken under color of state law violative of federal rights, including actions that involved wrongful killings.

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505. *Id.*

506. Section 6, Civil Rights Act of 1871, 17 Stat. 13. *See* Monell v. Department of Social Servs., 436 U.S. 658, 664-89 (1978) (reviewing the legislative history of Senator Sherman's proposed amendment).

507. *See supra* note 272.

508. President Grant's message to Congress provided in its entirety:

> A condition of affairs now exists in some of the States of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenues dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. It may be expedient to provide that such law as shall be passed in pursuance of this recommendation shall expire at the end of the next session of Congress. There is no other subject on which I would recommend legislation during the present session.

CONG. GLOBE, 42d Cong., 1st Sess. 236 (1871).

509. *See, e.g.*, S. 99, CONG. GLOBE, 42d Cong., 1st Sess. 21 (1871); H.R. 189, CONG. GLOBE, 42d Cong., 1st Sess. 173 (1871).

510. S. REP. No. 1, 42d Cong., 1st Sess. (1871). *See* Monroe v. Pape, 365 U.S. 167, 174 (1961).

511. *See* CONG. GLOBE, 42d Cong., 1st Sess. 317 (1871).

In presenting the proposal, Representative Shellabarger informed the House of Representatives that § 1 of the Act was modeled after the criminal provisions of § 2 of the Civil Rights Act of 1866. Aside from differences concerning the broader reach of the civil remedy, which was not limited to former slaves, Shellabarger stated that the earlier statute "provides a criminal proceeding in identically the same case as [§ 1] . . . provides a civil remedy."[512] Because § 2 of the Civil Rights Act of 1866[513] had extended the criminal sanction to situations in which persons acting under color of state law deprived others of their life,[514] there can be little doubt that § 1 of the Civil Rights Act of 1871 was also intended to provide a civil remedy in such cases. Moreover, in defending the constitutionality of legislation to secure the rights of citizens, Shellabarger noted how "plainly and grossly absurd" it would be to deny such power to the national government and "leave all the protection and law-making to the very States which are denying the protection."[515]

The debate on the Civil Rights Act of 1871 makes clear that its proponents were vitally concerned with the unlawful killings that characterized the reign of terror in the southern states. They repeatedly referred to wrongful killings

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512. CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871).

513. The Civil Rights Act of 1866 had been enacted prior to the proposal of the fourteenth amendment, and was re-enacted after its ratification. *See* Jones v. Mayer, 392 U.S. 409, 436-37 (1968). The full text of § 2 is as follows:

> SEC. 2 *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

514. Although § 2 of the Civil Rights Act of 1866 did not expressly proscribe murder, its legislative history demonstrates it was aimed at killings by state or local officials. Section 2 created a criminal sanction when there was a "deprivation of any right secured or protected by this act." As originally introduced, § 1 of the 1866 Act had expansively protected "civil rights" and "immunities" from discrimination based on race or slavery; it also guaranteed all inhabitants the "same right . . . to full and equal benefit of all laws and proceedings for the security of person and property. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). Opposition to the breadth and ambiguity of this formulation arose in the House because of concerns that the term "civil rights" might be extended to political and social rights, despite the efforts of proponents to present the bill as one of limited objectives. For example, Representative James Wilson, the bill's manager, strongly denied that this version reached the political right of suffrage or the right of equality in jury service or public school attendance. Such rights were not, he argued, civil rights which he defined to include a "right of personal security." *Id.* at 1117-18. Although proponents of the Act deleted the objectionable phrase "civil rights" after recommittal to committee by the House, the bill continued to enumerate the specific rights protected from discriminatory treatment, including the guarantee of personal security. *See generally* 1 J. COOK & J. SOBIESKI, *supra* note 350, at ¶ 1.19. Thus, under the criminal provision, a racially discriminatory killing was subject to criminal penalties.

515. CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871).

in identifying the evils they were addressing, and they relied extensively on the investigative report that vividly described the state of lawlessness.[516] Representative Lowe of Kansas, a Republican proponent of the Act, stated as follows:

> While *murder* is stalking abroad in disguise, while whippings and *lynchings* and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice.[517]

In summarizing the concern about the actions of the southern states, Representative Beatty of Ohio noted that

> certain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable . . . [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to pnnishment or afford protection or redress to the ontraged and innocent.[518]

Finally, Congressman Butler, although disappointed by the failure to obtain an even stronger bill, remarked as follows:

> This, then, is what is offered to the people of the United States as remedy for wrongs, arsons, and murders done. This is what we offer to a man whose house has been burned, as a remedy; to the woman whose husband has been murdered, as a remedy; to the children whose father has been killed, as a remedy.[519]

Although some of these comments refer to the private lawlessness to which the civil and criminal remedies created by § 2 of the Act were addressed,[520] there is no indication in the legislative debates that Congress intended to create remedies for killings that resulted from private conspiracies but not from official lawlessness. Moreover, the criminal sanction from which § 1 was derived was clearly available when the perpetrator acted under color of law,[521] and the tie-in between the new civil remedy and its criminal counterpart is unmistakable. Thus, there is strong support for the conclusion that wrongful killings under color of law were not only actionable in the courts of the United States through the criminal sanction, but also gave rise to a civil claim under § 1 of the Civil Rights Act of 1871.[522]

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516. *See also* Monroe v. Pape, 365 U.S. 167, 174 (1961) (reference to reliance on this report).

517. CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871) (emphasis added).

518. *Id.* at 428.

519. *Id.* at 807.

520. References in the legislative history to murder and murderers are commonplace and are often not tied to specific sections of the proposal.

521. *See* Screws v. United States, 325 U.S. 91 (1945).

522. Wrongful killings that result from private conspiracies are also subject to a criminal sanction under 18 U.S.C. § 241 (1982), the successor to the criminal sanction in § 2 of the Civil Rights Act of 1871. For the same reasons that § 1983 is available as a remedy for wrongful killings under color of law, 42 U.S.C. § 1985(3) (1982), which is the current version of one of the civil conspiracy actions created by § 2 of the Civil Rights Act of 1871, should be available as a remedy for wrongful killings that result from private conspiracies to violate the equal protection requirement. *See also infra* notes 534-37 and accompanying text.

The absence of detailed discussion on the reach of § 1 is not surprising given the lack of controversy concerning the provision. Its proponents accepted that it did not confer new rights, but only a new civil remedy available in federal court.[523] On the other hand, § 2, which created a civil and criminal remedy against private conspiracies, was controversial, and the debate on it was intense. As originally introduced, § 2 was only a criminal provision, but it proscribed private conspiracies to perform acts that violated the "rights, privileges, or immunities" of other persons. The criminal acts were then enumerated, and expressly included murder.[524]

Opponents of the legislation argued that Congress lacked power under the fourteenth amendment to regulate private conduct and that only the states could enact criminal codes.[525] Even some Republican supporters objected to the breadth of the original formulation,[526] and eventually Representative Shellabarger offered an amended version of § 2 to create a civil remedy and to more closely tie the underlying rights to the fourteenth amendment.[527] In doing this, the amended bill dropped all references to specific crimes, but there is no indication of any intent to exclude from the proscribed conspiracies those that achieved their prohibited evils through murder, or to create a civil remedy under § 2 that was not as broad as the criminal one. The controversy involved federalizing responsibility for enforcing what opponents viewed as state law, and no suggestion was made that the new remedies would be available when the conspiracy maimed its victims but not when it killed them.

Thus, Judge Brown in *Brazier v. Cherry* concluded:

> [I]t defies history to conclude that Congress purposefully meant to assure to the living freedom from such unconstitutional deprivation but that, with like precision, had meant to withdraw the protection of the Civil

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523. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (Rep. Shellabarger), 481-82 (Rep. Wilson), 568 (Sen. Edmunds) (1871).

524. Section 2 was intended to avoid the defects of the Civil Rights Act of 1870, and, as introduced, § 2 provided:

> That if two or more persons shall, within the limits of any State, band or conspire together to do any act in violation of the rights, privileges, or immunities of another person, which, being committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny; and if one or more of the parties to said conspiracy shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy, whether principals or accessories, shall be deemed guilty of a felony, and, upon conviction thereof, shall be liable, . . . and the crime shall be punishable as such in the courts of the United States.

Id. at app. 68-69 (Rep. Shellabarger).

525. *See generally* Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U.L.J. 331 (1967).

526. CONG. GLOBE, 42d Cong., 1st Sess. 382-84 (Rep. Hawley), app. 110-13 (Rep. Moore), app. 206-10 (Rep. Blair) (1871).

527. *Id.* at 477-78.

> Rights statutes against the peril of death. The policy of law and the legislative aim are certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple.[528]

Although this statement was made in the course of holding that a § 1983 action, in conjunction with state law, survived the death of a victim and could be used as a wrongful death remedy, the conclusion that the 42d Congress intended § 1 to reach wrongful killings is relevant to the question of how to construe § 1983 in the first place.

