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LIMITING THE RIGHT TO SUE: THE CIVIL RIGHTS DILEMMA

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I. Introduction

Potential plaintiffs and defendants of civil rights actions must rely upon statutes of limitation to protect their legal interests. For the plaintiff, failure to observe the proper statutory tolling provision may very well result in the loss of any remedy for a wrong which has been committed. The potential defendant, without knowing the applicable limitation, cannot accurately assess current or likely liability. Each party suffers from the absence of an identifiable statute of limitations. Civil rights litigation, specifically actions brought under section 1983[1] of Title 42 of the United States Code, has been the unfortunate victim of confusing and standardless decisions as courts attempt to apply the correct statute of limitations. Although the United States Supreme Court has provided a general rule that state limitations are to be applied,[2] the various federal courts of appeal differ substantially in choosing the most appropriate state limitation.

This article will review the problems encountered in making the limitation decision, the standards currently used by the United States courts of appeal, and attempt to suggest considerations necessary to derive predictable applications of limitations of action.

II. Fitting a Square Peg Into a Round Hole

Suppose you are presented with the following facts: Joe Smith, an avowed socialist, is calmly speaking to a group of listeners in a city park. Along comes Officer Brutal who promptly arrests Smith for disorderly conduct and loitering. To teach Smith a lesson, Brutal and the boys down at the jail severely beat him and refuse to give him treatment for his broken ribs and lacerated face. The local magistrate refuses to appoint counsel for Smith and he is sentenced to hard labor for one year after a trial without a jury. The local city council and mayor proclaim the good of the people in ridding the town of such "leperous scum."

What statute of limitations is applicable? In most states there are causes of action for false arrest, false imprisonment, assault and battery,

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1. 42 U.S.C. § 1983 (1976). While much of the context of this article concerns [section] 1983, the policy considerations should be equally applicable to an action brought under 42 U.S.C. § 1981 (1976). *See* identical problems in limitation application with [section] 1981 actions. Shah v. Halliburton, 627 F.2d 1055, 1057-58 (10th Cir. 1980).

2. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975).

negligence, and slander. But which one is the most significant, the *most* applicable?

And what about those rights which do not find their source in the common law, e.g., freedom of expression, the right to one's liberty, the right to due process, a jury trial, and appointed counsel? Do we ignore the constitutional nature of the claim? Or do we push aside the constitutional issue until we have determined whether the litigant has the right to bring his action?

Although the foregoing example may be exaggerated, it illustrates the point. Choosing a proper state limitation is a cumbersome process unless a disciplined approach is used.

The United States Supreme Court has provided the general rule that the most analogous state statute should govern a civil rights action.[3] However, the concept of "analogous" between the state limitation and the federal civil rights cause of action has proven to be a trying experience for the courts. Since most states do not provide a specific limitation for causes of action arising under federal statutes,[4] the courts seek to apply that which was not meant to be applicable.

The state limitation selection is usually limited to several standard provisions which may be categorized as limitations for: (1) contracts; (2) tort or personal injury; (3) liability created by statute; and (4) "catch-all" or general limitations covering all actions for which there are no specific provisions.[5] However, part of the difficulty in arriving at some uniform method of

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3. *Id.*

4. *See, e.g.*, TENN. CODE ANN. § 28-304 (1980 replacement) stating:

> Personal tort actions - Malpractice of attorneys - Civil rights actions - Statutory penalties - Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes, and statutory penalties shall be commenced within one (1) year after cause of action accrued.

Approved by the Sixth Circuit in Johnson v. Railway Express Agency, Inc., 489 F.2d 525 (6th Cir. 1973), *aff'd on other grounds*, 421 U.S. 454 (1975); Note that in 1973 the Virginia legislature passed VA. CODE § 8-24 (Michie 1950) stating: "Notwithstanding any other provision of the law to the contrary, every action brought pursuant to the Civil Rights Act of 1971, 42 U.S.C. § 1983, shall be brought within one year next after the right to bring the same shall have accrued." This statute was repealed in 1977. VA. CODE § 8.01-229 (Michie 1950). The Fourth Circuit disregarded its application to a prisoner's claim under § 1983 because "to do so would disregard the constitutional values to be protected by those actions and would condone an unreasonable discrimination . . . ." Johnson v. Davis, 582 F.2d 1316, 1317 (4th Cir. 1978); *see also* Warren v. Norman Realty Co., 513 F.2d 730 (8th Cir.), *cert. denied*, 423 U.S. 855 (1975). In *Warren*, a plaintiff claiming housing discrimination in violation of federal rights under 42 U.S.C. § 1982 was limited to a Nebraska limitation on housing discrimination charges of 180 days. *See* NEB. REV. STAT. § 20-119 (1977). Additionally, Colorado limits all unlimited federal causes of action. COLO. REV. STAT. ANN. § 13-80-106 (1973).

5. *See Statutes of Limitations in Federal Civil Rights Litigation*, 1 ARIZ. ST. L.J. 97, 116 (1976).

decision results from the variance between the state statutes of limitation. For example, some states do not have provisions for actions arising from liability created by statute.[6] Others do not address personal injuries as separate from intentional torts.[7]

In addition to the inherent problems of state law, the analytical approach of each circuit is many times varied and distinct. Some courts choose to look to the facts appearing upon the face of the pleading and make the federal case over into a state claim for the purpose of limitation determination.[8] Others look to the source of the cause of action.[9] In other words, the civil rights claim is viewed as very different from state causes of action. For example, the Eighth Circuit in rejecting a state tort analogy stated: "Section 1983 provides a cause of action for deprivation of civil rights that in no way depends upon state common law."[10] This type of analysis avoids reliance upon the particular facts of each case. But even viewing the origin of the action requires a characterization of the civil rights lawsuit. Various courts have arrived at contrary conclusions even though they have recognized the civil rights action as distinct from state law. For example, some courts reason that a civil rights claim is a tort while others see it as a violation of a personal right. The best illustration of this distinction is a comparison of the Fifth Circuit case of *Braden v. Texas A & M University*[11] and the Fourth Circuit decision of *McCausland v. Mason County Board of Education.*[12] In *Braden* a university professor brought an action in federal court under section 1983 in response to the termination of his employment.[13] The plaintiff in *McCausland* requested relief under section 1983 (among other federal statutes) for his discharge as a high school principal.[14] Each plaintiff claimed he was being deprived of his civil rights without due process of law,[15] and both sought application of their state's limitation for actions based on contract.[16] Although one would normally think that the analysis would be the same, consistency did not result. The Fifth Circuit found that the section 1983 claim should sound in tort, not contract.[17] Although finding that the Texas limitation statute for injury to a person would govern harm to a reputational interest, the court applied the limitation for the tort of trespass

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6. *E.g.*, IND. CODE ANN. § 34 (West 1973).
7. *E.g.*, MISS. CODE ANN. § 15 (1973).
8. *See infra* notes 102 - 204 and accompanying text.
9. *See infra* notes 205 - 270 and accompanying text.
10. Garmon v. Foust, 668 F.2d 400, 406 (8th Cir. 1982), *cert. denied*, 102 S. Ct. 2283 (1982).
11. 636 F.2d 90 (5th Cir. 1981).
12. 649 F.2d 278 (4th Cir. 1981).
13. Braden v. Texas A & M University, 636 F.2d at 92.
14. McCausland v. Mason County Bd. of Educ., 649 F.2d at 279.
15. *Id.*; Braden v. Texas A & M University, 636 F.2d at 92.
16. *Id.*
17. Braden v. Texas A & M University, 636 F.2d at 92.

or conversion of property.[18]

The Fourth Circuit in *McCausland* found the civil rights statutes to create actions for injury to the person which arise from federal rights guaranteed to the person.[19] The court then explained:

> As a consequence it is to the state statute of limitations for personal injuries to which we usually look in determining when claims are time-barred. Although McCausland had and may still have a cause of action on his contract in the state courts, to demonstrate the required constitutional basis for his complaint he must allege personal injury transcending contract rights.[20]

Finally, some courts refuse to characterize the action as anything but a constitutional deprivation not covered by state limitations, thus placing the action within the ambit of a "catch-all" provision or a provision covering liability created by statute.[21]

The maze of court opinions within this area can be divided into two major groups: (1) those that discern the factual basis of the claim and apply the state limitation for the state cause of action fitting those facts, and (2) those that recognize the civil rights cause of action as having its source distinct from the common or state law. Each method requires the application of policy decisions which bring about different results affecting potential litigants in each jurisdiction.

Unfortunately, the factual analysis method, i.e., analyzing the facts as they appear on the face of the petition, or attempting to discern the nature of the alleged wrongful conduct, creates an unwieldy decision-making process.[22] The grocery market pick-and-choose methodology of the Fifth, Sixth, and Tenth Circuits and the Third Circuit's former approach is problematic at best.[23] The primary result is uncertainty. Without the use of a standard the trial court must wade through each complaint and set of circumstances to discover the specific facts of each case. Then, with these facts in hand, the court must carefully review the state limitation periods and apply a limitation which appears to fit those facts. Even ignoring policy considerations, the court has no easy way to choose a state limitation. For instance, is a claim of employment discrimination an interference with an individual's right to contract, or the breach of a constitutional duty not to discriminate? Unless the appellate court for that jurisdiction has faced the same facts

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18. *Id.* at 94.
19. McCausland v. Mason City Bd. of Educ., 649 F.2d at 279.
20. *Id.*
21. *See infra* notes 219 - 225 and accompanying text.
22. Other commentators have been equally critical of this method. *See* Annot., 45 A.L.R. FED. 548 (1979); Note, *Statute of Limitations in Federal Civil Rights Litigation*, 1 ARIZ. ST. L.J. 97 (1976); Note, *A Call for Uniformity: Statutes of Limitations in Federal Civil Rights Actions*, 26 WAYNE L. REV. 61 (1979).
23. *See infra* notes 102 - 204 and accompanying text.

within the same state, there remains no precedential guidance.

