FOR WHOM BELL TOLLS: A DECEDENT'S RIGHT TO § 1983 PAIN AND SUFFERING DAMAGES IN THE NINTH CIRCUIT

Michael D. Moberly*

I. INTRODUCTION

An important federal civil rights statute, 42 U.S.C. § 1983, states in pertinent part as follows:

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

This statute is invoked so frequently that it is often simply referred to as “Section 1983.” Section 1983 is one of sev-

† With deference to Ernest Hemingway, the title reference is to Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984), which has been characterized as the “leading § 1983 wrongful death case” by one Ninth Circuit court analyzing the issue discussed in this article. Davis v. City of Ellensburg, 651 F. Supp. 1248, 1254 (E.D. Wash. 1987); see also Steven H. Steinglass, Wrongful Death Actions and Section 1983, 60 Ind. L.J. 559, 631 n.424 (1984) (“Bell has become the starting point in the analysis of Section 1983 wrongful death actions.”).

* B.B.A., J.D., University of Iowa; Shareholder, Ryley, Carlock & Applewhite, Phoenix, Arizona; Chairman, Arizona Agricultural Employment Relations Board; Editor, The Arizona Labor Letter. The author represented the defendants in Burns v. City of Scottsdale, No. CIV 96-0578-PHX-RGS, 1998 U.S. Dist. LEXIS 13961, at *1 (D. Ariz. Apr. 26, 1998), one of the cases discussed in this article, and is grateful to the plaintiff’s attorney in that case, Craig Stephan, for reviewing and commenting on an earlier draft.


eral Reconstruction-era statutes\(^3\) enacted in response to the corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the southern states.\(^4\) Although the statute's coverage clearly extends to other protected classes as well,\(^5\) § 1983 was primarily intended to deter "officially-condoned lawless conduct directed against newly-freed blacks"\(^6\) by creating what is essentially a tort remedy in favor of persons deprived of their federal civil rights.\(^7\) As one court observed, "Broadly described, the intent of § 1983 was to create a civil remedy for persons who prove that one acting under color of state law has illegally deprived them of rights guaranteed by the federal constitution or by federal law."\(^8\)

As in the case of conventional state law torts,\(^9\) the recov-
ery available under § 1983 typically includes damages for pain and suffering. The basic purposes of an award of such damages is twofold. First, § 1983 compensates plaintiffs for injuries caused by deprivations of their federal constitutional or statutory rights. Second, such an award often serves an important deterrent function as well.

In the Ninth Circuit, § 1983 does not provide a cause of action for civil rights violations that an individual suffers after his death, because a decedent is not considered a "person" within the protection of § 1983. On the other hand, a §
1983 claim premised upon civil rights violations that occur prior to death clearly can survive the subsequent death of the victim, at least where survival is authorized under an applicable state law. An unresolved issue is whether, and to what extent, the survivors in such a case can recover damages for pain and suffering experienced by the decedent prior to death.

At common law, a cause of action for personal injuries—of which § 1983 claims are generally considered to be an example—abated upon the death of the injured party. The common law rule has been the subject of enormous criticism.

City of New Bedford, 939 F. Supp. 921, 928 (D. Mass. 1996) ("[A]lthough neither . . . a decedent nor [his] estate . . . is a person with rights for which § 1983 provides a remedy, a cover-up can violate the rights of [the decedent's] survivors who may maintain their claims through his estate.") (parentheses omitted).


17. See Byrd v. Guess, 137 F.3d 1126, 1131 (9th Cir. 1998) ("It is undisputed that survival actions are permitted under § 1983 if authorized by the applicable state law.").

18. One federal appellate court observed that "there is no federal policy against awarding damages for pain and suffering" under these circumstances. Greene v. Vantage S.S. Corp., 466 F.2d 159, 166 n.9 (4th Cir. 1972); cf. In re Korean Air Lines Disaster, 807 F. Supp. 1073, 1081 (S.D.N.Y. 1992) (perceiving "no federal statutory or common law bar to [a] survival action brought by [a] decedent's estate . . . to recover damages for [the] decedent's conscious pain and suffering"). However, it may be "appropriate to look to state law . . . to supply an appropriate remedy for § 1983 violations" when the victim has died. Berry v. City of Muskogee, 900 F.2d 1489, 1505 (10th Cir. 1990) (emphasis added); see also Bell v. City of Milwaukee, 746 F.2d 1205, 1236 (7th Cir. 1984) ("Where the constitutional deprivation sought to be remedied in a Section 1983 action causes death and the applicable state law . . . would allow recovery for the damage claim at issue, courts generally apply the state law.").

19. See Wilson v. Garcia, 471 U.S. 261, 279 (1985) (holding that "§ 1983 claims are best characterized as personal injury actions"); Bell, 746 F.2d at 1242 n.43 ("Many courts have adopted the position that for survivorship . . . purposes, § 1983 actions can be viewed as redressing personal injuries."); Almond v. Kent, 459 F.2d 200, 204 (4th Cir. 1972) ("In the broad sense, every cause of action under § 1983 which is well-founded results from 'personal injuries.'").


21. See, e.g., Publix Cab Co. v. Colorado Nat'l Bank, 338 P.2d 702, 711 (Colo. 1959) (referring to the rule's "lack of logic and soundness as a matter of social policy") (parentheses omitted); Mattyasovsky v. West Towns Bus Co., 313
and virtually all states have enacted statutes, commonly known as "survival statutes," allowing tort actions to continue upon the death of the plaintiff. Because § 1983 itself is silent on this question, and there is no general federal survival statute, these state statutes also provide the principal

N.E.2d 496, 500 (Ill. Ct. App. 1974) (describing the rule as "harsh and unjust"); Canino v. New York News, 475 A.2d 528, 529 (N.J. 1984) (asserting that the rule has "no foundation in principle"); Moyer v. Phillips, 341 A.2d 441, 442 (Pa. 1975) (noting characterization of the rule as "one of the least rational parts of our law") (authority and internal quotation marks omitted); see also Gustafson v. Rajkovich, 263 P.2d 540, 548 (Ariz. 1953) (Phelps, J., dissenting) (characterizing the rule as "an ancient and barbaric legal concept long since outworn"). See generally Mickelson v. Williams, 340 P.2d 770, 772 (Wash. 1959) ("The common-law rule as to the survival of tort actions has been the subject of most severe criticism.").

22. See In re Inflight Explosion on Trans World Airlines, 778 F. Supp. 625, 631 (E.D.N.Y. 1991) ("The overwhelming majority of states have survival statutes . . . ."); Ospina v. Trans World Airlines, 975 F.2d 35 (2d Cir. 1992); Guyton v. Phillips, 532 F. Supp. 1154, 1165 (N.D. Cal. 1981) (observing that "most states have survival statutes"); disapproved on other grounds in Peraza v. Delameter, 722 F.2d 1455, 1457 (9th Cir. 1984). But cf. Evans, 796 P.2d at 92 ("[T]he Idaho legislature has not enacted any statute specifically abrogating the common law rule of non-survival of causes of action ex delicto in cases where the victim dies before recovery."); Thompson v. Estate of Petroff, 319 N.W.2d 400, 403 n.6 (Minn. 1982) (observing that while "[a]most all statutes permit causes of action for injuries to property to survive," only "[a]approximately one-half of the states permit the survival of certain personal injury actions").

23. In this context, a survival statute is "a statute wherein the decedent's right to recover for a tort survives, and can be enforced by his executors, administrators, or heirs." Rice v. Vancouver S.S. Co., 60 F.2d 793, 794 (9th Cir. 1932); see also Sea-Land Servs. v. Gaudet, 414 U.S. 573, 575 n.2 (1974) ("Survival statutes permit the deceased's estate to prosecute any claims for personal injury the deceased would have had, but for his death.") (emphasis omitted).

24. See Parkerson v. Carrouth, 782 F.2d 1449, 1451 (8th Cir. 1986) ("Statutes allowing the survival of actions were intended to modify the traditional rule that an injured party's claim was extinguished upon the death of either party."); Thompson, 319 N.W.2d at 406 ("The purpose of [a survival] statute is to alleviate in part the harsh results of the common law rule prohibiting the survival of any cause of action.").

25. See Ochoa v. Superior Court, 703 P.2d 1, 10 (Cal. 1985) ("Section 1983 itself is silent on the question whether an action pursuant to its provisions survives the death of the victim of the alleged violations."); County of Los Angeles v. Superior Court, 58 Cal. Rptr. 2d 358, 360 (Ct. App. 1996) ("The federal Civil Rights Act does not . . . address the survival of claims and remedies upon the death of the victim."); rev'd, 981 P.2d 1268 (Cal. 1999); Garcia v. Superior Court, 49 Cal. Rptr. 2d 580, 582 (Ct. App. 1996) ("The federal Civil Rights Act does not expressly specify . . . whether a cause of action survives the victim's death.").

reference point in assessing the survival of § 1983 actions. Generally, the state survival statutes apply to preserve § 1983 actions where the victim is deceased.

However, many state survival statutes, including several in the Ninth Circuit, preclude any recovery for the decedent’s pain and suffering. These survival statutes typically rely on the theory that, once deceased, an injured party cannot benefit from an award of such damages. Litigants frequently


27. See Robertson v. Wegmann, 436 U.S. 584, 589–90 (1978); Ochoa, 703 P.2d at 11; Guyton, 532 F. Supp. at 1165. As one federal court noted, “[t]he statutory mechanism that authorizes resort to state survival law to permit civil rights actions to survive the plaintiff’s death is 42 U.S.C. § 1988.” Sager v. City of Woodland Park, 543 F. Supp. 282, 288 (D. Colo. 1982). That statute, which is occasionally referred to in the case law (and this article) as “§ 1988,” provides, in pertinent part, as follows:

[IN all cases where [the laws of the United States]... are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction... is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern... in the trial and disposition of the cause....


challenge the application of these limitations in § 1983 actions, arguing that they are inconsistent with § 1983’s deterrent and compensatory purposes.31

There is no controlling Supreme Court precedent on this question,32 and many lower courts, including the Ninth Circuit, have also reserved judgment on the issue.33 However, several state tribunals and federal district courts within the Ninth Circuit have addressed it.34 Those cases are the primary focus of this article, although they are not necessarily indicative of how the Ninth Circuit itself would decide the issue.35 Indeed, the lower courts in the Ninth Circuit are not in agreement as to how to decide the issue.36

In Part II, this article discusses the Supreme Court’s consideration of the interplay between § 1983 and state survival

F.2d 159, 166 (4th Cir. 1972) (“The majority of states . . . permit recovery for pain and suffering under survival statutes.”).


32. See Garcia, 49 Cal. Rptr. 2d at 583–84.

33. See Smith v. City of Fontana, 818 F.2d 1411, 1417 n.8 (9th Cir. 1987) (“We express no view here as to whether the remedies authorized by California’s survival statute, pecuniary and punitive damages but not damages for pain and suffering, are too limited to be ‘consistent’ with the Civil Rights Act’s statutory scheme and whether federal law, therefore, provides an independent source of recovery for a broad array of damages.”); Williams v. City of Oakland, 915 F. Supp. 1074, 1076 (N.D. Cal. 1996) (“Relatively few cases have addressed whether the limitations on recovery contained in a state survivorship statute are inconsistent with the purposes of section 1983.”). But see Espinoza v. Dunn, No. 91-56353, 1995 U.S. App. LEXIS 955, at *4 n.1 (9th Cir. Dec. 7, 1993) (noting plaintiffs’ counsel’s acknowledgment that “under California law, [a decedent’s § 1983] claim for damages based on pain and suffering does not survive his death”).

34. State and federal courts have concurrent jurisdiction over § 1983 claims, see Brown v. Pitchess, 531 P.2d 772, 774–75 (Cal. 1975), and “[p]laintiffs often bring federal civil rights actions under . . . section 1983 in state court rather than in federal court,” County of Los Angeles v. Superior Court, 981 P.2d 68, 71 (Cal. 1999). However, one court in the Ninth Circuit recently noted that most of the cases addressing the issue explored here have arisen in the Seventh Circuit. See Garcia, 49 Cal. Rptr. 2d at 584 (citing, inter alia, Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984)).

35. See, e.g., United States v. Vega-Gomez, No. 93-55963, 1994 U.S. LEXIS 646, at *3 (9th Cir. Dec. 20, 1993) (“This Court is not bound by decisions of the district court.”); Garcia v. Whitehead, 961 F. Supp. 230, 233 n.7 (S.D. Cal. 1997) (observing that federal courts are “not bound by state court decisions regarding the issue . . . of whether application of [a state] survivorship statute would be contrary to the Constitution and laws of the United States”).

statutes,\textsuperscript{37} and in particular its seminal decision in \textit{Robertson v. Wegmann}.\textsuperscript{38} Part III then analyzes various cases arising in the Ninth Circuit\textsuperscript{39} that have considered whether state survival statutes precluding recovery for a decedent's pain and suffering are inconsistent with the compensatory and deterrent purposes of § 1983.\textsuperscript{40} The article ultimately concludes, in Part IV, that such statutes may be inconsistent with § 1983's deterrent purpose in cases in which the constitutional deprivation at issue results in death, but are not inconsistent with § 1983 where the victim's death is unrelated to the constitutional deprivation.\textsuperscript{41}

\section*{II. The Supreme Court's Consideration of the Interplay Between § 1983 and State Survival Statutes}

\subsection*{A. Federal Law is Deficient on the Issue of Survival}

The fact that § 1983 itself is silent on the issue of survival, and indeed can be read as not authorizing survival,\textsuperscript{42} has prompted several courts to characterize federal law as "deficient" in this area.\textsuperscript{43} Therefore, courts look to state law in

\textsuperscript{37} To the extent the Supreme Court has addressed the present issue, its analysis obviously is controlling. \textit{See}, e.g., \textit{Garcia}, 49 Cal. Rptr. 2d at 582.


\textsuperscript{39} \textit{See Whitehead}, 961 F. Supp. at 232 (noting the absence of controlling Ninth Circuit authority).

\textsuperscript{40} \textit{See discussion infra} Part III. \textit{See generally} LeBoff, \textit{supra} note 28, at 247–48 ("Since the Supreme Court [decided] \textit{Robertson}, the court system has been inundated with numerous cases debating what damages may be recovered.").

\textsuperscript{41} \textit{See discussion infra} Part IV.

\textsuperscript{42} \textit{See James v. Murphy}, 392 F. Supp. 641, 645 (M.D. Ala. 1975) ("[A] good argument could be made for § 1983 not providing for survival since the language of the statute provides remedies only for 'the party injured.'") (discussing Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961)). \textit{But see} Hall v. Wooten, 506 F.2d 564, 566 (6th Cir. 1974) ("Although section 1983 provides for liability to 'the party injured,' it does not foresee survival of the action on behalf of the estate of the injured party.").

\textsuperscript{43} \textit{See, e.g.}, Brazier, 293 F.2d at 408–09; Williams v. City of Oakland, 915 F. Supp. 1074, 1075–76 (N.D. Cal. 1996); Sager v. City of Woodland Park, 543 F. Supp. 282, 288 (D. Colo. 1982).
assessing the survival of § 1983 damage claims. This phenomenon places many civil rights plaintiffs, who must argue that the pertinent state law is inconsistent with § 1983, "in the anomalous position of relying upon . . . the survival statute for the very life of their lawsuit," while simultaneously seeking to "strike down that part of it which excludes damages for pain and suffering."

B. Effect of State Law on § 1983 Claims

1. Jefferson v. City of Tarrant

The Supreme Court has never directly addressed the survival issue under § 1983. A variation of the issue was recently presented in Jefferson v. City of Tarrant, where the Court granted certiorari to review an Alabama Supreme Court decision holding that a state wrongful death statute limiting the plaintiff's recovery to punitive damages applied.
in a § 1983 action in which the constitutional deprivation resulted in the victim's death.\textsuperscript{51} However, the Court in \textit{Jefferson} ultimately dismissed the writ of certiorari for want of jurisdiction when it became clear that the matter had been remanded to the trial court for further proceedings, and thus the Alabama Supreme Court's decision was not final.\textsuperscript{52}

Justice John Paul Stevens, dissenting from the Court's dismissal of the writ, asserted that state statutory limitations on damages have no application in § 1983 actions because federal law governs the damages recoverable under § 1983.\textsuperscript{53} Justice Stevens acknowledged that state law may govern the survival of § 1983 claims,\textsuperscript{54} but maintained that where such a claim does survive, "additional state law limitations on the particular measure of damages are irrelevant."\textsuperscript{55}

2. Jones v. Hildebrant

Although no other member of the Court joined Justice Stevens's opinion, one federal district court observed that Justice Byron White, in his dissent from dismissal of certiorari in \textit{Jones v. Hildebrant},\textsuperscript{56} also indicated that state law

\footnotesize{recoverable in a wrongful death action are punitive in nature.").}

\textsuperscript{51} See City of Tarrant v. Jefferson, 682 So. 2d 29 ( Ala. 1996), cert. dismissed as improvidently granted, 522 U.S. 75 (1997). The Alabama Supreme Court held that "state law applies in § 1983 actions seeking recovery for wrongful death unless . . . it is found to unduly restrict the federal claim," and that the pertinent Alabama statute did not unduly restrict the § 1983 claim at issue in that case "merely because the statute provides for recovery of only punitive damages." \textit{Id.} at 31 (internal quotation marks and authority omitted).

