Foreword: Is Civil Rights Law Dead?

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A HYPOTHETICAL:

A man walks into your office seeking representation. He has just been released from prison, cleared, by DNA testing, of a crime he did not commit. He tells you that when he first heard of DNA testing he knew he would finally prove he was wrongly convicted. You are suspicious of his legal claims from the start. His conviction would have been reviewed on direct appeal and probably via state and perhaps federal habeas proceedings. But he tells you something that catches your ear. He recounts how some ten years ago he requested DNA testing and was told flatly, “No.” You are outraged but not really shocked. You understand that this is not necessarily the basis for a legal claim; DNA testing is an expensive technique that might be refused to someone who had been duly convicted and whose conviction had been repeatedly upheld. But when he says his family and attorney at the time had been able to put together sufficient funds to finance the testing at discounted rates graciously offered by a recognized forensic laboratory, you start to believe there might be something here. Weeks of preliminary research and a review of several court transcripts reveals a shocking circumstance: DNA testing had been denied to this man for no reason at all—simply refused. You think, this man has been denied reasonable access to the very evidence used to convict him. The prosecutor did not offer any of the reasons that might implicate the state’s interest—limited material for testing,¹ minimal probative value to be derived from testing,² tests of similar accuracy having already been done,³ or the

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1. In United States v. Price, 1999 U.S. Dist. LEXIS 22292 at *28–38 (E.D. Okla. 1999), rev’d. on other grounds, United States v. Cherry, 217 F.3d 811 (10th Cir. 2000), early DNA tests conducted by federal officials consumed all of the material gathered at the scene of a crime, making independent testing by an alleged co-conspirator impossible. The district court admitted the DNA tests over the alleged co-conspirator’s objections. See also United States v. Stevens, 935 F.2d 1380, 1387–88 (3rd Cir. 1991) (upholding rejection of Brady claim based on non-malicious destruction of a biological sample collected from crime scene making DNA tests impossible).

2. Courts have widely denied testing where the testing will not prove the plaintiff’s innocence. These denials have involved testing impossibilities—where there were multiple assailants, for example, each depositing biological material and
plaintiff's failure to request testing at the appropriate time. Rather, they defend their refusal on no reason at all. The upshot is that the man, now your client (you fool!), endured an additional, needless decade in prison for a crime he did not commit.

You think: dream case! This is just what civil rights law is designed to address: unjustified abuses of power by state officials that cause injury to individual citizens—you are thinking Monroe v. making exclusion of the defendant impossible with current tests—or proof limitations—i.e. the evidence of guilt at trial is of a quantity and quality that DNA tests will not be expected to demonstrate innocence. See, e.g., Mebane v. State, 902 P.2d 494, 497 (Kan. Ct. App. 1995) (rejecting request for post-conviction DNA testing, saying testing would be appropriate where (1) there was single perpetrator, or (2) the person was convicted with "weak" evidence that might be overcome by DNA tests).

In People v. Ghulston, 697 N.E.2d 375, 378–80 (Ill. App. Ct. 1998), a typical testing impossibility case, an Illinois court rejected petitioner's request for DNA testing because the presence of multiple assailants depositing genetic material meant DNA tests would not prove actual innocence. The Ghulston court nevertheless recognized a due process right to evidence: "[W]e recognize that due process requires that no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence . . . . DNA testing may yield conclusive information as to the actual innocence of a wrongly accused criminal defendant." Id. at 421–22. See also Young v. State, 746 N.E.2d 920, 923–24 (Ind. 2001) (upholding denial of testing at trial because tests would not produce reliable evidence); but see State v. Frazier, 1995 Del. Super. Ct. LEXIS 474 (No. 30805884D1) (Super. Ct. Del., New Castle, Aug., 3, 1995) (state financed DNA was not required because, among other things, plaintiff had confessed to crime in question, and remote likelihood that DNA tests would add to abundant evidence of his guilt).

3. Compare United States v. Price, 1999 U.S. Dist. LEXIS 22292 (inability to conduct independent DNA tests because first test consumed sample did not bar admission of first tests' results).

4. Courts have denied DNA testing where testing was possible at the trial and the defendant did not request either testing or access to evidence for testing. This class of cases involves situations where the defendant argues that the prosecutors or police should have conducted tests on their own initiative prior to or immediately after arrest. See Harrison v. Abraham, 1997 U.S. Dist LEXIS 6894 (No. 96–4262) (E.D. Pa. 1997). It also implicates cases where, after conviction, defendant requests DNA testing but the record shows the defendant's attorney made a strategic decision to not pursue DNA testing. See People v. Brown, 162 Misc. 2d 555, 558 (N.Y. Co. Ct. 1994); Wistle v. State, 525 N.W.2d 860 (Iowa 1994); People v. Vaughn, 505 N.W.2d 41, 45 (Mich. Ct. App. 1993), rev'd on other grounds, People v. Vaughn, 524 N.W.2d 217 (Mich. 1994); People v. Kellar, 605 N.Y.S.2d 486 (N.Y. 1993). But see State v. Thomas, 586 A.2d 250 (N.J. Super. Ct. App. Div. 1991). The linchpin of the latter cases is the judgment that the defendant's attorney made a strategic decision to not have testing done. Compare Smith v. Edwards, 2000 U.S. Dist. LEXIS 7414 (No. 98-Civ-7962) (S.D. N.Y. 2000) at *16–18 (habeas petitioner's claim that prosecutor had obligation to conduct DNA testing rejected because petitioner's defense attorney made strategic decision not to request DNA testing at trial). As Smith discusses, the failure of a request undercuts the influence of the Brady v. Maryland obligation of the state. Id. at *18.
Pape. This is what civil rights law is all about: institutional behavior born of bureaucratic incentives that cause government actors to blindly harm society’s scorned populations—you are thinking Brown v. Board of Education, Carolene Products’ footnote 4, and structural reform.

You are relishing the little things about the case which you know have averted insurmountable hurdles. First, your client has already been proven innocent of the crime and released from prison. Apart from the substantial difficulty to be encountered in obtaining DNA testing and securing a convicted prisoner’s release, there are

7. 304 U.S. 144, 152 n.4, 58 S. Ct. 778, 783 (1938).


While the cases are fact intensive, each of them relies in part on federal constitutional authority for support, with some focus on the fundamental fairness requirement of the due process clause. See Thomas, 586 A.2d at 254. But, most follow the Dabbs court and focus on a version of the Brady doctrine. Dabbs argued:

it is well established that, notwithstanding the absence of a statutory right to postconviction discovery, a defendant has a constitutional right to be informed of exculpatory information known to the State . . . . A corollary to the duty of disclosure is the duty to preserve exculpatory material . . . . By a parity of reasoning, where evidence has been preserved which has high exculpatory potential, that evidence should be discoverable after conviction. Due process is not a technical conception with a fixed content unrelated to time, place and circumstances. It is flexible and calls for such procedural protections as the particular situation demands. Clearly, an advance in technology may constitute such a change in circumstance . . . .
insurmountable bars to civil rights suits of this type for incarcerated prisoners. Not only must any challenge directly or indirectly implicating the fact or duration of confinement be brought in difficult to win habeas proceedings, no § 1983 cause of action challenging problems with the conviction (and perhaps other defects of confinement) arises until after the equivalent of a judicial finding of innocence. Second, you realize that, despite your client’s thirst to challenge his initial conviction, this is a rare case, early in the life of DNA testing, where your client was refused testing in isolation from

[defendant] were to be tried now, he would be entitled to DNA testing of the physical evidence. The need for testing is analogous to that considered in [cases] where the evidence was a controlled substance. [In such cases, a] “defendant’s guilt or innocence h[a]ng[s] exclusively on the nature and amount of the substance in question . . . . For refutation of the charge against him, there [i]s no acceptable alternative to scientific testing by experts of his choice.” Similarly, in this case, while it is unclear what [DNA] testing will ultimately reveal, . . . [i]f DNA testing could exclude that semen as belonging to [defendant], it would strongly impeach the credibility of the victim’s identification of [defendant] . . . . [T]o deny [defendant] the opportunity to prove his innocence with such evidence simply to ensure the finality of convictions is untenable.

Dabbs, 570 N.Y.S.2d at 767–69 (citations omitted). The Thomas court also suggested that the state’s failure to submit material for DNA analysis may implicate its obligation to reveal exculpatory evidence, as set forth in Brady v. Maryland. Thomas, 586 A.2d at 252–53. See also Sewell, 592 N.E.2d at 708; State v. Schwartz, 447 N.W.2d 422, 427 (Minn. 1989); State v. Hammond, 604 A.2d 793, 806–08 (Conn. 1992). In Callace, the New York court revisited the Dabbs situation. Disagreeing with the exculpatory evidence analysis applied in Dabbs, the Callace court nevertheless granted the defendant’s request on the basis that DNA testing of the samples constituted after-discovered evidence. Callace, 573 N.Y.S.2d at 139–140.


the complexities of his conviction, appeals, and habeas proceedings. So while your client does not have a claim for false or malicious prosecution, his claim is neatly framed as an access to courts claim. Although this is not the clearest claim in the Constitution,


13. This was the subject of Heck, prompting the court to require a finding of innocence prior to any § 1983 suit for false or malicious prosecution. Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994).

14. While an access to court claim in these precise facts has not been decided, "It is clearly established that prisoners have a constitutionally protected right of access to the courts." Brewer v. Wilkinson, 3 F.3d 816, 820 (5th Cir. 1993). See also, Bounds v. Smith, 430 U.S. 817 (1977) (citations omitted); Johnson v. Avery, 393 U.S. 483, 89 S. Ct. 787 (1969); Jones v. Greninger, 188 F.3d 322, 325 (5th Cir. 1999) (prisoners "are guaranteed "the conferral of a capability--the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts" (quoting Lewis v. Casey, 518 U.S. 343, 355, 116 S. Ct. 2174, 2182); Jackson v. Procomun, 189 F.2d 307, 311 (5th Cir. 1986); Ryland v. Shapiro, 708 F.2d 967, 971 (5th Cir. 1983). Justice Scalia's recent description of the right of access to the court in his majority opinion in Lewis v. Casey, 518 U.S. 343, 116 S. Ct. 2174 (1996) warrants extensive quotation:

[The]right that Bounds acknowledged was the [already well-established] right of access to the courts. In the cases to which Bounds traced its roots, we protected that right by prohibiting state prison officials from actively interfering with inmates' attempts to prepare legal documents, or file them, and by requiring state courts to waive filing fees, or transcript fees for indigent inmates. Bounds focused on the same entitlement of access to the courts.

