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THE RELATIONSHIP OF PROCEDURE TO SUBSTANCE IN CIVIL RIGHTS ACTIONS UNDER SECTION 1983: NO CAUSE FOR COMPLAINT?*

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INTRODUCTION

In recent years, the Supreme Court has expanded civil rights actions[1] in two crucially important ways. First, the Court held that damage actions may be brought against government entities for civil rights violations.[2] This ruling extends to all government entities except the states, which remain protected by the explicit provisions of the eleventh amendment.[3] Although the scope of entity liability is

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*"Mr. Mayor,' said K., 'you always call my case one of the smallest, and yet it has given hosts of officials a great deal of trouble, and if, perhaps, it was unimportant at the start, yet through the diligence of officials of Sordini's type it has grown into a great affair. Very much against my will, unfortunately, for my ambition doesn't run to seeing columns of documents, all about me, rising and crashing together, but to working quietly at my . . . [job].'

'No,' said the Superintendent, 'it's not at all a great affair, in that respect you've *no ground for complaint*—it's one of the least important among the least important. The importance of a case is not determined by the amount of work it involves; you're far from understanding the authorities if you believe that. But even if it's a question of the amount of work, your case would remain one of the slightest; ordinary cases—those without any so-called errors, I mean—provide far more work and far more profitable work as well.'

F. KAFKA, THE CASTLE 85 (1954).

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[1] This article only discusses actions under the Civil Rights Act of 1870, 42 U.S.C. §§ 1981-1988 (1976). Most of these actions are brought under section 1983 of the Civil Rights Act which states:

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

Id. § 1983.

[2] Monell v. Department of Social Servs., 436 U.S. 658 (1978).

[3] The eleventh amendment protects states from federal court suits brought without the states' consent. *See* Edelman v. Jordan, 415 U.S. 651 (1974). It provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity,

still evolving, the basic concept has had, and will have, a strong salutary effect upon actions to protect constitutional rights. Second, the Court has limited the immunity enjoyed by government officials in the discharge of their duties by narrowly restricting absolute immunity to legislators[4] and judges[5] engaged in their official capacities, and to prosecutors engaged in the presentation of criminal cases in court.[6] In all other cases, government officials are protected at most by a qualified immunity,[7] which may be lost upon proof of malice, intentional deprivation of constitutional rights,[8] or arguably, negligence under appropriate circumstances. Furthermore, even this qualified immunity will not protect a government entity from liability for the conduct of high level government officials engaged in promulgating official policy.[9]

Together, these developments greatly enhance the potential for a successful civil rights damages action. This potential can be realized, however, only if there are complementary developments in procedural areas to remove obstacles which now substantially delay and often completely frustrate redress by the federal courts. Attorneys who have engaged in civil rights litigation will agree that there are several phases of the case where the complexity or uncertainty of the procedural law greatly exacerbates the difficulties of preparing for trial on the merits. For example, at the beginning of the case the defendant may attack the court's jurisdiction to hear the case upon the ground that the federal court ought to exercise its discretionary power of abstention. In addition, there is often a motion to dismiss on the ground that the complaint fails to state a claim upon which relief can be granted,[10] the motion in turn being evaluated according to a strict, pro-defense standard.[11] Finally, there is often a motion for summary judgment based upon res judicata and/or collateral estoppel.[12]

The result of these procedural sticking points may be months or even years of delay, during which time the plaintiff is deprived of the opportunity to conduct discovery or otherwise proceed to trial. When

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commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[4] Tenney v. Brandhove, 341 U.S. 367 (1951). *See* Gravel v. United States, 408 U.S. 606, 616 (1972). It should be noted, however, that while the Court reaffirmed the absolute immunity of Congressmen, it also extended immunity to activities of legislative aids which would be privileged if performed by the legislator. *Id.* at 616-17.

[5] Dennis v. Sparks, 101 S. Ct. 183 (1980).

[6] Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

[7] *See* Owen v. City of Independence, 445 U.S. 622, 637-38 (1980).

[8] *See* Wood v. Strickland, 420 U.S. 308, 322 (1975).

[9] Owen v. City of Independence, 445 U.S. 622, 638 (1980).

[10] FED. R. CIV. P. 12(b)(6).

[11] *See* notes 73-77 *infra* and accompanying text.

[12] *See* notes 131-34 *infra* and accompanying text.

the case does get into the discovery phase, the plaintiff typically finds that virtually all attempts to obtain information necessary to establish liability are countered with claims of privilege, resulting in further delay and expense, and frequently in a denial of the discovery request.

Some of these procedural problems are legitimate products of the substantive issues in civil rights cases. Many others are either anachronisms left from days when the substantive law was harsher, or simply the unfortunate result of a judicial failure to realize the substantial adverse impact that procedural rulings may have upon the plaintiff's right to a just, fair, and speedy resolution of his claims. This article examines the less useful procedural obstacles confronting a Civil Rights Act plaintiff in an effort toward recommending policies more in line with substantive law developments.

SUBSTANTIVE LAW DEVELOPMENTS

In Civil Rights Act litigation, two classes of substantive issues have tended to recur without definitive resolution: (1) whether individual liability is based upon ordinary negligence, or upon intent or malice; and (2) whether derivative liability should be imposed upon high ranking government officials and/or upon the government entity itself, and thus upon the taxpayers. Although this article is concerned with procedural aspects of civil rights cases, a brief discussion of the state of the law in these two substantive areas is a necessary prerequisite to an understanding of the relationship between substance and procedure.

The notion that actual malice, or the deliberate intent to harm the victim, is an essential element of a civil rights claim stems from confusion in early decisions concerning the scope of immunity based upon governmental privilege.[13] The Supreme Court has consistently approached the area of immunity by distinguishing between absolute immunity for a limited number of legislative and judicial officials,[14] and qualified immunity for virtually all other government employees.[15] For the latter group, immunity depends upon actions

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[13] O'Connor v. Donaldson, 422 U.S. 563, 577 (1975); Wood v. Strickland, 420 U.S. 308, 322 (1974). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 926-1049 (2d ed. 1973).

[14] *See* Imbler v. Pachtman, 424 U.S. 409, 424-29 (1976) (state prosecuting attorney acting within scope of duties absolutely immune from action under 42 U.S.C. § 1983 (1976)); Gravel v. United States, 408 U.S. 606, 616-17 (1972) (absolute immunity afforded federal legislators); Pierson v. Ray, 386 U.S. 547, 554-55 (1967) (absolute immunity afforded judges for acts within judicial jurisdiction); Tenney v. Brandhove, 341 U.S. 367 (1951) (state legislators).

[15] The Court has extended qualified immunity on a case-by-case basis to a variety of officials including: prison officials, Procunier v. Navarette, 434 U.S. 555, 561-62 (1978); state hospital

taken in "good faith"—in the absence of good faith, immunity is lost.[16] Under this model, malice plays only a peripheral role. Of course, actual malice will destroy qualified immunity.[17] Even actual malice, however, will not destroy absolute immunity.[18] More importantly, malice is *not* the only factor that will overcome qualified immunity; often a lesser showing will suffice. In fact, determining exactly what will overcome qualified immunity remains a largely unanswered question.

The Supreme Court has in recent years flirted with the idea of imposing liability for negligent violation of constitutional rights, but has thus far stopped just short of doing so.[19] Two cases are particularly illustrative of the Court's consideration of negligence in Civil Rights Act cases: *Procunier v. Navarette*[20] and *Baker v. McCollan*.[21]

In *Procunier*, the plaintiff was a jailhouse lawyer who complained that prison officials interfered with his mail.[22] As is typical in civil rights actions, the litigation was protracted: the claim arose in 1972; the action was filed in 1974; and in 1978, the parties were still in the pleading stage dealing with defense motions for dismissal and summary judgment. The plaintiff, although proceeding *pro se*, had nevertheless filed a complaint sophisticated enough to allege "knowing disregard" of state regulations, "bad faith disregard" of the plaintiff's rights, and "negligent and inadvertent" misapplication of state regulations.[23]

The Supreme Court assumed jurisdiction to determine whether the complaint alleging "negligent interference with a claimed constitutional right" stated a claim under section 1983 of the Civil Rights Act.[24] Although the Court found the complaint insufficient, the substantive standard it applied is instructive: officials with qualified immunity[25] are liable if they knew or should have known of a consti-

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officials, O'Connor v. Donaldson, 422 U.S. 563, 576-77 (1975); school board members, Wood v. Strickland, 420 U.S. 308, 314-22 (1975); executive officers performing discretionary acts, Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974); and police officers, Pierson v. Ray, 386 U.S. 547, 557 (1967).

[16] *E.g.*, Wood v. Strickland, 420 U.S. 308, 322 (1975).

[17] Procunier v. Navarette, 434 U.S. 555, 571 (1978) (Stevens, J., dissenting).

[18] Imbler v. Pachtman, 424 U.S. 409, 418 n.12 (1975) (citing Pierson v. Ray, 386 U.S. 547, 553-54 (1967)).

[19] For a discussion of potential § 1983 liability in crime prevention, see Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821, 829-31 (1981).

[20] 434 U.S. 555 (1978).

[21] 443 U.S. 137 (1979).

[22] 434 U.S. at 557-58.

[23] *Id.*

[24] 42 U.S.C. § 1983 (1976). 434 U.S. at 559.

[25] *Compare* Imbler v. Pachtman, 424 U.S. 409 (1976) *with* Pierson v. Ray, 386 U.S. 547 (1967) *and* other cases listed in *Procunier*, 434 U.S. at 561.

tutional right which they violated by their conduct.[26] In the case before it, the majority agreed that the first amendment right to be free from interference with one's mail, relied upon by the plaintiff, was not yet "clear" when the defendants acted, and that accordingly they should not be punished for their good faith attempts to enforce the existing laws.[27]

It appears then that the Court would sanction liability for a government official who negligently failed to know the laws affecting the discharge of his official duties. Indeed, in his dissent, Justice Stevens said,"[l]ike the Court, I shall assume, without deciding, that a guard who negligently misreads regulations and improperly interferes with a prisoner's mail has violated section 1983."[28]

In a more recent decision, *Parratt v. Taylor*,[29] the Court again eschewed a negligence standard in a case involving a prisoner's mail; however, that case merely involved a claim of negligent mishandling of mail with resultant loss of property, which the Court held did not constitute a taking of property without due process under the fourteenth amendment. There was no evidence of unconstitutional mail policies for prisoners, or of ill will or other malice toward the plaintiff by prison officials.[30]

In *Baker v. McCollan*,[31] the Court again approached the question whether acts of negligence give rise to civil rights liability. The plaintiff in *Baker* was held in jail for eight days[32] in a classic case of mistaken identity.[33] Although the prisoner insisted from the begin-

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[26] 434 U.S. at 562. *See* Wood v. Strickland, 420 U.S. 308, 322 (1975).

[27] 434 U.S. at 563-64.

[28] *Id.* at 569 n.4. Moreover, the dissent argues for a standard that would impose liability even for negligent acts—such as the mere mishandling of prisoner mail—provided the defendants acted with specific ill feeling toward the plaintiff or "carelessly disregarded the standards which their superiors directed them to follow." *Id.* at 571-72 (Stevens, J., dissenting).

