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CASE COMMENTARY

SHAW V. GARRISON: SOME OBSERVATIONS ON 42 U.S.C. § 1988 AND FEDERAL COMMON LAW

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Although the bundle of statutes loosely tied together with the phrase "Federal Civil Rights Acts" attempts to resolve a great variety of problems, gaps appear that must be filled by the courts. *Shaw v. Garrison*[1] presents a novel situation highlighting the difficulties of filling those statutory gaps. Plaintiff instituted suit in a federal district court in Louisiana for damages against a state district attorney as well as private citizens who, he asserted, conspired to deprive him of his civil rights. He claimed that bad faith prosecutions on various criminal charges, instituted and conducted by the district attorney and encouraged by the private citizens, gave rise to claims under 42 U.S.C. §§ 1983,[2] 1985,[3] and 1986.[4] Years after he had filed his claims and months before he was scheduled to present them to the jury, plaintiff died, leaving no surviving parents, wife, children, or siblings. His executor moved to be substituted as the plaintiff, and the defendants moved to dismiss on the grounds of abatement.[5]

The district court began its analysis with consideration of 42 U.S.C. § 1988, which provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of

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1. 391 F. Supp. 1353 (E.D. La. 1975).

2. 42 U.S.C. § 1983 (1970): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. 42 U.S.C. § 1985 (1970).

4. 42 U.S.C. § 1986 (1970). Plaintiff had previously been granted a permanent federal injunction against further criminal prosecution on the latest set of state charges instituted against him. Shaw v. Garrison, 328 F. Supp. 390 (E.D. La. 1971), *aff'd*, 467 F.2d 113 (5th Cir. 1972).

5. Defendants also successfully moved for dismissal of claims predicated on 42 U.S.C. §§ 1985, 1986 (1970). That phase of the court's opinion will not be treated in this commentary.

> 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, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Relying on legislative history that indicated a strong concern for the protection of civil rights, the court discerned a "deficiency" in federal law to the extent that it did not provide for survival of the section 1983 action. It acknowledged the possibility of survival, even though federal statutes are silent on this issue. Indeed, the Fifth Circuit's earlier holding in *Brazier v. Cherry*[6] mandated resort to state law in this case.

Resort to state law, however, would have posed problems for the plaintiff. Louisiana law, which the court felt obliged to interpret as accurately and as sympathetically for section 1988 purposes as it would in a diversity case,[7] would not allow survival. Although a Louisiana Code of Civil Procedure provision might support an unqualified substitution by the executor,[8] Louisiana Civil Code article 2315,[9] as interpreted

6. 293 F.2d 401 (5th Cir. 1961), *noted in* 24 GA. B.J. 414 (1962); 14 STAN. L. REV. 386 (1962); 40 TEX. L. REV. 1050 (1962); 15 VAND. L. REV. 623 (1962); 47 VA. L. REV. 1241 (1961).

7. 391 F. Supp. at 1363.

8. LA. CODE CIV. P. art. 428.

9. LA. CIV. CODE art. 2315: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2)

by the state judiciary,[10] restricts survival actions to certain enumerated surviving beneficiaries. Shaw had no statutory survivors, an executor being a proper survivor only to actions for property damage. The court found the characterization of damages as injury to property more artful than apt in this case.

Nevertheless, the court approved substitution of the executor, finding a qualification in the command of section 1988 to apply state law: the state law must not be *"inconsistent with the Constitution and laws of the United States. . . ."*[11] Abatement of a civil rights case already filed,[12] it held, would be inconsistent with the broad remedial purposes of the Congress that enacted section 1983. If the adequate protection of civil rights requires survival actions for their deprivation, state law may help accomplish that end. However, if state law is inadequate for the task, then federal common law, in conflict with state statute, must be pressed into service.

Shaw, then, raises difficult and important questions about the proper interpretation of section 1988 and its interplay with federal common law. The legislative history sheds dim light on the statute's meaning. Introduced as part of the Civil Rights Act of 1866,[13] the provision later codified in section 1988 provided for original civil jurisdiction and exclusive

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the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

As used in this article, the words 'child,' 'brother,' 'sister,' 'father,' and 'mother,' include a child, brother, sister, father, and mother, by adoption, respectively. (*Amended by Acts* 1948, *No.* 333, § 1; *Acts* 1960, *No.* 30, § 1)."

