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### Wrongful Death Actions Under Section 1983

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## **WRONGFUL DEATH ACTIONS UNDER SECTION 1983**

### **A Roundtable Dialogue**

Professor Martin A. Schwartz,<sup>1</sup> Dean Steven Steinglass,<sup>2</sup>  
Richard Emery, Esq.,<sup>3</sup> and Ilann Margalit Maazel, Esq.<sup>4</sup>

With comments by:  
Professor Erwin Chemerinsky  
and  
Honorable Victor Marrero

Moderated by  
Honorable George C. Pratt

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<sup>4</sup> J.D. University of Michigan, 1997; B.A. Harvard University, 1993. Mr. Maazel is a lawyer at Emery Cuti Brinckerhoff & Abady PC, former law clerk to Hon. John M. Walker, Chief Judge of the United States Court of Appeals for the Second Circuit, and a former Fellow of Coro Leadership New York and recipient of the Echoing Green Public Service Fellowship.

JUDGE PRATT: Thank you for joining us for a discussion of the very pertinent issue of survival and wrongful death actions under § 1983.<sup>5</sup>

PROFESSOR SCHWARTZ: Wrongful death actions under § 1983 have proven to be a very complex issue in recent years. “This issue has ‘generated considerable confusion and disagreement’ in the lower federal courts.”<sup>6</sup> Nevertheless, today we have an esteemed panel worthy of addressing such a difficult topic.

We will examine how courts handle questions of survivorship of claims. The issue of survivorship of a claim under § 1983 arises when there is a death of a party in an unresolved

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<sup>5</sup> 42 U.S.C. §1983 (2000) states in pertinent part:

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. . . .

*Id.*

<sup>6</sup> Martin A. Schwartz, *Section 1983 Survival and Wrongful Death Claims*, 229 N.Y.L.J. 3 (2003) (citing *Phillips v. Monroe County*, 311 F.3d 369, 374 (5th Cir. 2002)).

action. Surviving relatives frequently attempt to assert wrongful death claims under § 1983. It is important to keep the survivorship and wrongful death issues separate. We are fortunate to have the esteemed Judge Victor Marrero on our panel. In *Banks v. Yokemick*,<sup>7</sup> Judge Marrero addressed these issues in an extensive opinion. We also have the plaintiff's lawyers who litigated *Banks*, Richard Emery and his colleague, Ilann Maazel.

To put these issues in perspective, we must look to § 1988(a).<sup>8</sup> Generally, when discussing § 1988, everybody normally

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<sup>7</sup> 177 F. Supp. 2d 239 (S.D.N.Y. 2001).

<sup>8</sup> 42 U.S.C. § 1988(a) (2000) provides:

Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district and circuit courts [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.

*Id.*

thinks of fees, but fees are covered by subdivision (b).<sup>9</sup> Dean Steinglass, please tell us how § 1988(a) operates.

DEAN STEINGLASS: Section 1988(a) is a federal civil rights choice of law statute. It creates a methodology for courts to fill the gaps in federal law when they are hearing actions under § 1983 and some of the other surviving Reconstruction Era civil rights acts, such as § 1981<sup>10</sup> and § 1982.<sup>11</sup> Typically, the best way to understand a statute is to read it. In the case of § 1988(a), reading it is the worst way to understand it. It can be compared to the Supreme Court's Eleventh Amendment jurisprudence.

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<sup>9</sup> 42 U.S.C. § 1988(b) provides:

Attorney's fees. In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

*Id.*

<sup>10</sup> Equal Rights Under the Law, 42 U.S.C. § 1981 (2000).

<sup>11</sup> Property Rights of Citizens, 42 U.S.C. § 1982 (2000).

The Supreme Court, in *Burnett v. Grattan*,<sup>12</sup> held that under § 1988, which dates back to the Civil Rights Act of 1866,<sup>13</sup> there are three steps in the analysis. The first step is to ask whether there is a deficiency in federal law.<sup>14</sup> If there is a deficiency, the second step is to look to the state in which the federal court is sitting and borrow a suitable provision of state law.<sup>15</sup> This is usually an easy determination to make. On the other hand, the question of which statute of limitations to borrow is less easily determined. The Supreme Court has frequently granted *certiorari* to determine which statute of limitations theory should be applied.<sup>16</sup> It can be said that under § 1988(a) there is a deficiency inquiry,<sup>17</sup> a selection of the appropriate state law inquiry,<sup>18</sup> and an inconsistency inquiry.<sup>19</sup> For this analysis, the federal court borrows a suitable state policy unless the policy is inconsistent with § 1983's twin

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<sup>12</sup> 468 U.S. 42 (1984).

<sup>13</sup> Civil Rights Act, ch 31, § 3, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1988 (2000)).

<sup>14</sup> *Burnett*, 468 U.S. at 48.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 49-50 (citing *Johnson v. Ry. Express Agency*, 421 U.S. 454 (1975); *Bd. Of Regents v. Tomanio*, 446 U.S. 478 (1980); *McDonald v. West Branch*, 466 U.S. 284 (1984)).

<sup>17</sup> *Id.* at 48.