[29] 101 S. Ct. 1908 (1981).

[30] *Id.* at 1916. Four Justices concurred in *Parratt* in opinions reinforcing the narrow scope of the holding, and Justice Marshall dissented on the ground that due process required prison officials to advise the prisoner of any state claims procedures available to him after the loss was discovered. *Id.* at 1923 (Marshall, J., dissenting).

[31] 443 U.S. 137 (1979).

[32] Plaintiff was arrested on December 26, moved from one county to another on December 30, and was released January 3. Only the sheriff in the latter county was sued. *Id.* at 141. The majority's statement that as a result of the transfer he was held for only three days is misleading.

[33] The circumstances surrounding the arrest were as follows: Leonard and Linnie McCollon were brothers. At some point Leonard had obtained a copy of Linnie's driver's license. When Leonard was arrested on narcotics charges, he displayed the license, identified himself as Linnie, and signed various documents as Linnie. Shortly thereafter, he was released on bail. For an undisclosed reason, "the bondsman [then] sought and received an order allowing him to surrender Leonard, who everyone thought was Linnie." *Id.* at 150. Although the real violator was Leonard, a warrant for the arrest of Linnie was issued based on the false identification supplied by Leonard.

ning that the wanted man was in fact his brother, the sheriff failed to make any effort to verify his prisoner's identity.[34] When a file photograph of the wanted man was eventually examined, the error was at once apparent and the prisoner was released.[35] Although the Court ruled that the complaint failed to state a claim,[36] its discussion of the defendants' conduct during the three days the plaintiff was in jail is ambiguous. It may indicate that the negligent failure to respond to a prisoner's claim of mistaken identity is not actionable under section 1983; or it may merely suggest that the defendants' actions did not amount to negligence.[37]

Thus, the Court has not, at least in the view of its majority opinion writers, yet dealt with clearly negligent conduct resulting in the deprivation of life, personal liberty, or other fundamental constitutional rights. In the recent cases before it, the Court majority—or plurality—has avoided the ultimate issue by concluding that there was no negligence under the particular averments presented in the complaint. Although the narrow ground of decision may be preferred, particularly when the Court is so obviously divided on the major issue, it is unfortunate that the effect of these opinions is to prevent plaintiffs from presenting all of the relevant evidence in support of a

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[34] *Id.* at 141-42.

[35] *Id.* at 141.

[36] Specifically, Justice Rehnquist found that the plaintiff had failed to establish a constitutional violation which is a threshold requirement of section 1983 actions. *Id.* at 140. Because the arrest warrant was facially valid, there was no fourth amendment violation. *Id.* at 143-44. Moreover, in the majority's view "a detention of three days" did not amount to a deprivation of liberty "without due process of law." *Id.* at 142.

[37] The latter interpretation loses some force in view of the majority's repeated reference to potential tort liability for false imprisonment under state law, *id.* at 142, 146, though one may argue that false imprisonment, like trespass, is generally a matter of strict liability.

Only four justices joined the majority opinion in *Baker*. Justice Blackmun, in a concurring opinion, flatly found that the sheriff was not negligent and that the deputies were not defendants. *Id.* at 148 (Blackmun, J., concurring). He expressly left open the possibility of liability for more severe misconduct, such as "deliberately and repeatedly refus[ing] to check the identity of a complaining prisoner against readily available mug shots and fingerprints." *Id.*

Justice Marshall, in a brief dissent, characterized the arrest as an intentional act, thus obviating any consideration of the negligence issue. *Id.* at 149 (Marshall, J., dissenting). Justice Stevens' dissent, on the other hand, abounds with language suggesting the applicability of a negligence analysis. For example, reference is frequently made to the lack of general procedures aimed at reducing the risk of imprisonment by mistaken identity. *Id.* at 150, 152, 156 (Stevens, J., dissenting). In short, Justice Stevens strongly implies that careless failure to protect recognized constitutional rights should be actionable under section 1983. While the opinion stops short of recognizing liability for "occasional mistakes [that] may be made by conscientious police officers operating under the strictest procedures," *id.* at 155 (Stevens, J., dissenting), the concept of negligence is nonetheless impliedly recognized.

negligence theory, and thus to delay even further the day when the Court must ultimately rule whether negligent violation of constitutional rights states a claim under section 1983. Thus, for the time being, the question of liability for negligence under the Civil Rights Act remains an open one. The Court may well move toward a standard which recognizes liability based on only certain types of negligence, but not others.[38] Thus, a managerial official's failure to even inquire into relevant constitutional law areas directly affecting prisoners, or others for whom he is responsible, may be actionable even though negligent. Similarly, the failure to establish any procedures or to promulgate any regulations to protect clearly established constitutional rights may give rise to a section 1983 claim. On the other hand, the negligence of lower level employees in discharging their duties may be actionable, if at all, only under state law.

In the area of derivative liability, decisions by the Supreme Court have until recently prompted a wealth of speculation about the proper allocation of responsibility among various types of civil rights defendants.[39] It is now possible to put together several different Court decisions and to answer these questions. The answer, we shall see, depends upon the identity and function of the defendant in question.

There are three types of defendants in civil rights cases: the active tortfeasor; his supervisors and managers sued as individuals; and the entity of government which employs the tortfeasor. The active tortfeasor, whether a low-level employee or a high ranking official, is liable subject to absolute or qualified immunity.[40]

The derivative liability of managerial officials was of considerable interest in the era of *Monroe v. Pape*,[41] which held that the entity itself could not be sued in federal court. Under *Monroe*, an action against low level employees would not be expected to produce a collectible judgment. Nor would injunctive relief be adequate to engender institutional reforms. Accordingly, plaintiffs were anxious to develop legal theories that would fix liability at the highest levels of

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[38] *See* discussion of Justice Marshall's analysis in *Baker v. McCollan*, *supra* note 37. Justice Stevens has suggested that "generalized malice," that is, ill will or hostility to a particular individual, may form the basis of liability for even negligent infringement of that individual's rights. *See Procunier*, 434 U.S. at 572 (Stevens, J., dissenting), where Justice Stevens states: "A jury might . . . find that the defendants' animus toward Navarette so tainted their handling of his mail that the good-faith defense should be denied even with respect to harm caused by their negligence." *Id.*

[39] *See generally* Sheuer v. Rhodes, 416 U.S. 232 (1974).

[40] *See* notes 4-9 *supra* and accompanying text.

[41] 365 U.S. 167 (1961), *overruled*, Monell v. Department of Social Servs., 436 U.S. 658 (1978).

government, in order to enhance the potential extent of the remedy. When *Monroe* was overruled, that need became less pressing. Today, the two decisions most relevant to an understanding of entity liability, *i.e.*, the responsibility of the local government entity to pay damages for violations of section 1983 by agents or employees of that entity, are *Monell v. Department of Social Services*[42] and *Owen v. City of Independence*.[43] In those two cases, together with *Rizzo v. Goode*,[44] the Court, often sharply divided, carved out the rough contours of the principles that will guide developments in this area of law during the coming decade. Most notably, the Court held that local government entities may be liable for damages in actions under the Civil Rights Acts.[45] Additionally, the Court determined that entity liability will depend upon a finding that high level officials were involved in the tortious actions by means of official policy making, ratification of wrongful conduct, or failure to uncover or correct abuses by lower level employees.[46] Finally, the Court held that entity liability, unlike individual liability, is not subject to a qualified immunity for good faith mistakes committed by government officials in the discharge of their official duties, although entities are not liable for punitive damages.[47]

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[42] 436 U.S. 658 (1978).

[43] 445 U.S. 622 (1980).

[44] 423 U.S. 362 (1976).

[45] 436 U.S. at 690. The Court's decision in *Monell* expressly overruled *Monroe v. Pape*, insofar as that case held that local governments were immune from section 1983 liability. *Id.* at 664-89.

[46] *Id.* at 694; Owen, 445 U.S. 657.

[47] 445 U.S. at 650. The Court also noted that the availability of defenses in civil rights actions is solely a matter of federal law, and is not subject to limitation or modification by states through tort claims statutes or judicial decision. *See* Hampton v. City of Chicago, 484 F.2d 602, 607 (7th Cir. 1973) (majority opinion authored by then Circuit Judge Stevens). *See also* Fitzpatrick v. Bitzer, 427 U.S. 445, 455-56 (1976). This principle, however, is limited by the Court's approach to defining those defenses. In *Monell* and in the recent decision of City of Newport v. Fact Concerts, Inc., 101 S. Ct. 2748 (1981), the Court's analysis starts from the assumption that Congress was aware of the status of sovereign immunity in 1870, and intended to preserve that immunity to the extent that it was consistent with the purposes of the Act. Thus, the Court is indirectly taking into account state law at the time the Civil Rights Act was written by inferring legislative intent to recognize that law. The Act itself calls for the application of state law to fill in the procedural gaps in civil rights actions. *See* 42 U.S.C. § 1988 (1976).

It should also be noted that in the *City of Newport* case, the Court held that a government entity is *not* liable for punitive damages in Civil Rights actions. 101 S. Ct. at 2762. In so holding, the Court reasoned that even where government officials have acted with malice, both the history of sovereign immunity and public policy militate against granting the successful plaintiff a windfall in excess of compensation for his losses at the expense of the taxpayers who would be responsible for the judgment. *Id.* at 2756-62. In *City of Newport*, a local governing body had withdrawn a concert permit based upon spurious reasons and in the face of advice from counsel that its actions were unconstitutional and unsupportable. *Id.* at 2751-52. The Court affirmed an award of compensatory damages against the city, since the wrongful actions were committed by

Thus, after *Monell* and *Owen* civil rights actions may be maintained against individual government officials, the managers who supervise those officials, and/or the government entity which employs those officials. Although these decisions appear to facilitate the civil rights action, procedural hurdles continue to hamper many valid claims. The following section discusses these procedural impediments.

PROCEDURAL ISSUES

A. *Jurisdiction and Abstention by Federal Courts*

For a variety of reasons, claims under the Civil Rights Act may be adjudicated in either state or federal court. First, state and federal courts have concurrent jurisdiction over civil rights claims.[48] Second, civil rights violations may also give rise to state tort claims under common law or statute.[49] Finally, constitutional violations may be asserted and determined in criminal proceedings, state civil proceedings to determine status, ownership, or the like, or in myriad other contexts that may result in a judicial ruling that directly or indirectly affects the civil rights claim.[50] As a result of this overlapping jurisdiction, the initial procedural problem for the plaintiff is whether the federal court will accept jurisdiction over his civil rights claim when a related state court proceeding is also involved. The body of precedent concerning whether a federal court should, in the exercise of its discretion, decline jurisdiction under such circumstances is known as the doctrine of abstention.[51]

This doctrine has undergone considerable refinement in the last ten years, and the current status of abstention is set forth in *Moore v. Sims*.[52] In that case, Texas authorities had commenced a child neglect proceeding in state court, and had exercised statutory powers to remove a child from the home *pendente lite*.[53] The parents com-

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high ranking officials as defined in *Owen*, but reversed the award of punitive damages. *Id.* at 2762. Perhaps significantly, the punitive damage award against the individual council members was not affected by the decision. Thus, the Court again recognized the validity of entity liability to make whole an individual injured by unconstitutional official action.