Insofar as the right vindicated by Bounds is concerned, "meaningful access to the courts is the touchstone," and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint. Id. at 350–51, 116 S. Ct. at 2179–80 (citations omitted).

Justice Scalia's opinion is understood as establishing a two-part test to establish an actionable denial of access to the courts. A prisoner must show acts denying access and actual harm. Lewis thus limits the right in Bounds by recognizing in that decision an "actual injury" requirement. Lewis, 518 U.S. at 351, 116 S. Ct. at 2180; Chiccio, 169 F.3d at 137 ("the Supreme Court held [in Lewis] that an inmate alleging denial of access to courts must demonstrate an actual injury stemming from defendants' unconstitutional conduct.") See also Ruiz v. United States, 160 F.3d 273, 275 (5th Cir. 1998) ("without proving an actual injury, a prisoner cannot prevail on an access-to-the-courts claim"). Lewis also suggests that an apparent violation of the right to access to the courts might be justified by a showing that legitimate interests necessitate the action in question. Lewis, 518 U.S. at 361, 116 S. Ct. at 2185.
you suspect its novelty and the fact of your client’s innocence will buttress your case. Third, you are pleased to discover that, though you need not challenge the conduct of the trial itself, the conviction turned on only two pieces of evidence: notoriously unreliable eyewitness identification evidence and forensic comparison of blood and semen evidence. Sadly, but advantageous to your client at this stage, the case was a rape case—the prime candidate for DNA testing to establish innocence. Fourth, you are somewhat outraged to discover that, all the while the prosecutor’s office was refusing your client access to the evidence in the case to test, they were employing DNA testing in their prosecution.

15. The right to access to courts is, even after Lewis, a broad one. The parameters of the right to access is famously described in Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491 (1977), a case upholding a prisoner’s right to access to legal materials. The right to access to courts is fundamental and long established. Bounds, 430 U.S. at 821–22, 97 S. Ct. 1494–95. Access must be adequate, effective, and meaningful. Id. at 822–23, 97 S. Ct. at 1495. Meaningful access to courts might require affirmative actions by states. “Moreover, our decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts.” Id. at 824, 97 S. Ct. at 1496. The right of access in Bounds specifically concerned the right of access to post-conviction remedies and especially the preliminary preparation of petitions and complaints. See Bounds, 430 U.S. at 827–28 & n.17, 97 S. Ct. at 1497–98.

The right to access here also draws support from the main areas where the right has been found. Access to the evidence used at trial for the purpose of DNA testing is almost identical to the right to a transcript of the trial proceedings; denying plaintiff access to the evidence is no less a violation than denying him access to the trial transcript. See Mayer v. Chicago, 404 U.S. 189, 92 S. Ct. 410 (1971) where the right to a trial transcript was found to be supported by Supreme Court’s longstanding jurisprudence concerning right to transcripts as a necessary part of the right of access to courts: “it is now fundamental that, once established . . . avenues (of appellate review) must be kept free of unreasoned distinctions that can only impede open and equal access to the courts” . . . . In terms of a trial record, this means that the State must afford the indigent a ‘record of sufficient completeness’ to permit proper consideration of (his) claims.” Id. at 193–94, 92 S. Ct. at 414 (citations omitted).


17. See Future of DNA Testing, supra note 9; Christian, supra note 9.

18. Many jurisdictions adopted forensic DNA testing as a crime control technique as soon as the technique became readily available. See Michelle Hibbert, DNA Databases: Law Enforcement’s Greatest Surveillance Tool?, 34 Wake Forest L. Rev. 767 (1999). All jurisdictions currently maintain databases with the DNA profile of at least all convicted sex offenders, though many have already extended the data base to include all felony convicts or all misdemeanor sex offense convicts,
As it turns out, many of these facts will prove detrimental to your client’s case, but oblivious to the minefield that is civil rights litigation, you head off to battle, utterly unprepared for what you will encounter. Indeed, everyone you describe your client’s tale to is certain, like you, that you will succeed fabulously. Oh, but what you do not know. You are about to discover the truth about civil rights litigation.

I. MODERN CIVIL RIGHTS LITIGATION: IS THERE ANYTHING LEFT?

Whether our naive lawyer can succeed in his civil rights suit turns out to be an enormously complicated question. In this foreword I hope to highlight some of the perils she will encounter, but first a few simplifying assumptions. Although the reported cases do not clearly set out whether a convicted prisoner has a right to access to courts, which includes the right to inspect the physical evidence actually used to convict him, I will assume such a right exists (subject to reasonable restrictions aimed at protecting the evidence). In doing so I am putting aside likely disputes over what is reasonable inspection and who bears the cost of such inspections. However, like the right to a trial transcript, the right to inspect physical evidence, however conditioned, seems essential to any reasonable right to access the courts. I am also assuming away the most difficult questions related

and there is a move to add all felons arrested to these databases. As Hibbert notes:

[I]n the beginning only those classes of offenders with a high recidivism rate, such as sex offenders and violent felons, became mandatory DNA database donors. For the most part these DNA databanking laws were grounded in the belief that the compelling interest in solving past and future crimes justified any imposition on a convicted criminal’s privacy interest in not having his or her DNA digitized in the state database. But just one year after the passage of the first state DNA database law in Virginia, South Dakota passed a DNA databasing statute that required blood samples from all those arrested.

Hibbert, supra, at 769. As early as 1999, Hibbert could report that

[f]our states require DNA samples from all convicted felons, violent or non-violent . . . at least eight states require the collection of blood from certain classes of convicted misdemeanants . . . . Under a Louisiana law . . . law enforcement officials will collect DNA samples from adults and juveniles arrested for sex offenses or certain violent felonies. [And,] under Texas law, . . . [a person] . . . previously convicted of a sex offense . . . is required to submit a DNA sample.

Hibbert, supra, at 775–76.

Today most jurisdictions employ forensic DNA evidence in criminal trials, even jurisdictions which oppose DNA testing as a basis for exoneration of convicts. As of 1999, “the FBI report[ed] that . . . forensic DNA evidence ha[d] been relied upon in over 6800 cases.” Hibbert, supra, at 774.

19. See discussion supra notes 14 and 15.

to DNA testing of convicts by assuming the unlikely case that prosecutors would refuse testing without articulating any valid state interests. Most reported cases involving DNA testing testify to the ingenuity of prosecutors at perceiving reasons that testing should be denied a convict. Finally, it is fair to say that the hypothetical case is inspired by an actual case in which I was involved on behalf of a freed prisoner.

The difficulties our attorney will encounter begin at the very start of litigation. Knowing that these cases present a minefield for free trial transcript); Rinaldi v. Yeager, 384 U.S. 305, 310, 186 S. Ct. 1497, 1500 (1966) (unreasoned limits on access to court to be lifted); Coppedge v. United States, 369 U.S. 438, 446, 82 S. Ct. 917, 921 (1962) (record of sufficient completeness to make appeal required).


22. See, e.g., Mebane v. State, 902 P.2d 494, 497 (Kan. Ct. App. 1995) (rejecting request for post-conviction DNA testing, saying testing would be appropriate where (1) there was single perpetrator, or (2) the person was convicted with “weak” evidence that might be overcome by DNA tests).


The freed prisoner, Clyde Charles, was released in December 1999 after a nine year effort to conduct DNA testing at his own expense. During this odyssey he was represented by the Innocence Project of Cardozo Law School and its founder Barry Scheck. In his efforts to obtain compensation for the nine years he was denied testing, he was not represented by the naive counsel represented in the hypothetical case. Quite the contrary, he was represented by noted Louisiana criminal defense and environmental tort litigator, Lewis Unglesby, and State Senator and former Congressman, Cleo Fields.

plaintiffs, few defendants are going to engage in early settlement negotiations;\textsuperscript{24} indeed, the defendant is likely to be adversarial from the start, given the subject matter of the suit and the antagonistic view many have of civil rights litigation. If our attorney is a typical

\begin{quotation}
24. In a provocative study of civil right practitioners’ views of the practice, Julie Davies found that, despite the existence of attorneys’ fees as an incentive for parties to settle civil rights cases, few settle.

In the police misconduct area, for example, some plaintiffs’ counsel claim that they have not received reasonable settlement offers until right before trial, if at all. A number of plaintiffs’ attorneys perceive certain public entity defendants as being unwilling to settle cases under any circumstances . . . . The defense attorneys interviewed confirmed that settlements with certain public entities are extremely hard to achieve, although they differ somewhat as to the reasons for this difficulty . . . .

Although the plaintiffs’ attorneys found attorneys for private defendants to be much more willing to negotiate than those representing public entities, they still noted a reluctance to settle that seemed to hurt, rather than further, the defendants’ best interests. One plaintiffs’ attorney practicing employment law stated that sometimes defendants seem to expect lawsuits no matter what they do and consider them so much a cost of doing business that they do not even try to distinguish a factually meritorious claim from a non-meritorious claim until shortly before trial, when attorneys’ fees and costs are astronomical on each side.

Julie Davies, Federal Civil Rights Practice in the 1990’s: The Dichotomy Between Reality and Theory, 48 Hastings L.J. 197, 220–21 (1997) (footnotes omitted). In explanation for the lack of settlements, plaintiffs’ and defense attorneys offered differing, but overlapping explanations:

. . . Private defense counsel, [plaintiffs’ attorneys] say, have a personal interest in prolonging litigation because their billable hours increase. They are working for clients who expect to pay by the hour and to spend a lot of money on fees. Attorneys who are directly employed by public entities are said to be enmeshed in hierarchical bureaucracies where political issues predominate, and business sense and honest legal appraisal fall short . . . .

A city attorney acknowledged that institutional clients often have a huge amount invested in maintaining an institutional structure intact. For some of these clients, settlements may be tantamount to political suicide. The defense attorneys interviewed likewise concurred with plaintiffs’ attorneys that some entities are so hierarchical that achieving settlements is difficult and extremely time-consuming. Unlike plaintiffs’ attorneys, however, the defense attorneys interviewed also cited concerns such as discouraging non-meritorious litigation or the need for caution when recommending the expenditure of tax money, as reasons for failing to settle cases.

Davies, supra at 220–21. Nor has the prospect of sanctions under Rule 68 of the Federal Rules of Civil Procedure. See Marek v. Chesny, 473 U.S. 1, 105 S. Ct. 31012 (1985) (plaintiff loses attorney’s fees and cost if he rejects settlement offer and receives less in judgment, notwithstanding attorneys’ fee statute), encouraged settlement in civil rights cases. Apparently, it is difficult for defense counsel to accurately estimate the value of civil rights cases, especially if the attorney’s fees might be inflated between the offer and trial, and it is difficult to convince defense clients to agree to make a realistic settlement offer at an early date. Davies, supra, at 223–25.
\end{quotation}
plaintiff's attorney, this alone will come as quite a shock. But when the formal process begins\(^{25}\) she will be in for quite a few more.