This analysis is also consistent with a textual review of the other surviving Reconstruction-era private civil rights actions, including the civil actions created by other provisions of the Civil Rights Act of 1871. Section 1981 of Title 42, which is derived from the Civil Rights Acts of 1866 and 1870,[529] provides "persons within the jurisdiction of the United States" the same right to make contracts, and to participate in judicial proceedings for the security of person and property, as is enjoyed by white citizens. Section 1982 of Title 42, which is also derived from the Civil Rights Act of 1866,[530] limits its protection to "citizens of the United States" and provides them the same property rights as are enjoyed by white citizens. Neither of these sections contains any reference to the appropriate remedy or to the party who can seek redress for their violation.[531] Thus, the text of these sections does not shed any light on the proper interpretation of the "party injured" language of § 1983, and whether persons other than those whose rights are violated may sue depends on an analysis of the language and purposes of § 1983.[532]

However, § 1985, which is derived from § 2 of the Civil Rights Act of 1871,[533] also contains the phrase "party injured," and the textual argument made under § 1983 is similar to that made under § 1985. Section 1985 proscribes five separate classes of conspiracies[534] and contains a single remedial section providing that "the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."[535] Under these provisions the "party injured" either by an act under color of state law or pursuant to a proscribed conspiracy can be a person other than the person whose underlying rights

528. 293 F.2d 401, 404 (5th Cir.), *cert. denied,* 368 U.S. 921 (1961).

529. *See* § 1, Civil Rights Act of 1866, 14 Stat. 27; §§ 16, 18, Civil Rights Act of 1870, 16 Stat. 144.

530. *See* § 1, Civil Rights Act of 1866, 14 Stat. 27.

531. *But see* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238-40 (1969) (implying a damage remedy into § 1982).

532. *See infra* note 550.

533. 17 Stat. 13 (1871).

534. *See* Kush v. Rutledge, 460 U.S. 719 (1983) (analyzing § 1985).

535. 42 U.S.C. § 1985(3) (1982).

were violated.[536] Moreover, there is persuasive legislative history that supports interpreting § 2 of the Civil Rights Act of 1871 as being available to survivors in cases that involve wrongful killings.[537]

There is, however, a provision of the Civil Rights Act of 1871 that expressly provides survivors a legal remedy, and the argument has been made that its presence negates any congressional intent to permit § 1983 actions to be available as a wrongful death remedy.

Section 6 of the Civil Rights Act of 1871 was the watered-down version of Senator Sherman's amendment that was rejected twice by the House.[538]

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536. The version of this remedial language as originally enacted is also consistent with the reading that the injured party and the party whose rights are deprived need not be the same person:

> And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy . . . .

Section 2, Civil Rights Act of 1871, 17 Stat. 13.

537. In reporting § 6 of the Civil Rights Act of 1871, which now appears at 42 U.S.C. § 1986 (1982), Representative Shellabarger, the bill's floor manager, addressed the measurement of damages in death cases and made clear his belief that the rejection of the common law bar on wrongful death actions in § 6 was equally applicable to the civil conspiracy actions under § 2 of the Act, which are now contained in 42 U.S.C. § 1985 (1982):

> Now, here my friend from New York [Mr. Cox] asked how the damages should be measured, and somebody replied, "Let them be measured in a hat." But there is one method of measuring damages, as it exists in our State, to wit: that if the death of a party shall be occasioned there shall still be a right of action. And my interpretation is . . . that this language operates back upon the second section [current version at 42 U.S.C. § 1985 (1982)]. It will be remembered that the second section gives a civil right of action for injury to person or property . . . but it gives no right of action where a death occurs. I think that is a defect in the second section. And, at common law, where death ensues from a wrong against a person, there is no right of action . . . . Now, I think this amendment will give a right of recovery in all cases, either under the second section or under this section, where death ensues.

CONG. GLOBE, 42d Cong., 1st Sess. 805 (1871).

It could also be argued that the language of § 1 of the Civil Rights Act of 1871 incorporating the procedural requirements of the Civil Rights Act of 1866, *see supra* note 325, created a mechanism, now contained in § 1988, for initially borrowing and then reviewing state wrongful death policies to determine if they were consistent with the purposes of § 1983. A similar borrowing provision was also included in the cause of action created by § 2 of the Civil Rights Act of 1871, which created a civil action against certain proscribed conspiracies. Because Congress had not yet enacted the Conformity Act of 1872, 17 Stat. 196, 197, most federal courts were required to follow a system of "static conformity," *see supra* note 405, in which they borrowed state practices established prior to Lord Campbell's Act and the widespread adoption of wrongful death statutes in this country. *See supra* notes 77-79 and accompanying text. Nonetheless, at the time of the passage of the Civil Rights Act of 1871, the availability of §§ 1 and 2 as wrongful death actions could be established through a statutorily authorized borrowing of state law, as now done under § 1988. Moreover, the legislative history of the civil actions created by §§ 1 and 2 of the Civil Rights Act of 1871 strongly suggests that they were both intended to be available as wrongful death remedies when proscribed actions took the lives of victims as well as violated those victims' federal rights.

