Choice of Law under Section 1983

Section 1983, 42 U.S.C., provides that

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

Many issues which arise in cases brought pursuant to this brief statute are unresolved by its terms. The question whether to refer to state or federal law to formulate rules of decision for these unresolved issues is the choice of law problem with which this comment is concerned. For some matters the proper choice is clear; for example, the definition of the "rights, privileges, or immunities secured by the Constitution and laws" of the United States is a matter for federal law. For other issues, for example the use of state statutes of limitations, the practice of applying state law is well settled. Between these extremes there are several issues which arise under section 1983 which merit analysis to determine whether state or federal law, or some combination, should govern. These issues are the defenses available under section 1983, measure of damages, and survival of actions.

The choice of law for resolution of each of these issues has received little attention from the courts. There are few cases involving a direct conflict between a state law rule and a federal section 1983 rule because the latter body of law is not extensive. More frequently courts

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1 42 U.S.C. § 1983 (1964) (originally enacted as Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13) (known as "the Ku Klux Klan Act," or "the Third Civil Rights Act").
2 Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962).
3 The Supreme Court has not explicitly recognized the problem. Monroe v. Pape, 365 U.S. 167, 187 (1961), said that "§ 1983 should be read against the background of tort liability ...." Whether this was addressed to choice of law at all is open to question. See text at note 65 infra. If it was meant to speak to choice questions it has the effect of removing any restrictions upon the source of authorities that a court may rely on.
4 Pierson v. Ray, 386 U.S. 547 (1967), involved a direct conflict between a state law defense, adopted by the court below, of plaintiff's consent to the injury and the rules of defense developed in the opinion. See text at note 68 infra.
5 To date the majority of cases under § 1983 have dealt with the threshold consideration—what interpretation to give the terms of the section. Monroe v. Pape, 365
are faced with a gap in section 1983 law which must be filled either by use of state law or formulation of new section 1983 law. By one method or the other, courts generally achieve an outcome consistent with the developing pattern of section 1983 decisions. Uncertainty remains however about the use of federal law from other areas of federal jurisdiction, the role of state law, and the development of new federal law. Many opinions ignore these choice of law issues and base their decision on any, or all, of the sources of law which provide the desired result.

Congress has not left the federal courts without some guidance to the relationships between state and federal law in the application of section 1983. Section 1988 addresses itself to the problem of adequate rules for decisions:

[Section 1983 and other civil rights laws] 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.

In short, the section provides that federal law shall control where "suit-
able" and that state law shall be used to achieve the object of the statute or to provide suitable remedies where the federal laws are deficient.  

This section provides roughly the same pattern for choice of law problems under federal statutes that has been suggested by academic commentators:

Where federal matters are involved (1) specific language of valid federal statutes will control when applicable; (2) where federal statutes do not clearly articulate the law to be applied, federal courts must fill the interstices; (3) federal courts can do this by reference to federal or state law; (4) the choice here depends on a number of different factors.

The factors the authors deem relevant for making the proper choice are the purposes of the particular federal enactment.

Both these solutions for choice of law questions rely on the purposes of the statute to provide a guide. In *Monroe v. Pape* the Supreme Court set out the four purposes it saw for section 1983: 1) to override unconstitutional state laws, 2) to provide remedies where state laws are deficient, 3) to provide remedies which are technically, but not practically available under state law, and 4) to provide remedies substantially equivalent to those practically available in state court. It is disappointing that these purposes are of little aid in resolving the choice of law problem, since section 1988 and the commentators' statements of the solution intimate that once the purposes of a federal enactment are identified, the applicable law would become apparent. Perhaps this is being unfair to *Monroe*, or to the choice of law solutions, or all three, since the issues which demand choice analysis are restricted to the few identified. But the fact remains that the purposes as stated in *Monroe* do not lead to conclusions that a state statute of limitations applies or that a federal rule shall be formulated to measure damages. *Monroe*'s purposes can indicate which plaintiffs have rights protected by section 1983; the issues which raise the choice of law problems arise after the plaintiff has shown his right. They govern the remedy given to the plaintiff by answering the questions: "Has plaintiff delayed too long? Has he or the defendant died? Has the defendant a defense? How much money can the plaintiff recover?"

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11 § 1983 provides a civil remedy and this comment confines itself to choice of law in such actions. Therefore the provisions of § 1988 which apply to the criminal counterpart of § 1983, 18 U.S.C. § 242 (1964), are not relevant.

12 1A Moore's *Federal Practice* ¶ 0.328, at 3901 (2d ed. 1968).

13 Id. ¶ 0.323, at 3759.


15 Id. at 173, 174, 183.
To decide whether state or federal law shall govern each of these questions, it is necessary to consider the policies which are served by each choice. State law might be chosen because it provides a comprehensive, modern, and settled body of rules. Or it may be decided that a federal rule should govern because the issue is so closely related to the scope of the constitutional or federal right that it must be uniformly protected throughout the nation. This comment will examine these considerations as applied to each issue and describe the pattern for the resolution of the choice of law problems.

