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CIVIL RIGHTS—SECTION
1983—WRONGFUL DEATH
ACTION—AVAILABILITY OF DAMAGES IN
EXCESS OF THOSE PERMITTED UNDER
STATE LAW—*Jones v. Hildebrant*, 550 P.2d 339
(Colo. 1976), cert. granted, 429 U.S. 1061, cert.
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NOTES

CIVIL RIGHTS—SECTION 1983—WRONGFUL DEATH ACTION—AVAILABILITY OF DAMAGES IN EXCESS OF THOSE PERMITTED UNDER STATE LAW—*Jones v. Hildebrant*, 550 P.2d 339 (Colo. 1976), *cert. granted*, 429 U.S. 1061, *cert. dismissed*, 432 U.S. 189 (1977).

The plaintiff in *Jones v. Hildebrant*¹ was the mother of a fifteen year-old black youth who was shot and killed by an on-duty Denver police officer. In her complaint against Officer Hildebrant, the City of Denver, and the County of Denver, Mrs. Jones asserted three causes of action. The first two claims, based on the Colorado wrongful death statute,² were for the intentional and negligent killing of her son. The third cause of action, based on 42 U.S.C. § 1983,³ alleged the intentional deprivation of her son's civil rights without due process of law.⁴ Mrs. Jones claimed that her son's right to life, to freedom from physical abuse and intimidation, and to the equal protection of the laws had been violated.⁵ She sought \$1,500,000 in compensatory damages and \$250,000 in punitive damages.⁶

1. 550 P.2d 339 (Colo. 1976), *cert. granted*, 429 U.S. 1061, *cert. dismissed as improvidently granted*, 432 U.S. 189 (1977).

2. COLO. REV. STAT. § 13-21-202 (1973) provides:

When the death of a person is caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable in an action for damages notwithstanding the death of the party injured.

3. 42 U.S.C. § 1983 (1970) provides:

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.

4. 550 P.2d at 341.

5. *Id.* at 345.

6. *Id.* at 341.

The trial court ruled that her section 1983 claim "merged"⁷ with the claims under the Colorado wrongful death statute and dismissed it as a separate cause of action.⁸ Furthermore, the court ruled that the wrongful death statute did not permit recovery of punitive damages.⁹ Her recovery was limited to net pecuniary loss up to a maximum of \$45,000¹⁰ since she was not a dependent of the deceased.¹¹ The wrongful death claim went to the jury which returned a verdict for Mrs. Jones and awarded her \$1,500.¹²

On appeal Mrs. Jones' primary contention was that her section 1983 claim should not have been dismissed because it arguably would have permitted her to recover damages in excess of the net pecuniary loss ceiling imposed by the state wrongful death remedy.¹³ Affirming the trial court's rulings, the Colorado Supreme Court held that no section 1983 remedy for wrongful death exists independently of the state statute and that the net pecuniary loss

7. See note 16 *infra*.

8. 550 P.2d at 341.

9. *Id.*

10. *Id.* The jury was instructed that the damages recoverable were limited to net pecuniary loss up to a \$45,000 ceiling in a wrongful death action in which the decedent was a minor child. This common law rule was first articulated in *Herbertson v. Russell*, 150 Colo. 110, 371 P.2d 422 (1962). In the instant case, the court defined net pecuniary loss as the financial loss suffered by the plaintiff as a result of her child's death. It was to include the value of any services the child might have performed for the plaintiff, such as working around the home and running errands, less the expenses the plaintiff would have incurred in raising him. 550 P.2d at 341 n.1. Recovery is not permitted for parental grief and loss of society. *Id.* at 342.

11. *Id.* at 341.

12. *Id.* In the instant case, the award apparently included funeral expenses. The Colorado Supreme Court upheld the instructions and the award. *Id.* at 341 n.1.

13. *Id.* Mrs. Jones offered several theories in support of this contention. She argued the implied existence of a wrongful death remedy directly under § 1983. *Id.* at 342. See text accompanying notes 25-27 *infra*. She also contended the Colorado damage limitation did not apply to a § 1983 claim even when the state wrongful death statute is incorporated into the federal claim. 550 P.2d at 343. See note 26 *infra* and accompanying text. Aside from the wrongful death claim, she contended the dismissal of the § 1983 action prevented her from asserting a survival claim and a claim based on the loss of her own personal liberty to raise her child without unlawful interference from the state. 550 P.2d at 342. In the alternative, she argued that the damages awarded were inadequate as a matter of law. *Id.*

Mrs. Jones was unsuccessful in her attempt to assert the survival and parenthood claims. The Colorado Supreme Court held that no survival action under § 1983 exists independently of state law and that a mother cannot sue in her own right for deprivation of her constitutional right to raise her child. *Id.* at 345. *But see* *Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974), and *Jones v. McElroy*, 429 F. Supp. 848 (E.D. Pa. 1977). Relying on *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), these two courts have allowed plaintiffs to assert causes of action under § 1983 for loss of the right to parenthood. See note 21 *infra*.

rule was properly applied.¹⁴ The court reasoned that if the action had been brought in federal court the Colorado wrongful death statute would have been "incorporated" into the section 1983 action.¹⁵ However, since the suit was brought in state court, the section 1983 action "merged"¹⁶ into the "broader" state claim.¹⁷ This holding rested on the apparent assumption that the state remedy was the broader one since it, unlike section 1983, allowed the City and County of Denver to be sued as well as the individual defendant.¹⁸