In several jurisdictions she will be required to comply with heightened pleading rules. Although, in *Leatherman v. Tarrant County*\(^ {26}\) the Supreme Court invalidated such rules for suits against municipal defendants, several circuits, including the Fifth Circuit where the *Leatherman* case originated, have read that opinion narrowly and continue to apply heightened pleading requirements to cases against individuals.\(^ {27}\) The pleading rule is justified as

\[25. \text{A further assumption is that the suit will be filed as a § 1983 suit. The suit might be brought under 42 U.S.C. § 1985(3), but that cause of action, today, adds little to a § 1983 suit. See John Valery White, *Vindicating Rights in a Federal System: Rediscovering 42 U.S.C. § 1985(3)'s Equality Right*, 69 Temp. L. Rev. 145 (1996) ("Section 1985(3) is dead."). Suit might also be maintained under state law. As Professor Devlin argues, state constitutional rights have not always provided a happy refuge. 63 Devlin, 63 La. L. Rev. 885 (2003). Consequently, most state-based grounds will be rooted in tort law. In our hypothetical, tort law provides no comfort, as there is no tort theory readily applicable, given the prisoner's lack of a property interest in those samples in the rape kit that are taken from the rape victim and the minimal interest in his own biological material related to notions like abandonment.}

\[26. \text{507 U.S. 163, 113 S. Ct. 1160 (1993). In *Leatherman*, "[t]he Supreme Court abrogated the Fifth Circuit heightened pleading requirement for actions against municipalities." Anderson v. Pasadena Indep. Sch. Dist., 184 F.3d 439, 443 (5th Cir. 1999). The *Leatherman* Court said, "We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" 507 U.S. at 168, 113 S. Ct. at 1163. The *Leatherman* Court continued, "In Conley v. Gibson, we said in effect that the Rule meant what it said:}

\[\text{The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

*Id.* (citations and footnotes omitted).}


\[27. \text{See, e.g., Schultea v. Wood, 47 F.3d 1427, 1434 (5th Cir. 1995). Today the Seventh and Tenth Circuits reject heightened pleading in all cases; the Fifth and Eleventh Circuits require heightened pleading in all cases not covered by *Leatherman*; and the D. C. and Ninth Circuits require heightened pleading in cases where intent is an element. See Christopher M. Fairman, *Heightened Pleading*, 81 Tex. L. Rev. 551, 584–88 (2002). Heightened Pleading has been consistently criticized by commentators. In addition to Fairman, see, e.g., C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 Mo. L. Rev. 677, 693 (1984) (questioning the rationale for stricter pleading in civil rights cases).}
facilitating individual immunities (which municipalities do not enjoy) by providing detailed information on the basis of the suit with which a judge can dispose of the case on the pleadings.

However, this basis for heightened pleading creates a contradiction which circuits requiring heightened pleading have not resolved. In cases naming official policy makers in both their individual and official capacities, the policy goals of heightened pleading are necessarily unfulfilled because the individual defendant will be involved in the litigation—subject to discovery, required to testify, etc.—whether he remains in the suit in his individual capacity. Indeed, even non-policymaking individual defendants, for whom there is no good reason to name in their official capacity, will usually still be subject to many of the inconveniences of trial, if only as witnesses. If an individual is named in his individual and

28. In Monell [v. New York City Dept. of Social Services, 436 U.S. 658, 98 S. Ct. 2018 (1978)] we overruled Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, insofar as it held that local governments were wholly immune from suit under § 1983, though we did reserve decision on whether municipalities are entitled to some form of limited immunity. 436 U.S. at 701, 98 S. Ct. at 2041. Yet, when we took that issue up again in Owen v. City of Independence, 445 U.S. 622, 650, 100 S. Ct. 1398, 1415 (1980), we rejected a claim that municipalities should be afforded qualified immunity, much like that afforded individual officials, based on the good faith of their agents. These decisions make it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983. In short, a municipality can be sued under § 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury.

Leatherman v. Tarrant County, 507 U.S. 163, 166, 113 S. Ct. at 1162 (1993). See also Stefanoff v. Hays County, 154 F.3d 523, 525 (5th Cir. 1998) (“As an initial matter, we observe that municipalities are not entitled to qualified immunity.”) (citing Leatherman). Compare Crawford-El v. Briton, 523 U.S. 574, 595, 118 S. Ct. 1584, 1585 (1998) (“[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and effectively resolved either by the rule making process or the legislative process.”) (rejecting heightened pleading in cases involving improper motive).

29. “[N]o heightened pleading is required in actions against individual defendants in their official capacities, because ‘official-capacity lawsuits are typically an alternative means of pleading an action against the governmental entity involved[,]’” Anderson v. Pasadena Indep. Sch. Dist., 184 F.3d at 443 (citation omitted).

30. Unless an officer controls a budget or directs others, their “official capacity” exists only abstractly. Indeed, it is hard to imagine what a beating police officer’s official capacity is, much less to understand what funds would pay a reward against such an officer in that capacity. It is possible, perhaps, that the coverage of certain insurance contracts could make a suit against a subordinate officer in his official capacity advisable.

31. This is especially true if their basis for release from the suit is that they
official capacities and that official is an official policy maker, heightened pleading ought not apply because the policy goals underlying heightened pleading are unfulfilled. Rather, heightened pleading should be understood as a gratuitous barrier in civil rights litigation, erected to discourage such suits.

In any case, this distinction is important because courts employing heightened pleading rules also routinely issue protective orders barring all discovery against individual defendants until the immunity questions are answered. These protective orders are also rooted in the policy bases behind individual immunities. Like heightened pleading, however, they are strictly inapplicable to an official policymaker who is named in his official capacity. That officer will be the subject of discovery no matter the resolution of his individual immunities. By the same token, so long as the official policy maker or the municipality is named, the protective order would seem to be inapplicable since the individual officers might still be subject to discovery in the suit against their superior or employer. Courts employing these techniques have often ignored these arguments, seeming to use heightened pleading and protective orders as a replacement for the notice of claims rules that states unsuccessfully sought to impose on civil rights claims in the

acted pursuant to an apparently legal city policy.

32. See, e.g., Lion Boulos v. Wilson, 834 F.2d 504, 507–08 (5th Cir. 1987). In his excellent article on heightened pleading, Professor Fairman says Courts initially turned to heightened pleading out of an apparent hostility to civil rights cases; they retained it as a procedural fix to murky and shifting qualified immunity jurisprudence. The end result compelled civil rights plaintiffs to plead facts, often relating to the state of mind of the defendant, without the benefit of discovery.

Fairman, supra note 27, at 552.

33. [The] defendant’s entitlement under immunity doctrine to be free from suit and the burden of avoidable pretrial matters is effectively lost if the case erroneously goes to trial . . . [T]he refusal to rule on such claims “conclusively determines the defendant’s claim of right not to stand trial” . . . [and because] the claim of immunity in both cases “is conceptually distinct from the merits of the plaintiff’s claim that his rights have been violated.”

Helton v. Clements, 787 F.2d 1016, 1017 (5th Cir.1986) (citations omitted).

34. [E]ven if Leatherman permits a heightened standard to be maintained for public officials sued as individuals, no heightened standard can be allowed for actions against individual defendants in their official capacities. This is true, and the Supreme Court has explained that official-capacity lawsuits are typically an alternative means of pleading an action against the governmental entity involved . . . .

Baker v. Putnal, 75 F.3d 190, 195 (5th Cir. 1996).
1980s. Defendants get the benefit of a full articulation of the plaintiff's claims without any requirement of sharing information with the plaintiff.

Our attorney will face the challenge of framing a complaint and defending a motion to dismiss on immunity grounds without the benefit of discovery. If she is foolish enough to follow the federal rules in drafting her complaint she will be rudely educated. Though I have made the hypothetical easy by assuming that the defendants in fact offered no reason to refuse DNA testing, drafting the complaint is actually quite difficult. To state a constitutional violation, the plaintiff will have to show evidence that the defendants' decisions were extreme and outrageous or at least deliberately indifferent to constitutional rights. These motive-related matters will require discovery to establish and will need to be presented as more than bald supposition about the defendants' motives. Illegal motives like malice or discriminatory intent will be completely hidden. Moreover, which parties participated in the decision-making process will be also be unclear. Yet naming each party likely to have participated in the decision-making process will be essential to the litigation, despite the limits on discovery likely to follow and likely to constrain the process of tracing who did what, when, and why.

Individual immunities are themselves a severe impediment. It is not clear that prosecutors acting as custodians of evidence after all trial, appellate, and habeas proceedings are terminated are acting in their prosecutorial, investigative, or administrative capacities. Some courts have found that once the prosecutorial role is triggered by the filing of a charge or indictment, it continues into perpetuity.

36. Absolute immunity is available when the prosecutor is performing certain functions that are quasi-judicial in nature. Buckley v. Fitzsimmons, 509 U.S. 259, 268–69, 113 S. Ct. 2606, 2613 (1993) ("some officials perform 'special functions' which, because of their similarity to functions that would have been immune when Congress enacted § 1983, deserve absolute protection from damages liability") (citing Butz v. Economou, 438 U.S. 478, 508, 98 S. Ct. 2894, 2911 (1978)). The Supreme Court has "applied a 'functional approach,' which looks to 'the nature of the function performed, not the identity of the actor who performed it," Buckley, 509 U.S. at 269, 113 S. Ct. at 1613 (citations omitted). "It is clear from both the Supreme Court and Fifth Circuit jurisprudence, that when a prosecutor takes on a function other than that of state advocate in a criminal prosecution, the scope of his immunity is curtailed accordingly. It is 'the nature of the function performed, not the identity of the actor who performed it' that matters in deciding whether absolute or qualified immunity applies." Buckley, 509 U.S. at 269, 113 S. Ct. at 2613 (quoting Forrester, 484 U.S. at 229, 108 S. Ct. at 545). Lucas v. Parish of Jefferson, 999 F. Supp. 839, 846 (E.D. La. 1998).
37. The Fourth Circuit held that a prosecutor enjoys absolute immunity for ongoing advocacy on behalf of the state in direct appeals of the plaintiff. Carter v.
If the denial of access to the evidence for testing is in the prosecutorial capacity, the individual prosecutors enjoy absolute immunity and cannot be sued in their individual capacity. Even in their investigatory or individual capacities, they are likely to enjoy immunity from suit because of circuits' generous view of qualified immunity. Not only must the plaintiff prove that the immunity is

Burch, 34 F.3d 257 (4th Cir. 1994). The key in Carter was the fact that the prosecutor's challenged acts took place when the prosecutor was actively handling the direct appeals of the plaintiff.

