

§ 1983 - Right to  
sue policeman  
for killing T's  
teenage son.

Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice White

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No. 76-6416 - Jones v. Hildebrant

MR. JUSTICE WHITE, dissenting.

Physical abuses by police under color of state law may in some circumstances constitute a constitutional deprivation giving rise to criminal liability under the civil rights laws, even if the abuses result in the death of the victim, Screws v. United States, 325 U.S. 91 (1945); and if the victim survives such abuses, it is now clear that he may recover damages under 42 U.S.C. § 1983 for the injuries that he has sustained. See Monroe v. Pape, 365 U.S. 167 (1961); Johnson v. Glick, 481 F. 2d 1028 (CA 2), cert. denied, 414 U.S. 1033 (1973); Howell v. Cataldi, 464 F. 2d 272 (CA 3 1972); Tolbert v. Bragan, 451 F. 2d 1020 (CA 5 1971); Jenkins v. Averett, 424 F. 2d 822 (CA 9 1969). There remain the question whether, independently or in conjunction with state law, § 1983 affords parents a cause of action for a wrongful killing of their child by a state law enforcement officer and, if it does, the further question as to the measure of damages in such case.

This Court has never addressed these issues.<sup>1/</sup> Beginning with Brazier v. Cherry, 293 F. 2d 401 (CA 5), cert.

denied, 368 U.S. 921 (1961), however, the Courts of Appeals have permitted survivor suits under § 1983, at least where such actions are maintainable under state law. See, e.g., Spence v. Staras, 507 F. 2d 554 (CA 7 1974); Hall v. Wooten, 506 F. 2d 564 (CA 6 1974). See also Hampton v. City of Chicago, 484 F. 2d 602, 607 (CA 7 1973) (Stevens, J.), cert. denied, 415 U.S. 917 (1974). In Brazier the Fifth Circuit held that an action by a widow against a police officer for the wrongful killing of her husband was maintainable under § 1983. Although there the Court of Appeals found that in enacting 42 U.S.C. § 1988, "Congress adopted as federal law the currently effective state law on the general right of survival." 293 F. 2d, at 405. The same court has now ruled that a § 1983 action survives the death of the victim, despite state law to the contrary. Shaw v. Garrison, 545 F. 2d 980 (1977).

It is thus apparent that the availability of § 1983 in wrongful death actions is a recurring issue and that it is far from evident that the Colorado Supreme Court was correct in ruling that a § 1983 death action is tied to state law. It is clear that by enacting § 1983, Congress intended to create a federal right of action separate and independent from any remedies afforded under state law. See Monroe v. Pape, 365 U.S. 167 (1961). State law may be relevant where a

trial court is seeking to fix a remedy under § 1983, cf. Moor v. County of Alameda, 411 U.S. 693, 702-703 (1973), but it is by no means clear that state law may serve as a limitation on recovery where the remedy provided under state law is inadequate to implement the purposes of § 1983. Thus, "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. Cf. Brazier v. Cherry, 293 F. 2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1969). The Courts of Appeals have taken a similar approach by allowing recovery of punitive damages in suits brought under § 1983 even if state law would not have permitted them. See Caperci v. Huntoon, 397 F. 2d 799 (CA 1), cert. denied, 393 U.S. 940 (1968); Basista v. Weir, 340 F. 2d 74, 84-88 (CA 3 1965). See also Spence v. Staras, 507 F. 2d 554, 558 (CA 7 1974); Gill v. Manuel, 488 F. 2d 799, 801-802 (CA 9 1973); Ann., 14 A.L.R. Fed. 608.

Despite the importance of the question whether § 1983 is available when a state officer wrongfully takes a life, the Court dismisses the petition for certiorari as improvidently granted because in its view the critical issues are not properly before us. I disagree.

Petitioner included in her complaint filed in the trial court a claim for relief under 42 U.S.C. § 1983.<sup>2/</sup> That cause of action was dismissed on the ground that it was merged in the state wrongful death action also included in the complaint. The Colorado Supreme Court rejected petitioner's claim that "her § 1983 claim should not have been dismissed," 550 P. 2d 339, 342 (1976), and in so doing rejected each of the "four distinct theories [advanced] to support her" § 1983 cause of action. Id.

