



New Mexico Law Review

13 N.M. L. Rev. 555 (Spring 1983 1983)

Spring 1983

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Recommended Citation

Andy G. Schultz, *Federal Civil Rights Act - The New Mexico Appellate Court's Choice of the Proper Limitations Period for Civil Rights Actions Filed under 42 U.S.C. 1983: DeVargas v. State ex rel. New Mexico Department of Corrections*, 13 N.M. L. Rev. 555 (1983).
Available at: <https://digitalrepository.unm.edu/nmlr/vol13/iss2/18>

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FEDERAL CIVIL RIGHTS ACT—THE NEW MEXICO APPELLATE COURTS' CHOICE OF THE PROPER LIMITATIONS PERIOD FOR CIVIL RIGHTS ACTIONS FILED UNDER 42 U.S.C. § 1983: *DeVargas v. State ex rel. New Mexico Department of Corrections*.

In *DeVargas v. State ex rel. New Mexico Department of Corrections*,¹ the New Mexico Supreme Court affirmed the court of appeals' determination that the limitations period governing the New Mexico Tort Claims Act² is applicable to federal civil rights actions filed under 42 U.S.C. § 1983.³ In so doing, the court adopted an approach for choosing the proper limitations period to apply to federal civil rights actions that may produce inequitable and anomalous results in the future. This Note will examine the reasoning of both the court of appeals and the supreme court, and will consider the potential results that this type of reasoning can produce. This Note will also briefly suggest future steps that the New Mexico Legislature may wish to take in order to assure more consistent outcomes in similar cases.

STATEMENT OF THE CASE

In September, 1976, Antonio "Ike" DeVargas was involved in a fight with former Rio Arriba County Deputy Sheriff Anthony Griego.⁴ The county charged DeVargas with aggravated battery, but later dismissed this charge without trial.⁵ Both DeVargas' attorney and the office of the District Attorney expressed concern for DeVargas' safety while in the custody of the Rio Arriba County Sheriff's Department. For this reason, DeVargas requested a court order placing him in the custody of the New Mexico State Penitentiary, rather than in the Rio Arriba County Jail, pending his application for bail. The court agreed to this request, and

1. 97 N.M. 563, 642 P.2d 166 (1982).

2. The New Mexico Tort Claims Act [hereinafter sometimes referred to as the Act] is in N.M. Stat. Ann. §§ 41-4-1 to -29 (Repl. Pamph. 1982). The limitations period for the Act is contained in § 41-4-15.

3. Every person who, under color of any statute, ordinance, regulation, customs or usages 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.

42 U.S.C. § 1983 (Supp. III 1979) [hereinafter cited as section 1983 or the Civil Rights Act].

4. Plaintiff's Amended Complaint, Transcript of Record at 2. A copy of the Transcript of Record is available at the University of New Mexico Law Library.

5. *Id.*

DeVargas was transferred to the state penitentiary on September 21, 1976.⁶

Upon his arrival at the penitentiary, defendants⁷ ordered DeVargas to change into prison clothes and to shave his sideburns and moustache so as to comply with institutional regulations.⁸ He agreed to wear prison clothing, but was not willing to comply with the penitentiary shaving regulations.⁹ DeVargas alleged that, as a result of his refusal, the defendants then took him to the officers' lounge, beat him until he was unconscious, and then placed him in a segregation unit where he was forced to vomit, defecate, and urinate through a drain on the cell floor.¹⁰ DeVargas further alleged that during the course of this beating, the defendants forcibly shaved off his moustache and sideburns.¹¹ Two days later, DeVargas was released on bond, and received treatment at a Santa Fe hospital for a possible hairline fracture of the skull and several other injuries.¹²

DeVargas originally filed suit in state court¹³ in July, 1977, against the State of New Mexico, Clyde Malley (then warden of the state penitentiary), Edwin Mahr and Michael Hanrahan (former Secretaries of Corrections), and ten John Does (unidentified employees of the Department of Corrections working at the penitentiary).¹⁴ DeVargas filed the action under 42 U.S.C. § 1983, and alleged that the defendants' conduct deprived DeVargas of his civil rights.¹⁵ The New Mexico Attorney General's office moved to dismiss the action against the state and the state agency because the Federal Civil Rights Act allows suits against persons only. The Attorney General's office further moved to dismiss the action against the unidentified John Does because DeVargas failed either to identify them

6. *Id.*

7. See *infra* notes 14 & 19 and accompanying text for a description of the defendants. From the Transcript of the Record, it appears that the guards were the defendants who had physical contact with DeVargas.