\textsuperscript{52} See \textit{Jefferson}, 522 U.S. at 81. One commentator stated that "by granting certiorari in the first place, the Supreme Court indicated its willingness to consider whether a uniform federal rule of survivorship is necessary to advance the goals of § 1983 where the misconduct results in death." LeBoff, \textit{supra} note 28, at 234.

\textsuperscript{53} See \textit{Jefferson}, 522 U.S. at 85 (Stevens, J., dissenting).

\textsuperscript{54} See \textit{id.} at 85-86 (Stevens, J., dissenting). \textit{See generally} \textit{O'Connor v. Several Unknown Correctional Officers}, 523 F. Supp. 1345, 1347 (E.D. Va. 1981) ("Many courts have held that state law governs the question of whether an action under § 1983 survives the death of the injured party . . . ").

\textsuperscript{55} \textit{Id.} at 86 (Stevens, J., dissenting). \textit{But cf.} \textit{Berry v. City of Muskogee}, 900 F.2d 1489, 1503 (10th Cir. 1990) ("The Supreme Court has not directly considered the issue, but language in [Robertson v. Wegmann, 436 U.S. 584 (1978)] appears to encourage reference to state law in defining the scope and content of remedies available."); \textit{Bass by Lewis v. Wallenstein}, 769 F.2d 1173, 1188 (7th Cir. 1985) (holding that courts in § 1983 actions are to "look to the most closely analogous state law to determine survivability and the appropriate measure of damages") (emphasis added).

damage limitations do not apply in § 1983 actions.\textsuperscript{57} In actuality, Justice White acknowledged that state law may be relevant in assessing the remedies available in § 1983 actions.\textsuperscript{56} However, his opinion in \textit{Jones} also suggests that, at least in some cases, Justice White might subscribe to Justice Stevens’s analysis in \textit{Jefferson}.\textsuperscript{59}

In particular, Justice White stated that "it is by no means clear that state law may serve as a limitation on recovery where the remedy provided under state law is inadequate to implement the purposes of § 1983."\textsuperscript{60} This observation may suggest that a state survival statute could expand,\textsuperscript{61} but not contract, the damages available under § 1983.\textsuperscript{62}

\footnotesize{asserted by the mother of a police shooting victim on her own behalf rather than as a representative of the decedent’s estate. \textit{See id.} at 183–84. The Court dismissed the writ of certiorari when the issue as framed during oral argument diverged from the question raised in the petition for certiorari, which involved the extent to which state statutory damage limitations apply in § 1983 wrongful death actions. \textit{See id.} at 184–89.

\textsuperscript{57} Sager v. Woodland Park, 543 F. Supp. 282, 293 (D. Colo. 1982) (citing \textit{Jones}, 432 U.S. at 190 (White, J., dissenting)); \textit{see also} Bell v. City of Milwaukee, 746 F.2d 1205, 1252 (7th Cir. 1984) (observing that "both the majority and the dissent [in \textit{Jones}] questioned the applicability of state damage restrictions on a beneficiary's Section 1983 action where the deprivation of a [constitutional] right caused death").

\textsuperscript{58} \textit{See Jones}, 432 U.S. at 190 (White, J., dissenting).

\textsuperscript{59} \textit{See Esposito v. Buonome}, 647 F. Supp. 580, 583–84 (D. Conn. 1986) (citing Justice White’s opinion in \textit{Jones} for the proposition that “state limitations on damages that do not serve policies underlying § 1983 should not limit those remedies”). However, Justice Stevens did not join Justice White’s opinion in \textit{Jones}.

\textsuperscript{60} \textit{Jones}, 432 U.S. at 190 (White, J., dissenting).

\textsuperscript{61} \textit{See, e.g.}, Carter v. City of Birmingham, 444 So. 2d 373, 379 ( Ala. 1983) (discussing a state statute that “affords a remedy beyond that . . . permitted under federal law” and thus “does not, in substance, abrogate [a] plaintiff’s remedy . . . for violations of § 1983, but rather expands the recovery”); Seth F. Kreimer, \textit{The Source of Law in Civil Rights Actions: Some Old Light on Section 1988}, 133 U. PA. L. REV. 601, 632 (1985) (“[I]n most situations, it is not inconsistent with the policies underlying section 1983 for a state statute to impose a higher level of . . . damages than is available under federal law.”).

\textsuperscript{62} \textit{See DeMarco v. Sadiker}, 952 F. Supp. 134, 142 (E.D.N.Y. 1996); \textit{Sager}, 543 F. Supp. at 294; \textit{see also} Shaw v. Garrison, 545 F.2d 980, 986 (5th Cir. 1977) (observing that “state survival statutes have primarily been considered when their effect on the plaintiff’s § 1983 case was beneficial”), \textit{rev’d sub nom. Robertson v. Wegmann}, 436 U.S. 584 (1978); Pritchard v. Smith, 289 F.2d 153, 157 (8th Cir. 1961) (stating that “Congress by the language . . . in § 1988 intended to enlarge the civil right remedy by authorizing resort to state law”); Theis, \textit{supra} note 38, at 688 (“Generally, state statutes have been considered only for the beneficial effect they would have on the plaintiff’s case.”).}
3. Robertson v. Wegmann

Despite the views expressed in Jefferson and Jones, several courts rely on the United States Supreme Court decision in Robertson v. Wegman in rejecting the conclusion that the survival of remedies in § 1983 litigation is governed by federal law. Robertson involved a § 1983 claim premised upon a state district attorney’s alleged bad faith criminal prosecution of the plaintiff. The plaintiff died while the action was pending, leaving no close surviving relatives. The executor of the decedent’s estate then sought to be substituted as a party in order to pursue the action on the estate’s behalf. However, the applicable state survival statute only permitted claims to survive in favor of the spouse, children, parents, or siblings of a decedent. In Robertson there were no surviving relatives within the class established by the statute, thus

63. Robertson, 436 U.S. at 584.

64. See, e.g., Williams v. City of Oakland, 915 F. Supp. 1074, 1076 (N.D. Cal. 1996) (indicating that the Supreme Court has rejected the federal common law approach); Guyton v. Phillips, 532 F. Supp. 1154, 1166 (N.D. Cal. 1981) (rejecting as contrary to the Supreme Court’s "present interpretation" of § 1983 the proposition that the survival of remedies in a § 1983 action is governed by "federal common law without regard to state law"), disapproved on other grounds in Peraza v. Delameter, 722 F.2d 1455, 1457 (9th Cir. 1984).


66. Prior to his death, the plaintiff obtained a federal injunction prohibiting further state court prosecution of the criminal charges then pending against him. See Shaw v. Garrison, 328 F. Supp. 390 (E.D. La. 1971), aff’d, 467 F.2d 113 (5th Cir. 1972).

67. See Robertson, 436 U.S. at 585, 587.

68. See Fed. R. Civ. P. 25(a) (“If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper party.”).

69. See Robertson, 436 U.S. at 586–87.

70. See id. at 587, 591. The statute provided, in pertinent part, as follows:

The right to recover . . . damages caused by an offense or quasi offense, if the injured person dies, shall survive . . . in favor of: (1) the surviving spouse and child or children of the deceased or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

LA. CIV. CODE ANN. art. 2315 (West 1973).

71. The Louisiana Court of Appeal held that “[t]he chosen classes reasonably embrace those individuals that are likely to be most affected by the death of the deceased and reflect a reasonably appropriate limitation on [the survival] right of action.” Allen v. Burrow, 505 So. 2d 880, 888 (La. Ct. App. 1987).
the statute required the abatement of the action.\textsuperscript{72} Both the
trial and appellate courts concluded that the abatement of the
action would be inconsistent with § 1983,\textsuperscript{73} and purported to
establish a federal common law rule\textsuperscript{74} permitting the dece-
dent’s claim to survive.\textsuperscript{75}

The Supreme Court reversed,\textsuperscript{76} and applied the state
statute to bar the decedent’s § 1983 claim.\textsuperscript{77} The Court began
by noting that because federal law is silent on the issue, the
survival of § 1983 claims is generally determined through ref-
erence to analogous state law.\textsuperscript{78} The exception to this general
rule occurs where application of the pertinent state law—in
this case a state survival statute—would be inconsistent with
federal law.\textsuperscript{79}

The Court explained that in determining whether a state
survival statute is inconsistent with federal law, courts must
look not only to the language of the pertinent federal statute,
but also to the policies underlying that statute.\textsuperscript{80} The Court
then noted that the principal policies underlying § 1983 are
(1) compensating for injuries to persons who have been de-
prived of their federal rights, and (2) deterring abuses of

\textsuperscript{72} See Robertson, 436 U.S. at 587.
\textsuperscript{73} The Court of Appeal, for example, stated that “[b]ecause Louisiana’s
survivorship provisions would cause [the] pending civil rights action to abate,
we find that Louisiana law is inconsistent with the broad remedial purposes
embodied in the Civil Rights Acts.” Shaw v. Garrison, 545 F.2d 980, 983 (5th
Cir. 1977), rev’d sub nom. Robertson, 436 U.S. at 584. See generally Goad v.
Macon County, 730 F. Supp. 1425, 1429 (M.D. Tenn. 1989) (discussing lower
court decisions in Robertson); Sager v. City of Woodland Park, 543 F. Supp. 282,

\textsuperscript{74} See generally Berry v. City of Muskogee, 900 F.2d 1489, 1510 (10th Cir.
1990) (Tacha, J., concurring) (stating that where the “state law remedy for a
survival action [is] inadequate, the court should fashion a federal common law
remedy responsive to the federal policies underlying section 1983”); Theis, supra
note 38, at 683 (“If the adequate protection of civil rights requires survival ac-
tions for their deprivation, state law may help accomplish that end. However, if
state law is inadequate for the task, then federal common law, in conflict with
state statute, must be pressed into service.”).

\textsuperscript{75} See Robertson, 436 U.S. at 588–88, 590.

\textsuperscript{76} See id. at 588.

\textsuperscript{77} See id. at 593–95.

\textsuperscript{78} See id. at 589–90 (citing 42 U.S.C. § 1988 (1996), which permits resort to
state law where federal remedial provisions are “deficient”). But cf. Miller v.
Court’s] decision that federal law is ‘deficient’ with respect to survival was brief
and conclusory.”).


\textsuperscript{80} See id. at 590.
authority by individuals acting under color of state law.\footnote{81} The Court held that application of the pertinent survival statute was not inconsistent with § 1983 merely because it would cause the plaintiff to lose the litigation.\footnote{82} The Court noted that § 1983's goal of compensating persons who have been deprived of their federal rights provides no basis for authorizing recovery by an individual suing as executor of a decedent's estate.\footnote{83} In other words, § 1983's compensatory purpose was not undermined by the state survival statute because the substituted plaintiff in Robertson was not within the class of persons protected by § 1983.\footnote{84}

The Court also held the abatement of a particular action would not undermine § 1983's role as a deterrent,\footnote{85} at least in cases where the constitutional deprivation did not cause the victim's death.\footnote{86} The Court explained that because the state

\begin{footnotes}
\item[81] See id. at 590–91. The Ninth Circuit observed that "while perhaps not the prominent purpose, punishment is [also] a permissible purpose of § 1983 liability." Larez v. City of Los Angeles, 946 F.2d 630, 648 (9th Cir. 1991); cf. Sager v. Woodland Park, 543 F. Supp. 282, 296 n.16 (D. Colo. 1982) (referring to "a third purpose under § 1983—retribution").
\item[82] See Robertson, 436 U.S. at 593. The Court explained:
That a federal remedy should be available... does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which § 1983 refers us.... If success of the § 1988 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But § 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby.

Id.
\item[83] See id. at 592.
\item[84] See Sager, 543 F. Supp. at 295 (observing that the Court in Robertson concluded that "[Section] 1983's policy of compensating injured persons would not be undermined by Louisiana's survival law since mere executors are not truly injured parties pursuant to § 1983"). But cf. Ascani v. Hughes, 470 So. 2d 207, 209 (La. Ct. App.) (noting that "federal statutory law does not address... who the injured parties are when the victim is killed"), review denied, 472 So. 2d 919 (La. 1985).
\item[85] The Court found "nothing in [§ 1983] or its underlying policies to indicate that a state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship." Robertson, 436 U.S. at 590.
\item[86] See id. at 592. One court stated, somewhat exaggeratedly, that the Robertson Court "repeatedly emphasized that its decision to apply the Louisiana statute to the detriment of the plaintiff's case might be inappropriate in cases where the alleged misconduct caused the plaintiff's death." Weeks v. Benton, 649 F. Supp. 1297, 1306 n.8 (S.D. Ala. 1986); cf. McFadden v. Sanchez, 710 F.2d 907, 911 (2d Cir. 1983) (stating that the Robertson Court "pointedly distin-
statute permitted most actions to survive the victim's death,\textsuperscript{87} even state officials contemplating illegal activity who were familiar with the statute would be cognizant of their potential liability under § 1983.\textsuperscript{88} Given the virtual impossibility of purposely selecting victims who would subsequently die from causes unrelated to the constitutional deprivation,\textsuperscript{89} leaving no surviving next of kin,\textsuperscript{90} the Court concluded that application of the state survival statute was unlikely to have even a marginal influence on the future behavior of such officials.\textsuperscript{91} It therefore held that the original plaintiff's § 1983 claim abated upon his death, noting as a general proposition that state survival statutes apply in § 1983 actions unless they have an independent adverse effect on, and are generally inhospitable to, the policies underlying § 1983.\textsuperscript{92}

Robertson did not involve a state statutory limitation on the remedies available under § 1983.\textsuperscript{93} Indeed, claims for compensatory damages, including pain and suffering, clearly survive under the state statute at issue in that case.\textsuperscript{94} Thus, although the reasoning in Robertson may be instructive in analyzing survival statutes that preclude recovery for the de-

\textsuperscript{87} See Robertson, 436 U.S. at 591, 592, 594; see also Sager, 543 F. Supp. at 295 ("[T]he Robertson court held that § 1983's policy of deterring abuses of power by those acting under color of state law would not be thwarted by appeal to Louisiana state law since most people do not die unsurvived by family and, therefore, most actions would survive the plaintiff's death.").

\textsuperscript{88} See Robertson, 436 U.S. at 592.

\textsuperscript{89} See id. at 592 n.10 (discarding the suggestion that state officials could "deliberately . . . select as victims only those persons who would die before conclusion of the § 1983 suit for reasons entirely unconnected with the official illegality") (parentheses omitted).

\textsuperscript{90} See id. at 593 (noting that the § 1983 claim abated because the victim of the constitutional deprivation "was not survived by one of several close relatives" specified in the state statute); see also Williams v. City of Oakland, 915 F. Supp. 1074, 1078 (N.D. Cal. 1996) (asserting that the § 1983 claim in Robertson abated "only because the plaintiff had no next of kin survivors").

\textsuperscript{91} See Robertson, 436 U.S. at 592 n.10.

\textsuperscript{92} See id. at 594.


cedent’s pain and suffering, it is not dispositive of whether such statutes are inconsistent with § 1983. In any event, the lower courts in the Ninth Circuit have relied upon Robertson when considering such statutes. These courts have reached differing results.

III. THE NINTH CIRCUIT’S APPLICATION OF ROBERTSON IN § 1983 CASES INVOLVING STATE DAMAGE LIMITATIONS

A. The Impact of State Damage Limitations on § 1983’s Deterrent Objective

1. Where Death Results from the Constitutional Deprivation

a. Guyton v. Phillips and Its Progeny

In the Ninth Circuit, the first significant consideration of a § 1983 plaintiff’s right to recover for pain and suffering experienced prior to death occurred in Guyton v. Phillips. In that case, the plaintiff asserted a § 1983 claim on behalf of her deceased son, who had been shot and killed by two police officers.

The Guyton case was tried to the court sitting without a

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96. See Garcia, 49 Cal. Rptr. 2d at 583. See generally Weeks v. Benton, 649 F. Supp. 1297, 1308 (S.D. Ala. 1986) (“A number of . . . courts have held that restrictions on recoverable damages in state . . . survival statutes are inconsistent with federal law and therefore not applicable in § 1983 actions.”).

97. See supra note 36 and accompanying text.


The plaintiff presented evidence that for a brief period after being shot and prior to dying, the decedent consciously suffered pain. The Ninth Circuit has observed that "in order for a decedent's beneficiaries to recover damages for a decedent's pain and suffering, it is necessary to establish that the decedent was conscious for at least some period of time after he suffered the injuries which resulted in his death." Thus, the Guyton court was presented with the question of whether the plaintiff was precluded from recovering for that pain and suffering because the California survival statute's prohibition of such a recovery applied to the decedent's § 1983 claims.

The court concluded that an interpretation of § 1983 that permits recovery for pain and suffering only when the victim survives (which would have been the effect of applying the state survival statute) would deter conduct that injures an individual while providing little or no deterrence to conduct that results in the victim's death. Some courts suggest that

100. See Guyton, 532 F. Supp. at 1159. Section 1983 claims are generally jury-eligible. See, e.g., Keller v. Prince George's County, 827 F.2d 952, 954 (4th Cir. 1987) ("Persons seeking monetary damages under § 1983 have a right to a jury trial under the seventh amendment.").


102. Cook v. Ross Island Sand & Gravel Co., 626 F.2d 746, 749-50 (9th Cir. 1980). "In most jurisdictions recovery for pain and suffering is precluded where death is instantaneous or the victim is unconscious from the time the injury occurred until death." Ingram v. Howard-Needles-Tammen & Bergendoff, 672 P.2d 1083, 1092 (Kan. 1983) (Schroeder, C.J., dissenting).

103. See Guyton, 532 F. Supp. at 1164.


In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.