538. *See* Monell v. Department of Social Servs., 436 U.S. 658, 666-69 (1978).

As ultimately enacted, however, § 6 created a civil remedy against persons who are aware of conspiracies under § 1985 and who have the power to prevent them or aid their prevention but neglect or refuse to do so. The section made such persons "liable to the person injured, or his legal representatives, for all damages caused by any such wrongful act which such . . . person . . . by reasonable diligence could have prevented."[539] It then went on to contain the only explicit survival or wrongful death provision in the civil rights acts:

> [I]f the death of any person shall be caused by any such wrongful act and neglect, the legal representatives of such deceased person shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of such deceased person, if any there be, or if there be no widow, for the benefit of the next of kin of such deceased person.[540]

This provision supports the arguments that the "party injured" throughout the Civil Rights Act of 1871 is the party whose rights were violated, and that when Congress intended to provide remedies to other "legal representatives" it did so explicitly.[541] These arguments, however, must be rejected. The inclusion of an actionable interest in specified legal representatives when death resulted from the illegal conduct can best be explained as an effort to limit the unusual form of liability imposed by § 6 of the Civil Rights Act of 1871, and not as a limitation on the actions available under other sections of the Act.[542] Likewise, the inclusion of a ceiling on the damages available in actions under § 6 for nonfeasance in no way supports the conclusion that Congress intended that ceilings be used in the more traditional actions for misfeasance under § 1, even when such actions are brought on behalf of survivors.[543]

Further support for the use of § 1983 as a wrongful death remedy is available from a review of the state law against which the 42d Congress legislated. Although the common law in 1871 denied the existence of a cause of action for wrongful death, most states rejected the common law rule by

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539. *See* § 6, Civil Rights Act of 1871, 17 Stat. 13. The phrase "person injured" was changed to "party injured" in the 1874 codification of federal law. *See* U.S. REV. STAT. § 1981 (1874). This provision is now contained in 42 U.S.C. § 1986 (1982) in nearly identical language.

540. § 6, Civil Rights Act of 1871, 17 Stat. 13.

541. *See* Brazier v. Cherry, 293 F.2d 401, 410 (5th Cir. 1961) (De Vane, J., dissenting) (relying on this negative inference).

542. *See* 15 VAND. L. REV. 623 (1962) (arguing that the civil action for passive nonfeasance created by § 6 does not support an inference that wrongful death suits by survivors are unavailable under §§ 1983 and 1985, which require active malfeasance).

543. Although the Court has sometimes looked to other sections of the Civil Rights Act of 1871 in construing § 1983, *see supra* notes 319-22 and accompanying text, in Robertson v. Wegmann, 436 U.S. 584, 589 n.4 (1978), Justice Marshall characterized § 1986 as a survivorship provision and found it only applicable to the wrongs mentioned in § 1985. Congress also adopted a specific statute of limitations to apply to the unique actions for nonfeasance created by § 6 of the Civil Rights Act of 1871, but the Supreme Court has declined to apply it to actions created by other sections of the Act. *See* Burnett v. Grattan, 104 S. Ct. 2924, 2929 (1984).

enacting general wrongful death statutes patterned after Lord Campbell's Act.[544] Thus, by 1871 there was no well-established state policy of denying wrongful death remedies to survivors, and the availability of state wrongful death remedies was the rule, not the exception. The existence of wrongful death statutes had become part of American jurisprudence, and it is likely that members of the 42d Congress were aware of the expanding right of survivors to bring wrongful death actions.[545]

Although other aspects of the law of wrongful death, especially those involving damages, were in a state of flux in 1871, the immunity from civil suit previously given those whose illegal actions resulted in a killing was no longer well established. Thus, the widespread availability of wrongful death actions makes it inappropriate to condition the use of § 1983 as a wrongful death remedy upon the existence of express legislative history, and any ambiguity from the language of § 1983 and the use of the phrase "party injured" should be resolved in light of the purposes of the legislation. It is simply not convincing to argue that Congress, in making civil remedies available under § 1 of the Civil Rights Act of 1871, chose to exclude from the phrase "party injured" persons whose injury resulted from the wrongful killing of a family member.[546]

C. *Third-Party Standing*

The traditional policy of the federal courts is that parties may not assert the rights of others,[547] and some courts have rejected the use of § 1983 as a wrongful death remedy because they have been reluctant to transform § 1983 into a third-party standing statute.[548] These concerns, however, are misplaced.

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544. *See supra* note 78.

545. *See supra* notes 252 & 537.

