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A Need for Uniformity: Survivorship under 42 U.S.C. 1983

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A NEED FOR UNIFORMITY: SURVIVORSHIP UNDER 42 U.S.C. § 1983

Title 42 U.S.C. § 1983 provides a federal cause of action when state officials violate a citizen's federal rights, but it is silent on most issues substantially affecting federal civil rights litigation.[1] For example, § 1983 fails to address whether damages are available in survival actions.[2] A survival statute dictates what types of damages are available and who may act as the representative when the original plaintiff dies prior to receiving a final judgment.[3] Survival actions are often confused with wrongful death actions. In a wrongful death action, the plaintiffs seek compensation for the losses they suffered as a result of the decedent's death.[4] Conversely, in a survival action, a plaintiff sues to recover compensation for the decedent's injuries.[5]

Currently, state and federal courts borrow the survival statute of the state in which the court sits, unless that law is inconsistent with the policies of compensation and deterrence which underlie § 1983.[6] This has led to inconsistent and inequitable recoveries throughout the

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1. 42 U.S.C. § 1983 (1994).

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or 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.

2. *See id.*

3. *See* Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559, 575 (1985).

4. *See id.*

5. *See id.*

6. *See, e.g.*, Linzie v. City of Columbia, 651 F. Supp. 740, 742 (W.D. Mo. 1986); Garcia v. Superior Court, 42 Cal. App. 4th 177, 182, 49 Cal. Rptr. 2d 580, 583 (1996).

United States.[7] Therefore, courts need to create a uniform rule of survivorship to ensure fairness and equity.

Part I of this comment provides a brief background on § 1983. It also discusses § 1988,[8] which is used to justify the application of state law to § 1983 survival actions.[9] Lastly, Part I examines the United States Supreme Court holding in *Robertson v. Wegmann* which created the framework for applying state survival statutes.[10] Part II asserts that the federal judiciary has created uniform federal rules for many issues similar to survival damages, despite § 1988's apparent mandate to borrow state law. It also explores the courts' treatment of § 1983 where a violation of constitutional rights results in death. Part III argues that a federal rule is preferable to state laws which often fail to advance the policies underlying § 1983. Finally, Part IV shows the benefits of a uniform federal rule, including consistency throughout the country and fair and equitable recoveries.

I. § 1983, § 1988 & SURVIVAL ACTIONS

Congress originally enacted § 1983 during the post-Civil War Reconstruction era as part of the Civil Rights Act of 1866.[11] Although established in the 1860's, § 1983 claims were not widely brought until the civil rights movement of the 1960's.[12] In *Monroe v. Pape*, the Supreme Court empowered § 1983 litigation by holding that all state officials acting with authority of the state thereby acted under the color of state law, regardless of whether the conduct itself violated state procedures or rules.[13] In this case, the plaintiff sued Chicago police officers for violating his right to be free from

7. *Compare* Evans v. Twin Falls County, 796 P.2d 87, 94 (Idaho 1990) (holding Idaho's survival law barring the recovery of pain and suffering damages was not inconsistent with federal law), *with* Williams v. City of Oakland, 915 F. Supp. 1074, 1079 (N.D. Cal. 1996) (holding California's survival law barring pain and suffering damages was inconsistent with federal law).

8. 42 U.S.C. § 1988 (1994).

9. *See* Steinglass, *supra* note 3, at 613.

10. 436 U.S. 584, 590 (1978).

11. *See* Jennifer A. Coleman, *42 U.S.C. Section 1988: A Congressionally Mandated Approach to the Construction of Section 1983*, 19 IND. L. REV. 665, 665 (1986).

12. *See* Theodore Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499, 499 (1980).

13. 365 U.S. 167, 187 (1961).

unreasonable searches and seizures.[14] Since *Monroe*, § 1983 has been a major tool in advancing civil rights.[15] However, because § 1983 litigation is a relatively new phenomenon, courts are still developing an operative body of law.[16]

Courts frequently look to § 1988,[17] and consequently, to state law to develop such a body of law.[18] Section 1988 was enacted in 1871, shortly after § 1983.[19] The United States Supreme Court interpreted § 1988 to mandate the use of state law to fill gaps in § 1983 where state law is not inconsistent with the policies of § 1983.[20] Nonetheless, courts vary wildly in deciding when to apply state law.[21]

A. Robertson v. Wegmann[22]

The *Robertson* decision set the stage for the application of state law to survival actions under § 1983.[23] In *Robertson* the United States Supreme Court decided, for the first time, whether state law should apply in pure survival suits without a concurrent wrongful

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14. *Id.* at 169-70.
15. *See* Steinglass, *supra* note 3, at 563.
16. *See* Coleman, *supra* note 11, at 670.
17. 42 U.S.C. § 1988.

42 U.S.C. § 1988 provides, in pertinent part:

> The jurisdiction in civil and criminal matters conferred on the district courts . . . 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 . . .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 . . . .

18. *See, e.g.*, Bowling v. Oldham, 753 F. Supp. 588, 590 (M.D.N.C. 1990); Hoffman v. McNamara, 688 F. Supp. 830, 834 (D. Conn. 1988).
19. 42 U.S.C. § 1988. *See* Coleman, *supra* note 11, at 667.
20. *See, e.g.*, Board of Regents v. Tomanio, 446 U.S. 478, 484-85 (1980); Robertson v. Wegmann, 436 U.S. 584, 588 (1978).
21. *See infra* notes 117-71 and accompanying text.
22. 436 U.S. 584 (1978).
23. *See id.*

death action.[24] In doing so, the Court laid down the framework for determining when state laws apply in § 1983 survival actions.[25]

In *Robertson*, Clay Shaw filed a § 1983 action alleging that Louisiana attempted in bad faith to prosecute him for conspiring to assassinate President Kennedy.[26] Shaw's trial was set for November 1974, but he died in August 1974 from causes wholly unrelated to the alleged misconduct.[27] Edward F. Wegmann, the executor of Shaw's estate, sought to substitute himself as plaintiff, and the defendants moved for a dismissal claiming that Shaw's action abated upon his death.[28]

At the time of *Robertson*, Louisiana's survival statute provided that actions "survive only in favor of a spouse, children, parents or siblings."[29] Shaw had no such surviving relatives.[30] The District Court declined to apply state law.[31] It found Louisiana's survival statute inconsistent with federal law because the state law would completely abate Shaw's claim, as he had no living relatives with the requisite relationship.[32] The U.S. Court of Appeals for the Fifth Circuit affirmed the ruling of the District Court on an interlocutory appeal.[33] The Fifth Circuit agreed that Louisiana's survivorship provision was inconsistent with federal law because it would abate the entire claim.[34]

The United States Supreme Court reversed, concluding that the lower courts wrongly determined that Louisiana's survivorship provision was inconsistent with federal law.[35] The Court "rejected a plaintiff-oriented approach to § 1988 under which courts would reject otherwise applicable state policies whenever they caused a