Uncertainty affects every participant in the legal process. Not only are potential plaintiffs and defendants unaware of the time in which they must effectuate their rights, the attorneys to which they turn for advice are not in much better positions. The court is similarly unable to provide the parties before it with the correct solution.

This situation can engender a number of negative events. The number of appeals is likely to increase when the rule of law is in question. Significantly, the limitation decision may be made at the early stage of a case on a motion to dismiss or for summary judgment. After a lengthy appeal the parties may be returned to the trial court. Each party will have suffered substantial expense litigating an issue which may have nothing to do with a decision on the merits of the case. Witnesses may have disappeared, memories faded and documents vanished.

Increased appeals and litigation of the limitation issue place an even greater strain on a judicial system overloaded with the large volume of cases being pursued today. Further, if the injured party faces a short limitation, suit may be filed prematurely. Maturity of damages and settlement negotiations may be foregone in an effort to toll the time period for bringing suit.

There is also the possibility that attorneys will draft complaints to allege only those facts involved in the wrongful conduct which will obtain the longest limitation. An attorney in the Fifth Circuit can avail himself of a contractual statute of limitation merely by requesting backpay.[24] Surely, the days of the technically-pleaded complaint have expired long ago.

The factual analysis method also ignores the very core of the decision-making process. The nature of the method strips appellate decisions of their precedential value. The trial judge is left to forge new law with each set of distinct facts. He or she must decide to allow or deny redress for conduct which has presumably caused harm to another party. This determination is required to be made without consideration of the needs of society or the victim to punish the wrongdoer and compensate the injured, and without thought of the policy behind the civil rights statutes. Furthermore, the concept of making the federal case over into a state cause of action is incongruent. Obviously, the two causes are not the same. Unless the state happens to have a specific limitation for federal causes of action,[25] no state statute of limitation will be fashioned to address violations of either the state or federal constitutions. Thus, the federal court is forced to stretch state law beyond its intended purpose.

However, the problem of applying state law remains since neither Congress nor the United States Supreme Court has mandated a limitation per-

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24. Truvillion v. Kings Daughters Hospital, 614 F.2d 520, 525 (5th Cir. 1981) (actions for back pay would be governed by contractual provisions).

25. *See, e.g.*, NEB. REV. STAT. § 25-219 (1977); TENN. CODE ANN. § 28-3-104 (1980 replacement).

iod or provision to apply to civil rights cases. The solution to the problem lies in achieving a method of analysis which eliminates uncertainty and yet preserves the integrity of state law. At least five circuits (the Fourth, Second, Seventh, Eighth and Ninth) have attempted to achieve the goal of uniformity by focusing on the cause of action instead of the facts alleged.[26] The foregoing considerations largely support these efforts.

Before proceeding to discuss the nature and emphasis of the civil rights law, it is important to address the question of state law integrity. It is difficult to perceive infringement of state law in the process of civil rights limitation selection. If a state wishes to place a specific limitation on federal causes of action it clearly has that opportunity.[27] The initial selection of a limitation is unlike a tolling provision[28] or substitution statute,[29] which comes into play subsequent to the limitation determination. Those provisions are designed to govern the ability to bring and continue an action once the limitation provision has been selected. In those situations the issue is not which state provision will apply, but whether state law will apply at all. Conversely, the decision of limitation selection does not include the choice of whether the court should apply state law. Thus, no conflict exists when a federal court attempts to choose a state limitation which best effectuates judicial and federal statutory policy.

III. Necessary Considerations

The selection of a limitation for the civil rights cause of action must ultimately depend upon the precedent provided by the United States Supreme Court. There is virtually no controversy that a federal court must apply the most analogous state statute of limitation when determining the time in which a civil rights action may be filed. As early as 1830 the United States Supreme Court held that the limitation provisions of the forum state apply to actions based upon federal laws where no statutory limitation is present within the federal scheme.[30] The Court specifically required the application of the state statute of limitation for a federal civil rights action in *O'Sullivan v. Felix*.[31] The plaintiff in *O'Sullivan* requested relief for the violation of his civil rights in that the defendants prevented him from voting and in the process beat, assaulted, and threatened him.[32] The Court held the state law applicable: "Congress, of course could have by specific provision,

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26. *See infra* notes 205 - 270 and accompanying text.
27. Except when inconsistent with federal policies. *See* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977).
28. Board of Regents v. Tomanio, 446 U.S. 478 (1980).
29. Robertson v. Wegmann, 436 U.S. 584 (1978).
30. M'Cluny v. Silliman, 28 U.S. (3 Pet.) 270, 276 (1830).
31. 233 U.S. 318, 322 (1914).
32. *Id.* at 320-21.

prescribed a limitation, but no specific provision is adduced."[33] The *O'Sullivan* decision conforms with the statutory requirements of the Rules and Decisions Act[34] and section 1988 of the Civil Rights Act.[35] These precepts have subsequently been employed by both the United States Supreme Court and the various federal courts to require as a general rule the application of the state statute of limitations for analogous types of actions.[36]

Although no specific method of analysis has been required by the Supreme Court as to how another court is to choose the *most* analogous state provision, its interpretations of the various aspects of the limitation decision are helpful. In particular the Court has expressed its opinion of section 1983 of the Civil Rights Act,[37] the rationales for statutes of repose,[38] and the use of state law in applying statutes of limitation.[39] Careful review of these three areas of the law provides impetus useful for the limitation decision.

A. *The Nature of Section 1983*

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

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33. *Id.* at 322-23.

34. 28 U.S.C. § 1652 (1976) reads: "The laws of the several states, except where the constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

35. 42 U.S.C. § 1988 (1976):

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this title, and of the title "Civil Rights" and the title "Crimes," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in provisions necessary to furnish stable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes wherein the court having jurisdiction of such civil or criminal case is held so far as the same is not inconsistent with the constitution and the laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature in the infliction of the punishment on the party found guilty.

36. Chevron Oil Co. v. Huson, 404 U.S. 97, 104 (1971); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). *See, e.g.*, Ramirez De Arellano v. Alvarez De Choudens, 575 F.2d 315 (1st Cir. 1978); Jennings v. Shuman, 567 F.2d 1213 (3d Cir. 1977); Kissinger v. Foti, 544 F.2d 1257 (5th Cir. 1977); Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977).

37. Monroe v. Pape, 365 U.S. 167 (1961).

38. Burnett v. New York Cent. R.R., 380 U.S. 424 (1965).

39. Runyon v. McCrary, 427 U.S. 160 (1976).

redress.[40]

Whatever Congress may have originally intended through its enactment of section 1 of the Ku Klux Klan Act of April 20, 1871,[41] the United States Supreme Court has arrived at its own interpretation. Beginning with *Monroe v. Pape*,[42] the Court has embarked on a wide course of defining the nature and purpose of section 1983.[43] The Court in *Monroe* held that a cause of action was stated by the plaintiff's complaint,[44] which alleged that thirteen Chicago police officers ransacked the plaintiff's home while forcing the family to stand naked in the living room and detaining the father without a warrant or reason.[45]

In stating the purpose of section 1983, Justice Douglas, writing for the Court in *Monroe*, provided three aims for the statute: "*First*, it might, of course override certain kinds of state laws. . . . *Second*, it provided a remedy where state law was inadequate. . . . The *third* aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. . . ."[46]

The Court has further identified the goal of section 1983 as including deterrence of future violations of constitutional rights and compensation of victims.[47] Perhaps the most quoted passage of the *Monroe* decision is from the concurring opinion of Justice Harlan: "[A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and a deprivation of a constitutional right."[48]

The distinct and broad nature of section 1983 has been consistently emphasized by the Court. For example, the Court in *Mitchum v. Foster*[49] stated that:

> Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and the laws of the

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40. 42 U.S.C. § 1983 (1976).

41. 17 Stat. 13 (Now § 1983 of Title 42 of the United States Code).

42. 365 U.S. 167 (1961).

43. *See* Fair Assessment in Real Estate Association v. McNary, 454 U.S. 100, 104 (1981) (opinion of Justice Rehnquist stating: "It was not until our decision in Monroe . . . that section 1983 was held to authorize immediate resort to federal court whenever state actions allegedly infringed constitutional rights . . . .") (citation omitted).

44. 365 U.S. at 187.

45. *Id.* at 169.

46. *Id.* at 174.

47. Robertson v. Wegmann, 436 U.S. 584, 591 (1978); Board of Regents v. Tomanio, 446 U.S. at 488.

48. 365 U.S. at 194 (Harlan, J., concurring).

49. 407 U.S. 225 (1972).

