Judicially Created Life after Death: Recovery by a Decedent's Estate for Loss of Life under 42 U.S.C. Section 1983

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The Seventh Circuit has assumed the forefront in a recent trend allowing
a decedent to recover damages under 42 U.S.C. section 1983 through his
estate for "loss of the right to life." Under this theory, a decedent's estate
may seek to recover damages for the "hedonic value" of the decedent's

Act of 1871, provides in relevant part as follows:

Every person who, under color of any statute, ordinance, custom, or usage, of any
State . . . subjects, causes to be subjected, any citizen of the United States . . . to
the deprivation of any rights, privileges, or immunities secured by the Constitution
and laws, shall be liable to the party injured in an action at law, suit in equity, or
other proper proceeding for redress.


Under section 1983, a plaintiff must prove that (1) a person (2) acting under color of law
(3) subjected the plaintiff or caused the plaintiff to be subjected (4) to the deprivation of a
right secured by the Constitution or laws of the United States. City of Oklahoma v. Tuttle,

Because there is no respondeat superior liability under section 1983, municipal liability will
lie only if a plaintiff in addition to establishing a prima facie case, is able to establish that he
was subjected to a constitutional deprivation caused by a municipal custom, policy, or practice.
instance of police misconduct is insufficient to establish a policy claim. There must be allegations
of a policy "systemic in nature" that constitutes the "moving force" behind the constitutional
depprivation. Tuttle, 471 U.S. at 819-20. A single decision by a person vested with final decision
making authority is, however, sufficient to demonstrate the existence of a policy. Pembaur v.
City of Cincinnati, 475 U.S. 469, 480-81 (1986).

2. Sherrod v. Berry, 827 F.2d 195, 207 (7th Cir. 1987) (loss of life compensable to deceased's
estate under section 1983). See also Bass by Lewis v. Wallenstein, 769 F.2d 1173, 1190 (7th
Cir. 1985) (estate may recover damages for loss of life, pain and suffering, and punitive damages
where action brought under section 1983); Bell v. City of Milwaukee, 746 F.2d 1205, 1240 (7th
Cir. 1984) (Wisconsin law precluding recovery to deceased's estate must succumb to section
1983 which provides for recovery to estate for loss of life); Strandell v. Jackson County, 634
is inconsistent with compensatory and deterrence policies of section 1983 and is therefore not
controlling); Doty v. Carey, 626 F. Supp. 359, 363 (N.D. Ill. 1986) (recovery of damages for
loss of life under section 1983 consistent with policies of statute).
life. Against a backdrop of traditional death policies that allow a decedent to recover for conscious pain and suffering, and surviving family members for the economic injury to the decedent’s estate, the loss of the right to life claim is revolutionary. While compensating a person for such a loss may appear to be an appealing result, it cannot be achieved without traversing a complex legal terrain.

When a citizen is killed as a result of a police officer’s unconstitutional conduct, section 1983 provides a vehicle for the cause of action. In general, section 1983 affords individuals redress for deprivations of constitutional rights perpetrated by state actors. Its two primary policy objectives are to compensate for and deter constitutional injuries. It is the sword with which

3. The Seventh Circuit has given its approval for awarding hedonic damages which are defined as follows:

[Hedonic] derives from the word pleasing or pleasure. I believe it is a Greek word. It is distinct from the word economic. So it refers to the larger value of life, the life at the pleasure of society, if you will, the life—the value including economic, including moral, including philosophical, including all the value with which you might hold life, is the meaning of the expression ‘hedonic value.’ Sherrod v. Berry, 629 F. Supp. 159, 163 (N.D. Ill. 1985), aff’d, 827 F.2d 195 (7th Cir. 1987).

4. See infra notes 89-98 and accompanying text.

5. The English had experimented with allowing recovery for the loss of expectation of life, but abolished such an award by statute in 1982. See infra note 134 and accompanying text.

6. See, e.g., Smith v. City of Fontana, 818 F.2d 1411 (9th Cir.) (police shooting), cert. denied, 108 S. Ct. 311 (1987); Carter v. City of Chattanooga, 803 F.2d 217 (6th Cir. 1986) (police shooting of fleeing suspect in violation of fourth amendment); Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986) (shooting of kidnap victim by police in course of apprehending kidnappers); Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) (police shooting and subsequent conspiracy to prevent disclosure of true facts); Gilmore v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) (en banc) (beating and shooting of decedent by police constituted violation of fourth amendment and due process), cert. denied, 476 U.S. 115 (1986); Landrum v. Moats, 576 F.2d 1320 (8th Cir.) (use of excessive force caused death of deceased), cert. denied, 439 U.S. 912 (1978).


individuals enforce their constitutional rights, while the public at large reaps an indirect benefit from the conquest. But because section 1983 is essentially an enabling statute, it affords no substantive guidance for redressing an unconstitutional killing.

At present, there are four analytical steps that must be taken before a decedent's rights may be vindicated under section 1983. First, the question of who has standing to sue on the decedent's behalf must be addressed. Second, it must be determined whether the section 1983 action survives the death of the decedent. Third, the Constitution must be examined to determine the proper substantive source of redress. Fourth, and the primary focus of this Article, a damage remedy must be fashioned to vindicate the decedent's constitutional right not to be killed.

The Supreme Court has interpreted article III of the Constitution as allowing the federal courts to preside only over real cases or controversies where the parties have a personal stake in the outcome of the litigation. This rule extends to a section 1983 action by requiring the person injured to challenge the unconstitutional conduct. Therefore, although the right of redress for an unconstitutional killing is personal to the decedent, courts recognize that the representative of the decedent's estate has a sufficient personal stake to have standing to sue for the decedent's injury.

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9. See Blackmun, supra note 7.
10. See City of Oklahoma v. Tuttle, 471 U.S. 808, 816 (plurality) ("By its terms, of course, the statute [section 1983] creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere."), reh'g denied, 473 U.S. 925 (1985).
12. See Diamond v. Charles, 476 U.S. 54, 61-62 (1986) (Article III of the Constitution limits power of federal courts to deciding cases and controversies; this in turn requires that litigants have a direct stake in outcome).
14. See Estate of Johnson by Castle v. Village of Libertyville, 819 F.2d 174, 177-78 (7th
The issue arises as to whether the section 1983 action "survives" the decedent to provide the representative of the estate with an avenue for recourse. In general, survival simply means that a decedent's claim for an injury suffered before death is allowed to continue through the representative, as an asset of the estate. Although section 1983 does not expressly allow for survival, Congress has provided for such an eventuality in the form of 42 U.S.C. section 1988. Section 1988 is a choice of law provision that instructs federal courts to borrow from state law to define the scope of section 1983. In Robertson v. Wegmann, the Supreme Court held that section 1988 mandates reliance on state survival of claims rules to answer the survivability issue of section 1983.

