Denver Law Review

Volume 43 | Issue 4 Article 3

January 1966

State Law and the Damages Remedy under the Civil Rights Act: Some Problems in Federalism

Joseph A. Page

STATE LAW AND THE DAMAGES REMEDY UNDER THE CIVIL RIGHTS ACT: SOME PROBLEMS IN FEDERALISM

By JOSEPH A. PAGE*

The remedial reach of Section 1983 of the Civil Rights Act has been extended to tortious conduct violative of an individual's civil rights, such conduct also being actionable under state law. Professor Page examines this area of overlap of federal and state civil remedies and the challenge to federalism thus presented. He points out the problem of collateral estoppel which arises if separate suits are brought respectively in state and federal courts. Joinder of both claims in a single form, preferably federal, is thus desirable. Professor Page analyzes the issues which a federal court must resolve to award any monetary damages for the constitutional tort and the common law tort. Should the court invoke a federal common law or should it borrow state law? Should actions under section 1983 survive? Should there be wrongful death recoveries, and if so, any limitations on recovery? Professor Page then points out the advantages and disadvantages of a "selective use" of state law, i.e., federal and state law is utilized but the court may substitute federal law for state law when desirable. He concludes that a federal damages remedy can give the injured party a better recovery and in so doing, need not pose any imminent threat to federalism.

IN *Monroe v. Pape*,[1] the United States Supreme Court expanded the scope of the damages remedy created by Section 1983 of the Civil Rights Act.[2] Until *Screws v. United States*,[3] the act had generally been limited to abridgements of federally protected rights, privileges and immunities by action of state officials pursuant to state law.[4] *Screws* held that conduct by state officials, even though in

*Assistant Professor, University of Denver College of Law. The Author wishes to thank William J. Crowell, Jr., Associate Editor of the DENVER LAW JOURNAL, for his research assistance.

[1] 365 U.S. 167 (1961).

[2] REV. STAT. § 1979 (1875), as amended, 42 U.S.C. § 1983 (1958):

> 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 citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

A subsequent section provides a damages remedy for conspiracy to interfere with civil rights. REV. STAT. § 1980 (1875), as amended, 42 U.S.C. § 1985(3) (1958). The federal district courts have original jurisdiction over damage suits brought under §§ 1983, 1985(3). 68 Stat. 1241 (1954), as amended, 28 U.S.C. § 1343(3) (1958).

[3] 325 U.S. 91 (1945).

[4] See Alfange, *Under Color of Law: Classic and Screws Revisited*, 47 CORNELL L.Q. 395 (1962); Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 282-87 (1965); Comment, *The Civil Rights Act and Mr. Monroe*, 49 CALIF. L. REV. 145, 163-66 (1961).

violation of state law, might nevertheless qualify as action "under color of" state law, and subject state officials to criminal prosecution under the act. In *Monroe,* the Court applied the holding in *Screws* to section 1893, and extended the remedial reach of the act to tortious conduct violative of an individual's civil rights and actionable under state law.

Mr. Justice Douglas, writing for the majority, justified this duplication of remedies on the ground that "by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced, and the immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."[5] In a lengthy and forceful dissent, Mr. Justice Frankfurter argued that by not limiting the Civil Rights Act to cases where redress in state courts had been barred by state law or custom, the Court was upsetting the delicate balance vital to a viable federal system.

Monroe has predictably[6] led to an increase in the number of civil suits under the act.[7] However, the reported decisions scarcely touch upon the issue of the relationship between federal and state law in the area where civil remedies overlap. This comment will refrain from debate on the desirability of the overlap, and instead focus on the challenge to federalism posed by its existence.

Damage suits under section 1983 have been based upon the commission of such common law torts as assault and battery,[8] false arrest,[9] false imprisonment,[10] malicious prosecution,[11] invasion of privacy,[12] and apparently, even negligence.[13] Since the constitutional tort and the common law tort protect different interests even though they may arise from the same occurrence,[14] plaintiff may maintain separate suits in the state and federal court. Res judicata would seem clearly inapplicable because of the distinct nature of the right which plaintiff claims has been violated in each suit, but a specific finding of fact

[5] Monroe v. Pape, 365 U.S. 167, 180 (1961).