> Nation. It is clear from the legislative debates surrounding passage of § 1983's predecessors that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against State action, . . . whether the action be executive, legislative, or *judicial*.'[50]

The *Mitchum* decision concerned the power of a federal court to enjoin the proceedings of a state court under section 1983.[51] A bookstore owner had sought an order from the federal court which would enjoin a state court from closing down his business as a public nuisance.[52] In holding there was no absolute bar to enjoining the state court, the Court explained the assumption that section 1983 would affect the nature of the relationship between the various states and the federal government:

> This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.[53]

In *Allen v. McCurry*,[54] although finding that section 1983 was not a substitute for a writ of habeas corpus, the Court stated: "Through § 1983, the 42d Congress intended to afford an opportunity for legal and equitable relief in a federal court for certain types of injuries." The injuries curable by way of section 1983 were considered civil in nature.[55]

The remedial nature of section 1983 has likewise broadened throughout the Court's interpretation of its provisions. For example, although in *Monroe* the Court refused to recognize municipal liability under section 1983,[56] the decision of *Monell v. New York City Department of Social Services*[57] removed the defense of immunity for municipalities. In *Monell* the Court specified that: "By extending a remedy to all people, including whites, [section] 1 went beyond the mischief to which the remaining sections of the 1871 Act were addressed."[58] The Court had little difficulty in finding potential liability for the City of New York for sex discrimination against its employees.[59]

The Court in *Monell* quoted Representative Shellabarger, a participant

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50. *Id.* at 239, 240 (citing Ex parte Virginia, 100 U.S. 339, 346 (1879)) (emphasis original).
51. *Id.* at 226.
52. *Id.* at 227.
53. *Id.* at 242.
54. 449 U.S. 90, 104 (1980).
55. *Id.*
56. Monroe v. Pape, 365 U.S. at 191-92.
57. 436 U.S. 658 (1978).
58. *Id.* at 683.
59. Monell v. New York City Dept. of Social Services, 436 U.S. at 690.

in the reconstruction debates, in describing how the judiciary should interpret section 1 of the Civil Rights Act of 1871:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people . . . .[60]

Thus, the Supreme Court of the United States has cut a broad path of interpretation for the purpose and policies behind section 1983. The expansive nature of the statute was again emphasized in *Owen v. City of Independence*[61] where the Court ruled that ". . . the municipality may not assert the good faith of its officers or agents as a defense to liability under [section] 1983."[62] The Court therefore reversed the Eighth Circuit's ruling that the plaintiff police chief of Independence could not pursue his complaint that the city had deprived him of due process in terminating his employment.[63] There the Court again emphasized an intent on the part of section 1983 to "not only . . . provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well."[64] The application of section 1983 to cities was thought to deter future violation and provide incentive for precaution by municipalities.[65]

Again, section 1983 was expanded through the decision of *Maine v. Thiboutot*[66] to encompass not only violations of constitutional law but also violations which arise exclusively from federal statutory law.[67] The plaintiffs in *Maine* were thus allowed to pursue their claim that the state had incorrectly interpreted the federal law governing Aid to Families with Dependent Children. And in *Parratt v. Taylor*,[68] the Court held that there is no requirement of intentional wrongdoing on the part of a defendant in order for a plaintiff to be able to state a cause of action or prevail upon a section 1983 claim.[69] The negligent loss of a prisoner's hobby materials was enough to

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60. *Id.* at 684.
61. 445 U.S. 622 (1980).
62. *Id.* at 638.
63. *Id.* at 625.
64. *Id.* at 651.
65. *Id.* at 651-52.
66. 100 U.S. 1 (1980).
67. *Id.* at 4.
68. 451 U.S. 527 (1981).
69. *Id.* at 529, 535.

invoke the language of section 1983.[70]

The Supreme Court's decisions regarding section 1983 appear to present the portrait of panacea, enforcing the observance of constitutional conduct by all those acting under color of state law. However, the effect of section 1983 does not stem from the statute itself, but its constitutional underpinnings. As the Court stated in *Chapman v. Houston Welfare Rights Organization*,[71] section 1983 "does not provide any substantive rights . . . ."[72] In *Chapman*, the Court considered whether section 1983, coupled with 28 U.S.C. section 1343, would reach an action based exclusively upon the violation of a federal statutory right.[73] The Supreme Court rejected the plaintiff's claimed basis for jurisdiction under section 1343 for an action alleging conflict between state welfare regulations and the Social Security Act.[74] While at first blush the decision may seem to de-emphasize the impact of section 1983, the subsequent decision of *Maine v. Thiboutot*[75] clarified the Court's position. In *Thiboutot*, the Court held that an action founded solely upon a federal statutory violation could be maintained under 42 U.S.C. section 1983.[76] Thus, the significance of *Chapman* is only jurisdictional. It did not belie the broad nature of the Civil Rights Act nor require ignorance of the policy considerations behind section 1983.

It would seem then that any decision affecting the section 1983 claim must consider the nature of the action. This includes the drawing of an analogy to a state or common law cause of action. Perhaps the most significant consideration in attempting to draw an analogy from section 1983 to a state cause of action is an understanding that they are not the same. The distinction between the common law tort and an action based upon constitutional deprivation was emphasized in the Court's decision of *Carey v. Piphus*.[77] In determining the method of asserting damage in section 1983 lawsuits, the Court noted: "In some cases, the interests protected by a particular branch of the common law torts may parallel closely the interests protected by a particular constitutional right. . . . In other cases, the interests protected by a particular constitutional right may not also be protected by an analogous branch of common law torts."[78] Relying on the premise that constitutional deprivations may be different from state common law wrongs, the Court required federal judges to fashion their own rules of damage for

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70. *Id.* Note, however, that relief was not accorded to the plaintiff because of an apparent failure to sufficiently allege a violation of the due process clause of the fourteenth amendment. *Id.* at 544.

71. 441 U.S. 600 (1979).

72. *Id.* at 618.

73. *Id.* at 621.

74. *Id.* at 623.

75. 448 U.S. 1 (1980).

76. *Id.* at 4, 11.

77. 435 U.S. 247 (1978).

78. *Id.* at 258.

constitutional violations.[79]

The nature of the civil rights action is important since the federal courts are not faced with the simple task of applying an obvious single statute of limitations. Rather, an appropriate statute must be chosen from several potentially applicable limitations. The Court's explanations of the breadth and nature of section 1983 allow a reasoned approach to formulating a policy conscious standard for limitation selection. With the character of the cause of action in mind, it is necessary to analyze the goals and purposes of limiting the time in which an action may be brought.

IV. The Rationale for Limitation

The United States Supreme Court has frequently expressed the policies behind imposing statutes of limitations.[80] The general theory for limiting the time period in which a claimant must bring his action is to protect defendants from cases which are too old.[81] However, the issue in the context of limitation selection becomes whether any purpose is served by applying one particular limitation above another.

The Court in *Burnett v. New York Central Railroad Company*[82] considered whether the FELA statute of limitation was tolled by the filing of an action in state court.[83] In considering congressional intent, the Court explored the policies underlying statutes of limitations and stated:

> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber till evidence has been lost, memories have faded, and witnesses have disappeared. The theory is even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' . . .Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.
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> This policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights.[84]

The decision of what period of time will serve to properly protect defendants is left primarily to the legislature. In considering the legislative intent of the limitation for Federal Tort Claims, the Court explained in *United*

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79. *Id.* at 259.

80. American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974); Weber v. Board of Harbor Comm'r, 85 U.S. 57 (1873); Riddlesburger v. Hartford Ins. Co., 74 U.S. 386 (1868); Bell v. Morrison, 26 U.S. 351 (1828).

81. Burnett v. New York Cent. R.R. Co., 380 U.S. 424, 428 (1965).

82. 380 U.S. 424 (1965).

83. *Id.* at 426-27.

84. *Id.* at 428.

States v. Kubrick[85] that:

> Statutes of limitation, which 'are found and approved in all systems of enlightened jurisprudence' . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.' . . . These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.[86]

It is significant that limitation statutes are the result of legislative judgment. In the context of section 1983 this emphasizes the point that no direct interference with the state occurs when a federal court selects a particular limitation. Presumably, the state legislature has not expressed its judgment as to the time in which civil rights claims may be brought unless it has specifically made that reference.

As the placement of a limitation upon a cause of action is arbitrary,[87] there appears to be no inherent logic in applying a shorter or longer policy to serve the purpose of a statute of limitation developed by a particular legislature. Whether and to what extent a defendant may be protected by a two year instead of a three year or a three year instead of a five year statute of limitation is largely a subjective decision. In fact, when there is a question as to which statute of repose will apply, the general judicial policy is to apply the longer of the two.[88]

Thus, there is no reason for the federal courts to assume one statute of limitation is particularly mandated by a state legislature. Instead, the federal judiciary must examine the state policies surrounding the use of particular limitations. The state's policy concerning limitations can then be compared with the nature of the civil rights action.

V. The Supreme Court's View of Determining State Law

Unquestionably, the federal court is required to apply the appropriate state statute of limitation.[89] As previously discussed, however, little guidance other than the mere requirement for application has been provided by the Supreme Court.

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85. 444 U.S. 111 (1979).

86. *Id.* at 117.

87. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-64 (1975).

88. Marshall v. Kleppe, 637 F.2d 1217, 1224 (9th Cir. 1980); Shah v. Hallibarton, 627 F.2d 1055, 1059 (10th Cir. 1980); Reid v. Volkswagen of America, Inc., 512 F.2d 1294, 1297 (6th Cir. 1975); Payne v. Ostrus, 50 F.2d 1039, 1042 (8th Cir. 1931).

89. *See supra* Note 2.

Other than a mandate to apply the state's policies in addition to the statutes themselves,[90] the Court's review is limited to ensuring a reasoned approach by the court below. For example, in *Runyon v. McCrary*,[91] the Supreme Court merely commented that the court of appeals had given careful consideration to the question of the appropriate statute of limitation and that the issue was one of state law to which deference would be afforded by federal district court and court of appeals.[92] Thus, the Court upheld the determination that the petitioners did not bring their suit for racial discrimination under section 1981 in a timely manner.[93]

It is therefore up to the various courts of appeal to arrive at their own reasoned analysis of the limitation determination issue. The United States Supreme Court has left each court of appeals to find its own path through the maze of state limitations before it. Although a single statute for all litigants wherever located in the United States may be easier, uniformity has clearly been subordinated in the civil rights context. In *Board of Regents v. Tomanio*[94] the court repeated its philosophy, expressed in *Robertson v. Wegmann*,[95] that uniformity is not a significant goal in the civil rights area.[96] *Tomanio* concerned an action brought by a chiropractor claiming a violation of due process when the New York Board of Regents rejected her application to waive examination requirements for a license to practice chiropractic medicine.[97] The Supreme Court rejected the Second Circuit's failure to apply not only the New York statute of limitation but its tolling provision.[98] The Supreme Court relied on the rationale that a federal policy of uniformity is not capable of displacing state limitation provisions.[99] This statement reiterated the Supreme Court's position in the *Robertson* decision that Louisiana survivorship laws were applicable to a section 1983 claim of malicious prosecution despite any consideration of national uniformity.[100] As the Court stated in *Robertson:*

> [W]hatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide

90. Board of Regents v. Tomanio, 446 U.S. at 486-89.
91. 427 U.S. 160 (1976).
92. *Id.* at 181-82.
93. *Id.*
94. Board of Regents v. Tomanio, 446 U.S. at 478.
95. Robertson v. Wegmann, 436 U.S. at 584.
96. Board of Regents v. Tomanio, 446 U.S. at 489.
97. *Id.* at 481.
98. *Id.* at 483.
99. *Id.* at 489.
100. Robertson v. Wegmann, 436 U.S. at 594.

uniformity on these issues.[101]

VI. Circuit Court Analysis

A. *Factual Analysis in Deriving Limitations*

A number of circuits have chosen what initially appears to be a logical method for selecting analogous state limitations. The plaintiff's complaint is examined to discover the facts which led to the alleged wrong.[102] The court then makes its determination of what state cause of action could be asserted upon those facts.