8. Plaintiff's Memorandum in Response to Defendant's Motion to Dismiss, Transcript of Record at 7.

9. From the Transcript of Record, it appears that DeVargas refused to shave because he was merely at the prison for safekeeping, not as a convict, and therefore did not believe that he should be forced to comply with this prison regulation.

10. Plaintiff's Memorandum in Response to Defendant's Motion to Dismiss, Transcript of Record at 72.

11. Plaintiff's Amended Complaint, Transcript of Record at 23.

12. Plaintiff's Memorandum in Response to Defendant's Motion to Dismiss, Transcript of Record at 72.

13. DeVargas has subsequently filed suit in federal court challenging the state court's decision, and further alleging a conspiracy to deprive him "of his day in court." *DeVargas v. Montoya*, No. CIV 82-0482C (D.N.M. filed May 11, 1982).

14. Plaintiff's Complaint, Transcript of Record at 1.

15. *Id.* at 2.

specifically or to serve process on them in accordance with state law.¹⁶ Approximately three years later,¹⁷ DeVargas filed an amended complaint adding numerous factual allegations¹⁸ and seven defendants to the action.¹⁹ The trial court denied defendants' motion to dismiss the amended complaint, and the defendants sought an interlocutory appeal.²⁰ The court of appeals reversed the order of the trial court and the supreme court affirmed the court of appeals' decision.²¹

DISCUSSION AND ANALYSIS

Section 1983 grants a civil cause of action for damages, or equitable relief against persons who, acting "under color of state law," deprive the plaintiff of "rights, privileges, or immunities" extended by the laws or Constitution of the United States.²² Congress enacted section 1983 more than a century ago against the backdrop of the widespread breakdown in law enforcement and the terrorism of vigilante groups against black citizens in the Reconstruction South.²³ Since then, this broadly phrased statute has been judicially developed into a pervasive remedy of national

16. Memorandum in Support of Motion to Dismiss the Amended Complaint and the Motion to Dismiss the State, Transcript of Record at 90.

17. DeVargas filed the Amended Complaint approximately August 5, 1980. The district court filing stamp could not be read clearly, making the exact filing date difficult to determine. 97 N.M. at 452, 640 P.2d at 1329.

18. Claim II of the Amended Complaint alleged further violation of DeVargas' civil rights based on events which occurred after the incident on September 21, 1976. Specifically, Count II alleged that on September 23, 1976, an article appeared in the Santa Fe New Mexican quoting DeVargas as describing what the defendants had done to him, and that he would file suit for damages. As a result of this article, DeVargas alleged that the defendants were able to convince the District Attorney for the First Judicial District to attempt to indict DeVargas on false felony charges. This action was allegedly taken in retaliation for DeVargas' statement in the article and was further claimed to be a cover-up of the defendant's wrongful conduct during the original September 21, 1976, incident. Plaintiff's Amended Complaint, Transcript of Record at 26-28.

19. The defendants added in the Amended Complaint included Robert Montoya (then Deputy Warden of the penitentiary), Lt. Benito Gonzales, Capt. Wilfred Romero, and four guards who worked at the state prison at the time of the incident in question. *Id.* at 21-22.