10. The court relied on *J. Wilton Jones Co. v. Liberty Mut. Ins. Co.*, 248 So. 2d 878 (La. App. 4th Cir. 1970), *cert. denied*, 259 La. 61, 249 So. 2d 202 (1971), which the court found (391 F. Supp. at 1363) to have been "cited with apparent approval" in *Austrum v. City of Baton Rouge*, 282 So. 2d 434, 439 (La. 1973). *But see generally* King v. Cancienne, 316 So. 2d 366, 368 (La. 1975).

11. 391 F. Supp. at 1358-59 (court's emphasis).

12. The court emphasized that it was dealing with a case in which suit had been instituted before death. *Id.* at 1361. Presumably, for reasons not explicitly set forth, had Shaw not filed during his life, his executor might have been barred, even though the latter filed a timely petition.

13. Act of April 9, 1866, ch. 31, § 3, 14 STAT. 27. This section was reenacted in Act of May 31, 1870, ch. 114, § 18, 16 STAT. 144.

criminal jurisdiction of offenses under the 1866 Act; it also established removal jurisdiction of civil and criminal cases from state courts when the defendant was denied or could not enforce rights secured by the 1866 Act. This provision received virtually no attention in the legislative debates, which concerned themselves with the bill's more controversial features. Senator Trumbull's initial presentation of the bill merely stated, without comment, the terms of the provision.[14] Representative Thayer of Pennsylvania objected that the bill conferred "upon the courts the power of judicial legislation .... [T]he Federal Courts may ... make such rules and apply such law as they please, and call it *common law*."[15] President Johnson's veto message (his veto was quickly overridden) criticized, besides other features of the bill, the application of federal penal laws in criminal cases removed from state courts.[16]

Thayer's criticism of the provision certainly missed the mark. In the *Swift v. Tyson*[17] era, federal courts regularly applied general common law in the resolution of diversity cases, when no federal or state statute supplied a rule of law; so to say that under the 1866 Act they would be doing the same thing in the civil cases within the jurisdiction granted by the Act is hardly a severe indictment. Indeed, the statute seems to state the *Swift v. Tyson* rule: if no federal law (statute)[18] governed, general common law applied unless a state constitutional or statutory provision conflicted with or modified the general common law.[19] The requirement that state provisions not be inconsistent with the Constitution and laws of the United States states the obvious; namely, the supremacy clause of the Constitution would continue to play its role in the law selection process.[20]

Erie Railroad v. Tompkins,[21] although it repudiated *Swift v. Tyson*, has been qualified to allow for the existence of

14. CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866).

15. *Id.* at 1271.

16. *Id.* at 1680. This application of the statute was also criticized in *Tennessee v. Davis*, 100 U.S. 257, 272 (1880) (Clifford, J., dissenting).

17. 41 U.S. (16 Pet.) 1 (1842).

18. Justice Story's opinion clearly holds that "laws" are not the opinions of judges. Rather, laws are statutes or "long-established" customs. *Id.* at 18-19.

19. *See* Basista v. Weir, 340 F.2d 74, 85-86 n.10 (3d Cir. 1965).

20. U.S. CONST. art. VI, § 2.

21. 304 U.S. 64 (1938).

"federal common law"[22] in areas of special federal interest or concern. While this process of qualification has not brought the return of *Swift v. Tyson*, when federal common law is appropriate, the search for the appropriate rule of law is less fettered by the content of state statutory law.[23] A purist might argue that the *Swift v. Tyson* rule should continue to apply in civil rights cases since the legislative will expressed in section 1988 is clearly enough stated that the Court's pronouncements in *Swift* and in *Erie* about the meaning of the more imperfectly executed Rules of Decision Act[24] do not affect the construction of the Civil Rights Act. However, *Shaw* indicates that section 1988 has not fossilized *Swift v. Tyson*,[25] and the choice of law process in civil rights cases is now quite complicated.

Under *Swift v. Tyson*, the search for common law was in no way limited to the decisional law of the state where the federal court sat, although local law might provide insight into the proper common law rule for the federal court to apply.[26] Generally, the federal courts have taken the same approach in civil rights cases. Most especially in cases where the proper limits of defenses are drawn into question, the federal courts apply a common law rule in no way mandated by the local law of the jurisdiction where the case may happen to be heard.[27] For example, a number of federal courts have taken the position, contrary to traditional common law principles recognized in most states, that in police misconduct suits the officer may defend on the ground that at the time of the alleged deprivation, he thought reasonably and in good faith that he was not inflicting a deprivation of constitutional rights.[28] Surprisingly enough, the courts, on this issue as well

22. This development is set out and praised in Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964). *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 756-832 (2d ed. 1973) (exhaustive collection of cases and commentary).

