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Civil Rights—42 U.S.C. Section 1983: Statute of Limitations—Eighth Circuit Rejects Tort Analogy

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CIVIL RIGHTS—42 U.S.C. SECTION 1983: STATUTE OF LIMITATIONS—EIGHTH CIRCUIT REJECTS TORT ANALOGY. *Garmon v. Foust*, 668 F.2d 400 (8th Cir. 1982).

A package addressed to Mark Garmon, the plaintiff, was delivered to his residence hall at Drake University. The package was given to the defendant policeman, Foust, who opened it without a search warrant or probable cause. After he discovered a controlled substance inside the package, he resealed it and delivered it to Garmon's room. A search warrant was issued the following day, Garmon's dormitory room was searched, and incriminating evidence was seized by the defendant police officers. Garmon was charged with possession of a controlled substance, but the charge was subsequently dropped because the evidence was suppressed.

More than two years later, Garmon filed a civil rights action against the police officers under section 1983,[1] alleging that the defendants had deprived him of his fourth amendment[2] right to be secure against unreasonable searches and seizures and had violated his fourteenth amendment[3] right not to be deprived of property without due process of law. The defendant policemen asserted Iowa's two-year statute of limitations governing suits for injuries to the person or reputation as a defense.[4]

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1. 42 U.S.C. § 1983 (1976 & Supp. IV 1980) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. U.S. CONST. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. U.S. CONST. amend. XIV, § 1 provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

4. IOWA CODE ANN. § 614.1 ¶ 2 (West Supp. 1982-1983) provides:

> Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:
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> . . .

The United States District Court[5] held that the action was timely under Iowa's general five-year statute of limitations for all actions not specifically governed by other statutes.[6] The Eighth Circuit Court of Appeals affirmed the district court's ruling and stated that the warrantless seizure of Garmon's property and the subsequent search of his dormitory room did more than cause damage to his person or reputation; they violated his "*constitutional right* not to be so treated by persons acting under color of state law."[7] *Garmon v. Foust*, 668 F.2d 400 (8th Cir. 1982).

Congress originally enacted section 1983 as part of the Civil Rights Act of 1871[8] to enforce the provisions of the fourteenth amendment.[9] Section 1983 created a federal cause of action for deprivation of constitutional and civil rights under color of state law and imposed liability on those who deprived a citizen or other person of those rights.[10] The United States Supreme Court has made it clear that section 1983 is a broad statutory remedy[11] that is supple-

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Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years.

5. District court decisions for the southern district of Iowa have been inconsistent in applying Iowa's statutes of limitations to section 1983 actions. *E.g.*, Rosales v. Lewis, 454 F. Supp. 956 (S.D. Iowa 1978), and Silliman v. Rice, No. 79-29-2 (S.D. Iowa Oct. 10, 1980) (order denying motion to dismiss), applied Iowa's two-year statute of limitations and apparently adopted the tort analogy. In contrast, Barrett v. Wichael, 387 F. Supp. 1263 (S.D. Iowa 1974), and Garmon v. Foust, No. 77-367-2 (S.D. Iowa Nov. 17, 1980) (order denying summary judgment), applied Iowa's five-year statute of limitations for actions not specifically governed by other statutes and apparently rejected the tort analogy.

6. IOWA CODE ANN. § 614.1 ¶ 4 (West Supp. 1982-1983) provides:

> Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:
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> . . .
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> Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years, except as provided by subsection 8.

7. Garmon v. Foust, 668 F.2d 400, 406 (8th Cir. 1982) (emphasis in original).

8. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (1976 & Supp. IV 1980)).

9. *E.g.*, Monroe v. Pape, 365 U.S. 167 (1961). The Civil Rights Act of 1871 was popularly known as the Ku Klux Klan Act, and its title stated its purpose as "[a]n Act to [E]nforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." Lawless conditions existed in the South following the Civil War, which rendered life and property insecure, and the Act was passed to provide a remedy for deprivation of constitutional and civil rights. *Id.* at 171-80.

10. *See supra* note 1 for the present text of § 1983.