Choosing the appropriate amendment under which to sue for an unconstitutional killing is more difficult. It is unsettled whether the fourth or

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15. See 2 S. Speiser, supra note 6, § 14.1, at 408.
17. Section 1988 provides in relevant part:
   The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of the 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.
20. In Robertson, the plaintiff had filed a section 1983 claim before his death. The Court held that a Louisiana statute that required the plaintiff's section 1983 action to abate at his death was not inconsistent with the purpose of section 1983. Id. at 592-93. The Court further instructed that nothing in section 1983 mandated compensating a person who sued merely as the executor of an estate where there were no survivors, and where the constitutional violation was not the cause of death. Id.
21. The fourth amendment provides in relevant part: "The right of the people to be secure
fifteenth amendments (or both) supply the source of redress for killings by police officers because section 1983 is silent as to the shape of the remedy. Recently, in *Tennessee v. Garner*, the Supreme Court held Tennessee's deadly force statute unconstitutional and recognized that the fourth amendment right against unreasonable seizures is implicated when a police officer shoots and kills an unarmed, fleeing felon. The Court, however, only addressed the issue of the constitutionality of the statute, not the issue of the officer's liability for killing the decedent. The lower court had previously resolved that issue in favor of the officer on the basis of his qualified immunity from suit because he had acted in accordance with the statute. By reviewing the Tennessee statute under the fourth amendment, the Court seems to have placed its imprimatur on a fourth amendment objective reasonableness standard for analyzing such claims, but it did not preclude an action brought under the fourteenth amendment.

in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

22. The fourteenth amendment provides in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

As Justice Stevens explains in his concurring opinion to Daniels v. Williams, 474 U.S. 327 (1986), the fourteenth amendment may be implicated in three distinct ways:

First, it incorporates specific protections defined in the Bill of Rights. Thus, the State, as well as the Federal Government, must comply with the commands in the First and Eighth Amendments; so too, the State must respect the guarantees in the Fourth, Fifth, and Sixth Amendments. Second, it contains a substantive component, sometimes referred to as 'substantive due process,' which bars certain arbitrary government actions 'regardless of the fairness of the procedures used to implement them.' Third, it is a guarantee of fair procedure, sometimes referred to as 'procedural due process': the State may not execute, imprison, or fine a defendant without . . . providing appropriate procedural safeguards (footnotes omitted).

*Id.* at 337.


25. *Id.* at 11.


27. Such cases are to be analyzed by "balanc[ing] the nature and quality of the intrusion
Under the fourteenth amendment, a state actor must engage in conduct that qualitatively "shocks the conscience" before a constitutional injury occurs. In this society, a police officer is sometimes justified when he shoots on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. Tennessee v. Garner, 471 U.S. 1, 8 (1985) (quoting United States v. Place, 462 U.S. 696, 703 (1983)). Use of deadly force against a fleeing felon is an unreasonable seizure under the fourth amendment unless (1) it is necessary to prevent the suspect's escape and, where feasible, warning has been given, or (2) the officer has probable cause to believe that the offender poses a serious threat of death or serious physical injury to the officer or others. Garner, 471 U.S. at 11-12.

There must be a seizure before the fourth amendment is triggered. Cameron v. City of Pontiac, 813 F.2d 782, 784 (6th Cir. 1987). In Cameron, the decedent had been struck and killed by an automobile while he was fleeing from police officers who were shooting at him. Because the decedent had not been "seized," the court held that the plaintiff failed to state a claim under the fourth amendment. Id.

Other circuits have utilized fourth amendment principles to analyze an allegedly unconstitutional killing. See, e.g., Lundgren v. McDaniel, 814 F.2d 600, 602-03 (11th Cir. 1985) (en banc) (officers' conduct examined under fourth amendment's "objectively reasonable" standard), cert. denied, 476 U.S. 1115 (1986); Patterson v. Fuller, 654 F. Supp. 418, 425-27 (N.D. Ga. 1987) (section 1983 action seeking redress of fourth amendment violation is analyzed under such standards).

Whether negligent conduct can give rise to a claim under the fourth amendment is as yet an unresolved question. Compare Young v. City of Killeen, 775 F.2d 1349, 1353 (5th Cir. 1985) (negligence not enough to implicate fourth amendment) with Patterson v. Fuller, 654 F. Supp. 418, 427 (N.D. Ga. 1987) (police officer acting negligently in cocking gun provided basis for fourth amendment violation where arrestee was shot and killed).

28. Several circuits have analyzed an unconstitutional killing in whole or in part under the fourteenth amendment. See, e.g., Nishiyama v. Dickson County, 814 F.2d 277 (6th Cir. 1987) (fourteenth amendment guarantees that state may not deprive individual of life without due process); Patterson, 654 F. Supp. at 421-25 (police shooting constitutes fourteenth amendment violation); Gilmore v. City of Atlanta, 774 F.2d 1495, 1499-1501 (11th Cir. 1985) (shooting death of decedent by police constitutes deprivation of substantive due process under fourteenth amendment).

Many of the cases analyzing an unconstitutional killing under the fourteenth amendment have found that negligence on the part of the state actor was not enough to implicate a fourteenth amendment action. See Dodd v. City of Norwich, 827 F.2d 1, 3 (2d Cir. 1987); Maddox v. City of Los Angeles, 792 F.2d 1408, 1413-14 (9th Cir. 1986); Dunster v. Metropolitan Dade County, 791 F.2d 1516, 1518 (11th Cir. 1986), cert. denied, 108 S. Ct. 293 (1987); Young v. City of Killeen, 775 F.2d 1349, 1353 (5th Cir. 1985); Hewitt v. City of Truth or Consequences, 758 F.2d 1375, 1378-79 (10th Cir.), cert. denied, 474 U.S. 844 (1985); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983), cert. denied, 465 U.S. 1049 (1984).

Judge Easterbrook has criticized the practice of utilizing the doctrine of substantive due process under the fourteenth amendment in excessive force cases because the fourth amendment is substantively on point and provides well established objective guidelines. See Gumz v. Morrisette, 772 F.2d 1395, 1404-09 (7th Cir. 1985) (Easterbrook, J., concurring), cert. denied, 475 U.S. 1123 (1986). The Seventh Circuit adopted this reasoning in Lester v. City of Chicago, 830 F.2d 706 (7th Cir. 1987). The Fifth Circuit, however, apparently finds the choice of amendment inconsequential. See Jamieson v. Shaw, 772 F.2d 1205, 1209-11, reh'g denied, 776 F.2d 1048 (5th Cir. 1985).


30. Of course, defining conduct that shocks the conscience is a cryptic task at best. Judge Friendly has developed the following formulation:
and kills a suspect because police officers are all too often confronted with situations that require split-second decisions which have life-or-death consequences. Accidental or negligent shootings by police officers do not violate the fourteenth amendment. Under the Johnson v. Glick standard for evaluating excessive force cases under section 1983, a police officer is not liable under the fourteenth amendment unless his use of force is inspired by malice.

Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates . . . constitutional rights. In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.


Most of the circuits have adopted Judge Friendly's formulation in whole or in part. See, e.g., Dale v. Janklow, 828 F.2d 481, 484-85 (8th Cir. 1987) (conduct must be egregious); Graham v. City of Charlotte, 827 F.2d 945, 948 (4th Cir. 1987) (conduct must be applied "maliciously and sadistically" in light of all facts and circumstances as "descriptions of degrees of force"); McRorie v. Shimoda, 795 F.2d 780, 785 (9th Cir. 1986) (malicious action for purpose of causing harm constitutes violation of fourteenth amendment); Gunz v. Morissette, 772 F.2d 1395, 1400 (7th Cir. 1985) (not every injury inflicted by state official is actionable under section 1983), cert. denied, 475 U.S. 1123 (1986); Norris v. District of Columbia, 737 F.2d 1148, 1150 (D.C. Cir. 1984) (constitutional claim may lie where force used by state actor grossly exceeds that warranted by situation); Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981) (action must be disproportionate in relation to need presented and conducted with malice); Schillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981) (in determining whether injury inflicted by state actor rises to level of constitutional violation, court must consider whether action was grossly disproportionate to need for action); Furtado v. Bishop, 604 F.2d 80, 95-96 (1st Cir.) (correct standard for finding liability is whether conduct is shocking or violative of universal standards of decency) cert. denied, 444 U.S. 1035 (1979). But see Lester v. City of Chicago, 830 F.2d 706, 711-12 (7th Cir. 1987) (court adopted fourth amendment objective reasonableness standard and rejected fourteenth amendment's "shock the conscience standard").