105. See Guyton, 532 F. Supp. at 1166; cf. O'Connor v. Several Unknown Correctional Officers, 523 F. Supp. 1345, 1348 (E.D. Va. 1981) ("If a state rule, barring suit where the defendant's acts resulted in the death of the injured party, were allowed to prevail, a state official contemplating such severe conduct
in a case like Guyton, this phenomenon might encourage police officers to inflict force upon suspects “to the point of death.”\textsuperscript{106} Because one purpose of § 1983 is to prevent abuse of official acts that result in a deprivation of rights,\textsuperscript{107} and in particular those that result in the victim’s death,\textsuperscript{108} the Guyton court concluded that applying the state survival statute would be inconsistent with § 1983’s deterrent objective.\textsuperscript{109} The court maintained that awarding the plaintiff damages for the decedent’s pain and suffering was consistent with the “narrow ruling and discussion by the Supreme Court in Robertson,”\textsuperscript{110} where (unlike in Guyton) the alleged constitutional deprivation was unrelated to the victim’s death.\textsuperscript{111}

Although Guyton, a district court decision, is not binding on other courts in the Ninth Circuit,\textsuperscript{112} Davis v. City of Ellensburg\textsuperscript{113} specifically adopted the Guyton reasoning.\textsuperscript{114} Like
Guyton, Davis arose out of the death of an individual during his arrest.\textsuperscript{115} Relying on Robertson, the defendants argued that the plaintiffs’ § 1983 claims were subject to a provision in Washington’s survival statute precluding recovery for “pain and suffering . . . personal to and suffered by a deceased.”\textsuperscript{116} The plaintiffs, in turn, urged the court to follow Guyton in disregarding the state statutory damage limitation, arguing that the limitation was inconsistent with § 1983’s deterrent objective.\textsuperscript{117} They claimed that the defendants’ reliance on Robertson was misplaced because the facts in Davis were more analogous to those in Guyton in that the alleged constitutional deprivation was the cause of the victim’s death.\textsuperscript{118}

The Davis court agreed that the holding in Robertson should not be extended to cases where a constitutional violation results in the victim’s death.\textsuperscript{119} The court held that applying a state survival statute that excludes damages for pain and suffering in such a case would be inconsistent with § 1983 because wrongdoers would not be sufficiently deterred from killing their victims.\textsuperscript{120} Quoting Guyton, the court stated that applying such a statute in cases where the constitutional deprivation results in death would create a “substantial deterrent effect to conduct that results in the injury of an individual but virtually no deterrent to conduct that kills the victim.”\textsuperscript{121}

The Davis court also relied on the Seventh Circuit’s decision in Bell v. City of Milwaukee.\textsuperscript{122} In Bell, a police shooting

\begin{footnotes}
\item[114] See id. at 1255–56.
\item[115] See id. at 1249.
\item[116] Id. at 1255–56. See WASH. REV. CODE § 4.20.046(1) (1988). However, the statute was amended in 1993, see 1993 Wash. Laws. Ch. 44, sec. 1, and now specifically permits the decedent’s personal representative to recover for the decedent’s pain and suffering. See WASH. REV. CODE § 4.20.046(1) (1996); see also Steve Andrews, Comment, Survivability of Noneconomic Damages for Tortious Death in Washington, 21 SEATTLE U. L. REV. 625, 645 (1998) (observing that “the post 1993 general survival statute no longer precludes damages for pain [and] suffering”).
\item[117] See Davis, 651 F. Supp. at 1250.
\item[119] See Davis, 651 F. Supp. at 1253, 1256.
\item[120] See id. at 1255–56.
\item[121] Id. at 1256 (quoting Guyton, 532 F. Supp. at 1166).
\item[122] Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984); see Davis, 651
\end{footnotes}
victim's surviving relatives brought suit under § 1983. The defendants argued that state statutory restrictions upon the recovery available in wrongful death actions applied to limit the damages recoverable in connection with the plaintiffs’ § 1983 claims.

Noting that there is no federal statute addressing the survival of § 1983 actions or specifying the damages recoverable in such actions, the Seventh Circuit concluded that it must look to state law for guidance on those issues, unless that law is inconsistent with the federal civil rights laws. The court then proceeded to analyze the applicable state statutes, and rejected the provisions limiting the recovery available to the plaintiffs because these provisions were inconsistent with the deterrent policy underlying § 1983. Relying in part upon Guyton, the Bell court noted that where a constitutional deprivation results in the victim’s death, application of such limitations would result in “more than a marginal loss of influence on potentially unconstitutional actors.” In addition, such limitations would inhibit § 1983’s ability to deter unlawful conduct, in part because it would be “more advantageous to the unlawful actor to kill rather than to injure.”

Characterizing Bell as the leading case on the subject, F. Supp. at 1250, 1253–57.

123. See Bell, 746 F.2d at 1214, 1224.
124. The court noted that “recovery in a Wisconsin wrongful death action . . . cannot include damages for the loss of life itself,” and that Wisconsin law also “does not allow the victim’s estate to recover punitive damages.” Id. at 1235, 1241.
125. See id. at 1225–26, 1234–35.
126. See id. at 1234.
127. See id. at 1234, 1236.
128. See id. at 1240. In view of its analysis of § 1983's deterrent purpose, the court found it “unnecessary to address whether Section 1983 compensation policy is necessarily inconsistent with [a state] policy of noncompensation where the victim by virtue of death cannot be made whole.” Id. at 1240 n.42.
129. Bell, 746 F.2d at 1239. The Bell court here undoubtedly was responding to the Supreme Court's rejection of the suggestion that the state survival statute at issue in Robertson had “even a marginal influence on behavior.” Robertson v. Wegmann, 436 U.S. 584, 592 n.10 (1978).
130. Bell, 746 F.2d at 1239.
131. See Davis v. City of Ellensburg, 651 F. Supp. 1248, 1254 (E.D. Wash. 1987); see also Tracy v. Bittles, 820 F. Supp. 396, 399 (N.D. Ind. 1993) (describing Bell as “a[n] important Seventh Circuit opinion in this area”); Garcia v. Superior Court, 49 Cal. Rptr. 2d 580, 584 (Ct. App. 1996) (asserting that the present issue has arisen “primarily in the . . . Seventh Circuit,” and describing Bell
the court in *Davis* relied on its reasoning\(^\text{132}\) and the similar analysis in *Guyton*\(^\text{133}\) to conclude that where a constitutional deprivation causes the victim's death,\(^\text{134}\) a survival statute's preclusion of recovery for the decedent's pain and suffering is inconsistent with § 1983's deterrent purpose.\(^\text{135}\) Other courts in the Ninth Circuit have also indicated that *Guyton* and *Bell* stand for the proposition that where a constitutional deprivation results in death, the deterrent policy underlying § 1983 permits the decedent's survivors to recover for the decedent's pain and suffering.\(^\text{136}\)

b. Garcia v. Superior Court

Ironically, it was in part the same deterrent concerns expressed in *Guyton v. Phillips*,\(^\text{137}\) *Bell v. City of Milwaukee*,\(^\text{138}\) and *Davis v. City of Ellensburg*\(^\text{139}\) that prompted the enactment of many state survival statutes.\(^\text{140}\) In *Warner v. McCaughan*,\(^\text{141}\) for example, the court noted that the Wash-

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\(^\text{132}\) The damages at issue in *Bell* were for "the loss of [the decedent's] life and enjoyment thereof," and not for his pain and suffering. *Bell*, 746 F.2d at 1234; see supra note 124. However, the distinction presumably was of no significance to the *Davis* court because in Washington, where *Davis* arose, the courts characterized "the lost enjoyment of life's pleasures as merely a component of damages for pain and suffering—items of damage specifically excluded by [the former survival statute]." *Woolridge v. Woollett*, 638 P.2d 566, 569 (Wash. 1981).

\(^\text{133}\) See *Garcia*, 49 Cal. Rptr. 2d at 584 (indicating that *Bell* and *Guyton* are in the same "line of cases").

\(^\text{134}\) See *Davis*, 651 F. Supp. at 1250-51, 1253.

\(^\text{135}\) See *id*. at 1255-56.

\(^\text{136}\) See, e.g., *Garcia*, 49 Cal. Rptr. 2d at 584 (rejecting that view); see also *Garcia v. Whitehead*, 961 F. Supp. 230, 232 & n.6 (C.D. Cal. 1997).


\(^\text{138}\) *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984).


\(^\text{140}\) In *In re Inflight Explosion on Trans World Airlines*, 778 F. Supp. 625, 631 (E.D.N.Y. 1991), rev'd on other grounds sub nom. *Ospina v. Trans World Airlines*, 975 F.2d 35 (2d Cir. 1992), the court noted that "the majority of American states now permit some kind of survival action," and that those states generally permit the recovery of damages "for conscious pain and suffering in personal injury cases." The court added that "[t]his development is consistent with the current economic and conceptual underpinnings of modern American tort law," including "deterrence against future delicts by the wrongdoer." *Id*.

ington survival statute at issue in *Davis*\(^\text{142}\) reflected the Washington state legislature's intent to abrogate the common law rule that tort claims abate upon the death of the injured party.\(^\text{143}\) According to *Warner*, it was the fact that the common law rule made it "more profitable for the defendant to kill the plaintiff than to scratch him," that motivated the Washington legislature.\(^\text{144}\) Other courts have also alluded to the potential anti-deterrent implications of the common law rule.\(^\text{145}\)

However, these concerns with the common law rule did not prevent many of the same state legislatures from excluding damages for pain and suffering from the remedies available under their survival statutes.\(^\text{146}\) Further, many courts in those states have upheld these statutory schemes against various challenges.\(^\text{147}\) One of the premises implicitly underlying exclusion of damages for pain and suffering is that because such damages are simply one component of a broader compensatory damage scheme,\(^\text{148}\) the exclusion of such dam-

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142. *See Davis*, 651 F. Supp. at 1250.
144. *Warner*, 460 P.2d at 275 (quoting WILLIAM L. PROSSER, LAW OF TORTS § 121, at 924 (3d ed. 1964)); *see also* Cavazos v. Franklin, 867 P.2d 674, 677 (Wash. Ct. App. 1994) (observing that "the old twist of common law... made it more profitable to kill than to injure"); *cf. Inflight Explosion*, 778 F. Supp. at 630 ("A survival action insures that a tortfeasor will not do better by killing rather than by simply injuring.").
145. *See, e.g.*, Wiggins v. Lane & Co., 298 F. Supp. 194, 195 (E.D. La. 1964) (stating that the common law rule made it "cheaper for the defendant to kill a person than to tweak his nose"); *see also* Variety Children's Hosp. v. Perkins, 445 So. 2d 1010, 1012 (Fla. 1983).
At common law a person's right to sue for personal injuries terminated with his death. This created the anomaly that a tortfeasor who would normally be liable for damages caused by his tortious conduct would not be liable in situations where the damages were so severe as to result in death.

*Id.*/; Milton v. Cary Med. Ctr., 538 A.2d 252, 253 n.8 (Me. 1988) ("At common law, an action for injuries resulting in death could not be maintained. Because the tort died with the injured person, 'it was more profitable for the defendant to kill the plaintiff than to scratch him.'") (quoting WILLIAM L. PROSSER, LAW OF TORTS § 127, at 902 (4th ed. 1971)).
148. *See Fantozzi v. Sandusky Cement Prods. Co.*, 597 N.E.2d 474, 484 (Ohio 1992) ("One of the elements of compensatory damages that is universally al-
ages from the remedies preserved by a survival statute is likely to have little impact on state law deterrence objectives.\textsuperscript{149}

The view that such limitations are likewise not inconsistent with § 1983's similar deterrent objective\textsuperscript{150} is perhaps best represented by the California Court of Appeal's decision in \textit{Garcia v. Superior Court}.

In \textit{Garcia}, the plaintiff brought suit under § 1983 in her capacity as the personal representative of her deceased brother's estate, alleging her brother died as the result of excessive force inflicted by police officers during his arrest.

Relying on the successor to the California survival statute at issue in \textit{Guyton},\textsuperscript{153} the trial court in \textit{Garcia} struck the plaintiff's claim for pain and suffering damages.\textsuperscript{154} The plaintiff then sought appellate review, arguing that the pertinent provisions of the state statute were inconsistent with federal law, and the policies underlying § 1983 entitled her to recover

\textsuperscript{149} In other words, precluding the recovery of damages for pain and suffering under a survival statute does not mean that the plaintiff will necessarily be left without a remedy, see, e.g., \textit{Harvey}, 400 P.2d at 90 (noting that "[a]ny other element of damage . . . would appear to survive" under the Washington survival statute), and the damages that do survive may provide a sufficient deterrent. See, e.g., \textit{Garcia v. Superior Court}, 49 Cal. Rptr. 2d 580, 586 (Ct. App. 1996) (referring to "the deterrent potential of punitive damages under [a] state survival statute"); \textit{Karen M. Doore, Note, Survival of the Fittest? Waiting Out the Death of the Plaintiff in ADA Claims: Allred v. Solaray, Inc., 1998 UTAH L. REV. 371, 393 (indicating that deterrence may be accomplished where "even just one claim" survives) (discussing Rosenblum v. Colorado Dep't of Health, 878 F. Supp. 1401 (D. Colo. 1994)).

\textsuperscript{150} \textit{See} \textit{Brown v. Morgan County}, 518 F. Supp. 661, 664 (N.D. Ala. 1981) (observing that "deterrence is a goal of both [§ 1983] and [state law]"). \textit{But cf.} \textit{Sager v. Woodland Park}, 543 F. Supp. 282, 293 (D. Colo. 1982) (asserting that the damages necessary to effectuate § 1983's deterrent objective "may far exceed those required to satisfy the policies underlying . . . state [law]", because § 1983 is intended to deter deprivations of "constitutional rights, not state law rights," and the deprivation of a constitutional right is "significantly different from and more serious than a violation of a state right") (emphasis in original) (quoting \textit{Monroe v. Pape}, 365 U.S. 167, 196 (1961) (Harlan, J., concurring), overruled by \textit{Monell v. Department of Social Servs.}, 436 U.S. 658 (1978)).


\textsuperscript{152} \textit{See Garcia}, 49 Cal. Rptr. 2d at 581–82.

\textsuperscript{153} \textit{See CAL. CIV. PROC. CODE § 377.34 (West 1973 & Supp. 1999); see Garcia}, 49 Cal. Rptr. 2d at 585.

\textsuperscript{154} \textit{See Garcia}, 49 Cal. Rptr. 2d at 581–82.
for the pain and suffering experienced by her brother prior to his death.155

While acknowledging the Guyton court's view of the survival statute's anti-deterrent implications, the California Court of Appeal nevertheless concluded that § 1983's deterrent objective is adequately served by the availability of punitive damages.156 In reaching this conclusion, the court specifically rejected the portions of Guyton and Bell indicating that the unavailability of pain and suffering damages would effectively create an incentive for wrongdoers to "kill the victim rather than merely injure or maim the victim."157 The court explained:

We are not persuaded by the hypothetical example of a legally knowledgeable actor calculating that he would incur lesser liability by killing the victim than by injuring the victim. If we nevertheless indulge in that assumption, we must also attribute to the actor the knowledge that . . . a jury could punish such conduct with huge exemplary damages. We believe Bell and Guyton give insufficient consideration to the deterrent potential of punitive damages under the state survival statute.158

Thus, in the view of the Garcia court, the exclusion of pain and suffering damages under the California survival statute is not inconsistent with the policies of § 1983.

c. Reactions to Guyton and Garcia

Another court in the Ninth Circuit, having recently considered both Guyton and Garcia, found the analysis in Guyton more persuasive.159 In Garcia v. Whitehead,160 the federal district court for the Central District of California rejected the conclusion that punitive damages provide an adequate deterrent in cases where the victim of a constitutional deprivation is deceased.161 In particular, it noted that punitive damages

155. See id.
156. See id. at 585.
157. Id. at 585–86.
158. Id. at 586.
161. See id. at 233.
are unavailable in § 1983 actions against municipal defendants,162 and are not always warranted against individual defendants.163 Further, even appropriate punitive damages are likely to be relatively modest164 because the amount awarded is typically based upon the financial condition of the defendants,165 who are “not often wealthy individuals.”166 For these reasons, the deterrent potential of punitive damages in § 1983 cases may be “more imagined than real.”167 Thus, like the court in Guyton,168 the Whitehead court held that state survival statutes precluding recovery for a decedent’s pain and suffering are inconsistent with § 1983’s deterrent objective.169

On the other hand, some courts that agree with the result in Guyton have employed essentially the same reasoning as the Whitehead court to suggest that the availability of pain and suffering damages would not have a significant deterrent effect in § 1983 death actions. These courts cite the limited amount of pain and suffering damages in such a case for this result.170 Indeed, the Guyton court itself implicitly acknowledg-
edged this possibility.\textsuperscript{171}

However, the fact that awards for pain and suffering are often modest does not support the conclusion that a categorical prohibition of such awards would have no impact on § 1983's deterrent objective.\textsuperscript{172} As the \textit{Whitehead} court suggested, in cases where punitive damages are unavailable,\textsuperscript{173} the prospect of a pain and suffering award (or other "compensatory" damages)\textsuperscript{174} may be the only potential deterrent to future similar conduct.\textsuperscript{175}

The analysis in \textit{Guyton} and its progeny is also subject to criticism on the ground that it confuses § 1983's compensatory and deterrent purposes, although the two unquestionably overlap in many cases.\textsuperscript{176} For example, the courts in \textit{Garcia v. Whitehead}\textsuperscript{177} and \textit{Williams v. City of Oakland}\textsuperscript{178}

\begin{footnotesize}
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\item[171.] \textit{See Guyton}, 532 F. Supp. at 1167 (indicating that in cases where the constitutional deprivation results in death, the "period of pain and suffering" may be "brief," and the recovery attributable to that injury therefore modest); \textit{see also} Roger Goldman & Steven Puro, \textit{Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct}, 15 HASTINGS CONST. L.Q. 45, 57–58 (1987) ("Even when the victim of the misconduct prevails at trial, the action often provides little compensation and [therefore] has little deterrent effect on either the officers or their departments.").