546. The interpretation of the "party injured" language of § 1983 as referring to someone other than the person whose rights were violated raises the question of whether there are any limits as to who can qualify as a "party injured" for the purpose of bringing a § 1983 wrongful death action. *Cf.* Bell v. City of Milwaukee, 746 F.2d 1205, 1247 (7th Cir. 1984) (expressing need to define some principles to limit potential parties in refusing to recognize a constitutional interest in siblings). As can be seen from the use of § 1983 in other contexts, however, suits have often been brought by nonrelatives with professional or other relationships with persons whose rights were violated. *See, e.g.,* Singleton v. Wulff, 428 U.S. 106 (1976).

The better way to proceed in the context of § 1983 actions involving wrongful killings is to look for guidance in the legislative history of § 1983. For example, in adopting § 6 of the Civil Rights Act of 1871, Congress exhibited special concern for the families of the deceased, including widows and next of kin. This provides support for a construction that permits wrongful death suits by parents and children. *See supra* text accompanying note 519.

547. *See, e.g.,* Warth v. Seldin, 422 U.S. 490, 499 (1975) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.").

548. *See, e.g.,* Jones v. Hildebrant, 191 Colo. 1, 550 P.2d 339 (1976), *cert. dismissed as improvidently granted,* 432 U.S. 183 (1977). The issue of whether a party may assert the rights of others is distinct from whether a surviving relative had an actionable constitutional interest in a continued relationship with the decedent.

The case or controversy requirement of article III of the Constitution does not prohibit third-party standing, but the Supreme Court has developed prudential limitations on when it will permit an injured party to assert the rights of others.[549] When Congress has created a statutory action on behalf of a third party, the Court has deferred to this judgment.[550] In addition, when there is a special relationship between the party injured and the person whose rights have been violated, the Court has been willing to allow the injured party standing to advance the rights of the third party.[551]

Although the Court has not addressed the issue of third-party standing in terms of the text of § 1983, it has permitted parties who have been injured to assert the rights of others in actions authorized by § 1983.[552] Typically, such cases have involved the assertion of constitutional claims on which the legislative history of § 1983 had little relevance, but the availability of § 1983 in such circumstances demonstrates there is no constitutional or prudential bar to § 1983's being used as a third-party standing statute.[553]

When § 1983 is used to raise wrongful death claims, however, its legislative history and purposes have a special significance that justify its use as a third-party standing statute. Moreover, as Professor Currie recently noted, many standing questions, especially those involving statutory actions, are really questions as to the definition of the cause of action and require determinations of what action is authorized and who may bring it.[554]

Permitting survivors to obtain damages for losses they suffered as a result of the unconstitutional killing of a close relative is also consistent with the prudential doctrines that govern when the Court allows third-party standing. In *Warth v. Seldin*,[555] the Court denied city taxpayers standing to advance the rights of low-income persons allegedly excluded from a suburban community by restrictive zoning ordinances. Unlike the city taxpayers who had no special relationship with those whose rights they were seeking to enforce, survivors pursuing wrongful death actions are, by definition, claiming a close relationship with the decedent. The termination of that relationship by the

549. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-23 to -29, at 100-14 (1978).

550. *See, e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 208-12 (1972) (statutory language broadly defining "person aggrieved" as "[a]ny person who claims to have been injured by a discriminatory housing practice" gives person not discriminated against standing to sue claiming someone else was subjected to a racially discriminatory housing practice).

551. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 117-18 (1976) (special relationship justifies permitting physicians to raise patients' privacy rights).

552. *See generally* Rohr, *Fighting for the Rights of Others: The Troubled Law of Third-Party Standing and Mootness in the Federal Courts*, 35 U. MIAMI L. REV. 393, 460 n.289 (1981) (identifying cases in which the Court implicitly permitted parties to raise the rights of others under § 1983). Professor Rohr also suggests a possible construction of § 1983 under which the "party injured" need not be the person whose rights were deprived, and concludes that § 1983 poses no obstacle to third-party standing. *Id.* at 460-61 n.289.

553. *See, e.g.*, Secretary of State v. Joseph H. Munson Co., 104 S. Ct. 2839 (1984); Craig v. Boren, 429 U.S. 190 (1976); Singleton v. Wulff, 428 U.S. 106 (1976).

554. *See* Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41 (1982).

555. 422 U.S. 490 (1975).

wrongful killing and the resulting damages to the survivor provide the survivor with the constitutionally required "injury in fact" as well as with a special relationship that justifies permitting the survivor to pursue the rights of the decedent. Moreover, unlike the circumstances in *Warth* in which the low-income persons were at least in theory able to pursue their own rights, decedents will have only rarely been able to do so.[556]

The doctrine of third-party standing has often been criticized,[557] and it has been argued that courts should not extend that doctrine to cases involving damage claims.[558] Nonetheless, federal courts commonly award damages to injured parties asserting the rights of third parties in diversity cases under state wrongful death statutes,[559] in special damage actions under federal statutes,[560] and under general maritime law.[561] Such cases clearly meet the prudential limitations on third-party standing. The plaintiff—the survivor—is injured because of the death of the decedent; the rights enforced by the plaintiff are those of the decedent. More importantly, the availability of these third-party damage actions further supports the observation that the issue of third-party standing can often be reduced to a question of defining the cause of action.[562] Thus, the availability of § 1983 as a wrongful death action ultimately turns on the issue of statutory construction and the strength of the argument that the language, legislative history, and purposes of § 1983 support its use as a wrongful death remedy.