20. N.M. R. Civ. App. P. 3.

21. 97 N.M. 450, 640 P.2d 1327 (Ct. App. 1981), *cert. quashed*, 97 N.M. 563, 642 P.2d 166 (1982). DeVargas filed a petition for a writ of certiorari on November 9, 1981. The supreme court granted the writ approximately ten days later. Three months after that, in an opinion entitled "Decision on Certiorari," the supreme court quashed the writ of certiorari as "improvidently issued." DeVargas v. State *ex rel.* N.M. Dept. of Corrections, 97 N.M. 563, 642 P.2d 166 (1982). The court went on to affirm the choice of the New Mexico Tort Claims Act as the most appropriate cause of action under state law for the purpose of determining the limitations period to apply to this suit filed under Section 1983.

22. See *supra* note 3.

23. For an historical look at the background of the civil rights legislation, see J. Blum, E. Morgan, W. Rose, A. Schlesinger Jr., K. Stampf & C. Vann Woodward, *The National Experience* chs. 15 & 16 (1981); Comment, *A Limitation on Actions for Deprivation of Federal Rights*, 68 Colum. L. Rev. 763 (1968).

scope.²⁴ The federal courts' expansion of the remedy has led to its use in a wide variety of cases alleging deprivation of rights by state authorities.

Section 1983 does not contain a statute of limitations.²⁵ The United States Supreme Court has therefore determined that in section 1983 actions, the appropriate statute of limitations is the state limitations period governing a cause of action most analogous to the Federal Civil Rights Act.²⁶ This rule has been more easily stated than applied, however, and the choice of which statute of limitations of a particular state shall apply in a given action has been a difficult issue for the courts.²⁷ Some courts, seeking to provide consistency for civil rights litigants in a particular forum, have chosen one statute of limitations to govern all section 1983 actions.²⁸ Other courts have chosen different statutes of limitations in different section 1983 cases, depending on the facts of the particular case.²⁹

The United States Supreme Court has not set forth standards which lower courts can consider in selecting and applying state statutes of limitations to federal civil rights actions.³⁰ The Court has clearly said, however, that the federal policies behind the civil rights statute must be considered when there is a choice to be made among various state limitations statutes. As the Court noted in *Occidental Life Insurance Co. v. Equal Employment Opportunity Commission*:³¹

State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. . . . State limitations periods

24. See generally Mahoney, *The Prima Facie Section 1983 Case*, 14 Urb. Law. 131 (1982); McClellan & Northcross, *Remedies and Damages for Violation of Constitutional Rights*, 18 Duq. L. Rev. 409 (1979).

25. See *supra* note 3.

26. *Board of Regents v. Tomanio*, 446 U.S. 478, 483 (1980).

27. Comment, *Statutes of Limitations in Federal Civil Rights Litigation*, 1976 Ariz. St. L.J. 97 (1976).

28. In New York, for example, the state statute of limitations governing actions to recover upon liabilities created by statute has been held applicable to federal civil rights actions brought under § 1983. *Fiesle v. Board of Educ.*, 490 F. Supp. 363 (E.D. N.Y. 1980); *Allah v. Commissioner of Dep't of Correctional Services*, 448 F. Supp. 1123 (N.D. N.Y. 1978).

29. In Pennsylvania, a state statute of limitations governing tort actions in general has been applied to some federal civil rights actions under § 1983, *Orlando v. Baltimore & O.R.R.*, 455 F.2d 972 (3d Cir. 1972), while a separate statute of limitations controlling actions on contracts has also been applied to govern different fact situations. *Yatzor v. Allen*, 365 F. Supp. 875 (W.D. Pa.), *aff'd*, 503 F.2d 1400 (3d Cir. 1974), *cert. denied*, 420 U.S. 929 (1975). See also *Kedra v. City of Philadelphia*, 454 F. Supp. 652 (E.D. Pa. 1978) (applying separate statute of limitations for intentional torts to plaintiff's claims arising under § 1983).

30. Comment, *supra* note 27.

31. 432 U.S. 355 (1977).

will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute.³²

In other words, the state limitations statute will not be applied to a federal civil rights claim when its application would be inconsistent with the underlying policies of the federal statute giving rise to the cause of action.

