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Surviving Judicial Activism in the Tenth Circuit: An Analysis of *Berry v. City of Muskogee*

I. INTRODUCTION

It is a well established legal principle that a court of law must have authority in order to adjudicate a particular action.¹ A court's authority to adjudicate an issue is non-existent if a party does not have standing to sue.² A deceased person did not have standing to sue at common law.³ Today, state statutes governing the survival of actions and the parties who may bring those actions provide standing to sue and mitigate the harsh common law rule that a person's cause of action always terminated upon death.⁴ To decide whether or not a civil rights claim brought under 42 U.S.C. § 1983⁵ survives, federal law provides that courts apply the state law wherein the claim was brought.⁶

The Tenth Circuit addressed the survivability and damages applicable when a § 1983 civil rights claim is alleged in *Berry v. City of Muskogee*⁷. This note will analyze the *Berry* decision and compare the Tenth Circuit approach to the survivability of § 1983 claims with that of other jurisdictions and the Supreme

1. FED. R. CIV. P. 12(b)(1); see *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

2. *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1346-47 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990).

3. *Moor v. County of Alameda*, 411 U.S. 693, 702 n.14, *reh'g denied*, 412 U.S. 963 (1973).

4. *Id.*; see *Robertson v. Wegmann*, 436 U.S. 584, 589 (1978); *Cunningham v. Ray*, 648 F.2d 1185, 1186 (8th Cir. 1981).

5. Section 1983 states,

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

42 U.S.C. § 1983 (1984).

6. 42 U.S.C. § 1988. For cases applying state law under § 1988, see *infra* n.16 and accompanying text.

7. 900 F.2d 1489 (10th Cir. 1990).

Court. Part II of this note will provide a review of the Tenth Circuit's decision in *Berry*. Part III will survey other decisions regarding the survivability of § 1983 actions. Part IV will compare the Tenth Circuit's decision in *Berry* with the decisions surveyed in part III. This note concludes that the Tenth Circuit's *Berry* decision contradicts federal law and Supreme Court precedent and therefore should be overturned.

II. BACKGROUND

Mark Berry was a prisoner in the Muskogee City Federal jail. While in prison, fellow inmates murdered Berry. In *Berry v. City of Muskogee*, Berry's widow brought a § 1983 civil rights action against the City of Muskogee in the United States District Court for the Eastern District of Oklahoma.⁸ At trial the defendant, City of Muskogee, objected to an application of Oklahoma's wrongful death statute as the proper source of authority for an award of damages.⁹ The trial court overruled this objection and used the damages available under Oklahoma's wrongful death statute to instruct the jury.¹⁰ Judgment was entered against the City and the City appealed claiming, inter alia, that the measure of damages should be calculated according to Oklahoma's survival statute pursuant to 42 U.S.C. § 1988.¹¹

In considering which statutory measure of damages was appropriate, the Tenth Circuit had to decide two things: 1) whether this was a survival or wrongful death action, and 2) whether the damages should be based on a state survival statute, wrongful death statute, or "whether damages are determined by some federal standard either as a survival or wrongful death-type action not defined or limited by state law."¹²

In deciding these two issues, the Tenth Circuit acknowledged that 42 U.S.C. § 1988 contains a three step process for resolving areas of ambiguity or deficiency in the civil rights statutes.¹³ First, § 1988¹⁴ directs courts to look at the federal

8. *Id.* at 1506.

9. *Id.* at 1500.

10. *Id.*

11. *Id.*

12. *Id.* at 1501.

13. *Id.* at 1502.

14. Section 1988 provides in pertinent part,

"in all cases where the [federal law] is not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . the

law; second, if the federal law is "deficient," the courts are to apply the law of the state where the claim is brought; and third, the courts are to reject the state law if it is "inconsistent with the Constitution and laws of the United States."¹⁵

Applying the first step of § 1988, the Tenth Circuit looked to the federal law and concluded that this was a survival action.¹⁶ The court reasoned that § 1983 states that liability is "to the party injured."¹⁷ The deceased is the injured party and therefore, the person who has the cause of action.¹⁸