11. Monroe v. Pape, 365 U.S. 167 (1961). The Court stated that section 1983 had three main aims: (1) "it might . . . override certain kinds of state laws," that is, legislation by states against the rights of citizens of the United States; (2) "it provided a remedy where state

mentary to any remedy a state might provide.[12]

Congress did not include a specific limitations period for actions brought under section 1983. However, other federal legislation provides a possible independent statutory basis for determining the applicable time period. Section 1988 of the Civil Rights Act[13] provides that federal law will be supplemented by state law when the federal provisions are insufficient to achieve the objectives of the civil rights statutes.[14] The Rules of Decision Act[15] requires use of state law in appropriate cases. Both of these federal statutes indicate that state law governs federal causes of action that have no limitations period, but emphasize that state law may not apply when it is inconsistent with the Constitution or laws of the United States.[16]

The silence of Congress on the issue of statutes of limitations caused the federal courts to apply state statutes of limitations in federal civil rights cases. Congress acquiesced in this tradition for al-

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law was inadequate;" and, (3) it provided "a federal remedy where the state remedy, though adequate in theory, was not available in practice." 365 U.S. at 173-74.

12. Monroe v. Pape, 365 U.S. 167, 183. The Court stated, "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.*

13. 42 U.S.C. § 1988 (1976 & Supp. IV 1980) provides in part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of 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 the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction 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 . . . .

14. Board of Regents v. Tomanio, 446 U.S. 478, 484 (1980) ("In . . . § 1988, Congress 'quite clearly instructs [federal courts] to refer to state statutes' when federal law provides no rule of decision for actions brought under § 1983.") (quoting Robertson v. Wegmann, 436 U.S. 584 (1978)).

15. Rules of Decision Act, Federal Judiciary Act of 1789, § 34 (codified at 28 U.S.C. § 1652 (1976)). 28 U.S.C. § 1652 provides: "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."

16. Quoting Robertson v. Wegmann, 436 U.S. 584 (1978) the Court in Board of Regents v. Tomanio, 446 U.S. 478, 485 (1980) stated, "[Section] 1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is 'inconsistent with the Constitution and laws of the United States'."

most seventy years.[17] It seems certain that if Congress had disagreed with the practice, it would have "spoken to overturn it by enacting a uniform period of limitations."[18]

Federal courts have not mechanically applied state statutes of limitations simply because the federal statute lacks a limitations period. Federal courts need not apply state statutes of limitations if they frustrate or interfere with implementation of national policies.[19] State law has been considered the primary, but not the exclusive, guide.[20] The Supreme Court rejected application of state limitations to employment discrimination suits brought by the Equal Employment Opportunity Commission[21] under the Civil Rights Act of 1964 as inconsistent with the underlying policies of the federal statute.[22] Generally, the federal courts have been reluctant to hold state statutes of limitations inconsistent with federal legislation, although the courts have discussed the matter frequently.[23] Occasionally a dissenting judge has expressed the belief that there is a need for uniformity in the particular area or that state law is in-

17. *E.g.*, Board of Regents v. Tomanio, 446 U.S. 478 (1980) (Civil Rights Act of 1871); Runyon v. McCrary, 427 U.S. 160 (1976) (Civil Rights Act of 1866); Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (Civil Rights Act of 1866); O'Sullivan v. Felix, 233 U.S. 318 (1914) (Civil Rights Act of 1871).

18. UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 704 (1966). Even though *Hoosier* was an action brought under the Labor Management Relations Act, rather than a civil rights action, the same reasoning applies.

19. *E.g.*, Board of Regents v. Tomanio, 446 U.S. 478, 483-84 (1980); Johnson v. Railway Express Agency, 421 U.S. 454, 465 (1975); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 706-07 (1966); Cope v. Anderson, 331 U.S. 461 (1947); Campbell v. Haverhill, 155 U.S. 610 (1895).

20. *E.g.*, Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977); Johnson v. Railway Express Agency, 421 U.S. 454, 465 (1975).

21. The EEOC may bring an enforcement action against a private employer for violation of the Civil Rights Act of 1964, and the action is not subject to state statutes of limitations. *E.g.*, Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 366-72 (1977).

