

February 1985

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### Repository Citation

John R. Pagan, *Civil Rights and "Personal Injuries": Virginia's Statute of Limitations for Section 1983 Suits*, 26 Wm. & Mary L. Rev. 199 (1985), <https://scholarship.law.wm.edu/wmlr/vol26/iss2/3>

## CIVIL RIGHTS AND "PERSONAL INJURIES": VIRGINIA'S STATUTE OF LIMITATIONS FOR SECTION 1983 SUITS

JOHN R. PAGAN\*

Congress often creates rights of action without explicitly limiting the period for bringing suit. Since as early as 1830,<sup>1</sup> federal courts have interpreted congressional silence as a tacit instruction to absorb state statutes of limitations "within the interstices of the federal enactments," thereby "fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles."<sup>2</sup> Invoking the Rules of Decision Act,<sup>3</sup> courts have applied state limitation provisions in a variety of federal question cases. In 1914, the Supreme Court approved the use of state statutes of limitations in civil rights litigation,<sup>4</sup> a practice which the Court now considers

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\*Associate Professor of Law, University of Arkansas at Little Rock. A.B., College of William and Mary; M. Litt., Oxford University; J.D., Harvard University. The author gratefully acknowledges the valuable suggestions of Judge J. R. Zepkin and Professor John Donaldson. He also wishes to thank his former students and colleagues at the Marshall-Wythe School of Law for their friendship, encouragement, and inspiration. To them this Article is respectfully dedicated.

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1. See *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966) (citing *M'Cluney v. Silliman*, 28 U.S. (3 Pet.) 270 (1830)).

2. *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946).

3. 28 U.S.C. § 1652 (1982), which provides:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

*Id.* See *Campbell v. Haverhill*, 155 U.S. 610, 613-20 (1895).

4. See *O'Sullivan v. Felix*, 233 U.S. 318 (1914). The plaintiff in *O'Sullivan* sought damages for physical injuries and emotional distress received when the defendants beat him to prevent him from voting. Three and a half years after the attack, he filed suit under the predecessors of 42 U.S.C. §§ 1983 and 1985 (1982). The Supreme Court affirmed dismissal of his civil rights action on the ground that the forum state's one-year statute of limitations for actions "resulting from offenses or quasi offenses," *id.* at 322, barred recovery. Louisiana law applied, the Court held, because Congress had not fixed a specific limitation period for litigation under remedial civil rights laws. The Court declined to borrow the time limits in federal criminal statutes protecting civil rights because the punitive nature of those laws

mandated<sup>5</sup> by 42 U.S.C. section 1988.<sup>6</sup>

Like other Reconstruction-era civil rights statutes,<sup>7</sup> 42 U.S.C. section 1983<sup>8</sup> lacks its own statute of limitations. Section 1983 confers a private right of action upon anyone whose federal constitutional or statutory rights<sup>9</sup> have been violated by a person<sup>10</sup> acting

differed substantially from the compensatory character of remedial civil rights legislation. *See id.* at 323-25.

5. *See* *Burnett v. Grattan*, 104 S. Ct. 2924, 2928-29 (1984); *Chardon v. Soto*, 103 S. Ct. 2611, 2616, 2619 (1983); *Board of Regents v. Tomanio*, 446 U.S. 478, 484-86 (1980); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975).

6. Section 1988 requires federal courts to exercise their civil rights jurisdiction

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 the 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

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42 U.S.C. § 1988 (1982). For explanations of the role of § 1988 in civil rights litigation, see generally *Robertson v. Wegmann*, 436 U.S. 584, 588-93 (1978) (applying state law regarding survival of rights of action); *Moor v. County of Alameda*, 411 U.S. 693, 702-06 (1973). For a more restrictive view of § 1988, see *Eisenberg, State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. Pa. L. Rev. 499 (1980).

7. *E.g.*, 42 U.S.C. § 1981 (1982) (guaranteeing freedom from racial discrimination in contractual relations, litigation, and other areas); *see* *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975). Only 42 U.S.C. § 1986 (1982) contains an express limitation provision.

8. Originally enacted as § 1 of the Civil Rights Act of 1871 (Ku Klux Klan Act), ch. 22, 17 Stat. 13, the statute now reads:

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.

42 U.S.C. § 1983 (1982).

9. Because section 1983 does not create substantive rights and duties, "one cannot go into court and claim 'a violation of § 1983'—for § 1983 by itself does not protect anyone against anything." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979). Section 1983 simply furnishes a means of enforcing rights granted by the Constitution or by some other substantive federal law. The right of action embraces all types of federal statutory entitlements, not merely those based on equal rights legislation. Rights under the Social Security

under color of state law.<sup>11</sup> In accordance with section 1988, federal courts calculate the limitation period for a section 1983 suit by borrowing "the most appropriate"<sup>12</sup> state rule. The Supreme Court enumerated the criteria for identifying that rule in *Burnett v. Grattan*,<sup>13</sup> the Court's most recent and most comprehensive decision analyzing selection of limitation periods for section 1983 cases.

A federal court begins the process of choosing an appropriate statute of limitations by searching state law for a common-law or statutory right of action that protects interests similar to those safeguarded by section 1983 and that shares the functional characteristics of a constitutional tort<sup>14</sup> claim. The state right of action

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Act, 42 U.S.C. § 602(a)(7) (1982), for example, are enforceable through § 1983. *Maine v. Thiboutot*, 448 U.S. 1 (1980). *But see* *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19-21 (1981) (§ 1983 inapplicable if statute creating substantive right contains its own comprehensive remedial scheme). *See generally* Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394 (1982); Note, *Preclusion of Section 1983 Causes of Action by Comprehensive Statutory Remedial Schemes*, 82 COLUM. L. REV. 1183 (1982).

10. The term "person" includes local government entities as well as natural persons such as state, county, and municipal officials. *See* *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978). Private citizens and corporations acting under color of state law also qualify as "persons" suable under § 1983. *See* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Whether states are "persons" remains unclear largely because courts have failed to distinguish adequately between personhood and constitutional sovereign immunity. *Compare* *Smith v. State*, 122 Mich. App. 340, 348-52, 333 N.W.2d 50, 54-56 (1983) (state is a "person" for purposes of § 1983) *with* *Edgar v. State*, 92 Wash. 2d 217, 221-22, 595 P.2d 534, 537-38 (1979) (en banc) (state is not a "person"), *cert. denied sub nom.* *Edgar v. Washington*, 444 U.S. 1077 (1980). *See generally* Note, *Amenability of States to Section 1983 Suits: Reexamining Quern v. Jordan*, 62 B.U.L. REV. 731 (1982) (arguing that states are "persons").

11. The relationship between § 1983's color-of-state-law requirement and the fourteenth amendment's state-action prerequisite is analyzed in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 928-35 (1982).

12. *Burnett v. Grattan*, 104 S. Ct. 2924, 2929 (1984) (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975)).

13. 104 S. Ct. 2924 (1984). For descriptions of the confused and inconsistent approaches to limitation problems taken by federal courts before *Burnett*, see *Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984) (en banc) (surveying cases from all federal circuits); Biehler, *Limiting the Right to Sue: The Civil Rights Dilemma*, 33 DRAKE L. REV. 1 (1983-1984); Note, *A Limitation on Actions for Deprivation of Federal Rights*, 68 COLUM. L. REV. 763 (1968); Note, *A Call for Uniformity: Statutes of Limitations in Federal Civil Rights Actions*, 26 WAYNE L. REV. 61 (1979); Comment, *Statutes of Limitations in Federal Civil Rights Litigation*, 1976 ARIZ. ST. L.J. 97; Comment, *Choice of Law under Section 1983*, 37 U. CHI. L. REV. 494, 502-04 (1970).

14. Section 1983 "creates a species of tort liability," *Imbler v. Pachtman*, 442 U.S. 409,

must be "judicially enforceable in the first instance"<sup>15</sup> rather than part of a scheme requiring exhaustion of administrative remedies.<sup>16</sup> The aggrieved party himself, and not just an agency acting on his behalf, must enjoy access to the courts.<sup>17</sup> Furthermore, the range of available remedies must approximate that of section 1983.<sup>18</sup> If the state-created right of action sufficiently resembles section 1983, the court tentatively will adopt the state right of action's time limits for use in civil rights adjudication. The choice-of-law decision is only tentative because, having found the "most analogous state statute of limitations,"<sup>19</sup> the court must assess the appropriateness of the state rule.

In order to determine whether a state statute of limitations satisfies the appropriateness test, a court must examine two factors. First, the length of the limitation period must accommodate the practicalities of civil rights litigation. State law must afford the plaintiff ample time to investigate the facts, secure counsel, prepare pleadings, and perform the other tasks necessary to commence a complex federal lawsuit.<sup>20</sup> Second, the time limit must

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417 (1976), and thus courts construe the statute "against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled in part in* *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978); *see also* *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258-59 (1981); *Carey v. Piphus*, 435 U.S. 247, 253-54 (1978).

15. *Burnett*, 104 S. Ct. at 2930. The "dominant characteristic of civil rights actions" is that "they belong in court." *Id.*

16. A § 1983 plaintiff need not exhaust state judicial or administrative remedies. *Monroe*, 365 U.S. at 183; *Patsy v. Board of Regents*, 457 U.S. 496 (1982). *But see* 42 U.S.C. § 1997e (1982) (court may continue state prisoner's § 1983 suit for ninety days pending exhaustion of administrative remedies). A special rule, however, applies to procedural due process cases. Although technically not an exhaustion requirement, the rule compels resort to state remedies in certain instances. A plaintiff who alleges an unauthorized deprivation of liberty or property does not have a valid § 1983 claim for denial of procedural due process if the state affords him an adequate means of redress. *See Hudson v. Palmer*, 104 S. Ct. 3194 (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981); *Ingraham v. Wright*, 430 U.S. 651 (1977).

17. *See Burnett*, 104 S. Ct. at 2931-32.

18. *See id.* at 2930, 2932.

19. *Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980). This phrase is a shorthand reference for "the state law of limitations governing an analogous cause of action." *Id.* at 483-84. The Court employed a similar expression in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975): "In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim." *Id.* at 464.

20. *Burnett*, 104 S. Ct. at 2930.

comport with the two principal purposes of section 1983: compensation for victims of civil rights violations and deterrence of governmental wrongdoing. A court cannot adopt a state statute of limitations if its application would subordinate federal objectives to other goals, such as repose, judicial economy, protection of state officers, or maintenance of a hierarchy of rights.<sup>21</sup>

A federal court must ignore a state statute of limitations that discriminates among classes of plaintiffs based on the nature of their claims. Section 1983 reflects Congress's desire to redress all infringements of federal rights; no right takes precedence over another. State legislatures, by contrast, frequently vary the lengths of limitation periods according to the perceived importance of the rights underlying particular claims. "That policy, keyed to a classification of plaintiffs, cannot preempt the broadly remedial purposes of the Civil Rights Acts, which make no distinction among persons who may look to the court to vindicate their federal constitutional rights."<sup>22</sup> A federal court, therefore, may not borrow a statute if it is part of a scheme that fixes longer time limits for enforcing some rights than for enforcing others. Instead, the court must look elsewhere in state law for a nondiscriminatory rule.<sup>23</sup>

This prohibition against borrowing state statutes of limitations that discriminate among classes of plaintiffs based on the nature of their claims effectively prevents courts from adopting all but the most general statutes of limitations.<sup>24</sup> These general statutes fall

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21. *See id.* at 2931-32. In *Burnett*, the Court declined to subject a § 1983 employment discrimination suit to Maryland's six-month statute of limitations for administrative proceedings. The Court concluded that the statute furthered the state's interest in expeditiously resolving employment disputes at the expense of the policies underlying § 1983. In addition, the brevity of the limitation period rendered it unsuitable for litigation in a judicial, as opposed to an administrative, forum. *See id.* at 2930-32. The Court affirmed the Fourth Circuit's decision to borrow Maryland's three-year catchall statute of limitations. *See id.* at 2927, 2933. *See infra* note 25.

22. *Burnett*, 104 S. Ct. at 2932.

23. *Id.*

24. Justice Rehnquist accurately described the practical impact of the Court's nondiscrimination doctrine:

[T]he Court seems to believe that the basic purpose underlying the federal civil rights statutes, vindication of a violation of a federal right, necessitates a statute of limitations that is both general in the remedies it encompasses and nondiscriminatory between the federal plaintiffs bringing suit. The logical result of this approach is that a federal court should always prefer a general statute of limitations to any specific state statute of limitations directed at a

into four main categories. The first type, the catchall statute, restricts every action not covered by a more specific limitation provision.<sup>25</sup> The second prescribes a single limitation rule for all claims based on liability created by statute.<sup>26</sup> The third governs all suits involving injury to the person.<sup>27</sup> The fourth explicitly imposes a uniform deadline on civil rights actions.<sup>28</sup> Incorporation of any of these general statutes of limitations would ensure equal protection for section 1983 litigants.

After identifying the appropriate general statute of limitations, the court must determine whether the state rule is "inconsistent

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particular type of claim or involving a particular party as plaintiff or defendant. Thus, a general catchall statute of limitations, or one covering all forms of invasions of personal rights, would be the appropriate statute of limitations to govern nearly all federal civil rights actions.

*Burnett*, 104 S. Ct. at 2934 (Rehnquist, J., concurring in the judgment). Justice Rehnquist criticized the majority's position on the ground that it conflicted with Congress's decision not to establish a uniform limitation rule for civil rights litigation. *Id.* at 2934-35.

25. For an example of such a statute, see the three-year catchall applied in *Burnett*, 104 S. Ct. 2924 (1984). That law stated: "A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." MD. CTS. & JUD. PROC. CODE ANN. § 5-101 (1984), *quoted in Burnett*, 104 S. Ct. at 2927 n.7.

26. The New York law applied in *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), exemplifies the second type of general statute of limitations. That statute fixed a three-year limit for actions "to recover upon a liability, penalty or forfeiture created or imposed by statute." N.Y. CIV. PRAC. LAW § 214(2) (McKinney Supp. 1979-1980), *quoted in Tomanio*, 446 U.S. at 484 n.4.

In *Tomanio*, unlike *Burnett*, the Court did not have occasion to review the lower courts' selection of a particular limitation period. The justices simply assumed that the three-year rule controlled and turned their attention to the question of tolling. The Court held that state law determines whether the pendency of related state-court proceedings tolls the running of the limitation period for a § 1983 claim, provided the state rule comports with federal policies. *See Tomanio*, 446 U.S. 478 (1980); *see also Chardon v. Soto*, 103 S. Ct. 2611 (1983) (effect of tolling depends on state law).

27. Injury to the person means violation of a personal right. The best illustration of this type of general statute of limitations is N.M. STAT. ANN. § 37-1-8 (1978), which provides that "[a]ctions must be brought . . . for an injury to the person . . . within three years." *Id.* Applying this law, the Tenth Circuit held in *Garcia v. Wilson*, 731 F.2d 640, 651 (10th Cir. 1984) (en banc), that all § 1983 claims are to be characterized uniformly for limitation purposes as actions for injury to personal rights rather than in terms of the specific facts generating the case. *Id.*

28. For an example, see the Tennessee statute applied in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 456 & n.2 (1975). That law imposed a one-year limit on "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes." TENN. CODE ANN. § 28-304 (Supp. 1974) (current version at TENN. CODE ANN. § 28-3-104 (1980)), *quoted in Johnson*, 421 U.S. at 456 n.2.

with the Constitution and laws of the United States.”<sup>29</sup> To some degree, this final step overlaps the appropriateness inquiry.<sup>30</sup> The consistency test, however, primarily addresses a different kind of discrimination. Whereas the appropriateness inquiry guards against discrimination among classes of section 1983 plaintiffs, the consistency test seeks to eliminate discrimination between state and federal rights of action. Consistency requires that state statutes of limitations be “uniform in their operation upon state and Federal rights.”<sup>31</sup> Thus, to qualify for adoption under section 1988, a state limitation provision must grant a section 1983 plaintiff the same amount of time to file suit<sup>32</sup> as it grants a plaintiff asserting an analogous state-law claim.<sup>33</sup>

The Supreme Court in *Burnett* cited *Johnson v. Davis*,<sup>34</sup> a decision by the United States Court of Appeals for the Fourth Circuit, as a case that correctly applied the consistency test. In *Johnson*, the court of appeals refused to adopt a one-year Virginia statute of limitations that explicitly applied to section 1983 cases<sup>35</sup> because the court thought the measure discriminated against a federal right of action.<sup>36</sup> The Fourth Circuit, in reaching its conclusion, relied heavily upon *Almond v. Kent*,<sup>37</sup> a case decided before enact-

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29. 42 U.S.C. § 1988 (1982).

30. In the Court's words, the issues of appropriateness and consistency “shade into each other.” *Burnett*, 104 S. Ct. at 2931 n.15.

31. *Campbell v. Haverhill*, 155 U.S. 610, 615 (1895), cited with approval in *Burnett*, 104 S. Ct. at 2931 n.15.

32. The federal claimant should receive neither a longer nor a shorter limitation period than his state-law counterpart. See *Campbell v. Haverhill*, 155 U.S. 610, 616 (1895).

33. To identify the closest analog to a § 1983 suit, a court must characterize the federal claim in state-law terms. Although the characterization “is ultimately a question of federal law,” the Supreme Court sees “no reason to reject the characterization that state law would impose unless that characterization is unreasonable or otherwise inconsistent” with federal policies. *International Union of Automobile, Aerospace and Agricultural Implement Workers of America v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966).

34. 582 F.2d 1316 (4th Cir. 1978), cited with approval in *Burnett*, 104 S. Ct. at 2931 n.15.

35. The Virginia General Assembly amended VA. CODE § 8-24 (1957) in 1973 by adding this sentence: “Notwithstanding any other provision of law to the contrary, every action brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, shall be brought within one year next after the right to bring the same shall have accrued.” Act of March 15, 1973, ch. 385, 1973 Va. Acts 552 (repealed 1977).

36. *Johnson*, 582 F.2d at 1319.

37. 459 F.2d 200 (4th Cir. 1972).



ment of the one-year limitation.<sup>38</sup> In *Almond*, the court held that Virginia's two-year statute of limitations for actions to redress "personal injuries" governed all section 1983 actions brought in Virginia.<sup>39</sup> The two-year rule provided the most appropriate timing requirement, the court concluded, because "personal injuries," as defined by Virginia law, necessarily resulted whenever any type of personal right was infringed.<sup>40</sup>

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38. Ironically, the General Assembly probably passed the law in response to a suggestion in *Almond*. Commenting upon other states' adoption of express statutes of limitations for § 1983 cases, the Fourth Circuit remarked, "Because of the rising tide of § 1983 suits against state officials and the difficulty of applying a statute enacted primarily to deal with different types of litigation, Virginia may well wish to consider the enactment of a similar statute." *Almond*, 459 F.2d at 203 n.3 (dictum).

39. *Id.* at 203-04. When *Almond* was decided in 1972, the two-year personal injury limitation appeared in VA. CODE § 8-24 (1957) (repealed 1977), which read:

Every action for personal injuries shall be brought within two years next after the right to bring the same shall have accrued. Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued. The amendment extending the period within which an action for personal injuries may be brought under this section to two years shall not apply to any cause of action arising prior to July one, nineteen hundred fifty-four.

*Id.*

40. The Fourth Circuit characterized § 1983 as a statute which "creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person." *Almond*, 459 F.2d at 204. "[I]njury . . . to the person," the court assumed, meant precisely the same thing as "personal injuries," to which the two-year limitation of VA. CODE § 8-24 (1957) applied. "In the broad sense," the court wrote, "every cause of action under § 1983 which is well-founded results from 'personal injuries.' . . . Hence, our conclusion that the Virginia two-year period of limitations, applying to 'every action for personal injuries' applies generally to § 1983 suits." *Id.* (quoting VA. CODE § 8-24 (1957) (emphasis added)).

This liberal interpretation of "personal injuries" rendered the presence or absence of bodily harm wholly immaterial as a factor in § 1983 limitation analysis. The two-year rule controlled regardless of the nature of the right violated or damage sustained. *See, e.g., Williams v. Westbrook Psych. Hosp.*, 420 F. Supp. 322, 323-24 (E.D. Va. 1976) (unconstitutional confinement to mental institution); *Wilkinson v. Hamel*, 381 F. Supp. 768, 768-69 (W.D. Va. 1974) (nonrenewal of teaching contract in violation of freedom of speech and due process); *Landman v. Royster*, 354 F. Supp. 1302, 1313-15 (E.D. Va. 1973) (solitary confinement amounting to cruel and unusual punishment); *Sitwell v. Burnette*, 349 F. Supp. 83, 86-87 (W.D. Va. 1972) (nonrenewal of teaching contract in violation of freedom of speech, due process, and equal protection).