I. SECTION 1988 AND THE USE OF FEDERAL LAW

Section 1988 plainly provides that federal laws shall govern section 1983 cases insofar as they are suitable to achieve the purpose of the act. At the time of section 1988's passage in 1866, the term "federal laws" did not encompass a large body of rules and the common law was a fairly unitary set of precedents that were applied in all courts. In this context section 1988 made federal law binding where it applied but the great majority of factual situations would be resolved by the common law as announced largely by state courts and as modified by state legislatures.

With the growth of federal powers and responsibilities the body of federal law has increased dramatically. There is a large and diverse accumulation of federal precedents. Pritchard v. Smith, a section 1983 case, suggests a few of the sources from which a federal rule might be drawn: the admiralty jurisdiction, the Federal Employers Liability Act, and the Sherman Act. At least one section 1983 case relied solely on an antitrust case as controlling precedent. Other possible

16 14 Stat. 27 (1866).
17 289 F.2d 153 (8th Cir. 1961).
18 U.S. Const. art. III, § 2. The federal courts clearly have the power to form a federal common law in an area granted to them by the Constitution.
19 45 U.S.C. § 51 et seq. (1964). This act does not specifically treat the question of governing law; the federal courts have taken the position that a federal common law governs.
20 15 U.S.C. §§ 1-7 (1964). The federal courts have developed antitrust law in the absence of other available rules of law.
21 Lauderdale v. Smith, 186 F. Supp. 958 (D.C. Ark. 1960), arose from an alleged false imprisonment. The defendant died and the district court ruled that survival should be governed by federal common law, citing Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958), on the choice of law problem. For the substantive rule the court turned to a case decided under the Sherman Act. This case, Barnes Coal Corp. v. Retail Coal Merchants Ass'n, 128 F.2d 645 (4th Cir. 1942), held that survival of an action under a federal statute was governed by federal common law and that this law allowed survival of actions only for injuries to property; actions for damages for injuries to the person abated upon the death of either party. The Lauderdale court concluded that the § 1983 action, based on an injury to the person, did not survive. Both the choice of law and substantive hold-
sources of federal law include diversity cases which, prior to *Erie v. Tompkins,*
were decided according to a federal common law, cases decided in the courts of the District of Columbia, and cases drawn

ings of this case were overruled on appeal of a companion case, *Pritchard v. Smith*, 289 F.2d 153 (8th Cir. 1961). See text at note 58 infra.

Cases decided under federal statutes may enunciate federal rules of decision as the *Barnes* case did, but to a great extent state law has been used by federal courts to fill gaps in federal enactments and to give meaning to their terms. The Federal Tort Claims Act specifically provides that actions under it shall be governed by the law of the place of injury. 28 U.S.C. § 1346(b) (1964). Reference to cases decided under such federal statutes may provide only a federal statement of a state rule. This defeats the basic consideration served by following federal law at all—the achievement of uniform protection for federal rights.

See, e.g., *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965), text at note 80 infra, a § 1983 case which relies on a pre-*Erie* diversity decision. *Basista* grew out of a fight between a citizen who had been arrested for beating his wife, and the arresting officer. The case was tried to a jury which returned a verdict of $1500 punitive damages. On appeal the Third Circuit considered the proper measure of damages to apply. The applicable Pennsylvania rule would allow no punitive damages in the absence of actual damage but the court held that considerations of uniformity required that a federal rule govern the issue. The federal rule which was followed allowed the award of punitive damages alone to stand; it was found in *Press Publishing Co. v. Monroe*, 73 F. 196, 201 (S.D.N.Y. 1896), a diversity case decided under the rule in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

The resurrection of this aged precedent to justify a contemporary police brutality damage award is incongruous. The *Erie* decision declared that the interpretation of § 34 of the Federal Judiciary Act of 1789, now 28 U.S.C. § 1652 (1964), which required federal courts in diversity cases to give binding effect only to the statutory laws of states and which allowed a federal common law to develop was not only unfair and ineffective but unconstitutional. In forming its own rules of decision the federal courts invaded rights reserved to the states by the Constitution. 304 U.S. 64 (1938). The question of whether precedents drawn from pre-*Erie* case law can be taken to be authoritative after that decision has not occupied the courts. Their approach is pragmatic: where a case allows the court to achieve a desired result it will surely be used. This choice allows the court to operate under the federal law branch of § 1988 and avoid the more complicated reference to state law or formulation of a new federal law if the state rules are unsuited for the particular use under § 1983. If a pre-*Erie* decision seemed to support an outcome that a court desired to avoid, the case would surely be disregarded on any of several possible bases: that pre-*Erie* rules have no precedential value today, that the case was factually different, or that it is too old.

*See Pierson v. Ray*, 386 U.S. 547 (1967), which relies on a case which applies the common law as it existed in the District of Columbia. In part *Pierson* held a municipal police court judge immune from suit by parties who were found guilty of violating an ordinance that was later ruled unconstitutional. The Supreme Court made reference to the common law strength of the doctrine of judicial immunity. The authority cited is *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), arising from the removal of an attorney from the rolls of practice of the District of Columbia courts. The judge who issued the removal order was held to be immune from any liability.

