Section 1983 and the Collateral Source Rule

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I. INTRODUCTION

The cause of action created by section 1 of the Civil Rights Act of 1871, now 42 U.S.C. § 1983,1 broadly provides a remedy for persons deprived

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


of constitutional rights by anyone acting under color of state law. The statutory language does little beyond establishing this cause of action, however, and federal courts have had the task of defining the parameters and fleshing out the details. One aspect of § 1983, not directly addressed by its wording or legislative history, is the damages recoverable under the statute. In the “first generation” of § 1983 damage issue decisions, the Supreme Court has provided significant guidance as to what types of damages are available and has indicated in broad terms how they are to be measured. The Court, however, has not directly addressed some of the finer points of damage computation in § 1983 actions, such as the availability of prejudgment interest, contribution among joint tortfeasors, and the application of the collateral source rule to damage determinations. In particular, the Court has not clarified whether these “second generation” damage details should be governed by state or federal law.

“Second generation” damage issues which raise choice of law problems are becoming increasingly important as states adopt damage policies that are different from federal policies. One area where state policies may now differ dramatically from federal policies due to recent “tort reform” efforts is the collateral source rule. This rule is a principle of tort law governing reduction of damage awards. The collateral source rule is applicable to § 1983 actions. There appears, however, to be some disagreement among the federal courts, and between the majority of those courts and state courts as to whether a federal common law collateral source rule or state collateral source rules should apply to § 1983 damage determinations.

This note examines the different approaches to the application of the collateral source rule among federal and state courts entertaining § 1983 actions and the principles which should be applied by courts to resolve the choice of law problem raised by the rule. The first section discusses the common law collateral source rule and recent state legislative alterations and abrogations of it. The second section explores current applications of the collateral source rule in federal and state courts entertain-
ing § 1983 actions. The third section suggests principles which should guide courts in their applications of the collateral source rule. This section further focuses on the choice of law problem and the applicability of 42 U.S.C. § 1988 to resolve it.

II. THE COMMON LAW COLLATERAL SOURCE RULE AND RECENT LEGISLATIVE ALTERATIONS

The collateral source rule applied in federal courts was derived from the mid-nineteenth century common law of torts. Until recent state statutory alterations of the rule, it was a well-established principle of the tort law of every state. Under the collateral source rule, a prevailing plaintiff's recovery is not reduced by the amount received by him from gratuitous or pre-planned sources which are collateral to the defendant. Sources collateral to the defendant include insurance benefits, social security payments, disability benefits, workmen's compensation, welfare payments, gratuitous benefits such as free medical care, and any other third party compensation for plaintiff's injuries. For the rule to apply, the source must truly be collateral.

The collateral source rule does not apply where the defendant or anyone identified with the defendant, such as the defendant's insurer, has paid for the plaintiff's benefit. While it is often a simple matter to determine if a benefit is collateral, the distinction between benefits from sources wholly independent of the tortfeasor and those identified with the tortfeasor may be blurred at times. For instance, situations involving recoveries against the government can present this problem. Where one governmental agency is found liable for plaintiff's injuries and another governmental agency furnishes a benefit like social security or workmen's compensation for that injury, it is more difficult to determine whether the benefit is collateral since it is in some ways both independent of, and identified with, the tortfeasor.

Courts have applied the collateral source rule both as a rule of law and as a rule of evidence. As a substantive rule of law, the collateral source rule affects the size of a damage award by precluding reduction of the award by plaintiff's collateral recovery. Its use as a procedural rule of

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9 Branton, supra note 8, at 883-84.
12 DOBBS, supra note 10, at 583.
13 Id.
14 Ferguson, supra note 11, at 1307-08; Branton, supra note 8, at 883.
evidence flows logically from its substantive application. Since the plaintiff’s damages may not be reduced by his collateral benefits, such benefits are irrelevant to damage determinations and may not be presented to a jury lest they prejudicially influence the jury’s determination of damages.

Three primary justifications for the rule have been advanced by its proponents. First, a tortfeasor should not be permitted to profit from the injured party’s collateral benefits, especially if the plaintiff has paid for those benefits. For example, if the plaintiff has directly paid for insurance coverage or has indirectly paid for bargained-for job benefits through a reduced salary scale, the defendant should not get credit for the benefits purchased by the plaintiff. To allow the defendant to do so would clearly amount to a windfall for the defendant. The California Supreme Court aptly explained this policy in Helfend v. Southern California Rapid Transit District:

\[15\] The collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities. Courts consider insurance a form of investment, the benefits of which become payable without respect to other possible sources of funds. If we were to permit a tortfeasor to mitigate damages with payments from plaintiff’s insurance, plaintiff would be in a position inferior to that of having bought no insurance, because his payment of premiums would have earned no benefit. Defendant should not be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide himself with insurance.\[17\]

Even in the case of benefits not paid for by the plaintiff the defendant should not be permitted to have his liability reduced and receive, in essence, a windfall. The policy issue is whether the tortfeasor or the injured party should receive the windfall. The collateral source rule represents the common law’s clear choice for the injured plaintiff over the defendant with respect to who should benefit from third party contribution to plaintiff’s recovery. Furthermore, in situations where the third party insurer has rights of subrogation, neither the plaintiff nor the defendant will receive a windfall.

\[18\] See Fleming, supra note 8, at 1483; Branton, supra note 8, at 885 (quoting Grayson v. Williams, 256 F.2d 61 (10th Cir. 1958)).

\[19\] A party with a right of subrogation has “a right to step into the injured party’s shoes to the extent it has paid the loss.” Dobbs, supra note 10, at 585. Thus, a right of subrogation would allow the third party insurer to recover the amount he paid to the plaintiff.

\[20\] Id. at 585-86.

\[15\] Dobbs, supra note 10, at 584 (also arguing against this justification based on the proposition that the plaintiff paid only for security and not for the possibility of a double recovery).


\[17\] Id. at 66-67.

\[18\] See Fleming, supra note 8, at 1483; Branton, supra note 8, at 885 (quoting Grayson v. Williams, 256 F.2d 61 (10th Cir. 1958)).
A second justification for the collateral source rule is that legal compensation is not truly adequate compensation. Particularly in personal injury cases, a plaintiff can never really be made whole. For example, it is impossible to accurately judge for what amount, if any, a person would be willing to lose a limb. In addition, since tort law generally does not allow a plaintiff to recover attorney fees, the plaintiff's recovery is, in reality, reduced by the costs of litigation. The collateral source rule compensates for this reduction, thus allowing a more equitable result. This justification is not applicable to § 1983 litigation, though, because the prevailing plaintiffs are able to recover attorney fees as a result of 42 U.S.C. § 1988. A provision of § 1988 allows for recovery of attorney fees for civil rights plaintiffs.

Deterrence, as a basic purpose of tort law, is the basis of the third justification of the collateral source rule. A tortfeasor must pay in full for his wrongful act to discourage both him and others from committing similar tortious acts in the future. "[R]educing a plaintiff's recovery by the sum of collateral payments would weaken the deterrent effect of damage awards on tortious activity." The collateral source rule helps to ensure this deterrent effect.

Opponents of the collateral source rule raise a strong counterargument. By conferring a windfall on the plaintiff, the rule overcompensates victims and provides a double recovery. The primary purpose of tort law is to compensate the victim for his injuries. A plaintiff who receives part of his damages from the defendant and part from a third party is fully compensated even though the defendant himself did not have to pay fully for his tortious conduct. If the plaintiff is permitted to retain the full damage award in addition to collateral benefits, he has been compensated more than once for the same injury. Even where the third party conferring the collateral benefit is permitted to recoup the amount of the benefit through subrogation thus eliminating the double recovery, the

21 Fleming, supra note 8, at 1483.
22 Branton, supra note 8, at 885 (quoting Hudson v. Lazarus, 217 F.2d 344 (D.C. Cir. 1954)).
23 Dobbs, supra note 10, at 584.

26 Ferguson, supra note 11, at 1310 & n.21.
27 Id. at 1310.
28 Branton, supra note 8 at 886.
29 See id. at 885-86; Dobbs, supra note 10, at 581.
costs for the additional litigation involved in subrogation must be borne by the litigants and the public. 30

Another more recent argument against the collateral source rule is that it has an inflationary effect on insurance premiums. 31 In most lawsuits today "a collectible judgment is insured against and it is the insurer, not the individual defendant who pays." 32 The costs of the judgments borne by the insurance companies are passed on to consumers in the form of higher premiums; thus, larger damage awards result in higher insurance rates. Theoretically, abolition of the collateral source rule will reduce damage awards and correspondingly lower insurance rates.