23. *See* notes 35-36, *infra*, and accompanying text.

24. 28 U.S.C. § 1652 (1970).

25. Indeed, one court has greatly minimized the relevance of this statute to the questions of federal law and policy which arise in federal civil rights cases. *See* Baker v. F & F Investment Co., 420 F.2d 1191, 1196 n.7 (7th Cir. 1970).

26. 41 U.S. (16 Pet.), 1, 19 (1842).

27. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 318 n.9 (1975).

28. *See, e.g.*, Bivens v. Six Unknown Named Agents of the Federal

as on others in which they rely on federal common law,[29] seldom place express reliance on section 1988.

Although courts generally search for federal common law without granting any binding effect to state decisional laws, the Supreme Court's decision in *Sullivan v. Little Hunting Park*[30] suggests that local decisional law may sometimes supply the rule of decision. In that case, plaintiff sought damages for violation of 42 U.S.C. § 1982. Although that section does not provide an express remedy for its breach, the Court granted an implied remedy and remanded for further consideration. In commenting on the measure of damages, the Court said that a federal standard should apply and that section 1988 supplied that standard:

> As we read § 1988 . . . both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. . . . [T]he rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired.[31]

Although the Court denominates as federal the law eventually applied, it seems that the state law under this formulation plays a role denied it by *Swift v. Tyson.* Since in most states damages law is mostly judge-made, *Sullivan* clearly contemplates an application of a state's judge-made law. If the local rule, either alone or in conjunction with federal law, better promotes protection of civil rights than the application of federal law only, then the judge must apply state law,

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Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972); Theis, *"Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights*, 59 MINN. L. REV. 991 (1975).

29. *See, e.g.*, Tillman v. Wheaton—Haven Recreation Ass'n, Inc., 517 F.2d 1141 (4th Cir. 1975) (liability of corporate directors, a matter of federal law); Boyd v. Adams, 513 F.2d 83 (7th Cir. 1975) (validity of release a matter of federal law); Burton v. Waller, 502 F.2d 1261 (5th Cir. 1974); Johnson v. Greer, 477 F.2d 101 (5th Cir. 1973) (proximate cause a matter of federal law); District of Columbia v. Carter, 409 U.S. 418 (1973) (availability of negligence claim a matter of federal law); Martin v. Duffie, 463 F.2d 464 (10th Cir. 1972) (burden of proof a matter of federal law); Anderson v. Nosser, 456 F.2d 835 (5th Cir. 1972) (proximate cause a matter of federal law); Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970) (same issue and holding as in *Carter*); Caperci v. Huntoon, 397 F.2d 799 (1st Cir. 1968) (availability of punitive damages a matter of federal law).

30. 396 U.S. 229 (1969).

31. *Id.* at 240.

whether it be decisional or statutory. Presumably, on the issue of damages in civil rights cases, more is better.[32] Hence, the judge must award damages for whatever items of recovery would be allowed under the law of the state where he sits, even though the applicable precedent might demand that the particular items are not recoverable under the federal common law.

Besides a lack of uniformity in damage awards,[33] *Sullivan*'s language creates severe difficulties of reconciliation. To what extent are more liberal state decisional rules applicable to issues other than the award of damages? Must the federal courts apply local decisional law whenever it enhances the plaintiff's possibility of recovering?[34] If that is *Sullivan*'s message, then the development of defenses in police misconduct suits, as in the earlier example, has no practical effect in states which adhere to a more objective standard. It is unlikely, however, that the federal courts that have so drastically departed from traditional, prevailing principles of common law would allow their efforts to be undone so easily. State decisional law will continue to expand the horizons of federal common law; but it is difficult to believe that, except in the area of damages, it will have an independent force.

The federal courts' post-*Erie* development of federal common law makes unlikely the survival of the assumptions codified in section 1988. In cases other than civil rights cases, the trend of the decisions is to fill the gaps in federal statutory schemes with federal common law or with state law, without regard to the latter's character as statutory or decisional.[35] If state law, whatever its source, conflicts with over-

32. *But see* Salazar v. Dowd, 256 F. Supp. 220 (D. Colo. 1966).