The United States Supreme Court granted certiorari¹⁹ to decide whether a state's damage limitation controls in a wrongful death action brought pursuant to section 1983.²⁰ However, in a per curiam opinion, the Court dismissed as improvidently granted Mrs. Jones' petition for certiorari.²¹ Thus, the United States Supreme Court has left unresolved the extent to which section 1983 provides a state court remedy when a police officer wrongfully takes a life.²² The following discussion capsulizes the development of remedies for wrongful death under section 1983 of the Civil Rights Act. It examines the conceptual difficulties which have caused an unequal availability of these remedies, questions the Colorado Supreme Court's understanding of federal procedure, and suggests alternative resolutions of the issues presented in the case.

14. 550 P.2d at 344.

15. *Id.* See note 27 *infra* for an explanation of "incorporation."

16. In the law relating to rights of action, when a person takes or acquires a remedy of a higher nature, in legal estimation a broader remedy, than the one he already possesses for the same right, then his remedies in respect of the minor right merge in those attaching to the higher one. The less important remedy ceases to have an independent existence. BLACK'S LAW DICTIONARY 1140 (rev. 4th ed. 1976).

17. 550 P.2d at 344.

18. *Id.* at n.7. Municipalities are immune to suit under § 1983. *Monroe v. Pape*, 365 U.S. 167 (1961). The ruling of the Colorado Supreme Court is correct only if the net pecuniary loss rule was properly applied to the § 1983 claim. If the damage limitation does not apply, the § 1983 remedy is broader in one sense since it allows the plaintiff to recover damages in excess of the net pecuniary loss limitation. See note 30 *infra* for a discussion of a state court's obligation to enforce federal law.

19. 429 U.S. 1061 (1977).

20. 432 U.S. 183, 184-85 (1977).

21. *Id.* at 189. In the majority view, Mrs. Jones' only argument before the Court was one she did not raise in her petition for certiorari: that her personal liberty to raise her child without interference from the state had been infringed. See note 13 *supra*. The dissent reasoned that this issue, as well as the damage limitation issue, was sufficiently preserved on appeal to the Colorado Supreme Court and was properly raised in her petition for certiorari. 432 U.S. at 194.

22. State courts are likely to have an increasingly important role in the adjudication of § 1983 claims. See note 105 *infra*.

I. WRONGFUL DEATH ACTIONS

A. *Incorporation of State Law into Section 1983 Wrongful Death Actions Brought in Federal Courts*

The basic issue before the Colorado Supreme Court was the nature of the wrongful death remedy available in actions brought under section 1983. The court ruled correctly that no section 1983 remedy for wrongful death exists independently of state statutes.²³ It observed that federal courts presiding over section 1983 actions, in order to provide remedies for wrongful death, "incorporate" state wrongful death statutes into the section 1983 cause of action. This allows wrongful death actions to be brought under the federal statute where, but for the death of the injured party, the federal tort remedy would have been available.

This approach was first taken by the Court of Appeals for the Fifth Circuit in *Brazier v. Cherry*.²⁴ There, the court considered the legislative policy behind the Civil Rights Act, and reasoned that "it defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw [that] protection . . . [from an injury resulting in death]."²⁵ Having determined that Congress intended to prohibit violence which kills as well as violence which injures,²⁶ the *Brazier* court searched for

23. 550 P.2d at 344-45. In *Insurance Co. v. Brame*, 95 U.S. 754 (1877), the United States Supreme Court recognized that no action for wrongful death exists in the common law. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 377-93 (1970), for an historical analysis of this rule. As a result of the rule, it was held that no action for wrongful death could lie under § 1983 because that statute does not expressly authorize such a remedy. Federal courts sitting in § 1983 actions have responded by "incorporating" state wrongful death statutes into § 1983 actions. See text accompanying notes 24-34 *infra*. The same result has been reached by courts deciding the issue in other areas of federal law which do not expressly provide a wrongful death remedy in their statutory schemes. See, e.g., *The Harrisburg*, 119 U.S. 199 (1886) (in the absence of a statute there is no action for wrongful death in federal maritime law). *The Harrisburg* was overruled in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). See notes 57-58 *infra* and accompanying text.

24. 293 F.2d 401 (5th Cir. 1961).

25. *Id.* at 404. See *id.* at n.9 for a comparison of criminal sanctions recognizing criminal accountability for injuries resulting in the death of the victim.

26. Support for this interpretation of the legislative intent behind the Civil Rights Act of 1871 was derived from *Monroe v. Pape*, 365 U.S. 167 (1961). There, the United States Supreme Court extensively re-examined the legislative history of that act. It concluded that Congress intended the law to provide a broad remedy for all deprivations of civil rights. In the Court's view it is irrelevant that a state has a law which provides relief; the federal remedy is independent of the state remedy and the state remedy need not be tried before the federal one becomes available. *Id.* at 183.

a way to provide the appropriate relief. It either had to imply a wrongful death remedy from section 1983 itself, or find the necessary language in other statutes.