Since the District of Columbia is under federal jurisdiction any case decided there is federal law. The literal reading of § 1988 requires that such federal law govern where suitable. This should not be interpreted to mean that the decisions of the District of Columbia courts, as federal law, are binding on all other federal courts precluding reference to the law of the state in which they sit. When a federal court outside the
from the areas where federal courts have felt that protection of federal interests requires the development of a federal common law.\textsuperscript{25}

With these diverse and extensive sources of federal law it will be the unusual case where there is no federal case which is, or can be made to seem, suitable to resolve a given issue under section 1983. To fill the gaps in section 1983, some courts have been moved to dig deeply into this mass of precedent to locate a federal rule on a particular issue. This venture, undertaken simply for the sake of being able to use a federal law, can be time-consuming and fruitless. \textit{Nelson v. Knox}\textsuperscript{26} demonstrates the problem. The majority and the concurring judge agreed that when a defense of immunity was raised by municipal officials, the federal interests in providing an effective and uniform remedy under section 1983 were sufficient to require a federal rule. The majority purported to find such a rule in the federal cases.\textsuperscript{27} The concurring judge demonstrated that the cases relied on by the majority did not in fact compel the majority ruling and that federal law could not provide a precedent on the point. He then examined the decisions of the state courts which did resolve the point and relied on them as guides for the formulation of a new federal rule which compelled a disposition similar to that of the majority.\textsuperscript{28} The division in this court could have been avoided if the majority had not felt compelled to reach its result on the basis of federal precedent however inappropriate it might be, but had understood that there was a role that state law could play in the application of section 1983.

A further problem with an extensive search for federal precedent, one avoided by the \textit{Nelson} court, is that the process of finding a federal case to cite for a particular rule or outcome may obscure the more important consideration: are the issues raised by the case of the nature that require a federal rule or would the application of state rules be more satisfactory? A clear statement of the reasons for using a federal rule can guide future decisions; a citation to an admiralty, or antitrust, or employers liability case sheds little on the development of rules for the protection of civil rights.

The requirement of section 1988 that federal law govern section 1983 actions insofar as it is suitable should not be interpreted too rigidly. If

\textsuperscript{25} See note 64 infra.
\textsuperscript{26} 256 F.2d 312 (6th Cir. 1958).
\textsuperscript{27} Id. at 314.
\textsuperscript{28} Id. at 315, 316.
every old or factually remote federal precedent were accepted as binding on section 1983 cases then the values that are served by allowing federal courts to apply state rules would be lost.29 State law can provide binding rules of decision for the survival of actions and statute of limitations issues.30 For the development of a federal common law of damages and defenses, state law can provide guidance.31 In interpreting section 1988, emphasis should be placed on the flexibility inherent in the operative term “suitable.” This will allow the federal courts to apply both state and federal precedents depending upon which provide the appropriate structure of rules for applying section 1983.

II. STATE LAW IN FEDERAL COURTS

The starting point in discussion of the use of state law in federal courts must be the Rules of Decision Act:32

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The currently authoritative interpretation of this rule is found in Erie v. Tompkins33 and its descendants.34 The thrust of these cases is

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29 The objection can be made only when the court feels bound by an old or factually remote precedent. The use of such cases as expressions of rules which have been reached by consideration of the policies involved is acceptable. For example the Supreme Court's opinion in Pierson v. Ray, 386 U.S. 547 (1967), supra note 19, relied on an 1872 case which was factually very different from Pierson. But the Court made the decision on the policy: judges should be protected from lawsuits so they can continue “principled and fearless decision making . . . .” 386 U.S. 547, 554. The old case is cited not because it is considered controlling but because it is a thorough exposition of the common law judicial immunity doctrine which the Court incorporates into § 1983.

30 See text at notes 40 & 52 infra.

31 See text at note 65 infra.


33 304 U.S. 64 (1938). The holding in Erie is only binding on cases brought in federal court under diversity jurisdiction but the policies determinative in the case have broad implications.

But see the confused opinion in Zellner v. Wallace, 233 F. Supp. 874 (N.D. Ala. 1964), a § 1983 case which held that “[w]here such a doctrine of immunity is raised by a state official . . . . the matter is controlled by state law under Erie R.R. Co. v. Tompkins . . . .” 233 F. Supp. at 877. By chance this court did conclude that judicial officials were immune while the police were subject to suit, which is consistent with the Supreme Court's cases on the points, Pierson v. Ray, 386 U.S. 547 (1967) (judicial officers immune), and Monroe v. Pape, 365 U.S. 167 (1961) (municipal corporations immune, police officers subject to suit). However, the Supreme Court has apparently taken the position that immunity is a matter of federal law; conflicting state laws are therefore not to be controlling.