22. *Id.* The Court explained that the 1972 amendments to the Civil Rights Act of 1964 (codified at 42 U.S.C. §§ 2000e-5(f)(1) (1976 & Supp. IV 1980)) created a procedural structure for bringing employment discrimination suits by the EEOC. The Commission is charged with investigating these claims and settling them by informal methods if conciliation is possible. The Commission must refrain from suing until it has discharged its administrative responsibilities. Application of a state's limitation period would not further the policy of conciliation. 432 U.S. at 366-72. The Court held that California's one-year statute of limitations could, under some circumstances, conflict with that policy. *Id.* at 368-69. The Court further stated, "But even in cases involving no inevitable and direct conflict with the express time periods provided in the Act, absorption of state limitations would be inconsistent with the congressional intent underlying the enactment of the 1972 amendments." *Id.* at 369 (Rehnquist, J. & Burger, C.J., dissenting).

23. *See* cases cited *supra* note 19.

consistent with federal policy.[24] However, in civil rights actions, the Court has stated, "The need for uniformity, while paramount under some federal statutory schemes, has not been held to warrant displacement of state statutes of limitations for civil rights actions."[25]

Thus, when Congress has created a cause of action and has not specified the period of time within which it may be asserted, federal courts generally have applied the state statute of limitations for an analogous type of action.[26] The Supreme Court has expressly approved this practice of "borrowing" the applicable state statute of limitations and has applied it in many contexts.[27]

The Court first applied the rule that relevant state statutes of limitations were applicable in civil rights actions in *O'Sullivan v. Felix*.[28] In *O'Sullivan* the plaintiff was assaulted when he attempted to vote, and the Court applied Louisiana's one-year statute of limitations for damages resulting from personal assault.[29] Over sixty years later, in *Johnson v. Railway Express Agency*,[30] an employment discrimination suit, the Court still applied the most appropriate statute of limitations provided by state law and held that Tennessee's one-year statute of limitations for civil actions brought under the federal civil rights statutes specifically applied.[31] In a recent action brought under section 1983, *Board of Regents v. Tomanio*,[32] the

24. *See, e.g.*, Board of Regents v. Tomanio, 446 U.S. 478, 494-99 (1980) (Brennan and Marshall, JJ., dissenting); Johnson v. Railway Express Agency, 421 U.S. 454, 470-73 (1975) (Marshall, Douglas, and Brennan, JJ., dissenting); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 709-14 (1966) (White, Douglas, and Brennan, JJ., dissenting).

25. Board of Regents v. Tomanio, 446 U.S. 478, 489 (1980).

26. *E.g.*, Board of Regents v. Tomanio, 446 U.S. 478, 483-84 (1980); Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1975); Chevron Oil Co. v. Huson, 404 U.S. 97, 104-05 (1971); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 703-05 (1966); Cope v. Anderson, 331 U.S. 461, 463 (1947); O'Sullivan v. Felix, 233 U.S. 318, 322 (1914); Campbell v. Haverhill, 155 U.S. 610, 618 (1895).

27. *E.g.*, Chevron Oil Co. v. Huson, 404 U.S. 97, 105 (1971) (The Court applied Louisiana's one-year statute of limitations for personal injury in a cause of action which arose under the federal Outer Continental Shelf Act.); UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 707 (1966) (The Court applied Indiana's six-year statute of limitations for suits governing contracts not in writing in a case involving the federal Labor Management Relations Act.); Cope v. Anderson, 331 U.S. 461, 468 (1947) (The Court applied Kentucky's five-year statute of limitations for liability created by statute when the case arose under the National Bank Act.); Campbell v. Haverhill, 155 U.S. 610, 621 (1895) (The federal legislation involved was the Patent Act and the Court applied Massachusetts' six-year statute of limitations for tort actions).

28. 233 U.S. 318 (1914).

29. *Id.* at 325.

30. 421 U.S. 454 (1975).

31. *Id.* at 462.

32. 446 U.S. 478 (1980).

Court applied New York's three-year statute of limitations. The Court noted that when Congress does not establish a statute of limitations applicable to actions brought under a federal statute, the Supreme Court "has repeatedly 'borrowed' the state law of limitations governing an analogous cause of action."[33] Here, also, the Court pointed out that state law is only a guide and may be displaced when its application would be inconsistent with the federal policy underlying the cause of action.[34]

The federal practice of "borrowing" state statutes of limitations in civil rights suits and applying the most analogous one has resulted in confusion among the lower federal courts because the courts have drawn differing analogies between section 1983 actions and state forms of action. Since many section 1983 cases involve wrongs that resemble common-law torts, for example, false imprisonment, malicious prosecution, and assault and battery, several circuits have applied various state tort statutes.[35] These circuits emphasize the nature of the defendant's conduct rather than the unique nature of the federal claim.[36] The result reached depends on the particular fact situation and the state statutory scheme. A federal court might be required to apply several statutes of limitations to a cause of action under section 1983.[37] The confusion which results in such situations is epitomized in *Polite v. Diehl*,[38] in which the

33. *Id.* at 483-84.