<sup>18</sup> *Id.*

<sup>19</sup> *Burnett*, 468 U.S. at 48.

goals of compensation and deterrence. The court must then address the issues of deficiency, suitability, and finally, inconsistency.<sup>20</sup>

PROFESSOR SCHWARTZ: There is a possibility of a fourth step if the federal court finds an inconsistency. Then what is the court to do?

DEAN STEINGLASS: If there is a finding of inconsistency, then the court must decide what to do. If the court finds a need for a policy, the court must search for one, and that raises the need for a fourth step. This need to find a policy can create additional problems for federal courts that may need to create federal law to fill the void.

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<sup>20</sup> See Schwartz, *supra* note 6. “When federal law fails to establish a rule of law necessary for litigation of a Section 1983 claim, 42 USC Section 1988(a) directs the federal court to remedy the deficiency by applying the state rule, so long as the state rule is not inconsistent with the policies of Section 1983.” *Id.* “[B]ecause survivorship of Section 1983 claims is not covered by federal law, the federal court must apply the state law of survivorship, so long as the state policy is not inconsistent with the Section 1983 policies of compensation and deterring constitutional violations.” *Id.* (citing *Robertson v. Wegmann*, 436 U.S. 584 (1978)).

2003]

## WRONGFUL DEATH ACTIONS

713

PROFESSOR SCHWARTZ: This speaks to the question of deficiency. Sometimes there is an obvious deficiency, such as when there is no federal statute of limitations for § 1983.<sup>21</sup> But, it is not always obvious that the federal law is deficient.

DEAN STEINGLASS: It is difficult to assume that Congress meant § 1983 cases to linger for decades and decades, so that deficiency is obvious.<sup>22</sup>

PROFESSOR SCHWARTZ: Would you assert that the lack of a federal law for survivorship of claim is an obvious deficiency as well?

DEAN STEINGLASS: There is an obvious lack of a federal statute on survivorship. The Supreme Court, however, has offered little guidance in this area. In *Robertson v. Wegmann*,<sup>23</sup> the Court

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<sup>21</sup> *Burnett*, 468 U.S. at 48 (stating that “only 42 U.S.C. § 1986 contains a statute of limitations”).

<sup>22</sup> *Id.* at 61 (“The willingness of Congress to impose a 1-year limitations period in 42 U.S.C. § 1986 demonstrates that at least a 1-year period is reasonable”).

<sup>23</sup> 436 U.S. 584 (1978).



held that there was a deficiency in federal law with respect to whether an action survives the death of the plaintiff or the death of the defendant.<sup>24</sup> We are told to look to state law when this issue arises.<sup>25</sup> So, on survivorship issues we have a clear decision to follow.

JUDGE MARRERO: When there is a slight nuance in the analysis, or the other side of the coin, before there is a determination of deficiency, the court must first determine whether or not federal law is adequate. The rationale is that if you examine federal law and find there is an adequate remedy in place, there is no need to determine the outcome of the next step, deficiency. Again, it may be two sides of the same coin, but it might make the analysis simpler.

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<sup>24</sup> *Id.* at 589. Federal law is ‘deficient’ because “[a]s we noted in *Moor v. County of Alameda*, and as was recognized by both courts below, one specific area not covered by federal law is that relating to ‘the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant.’” *Id.* (quoting *Moor v. County of Alameda*, 411 U.S. 693, 702 (1973)).

<sup>25</sup> *Id.* at 588 (“When federal law is thus ‘deficient,’ § 1988 instructs us to turn to ‘the common law, as modified and changed by the constitution and statutes of the [forum] State,’ as long as these are ‘not inconsistent with the Constitution and laws of the United States.’”) (quoting 42 U.S.C. §1988).

2003]

## WRONGFUL DEATH ACTIONS

715

PROFESSOR SCHWARTZ: In the area of notice of claim, sometimes there is no federal law on the issue. Steve Steinglass, you argued this in *Felder v. Casey*.<sup>26</sup> In *Felder*, there was no federal notice of claim provision, but still it was not held to be a deficiency.<sup>27</sup>

DEAN STEINGLASS: Just because there is no federal policy in the area, it does not mean there is a deficiency. The Supreme Court, in *Felder*, held that for there to be a deficiency, there have to be “universally familiar aspects of litigation considered indispensable to any scheme of justice” in general.<sup>28</sup> But, in survival claims, there is no federal survival policy that Congress made applicable to § 1983. This holding leads us to the more interesting questions.

PROFESSOR SCHWARTZ: Richard Emery and Ilann Maazel, as the attorneys in *Banks*,<sup>29</sup> a case originally brought against

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<sup>26</sup> 487 U.S. 131 (1988).

<sup>27</sup> *Id.* at 140.

<sup>28</sup> *Id.*

<sup>29</sup> 177 F. Supp. 2d at 239.

multiple defendants,<sup>30</sup> please describe how the offset issue in *Banks* came about.

MR. MAAZEL: There were two novel issues that we brought before Judge Marrero.<sup>31</sup> One was whether loss of life damages were available,<sup>32</sup> the other was the setoff issue.<sup>33</sup> We settled with the City. Subsequently, the jury returned a verdict against Officer Yokemick for \$605,000. Officer Yokemick argued that there was

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<sup>30</sup> *Id.* (plaintiff sued the City of New York, Craig Yokemick, and nineteen other individual defendants).