As an alternative ground for holding that the two-year statute of limitations applied to all § 1983 cases, the Fourth Circuit in *Almond* stressed the relative importance of civil rights

Given the Fourth Circuit's expansive construction of the term "personal injuries," the one-year statute of limitations at issue in *Johnson* seemed blatantly inconsistent with federal law. If every common-law tort action involving violation of a personal right merited a two-year limitation period, the court reasoned, every constitutional tort claim deserved the same treatment.<sup>41</sup> Accordingly, the court disregarded the one-year statute and declared the two-year personal injury provision still in effect.<sup>42</sup> By the time the court of appeals reached its decision in *Johnson*, however, the short career of the one-year statute already had ended. Following two district court decisions rejecting the law,<sup>43</sup> the General Assembly repealed

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actions. Constitutional tort suits typically involved weightier issues than those in the common-law tort actions for which Virginia prescribed a one-year limitation. Therefore, the court concluded, a § 1983 claim "more properly belongs at the two-year step in Virginia's statute of limitations scale of values." *Almond*, 459 F.2d at 204. This rather amorphous theory was the forerunner of the equally invalid undervaluation argument advanced in *Johnson*. See *infra* note 41.

41. See *Johnson*, 582 F.2d at 1319. The plaintiff in *Johnson* claimed that corrections officials had threatened, humiliated, and harassed him. *Id.* at 1317. He did not allege that he had sustained bodily harm. The court of appeals, nevertheless, deemed his suit the functional equivalent of a tort action for personal injuries. "The facts to be proven, the witnesses to be called to testify, the evidence to be considered are generally the same for § 1983 actions as for state actions brought to compensate for the personal injury underlying the deprivation of federal constitutional rights." *Id.* at 1319. By taking this position, the court reiterated its belief that "personal injury" merely represented an alternate way of saying "injury to the person." The opinion used the terms interchangeably. *Id.*

The Fourth Circuit found the Virginia statute defective for an additional reason: a one-year limitation period undervalues the interests at stake in constitutional litigation. See *id.* at 1317, 1319. Judging from the substantial discussion devoted to the discrimination issue, undervaluation played a distinctly secondary role in the court's decision. In any case, the undervaluation argument had little, if any, merit. Congress has prescribed a one-year limitation for suits under 42 U.S.C. § 1986 (1982), which confers a right of action against persons who fail to prevent conspiracies aimed at denying equal protection of the law. *Id.* Unless Congress itself has undervalued constitutional rights—a dubious proposition given the magnitude of Congress's power to shape remedies—one hardly can fault state lawmakers for following the national legislature's example. See *Burnett*, 104 S. Ct. at 2935 (Rehnquist, J., concurring in the judgment) ("The willingness of Congress to impose a one-year limitations period in 42 U.S.C. § 1986 demonstrates that at least a one-year period is reasonable"); see also *O'Sullivan v. Felix*, 233 U.S. 318 (1914) (applying a one-year limitation to federal civil rights claims). A one-year statute of limitations is not invalid *per se*; a discriminatory one-year provision, of course, is quite another matter.

42. *Johnson*, 582 F.2d at 1319.

43. See *Van Horn v. Lukhard*, 392 F. Supp. 384, 389-91 (E.D. Va. 1975); *Edgerton v. Puckett*, 391 F. Supp. 463, 465-66 (W.D. Va. 1975). Judge Turk refused to apply the one-year statute of limitations in *Edgerton* because he considered it to be discriminatory. Analo-

it in 1977.<sup>44</sup>

The Fourth Circuit's broad interpretation of "personal injuries" received the approval of the Supreme Court in *Runyon v. Mc-Crary*.<sup>45</sup> The Court deferred to the Fourth Circuit's expertise in Virginia law and rebuffed the argument that the two-year statute of limitations for personal injury suits applied solely to claims predicated upon actual physical harm. The parties urging that construction had "not cited any Virginia court decision to the effect that the term 'personal injuries' . . . means only 'physical injuries.'" <sup>46</sup> Moreover, the Court observed, "[i]t could be argued with at least equal force that the phrase 'personal injuries' was designed to distinguish those causes of action involving torts against the person from those involving damage to property."<sup>47</sup> The Court, therefore, let stand the Fourth Circuit's holding that the two-year statute governs actions for racial discrimination in contractual relations brought under 42 U.S.C. section 1981.<sup>48</sup>

Federal courts in Virginia continue to apply the personal injury

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gous state-law torts were not similarly limited, he concluded, "nor was any attempt made to rationally prescribe a limitation period for § 1983 suits in terms of the object of the litigation." *Edgerton*, 391 F. Supp. at 465-66. Instead, the legislature had sought "to limit all § 1983 causes of action without regard to the federal statutory and constitutional values at stake." *Id.* at 466. Judge Turk consequently rejected the 1973 amendment to VA. CODE § 8-24 (1957) and adhered to the two-year limitation adopted in *Almond*. *See id.* at 466.

Four days after *Edgerton* was decided, Judge Merhige issued his opinion in *Van Horn*. Rather than simply disregard the one-year statute of limitations for § 1983 cases, as Judge Turk had done, Judge Merhige declared the measure unconstitutional. The statute violated both the supremacy clause, U.S. CONST. art. VI, and the fourteenth amendment's equal protection clause, U.S. CONST. amend. XIV, § 1. Judge Merhige held, because the short limitation period unreasonably burdened the enforcement of federal rights and discriminated against federal litigants. *Van Horn*, 392 F. Supp. at 389-91. Like Judge Turk, Judge Merhige thought the General Assembly had singled out § 1983 cases for disadvantageous treatment while subjecting all other personal injury suits to a two-year limitation. To restore what he considered equality, Judge Merhige held that the two-year rule formulated in *Almond* continued to govern § 1983 actions brought in Virginia. *Id.* at 391.

44. Act of Apr. 1, 1977, ch. 617, 1977 Va. Acts 1052 (repealing VA. CODE § 8-24 (1957)). The statute was repealed when the legislature revised the civil procedure title of the Code. Repeal did not affect *Johnson*, which involved a cause of action that accrued before October 1, 1977, when the change became effective. *See Johnson*, 582 F.2d at 1318; VA. CODE § 8.01-256 (1984).

45. 427 U.S. 160, 179-82 (1976).

46. *Id.* at 182.

47. *Id.*

48. *Id.* at 179-82, *affirming* 515 F.2d 1082 (4th Cir. 1975).

statute of limitations<sup>49</sup> in all section 1983 cases irrespective of the type of damage the plaintiff alleges.<sup>50</sup> This Article will examine whether that practice remains valid after the Supreme Court's decision in *Burnett*. Two questions will be addressed: (a) Should a two-year limitation govern all section 1983 suits litigated in Virginia? (b) If so, is the personal injury statute the proper source of such a rule? Part I traces the history of Virginia statutes of limita-

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49. VA. CODE § 8.01-243(A) (1984) (effective Oct. 1, 1977), which states: "Unless otherwise provided by statute, every action for personal injuries, whatever the theory of recovery, except as provided in B hereof, shall be brought within two years next after the cause of action shall have accrued." *Id.* Subsection B prescribes a five-year limitation for suits involving injury to property. VA. CODE § 8.01-243(B) (1984); see *infra* note 258.

50. See, e.g., *Cramer v. Crutchfield*, 648 F.2d 943, 945 (4th Cir. 1981) (unreasonable search and seizure); *Buntin v. Board of Trustees*, 548 F. Supp. 657, 659 (W.D. Va. 1982) (age discrimination); *United Steelworkers of America v. Dalton*, 544 F. Supp. 291, 297 (E.D. Va. 1982) (malicious prosecutions aimed at denying plaintiffs' right to strike). In applying the two-year statute of limitations to § 1983 claims, federal courts follow the tolling rules of VA. CODE § 8.01-229 (1984). See *Cox v. Planning Dist. I Community Mental Health & Mental Retardation Servs. Bd.*, 669 F.2d 940, 943 (4th Cir. 1982); *Cramer*, 648 F.2d at 945; *Clymer v. Grzegorek*, 515 F. Supp. 938, 939-40 (E.D. Va. 1981). Borrowing state tolling rules accords with the doctrines set forth in *Chardon v. Soto*, 103 S. Ct. 2611 (1983), and *Board of Regents v. Tomanio*, 446 U. S. 478 (1980).

The General Assembly—or at least its advisors—appears to have acquiesced in the practice of applying a two-year limitation to all § 1983 cases litigated in Virginia. Acceptance came slowly, however. In November 1976, over a year and a half after the decisions in *Edgerton* and *Van Horn*, see note 43 *supra*, the Virginia Code Commission sent the governor and legislature a report suggesting that § 1983 actions would remain subject to a one-year limitation even if the General Assembly repealed the 1973 amendment to § 8-24. The Commission (or its consultants, who prepared the Revisers' Notes accompanying the report) thought that civil rights cases lay within the ambit of the proposed catchall statute of limitations. The catchall, which became VA. CODE § 8.01-248 (1984) (effective Oct. 1, 1977), imposed a one-year limitation on every personal action for which no time limit was otherwise prescribed. The report said, "While not specifically set forth in proposed § 8.01-248, actions for the deprivation of civil rights under Title 42 U.S.C.A. are deemed to be bound by the one-year limitation. See *Almond v. Kent*, 459 F.2d 100 [sic] (4th Cir. 1972), N.3 at p. 203." VIRGINIA CODE COMM'N, REPORT TO THE GOVERNOR AND GENERAL ASSEMBLY OF VIRGINIA, 1977 SESSION, H. DOC. NO. 14, at 157 (1977) [hereinafter cited as CODE COMMISSION REPORT].

The Commission's draft of the revision of Title 8, as amended by the General Assembly, became the new Title 8.01. See VA. CODE § 8.01-1 revisers' note (1984). The Commission's consultants edited the notes in the report, and the modified comments appeared as the "Revisers' Notes" printed after each section of the new Title 8.01. During the editing process, someone apparently reread *Almond*. The Note to § 8.01-248 omitted the assertion that the one-year catchall applies to § 1983 actions. Moreover, the consultants' treatise on Virginia procedure, published in 1982, acknowledged that § 8.01-243(A), rather than § 8.01-248, defines the limitation period for § 1983 suits. T. BOYD, E. GRAVES & L. MIDDLEDITCH, VIRGINIA CIVIL PROCEDURE § 3.2, at 149-50, § 3.8, at 175, 181 (1982).

tions and concludes that the term "personal injuries" has a much narrower meaning than the Fourth Circuit and the Supreme Court assumed. Part II then analyzes the significance of that finding from the standpoint of the two antidiscrimination principles articulated in *Burnett*.

## I. HISTORY OF VIRGINIA STATUTES OF LIMITATIONS

### A. *English Background and Virginia Developments to 1850*

At common law, the passage of time did not affect a litigant's right to sue. The victim of an actionable tort or breach of contract could invoke the jurisdiction of the king's courts at any time, no matter how stale his claim. Only the death of a party terminated a right of action.<sup>51</sup> In 1623, James I and Parliament changed the common-law rule by enacting a statute of limitations covering most personal actions.<sup>52</sup> Section 3 of the statute<sup>53</sup> provided that the length of the limitation period depended on the form of action. A person suing in debt or detinue, for example, had to institute proceedings within six years after his cause of action accrued. Claims for assault, battery, or false imprisonment had to be brought within four years, and actions for slander became time-barred only two years after the offending words were spoken.<sup>54</sup> Section 3 of the 1623 act remained England's basic statute of limitations for personal actions until 1939.<sup>55</sup>

During the seventeenth century, the Virginia General Assembly, like Parliament, imposed time limits on certain rights of action. Instead of adopting an omnibus statute of limitations, however, the Assembly legislated piecemeal. Largely ignoring actions *ex delicto*, the Assembly fixed specific limitation periods for suits involving

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51. *Williams v. Jones*, 13 East 439, 449, 104 Eng. Rep. 441, 445 (K.B. 1811); J. WILKINSON, A TREATISE ON THE LIMITATION OF ACTIONS \*1-2 (Amer. ed. Philadelphia 1833) (1st ed. London 1829). Some actions survived the death of the parties. See *infra* Part I(B).

52. 21 Jac., ch. 16, § 3 (1623). Although this was the first comprehensive statute of limitations, a few specialized provisions preceded it. For a description of statutes of limitations enacted before 1623, see H. WOOD, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY § 2 (4th ed. 1916).

53. 21 Jac., ch. 16, § 3 (1623).

54. *Id.*

55. Section 3 of the 1623 act was repealed by the Limitation Act, 1939, 2 & 3 Geo. 6, ch. 21, § 34(4).

debts, bonds, judgments, accounts, and officers' fees.<sup>56</sup> The legislature abandoned this ad hoc approach in 1705 and passed a comprehensive statute of limitations for tort and contract claims.<sup>57</sup> The 1705 measure was patterned on the English statute of 1623, but the Virginia lawmakers shortened each limitation period by one year. Thus, slander suits had to be brought within one year from the date of accrual; claims for assault, battery, or false imprisonment within three years; and other actions, such as account, trespass *quare clausum fregit*, debt, detinue, replevin, and miscellaneous varieties of trespass on the case, within five years.<sup>58</sup>

In 1748, the General Assembly attempted to replace the 1705 statute of limitations with a streamlined version containing the same time limits.<sup>59</sup> The crown, however, repealed this new measure by proclamation in 1751.<sup>60</sup> Hence the 1705 act continued in force throughout the remainder of the colonial period. The act survived the Revolution because the convention that assembled in Williamsburg in May and June of 1776 enacted a reception ordinance giving "full force" to the legislation of the colonial Assembly.<sup>61</sup> The legislature of the new Commonwealth reenacted the 1705 statute, with only a few minor changes, in 1792.<sup>62</sup> This limitation provision became part of the 1794 Code.<sup>63</sup> The Code underwent revision in 1803, but the statute of limitations for personal actions remained unaltered.<sup>64</sup> The General Assembly reenacted the statute in 1819 when it again revised the Code.<sup>65</sup> The limitation rules of the 1819

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56. 1 W. HENING, THE STATUTES AT LARGE 301-02, 390, 483-84 (1809-1823); 2 *id.* at 22, 26-27, 104-05, 143-44, 296-97, 301, 442; 3 *id.* at 145-46, 163.

57. 3 *id.* at 381-82.

58. *Id.*; see 4 S. TUCKER, BLACKSTONE'S COMMENTARIES 307 nn.27-29 (Philadelphia 1803) (comparing English and Virginia limitation periods).

59. 5 W. HENING, *supra* note 56, at 513.

60. *Id.* at 432, 513, 568.

61. 9 *id.* at 127.

62. Act of Dec. 19, 1792, ch. 15, § 4, reprinted in 1 S. SHEPHERD, THE STATUTES AT LARGE OF VIRGINIA 27 (1835) (codified at A. DAVIS, A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE ch. 76, § 4 (1794) [hereinafter cited as VA. CODE (1794)]).

63. VA. CODE ch. 76, § 4 (1794).

64. S. PLEASANTS & H. PACE, A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE ch. 76, § 4 (1803) [hereinafter cited as VA. CODE (1803)].

65. 1 B. LEIGH, THE REVISED CODE OF THE LAW OF VIRGINIA ch. 128, § 4 (1819) [hereinafter cited as VA. CODE (1819)].

Code retained their basic form<sup>66</sup> until July 1, 1850, when radical changes embodied in the 1849 Code went into effect.

The 1849 Code took a traditional approach to contract actions, prescribing specific limitation periods for particular types of claims.<sup>67</sup> For torts, however, the 1849 Code replaced the relatively straightforward system used since 1705 with a confusing formula based upon principles of survival. The new statute of limitations for torts provided:

Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature, that in case a party die, it can be brought by or against his representative, and if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued, unless it be against a master or skipper of a vessel for carrying a slave out of the state, to which this chapter shall not extend.<sup>68</sup>

In general, then, rights of action that survived the death of either party had a five-year limitation; nonsurvivable actions had a one-year limitation. Except for deletion of the reference to slavery and minor changes in punctuation, the 1849 statute remained in force, though several recodifications,<sup>69</sup> for over a century.<sup>70</sup> To understand how the law operated, one must examine the evolution of doctrines regulating the survival of actions.

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66. The rules for contract actions changed slightly. *See generally* W. JOYNES, AN ESSAY UPON THE ACT OF THE GENERAL ASSEMBLY OF VIRGINIA, PASSED APRIL 3, 1838, ENTITLED "AN ACT AMENDING THE STATUTE OF LIMITATIONS" (Richmond 1844).

67. VA. CODE ch. 149, § 5 (1849).

68. *Id.* § 11.

69. The statute appeared in VA. CODE (1860) under the same chapter (ch. 149) and section (§ 11) numbers as those used in VA. CODE (1849). Subsequent codes reclassified the provision several times. The statute became, successively, VA. CODE ch. 146, § 14 (1873); VA. CODE § 2927 (1887); VA. CODE § 2927 (1904); VA. CODE § 5818 (1919); and VA. CODE § 8-24 (1950) (repealed 1977).

70. The first major modification of the statute occurred in 1954. *See* Act of Apr. 6, 1954, ch. 589, 1954 VA. ACTS 764 (codified at VA. CODE § 8-24 (1957)). The 1954 amendment is described in the text accompanying notes 243-45 *infra*.

## B. *Survival of Personal Actions in England and Virginia*

### 1. *The Personal Representative as Plaintiff*

#### a. *Contract Actions*

From the earliest times, royal courts permitted a personal representative to sue a defendant in covenant<sup>71</sup> for violating the terms of a sealed agreement with a testator or intestate during the decedent's lifetime.<sup>72</sup> Covenant survived because the common law considered the promisee's chose in action part of his personal estate.<sup>73</sup> Starting in the late thirteenth century, the action of debt<sup>74</sup> also survived in favor of executors.<sup>75</sup> Executors of executors gained the right to bring actions of debt in 1352,<sup>76</sup> as did administrators in 1357.<sup>77</sup> Thereafter, personal representatives could sue in debt on a judgment,<sup>78</sup> debt on a statute,<sup>79</sup> or debt on a contract or obligation.<sup>80</sup>

Prior to the reign of Edward I, a personal representative could not obtain a writ of account<sup>81</sup> to compel someone to submit to an audit of sums owed a testator or intestate.<sup>82</sup> This barrier began to

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71. For a description of the action of covenant, see generally J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 264-66 (2d ed. 1979).

72. Evans, *Survival of Claims for and Against Executors and Administrators*, 19 Ky. L.J. 195, 196-97 (1931). For examples, see *Morley v. Polhill*, 2 Vent. 56, 86 Eng. Rep. 305 (C.P. 1688); *Lucy v. Levington*, 1 Vent. 175, 86 Eng. Rep. 119, 2 Lev. 26, 83 Eng. Rep. 436 (K.B. 1671).

73. *Raymond v. Fitch*, 2 C. M. & R. 588, 597, 150 Eng. Rep. 251, 254 (Ex. Pl. 1835).

74. See generally J. BAKER, *supra* note 71, at 266-71 (describing action of debt).

75. 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 584 (5th ed. 1942); 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 347 (2d ed. 1898).

76. The statute 25 Edw. 3, stat. 5, ch. 5 (1352) permitted the executor of an executor to bring an action of debt if the first executor's testator could have sued in debt had he lived.

77. The statute 31 Edw. 3, stat. 1, ch. 11 (1357) gave administrators of intestates' property the same right of action for debt that executors possessed. See Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 Mo. L. Rev. 107, 114 (1943).

78. *Berwick v. Andrews*, 2 Ld. Raym. 971, 92 Eng. Rep. 147, 1 Salk. 314, 91 Eng. Rep. 277, 6 Mod. 125, 87 Eng. Rep. 882 (K.B. 1703).

79. *Moreton v. Hopkins*, 1 Vent. 30, 86 Eng. Rep. 22, 2 Keble 502, 84 Eng. Rep. 316 (K.B. 1669).

80. See 2 M. BACON, *A NEW ABRIDGMENT OF THE LAW* 439 (5th ed. Dublin 1786).

81. See generally J. BAKER, *supra* note 71, at 300-03 (describing action of account).

82. According to Sir Edward Coke, the common law did not allow a personal representative to sue in account "because the account rested in privity," i.e., in the private knowledge of the decedent. E. COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWEES OF ENGLAND*



crumble in 1285 when the Statute of Westminster II<sup>83</sup> enabled an executor to sue in account if his testator could have brought that action during his lifetime. A few decades later, courts allowed executors of executors to sue in account,<sup>84</sup> a practice which received statutory approval in 1352.<sup>85</sup> Administrators were placed on an equal footing in 1357.<sup>86</sup>

By the end of the sixteenth century, English courts allowed a personal representative to sue a promisor in assumpsit for breaching an informal agreement with a testator or intestate during the dead promisee's lifetime.<sup>87</sup> This development marked the final stage in the formulation of a general rule: any claim sounding in contract survived the death of the person to whom the cause of action had accrued. The rule had one major exception. If the breach injured the decedent's person rather than his estate, the action did not survive.<sup>88</sup>

These English principles strongly influenced Virginia law. The General Assembly passed a statute in 1785 authorizing executors and administrators to sue "upon all judgments, bonds, or other specialties, bills, notes, or other writings of their testators or intestates, whether the executors or administrators be, or be not named in such instruments, and also upon all their personal contracts."<sup>89</sup>

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404 (6th ed. London 1681) (1st ed. London 1642); see also E. COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* § 123, at 89b (London 1628).