Rather than imply the remedy, the court “incorporated”²⁷ the state wrongful death statute into the section 1983 action. The procedure was suggested by section 1988 of the Civil Rights Act²⁸ which authorizes federal district courts to draw on state law when federal law is “deficient” and cannot adequately protect federally guaranteed rights. The court reasoned that through section 1988 Congress intended to provide any necessary remedial²⁹ measures not expressly granted in other civil rights statutes.³⁰ The sole limi-

The civil rights laws were enacted to provide a *federal* right in a *federal* forum because by “reason of prejudice, passion, neglect, intolerance or otherwise,” state laws might be inadequate or inadequately enforced, and the “claim of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.” 365 U.S. at 180. Thus, the *Monroe* Court did not perceive a congressional policy against a remedy for wrongful death under § 1983. See note 30 *infra* for an explanation of state court jurisdiction over § 1983 claims.

27. 293 F.2d at 405. The term “incorporation” means that the wrongful death remedy of the state in which the § 1983 action is brought is available. In such cases, the state created remedy becomes part of the federal cause of action. This situation is distinguished from that in which the plaintiff has also asserted a state wrongful death claim which is merged with the § 1983 claim. For an explanation of “merger” see note 16 *supra*.

28. 42 U.S.C.A. § 1988 (West Supp. 1977) provides in pertinent part:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, 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.

29. The term “remedial” is used because § 1988 does not create causes of action; it merely supplies necessary remedies incident to the rights protected in the other civil rights statutes.

30. This applies to both federal and state courts hearing § 1983 claims. Once jurisdiction has been established in a state court which enforces state claims similar to claims established by federal law, the state court may not decline to enforce the federal law, and must do so in the manner in which it would be enforced in the federal courts. *Testa v. Katt*, 330 U.S. 386 (1947). See *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 363 (1952).

Until recently it was unclear whether state courts have concurrent jurisdiction with federal district courts over § 1983 claims. The United States Supreme Court

tation on the use of relevant state law is that it must be consistent "with the Constitution and laws of the United States."³¹ Finding the failure to provide a wrongful death remedy in section 1983 to be a "deficiency," the *Brazier* court incorporated the state wrongful death statute into the section 1983 action. It thereby created an effective remedy for violations of federally protected rights.

Thus, the *Brazier* court developed a simple test to determine when state remedies can be used by a federal court in a section 1983 action. The court first determines what is needed in a particular case to make the Civil Rights Act fully effective. It then decides whether section 1983 is "deficient" in furnishing the appropriate remedy. If it is, the court is directed to look to relevant state law to fill the gap in the federal provisions. Finally, if state law is available to fill this gap, the court must be certain that the state law is consistent with federal statutory and constitutional law.³² State law is used only to the extent that it is "currently available" to overcome the deficiencies in the federal statutory scheme.³³ The *Brazier* court did not decide what approach should be taken when section 1983 is deficient and the available state remedy is *not* consistent with federal policy, or otherwise leaves the plaintiff without an effective remedy. Leaving this question aside for the moment, it is enough to say that the reasoning in *Brazier* has been adopted by other federal courts when dealing with wrongful death actions brought under section 1983.³⁴

appears to have decided this issue sub silentio in *Aldinger v. Howard*, 427 U.S. 1 (1976). In *Aldinger*, the Court indicated the plaintiff could have brought the § 1983 action in state court, along with the plaintiff's state claim. See *Brody v. Leamy*, 90 Misc. 2d 1, 393 N.Y.S.2d 243 (Sup. Ct. 1977) (the court grudgingly accepted jurisdiction over a § 1983 claim because of *Aldinger*, although by its own analysis it felt state courts did not have jurisdiction over such claims).

31. 42 U.S.C.A. § 1988 (West Supp. 1977). From a federal standpoint, the only limitation upon the use of such adoptive state law, rule, or decision is that it must be suitable to carry the civil rights law into effect because available direct federal legislation is deficient in furnishing fully effective redress. 293 F.2d at 409.

32. 293 F.2d at 409.

33. *Id.* at 408.

34. The following cases have allowed incorporation of state wrongful death remedies into § 1983 actions to enable the personal representative of certain designated beneficiaries or the beneficiaries themselves to bring an action for wrongful death under the federal statute: *Wolfer v. Thaler*, 525 F.2d 977 (5th Cir.), *cert. denied*, 425 U.S. 975 (1976); *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974); *Smith v. Wickline*, 396 F. Supp. 555 (W.D. Okla. 1975); *James v. Murphy*, 392 F. Supp. 641 (E.D. Ala. 1975); *Love v. Davis*, 353 F. Supp. 587 (W.D. La. 1973); *Galindo v. Brownell*, 255 F. Supp. 930 (S.D. Cal. 1966). The following courts have held that § 1983 claims which accrued during the

B. *Another Approach: Creating a Federal Common Law Cause of Action for Wrongful Death in Maritime Law*

Just as section 1983 does not provide a cause of action for wrongful death, the maritime statutes do not make a remedy available for wrongful deaths which occur on state territorial waters.³⁵ Federal courts sitting in maritime actions, just as those sitting in section 1983 actions, have turned to state law to supply the missing remedy. The development of maritime wrongful death remedies, however, did not stop with incorporation of state law. Instead, federal courts have gone on to create a federal common law wrongful death remedy.