that federal courts in deciding diversity cases should apply state law in matters of "substance," as opposed to "procedure," so that the outcome in federal court is similar to what would be achieved had the case been brought in state court. As to federal question cases, including section 1983 actions, there is language in *Erie* which arguably implies that there is no power in federal courts to develop rules of decision in the manner of common law courts. This doctrine, if applied to section 1983, would result in a choice of law formulation which would focus on the scope of the congressional enactment. Insofar as the terms of the statute and their interpretational gloss governed an issue, they would control. At some point, as the issues became sufficiently remote from those governed by the section's literal terms, the courts would no longer be interpreting the statute but would be creating rules for decision, and according to this interpretation of *Erie* the federal courts are not competent to decide in such a manner. If the courts cannot formulate their own rules for decisions they must look to state law. The issues arising under section 1983 which require choice of law analysis clearly fall in this area. The terms of section 1983 cannot provide a statute of limitations or a set of principles for measuring damages. The statute also says nothing of defenses, giving rise to argument that Congress meant for section 1983 to provide a form of strict liability—that if a state official deprived a citizen of federal rights he could make no defense of good faith, probable cause, or immunity. The courts, however, have not been persuaded by this argument. The result of these gaps in the terms of the statute, according to this interpretation of *Erie*, would be that if an issue arises upon which there is no statutory language it should be governed by the law of the state in which the federal court sits. Thus section 1983 would develop as federal law insofar as the courts' decisions could be related to the terms of the statute, but when issues arose which were completely untreated by the terms of the statute state law would govern.

Modern interpretations of *Erie* and of the powers of federal courts would reject this analysis. The presence or absence of certain language from a statute should not be the sole criterion in a choice of law theory. But this analysis provides a rationale in addition to the language of section 1988 for the practice of federal courts of referring to state law. It also explains the preference of federal courts in instances where the terms of the statute do not resolve a particular issue for relying on settled state law rules which are consistent with the purpose of the federal enactment rather than explicitly announcing new federal rules.

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35 304 U.S. at 78.
37 See text at note 64 infra.
A practical reason for applying state law rules in federal court under section 1983 stems from the nature of the section; it has been described as creating a constitutional tort. The types of problems that have been identified as ones upon which the statute is silent are commonly resolved in tort litigation which for the most part is conducted in state courts or in federal courts applying state law. Thus the greatest body of law applicable to these issues will be found in state decisions.

There are two ways of characterizing such reference to state law. If a federal court is only guided by state law, then the holding of the federal decision must take its authority from the power of the federal courts to create rules of decision. On the other hand if the issue is said to be controlled by state law then federal courts have not exercised a law making power, but have only applied rules formed by state courts. The choice between alternative formulations is of more than academic interest. If the section 1983 decisions are federal common law, then that law must be uniform throughout the nation. If inconsistencies occur as the law is developed the appellate courts will affirm and overrule different lines of cases until there is a single system of law throughout the nation. If on the other hand the state law controls then the only function of appellate review will be to insure the correctness of lower courts' ascertainment of the state law. Application of section 1983 would depend upon the state law and there would be variations among the particular applications of the section from state to state.

A. Use of State Statutes of Limitations

The most common use of state law under section 1983 has been to provide a statute of limitations. This is in accordance with a settled


39 This is not to say that in order for state law to provide rules of decision for § 1983 that it must bind federal courts in the same manner that the courts are obligated to follow state rules in diversity cases. If on a given issue it is decided that it is necessary to form a new federal rule, the court may look to any state court decision for guidance. Once a state decision is adopted as the federal rule, it becomes part of the common law of § 1983.

But see Belveal v. Bray, 253 F. Supp. 606 (D.C. Colo. 1966). Here the district judge made reference to the strong federal rule favoring immunity of administrative officials. He examined the body of state law on the problem and concluded that there was no applicable judicial or legislative rule. Thus he concluded that the action should be controlled by the federal law. This represents the converse of the normal situation where state law fills a gap in federal precedent. The number of jurisdictions where such problems will arise is probably rather limited.

practice of federal courts; state limitation periods are applied to federal statutes for which Congress has failed to provide a limitation.\textsuperscript{41} The application of this general practice to the Civil Rights laws was first accomplished in \textit{O'Sullivan v. Felix}\textsuperscript{42} involving a sheriff's beating of a black prisoner. Since this case the only issue arising in the application of state limits is the particular period to be used. One approach, used consistently in the Third Circuit, has been to apply the state statute applicable to the state tort action most analogous to section 1983 claims. In \textit{Hughes v. Smith},\textsuperscript{43} the plaintiff sought damages for personal injury suffered while in custody of the police. The trial court dismissed the action as barred by the New Jersey statute of limitations for actions for personal injury, and the court of appeals affirmed in a brief opinion. The Second Circuit has taken a similar approach.\textsuperscript{44}

A slightly different rule was applied in the Seventh Circuit's holding in \textit{Wakat v. Harlib}.\textsuperscript{45} The court applied the residual section of the Illinois Limitations Act which provides for a five-year limit for all claims which are not covered by other sections. A variation on this theme is found in \textit{Hoffman v. Wair}\textsuperscript{46} where the district court held section 1983 to be merely procedural and that once in federal court the case became a common law action controlled by the Oregon statute which governs common law causes. Colorado has a statute limiting claims brought pursuant to federal law which has been specifically applied to a section 1983 claim.\textsuperscript{47}

The reference to state law for a limitation period may be criticized as uncertain and complex. It is doubtful that an attorney can predict which limit will be applied to a particular cause of action unless there has been a limitations decision on a claim arising from a similar injury. This criticism has led to a suggestion\textsuperscript{48} that a better approach would be for the Supreme Court to announce in an appropriate case a statute of limitations, or for the Court to overrule \textit{O'Sullivan v. Felix}\textsuperscript{49} and apply

\textsuperscript{41} Campbell v. City of Haverhill, 155 U.S. 610 (1895), held that when Congress failed to include a statute of limitations the courts could presume first, that there was no intent to confer a right of action good in perpetuity and second, that Congress intended the state statutes to govern. This rationale was reaffirmed in Holmberg v. Armbrecht, 327 U.S. 392 (1946); D. Currie, Federal Courts 689-92 (1968).