\item[172.] \textit{See generally} Jones \textit{v. Reagan}, 696 F.2d 551, 554 (7th Cir. 1983) (observing that "deterrence [is] accomplished . . . by means of damage awards, compensatory and punitive"); Hobson \textit{v. Wilson}, 556 F. Supp. 1157, 1194 (D.D.C. 1982) ("Whether it is called compensatory or punitive, the whole award granted to a plaintiff and against a defendant . . . has a deterrent function.") (citing Owen \textit{v. City of Independence}, 445 U.S. 622 (1980)).

\item[173.] \textit{See Whitehead}, 961 F. Supp. at 233 ("Even where a constitutional violation is found, punitive damages are never available against the agency itself in a section 1983 action, and are not always warranted against the individual defendant.").

\item[174.] It has been argued that "pain and suffering damages awarded after the victim's death are not compensatory," but "in effect, quasi-punitive," because "the person whom the damages would compensate is unable to receive the benefit of the compensation." \textit{Denton v. Superior Court}, 945 P.2d 1283, 1286–87 (Ariz. 1997) (emphasis added).

\item[175.] \textit{See Weeks v. Benton}, 649 F. Supp. 1297, 1303–09 (S.D. Ala. 1986). \textit{But cf.} \textit{Bell v. City of Milwaukee}, 746 F.2d 1205, 1239 n.40 (7th Cir. 1984) ("In some cases the death of the victim might of course give rise to other claims on behalf of the survivors.").

\item[176.] \textit{See Gilmer v. Interstate/Johnson Lane Corp.}, 895 F.2d 195, 200 (4th Cir. 1990) (discussing the "mixing of compensatory and deterrent functions in the remedial provisions of a statute"), \textit{aff'd}, 500 U.S. 20 (1991); \textit{Minnesota v. Parker}, 538 N.W.2d 141, 143 (Minn. Ct. App. 1995) ("It is evident that most civil remedies have, to some extent, a punitive or deterrent as well as remedial effect from the viewpoint of the individuals who suffer such sanctions.").

\item[177.] \textit{Whitehead}, 961 F. Supp. at 230.
\end{itemize}
\end{footnotesize}
indicated that the prospect of punitive damages would not provide an adequate deterrent because the amount awarded would be dependent upon the financial resources of the particular defendant involved, rather than the pain and suffering experienced by the decedent.

To the extent a victim's pain and suffering is indicative of the egregiousness of the defendant's conduct, the assumption upon which this reasoning is based may be incorrect—the amount of punitive damages awarded may indeed reflect the decedent's pain and suffering. Nevertheless, in many


179. In California, where Whitehead, Williams, and Guyton all arose, “evidence of the defendant's financial condition is a prerequisite to a punitive damages award.” Adams v. Murakami, 813 P.2d 1348, 1357 (Cal. 1991). However, “the view adopted in California . . . is not universally held.” Chavez v. Keat, 41 Cal. Rptr. 2d 72, 76 (Ct. App. 1995). The Third Circuit, for example, has specifically “reject[ed] the . . . contention that evidence of [the defendant's] financial status [is] a prerequisite to the imposition of punitive damages.” Bennis v. Gable, 823 F.2d 723, 734 n.14 (3d Cir. 1987).

180. See Whitehead, 961 F. Supp. at 233; Williams, 915 F. Supp. at 1078.


182. In fact, juries contemplating punitive damage awards in California take into consideration not only the defendant's financial condition, but also the reprehensibility of the defendant's conduct and “the injury, harm, or damage actually suffered by the plaintiff.” Michelson v. Hamada, 36 Cal. Rptr. 2d 343, 357 n.7 (Ct. App. 1994) (quoting standard California jury instruction); cf. Hawkins v. Allstate Ins. Co., 733 P.2d 1073, 1085 (Ariz. 1987) (“In general, the more reprehensible the defendant's conduct and the more serious the harm likely to occur, the larger the appropriate [punitive damage award].”).

183. In this regard, the California Court of Appeal stated that “an appropriate and reasonable measure of punishment and deterrence can only be determined in relation to the actual harm suffered by the plaintiff.” Gagnon v. Continental Cas. Co., 260 Cal. Rptr. 305, 307 n.4 (Ct. App. 1989); see also Martini v. Federal Nat'l Mortgage Ass'n, 977 F. Supp. 464, 478 (D.D.C. 1997) (upholding a punitive damages award tied to the pain and suffering inflicted upon the plaintiff); Stern v. Wesley College, 747 F. Supp. 263, 270 (D. Del. 1990) (noting that “punitive damages are available under . . . survival action statutes for the pain and suffering incurred by the deceased prior to death”); cf. Garrick v. City and County of Denver, 652 F.2d 969, 971 (10th Cir. 1981) (considering the contention that the jury in a § 1983 action "based the amount of punitive damages on [the victim’s] pain and suffering"); Alabama Power Co. v. Cantrell, 507 So. 2d 1295, 1309 (Ala. 1986) (Maddox, J., concurring in part and dissenting in part) (noting state statutory schemes permitting plaintiffs to introduce "graphic evi-
§ 1983 cases a punitive damage award undoubtedly would not be sufficient to compensate for that injury, and this may be particularly true in cases where the constitutional deprivation results in the victim's death.

However, this is not to say (as the Whitehead and Williams courts did) that the prospect of such an award would also serve as an inadequate deterrent. Indeed, it is precisely because punitive damages are intended to deter future wrongdoing, rather than compensate for the plaintiff's injuries, that an award of such damages is typically based upon the wealth of the defendant and may not necessarily reflect the extent of pain and suffering experienced by the victim.

dence of the decedent's pain and suffering" when seeking "punitive damages in survival actions") (quoting appellant's brief)).

184. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266–67 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct."); Vasbinder, 976 F.2d at 121 (observing that "neither compensation nor enrichment is a valid purpose of punitive damages").

185. See Stern, 747 F. Supp. at 270 (holding that "punitive damages are applicable to the brief period of pain and suffering [the decedent] may have endured"); Roman v. City of Richmond, 570 F. Supp. 1554, 1557 (N.D. Cal. 1983) ("Although punitive damages are recoverable in a survival action, these damages are limited to the punitive damages the decedent would have been entitled to recover had he lived, and bear no relationship to the fact of the death."); see also Sullivan v. Delta Air Lines, 935 P.2d 781, 788 (Cal. 1997) (noting that the California survival statute "allow[s] recovery of punitive damages that the deceased plaintiff would have been entitled to recover if he or she had lived").


187. See City of Newport, 453 U.S. at 269 ("[A]llowing juries and courts to assess punitive damages in appropriate circumstances against the offending official[] based on his personal financial resources . . . directly advances the public's interest in preventing repeated constitutional deprivations."); Lee v. Edwards, 101 F.3d 805, 813 (2d Cir. 1996) ("[O]ne purpose of punitive damages is deterrence, and . . . deterrence is directly related to what people can afford to pay."); Maxwell v. Aetna Life Ins. Co., 693 P.2d 348, 362 (Ariz. Ct. App. 1982) (observing that "generally the wealthier the defendant the larger the award should be" in order to "deter others in similar circumstances").

188. In cases in which the victim of a constitutional deprivation is deceased, this "disconnect" between the victim's pain and suffering and the amount of punitive damages awarded actually may operate to the plaintiff's benefit. In Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566 (W.D. Okla. 1979), for example, the court postulated a situation in which the defendant intentionally inflicts an injury "severe enough to cause long term suffering," but "the suffering from that
In City of Newport v. Fact Concerts, Inc., for example, the Supreme Court relied on the availability of punitive damages against individual defendants in holding that such damages are not recoverable against municipalities in § 1983 actions. The Court specifically concluded that the possibility of a punitive damage award against an individual defendant based on his own financial resources not only advances the public interest in deterrence, but indeed may be a more effective deterrent than the threat of much larger punitive damage awards against governmental agencies. Not only does the analysis in Whitehead and Williams conflict with this reasoning, it is also questionable as an empirical matter.

In addition, the California Court of Appeal's conclusion in Garcia v. Superior Court that potential § 1983 defendants are unlikely to assess whether they could minimize their liability by killing their victims seems persuasive. In Carl...
son v. Green, Chief Justice Rehnquist's dissent criticized the suggestion that an actor, relying on the nuances of a state survival statute, would "intentionally kill [an] individual or permit him to die, rather than violate his constitutional rights to a lesser extent, in order to avoid liability." Another state court has likewise characterized that assumption as "too facile for the realities of [most] situations," and "of some use only if the actor is consciously bent upon killing the victim." In actuality it may be in this latter circumstance that a survival statute is least likely to influence the actor's conduct.

In addition to the punitive damages relied upon in Garcia, there are other potential deterrents to unconstitutional killings, such as the prospect of criminal liability, that may compensate for the unavailability of pain and suffering damages under a state survival statute. In Bell v. City of

198. Id. at 50–51 n.17 (Rehnquist, J., dissenting).
200. Id.; cf. O'Connor v. Several Unknown Correctional Officers, 523 F. Supp. 1345, 1348 (E.D. Va. 1981) (discussing the prospect of "a state official contemplating such severe conduct" that it would "result[] in the death of the injured party").
201. See Furman, 408 U.S. at 301 (Brennan, J., concurring) (observing that "many, and probably most, capital crimes cannot be deterred by the threat of punishment").
203. Indeed, "[s]ome courts have held that the threat of litigation [alone] is sufficient to deter future misconduct." LeBoff, supra note 28, at 242 (citing Goad v. Macon County, 730 F. Supp. 1425 (M.D. Tenn. 1989)). See generally Graham v. Sauk Prairie Police Comm'n, 915 F.2d 1085, 1105 (7th Cir. 1990) (observing that "the overriding concern of § 1983 is deterring unjustified takings of life").
204. See, e.g., Rosario Nevarez v. Torres Gaztambide, 633 F. Supp. 287, 298 n.15 (D.P.R. 1986) ("Should punitive damages prove to be insufficient to . . . deter . . . pernicious practices, perhaps the next step should be the initiation of criminal charges under 18 U.S.C. § 242, the criminal counterpart of 42 U.S.C. § 1983."); rev'd on other grounds, 820 F.2d 525 (1st Cir. 1987); Morse, supra note 48, at 36 ("[I]t is implausible to suggest that [an individual] will risk criminal prosecution . . . because damages are not recoverable against his employer [under § 1983].").
205. One potential deterrent that has received relatively little attention is the prospect of declaratory or injunctive relief. See Roman v. City of Richmond, 570 F. Supp. 1554, 1556 (N.D. Cal. 1983) ("Injunctive relief is a very important part of the relief sought by plaintiffs in these cases."); Rosario Nevarez, 633 F. Supp. at 301 ("Equitable relief is a component of a § 1983 action."); cf. Williams
Milwaukee, for example, one of the police officers named as a defendant served a prison term for reckless homicide and perjury as the result of the conduct that caused the victim's death and thus formed the basis for the § 1983 claim. Many courts consider the possibility of such criminal punishment to be a more effective deterrent than any prospect of a damage award under § 1983. Even in cases where that is not true, the prospect of a significant state law damage award may be a sufficient deterrent to overcome the un-

v. City of Oakland, 915 F. Supp. 1074, 1078 n.4 (N.D. Cal. 1996) (recognizing that "successful plaintiffs . . . may be able to obtain declaratory or injunctive relief" in § 1983 actions, but asserting that "where the victim is deceased, mootness looms" as an impediment to that remedy). See generally Committee of Cent. Am. Refugees v. INS, 682 F. Supp. 1055, 1064 (N.D. Cal. 1988) ("Injunctive relief is designed to deter future misdeeds, not to punish for past misconduct.").

206. Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984).
207. See id. at 1223. For a highly publicized example of a criminal conviction resulting from a civil rights violation that occurred in the Ninth Circuit, see Koon v. United States, 518 U.S. 81 (1996) (reviewing the convictions of police officers involved in the infamous Rodney King incident). However, this appears to be unusual. See, e.g., Goldman & Puro, supra note 171, at 59 (asserting that "criminal prosecution of police officers for public, official misconduct is rare").

208. The officer also lost his job. See Bell, 746 F.2d at 1222. That prospect also serves as a potential deterrent, although some observers have suggested that it is not a sufficient one. See, e.g., Goldman & Puro, supra note 171, at 49 ("Revoking an officer's certification . . . is a more effective deterrent than merely terminating his employment with the local police department because the terminated officer may be able to continue in law enforcement by working for a different department within the state.").

209. See, e.g., Rosario Nevarez, 633 F. Supp. at 298 n.15; see also Culver-Union Township Ambulance Serv. v. Steindler, 611 N.E.2d 698, 705 (Ind. Ct. App. 1993) ("In . . . cases [where the actor is consciously bent upon killing the victim,] there are other more clear deterrents in existence, i.e., penalties which might be imposed for murder or manslaughter."); cf. Carlson v. Green, 446 U.S. 14, 50 n.17 (1980) (Rehnquist, J., dissenting) (questioning whether a [civil] remedy will have a deterrent impact . . . beyond that of ordinary criminal sanctions"). See generally Goldman & Puro, supra note 171, at 56 ("Scholars have long disputed the effectiveness of damage actions brought by victims of police misconduct as a means of deterring such behavior.").

210. See, e.g., Collins v. Frisbie, 189 F.2d 464, 468 (6th Cir. 1951) ("Obviously fear of criminal punishment has been an insufficient deterrent on the police officers involved in this case, if the averments of the petition be accepted as true."); Matthew V. Hess, Comment, Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct, 1993 UTAH L. REV. 149, 184 (discussing the "inefficacy of criminal prosecutions as a tool to deter police misconduct").

211. See, e.g., Jaffee v. Redmond, 142 F.3d 409, 411-12 (7th Cir. 1998) (discussing administrator's request for "$100,000 in damages on her § 1983 claim and $2,000,000 in damages on her state-law wrongful death claim," after having been awarded "$45,000 on her federal claim and $500,000 on her state-law
availability of pain and suffering damages under § 1983.²¹²

In summary, there is disagreement among the courts in the Ninth Circuit concerning the propriety of applying a state survival statute prohibiting recovery for the decedent's pain and suffering in a § 1983 action in which the alleged constitutional deprivation resulted in the victim's death. Courts that follow Guyton hold that the state statutory limitation cannot apply in such a case because the potential for an award of damages for the decedent's pain and suffering is necessary to deter conduct that would violate § 1983. On the other hand, Garcia and other similar cases have applied the state statutory prohibition on the assumption that the availability of other remedies not prohibited by the survival statute serves as an adequate deterrent in § 1983 actions.

d. Carlson v. Green

The United States Supreme Court's decision in Carlson v. Green²¹³ suggests that the analysis in Robertson v. Wegmann²¹⁴ does not compel the application of a state survival provision precluding the recovery of damages for the decedent's pain and suffering in cases in which the constitutional deprivation results in death.²¹⁵ Carlson involved a claim asserted against federal officials directly under the United States Constitution pursuant to Bivens v. Six Unknown Fed-


²¹² See, e.g., Brown, 518 F. Supp. at 664 (“A tortfeasor who caused death by his actions would, if found liable under [state law], face a punitive damage award . . . for his wrongful act. Such an award would be imposed against tortfeasors held liable for acts causing death, thus deterring future misconduct.”); Garcia v. Superior Court, 49 Cal. Rptr. 2d 580, 586 (Ct. App. 1996) (holding that the “significant compensatory damages flowing from the actor’s killing of the victim” under state law provided sufficient deterrence to warrant the application of a state survival statute precluding recovery for pain and suffering in § 1983 actions). But see Sager v. City of Woodland Park, 543 F. Supp. 282, 293 n.12 (D. Colo. 1982) (observing that “the mere availability of a state remedy arising from the same transaction underlying a constitutional violation . . . does not generally preclude the availability of a § 1983 action”).


²¹⁵ See, e.g., McFadden v. Sanchez, 710 F.2d 907, 911 (2d Cir. 1983) (citing Robertson and Carlson for the proposition that “limitations in a state survival statute have no application to a § 1983 suit brought to redress a denial of rights that caused the decedent’s death”).
eral Narcotics Agents,\textsuperscript{216} rather than one arising under § 1983.\textsuperscript{217} However, given the similarity between “Bivens actions” and § 1983 claims,\textsuperscript{218} courts in the Ninth Circuit (and elsewhere)\textsuperscript{219} have looked to Carlson for guidance in addressing the survival of claims for pain and suffering in § 1983 cases.\textsuperscript{220}

Carlson arose out of the death of the plaintiff’s son while incarcerated in a federal prison.\textsuperscript{221} The plaintiff contended that the failure of prison officials to provide adequate medical attention caused her son’s death,\textsuperscript{222} thereby violating his Eighth Amendment rights.\textsuperscript{223} Under the applicable state law,


\textsuperscript{217} See Bell v. City of Milwaukee, 746 F.2d 1205, 1237 (7th Cir. 1984) (observing that Carlson involved “an action brought not against state or local officials under § 1983 but against federal officials directly under the Constitution”); Culver-Union Township Ambulance Serv. v. Steindler, 611 N.E.2d 698, 705 n.8 (Ind. Ct. App. 1993) (“Carlson v. Green was a damage action brought directly against federal prison officials under the Constitution and not as a § 1983 action.”).