[6] *Id.* at 240:

> One argument urged in *Screws* in favor of the result which that case reached was the announced policy of self-restraint of the Department of Justice in the prosecution of cases under 18 U.S.C. § 242. . . . Experience indicates that private litigants cannot be expected to show the same consideration for the autonomy of local administration which the Department purportedly shows. (Frankfurter, J., dissenting.)

See also Hardwick v. Hurley, 289 F.2d 529, 530 (7th Cir. 1961).

[7] See Shapo, *supra* note 4, at 325 n.249.

[8] *E.g.,* Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

[9] *E.g.,* Antelope v. George, 211 F. Supp. 657 (N.D. Idaho 1962).

[10] *E.g.,* Nesmith v. Alford, 318 F.2d 110 (5th Cir.), *cert. denied,* 375 U.S. 975 (1963).

[11] *Ibid.*

[12] York v. Story, 324 F.2d 450 (9th Cir. 1963).

[13] See Coleman v. Johnston, 247 F.2d 273 (7th Cir. 1957) (complaint which included allegation of negligent or intentional failure to procure medical attention upheld).

[14] See Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962).

(for example, defendant did not commit a battery upon plaintiff) made in the first suit may be binding in the second suit under the principle of collateral estoppel.[15] In what appears to be the only opinion considering the point, the Third Circuit assumed, without deciding, that collateral estoppel would be available as a defense in a suit under section 1983, and held that since the transcript of the prior state-court action (plaintiff's conviction of assault and battery upon two of the defendants) had not been admitted into evidence in the federal suit, defendants could not invoke collateral estoppel to bar plaintiff's claim for damages under the Civil Rights Act.[16]

The paucity of authority on this issue suggests a strategic reluctance on the part of plaintiffs to bring separate suits in state and federal courts. In confining themselves to the federal forum, plaintiffs are faced with the question of whether they may join counts alleging common law torts with their claim for relief under section 1983. If diversity of citizenship exists and the prayer for damages seeks the jurisdictional amount, joinder is of course permissible.[17] In the absence of diversity jurisdiction, the federal court may adjudicate the state claim only if the doctrine of pendent jurisdiction is applicable.[18]

The leading case delineating the scope of pendent jurisdiction is *Hurn v. Oursler*.[19] There the Supreme Court held that "where two distinct grounds in support of a single cause of action are alleged, only one of which presents a federal question . . . where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case on the nonfederal *ground . . .*."[20] A distinction is drawn between situations involving a single cause of action based on both federal and nonfederal grounds and those involving more than one cause of action, some of which are federal and others of which are nonfederal. The Court will apply the doctrine of pendent jurisdiction to the former,[21] but not the latter. Thus, in *Hurn* the Court states that "the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-

---

[15] See Note, *Problems of Parallel State and Federal Remedies*, 71 HARV. L. REV. 513, 523-25 (1958).

[16] Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).

[17] See Nesmith v. Alford, 318 F.2d 110 (5th Cir.), *cert. denied*, 375 U.S. 975 (1963).

[18] See generally Ferguson, *Pendent Personal Jurisdiction in the Federal Courts*, 11 VILL. L. REV. 56 (1965); Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018 (1962).

[19] 289 U.S. 238 (1933).

[20] *Id.* at 246.

[21] See Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175 (1909).

federal cause of action because it is joined in the same complaint with a federal cause of action."[22]

A complaint which alleges a common law assault and a violation of section 1983 states two causes of action and seeks money damages for two wrongs. On the other hand, the claims arise out of the same occurrence and the elements of the state cause of action are included among the elements of the federal cause of action.[23]

Where the federal claim is "plainly wanting in substance," the courts have not hesitated to dismiss any nonfederal claim joined with it.[24] A suggested rationale for this result is that "the dog would be wagged by his tail if plenary trial of an ancillary claim was compelled by a primary claim which could be disposed of on the pleadings."[25] Application of this rule may be found in several cases under the Civil Rights Act, where courts have dismissed for lack of jurisdiction complaints alleging an insubstantial claim of violation of section 1983 and the commission of a common law tort.[26]

Yet these decisions do not concern themselves with the question of whether a claim based on the commission of a common law tort may be joined with a *valid* claim for relief under section 1983.[27] One answer is that the elements of damage recoverable under section 1983 substantially encompass those recoverable at common law,[28] and therefore the issue of jurisdiction need never be reached. Thus,

---

[22] 289 U.S. at 246.