VI. THE CONTOURS OF THE § 1983 WRONGFUL DEATH ACTION

If the Supreme Court interprets § 1983 as a wrongful death remedy regardless of state law, it will still have to answer questions typically ad-

556. In some cases, a substantial amount of time may elapse between the injury and death, thus enabling the person whose rights were violated to bring his own action. *Cf.* Delesma v. City of Dallas, 770 F.2d 1334 (5th Cir. 1985) (wrongful death actions brought by children of decedent based on a 1960 incident alleged to have caused death in 1982). The Court, however, has not required a showing that the party whose rights are being enforced by a third party was unable to advance them himself. *See* Secretary of State v. Joseph H. Munson Co., 104 S. Ct. 2839, 2847 (1984).

557. *See, e.g.*, Sedler, *The Assertion of Constitutional Jus Tertii: A Substantive Approach*, 70 CALIF. L. REV. 1308 (1982).

558. *See* Rohr, *supra* note 522, at 459-61, 463 (arguing that third-party standing should only be available in cases involving claims for declaratory and injunctive relief).

559. *See, e.g.*, Dennick v. Railroad Co., 103 U.S. 11 (1880).

560. *See* Federal Employers' Liability Act, ch. 149, 35 Stat. 65 (1908) (current version at 45 U.S.C. §§ 51-60 (1982)); Merchant Marine Act of 1920 (Jones Act), ch. 250, § 33, 41 Stat. 1007 (current version at 46 U.S.C. § 688 (1982)); Death on the High Seas Act of 1920, ch. 111, 41 Stat. 537 (current version at 46 U.S.C. §§ 761-68 (1982)).

561. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

562. Unlike the clear congressional authorization of third-party damage actions under the Federal Employers' Liability Act and similar statutory areas, *see supra* note 560, Congress has authorized federal courts to hear wrongful death claims under the general maritime law by implication through the jurisdictional statute. Nonetheless, whether based on statutes or the common law, the issue of the availability of wrongful death remedies reduces to a question of the definition of the available cause of action and not standing.

dressed in wrongful death statutes, such as who may sue, what elements of damages are available, and how to distribute any awards. In fact, the difficulty of some of these issues and their legislative nature has made some courts reluctant to develop nonstatutory wrongful death remedies.[563] Nonetheless, there are tools available to address these problems. The Federal Rules of Civil Procedure provide guidance for managing litigation and determining who is a proper plaintiff, and damage issues that arise are governed by the same principles of compensation used in determining available damages in other § 1983 cases. Moreover, the damages available may help define both who is a proper party and how to distribute the proceeds from successful suits. Finally, there may be room for a limited use of state law to address some of these questions.[564]

Although the emergence of § 1983 as a wrongful death remedy independent of state law will raise a number of unique damage and other issues that do not typically arise in § 1983 litigation, this is not a basis for rejecting the use of § 1983 as a wrongful death remedy.[565] The federal common law that governs damage issues and other aspects of § 1983 is capable of responding to the requirements of the § 1983 wrongful death action. Finally, if the problems of determining what damages are available in § 1983 wrongful death actions and these related questions prove too difficult or if the Court's resolution of them is unacceptable, Congress can address them through legislation as it has in other statutory wrongful death actions.

A. Proper Parties

The question of who can bring a § 1983 wrongful death action involves a determination of both the party in whose name a case may be filed and the identity of the party for whose benefit it is brought. The latter issue is one of substance and its resolution depends initially on the language, legislative history, and purposes of § 1983.

Regardless of whether state or federal law is used to identify the parties for whose benefits wrongful death actions are brought, there will be technical issues of who is a proper party. With state law no longer the starting point, federal courts can address these issues by looking to the Federal Rules of Civil Procedure and by considering the nature of the claim and the damages being sought.

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563. *See* Jones v. Hildebrant, 191 Colo. 1, 8 n.11, 550 P.2d 339, 345 n.11 (1976), *cert. dismissed as improvidently granted,* 432 U.S. 183 (1977).