The Tenth Circuit then turned its attention to the issue of which statutory authority for an award of damages should apply. The court concluded that "Congress envisioned a significant remedy for wrongful killings resulting from conduct proscribed by § 1983 but did not provide specific guidance regarding whether that would be realized under a federal law or state survival action or by other means."¹⁹ Thus, following § 1988's second step, the court turned to the Oklahoma statute regarding survival actions and decided this statute contradicted federal law.²⁰ Federal law is contradicted when the direct language of the Constitution or federal statute is impeded or when the purpose of the federal law is undermined.²¹ The purposes of § 1983 are the prevention of abuses of power by those acting under color of state law and compensation of persons injured by deprivation of federal rights.²² The court held that applying the Oklahoma survival statute would "provide extraordinarily

common law, as modified by the constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause"

42 U.S.C. § 1988 (1984).

15. *Id.*; see also *Robertson v. Wegmann*, 436 U.S. 584, 590-591 (1978); *Berry*, 900 F.2d at 1504-1507 (10th Cir. 1990); *Gilmere v. City of Atlanta*, 864 F.2d 734, 738 (11th Cir. 1989), *reh'g denied*, 871 F.2d 122 (11th Cir. 1989), *cert. denied*, 493 U.S. 817, *appeal after remand*, 931 F.2d 811 (11th Cir. 1991); *Jaco v. Bloechle*, 739 F.2d 239, 243 (6th Cir. 1984); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1240 (7th Cir. 1984).

16. *Berry*, 900 F.2d at 1506-07.

17. *Id.* at 1507.

18. *Id.*

19. *Id.* at 1503.

20. *Id.* at 1506-07.

21. *Robertson v. Wegmann*, 436 U.S. 584, 590 (1978); see *Moor v. County of Alameda*, 411 U.S. 693, 703 (1973).

22. *Berry*, 900 F.2d at 1503; *Robertson*, 436 U.S. at 590, 591; see also *Carey v. Phipps*, 435 U.S. 247, 254 (1978).

limited recovery, possibly only damages to property loss, of which there were none, and loss of decedent's earnings between the time of injury and death, of which there also were none."²³ Thus, the Tenth Circuit found that the Oklahoma survival statute was deficient in its "remedy and deterrent effect."²⁴

The Tenth Circuit then considered whether the trial court was correct in applying Oklahoma's wrongful death statute.²⁵ The court found that although applying the state wrongful death statute in this case would meet the purposes of § 1983, other state statutes might not be adequate.²⁶ The Court feared that applying the state law in this case would lead to a defeat of § 1983's purposes in future cases.²⁷ The Tenth Circuit rejected an award of damages under Oklahoma's wrongful death statute, reasoning that to do otherwise leaves the issue of damages and survival in § 1983 cases entirely in the hands of the states.²⁸ Therefore, the Tenth Circuit reasoned, federal damages must be created.²⁹ The court decided the damages that would apply would be punitive and compensatory, including "medical and burial expenses, pain and suffering before death, loss of earnings based upon the probable duration of the victim's life had not the injury occurred, the victim's loss of consortium, and other damages recognized in common law tort actions."³⁰

III. SURVIVABILITY OF A § 1983 CIVIL RIGHTS CLAIM

The federal courts have generally followed § 1983's three step process and applied state law when survivability becomes an issue in § 1983 civil rights claims. This generally leads to three results: 1) the courts find that the statute allows survival, or 2) the courts find the statute does not allow survival, but is consistent with federal law, or 3) the courts find the statute does not allow survival and is inconsistent with federal law.

23. *Berry*, 900 F.2d at 1504.

24. *Id.*

25. *Id.*

26. *Id.* Additionally, the Tenth Circuit found that wrongful death damages were not a new action under *Moor v. County of Alameda*, 411 U.S. 693 (1973) because applying the wrongful death statute would simply be assisting in the remedial purposes of § 1983. *Berry*, 900 F.2d at 1504-05.

27. *Berry*, 900 F.2d at 1506.

28. *Id.* at 1506.

29. *Id.* at 1506-07.

30. *Id.* at 1507.