[48] *See* Maine v. Thiboutot, 448 U.S. 1 (1980); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958); T&M Homes, Inc. v. Mansfield Twp., 162 N.J. Super. 497, 393 A.2d 613 (Law Div. 1978).

[49] *See, e.g.*, City of Newport v. Fact Concerts, Inc., 101 S. Ct. 2748, 2752 n.6 (1981). *See also* T&M Homes, Inc., v. Mansfield Twp., 162 N.J. Super. 497, 393 A.2d 613 (Law Div. 1978).

[50] *See, e.g.*, Moore v. Sims, 442 U.S. 415 (1979); *see* notes 131-34, *infra* and accompanying text.

[51] The principle of abstention was first articulated by the Court in the context of criminal proceedings in Younger v. Harris, 401 U.S. 37 (1971).

[52] 442 U.S. 415 (1979).

[53] *Id.* at 419-21.

menced a federal court action alleging that the Texas statute empowering a governmental department to take custody of their children violated their right to due process under the fourteenth amendment.[54] The Supreme Court held that abstention was appropriate, affirming the principal of *Huffman v. Pursue, Ltd.*,[55] that abstention is not restricted to criminal cases, but extends to any civil proceeding[56]—at least where the state is a party to that proceeding[57]—so long as there is an adequate opportunity to raise the constitutional claims in the case pending in state court.[58]

Procedurally, a federal court's decision to abstain in a civil rights case can be implemented in two ways. The court may simply dismiss the action, upon the supposition that the state proceedings will dispose of the entire controversy. Or, if the court believes that civil rights questions may still exist unresolved after the state case is decided, the court may temporarily stay further proceedings in federal court, giving the plaintiffs the option to move to vacate that stay and prosecute their federal claims when the state proceedings are concluded. This latter approach is clearly appropriate where the state proceedings do not provide an adequate opportunity for presentation of the federal civil rights claims, or when the plaintiffs have invoked the jurisdiction of the federal court prior to commencement of state proceedings.

From a procedural standpoint, it is significant that the Court in *Moore* remanded with instructions that the complaint be dismissed.[59] If for any reason the plaintiffs had occasion to return to federal court, they would be required to commence a new action, effect service of new process, and, in short, incur substantial additional expense, inconvenience, and delay. Whether the Court intended to cast doubt upon the plaintiff's substantive right to return to federal court by its

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[54] *Id.* at 422.

[55] 420 U.S. 592 (1975).

[56] It should be noted, however, that the Supreme Court was careful to describe the civil proceeding in *Moore* as one "in aid of and closely related to criminal statutes." *Id.* at 604. Whether this is a qualification on the Court's holding or merely dicta is unclear.

[57] Two other cases which expand the scope of the types of civil actions to which abstention is applicable are Judice v. Vail, 430 U.S. 327 (1977) (state's civil contempt process), and Trainor v. Hernandez, 431 U.S. 434 (1977) (state's law governing attachment actions).

[58] The adequacy of the parents' opportunity to present their constitutional claim in *Moore* was sharply challenged by the four dissenters, who argued that the parents' allegation of being unconstitutionally deprived of custody of their child during a forty-two day period was of no direct concern to the state judge deciding a child neglect proceeding and passing upon the propriety of permitting the parents to regain custody of their child. 442 U.S. at 438-39 (Stevens, J., dissenting).

[59] *Id.* at 435.

order is more difficult to assess. It is clear from the Court's prior decisions that plaintiffs had a right to go directly to federal court rather than to the state court with their constitutional claim, provided they could win the race to the courthouse.[60] Furthermore, under *England v. Board of Medical Examiners*,[61] plaintiffs had the right to return to an abstaining federal court for an adjudication of their constitutional claims after state court proceedings were concluded. It was, therefore, both unnecessary and inappropriate for the Court in *Moore* to dismiss the complaint and so require the plaintiffs to re-commence their federal action. Based on precedent, the case should have been retained on the federal court docket unless dismissed at the plaintiff's discretion. This conclusion is further supported by the specific facts of the case—facts which formed a major basis for Justice Stevens' dissent.[62] Prior to commencing the federal action, the parents had attempted for *forty-two days*, with the assistance of counsel, to obtain a hearing in state court seeking return of their child.[63] In fact, the delay was so extensive that the dissenters would have found that, despite *Younger v. Harris*,[64] abstention was inappropriate due solely to the inadequacy of the state remedy. When the parents turned to the federal court and obtained emergency relief and a stay of state court proceedings, the case was again delayed while the Supreme Court reviewed the decision of the three judge district court.[65] Adding to these frustrations was the inappropriate and unfair dismissal of

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[60] The dissent, citing *Monroe*, discussed this option available to the plaintiff. *Id.* at 437 (Stevens, J., dissenting). *See, e.g.*, Steffel v. Thompson, 415 U.S. 452 (1974); Mitchum v. Foster, 407 U.S. 225 (1972); Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913).

[61] 375 U.S. 411 (1964). In Allen v. McCurry, 101 S. Ct. 411 (1980), the Court expressly recognized the continued validity of the holding in *England*. *Id.* at 418 n.17. In the *England* case the Court determined that when a plaintiff wins the race to the courthouse, but is met with abstention, he has the option of returning to federal court for final resolution of his federal claims provided he informs the state court that he is reserving the right to do so. *See* text accompanying notes 67 & 71 *infra*. *See generally Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1318-19 (1977).

[62] 442 U.S. at 435 (Stevens, J., dissenting). Joining in dissent were Justices Brennan, Stewart, and Marshall.

[63] *Id.* at 437 (Stevens, J., dissenting).

[64] *See* note 51 *supra*.

[65] 422 U.S. at 440-41 (Stevens, J., dissenting). According to the dissent, "*Younger* abstention in these circumstances does not merely deprive the plaintiffs of their right to initiate new claims in the form of their choice. Far more seriously, it deprives them of any right at all." *Id.* at 440 (Stevens, J., dissenting). *See also* Gibson v. Berryhill, 411 U.S. 564, 577 (1973).

Gibson arose under 28 U.S.C. §§ 2281-2284 (1970) (sections 2281-2282 repealed 1976), which established three-judge district courts to review all applications to enjoin a state statute as unconstitutional, and provided, *inter alia*, for mandatory review by the Supreme Court of decisions to grant such an injunction.

the federal action. Ironically, this aspect of the case did not even receive mention in the dissent.

In general, it seems that where a federal court abstains from the exercise of jurisdiction over a civil rights claim, the preferred procedure should be a retention of jurisdiction with a stay of its own proceedings.[66] The plaintiffs would then have the option to return to federal court without the delay and inconvenience—or prejudice in the case of the statute of limitations—of commencing a new case in order to exercise the rights that exist under *England.*

B. *Pleadings in Civil Rights Cases*

In civil rights actions, the complaint has assumed an untoward and frustrating prominence for the plaintiff. Although in the normal lawsuit the complaint serves merely to notify the proper defendants of the action and to give them a rough idea of the transactions and events they will be litigating,[67] the civil rights complaint is often the most significant legal document in the whole docket. Five years or more may pass while the legal sufficiency of the complaint is pondered and considered by both trial and appellate courts. There are a variety of plausible explanations for this emphasis. For one thing, it has been quite common in civil rights cases (most certainly prior to *Monell*) for the plaintiff to seek solely or primarily injunctive relief against government officials, restraining continued or future violations of constitutional rights. When a plaintiff seeks the extraordinary remedy of an injunction against a government officer, he must show a clear legal right to the relief sought.[68] Under those circumstances, scrutiny of the complaint for legal sufficiency is not only justifiable, but obligatory.

Another explanation may be found in the federal habeas corpus statutes, which are often an alternative vehicle for the assertion of claims arising under the Civil Rights Act. As discussed more fully below, the federal statute[69] imposes explicit specificity requirements

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[66] If the court is concerned about stale or moot cases on its docket, the court could add a requirement that the parties report periodically on the status of the state case.

[67] *See* FED. R. CIV. P. 12(b)(6). *See generally* 2A MOORE'S FEDERAL PRACTICE ¶ 8.03 (2d ed. 1981).

[68] This caution is reinforced by the traditional reluctance of Congress to permit federal court restraint of state officials in any but the most extreme cases. *See* 28 U.S.C. §§ 2281-2283 (1976) (sections 2281-2282 repealed 1976) (anti-injunction act); *id.* § 2284 (1976) (old three judge court act); *id.* § 2283 (1976) (prohibition against enjoining state tax procedures). Although in private cases the plaintiff's legal right need not always be clear, *e.g.*, Semmes Motors, Inc., v. Ford Motor Co., 429 F.2d 1197 (2d Cir. 1970), the same is not true when a court is asked to enjoin a government official.

[69] *See* 18 U.S.C. §§ 2242-2243 (1976).

on habeas corpus petitions, and permits dismissal before a responsive pleading is filed if those requirements are not met.[70] A third, and perhaps related explanation, is that civil rights actions are frequently fraught with volatile political issues, and are, in the opinion of many, an affront to the government and an unwarranted intrusion into its operations. Vindication of the government position after extensive discovery and a long and embarrassing trial may be a pyrhhic victory, while dismissal at the complaint stage is quick, tidy, and quiet. A fourth reason for the emphasis on pleadings is that the allegations in civil rights actions may often describe or suggest quasi-criminal or otherwise objectionable conduct on the part of the defendants. At best, a negligent failure to follow the law, and at worst, outright malice, are the basis for the bulk of civil rights claims. Procedural requirements generally require that allegations of fraudulent or criminal conduct be made in specific terms;[71] to permit these allegations to be made carelessly and vaguely may be to submit a conscientious official to public humiliation and exposure when in fact he has been doing his very best to serve the public good. The possibility of a "strike" suit to force the government to settle rather than to permit these abuses to run their course creates a powerful source of pressure to weed out the frivolous and baseless actions at the outset. Finally, the evolving standards governing liability and the scope of immunity, and the uncertain limits of federal court jurisdiction, give rise to their own pressure to require a plaintiff to have at least a coherent legal theory before being permitted to delve into government records and interrogate government officials, searching—or fishing—for damaging material to lay before a jury.

Taken together, these factors have produced a situation that places upon the civil rights plaintiff a heavy pleading burden. That burden may be expressed in terms of specificity, or burden of pleading, or more generally in terms of "adequacy." In any case, the functional result is the same: while the plaintiff is confronted with attacks upon the sufficiency of the complaint, he is almost always precluded from initiating pre-trial discovery. And, since in civil rights cases the plaintiff's case literally comes from the defendants' files, this preclusion is a harsh and often unfair handicap, one that is not shared by the antitrust plaintiff, the contract plaintiff, or the tort plaintiff—even if the tort claim is against a government entity. The following

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[70] *See* FED. R. CIV. P. 9(b).