32. See supra note 28. The fact that the officer was responsible for creating the situation where his negligence resulted in the decedent being killed apparently does not matter. Young v. City of Killeen, 775 F.2d 1349, 1353 (5th Cir. 1985). But cf. Patterson, 654 F. Supp. at 425 (police officer who negligently cocked gun could be held liable under section 1983 for fourth amendment violation).

33. 481 F.2d 1028 (2d Cir. 1973).

34. See supra note 30. But cf. Nishiyama v. Dickson County, 814 F.2d 277, 280-81 (6th Cir. 1987) (en banc) (gross negligence of law enforcement personnel in entrusting sheriff's vehicle to a convicted felon who used vehicle to pull over decedent's car and kill her, was actionable).
Once the section 1983 action is deemed to survive and the appropriate substantive source of law has been discerned, section 1988 is called into play for a second time to forge a meaningful remedial structure to simplify the formidable task of valuing the important constitutional rights violated when an officer kills a person without justification. Because state wrongful death remedies have evolved to contravene the common law rule against recovery for death and are uniformly statutory, they are obvious candidates for adoption under section 1988.

Remedies available for death under state law most commonly fall within two broad categories: hybrid survival statutes and parallel survival-wrongful death statutes. A hybrid survival statute allows a decedent, through his estate, to recover for injuries suffered prior to death and for the economic injury to the estate as a result of the decedent’s death. A survival-wrongful death statutory scheme allows for two parallel but distinct actions: a survival action on behalf of the decedent for personal injury arising prior to death, and a wrongful death action for injury to the decedent’s estate on behalf of select family members for their broadly defined economic interest in the decedent.

35. Even though section 1988 has not been invoked in other fourth amendment cases relating to unlawful seizures, section 1988 is implicated in fourth amendment death cases. In those fourth amendment cases where the Supreme Court has ignored section 1988, state law is not borrowed because it simply reflects or codifies the common law, e.g., false arrest. In a death case, however, an action for death did not exist at common law and state statutes arose to abrogate this harsh rule. Accordingly, adoption of state law in this particular fourth amendment context is compelling.

36. See infra notes 37-40 and accompanying text.


If the administrator of the deceased party is plaintiff, and the death of such party was caused by the injury complained of in the action, the mental and physical pain suffered by the deceased in consequence of the injury, the reasonable expenses occasioned to his estate by the injury, the probable duration of his life but for the injury, and his capacity to earn money during his probable working life, may be considered as elements of damage in connection with other elements alleged by law in the same manner as if the decedent had survived.

Id.


Actions which survive. In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal
In Part I, this Article will discuss the nature of the loss of the right to life claim as it has evolved in the Seventh Circuit, and will introduce the reader to the cases recognizing such a right. Then, in Part II, it will present essential background on choice of law under section 1988 as well as basic damage principles under section 1983. In Part III, it will examine the basis for the loss of the right to life claim and criticize the courts' rejection of state remedies. Finally, in Part IV, it will suggest that the action for civil redress of an unconstitutional killing during arrest is one to be found in the fourth, not fourteenth amendment, and will set forth the proper remedial framework for affording relief to a decedent's estate.

I. THE NATURE OF THE LOSS OF THE RIGHT TO LIFE CLAIM

It is elementary that life is the most fundamental right known to man.41 A person whose life is taken from him has certainly suffered an injury of virtually unquantifiable magnitude, yet he can never be personally compensated precisely because he has died. The loss of the right to life claim has arisen as an attempt to supply a remedy for the wrongful taking of life by persons acting under the cloak of state governmental authority—the most common scenario involving a situation where a police officer shoots and

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kills a suspect. Those courts that have recognized the loss of the right to
life claim have treated it as a violation of substantive due process under the
fourteenth amendment. The Supreme Court, however, never has held that
there has been a deprivation of life without due process in the context of a
police shooting.

In Guyton v. Phillips, a California district court for the first time held
that a decedent’s estate could recover under the fourteenth amendment for
loss of the right to life. In Guyton, the police officer shot an apparently
unarmed, fleeing black teenager in the back. While finding the California
survival statute inconsistent for failing to allow recovery for pain and
suffering, the court never considered adopting the state’s wrongful death
statute to provide a remedial framework. The district court simply created
a separate right of recovery under section 1983 on behalf of the decedent
for the loss of his “right to life.”

Later, in a notorious case of police misconduct, Bell v. City of Milwau-
kee, the Seventh Circuit, relying on Guyton, became the first circuit to
recognize a section 1983 action for loss of the right to life as a matter of
federal common law. Bell not only involved a completely unjustifiable
police shooting, but also a twenty year cover-up of the incident. As mandated
by section 1988, the court examined the Wisconsin survival and wrongful
death statutes in its search to provide a remedy. Since the Wisconsin statutes
placed significant limitations on the amount of damages recoverable, the
court found the statutes inconsistent and proceeded to create an action on
behalf of the decedent for loss of the right to life.

42. See supra notes 6 & 31. See also Bouza, Myths and Hard Truths About Police
Shootings, 13 TUL. L. REV. 337 (1982) (police sometimes justified in shooting suspect); J. FYFE,
READINGS ON POLICE USE OF DEADLY FORCE (Police Foundation 1982) (“Police often use their
firearms as the last resort against real and imminent peril; they often have no choice but to
shoot.”).

43. See Davis v. City of Ellensburg, 651 F. Supp. 1248 (E.D. Wash. 1987); Linzie v. City
Cal. 1981). See generally R. ROTUNDA, J. NOWAK, & N. YOUNG, supra note 13, at §§ 15.1-
15.4 (evolution of substantive due process).


46. Id. at 1166. California Probate Code § 573 limited damages to “such loss or damage
as the decedent sustained or incurred prior to his death, including any penalties or punitive or
exemplary damages that the decedent would have been entitled to recover had he lived, and
shall not include damages for pain, suffering, and disfigurement.” Id. at 1164 (quoting CAL.
PROB. CODE § 573 (West 1956) (repealed 1988)).

47. Id. at 1168. The district court awarded $100,000 to the decedent’s estate on that claim.

48. 746 F.2d 1205 (7th Cir. 1984). The opinion is an extensive one, complete with a table
of contents, and considers many issues in addition to the loss of life action. The Bell case
received a great deal of notoriety, including a feature segment on 60 Minutes (CBS television
broadcast). S. SPEISER, supra note 6, at 28.

49. 746 F.2d at 1238-40.

50. Id. at 1234-41.
While Bell at first appeared to be an anomaly, the Seventh Circuit has since extended its holding to allow recovery for loss of life in Bass by Lewis v. Wallenstein,\(^1\) and its most recent decision of Sherrod v. Berry.\(^2\) In Bass, the decedent’s estate brought an action under the eighth and fourteenth amendments and alleged that the decedent, a prison inmate, died of cardiorespiratory arrest as a result of the prison official’s deliberate indifference.\(^3\) The court held that Illinois survival and wrongful death statutes, which placed no limits on recovery, were “inconsistent” with the objectives of section 1983, specifically because they failed to allow recovery for loss of life.\(^4\) The court apparently considered any state statute that fails to allow recovery for loss of life to be \textit{per se} inconsistent with federal civil rights objectives.