A review of this development is important for two reasons. First, the maritime law provides an alternative approach which has many analytical and practical advantages over incorporation.³⁶ Second, the Colorado Supreme Court in the instant case, *Jones v. Hildebrant*, relied on a maritime case, *The Tungus v. Skovgaard*,³⁷ to support its holding that if state law is incorporated into federal law, it must be incorporated as an integrated whole.³⁸ In view of the results that federal courts have reached in subsequent maritime cases, it is doubtful whether *The Tungus* was good law when the *Jones* court turned to it for guidance.

In *The Harrisburg*,³⁹ the United States Supreme Court applied to maritime law the rule that there is no common law action for wrongful death.⁴⁰ To alleviate the hardship worked by this rule, courts have traditionally relied upon state wrongful death statutes in actions under maritime law.⁴¹ As in *Brazier*, incorporation of state law into the federal cause of action provided a remedy for injury resulting in death in cases in which less serious injury would otherwise have been actionable under the general maritime law. However, courts left open the question whether state law could be utilized in part or whether it had to be incorporated as a whole.

lifetime of the decedent do not abate at his death but survive to his estate according to state law, via § 1988: *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Hall v. Wooten*, 506 F.2d 564 (6th Cir. 1974); *Javits v. Stevens*, 382 F. Supp. 131 (S.D.N.Y. 1974).

35. Deaths of merchant seamen and deaths of persons on the high seas are covered by federal statutes. See note 60 *infra*.

36. See notes 58-61 *infra* and accompanying text.

37. 358 U.S. 588 (1959).

38. See note 98 *infra*.

39. 119 U.S. 199 (1886).

40. *Id.* at 204. See note 23 *supra*.

41. See text accompanying notes 42-44 *infra*.

This was the issue before the Court in *The Tungus v. Skovgaard*.⁴² There, the plaintiff brought a suit for wrongful death based on unseaworthiness.⁴³ The Supreme Court unanimously agreed that when the maritime law leaves a survivor without a remedy for a death on state territorial waters, the remedy may be provided under any applicable state law granting a right of action for wrongful death. The Court was divided, however, on whether the state statute must be incorporated as a whole or whether selected provisions could be independently incorporated while others were ignored. The issue arose because the negligence standard of care imposed on the defendant by the relevant New Jersey statute was less stringent than that which would have been required of him under federal maritime law had the injury not resulted in death.⁴⁴ The majority held that "when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached."⁴⁵ The Court found that the state wrongful death statute encompassed an action under federal maritime law, but that the duty of care was governed by state law.

The dissent would have held that federal maritime law could utilize state law to supply the "right" to sue, without regard to any substantive limitations contained in the state law.⁴⁶ It reasoned that since the standard of care allegedly breached was one grounded in federal law, that standard should not differ from state to state. "It would be a strained statement of the effect of *The Harrisburg*" to say that because there is no common law wrongful death remedy under maritime law there is "no duty imposed by the maritime law not to kill persons. . . ."⁴⁷ Even where the injured party seeks to enforce a state created remedy, federal standards should control.⁴⁸

42. 358 U.S. 588 (1959).

43. *Id.* at 589-90.

44. *Id.* at 594. Under maritime law the defendant owed the deceased the duty to maintain the vessel in a seaworthy condition. A breach of the duty of seaworthiness establishes strict liability. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944). Under the state wrongful death statute, the defendant only owed the deceased the duty to exercise ordinary care in maintaining a safe work area. N.J. STAT. ANN. § 2A:31-1 (West 1952).

45. 358 U.S. at 592. The Colorado Supreme Court in *Jones v. Hildebrant* relied on *The Tungus* as authority for its ruling that the Colorado rule of damages applied to a § 1983 action. *See* note 98 *infra*.

46. 358 U.S. at 597-99.

47. *Id.* at 601.

48. *Id.* at 601-02. *See also* *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953). If federal standards were to control, the duty imposed under maritime law would not differ from state to state, or otherwise, merely because the injury resulted in death.

"It is enough" that the state furnish the remedy "in a general way." The right to maintain an action for wrongful death should be derived from state law without applying any substantive conditions or limitations it might contain.⁴⁹ According to the dissent, the majority decision was "contrary to one of the basic principles" of law,⁵⁰ that similarly injured persons should be able to obtain similar remedies. The anomalous result that different laws govern, depending on whether conduct kills or merely injures its victims, was a "conscious choice of a nonuniform solution on an essential matter."⁵¹

The issue debated in *The Tungus* was finally disposed of by the Supreme Court in *Moragne v. States Marine Lines, Inc.*⁵² *Moragne* also involved an action for wrongful death based on unseaworthiness. The case was before the Court on appeal from the Florida Supreme Court.⁵³ Following the rule of *The Harrisburg*,⁵⁴ the Florida Supreme Court had looked to the state wrongful death statute for a remedy.⁵⁵ It dismissed the action, however, because it held that lack of ordinary care had not been pleaded or proved and the state statute did not encompass a wrongful death action based on unseaworthiness.⁵⁶ The Court of Appeals for the Fifth Circuit affirmed on the basis of *The Tungus*.⁵⁷ The plaintiff was left without a remedy since no wrongful death action could be maintained directly under maritime law and the available state remedy proved to be inadequate. Re-examining the ruling in *The Harrisburg*, and noting the confusion resulting from its decision in *The Tungus*, the United States Supreme Court overruled *The Harrisburg* and created a common law action for wrongful death in federal maritime law.⁵⁸

49. 358 U.S. at 609.