[71] Such evidence is essential to show knowledge by high ranking officials, to show intent and malice, to attack credibility, etc. *See, e.g.*, Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D. Pa. 1973).

sections further explore and evaluate the use of specificity and burden of pleading requirements in civil rights cases. Specifically, three major issues will be discussed: (1) whether civil rights complaints, at least where the plaintiff has a lawyer, are held to a greater degree of specificity than other claims; (2) what allegations are necessary in order to set forth a claim against the government entity or against the supervisory and managerial officials with responsibility for the conduct of the active tortfeasor; and (3) who bears the burden of pleading on the issue of official immunity.

1. *Specificity Requirement*

Although no provision in the Federal Rules of Civil Procedure requires it,[72] several courts have imposed upon plaintiffs in civil rights cases a higher than usual standard of specificity for the statement of a claim. In the Third Circuit, this approach has been explicitly adopted,[73] and consistently applied in cases where the civil rights plaintiff is represented by counsel.[74]

In some instances, the specificity requirement is used in effect to require the plaintiff to furnish a bill of particulars, *i.e.*, specific statements concerning both evidentiary matters and legal contentions. Under the Federal Rules of Civil Procedure, these functions should be served by contention interrogatories[75] and other discovery devices. In that way, the plaintiff would be free to commence his own discovery

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[72] Rule 8 stipulates that a complaint must contain a "short and plain" statement of the claim showing the plaintiff is entitled to relief. FED. R. CIV. P. 8. In certain areas such as fraud, greater specificity is required, but FED. R. CIV. P. 9 does not impose any such requirement upon civil rights actions. In fact, rule 9(b) provides that allegations concerning malice (often an important part of a civil rights case) or any other state of mind may be made in *general* terms. A number of courts, however, have overlooked the rules in dismissing civil rights complaints under FED. R. CIV. P. 12(b)(6). *See, e.g.*, Albany Welfare Rights Org. v. Schreck, 463 F.2d 620 (2d Cir. 1972), *cert. denied*, 410 U.S. 944 (1973) (action dismissed under rule 12(b)(6) for failure to allege specific facts in support of claim of acts done "in retaliation").

[73] The case most frequently cited for this proposition is Kaufman v. Moss, 420 F.2d 1270, 1275 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970). Judge Gibbons, sitting in the Third Circuit, has repeatedly disagreed, however, with the notion that something beyond adequate notice to the defendants is required. *E.g.*, Rotolo v. Borough of Charleroi, 532 F.2d 920, 924 (3d Cir. 1976) (Gibbons, J., concurring and dissenting).

[74] The standard is less burdensome for the *pro se* claimant based upon the Supreme Court's holding in Haines v. Kerner, 404 U.S. 519, 520 (1972). The Court recently reaffirmed this principle in Hughes v. Rowe, 101 S. Ct. 173, 176 (1980), though most of the *pro se* complaint in *Hughes* was dismissed as "insufficient."

[75] Interrogatories designed to elicit more specific statements of the plaintiff's claim are clearly proper, and are widely employed in all types of litigation. *See* Sundstrand Corp. v. Standard Killsman Indus. Inc., 488 F.2d 807 (7th Cir. 1973). *See generally* 4A Moore, *supra* note 67, at ¶ 33.17(2.2).

program, and could obtain court permission to defer furnishing his legal contentions until the latter phases of the case. A court may subvert this natural state of affairs, however, by dismissing the complaint with leave to amend. This leaves the plaintiff on the horns of a dilemma. If he complies with the order, he has accepted the delay and difficulty of trying to flesh out his claim before discovery. If he stands his ground, he must appeal the dismissal and risk a determination that, having failed to even attempt an amendment, the dismissal will be with prejudice.[76]

Professor Moore[77] traces the policy basis for the specificity requirement to a Connecticut district court opinion, *Valley v. Maule*,[78] in which the court stated that:

> As a general rule notice pleading is sufficient, but an exception has been created for cases brought under the Civil Rights Acts. The reason for this exception is clear. In recent years there has been an increasingly large volume of cases brought under the Civil Rights Acts. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants—public officials, policemen and citizens alike—considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.[79]

Note that there are three separate ideas embodied in this analysis: (1) many civil rights actions are frivolous; (2) many non-frivolous civil rights actions should be litigated in the state courts rather than the federal courts; and (3) civil rights actions subject governments and their employees to a good deal of hardship and embarrassment.

The rationale of *Valley v. Maule*, however, is unpersuasive. It is true that the number of civil rights cases in federal courts has increased. This is due to expanded concepts of substantive liability as well as the elimination of certain—though by no means all—jurisdictional limitations on civil rights actions. The statement that "substan-

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[76] *See e.g.*, Hacker v. Beck, 325 Mass. 594, 91 N.E.2d 832 (1950). My colleagues, Professors Risinger and Denbeaux, have recently encountered the Third Circuit's specificity standard. After filing a complaint consisting of forty-one paragraphs, they were required to file an even more specific amended complaint. After eight months of motions, the judge concluded that "while the point is very close, we believe plaintiff has pleaded with sufficient specificity." Bragton v. Rendell, No. 80-4629 (E.D. Pa. Aug. 4, 1981) (citing Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976)).

[77] Moore, *supra* note 67, at ¶ 8.17 [4.-1].

[78] 297 F. Supp. 958 (D. Conn. 1968).

[79] *Id.* at 960.

tial" numbers of civil rights cases are "frivolous" is not supported by any empirical evidence in the decision, although it appears to be an opinion held by many federal judges. Yet, even assuming that civil rights claims have been extensively misused, most judges and defense attorneys would concede that the great majority of the frivolous cases are those filed *pro se*. The strict pleading rule, however, is *not* applied to those cases, and thus misfires in its attempt to weed out frivolous claims.

There are several responses to the argument that many civil rights cases should be litigated in the state courts, but the most persuasive is that Congress has vested the federal courts with jurisdiction to hear civil rights claims, and accordingly they have an obligation to accept these cases. In the words of Chief Justice Marshall:

> With whatever doubts, whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.[80]

In times of crowded dockets most federal judges would probably prefer to eliminate some types of cases. Certainly diversity jurisdiction results in its share of unimportant lawsuits that "ought" to be in state courts.[81] Yet in diversity cases, the federal courts unquestioningly accept cases even where there is a substantial suspicion of abuse, and confine corrective action to an occasional assessment of costs.[82]

In any event, civil rights claims have already been significantly limited by principles such as abstention,[83] continued recognition of the eleventh amendment in civil rights cases against the states,[84] and application of res judicata[85] and collateral estoppel.[86] These principles not only prevent re-litigation of claims raised in related state court proceedings, but can also bar litigation of claims that could have been raised in state courts. The use of a strict specificity pleading rule as an additional method of declining jurisdiction over civil rights cases

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[80] Cohens v. Virginia, 19 U.S. 264 (1821). Jurisdiction is conferred by 28 U.S.C. § 1343(3) (1976). *See generally* Monroe v. Pape, 365 U.S. 167 (1961); Hague v. CIO, 307 U.S. 496 (1939).

[81] *See generally* Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 268 (1969); Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

[82] *See, e.g.*, Deutsch v. Hewes Street Realty Co., 359 F.2d 96 (2d Cir. 1966).

[83] *See* notes 53-71 *supra* and accompanying text.

[84] *See* Quern v. Jordon, 440 U.S. 332, 334-43 (1979); Edelman v. Jordon, 415 U.S. 651 (1974); note 4 *supra* and accompanying text.

[85] *See* Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977).

[86] *See* Allen v. McCurry, 101 S.Ct. 414-17 (1980); notes 131-34 *infra* and accompanying text.

is, at the least, disingenuous and, at worst, unjust since it may preclude the plaintiff from going into state court following dismissal.

The final justification for greater specificity in civil rights claims—that litigation against government officials must be supported by general tax revenues, and that it has a disruptive effect upon the conduct of government affairs[87]—has great appeal to the taxpayer, but is in fact another version of the frivolity argument. If that action has merit, the cost of defending and paying the judgment is a *legitimate* cost of government, and should be treated as such. Moreover, an attorney undertaking a case must certify that the action is not frivolous and is subject to judicial sanctions if he abuses his office.[88] Given the crucial importance of information possessed by defendants in civil rights cases, it is simply unrealistic for the court to attempt to separate the wheat from the chaff until after discovery has been had. As has been cogently argued by commentators, the proper approach is to evaluate the worth of the plaintiff's claim on summary judgment or at trial.[89] Only in this way can the courts actually strike the delicate balance called for in *Valley* of deterring frivolous actions while "keep[ing] the doors of the federal courts open to legitimate claims."[90]

If this stricter pleading standard for civil rights cases were confined to the Third Circuit, the situation might be treated as an aberration, although a sufficiently serious one to merit the attention of the Supreme Court. Yet, in many decisions of other circuits, civil rights cases have been dismissed at the pleading stage on the grounds that the complaint was vague or conclusory. This reasoning appears to operate as an application of the Third Circuit standard by another name.[91] One suspects that in civil rights actions challenging police conduct, criminal procedures, treatment of prisoners, or the like, the stricter specificity standard for civil rights complaints is linked to the close parallel to habeas corpus proceedings.[92] Both statutes recognize

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[87] *See* Owen v. City of Independence, 445 U.S. 622 (1980).

[88] Rule 11 of the Federal Rules of Civil Procedure requires that the pleadings be signed by counsel to certify that "to the best of his knowledge, information, and belief there is good ground to support it." FED. R. CIV. P. 11.

[89] *E.g.*, Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976).

[90] 297 F. Supp. at 960-61.

[91] For a representative sampling, *see* Cohen v. Illinois Inst. of Tech., 424 F.2d 818 (7th Cir.), *cert. denied*, 425 U.S. 943 (1975); Albany Welfare Rights Org. v. Schreck, 463 F.2d 620 (2d Cir. 1972), *cert. denied*, 410 U.S. 944 (1973); Birnbaum v. Trussel, 347 F.2d 86 (2d Cir. 1965); Schram v. Krishcell, 84 F.R.D. 294 (D. Conn. 1979); Moore, *supra* note 67, 8.17 [4.-1], at 8-178 n.11.

[92] 28 U.S.C. §§ 2242-2255 (1976).

claims based on violation of constitutional rights by state officials. Accordingly, claims by state prisoners may be couched in terms of either proceeding, or both.[93] In habeas corpus actions, the federal statute[94] provides that the petitioner must set forth the specific facts entitling him to relief, and explicitly authorizes the court to dismiss *sua sponte* "if it appears from the application that the . . . person detained is not entitled to [the relief sought]."[95] There is no counterpart in the Federal Rules of Civil Procedure which authorizes or justifies imposition of this standard in civil rights cases.[96]

A strong argument can be made against this specificity standard in habeas corpus proceedings.[97] Regardless of the merits of that controversy, however, it simply does not follow that the same standard of specificity should be incorporated into civil rights procedure where there is no statutory requirement. Although prisoners' claims comprise a fair number of the civil rights actions filed each year, they are by no means the most significant. The civil rights action has significantly broader application, and is used to obtain review of government action at all levels. Furthermore, habeas corpus procedures are expressly recognized as exceptions to the normal requirements of the Federal Rules of Civil Procedure, whereas section 1983 actions are not.[98] Thus, there is no justification for imposing the higher standard of pleading on civil rights claims. Nonetheless, the decisions support the belief that such a higher standard should be employed and the habeas corpus crossover may be a reason for the courts' approach in this area.