However, as indicated in Section I, several problems result from the use of this method. Yet, the factual analysis method continues to be utilized by several circuits.

1. *Third Circuit*

Historically, the Third Circuit Court of Appeals has ardently applied the factual analysis methodology. The court has looked exclusively to the facts or conduct appearing on the face of the petition to chose a statute of repose.[103] The court has then reviewed the available state limitation provisions to apply the "most analogous" limitation as if the action were brought without the benefit of constitutional redress. For example, in *Ammulung v. City of Chester*,[104] the plaintiffs alleged that an 18 year-old high school student had been wrongfully arrested, jailed and allowed to die in his cell without treatment. The court picked over the pleading to arrive at state causes of action for wrongful death or trespass.[105] Although the plaintiff urged an analogy of conspiracy, the appellate court rejected the argument because none was pled.[106] The court's mandate required selection of a state cause of action from the "nature of the conduct alleged."[107]

The Third Circuit has extended its factual analysis to the point where different limitations are applied to the same case.[108] In *Polite v. Diehl*[109] the

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101. *Id.* at 593, 594 n.11.

102. *See, e.g.*, Braden v. Texas A & M Univ., 636 F.2d 90, 92 (5th Cir. 1981). The *Braden* court indicated that although it had described the method of choosing state limitations for civil rights as a two step process, the process was more truly a single procedure. The Fifth Circuit had previously determined first "the essential nature of the claim under federal law and then on the period applicable to a like claim brought under state law." *Id.* The court realized, however, that its reliance on state law catergorization of the claim blurred the difference between the two steps.

103. Ammulung v. City of Chester, 494 F.2d 811, 814 (3d Cir. 1974).

104. 494 F.2d 811 (3d Cir. 1974).

105. *Id.* at 814.

106. *Id.*

107. *Id.* (discussing Conrad v. Stitzel, 225 F. Supp. 244, 247 (E.D. Pa. 1963)).

108. Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 901 (3d Cir. 1977); *contra*, Walden III, Inc. v. Rhode Island, 442 F. Supp. 1168, 1172 (D.C. R.I. 1977) ("sin-

court held that the one year limitation for false arrest would apply to one portion of the claim and the six year limitation for recovery of goods would apply to a different type of conduct alleged in the complaint.[110] The plaintiff's claim in *Polite* stemmed from his arrest after an automobile accident. Polite alleged in his complaint that he was wrongfully arrested, physically and verbally abused, forced to plead guilty to various charges and had his car wrongfully seized.[111] The appellate court refused to apply a single limitation to the plaintiff's complaint[112] because this would result in either extending one claim or shortening the other.[113] The *Polite* court discussed earlier criticism expressed by the Ninth Circuit[114] that different limitation periods applied to the same action could present problems of confusion.[115] The Third Circuit, however, distinguished the two cases by recognizing that the statutory framework differed and by stating that the *Smith* court was able to apply a state limitation for liability created by statute whereas "[n]o such broad statute of limitations is available under Pennsylvania law."[116]

Despite its previous decisions concentrating on the factual context of the civil rights claim, the Third Circuit has appeared to move closer to focusing upon the nature of the cause of action with the decision of *Knoll v. Springfield Township School District.*[117] The plaintiff in *Knoll* was a teacher bringing an action under Title VII of the Civil Rights Act of 1964,[118] as amended, and section 1983 alleging sex discrimination for failure to promote her to several administrative positions.

The court considered whether the most applicable Pennsylvania statute of limitation was a six-month limitation for actions against government officials or a six-year residuary limitation for civil actions not otherwise provided for.[119] Under a factual analysis approach the court concluded that the

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gle application is necessary to avoid confusion or inconsistency which would result if the single federal civil action were to be fragmented by the application of different statutes of limitation analogous to the differing state created or common law rights involved").

109. 507 F.2d 119 (3d Cir. 1974).

110. *Id.* at 122-23.

111. *Id.* at 121.

112. *Id.* at 123.

113. *Id.*

114. Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962).

115. Polite v. Diehl, 507 F.2d at 123 n.10.

116. *Id.* The Pennsylvania statutory scheme for limitations of action has changed to provide a general catch-all statute of limitation. 42 PA. CONS. STAT. ANN. § 5527 (Purdon 1977). *See* Act of July 9, 1976, P. L. 586, Act No. 112, § 42 PA. CONS. STAT. ANN. §§ 5501-5574 (Purdon 1977).

117. 699 F.2d 137 (3d Cir. 1983).

118. 42 U.S.C. § 2000e (1976).

119. Knoll v. Springfield Township School Dist., 699 F.2d at 140; *See also* 42 PA. CONS. STAT. ANN. § 5522(b)(1) (Purdon 1981) (six-month limitation) and 42 PA. CONS. STAT. ANN. § 5527(6) (Purdon 1981) (six-year limitation).

six-month limitation was most applicable.[120] The Third Circuit Court of Appeals, however, refused to apply the six-month limitation because: (1) to do so "would contravene the remedial purpose of federal civil rights actions and deny appellant the breadth of [section] 1983's sweep,"[121] (2) the six-month limitation would be too short to allow the normal claimant to prepare and file a lawsuit,[122] and (3) its application "would be inconsistent with the legislative history and subsequent judicial construction of those [Civil Rights] Acts."[123] Based upon these policy considerations the court applied the six-year limitation to the plaintiff's section 1983 action.[124] Thus, the Third Circuit may be shifting from a strict factual analysis of the civil rights claim to a concern for implementing the purpose of section 1983. This emphasis is demonstrated by the court's comment in *Knoll* that: "When poured into the federal vessel, the state statute becomes a federal legal precept, and all aspects of the proceeding must be measured by the federal interest implicated in the case."[125] Although the continuation of this trend can only be determined by future observation of the Third Circuit's decision making process, it appears that the prospect of a consistent, uniform application is good.

2. *Fifth Circuit*

The Fifth Circuit has adopted a methodology of selecting statutes of limitations much like that of the Third Circuit prior to its decision in *Knoll*. The Fifth Circuit has explained the process as including two steps: "The court must first determine the essential nature of the federal claim before it, and then look to the state law in order to determine which state statute is applicable to claims similar to the one before the court."[126]

In *McMillan v. City of Rockmart*[127] the Fifth Circuit considered an action brought under section 1983 for improper arrest procedures. The plaintiff argued for the application of the Georgia twenty year statute of limitations applied to actions for "enforcement of rights accruing to individuals under statutes. . . ."[128] The court refused, citing Georgia case law to the effect that the twenty year limitation did not apply to codifications of previously recognized principles.[129] The *McMillan* court cited *Chapman v. Houston Welfare Rights Organization*[130] for the proposition that section 1983 is

120. Knoll v. Springfield Township School Dist., 699 F.2d at 141.
121. *Id.* at 142.
122. *Id.*
123. *Id.* at 143.
124. *Id.* at 145.
125. *Id.* at 141.
126. McMillan v. City of Rockmart, 653 F.2d 907, 909 (5th Cir. 1981).
127. 653 F.2d 907 (5th Cir. 1981).
128. *Id.* at 909 n.1 (citing GA. CODE ANN. § 3-704 (1975)).
129. *Id.* at 909.
130. 441 U.S. 600 (1979).

premised upon the Constitution and does not create substantive rights.[131] It thus applied the two year Georgia limitation for "actions based on personal injuries."[132]

Despite its method of attempting to apply state limitations for similar claims to that brought in the federal court, the Fifth Circuit has generally preferred to characterize the civil rights claim as a tort.[133] For example, in *Braden v. Texas A & M University System,*[134] the court stated: "Section 1983 is interpreted against a 'background of tort liability . . .'" and "the analogous state law claim for purposes of selecting the state statute of limitations should sound in tort, not contract . . . ."[135]

The court thus corrected the district court's analysis of a breach of contract for the plaintiff's allegation of a section 1983 violation of constitutional rights for employment termination without due process.[136] However, interestingly, the Fifth Circuit did not apply the Texas limitation for "injury done to the person of another."[137] Instead, the court held applicable the limitation for actions for trespass and detaining property as most similar to a deprivation of property interest in employment.[138]

This remaining inclination to choose different limitations based upon the facts of the pleading or conduct alleged is reflected in most of the Fifth Circuit decisions.[139] Thus, while the Fifth Circuit has moved toward making its limitation decision based upon the source of the civil rights action, it remains committed to analyzing the facts pled.

3. *Sixth Circuit*

Although the Sixth Circuit has also made some effort to develop a uniform method of analysis,[140] a recent decision[141] by that court predicates a

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131. McMillan v. City of Rockmart, 653 F.2d at 909.

132. *Id.* at 910.

133. Braden v. Texas A & M Univ., 636 F.2d 90, 92 (5th Cir. 1981). The court mentioned, in a footnote to *Truvillion v. Kings Daughters Hospital,* 614 F.2d 520, 525 (5th Cir. 1980), that actions for backpay in employment discrimination cases would be governed by contractual provisions.