<sup>31</sup> The following comments were presented by Mr. Emery and Mr. Maazel. Mr. Emery, in describing the facts of *Banks*, promises that the facts will make a very abstract case more illustrative. In *Banks*, there are gaps in the federal law. Judge Marrero, the presiding judge in *Banks*, will discuss at a later time the underlying federal concepts of § 1983.

*Banks* is really a very simple case. An officer pursued a young man who was on a bicycle. The officer wanted to arrest him. The young man was getting away from the officer, so the officer threw his radio and hit the young man in the back of the head. The young man subsequently died. *Banks*, 177 F. Supp. 2d at 243-44. Although the facts are quite straightforward, there are a number of nuances to this. There was a denial of care prior to his death. *Id.* The family asserted a substantive due process claim on behalf of the young man's mother for this denial of care and for the excessive force that resulted in his death. *Id.*

Mr. Maazel stated that the plaintiff brought suit against the City of New York and against a number of police officers. *Id.* at 243. The plaintiffs settled the case with every defendant except for Officer Yokemick. During the trial against Officer Yokemick, the plaintiffs argued that there was a variety of damages available. One was Kenneth Banks' pain and suffering before he died. *Id.* Another was the cost of the funeral and associated expenses. *Banks*, 177 F. Supp. 2d at 243. Third was a new concept to the Second Circuit, damages for the loss of Kenneth Banks' life itself. *Id.* (explaining loss of life damages do not exist under New York law).

<sup>32</sup> *Banks*, 177 F. Supp. 2d at 247.

<sup>33</sup> *Id.* at 243.

an automatic setoff for the \$750,000 that was awarded by the City in the settlement. Further, he asserted that under New York law, this conclusion would be valid,<sup>34</sup> reasoning that the plaintiff already received \$750,000 and should get nothing more.<sup>35</sup> Additionally, he noted that if the jury awarded \$1,000,000 to plaintiff, it would be appropriate to receive only \$250,000 because the City already settled for \$750,000.<sup>36</sup> The plaintiff argued that the New York law did not apply if one utilized the three-step analysis as suggested by Dean Steinglass.<sup>37</sup>

First, we looked to federal law; does federal law speak to the issue of setoff? We argued before Judge Marrero that there was precedent in an admiralty case, admiralty being the quintessential federal common law. In *McDermott, Inc. v Amclyde & River Don Castings, Ltd.*,<sup>38</sup> the Court held that you do not look to the amount that was settled by the defendants who are out of the case, but look only at the allocation of fault between the remaining

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<sup>34</sup> *Id.* The settlement with the City was for \$750,000 plus fees. *Id.*

<sup>35</sup> See N.Y. GEN. OBL. LAW § 15-108 (McKinney 2001).

<sup>36</sup> *Banks*, 177 F. Supp. 2d at 254.

<sup>37</sup> See *supra* text accompanying notes 14-20.

<sup>38</sup> 511 U.S. 202 (1994).

defendants and the defendants who settled.<sup>39</sup> Thus, if you determine the percentage of fault allocated to the remaining defendant, for example, eighty percent responsible, and the defendants who have settled are determined to be twenty percent responsible, the court would then deduct twenty percent from the jury verdict. The remainder would be the amount recovered from the jury trial. This is the allocation apportion and share rule<sup>40</sup> as opposed to the New York *pro tanto* setoff rule.<sup>41</sup> Our argument was that if there is a federal common law of setoff, it should apply to this case; the Supreme Court agreed, so we did not need to advance to the second step to determine if there was a state law when federal law was unavailable.

PROFESSOR SCHWARTZ: Judge Marrero, in this case the plaintiffs relied on federal law.<sup>42</sup> I suppose that you could have held that there is federal law governing the setoff issue and, therefore, the federal court did not have to look to state law. But,

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<sup>39</sup> *Id.* at 204.

<sup>40</sup> *Id.* at 210.

<sup>41</sup> See N. Y. GEN. OBLIG. LAW § 15-108 (McKinney 2001).

<sup>42</sup> *Banks*, 177 F. Supp. 2d at 242-43.

you did not. Although there was federal law, you held that there was a deficiency.<sup>43</sup> I believe this raises a more pervasive problem - judges doing the same with other issues as well. For example, sometimes there is a question raised about tolling the statute of limitations in a case with a federal issue of fraudulent concealment.<sup>44</sup> Even though there is federal law on this issue, federal courts have often relied on state tolling law.<sup>45</sup> In *Banks*, there was a law dealing with the impact of the setoff,<sup>46</sup> but you decided that there was a deficiency. One can surmise that you did not rely on the previous case because it was in an admiralty context.<sup>47</sup>

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<sup>43</sup> *Id.* at 263.

<sup>44</sup> *See, e.g., Dohra v. Alcon*, No. 92 C 2624, 1994 U.S. Dist. LEXIS 10173, \*\*6-8 (N.D. Ill. July 25, 1994) (holding the fraudulent concealment statute did not toll the products liability statute of repose); *Dean Witter Reynolds, Inc. v. McCoy*, 995 F.2d 649, 651 (6th Cir. 1993) (holding that, on remand, if the District Court found fraudulent concealment, claims could proceed even though the statute of limitations had elapsed).