50. *Id.* The dissent spoke in terms of admiralty law but the principle is equally applicable to civil rights law. The extent of the role played by state law under *The Tungus* decision had been the subject of substantial debate and uncertainty in the Supreme Court, with opinions on both sides of the question acknowledging the shortcomings in the law. See *Hess v. United States*, 361 U.S. 314 (1960), and *Goett v. Union Carbide Corp.*, 361 U.S. 340 (1960).

51. 358 U.S. at 609.

52. 398 U.S. 375 (1970). Instead of deciding whether partial incorporation of a state statute is permissible, the Court circumvented the issue by creating a federal common law action for wrongful death in maritime law. See text accompanying notes 57-58 *infra*.

53. *Moragne v. States Marine Lines, Inc.*, 211 So. 2d 161 (Fla. 1968).

54. See note 39 *supra* and accompanying text.

55. 211 So. 2d at 162.

56. *Id.* at 167.

57. *Moragne v. States Marine Lines, Inc.*, 409 F.2d 32 (5th Cir. 1969).

58. 398 U.S. at 388-90. At least two states have relied on *Moragne* in recogniz-

In a carefully reasoned decision, the *Moragne* Court noted the analytical and practical difficulties of the old rule and discarded it for several reasons. First, every state has enacted a wrongful death statute.⁵⁹ This indicates that there is a uniform national policy of providing a remedy for wrongful death. Second, the Court recognized that Congress has provided for wrongful death actions in some areas of federal law.⁶⁰ Thus, the Court did not perceive a congressional policy against this type of remedy. Finally, it regarded the rule of *The Harrisburg* as unacceptably cumbersome; it had become an "increasingly unjustifiable anomaly" as the law over the years had changed. Together with its corollary, *The Tungus*, it had produced "litigation-spawning confusion in an area that should be easily susceptible of more workable solutions."⁶¹ Implicit in the Court's rationale is the idea that when a federal right is asserted, federal law should govern.⁶² Further support for this idea is derived from several courts that have had the opportunity to interpret the *Brazier* decision.

ing a wrongful death remedy of common law origin. See *Gaudette v. Webb*, 362 Mass. 60, 284 N.E.2d 222 (1972); *Barnette v. Butler Aviation Int'l, Inc.*, 89 Misc. 2d 350, 391 N.Y.S.2d 348 (Sup. Ct. 1977). But see *Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977), in which the court stated that it did not question the soundness of *Moragne* but that it felt it could not follow *Gaudette* because it was persuaded that the California legislature had intended to occupy the field of recovery for wrongful death by enacting the state wrongful death statute. The court held that the state legislature could, and did, modify the common law by enacting the California wrongful death statute. *Id.* at 573-75, 565 P.2d at 128-29, 139 Cal. Rptr. at 103-04.

Relying on *Moragne*, one district court has held that there is an "extension" provision, as a matter of federal common law, similar to those found in state law, in § 502 of the Employee Retirement Security Act of 1974, 29 U.S.C. § 1132 (Supp. V 1975), although the remedy is ordinarily a creature of statute. *Wayne Chem. v. Columbus Agency Serv. Corp.*, 426 F. Supp. 316 (N.D. Ind. 1977).

59. 398 U.S. at 390. See Comment, *Wrongful Death Damages in North Carolina*, 44 N.C. L. REV. 402 (1966).

60. Federal Employers' Liability Act, 45 U.S.C. §§ 51-59 (1970) (wrongful death of railroad employees); Jones Act, 46 U.S.C. § 688 (1970) (of merchant seamen); Death on the High Seas Act, 46 U.S.C. §§ 761, 762 (1970) (of persons on the high seas); Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1970) (made the United States subject to liability in certain circumstances for negligently caused wrongful death to the same extent as a private person). The *Moragne* Court concluded that the Jones Act and the Death on the High Seas Act were not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by those acts. 398 U.S. at 390-93.

61. 398 U.S. at 404.

62. *Id.* at 378, 404-05.

II. BEYOND *BRAZIER*: CREATING FEDERAL COMMON LAW WHEN INCORPORATION OF STATE LAW DOES NOT PROVIDE AN ADEQUATE REMEDY

In *Jones v. Hildebrant*, the Colorado Supreme Court ruled that the damages recoverable in a wrongful death action brought pursuant to section 1983 are controlled by state law.⁶³ The court concluded that federal policy required the incorporation of the state wrongful death remedy as an integrated whole. This perception of federal policy is inaccurate. Federal courts will incorporate state law when it is needed to provide an adequate remedy. However, where total incorporation fails to accomplish this goal, the courts have fashioned appropriate remedies ranging from the incorporation of selected portions of state law to the creation of federal common law.

This flexible approach is the outgrowth of the United States Supreme Court's decision in *Sullivan v. Little Hunting Park*.⁶⁴ *Sullivan* involved the availability of damages in a discrimination suit.⁶⁵ The suit was instituted under section 1982 of the Civil Rights Act⁶⁶ which, like section 1983, makes no express provision for awarding damages. The Court was persuaded, however, that the "existence of a statutory right implies the existence of all necessary and appropriate remedies."⁶⁷ Interpreting section 1988 and the holding in *Brazier*, the Court held that both federal and state rules on damages may be used, whichever best serves the policies expressed in the federal statutes.⁶⁸ "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."⁶⁹ Thus, the only limitation

63. See text accompanying notes 14-18 *supra*.

64. 396 U.S. 229 (1969).