34. *Id.* at 485; *see also* Johnson v. Railway Express Agency, 421 U.S. 454, 465 (1975).

35. *See, e.g.*, Cramer v. Crutchfield, 648 F.2d 943 (4th Cir. 1981) (in which the court applied Virginia's two-year statute of limitations for personal injury actions); Rubin v. O'Koren, 644 F.2d 1023 (5th Cir. 1981) (in which the court applied Alabama's one-year statute of limitations for personal injury actions); Polite v. Diehl, 507 F.2d 119 (3d Cir. 1974) (in which the court applied several state tort statutes); Madison v. Wood, 410 F.2d 564 (6th Cir. 1969) (in which the court applied Michigan's three-year statute of limitations for personal injury actions).

36. *E.g.*, Madison v. Wood, 410 F.2d 564, 567 (6th Cir. 1969).

37. *E.g.*, Polite v. Diehl, 507 F.2d 119, 123 (3d Cir. 1974).

38. 507 F.2d 119 (3d Cir. 1974). The plaintiff brought suit against city policemen for false arrest, assault and battery, illegal seizure of his car, and coercion of a guilty plea. Pennsylvania had a one-year statute of limitations for false arrest, a two-year statute of limitations for personal injury, a six-year statute of limitations for recovery of goods, and a two-year statute of limitations for wrongful personal injury not resulting in death. The court said the claims were not governed by a single limitations statute, and a federal court was required to apply the same statute of limitations as the state court would apply in state actions seeking similar relief so that the district court should have applied a separate statute to each cause of action. The plaintiff's action for false arrest was barred under the one-year statute of limitations. However, his actions for assault and battery were timely since they were filed within the two-year statute of limitations; his action for illegal seizure was timely because it was filed within the six-year statute of limitations, and the suit for coercion of a

court applied four different tort statutes of limitations and held the action barred under one statute and timely under the other three.

Other actions under section 1983 have no tort similarity, for example, segregation and deprivation of voting rights. Consequently, several circuits have applied statutes of limitations for liability created by statute.[39] These circuits view the federal cause of action as much broader and as much more serious than the torts described in the state statutes.[40] They emphasize the nature of the complaint rather than the defendant's conduct; they characterize section 1983 claims as actions created by statute.[41] The Ninth Circuit recognized the distinction between actions brought under section 1983 and state tort actions in *Smith v. Cremins*[42] and then applied California's three-year statute of limitations for actions based upon a liability created by statute.[43] The Ninth Circuit stated the distinction:

> Section 1983 of the Civil Rights Act clearly creates rights and imposes obligations different from any which would exist at common law in the absence of statute. A given state of facts may of course give rise to a cause of action in common-law tort as well as to a cause of action under Section 1983, but the elements of the two are not the same. The elements of an action under Section 1983 are (1) the denial under color of state law (2) of a right secured by the Constitution and laws of the United States. Neither of these elements would be required to make out a cause of action in common-law tort; both might be present without creating common-law tort liability.[44]

A few circuits have followed the state statute of limitations which specifically governs federal civil rights actions.[45] Only a few

guilty plea was timely because it was filed within the two-year statute of limitations for wrongful personal injury not resulting in death.

39. *See, e.g.*, Major v. Arizona State Prison, 642 F.2d 311 (9th Cir. 1981) (in which the court applied Arizona's one-year statute of limitations); Taylor v. Mayone, 626 F.2d 247 (2d Cir. 1980) (in which the court applied New York's three-year statute of limitations); White v. Padgett, 475 F.2d 79 (5th Cir. 1973), *cert. denied*, 414 U.S. 861 (1973) (in which the court applied Florida's three-year statute of limitations).

40. These circuits adopt the reasoning of Justice Harlan in his concurring opinion in Monroe v. Pape, 365 U.S. 167 (1961). He stated, "[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 the deprivation of a constitutional right." *Id.* at 196.