<sup>45</sup> *See, e.g., Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2001) (explaining that federal courts will apply state tolling law as long as it is not inconsistent with federal law); *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117 (9th Cir. 1980) (holding in § 1981 claims the state tolling law applied where it is not inconsistent with the Constitution or federal law).

<sup>46</sup> *Banks*, 177 F. Supp. 2d at 254 (“*Banks* argues that . . . the setoff rule applicable to this case derives from federal common law . . .”).

<sup>47</sup> *McDermott*, 511 U.S. at 201.

JUDGE MARRERO: This case is still before the court, so it might be inappropriate for me to say too much about it given we have the plaintiff here, but not the defendant.<sup>48</sup> There has not been a final judgment, and I still have proceedings before me in this case. In very brief summary, the court found that there was federal law in *McDermott*, which was an admiralty case, which required a process of allocating culpability.<sup>49</sup> At the time the defendants introduced the defense of setoff, they had pled state law setoff. In ruling that the state setoff rule did not apply, the court had not considered the federal rule.<sup>50</sup> If the court were to adopt the federal rule, requiring the allocation of culpability, it would have been quite impossible, as it had not been argued throughout the trial. I determined that in order to actually apply the federal process of allocation of culpability, it would be necessary for the parties to stipulate to the issue of culpability, or conversely, if the parties did not stipulate, the court would be required to decide it at trial.

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<sup>48</sup> The defendant was invited to participate in this discussion.

<sup>49</sup> See *supra* text accompanying notes 38-40.

<sup>50</sup> *Banks*, 177 F. Supp. 2d at 263.

2003]

## WRONGFUL DEATH ACTIONS

721

PROFESSOR SCHWARTZ: It appears that the court initially found a deficiency, so it turned to the state law. When it found the state law to be inconsistent with the policy in § 1983, it was forced to adopt a federal rule, which, I would guess, brought the court right back to *McDermott*.<sup>51</sup> Is that fairly accurate? Is that how the court found itself on step four?

JUDGE MARRERO: No, I believe as I understood *McDermott*, it did apply. I determined that there was a federal rule that pertained to the set of facts before the court. The difficulty was that the parties had not presented the issue in that context to the court in briefing the matter because the defense had not pled *McDermott*. The defense in *Banks* pled state law,<sup>52</sup> which I later determined was inapplicable.<sup>53</sup>

PROFESSOR SCHWARTZ: It appears to me that the application of this principle could be very difficult.

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<sup>51</sup> *McDermott*, 511 U.S. at 217.

<sup>52</sup> *Banks*, 177 F. Supp. 2d at 243.

<sup>53</sup> *Id.* at 263.



JUDGE MARRERO: It could be, and that is why it required, after the fact, the determination that perhaps a new trial might be necessary.

PROFESSOR SCHWARTZ: There is the potential that the plaintiff could wind up with a windfall, or the remaining defendant could wind up with a break, depending on how it plays out. The overall point is that it is not always obvious whether there is a deficiency in the federal law; and furthermore, if there is a deficiency, is it still necessary to determine whether the state law is consistent with § 1983 policies?

JUDGE MARRERO: In *Banks*, it was not clear on its face.

PROFESSOR SCHWARTZ: Let us now turn our focus to survival and wrongful death decisions. I have an impression, and perhaps I am incorrect, that the decisions are not always clear as to whether a survival or wrongful death claim is before the court. It could be that the plaintiff's attorney had not distinguished them sufficiently.

DEAN STEINGLASS: I do agree that frequently plaintiffs' attorneys do not distinguish the claims. There are two different clusters of issues surrounding survival and wrongful death claims. Survival policies determine whether the claim of the litigant survives the litigant's death or whether death abates the claim. The traditional measure of damages in survival actions is the amount that the decedent would have been awarded had he not perished.<sup>54</sup> Thus, the damages are those that have accrued from the time of the complained of incident until the time of death.<sup>55</sup> Wrongful death damages, on the other hand, are the damages that accrue to survivors as a result of the death of the decedent.<sup>56</sup> The underlying cause of action and the complained of conduct are the same, but in survival damage, the court must address the loss of earnings, medical expenses, conscious pain and suffering, and in most jurisdictions, punitive damages.<sup>57</sup> On the wrongful death claim, the court must address the loss of support, loss of inheritance, loss of

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<sup>54</sup> Hon. George C. Pratt & Martin A. Schwartz, *18th Annual Section 1983 Civil Rights Litigation*, 1 PRACTISING LAW INST. 584 (2002).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 587.

<sup>57</sup> *Id.*

society, and in a number of states, mental anguish and grief, and often punitive damages.<sup>58</sup> Some might mistakenly see this as double recovery, but in fact it is two distinct recoveries to compensate two different interests for the same underlying constitutional claim.

The remarkable thing about survival and wrongful death measures of damages is that these remedial issues are in virtually every § 1983 case involving an alleged wrongful killing, but they are rarely addressed. The Supreme Court has never fully addressed wrongful death damages. On two occasions, *certiorari* had been granted, only to be dismissed, as the Court found that *certiorari* was improvidently granted.<sup>59</sup>

Interestingly, virtually every circuit has developed its own unique approach to these issues.<sup>60</sup> Further, state policies play a big

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<sup>58</sup> *Id.*

<sup>59</sup> *See, e.g.,* Jefferson v. City of Tarrant, 522 U.S. 75 (1997) (holding that the lower court decision was not a final judgment); Jones v. Hildebrant, 432 U.S. 183 (1977) (holding that the petition for *certiorari* was mooted after oral arguments).