33. Before *Sullivan*, uniformity of awards was regarded as a desirable goal. *See* Caperci v. Huntoon, 397 F.2d 799 (1st Cir. 1968); Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).

34. A few cases have applied local decisional law to impose vicarious liability on supervisory law enforcement personnel. *See* Scott v. Vandiver, 476 F.2d 238 (4th Cir. 1973); McDaniel v. Carroll, 457 F.2d 968 (6th Cir. 1972); Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955). Contrary to the suggestion of *McDaniel*, these cases do not pose an issue of "damages." Thus, they appear to be the only cases outside the damages area that grant state decisional law an independent force, contrary to the command of section 1988. *Moor v. County of Alameda*, 411 U.S. 693 (1973), discussed in text accompanying notes 42-46, *infra*, has disapproved these holdings to the extent that they rely on any state law, statutory or decisional.

35. *See* United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973); UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966); Free v. Bland, 369 U.S.

riding federal policy, although not directly with a federal statute, then it must give way.[36] *Shaw*'s reading of section 1988 parallels this development found in other areas; "inhospitable" state statutes may be discarded.[37]

It is this author's projection that any state statute, other than a statute of limitations,[38] which inhibits plaintiff's case more than would federal common law will be found "inhospitable." Generally, state statutes have been considered only for the beneficial effect they would have on the plaintiff's case.[39] If the federal policy in favor of the protection of civil rights is a strong one, as the federal courts frequently insist,[40] then local concerns reflected in state statutes that stand to bar or diminish plaintiff's chances of recovery will likely give way.[41] *Sullivan v. Little Hunting Park* clearly contemplates that all state damages rules, even those found in statutes, must give way to federal rules, decisional as well as statutory, that better advance federal policy.

Beyond *Shaw*, the United States Supreme Court's recent decision in *Moor v. County of Alameda*[42] raises the question whether there are instances in which neither federal common

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663 (1962); De Sylva v. Ballentine, 351 U.S. 570 (1956); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942).

36. *See, e.g.*, Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) (Florida statute ousted by federal admiralty common law); Roberson v. N.V. Stoomvaart Maatschappij, 507 F.2d 994 (5th Cir. 1975).

37. *Sullivan*, discussed in text accompanying notes 30-37, *supra*, certainly leaves open the possibility that federal common law may oust state law, whatever its source, statutory or decisional.

38. O'Sullivan v. Felix, 233 U.S. 318 (1915) (civil rights act cases subject to state statutes of limitations). The application of state statutes of limitations is a special situation not inconsistent with prior observations. The federal courts have always been concerned lest a federal right be of infinite duration. *See, e.g.*, Campbell v. Haverhill, 155 U.S. 610, 616-17 (1895). Since the setting of limitations is not a task performed well by the judiciary, the adoption of local statutes is better than no statute at all. *See* Note, 53 COLUM. L. REV. 68, 72 (1953). Only if the state statute discriminates against federal suits might rejection of the state statute be proper. *See* Campbell v. Haverhill, *supra*.

39. *See, e.g.*, Hall v. Wooten, 506 F.2d 564 (6th Cir. 1974); McDaniel v. Carroll, 457 F.2d 968 (6th Cir. 1972); Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961); Pritchard v. Smith, 289 F.2d 153 (8th Cir. 1961); Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974); Perkins v. Sulafia, 338 F. Supp. 1325 (D. Conn. 1972); Galindo v. Brownell, 255 F. Supp. 930 (S.D. Cal. 1966).

40. *See, e.g.*, Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961); Shaw v. Garrison, 391 F. Supp. 1353 (E.D. La. 1975).

41. *See* notes 35-36, *supra*, and accompanying text.