83. 13 Edw., stat. 1, ch. 23 (1285).

84. Executors of executors were allowed to bring actions of account as early as 1337. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 742 n.1 (5th ed. 1956).

85. 25 Edw. 3, stat. 5, ch. 5 (1352).

86. 31 Edw. 3, stat. 1, ch. 11 (1357). See generally 1 E. WILLIAMS, *A TREATISE ON THE LAW OF EXECUTORS AND ADMINISTRATORS* \*557 (2d Amer. ed. Philadelphia 1841) (1st ed. London 1832).

87. A. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* 565-66 (1975); see also 3 W. HOLDSWORTH, *supra* note 75, at 584.

88. The classic example of this exception was a suit in assumpsit for breach of promise to marry. Ordinarily, refusal to marry hurt the promisee's feelings but did not cause pecuniary loss. Therefore, absent allegations of special damage to the promisee's estate, courts treated the action as though it sounded in tort rather than in contract, and the claim died with the jilted promisee. See *Chamberlain v. Williamson*, 2 M. & S. 408, 415, 105 Eng. Rep. 433, 436 (K.B. 1814). The same principle applied to medical malpractice suits. English courts did not permit personal representatives to sue physicians for breaching their implied promise to use a proper degree of skill. "[S]uch cases being, in substance, actions for injuries to the person," they did not survive. 1 E. WILLIAMS, *supra* note 86, at \*568.

89. 12 W. HENING, *supra* note 56, at 152. The statute was reenacted in 1792. Act of Dec.

Versions of the 1785 law appeared in all subsequent Virginia codes.<sup>90</sup> This legislation ensured survival of every contractual form of action designed to remedy harm to a decedent's estate. As in England, however, tort survival rules applied to contract-based claims for injury to the person, such as breach of promise to marry<sup>91</sup> or failure to transport passengers safely.<sup>92</sup> Conversely, contract survival principles governed actions that nominally sounded in tort but essentially sought redress for violation of an agreement.<sup>93</sup>

*b. Possessory and delictual actions*

From the early fourteenth century, the common law recognized the right of a personal representative to sue in detinue<sup>94</sup> to recover personalty entrusted by the decedent to a bailee.<sup>95</sup> Detinue lay for a personal representative because he succeeded to his decedent's property interest in the bailed chattel.<sup>96</sup> Detinue was especially ef-

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13, 1792, ch. 30, § 55, *reprinted in* 1 S. SHEPHERD, *supra* note 62, at 97 (codified at VA. CODE ch. 92, § 55 (1794)). The right of an executor to sue and to be sued on the contracts of a decedent descended to his own executor. *See* 12 W. HENING, *supra* note 56, at 152 (statute of 1785 based on 25 Edw. 3, stat. 5, ch. 5 (1352)) (codified at VA. CODE ch. 92, § 59 (1794)).

In addition to his general right to sue in contract, a personal representative enjoyed specialized rights of action. For example, a 1752 statute allowed the personal representative of a creditor to bring a debt action against a sheriff who wilfully or negligently allowed an imprisoned debtor to escape. 6 W. HENING, *supra* note 56, at 345. The statute was reenacted by Act of Nov. 24, 1792, ch. 18, § 3, *reprinted in* 1 S. SHEPHERD, *supra* note 62, at 42-43 (codified at VA. CODE ch. 79, § 3 (1794)), and appeared in VA. CODE ch. 79, § 3 (1803), and VA. CODE ch. 136, § 3 (1819). The measure was omitted from the 1849 Code because Virginia abolished imprisonment for debt in civil cases. 1 J. LOMAX, A TREATISE ON THE LAW OF EXECUTORS AND ADMINISTRATORS 473 (2d ed. Richmond 1857) (1st ed. Philadelphia 1841).

90. *See* VA. CODE ch. 92, § 55 (1794); VA. CODE ch. 92, § 55 (1803); VA. CODE ch. 104, § 62 (1819); VA. CODE ch. 130, § 19 (1849); VA. CODE ch. 130, § 19 (1860); VA. CODE ch. 126, § 19 (1873); VA. CODE § 2654 (1887); VA. CODE § 2654 (1904); VA. CODE § 5384 (1919); VA. CODE § 64-134 (1950); VA. CODE § 64.1-144 (1980). The current statute reads: "A personal representative may sue or be sued upon any judgment for or against or any contract of or with his decedent." *Id.*

91. *See* Grubb's Adm'r v. Sult, 73 Va. (32 Gratt.) 203 (1879).

92. *See* Birmingham v. Chesapeake & O. Ry., 98 Va. 548, 37 S.E. 17 (1900).

93. *See* Lee's Adm'r v. Hill, 87 Va. 497, 500, 12 S.E. 1052, 1052-53 (1891) (wrongful discharge from employment).

94. *See generally* J. BAKER, *supra* note 71, at 325-28 (describing action of detinue).

95. 3 W. HOLDSWORTH, *supra* note 75, at 584; T. PLUCKNETT, *supra* note 84, at 647 n.3.

96. S. TOLLER, THE LAW OF EXECUTORS AND ADMINISTRATORS 434 (4th Amer. ed. Philadelphia 1834) (1st ed. London 1800); 11 C. VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 131 (Aldershot, England 1741).

fective when brought by executors because, in such cases, English courts departed from normal practice<sup>97</sup> and forbade defense by wager of law.<sup>98</sup> Replevin likewise survived in favor of a personal representative.<sup>99</sup>

At common law, all trespass rights of action died with the party whose person or property sustained injury.<sup>100</sup> The statute *De Bonis Asportatis in Vita Testatoris*,<sup>101</sup> enacted in 1330, modified this rule by providing for survival of trespass actions involving personal property. Originally the statute applied only to executors, but later its coverage expanded to include executors of executors<sup>102</sup> and administrators.<sup>103</sup> Courts read the provision broadly, allowing survival of virtually every kind of action to redress property loss or damage.<sup>104</sup> If a wrongful act diminished the value of a decedent's personal estate, his representative could sue, regardless of the theory of recovery.<sup>105</sup> Executors and administrators could bring actions of trespass or trespass on the case against persons who cut and carried away a decedent's corn,<sup>106</sup> converted his goods,<sup>107</sup> removed his collateral,<sup>108</sup> allowed his debtor to escape,<sup>109</sup> or kept pro-

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97. As a general rule, a bailee sued in detinue could plead the general issue and elect trial by compurgation. See Pagan, *English Carriers' Common-Law Right to Reject Undeclared Cargo: The Myth of the Closed-Container Conundrum*, 23 WM. & MARY L. REV. 791, 799-800 (1982).

98. T. PLUCKNETT, *supra* note 84, at 647 n.3.

99. 1 J. CHITTY, A TREATISE ON THE PARTIES TO ACTIONS, THE FORMS OF ACTIONS, AND ON PLEADING \*159-60 (4th Amer. ed. Philadelphia 1825) (1st ed. London 1809); Evans, *supra* note 72, at 201 n.27; 11 C. VINER, *supra* note 96, at 127.

100. 2 M. BACON, *supra* note 80, at 439; 1 R. BARTON, THE PRACTICE IN THE COURTS OF LAW IN CIVIL CASES 112 (1891); 1 J. CHITTY, *supra* note 99, at \*59-61.

101. 4 Edw. 3, ch. 7 (1330).

102. 25 Edw. 3, stat. 5, ch. 5 (1352).

103. No statute specifically conferred upon administrators the right to sue for property loss or damage. Intestates' actions survived because courts interpreted 4 Edw. 3, ch. 7 (1330) liberally, basing decisions on the equity of the statute rather than on its literal language. See *Smith v. Colgay*, Cro. Eliz. 384, 78 Eng. Rep. 630 (Q.B. 1595).

104. See *Wheatley v. Lane*, 1 Wms. Saund. 216, 217 n.1, 85 Eng. Rep. 228, 231 n.1 (K.B. 1668) (annotation).

105. See *Twycross v. Grant*, 4 C.P.D. 40, 45-46 (1878); *Wilson v. Knubley*, 7 East 128, 134-35, 103 Eng. Rep. 49, 51-52 (K.B. 1806); 1 E. WILLIAMS, *supra* note 86, at \*561-62.

106. *Emerson v. Emerson*, 1 Vent. 187, 86 Eng. Rep. 127 (K.B. 1672).

107. *Crossier v. Ogleby*, 1 Strange 60, 93 Eng. Rep. 385 (K.B. 1716); *Rutland v. Rutland*, Cro. Eliz. 377, 78 Eng. Rep. 624 (C.P. 1595); *Russell & Prats Case*, 1 Leo. 193, 74 Eng. Rep. 178 (Ex. Ch. 1589).

108. *Palgrave v. Windham*, 1 Strange 212, 93 Eng. Rep. 478 (K.B. 1719).

ceeds owed him from execution of a judgment.<sup>110</sup>

The 1330 statute did not, however, alter the common-law rule prohibiting the personal representative of a freeholder from suing one who trespassed on the decedent's land during the decedent's lifetime.<sup>111</sup> Nor did the statute lift the common law's ban on survival of actions for injury to the person. Consequently, English personal representatives could not recover for false imprisonment, assault, battery, slander, libel, malicious prosecution, deceit, and similar torts committed against decedents.<sup>112</sup>

For the most part, Virginia followed England's example. Courts of the Commonwealth allowed personal representatives to bring actions in detinue as early as 1790,<sup>113</sup> and in 1785 the General Assembly passed a statute<sup>114</sup> based on *De Bonis Asportatis in Vita Testatoris*.<sup>115</sup> The 1785 statute was reenacted in 1792 and later appeared in the Codes of 1794, 1803, and 1819.<sup>116</sup> Despite similarity

109. *LeMason v. Dickson*, Popham 189, 79 Eng. Rep. 1282 (K.B. 1626).

110. *Williams v. Carey*, 1 Salk. 12, 91 Eng. Rep. 12, 4 Mod. 403, 87 Eng. Rep. 468, 12 Mod. 71, 88 Eng. Rep. 1171, 1 Ld. Raym. 40, 91 Eng. Rep. 923 (K.B. 1695).

111. *Emerson v. Emerson*, 1 Vent. 187, 86 Eng. Rep. 127 (K.B. 1672); *Wheatley v. Lane*, 1 Wms. Saund. 216, 217 n.1, 85 Eng. Rep. 228, 231 n.1 (K.B. 1668) (annotation); 1 J. CHITTY, *supra* note 99, at \*61-62; 1 J. LOMAX, *supra* note 89, at 474. In England, actions for damage to real property did not survive until 1833. See 3 & 4 Will. 4, ch. 42, § 2 (1833).

112. See *Wheatley v. Lane*, 1 Wms. Saund. 216, 217 n.1, 85 Eng. Rep. 228, 231 n.1 (K.B. 1668) (annotation); T. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 116, at 642 (2d ed. 1953); EYANS, *supra* note 72, at 204. The maxim *actio personalis moritur cum persona* held sway until the twentieth century, when Parliament finally provided for survival of all tort actions except defamation and seduction. See Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. 5, ch. 41, § 1(1), amended by Law Reform (Miscellaneous Provisions) Act, 1970, ch. 33, §§ 4-5. For discussions of this survival legislation, see A. ARMITAGE & R. DIAS, *CLERK & LINDSELL ON TORTS* ¶ 413, at 271 (14th ed. 1975); W. ROGERS, WINFIELD & JOLOWICZ *ON TORT* 530-33 (11th ed. 1979). Long before the enactment of survival laws, however, Parliament conferred a special right of action on the personal representatives of wrongful death victims. See Lord Campbell's Act (Fatal Accidents Act), 9 & 10 Vict., ch. 93 (1846); see also Winfield, *Death as Affecting Liability in Tort*, 29 COLUM. L. REV. 239, 241 (1929).

113. See *Hughes v. Clayton*, 7 Va. (3 Call.) 554 (1790).

114. The 1785 statute provided:

Actions of trespass may be maintained by or against executors or administrators, for any goods taken and carried away in the life-time of the testator or intestate; and the damages recovered shall be in the one case for the benefit of the estate, and in the other out of the assets.

12 W. HENING, *supra* note 56, at 152.

115. 4 Edw. 3, ch. 7 (1330).

116. Act of Dec. 13, 1792, ch. 30, § 58, reprinted in 1 S. SHEPHERD, *supra* note 62, at 98;

of language, the Virginia measure received a less generous construction than its English model. Virginia judges apparently restricted the law's application to cases involving the actual taking and carrying away of goods.<sup>117</sup> An 1827 amendment extended the ambit of the Virginia survival statute to embrace all actions for injury to personal property.<sup>118</sup> Rights of action for torts to realty continued to expire at the landowner's death,<sup>119</sup> however, until enactment of another amendment in 1849.<sup>120</sup>

By the middle of the nineteenth century, a rule had emerged which remains in effect to this day: all claims for injury to real or personal property survive the aggrieved party's death.<sup>121</sup> Rights of action for injury to the person, by contrast, continued to die with the victim until 1950.<sup>122</sup> When claims for injury to the person

VA. CODE ch. 92, § 58 (1794); VA. CODE ch. 92, § 58 (1803); VA. CODE ch. 104, § 64 (1819).

117. See *Henshaw v. Miller*, 58 U.S. (17 How.) 212, 221-23 (1854); *Thweatt's Adm'r v. Jones*, 22 Va. (1 Rand.) 328, 331 (1823); see also 1 R. BARTON, *supra* note 100, at 115; 1 J. LOMAX, *supra* note 89, at 471-72; 2 *id.* at 434.

118. Act of March 9, 1827, ch. 29, § 1, 1826-27 Va. Acts 27 (codified at VA. CODE ch. 196, § 1 (Supp. 1833)).

119. See *Harris v. Crenshaw*, 24 Va. (3 Rand.) 14, 23 (1825).

120. The survival statute was modified during recodification. As amended, the statute read:

An action of trespass, or trespass on the case, may be maintained by or against a personal representative for the taking or carrying away any goods, or for the waste or destruction of, or damage to, any estate of, or by, his decedent.

VA. CODE ch. 130, § 20 (1849).

121. Every revision of the Virginia Code since 1849 has contained some variation of VA. CODE ch. 130, § 20 (1849). See VA. CODE ch. 130, § 20 (1860); VA. CODE ch. 126, § 20 (1873); VA. CODE § 2655 (1887); VA. CODE § 2655 (1904); VA. CODE § 5385 (1919); VA. CODE § 64-135 (1950) (repealed 1968); VA. CODE § 64.1-145 (1980). The current version reads:

Any action at law for damages for the taking or carrying away of any goods, or for the waste, destruction of, or damage to any estate of or by the decedent, whether such damage be direct or indirect, may be maintained by or against the decedent's personal representative. Any such action shall survive pursuant to § 8.01-25.

*Id.* VA. CODE § 8.01-25 (1984) provides in part:

Every cause of action whether legal or equitable, which is cognizable in the Commonwealth of Virginia, shall survive either the death of the person against whom the cause of action is or may be asserted, or the death of the person in whose favor the cause of action existed, or the death of both such persons.

VA. CODE § 8.01-25 (1984).

122. See, e.g., *Beavers' Adm'r v. Putnam's Curator*, 110 Va. 713, 67 S.E. 353 (1910) (battery); *Birmingham v. Chesapeake & O. Ry.*, 98 Va. 548, 37 S.E. 17 (1900) (negligence causing bodily harm); *Mumpower v. City of Bristol*, 94 Va. 737, 27 S.E. 581 (1897) (malicious prosecution); *Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 24 S.E. 269 (1896) (negligence causing

finally became descendible, the change climaxed a gradual process of evolution lasting almost eighty years. That process began with the enactment of Virginia's first wrongful death act in 1871.<sup>123</sup>

Patterned on Lord Campbell's Act,<sup>124</sup> the 1871 wrongful death statute abolished the common-law rule against awarding damages for the death of a human being.<sup>125</sup> In place of that harsh policy, the wrongful death act authorized recovery for the death of a person killed due to misconduct "such as would (if death had not ensued) have entitled the party injured . . . to maintain an action and recover damages."<sup>126</sup> The statute required the action to be brought by the decedent's personal representative on behalf of a class of beneficiaries consisting of the victim's spouse, parents, and children.<sup>127</sup>

The wrongful death act of 1871 said nothing about continuation

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bodily harm). The change that occurred in 1950 is discussed in the text accompanying notes 148-50 *infra*.

123. Act of Jan. 14, 1871, ch. 29, 1870-71 Va. Acts 27 (codified at VA. CODE ch. 145, §§ 7-10 (1873)).

A wrongful death suit differs from a survival action in several respects. The cause of death matters in the former but not in the latter. A wrongful death suit benefits particular relatives of the victim; the proceeds from a survival action go to the decedent's estate. A wrongful death act creates a new right of action; a survival statute simply enables a personal representative to enforce the decedent's own right of action. Wrongful death legislation specifies categories of recoverable damages; survival laws generally permit recovery of whatever damages the decedent himself could have recovered. Beneficiaries of a wrongful death suit take free of the victim's debts and liabilities; the proceeds from a survival action are subject to the claims of creditors. See *Bagley v. Weaver*, 211 Va. 779, 782, 180 S.E.2d 686, 688-89 (1971); *Wilson v. Whittaker*, 207 Va. 1032, 1036, 154 S.E.2d 124, 127 (1967); *Beaver's Adm'x v. Putnam's Curator*, 110 Va. 713, 715, 67 S.E. 352, 354 (1910); *Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 693, 24 S.E. 269, 271-72 (1896); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* §§ 125A-127 (5th ed. 1984).

Notwithstanding these distinctions, the history of Virginia's wrongful death legislation merits attention. By eroding the common-law notion that death bars tort claims and liabilities and by expanding the litigation function of personal representatives, wrongful death acts paved the way for survival laws.

124. Fatal Accidents Act, 9 & 10 Vict., ch. 93 (1846).

125. See *Baker v. Bolton*, 1 Camp. 493, 493, 170 Eng. Rep. 1033, 1033 (K.B. 1808) ("In a civil Court, the death of a human being could not be complained of as an injury . . .").

126. Act of Jan. 14, 1871, ch. 29, § 1, 1870-71 Va. Acts 27, 27 (codified at VA. CODE ch. 145, § 7 (1873)). This statute and subsequent Virginia wrongful death acts are discussed in Note, *Death by Wrongful Act and Survival of Personal Injury Actions in Virginia*, 38 VA. L. REV. 959 (1952).

127. Act of Jan. 14, 1871, ch. 29, § 2, 1870-71 Va. Acts 27, 27 (codified at VA. CODE ch. 145, § 8 (1873)).

of a suit brought by a victim who died before judgment. The General Assembly partially addressed the issue of revival in 1878 when it amended the statute.<sup>128</sup> The amendment permitted a personal representative to revive his decedent's pending suit if death resulted from the defendant's wrongful act. After revival, the suit proceeded as a wrongful death claim.<sup>129</sup> Revival was unavailable if the events giving rise to suit did not cause the plaintiff's death. Neither the original 1871 statute nor the 1878 amendment allowed a personal representative to assert the right of action of a testator or intestate who sustained injury to his person and then died of unrelated causes before filing suit.

The amended wrongful death act was codified as sections 2902 through 2906 of the 1887 Code.<sup>130</sup> Construing those sections in *Anderson v. Hygeia Hotel Co.*,<sup>131</sup> the Virginia Supreme Court<sup>132</sup> held that the common law of survival remained in force. Wrongful death legislation gave the personal representative "a new and original right of action";<sup>133</sup> the victim's own right of action "still, as at common law, die[d] with the person."<sup>134</sup> The revival statute, section 2906,<sup>135</sup> did not change the traditional rule, the court concluded, because all that provision did was convert the victim's defunct personal injury suit into a new wrongful death claim. His original action did not continue.<sup>136</sup>

The General Assembly amended section 2906 in 1894 by authorizing revival of all suits for injury to the person irrespective of whether the defendant's wrongful act caused the plaintiff to die before judgment.<sup>137</sup> Unlike the revival provision of 1878<sup>138</sup> which it

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128. Act of March 12, 1878, ch. 238, § 1, 1877-78 Va. Acts 221 (amending VA. CODE ch. 145, § 10 (1873)).

129. *See id.*

130. VA. CODE §§ 2902-06 (1887).

131. 92 Va. 687, 24 S.E. 269 (1896).

132. This Article, for the sake of consistency and simplicity, always refers to the highest court of the Commonwealth as the Virginia Supreme Court even though that tribunal has borne several other names in its history.