A. *Courts Finding That State Law Allowed Survival of § 1983 Claims*

The United States Court of Appeals for the Fifth Circuit, in *Brazier v. Cherry*,³¹ applied § 1988's three step process and looked to Georgia's survival statute.³² In *Brazier* the defendant's police officers allegedly beat the decedent to death after wrongfully arresting him.³³ The decedent's widow brought suit as administratrix of decedent's estate.³⁴ The court of appeals reversed the district court's dismissal and explained that, although according to the common law claims for injury to the person die with the victim, "amelioration of the harshness of this principle must come from legislation."³⁵ The court, pursuant to § 1988, applied Georgia's survival statute and held that the civil rights claim survived.³⁶

Similarly, the Ninth Circuit found that California's survival statute allowed the survival of civil rights claims in *Smith v. City of Fontana*.³⁷ Following § 1988's three step process, the court applied the state law which the court interpreted to allow the survival of a § 1983 civil rights claim.³⁸

B. *Courts Finding that State Statutes which Prohibit Survival of § 1983 Claims are Consistent with Federal Law*

The United States Supreme Court in *Robertson v. Wegmann*³⁹ addressed the survival issue, and concluded that the survival of § 1983 claims was not imperative. In *Robertson*, the plaintiff brought a civil rights claim under § 1983,⁴⁰ but died before the case went to trial.⁴¹ The district court denied defendants' motion to dismiss, finding that the action abated on plaintiff's death.⁴² The district court reasoned that following §

31. 293 F.2d 401 (5th Cir. 1961), *cert. denied*, 368 U.S. 921 (1961).

32. *Id.* at 407 (citing GA. CODE ANN. §§ 3-505, 105-1302 (Michie Supp. 1958)).

33. *Brazier*, 293 F.2d at 402.

34. *Id.*

35. *Id.* at 403.

36. *Id.* at 407.

37. 818 F.2d 1411 (9th Cir. 1987) (citing CAL. PROB. CODE § 573 (West Supp. 1986)).

38. *Id.* at 1416.

39. 436 U.S. 584 (1978).

40. *Id.* at 586.

41. *Id.*

42. *Id.* at 587. Louisiana law allowed an action like decedents to survive only in favor of a spouse, children, parents, or siblings of which the decedent had none.

1988's three-step process and applying Louisiana's survival statute would lead to the abatement of plaintiff's civil rights claim which would be inconsistent with the purposes of § 1983.⁴³ Thus, the district court created "a federal common law of survival in civil rights actions in favor of the personal representative of the deceased."⁴⁴

On appeal, the Fifth Circuit affirmed, reasoning that applying Louisiana law would cause the action to abate which would be inconsistent with § 1983's purposes.⁴⁵ The Fifth Circuit reasoned that a federal law of survival would advance the § 1983 policies and provide uniformity in the application of civil rights laws.⁴⁶ The Supreme Court granted certiorari and reversed.⁴⁷

The Supreme Court first outlined the principles which govern the survival of a § 1983 civil rights claim. Those principles include § 1988's three step process,⁴⁸ which as explained above are: 1) look at the federal law; 2) if the federal law is deficient look to the state law wherein the suit is brought; and 3) the state law cannot contradict federal law. The Supreme Court recognized that federal law does not cover the survival of a § 1983 civil rights claim, and thus, application of state law is appropriate so long as the state law is not inconsistent with federal law or the purposes of federal law.⁴⁹

Applying these general principles Justice Marshall writing for the majority concluded that, "[d]espite the broad sweep of § 1983, we can find nothing in the statute or its underlying policies to indicate that a state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship."⁵⁰ The Court supported this conclusion reasoning that Louisiana's statute is not inconsistent with the compensation and deterrence policies of § 1983.⁵¹ The policy of compensating the decedent for violation of his civil rights is

LA. CIV. CODE ANN. art. 2315 (West 1971).

43. *Robertson*, 436 U.S. at 587.

44. *Id.* (quoting *Shaw v. Garrison*, 391 F. Supp. 1353, 1368 (E.D. La. 1975) *aff'd*, 545 F.2d 980 (5th Cir. 1977), *reh'g denied*, 555 F.2d 1391, *cert. granted and rev'd* by *Robertson v. Wegmann*, 436 U.S. 504 (1978)).

45. *Id.* at 587-8.

46. *Id.* at 588.

47. 434 U.S. 983 (1977).

48. *Id.*

49. *Id.* at 589-90.

50. *Id.* at 590.