[23] The presence of the elements of the common law tort among the elements of the constitutional tort (see also note 36 *infra*), and the virtual identity of damages recoverable under each tort (see note 28 *infra* and accompanying text), support the view that pendent jurisdiction is really a discretionary device to promote judicial economy. It has been suggested that the ultimate inquiry to be answered by the federal courts is "has there been a substantial commitment of federal judicial resources to the nonfederal claim at the time the federal claim is decided so that remittance of the nonfederal claim to a state court would occasion a senseless duplication of judicial and litigant effort?" Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts,* 62 COLUM. L. REV. 1018, 1044 (1962).

[24] *E.g.,* Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947).

[25] HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 808 (1953).

[26] *E.g.,* Vechiola v. City of Chicago, 244 F. Supp. 45 (N.D. Ill. 1965); Rogers v. Provident Hosp., 241 F. Supp. 633 (N.D. Ill. 1965).

[27] This issue seems to have been overlooked in at least one case involving a valid § 1983 claim and a tort claim based on state law. In Stringer v. Dilger, Civil No. 7073, D. Colo., March 16, 1961, the common law claim made no allegation of jurisdiction. *Id.,* Complaint, p. 4. The answer failed to raise lack of diversity of citizenship as a defense (*Id.,* Answer, pp. 2-3), although diversity was apparently lacking. In the pre-trial order, jurisdiction was determined by the court and admitted by the parties. Record, p. 8, Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963). On appeal, the Tenth Circuit did not consider the jurisdiction issue. Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

[28] Rue v. Snyder, 249 F. Supp. 740 (E.D. Tenn. 1966). Here plaintiff attempted to utilize the doctrine of pendent jurisdiction to join a § 1983 claim with a claim alleging the commission of false arrest, false imprisonment, and malicious prosecution at common law. The court found it unnecessary to rule on the common law claim because the damages recoverable under it were included in the damages awarded for the violation of § 1983.

whether or not plaintiff adds a count alleging the commission of a common law tort may make no practical difference in the outcome of his case.

It is curious that the only case squarely raising the issue of whether a tort claim under state law may be joined with a valid claim of violation of the Civil Rights Act does not really involve the problem of overlapping damages because each count names a different defendant. In *Wojtas v. Niles,*[29] the Seventh Circuit affirmed a dismissal of common law claims against a municipal corporation on the grounds that the doctrine of pendent jurisdiction, as enunciated in *Hurn,* was inapplicable, and that there was no diversity of citizenship. Defendants under the section 1983 claim were policemen employed by the municipal corporation. The fact that the defendants were different under the federal and state claims would seem to be relevant to a decision not to apply pendent jurisdiction, but the court makes no mention of it. The opinion conveys the impression that common law claims had not been brought against the policemen.[30] If such claims had been made, the issue would have been more clearly drawn, and the language of the court suggests that they would have been dismissed on the same grounds.

Though section 1983 says nothing about money damages, the courts have interpreted it to provide a remedy enabling plaintiff to obtain monetary relief.[31] Punitive damages, intended to punish defendant and deter him from subsequent misconduct,[32] are clearly recoverable.[33] Under the general rule that plaintiff may obtain damages proximately resulting from the commission of a tort,[34] it would seem that compensatory damages caused by injury stemming from a violation of section 1983 should also be recoverable. In support of this proposition is Mr. Justice Douglas' statement in his majority opinion in *Monroe* that "Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[35]

Common law tort damages may also be both compensatory and punitive. The pecuniary and non-pecuniary loss which results from the commission of the common law tort will also result from the

[29] 334 F.2d 797 (7th Cir.), *cert. denied,* 379 U.S. 964 (1964).

[30] A claim under § 1983 had not been brought against defendant-village because the Civil Rights Act has been held not to create a damages remedy against a municipal corporation. Monroe v. Pape, 365 U.S. 167 (1961).

[31] See generally Shapo, *supra* note 4; Note, *Section 1983: A Civil Remedy for the Protection of Federal Rights,* 39 N.Y.U.L. REV. 839, 846-47 (1964).

[32] MCCORMICK, DAMAGES § 77 (1935).

[33] *E.g.,* Antelope v. George, 211 F. Supp. 657 (N.D. Idaho 1962).

[34] MCCORMICK, *op. cit. supra* note 32, ch. 9.