One of petitioner's arguments was that §§ 1983 and 1988 together permit suits under § 1983 in reliance on state wrongful death statutes but authorize recovery of damages free from the limitations of state law. The Colorado Supreme Court agreed that "§ 1988 permits the incorporation of the states' non-abatement statutes and wrongful death statutes into § 1983 actions in order to effectually implement the policies of that legislation," 550 P. 2d, at 343-344, and that in a federal suit "Colorado's wrongful death remedy would have been ingrafted into a 1983 action." Id. But it disagreed with petitioner on the question of remedy, holding that any such § 1983 action was subject to the damages limitations of state law--here the Colorado rule limiting recovery for wrongful death to direct pecuniary loss to the survivors; and because suit was brought in state court, the § 1983 case

merged with the state wrongful death action and was properly dismissed. Chief Justice Pringle and Justice Groves dissented, saying that they did not "believe that Colorado's judicial limitation of net pecuniary loss as a measure of damages for wrongful death applies to actions founded upon 42 U.S.C. § 1983 . . . ." 550 P. 2d, at 345-346.

In the course of arriving at this conclusion, the Colorado Supreme Court expressly rejected the other grounds offered by petitioner to sustain her § 1983 claim. First, because the Colorado statute permitted petitioner to bring her suit, she was not deprived of any civil right "without due process of law." 550 P. 2d, at 343. Second, the Colorado court rejected as contrary to congressional intent, the "theory . . . that a federal wrongful death remedy impliedly exists in § 1983, independent of state wrongful death remedies."<sup>3/</sup>

Petitioner also claimed that she was entitled to a "separate recovery under her § 1983 claim" because "she was deprived of her own constitutional rights" in that "her child's right to life, his right to freedom from physical abuse and intimidation, and his right to equal protection of the laws were violated." 550 P. 2d, at 345. In rejecting this claim, the court held that "these deprivations . . . are really those of her son" and that a § 1983 action did not lie for injuries to another. Petitioner "could not sue in her own

right for the deprivations of her son's rights," such as his right to life. Id. The Colorado court thus treated petitioner's claim as a survivor's suit based on the deceased's cause of action, holding that § 1983 does not provide for such an action independently of state law.

Finally, the Colorado Supreme Court expressly rejected any notion that "the state "directly attempt[ed] to restrict [petitioner's] own personal decisions relating to procreation, contraception, and child-rearing which are involved in Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), and Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)." Id. While conceding that "the death of a family member represents a loss" to petitioner, the court held that the state had not interfered with her right to child rearing, and "§ 1983 was not designed to compensate for these collateral losses resulting from injuries to others." Id. Accordingly, the rights of parents were sufficiently vindicated by the state statutory recovery of direct pecuniary losses resulting from the death.

It is obvious from the proceedings in the Colorado courts that the dismissal of petitioner's § 1983 claim and the associated damages limitation ruling were unsuccessfully challenged in the Colorado Supreme Court on the grounds mentioned earlier. It also seems to me that these grounds were preserved by the petition for certiorari, which we granted and

which presented the following questions:

"Where the black mother of a 15-year-old-child, who was intentionally shot and killed by a white policeman acting under color of state law, brings a suit in state court pursuant to 42 U.S.C. § 1983, what is the measure of damages? Particularly, can the state measure of damages cancel and displace an action brought pursuant to 42 U.S.C. § 1983?"

The questions "what is the measure of damages" in a § 1983 suit and "can a state measure of damages rule displace an action brought pursuant to § 1983" fairly pose the correctness of the Colorado Supreme Court rulings that (1) no § 1983 action exists independently of state law; (2) a survivor may not sue under § 1983 for injuries suffered by the deceased; and (3) the damages recoverable under § 1983 are limited by Colorado law to direct pecuniary loss and do not reach "collateral" injuries. These issues were addressed directly by the Colorado Supreme Court, and I doubt that that court misunderstood the scope of the litigation before it or reached and decided issues not fairly presented by the appeal.