51. *Id.*

moot because the decedent is dead. Justice Marshall stated that "[t]he goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate."⁵²

As for the policy of deterrence, the Supreme Court ruled that, given the amount and types of claims which do survive under Louisiana law, there is little reason to think officials will not be deterred from violating § 1983 at least when there is no claim that the illegal conduct caused death.⁵³ In response to the plaintiff's concern that § 1983 is a unique federal remedy, the Supreme Court stated that,

[because] a federal remedy should be available, however, does not mean that a § 1983 plaintiff . . . must be allowed to continue an action in disregard of the state law to which § 1988 refers us. A state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation.⁵⁴

While the Court left open the question of whether or not a civil rights claim survived when the act giving rise to the cause of action was also the cause of death, the Court was unequivocal in its assertion that § 1988 should be implemented and abatement alone did not justify ignoring the state law.⁵⁵

The United States Court of Appeals for the Eighth Circuit followed the Supreme Court in *Parkerson v. Carrouth*,⁵⁶ and found that the Arkansas survival statute did not permit the survival of § 1983 claims.⁵⁷ In *Parkerson*, the decedent died after filing a § 1983 claim against the defendants.⁵⁸ The cause of death was unrelated to the § 1983 claim. The Eighth Circuit reasoned that the compensation and deterrence policies of §

52. *Robertson*, 436 U.S. at 592 (footnote omitted); see *Parkerson v. Carrouth*, 782 F.2d 1449, 1455 (8th Cir. 1986); *Bowling v. Oldham*, 753 F. Supp. 588, 590 (M.D.N.C. 1990); *Jones v. George*, 533 F. Supp. 1293, 1305 (S.D.W. Va. 1982); *Ascani v. Hughes*, 470 So.2d 207, 211 (La. Ct. App.), *cert. denied*, 474 U.S. 1001 (1985).

53. *Robertson*, 436 U.S. at 591-2 (citing LA. CIV. CODE ANN. art. 2315 (West 1971) which provides for the survival of most actions including defamation and malicious prosecution).

54. *Id.* at 593.

55. *Id.* at 593-94.

56. 782 F.2d 1449 (8th Cir. 1986).

57. *Id.* at 1450 (interpreting ARK. CODE ANN. § 27-901 (Michie 1991)).

58. *Id.*

1983 were met under Arkansas law.⁵⁹ The court explained that persons violating § 1983 would have little reason to believe the plaintiff would die, and thus, abating the claim would not defeat § 1983's deterrence policies.⁶⁰

Other courts have applied the Supreme Court's analysis and held that § 1983 claims do not survive even when the act giving rise to the cause of action caused the death. In *Jones v. George*⁶¹ the United States District Court for the Southern District of West Virginia found that the plaintiff's civil rights claims on behalf of the decedent did not survive under West Virginia's survival statute.⁶²

Upon so finding the district court considered whether or not this statute was inconsistent with federal law. The Court in *Jones* found that abatement when a civil rights action has caused death would, in general, defeat the purposes of § 1983.⁶³ However, relying on *Robertson* and *Carlson*,⁶⁴ the court reasoned that the claim should not survive if "the law applicable to viable claims joined with the personal injury claims satisfies that philosophy and those policies as they apply to the personal injury claims."⁶⁵ The district court in *Jones* found that West Virginia's wrongful death law "suffice[s] to meet the § 1983 'deterrence of official misconduct' policy The potential damages in a West Virginia wrongful death action are broad by category and notably include punitive damages."⁶⁶ Therefore, the district court resolved

the question of "whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death" [citation omitted] as "yes" in situations like the instant one, in which wrongful death claims are also pleaded and where the state law covering such claims is not, *as analyzed and found herein*, "inconsistent with the constitution and laws of the United States."⁶⁷

59. *Id.* at 1454-55.

60. *Id.* at 1454.

61. 533 F. Supp. 1293 (S.D. W. Va. 1982).

62. *Id.* at 1301 (citing W. VA. CODE § 55-7-8a(a)).

63. *Id.* at 1305-06.

64. *Carlson v. Green*, 446 U.S. 14 (1980).

65. *Jones*, 533 F. Supp. at 1304.

66. *Id.* at 1305.

67. *Id.* at 1305-06 (quoting *Robertson*, 436 U.S. at 594).