133. *Anderson*, 92 Va. at 691, 24 S.E. at 271.

134. *Id.* at 694, 24 S.E. at 272.

135. VA. CODE § 2906 (1887), which basically duplicated VA. CODE ch. 145, § 10 (1873).

136. *See Anderson*, 92 Va. at 694, 24 S.E. at 272.

137. Act of Jan. 29, 1894, ch. 88, § 1, 1893-94 Va. Acts 83 (amending VA. CODE § 2906 (1887)).

138. Act of March 12, 1878, ch. 238, § 1, 1877-78 Va. Acts 221 (amending VA. CODE ch.

replaced, the 1894 amendment did not indicate the form the revived suit would take. Presumably, a suit based on the same act that caused the plaintiff's death still went forward as a wrongful death claim. The possibility existed, however, that a suit brought by a plaintiff who died from unrelated causes might proceed in its original form, in which case the amended section 2906 arguably qualified as a survival statute. This theory was rejected by the Virginia Supreme Court in *Birmingham v. Chesapeake & Ohio Railway*.<sup>139</sup> The court refused to recognize a conceptual link between revival and survival. Unexercised rights of action for injury to the person still died with the victim notwithstanding the unrestricted availability of revival.<sup>140</sup>

Section 2906 appeared, without changes, in the Code of 1904.<sup>141</sup> The General Assembly completely recodified the laws of Virginia fifteen years later, and section 2906 became section 5790 of the 1919 Code.<sup>142</sup> Section 5790 allowed revival of all suits brought by decedents, but required every revived action to proceed as a wrongful death claim whether or not the defendant's misconduct caused the plaintiff's death. Lest anyone confuse revival with survival, the General Assembly appended a caveat which said that section 5790 did not extend the one-year limitation period for non-survivable actions.<sup>143</sup> Moreover, the Revisers' Note to section 5790 declared, "For a personal injury not resulting in death, for which no action is brought by the injured party in his lifetime, no provision is now, or has ever been made, and it simply dies as at common law."<sup>144</sup>

Only a year after adopting the 1919 Code, the legislature recognized the absurdity of treating all revived suits as wrongful death

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145, § 10 (1873) (recodified at VA. CODE § 2906 (1887)).

139. 98 Va. 548, 37 S.E. 17 (1900).

140. See *id.* at 552, 37 S.E. at 18. Divorcing revival from descent marked a break with tradition. In the early nineteenth century, an executor or administrator could revive a suit by *scire facias* only if he could have brought the action originally. See VA. CODE ch. 128, § 38 (1819).

141. VA. CODE § 2906 (1904).

142. VA. CODE § 5790 (1919).

143. See *id.*

144. VA. CODE § 5790 revisers' note (1919). The note also stated that § 5790 was not intended to change the holding in *Birmingham v. Chesapeake & O. Ry.*, 98 Va. 548, 37 S.E. 17 (1900). See *supra* text accompanying notes 139-40.



actions. The General Assembly amended section 5790<sup>145</sup> to distinguish between fatal and nonfatal injuries. If the victim of a wrongful act filed suit and then died of injuries inflicted by the defendant, the plaintiff's personal representative could revive the action and prosecute it as a wrongful death claim.<sup>146</sup> By implication, if death stemmed from other causes, the revived suit kept its original character. Unasserted rights of action still terminated at death.<sup>147</sup>

Full-scale survival of rights of action for injury to the person arrived at last in 1950. The General Assembly amended the new Code of 1950<sup>148</sup> by adding section 8-628.1,<sup>149</sup> which provided: "No cause of action for injuries to person or property shall be lost because of the death of the person in whose favor the cause of action existed, provided, however, in such action no recovery can be had for mental anguish, pain or suffering."<sup>150</sup> Section 8-628.1 did not contain a limitation caveat, so plaintiffs predictably argued that the new survival rule lengthened the filing period for suits involving injury to the person from one year to five years.<sup>151</sup> The Virginia Supreme Court just as predictably disagreed, holding that the legislature did not intend to affect the statute of limitations when it enacted section 8-628.1.<sup>152</sup> In 1952<sup>153</sup> and again in 1954,<sup>154</sup> the Gen-

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145. Act of Feb. 10, 1920, ch. 26, § 1, 1920 Va. Acts 27 (amending VA. CODE § 5790 (1919)).

146. *See id.*

147. The 1920 amendment reiterated the limitation caveat. *Id.*

148. The 1950 Code, as originally promulgated, reproduced the 1920 version of former § 5790 under a new number, viz. VA. CODE § 8-640 (1950).

149. VA. CODE § 8-628.1 (Supp. 1951), added by Act of Apr. 7, 1950, ch. 481, 1950 Va. Acts 948.

150. *Id.* The restriction on damages was removed in 1964. Act of Feb. 17, 1964, ch. 34, 1964 Va. Acts 51 (amending VA. CODE § 8-628.1 (1957)); *see* Bagley v. Weaver, 211 Va. 779, 782, 180 S.E.2d 686, 688 (1971).

151. *See* VA. CODE § 8-24 (1950) (imposing a five-year limitation on actions that survived and a one-year limitation on those that did not survive).

152. *Herndon v. Wickham*, 198 Va. 824, 97 S.E.2d 5 (1957). Because the cause of action at issue in *Herndon* arose in 1951, the court based its decision on the 1950 version of § 8-628.1. Although that section did not explicitly caution against construing survival legislation so as to alter limitation periods, such a caveat appeared in VA. CODE § 8-628 (1950) (repealed 1954), which authorized survival actions against personal representatives of dead wrongdoers. The court assumed that the caveat applied equally to survival actions by personal representatives of victims. *Herndon*, 198 Va. at 831-32, 97 S.E.2d at 11. The legislature's subsequent insertion of express caveats in § 8-628.1 confirmed the correctness of that assumption. *See infra* notes 153-54; *see also* *Sherley v. Lotz*, 200 Va. 173, 178, 104 S.E.2d 795, 798-99 (1958) (reaffirming *Herndon*).

eral Assembly amended section 8-628.1 to indicate that courts should ignore survival legislation when they calculate limitation periods.

Thus, from 1950 to 1977,<sup>155</sup> Virginia had a schizoid law of survival. A right of action for injury to the person descended in one sense but not in the other. By virtue of section 8-628.1,<sup>156</sup> a personal representative could sue on his decedent's claim; yet, for limitation purposes, the claim died with the testator or intestate, as dictated by the common law.

## 2. *The Personal Representative as Defendant*

So far, we have viewed rights of action as assets of an estate. Now we turn to their role as liabilities and examine when a right of action on which a testator or intestate might have been sued in his lifetime survived his death and lay against his personal representative.

### a. *Contract Actions*

Actions of covenant survived against executors and administrators as early as the latter part of the thirteenth century.<sup>157</sup> A personal representative had to honor his decedent's sealed agreements unless the instrument required an act that only the testator or intestate himself could perform.<sup>158</sup> Account did not lie against per-

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153. Act of March 31, 1952, ch. 378, 1952 Va. Acts 671 (amending VA. CODE § 8-628.1 (Supp. 1951)).

154. Act of Apr. 6, 1954, ch. 607, 1954 Va. Acts 782 (codified at VA. CODE § 8-628.1 (1957)).

155. Virginia halted its practice of basing limitation periods on survival in 1977 when VA. CODE §§ 8.01-243, -248 (1977) supplanted VA. CODE § 8-24 (1957). Since 1977, the law of survival has dealt solely with the actual descent of claims and liabilities.

156. A 1964 amendment to § 8-628.1 made explicit what the statute had long implied: only actions for nonfatal injuries survived. If a victim sustained fatal injuries, his right of action for bodily harm was replaced by a right of action for wrongful death. Act of Feb. 17, 1964, ch. 34, 1964 Va. Acts 51 (amending VA. CODE § 8-628.1 (1957)).

Section 8-628.1 was repealed in 1977. Act of Apr. 1, 1977, ch. 617, 1977 Va. Acts 1052. The principal features of the statute were transferred to VA. CODE § 8.01-25 (1984).

157. Atkinson, *supra* note 77, at 113; 3 W. HOLDSWORTH, *supra* note 75, at 578. Until the reign of Edward I, the heir, not the executor, was the proper party to sue. A. SIMPSON, *supra* note 87, at 82; T. PLUCKNETT, *supra* note 84, at 377; 2 F. POLLOCK & F. MAITLAND, *supra* note 75, at 344-45, 347.

158. Walker v. Hull, 1 Lev. 177, 83 Eng. Rep. 357 (K.B. 1666); Hyde v. Dean and Canons

sonal representatives,<sup>159</sup> however, until enactment of a statute in 1705.<sup>160</sup>

For procedural reasons, debt on a simple contract did not survive until the nineteenth century.<sup>161</sup> The right of action died with the debtor due to the peculiarities of compurgation. A person sued in debt based on an unsealed bargain could defend himself by wager of law because he might have satisfied the debt privately without witnesses to verify payment.<sup>162</sup> Accordingly, the common law absolved the defendant of all liability if he swore that he did not owe the sum claimed and produced oath helpers who attested to his good reputation.<sup>163</sup> Since compurgation relied upon the conscience of the debtor, only he could swear, "for no man can with a safe conscience wage law of another man's contract; that is, swear that he never entered into it, or, at least, that he privately discharged it."<sup>164</sup> A personal representative was presumed ignorant of his decedent's private dealings and, therefore, could not wage law on his behalf. Consequently, the representative escaped liability in debt if the decedent could have elected trial by oath had he been sued during his lifetime.<sup>165</sup>

Although compurgation prevented descent of liability for simple

of Windsor, Cro. Eliz. 552, 553, 78 Eng. Rep. 798, 798 (Q.B. 1597) (dictum).

159. 2 M. BACON, *supra* note 80, at 444. The prohibition did not apply to actions of account brought by the crown. 11 C. VINER, *supra* note 96, at 246.

160. 4 & 5 Anne, ch. 16, § 27 (1705).

161. Debt on a simple contract apparently survived in the thirteenth century, but by Edward III's reign the right of action terminated when the debtor died. 3 W. HOLDSWORTH, *supra* note 75, at 578.

162. Informal debts and private payments did not lie within the knowledge of the country, so trial by jury was unavailable. A. SIMPSON, *supra* note 87, at 143.

163. J. WILKINSON, *supra* note 51, at \*3-5. Because a person could not wage law against the crown or the king's debtor, the Court of Exchequer did not allow compurgation in *quo minus* actions to collect simple contract debts. 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 347 (1765-1769).

164. 3 W. BLACKSTONE, *supra* note 163, at 347.

165. *Hodges v. Jane*, Style 199, 82 Eng. Rep. 643 (U.B. 1649); *Morgan v. Green*, Cro. Car. 187, 79 Eng. Rep. 763 (K.B. 1630); *Legate v. Pinchon* (Pinchon's Case), 9 Co. Rep. 86b, 87b, 88a, 77 Eng. Rep. 859, 861, 862 (Ex. Ch. 1612); *Germyn v. Rolls*, Cro. Eliz. 425, 78 Eng. Rep. 666 (Q.B. 1595); *Hughson v. Webb*, Cro. Eliz. 121, 78 Eng. Rep. 378 (Ex. Ch. 1588).

Although the common law disallowed actions of debt on simple contracts against personal representatives, the custom of London permitted such suits. See *Snelling v. Norton*, Cro. Eliz. 409, 78 Eng. Rep. 652 (C.P. 1595). Chancery enforced simple contract debts against personal representatives beginning in the sixteenth century. A. SIMPSON, *supra* note 87, at 561.

contracts, other types of debt actions survived because they were not subject to wager. Thus, debt lay against the personal representative of a person who owed rent<sup>166</sup> or servants' wages,<sup>167</sup> breached a statutory duty,<sup>168</sup> retained money levied on a writ of execution,<sup>169</sup> failed to satisfy a judgment,<sup>170</sup> omitted to perform an obligation imposed by a sealed instrument,<sup>171</sup> or neglected to pay the balance found due on account before auditors.<sup>172</sup> Wager was abolished by statute in 1833,<sup>173</sup> and at that time personal representatives became subject to suit in debt even for sums based on simple contracts.<sup>174</sup>

Long before 1833, however, creditors found an effective way to proceed against debtors' representatives. Rather than sue in debt, they resorted to assumpsit, a subcategory of trespass on the case that employed trial by jury as the exclusive method of proof. In the early sixteenth century, the King's Bench allowed actions of assumpsit to be brought against executors to collect money owed under testators' simple contracts.<sup>175</sup> The Common Pleas, which enjoyed a monopoly of debt actions, originally opposed this extension

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166. *Wheatley v. Lane*, 1 Wms. Saund. 216, 217 n.1, 85 Eng. Rep. 228, 230 n.1 (K.B. 1668) (annotation); *President of Magdalene [sic] College, Oxford v. Heron* (C.P. 1528), in 1 *THE REPORTS OF SIR JOHN SPELMAN* [hereinafter cited as *SPELMAN'S REPORTS*] 33 (94 Selden Society, J. Baker ed. 1977).

167. A laborer could sue a personal representative for wages owed by the decedent if the worker had been compelled by statute to serve. 11 C. VINER, *supra* note 96, at 274; *see also* A. SIMPSON, *supra* note 87, at 140-42.

168. *Hole v. Bradford*, Sir T. Raym. 57, 83 Eng. Rep. 32 (K.B. 1662).

169. *Cockram v. Welbye*, 2 Show. K.B. 79, 89 Eng. Rep. 806 (K.B. 1679); *Perkinson v. Gilford*, Cro. Car. 539, 79 Eng. Rep. 1064 (K.B. 1639).

170. 11 C. VINER, *supra* note 96, at 278.

171. *Lovell v. Peinter* (C.P. 1522), in *SPELMAN'S REPORTS*, *supra* note 166, at 168-69. A personal representative was suable in debt if his decedent had given a deed acknowledging the obligation because "against a specialty no man shall wage his law." *Core's Case*, 1 Dyer 20a, 23a, 73 Eng. Rep. 42, 48 (K.B. 1536), *aff'd*, Jenk. 195, 145 Eng. Rep. 130 (Ex. Ch. 1536). Jurors decided disputes over bonds by comparing seals. S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 257 (2d ed. 1981).

172. *Bowyer v. Garland*, Cro. Eliz. 600, 78 Eng. Rep. 843 (Q.B. 1598). Debt did not lie against a personal representative, however, to collect an arbitration award made by parol during the decedent's lifetime because the testator or intestate might have waged his law. *Hampton v. Boyer*, Cro. Eliz. 557, 78 Eng. Rep. 802 (Q.B. 1597).

173. 3 & 4 Will. 4, ch. 42, § 13 (1833).

174. *Id.* at § 14.

175. *See Baker, New Light on Slade's Case: Part II*, 29 *CAMBRIDGE L.J.* 213, 232 (1971); *see also Norwood v. Read*, 1 Plowd. 180, 75 Eng. Rep. 277 (Q.B. 1557).

of assumpsit. Then, around the third quarter of the sixteenth century, the Common Pleas showed signs of following the King's Bench. By the end of the century, however, the Common Pleas had reverted to its original view. The statutory court of Exchequer Chamber sided with the Common Pleas and reversed King's Bench judgments against executors.<sup>176</sup> *Slade's Case*,<sup>177</sup> decided in 1602, forced abandonment of that position.

*Slade's Case* established the principle that every executory contract contains an implied assumpsit to pay the sum due. Assumpsit therefore became a substitute for debt on a simple contract, rendering the older form of action—and wager of law—practically obsolete in litigation against living debtors.<sup>178</sup> Although *Slade's Case* laid the foundation for transfer of liability in assumpsit, the court did not actually address the hotly disputed issue of personal representatives' amenability to suit.<sup>179</sup> That question was reached a decade later in *Pinchon's Case*.<sup>180</sup> The Exchequer Chamber held that a creditor could sue a personal representative in assumpsit to recover a decedent's simple contract debt<sup>181</sup> because trespass on the case did not allow compurgation.<sup>182</sup>

After *Pinchon's Case*, courts expanded personal representatives'

176. Baker, *supra* note 175, at 233.

177. *Slade v. Morley* (*Slade's Case*), 4 Co. Rep. 92b, 76 Eng. Rep. 1074 (Q.B. 1602).

178. A. SIMPSON, *supra* note 87, at 572; J. BAKER, *supra* note 71, at 286; 3 W. HOLDSWORTH, *supra* note 75, at 444-45, 451.

179. Baker, *supra* note 175, at 233; Baker, *New Light on Slade's Case: Part I - The Manuscript Reports*, 29 CAMBRIDGE L.J. 51, 67 (1971). *But see* *Slade v. Morley* (*Slade's Case*), Yelv. 21, 80 Eng. Rep. 15 (Q.B. 1602) (suggesting that the court did address the issue of personal representatives' liability in assumpsit).

180. *Legate v. Pinchon* (*Pinchon's Case*), 9 Co. Rep. 86b, 77 Eng. Rep. 859 (Ex. Ch. 1612).

181. The availability of assumpsit did not alter the rule against suing personal representatives in debt. Prior to 1833, if a plaintiff foolishly selected debt, his suit failed even though courts candidly acknowledged that "[t]he distinction between the actions of debt and assumpsit, as applicable to the case of executors, is not founded in good sense." *Barry v. Robinson*, 1 Bos. & Pul. (N.R.) 293, 297, 127 Eng. Rep. 475, 476 (C.P. 1805).

182. The Court's reliance on assumpsit's roots in trespass on the case raised a potentially troublesome conceptual problem. Trespass on the case redressed wrongs; punishing dead wrongdoers seemed senseless, so tort liability normally ended at death. If breaking a promise constituted a wrong, how did assumpsit manage to evade the rule *actio personalis moritur cum persona*? The Exchequer Chamber finessed that issue in *Pinchon's Case* by simply declaring that the right to sue or to be sued in assumpsit was not so "annexed to the persons of the parties, that it shall die with the persons." *Legate v. Pinchon* (*Pinchon's Case*), 9 Co. Rep. 86b, 89a, 77 Eng. Rep. 859, 863 (Ex. Ch. 1612).

liability in assumpsit to include a variety of breaches of promise.<sup>183</sup> A general rule developed which Lord Mansfield summarized in 1776: "where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator expressed or implied . . . the action survives against the executor."<sup>184</sup> Selecting a plainly contractual form of action remained crucial, however, for if a plaintiff brought a tort action such as trover, rather than an action in assumpsit for money had and received, the rule against survival of delictual liability prevented recovery.<sup>185</sup> In any event, the accountability of a personal representative reached only to the extent of the estate's assets,<sup>186</sup> and he escaped responsibility altogether if the contract was uniquely performable by the decedent.<sup>187</sup>

Virginia treated contract actions against personal representatives in much the same fashion as England. Twenty-five years after Parliament made actions of account survivable, the colonial legislature of Virginia passed a similar statute.<sup>188</sup> Following the Revolution, Virginia adopted a simplified version of the English rules governing survival of other contract actions. In 1785, the General Assembly authorized creditors and other obligees to sue personal representatives on the contracts of their testators and intestates.<sup>189</sup>

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183. See, e.g., *Sanders v. Esterby*, Cro. Jac. 417, 79 Eng. Rep. 356 (Ex. Ch. 1615) (executor liable for testator's breach of promise to pay plaintiff money in consideration of marriage); *Clark v. Thomson*, Cro. Jac. 571, 79 Eng. Rep. 489 (K.B. 1619) (same); *Fawcett v. Charter*, Cro. Jac. 662, 79 Eng. Rep. 573 (Ex. Ch. 1623) (assumpsit lies against executor for testator's breach of promise to redeliver bond).

184. *Hambly v. Trott*, 1 Cowp. 371, 375, 98 Eng. Rep. 1136, 1138 (K.B. 1776).

185. *Id.* Lord Mansfield reasoned that assumpsit would lie against a converter or his personal representative because, when one takes another's property, he impliedly promises to pay for it or turn over the proceeds from its sale. See *Phillips v. Homfray*, 24 Ch. D. 439, 460 (1883), *aff'd sub nom. Phillips v. Fothergill*, 11 App. Cas. 466 (H.L. 1886) (explaining *Hambly*).

186. P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 158 (1979); S. TOLLER, *supra* note 96, at 462.

187. 2 M. BACON, *supra* note 80, at 443; 2 J. LOMAX, *supra* note 89, at 430.

188. 4 W. HENING, *supra* note 56, at 285 (act of 1730). This statute, which authorized actions of account against personal representatives of guardians, bailiffs, receivers, joint tenants, and tenants in common, was based on 4 & 5 Anne, ch. 16 (1705). The 1730 act, in slightly modified form, remained part of Virginia law until the early twentieth century. See Act of Dec. 19, 1792, ch. 15, § 24, reprinted in 1 S. SHEPHERD, *supra* note 62, at 32 (codified at VA. CODE ch. 76, § 24 (1794)); VA. CODE ch. 76, § 24 (1803); VA. CODE ch. 128, § 81 (1819); VA. CODE ch. 145, § 14 (1849); VA. CODE ch. 145, § 14 (1860); VA. CODE ch. 145, § 14 (1873); VA. CODE § 3294 (1887); VA. CODE § 3294 (1904).