In *DeVargas*, the trial court ruled that the applicable limitation period was four years as provided in N.M. Stat. Ann. § 37-1-4 (1978)³³ (providing a four-year limitations period for actions not otherwise provided for). The court of appeals found this to be incorrect.³⁴ Instead, the court determined that either N.M. Stat. Ann. § 37-1-8 (1978)³⁵ (providing a three-year limitations period for injury to the person), or N.M. Stat. Ann. § 41-4-15(A) (Repl. Pamp. 1982)³⁶ (allowing a two-year period for claims against a governmental entity or a public employee for torts) were more appropriate limitation periods than the four-year period provided by section 37-1-4.³⁷ Although the court did not specifically choose between the two-year and the three-year periods,³⁸ the court of appeals did note that in the court's opinion, the two-year period was the applicable limitation period to *DeVargas*' claim under section 1983.³⁹ The supreme court rein-

32. *Id.* at 367. Whether these considerations are valuable in providing guidance for other courts, however, is unclear. The underlying policies of the federal statute have been described as everything from "remedial," *Childers v. Independent School Dist.*, 676 F.2d 1338, 1343 (10th Cir. 1982), to "compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson v. Wegmann*, 436 U.S. 584, 591 (1978). If, in fact, the policies underlying § 1983 are as broad and far reaching as they have been characterized, then the admonition to choose a limitations period that is consistent with such concerns provides virtually no direction at all.

33. 97 N.M. at 453, 640 P.2d at 1330. Section 37-1-4 provides in full: "Those [actions] founded upon accounts and unwritten contracts; those brought for injuries to property or for the conversion of personal property, or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified [may be brought] within four years."

34. 97 N.M. at 453, 640 P.2d at 1330.

35. Actions must be brought against sureties on official bonds and on bonds of guardians, conservators, personal representatives and persons acting in a fiduciary capacity, within two years after the liability of the principal or the person from whom they are sureties is finally established or determined by a judgment or decree of the court, and for an injury to the person or reputation of any person, within three years.

N.M. Stat. Ann. § 37-1-8 (1978).

36. A. Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death, except that a minor under the full age of seven years shall have until his ninth birthday in which to file. This subsection applies to all persons regardless of minority or other legal disability.

N.M. Stat. Ann. § 41-4-15(A) (Repl. Pamp. 1982).

37. 97 N.M. at 454, 640 P.2d at 1331.

38. This choice was not necessary because *DeVargas*' claims were barred under either limitation period.

39. 97 N.M. at 454, 640 P.2d at 1331.

forced this by explicitly selecting section 41-4-15 as the proper statute of limitations applicable to DeVargas' claims.⁴⁰

The court of appeals was correct in finding that the four-year omnibus statute of limitations detailed in section 37-1-4 was not the most appropriate limitations period for DeVargas' claim. This finding is consistent with the decisions of several federal courts that have rejected the argument that the "catchall" statutes of limitations should be selected over statutes limiting specific actions.⁴¹ The court of appeals' decision not to apply section 37-1-4 is also consistent with the clear mandate set forth by the United States Supreme Court in *Board of Regents v. Tomanio*,⁴² that the most analogous state action limitation should be applied to a section 1983 claim. For the court to have applied a limitations period for an action not specified would have been to abandon any attempt to draw an analogy with the most similar state action.

The choice of the Tort Claims Act as the most analogous state cause of action to suits filed under section 1983 is, however, in direct conflict with *Gunther v. Miller*,⁴³ a recent federal case from the District of New Mexico involving substantially the same set of facts as *DeVargas*. In *Gunther*, police arrested the plaintiff in October, 1977; the plaintiff filed suit in June, 1980, under the Civil Rights Act against the City of Albuquerque, its chief of police, and one of its police officers. The plaintiff claimed that defendants had used excessive force in making her arrest. The defendants argued that the two-year limitations period set by the New Mexico Tort Claims Act should be controlling⁴⁴ and moved for dismissal on the grounds that the statute of limitations had run.⁴⁵

In rejecting this contention, the court held that "[a] § 1983 claim is not analogous to a cause of action brought under a state tort claims act, because tort claims acts are based on 'state concepts of sovereign immunity . . . alien to the purposes served by the Civil Rights Act.'" ⁴⁶ The court concluded that the general limitations period established by

40. 97 N.M. at 564, 642 P.2d at 167.