[35] Monroe v. Pape, 365 U.S. 167, 187 (1961).

commission of the constitutional tort, so that the compensatory element will exactly overlap with the compensatory damages recoverable under section 1983.[36] The punitive element seeks to punish defendant, but only for the infringement of plaintiff's rights as protected by common law. However, since this infringement is in effect a part of the violation of plaintiff's constitutional rights, it would seem that a jury might take both wrongs into account in awarding punitive damages under section 1983.[37] The only elements of damage recoverable under federal law but not under state law would be punitive damages directed solely at punishing the commission of the constitutional tort, and perhaps damages for mental suffering related to the constitutional infringement only.

The substantial identity of the damages recoverable at common law and under the Civil Rights Act creates further complications when the question of choice of damage law is considered. Though section 1983 is silent on this point, section 1988 provides that where federal law is insufficient to furnish a proper remedy,

> the common law, as modified and changed by the constitution and statutes of the State wherein the court . . . is held, so far as the same is not inconsistent with the Constitution and laws of the United States shall be extended to and govern the said courts in the trial and disposition of the cause . . . .[38]

The Third Circuit has broadly interpreted this provision in a dictum in *Basista v. Weir*.[39] The court stated that an award of punitive damages in a civil-rights action brought in Pennsylvania would be governed by federal common law, which allows recovery of punitive damages in a civil rights action brought in Pennsylvania would by Pennsylvania law, which requires proof of actual harm before punitive damages may be awarded. The need for uniformity in the application of a federal statute was postulated as the basis for this position. To apply state law, the court declared, "would be to create a legal hybrid of an incredible and unworkable kind."[40]

It is submitted that the court's language is too broad. A decision to use the federal law of punitive damages in a particular case might

---

[36] *But see The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 215 (1961): "Since 1983 recovery is necessarily limited to conduct in violation of federal law, any torts not so violative commited in the course of the misconduct giving rise to the federal right cannot be compensated under section 1983 and are therefore separately actionable under state law."

The difficulty with this statement is that it fails to differentiate between a tort and the damages recovarebl as a result of it. And *quaere* whether the common law tort is not in effect a "lesser included offense" within the reach of the constitutional tort.

[37] Of course, if separate actions are brought in state and federal court, or if § 1983 and common law claims are made in federal court, plaintiff will not be permitted to recover double damages. See, *e.g.*, Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

[38] REV. STAT. § 722 (1875), 42 U.S.C. § 1988 (1958).

[39] 340 F.2d 74 (3d Cir. 1965).

[40] *Id.* at 87.

better be based upon the desirability of circumventing a restrictive state rule which is inconsistent with the policy of section 1983, the result being punishment of those who abridge constitutionally protected rights under color of state law. The punitive damages sought in *Basista* were aimed at a violation of plaintiff's federally created rights and could not be recovered under state law. Therefore, the federal substantive law of damages was properly chosen, even though the court's sole reliance on the need for uniformity is questionable. The exclusive use of federal damage law under the Civil Rights Act would lead to the disparity feared by Mr. Justice Frankfurter in his dissent in *Monroe,* where he asked: "Should an unlawful intrusion by a policeman in Chicago entail different consequences than an unlawful intrusion by a hoodlum?"[41]

It follows, then, that a federal court *may* apply state law in determining questions of damage law which relate to damages also recoverable under state law. While section 1988 may be cited to justify this "borrowing,"[42] the overlap itself provides a more appropriate basis for supporting the use of state law. If the same elements of damage may be recovered under federal and state law, consistency in principles of substantive damage law makes the existing duplication of remedy somewhat less disruptive. If federal law is to be exclusively applied, the purpose, as stated by the court in *Basista,* would be to ensure uniformity in the application of a federal statute. A federal law of personal injury damages may be gleaned from decisions under the Federal Employers' Liability Act [43] or the Jones Act.[44] Yet it is doubtful whether even among these decisions uniformity will always be found.[45]

Another aspect of the choice-of-law problem arises upon the death of a party to an action under section 1983. Two distinct issues are involved: (1) should the action survive? (2) if so, what law should be applied? Where the original defendant has died, federal common law provides that penal actions are extinguished, but reme-

---

[41] Monroe v. Pape, 365 U.S. 167, 239 (1961) (dissenting opinion).

[42] *But see* Note, *Survival of Actions Brought under Federal Statutes,* 63 COLUM. L. REV. 290, 294-97 (1963) (argument that § 1988 was intended to apply to forms of process and remedy only).

[43] 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1952) (remedy for railroad employees for injuries sustained because of negligence of employers). See also DeParcq & Wright, *Damages Under the Federal Employers' Liability Act,* 17 OHIO ST. L.J. 430 (1956).