\textsuperscript{218} See, e.g., Tavarez v. Reno, 54 F.3d 109, 110 (2d Cir. 1995) (noting the “similarity between suits under § 1983 and Bivens”); Grandbouche v. Clancy, 825 F.2d 1463, 1465 (10th Cir. 1987) (observing that “§ 1983 suits and Bivens actions are conceptually identical”); Paton v. La Prade, 524 F.2d 862, 871 (3d Cir. 1975) (stating that “a Bivens-type cause of action is the federal counterpart to claims under 42 U.S.C. § 1983”).


\textsuperscript{220} See, e.g., Davis v. City of Ellensburg, 651 F. Supp. 1248, 1254–55 (E.D. Wash. 1987); Guyton v. Phillips, 532 F. Supp. 1154, 1166 (N.D. Cal. 1981), disapproved on other grounds in Peraza v. Delamer, 722 F.2d 1455, 1457 (9th Cir. 1984); see also LeBoff, supra note 28, at 232 (“Although Carlson dealt with constitutional deprivations by federal officials, many courts have extended the rule laid down in Carlson to § 1983 actions where state officials deprived citizens of their federal rights.”).

\textsuperscript{221} See Carlson v. Green, 446 U.S. 14, 16 & n.1 (1980).

\textsuperscript{222} In particular, the prison officials were alleged to have provided improper medical care for the decedent’s chronic asthmatic condition. See id. at 16 n.1.

\textsuperscript{223} See id. at 16. The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments
however, no recovery was available where the acts complained of caused the victim’s death.\textsuperscript{224}

The Court rejected the argument that it should look to this state law in assessing the survival of the decedent’s \textit{Bivens} claim,\textsuperscript{225} holding that only a uniform federal survivorship rule would suffice to redress the constitutional deprivation being alleged.\textsuperscript{226} It stated that whenever a state survival statute would result in the abatement of a \textit{Bivens} action asserted against defendants whose conduct caused the victim’s death, federal common law applies to permit survival of the action.\textsuperscript{227} The Court maintained that this result was not inconsistent with its previous holding in \textit{Robertson},\textsuperscript{228} because in \textit{Robertson} the victim’s death was not caused by the alleged constitutional deprivation upon which the action was based.\textsuperscript{229}

Significantly, Justices Powell and Stewart in a concurring

\begin{itemize}
  \item \textsuperscript{*} U.S. CONST. amend. VIII. The amendment has been interpreted to require prison officials “to provide medical care for those whom [the government] is punishing by incarceration.” Estelle v. Gamble, 429 U.S. 97, 103 (1976); see also Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982) (“The Eighth Amendment requires that prison officials provide a system of ready access to adequate medical care.”).
  \item \textsuperscript{224} See Carlson, 446 U.S. at 17 n.4 (discussing IND. CODE § 34-1-1-1 (1976)).
  \item \textsuperscript{225} The Court explained: \textit{Bivens} defendants are federal officials brought into federal court for violating the Federal Constitution. No state interests are implicated by applying purely federal law to them. While it makes some sense to allow aspects of § 1983 litigation to vary according to the laws of the States under whose authority § 1983 defendants work, federal officials have no similar claim to be bound only by the law of the State in which they happen to work.
  \item \textsuperscript{226} See id. at 23.
  \item \textsuperscript{227} See id. at 24 (adopting the reasoning of the lower court decision under review). One federal appellate court described the impact of this holding in the following terms: “[T]he Supreme Court held that whenever a state survival statute would abate a \textit{Bivens}-type suit against a defendant whose conduct caused the plaintiff’s death, federal common law allows the action to survive. \textit{Carlson} also contains language indicating that, to further the goal of deterring the unconstitutional conduct of federal officials, the Court might apply a federal rule allowing survival of all \textit{Bivens} actions. . . . [W]hen a suit survives under [state] law, [the court] need not decide whether \textit{Carlson} would dictate its survival under federal law.” Grandbouche v. Clancy, 825 F.2d 1463, 1465 n.1 (10th Cir. 1987) (citations omitted).
  \item \textsuperscript{228} See Bell v. City of Milwaukee, 746 F.2d 1205, 1238 (7th Cir. 1984) (stating that the \textit{Carlson} Court “distinguished \textit{Robertson}”); O’Connor v. Several Unknown Correctional Officers, 523 F. Supp. 1345, 1348 (E.D. Va. 1981) (same).
  \item \textsuperscript{229} See Carlson, 446 U.S. at 24.
\end{itemize}
opinion in *Carlson* suggested that they would have reached the same result if the case had arisen under § 1983, and several lower courts have likewise concluded that the analysis in *Carlson* applies by analogy in § 1983 actions.

One such court has summarized the present state of the law as follows: "After *Robertson* and *Carlson*, . . . state law governs the survivability of section 1983 actions, but a federal rule of survival supercedes any state law requiring abatement in an action where the acts of the defendants caused the death of the injured party." Nevertheless, in both *Robertson* and *Carlson* the Court focused on the validity of state survival statutes that result in the complete abatement of an action. Thus, neither case resolves the applicability, in § 1983 actions, of state survival provisions that merely preclude the recovery of damages for pain and suffering. Indeed, the propriety of extending *Carlson* to § 1983 actions under any circumstances remains an open question.

230. *Id.* at 29–30 (Powell, J., concurring).


233. See Ascani v. Hughes, 470 So. 2d 207, 209 (La. Ct. App. 1985) ("In *Robertson* . . . the issue was . . . whether the action must be dismissed on the ground of abatement."); *review denied*, 472 So. 2d 919 (La. 1985); *O'Connor*, 523 F. Supp. at 1348 (observing that *Carlson* permits survival under federal law "whenever a state survival statute would abate the action").


235. See, e.g., *Jefferson v. City of Tarrant*, 522 U.S. 75, 82 n.2 (1997) (Stevens, J., dissenting) (asserting that the holding in *Robertson* "does not bear on the question whether a state limitation on the measure of damages applies to a § 1983 claim"); *McFadden v. Sanchez*, 710 F.2d 907, 911 (2d Cir. 1983) (observing that *Robertson* "does not require deference to a survival statute that would . . . limit the remedies available under § 1983").

2. Where Death is Unrelated to the Constitutional Deprivation

In Williams v. City of Oakland,\textsuperscript{237} the federal district judge who decided Guyton v. Phillips\textsuperscript{238} extended Guyton's holding to find a state survival statute inconsistent with § 1983 when the victim's death is unrelated to the constitutional violation.\textsuperscript{239} Like Guyton, Williams involved allegations of excessive use of force by police officers during an individual's arrest.\textsuperscript{240} However, the alleged deprivations of the victim's constitutional rights did not result in her death;\textsuperscript{241} she instead died from unrelated causes more than a year after commencing her § 1983 action.\textsuperscript{242}

After being substituted as plaintiff in his capacity as administrator of the decedent's estate, the decedent's husband sought to recover for the pain and suffering the victim experi-

\textsuperscript{n.19:}

Congress having prescribed § 1988's formula as the course to follow in § 1983 actions . . . , the courts are not free to adopt a federal common law rule of survival which applies to all § 1983 actions as was done, in effect, in Carlson with respect to all Bivens actions, and are not as free to apply federal common law in a given § 1983 case as in a given Bivens case.

Id. The Carlson Court itself suggested that its analysis may not extend to § 1983 actions because § 1988, which authorizes resort to state law in such actions, "does not in terms apply to Bivens actions." Carlson v. Green, 446 U.S. 14, 24 n.11 (1980); see also LeBoff, supra note 28, at 232 (indicating that the Carlson Court "looked to federal common law to fashion an appropriate remedy" because it was "not constrained by § 1988").


\textsuperscript{239.} The judge who decided Williams and Guyton, Marilyn Hall Patel, has frequently been at odds with members of the law enforcement community. See, e.g., Lisa Wiehl, Keeping Files on the File Keepers: When Prosecutors Are Forced to Turn Over the Personnel Files of Federal Agents to Defense Lawyers, 72 WASH. L. REV. 73, 91 n.71 (1997) (observing that "Judge Patel is commonly known as a liberal judge and a critic of the Justice Department," and discussing one of her rulings, United States v. Lacy, 896 F. Supp. 982 (N.D. Cal. 1995), vacated by United States v. Herring, 83 F.3d 1120 (9th Cir. 1996), that "again" had that department and other federal agencies "up in arms") (internal quotation marks and citation omitted).

\textsuperscript{240.} See Williams, 915 F. Supp. at 1075.

\textsuperscript{241.} Like deadly force, see supra note 99, a police officer's use of force that does not result in death is subject to the Fourth Amendment's reasonableness requirement, and thus, where excessive, can provide the basis for a § 1983 claim. Graham v. Connor, 490 U.S. 386, 395 (1989).

\textsuperscript{242.} See Williams, 915 F. Supp. at 1075.
enced, notwithstanding the California survival provision to the contrary. The plaintiff contended that the holding in Guyton should apply in all § 1983 actions, and not merely those in which the victim died as a result of the constitutional violation.

The defendants argued that where the death of the decedent is unrelated to the constitutional deprivation, the prospect of a pain and suffering award in favor of the decedent's survivors would not serve as a deterrent. The defendants relied on a passage from Robertson v. Wegmann, noting that for a state survival statute to have "even a marginal influence on behavior" in such cases, state officials must have both the desire and the ability to select victims who would die before the conclusion of their § 1983 actions for reasons entirely unrelated to the illegal conduct at issue in those cases.

The court essentially agreed with the plaintiff. It concluded that the holding in Robertson was not based solely on the fact that the victim's death was unrelated to the civil rights violation. Rather, Robertson also relied on the fact that § 1983 claims would abate under the survival statute only if the decedent leaves no close surviving relatives. The Williams court contrasted that situation with the impact of the California survival statute, which often leaves the survivors with no remedy and, correspondingly, defendants with insufficient incentives to refrain from unlawful conduct.

The implication of this analysis is that because relatively few actions abate under the state survival statute at issue in Robertson, the statute is not inconsistent with § 1983's de-

243. See id.
244. See id. at 1077; cf. LeBoff, supra note 28, at 240 ("Although Guyton . . . dealt with [the] situation[] where the unlawful conduct resulted in the death of the victim, the unavailability of substantial damages equally undermines the goal of deterrence when the victim died from causes unrelated to the claim.").
245. See Williams, 915 F. Supp. at 1077.
247. Williams, 915 F. Supp. at 1077 (citing Robertson, 436 U.S. at 592 n.10).
248. See id.
249. See id.; see also Kilgo v. Bowman Transp., 87 F.R.D. 26, 28 (N.D. Ga. 1980) ("The situation presented in [Robertson] was an exception to the usual result under Louisiana law . . .").
250. See Williams, 915 F. Supp. at 1078. See generally Berry v. City of Muskogee, 900 F.2d 1489, 1506 (10th Cir. 1990) (observing that "some state [survival] laws may deny all recovery in particular circumstances").
251. See Williams, 915 F. Supp. at 1078.
252. Robertson, 436 U.S. at 591 (observing that "most Louisiana actions sur-
On the other hand, where a survival statute would completely immunize some defendants from liability under § 1983, those defendants "would know, in advance, that they would never be monetarily liable under § 1983 for acts that cause deprivations of constitutional rights as long as the victim dies." For example, a survival statute precluding the recovery of damages for pain and suffering may effectively immunize municipalities (which cannot be liable for punitive damages) from any liability in § 1983 cases in which the victim dies. This leaves those potential defendants with "little or no incentive to refrain from illegal conduct," and thus is contrary to § 1983's deterrent objective even in cases where the victim dies of causes unrelated to the constitutional deprivation.

As the defendants in Williams contended, however, this reasoning is difficult to reconcile with the analysis in Robertson. In Robertson, the Court indicated that § 1983's deterrent objective would not be undermined by applying a state survival statute in cases in which the victim's death was an "intervening circumstance" because a defendant is not likely to be able to select victims who would subsequently die from causes unrelated to the defendant's unlawful conduct. In Strickland v. Deaconess Hospital, for example, the Washington Court of Appeals cited Robertson for the proposition

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253. See Kilgo, 87 F.R.D. at 28 ("The Supreme Court [in Robertson] found that because a civil rights action would almost always survive under Louisiana law the law was not inconsistent with § 1983 and would control the question of survival of a § 1983 action.").
256. See Weeks, 649 F. Supp. at 1307.
258. See id.
259. See id. at 1077.
260. See generally Glanz v. Vernick, 750 F. Supp. 39, 44 (D. Mass. 1990) ("The analysis in Robertson indicates that the Supreme Court would not usually consider a state law allowing abatement of a cause of action to be 'inconsistent' with a federal civil rights statute.").
that § 1983's deterrent objective is not undermined by the complete abatement of an action in which the constitutional deprivation did not cause the victim's death.\textsuperscript{264} The Strickland court, therefore, held that a survival statute that did not result in abatement of the action,\textsuperscript{265} but instead merely precluded recovery for pain and suffering experienced by the decedent,\textsuperscript{266} cannot be inconsistent with § 1983 in actions brought to recover for injuries not causing the decedent's death.\textsuperscript{267}

A similar result was reached in Burns v. City of Scottsdale,\textsuperscript{268} where the plaintiffs claimed to have been injured as the result of police officers' use of excessive force during a traffic stop.\textsuperscript{269} In addition to various state law claims,\textsuperscript{270} the plaintiffs asserted a cause of action under § 1983.\textsuperscript{271} After the action commenced, one of the plaintiffs died of causes unrelated to the incident.\textsuperscript{272} The remaining plaintiff, acting in his capacity as personal representative of the deceased plaintiff's estate,\textsuperscript{273} filed a motion for partial summary judgment on the issue of whether damages were re-

\textsuperscript{264} See id. at 77.

\textsuperscript{265} See Harvey v. Cleman, 400 P.2d 87, 90 (Wash. 1965) ("In unequivocal language the [Washington] legislature has established that all causes of action survive, provided, however, that there can be no recovery by a personal representative for pain and suffering . . . personal to and suffered by a deceased.") (internal quotation marks omitted); Woody's Olympia Lumber, Inc. v. Roney, 513 P.2d 849, 853 (Wash. Ct. App. 1973) (observing that under the then applicable Washington survival statute, "all causes of action survive except damages for pain and suffering") (internal quotation marks and ellipses omitted).

\textsuperscript{266} See WASH. REV. CODE § 4.20.046(1) (1988).

\textsuperscript{267} See Strickland, 735 P.2d at 76–77.


\textsuperscript{269} See id.


\textsuperscript{271} See Burns, 1998 U.S. Dist. LEXIS 13961, at *1.

\textsuperscript{272} See id.

coverable under § 1983 for the pain and suffering allegedly suffered by the decedent prior to his death.\textsuperscript{274} The pertinent Arizona survival statute\textsuperscript{275} prohibits the award of such damages.\textsuperscript{276}

The court indicated that under \textit{Robertson v. Wegmann},\textsuperscript{277} the issue with which it was confronted was whether the Arizona statute's prohibition of recovery for pain and suffering was inconsistent with federal law, and in particular with the policies underlying § 1983.\textsuperscript{278} Observing that the issue was one of first impression,\textsuperscript{279} the court held that the state statute was not inconsistent with § 1983's deterrent objective.\textsuperscript{280} While acknowledging the importance of that objective,\textsuperscript{281} the court found it "highly unlikely that application of the Arizona survival statute to a [section] 1983 action where the death of the plaintiff is due to unrelated and unforeseen events [would] weaken [section] 1983's role in preventing official illegality."\textsuperscript{282} The court added that this was particularly true in view of the apparent availability of punitive damages under

\textsuperscript{274} See Burns, 1998 U.S. Dist. LEXIS 13961, at *1.
\textsuperscript{275} The statute states, in pertinent part, as follows:

\textit{Every cause of action . . . shall survive the death of the person entitled thereto or liable therefore, and may be asserted by or against the personal representative of such person, provided that upon the death of the person injured, damages for pain and suffering of such injured person shall not be allowed.}


\textsuperscript{277} Robertson v. Wegmann, 436 U.S. 584 (1978).

\textsuperscript{278} See Burns, 1998 U.S. Dist. LEXIS 13961, at **2–3.

\textsuperscript{279} See id. at **1–2.

\textsuperscript{280} See id. at *5. The Arizona Court of Appeals subsequently reached the same conclusion. See Badia v. City of Casa Grande, 988 P.2d 134, 140 (Ariz. Ct. App. 1999) (holding that the Arizona survival statute "does not undermine the deterrent purposes of § 1983").

\textsuperscript{281} See Burns, 1998 U.S. Dist. LEXIS 13961, at *5. See generally Berry v. City of Muskogee, 900 F.2d 1489, 1507 (10th Cir. 1990) (stating that "the deterrent function [is] central to the purpose of § 1983"); Badia, 988 P.2d at 140 (describing § 1983's deterrent objective as "fundamental").