\textsuperscript{42} 233 U.S. 318 (1914). Although the case was brought under § 1985 it was interpreted to extend the rule to § 1983.

\textsuperscript{43} 389 F.2d 42 (3d Cir. 1968).

\textsuperscript{44} Swan v. Board of Higher Educ., 319 F.2d 56 (2d Cir. 1963).

\textsuperscript{45} 253 F.2d 59 (7th Cir. 1958).


\textsuperscript{48} Note, cited supra note 40.

\textsuperscript{49} 223 U.S. 318 (1914).
the federal statute of limitations for actions to recover fines or penalties imposed by federal law.\textsuperscript{50}

Either of these suggestions meets the criticisms which prompted it, but they evidence a willingness to discard certain values that are served by the present system. The variety of possible claims that might be brought under section 1983 is unlimited, ranging from simple police brutality to school desegregation cases. To impose one statute of limitations for actions so diverse would be to disregard the unanimous judgment of the states that periods of limitations should vary with the subject matter of the claim. While the present system of reference to these many state limits is not perfect in operation, it surely preserves some of the judgments that have been made about what appropriate periods of limitation should be for causes of action diverse in nature. While the uncertainty problem may loom large when the mass of section 1983 cases involving statutes of limitations are examined, from the perspective of the individual practitioner familiar with the limitation rules of his jurisdiction the problem may not be so severe. He is familiar with the limits imposed by his state as to actions for damage to person, property, or whatever distinctions his particular state draws. These statutes are more accessible to the profession than a limitation contained in a Supreme Court decision which would apply to only one section of the United States Code. Use of the limit on recovery of fines and penalties with section 1983 is also objectionable; since this would be contrary to the settled practice under most federal statutes which fail to provide a statute of limitations, it might therefore be the source of considerable confusion.

Another problem with having a unique federal limit is the danger of forum shopping, an inherent possibility in any difference between the law as applied in federal and state courts. In the context of section 1983, litigation in federal court is not a danger, but the object of the section. However the statutes of limitations are not the sort of deficiencies in state law that section 1983 was meant to remedy. Were there to be a unique federal limitations period, a claim against arresting officers might be barred by a state statute on batteries, but the same claim framed as a deprivation of due process might be permitted under federal law.\textsuperscript{51} As long as the present rules prevent litigation in federal court simply to take advantage of a longer limitations period, they should be preserved. State statutes of limitations should be applied to section 1983 claims.


\textsuperscript{51} However, § 1983 relief would be appropriate if a state limitations period for actions against state officials were so unreasonably short that it impinged on federal rights.
B. Use of State Survival of Action Rules

The other major area for the use of state law has been to allow survival of actions. As late as 1955 "[t]he question of survival of actions under section 1983 . . . ha[d] apparently never been adjudicated." The apparent absence of litigation on this issue reflects the narrow judicial construction placed upon section 1983 in the years shortly after its passage. By 1961 the section had become a source of sufficient litigation to produce two circuit court cases which held that section 1983 actions could survive the death of either the plaintiff or defendant. Brazier v. Cherry arose from the beating death of a police prisoner. The Fifth Circuit's opinion is exceptional in its total reliance on section 1988.

Thus section 1988 declares a simple, direct abbreviated test: what is needed in the particular case under scrutiny to make the civil rights statutes fully effective? The answer to that inquiry is then matched against (a) federal law and if it is found wanting the court must look to (b) state law currently in effect.

The court applied its test, found no federal law, and then held that the Georgia survival of actions law governed. In Pritchard v. Smith the defendant police chief died during the litigation. After discussion of various federal rules allowing survival of the action, the court based its holding on the survival right provided by Arkansas law as incor-

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52 See generally Annot., 88 A.L.R.2d 1153 (1963); see also Fed. R. Civ. P. 25(d)(l) which provides: "When a public officer is a party to an action in his official capacity and during its pendency dies . . . the action does not abate and his successor is automatically substituted as a party . . . ." This section allows most injunctive actions to survive but in many tort claims seeking compensation for past injury the rule would be of little aid because the government official has acted beyond his official capacity in inflicting the injury. No case has been found where the rule was relied on to allow survival under § 1983.


54 See generally Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. 1323 (1952). Every section of the post Civil War Civil Rights laws, except § 1983 and its criminal analog, suffered debilitating restrictions in Supreme Court decisions. These two sections survived albeit in narrower form than today because their "under color" of state law requirement was interpreted to meet the "state action" requirement.

55 293 F.2d 401 (5th Cir.), cert. denied, 368 U.S. 921 (1961).

56 Id. at 409.

57 Id.

58 289 F.2d 153 (8th Cir. 1961).