65. *Id.* at 235-38. Plaintiff sued for discrimination in the disposition of property. Little Hunting Park is a Virginia non-stock corporation operating playground facilities and a community park for residents in an area of Fairfax County, Virginia. A membership share entitles the shareholder to use the facilities, and, under the corporation bylaws, when a member rents her home she may assign the membership share. The board of directors of Little Hunting Park refused to approve the assignment because the plaintiff was black. *Id.* at 234-35.

66. 42 U.S.C. § 1982 (1970) provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

67. 396 U.S. at 239 (citations omitted).

68. *Id.* at 240. For an analogous approach see *Brazier v. Cherry*, 293 F.2d 401, 408-09 (1961).

69. 396 U.S. at 240 (emphasis added).

upon the use of state law is that it must be suitable to effect the purposes of the civil rights laws. State law is used only to the extent that it is available to overcome any deficiency in the federal statute.⁷⁰ At least two federal courts of appeals have followed the *Sullivan* approach and allowed recovery of punitive damages in section 1983 actions even when state law did not permit them.

*Basista v. Weir*⁷¹ was an action brought pursuant to section 1983 for unlawful arrest and detention.⁷² The issue before the court was the availability of punitive damages.⁷³ Section 1983 is silent on the kind of damages recoverable by an injured party. The statute only states that the offending person "shall be liable to the party injured in an action at law."⁷⁴ These words connote damages of some kind, but the statute does not explain what kind. Since the Third Circuit Court of Appeals had determined that the federal common law was deficient on the issue of punitive damages, the court followed the *Brazier* approach and looked to the applicable state law. The state law did not allow punitive damages absent a showing of actual damages.⁷⁵ Since the plaintiff had suffered no actual damages, he would be entitled to recover only nominal damages⁷⁶ if the state law were applied. The Third Circuit refused to apply the state law, because it understood the injustice that could result from applying federal common law to determine compensatory damages, while at the same time using state law to measure

70. 293 F.2d at 408.

71. 340 F.2d 74 (3d Cir. 1965).

72. *Id.*

73. *Id.* at 87. Punitive, or exemplary, damages are damages awarded to the plaintiff over and above bare compensation for property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant. These damages are intended to give solace to the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong; or else to punish the defendant for his evil behavior or to make an example of him. BLACK'S LAW DICTIONARY 467-68 (rev. 4th ed. 1976).

74. 42 U.S.C. § 1983, reproduced at note 3 *supra*.

75. 340 F.2d at 87. Actual damages are synonymous with compensatory damages and are "[r]eal, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury. . . ." BLACK'S LAW DICTIONARY 467 (rev. 4th ed. 1976).

76. 340 F.2d at 88. Nominal damages are a trifling sum awarded to a plaintiff in an action in which there is no substantial loss or injury to be compensated. The law recognizes a technical invasion of his rights or a breach of the defendant's duty. Nominal damages are also awarded when the plaintiff proves a real injury, but the evidence failed to show its amount. BLACK'S LAW DICTIONARY 469 (rev. 4th ed. 1976).

punitive damages.⁷⁷ The court recognized that the protection afforded to individuals by section 1983 was not intended to differ from state to state. Therefore, the amount of damages recovered by an injured party should not vary because of the law of the state in which the federal suit was commenced. "Federal common law must be applied to effect uniformity, otherwise the Civil Rights Acts would fail to effect the purposes and ends which Congress intended."⁷⁸ As a result of this analysis, the Court of Appeals for the Third Circuit held that federal law permitted the recovery of punitive damages even in the absence of actual damages.⁷⁹

This ruling was followed by the Court of Appeals for the Seventh Circuit in *Spence v. Staras*,⁸⁰ in which the plaintiff brought wrongful death and survival actions pursuant to section 1983.⁸¹ She sought actual as well as punitive damages for the death of her nonverbal, mentally-ill son. As in *Basista*, the state law did not allow punitive damages unless actual damages were first alleged and proved.⁸² Noting that actual damages would be difficult to prove, the Seventh Circuit held that federal common law allows punitive damages even in the absence of actual damages "[p]rovided certain aggravating circumstances are shown."⁸³ Applying the rule of *Sullivan*,⁸⁴ the court concluded that both federal and state rules on damages could be used, whichever best served the policies behind the civil rights laws.⁸⁵ The *Spence* court, consistent with the Third Circuit Court of Appeals in *Basista*, refused to apply a state damage rule which limited the plaintiff's chances of adequate recovery. By refusing to apply state punitive damage limitations, those courts have broadened the availability of suitable relief to meet the needs of a particular case. In some cases this "suitable remedy" approach has taken federal courts past the technique of selective incorporation of state law.⁸⁶ For example, in a re-

77. 340 F.2d at 86.

78. *Id.* (footnote omitted).

79. *Id.* at 88.

80. 507 F.2d 554 (7th Cir. 1974).

81. *Id.*

82. *Id.* at 558 n.4.

83. *Id.* at 558. The Seventh Circuit Court of Appeals relied on *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965). See also *Gill v. Manuel*, 488 F.2d 799, 801-02 (9th Cir. 1973), and *Caperci v. Huntoon*, 397 F.2d 799 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968).