24. *See* Steinglass, *supra* note 3, at 591.
25. *See Robertson*, 436 U.S. at 590-94.
26. *Id.* at 586.
27. *See id.*
28. *See id.* at 586-87.
29. *Id.* at 587.
30. *See id.*
31. *See* Shaw v. Garrison, 391 F. Supp. 1353, 1368 (E.D. La. 1975).
32. *See id.* at 1365.
33. *See* Shaw v. Garrison, 545 F.2d 980, 987 (5th Cir. 1977).
34. *See id.* at 984.
35. *See Robertson*, 436 U.S. at 588.

plaintiff to lose."[36] Rather, the Court attempted to provide a framework for determining when to apply state law. Accordingly, the Court held that state laws should not apply to § 1983 actions when inconsistent with the two policies underlying § 1983: "compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law."[37] The Court further held that Louisiana's survival statute was not inconsistent with these policies because:

> [t]he goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate. And, given that most Louisiana actions survive the plaintiff's death, the fact that a particular action might abate surely would not adversely affect § 1983's role in preventing official illegality.[38]

In reversing the lower courts, the majority made clear that its holding was a very narrow one.[39] The majority stated a different result might have been appropriate if no tort actions survived under state law or if the state law "significantly restricted the types of actions that survive."[40] Furthermore, the majority expressed that it "intimate[d] no view . . . about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death."[41]

Moreover, the majority expressly rejected the idea of creating a federal rule of absolute survivorship.[42] The Court stated that, "we can find nothing in [§ 1983] or its underlying policies to indicate that a state law causing abatement of a particular action should invariably

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36. Steinglass, *supra* note 3, at 592; *see also 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. If success of the § 1983 action were the only benchmark . . . the appropriate rule would then always be the one favoring the plaintiff. . . .").

37. *Robertson*, 436 U.S. at 590-91.

38. *Id.* at 592.

39. *See id.* at 594.

40. *Id.*

41. *Id.*

42. *See id.* at 590.

be ignored in favor of a rule of absolute survivorship."[43] The Court further declared that if Congress has not adopted a policy of uniformity then the Court should not create one.[44]

However, Justice Blackmun, joined by Justices White and Brennan, argued in dissent that the Court should have used federal laws to fashion a uniform rule, rather than apply state law.[45] The dissent asserted that "[a] flexible reading of § 1988, permitting resort to a federal rule of survival . . . 'better serves' the policies of [§ 1983]."[46] The dissent further argued that a uniform federal rule would provide consistency and clear answers as to which actions survive and which abate.[47]

The dissent's argument for consistency and clarity in § 1983 survival actions is even more persuasive now than it was twenty years ago. Recovery under § 1983 greatly varies depending on the jurisdiction in which the suit is brought, despite the majority's attempt to provide guidance in defining "inconsistent."[48]

B. A Strict Reading of § 1988 Undermines the Effectiveness of § 1983

The language of § 1988 appears to mandate the application of state law whenever § 1983 is silent.[49] But the language of § 1983 is so vague that a strict reading of § 1988 would render § 1983 ineffective in protecting federal civil rights. For example, § 1983 does not provide for any remedies, yet "[a] right would have little value without an appropriate remedy for its violation."[50] Consequently, to give maximum effect to § 1983, the courts must have enough latitude to advance federal civil rights goals through uniform rules establishing effective remedies, such as survivorship provisions. A strict reading

43. *Id.*

44. *See id.* at 593-94 & n.11.

45. *See id.* at 595 (Blackmun, J., dissenting); *see also* Steinglass, *supra* note 3, at 593 ("Justice Blackmun . . . argued that § 1983 required a federal policy as the rule, not the exception.").

46. *Robertson*, 436 U.S. at 597 (Blackmun, J., dissenting).

47. *See id.* at 602 (Blackmun, J., dissenting).

48. *See infra* notes 117-71 and accompanying text.

49. *See* 42 U.S.C. § 1988 (1994).

50. Linda L. House, *Section 1983 and the Collateral Source Rule*, 40 CLEV. ST. L. REV. 101, 120 (1992).

of § 1988 prevents such latitude, requiring courts to apply state laws which may do nothing to advance the policies of the federal civil rights laws.

Opponents of a federal rule of survivorship in § 1983 actions argue that if Congress wants uniformity, it has the ability to create such a rule.[51] In fact, Congress created federal survivorship provisions in numerous statutes, but not in § 1983.[52] Additionally, the Supreme Court has held that, "'[i]t is generally presumed that Congress acts intentionally and purposely.'"[53] Accordingly, because Congress failed to create a federal rule of survivorship, the courts should assume that Congress intended for state laws to govern.

However, Congress has been extremely reluctant to develop § 1983 litigation.[54] Moreover, if Congress wants state law to apply, it as the power to compel the courts to do so. The judiciary has created uniform federal rules for damages, immunities, and more.[55] Yet Congress has refused to reverse any judicial modifications in § 1983 litigation. Congress could easily end that discretion if it felt the courts had too much undisturbed latitude to alter federal civil rights laws. Because Congress has not reversed judicial developments in § 1983 litigation, there is no evidence that Congress objects to the courts establishing uniform federal rules that advance the goals of federal civil rights laws.

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51. *See* Brief for Respondent at *21, Jefferson v. City of Tarrant, 118 S. Ct. 481 (1997) (No. 96-957), *available in* 1997 WL 401190.

52. *See, e.g.*, Employer's Liability Act, 45 U.S.C. § 51 (1986) ("Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee . . . ."); Federal Tort Claims Act, 28 U.S.C. § 2674 (1994) ("In any case wherein death was caused . . . the United States shall be liable for actual or compensatory damages . . . .").

53. City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 338 (1994) (quoting Keene Corp. v. United States, 508 U.S. 200, 208 (1993)) (referring to a general principle of statutory interpretation and not a principle specifically designed for § 1983).

54. *See* Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 92-94 (1989).

55. *See infra* notes 58-99 and accompanying text.

A strict reading of § 1988 severely curtails the effectiveness of § 1983, as the courts would be unable to guarantee effective remedies. Furthermore, Congress had the power when it enacted § 1983, and has the power now, to compel the application of state laws in the § 1983 arena, but it has declined to do so. As a result, courts should develop a uniform federal rule of survivorship that effectively promotes § 1983's underlying goals of compensation and deterrence.

II. FASHIONING A UNIFORM FEDERAL RULE

Courts have sometimes borrowed state laws to fill gaps in § 1983.[56] At other times courts have created federal rules.[57] This section discusses when and where courts have fashioned federal remedies rather than borrowed state law. Furthermore, this section analyzes how the courts have handled survival actions under § 1983 where the victim died from unconstitutional conduct.