189. 12 W. HENING, *supra* note 56, at 152. This was the same statute that permitted suits

Actions of covenant survived,<sup>190</sup> and because wager of law never took root in Virginia, so did debt.<sup>191</sup> Statutes permitted suits against executors and administrators of sheriffs who allowed imprisoned debtors to escape<sup>192</sup> and against personal representatives of public officers who retained fees belonging to someone else.<sup>193</sup> Liability in assumpsit descended unless the alleged breach caused injury to the person of the obligee, in which case tort rules applied.<sup>194</sup>

### *b. Possessory and Delictual Actions*

A detainee defendant in England could wage his law,<sup>195</sup> so detainee, like debt, did not survive. Detainee lay against the executor or administrator of a bailee only if the personal representative himself came into possession of the chattel. Otherwise, the action died with the bailee.<sup>196</sup> Until passage of special devastavit legislation in 1677<sup>197</sup> and 1692,<sup>198</sup> a right of action for waste also terminated at the wrongdoer's death.<sup>199</sup> *De Bonis Asportatis in Vita Testatoris*<sup>200</sup> did not apply to suits against personal representatives, so execu-

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by personal representatives. See *supra* notes 89 & 90 and accompanying text. If an executor died before discharging the obligations of an estate, his own personal representative assumed the liabilities of the original testator. 12 W. HENING, *supra* note 56, at 152.

190. See *Harrison v. Sampson*, 2 Va. (2 Wash.) 155 (1795).

191. See 4 J. MINOR, *INSTITUTES OF COMMON AND STATUTE LAW* 368, 680 (1878); 2 H. TUCKER, *COMMENTARIES ON THE LAWS OF VIRGINIA* \*96, \*284 (3d ed. Richmond 1846) (1st ed. Richmond 1826); 4 S. TUCKER, *supra* note 58, at 348 n.9.

192. 6 W. HENING, *supra* note 56, at 345 (act of 1753); Act of Nov. 24, 1792, ch. 18, § 3, reprinted in 1 S. SHEPHERD, *supra* note 62, at 42-43 (codified at VA. CODE ch. 79, § 3 (1794)); VA. CODE ch. 79, § 3 (1803); VA. CODE ch. 136, § 3 (1819).

193. *E.g.*, VA. CODE ch. 85, §§ 22-27 (1819); VA. CODE ch. 184, § 22 (1849).

194. *Grubb's Adm'r v. Sult*, 73 Va. (32 Gratt.) 203 (1879); 2 T. HARRISON, *WILLS AND ADMINISTRATION* § 434 (2d ed. 1961) (1st ed. 1927).

195. J. BAKER, *supra* note 71, at 328.

196. See 3 W. HOLDSWORTH, *supra* note 75, at 579-80; 8 C. VINER, *supra* note 96, at 28; 11 *id.* at 246.

197. 30 Car. 2, ch. 7 (1677).

198. The statute 4 & 5 W. & M., ch. 24, § 12 (1692), amplified and made permanent 30 Car. 2, ch. 7. The 1692 law stated that the personal representative of a personal representative "who shall waste or convert to his own use, goods, chattels, or estate of his testator or intestate, shall from henceforth be liable and chargeable in the same manner as his or their testator or intestate should or might have been." 4 & 5 W. & M., ch. 24, § 12.

199. See *Brown v. Collins*, 2 Lev. 110, 83 Eng. Rep. 473, 1 Vent. 292, 86 Eng. Rep. 188 (K.B. 1675); *Sir Brian Tucke's Case*, 3 Leon. 241, 74 Eng. Rep. 659 (Exch. 1589).

200. 4 Edw. 3, ch. 7 (1330); see *supra* text accompanying notes 102-12.

tors and administrators avoided liability for a decedent's torts to personal property.<sup>201</sup> Rights of action for trespass to land<sup>202</sup> and injury to the person<sup>203</sup> likewise expired when the tortfeasor died.<sup>204</sup>

Virginia gave personal representatives considerably less protection than England afforded. The Commonwealth's survival rules for waste<sup>205</sup> and detinue<sup>206</sup> paralleled England's, but Virginia treated actions for torts against property much differently. Unlike the English statute of 1330, the Virginia version of *De Bonis Asportatis in Vita Testatoris*<sup>207</sup> applied to suits against, as well as suits by, personal representatives. From 1785 to 1827, only trespass

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201. See, e.g., *Hambly v. Trott*, 1 Cowp. 371, 98 Eng. Rep. 1136 (K.B. 1776); *Baily v. Birtles*, Sir T. Raym. 71, 83 Eng. Rep. 40 (K.B. 1663); *Holland v. Owen*, Tothill 87, 21 Eng. Rep. 131 (Ch. 1627). As with detinue, trover lay against a personal representative only if he personally obtained possession of a chattel and refused to return it. See 1 J. CHITTY, *supra* note 99, at \*82-83; 2 H. TUCKER, *supra* note 191, at \*228-29. Chancery sometimes granted relief, however, when the common-law courts adhered rigidly to nonsurvival rules. See *Garth v. Cotton*, 3 Atk. 751, 757, 26 Eng. Rep. 1231, 1234 (Ch. 1753).

202. 1 J. CHITTY, *supra* note 99, at \*83.

203. Lord Mansfield's judgment in *Hambly v. Trott*, 1 Cowp. 371, 98 Eng. Rep. 1136 (K.B. 1776), stated the basic rule governing actions for injury to the person and other torts: [W]here the cause of action is a tort, or arises ex delicto . . . , supposed to be by force and against the King's peace, there the action dies; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water course, escape against the sheriff, and many other cases of the like kind . . . . [All private wrongs] as well as all public crimes, are buried with the offender.

1 Cowp. at 375, 98 Eng. Rep. at 1138.

204. Parliament eventually changed the common law and provided for transmission of tort liability to personal representatives. An 1833 statute authorized actions of trespass and trespass on the case to be maintained against executors and administrators for wrongs to real or personal property committed by a testator or intestate within six months of death. 3 & 4 Will. 4, ch. 42, § 2 (1833). In 1934, all rights of action for injury to the person except defamation and seduction became survivable. See *supra* note 112.

205. If a personal representative wasted assets of an estate, liability for the devastavit descended to his own executor or administrator. 4 W. HENING, *supra* note 56, at 284-85 (act of 1730); 5 *id.* at 465-66 (act of 1748); Act of Dec. 13, 1792, ch. 30, § 60, reprinted in 1 S. SHEPHERD, *supra* note 62, at 98 (codified at VA. CODE ch. 92, § 60 (1794)); VA. CODE ch. 92, § 60 (1803); VA. CODE ch. 104, § 66 (1819); VA. CODE ch. 130, § 21 (1849); VA. CODE ch. 130, § 21 (1860); VA. CODE ch. 126, § 21 (1873); VA. CODE § 2656 (1887); VA. CODE § 2656 (1904); VA. CODE § 5386 (1919); VA. CODE § 64-157 (1950); VA. CODE § 64.1-167 (1980).

206. Detinue lay against a personal representative if at some point the chattel passed through his hands. Once the plaintiff had proved possession, he could recover damages for any harm caused by either the representative or the decedent. See *Hunt's Adm'r v. Martin's Adm'r*, 49 Va. (8 Gratt.) 578 (1852); *Catlett's Ex'r v. Russell*, 33 Va. (6 Leigh) 344 (1835); *Allen's Ex'r v. Harlan's Adm'r*, 33 Va. (6 Leigh) 42 (1835).

207. 4 Edw. 3, ch. 7 (1330). The original Virginia survival statute of 1785, 12 W. HENING, *supra* note 56, at 152, is quoted at note 114 *supra*.



actions for taking and carrying away goods survived.<sup>208</sup> The scope of the survival statute widened in 1827 to include every action for tortious interference with personal property.<sup>209</sup> Torts to realty came under the statute in 1849.<sup>210</sup> As a result, the rule for descent of liability mirrored the rule for descent of claims: all actions for injury to real or personal property<sup>211</sup> survived the wrongdoer's death.

Virginia dealt with torts against persons in a more traditional manner. Throughout the first three-quarters of the nineteenth century, courts rigorously followed the common-law doctrine that an action for injury to the person dies with the tortfeasor. A slander suit, for instance, abated if the defendant succumbed.<sup>212</sup> So did a suit for deceit, provided the alleged fraud was directed at the plaintiff himself rather than at his property.<sup>213</sup> Liability for in-

208. See *supra* text accompanying notes 114-18. Under this rule, a plaintiff could recover from the personal representative of a decedent who trespassed onto land and took some corn. *Vaughan's Adm'r v. Winckler's Ex'r*, 18 Va. (4 Munf.) 136 (1814). But a tort action against a negligent bailee did not survive. *Thweatt's Adm'r v. Jones*, 22 Va. (1 Rand.) 328, 331 (1823). Nor did an action of trespass *quare clausum fregit*. *Harris v. Crenshaw*, 24 Va. (3 Rand.) 14, 23 (1825).

The survival statute reached somewhat farther than its wording suggested, however, because the term "goods" received an elastic construction. The plaintiff in *Lee v. Cook's Ex'r*, 21 Va. (Gilm.) 331 (1821), for example, successfully sued an executor in trespass to recover mesne profits of land converted by the testator. The court held that the action came within the equity of VA. CODE ch. 104, § 64 (1819). Apparently the court considered the profits "goods" which the testator had taken and carried away. See *id.*; *Henshaw v. Miller*, 58 U.S. (17 How.) 212, 223 (1854); see also *Patton v. Brady*, 184 U.S. 608, 613 (1902) (treating money as "goods" for survival purposes).

209. Act of March 9, 1827, ch. 29, § 1, 1826-27 Va. Acts 27 (codified at VA. CODE ch. 196, § 1 (Supp. 1833)); see *supra* text accompanying note 118. The 1827 act enabled a plaintiff to bring trover against the personal representative of a converter. See *Ferrill v. Brewis' Adm'r*, 66 Va. (25 Gratt.) 765 (1875).

210. VA. CODE ch. 130, § 20 (1849).

211. The Virginia version of *De Bonis Asportatis in Vita Testatoris* did not actually contain the word "property." The statute referred, instead, to loss of or damage to any "estate." VA. CODE ch. 130, § 20 (1849); see also VA. CODE § 64.1-145 (1980). Courts used the terms interchangeably, for "estate" meant "every description of vested right and interest attached to and growing out of property," including contract rights and choses in action. *Lee's Adm'r v. Hill*, 87 Va. 497, 503, 12 S.E. 1052, 1054 (1891); see also *Worrie v. Boze*, 198 Va. 533, 537, 95 S.E.2d 192, 196 (1956) (right to performance of contract is a species of property for survival purposes), *aff'd on rehearing*, 198 Va. 891, 96 S.E.2d 799 (1957).

212. *Hook's Adm'r v. Hancock*, 19 Va. (5 Munf.) 546 (1817).

213. *Henshaw v. Miller*, 58 U.S. (17 How.) 212 (1854) (fraudulent credit reference); *Boyle's Adm'r v. Overby*, 52 Va. (11 Gratt.) 202 (1854) (fraudulent representation in sale of slave).

flicting bodily harm did not descend<sup>214</sup> until 1871, when wrongful death legislation began to erode the common-law rule.

The original wrongful death statute<sup>215</sup> provided for both descent of liability and revival of suits. If the tortfeasor died before being sued, his legal responsibility for the victim's death devolved onto his personal representative, against whom an original action lay. If the defendant died after the commencement of wrongful death litigation but before judgment, the plaintiff could revive the suit and proceed against the defendant's executor or administrator.<sup>216</sup> The 1871 statute contained a loophole, however. A personal representative could not be sued for wrongful death if his testator or intestate predeceased the victim.<sup>217</sup> The General Assembly closed that loophole in 1926.<sup>218</sup>

A special one-year statute of limitations applied to wrongful death actions,<sup>219</sup> so survival did not lengthen the period for commencing such suits. Victims of nonfatal torts argued, however, that if actions for fatal injuries survived the death of the wrongdoer, so did all other actions for injury to the person. *Anderson v. Hygeia Hotel Co.*<sup>220</sup> demolished that contention. A right of action for wrongful death had a separate identity from a victim's own right of

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214. 2 J. LOMAX, *supra* note 89, at 433; 2 H. TUCKER, *supra* note 191, at \*223, \*228.

215. Act of Jan. 14, 1871, ch. 29, 1870-71 Va. Acts 27 (codified at VA. CODE ch. 145, §§ 7-10 (1873)).

216. Act of Jan. 14, 1871, ch. 29, § 4, 1870-71 Va. Acts 27, 28 (codified at VA. CODE ch. 145, § 10 (1873)). The portions of the 1871 wrongful death act pertaining to survival of actions against personal representatives were not significantly altered for the next half-century. See VA. CODE § 2906 (1887); VA. CODE § 2906 (1904); VA. CODE § 5790 (1919).

217. See *Beavers' Adm'x v. Putnam's Curator*, 110 Va. 713, 67 S.E. 353 (1910).

218. Act of March 25, 1926, ch. 507, 1926 Va. Acts 858, 859 (amending VA. CODE § 5786 (1919)).

219. VA. CODE ch. 145, § 8 (1873); VA. CODE § 2903 (1887); VA. CODE § 2903 (1904); VA. CODE § 5787 (1919); VA. CODE § 5786 (1942); VA. CODE §§ 8-633, -634 (1950). No action lay for wrongful death if the injured party himself could not have sued on the day he died because more than a year had elapsed since the tort occurred. *Street v. Consumers Mining Corp.*, 185 Va. 561, 575, 39 S.E.2d 271, 277 (1946). "In other words, the personal representative ha[d] a right of action within one year after the death of the injured party provided the decedent had a right of action at his death." M. BURKS, COMMON LAW AND STATUTORY PLEADING AND PRACTICE § 233, at 396 (4th ed. 1952).

Since 1958, the limitation period for wrongful death litigation has been two years. See VA. CODE § 8.01-244 (1984).

220. 92 Va. 687, 24 S.E. 269 (1896).

action for bodily harm.<sup>221</sup> For that reason, the court concluded, survival of one did not ensure survival of the other.<sup>222</sup> The legislature later ratified the court's holding that the survivability of wrongful death actions did not affect the limitation period for any other tort.<sup>223</sup>

In 1928, the General Assembly extended the descent and revival rules previously reserved for wrongful death litigation to all actions for injury to the person.<sup>224</sup> Although an important reform in its own right, this step proved inconsequential from the standpoint of calculating time limits. The legislature instructed courts not to construe the measure in a way that altered filing deadlines.<sup>225</sup> The 1950 Code, which reaffirmed the broad survival policy adopted in 1928, contained a similar caveat.<sup>226</sup>

Descent of liability, like descent of claims, thus operated according to a double standard. The applicable rule depended on the context in which the issue of survival arose. To determine whether an action for injury to the person actually lay against the personal

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221. A right of action is not the same thing as a cause of action. The former is a license to sue conferred either by statute or by the common law; the latter is a set of facts having legal consequences. See *First Virginia Bank-Colonial v. Baker*, 225 Va. 72 & 81-82, 301 S.E.2d 8, 13-14 (1983). A wrongful death suit stems from the same cause of action—tortious misconduct—as the victim's claim for bodily harm but rests on a different right of action. See *Wilson v. Whittaker*, 207 Va. 1032, 1036, 154 S.E.2d 124, 127 (1967); *Street v. Consumers Mining Corp.*, 185 Va. 561, 570-75, 39 S.E.2d 271, 275-77 (1946); *Virginia Electric & Power Co. v. Decatur*, 173 Va. 153, 159, 3 S.E.2d 172, 175 (1939).

222. *Anderson*, 92 Va. at 691, 694, 24 S.E. at 271, 272.

223. VA. CODE § 5790 revisers' note (1919).

224. Act of March 26, 1928, ch. 446, 1928 Va. Acts 1141 (amending VA. CODE § 5790 (1919)). Under the 1928 amendment, any right of action for a nonfatal injury to the person caused by a wrongful act survived the death of the wrongdoer. The victim could enforce the right of action against the wrongdoer's executor or administrator "either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against the personal representative" after the wrongdoer's death. *Id.*

225. *Id.*

226. VA. CODE § 8-628 (1950). This section was repealed in 1954 and its principal provisions were transferred to VA. CODE § 8-628.1 (1957). Act of Apr. 6, 1954, ch. 607, 1954 Va. Acts 782. See generally M. BURKS, *supra* note 219, at § 72 (4th ed. Supp. 1961) (describing interrelationship of §§ 8-628 and 8-628.1).

Section 8-628.1, as amended in 1954, stated that "No cause of action for injuries to person or property shall be lost because of the death of the person liable for the injury." VA. CODE § 8-628.1 (1957). The statute went on to say that actions for "personal injuries" had to be brought within two years and that nothing contained in § 8-628.1 "shall be construed to extend the time within which an action for any other tort shall be brought." *Id.*

representative of a wrongdoer, courts consulted the statutes of Virginia and received an affirmative answer. To discover whether an action hypothetically survived for limitation purposes only, courts disregarded the statutes and turned to the common law, which gave a negative answer.

Because rights of action for injury to the person did not survive at common law, the statutes of limitations in force from 1850 to 1954 imposed a one-year deadline on all such claims. By examining the types of suits subjected to the one-year rule during that period, we can ascertain what injury to the person meant before the legislature created a two-year limitation for actions to redress "personal injuries."<sup>227</sup> We can then obtain a reliable definition of "personal injuries" by comparing the post-1954 claims that received a two-year limitation with those that remained under the old one-year restriction.

### *C. Enforcement of Virginia Statutes of Limitations Since 1850*

#### *1. Pre-1954 Developments*

Courts sometimes experienced difficulty when they attempted to distinguish injuries to persons from injuries to property. A few kinds of damage clearly belonged in one category or the other. Bodily harm obviously constituted injury to the person,<sup>228</sup> just as pollution of a stream or well<sup>229</sup> and invasion of land by water, cinders, and smoke<sup>230</sup> plainly qualified as injury to property. Many cases, however, fell into a gray area. To decide those cases, the Virginia Supreme Court devised a three-step method of analysis. First, the court identified the wrongful act from which the plaintiff's purported injuries flowed. Next, the court examined whether

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227. Act of Apr. 6, 1954, ch. 589, 1954 Va. Acts 764 (codified at VA. CODE § 8-24 (1957)).

228. See, e.g., *Herndon v. Wickham*, 198 Va. 824, 97 S.E.2d 5 (1957); *U.S. Fidelity and Guaranty Co. v. Blue Diamond Coal Co.*, 161 Va. 373, 170 S.E. 728 (1933); *Birmingham v. Chesapeake & O. Ry.*, 98 Va. 548, 37 S.E. 17 (1900); *Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 24 S.E. 269 (1896). But see *Watson v. Daniel*, 165 Va. 564, 183 S.E. 183 (1936) (father's suit to recover for loss of services of tortiously injured child and for cost of child's medical treatment classified as action for wrong to property).

229. See *Worley v. Mathieson Alkali Works*, 119 Va. 862, 89 S.E. 880 (1916); *Hawling v. Chapin*, 115 Va. 792, 80 S.E. 587 (1914); *Virginia Hot Springs Co. v. McCray*, 106 Va. 461, 56 S.E. 216 (1907).

230. See *Southern Ry. v. Fitzpatrick*, 129 Va. 246, 105 S.E. 663 (1921).

the act affected the plaintiff's person, his property, or both. Finally, if the act affected both his person and his property, as often happened, the court determined which received a direct impact and which suffered only consequential effects. If the tort directly affected the person and caused only indirect harm to his property, a one-year limitation applied; if the tort directly affected property, a five-year limitation controlled.<sup>231</sup>

Troublesome line-drawing problems inevitably arose. In *Mumpower v. City of Bristol*,<sup>232</sup> for example, the defendant obtained an unwarranted injunction that prevented the plaintiff from operating his mill with water from a creek. Eventually the plaintiff succeeded in getting the injunction dissolved, but meanwhile he lost the benefit of his mill and incurred legal expenses. To recover his losses, he sued for malicious prosecution. Was he seeking redress for injury to his person or for harm to his property? The answer was far from easy. On the one hand, the plaintiff sustained damage which, in economic terms, put him in much the same position as a property owner whose goods were taken and carried away. By "taking away" the plaintiff's beneficial use of his mill, the defendant diminished the plaintiff's personal estate, leaving less wealth for distribution to beneficiaries at death. On the other hand, the injunction did not actually destroy the mill. The plaintiff retained his real property although he lost the freedom to exploit it financially. The Virginia Supreme Court held that the one-year statute governed because the injunction directly affected only the plaintiff himself; the harm to his estate merely flowed consequentially from the direct tort.<sup>233</sup>

Negligence also presented problems of classification. In *Winston v. Gordon*,<sup>234</sup> for instance, trustees representing depositors sued bank directors for negligently loaning money to insolvent borrow-

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231. See *Keepe v. Shell Oil Co.*, 220 Va. 587, 593-94, 260 S.E.2d 722, 725-26 (1979), *reaff'd*, *First Virginia Bank-Colonial v. Baker*, 225 Va. 72, 84, 301 S.E.2d 8, 15 (1983). These cases are discussed in note 242 *infra*.