Nor do I think that the oral argument, even when read in the majority's common-law pleading style, ineluctably supports any conclusion that petitioner has abandoned any of

these claims. At oral argument, petitioner's claim as a parent was articulated several times: "[a] right to not have her child taken"; she was deprived of the "liberty to raise children"; she had the "right to raise [her] child"; and the "constitutional violation was the infringement of her rights as a parent." Tr. 8, 9, 10. In light of these statements and similar ones throughout the oral argument it cannot be said that petitioner has abandoned her claim, expressly rejected by the Colorado Supreme Court, that § 1983 affords a remedy to petitioner in her capacity as a parent wholly independent of state law.

Similarly, petitioner's counsel made his view clear that even if the § 1983 action for the death of petitioner's child was dependent on state law, it was error to restrict petitioner's recovery to her direct pecuniary losses pursuant to the Colorado rule. Recovery should include, it was urged, damages for loss of a parent's own "civil rights" as well as punitive damages for the wrongful killing. Tr. 45.

Finally, it appears to me that petitioner has preserved her claim that § 1983 affords a survivor's action for the invasion of her child's right to life. Although petitioner's counsel seems to have characterized his claim in the state courts as being related solely to the mother's rights as a parent, the Colorado Supreme Court understood them to consist

in part of claims on behalf of the son and, as I have indicated, expressly held these claims not cognizable under § 1983. 550 P. 2d, at 345. At oral argument, counsel for petitioner conceded that he had not pressed his client's survivorship claim, apparently because he felt constrained by certain lower court opinions, since reversed or overruled, to articulate petitioner's claims in the Colorado courts in terms of the mother's rights alone. But he made it clear that "in hindsight" he would assert the survivorship claim, citing Shaw v. Garrison, supra, for the proposition that independently of state law a § 1983 action survives the death of the victim. Tr. 17, 18, 20, 22. Because the Colorado Supreme Court understood petitioner's submission as including a survivorship claim based on injury to the son and because the issue is fairly presented by petitioner's petition for certiorari, it is hypertechnical to hold that the survivorship issue is not here. Of course, the Court is not bound by concessions of counsel in oral argument as to whether a legal issue is open in this Court. Cf. Oregon State Land Board v. Corvallis Sand and Gravel Co., \_\_\_ U.S. \_\_\_, \_\_\_ n. 3, 45 U.S.L.W. 4105, 4106 n. 3 (1977).

In any event, in light of the record, I am at a loss to understand the basis for dismissing the petition for certiorari with respect to the other questions expressly raised or fairly subsumed in the questions presented in the

petition. These issues are important and we should decide them. I respectfully dissent from the judgment of dismissal.

Jones v. Hildebrant footnotes

1/ At least one case in this Court has involved such an action. In Scheuer v. Rhodes, 416 U.S. 232 (1974), survivors of students killed in the 1970 slayings at Kent State University brought a § 1983 action alleging the wrongful killing of the victims. The Court held that state officials were not absolutely immune from such suits. Although the question whether the survivors' action could be maintained under § 1983 was not before the Court, it did not disapprove of such actions in remanding the case to the lower courts.

2/ Petitioner's first two claims for relief were grounded on state law. The third claim for relief stated:

"During all times mentioned in this Complaint, Douglas Hildebrant while acting under color of law, intentionally deprived the Plaintiff of her rights, security and liberty secured to her by the Constitution of the United States, including but not limited to:

"a. Her child's right to life;

"b. The right to her child's freedom from physical abuse, coercion, intimidation, and physical death; and

"c. Her right to her children's equal protection of the laws." App. 3.

3/ The Colorado Supreme Court was emphatic:  
"Though the United States Supreme Court has ruled that federal wrongful death remedies impliedly exist in some areas of the law, we do not believe that such a remedy exists with § 1983 claims. This belief is based on the perceived Congressional intent not to pre-empt the states' carefully wrought wrongful death remedies, the adequacy in a death case of the state remedies to vindicate a civil rights violation, and the overwhelming acceptance of such state remedies in the federal courts."  
550 P. 2d, at 343.