84. See notes 64-65 *supra* and accompanying text.

85. 507 F.2d at 558.

86. It should make no difference whether it is a federal or state court. See note 30 *supra*.

cent decision, the Court of Appeals for the Fifth Circuit ignored state law altogether and instead created federal common law to prevent a section 1983 action from abating at the death of the plaintiff.

In this decision, *Shaw v. Garrison*,⁸⁷ the plaintiff sued James Garrison, onetime New Orleans District Attorney, under section 1983 for an allegedly unlawful prosecution of Shaw for complicity in the assassination of President Kennedy.⁸⁸ After instituting the action, the plaintiff died.⁸⁹ Following its own analysis in *Brazier*, the court of appeals recognized that the civil rights statutes are deficient in that they fail to provide for the survival of an action after the death of a plaintiff.⁹⁰ Therefore, the court concluded that the state survivorship law would apply unless that law was "inconsistent with the Constitution and laws of the United States."⁹¹ Under state law,⁹² Shaw's suit would abate since he had no statutory survivors.⁹³ The court therefore refused to apply the state law, reasoning that it was inconsistent with the broad remedial purposes embodied in the civil rights laws. It viewed the civil rights statutes as "designed to insure to all citizens" the right to be free from deprivations of constitutionally secured civil rights.⁹⁴ Since the state law in *Shaw* was unable to provide the relief envisioned by Congress in enacting section 1983, the Court of Appeals for the Fifth Circuit looked beyond it and held that the action survived in favor of Shaw's estate as a matter of federal common law.⁹⁵

87. 545 F.2d 980 (5th Cir. 1977).

88. *Id.* at 981.

89. *Id.*

90. *Id.* at 983. This should not be confused with survival actions brought by the survivors of the deceased in their representative capacity. Other courts, including the United States Supreme Court, have reached the same conclusion as that reached by the Fifth Circuit Court of Appeals in *Shaw*. *Moor v. County of Alameda*, 411 U.S. 693, 702 n.14 (1973); *Pritchard v. Smith*, 289 F.2d 153, 155 (8th Cir. 1961).

91. 545 F.2d at 983 (quoting § 1988).

92. *Id.* at 981.

93. *Id.* at 980.

94. *Id.* at 983.

95. Support for this decision was derived from the United States Supreme Court's interpretation of the authority granted by § 1988. In *Moor v. County of Alameda*, 411 U.S. 693 (1973), the Supreme Court held that state law can be used only if it is consistent with the Constitution and laws of the United States. *Id.* at 706. See 42 U.S.C.A. § 1988 (West Supp. 1977), reproduced at note 28 *supra*. Since the civil rights statutes are laws of the United States, the Court of Appeals for the Fifth Circuit concluded that Congress was concerned about the possibility of hostile state law interfering with the policy and purposes of the civil rights laws. 545 F.2d at 983.

From cases such as *Sullivan*, *Basista*, *Spence*, and *Shaw*, the willingness of federal courts to fashion appropriate remedies for civil rights violations is apparent. The federal judiciary has consistently maintained a flexible approach. If state law is beneficial to the plaintiff's cause of action in one respect but adverse to it in another, the federal courts will ignore those state provisions which restrict the plaintiff's ability to obtain a meaningful remedy. In cases where state law is totally unavailable, the courts have fashioned suitable remedies by creating federal common law to fill the gaps in the federal provisions. Whatever the facts of the case may be, the policy of federal courts is to do what is necessary to effect the purposes of the civil rights laws.

III. *JONES V. HILDEBRANT* IN LIGHT OF FEDERAL PRECEDENTS

It is clear from the foregoing discussion that the Supreme Court of Colorado did not understand how federal courts approach the difficult problems in federal-state relations that are involved when a plaintiff seeks recovery for wrongful death under the federal civil rights statutes. The Colorado Supreme Court agreed with Mrs. Jones that section 1983 permits the incorporation of state wrongful death statutes into section 1983 actions.⁹⁶ However, since the action was brought in state court and joined with a state claim under the state wrongful death statute, the court held that the two claims had "merged,"⁹⁷ and dismissed the section 1983 claim.

The court based its reasoning on a belief that even if the suit had been brought in federal court, relief would have been provided according to a wholly incorporated state statute.⁹⁸ Thus, in the view of the Colorado Supreme Court, the state remedy was "broader" because it, unlike section 1983, allowed the City and County of Denver to be sued. Section 1983 was in no sense broader because "whole incorporation" imposed the dollar limitation of the state remedy on any potential recovery under section 1983. In reaching this result, the court relied on *The Tungus*,

96. 550 P.2d at 343.

97. *Id.* at 344. The only reason given for the merger and dismissal was that the state claim provided a broader remedy because it allowed recovery against the City and County of Denver. *Id.* at 344 n.7. The merger and dismissal is a major source of confusion in the Colorado Supreme Court decision. See note 18 *supra* and accompanying text.