232. 94 Va. 737, 27 S.E. 581 (1897).

233. *Id.* at 740, 27 S.E. at 582. Although malicious interference with the use of property fell into the category of injury to the person, malicious interference with contractual relations qualified as damage to property and therefore had a five-year limitation period. See *Worrie v. Boze*, 198 Va. 533, 536-37, 95 S.E.2d 192, 196 (1956), *aff'd on rehearing*, 198 Va. 891, 96 S.E.2d 799 (1957).

234. 115 Va. 899, 80 S.E. 756 (1914).

ers. Arguably, the directors owed a duty of care to the depositors themselves, rather than to their money, and when the defendants breached that duty, the plaintiffs suffered injury to their persons. The court, however, took the opposite view. The alleged negligence incidentally affected depositors, but "[t]he wrong, if any, was to rights of property."<sup>235</sup> The five-year statute of limitations therefore applied.

A series of misrepresentation cases forced the court to draw even subtler distinctions between direct and consequential effects. The plaintiff in *Cover v. Critcher*<sup>236</sup> sued a defendant who had fraudulently induced him to enter into a contract for the purchase of land by claiming to have a right of way that would enable the plaintiff to remove timber from the tract. The plaintiff sought to recover damages for the cost of a rescission suit, for lost profits from the sale of wood, and for the value of the other uses of the land. Citing *Mumpower*, the court concluded that the one-year statute controlled. Misrepresentation, like malicious prosecution in the earlier case, deprived the plaintiff of the use of his property but not of the property itself. The lie directly affected the person of the plaintiff; his estate, i.e., his net worth, suffered only indirectly.<sup>237</sup>

Compare *Cover*, however, with *Trust Co. of Norfolk v. Fletcher*,<sup>238</sup> a case decided four years later. The plaintiff in *Fletcher* claimed that the defendant had defrauded him into exchanging valuable securities for worthless stock and sued to recover the value of the surrendered securities. The court, citing *Winston*, applied the five-year limitation. The defendant's conduct caused direct injury to property, the court ruled, because the misrepresentation deprived the plaintiff of the possession, and not merely the use, of his securities.<sup>239</sup> The same theory prevailed in *Westover Court Corp. v. Eley*.<sup>240</sup> The seller of a house allegedly misrepresented that the dwelling had an adequate heating system. The

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235. *Id.* at 917, 80 S.E. at 763.

236. 143 Va. 357, 130 S.E. 238 (1925).

237. *Id.* at 365, 130 S.E. at 240; *see also* *Vance v. Maytag Sales Corp.*, 159 Va. 373, 165 S.E. 393 (1932) (one-year limitation applied to suit for fraudulent inducement to enter into a dealer franchise agreement).

238. 152 Va. 868, 148 S.E. 785 (1929).

239. *See id.* at 877, 148 S.E. at 787.

240. 185 Va. 718, 40 S.E.2d 177 (1946).

buyers sued in tort for the difference in value between an adequate heating system and the system they actually received. The court concluded that the seller's misrepresentation caused direct damage to the buyers' property—their pocketbook—by inducing them to part with a sum of money in return for nothing.<sup>241</sup>

One might well disagree with some of the reasoning in these cases applying the direct/consequential effects test.<sup>242</sup> They nonetheless stand for two important propositions. First, Virginia courts distinguished between injury to persons and injury to property, but not between injury to the person and personal injury. If "personal injury" had any status as a legal term of art before 1954, the label simply described a subdivision of the broader category known as injury to the person. Second, injuries to the person included many forms of damage besides bodily harm. Violations of an assortment of rights—even the right to use property—fit under the rubric of injury to the person. In fact, *all* torts that neither damaged property directly nor induced the plaintiff to give up money or other valuables triggered the one-year limitation applicable to actions for injury to the person.

## 2. Post-1954 Developments

In 1954, the General Assembly imposed an express two-year limitation on "[e]very action for personal injuries."<sup>243</sup> The amended

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241. *Id.* at 722, 40 S.E.2d at 179. *Fletcher and Westover Court* were followed in *Progressive Realty Corp. v. Meador*, 197 Va. 807, 91 S.E.2d 645 (1956). The plaintiff in *Progressive Realty* claimed he was fraudulently persuaded to buy a building by the seller's misrepresentation that the elevator worked satisfactorily. The buyer sued for the cost of replacing the defective lift. The court applied the five-year limitation for torts to property because the misrepresentation, by causing the buyer to pay for something he did not receive, reduced the net value of his personal estate. *See id.* at 809-10, 91 S.E.2d at 646-47.

242. Indeed, the Virginia Supreme Court has disavowed the reasoning in one decision employing the test, *Richmond Redevelopment and Housing Auth. v. Laburnum Constr. Corp.*, 195 Va. 827, 80 S.E.2d 574 (1954). The court in *Laburnum* applied a one-year limitation to a tort claim for damage to a building because the harm flowed too indirectly to bring the five-year limit into play. *See id.* at 834-36, 80 S.E.2d at 579-80. According to *First Virginia Bank-Colonial v. Baker*, 225 Va. 72, 84, 301 S.E.2d 8, 15 (1983), the holding of *Laburnum* was implicitly overruled by *Keepe v. Shell Oil Co.*, 220 Va. 587, 260 S.E.2d 722 (1979). *Keepe* emphasized that the crucial factor was not whether damages stemmed directly or consequentially from the tort, but whether the tort had a more direct impact on the person or on his property. *See id.* at 593-94, 260 S.E.2d at 726.

243. Act of Apr. 6, 1954, ch. 589, 1954 Va. Acts 764 (codified at VA. CODE § 8-24 (1957)).

statute of limitations, section 8-24,<sup>244</sup> further provided that "[e]very personal action, for which no limitation is otherwise prescribed," shall be brought within five years if the action survived the death of either party and within one year if it did not survive.<sup>245</sup> Passage of the amendment raised a problem of interpretation: to which actions did the traditional one- and five-year limitations now apply? The "otherwise prescribed" language ruled out contract suits, which had their own statute of limitations,<sup>246</sup> as well as claims for "personal injuries," which the new two-year limitation covered. Construing the five-year rule posed little real difficulty, for nothing in the amendment suggested that the legislature intended to divorce the provision from actions to redress property loss or damage. That left the one-year limitation: what was its scope?

The Virginia Supreme Court tacitly answered that question in *Weaver v. Beneficial Finance Co.*<sup>247</sup> by applying a one-year limitation to an action for defamation.<sup>248</sup> Prior to the 1954 amendment, the court had classified defamation as a tort that caused injury to the person and thus came under the one-year limitation for non-survivable actions.<sup>249</sup> *Weaver* accorded defamation exactly the same treatment, thereby indicating that the 1954 legislation did not affect all actions for injury to the person. Put another way, *Weaver* established that "personal injuries" was not synonymous with injury to the person. Some injuries to the person, namely those now denominated "personal injuries," qualified for the special two-year limitation, while others, such as damage to reputation, remained subject to the traditional one-year rule first promulgated in the 1849 Code.<sup>250</sup>

The Supreme Court of the United States erred when it sug-

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244. VA. CODE § 8-24 (1957).

245. *Id.*

246. VA. CODE § 8-13 (1957) (repealed 1977) (current version at VA. CODE § 8.01-246 (1984)).

247. 199 Va. 196, 98 S.E.2d 687 (1957).

248. *Id.* at 197, 98 S.E.2d at 689; see also *Watt v. McKelvie*, 219 Va. 645, 649, 248 S.E.2d 826, 828 (1978) (applying one-year limitation to 1976 defamation suit).

249. See *Watson v. Daniel*, 165 Va. 564, 567, 183 S.E. 183, 184 (1936) (quoting with approval T. HARRISON, *supra* note 194, at § 426 (1st ed. 1927)).

250. See *supra* text accompanying notes 67-70.



gested in *Runyon v. McCrary*<sup>251</sup> that the General Assembly inserted the term "personal injuries" into section 8-24 because lawmakers wished to separate torts to persons from torts to property.<sup>252</sup> On the contrary, the legislature added the phrase in order to distinguish one subcategory of injuries to the person—bodily harm, i.e., "personal injuries"—from all the other subcategories. The *Runyon* theory, in addition to conflicting fundamentally with *Weaver*, made no sense whatever unless the General Assembly intended the one-year provision in section 8-24 to be a chimera. If the two-year personal injury limitation governed every action for injury to the person, and the five-year limitation controlled every action for damage to property, the one-year rule never would apply. Given the presumption that legislators act rationally, such an interpretation of Virginia law seems highly implausible.

The Court in *Runyon* emphasized the litigants' failure to cite any Virginia case declaring that "personal injuries" meant only physical harm.<sup>253</sup> From the silence of the Virginia judiciary, the Court deduced that "personal injuries" must encompass more than damage to the human body. One may draw the opposite inference, however, from the fact that apparently no Virginia court has ever applied the two-year limitation to an action for nonphysical injury to the person.<sup>254</sup> The one-year limitation has governed all such claims.<sup>255</sup> This consistent pattern of judicial behavior indicates

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251. 427 U.S. 160 (1976).

252. *Id.* at 182, quoted in text accompanying note 47 *supra*.

253. *Id.*, quoted in text accompanying note 46 *supra*.

254. Note, *Twenty-Fourth Annual Survey of Developments in Virginia Law, 1978-1979 - Practice and Pleading: Limitations of Actions*, 66 VA. L. REV. 343, 345 & n.18 (1980). Virginia courts have applied the two-year rule to all cases involving bodily harm regardless of the theory of recovery. See, e.g., *Friedman v. Peoples Serv. Drug Stores, Inc.*, 208 Va. 700, 703-04, 160 S.E.2d 563, 565-66 (1968) (breach of warranty).

255. In addition to the defamation cases referred to in notes 247-49 *supra* and accompanying text, see *Goodstein v. Allen*, 222 Va. 1, 278 S.E.2d 787 (1981); *Goodstein v. Weinberg*, 219 Va. 105, 245 S.E.2d 140 (1978) (one-year limitation applied to tort-based negligence action against attorney). But see *Winslow, Inc. v. Scaife*, 219 Va. 997, 254 S.E.2d 58 (1979); *Oleyar v. Kerr*, 217 Va. 88, 225 S.E.2d 398 (1976); *McCormick v. Romans*, 214 Va. 144, 198 S.E.2d 65 (1973) (contract statute of limitations applied to claims against attorneys for breach of duties imposed by contract). But cf. *Comptroller of Virginia ex rel. Virginia Military Institute v. King*, 217 Va. 751, 232 S.E.2d 895 (1977) (contract statute of limitations applied to negligence suit against architect of defective building).

The court held in *Carva Food Corp. v. Dawley*, 202 Va. 543, 547, 118 S.E.2d 664, 667 (1961), that the one-year rule governed a suit for negligent failure to procure property insur-

that the term "personal injuries" in section 8-24 referred to bodily harm and nothing else.

The meaning of "personal injuries" did not change when the General Assembly revised the civil procedure title of the Virginia Code in 1977.<sup>256</sup> The legislature transferred the two-year limitation for personal injury claims to the new section 8.01-243(A);<sup>257</sup> moved the five-year limitation for suits involving torts to property to section 8.01-243(B);<sup>258</sup> and incorporated the one-year limitation for actions to redress nonphysical injuries to persons in the new catch-all statute, section 8.01-248.<sup>259</sup>

Today, as at all times since 1954, Virginia bifurcates violations of personal rights. If tortious infringement of a common-law right

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ance, but that decision was implicitly overruled in *Keepe v. Shell Oil Co.*, 220 Va. 587, 260 S.E.2d 722 (1979); see *First Virginia Bank-Colonial v. Baker*, 225 Va. 72, 84, 301 S.E.2d 8, 15 (1983).

256. See VA. CODE § 8.01-243 revisers' note (1984).

257. VA. CODE § 8.01-243(A) (1984), *quoted in* note 49 *supra*. The legislature misleadingly entitled the new statute "Personal action for injury to person or property generally," but the operative language in subsection A refers solely to "personal injuries." See *id.*

258. VA. CODE § 8.01-243(B) (1984) provides:

Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to cure such infant from the result of a personal injury or loss of services of such infant, shall be brought within five years next after the cause of action shall have accrued.

*Id.*

The legislature attempted to make one substantive change when it revised the statute of limitations for torts to property. Under former § 8-24, suits for direct injury to property had a five-year limitation; actions for torts that affected property only indirectly were considered suits for injury to the person and thus had a one-year limitation. The direct/consequential effects test bred confusion. See T. BOYD, E. GRAVES & L. MIDDLEDITCH, *supra* note 50, § 4.4, at 209 & n.97; see also notes 232-42 *supra* and accompanying text. The General Assembly tried to eliminate the confusion by erasing the distinction between direct and indirect injuries to property. Now all actions for harm to property have a five-year limitation period. See VA. CODE §§ 8.01-25, -243 revisers' notes (1984); T. BOYD, E. GRAVES & L. MIDDLEDITCH, *supra* note 50, § 3.8, at 173.

This supposed reform seems largely futile, however. Because most torts have financial consequences, courts still must determine whether a breach of duty primarily affected the plaintiff's estate, causing "injury to property" within the meaning of § 8.01-243(B), or whether the wrong principally affected his person, triggering the one-year limitation of § 8.01-248.

259. VA. CODE § 8.01-248 (1984) reads: "Every personal action, for which no limitation is otherwise prescribed, shall be brought within one year after the right to bring such action has accrued." *Id.*

results in bodily harm, the plaintiff must sue within two years.<sup>260</sup> He has only one year if the tort causes nonphysical injury.<sup>261</sup> Now we must examine the extent to which this dichotomy affects the choice of a limitation period for federal civil rights litigation.

## II. SIGNIFICANCE OF THE DISTINCTION BETWEEN "PERSONAL INJURIES" AND INJURIES TO PERSONS

The Fourth Circuit rejected Virginia's one-year statute of limitations for section 1983 suits on the ground that the principle of equal treatment for similar claims required application of a uniform two-year rule. The decision in *Johnson v. Davis*<sup>262</sup> implicitly rested on the following syllogism:<sup>263</sup>

- (a) Under Virginia law, every action for "personal injuries" has a two-year limitation.
- (b) "Personal injury" is synonymous with injury to the person.
- (c) Every section 1983 suit involves injury to the person.

Therefore, subjecting any section 1983 claim to a limitation of less than two years constitutes impermissible discrimination against a federal right of action.

As Part I explained, premise (b) was false. The Fourth Circuit's misinterpretation of the term "personal injuries" skewed the analysis in *Johnson*. All section 1983 suits deserve a two-year filing period, to be sure, but not for the reasons adduced in the Fourth Circuit's opinion.

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260. For examples of recent cases applying VA. CODE § 8.01-243(A) to actions for bodily harm, see *Dye v. Staley*, 226 Va. 15, 17, 307 S.E.2d 237, 238 (1983) (medical malpractice); *Baker v. Zirkle*, 226 Va. 7, 9, 307 S.E.2d 234, 234 (1983) (medical malpractice); *Locke v. Johns-Manville Corp.*, 221 Va. 951, 955-56, 275 S.E.2d 900, 903 (1981) (mesothelioma caused by inhaling asbestos particles).

261. The Revisers' Note following VA. CODE § 8.01-248 (1984) mentions malicious prosecution and abuse of process as examples of torts subject to the one-year catchall statute of limitations. See VA. CODE § 8.01-248 revisers' note (1984).

262. 582 F.2d 1316 (4th Cir. 1978).

263. See *supra* notes 34-42 and accompanying text.

A. *The Fallacy in Johnson*

Two hypotheticals may help to illuminate the nature of the court of appeals' error in *Johnson*.

*Case 1:* A trigger-happy member of the Virginia state police shot a fleeing shoplifter whom he knew to be unarmed. Eighteen months later, the victim sued the officer for damages in a section 1983 action brought in a United States district court in Virginia. The complaint alleged that the policeman's use of excessive force deprived the plaintiff of liberty without due process of law. The defendant moves to dismiss, citing the one-year statute of limitations for section 1983 suits.

*Case 2:* The despotic mayor of a Virginia town managed to drive his chief opponent, a restaurateur, into bankruptcy by using his mayoral power to obtain an unjustified injunction closing the restaurant for public health reasons. Eighteen months after dissolution of the injunction, the insolvent restaurateur sued the mayor for damages in a United States district court in Virginia, basing his claim on section 1983. The complaint asserted that the maliciously procured injunction deprived the plaintiff of property without due process of law. Relying on the one-year statute of limitations for section 1983 litigation, the defendant moves to dismiss.

Case 1 presents the problem that the Fourth Circuit thought it was addressing in *Johnson*.<sup>264</sup> If the district court enforces the Virginia statute and grants the motion to dismiss, discrimination against a federal claim will occur. Unfairness will result because the same cause of action would receive a two-year limitation if litigated under a common-law tort theory in state court. The tort that most closely resembles the shooting victim's section 1983 claim is battery. Virginia undoubtedly classifies wounds from battery as "personal injuries." Since 1954, Virginia has given plaintiffs with "personal injuries" the benefit of a two-year filing period.<sup>265</sup> Had the victim elected to sue the policeman for battery in a state court, his suit would have been timely. Unless the district court disre-

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264. *Johnson* itself did not involve any claim of bodily harm. See *supra* note 41. The plaintiff's alleged injuries had more in common with the nonphysical damage sustained in Case 2 than with the wounds suffered in Case 1. Nevertheless, the Fourth Circuit analyzed *Johnson* as if it raised the same issue as Case 1.

265. See *supra* text accompanying notes 244 and 260.

gards the one-year provision and applies the same limitation that the state court would have applied, the victim will suffer a penalty for suing under section 1983 instead of Virginia common law. The *Johnson* doctrine produces the only acceptable outcome in this situation.

In the context of Case 2, however, *Johnson* does not prevent discrimination; rather, the two-year rule confers a windfall on the section 1983 plaintiff. The closest analog to the restaurateur's civil rights claim is an action for malicious prosecution.<sup>266</sup> Virginia characterizes the harm inflicted by malicious prosecution as injury to the person but not as "personal injury," so a one-year limitation governs.<sup>267</sup> Had the plaintiff in Case 2 couched his eighteen-month-old claim as a common-law tort, a state court would have dismissed his suit. He therefore will not be prejudiced if the district court enforces the one-year statute and grants the mayor's motion. *Johnson* compels the district court to entertain the restaurateur's action nonetheless. Merely by invoking section 1983, the plaintiff gains an extra year within which to file his complaint, a result at odds with the long-established precept that incorporation of a state limitation should leave a federal litigant in the same position as—not better off than—his counterpart in state court.<sup>268</sup>

*Johnson* cut an unnecessarily broad swath. Contrary to the view taken by the Fourth Circuit, Virginia's one-year statute of limitations for section 1983 actions did not invariably discriminate against federal claims. The statute treated physically injured plaintiffs unfairly, but operated evenhandedly with respect to other section 1983 litigants. The court of appeals could have eliminated the law's discriminatory effect on people such as the shooting victim in Case 1 by restricting its application to suits like Case 2. The result would have been a two-tiered system that imposed a limit of two years on section 1983 actions involving bodily harm and a limit of one year on section 1983 actions for noncorporate damage. That approach would have established parity between analogous state and

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266. See *Mumpower v. City of Bristol*, 94 Va. 737, 27 S.E. 581 (1897); see also *United Steelworkers of America v. Dalton*, 544 F. Supp. 291, 296 (E.D. Va. 1982) (§ 1983 claim for malicious prosecution resembles a common-law tort but requires proof of intent to interfere with a federal right).

267. See VA. CODE § 8.01-248 revisers' note (1984).

268. See *supra* note 32.

federal claims without distorting the meaning of "personal injuries." Unfortunately, however, curing one form of inequality would have generated another: discrimination among section 1983 plaintiffs. Even if a two-tiered system could have passed muster in 1978, when the Fourth Circuit decided *Johnson*, current doctrine precludes its use. *Burnett v. Grattan*<sup>269</sup> mandates that all section 1983 claimants in a particular state receive the same limitation.<sup>270</sup>

### *B. The Dilemma Created by Burnett and a Proposed Solution*

*Burnett* requires federal courts to borrow a state statute of limitations that is general enough to encompass every type of section 1983 suit.<sup>271</sup> At first glance, section 8.01-248,<sup>272</sup> the one-year catchall, seems the correct choice. By definition, a catchall erases distinctions between claims and treats plaintiffs equally. Section 8.01-248 also meets the other criteria of appropriateness. The statute governs common-law rights of action that bear a functional resemblance to actions under section 1983.<sup>273</sup> A one-year deadline affords sufficient time for handling the practical aspects of civil rights litigation.<sup>274</sup> Enforcement of the catchall would not undercut the purposes of section 1983.<sup>275</sup> Even so, a federal court could not adopt section 8.01-248 because it flunks the consistency test. To be consistent with the Constitution and laws of the United States, a statute must grant civil rights plaintiffs a limitation no shorter than the longest period assigned to suitors with comparable state-law claims.<sup>276</sup> The longest such period conferred by Virginia law is two years, the amount of time given tort victims who sustain bod-

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269. 104 S. Ct. 2924 (1984).