A. Courts Have Generally Applied Uniform Federal Rules for Other § 1983 Damages Issues

The language of § 1983 does nothing more than grant a federal cause of action to those deprived of their civil rights by state officials.[58] Consequently, § 1983 is deficient in practically all substantive areas.[59] However, the Supreme Court has not borrowed state law to fill many gaps in § 1983 litigation, although § 1988 seems to mandate applying state law.[60] In fact, "[t]he Supreme Court has looked to section 1988 for guidance only in the areas of statutes of limitations and survival of actions."[61] Furthermore, the Supreme

56. *See, e.g.*, Board of Regents v. Tomanio, 446 U.S. 478, 492 (1980) (statute of limitations); Robertson v. Wegmann, 436 U.S. 584, 594-95 (1978) (survival statute).

57. *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) (punitive damages against municipalities); Imbler v. Pachtman, 424 U.S. 409, 424 (1976) (prosecutorial immunity).

58. *See* Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 603 (1985).

59. *See id.*

60. *See, e.g.*, *City of Newport*, 453 U.S. at 271 (punitive damages are not available against municipalities); Smith v. Wade, 461 U.S. 30, 55 (1983) (punitive damages are available against individual defendants).

61. Kreimer, *supra* note 58, at 604.

Court has failed to clearly articulate when lower courts should rely on § 1988.[62] "This lack of clarity as to choice of law rules has lead [sic] to scholars describing the Supreme Court's approach as ad hoc."[63]

The Supreme Court has generally declined to look to § 1988 for remedies and has chosen instead to create uniform rules.[64] In *Sullivan v. Little Hunting Park*, the Court stated that, "the existence of a statutory right implies the existence of all necessary and appropriate remedies."[65] There, the Court fashioned a federal remedy against a corporation maintaining a public park in violation of 42 U.S.C. § 1982 for refusing to admit African-Americans.[66] The Court felt the need to create a federal rule of damages to better remedy the impairment of federal rights.[67] State law provided for monetary damages, but did not permit injunctive relief.[68] The Court bypassed state law by reading § 1988 to allow, "both federal and state rules on damages [to] be utilized, whichever better serves the policies expressed in the federal statutes."[69] From there, the Court reversed the lower court holding which denied injunctive relief.[70]

In *Carey v. Piphus*, the Court again declined to borrow state law as § 1988 would seem to compel.[71] In this case, two high school students sued a school district under § 1983 alleging they were deprived due process rights because they were suspended from school without a proper hearing.[72] The Court did not even consider analogous state law.[73] Rather, the Court decided that the plaintiffs could only recover damages for actual injuries, and not for the value of the

62. *See* House, *supra* note 50, at 118.
63. *Id.* at 119.
64. *See infra* notes 65-82 and accompanying text.
65. 396 U.S. 229, 239 (1969).
66. *See id.* at 234. Section 1982 guarantees all citizens shall have equal property rights and applies to private parties. *See* 42 U.S.C. § 1982 (1994). Section 1982 is also supplemented by § 1988. *See Sullivan*, 396 U.S. at 239-40.
67. *See Sullivan*, 396 U.S. at 240.
68. *See id.* at 235.
69. *Id.* at 240.
70. *See id.*
71. 435 U.S. 247, 267 (1978).
72. *See id.* at 248.
73. *See id.* at 264-67.

constitutional right impaired.[74] The Court held that, "to further the purpose of § 1983, the rules governing compensation . . . should be tailored to the interests protected by the particular right in question."[75]

Moreover, in *City of Newport v. Fact Concerts, Inc.*, the Court added to the development of a federal body of law in § 1983 actions holding that punitive damages are not available against municipalities, regardless of state law provisions.[76] The Court did not borrow state law, but rather fashioned a uniform rule precluding recovery of punitive damages despite the fact that § 1983 is silent on the issue.[77] Instead of state law, the Court looked to Congressional intent and public policy.[78] The Court felt that the deterrent value of punitive damages did not justify the increased burdens on the citizens of the offending municipality.[79]

Elsewhere, the Court did adopt a uniform rule allowing courts to assess punitive damages against offending officials in their individual capacity.[80] In *Smith v. Wade*, the Court held that punitive damages are available if conduct "involves reckless or callous indifference to the federally protected rights of others," as well as when it is motivated by evil motive or intent.[81] As in *City of Newport*, the Court made no attempt to determine whether state law was inconsistent with the policies of § 1983.[82] Accordingly, the aforementioned cases demonstrate the Court's ability and willingness to overlook § 1988 and corresponding state laws in order to fashion a federal remedy that better protects the goals of § 1983. The Court did not consider whether state law would defeat the goals of § 1983. Rather, the Court looked at whether a uniform rule best advances those goals.

In addition to survival actions, the only other area in which the Supreme Court has borrowed state law is for statutes of limitations.[83]

74. *See id.* at 264.
75. *Id.* at 258-59.
76. 453 U.S. 247, 271 (1981).
77. *See id.*
78. *See id.* at 265-71.
79. *See id.* at 268.
80. *See* Smith v. Wade, 461 U.S. 30, 35-36 (1983).
81. *Id.* at 56.
82. *See id.*
83. *See* Board of Regents v. Tomanio, 446 U.S. 478, 492 (1980); *see also,*

In *Tomanio*, the Court applied New York's statute of limitations and rules for tolling the statute of limitations.[84] The Court held that because Congress neglected to establish a statute of limitations or a body of tolling rules applicable to § 1983 actions, analogous state statutes of limitations and the coordinate tolling rules are binding.[85] The Court's approach to § 1988 with respect to statutes of limitations, however, is inconsistent with the way the Court has dealt with damages issues under § 1983.[86]

Does the availability of survival damages more closely resemble statutes of limitations or availability of remedies? Statutes of limitations and corresponding tolling rules simply attempt to provide finality to causes of action.[87] They are not intended to give effect or substance to federally protected rights.[88] In fact, there is no reason to believe that a four-year statute of limitations would more effectively promote the goals of § 1983 than a three-year statute. Quite simply, a reasonable statute of limitations does not directly affect a plaintiff's substantive rights.[89]

Conversely, "damages are directly related to substantive rights. They are closely tied to the substance of § 1983 in that they define the nature and scope of one type of available remedy."[90] The Supreme Court created federal rules for damages, presumably because the availability of proper relief is crucial to make the civil rights statutes effective.[91] That same need exists in survival actions. Applying a federal rule of damages when the victim is dead would make § 1983 just as effective as when the victim is alive. Limited damages

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e.g., Coleman, *supra* note 11, at 712. ("[T]he cases in which the Court has referred to section 1988 have typically involved rather narrow questions, such as the applicable statute of limitations . . . ."). *But see* Burnett v. Grattan, 468 U.S. 42, 54-55 (1984) (holding Maryland statute of limitations requiring prior administrative proceedings be exhausted was inconsistent with § 1983 because the federal statute provided for an independent remedy).