2. *The Specificity Requirement in Pleading Entity Liability*

A particular area of concern in civil rights litigation is the pleading requirements for the statement of a claim under the developing theory of entity liability, set forth in *Owen v. City of Independence*.[99] Substantively, we have seen that entity liability will depend

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[93] *E.g.*, Allen v. McCurry, 101 S. Ct. 411 (1980).

[94] 28 U.S.C. § 2242 (1976).

[95] *Id. See generally* Martinez v. United States, 344 F.2d 325 (10th Cir. 1965); United States v. Harpole, 249 F.2d 417 (5th Cir. 1957), *cert. denied*, 361 U.S. 850 (1959). Over 90 percent of federal habeas corpus and section 2255 (28 U.S.C. § 2255 (1976) is analogous provision for federal prisoners) proceedings filed in 1968 were dismissed on the pleadings. *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1174 n.132 (1970) [hereinafter cited as *Developments*].

[96] *See generally Developments*, *supra* note 95, at 1173-79.

[97] *See Developments*, *supra* note 95, at 1174-79.

[98] *Cf.* Goldsby v. Harpole, 249 F.2d 417, 419-20 (5th Cir. 1957)(Federal Rules of Civil Procedure have no application other than by analogy to habeas corpus proceeding unless by express statutory requirement).

[99] 445 U.S. at 657.

upon a showing that the injury to the plaintiff was caused by some official policy, practice or custom,[100] or by the active participation, or ratification, of the misconduct by high level officials, or their failure to correct systematic patterns of misconduct.[101] The initial procedural juncture at which this problem may arise is, again, a defense motion to dismiss the complaint for failure to state a claim. The issue is whether the plaintiff will be given the opportunity, through pretrial discovery, to obtain relevant evidence from the government defendants in order to establish a link between the wrongdoing of the low level "line" employee and the major officials who employ and supervise his work.

The Second Circuit has taken the position that the complaint must contain more than an allegation of a single incident of misconduct in support of a claim of official policy.[102] Some trial court decisions have gone further and required a detailed specification of the actual incidents *and* an analysis of the causal tie between those incidents and the claim of official approval of the wrongdoing.[103] The reasoning behind decisions imposing strict specificity requirements on civil rights plaintiffs alleging entity liability is essentially the same as that set forth in *Valley v. Maule.*[104] In fact, in *Smith v. Abrogio,*[105] Judge Newman, elsewhere a staunch supporter of civil rights claimants,[106] ruled that civil rights plaintiffs should *not* be permitted to undertake the complex and protracted discovery necessary in order to establish the basis for a claim of entity liability in the absence of a preliminary showing of misconduct by high level officials.[107]

These decisions do not address the fundamental problem. The unfortunate reality is that in any type of civil case discovery can be costly and time-consuming. In products liability, medical malpractice, antitrust, and myriad other types of actions, the parties utilize discovery to uncover the substance of the legal claims and defenses,

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[100] *E.g., Monell,* 436 U.S. at 690. *See* text accompanying notes 41-46 *supra.*

[101] *E.g., Rizzo,* 423 U.S. at 377.

[102] In Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980), the court found that "a policy could not ordinarily be inferred from a single incident of illegality such as a first arrest without probable cause or with excessive force." *Id.* at 202.

[103] *E.g.,* Schramm v. Krischell, 84 F.R.D. 294 (D. Conn. 1979); Smith v. Ambrogio, 456 F. Supp. 1130 (D. Conn. 1978); Leite v. City of Providence, 463 F. Supp. 585 (D.R.I. 1978). *But see* Popow v. City of Margate, 476 F. Supp. 1237 (D.N.J. 1979) (allegation of recklessness or gross negligence sufficient to preclude summary judgment in favor of defendant).

[104] 297 F. Supp. at 960. *See* text accompanying notes 75-77 *supra.*

[105] 456 F. Supp. 1130 (D. Conn. 1978).

[106] *See* Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct,* 87 YALE L.J. 447 (1978).

[107] 456 F. Supp. at 1137.

often involving parties who are only tenuously connected to the central controversy. If this breadth of discovery is unjust and unworkable, then it ought to be curbed across the board, and not just in cases involving civil rights claims. Dismissal of the claim against the entity does not necessarily dispose of the action; rather, the dismissal merely reduces the claim to one against the individual employee who was the active wrongdoer. Moreover, since the search for additional defendants is a universally accepted discovery function, the plaintiff would be able to conduct depositions of government officials and, through use of freedom of information statutes[108] and/or document discovery under rule 34 of the Federal Rules of Civil Procedure,[109] seek information to support an amendment of the complaint.[110]

Nonetheless, it appears that the specificity requirement in entity liability cases is rapidly gaining acceptance as a device for preventing plaintiffs from obtaining the discovery necessary to support their claims in the civil rights area. This is inconsistent with the approach in other areas of civil litigation, and has the effect of complicating and delaying these proceedings without substantially reducing the number of claims which eventually will be brought against such entities.

3. *Burden of Pleading Immunity*

Compared to the harsh specificity standards adopted by some lower courts,[111] particularly in cases with claims of entity liability,[112] the pleading rule concerning the various immunity defenses has followed a more salutary path. Although the substantive law concerning the immunity of government officials for acts performed in the discharge of their official duties has received extensive treatment, the important procedural question of the burden of pleading on this crucial issue was only recently resolved by the Supreme Court.

In *Gomez v. Toledo*,[113] the Supreme Court unanimously held that in civil rights cases the burden of pleading immunity as a defense

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[108] *E.g.*, Freedom of Information Act, 5 U.S.C. § 552 (1976).

[109] FED. R. CIV. P. 34(a). Rule 34(a) permits any party to require that his adversary produce for inspection and copying, documents and other tangible items that are relevant to the litigation.

[110] The statute of limitations would not necessarily bar an amendment to the complaint to include another party. FED. R. CIV. P. 15(c) permits relation back in many situations so long as the party to be added knew of the claim within the statutory period. Additionally, many states recognize that accrual of a claim occurs upon discovery of the wrong. *E.g.*, Farrell v. Votator Div. of Chemtron Corp., 62 N.J. 111, 299 A.2d 394 (1973).

[111] *See* notes 73-77 *supra* and accompanying text.

[112] *See* notes 100-05 *supra* and accompanying text.

[113] 100 S. Ct. 1920 (1980).

rests upon the defendant, and reversed the lower court's ruling that lack of good faith is an essential averment if the complaint is to state a claim sufficient to withstand a motion to dismiss under rule 12(b)(6) of the Federal Rules of Civil Procedure.[114] After a brief review of the development of substantive immunity in civil rights cases, Justice Marshall, writing for the Court, held that the statement of a claim under section 1983 requires only two allegations: that there was deprivation of a federal right, and that the deprivation was caused by a person acting under color of law.[115]

Turning to the immunity question, Justice Marshall's opinion then followed the classic model for analyzing a burden of pleading problem by first ascertaining where the burden of persuasion at trial lies. After looking at both the historical[116] and policy[117] tests for resolving the issue, Justice Marshall apparently decided, without explicitly stating, that the burden of persuasion should be upon the defendants.[118] As he apparently reasoned, the burden of pleading, following the burden of persuasion, must also be upon the defendants. Only two factors weigh against the conclusion that *Gomez* totally disposes of the burden of persuasion issue: Justice Marshall's failure to explicitly state the obvious conclusion; and Justice Rehnquist's one sentence concurrence based upon his "reading" of the majority opinion as leaving open the burden of persuasion issue for another day.[119]

Even if Justice Rehnquist's reading is correct, placing the burden of pleading immunity upon defendants still serves several important purposes. A rule 12(b)(6) motion may properly be addressed to the sufficiency of the complaint alone, while issues raised by an affirmative defense pleaded in the answer under rule 8(c) of the Federal Rules of Civil Procedure[120] must be resolved by motion for judgment on the pleadings, by motion for summary judgment,[121] or at trial. The effects of this procedure are significant to the flow of section 1983 litigation

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[114] FED. R. CIV. P. 12(b)(6). 100 S. Ct. at 1922.

[115] 100 S. Ct. at 1923.

[116] The historical test focuses on whether the matter would have been considered one of confession and avoidance at common law, that is, whether the matters seemed more or less to admit the general complaint and yet to suggest why there was no answer. *Id.* at 1924 n.8 (quoting PROCEEDINGS, WASHINGTON AND NEW YORK CITY INSTITUTES ON THE FEDERAL RULES 49 (1939)).

[117] The policy test turns on whether knowledge of facts relevent to immunity are within the exclusive control of the defendants. *Id.* at 1924.

[118] 100 S. Ct. at 1924.

[119] *Id.*

[120] FED. R. CIV. P. 8(c).

[121] FED. R. CIV. P. 56.

in three respects. First, defendants claiming immunity are obliged to file their answers before the motions begin, thus opening the door to discovery. Whether the prevalence to pre-answer motions in this type of litigation is in part a dilatory tactic can be debated. The fact is that this skirmishing does substantially delay determination of cases on the merits. Secondly, at least in qualified immunity situations, the plaintiff should be afforded a full opportunity to conduct a pre-trial discovery in an effort to meet any motion for summary judgment based upon the defendant's showing of good faith. Finally, since liability for civil rights violations is subject to different and sometimes inconsistent defenses on behalf of the actual wrongdoers, their supervisors, or the government entity,[122] by shifting the burden of pleading to the defendants, the court has reduced the confusion that arises when several or all of the defendants join in a single rule 12(b)(6) motion. Under the procedure announced in *Gomez*, each defendant should be required to set forth the precise basis for the defense claimed, either in the answer or in response to contention interrogatories during pre-trial discovery.

Placing the burden of pleading immunity on the defendant has, therefore, greatly increased the plaintiff's ability to use pre-trial discovery and the pleadings to delineate the complex substantive issues involved in the various immunity questions without being subject to undue delay and the risk of unwarranted dismissal at the very outset of the action.

This is by no means meant to concede the major point concerning the burden of proof on the question of immunity at the trial itself. The Court's decision in *Gomez* should be read as based upon an underlying determination that the defendant, possessed of all the salient information pertaining to qualified immunity, bears the burden of proof on the issue at trial. More importantly, the majority decision explicitly reaffirms the principle that section 1983 is "remedial legislation" which is to be liberally construed and applied to maximize its potential.[123] Placing the burden of proving facts constituting an immunity defense on the defendant is fully consistent with this principle.

The majority opinion in *Dennis v. Sparks*[124] strongly intimates that this is the route the Court will take. In that case, a state judge had issued an injunction enjoining allegedly corrupt practices.[125] After

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[122] *See* notes 4-9 *supra* and accompanying text.