270. See *supra* text accompanying notes 22-23.

271. See *supra* text accompanying notes 24-28.

272. VA. CODE § 8.01-248 (1984), *quoted in* note 259 *supra*.

273. Section 8.01-248 applies to claims for malicious prosecution, libel, slander, and similar torts. Those claims, like § 1983 actions, are litigable by private citizens, are judicially enforceable in the first instance, and have a full range of remedies. See *supra* text accompanying notes 14-18.

274. Congress implicitly made such a finding when it imposed a one-year limitation on civil rights suits brought under 42 U.S.C. § 1986 (1982); see *supra* note 41.

275. A limitation of one year is not so unreasonably short that it would destroy § 1983's deterrent value and deprive numerous deserving plaintiffs of compensation for civil rights violations.

276. See *supra* text accompanying notes 29-33.

ily harm.<sup>277</sup>

Now we have an answer to the first question posed in the introduction:<sup>278</sup> yes, a two-year statute of limitations should govern every section 1983 suit brought in Virginia. *Johnson*, for all its faults, was right to that extent. But which Virginia statute can serve as the basis for incorporating a universal two-year standard? Section 8.01-243(A), the statute of limitations for cases involving "personal injuries," appears to be the only conceivable candidate. No other limitation provision in the present Code, apart from the catchall, deals with violations of noncontractual rights of persons.<sup>279</sup> We have seen, however, that "personal injuries" has a specialized meaning and does not include many harms remediable under section 1983. Section 8.01-243(A) therefore lacks the generality required by *Burnett*. That deficiency dictates the answer to the introduction's second question:<sup>280</sup> no, the personal injury statute does not constitute a proper source from which to borrow a two-year limitation for section 1983 suits.

*Burnett* places Virginia's federal courts in a dilemma. They must apply a general two-year rule, and yet that rule currently has no legitimate foundation in state law. Federal courts are left with just two options. They can pretend that the term "personal injuries" means more than it does, or they frankly can acknowledge the inadequacy of Virginia's limitations structure and fill the gap with federal common law. The first course of action would be intellectually dishonest; the second would clash with the federalist philosophy embodied in section 1988.<sup>281</sup> The district courts and the Fourth Circuit need an alternative to these unsatisfactory choices,

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277. VA. CODE 8.01-243(A) (1984).

278. See *supra* text accompanying note 50.

279. The five-year statute of limitations for suits to redress injuries to property, VA. CODE § 8.01-243(B) (1984), has no relevance to § 1983 litigation. The freedom to use and possess property is a personal right; when someone violates that right, he inflicts injury to the person. "Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

280. See *supra* text accompanying note 50.

281. Congress has expressed a very strong preference for state limitation rules; courts may fashion federal common law only as a last resort. See *Chardon v. Soto*, 103 S. Ct. 2611, 2616, 2619 (1983); *Board of Regents v. Tomanio*, 446 U.S. 478, 484, 489 (1980); *Robertson v. Wegmann*, 436 U.S. 584, 593, 594 n.11 (1978).

a third option that only the Virginia General Assembly has the authority to supply.

The legislature could solve the limitation conundrum at a stroke by amending section 8.01-243(A) to read: "Unless otherwise provided by statute, every action for injury to the person, whatever the theory of recovery, except as provided in B hereof, shall be brought within two years next after the cause of action shall have accrued."<sup>282</sup> Substituting "injury to the person" for "personal injuries" would convert section 8.01-243(A) into the type of general statute of limitations that *Burnett* allows federal courts to adopt.

The Virginia Supreme Court, in *Fuller v. Edwards*,<sup>283</sup> defined "injury to the person"<sup>284</sup> as any infringement of what Blackstone called the "Absolute Rights of Individuals."<sup>285</sup> The court adhered to Blackstone's system of dividing rights into three main categories: personal security, personal liberty, and private property. The right of personal security consisted of various subrights, including "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."<sup>286</sup> The right of personal liberty, Blackstone said, forbade imprisonment or other restraint without due process of law.<sup>287</sup> The right to private property guaranteed the free use, enjoyment, and disposal of acquisitions "without any control or diminution, save only by the laws of the land."<sup>288</sup> These basic freedoms were safeguarded by restrictions on governmental power, by the right to petition for redress of grievances, and by access to courts.<sup>289</sup>

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282. Compare the language of the proposal with the wording of the present version of § 8.01-243(A), which is quoted in note 49 *supra*. The suggested amendment would bring the body of § 8.01-243(A) into conformity with the statute's title. See *supra* note 257.

283. 180 Va. 191, 22 S.E.2d 26 (1942).

284. The phrase appeared in VA. CODE § 4987f(3) (1936), amended by 1938 Va. Acts 153, the statute conferring subject matter jurisdiction on trial justices, who were the predecessors of general district courts. The current version, VA. CODE § 16.1-77(1) (Supp. 1984), authorizes general district courts to adjudicate claims "for any injury to the person," provided the amount in controversy does not exceed \$7000.

285. 1 W. BLACKSTONE, *supra* note 163, at 117. The court held in *Fuller* that an action for slander and insulting words lay within the jurisdiction of trial justices because "injury to one's reputation is an injury to the person." 180 Va. at 197, 22 S.E.2d at 29.

286. 1 W. BLACKSTONE, *supra* note 163, at 125.

287. *Id.* at 130-34.

288. *Id.* at 134.

289. *Id.* at 136-39.



The "Absolute Rights" catalogued by Blackstone in 1765 resemble the interests that the Constitution and acts of Congress protect today. If violation of a Blackstonian interest causes "injury to the person" within the meaning of Virginia law, we safely may assume that abridgment of a federal right falls into the same category of harm. Expanding section 8.01-243(A) to reach every suit for "injury to the person," therefore, would subject all section 1983 actions to a two-year limitation. The new uniform rule would prevent both types of discrimination discussed in *Burnett*.<sup>290</sup> Civil rights plaintiffs would receive identical filing periods, and section 1983 claims would have the same deadline as analogous state tort actions.<sup>291</sup>

*C. How the Proposed Amendment to Section 8.01-243(A) Would Benefit State Courts*

Some legislators may balk at the idea of changing Virginia law to extricate federal courts from a problem that Congress created. Federal judges find themselves in a dilemma because section 1983 lacks an express statute of limitations. Why should the General Assembly come to the aid of the federal judiciary when Congress really ought to assume responsibility for solving the limitation imbroglio? One could respond with paens to cooperative federalism, but a more pragmatic consideration favors action by the Virginia legislature: federal courts are not the only tribunals that need to be rescued from this predicament.

*1. Virginia Courts' Duty to Hear Section 1983 Cases*

The Framers of the Constitution envisioned that state courts would play a major role in enforcing federal rights.<sup>292</sup> Although

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290. See *supra* text accompanying notes 22-33.

291. Besides covering all civil rights suits, the amended § 8.01-243(A) would impose a two-year limitation on every tort claim for injury to the person, including defamation, malicious prosecution, abuse of process, and the other rights of action that VA. CODE § 8.01-248 (1984) currently limits. The amendment would render § 8.01-248 obsolete. To avoid confusion, the legislature should repeal the one-year catchall.

292. For commentary analyzing the place of state courts in the constitutional plan, see generally Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3 (1948); Frankfurter, *Distribution of Judicial Power Between United*

Congress may assign federal courts exclusive jurisdiction over cases arising under federal law,<sup>293</sup> state courts presumptively share federal question jurisdiction. State judges may entertain federal claims "absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court adjudication."<sup>294</sup>

Congress offers, rather than grants, concurrent jurisdiction because the national government cannot bestow judicial power on courts it did not create.<sup>295</sup> Congress can give state courts permission, but not capacity, to adjudicate. Capacity depends on state law, for state courts acquire all their legitimacy and power from their creators, the state constitution and state legislature.<sup>296</sup> The

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*States and State Courts*, 13 CORNELL L.Q. 499 (1928); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975); Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U.L. REV. 143 (1982); Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

293. See *Bowles v. Willingham*, 321 U.S. 503, 511-12 (1944); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 429 (1866); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 396-97 (1821); THE FEDERALIST No. 82, at 555 (A. Hamilton) (J. Cooke ed. 1961); 1 J. KENT, COMMENTARIES ON AMERICAN LAW 370-72 (1826); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1748 (1833). See generally Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509 (1957).

294. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981); see also *Hathorn v. Lovorn*, 457 U.S. 255, 266 (1982); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962); *Claffin v. Houseman*, 93 U.S. 130, 136-37 (1876). See generally Cullison, *State Courts, State Law, and Concurrent Jurisdiction of Federal Questions*, 48 IOWA L. REV. 230 (1963); Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311 (1976); Comment, *State Court Jurisdiction Over Claims Arising Under Federal Law*, 7 U. DAYTON L. REV. 403 (1982).

295. "I hold it to be perfectly clear," wrote Justice Bushrod Washington in *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820), "that Congress cannot confer jurisdiction upon any Courts, but such as exist under the constitution and laws of the United States, although the State Courts may exercise jurisdiction of cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the federal Courts." *Id.* at 27-28. See also *Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring); *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 222 (1916).

296. The Supreme Court has said repeatedly that state courts' ability to entertain federal rights of action hinges on whether they possess adequate jurisdiction under local law. Jurisdiction is considered adequate if it renders the state court "competent to decide rights of

supremacy clause,<sup>297</sup> however, imposes substantial constraints on the manner in which states allocate jurisdiction. If a state confers sufficient authority to enforce a state-created right of action, it may not withhold jurisdiction over an analogous federal claim. State courts must ignore jurisdictional restrictions that discriminate against suits founded on federal law.<sup>298</sup> They have an obligation to try federal actions unless they would reject "generically similar"<sup>299</sup> state claims for the same reason.<sup>300</sup>

Congress chose not to preclude state courts from hearing section 1983 cases<sup>301</sup> despite the fact that the Civil Rights Act of 1871<sup>302</sup>

the like character and class" as the federal claim. *Clafin v. Houseman*, 93 U.S. 130, 137 (1876). *See also id.* at 136; *FERC v. Mississippi*, 456 U.S. 742, 760 (1982); *Testa v. Katt*, 330 U.S. 386, 392, 394 (1947); *Herb v. Pitcairn*, 324 U.S. 117, 120 (1945); *McKnett v. Saint Louis & S.F. Ry.*, 292 U.S. 230, 232-33 (1934); *Minneapolis & S.L. R.R. v. Bombolis*, 241 U.S. 211, 221-23 (1916); *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1, 56-57, 59 (1912).

297. U.S. CONST. art. VI, § 2.

298. *See FERC v. Mississippi*, 456 U.S. 742, 760-61 (1982); *Testa v. Katt*, 330 U.S. 386, 394 (1947); *McKnett v. Saint Louis & S.F. Ry.*, 292 U.S. 230, 233-34 (1934); *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1, 56-59 (1912). *See generally* Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551 (1960).

The Supreme Court has not determined whether Congress can require state courts to adjudicate federal claims that are not analogous to state-created rights of action. C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 45, at 271 (4th ed. 1983). Several scholars have argued that Congress probably has that power. *See* M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 130-38 (1980); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 507 (1954); Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277, 296 n.111 (1984); Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 759-66 (1981); Redish & Muench, *supra* note 294, at 347-59; Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 205-07.

State courts must take cognizance of constitutional claims against state actors in cases where the plaintiff lacks access to a federal forum. *See General Oil Co. v. Crain*, 209 U.S. 211, 226 (1908); C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *FEDERAL PRACTICE AND PROCEDURE* § 4024, at 718-20 (1977). For a more expansive view of state courts' obligations, see Gordon & Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1171-77 (1984) (arguing that state courts must adjudicate federal constitutional challenges to state action even if federal courts are available to hear those claims).

299. Neuborne, *supra* note 298, at 757.

300. The Supreme Court has recognized two valid excuses for refusing to adjudicate federal claims: forum non conveniens and limited jurisdiction. A state court may dismiss if the cause of action arose outside the forum state and the parties are nonresidents, *see Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950); *Douglas v. New York, N.H. & H. R.R.*, 279 U.S. 377 (1929), or if the suit falls into a category of cases assigned to some other state court, *see Herb v. Pitcairn*, 324 U.S. 117 (1945).

301. Congress authorized United States district courts to adjudicate § 1983 suits, *see* 28 U.S.C. §§ 1331, 1343(a)(3) (1982), but that express grant of jurisdiction did not divest state

came into existence largely because state judges proved unable or unwilling to enforce federal law.<sup>303</sup> The Supreme Court held in *Martinez v. California*<sup>304</sup> that state courts may entertain section 1983 suits, but refrained from deciding whether they must accept Congress's offer of concurrent jurisdiction.<sup>305</sup> Courts in at least forty-two states have responded affirmatively to Congress's invitation. In twenty-nine of those states, courts have explicitly acknowledged their power to try section 1983 cases;<sup>306</sup> in the other thirteen,

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courts of their implied right to handle such cases. "It is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive." *United States v. Bank of N.Y. & Trust Co.*, 296 U.S. 463, 479 (1936).

302. Ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1982)).

303. See *Haring v. Prosise*, 103 S. Ct. 2368, 2378 (1983); *District of Columbia v. Carter*, 409 U.S. 418, 426-29 (1973); *Monroe v. Pape*, 365 U.S. 167, 174-80 (1961).

304. 444 U.S. 277 (1980).

305. *Id.* at 283-84 n.7 (1980); accord *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1, 10-11 (1980). The Court noted, however, that "where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim." *Martinez*, 444 U.S. at 283-84 n.7 (citing *Testa v. Katt*, 330 U.S. 386, 394 (1947)).

306. ALABAMA: *Terrell v. City of Bessemer*, 406 So. 2d 337, 340 (Ala. 1981); ARIZONA: *New Times, Inc. v. Arizona Bd. of Regents*, 110 Ariz. 367, 374, 519 P.2d 169, 176 (1974); CALIFORNIA: *Brown v. Pitchess*, 13 Cal. 3d 518, 520-23, 531 P.2d 772, 774-75, 119 Cal. Rptr. 204, 206-07 (1975); COLORADO: *Espinoza v. O'Dell*, \_\_\_\_\_ Colo. \_\_\_\_\_, 633 P.2d 456, 460 n.2, cert. granted, 454 U.S. 1122 (1981), *dismissed for want of juris.*, 456 U.S. 430 (1982); CONNECTICUT: *Vason v. Carrano*, 31 Conn. Supp. 338, \_\_\_\_\_, 330 A.2d 98, 98 (Super. Ct. 1974); ILLINOIS: *Alberty v. Daniel*, 25 Ill. App. 3d 291, 295, 323 N.E.2d 110, 113-14 (1974); INDIANA: *Colvin v. Bowen*, \_\_\_\_\_ Ind. App. \_\_\_\_\_, 399 N.E.2d 835, 837 (1980); KANSAS: *Gumbhir v. Kansas State Bd. of Pharmacy*, 231 Kan. 507, 509, 646 P.2d 1078, 1082 (1982), cert. denied, 459 U.S. 1103 (1983); KENTUCKY: *Scott v. Campbell County Bd. of Education*, 618 S.W.2d 589, 590 (Ky. Ct. App. 1981); LOUISIANA: *Ricard v. State*, 390 So. 2d 882, 883-84 (La. 1980); MAINE: *Thiboutot v. State*, 405 A.2d 230, 235 (Me. 1979), *aff'd*, 448 U.S. 1 (1980); MARYLAND: *DeBleecker v. Montgomery County*, 48 Md. App. 455, 457-59, 427 A.2d 1075, 1077 (1981), *rev'd on other grounds*, 292 Md. 498, 438 A.2d 1348 (1982); MASSACHUSETTS: *Rzeznik v. Chief of Police of Southampton*, 374 Mass. 475, 484-85 n.8, 373 N.E.2d 1128, 1134-35 n.8 (1978); MICHIGAN: *Dudley v. Genesee County Sheriff (Dudley v. Bell)*, 50 Mich. App. 678, 679-80, 213 N.W.2d 805, 806-07 (1973); MINNESOTA: *Finch v. Wemlinger*, 310 N.W.2d 66, 69-70 (Minn. 1981); MISSISSIPPI: *State Tax Comm'n v. Fondren*, 387 So. 2d 712, 723 (Miss. 1980), cert. denied sub. nom. *Redd v. Lambert*, 450 U.S. 1040 (1981); MISSOURI: *Shapiro v. Columbia Union Nat'l Bank & Trust Co.*, 576 S.W.2d 310, 315-16 (Mo.), cert. denied, 444 U.S. 831 (1979); NEW HAMPSHIRE: *MBC, Inc. v. Engel*, 119 N.H. 8, 10, 397 A.2d 636, 637 (1979), *reaff'd in Royer v. Adams*, 121 N.H. 1024, 1026-27, 437 A.2d 316, 317-18 (1981); NEW JERSEY: *MacNeil v. Klein*, 141 N.J. Super. 394, 400 n.1, 358 A.2d 488, 491 n.1 (App. Div. 1976); NEW YORK: *Clark v. Bond Stores, Inc.*, 41 A.D.2d 620, 620, 340 N.Y.S.2d 847, 848 (1973); NORTH CAROLINA: *Williams v. Greene*, 36 N.C. App. 80, 84, 243 S.E.2d 156, 159, *disc. rev. denied and*

civil rights jurisdiction has received implicit recognition.<sup>307</sup> Courts in seven states,<sup>308</sup> and probably in three others,<sup>309</sup> have deemed adjudication of section 1983 suits compulsory. Only the Supreme Court of Tennessee has held that state tribunals never need open their doors to section 1983 litigants.<sup>310</sup> The Tennessee decision

*appeal dismissed*, 295 N.C. 471, 246 S.E.2d 12 (1978); OHIO: *Jackson v. Kurtz*, 65 Ohio App. 2d 152, 156-57, 416 N.E.2d 1064, 1067-68 (1979); OREGON: *Rosacker v. Multnomah County*, 43 Or. App. 583, 587, 603 P.2d 1216, 1218 (1979); PENNSYLVANIA: *Commonwealth ex rel. Saunders v. Creamer*, 464 Pa. 2, —, 345 A.2d 702, 703-04 n.3 (1975); RHODE ISLAND: *Licht v. Quattrocchi*, — R.I. —, —, 454 A.2d 1210, 1211 (1982); UTAH: *Kish v. Wright*, 562 P.2d 625, 627 (Utah 1977); WEST VIRGINIA: *Harrah v. Leverette*, 271 S.E.2d 322, 332 (W. Va. 1980); WISCONSIN: *Terry v. Kolski*, 78 Wis. 2d 475, 482-97, 254 N.W.2d 704, 705-12 (1977); WYOMING: *Board of Trustees v. Holso*, 584 P.2d 1009, 1017 (Wyo. 1978).

307. ALASKA: *Fairbanks Correctional Center Inmates v. Williamson*, 600 P.2d 743 (Alaska 1979); ARKANSAS: *Burden v. Hayden*, 275 Ark. 93, 627 S.W.2d 555 (1982); FLORIDA: *Graham v. Vann*, 394 So. 2d 178 (Fla. Dist. Ct. App. 1981); GEORGIA: *Davis v. City of Roswell*, 250 Ga. 8, 295 S.E.2d 317 (1982); IDAHO: *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982); IOWA: *Blessum v. Howard County Bd. of Supervisors*, 295 N.W.2d 836 (Iowa 1980); NEW MEXICO: *Gomez v. Board of Education*, 85 N.M. 708, 516 P.2d 679 (1973); NORTH DAKOTA: *Falkenstein v. City of Bismarck*, 268 N.W.2d 787 (N.D. 1978); OKLAHOMA: *Gay Activists Alliance v. Board of Regents*, 638 P.2d 1116 (Okla. 1981); SOUTH DAKOTA: *Van Emmerik v. Montana Dakota Utilities Co.*, 332 N.W.2d 279 (S.D. 1983); TEXAS: *City of Amarillo v. Langley*, 651 S.W.2d 906 (Tex. Civ. App. 1983); VERMONT: *Beauregard v. City of St. Albans*, 141 Vt. 624, 450 A.2d 1148 (1982); WASHINGTON: *Jacobsen v. City of Seattle*, 98 Wash. 2d 668, 658 P.2d 653 (1983).