In Sherrod, the Seventh Circuit held that the reasoning in Bell and Bass should be applied to a case where an unarmed black man was shot to death as he reached for his driver’s license during a traffic stop.\(^5\) The Seventh Circuit not only reaffirmed Bell and Bass but also affirmed the district court’s decision to allow an expert witness to give testimony on the “hedonic value” of life.\(^6\)

In order to analyze critically the recent development of the loss of the right to life precedent, a brief discussion of section 1988 choice of law principles is essential. The policies underlying state death remedies must then be compared to the objectives of section 1983 in providing for vindication of violations of constitutional rights. Familiarity with the rules of damages recoverable under section 1983 is also essential.

\section*{II. BACKGROUND: CHOICE OF LAW AND DAMAGES}

\textbf{A. Choice Of Law Under Section 1988}

Section 1988 was originally enacted as section 3 of the Civil Rights Act of 1866.\(^7\) While there are numerous decisions concerning section 1988’s attorney’s fee provision,\(^8\) relatively few decisions have attempted to interpret

\begin{itemize}
  \item 51. 769 F.2d 1173 (7th Cir. 1985).
  \item 52. 827 F.2d 195 (7th Cir. 1987).
  \item 53. 769 F.2d at 1177-83.
  \item 54. \textit{Id.} at 1189-90.
  \item 55. 827 F.2d at 207.
  \item 56. \textit{Id.} at 205-06. \textit{See supra} note 3 and accompanying text.
\end{itemize}
its choice of law provision. Although this provision reads very simply, it has proved an interpretative hydra. The Supreme Court has recently made significant strides, however, to simplify section 1988 analysis. Before a court utilizes section 1988 principles, it must first find federal law "deficient" on the point in question. Once federal law is deemed deficient, the next step is to look to the statutory law of the forum state and adopt the "appropriate" or "analogous" forum state provision. If such a provision exists, it will be borrowed as the federal rule. But because it is the federal interest that predominates, a forum state provision will be rejected if it is "inconsistent" with the policies underlying the federal civil rights law. If the forum state's law is rejected as inconsistent, federal common law will be created.

I. When is federal law deficient?

A district court must first search for an avenue of redress under federal law before it may borrow from state law. It should limit its consideration, however, to specifically dispositive federal statutes. Section 1988 analysis


A number of earlier decisions addressed section 1988 (denominated as either R.S. 722 or § 3 of the Civil Rights Act of 1866) tangentially. United States v. Thompson, 251 U.S. 407 (1920); Ex Parte United States, 242 U.S. 27 (1916); Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894).

60. The confusion started early. Compare United States v. Mitchell, 136 F. 896, 909 (C.C.D. Or. 1905) ("there is no ambiguity whatever in [section 1988]") with Tennessee v. Davis, 100 U.S. 257, 299 (1879) (Clifford, J., dissenting) ("[examined in the most favorable light, [section 1988] is a mere jumble of federal law, common law, and state law, consisting of incongruous and irreconcilable regulations, which in legal effect, amounts to no more than a direction to a judge . . . [to do] as well as he can."). This confusion continues today. Compare Kreimer, supra note 18, at 622-28 (section 1988 applies to actions filed originally in federal courts) with Eisenberg, supra note 18, at 525-43 (section 1988 only applies to actions removed from state courts to federal courts).


64. 471 U.S. at 269.


66. See supra note 62.
has been invoked in areas where there clearly is no federal rule, and ipso facto federal law is "deficient." Generally, state law has been borrowed to resolve statute of limitation\(^6\) and survival of claims\(^6\) questions. Similarly, section 1988 analysis has been invoked in the search to provide a remedy for the unconstitutional taking of life.\(^6\) The deficiency question has proved a simple hurdle because there is no specifically dispositive statute or Supreme Court decision aimed at redressing an unconstitutional killing. Section 1988 mandates resort to state law to fill this interstitial void, so long as state law is not "inconsistent" with federal policies.

2. **When is state law inconsistent?**

The Supreme Court has yet to provide any clear guidelines for determining when state law is inconsistent with federal policies. Generally, state law is inconsistent "if it fails to take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil Rights Acts."\(^7\) A state rule apparently must be "systemically hostile" before a federal court may reject it and create federal common law.\(^7\) A state statute will not be rejected simply because the plaintiff may lose the litigation\(^7\) or because the adoption of state rules may result in discordant outcomes throughout the different jurisdictions.\(^7\) Since the policies underlying the federal enactment must be furthered and consistent with the borrowed state provisions, the aims of section 1983 must be compared with the objectives of state death remedies.

The proclaimed policy aims of section 1983 are to compensate for and deter civil rights violations.\(^7\) Section 1983 itself is not a substantive provision, but merely affords an avenue of redress for rights created elsewhere.\(^7\) Accordingly, section 1983 has been used as a vehicle for lawsuits as varied as racial discrimination in public employment and the use of excessive force.

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69. See supra notes 2 & 6 and accompanying text.
71. See Morgan v. South Bend Community School Corp., 797 F.2d 471, 475 (7th Cir. 1986).
72. Robertson, 436 U.S. at 593. The Court stated:
   A state statute cannot be considered 'inconsistent' with federal law merely because it causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But § 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby.

Id.
73. See Burnett, 468 U.S. at 52 n.14; Robertson, 436 U.S. at 593 n.11.
74. See supra note 8.
75. See supra note 10 and accompanying text.
by police officers.\textsuperscript{76} Section 1983, dormant for more than ninety years, has, since \textit{Monroe v. Pape}\textsuperscript{77} in 1961, become a powerful tool for vindicating violations of fundamental constitutional rights, as well as the subject of great controversy and abuse.\textsuperscript{78} Recognizing the potential for substantial overlap between state causes of action and those available under section 1983, the Supreme Court has sought to limit the reach of the statute to deprivations of constitutional magnitude.\textsuperscript{79}

Section 1983 is commonly recognized as creating a body of constitutional torts.\textsuperscript{80} The Court recently explained that “[t]he atrocities that concerned Congress in 1871 plainly sounded in tort” and found “tort analogies compelling in establishing the elements of a cause of action under [section] 1983.”\textsuperscript{81} Constitutional torts can be conceptualized as a highly specialized supplement to tort law.\textsuperscript{82} Where tort doctrine is designed to prevent a person from harming his neighbor—what Dean Prosser called the “prophylactic factor”\textsuperscript{83}—and to compensate the injured party if so harmed, section 1983 seeks to prevent those who bear the aegis of governmental authority from depriving a person of rights secured by the Constitution, and to compensate him if he is so harmed.\textsuperscript{84} The query thus becomes whether state survival and wrongful death statutes are compatible with the objectives of section 1983.

Under the common law, the maxim \textit{actio personalis mortitur cum persona}, signifying that death gave rise to no causes of action, ruled the day.\textsuperscript{85} This

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82. \textit{Wilson}, 471 U.S. at 272 (quoting McNeese v. Board of Educ., 373 U.S. 668, 672 (1963)). Traditional tort remedies may not have been available to persons wronged by state actors at the time section 1983 was enacted because of a complex network of tort immunities that shielded municipalities and its officers from tort liability. City of Oklahoma v. Tuttle, 471 U.S. 808, 818 n.5, \textit{reh'g denied}, 473 U.S. 925 (1985).