The argument that the collateral source rule affects insurance rates was the primary reason the rule came under attack during the wave of tort reform in the 1970s. 33 Due to concern about rapidly rising insurance costs, legislatures in many states altered the collateral source rule in an attempt to reduce damage awards in medical malpractice cases, 34 "and thus induce insurance companies to provide malpractice insurance at lower prices." 35 A number of commentators have questioned the effect of tort reform in general on the "insurance crisis," 36 but there is some evidence that medical malpractice claim levels are rising at a lower rate due to alterations of the collateral source rule. 37

The more recent state legislative tort reform efforts during the last decade involved a broader attack on the collateral source rule. While earlier tort reform focused on the area of medical malpractice, 38 many of the recent reforms apply to all types of tort actions, including claims against the government. The reforms of the 1980's indicate a more general

30 See Dobbs, supra note 10, at 586. Dobbs argues that abrogation of both the collateral source rule and subrogation rights would effect a savings to all concerned parties. Although elimination of both would result in collateral sources bearing the loss, the cost involved in shifting that loss from the collateral source to the tortfeasor or his insurer would be saved. Subrogation actions would be minimized or eliminated, thus avoiding both the costs involved in such suits and any related administrative costs which would have been borne by the parties involved.

31 Id. at 587.

32 Id.


35 Ferguson, supra note 11, at 1305.


37 Hubbard, supra note 36, at 336-37 & n. 167 (citing to Patricia M. Danzon, The Frequency and Severity of Medical Malpractice Claims: New Evidence, 49 LAW AND CONTEMP. PROBS., 57 (1986)); Ferguson, supra note 12, at 1313 & n.31 (citing same).

38 See supra notes 33-35 and accompanying text.
concern for correcting problems in tort law. In particular, they address the problems of overcompensating plaintiffs and creating subrogation litigation brought about by the common law collateral source rule. The collateral source rule has been legislatively altered or abolished in at least thirty states as it applies to various civil causes of action including medical malpractice, products liability and automobile cases. Reform of the collateral source rule varies among these states. Legislative approaches range from slight modification in a single type of civil action to sweeping abrogation in many types of actions. Some statutes eliminate rights of subrogation, while others retain them. Most of these alterations allow the plaintiff to retain any portion of the collateral benefit that he has directly or indirectly paid for, but a few do not.

Although legislative alterations of the common law collateral source rule differ greatly from state to state, analysis of one state's statutory revisions of the rule will provide a concrete basis of comparison to the

39 See generally Manzer, supra note 33 (discussing 1986 statutory tort reforms).
45 Compare Colo. Rev. Stat. § 13-21-111.6 (1990) (requiring awards in civil actions to be reduced only by collateral recovery which was not paid for under contract by or on behalf of the plaintiff) with Idaho Code § 6-16-6 (1990) (eliminating the collateral source rule in any action for personal injury or property damage regardless of plaintiff's payments towards the benefit).
46 See supra notes 40-45 and accompanying text.
federal common law collateral source rule. In relation to § 1983, the initial question raised when dealing with state statutory alterations of the collateral source rule is whether the reform statutes apply to actions under § 1983. 47

As an illustration of state legislative tort reform of the collateral source rule, Ohio has passed several statutes addressing the rule. These statutes reflect a desire to avoid overcompensating plaintiffs, to reduce litigation costs by eliminating subrogation in some areas, and to save taxpayers' money. The earliest of these statutes48 altered the collateral source rule with regard to medical claims, abolishing it for all collateral recovery except where the benefits have been paid for by the plaintiff or his employer. This statute has been held to apply only to medical malpractice actions.49 Another statute, dealing with recoveries against the state, provides for mandatory reduction of awards against the state of Ohio by all collateral benefits received by the plaintiff.50 This statute is not applicable to § 1983 actions because the state cannot be a defendant to a § 1983 action.51 A third statute, section 2744.05 of the Ohio Revised Code, addresses the collateral source rule in recoveries against political subdivisions.52 This statute requires a prevailing plaintiff to disclose all collateral benefits to the court, which must then deduct them from the damage award. In addition, the statute bars subrogation claims against political subdivisions. While section 2744.05, standing alone, applies to all civil rights litigation including § 1983 actions,53 section 2744.09(E) of the Ohio Revised Code54 specifically exempts "[c]ivil claims based upon alleged violations of the constitution or statutes of the United States"55 from the entire chapter of the Ohio Revised Code which contains section 2744.05.

47 Steinglass, supra note 4, § 10.2, at 10-3.
48 Ohio Rev. Code Ann. § 2305.27 (Baldwin 1990) (effective July 1, 1976). This statute was enacted during the first wave of tort reform. See supra notes 33-37 and accompanying text.
50 Ohio Rev. Code Ann. § 2743.02(D) (Baldwin 1990).
51 The Supreme Court has held that a state is not a "person" within the meaning of § 1983, and thus is not subject to liability under the statute. Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) ("Neither a State nor its officials acting in their official capacities are 'persons' under § 1983." Id. at 66). See also 15 Am. Jur. 2d Civil Rights § 17 (1976) (providing a general discussion of who may be considered "persons" within the meaning of § 1983).
52 Ohio Revised Code Ann. § 2744.05 (Baldwin 1990).
53 The language of § 2744.05 draws no distinction as to types of litigation. In addition, while a number of federal courts have held that various political subdivisions are not considered persons under 42 U.S.C. § 1983, some have held otherwise. See 15 Am. Jur. 2d Civil Rights § 17 (1976). Municipalities, local governmental units, and school boards have been held to be "persons" within the meaning of § 1983. Monell v. Department of Social Servs., 436 U.S. 658 (1978). Thus, it appears that at least some political subdivisions may be reached under § 1983.
54 Ohio Revised Code Ann. § 2744.09(E) (Baldwin 1990).
55 Id.
While the Ohio statutory provisions described thus far do not apply to federal causes of action, Section 2317.45 of the Ohio Revised Code\(^6\) may be applicable. Enacted in 1988, the statute deals in a detailed fashion with the admission and utilization of evidence regarding collateral benefits in tort litigation. It specifies both the nature of the evidence to be admitted and the effect of that evidence on the calculation of damage awards. Under section 2317.45(B)(1), a prevailing plaintiff must reveal all relevant collateral benefits to the court.\(^5\) The court must then establish whether the plaintiff has already received or is reasonably certain to receive the benefits within the next five years, and whether there are any rights of recoupment involved.\(^5\) Once the court is satisfied that the benefits are or will be received by the plaintiff, and that there are no rights of recoupment, the court then determines what portion of the collateral benefit was paid for by the plaintiff or his employer.\(^5\) Finally, the court is required to:

(i) Subtract from the compensatory damages that the plaintiff otherwise would be awarded the amount of any disclosed collateral benefits in relation to which both requirements of division (B)(2)(a) of this section are satisfied;

(ii) Subject to the limitation specified in this division, add to the balance derived under division (B)(2)(c)(i) of this section the total of any costs, premiums, and charges described in division (B)(2)(b) of this section. The amount of those costs, premiums, and charges that is added to this balance shall not exceed any amount subtracted pursuant to division (B)(2)(c)(i) of this section from the compensatory damages that the plaintiff otherwise would be awarded.\(^6\)

\(^6\) OHIO REVISED CODE ANN. § 2317.45 (Baldwin 1990).

\(^5\) Section 2317.45(B)(1) requires comprehensive disclosure of benefits:
Except as provided in division (C) of this section, if a plaintiff in a tort action is entitled to an award of compensatory damages, that plaintiff shall disclose to the court after such entitlement is determined all relevant collateral benefits, all rights of recoupment relative to the disclosed collateral benefits, and the costs, premiums, or charges for any of the disclosed collateral benefits paid or contributed within the three-year period immediately preceding the accrual of the cause of action, by the plaintiff, any member of his immediate family, or the employer of the plaintiff or any member of his immediate family or, in a wrongful death action, the decedent, any beneficiary of the action, the employer of the decedent or any beneficiary of the action, any member of the immediate family of the decedent or any such beneficiary, or the employer of any member of the immediate family of the decedent or any such beneficiary.

Furthermore, collateral benefits are broadly defined in the statute to include such items as social security, medicare, state disability and workmen's compensation, private health insurance and accident insurance plans. OHIO REV. CODE ANN. § 2317.45(A)(1)(a) (Baldwin 1990).


\(^5\) § 2317.45(B)(2)(b).

\(^6\) § 2317.45(B)(2)(c).
Thus, the damage award is ultimately reduced by the total amount of the collateral benefits for which the plaintiff did not directly or indirectly pay.