308. ALABAMA: *Terrell v. City of Bessemer*, 406 So. 2d 337, 340 (Ala. 1981); CALIFORNIA: *Brown v. Pitchess*, 13 Cal. 3d 518, 520-23, 531 P.2d 772, 775, 119 Cal. Rptr. 204, 207 (1975); INDIANA: *Colvin v. Bowen*, — Ind. App. —, —, 399 N.E.2d 835, 837 (1980); MISSOURI: *Shapiro v. Columbia Union Nat'l Bank & Trust Co.*, 576 S.W.2d 310, 315-16 (Mo.), *cert. denied*, 444 U.S. 831 (1979); NEW JERSEY: *MacNeil v. Klein*, 141 N.J. Super. 394, 400 n.1, 358 A.2d 488, 491 n.1 (App. Div. 1976); NEW YORK: *Felder v. Foster*, 107 Misc. 2d 782, 783-84, 436 N.Y.S.2d 675, 677 (Sup. Ct. 1981), *modified & aff'd*, 86 A.D.2d 766, 448 N.Y.S.2d 84 (1982); WISCONSIN: *Terry v. Kolski*, 78 Wis. 2d 475, 482-97, 254 N.W.2d 704, 705-12 (1977).

309. ARIZONA: *New Times, Inc. v. Arizona Bd. of Regents*, 110 Ariz. 367, 374, 519 P.2d 169, 176 (1974); KANSAS: *Cooper v. Hutchinson Police Dept.*, 6 Kan. App. 2d 806, 807-08, 636 P.2d 184, 186 (1981), *overruled on other grounds*, *Miller v. City of Overland Park*, 231 Kan. 557, 563, 646 P.2d 1114, 1119 (1982); PENNSYLVANIA: *Commonwealth ex rel. Saunders v. Creamer*, 464 Pa. 2, —, 345 A.2d 702, 703-04 n.3 (1975).

310. *Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969).

Courts in two other states, Ohio and Georgia, have displayed some reluctance to exercise jurisdiction over § 1983 suits. Michael Solimine found several unreported Ohio cases in which lower courts declined to adjudicate § 1983 claims. Solimine, *Adjudication of Federal Civil Rights Actions in Ohio Courts*, 9 U. DAYTON L. REV. 39, 43 n.26 (1983). Those decisions conflict with *Jackson v. Kurtz*, 65 Ohio App. 2d 152, 416 N.E.2d 1064 (1979), and seem to be aberrations.

rested upon the erroneous premise that federal courts have exclusive jurisdiction over section 1983 cases and thus appears to have been overruled by *Martinez*.<sup>311</sup>

Virginia is one of the handful of states that have not squarely addressed the issue of jurisdiction over section 1983 litigation. The United States District Court for the Eastern District of Virginia and the Fourth Circuit have assumed that Virginia courts would adjudicate section 1983 claims if called upon to do so.<sup>312</sup> That assumption seems incontrovertibly correct. Section 1983 suits easily fit within the jurisdictional framework devised by the state constitution and the General Assembly. Moreover, decisions of the Virginia Supreme Court involving other federal rights of action indi-

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The authors of a leading casebook cite a decision of the Supreme Court of Georgia—*Backus v. Chilivis*, 236 Ga. 500, 224 S.E.2d 370 (1976)—as an example of a state court's refusal to assert jurisdiction over a § 1983 action. 1 N. DORSEN, P. BENDER, B. NEUBORNE & J. GORA, EMERSON, HABER, AND DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 401 (4th ed. Supp. 1982) [hereinafter cited as DORSEN]. Professors Dorsen *et al.* note parenthetically that *Backus* involved only a "partial" refusal of jurisdiction. *Id.* Perhaps even that characterization slightly overstates the court's actual holding.

The issue in *Backus* was whether taxpayers could prosecute a § 1983 damages claim against an appraisal company whose work allegedly resulted in unconstitutionally unequal tax assessments. The Supreme Court of Georgia observed that courts in other states had heard § 1983 suits, 236 Ga. at 504 n.1, 224 S.E.2d at 374 n.1, but refrained from discussing Georgia courts' general capacity to try civil rights cases. Confining its opinion to the particular circumstances of the case at bar, the court held in *Backus* that § 1983 does not afford a remedy in tax suits because state law provides an adequate means of redress. *Id.* at 505, 224 S.E.2d at 374-75. That conclusion rested on a line of federal decisions applying the Tax Injunction Act, 28 U.S.C. § 1341 (1982), which states, "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The Court's reliance on the act was misplaced. A rule designed to prevent federal courts from entering a field which Congress preferred to leave to state courts hardly justifies abstention by state judges. The Supreme Court of Georgia is not the only state tribunal that has mistaken a federalism doctrine for a restriction on the scope of § 1983. *See also* State Tax Comm'n v. Fondren, 387 So. 2d 712, 723 (Miss. 1980), *cert. denied sub nom.* Redd v. Lambert, 450 U.S. 1040 (1981) (misapplying Tax Injunction Act to § 1983 suit in state court). In any event, the important point is that the holding in *Backus* did not extend beyond tax challenges. A subsequent case, *Davis v. City of Roswell*, 250 Ga. 8, 295 S.E.2d 317 (1982), indicated that the courts of Georgia may entertain § 1983 actions dealing with subjects other than taxation.

311. 1 DORSEN, *supra* note 310, at 401. Even though *Martinez* repudiated the reasoning in *Chamberlain*, the Court inexplicably considered the Tennessee case worthy of a "but see" citation. *Martinez*, 444 U.S. at 284 n.7.

312. *See* *Davis v. Towle*, 379 F. Supp. 536, 538 (E.D. Va. 1974), *aff'd*, 526 F.2d 588 (4th Cir. 1975).

cate that circuit and general district courts not only may but must try section 1983 cases.

The Virginia Constitution provides that "[t]he judicial power of the Commonwealth shall be vested in a Supreme Court and in such other courts of original or appellate jurisdiction subordinate to the Supreme Court as the General Assembly may from time to time establish."<sup>313</sup> Article VI gives the Virginia Supreme Court appellate jurisdiction "in cases involving the constitutionality of a law under this Constitution or the Constitution of the United States and in cases involving the life or liberty of any person."<sup>314</sup> Appellate jurisdiction cannot exist unless a lower court possesses original jurisdiction over the same subject matter. Obviously the framers expected the legislature to create "[t]rial courts of general jurisdiction"<sup>315</sup> that would enforce the federal Constitution and acts of Congress safeguarding civil liberties.

The General Assembly followed the intent of the framers and granted circuit courts original jurisdiction "of all cases, civil or criminal, in which an appeal may be had to the Supreme Court."<sup>316</sup> In addition, circuit courts acquired "original and general jurisdiction of all cases in chancery and civil cases at law" not assigned exclusively to another tribunal.<sup>317</sup> By using the sweeping phrase "all cases" instead of a more restrictive expression such as "all cases arising under state law," the General Assembly enabled circuit courts to accept every congressional offer of concurrent jurisdiction, including the invitation to try section 1983 suits. General district courts by implication also received authorization to hear federal civil rights actions. The legislature empowered district

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313. VA. CONST. art. VI, § 1, para. 1.

314. *Id.* para. 2. See generally 2 A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 711-13 (1974) (discussing mandatory appellate jurisdiction of the Virginia Supreme Court). The General Assembly has augmented the appellate jurisdiction conferred by the Constitution. See VA. CODE § 17-97 (1982); *id.* § 8.01-670 (1984).

315. VA. CONST. art. VI, § 1, para. 1.

316. VA. CODE § 17-123 (1982).

317. *Id.* Section 17-123 excepts from circuit courts' original jurisdiction "cases at law to recover personal property or money not of greater value than \$100." The \$100 requirement has no practical significance because general district courts have exclusive original jurisdiction over claims for \$1000 or less. VA. CODE § 16.1-77(1) (Supp. 1984). For discussions of circuit courts' jurisdiction, see T. BOYD, E. GRAVES & L. MIDDLEDITCH, *supra* note 50, at § 1.3; W. BRYSON, HANDBOOK ON VIRGINIA CIVIL PROCEDURE 47 (1983).

courts to entertain "any claim . . . to damages" not exceeding \$7000 "for any injury to the person, which would be recoverable by action at law or suit in equity."<sup>318</sup> As noted above,<sup>319</sup> "injury to the person" aptly describes the type of harm that section 1983 remedies.

Decisions enforcing the Federal Employers' Liability Act (FELA)<sup>320</sup> and section 301(a) of the Labor Management Relations Act of 1947 (Taft-Hartley Act)<sup>321</sup> substantiate the foregoing interpretation. *Cheaspeake & Ohio Railway v. Carnahan*,<sup>322</sup> an early FELA case, established that Virginia courts have the capacity to try whatever federal claims Congress permits them to hear.<sup>323</sup> *Carnahan* implied that state courts have a concomitant duty to exercise their concurrent jurisdiction.<sup>324</sup> That idea resurfaced a half-century later as the holding of *Pearman v. Industrial Rayon Corp.*<sup>325</sup> The plaintiff in *Pearman*, a union member, filed a damages suit under the Taft-Hartley Act in the circuit court of Allegheny County, Virginia, two years after the United States Supreme

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318. VA. CODE § 16.1-77(1) (Supp. 1984) (emphasis added).

319. See *supra* text accompanying notes 283-90.

320. 45 U.S.C. §§ 51-60 (1982). The FELA confers a right of action upon interstate railroad workers who suffer injury due to their employers' negligence. Congress enacted the statute on April 22, 1908. Federal Employers' Liability Act, ch. 149, 35 Stat. 65 (1908). From 1908 to 1910, jurisdiction to try FELA claims was implicitly concurrent. See *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1, 56 (1912). Congress expressly authorized state-court adjudication in 1910. Act of Apr. 5, 1910, ch. 143, § 1, 36 Stat. 291 (codified as amended at 45 U.S.C. § 56 (1982)). The FELA now provides in part: "The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States." 45 U.S.C. § 56. An FELA defendant who is sued in a state court may not remove the action to a federal district court. 28 U.S.C. § 1445(a) (1982).

321. 29 U.S.C. § 185(a) (1982). On its face, section 301(a) merely grants jurisdiction to federal courts, but the United States Supreme Court has construed the statute as a mandate for judges to create substantive rules defining the rights and obligations of parties to collective bargaining agreements. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

322. 118 Va. 46, 86 S.E. 863 (1915), *aff'd*, 241 U.S. 241 (1916).

323. *Id.* at 51-56, 86 S.E. at 865-67. The court evidently concluded that FELA suits lay within circuit courts' "'ordinary jurisdiction, as prescribed by local law.'" *Id.* at 52, 86 S.E. at 865 (quoting *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1, 56-57 (1912)). In 1915, when *Carnahan* was decided, circuit courts derived their general jurisdiction from VA. CODE § 3058 (Supp. 1912), which was worded almost identically to the current jurisdictional provision, VA. CODE § 17-123 (1982).

324. *Carnahan*, 118 Va. at 53, 86 S.E. at 865, 866.

325. 207 Va. 854, 153 S.E.2d 227 (1967). *Pearman* is discussed in Laughlin, *Labor Law in Virginia*, 25 WASH. & LEE L. REV. 193, 208-09 (1968).



Court held that state courts could hear such cases.<sup>326</sup> The trial judge dismissed for lack of subject matter jurisdiction, and the Virginia Supreme Court reversed, holding that the dismissal contravened the circuit court's jurisdictional statute.<sup>327</sup> *Pearman* dispelled any lingering doubts about the obligatory nature of judicial power: if Congress has allowed state tribunals to handle a certain kind of federal claim, the Virginia Code compels circuit and general district courts to assume jurisdiction.<sup>328</sup>

Logically, the rule laid down in *Pearman* applies with equal force to section 1983 cases and to all other litigation within the concurrent jurisdiction of state and federal courts. Even if civil rights actions were somehow distinguishable from Taft-Hartley suits, however, the supremacy clause would require Virginia courts to accept section 1983 cases because they enforce the "same type of claim"<sup>329</sup> based on state law. Virginia has no statutory counterpart to section 1983,<sup>330</sup> but does have a reasonably close common-law analog: an implied private right of action under the just compensation clause of the Virginia Constitution.<sup>331</sup> Throughout this century, state courts have entertained suits seeking damages for

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326. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). When state courts adjudicate suits to enforce collective bargaining agreements, federal common law controls. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 102-04 (1962).

327. *Pearman*, 207 Va. at 856, 153 S.E.2d at 229 (applying VA. CODE § 17-123 (1960)). "[S]ince the State and Federal Courts have concurrent jurisdiction of the subject matter," the court concluded, "the trial court erred in sustaining the motion to dismiss." 207 Va. at 859, 153 S.E.2d at 230.

*Service Steel Erectors Co. v. International Union of Operating Engineers*, 219 Va. 227, 229 n.1, 247 S.E.2d 370, 372 n.1 (1978), reaffirmed Virginia courts' jurisdiction to try cases arising under § 301(a) of the Taft-Hartley Act. *See id.*

328. Although *Pearman* discussed only circuit court jurisdiction, the reasoning in the opinion seems no less pertinent to general district courts.

329. *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980); *Testa v. Katt*, 330 U.S. 386, 394 (1947).

330. The only state statute that even remotely resembles § 1983 is the Virginia Tort Claims Act, VA. CODE §§ 8.01-195.1 to 8.01-195.8 (1984), which subjects the Commonwealth to liability for "damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any state employee while acting within the scope of his employment under circumstances where the Commonwealth, if a private person, would be liable." *Id.* § 8.01-195.3.

331. VA. CONST. art. I, § 11, para. 1, which prohibits the General Assembly from passing "any law whereby private property shall be taken or damaged for public uses, without just compensation." *See generally* 1 A. HOWARD, *supra* note 314, at 210-29.

violation of the state constitutional right to just compensation.<sup>332</sup> The supremacy clause<sup>333</sup> therefore obliges Virginia courts to try section 1983 actions to redress deprivations of federal rights.

## 2. *Statute of Limitations for Section 1983 Litigation in State Courts*

Having determined that Virginia courts must try section 1983 cases, we now turn to the question of which limitation rule they should use. The statutes that prescribe limitation borrowing—the Rules of Decision Act<sup>334</sup> and section 1988<sup>335</sup>—by their terms apply solely to federal courts. The Supreme Court has indicated, however, that state courts should employ the methodology of section 1988 when they decide choice-of-law issues in civil rights cases.<sup>336</sup> Hence the principles of *Burnett v. Grattan*<sup>337</sup> govern state as well as federal courts.<sup>338</sup>

Although state courts have the power to take an independent approach to limitation selection, provided they stay within the guidelines of section 1988, they have tended to follow federal precedents.<sup>339</sup> Uniformity has many virtues,<sup>340</sup> not the least of

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332. See *Burns v. Board of Supervisors*, 218 Va. 625, 238 S.E.2d 823 (1977); *Morris v. Elizabeth River Tunnel Dist.*, 203 Va. 196, 123 S.E.2d 398 (1962); *Heldt v. Elizabeth River Tunnel Dist.*, 196 Va. 477, 84 S.E.2d 511 (1954); *Nelson County v. Coleman*, 126 Va. 283, 101 S.E. 406 (1919); *Swift & Co. v. City of Newport News*, 105 Va. 108, 52 S.E. 821 (1906).

333. See *supra* text accompanying notes 297-300.

334. 28 U.S.C. § 1652 (1982), *quoted in* note 3 *supra*.

335. 42 U.S.C. § 1988 (1982), *quoted in* note 6 *supra*.

336. In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239-40 (1969), a case originating in the circuit court of Fairfax County, Virginia, the United States Supreme Court held that § 1988 controls the award of damages by state courts in suits based on 42 U.S.C. § 1982 (1982), which guarantees racial equality in property transactions. Section 1988 has as much applicability to the choice of limitation rules for § 1983 actions as it does to the selection of damages rules for § 1982 claims. *Sullivan* therefore suggests that state courts should obey § 1988 and define limitation periods through the same process that federal courts use.

337. 104 S. Ct. 2924 (1984).

338. As Burt Neuborne has pointed out, when a state court chooses an appropriate statute of limitations for a § 1983 claim, the court is applying a federalized version of state law and not a state rule that operates of its own force. See Neuborne, *supra* note 298, at 785 n.272; see also *Robertson v. Wegmann*, 436 U.S. 584, 588-89 (1978) (§ 1988 transforms state law into federal law); *cf. Martinez v. California*, 444 U.S. 277, 284 & n.8 (1980) (state immunity rules do not operate of their own force in § 1983 cases tried by state courts).

339. See, e.g., *Evans v. Chipps*, 56 N.C. App. 232, 235, 287 S.E.2d 426, 428 (1982); *Laferty v. Nickel*, 663 P.2d 168, 170 (Wyo. 1983). But see *Miller v. City of Overland Park*, 231 Kan. 557, 560-62, 646 P.2d 1114, 1117-18 (1982) (rejecting limitation adopted by local fed-

which is avoidance of forum shopping; but if federal courts err, emulation by state courts only compounds the mistake. Messrs. Boyd, Graves, and Middleditch predict that when Virginia courts are presented with section 1983 claims, they will adhere to Fourth Circuit doctrine and enforce the two-year "personal injuries" limitation in all cases.<sup>341</sup> If so, state judges, like their federal brethren, will be half right and half wrong: two years is the right period, but section 8.01-243(A)—in its present form—is the wrong statute.<sup>342</sup>

The right statute does not yet exist. Unless the General Assembly amends section 8.01-243(A) to cover all injuries to the person, state courts soon will confront the same dilemma that the federal judiciary already faces. The legislature has a responsibility to prevent such a problem from occurring. Helping federal courts perform their tasks may be merely a matter of comity, but facilitating orderly and rational state-court adjudication is an affirmative legislative duty. To forestall confusion and inconsistency in the Commonwealth's own tribunals, the General Assembly should convert section 8.01-243(A) into the sort of general limitation provision that *Burnett* demands.

In addition to enhancing the coherence of section 1983 litigation in state and federal courts, the proposed amendment would clarify the rules for common-law torts. The present practice of dividing actions for injuries to persons into two categories with different limitation periods<sup>343</sup> breeds uncertainty. The line of demarcation between sections 8.01-243(A) and 8.01-248 is so vague that potential suitors sometimes have no way of discerning which statute controls. Claims involving emotional distress,<sup>344</sup> for example, are ex-

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eral courts).

340. See generally Neuborne, *supra* note 298.

341. T. BOYD, E. GRAVES & L. MIDDLEDITCH, *supra* note 50, § 3.8 at 181.

342. See *supra* text accompanying notes 278-80.

343. See *supra* text accompanying notes 260-61.

344. The Virginia Code Commission originally recommended that "every action for injury to the person, including an action for emotional injuries, whatever the theory of recovery" be subject to § 8.01-243. CODE COMMISSION REPORT, *supra* note 50, at 152. The Revisers' Note accompanying the initial draft of § 8.01-243 said the two-year limitation would apply whether or not the emotional distress entailed physical harm. *Id.* at 153. Instead of adopting that proposal, the General Assembly restricted the scope of § 8.01-243(A) to actions for "personal injuries," see VA. CODE § 8.01-243(A) (1984), leaving suits based on purely psychological damage in an ambiguous status.

ceedingly difficult to classify. If mental suffering causes bodily harm or vice versa, section 8.01-243(A) undoubtedly governs. But what about psychic damage resulting from a "wrongful birth"<sup>345</sup> or severe distress stemming from outrageous conduct?<sup>346</sup> Both are actionable without proof of physical symptoms. Does the two-year standard apply nevertheless, or is the one-year catchall more appropriate? Reasonable people can reach opposite conclusions, a situation that thwarts predictability and repose. Resolving borderline limitation cases wastes judges' time, lawyers' energy, and litigants' money. The legislature ought to simplify the system by eliminating section 8.01-248 and making section 8.01-243(A) all-inclusive.<sup>347</sup>

### CONCLUSION

*Burnett* requires state and federal courts sitting in Virginia to apply a two-year limitation to all section 1983 actions. The Virginia Code lacks a provision broad enough to accommodate that rule. Section 8.01-243(A), as presently worded, does not qualify for incorporation as the statute of limitations for civil rights cases because its scope is restricted to suits involving "personal injuries," i.e., bodily harm, whereas section 1983 redresses every variety of damage caused by violation of a federal right. Virginia needs a statute of limitations that is coextensive with section 1983. This Article has proposed such a measure: a modified version of section 8.01-243(A) which would impose a two-year deadline on all claims for "injury to the person." Adoption of this proposal by the General Assembly would ensure equality among section 1983 litigants and between state and federal rights of action, thereby bringing the Code into conformity with *Burnett*.

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345. See *Naccash v. Burger*, 223 Va. 406, 415-16, 290 S.E.2d 825, 830-31 (1982).

346. See *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974).

347. See *supra* note 291.