84. 446 U.S. at 480.
85. *See id.* at 483-86.
86. *See* Coleman, *supra* note 11, at 719.
87. *See Tomanio*, 446 U.S. at 487.
88. *See* House, *supra* note 50, at 119.
89. *See id.*
90. *Id.* at 120.
91. *See id.*

awards in survival actions suggest that once a victim dies, the need to effectively protect federal civil rights is not nearly as compelling.

B. Carlson v. Green[92] *and a Uniform Rule of Survivorship*

The Supreme Court has created a uniform rule of survivorship where a federal official wrongfully kills.[93] The reasoning behind this rule logically extends to state officials who wrongfully kill, as well as to state officials whose misdeeds do not result in death.

In *Carlson*, the Court dealt with a *Bivens* action, and not § 1983.[94] The decedent's estate sued federal prison officials for violating the decedent's Eighth Amendment rights.[95] The defendants allegedly failed to provide the decedent with competent medical care.[96] Indiana law abated personal injury claims where misconduct resulted in death; however, the state did permit significant recovery under a wrongful death action.[97] The Supreme Court, not constrained by § 1988, as the action was not brought under § 1983, looked to federal common law to fashion an appropriate remedy.[98] The Court agreed with the respondent's contention that "only a uniform federal rule of survivorship is compatible with the goal of deterring federal officials from infringing federal constitutional rights."[99]

Although *Carlson* dealt with constitutional deprivations by federal officials, many courts have extended the rule laid down in *Carlson* to § 1983 actions where state officials deprived citizens of their federal rights.[100] For example, in *Bell v. City of Milwaukee*, the Seventh Circuit refused to apply Wisconsin's survival laws where the

92. 446 U.S. 14 (1980).
93. *See id.*
94. *See id.* at 18. A *Bivens* action is brought where a federal official, under color of law, violates a citizen's constitutional right. *See* Steinglass, *supra* note 3, at 596. The cause of action for a *Bivens* action is implicitly provided by the United States Constitution. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).
95. *See Carlson*, 446 U.S. at 16.
96. *See id.* at 16 n.1.
97. *See id.* at 17.
98. *See id.* at 23-24.
99. *Id.* at 23.
100. *See, e.g.*, Bell v. City of Milwaukee, 746 F.2d 1205, 1238 (7th Cir. 1984); O'Connor v. Several Unknown Correctional Officers, 523 F. Supp. 1345, 1348 (E.D. Va. 1981).

decedent died as a result of unconstitutional conduct.[101] There, a Milwaukee police officer fatally shot Daniel Bell; Bell's father pursued a § 1983 survival action.[102] State law barred the survival of loss of life damages.[103] The court cited *Carlson* in ignoring the more restrictive state law, holding that "Supreme Court precedent . . . indicate[s] that allowing the estate of Daniel Bell to recover is the proper result under federal policy."[104] Consequently, the court upheld a $100,000 award for Daniel Bell's loss of life.[105]

Similarly, an Alabama district court relied on *Carlson* in applying a federal remedy over the state law precluding compensatory damages.[106] In *Weeks v. Benton*, the estate of a deceased prisoner brought a § 1983 action against county officials who failed to provide him with adequate medical care.[107] The court relied on *Carlson* to justify applying a federal remedy in favor of state law.[108] The court stated that "even though the *Carlson* Court's decision was not controlled by § 1988, many of the policy reasons for declining to apply state survival law in *Bivens* actions are also applicable by analogy to § 1983 actions."[109]

Conversely, the Alabama Supreme Court ignored *Carlson* and applied Alabama's survival statute in a § 1983 action where the victim died when city firefighters allegedly refused to save the decedent from her burning home.[110] Presumably as a result of the split between state and federal courts in Alabama, the United States Supreme Court granted certiorari in *City of Tarrant* in order to decide "[w]hether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, Section 6-5-410 (Ala. 1975) governs the recovery by the representative of the decedent's estate under 42 U.S.C.

101. 746 F.2d at 1238.
102. *See id.* at 1214-22.
103. *See id.* at 1235.
104. *Id.* at 1238.
105. *See id.* at 1240.
106. *See* Weeks v. Benton, 649 F. Supp. 1297, 1308 (S.D. Ala. 1986).
107. *See id.* at 1298.
108. *See id.* at 1308.
109. *Id.* at 1309.
110. *See* City of Tarrant v. Jefferson, 682 So. 2d 29, 31 (Ala. 1996).

Section 1983."[111] The Court did not decide the case on the merits because the ruling by the Alabama Supreme Court was not a final judgment.[112] However, by granting certiorari in the first place, the Supreme Court indicated its willingness to consider whether a uniform federal rule of survivorship is necessary to advance the goals of § 1983 where the misconduct results in death.

III. SEVERAL CURRENT STATE LAW LIMITATIONS DEFEAT THE POLICIES UNDERLYING § 1983

This section examines why a federal rule of survivorship is necessary in pure survival actions. Current state law limitations on recovery in survival actions fail to promote the primary goals of the federal statutes. This section also deals with the common arguments asserted by proponents of state law limitations, particularly the assertion that state survival statutes are never inconsistent with the policies underlying § 1983.

A. Current Limitations on § 1983 Survival Damages Are Inconsistent with the Underlying Goal of Compensation

In *Robertson v. Wegmann*, the United States Supreme Court attempted to provide a useful definition of "inconsistent" when determining the applicability of state survival statutes.[113] According to the Court, "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation."[114] However, the Court asserted its decision was "a narrow one," and that a state survival statute may be inconsistent with § 1983 where a state law has an "independent adverse effect on the policies underlying § 1983."[115] Furthermore, a state statute could be inconsistent if it "did not provide for survival of any tort actions, or if it significantly restricted the types of actions that survive."[116]

Since *Robertson*, state and federal courts are in considerable disarray in determining whether a state statute is inconsistent with the

111. Jefferson v. City of Tarrant, 117 S. Ct. 1333, 1333 (1997).
112. *See* Jefferson v. City of Tarrant, 118 S. Ct. 481, 483-84 (1997).
113. *See* 436 U.S. 584, 590-91 (1978).
114. *Id.* at 593.
115. *Id.* at 594.
116. *Id.* (citations omitted).

policies underlying § 1983. For example, in *Larson v. Wind*, a federal district court held that barring the survival of a § 1983 action when misconduct does not result in death was inconsistent with the goals of § 1983.[117] There, Larson brought a § 1983 action alleging police officers wrongfully shot him in violation of his civil rights.[118] He later died from causes unrelated to the claim.[119] The court construed the Illinois Survival Act to permit the survival of Larson's claim, but the court held Larson's claim would have survived regardless because "[i]t would clearly disserve the purposes of the Civil Rights Act—causing an 'independent adverse effect on the policies underlying § 1983'—to permit the fact of Larson's later death to change the result."[120]