84. See \textit{supra} note 8 and accompanying text.

rule was articulated in the much criticized English case of *Baker v. Bolton*\(^{86}\) and blindly followed for years by English and American courts alike.\(^{87}\) It was then commonly stated that it was less expensive to kill a man than to scratch him.\(^{88}\) This result being anathema to a civilized society, the English adopted *Lord Campbell's Act* of 1846, the historical antecedent to modern American wrongful death statutes.\(^{89}\) Every state now has its own statutory remedy for wrongful death.\(^{90}\) While the state statutory schemes are diverse, they generally fall into two categories: hybrid survival statutes\(^{91}\) and parallel survival and wrongful death statutory schemes\(^{92}\) (with the notable exception of a purely punitive wrongful death statute unique to Alabama).\(^{93}\)

Hybrid survival statutes entitle the administrator or executor of the deceased's estate to bring a personal injury action for any pain and suffering the decedent incurred prior to death and to recover for the economic injury to the estate incurred as a result of death.\(^{94}\) Beneficiaries share in the damages as they are funneled through the decedent's estate. The majority of states, however, provide for two distinct but parallel actions for survival and wrongful death. Under a typical survival statute, the decedent's estate is entitled to recover for the decedent's pain and suffering.\(^{95}\) Under a wrongful death statute, the representative of the decedent's estate is entitled to sue

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87. *See infra* note 134 and accompanying text.
88. *See Prosser & Keeton, supra* note 38, at 942. Dean Prosser offered the following anecdote:
Most lawyers are familiar with the legend, quite unfounded, that this was the original reason that passengers in Pullman car berths rode with their heads to the front. Also that the fire axes in railroad coaches were provided to enable the conductor to deal efficiently with those who were merely injured.

*Id.*

*See also* 1 S. Speiser, *supra* note 6, at 9-16 (presenting criticisms of harsh rule denying recovery of damages for killings).
89. *See Prosser & Keeton, supra* note 38, at 945.
90. *Id.* at 945. *See 1 S. Speiser, supra* note 6, at 16-17 & App. A.
92. *Id.* at 950.
94. *See 1 S. Speiser, supra* note 6, § 3.2, at 117-19; 2 S. Speiser, *supra* note 6, § 14.3, at 746.
95. *See 2 S. Speiser, supra* note 6, § 14.6, at 758.
for the injury to the estate caused by the decedent's death. "Pecuniary injuries" is somewhat of a misnomer, however, often consisting of damages for such intangibles as loss of society, love and affection, and loss of consortium. Damages for the decedent's lost expected life's pleasures are not recoverable.

B. Damages Recoverable Under Section 1983

The ultimate objective of any action for redress of an unconstitutional killing is to recover damages. In Carey v. Piphus, the Supreme Court made its first attempt to clarify the rules of damages under section 1983. In Carey, the plaintiffs claimed that they were deprived of procedural due process under the fourteenth amendment when they were expelled from school without a prior adjudicatory hearing. The Court rejected the plaintiffs' argument that damages should be presumed when a constitutional violation is proved, and stated that tort damage principles apply with equal force to actions under section 1983. In addition, the Court noted that "[t]o the extent that Congress intended that awards under [section] 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages."

In Smith v. Wade, the Supreme Court for the first time addressed the issue of whether punitive damages were awardable under section 1983. The Court answered this question affirmatively and emphasized that without such an option the deterrent purpose of section 1983 would be thwarted. It concluded that "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages."

More recently, the Court addressed the question of whether a plaintiff could recover damages based on the value or importance of the constitutional right involved. In Memphis Community School Dist. v. Stachura, the Court answered the question negatively. In Stachura, the plaintiff, a seventh-grade teacher, was suspended for showing as a part of his life science course

96. See 1 S. Speiser, supra note 6, § 3.2, at 63.
97. PROSSER & KEETON, supra note 38, at 951-52; 1 S. Speiser, supra note 6, § 3.58, at 257-58.
100. Id. at 253-54.
101. Id. at 256-57.
103. Id. at 48-50.
104. Id. at 51.
pictures of his wife during pregnancy, as well as two county health department films dealing with human growth and sexuality. At the close of the case, the trial court's instructions allowed the jury to consider the value of the constitutional right violated in its damage calculation. Liability was established at trial and substantial compensatory damages were awarded to the plaintiff. In attempting to justify the damage award, the plaintiff argued that Carey could be distinguished because it involved only a violation of procedural due process, whereas he had claimed a violation of a substantive constitutional right. In rejecting this argument, the Court once again stressed that tort damage principles play an important role in section 1983 damage actions, and that the abstract value of a violation of a substantive constitutional guarantee is not a proper basis for awarding damages. The Court further explained that "whatever the constitutional basis for [section] 1983 liability, such damages must always be designed 'to compensate injuries caused by the [constitutional] deprivation.'"

III. DISCUSSION AND CRITICISM—STARE DECISIS GONE AWRY

In Robertson v. Wegmann, the Supreme Court held that a state statute that caused a plaintiff's civil rights action to abate at his death was not inconsistent with section 1983. Yet the Court left open the question of whether it would reach the same result if the constitutional deprivation itself

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106. Id. at 300-01.
107. Id. at 302. The trial court instructed the jury as follows:
   "If you find that the Plaintiff has been deprived of a Constitutional right, you may award damages to compensate him for the deprivation. Damages for this type of injury are more difficult to measure than damages for a physical injury or injury to one's property. There are no medical bills or other expenses by which you can judge how much compensation is appropriate. In one sense, no monetary value we place upon Constitutional rights can measure their importance in our society or compensate a citizen adequately for their [sic] deprivation. However, just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded. The precise value you place upon any Constitutional right which you find was denied to Plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right.
   Id. at 302-03.
108. Id. at 303. The jury awarded the plaintiff $275,000.00 in compensatory damages and $46,000.00 in punitive damages. The district court reduced the award to $266,750.00 and $36,000.00 respectively. Id.
109. Id. at 309. The Court provides a number of cases both adopting and rejecting this argument. Id. at 304 n.5.
110. Id. at 308.
111. Id. at 309-10.
had caused the plaintiff's death.\textsuperscript{114} It is in this precedential vacuum that the loss of life action under section 1983 has arisen. While \textit{Guyton} and \textit{Bell} can be explained as "hard cases,"\textsuperscript{115} the sweeping recognition of a right to recovery for loss of life in \textit{Bass} and \textit{Sherrod} is much more troubling. In these cases, the Seventh Circuit rejected as inconsistent with federal law a state survival and wrongful death scheme that was more malleable and significantly less limiting than those previously rejected, and in most respects reflected the state of the art in tort recovery for death.\textsuperscript{116}

Because a decision is only as strong as the foundation upon which it rests, the \textit{Guyton} decision requires close scrutiny since it is the foundational underpinning for the Seventh Circuit's recognition of a right to recovery for loss of life. The California district court's outrage at the wrongful taking of a young life is understandable, yet, its unbridled judicial activism is not.\textsuperscript{117}

The district court in \textit{Guyton} followed the section 1988 analysis of \textit{Robertson} and found California's survival provision, allowing no recovery for pain and suffering, inconsistent with the aims of section 1983.\textsuperscript{118} After comparing the survival statutes of other states, the court fashioned a survival remedy consistent with those laws as the federal rule in the case and awarded $15,000 in damages to the decedent's estate for pain and suffering.\textsuperscript{119}

The district court next examined California's parallel, but separate, wrongful death provision, and found it adequate.\textsuperscript{120} The wrongful death action

\textsuperscript{114} \textit{Id.} at 589-91.