134. *Id.* at 90.

135. *Id.* at 92 (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961)).

136. *Id.* at 94.

137. *Id.* at 93; *see* TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon 1971).

138. Braden v. Texas A & M Univ., 636 F.2d at 93.

139. Whatley v. Department of Educ., 673 F.2d 873 (5th Cir. 1982); Rubin v. O'Koren, 644 F.2d 1023 (5th Cir. 1981); Dumas v. Town of Mount Vernon, 612 F.2d 974 (5th Cir. 1981); Pegues v. Morehouse Parish School Bd., 632 F.2d 1279 (5th Cir. 1980), *cert. denied,* 101 S. Ct. 2322 (1981).

140. *See, e.g.,* Geromette v. General Motors Corp., 609 F.2d 1200 (6th Cir. 1979), *cert. denied,* 446 U.S. 985, *reh'g denied,* 448 U.S. 912 (1980); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *vacated and remanded on other grounds,* 431 U.S. 951 (1977).

141. Hines v. Board of Educ. of Covington, 667 F.2d 564 (6th Cir. 1982).

continued state of confusion.[142] The Sixth Circuit at one time considered a claim of constitutional deprivation as "merely descriptive of the damages."[143] In *Marlowe v. Fisher Body*,[144] however, the court found a broader purpose: "The fact that the amended complaint also referred to alleged breaches of contract (contract rights being specifically protected by section 1981) does not alter the fact that a deprivation of civil rights is primarily the violation of personal rather than property rights."[145] The plaintiff's claim of employment discrimination resulting from his adherence to the Jewish faith was thus considered to have been brought within the three year period "allowed for injuries to the person" in Michigan.[146]

In Michigan the statute governing actions for injuries to the person is generally applied by the Sixth Circuit.[147] However, in *Mason v. Owens-Illinois, Inc.*,[148] the Sixth Circuit applied the Ohio provision for an action upon liability created by statute and stated: "Plaintiff's action is founded upon a federal statute, 42 U.S.C. § 1981, creating a cause of action unknown at common law."[149] The plaintiff in *Mason* alleged racial discrimination in his treatment in and discharge from employment.[150] The defendant sought application of the one year limitation for civil rights actions brought by the Ohio Civil Rights Commission. The plaintiff asserted that the Ohio six year limitation for "[a]n action upon a liability created by statute" was most analogous.[151] The court concluded that the purposes served by a relatively

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142. *See, e.g.*, Austin v. Brammer, 555 F.2d 142, 143-44 (6th Cir. 1977) (Ohio's one-year statute of limitations for intentional torts applied); Crawford v. Zeitler, 326 F.2d 119, 121 (6th Cir. 1964) (Ohio's four-year statute of limitations for injuries to the rights of "plaintiffs not arising on contract nor enumerated in" Ohio Code applied); Mason v. Owens-Illinois, Inc., 517 F.2d 520, 521-22 (6th Cir. 1975) (Ohio's six-year statute of limitations for an action "upon a liability created by statute" applied); Carmicle v. Weddle, 555 F.2d 554, 555 (6th Cir. 1977) (Kentucky one-year statute for false arrest and malicious prosecution applied); Garner v. Stephens, 460 F.2d 1144, 1148 (6th Cir. 1972) (Kentucky five-year statute of limitations for an action upon liability created by statute held to be applicable).

143. Kleve v. Negangard, 330 F.2d 74, 75-76 (6th Cir. 1964). Plaintiff sought application of an Indiana statute for actions against a sheriff in his diversity action. *Id.* at 76. Section 1983 was not the basis of the plaintiff's claim for violation of constitutional rights. The appellate court held the applicable statute was an Ohio false arrest limitation. *Id. See also* Sell v. Price, 527 F.Supp. 114, 115-18 (S.D. Ohio 1981).

144. 489 F.2d 1057 (6th Cir. 1973).

145. *Id.* at 1063.

146. *Id.*

147. *See, e.g.*, EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *vacated and remanded on other grounds*, 431 U.S. 951 (1977); Geromette v. General Motors Corp., 609 F.2d 1200 (6th Cir. 1979), *cert. denied*, 446 U.S. 985, *reh'g denied*, 448 U.S. 912 (1980); Madison v. Wood, 410 F.2d 564 (6th Cir. 1969); An-ti Chai v. Michigan Technological Univ., 493 F. Supp. 1137 (W.D. Mich. 1980).

148. 517 F.2d 520 (6th Cir. 1975).

149. *Id.* at 522.

150. *Id.* at 521.

151. *Id.*

short limitation for filing a charge and suit by the state were not applicable to a section 1981 suit brought by a private litigant.[152] The resources of a private litigant were not considered the same as a state commission and the opportunity for settlement and conciliation was viewed as anomalous to the filing of suit.[153]

Confusing matters somewhat, the Sixth Circuit applied a one year limitation for intentional torts in *Austin v. Brammer*[154] just two years later. Suit was brought under sections 1983 and 1985 for a violation of civil rights by police officers allegedly giving false testimony in the plaintiff's criminal trial for rape and breaking and entering.[155] Without considering any other potentially applicable statute, the court accepted the defendant's argument that the Ohio statute for false imprisonment was the most analogous.[156]

The difficulties created by these decisions are exemplified by the Sixth Circuit district court cases of *Hines v. Board of Education of Covington*,[157] and *Schorle v. City of Greenhills*.[158] In *Hines* the district court considered the plaintiff's claim that she was illegally terminated from her teaching position without due process of law.[159] Faced with the various statutes previously applied by the Sixth Circuit, the district court judge made a plea for a more reasonable analysis, stating:

> If this court were writing on a clean slate in this matter, it would be inclined to view the need for certainty and uniformity as an overwhelming consideration and, following the suggestions of the commentators, adopt a single state statutory analogue for all federal civil rights actions. A suitable candidate would be the state limitations statute for an action upon a liability created by statute.[160]

The court, however, felt constrained to apply the one year slander limitation of the Kentucky Code by the Sixth Circuit precedent.[161]

The district court in *Schorle* was more optimistic in applying the Ohio limitation for actions on liability created by statute,[162] stating:

> While the Sixth Circuit has not explictly embraced these concepts, we believe our analysis of the case law to this point leads to the conclusion that these concepts are properly applied to the cause of action stated in

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152. *Id.* at 522.
153. *Id.*
154. 555 F.2d 142, 143 (6th Cir. 1977).
155. *Id.* at 143.
156. *Id.* at 143-44.
157. 492 F. Supp. 469 (E.D. Ky. 1980), *aff'd*, 667 F.2d 564 (6th Cir. 1982).
158. 524 F. Supp. 821 (S.D. Ohio 1981).
159. 492 F. Supp. at 471.
160. *Id.* at 472.
161. *Id.* at 475. Without the benefit of considering the goals of uniformity and certainty, the district court ruled that the primary interest protected by the due process rights was reputation. *Id.* at 474.
162. 524 F. Supp. at 827.

> the instant case. [citations omitted] The facts stated in the instant complaint are much broader than those giving rise to the simple common law torts of false arrest, false imprisonment, and malicious prosecution.[163]

The district court in *Schorle* considered the plaintiff's action under section 1983 a claim of constitutional deprivation stemming from an arrest, detention, trial without jury and sentence.[164] The defendants asserted that the Ohio one year limitation for false arrest, imprisonment and malicious prosecution was most applicable.[165] The trial judge echoed the sentiment expressed in *Hines* that "trial courts have been provided with little guidance. . . ."[166] The trial judge's expression of the rationale for uniformly applying a limitation statute is both succinct and eloquent:

> Plaintiff's claim is broader and different from a claim that he was accused without probable cause or that he was improperly detained or arrested. The thrust of plaintiff's complaint is that he was repeatedly deprived of certain fundamental rights by the concerted actions of the officials and employees of the City of Greenhills and by a judge of a court that had no jurisdiction to hear the matter. The continuum of incidents inextricably entwined, which culminated in the plaintiff's conviction in the Greenhills' Mayor's Court, demonstrates not that he was falsely accused or that he was falsely arrested or imprisoned, but rather that he suffered injury to his rights guaranteed under the Constitution—his rights to counsel, to be advised of his right to have a jury trial, to have the matter heard in a court of proper jurisdiction, and not to be sentenced in excess of the permitted penalty. It is not for this Court to break plaintiff's complaint down into isolated incidents which would, if taken separately, bear some token resemblance to various state common law torts. This is because it is the series of events, the totality of acts done under color of state law, which have allegedly deprived plaintiff of his rights under the Constitution. And, it is this continuum of events, for which there is not adequate state relief, that comprises a cause of action under [section] 1983 that is broader than a common law tort. . . . For federal courts to apply a limited state limitations period, such as a one-year period for a common law tort, to a [section] 1983 complaint would only serve to defeat the broad remedial purpose Congress intended in passing the Civil Rights Act, 42 U.S.C. [sections] 1981 *et seq.* . . .
>
> It is this Court's opinion that a well-pleaded cause of action under [section] 1983 always states a cause of action broader than one for simple common law tort. The difference lies in concepts which are fundamental to our democratic way of life. Although it is true that activity which is a tort if done by a private person may take on the character of a violation of a constitutional right if done by one acting under color of state law, it

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163. *Id.* at 826.
164. *Id.* at 822.
165. *Id.* at 823.
166. *Id.* at 822 (quoting Hines v. Board of Educ. of Covington, 492 F. Supp. 469, 472 (E.D. Ky. 1980), *aff'd*, 667 F.2d 564 (6th Cir. 1982)).