41. *E.g.*, Major v. Arizona State Prison, 642 F.2d 311, 312 (9th Cir. 1981).

42. 308 F.2d 187 (9th Cir. 1962).

43. *Id.* at 190.

44. *Id.*

45. *See, e.g.*, Johnson v. Railway Express Agency, 489 F.2d 525 (6th Cir. 1973), *aff'd*,

states have enacted such statutes.[46] The case law interpreting these state-enacted federal civil rights statutes of limitations indicates that the statutes will be followed in section 1983 cases[47] unless they are found to be inconsistent with the Constitution or laws of the United States.[48]

Since most states lack a limitations period for federal civil rights actions and several states have no statutorily created liability, other circuits are left with a choice between tort statutes and the general catch-all statute of limitations. Faced with this choice, a few

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421 U.S. 454 (1975) (in which the court applied Tennessee's one-year statute of limitations); Chambers v. Omaha Pub. School Dist., 536 F.2d 222 (8th Cir. 1976) (in which the court applied Nebraska's three-year statute of limitations).

46. *See* COLO. REV. STAT. ANN. § 13-80-106 (1973) (two years); NEB. REV. STAT. § 25-219 (1979) (three years); TENN. CODE ANN. § 28-3-104 (1980) (one year). These statutes are of two types. Tennessee's statute expressly states that it covers civil actions brought under the federal civil rights statutes. Nebraska's and Colorado's statutes cover actions upon liability created by a federal statute. Nebraska's statute is typical and provides: "All actions upon a liability created by a federal statute, other than a forfeiture or penalty, for which actions no period of limitations is provided in such statute shall be commenced within three years next after the cause of action shall have accrued."

47. The Nebraska statute was held applicable in an action under §§ 1981 and 1983 in Chambers v. Omaha Pub. School Dist., 536 F.2d 222 (8th Cir. 1976). The plaintiff alleged his dismissal was due to his race and his exercise of first amendment speech rights. The court held the action barred by Nebraska's three-year statute of limitations for liability created by federal statute. *Id.* at 231. *But cf.* Warren v. Norman Realty Co., 513 F.2d 730 (8th Cir. 1975), *cert. denied*, 423 U.S. 855 (1975). The plaintiffs in *Warren* brought suit under §§ 1981 and 1982 alleging that the defendants had racially discriminated against them in the leasing of a home. Since Nebraska had enacted a housing discrimination law, the court applied that period of limitations and dismissed the plaintiff's complaint. *Warren* can be distinguished from *Chambers* in that it was a *state* civil rights claim, and Nebraska had a specific statute of limitations which applied. In *Chambers*, which was a *federal* civil rights action, the applicable Nebraska statute of limitations was for actions based upon liability created by federal statute.

The Colorado statute, which is similar to Nebraska's, was applied in a § 1983 and § 1985 action in Salazar v. Dowd, 256 F. Supp. 220 (D. Colo. 1966). The decedent was allegedly arrested without a warrant, beaten, and incarcerated. The administrator of his estate brought an action for damages for deprivation of his federal civil rights.

The Tennessee statute was applied to an action based on racial employment discrimination filed under §§ 1981, 1982, and 1983 of the Civil Rights Act in Johnson v. Railway Express Agency, 489 F.2d 525 (6th Cir. 1973), *aff'd on other grounds*, 421 U.S. 454 (1975). The statute also provides the applicable limitations period for a constitutional claim based on the equal protection clause of the fourteenth amendment. Wright v. Tennessee, 628 F.2d 949 (6th Cir. 1980).

48. In 1945, Iowa had a statute which required actions arising under a federal statute to be instituted within six months after the claim accrued, but the Eighth Circuit, with one judge dissenting, concluded that this statute was unconstitutional as a violation of equal protection. Republic Pictures Corp. v. Kappler, 151 F.2d 543 (8th Cir. 1945), *aff'd per curiam*, 327 U.S. 757 (1946). Iowa presently does not have a statute of limitations for actions arising under federal statutes.

circuits have chosen the latter.[49] These circuits reject the tort analogy and apply the statute which covers all actions for which no other period of limitations is prescribed.[50]