In determining whether section 2317.45 of the Ohio Revised Code is applicable to § 1983 litigation, a number of details must be examined. First, the definitions division of the Ohio statute provides that the collateral sources in question must be related to "injury, death, or loss to person or property that is a subject of a tort action."§61 "Tort action" is defined in the Ohio statute as "a civil action for damages for injury, death, or loss to person or property . . . but does not include civil action for damages for a breach of contract or another agreement between persons."§62 Federal causes of action are not excluded by the language of this section, and claims arising under 42 U.S.C. § 1983 may certainly fall under this definition of tort action. Section 2317.45 of the Ohio statute, does contain a division excluding certain actions:

(c) This section does not apply as follows:
(1) In tort actions against the state in the court of claims or in tort actions against political subdivisions of this state that are commenced under or are subject to Chapter 2744 of the Revised Code;
(2) To any medical claim, as defined in section 2305.11 of the Revised Code.63

Again, the language contains no explicit exclusion of federal causes of action from this particular division. Thus, it appears that the statute does apply as a matter of state statutory interpretation, at least to actions against individuals brought pursuant to § 1983. In addition, the statute may also apply to § 1983 litigation against political subdivisions because the exclusion in section 2317.45(C)(1) of the Ohio statute specifically refers to actions governed by chapter 2744.64 Since federal causes of action are explicitly outside the scope of chapter 2744,65 the exclusion in section 2317.45(C)(1) does not apply to them.66 Section 1983 actions brought against political subdivisions may, therefore, be governed by the terms of this statute.

§ 2317.45(A)(1)(a).
§ 2317.45(A)(1)(c).
§ 2317.45(C)(1)-(2).

See supra notes 52-55 and accompanying text for discussion of pertinent sections of Chapter 2744.

§ 2317.45(A)(1)(a).
§ 2317.45(A)(1)(c).
§ 2317.45(C)(1)-(2).

64 See supra notes 52-55 and accompanying text for discussion of pertinent sections of Chapter 2744.
66 That the Ohio legislature truly intended to make § 2317.45 applicable to federal causes of action is highly doubtful. Most state legislatures focusing on state "tort reform" issues do not consider the possible application of their statutes to federal causes of action such as § 1983. STEINGLASS, supra note 4, § 10.2, at 10-2, 10.6 (discussing Mellinger v. Town of West Springfield, 515 N.E.2d 584 (Mass. 1987), in which the court appeared to recognize that state legislatures do not usually consider the effect of their legislation on federal causes of action). In all probability, the Ohio legislature, by referring to Chapter 2744 in § 2317.45, unintentionally included under § 2317.45 all the forms of action which were explicitly excluded from Chapter 2744.
The Ohio statute affecting the common law collateral source rule is not especially unique in its applicability to federal causes of action; other states have enacted statutes which would similarly apply. For example, a Colorado statute which mandates reduction of damage awards in civil actions by payments from collateral sources may be applicable to § 1983 litigation. Similarly, a Florida statute requiring its courts to offset damage awards by various collateral source payments also appears to apply to § 1983 cases. However, even if a state collateral source rule is applicable to § 1983 actions as a matter of state statutory construction, the more basic issue of whether courts should look to state or federal law for the appropriate collateral source rule must also be addressed.

III. CURRENT FEDERAL AND STATE CASE LAW CONCERNING THE COLLATERAL SOURCE RULE APPLIED TO SECTION 1983 ACTIONS

Courts are not entirely in agreement as to whether to use federal or state law in applying the collateral source rule to § 1983 damage determinations. A review of the limited case law in this area reveals that the majority of the federal courts have chosen to apply federal common law. Some federal courts, though, have utilized state law in their application of the collateral source rule to § 1983 actions. In addition, at least one state court entertaining a § 1983 action under concurrent jurisdiction has looked to the law of its state for the appropriate collateral source rule. A brief review of these cases clarifies both the nature and scope of the choice of law problem with respect to the application of the collateral source rule in § 1983 actions.

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67 See COLO. REV. STAT. § 13-21-111.6 (1990) The Colorado statute applies to all civil actions, which are defined as “any action by any person or his legal representative to recover damages ... resulting in death or injury to person or property.” Federal causes of action are not explicitly excluded. Thus, on its face, § 13-21-111.6 appears to apply to federal causes of action, including § 1983 litigation.

68 See FLA. STAT. ch. 768.76 (1990). The Florida statute applies to any action in the same part of the code. These actions are defined in FLA. STAT. ch. 768.71 (1990) as “any action for damages, whether in tort or contract.” Like the Ohio and Colorado statutes, this one also may apply to federal causes of action such as § 1983. See also STEINGLASS, supra note 4, § 16.4(a), at 16-20 to 16-21.

69 Federal courts may be required to apply the federal common law collateral source rule in § 1983 litigation. See infra notes 128 & 129 and accompanying text. State courts entertaining § 1983 actions, however, may face a more complicated decision regarding whether to follow state or federal law on the collateral source rule. See STEINGLASS, supra note 4, § 10.1 - 10.6 (providing a list of questions courts should ask in determining whether to apply state law and a detailed analysis of those questions).

70 See infra, notes 73-85 and accompanying text.

71 See infra, notes 86-97 and accompanying text.

72 See Orr v. Crowder, 315 S.E.2d 593 (W. Va. 1983). See also infra notes 98-100 and accompanying text.
A. Courts Applying a Federal Common Law Collateral Source Rule to Section 1983 Actions

Courts applying a federal form of the collateral source rule have taken the view that relevant common law tort doctrines may apply to § 1983 litigation, and that "[f]ew rules are more firmly settled in the law of torts than the inability of a tortfeasor to claim benefit for payments from a collateral source." These cases have held that unemployment compensation benefits and public assistance payments are collateral sources which may not be used to offset damages.

The Seventh Circuit, in Perry v. Larson, applied the federal collateral source rule to a § 1983 action. The prevailing plaintiff in Perry was a deputy sheriff who had been wrongfully discharged for his political activities. On appeal, the defendant requested that the damage award be reduced by the amount of unemployment compensation the plaintiff received following his discharge. The court expressly found the collateral source rule to be applicable to § 1983. Looking to federal common law, the court noted that "[t]he purpose of the collateral source rule is not to prevent the plaintiff from being overcompensated, but rather to prevent the tortfeasor from paying twice." The court held that "[u]nemployment compensation is a source of funds independent of the transaction giving rise to the claim and thus is collateral." Given the collateral nature of the benefit, the court refused to deduct it from the damage award.

In a recent decision by the Tenth Circuit, Starrett v. Wadley, the court upheld the application of the federal collateral source rule as a rule of evidence in a § 1983 case involving sexual harassment of a county employee by her supervisor. Having been found liable for violating the

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72 794 F.2d 279 (7th Cir. 1986).
74 Perry, 794 F.2d at 286 (quoting Thomas v. Shelton, 740 F.2d 478, 484 (7th Cir. 1984)).
75 Id.
77 876 F.2d 808 (10th Cir. 1989).
78 See supra note 14 and accompanying text.
plaintiff's First and Fourteenth Amendment rights, the county raised on appeal the issue of whether the district court had erred in excluding the plaintiff's unemployment compensation application as evidence to impeach plaintiff's testimony. At trial, the plaintiff had made a motion in limine to preclude reference to her receipt of unemployment compensation under the collateral source rule and the defendant had agreed to not introduce such evidence. During trial, however, the defendant's counsel attempted to introduce the unemployment compensation application to indicate a discrepancy in plaintiff's testimony. The district court held that the application's "slight impeachment value was outweighed by the danger of jury confusion." Since allowing the evidence may have prejudiced the jury's damage determination by confusing them about the existence of unemployment compensation, the court held that the trial court was correct in excluding it. In reaching this decision, the appeals court referred to federal case law, holding that unemployment compensation is a collateral benefit, not to be offset against damage awards.

**B. Courts Applying State Collateral Source Rules to Section 1983 Actions**

Some federal and state courts entertaining § 1983 actions have looked to state common law collateral source rules for application to § 1983 cases. While state statutory alterations of the collateral source rule often differ greatly from the federal common law rule, state common law collateral source rules may or may not differ from the federal common law version. Thus, it is possible for a court to look to state common law for a collateral source rule and still produce the same result as a court which has applied the federal form of the rule.

The plain fact that a court is applying state law to resolve this damage issue, however, could be problematic. If a particular state's common law collateral source rule has developed differently from the federal common law rule, a court applying that state rule may often produce a result different from that reached by a court looking to the federal common law collateral source rule. Furthermore, if a court has chosen to utilize state common law in this area, and that common law is later legislatively altered through the tort reform movement, the court may continue to apply state law in its altered statutory form. Thus the dilemma presented

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81 Starrett, 876 F.2d at 811-12.
82 Id. at 823.
83 Id.
84 Id.
85 The court in Starrett cited to E.E.O.C. v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980), for the proposition that unemployment compensation benefits are collateral. Starrett, 876 F.2d at 823.
86 See supra notes 40-45 and accompanying text.
is that the application of state collateral source rules, whether statutory or common law, may produce results which differ dramatically from federal common law.\textsuperscript{87}

An example of a court applying a state collateral source rule which produced a result different from that which would be reached by application of the federal rule is found in Carswell v. Bay County.\textsuperscript{88} In Carswell, the Eleventh Circuit upheld a district court’s application of Florida’s common law collateral source rule to reduce a § 1983 damage award allowing for medical expenses against a county jail administrator for deliberate indifference to the plaintiff’s medical needs.\textsuperscript{89} Under a settlement agreement with the county, the plaintiff was not required to repay the county for the medical expenses involved when he was finally treated. Noting that Florida’s common law version of the collateral source rule only applies when the benefits are somehow earned in order to prevent a windfall to the plaintiff,\textsuperscript{90} the court held that this limitation on Florida’s rule precluded the plaintiff from recovering for medical expenses under his § 1983 claim.\textsuperscript{91} Since the stipulation that the benefit be earned by the

\textsuperscript{87} Seemingly minor variations in the different forms of the collateral source rule can significantly alter the amount of damage awards by allowing awards to be reduced by the amount of collateral recovery, whether in part or in whole. For example, in Mays v. United States, 806 F.2d 976 (10th Cir. 1986), the court noted a split of authority on whether Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) benefits are a collateral source to a Federal Tort Claims Act award. The court held that under the Colorado common law collateral source rule, CHAMPUS benefits were not collateral. \textit{Id. at 977-78}. The benefits that were deducted from the award totalled $195,055. \textit{Id. at 977}. See \textit{infra} notes 77-80 and accompanying text for a variation of the collateral source rule applied to a § 1983 damage determination that resulted in an award reduction which would not have occurred under the federal common law collateral source rule.

\textsuperscript{88} 854 F.2d 454 (11th Cir. 1988).

\textsuperscript{89} Id. at 458-59.

\textsuperscript{90} The trial court in Carswell cited to Florida Physician’s Ins. Reciprocal v. Stanley, 452 So. 2d 514 (Fla. 1984), and Winston Towers 100 Ass’n v. De Carlo, 481 So. 2d 1261 (Fla. Dist. Ct. App. 1986), in support of its definition of Florida’s collateral source rule. \textit{Carswell}, 854 F.2d at 458. The plaintiff did not argue that a federal collateral source rule should apply. He instead argued that under Florida’s collateral source rule, there should be no set off against his recovery on the § 1983 claim for his collateral compensation from the hospital. Had the plaintiff argued for and succeeded in convincing the appeals court that the correct collateral source rule to apply was the federal common law version, there may have been no set off. An additional twist to the damage determination aspect of Carswell, however, is that the medical payments by the hospital could possibly be viewed as a settlement by a joint tortfeasor rather than a collateral benefit. If the Eleventh Circuit had approached the award in this manner, the collateral source rule analysis would not apply. See \textit{Carswell}, 854 F.2d at 458 n.4. Courts have held that “the collateral source rule, which applies to gratuitous or pre-planned benefits such as insurance and sick pay, could not be tortured to encompass settlements made in contemplation of litigation, even when made by a defendant later found not liable to the plaintiff.” Johnson v. Rogers, 621 F.2d 300, 303 n.5 (8th Cir. 1980) (citing Snowden v. D.C. Transit System, 454 F.2d 1047 (D.C. Cir. 1971)).

\textsuperscript{91} \textit{Carswell}, 854 F.2d at 458-59.
plaintiff is not a part of the federal common law collateral source rule,\textsuperscript{92} the opposite result would have been reached if the court had applied the federal rule.

Other courts have applied state common law collateral source rules which have produced results similar to that which would be expected under application of the federal rule. For example, in \textit{Barberic v. City of Hawthorne},\textsuperscript{93} the United States District Court for the Central District of California applied California common law to the damage determination in a § 1983 case involving the violation of a police woman's constitutional rights when she was involuntarily retired due to a psychological disability. The court reduced the plaintiff's award of lost wages by the amount of the benefits she had received through the California Public Employees Retirement System.\textsuperscript{94} The court looked to the California common law collateral source rule\textsuperscript{95} to determine that these benefits were identified with the defendant\textsuperscript{96} and, as such, fell outside of California's collateral source rule. The view that sources identified with the defendant are not collateral is also a part of the federal common law collateral source rule,\textsuperscript{97} but it is not entirely clear from the details of this case if the retirement benefits at issue would be considered identified with the defendant under the federal rule.

State courts have also looked to their own state collateral source rules in § 1983 litigation. In \textit{Orr v. Crowder},\textsuperscript{98} a § 1983 suit brought in a West Virginia state court for the discharge of a teacher in violation of his First Amendment rights, the Supreme Court of Appeals of West Virginia looked to West Virginia common law\textsuperscript{99} to uphold the trial court's application of the collateral source rule to the plaintiff's damage award. The court held that, according to West Virginia law, unemployment compensation benefits received by the plaintiff were collateral and could not be used to reduce the damage award.\textsuperscript{100} The result in \textit{Orr} is the same as that which would be reached under the federal version of the collateral source rule.

Although the courts in the above three cases were applying state common law collateral source rules to their damage determinations, only the common law version in Florida was clearly different from the federal

\textsuperscript{92} See supra notes 15-20 and accompanying text.

\textsuperscript{93} 669 F. Supp. 985 (C.D. Cal. 1987).

\textsuperscript{94} Id. at 995.

\textsuperscript{95} The court in \textit{Barberic} cited \textit{Helfend v. Southern Cal. Rapid Transit Dist.}, 465 P.2d 61 (Cal. 1970), and CAL. GOVT CODE §§ 20740-20760 (1986) (describing the funding for the California Public Employees Retirement System) in support of its determination that the California collateral source rule did not apply to the benefits received by the plaintiff. \textit{Barberic}, 669 F. Supp. at 985.

\textsuperscript{96} See supra notes 12-13 and accompanying text.

\textsuperscript{97} Id.

\textsuperscript{98} 315 S.E.2d 593 (W. Va. 1984).


\textsuperscript{100} \textit{Orr}, 315 S.E.2d at 610.
common law collateral source rule, and thus produced a result at variance
with that which would have been produced by use of the federal common
law rule. There is not a great deal of case law available concerning the
collateral source rule in § 1983 litigation and virtually none applying
state statutory forms of the rule. To some degree, the lack of case law is
due to the fact that state statutory alterations of the collateral source
rule were enacted only recently. In addition, “second generation” damage
issues are not encountered with great frequency in § 1983 litigation be-
cause they do not arise until the tail end of a lawsuit as part of, or following
the determination of the damage award, providing, of course, that the
plaintiff has prevailed. Though limited in frequency of appearance, “sec-
ond generation” damage issues, such as the collateral source rule, can
have significant effects on damage awards. At present, there is no
binding precedent to prevent application of state rules, which leaves open
the possibility that differing damage computations under § 1983 may
result through application of state statutory alterations of the collateral
source rule.

IV. CHOICE OF LAW REGARDING THE COLLATERAL SOURCE RULE IN
SECTION 1983 LITIGATION

The question of damages in general, including the collateral source
rule, is not specifically addressed by 42 U.S.C. § 1983. Since the statute
is silent concerning the collateral source rule, federal courts must choose
whether to follow the law of the forum state or to create independent
federal doctrine to govern this area. Given the great differences between
the common law collateral source rule and state statutory constructions
of it, the choice of law issue here is a significant one. If courts may look
to state law for the appropriate form of the collateral source rule to apply
to § 1983 cases, the amount of damages awarded to prevailing plaintiffs
will vary depending on the location of the court in which the suit is
brought. Even if federal courts are required to apply a federal common
law collateral source rule to § 1983 actions, it is not clear whether state
courts would be required to apply the federal version. Another question
which must be addressed is whether there is a sufficient body of federal
law concerning the collateral source rule as applied to § 1983 and other
civil rights actions which may be utilized as a federal collateral source
rule in all § 1983 litigation.

101 See supra note 87.
102 See supra notes 40-45 and accompanying text.
103 See generally STEINGLASS, supra note 4 (raising the issue of whether state
courts must apply federal rules in the area of damages); Susan N. Herman, Beyond
(providing a more general discussion of the choice of law problem in state courts
entertaining § 1983 actions).
A. The Applicability of 42 U.S.C. § 1988 to Resolve the Choice of Law Problem Regarding the Collateral Source Rule

Congress attempted to provide guidance regarding choice of law for civil rights actions by enacting 42 U.S.C. § 1988, and courts have applied § 1988 to actions brought under § 1983. Section 1988, on its face, appears to require federal courts to look to state law on issues where the federal law is deficient. However, the language of the statute is not at all clear regarding such items as which source of federal law - present statutory, common, or other - is intended to be examined for deficiencies; what the term deficient means; or even what "common law" should be employed to fill in the gaps. As one commentator aptly stated, "[t]he few commentaries on this provision demonstrate conclusively that no one knows what it means. The language is baroque, and the legislative history of little help."

Supreme Court interpretation of § 1988 has not been entirely clear or consistent. The Court initially provided a broad approach to choice of law in civil rights actions. In Sullivan v. Little Hunting Park, the Court

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104 The choice of law provision in 42 U.S.C. § 1988 (1988) provides: 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 case is held, so far as the same is not inconsistent with the Constitution or 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 punishment on the party found guilty.

105 The applicability of § 1988 to § 1983 litigation is founded on the historical link between the two statutes. Section 1988, derived from the Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, 14 Stat. 27, was enacted first. The Civil Rights Act of 1871 (section 1 of which is now § 1983) was part of a group of Reconstruction Statutes enacted between 1866 and 1875, and as such, "incorporated by reference the procedures adopted by the Civil Rights Act of 1866 to govern federal civil rights actions." Seth F. Kreimer, The Source of Law in Civil Rights Actions: Some Old Light on Section 1988, 133 U. Pa. L. Rev. 601, 613 (1985). For a detailed historical derivation of § 1988, see Theodore Eisenberg, State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988, 128 U. Pa. L. Rev. 499 (1980).

106 See, e.g., Eisenberg, supra note 105 (thoroughly analyzing and criticizing § 1988, and proposing that it not be applied to § 1983 actions); Kreimer, supra note 105, at 615 (footnote omitted) (noting that Section 1988's "tortious syntax, read in light of its opaque legislative history, leaves substantial room for interpretation.").

107 Herman, supra note 103, at 1077.

gave an interpretation of § 1988 which permitted courts to look to both state and federal law for the most appropriate rules:

This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes . . . . 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.\(^{109}\)

Later, however, the Supreme Court identified a narrower, three-step approach to resolving the choice of law issue in civil rights actions in *Burnett v. Grattan.*\(^{110}\) The Fifth Circuit, which has utilized this three-part analysis extensively, succinctly summarized the approach in a recent § 1983 case:

This statutory scheme establishes a three part test for finding substantive law. First, if federal law is neither deficient nor inapplicable, it will apply. Second, if federal law does not apply, state law does apply, unless, third, state law would be inconsistent with the Constitution and the laws of the United States.\(^{111}\)

Despite the Supreme Court's identification of this deceptively simple analysis,\(^{112}\) which could be applied to all remaining § 1983 choice of law issues, the Court has only applied § 1988 analysis in a few, limited areas governing issues such as survival of civil rights actions\(^{113}\) and statutes of limitations.\(^{114}\) It has not applied the § 1988 choice of law language to its decisions on damage issues.\(^{115}\) The Supreme Court has not clearly articulated why it has chosen to apply § 1988 in only limited circumstances, or even whether § 1988 compels the use of state law in those

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\(^{109}\) Id. at 240.

\(^{110}\) 468 U.S. 42 (1984) (brought under 42 U.S.C. § 1981). The three-step process is described by the Supreme Court in *Burnett* as follows: First, courts are to look to the laws of the United States “so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.” *Ibid.* If no suitable federal rule exists, courts undertake the second step by considering application of state “common law as modified and changed by the constitution and statutes” of the forum State. *Ibid.* A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not “inconsistent with the Constitution and the laws of the United States.” *Ibid.*

\(^{111}\) Id. at 47-48 (quoting portions of 42 U.S.C. § 1988) (brackets in original).

\(^{112}\) Dobson v. Camden, 705 F.2d 759, 762 (5th Cir. 1983).

\(^{113}\) At first glance, the three-step process identified by the Supreme Court appears to be easy and mechanical in application. The confusion as to the language of § 1988, however, makes application very difficult since courts must first interpret the meaning of the statute. *See supra* notes 106-107 and accompanying text. Scholars do not agree on a single interpretation of the Supreme Court's application of § 1988 and hold widely divergent views on how § 1988 should be applied. *See infra* note 117.


\(^{116}\) *See* Steinglass, *supra* note 2, at 618 (noting that the Supreme Court “has all but ignored § 1988 and the law of the forum state in its damage cases.”).
limited instances in which the Court has applied it.\textsuperscript{116} This lack of clarity as to choice of law rules has lead to scholars describing the Supreme Court’s approach as ad hoc.\textsuperscript{117} As one recent commentator stated, “[t]here is no developed body of law governing choice of law in § 1983 cases, just a hodgepodge of different approaches.”\textsuperscript{118}

Other commentators have attempted to identify a pattern in the Supreme Court’s use of § 1988. Some view the Court’s application of § 1988 as an indication that the Court is drawing a distinction between substantive matters and procedural rules involved in § 1983 litigation.\textsuperscript{119} Under this analysis, the Supreme Court is viewed as saying that courts may apply § 1988 and look to state law regarding procedures to be applied, but that they may not do so regarding the substance of § 1983.\textsuperscript{120} It is not always clear, however, whether a rule is procedural or substantive.\textsuperscript{121} For example, statutes of limitations and survival actions may be considered substantive,\textsuperscript{122} yet under this analysis, they must be viewed as procedural. Problems with semantics aside, this view does make some sense in the context of § 1983. Statutes of limitations are uniquely legislative in nature,\textsuperscript{123} and when they are not included as part of a statute, they do not directly affect substantive rights granted by the statute.\textsuperscript{124} Similarly, survival of a cause of action is not integrally related to the substance of that action. It does nothing to further the definition of the cause of action and does not create a new cause of action.\textsuperscript{125} Thus, statutes of limitations and survival actions may be considered procedural in the sense that they are more closely related to the functioning of the judicial process than to

\textsuperscript{117} Id. at 54, 60 (noting this description of the Supreme Court’s approach to § 1988 and citing to Jennifer A. Coleman, 42 U.S.C. Section 1988: A Congressionally-Mandated Approach to the Construction of Section 1983, 19 IND. L. REV. 665 (1986)). Many scholars are critical of the Supreme Court’s confusing approach to § 1988. They offer a wide range of views regarding what § 1988 means and how it should be applied. Compare, e.g., Eisenburg, supra note 105 (proposing that § 1988 be applied only in cases which are brought under state law in a state court and then removed to federal court) with Kreimer, supra note 105 (arguing that the reference in § 1988 to common law should be interpreted as meaning some sort of general common law as opposed to any particular state’s common law. Thus, when federal law is deficient, courts may fill the gap by creating federal common law). For a brief review of the scholarly debate and analysis of the views held by several commentators, see Beermann, supra note 116, at 59-65.
\textsuperscript{118} Beermann, supra note 116, at 75.
\textsuperscript{119} See, e.g., Herman, supra note 103, at 1080 n.102.
\textsuperscript{120} Id.
\textsuperscript{121} Id. “[L]ong experience in diversity cases and in other areas of concurrent jurisdiction teaches that this distinction is more of a restatement of the problem than a resolution of it.” Id.
\textsuperscript{122} See 51 AM. JUR. 2d Limitation of Actions § 21 (1970) (attempting to distinguish when statutes of limitations are substantive and when they are procedural).
\textsuperscript{123} Id. at § 9.
\textsuperscript{124} Id. at § 21.
\textsuperscript{125} 1 AM. JUR. 2d Abatement, Survival, and Revival § 556 (1962).
the definition of statutory rights. Perhaps a better way of describing the Supreme Court's approach is that "the Court has generally developed uniform federal policies on issues that go to the substance of the § 1983 cause of action and that affect the underlying conduct § 1983 was intended to control," but has used § 1988 to allow resort to state law for issues that are not integrally related to the substance of § 1983 or to the underlying conduct. 126 While neither of these descriptions can fully account for the Supreme Court's application of § 1988 to § 1983 litigation, they do provide some framework for analysis. 127

Unlike statutes of limitations and survival issues, damages are directly related to substantive rights. They are closely tied to the substance of § 1983 in that they define the nature and scope of one type of available remedy. A right would have little value without an appropriate remedy for its violation. Damages also provide a deterrent influence on the underlying conduct proscribed by § 1983. 128 Viewed in this way, damages are more like immunities than statutes of limitations. Immunities relate to the extent of the right; they define who can be reached under the statute. Under § 1983, immunities are treated as an integral part of the statute and are dealt with under federal common law. 129 Similarly, damages in general are considered as part of the substantive portion of § 1983. The collateral source rule, whether applied directly as a rule of law or indirectly as a procedural rule of evidence, ultimately affects the substantive determination of damages. Therefore, under this view of the Supreme Court's application of § 1988, federal common law should govern the application of the collateral source rule in § 1983 litigation.

Another possible way of viewing the Supreme Court's approach to § 1988 is that the federal policy behind the approach is one of convenience, with manageability the key concern. It makes sense to apply state statutes of limitations to § 1983 litigation since a federal one does not exist in the context of § 1983. 130 Application of state survival policies to § 1983 claims may allow the federal remedy to be applied 131 where it would otherwise

126 Steinglass, supra note 2, at 618.
127 These views of the Supreme Court's application of § 1988 to § 1983 litigation are consistent with the Supreme Court's determination in Felder v. Casey, 487 U.S. 131 (1988). The Court in Felder held that a state notice-of-claim statute is not applicable to a § 1983 action brought in state court. Id. at 134. Notice-of-claim statutes are procedural; they do not go to the substance or affect the underlying behavior addressed by § 1983. See supra note 126 and accompanying text. Further, there is no federal notice-of-claim provision applicable to § 1983 actions. The Supreme Court in Felder, however, held that the mere absence of a federal notice-of-claim provision was not a deficiency and that the issue, therefore, was one of preemption. Id. at 138. Thus, the Court did not find it necessary to apply the § 1988 three-part test. In so holding, the Supreme Court provided further guidance as to when § 1988 does and does not apply to civil rights litigation.
128 See Steinglass, supra note 2, at 618.
129 Id.
abate due to lack of federal law to govern it in § 1983 actions.\textsuperscript{132} With regard to damages, however, the aspect of convenience is reversed. It may be easier, at least for appellate courts dealing with federal rights under § 1983, to apply an already-established uniform federal common law of damages rather than juggle the application of widely diverse state damage laws. The diversity and flux in state damage laws is evident in the recent statutory modification of the collateral source rule. Since damage policies differ greatly from state to state, application of state damage laws would make the value of the substantive right afforded by § 1983 vary according to the laws of the state in which the suit is brought. The Supreme Court appears to be attempting to avoid this result.

In a line of cases involving damage issues under § 1988,\textsuperscript{133} the Supreme Court consistently refused to use a § 1988 analysis to determine the choice of law. The Court did not look to the laws of the forum state, but instead applied the "principles derived from the common law of torts"\textsuperscript{134} to resolve the damage issues. Commentators and courts have interpreted the Supreme Court's apparent unwillingness to apply § 1988 choice of law language to § 1983 actions as an indication that, while resort to state law is acceptable to resolve some procedural issues even though inconsistencies result therefrom,\textsuperscript{135} the Supreme Court is strongly concerned with

\textsuperscript{132} A federal survival policy was applied in Carlson v. Green, 446 U.S. 14 (1980). \textit{Carlson} was a \textit{Bivens} action, a judicially-created counterpart to § 1983 directed at defendants acting under color of federal law who have violated a plaintiff's constitutional rights. In spite of the obviously analogous nature of the suit in \textit{Carlson} to a § 1983 action, there has been no indication by the Supreme Court that the federal survival policy utilized in \textit{Carlson} may be applicable to § 1983 litigation.


\textsuperscript{134} \textit{Stachura}, 477 U.S. at 158.

\textsuperscript{135} See Herman, supra note 103, 1062-83 (noting that state statutes of limitations, tolling statutes, survivorship statutes and collateral estoppel rules are borrowed by federal courts in § 1983 actions and that "[n]ationwide uniformity of procedure in section 1983 is not an overriding value"). While interstate uniformity as to procedural rules may not be of major importance to the Supreme Court, intrastate uniformity in procedures appears to be highly valued. For example, in Wilson v. Garcia, 471 U.S. 261 (1985), the Supreme Court limited the use of state law relating to statutes of limitations in § 1983 actions to determination of the length of the limitations period and issues related to tolling and application. The Court held that federal law governs the characterization of § 1983 actions, and that for statute of limitations purposes § 1983 should be uniformly characterized as a personal injury action. \textit{Id.} at 280. Both federal and state courts are to look only to the appropriate personal injury statute of limitations in each state for application to § 1983 litigation. Thus, while the statute of limitations will vary somewhat from state to state, intrastate uniformity is achieved in relation to statutes of limitations. \textit{See also} Felder v. Casey, 487 U.S. 131 (1988) (holding that a state notice-of-claim statute does not apply to § 1983 litigation partly because "its enforcement in state-court actions will frequently and predictably produce different outcomes in section 1983 litigation based solely on whether the claim is asserted in state or federal court" \textit{Id.} at 131).
nationwide uniformity in the substantive aspects of § 1983, such as the area of damages. This same concern for uniformity in the substance of the Civil Rights Acts was succinctly stated by the Third Circuit over two decades ago in Basista v. Weir.

We believe that the benefits of the Acts were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from state to state, and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the state in which the federal court suit was brought. Federal common law must be applied to effect uniformity, otherwise the Civil Rights Acts would fail to effect the purposes and ends which Congress intended.

Recent § 1983 cases carry on this theme of uniformity and emphasize the exhaustion of all potentially applicable federal law prior to turning to state law under § 1988. For example, the Eleventh Circuit in Gilmere v. City of Atlanta held that a federal rule of damages applied to remedy injuries suffered by a decedent which resulted from a deprivation of the decedent’s constitutional rights. The court expresses a concern for uniformity in its reasoning:

[Applying a federal standard of damages for injuries suffered by a decedent will promote consistency in the type and amount of damages awarded. Were we to follow the dissent’s rule and award damages provided in the state wrongful death statute, there would be three separate measures of damages for the unconstitutional deprivation of life in this circuit: the damages permitted by the wrongful death statutes of Alabama, Florida and Georgia. Under that scenario, it is not inconceivable that a plaintiff in one state would be awarded substantially more damages under her state’s wrongful death statute than another plaintiff who happens to live in a state with a different measure of damages for wrongful death.]

131340 F.2d 74 (3d Cir. 1965).

138 See, e.g., Berry v. City of Muskogee, 900 F.2d 1489, 1506 (1990); Gilmere v. City of Atlanta, 864 F.2d 734, 739 (1989); STEINGLASS, supra note 4, § 16.2 at 16-2 to 16-4 & n.18; Herman, supra note 103, at 1082.

135 Id. at 86.

140 Id. at 739. See also Berry v. City of Muskogee, 900 F.2d 1489 (1990). The court in Berry refused to apply a state survival statute supplemented with a state wrongful death statute to determine damages in a § 1983 case in which death occurred. The court expressed concern that borrowing the state policies would “place into the hands of the state the decision as to allocation of the recovery in a § 1983 case, and, indeed, whether there can be any recovery at all.” Id. at 1506. The court also noted that using state law “permits the state to define the scope and extent of recovery.” Id. The court in Berry ultimately concluded “that the federal courts must fashion a federal remedy to be applied to § 1983 death cases.” Id.
The Supreme Court has not clearly indicated what role, if any, state law may play in § 1983 actions. This has left the door open for courts to continue to apply state substantive law to some aspects of damages in § 1983 cases. For example, in Grandstaff v. City of Borger, the Fifth Circuit applied the substantive law of Texas to determine the damages recoverable by a § 1983 plaintiff for wrongful death, with the implication that § 1988 determines the choice of law governing damages for § 1983. There does appear to be some need for Supreme Court clarification in this area. But in spite of the approach employed by the Fifth Circuit, a majority of the other circuit courts of appeals agree that damages under § 1983 are to be governed by federal common law, and that the concern for nationwide uniformity should prevail with regard to the substantive aspects of the statute.

In relation to the collateral source rule, if courts are to look to state law for the appropriate rule, uniformity in computation of damages cannot

142 See supra notes 113-15 and accompanying text.
143 767 F.2d 161 (1985).
144 There is some difficulty analogizing from a wrongful death suit to other damage determinations under § 1983. Wrongful death actions present some unique choice of law problems because the choice of law issues involve more than just damage questions. Unresolved issues remain as to the availability of § 1983 as a wrongful death remedy. Wrongful death actions thus force the court to determine the availability of § 1983 as a wrongful death remedy in addition to determining damage issues. Courts have not agreed on either of these issues. Compare Berry, 900 F.2d 1489 (utilizing § 1988 to find that federal law is deficient with regard to wrongful killings, that state law in this area is inconsistent with federal interests in some instances, and that therefore, a federal remedy must be created) with Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961) (applying § 1988 to utilize state wrongful death and survival statutes as a remedy for wrongful killing in civil rights litigation). See also Steinglass, supra note 2 at 618-23.
145 The court in Grandstaff, without discussion, looked directly to Texas law to determine damages recoverable for wrongful death under § 1983. Grandstaff, 767 F.2d at 172. The court simply cited Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961), a case in which state law was applied via § 1988 to determine survival of a § 1983 action, as support for its choice of state law. In a later decision, Deselma v. City of Dallas, 770 F.2d 1334, 1337 n.5 (5th Cir. 1985), the court characterized Grandstaff as implying that § 1988 determines choice of law for damages under § 1983.
146 See, e.g., Figueroa-Rodriguez v. Aquino, 863 F.2d 1037, 1045 (1st Cir. 1988) (holding that "the measure of damages in section 1983 actions is a matter of federal common law"); Busche v. Burkee, 649 F.2d 509, 578 (7th Cir. 1981) (holding that "federal, not State, common law governs the determination of damages in § 1983 actions"); Basista v. Weir, 340 F.2d 74, 86 (3d Cir. 1965) (finding the application of federal common law necessary for uniformity).

Nationwide uniformity is not necessarily more favorable to the plaintiff. Insistence on uniformity may preclude courts from applying state law more favorable to the plaintiff. See, e.g., Gilmere v. City of Atlanta, 864 F.2d 734 (1989) (upholding the trial court's use of federal common law to measure damages for wrongful death even though application of state law would have resulted in a much greater award for the plaintiff); Herman, supra note 103, at 1079 n.98 (citing Monessen Southwestern R.R. v. Morgan, 486 U.S. 330 (1988), an FELA case with the same type of result as that in Gilmere).
exist. The growing divergence of state statutory collateral source rules and the common law rule will preclude such uniformity. The inference to be drawn from the more recent Supreme Court cases addressing damage issues under § 1983 and the majority opinion of the circuit courts is that there is no role for state law to play in relation to the collateral source rule. Thus, it would appear that federal courts should apply a federal common law collateral source rule to damage determinations in § 1983 actions.

Even applying the three-step § 1988 analysis results in the same conclusion.\(^{147}\) Under the more recent Supreme Court applications of § 1988, the first step is to determine if federal law on the collateral source rule is deficient or inapplicable.\(^{148}\) Considering the apparently broad reading given to federal law in these recent cases,\(^{149}\) it is difficult to see how that law is deficient with regard to the collateral source rule. A federal collateral source rule does appear to exist in the context of § 1983 litigation\(^ {150}\) and in actions brought under other federal causes of action.

\[B. \text{Application of the Collateral Source Rule to Other Federal Causes of Action}\]

Although the rule in its federal common law form has been applied in only a few § 1983 cases involving a limited variety of benefits,\(^ {151}\) the collateral source rule has been more fully developed in other federal causes of actions. An overview of collateral source rule application in other federal causes of action will indicate the extent to which a federal common law collateral source rule has been developed in these areas, and may yield some method of determining how the rule should be applied in § 1983 litigation.

The United States Supreme Court has addressed a number of damage issues in the context of § 1983 litigation,\(^ {152}\) but has not directly addressed the collateral source rule as it relates to § 1983. The Court has, however, upheld application of the federal common law collateral source rule in litigation based on other federal causes of action.

In National Labor Relations Board v. Gullett Gin Co.,\(^ {153}\) the Supreme Court held unemployment compensation benefits to be collateral, and that the NLRB did not abuse its discretion by applying the collateral source rule and refusing to reduce a backpay award by the amount of plaintiff's benefits. The Court reasoned:

\(^{147}\) See supra notes 110-11 and accompanying text.
\(^{149}\) See supra note 136 and accompanying text.
\(^{150}\) See supra notes 73-85 and accompanying text.
\(^{151}\) See supra notes 73-85 and accompanying text.
\(^{152}\) See supra note 3 and accompanying text.
\(^{153}\) 340 U.S. 361 (1951).
To decline to deduct state unemployment compensation benefits in computing back pay is not to make the employees more whole as contended by respondent. Since no consideration has been given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received. 154

In addition, the Court rejected the defendant's contention that the benefits were identified with the defendant, holding that unemployment compensation benefits are collateral even though the employer had paid into the fund through taxation. The court based its ruling on the fact that "the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state." 155 The Court also noted that the state would be allowed to recoup the unemployment compensation benefits from the plaintiff.

Applying the collateral source rule to disability pension benefits in a claim under the Federal Employers' Liability Act (FELA), 156 the Supreme Court in Eichel v. New York Central Railroad 157 held that evidence of such benefits was not admissible to indicate a motive for not returning to work since the evidence might be misused by a jury on the issue of damages. The Court stated, "(i)t has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse [by a jury]. Similarly, we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact." 158

Under the guidance of these Supreme Court decisions, federal courts have applied the collateral source rule to a number of different benefits in civil rights actions analogous to § 1983. Finding the Supreme Court's reasoning in Gullett Gin particularly persuasive, federal courts have used the rule to prevent reduction of damage awards by unemployment compensation in actions brought under 42 U.S.C. § 1981, 159 the Age Discrim-

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154 Id. at 364 (emphasis in original).
155 Id.
158 Id. at 255.
ination in Employment Act (ADEA), and Title VII. Social Security and disability benefits have been held to be collateral in ADEA, FELA, and Federal Torts Claims Act (FTCA) cases. In one FTCA case, the court held that medicare benefits could not be used to reduce a damage award. Welfare benefits were also considered as collateral recovery in a § 1981 action. Even vacation allowances have been ruled to be a collateral benefit in an ADEA action.

Other courts have been hesitant in extending the Supreme Court decisions to other areas. Due to the fact that many circuits hold that the application of the collateral source rule, along with most damage determination decisions, is within the discretion of the trial court, most of the circuit court decisions which decline to extend the application of the collateral source rule involve upholding a trial court's discretion in its application of the rule.

Although a majority of circuits still hold that application of the collateral source rule is within the discretion of the trial court, an increasing number of circuits are eliminating the trial court's discretion and instead requiring the collateral source rule to be brought into play to preclude

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163 Berg v. United States, 806 F.2d 978 (10th Cir. 1986).

164 Hunter v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986).

165 E.E.O.C. v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980).


167 See, e.g., Perry v. Larson, 794 F.2d 279 (7th Cir. 1986). "Most circuits including our own hold that the decision whether to deduct is within the discretion of the district court." Id. at 286 n.3.

168 See, e.g., Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743 (7th Cir. 1983) (holding that district court's deduction of unemployment compensation benefits and retirement pension benefits was a matter within the discretion of the district court in an ADEA action); E.E.O.C. v. Enterprise Ass'n Steamfitters, 542 F.2d 579 (2d Cir. 1976) (finding no abuse of discretion in the trial court's decision to deduct public assistance benefits from a backpay award in a Title VII case); Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969) (holding that deduction of unemployment compensation benefits was proper as a valid exercise of the trial court's discretion in a Title VII case).
deductions for some benefits in certain causes of action. For example, the Third, Fourth, Ninth and Eleventh circuits have held that unemployment compensation benefits may not be deducted from backpay awards in Title VII actions. Part of the reasoning behind these decisions appears to be a desire for uniformity. The Seventh Circuit also seems to be moving in this direction. In Hunter v. Allis-Chalmers Corp., the appellate court upheld the district court's use of the collateral source rule to refuse to deduct unemployment compensation and welfare benefits from the plaintiff's backpay award in a suit brought under 42 U.S.C. § 1981. The court concluded that "this circuit's rule, which allows the district judge in his discretion to deduct or not deduct unemployment benefits in Title VII cases (and, we may assume, substantively similar section 1981 cases), may be unduly favorable to defendants." The court also noted:

Our decisions allowing the [discretionary] deduction of unemployment benefits in Title VII cases may have been undermined by our recent holding that the collateral-benefits rule forbids a deduction for unemployment benefits in a civil rights damage suit. Perry v. Larson, 794 F.2d 279, 285-86 (7th Cir. 1986). Perry was a suit under 42 U.S.C. § 1983; the present case is under 42 U.S.C. § 1981, but it is not obvious why that should make a difference.

There is some difficulty analogizing from other federal causes of action to § 1983. The difficulty is due in part to differences in legislative purpose and statutory language. But more importantly, some of the analogous civil rights cases differ from § 1983 actions in their use of state law. In

169 See Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983); Brown v. A.J. Gerrard Mfg. Co., 715 F.2d 1549 (11th Cir. 1983); Kauffman v. Sidereal Corp., 695 F.2d 343 (9th Cir. 1982); E.E.O.C. v. Ford Motor Co., 645 F.2d 183 (4th Cir. 1981), rev'd, 458 U.S. 219 (1982) (decision not disturbed with respect to collateral source rule holding). While purporting to eliminate discretion on the part of the trial court, the Third Circuit has not taken an absolute approach to deduction of unemployment compensation. In Dillon v. Coles, 746 F.2d 998 (3d Cir. 1984), the court sidestepped the Pennsylvania legislature by taking a novel approach to damage award reduction in a Title VII suit. The defendant in the case was a state juvenile detention facility operated by the Pennsylvania Department of Public Welfare. The court distinguished Craig, 721 F.2d 77, and held that unemployment compensation and public assistance benefits should be deducted from the damage award. Id. at 1006-07. The court reasoned that even though a Pennsylvania statute provided for recoupment of those benefits in a backpay award situation, it would be a waste of taxpayers' money to make the state sue for recoupment when award reduction would accomplish the same objective. Id. at 1007.

170 797 F.2d 1417 (7th Cir. 1986).

171 Id. at 1429.

172 Id. at 1428-29.

173 These differences are apparent when comparing FELA cases and § 1983 actions with regard to choice of law. For an analysis of the differences between FELA and § 1983 with focus on choice of law issues, see Herman, supra note 103, at 1104-09.
this regard, FTCA cases are probably the least analogous since under that Act, damages in general are determined by state law,\textsuperscript{174} and the collateral source rule, in particular, has been held to be governed by state law.\textsuperscript{175} On the opposite end of the spectrum, Title VII and ADEA damage decisions, including application of the collateral source rule, are determined according to federal common law, with no reference to state law.\textsuperscript{176} Section 1981 litigation, however, is identical to § 1983 litigation with regard to choice of law since § 1981 is another of the post-Civil War Federal Civil Rights Acts.\textsuperscript{177} Thus, cases under § 1981 may apply directly to solving the problem regarding the collateral source rule in § 1983 actions. It may be significant, for example, that the Seventh Circuit in Hunter\textsuperscript{178} chose to base its decision regarding the application of the collateral source rule in a § 1981 case on federal common law, rather than turning to the law of the forum state.