On the other hand, the Idaho Supreme Court held that Idaho's survival statute, which abates all claims upon the death of the plaintiff, was not inconsistent with § 1983.[121] There, the plaintiff filed a § 1983 action against law enforcement officers for violating her Fourth Amendment rights.[122] Ms. Evans alleged that sheriff deputies assaulted her.[123] She later died from causes unrelated to the claim.[124] But, Idaho did not provide for the survival of personal injury claims.[125] In finding Idaho law consistent with § 1983, the court held, "[t]he application of Idaho common law non-survivability rule is presumably the same as the federal common law rule and is not inconsistent with the Constitution and laws of the United States."[126] Apparently, the court felt the federal common law was identical to the general common law which barred *all* survival actions.[127] According to the logic of the court, however, no survival action could be inconsistent with federal law because no law can be more restrictive than an absolute ban on survival actions.

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117. 542 F. Supp. 25, 27 (N.D. Ill. 1982).
118. *See id.* at 26.
119. *See id.*
120. *Id.* at 27.
121. *See* Evans v. Twin Falls County, 796 P.2d 87, 94 (Idaho 1990).
122. *See id.* at 88.
123. *See id.*
124. *See id.*
125. *See id.* at 91.
126. *Id.* at 94.
127. *See id.*

Despite the split among courts, failing to provide for significant damage awards is inconsistent with the policy of compensation. For example, in *Williams v. City of Oakland*, a federal district court held that California's survival statute, which precluded the recovery of pain and suffering damages, was inconsistent with the policy of compensation.[128] Piedad Williams filed a § 1983 suit alleging that Oakland police officers violated her Fourth Amendment protections by using excessive force to effect an unlawful search and seizure.[129] Williams later died from causes unrelated to the claim.[130] The court looked to California's survival statute, but determined it was inconsistent with federal law because California law barred recovery for pain and suffering.[131] The Court held that "deny[ing] pain and suffering damages would strike at the very heart of a section 1983 action,"[132] since it prevented significant monetary relief.

Excluding pain and suffering damages in § 1983 survival actions is always inconsistent with the policy of compensation and can have a particularly devastating effect in certain types of actions, such as illegal searches and seizures and sexual harassment claims. In actions where the predominant injuries are emotional, excluding pain and suffering damages has the practical effect of abating the entire claim. Quite simply, if a representative cannot recover for pain and suffering, which are the only types of injuries resulting from a wrongful act, then the victim has no other means of relief.

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128. 915 F. Supp. 1074, 1079-80 (N.D. Cal. 1996); *accord* Davis v. City of Ellensburg, 651 F. Supp. 1248, 1257 (E.D. Wash. 1987) (holding Washington's survival statute, which barred recovery of pain and suffering damages, was inconsistent with § 1983).

129. *See Williams*, 915 F. Supp. at 1075.

130. *See id.*

131. *See id.* at 1079.

> In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

CAL. CIV. PROC. CODE § 377.34 (West 1992).

132. *Williams*, 915 F. Supp. at 1077 (quoting Guyton v. Phillips, 532 F. Supp. 1154, 1167 (N.D. Cal. 1981)).

Consequently, the victim endures the pain and suffering, but cannot obtain any compensation for it.

In addition to state statutes excluding the recovery of pain and suffering damages, other state law limitations similarly work to defeat the goal of compensation. In *Jaco v. Bloechle*, the Sixth Circuit held that Ohio law, which abated the entire action if the victim dies instantly from the illegal conduct, was inconsistent with the goal of compensation.[133] Jaco filed a § 1983 action alleging her son's civil rights were violated when he was shot and killed instantly by police officers.[134] Although Ohio law would have abated the survival action, Jaco could still maintain an action for wrongful death.[135] In finding Ohio's survival statute inconsistent with the goal of compensation, the court held that "[t]he § 1983 objective of . . . providing compensation to the victim for an illegal deprivation of constitutional entitlements by state officers cannot be advanced, and is only undermined, by deferring to a state law which decrees abatement."[136]

Although numerous courts agree that substantial compensatory damages must be available in order to be consistent with § 1983's purpose of compensating victims of constitutional deprivations, other courts have held that compensation is not an issue if the victim is dead because no award can effectively compensate a dead person.[137] For example, in *Garcia v. Superior Court*, a state appellate court applied California's survival law precluding recovery for pain and suffering damages in a § 1983 survival action where the victim died from injuries sustained when police officers applied a choke-hold in the course of an arrest.[138] The court concluded, "once deceased, the decedent cannot in any practical way be compensated for his injuries or pain and suffering, or be made whole."[139]

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133. 739 F.2d 239, 244-45 (6th Cir. 1984).
134. *See id.* at 240.
135. *See id.* at 242.
136. *Id.* at 244.
137. *See, e.g.,* Jones v. George, 533 F. Supp. 1293, 1305 (S.D. W. Va. 1982); Brown v. Morgan County, 518 F. Supp. 661, 664 (N.D. Ala. 1981); Garcia v. Superior Court, 42 Cal. App. 4th 177, 186, 49 Cal. Rptr. 2d 580, 586 (1996).
138. *See* 42 Cal. App. 4th at 180, 49 Cal. Rptr. 2d at 581.
139. *Id.* at 186, 49 Cal. Rptr. 2d. at 586. The court does note, however, that significant compensatory damages are available to the estate under a wrongful

Similarly, in *Jones v. George*, the court held that West Virginia's survival statute, which abated personal injury actions that resulted in death, did not defeat the goal of compensation.[140] The court concluded that "compensating the victim of constitutional deprivation, is not in issue as it relates to the personal injury claims, since [the victim] is dead."[141] Furthermore, a district court held Alabama's survival scheme, which provides for punitive, but not compensatory damages, was not inconsistent with the goal of compensation.[142] The court stated, "[i]t is clear that where the injured party is deceased, any damage award would not compensate *him* for his injuries, because the cruel fact is that he is no longer present to benefit from any damages awarded. No damages award could compensate him."[143]

Courts believing that compensation is not an issue in survival damages often find support from *Robertson*, where the Supreme Court stated, "[t]he goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate."[144] However, reliance on this passage to avoid considering the effect state survival statutes have on compensation is misplaced. In *Robertson*, the plaintiff was *merely* the executor of the estate.[145] However, in most § 1983 survival actions, the executor of the estate is also the spouse,[146] child[147] or parent[148] of the victim whose constitutional rights were violated. When the immediate family is forced to

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death action. *See id.*

140. *See* Jones v. George, 533 F. Supp. at 1305. The court did find the state law was not inconsistent with the deterrent purpose of § 1983 and declined to apply state law. *See id.*

141. *Id.*

142. *See* Brown v. Morgan County, 518 F. Supp. at 664.