> is also true that many things, if done privately, *e.g.*, discrimination, are not actionable. This is so because those who govern bear a heavy burden of responsibility in enforcing the laws upon the governed. Those who under our political compact have the privilege and authority to govern must do so fairly and reasonably with respect for the rights guaranteed to all citizens under the Constitution. The burden this imposed on those who govern is not unreasonable if the individuals by whose authority and for whose benefit they act are to perceive and enjoy those benefits of freedom and democracy to which they are entitled, rather than to suffer the abuses of a police state. While one may expect fair treatment from his fellow man, it is his right to do so from those in authority. Thus, the allegation that one has been deprived of a fundamental right by, or has suffered continuing abuses at the hands of *one acting under color of law* is the essence of a § 1983 action as well as that element of a § 1983 action which sets it forever apart, in breadth, from its sometime superficially analogous partner in common law tort.[167]

Unfortunately, the appellate court for the Sixth Circuit rejected a more uniform approach by affirming the lower court in *Hines* and stating: "We have considered the District Judge's suggestion that a uniform statute of limitation for actions under [section] 1983 would be helpful to the federal trial courts. Congress, however in 1866 did not provide one and neither has the U.S. Supreme Court . . . ."[168]

4. *Tenth Circuit*

The articulated methodology utilized by the Tenth Circuit in determining civil rights limitations is similar to the previous Third Circuit approach.[169] The Tenth Circuit Court of Appeals has engaged in a "critical analysis" of each plaintiff's claim and then attempted to find a "comparable state law analog."[170] In *Zuniga v. AMFAC Foods, Inc.*,[171] the court considered an employment discrimination claim brought under section 1981[172] of Title 42 of the United States code.[173] In seeking to arrive at a decision as to the correct Colorado limitation, the court commented on the different approaches taken by the various courts of appeal. The court compared the

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167. Schorle v. City of Greenhills, 524 F. Supp. at 826-27.
168. Hines v. Board of Educ. of Covington, 667 F.2d at 564 n.1.
169. *See* Zuniga v. AMFAC Foods, Inc., 580 F.2d 380 (10th Cir. 1978).
170. *Id.* at 383.
171. 580 F.2d 380 (10th Cir. 1978).
172. 42 U.S.C. § 1981 (1976):

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

173. Zuniga v. AMFAC Foods, Inc., 580 F.2d at 381.

approach of the Seventh Circuit in *Beard v. Robinson*[174] with the *Meyers v. Pennypack Woods Home Ownership Association*[175] decision of the Third Circuit.[176] The *Beard* decision was described as rejecting "the method of characterizing the facts underlying the plaintiff's claim in terms of traditional common law torts to determine the applicable limitation; instead a uniform limitation for all statutory claims was applied."[177] The methodology of the *Meyer's* court was explained as "characterization of the civil right claim . . . by analysis of the particular allegations of the claim. . . ."[178] The Tenth Circuit chose the Third Circuit approach[179] since it believed the characterization of a plaintiff's claim was more in tune with the Supreme Court's direction in *Runyon v. McCrary,*[180] and *UAW v. Hoosier Cardinal Corp.*[181] to select the most analogous state limitation by adopting the local law and the characterization of the federal action that state law would impose. The Tenth Circuit apparently did not consider the *UAW* decision distinguishable as based upon the Labor Management Relations Act, nor did the court comment upon the Supreme Court's failure to cite *McCrary* in arriving at its decision in *Runyon.* Additionally, the Tenth Circuit did not appear to reflect upon either the distinction between state common law and constitutional rights or the purpose of the civil rights statutes.

Despite its conservative attitude, the Tenth Circuit has approached the question of limitation determination pragmatically when doubt exists as to the correct statutory analogy. For example, in *Shah v. Halliburton Co.,*[182] the court was faced with a section 1981 employment discrimination claim. Since there was a question as to which Oklahoma limitation provision would apply, the court simply applied the longer period[183] stating: "We believe this rule is particularly apposite where civil rights statutes are involved. 'The purpose for which the section was enacted—to afford equal opportunities to secure the benefits of American life regardless of race—requires that a court adopt a broad outlook in enforcing [section] 1981.' "[184] Thus, the Tenth Circuit has sought to effectuate the purpose of the Civil Rights Act by exercising its judicial perogative in selecting the longer of potentially applicable limitation provisions.

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174. 563 F.2d 331 (7th Cir. 1977), *cert. denied,* 438 U.S. 907 (1978).
175. 559 F.2d 894 (3d Cir. 1977).
176. Zuniga v. AMFAC Foods, Inc., 580 F.2d at 383.
177. *Id.*
178. *Id.*
179. *Id.*
180. 427 U.S. 160, 180-82 (1976).
181. 383 U.S. 696, 706 (1966).
182. 627 F.2d 1055 (10th Cir. 1980).
183. *Id.* at 1059.
184. *Id.* (citing Long v. Ford Motor Co., 496 F.2d 500, 505 (6th Cir. 1974)); *see also* Brogan v. Wiggins School Dist., 588 F.2d 409, 412 (10th Cir. 1978) (applying the longer Colorado limitation); *but cf.* Brown v. Bigger, 622 F.2d 1025 (10th Cir. 1980).

5. *First Circuit*

The First Circuit has been included within this section not because of its method of analysis but because of its treatment of the civil rights claim. While structuring its method of analysis upon a four part test,[185] the application of the standard fails to recognize the nature of the civil rights cause of action.

In *Burns v. Sullivan*[186] the First Circuit articulated a test stating:

> Determination of the applicable state statute of limitations requires consideration of four questions: 1) The nature of the federal cause of action, see *Davis v. United States Steel Supply*, 581 F.2d 335, 337 (3d Cir. 1978); 2) the analogous state causes of action; 3) the state statutes of limitations for those causes of action; and 4) which of the state statutes of limitations is the most appropriate under federal law . . . .[187]

This test would appear to lead to decisions reflecting consideration of the broad nature of civil rights causes of action. However, instead of focusing upon the remedial nature of the Civil Rights Act, the First Circuit expressed concern for prompt resolution of personnel disputes and avoiding the possibility that "federal courts will become surrogate personnel departments."[188]

The plaintiff's primary claim in *Burns* was for reverse racial discrimination in his attempt to obtain a police promotion from the City of Cambridge, Massachusetts.[189] Burns brought his cause of action under sections 1985(3)[190] and 1983.[191] The court recognized that it had previously decided that civil rights actions by employees sounded in tort.[192] However, the court refused to adhere to an automatic application of tort limitations, especially when it considered the state to have a specific statute addressing the plaintiff's cause of action.[193]

Instead of applying the tort limitation the court chose the six-month limitation for filing complaints with the Massachusetts Commission Against Discrimination.[194] The First Circuit did not believe that six months was too short a time period, stating: "Although it may take more than six months to properly prepare a civil rights case, a complaint meeting the requirement of *Fed. R. Civ. P.* 8(a) can surely be filed in that time."[195] In addition to the

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185. Burns v. Sullivan, 619 F.2d 99, 105 (1st Cir.), *cert. denied*, 449 U.S. 893 (1981).
186. 619 F.2d 99, (1st Cir.), *cert. denied*, 449 U.S. 893 (1981).
187. *Id.* at 105.
188. *Id.* at 107.
189. *Id.* at 103.
190. 42 U.S.C. § 1985(3).
191. Burns v. Sullivan, 619 F.2d at 105.
192. *Id.* at 106; *See also* Ramirez De Arellano v. Alvarez de Choudens, 575 F.2d 315, 318 (1st Cir. 1978); Graffals Gonzalez v. Garcia Santiago, 550 F.2d 687, 688 (1st Cir. 1977).
193. Burns v. Sullivan, 619 F.2d at 106.
194. *Id.*
195. *Id.* Despite this statement, the First Circuit affirmed the dismissal of a portion of a

policy rationale of prompt resolution of employment matters and avoiding a burden upon the federal courts, the First Circuit expressed itself:

> Where, as here, the state has provided a specific remedy, complete with statute of limitations, for racial discrimination in public employment and promotion, actions under the federal Civil Rights Acts alleging racial discrimination by the state must be governed by that statute of limitations. In our view, although this rule shortens considerably the time in which an aggrieved person may bring a [section] 1983 action for racial discrimination in public employment, it conflicts with no federal policy and enhances the ability of the state to resolve its own personnel problems.[196]

Unfortunately, there are several fallacies in the *Burns* opinion. No deference is given to the nature or purpose of the section 1983 claim. Perhaps the best criticism of applying a six-month limitation can be found in the *Knoll* decision of the Third Circuit.[197] There the court supplied numerous reasons for the disregard of such a short limitation.[198] The Third Circuit summed up its approach with a comment which is surely applicable to the First Circuit analytical method: " 'We are not at liberty to seek ingenious analytical instruments' that would dilute the power of [section] 1983 or the majesty of its objectives."[199]

In addition to ignoring the purpose and history of section 1983, the First Circuit has misconstrued the type of limitation it is analogizing. The court apparently perceived no difference between the six-month time limit for filing an administrative complaint with state and federal agencies and the filing of a lawsuit. The First Circuit did not address the logic of its rationale in light of the United States Supreme Court's holding in *Johnson v. Railway Express Agency, Inc.*[200] that the agency process is separate and distinct from a civil rights action. Additionally, no distinction was made on the basis that an individual may file a complaint with an agency without retaining an attorney, without the fee to pay for investigation of the complaint, without fees for the expenses of a lawsuit or for retention of an attorney, and without the time and preparation requirements of a lawsuit. Although the *Burns* decision reflects a concern that the federal courts do not become surrogate personnel departments, no consideration is given to the possibility that the court may become a "surrogate" for administrative agencies created to resolve claims of discrimination with minimal litigation. Interestingly, the *Burns* court applied the Massachusetts six-month limitation[201] for filing a

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civil rights claimant's petition for a lack of specificity in *Dewey v. University of New Hampshire*, 694 F.2d 1 (1982).

196. *Id.* at 107.

197. *See infra* notes 117-25 and accompanying text.