[123] 100 S. Ct. at 1923.

[124] 101 S. Ct. 183 (1980).

[125] *Id.* at 185. The judge had "enjoined the production of minerals from certain oil leases owned by respondents." *Id.*

a state appellate court had dissolved the injunction, an action for damages was brought in federal court under section 1983 against both the judge and his alleged co-conspirators.[126] The trial court dismissed the complaint under rule 12(b)(6), holding that the judge had absolute immunity,[127] and that his private co-conspirators fell within the zone of that immunity. The court of appeals reversed as to the co-conspirators' immunity[128] and the Supreme Court sustained the reversal. Writing for a unanimous Court, Justice White squarely stated that "the burden is on the official claiming immunity to demonstrate his entitlement."[129] The Court went on to hold that a judge's absolute immunity from civil damage actions under section 1983 did not extend to private individuals who acted in concert with that judge.[130] The Court noted that the co-conspirators were not judicial employees who were essential to the judge's discharge of his office.[131]

Gomez and *Dennis*, taken together, indicate that the Court would place the burden of proving immunity based on government privilege upon the defendants in a section 1983 action.[132] This position is consistent with the analysis of several lower courts. For example, in *Skehan v. Board of Trustees*,[133] the court of appeals held that:

> [I]n Section 1983 actions, the burden is on the defendant official claiming official immunity to come forward and to convince the trier of fact by a preponderance of the evidence that . . . official immunity should attach.[134]

C. *Collateral Estoppel*

In addition to interposing defenses based upon immunity and lack of jurisdiction, civil rights defendants frequently claim that the

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[126] *Id.* "Essentially the claim was that the injunction had been corruptly issued as the result of a conspiracy between the judge and the other defendants, thus causing a deprivation of property, *i.e.*, two years of oil production, without due process of law." *Id.*

[127] *Id.*

[128] The court of appeals first affirmed the trial court's decision, then, on reconsideration *en banc*, reversed the decision "insofar as it had dismissed claims against the defendants other than the judge." *Id.* at 185-86.

[129] *Id.* at 187.

[130] *Id.* at 186. The Court also pointed out that criminal prosecution for judicial conduct under O'Shea v. Littleton, 414 U.S. 488 (1974), remains a valid alternative. 101 S. Ct. at 188.

[131] 101 S. Ct. at 187. The Court thus distinguished Gravel v. United States, 408 U.S. 606 (1972).

[132] *See* Justice Stevens' dissenting opinion in *Procunier*, suggesting that defendants who carelessly disregard their superiors' directives "would be unable to make the threshold showing necessary to establish good faith." 434 U.S. at 572 (Stevens, J., dissenting).

[133] 538 F.2d 53 (3d Cir. 1976).

[134] *Id.* at 61-62.

federal action is barred by res judicata or collateral estoppel. These doctrines are particularly relevant in civil rights cases for two reasons. First, many civil rights claims are based upon facts which may also give rise to a claim under state tort law due to the dramatic expansion of government liability under state common law and state tort claims statutes.[135] Accordingly, some aspects of a civil rights claim may have been previously litigated in a state tort action, with or without consideration of possible federal claims.[136] In addition, many civil rights claims arise in contexts involving actions by government officials which entail the commencement of state criminal, regulatory, or other "prosecutorial" proceedings before a civil rights action is brought. Again, the consideration of constitutional claims in such proceedings is often not clear on the record, although there may have been some opportunity to present those claims to the state tribunal. The issues remaining available for federal consideration accordingly present a problem in civil rights cases.[137]

If the civil rights plaintiff voluntarily submits his federal claims to the state court during the state proceeding, he is precluded from re-litigating those claims in a subsequent federal action.[138] When, however, the civil rights plaintiff has been *involuntarily subjected to* prior state proceedings, the application of collateral estoppel becomes more problematical in view of the argument that he should at least have one opportunity to present his federal claims in federal court for adjudication. Yet, in recent years the Supreme Court has opted for limiting this right.

In *Allen v. McCurry*,[139] the Court continued its efforts to cut down parallel state and federal litigation of constitutional claims, at least those arising in criminal trial situations. McCurry had been convicted in state court of narcotics possession and assault[140] after

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[135] *See generally* IA C. ANTIEAU, MUNICIPAL CORPORATION LAW, ch. 11 (1979).

[136] State courts have concurrent jurisdiction over federal civil rights claims. *E.g.*, Maine v. Thiboutot, 448 U.S. 1 (1980); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958).

[137] This problem does not arise in the case of state *administrative* proceedings, because of the exhaustion requirement. *See generally* Annot., 47 A.L.R. Fed. 15 (1980). A claimant who voluntarily seeks state court review of an adverse administrative determination may, however, have a subsequent federal action dismissed based upon collateral estoppel. Mitchell v. National Broadcasting Co., 553 F.2d 265 (2d Cir. 1977) (judicial affirmance of adverse decision by state agency charged with enforcement of discrimination provisions precluded subsequent civil rights action).

[138] *E.g.*, Montana v. United States, 440 U.S. 147, 157-58 (1979); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 419 (1964).

[139] 101 S. Ct. 411 (1980).

[140] *Id.* at 414. The latter charge resulted from a dispute between the defendant and the police who conducted the search. *Id.*

losing a suppression hearing in which fourth and fourteenth amendment claims were raised.[141] McCurry then sued the police officers and the police department in federal court under section 1983.[142] The trial court held that McCurry was collaterally estopped from raising constitutional claims, and granted summary judgment for the defendants.[143] The court of appeals, after noting that federal habeas corpus relief was precluded under *Stone v. Powell*,[144] reversed on the ground that the federal courts have a special duty to protect constitutional rights and that the section 1983 action was McCurry's only available remedy.[145]

The Supreme Court reversed the decision of the court of appeals. After reviewing the history and policy of the Civil Rights Acts,[146] the Court concluded that there was no inherent incompatibility between the general concept of collateral estoppel and the protection of constitutional rights in federal court actions under section 1983.[147] Furthermore, the Court declined to accept the idea that every civil rights plaintiff has a right to one chance in federal court to sustain his constitutional claim. The Court could find no support in the legislative history of the Civil Rights Acts for a standard that differs from the ordinary tort case, and held that the assertion and litigation of that claim in a state proceeding may preclude subsequent relitigation of the issue in any other forum.[148]

The Court was similarly unpersuaded that civil rights claims should be treated under the same standard as federal habeas corpus proceedings. The Court noted that, while both the language of the habeas corpus statute, and its purpose, *i.e.*, release from unlawful confinement, support the Court's refusal to apply collateral estoppel in such situation,[149] no parallel justification for a similar doctrine

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[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] 428 U.S. 465 (1976). In *Stone v. Powell*, the Court held that where the state has provided a defendant with a full and fair opportunity to raise his fourth amendment claim, the constitution does not require that he be allowed to present it again at a habeas corpus hearing. *Id.* at 496.

[145] 101 S. Ct. at 414.

[146] *Id.* at 414-18.

[147] *Id.* at 419-20. The Court has expressly approved the "offensive" use of collateral estoppel by one who had been a stranger to the earlier law suit provided that two conditions are satisfied. First, the party against whom collateral estoppel is asserted must have had one prior "full and fair" opportunity to litigate the issue involved. Second, the court must be satisfied, after a review of all the facts and circumstances, that the application of collateral estoppel in the latter case is fair and reasonable to all concerned. Parklane Hosiery v. Shore, 439 U.S. 322, 332-33 (1978).

[148] 101 S. Ct. at 419-20.

[149] *See* Stone v. Powell, 428 U.S. 465 (1976); Preise v. Rodriguez, 411 U.S. 475 (1973); Fay v. Noia, 372 U.S. 391 (1963); Sanders v. United States, 373 U.S. 1 (1963).

exists in the case of section 1983.[150] The Court did, however, expressly leave open three important and interesting issues.

First, the Court stopped far short of holding that the assertion of a federal constitutional right in the course of defending a state criminal case (in this situation, a suppression hearing) is always a "full and fair" opportunity to litigate the issue.[151] More broadly, the Court made no attempt to define the standards of collateral estoppel in section 1983 situations, leaving to the lower courts the initial responsibility for developing guidelines on the subject.

Second, the Court failed to apply the decision to the case in which the claimant intentionally or inadvertently fails to raise the constitutional issue in the first lawsuit, although the majority opinion seems to intimate a dim view of the claimant's position in such circumstances.[152]

Finally, the Court expressly preserved, for litigants who win the initial race to court, the possibility of insuring a federal bite at the apple.[153] Although the federal court may then abstain pending the outcome of state proceedings, the claimant may thereafter come back to federal court for a trial of his section 1983 claims free of collateral estoppel or res judicata problems.[154]

Justice Blackmun dissented in *Allen* essentially because he felt that the assertion of constitutional claims in a state court suppression hearing could never satisfy the "full and fair opportunity to litigate" standard in light of any realistic view of criminal defense decisions.[155] In his view, a state judge deciding whether to preclude evidence in a criminal case is concerned with an entirely different "remedy" (conviction of a crime as opposed to damages) and, in deciding this "peripheral" issue, may well be under "institutional" pressures in evaluating the effect his ruling will have upon the search for truth in the criminal justice context.[156] Furthermore, he could see no reason for supposing that the decision to raise the claim in the criminal presecution was voluntary, in view of the overriding concerns of the immediate consequences of conviction.[157] In short, Jus-

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[150] 101 S. Ct. at 420.

[151] *See* note 145 *supra*.

[152] 101 S. Ct. at 416 n.10, 420 n.23. *See also id.* at 415 n.6, suggesting that Blonder-Tongue Labs., Inc. v. University of Ill., 402 U.S. 313 (1971), and similar cases broadening the notion of a claim for res judicata purposes, would also cut off the constitutional claim which could have been, but was not, raised in state court.

[153] 101 S. Ct. at 418 n.17 (dictum).

[154] *Id. See* notes 58-60 *supra* and accompanying text.

[155] 101 S. Ct. at 425 (Blackmun, J., dissenting).

[156] *Id.*

[157] *Id.* at 426 (Blackmun, J., dissenting). The majority apparently agrees on this last point. *Id.* at 420 n.23 (Blackmun, J., dissenting).

tice Blackmun simply found the difference in context between the two proceedings to be so profound that the majority's suggestion of any potential equivalence was absurd. As he put it:

> The criminal defendant is an involuntary litigant in the state tribunal, and against him all the forces of the State are arrayed. To force him to a choice between foregoing either a potential defense or a federal forum for hearing his constitutional claim is fundamentally unfair.[158]

In addition, Justice Blackmun saw the majority's wholesale incorporation of collateral estoppel into the procedural law of civil rights actions as a failure to give proper weight to the purposes behind the Civil Rights Acts. In his view, "the Court repeatedly has recognized that section 1983 embodies a strong congressional policy in favor of federal courts acting as the primary and final arbiters of constitutional rights."[159] On that basis alone, the dissent would not preclude the federal courts from reviewing claims like McCurry's.