41. See *Rubin v. O'Koren*, 644 F.2d 1023 (5th Cir. 1981) (one-year statute of limitations for injury to the person or rights of another not arising from contract applied, rather than one-year non-specific statute); *Madison v. Wood*, 410 F.2d 564 (6th Cir. 1969) (three-year statute for actions to recover damages to person or property applied, rather than six-year "catchall" statute).

42. 446 U.S. 478 (1980).

43. 498 F. Supp. 882 (D.N.M. 1980). For a further discussion of the conflict between *DeVargas* and *Gunther*, see Kovnat, *Constitutional Torts and the New Mexico Tort Claims Act*, 12 N.M.L. Rev. 1, 45-50 (1983).

44. 498 F. Supp. at 882.

45. *Id.*

46. *Id.* at 883 (citing *Donovan v. Reinbold*, 433 F.2d 738, 742 (9th Cir. 1970)).

New Mexico law⁴⁷ should be applied instead of the Tort Claims Act limitation period and denied the defendants' motion to dismiss.

In refusing to follow the reasoning of *Gunther*, the court in *DeVargas* was correct in disagreeing with the notion that "state tort claims acts are based on state concepts of sovereign immunity alien to the purposes to be served by the Civil Rights Act."⁴⁸ The New Mexico Tort Claims Act seeks to moderate "the inherently unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity."⁴⁹ It achieves this goal by reinstating immunity⁵⁰ from tort liability for a governmental entity, as well as for public employees.⁵¹ It then waives immunity for both governmental entities and public employees for particular acts set forth in the Act itself.

Beginning with the premise that "New Mexico's Tort Claims Act is based on a waiver of immunity,"⁵² the court of appeals then reasoned as follows. Section 1983 provides liability for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States. Section 41-4-12 of the New Mexico Tort Claims Act⁵³ also provides for similar liability (by waiver of immunity) "when caused by law enforcement officers while acting within the scope of their duties."⁵⁴ Liability under section 1983 is analogous to liability under section 41-4-12, and therefore, the limitations period governing section 41-4-12 can be properly applied to actions brought under the Federal Civil Rights Act.⁵⁵

Although the court's reasoning is correct in the given fact situation, it

47. The *Gunther* court was referring to N.M. Stat. Ann. §§ 37-1-4 to -8 (1978). See also *Hansbury v. Regents of Univ. of Cal.*, 596 F.2d 944 (10th Cir. 1979) (trial court's conclusion that N.M. Stat. Ann. § 37-1-4 (1978), was applicable statute of limitations was correct).

48. 97 N.M. at 454, 640 P.2d at 1331.

49. N.M. Stat. Ann. § 41-4-2(A) (Repl. Pamp. 1982).

50. The declaration of purpose purports to abolish all judicially created categories previously used to determine liability or immunity. N.M. Stat. Ann. § 41-4-2(B) (Repl. Pamp. 1982). Section 41-4-4 then grants immunity from tort liability to governmental entities and public employees, and authorizes certain exceptions and waivers of this immunity. See Kovnat, *Sovereign and Governmental Immunity in New Mexico*, 6 N.M.L. Rev. 249 (1976).

51. See N.M. Stat. Ann. § 41-4-4 (Repl. Pamp. 1982).

52. 97 N.M. at 454, 640 P.2d at 1331.

53. N.M. Stat. Ann. § 41-4-12 (Repl. Pamp. 1982).

54. Section 41-4-12 provides in full:

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

55. 97 N.M. at 454, 640 P.2d at 1331.

side-steps the crucial issue of whether the Tort Claims Act is the most analogous cause of action to apply to all civil rights claims arising under section 1983. For whatever reason the court chose to ignore this issue,⁵⁶ its omission seriously weakens the applicability of the two-year limitations period set forth in the Tort Claims Act to future actions arising under section 1983. The approach adopted by the New Mexico Court of Appeals and Supreme Court for determining the appropriate statute of limitations is capable of generating inconsistent results, and does not promote the application of a single limitations period for federal civil rights claims.