\textsuperscript{282} Burns, 1998 U.S. Dist. LEXIS 13961, at *5; cf. Badia, 988 P.2d at 140 ("[I]t is patently absurd to suggest that officers are likely to engage in unconstitutional conduct based on the assumption that the victim will die within a short period of time, thereby freeing them from liability for pain and suffering damages.").
the Arizona statute,\textsuperscript{283} because punitive damages serve “both as an appropriate punishment and a significant deterrent as contemplated by section 1983.”\textsuperscript{284}

Thus, Ninth Circuit courts are not in agreement concerning the propriety of applying a state survival statute precluding recovery for the decedent’s pain and suffering in a § 1983 case in which the victim’s death was unrelated to the constitutional deprivation. The court in Williams\textsuperscript{285} followed Guyton,\textsuperscript{286} for example, in holding that the application of the state statute in these cases would be inconsistent with § 1983’s deterrent objective. The courts in Strickland\textsuperscript{287} and Burns,\textsuperscript{288} on the other hand, concluded that prohibiting recovery for the decedent’s pain and suffering is no impediment to deterrence, in part because it is unlikely that the defendant could predict the victim’s death.

B. The Impact of State Damage Limitations on § 1983’s Compensatory Purpose

1. The View that such Limitations are not Inconsistent with § 1983

The primary purpose of a § 1983 damage award is to compensate victims for deprivations of their federal constitutional or statutory rights.\textsuperscript{289} An award of damages for pain and suffering experienced by the victim is one aspect of this compensatory scheme.\textsuperscript{290} As one federal court recently observed: “It is hornbook law that pain and suffering, whether physical or otherwise, is an element of compensatory dam-


\textsuperscript{287} Strickland v. Deaconess Hospital, 735 P.2d 74 (Wash. Ct. App. 1987).

\textsuperscript{288} Burns, 1998 U.S. Dist. LEXIS 13961, at *1.


Most state survival statutes also reflect modern tort law’s emphasis upon the compensatory nature of damage awards. Pain and suffering damages are nevertheless excluded from the remedies preserved by many survival statutes on the theory that “an injured person who is dead cannot benefit from an award for his pain and suffering.” As one jurist stated: “The reason for the exclusion is the belief that since the decedent alone endured the pain and can no longer benefit from the award, there is no reason for the survivors to be enriched as a result of the decedent’s suffering.

Absent a constitutional infirmity, it is not the role of the courts to assess the wisdom or reasonableness of a state’s refusal to compensate for a decedent’s pain and suffering. Undoubtedly, this conclusion reflects a reasonable legislative

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291. *In re Aircrash Disaster Near Roselawn, Ind.*, 948 F. Supp. 747, 751 (N.D. Ill. 1996); *see also* Denton v. Superior Court, 945 P.2d 1283, 1286 (Ariz. 1997) (“Compensatory damages include damages for pain and suffering.”).

292. *See, e.g.*, Thompson v. Estate of Petroff, 319 N.W.2d 400, 405 (Minn. 1982) (observing that “survival statutes were designed in accordance with modern theories of tort law, which stress the compensatory rather than the punitive aspects of damages for any injury”); Moyer v. Phillips, 341 A.2d 441, 444 (Pa. 1975) (“The broadness of the [Pennsylvania survival statute comprehends the modern theory of torts which is generally compensatory in nature.”).


294. Vulk v. Haley, 736 P.2d 1309, 1313 (Idaho 1987); *see also* Weeks v. Benton, 649 F. Supp. 1297, 1309 (S.D. Ala. 1986); Brown v. Morgan County, 518 F. Supp. 661, 664 (N.D. Ala. 1981) (“It is clear that where the injured party is deceased, any damage award would not compensate him for his injuries, because the cruel fact is that he is no longer present to benefit from any damages awarded.”) (emphasis in original).


297. *See* Parkerson v. Carrouth, 782 F.2d 1449, 1455 (8th Cir. 1986); *see also* Bills v. United States, 857 F.2d 1404, 1407 (10th Cir. 1988).

There appears to be no reason why [a] legislature should not be free to prescribe the measure of damages recoverable . . . in survival . . . cases . . .

Whatever views we may entertain as to wise public policy on these matters, it seems clear that they are issues to be resolved by the legislature . . ., and not by federal courts.

*Id.*
judgment. While the reasonableness of a state survival statute is not necessarily dispositive of whether the statute is consistent with § 1983, the Supreme Court’s analysis in Robertson v. Wegmann strongly suggests that § 1983’s compensatory purpose creates no constitutional impediment to the application of state survival rules in § 1983 actions.

In particular, the Robertson Court stated that § 1983’s compensatory objective “provides no basis for requiring compensation of one who is merely suing as executor of the deceased’s estate.” Several courts in the Ninth Circuit have engaged in similar reasoning in rejecting the contention that state survival laws precluding recovery for pain and suffering are inconsistent with § 1983.

In Evans v. Twin Falls County, for example, the Idaho Supreme Court held that a state common law rule that personal causes of action do not survive the death of the injured party was not inconsistent with § 1983’s compensatory pur-

298. See Bills, 857 F.2d at 1407 (“[W]here the injured party dies before judgment or settlement, the legislature may reasonably conclude that it is unwarranted and incongruous to permit creditors of [the] decedent’s estate (or even next of kin) to . . . receive pecuniary benefit based upon the pain and suffering experienced by someone else.”); Garcia v. Superior Court, 49 Cal. Rptr. 2d 580, 586 (Ct. App. 1996) (stating that the exclusion of damages for pain and suffering in California’s survival statute “represents the Legislature’s reasonable judgment”).

299. See Robertson v. Wegmann, 436 U.S. 584, 592 n.8 (1978) (observing that “the fact that a state survivorship statute may be reasonable [does not] by itself resolve the question whether it is ‘inconsistent with the Constitution and laws of the United States’”) (quoting 42 U.S.C. § 1988 (1996)).

300. Id. at 584.

301. See Steinglass, supra note †, at 624 (observing that “[t]he goal of compensation was disposed of almost summarily” in Robertson).

302. Robertson, 436 U.S. at 592. One court in the Ninth Circuit extended this analysis to conclude that § 1983’s deterrent objective is likewise “not undermined by abating [an] action against one who is merely suing as the executor of the deceased’s estate.” Strickland v. Deaconess Hosp., 735 P.2d 74, 77 (Wash. Ct. App. 1987) (citation and internal quotation marks omitted).

303. That conclusion has also been reached by courts in other jurisdictions. See, e.g., Culver-Union Township Ambulance Serv. v. Steindler, 611 N.E.2d 698, 705 (Ind. Ct. App. 1993); see also Jones v. George, 533 F. Supp. 1293, 1305 (S.D. W. Va. 1982) (observing that § 1983’s “stated policy . . . of compensating the victim of [a] constitutional deprivation] is not in issue” when the victim is deceased”); Brown v. Morgan County, 518 F. Supp. 661, 664 (N.D. Ala. 1981) (quoting Robertson in concluding that “[t]he policy of compensation is not a factor in death cases”).


pose. The Idaho court specifically noted that a decedent cannot benefit from an award of pain and suffering damages. In Strickland v. Deaconess Hospital, the Washington Court of Appeals similarly held that a state survival statute precluding recovery for pain and suffering did not undermine § 1983’s compensatory purpose because such damages are “personal” to the decedent.

The California Court of Appeal reached essentially the same conclusion in Garcia v. Superior Court, where it observed that the California survival statute’s exclusion of pain and suffering damages reflected the state legislature’s considered judgment that “once deceased, the decedent cannot in any practical way be compensated for his injuries or pain and suffering, or be made whole.” The availability of punitive damages under the California survival statute was a significant factor underlying the Garcia court’s holding that the statute is not inconsistent with § 1983.

Although the court

rules of nonsurvivability, except with respect to wrongful death actions and actions against the estate of the tortfeasor” (citations omitted).

306. See Evans, 796 P.2d at 93-95.
310. See Strickland, 735 P.2d at 76-77.
313. Garcia, 49 Cal. Rptr. 2d at 586. However, the court also noted that a decedent’s survivors are not precluded by the California survival statute from recovering for their own losses, including, arguably, damages for pain and suffering. See id.; see also Sullivan v. Delta Air Lines, 935 P.2d 781, 789 (Cal. 1997) (noting that the survival statute’s prohibition of recovery for pain and suffering “applies to causes of action personal to the decedent and not to causes of action that others may have for the decedent’s wrongful death”). The Garcia court relied in particular upon the availability of a state law wrongful death action whereby the decedent’s surviving relatives could recover damages for having been deprived of the decedent’s comfort and society. See Garcia, 49 Cal. Rptr. 2d at 586. The California Court of Appeal observed that the damages awarded to compensate for these losses are “akin to those awarded for pain and suffering and emotional distress.” Canavin v. Pacific Southwest Airlines, 196 Cal. Rptr. 82, 91 (Ct. App. 1993).
314. See Jackson v. East Bay Hosp., 980 F. Supp. 1341, 1355 (N.D. Cal. 1997) (“California law permits a decedent’s heirs or successors to recover... punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived.”).
315. See Garcia, 49 Cal. Rptr. 2d at 585.
did not specifically analyze the impact such damages may have on § 1983’s compensatory purpose, there is support for the conclusion that, in cases where a constitutional deprivation results in the victim’s death, punitive damages effectively serve whatever “compensatory” function might have been served by an award for the decedent’s pain and suffering.

In Brown v. Morgan County, for example, the court indicated that in cases in which a constitutional deprivation results in death, § 1983’s compensatory purpose would be satisfied by a punitive damage award. The court reasoned that the beneficiaries of compensatory damages would be the same as the beneficiaries of the punitive damages award—“the next of kin or other beneficiaries of the deceased’s estate.” In other words, because any compensatory damages awarded under a state survival statute are intended to compensate for the decedent’s losses, and thus represent a potential windfall for the survivors, the survivors are “in no way disadvantaged” (i.e., they are not undercompensated) if the only

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316. The court instead observed that “[t]he deterrent purpose of [§ 1983] is satisfied . . . by the fact that [the state survival statute] expressly allows punitive damages the decedent would have been entitled to recover had he survived.” Id. (emphasis added). This implicit distinction is consistent with California law, where “[p]unitive damages are not designed to compensate a plaintiff for actual losses.” California State Auto. Ass’n Inter-Ins. Bureau v. Carter, 210 Cal. Rptr. 140, 143 (Ct. App. 1985). See generally In re Air Disaster at Lockerbie, Scotland, 928 F.2d 1267, 1272 (2d Cir. 1991) (“Lower federal courts and a majority of state courts have . . . held that punitive damages are penal, rather than compensatory, in nature.”).

317. See Air Disaster, 928 F.2d at 1272 (“A minority of state courts view punitive damages as serving a compensatory purpose.”); Perry v. Melton, 299 S.E.2d 8, 12 (W. Va. 1982) (“Some courts have recognized that from the plaintiff’s standpoint punitive damages are additional compensation for the egregious conduct that has been inflicted on the injured party.”) (quoting Hensley v. Erie Ins. Co., 283 S.E.2d 227, 233 (W. Va. 1981)).


319. See id. at 664.

320. Id.; see also Carter v. City of Birmingham, 444 So. 2d 373, 376 (Ala. 1983) (adopting the reasoning in Brown); Boykin, supra note 49, at 43 (“The Carter court noted that the . . . punitive damages remedy satisfies the compensatory policy of § 1983.”).

321. See Kuehn v. Children’s Hosp., 119 F.3d 1296, 1303 (7th Cir. 1997) (“[I]f the victim is dead the award of damages for his pain and suffering constitutes a windfall—the award is to someone other than the victim.”); Bills v. United States, 857 F.2d 1404, 1407 (10th Cir. 1988) (indicating that survivors who are permitted to recover for a decedent’s pain and suffering “derive a windfall”).

damages available to them are “punitive” in nature.\footnote{324}

2. The View that State Damage Limitations are Inconsistent with § 1983

a. Where Death is Unrelated to the Constitutional Deprivation

In \textit{County of Los Angeles v. Superior Court},\footnote{325} the California Court of Appeal declined to extend its holding in \textit{Garcia v. Superior Court}\footnote{326} that the California survival statute is not inconsistent with § 1983’s compensatory objective to cases in which the victim’s death is unrelated to the constitutional deprivation at issue.\footnote{327} The plaintiff in \textit{County of Los Angeles} brought suit under § 1983 alleging sex discrimination and sexual harassment in connection with her employment.\footnote{328} While the action was pending, the plaintiff died in an unrelated automobile accident. The plaintiff’s personal representative thereafter prosecuted the action on her behalf in accordance with the terms of the California survival statute.\footnote{329}

The trial court held that the decedent’s claim for emo-


324. This analysis applies where the compensatory damages at issue are for the decedent’s pain and suffering, because that injury is “strictly personal to the deceased,” and a failure to compensate for it does not “lessen the value of the estate.” \textit{Sullivan}, 52 Cal. Rptr. 2d at 664 n.3 (citations omitted). It may not apply to damages intended to compensate for economic losses suffered by the decedent, such as medical expenses incurred prior to death, because such losses do deplete the decedent’s estate. \textit{See Brown}, 518 F. Supp. at 664. Thus, most state survival statutes “provide for recovery of... damages in the nature of hospital and medical expenses.” \textit{Gartin v. St. Joseph’s Hosp. & Med. Ctr.}, 749 P.2d 941, 945 (Ariz. Ct. App. 1988).


327. \textit{See County of Los Angeles}, 58 Cal. Rptr. 2d at 360.

328. See id. at 359. Although \textit{Title VII} of the \textit{Civil Rights Act of 1964}, 42 U.S.C. §§ 2000e to 2000e-17 (1994), is the principal federal statute redressing sex discrimination in employment, such claims are also cognizable under § 1983 when the employer is a state governmental entity. \textit{See Sischo-Nownejad v. Merced Community College Dist.}, 934 F.2d 1104, 1112 (9th Cir. 1991).

329. \textit{See County of Los Angeles}, 58 Cal. Rptr. 2d at 359.}
tional distress survived her death\textsuperscript{330} despite the survival statute's exclusion of damages for pain and suffering.\textsuperscript{331} When the California Court of Appeal subsequently issued its opinion in \textit{Garcia}, the employer sought a writ from the Court of Appeal directing the trial court to vacate its ruling in \textit{County of Los Angeles}.\textsuperscript{332}

The Court of Appeal began its analysis\textsuperscript{333} by acknowledging that where the alleged constitutional deprivation results in the victim's death, \textit{Garcia} holds that the remedies available to the survivors do not include damages for the decedent's pain and suffering.\textsuperscript{334} The issue in \textit{County of Los Angeles}, however, was whether the same result is appropriate in cases where the victim's death is unrelated to the constitutional deprivation.\textsuperscript{335}

The court ultimately concluded that \textit{Garcia} does not apply in the latter situation\textsuperscript{336} because application of the California survival statute in such cases would be inconsistent with § 1983's compensatory purpose.\textsuperscript{337} The court noted that in \textit{Garcia},\textsuperscript{338} California's wrongful death statutes\textsuperscript{339} permitted

\begin{itemize}
\item \textsuperscript{330} See id.
\item \textsuperscript{331} See Ambruster v. Monument 3: Realty Fund VIII Ltd., 963 F. Supp. 862, 864–65 (N.D. Cal. 1997) ("Emotional distress damages are within the definition of pain and suffering damages and do not survive the death of a decedent under the California survival statute."); Sullivan v. Delta Air Lines, 52 Cal. Rptr. 2d 662, 664 (Ct. App. 1996) ("The plain language of [the survival statute] precludes any recovery of emotional distress damages (which are for pain and suffering) . . . ."), rev'd on other grounds, 935 P.2d 781 (Cal. 1997).
\item \textsuperscript{332} See \textit{County of Los Angeles}, 58 Cal. Rptr. 2d at 359.
\item \textsuperscript{333} The procedural history of the \textit{County of Los Angeles} case is more complex than the abbreviated textual discussion suggests. Relying on \textit{Garcia}, the Court of Appeal initially issued an alternative writ, but subsequently concluded that \textit{Garcia} was not dispositive and, believing it had therefore acted improvidently, discharged the writ and denied the defendant's petition. See id. at 359–60. However, the California Supreme Court granted the defendant's petition for further review and, also citing \textit{Garcia}, directed the Court of Appeal to vacate its order denying the defendant's petition, issue another writ, and hold argument. See \textit{County of Los Angeles} v. Los Angeles County Superior Court, No. S053930, 1996 Cal. LEXIS 4695, at *1 (Cal. Aug. 21, 1996). The Court of Appeal complied, and ultimately issued the opinion discussed here. See \textit{County of Los Angeles}, 58 Cal. Rptr. 2d at 360. That decision, in turn, was recently overturned by the California Supreme Court. See \textit{County of Los Angeles} v. Superior Court, 981 P.2d 68 (Cal. 1999).
\item \textsuperscript{334} See \textit{County of Los Angeles}, 58 Cal. Rptr. 2d at 359.
\item \textsuperscript{335} See id. at 359–60.
\item \textsuperscript{336} See id. at 360.
\item \textsuperscript{337} See id. at 361 (citation omitted).
\item \textsuperscript{338} Garcia v. Superior Court, 49 Cal. Rptr. 2d 580, 586 (Ct. App. 1996).
\end{itemize}
the decedent's heirs to recover compensatory damages attributable to the losses caused by the victim's death. The court concluded that it was the potential availability of these state law damages that justified denying recovery for pain and suffering under § 1983. Where the constitutional deprivation does not result in death, by contrast, the decedent's heirs obviously have no claim for wrongful death. Thus, in the latter situation, application of the state survival statute would undermine § 1983's compensatory objective by leaving the heirs "without any meaningful remedy."