198. *Id.*

199. Knoll v. Springfield Twp. School Dist., 699 F.2d at 144.

200. Johnson v. Railway Express Agency, Inc., 421 U.S. at 459-62.

201. MASS. GEN. LAWS ANN. ch. 151B, § 5 (West 1982).

discrimination charge with the agency despite the presence of a two year limitation[202] for commencing a civil action once the administrative charge has been timely filed.[203]

The *Burns* decision has been reaffirmed by the First Circuit.[204] Thus, it appears that if there exists an administrative mechanism for addressing the plaintiff's section 1983 complaint, the limitation for filing an administrative charge will apply. It remains plausible that a limitation for torts would apply should the civil rights claimant's allegation of wrongdoing fall outside the scope of an administrative agency.

B. *Recognizing the Source of the Civil Rights Cause of Action*

Five circuits have attempted, where possible, to eliminate the vast problems of uncertainty engendered by a dependency on the factual allegations of a pleading. While the Fourth Circuit has primarily chosen to label all civil rights actions as those for injury to the person,[205] the Second, Seventh, Eighth and Ninth Circuits have applied, where possible, limitations for actions based upon liability created by statute.[206]

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202. MASS. GEN. LAWS ANN. ch. 151B, § 9 (West 1982).

203. In *Carter v. Supermarkets General Corp.*, 684 F.2d 187 (1st Cir. 1982) a plaintiff made the argument that the two year limitation of MASS. GEN. LAW ANN. ch. 151B, § 9 (West 1982) should apply. The court did not reach the issue as the plaintiff had not filed her complaint within six months with the agency.

204. *See, e.g.*, Holden v. Commission Against Discrimination, 671 F.2d 30, 33-34 (1st Cir. 1982) (Burns and Hussey limitations applied to equal protection and free speech claims); Carter v. Supermarkets General Corp., 684 F.2d 187, 190 (1st Cir. 1982) (Section 1981 claim for race and sex discrimination in employment against private employer is analogized to MASS. GEN. LAWS ANN. ch. 151B, § 5 (West 1982)); Hussey v. Sullivan, 651 F.2d 74, 76 (1st Cir. 1981) (policeman's claim of political discrimination analogized to six-month limitation under Mass. civil service procedure).

205. McCausland v. Mason County Bd. of Educ., 649 F.2d 278 (4th Cir.), *cert. denied*, 454 U.S. 1098 (1981). Cramer v. Crutchfield, 648 F.2d 943 (4th Cir. 1981); Almond v. Kent, 459 F.2d 200 (4th Cir. 1972).

206. Second Circuit: Taylor v. Mayone, 626 F.2d 247 (2d Cir. 1980); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 449 (2d Cir. 1980); Meyer v. Frank, 550 F.2d 726 (2d Cir.), *cert. denied*, 434 U.S. 830 (1977); Swan v. Board of Higher Educ., 319 F.2d 56 (2d Cir. 1963), *but cf.* Williams v. Welsh, 558 F.2d 667 (2d Cir. 1977) (applying Connecticut tort limitation); Seventh Circuit: Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978); Rinehart v. Locke, 454 F.2d 313 (7th Cir. 1971), *but cf.* Movement for Opportunity and Equality v. General Motors, 622 F.2d 1235 (7th Cir. 1980) (Indiana tort analogy limitation applied); Eighth Circuit: Garmon v. Foust, 668 F.2d 400 (8th Cir.), *cert. denied*, 102 S. Ct. 2283 (1982); Berry v. Battey, 666 F.2d 1183 (8th Cir. 1981); Wagh v. Dennis, 677 F.2d 666 (8th Cir. 1982); Ninth Circuit: Chung v. Pomona Valley Community Hosp., 667 F.2d 788 (9th Cir. 1982); London v. Coopers Lybrand, 644 F.2d 811 (9th Cir. 1981); Mason v. Schaub, 564 F.2d 308 (9th Cir. 1977); *but cf.* Kosikowski v. Bovine, 659 F.2d 105, 107 (9th Cir. 1981) (Oregon state torts claim act applied).

1. *Fourth Circuit*

The Fourth Circuit has consistently characterized the sections of the Reconstruction Civil Rights Acts as implicating a remedy beyond that provided at common law.[207] Using this assumption as a stepping stone, the court views the deprivation of a constitutional right as an "injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person."[208] Therefore, the Fourth Circuit in *Almond v. Kent*[209] applied the two year Virginia statute of limitation applicable to injuries to the person.[210] Almond alleged that he was beaten, isolated from his family, deprived of his property and imposed with excessive bond.[211] In determining that the two-year personal injury statute was applicable, the court distinguished between the common law and federal civil rights law. The personal injury statute was applied:

> [N]ot because there was a right of recovery at common law but because there was a violation of a constitutional right not to be beaten. . . . This right of recovery depends upon federal considerations, and it is not one which is concerned with the archaic concepts of survivability of the common law. . . . In the broad sense, every cause of action under [section] 1983 which is well-founded results from 'personal injuries'.[212]

The court went on to emphasize the fact that the constitutional violation was more significant than a violation of a state right.[213] Conceptually, the court ranked the constitutional right in the framework of the Virginia statutory system:

> [w]e think that it more properly belongs at the two year step in Virginia's statute of limitations scale of values. It is more important than those transitory torts for which a one-year period is prescribed, and it is not to redress damage to property and estate for which Virginia prescribes a five-year period.[214]

The purpose of the statute, as opposed to the factual allegations contained within the pleading, was again emphasized by the Fourth Circuit in

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207. Almond v. Kent, 459 F.2d 200, 203 (4th Cir. 1972); Evans v. Chesapeake and Potomac Tel. Co., 535 F.Supp. 499, 509 (D.C.Md. 1982) (Maryland three year statute for enforcement of a personal right applied to employment discrimination claim under section 1981. The court rejected application of Maryland's six-month limitation for charges filed with Maryland's fair employment agency); *but cf.* Feilder v. Moore, 423 F.Supp. 62, 63 (W.D.N.C. 1976)(analogous statute deemed to be that for liability created by statute under North Carolina statutory scheme); *accord,* Gardner v. King, 464 F.Supp. 666, 667-8 (W.D. N.C. 1979).

208. McCausland v. Mason County Bd. of Educ., 649 F.2d at 279.

209. 459 F.2d 200 (4th Cir. 1972).

210. *Id.* at 204.

211. *Id.* at 201.

212. *Id.* at 204.

213. *Id.*

214. *Id.*

the decision of *Johnson v. Davis*.[215] There the court refused to apply a one year statute created especially for section 1983 actions.[216] The decision to apply the two year personal injury statute was based upon the concepts elucidated in *Almond:* (1) the limitation should turn upon the object of compensating injury to a person rather than the common law, and (2) the seriousness of a constitutional deprivation requires placement of the action above a one year statute of limitation.[217]

The Fourth Circuit's perception of the section 1983 claim as deriving from a source independent of state law has resulted in a uniform method of analogy.[218] Wherever possible it appears the court will analogize a statute governing injury to the person. This approach, however, is ruled primarily by selection of a statute which adequately protects both the interests of the civil rights action and provides an opportunity to allow reasonable pursuit of legal redress.

2. *Second Circuit*

Uniformity in limitation application has largely been achieved in the Second Circuit by applying the state limitation for actions premised upon liability created by statute.[219] Thus, a section 1983 claim for infringement of liberty and due process interest against a municipal agency for matters relating to the plaintiff's discharge was determined to come within the three year New York limitation for liability created by statute.[220] Again, in *Taylor v. Mayone*[221] the three year limitation was applied to a claim that the defendant sheriff and deputies endangered and shot at the plaintiff.[222] The Second Circuit has reasoned very simply that such a statute should apply since, "[p]laintiff's cause of action derives from a statute, the Civil Rights Act."[223]

In Connecticut, however, there exists no limitation provision for an action based on liability created by statute.[224] In the alternative, the application of the three year limitation for torts has been accepted.[225]

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215. 582 F.2d 1316 (4th Cir. 1978).

216. *Id.* at 1317.

217. *Id.* at 1318-19.

218. *See, e.g.*, Evans v. Chesapeake and Potomac Tel. Co., 535 F. Supp. 499, 509 (D.C. Md. 1982).

219. *See infra* note 206.

220. Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d at 449.

221. 626 F.2d 247, 249 (2d. Cir. 1980).

222. *Id.* at 253.

223. Swan v. Board of Higher Educ., 319 F.2d 56, 59 (2d Cir. 1963).

224. *See* CONN. GEN. STAT. ANN. § 52-555 *et. seq.* (West 1960).

225. Williams v. Walsh, 558 F.2d 667, 670 n.3 (2d Cir. 1977).

3. *Seventh Circuit*

In *Beard v. Robinson*[226] the Seventh Circuit chose to resolve a split within the circuit and apply the Illinois limitation for "actions not otherwise provided for."[227] Following the Ninth Circuit decision of *Smith v. Cremins*,[228] the court refused to apply the Illinois statute for injuries to the person because of the serious and distinct nature of constitutional deprivation involved.[229] The plaintiff in *Beard* alleged that a Chicago policeman and several FBI agents conspired and accomplished the murder of Jeff Beard.[230] The murder was alleged to have been committed by clubbing and shooting.[231] Beard's widow pursued the action as administratrix of her husband's estate.[232]

The Seventh Circuit's previous decisions used inconsistent methodologies to arrive at a determination of the appropriate statute of limitation.[233] The court in *Beard* overruled the method of characterizing "the facts underlying plaintiff's claim in terms of traditional common law torts for purposes of determining the applicable state statute of limitations."[234] The court further viewed the application of a uniform statute of limitations as an avoidance of "the often strained process of characterizing civil rights claims as common law torts. . . ."[235]

Unfortunately, the Seventh Circuit was eventually faced with the prospect of characterizing a claim under Indiana law. In *Movement for Opportunity and Equality v. General Motors*[236] the court was forced to choose between an Indiana two year statute[237] for torts and a fifteen year residuary provision.[238] While adhering to its decision in *Beard*, the court reasoned that the availability of evidence and witnesses, the absence of state law interpreting the longer statute to apply to liability created by statute, and the unreasonable extension of the plaintiff's rights required selection of the shorter statute.[239]