As already discussed,⁵⁷ the Tort Claims Act is a waiver of the traditional doctrine of sovereign immunity. However, the Act provides that the modification of this doctrine is to be carefully circumscribed, and "that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act . . . and in accordance with the principles established in that Act."⁵⁸ Specifically, the Act provides that "[l]iability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty."⁵⁹ The sections following this legislative declaration of policy contain detailed provisions defining the bases for suits against governmental entities and designating the procedures to be followed when pursuing claims allowed by the Act.⁶⁰

In selecting section 41-4-12 as the most analogous state cause of action, therefore, the court in *DeVargas* implicitly characterized the facts underlying *DeVargas*' claim in terms of traditional common law torts for purposes of determining the applicable state statute of limitations.⁶¹ This characterization ignores the fundamental differences between a civil rights action and a common law tort.⁶² The Civil Rights Act does not create "a body of general federal tort law."⁶³ Rather, section 1983

[c]reates rights and imposes obligations different from any which would exist at common law in the absence of statute. A given state of facts may of course give rise to a cause of action in common-law tort as well as to a cause of action under Section 1983, but the

56. See *supra* note 37 and accompanying text.

57. See *supra* notes 48-53 and accompanying text.

58. N.M. Stat. Ann. § 41-4-2(A) (Repl. Pamp. 1982).

59. N.M. Stat. Ann. § 41-4-2(B) (Repl. Pamp. 1982).

60. N.M. Stat. Ann. §§ 41-4-4 to -29 (Repl. Pamp. 1982).

61. For liability to be imposed under this section of the Tort Claims Act, a law enforcement officer acting within the scope of his duties would have to be guilty of one of the particular acts set forth in this section, which would be determined by the traditional tort concepts of duty and breach. The plaintiff's claim, therefore, must consist of the elements of traditional common law torts for liability to be imposed.

62. See *supra* note 60 and accompanying text; Kovnat, *Constitutional Torts and the New Mexico Tort Claims Act*, 13 N.M.L. Rev. 1 (1983).

63. *Paul v. Davis*, 424 U.S. 693, 701 (1960).

elements of the two are not the same. The elements of an action under Section 1983 are (1) the denial under color of state law (2) of a right secured by the Constitution and laws of the United States. Neither of these elements would be required to make out a cause of action in common-law tort; both might be present without creating common-law tort liability.⁶⁴

In *Monroe v. Pape*,⁶⁵ Justice Harlan suggested that with regard to the Civil Rights Act, "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."⁶⁶

Selecting the appropriate limitations period by identifying the specific state tort most analogous to the acts alleged in the complaint also serves to fragment the single federal cause of action "in accordance with analogies drawn to rights created by state law."⁶⁷ Under the ruling in *DeVargas*, the court would apply the two-year limitation period to civil rights claims brought against those governmental entities and public employees subject to liability under the state's Tort Claims Act. Similar suits brought against other public employees who are immune from liability under the Tort Claims Act's provisions, however, would present a state of facts analogous to a different statutory cause of action and would be governed by a different statute of limitations.

For example, if a person were injured after being struck unreasonably by a local policeman, he might bring an action under section 1983 alleging the deprivation of his civil rights. Because the state's Tort Claims Act provides for similar liability when caused by law enforcement officers while acting within the scope of their duties, under *DeVargas*, the two-year statute of limitations governing the Tort Claims Act would be the appropriate limitations period to apply to the plaintiff's suit brought under section 1983 as well. If the same plaintiff had been injured by being struck by a public school teacher, however, a cause of action under Section 1983 would still exist, but it would now be governed by a different statute of limitations. Public school employees are not covered by the New Mexico Tort Claims Act, and are therefore immune from liability for any tort.⁶⁸ The most analogous state cause of action to the type of conduct involved in this situation is battery,⁶⁹ which is governed by the three-year limitation period described in N.M. Stat. Ann. § 37-1-8 (1978).⁷⁰

64. *Smith v. Cremins*, 308 F.2d 187, 190 (9th Cir. 1962) (footnote and citations omitted).

