Civil Rights Plaintiffs and John Doe Defendants: A Study in § 1983 Procedure

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CIVIL RIGHTS PLAINTIFFS AND JOHN DOE DEFENDANTS: A STUDY IN SECTION 1983 PROCEDURE

Howard M. Wasserman*

INTRODUCTION: A CIVIL (RIGHTS) ACTION

On May 10, Robert Hall was arrested in Baker County, Georgia on a warrant charging him with theft of a tire. Deputy Sheriff Screws, Special Deputy Kelley, and Police Officer Jones arrested Hall at his home late in the evening, placing him in handcuffs and transporting him by squad car to the county jail. As Hall emerged from the car, apparently still with his hands cuffed behind his back, some or all of the three officers began beating him with their fists and with an eight-inch, two-pound blackjack. The beating continued after Hall had fallen to the ground, for between fifteen and thirty minutes, until Hall lost consciousness. Hall was dragged into the jail and left on the floor of the cell. An ambulance later transported him to the hospital, where he died within the hour, never regaining consciousness.

Suppose that Hall left behind a wife, who wants to sue the government and the public officials responsible for her husband’s death under 42 U.S.C. § 1983. Section 1983 lacks its own limitations period;

* Assistant Professor, FIU College of Law. J.D., 1997, B.S., 1990, Northwestern University. © 2003 Howard M. Wasserman. My thanks to Carol Rice Andrews, Edward Cooper, Larry Garvin, Michael Gerhardt, Steven Gey, Harold Lewis, Greg Mitchell, Peter Oh, Benjamin Priester, and Carl Tobias for their thoughts and reviews of earlier drafts. This paper was presented to the faculties at Florida State University College of Law, Michigan State-DCL College of Law, and Brooklyn Law School.

1 The incident described is based on the facts of Screws v. United States, 325 U.S. 91, 92-93 (1945), in which the Supreme Court upheld the convictions of three officers for criminal civil rights violations, pursuant to 18 U.S.C. § 242. See Christopher A. Bracey, Truth and Legitimacy in the American Criminal Process, 90 J. CRIM. L. & CRIMINOLOGY 691, 711-12 (2000); Christina Brooks Whitman, Emphasizing the Constitution in Constitutional Torts, 72 CHI.-KENT L. REV. 661, 671-72 (1997) [hereinafter Whitman, Constitutional Torts]. The one minor change made in setting this scenario is making Screws a deputy, when in fact he was the County Sheriff. The reasons for this change will become clear. See discussion infra notes 158-62, 254 and accompanying text.

2 Section 1983 is the codification of § 1 of the Ku Klux Klan Act of 1871. It provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage,
it borrows and incorporates the limitations period for personal injury actions in the state in which the alleged violation occurred,\(^3\) two years in Georgia.\(^4\) On May 8 two years after Robert’s death, two days prior to the expiration of the limitations period, Mrs. Hall files a §1983 action in federal district court naming as defendants Baker County and Sheriff’s Deputies John Doe 1-3. The Doe defendants are described in the body of the Complaint as the officers who arrested, transported, and jailed Robert Hall on the night of May 10 and who administered, aided in, failed to prevent, and/or were present at the fatal beating. Neither Mrs. Hall nor her attorney knows the names of the officers who were involved in or present at the incident.

The Complaint alleges that the three Doe officers used excessive force against Robert Hall, an unreasonable seizure in violation of the Fourth Amendment.\(^5\) The Complaint also alleges that the three officers acted pursuant to an unwritten, generally accepted custom of Baker County and the Sheriff’s Department of using excessive force against arrestees\(^6\) and/or that the County had failed properly to train, supervise,
discipline, or otherwise control the three officers with regard to the proper use of force on arrestees.  

The Complaint was served on Baker County fourteen days later, on May 22. The County, after receiving from the court two extensions of time to answer or otherwise plead, files its Answer fifty days later (sixty-four days after the Complaint was filed), on July 11.  

Forty days later, on August 20, Mrs. Hall's counsel and the County Attorney meet for a discovery conference, pursuant to Rule 26(f). Mrs. Hall's counsel requests that the County make its mandatory disclosures as quickly as possible; she informs counsel for the County that she anticipates the disclosures will reveal the names of the individual John Doe deputies involved in the incident and that she wants to amend her complaint to change the Doe designations. Mrs. Hall's lawyer also serves a First Set of Interrogatories, asking for the names and addresses of the officers who arrested Robert Hall or who were present at the jailhouse when he was brought there on May 10.

Fourteen days after the conference, on September 3 (118 days after the lawsuit was commenced, 116 days after the Statute of Limitations ran), the County makes its Rule 26(a) disclosures, identifying Deputy

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7 See Gilles, supra note 2, at 41-42 (describing the “failure to [blank]” model of municipal liability as to police training, where the failure to train, supervise, or control is so obvious and so likely to result in the violation of constitutional rights); see also City of Canton v. Harris, 489 U.S. 378, 390 (1989) (holding that the plaintiff must demonstrate that the municipal action leading the employer to violate the Constitution was taken with deliberate indifference to its known consequences, where the need for more or different training is so obvious and its inadequacy so likely to result in a constitutional violation); Karen M. Blum, Municipal Liability: Derivative or Direct? Statutory or Constitutional? Distinguishing the Canton Case from the Collins Case, 48 DePaul L. Rev. 687, 695 (1999) (arguing that in failure-to-train cases there is no question about the underlying constitutional violation by the employee, rather the issue is the level of culpability the plaintiff must prove to demonstrate that the municipality “caused” the violation); Brown, supra note 6, at 1512 n.57 (describing three ways of establishing local fault in order to establish governmental liability).

8 See Fed. R. Civ. P. 12(a)(1)(A) (providing that party must file and serve an answer within twenty days of receipt of service of a complaint and summons); see also Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 384 (1982) (hereinafter Resnik, Managerial Judges) (stating that parties commonly stipulate to extend the deadline for a defendant to answer and that “months would pass before a defendant filed a responsive pleading”).

9 See Fed. R. Civ. P. 26(f) (providing that parties “as soon as practicable” must confer to, inter alia, consider the nature and basis of their claims and defenses and to make or arrange for mandatory disclosures required under Fed. R. Civ. P. 26(a)(1)).

10 See Fed. R. Civ. P. 26(a)(1)(A) (providing for mandatory initial disclosures by each party of, inter alia, the “name . . . of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses”).

Screws, Special Deputy Kelley, and Police Officer Jones as individuals likely to have information supporting the County's legal and factual defenses, based on their having been present at or involved in the incident in question. Six days after that, on September 9, the County answers Hall's interrogatories, identifying the same three officers as the men who effected Hall's arrest and were present when Hall was transported to the jail.

On September 5, 120 days after the Complaint was filed and 118 days after the two-year statute of limitations ran, Mrs. Hall moves for leave to amend her Complaint, replacing Deputies John Doe 1-3 with Screws, Kelley, and Jones as named party defendants. A copy of the proposed Amended Complaint is attached as an exhibit to the motion, which is personally served on the County and on the three individual officers. Screws, Kelley, and Jones oppose the motion, arguing that leave to file the Amended Complaint should be denied as futile, because the two-year limitations period for bringing constitutional claims against them expired on May 10, four months prior to the proposed pleading.

Resolution of the motion for leave to amend depends on the interpretation and application of the doctrine of relation back. Under Rule 15(c)(3) of the Federal Rules of Civil Procedure, a party not named in an original Complaint may be named in an Amended Complaint, even after the applicable limitations period has expired; the claims in the Amended Complaint "relate back" and are deemed filed as part of the original, pre-limitations filing. The basic requirements are that the added defendants have notice within 120 days of the filing of the lawsuit, that the lawsuit has been filed, that they are intended targets of the lawsuit, and that only a "mistake concerning the identity of the proper party" prevented them from being named in the original

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12 See Bracey, supra note 1, at 711 (discussing Screws, in which officers' defense was that Mr. Hall had reached for a gun and used insulting language as he alighted from the car).
13 See Fed. R. Civ. P. 15(a) (providing that, once a responsive pleading has been filed, "a party may amend the party's pleading only by leave of court ... and leave shall be freely given when justice so requires.").
14 Foman v. Davis, 371 U.S. 178, 182 (1962) (defining circumstances in which leave to amend a pleading can be denied, including "futility of amendment").
15 The example here is fairly basic and straightforward procedurally, particularly in the manner of pleading and service and the process of disclosure and discovery, most notably in supposing the County will be diligent in the extreme in its discovery obligations.
The last point is the crux of the Rule 15(c) puzzle. Nearly every federal court of appeals has concluded, in circumstances comparable to Mrs. Hall's, that the Amended Complaint cannot relate back to the original time of filing. A mistake as to the identity of the proper defendant means an affirmative misapprehension, misstatement, or misunderstanding about the identity of the proper defendant; mistake does not mean ignorance or lack of knowledge as to the defendant's identity. Commentators generally agree.

The action arising from Robert Hall's death illustrates the special problem created by this understanding and application of mistake in § 1983 actions. The use of John Doe or Unknown Officer pleading is

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17 Rule 15(c) provides in relevant part as follows:
An amendment of a pleading relates back to the date of the original pleading when:

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint [120 days, see Fed. R. Civ. P. 4(m)], the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or any agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Id. See discussion infra notes 74-105 and accompanying text.

18 See, e.g., Wayne v. Jarvis, 197 F.3d 1098, 1103 (11th Cir. 1999); Jacobsen v. Osborne, 133 F.3d 315, 321-22 (5th Cir. 1998); Barrow v. Wethersfield Police Dep't, 66 F.3d 466, 469-70 (2d Cir. 1996); Worthington v. Wilson, 8 F.3d 1253, 1257 (7th Cir. 1993). But see Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 175 (3d Cir. 1977) (reaching opposite conclusion and permitting relation back where plaintiff replaced "Unknown Employee" with proper name of unknown defendant in Amended Complaint); see also Brussack, supra note 16, at 692 (arguing that Varlack is a better approach). But see Singletary v. Pennsylvania Dep't of Corr., 266 F.3d 186, 200-01 n.5 (3d Cir. 2001) (calling Varlack into question and calling for an amendment to Rule 15(c)).

19 See Wayne, 197 F.3d at 1103 ("[W]e do not read the word 'mistake' to mean 'lack of knowledge.'"); Barrow, 66 F.3d at 470 ("[F]ailure to identify individual defendants when the plaintiff knows that such defendants must be named cannot be characterized as a mistake."); Worthington, 8 F.3d at 1257 (holding that where plaintiff's failure to name defendants "was due to a lack of knowledge as to their identity, and not a mistake in their names," plaintiff was prevented from availing himself of relation back doctrine).

20 See Edward Cooper, Rule 15(c)(3) Puzzles 3 (Unpublished Manuscript on file with Author) ("The plaintiff knew from the beginning that he did not know the identity of the proper defendants. This was ignorance, not mistake."); Rice, supra note 16, at 927 ("A Doe allegation simply is not a mistake."); see discussion infra notes 106-49 and accompanying text.
most common and most necessary in these cases, in light of 1) the conduct that gives rise to much constitutional litigation, and 2) substantive § 1983 law, which emphasizes the liability of the individual officer and de-emphasizes or eliminates the liability of the government entity. Mrs. Hall is unable to identify the individual officers and name them as defendants without the benefit of formal discovery, but cannot get formal discovery until after she files the lawsuit. Without the benefit of relation back, her claims against the three officers are barred by the statute of limitations. Further, given substantive law that makes it unlikely she can establish liability against Baker County as an entity, Mrs. Hall will be deprived of any remedy and of any opportunity to hold state actors to answer for their constitutional misconduct. Such a result defeats the twin substantive aims of § 1983—compensating individuals for the deprivation of their constitutional rights and deterring future unconstitutional conduct by those officers and others.

This substantive outcome results from a narrow interpretation and application of a procedural rule, contradicting the notion that stringent procedure should not defeat substance. Rather, a civil rights plaintiff such as Mrs. Hall should be able to discover the names of the target

21 See Cooper, supra note 20, at 3 (noting that the need to plead a John Doe is common in § 1983 actions); Rice, supra note 16, at 895 (“Civil rights cases against unknown law enforcement officers, the most frequent uses of the Doe defendant in federal courts, best illustrates this reality.”); id. at 886-87 (stating that Bivens was one of the first and most obvious uses of an unknown defendant). See discussion infra note 150 and accompanying text. Our discussion focuses on § 1983 actions against state and local governments and officers as well as the counterpart claim against federal officials under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

22 See discussion infra notes 150-55 and accompanying text.

23 See John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 VA. L. REV. 47, 59 (1998) (arguing that the liability scheme forces civil rights plaintiffs to sue state officers rather than governments themselves and that municipal liability is a narrow deviation from the general rule of individual liability based on fault); see also Jack M. Beermann, Municipal Responsibility for Constitutional Torts, 48 DEPAUL L. REV. 627, 627 (1999) (“The fundamental principle in the law of municipal liability under § 1983 is that municipalities may be held liable only for their own conduct, not for the conduct of municipal employees.”); see discussion infra notes 156-74 and accompanying text.

24 See Rice, supra note 16, 896-97 n.39

25 See discussion infra notes 170-74 and accompanying text.

26 See Whitman, Constitutional Torts, supra note 1, at 693 (“Damage relief becomes important, not because every official mistake should be corrected, or even because every violation of the Constitution should be remedied, but because, without the right to sue for compensation, certain sorts of abuse of power will entirely escape judicial scrutiny.”).

27 See Brown, supra note 6, at 1529-30; Gilles, supra note 2, at 33; see discussion infra notes 36-39 and accompanying text.

individual officer defendants in sufficient time that she can bring them into a federal court action and proceed to a determination of the merits of her claim, vindicating the substantive rights and interests guaranteed by § 1983 and the Constitution.

We might ensure that such plaintiffs are not left without a remedy by making changes to litigation strategy, to substantive § 1983 law, or to Rule 15(c) and the relation back doctrine. However, those solutions, while perhaps effective in Mrs. Hall’s case, suffer from shortcomings that render each, standing alone, a less-than-complete solution. This problem demands a fourth option, a procedural mechanism that permits a potential plaintiff to obtain formal discovery from the government entity or agency as to the identities of individual officer defendants prior to commencing litigation and prior to the expiration of the statute of limitations.

Discovery ordinarily is available only after a lawsuit has been initiated. The limited exception to this is Rule 27, which permits a person who anticipates filing a lawsuit but is not quite ready to do so to depose a witness for the purpose of “perpetuating” testimony or evidence. A new procedure modeled on Rule 27 would enable a potential § 1983 plaintiff, prior to filing her Complaint, to depose the government entity for the limited purpose of learning the identities of the officers who could be proper defendants. The government would not be named as a party in any ultimate lawsuit, but would be used solely as a non-party witness for discovering preliminary information necessary for the plaintiff to commence her action. The identities can be learned through a short deposition of a government designee with

29 See discussion infra notes 177-97 and accompanying text.
30 See Beermann, supra note 23, at 666 (“[F]airness concerns, as well as the policies underlying § 1983, point toward a rule of vicarious liability.”); see discussion infra notes 198-220 and accompanying text.
31 See Cooper, supra note 20, at 5, 9 (arguing for amendment to “mistake or lack of information”); Rice, supra note 16, at 953; Rebecca S. Engrav, Comment, Relation Back of Amendments Naming Previously Unnamed Defendants Under Federal Rule of Civil Procedure 15(c), 89 CALIF. L. REV. 1549, 1586 (2001) (proposing new standard of “knew or should have that, but for the movant's lack of knowledge of the proper party, or a mistake concerning the identity of the party . . . .”) (emphasis added); see also Singletary v. Pennsylvania Dep’t of Corr., 266 F.3d 186, 201-02 n.5 (3d Cir. 2001); see discussion infra notes 221-36 and accompanying text.
32 See discussion infra notes 251-84 and accompanying text.
33 See Rice, supra note 16, at 896 (“He cannot get the court’s help in identifying the officer until he files suit . . . .”); see also Fed. R. Civ. P. 26(d) (providing that, unless otherwise ordered by the district court, discovery cannot be sought by a party until the parties have conferred).
34 See Fed. R. Civ. P. 27(a)(1) (“A person who desires to perpetuate testimony regarding any matter that might be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party.”); Application of Deiulemar Compagnia di Navigazione, 198 F.3d 473, 484 (4th Cir. 1999) (“Rule 27 is a means of perpetuating testimony before trial.”); see discussion infra notes 287-92 and accompanying text.
knowledge of the relevant officers or through the production of documents indicating the officers involved in a particular incident at a particular time and place.\textsuperscript{35}

Armed with the identities of the responsible officers, the plaintiff can sue them by name in the timely original Complaint, obviating the need for John Doe pleading, for amending pleadings, or for having to satisfy requirements for relation back. This narrow rule, motivated by the unique problem of unknown defendants in § 1983 actions (although not limited only to civil rights cases), provides the most viable solution to the John Doe problem, one with fewer problems than Rule 15-centered mechanisms.

Part I of this Article examines the intersection between procedure and substance and between the rules of civil procedure and civil rights litigation, including the theoretical wisdom and propriety of creating substance-specific procedural rules. Part II examines Rule 15(c) of the Federal Rules of Civil Procedure and the current requirements for relation back, particularly the way in which courts and commentators have approached the meaning of the word "mistake" and the problems this interpretation poses for civil rights plaintiffs. Part III discusses in detail five possible mechanisms for identifying and proceeding against unknown officer defendants under § 1983, including the defects and benefits of each, concluding that the creation and use of a pre-filing discovery mechanism provides the best solution.

I. \textsc{Section 1983 and the Substance/Procedure Link}

The primary, basic purposes of § 1983 and \textit{Bivens} are deterring future government and official misconduct and abuse of power and compensating victims for past constitutional deprivations.\textsuperscript{36} These twin

\begin{itemize}
\item \textsuperscript{35} See discussion \textit{infra} notes 293-319 and accompanying text.
\item \textsuperscript{36} See, e.g., \textit{Wyatt v. Cole}, 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief if such deterrence fails."); \textit{Smith v. Wade}, 461 U.S. 30, 49 (1983) (stating that "deterrence of future egregious conduct is a primary purpose" of § 1983); \textit{Owen v. City of Independence}, 445 U.S. 622, 650 (1980) (citations omitted) ("The central aim of the Civil Rights Act was to provide protection to those persons wronged by the '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"); \textit{Carey v. Piphus}, 435 U.S. 247, 254 (1978) ("[T]he basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights . . . ."); see also \textit{Beermann, supra} note 23, at 646; \textit{Brown, supra} note 6, at 1529-30; \textit{Gilles, supra} note 2, at 29, 33; \textit{Kit Kinports, The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases}, 1997 U. ILL. L. REV. 147, 150 (1997); \textit{Sheldon Nahmod, From the Courtroom to the Street: Court Orders and Section 1983}, 29 HASTINGS CONST. L.Q. 613, 637 n. 108 (2002) [hereinafter \textit{Nahmod, Courtroom}] ("The damages remedy functions not only to deter unconstitutional conduct, but also to compensate innocent people as a matter of corrective justice."); \textit{Wells, supra} note 5, at 620 (arguing that the real change wrought by the revival of §
aims go unsatisfied when a plaintiff, such as Mrs. Hall, has no potentially liable public defendant against which to timely plead and proceed, leaving her unable to recover damages for constitutional injuries.\textsuperscript{37} And there is no reason to believe that, in the absence of successful litigation against some person or institution, Baker County will take steps to prevent or avoid future similar incidents between its officers and other citizens.\textsuperscript{38} Moreover, § 1983 plaintiffs, even individual damages plaintiffs, assume the role of private attorneys general, aiding the enforcement of federal law against state violators and furthering the public good through their private civil actions.\textsuperscript{39} But a plaintiff cannot perform that role if she lacks the ability to find and sue a proper defendant.

Mrs. Hall is deprived of the opportunity to plead against Screws, Kelley, and Jones because courts interpret and apply “mistake” and

\textsuperscript{37} See Whitman, \textit{Constitutional Torts, supra} note 1, at 693 (“Damage relief becomes important, not because every official mistake should be corrected, or even because every violation of the Constitution should be remedied, but because without the right to sue for compensation, certain sorts of abuse of power will entirely escape judicial scrutiny.”).

\textsuperscript{38} See Beermann, \textit{supra} note 23, at 646 (arguing that broader municipal liability improves deterrence of governmental misconduct); Brown, \textit{supra} note 6, at 1523 (arguing that even overdeterrence of unconstitutional behavior is a general societal good); \textit{id.} at 1529 (arguing that the payment of constitutional judgments through tax dollars does guarantee the public more responsible government); Gilles, \textit{supra} note 2, at 31 (arguing that the § 1983 liability scheme should make it more likely that the government will take steps to remedy the problems); Harold S. Lewis, Jr. & Theodore Y. Blumoff, \textit{Reshaping Section 1983’s Asymmetry, 140 U. Pa. L. Rev. 755, 756-57} (1992) (“[T]he deprivation of a federally guaranteed right by government action is uniquely damaging and therefore demands remedies of potent deterrent impact.”); Sheldon Nahmod, \textit{Section 1983 Discourse: The Move from Constitution to Tort, 77 Geo. L.J. 1719, 1750} (1989) [hereinafter Nahmod, \textit{Discourse}](arguing that § 1983 litigation takes a prominent role in promoting the public good).

\textsuperscript{39} See Pamela S. Karlan, \textit{Disarming the Private Attorney General, 2003 U. Ill. L. Rev. 183, 186} (“The idea behind the ‘private attorney general’ can be stated relatively simply: Congress can vindicate important public policy goals by empowering private individuals to bring suit . . . . It consists of providing a cause of action for individuals who have been injured by the conduct Congress wishes to proscribe . . . .”); \textit{id.} at 187 (“[T]his public function exists even when a civil rights plaintiff asks for compensatory damages rather than injunctive relief.”); see also Brown, \textit{supra} note 6, at 1529 (“The private attorneys general that § 1983 created are an important check on state and local government.”); Robert L. Carter, \textit{The Federal Rules of Civil Procedure as a Vindicator of Civil Rights, 137 U. Pa. L. Rev. 2179, 2189} (1989) (emphasizing the need to protect the “institution of the private attorney general,” the private attorney who undertakes the vindication of public rights); \textit{id.} at 2185 (“Congress has created . . . private rights of action under a variety of statutes which are thought to be so vital as to justify enhanced enforcement, above and beyond that which the Executive branch is able or willing to undertake.”); Carl Tobias, \textit{Civil Rights Procedural Problems, 70 Wash. U. L.Q. 801, 811} (1992) [hereinafter Tobias, \textit{Civil Rights}] (arguing that Congress envisioned plaintiffs acting as “private attorneys general vindicating civil rights of many citizens who are not before the court”).
Rule 15(c)(3) in a constricted manner. In other words, a procedural rule is interpreted in a manner that hinders or defeats the full realization of the substantive purposes and benefits of § 1983, even though the Federal Rules generally are to be interpreted and applied so as to ensure the just resolution of legal claims. The application of a procedural rule becomes suspect if it defeats clearly articulated substantive principles. Similarly, the search for new procedures must consider the intersection between procedure and substance.