42. 411 U.S. 693 (1973).

law nor state law may be employed under section 1988. In that case plaintiffs argued that, notwithstanding *Monroe v. Pape*'s[43] holding on municipal liability, California statutes providing for municipal liability allowed recovery. Although defendant was not a "person" within the meaning of section 1983, it was liable under the California statutes, as incorporated by section 1988. The Court, in rejecting this attempt to undermine *Monroe*, a decision it found firmly rooted in legislative history, declared:

> Properly viewed . . . § 1988 instructs the federal court as to what law to apply in causes of action arising under federal civil rights acts. But we do not believe that the section, without more, was meant to authorize the wholesale importation into federal law of state causes of action . . . . Considered in context . . . § 1988 . . . was obviously intended to do nothing more than to explain the source of law to be applied in actions brought to enforce the substantive provisions of the Act. . . .[44]

Importantly, the remarks on the role of state law make no distinction between state statutes and decisional law.[45]

Moor adds a cautionary note. Although section 1988 provides the courts with two sources of law, they may not employ those sources unless they are protecting interests found in other "provisions of the Act." Unlike the approach under *Swift v. Tyson*, the basic interests to be protected through legal action must find their roots in federal statute apart from section 1988.[46]

In the context of *Shaw*, the application of state survival

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43. 365 U.S. 167 (1961).

44. 411 U.S. at 703-05.

45. The Court criticizes in a footnote (*id.* at 704 n.17) two cases imposing vicarious liability, lumping them together even though one decision rested on state statutory law and the other on state decisional law.

46. This limitation is as stringent as the limitations found in post-*Erie* federal common law. *Compare* United States v. Gilman, 347 U.S. 507 (1954); United States v. Standard Oil Co., 332 U.S. 301 (1947), *with* Cotton v. United States, 52 U.S. (11 How.) 229 (1850). It should be noted, however, that *Moor* in no way disapproves the well-known technique of implying remedies from federal statutes. Implying a cause of action is a device frequently used by the Court. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 798-800 (2d ed. 1973). The Court may have tightened up the availability of the device in *Cort v. Ash*, 422 U.S. 66 (1975), 95 S. Ct. 2080 (1975).

statutes seems to cause no problems. By definition, these create no state cause of action; they merely allow a federal cause of action to survive. Only the decedent's interests are protected. However, not all state statutes can be so neatly categorized. Some, as does Louisiana Civil Code article 2315, include in addition to survival recovery elements of wrongful death recovery, that is, protection of the survivors' own interests.[47] Even in some states which ostensibly distinguish between survival and wrongful death recovery, survival recovery includes compensation for diminution of the decedent's estate, which realistically seems to protect the survivors' interests.[48]

If section 1988 can be employed only "in actions brought to enforce the substantive provisions of the Act,"[49] protection under state or federal law of the survivors' interests seems inappropriate. *Brazier*, it is argued, incorrectly extended[50] recovery to protect the survivors' interests. Nothing in the text of section 1983 sanctions the protection of their interests. Although the survivors of a person whose life was taken as the result of a deprivation of constitutional rights may be "injured," "the party injured" in the text of section 1983 refers only to the victim of a deprivation of constitutional rights. It would be a strained reading of section 1983 to say that the "person" deprived of his rights and the "party injured" were not always identical. A deprivation leading to death would not deprive the members of the family of constitutional rights belonging to themselves.[51] Although *Brazier* had a justifiable concern lest death—either fortuitous or intentionally inflicted—absolve a wrongdoer,[52] the interest to be protected is the vindication of the *decedent's* constitutional rights. State law insofar as it protects the survivors' interests may properly be considered only with respect to whatever pendent state law claims they may wish to present.

47. Until *Callais v. Allstate Ins. Co.*, No. 56,120 (La. Sup. Ct., Nov. 4, 1975), the Louisiana Supreme Court had held that article 2315 created one cause of action. *E.g.*, Reed v. Warren, 172 La. 182, 136 So. 59 (1931).

48. For a brief discussion of the various statutory schemes, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 126-27 (4th ed. 1971).

49. Moor v. County of Alameda, 411 U.S. 693, 705 (1973).

50. 293 F.2d at 407 & n.15.

51. *But see* Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974). Only section 1986 provides recognition of the survivors' interests and that is a highly limited recognition.

52. 293 F.2d at 404 & n.9.

The pattern resulting from *Shaw* and *Moor* is not the tidy one that strict adherence to section 1988 might have produced. Federal common law fills in statutory gaps; it protects only the interests given recognition by statute. State law, if more beneficial to plaintiff, at least in the area of damages, may oust federal common law. State statutes, except statutes of limitations, receive no special deference; they may be swept away. Although this untidy state of affairs is disturbing, the "new" federal common law will probably proceed without too much concern for the antique framework of section 1988.