While the court's rationale seems understandable, it appears destined to

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226. 563 F.2d 331, 336 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978).
227. *Id.* at 336-37.
228. 308 F.2d 187, 190 (9th Cir. 1962).
229. Beard v. Robinson, 563 F.2d at 336-37.
230. *Id.* at 332.
231. *Id.*
232. *Id.*
233. *Compare* Wakat v. Harlib, 253 F.2d 59 (7th Cir. 1958) *with* Jones v. Jones, 410 F.2d 365 (7th Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970).
234. Beard v. Robinson, 563 F.2d at 336.
235. *Id.* at 337.
236. 662 F.2d 1235 (7th Cir. 1980).
237. IND. CODE ANN. § 34-1-2-2 (Burns 1973).
238. *Id.*
239. Movement for Equal Opportunity and Equality v. General Motors, 622 F.2d at 1242-43.

lead to another strain of confusing and uncertain limitation applications. In addition to the foregoing reasons for rejecting the fifteen year statute, the court stated that its decision was controlled by *Hill v. Trustees of Indiana University*.[240] The panel in *Movement* reasoned that *Hill* was binding because there the court adopted the two year Indiana limitation for a section 1983 action.[241]

The *Movement* panel's reliance on *Hill* was misplaced. The opinion of the court in *Hill* did not address the limitation issue.[242] A single concurring opinion mentioned the limitation, but only to note that both parties and the district court agreed to the application of the Indiana two year limitation for character injury.[243]

The logic of *Beard*, fractured in *Movement*, appears to be suffering from additional stress. For example, *Movement* and *Hill* were relied upon by a different panel in *Blake v. Ketter*.[244] There the court applied a five year Indiana statute for actions against public officers for a section 1983 claim of wrongful arrest, detention, and trial.[245] The court claimed to avoid analogy because the limitation was for the same conduct alleged in the petition.[246] Although the goal of extending a claimant's opportunity to redress wrongdoing may be laudable, the reason should not be cloaked beyond logic. The Seventh Circuit panel in *Blake* failed to grasp the essence of the *Beard* decision. Finding a statute of limitation pertaining to the exact conduct alleged in the complaint is no better than any other analogy. Such a method cannot avoid the factual characterization and eventual reliance upon the conduct alleged in the petition. The goals of uniformity and consistency expressed by the Seventh Circuit in *Beard* will not be reached by a return to the factual analysis of the conduct alleged in each complaint.

The fallacious logic of *Blake* has been followed by at least one district court. In *Gates v. Montalbano*[247] the court held that a section 1983 claim resulting from the shooting of a man by a policeman was governed by a two year Illinois limitation for wrongful death.[248] The trial court relied on *Blake* and stated that no analogy was made because the application of the statute was *direct*.[249]

Unless the Seventh Circuit moves to stem the flow of decisions returning to the factual analysis method, it will again find itself plagued with contradictory law. The benefits produced by *Beard* will be lost.

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240. 537 F.2d 248 (7th Cir. 1976).
241. Movement for Equal Opportunity and Equality v. General Motors, 622 F.2d at 1243.
242. 537 F.2d at 249-53.
243. *Id.* at 254.
244. 693 F.2d 677, 680 (7th Cir. 1982).
245. *Id.* at 680.
246. *Id.*
247. 555 F. Supp. 708 (N.D. Ill. 1983).
248. *Id.* at 710.
249. *Id.*

4. *Eighth Circuit*

The Eighth Circuit cured the confusing nature of its previous decisions[250] in the case of *Garmon v. Foust*.[251] The plaintiff in *Garmon* alleged damages resulting from an illegal search and seizure.[252] Mark Garmon initiated his action under 42 U.S.C. section 1983 for the violation of his constitutional rights.[253] The defendants argued that a two year Iowa limitation for injury to reputation and personal injury should apply while the plaintiff urged the application of an Iowa five year general limitation.[254] Particularly, the defendants suggested that the court compare the federal lawsuit to the state common law action governing the same conduct. The plaintiff argued that the appropriate methodology required comparison of the federal and state causes of action instead of the factual conduct alleged within the petition.[255] In choosing the plaintiff's suggested method, the court, sitting *en banc*, stated:

> We . . . reject the tort analogy because it unduly cramps the significance of section 1983 as a broad, statutory remedy. Section 1983 provides a cause of action for deprivation of civil rights that in no way depends upon state common law. A litigant may pursue a section 1983 action rather than, or in addition to, state remedies.[256]

Before *Garmon*, the Eighth Circuit's panels were split between the decisions of *Glasscoe v. Howell*[257] and *Savage v. United States*.[258] In *Glasscoe*, the plaintiff brought a section 1983 action against police officers for wrongfully arresting and physically abusing him, thereby depriving him of his civil rights.[259] The court stated: "We do not feel the appellee's action here can be narrowly characterized as merely an action for assault and battery."[260] The court held an Arkansas limitation for either liability created by statute or a general statute of limitations applied rather than the one year limitation for assault and battery.[261] The plaintiff in *Savage* alleged that the defendants had maliciously attempted and obtained a criminal indictment against him, and then dismissed the charges before trial.[262] The *Savage* panel considered:

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250. *See, e.g.*, Glasscoe v. Howell, 431 F.2d 863 (8th Cir. 1970) (rejecting the tort analogy); *but cf.* Savage v. United States, 450 F.2d 449 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972) (accepting the tort analogy).

251. 668 F.2d 400 (8th Cir.), *cert. denied*, 102 S. Ct. 2283 (1982).

252. *Id.* at 402.

253. *Id.*

254. *Id.*

255. *Id.* at 405.

256. *Id.* at 406.

257. 431 F.2d 863 (8th Cir. 1970).

258. 450 F.2d 449 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972).

259. Glasscoe v. Howell, 431 F.2d at 864.

260. *Id.* at 865.

261. *Id.*

262. Savage v. United States, 450 F.2d at 450.

"The deprivation of civil rights claims focus entirely on what was said and done by the various defendants in instigating and encouraging the return of the indictment charging Savage with mail fraud."[263]

By choosing the methodology of *Glasscoe*, the Eighth Circuit chose a path which has dissipated the vagaries of factual distinctions. The Eighth Circuit has, in the process, eliminated the quagmire of contradictory decisions previously existing within its jurisdiction.[264]

5. *Ninth Circuit*

The Ninth Circuit, by its decision of *Smith v. Cremins*,[265] was one of the forerunners of consistency and uniformity in its decision making process for civil rights limitation application. The court considered a claim alleging that defendant policemen had violated the plaintiff's civil rights by taking and destroying his religious pamphlets and detaining him for a short period of time.[266] There the court stated: "[I]nconsistency and confusion would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several differing periods of limitation applicable to each state-created right were applied to the single federal cause of action."[267] The focus of the court's decision was the distinction of the civil rights cause of action from the common law based analogies that some courts were seeking to make.[268]

The Ninth Circuit has articulated its methodology by describing a four-part test: (1) where no applicable federal statute of limitation exists a federal court must look to the state law for the appropriate limitation; (2) in determining which period of limitation to apply the courts must first characterize the federal claim; (3) although characterization is a federal question, courts will adopt state court adaptations to analogous state claims unless unreasonable or inconsistent with federal policy; and (4) once a claim has been characterized, the court must apply the appropriate limitation guided by the state's interpretation of its own statutes of limitation.[269]

As a result of this analysis civil rights claims in the Ninth Circuit have been characterized consistently as actions created by statute. The state limitation for liability created by statute is almost always applied.[270]

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263. *Id.* at 451.

264. *See, e.g.*, Wagh v. Dennis, 677 F.2d 666, 667 (8th Cir. 1982).

265. 308 F.2d 187 (9th Cir. 1962).

266. *Id.* at 188.

267. *Id.* at 190.

268. *Id.*

269. Clark v. Musick, 623 F.2d 89 (9th Cir. 1980).

270. *See* Mason v. Schwab, 564 F.2d 308 (9th Cir. 1977); Shouse v. Pierce County, 559 F.2d 1142, 1146-47 (9th Cir. 1977); Strung v. Anderson, 452 F.2d 632 (9th Cir. 1971); Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970).

VII. Conclusion

The various courts of appeal select state limitations through two primary methods. The first method requires analysis of the conduct alleged in the plaintiff's petition and matching that conduct to a state cause of action.[271] The alternative is a recognition of the nature of the federal cause of action and an application based upon the cause of action as opposed to the factual basis. The first method of factual analysis has demonstrated enormous drawbacks in a lack of consistent application which cannot avoid confusing and prejudicing litigants. The alternative approach of recognizing the cause of action comes closer to providing litigants with a reasoned approach to limitation determination. Obviously, the distinct nature of each state's limitations prevents absolute consistency in every instance. By selecting a reasoned method of analysis, however, each state should be consistent within itself and each circuit can demonstrate the type of limitation which will apply to a civil rights action.

Significantly, there is nothing which prevents a federal court from considering the nature of the federal action and applying state law to the case at hand. Few states have directly mandated the selection of a particular limitation for federal courts in civil rights actions.[272] Without such an indication from the state's legislature or judicial system, the federal court's decision must be based upon the policies of both federal and state law.

The most effective solution to the convolution of civil rights limitation law would be the congressional passage of a federal limitation. The need for clarity and uniformity is apparent. Without a fixed federal limitation, however, the federal court should approach the matter by: (a) considering the nature and purposes sought to be achieved by the civil rights cause of action; (b) analyzing whether the purpose sought to be achieved by applying a limitation prohibits the selection of particular provisions; (c) determining what state policies lie behind the state's imposition of a statute of limitation; and (d) combining the policies of both the federal cause of action and the state's limitations to derive a particular conclusion.

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271. *See infra* notes 102 - 167 and accompanying text.
272. *See infra* note 4.