The Eighth Circuit Court of Appeals has taken inconsistent approaches to the application of state statutes of limitations in section 1983 cases. Various panels of the court have rejected the tort analogy,[51] while other panels of the court have adopted the tort analogy and emphasized the underlying conduct of the defendant in determining the applicable statute of limitations.[52] These two divergent approaches are found in *Glasscoe v. Howell*[53] and *Savage v. United States*.[54]

In *Glasscoe* an Arkansas resident brought an action against state police officers alleging he had been arrested with unnecessary force and violence. The court emphasized the nature of the federal claim being asserted by the plaintiff rather than the underlying tortious conduct of the defendant.[55] The court concluded that *either* Arkansas' three-year statute of limitations for actions founded on any contract or liability, express or implied[56]—which had been con-

49. *See, e.g.*, Rinehart v. Locke, 454 F.2d 313 (7th Cir. 1971) (in which the court applied Illinois' five-year statute of limitations); Franklin v. City of Marks, 439 F.2d 665 (5th Cir. 1971) (in which the court applied Mississippi's six-year statute of limitations).

50. *E.g.*, Rinehart v. Locke, 454 F.2d 313, 315 (7th Cir. 1971); Franklin v. City of Marks, 439 F.2d 665, 670 (5th Cir. 1971).

51. *See, e.g.*, Lamb v. Amalgamated Labor Life Ins. Co., 602 F.2d 155 (8th Cir. 1979) (in which the court applied Missouri's five-year statute of limitations for an action based on liability created by statute); Clark v. Mann, 562 F.2d 1104 (8th Cir. 1977) (in which the court applied Arkansas' three-year statute of limitations for actions founded on any contract or liability, express or implied); Williams v. Anderson, 562 F.2d 1081 (8th Cir. 1977) (decided the same day as *Clark* in which the court applied the three-year Arkansas statute of limitations for liability created by statute); Reed v. Hutto, 486 F.2d 534 (8th Cir. 1973) (in which the court applied Arkansas' three-year statute of limitations for liability created by statute); Glasscoe v. Howell, 431 F.2d 863 (8th Cir. 1970) (applied *either* Arkansas' three-year statute of limitations for liability created by statute or the five-year general statute of limitations).

52. *See, e.g.*, Johnson v. Dailey, 479 F.2d 86 (8th Cir. 1973), *cert. denied*, 414 U.S. 1009 (1973) (in which the court applied Iowa's two-year statute of limitations for injuries to the person or reputation); Savage v. United States, 450 F.2d 449 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972) (in which the court applied Minnesota's two-year statute of limitations pertaining to defamation and malicious prosecution).

53. 431 F.2d 863 (8th Cir. 1970).

54. 450 F.2d 449 (8th Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972).

55. 431 F.2d at 865.

56. ARK. STAT. ANN. § 37-206 (1962) provides in part:

> The following actions shall be commenced within three [3] years after the passage of this act, or, when the cause of action shall not have accrued at the taking effect of this act, within three [3] years after the cause of action shall accrue: . . . fourth, all actions . . . founded on any contract or liability, express or implied; . . . .

strued by Arkansas courts to cover statutorily created liability[57]—or Arkansas' five-year general statute of limitations[58] was applicable. The court found it unnecessary to decide which statute of limitations was applicable since the action was timely under either.[59]

In *Savage* the plaintiff brought an action against state officials for malicious prosecution and deprivation of civil rights. The plaintiff alleged that the defendants put erroneous and defamatory material before the grand jury, which returned an indictment.[60] The court focused on the defendants' tortious conduct, held that Minnesota's two-year statute of limitations for defamation and malicious prosecution applied, and found that the action was barred.[61]

The Eighth Circuit has been more consistent in applying Arkansas statutes of limitations in section 1983 actions than in applying the statutes of limitations of other states. Although in *Glasscoe* the Eighth Circuit held that *either* the three-year statute founded on any contract or liability[62] or the five-year catch-all statute of limitations[63] was applicable to an action brought under section 1983, in *Reed v. Hutto*[64] the court specifically rejected the general five-year statute of limitations.[65] In *Reed* a prisoner brought an action against prison officials alleging that they had failed to protect him from being forced to participate in homosexual acts with an inmate guard. The court applied the three-year statute of limitations but did not state whether it applied the statute as a tort limitation or as a