Choice of law under § 1983 falls somewhere between the extremes of looking solely to federal common law and extensive borrowing of appropriate state law. For instance, the Supreme Court has held that statutes of limitations\textsuperscript{179} and survival actions\textsuperscript{180} under § 1983 are governed by state law, but immunities\textsuperscript{181} and availability of damages\textsuperscript{182} are to be determined by federal common law.\textsuperscript{183} Since § 1983 appears to be somewhat of a hybrid as to choice of law, examination of analogous causes of action provides only limited guidance. What can be drawn from the other civil rights cases though, is that the federal common law collateral source rule is quite well-developed in the general area of federal civil rights litigation, in spite of the limited opportunities courts have had to deal with it.

Applying the federal common law collateral source rule in § 1983 cases, courts have held that public assistance benefits and unemployment compensation payments are from collateral sources and may not be used to reduce damage awards.\textsuperscript{184} In a § 1981 case, the court looked to federal common law to determine that welfare payments constituted a collateral

\textsuperscript{175} See Feeley v. United States, 337 F.2d 924 (3d Cir. 1964). "[B]efore the collateral source doctrine will be applied in a Federal Tort Claims Act case, it must appear that the law of the state in which the wrong occurred would apply the doctrine." 35 AM. JUR. 2D Federal Tort Claims Act § 110 (1967).
\textsuperscript{176} ADEA and Title VII cases require use of federal common law partly for manageability reasons. Since both may involve multi-state employers and class action suits, it would be virtually impossible to sort out the relationship between various state laws and various parties.
\textsuperscript{178} 797 F.2d 1417 (7th Cir. 1986).
\textsuperscript{180} Robertson v. Wegmann, 436 U.S. 584 (1978).
\textsuperscript{181} Martinez v. California, 444 U.S. 277 (1980).
\textsuperscript{183} See also Herman, supra note 103, at 1079.
\textsuperscript{184} See supra notes 73-85 and accompanying text.
benefit.\textsuperscript{185} A court dealing with welfare payments in a § 1983 suit should reach the same result. Exactly what approach courts entertaining § 1983 actions will take with regard to other types of benefits is not entirely clear. Assuming that federal courts must apply the federal common law collateral source rule, and given the Supreme Court's fairly broad definition of federal law in § 1983 litigation, courts may analogize to Title VII, ADEA and FELA actions for application of the federal common law collateral source rule. Analogizing to these other civil rights actions for federal common law is reasonable and would provide a method of dealing with a number of benefits which have not yet been questioned in § 1983 litigation. In addition, the reasoning applied in Title VII, ADEA and FELA cases could reveal a method of analysis that federal courts could apply to new types of benefits issues which are not likely to arise in other federal civil rights litigation.\textsuperscript{186}

\section*{C. The Federal Common Law Collateral Source Rule in State Courts Entertaining Section 1983 Actions}

Even if there is a sufficiently developed body of federal common law to govern the collateral source rule in § 1983 actions brought in federal courts, an additional question exists as to whether state courts entertaining § 1983 actions may continue to look to the law of their state to resolve this damage issue. Most state courts have, on "first generation" damage issues, followed federal common law.\textsuperscript{187} In addition, commentators on this question agree that "state courts must follow the 'substance' of section 1983,"\textsuperscript{188} but may apply state procedural rules. Although it may

\textsuperscript{185} See Hunter v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986). \textit{See also supra} notes 177-78 and accompanying text.

\textsuperscript{186} Some of these benefits, such as medicare and private medical insurance benefits, seem to arise more frequently as issues in FTCA cases. Courts entertaining § 1983 actions cannot analogize to FTCA actions, however, since state, rather than federal law is applied to damage determinations in FTCA suits. \textit{See supra} note 175 and accompanying text.

\textsuperscript{187} \textit{See STEINGLASS, supra} note 4, § 16.3 at 16-5 to 16-6 & n.26. \textit{See also Brody v. Leamy, 393 N.Y.S.2d 243 (Sup. Ct. 1977) (holding that damages recoverable under Section 1983 are governed by federal common law); Rogers v. Saylor, 746 P.2d 718 (Or. Ct. App. 1987) (noting the development of federal common law relating to damages for § 1983 claims); Orr v. Crowder, 315 S.E.2d 593 (W. Va. 1984) (noting the existence of a federal common law of damages in § 1983 litigation, but applying the state collateral source rule); Barnhill v. Board of Regents of UW System, 462 N.W.2d 249 (Wis. Ct. App. 1990) (stating that punitive damage awards under § 1983 are governed by the federal common law of damages. \textit{But see Boulder Valley School Dist. R-2 v. Price, 805 P.2d 1085 (Colo. 1991) (using § 1988 analysis to apply state law concerning the burden of proof for finding punitive damages in a § 1983 case); Ricard v. State of Louisiana, 390 So. 2d 882 (La. 1980) (refusing to apply federal common law which allows punitive damages and holding that punitive damages are not available in § 1983 actions brought in Louisiana state courts).}

\textsuperscript{188} See, e.g., Herman, \textit{supra} note 103, at 1060-61.
be difficult in some instances to determine whether a particular rule is substantive or procedural, \(^{189}\) that is not the case with the collateral source rule. This rule of damages can directly affect the size of damage awards, and thus is a part of substantive common law of damages. Since the collateral source rule has been applied to § 1983 actions in a federal common law form, that rule should also apply to § 1983 suits heard in state courts to help effect the uniformity of substance which is desirable in civil rights litigation. In addition, allowing state courts to refuse to apply the federal common law collateral source rule to § 1983 actions could increase forum shopping. The disadvantages to plaintiffs in states like Ohio, which has enacted collateral source rule reform legislation arguably applicable to § 1983 litigation, could strongly influence the choice of a federal forum over a state one.\(^{190}\)

V. CONCLUSION

The fact that there is no direct Supreme Court guidance or clear circuit court consensus on the appropriate collateral source rule to apply to damage determinations in § 1983 actions has resulted in some lack of uniformity in § 1983 damage awards. While uniformity in all aspects of § 1983 litigation has never been of overriding importance in relation to damage determination issues such as the collateral source rule, uniformity should be a primary consideration because of the way in which damages aid in defining the rights involved in § 1983 actions. If courts may continue to look to state law for the appropriate rule, this lack of uniformity in a substantive area of § 1983 may increase as additional states enact statutes altering the common law collateral source rule. The resulting differences in the relief afforded to § 1983 plaintiffs in various forums argues strongly against allowing the application of state collateral source rules to damage awards. The remedy provided by § 1983 must be the same for all persons whose constitutional rights have been violated, regardless of the state in which the suit is brought.

Opponents of the collateral source rule may have the better argument; they have, after all, convinced a good number of state legislatures to alter a common law rule which has been firmly established for over a century.

\(^{189}\) See supra notes 120-27 and accompanying text.

\(^{190}\) See generally Steinglass, supra note 4, § 10.1 at 16-1 (noting that state court "reliance on state policies in § 1983 litigation may deny plaintiff a forum that can reach the merits of their federal claims and provide full relief," thus forcing potential state court litigants to choose a federal forum). See also Felder v. Casey, 487 U.S. 131 (1988) (expressing a concern for creating a situation conducive to forum shopping by reasoning in part that use of state notice of claim statutes would produce different outcomes depending only on whether the suit was brought in state or federal court). The Louisiana Supreme Court's decision in Ricard v. State of Louisiana, 390 So. 2d 882 (La. 1980), which held that punitive damages are not available in § 1983 actions brought in Louisiana courts, is a good example of forcing certain litigants to shop for the best forum. If a plaintiff in Louisiana wishes to pursue punitive damages under § 1983, he must bring the action in federal district court or lose the possibility of recovering those damages.
Perhaps the federal rule should also be modified or abolished altogether.\textsuperscript{191} At present, however, the common law collateral source rule is most definitely an established part of federal common law and as such, should apply uniformly to civil rights actions such as § 1983. If the rule needs to be changed in the federal context, it should be judicially altered or statutorily modified by Congress, not changed in a piecemeal and inconsistent manner through application of widely varying state rules.

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\textsuperscript{191} A majority of commentators would opt for complete abrogation of the collateral source rule. See, e.g., Dobbs, supra note 10; Fleming, supra note 8; William Schwartz, The Collateral Source Rule, 41 B.U.L. Rev. 348 (1961); see also Kenneth S. Abraham, What is a Tort Claim? An Interpretation of Contemporary Tort Reform, 51 Md. L. Rev. 172, 190-96 (1992) (interpreting legislative alteration of the collateral source rule as a positive move toward a more equitable compensation system in tort law). But see Branton, supra note 8 (arguing that a truly objective perspective requires retention of the rule in the interests of equity).