<sup>60</sup> *See, e.g.,* Baker v. Putnal, 75 F.3d 190, 195 (5th Cir. 1996) (“[I]t is the law of this circuit that individuals who are within the class of people entitled to recover under Texas’s wrongful death statute have standing to sue under § 1983 for their own injuries resulting from the deprivation of decedent’s constitutional rights”); Bell v. City of Milwaukee, 746 F.2d 1205, 1236 (7th Cir. 1984) (“Where the constitutional deprivation sought to be remedied in a Section 1983 action causes death and the applicable state law would deem the action to survive or would

role in defining how the § 1983 wrongful death action will proceed, and state policies differ widely in these areas.<sup>61</sup> The tactical decision that a lawyer will make in one jurisdiction will be different than the tactical decision that same lawyer would make in an adjoining jurisdiction in another state, both in the same circuit.

From a plaintiff's perspective, there is an infinitely broad range of damages available on either a survival or a wrongful death claim. A plaintiff's lawyer would argue that this is a case in which it would be appropriate to borrow state law. If state law had limitations, a plaintiff's lawyer might choose to either seek other sources of law or choose to adopt only some portions of state law, arguing that other portions of the same state law violated the inconsistency clause. Those portions in violation of the inconsistency clause would have to be rejected. This analysis would be very situational. The facts of a case and the impact of state and federal law would all have to be understood in great depth before an argument could proceed.

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allow recovery for the damage claim at issue, courts generally apply the state law").

<sup>61</sup> Pratt & Schwartz, *supra* note 54, at 585-89.

PROFESSOR SCHWARTZ: Therefore, it is imperative to separate the issues of survival and wrongful death and not fall into the common trap of lumping them together. We must understand that a survival claim survives a plaintiff's death, but a wrongful death action only begins at the time a plaintiff dies. Further, we understand that if there is a deficiency in the federal law, a federal judge must look to state survival statutes. When the attorneys in *Banks* argued that there was no federal law, the federal court turned to the New York state survival law<sup>62</sup> but it was found to be

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<sup>62</sup> N.Y. EST. POWERS & TRUSTS LAW §11-3.3 (McKinney 2001) provides:

- (a) Where an injury causes the death of a person the damages recoverable for such injury are limited to those accruing before death and shall not include damages for or by reason of death, except that the reasonable funeral expenses of the decedent, paid by the estate or for the payment of which the estate is responsible, shall be recoverable in such action. The damages recovered become part of the estate of the deceased.
- (b) Nothing contained herein shall affect the cause of action existing in favor of the next of kin under 5-4.1, subject to the following:
  - (1) Such cause of action and the cause of action, under this section, in favor of the estate to recover damages may be prosecuted to judgment in a single action; a separate verdict, report or decision shall be rendered as to each cause of action.
  - (2) Where an action to recover damages for personal injury has been brought, and the injured person dies, as a result of the injury, before verdict, report or decision, his personal representative may enlarge the complaint in such action to include the cause of action for wrongful death under 5-4.1.
  - (3) Where an action to recover damages under this section and a separate action for wrongful death under 5-4.1 are pending against the same defendant, they may be consolidated on the motion of either party.

inconsistent with the policy of § 1983.<sup>63</sup>

MR. EMERY: That was, in fact, what we argued. The anomaly that came up in *Banks* was that there was an inadequate compensatory scheme from the plaintiff's point of view.<sup>64</sup> It was recognized by Judge Marrero's decision that the problem was greater than just an inadequate compensatory scheme.<sup>65</sup> Under New York law, a survival claim is terminated at the time of death, and under most circumstances, a wrongful death claim is not worth much. The only instance in which there is adequate compensation is when the deceased plaintiff is very valuable economically.<sup>66</sup>

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*Id.*

<sup>63</sup> *Banks*, 177 F. Supp. 2d at 249. The court explained:

On its face and as construed by New York courts, the state's survival claim law does not evince an objective to secure compensation designed to protect these broader non-economic interests that inure to the benefit of both the decedent and the larger community. In other words, the interests the state law seeks to promote are principally the financial needs the decedent's estate and its intended beneficiaries. These values do not encompass the whole expanse of intangible, more social and individual interests, such as enjoyment of life, that inherently derive from the person of the victim and that § 1983 protects from unlawful deprivation.

*Id.* (internal citations omitted).

<sup>64</sup> 177 F. Supp. 2d at 249.

<sup>65</sup> *Id.* at 249-50.

<sup>66</sup> *Banks*, 177 F. Supp. 2d at 247.

Banks was not such a person. Banks was a young man who was not earning much money.<sup>67</sup>

The facts and circumstances of our case necessitated that our argument rely on the determination that although federal law was deficient,<sup>68</sup> New York law was too inadequate to rely on.<sup>69</sup> Moreover, the policies underlying § 1983, compensation and the need to deter and punish those who do not comply with constitutional rights mandated that the court look at federal law anew. Judge Marrero's opinion confirmed our argument.<sup>70</sup>

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<sup>67</sup> This personal characterization was made by the speaker, Richard Emery, who is Banks' attorney.