The California Court of Appeal specifically rejected the contention that the Supreme Court's decision in Robertson v. Wegmann compelled a different outcome, even though the victim's death in Robertson was also unrelated to the alleged constitutional deprivation. In particular, the County of Los Angeles court relied upon that portion of Robertson stating that abatement of a particular claim should not "itself" be sufficient to compel the conclusion that a state survival statute is inconsistent with § 1983. The holding in Robertson, the California court maintained, applied only to situations in which the pertinent state survival statute is not generally inhospitable to the survival of § 1983 actions and has no independent adverse impact on the policies underlying the federal statute. In contrast to the statute at issue in Robertson, the court went on to hold the California survival statute is inhospitable to § 1983 claims where the decedent's

340. See County of Los Angeles, 58 Cal. Rptr. 2d at 360.
341. See id. at 360–61 (discussing Garcia).
342. See id. at 361.
343. Id.; see also LeBoff, supra note 28, at 241 ("[S]evere limitations on survival damages defeat the goals of § 1983 when not accompanied by a wrongful death action.").
345. See County of Los Angeles, 58 Cal. Rptr. 2d at 361.
346. See Robertson, 436 U.S. at 594; supra note 111 and accompanying text.
347. See County of Los Angeles, 58 Cal. Rptr. 2d at 361 (quoting Robertson, 436 U.S. at 594).
349. See County of Los Angeles, 58 Cal. Rptr. 2d at 361.
death is unrelated to the alleged constitutional deprivation because its application in such a case would leave the decedent's survivors with no meaningful remedy.\textsuperscript{350}

This analysis is questionable.\textsuperscript{351} Contrary to the California Court of Appeal's suggestion, conduct that violates § 1983 but does not result in death clearly can give rise to state law claims.\textsuperscript{352} Indeed, the decedent in \textit{County of Los Angeles} presumably could have asserted any of several such claims that would have survived her death,\textsuperscript{353} despite the inapplicability of the state wrongful death statute in that case.\textsuperscript{354} Thus, the \textit{Garcia} court's conclusion that the availability of state law remedies may be sufficient to satisfy § 1983's compensatory

\textsuperscript{350} See id. at 362; cf. O'Connor v. Several Unknown Correctional Officers, 523 F. Supp. 1345, 1349 (E.D. Va. 1981) (concluding that a state survival statute denying the victim any recovery “effectively calls for the abatement of the decedent's constitutional claims,” and therefore is “inconsistent with the compensatory... policies behind § 1983”).

\textsuperscript{351} The California Supreme Court granted the employer's petition for review of the Court of Appeal's decision, \textit{County of Los Angeles v. County of Los Angeles Superior Court}, 932 P.2d 1296 (Cal. 1997), and ultimately reversed the decision, \textit{County of Los Angeles v. Superior Court}, 981 P.2d 68 (Cal. 1999).


\textsuperscript{353} The conduct alleged in \textit{County of Los Angeles} would have been actionable under the California Fair Employment and Housing Act (the “CFEHA’’), see \textit{CAL. GOV'T CODE §§ 12900-12966} (West 1992 & Supp. 1995), and a claim under that act could have been asserted simultaneously with the plaintiff's § 1983 claim. See, e.g., Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1112-13 (9th Cir. 1991). The plaintiff also could have asserted a common law wrongful discharge claim premised upon the public policy exception to the employment-at-will doctrine. See Rojo v. Kliger, 801 P.2d 373, 388-90 (Cal. 1990). \textit{But cf.} Cook v. Lindsay Olive Growers, 911 F.2d 233, 238 (9th Cir. 1990) (concluding that “the California legislature intended the [CFEHA] to be the exclusive remedy for a discriminatory wrongful discharge”). However, the decedent's claim for emotional distress under the CFEHA would not have survived her death. See California v. Home Fed. Sav. & Loan Ass'n, 51 Fair. Empl. Prac. Cas. (BNA) 990, 992 (N.D. Cal. 1989) (“Although emotional distress damages may be recovered under the CFEHA, they do not survive the death of the injured party.”).

\textsuperscript{354} See \textit{County of Los Angeles}, 58 Cal. Rptr. 2d at 361. In fact, the decedent may well have done so. The court noted that she originally sought relief “on a variety of theories, including violations of the federal Civil Rights Acts,” but that the only question raised by the petition for review was whether the state survival statute's prohibition of recovery for a decedent's pain and suffering “applies to claims brought by the decedent's representative under § 1983.” \textit{Id.} at 359–60 n.3 (ellipses omitted).
purpose, which the County of Los Angeles court acknowledged makes “perfect sense” in cases where the constitutional deprivation caused the victim’s death, would appear to be equally applicable where the victim’s death is unrelated to the constitutional deprivation.

In Carter v. City of Birmingham, for example, the Alabama Supreme Court engaged in essentially the same analysis as the Garcia court, holding that a state statute precluding the recovery of compensatory damages in wrongful death cases is not inconsistent with § 1983 because an alternative state law remedy is available in such cases. Although Justice Richard Jones dissented from that holding, he noted that the majority’s reasoning would apply in all § 1983 cases, and not merely those in which constitutional deprivation results in the victim’s death.

Addressing the issue the County of Los Angeles court overlooked, Justice Jones explained: “Just as our wrongful death act affords a state remedy where death results from conduct proscribed by section 1983, our statutory and common law affords certain remedies for personal injury resulting from the same culpable conduct...”

Significantly, the California Supreme Court recently reversed the California Court of Appeal’s ruling in County of Los Angeles, albeit on slightly different grounds. Acknowledging that its analysis was contrary to the result reached in other cases decided in the Ninth Circuit, including specifically Williams v. City of Oakland, the California

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356. See County of Los Angeles, 58 Cal. Rptr. 2d at 361.
358. See id. at 380.
359. See id. (Jones, J., dissenting).
360. See supra notes 351–356 and accompanying text.
361. Carter, 444 So. 2d at 380 (Jones, J., dissenting) (emphasis added).
363. In fact, the California Supreme Court declined to express a view as to whether the state survival statute’s preclusion of damages for the decedent’s pain and suffering would apply in cases such as Garcia, in which the alleged civil rights violation caused the victim’s death. See id. at 78 & n.5.
364. See id. at 77–78 & n.5.
365. Williams v. City of Oakland, 915 F. Supp. 1074 (N.D. Cal. 1996). The County of Los Angeles court asserted that the federal district court in Williams overlooked one significant factor that the high court had stressed in Robertson v. Wegmann, 436 U.S. 584 (1978): whether a state’s particular limitation on an estate’s recovery of the deceased plaintiff’s damages was an unreasonable one. See County of Los Angeles, 981 P.2d at 78.
Supreme Court held that the California survival statute’s prohibition of recovery for a decedent’s pain and suffering is not inconsistent with § 1983’s compensatory or deterrent objectives. Among other things, the court concluded that the statute permits the decedent’s estate to recover all damages to which the decedent would have been entitled except those for pain and suffering, and that the California legislature had reasonably concluded that pain and suffering injuries are strictly personal to the decedent, and thus are not transmissible to the estate.

The California Supreme Court also indicated that its analysis was not altered by the fact that the statute’s application may preclude any recovery in cases in which the decedent did not suffer any recoverable pecuniary losses—that

366. See County of Los Angeles, 981 P.2d at 75–78. With respect to § 1983’s deterrent objective, the court stated:

To conclude that [the statute’s] limitation on damages could have any influence on the behavior of public officials and employees, we would have to accept, to paraphrase the high court, the farfetched proposition that they would have both the desire and ability to select as . . . victims only those who will die before resolution of a civil rights lawsuit and whose only compensable injury will be emotional distress.

Id. at 76 (quoting Robertson, 436 U.S. at 592 n.10).

367. See id. The court observed that under California’s survival law, an estate can recover not only the deceased plaintiff’s lost wages, medical expenses, and any other pecuniary losses incurred before death, but also punitive or exemplary damages. See id. at 75.

368. See id. at 76, 78. The court explained:

Essentially, the line drawn by the Legislature approximates the pecuniary out-of-pocket losses the deceased plaintiff experienced because of the defendant’s unlawful behavior. These pecuniary losses, such as lost or reduced wages or expenses of medical care, actually reduced the plaintiff’s income or increased the plaintiff’s pecuniary expenses. If uncompensated, these pecuniary losses would reduce the value of the estate below what it would have been in the absence of the defendant’s harmful conduct by reducing the plaintiff’s lifetime income or by increasing the plaintiff’s lifetime expenses. By contrast, when the plaintiff experiences emotional distress, the loss is non-pecuniary. Psychic injury, while it can be psychologically devastating, does not itself reduce income or increase expenses. Therefore, psychic injury does not reduce the value of the plaintiff’s estate compared to what it would have been in the absence of the injury, and the Legislature’s decision not to allow the estate to recover damages for such injury was reasonable.

Id. at 76 (footnote omitted).

369. See id. This was not the case in County of Los Angeles, however, because “in addition to damages for emotional distress, the estate [was] seek[ing] compensation for the deceased plaintiffs back wages as a result of alleged wrongful termination, a remedy available under California’s survival law.” Id.
is, in cases where damages for the decedent's pain and suffering would be the only significant component of compensa-

Quoting the Supreme Court's observation in *Robertson v. Wegmann*\textsuperscript{371} that a state survival statute cannot be considered inconsistent with federal law merely because it causes the plaintiff to lose the litigation,\textsuperscript{372} the *County of Los Angeles* court concluded that the California statute does not conflict with federal law even if its application would eliminate all recovery in some cases.\textsuperscript{373}

b. *Where Death Results From the Constitutional Deprivation*

In holding that the California survival statute is inconsistent with § 1983's compensatory purpose, the California Court of Appeal in *County of Los Angeles* acknowledged that the *Garcia* court's contrary conclusion made "perfect sense" where the death of the victim was caused by the alleged constitutional deprivation.\textsuperscript{374} The California Supreme Court, on the other hand, declined to address that issue.\textsuperscript{375} However, a federal district court in California effectively rejected the California Court of Appeal's analysis in *Williams v. City of Oakland*,\textsuperscript{376} a case decided two days before *Garcia*.\textsuperscript{377}

The *Williams* court interpreted *Robertson* to have held that § 1983's compensatory purpose was not undermined by the state survival statute at issue in that case primarily because the decedent's § 1983 claim would not have abated if he had left any surviving next of kin.\textsuperscript{378} In the *Williams* court's

\textsuperscript{370} See id. at 76–77.


\textsuperscript{372} See id. at 592.

\textsuperscript{373} See *County of Los Angeles*, 981 P.2d at 77. The court did note, however, that the United States Supreme Court has not specifically addressed "whether a state survival law precluding a deceased plaintiff's estate from recovering damages for the deceased plaintiff's emotional distress would conflict with the compensation and deterrence goals of the federal civil rights statute in a ... case in which emotional distress was the only compensable injury." *Id.* at 77 n.4.

\textsuperscript{374} See *County of Los Angeles v. Superior Court*, 58 Cal. Rptr. 2d 358, 361 (Ct. App. 1996), rev'd, 981 P.2d 68 (Cal. 1999).

\textsuperscript{375} See *County of Los Angeles*, 981 P.2d at 78 n.6.

\textsuperscript{376} Williams v. City of Oakland, 915 F. Supp. 1074 (N.D. Cal. 1996).

\textsuperscript{377} See *Williams* at 1075, 1078.

\textsuperscript{378} See *Williams* at 1078; see also *Dispenza v. Eastern Air Lines*, 508 F. Supp. 239, 243 n.13 (E.D.N.Y. 1981) (observing that the Louisiana survival statute authorizes suit by "a decedent's next of kin"); *Sager v. City of Woodland Park*,
opinion, the implications of the California survival statute are much broader,\textsuperscript{379} because its application would often deprive a victim's survivors of the only element of damages the victim himself might have been able to recover.\textsuperscript{380} The court therefore concluded that when the party bringing suit on the decedent's behalf is within the "familial range" of those affected by the alleged constitutional deprivation\textsuperscript{381} (as, presumably, where the plaintiff \textit{is} among the decedent's next of kin), § 1983's compensatory purpose would be undermined by the application of a state survival statute precluding recovery for pain and suffering because, unlike in \textit{Robertson}, there would be surviving family members "who could benefit from the section 1983 goal of compensating injured persons."\textsuperscript{384}

\textsuperscript{379} See \textit{Williams}, 915 F. Supp. at 1078. In one respect this observation is unquestionably correct: unlike the California statute, the Louisiana survival statute permits recovery for pain and suffering in cases where there are surviving next of kin. \textit{See supra} note 94 and accompanying text; \textit{see also} \textit{Poynor v. Cure}, 443 So. 2d 1151, 1160 (La. Ct. App. 1983), \textit{writ denied}, 446 So. 2d 1225 (La. 1984).

\textsuperscript{380} The court based this assessment on the unavailability of punitive damages against municipal defendants, and the potential qualified immunity of municipal officials. \textit{See Williams}, 915 F. Supp. at 1078; \textit{cf.} Alexander \textit{v. Whitman}, 114 F.3d 1392, 1399 (3d Cir. 1997) ("The major item of damages in a survival action (aside from funeral and burial expenses) is recovery for the decedent's pain and suffering between the time of injury and the time of death."). \textit{See generally} \textit{Sullivan v. Delta Air Lines}, 935 P.2d 781, 792 (Cal. 1997) ("When... the only damages at issue are for pain and suffering, to say that such damages are not recoverable is the functional equivalent of saying that [the victim's] cause of action... did not survive his death."").

\textsuperscript{381} See \textit{Williams}, 915 F. Supp. at 1078.

\textsuperscript{382} As a general proposition, the California courts define "next of kin" to mean "those upon whom... the law has conferred the right to inherit the property of one who dies intestate." \textit{In re Paterson's Estate}, 93 P.2d 825, 829 (Cal. Dist. Ct. App. 1939). \textit{But cf. In re Roberts' Estate}, 194 P.2d 28, 30 (Cal. Dist. Ct. App. 1948) (suggesting that "next of kin" means only blood relatives).

\textsuperscript{383} See \textit{Williams}, 915 F. Supp. at 1078. The court therefore held that the California survival statute governed the plaintiff's § 1983 claim except to the extent it prevented him from recovering damages for the decedent's pain and suffering. \textit{See id.} at 1079–80.

\textsuperscript{384} Parkerson \textit{v. Carrouth}, 782 F.2d 1449, 1453 (8th Cir. 1986); \textit{cf. LeBoff, supra} note 28, at 238–39 ("When the immediate family is forced to sit back and watch their loved one suffer at the hands of state officials, the family should be entitled to compensation.").
3. Assessing the Competing Views—The § 1983 Standing Issue

The federal standing requirement derives from Article III of the Constitution, which limits the federal judicial power to "cases" and "controversies." Such standing is present when (1) the plaintiff has suffered an actual injury, (2) there is a causal connection between the injury and the defendant's conduct, and (3) the injury is likely to be redressed by a ruling in the plaintiff's favor. The analysis in Williams v. City of Oakland appears to confuse the impact of a state survival statute precluding recovery for a decedent's pain and suffering with the application of a state law standing limitation to preclude the assertion of a § 1983 claim. Although a state survival statute obviously can give rise to standing issues, that was not the case in Williams.

Section 1983 redresses injuries attributable to the deprivation of an individual's federal rights, and not those harms suffered by the community in general. This limitation pre-

387. Williams, 915 F. Supp. at 1074.
388. Justice Stevens recognized the distinction in his dissent in Jefferson v. City of Tarrant, 522 U.S. 75, 82 n.2 (1997) (Stevens, J., dissenting) (noting that in Robertson v. Wegmann, 436 U.S. 584 (1978), the Court addressed the "appropriate party to bring the suit," and not a "state limitation on the measure of damages"). See also Boykin, supra note 49, at 39 (characterizing "standing to sue for the violation of the deceased's federal rights and the damages available in such cases" as "two [separate] issues").
390. See Williams, 915 F. Supp. at 1076 ("The parties do not dispute that under California [law] this action survives the death of [the decedent] and by reason of its provisions it may be brought by the decedent's survivors.").
391. See Evans v. Twin Falls County, 796 P.2d 87, 94 (Idaho 1990) ("The § 1983 cause of action, by virtue of the statute's express language, is a personal cause of action, actionable only by persons whose civil rights have been violated.").
[Section] 1983 is designed for the redress, through federal court action, of a party who is, or a class of persons who are, injured by subjection to
cludes relatives of alleged victims of constitutional deprivations from bringing suit under § 1983 where those relatives' own alleged injuries are indistinct from the harm suffered by the citizenry at large.393

On the other hand, persons who can allege sufficiently particularized injuries to their own interests may have standing to sue under § 1983,394 even though they may not have been the direct or intended victim of the unlawful conduct at issue.395 Courts in the Ninth Circuit have applied this principle to permit some surviving relatives to recover under § 1983 for losses attributable to deprivations of their own constitutionally protected interests,396 and have held that this result cannot be abrogated by state law standing requirements.397 This appears to be the "survival" question at issue

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a deprivation of a constitutional right, privilege, or immunity—not the enforcement of abstract rights nor for redress for conduct, which although it constitutes a public wrong in transgression of a constitutionally protected right, the only impact resulting therefrom is that which the individual who seeks redress shares in common with all members of the public, without specific individual injury to himself.

Id.

393. See, e.g., Clay v. Fort Wayne Community Sch., 76 F.3d 873, 878–79 (7th Cir. 1996); see also Theis, supra note 38, at 690 ("A deprivation leading to death would not deprive the members of the family of constitutional rights belonging to themselves.").