143. *Id.*

144. *Robertson*, 436 U.S. at 592. *See, e.g.*, Brown v. Morgan County, 518 F. Supp. at 664; Jones v. George, 533 F. Supp. at 1302.

145. *See Robertson*, 436 U.S. at 586.

146. *See, e.g.*, Burt v. Abel, 466 F. Supp. 1234, 1236 (D.S.C. 1979); County of Los Angeles v. Superior Court, 58 Cal. Rptr. 2d 358, 360 (1996), *rev. granted*, 932 P.2d 1296, 62 Cal. Rptr. 2d 21 (1997).

147. *See, e.g.*, City of Tarrant v. Jefferson, 682 So. 2d 29, 29 (Ala. 1996); Espinoza v. O'Dell, 633 P.2d 455, 459 (Colo. 1981).

148. *See, e.g.*, *Jaco*, 739 F.2d at 239; Agresta v. Sambor, 687 F. Supp. 162, 162 (E.D. Pa. 1988).

sit back and watch their loved one suffer at the hands of state officials, the family should be entitled to compensation.

The Court also stressed that its holding in *Robertson* was "a narrow one" and should be limited to the specific situation before the Court.[149] The Court held that the policy of compensation is not violated when a mere executor cannot recover under a § 1983 survival action when the state law permitted recovery only by a spouse, parent, child, or sibling of the deceased.[150] Interpreting that statement to permanently preclude consideration of the effect a state statute has on compensation completely ignores the Court's mandate to narrowly construe its holding. If the Court intended to absolutely ignore the effect on compensation in determining the consistency of state survival statutes, it could have used more definitive language, such as that in *Brown v. Morgan County*, which stated, "the cruel fact is that he is no longer present to benefit from any damages awarded. No damage award could compensate him."[151] However, the Court elected not to do so.

Barring or substantially limiting available compensatory damages for actual injuries suffered does nothing to further compensation. On the other hand, allowing full recovery to the estate of those whose constitutional rights have been violated actively seeks to advance the goal of compensation.

B. Current Limitations on § 1983 Survival Damages are Inconsistent with the Underlying Goal of Deterrence

State survival statutes are also inconsistent with § 1983 when they hinder the goal of deterring future acts of official misconduct.[152] Many courts have held that, in order to promote deterrence, significant damages must be available against state officials who violate the constitutional rights of others.[153] In *Guyton v. Phillips*, California's survival law precluding pain and suffering damages was examined by

149. 436 U.S. at 594.
150. *See id.* at 592.
151. 518 F. Supp. at 664.
152. *See* Robertson v. Wegmann, 436 U.S. 584, 590 (1978).
153. *See, e.g.*, Berry v. City of Muskogee, 900 F.2d 1489, 1504 (10th Cir. 1990); Guyton v. Phillips, 532 F. Supp. 1154, 1165 (N.D. Cal. 1981).

the courts.[154] This case involved a § 1983 action brought by the mother of a man wrongfully shot and killed by police officers.[155] The court concluded that if damages available if the victim lives are not available if the victim dies then state officials will not have a deterrent, but rather an incentive to kill instead of merely injuring their victims.[156] Specifically, the court stated, "[t]he 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."[157] The court further stated that deterrence "is hardly served when the police officer who acts without justification suffers a harsher penalty for injuring or maiming a victim than for killing him."[158]

Similarly, *Bell v. City of Milwaukee* was another § 1983 action brought by a parent whose son was wrongfully killed by police officers.[159] In *Bell*, the court held that Wisconsin's survival statute was inconsistent with the underlying purpose of deterrence because the statute did not provide for recovery of loss of life damages.[160] The court noted, "if Section 1983 did not allow recovery for loss of life notwithstanding inhospitable state law, deterrence would be further subverted since it would be more advantageous to the unlawful actor to kill rather than injure."[161]

Although *Guyton* and *Bell* dealt with situations where the unlawful conduct resulted in the death of the victim, the unavailability of substantial damages equally undermines the goal of deterrence when the victim died from causes unrelated to the claim. In *Williams v. City of Oakland*, the court relied on *Guyton* in holding California's

154. *See Guyton*, 532 F. Supp. at 1164.
155. *See id.* at 1156.
156. *See id.* at 1166.
157. *Id.*
158. *Id.* at 1167.
159. 746 F.2d 1205, 1214 (7th Cir. 1984).
160. *Id.* at 1240; *accord* Bass v. Wallenstein, 769 F.2d 1173, 1190 (7th Cir. 1985) (holding that Illinois law barring survival of loss of life damages was inconsistent with the deterrent policy underlying § 1983); Linzie v. City of Columbia, 651 F. Supp. 740, 742 (W.D. Mo. 1986) (holding Missouri's ban on the survival of loss of life damages thwarted the goal of deterrence).
161. *Bell*, 746 F.2d at 1239.

survival statute inconsistent with the policies underlying § 1983.[162] Barring pain and suffering damages had the practical effect of abating the entire claim.[163] The *Williams* court held California's survival statute "would leave the deceased plaintiff's survivors with no remedy and the violating defendants with little or no incentive to refrain from illegal conduct."[164] Preventing recovery for a decedent's pain and suffering has devastating effects on § 1983 suits, particularly if a wrongful death action cannot be brought.

Where courts have determined state statutes abating large damage claims are not inconsistent with the policies underlying § 1983, the decisions often rested on the availability of significant damages under a separate cause of action, usually for wrongful death.[165] For example, the plaintiffs in *Garcia* could simultaneously maintain a wrongful death action and a survival action because the misconduct resulted in death.[166] Under California law, significant damages were available under a wrongful death action, including loss of society and future support.[167] In concluding that limitations on survival damages were not inconsistent with § 1983, the court stated, "significant compensatory damages flowing from the actor's killing of the victim [are available], and which the actor must take into account; this provides both compensation and deterrence."[168]

Survival actions and wrongful death actions cannot always be viewed together. In instances where misconduct does not result in death, wrongful death actions are unavailable.[169] Therefore, severe limitations on survival damages defeat the goals of § 1983 when not accompanied by a wrongful death action.[170] Furthermore, wrongful death actions and survival actions are based on separate injuries;

162. 915 F. Supp. 1074, 1077 (N.D. Cal. 1996).
163. *See id.* at 1079.
164. *Id.* at 1078.
165. *See, e.g.*, Brown v. Morgan County, 518 F. Supp. 661, 662 (N.D. Ala. 1981); Garcia v. Superior Court, 42 Cal. App. 4th 177, 187, 49 Cal. Rptr. 2d 580, 586 (1996).
166. 42 Cal. App. 4th at 186-87, 49 Cal. Rptr. 2d at 586.
167. *See id.*
168. *Id.* at 187, 49 Cal. Rptr. 2d at 586.
169. *See* County of Los Angeles v. Superior Court, 58 Cal. Rptr. 2d 358, 361 (1996).
170. *See id.* at 362.

wrongful death actions compensate for injuries suffered by the estate, while survival actions remedy injuries suffered by the decedent.[171]

Some courts have held that the threat of litigation is sufficient to deter future misconduct; consequently, restrictive state statutes are not inconsistent with the § 1983 goal of deterrence.[172] For example, in *Goad v. Macon County* the court borrowed Tennessee's statute providing for a dollar-for-dollar set-off of settlement amounts from a final judgement.[173] In this case, the plaintiff settled with three defendants for an amount greater than the final judgment.[174] Consequently, the remaining defendants escaped all financial liability for compensatory damages.[175] The court felt, "the possibility of compensating for the entire injury still exists as a deterrent to the contemplated act."[176] That contention, however, should not be extended to survival suits.