<sup>68</sup> *Banks*, 177 F. Supp. 2d at 249-50.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 249.

Here, the particular interest asserted and the fundamental constitutional right sought to be vindicated is Banks's Fourth Amendment right not to be subjected to use of excessive force by police that caused his loss of life. The right to enjoyment of life without its unlawful curtailment has an intrinsic worth that necessarily exceeds the dollars-and-cents value of the decedent to his beneficiaries. For, implicit in the legislative history and philosophy of § 1983 is that the life interest the statute protects is not just the private economic interest of the injured person himself to enjoy his own life, but the much more fundamental public interest of the rest of society in that the life of any individual not be ended by the lawless conduct of state agents. To this extent, in a measure of damages under the federal statutory scheme, a state rule's quantification of the value of a particular person's life would be fundamentally flawed insofar as it counted alike whether the individual died of natural causes or was killed unlawfully by the state's own hand. The life wrongfully foreshortened is doubly

JUDGE MARRERO: In the analysis, there was a need to look to state law and the underlying policies that § 1983 was to promote. In this instance it was clear. New York precedent explicitly denies loss of life as an element of a cause of action or as elements of damages to be awarded.<sup>71</sup> In *Banks*, the court interpreted New York's Estate Powers and Trust Law Section 11-3.3.<sup>72</sup> In interpreting this law, New York courts have held that only economic interests were to be compensated when calculating damages. The courts have made it absolutely clear that, to the extent federal law promoted other interests, New York law would be inconsistent with those goals.<sup>73</sup>

PROFESSOR SCHWARTZ: When examining different state rulings in response to recovery of damages for the surviving plaintiff, we see a variety of limitations imposed. Some states may

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shortchanged if that singular quantum of loss is discounted in the official reckoning of the person's social worth.

*Id.*

<sup>71</sup> See *Sand v. Chapin*, 656 N.Y.S.2d 700, 701 (App. Div. 3d Dep't 1997); *Kordonsky v. Andrst*, 568 N.Y.S.2d 117, 119 (App. Div. 2d Dep't 1991).

<sup>72</sup> *Banks*, 177 F. Supp. 2d at 249-50.

<sup>73</sup> *Id.* at 251-52.



have a maximum dollar limitation.<sup>74</sup> Some might not permit the awarding of punitive damages,<sup>75</sup> while others might award *only* punitive damages.<sup>76</sup> In New York, the law does not permit damages for loss of enjoyment of life. But, it appears the New York cases draw a distinction between two types of situations. In the first instance, the plaintiff brings the claim and subsequently dies for reasons not having to do with the alleged wrongdoing. In the second instance, the plaintiff's allegation is that the defendant's wrongdoing caused the death. My impression is that the limitations we discussed are much less likely to be imposed in cases where the defendant's conduct caused the death of a plaintiff.

DEAN STEINGLASS: I believe you are correct. *Robertson v. Wegmann*,<sup>77</sup> is the first major case in this area. *Robertson* is a case in which the plaintiff died during the pendency of the litigation

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<sup>74</sup> See, e.g., *Allstate Ins. Co. v. Heffner*, 421 A.2d 629 (1980) (noting Pennsylvania's \$15,000 limit).

<sup>75</sup> See, e.g., *Bass by Lewis v. Wallentsein*, 769 F.2d 1173, 1190 (7th Cir. 1985) (noting that both New York and Illinois do *not* permit punitive damage awards).

<sup>76</sup> See, e.g., *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983) (noting Alabama awards *only* punitive damages).

<sup>77</sup> 436 U.S. 584 (1978).

from causes unrelated to the complained of conduct.<sup>78</sup> The Supreme Court, in *Carlson v. Green*,<sup>79</sup> subsequently held that survival of the administratrix' *Bivens*<sup>80</sup> cause of action was governed by federal common law rather than by state statutes and that the action survives even if state law did not permit survival.<sup>81</sup>

In reviewing the cases on record, particularly the *Robertson* case, we can determine what the Court tells us about the inconsistency clause of § 1983. I do believe that *Banks* is a great, compelling case, and very well written. Nevertheless, it puts forth an incorrect approach for an examination of the inconsistency clause.

*Robertson* is a famous case. The plaintiff in *Robertson* was Clay Shaw, a New Orleans businessman indicted for conspiracy in the assassination of President Kennedy.<sup>82</sup> After his acquittal, he brought a bad faith prosecution case against the New Orleans District Attorney, Jim Garrison.<sup>83</sup> The plaintiff died during the

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<sup>78</sup> *Id.* at 585.

<sup>79</sup> 446 U.S. 14 (1980).

<sup>80</sup> *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>81</sup> *Carlson*, 446 U.S. at 24.

<sup>82</sup> 436 U.S. at 586.

<sup>83</sup> *Id.*

pendency of the case.<sup>84</sup> His executor “jump[ed] in” and said, “I am going to continue the case on the behalf of the estate.”<sup>85</sup> Louisiana had an odd statute which, in effect, said that the action would abate unless there was a surviving spouse, parent, or sibling, and there were none. Thus, the action abated. The Supreme Court granted *certiorari* and, in an opinion written by Justice Thurgood Marshall, the Court held that there was no compensation interest because Clay Shaw was dead.<sup>86</sup> Justice Marshall made this point:

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.<sup>87</sup>

I regard this as a theory of marginal deterrence. The question that must be raised is this: if there is additional deterrence, is the state law struck down? The Supreme Court framed the issue relatively narrowly under the inconsistency clause.<sup>88</sup>

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 586-87.