59 See text at note 17 supra.
porated into section 1983 by section 1988. Other courts have similar results relying on section 1988.

The problem of allowing section 1983 actions to survive presents the most attractive situation for the application of state law. The state law on the point is generally comprehensive so the federal court will be much more likely to find a controlling statute or similar case there than in federal law. State law will be applied in a positive sense—it will permit the application of the federal remedy.

Both of these issues which should be controlled by state law—the statute of limitations and survival of the action—present unique considerations. The practice of using state limitation periods under section 1983 is only a specific use of a general federal rule. The survival of actions issue is resolved by state law because this is a path of least resistance—it provides a relevant positive answer. These two rules of reference to state law for controlling precedent should be limited to the issues they resolve. They should not be taken to imply a similar choice of law for damage and defense issues. The former issues are not so directly related to the scope or definition of federal rights as the latter. Inquiry into the meaning of due process cannot elucidate the questions raised by a stale claim or a dead party in the same way it can indicate an appropriate resolution for the question of a police officer's immunity or the extent of liability of a state employer who dismisses a teacher thereby infringing on his freedom of speech. These latter issues are closely related to, if not identical with, the definition of federal rights. The former govern the operation of the judicial process. It is proper, therefore, that with respect to the statute of limitations and the survival of the action, the considerations of using a modern and comprehensive body of state law should outweigh the consideration of defining the scope of federal rights uniformly throughout the nation. The next section considers the development of a federal common law of damages and defenses where the considerations of uniformity are dominant.

III. A Federal Common Law of Damages and Defenses Under Section 1983

Earlier discussion of the *Erie* doctrine indicated that reliance on state law where federal enactments are silent has been justified by

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60 289 F.2d at 158.
62 An example of the broad protection afforded federal rights under § 1983 is Keefe v. Geanakos, 318 F.2d 359 (1st Cir. 1969). Here plaintiff was dismissed from his position as a high school teacher for using the word "motherfucker" in class. The court held that such dismissal infringed the plaintiff's free speech rights when the school library contained five books which included that word.
the argument that the federal courts are not empowered to create rules of decision. It is now generally accepted that there are substantial exceptions to this rule; federal courts will develop rules of decision to govern areas of particular federal concern. It can be argued that the protection of federal civil rights as defined in the Constitution and laws of the United States is one of these areas; that the effect of the fourteenth amendment was to commit to Congress the power and responsibility to regulate exercise of civil rights in the nation; and that section 1983 and the related sections constitute a grant of jurisdiction to the federal courts which supports the development of rules of decision sufficient to carry out the purposes of the civil rights law. This theory would require federal courts to enunciate federal rules to govern the problems identified as untreated by the terms of the statute, and to the extent these rules were enunciated by higher federal courts they would be binding in all cases and would apply regardless of conflicting state rules on the points.

This analysis supports the approach which the Supreme Court has apparently taken to the questions of damages and defenses. There has been no explicit mention that a choice of law problem exists at all. Instead the Court has announced its rules regarding defenses in section 1983 cases on the basis of both state and federal authorities without indicating that either body of law is controlling. Language in Monroe may have been meant to indicate this: “[section 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.” In context this statement rejected a defense by a police officer that since he had no specific intent to deprive plaintiff of his federal rights he could not be held liable under section 1983. The operative part of the sentence is therefore the language concerning responsibility for the natural consequences of the actions taken. However the initial clause of the sentence has been read by lower courts to hold that general rules of tort law are applicable to section 1983 actions. Such a formulation is completely permissive, allowing the federal courts to utilize state, federal, or commentators’

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63 See text at note 35 supra.
65 Pierson v. Ray, 386 U.S. 547 (1967), relied on a federal precedent to resolve the issue of judicial immunity and secondary authority supported by a diversity case decided on Missouri law to indicate that a police officer may raise a defense of good faith and probable cause.
statements of the appropriate general rule. With this system the standard of choice is simply, if somewhat indefinitely, the achievement of the purposes of section 1983 as applied to the given factual situation. Decisions made in this manner will form rules of a federal common law of application of section 1983.

The virtue of this system is its flexibility and non-restrictive nature; it provides an opportunity for federal courts to develop a uniform set of rules for damages, defenses, or other issues if it is extended. Its undesirable aspect is uncertainty. Already the Monroe statement about the general background of tort liability has led the Fifth Circuit to apply state law which the Supreme Court held to be inapplicable. The court of appeals opinion in Pierson v. Ray followed the law of Mississippi, the place of the injury, holding consent to an injury to be a defense to a tort claim under section 1983. The Supreme Court held that this defense was not available under section 1983, regardless of state law, and it allowed plaintiffs to continue their suit, relying on a secondary authority and a diversity case which applied Missouri law. The Fifth Circuit's error arose from the difficulty in ascertaining that the purposes and policies of section 1983 excluded a defense based on the plaintiff's consent.

The Court's latest word on these problems is Sullivan v. Little Hunting Park, Inc. This case arose under section 1982 which guarantees

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67 In 1963 the Supreme Court denied certiorari to an appeal from a Fifth Circuit judgment which contained instructions to the district court on remand to apply general rules of law. Nesmith v. Alford, 318 F.2d 110, rehearing denied, 319 F.2d 859 (5th Cir.), cert. denied, 375 U.S. 975 (1963). The case instructed the lower court that "[i]n connecting the acts with the Defendants (causation problem), civil liability for money damages of the respective Defendants would depend on traditional tort principles," 318 F.2d at 125, and "[t]he elements of a § 1983 cause of action may well partake substantially of traditional general tort law to bring in elements akin to want of probable cause, or malice, or both." 318 F.2d at 126. See also Lefton v. City of Hattiesburg, 333 F.2d 280 (5th Cir. 1964) (§ 1988 requires federal courts to use the best combination of state and federal law to vindicate civil rights).

68 352 F.2d 213 (6th Cir. 1965).

69 Id. at 220.

70 The Fifth Circuit has taken the Supreme Court's approach to choice of law questions under § 1983 to heart. In Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969), a sheriff was faced with a § 1983 claim based on detention of a prisoner after the charges had been dismissed. The officer defended on grounds of good faith and absence of intent—the failure to release the prisoner arose from a clerical error. The Fifth Circuit reversed the district court's finding for the defendant and remanded with instructions to enter a directed verdict for plaintiff. In marked contrast to their systematic approach in Pierson of applying the law of the state, the Fifth Circuit supported its holding with citations to a diversity tort case, a case from the Texas Court of Civil Appeals, the Restatement (Second) of Torts, and Am. Jur. 2d. 407 F.2d at 792.


72 42 U.S.C. § 1982 (1964) (originally enacted as Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27) ("the Civil Rights Act of 1866").
all citizens the same rights enjoyed by white citizens in transactions involving real property. Like section 1983 this law is very brief but it can be extended to include a broad range of conduct. The same problem, lack of express terms to govern certain basic issues of application of the law, which arises under section 1983 is also present in section 1982. In *Sullivan* the Supreme Court considered what law should measure damages to be awarded for a community recreation club's racially motivated refusal to allow a black sub-lessee in the community to participate in the use of the recreation facilities:

This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in federal statutes. Cf. *Brazier v. Cherry*, 293 F.2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired.\(^7^3\)

This statement constitutes a clear directive to the federal courts on the measure of damages issue, and it will certainly be interpreted to hold that section 1988 opens the way for any precedent to govern any issue in these civil rights cases insofar as it comports with the judge's view of the "policies" of the statute. Since section 1988 applies with equal force to section 1983, this statement can be taken to make explicit what was hinted in *Monroe*.\(^7^4\)

There are reasons to limit the *Sullivan* case to the damage issue. Federal courts have traditionally been willing to shape remedies necessary to effectuate the policies expressed in federal statutes. This has been done in areas as divergent as the protection of constitutional rights\(^7^5\) and the protection of investors.\(^7^6\) *Sullivan* relies on this line of authority as well as on section 1988. Thus the case might be limited as dealing only with an application of a general federal damage rule in much the same manner that the rule of reference to state law for statutes of limitations was limited. However, when read with the *Monroe* and *Pierson* approaches to issues of necessary intent and other defenses, this restriction of *Sullivan* is unlikely.

The acceptance of the proposition that federal courts may refer to any precedent which they believe effectuates the policies and purposes of section 1983 makes the practical choice of law problem more difficult. Where formerly there was a possibility that the *Erie* analysis might require the use of state law in certain applications of section 1983, the

\(^7^3\) 396 U.S. 229, 240 (1969).
\(^7^5\) Bell v. Hood, 327 U.S. 678 (1946).
\(^7^6\) J.I. Case Co. v. Borak, 377 U.S. 426 (1964).
federal courts are now directed to develop a comprehensive common law of damages and defenses. Recalling the Supreme Court's purposes for section 1983 as stated in *Monroe,1*
 it is clear that the development of part of this common law will be easier than development of the remainder. If a claim under section 1983 is merely a federal formulation of a cause of action that could have been remedied under state law, the federal remedy can at least provide that remedy. This occurred in *Cobb v. City of Malden,7*
 where a class of schoolteachers claimed they were wrongly dismissed from their positions. The court agreed but found no applicable federal rule as to the limits of liability for breach of contract and concluded that "[i]n the absence of any clear authority on this point, we are of the opinion that the Massachusetts law in this regard properly defines the limits of liability which Congress intended."79 Similarly in cases where relief is technically, but not practically, available under state law, section 1983 can at least remedy the injury to the extent the state law provides. These state rules can be adopted by federal courts and become part of the federal common law subject to the unifying forces that work in the appellate process.

*Monroe* also requires that relief under section 1983 be extended where the state law is found to be deficient. If federal rights include protection against the particular injury suffered, and no relief is provided by state law, then development of federal common law is necessary. *Basista v. Weir,80* arising out of a police officer's battery of an arrested citizen, is an example of such development. Under the circumstances of the case Pennsylvania, the state of the injury, would have compensated the victim only for his actual damages. The case came to the Third Circuit in the posture that only punitive damages had been awarded in federal court below. In this situation the court went beyond the relief provided by state law and allowed the award of punitive damages alone to stand.81 The difficult problem for the courts is determining when section 1983 should only parallel state law and when it should take the *Basista* step of extending remedies.82 *Monroe* tells us only that section 1983 can provide all remedies available under the

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78 202 F.2d 701 (1st Cir. 1953).
79 Id. at 703.
80 340 F.2d 74 (3d Cir. 1965), supra note 23.
81 Id. at 87.
82 As to the measure of damages for deprivation of first amendment rights there is a total absence of decisions, probably because these rights are usually unrelated to profit-making endeavors and in any case it is difficult to show monetary damages flowing from their deprivation. The nature of these damages, if they can be proven in future cases, are identical with the definition of the first amendment right itself which indicates that if damage law is developed at all it should be developed in federal courts.
state law and that it can go beyond these remedies, but it does not give any indication where the former remedies are sufficient and where the additional common law developments are necessary.

The final purpose of section 1983 is to override unconstitutional state laws. This does not add anything to federal law since the rights expressed in the Constitution and laws of the United States will be given effect through the supremacy clause when there is conflict with state law.\footnote{U.S. CONsr. art. VI, § 2. The same point has been made about § 1983 as a whole—that it adds nothing substantive to federal law but merely makes explicit what is implied by the existence of federal rights. Bell v. Hood, 327 U.S. 678 (1946), implies that such a right of damages is implicit in federal protection of rights. If this view is accepted § 1983 becomes merely a jurisdictional grant. See Mohler v. Miller, 235 F.2d 153 (6th Cir. 1956). The implications of this proposition are of little practical significance: whether courts regard § 1983 as creating a right of civil action or as a jurisdictional grant, they must still face the question of formulating adequate rules of decision.} To effectuate this purpose, conflicting state laws will be disregarded; otherwise section 1983 remedies will be restricted to those which state law provides, or those about which the state law was silent. In \textit{Jobson v. Henne}\footnote{355 F.2d 129 (2d Cir. 1966).} employees of a state mental institution sought to raise a defense of official immunity to a charge that they had subjected a mental defective to, \textit{inter alia}, slavery. The Second Circuit observed that:

\begin{quote}
To hold that all state officials in suits brought under § 1983 enjoy an immunity similar to that they might enjoy in suits under state law “would practically constitute a judicial repeal of the Civil Rights Acts.” Hoffman v. Halden, 268 F.2d 280, 300 (9th Cir. 1959).\footnote{\textit{Id.} at 133.}
\end{quote}

In disregarding the state immunity law the court extended protection of the plaintiff’s federal right beyond that which was provided under state law. The difficult problem here for the courts is determining when state law does not infringe on federal rights and when the state law, if applied, would cause such infringement. In the former area federal rights simply do not extend so far as to protect citizens from such conduct by state officials\footnote{But see Charlton v. City of Hialeah, 188 F.2d 421 (5th Cir. 1951), which accepted Florida law as governing municipal immunity without considering whether there was an alternative choice. This holding denied a jailed motorist the opportunity to present a case for wrongful imprisonment.} while in the latter area the federal common
law remedies must be developed to provide relief from deprivations inflicted by officials engaged in officially sanctioned conduct. This development will complement the extension of federal remedies into areas where state law was merely deficient.

This analysis indicates that formulation of damage and defense rules under section 1983 ultimately becomes an inquiry into the definition of the rights protected by federal law. Insofar as state law protects such rights, it can be adopted by federal courts to provide substantially similar relief. When it is decided that the federal right extends beyond the protection afforded by state law, the federal courts will shape their remedies to protect the rights. In either case, the necessity for uniform definition of federal rights requires that the defenses and measure of damages rules which are bound up with the definition also be uniform. This requires the development of a federal common law.

**Conclusion**

The issues which raise choice of law questions—statute of limitations, survival of actions, measure of damages, and defenses—can be separated into two categories. The statute of limitations and the survival of actions generally bear only a peripheral relationship to the scope and definition of federal rights and state law provides reasonable and administrable rules to resolve these issues. They should be governed by state law. The remaining issues are bound up with the definition of the extent of the federal rights and should be resolved by rules of federal common law pursuant to the power inherent in federal courts to define the Constitution and laws of the United States and power delegated to the federal courts by the fourteenth amendment and section 1983.

The distinction between these categories is imperfect. It is easy to imagine that a state might have an extremely short statute of limitations for actions against police officers and that the adoption of it would constitute an infringement of the scope of federal rights. The distinction can serve, however, to guide the initial inquiries as to the choice of precedent and to give some idea of the types of issues that are proper for state or federal law.

87 A brief summary of this common law can be suggested at this point. § 1983 apparently creates liability for all state officials, excepting judges, Pierson v. Ray, 386 U.S. 547, 553 (1967), for deprivation of federal rights. Malice is not an element of the cause of action, Whirl v. Kern, 407 F.2d 781, 791 (5th Cir. 1969), although malice may impose liability for what would otherwise have been a lawful arrest, Pierson v. Ray, 386 U.S. 547, 553 (1967). Executive officers are not immune, Monroe v. Pape, 365 U.S. 167 (1961), but they are not liable when they have made reasonable errors while acting within the scope of their jurisdiction, Hoffman v. Halden, 268 F.2d 280, 300 (9th Cir. 1969).