The effect of the Court's decision in *Allen* will depend in large measure upon the inclination of the circuits to scrutinize the actual factors confronting state criminal defendants in their assertion of federal constitutional claims in state courts, as well as the nature of the hearing afforded them in that context. Under *Park Lane Hosiery v. Shore*,[160] collateral estoppel should not be used to summarily dispose of a claim merely because there has been previous litigation on the general subject. Collateral estoppel should bar litigation only if the court considering the defense is satisfied after an examination of *all* the facts and circumstances that such a result is fair and just, and that there was a *full* and *fair* opportunity to litigate in the prior action or proceeding. Accordingly, the determination of necessity requires a comprehensive review of the facts, far more than a cursory assessment of the issues. In *Allen*, the claim was dismissed on summary judgment before trial. Given the Court's recognition of the complex factual issues involved, and given the express reservation concerning the precise scope of the ruling as it affected McCurry,[161] the approval of summary judgment is most problematical. Certainly a claim of collateral estoppel should not be permitted to prevent the plaintiff from

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[158] *Id.* at 426 (Blackmun, J., dissenting).

[159] *Id.* at 423 (Blackmun, J., dissenting) (citing Zwickler v. Koota, 389 U.S. 241 (1967); McNeese v. Board of Educ., 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961)).

[160] 439 U.S. 322, 332-33 (1978). *See* note 145 *supra*.

[161] Specifically, the Court noted that "questions as to the scope of collateral estoppel with respect to the particular issues in this case are not now before us." 101 S. Ct. at 414 n.2. Indeed,

seeking discovery in order to develop evidence in support of a claim that the *Park Lane* requirements have not been met. If summary judgment is to be granted in this situation, it should not be considered until after discovery is complete and the parties are ready for trial. Indeed, in those situations where there are facts raising *Park Lane* questions, and in any criminal trial situation, one would find Justice Blackmun's call for a *per se* rule most convincing. A hearing at, or immediately before, the trial itself would be the most logical and fair method of disposing of the issue.

D. *Pre-trial Discovery*

The subject of pre-trial discovery has commanded a great deal of attention as courts and attorneys[162] debate the serious problems caused by liberal standards of relevancy,[163] difficult problems of privilege,[164] and recurrent claims of persistent abuse by both discoverers and their targets.[165] Modern discovery has become the battleground on which most litigation is fought to its ultimate conclusion: settlement without trial.[166] For those with the financial resources, the legal manpower, and the patience and persistence to utilize full dis-

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some of the police conduct in McCurry's case had been found unlawful by the state courts reviewing his conviction. *Id.* at 414.

[162] *See generally* Discovery Symposium, 4 LITIGATION (ABA) (fall 1977); *Survey of Literature From 1970 to the Present: Expressed Dissatisfactions and Proposed Reforms* (Federal Judicial Center 1978).

[163] Rule 26(b)(1) permits discovery of:

> any matter, not privileged, which is *relevant* to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objecting that the information will be inadmissable at the trial if the information sought appears reasonably calculated to lead to the discovery of admissable evidence.

FED. R. CIV. P. 26(b)(1) (emphasis added).

The courts have given broad scope to this provision. *See* Hickman v. Taylor, 329 U.S. 495 (1947); United States v. Proctor & Gamble Co., 356 U.S. 677 (1958). *See generally* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 81 (1970); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940 (1961).

[164] Rule 26(b)(1) of the Federal Rules of Civil Procedure merely protects "privileged" information from discovery. In federal question cases, including civil rights actions, evidentiary privilege is a matter of federal common law. FED. R. CIV. P. 26(b)(1). Rule 501 of the Federal Rules of Evidence makes no effort to catalogue or define the privileges. FED. R. EVID. 501.

[165] *See, e.g., Civil Discovery: How Bad are the Problems?*, 67 A.B.A. J. 450 (1981) (account of 1979 American Bar Foundation survey of Chicago based litigators who feel that courts are lax in policing and punishing discovery abuses).

[166] Well over 90% of civil cases filed are settled without trial. In some jurisdictions, the figures exceed 95%. *See* M. ROSENBERG, J. WEINSTEIN, & H. SMIT, ELEMENTS OF CIVIL PROCEDURE 901 (1976).

covery, the system seems to work. In the context of civil rights litigation, the subject of pre-trial discovery is subject to a fundamental contradiction. In the greatest number of cases, there is little or no discovery, because the plaintiff has neither the financial nor the legal resources to conduct it. For the *pro se* litigant, discovery is simply an incomprehensible morass, and most such plaintiffs do without it. Even where the plaintiff has counsel, financial and caseload limitations most often keep discovery to a bare minimum. On the other hand, in the major test case or the pitched battle between a political organization or prominent public figure and the government, discovery may consume several years, involving dozens of depositions, hundreds of interrogatories, and thousands of documents,[167] just as one would expect in antitrust or other complex litigation with myriad factual and legal issues.

Generally, the procedural wrangles that arise during discovery involve three types of issues: relevance, privilege, and abuse. Relevance has become so broad that it is difficult to find decisions limiting discovery solely on that ground.[168] Discovery requests designed to elicit evidence, to uncover and identify additional defendants or theories of liability, to rehearse or provide a foundation for cross examination and independent attacks upon credibility, and to determine insurance coverage and settlement discussions among other parties to the litigation, are all "relevant" for discovery purposes.[169] The question of abusive or burdensome discovery requests has been dealt with on a case-by-case basis by judges and magistrates, taking into account the needs and circumstances of the parties and applying the court's sense of what is fair in the particular situation.[170]

In the area of privilege, however, there is frequently an important and fundamental conflict between the civil rights plaintiff and the government defendant. The plaintiff will want to discover internal memoranda, reports, and evaluations of the incident in order to prove that the individual defendant intended to harm the plaintiff, or knew that his conduct was unlawful. He will want to determine what efforts have been made by officials to gauge the legality of their conduct, such as seeking the advice of counsel. He will seek to ascer-

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[167] *See, e.g.*, Dunn v. Midwestern Indem., 88 F.R.D. 191 (S.D. Ohio 1980). *See generally* Burns v. Thiokol Chem. Corp., 483 F.2d 300 (5th Cir. 1973).

[168] *See* note 161 *supra*.

[169] *See* Laufman v. Oakley Bldg. & Loan Co., 72 F.R.D. 116 (S.D. Ohio 1976); Felix A. Thillet, Inc. v. Kelley-Springfield Tire Co., 41 F.R.D. 55 (D.P.R. 1966); Cox v. E.I. DuPont de Nemours & Co., 38 F.R.D. 396 (D.S.C. 1965); FED. R. CIV. P. 26(b)(1).

[170] FED. R. CIV. P. 26(c) permits the court to limit discovery to protect a person "from annoyance, embarrassment, oppression or undue burden or expense."

tain when management officials became aware of the conduct of lower level employees in order to support a claim of authorization or ratification. He will want to know what alternative courses were available to and considered by the defendants, and whether they considered their actions before taking them. He will attempt to discover if efforts were made to conceal or alter information to mislead the public and/or high ranking officials.[171] In short, he wants to go beyond the public facts to find out what actually happened, just as does the plaintiff suing a hospital, an automobile manufacturer, or a price-fixer. The defendant, of course, wants to keep all such information to itself, and has available two claims which are ideally suited to the situation: the attorney–client privilege, one of the most sacrosanct of all the common law privileges; and executive privilege, with vague contours but boasting a constitutional foundation.[172]

In passing upon claims of privilege in discovery, the court does not have the "out" of permitting disclosure subject to exclusion of the material at trial, because the disclosure itself is seen as a harmful intrusion upon the defendant's rights.[173] Accordingly, the court must adopt some alternative approach to the problem. In addition to simply granting or denying all discovery, two other approaches have evolved. The most common device is to require the objecting party to submit the material for *in camera* inspection, with the judge or magistrate determining what is protected and passing the remainder along to the plaintiff.[174] Another less common and more problematic device is to require the plaintiff to make an evidentiary showing of some sort before permitting further discovery, *i.e.*, by proving the constitutional violation before being allowed to seek proof of malice or knowledge.[175] In either case, the court must become involved with the merits of the controversy in order to rule intelligently on the motion.

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[171] The reasons for obtaining all these kinds of information were previously discussed in the section dealing with substantive liability of various civil rights defendants. *See* notes 13-46 *supra* and accompanying text. The actual wrongdoer is protected by qualified privilege so long as he acts in good faith. This immunity may be overcome upon proof of malice, intent, or negligent failure to know the applicable constitutional standards. All of these in turn require investigation of internal documents and memoranda to establish state of mind, or knowledge, as of the time the acts were committed. High ranking officials are liable only for actual authorization or ratification of the wrongdoing of low level employees. *Id.* Entity liability is far more than a matter of respondeat superior, but requires the plaintiff to show wrongful involvement on the part of high ranking, policy-making officials in the government. *See* notes 41-46 and accompanying text.

[172] *See* United States v. Nixon, 418 U.S. 683 (1974). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-14, at 202-12 (1978).

[173] *See* Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D. Pa. 1973).

[174] *Id.*

[175] Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975).

Ultimately, the decision of the court on these privilege claims may well determine the outcome of the case, since the material sought has great potential to produce important evidence that will overcome the qualified immunity and other special standards of liability in civil rights actions.

1. *Attorney-Client Privilege*

As previously discussed, in most civil rights actions defendants have only a qualified immunity for their wrongful actions.[176] This qualified immunity may depend upon their having taken reasonable measures to ascertain the current principles of constitutional law relevant to their activities. In *Wood v. Strickland*,[177] the Supreme Court held that government officials with supervisory or managerial responsibilities are expected to know the established law relevant to their area of responsibility, and to make reasonable efforts to keep up with changes in that area.[178]

For a government official, the most obvious method of complying with this responsibility is to consult with counsel concerning potential constitutional issues when engaged in promulgating written regulations or policy, delegating authority, conducting training programs for lower level employees, establishing reporting requirements for subordinates, reviewing complaints, and the like. Although the need to consult counsel is more pronounced in areas of extensive court involvement such as prison and school administration, it would appear that all government officials may at least be expected to take advantage of opportunities to get advice from government attorneys assigned to their areas, since such consultation involves neither hardship nor individual expense for the official in question. Where such advice is obtained, the official may be immune from liability even if his actual analysis of the law is incorrect.[179]

In areas of rapidly developing or unclear decisional law, the defendant may base his qualified privilege defense on good faith reliance upon the advice of counsel, particularly where specific inquiry is made before actual harm is caused to the eventual civil rights plaintiffs. When this defense is put forth in the answer or in response to interrogatories, the plaintiff quite properly will seek further infor-

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[176] *See* notes 13-18 *supra* and accompanying text.

[177] 420 U.S. 308 (1975).

[178] *Id.* at 322.

[179] There may, however, be questions concerning the liability of the entity for damages though the individual enjoys a qualified immunity. *See* note 42 *supra* and accompanying text.

mation concerning the source, timing, and exact nature of the legal advice relied upon as a basis for the claim of immunity.

Such an inquiry, however, will be met with a claim of attorney-client privilege. Under rule 26(b)(1) of the Federal Rules of Civil Procedure, evidence which is privileged from disclosure at trial is protected from discovery.[180] The law of privilege is governed by the Federal Rules of Evidence,[181] which, in cases involving federal law questions, are a part of the body of federal common law.[182] As a general matter, federal common law protects from disclosure communications made in confidence between an attorney and his client in furtherance of the professional relationship, with exceptions for certain instances of criminal conduct or fraud upon the tribunal.[183]

The conflict between the attorney-client privilege as a limitation upon discovery and the assertion of immunity based upon advice of counsel has received scant attention from the courts in civil rights cases. This conflict may arise in several different contexts and poses some interesting questions. In particular, (1) Are communications between a government official and an attorney who acts as permanent, in-house staff counsel for the department within the zone of attorney-client communications? (2) Does the attorney-client privilege apply to communications between a government official and a government attorney who is a member of the Attorney General's office or a separate department, or who is counsel to the agency or entity and who becomes involved only at the point when litigation has been commenced or is imminent? (3) What is the status of communications made to a government attorney who is charged with investigating conditions in a particular department at the request of the legislature, the governor, or a grand jury? (4) In cases involving the assertion of pendant state law claims in addition to the federal civil rights claims, should the court apply state or federal rules in ascertaining the existence and scope of the privilege?

The first three issues have as their common nexus the relationship between the government official and the full-time government attor-

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[180] FED. R. CIV. P. 26(b)(1). *See* note 162 *supra* and accompanying text.

[181] FED. R. EVID. 501.

[182] *Id.* Rule 501 distinguishes between cases in which the substantive decision is governed by federal law and those in which it is based on state law, thus implementing the policy behind Erie R.R. Co. v. Tomkins, 304 U.S. 64 (1938). In the latter type of case, the federal courts are instructed to "borrow" the law of privilege as recognized by the state whose substantive law will govern the decision on the merits.

[183] ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 4, DR 4-101 and related sections. While the attorney-client privilege is fundamental to the American legal system, it is not of constitutional dimension. Like all other common law or statutory privileges, it is subject to exceptions and limitations based upon policy and justice.

ney who provides legal advice.[184] The Supreme Court has not ruled upon the nature and extent of the attorney-client privilege in this context. However, in *Upjohn Co. v. United States*,[185] the Supreme Court considered the problem of attorney-client privilege in the somewhat analogous area of officials and employees of private corporations. Although it upheld the claim of attorney-client privilege, the Court refused to enunciate a general standard,[186] holding only that the privilege would protect non-executive level corporate employees where they had been instructed by management to cooperate with counsel in providing information.[187]

Application of the principles in *Upjohn* to the government official situation raises two problems. First, in *Upjohn* the corporation was not basing its defense upon advice of counsel. Thus, the party seeking discovery was not deprived of information directly relevant to part of its substantive case.[188] Second, there exists in the government situation at least the possibility that an official may seek the advice of counsel solely to cover himself against liability for damages in an improper attempt to create a zone of immunity for official action.

At least one lower court has held that in actions where advice of counsel is the basis for defense, the attorney-client privilege is waived by implication. In *Hearn v. Rhay*,[189] the court, basing its ruling upon an analysis of decisions in habeas corpus proceedings wherein prisoners asserted incomplete or improper advice of counsel as a basis for their failure to resort to available state remedies,[190] held that an individual waives the attorney-client privilege by asserting it in connection with some claim relevant to the litigation, where the assertion of the privilege would deprive the opponent of information vital to his case.[191]

Where a government official has treated an individual in a manner which violates the constitution, he may escape liability for this

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[184] It would be unusual for a government official confronted with a problem of constitutional interpretation to consult private counsel, although he might well do so when the issue is conflict of interest or claimed disability from holding office.

[185] 101 S. Ct. 677 (1981).

[186] *Id.* at 681, 686.

[187] *Id.* at 685-86.

[188] Indeed, in *Upjohn* the Internal Revenue Service had been provided with a preliminary report discussing certain of the questionable payments. Upjohn Company had also provided the government with the names of all persons responding to the questionaire. *Id.* at 681.

[189] 68 F.R.D. 574 (E.D. Wash. 1975). *See* Note, 22 WAYNE L. REV. 1451 (1976).

[190] 68 F.R.D. at 581. *See* Laughner v. United States, 373 F.2d 326 (5th Cir. 1967); Henderson v. Heinze, 349 F.2d 67 (9th Cir. 1965).

[191] 68 F.R.D. at 581. The court went on, somewhat confusingly, to limit the decision by ruling that "[a] substantial showing of merit to plaintiff's case must be made before a court should apply the exception to the attorney-client privilege defined herein." *Id.* at 582.

error in judgment only upon a finding that he believed, reasonably and in good faith, that his actions were indeed proper.[192] If he intends to adduce evidence showing that advice of counsel was sought prior to the acts complained of, he should not be permitted to claim privilege in discovery and later waive the privilege selectively for his own benefit.[193]

There may even be some instances in which the defendant will plead immunity under *Gomez*,[194] but maintain that the plaintiff has the burden of proving his lack of good faith at the trial. In these situations the plaintiff must have discovery concerning the source of the purported legal advice, the time at which such advice was sought and obtained, and any documentation of the advice which the defendant relied upon. In addition, the trial court should have discretion to permit additional discovery if there is any indication that the defendant sought legal advice as a "cover" for improper action. This approach would be roughly analogous to that currently utilized in the federal courts regarding discovery of expert opinion testimony.[195]

The final issue, concerning rules of privilege in cases with both federal and state law claims, has likewise received little attention in the courts. Yet, this issue will arise with increasing frequency in future cases because of the increased scope of civil rights actions coupled with the expanding state law immunity developing in both case law and state tort claims statutes.[196] In one district court case,[197] the court held that since the general policy of federal procedure rules favors discovery and introduction into evidence of all relevant material, a court should simply refuse to recognize the more restrictive privilege in cases involving related federal and state law claims.[198] Accordingly, the court did not recognize the privilege in the case before it. It would appear that a similar approach in civil rights cases is both sensible and practical.

2. *Executive Privilege*

If the action includes a claim against a government entity, substantive principles of law require the plaintiff to demonstrate the

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[192] *See* notes 24-25 *supra* and accompanying text.

[193] *Cf.* Rubenstein v. Klevin, 150 F. Supp. 47 (D. Mass. 1957) (in action by woman against married man for breach of companionship agreement, defendant could not refuse to answer incriminating questions and raise affirmative defense of illegality).

[194] *See* notes 111-17 *supra* and accompanying text.

[195] FED. R. CIV. P. 26(b)(4).

[196] *See, e.g.*, City of Newport v. Fact Concerts, Inc., 101 S. Ct. 2748 (1981).

[197] FDIC v. Mercantile Nat'l Bank of Chicago, 84 F.R.D. 345 (N.D. Ill. 1979).

[198] *Id.* at 349.

involvement of high level officials in the pattern of wrongful conduct, by promulgation of official policy, ratification or approval of the wrongful conduct, or by failure to correct abuses.[199] In addition, when a claim of qualified immunity is made by the defense, it may be overcome by showing actual malice, knowledge of wrongful conduct, or intentional or careless disregard for developments in the constitutional law cases.[200] In both types of situations, the plaintiff's chances for success at trial are directly dependent upon his ability to discover evidence concerning the state of mind of those government officials involved in the case. Attempts to discover this information, however, are met by a claim of executive privilege, protecting the government from unwarranted disclosures of the internal analytical and deliberative functions of government.[201]

As in the attorney-client privilege situation, the question is whether the claim of executive privilege must give way to the plaintiff's need to obtain essential relevant information. Although this issue has not been discussed by the courts, there is a useful analogy in the Supreme Court's decision in *Herbert v. Lando*.[202] That case involved a public figure defamation action,[203] and thus the plaintiff could prevail only by showing that the published material was false *and* that the defendant either knew it was false or published it in reckless disregard of its truth or falsity.[204] During discovery the plaintiff sought to obtain internal information concerning decisions made in the course of preparing the television program in question, and the defense claimed the newsman's or journalist's privilege.[205] The Court

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[199] *See* note 45 *supra* and accompanying text.

[200] *See* notes 14-17 *supra* and accompanying text.

[201] *See* Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D. Pa. 1973). The *Frankenhauser* court described executive privilege as "the government's privilege to prevent disclosure of certain information whose disclosures would be contrary to the public interest." *Id.* at 342. In order to make a determination as to whether the executive privilege should apply, "the Court must balance the public interest in the confidentiality of governmental information against the needs of a litigant to obtain data, not otherwise available to him, with which to pursue a non-frivolous cause of action." *Id.* at 344. *See also* Peck v. United States, 88 F.R.D. 65 (S.D.N.Y. 1981).

[202] 441 U.S. 153 (1979).

[203] Anthony Herbert, a retired army officer became a public figure when he accused his superior officers of covering up reports of "atrocities and other war crimes" during the Vietnam War. CBS subsequently aired a program about Herbert produced by Barry Lando. *Id.* at 156. Lando also published a magazine article about Herbert. Herbert then filed a defamation action against Lando alleging "that the program and article falsely and maliciously portrayed him as a liar and a person who had made war-crime charges to explain relief from command." *Id.*

[204] *E.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964). Herbert conceded that he was a public figure and, therefore, would have to meet the high standard of proof required in a defamation action by the *New York Times* case. 441 U.S. at 156.

[205] *Id.* at 157.

held that since evidence of the defendants' state of mind was of central importance to the plaintiff's case, the claim of privilege must give way to the needs of the litigation.[206] Much of the Court's opinion is an evaluation of the journalist's privilege and its relationship to the rights of a defamed individual to seek compensation for the damage to his reputation. Nonetheless, the parallel between this case and a civil rights claim where the various defendants' states of mind are of central concern is clear, and *Herbert* may well be extended into the civil rights area.

CONCLUSION

Civil rights actions are probably the most controversial of all civil legal proceedings. They are subject to abuse by those who seek to harass the government or to obtain some transient notoriety. More often, they are a valuable weapon for the attorney who is combatting oppression, deprivation, or just plain indifference by those who are vested with the powers of government. When courts permit peripheral procedural issues to slow down or divert the adjudication of civil rights claims, they ratify the injustices committed by the defendants. When a civil rights plaintiff seeks money damages, he confronts a substantial barrier if he is to establish tort liability on the part of individual and/or entity defendants. There is generally a large number of issues, both factual and legal. Information necessary for preparation of the case lies with the defendants themselves and is not available elsewhere. The whole structure of the Federal Rules of Civil Procedure dictates that a person in this situation be afforded the opportunity (assuming he can afford to take advantage of it) to utilize pre-trial discovery devices in an effort to obtain that information before the court determines his entitlement to a full trial. Procedurally, this just result may be obtained by dealing with defense motions at trial or on summary judgment *after* discovery, and not as motions attacking the complaint. While this approach will not serve the indigent *pro se* litigant, it will materially assist the plaintiff's attorney by eliminating much of the delay, confusion, and frustration that are now characteristics of the federal civil rights action.

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[206] *Id.* at 174.