<sup>86</sup> *Id.* at 594-95.

<sup>87</sup> *Robertson*, 436 U.S. at 592 n.10.

<sup>88</sup> *Id.* at 594.

PROFESSOR SCHWARTZ: Professor Chemerinsky, California has similar limitations, and I believe you know an attorney who litigated one of these issues in California. My recollection is there are conflicting decisions in California state and district courts.<sup>89</sup> The decisions concern California's limitations on survival damages.

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<sup>89</sup> See generally *Los Angeles v. Superior Court*, 981 P.2d 68, 73 (Cal. 1999) (holding that survival statute prohibiting recovery of damages for decedent's pain and suffering or disfigurement applied to federal civil rights claim prosecuted in state court). *Contra Smith v. City of Fontana*, 818 F.2d 1411, 1416-17 n.8 (9th Cir. 1987) (noting a potential issue whether California's survival statute was inconsistent with the federal Civil Rights Act, but did not decide it); *Williams v. City of Oakland*, 915 F. Supp. 1074, 1076-77 (N.D. Cal. 1996) (concluding that California survival law's disallowance of recovery for a deceased plaintiff's pain and suffering, as expressed in section 377.34, is "inconsistent with section 1983 [even in cases] when the victim's death was not a result of the constitutional violation."); *Guyton v. Phillips*, 532 F. Supp. 1154, 1167-68 (N.D. Cal. 1981) (citing a line of cases, with the exception of the first case, by a district court in California, primarily in the Seventh Circuit, holding that where the civil rights violation killed the victim, the policy of the civil rights law requires that the decedent's estate be compensated for the "value of the loss of the decedent's life," or the "deprivation of the pleasures of life," known as "hedonic" damages, and for the decedent's pain and suffering, even though a state's survival statute does not allow such damages); *Sullivan v. Delta Air Lines, Inc.* 935 P.2d 781, 784 (Cal. 1997) (stating under the common law, by contrast, "all causes of action for personal torts abated on the death of either the injured party or the tortfeasor..."); *Garcia v. Superior Court*, 49 Cal. Rptr. 2d 580 (Cal. Ct. App. 1996) (holding that California's survival statute was not inconsistent with Constitution and laws of the United States, and could be borrowed for purposes of determining damages in § 1983 action).

PROFESSOR CHERMERINSKY: Currently, there is a split between the federal district courts in California and the California Supreme Court as to what happens when somebody dies while there is a § 1983 claim pending but the demise is not caused by the underlying action.<sup>90</sup> In 1999, in the case of *County of Los Angeles v. Los Angeles Superior Court*,<sup>91</sup> the California Supreme Court held that if a person dies while the claim is pending and the death is unrelated to the lawsuit, the claim is abated.<sup>92</sup> If a case is pending and the plaintiff dies, and the death was unrelated to the facts of the case (an unrelated accident), the California Supreme Court held that the plaintiff's death ended the matter. The opposing parties cited cases from several federal district courts in California which all held that a death unrelated to the underlying cause of action does not cause the claim to abate.<sup>93</sup> This presents a strange situation where getting into federal court would make all the difference to the outcome. This situation is at odds with the *Erie* Doctrine, as articulated by the Court in *Erie Railroad v.*

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<sup>90</sup> *Los Angeles*, 981 P.2d at 68.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 79-81.

<sup>93</sup> *Id.* at 78 n.6.

*Tompkins.*

PROFESSOR SCHWARTZ: No Supreme Court decision has resolved whether there is a right to assert a wrongful death claim under § 1983.<sup>94</sup> Further, there are no Second Circuit decisions, although several other circuits have decisional law in this area.<sup>95</sup> In *Banks*, the focus was on wrongful death under § 1983. One possible resolution is for the plaintiff to assert a supplemental state law wrongful death claim.

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<sup>94</sup> See, e.g., *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) holding: Although we are urged to consider the merits of the Court of Appeals' holding, we are unable to do so, because this suit does not now present a live "case or controversy." This suit was brought to determine the police officers' liability for the death of appellee's son. That issue has been decided, and there is no longer any possible basis for a damages claim. Nor is there any possible basis for a declaratory judgment. For a declaratory judgment to issue, there must be a dispute which "calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts." Here, the District Court was asked to answer the hypothetical question whether the defendants would have been liable apart from their defense of good faith. No "present right" of appellee was at stake. Indeed, appellee's primary claim of a present interest in the controversy is that he will obtain emotional satisfaction from a ruling that his son's death was wrongful. . . . Emotional involvement in a lawsuit is not enough to meet the case-or-controversy requirement; were the rule otherwise, few cases could ever become moot.

*Id.* (internal citations omitted)

<sup>95</sup> See, e.g., *Cruz v. City of Escondido*, 139 F.3d 659 (9th Cir. 1998); *Bethley v. City of Spencer*, 37 F.3d 1509 (10th Cir. 1994); *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993); *Robinette v. Barnes*, 854 F.2d 909 (6th Cir. 1988).