Similarly, the Louisiana Court of Appeals, in *Ascani v. Hughes*, found that under Louisiana law an estate could not bring a civil rights claim and held that Louisiana's wrongful death statute satisfied § 1983's deterrence policy.⁶⁸ Thus, the court in *Ascani* reasoned that applying state law to the abatement of plaintiff's § 1983 claim did not defeat § 1983's policies.⁶⁹

C. Courts Finding that State Statutes which Prohibit Survival are Inconsistent with Federal Law.

In *Bell v. Milwaukee*,⁷⁰ the Seventh Circuit found that because the state law would not permit the plaintiff's § 1983 claim to survive, the law was inconsistent with the policies of § 1983.⁷¹ Thus, the Seventh Circuit concluded that in order "to deter officials from committing violations of constitutional rights that result in death of the victim . . . [the decedent's estate] has a § 1983 claim for loss of life notwithstanding inhospitable Wisconsin law."⁷²

Similarly, in *Jaco v. Bloechle*,⁷³ the Sixth Circuit found that Ohio's survival statute does not permit the survival of the decedent's civil rights action when death was instantaneous.⁷⁴ The court then concluded that this statute was inconsistent with the deterrent purposes of § 1983.⁷⁵ Therefore, the court decided to "implement congressional intent by allowing survival."⁷⁶

The above cases exemplify three possible outcomes when applying § 1983. Regardless of the accuracy of the courts' interpretations of the state law in these cases, or others coming to similar conclusions, the courts do attempt to follow the procedure outlined in § 1983. While the Tenth Circuit in *Berry*

68. 470 So. 2d 207, 210 (La. Ct. App. 1985).

69. *Id.* at 211; see *Bowling v. Oldham*, 753 F. Supp. 588 (M.D.N.C. 1990) (refusing to follow *Berry*, holding that in a § 1983 suit North Carolina's wrongful death statute provides adequate relief for the estate of the deceased, and finding that the policy of preventing abuses of power by state officials is satisfied by the availability of punitive damages).

70. 746 F.2d 1205 (7th Cir. 1984).

71. *Id.* at 1236.

72. *Id.* at 1238.

73. 739 F.2d 239 (6th Cir. 1984).

74. *Jaco*, 739 F.2d at 242 (citing OHIO REV. CODE ANN. § 2305.216 (Anderson 1981)).

75. *Id.* at 244.

76. *Id.* at 244-5.

reached the same conclusion as some of those mentioned above, the Tenth Circuit did not follow the same process. The Tenth Circuit found that the Oklahoma survival statute supplemented with the Oklahoma wrongful death statute would meet the purposes of § 1983.⁷⁷ However, the court reasoned that because the § 1988 procedure might occasionally lead to non-survival or inconsistent results, the court should, in the interest of uniformity, create a standard survival action with specific damages.⁷⁸

IV. THE TENTH CIRCUIT IN *Berry v. City of Muskogee* CONTRADICTS FEDERAL LAW AND PRIOR SUPREME COURT DECISIONS

A. *The Tenth Circuit Contradicts Federal Law*

The Tenth Circuit in *Berry* contradicts the United States Supreme Court and federal law. The Tenth Circuit reasoned that:

In considering whether the purposes of § 1983 are satisfied by adoption of state survival and wrongful death actions, we must consider that different states will define them differently, thus requiring individual analyses of each state's law. We might have to find that a state's law works satisfactorily in some instances, as when there are surviving dependents, but not in other cases, as when there is no one with a right to sue.⁷⁹

Thus, the Tenth Circuit hypothesized that in some instances state law might be insufficient to satisfy the purposes of § 1983, and because of that possibility concluded that "the federal courts must fashion a federal remedy to be applied to § 1983 death cases."⁸⁰ This remedy included the survivability of § 1983 claims and a list of damages available under § 1983.⁸¹

The Tenth Circuit ostensibly adopts the three step process of § 1988 concluding that Oklahoma's survival statute supplemented by Oklahoma's wrongful death statute would allow the survival of the § 1983 claim in Oklahoma and meet § 1983 policies. The court stated "[w]e believe that the 'new' cause of

77. *Berry*, 900 F.2d at 1506.

78. *Id.* at 1506-07.

79. *Berry*, 900 F.2d at 1506.