[44] 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952) (remedy for seamen for injuries sustained because of negligence of employers).

[45] See, *e.g.,* Dagnello v. Long Island R.R. Co., 289 F.2d 797, 802 (2d Cir. 1961) (split among federal courts of appeal on question whether exercise of discretion by trial judge in refusing to set aside verdict for excessiveness may be reviewed).

dial suits survive.[46] Since an action under section 1983 seeking punitive and compensatory damages is both penal and remedial, it is plausible to conclude that at least that part of the claim seeking compensatory damages will survive the death of the tortfeasor under federal common law. Thus, the Eighth Circuit in *Pritchard v. Smith*[47] unnecessarily looked to state law and used the Arkansas survival statute to preserve plaintiff's claim for compensatory damages.

The aggrieved party may die, either as a result of the violation of his civil rights or from independent causes. An example of the latter is *Nelson v. Knox*,[48] an action under the Civil Rights Act for destruction of decedent's business. The court, drawing on the common law rule that tort actions based on interference with property rights survive, allowed decedent's estate to bring the action. It has already been pointed out that federal common law permits remedial actions to survive.[49] Therefore when decedent dies from causes unrelated to the deprivation of his civil rights, his estate should be able to recover the compensatory damages which decedent could have obtained had he lived.

Where death results from the constitutional tort, the anomaly of relieving from liability the wrongdoer who brings about the ultimate liquidation of his victim's civil rights is a strong policy argument for the recognition of a death action under section 1983. While it may be argued that a subsequent section of the act providing for the survival of actions based upon the intentional failure or refusal to prevent a conspiracy to interfere with civil rights which results in death[50] indicates a Congressional intent not to permit death actions under section 1983, this contention was rejected by the Fifth Circuit in *Brazier v. Cherry*.[51] The court stated that the details of the statute would be construed according to the total, overriding purpose of the act. The opinion in *Brazier* also points to section 1988 as authorizing

[46] See Note, *Survival of Actions Brought under Federal Statutes*, 63 COLUM. L. REV. 290, 300-03 (1963); see also Derdiarian v. Futterman Corp., 223 F. Supp. 265 (S.D.N.Y. 1963), recognizing that an action under the federal securities act is both penal and remedial, but characterizing it as remedial to allow the action to survive the death of the tortfeasor and thus fulfil the policy of the act to recompense defrauded purchasers.

[47] 289 F.2d 153 (8th Cir. 1961); see Comment, 15 VAND. L. REV. 623 (1962).

[48] 230 F.2d 483 (6th Cir. 1956); *cf.* Moss v. Jones, 288 F.2d 342 (6th Cir.), *cert. denied*, 368 U.S. 868 (1961) (refusal to enjoin execution of prisoner, even though latter had initiated damage suit under § 1983 against penitentiary guards; court assumes without deciding that action under Civil Rights Act would abate on prisoner's execution).

[49] See Note, *Survival of Actions Brought under Federal Statutes*, 63 COLUM. L. REV. 290, 300-03 (1963).

[50] REV. STAT. § 1981 (1875), 42 U.S.C. § 1986 (1958) (recovery limited to $5,000).

[51] 293 F.2d 401 (5th Cir.) *cert. denied*, 368 U.S. 921 (1961); Comment, 14 STAN. L. REV. 386 (1962); Comment, 40 TEXAS L. REV. 1050 (1962); Comment, 47 VA. L. REV. 1241 (1961); Comment, 15 VAND. L. REV. 623 (1962).

resort to state law in order to create a remedy for death, although it has been suggested that if Congress intended such a remedy to be available, its existence should not depend on state law.[52]

The difference between a survival statute and a wrongful death statute is that the former permits recovery of damages sustained by decedent until the time of his death, while the latter creates a remedy for damages resulting from his death.[53] This distinction supports the solution reached in *Davis v. Johnson,*[54] which allowed a death action to be brought under section 1983 by construing the words "party injured" to include the administratrix of decedent's estate.