The argument that the threat of suit is a sufficient deterrent seems to be based on a faulty reading of *Robertson.* The *Robertson* court held Louisiana's survival statute did not significantly thwart the goal of deterrence.[177] It stated, "[a] state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him."[178] However, the Court based that statement on the fact that "most Louisiana actions survive the plaintiff's death."[179] Consequently, extending the holding in *Robertson* to support a universal belief that the potential of a suit is an adequate deterrent completely ignores the *Robertson* Court's desire to produce a narrow holding.

171. *See* Steinglass, *supra* note 3, at 564.
172. *See* Goad v. Macon County, 730 F. Supp. 1425, 1432 (M.D. Tenn. 1989).
173. *See id.* at 1431.
174. *See id.* at 1425-26.
175. *See id.*
176. *Id.* at 1431; *but see* Dobson v. Camden, 705 F.2d 759, 766 (5th Cir. 1983) (The court refused to apply a dollar-for-dollar set-off in a similar situation, holding, "[a] rule that removes the burden of damages from the wrongdoer certainly conflicts with the policy of deterrence.").
177. 436 U.S. at 592.
178. *Id.*
179. *Id.*

In support of its conclusion that Louisiana's survival law was not inconsistent with the policy of deterrence, the Court stated:

> In order to find even a marginal influence on behavior as a result of Louisiana's survivorship provisions, one would have to make the rather farfetched assumptions that a state official had both the desire and the ability deliberately to select as victims only those persons who would die before conclusion of the § 1983 suit (for reasons entirely unconnected with the official illegality) *and* who would not be survived by any close relatives.[180]

However, the implausible hypothetical laid down by the Court in *Robertson* becomes far more real under a state survival statute severely restricting what damages are recoverable. State officials could be heedless of the civil rights of any person likely to die prior to the conclusion of a § 1983 trial, regardless of whether that person will be survived by a close relative. In fact, it was the difficulty of finding a victim not survived by a parent, spouse, child, or sibling that made the situation in *Robertson* so unlikely.[181]

A survival statute that prevents significant recovery by any survivor offers little or no protection for the elderly, terminally ill, and others unlikely to live for the several years a § 1983 suit can take. State officials could violate these people's civil rights at will and with very little fear of liability. If illegal conduct does not kill a victim, then no wrongful death suit is available, allowing offending officials to completely escape liability for injuries they caused. For example, a state official who sexually harasses elderly women at a state-operated nursing facility will go unpunished, so long as his victims die from causes unrelated to the claim prior to the conclusion of a § 1983 suit. Since damages for sexual harassment are primarily for pain and suffering, which many state survival statutes exclude,[182] the perpetrator is beyond the grasp of § 1983 and has no legal incentive to refrain from continued violations.

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180. *Id.* at 592-93 & n.10 (emphasis added).

181. *See id.*

182. *See, e.g.*, CAL. CIV. PROC. CODE § 377.34 (West Supp. 1998); COLO. REV. STAT. § 13-20-101(1) (1987).

Lastly, restrictive state survival statutes defeat the purpose of deterrence by providing an undeserved windfall to offending state officials. Where compensatory damages are precluded or substantially limited in § 1983 survival actions, the wrongdoer has effectively avoided a substantial amount of liability simply as a result of the death of the victim. But if the victim does not die then a wrongdoer may be liable for substantially greater compensatory damages. It is nonsensical that state officials who deprive citizens of their federal rights should benefit from the unintended death of the victim.[183]

Significant compensatory damages are necessary to effectively deter state officials from violating the civil rights of all citizens. When state survival statutes substantially reduce the liability of offending state officials, the underlying intent of § 1983 is thwarted, if not completely destroyed. Furthermore, restrictive survival statutes provide little protection for many who need it, yet provide an undeserved windfall to the state official who acts outside the bounds of the Constitution. Consequently, a uniform federal rule of survivorship, which allows for significant economic and non-economic damages, best advances the goal of deterrence.

IV. BENEFITS OF A UNIFORM FEDERAL RULE OF SURVIVORSHIP

In *Robertson v. Wegmann*, the United States Supreme Court opted against a uniform rule of survivorship and created the "inconsistent with federal policies" test, which is proving ineffective in adequately protecting constitutional rights.[184] As discussed above, a comprehensive federal rule of survivorship would more effectively deter future constitutional violations and better ensure compensation.[185] A uniform rule of survivorship would provide consistent results in § 1983 actions, making federal rights apply equally to citizens of each state. It would also provide additional benefits, such as certainty and discouraging forum shopping.

183. *See* Burt v. Abel, 466 F. Supp. 1234, 1241 (D.S.C. 1979) (holding "the sound public policy . . . that the death of a party . . . should not provide a windfall to the opposition . . . is . . . applicable here and should support the court's interpretation").

184. 436 U.S. 584, 590 (1978).

185. *See supra* Part III.

A. A Uniform Rule of Survivorship Would Bring Consistency to § 1983 Actions

Although the majority in *Robertson* declined to adopt a uniform federal rule of survivorship, the dissent, led by Justice Blackmun, argued in favor of a uniform rule.[186] One of the major reasons the dissent argued for uniformity was to provide for consistent results throughout the country.[187] In dissent, Justice Blackmun argued that if the Court adopted a uniform rule of survivorship, "[l]itigants identically aggrieved in their federal civil rights, residing in geographically adjacent States, will not have differing results due to the vagaries of state law."[188] In other words, citizens of every state will enjoy equal protection of federal rights.