98. 550 P.2d at 344 n.8. Citing *The Tungus*, the court stated its own ruling accords "with what appears to be the federal policy of wholly incorporating state wrongful death remedies when incorporation of state law is the Congressional intent."

which held that state law must be incorporated as an integrated whole, even when the law puts substantive limitations on the plaintiff's right to recover.⁹⁹

However, the Colorado Supreme Court did not recognize several major developments in federal law since *The Tungus* was decided in 1959. First, by overruling *The Harrisburg*, and creating federal common law, *Moragne* has substantially weakened the "whole incorporation" rule of *The Tungus*.¹⁰⁰ The rule of *The Tungus* is no longer applied in maritime law, the context in which it was formulated. In *Moragne*, moreover, the Supreme Court intimated that it was adopting the position of *The Tungus* dissent: that liability for the breach of a federally imposed duty should not be subject to potential differences in state law.¹⁰¹

Many federal courts have recognized that in enacting section 1983, Congress intended to create a federal cause of action separate from the remedies afforded under state law,¹⁰² and therefore that state law should not be used to limit the recovery available under the federal statute. Those courts have taken a very flexible approach in section 1983 actions, "incorporating" state law only to the extent necessary to effect the policy behind the civil rights statutes. When incorporation of state law cannot provide the injured party with a suitable remedy, a remedy will be fashioned as a matter of federal common law.

The state law used in *Jones v. Hildebrant* was helpful since it provided the plaintiff with a "right" to bring her suit. State laws should be used to that extent only. Federal rules of damages should apply instead of the diverse rules of damages found in the state wrongful death laws. Local concerns reflected in state statutes which would bar or substantially limit the plaintiff's chance of recovery should give way to the policies expressed in the civil rights laws.

The Colorado statute, together with its net pecuniary loss limitation, does not provide adequate redress in a situation in which, as in *Jones*, the financial loss suffered as a result of death is merely intangible.¹⁰³ This type of damage rule should not be permitted

99. 358 U.S. at 592.

100. See notes 57-58 *supra* and accompanying text.

101. Compare *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405 (1970), with *The Tungus v. Skovgaard*, 358 U.S. 588, 602 (1959).

102. See note 26 *supra*.

103. 550 P.2d at 341-42. The Colorado net pecuniary loss rule bars recovery for loss of society and punitive damages. Mrs. Jones' provable damages consisted of fu-

to control in a section 1983 suit. "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."¹⁰⁴

IV. CONCLUSION

To avoid potential differences in allowable damages, a simple solution is available: the creation of a common law wrongful death action under federal law. There is little difference between creating federal common law to avoid abatement of a section 1983 action at the plaintiff's death, as was done in *Shaw v. Garrison*, and creating federal common law to allow actions for wrongful death under section 1983.

The benefits of the civil rights laws were intended to be uniform throughout the United States. Those benefits should not be impaired because conduct results in death rather than serious injury. In addition, choice of a federal or state forum should not affect the protection afforded by section 1983.¹⁰⁵ Adoption of a federal

neral expenses plus the value of her son's services she lost as a result of his death. These damages were offset by the expenses the plaintiff would have incurred in raising him. *See* note 10 *supra*.

104. 396 U.S. at 240 (emphasis added).

105. The reluctance of state courts to grant relief under § 1983 is an important concern in view of the United States Supreme Court's decision in *Aldinger v. Howard*, 427 U.S. 1 (1976). In *Aldinger*, the Court refused to accept pendent party jurisdiction over a § 1983 plaintiff's state law claim against the county that employed the plaintiff. Since a plaintiff would normally choose to proceed against both individual and governmental defendants in one forum, the effect of *Aldinger* is to force § 1983 claims into the state courts. For a discussion of *Aldinger* and pendent party jurisdiction see Note, 87 YALE L.J. 627 (1978).

The *Aldinger* decision, however, left open the question whether a local governmental unit can be sued directly under the fourteenth amendment. Thus, one avenue that remains open to a § 1983 plaintiff is to also assert a fourteenth amendment claim against the city or county. A federal court can accept pendent jurisdiction over the state law claim because the city or county is already a party to the federal suit. *See, e.g.,* *Gagliardi v. Flint*, 564 F.2d 112 (3d Cir. 1977) (after basing jurisdiction on a "substantial" fourteenth amendment question, the court addressed the state law claim against the city rather than the more difficult fourteenth amendment issue). If the Supreme Court should decide that a local governmental unit cannot be sued directly under the fourteenth amendment, then state courts will provide the only forum in which a § 1983 plaintiff can sue the individual defendant *and* his or her city or county employer.

Jones v. Hildebrant is the only case the author found in which a state court awarded damages to a § 1983 plaintiff. Since the federal and state claims were merged in *Jones*, *see* note 97 *supra* and accompanying text, the award was probably based on the state claim. Writing in 1969, one commentator noted that he could find no state decision awarding relief under § 1983. He further observed that state courts usually adopt the expedient of accepting jurisdiction over such claims while dismiss-

common law rule allowing wrongful death actions under section 1983 without regard to state law is desirable since it would foster the uniform application of the statute. As the Supreme Court concluded, "federal courts may use any available remedy to make good the wrong done."¹⁰⁶ The creation of federal common law is an available remedy which should be used.

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ing them on the merits. *See* Note, 82 HARV. L. REV. 1486, 1497 n.62 (1969). In a recent New York decision, the court did just that. *Brody v. Leamy*, 90 Misc. 2d 1, 393 N.Y.S.2d 243 (Sup. Ct. 1977). *See also* note 30 *supra*.

Dissatisfaction with the present scope of § 1983 has led one commentator to suggest that the statute be amended to allow suits against state and local governments. *See* Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 455-57 n.38 (1978).

106. *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted).