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Steven H. Steinglass
Cleveland State University, s.steinglass@csuohio.edu

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ARTICLES

SECTION 1983 AND THE REAGANIZATION OF THE SIXTH CIRCUIT: CLOSING THE DOORS TO THE FEDERAL COURTHOUSE

*Steven H. Steinglass**

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* Associate Professor, Cleveland-Marshall College of Law; Cleveland State University. B.S., University of Pennsylvania; LL.B., Columbia University. A faculty research grant from the Cleveland-Marshall Educational Foundation provided funding for this work. The author was counsel of record in the United States Supreme Court in Thomas v. Shipka, 109 S. Ct. 859 (1989), *vacating* 829 F.2d 570 (6th Cir. 1987) (on rehearing), a § 1983 statute of limitations case. The petition for certiorari in *Thomas* only raised the issue discussed in II.A., *infra*, concerning the selection of the appropriate statute of limitations for § 1983 actions, an issue on which the author had previously expressed his views. *See* S. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 20.2(b)(1) (1988).

I. INTRODUCTION

DURING the twenty-one month period from October 1, 1984 to July 1, 1986, President Ronald W. Reagan appointed six new judges to the United States Court of Appeals for the Sixth Circuit. As a result, eight of the fifteen active judges on this court have been appointed by a president who had both the commitment and the opportunity to transform the federal judiciary with his appointments.[1] This article reviews

1. *See generally* Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 324 (1987); Goldman, *Reaganizing the Judiciary: The First Term Appointments*, 68 JUDICATURE 313 (1985). President Reagan appointed almost one-half of the active (i.e., non-senior) federal court judges. This includes 72 of the 150 active judges on the regional courts of

recent developments in section 1983[2] litigation in the Sixth Circuit against the background of these appointments.[3]

This article looks at the most significant developments in section 1983 litigation in the Sixth Circuit during the two-year period from January 1, 1987 to December 31, 1988. The emphasis is on the remedial and procedural issues that arise in section 1983 litigation rather than on the underlying federal constitutional and statutory rights enforceable through section 1983.[4] This focus on the section 1983 remedy permits an examination of plaintiffs' access to federal courts[5] and is one way to gauge the

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appeals and 272 of the 556 active district court judges. These figures do not include the 25 vacancies in these courts. *See* CONG. Q. WEEKLY REP. 3392 (Nov. 26, 1988).

The number of Sixth Circuit appointments available to President Reagan was attributable, in part, to the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984), which increased the number of Sixth Circuit judgeships from eleven to fifteen.

2. 42 U.S.C. § 1983 (1982), generally referred to merely as § 1983, is the modern version of § 1 of the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, and the principal remedial provision for the private enforcement of federal constitutional provisions in civil litigation against state and local governments and their employees. *See generally Developments in the Law - Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

3. The eight current Reagan appointees to the Sixth Circuit and their year of appointment are: Robert B. Krupansky (1982); Harry W. Wellford (1982); H. Ted Milburn (1984); Ralph B. Guy, Jr. (1985); David A. Nelson (1985); James L. Ryan (1985); Danny J. Boggs (1986); and Alan E. Norris (1986). In addition, Leroy J. Contie, Jr., who was appointed by President Reagan in 1982, took senior status in 1986.

The other active Sixth Circuit judges during the period under study and their appointing president and year of appointment are: Pierce Lively (Nixon; 1972); Albert J. Engel (Nixon; 1973); Damon J. Keith (Carter; 1977); Gilbert S. Merritt (Carter; 1977); Cornelia G. Kennedy (Carter; 1979); Boyce F. Martin, Jr. (Carter; 1979); and Nathaniel R. Jones (Carter; 1979). Judge Lively took senior status on January 1, 1989.

4. Section 1983 does not confer any substantive rights, *see* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979), but is a remedy for violations of federal statutory and constitutional rights. *See* Maine v. Thiboutot, 448 U.S. 1 (1980) (federal statutes); Lynch v. Household Fin. Corp., 405 U.S. 538 (1972) (federal constitutional claims).

5. Although a remedial statute applicable in both state and federal courts, § 1983 is most commonly identified with federal court litigation. There is, however, an increase in state court § 1983 litigation, driven, in part, by the growing hostility of federal courts and federal doctrines to § 1983 claims. *See generally* Steinglass, *The Emerging State Court* § 1983 *Action: A Procedural Review*, 38 U. MIAMI L. REV. 381, 394-424 & 432-39 (1984).

seriousness with which the federal courts assume responsibility for protecting fundamental federal rights.

Section 1983 litigation has become exceedingly complex—far more complex than traditional tort litigation—as Judge Frank Easterbrook, one of the better known recent conservative academic appointments to the federal appellate courts, has noted.[6] Thus, section 1983 litigation presents sophisticated as well as unsophisticated litigants with many opportunities to stumble. It is this author's belief, however, that the path to the federal courthouse should be cleared of unnecessary obstacles so that cases may be decided on their merits, and this article examines section 1983 litigation in the Sixth Circuit against this standard.

Section 1983 litigation also constitutes a substantial portion of the civil litigation in the federal courts. For example, during the one-year period from July 1, 1987 to June 30, 1988, the Sixth Circuit terminated 2,337 appeals on the merits.[7] There are no reliable statistics as to how many of these cases were section 1983 as contrasted to other "civil rights" cases,[8] but during each of the two years covered by this study, the Sixth Circuit, on the average, cited section 1983 in 72 published and 378 unpublished opinions.[9] Not all these cases were section 1983 cases, as a number simply cited section 1983 in the course of addressing other claims. On the other hand, section 1983 opinions

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6. *See* Kirchoff v. Flynn, 786 F.2d 320, 323-24 (7th Cir. 1986) (describing the greater complexity of § 1983 litigation and observing that "the risks plaintiffs face in § 1983 litigation are greater and the rewards smaller").

7. *See* ADMINISTRATIVE OFFICE OF U. S. CTS., ANN. REP. Tables S-3 & B-5 (1988). These 2,337 cases fall into the following categories: Criminal (309); U.S. Prisoner Petitions (131); Other U.S. Civil (335); Private Prisoner Petitions (594); Other Private Civil (744); Bankruptcy (50); Administrative Appeals (152); Original Proceedings (22). *Id.* at Table B-5.

8. The Administrative Office of the United States Courts collects its statistics from the civil cover sheets completed by attorneys at the time of filing, but the "civil rights" category is broader than § 1983. Thus, the published figures overstate the volume of § 1983 litigation. *See* Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 522-38 (1982).

9. In 1987 there were 66 published and 341 unpublished Sixth Circuit opinions that cited § 1983. In 1988, there were 78 and 414 respectively. This information was obtained by searching the Sixth Circuit's "unpublished disposition" opinions, which are available on WESTLAW.

do not always cite section 1983, and plaintiffs are not obligated to plead section 1983 in order to state section 1983 claims.[10] Thus, these figures are only proxies for the actual volume of section 1983 actions, but it is clear that section 1983 litigation constitutes a substantial part of the appellate caseload of the Sixth Circuit.[11] This review of section 1983 litigation in the Sixth Circuit serves several different purposes.

First, this review of recent developments in section 1983 litigation should assist practitioners and judges who must struggle to keep current with this expanding body of law. The specific procedural and remedial issues discussed in depth include statutes of limitations, preclusion, immunities, the use of deadly force, municipal liability, damages, and waivers of section 1983 claims.[12]

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10. *See* Americans United for Separation of Church & State v. School Dist. of the City of Grand Rapids, 835 F.2d 627 (6th Cir. 1987) (finding an action to be under § 1983 and authorizing an award of fees under 42 U.S.C. § 1988 despite the failure of the plaintiff to plead § 1983).

11. For a discussion of the disproportionate increase in the federal court caseload in the federal courts of appeals, see R. POSNER, THE FEDERAL COURTS 65 (1985) (789% increase in appeals from district courts between 1960 and 1983).

12. During the period under study, the Sixth Circuit also decided a number of important cases defining the federal constitutional rights enforceable through § 1983. *See, e.g.*, Cale v. Johnson, 861 F.2d 943 (6th Cir. 1988) (inmate may bring a substantive due process claim against prison officials who allegedly planted illegal drugs on him in retaliation for complaints about prison conditions); Gutzwiller v. Fenik, 860 F.2d 1317 (6th Cir. 1988) (finding denial of tenure to violate equal protection and substantive due process); Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988) (holding Ohio parental notification abortion statute unconstitutional), *appeal filed*, 57 U.S.L.W. 3378 (U.S. Nov. 10, 1988); Duchesne v. Williams, 849 F.2d 1004 (6th Cir. 1988) (en banc) (discharged municipal employees not entitled to pretermination hearings before neutral and impartial decision-makers other than the supervisors who fired them), *cert. denied*, 109 S. Ct. 1535 (1989); Doe by Doe v. Austin, 848 F.2d 1386 (6th Cir.) (mentally retarded adults do not have a due process right to prior judicial hearings before being committed or to periodic judicial review), *cert. denied*, 109 S. Ct. 495 (1988); Lovvorn v. City of Chattanooga, Tennessee, 846 F.2d 1539 (6th Cir. 1988) (mandatory urinalysis testing of firefighters without reasonable cause or suspicion that firefighters tested used controlled substances violates the fourth amendment), *judgment vacated and reh'g en banc granted*, 861 F.2d 1388 (6th Cir. 1988); Penny v. Kennedy, 846 F.2d 1563 (6th Cir. 1988) (applying same ruling to police officers), *judgment vacated and reh'g en banc granted*, 862 F.2d 567 (6th Cir. 1988); Rezadkowlski

In addition, there are briefer discussions of the use of section 1983 to raise statutory claims, abstention, the color of law requirement, and the relevance of adequate state remedies.[13]

Second, the article critically reviews a number of Sixth Circuit decisions on section 1983 procedural and remedial issues and concludes that the court's performance has often fallen short of the standards that the bench, the bar, and the public have a right to expect from the federal appellate courts.[14]

Third, this article provides some information about the reality of section 1983 litigation. Section 1983 litigation is often the subject of broad generalizations, but scholars have done little empirical or other research on what is actually happening in

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v. Village of Lake Orion, 845 F.2d 653 (6th Cir. 1988) (upholding limitation on the number of billboards); Chernin v. Welchans, 844 F.2d 322 (6th Cir. 1988) (with a minor exception upholding the constitutionality of Ohio rent withholding statutes); Loudermill v. Cleveland Bd. of Educ., 844 F.2d 304 (6th Cir.) (on remand) (constitutionally required pretermination hearing for public employee could be held without advance notice and before a supervisor without authority to discharge the employee), *cert. denied*, 109 S. Ct. 363 (1988); Newsome v. Batavia Local School Dist., 842 F.2d 920 (6th Cir. 1988) (due process does not entitle high school student to cross-examine student accusers and school officials at expulsion hearing); Michigan Road Builder's Ass'n, Inc. v. Milliken, 834 F.2d 583 (6th Cir. 1987) (finding unconstitutional Michigan set-aside law providing state contracts for minority and women business enterprises), *aff'd*, 109 S. Ct. 1333 (1989); Thompson v. Commonwealth of Kentucky, Dep't of Corrections, 833 F.2d 614 (6th Cir. 1987) (prison policy governing visitation creates a liberty interest entitling inmates to procedural due process), *cert. granted*, 108 S. Ct. 2869 (1988); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) (rejecting free exercise of religion claim by students required to use text books they found offensive), *cert. denied*, 108 S. Ct. 1029 (1988).

13. The Sixth Circuit also decided a number of important issues in civil rights actions not brought under § 1983 during this period. *See, e.g.*, Gutzwiller v. Fenik, 860 F.2d 1317 (6th Cir. 1988) (district court in Title VII action bound by jury's findings on § 1983 claim); Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988) (applying the Voting Rights Act to judicial elections); Jaimes v. Lucas Metro. Hous. Auth., 833 F.2d 1203 (6th Cir. 1987) (upholding a race conscious desegregation plan for public housing under Title VIII of the Civil Rights Act of 1968); Conklin v. Lovely, 834 F.2d 543 (6th Cir. 1987) (interpreting 42 U.S.C. § 1985(3) as not limited to racially based conspiracies and extending the cause of action to politically-motivated conspiracies).

14. The article is particularly critical of Sixth Circuit § 1983 decisions on statutes of limitations and preclusion. *See infra* notes 18-121 and accompanying text.

section 1983 litigation in the lower federal courts or in the state courts.[15] Nonetheless, proposals for changes in section 1983 are often based on assumptions about the volume and nature of section 1983 litigation.[16] Therefore, it is important for the full picture to be painted, but for this to happen a number of smaller studies must be done. This review of section 1983 litigation in the Sixth Circuit is one small piece of that larger picture. It also suggests, however, the need for similar reviews of section 1983 litigation in other forums.

Finally, the article documents the doctrinal shift that has taken place in section 1983 litigation in the Sixth Circuit as a result of the change in composition of the court and the emergence of a new working majority. Once one of the most sympathetic federal circuits to section 1983 claims, the Sixth Circuit has sharply changed direction. A conservative majority is now aggressively rearranging the doctrinal foundation for section 1983 litigation. In both *en banc* rehearings and panel decisions, the Sixth Circuit is reaching out to decide section 1983 issues in such a way as to increase the difficulty section 1983 plaintiffs have in convincing federal courts to reach the merits of their federal claims.[17]

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15. *But see* Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987); Eisenberg, *supra* note 8. *But see also* Steinglass, *supra* note 5, at 435 & 559-64 (breakdown of state court § 1983 litigation by year, state, and type of case).

16. *See* Eisenberg & Schwab, *supra* note 15, at 645.

17. There has been an increase in the volume of en banc rehearings in the Sixth Circuit in recent years. *See* Trier, *Increased* En Banc *Activity by the Sixth Circuit*, 19 U. TOL. L. REV. 277 (1988). For example, during the four year period from 1980 to 1983 the Sixth Circuit rendered only eleven en banc decisions, but in the four year period from 1984 to 1987, the court rendered twenty-eight en banc decisions. *See* Solimine, *Ideology and En Banc Review*, 67 N.C.L. REV. 29, 45 (1988). There has also been an increase in en banc rehearings in other circuits, *see* Note, *The Politics of En Banc Review*, 102 HARV. L. REV. 864, 866-74 (1989) (concluding that ideological considerations have influenced the recent increase in en banc reviews), a practice that has even come under criticism from some Reagan appointees. *See* Bartlett *ex rel* Neuman v. Bowman, 824 F.2d 1240, 1246 (D.C. Cir. 1987) (Silberman, J., concurring) (opinion concurring in denials of rehearings en banc); Rakovich v. Wade, 850 F.2d 1179, 1180 (7th Cir. 1987) (Ripple, J., dissent) (dissent on grant of rehearing en banc) (characterizing a particular rehearing en banc as giving a favored classes of defendants "'a third bite at the apple'").

II. STATUTES OF LIMITATIONS

It is difficult to overstate the confusion that has reigned in the Sixth Circuit on section 1983 statute of limitations issues since 1985, when the Supreme Court in *Wilson v. Garcia*[18] required the selection of the state statute of limitations for personal injury actions. By addressing this issue in *Mulligan v. Hazard*,[19] an Ohio case in which the choice of the appropriate limitations period need not have been made, by treating the *Mulligan* dictum as a holding, and by refusing, until recently, to address the issue in an en banc rehearing, despite its adoption of a conflicting approach in Michigan, the Sixth Circuit has denied trial courts and litigants the bright line that statutes of limitations should provide. Moreover, these decisions and related decisions applying the newly adopted limitations period retroactively and limiting the use of state tolling policies have denied many section 1983 plaintiffs access to federal courts. The final chapter on most of these issues will be written by the Supreme Court, but in the four years since *Wilson* the Sixth Circuit has done little to clarify the law on statutes of limitations and much to confuse it.

A. *Selecting the Appropriate Limitations Period*

1. Wilson v. Garcia

Prior to *Wilson*, federal appellate courts followed a variety of approaches to selecting the appropriate limitations period for section 1983 and related civil rights actions.[20] Some federal circuits selected a single limitations period in each state by

18. 471 U.S. 261 (1985).

19. 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174 (1986).

20. *See* Shapiro, *Choosing the Appropriate State Statute of Limitations for Section 1983 Claims After* Wilson v. Garcia: *A Theory Applied to Maryland Law*, 16 U. BALT. L. REV. 242, 243-44 (1987); Brophy, *Statutes of Limitations in Federal Civil Rights Litigation*, 1976 ARIZ. ST. L.J. 97. The different approaches were discussed by the Tenth Circuit in Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984) (en banc), *aff'd*, 471 U.S. 261 (1985).

borrowing the limitations period for liability based on statutes.[21] Other circuits, including the Sixth Circuit,[22] required the use of the state limitations period that was most analogous to the particular section 1983 claim at issue.[23] Under this approach, however, a single event could give rise to multiple section 1983 claims each of which could be subject to a different limitations period depending upon the analogous state law claim.[24]

The Supreme Court in *Wilson* sought to end this confusion by treating the characterization of civil actions for purposes of selecting a section 1983 statute of limitations as a matter of federal law and by requiring the use of a single limitations period in each state.[25] The *Wilson* Court also identified the criteria for selecting the appropriate limitations period for section 1983 actions and concluded that the 42d Congress "would have characterized § 1983 as conferring a general remedy for injuries to personal rights."[26]

In *Wilson*, the Court explicitly rejected the statute of limitations for liability based on statutes as well as the limitations period from the New Mexico Tort Claims Act for actions against governmental entities. In taking this position, the Court noted the wide diversity of federal constitutional claims that section 1983 ultimately came to embrace[27] and observed that the section 1983 claim under consideration—a claim of excessive force in the course of an arrest—was "arguably analogous to distinct state tort claims for false arrest, assault and battery, or personal

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21. *See, e.g.*, Garmon v. Foust, 668 F.2d 400 (8th Cir.) (en banc), *cert. denied*, 456 U.S. 998 (1982); Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978); Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970).

22. *See* Kilgore v. City of Mansfield, Ohio, 679 F.2d 632 (6th Cir. 1982). *See also infra* note 76.

23. *See, e.g.*, McMillan v. City of Rockmart, 653 F.2d 907, 909 (5th Cir. Unit B 1981); Polite v. Diehl, 507 F.2d 119 (3d Cir. 1974).

24. *See Wilson*, 471 U.S. at 274 n.33 (discussing *Polite*).

25. *Id.* at 268-75.

26. *Id.* at 278.

27. *See id.* at 273-74 & n.31 (relying on Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U.L. REV. 1, 19-20 (1985)).

injuries."[28] Nonetheless, the Court required the adoption of the general limitations period for personal injuries rather than the limitations period for intentional torts. In choosing the former, the Court opted for the general over the specific, despite the close resemblance between much of the lawless conduct that the Civil Rights Act of 1871 was designed to curb and many traditional common law torts.

In requiring the use of a general limitations period that was broadly applicable to state court litigation, the Court wanted to assure that states would not discriminate against section 1983 actions.

> General personal injury actions, sounding in tort, constitute a major part of the total volume of civil litigation in the state courts today, and probably did so in 1871 when § 1983 was enacted. It is most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect.[29]

The Court's decision in *Wilson* removed some, but not all, of the uncertainty concerning the selection of the appropriate statute of limitations in litigation under section 1983 and other surviving Reconstruction-era civil right actions. Most states have more than one limitations period for personal injury actions,[30] and, as Justice O'Connor correctly pointed out in her dissent, *Wilson* did not "resolve [the] confusion [but] banish[ed] it to the lower courts."[31] Most importantly, *Wilson* left unresolved the important issue of the appropriate limitations period in those states that have one limitations period for general personal injury

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28. 471 U.S. at 273.

29. *Id.* at 279. *See also* Felder v. Casey, 108 S. Ct. 2302, 2310-11 (1988) (notice of claim requirement that only applies to governmental defendants discriminates against federal rights).

30. One commentator identified twenty-seven jurisdictions with different limitations periods for actions involving intentional torts and most other personal injury actions. *See* Shapiro, *supra* note 20, at 245 n.18.

31. 471 U.S. at 286. Justice O'Connor would have retained the policy of applying the statute of limitations for the most analogous state law claim. *Id.* at 280.

actions and another, invariably shorter,[32] limitations period for various enumerated intentional torts.[33]

This issue, however, was ultimately resolved by the Supreme Court in *Owens v. Okure*[34] in which a unanimous Court reaffirmed *Wilson* and rejected the use of state statutes of limitations for enumerated intentional torts in favor of the state "general or residual statute of limitations governing personal injury actions."[35]

2. *The Sixth Circuit—Interpreting* Wilson v. Garcia

Prior to the Supreme Court's decision in *Owens*, the Sixth Circuit had addressed the section 1983 statute of limitations issue in *Mulligan v. Hazard*.[36] The *Mulligan* court construed *Wilson* to require the use of the one-year Ohio statute of limitations for enumerated intentional torts and applied this period retroactively.

The issue of the applicability of the one-year limitations period in *Mulligan* should not have been reached. *Mulligan* involved a due process claim by a professor at a regional branch of Ohio State University who sought university-wide, as contrasted to

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32. In the jurisdictions identified by one commentator as having more than one limitations period, every state except Alabama maintains a longer limitations period for personal injury actions than for intentional torts. *See* Shapiro, *supra* note 20, at 245 n.18.

33. The argument in favor of a § 1983 statute of limitations based on intentional torts rests on the fact that the underlying federal rights actionable through § 1983 generally require intentional conduct or its equivalent. *See, e.g.*, Daniels v. Williams, 474 U.S. 327 (1986) (due process); Estelle v. Gamble, 429 U.S. 97 (1976) (eighth amendment); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (equal protection); Washington v. Davis, 426 U.S. 229 (1976) (equal protection). The Court, however, has not applied a state of mind requirement to § 1983. *See* Daniels v. Williams, 474 U.S. 327, 329-30 (1986); Parratt v. Taylor, 451 U.S. 527, 534-35 (1981).

34. 109 S. Ct. 573 (1989), *aff'g* 816 F.2d 45 (2d Cir. 1987).

35. *Id.* at 582. *See also infra* notes 52-55 and accompanying text.

36. 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 476 U.S. 1174 (1986). *Mulligan* was fully briefed before the Supreme Court's April 17, 1985 decision in *Wilson* but argued on June 4, 1985. No supplemental briefing was submitted on the statute of limitations issue, although questions were asked at oral argument concerning *Wilson*. Telephone interview with Frederick G. Cloppert, Jr., Counsel for the Plaintiff in *Mulligan* (Jan. 23, 1986).

campus-specific, tenure. She had been hired in 1973 and was awarded campus-specific tenure in 1979. She filed her action in October, 1983, but the Sixth Circuit found that her action accrued eight years earlier in 1975 when the Board of Trustees changed the applicable tenure rules. Thus, her section 1983 claim was time-barred regardless of the limitations period that the Sixth Circuit selected for section 1983 claims.[37]

The plaintiff claimed, however, that her action accrued in 1980, when she first became aware of the change in tenure policies,[38] and that her October, 1983 suit was timely under Ohio's four-year residual limitations period. Thus, it was proper for the Sixth Circuit to address whether the four-year period applied. If it did not, however, there was no reason to decide which of Ohio's shorter limitations periods was applicable to section 1983 actions.

Nonetheless, the *Mulligan* court addressed a number of important statute of limitations issues. Initially, the court determined which of Ohio's four different limitations periods should be used in section 1983 cases. In two separate statutes, Ohio applies a one-year limitations period to such intentional torts as libel, slander, assault, battery, malicious prosecution, and false imprisonment.[39] In addition, Ohio has a two-year limitations period for actions for "bodily injury or injuring personal property."[40] Finally, Ohio has a four-year residual limitations period "[f]or an injury to the rights of the plaintiff not arising on contract nor enumerated in [other] sections."[41]

In selecting the one-year limitations period for enumerated intentional torts, the Sixth Circuit relied on language from *Wilson* in which the Supreme Court described the lawlessness that led to the Civil Rights Act of 1871, the predecessor of section 1983. The court, however, ignored the *Wilson* Court's refusal to characterize the pending action as an intentional tort

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37. 777 F.2d at 341-42.

38. Under federal law, § 1983 actions accrue when a party knew or should have known of the injury that is the basis of the action. *See* Chardon v. Fernandez, 454 U.S. 6 (1981).

39. *See* OHIO REV. CODE ANN. § 2305.11 (Anderson 1981) (enumerated intentional torts); § 2305.111 (Anderson Supp. 1986) (assault or battery).

40. OHIO REV. CODE ANN. § 2305.10 (Anderson 1981).

41. OHIO REV. CODE ANN. § 2305.09(D) (Anderson 1981).

and the language in *Wilson* requiring the use of the general limitations period.

The implications of *Mulligan* on the federal court section 1983 caseload was quickly seen, and federal courts throughout the Sixth Circuit applied the *Mulligan* dictum to dismiss section 1983 cases that were not filed within the one-year period.[42] Moreover, Sixth Circuit panels consistently followed *Mulligan* in Ohio cases,[43] despite the reservations of at least one Sixth Circuit judge about the selection of a limitations period based on intentional torts.[44]

The Sixth Circuit's continued adherence to and even understanding of *Mulligan* were called into question by its treatment of the statute of limitations issue in Michigan. In *Carroll v. Wilkerson*[45] the Sixth Circuit purported to rely on *Mulligan* in adopting the three-year Michigan limitations period for "injury to a person"[46] rather than the two-year period for "an action charging assault, battery, or false imprisonment."[47]

Mulligan and *Carroll* are irreconcilable, a point suggested by Justice White in his dissent from the denial of certiorari in *Carroll* when he observed that "the confusion evidenced by this split [among the circuits] is underscored by the Sixth Circuit's

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42. Lower courts within a jurisdiction are not obligated to follow dictum, *see* RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment i (1980), but trial courts in the Sixth Circuit appear to have enthusiastically followed *Mulligan*. *See, e.g.*, Haskell v. Washington Township, 864 F.2d 1266 (6th Cir. 1988) (reversing trial court's *sua sponte* raising of one-year Ohio statute of limitations that defendants failed to raise in their first responsive pleading).

43. *See, e.g.*, Demery v. City of Youngstown, 818 F.2d 1257 n.3 (6th Cir. 1987); Thomas v. Shipka, 818 F.2d 496 (6th Cir. 1987), *on reh'g*, 829 F.2d 570 (6th Cir.), *vacated*, 109 S. Ct. 859 (1989); Jones v. Shankland, 800 F.2d 77 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 2177 (1987). *See also infra* note 55.

44. *See, e.g.*, 818 F.2d at 1261 (Guy, J., concurring) ("[I]f writing in Mulligan I would have opted for Ohio's two-year statute rather than the one-year statute chosen.").

45. 782 F.2d 44 (6th Cir.), *cert. denied sub nom.* County of Wayne v. Carroll, 479 U.S. 923 (1986).

46. MICH. COMP. LAWS § 600.5805(8) (1979).

47. MICH. COMP. LAWS § 600.5805(2) (1979).

change in approach."[48] Nonetheless, the Sixth Circuit, until recently, refused to hear this issue en banc to resolve this split within the Circuit.[49]

On June 20, 1988, however, the Sixth Circuit agreed to hear the issue en banc in *Browning v. Pendelton*.[50] This belated decision only came after the Supreme Court granted certiorari on this issue in *Owens v. Okure*,[51] a case from the Second Circuit.

The Supreme Court's subsequent decision in *Owens* not only requires the rejection of the one-year Ohio limitations period

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48. 479 U.S. at 924 (White, J., dissenting), (opinion on denial of cert.). *See also* Mulligan v. Hazard, 476 U.S. 1174 (1986) (White, J., dissenting) (identifying split among the circuits), *denying cert.* to 777 F.2d 340 (6th Cir. 1985).

49. *See, e.g.*, Jones v. Shankland, *supra* (denying rehearing en banc), 800 F.2d 77 (6th Cir. 1986).

50. 869 F.2d 989 (6th Cir. 1989) (en banc). *Browning* was argued before the full Sixth Circuit on December 7, 1988. On March 16, 1989, the court acknowledged both the inconsistency between *Mulligan* and *Carroll* and the Supreme Court's subsequent rejection of the *Mulligan* approach in Owens v. Okure, 109 S. Ct. 573 (1989). The Sixth Circuit then treated the issue as involving a choice between Ohio's one-year and two-year limitations periods and selected the latter. The court made no reference to Ohio's four-year residual limitations period, which the Supreme Court in *Owens* had suggested was inappropriate for § 1983 claims. *See infra* notes 51-54 and accompanying text.

Given the absence of any reference to the four-year limitations period in *Browning*, the case apparently leaves this issue open for another day. Nonetheless, the failure of the Sixth Circuit to acknowledge that it had not reached the issue of the four-year limitations period will likely result in *Browning* becoming a virtually insurmountable obstacle for Ohio plaintiffs seeking a four-year limitations period for § 1983 claims.

Browning will also raise the issue of whether the new limitations period should be applied retroactively to lengthen the time to sue, but federal courts addressing this issue under *Wilson* had consistently given plaintiffs the benefit of longer limitations periods. *See, e.g.*, Small v. Inhabitants of City of Belfast, 796 F.2d 544 (1st Cir. 1986); Rivera v. Green, 775 F.2d 1381 (9th Cir. 1985), *cert. denied*, 475 U.S. 1128 (1988); Jones v. Preuitt & Mauldin, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 474 U.S. 1105 (1986), *on remand*, 851 F.2d 1321 (11th Cir. 1988) (en banc), *vacated on other grounds*, 109 S. Ct. 1105 (1989). *See also* Farmer v. Cook, 782 F.2d 780, 781 (8th Cir. 1986) (distinguishing the reliance of plaintiffs and defendants on shorter limitations periods).

51. 108 S. Ct. 1218 (1988), *granting cert. to* 816 F.2d 45 (2d Cir. 1987) (selecting the three-year New York statute "to recover damages for a personal injury" over the one-year period for enumerated intentional torts).

for enumerated intentional torts, but also should resolve the issue of whether the two-year limitations period for "bodily injury" or the four-year residual limitations period "[f]or an injury to the rights of the plaintiff" is appropriate in section 1983 cases in Ohio.[52] In rejecting the use of the limitations period for enumerated intentional torts, the *Owens* Court expressed concern about the confusion that would result because of the existence of multiple intentional tort limitations provisions in every state. To illustrate this point, the Court specifically identified Ohio's various intentional tort limitations periods, including the two-year period for "bodily injury" actions.[53] Thus, *Owens* appears to require the use of the four-year residual limitations period for section 1983 actions in Ohio.[54] Nonetheless, *Owens* offers little assistance to the many section 1983 plaintiffs in Ohio whose cases were dismissed based on the one-year limitations period adopted by *Mulligan*.[55]

The impact of *Owens* in the other states within the Sixth Circuit will vary. The selection of the three-year Michigan statute of limitations in *Carroll*, despite its purported reliance on *Mulligan*, really ignored *Mulligan* and applied a general limitations period that is consistent with *Owens*. Thus, *Owens* will not cause any changes in section 1983 practice in Michigan. Likewise, *Owens* should not change the selection of the section 1983 statute of limitations in Tennessee. In *Berndt v. Tennessee*[56] the Sixth Circuit adopted the one-year Tennessee limitations

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52. *See supra* notes 40-41.

53. 109 S. Ct. 573, 578 (1989).

54. *But see supra* note 50. Prior to *Owens*, at least one federal court construed *Wilson* as precluding the use of personal injury statutes narrowly limited to claims involving bodily injury. *See* Saldivar v. Cadena, 622 F. Supp. 949, 955 (W.D. Wis. 1985) (applying the six-year Wisconsin limitations period "for an injury to the character or rights of another" rather than the three-year general limitations period "for injuries to the person" because the former does not require bodily injury).

55. In reliance on *Mulligan*, the Sixth Circuit in unpublished opinions available on WESTLAW dismissed at least twelve § 1983 actions in Ohio federal courts as not timely under the one-year limitations period. In addition, the Sixth Circuit presumably dismissed other cases in unpublished decisions not available on WESTLAW and district courts dismissed other cases that were not appealed.

56. 796 F.2d 879 (6th Cir. 1986).

period that applied not only to "injury to the person" but also to most enumerated intentional torts.[57]

In Kentucky, on the other hand, the impact of *Owens* is less clear. Kentucky has a one-year limitations period for "an injury to the person" and for such torts as malicious prosecution, conspiracies, and arrest,[58] and the Sixth Circuit in *McSurely v. Hutchison*[59] relied on *Wilson* to apply this period to *Bivens* actions, thus making clear that this one-year period also applied to section 1983 actions. Kentucky, however, also has a residual five-year limitations period for an "action for an injury to the rights of the plaintiff, not arising on contract, and not otherwise enumerated"[60] and it is uncertain whether courts will be required to apply this period to section 1983 actions.[61]

B. *The Retroactivity of* Wilson v. Garcia

The Sixth Circuit's adoption in *Mulligan* of a one-year limitations period for section 1983 actions in Ohio was dictum, but the decision to apply the new limitations period retroactively was not.[62] If a four-year or longer limitations period had applied to the plaintiff's tenure denial under the Sixth Circuit's prior approach, her section 1983 action would not have been time-barred under a prospective application of *Wilson*. Thus, it was appropriate for the Sixth Circuit to determine whether any of the shorter limitations periods identified in *Mulligan* could be applied retroactively to cut off the plaintiff's right to sue.

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57. TENN. CODE ANN. § 28-3-104(a) (1980). *But see infra* note 61.

58. KY. REV. STAT. ANN. § 413.140(1)(a), (c) (Baldwin 1988).

59. 823 F.2d 1002 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1107 (1988). Courts generally apply *Wilson* to govern the selection of the statute of limitations for actions against federal officials under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). *See, e.g.*, Chin v. Bowen, 833 F.2d 21 (2d Cir. 1987); Drum v. Nasuti, 648 F. Supp. 888 (E.D. Pa. 1986).

60. KY. REV. STAT. ANN. § 413.120(6) (Baldwin 1988).

61. The Second Circuit in Okure v. Owens, 816 F.2d 45 (2d Cir. 1987), *aff'd*, 109 S. Ct. 573 (1989), also found the one-year limitations period too short, but the Supreme Court in *Owens* did not reach this issue. 109 S. Ct. at 582 n.13. The Tennessee one-year limitations period clearly raises this issue, and the Sixth Circuit may also have to address it in Kentucky if the court adheres to *McSurley*.

62. This assumes that the plaintiff's § 1983 action accrued in 1980. *See supra* note 38 and accompanying text.

To support its conclusion, the *Mulligan* court relied principally on *Wilson* in which the Supreme Court applied the newly adopted New Mexico limitations period retroactively.[63] The Sixth Circuit, however, ignored the fact that the *Wilson* Court had approved the retroactive application of a new limitations period that *lengthened* the time to sue, while *Mulligan* had involved a new limitations period that shortened the time to sue.[64]

In deciding this issue, the *Mulligan* court not only misconstrued *Wilson* but also ignored *Chevron Oil Co. v. Huson*,[65] the Supreme Court's leading decision on the retroactivity of statutes of limitations.

The Sixth Circuit found support for its retroactive application of the statute of limitations in its cases applying a new statute of limitations to actions under section 301 of the Labor Management Relations Act.[66] In *DelCostello v. International Brotherhood of Teamsters*[67] the Supreme Court had adopted a six-month limitations period for section 301 actions. The Sixth Circuit, in *Smith v. General Motors Corp.*,[68] applied this period retroactively, and the *Mulligan* court relied on *Smith* to apply a per se Sixth Circuit policy in favor of the retroactive application of new statutes of limitations.

In *Chevron*, however, the Supreme Court required a more careful inquiry into whether newly adopted statutes of limitations should be applied retroactively and adopted a three-part balancing test, which required *inter alia*, a determination as to whether a party was justified in relying on a prior limitations period.[69]

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63. *See* 777 F.2d 340, 343-44 (6th Cir. 1985).

64. The *Mulligan* court also ignored *Wilson*'s citation with apparent approval of Jackson v. City of Bloomfield, 731 F.2d 652, 654-55 (10th Cir. 1984), in which the Tenth Circuit refused to apply its new approach to § 1983 statutes of limitations retroactively to shorten the limitations period. *See Wilson*, 471 U.S. at 265 n.10.

65. 404 U.S. 97 (1971).

66. 29 U.S.C. § 185 (1982).

67. 462 U.S. 151 (1983).

68. 747 F.2d 372 (6th Cir. 1984) (en banc).

69. *See*, 404 U.S. at 106-07 (three-step test of retroactivity). *See also infra* notes 261-302 and accompanying text (discussing the application of *Chevron* to Tennessee v. Garner, 471 U.S. 1 (1985)).

Subsequent to *Mulligan*, the Supreme Court addressed the retroactivity issue in private employment discrimination litigation under 42 U.S.C. § 1981.[70] In *St. Francis College v. Al-Khazraji*[71] the Court upheld a refusal to apply a shortened limitations period retroactively because the Third Circuit had clearly established a longer period for section 1981 actions in Pennsylvania, thus justifying the plaintiff's reliance on the longer period. In *Goodman v. Lukens Steel Co.*,[72] on the other hand, the Court found that at the time that section 1981 action arose, the limitations period in Pennsylvania was not clearly established and the plaintiffs' reliance on the period was not justified. Thus, the Court upheld the retroactive application of the shorter period even though it cut off the plaintiffs' ability to sue.

In *Thomas v. Shipka*[73] the Sixth Circuit granted a rehearing for the limited purpose of addressing the retroactivity issue and explicitly adopted the balancing approach of *Chevron*.[74] *Thomas* involved a claim by a municipal employee that she was terminated from her non-policy making job for political reasons, but the Sixth Circuit held that the four-year limitations period that some courts had selected prior to *Mulligan*[75] was not so well established to have justified plaintiff's reliance on it.[76] Thus, *Thomas* applied *Mulligan* retroactively to bar the suit.

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70. 42 U.S.C. § 1981 (1982). Section 1981 is the current version of § 1 of the Civil Rights Act of 1866, 14 Stat. 27, see generally *Developments in the Law—Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29 (1980).

71. 481 U.S. 604 (1987).

72. 107 S. Ct. 2617 (1987). In *Goodman* the Court also held that *Wilson* governs the selection of § 1981 statutes of limitations. *Id.* at 2620-21.

73. 818 F.2d 496 (6th Cir.), *modified*, 829 F.2d 570 (6th Cir. 1987) (on rehearing), *vacated*, 109 S. Ct. 859 (1989).

74. Subsequent to *Goodman* and *St. Francis College*, the Supreme Court in Vodila v. Clelland, 107 S. Ct. 3255 (1987), *vacating* 802 F.2d 460 (6th Cir. 1986) (table), vacated an unpublished Sixth Circuit decision applying the one-year Ohio limitations period retroactively and required the Sixth Circuit to reconsider the retroactivity issue in light of the Court's more recent decisions. The *Thomas* rehearing was apparently the result of this remand, and the Sixth Circuit ultimately applied its conclusion in *Thomas* to *Vodila*. *See* 836 F.2d 231 (6th Cir. 1987) (on remand).

75. *See* Schorle v. City of Greenhills, 524 F. Supp. 821 (S.D. Ohio 1981) (rejecting analogous state law claim approach and selecting four-year residual limitations period).

76. 829 F.2d at 576. The Sixth Circuit in *Thomas* cited a number of cases

It now appears that the Sixth Circuit is correctly following a case-by-case approach to the retroactivity of statutes of limitations in section 1983 actions and is attempting to analyze such issues under the balancing test required by *Chevron* and the Supreme Court's section 1981 cases. This more flexible approach permits courts to refuse to apply new limitations periods retroactively,[77] but the Sixth Circuit has not yet refused to apply any newly adopted section 1983 statute of limitations retroactively.[78]

C. *Tolling*

In *Board of Regents v. Tomanio*[79] the Supreme Court required federal courts entertaining section 1983 actions to look to state law for not only the applicable limitations period but also the appropriate tolling policies. The *Tomanio* Court refused to construct a federal tolling policy but instead required federal courts to borrow state tolling policies, as long as such policies were not inconsistent with the purposes of section 1983.[80]

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to support its conclusion that the analogous cause of action approach applied in the Sixth Circuit. *See* Kilgore v. City of Mansfield, 679 F.2d 632 (6th Cir. 1982); Hines v. Board of Educ., 667 F.2d 564 (6th Cir. 1982); Woods v. City of Dayton, 574 F. Supp. 689, 695 (S.D. Ohio 1983), *aff'd on other grounds*, 734 F.2d 17 (6th Cir. 1984).

77. *See Thomas*, 829 F.2d at 576 n.13 ("Depending upon the particular facts . . . it is entirely possible that a factually analogous pre-*Wilson* [§ 1983] case decided within the Sixth Circuit established a clear precedent upon which the plaintiff could have relied, thereby precluding the retroactive application of *Mulligan*."). This formulation, however, seems to focus on factual identity of the cases and ignores the possibility that the Sixth Circuit's analogous cause of action approach could also have justified a plaintiff's reliance on a longer limitations period.

78. *But see* Carlisle v. TRW, Inc., 860 F.2d 1078 (6th Cir. 1988) (unpublished disposition) (refusing to apply one-year Ohio limitations period retroactively to § 1981 claim to which a six-year limitations period had previously applied). The *Carlisle* court relied upon the statement in Demery v. City of Youngstown, 818 F.2d 1257, 1264 (6th Cir. 1987), that the one-year Ohio limitations period should not be applied retroactively "where this decision would mandate the application of a shorter limitations period than had previously been applied in § 1981 actions."

79. 446 U.S. 478 (1980).

80. *Id.* at 483-86. In addition to the § 1983 purposes of compensation and deterrence, *see* Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978), the *Tomanio* Court examined whether considerations of federalism or uniformity

The Sixth Circuit has decided an important case applying tolling policies to section 1983 prison litigation. *Higley v. Michigan Department of Corrections*[81] involved a Michigan statute that tolled the limitations period for persons who were incarcerated at the time their claims accrued.[82] In addressing the application of this policy to section 1983 litigation, the Sixth Circuit initially found federal law to be deficient and looked to state law.[83] The court then concluded that the policy reasons behind the Michigan tolling policy were no longer applicable to section 1983 prison litigation and thus rejected the state policy as inconsistent with the purposes of section 1983.

In taking this position and dismissing the action as not timely, the Sixth Circuit in *Higley* followed the lead of a number of district courts in Ohio.[84] These decisions, however, are inconsistent with the position taken by other federal appellate courts that have addressed the issue since the Supreme Court decision in *Tomanio*. For example, in *Bailey v. Faulkner*[85] the Seventh Circuit acknowledged that prisoners could now file section 1983 and other civil actions and that tolling policies for incarcerated

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required federal courts to reject a state policy that did not toll the limitations period for plaintiffs who filed § 1983 actions after having presented state law claims to state courts. 446 U.S. at 489-92.

81. 835 F.2d 623 (6th Cir. 1987).

82. *See* MICH. COMP. LAWS § 600.5851(1) (1987). The Michigan courts have upheld this provision despite the changed circumstances of prisoners. *See* Hawkins v. Justin, 109 Mich. App. 743, 311 N.W.2d 465 (1981).

83. Federal courts borrowing state policies under 42 U.S.C. § 1988, the federal choice of law statute, are required to engage in a three-step process. Under Burnett v. Grattan, 468 U.S. 42, 47-48 (1984), courts first determine whether federal law is deficient. If it is, courts then borrow the appropriate state policy. Finally, at the third step of the process, courts must reject otherwise applicable borrowed policies if such policies are inconsistent with § 1983's purposes of compensation and deterrence. *Id.*

84. *See, e.g.*, Vargas v. Jago, 636 F. Supp. 425, 429 (S.D. Ohio 1986) (refusing to apply the tolling requirements of OHIO REV. CODE ANN. § 2305.16 to § 1983 actions); Perotti v. Carty, 647 F. Supp. 39, 40 (S.D. Ohio 1986) (same), *aff'd*, 848 F.2d 193 (6th Cir. 1988) (unpublished disposition), *vacated*, 109 S. Ct. ____(1989). The Ohio Court of Appeals, relying on these cases, has also refused to apply the state tolling statute to § 1983 claims as a matter of federal law. *See* Miller v. Stevens, 37 Ohio App.3d 179, 525 N.E.2d 533 (1988).

85. 765 F.2d 102 (7th Cir. 1985).

persons were no longer necessary.[86] Nonetheless, the Seventh Circuit felt bound to follow *Tomanio* and applied the state tolling policies for incarcerated persons.[87]

The Sixth Circuit in *Higley* took a different path. In so doing, however, the court ignored the standards the Supreme Court had applied in *Tomanio* to determine when borrowed state policies are inconsistent with the purposes of section 1983. The *Higley* court did not analyze the impact of the tolling policy on either compensation or deterrence.[88] Nor did it analyze or even discuss the issue the Seventh Circuit in *Bailey* had found dispositive— namely the duty of lower courts to follow decisions of the Supreme Court.[89] Rather the Sixth Circuit in *Higley* simply substituted its views for those of both the state legislature and the Supreme Court and pronounced the state tolling policy to be inconsistent with federal law.[90]

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86. *Id.* at 103 (describing a since-repealed Indiana tolling provision as "hopelessly archaic in an era when the ready access of prisoners to the courts, state and federal, is constitutionally guaranteed").

87. *Accord* Miller v. Smith, 625 F.2d 43, 44 (5th Cir. 1980).

88. A proper analysis of this issue requires courts to ask whether the state policy of tolling the limitations period for incarcerated persons either overcompensates prisoners for their injuries or overdeters defendants, in this case prison officials, from properly enforcing the law. *Cf.* Robertson v. Wegmann, 436 U.S. 584, 592-93 (1978) (finding Louisiana abatement policy to not affect the § 1983 goal of compensation or have a marginal influence on the behavior of public officials).

89. In refusing to apply the Michigan tolling policy, the *Higley* court "distinguished" Austin v. Brammer, 555 F.2d 142 (6th Cir. 1977) (per curiam), by noting that *Austin* had "assum[ed] possible applica[tion] of Ohio's tolling statute." Higley v. Michigan Dep't of Corrections, 835 F.2d 623, 625 (6th Cir. 1987). In *Austin*, however, the Sixth Circuit applied the Ohio tolling policy and reversed a statute of limitations dismissal because of the failure of the district court to hold an evidentiary hearing to determine whether the plaintiff had been in custody within the meaning of the tolling statute. 555 F.2d at 143-44. Although the *Austin* court did "assume" that the applicable tolling statute was consistent with federal law, that conclusion was necessary to the decision.

90. In Hardin v. Straub, 109 S. Ct. 1998 (1989), *rev'g* 836 F.2d 549 (6th Cir. 1987) (unpublished disposition), the Supreme Court unanimously reversed a Sixth Circuit case that followed *Higley* and held that federal courts were required to apply state tolling policies to § 1983 suits brought by incarcerated prisoners.

III. PRECLUSION

Federal courts entertaining section 1983 actions are required by the Full Faith and Credit Statute[91] to give state court judgments the same preclusive effect that the courts of the forum state would give them.[92] Thus, federal court preclusion cases often involve determining how the state courts would have decided the preclusion issues, and most Sixth Circuit cases during the period under study simply attempted to apply state policies.[93] The Sixth Circuit, however, has a tendency to ignore state preclusion principles in favor of federal policies that limit access to federal courts because of earlier state court proceedings.

A. *Election of Remedies*

The most unusual preclusion case of the period was *Campbell v. City of Allen Park*[94] in which the Sixth Circuit applied a federal election of remedies doctrine to deny a section 1983 plaintiff access to federal court. Although *Campbell* does not purport to be a preclusion case, the court relied on preclusion principles to prevent the plaintiff from litigating a section 1983

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91. 28 U.S.C. § 1738 (1982).

92. *See* Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 80-85 (1984) (claim preclusion); Allen v. McCurry, 449 U.S. 90, 105 (1980) (issue preclusion). *See also* University of Tenn. v. Elliott, 478 U.S. 788 (1986) (following the federal common law and requiring federal courts in § 1983 actions to give state agency factfinding the same preclusive effect state courts would give such factfinding).

93. *See, e.g.*, Nelson v. Jefferson County, Ky., 863 F.2d 18, 19-20 (6th Cir. 1988) (applying Kentucky law of administrative res judicata to give preclusive effect to factual findings of unreviewed administrative proceeding); Barnes v. McDowell, 848 F.2d 725, 730-32 (6th Cir. 1988) (applying Kentucky principles of issue preclusion), *cert. denied*, 109 S. Ct. 789 (1989); Pilarowski v. Macomb County Health Dep't, 841 F.2d 1281, 1286-87 (6th Cir.) (treating unreviewed factual determinations of Michigan Employment Relations Commission as binding in subsequent § 1983 action), *cert. denied*, 109 S. Ct. 133 (1988); Gutierrez v. Lynch, 826 F.2d 1534, 1537-38 (6th Cir. 1987) (applying Ohio definition of cause of action to treat § 1983 claims for pre-termination and post-termination hearings as same cause of action). *But see* Wicker v. Board of Educ. of Knott County, Ky., 826 F.2d 442, 445-47 (6th Cir. 1987) (applying federal principles to permit claim splitting by plaintiff who filed an *England* "reservation" in state court after federal court abstention).

94. 829 F.2d 576 (6th Cir. 1987).

claim without asking whether state law required her to join her section 1983 claim in an earlier state court proceeding.

Campbell was a federal court section 1983 action in Michigan by a female municipal employee, who was discharged under a municipal residency requirement after she moved outside the city to live with her husband. Prior to commencing her federal court action,[95] the employee appealed the denial of her request for an exemption to a Michigan state court, which held that the Commission had erred for reasons independent of the constitutionality of the residency requirement. The state court awarded her back pay and remanded the reinstatement issue, and the city subsequently granted her an exemption.

Despite her success in state court, the employee and her husband continued to pursue their federal court section 1983 claim for emotional damages and attorney fees. The district court granted summary judgment for the defendant, concluding that the city had not violated the plaintiffs' equal protection or substantive due process rights.[96]

On appeal, the Sixth Circuit became an active participant in the litigation. At oral argument, the court called attention to *Punton v. City of Seattle*,[97] a recent Ninth Circuit decision that precluded a public employee who had been reinstated in a state court proceeding from seeking additional relief in federal court.

After receiving supplemental briefs,[98] the Sixth Circuit in a unanimous opinion written by Judge David A. Nelson held that once the worker was reinstated with an award of back pay she was not free to pursue her other federal claims. In reaching this

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95. The employee's husband, who ironically was employed by a neighboring city that also had a residency requirement, was a co-plaintiff in the federal court but not the state court action.

96. *Id.* at 578.

97. 805 F.2d 1378 (9th Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987).

98. The City of Allen Park did not raise a preclusion or election of remedies defense in its answer and, in response to the Sixth Circuit's request for supplemental briefing, conceded that, unlike *Punton*, the state and federal claims in *Campbell* involved different legal issues. 829 F.2d at 579. Nonetheless, the city observed that if *Punton* "is extended to . . . situations involving different *issues*, which, however, lead to substantially the same *type* of *damages*, then it arguably would be applicable," but cited no supporting authority. *Id.* at 579-80.

conclusion, the Sixth Circuit relied on the following language from *Punton*:

> Punton's election to proceed initially in the state court amounted to a splitting of his cause of action as well as an election of remedies. At the start, he could have proceeded directly in federal court with a § 1983 claim for reinstatement, back pay, and general damages. Instead, he first chose to seek the relief of reinstatement and back pay in the state court.
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> We recently held in an employment grievance case originating in California that claim preclusion arising from a state court mandamus action in which substantial but incomplete relief was granted barred relitigation of the claim in federal court under § 1983. *Clark v. Yosemite Community College District*, 785 F.2d 781 (9th Cir. 1986).
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> Another instructive case is that of a police officer in Philadelphia who was charged with a crime, discharged from his job, acquitted after trial, and upon application to the municipal Civil Service Commission, reinstated without back pay. *Cohen v. City of Philadelphia*, 736 F.2d 81 (3d Cir. 1984). The commissions found that whether or not Cohen had participated in the burglary for which he was acquitted, he had violated police department rules by lending money to a superior officer. Cohen thereupon sued in federal court, alleging a § 1983 claim. Summary judgment for the city was affirmed on the basis of claim preclusion.
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> We have found no Supreme Court case holding that merely because litigation strategy and the perceived advantages of a more adequate award in federal court make it an attractive alternative, a person aggrieved by official state action can abandon a remedy that colorably satisfies due process of law in the state court after recovering substantially what he had lost. On the contrary, *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 85, 104 S. Ct. 892, 898, 79 L.Ed.2d 56 (1984), instructs to the contrary.[99]

In attempting to distinguish *Punton*, the plaintiffs in *Campbell* argued that the constitutionality of the denial of a waiver could

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99. 829 F.2d at 579 (quoting *Punton*, 805 F.2d at 1381-83).

not have been litigated in the state court proceeding. The Sixth Circuit expressed doubt as to that proposition, pointing out that constitutional claims may be asserted in appeals from Fire and Police Civil Service Commission decisions.[100] In taking this position, however, the court confused the making of an argument with the assertion of a claim, an important distinction in this case. There is little question that the employee could have raised a constitutional argument in her appeal of the commission decision, and the Michigan courts would have been required under the supremacy clause to apply federal law.[101] The relevant issue, however, was whether the employee was *required* under state law to join her separate claim for damages in the special judicial review proceedings, but the Sixth Circuit did not address this question.[102]

The decision in *Campbell* is confusing. At one point the Sixth Circuit observed that federal courts were limited to deciding real

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100. *Id.* at 580. *See* Shelby Township Fire Dep't v. Shield, 115 Mich. App. 98, 105, 320 N.W.2d 306, 309 (1982) (discharged firefighter permitted to make a fourteenth amendment argument).

101. *See* U.S. CONST., art. VI.

102. The Second Circuit approaches this issue in § 1983 damage cases in New York by asking whether § 1983 plaintiffs could have recovered damages in earlier completed Article 78 proceedings to review actions of governmental agencies. *See* Davidson v. Capuano, 792 F.2d 275, 278-79 (2d Cir. 1986) (prisoners not entitled to damages in earlier state court proceedings). *Cf.* Kirkland v. City of Peekskill, 828 F.2d 104, 109 (2d Cir. 1987) (availability of damages in Article 78 proceeding involving employment termination justifies application of claim preclusion to bar federal court § 1983 damage action).

Other federal circuits also follow the state law of claim preclusion in deciding whether to bar plaintiffs from pursuing § 1983 claims in federal court for supplementary relief beyond that sought in related state court proceedings. *See, e.g.*, Cimasi v. City of Fenton, Missouri, 838 F.2d 298, 299 (8th Cir. 1988) (applying state law to preclude damage claim that could have been raised in earlier state court injunctive proceeding); Jarrett v. Gramling, 841 F.2d 354, 357-59 (10th Cir. 1988) (applying state law to dismiss a § 1983 action that state law required be joined with earlier mandamus proceeding); Healy v. Town of Pembroke Park, 831 F.2d 989, 991-93 (11th Cir. 1987) (following state law and refusing to preclude § 1983 claim for damages not available to employee reinstated in State Public Employees Relations Commission proceeding).

The Ninth Circuit decision discussed in the language quoted from *Punton*, *see supra* text accompanying note 99, also looks to state law. *See* Clark v. Yosemite Community College Dist., 785 F.2d 781, 784 (9th Cir. 1986) (applying California primary rights doctrine to preclude plaintiff from bringing § 1983 suit seeking additional relief after successful state court mandamus proceeding).

not academic controversies and suggested that the constitutionality of the discharge was moot once the plaintiff was restored with back pay.[103] Nonetheless, the court conceded that the issue could be heard if the claim for money damages was viable but, relying on *Punton*, concluded that supplemental relief was not available. Thus, properly read, the *Campbell* decision embraces a federal election of remedies doctrine under which section 1983 plaintiffs may not seek supplemental relief after obtaining limited relief in state court.

The *Campbell* decision is seriously flawed.[104] In purporting to rely on *Punton*, the Sixth Circuit ignored the preclusion principles upon which *Punton* relied.[105] Instead, the court took the *Punton* election of remedies language out of context and failed to acknowledge the relevance of the state law of preclusion. Thus, the *Campbell* court never examined how Michigan courts applying Michigan law of claim preclusion would treat an employee's post-reinstatement suit for damages.[106]

The Sixth Circuit, however, should be more sensitive to the borrowing principles that the Supreme Court's preclusion decisions require federal courts to apply. For example, in *Migra*

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103. 829 F.2d at 580.

104. *Accord* M. SCHWARTZ & J. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 9.5 (Supp. 1988).

105. *Punton* itself is less than a model of clarity. Although there is some question as to whether the Ninth Circuit actually applied the Washington law of claim preclusion or its own federal election of remedies doctrine, *see* 805 F.2d at 1383 n.1 (Norris, J., dissenting), the *Punton* court at least looked to claim preclusion principles and asked whether Washington law permitted the plaintiff to join his § 1983 claim for supplementary relief in the state court proceeding. *Punton*, therefore, is nothing more than a somewhat unusual application of the borrowing principles that determine the preclusive effect of state court judgments in subsequent federal court proceedings.

106. Had the Sixth Circuit applied Michigan law of claim preclusion, it is unlikely that it would have reached the same conclusion. Although Michigan maintains a unique compulsory joinder of claims policy, *see* MICH. COURT RULE 2.203(A)(1) (1986), Michigan requires an opponent to object by pleading, by motion, or at a pretrial conference to the failure to join all claims. The failure to raise this issue is a waiver of the defense and the "judgment . . . only merge(s) the claims actually litigated." *See* MICH. COURT RULE 2.203(A)(2) (1986). Thus, under Michigan law, a party who obtained only partial relief in a state court proceeding is not necessarily precluded from seeking supplemental relief in a second state court proceeding.

v. Warren City School District,[107] a Sixth Circuit case arising in Ohio, the district court relied on Sixth Circuit and other federal court decisions applying both federal and state law to preclude the plaintiff, a school administrator who had unsuccessfully litigated a contract claim in state court, from litigating a section 1983/first amendment claim in federal court. In remanding, the *Migra* Court made clear that state not federal law governed the preclusive effect of state court judgments in subsequent federal court proceedings.

Campbell is a prime example of judicial activism in the service of a conservative agenda of closing the doors to the federal courts.[108] The election of remedies-preclusion issue decided in *Campbell* was raised by the court. This issue, however, is not jurisdictional, and there is a substantial question as to the propriety of courts raising such issues *sua sponte*.[109] Moreover, the merits of the underlying constitutional issues in *Campbell* could not have been avoided because the employee's husband, a co-plaintiff in the federal court section 1983 action, was not a party to the earlier proceedings. Thus, the door-closing holding of *Campbell* could easily have been avoided.

Campbell was also an opinion waiting for a case. An almost identical set of events had taken place a few months earlier in *McMaster v. Cabinet for Human Resources*,[110] an action by discharged Kentucky governmental employees who were reinstated with full pay by a state agency. The *McMaster* plaintiffs also sought additional relief for emotional injuries and attorney fees in a federal court section 1983 action, and the Sixth Circuit at

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107. 465 U.S. 75 (1984).

108. *See* Marrese v. American Academy of Orthopaedic Surgeons, 726 F.2d 1150, 1175 (7th Cir. 1984) (en banc) (Cudahy, J., dissenting) (characterizing a similar attempt to give state court judgments a greater preclusive effect than state courts would give them as "judicial activism in the service of judicial abdication"), *rev'd* 470 U.S. 330 (1985).

109. Res judicata is expressly listed as an affirmative defense in FED. R. CIV. P. 8(c) and election of remedies fits the classification in 8(c) of "any other matter constituting an avoidance or affirmative defense." Thus, the defendants' failure to raise these defenses should have constituted a waiver of them. *But see* Agg v. Flanagan, 855 F.2d 336, 344 (6th Cir. 1988) (Conte, J., dissenting) (federal courts may raise preclusion issues *sua sponte*).

110. 824 F.2d 518 (6th Cir. 1987).

oral argument raised *sua sponte* whether *Punton* precluded relief.[111]

The *McMaster* court, however, was unwilling to accept the federal election of remedies doctrine subsequently embraced in *Campbell*.[112] Nonetheless, Judge Nelson, a member of the *McMaster* panel and the author of the *Campbell* opinion, filed a concurring opinion. This concurring opinion in *McMaster* previewed *Campbell*. It relied on the same quoted language from *Punton* and applied a federal election of remedies doctrine to argue that the reinstated employees should not be permitted to seek supplemental relief in a section 1983 federal court action.[113]

In response to this critique, one might argue that there *should* be a federal election of remedies doctrine applicable to section 1983 actions regardless of the law of the forum state.[114] Such a

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111. *Id.* at 524-25.

112. The Sixth Circuit decided *McMaster* on the substantive ground that the dismissal could not be characterized as a malicious prosecution claim actionable under the substantive due process protections of the fourteenth amendment. 824 F.2d at 522-23.

113. Judge Avern Cohn, a district court judge sitting by designation and the author of the panel opinion in *McMaster*, responded to Judge Nelson by noting that "[t]here is simply no need to discuss election of remedies or claim preclusion" since the *McMaster* plaintiffs had based their § 1983 claim on the malicious initiation of charges without probable cause. Admonishing his more activist colleague, Judge Cohn observed that the plaintiffs' "narrowly drawn claim was an obvious effort to avoid pleading an attack on the act of dismissal itself. . . . We should, and do in the majority opinion, respect the narrowness of plaintiffs' claim." *Id.* at 523 n.6.

114. Election of remedies doctrines, however, are only applicable where parties have chosen to pursue inconsistent positions, and courts generally view them as harsh doctrines that should rarely be applied. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 13-15 (1973). Moreover, a leading federal treatise has sharply criticized the use of "the election [of remedies] label . . . to explain decisions that today seem better explained in terms of claim preclusion." 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4476 (1981). *See also id.* ("There is no more modern need for election [of remedies] reasoning in this area than there is in respect to the common law forms of action."). Thus, it is unlikely that the Supreme Court would permit the adoption of an election of remedies doctrine that so easily permitted courts to circumvent the preclusion principles contained in 28 U.S.C. § 1738. *But cf.* University of Tenn. v. Elliott, 478 U.S. 788, 794-95 (1986) (relying on federal common law to apply a doctrine of administrative res judicata to § 1983 litigation).

position, however, is inconsistent with the preclusion cases under which federal courts follow state law and may not give state court judgments greater preclusive effect than state courts would give them.[115]

B. *False Arrest Actions and Prior Convictions*

The Sixth Circuit's tendency to apply preclusion principles without regard to the law of the forum state was manifested again in *Walker v. Schaeffer*[116] in which the court applied issue preclusion to nolo contendre pleas and guilty findings to estop section 1983 plaintiffs from asserting that police officers acted without probable cause in arresting and imprisoning them.

In deciding *Walker*, the Sixth Circuit paid lip service to *Migra* and the borrowing principles that govern preclusion issues. Although the court found that Ohio law treated guilty findings as constituting an absolute defense in a false arrest action,[117] it also concluded that federal law barred false arrest claims in such circumstances. In reaching this conclusion, the Sixth Circuit explicitly relied on *Cameron v. Fogarty*[118] in which the Second Circuit denied any reliance on preclusion principles in applying the common law rule that precluded actions for false arrest or malicious prosecution by criminal defendants who were subsequently convicted of the underlying offenses. Although the *Walker* court somehow characterized this defense as a "qualified immunity," the Sixth Circuit really borrowed the common law principle "that where law enforcement officers have made an arrest, the resulting conviction is a defense to a section 1983

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115. *See* Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 383 (1985). In *Migra*, Justice White addressed his argument for a policy in which federal courts could give state court judgments greater preclusive effect to Congress, because he saw any other position foreclosed by prior Supreme court decisions. *See* 465 U.S. at 88 (White, J., concurring).

116. 854 F.2d 138 (6th Cir. 1988).

117. The court relied on the rarely cited fifty year old intermediate appellate court decision, *see* Ryan v. Conover, 59 Ohio App. 361, 18 N.E.2d 277 (1938), and a legal encyclopedia. *See* 45 OHIO JUR.3D *False Imprisonment* § 10 (1983) ("A guilty finding in a criminal proceeding, whether by trial or plea, constitutes an absolute defense to an action for false arrest or false imprisonment."). *Id.* at 165.

118. 806 F.2d 380 (2d Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987).

action asserting that the arrest was made without probable cause."[119]

Neither the Second nor the Sixth Circuits, however, explained how this common law requirement found its way into the section 1983 cause of action,[120] and, most disturbingly, the *Walker* Court did not address or even acknowledge its own earlier rejection of this limitation on the scope of section 1983.[121] Therefore, even though *Walker* can be explained by the court's reliance on Ohio law, the broad language in *Walker* may be the basis for subsequent decisions in other states limiting the scope of section 1983 without regard to state preclusion law.

IV. IMMUNITIES

The most commonly litigated section 1983 remedial issues in the Sixth Circuit involve the availability of immunities in individual capacity section 1983 damage actions. This is a direct result of Supreme Court decisions redefining the qualified immunity and transforming it into a right to not stand trial.[122] These decisions have radically altered the nature of section 1983 damage litigation by thrusting the immunity issue to the forefront of litigation, by limiting discovery, and by permitting interlocutory appeals of decisions rejecting immunity defenses.

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119. 854 F.2d at 143 (quoting *Cameron*, 806 F.2d at 388-89).

120. *See infra* notes 152-56 and accompanying text for a discussion of the use of common law principles to define § 1983 claims. Nor did the Second or Sixth Circuits even acknowledge Haring v. Prosise, 462 U.S. 306 (1983), in which the Supreme Court applied state preclusion principles to permit a § 1983 damage action for an illegal search after a guilty plea.

121. In Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968) (per curiam), the Sixth Circuit refused to dismiss a § 1983 false arrest complaint because the plaintiff was later convicted. Although the court ultimately dismissed the case on statute of limitations grounds, it first ruled that a criminal conviction did not mandate dismissal, stating that "the simple fact of an unreversed state court conviction cannot by itself require dismissal [of a civil rights action]." *Id.* at 233. *Accord* Brown v. Edwards, 721 F.2d 1442, 1448 n.8 (5th Cir. 1984); Greer v. Turner, 603 F.2d 521, 522 (5th Cir. 1979); Guerro v. Mulhearn, 498 F.2d 1249, 1254 (1st Cir. 1974). *Cf.* Singleton v. Perry, 45 Cal.2d 489, 492, 289 P.2d 794, 798 (1955) (conviction does not prevent suit for false arrest under state law).

122. *See* Mitchell v. Forsyth, 472 U.S. 511, 525-27 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982).

The federal courts, including the Sixth Circuit, have been addressing three principal clusters of immunity issues. First, courts are continuing to review the functions performed by various public officials to determine whether such officials are entitled to absolute or qualified immunities. Second, courts are struggling with how to approach immunity issues at trial and in interlocutory appeals. Finally, courts are being forced to decide on limited factual records quasi-substantive issues involving whether the federal constitutional rights at issue were "clearly established" when actions accrued.[123]

A. *The Threshold Question: Determining the Applicable Immunity*

The Supreme Court has held that the common law absolute immunity from damage suits available to judges and legislators was not abrogated by section 1983[124] and has applied a functional test to determine when public officials are entitled to an absolute immunity. Thus, judges acting within their jurisdiction to perform judicial acts have an absolute immunity,[125] but judges acting in an administrative capacity to make hiring decisions do not.[126] Likewise, prosecutors performing prosecutorial functions are sufficiently close to the judicial process to entitle them to an absolute immunity,[127] but prosecutors engaged in purely investigative law enforcement activities have only the qualified immunity available to police officers.[128]

During the two-year period under study, the Sixth Circuit decided several cases involving the threshold question of which

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123. Although § 1983 is available to enforce federal statutory claims, see Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 429-30 (1987); Maine v. Thiboutot, 448 U.S. 1, 4-8 (1980), qualified immunity issues also arise, albeit rarely, in cases not involving constitutional claims.

124. Pierson v. Ray, 386 U.S. 547, 554 (1967) (judges); Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (legislators).

125. *See* Stump v. Sparkman, 435 U.S. 349, 355-57 (1978).

126. *See* Forrester v. White, 108 S. Ct. 538, 544-46 (1988).

127. *See* Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

128. *See* Hampton v. Hanrahan, 600 F.2d 600, 631-33 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980). *See also* Joseph v. Patterson, 795 F.2d 549, 555-57 (6th Cir. 1986) (refusing to apply *Imbler* to certain investigative activities), *cert. denied*, 481 U.S. 1023 (1987).

immunity was available to particular defendants. Most of these cases involved whether officials were entitled to an absolute immunity from section 1983 damage awards, but one involved the application of immunity principles to private defendants acting under color of state law.

1. *Public Officials*

In *Sparks v. Character and Fitness Committee of Kentucky*[129] the Sixth Circuit addressed whether judicial and other defendants in a section 1983 action by an unsuccessful applicant to the Kentucky bar were entitled to absolute judicial immunity. Relying on federal court cases, the Sixth Circuit classified the act of passing on the credentials of bar applicants as a judicial act when performed by a judge, thus entitling the Chief Justice of the Kentucky Supreme Court to absolute judicial immunity.[130] The court then held that quasi-judicial acts performed by non-judicial officials with delegated responsibility for the bar admission process were part of the judicial process and functionally equivalent to judicial duties, thus entitling members of the committee and staff that administer the admission process to absolute judicial immunity.

Sparks was decided shortly before the Supreme Court, in *Forrester v. White*,[131] applied a functional test to deny a judge an absolute immunity for the non-judicial administrative act of firing a probation officer. Consequently, the Court remanded *Sparks* for further consideration in light of *Forrester*, but the Sixth Circuit adhered to its earlier decision granting judges and

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129. 818 F.2d 541 (6th Cir. 1987), *vacated*, 108 S. Ct. 744 (1988), *adhered to on remand*, 859 F.2d 428 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1120 (1989).

130. 818 F.2d at 543. The Sixth Circuit relied on Chief Justice Taney's statement that "it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed." *Id.* (quoting *Ex parte* Secombe, 60 U.S. (19 How.) 9, 13 (1856)). The court also looked to state law and observed that the Kentucky Constitution charged the Kentucky Supreme Court with the duty to "govern admission to the bar and the discipline of members of the bar." KY. CONST. § 116 (1976).

131. 108 S. Ct. 538 (1988).

other persons in the bar admission process an absolute immunity.[132]

In taking this position, the Sixth Circuit relied on the availability of an appeal process for reviewing adverse decisions on bar admission,[133] the Supreme Court's grant of judicial immunity for disbarment proceedings,[134] and the traditional responsibility of courts for determining bar membership.

In *Shelly v. Johnson*[135] the Sixth Circuit addressed the immunity of prison hearing officers. In *Cleavinger v. Saxner*[136] the Supreme Court had denied members of an Indiana prison disciplinary committee an absolute judicial immunity because they did not perform a classic adjudicatory function and lacked the independence and neutrality associated with judges or others performing judicial functions. In *Shelly,* however, the Sixth Circuit concluded that state law gave prison hearing officers in Michigan the type of independence and responsibility that was consistent with adjudicatory functions. Thus, the *Shelly* court held that the defendants were entitled to absolute immunity from suits by inmates for actions taken as hearing officers.

In *Alioto v. City of Shively, Kentucky*[137] the court addressed an issue left open in *Briscoe v. LaHue*,[138] and held that police officers who testify before grand juries are entitled to absolute immunity despite the allegations of a conspiracy to give false and incomplete testimony.

In *White v. Gerbitz*[139] in an alternative holding the Sixth Circuit extended absolute immunity to the prosecutors responsible

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132. 859 F.2d 428 (6th Cir.), *on remand from* 108 S. Ct. 744 (1988). *See also* Foster v. Walsh, 864 F.2d 416, 417-18 (6th Cir. 1988) (holding that a municipal court clerk responsible for the non-distrectionary act of issuing a warrant performed a judicial function to which absolute immunity attached).

133. 859 F.2d at 433. In *Forrester* the Supreme Court pointed to the absence of an appeal process to justify denying judges an absolute immunity for employment decisions. 108 S. Ct. at 544.

134. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354-56 (1871) (providing absolute judicial immunity in a case involving the disbarment of an attorney).

135. 849 F.2d 228 (6th Cir. 1988).

136. 474 U.S. 193 (1985).

137. 835 F.2d 1173 (6th Cir. 1987).

138. 460 U.S. 325, 329 n.5 (1983).

139. 860 F.2d 661 (6th Cir. 1988).

for the plaintiff's arrest and incarceration for 288 days as a "material witness" but denied both an absolute and a qualified immunity to the prosecutor who failed to act in a timely fashion to secure the plaintiff's release after the court ordered him to work out the details of the release.

Finally, in *Haskell v. Washington Township*,[140] the Sixth Circuit reversed an earlier decision[141] and held that in light of *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*[142] local legislators are entitled to absolute immunity insofar as they are acting in a legislative capacity. Nonetheless, the court ruled that administrative activities, including enforcing zoning ordinances, are only subject to a qualified immunity. Moreover, the court noted that "absolute immunity does not extend to even traditionally legislative actions of officials taken either in bad faith, because of corruption, or primarily in furtherance of *personal* instead of public interests."[143]

2. *Private Defendants*

One of the most interesting immunity cases decided during this period by the Sixth Circuit was *Duncan v. Peck*.[144] This was the latest chapter in a protracted dispute involving a section 1983 claim against a private party who used an unconstitutional Ohio proceeding to attach the plaintiff's property. Section 1983 was available under *Lugar v. Edmondson Oil Co.*,[145] which liberally construed the "color of law" requirement in cases involving joint participation, and the immunity issue was whether the private defendant could claim a qualified immunity based on his reliance on his attorney's advice about the constitutionality of the state attachment proceeding.[146]

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140. 864 F.2d 1266 (6th Cir. 1988).

141. Nelson v. Knox, 256 F.2d 312, 314-15 (6th Cir. 1958).

142. 404 U.S. 391 (1979).

143. 864 F.2d at 1278.

144. 844 F.2d 1261 (6th Cir. 1988).

145. 457 U.S. 922 (1982).

146. *Lugar* had expressly reserved whether private defendants were entitled to a qualified immunity. *Id.* at 942 n.23.

Noting the split in the circuits,[147] the Sixth Circuit held that there is no qualified immunity for private defendants in section 1983 actions. Nonetheless, the court distinguished the objective qualified immunity available in section 1983 actions from a fact-specific subjective "good faith defense"[148] and concluded that the common law good faith defense to malicious prosecution and wrongful attachment actions should be available in section 1983 suits. Thus, the court held that parties who rely in good faith on the advice of their attorneys to invoke presumptively valid state statutes have a good faith defense.[149]

At first blush, there may not seem to be any difference between the qualified immunity that the Sixth Circuit rejected and the good faith defense it found available, but the distinction is really quite important in the conduct of section 1983 litigation. An immunity entitles a defendant to avoid standing trial,[150] but a good faith defense is simply one of a number of defenses that a defendant may raise at trial.[151] Moreover, an immunity that is rejected by a trial court may be the subject of an interlocutory appeal, but a defendant who fails to secure the dismissal of an action based on a good faith or other affirmative defense must stand trial and is not entitled to an interlocutory appeal on the validity of the defense.

The use of a good faith defense borrowed from state law also raises questions about the use of state law to define the elements of the section 1983 cause of action. In looking to state tort law for available defenses, the Sixth Circuit assumed, as it has in

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147. *Compare* Howerton v. Gabica, 708 F.2d 380, 385 n.10 (9th Cir. 1983) (rejecting good faith immunity); Downs v. Sawtelle, 574 F.2d 1 (1st Cir.) (same), *cert. denied*, 439 U.S. 910 (1978), *with* Folsom Inv. Co. v. Moore, 681 F.2d 1032, 1037 (5th Cir. 1982) (applying good faith immunity); Buller v. Buechler, 706 F.2d 844, 850-52 (8th Cir. 1983) (same). The Sixth Circuit also relied on an Eleventh Circuit decision applying a qualified immunity, a position subsequently embraced by the full Eleventh Circuit in Jones v. Preuit & Mauldin, 851 F.2d 1321, 1323-28 (11th Cir. 1988) (en banc), *vacated on other grounds*, 109 S. Ct. 1105 (1989).

148. 844 F.2d at 1266-67.

149. *Id.* at 1267-68.

150. *See* Mitchell v. Forsyth, 472 U.S. 511, 525-26 (1985).

151. The Sixth Circuit in *Duncan* noted that courts that had approved the use of a qualified immunity had done so because of their conclusion that private defendants were entitled to a good faith defense. 844 F.2d at 1266.

its malicious prosecution cases,[152] that the elements of various common law torts have somehow been incorporated into constitutional claims actionable under section 1983. This approach to defining the elements of a section 1983 cause of action, which may sometimes expand and sometimes restrict the section 1983 cause of action, ignores the fact that section 1983 itself confers no rights and that a necessary condition of a viable section 1983 action is a violation of an underlying federal constitutional or statutory right.[153] Moreover, the Supreme Court has repeatedly made clear that state torts must be distinguished from constitutional rights.[154] Thus, in *Baker v. McCollan*,[155] in holding that the mere allegation of false imprisonment did not rise to a constitutional violation, the Court noted that

> [s]ection 1983 imposes liability for violations of rights protected by the Constitution, for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," . . . false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.[156]

Thus, for section 1983 to be available, there must be a violation of federal law, and conduct by public officials that meets state

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152. *See* Coogan v. City of Wixom, 820 F.2d 170, 174 (6th Cir. 1987). The Supreme Court has not decided the extent to which state law defines elements of a § 1983 claim based on malicious prosecution. *See* Conway v. Village of Mt. Kisco, 750 F.2d 205 (2d Cir. 1984), *adhered to*, 758 F.2d 46, 49 (2d Cir. 1985), *cert. dismissed as improvidently granted sub nom.* Cerbone v. Conway, 479 U.S. 84 (1986). *See generally* M. SCHWARTZ & J. KIRKLIN, *supra* note 104, at § 3.6 (1986 & 1988 Supp.).

153. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979).

154. *See* Paul v. Davis, 424 U.S. 693, 701 (1976) (rejecting a broad reading of the fourteenth amendment that would make it "a font of tort law to be superimposed upon whatever systems may already be administered by the States").

155. 443 U.S. 137 (1979).

156. *Id.* at 146.

definitions of such common law torts as assault and battery, false arrest, false imprisonment, defamation, or malicious prosecution does not, standing alone, constitute a constitutional violation actionable through section 1983.

Likewise, state definitions of common law torts should not be used to limit the definition of the constitutional violations actionable through section 1983. The Sixth Circuit in *Duncan*, however, did not explain why elements of common law torts should be incorporated into section 1983 when it approved the use of an element of the analogous common law cause of action as a subjective good faith defense.

Finally, the application of this good faith defense to section 1983 actions against private defendants may have implications that the Sixth Circuit did not address. Qualified immunity defenses in section 1983 action are based on objective factors, but the good faith defense approved in *Duncan* is based on subjective factors, thus making summary judgment less likely and opening defendants' state of mind to discovery.[157] This will present practical problems for defendants in cases such as *Duncan* in which the asserted good faith defense is based on reliance on the advice of counsel. The assertion of such a defense, for example, will subject defendants to some very uncomfortable discovery. Thus, the *Duncan* plaintiff should be able to learn what legal advice was provided by the attorney who represented the private defendant in the original attachment proceeding.[158] Moreover, the attorney on whose advice the defendant relied (and who will also be subject to discovery) may not be able to represent any of the defendants in the section 1983 action.[159]

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157. *See infra* notes 222-27 and accompanying text (discussing relationship between unlawful motive and qualified immunity).

158. Prior to Harlow v. Fitzgerald, 457 U.S. 800 (1982), the assertion of a subjective good faith defense based on advice of counsel was treated by some courts as a waiver of the attorney-client privilege, thus subjecting defendants to discovery concerning the legal advice they received. *See, e.g.*, Hearn v. Rhay, 68 F.R.D. 574, 578 (E.D. Wash. 1975).

159. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7(a)(3) (1983) (not requiring disqualification of lawyer-witness where disqualification would work "substantial hardship on the client"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR-5-102(B) (1981) (permitting lawyer-witness "to continue the representation until it is apparent that his testimony is or may be prejudicial to his client").

B. *Method: Administering the New Qualified Immunities*

The Sixth Circuit has also decided a number of important decisions that help clarify how trial and appellate courts should approach immunity claims in section 1983 litigation.

1. *Interlocutory Appeals*

The federal judicial system, as contrasted to some state judicial systems, does not favor interlocutory appeals,[160] but there have long been both statutory and judge-made exceptions to the final judgment rule.[161] The final judgment rule, however, is no longer the prevailing policy in federal courts for section 1983 immunity issues.

Although interlocutory appeals of decisions denying motions to dismiss or motions for summary judgment are generally not available, the Supreme Court in *Mitchell v. Forsyth*[162] construed the "collateral order" exception to the final judgment rule[163] broadly to permit defendants to file immediate appeals of decisions that deny them absolute immunities and force them to go to trial.[164] In addition, the *Mitchell* Court held that

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160. *See generally* R. MARTINEAU, MODERN APPELLATE PRACTICE § 4 (1983 & Supp. 1987).

161. *See, e.g.*, 28 U.S.C. § 1292 (defining permissible interlocutory appeals). *See also infra* note 163.

162. 472 U.S. 511 (1985). *See also* Nixon v. Fitzgerald, 457 U.S. 731, 742-43 (1982).

163. Under this exception, a small class of interlocutory orders are immediately appealable when they (1) present serious and unsettled questions, *see* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 547 (1949); and (2) "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and . . . [are] effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (citing Abney v. United States, 431 U.S. 651, 658 (1977); and United States v. MacDonald, 435 U.S. 850, 855 (1978)).

164. By treating immunity defenses as giving certain defendants a right to avoid standing trial rather than a defense to be asserted at trial, the Court has justified not only the expanded use of interlocutory appeals but also limitations on discovery. *See* Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982). *But see* Anderson v. Creighton, 107 S. Ct. 3034, 3042 (1987) (describing qualified immunity as "fact-specific" and permitting limited immunity-related discovery).

interlocutory appeals are also available when a qualified immunity "turns on an issue of law."[165]

Mitchell, however, left the lower federal courts with a range of unanswered questions on how to approach immunity and related issues. For example, *Mitchell* left open whether interlocutory appeals of immunity issues are available when injunctive relief is sought in addition to damages.[166] Since the relevant immunities, both absolute and qualified, protect defendants from standing trial, defendants against whom injunctive relief is sought will have to stand trial regardless of the presence of immunity defenses. Thus, some courts do not permit such defendants to file interlocutory appeals to review denials of immunity.[167]

There is also a great deal of uncertainty as to how courts should apply *Mitchell*, and the Sixth Circuit seems acutely aware of the spectre of multiple interlocutory appeals on immunity issues. Consequently, in a series of section 1983 cases, the Sixth Circuit has addressed various aspects of administering the new regime of qualified immunities and interlocutory appeals.

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165. 472 U.S. at 530.

166. *Id.* at 519 n.5.

167. *See* Prisco v. United States Dep't of Justice, 851 F.2d 93, 96 (3d Cir. 1988) (refusing to permit interlocutory appeals on immunity issues in *Bivens* actions in which defendants are sued for both damages and injunctive relief). The Fourth Circuit, which had previously taken this position, *see* Bever v. Gilbertson, 724 F.2d 1083 (4th Cir.), *cert. denied*, 469 U.S. 948 (1984), has now abandoned it and permits interlocutory appeals despite the presence claims for injunctive relief. *See* Young v. Lynch, 846 F.2d 960, 962-63 (4th Cir. 1988).

The Sixth Circuit, however, approved the availability of interlocutory appeals in such circumstances in Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987).

> The exposure to personal liability in damages and the potential need for retention of private counsel to protect against that risk is quite different from the problem faced by an official who is charged only in an official capacity. . . . We believe that the rationale of *Mitchell* . . . should apply equally whether only personal liability for damages is sought or whether added relief against the defendant in his official capacity is also sought. *Id.* at 306.

Other circuits that have addressed this issue also permit interlocutory appeals in these circumstances. *See* M. SCHWARTZ & J. KIRKLIN, *supra* note 104, § 7.18 (Supp. 1988), and cases cited therein.

In *Kennedy v. City of Cleveland*,[168] a 1986 case, the Sixth Circuit, in reaffirming the power of trial courts to set time limits for managing litigation, was fully aware that those time limits could restrict the availability of interlocutory appeals. Noting the "delay and inconvenience" to the plaintiff and to the court caused by even "good faith" interlocutory appeals of immunity issues, the court applied "the same rules of waiver and procedural default as have been traditionally applied to other cases."[169]

Because immunities, whether qualified or absolute, are affirmative defenses that may be waived,[170] the Sixth Circuit in *Kennedy* reasoned that defendants may be required to assert their immunities at various stages of the proceedings in order to take full advantage of the protections that flow from such immunities.

For example, defendants may raise immunity defenses in motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[171] Normally, 12(b)(6) motions can be made at any time,[172] but the *Kennedy* court approved trial judges' "establish[ing] a time for the filing of motions challenging the sufficiency of the pleadings, during which discovery will be stayed unless good cause can be shown to the contrary."[173] Thus, the court limited the ability of defendants to use motions to dismiss to cut off discovery.[174] Likewise, the *Kennedy* court applied the 30-day time limit for filing appeals under Rule 4(a) Federal Rules of Appellate Procedure to interlocutory appeals and held that "if the order is appealable at all, it must be appealed within the time set by law, . . . or the right must be considered to have been waived."[175]

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168. 797 F.2d 297 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987).

169. *Id.* at 300.

170. *See* Gomez v. Toledo, 446 U.S. 635 (1980).

171. Although the Court has expressed a preference for resolving immunity issues on summary judgment, *see Harlow*, 457 U.S. at 815-19, such defenses may also be raised in motions to dismiss. *See*, Martin v. City of Eastlake, 686 F. Supp. 620, 627 (N.D. Ohio 1988).

172. *See* FED. R. CIV. P. 12(h)(2).

173. 797 F.2d at 300.

174. *Id.* at 301.

175. *Id.*

Because defendants may file interlocutory appeals when motions for summary judgment on immunity grounds are denied, the *Kennedy* court was faced with the possibility of approving the availability of multiple interlocutory appeals. In *Kennedy* the trial court denied a motion for summary judgment arguably based on immunity grounds, and the defendants did not seek interlocutory review.[176] Subsequently, one of the defendants filed a supplemental motion for summary judgment, but the trial court struck that motion as not timely. The issue posed by the supplemental motion for summary judgment therefore was whether it too was appealable.

In upholding the denial of the motion for summary judgment, the Sixth Circuit deferred to the discretion of the trial court. In taking this position, the court seemed to acknowledge that the availability of supplemental motions for summary judgment would, in some cases, permit defendants to take additional interlocutory appeals. In *Kennedy,* however, "no new facts or previously unavailable legal arguments were offered and no good cause . . . [was] shown to excuse the inordinate delay" in filing the supplemental motion for summary judgment.[177]

Nonetheless, despite the effort by the Sixth Circuit in *Kennedy* to give trial courts broad power to manage section 1983 litigation and set time limits that may restrict the availability of interlocutory appeals, it is still possible for defendants to take three interlocutory appeals of immunity rulings.

First, a defendant may file a motion to dismiss claiming that the facts alleged in the complaint do not state a violation of clearly established federal law. If that motion fails, a defendant may file a timely interlocutory appeal under *Mitchell.* Second, a defendant may test the facts in a summary judgment motion.[178] The trial court will then review the uncontroverted facts that emerge from an examination of the competing affidavits to determine whether the defendant has an immunity defense, and the defendant may file a second interlocutory appeal if the court

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176. At the time the first motion for summary judgment in *Kennedy* was denied, the Supreme Court had not yet decided *Mitchell,* and thus it was not clear that an interlocutory appeal was available. *See id.* at 304.

177. *Id.* at 305.

178. At this point the plaintiff may be limited to immunity-related discovery. *See supra* note 164.

rejects the immunity.[179] Finally, the parties may engage in full discovery, which may develop new facts and new legal theories, and may justify a renewed or supplemental motion for summary judgment, the denial of which may give rise to a third interlocutory appeal.[180]

Although *Kennedy* seems to permit multiple interlocutory appeals in some cases, the Sixth Circuit has attempted to place some limits on their availability. In *Sinclair v. Schriber*[181] the trial court denied motions for summary judgment made by defendant FBI agents on the basis of a qualified immunity without prejudice and ordered discovery. The defendants appealed from this order, but the Sixth Circuit held that an order denying summary judgment without prejudice (and thus permitting discovery) was not an appealable interlocutory order.[182]

It is easy to understand the Sixth Circuit's discomfort at the spectre of multiple interlocutory appeals on immunity issues. Nonetheless, that is what the Supreme Court has wrought, and until and unless the Court reexamines the issue, or Congress intervenes, defendants in appropriate cases are entitled to as many as three interlocutory appeals on the immunity issues.[183] Moreover, it is difficult to understand why an order denying summary judgment, without prejudice, based on an immunity defense is not immediately appealable under *Mitchell*. All orders denying motions for summary judgment are without prejudice

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179. A defendant who violated clearly established federal law could also claim to fall within the *Harlow* "extraordinary circumstances" exception. *See infra* note 193. If unsuccessful at the trial court, the defendant could include such a claim in an interlocutory appeal. *See* Balcerzak, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126, 145 n.74 (1985).

180. Although the law of the case will apply to prevent defendants from obtaining review of issues previously reviewed, the shifting nature of the facts involving both the alleged violations of law and the particular defendants' involvement will often present different legal issues in each appeal.

181. 834 F.2d 103 (6th Cir. 1987). *Sinclair* was an action against FBI agents under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), but the Supreme Court applies the immunity principles in § 1983 and *Bivens* actions interchangeably. *See Harlow*, 457 U.S. at 818 n.30; Butz v. Economou, 438 U.S. 478, 504 (1978).

182. 834 F.2d at 104-05.

183. *See supra* notes 178-80 and accompanying text.

in the sense that the court has found that a genuine material issue of fact entitles the party opposing summary judgment to go to trial. Denials of such motions do not cut off discovery, and when additional factual material is obtained, a party whose motion for summary judgment was denied may generally file a new motion for summary judgment.[184] Moreover, the right to an interlocutory appeal on an immunity issue is part and parcel of defendants' right to be protected from discovery, and the Sixth Circuit's decision in *Sinclair* to deny interlocutory review "until *after* discovery is to deny a key part of their claims irrevocably and for all time."[185]

2. *Burdens and Decision-Makers*

The Sixth Circuit has also addressed the allocation of the various burdens on immunity issues and the respective roles of the judge and jury in deciding such issues.

In *Dominique v. Telb*[186] the district court refused to dismiss on immunity grounds a section 1983 damage action against a Michigan Department of Corrections official who was sued because of his role in filing an unlawful detainer. In reviewing the denial of the immunity in an interlocutory appeal, the Sixth Circuit discussed the allocation of the various burdens on the immunity issue. The trial court had placed the burden of going forward on the defendant once he raised the qualified immunity defense. The Sixth Circuit reversed, noting that although qualified immunity is an affirmative defense, plaintiffs have an initial pleading burden of demonstrating that the defendant's alleged conduct violated clearly established law.[187] Despite the Supreme

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184. The Second Circuit takes the position that the refusal to address or decide a motion for summary judgment is a de facto denial of the motion and subject to an interlocutory appeal. *See* Francis v. Coughlin, 849 F.2d 778, 780 (2d Cir. 1988).

185. *Sinclair*, 834 F.2d at 106 (Nelson, J., dissenting).

186. 831 F.2d 673 (6th Cir. 1987).

187. *Id.* at 676. In taking this position, the *Dominique* court relied on Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), in which the Sixth Circuit had stated that

> the plaintiff must plead facts which, if true, describe a violation of a clearly established statutory or constitutional right of which a reasonable

Court's holding in *Gomez v. Toledo*[188] that qualified immunity was an affirmative defense, the Sixth Circuit treated the Court's more recent immunity decisions as placing this pleading burden on plaintiffs.[189] Thus, the court effectively requires plaintiffs who are pursuing section 1983 damage claims to forsake the liberal notice pleading policies of the federal rules and file complaints that contain enough facts to demonstrate that at the time the action accrued federal law was clearly established.

The Sixth Circuit in *Dominique* also held that the district court had erred in treating the qualified immunity defense as raising a factual issue that precluded a grant of summary judgment.[190] In *Harlow v. Fitzgerald*[191] the Supreme Court defined the immunity in objective terms by asking whether a defendant knew or should have known that his action violated the plaintiff's clearly established federal rights.[192] This alternative formulation, however, could be seen raising both the factual question of what the defendant actually knew[193] and the legal question of whether

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public official, under an objective standard, would have known. The failure to so plead precludes a plaintiff from proceeding further, even from engaging in discovery, since the plaintiff has failed to allege acts that are outside the scope of the defendant's immunity.

Id. at 299. The *Kennedy* court, however, did not discuss or attempt to reconcile its allocation of burdens with the Supreme Court decision in Gomez v. Toledo, 446 U.S. 635 (1980), but the *Dominique* court addressed this issue. 831 F.2d at 677.

188. 446 U.S. 635 (1980). The Supreme Court in *Gomez* held that qualified immunity was an affirmative defense that the defendant must raise. Justice Rehnquist, however, noted that the Court did not address the allocation of the non-pleading burdens. *See id.* at 642 (Rehnquist, J., concurring).

189. Prior to *Kennedy* and *Dominique*, the Sixth Circuit had also held that the burden of proof on affirmative defenses rested with the defendants. *See* Alexander v. Alexander, 706 F.2d 751 (6th Cir. 1983); Wolfel v. Sanborn, 666 F.2d 1005 (6th Cir.), *vacated on other grounds*, 458 U.S. 1102 (1982). *Kennedy* and *Dominique*, however, appear to have placed that burden on plaintiffs without addressing or even citing the earlier decisions by other Sixth Circuit panels.

190. 831 F.2d at 677.

191. 457 U.S. 800 (1982).

192. *See id.* at 819.

193. This is not a subjective question as to the defendant's motivation but rather an objective, fact-specific question as to what the defendant knew. Under

the law was sufficiently clearly established at the time the action accrued so as to impute knowledge of the law to the defendant. Nonetheless, the Sixth Circuit in *Dominique*, held that the qualified immunity defense only raises "the purely legal question of whether the law at the time of the alleged action was clearly established in favor of the plaintiff."[194] Thus, *Dominique* makes clear that courts, not juries, are to decide the legal question of whether the law was clearly established.[195]

The Sixth Circuit has also made clear that courts deciding a qualified immunity issue may not limit their review to the pleadings. For example, in *Poe v. Haydon*[196] the depositions contained undisputed facts, and the Sixth Circuit held that a trial court erred by limiting its inquiry on the immunity issue to the pleadings and by not reviewing the deposition testimony.[197]

3. *Underlying Rights v. Defendants' Involvement*

The Supreme Court in *Anderson v. Creighton*[198] stated that the focus of the immunity inquiry is not the abstract right but a more particularized right, "[t]he contours [of which] . . . must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[199] Nonetheless, it is still sometimes unclear whether courts approaching immunity

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Harlow, in "extraordinary circumstances" the *defendant* may introduce subjective factors to temper the objective test and show that "he neither knew nor should have known of the relevant legal standard." *Id.*

194. 831 F.2d at 676.

195. Nonetheless, under the requirements of the seventh amendment, the jury is responsible for resolving the underlying factual issues on which immunities depend.

196. 853 F.2d 418 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 788 (1989).

197. 853 F.2d at 426. Thus, the Sixth Circuit joins the Seventh Circuit, which in Green v. Carlson, 826 F.2d 647 (7th Cir. 1987), looked to the uncontested or uncontroverted facts in the interlocutory appeal. This position rejects the decision of the First Circuit in Bonitz v. Fair, 804 F.2d 164 (1st Cir. 1986), but the First Circuit itself appears to be reexamining its position. *See* Mendez-Palov v. Rohena-Bentacourt, 813 F.2d 1255, 1259-60 (1st Cir. 1987) (permitting review of uncontested facts where plaintiff's allegations are sketchy).

198. 107 S. Ct. 3034 (1987).

199. *Id.* at 3039.

issues should focus on the underlying federal rights (and whether they are clearly established) or on the involvement of the defendants in the allegedly illegal activity.

This problem, which also exists for trial courts, arose in *Ramirez v. Webb*,[200] a *Bivens* action against Federal Immigration and Naturalization Service agents based on an allegedly illegal search. The trial court denied the defendants' motions for summary judgment based on qualified immunity, but the Sixth Circuit reversed, holding that the search warrant did not violate clearly established federal law governing the specificity of the persons or places to be searched. Thus, the agents who participated in the search were entitled to a qualified immunity.

With respect to other agents, whose unrefuted affidavits denied all knowledge of and participation in the alleged specific acts of misconduct, the trial court construed *Mitchell* as entitling defendants to summary judgment if there was no genuine issue as to their involvement.[201] Nonetheless, because the trial court did not analyze the summary judgment issue for these defendants in terms of qualified immunity, the Sixth Circuit held that this issue was not ripe for interlocutory review. In distinguishing proceedings on immunity issues at the trial and appellate levels, the Sixth Circuit seems to be suggesting that the right to not stand trial implicit in the availability of an immunity does not extend broadly to all defenses. Thus, defendants who claim to be immune because they did not engage in the alleged acts rather than because federal law was not clearly established may not be able to obtain interlocutory review and may have to present their non-immunity defenses at trial.

Some courts have dealt with similar issues by recognizing a type of pendent appellate jurisdiction under which federal appellate courts may decide closely related non-immunity issues.[202] For example, the Sixth Circuit in *Feaster v. Miksch*[203] decided an abstention issue in an interlocutory appeal of the denial of a qualified immunity in order to avoid deciding the immunity

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200. 835 F.2d 1153 (6th Cir. 1987).

201. *Id.* at 1159.

202. *See, e.g.*, Craft v. Wipf, 836 F.2d 412, 418 (8th Cir. 1987); Bolden v. Alston, 810 F.2d 353 (2d Cir.), *cert. denied*, 108 S. Ct. 229 (1987).

203. 846 F.2d 21 (6th Cir.), *cert. denied*, 109 S. Ct. 148 (1988).

issue. Nonetheless, the expanded use of pendent appellate jurisdiction has the potential for broadening the collateral order doctrine to the point that the exceptions to the final judgment rule swallow up the rule.[204]

4. *Clearly Established Federal Law*

In *Robinson v. Bibb*[205] the Sixth Circuit addressed how to determine whether federal law is clearly established. *Robinson* involved a section 1983 suit by the administratrix of the estate of a fleeing felon who was shot and killed by a police officer. The shooting took place four days after the Supreme Court decision in *Tennessee v. Garner*,[206] and the defendant claimed that he was not expected to be aware of the changes in the law brought about by *Garner* in this brief period. Thus, he argued that he fell within the "extraordinary circumstances" exception identified by the Court in *Harlow*.[207] The Sixth Circuit, however, after suggesting that the defense "might fall within the exception,"[208] approached this issue by looking at its earlier decision in *Garner* (approximately two years prior to the shooting in *Robinson*) in which it limited the use of deadly force by the police.[209] Thus, the immunity issue in *Robinson* was whether decisions of federal courts of appeals could clearly establish the law and thus deny defendants a qualified immunity.

In addressing this issue, the Sixth Circuit in *Robinson* held that "[i]n order to be clearly established, a question must be decided either by the highest state court in the state where the

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204. Justice White has criticized the use of "pendent appellate jurisdiction" to expand the scope of interlocutory appeals by pointing out that under the "collateral order" exception to the final judgment rule all claims subject to interlocutory review must fall within the exception. *See* San Fillippo v. United States Trust Co., 470 U.S. 1035, 1036 (1985) (White, J., dissenting) ("Any other rule . . . would encourage the assertion of frivolous but appealable claims in order to obtain premature appellate review of otherwise unappealable 'pendent' claims."), *denying cert. to* 737 F.2d 246 (2d Cir. 1984).

205. 840 F.2d 349 (6th Cir. 1988).

206. 471 U.S. 1 (1985).

207. *See supra* note 193.

208. 840 F.2d at 350.

209. *See* Garner v. Memphis Police Dep't, 710 F.2d 240 (6th Cir. 1983), *aff'd sub nom.* Tennessee v. Garner, 471 U.S. 1 (1985).

case arose, by a United States Court of Appeals, or by the Supreme Court."[210] Applying that standard, the court held that the law was clearly established by the Sixth Circuit long before the fatal shooting.[211]

Although the conclusion of the Sixth Circuit that the determination of clearly established law may be made by reference to decisions other than those of the Supreme Court seems sound,[212] the formula adopted by the Sixth Circuit in *Robinson* may be too rigid. By requiring the issue to have been decided by one of the three levels of courts, the Sixth Circuit ignores the possibility that federal law may become clearly established in other ways. For example, the focus on the highest state court ignores the possibility that some state courts of last resort may only rarely review decisions with which they agree[213] as well as the fact that state intermediate appellate court decisions may sometimes not only create binding statewide precedents but also place state officials on notice as to what the law requires.[214] Moreover, the formula appears to absolutely preclude the determination from being based on district court decisions.[215]

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210. 840 F.2d at 351. In taking this position, the Sixth Circuit relied on the Fourth Circuit decision in Wallace v. King, 626 F.2d 1157, 1161 (4th Cir. 1980), *cert. denied*, 451 U.S. 969 (1981).

211. 840 F.2d at 351. *But cf.* Washington v. Starke, 855 F.2d 346, 350 (6th Cir. 1988) (police officer has a qualified immunity for the use of deadly force in 1982 to apprehend a burglar even though the use of deadly force may have violated a police department regulation).

212. *Accord* Benson v. Allphin, 786 F.2d 268 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986); Ward v. San Diego County, 791 F.2d 1329 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 3263 (1987).

213. Moreover, in Ohio only a limited number of opinions of the Ohio Court of Appeals are published. *See generally* Richman & Reynolds, *The Supreme Court Rules for the Reporting of Opinions: A Critique*, 46 OHIO ST. L.J. 313 (1985). Thus, given the absence of state court decisions addressing many of the claims that arise in § 1983 litigation, the Sixth Circuit's insistence on a decision from the highest state court only pays lip service to the notion that state courts have a role in establishing federal standards that state and local officials must follow.

214. *See* R. MARTINEAU, *supra* note 160, § 1.4, for a discussion of different roles of state intermediate courts of appeals.

215. Although it might be rare, a series of persuasive district court decisions should sometimes be sufficient to clearly establish the law and put defendants

On the other hand, the *Robinson* formula permits a single federal appellate court decision to clearly establish federal law. Where that single decision is in the circuit in which the district court is located, as in *Robinson*, the Sixth Circuit's formula seems appropriate. But when the single appellate court decision is from another circuit, it should only rarely be sufficient to clearly establish federal law.

Although the *Robinson* decision approved reliance on court of appeals decisions from outside the Sixth Circuit, the court had earlier rejected such reliance. In *Davis v. Holly*[216] the Sixth Circuit refused to permit a single court of appeals opinion from outside the Sixth Circuit to preclude the application of a qualified immunity in a case involving the failure of prison officials to prevent self-injury, noting that "[a] single idiosyncratic opinion from the court of appeals for another circuit was hardly sufficient to put the defendants on notice of where this circuit or the Supreme Court might come out on the issue in question."[217]

The Sixth Circuit returned to these issues again in *Ohio Civil Service Employees Association v. Seiter*[218] in which it held that prison officials are entitled to a qualified immunity in a suit challenging strip and body cavity searches of prison employees. After reviewing the possible sources of clearly established law, the Sixth Circuit, without citing *Robinson* but relying on *Davis*, explained where courts must look for clearly established law.

> Our review of the Supreme Court's decisions and of our own precedent leads us to conclude that, in the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such "clearly estab-

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on notice. *But see* Hawkins v. Steingut, 829 F.2d 317, 321 (2d Cir. 1987) ("[A] district court decision does not 'clearly establish' the law even of its own circuit, much less that of other circuits.").

216. 835 F.2d 1175 (6th Cir. 1987).

217. *Id.* at 1182. *Accord* Garvie v. Jackson, 845 F.2d 647, 649 (6th Cir. 1988) ("We should focus on whether, at the time defendants acted, the rights asserted were clearly established by decisions of the Supreme Court or the courts of this federal circuit").

218. 858 F.2d 1171 (6th Cir. 1988).

> lished law," these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.[219]

In taking this position, the *Seiter* court appears to establish a dichotomy to govern qualified immunity determinations. When plaintiffs rely on federal appellate court decisions from outside the Sixth Circuit, such decisions must clearly and unmistakably establish the unconstitutionality of the conduct. In other cases, binding circuit court precedents suffice.

In *Seiter*, however, the Sixth Circuit was unable to find anything other than a "mere handful of decisions of other circuit and district courts"[220] prohibiting the complained-of searches. Thus, in light of the Supreme Court's admonition in *Anderson* that courts not operate on too high a level of generality in addressing immunity issues,[221] the Sixth Circuit held that the prison officials had a qualified immunity.

5. *Unlawful Motive and Qualified Immunities*

The Sixth Circuit has also addressed the qualified immunity issue in cases in which the defendant's alleged unlawful motive was an essential element of the claim. Although the Supreme Court has not read a "specific intent"[222] or other intent requirement into section 1983, intent (or its equivalent) is an

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219. *Id.* at 1177.

220. *Id.*

221. 107 S. Ct. at 3038-39.

222. *See* Monroe v. Pape, 365 U.S. 167, 187 (1961). The Sixth Circuit addressed the issue of "specific intent" in the context of jury instructions in Donald v. Wilson, 847 F.2d 1191, 1198-99 (6th Cir. 1988), and held that trial courts in § 1983 actions must instruct the jury that there is no requirement that the defendant had the "specific intent" to deprive the plaintiff of his federal rights. Nonetheless, the court held that it was not reversible error to refuse to give such a requested instruction. *But cf.* Holt v. Artis, 843 F.2d 242, 244-46 (6th Cir. 1988) (failure to give instruction on lack of specific intent requirement in a § 1983 case involving the excessive use of force is reversible error where the court also gave an erroneous instruction treating the qualified immunity defense as a factual issue for the jury based on subjective factors).

element of a substantial number of the underlying constitutional provisions actionable through section 1983.[223]

In *Poe v. Haydon*[224] the Sixth Circuit noted that the Supreme Court decision in *Harlow* adopted an objective rather than a subjective test for defining the qualified immunity. Nonetheless, the court noted that "the objective legal reasonableness of the public employer's conduct will turn, necessarily, on whether that conduct was motivated by racial, sexual or political animus or by a legitimate concern for workplace efficiency."[225] Thus, the Sixth Circuit construed *Harlow* as still forbidding an inquiry into whether the defendant actually knew that his conduct was unlawful but held that "a government official's motive or intent in carrying out challenged conduct must be considered in the qualified immunity analysis, where unlawful motive or intent is a critical element of the substantive claim."[226] Consequently, the Sixth Circuit in *Poe* held that the district court must give the plaintiff an opportunity to amend her response to a motion for summary judgment.[227]

C. *Preliminary Reviews of the Merits: Determining Whether Federal Law is Clearly Established*

In the course of deciding interlocutory appeals of section 1983 immunity issues, appellate courts inevitably have the opportunity to address issues on the merits. In some cases, the Sixth Circuit has narrowly confined itself to addressing whether the underlying federal law was clearly established at the time the action accrued. In other cases, the court has gone beyond that narrow immunity question to consider whether the alleged conduct violated the plaintiff's federal rights.

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223. *See supra* note 33.

224. 853 F.2d 418 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 778 (1989).

225. 853 F.2d at 431.

226. *Id. See also* Balcerzak, *supra* note 179, at 129 (distinguishing purely legal questions of qualified immunity from factual inquiries into state of mind for purposes of substantive claims).

227. Because the *Poe* case had already proceeded to discovery, the Sixth Circuit did not have to discuss the implications of its decision on discovery, but *Poe* clearly suggests that plaintiffs will be entitled to discovery concerning the defendants' motivation. *See* 853 F.2d at 432.

For example, in *Carlson v. Conklin*[228] the Sixth Circuit permitted an interlocutory appeal on the qualified immunity issue by a plaintiff who had been abducted, sexually assaulted, and robbed by an inmate residing in a half-way house. The court, however, did not confine the issues on review to the availability of the qualified immunity but rather held that the plaintiff failed to state a claim because of the remoteness of the crime and the act of the defendant in placing the inmate in the half-way house. Likewise, in *Turner v. Scroggy*[229] the Sixth Circuit addressed whether an inmate stated a due process claim against members of a prison adjustment committee that had disciplined him. Assuming that the defendants were only entitled to a qualified immunity, the Sixth Circuit held that due process only required that "some evidence" support the decision. Thus, in the course of reviewing the qualified immunity issue in an interlocutory appeal, the Sixth Circuit unnecessarily reached the merits of an issue and removed any basis for the plaintiff and those similarly situated to obtain injunctive relief based on similar incidents. Finally, in *Walker v. Schaeffer*[230] the Sixth Circuit in an interlocutory appeal somehow used the presence of an immunity defense to decide the appeal on the basis of a dispositive preclusion issue. After concluding that plaintiffs whose nolo contendre pleas resulted in guilty findings could not bring section 1983 false arrest actions, the court held that the defendant police officers had established a qualified immunity.

On the other hand, in other cases, the Sixth Circuit has limited the inquiry on interlocutory appeals and not addressed the state of the current law. For example, in *Davis v. Holly*[231] the Sixth Circuit narrowly approached the qualified immunity issue that was the subject of an interlocutory appeal. A patient at a state mental hospital had sued administrators and supervisors for failing to prevent her rape by a hospital employee and for

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228. 813 F.2d 769 (6th Cir. 1987). *See also* Foster v. Walsh, 864 F.2d 416 (6th Cir. 1988) (relying on *Carlson* to exercise pendent appellate court jurisdiction in an interlocutory appeal and deciding that a municipal court is not a "person" within the meaning of § 1983).

229. 831 F.2d 135 (6th Cir. 1987).

230. 854 F.2d 138 (6th Cir. 1988). *See also supra* notes 116-21 and accompanying text.

231. 835 F.2d 1175 (6th Cir. 1987).

failing to prevent her from injuring herself. The trial court refused to recognize a qualified immunity on two of the counts, and defendants brought an interlocutory appeal. The Sixth Circuit held that the duties of the administrators and supervisors to provide care and treatment were discretionary in nature and that the failure to prevent the rape did not violate clearly established constitutional rights. The court also held that the failure to prevent self-injury did not violate clearly established constitutional rights during 1978 and 1979 when the injuries occurred.[232]

V. DEADLY FORCE

A. Tennessee v. Garner *and Limitations on the Use of Deadly Force*

In *Tennessee v. Garner*[233] the Supreme Court prohibited the use of deadly force to apprehend nondangerous fleeing felons. In taking this position, the Court ruled that the fourth amendment governed not only the necessity of probable cause before making a seizure but also the method of effectuating the seizure.

Garner involved the use of deadly force to prevent the escape of an unarmed, fifteen year old burglary suspect. Tennessee permitted the use of such deadly force in a statute that codified the common law rule,[234] but the *Garner* Court, applying a test

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232. Other immunity cases that focused on the state of the law at the time the action accrued in order to decide whether federal rights were clearly established include: Hensley v. Wilson, 850 F.2d 269 (6th Cir. 1988) (failure of prison disciplinary committee members to make independent assessment of informant's reliability not inconsistent with clearly established federal law when action accrued but reaching merits to adjudicate injunctive claim); Hudson v. Edmonson, 848 F.2d 682 (6th Cir. 1988) (prison officials would not have known in 1983 that reasons given for disciplinary action were constitutionally inadequate); Garvie v. Jackson, 845 F.2d 647 (6th Cir. 1988) (termination of professor as university department head not inconsistent with clearly established first and fourteenth amendment rights in 1986); Robinson v. Bibb, 840 F.2d 349 (6th Cir. 1988) (restriction on use of deadly force to apprehend nondangerous fleeing felons clearly established in 1983).

233. 471 U.S. 1 (1985), *aff'g* 710 F.2d 240 (6th Cir. 1983).

234. *See* TENN. CODE ANN. § 40-7-108 (1982) ("If, after notice of the intention to arrest the defendant, he either flees or forcibly resists, the officer may use all the necessary means to effect the arrest.").

of objective reasonableness, observed that "[i]t is not better that all felony suspects die than that they escape,"[235] and limited the use of deadly force.

In limiting the use of deadly force, the Court affirmed the Sixth Circuit decision finding the Tennessee statute to be unconstitutional as applied to the pending case. The Sixth Circuit had found the Model Penal Code to accurately state the fourth amendment limitation on the use of deadly force,[236] but the Model Penal Code is framed in terms of the subjective beliefs of the person using deadly force.[237] The Supreme Court, however, framed its fourth amendment test in objective not subjective terms.

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.[238]

Garner involved the use of deadly force to apprehend a nondangerous fleeing felon, but the Sixth Circuit has applied *Garner* to cases involving the excessive use of nondeadly force to effectuate an arrest[239] and most courts have assumed that

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235. 471 U.S. at 11.

236. 710 F.2d at 247.

237. *See* 471 U.S. at 6 n.7 (quoting MODEL PENAL CODE § 3.07(2)(b) (Proposed Official Draft 1962).

238. 471 U.S. at 11-12.

239. *See, e.g.*, McDowell v. Rogers, 863 F.2d 1302 (6th Cir. 1988); Dugan v. Brooks, 818 F.2d 513 (6th Cir. 1987); Leber v. Smith, 773 F.2d 101 (6th Cir. 1985), *cert. denied*, 475 U.S. 1084 (1988). The Sixth Circuit has also permitted plaintiffs to raise claims involving the excessive use of force in an arrest on substantive due process grounds. *See* 818 F.2d at 517; Lewis v. Downs, 774 F.2d 711 (6th Cir. 1985).

A number of circuits, however, treat the fourth amendment as the exclusive basis for such claims. *See, e.g.*, Lester v. City of Chicago, 830 F.2d 706, 710-

Garner governs not only the amount of force used to apprehend suspects but also the use of deadly force in self-defense.[240] On the other hand, the Sixth Circuit has construed the seizure requirement of the fourth amendment narrowly to find *Garner* inapplicable in a number of cases in which police conduct led to a death.

In *Cameron v. City of Pontiac*[241] the Sixth Circuit held that the police pursuit of a fleeing burglary suspect who ran onto a highway and was killed was not a seizure under the fourth amendment. In reaching this conclusion, the court construed the fourth amendment as requiring not only a "completed seizure"[242]

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12 (7th Cir. 1987); Martin v. Malhoyt, 830 F.2d 237, 261 n. 76 (D.C. Cir.), *reh'g denied*, 833 F.2d 1049 (D.C. Cir. 1987). *But see* Heath v. Henning, 854 F.2d 6, 9 n.2 (2d Cir. 1988) (leaving open the availability of a substantive due process theory where the use of deadly force was motivated by malice). The Sixth Circuit has not decided whether the only analysis in excessive force cases should be under the fourth amendment. *See* Robinette v. Barnes, 854 F.2d 909, 911 n.2 (6th Cir. 1988). In *McDowell*, however, the Sixth Circuit acknowledged that it had treated claims of excessive force in the course of an arrest as both fourth amendment and substantive due process claims but suggested that the fourth amendment approach was preferable without holding it was the only approach. 863 F.2d at 1306. *But see infra* note 260.

240. *Garner* did not involve a claim of self-defense, but the Court broadly stated that "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person," and further noted that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." 471 U.S. at 7. Other circuits have assumed that *Garner* standards apply to the use of deadly force in self-defense. *See, e.g.*, Sherrod v. Berry, 856 F.2d 802 (7th Cir. 1988) (en banc); Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985), *cert. denied*, 476 U.S. 1115 & 1124 (1986). The Sixth Circuit, however, requested supplemental briefing on the applicability of *Garner* to self-defense claims in Estate of Daniels v. City of Cleveland, 865 F.2d 1267 (6th Clr. 1989) (unpublished disposition), but did not reach this issue.

241. 813 F.2d 782 (6th Cir. 1987).

242. *Id.* at 784. The Sixth Circuit has held that "the reasonableness of a seizure or method of seizure cannot be challenged under the Fourth Amendment unless there was a completed seizure (that is, a restraint on the individual's freedom to leave), accomplished by a means of physical force or show of authority." Galas v. McKee, 801 F.2d 200, 203 (6th Cir. 1986). The court in *McDowell*, however, took an expansive view of the duration of a seizure by holding that "the seizure that occurs when a person is arrested continues throughout the time the person remains in the custody of the arresting officers." 863 F.2d at 1306. *See also* Lester v. City of Chicago, 830 F.2d 706, 713 n.7 (7th Cir. 1987); Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985).

but also a restraint "by means of physical force or a show of authority."[243] Thus, the court concluded that the decedent's "freedom of movement was restrained only because he killed himself by electing to run onto a heavily traveled, high speed freeway"[244] and did not decide whether the conduct of the police officers was reasonable. Nonetheless, the court ruled that use of firearms by the police, which apparently had something to do with the decedent's "unwise choice of an escape route,"[245] was not the proximate cause of the death.[246]

Likewise, in *Jones v. Sherrill*[247] the Sixth Circuit held that an innocent bystander who was killed as a result of an accident during a high-speed car chase of a furloughed prisoner could not challenge the police conduct under the fourth amendment.[248]

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243. 813 F.2d at 784 (quoting United States v. Mendenhall, 446 U.S. 544, 553 (1980)).

244. *Id.* at 785. In Michigan v. Chesternut, 108 S. Ct. 1975 (1988), however, the Court explained the reason for looking at the totality of the circumstances in applying the limitations of the fourth amendment to seizures: "The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." Id. at 1979.

245. 813 F.2d at 786 (quoting the district court).

246. The Supreme Court in Brower v. County of Inyo, 109 S. Ct. 1378 (1989), *rev'g* 817 F.2d 540 (9th Cir. 1987), held that the use of a blind roadblock that denied a fleeing motorist the option of stopping constituted a seizure. The Court then remanded for a determination of the reasonableness of the seizure.

In deciding *Brower* the Court rejected the Sixth Circuit's narrow definition of a seizure in *Galas, see supra* note 243, but observed that *Galas* did not involve an unconstitutional seizure because "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control." *Id.* at 1381. Moreover, the Court noted that "the Fourth Amendment addresses 'misuse of power,' . . . not the accidental effects of otherwise lawful government conduct." *Id.* The *Brower* Court also explicitly approved the result in *Cameron, see supra* notes 241-46 and accompanying text, because the decedent in *Cameron*, unlike the decedent in *Brower*, had the opportunity to stop. *Id.* at 1382-83.

247. 827 F.2d 1102 (6th Cir. 1987).

248. The Sixth Circuit in *Jones* also rejected the decedent's substantive due process claim, holding that the accident was too remote a consequence of the decision to furlough the prisoner. *See, e.g.*, Martinez v. California, 444 U.S. 277 (1980). The court also held that the chase did not rise to the level of gross negligence or outrageous conduct necessary to state a substantive due process claim under Nishiyama v. Dickson County, Tennessee, 814 F.2d 277 (6th Cir. 1987) (en banc). *See Jones*, 827 F.2d at 1106.

In *Robinette v. Barnes*[249] the Sixth Circuit held that the use of a trained police dog to seize a burglary suspect did not constitute deadly force, even if the use was unreasonable under the circumstances. The dog was trained to apprehend a person by seizing an arm or, if an arm was not available, "the first thing . . . offered to him."[250] The suspect was hiding inside a darkened building and the dog, apparently finding the arm unavailable, seized him by the neck thus causing his death.

In rejecting the decedent's fourth amendment claim, the Sixth Circuit broadly concluded that the use of police dogs does not constitute deadly force. Although the court acknowledged that "an instrument of death need not be something as obviously lethal as a gun or a knife,"[251] it identified the following two factors as relevant to whether the use of a particular law enforcement tool constitutes deadly force:

> the intent of the officer to inflict death or serious bodily harm, and the probability, known to the officer but regardless of the officer's intent, that the law enforcement tool, when employed to facilitate an arrest, creates a "substantial risk of causing death or serious bodily harm."[252]

Thus, the Sixth Circuit accepted the fact that a "seizure" had taken place under the fourth amendment but then introduced an intent requirement into the *Garner* inquiry.[253] The court also

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249. 854 F.2d 909 (6th Cir. 1988).

250. *Id.* at 911 (quoting trial testimony).

251. *Id.* at 912.

252. *Id.* (quoting MODEL PENAL CODE § 3.11(2) (Proposed Official Draft 1962)).

253. Some courts have addressed more directly the issue of whether negligent conduct can give rise to a fourth amendment claim under *Garner*. *Compare* Dodd v. City of Norwich, 827 F.2d 1, 7-8 (2d Cir. 1987) (on rehearing) (negligent discharge of cocked firearm during handcuffing of suspect not actionable under the fourth amendment), *cert. denied*, 108 S. Ct. 701 (1988), *with* Specht v. Jensen, 832 F.2d 1516, 1523 (10th Cir. 1987) (negligence actionable under the fourth amendment), *remanded on other grounds*, 853 F.2d 805 (10th Cir. 1988). Although the Supreme Court in *Brower* read a threshold intent requirement into the fourth amendment, *see supra* note 246, it did so for the purpose of determining whether a detention or taking was willful not for determining the subjective intent of the police officers who set up the roadblock.

decided that, under these circumstances, the use of the police dog was not unreasonable,[254] but the definition of deadly force in terms of subjective intent removes the fourth amendment as a protection in those cases in which police dogs or other nontraditional "law enforcement tools" are used in an objectively unreasonable way.

Finally, in *McDowell v. Rogers*[255] the Sixth Circuit applied the fourth amendment to a case involving the excessive use of force in the course of an arrest but defined the fourth amendment standard by relying on the subjective "shock the conscience" test developed by Judge Friendly in *Johnson v. Glick*.[256] Under this standard, a court must inquire into "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[257]

This approach to abuses of governmental authority, especially in the law enforcement context, may be consistent with both fourteenth amendment substantive due process[258] and eighth amendment[259] standards but is the antithesis of the objective approach the Supreme Court has applied in *Garner* and other fourth amendment cases.[260]

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254. *Robinette*, 854 F.2d at 913-14.

255. 863 F.2d 1302 (6th Cir. 1988).

256. 481 F.2d 1028 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973). *See generally* Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security Under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 171 (1987).

257. *McDowell*, 863 F.2d at 1306-07 (quoting *Johnson*, 481 F.2d at 1033).

258. *Cf.* Rochin v. Califorinia, 342 U.S. 165 (1952).

259. *See* Whitley v. Albers, 475 U.S. 312 (1986).

260. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 21 (1968) (when fourth amendment claims are asserted, "it is imperative that the facts be judged against an objective standard"); Schmerber v. California, 384 U.S. 757 (1966) (reasonableness of performing blood test when probable cause to believe suspect was driving while drunk).

In Graham v. Connor, 109 S. Ct. 1865 (1989), *rev'g* 827 F.2d 945 (4th Cir. 1987), the Supreme Court effectively overruled *McDowell* and held that claims that law enforcement officials used excessive force in the course of an arrest, an investagatory stop, or other seizure are properly analyzed under a fourth amendment objective reasonableness standard rather than under a subjective Johnson v. Glick substantive due process standard.

B. Tennessee v. Garner *and the Question of Retroactivity*

In addition to narrowly defining the fourth amendment limitations on the use of deadly force, the Sixth Circuit sitting en banc in *Carter v. City of Chattanooga*[261] refused by a 9-5 vote to apply retroactively either the 1985 Supreme Court decision in *Tennessee v. Garner*[262] or the Sixth Circuit's 1983 decision in *Garner*.[263] Both *Carter* and *Garner* involved the use of deadly force to apprehend fleeing but nondangerous felons in Tennessee, which permitted the use of deadly force in such cases.[264]

In the protracted proceedings in *Garner*, which involved a 1974 shooting, the Sixth Circuit initially held in 1979 that the individual police officers who killed the decedent were immune from liability based on their good faith reliance on the Tennessee statute.[265] The Sixth Circuit, however, remanded for further proceedings against the city in light of the Supreme Court decision in *Monell v. Department of Social Services*,[266] holding that municipalities were proper defendants in section 1983 actions. The Sixth Circuit had previously rejected a number of constitutional challenges to the Tennessee fleeing felon statute,[267]

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261. 850 F.2d 1119 (6th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 795 (1989).

262. 471 U.S. 1 (1985), *aff'g sub nom.* Garner v. Memphis Police Dep't, 710 F.2d 240 (6th Cir. 1983) (hereinafter *Garner II*). The earlier Sixth Circuit decision in *Garner* is reported at 600 F.2d 52 (6th Cir. 1979) (hereinafter *Garner I*).

263. The federal courts of appeals that have expressly addressed the retroactivity issue are divided. The Second and Eleventh Circuits apply *Garner* retroactively, *see* Davis v. Little, 851 F.2d 605, 609-11 (2d Cir. 1988); Acoff v. Abston, 762 F.2d 1543, 1548-49 (11th Cir. 1985), but the Tenth Circuit, relying on *Carter*, applies *Garner* prospectively. *See* Mitchell v. City of Sapula, 857 F.2d 713, 717-20 (10th Cir. 1988) (per curiam).

264. *See supra* note 234.

265. *Garner* I, 600 F.2d at 54 ("Applying the qualified 'good faith' privilege or immunity from liability for constitutional claims, . . . we affirm that portion of the . . . judgment dismissing the case against the individual defendants.").

266. 436 U.S. 658 (1978).

267. *See* Wiley v. Memphis Police Dep't, 548 F.2d 1247 (6th Cir. 1976), *cert. denied*, 434 U.S. 822 (1977); Beech v. Melancon, 465 F.2d 425 (6th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973). *See also* Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971) (three-judge court).

but those decisions all involved claims against the individual police officers not their municipal employers.[268]

As the Sixth Circuit makes clear in *Carter*, the Tennessee fleeing felon statute had been the subject of repeated constitutional attacks since at least the early 1970's, a campaign that began to bear fruit in 1979 when the Sixth Circuit in *Garner I* distinguished the claim against the police officer, who was only following state law, from the claim against the city.

In 1983, in *Garner II* the Sixth Circuit held that it was unconstitutional to use deadly force to apprehend a fleeing suspect,[269] although the court applied a subjective rather than the objective standard the Supreme Court ultimately adopted in rejecting the use of deadly force to apprehend nondangerous fleeing felons under the fourth amendment.[270]

After the *Garner II* decision in 1983, of course, there was little doubt in the Sixth Circuit that the use of deadly force to apprehend nondangerous fleeing felons was unconstitutional, and the Sixth Circuit has used 1983 as the date on which federal law became sufficiently clearly established to justify denying police officers a qualified immunity in individual capacity suits.[271]

Carter, however, involved an improper use of deadly force in 1982, and the issue was whether either the 1985 Supreme Court decision in *Garner* or the 1983 Sixth Circuit decision in *Garner II* applied retroactively to a section 1983 action on behalf of a decedent who was killed by Chattanooga police officers while he was fleeing the scene of a burglary.

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268. The Sixth Circuit in *Carter* referred to the "substantial inconsistency" between *Wiley* and the 1979 decision in *Garner I*, see 850 F.2d at 1127, but the Sixth Circuit in *Garner II* had denied any such inconsistency, observing that the earlier cases did not involve the fourth amendment and further noting that in each of the earlier cases "the narrow question before the court was whether the police officer who shot the fleeing boy was entitled to a good faith privilege against liability based upon his reliance upon the Tennessee statute." 710 F.2d at 247.

269. 710 F.2d at 243-48.

270. *See supra* notes 238-39 and accompanying text.

271. *See* Washington v. Starke, 855 F.2d 346 (6th Cir. 1988) (qualified immunity for use of deadly force in 1982); Robinson v. Bibb, 840 F.2d 349 (6th Cir. 1988) (no qualified immunity for use of deadly force in 1985). *See also supra* notes 205-11 and accompanying text.

Unlike the statute of limitations cases, which involved remedial rules designed to cut off litigation,[272] *Carter* involved a substantive rule of constitutional law, but the Sixth Circuit refused to apply either *Garner* decision retroactively, thus immunizing the municipality from liability for any unconstitutional killings that occurred prior to 1983 and denying the plaintiff all relief.

In addressing this issue, the Sixth Circuit applied *Chevron Oil Co. v. Huson*[273] in which the Supreme Court adopted a three-part test to determine whether courts should depart from the general rule requiring the application of current law to pending cases. *Chevron* establishes a presumption in favor of the retroactive application of new decisions but permits courts to apply decisions prospectively in limited circumstances.

The *Chevron* criteria relied on by the Sixth Circuit in *Carter* was defined by the Supreme Court as follows:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . ., or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."[274]

The most important of the *Chevron* criteria involves whether the decision to be applied nonretroactively establishes "a new principle of law, either by overturning clear past precedent on which litigants may have relied . . . , or by deciding an issue of

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272. *See supra* notes 62-78 and accompanying text.

273. 404 U.S. 97 (1971).

274. *Id.* at 106-07 (citations omitted).

first impression whose resolution was not clearly foreshadowed. . . ."[275]

In applying *Chevron*, the Sixth Circuit in *Carter* noted that until its 1983 *Garner II* decision "no court had struck down the fleeing felon rule as unconstitutional . . . under the Fourth amendment."[276] Thus, the *Carter* court concluded that *Garner II*, as affirmed by the Supreme Court, established "a new and unexpected principle of law by setting aside clearly established precedent . . . on which the City of Chattanooga and its police officers had a right to rely . . . in 1982."[277] Alternatively, the court found that the Supreme Court in *Garner* decided "an issue of first impression whose resolution was not clearly foreshadowed."[278]

In reaching this conclusion, the Sixth Circuit treated the Supreme Court decision in *Garner* as establishing a new principle of law by setting aside clearly established precedent particularly in the circuit. The Supreme Court decision in *Garner*, however, did not overrule any past precedents interpreting federal law. Rather, *Garner* was a logical (though possibly unexpected) result of a progression of Supreme Court decisions that had interpreted the fourth amendment not only to require probable cause but also to regulate the manner in which both searches and seizures are conducted.[279]

Because the Supreme Court in *Garner* did not overrule *any* of its own precedents,[280] the "clear past precedent" the Sixth

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275. *Id.* at 106.

276. 850 F.2d at 1123.

277. *Id.* at 1129.

278. *Id.*

279. *See* Tennessee v. Garner, 471 U.S. 1, 9-11 (1985). *See also* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (Burger C.J., dissenting).

> I wonder what would be the judicial response to a police order authorizing "shoot to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a "shoot" order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter.

Id. at 419.

280. Judge Merritt, dissenting in *Carter*, pointed out that the Supreme Court

Circuit concluded had been overruled could only have been the Sixth Circuit's decisions in *Wiley v. Memphis Police Department*[281] and the other pre-*Garner I* cases.[282] These decisions, however, were clearly not overruled despite the attempt by the *Carter* court to treat them as deciding more than the qualified immunity issues necessary to absolve individual police officers from liability for the use of deadly force.[283]

The Sixth Circuit in *Carter* also concluded that the Supreme Court in *Garner* decided "an issue of first impression whose resolution was not clearly foreshadowed." What is puzzling about the court's reliance on this alternative formulation of the first prong of *Chevron*, however, is that it proves too much. Virtually all Supreme Court decisions are issues of first impression in the sense that the Court has generally not previously addressed the precise issue. Moreover, given the number of closely divided decisions by the Supreme Court, few results are clearly foreshadowed. Thus, if this formulation of *Chevron* is construed literally, as the Sixth Circuit did in *Carter*, only rarely would decisions fail to meet this prong of *Chevron* and the presumption in favor of retroactive decisions would be undercut.

The *Carter* court erred in treating Garner as an issue of first impression.[284] The Supreme Court had previously held that the

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had not previously spoken on the use of the fourth amendment to limit the use of deadly force. Thus, Judge Merritt concluded that no past precedents stood in the way of the holding that the fleeing felon statute violated the fourth amendment. 850 F.2d at 1139 (Merritt, J., dissenting).

281. 548 F.2d 1247 (6th Cir. 1976), *cert. denied*, 434 U.S. 822 (1977).

282. *See supra* note 267.

283. *See supra* notes 265-68 and accompanying text.

284. In permitting the decision of "an issue of first impression whose resolution was not clearly foreshadowed" to weigh in favor of prospectivity, see Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971), the Supreme Court in *Chevron* relied on Allen v. State Bd. of Elections, 393 U.S. 544, 572 (1969), in which the Court reviewed a provision of the recently enacted Voting Rights Act of 1965 that had not previously been the subject of any judicial constructions by appellate courts. The *Allen* Court refused to apply its new construction of the Act to even the pending case to require a new election because certain changes in voting qualifications had not been submitted to the Attorney General.

In addressing whether to apply the Court's decision in Wilson v. Garcia, 471 U.S. 261 (1985), retroactively, the Eighth Circuit discussed when a case decides an "issue of first impression." *See* Wycoff v. Menke, 773 F.2d 983,

fourth amendment governs the means used to effect a seizure[285] and the Sixth Circuit had reviewed a number of cases challenging the use of deadly force based on the Tennessee statute.[286] Thus, neither court in *Garner* was writing on a blank slate, and the Sixth Circuit's construction of this part of the first *Chevron* criterion places an impossible burden on parties urging the retroactive application of new decisions.[287]

The principal problem with *Carter* is that it attempts to parse the nonretroactivity language from the first prong of *Chevron* as though it were construing a statute and, in so doing, loses sight of what *Chevron* and the Supreme Court's retroactivity cases are really about.

The Court asks whether there was "a new principle of law" or a "clear break" to determine whether a party was justified in relying on the prior law. Thus, in the context of statutes of limitations the Court has upheld the retroactive application of a shorter limitations period because a plaintiff could not justifiably rely on the uncertainty and expect to preserve his action.[288]

In the area of the improper use of deadly force, however, the threshold inquiry under *Chevron* should be whether city officials in Chatanooga were justified in adhering to their deadly force policy after the Sixth Circuit in 1979 signaled in another Tennessee case that the issue was open, and other courts had begun to reject such policies on constitutional grounds.

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986 (8th Cir. 1985) ("The issue presented to the Supreme Court in *Wilson* had not previously been addressed by that Court. The issue had, however, been addressed in virtually every circuit . . . and thus cannot realistically be considered one of 'first impression.'") (citations omitted), *cert. denied*, 475 U.S. 1028 (1986).

285. *See Garner*, 471 U.S. at 7-8, and cases cited.

286. *See supra* notes 262 & 267.

287. Ironically, as Judge Merritt also pointed out in *Carter*, 850 F.2d at 1140, the Sixth Circuit (or at least its predecessor) had expressed doubts more than one hundred years ago about the validity of a rule allowing deadly force against all fleeing felony suspects. *See* United States v. Clark, 31 F. 710, 713 (C.C.E.D. Mich. 1887) ("Suppose, for example, a person were arrested for petit larceny, which is a felony at the common law, might an officer under any circumstances be justified in killing him? I think not. The punishment is altogether too disproportionate to the magnitude of the offense.").

288. *See* Goodman v. Lukens Steel Co., 482 U.S. 656 (1987).

The Sixth Circuit in *Carter* also looks too closely at the doctrinal bases of challenges to the use of deadly force to apprehend nondangerous fleeing felons. Although the Sixth Circuit may be correct in noting that prior to 1983 no court had rejected such a policy on fourth amendment grounds,[289] that is not the point. The fact that the unconstitutionality of the policy was not clearly established prior to 1983 is relevant to the qualified immunity but not the retroactivity issue.

The Sixth Circuit gives lip service to these principles when it quotes at length from *United States v. Johnson*[290] in which the Supreme Court defined more precisely when a new principle of law replaces prior law.

> In general, the Court has not subsequently read a decision to work a "sharp break in the web of the law," . . . unless that ruling caused "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one. . . ." Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, . . . disapproves a practice this Court arguably has sanctioned in prior cases, . . . or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.[291]

Nonetheless, it is apparent that the Sixth Circuit in *Carter* did not apply these principles but instead concluded that *Garner II* represented a new principle of law because the court had not previously rejected the use of deadly force to apprehend nondangerous fleeing felons.

The Second Circuit has taken a contrary view of *Garner* in applying it retroactively to an improper use of deadly force in 1981. In *Davis v. Little*[292] the Second Circuit pointed out "that no real issue of retroactivity arises 'when a decision . . . merely . . . applie[s] settled precedents to new and different factual

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289. 850 F.2d at 1123.

290. 457 U.S. 537 (1982).

291. *Id.* at 551 (citations omitted).

292. 851 F.2d 605 (2d Cir. 1988).

situations.'"[293] Thus, *Davis* views *Garner* as not "announcing a new rule" but rather "apply[ing] a traditional Fourth Amendment balancing test to a particular set of facts."[294] Moreover, the Second Circuit has noted that the substantive due process "shock the conscience" test also limited the improper use of deadly force and that "the similarities between this test and the Fourth Amendment balancing test set forth in Garner far outweigh any differences."[295]

Carter also raises an important issue concerning the nature of the reliance that justifies denying new decisions retroactive effect. The Sixth Circuit seems to ignore the fact that the case only involved municipal liability. *Carter* did not deal with the qualified immunity of individual officials who may not be liable for damages under section 1983 unless their conduct violated clearly established federal law. Under *Carter*, however, the 1983 decision by the Sixth Circuit in *Garner II* is the bright line for both the qualified immunity[296] and the retroactivity inquiries. These issues, however, involve different policies and it is a mistake to not distinguish them.

In its qualified immunity cases, the Supreme Court has immunized officials sued under section 1983 in their individual capacity unless they violated clearly established federal law. In applying this test, the Court has required an objective test to avoid subjective inquiries into the motives or state of mind of defendants. The Court thus assumes that reasonably well trained public officials are aware of the applicable federal law. In effect, the Court treats it as unfair to make individual public officials liable for damages for failing to predict future developments in the law. Moreover, the immunity is a protection not only from liability but also from standing trial to protect individuals who accept public positions from the burden of trials at which they could be found liable.[297] Thus, an official sued in an individual

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293. *Id.* at 609 (quoting United States v. Johnson, 457 U.S. at 549).

294. *Id.* at 609.

295. *Id.* at 610.

296. *See* Robinson v. Bibb, 840 F.2d 349 (6th Cir. 1988). *See also supra* notes 205-11 and accompanying text.

297. *See generally* Harlow v. Fitzgerald, 457 U.S. 800 (1982). *See also supra* note 164.

capacity section 1983 damage suit may have a qualified immunity in a case in which a new principle of law applies retroactively.

On the other hand, municipalities do not have a qualified immunity in section 1983 cases[298] and may be liable for their official policies even if the federal law on which a suit is based was not clearly established when the action accrued. Moreover, the presumption of retroactive application applies, and this is consistent with the Court's effort to balance the competing interests of individual wrongdoers, municipalities and victims of illegal governmental actions.[299]

Finally, one of the questions suggested by *Carter* is what effect, if any, will the decision have on cases challenging the use of nondeadly force under the fourth amendment. Although *Garner* involved the use of deadly force, the objective test it adopted under the fourth amendment to govern the means used to effect seizures applies to nondeadly but excessive force. Thus, in *Dugan v. Brooks*[300] the Sixth Circuit relied on *Garner* in a case involving the alleged excessive use of force by a university police officer, noting that "even if there is probable cause for the arrest, the fourth amendment further requires that the means used to effect the arrest be reasonable, which is determined by balancing the extent of the intrusion against the need for it."[301] The incident in *Dugan*, however, took place in 1981, before both the Supreme Court's 1985 decision in *Garner* and the Sixth Circuit's 1983 decision in *Garner II*. The question then is whether the non-retroactive application of *Garner* in *Carter* applies to fourth amendment claims involving the use of nondeadly but excessive force.[302]

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298. Owen v. City of Independence, 445 U.S. 622 (1980).

299. *Id.* at 657. *See generally* P. SCHUCK, SUING GOVERNMENT (1983).

300. 818 F.2d 513, 516 (6th Cir. 1987).

301. *Id.* at 516.

302. Even if the *Garner* decisions are only applied prospectively, pre-1983 uses of excessive force may still be actionable as substantive due process violations. *Cf. Dugan*, 818 F.2d at 517 (applying substantive due process analysis to a 1981 incident). Moreover, what is unique about *Garner* is that after applying a fourth amendment balancing test, the Supreme Court effectively adopted a per se rule under which it is *never* reasonable to use deadly force to apprehend nondangerous fleeing felons. Independent of this ruling, the fourth amendment places other limitations on the means by which seizures are

VI. DAMAGES

The Supreme Court has relied on evolving principles of compensation to determine the damages available in section 1983 litigation.[303] Under this approach, courts develop a uniform national law of section 1983 damages by considering the nature of the legal violation and the injury to the plaintiff.[304]

In *Carey v. Piphus*[305] the Court refused to award damages for procedural due process violations without proof of actual damages. *Carey*, however, did not reach whether presumed damages would be available for violations of federal law that were not procedural in nature. However, in *Memphis Community School District v. Stachura*[306] the Court held that damages are not available under section 1983 for violations of constitutional rights based on speculation about the importance of the rights in our system of government or their role in American history.

Although the *Stachura* Court prohibited the use of presumed damages to supplement awards of compensatory damages, the Court acknowledged that there might be circumstances in which "a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish"[307] and left open the possibility of awards of presumed damages in lieu of actual damages in such cases.

In *Ratliff v. Wellington Exempted Village School Board of Education*[308] the Sixth Circuit vacated an award of damages given under a jury instruction that permitted the jury to consider the abstract value of the first amendment rights of a school principal who challenged her discharge. The trial was held prior

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made. *See supra* note 239. Thus, even under *Carter* the Sixth Circuit could apply the *Garner* decisions retroactively to cases involving the excessive use of nondeadly force. *See, e.g.*, McDowell v. Rogers, 863 F.2d 1302 (6th Cir. 1988) (post-*Carter* case applying *Garner* and the fourth amendment to a 1981 nondeadly force claim without citing *Carter* or discussing the retroactivity issue).

303. *See generally* Smith v. Wade, 461 U.S. 30 (1983); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981); Carey v. Piphus, 435 U.S. 247 (1978).

304. *Carey*, 435 U.S. at 255.

305. 435 U.S. 247 (1978).

306. 477 U.S. 299 (1986).

307. *Id.* at 310-11.

308. 820 F.2d 792 (6th Cir. 1987).

to the *Stachura* decision, and the defendant did not object to the a jury instruction. The Sixth Circuit, however, permitted the defendant to raise for the first time on appeal the challenge to jury instructions that the court described as arguably correct when given but clearly incorrect under *Stachura*.[309] The *Ratliff* court then applied *Stachura* retroactively to vacate the damage award. In taking this position, the court relied on a since-discredited line of Sixth Circuit cases that applied new decisions retroactively whenever they had been so applied by the appellate court that rendered them.[310]

Alternatively, the Sixth Circuit in *Ratliff* relied on *Chevron Oil Co. v. Huson*[311] to apply its ruling retroactively. In taking this position, however, the Sixth Circuit did not analyze the *Chevron* factors[312] but merely assumed that they required retroactive application of *Stachura*. This conclusion, however, is curious in light of the court's decision to permit the *Ratliff* defendant to appeal the jury instruction because it was arguably correct when given. Thus, the *Ratliff* opinion itself suggests that *Stachura* adopted a new principle of law, especially in the Sixth Circuit from which the *Stachura* decision came.

The Sixth Circuit has also had an opportunity to apply the *Stachura* exception to the prohibition of presumed damages. In *Walje v. City of Winchester, Kentucky*[313] the Sixth Circuit upheld a $5,000 compensatory damage award to a city firefighter who was suspended in violation of his first amendment rights. In an earlier appeal, the Sixth Circuit had held that more than nominal damages were appropriate,[314] and the district court awarded $5,000 in damages for a violation of substantive constitutional rights. On appeal, the *Walje* defendants argued that *Stachura* prohibited awards of damages based on the abstract value of constitutional rights. In upholding the damage award, the Sixth

309. *Id.* at 797.

310. *Id. See* Smith v. General Motors Corp., 747 F.2d 372, 375 (6th Cir. 1984) (en banc). The Sixth Circuit subsequently repudiated the *Smith* line of cases. *See supra* notes 73-78 and accompanying text.

311. 404 U.S. 97 (1971).

312. *See supra* text accompanying note 274.

313. 827 F.2d 10 (6th Cir. 1987).

314. *See* 773 F.2d 729 (6th Cir. 1985).

Circuit relied on the language in *Stachura* approving the use of presumed damages in cases where the "plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish."[315]

The Sixth Circuit has also decided a number of cases involving the application of federal damage principles to section 1983 litigation. In *Conklin v. Lovely*[316] the court limited the ability of the defendants to question the plaintiff in a public employment discharge case about unemployment insurance benefits. In upholding this limitation on the scope of cross-examination, the court noted that under mitigation of damages principles unemployment insurance benefits are generally not deducted from back pay awards in unlawful discharge cases.

In *Young v. Langley*,[317] an unpublished decision, the Sixth Circuit addressed the availability of prejudgment interest in section 1983 actions and applied the general rule in which prejudgment interest is available in federal question cases. Nonetheless, the court refused to disturb the trial court's exercise of discretion in refusing to award prejudgment interest in this politically-motivated demotion case in which the plaintiff was awarded $750,000 in compensatory and punitive damages.[318]

VII. MUNICIPAL LIABILITY

The Sixth Circuit did not announce any important new principles involving municipal liability during the period under review. Nonetheless, an unpublished 1986 Sixth Circuit decision was the vehicle for what had become the Supreme Court's annual attempt to sort out the many complexities surrounding the scope

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315. 827 F.2d at 12. *Accord* Parrish v. Johnson, 800 F.2d 600, 610-11 (6th Cir. 1986) (following *Stachura* to reject an "actual injury" requirement in eighth amendment damage actions and approving presumed general damages for a prison guard's waiving a knife in front of a prisoner).

316. 834 F.2d 543 (6th Cir. 1987).

317. 840 F.2d 19 (6th Cir.), *cert. denied*, 109 S. Ct. 243 (1988).

318. *See* Young v. Langley, 793 F.2d 792 (6th Cir.) (table) (upholding damage award on merits), *cert. denied*, 479 U.S. 950 (1986).

of municipal liability under section 1983.[319] In *City of Canton v. Harris*[320] the Supreme Court held that in limited circumstances municipal policies that are not themselves unconstitutional may be the basis for imposing liability under section 1983. In reaching this conclusion, however, the Court held that an inadequate training policy may only serve as the basis for municipal liability where the failure to train amounts to a deliberate indifference to constitutional rights and is the actual cause of the ultimate injury.[321]

Prior to *Harris*, the plurality opinion in *City of Oklahoma City v. Tuttle*[322] by Justice Rehnquist suggested that conduct that was not itself unconstitutional could not be the basis of municipal liability under section 1983.[323] The Court granted certiorari in *City of Springfield v. Kibbe*[324] to resolve this issue but dismissed the writ as improvidently granted because of the defendant's failure to object to the jury instructions. Nonetheless, the four Justices who would have reached the merits of this issue in *Kibbe*—Chief Justice Burger and Justices Rehnquist, White and O'Connor—spoke approvingly of the imposition of municipal liability based on improper training policies that caused the constitutional deprivation.[325]

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319. For earlier attempts, see generally City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988); City of Springfield v. Kibbe, 480 U.S. 257 (1987), *dismissing cert. as improvidently granted* 777 F.2d 801 (1st Cir. 1985); Pembaur v. City of Cincinnati, 475 U.S. 469 (1986); City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985).

320. 109 S. Ct. 1197 (1989), *vacating sub nom.* Harris v. Cmich, 798 F.2d 1414 (6th Cir. 1986) (unpublished disposition). The Sixth Circuit opinion is available on WESTLAW. *See* 1986 WL17268.

321. *Id.* at 1204-06.

322. 471 U.S. 808 (1985).

323. *Id.* at 824 n.7.

324. 480 U.S. 257 (1987), *dismissing cert. as improvidently granted* 777 F.2d 801 (1st Cir. 1985).

325. 480 U.S. at 260 (O'Connor, J., dissenting). The Court did not discuss this issue in City of St. Louis v. Praprotnik, 108 S. Ct. 915 (1988), but Justice Brennan, in his concurring opinion, observed that the issue of "whether a city can be subjected to liability for a policy that, while not unconstitutional in and of itself, may give rise to constitutional deprivations" was still open. *Id.* at 936.

The Sixth Circuit, however, had long taken the position that a training policy that is not itself unconstitutional may be the basis for establishing municipal liability under section 1983. This position was reaffirmed in *Rymer v. Davis*[326] in which the court upheld the imposition of liability on a municipality for failing to train police officers in proper arrest procedures. In *Rymer*, the court made clear that grossly negligent training policies that caused unconstitutional conduct could be the basis for municipal liability without running afoul of the Supreme Court's rejection in *Monell v. Department of Social Services*[327] of respondeat superior by upholding the following jury instruction:

> If you find for the plaintiff with regard to his claim of excessive force, then you will consider the claim made by him against the City of Shepherdsville; and if you find from the preponderance of the evidence that the City of Shepherdsville trained its police officers in a way that was so reckless or grossly negligent that future police misconduct was almost inevitable or would be properly characterized as substantially certain to result, then you shall find for the plaintiff against the City of Shepherdsville.[328]

Thus, the Sixth Circuit had approved the imposition of municipal liability in section 1983 actions when plaintiffs could establish the link between grossly negligent training policies and resulting constitutional deprivations.[329]

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326. 754 F.2d 198 (6th Cir.), *vacated and remanded sub nom.* City of Shepherdsville v. Rymer, 473 U.S. 901, *adhered to on remand*, 775 F.2d 756 (6th Cir. 1985) (on remand), *cert. denied*, 480 U.S. 916 (1987).

327. 436 U.S. 658 (1978).

328. 775 F.2d at 757.

329. To establish municipal liability under § 1983, the Sixth Circuit requires a plaintiff to produce evidence establishing that a constitutional violation was the inevitable result of the municipal policy. *See* Frost v. Hawkins County Bd. of Educ., 851 F.2d 822, 827 (6th Cir.) (failure to demonstrate that arrest growing out of a dispute over the choice of school textbooks was proximately caused by custom or policy of city or school board), *cert. denied*, 109 S. Ct. 529 (1988); Vinson v. Campbell County Fiscal Court, 820 F.2d 194, 200 (6th Cir. 1987) (failure to produce evidence that removal of child from custody without due process was the inevitable result of inadequate training and supervision of probation officer). *See also* Foster v. Walsh, 864 F.2d 416 (6th

The Supreme Court decision in *Harris* clearly rejects reliance on grossly negligent training policies as the basis for municipal liability.[330] *Harris* involved a jury verdict against a city for the denial of medical care to an arrestee. The plaintiff had offered evidence describing the failure of jail officials to provide medical care for the gross stress reaction she experienced after her arrest on a driving violation. She also introduced evidence that the city gave shift commanders broad authority to decide what medical care was appropriate for prisoners based on personal observations but provided no training or other instructions (other than minimal first aid instruction) to prepare them for making such determinations. The Sixth Circuit ultimately vacated the award of damages because of a faulty instruction concerning supervisory liability, but the issues before the Supreme Court were whether and when the inadequate training of jail personnel could be the basis for municipal liability.

The Supreme Court in *Harris* held that municipal liability may be based on a city's training policy only where the failure to train amounts to a deliberate indifference to the rights of persons with whom city employees come into contact. In making the inquiry, the Court required lower courts to look to the duties assigned specific employees and to the experience of the city in a particular area. Thus, the Court observed that the need to train police officers in the proper use of deadly force was " 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights."[331] Moreover, the Court noted that frequent violations of constitutional rights could make "the need for further training . . . plainly obvious to the city policy makers."[332] In reaching these conclusions, however, the Court distinguished the requirements for municipal liability from the underlying definition of the constitutional violation[333] and accepted inadequate training

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Cir. 1988) (rejecting § 1983 liability of a municipal court based on respondeat superior absent an allegation that the municipal court had a policy or custom of issuing warrants for the arrest of traffic violators who had already paid their fines).

330. 109 S. Ct. at 1204-05 (1989).

331. 109 S. Ct. at 1205 n.10.

332. *Id.*

333. *Id.* at 1205 n.8.

as a basis for imposing section 1983 liability without requiring a showing that city policy makers acted unconstitutionally.

Although the Sixth Circuit decision in *Harris* was consistent with earlier Sixth Circuit cases that found municipal liability under section 1983 when grossly negligent training leads to constitutional violations, the Sixth Circuit has not always separated the alleged constitutional violation from the defective training policy. For example, in *Molton v. City of Cleveland*[334] the Sixth Circuit reversed a section 1983 damage award in a case brought against a city by the estate of a pretrial detainee who committed suicide. The plaintiff had identified a number of defects in the structure and operation of the jail that persisted despite eight prior suicides. The plaintiff contended that this constituted deliberate indifference to the strong likelihood that the decedent would take his own life, but the Sixth Circuit concluded that the plaintiff "never adduced evidence of a definitive City policy, custom, or usage which was an affirmative link, the moving force that animated the behavior—the acts of commission or omission—of the police officers that resulted in the constitutional violations alleged."[335] Moreover, the Sixth Circuit found that the policies identified by the estate described merely negligent acts that could not be the basis for municipal liability under section 1983.[336]

In taking this position, the Sixth Circuit read Supreme Court precedents as "requir[ing] proof of a deliberate and discernible city policy to maintain an inadequately trained police department, or nonsuicide-proof, inadequately designed and equipped jails."[337]

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334. 839 F.2d 240 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1345 (1989).

335. *Id.* at 246.

336. After concluding that the training policies constituted negligence, the Sixth Circuit liberally construed Ohio law to impose municipal liability on the city for negligently maintaining a jail. *See* 839 F.2d at 247-48. This result was possible because the cause of action in *Molton* arose after the abrogation of governmental immunity by the Ohio Supreme Court, but before the November 20, 1985, effective date of the Ohio Political Subdivision Liability Act, Chapter 2744 of the Ohio Revised Code, which immunized political subdivisions and their employers from liability for various discretionary activities involving policy making, planning or enforcement. *See* OHIO REV. CODE ANN. § 2744.03(A)(3) (Anderson Supp. 1987).

337. 839 F.2d at 246 (relying on *Tuttle* and *Pembaur*). *See also* Beddingfield v. City of Pulaski, Tenn., 861 F.2d 968 (6th Cir. 1988) (relying on *Molton* to reverse the denial of city's motion for judgment n.o.v. in a jail suicide case).

Such a standard, however, requires far more deliberateness than either the *Rymer* instruction or the Supreme Court decision in *Harris* contemplates and places the almost impossible burden on plaintiffs of demonstrating that municipal policymakers engaged in deliberate wrongdoing.

The Sixth Circuit in *Molton* also appears to have ignored the narrow scope of review of jury verdicts under the seventh amendment. There is no discussion at all of the jury instructions and no apparent deference to jury factfinding. Thus, the Sixth Circuit did not ask whether the jury instructions were correct or whether the verdict rested on substantial evidence. Rather, the court reviewed the evidence *de novo* and, in effect, concluded that the evidence could not as a matter of law establish the degree of fault necessary to establish municipal liability under section 1983.[338]

VIII. WAIVERS

The most novel Sixth Circuit section 1983 decision during the period was *Leaman v. Ohio Department of Mental Retardation & Development Disabilities*,[339] which involved an action by a probationary state employee challenging her termination on federal statutory and constitutional grounds and seeking both damages and equitable relief.

Prior to commencing her section 1983 action in federal court, the plaintiff had filed a virtually identical complaint against the state agency in the Ohio Court of Claims, which dismissed her suit on the merits. The plaintiff did not appeal this decision but rather elected to pursue her federal court section 1983 claim against the state officials.[340] The Ohio Court of Claims Act includes a provision under which "filing a civil action in the court of claims results in a complete waiver of any cause of

338. For a discussion of the tendency of appellate courts to invade the province of the jury in reviewing § 1983 cases involving municipal liability, see Schnapper, *Municipal Liability: From* Monell *to* Tuttle *and* Pembaur 44-45, in 2 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK (J. Lobel ed. 1986).

339. 825 F.2d 946 (6th Cir. 1987) (en banc), *cert. denied*, 108 S. Ct. 2844 (1988).

340. *Id.* at 951.

action, based on the same act or omission, which the filing party has against any state officer or employee."[341] Thus, Ohio has waived sovereign immunity from suit in its own courts, but as a condition of bringing such suits plaintiffs must refrain from suing the individual employees involved.[342]

The issues in *Leaman* were whether the state waiver provision applied to section 1983 actions, and, if so, whether it was consistent with federal law. The trial court applied the waiver to section 1983 actions and dismissed the action. The original Sixth Circuit panel reversed in a split decision, but the full Circuit voted to rehear the case en banc.[343] The court then

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341. OHIO REV. CODE ANN. § 2743.02(A)(1) (Anderson Supp. 1987).

342. This waiver, however, does not apply where the court of claims "determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner." OHIO REV. CODE ANN. § 2743.02(A)(1) (Anderson Supp. 1987). *See also* OHIO REV. CODE ANN. § 9.86 (Anderson 1984) (defining immunity of state officers and employees similarly).

Most states with courts of claims do not have waiver provisions but rather provide courts of claims with exclusive jurisdiction over certain cases. For example, the Michigan Court of Claims Act provides that the jurisdiction conferred against the state be exclusive, see MICH. COMP. LAWS § 600.6419 (1987), and that "[n]o claimant may be permitted to file [a] claim . . . who has an adequate remedy . . . in the federal courts. . . ." MICH. COMP. LAWS § 600.6440 (1987). In New York, state courts of general jurisdiction do not have jurisdiction over damage actions against state correctional officials, see N.Y. CORRECT. LAW § 24(1) (McKinney 1987), but suits seeking damages for the illegal activities of state correctional officials may be brought against the state in the New York Court of Claims. *See* Cepeda v. Coughlin, 128 A.2d 995, 513 N.Y.S.2d 528 (App. Div.), *appeal denied*, 70 N.Y.2d 602, 518 N.Y.S.2d 1024, 512 N.E.2d 550 (1987). Finally, the Illinois Court of Claims has exclusive jurisdiction over all claims against the state "founded upon any law of the State." ILL. REV. STAT. ch. 37, § 439.8(a) (1983 & Supp. 1988). *See also infra* note 344 (discussing Tennessee Claims Commission).

343. 825 F.2d at 948. The circumstances of granting the rehearing en banc raised another unusual issue. The Sixth Circuit initially voted to rehear the case en banc by a vote of 8-7, as authorized by 28 U.S.C. § 46(c). One of the judges who voted for the rehearing en banc, Alan E. Norris, was the Republican Majority Leader of the Ohio House of Representatives at the time the Ohio Court of Claims Act was passed in 1975 and had drafted and sponsored the legislation. *See* 825 F.2d at 965. After oral argument, however, Judge Norris recused himself from further participation. *See id.* at 948. Had Judge Norris not participated in the vote to rehear, the motion for rehearing would have

affirmed the district court decision by an 8-6 vote and held that by bringing an action against the state agency in the Court of Claims, the plaintiff waived her right to pursue her section 1983 claim against the individual employees.[344]

Before reaching the federal issue, the Sixth Circuit had to decide the threshold state law issue of whether the "complete waiver of any cause of action" applied to section 1983 cases. Reading these phrases broadly and literally, the court concluded that the phrase was unambiguous and included section 1983 claims in federal courts.[345]

Turning to the federal question, the Sixth Circuit distinguished *Rosa v. Cantrell*[346] in which the Tenth Circuit held that the

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failed by a 7-7 vote of the Circuit's active judges. *See id.* at 966. Thus, the issue was whether the subsequent recusal applied retroactively to require the vacating of the en banc reconsideration, but the Chief Judge ruled at an administrative meeting that the recusal was not retroactive, see *id.* at 948, and the full court supported that position over written dissents by Judges Merritt and Jones. *See id.* at 960 & 969.

344. The Sixth Circuit took *Leaman* a step further in White v. Gerbitz, 860 F.2d 661 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1160 (1989), which involved a proceeding before the Tennessee Claims Commission, an administrative body that receives claims against the state. Under Tennessee law, the filing of a claim with the commission "operate(s) as a waiver of any cause of action, based on the same act or omission, which the claimant has against any state officer or employee [for acts or omissions] . . . within the scope of the officer's or employee's office or employment." TENN. CODE ANN. § 9-8-307(b) (Supp. 1986). Concluding that administrative proceedings before the Commission were "the functional equivalent of the proceeding before the Ohio Court of Claims in *Leaman*," *see* 860 F.2d at 664, the Sixth Circuit in *White* dismissed a § 1983 claim brought by a plaintiff who had filed a similar claim with the Tennessee Claims Commission.

345. 825 F.2d at 952-53. Some state courts, however, apply different rules of statutory construction in deciding whether state policies apply to § 1983 actions. For example, in Mellinger v. Town of West Springfield, 401 Mass. 188, 196, 515 N.E.2d 584, 589 (1987), the Supreme Judicial Court of Massachusetts adopted a "clear statement rule" of statutory construction under which it refused to apply a state notice of claim requirement to § 1983 actions "absent a clear legislative statement that § 1983 claimants must comply" with the state policy. On the other hand, the Wisconsin Supreme Court in Felder v. Casey, 139 Wis.2d 614, 408 N.W.2d 19 (1987), *rev'd on other grounds*, 108 S. Ct. 2302 (1988), applied its state notice of claim requirement to § 1983 actions because the state statute broadly provided that "no action may be brought" unless the plaintiff complied with the statute. *Id.* at 624, 408 N.W.2d at 24.

346. 705 F.2d 1208 (10th Cir. 1982), *cert. denied*, 464 U.S. 821 (1983).

exclusive remedy provision of a state worker's compensation act did not bar suits against municipal employers under section 1983. Unlike *Rosa*, in which the state statute barred all section 1983 actions, the Ohio statute gave plaintiffs the option of either bringing a section 1983 action against individual employees or pursuing a remedy against the state in the Ohio Court of Claims. Analogizing this to an "accord and satisfaction," the Sixth Circuit in *Leaman* treated the Ohio Court of Claims Act as "a standing offer for a settlement of claims against state employees in exchange for an otherwise non-existent opportunity to sue the state itself for damages."[347]

In distinguishing *Leaman* from the worker's compensation cases and relying on *Town of Newton v. Rumery*[348] in which the Supreme Court refused to adopt a per se rule banning the use of release-dismissal agreements in section 1983 actions, the Sixth Circuit was correct in noting the differences between the voluntary action of a plaintiff in accepting a release (or an accord and satisfaction) and a statute that creates an exclusive remedy. Nonetheless, *Leaman* rests upon an assumption about the obligation of state courts to entertain suits against the states.

The key but unexamined assumption upon which the Sixth Circuit's conclusion rests is that "the Constitution does not require the state of Ohio to offer *any* waiver of its sovereign immunity."[349] The Sixth Circuit, however, cited no direct authority to support this assertion,[350] even though the question of whether states are obligated to permit suits against them in their own courts based on *federal* claims is a difficult issue that the Supreme Court has not decided.[351] Nonetheless, the

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347. 825 F.2d at 953.

348. 480 U.S. 386 (1987).

349. 825 F.2d at 953.

350. The Sixth Circuit did cite Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984), but *Pennhurst* involved an application of the states' eleventh amendment immunity to suit in federal court, as the Sixth Circuit acknowledged in its use of the "*Cf.*" signal. 825 F.2d at 953.

351. *See generally* Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189 (1981).

The related question of whether states are "persons" within the meaning of § 1983 was subsequently answered in the negative by the Supreme Court in

assumption behind the Supreme Court's eleventh amendment decisions is that states are subject to suit in the state courts on the very claims on which they are immune from suits in federal courts.[352]

Clearly, Ohio is not required to establish a Court of Claims. Nor is it required by federal law to subject itself to suit on state law claims. On the other hand, Ohio may be under a constitutional obligation to open its courts to suits against the state based on federal law. In fact, the Supreme Court suggested as much more than eighty years ago in *General Oil Co. v.*

Will v. Michigan Dep't of State Police, 109 S. Ct. ____(1989), *aff'g* Smith v. Department of Pub. Health, 428 Mich. 540, 410 N.W.2d 749 (1987). *Will* involved a § 1983 suit against a state agency in the Michigan Court of Claims in which Michigan broadly waived its immunity to suit, including suits directly under the state constitution. *Will* thus raised the narrow issue of whether states can ever be "persons" within the meaning of § 1983 rather than the broader issue of whether states may rely on state sovereign immunity to refuse to entertain suits against states directly under federal constitutional provisions.

352. In Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985), the Court, in approving an eleventh amendment defense, rejected the argument that its interpretation of the Rehabilitation Act of 1973, 28 U.S.C. § 794, would leave individuals whose federal rights were violated by states without a remedy. The Court noted that such an argument "denigrates the judges who serve on the state courts [by] suggest[ing] that they will not enforce the supreme law of the land. *Id.* at 240 n.2. *See also* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 122 (1984) ("Under Edelman v. Jordan, . . . a suit against state officials for retroactive monetary relief, whether based on federal law or state law, must be brought in state court."); Employees v. Department of Pub. Health & Welfare, 411 U.S. 279, 298 (1973) (Marshall, J., concurring) (citations and footnotes omitted):

> While constitutional limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights. . . . For Missouri has courts of general jurisdiction competent to hear suits of this character, and the judges of those courts are co-equal partners with the members of the federal judiciary in the enforcement of federal law and the Federal Constitution. . . . Thus, since federal law stands as the supreme law of the land, the State's courts are obliged to enforce it, even if it conflicts with state policy.

Professor Tribe, however, rejects Justice Marshall's suggestion that state courts are obligated to entertain such federal claims. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 184 n.45 (2d ed. 1988).

Crain,[353] a case decided the same day as *Ex Parte Young*.[354] *Ex Parte Young* created an exception to the eleventh amendment in suits against states in federal court by permitting suits against state officials. *Crain*, however, involved the use of state sovereign immunity as a defense to the state court litigation of federal claims. In *Crain* the plaintiffs challenged on federal grounds the constitutionality of state taxation statutes involving the inspection of oil, but the Tennessee courts dismissed the claim because Tennessee was immune from suit in its own courts. In reviewing *Crain*, the Supreme Court rejected the state sovereign immunity defense. Although the Court ruled against the plaintiffs on the merits, it recognized the potential impact that state sovereign immunity could have on federal law and observed that:

> [i]f a suit against state officers is precluded in the national courts by the Eleventh Amendment . . . and may be forbidden by a State to its courts, . . . an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation.[355]

The amenability of states to suit in their own courts on federal claims raises many complex issues, and the Sixth Circuit in *Leaman* treated this question as central to its analysis. Nonetheless, the court failed to analyze its assumption that states are not required to waive any of their sovereign immunity.

Moreover, the Sixth Circuit's decision in *Leaman* ignores the nature of section 1983, which the Supreme Court in *Monroe v. Pape*[356] described as a "supplementary remedy." To deny plaintiffs their section 1983 causes of action against persons responsible for deprivations of federal constitutional rights because the state provides a state remedy that may redress the violation permits states to adopt a wide range of similar waiver statutes in which injured plaintiffs will be required to waive their federal remedies as the price of using state remedies. For

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353. 209 U.S. 211 (1908).

354. 209 U.S. 123 (1908).

355. *Id.* at 226.

356. 365 U.S. 167, 183 (1961).

example, after *Leaman* a state could provide that any plaintiff who files a state-created tort claim against police officers or municipalities based on the conduct of police officers is deemed to have "completely waived any other cause of action" against the employee. Since the state is not required to create such remedies, the *Leaman* majority would presumably treat a plaintiff's use of such remedies as an accord and satisfaction and a waiver of all section 1983 claims.

The application of these waiver principles to section 1983 actions goes far beyond the negotiated settlement approved in *Rumery*. Section 1983 cannot be a supplementary federal remedy if states may create exclusive remedies or set up automatic waiver provisions. The *Leaman* court does not hold that states may make state remedies exclusive or limit access to federal courts, but the Sixth Circuit seems to have been so enamored by what Judge Keith described in his dissent as its "simple contractual metaphor"[357] that it lost sight of the nature of the remedy created by section 1983.

Although the waiver provision of the Court of Claims Act seems to limit the jurisdiction of the federal courts, the provision really only limits the section 1983 cause of action, regardless of forum, and the Sixth Circuit in *Leaman* correctly rejected the jurisdictional argument. Nonetheless, post-*Leaman* cases will raise the issue of the impact of the waiver provision on federal court jurisdiction.

In *Leaman* the Court of Claims had already determined that the termination of the plaintiff was in accordance with state law. This finding triggered the statutory waiver provision,[358] and the Sixth Circuit did not have to rule on whether federal courts could also decide whether state employees were acting beyond the scope of their employment.

In other cases, however, federal court section 1983 actions against individual state employees will be brought *before* the Court of Claims has made any determination concerning the scope of employment. Prior to *Leaman*, the Court of Claims

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357. 825 F.2d at 958 (Keith, J., dissenting). Judge Keith criticized the *Leaman* majority for "characteriz[ing] the effect of its holding in terms of a simple contractual metaphor, as if Constitutional rights are bushels of wheat and the Constitution itself the Restatement (Second) of Contracts." *Id.*

358. 825 F.2d at 952-53.

did not have exclusive jurisdiction to make such determinations, but the Ohio General Assembly has amended state law to provide the Court of Claims with such exclusive authority.[359]

Unlike *Leaman*, such cases will raise directly the question of whether state law may give state courts exclusive jurisdiction over such state law issues. There is, however, a long line of federal court cases that make clear that states may not divest federal courts of jurisdiction.[360] Moreover, plaintiffs in federal court section 1983 actions are not required to exhaust state judicial remedies.[361] Thus, an extension of *Leaman* that precluded federal courts from addressing the state law issue of whether state employees were acting beyond the scope of their employment would preclude federal courts from exercising jurisdiction over cases otherwise within their subject matter jurisdiction.

IX. OTHER SECTION 1983 ISSUES

In addition to the principal section 1983 cases discussed earlier, the Sixth Circuit has decided section 1983 cases involving federal statutory claims, abstention, the color of law requirement, and

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359. This amendment was passed by the Ohio General Assembly before the decision in Cooperman v. University Surgical Assocs., 32 Ohio St.3d 191, 513 N.E.2d 288 (1987), permitting § 1983 actions to be brought against state officials in the Ohio Court of Common Pleas and rejecting the argument that Court of Claims had exclusive jurisdiction to determine whether state officials had acted beyond the scope of their employment. The amendment, which was apparently intended to overrule the anticipated decision in *Cooperman*, gives the Ohio Court of Claims "exclusive original jurisdiction" to decide the scope of employment issue and thus the availability of an immunity under state law. *See* OHIO REV. CODE ANN. § 2743.02(F) (Anderson Supp. 1987).

Although federal not state immunities apply to § 1983 litigation regardless of forum, *see generally* Felder v. Casey, 108 S. Ct. 2302, 2307 (1988), the amended state statute will be relevant when federal court § 1983 plaintiffs join pendent state law claims against state employees.

360. *See, e.g.*, Chicot County v. Sherwood, 148 U.S. 529, 534 (1893); Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 453 (1874); Railway Co. v. Whitton's Adm'r, 80 U.S. (13 Wall.) 270 (1871). *See also* Thompkins v. Stuttgart School Dist. No. 22, 787 F.2d 439, 442 (8th Cir. 1986) ("To allow a state legislature to limit the pendent jurisdiction of the federal courts would in many cases defeat the purpose of pendent jurisdiction. . . ."). *Cf.* Felder v. Casey, 108 S. Ct. 2302, 2307 (1988) (state law may not burden litigation of federal claims).

361. *See generally* Monroe v. Pape, 365 U.S. 167 (1961).

the relevance of state remedies during the two-year period under study, and these issues will be discussed briefly.

A. *Federal Statutory Claims*

In *Maine v. Thiboutot*[362] the Supreme Court construed the phrase "and laws" in section 1983 literally to reach all federal statutes, but in subsequent cases the Court read implied limitations into the phrase.[363] Thus, where Congress adopts statutes that have their own comprehensive set of remedial provisions, plaintiffs may not enforce such statutes through section 1983.[364] Likewise, when federal statutes contain provisions that are not susceptible to the development of judicially enforceable standards, the Court also limits the availability of section 1983.[365]

In *Scrivner v. Andrews*,[366] the Sixth Circuit addressed the availability of section 1983 to enforce federal statutory provisions and held that a mother whose child was in foster care could not use section 1983 to obtain the "meaningful visitation" provided in the federal Adoption Assistance and Child Welfare Act.[367] Because the Act encouraged but did not mandate "meaningful visitation," the court concluded that it did not secure rights enforceable through section 1983. Thus, the court denied the plaintiff the right to use section 1983 to seek damages or injunctive relief for denials of her visitation rights.[368]

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362. 448 U.S. 1 (1980).

363. *See generally* Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394 (1982).

364. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).

365. *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981). *See also* Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 423-24 (1987) (discussing exceptions to *Thiboutot*).

366. 816 F.2d 261 (6th Cir. 1987).

367. 42 U.S.C. §§ 620-28 (1982).

368. In taking this position, the Sixth Circuit distinguished Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983), in which the First Circuit authorized injunctive relief to enforce the provision of the Act requiring individual case plans and case reviews. *Id.* at 512.

B. *Abstention*

In *Watts v. Burkhart*[369] the court applied principles of equitable abstention to a suit by a physician to enjoin a state administrative proceeding initiated to suspend his license to practice medicine. Relying on *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*,[370] the Sixth Circuit held that the physician could not bring a federal court section 1983 action to challenge the pending administrative proceeding. On the other hand, the Sixth Circuit reversed the trial court dismissal of the section 1983 claim for damages, holding that such claim should have been stayed rather than dismissed under the recent Supreme Court decision in *Deakins v. Monaghan*.[371] Because the plaintiff could not obtain redress for his monetary claims in the state court proceeding, the Sixth Circuit concluded that the dismissal was inappropriate.[372]

C. *Color of Law*

To litigate a claim under section 1983, a plaintiff must establish not only a deprivation of rights secured by federal law but also that the defendant acted "under color of law."[373] The Sixth Circuit decided two cases involving the "color of law" requirement during the period.

In *Jones v. Duncan*[374] the court reviewed the pleading standards for alleging that defendants acted under "color of law" in a suit by a former county superintendent of schools against members of a county commission. The plaintiff alleged that members of the commission filed suit in state court to seek his removal, but the district court dismissed the complaint because it viewed the defendants as having acted in their unofficial capacities as private citizens. In reversing, the Sixth Circuit (unlike the district court) did not confine its analysis to state

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369. 854 F.2d 839 (6th Cir. 1988).

370. 477 U.S. 619 (1986).

371. 484 U.S. 193 (1988).

372. 854 F.2d at 849.

373. *See* Parratt v. Taylor, 451 U.S. 527 (1981); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

374. 840 F.2d 359 (6th Cir. 1988).

law, which provided that individual citizens could bring ouster suits. Rather, the court relied on a larger series of predicate actions taken by the commissioners in their official roles, including use of public funds to finance the ouster proceedings.[375]

In *Adams v. Vandemark*[376] the Sixth Circuit decided a more complex color of law issue in two section 1983 actions brought by former employees of a federally-funded weatherization program run by a non-profit Michigan corporation established to receive community action program grants. The plaintiffs claimed that they were discharged in retaliation for exercising their first amendment rights, but the issue on appeal was whether the non-profit corporation, which received between 90 and 99% of its budget from governmental funding, and its director were acting under color of law and thus subject to suits under section 1983. The majority examined the various links between the defendant organization and the state, including the public funding, the public regulation, the use of public facilities for a nominal rent, and the board of directors composed of one-third public officials pursuant to state law, but concluded that none of these linkages established the symbiotic relationship between the state and the defendants that would have met the section 1983 color of law requirement.[377]

There is a sharp dissent in *Adams* by Judge Merritt, who relied in part on the recent Supreme Court decision in *West v. Atkins*.[378] *West* involved whether a private physician who provided medical care to state prisoners under a contract with the state prison was subject to suit under section 1983 for an eighth amendment claim based on his alleged deliberate indifference to the serious medical needs of a prisoner. In finding color of law, the *West* Court did not look to the traditional state action doctrines but rather relied heavily on the unique facts of the case, especially the state's duty to provide medical services and the absence of other access to these services.

Relying on *West*, Judge Merritt in *Adams* argued for greater concern for "the functional role played by a private party and

375. *Id.* at 362-63.

376. 855 F.2d 312 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 868 (1989).

377. *Id.* at 316-17.

378. 108 S. Ct. 2250 (1988).

the context of its relationship with the state, and less with the formal nature of . . . [the] legal relationship."[379] He then looked to agency principles to develop a non-exhaustive list of factors that should help resolve close state action questions and concluded that the "wholly public[ly]" funded agency was involved in a "highly regulated" welfare program that "substitute[d] a government program for the private marketplace."[380]

D. Parratt v. Taylor, *State of Mind Requirements, and the Adequacy of State Remedies*

In *Parratt v. Taylor*[381] the Supreme Court held that the requirements of procedural due process were met in cases in which governmental officials had acted in random and unauthorized ways if the state provided an adequate post-deprivation remedy. In *Hudson v. Palmer*[382] the Court expanded *Parratt* to intentional deprivations of property and, although the Court has not decided whether *Parratt* also applies to liberty deprivations,[383] most courts,[384] including the Sixth Circuit in *Wilson v. Beebe*,[385] apply *Parratt* to liberty deprivations. The Supreme Court also appears to have limited *Parratt* to procedural due process claims, and federal courts, including the Sixth Circuit,[386] have consistently refused to apply *Parratt* to substantive due process claims.[387]

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379. 855 F.2d at 320.

380. *Id.* at 323. *See also id.* at 322 ("The entity . . . was created by government, is sustained by government, is required to further government purposes, and cannot exist without government. It is strange indeed to characterize such an animal as 'private', a real confusion of categories. . . .").

381. 451 U.S. 527 (1981).

382. 468 U.S. 517 (1984).

383. *See* Conway v. Village of Mt. Kisco, 750 F.2d 205 (2d Cir. 1984) & 758 F.2d 46 (2d Cir. 1985), *cert. dismissed as improvidently granted*, 479 U.S. 84 (1986).

384. *See, e.g.*, Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984); Wolf-Lillie v. Sonquist, 699 F.2d 864 (7th Cir. 1984).

385. 770 F.2d 578 (6th Cir. 1985) (en banc).

386. *See, e.g.*, Vinson v. Campbell County Fiscal Court, 820 F.2d 194 (6th Cir. 1987); Dugan v. Brooks, 818 F.2d 513 (6th Cir. 1987).

387. *See* M. SCHWARTZ & J. KIRKLIN, *supra* note 104, § 3.9, and cases cited therein.

In *Parratt* the Supreme Court also held that negligent conduct could give rise to a deprivation within the meaning of the due process clause of the fourteenth amendment, but the Court in *Daniels v. Williams*[388] and *Davidson v. Cannon*[389] reversed this aspect of *Parratt* and held that mere negligence does not give rise to a due process claim. In *Daniels*, however, the Court explicitly left open whether gross negligence or reckless disregard of the plaintiffs' rights could give rise to a due process violation.[390]

The Sixth Circuit addressed this issue in *Nishiyama v. Dickson County, Tennessee*[391] and held that allegations of gross negligence could be sufficient to establish a due process violation. *Nishiyama* was a section 1983 action by parents whose daughter was killed by an inmate who was driving a fully equipped official patrol car with the authorization of the sheriff and deputy. The Sixth Circuit not only held that intentional conduct was not required in section 1983 substantive due process actions but also found the close relationship between the criminal act and the defendants' acts sufficient to state a substantive due process claim.[392]

The Sixth Circuit has also addressed various issues involving the application of *Parratt*. In section 1983 cases in which *Parratt* is applicable, the Sixth Circuit requires plaintiffs to plead and prove the inadequacy of the state judicial remedy.[393] The court reaffirmed that position in *Sproul v. City of Wooster*,[394] a section 1983 suit by a real estate developer whose plans for the

388. 474 U.S. 327 (1986).

389. 474 U.S. 344 (1986).

390. 474 U.S. at 334 n.3.

391. 814 F.2d 277 (6th Cir. 1987) (en banc).

392. *Id.* at 281-82. *But see* Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988) (en banc) (gross negligence not sufficient to raise substantive due process claim), *cert. denied*, 109 S. Ct. 1338 (1989).

Nishiyama's reliance on a special relationship to support a substantive due process claim is no longer good law. The Supreme Court in DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989), held that the failure to provide a child with adequate protection against his father's violence did not violate the child's substantive due process rights despite the special relationship between the child and the county social worker.

393. *See* Vicroy v. Walton, 721 F.2d 1062 (6th Cir. 1983), *reh'g en banc denied*, 730 F.2d 466 (6th Cir.), *cert. denied*, 469 U.S. 834 (1984).

394. 840 F.2d 1267 (6th Cir. 1988).

construction of a shopping center were thwarted. In addition to a federal antitrust claim, the plaintiff raised a pendent state law contract claim and a section 1983 procedural due process claim, but the court noted that the failure to plead or prove the inadequacy of the state judicial remedy required dismissal of the section 1983 claim.

The Supreme Court only applies *Parratt* to cases in which the challenged conduct was random and unauthorized, because in cases involving established state policies the requirements of procedural due process can be met through timely post-deprivation hearings. In *Vinson v. Campbell County Fiscal Court*[395] a mother whose children had been removed from her custody in Ohio by a Kentucky juvenile services probation officer brought a section 1983 action against the probation officer. The court noted that the plaintiff had alleged a deprivation of a liberty interest because of the failure to follow established state procedures, and therefore, she had to plead and prove that state postdeprivation remedies were inadequate. The plaintiff, however, could have brought a state tort false imprisonment claim against the probation officer, and the Sixth Circuit concluded that there was an adequate remedy that met the state's obligation to provide procedural due process to remedy the random and unauthorized violations of law.

In *Ramsey v. Board of Education of Whitley County, Kentucky*[396] the Sixth Circuit treated an action by a retired school teacher challenging a reduction in accumulated sick leave days as a procedural due process claim. Although it is not clear that the plaintiff saw this as a procedural rather than a substantive violation, the Sixth Circuit found that the availability of a post-deprivation contract action constituted an adequate state remedy and met the requirements of due process.

In *Watts v. Burkhart*[397] the Sixth Circuit addressed both the adequacy of state remedies and the nature of established state procedures. *Watts* was a section 1983 action by a physician seeking to enjoin a state administrative proceeding to suspend his license to practice medicine. The Sixth Circuit upheld the

395. 820 F.2d 194 (6th Cir. 1987).

396. 844 F.2d 1268 (6th Cir. 1988).

397. 854 F.2d 839 (6th Cir. 1988).

dismissal of the claim for injunctive relief on equitable abstention grounds but stayed the damage claim.[398] In refusing to dismiss the damage claim, the court found that *Parratt* applied to claims of deprivations of liberty but did not bar claims based on predeprivation actions taken pursuant to establish state procedures. Because the court concluded that the state officials could have provided predeprivation process but arguably chose not to do so, it found *Parratt* not applicable.[399]

There is a partial dissent in *Watts* by Judge Nelson who disagreed with the dismissal of the procedural due process damage claim on *Parratt* grounds. In addition to questioning whether the alleged action was taken pursuant to established state procedures, Judge Nelson expressed doubts as to whether state judicial remedies were really inadequate.[400]

X. Conclusion

During the past two years the Sixth Circuit decided a large number of cases involving the remedial and procedural aspects of section 1983. Most of these decisions considered either issues left open in earlier Supreme Court decisions or the application of established section 1983 principles to the facts of specific cases. Nonetheless, the Sixth Circuit has addressed the scope of section 1983 in a number of important areas, and a discernible pattern has begun to emerge in which the court is narrowly construing section 1983 and its related procedural and remedial doctrines in such a way as to limit the availability of section 1983 in federal courts.

The clearest examples of such cases are the en banc decisions in *Carter v. City of Chattanooga*[401] and *Leaman v. Ohio Department of Mental Retardation and Development Disabilities*[402] involving the use of deadly force and the waiver

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398. *See supra* notes 369-72 and accompanying text.

399. 854 F.2d at 843-44.

400. *Id.* at 850-51. Judge Nelson argued that the Tennessee courts could entertain actions for injunctive relief and damages, and that such proceedings constituted an adequate state remedy. *Id.*

401. 850 F.2d 1119 (6th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 795 (1989). *See supra* notes 261-302 and accompanying text.

402. 825 F.2d 946 (6th Cir. 1987) (en banc), *cert. denied*, 108 S. Ct. 2844 (1988). *See supra* notes 339-61 and accompanying text.

of section 1983 claims respectively. What is noteworthy about these cases is the court's voting pattern. In each case, the eight Reagan-appointed Sixth Circuit judges voted almost unanimously to restrict the scope of section 1983, thereby restricting access to federal court. For example, *Carter* was decided by a vote of 9-5 with all seven of the participating Reagan appointees in the majority. Likewise, *Leaman* was decided by a vote of 8-6 with six of the seven participating Reagan appointees in the majority.[403]

This voting pattern was also apparent in the en banc decision in *Nishiyama v. Dickson County, Tennessee*,[404] a section 1983 case in which the Sixth Circuit did not restrict the availability of section 1983 but held by an 8-6 vote that intentional conduct was not necessary to establish substantive due process violations. Of the six Reagan appointees participating in *Nishiyama*, four voted to restrict the availability of section 1983 by requiring that for conduct to be actionable as a substantive due process violation, it must be directed against a specific targeted individual.[405]

On other important section 1983 issues, the Reagan appointees have played a dominant role in narrowing the availability of section 1983. Thus, in panel decisions selecting an appropriate statute of limitations,[406] applying a federal election of remedies doctrine,[407] precluding section 1983 false arrest suits by persons who had pleaded *nolo contendere* to underlying offenses,[408] restricting the availability of section 1983 in cases involving deadly or excessive force,[409] and limiting the scope of municipal

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403. Judge Milburn did not participate in *Carter* and dissented in *Leaman*. Judge Norris voted to rehear *Leaman* en banc but subsequently recused himself. *See supra* note 343.

404. 814 F.2d 277 (6th Cir. 1987) (en banc). *See supra* notes 391-92 and accompanying text.

405. 814 F.2d at 290. Judges Nelson and Boggs voted with the *Nishiyama* majority, and Judges Milburn and Norris did not participate.

406. Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985) (Milburn and now-senior Judge Contie), *cert. denied*, 476 U.S. 1174 (1986).

407. Campbell v. City of Allen Park, 829 F.2d 576 (6th Cir. 1987) (Nelson and Boggs). *See supra* notes 94-115 and accompanying text.

408. Walker v. Schaeffer, 854 F.2d 138 (6th Cir. 1988) (Krupansky and Wellford). *See supra* notes 116-20 and accompanying text.

409. Robinette v. Barnes, 854 F.2d 909 (6th Cir. 1988) (Guy and Boggs);

liability,[410] Reagan appointees on the Sixth Circuit constituted a majority of the panel.

It is a mistake, however, to view President Reagan's appointees as completely responsible for the Sixth Circuit's decisions restricting the scope of section 1983. Although four of his appointees voted to narrow section 1983 and thereby limit access to federal court in *Carter*, *Leaman*, and *Nishiyama*, the three en banc decisions discussed earlier,[411] they were joined in each of these decisions by Judges Engel and Kennedy, appointees of Presidents Nixon and Carter.[412] Moreover, Judge Nelson, the Reagan appointee who has shown the most interest in restricting the scope of section 1983,[413] voted with the majority in *Nishiyama* to treat grossly negligent conduct as actionable in substantive due process cases, and Judge Guy, one of the four, has been critical of the adoption of a one-year limitations period in *Mulligan*.[414]

The Sixth Circuit also includes a group of five pre-Reagan appointees who have consistently voted against narrowing the scope of section 1983. Thus, in the three major en banc decisions discussed in this article—*Carter, Leaman*, and *Nishiyama*—

Cameron v. City of Pontiac, Michigan, 813 F.2d 782, 785 (6th Cir. 1987) (Krupansky, Nelson and Ryan). *See supra* notes 241-54 and accompanying text.

410. Molton v. City of Cleveland, 839 F.2d 240 (6th Cir. 1988) (Ryan and Norris), *cert. denied*, 109 S. Ct. 1345 (1989). *See supra* notes 334-38 and accompanying text.

411. Judges Krupansky, Wellford, Guy and Ryan.

412. Judge (now Chief Judge) Engel, a Nixon appointee, and Judge Kennedy, a Carter appointee, joined the Reagan appointees in *Carter, Leaman*, and *Nishiyama*.

413. Judge Nelson wrote the *en banc* opinion in *Leaman* applying the Ohio Court of Claims waiver provisions of § 1983 actions. He also pursued aggressively the application of a federal election of remedies doctrine to § 1983 actions without regard to state preclusion principles. *See* Campbell v. City of Allen Park, *supra*, and wrote the majority opinion requiring the application of a subjective test in fourth amendment excessive use of force cases. *See* McDowell v. Rogers, 863 F.2d 1302 (6th Cir. 1988). Finally, Judge Nelson has dissented in a recent case involving the proper interpretation of *Parratt, see* Watts v. Burkhart, 854 F.2d 839, 849 (6th Cir. 1988) (Nelson, J., dissenting in part), and suggested that *Bivens* actions may not be available for due process damage actions based on unauthorized conduct. *See* Cale v. Johnson, 861 F.2d 943, 951 (6th Cir. 1988) (Nelson, J., concurring).

414. *See supra* note 44.

Judges Lively, Keith, Jones, Merritt and Martin voted in favor of a liberal construction of section 1983 (or the underlying constitutional provision) that would expand access of section 1983 plaintiffs to federal court. Even these judges, however, have not always voted in favor of a broad section 1983 remedy. For example, Judge Lively voted to reject the application of state tolling policies to prisoners' section 1983 actions,[415] and Judges Keith and Martin voted to apply a subjective standard to fourth amendment excessive use of force claims.[416]

Nonetheless, there is little question that during the past two years the Sixth Circuit has become far less receptive to section 1983 claims. Establishing empirically that this is the direct result of President Reagan's Sixth Circuit appointments, however, is more difficult. The data collected in this article is limited and the conclusions reached are necessarily tentative. Moreover, the law of section 1983 is not standing still, and the argument could be made that the section 1983 decisions of the new Sixth Circuit correctly anticipate the direction in which the Supreme Court is taking the procedural and remedial law of section 1983.[417]

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415. *See supra* notes 81-90 and accompanying text (discussing *Higley*).

416. *See supra* notes 255-60 and accompanying text (discussing *McDowell*).

417. In discussing the historical preference for selecting federal courts as forums to enhance federal rights, one commentator has viewed federal courts as more familiar with federal law and thus better able to understand federal law and anticipate its future direction. *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1124-25 (1977). Such clairvoyance may be a mixed blessing, however, in an era in which the trend seems to be a narrowing of federal remedies. Moreover, the Sixth Circuit's record in anticipating future directions in the development of § 1983 remedial and procedural issues has not been particularly good in recent years. *See, e.g.*, Dayton Christian Schools, Inc. v. Ohio Civil Right Comm'n, 766 F.2d 932 (6th Cir. 1985), *rev'd*, 477 U.S. 619 (1986) (equitable abstention); Elliott v. University of Tenn., 766 F.2d 982 (6th Cir. 1985), *rev'd in part*, 478 U.S. 788 (1986) (administrative res judicata); Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985), *rev'd sub nom.* Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986) (damages); Pembaur v. City of Cincinnati, 746 F.2d 337 (6th Cir. 1984), *rev'd*, 475 U.S. 469 (1986) (municipal liability); Graham v. Wilson, 742 F.2d 1455 (6th Cir. 1984), *rev'd sub nom.* Kentucky v. Graham, 473 U.S. 159 (1985) (official capacity); Brandon v. Holt, 719 F.2d 151 (6th Cir. 1983) (official capacity suits), *rev'd*, 469 U.S. 464 (1985); McDonald v. City of West Branch, 709 F.2d 1505 (6th Cir. 1983) (table), *rev'd*, 466 U.S. 284 (1984) (preclusion); Migra v. Warren City School Dist., 703 F.2d 564 (6th Cir. 1982), *vacated*, 465

This article concludes, however, that many of the Sixth Circuit's most important section 1983 procedural and remedial decisions—especially *Mulligan, Higley, Campbell, Carter, Molton, McDowell,* and *Leaman*—were either wrongly decided or not compelled by precedent. Such cases, at a minimum, fall in the gray area, and a different result could easily have been supported by Supreme Court decisions. Thus, regardless of questions of causation, the clear emerging trend in the Sixth Circuit is a narrowing of the scope of section 1983.

Despite this trend, plaintiffs who can establish serious abuses of governmental authority are still often able to overcome the remedial and procedural obstacles to reaching the merits of section 1983 actions and prevail on their federal claims.[418] Nonetheless, recent section 1983 decisions in the Sixth Circuit should make plaintiffs pause before selecting federal courts as the forums for pursuing even meritorious section 1983 claims.[419]

U.S. 75 (1984) (claim preclusion). *But see* Saxner v. Benson, 727 F.2d 669 (6th Cir. 1984), *aff'd sub nom.* Cleavinger v. Saxner, 474 U.S. 193 (1985) (immunity); Garner v. Memphis Police Dep't, 710 F.2d 240 (6th Cir. 1983), *aff'd sub nom.* Tennessee v. Garner, 471 U.S. 1 (1985) (deadly force).

418. *See supra* notes 12-13 (describing substantive decisions in § 1983 and other civil rights actions).

419. One result of the lack of receptivity of federal courts to § 1983 claims has been the increase in state court § 1983 litigation. *See generally*, Steinglass, *supra* note 5.