Some circuits have adopted circuit-wide survivorship rules in order to promote consistency.[189] For example, the Eleventh Circuit argued that uniformity would promote consistency and provide equitable results.[190] In *Gilmere v. City of Atlanta*, the court opted to create a federal rule of damages, rather than apply Georgia's recovery scheme.[191] The court held:

> applying a federal standard of damages for injuries suffered by a decedent will promote consistency in the type and amount of damages awarded. Were we to . . . award the damages provided in the state wrongful death statute, there would be three separate measures of damages for the unconstitutional deprivation of life in this circuit: the damages permitted by the wrongful death statutes of Alabama, Florida and Georgia.[192]

The Third Circuit has also supported uniformity in federal survivorship rules.[193] The court held, "[t]he Civil Rights Acts were brought into being at a critical time in the history of the United States

186. 436 U.S. at 595-603 (Blackmun, J., dissenting).
187. *See id.* at 602 (Blackmun, J., dissenting).
188. *Id.* (Blackmun, J., dissenting).
189. *See* Gilmere v. City of Atlanta, 864 F.2d 734, 739-40 (11th Cir. 1989); Basista v. Weir, 340 F.2d 74, 86 (3d Cir. 1965).
190. *See Gilmere*, 864 F.2d at 739-40.
191. *See id.* at 737.
192. *Id.* at 739.
193. *See Basista*, 340 F.2d at 86.

following the Civil War. They were intended to confer equality in civil rights before the law in all respects for all persons embraced within their provisions."[194] The court continued, holding that:

> the benefits of the Acts were intended to be uniform throughout the United States . . . and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the state in which the federal court suit was brought. Federal common law must be applied to effect uniformity, otherwise the Civil Rights Acts would fail to effect the purposes and ends which Congress intended.[195]

Although the United States Supreme Court rejected a uniform rule of survivorship in *Robertson*,[196] the logic of the circuit court's holding remains true.

By allowing state law to dictate the amount of recovery, the courts are allowing the states to determine the scope of federal protection under § 1983 if the victim dies prior to the conclusion of the litigation. Consistent recoveries, on the other hand, would protect the federal rights equally for all people, regardless of what state they were in when deprived of their civil rights. Consequently, the scope of federal protection would be equal throughout the nation.

Residency determines the availability and scope of several important rights and protections. In many circumstances the rights and responsibilities of citizens should depend upon residency. For example, welfare recipients may receive larger or smaller benefits depending on the state in which they receive aid.[197] Also, crimes that qualify for the death penalty in one state may only qualify for life imprisonment in another.[198] However, the purpose of § 1983 is to protect rights that the United States Constitution guarantees to all citizens regardless of residency. Accordingly, equality of federal rights is not accomplished if the protection of those rights varies

194. *Id.*
195. *Id.*
196. 436 U.S. at 590.
197. *See, e.g.*, CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN: YEARBOOK 1997, at 98 (1997).
198. *See, e.g.*, THE DEATH PENALTY IN AMERICA 36-38 (Hugo Adam Bedau ed., 1997).

greatly from state to state. Therefore, a uniform rule of survivorship in § 1983 actions is necessary to equally protect fundamental federal rights in every state.

B. Additional Benefits of a Uniform Rule of Survivorship

A uniform rule of survivorship would not only bring about fair and consistent results, but would also achieve additional benefits. For example, a uniform rule would lead to certainty and predictability in § 1983 survival actions, which would decrease litigation over whether to apply state or federal law. Furthermore, a uniform rule of survivorship would also deter forum shopping.

In his dissent in *Robertson*, Justice Blackmun contended that a uniform rule of survivorship would provide much needed predictability to § 1983 litigation.[199] He argued that, "[l]itigants need not engage in uncertain characterization of a § 1983 action in terms of its nearest tort cousin, a questionable procedure to begin with."[200] Justice Blackmun further argued, "[a] federal rule of survivorship allows uniformity, and counsel [to] immediately know the answer [to § 1983 survivorship issues]."[201]

The certainty which a uniform survivorship rule would provide has many advantages. Certainty would allow attorneys to give their clients quick and accurate answers as to the likely success of a § 1983 survival action.[202] The ability to provide quick answers will more adequately inform potential litigants of the costs and benefits of pursuing a § 1983 action. Hypothetically, if a potential plaintiff knew that he could not recover significant damages for the unconstitutional injuries suffered by his deceased wife, then that plaintiff would most likely avoid incurring the time and costs associated with § 1983 litigation.

Furthermore, certainty would reduce much, if not all, of the litigation over what types of damages are available under § 1983 survival actions. Since the Supreme Court adopted the "inconsistent" test in *Robertson*, the court system has been inundated with

199. 436 U.S. 584, 602 (1978) (Blackmun, J., dissenting).
200. *Id.* (Blackmun, J., dissenting).
201. *Id.* (Blackmun, J., dissenting).
202. *See id.* (Blackmun, J., dissenting).

numerous cases debating what damages may be recovered.[203] A uniform survivorship rule would end constant litigation over whether a state law is inconsistent with federal policies.

In addition to providing certainty and promoting judicial efficiency, a uniform federal rule of survivorship would also eliminate the advantages of forum shopping. In determining whether to apply state law in a § 1983 survival action, state and federal courts within the same state may have completely opposite rulings. For example, in *Guyton v. Phillips*, a federal court held that California's survival statute was inconsistent with the policies underlying § 1983.[204] On the other hand, a California appellate court has held state law is not inconsistent with those same policies.[205] Consequently, such inequitable results influence litigants to bring the action in the forum most favorable to their position.

The United States Supreme Court has stated that forum shopping is an undesirable result of inconsistent laws and should be avoided.[206] In *Southland Corp. v. Keating*, the Supreme Court overturned a state court interpretation of the Federal Arbitration Act.[207] The Court ruled in favor of consistency because it did not want to "encourage and reward forum shopping."[208] A uniform rule of survivorship bests promotes the policy of discouraging forum shopping by eliminating the benefits of choosing one forum over another.

A uniform rule of survivorship possesses many potential advantages. Such a rule would bring fairness and equity to § 1983 actions throughout the United States. Furthermore, a uniform federal rule brings consistency to § 1983 survival actions, which decreases litigation and prevents forum shopping.

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203. *See, e.g.*, Williams v. City of Oakland, 915 F. Supp. 1074 (N.D. Cal. 1996); Evans v. Twin Falls County, 796 P.2d 87 (Idaho 1990).

204. 532 F. Supp. 1154, 1166 (N.D. Cal. 1981).

205. *See* Garcia v. Superior Court, 42 Cal. App. 4th 177, 187, 49 Cal. Rptr. 2d 580, 587 (1996).

206. *See* Southland Corp. v. Keating, 465 U.S. 1, 15 (1984).

207. *See id.*

208. *Id.*

CONCLUSION

Since the Supreme Court's ruling in *Robertson*, § 1983 survival litigation has been uncertain, inconsistent, and often unfair. A uniform federal rule of survivorship would provide certainty and consistency in federal civil rights litigation and more effectively promote the fundamental goals underlying § 1983—compensating victims of constitutional deprivations and deterring future misconduct by state officials.

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