\textsuperscript{115} "Hard cases" are defined as "judicial decisions which, to meet a case of hardship to a party, are not entirely consonant with the true principle of the law. It is said of such: 'Hard cases make bad law.'" \textit{BLACK'S LAW DICTIONARY} 646 (5th ed. 1979).


\textsuperscript{117} The doctrine of "stare decisis" requires courts to abstain from creating new law and follow the precedent of past decisions. Specifically, stare decisis is the:

\begin{quote}
Policy of courts to stand by precedent and not to disturb settled point. Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same. Under doctrine a deliberate or solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or is binding precedent in the same court, or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy.
\end{quote}


\textsuperscript{119} \textit{Id.} at 1167 & n.6.

\textsuperscript{120} \textit{Id.} at 1167.
could not be pursued as a pendent claim, however, because when the plaintiff
had previously attempted to bring such an action in the state court, it was
dismissed for failure to comply with the statute of limitations.\textsuperscript{121} This,
however, did not preclude the district court from borrowing the state statute
under section 1988 as a damage template for the decedent's estate's civil
rights claim.

Nevertheless, the district court ignored the wrongful death statute for
adoption and opted instead to create a separate federal right of recovery for
"loss of the right to life,"\textsuperscript{122} claiming that it was empowered to "use any
available remedy to make good the wrong done."\textsuperscript{123} It must be emphasized
that the court created the loss of life claim, not on the basis of an articulated
inconsistency of state wrongful death policies, but purely as a matter of
judicial invention to implement the district court's perception of the objec-
tives of section 1983.\textsuperscript{124}

\textsuperscript{121} Id. at 1167 & n.7.
\textsuperscript{122} Id. at 1168. The district court's categorization of the claim as an injury to the person
of the decedent rather than to his estate poses an interesting analytical problem. A person
cannot lose his right to life until he is dead. Several courts have held that a person's civil rights
cannot be violated once he is dead. See Guyton v. Phillips, 606 F.2d 248, 250 (9th Cir. 1979),
cert. denied, 445 U.S. 916 (1980); Whitehurst v. Wright, 592 F.2d 834, 840-41 (5th Cir. 1979);
Cartwright v. City of Concord, 618 F. Supp. 722, 730 (N.D. Cal. 1985); McQuirter v. City of
Because the loss of the right to life claim cannot vest until death has occurred, the loss of life
claim may very well die with the decedent. Cf. O'Leary v. United States Lines Co., 111 F.
Supp. 745, 747 (D. Mass. 1953) (court refused to adopt English rule which would allow recovery
for "decedent's loss of 'a predominantly happy life'"); Wooldridge v. Woollett, 96 Wash. 2d
659, 666, 638 P.2d 566, 570 (1981) (en banc) ("We believe that the loss of the ability to enjoy
life's pleasures and amenities is not an asset to be accumulated by the deceased.") (emphasis
in original); Prunty v. Schwantes, 40 Wis. 2d 418, 423-24, 162 N.W.2d 34, 38 (1968)(loss of
right to life claim dies with decedent since after death, one can no longer be compensated).
On the other hand, if death is considered to be an injury proximately caused by the constitutional
injury inflicted prior to death, death should be considered as an element of the damages for
the constitutional violation. See infra text Part IV. C.

\textsuperscript{123} Guyton, 532 F. Supp. at 1167-68 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).
The court stated: "The court must be able to fashion a remedy that will fit the penalty to the
deprivation and will serve as a deterrent to abusive conduct in the future." \textit{Id.} at 1167. The
court's reliance on \textit{Bell v. Hood} is misplaced, however. \textit{Bell} was an action against FBI agents
for, \textit{inter alia}, violating the fourth amendment. Today, this action is characterized as a \textit{Bivens}
action. See \textit{supra} note 81, where reference to state law under section 1988 is not an issue. Even
so, \textit{Bell}'s reference to searching for an available remedy was itself deferential to state law. Bell

\textsuperscript{124} But \textit{cf.} Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980), where the Court
gave the following admonition:

It is a commonplace that courts will further legislative goals by filling the
interstitial silences within a state . . . . Because legislators cannot foresee all event-
tualities, judges must decide unanticipated cases by extrapolating from related
statutes . . . . But legislative silence is not always the result of a lack of prescience;
it may instead betoken permission or, perhaps, considered abstention from regu-
lation. In that event, judges are not accredit to supercede Congress . . . . by embel-
It is interesting to note that this creativity did not go unnoticed by the Seventh Circuit. The Seventh Circuit's broad based recognition of a right to recovery for loss of life in Bass and Sherrod is subject to question because it is premised on the holding in Bell, which in turn rests on Guyton. In Bell, the Seventh Circuit was compelled to provide an avenue of redress for a murder by a police officer; a murder subsequently covered up for two decades by the police officers. In framing a remedy, the court found itself constrained by a Wisconsin survival and wrongful death statutory scheme that set a maximum recovery of $25,000 payable to a strict hierarchy of beneficiaries. Finding Guyton the only case "directly pertinent," the court concluded that unless the decedent's estate was compensated for the decedent's loss of life, the deterrence objective of section 1983 would be subverted.

Curiously, the court also found it compelling that Wisconsin law precluded an award of punitive damages. Prior to Bell, the Supreme Court in Smith v. Wade, had ruled that punitive damages were available as a matter of federal common law under appropriate circumstances in a section 1983 action, and such damages were certainly appropriate under the facts of Bell. Accordingly, whether the Wisconsin state statute allowed for an award of punitive damages was an irrelevant consideration.

In Bass, the Seventh Circuit, citing only Bell and Guyton, refused to borrow the survival and wrongful death statute of Illinois. Unlike the California survival statute modified in Guyton, the Illinois survival statute allowed recovery for pain and suffering. Also, contrary to the Wisconsin wrongful death statute rejected in Bell, the Illinois wrongful death statute placed no dollar limitation on the amount of recovery. Yet, the court cited to these cases to support its holding that "state law that precludes recovery on behalf of the victim's estate for the loss of life is inconsistent with the deterrent policy of section 1983." This inconsistency presumably stemmed from the failure of the state law to reflect the Guyton rule recognizing recovery for loss of life. In addition, the court found it compelling that Illinois courts had interpreted the Illinois statutes as precluding recovery for
punitive damages,132 again failing to recognize that such a right existed as a matter of federal common law under section 1983 so that the state interpretation was irrelevant.

Finally, in a single paragraph, the Seventh Circuit in Sherrod allowed a claim for loss of life in a police shooting case solely on the basis of Bell and Bass.133 Sherrod is revolutionary, however, because the Seventh Circuit refused to reverse the district court’s decision to allow an expert to give testimony defining the “hedonic value” of life, a claim for which the jury awarded $850,000 in damages to the decedent’s estate.134

But without Guyton as precedent, Bell, Bass, and Sherrod cannot stand as viable authority. In Guyton, the court found that traditional tort damages provided an inadequate remedy for a claim where the constitutional deprivation resulted in death.135 Purporting to rely on Carey v. Piphus,136 it

132. Id.

133. 827 F.2d 195, 207 (7th Cir. 1987).

134. Id. at 205-06. The district court had relied in part on an English model that allowed for recovery of damages for the “loss of expectation of life.” Sherrod v. Berry, 629 F. Supp. 159, 164 (N.D. Ill. 1985), aff’d, 827 F.2d 195 (7th Cir. 1987). But it failed to note that the English had statutorily abolished such damages in 1982. See Administration of Justice Act, § 1 (1) (a) (1982); White, Damages for the Lost Earnings of the Lost Years, 20 IR. JUR. 295, 314 & nn. 45 & 46 (1985).