57. *E.g.*, McDonald v. Mueller, 123 Ark. 226, 183 S.W. 751 (1916); Zimmerman v. Western & S. Fire Ins. Co., 121 Ark. 408, 181 S.W. 283 (1915); Nebraska Nat'l Bank v. Walsh, 68 Ark. 433, 59 S.W. 952 (1900). For over eighty years, the Arkansas Supreme Court has construed the language of the three-year limitation, "all actions founded on any contract or liability, expressed or implied," as including liability created by statute. Although the older cases dealt with the personal liability of corporate officers or directors to perform statutory duties, those cases and § 1983 cases are similarly based upon a liability created by statute. In the corporate cases, the liability was created by Arkansas' corporation laws, whereas in § 1983 cases, a federal statute imposes liability upon those who deprive others of constitutional rights. As the Eighth Circuit Court of Appeals noted in Reed v. Hutto, 486 F.2d 534, 536 (8th Cir. 1973), it makes no difference whether the liability is created by state statute or federal legislation; it is still a statutorily created liability.

58. ARK. STAT. ANN. § 37-213 (1962) provides: "All actions not included in the foregoing provisions shall be commenced within five [5] years after the cause of action shall have accrued."

59. 431 F.2d at 865.

60. 450 F.2d at 451.

61. *Id.* at 451-52.

62. ARK. STAT. ANN. § 37-206 (1962). *See supra* note 56 for the text of this statute.

63. ARK. STAT. ANN. § 37-213 (1962). *See supra* note 58 for the text of this statute.

64. 486 F.2d 534 (8th Cir. 1973).

65. *Id.* at 537.

limitation of statutorily created liability.[66]

Four years later, in *Clark v. Mann*[67] and *Williams v. Anderson*,[68] decided the same day, the court seemed to resolve the question. The plaintiffs in both cases were black faculty members who alleged racial discrimination in the personnel policies of their respective school districts. The court reaffirmed its rejection of the general five-year statute of limitations in section 1983 cases and stated in *Clark*, "Since a § 1983 action is one to enforce a liability created by statute, we do find an analogy between the instant case and actions governed by [the three-year limitation]."[69] However, later in its opinion, the court stated it would not resolve the conflict in approaches because the same three-year limitations period applied.[70]

Even though the language in *Reed* and in *Clark* seems confusing, the result was the same—the three-year statute of limitations applied whether viewed as a tort limitation or as a limitation on statutorily created liability.[71]

The Eighth Circuit Court of Appeals in *Garmon v. Foust*[72] began its analysis by noting Supreme Court decisions which consistently applied the general rule that when a federal statute creates a federal right and provides no period of limitations, the federal courts look to state law for guidance and "borrow" the most appropriate state statute of limitations.[73] The court first reviewed the history of limitations of actions for civil rights suits brought under section 1983[74] and looked to other federal legislation, including the Rules of Decision Act and section 1988 of the Civil Rights Act, for guidance in determining which statute of limitations to apply.[75]

66. *Id.* The court stated that whether it focused on the underlying negligence of the prison officials or based its decision on the rationale that the action was to enforce a statutory right, the action was barred by the three-year statute of limitations. *Id.* at 536. In a later case, Martin v. Georgia-Pacific Corp., 568 F.2d 58 (8th Cir. 1977), the court characterized *Reed* as applying a statutory liability limitation. *Id.* at 63.

67. 562 F.2d 1104 (8th Cir. 1977).

68. 562 F.2d 1081 (8th Cir. 1977).

69. 562 F.2d at 1112. This statement is confusing because the three-year limitation is applied both as a tort limitation and as a limitation on statutorily created liability. The court appears to have intended by the language quoted that a § 1983 action should not be analogized as a tort action.

70. 562 F.2d at 1112.

71. It is important to note that Arkansas has no specific provision for federal civil rights actions, so that issue has not been important.

72. 668 F.2d 400 (8th Cir. 1982).

73. *Id.* at 403.

74. *Id.* at 402-03.

75. *Id.*

The court reviewed the practice followed by the other circuits.[76] These circuits applied state statutes of limitations for common-law torts, liability created by statute, or actions not specifically governed by other statutes. Third, the court reviewed the practice that had been followed by various panels of the Eighth Circuit Court of Appeals.[77] Often the court had followed *Glasscoe*,[78] rejected the tort analogy, and had applied other statutes of limitations which were not based on the conduct of the defendant. Less often the court had followed *Savage*,[79] accepted the tort analogy, and had applied the tort statute of limitations which was based on the tortious conduct of the defendant. The result had been confusion within Eighth Circuit decisions.