564. *Cf.* Carlson v. Green, 446 U.S. 14, 24-25 n.11 (1979) (leaving open the use of state survivorship law as a matter of convenience in *Bivens* cases). When § 1983 wrongful death actions are filed in state courts, *see supra* note 50, state rules of civil procedure may provide some guidance, but most questions will generally be answered by state wrongful death statutes.

565. *Cf. Moragne,* 398 U.S. 375 (1970) (rejecting difficulty of addressing technical issues of wrongful death action in finding such an action available under the general maritime law).

Rule 17(a) of the Federal Rules of Civil Procedure requires that actions be pursued in the name of the "real party in interest."[566] Nonetheless, executors, administrators or other representative parties with duties to the decedent under state law, or the decedent's beneficiaries may also sue. Thus, state law may identify the nominal party.

The duties of statutory representatives are also defined by state law, and those representatives may file wrongful death actions under § 1983. Their ability to pursue such § 1983 wrongful death claims in federal courts, however, will be determined by federal rules, but the Federal Rules of Civil Procedure incorporates state law.[567] Thus, statutory beneficiaries may have wrongful death claims pursued on their behalf only by their statutory representatives, and they will not be able to proceed independently.[568]

The borrowing of state procedures to govern issues involving the real party in interest and capacity to sue, however, does not prevent nonstatutory beneficiaries from pursuing wrongful death actions independently. Thus, parties with no rights under a state wrongful death statute may nevertheless file actions in their own name under § 1983 to seek damages that result from the wrongful killing of their respective decedents.

The identity of the beneficiaries of § 1983 wrongful death actions is a function of the losses those beneficiaries have experienced and the relief they seek. Thus, family members legally dependent on the decedent should have little difficulty becoming plaintiffs in § 1983 wrongful death actions. Likewise, family members who were not legally dependent on the decedent but who were receiving actual financial support prior to the killing should also be able to claim that the death denied them support. Finally, persons claiming loss of services or loss of society may have suffered a palpable injury and, if such damages are available in § 1983 wrongful death actions, they should be able to recover them.

Problems may arise, however, where nonstatutory beneficiaries file § 1983 wrongful death actions. Without the constraints of a comprehensive state law, there may be no limit on the number of persons claiming that their relationship with the decedent resulted in compensable injuries. Initially, however, the ability to claim damages will depend on the element of damages available in § 1983 wrongful death actions. There are also a number of other sources of guidance that courts could follow to develop limiting principles. For example, courts entertaining § 1983 wrongful death actions could rely

566. *See* FED. R. CIV. P. 17(a).

567. *See* FED. R. CIV. P. 17(b).

568. Some federal courts, however, have mistakenly viewed the technical issues of identifying the real party in interest as a substantive issue, and have dismissed actions they concluded were brought by the wrong party. *See, e.g.*, Cunningham v. Ray, 648 F.2d 1185 (8th Cir. 1981); Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974). *But cf.* Hess v. Eddy, 689 F.2d 977 (11th Cir. 1982), *cert. denied*, 462 S. Ct. 1118 (1983). Under Rule 17(a) of the Federal Rules of Civil Procedure, an action should not be dismissed on the ground it is not being prosecuted in the name of the real party in interest until the real party has an opportunity to ratify the suit or commence his own. FED. R. CIV. P. 17(a).

on Roscoe Pound's observation about wrongful death statutes having become part of the general law and look to see how states generally limit the beneficiaries who could pursue claims.[569] Similarly, courts could look to the beneficiaries under federal wrongful death statutes.

The Federal Rules of Civil Procedure also provide some assistance in making § 1983 wrongful death litigation more manageable. Given the absence of a comprehensive federal statute, there are many unresolved questions as to the scope of the § 1983 wrongful death action, and defendants may be subject to multiple or successive suits arising out of the same death. Although this may currently happen in states that permit survival and wrongful death suits to be pursued simultaneously,[570] the use of § 1983 as a wrongful death remedy without the constraints of settled state law may expand the number of potential beneficiaries and potential law suits. In such cases, however, defendants may be able to rely on Rule 19, which creates a mechanism whereby indispensable parties may be joined.[571]

B. Damages

Damage issues in § 1983 wrongful death actions require courts to look to federal common law and to the general principles of compensation applied in non-wrongful death § 1983 cases. In addressing such issues, courts should look to the state of the law in 1871 to determine whether there was a well-established policy precluding the availability of particular elements of damages. If an element of damage was clearly unavailable in 1871, courts may still consider the evolving law of damages, public policy, and the purpose of § 1983 in deciding whether to make that element available. In such cases, however, there must be a strong showing before a well established policy would be rejected. On the other hand, when elements of damages were not clearly precluded, courts should search for the most appropriate damage policy without any presumption in favor of using state law. In any case, it should not be nccessary to demonstrate affirmatively that an element of damage was available in 1871 to support making it available today. Thus, when particular elements of damages were not generally available in 1871, courts should look to the broad purposes of § 1983—compensation and deterrence—to determine which policies best meet these ends.[572]

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569. *See* source cited *supra* note 252. A review of state common law would search for a policy that is consistent with the purposes of § 1983. Alternatively, federal courts, as a matter of convenience, could look to the law of the forum state. *Cf. Carlson,* 446 U.S. at 24-25 n.11 (1980) (suggesting use of state law for convenience in *Bivens* actions). Such an approach, however, could reintroduce the state law policies that often led plaintiffs to avoid state law in the first place.