In any event, the English allowed for recovery of general damages. See McCann v. Sheppard, 1 W.L.R. 540, 553 (C.A. 1973). General damages, however, are not recoverable under section 1983. Memphis Community School Dist. v. Stachura, 477 U.S. 299, 308 (1986); Taliferro v. Augle, 757 F.2d 157, 162 (7th Cir. 1985). Moreover, the English system was not one that placed unbridled discretion in the hands of a jury. In the lead case on the subject, the House of Lords had explained that:

It would be fallacious to assume, for this purpose, that all human life is continuously an enjoyable thing, so that the shortening of it calls for compensation, to be paid to the deceased’s estate, on a quantitative basis. The ups and downs of life, its pains and sorrows as well as its joys and pleasures—all that makes up ‘life’s fitful fever’—have to be allowed for in the estimate. In assessing damages for shortening of life, therefore, such damages should not be calculated solely, or even mainly, on the basis of the length of life that is lost.

The truth, of course, is that in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived, the jury or judge of fact is attempting to equate incommensurables. Damages which would be proper for a disabling injury may well be much greater than for deprivation of life. These considerations lead me to the conclusion that in assessing damages under this head, whether in the case of a child or an adult, very moderate figures should be chosen.


determined that presumed constitutional damages were in order because of the importance of the constitutional right violated.\textsuperscript{137} Because the California district court perceived that presumed constitutional damages flowed from the violation of that constitutional right, it created an independent constitutional claim for the loss of the right to life.\textsuperscript{138} This major premise of the \textit{Guyton} decision, so important to the holding in \textit{Bell}, which in turn was essential to \textit{Bass} and \textit{Sherrod}, has apparently been rejected by the Supreme Court in \textit{Stachura}.\textsuperscript{139} Moreover, under \textit{Stachura}, it would appear that state death remedies that have evolved to compensate for death would be perfectly appropriate for adoption under section 1988.

From a practical standpoint, recognition of the right to recover for loss of life presents a significant problem in placing a value on the loss of life. Because life has been described as "the primordial experience of being alive, of experiencing the elemental sensation of vitality and of fearing its extinction,"	extsuperscript{140} placing a value on it poses a vexing problem for juries and jurists alike.\textsuperscript{141} Both are confronted with the awesome task of determining what a decedent's life would have been worth to him had he lived, which entails placing a value on intangibles that would only have had value to the decedent had he lived long enough to enjoy them.\textsuperscript{142}

IV. RECOVERY FOR AN UNCONSTITUTIONAL KILLING: DEVELOPING A WORKABLE STANDARD

A. Standing

It is relatively clear that the representative of the decedent's estate is the only person with standing to sue for civil redress in an unconstitutional killing case.\textsuperscript{143} The closely related but distinct issue of whether the decedent's
survivors have an independent associational interest in the continued life of the decedent is a question the Supreme Court has yet to address. 144

in their own right for the injuries suffered by the decedent. First person standing is vested in the personal representative of the decedent, who merely stands in the shoes of the decedent in order to vindicate the decedent's rights offended prior to his death, a case or controversy under Article III. That Congress has through section 1988 provided for the adoption of state law in absence of federal law—here, to provide a remedy for the decedent's action for death—that as an incident of adoption confers a benefit to the third party survivors, does not alter standing rules under section 1983: the decedent's estate has the standing, it is only the adoption of the state law at the remedy phase of the analysis that confers the benefit to third party survivors. Conferring such a benefit to a decedent's survivors can only be accomplished through the license granted by section 1988 to adopt analogous state law. See Davis v. Passman, 442 U.S. 228, 241 (1979) ("Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner."). Cf. S. v. D., 410 U.S. 614, 617 n.3 (1973) (violation of statutorily created right confers standing even though right does not exist apart from statute). Without invoking section 1988, these persons would lack standing to receive damages for the death of the decedent, except that the death deprived them of their own independent liberty interest. See supra note 13.

Professor Steinglass argued that section 1983 analysis mandates the creation of a federal common law of wrongful death. See supra note 6, at 644-61. But, this argument is subject to challenge in several respects. First, section 1988 is an enactment of Congress that should not be lightly cast aside. See, e.g., TVA v. Hill, 437 U.S. 153, 194 (1978)(Congress's role is to formulate legislative policy). Second, the Supreme Court's decision in Carlson v. Green, 446 U.S. 14 (1980), is weak precedential support for creation of a federal common law of wrongful death because the defendants were members of the FBI who were sued directly under the Constitution in a Bivens action. As noted in Carlson, section 1988 does not apply to such actions. Id. at 24 n.11. Because there were no concerns of federalism, the Supreme Court was free to create a federal common law rule of survivorship without reference to state law.

144. See Jones v. Hildebrant, 432 U.S. 183 (1977) (dismissing certiorari as improvidently granted). In Bell v. City of Milwaukee, 746 F.2d 1205, 1242-48 (7th Cir. 1984), the Seventh Circuit recognized a parent's liberty interest under the fourteenth amendment in the continued life of a child, while refusing to find such an interest between siblings. This holding was based in part on two opinions written by Judge Kane. See Sager v. City of Woodland Park, 543 F. Supp. 282 (D. Colo 1982); Sanchez v. Marquez, 457 F. Supp. 359 (D. Colo. 1978). But see Jackson v. Marsh, 551 F. Supp. 1091, 1094 (D. Colo. 1982) ("The Supreme Court has never addressed, nor has it created, a right of a constitutional magnitude which protects individuals from particular acts of governmental agents focusing upon specific family members and potentially affecting the continuity of the intrafamily relationship."). Judge Kane, however, had in the meantime reconsidered his prior opinions in light of Jackson and adopted its holding in White v. Talboys, 573 F. Supp. 49, 51 (D. Colo. 1983), a fact overlooked by the Seventh Circuit in Bell.

The Tenth Circuit, however, more recently expanded on Bell to allow recovery to siblings as well as parents in a section 1983 death case. Trujillo v. Board of County Comm'r's, 768 F.2d 1186 (10th Cir. 1985). The court, however, added a state of mind requirement by requiring "an allegation of intent to interfere with a particular relationship protected by the freedom of intimate association" in order to state a claim under section 1983. Id. at 1190. See also Kelson v. City of Springfield, 767 F.2d 651, 653 (9th Cir. 1985) (state's interference with parents' constitutionally protected liberty interest in companionship of their children is cognizable under section 1983); Mattis v. Schnarr, 502 F.2d 588, 593-95 (8th Cir. 1976) (father of minor whom police shot and killed had standing to bring action challenging statutes authorizing such action), cert. denied, 433 U.S. 915 (1977); Myres v. Rask, 602 F. Supp. 210, 213 & n.4 (D. Colo. 1985) (parents could maintain civil rights action for violation of their constitutional right to family
B. Survival Of The Claim

As Robertson makes clear, whether a decedent’s claim survives is resolved by reference to state law. In a situation where a state law would preclude the survival of a section 1983 claim where unconstitutional conduct was the cause of death, the analysis of Jaco v. Bloechle is compelling. In Jaco, the Second Circuit was confronted with a state survival statute that caused an action to abate where death was instantaneous. As the court explained, it was obligated to “gauge the impact of abatement upon the ‘goal of compensating those injured,’ and [section] 1983’s role in preventing official illegality.” The court held that where the unconstitutional conduct caused death, the remedial purpose of section 1983 would be defeated if the action was to abate as state law required. The state rule was thus rejected and the claim allowed to survive as a matter of federal common law.