[T]he evidence is uncontradicted that, at the time Burch testified that he learned of the [evidence] and failed to disclose it, he was handling the post-conviction motions and the initial direct appeal to the Court of Appeals of Virginia, after which the Attorney General's office took over. In these post-trial motions and preparations for appeal, Burch was still functioning as an advocate for the State, and not in an investigatory capacity.

Carter, 34 F.3d at 263. In contrast, in Houston v. Partee, 978 F.2d 362 (7th Cir. 1992), the Seventh Circuit held that absolute immunity was unavailable to a prosecutor after all direct appeals were exhausted and the prosecutor was no longer involved in litigation against the convict on behalf of the state. It reasoned that apart from failing to satisfy the policy goals of absolute immunity, id. at 367–68, there was another method for discerning the dividing line between absolute and qualified immunity: "whether the injury depends on the judicial decision. If there would be no loss but for the judge's acts, then the prosecutor or witness who induces the judge to act has absolute immunity." Previously, this test has only been applied to pre-conviction prosecutorial abuses, and applying it to the facts in this case is somewhat awkward. We believe, however, that it also supports our holding. The defendant prosecutors discovered and then suppressed the exculpatory evidence after Houston and Brown had been convicted . . . [T]here was an actionable harm without the mediation of a judge. Every day that the prosecutors failed to disclose the exculpatory evidence was a day that Houston and Brown were wrongly imprisoned. This injury does not flow from (and the plaintiffs are not seeking damages for) Wharrie's prosecution of the wrong men or the conduct of the prosecution on appeal. Rather, Houston and Brown seek damages for the defendant prosecutors' failure to correct Wharrie's mistake once they discovered evidence that Houston and Brown may not be guilty.

Houston, 978 F.2d at 368 n.4 (citations omitted).

Immunity law was applied to DNA claims in the Third Circuit in Brison v. Tester, 1994 U.S. Dist. LEXIS 18193 (E.D. Pa. 1994). In Brison the prosecutors were entitled to absolute immunity because all the DNA testing-related claims took place after Brison had been charged and while the prosecutors were preparing for trial. Id. at *60–64. Even the claims in Brison concerning the prosecutors' post appeals behavior take place in the context of on-going litigation on his guilt—the delays the prosecutor is accused of precipitating are delays in scheduling a new trial at which Brison's innocence can be established. To this point his appeal remained active as the case was on remand from the appellate court; this behavior is probably quasi-judicial and reasonably protected by absolute immunity. Id. at *64–70.

38. Qualified immunity is generally available to executive officers. Harlow v.
inapplicable because the officer violated clearly established law at the time of the decision, most circuits define "clearly established" as governed by a case on point in that Circuit or the Supreme Court. See Fitzgerald, 457 U.S. 800, 807–08, 102 S. Ct. 2727, 2732–33 (1982). See also Butz v. Economou, 438 U.S. 478, 98 S. Ct. 2894 (1978); Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683 (1974). Qualified immunity is, generally, a broad immunity; it protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986). "Discussing in detail the considerations that also had underlain [its] decision in Scheuer, [the Court] explained [in Butz] that the recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." Harlow, 457 U.S. at 807, 102 S. Ct. at 2732 (citations omitted). Later in Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987), the Court reaffirmed that qualified immunity applies to the acts of FBI agents, even for decisions that inherently involve subjective determinations like probable cause and exigency. Nevertheless, the Court emphasized that qualified immunity turns, not on the subjective intention of officers, but on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time it was taken. Anderson, 483 U.S. at 639, 107 S. Ct. at 3038 (citations omitted).

Circuit courts have given qualified immunity a broad scope by defining "clearly established" legal principles narrowly. But see Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508 (2002) (clearly established law need not be established in case with "materially similar" facts).

39. This view is expressed strongly in Medina v. City & County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992): "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." The Tenth Circuit has softened that rule, emphasizing the second part over the first. Anaya v. Crossroads Managed Care, 195 F.3d 584, 594 (10th Cir. 1999). However, other circuits have maintained such a view. The most clear are the Fourth, Sixth, and Eleventh Circuits. Jean v. Collins, 155 F.3d 701, 709 (4th Cir. 1998) (en banc) (ordinarily decisions outside the circuit do not establish clearly established law); Jenkins by Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 826 n.4 (11th Cir. 1997) (en banc); Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988) (absent extraordinary circumstances, clearly established law cannot be found in other courts). See also Edwards v. City of Goldsboro, 178 F.3d 231, 251 (4th Cir. 1999). Courts have also addressed other administrative issues related to clearly established law. These include determining the closeness of facts to the case at bar, see Suisse v. Fulton County, 74 F.3d 266, 269–70 (11th Cir. 1996), abrogated by Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508 (2002), and the weight of unpublished opinions in determining clearly established law. Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995) (unpublished opinions do not establish clearly established law). Courts especially have confronted the weight to be given district court decisions in establishing clearly established law. Hayes v. Long, 72 F.3d 70, 73–74 (8th Cir. 1995) (look to Supreme, Circuit, District, and State Supreme Court opinions); Tribble v. Gardner, 860 F. 2d 321, 324 (9th Cir. 1988) (same); Jermsen v. Smith, 945 F.2d 547, 551 (2nd Cir. 1991) (district court opinion cannot establish clearly established law).
While the Supreme Court has lately cast some doubt on this view of clearly established law in *Hope v. Pelzer*, the Court had added yet

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40. 536 U.S. 730, 122 S. Ct. 2508 (2002). In *Hope* the Court rejected the 11th Circuit's use of a "materially similar" test of whether the law alleged to be violated was "clearly established" for qualified immunity purposes. The 11th Circuit rule would have required that a plaintiff seeking to defeat a qualified immunity claim show that the facts alleged in his complaint were "materially similar" to those in a prior case upholding the right in question. The Court noted that "clearly established" law was intended to serve the same purposes as and was to be understood as similar to the "fair warning" requirement in civil rights criminal cases. *Id.* at 739–40, 122 S. Ct. at 2515. That standard, discussed in the 18 U.S.C. § 242 case, *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219 (1997), found fair notice "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Lanier*, 520 U.S. at 269, 117 S. Ct. 1227 (quoted in *Hope*, 536 U.S. at 740, 122 S. Ct. at 2516).

The Court continued:

This is not to say, of course, that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'

*Hope*, 536 U.S. at 740, 741, 122 S. Ct. at 2516 (quoting *Lanier*, 520 U.S. at 271, 117 S. Ct. at 1227). This view of "clearly established" is adopted by Justice Thomas in his vigorous dissent.

That is not to say, of course, that conduct can be "clearly established" as unlawful only if a court has already passed on the legality of that behavior under materially similar circumstances. Certain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address "materially similar" conduct.

*Hope*, 536 U.S. at 753, 122 S. Ct. at 2522 (Thomas, J., dissenting).

This language is quite broad and would seem to preclude both "material similarity" and similar tests of "clearly established." However, neither the Court nor the dissent mention other tests, like the "case on point in the circuit" test articulated by other jurisdictions. *See supra* note 39. Support for this effect is found in the Fifth Circuit's abandonment of its cases from the circuit only rule in *Shipp v. McMahon*, 234 F.3d 907, 915 (5th Cir. 2000) and *McClenod v. City of Columbia*, 305 F.3d 314, 328–29 (5th Cir. 2002) (en banc). However, the Fifth Circuit's application of the clearly established law requirement in *McClenod* implied that it had not adopted a broad view of when the law was established, despite citing *Hope*.

Noted Civil Rights scholar Karen Blum has argued that the 11th Circuit has ignored *Hope*, creating an unduly restrictive qualified immunity law which "combined with the *Monell* doctrine of no vicarious liability for the public entity, leaves many wronged plaintiffs without a remedy under § 1983." Karen M. Blum, Eleventh Circuit is Out of Step, National L. J., April 21, 2003, at A13. Blum notes
another layer of difficulty in *Saucier v. Katz*. In *Saucier*, the Court held that even if the law violated was clearly established, the officer might still be entitled to immunity if he acted reasonably. This constituted the revival of a subjective component to immunity law, but only in the benefit of defendant officers. Proving officer malice remains an insufficient ground for overcoming claims of immunity.

that in less than ten months the Eleventh Circuit has basically revived their pre-*Hope* jurisprudence in three cases. See *Vaughan v. Cox*, 316 F.3d 1210 (11th Cir. 2003) (existing precedent did not apply with "obvious clarity"); *Willingham v. Loughnan*, 321 F.3d 1299, 1300 (11th Cir. 2002); and *Thomas v. Roberts*, 323 F.3d 950, 955 (11th Cir. 2003) (factually similar cases cited by plaintiff do not establish notice that government action was unlawful).


42. *Saucier* ruled that even an officer who violated clearly established law might be able to benefit from qualified immunity if his violation was produced by a reasonable mistake as to what the law required. *Saucier*, 533 U.S. at 205, 121 S. Ct. at 2158. Because the case posed the question of whether a court could merge immunity and substantive law where both turned on the reasonableness of the officer’s actions under the circumstances, some discussion of what *Saucier* held is in order.

*Saucier* required a two-step analysis of qualified immunity defenses. First, a court must determine if a constitutional right alleged *could* be established on the facts of the case. *Id.* at 201, 121 S. Ct. at 2156. If not, the case is to be dismissed. Second, if the right could be established on the facts, the court must ask whether that right is clearly established "in light of the specific context of the case." *Id.* The Court recognized that it is this second inquiry that could prove troublesome because it seems to demand, in many cases, development of the facts surrounding the incident. However, the Court emphasized that the inquiry is focused on whether the "contours of the right" are "sufficiently clear that a reasonable official would understand that what he is doing violates that right," *Id.* at 202, 121 S. Ct. at 2156 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039), and that this cannot turn on fact determinations as this would undercut goals of qualified immunity. *Id.* So far, this part of the Court’s analysis does little more than emphasize what the Court had already said in *Harlow* – but the court went further. The Court declared that this meant "that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Id.* at 205, 121 S. Ct. at 2158. "If the officer’s mistake as to what the law requires is reasonable . . . the officer is entitled to the immunity defense." *Id.* It seems a leap to go from rejecting the factual development of the plaintiff’s claim that might require discovery (and which in the courts below, lead to the merger of the immunity and substantive inquiries), to declaring that violations of clearly established law might nevertheless be subject to immunity.

43. *Saucier* operates in only one direction as though a ratchet: plaintiffs cannot defeat qualified immunity by pointing to the bad faith motivating the officer’s behavior. See *Harlow*, 457 U.S. at 815–18, 102 S. Ct. at 2736–38. But, the officer can point to his good faith mistake in the law as a means to excuse violations of law that are abundantly clear and well known.

44. *Harlow* banished "good faith" from the qualified immunity analysis in order to protect officers from the burden of trial and pre-trial activities like discovery and replaced it with an objective reasonableness standard. *Harlow*, 457 U.S. at 815–19, 102 S. Ct. at 2736–38.
The problems of individual immunities are avoided by naming a municipal defendant in his official capacity or simply naming the municipal corporation. This approach is itself barred in jurisdictions where the local prosecutor is viewed as a state officer or if the decision in question was the exercise of state power on behalf of the state. In those cases the suit becomes a suit against the state, which is not a "person" subject to suit under § 1983, quite apart from the newly vigorous sovereign immunity law the court has applied to bar suits under other statutes.

If the plaintiff is fortunate enough to be suing a prosecutor's office in a state that treats them as an independent municipality or can otherwise link the decisions to a municipal actor, his attorney still faces the daunting task of attributing the decisions made to that municipality. Everyday decisions about the release of evidence for

45. Kentucky v. Graham, 473 U.S. 159, 105 S. Ct. 3099 (1985) (Official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent").


47. McMillan v. Monroe County, 520 U.S. 781, 117 S. Ct. 1734 (1997) (state law dictated that, for certain purposes, a local sheriff is, in fact, a state officer).


50. Such is the case in Louisiana, for example. See Burge v. Parish of St. Tammany, 187 F.3d 452 (5th Cir. 1999); Hudson v. New Orleans, 174 F.3d 677 (5th Cir. 1999).


Board of County Commissioners emphasizes that "at least two routes can lead to the conclusion that a municipality has inflicted a constitutional injury." Gibson v. County of Washoe, 290 F.3d 1175, 1183 (9th Cir. 2002). First, where the
inspection are, in all but the smallest municipalities, likely to be made by a lower or mid-level prosecutor who is not the official policymaker for the municipal defendant. With that individual officer dismissed from the suit and there being no link between him and the official policymaker for the municipality, there are simply no defendants to sue.

Here the novelty of the claim comes to hurt the plaintiff once again. Apart from the dearth of reported decisions available to defeat a qualified immunity defense, the lack of case law makes it less likely that the municipality will have developed a department-wide policy on point. Similarly, proving custom will be difficult since there is unlikely to be a custom or practice so widespread that the official policymaker is expected to be on notice of it and assumed to have ratified it by allowing it to continue.\textsuperscript{52} Recognized theories of liability based an official policy like the failure to properly train\textsuperscript{53} or like the

defendant municipality itself (or through its official policymaker) violates the Constitution or directed its employees to do so, no causal analysis is needed.\textit{Brown}, 520 U.S. at 404–05, 117 S. Ct. at 1388.

To show that the municipality violated someone’s rights or instructed its employees to do so, a plaintiff can prove that the municipality acted with ‘the state of mind required to prove the underlying violation,’ just as a plaintiff does when he or she alleges that a natural person has violated his rights.\textit{Gibson}, 290 F.3d at 1185 (citation omitted).

Second, where the defendant municipality is called to answer for the constitutional violations of third parties (including their non-policymaking employees), it is necessary to show an affirmative decision that permits a finding that the defendant municipality is the cause of the constitutional violation.\textit{Bd. of County Commissioners}, 520 U.S. at 405, 117 S. Ct. at 1388; Canton v. Harris, 489 U.S. at 387–89, 109 S. Ct. 1204–05. The standard by which this conduct is measured is deliberate indifference as the passages cited by the appellate court describe.\textit{Bd. of County Commissioners}, 520 U.S. at 404, 414–15, 117 S. Ct. at 1388, 1393. However, Justice O’Connor emphasizes that the decisions which “cause” the third parties’ constitutional violation are otherwise ordinarily “legal" and permissible.\textit{Bd. of County Commissioners}, Id. at 405, 117 S. Ct. at 1389. That is, “a plaintiff can [show] that through its omissions the municipality is responsible for a constitutional violation committed by one of its employees, even though the municipality’s policies were facially constitutional, the municipality did not direct the employee to take the unconstitutional action, and the municipality did not have the state of mind required to prove the underlying violation.”\textit{Gibson}, 290 F.3d at 1186 (citing\textit{Canton}, 489 U.S. at 387–89, 109 S. Ct. 1197, 1204). The municipality’s liability does not rest on breach of a duty but arises because it “causes” a constitutional violation which the official policymaker knew or should have known and “deliberately” disregarded.

52. A custom or practice can establish official policy only if it is so widespread that it can be said to have the force of law.\textit{See Bd. of County Commissioners}, 520 U.S. at 403–04, 117 S. Ct. at 1388;\textit{Monell}, 436 U.S. at 690–91, 98 S. Ct. at 2036; Adickes v. S. H. Kress & Co., 398 U.S. 144, 167–68, 90 S. Ct. at 1613.

53.\textit{Canton}, 489 U.S. 278, 109 S. Ct. 1197 (failure to train is established if it
hiring of incompetent prosecutors would fail on the same ground, since one cannot train for something novel nor judge prosecutor candidates on how they will handle policy questions that have never come up.

If the plaintiff is lucky enough to be suing a small enough prosecutor’s office or one where the official policymaker made the decision in question herself, the plaintiff would still have to overcome the Court’s restrictive precedent on how to judge single decisions by official policymakers which cause harm. Under Board of County Comm’rs v. Brown, the attorney would have to be prepared to show that in making the decision, the official policymaker was deliberately indifferent to the foreseeable constitutional violations that the plaintiff would suffer. For our attorney, this state of mind requirement would prove difficult to meet. The defendant policymaker would likely claim that he was convinced by the weight of the evidence at trial and the fact that the conviction was uniformly upheld, that access to the evidence was pointless. That is, even assuming that the plaintiff had a right to the evidence, it might be possible for the defendant to argue that the violation of those rights did not seem to him to cause any harm, in which case he would arguably not have been deliberately indifferent to those rights. While our attorney might be able to fend off this argument by reference to medical treatment cases in prison, this would prove to be a difficult argument in any case—and one likely litigated at the summary judgment stage with the benefit of minimal discovery conducted only after individual immunity claims were resolved.

If these troubles were not enough, the assumptions of the hypothetical obscure several others. Just how the constitutional violation is framed is a matter of some consequence. The court’s injunction in Graham v. Conner, that plaintiffs must rely on the narrowest ground for recovery, seems to exclude substantive due process bases for recovery.

amounts to deliberate indifference to the rights of the people with whom the police come in contact).

54. A single hiring decision might be recoverable if it is itself unconstitutional or, more likely, if it can be said to have caused a constitutional violation to which the official policy maker was deliberately indifferent. See Bd. of County Commissioners, 520 U.S. at 405, 117 S. Ct. at 1389.


56. Id. at 404–05, 117 S. Ct. 1388–89.


59. Substantive due process would be violated, in any case, by only the most egregious official conduct. In cases involving quick decisions, at least, this means behavior which “shocks the conscience.” City of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708 (1998). See also, S.S. v. McMullen, 225 F.3d 960, 964 (8th Cir. 2000) (en banc). Several Circuit Courts have refused to extend the “shocks the conscience” test to decisions made with the benefit of reflection, applying instead “deliberate indifference” to judge illegal behavior. See Khan v. Gallitano, 180 F.3d
Similarly, restrictions on procedural due process seem to suggest that state tort remedies might be sufficient process (even if those remedies are unavailable in fact).\textsuperscript{60} Also, the temptation to allege discrimination in the decision to deny access is burdened by the strict proof of intent required to establish a violation\textsuperscript{61} which is further hampered by limitations on discovery at the preliminary stages. That is, stating a claim requires the presence of public or notorious statements supporting discriminatory intent, or similarly inflammatory evidence obtained prior to discovery.\textsuperscript{62}

Just how the prisoner finally obtained the evidence for testing is likely to also affect the chances of his claim. If he obtained access to the evidence through litigation, it is likely that he will have been forced to sign a release/dismissal agreement as settlement of the demand for access to the evidence. These agreements might limit recovery.\textsuperscript{63} The Supreme Court’s focus in judging the validity of release/dismissal agreements has been “voluntariness.”\textsuperscript{64} This focus would seem to take our hypothetical outside that jurisprudence. After all, how voluntary is an innocent person’s decision to waive his claims against a person denying him access to the only instrument of his freedom—as a condition for access to that means of proving his innocence? In any case, a release/dismissal agreement could prove detrimental to his litigation in other ways. For example, the agreement, signed by a prisoner who was advised by competent counsel, might be employed in support of an argument that the issues in question were res judicata.\textsuperscript{65}


\textsuperscript{61} \textit{See especially}, Personnel Adm’r of Massachusetts v. Feeney, 442 U.S. 256, 258, 99 S. Ct. 2282, 2285 (1979) (“‘Discriminatory purpose,’ [however,] implies more than intent as volition or intent as awareness of consequences. [I]t implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”); Washington v. Davis, 426 U.S. 229, 240, 96 S. Ct. 2040, 2048 (1976) (“The essential element . . . is purpose or intent . . .”).


\textsuperscript{64} \textit{Id.} at 392, 107 S. Ct. at 1192.

\textsuperscript{65} This was precisely the decision of the federal district court in the case on which the author worked. \textit{See} Charles v. Greenberg, 2001 U.S. Dist. LEXIS 13665 (E.D. La. 2001) (case dismissed as res judicata on basis of plaintiff’s release).
On top of all of this, the plaintiff needs to negotiate the myriad extra-statutory limitations that might bar recovery. Justiciability requirements, limitations on injunctive recovery, and application of borrowed state limitations on recovery all raise the stakes of civil rights litigation, stakes compounded by the likes of Rule—which makes rejection of even offensively low settlement proposals risky given the prospect of losing on any of the foregoing grounds and having to pay the defendant’s costs. Our attorney will have to master each of these doctrines and fend off the waves of motions seeking to defeat his client’s recovery. What looked promising, even fabulously so, now seems daunting and morose. Is this what civil rights law was supposed to be?

II. A DIALECTIC TALE OF THE DEMISE OF CIVIL RIGHTS LAW

Does all of this mean that civil rights law is dead? To the extent that civil rights law reflected the promise of *Brown v. Board of Education*—that civil rights law would provide a mechanism to promote social change and bring bureaucratic behavior in line with public values—the answer is yes. *Brown’s* structural reform

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71. This is, of course, a reference to “structural reform” or “institutional” litigation. “Institutional litigation, while not precisely definable, typically requires the courts to scrutinize the operation of large public institutions. The suits are generally brought by persons subject to the control of the institutions who seek as relief some relatively elaborate rearrangement of the institution’s mode of operation.” Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 Harv. L. Rev. 465, 467–68 (1980). Structural litigation’s purpose, according to Professor Schuck

is to alter broad social conditions by reforming the internal structural relationships of government agencies or public institutions. Instrumentally, it operates through the forward-looking, mandatory injunction but assumes a relatively intrusive form, a more or less detailed order whose
implications\textsuperscript{72} were perhaps abandoned in substantive terms by \textit{Roe};\textsuperscript{73} in institutional terms it was supplemented by \textit{Monroe v.}

prescriptions displace significant areas of defendants' discretion. It relies upon a rather fluid, group-oriented party structure and often demands an active, administrative role for the judge. It usually finds its justification in the more open-ended constitutional provisions, such as the equal protection or due process clauses. Its issuance often precipitates an extremely protracted process typically including judicial wheeling, spasmodic negotiation, and bureaucratic resistance.


72. \textit{Brown II}'s affirmative obligation to desegregate schools represented one institutional mandate; \textit{Greene v. County School Bd. of New Kent County}, 391 U.S. 430, 88 S. Ct. 1689 (1968) and \textit{Swann v. Charlotte-Mecklenberg}, 402 U.S. 1, 91 S. Ct. 1267 (1971) represent another. The former placed on all governmental units an affirmative obligation to eliminate dual school systems. \textit{Brown II}, 349 U.S. at 300, 301, 75 S. Ct. at 756, 757 (requiring "prompt and reasonable start toward full compliance" in order to achieve public schools of racially nondiscriminatory character "with all deliberate speed"). The latter, perhaps supplanting the former, focused on districts shown to be engaged in continuing segregation. See \textit{Green}, 391 U.S. at 438, 88 S. Ct. at 1694 ("deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable"); \textit{Swann}, 403 U.S. at 24, 91 S. Ct. at 1280. (District Court's "express finding . . . that a dual school system had been maintained by the school authorities at least until 1969" is a basis for key remedial order). That is, the latter requires a proof of, basically, discrimination. While both triggered an obligation to eliminate all vestiges of segregation, whether current segregation or the current effects of past segregation, only the former is self-executing. So, by the 1970s, the Supreme Court can be said to have transformed a presumption of segregation into a presumption of compliance with the Constitution which required proof of a constitutional violation to trigger the affirmative obligation. In both cases, the goal is to transform institutions rather than to remedy individual injury.

73. 410 U.S. 113, 93 S. Ct. 705 (1973). I have written elsewhere: \textit{Roe}, as Professor Fiss indicates, is not concerned with the institutional character of rights deprivations: "[o]ver the last twenty years, \textit{Roe v. Wade} has replaced \textit{Brown v. Bd. of Educ.} as the central organizing precedent of our jurisprudence, and it has commonly been taken to affirm the value of individual autonomy." Institutions, the intermediary apparatus of the state, are less than an essential component of \textit{Roe's} construction of privacy and abortion. The focus is on individual's prerogatives, ensured by the
Pape. But the individual rights conceived in *Roe* and made compensable by *Monroe*'s reading of § 1983 have themselves been subject to revision. Today civil rights law seems more a system of equitable remedies for extreme and outrageous governmental action. Neither structural change nor compensation for violations of civil liberties is assured. Judicial discretion, not rights, characterizes this system. Extreme abuses of power, not violations of constitutional values, are its triggers.

This transformation is the product of a dialectical process shifting from a focus on institutional reform to individual liability and recovery and back. This process has spiraled toward narrower recovery as problems in each vision of recovery has prompted a move to an ever narrower vision of the other.

After years of engaging Jim Crow only arbitrarily, it can be said that the Court took a great leap in *Brown v. Board of Education*, deciding in *Brown II* that conformity with public values implicit in the Constitution required broad structural change. Given the

Constitution and violated by the state.

*Roe* and *Brown*’s significance as organizing precedents derive from what they say about citizens’ relations with the state. *Roe* tells of inviolable human rights and a state whose power derives from an agreement to preserve the inviolable—that agreement sometimes understood as advancing the public good. *Brown* shares this origin in natural rights rhetoric, but tells fundamentally of a responsibility of government to advance important “public values.” *Brown*’s “public values” relate to and incorporate natural rights, but, unlike *Roe*, fulfill a larger role.


74. *Monroe* created a ready remedial route for the vindication of rights by loosening the restrictive post-Reconstruction understanding of “under color of law.” While *Monroe* only supplemented *Brown*, its focus, unlike *Brown*, is on individual litigation. This focus is emphasized by *Monroe*’s rejection of institutional liability. *Monroe*, 365 U.S. at 187–92, 81 S. Ct. at 484–87. Thus, unlike *Brown*, which ignores individual remedies and focuses on institutional responsibility, *Monroe* focuses on individual remedies from individually responsible actors. This formulation is changed by *Monell v. Dept. of Soc. Serv. of City of New York*, 436 U.S. 658, 663, 98 S. Ct. 2018, 2022 (1978), which extends liability to municipal corporations, but rejects respondeat superior liability — i.e., true institutional responsibility.


77. *Brown II* says:
enormity of the charge to state actors, it is not surprising that the Court left it to them to develop means of achieving change.

Five years after Brown II the Court, which that same term had begun with Mapp v. Ohio\textsuperscript{78} to protect civil liberties in criminal prosecutions, expanded the avenues for enforcing civil liberties in Monroe v. Pape. Monroe represented a substantial change, perhaps even a departure, from Brown. In Monroe the Court envisioned protection of rights that did not implicate institutional change but rather individual liability. That this represented at least a tacit departure from Brown is seen in the Court’s rejection of municipal liability.\textsuperscript{79} Enforcement of public values was subordinated to protection of individual rights. Deterrence was assumed to occur in Monroe on an individual basis.

But Brown II’s approach was in no way squelched by Monroe. Rather it was transformed from an assumption that states’ behavior was out of line with constitutional principle to a system where the proof of specific unconstitutionality was necessary to trigger a remedial response. In Swann the Court focuses on the District Court’s finding that the defendant school district had continued to operate a dual system of schools.\textsuperscript{80} The abandonment of formal segregation was not enough to comply with the Constitution if intentional segregation was evidenced.\textsuperscript{81} But the quiet change was

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  \item Full implementation of [the constitutional principles articulated in Brown I] may require solution of varied local school problems . . . . Accordingly, we believe it appropriate to remand the cases to those [district courts which originally heard them].
  
  In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power . . . . Courts of equity may properly take into account the public interest in the elimination of [any] obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

Brown II, 349 U.S. at 299–300, 75 S. Ct. at 756.
80. Swann, 402 U.S. at 24, 91 S. Ct. at 1280 (District Court’s “express finding . . . that a dual school system had been maintained by the school authorities at least until 1969” is basis for key remedial order).
81. In its discussion of “Racial Balances or Racial Quotas,” the Swann Court first rejects the legality of any fixed quotas in student assignments or otherwise. Swann, 402 U.S. at 22–24, 91 S. Ct. at 1279–80. But, the Court goes on to say that, “As the voluminous record in this case shows, the predicate for the District Court’s use of the 71%-29% ratio was twofold: first, its express finding . . . that a dual system had been maintained by the school authorities at least until 1969; second, its finding . . . that the school board had totally defaulted in its acknowledged duty to
\end{itemize}
\end{footnotesize}
that now intentional segregation would have to be shown and that this was the trigger for the affirmative duties. Despite this perhaps narrowing aspect of Swann, it emphasized, along with cases like it, the tremendous power the Court was willing to allow District Court judges in order to achieve compliance with public values. As summarized by defenders of structural reform litigation, this approach was aimed at the big bureaucratic institutions which blindly violated rights. In something of a last gasp, this approach could be said to have prompted the court to extend Monroe to municipalities in Monell v. Dept. of Social Services. But even as the Court envisioned municipal liability creating incentives for government units to eliminate rights violating behavior, it shielded away from vicarious liability, thus undercutting any such effects.

Resistance to structural reforms of the type envisioned in desegregation orders, especially Swann's support for busing, triggered another shift toward individual rights. This shift, like previous ones, was informed by the concerns which triggered it. The move to individual rights conceptions of civil rights law was offered as an antidote to courts' increased involvement in everyday affairs of government bodies. That is, civil rights cases should be thought of come forward with an acceptable plan . . . .” Id. This division of failures is revealing. The failure of the duty is a failure to construct a plan, not a failure to comply with Brown. Instead, the first finding is the trigger based on illegal behavior, which is defined as “maintaining” a dual system. This distinction subtly changes the focus from Brown's ongoing duty to the specific actions of the defendant school board. This view would be memorialized in Milliken v. Bradley's limitation of the reach of desegregation equitable powers, Milliken v. Bradley (I), 418 U.S. 717, 91 S. Ct. 3112 (1974), despite the Court's efforts to limit the implications of its Milliken decision on Brown's affirmative duty. See Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 99 S. Ct. 2941 (1979) (school boards have a continuing, affirmative duty to desegregate if they were operating under system of de jure segregation when Brown was decided); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 99 S. Ct. 2971 (1979) (same).

82. See authorities cited supra note 71.
84. Id. at 691–95, 98 S. Ct. at 2036–38.
85. See Robert F. Nagel, Controlling the Structural Injunction, 7 Harv. J.L. & Pub. Pol'y 395 (1984). Professor Nagel noted that as of 1984 more than 600 school districts, prisons in thirty states, and some 270 local jails were subject to federal judicial supervision, id. at 396, a circumstance which, “[a]t present the Supreme Court is either unwilling or unable to provide any effective restraint on the intrusions of the federal judiciary into state and local government.” Id. at 396–97 (footnote omitted). Characteristic of critics of structural injunctions, Nagel's critique notes that the remedies provided rarely benefit the original plaintiffs. See id. at 402 (noting that desegregation remedies do not place victims in the position the victims would have “enjoyed but for” the violation; often victims have grown up by the time the remedy is implemented). In a celebrated essay Professor Fuller expressed concern over the inability of courts to handle “polycentric” tasks, that is,
as constitutional torts and rights conceived, as in Roe v. Wade, as protections of individual autonomy. Structural reform is dead.\textsuperscript{86} Cross jurisdictional remedies in school desegregation cases are rejected.\textsuperscript{87} Disparate impact and pattern and practice proofs are subordinated to disparate treatment proofs\textsuperscript{88} and subjected to severe versions of that proof requirement.\textsuperscript{89} And disparate impact proofs are rejected in equal protection cases.\textsuperscript{90}

By 1978 it can be said that the second reconstruction had drawn to an end. Indeed, where Brown's injunction to dismantle dual educational systems ran into conflict with individual rights, it was Brown that was abandoned.\textsuperscript{91} This new individualist focus recast the key question of the post-structural reform age. While judges supplanting elected officers was no longer the severe problem it was predicted to become, it lived on in the new question: where was the line between civil rights and "mere torts?"\textsuperscript{92} This reformulated question broadened the inquiry that was supposedly focused on individual rights. Rather the concern became again structural, but with the limitations of the new focus.

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\footnotetext[86]{See Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040 (1976).}
\footnotetext[87]{See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 106 S. Ct. 1842 (1986).}
\footnotetext[88]{See Milliken v. Bradley (I), 433 U.S. 267, 97 S. Ct. 2749 (1977).}
\footnotetext[89]{See White, Irrational Turn, supra note 62, at 728–29.}
\footnotetext[91]{See Milliken v. Bradley (II), 433 U.S. 267, 97 S. Ct. 2749 (1977).}
\footnotetext[92]{See White, Irrational Turn, supra note 62, at 728–29.}
\end{footnotesize}
Consequently individual immunities were expanded at the cost of individual recovery to ensure that government actors could act without worry of litigation. Restrictions on official policy and custom suits (especially failure to train suits) were imposed in order to enforce Monell’s rejection of vicarious liability and to save the public fisc from exposure. Substantial limits on constitutional rights were imposed to further restrict civil rights litigation. Prison abuse was to be judged by the restrictive deliberate indifference test, and abuses occurring during emergencies subject to the even more restrictive criminal malice test. Substantive due process claims were subjected to standards of proof quite similar to Eighth Amendment cases. Procedural due process was said to be satisfied by post-deprivation remedies, transforming erstwhile due process cases into state tort claims. Claims missed by this restriction were further culled by the exclusion of negligent takings from procedural due process.

While the restrictive spirit continued into the 1990s, a new repudiation of the individualist model emerged. This final abandonment of the individual rights model was most clearly evident in the Prison Litigation Reform Act of 1996. Prison litigation had been the model which structural reformers raised to prove the advantages of structural litigation. They noted that the closed institutional context of a prison was a poor place for individual rights litigation. The demise of the structural reform was in part a repudiation of their view of prison reform litigation. Critics of structural reform argued that it put courts in inappropriate control over the running of day to day affairs of prisons and advocated for individual suits. By the 1990s these same critics were criticizing individual suits as unwieldy. The PLRA shifts away from

93. See supra cases discussed in notes 36–44.
94. See supra cases discussed in notes 50–56.
100. Daniels, 474 U.S. 327, 106 S. Ct. 662.
102. See discussion in Joseph T. Lukens, The Prison Litigation Reform Act:
individual suits but replaces it with a system of administrative reviews that make reform of prison administration a practical impossibility. Lest this move be mistaken for support for structural litigation, the PLRA also includes severe limits on courts' equitable powers. Indeed, it goes so far as ending many of the existing supervisory injunctions still in effect when the act was passed.

Restrictions similar to the PLRA can be found in the Anti-terrorism and Effective Death Penalty Act of 1996 and is found in the numerous anti-terrorism reforms that have followed the September 11 attacks. On the whole these reforms can be seen as themselves repudiating the individual rights model which itself repudiated the structural reform one. The question of this symposium is whether these changes constitute the complete demise of civil rights law, but first a few words on what these changes have amounted to.

III. WHAT DOES IT MEAN? THE PARADOX OF CIVIL RIGHTS LAW

The paradox of civil rights law is that these myriad shifts in emphasis have occurred without a serious, overt repudiation of civil rights law itself. That is, opponents of civil rights law no longer attack the notion of rights; they want rights to protect their interests. Courts restricting civil rights litigation are not repudiating civil rights as an ideal; they are refoocusing civil rights law as a means of


103. [N]either the newly shrunked circumference of these important predicate constitutional rights nor the "clearly established" approach to individual immunity represents a broad-spectrum restriction on the scope of § 1983 itself. Instead, the doctrinal accretions simply reduce the plaintiff's chances of success in stating a claim... [T]he qualified immunity decisions, Harlow, and Creighton v. Anderson, while they doom all constitutional claims against individual defendants when the right asserted was not judicially articulated with clarity at the time of the challenged conduct, do not by themselves increase the plaintiff's prima facie burden under § 1983. Nevertheless, the combination of sharply curtailed predicate protections and the greatly expanded qualified immunity defense does as a practical matter significantly disable § 1983 individual-defendant litigation from pushing the frontiers of federally protected rights.

protecting property and privilege. In this light, there is something strange about the topic of this symposium. Some might even say it is strained and overly dramatic to even ask if civil rights law is "dead."\textsuperscript{104} On the whole I nevertheless think civil rights law is dead. So how do I explain the paradox that there remains a panoply of statutory causes of action to enforce numerous rights? The resolution to this paradox of civil rights law is that civil rights law is no longer law, but has been transformed into something akin to traditional equity.\textsuperscript{105}

\begin{enumerate}
\item Professor Julie Davis' comments, admittedly a bit dated today, are characteristic of the optimistic view of civil rights law.
\item data exist that seem to indicate civil rights litigation is exploding. Private employment discrimination claims, as measured by filings in all federal courts, have greatly increased from 344 in 1970 to 15,965 in 1994. Similarly, the number of prisoner claims filed has greatly increased—the vast majority being pro se—notwithstanding the low success rate of prisoner litigation. Eisenberg's most recent calculations show an increase in the numbers of general civil rights filings in the 1990s to over 35% of the federal docket in 1994. One could look at the numerical data and conclude that private enforcement of civil rights legislation had never been better. Some might even conclude that civil rights legislation is too successful.

Davis, supra note 24, at 203–04 (citations omitted). This data predates the Prison Litigation Reform Act. Nevertheless, there remains a large number of prisoner civil rights filings. There were 13,523 prisoner civil rights filings (exclusive of prison conditions filings, another 9,987) in the federal district courts in the 12 month period ending March 31, 2002. See Federal Judicial Case Load Statistics, March 31, 2003, Table C-2, Office of Human Resources and Statistics, Statistics Division, Administrative Office of the United States Courts. There were 40,549 civil rights cases commenced during this period exclusive of prisoner suits. Id. These included 21,117 employment civil rights cases. Id.
\item "Equity is the branch of law which . . . was applied and administered by the Court of Chancery . . . . A litigant asserting some equitable right or remedy must show that his claim has 'an ancestry found in history and in the practice and precedents of the court administering equity jurisdiction.'" Jill E. Martin, Hanbury and Martin's Modern Equity 3 (16th ed., 2001). The rules of equity, are often described by reference to maxims of equity, a dozen of which are listed in Hanbury and Martin. Id. at 27–31. They are:
\begin{enumerate}
\item Equity will not suffer a wrong to be without a remedy,
\item Equity follows the law,
\item He who seeks equity must do equity,
\item He who comes to equity must come with clean hands,
\item Where the equities are equal the law prevails,
\item Where the equities are equal the first in time prevails,
\item Equity imputes an intention to fulfill an obligation,
\item Equity regards as done that which ought be done,
\item Equity is equality,
\item Equity looks to the intent rather than the form,
\item Delay defeats equities, and
\item Equity acts in personam.
\end{enumerate}
\end{enumerate}
I have argued elsewhere that disparate treatment cases in employment discrimination law have been transformed into equity, and I believe the same transformation can be identified in civil rights law generally. This is not the place to describe this transformation in detail, but I believe it is evidenced in several substantive factors. First, severe limitations have been placed on substantive constitutional rights, restricting violations to cases where state actors have engaged in utterly outrageous behavior. Second, the individual’s liability will be excluded in all new cases by the court’s robust view of individual immunities. Third, the defendant’s municipal employer will be shielded from liability unless it participated in the decision, or knew of its risk and, basically, outrageously ignored it by refusing to train its officers or by making other decisions in the face of the known risks.

More significantly, perhaps, these limitations vest in judges tremendous power. This is an ironic charge, since the main criticism of traditional civil rights law has been that it vested judges with too much power. However, this irony is, I believe, only proof of the paradox of civil rights law: federal judges in civil rights cases have never been more powerful. Only the tremendous discretion given them is understood to be used primarily if not exclusively to throttle social change through the law. In any case, the transformation of civil rights

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Id. These values, while offering remedies outside “the law” clearly subordant the system of equity to legal principles (as overtly suggested by number two). They can be summarized as a system that offers a) extraordinary relief, b) to deserved petitioners, c) where the law fails to help but does not prohibit, and on the basis of bad acts—intentional, inequitable behavior.

The vision of civil rights law as “equity” is both obvious and strained. It is obvious in the sense that the courts have long relied on the equitable powers of the courts as the basis for crafting flexible remedies. See, e.g., Brown I, 349 U.S. at 300, 73 S. Ct. at 756. Abram Chayes even describes modern public law as “the triumph of equity.” Chayes, supra note 71, at 1292 (“One of the most striking procedural developments of this century is the increasing importance of equitable relief . . . the old sense of equitable remedies as ‘extraordinary’ has faded”). It is strained, though, in that civil rights plaintiffs have not been asked to appeal to the conscious of the court for remedy, but go to court armed with individual rights established under no less a font of law than the Constitution itself. However, it can be said that the shifts in civil rights law that allow relief only when there exist outrages, treat those hallowed rights as mere rites, conceiving only of state law as law, per se. In this way the “Maxims of Equity” resonate.

106. White, Irrational Turn, supra note 62, at 709.

107. In disparate treatment cases,

The Supreme Court’s employment discrimination jurisprudence can be understood as coherent only by seeing it as a effort to unify all of civil rights law under a single approach. That is, the “discrimination” to which the Court’s tests refer is best understood as an “outrageous act” — a decision akin to, but more conscious than deliberate indifference. In the Courts substantive due process jurisprudence, this standard is designated the “shocks the conscience” standard.