80. *Id.*

81. *Id.* at 1506-07.

action theory [i.e., § 1983 as applied by the Tenth Circuit,] would not warrant rejection of state wrongful death remedies as appropriate to vindicate § 1983 violations when death results."⁸² Therefore, unlike the courts in *Jaco* and *Bell*, the Tenth Circuit did not find that state law contradicted federal law.⁸³ However, the Tenth Circuit, reasoned that other states might not have amenable laws and therefore uniformity in result would be impossible.⁸⁴ Thus, unlike the courts in *Robertson*, *Parkerson* and *Jones*, the Tenth Circuit did not apply the state law as § 1988 requires.⁸⁵ The court simply bypassed that aspect of § 1988 and under the banner of uniformity created a survival claim and federal damages to accompany civil rights claims.⁸⁶

Uniformity should not override the dictates of § 1988. The United States Supreme Court, in referring to the survivability of § 1983 actions, has stated that states have an interest in the civil liability of their officials, and thus, deference should be paid to the state laws when enforcing § 1983 claims.⁸⁷ The Tenth Circuit fails to realize that while there is a lack of uniformity in result, the correct application of § 1988 leads to uniformity in procedure.⁸⁸ Congress in passing § 1988 has determined that uniformity in procedure and state deference are to take priority over uniformity of result. The Tenth Circuit clearly ignored this congressional preference.

In creating a "federal remedy to be applied to § 1983 death cases,"⁸⁹ the Tenth Circuit oversteps "the function of the judiciary into the domain of the legislature."⁹⁰ Chief Justice Rehnquist has stated, "absent a clear indication from Congress, federal courts lack the authority to grant damages relief for constitutional violations."⁹¹ The courts cannot create common-

82. *Id.* at 1505.

83. *See supra* part III.C.

84. *Berry*, 900 F.2d at 1506 (stating that the "[a]pplication of state law, at least in some instances, will be inconsistent with the predominance of the federal interest").

85. *See supra* part III.B.

86. *Berry*, 900 F.2d at 1506-07.

87. *Carlson v. Green*, 446 U.S. 14, n.11 (1980).

88. *Bowling v. Oldham*, 753 F. Supp. 588, 591 (M.D.N.C. 1990).

89. *Berry*, 900 F.2d at 1506.

90. *Bowling v. Oldham*, 753 F. Supp. 588, 591 (M.D.N.C. 1990) (specifically rejecting *Gilmere*, *Jaco* and *Berry*).

91. *Carlson v. Green*, 446 U.S. 14, 41 (1980) (Justice Rehnquist dissenting opinion).

law rights or federal common law.⁹² The Tenth Circuit's creation of a federal survival action and damages for § 1983 cases amends § 1988 and usurps legislative authority.

The Tenth Circuit relied on *Smith v. Wade*⁹³ and *Memphis Community School District v. Stachura*⁹⁴ as a basis for creating federal common law for § 1983 actions.⁹⁵ The Court, in *Smith* and *Stachura* did not create new law. It simply applied the federal common law applicable when § 1983 was passed in 1871, "with such modification or adaptation as might be necessary to carry out the purpose and policy of [§ 1983]."⁹⁶ In essence, the Supreme Court in these cases never got past the first prong of § 1988 in applying federal law. Certainly, the Supreme Court's modification of existing common law is distinguishable from the Tenth Circuit's creation of new common law.

B. The Tenth Circuit Contradicts the United States Supreme Court

The Tenth Circuit, by ruling that a state law can never cause a § 1983 claim to abate, contradicts the United States Supreme Court. The Tenth Circuit explains that if courts apply state survival statutes the courts may "have to find that a state's law works in some instances, as when there are surviving dependents, but not in other cases, as when there is no one with the right to sue."⁹⁷ Yet, the Supreme Court has found that a state survival statute should be applied pursuant to § 1988 even when the result is abatement.⁹⁸ The Supreme Court has said that "[d]espite the broad sweep of § 1983, we can find nothing in the statute or its underlying policies to indicate that a state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship."⁹⁹ Additionally, the Supreme Court explained that,

92. *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

93. 461 U.S. 30 (1983).

94. 477 U.S. 299 (1986).

95. *Berry*, 900 F.2d at 1506.

96. *Smith*, 461 U.S. at 34.

97. *Id.* at 1506.

98. *Robertson v. Wegmann*, 436 U.S. 584, 591-92 (1978).