C. Fourth Amendment Standard

Recovery for an unconstitutional killing by a police officer committed in the course of arrest should be governed solely by a fourth amendment standard. As Judge Easterbrook has explained, the objective standards of the fourth amendment are well defined and turn on the objective reasona-
bleness of a police officer’s use of force rather than the completely subjective interpretation of what is shocking to the conscience of a particular district court.151 Ironically, it is the Seventh Circuit that has taken the lead in repudiating the application of the doctrine of substantive due process in arrest cases. In Lester v. City of Chicago,152 the Seventh Circuit overruled the majority opinion in Gumz v. Morrissette,153 which had adopted the Glick fourteenth amendment excessive force standard, and held that police excessive force cases should be analyzed solely under a fourth amendment objective reasonableness standard.154

In reversing Gumz, Judge Manion relied on a perceived shift by the Supreme Court away from the shocking to the conscience substantive due process analysis to a fourth amendment objective reasonableness standard.155 Under the fourth amendment, the subjective intent of the police officer is irrelevant. “An objectively unreasonable seizure violates the Constitution regardless of an officer’s good intent; likewise, an objectively reasonable seizure does not violate the Constitution despite the officer’s bad intent.”156

D. Adopting State Law To Shape A Remedy

In order to provide a workable remedy for death under section 1983, it is necessary to retrace some analytical steps and put all the pieces of the puzzle together. Initially, it is essential to bear in mind the basic differences between survival and wrongful death actions. Survival claims allow a decedent’s personal claim, which existed prior to death, to continue. Wrongful death actions are designed to compensate the estate for the economic harm to it as well as to benefit survivors. The section 1983 action for death survives the decedent’s death where an unconstitutional act caused the death. If the unconstitutional act occurred during the course of an arrest, the claim that survives is one for an unreasonable seizure under the fourth amendment, brought by the representative of the decedent’s estate. Thus, the claim confronting the district court is a claim for an unreasonable seizure under the fourth amendment where the injury caused by the seizure is death.

Section 1983 is silent as to the appropriate remedy where the injury is death. Fortunately, section 1988 counsels the district court to search for an analogous state remedy. The states have traditionally relied on wrongful death statutes, contravening the common law rule against recovery for death. Because wrongful death statutes are the analogous state remedy for death, they should be adopted in order to provide a damage template for the injury

152. 830 F.2d 706 (7th Cir. 1987).
153. 772 F.2d 1395 (7th Cir. 1985).
154. 830 F.2d at 713.
155. Id. at 711-13.
156. Id. at 712.
of death. To the extent that the section 1983 action seeks redress for conscious pain and suffering prior to death, survival statutes provide the remedial analog for that injury. Hybrid survival statutes are particularly suited for adoption where a case involves both conscious pain and suffering and death. In states where the survival and wrongful death actions are separate, adopting the survival action for conscious pain and suffering and the wrongful death action as the remedial analog for death has the effect of combining the two actions into one, both for the benefit of the decedent's estate, in effect converting the civil rights death action into a hybrid survival action.

This flexible system should yield a result consistent with the objectives of section 1983 as well as provide some consistency and predictability. State wrongful death remedies, which have evolved over the last century, provide an excellent outline for the federal remedy. Because the law of torts has been accurately described as "a battle ground of social theory," adopting the state statutory analogies for recovery for death in a section 1983 claim ensures some predictability in the result, as well as affords federal courts the benefit of the experience of state courts which are presented with death cases much more frequently. For this reason, section 1988 has the desired effect of incorporating state statutes reflecting the prevalent social policies on recovery for death. The economic valuation techniques utilized by most states would now seem perfectly appropriate in a section 1983 case since the "abstract value" of the constitutional right itself is no longer an appropriate factor for awarding damages.

Although the remedies for death are almost as numerous as there are states, section 1988 provides the resiliency to adapt to each. The borrowed state law need not fit perfectly with federal objectives, but need only provide a workable analogy. If, however, a particular state lags behind its sister states in evolving its doctrine, a strong case can be made for finding its law inconsistent with federal policies. When confronted with inconsistent state law, a district court should exercise its "federal veto," but should not be entitled to exercise unbridled discretion in creating federal law. The law of other states should be consulted and the best rule, or a collage of the better aspects of the rule of several states, borrowed to fill the void between the inconsistent state statute and a result consistent with section 1983.

157. See PROSSER & KEETON, supra note 38, at 15.
158. Kreimer, supra note 18, at 621.
159. See Kreimer, supra note 18, at 630-32. In Professor Kreimer's view, section 1988 was never meant to mandate rigid adherence to a vast and divergent body of state law, and the resultant necessity for federal courts to excavate an "arcana of nineteenth century tort doctrine." He suggests that the courts establish a common law of civil rights law by "searching for the best current common law rule in light of federal policies." He does not advocate, however, that the courts run unbridled through the still infant frontiers of federal civil rights law, but instead offers pragmatically, and in deference to the principle of stare decisis, that the federal courts cannot ignore state law that serves the purposes of federal law. Id.
V. Conclusion

The loss of life claim under section 1983 has arisen not by accretion, but as the byproduct of unrestrained judicial activism. Its objective of compensating a dead person for losing his right to life is quixotic and has no prior basis in American law. By lending further plausibility to this approach, the Seventh Circuit trivialized both the role of section 1988 as a choice of law provision in civil rights actions and the role of the states in determining social policy in death cases. If state death statutes serve the policies of section 1983, they should not be lightly discarded in favor of the unrestrained expansion of federal common law.

The unconstitutional taking of life certainly merits redress in the courts. But in so doing, the district courts must remain mindful of presently articulated constitutional analysis under section 1983. Those courts that have rejected adopting state death remedies have been quick to cast section 1988 as a villain. Such a characterization is unfortunate, however, because it misses the true benefit of the statute. Because state law adopted under section 1988 need only be analogous, section 1988 allows for an imperfect fit between the state provision selected and the desired federal objective. Section 1988 thus provides the flexibility to confer benefits by adopting state wrongful death remedies for third persons who otherwise would lack standing to recover damages.

When coupled with the availability of punitive damages as a matter of federal common law under section 1983, the adoption of state death remedies adequately serves the compensation and deterrence objectives of section 1983. Section 1983 requires no more. To cast aside this workable system in order to accomplish the unrealistic objective of paying money to someone who is already dead would be both unfortunate and unnecessary under presently articulated constitutional standards.

VI. Addendum

As this Article was being finalized for publication, Sherrod v. Berry, on petition for rehearing en banc before the Seventh Circuit, was vacated, and, after rehearing, reversed and remanded for retrial on other grounds. The court held that the introduction of evidence demonstrating the decedent to be unarmed in fact at the time he was shot by the police was not only irrelevant to the question of whether the police could have reasonably believed the decedent to be armed, but also so prejudicial as to warrant a new trial. The Seventh Circuit did not reach the loss of life claim or the viability of "hedonic damages," but directed the district court to resolve such issues in

160. Supra note 2.
161. 835 F.2d 1222 (7th Cir. 1988) (en banc).
162. No. 85-3151, slip op. (7th Cir. August 22, 1988) (en banc).
163. Id. at 4-11.
light of its earlier, vacated opinion, which allowed such claims to stand.\textsuperscript{164} In any event, the loss of life claim is still very much alive in the Seventh Circuit, and that Court will assuredly confront the issue of "hedonic damages" in the near future.

\textsuperscript{164} \textit{Id.} at 11.