MR. MAAZEL: I feel compelled to defend Judge Marrero's decision. First, there is an important Second Circuit case on this issue entitled *McFadden v. Sanchez*.<sup>96</sup> At the time of the suit, there were no punitive damages available under the New York State Estate Power and Trust Law,<sup>97</sup> so the question was whether the estate of the deceased could assert punitive damages under § 1983.<sup>98</sup> In *McFadden*, the Second Circuit held that a plaintiff could assert such damages.<sup>99</sup> So, it appears to be settled law that anything in state survival statutes that eliminates remedies is invalid.<sup>100</sup> If the state survival statute does not afford punitive

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<sup>96</sup> 710 F.2d 907 (2d Cir. 1983). In *McFadden*, a police officer killed *McFadden* while he was resisting arrest. The decedent's estate brought a survival claim pursuant to § 1983 against the City of New York and four police officers, requesting punitive damages. *Id.* at 908. The case does not mention a wrongful death claim.

<sup>97</sup> *Id.* at 910.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 914. The court explained:

We have no doubt that limitations in a state survival statute have no application to a Section 1983 suit brought to redress a denial of right that caused the decedent's death . . . to whatever Section 1988 makes state law applicable to Section 1983 actions, it does not require deference to a survival statute that would bar or limit the remedies available under Section 1983 for unconstitutional conduct that causes death.

*Id.* at 911.

<sup>100</sup> *Id.* at 914.

damages, it is facially invalid.<sup>101</sup>

PROFESSOR SCHWARTZ: This might not be an absolute conclusion. What if the state law placed some limitations on recovery, for example, a limit of recovery to \$2,000,000? There may be some limitations that are not inconsistent with § 1983.

MR. MAAZEL: The plaintiff in *Banks* asserted a state law wrongful death claim, but as was stated, wrongful death damages in New York State are very limited.

PROFESSOR SCHWARTZ: One difficulty with the state wrongful death claim is that it falls under supplemental jurisdiction, which allows the court discretion to decline jurisdiction over the supplemental claim. Nevertheless, could a federal court use § 1988 and hold that the state wrongful death provision will be applied? This would not now become a state law claim, it would become part of federal law.

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<sup>101</sup> *McFadden*, 710 F.2d at 914.



DEAN STEINGLASS: A number of circuits have adopted this type of borrowing theory, unlike the constitutional theory used in some circuits.

PROFESSOR SCHWARTZ: The problem with the borrowing theory is that when the federal court borrows state law, the federal court is not allowed to borrow whole causes of action.

DEAN STEINGLASS: That is correct. The federal court must decide whether § 1988's prohibition on borrowing new and independent causes of action is violated by the borrowing of a wrongful death remedy.<sup>102</sup> One can argue that a wrongful death remedy just gives survivors some additional remedial rights and that these rights are related to the cause of action the decedent would have been allowed. It is evident that there are definite problems with the borrowing approach.

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<sup>102</sup> Some federal courts have followed the borrowing approach to survival issues and relied on § 1988(a) to borrow state wrongful death remedies. *See, e.g.,* Hall v. Wooten, 506 F.2d 564 (6th Cir. 1974); Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961), *cert. denied*, 368 U.S. 921 (1961).

2003]

*WRONGFUL DEATH ACTIONS*

739

PROFESSOR SCHWARTZ: There is a third doctrine available, which we can call the “Steinglass Theory.” A number of years ago, there was a law professor who wrote an award winning article which advocated that Congress intended under § 1983 a wrongful death cause of action.<sup>103</sup> Dean Steinglass is the author of that article.

DEAN STEINGLASS: Actually, a great deal of the language in Judge Marrero’s opinion is consistent with that theory. However, there is a problem with the theory; it is far too complicated. If we were to look at the language of § 1983, there are references to the “party injured.” The prevailing assumption is that the party injured under § 1983 is the same person whose constitutional rights are violated. Typically, that is how we interpret statutes. Actions are personal, and when rights are violated, the victim seeks recompense for his injuries.

I believe that the language of § 1983 can be read differently. We can disconnect the language; the party injured and the person whose rights are violated need not be the same party. In

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<sup>103</sup> Steven Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L. J.

fact, it happens all the time. It occurs in cases involving third party standing.<sup>104</sup> I am certain that if we were to look in Professor Chemerinsky's treatise,<sup>105</sup> we would read *Singleton v. Wulff*.<sup>106</sup> Along with *Wulff*, a number of other cases would be present in which a doctor, for example, claims he or she was injured because state law restricted the ability of a third party, his female clients, to terminate pregnancies.<sup>107</sup> Attorney fees are awarded in those cases.

My argument is that § 1983, by its legislative history, could be viewed as a wrongful death statute in and of itself. If that argument was accepted, or if it was understood by anyone, it would require federal courts to apply a measure of damages the way they generally do in § 1983 cases. That is to say, federal rules for damages should govern. State law would not be relevant.

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559 (1985).

<sup>104</sup> See *Singleton v. Wulff*, 428 U.S. 106 (1976).

<sup>105</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW (Aspen Law & Business 2001).

<sup>106</sup> 428 U.S. at 106.

<sup>107</sup> See, e.g., *Marie v. McGreevey*, 314 F.3d 136, 139 (3d Cir. 2002).