On balance, the conclusion that death actions may be brought under section 1983 seems fully justifiable. The issue of choice of law must next be faced. In *Brazier,* the Fifth Circuit used the Georgia death statute. Resort to state law is supported by the analogy to admiralty cases, where the federal courts have applied state death statutes to furnish a remedy unavailable under admiralty law.[55] Furthermore, it is well settled that state statutes of limitations are applicable in damage suits under the Civil Rights Act.[56] On the other hand, whether punitive damages survive, where the death is from violation of section 1983 or from independent causes, should be a matter of federal law, since such damages specifically punish the constitutional infringement.[57]

The suggestion that the federal courts may resort to state law in assessing compensatory damages for injury or death resulting from a violation of the Civil Rights Act leads to a further, more difficult question: namely, must they do so where the state law imposes undesirable limitations? Mr. Justice Frankfurter's dissent in *Monroe* poses the possibility of a state's passing legislation which eliminates pain and suffering as elements of damage.[58] A more realistic eventuality is the death of a man who would contribute to his survivors much more than the maximum limit placed by state law upon wrongful-death recoveries.[59] In an action under section 1983, if a federal

---

[52] See Note, *Survival of Actions Brought under Federal Statutes,* 63 COLUM. L. REV. 290, 297 (1963).

[53] MCCORMICK, *op. cit. supra* note 32, § 93.

[54] 138 F. Supp. 572 (N.D. Ill. 1955).

[55] See Comments, *State Wrongful Death Acts and Maritime Torts,* 39 TEXAS L. REV. 643 (1961); *The Application of State Survival Statutes in Maritime Cases,* 60 COLUM. L. REV. 534 (1960).

[56] See Annot., 98 A.L.R.2d 1160 (1964).

[57] See Basista v. Weir, 340 F.2d 74 (3d Cir. 1965). Under federal law, it appears that punitive damages do not survive. See Note, *Survival of Actions Brought under Federal Statute,* 63 COLUM. L. REV. 290, 300-03 (1963).

[58] Monroe v. Pape, 365 U.S. 167, 239 (1961) (dissenting opinion).

[59] The use of the Civil Rights Act as a device to circumvent the $25,000 limitation on the Colorado death statute is suggested in 13 Trial Talk, Colo. Trial Lawyers Ass'n, No. 5, p. 2, Law Day 1966.

court *may* use state law in these instances, what standards should be used to determine when the court may *not* use state law, and resort to principles such as federal common law is authorized?

In support of a selective use of state law is the view that a federally protected right should not be subjected to substantial undermining by state law. Thus, when use of state law would in effect deprive plaintiff of a remedy under section 1983, the federal courts should ignore state law.[60] It is doubtful whether a maximum wrongful-death dollar limit or the elimination of pain and suffering as elements of damage would substantially destroy the remedy provided under section 1983. On the other hand, the use of the strict pecuniary loss theory in a death case[61] involving an aged person whose demise causes no monetary loss to his survivors might be considered as so repugnant to the purpose of the federal statute that a departure from state law would be justifiable. This approach bestows upon the federal courts a certain flexibility devoid of precision but better adapted to the intent of the Civil Rights Act.

The argument against selective use is that it further complicates the "legal hybrid" created by the application of federal and state law to various elements of damage recoverable under the act. In other words, both federal and state law are utilized, but for that portion of the cause of action to which state law is ordinarily applicable, the court may decide to substitute, in part, federal law.

By this time, it should be obvious that the disclaimer at the beginning of this comment regarding discussion of the desirability of the state-federal overlap has not been strictly followed. The entanglements caused by the overlap indeed reflect in some way upon its desirability. While predictions that the overlap will destroy the federal system seem overdrawn, the conceptual difficulties inherent in its existence should not be underestimated, even though they have up to now been largely neglected by the courts.

Nonetheless, these complexities do not seem capable of counterbalancing the need for a federal damages remedy under the Civil Rights Act. The duplication of remedies has not yet destroyed the delicate balance between state and federal government. After all, federalism is not an abstract ideal to be revered for its logical purity, but a relational structure designed to serve a nation's needs. As these needs shift, creative adjustments in the system are unavoidable.

---

[60] *Cf.* Cinnamon v. Abner A. Wolf, Inc., 215 F. Supp. 833 (E.D. Mich. 1963) (plaintiff died during pendency of private antitrust suit under Clayton Act; defendant argued that since federal act made no mention of survivability, the court should apply state law, under which the action would abate; *held,* since state law might defeat the policy of the federal act, federal decisional law, which allowed survival of the action, would govern).

[61] See Page, *"Pecuniary" Damages for Wrongful Death,* 7 TRIAL LAWYER'S GUIDE 398 (1963).