65. 365 U.S. 167 (1961).

66. 365 U.S. at 196 (Harlan, J., concurring).

67. *Smith v. Cremins*, 308 F.2d at 190.

68. N.M. Stat. Ann. § 41-4-4(A) (Repl. Pamph. 1982).

69. N.M. Stat. Ann. § 30-3-4 (1978).

70. See *supra* note 35.

Under the *DeVargas* approach for selecting the appropriate limitations period for a section 1983 action, a two-year statute would apply to certain public employees, while a three-year (or possibly a four-year statute⁷¹) would apply to other public employees and everyone else. This distinction is not based on the nature of the conduct involved, but turns instead on the category of defendant involved. It thus splinters the single federal cause of action created under section 1983 along lines that adhere to state, not federal, policy considerations.⁷² It also produces the anomalous result that different defendants would be governed by different statutes of limitations when charged with exactly the same conduct, and when relief is sought under precisely the same federal statute.⁷³

To avoid this confusion, the state legislature should consider adopting either one of two different statutes. First, the legislature should adopt a statute containing a limitations period applicable to all causes of action that do not contain their own limitation periods. Several states have adopted such statutes,⁷⁴ and historically, they have been the statute of limitations most frequently applied in section 1983 actions.⁷⁵ If this suggestion is not acceptable, the legislature could instead draft a statute establishing a limitations period specifically governing federal civil rights actions.⁷⁶ Although the enactment of this type of statute would seem to solve the problem of deciding which statute of limitations governs section 1983 actions, at least one federal court of appeals has refused to apply a statute of limitations specifically applicable to federal civil rights suits that was so short as to "impose an unreasonably discriminatory limitation period on the assertion of important federally protected rights."⁷⁷ In drafting an applicable statute of limitations, therefore, the legislature should be careful to select one that is "sufficiently generous in the time periods to preserve the remedial spirit of the federal civil rights actions."⁷⁸

71. See *supra* note 32.

72. See *supra* notes 64 & 67 and accompanying text.

73. *Gipson v. Township of Bass River*, 82 F.R.D. 122 (D.N.J. 1979).

74. See, e.g., New York's statutory scheme which provides "The following actions must be commenced within three years . . . (2) an action to recover upon a liability, penalty or forfeiture created or imposed by statute. . . ." N.Y. Civ. Prac. Law § 214(2) (McKinney 1972). See also Oregon's statutory scheme allowing for "(2) An action upon a liability created by statute, other than a penalty or forfeiture . . . shall be commenced within six years." Or. Rev. Stat. § 12.080 (1970).

75. Annot., 45 A.L.R. Fed. 458 (1979).

76. See, e.g., Tenn. Code Ann. § 28-3-104 (1980), which provides in part:

(a) Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under federal civil rights statutes, and actions for statutory penalties shall be commenced within one (1) year after cause of action accrued.

77. *Johnson v. Davis*, 582 F.2d 1316, 1319 (4th Cir. 1978).

78. *Shouse v. Pierce County*, 559 F.2d 1142, 1146 (9th Cir. 1977) (footnote omitted).

CONCLUSION

In *DeVargas v. State ex rel. New Mexico Department of Corrections*, the New Mexico appellate courts adopted an approach for selecting the applicable statute of limitations to apply to federal civil rights claims brought under 42 U.S.C. § 1983. This approach seeks to characterize the facts underlying the plaintiff's claim in terms of the specific state tort most similar to the acts alleged in the complaint. From there, the most appropriate limitations period governing the state cause of action is then applied to the section 1983 suit. Although adequate in *DeVargas*, this approach has the potential for producing inequitable results when applied to all section 1983 actions and should be viewed with some caution. The state legislature should act to correct this problem by adopting a statute of limitations applicable either to federal civil rights actions in particular, or to all statutory causes of action that do not contain their own limitations periods. This solution will avoid both the strained process of characterizing civil rights as common law torts, and the inconsistency that would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law.

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