White, Irrational Turn, supra note 62, at 755.
law into equity has been accomplished by erecting numerous judgment questions which judges must assess if a case is to ever proceed to decision. At every stage of the litigation civil rights plaintiffs are required to re-litigate the basic question in dispute. And, at no point in the litigation does their success on one aspect of the claim have estoppel effect on any of the other questions pertinent to the litigation. In fact the law is littered with ratchet-like doctrines that bind the plaintiff if he loses, but leave an unsuccessful defendant to relitigate basically the same substantive question under a different doctrine.\footnote{In \textit{Saucier}, Justice Kennedy emphasized that "In a suit against an officer for an alleged violation of a constitutional policy, the requisites of a qualified immunity defense must be considered in proper sequence." \textit{Saucier}, 533 U.S. at 200, 121 S. Ct. at 2155. Because qualified immunity is an entitlement not to stand trial, the court must consider "in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? This must be the initial inquiry." \textit{Id.} at 201, 121 S. Ct. at 2156. Consequently, the plaintiff will be forced to argue his substantive constitutional claim on the pleadings, usually with no discovery. If he loses, his case is lost. For Kennedy, “This is the process for the law’s elaboration from case to case,” \textit{id.} at 201, on the pleadings. Should the plaintiff overcome this hurdle, this finding has no binding effect on the defendant who is free to argue that the right is insufficiently precise to be applied to the case at bar, \textit{id.} at 201–02, challenge whether this right was clearly established at the time of the events in question, \textit{id.} at 202, or move for summary judgment on the precise legal issue later in the proceedings. In many instances, such as in \textit{Saucier}, the substantive constitutional issue in question in the case will mirror the question of whether a reasonable officer would have known the act to be unconstitutional. In those cases, should the plaintiff survive so far, he will be charged with relitigating that issue yet again.}

Even the most rudimentary claim is made expensive and complicated. But behind this, all the questions in civil rights cases have been transformed into the unseemly quest to convince the judge that what took place, what happened to your client was the most outrageous thing ever. Few cases can bear the weight of this proof. Consequently, civil rights cases have come to turn as much on pretrial publicity as on the merits of the claim. Law is surrendered to tabloid-like publicity, and the rights of citizens are sacrificed to the whims of men and women sitting in judgment.

**IV. THE SYMPOSIUM’S TAKE ON THE QUESTIONS**

Well, is civil rights law dead? The question implies that there has been a departure from the seminal \textit{Brown v. Bd. of Education} decision, raising the need to assess the nature of the fifty-odd years of jurisprudence since \textit{Brown}. It demands reflection on the complex of social phenomena with which civil rights law interacts. And, it requires examination of the promise that civil rights law could transform the relationships of citizens to power. Indeed, civil rights
law boldly pledges to facilitate equality, dignity, and justice, but it is
today unclear it can (or perhaps ever could) really deliver. Over the
last several decades, efforts to reconcile the transformative promise
of civil rights law with pre-existing commitments to notions like
federalism seem to have left standing little of the original ideals
associated with the term civil rights. Whether this constitutes the
complete demise of the civil rights regime was vigorously debated at
this symposium.

A diverse group of civil rights scholars\textsuperscript{109} was assembled by the
\textit{Louisiana Law Review} at the Lod Cook Conference Center on the
Louisiana State University campus in March of 2003. The group sat
around a table for two days to engage these issues in a classic
symposium format. Collectively, the group was optimistic about the
future of civil rights law, though everyone recognized that the severe
doctrinal limitations imposed in recent years have had a devastating
and foreboding effect on the field. The participants presented papers
and responses and engaged in open discussion of numerous civil
rights-related topics. The paper's presented below reflect the formal
presentations, though the papers typically transcend their author's role
as primary presenter or respondent.

The participants addressed civil rights law in its international,
comparative, national, and state dimensions. The international and
comparative foci introduced discussion of the relation of civil rights
law to human rights and allowed for discussion of civil rights in
contexts free of the complications of the American federal system.
The federal dimension introduced traditional civil rights issues related
to the American history of racial apartheid and recent demographic
and social transformations in the American populace. That focus also
facilitated the symposium's engagement with structural constitutional
concerns like separation of powers and federal judicial power. The
state law focus of course interposed federalism concerns, but also
raised discussion of legal history and state practice.

The discussion was consequently wide ranging. It touched on the
relationship between broad conceptions of justice like equal
protection and human dignity, reflected on the future of affirmative
action and the role of affirmative action in civil rights law's future,
and took up the construction of race and the threats to civil rights
raised by the renewed acceptance of profiling under the rubric of
national security. Discussion of civil rights legal doctrine, its demise,
and possible explanations easily flowed into discussion of

\textsuperscript{109} The Symposium participants included Rhonda Magee Andrews, John M.
Devlin, Raymond T. Diamond, Tanya Hernandez, F. Michael Higginbotham, Kevin
R. Johnson, Denise Reaume, Gregory Vincent, Robert F. Williams, Adrien
Katherine Wing, and this author.
comparative civil rights practice, especially in states not blessed with or burdened by a civil rights law born of a contentious civil rights movement. In the last session, the symposium focused its exchange on the sometimes contradictory role of state constitutional law in the enforcement of civil rights.

Throughout, the symposium touched on substantial issues of legal theory. Participants examined whether locating civil rights concepts in larger principles like human dignity could ensure that civil rights law remained true to advancing equality and combating subordination. Participants contemplated what remedies to inequality and racism might remain viable today. And, much discussion was focused on the relationship between civil rights law and advocacy, with participants questioning whether a civil rights regime could remain viable without coalition building, advocacy, and activism. The symposium also raised the thorny question of the role of precedent and adjudication in civil rights law, especially in light of the transformations of the field in the last fifteen years. Last, the symposium scrutinized the role of states in ensuring justice through civil rights.

The articles of the symposium are published in the order of their presentation at the conference. The first article is Professor Denise Reaume's examination of the role of dignity in Canadian equal protection jurisprudence, *Discrimination and Dignity.* It is followed by Professor F. Michael Higginbotham's and Kathleen Bergin's reflection on the current state of affirmative action, *Why the University of Michigan Should Win in Grutter and Gratz.* Professor Rhonda Magee Andrews' article, *Affirmative Action After Grutter: Reflections on a Tortured Death, Imagining a Humanity-Affirming*

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110. Professor of Law at the University of Toronto. Professor Reaume teaches and writes on anti-discrimination law, language rights, and legal responses to multicultural society. *See, e.g.*, Denise Reaume, *Harm and Fault in Discrimination Law: The Transition from Intentional to Adverse Effect Discrimination*, 2 Theoretical Inquiries in Law 349 (2001); Denise Reaume, *Individuals, Groups, and Rights to Public Goods*, 38 U. Toronto L.J. 1 (1988). She recently delivered the Catriona Gibson lecture at the Faculty of Law, Queen's University on "Making a Place for Dignity in Modern Legal Thought."


112. Professor of Law at the University of Baltimore. Professor Higginbotham writes on race and the law and is author of *Race Law: Cases, Commentary and Questions* (2001).


Reincarnation\textsuperscript{115} grew out of a response to Professor Higginbotham's presentation but goes beyond it, invoking Canada's dignity focus in making the case for a remedial-focused affirmative action regime. Professor Adrien Katherine Wing's\textsuperscript{116} presentation concluded the first day of the conference. Her article, \textit{Civil Rights in the Post 9-11 World: Critical Race Praxis, Coalition Building, and the War on Terrorism}\textsuperscript{117} captures her thought-provoking examination of the social construction of race and the other after 9-11. Her call for coalition building as a political remedy to practices like racial profiling is taken up by Professor Kevin R. Johnson\textsuperscript{118} in \textit{The Struggle for Civil Rights: The Need for, and Impediments to, Political Coalitions Among and Within Minority Groups}.\textsuperscript{119} Together the first day's contributions examined troubles with conceiving of an adequate rights regime, explored the challenges to maintaining the remedial effectiveness of civil rights law, and pointed to the need to organize to combat assaults on rights protections.

This author's\textsuperscript{120} \textit{Activist Insecurity and the Demise of Civil Rights Law}\textsuperscript{121} represents the beginning of the second day of the Symposium. Professor Tanya Hernandez,\textsuperscript{122} in \textit{Comparative Judging of Civil Rights},\textsuperscript{123} extends the author's theory about the longstanding and deep seeded vulnerabilities of civil rights law to the context of Latin America to ask whether it might apply differently in states without a

\begin{thebibliography}{1}
\bibitem{115} 63 La. L. Rev. 705 (2003).
\bibitem{116} The Bessie Dutton Murray Distinguished Professor of Law at the University of Iowa. Professor Wing, a noted figure in the Critical Race Theory movement, has written extensively on race, feminism, civil rights law, and international law (focusing on women's rights and issues in the Middle East). She has recently published, Critical Race Feminism—A Reader (2nd ed., 2003) and Global Critical Race Feminism: An International Reader (2000).
\bibitem{117} 63 La. L. Rev. 717 (2003).
\bibitem{118} Associate Dean for Academic Affairs and Professor of Law and Chicana/o Studies at the University of California at Davis. Dean Johnson has published extensively on international migration, immigration law and policy and civil rights, including several books on race and identity. \textit{See}, \textit{e.g.}, \textit{Reader on Race, Civil Rights, and the Law: A Multicultural Approach} (2001).
\bibitem{119} 63 La. L. Rev. 759 (2003).
\bibitem{120} The author is the J. Dawson Gasquet Professor of Law at Louisiana State University. He teaches and writes on civil and human rights law. This Symposium was inspired by his multi-part project on the Activist Insecurity, the final part of which is his symposium contribution.
\bibitem{121} 63 La. L. Rev. 785 (2003).
\bibitem{122} Professor of Law and Justice Frederick Hall Scholar at Rutgers University School of Law-Newark. Professor Hernandez teaches and writes on Race and the Law, especially focusing on comparative race relations. \textit{See}, \textit{e.g.}, Tanya Kateri Hernandez, \textit{Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin American Comparison}, 87 Cornell L. Rev. 1093 (2002).
\bibitem{123} 63 La. L. Rev. 875 (2003).
\end{thebibliography}
contentious civil rights movement as the basis of the regime. Professor John M. Devlin's examination of affirmative action under the Louisiana state constitution, Louisiana Associated General Contractors: A Case Study in the Failure of a State Equality Guarantee to Further the Transformative Vision of Civil Rights, and Professor Robert F. Williams' reply, Shedding Tiers "Above and Beyond" the Federal Floor: Loving State Constitutional Equality Rights to Death in Louisiana, conclude the Symposium by reflecting on the opportunity state constitutional law presents for civil rights enforcement and the ironic abdication by states of their leadership role in civil rights law.

126. Distinguished Professor of Law at Rutgers University-Camden. Professor Williams teaches and has written extensively on state constitutional law and legislation, including leading casebooks in those areas. See Robert F. Williams, State Constitutional Law: Cases and Materials (3d ed. 1999). Among his may articles, see, e.g., Robert F. Williams, Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples, 43 B.C. L. Rev 73 (2001).
127. 63 La. L. Rev. 917.