99. *Id.* at 590.

[simply because] a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which § 1988 refers us. A state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation. If the success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law¹⁰⁰

While the Court was careful to distinguish this action, in which the decedent's death was unrelated to the civil rights violation, from one in which the decedent's death was caused by the civil rights violation, clearly the language of the Supreme Court leans toward a more rigid application of § 1988 than the Tenth Circuit applied in *Berry*.

The Tenth Circuit also contradicts the Supreme Court by finding that § 1983 is a survival action. The Tenth Circuit relied upon § 1983's direction that relief should go "to the party injured" to conclude that the action in *Berry* should be a survival action.¹⁰¹ The Tenth Circuit does not explain how the phrase "to the party injured" creates a survival action or gives the deceased standing to sue. In fact, the Tenth Circuit's conclusion that this is a survival action contradicts the United States Supreme Court's finding in 1978 that "one specific area not covered by federal law is that relating to 'the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant.'"¹⁰² A more reasonable interpretation of the phrase "to the party injured" is that whatever action is available, whether survival or wrongful death, it is only available to the "party injured." It appears that the federal law is deficient as to just what type of claim this is, and therefore, following § 1988's second step, the court should look to the state statute.

In *Berry*, under Oklahoma's statute, a decedent's civil rights claims do not survive his death. Oklahoma law states that only those actions which survive at common law and "causes of actions for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud,

100. *Id.* at 593.

101. *Berry*, 900 F.2d at 1506-07; see *supra* note 18 and accompanying text.

102. *Robertson v. Wegmann*, 436 U.S. 584, 589 (1978) (quoting *Moor v. County of Alameda*, 411 U.S. 692, 702 n.14 (1973)).

shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same.¹⁰³ At least one court has held that, applying § 1988's three step approach, a civil rights action would not survive in Oklahoma.¹⁰⁴ In *Black v. Cook*¹⁰⁵ the United States District Court for the Western District of Oklahoma held that since the Oklahoma statute governing survival and abatement of actions does not provide for the survival of an action to recover damages for violation of a decedent's civil rights, the plaintiffs lack standing to sue for the alleged violation of their son's civil rights even though their son died as a result of the violation.¹⁰⁶

Additionally, the Tenth Circuit's reasoning in other cases would seem to forbid the survival of civil rights actions under Oklahoma law. The Tenth Circuit has held that because libel, slander, defamation and invasion of privacy actions did not survive at common law and were not specifically mentioned under New Mexico's survival statute which contains wording similar to Oklahoma's, such claims did not survive.¹⁰⁷ By analogy, a civil rights action does not survive at common law and is not mentioned in Oklahoma's survival statute, thus a civil rights action should not survive.

V. CONCLUSION

The Tenth Circuit in *Berry* has created a survival action and specific damages in § 1983 civil rights claims. This judicial creation contradicts federal law and the Supreme Court. While the Tenth Circuit's results in *Berry* may be desirable, the means with which the Tenth Circuit obtained their results undermines both the legislative process and representative government. Extending the Tenth Circuit's analysis, a Court could easily create any amendment to any statute simply by finding that in some cases, though not the one at bar, the outcome might contradict the statute's purposes. On a practical level overturning *Berry* would allow courts to apply § 1988 appropriately, giving states some control over the financial liability of

103. OKLA. STAT. ANN. tit. 12 § 1051 (West 1984).

104. *Black v. Cook*, 444 F. Supp. 61 (W.D. Okla. 1977).

105. 444 F. Supp. 61 (D. Okla. 1977).

106. *Id.*

107. *Gruschus v. Curtis Publishing Co.*, 342 F.2d 775, 776 (10th Cir. 1965) (citing N.M. STAT. ANN. § 21-7-1 (now N.M. STAT. ANN. § 37-2-1 (Michie 1978))).

their officials.¹⁰⁸ On a larger, and perhaps more important level, overturning *Berry* would restore meaning and representation to the legislative process.

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108. Moreover, overturning *Berry* would not necessarily mean that plaintiffs have no claim for relief in cases in which the § 1983 action does not survive the victim's death. Plaintiffs would still be entitled to sue in most states, under common law or statutory tort actions. However, plaintiffs would lose the generous attorney fee advantage allocated them under § 1988.