Finally, the court rejected the tort analogy, recognized the distinction between common-law tort actions and federally created causes of action, and concluded that section 1983 does not depend on state common law for its existence, but rather creates a new cause of action for deprivation of civil rights.[80] The court also noted that "[a] litigant may pursue a section 1983 action rather than, or in addition to, state remedies."[81] The court expressly adopted the reasoning of Justice Harlan in his concurring opinion in *Monroe v. Pape*:[82] "[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 the deprivation of a constitutional right."[83]

Garmon is significant because it resolved inconsistent applications of Iowa statutes of limitations in section 1983 actions,[84] and it clarified the law in the Eighth Circuit. *Garmon* expressly rejected the tort analogy that had been applied in the Eighth Circuit in *Savage* and the cases following it and adopted the reasoning of *Glasscoe* as the rule for the Eighth Circuit. *Garmon* also reaffirmed application of Arkansas' three-year statute of limitations in section 1983 cases.

The court in *Garmon* based its conclusion on the statutory

76. *Id.* at 403.
77. *Id.* at 403-05.
78. *See supra* text accompanying notes 55-59.
79. *See supra* text accompanying notes 60-61.
80. 668 F.2d at 406.
81. *Id.*
82. 365 U.S. 167 (1961).
83. 668 F.2d at 406 (quoting Monroe v. Pape, 365 U.S. 167, 196 & n.5 (1961) (Harlan, J., concurring)).
84. *See supra* note 5.

scheme of each state in the Eighth Circuit and held that in Iowa, the state's general five-year statute of limitations applies rather than a statute based on common-law tort.[85] Since Iowa has no period of limitations for liability created by statute, the court was confined to choosing between tort statutes and the general catch-all statute of limitations. The court noted that some states in the Eighth Circuit have a statute of limitations based on liability created by statute and stated that that statute may govern section 1983 actions.[86] The court apparently intended that "liability created by statute" include liability created by federal and state statutes. Since Nebraska has a statute of limitations which clearly applies to actions founded upon federal statutes[87] such as section 1983, and the court has applied that statute in a federal civil rights action brought by a former guidance counselor against a school district in *Chambers v. Omaha School District*,[88] it appears that the court would do the same in the future. Should another state in the Eighth Circuit enact a statute of limitations clearly applicable to federal civil rights suits, it seems apparent that the Eighth Circuit will apply it to suits brought under section 1983 unless it is inconsistent with the Constitution or laws of the United States.[89] Since Garmon brought his civil rights action under section 1983 only, the court stated that it limited its holding to actions brought specifically under that section. It stated that its rationale might subsequently be extended to actions brought under sections 1981 and 1985.[90]

In summary, if the state's statutory scheme consists of tort statutes, statutorily created liability, and a general catch-all statute of limitations, the Eighth Circuit will follow the statute of limitations for liability created by statute. If the state's statutory scheme consists of tort statutes and the general catch-all statute, the Eighth Circuit will follow the statute of limitations for actions not specifically governed by other statutes.

Litigants in the Eighth Circuit now can be reasonably sure about which statute of limitations the court will apply in federal civil rights actions brought under section 1983. Iowa plaintiffs can be guaranteed that the five-year general statute of limitations will be

85. 668 F.2d at 406.

86. *Id.* at 406, nn.11 & 7.

87. NEB. REV. STAT. § 25-219 (1979). *See supra* notes 46 & 47 for the text of this statute and case law construing it.

88. 536 F.2d 222 (8th Cir. 1976). *See supra* note 47.

89. *See supra* note 48.

90. 668 F.2d at 406, n.12.

applied. Arkansas claimants can also be assured that the three-year statute of limitations for liability created by statute will be applied to these claims. Nebraska litigants can be reasonably certain that the three-year statute of limitations for actions upon liability created by federal statute will be applied. Plaintiffs from other states in the Eighth Circuit can determine the applicable statute of limitations by comparing the statutory scheme of their respective states with that of Iowa, Arkansas, or Nebraska. The Eighth Circuit has finally resolved the issue of the applicable statute of limitations for section 1983 actions.

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