394. See Clay, 76 F.3d at 878; cf. Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1212 n.4 (8th Cir. 1972) ("We think "that all that is required for a plaintiff to have standing to sue [under § 1983] for a constitutional or a statutory violation is a showing of injury in fact." ) (authorities and internal quotation marks omitted).

395. See Coggins v. Carpenter, 468 F. Supp. 270, 282 (E.D. Pa. 1979); see generally Steinglass, supra note †, at 645 (observing that "§ 1983 may be read as permitting the third-party standing of survivors suing because they were injured by conduct that . . . violated the decedent's constitutional rights"); Boykin, supra note 49, at 49 (observing that Professor Steinglass "would give representatives of the deceased standing to sue under § 1983 for the violation of a federal right that resulted in death").

396. See Smith v. City of Fontana, 818 F.2d 1411, 1417–20 (9th Cir. 1987) (children have standing); Kelson v. City of Springfield, 767 F.2d 651, 653–55 (9th Cir. 1985) (decedent's parents have standing). But see Ward v. City of San Jose, 967 F.2d 280, 283–84 (9th Cir. 1991) (siblings do not have standing).

397. See Reynolds v. County of San Diego, 858 F. Supp. 1064, 1069–70 (S.D. Cal. 1994), aff'd in part and remanded in part on other grounds, 84 F.3d 1162 (9th Cir. 1996); see also Steinglass, supra note †, at 645 ("A textual argument can be made that § 1983 itself authorizes parties injured by [constitutional deprivations experienced by] another to recover damages suffered from that injury."). But cf. Sager v. City of Woodland Park, 543 F. Supp. 282, 291 (D. Colo. 1982) ("Since § 1983, through § 1988, incorporates the state statutes and these statutes do not grant standing to the decedent's sister, she lacks standing to as-
in Williams v. City of Oakland,\textsuperscript{398} although it actually is a standing rather than a survival issue.\textsuperscript{399}

In other words, concluding that a decedent's relatives should have standing to recover under § 1983 for their own pain and suffering\textsuperscript{400} does not establish that they should also be entitled to recover for the decedent's injuries through application of a state survival statute.\textsuperscript{401} On the contrary, one court has observed that in most jurisdictions, “there cannot be an award for pain and suffering to both the decedent and his survivor.”\textsuperscript{402}

In Rose v. City of Los Angeles,\textsuperscript{403} for example, a federal district court in the Ninth Circuit held that a § 1983 claim brought by a decedent's mother would fail if she were attempting to maintain an action for a violation of the decedent's rights.\textsuperscript{404} If this analysis is correct,\textsuperscript{405} the Williams asert those § 1983 claims.").

\textsuperscript{398} Williams v. City of Oakland, 915 F. Supp. 1074 (N.D. Cal. 1996); cf. O'Connor v. Several Unknown Correctional Officers, 523 F. Supp. 1545, 1347 (E.D. Va. 1981) (“The . . . two [issues] . . . blend into one problem, for the plaintiff . . . does have standing to sue as the personal representative of the deceased's estate . . . under § 1983 . . . if the deceased's constitutional claims survived his death.”). See generally Steinglass, supra note \textsuperscript{t}, at 567 (“treating the survivor of the person whose rights were violated as the 'party injured' under § 1983 . . . transforms § 1983 into a third party standing statute”)).

\textsuperscript{399} See Sea-Land Servs. v. Gaudet, 414 U.S. 573, 575 n.2 (1974) (superceded by statute) (observing that survival statutes “do not permit recovery for harms suffered by the deceased’s family as a result of his death”).

\textsuperscript{400} See Williams, 915 F. Supp. at 1078; see also Martin v. United Sec. Servs., 314 So. 2d 765, 769 (Fla. 1975) (recognizing “a claim for pain and suffering of close relatives’ of the decedent); LeBoff, supra note 28, at 238–39 (indicating that the “immediate family” of an individual who has “suffer[ed] at the hands of state officials . . . should be entitled to compensation”)

\textsuperscript{401} See Gates v. Montalbano, 550 F. Supp. 81, 82–83 (N.D. Ill. 1982) (noting the “distinction between the survival of the claim of a decedent for injuries” and the separate claim “of the decedent's next of kin”); Ascani v. Hughes, 470 So. 2d 207, 211 (La. Ct. App.) (observing that “the claims of [a] decedent’s estate present a "different situation" from “the claim of decedent’s siblings for [their own] loss”), review denied, 472 So. 2d 919 (La. 1985); Steinglass, supra note \textsuperscript{t}, at 654 n.548 (“The issue of whether a party may assert the rights of others is distinct from whether . . . surviving relative[s] had an actionable constitutional interest [of their own].”).

\textsuperscript{402} Perkins v. Variety Children's Hosp., 413 So. 2d 760, 764 (Fla. Ct. App. 1982) (emphasis added), quashed and remanded, 445 So. 2d 1010 (Fla. 1983).

\textsuperscript{403} Rose v. City of Los Angeles, 814 F. Supp. 878 (C.D. Cal. 1993).

\textsuperscript{404} In reaching this conclusion, the court stated that “courts are uniform in insisting that a § 1983 plaintiff allege a deprivation of her own constitutional rights.” Id. at 881.

\textsuperscript{405} Another court in the Ninth Circuit held that a plaintiff had standing to sue under § 1983 for damages she sustained as a result of her son's wrongful
court's reliance upon the purported need for a decedent's relatives to "vindicate" the decedent's rights is misplaced.\(^\text{406}\) Further, the result in Rose implicitly rejects the Williams court's conclusion that a state survival statute precluding recovery for the decedent's own pain and suffering is inconsistent with § 1983's compensatory objective.\(^\text{407}\)

This conclusion seems to agree with the reasoning in Robertson, where the Court suggested in a footnote that state law cannot deprive a decedent's survivors of the right to bring suit under § 1983 for injuries to their own interests.\(^\text{408}\) Therefore, the application of a state survival statute in an action to recover solely for injuries suffered by the decedent does not implicate § 1983's compensatory objective.\(^\text{409}\) In other words, because pain and suffering damages are "personal" to the victim of a constitutional deprivation,\(^\text{410}\) and most state survival statutes merely address the right to recover for a decedent's injuries,\(^\text{411}\) the fact that the application of a survival statute

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\(^\text{407}\) See Steinglass, supra note †, at 631 n.428. ("If federal law independently gives [relatives] a constitutional interest in their relationship with [the victim], that relationship should be enforceable in a § 1983 action under federal damage policies. In such cases, state limitations on the available damages should not have any special relevance to the damages available under § 1983.").

\(^\text{408}\) See Robertson v. Wegmann, 436 U.S. 584, 592 n.9 (1978).

\(^\text{409}\) See Parkerson v. Carrough, 782 F.2d 1449, 1455 (8th Cir. 1986) (discussing Robertson); see also Culver-Union Township Ambulance Serv. v. Steindler, 611 N.E.2d 698, 705 (Ind. Ct. App. 1993) ("Obviously, when the injured person is deceased he cannot be compensated. [Section 1983's compensatory purpose] is thus incapable of fulfillment.").


\(^\text{411}\) See In re Air Crash Disaster Near Honolulu, Haw., 783 F. Supp. 1261, 1264 (N.D. Cal. 1992); Ingram v. Howard-Needles-Tammen & Bergendorf, 672 P.2d 1083, 1092 (Kan. 1983) (Schroeder, C.J., dissenting). See generally Kynaston, 717 F.2d at 511: [A] survival statute merely maintains an action already in existence. The injured party's claim after his death becomes a part of the estate, and the damages recoverable are only those the injured person might have recovered had he lived. Any funds made available through a re-
precluding the recovery of damages for the decedent's pain and suffering may leave the decedent's survivors without a remedy\textsuperscript{412} does not establish that the statute fails to satisfy § 1983's compensatory purpose.\textsuperscript{413} Indeed, permitting survivors to recover for the decedent's pain and suffering actually may result in their receiving a windfall,\textsuperscript{414} because if the decedent survived, these relatives could not recover.\textsuperscript{415}

This reasoning provided the basis for the holding in \textit{Weeks v. Benton},\textsuperscript{416} where the court addressed the issue of whether a state statute limiting the recovery in wrongful death actions to punitive damages was inconsistent with § 1983.\textsuperscript{417} In \textit{Weeks}, the decedent's survivors effectively brought a § 1983 claim for the decedent's death.\textsuperscript{418} The survivors were not merely executors of the decedent's estate as was the plaintiff in \textit{Robertson}. Relying on the footnote in \textit{Robertson} suggesting that a state survival statute could not preclude a victim's survivors from recovering under § 1983 for

\begin{itemize}
\item recovery belong to the estate for the protection of its creditors and to compensate the estate for losses it has incurred.
\end{itemize}

\textit{Id.}

\textsuperscript{412} See County of Los Angeles v. Superior Court, 58 Cal. Rptr. 2d 358, 361 (Ct. App. 1996), rev'd, 981 P.2d 68 (Cal. 1999).


\textsuperscript{414} See supra note 321 and accompanying text. \textit{See generally Parkerson}, 782 F.2d at 1455 (observing that a desire to "prevent the victim's heirs from receiving an undeserved windfall" may be a "sound reason[] for abating certain kinds of claims upon the death of the party allegedly injured"). However, at least one court has questioned opposition to survival provisions "based upon the argument that justice does not require a windfall to the plaintiff's heirs," asserting that the proper question instead is "why a fortuitous event such as death should extinguish a valid action." Moyer v. Phillips, 341 A.2d 441, 445 n.9 (Pa. 1975) (quoting PROSSER, supra note 145, § 126, at 901); see also Canino v. New York News, 475 A.2d 528, 530 (N.J. 1984) (also quoting PROSSER); cf. Kuehn v. Children's Hosp., 119 F.3d 1296, 1303 (7th Cir. 1997) (characterizing the windfall argument as "too powerful" because "it implies that all . . . suits should abate with the death of the victim, not just suits seeking damages for pain and suffering") (emphasis in original).

\textsuperscript{415} See Parrott v. Caskey, 873 S.W.2d 142, 150 (Tex. Ct. App. 1994) ("The Survival Statute authorizes recovery of all damages which the injured party, if living, could recover.").


\textsuperscript{417} See id. at 1303–05.

\textsuperscript{418} In particular, the court noted that the survivors were direct beneficiaries under the applicable state statute, since the damages recoverable under the statute were not subject to administration and did not become part of the decedent's estate. \textit{See id.} at 1306 n.9.
their own injuries, the Weeks court permitted the decedent’s survivors to recover for the losses they had suffered as a result of his death, including damages for pain and suffering.

The court nevertheless declined to award compensatory damages for the decedent’s losses. Adopting essentially the same reasoning as the California Court of Appeal in Garcia v. Superior Court, the Weeks court explained that such an award was not necessary to compensate the survivors, and that the decedent himself obviously could not be compensated for his pain and suffering once dead.

The significance of this reasoning is apparent from the fact that most state survival statutes do not interfere with the right of survivors to recover for their own pain and suffering. For example, the Arizona statute at issue in Burns v.
City of Scottsdale\textsuperscript{428} prevents a decedent's survivors from recovering for the decedent's pain and suffering.\textsuperscript{429} This statute does not prevent survivors from recovering damages for their own injuries,\textsuperscript{430} including pain and suffering.\textsuperscript{431} Implicitly adopting the distinction recognized in Weeks,\textsuperscript{432} the court in Burns applied Robertson in holding that this statutory scheme is not inconsistent with § 1983's compensatory purpose because it permits survivors to be compensated for their own injuries.\textsuperscript{433} The Washington Court of Appeals reached a similar conclusion in Strickland v. Deaconess Hospital,\textsuperscript{434} where a comparable statutory scheme existed.\textsuperscript{435}

This interpretation of Robertson is shared by other courts, both in the Ninth Circuit\textsuperscript{436} and elsewhere,\textsuperscript{437} and appears correct. Indeed, the dissenting justices in Robertson itself appear to have interpreted the Court's decision in this

\textsuperscript{430} See Watts v. Golden Age Nursing Home, 619 P.2d 1032, 1035 (Ariz. 1980). The Arizona Supreme Court held that because the plaintiff was not suing in a representative capacity to recover for her deceased husband's injuries, but instead was suing on her own behalf to recover for losses she had incurred as the result of her husband's injuries, the Arizona survival statute had no application. See id.
\textsuperscript{432} See supra notes 416-421 and accompanying text.
\textsuperscript{434} Strickland v. Deaconess Hospital, 735 P.2d 74, 76-77 (Wash. Ct. App. 1987) (applying state survival statute to preclude recovery under § 1983 for pain and suffering "personal" to the decedent).
\textsuperscript{435} See Cavazos v. Franklin, 867 P.2d 674, 678 (Wash. Ct. App. 1994) (noting that a decedent's survivors "suing in their own right are entitled to recover damages for pain and suffering," even though the Washington survival statute "expressly prohibit[ed] recovery for the decedent's pain and suffering"). The Washington survival statute has since been amended. See supra note 116.
\textsuperscript{436} See, e.g., Golden State Transit Corp. v. City of Los Angeles, 773 F. Supp. 204, 214 (C.D. Cal. 1991) (citing Robertson v. Wegmann, 436 U.S. 584 (1978), for the proposition that a state survival statute is not inconsistent with § 1983 where it is "not the injured party who state law fail[s] to compensate, but a third party").
\textsuperscript{437} See, e.g., Brown v. Morgan County, 518 F. Supp. 661, 664 (N.D. Ala. 1981). But see Barrett v. United States, 689 F.2d 324, 333 (2d Cir. 1982) (concluding that the "administratrix of [an] estate should also be considered an injured 'person' for the purposes of § 1983").
fashion. In short, because the decedent's pain and suffering is not a loss suffered by the decedent's beneficiaries (or the decedent's estate), excluding damages for that pain and suffering from the recovery available under a state survival statute is not inconsistent with § 1983's compensatory purpose, because that purpose is simply "incapable of fulfillment" where the victim of the constitutional deprivation is deceased.

IV. CONCLUSION

There is relatively little authority addressing the right of survivors to recover for a decedent's pain and suffering under § 1983, and no controlling Supreme Court or Ninth Circuit precedent. While the Supreme Court's decision in *Robertson v. Wegmann* provides some guidance, lower courts in the Ninth Circuit disagree on how such pain and suffering issues should be resolved.

The validity of a state statutory limitation on recovery for pain and suffering may depend upon whether the constitutional deprivation leading to the § 1983 claim resulted in the victim's death, or the death instead was unrelated to the deprivation. In neither situation does a state survival statute precluding recovery for a decedent's pain and suffering

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438. See *Robertson*, 436 U.S. at 600-01 (Blackmun, J., dissenting) (asserting that the Court "intimate[d]" that abatement of the action under the applicable state survival statute was not inconsistent with § 1983's compensatory purpose because the decedent's survivors "were not personally injured").


445. See *Davis v. City of Ellensburg*, 651 F. Supp. 1248, 1256 (E.D. Wash. 1987) (describing the situation in which "the alleged deprivation of constitutional rights caused the death of plaintiff's decedent" as "distinct from *Robertson*"). But see *Boykin*, supra note 49, at 49 ("Not surprisingly, courts have applied *Robertson* to wrongful death actions under § 1983, because the Supreme Court has yet to decide such a case.").

appear to be inconsistent with § 1983’s compensatory purpose,"447 because "the victim once deceased cannot practicably be compensated for the loss."448 Where the death is unrelated to the constitutional deprivation, such a statute is also consistent with § 1983’s deterrent objective, since its application most likely has little influence on future behavior.449

Where the constitutional deprivation is the cause of the victim’s death, on the other hand, the application of a state survival statute precluding recovery for pain and suffering may be an impediment to deterrence.450 In particular, courts have suggested that the application of such a statute in those circumstances may encourage individuals contemplating the violation of others’ rights to engage in conduct severe enough to kill their victims.451 While that assessment is not entirely persuasive,452 several courts in the Ninth Circuit have held that a survival statute precluding recovery for pain and suffering is inconsistent with § 1983’s deterrent objective in cases where the constitutional deprivation results in death.453

The Ninth Circuit could eliminate much of the existing confusion concerning the recoverability of pain and suffering damages in § 1983 actions by addressing that issue directly. Alternatively, Congress could resolve the issue through the

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448. Bell v. City of Milwaukee, 746 F.2d 1205, 1236 (7th Cir. 1984); see also Morse, supra note 48, at 26 n.69.

449. See Robertson, 436 U.S. at 592 n.10; see also Bell, 746 F.2d at 1239 (observing that the Robertson Court “did not perceive any significant loss of deterrence” in the application of a restrictive state survival statute where the victim’s death was “an intervening circumstance”).

450. See McFadden v. Sanchez, 710 F.2d 907, 911 (2d Cir. 1983) (“To whatever extent [Robertson holds that] § 1988 makes state law applicable to § 1983 actions, it does not require deference to a survival statute that would . . . limit the remedies available under § 1983 for unconstitutional conduct that causes death.”). One lower court asserted that the Robertson Court itself recognized “the potential anti-deterrent effects of [such] state law limitations in situations where unconstitutional conduct causes death.” Sager v. City of Woodland Park, 543 F. Supp. 282, 295 (D. Colo. 1982).


enactment of federal legislation. In the absence of such federal appellate or legislative action, however, the lower courts in the Ninth Circuit are likely to continue to differ in their applications of state survival law to § 1983 claims.