The irony of focusing on that intersection in the realm of § 1983 is that constitutional damages actions were unknown to the framers of the original Federal Rules of Civil Procedure in 1938. The original paradigm for the civil rules was the basic diversity case, a tort or contract dispute between two private individuals or businesses, each represented by private counsel, seeking money damages. The rise of federal social legislation in the 1960s and 1970s changed that paradigm. Constitutional litigation under § 1983 must be understood

40 See discussion supra notes 18-20 and accompanying text; see discussion infra notes 106-49 and accompanying text.
41 See Cooper, supra note 20, at 3-4 (arguing that the denial of relation back in Doe cases "seems strange"); Rice, supra note 16, at 958 (arguing that, under current Rule 15(c), "the plaintiff may not be able to hold the proper party responsible for the wrongs he suffered").
42 See Fed. R. Civ. P. 1 (stating that the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action"); see also Joseph P. Bauer, Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure, 63 NOTRE DAME L. REV. 720, 730 (1988) (arguing that the Court's task in interpreting the federal rules must bear in mind the general rule of construction in Rule 1); Karen Nelson Moore, The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure, 44 HASTINGS L.J. 1039, 1040 (1993) ("[T]he failure to heed this admonition... may result in an unduly stingy interpretation of a Rule..."). But see Patrick Johnston, Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1, 75 B.U. L. REV. 1325, 1375-76 (1995) ("References to the Rule 1 trinity and 'liberal' interpretations of other Rules to secure resolution on the merits can be misleading...").
44 See David. A. Hyman, When Rules Collide: Procedural Intersection and the Rule of Law, 71 TUL. L. REV. 1389, 1391 (1997) ("Procedure is the ways and means of substantive law. By specifying the mechanisms for administrative enforcement and judicial review, procedure helps ensure the outcome dictated by the substantive law.").
45 See Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. CHI. L. REV. 494, 512 (1986) [hereinafter Resnik, Failing Faith] (stating that the 1930s, when original Federal Rules of Civil Procedure were drafted, was an era before the rise of civil rights litigation).
46 See id. at 508.
as part of this change. Although enacted as part of the Ku Klux Klan Act of 1871, § 1983 was not brought to life until nearly a century later, when the Supreme Court for the first time recognized a plaintiff’s right to recover damages for the misconduct of public officers acting under the cloak of their authority as state actors, even where their conduct was not formally permitted or ratified by state law. That revival continued into the late 1970s, when the Court first recognized at least limited municipal liability under § 1983. Constitutional actions against individual federal officers for money damages were unknown until 1971.

The premise of civil rights litigation is that private plaintiffs should use judicial procedure as a vehicle for vindicating substantive rights, thereby vindicating the substantive purposes of the law and the public interest. On the other hand, the Federal Rules of Civil Procedure reflect the ascension of trans-substantivity, the ideal that one general,
neutral set of procedural rules properly and coherently could apply across the full range of cases brought in federal court.52 This idea has come under attack in part out of recognition that facially neutral procedural rules often have disparate negative impact on certain classes of cases and litigants, notably civil rights cases and litigants.53 This disparate impact suggests that some substantive interests should be favored with, in Paul Carrington’s words, a “legislated thumb on the procedural scales.”54 Procedural rules may account for substance, facilitating the plaintiff’s vindication of congressionally created substantive rights, particularly in light of the remedial purposes of an enactment such as § 1983.55 And even a generally neutral, trans-

52 See Robert G. Bone, The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy, 87 GEO L.J. 887, 889 (1999) (arguing that court-centered rulemaking was justified by the idea that civil process is normatively independent of substance); Paul D. Carrington, Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure, 137 U. PA. L. REV. 2067, 2074 (1989) [hereinafter Carrington, Making Rules] (“Neutrality with respect to the interests of particular groups of disputants is an obvious objective, indeed perhaps of paramount value, of any enterprise engaged in dispute resolution.”); id. at 2079 (arguing that procedural rulemakers should work behind a Rawlsian “veil of ignorance”); Robert M. Cover, For James Wm. Moore: Some Reflections on a Reading of the Rules, 84 YALE L.J. 718, 718 (1975) (arguing that the Rules expressed “trans-substantive values”); Richard L. Marcus, Of Babies and Bathwater: The Prospects for Procedural Progress, 59 BROOK L. REV. 761, 778 (1993) [hereinafter Marcus, Of Babies and Bathwater] (“A shift away from trans-substantive procedure would erode or eliminate the positive effect of applying procedural learning from one substantive area to another.”); Resnik, Failing Faith, supra note 45, at 512 (arguing that the framers of the original Rules relied on a paradigm of private damages actions, which made a single trans-substantive set of rules appealing and possible); id. (“With a single paradigm, it is easier to overlook the saliency of the distinctions among various kinds of cases and hence to underestimate the need for rulemaking to take variation into account.”); Tobias, Transformation, supra note 47, at 1502 (describing “trans-substantive vision that most drafters of the original Federal Rules apparently held in 1938”); Tobias, Public Law Litigation, supra note 47, at 274 (“The Committee intended the Rules as a whole to provide a ‘trans-substantive code of procedure’ . . . procedure generalized across substantive lines.”).

53 See Bone, supra note 52, at 900 (arguing that the increase in federal civil rights litigation “gave rise to concerns about the adequacy of the existing procedural system to promote substantive values”); id. at 909 (“Many critics focus on the distribution of outcomes and, in particular, on distributions that systematically disadvantage particular classes of litigants.”); Carter, supra note 39, at 2182 (“[P]articular classes of substantive claims consistently receive less favorable treatment than others at the hands of those rules.”); Subrin, supra note 28, at 2043 (“[A]bsolute standard may prejudice different cases. Such thinking leads to non-trans-substantive rules.”).

54 Carrington, Making Rules, supra note 52, at 2086 (“[C]ongress may be justified in building into substantive enactments specific procedural provisions.”).

55 See Resnik, Failing Faith, supra note 45, at 547 (“[W]e need to determine what subsets of cases require special kinds of rules, and write rules for those kinds of cases.”); Subrin, supra note 28, at 2051 (“If legislators want the rights proclaimed in statutes translated into real gains for citizens they will have to consider some procedural incidents when they enact laws.”); Tobias, Transformation, supra note 47, at 1502 (arguing that a court should facilitate the plaintiff’s vindication of substantive purposes by affording procedural benefits to parties who seek to vindicate those rights); id. at 1507 (arguing that Congress intended through substantive provisions to afford potential litigants certain procedural advantages); see also Bone, supra note 52, at 933 (describing the rights-based metric, which defines the value of outcome-accuracy in terms of the
substantive procedural system recognizes the efficacy and necessity of some limited, narrow, substance-specific rules.\textsuperscript{56}

At the very least, procedural rules ought not have disparate impact against civil rights plaintiffs.\textsuperscript{57} Such impact results in non-enforcement (or under-enforcement) of civil rights legislation; plaintiffs and their attorneys are unable to bring successful claims, resulting in an increase in the harms that the laws were designed to remedy and a decrease in the intended benefits of enforcement.\textsuperscript{58} The unavailability of relation back in Doe defendant cases under § 1983 brings the point into stark relief. The prevailing interpretation of mistake in Rule 15(c)(3)(B) denies relation back in many Doe cases, defeating a greater number of § 1983 cases at the pleading or amendment stage.\textsuperscript{59} Recognizing this differential effect should motivate rules changes to ameliorate the impact on substantive policy.\textsuperscript{60}

\begin{itemize}
  \item See Carrington, Making Rules, supra note 52, at 2068-69 ("There are and will continue to be many significant variations in the uses made of procedure rules in different kinds of cases, including some noncontroversial accommodations to differences in the substantive natures of matters in dispute."); id. at 2079-80 (emphasizing the limited application of special rules); Marcus, Of Babies and Bathwater, supra note 52, at 778-79 (arguing that the critique of trans-substantivity "does not reject the general idea of a common model of procedure for most or all cases, but only asks that special circumstances be noted.").
  \item See Marcus, Of Babies and Bathwater, supra note 52, at 776 ("The judgment to be made, therefore, is whether some adjustment in the general procedural regime should be undertaken to ameliorate the impact on a particular group."); Subrin, supra note 28, at 2050-51 (criticizing procedure that defeats rather than vindicates congressionally created rights); Tobias, Civil Rights, supra note 39, at 801 (arguing that procedural decision making has "adversely affected civil rights and employment discrimination plaintiffs, who Congress intended to serve as private attorneys general").
  \item See Tobias, Civil Rights, supra note 39, at 811 ("The [procedural] developments have made it increasingly difficult for individuals and groups who believe that they have suffered discrimination to institute, continue and win civil rights suits, as well as maintain any victories secured."); Jack B. Weinstein, After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?, 137 U. PA. L. REV. 1901, 1920 (1989) (arguing that if procedural rules defeat civil rights claims, "those behaving in the shadow of the law will risk inflicting more insidious discrimination").
  \item See Rice, supra note 16, at 895 ("Civil rights cases against unknown law enforcement officers, the most frequent use of the Doe defendant in federal courts, best illustrates this reality."); see discussion infra notes 151-75 and accompanying text.
  \item One previous source of disparate substantive impact was the version of Fed. R. Civ. P. 11 in place from 1983 to 1993, which imposed mandatory sanctions on parties and attorneys for failing to conduct sufficient pre-filing investigation. See Fed. R. Civ. P. 11 (1983) ("If a pleading . . . is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose . . . an appropriate sanction . . ."); Stephen B. Burbank, The Transformation of American Civil Procedure: The Example of Rule 11, 137 U. PA. L. REV. 1925, 1932 (1989) [hereinafter Burbank, Transformation]; Carter, supra note 39, at 2191. Commentators suggested the 1983 rule had a disproportionately adverse impact on civil rights plaintiffs. See Burbank, Transforming, supra, at 1938 (discussing results of one-year study of Rule 11 cases in Third Circuit, showing civil rights lawyers sanctioned at far higher rate than for plaintiffs as a whole or non-civil rights plaintiffs); id. ("[I]f we find that § 1983 actions constitute a disproportionately large slice of the Rule 11 pie, [we should] consider whether they have characteristics that render
Beyond neutrality, the Federal Rules reflect what Richard Marcus calls the "liberal ethos," the ideal that lawsuits should be resolved on their merits by the trier of fact after an opportunity for discovery and that courts should eschew procedural details in deciding cases. The idea was to make the filing of cases easier. It follows that a plaintiff must have a genuine opportunity to timely plead against potentially liable defendants.

The most obvious manifestation of the liberal ethos is notice pleading, which lowers the hurdles to the initiation of an action and permits plaintiffs to pass through pleading and into fact discovery under court supervision. A liberal approach to relation back achieves that

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61 See Marcus, Of Babies and Bathwater, supra note 52, at 766; Richard L. Marcus, The Revival of Fact Pleading under the Federal Rules of Civil Procedure, 86 COLUM. L. REV. 433, 439 (1986) [hereinafter Marcus, Fact Pleading]; see also Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 BROOK. L. REV. 841, 853 (1993) [hereinafter Burbank, ignorance] (describing federal procedural system as one of "open access to the courts"); Resnik, Failing Faith, supra note 45, at 497 (noting early arguments about the "need to foster judicial decisions on the merits by simplifying procedure"); id. at 501 (arguing that framers of the rules "insisted on abandoning technicalities so as to enable consideration of the merits of individuals' claims"); Resnik, Domain, supra note 43, at 2221 (agreeing that some of the push behind the 1938 Rules intended to make the filing of cases easier and to enable dispositions on the merits); id. at 2226 (describing values embodied in procedural systems that stress getting to the merits); Tobias, Public Law Litigation, supra note 47, at 286-87 ("[T]he liberal ethos pervading the Rules as a whole and the liberality and flexibility that equity fostered in specific Rules enabled public interest litigants to institute suit, successfully resist preliminary motions, conduct broad discovery, and reach the merits of their claims."); Weinstein, supra note 58, at 1920 ("Parties could no longer rely on clever maneuvers, but were required to make their best cases on the merits and face a dispositive ruling or a trial."); cf. Marcus, Of Babies and Bathwater, supra note 52, at 785 (arguing that the liberal ethos fits with a neutralist view of procedure).

62 See Resnik, Domain, supra note 43, at 2221 ("[T]he rule drafters intended to provide ready access to a variety of litigants who are now being closed out."); id. at 2220 (arguing for a system of federal rules that provides "ready access to courts and the opportunity for the heretofore silent to make new claims of legal right"); Weinstein, supra note 58, at 1906 (arguing that the "Federal Rules were intended by their drafters to open wide the courthouse doors" and to provide every claimant a "meaningful day in court"); id. at 1920 ("The advent of the Federal Rules swung the courthouse door open.").

63 Cf. Marcus, Fact Pleading, supra note 61, at 492 ("The real question is whether pleading practice can yield reliable merits decisions.").

64 See Burbank, Transformation, supra note 60, at 1943 (describing a "system in which pleading was to play a relatively minor, and not often dispositive, role in the definition or resolution of disputes brought to federal court"); Marcus, Fact Pleading, supra note 61, at 440 ("Rather than dwell on pleading niceties, under the new system litigants were to use the expanded discovery mechanisms provided by the Federal Rules to get to the merits of the case."); Richard
same end, broadening the plaintiff's ability to plead and proceed to
discovery and a determination on the merits against all defendants,
particularly those defendants identified relatively late in the process.\footnote{See Bauer, supra note 42, at 731 (arguing that courts must recognize that the "purpose of Rule 15(c) ... is to ensure that an action should proceed if the intended defendant receives timely notice of the nature and pendency of the action against it and also to ensure that the merits of the claim should not be foreclosed because of this 'procedural error.'").}

So, too, does a procedural mechanism that enables a plaintiff to timely
plead and proceed on the merits in cases in which the identity of the
target defendant cannot be discovered at the outset or becomes known
only through discovery after the limitations period has expired.

Finally, trans-substantivity assumes a procedural rulemaking
system in which the identities of the parties to the action and their
respective litigation positions are unknown in advance and
interchangeable—a system in which one never knows whether one will
be a plaintiff or defendant in a given case and in which one might be
plaintiff in one case and defendant in the next.\footnote{See Resnik, Domain, supra note 43, at 2222-23; id. at 2224 (arguing that it is widely recognized that the Department of Justice, the critical repeat player in the federal criminal justice system, must be satisfied with a proposed Federal Rule of Criminal Procedure in order for a change to go forward).}

The converse of this model informs criminal procedure rulemaking, where rules are drafted
knowing, in advance, the respective roles of each party. The
government, the critical repeat player in the system, always will be
prosecuting; individuals, often proceeding with government-appointed
counsel, always will be on the defensive. Rulemakers consider what
rules will be beneficial to each side, as well as wealth, resource, and
power imbalances existing between those parties; rules often are drafted
to reflect or remedy those locked-in positions or imbalances.\footnote{Id. at 2225 ("[I]n a substantial category of cases we can know up front the identity of those who will be the 'plaintiffs' and the 'defendants.'").}

The criminal rules model is more applicable to § 1983, where
parties have similarly pre-determined roles.\footnote{Id. at 2225 ("[I]n a substantial category of cases we can know up front the identity of those who will be the 'plaintiffs' and the 'defendants.'").} The defendant, by
definition, will be a government official and/or government entity, both
represented by government counsel, creating a cast of repeat players on

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[hereinafter Marcus, Puzzling Persistence] (arguing that pleading practice serves to enable
disposition on the merits, by helping to weed out weak claims and focus the litigation only on
viable claims); see also Fed. R. Civ. P. 8(a)(2); Conley v. Gibson, 335 U.S. 41, 47 (1957)
(holding that the Federal Rules do not require a detailed complaint, only such that will "give the
defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests").
the defense side. The plaintiff will be a private individual asserting a claim arising from some contentious or adversarial encounter with a government officer involving an abuse of official power that allegedly violates some Constitutional guarantee. Plaintiffs in Equal Protection and many Fourth Amendment cases tend to be minorities. There generally is a resource, power, and information imbalance between the government and the plaintiffs. Thus, there are systemic benefits to devising some civil rules in a manner akin to criminal rules, accounting for those pre-identified parties, pre-determined roles, and power imbalances, and providing procedures that will benefit a particular side to the litigation.

69 See id. at 2225 ("[I]n civil rights cases, by statutory or constitutional definitions, the defendants can only be those acting 'under color of state law'-i.e., governmental entities or those who work for state and local governments."); Stewart J. Schwab & Theodore Eisenberg, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 CORNELL L. REV. 719, 749 (1988) ("[B]y definition, the government or its officials are the defendants in constitutional tort cases.").

70 See Lewis & Blumoff, supra note 38, at 825 ("The implicit purpose of § 1983 is the restraint of governmental conduct violative of any federal right . . . ."); Wells, supra note 5, at 618 (arguing that § 1983 cases are "mainly concerned with redressing abuses of power by government officers"); Whitman, Constitutional Torts, supra note 1, at 675 (arguing that the nature of the injury is affected in constitutional cases by the fact that government actors are involved).

71 See Resnik, Domain, supra note 43, at 2225.

72 See Thomas D. Rowe, The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 DUKE.L.J. 651, 662-63 [hereinafter Rowe, Attorney Fee] (describing problems of one side in particular class of litigation regularly having the advantage of superior resources); Schwab & Eisenberg, supra note 69, at 749 ("[A] private person suing the government is in a weaker position that [sic] a private person suing another private person.").

73 See Resnik, Domain, supra note 43, at 2223. In fact, Congress has sought to ease some of the resource imbalances in § 1983 through the Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. § 1988(b), a one-way fee shifting statute under which civil rights plaintiffs ordinarily recover fees when they prevail on their claims, although they generally will not be responsible for the defendants' fees if they do not prevail. See Rowe, Attorney Fee, supra note 72, at 678; Tobias, Public Law Litigation, supra note 47, at 312; see also Christianburg Garment Co. v. EEOC, 434 U.S. 412, 416-17, 421 (1978) (stating that a plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust," while defendants will recover only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"). The fee-shifting scheme explicitly sought to remedy the resource, power, and experience imbalance between the one-shot private plaintiff and the repeat-player government entity or officer defendants. See Resnik, Failing Faith, supra note 45, at 518-20 (arguing that one-way fee shifting is a way, but not the only way, to subsidize poor litigants); Rowe, Attorney Fee, supra note 72, at 664 ("[W]hen a legislature perceives a regular imbalance, it can seek to match adversaries more evenly by adopting some form of fee shifting to prevent disproportionate advantage in access to and use of the legal process."); Tobias, Civil Rights, supra note 39, at 806 (arguing that § 1988 recognized resource discrepancies between civil rights plaintiffs and those parties they normally oppose); see also Resnik, Failing Faith, supra note 45, at 517 ("Adversarialism is a plausible mechanism for generating information leading to acceptable outcomes and for validating individual dignity only when the adversaries are roughly comparable—when each side has similar resources.").
II. STATUTES OF LIMITATIONS, RELATION BACK, AND § 1983

A. Structure and Application of Rule 15(c)(3)

Mrs. Hall timely filed her original Complaint, naming as defendants Baker County and Sheriff’s Deputies John Doe 1-3, two days before the period ran.\(^7\) Her problems arise in attempting to amend the Complaint, renaming Deputies John Doe 1-3 as Deputy Screws, Deputy Kelley, and Police Officer Jones; the limitations period expired before she discovered their names and before she moved for leave to amend. The three officers oppose the motion for leave, arguing that justice does not require that leave be granted because the Amended Complaint will be barred by the applicable limitations period, making the Amended Complaint futile.\(^7\)

Rule 15(c) and relation back potentially fill this void.\(^7\) Relation back is a legal fiction, pursuant to which claims against newly named (or renamed) parties in an amended pleading will, under certain conditions, be deemed filed as part of the initial, timely pleading;\(^7\) claims against the newly named defendants will be treated as if they had been brought within the limitations period. Rule 15(c)(3) applies whenever the amended pleading “changes the party or the naming of the party against whom a claim is asserted.”\(^7\) The rule establishes four elements that must be met in order for an amended pleading to relate back.\(^7\)

First, the claims asserted in the Amended Complaint must arise

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74 See discussion supra notes 2-7 and accompanying text.

75 See Fed. R. Civ. P. 15(a) (providing that, after a responsive pleading has been served, “a party may amend the party’s pleading only by leave of court... and leave shall be freely given when justice so requires.”); Foman v. Davis, 371 U.S. 178, 182 (1962) (stating that one ground for denial of leave to amend under Rule 15(a) is futility of amendment).

76 See Lewis, supra note 16, at 1511 (“Relation back rules breathe new life into lawsuits in which the person or entity the plaintiff intends to sue, the ‘intended defendant,’ has not received personal or precise notice of an action’s commencement until after the last day of an applicable period of limitations.”).

77 See Brussack, supra note 16, at 674 (describing “legal fiction” of relation back); Rice, supra note 16, at 898 (“Relation back is a fiction that saves an otherwise later amendment to a pleading.”).

78 Fed. R. Civ. P. 15(c)(3); see also Brussack, supra note 16, at 675-76 (discussing the argument that an amendment changing the name of a defendant from the government entity or agency to an individual officer at the head of that entity or agency merely corrects, rather than changes, the name of the party, making it unnecessary to satisfy the remainder of the relation back requirements; ultimately rejecting that view in light of the history of Rule 15(c)(3)). The “naming of the party” language was added in 1991, to make clear that changing the defendant from the government to an officer does trigger Rule 15(c)(3) and such amendment must satisfy the rule. See Fed. R. Civ. P. 15 Advisory Committee’s notes to 1991 Amendment; see also Lewis, supra note 16, at 1515 (describing difficulties plaguing courts prior to 1991 in determining which amendments truly change parties defendant).

79 In the alternative, relation back is permitted whenever “relation back is permitted by the
from the same conduct, transaction, or occurrence set forth in the original Complaint. 80

Second, a timing provision demands that the defendant to be added receive certain notice regarding the lawsuit and his role in it within 120 days of the filing of the lawsuit. 81 A federal-question action such as § 1983 is commenced by filing the Complaint with the district court, which halts the running of the limitations clock. 82 The plaintiff then has 120 days to serve the Complaint and summons on the defendants. 83 In essence, the period in which a named defendant must formally be notified that he is a party to the action is the statutory limitations period plus 120 days. 84 Similarly, assuming a lawsuit filed on the last day

law that provided the statute of limitations applicable to the action.” Fed. R. Civ. P. 15(c)(1). Several states, including Alabama, Mississippi, and New Jersey, specifically and explicitly permit John Doe pleading and relation back of Doc substitutions, even without notice to the to-be-added defendant. See Rice, supra note 16, at 941-42 & nn.218-19. Federal courts hearing § 1983 actions in those states permit the change of names and relation back pursuant to the state relation back rule incorporated through 15(c)(1). See id. at 942. Absent such express state allowance of relation back of Doe pleading, the federal court must look elsewhere for guidance on whether relation back is proper.