570. Many states already require the consolidation of survival and wrongful death actions to avoid parallel litigation.

571. Under Rule 19 of the Federal Rules of Civil Procedure, a defendant faced with multiple suits by different survivors may seek to have the unnamed parties joined and their interests litigated in the same suit. *See* FED. R. CIV. P. 19.

572. *See supra* notes 305-18 and accompanying text.

Section 1983 actions involving wrongful killings also raise survival issues, and the Court has required courts to look to the state law of survival. In addressing the availability of survival actions under § 1983, federal courts have often had to address whether specific state limitations on the damages available in survival actions are inconsistent with the purposes of § 1983. For example, some states expressly prohibit the survival of punitive damages as well as damages for pain and suffering. However, the framework that the Court has developed to determine the consistency of state policies with the purposes of § 1983 has been used to reject such limitations.[573]

Federal courts entertaining § 1983 survival actions have also had to address the appropriate measure of damages when state law was silent. For example, states that do not permit personal actions to survive provide little guidance as to the appropriate measure of damages. In such cases, there is little difficulty in concluding that the decedent's estate is entitled to damages for the losses the decedent suffered during his lifetime. Thus, loss of income or medical expenses during the period between the time of injury and death should be available in the § 1983 survival action even if state law required the action to abate. The more difficult question, however, is whether an award should be made for the illegal killing and for the violation of the constitutional right itself. These issues often arise because the circumstances of persons whose deaths result in § 1983 survival and wrongful death actions often preclude significant damages under the state wrongful death statute. Thus, the question often arises whether the survival action will be able to award damages for injuries that may not be described as actual injuries, and some courts have been willing to award damages in such cases for the loss of life and for the violation of the rights despite the absence of consequential damages.[574]

C. *Distribution*

The distribution of the proceeds of § 1983 wrongful death and survival actions depends on the nature of the damages awarded and the identity of the plaintiffs who obtained them. When survival claims are made under § 1983 for the wrongful killing, the estate would typically bring the action, and either the decedent's will or state law on intestate succession will govern the distribution of the proceeds of any litigation.

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573. *See, e.g.*, McFadden v. Sanchez, 710 F.2d 907 (2d Cir.) (rejecting state policy denying survival of claims for punitive damages), *cert. denied*, 104 S. Ct. 394 (1983); Guyton v. Phillips, 532 F. Supp. 1154 (N.D. Cal. 1981) (rejecting state policy denying survival of claims for pain and suffering).

574. *See* Heath v. City of Hialeah, 560 F. Supp. 840 (S.D. Fla. 1983) (approving damages to estate for loss of life where decedent was an emancipated adult male and survivors could not recover in state wrongful death action); Guyton v. Phillips, 532 F. Supp. 1154 (N.D. Cal. 1981) (awarding $100,000 for deprivation of the right to life). *See also supra* notes 464-72 and accompanying text.

In § 1983 wrongful death actions, on the other hand, the distribution of damages will depend on the nature of the damages awarded, and the allocation will generally not pose significant questions. When damages are awarded for loss of support, loss of inheritance, loss of services, loss of society, or mental grief or anguish, the parties experiencing those losses are the ones to whom the awards will be distributed. When punitive damages are obtained in wrongful death actions, the question of distributing the award will be more difficult, but courts should be able to resolve such issues based on the identity of the parties bringing the suit and, when necessary, state law.[575]

CONCLUSION

The use of § 1983 as a remedy in cases involving wrongful killings has undergone a significant expansion in recent years. Originally tied to the provisions of state law, such actions are on the increase as the personal representatives and survivors of decedents seek federal remedies that avoid the limitations of state law. Although courts have been willing to reject state law limitations that are inconsistent with the purposes of § 1983, courts should break away from their initial dependence on state law and develop an independent § 1983 wrongful death action. Such a development is supported by this analysis of § 1983 ex proprio vigore as a wrongful death remedy.

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575. *Cf.* Bell v. City of Milwaukee, 746 F.2d 1205, 1254 n.62 (7th Cir. 1984) (lookiug to state law and the distribution of compensatory damages to allocate punitive damages in a § 1983 wrongful death action).