In any event, this use of Rule 15(c)(1) arguably is inappropriate in § 1983 actions. Section 1983 “borrows” the state limitations period in order to fill interstices in federal law; in doing so, it incorporates that state provision into federal law and converts it into a federal limitations period. Cf. Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 103 (2d ed. 1990) (suggesting that state law is “federalized” through its incorporation-by-reference into federal law). For example, the incorporated limitations period is treated as federal, rather than state, for determining whether the filing of a Complaint (which commences an action in federal court, see Fed. R. Civ. P. 3) tolls the clock and allows for service of process even after the period has expired. Compare West v. Conrail, 481 U.S. 35, 39 (1987) (“[W]hen the underlying cause of action is based on federal law and the absence of an express federal statute of limitations makes it necessary to borrow a limitations period from another statute, the action is not barred if it has been ‘commenced’ in compliance with Rule 3 within the borrowed period.”), with Walker v. Aroco Steel Co., 446 U.S. 740, 750 (1980) (stating that Rule 3 was not intended to toll a state statute of limitations in diversity actions). See also West, 481 U.S. at 39 n.4 (reaffirming Walker rule that, in diversity actions, state law determines whether service must be commenced within the limitations period). The two-year limitations period for § 1983, having been borrowed from state law, now is “provided by” federal law, not state law, rendering Rule 15(c)(1) inapplicable.

80 See Fed. R. Civ. P. 15(c)(3) (incorporating Fed. R. Civ. P. 15(c)(2) (requiring that the “claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading”)); see also Rice, supra note 16, at 928.

81 See Fed. R. Civ. P. 15(c)(3) (“within the period provided by Rule 4(m) for service of the summons and complaint”); Fed. R. Civ. P. 4(m) (providing plaintiff with 120 days after the filing of the complaint to affect service); see also Fed. R. Civ. P. 15 Advisory Committee’s notes to 1991 Amendments (“An intended defendant who is notified of an action within the period allowed by Rule 4(m) for service of a summons and complaint may not under the revised rule defeat the action on account of a defect in the pleading with respect to the defendant’s name, provided that the requirements of clauses (A) and (B) have been met.”).


84 See Brussack, supra note 16, at 682-83 (“[T]he underlying premise [is] that the statutory period for filing the complaint plus the period permitted for service on the defendant, when added together, provide the defendant with sufficiently timely notice to accomplish the aims of
before the statute of limitations expires, the period in which an intended to-be-named defendant must have notice of the action for relation-back purposes is the day of filing plus 120 days.\textsuperscript{85} This does not mean that the Amended Complaint necessarily must be filed within those 120 days, only that the defendant must receive notice within that period.

Rule 15(c)(3) then requires that the target defendant receive two types of notice: 1) notice of the lawsuit, that a civil action is pending, and 2) notice of his role in that lawsuit, that he is an intended target of the action who could or would be made a party. As to the first, the defendant must have received "such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits."\textsuperscript{86} This means that the target defendant must learn or be made aware that a lawsuit was filed seeking some legal relief for claims arising out of some particular conduct, transaction, or occurrence, such that he knows to gather and protect the evidence he will need for his defense.\textsuperscript{87}

This notice need not be formal.\textsuperscript{88} Notice often is imputed by virtue

\textsuperscript{85} See Brussack, supra note 16, at 683; Cooper, supra note 20, at 5. The use of the 120-day period as the benchmark for notice was established in the 1991 amendment to Rule 15(c), expressly to overrule the Supreme Court's decision in \textit{Schiavone v. Fortune}, 477 U.S. 21 (1986). See Fed. R. Civ. P. 15 Advisory Committee's note to 1991 Amendment ("This paragraph has been revised to change the result in \textit{Schiavone v. Fortune}, supra, with respect to the problem of a misnamed defendant.").

In \textit{Schiavone}, the Court read the former language requiring notice "within the period provided by law for commencing the action" to require notice prior to the expiration of the statute of limitations. \textit{See Schiavone}, 477 U.S. at 31; Brussack, supra note 16, at 681; Cooper, supra note 20, at 2; Rice, supra note 16, at 929 & n.169. In other words, only if the to-be-added defendant had notice of the action prior to the expiration of the limitations period would relation back be possible. The decision in \textit{Schiavone} was the target of strong scholarly criticism. See Bauer, supra note 42, at 732 ("Other than references to the 'plain meaning' of the Rule and quotations of ambiguous language in the Advisory Committee's Notes, there is nothing else to explain or support the Court's result."); Brussack, supra note 16, at 683 (arguing that the decision gives an advantage to misnamed defendants over correctly named defendants, who often need not receive notice of the lawsuit until after the expiration of the limitations period, but within the period for service); Cooper, supra note 20, at 2 ("The difficulty with the conclusion is that it requires notice to the 'new' defendant at a time earlier than would be required if the new defendant had been properly identified in the initial complaint."). It generally was agreed that the result was inconsistent with liberal pleading practices under the Federal Rules, prompting amendment. \textit{See Fed. R. Civ. P. 15 Advisory Committee's notes to 1991 Amendment}; Rice, supra note 16, at 929-30 & n.171.


\textsuperscript{87} See Cooper, supra note 20, at 3 ("The notice that obviates prejudice in defending responds to the purpose to protect the opportunity to gather evidence and to stimulate the gathering."); Rice, supra note 16, at 928 ("If the new defendant did not have timely notice of the lawsuit, the plaintiff cannot add him . . .").

\textsuperscript{88} See Fed. R. Civ. P. 15 Advisory Committee's note to 1966 Amendment ("[T]he notice need not be formal."); Lewis, supra note 16, at 1557-58 n.246 ("Adequate notice may instead reach the intended defendant wholly outside the channels of a lawsuit or, after an action commences, through documents or events other than service of process."); Rice, supra note 16,
of the original defendants and the to-be-added defendants sharing

counsel or sharing some overlap of interests. The court also will look
to evidence that the to-be-added defendant actually learned and knew of
the lawsuit. For example, attorneys and higher government officials
likely spoke with the officer who committed the alleged violation, in
order to learn from him what happened and why, who else might have
been present, and other information necessary for the government entity
to prepare its own defense. Government attorneys likely will show each
officer a copy of the Complaint, so he could see what was alleged and
help the government prepare a response. The officer might have heard
from other rank-and-file officers that a lawsuit had been filed and that
there might be some issues involving him. He might have learned about
the lawsuit in the media. In addition, the plaintiff’s motion to amend,
which often includes a copy of the proposed Amended Complaint as an
attachment, may provide that notice when served on the officers.

Second, the target defendant must or should know that “but for a
mistake concerning the identity of the proper party, the action would
have been brought against” the target defendant in the first instance.
The to-be-added party must have notice that he is a target of the lawsuit,
that he allegedly played some role in the conduct or occurrence that
injured the plaintiff, and that he is or could be liable for that injury. In
other words, the officer defendant must know that the plaintiff meant to

The mistake requirement has become the crux of Rule 15(c)(3).
That provision was added in 1966 to undo the restrictive application of
relation back in actions brought by private individuals against the
federal government. The cases that caught the Rules Advisory

904 (“[T]hat notice need not be formal service.”).

89 See Schiavone, 477 U.S. at 28 (describing “identity-of-interest” means of imputing notice);
Singletary v. Pennsylvania Dep’t of Corr., 266 F.3d 186, 197 (3d Cir. 2001); Jacobsen v.
Osborne, 133 F.3d 315, 320 (5th Cir. 1998) (finding identity of interest by virtue of shared
counsel).

90 Courts have held that a plaintiff is or should be on inquiry notice of a potential § 1983
claim by virtue of newspaper reports highlighting government misconduct and suggesting that a
civil claim may lie. See Jenny Rivera, Extra! Extra! Read All About It: What a Plaintiff “Knows
or Should Know” Based on Officials’ Statements and Media Coverage of Police Misconduct For
media reports can provide a plaintiff with notice that he might have a meritorious cause of action,
such reports similarly should provide a potential defendant with notice of the lawsuit. This is
particularly true in high-profile television cases, in which counsel and plaintiff often will hold
press conferences simply to announce that they have filed a lawsuit.

91 See Rice, supra note 16, at 930 n.172 (“The motion itself serves as notice of the lawsuit
and unequivocally puts the new defendant on notice that he is an intended defendant.”).


93 See Fed. R. Civ. P. 15 Advisory Committee’s note to 1966 Amendment (“The problem has
arisen most acutely in certain actions by private parties against officers or agencies of the United
States.”); see also Brussack, supra note 16, at 674-75 (“[I]n cases involving government
defendants, lower federal courts had applied the dichotomy in a way that seemed to exalt form
Committee’s attention involved social security benefits claimants whose appeals to the district court named as defendant the United States or the executive agency or the former Secretary of Health, Education, and Welfare rather than the current Secretary. Relation back was denied when the claimant moved to amend and change the name after the statutory 60-day appeal period had expired, even though the government agency and officials acting on behalf of the agency unquestionably knew the actions had been filed. The rule as amended permitted a claimant to change the named defendant to the current Secretary in the event of a “misnomer or misdescription” as to the proper defendant, even after the limitations period had run. The Committee emphasized that the government had been put on notice of the social security claims within the stated period by means of initial service on some government officer.

The purpose and function of relation back is intertwined with the purpose and function of statutes of limitations. Limitations periods protect a range of interests inuring primarily to potential defendants. A defendant has an interest in not being put to the burden of defending over the aims of the limitations doctrine.

94 See Brussack, supra note 16, at 671; Lewis, supra note 16, at 1516; see also 42 U.S.C. § 405(g) (2003) (granting federal court jurisdiction to hear appeals from denial of social security benefits, where Secretary is named as defendant, where applicant files appeal within 60 days).


96 See Fed. R. Civ. P. 15 Advisory Committee’s notes to 1966 Amendment (“[T]o deny relation back is to defeat unjustly the claimant’s opportunity to prove his case.”); see also Brussack, supra note 16, at 672 (arguing that the rule was amended to ensure that the statute of limitations would not be a problem in such cases); Lewis, supra note 16, at 1518 (arguing that the amendment “appears designed to expand the circumstances in which relation back would be allowed is indicated by the Committee’s critical references to the restrictive government-defendant decisions”). To further this goal in actions against the federal government and federal officers, an additional paragraph in the rule provides that service is proper on the United States Attorney, his designee, the Attorney General of the United States, and the agency or officer who would have been a proper defendant if named. See Fed. R. Civ. P. 15(c); Fed. R. Civ. P. 15 Advisory Committee’s notes to 1966 Amendment.

97 See Fed. R. Civ. P. 15 Advisory Committee’s notes to 1966 Amendment (“[T]he government was put on notice within the stated period.”).

98 See Lewis, supra note 16, at 1511 (arguing that, without relation back, amendments would violate the statute of limitations and its underlying policies); Rice, supra note 16, at 903 (arguing that the rules for relation back protect the substantive aims of statutes of limitations); see also Fed. R. Civ. P. 15 Advisory Committee’s note to 1966 Amendment (“Relation back is intimately connected with the policy of the statute of limitations.”).

99 See Brussack, supra note 16, at 682 (“Statutes of limitations exist primarily to protect potential defendants.”); Tyler T. Ochoa & Andrew J. Wistrich, The Puzzling Purposes of Statutes of Limitations, 28 PAC. L.J. 453, 483 (1997) (arguing that “one of the purposes of a limitation system is to avoid making it unreasonably difficult for defendants to answer the claims against them”); id. at 484 (arguing that limitations periods rest on the premise that delay generally works to the disadvantage of the defendant rather than the plaintiff).
against stale claims in lawsuits occurring so far after the event that witnesses may have become unavailable, memories may have faded, and evidence may have been lost. A defendant has an interest in repose, in the opportunity to rest easy, secure that at some point he no longer will be called to answer for past misdeeds. Statutes of limitations depend, above all, on the defendant receiving notice within a specified period of time that a civil action has been commenced and that he, and his past conduct, are targets of that civil action. The target defendant knows that he should gather and preserve evidence and prepare a possible defense and he knows that he is not entitled to repose, but will be called to answer for his conduct.

The 1966 amendments to Rule 15(c)(3) explicitly brought relation back into line with limitations by making notice to the target defendant the theoretical touchstone of both. Relation back is proper where the

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100 See Bauer, supra note 42, at 731 ("[T]he courts ... are entitled as well to take steps to lessen the likelihood of trials where memories of witnesses grow dim and where evidence is unreliable or unavailable."); Brussack, supra note 16, at 682 ("Such statutes help ensure against litigation that occurs so long after the event that witnesses and evidence may be unavailable or lost, jeopardizing a defendant's ability to defeat baseless allegations."); Lewis, supra note 16, at 1511 ("Foremost is protecting a defendant from claims brought after 'memories have faded, witnesses have died or disappeared, and evidence has been lost.'"); Ochoa & Wistrich, supra note 99, at 471 (arguing that concerns for the deterioration of evidence serve several distinct, but overlapping, purposes, including ensuring accuracy of fact-finding, reducing litigation costs, and preserving the integrity of the judicial system); id. at 472 (arguing that limitations periods rest on the premise that evidence deteriorates over time and that the effects of such deterioration on the accuracy of fact-finding process can be avoided by barring late claims); Rice, supra note 16, at 904 (emphasizing the need to "ensure that a defendant can protect against lost or stale evidence and not suffer prejudice at trial due to the plaintiff's delay"); see also Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (emphasizing that statutes of limitations "spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost").

101 See Bauer, supra note 42, at 731 ("At some point, defendants are entitled to repose, knowing that the threat of litigation no longer hangs over their heads ... "); Brussack, supra note 16, at 682 ("[T]he statutes allow potential defendants to continue their lives or businesses by providing a date after which an incident can be relegated to the past."); Lewis, supra note 16, at 1511 (arguing that statutes of limitations alleviate a potential defendant's economic or psychological insecurity); Ochoa & Wistrich, supra note 99, at 460 (arguing that repose includes four distinct, but overlapping, concepts, including peace of mind and reduction of uncertainty about the future); Rice, supra note 16, at 905 ("He is entitled to repose.").

102 See Brussack, supra note 16, at 682. ("[N]otice to a defendant within a certain time is the universally recognized mechanism for securing the aims of limitations doctrine ..."); Cooper, supra note 20, at 3 ("The notice that obviates prejudice in defending responds to the purpose to protect the opportunity to gather evidence and to stimulate the gathering."); Ochoa & Wistrich, supra note 99, at 483 (arguing that statutes of limitations serve their purpose by "requiring timely notice to potential defendants").

103 See Fed. R. Civ. P. 15 Advisory Committee's note to 1966 Amendment (emphasizing that relation back should be proper in cases where the government was put on notice of the claim within the required period); see also Ochoa & Wistrich, supra note 99, at 487 (arguing that relation back of amendments "depend[s] in part upon a showing that the plaintiff has in some effective manner placed the defendant on notice of the claim, providing the defendant with a fair opportunity to protect his or her interests by collecting relevant evidence shortly after the events at issue").
A plaintiff often does not know the proper name or identity of the target defendant at the time the action is commenced. Further, she often is unable to learn that identity until after she files the action and obtains the critical information through formal discovery, by which time the limitations period has run.\textsuperscript{106} This is Mrs. Hall's problem: she does not know the identities of the three officers who arrested and assaulted her husband and needs some formal investigative process to discover them. Unfortunately, a plaintiff usually cannot get judicial help in identifying the officers and cannot engage in formal, court-supervised discovery until she files the lawsuit.\textsuperscript{107} But she cannot file the lawsuit (and initiate the discovery process) unless she can identify some potentially liable proper defendant.\textsuperscript{108}

Pleading "Unknown" or John Doe defendants perhaps provides a way around the dilemma.\textsuperscript{109} There are two elements to effective John Doe pleading. First, the Complaint should sketch Doe, through some detailed, specific descriptions of the individuals involved and of their

\textsuperscript{104} See Cooper, supra note 20, at 3 ("Knowing that the new party would have been sued if only the plaintiff had known enough both helps to stimulate the evidence gathering and also defeats the sense of repose that arises with the end of a limitations period."); Lewis, supra note 16, at 1512 (arguing that relation back reflects a compromise between the conflicting policies of statutes of limitations and modern circumstances that justify relaxation of those strictures).

\textsuperscript{105} See Bauer, supra note 42, at 731 (arguing that one purpose of Rule 15(c) "is to ensure that an action should proceed if the intended defendant receives timely notice of the nature and pendency of the action against it"); Rice, supra note 16, at 904 (arguing that the new defendant not only should know of the lawsuit, but also should appreciate that he is an intended defendant in the action).

\textsuperscript{106} See Brussack, supra note 16, at 691; Cooper, supra note 20, at 4 ("The plaintiff very well may have faced insuperable difficulties in learning the identities of the arresting officers.").

\textsuperscript{107} See Rice, supra note 16, at 896 n.39.

\textsuperscript{108} See id. at 896 ("[H]e cannot file the suit without naming at least one defendant."); id. at 896-97 (arguing that procedural and ethical rules prohibit a plaintiff from suing any random officer, but require some basis for naming or describing a particular person as a defendant).

\textsuperscript{109} See Brussack, supra note 16, at 691; Rice, supra note 16, at 897.
wrongful conduct. The Doe allegations should enable someone familiar with the events at issue, especially the intended defendant himself, to recognize John Doe. This may require a description of the allegedly wrongful conduct; the date, time, and place of the occurrence; and Doe’s position, actions, and role in the wrongful conduct. Particularized Doe allegations ensure the notice required for relation back.

Second, the plaintiff must find some known, identifiable, potentially liable adverse party to name as a defendant in the action along with Doe; the plaintiff then can serve the Complaint on that known party and utilize party discovery to identify the more important defendants. In § 1983 actions, this known party most commonly will be the government entity for which the individual officer acts. It also could be a known individual, such as a supervisor or a fellow officer. A plaintiff perhaps could sue only John Doe or “Unknown Officers,” but this raises the genuine question of how to serve a Complaint that names no identifiable person or entity as defendant.

The Federal Rules do not mention John Doe or unknown-defendant pleading and provide no guidance as to how to handle relation back in such cases. This perhaps is a product of the paradigm that guided the drafters of the original rules: a private tort or contract action for

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110 See Rice, supra note 16, at 947 (emphasizing the importance of particularized Doe allegations that distinguish the unknown defendant in some way).

111 See id. at 948 (“The key is to put the intended defendant on notice, if he were to read the complaint, that he is John Doe.”).

112 See id. at 948-49; cf. Singletary v. Pennsylvania Dep’t of Corr., 266 F.3d 186, 201 (3d Cir. 2001) (holding that, where the Doe defendants were identified as “Corrections Officers,” a prison psychologist would not receive notice that he is an intended target of the action).

113 See Rice, supra note 16, at 947 (“[T]he federal court in most cases must insist that the defendant have had timely notice that he is the intended defendant. Particularized, not generic, Doe allegations will help serve this aim.”).

114 See Cooper, supra note 20, at 5 (“[T]here will be cases where the defendant has a claim against an identifiable adversary strong enough to meet the Rule 11 test, and can proceed to attempt to use discovery to identify the more important defendants.”).

115 See, e.g., Singletary, 266 F.3d at 189 (naming the Department of Corrections, the prison, the former warden, and “Unknown Corrections Officers”); Wayne v. Jarvis, 197 F.3d 1098, 1101 (11th Cir. 1999) (naming Sheriff, Sheriff’s Department, and “Seven Unknown Deputy Sheriffs”); Barrow v. Wethersfield Police Dep’t, 66 F.3d 466, 467 (2d Cir. 1996) (naming township, police department, and “Police Officers”).


117 Compare Cooper, supra note 20, at 5 (“The strategy of simply suing a pseudonymous defendant as a basis for invoking discovery to find a real defendant is not permitted in most federal courts.”), with Rice, supra note 16, at 897 (suggesting that simply naming a John Doe defendant permits a plaintiff to begin his lawsuit and initiate discovery); see discussion infra notes 259-81 and accompanying text.

118 See Rice, supra note 16, at 887 (“Neither the Federal Rules of Civil Procedure nor the Judiciary Code give courts guidance on the proper procedure for the use of Doe parties . . . . The Rules simply do not contemplate the case where a plaintiff does not know the true identity of the defendant.”).
damages between one plaintiff and one defendant, who know one another's identity (likely because of a pre-existing business relationship) and the substance of the events giving rise to the civil action.\footnote{See Resnik, Failing Faith, supra note 45, at 508; see discussion supra notes 46-73 and accompanying text.} Absent a true John Doe rule, such pleading practices must squeeze into the existing rules framework.

Mrs. Hall's is, in many respects, the classic Doe Complaint: she named Baker County (a known, identifiable, potentially liable party) and Sheriff's Deputies John Doe 1-3 in the original timely pleading, used the County as a discovery source to identify the Does, then sought leave to file an Amended Complaint properly replacing Does with Screws, Kelley, and Jones.\footnote{See discussion supra notes 2-15 and accompanying text.} But the limitations period had expired by this point. For this pleading practice to work, Mrs. Hall must be able to amend, even after the statute of limitations has run, particularly where it takes several months of discovery to obtain the necessary information and the plaintiff uses most of the limitations period prior to commencing the action.\footnote{It could be argued that one way around the timing dilemma is for a plaintiff who does not know the names of the proper defendants to file well before the limitations period has expired, leaving her sufficient time to conduct discovery, learn the defendants' names, and amend the Complaint, all before the limitations period has run. See Cooper, supra note 20, at 4; see also discussion infra notes 177-97 and accompanying text.} In Bivens,\footnote{Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).} the district court, facing a Complaint that identified no defendant by name, ordered that the Complaint be served on "those federal agents who it is indicated by the records of the United States Attorney participated" in Bivens's arrest.\footnote{See id. at 390 n.2; Rice, supra note 16, at 886-87, 897. The Seventh Circuit in one case imposed similar duties on the district court, at least where the plaintiff proceeds pro se. The court suggested that the district court take any of several steps, including ordering the named defendants to disclose the identities of the unnamed officers, allowing the case to proceed to discovery against high-level administrators with the expectation that this discovery will reveal the identities of potentially responsible individual officers, or ordering service of the Doe Complaint on all officers who were on duty during the incident in question. See Donald v. Cook County Sheriff's Dep't, 95 F.3d 548, 556 (7th Cir. 1996). But see King v. One Unknown Fed-Corr. Officer, 201 F.3d 910, 915 (7th Cir. 2000) (holding that plaintiff could not rely on Donald where plaintiff did not know the names of the proper individual officers and did not name the institution as a defendant).} This is atypical; "most plaintiffs do not get this much help from the court."\footnote{Rice, supra note 16, at 897; see discussion infra notes 251-81 and accompanying text.} A plaintiff must be able to relate back the Amended Complaint naming the now-known defendants after the statute of limitations has run.

The problem is the prevailing interpretation of the Rule 15(c)(3)(B) requirement of a "mistake concerning the identity of the proper
party." The rule does not define mistake. The Advisory Committee spoke of providing relation back for amendments correcting a "misnomer or misdescription of a defendant." But neither the text of the rule nor the advisory notes address whether a mistake as to identity can or should include ignorance or lack of knowledge concerning that identity. The overwhelming judicial and scholarly consensus is that lack of knowledge is not mistake. As Professor Rice baldly asserts, a "Doe allegation simply is not a mistake." Lower federal courts agree, in light of the Advisory Committee's focus on misnomer or misdescription. A plaintiff such as Mrs. Hall thus will be precluded in most courts from relating back the Amended Complaint naming Screws, Kelly, and Jones.

The lone departure is a twenty-five-year-old personal injury action from the Third Circuit, Varlack v. SWC Caribbean, Inc. The original Complaint named as defendants the corporate owner of the restaurant and an "Unknown Employee of Orange Julius Restaurant," the employee who had struck him. The plaintiff learned the name of that unknown employee, Bernette Cannings, during discovery and moved to amend the Complaint after the two-year statute of limitations had expired. In affirming the district court's decision permitting relation

125 See Fed. R. Civ. P. 15(c)(3)(B); see discussion supra note 17 and accompanying text.
127 Rice, supra note 16, at 927, 952 ("The failing of the current relation back standard in Rule 15(c)(3) in Doe cases is that the initial pleading a Doe defendant is not a 'mistake.'"); see Cooper, supra note 20, at 3 (stating that where the plaintiff knew from the beginning that he did not know the identity of the proper defendants, this was "ignorance, not mistake"); Engrav, supra note 31, at 1585 ("Such plaintiffs do not misunderstand either who the Doe is or the relationship between the Doe and themselves. Instead, plaintiffs suing Doe defendants are fully aware that they lack knowledge of the identity of the party they intend to sue, and that awareness prompts them to include a Doe defendant.").
128 See, e.g., King, 201 F.3d at 914 (holding that the plaintiff did not satisfy the mistake requirement for relation back when he had a "simple lack of knowledge of the identity of the proper party"); Wayne v. Jarvis, 197 F.3d 1098, 1103 (11th Cir. 1999) (holding that plaintiff's "lack of knowledge regarding the identities of the deputy sheriffs was not a 'mistake concerning the identity of the proper party.'"); Jacobsen v. Osborne, 133 F.3d 315, 321-22 (5th Cir. 1998) ("[T]he proposed amendment as to the deputies was not necessitated by the 'mistake' or 'misidentification' at which Rule 15(c)(3) is aimed."); Cox v. Treadway, 75 F.3d 230, 240 (6th Cir. 1996) (holding that amendment substituting named defendants for unknown police officers did not satisfy requirement of mistaken identity); Worthington v. Wilson, 8 F.3d 1253, 1257 (7th Cir. 1993) (holding that because plaintiff's failure to name the officer defendants "was due to a lack of knowledge as to their identity, and not a mistake in their names, Worthington was prevented from availing himself of the relation back doctrine of Rule 15(c)").
129 See Barrow v. Wethersfield Police Dep't, 66 F.3d 466, 469 (2d Cir. 1995) (quoting Advisory Committee's notes and holding that commentary implies that relation back is proper only if "the change is the result of an error").
130 550 F.2d 171 (3d Cir. 1977). The plaintiff alleged that he was injured when an employee at a restaurant hit him with a two-by-four, dazing him and causing him to stumble into an alley and fall through a glass window, injuring his right arm, which had to be amputated. See id. at 173-74.
131 See id. at 174.
back, the court emphasized Cannings’ testimony that he knew there was a suit against an unknown employee, that he knew the phrase “unknown employee” referred to him, and that he knew that if his name had been in the caption he would have been one of the persons sued. This was sufficient to satisfy Rule 15(c)(3).

Importantly, *Varlack* did not focus on the meaning of the mistake clause. Instead, the court conflated notice and mistake, emphasized notice, and held essentially that the fact that the target defendant knew of the lawsuit and knew that he was the unknown employee described satisfied both elements of Rule 15(c)(3). Textual fidelity to one side, the result in *Varlack* allowing relation back strikes many commentators as proper.

But the Third Circuit appears to be backing away from *Varlack*, perhaps realizing that “sticky issues” call its earlier approach into doubt. In *Singletary v. Pennsylvania Dep’t of Corrections*, the plaintiff prisoner brought a § 1983 action against, *inter alia*, “Unknown Corrections Officers,” then sought to amend the Complaint to replace one Unknown Corrections Officer with the prison psychologist, the one person against whom the plaintiff had a potentially viable claim. The Third Circuit affirmed the district court’s refusal to permit relation back, based entirely on the absence of any notice satisfying Rule 15(c)(3)(A). The court avoided resolution of the meaning of the word mistake, finding it unnecessary in light of the lack of notice.

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132 See id. at 175.
133 See Brussack, *supra* note 16, at 692 (stating that the Third Circuit reached its conclusion “without looking too closely at the language” of the mistake clause); see also *Singletary v. Pennsylvania Dep’t of Corr.*, 266 F.3d 186, 201 (3d Cir. 2001) (stating that every other court of appeals had come out contrary to *Varlack*, based on the “linguistic argument that a lack of knowledge of a defendant’s identity is not a mistake concerning that identity”).
134 See Brussack, *supra* note 16, at 692 (arguing that the approach in *Varlack* “takes account of the difficulties that can attend the discovery of a defendant’s name, and does no offense to the policies underlying statutes of limitations”); Cooper, *supra* note 20, at 4 (questioning why the plaintiff should be left out in the cold in the Doe scenario); Rice, *supra* note 16, at 939 (arguing that focusing on the adequacy of the Doe allegations is the best possible approach under the current rule, capturing the intent of the mistake clause without redefining it).
135 See *Singletary*, 266 F.3d at 190, 201 (“[B]ecause the plaintiff simply did not know of [the target defendant’s] identity, it is an open question whether failure to include him originally as a defendant was a ‘mistake’ under Rule 15(c)(3)(B).”).
136 See id. at 189.
137 The court emphasized several points. First, the psychologist did not share an identity of interest with the prison sufficient to impute notice, given that the psychologist was a non-management, staff-level employee with no administrative or supervisory duties and that the psychologist did not have continuing close contact with the plaintiff that might provide notice of the lawsuit. *See Singletary*, 266 F.3d at 199, 201 (emphasizing that the initial complaint had named Unknown Corrections Officers, a description that would not necessarily provide a prison psychologist notice that he was a potential target of the action). Second, although counsel for the prison and warden also represented the psychologist, that representation did not commence until after the 120-day notice period had expired. See id. at 197.
138 See id. at 201.
Instead, Chief Judge Becker argued that fairness demands that relation back be allowed in John Doe cases where notice requirements have been satisfied; he called on the Rules Advisory Committee to amend Rule 15(c)(3) to allow relation back in cases in which the plaintiff did not know the defendant's identity at the outset.

The other way courts have gotten around the mistake element has been creative interpretation of the type of mistake at issue. Consider the Second Circuit decision in Soto v. Brooklyn Correctional Facility. A prisoner, proceeding pro se, named the prison as the sole defendant in a § 1983 action; the prison then successfully moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6) for failure to allege the elements of entity liability. The prisoner did not know, and therefore could not sue, the individual officers who engaged in the alleged unconstitutional conduct. In holding that Soto should be given the opportunity to file an Amended Complaint and have it relate back, the court held that mistake under Rule 15(c)(3)(B) includes mistakes of law at the pleading stage, mistakes as to who may be legally liable for constitutional violations and who the proper defendant in a § 1983 action should be. In the Second Circuit's view, Soto named the prison instead of the individual guards because he did not understand the technicalities of § 1983 pleading and liability and therefore misunderstood whom to sue. On the other hand, any individual officers at the prison who became aware of the lawsuit arising out of the attack on the plaintiff knew or should have known that they potentially were subject to liability for the constitutional tort alleged.

The Second Circuit's approach, while perhaps achieving justice in the particular case by allowing Mr. Soto to amend his pleadings and proceed against the officers, is too narrow to function as a general rule. It treats pro se plaintiffs differently from counseled plaintiffs; a court would and should be far less solicitous of an attorney who does not understand the law of § 1983 or who does not know the limited circumstances under which the government entity may be sued and held

139 See id. at 201 n.5 (finding the conclusions of other courts of appeals "highly problematic"); id. (arguing that fairness requires that the plaintiff be able to amend in the Doe situation, where the newly named parties knew about the lawsuit, knew they were the ones targeted, and withheld information about their identities).
140 See id. (noting that all the commentators to address the issue have called for amendment to the rule); see discussion infra notes 221-36 and accompanying text.
141 80 F.3d 34 (2d Cir. 1996).
142 See id. at 35; see discussion infra notes 156-63 and accompanying text.
143 See id.
144 See id. at 37 ("[Blut for his mistake as to the technicalities of constitutional tort law, he would have named the officers in the original complaint within the three-year limitations period, or at least named the superintendent of the facility and obtained the names of the responsible officers through discovery.").
145 See id. at 36.
liable. But a counseled plaintiff is just as likely to lack knowledge of an intended defendant's identity as a pro se plaintiff.

Further, the court's suggestion that a non-mistaken plaintiff would have sued the prison superintendent and obtained the names through discovery is not helpful because the superintendent or other supervisory officer is no more vicariously liable for the individual acts of rank-and-file officers than is the government entity. Just as the prison was able to get itself dismissed prior to discovery because the Complaint failed to allege the elements of entity liability, so could the superintendent get himself dismissed because the Complaint fails to allege the type of deliberate indifference necessary to state a claim for supervisory liability. The problem remains that the plaintiff does not know the individual actors who committed the constitutional violation. The mistake that Soto and other § 1983 plaintiffs make is not one of law, but one of fact—the fact of the identity of the proper target defendant.

C. Special Circumstances of § 1983

John Doe or Unknown Officer pleading frequently is utilized in

146 See Fed. R. Civ. P. 11(b)(2) (providing that counseled party must certify that the "legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law").

147 See Soto, 80 F.3d at 37 (stating that, absent a mistake of law, Soto at least would have named the prison superintendent).

148 See Kinports, supra note 36, at 153 (arguing that lower courts have interpreted Supreme Court precedent as rejecting respondeat superior liability on supervisors); see also Harley v. Parnell, 193 F.3d 1263, 1269 (11th Cir. 1999) ("Supervisory liability [under § 1983] occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation. The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so. The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences."); Colon v. Couglin, 58 F.3d 865, 873 (2d Cir. 1995) (citing Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994)).

The personal involvement of a supervisory defendant may be shown by evidence that: (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

Id. See discussion infra note 164 and accompanying text.

149 See Kinports, supra note 36, at 169 (describing the factors that establish supervisory liability under § 1983, particularly the supervisor's knowledge and lack of responsiveness to past misconduct); see discussion infra note 164 and accompanying text.
There are several explanations for the commonality of Doe pleading in these cases.

1. Conduct Giving Rise to § 1983 Claims

The conduct and circumstances giving rise to § 1983 claims often do not allow the plaintiff and defendant to exchange information regarding their respective identities. There often is no pre-existing relationship between a citizen and a government official. Instead, a claim arises from a brief, one-time-only encounter between an individual government officer and a citizen, actors who come to the encounter from unequal positions of power. It may involve a violent or extremely antagonistic, quickly occurring event. The plaintiff may not be the person who actually suffered the constitutional harm, where

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150 See Rice, supra note 16, at 895 ("Civil rights cases against unknown law enforcement officers, the most frequent use of the Doe defendant in federal courts, best illustrates this reality."); id. at 886-87 (stating that Bivens was one of the first and most obvious uses of an unknown defendant); see also Cooper, supra note 20, at 3 (stating that civil rights actions involve the "not uncommon problem" of an unknown defendant).

A Westlaw search revealed, since 1992, seventy-seven cases in which a federal court of appeals or district court has issued an opinion on relating back an amended complaint against a later-identified John Doe defendant; sixty-eight of those were § 1983 or Bivens actions.

A second class of cases involving John Doe defendants is defamation suits brought by corporations against anonymous Internet speakers. The plaintiff must "sue the person who originated the defamatory communication," the speaker himself, even though that person is unknown. See Lyrisa Barnett Lidsky, Silencing John Doe: Defamation and Discourse in Cyberspace, 49 DUKE L.J. 855, 872 (2000). Federal law gives Internet Service Providers (ISPs), the intermediary which republished the defamation and which (like the government in a § 1983 action) is a more obviously known or identifiable defendant, complete immunity from liability for third-party defamations. See id. at 871-72; see also discussion infra notes 304-05 and accompanying text.

151 See Nahmod, Discourse, supra note 38, at 1747 ("[C]ourts tend to treat § 1983 plaintiffs and defendants as anonymous strangers who have no prior relationship with one another—even though the defendant is a . . . government employee."); Wells, supra note 5, at 650 (arguing that the primary value served in civil rights actions is "stopping egregious misconduct amounting to a severe misuse of power on the part of a government official").

152 See, e.g., County of Sacramento v. Lewis, 523 U.S. 833, 836-37 (1998) (arising from plaintiff’s decedent’s death in high-speed automobile chase with police); Bd. of County Comm’rs of Bryan County v. Brown, 520 U.S. 397, 400-01 (1997) (arising from police officer forcibly yanking plaintiff from her car via “arm bar” technique and spinning her to the ground); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (arising from federal officers entering plaintiff’s apartment, arresting him, and threatening to arrest entire family); Monroe v. Pape, 365 U.S. 167, 169 (1961) (arising from thirteen Chicago police officers breaking into the plaintiff’s home, rousting him and his family members from bed, making them stand naked in the living room, and ransacking every room in the house); see also Singletary v. Pennsylvania Dep’t of Corr., 266 F.3d 186, 201 n.5 (3d Cir. 2001) (arguing that civil rights plaintiffs are disadvantaged where they were unable to see the name tags on offending state actors during a hostile encounter).
the violation in fact caused the victim's death. The identities of the offending officers are uniquely in the hands of the potential defendants, their law enforcement compatriots, and the governmental entity, none of which may be willing to come forward. Most importantly, § 1983 actions, by definition, involve abuses of official government power, resulting in different, arguably greater, injury.

2. Section 1983 Liability Regime

The more important factor making Doe pleading necessary under § 1983 is its uniquely complicated (one might say Byzantine) liability scheme. Municipalities and local government entities are not subject to damages on vicarious or respondeat superior liability based solely on the existence of an employment relationship between the government and the individual wrongdoer. Instead, a local governmental entity is

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153 See, e.g., Lewis, 523 U.S. at 836-37 (arising from the plaintiffs' son's death in high-speed police automobile chase); City of Oklahoma v. Tuttle, 471 U.S. 808, 811 (1985) (plurality opinion) (arising from plaintiff husband's shooting death at the hands of police). This, of course, is the situation in Mrs. Hall's case. See discussion supra note 1 and accompanying text.

154 See Cooper, supra note 20, at 4 ("Neither the arresting officers nor their police-department compatriots may have been willing to come forward."); cf. Gilles, supra note 2, at 63-71 (describing police "code of silence" as an example of government custom, given the harsh treatment accorded officers who break the code); see discussion supra notes 1-7 and accompanying text.

155 See Monroe, 365 U.S. at 196 (Harlan, J., concurring) ("[A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy . . ."); Lewis & Blumoff, supra note 38, at 825 ("The implicit purpose of § 1983 is the restraint of governmental conduct violative of any federal right . . ."); Nahmod, Discourse, supra note 38, at 1747 (arguing that § 1983 actions should not be treated as ordinary tort cases, given that the defendant is a government or government employee); Wells, supra note 5, at 618 (arguing that § 1983 cases are "mainly concerned with redressing abuses of power by government officers"); Whitman, Constitutional Torts, supra note 1, at 675 ("[I]n constitutional cases, the person who is said to have wronged another is by definition someone who has a special power to do harm because of his government position. Because the government is implicated, the nature of the inquiry is affected."); id. at 677 ("Society has more of a stake in constitutional behavior by officials.").

156 See Brown, 520 U.S. at 431 (Breyer, J., dissenting) (arguing that the doctrine of municipal liability has "generated a body of interpretive law that is so complex that the law has become difficult to apply," grounded in distinctions that are "obsolete and a potential source of confusion"); Susan Bandes, Introduction: The Emperor's New Clothes, 48 DEPAUL L. REV. 619, 619 (1999) (describing § 1983 jurisprudence as a "highly peculiar body of law"); Beermann, supra note 23, at 653 (describing § 1983 liability rules as a "complicated morass"); id. at 667 (stating that the Court, not Congress, is responsible for the "doctrinal mess" that is § 1983); Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions, 69 U. CHI. L. REV. 429, 463 (2002) (stating that it is "exceedingly difficult to prove that local governments are causally responsible, and thus directly liable, for wrongs committed by their officials"); Gilles, supra note 2, at 35 ("[T]he Court's jurisprudence in this area 'manifestly needs clarification' . . ."); Lewis & Blumoff, supra note 38, at 756 (expressing hope that a coherent whole may be recomposed of bits of civil rights jurisprudence).

157 See Brown, 520 U.S. at 403 ("[A] municipality may not be held liable under § 1983 solely
liable only if the plaintiff pleads and proves that some municipal policy or custom actually caused the constitutional violation. As one commentator has argued, the "fundamental principle in the law of municipal liability under § 1983 is that municipalities may be held liable only for their own conduct, not for the conduct of municipal employees." The plaintiff must show that the actor who committed or participated in the violation was the final policymaker for that entity; that the offending actor proceeded pursuant to a formal policy, provision, or decision officially promulgated or explicitly ratified by that official policymaker; or that the violative rank-and-file actor proceeded pursuant to a common custom or practice of which some final policymaker had knowledge. Local government also may be

because it employs a tortfeasor."); Monell v. Dep't of Soc. Serv. of New York, 436 U.S. 658, 691 (1978) (holding that a municipality cannot be held liable under §1983 on a respondeat superior theory); see also Brown, 520 U.S. at 404 (requiring proof of a "direct causal link between the municipal action and the deprivation of federal rights"); Gerhardt, supra note 6, at 674 ("[G]overnment acts as government only when it has played the role of decisionmaker or legislature.").

See Brown, 520 U.S. at 403; Lewis & Blumoff, supra note 38, at 787-88; Whitman, Government Responsibility, supra note 6, at 254; see also Beermann, supra note 23, at 627 (stating that the local governmental entity "can be held liable only when municipal policy is the moving force behind the violation").

Beermann, supra note 23, at 627.

See Brown, 520 U.S. at 408 (accepting stipulation of parties that Sheriff, who made hiring decision at issue, had final authority to act on behalf of County), McMillian v. Monroe County, 520 U.S. 781, 783 (1997) ("If the sheriff's actions constitute county 'policy,' then the county is liable for them."); City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (setting forth principles for defining who is a policymaker for purposes of municipal liability); see also Brown, supra note 6, at 1513 n.57; Gilles, supra note 2, at 38 ("[A] § 1983 plaintiff may attribute to the municipality actions of supervisory personnel whose 'acts may fairly be said to represent official policy.'"); Whitman, Government Responsibility, supra note 6, at 254-55 ("The Court had no language for describing how an institution or a government uniquely acts, so it looked to acts, such as passage of ordinances or regulations, or decisions by those with a very high level of authority, that, in essence, label themselves as institutional or governmental.").

See Brown, 520 U.S. at 403-04 ("Locating a 'policy' ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality."); Praprotnik, 485 U.S. at 127 ("If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final."); Monell, 436 U.S. at 695 ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."); see also Whitman, Government Responsibility, supra note 6, at 254 (arguing that the Court's approach requires the plaintiff to look for the individual or individuals who could be said to act for the government).

See Brown, 520 U.S. at 404 ("[A]n act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law."); Monell, 436 U.S. at 690-91 (stating that local governments may be sued for "constitutional deprivations visited pursuant to governmental 'custom' even though such custom has not received formal approval through the body's official decisionmaking channels"). But see Gilles, supra note 2, at 49 (arguing that the very evils that the custom language was designed to address—the unwritten codes of conduct that permeated local officialdom—are precisely the evils that are least
liable for single unconstitutional acts of individual officers where there has been some failure to train, supervise, discipline, or otherwise control the individual actor, a difficult inquiry that demands some deliberate or intentional misconduct on the part of a policymaker acting on behalf of the government that causes or enables the underlying constitutional violation.\(^\text{163}\)

A high-level supervising officer, an elected official such as the Sheriff, also may be an initial target of the lawsuit. Such a high official is, like the government itself, easily known: he often is publicly elected or appointed, in the public eye, and easily found and named in the original Complaint. But a supervisor also will not be liable on a **respondeat superior** theory simply because an underlying committed a constitutional violation. A plaintiff must allege and show that the supervisor committed (or omitted) some intentional or deliberately indifferent act that deprived the plaintiff of her civil rights.\(^\text{164}\) A

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\(^{163}\) See Gilles, supra note 2, at 41-42 (describing the “failure to [blank]” model of municipal liability in context of police training, where the failure is so obvious and so likely to result in the violation of constitutional rights); see also Brown, 520 U.S. at 410 (“[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.”); City of Canton v. Harris, 489 U.S. 378, 390 (1989) (holding that plaintiff must demonstrate that the municipal action leading the employer to violate the Constitution was taken with deliberate indifference to its known or obvious consequence, where the need for more or different training is so obvious and its inadequacy or absence so likely to result in a constitutional violation); Beermann, supra note 23, at 659 (describing claims in which the municipality is alleged to have shown disregard through failure to train employees, maintain safe workplaces, or adequately screen employees); Blum, supra note 7, at 695 (arguing that in failure-to-train cases there is no question about the underlying constitutional violation committed by the non-policymaking employee, rather the issue is the level of culpability that the plaintiff must prove to demonstrate that the municipality “caused” the violation); Gilles, supra note 2, at 42-43 (“[P]laintiffs may simply point to a municipal omission, such as the failure of municipal government to provide adequate training and services to its employees and constituency.”); Lewis & Blumoff, supra note 38, at 813-16 (describing “deliberate indifference” as a surrogate for a demonstrated municipal policy).

\(^{164}\) See Kinports, supra note 36, at 150; id. at 169 (arguing that supervisory liability depends on five factors, including the extent to which prior similar incidents involving those officers had occurred, the supervisor’s knowledge of and response to those prior incidents, and the nature of the supervisor’s awareness); see, e.g., Hartley v. Parnell, 193 F.3d 1263, 1269 (11th Cir. 1999) (“Supervisory liability [under § 1983] occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation. The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so. The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.”); Colon v. Couglin, 58 F.3d 865, 873 (2d Cir. 1995) (citing Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994)); The personal involvement of a supervisory defendant may be shown by evidence that: (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who
plaintiff thus may have as much trouble bringing a viable claim against
a known supervisory officer as against the governmental entity itself.

Further, damages are entirely unavailable from governmental
entities above the municipal or county level. A state or state agency is
not a “person” for purposes of § 1983, meaning the state cannot even be
named as a defendant in a Complaint. 165 Moreover, Congress did not
abrogate state sovereign immunity when it passed the Civil Rights Act
of 1871 (of which § 1983 is § 1) because it never made a clear statement
of its intention to subject states to suit; from this, the Supreme Court
concludes that Congress never intended for states as entities to be
named as defendants or held liable for constitutional claims. 166 At
the same time, Bivens actions can be brought only against individual federal
officers, not the United States or any federal agency employing or
supervising those officers. 167 No federal institutional defendant can be
sued, regardless of any policy, custom, or deliberately indifferent
failures by federal policymakers the plaintiff may attempt to plead.

This complex structure and limited institutional liability contrasts
with the relatively straightforward rules for entity or organizational
liability in common law tort actions. Employers generally are
responsible for torts committed by employees in the scope of their
employment on the theory that the employer is the ultimate beneficiary
of actions taken within the scope of that employment. 168 This liability
structure also contrasts with that of other federal civil rights laws, under
which the corporate or governmental actor, particularly an employer,
will be primarily or exclusively subject to suit and liability. 169

committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to
the rights of inmates by failing to act on information indicating that unconstitutional
acts were occurring.

a state is not a person within the meaning of §1983); Catherine Fisk & Erwin Chemerinsky, Civil
Rights Without Remedies: Title VII, Section 1983, and Title IX, 7 WM. & MARY BILL RTS. J. 755,

166 See Quern v. Jordan, 440 U.S. 332, 345 (1978); Fisk & Chemerinsky, supra note 165, at
774 n.129.

Bivens is to deter individual federal officers from committing constitutional violations,” but that
“the threat of suit against an individual’s employer was not the kind of deterrence contemplated
by Bivens”). The United States is liable for certain tort claims arising from the actions of federal
employees, but cannot be sued for constitutional violations by those employees. See 42 U.S.C. §
2679(b)(2) (2003) (denying lawsuit against the United States for civil actions arising from
violations of the Constitution of the United States).

168 See Beermann, supra note 23, at 646, 666 (“The common law’s widespread acceptance of
vicarious liability exhibits a consensus that employers are responsible for the tortious conduct of
their employees.”)

169 As Professors Fisk and Chemerinsky explain:

[T]he issue of vicarious liability is narrower under § 1983 than under other civil rights
statutes because the question is solely when, if at all, municipalities can be found liable
on a respondeat superior basis. The Court’s answer has been to reject respondeat
superior liability in § 1983 claims, holding that municipalities are liable only for
The upshot is that the primary, likely, and perhaps only, target of liability for constitutional violations will be the individual wrongful actor, not the governmental entity. Of course, the officer likely can count on the government providing his counsel and defense and indemnifying him for any judgment entered against him. In other words, the cost of litigation and judgment will be paid from the public fisc. However, the individual officer remains the defendant against whom judgment will be entered, meaning the officer must be the named party in the controlling pleading and must be treated procedurally as the true party defendant.

This liability regime demands that the plaintiff identify the violations resulting from their own policies.

Fisk & Chemerinsky, supra note 165, at 774; see, e.g., 42 U.S.C. § 1981 (2003) (guaranteeing equal right to make and enforce contracts, including contracts with employers); 42 U.S.C. § 2000e-2(a) (2003) (defining liable entity in race and gender employment discrimination claims as the "employer"); 42 U.S.C. § 2000e(b) (2003) (defining employer as "a person engaged in an industry affecting commerce who has fifteen or more employees," including state and local governments and corporate and organizational entities); see also Meyer v. Holley, 123 S. Ct. 824, 828-29 (2003) (stating that the Fair Housing Act provides for vicarious liability, that a claim for compensation for housing discrimination is, in effect, a tort action and the court assumes that Congress intends its legislation to incorporate ordinary tort-related vicarious liability rules); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762-63 (1998) ("[A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer... [W]hen a supervisor takes a tangible employment action against a subordinate... it would be implausible to interpret agency principles to allow an employer to escape liability ...."); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) ("An employer is subject to vicarious liability under Title VII to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.").

See Jefferies, supra note 23, at 59 (arguing that the municipal liability exception is a narrow deviation from the generally applicable rule of liability based on individual fault and arguing that the liability scheme forces civil rights plaintiffs to sue state officers rather than the states themselves); Nahmod, Courtroom, supra note 36, at 638 ("By its very terms, then, 1983 makes individuals responsible for the constitutional harm they cause others."); see also Gilles, supra note 2, at 39 (arguing that most § 1983 cases are based on "allegations of recurring, unconstitutional local practices by rank-and-file officers").

See Jefferies, supra note 23, at 49-50 ("Very generally, a suit against a state officer is functionally a suit against the state, for the state defends the action and pays any adverse judgment."); see also Beermann, supra note 23, at 646 (arguing that the numerous municipalities that indemnify their workers suggest the fairness of holding the employer responsible for employee misconduct in the scope of employment); Gilles, supra note 2, at 30 ("The reality is that individual officers are not often forced to pay damage awards from their own pockets."). Lewis & Blumoff, supra note 38, at 828 (arguing that "we ignore reality if we forget that the entity pays for the liability even if the individual defendant formally suffers the adverse judgment"); Daniel J. Meltzer, Overcoming Immunity: The Case of Federal Regulation of Intellectual Property, 53 Stan. L. Rev. 1331, 1359 (2001) ("Were indemnification universal and comprehensive, the resulting system would approximate direct governmental liability."); see also Malesko, 534 U.S. at 70 (stating that the threat of being sued provides adequate deterrence of the individual officer, even if he will be indemnified by the employing agency or entity).

Cf. Brown, supra note 6, at 1529-30 (arguing that the public derives the benefit of more responsible government from extracting necessary tax dollars from the offending locale).

See Jefferies, supra note 23, at 50 (arguing that there is a difference between proceeding directly against an officer as opposed to a government entity, as "[j]uries confronting a flesh-and-blood defendant may be less quick to play Robin Hood").
individual officers who engaged in the unconstitutional conduct and plead against them in a timely manner; the plaintiff can litigate successfully only if and when she knows the names of those individual actors. The paradox is that the obviousness of a potential defendant’s identity is inverse to the likelihood of that defendant’s liability. The most easily and obviously known and identified defendant in most cases is the government entity, but its liability is unlikely, legally and practically. The names of supervisory officers—elected officials such as the Mayor or Sheriff—also might be obvious or easily learned, but their liability is premised on a degree of involvement that generally is absent.\footnote{See Gilles, supra note 2, at 39 (arguing that cases rarely involve singular actions by higher ranking municipal officers, as opposed to rank-and-file officers).} The primary target defendants, the individual officers who committed the acts on the ground and who might be liable for the violation, are least likely to be known by the plaintiff and most difficult for the plaintiff or her counsel to identify, at least without the benefit of formal discovery.

III. SOLUTIONS TO THE JOHN DOE DEFENDANT PROBLEM IN § 1983 CASES

If, as Paul Carrington suggests, it is legitimate to favor some substantive parties and issues with a thumb on the procedural scales,\footnote{See Carrington, Making Rules, supra note 52, at 2085; see discussion supra notes 51-65 and accompanying text.} the question is what that thumb should look like. Four approaches might remedy the disparate impact that the narrow interpretation of Rule 15(c)(3)(B) has on § 1983: 1) changing procedure to require a plaintiff who knows she does not know the identity of the target defendant to file her Complaint with more time remaining on the limitations period; 2) changing substantive § 1983 law; 3) changing procedure by changing Rule 15 and the rules for amending pleadings; and 4) changing procedure by creating a mechanism to allow the plaintiff to identify the target defendants prior to bringing the action, through some form of limited formal pre-filing discovery. The connection among all four is respect for the necessary and important link between substance and procedure, a recognition that an adjustment to one necessarily produces an adjustment to the other.\footnote{See Bone, supra note 52, at 889 (recognizing that “procedure has substantive effects”); Hyman, supra note 44, at 1391 (“Procedure is the ways and means of substantive law. By specifying the mechanisms for administrative enforcement and judicial review, procedure helps ensure the outcome dictated by the substantive law.”).} While any of these changes would be positive legal developments, only the pre-filing discovery procedure will guarantee that the whole class of constitutional
damages plaintiffs is ensured of an opportunity to pursue a remedy in those cases in which she does not know the responsible officers at the outset.

A. Suing Early

The simplest and most intuitive solution is for the plaintiff simply to sue earlier, rather than waiting until the end of the limitations period to go into court, as Mrs. Hall did.\textsuperscript{177} No substantive or procedural changes are necessary; the plaintiff simply must adjust her litigation strategy to account for her initial lack of knowledge as to the officers' identities and to leave enough time to discover those identities and amend the pleadings before the limitations period expires.

As Edward Cooper suggests, a plaintiff in this position knows that if she waits until the end of the limitations period to commence her action, she may be unable to take discovery, learn the names of the individual officers, seek leave from the court to amend, and file and serve the Amended Complaint, all before the period has run as to the individual officers.\textsuperscript{178} Arguably the burden should be on the plaintiff to commence her action well before the limitations period has expired when she knows that she does not know the identity of the proper person to be sued.\textsuperscript{179} There would be no need for the Amended Complaint to relate back, because it would be timely standing alone. Leave to file such a timely amended pleading almost certainly will be granted, given the general presumption in favor of permitting timely amendment "when justice so requires."\textsuperscript{180}

The early-commencement approach may be more workable since the 2000 amendments governing mandatory initial disclosure. In all

\textsuperscript{177} See discussion supra notes 1-5 and accompanying text.
\textsuperscript{178} See Cooper, supra note 20, at 4.
\textsuperscript{179} See id.; see, e.g., Wayne v. Jarvis, 197 F.3d 1098, 1104 (11th Cir. 1999) ("[Plaintiff] bears the consequences of his own delay. Had he filed earlier, he could have learned the deputy sheriffs' identities in time to amend his complaint before the statute of limitations ran.").
\textsuperscript{180} See Foman v. Davis, 371 U.S. 178, 182 (1962):
  In the absence of any apparent or declared reasons—such as undue delay, bad faith, dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."
  \textit{Id.}; Fed. R. Civ. P. 15(a) (providing that leave to amend "shall be freely given when justice so requires"); see also Rice, supra note 16, at 899 n.49. Note the difference between obtaining leave to amend under Rule 15(a) and relating back under Rule 15(c). While relation back presently is not permissible when the plaintiff does not know the target defendants' names at the outset, see discussion supra notes 106-49 and accompanying text, that lack of knowledge should be a sufficient justification for granting amendment when no limitations period is at issue.
district courts, each party must disclose at the outset of the case, without awaiting a discovery request, the name and other information about "each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses... identifying the subjects of the information." A party need disclose only those witnesses who will support a defense, those who possess favorable information.

The names of the officers who were involved in or present at a constitutional deprivation should be disclosed under the new Rule 26(a)(1) standard. Testimony and evidence from the officers who were present at the time of some unconstitutional conduct would support most defenses that the government entity might raise. Only those officers could testify as to whether the plaintiff's version of events is accurate or whether something else occurred that made the use of force reasonable.

Imagine that Mrs. Hall files her action one year after her husband's death and serves the Complaint one month later, leaving eleven months remaining on the incorporated Georgia two-year limitations period.

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181 See Fed. R. Civ. P. 26 Advisory Committee's note to 2000 Amendment (stating that the amended disclosure provisions were amended to establish a nationally uniform practice); see also Carl Tobias, The 2000 Federal Rules Revisions, 38 SAN DIEGO L. REV. 875, 881 (2001) [hereinafter Tobias, Revisions] (stating that the 2000 amendments made mandatory disclosure rules apply nationally in all federal district courts, a change from the opt-out permitted under the original initial disclosure rule and describing the "notion that the opt-out measure had additionally fractured the already fragmented condition of federal civil practice because the mechanism encouraged the district courts to institute local disclosure procedures that diverged from the federal disclosure strictures or to reject them altogether"). The original opt-out rule was the subject of a great deal of scholarly criticism. See Fed. R. Civ. P. 26 Advisory Committee's note to 2000 Amendment ("The Committee has discerned widespread support for national uniformity."); see, e.g., Paul D. Carrington, A New Confederacy? Disunionism in the Federal Courts, 45 DUKE L.J. 929, 947 (1996) [hereinafter Carrington, New Confederacy] ("While there are no visible benefits to most local rules, their vices are obvious. Local rulemaking dealing with matters that are also the subject of national rules is in almost every instance at odds with the primary aims of the Rules Enabling Act.").

182 See Fed. R. Civ. P. 26(a)(1)(E) (enumerating categories of cases excluded by mandatory disclosures, including cases brought by unrepresented persons and prisoners).

183 See Fed. R. Civ. P. 26(a)(1) (providing that mandatory disclosures must be made within fourteen days after a discovery conference); Fed. R. Civ. P. 26(f) (providing for parties to hold discovery conference at least twenty-one days prior to a Rule 16 Pre-Trial Conference with the district court).

184 See Fed. R. Civ. P. 26(a)(1)(A). This disclosure requirement is narrower than the 1993 rule, which required disclosure of identities of individuals "likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings." See Fed. R. Civ. P. 26 Advisory Committee's note to 2000 Amendment ("The initial disclosure obligation... has been narrowed to identification of witnesses and documents that the disclosing party may use to support its claims or defenses.").


186 For example, Baker County might want to argue that the force used was reasonable under the circumstances, because Robert Hall reached for a gun as he akefti the car, permitting the officers to defend themselves. See Screws v. United States, 325 U.S. 91, 93 (1945); Bracey, supra note 1, at 711. The three officers could provide evidence on that point.
Baker County, the only named defendant, might disclose the names of the three officers automatically within two or three months. Armed with the names, she now moves to amend to name Screws, Kelley, and Jones in an Amended Complaint that would be timely and her motion for leave to amend almost certainly will be granted.

But automatic disclosure of the identities is not guaranteed, given the narrow scope of evidence that "support[s]" a defense. If, like most government entity defendants, Baker County wants to argue that its policies and training programs were sufficient and unconnected to any unconstitutional conduct by its officers, it could support that defense without evidence or testimony from the officers themselves, in which case their identities need not be disclosed. Mrs. Hall still may learn the names through discovery requests directed to the government, where information sought merely must be "relevant" to a party's defense. However, it may take longer to obtain this information if she must submit, and await answers to, formal discovery, all while the limitations clock is ticking.

This may require Mrs. Hall to file the lawsuit even sooner than one year after the incident, in order to gain necessary additional time to engage in this discovery. Considering the possibility of delays in obtaining counsel, understanding her rights, and readying herself to litigate (not to mention time to grieve for her husband), such timing obligations become onerous. They become even more onerous in states that apply a one-year limitations period to § 1983, perhaps forcing the plaintiff to file within a few months of the event itself.

Moreover, it is intuitively unfair to make early filing the standard procedural command. As Chief Judge Becker of the Third Circuit argued, demanding that the plaintiff sue early in all cases in order to avoid the relation back problem effectively renders the § 1983 limitations period much shorter for a plaintiff who does not know her assailants than for plaintiffs with identical claims who happen to know the names of their assailants. The dichotomy becomes more troubling because the more severe the constitutional injury (if not the more severe the constitutional violation), the less likely that the victim will have been able to identify the officer and the more likely that she

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187 See Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . .").
188 See Golden Gate Hotel Ass'n v. City & County of San Francisco, 18 F.3d 1482, 1485 (9th Cir. 1994).
189 See Singletary v. Pennsylvania Dep't of Corr., 266 F.3d 186, 201 n.5 (3d Cir. 2001) ("There seems to be no good reason to disadvantage plaintiffs in this way simply because, for example, they were not able to see the name tag of the offending state actor.").
190 See id. at 190, 201 n.5; see also Felder v. Casey, 487 U.S. 131, 146 n.3 (1988) (stating that one problem with a state statute requiring § 1983 plaintiffs to file a notice of the claim with the municipality prior to filing suit was that it "drastically reduces" the length of the limitations period).
must sue early. The victim of an unconstitutional arrest, in which the
plaintiff merely asserts that there was no probable cause to take her into
custody or that her arrest violated the First Amendment, might have had
a better opportunity to see the officers’ name tag than the victim of
some rough handling during an arrest, who might have had a better
opportunity to see the name tag than the late Robert Hall.

The most problematic aspect of an early filing requirement is that
the resultant shortened filing period is inconsistent with the theory
underlying statutes of limitations. The length of any limitations period
is within the discretion of the legislature and ultimately arbitrary,
grounded, the Supreme Court has said, in convenience and expediency
rather than any reason or logic. But the Court has suggested that the
applicable limitations period incorporated into § 1983 must be
“responsive” to the characteristics of federal constitutional litigation and
must be of sufficient length to take into account “practicalities that are
involved in litigating federal civil rights claims and policies that are
analogous to the goals of the Civil Rights Acts.” The limitations
period must be long enough to accommodate the “considerable
preparation” involved in litigating civil rights claims, particularly in
recognizing the constitutional dimensions of the injury.

In other words, the borrowed limitations period cannot be so short
as to constrict the plaintiff’s ability to prepare her Complaint and
proceed with her action. It follows that the plaintiff controls when
within that period the action will be


their justification in necessity and convenience rather than in logic. They represent expedients,
rather than principles.”); see id. at 313 (“Statutes of limitations always have vexed the
philosophical mind . . . .”); Bauer, supra note 42, at 731 (“[T]he function of a statute of
limitations is to provide some admittedly arbitrary date by which the plaintiff must commence the
action.”).

192 Burnett v. Grattan, 468 U.S. 42, 50 (1984); see also Felder, 487 U.S. at 139-40 (“[W]e
disapproved the adoption of state statutes of limitation that provide only a truncated period
of time within which to file suit, because such statutes inadequately accommodate the
complexities of federal civil rights litigation and are thus inconsistent with Congress’
compensatory aims.”).

193 See Burnett, 468 U.S. at 50:

An injured person must recognize the constitutional dimensions of his injury. He must
obtain counsel, or prepare to proceed pro se. He must conduct enough investigation to
draft pleadings that meet the requirements of federal rules; he must also establish the
amount of his damages, prepare legal documents . . . . At the same time, the litigant
must look ahead to the responsibilities that immediately follow filing of a complaint.
He must be prepared to withstand various responses, such as a motion to dismiss, as
well as to undertake additional discovery.

the Appropriate Dilemma, 91 HARV. L. REV 356, 375 (1977) (arguing that a plaintiff has wide
choice of timing in bringing suit within the confines established by the applicable limitations
period).
investigate, prepare, and file her claim, if she elects to use it. The plaintiff perhaps obtains a strategic advantage from waiting the entire period; anticipating bringing a claim, she takes steps to preserve and gather favorable evidence while evidence favorable to the defendant deteriorates, with the defendant all the while unaware of the looming lawsuit or even of having done anything wrong.\textsuperscript{195} That, however, is an incidental benefit that runs with the length of the limitations period. The limitations period represents the point at which any delay, and any benefit to the plaintiff from that delay, becomes unreasonable or unfair.\textsuperscript{196}

Relation back is "intimately connected" with the statute of limitations, meaning their underlying policies run together.\textsuperscript{197} A procedural rule that shortens the period for an entire class of plaintiffs is inconsistent with limitations policies, denying plaintiffs the full statutory period to which they are entitled for filing the Complaint. Rather, consistency and uniformity between the statute of limitations and relation back demand that a plaintiff have the opportunity to use the entire limitations period while also having the opportunity to assert timely claims, either in the initial pleading or by relating back claims in an amended pleading. The point is that systematically demanding that a plaintiff such as Mrs. Hall sue early when she does not know the names of the individual officer defendants does not properly reconcile limitations and relation back. It therefore cannot provide a broad solution to the dilemma of John Doe pleading.

B. Changing Substantive Law

Our primary concern, at bottom, is the unique impact the narrow interpretation of Rule 15(c)(3) relation back has on § 1983, in light of the likelihood of a civil rights plaintiff not knowing the individual defendant and the complex liability scheme that demands a plaintiff discover that individual defendant.\textsuperscript{198} A second workable remedy would be to change substantive law, thereby eliminating the procedural

\textsuperscript{195} See Ochoa & Wistrich, supra note 99, at 484; id. at 484-85 (describing cases in which defendant does not realize that she did anything wrong and has no reason to preserve or gather evidence, while the plaintiff, aware of the injury, has a greater recollection of events and greater evidence to preserve and gather evidence, but rejecting the idea of a plaintiff lying in wait as "fanciful"); see also Redish & Phillips, supra note 194, at 375 (arguing that the choice of timing is one litigation option afforded to the plaintiff and denied to the defendant).

\textsuperscript{196} See Ochoa & Wistrich, supra note 99, at 483-84 (stating that one purpose "is to avoid making it unreasonably difficult for defendants to answer the claims against them" and to give both parties an equal opportunity to gather evidence while facts are fresh) (emphasis added).

\textsuperscript{197} See Fed. R. Civ. P. 15 Advisory Committee's notes to 1966 Amendment; see discussion supra notes 98-105 and accompanying text.

\textsuperscript{198} See discussion supra notes 150-74 and accompanying text.
problems created by the interaction between the rules and that substantive law.

A new liability regime for constitutional damages actions would emphasize the liability of the governmental entity and de-emphasize the liability of the individual officers. Both purposes of § 1983 (and Bivens)—compensation and deterrence—would be better served by making the government primarily responsible for damages caused by the unconstitutional conduct of its officers.199 Moreover, the near-universal acceptance of government indemnification of individual officers, pursuant to which government itself bears the cost of defense and judgment, logically suggests the next step of making government the named defendant, the proper and formally liable party.200

Indeed, John Jefferies suggests that having the government, rather than the officer, as the defendant affects how the jury views the case.201 It follows that having judgment entered and damages assessed against the government, rather than against the officer, affects the amount of governmental deterrence achieved by that judgment, producing greater institutional deterrence. Commentators thus urge respondeat superior liability, under which government will be liable for the unconstitutional conduct of its officers committed under color of law—that is, for the misuse of power in furtherance of or pursuant to official powers or apparent authority possessed by virtue of state law and made possible

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199 See Brown, supra note 6, at 1540 ("[G]overnment should be held accountable for the harms it causes.""); Gilles, supra note 2, at 29 (arguing that municipal liability is a precondition to meaningful recovery of damages for constitutional violations); id. at 32 (arguing that municipal liability for injuries caused by its officers makes it more likely that the municipality will take steps to remedy broader constitutional problems); see also Beermann, supra note 23, at 646 (arguing that broader municipal liability "would improve the prospects of compensation, since municipalities are more likely to have sufficient reachable assets than individual officers," which would improve deterrence by providing added incentives to municipality to prevent employees from committing constitutional violations); Brown, supra note 6, at 1523 ("[O]verdeterrence discourages risky conduct that might harm others in an unconstitutional fashion."); Lewis & Blumoff, supra note 38, at 826 ("[G]overnment entity defendants should be the chief and ultimate targets of § 1983 proscriptions . . . ."); Whitman, Government Responsibility, supra note 6, at 258:

[A] government defendant can fairly be required to be more responsive to broad community values in a way that would be an inappropriate imposition on private or individual conduct, for the government is charged to reflect the goals of society as a whole rather than the narrower self-interest permitted private actors. Id.; see discussion supra notes 36-42 and accompanying text.

200 See Beermann, supra note 23, at 646 (arguing that the numerous municipalities that indemnify their workers suggest the fairness of holding the employer responsible for employee misconduct in the scope of employment); Lewis & Blumoff, supra note 38, at 828 (arguing that "we ignore reality if we forget that the entity pays for the liability even if the individual defendant formally suffers the adverse judgment"); Meltzer, supra note 171, at 1359 ("Were indemnification universal and comprehensive, the resulting system would approximate direct governmental liability."); see discussion supra notes 171-73 and accompanying text.

201 See Jefferies, supra note 23, at 50 ("Juries confronting a flesh-and-blood defendant may be less quick to play Robin Hood.").
only because the individual wrongdoer is clothed with the authority of state law.\textsuperscript{202}

The effect of such a change on pleading and procedure will be to enable the plaintiff to name the government (a known and obvious entity) as the sole defendant, within the limitations period and the time required for service of process. There would be no need to identify or pursue individual officers, thus no need to sue John Doe, to use discovery to identify Doe, or to amend or relate back pleadings naming the individual officers. To the extent the plaintiff misnames the government entity in the original Complaint, for example by suing the Baker County Sheriff's Department rather than Baker County, it would be a mistake equivalent to suing the Department of Health and Human Services rather than the Secretary, the paradigmatic misnomer or misidentification in which the 1966 Amendments intended to permit relation back.\textsuperscript{203} The procedural benefits in unknown-officer cases provide an additional argument in favor of extending governmental entity liability for constitutional claims.

There perhaps is some question as to the source of these substantive changes, Congress or the courts. On one hand, although Congress retains the power to amend a statute, Michael Gerhardt argues that Congress has seemed disposed to leave the contours of § 1983 to the courts.\textsuperscript{204} There has been no groundswell of political support for statutory amendment, either from interested parties outside Congress or from within Congress itself.\textsuperscript{205} This suggests that legislative change is

\textsuperscript{202} See Beermann, supra note 23, at 666 ("[F]airness concerns, as well as the policies underlying § 1983, point toward a regime of vicarious liability."); id. ("The common law's widespread acceptance of vicarious liability exhibits a consensus that employers are responsible for the tortuous conduct of their employees . . . . Often municipalities are behind violations in ways that are difficult to prove and would not stand up to scrutiny under the Monell rule."); Lewis & Blumoff, supra note 38, at 828 ("[I]f the plaintiff can demonstrate a violation of her federal rights, the only remaining question we should ask before attaching liability to the entity is whether it can fairly be charged with the conduct."); id. at 836 (rejecting the need for a finding of entity fault, because neither the text nor history of § 1983 suggests that compensation should be limited only to violations that reflect "fault"); see also Monroe v. Pape, 365 U.S. 167, 184 (1961) (quoting United States v. Classic, 313 U.S. 299, 325-26 (1941)) (defining "under color of law").

\textsuperscript{203} See Fed. R. Civ. P. 15 Advisory Committee's notes to 1966 Amendment (stating that to deny relation back in cases in which the plaintiff has misnamed the government entity is "to defeat unjustly the claimant's opportunity to prove his case"); see discussion supra notes 93-97 and accompanying text.

\textsuperscript{204} See Gerhardt, supra note 6, at 686 ("Congress seems disposed to leave the future of municipal litigation under § 1983 for the federal courts to decide."); id. at 681 (arguing that the federal judiciary has largely dictated the fate of § 1983 municipal liability).

\textsuperscript{205} See id. at 680 ("[N]one of the groups one would expect to have an interest in amending § 1983 have moved to amend nor succeeded in reforming § 1983."); id. ("The failure to influence Congress is a function to some extent of states, cities, and other interested parties not having had such sufficient incentive for pressuring Congress to amend § 1983."); id. at 680 (arguing that there is an absence of the "means, pressures, or incentives for a critical mass of members of Congress to amend § 1983"); id. at 681 (noting that the federal judiciary has not lobbied Congress for reform of § 1983, as it did in other areas, such as habeas corpus).
unlikely. On the other hand, aside from the dissent of three Justices, there is no serious judicial movement towards reconsideration of Monell or its problematic applications.

Four substantive statutory or doctrinal changes would be necessary to resolve the disconnect between relation back and John Doe defendants in all constitutional damages litigation against all levels of government. Municipal, local, and county government liability requires the rejection of Monell and its progeny in favor of respondeat superior liability. Several commentators have argued that the doctrinal evolution of municipal liability since Monell has been grounded not in the text or history of § 1983, but purely on judicial concerns for the policy implications of imposing broader, vicarious liability on government entities. A more historically and textually justified regime may be in order.

As for states and state agencies, several judicial decisions must be overruled in order to recognize or establish both that state governments are persons for § 1983 purposes and that Congress in 1871 did, or Congress presently does, intend to abrogate state Eleventh Amendment immunity through § 1983. Both aspects of § 1983 must be changed

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206 See id. at 683 ("[T]he absence of any real reform of § 1983 suggests that considerable mobilization would have to occur and considerable pressure would have to be brought to bear in order to effectuate meaningful change.").
207 See Bd. of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 430-31 (1997) (Breyer, J., joined by Stevens and Ginsberg, JJ., dissenting); id. at 433 ("Monell's basic effort to distinguish between vicarious liability and liability derived from 'policy or custom' has produced a body of law that is neither readily understandable nor easy to apply."); see also Brown, supra note 6, at 1516 (noting doubt cast by three Justices on viability of current municipal liability regime); Gerhardt, supra note 6, at 676 (noting that three Justices found all the prerequisites for reconsidering Monell present, including the doubtfuls of the original principal and the complex body of law that had developed around the principal); see also Beermann, supra note 23, at 665 ("The rule is so complicated that a change to a more definite rule, whether expanding or shrinking municipal liability, could save litigation expenses.").
208 As Jack Beerman has argued, The Court's municipal liability jurisprudence differs in that it is dominated by an underdeveloped analysis of text and legislative history with little attention to either the common law background against which the statute was passed or more recent common law developments, both of which may point toward broad municipal liability for the constitutional violations of employees. In my view, this is because the Court is concerned about the policy implications of broad vicarious municipal liability. Beermann, supra note 23, at 627; id. at 642 ("[T]he Court has not offered a satisfactory justification for rejecting vicarious municipal liability."); Gerhardt, supra note 6, at 675 (describing the Brown Court's "rejection of any pretense that its analysis was grounded in the text or actual legislative history of § 1983"); see also Bandes, supra note 156, at 620 (arguing that commentators have shown that the Monell analysis is not clothed in text and history, but is "often frankly policy-oriented and strikingly uninterested in the legislative history or even the text of the statute"); cf. Gilles, supra note 2, at 49 ("[T]he 'custom' language of § 1983 has indeed been lost, and the very evils that it was designed to address—the unwritten codes of conduct that permeated local officialdom—are precisely the evils that are least accommodated by post-Monell bases for imposition of municipal liability.").
to make the State or agency vicariously liable for the unconstitutional conduct of state-level officers.\textsuperscript{210} Once again, these changes could come from the Supreme Court, although the direction of recent sovereign immunity doctrine suggests that a majority is not receptive to any broadening of state susceptibility to suit under federal law.\textsuperscript{211} Or they could come from Congress willing to reenact $\S$ 1983,\textsuperscript{212} expressly defining "person" to include states and state agencies and, exercising its power under section Five of the Fourteenth Amendment, explicitly abrogating Eleventh Amendment immunity and subjecting states as entities, to suit and damages liability for constitutional violations.\textsuperscript{213}

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\textsuperscript{210} Compare Brown, supra note 6, at 1516 (arguing that many revisions to Eleventh Amendment jurisprudence would be necessary to construct a consistent and workable approach to state liability), with Jefferies, supra note 23, at 59 (arguing that the main, beneficial effect of the Eleventh Amendment is the fact that it forces civil rights plaintiffs to sue state officers rather than the states themselves); see also Lewis & Blumoff, supra note 38, at 827 ("Conduct fairly attributable to government that causes the deprivation of federally secured rights should be subject to judicial oversight and a federal remedy in a proceeding under federal law.").


\textsuperscript{212} Congress did something similar in the Civil Rights Act of 1991. The Act amended 42 U.S.C. $\S$ 1981, which originally had been part of the Civil Rights Act of 1866. \textit{See} Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). Congress added sections (b) and (c) to $\S$ 1981, establishing that the term 'make and enforce contracts' includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Congress expressly intended to undo several restrictive Supreme Court decisions and to "expand[] the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Pub. L. No. 102-166, 105 Stat. 1071, $\S$ 3 (1991).

\textsuperscript{213} This would present the open question of whether, in light of the Supreme Court's recent, more-restrictive approach towards congressional power to abrogate the Eleventh Amendment, Congress could abrogate state sovereign immunity through this newly re-enacted $\S$ 1983. \textit{See} Karlan, supra note 39, at 193-94. Congress has the power under $\S$ 5 of the Fourteenth Amendment to enforce the provisions of the Amendment through "appropriate legislation." \textit{See} U.S. CONST. amend. XIV, $\S$ 5 (1868). The Court continues to insist that Congress retains power to abrogate Eleventh Amendment immunity acting through its $\S$ 5 power, so long as it stays within the scope of the substantive guarantees of the Fourteenth Amendment or shows "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." \textit{See} Bd. of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356, 365 (2001). A legislative enactment that regulates only conduct judicially defined to violate the
But that change is unlikely to get through Congress given the obvious federalism implications of subjecting states directly to suit and liability under § 1983.214

Finally, the United States must be made subject to suit for damages for constitutional violations committed by federal officers. The Supreme Court is unlikely to establish this change, given its disinclination to extend the judicially created Bivens remedy.215 Under FDIC v. Meyer,216 a Bivens action is not permitted against a federal agency, only against an individual federal officer.217 The purpose of Bivens, the Court insists, is deterrence of individual wrongdoing only, not agency wrongdoing.218 Meyer was unanimous and there is no suggestion, even from the dissenters in Correctional Services Corporation v. Malesko (in which the majority declined to extend Bivens to a private corporate entity operating a federal prison under contract with the federal government), that Bivens should reach the Constitution, one that merely supplies a vehicle for remedying a constitutional violation, should not require the same demonstration of need in order to hold states liable. Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1157 (2001); see also Karlan, supra note 39, at 192-93 (arguing that it is difficult to justify an Eleventh Amendment constraint on congressional power to enforce the type of discrimination the Constitution already prohibits). A statute reaching only instances of actual unconstitutional conduct is more easily viewed as "remedial," without requiring any additional congressional showing. See Meltzer, supra note 171, at 1348. For example, Daniel Meltzer suggests that if Congress were to enact a statute making it a federal crime for a person acting under color of state law to participate in a lynching (which Meltzer views as a clear due process violation), that defendant could not defend on the ground that lynching is not widespread or persistent. See id.

That is precisely what a re-enacted § 1983 would be, at least as applied to constitutional claims—a congressional enactment prohibiting precisely and only the conduct that the Fourteenth Amendment (and the incorporated provisions of the Bill of Rights) already prohibits. There would be perfect congruence and proportionality between what the statute prohibits and what the Constitution prohibits. For the Court to hold that such a version of § 1983 impermissibly abrogates the Eleventh Amendment would be to acknowledge, effectively, that Congress never, under any circumstances, can abrogate state sovereign immunity, even when exercising § 5 powers. Cf. Karlan, supra note 39, at 194 ("[N]othing in Will suggested that Congress would have lacked the power to include states within § 1983's purely corrective ambit."); see Nevada Dep't of Human Resources v. Hibbs, 123 S.Ct. 1972, 1984 (2003) (holding that states can be sued for damages under the Family and Medical Leave Act, because the Act is congruent and proportional to the remedial object of preventing unconstitutional gender discrimination).

214 See Gerhardt, supra note 6, at 679-80 (emphasizing the federalism concerns raised by any proposal subjecting state and local governments to suit that might deter a majority in Congress from amending § 1983 to broaden government entity liability).

215 See Corr. Serv. Corp. v. Malesko, 534 U.S. 61, 68 (2001) ("We have consistently refused to extend Bivens liability to any new context or new category of defendants."); id. at 75 (Scalia, J., concurring) (describing Bivens as a "relic of the heady days in which this Court assumed common-law powers to create causes of action").


217 See id. at 484-86.

218 See Malesko, 534 U.S. at 70 ("The purpose of Bivens is to deter individual federal officers from committing constitutional violations. Meyer made clear that the threat of litigation and liability will adequately deter federal officers . . . ."); id. ("Meyer also made clear that the threat of a suit against an individual's employer was not the kind of deterrence contemplated by Bivens.").
federal government and federal agencies. Once again, it would be up to Congress to permit such a suit against the United States or an agency, by waiving federal sovereign immunity through an amendment to the Federal Tort Claims Act, which currently prohibits damages suits against the United States to remedy constitutional violations by federal officers.

C. Changing Procedure: Rule 15 and Relation Back

If substantive liability structures of § 1983 and Bivens remain unchanged, we must alter procedural rules to handle the unknown defendant problem in light of that substantive law. There must be some procedural mechanism that will enable a § 1983 or Bivens plaintiff to identify and name the individual officers as defendants in the Amended Complaint, while avoiding the statute of limitations. The most obvious starting point is Rule 15, which controls the amending of pleadings and the intersection of pleading and limitations periods.

1. Re-interpret Rule 15(c)(3)

One approach is to re-interpret the present language of Rule 15(c)(3) to recognize that a "mistake concerning the identity of the party to be sued" can include a lack of knowledge or ignorance concerning that identity. Courts and commentators rejecting this interpretation of mistake simply have declared that lack of knowledge is not a mistake. However, it is not clear why this is so. A reasonable
definition of the word mistake might include lack of knowledge or ignorance as the cause of an unintentional or wrong action or statement.223 Rule 15(c)(3)(B) could be interpreted as permitting relation back where the to-be-added defendant knew that, but for the plaintiff's unintentional and wrong action in not naming the defendant in the original pleading due to a lack of knowledge or ignorance concerning his identity, that defendant would have been named in the first instance. Mrs. Hall did not name Screws, Kelley, or Jones in her original Complaint because she did not know their names. This was a mistake concerning their identities, in the sense of being a wrong action proceeding from inadequate knowledge or ignorance as to those identities. Allowing relation back in Doe cases thus comports with the language of Rule 15(c)(3)(B), subject to notice requirements.224

One still could argue that lack of knowledge or ignorance does not comport with the most common understanding of mistake.225 It then becomes relevant that, to paraphrase Chief Justice Marshall, it is a rule of procedure we are expounding.226 Commentators have argued that courts (or at least the Supreme Court) retain greater freedom and should be less bound by plain meaning in interpreting and applying procedural rules than in interpreting and applying congressionally enacted substantive statutes.227 This derives from the Court's primary responsibility under the Rules Enabling Act for promulgating the rules of procedure.228 The Court created the rules it is interpreting, meaning

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223 See WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1446 (1966) (defining mistake as "wrong action or statement proceeding from faulty judgment, inadequate knowledge, or inattention") (emphasis added); BLACK'S LAW DICTIONARY 693 (6th ed. abridged 1990) (defining mistake as "some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence") (emphasis added); id. ("It may arise either from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence.") (emphasis added).

224 See discussion infra notes 237-50 and accompanying text; see discussion supra notes 86-92, 98-105 and accompanying text.

225 See Engrav, supra note 31, at 1585.


227 See Moore, supra note 42, at 1040 ("[T]he Supreme Court should take a more activist role in interpreting the Federal Rules by including an analysis of purpose and policy and should refrain from excessive reliance upon the plain meaning doctrine."); see also Bauer, supra note 42, at 720 ("[C]ourts should recognize that their role is different from the one they play in interpreting statutes or in applying substantive common law doctrines . . ."); Joan Steinman, After Steel Co.: "Hypothetical Jurisdiction" in the Federal Appellate Courts, 58 WASH. & LEE L. REV 855, 945-46 (2001) ("[A]s the Court's creation, the Rules should be subject to judicial relaxation . . .").

228 See Moore, supra note 42, at 1049 (stating that Congress has given the Supreme Court the power to promulgate rules of procedure, but has retained the power to consider and reject procedural rules of which it does not approve). Under the Rules Enabling Act, the Supreme Court promulgates rules of process and procedure, as recommended by the standing Rules Advisory Committee. See 28 U.S.C. § 2072 (a)(1) (2003). The Court transmits each proposed rule to Congress by May 1 and the rule automatically takes effect on December 1 of that year, unless Congress by law disapproves of the proposed rule. See id. § 2074(a) (2003). Congress
there are fewer separation of powers concerns with the Court taking a more expansive interpretive role.\textsuperscript{229}

These commentators further suggest that the Court must interpret the text of one rule in light of its conformity with other aspects of that rule and the rules as a whole.\textsuperscript{230} A particular rule also should be read in light of the systemic goal of fair, efficient, and just litigation.\textsuperscript{231} The purpose of Rule 15(c) is to ensure that an action proceeds if the intended defendant receives timely notice of the pendency and nature of the action against him and to ensure that the merits of the claim against the target defendant are not foreclosed.\textsuperscript{232} With this purpose in mind, courts are justified in understanding mistake more broadly, in furtherance of the rule’s purpose of avoiding the limitations bar and enabling the plaintiff to proceed in spite of an initial procedural error in identifying the target defendant. This guarantees the benefit of relation back to all plaintiffs, including those forced to resort to Doe pleading, because the circumstances underlying the events giving rise to the cause of action prevent her from knowing that identity at the outset.

This interpretive leeway also permits the Court to apply rules in a way that accounts for the changed paradigm of civil litigation reflected in § 1983 and \textit{Bivens}.\textsuperscript{233} Section 1983 cases demand an interpretation of Rule 15(c) that recognizes that individual officers, the primarily liable defendants, are more likely to be unknown and that civil rights plaintiffs must be able to identify and proceed against those individual officers without the burden of a strict limitations bar.\textsuperscript{234} Interpreting “mistake” to include lack of knowledge or ignorance better fits the new paradigm by making relation back more readily available to a common class of civil rights plaintiffs.

\textsuperscript{229} See Moore, supra note 42, at 1055-56. Although such a statute is procedural, the Court’s interpretation would be different from its interpretation of rules.

\textsuperscript{230} See Moore, supra note 42, at 1085 (“[B]ecause the Court is interpreting Rules that are supposed to be at least in part of its own work product, such interpretation does not implicate congressional powers in the way that statutory interpretation does.”); id. at 1092 (arguing that there is no separation of powers problem if the Court considers purpose and policy in interpreting the rules, because the Court is exercising its own Article III powers and not interfering with Congress’s own separate powers; see also Bauer, supra note 42, at 720 (“[T]he courts are interpreting standards which the Supreme Court itself has promulgated.”); Steinman, supra note 227, at 945-46 (“[T]he separation of powers issues . . . are not so acute if federal courts take some liberties with Federal Rules.”).

\textsuperscript{231} See id. at 1084-85; see also Bauer, supra note 42, at 720 (“[T]he federal courts are fully justified in taking an expansive view of the Federal Rule under scrutiny, giving it a liberal reading if that is required to fulfill the purposes of the Rule or to do justice between the parties before the court.”). \textit{But see} Johnston, supra note 42, at 1375-76 (“References to the Rule 1 trinity and ‘liberal’ interpretations of other Rules to secure resolution on the merits can be misleading . . . .”).

\textsuperscript{232} See Bauer, supra note 42, at 731.

\textsuperscript{233} See discussion supra notes 47-73 and accompanying text.

\textsuperscript{234} See discussion supra notes 151-74 and accompanying text.
2. Amend Rule 15(c)(3)(B)

The most commonly proposed solution to the John Doe problem among judges and commentators would amend Rule 15(c)(3)(B) expressly to permit relation back where there was either a mistake or a lack of information or knowledge or ignorance concerning the identity of the proper party. Edward Cooper has questioned just how many cases such an amendment, attractive though it may be, will reach.

It will reach some cases, of course, most importantly Mrs. Hall's. Her original Complaint named Sheriff's Deputies John Doe 1-3 as defendants because Mrs. Hall did not know who the three officers were. She was not present at the incident at issue and her husband, who obviously was present, is dead. The identities of the arresting officers are known to the County, supervising officers, and the arresting officers, none of whom are forthcoming. This is reasonable ignorance or lack of information as to the proper party, satisfying an amended rule.

3. The Good and the Bad of Expanding Rule 15

a. Operation of Rule 15

The real effect of an amended or re-interpreted mistake clause will be to shift the analytical focus of Rule 15(c)(3) to the notice element, to the question of whether the target defendants received notice within the requisite time frame of 120 days from the filing of the original Complaint that the lawsuit had been instituted and that they were

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235 Cooper, supra note 20, at 9 (proposing amendment to provide for relation back when the defendant to be added "knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party the action would have been brought against the party") (emphasis added); Rice, supra note 16, at 953 (proposing amendment to "but for a mistake concerning the identity of the proper party or the alleged lack of knowledge as to the proper party's identity") (emphasis added); Engrav, supra note 31, at 1586 (proposing amendment to "knew or should have that, but for the movant's lack of knowledge of the proper party, or a mistake concerning the identity of the party") (emphasis added); see also Singletary v. Pennsylvania Dep't of Corr., 266 F.3d 186, 202 n.5 (3d Cir. 2001) (urging the Rules Advisory Committee to amend Rule 15(c)(3) to adopt Cooper's proposed amendment). But cf. Moore, supra note 42, at 1040 (arguing that a more activist judicial role in rule interpretation avoids unduly stingy applications of rules, in turn voiding unnecessary amendments). As this article went to press, the Rules Advisory Committee, acting on Chief Judge Becker's suggestion, was exploring amendments to Rule 15, including expressly allowing relation back where the identity of the proper party was unknown.

236 See Cooper, supra note 20, at 5.

237 See Fed. R. Civ. P. 15(c)(3) (requiring notice "within the period provided by Rule 4(m) for service of the summons and complaint"); Fed. R. Civ. P. 4(m) (providing for service within 120 days after filing of the Complaint).
intended targets of that lawsuit. This is precisely where the analytical focus should be, given the intimate connection between statutes of limitations and relation back and given that notice to the defendant is the ultimate theoretical touchstone of both.\textsuperscript{238} Indeed, the framers of the 1966 amendment argued that relation back should be proper whenever the to-be-added defendant was placed on notice of the claim within the required period.\textsuperscript{239}

Notice demands that the trial court, in deciding whether to permit an amended pleading to relate back, engage in a discretionary, fact-intensive inquiry as to what the intended defendant knew about the filing of the lawsuit and his potential role in that lawsuit and when he knew it.\textsuperscript{240} Notice in turn demands that the plaintiff plead the John Doe defendant with some level of specificity, describing who the individuals were, what they did, and the time, place, and manner in which events occurred.\textsuperscript{241} The key, Carol Rice argues, is that the Complaint should enable someone familiar with the events at issue, particularly John Doe himself, to recognize John Doe.\textsuperscript{242}

Courts also may continue to impute notice from the government entity or supervising officers to the individual rank-and-file officers. Imputation occurs most frequently when the government and the individual officers share counsel, as generally occurs in § 1983 actions.\textsuperscript{243} An identity of interest between the government and

\begin{footnotesize}
\textsuperscript{238} See Bauer, supra note 42, at 731 (arguing that the purpose of Rule 15(c) is "to ensure that an action should proceed if the intended defendant receives timely notice of the nature and pendency of the action"); Cooper, supra note 20, at 3 (arguing that the two types of notice under Rule 15 respond to the two major purposes of statutes of limitations); Ochoa & Wistrich, supra note 99, at 487 (arguing that the policy of placing plaintiffs and defendants on equal footing, by providing the defendant with effective notice of the claim and the opportunity to protect his interests, shapes the limitations system, including the doctrine of relation back); Rice, supra note 16, at 947 ("[T]he federal court in most cases must insist that the defendant have had timely notice that he is the intended defendant."); see also Singletary, 266 F.3d at 194 ("Notice is the main issue . . . ."); see discussion supra notes 86-92, 98-105 and accompanying text.

\textsuperscript{239} See Fed. R. Civ. P. 15 Advisory Committee's notes to 1966 Amendment (stating that relation back should be proper where the government defendant had knowledge of the institution of the action); see also Ochoa & Wistrich, supra note 99, at 487 (arguing that relation back of amendments depends "upon a showing that the plaintiff has in some effective manner placed the defendant on notice of the claim").

\textsuperscript{240} See Rice, supra note 16, at 928 (arguing that timely notice requires a factual determination in each case).

\textsuperscript{241} See id. at 948-49 (arguing for Doc pleadings that distinguish the intended defendant in some way, including descriptions of the conduct at issue).

\textsuperscript{242} See id. at 948 ("The key is to put the intended defendant on notice, if he were to read the complaint, that he is John Doe."); see discussion supra notes 110-13 and accompanying text.

\textsuperscript{243} See Jefferies, supra note 23, at 50-51 (noting policies of most state and local governments to defend civil rights suits against officers, but stating that officers often distrust the government attorney and seek to use their own counsel); see Singletary, 266 F.3d at 166 (endorsing shared attorney method of imputing notice); Jacobsen v. Osborne, 133 F.3d 315, 320 (5th Cir. 1998) ("[N]otice may be imputed to the new party through shared counsel.") (citations omitted). Compare Jacobsen, 133 F.3d at 320 (holding that same-counsel test satisfied where the original Complaint was served on City Attorney, who represented City and named officers and would
individual officers also may provide a basis for imputing knowledge, where the interests of both are so closely related that the institution of the action against one provides notice to the other.244

Moreover, the entity defendant must, prior to responding to the Complaint via an Answer or pre-Answer motion to dismiss, conduct a reasonable investigation of the facts alleged in the Complaint and of its planned admissions, denials, and defenses.245 Most responses or defenses must consider what actually happened during the occurrence in question, requiring that the government’s attorney communicate with the officers involved and learn their version of events and their explanation for their conduct. The government’s attorney likely will show the officers a copy of the Complaint and the specific facts alleged by the plaintiff, including any detailed descriptions of the Doe officer defendants. This discussion and interview, which certainly should occur within 120 days of the filing of the Complaint (since the government ordinarily has only twenty days to respond to the Complaint), provides the to-be-added officer defendants with much of the informal notice required under Rule 15(c)(3)(A). In Mrs. Hall’s

244 See Singletary, 266 F.3d at 197 (holding that shared counsel does not satisfy notice requirements when counsel’s representation of the intended defendant did not commence within the 120-day period set in Rule 15(c)(3)); see discussion supra notes 89-91 and accompanying text.

245 See Fed. R. Civ. P. 11 (b) (requiring that party filing pleading or motion certify that it made “an inquiry reasonable under the circumstances”); Fed. R. Civ. P. 11(b)(2) (requiring that claims, defenses, and legal contentions are warranted by existing law or by a nonfrivolous argument for extension of law) Fed. R. Civ. P. 11(b)(4) (requiring that the “denials of factual contentions are warranted on the evidence, or, if specifically so identified, are reasonably based on a lack of information or belief”); Fed. R. Civ. P. 8(b) (“A party shall state in short and plain terms the party’s defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies.”).
case, for example, the officers may argue that Robert Hall reached for a gun as he got out of the car.246 Once the officers learn of the lawsuit arising from a particular incident or set of facts in which they were involved, they should understand that a plaintiff would want to identify and proceed against them.247

An expanded understanding of Rule 15(c)(3) should be more effective under the 2000 amendments to Rule 26(a), which require that all parties immediately and without request exchange the names of individuals likely to have discoverable information that the defendant may use to support its defenses.248 The individual officers should be witnesses possessing information supporting most defenses that the government will assert, requiring that their names be disclosed.249 Moreover, plaintiff's counsel likely will notify government counsel that individual officers are target defendants, which should prompt government counsel to discuss the Complaint with the officers, thereby providing informal notice. In any event, the names of the officers will be revealed through ordinary discovery, since the officers' names and the subject of their testimony will be relevant to the claims and defenses in the action.250

b. Some Problems with Relying On Rule 15

Ultimately, amending or re-interpreting mistake in Rule 15(c)(3)(B) is appealing, but will not resolve the problem of John Doe pleading in § 1983 and Bivens cases. A Rule 15 approach is effective only to the extent that the plaintiff has some known entity or individual which she can name and serve as a proper defendant in the original Complaint along with specifically described Doe defendants.251 That named defendant likely will be the relevant government entity, such as Baker County, or a known supervisory officer, such as the Sheriff of Baker County.

However, as a practical matter, the option of suing the government entity will not be available in most actions. The government cannot be named as a defendant in any case involving unconstitutional conduct by

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246 See Screws v. United States, 325 U.S. 91, 93 (1945); Bracey, supra note 1, at 711.
247 See Donald v. Cook County Sheriff's Dep't, 95 F.3d 548, 557 (7th Cir. 1996) ("[P]ublic officials are charged with the knowledge that they are the appropriate targets of § 1983 suits.").
249 See discussion supra notes 181-88 and accompanying text.
250 See Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . ").
251 See Cooper, supra note 20, at 5 ("[T]here will be cases where the defendant has a claim against an identifiable adversary strong enough to meet the Rule 11 test, and can proceed to attempt to use discovery to identify the more important defendants.").
federal- or state-level actors.²⁵² A municipal or county government may be sued, but its liability has been so circumscribed that suing the government likely is futile. As Myriam Gilles argues, an allegation of failure to train or supervise generally does not fit the underlying facts, because in the "vast majority of constitutional wrongs, it is simply not true that additional training (or other measures, such as improved hiring or supervision practices) would have prevented the injury."²⁵³ As a general rule, the official action model for municipal liability fails to capture most unconstitutional conduct of lower-level officials.²⁵⁴ Most unconstitutional acts are not necessarily committed by rank-and-file officers with a history of similar past actions of which supervisors or policymakers were aware.²⁵⁵

The reality of the § 1983 landscape is that the government entity, even a county or local government, rarely will be responsible for its officers’ unconstitutional conduct; the locus of ultimate liability remains on individual rank-and-file officers.²⁵⁶ It follows that the officer likely will be the sole defendant at the pleading stage.²⁵⁷ The entity is, ultimately, involved not because it might be legally responsible for the violation of the plaintiff’s rights, but only for purposes of answering discovery as to the identities of the more important individual officers who might be responsible. Pleading rules permit a plaintiff to name as a party defendant only those individuals or entities whom she has a good-faith basis for arguing might bear legal liability for her injuries.²⁵⁸

But without a known entity to sue at the outset, there is no way for a plaintiff to sue John Doe or utilize relation back. A plaintiff cannot properly commence the action against John Doe alone.²⁵⁹ If the only

²⁵² See discussion supra notes 165-67 and accompanying text.
²⁵³ See Gilles, supra note 2, at 44.
²⁵⁴ See id. at 41. It is worth noting one change to Screws v. United States in setting out the guiding scenario for this Article. Screws was, in fact, the Sheriff of Baker County, the final policymaker for the County in law enforcement matters, whose unconstitutional actions in the arrest, beating, and death of Mr. Hall would bind the County. See Bd. of County Comm’rs of Bryan County v. Brown, 520 U.S. 397, 408 (1997). If Screws is the Sheriff (rather than a Deputy, as in our scenario), Mrs. Hall’s municipal liability claim is on firmer footing, because one of the officers involved in the violation is himself the County policymaker.
²⁵⁵ See id. at 39.
²⁵⁶ See Brown, supra note 6, at 1507 (arguing that in the ordinary case “any action for damages will proceed only against the errant police officer”); Gerhardt, supra note 6, at 670 (“[T]he Court has gone to great lengths to fit the individual tort model to its analysis in municipal liability cases . . . .”); Jefferies, supra note 23, at 59 (“[T]he exception of municipal liability is exactly that—a narrow deviation from the generally applicable rule of liability based on fault.”); see discussion supra notes 170-74 and accompanying text.
²⁵⁷ See Jefferies, supra note 23, at 59 (arguing that the § 1983 liability regime forces civil rights plaintiffs to sue state officers rather than states themselves).
²⁵⁸ See Fed. R. Civ. P. 11(b)(3) (requiring that pleadings “have evidentiary support” or “are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery”).
²⁵⁹ See Cooper, supra note 20, at 5 (citing Petition of Ford, 170 F.R.D. 504 (M.D. Ala. 1997))
defendant is unknown, there is no one on whom to serve the Complaint; without service, discovery obligations are not triggered. Only parties are involved with Rule 26(a) initial disclosures and those disclosures cannot be made until the plaintiff and served defendants confer to discuss and develop a proposed plan for conducting discovery. No discovery of information from any source will occur, without a court order, until that discovery conference. In short, a plaintiff cannot use discovery to identify the target officers unless some known named defendant is served with the Complaint and given the opportunity to appear, file a responsive pleading or motion, and participate in the early stages of discovery.

There are three ways in which a plaintiff arguably might sue John Doe only and still be able to learn those defendants' true identities. Each might work with broader relation back under an amended or re-interpreted mistake clause. None, however, functions effectively enough in all civil rights actions.

First, a plaintiff could follow the course in Bivens, where the plaintiff named only "Six Unknown Named Agents of the Federal Bureau of Narcotics," not the United States or a federal agency; he got away with it when the district court ordered the Complaint served on "those federal agents who it is indicated by the records of the United States Attorney participated in the ... arrest of the [plaintiff]," resulting in service on five agents. Most plaintiffs do not get this much help from the district court. In any event, it would be unwieldy for a district court to do this in every unknown-defendant § 1983 action. Making this practice the systemic norm would shift responsibility for service of the summons and Complaint from the plaintiff to the

(260 See Fed. R. Civ. P. 26(a)(1) (providing for disclosures within fourteen days of a discovery between the plaintiff and all parties served with the Complaint); Fed. R. Civ. P. 26(f) (setting forth requirements of discovery conference between parties, including need to agree as to scope and timing of discovery); see also Fed. R. Civ. P. 26 Advisory Committee's notes to 1993 Amendments ("A major purpose of the revision [to the rule on mandatory disclosures] is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information . . . ").

261 See Fed. R. Civ. P. 26(d) ("Except . . . when authorized . . . by order . . . , a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).").

262 See discussion supra notes 222-36 and accompanying text.


264 See id. at 390 n.2; see also Rice, supra note 16, at 887 ("Only by filing suit against 'unknown' defendants was Bivens able to identify, through court order, his alleged wrongdoers by their proper names."); cf. King v. One Unknown Fed. Corr. Officer, 201 F.3d 910, 912 (7th Cir. 2000) (plaintiff sued Unknown Corrections Officer; after in camera review of prison records, court ordered Complaint served on particular officers).

265 See Rice, supra note 16, at 897.

266 See Fed. R. Civ. P. 4(c)(1) ("The plaintiff is responsible for service of summons and
district court and, as in *Bivens*, to a government entity that is not an actual party to the action. Courts likely will be reluctant to assume this task.

Second would be a variation on the *Bivens* approach. A plaintiff could file a Complaint naming only Sheriff's Deputies John Doe 1-3 as defendants, but not serve it on anyone at the outset (she has 120 days to effect service\(^{267}\)), then move immediately for a court order permitting her to seek non-party discovery from the government.\(^{268}\) The plaintiff, pursuant to a discovery subpoena, may depose the government entity to learn the names of the officers whom government records indicate were involved in the incident at issue or request production of government records on this point.\(^{269}\) The plaintiff must show good cause for this early discovery, although the need to discover the responsible defendants in order to serve the Complaint should be sufficient. Assuming that the government responds to the discovery requests in reasonable time, the plaintiff then could amend her pleading as a matter of right to name the now-known officers as defendants.\(^{270}\) The Amended Complaint, naming the responsible officer defendants only, is served on those officers and becomes the controlling, timely filed pleading.

This option avoids the problem of a plaintiff suing a likely non liable known party solely to use it as a discovery source.\(^{271}\) But it demands closer-than-usual judicial involvement in the early stages of discovery. A court must order non-party discovery before any defendant has been served, much less appeared in the case or conferred with the plaintiff as to the scope and manner of discovery. This runs counter to the tenor of party-managed early disclosure and discovery, which depends on a cooperative exchange of information relevant to claims or defenses at the outset of litigation, controlled by the parties and without judicial intervention.\(^{272}\)

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\(^{267}\) See Fed. R. Civ. P. 4(m).

\(^{268}\) See Fed. R. Civ. P. 26(d) (permitting discovery prior to the parties' discovery conference on order of the court).

\(^{269}\) See Fed. R. Civ. P. 45(a)(1)(C) (providing that non-party discovery subpoena shall "command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things").

\(^{270}\) Because the initial Complaint against John Doe was not served, no responsive pleading was filed or served. The plaintiff retains her one amendment as a matter of course. See Fed. R. Civ. P. 15(a) ("A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served...").

\(^{271}\) Such an approach has been used in many defamation actions against anonymous Internet speakers. The ISP is not liable for the defamatory speech of its users, thus defamed companies sue the unknown speaker as John Doe, then subpoena the ISP as a non-party to compel it to reveal the names and addresses of its members and users. See Lidsky, *supra* note 150, at 872.

\(^{272}\) As Professor Resnik explained:

> Unless and until one of the parties requested some sort of judicial action (granting a
Moreover, there is no guarantee that the individual officers would receive the required Rule 15(c)(3) notice of the action and their role in it, which calls this approach into question. The government, in order to respond to a non-party discovery subpoena, need not communicate with the officers or inform them of the lawsuit. This contrasts with the government’s obligation as a party defendant to investigate claims and defenses prior to responding to a pleading, which almost certainly entails some discussion with the officers involved. There is a chance that the officers will learn of the action through the media, the rumor mill, or other informal means, but no certainty.

Third, one perhaps could argue that a § 1983 plaintiff should be able to serve a Deputy John Doe Complaint on the relevant government entity (even if the entity is not a party to the action) or on the government attorney. The final paragraph of Rule 15(c)(3) provides that service of process on, inter alia, the United States Attorney, Attorney General’s designee, Attorney General of the United States, or on an agency or officer who would have been a proper defendant if named, satisfies the notice requirements with respect to the United States or any agency or officer to be brought in as a defendant. In other words, service on the government or its attorney establishes notice to the Secretary who should have been sued.

That provision was geared towards a particular class of case—social security benefits actions, in which, although the Secretary was the proper named party defendant under controlling law, the plaintiff named the United States, the Social Security Administration, or some other improper defendant. The Secretary stood in the precise shoes of the United States and the agency; the action at issue was one to recover benefits wrongfully denied by someone acting in a decision making capacity on behalf of the agency, which benefits would be paid from the federal treasury. Naming a defendant other than the Secretary departed from the formalities demanded by Congress in creating the cause of action, but everyone at the top of the agency knew that the action had

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motion for summary judgment, a date for trial, a pretrial conference), most judges did not intervene during the pretrial stage. The parties might undertake discovery, negotiate settlement, or let the case lie dormant for years—all without judicial scrutiny.

Resnik, Managerial Judges, supra note 8, at 384; see also Fed. R. Civ. P. 26 Advisory Committee’s notes to 2000 Amendments (describing amendments to Rule 26 creating two types of discovery, narrower “party-controlled discovery” and broader “court-controlled discovery”); Thomas D. Rowe, Jr., A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery, 69 TENN. L. REV. 13, 17 (2001) [hereinafter Rowe, Square Peg].

273 See discussion supra notes 245-50 and accompanying text.


275 See Brussack, supra note 16, at 671; see discussion supra notes 93-97 and accompanying text.

276 See 42 U.S.C. § 405(g) (2000) (granting federal court jurisdiction to hear appeals from denial of social security benefits, where Secretary is named as defendant and applicant files
been filed and what it was about—judicial review of the administrative decision.

There is no such clarity or connection under current § 1983 doctrine. The potential legal responsibility of the individual officer is distinct from that of the government. The presumptive constitutional case has the officer exercising power conferred by state law, but acting entirely on his own in causing the constitutional deprivation. Unlike social security cases, there is no liability overlap between the entity and the individuals. Simple service on the government alone cannot be presumed to confer notice to a rank-and-file officer of the filing of the action or of his role in it. Rather, the officer obtains notice through an additional step—actual discussion with higher officials or attorneys in which the officer is shown the Complaint, told of its contents, or asked to give his side of the story. That additional step need not and may not occur when the government is merely a non-party discovery source. And we cannot infer notice under the last part of Rule 15(c) in these circumstances.

Finally, more generally, exclusive reliance on Rule 15 to handle John Doe cases demands a discretionary, fact-intensive determination by the district court as to what the target defendants knew about the institution of the lawsuit and their role in that lawsuit, when they knew it, and whether or not they will be prejudiced. This drags the court into what Harold Lewis calls "procedural litigation," satellite litigation of ancillary issues, such as notice, that consume litigation resources, cause delay, and ultimately turn on complicated and discretionary factual determinations by the district court that create a risk of inconsistent or divergent results across cases.

c. Mrs. Hall’s Action Under Rule 15(c)

Mrs. Hall does have one of the actions that will benefit from a new

\[\text{appeal within 60 days).}\]

\[\text{277 See Gilles, supra note 2, at 31-32.}\]

\[\text{278 The fact that the government, by contract, defends and indemnifies the officers does not create this overlap in liability nor does it impose a duty on the government to notify the officers of the lawsuit.}\]

\[\text{279 See Rice, supra note 16, at 928 ("[T]imely notice requires a factual determination in each case.").}\]

\[\text{280 See Lewis, supra note 16, at 1559.}\]

\[\text{281 See Bone, supra note 52, at 918 ("To be sure, trial judges are better informed about individual cases, but vesting broad (and essentially unreviewable) discretion in the trial judge undermines predictability and consistency and raises its own legitimacy concerns."); Lewis, supra note 16, at 1560 (criticizing decisions that turn on "complicated, unprincipled "balancing" of multiple weighted factors"); Resnik, Failing Faith, supra note 45, at 548 ("I am deeply skeptical of the capacity of individual judges to craft rules on a case-by-case basis.").}\]
interpretation of or amendment to Rule 15(c)(3). Because her lack of knowledge or ignorance as to Screws, Kelley, and Jones is either included in “mistake” under the reinterpreted current language or a permissible element under an amended rule, the court will turn to notice, of what Screws, Kelley, and Jones knew about the lawsuit and when they knew it.

Notice requirements were satisfied. At the outside, Screws, Kelley, and Jones were served with Mrs. Hall’s Motion for Leave to Amend, which contained a copy of the proposed Amended Complaint naming all three as defendants, on the 120th (and final) day after initiation of the lawsuit, which provides sufficient notice. Mrs. Hall learned the officers’ names primarily because the early steps of litigation moved relatively quickly. Baker County filed its Answer quickly and was forthcoming with Rule 26(a) disclosures. The attack on Robert Hall and the resulting lawsuit perhaps received some media attention, from which the three would learn that a lawsuit had been filed arising from an incident in which they knew they were involved.

Counsel for Baker County represents the three officers, permitting the imputation of notice. The defendants likely read a copy of the original Complaint, which contained sufficient descriptions of the unknown defendants to permit Screws, Kelley, and Jones to know that each is John Doe. Having received notice that a § 1983 lawsuit against some described officers had been filed, they should have been on notice that they are proper targets of that lawsuit. Finally, the County filed an Answer within fifty days of the original Complaint being served, which necessarily means the County reasonably investigated the incident within that time, which should have included discussions with Screws, Kelley, and Jones, from which the officers received notice of the action, its subject matter, and their status as target defendants.

Either of the proposed changes to the mistake clause forces the district court to grapple with notice, the real issue underlying statutes of limitations and relation back. Given the substantial amount of informal notice the officers received, Mrs. Hall should be able to relate back her Amended Complaint under an expanded Rule 15(c)(3).

But this case may be the exception rather than the rule. Many things worked in her favor. Most importantly, the defendant officers did not represent state or federal governments, providing Mrs. Hall with a suable entity in the first instance. Service of the Complaint was executed quickly. Baker County answered (which, of course, required that it investigate, thus providing the officers with notice) reasonably

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282 See discussion supra notes 222-34 and accompanying text.
283 See discussion supra notes 235-36 and accompanying text.
284 See Rice, supra note 16, at 930 n.172 (“The motion itself serves as notice of the lawsuit and unequivocally puts the new defendant on notice that he is an intended defendant.”).
quickly. Baker County revealed the names of the three officers as part
of its Rule 26(a)(1) mandatory disclosures, understanding the three as
having information supporting the County’s defenses. Other discovery
was conducted expeditiously. And the court’s discretionary factual
determinations went in Mrs. Hall’s favor. Procedural facts are not
always so favorable and service, pleading, disclosure, and discovery do
not always go so smoothly. Change any or all of those factual
circumstances and relation back might be denied. A more-expansive
Rule 15(c) thus is a less-than-complete answer to the problem of John
Doe pleading in § 1983 actions.

D. Changing Procedure: Pre-Filing Discovery

An amended or reinterpreted Rule 15(c)(3)(B) resolves the John
Doe problem in actions involving claims against county- and local-level
actors where there is a viable Monell claim, subject to the fact-intensive
notice inquiry, as well as to the vagaries of service, pleading, disclosure,
and discovery. However, the problems and limitations inherent in
relation back make it insufficient, standing alone, to handle all
constitutional actions involving Doe defendants from all levels of
government. There remain a substantial number of cases in which no
government entity or supervisory officer is available as a proper party
defendant or is so unlikely to be liable under the facts that suing that
tility or supervising officer would be futile.285

An entirely different solution, one that avoids the substantive
difficulties in constitutional damages actions, utilizes some limited pre-
filing discovery mechanism. A plaintiff could—prior to commencing a
lawsuit and with judicial oversight—determine the identities of the
individual officer defendants, who then could be named in the timely
original Complaint. The government entity need never be brought into
the action as a party, but may be used exclusively as a non-party source
of limited discovery for one piece of information—the identities of the
relevant officers—obtained prior to commencing the lawsuit.

1. Creating a New Procedure

No general pre-filing discovery mechanism exists under the
Federal Rules.286 But there is Rule 27, which permits a plaintiff who

285 See discussion supra notes 252-61 and accompanying text.
286 See James A. Pike & John W. Willis, The New Federal Deposition-Discovery, 38 COLUM.
L. REV. 1179, 1192 (1938) [hereinafter Pike & Willis, Deposition-Discovery] (“Rule 26 makes no
 provision for discovery by the plaintiff before pleading.”) (emphasis in original); James A. Pike
anticipates bringing a lawsuit, but presently is unable to do so, to take the deposition of a non-party witness for the purpose of perpetuating that testimony for use once the action is filed.287 A district court must order the deposition if it is satisfied that "the perpetuation of the testimony may prevent a failure or delay of justice ...."288

The purpose of Rule 27, one court has suggested, is "not the determination of substantive rights, but merely the providing of aid for the eventual adjudication of such rights in a suit later to be begun," thus "it is designed to 'afford a simple ancillary or auxiliary remedy to which the usual federal jurisdictional and venue requirements do not apply.'"289 The underlying theory is that when some evidence or information is in the hands of a non-party to a contemplated action and that evidence or information is essential to the ultimate success of the contemplated action, the potential plaintiff should, in the interest of justice, have the opportunity to obtain that information prior to filing. For a § 1983 plaintiff, the essential information is the names of the individual officers who may have violated the Constitution.

The prevailing understanding of Rule 27 is that it is to be used only to perpetuate known evidence, testimony, or information, not to discover new information.290 Courts have gone one step further by

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287 See Fed. R. Civ. P. 27(a)(1) ("A person who desires to perpetuate testimony regarding any matter that might be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party."); Application of Deiulemar Compagnia di Navigazione, 198 F.3d 473, 484 (4th Cir. 1999) ("Rule 27 is a means of perpetuating testimony before trial.").

288 See Fed. R. Civ. P. 27(a)(3); Application of Deiulemar Compagnia di Navigazione, 198 F.3d at 486; Penn Mut. Life Ins., 68 F.3d at 1371, 1374 (D.C. Cir. 1995).

289 See Deiulemar Compagnia di Navigazione, 198 F.3d at 484 (citing Mosseller v. United States, 158 F.2d 380, 382 (2d Cir. 1946)).

290 See Deiulemar Compagnia di Navigazione, 198 F.3d at 485 ("Rule 27 is not a substitute for broad discovery, nor is it designed as a means of ascertaining facts for drafting a complaint ....") (citations omitted); Pike & Willis, Federal Discovery, supra note 286, at 321 ("[T]he committee did not intend the rule to be 'misused' as a means of discovery."); Pike & Willis, Deposition-Discovery, supra note 286, at 1193 ("Historically the bill for perpetuation of testimony was not regarded as a mode of discovery and could not be used for that purpose."); id. (discussing
demanding a showing that evidence or testimony will be lost or unavailable by the time litigation has commenced if not preserved through the Rule 27 deposition. By definition, questions directed at the government or a high-ranking government official about the identity of the responsible rank-and-file officers would entail discovery of new information. Moreover, the information at issue, the name of the officer, is unlikely to be lost over time without the deposition. The plaintiff's timely claim against that officer might be lost, but not the information itself.

At the same time, the information sought here is a different type of new information. Mrs. Hall is not trying to discover facts in order to frame her complaint. She is not using Rule 27 to conduct a factual fishing expedition. She is not trying to determine whether or not she has a possible constitutional cause of action; she already knows she does. She knows the basic what, when, and where of the events leading to her husband's death, at least for Rule 8(a)(2) pleading purposes. She even knows and can describe a skeletal "who"—some officer or officers working for Baker County, on duty on May 10, who effected her husband's arrest, beat her husband, were involved in or present at the arrest and beating, or who left him unconscious on the floor of a jail cell to die. The plaintiff in some cases could pick the target officer defendant out of a police line-up. She needs pre-filing discovery only to fill one gap in who—his proper name—a gap that she cannot fill in any other manner.

A plaintiff perhaps could use current Rule 27 to obtain the necessary information. Certainly, pre-filing discovery of the officer defendant's identity will "prevent a failure or delay of justice," given

comments of former Attorney-General William Mitchell, a member of the Rules Committee, insisting that the "Committee 'wanted to prevent the misuse of his perpetuation of testimony rule as a means of discovery'"; Rice, supra note 16, at 896 n.39 (arguing that Rule 27 allows pre-filing discovery "only in extraordinary circumstances to preserve evidence but not to conduct general discovery to support a complaint"); Rowe, Square Peg, supra note 272, at 19 n.22 (stating that Rule 27 has been interpreted not to be used as a method of discovery to determine whether a cause of action exists and, if so, against whom that action should be instituted; such use is viewed as an abuse of the rule).

291 See Penn Mut. Life Ins., 68 F.3d at 1375 ("The age of a proposed deponent may be relevant in determining whether there is sufficient reason to perpetuate testimony. Advanced age certainly carries an increased risk that the witness will be unavailable by the time of trial."); id. at 1374-75 (stating that petitioner had not satisfied requirements for Rule 27 deposition where it offered no evidence regarding the deponent's age or health); see also Deiulemar Compagnia di Navigazione, 198 F.3d at 486 (approving, under Rule 27, a petition seeking to preserve evidence of the present condition of a ship that was undergoing repairs and was scheduled to leave United States waters). But see Nicholas A. Kronfeld, Note, The Preservation and Discovery of Evidence under Federal Rule of Civil Procedure 27, 78 GEO. L.J. 593, 598 (1990) (arguing that cases on which Rule 27 drafters relied recognized that delay could cause a failure of justice, irrespective of the condition of the witness).

292 But see Kronfeld, supra note 291, at 594 (recommending that courts interpret Rule 27 to make discovery mechanisms freely available to help frame a complaint).
that the consequences to the plaintiff of not being able to plead and proceed against the named officers in a timely manner will be the loss of any opportunity to obtain compensation for the constitutional deprivation. Arguably, identifying the officers prior to filing does perpetuate their names, in the sense of causing the information about their names to endure or to be continued indefinitely.

The better solution is a new tailored procedure, modeled on Rule 27, expressly permitting a potential plaintiff to obtain an order from a district court granting leave to depose someone with knowledge (namely, the government entity speaking through a designated official with knowledge) for the sole and limited purpose of identifying the unknown individuals who might be responsible party defendants.

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293 See Pike & Willis, Deposition-Discovery, supra note 286, at 1193 ("A liberal attitude toward the prevention of a 'failure or delay of justice' might expand this remedy to include discovery before pleading."); see discussion supra notes 18-20, 106-49 and accompanying text.

294 The proposed rule could be Fed. R. Civ. P. 15.1, 27.1, or a new part of current Rule 27, or it could be enacted as a stand-alone procedural statute, promulgated not by the Rules Advisory Committee and Supreme Court absent disapproval by Congress, but by Congress on its own initiative, with presentment to the President. See, e.g., Moore, supra note 42, at 1059 ("Congress is moving to reclaim some degree of involvement in the rulemaking process, notwithstanding the continued broad delegation of rulemaking power to the Court."). The provision would read as follows:

(a) **Petition.** A person who expects to bring an action in a court of the United States, but who lacks knowledge or information concerning the identity of the proper party to be sued, may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to bring an action in a court of the United States, but is presently unable to bring it or cause it to be brought because of a lack of knowledge of the proper identity of the adverse party, 2, a short and plain statement of the claim, as required by Rule 8(a), that petitioner expects to bring, 3, a description of the persons whose identities petitioners hopes to learn, including their roles in the underlying conduct, with particularity, 4, the names and addresses of the persons or government entities or agencies to be examined, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined, for the purpose of obtaining information about the identities of the persons who are to be adverse parties in the action.

(b) **Order and Examination.** If the court is satisfied that a deposition to identify the individuals who will be adverse parties to the action may prevent a failure or delay of justice, it shall make an order designating or describing the persons or entities whose depositions may be taken and specifying the subject matter of the examination as the names, addresses, and locations of the individuals described in the petition as potentially liable adverse parties in the petitioner's anticipated action. The court shall determine whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. If the person to be examined is a government entity at the federal, state, local, municipal, or other level, or agency of such government entity, the entity or agency shall designate one or more individuals who consent to testify on its behalf as to the matters at issue, as provided in Rule 30(b)(6).

(c) **No tolling.** Any limitations period shall not be deemed tolled while any petition under this rule is pending before a district court nor while the petition is pursuing the deposition.
This deposition occurs prior to the plaintiff commencing the action. And it occurs on the assumption that the government entity or official deposed will not be a party to the eventual action; there will be no need to sue the government, absent a viable Monell claim. Having ascertained the officers' names through the pre-filing mechanism, the plaintiff will not have to sue Officers John Doe or rely on amendment or relation back. When she finally commences the civil action by filing her § 1983 Complaint, she can sue and serve the officers by name. It is up to the plaintiff, armed with this information, to ensure that the Complaint is timely filed.

The proposed rule imposes requirements similar to those in Rule 27. A petitioner must file the petition in the district court, certifying that she expects to bring a federal action, but presently is unable to do so precisely because of her lack of knowledge as to the identities of the officer defendants. She must describe the conduct and events giving rise to her potential lawsuit and the officers allegedly involved, again with sufficient detail to enable the government to recognize who the target officers are. The court will permit the deposition when it is satisfied that providing the names of the officers will prevent or delay a failure of justice, a standard a plaintiff such as Mrs. Hall certainly meets—she will be able to proceed to a merits determination of her § 1983 action only if she learns the officers' names at the pre-filing stage. The twin substantive purposes of awarding damages under § 1983 in such a case—compensating Mrs. Hall and deterring future violations by these and other officers in Baker County—only can be served if Mrs. Hall is able to do so.

Rule 27 permits the district court to decide whether the deposition will be taken via oral examination or written interrogatories. Petitioners under the proposed rule would be entitled only to precise information and the scope of any questions accordingly will be limited only to the identities of a few relevant individual officers. It may

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295 Where the plaintiff has a viable Monell claim under the policy-or-custom requirement or on a "failure to [blank]" theory, she can sue the government and Officer John Doe, then amend and relate back under the expanded or amended Fed. R. Civ. P. 15(c)(3)(B). See discussion supra notes 221-36 and accompanying text.

296 The plaintiff must take care to bring the discovery petition with sufficient time remaining on the limitations period so that she can await the government's responses and still be able to timely file the Complaint against the individual officers once she has learned those names. The pre-filing petition properly is understood as an aspect of the plaintiff's investigative process, distinct from the filing of the Complaint that initiates the action. Thus, while it is inconsistent with the statute of limitation to demand early filing of a Complaint, see discussion supra notes 177-97 and accompanying text, it is not inconsistent to demand early pre-filing investigation under the proposed rule.

297 See Rice, supra note 16, at 947-48; see discussion supra notes 110-13, 241-42 and accompanying text.

298 See discussion supra notes 36-42 and accompanying text.

require no more than a few questions with little or no follow-up, rendering a costly live deposition unnecessary. The court could order that the deposition be taken by written questions\textsuperscript{300} to be answered by the government through a designated officer having knowledge of the personnel on duty at that time. The court also could order that the government produce—at or in lieu of the deposition—incident and patrol reports, duty logs, or other records identifying the officers involved in the incident. Either of these steps should address the argument that pre-filing discovery imposes additional undue costs and burdens on the government entity by forcing a public official to sit through a lengthy deposition before an action has even been filed.

The pre-filing discovery rule is written in generally applicable language, meaning it could be used in a range of cases, in keeping with the general commitment of the Federal Rules to trans-substantive procedure.\textsuperscript{301} However, the rule is motivated by the disparate impact the current treatment of relation back has on § 1983 and Bivens plaintiffs.\textsuperscript{302} And the procedure is uniquely tailored to, and workable in, constitutional damages cases. The government likely will be the non-party target of the discovery petition. The officer is sued because of his conduct on behalf and in the name of the government; at the same time, the government will, pursuant to indemnification agreement, bear the cost of litigation and judgment on behalf of the officer.\textsuperscript{303} The governmental discovery source’s interests are intimately intertwined with those of the officer it is asked to identify and the discovery source has a substantial stake in the outcome of the anticipated litigation.

That close connection between discovery source and defendant is absent in most other cases. Consider the somewhat analogous example of a defamation suit brought by a corporation against an anonymous poster to the Internet. The plaintiff can pursue only the unknown speaker as defendant, even if the speaker must be sued as John Doe; the ISP, like a government entity, is immune from liability.\textsuperscript{304} Corporate plaintiffs frequently subpoena the ISP as a non-party discovery source through which to identify the individual who posted the defamatory statements.\textsuperscript{305} That corporate plaintiff might make similar use of the pre-filing discovery rule, using the ISP as its non-party witness, to

\textsuperscript{300} For example, “State the name, address, home and work telephone numbers, and badge numbers of the police officer or officers who arrested, transported, and jailed Robert Hall on the night of May 10 and who administered, aided in, failed to prevent, and/or were present at the time of the fatal beating on May 10.”

\textsuperscript{301} See discussion supra notes 43-56, and accompanying text.

\textsuperscript{302} See discussion supra notes 57-60, 150-74 and accompanying text.

\textsuperscript{303} See discussion supra notes 171-73, 200 and accompanying text.

\textsuperscript{304} See Lidsky, supra note 150, at 871-72.

identify the speaker who then can be sued and served by name in the timely original Complaint.

But there is no overlap of interests between subscriber and ISP. There is a contractual or business relationship and the ISP has the knowledge to identify the subscriber for the potential plaintiff. But there is no commitment to defend or indemnify and no indication that the individual speaker was working on behalf, or for the benefit of, the ISP when she made her allegedly defamatory comments. The ISP lacks any substantial stake in the outcome of the anticipated litigation against its subscriber.

2. Applying the New Procedure

There are several ways to understand the proposed pre-filing discovery procedure. One is as a pre-commencement version of what the district court did in Bivens. Faced with a Complaint naming only unknown defendants (which could not be served on anyone), the court ordered the United States government to use its records to identify the officers involved in the incident in question, upon whom the Complaint then could be served.\(^{306}\) Alternatively, this rule may be seen as a pre-filing variation on the model of a filed-but-unserved Doe Complaint with early, court-ordered non-party discovery of the officers’ identities from the government.\(^{307}\)

The court will order the government, which is not and will not be a named party to the eventual lawsuit, to reveal the names of the individual officers whom its records indicate were involved in the events described in the petition. The difference is that the court issues the order prior to the plaintiff commencing her lawsuit. The court’s role is to ensure that the plaintiff obtains the necessary information from the government as an incident to the eventual lawsuit. It then is up to the plaintiff properly to caption, file, and serve a Complaint naming the individual officers within the time required by the borrowed state statute of limitations.

This pre-filing model is preferable in that it establishes a formal procedure, initiated by petition and permitted under a particularly applicable judicial standard. Commencing an action by filing a Complaint against John Doe alone demands early judicial involvement either in service or discovery, responsibilities that district courts


\(^{307}\) See discussion supra notes 267-73 and accompanying text.
generally do not assume or want and that contradict the preference for party control of the earliest stages of litigation manifested in the Rules of Civil Procedure. A court may be reluctant to permit early discovery. By contrast, a formalized pre-filing procedure compels the district court to permit and oversee this limited discovery.

A different way to understand this procedure is as a judicially monitored Freedom of Information Act ("FOIA") request. Plaintiffs may attempt to use FOIA and open records requests to ascertain the names of individual officers involved in an incident, using the names obtained through FOIA to frame the Complaint. However, such requests often are met with long delays, intentional or otherwise, and plaintiffs face other difficulties in obtaining the necessary information within the time constraints imposed by the statute of limitations. This renders FOIA unsatisfactory as a sole means of enabling § 1983 plaintiffs consistently to obtain the necessary information.

A good illustration of the pitfalls is using FOIA is in the Seventh Circuit decision in King v. One Unknown Federal Corrections Officer. In King, a federal prisoner brought a pro se Bivens action, alleging that an unknown prison guard had failed to protect him from an attack at the hands of two other inmates. Mr. King’s first step was to direct several FOIA requests to the United States Bureau of Prisons, with little or no success, as the Bureau asserted the sensitive nature of the documents as a basis for nondisclosure. The district court conducted several in camera inspections of the records, twice reaching its own determination of who the officer likely was, both times having the plaintiff himself object that the court had not tapped the correct guard. In other words, the plaintiff did not know who the guard was, but he knew who the guard was not. Ultimately, before the plaintiff or

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308 See discussion supra note 265-66, 272 and accompanying text.
309 See Mark H. Grunewald, E-FOIA and the "Mother of All Complaints:" Information Delivery and Delay Reduction, 50 ADMIN. L. REV. 345, 345 (1998) (describing “three-decade long history of agency delay” in processing FOIA requests as a stark example of the legal system’s tolerance for delay); Eric J. Sinrod, Freedom of Information Act Response Deadlines: Bridging the Gap Between Legislative Intent and Economic Reality, 43 AM. U. L. REV. 325, 328 (1994) (“Given the magnitude of the backlogs and incoming requests faced by agencies . . . it is probable that although the renewed administration commitment is an encouraging sign, it will be as unsuccessful at eliminating backlogs . . . .”)
310 201 F.3d 910 (7th Cir. 2000).
311 See id. at 911-12.
312 See id. at 912 n.3 (describing responses to several FOIA requests, one of which identified thirty-seven pages of relevant documents, only seven of which the Bureau released to the plaintiff, citing their sensitive nature); id. at 912-13 (stating that later in the case the district court refused to permit one potential attorney for plaintiff to inspect the records and that the Bureau objected to inspection by another potential counsel for plaintiff).
313 See id. at 912-13; cf. Resnik, Failing Faith, supra note 45, at 548 (criticizing district court practices of becoming involved “so deeply in managerial and adversarial events that it undermines the ability of the judge to adjudicate—should that become necessary”).
his later-retained counsel ever had an opportunity to review the records or identify a possible proper defendant, the district court *sua sponte* dismissed the action as time-barred.\(^{314}\)

The proposed pre-filing deposition should avoid many of the problems that haunted Mr. King. By ordering someone from the government to submit to an oral or written deposition, the court puts the onus on the government to present to the plaintiff the name or names of potentially responsible officers—in Mr. King’s case, any officers who were on duty in that cell block on that date, in Mrs. Hall’s case the officers involved in her husband’s arrest, transport, jailing, and death. The government need not turn over documents that it deems sensitive if it simply tells the plaintiff in the deposition what she wants to know. Further, the court retains power under this procedure to compel the government to release the necessary information through its power to sanction misconduct in pre-commencement depositions and discovery.\(^{315}\) Finally, by codifying a regime of pre-filing discovery of singular information, the rules force district courts to exercise their discretion more to the benefit of potential § 1983 plaintiffs than did the district court in *King*. The basic question of “who was on duty when this alleged violation occurred” will be answered and the plaintiff will have the opportunity to pursue a meritorious § 1983 claim against those officers.

One objection to this proposal goes to judicial resources, the argument that the number of pre-filing petitions, like the number of civil rights actions, will explode and that such a procedure is subject to abuse.\(^{316}\) However, it is unlikely that there will be such an explosion of pre-commencement petitions. There is not likely to be a flood of petitions seeking to identify the officer and avoid John Doe pleading, because there is not a flood of John Doe lawsuits. Moreover, the

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\(^{314}\) *See id.* at 913. The Seventh Circuit affirmed, holding that any complaint against any officer discovered from a review of the Federal Bureau records would be time-barred and would not relate back because King did not know the identity of the proper defendant, which is not a mistake for Rule 15(c)(3) purposes. *See id.* at 914; *see discussion supra* notes 125-49 and accompanying text.

\(^{315}\) *See Fed. R. Civ. P. 27(a)(3)* (providing that “depositions may then be taken in accordance with these rules,” which includes the power of the court to impose sanctions for violations of the rules); *see Fed. R. Civ. P. 37(b), (d).

\(^{316}\) *See Tobias, Public Law Litigation, supra* note 47, at 287 (“[M]any perceive that the federal courts are experiencing a ‘litigation explosion.’ Important to this perception is the belief that litigants and lawyers overuse, misuse, and abuse the civil justice system.”); *see also* Brown, *supra* note 6, at 1519-20 (describing the concern for the litigation explosion in § 1983 actions, although doubting the premise of such an explosion); Marcus, *Fact Pleading, supra* note 61, at 440 (“Much ink has already been spilled on the litigation ‘boom’ and the crisis in the adversary system, but dramatic increases in litigation are hardly unprecedented.”); Resnik, *Failing Faith, supra* note 45, at 494-95; Schwab & Eisenberg, *supra* note 69, at 740 (arguing that studies suggest that the rate at which constitutional tort cases are filed relative to other cases is lower than expected).
procedure will be unnecessary for those plaintiffs who have a truly viable Monell claim against a local or county government; those plaintiffs may proceed through Rule 15(c)(3) and relation back. Nor will it be necessary for prisoner plaintiffs challenging their conditions of confinement, who must exhaust administrative remedies prior to proceeding to federal court, and who should learn the names of the responsible officers through that administrative process. The new mechanism is only for that subset of non-prisoner plaintiffs who cannot proceed against a governmental entity and must identify individual officers in order to have an officer defendant against whom to move to a merits determination.

Further, the petitions themselves should not be difficult for the court to resolve. They demand only a review of whether the plaintiff has described a potentially viable § 1983 action against some described government officers and a determination that discovery will prevent a failure or delay of justice, along with an order to the relevant government or agency to choose a designee to sit for a deposition, answer written questions, or produce documents identifying the officers described in the petition. Perhaps the court must assess and sanction any dilatory behavior by the government. But given the straightforwardness of the inquiry, the procedure arguably consumes fewer judicial resources than the fact-specific and discretionary Rule 15(c)(3) relation back inquiry into whether the target defendants received sufficient notice of the action and its subject matter and their roles in the action within the prescribed time frame.

The proposed procedure merely shifts the time at which resources will be consumed. A Rule 15 inquiry occurs after the original Complaint has been filed, during pleading and discovery as the plaintiff seeks leave to file an Amended Complaint. The new procedure consumes judicial resources prior to commencement of the action, as

317 See 42 U.S.C. § 1997e(a) (2003) ("No action shall be brought with respect to prison conditions under section [1983]... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."); Booth v. C.O. Churner, 532 U.S. 731, 734 (2001) (holding that an inmate who seeks only money damages must exhaust an administrative procedure that could not provide monetary relief); id. at 741 ("Congress has mandated exhaustion clearly enough, regardless of the relief offered through administrative procedures."). But see Lynn S. Branham, The Prison Litigation Reform Act’s Enigmatic Exhaustion Requirement: What it Means and What Congress, Courts and Correctional Officers Can Learn From It, 86 CORNELL L. REV. 483, 514 (2001) ("It is debatable whether application of the exhaustion requirement in § 1997e(a) to prisoners seeking damages that cannot be obtained through the grievance process would further the traditional purposes of exhaustion."); see also id. at 513 (arguing that one purpose of exhaustion is to promote judicial efficiency); id. at 514 (arguing that exhaustion supports the judicial process by providing a factual record that can aid the court in process a claim); id. at 506 (stating that the PLRA’s broad exhaustion requirement siphons off potentially frivolous claims from the courts, resolving them within the prison walls, before they get into federal court).

318 See discussion supra notes 279-81 and accompanying text.
one small part of the plaintiff’s pre-filing investigation, in a simpler inquiry into whether or not discovery on one narrow point should be had and whether the government has complied with its duty to answer one simple question about who was present when Robert Hall was arrested, transported to the jailhouse, beaten, jailed, and died. By the time the lawsuit itself is commenced, Mrs. Hall has identified Screws, Kelly, and Jones. The parties can focus their discovery and litigation efforts not on pleading and amendment but on the substantive merits: what happened, whether a deprivation of rights occurred, whether the officers are entitled to qualified immunity, and what relief the plaintiff might obtain.319

319 See Marcus, Fact Pleading, supra note 61, at 439.